

2016

**Marjorie Ann Brown, Appellant/Plaintiff, v. Lennie Williams as
Personal Representative Of the Estate of Alice Fa Ye Nelson, Appel
Lee/Defendant.**

Utah Court of Appeals

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IN THE UTAH COURT OF APPEALS

MARJORIE ANN BROWN,
Appellant/Plaintiff,

v.

LENNIE WILLIAMS as personal
representative of THE ESTATE OF
ALICE FAYE NELSON,
Appellee/Defendant.

Appeal No.: 20150412-CA

Oral Argument Requested

BRIEF OF APPELLANT

Appeal from a Summary Judgment in the Second District Court for Weber
County, State of Utah, Hon. Ernie W. Jones

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FILED
UTAH APPELLATE COURTS

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Statement of Jurisdiction

The Utah Supreme Court had original appellate jurisdiction over this appeal under Utah Code section 78A-3-102(3)(j). By virtue of its authority under Utah Code section 78A-3-102(4), the case was transferred to the Court of Appeals which has jurisdiction pursuant to Utah Code section 78A-4-103(2)(j).

Issues Presented/Standards of Review

1. In a third-party negligence action, is the worker's compensation premises rule the correct law to determine if employees were in the course and scope of their employment while in the parking lot and on their way to work?

Determinative law: *Birkner v. Salt Lake County*, 771 P.2d 1053 (Utah 1989).

Standard of review: Reviewed for correctness. No deference is given to the trial court's conclusions of law. *Clover v. Snowbird*, 808 P.2d 1037 (Utah 1991).

2. In a light most favorable to Mrs. Brown, resolving all inferences in her favor, are there material issues of disputed fact that were decided by the trial court?

Determinative law: *Clover v. Snowbird*, 808 P.2d 1037 (Utah 1991).

Standard of review: Question of Law. *Clover v. Snowbird*, 808 P.2d 1037 (Utah 1991).

Preservation of Issues

The issues raised in the Brief for Appellant were preserved in her memorandum in opposition to the defendant's summary judgment motion, (R. at 175-183, 187-190); and, in her objection and reply to the defendant's proposed order on summary judgment, (R. at 330-332, 337-338).

Determinative Statutes

Utah Code 34A-2-105(1) The right to recover compensation pursuant to this chapter for injuries sustained by an employee, whether resulting in death or not, is the exclusive remedy against the employer and is the exclusive remedy against any officer, agent, or employee of the employer and the liabilities of the employer imposed by this chapter is in place of any and all other civil liability whatsoever, at common law or otherwise, to the employee or to the employee's spouse, widow, children, parents, dependents, next of kin, heirs, personal representatives, guardian, or any other person whomsoever, on account of any accident or injury or death, in any way contracted, sustained, aggravated, or incurred by the employee in the course of or because of or arising out of the employee's employment, and an action at law may not be maintained against an employer or against any officer, agent, or employee of the employer based upon any accident, injury, or death of an employee. Nothing in this section prevents an employee, or the employee's dependents, from filing a claim for compensation in those cases in accordance with Chapter 3, Utah Occupational Disease Act.

Utah Code 34A-2-106

(1) When any injury or death for which compensation is payable under this chapter or Chapter 3, Utah Occupational Disease Act is caused by the wrongful act or neglect of a person other than an employer, officer, agent, or employee of the employer:

- (a) the injured employee, or in case of death, the employee's dependents, may claim compensation; and
- (b) the injured employee or the employee's heirs or personal representative may have an action for damages against the third person.

Statement of the Case

This case arises out of an auto-pedestrian collision that happened in a parking lot designated for employees while both parties were on their way to work. Plaintiff Marjorie Brown brought a third-party negligence action against the defendant Alice Nelson. Mrs. Nelson pleaded the worker's compensation exclusive remedy as an affirmative defense.

Just before trial, Mrs. Nelson brought a motion for summary judgment. She asserted that because both she and Mrs. Brown were in a parking lot designated for employees when the collision happened, that under the premises rule exception to the coming and going rule, they were both in the course and scope of their employment such that the exclusive remedy applied.

The Honorable Ernie W. Jones agreed. He held that because of the factual similarities to *Hope v. Berrett*, 756 P.2d 102 (Utah Ct. App. 1988), the premises rule exception applied and that Mrs. Brown's exclusive remedy was worker's compensation.

Statement of Facts

1. On January 30, 2012, Plaintiff Marjorie Brown was involved in an automobile/pedestrian accident. (R. at 101).
2. At that time, she was employed by the Internal Revenue Service. *Id.*
3. The building where Mrs. Brown worked had a designated parking lot for the employees. (R. at 102).

4. On the morning of the collision, Mrs. Brown parked her van in the building parking lot. (R. at 102).
5. Mrs. Brown was walking from her van to the building to report for work. (R. at 103).
6. She had not yet clocked-in to work. *Id.*
7. Defendant Alice Nelson was also employed by the Internal Revenue Service. *Id.*
8. Mrs. Nelson was in the parking lot and had not clocked in to work. *Id.*
9. Mrs. Nelson hit Mrs. Brown while Mrs. Brown was walking across the parking lot. *Id.*
10. Mrs. Brown filed a third-party negligence action against Mrs. Nelson. (R. at 1-2).

Summary of the Argument

The trial court applied the wrong law. This is a third-party negligence claim. (R. at 9, ln. 10). Defendant raised the affirmative defense of the worker's compensation exclusive remedy. (R. at 12). The coming and going rule governs employees' commutes to work. However, depending on whether a claim is brought for worker's compensation benefits or as a negligence claim, separate and independent avenues of analysis exist.

In granting summary judgment, the trial court applied the premises rule as expressed in *Hope*. There, the Court of Appeals imported and applied the worker's

compensation premises rule into a third-party liability case to analyze whether the parties were in the course and scope of their employment. It concluded that the parties were, and found that the plaintiff was only entitled to worker's compensation benefits.

Subsequently, the Utah Supreme Court handed down a series of cases that sub-silentio overruled *Hope*. *Birkner v. Salt Lake County*, 771 P.2d 1053 (Utah 1989); *Clover v. Snowbird*, 808 P.2d 1037 (Utah 1991); *Ahlstrom v. Salt Lake City Corp.*, 73 P.3d 315 (Utah 2003); and *Salt Lake City Corp. v. Labor Comm'n*, 153 P.3d 179, 180 (Utah 2007).

In those cases, the Supreme Court discussed and consolidated Utah's case law on course and scope of employment. *Birkner* and its related progeny are the law in Utah on analyzing the course and scope of employment in a third-party claim. Having applied the wrong law, the summary judgment must be reversed. However, to avoid further appeals, this Court can and should analyze the undisputed facts of the present case in light of *Birkner*.

Argument

I. THE PREMISES RULE IS THE WRONG LAW TO ANALYZE THE QUESTION OF WHETHER AN EMPLOYEE IS IN THE COURSE AND SCOPE OF HER EMPLOYMENT IN A THIRD-PARTY NEGLIGENCE CASE

To begin, consider the following contrasting hypotheticals where persons "A" and "B" share the same employer and "B" negligently hurts "A". In the first

hypothetical, the incident happened in the employer's building, while both were clocked-in to work, and both were performing work related acts. This would be a worker's compensation claim protected by the exclusive remedy.

By contrast, in the second hypothetical, the negligent act happened a mile from their job while in route to work, neither had clocked-in to work, and neither were performing any work-related acts. This would simply be a negligent act between two unrelated people.

The present case involves analyzing a negligent act at a particular time and place to see whether it had crossed the line from an independent third-party negligence claim to one protected by the worker's compensation exclusive remedy. It also demands that the Courts decide the appropriate law used to make the analysis.

a. The plaintiff asserted a third-party negligence claim against the defendant.

In the present case, both the plaintiff and the defendant had jobs with the IRS in Ogden, Utah. (R. at 102, ln. 2; 103, ln. 15). On the morning of the crash, the plaintiff was on her way to work. (R. at 102, ln. 11). She had parked her car in the parking lot and was walking toward the building. (R. at 102, ln.9-10). At the same time, the defendant was driving her car, in the same parking lot, on her way to work. (R. at 102, ln. 18-19). As the plaintiff walked across the parking lot, the defendant hit the plaintiff with her car. (R. at 104, ln. 23).

The Utah's Worker's Compensation Act states that

"The right to recover compensation...by an employee shall be the exclusive remedy...against any...employee of the employer...on account of any accident or injury...in any way contracted, sustained, aggravated, or incurred by the employee in the course of or because of or arising out of the employee's employment...". UCA Section 34A-2-105 (emphasis added).

In contrast, it also states:

"When any injury...for which compensation is payable...is caused by the wrongful act or neglect of a person other than an employer...or employee...(b) the injured employee...may have an action for damages against the third person." UCA Section 34A-2-106 (emphasis added).

Thus, at the time of this incident, was either party an "employee"? Or, were they "third-persons"? Simplified, were either or both in the course and scope of their employment at the time of the crash?

The exclusive remedy only applies if both were in the course and scope of their employment. However, if either of them were outside the course and scope of employment, then the plaintiff can maintain a third-party claim against the defendant.

- b. Third-party cases and worker's compensation claims each have distinctly different methods of analysis.

To decide whether a person is in the course and scope of their employment, it is critical to know if the claim involves worker's compensation benefits or, if the

claim involves a third-party negligence action. *Ahlstrom*, 73 P.3d at fn.1. The distinction is critical and defines the method of analysis.

The scope of employment question arises in both worker's compensation and negligence cases but the method by which the question is answered is markedly different. *Id.*

The purpose of worker's compensation is to protect workers who are hurt on the job and to ensure that there is a measure of financial security during their disability. *State Tax Comm'n v. Indus. Comm'n of Utah*, 685 P.2d 1051, 1053 (Utah 1984). To carry out its purpose, the Act should be liberally construed and applied to provide coverage. *Id.* Any doubt respecting the right of compensation should be resolved in favor of the injured employee. *Id.*

By contrast, negligence cases require proof by the preponderance of the evidence that the employee was acting within the scope of [her] employment. *Ahlstrom*, 73 P.3d at fn. 1. "Because there are different presumptions governing worker's compensation and negligence cases, it would not be wise to hold that the rules governing scope of employment questions in one area are wholly applicable to the other because the legal effect of identical facts may be different in a negligence case than in a worker's compensation case." *Id.*

- c. As a general rule, the coming and going rule governs course and scope of employment questions in both worker's compensation and third party liability cases.

"The law uses the "coming and going" rule to determine when a person acquires and abandons her status as an employee at the beginning and end of the workday. If an accident happens to an employee who is "just coming or going from the workplace, it is of no legal consequence to the employer." *Salt Lake City Corp.* at 180.

In worker's compensation cases, Utah has applied the coming and going rule as early as 1970. *Lundberg v. Cream O'Weber/Fed. Dairy Farms, Inc.*, 465 P.2d 175 (1970). In 1989, The Utah Supreme Court adopted the coming and going rule into third-party negligence claims. *Whitehead v. Variable Annuity Life Ins.*, 801 P.2d 934 (Utah 1989).

The coming and going rule holds that a person is not in the course and scope of her employment when commuting to and from work. This general rule is true in both worker's compensation cases and in third-party liability cases. *Drake v. Indus. Comm'n of Utah*, 939 P.2d 177, 182 (Utah 1997)(rule applied in the worker's compensation context); *Whitehead*, 801 P.2d at 936 (rule applied in the third-party liability context).

Over the years, a collection of exceptions to the coming and going rule have been addressed by Utah courts. Worker's compensation cases and third-party

liability cases each have their own unique sets of exceptions. *State Tax Comm'n*, 685 P.2d at 1053-54 (cataloging various work comp exceptions to coming and going); *Windsor v. Am. States*, 22 P.3d 1246, 1248-49 (Utah Ct. App. 2001)(refusing to adopt exceptions to coming and going in a third-party case); *Coleman v. Giguere*, 330 P.3d 83, 87 (Utah 2014)(applying special errand exception to coming and going in a third-party case). Here, the defendant has asserted that the worker's compensation premises rule exception to the coming and going rule applies in this third-party action.

- d. The worker's compensation premises rule is not a third-party exception to the coming and going rule.

The premises rule comes from worker's compensation law. *See* 1. A. Larson, *The Law of Workmen's Compensation* § 15.11 (1985). Under worker's compensation, the premises rule is an exception to the coming and going rule. *Soldier Creek v. Bailey*, 709 P.2d 1165 (Utah 1985). The premises rule says that if an accident happens on an employer's premises, a worker is in the course and scope of her employment, even if an employee has not arrived at his or her work site or has already left the work site. *Id.* (quoting 1 A. Larsen at § 15.11). That worker would be covered by worker's compensation and protected by the exclusive remedy.

This exception was first discussed by Utah courts in *Soldier Creek v. Bailey*. 709 P.2d at 1166-67. There, the Court reviewed the denial of a worker's

compensation claim when an employee was killed while driving to work on a gravel road. Although he was not on his employer's premises, his heirs urged the Court to extend the premises rule to include cases beyond the employer's property boundaries. *Id.* In upholding the ALJ's denial of benefits, the Court stated:

We decline to modify the premises rule to reach occurrences beyond the employer's boundaries that are not covered by the special hazard rule. The employer's property line provides a bright line test for application of the premises rule, based on the logic that while the employee is on the employer's premises, his connection with employment is both physical and tangible. *Id.* at 1167 (internal citations omitted).

Although the Court discussed the premises rule here, it did not formally adopt it.

It was again discussed by the Utah Supreme Court in *Clover v. Snowbird*. 808 P.2d at 1037. There, an employee of the Snowbird Ski Resort injured another skier while the employee was allegedly skiing in the course and scope of his employment. The Court first analyzed if the Snowbird employee was in the course and scope of his employment for purposes of respondeat superior. Next, the Court rejected the use of the premises rule in that third-party case. Finally, like a dagger to the very nature of the premises rule, the Court said:

...In fact, it is not entirely clear that the premises rule would apply in a worker's compensation case if the only connection an employee had with work was that the employee, after some recreational skiing was returning to work on the employer's ski runs." *Id.*

In summary, The Utah Supreme Court has only addressed the worker's compensation premises rule twice. The Court refused to extend it beyond an employer's property line under worker's compensation; the Court rejected it as a third-party test for course and scope; and the Court questioned whether it even applied in a worker's compensation case. The premises rule is not a valid test for course and scope of employment in a third-party analysis.

- e. *Hope v. Berrett* imported the worker's compensation premises rule into a third-party liability case.

Hope v Berrett is the only other instance where a Utah court has invoked the premises rule. 756 P.2d 102 (Utah Ct. App. 1988). The Court of Appeals heard *Hope* shortly after *Soldier Creek*, and shortly before *Clover*. In *Hope*, both the plaintiff and defendant were civilian employees of the United States Government. *Id.* As the plaintiff was coming to work, she was walking from a government parking lot to her job. *Id.* The defendant was arriving in her own car and hit the plaintiff as plaintiff walked across the parking lot. *Id.* The plaintiff made both a third-party liability claim against the defendant and a worker's compensation claim. *Id.* at 103.

In analyzing the course and scope question, the panel imported the worker's compensation premises rule from *Soldier Creek's* dicta. *Id.* Based on its reading of the premises rule, the Court of Appeals found that the plaintiff and defendant were both on their employer's property and were both in the course and scope of their

employment. *Id.* Having thus concluded, it applied the exclusive remedy provision of the worker's compensation statute and upheld the trial court's grant of summary judgment.

Hope was the trial court's sole factual and legal basis for summary judgment in the present case.

f. *Hope v. Berrett* is no longer controlling law

To the extent *Hope* was correctly decided in 1988, it has since been overruled sub-silentio by a series of Utah cases. Vertical stare decisis compels this Court to follow strictly the decisions rendered by the Utah Supreme Court. *State v. Menzies*, 889 P.2d 393, fn.3 (Utah 1994); *Jaffree v. Bd. of Sch. Comm'rs*, 459 U.S. 1314, 1316 (1983). Moreover, this Court has consistently followed these new lines of cases. Thus, *Hope*, sub-silentio, is no longer good law.

Shortly after the *Hope* decision, the Utah Supreme Court handed down *Birkner v. Salt Lake County*. 771 P.2d 1053 (Utah 1989). In *Birkner*, the Court considered whether a social worker was in the course and scope of his employment at the time of alleged tortious conduct. *Id.* at 1055-56. In analyzing whether that conduct fell within the course and scope of his employment, the Court consolidated, refined and announced three criteria for determining when an employee falls within the scope of employment in third-party negligence cases. *Id.* at 1057.

Those criteria are: 1) An employee must be about the employer's duties and business; 2) The employee's conduct must occur substantially within the temporal and spatial boundaries of the employment; and 3) The employee's conduct must be motivated, at least in part, by the purposes of serving the employer's interest. *Id.* These criteria are the law in Utah on third-party course and scope.

Since *Birkner*, most Utah cases involving third-party course and scope issues have applied the three-part *Birkner* test; or, used those criteria as the foundation for analysis. *Christensen v. Burns*, 844 P.2d 992 (Utah Ct. App. 1992)(negligence action dismissed because not in the course and scope); *Christensen v. Burns II*, 874 P.2d 125 (Utah 1994)(Sup. Ct. reversed, applying *Birkner* criteria for course and scope); *Clark v. Pangan*, 998 P.2d 268 (Utah 2000)(certification from Fed District analyzes intentional battery based on *Birkner*); *DDZ v. Molerway*, 880 P.2d 1 (Utah Ct. App. 1994)(assault and battery summary judgment in light of *Birkner*); *Glover v. Boy Scouts*, 923 P.2d 1383 (Utah 1996)(negligence Claim determining whether Scout Master was in the course and scope); *Mann v. Wadsworth*, 776 P.2d 926 (Utah Ct. App. 1989)(legal Malpractice case); *Newman v. Whitewater*, 197 P.3d 654 (Utah 2008)(analyzing exceptions to coming and going under three-part *Birkner* test). To the extent that the premise rule was ever the appropriate test in a third-party case, it was replaced by *Birkner*.

Changes in the law did not stop with *Birkner*. In *Clover v. Snowbird*, the Utah Supreme Court explicitly overruled the use of the premises rule as the sole test in a third-party case. 808 P.2d at 1041-42. After analyzing the course and scope question under the three-part *Birkner* test, the Court addressed *Clover*'s premises rule argument. *Id.* at 1043. The Court said:

“Second, *Clover* urges this court to apply the premises rule...In this instance, we decline to adopt such an approach. It is to be noted that the policies behind worker's compensation law differ from the policies behind respondeat superior claims.” *Id.*

Yet, if any question remained whether the premises rule is a third-party test for course and scope of employment, the Court continued:

“... [T]he premises rule departs from the analysis in *Birkner* in that it focuses entirely upon the second criterion discussed in *Birkner*, the hours and ordinary spatial boundaries of the employment, to the exclusion of the first and third criteria. *Id.*

Under the most liberal reading, the premises rule was limited to only the second of the three *Birkner* criteria. The clearer reading is that the premises rule was eliminated as a test for third-party course and scope of employment.

Over time, the Utah Supreme Court continued to chip away at the underpinnings of the premises rule as a third party test. In *Ahlstrom*, the Utah Supreme Court examined whether an off-duty police officer was in the course and scope of her employment while driving home after work in her police car. 73 P.3d at 317-320. After analyzing the coming and going rule, the Court noted:

“Although the coming and going rule was imported from our worker’s compensation jurisprudence, we note that such portability, while sometimes appropriate, is not the rule in Utah...”

...

“... With very different presumptions governing worker’s compensation and negligence cases, it would not be wise to hold that the rules governing scope of employment questions in one area are wholly applicable to the other because the legal effect of identical facts may be different in a negligence case than in a worker’s compensation case.” *Id.* at fn.1.

Both *Clover* and *Ahlstrom* explicitly warn against importing worker’s compensation doctrines into third-party negligence cases. The underlying reasoning in *Hope* was based on importing the premises rule into the third-party case from a worker’s compensation case. These cases overrule that reasoning.

A supporting leg of *Ahlstrom* came later in *Salt Lake City Corp. v. Labor Comm’n*. 153 P.3d 179 (Utah 2007). Taken together, *Ahlstrom* and *Salt Lake City Corp.* stand for the proposition that a claimant like Mrs. Brown can be in the course and scope of her employment for purposes of receiving worker’s compensation benefits; but, not in the course and scope for purposes of a third-party analysis. This proposition directly opposes *Hope* and the summary judgment before this Court.

Salt Lake City Corp. was the worker’s compensation arm of the *Ahlstrom* decision. In *Salt Lake City Corp.*, Officer Michelle Ross, the defendant/employee in *Ahlstrom*, made a claim for worker’s compensation benefits for her injuries arising out of the *Ahlstrom* crash. *Salt Lake City Corp.*, 153 P.3d at 180. The

Ahlstrom Court found that Officer Ross was not in the course and scope of her employment for purposes of third-party liability. *Ahlstrom*, 73 P.3d at 320; *Salt Lake City Corp.*, 153 P.3d at 180. However, she was in the course and scope for purposes of her worker's compensation claim. *Salt Lake City Corp.*, 153 P.3d at 180.

“...the application of the going and coming rule to a single event may result in treating a person as an employee for the purpose of establishing eligibility for worker's compensation benefits while withholding employee status for the purpose of making the employer liable to third persons.” *Id.* at 180-181.

This directly overrules the reasoning in *Hope*. Mrs. Brown's standing as to worker's compensation benefits is irrelevant to whether she can bring a third-party claim against Mrs. Nelson. The analysis and objectives are different in worker's compensation and third-party claims. *Id.* The third-party question must be examined separately and distinctly. *Id.* It can only be resolved by analyzing Mrs. Brown and Mrs. Nelson's course and scope of employment under *Birkner*.

Because the trial court applied the wrong law to the analysis, the summary judgment must be set aside.

II. THE DISPUTED FACTS ARE INSUFFICIENT FOR SUMMARY JUDGMENT

Summary judgment is proper where there is no genuine issue of material fact. *Clover*, 808 P.2d at 1039. In cases where the facts are in dispute, summary judgment is only granted when, viewing the facts in a light most favorable to the

party opposing summary judgment, the moving party is entitled to summary judgment. *Id.* Here, not only did the trial court apply the wrong law, it made findings of fact on disputed issues of critically material fact. (R. at 369).

a. The trial court decided a material issue of disputed facts.

Even assuming that the premises rule is proper and intact, there were insufficient facts to establish summary judgment. The entire foundation of the premises rule is that the parties were on the employer's premises. In her motion for summary judgment, Mrs. Nelson failed to establish any facts that the parties were on IRS property. Worse yet, the trial court made a factual finding on the facts regarding ownership or control of the parking lot property.

In her motion, Mrs. Nelson went to great lengths to show that the parking was "designated" and "controlled" by the IRS. (R. at 102). Mrs. Brown disputed those facts at great length. (R. at 177-184). Despite all of the back and forth over the facts, Mrs. Nelson never established sufficient facts to show that the parking lot was the employer's parking lot. On this critical question, the trial court decided the fact. It found:

"The accident occurred in the parking lot designated for employees of the IRS." (R. at 369).

It implicitly held that "designated" meant they were on the employer's property.

This critical finding of fact must be reserved to a jury. By deciding that

"designated" meant "employer's property", the trial court inappropriately made a

finding of fact on the most material question regarding the premises rule: Were the parties on the employer's premises?

b. The Court should analyze the facts in this case in light of the *Birkner* test

Notwithstanding the question of fact above, a remand of this case to the trial court would likely come with instructions to analyze the course and scope question using the *Birkner* test. This raises the possibility that the trial court could again grant summary judgment and subject this case to a further appeal.

In *Christensen v. Swenson*, the Utah Supreme Court reviewed on certiorari the Court of Appeal's affirmation of a summary judgment. 874 P.2d 125 (Utah 1994). There, a security guard was involved in a car crash during a break from work. The injured party filed suit against the guard and his employer. In analyzing the course and scope question on certiorari, the Supreme Court stated:

“... reasonable minds could differ on all three [*Birkner*] criteria. Thus, to avoid a second summary judgment on remand, we address all three of the *Birkner* criteria.” *Id.* at 128.

Mrs. Brown urges this Court to follow this guidance and analyze this case in light of the *Birkner* criteria in order to avoid a subsequent appeal on remand.

In *Birkner*, the Court said, “[w]hether an employee is acting within the scope of her employment is ordinarily a question of fact.” *Birkner*, 771 P.2d at 1057; *Clover*, 808 P.2d at 1040; *Christensen*, 874 P.2d at 127. The question must be submitted to the jury whenever reasonable minds may differ as to whether the

employee was at a certain time involved wholly or partly in the performance of the employer's business or within the scope of employment." *Christensen*, 874 P.2d at 127.

"In *Birkner*...[w]e articulated three criteria helpful in determining whether an employee is acting within or outside the scope of her employment.' *Id.* (internal citations omitted).

i. First Criterion – There are insufficient facts for summary judgment

The first *Birkner* criterion requires that the employee's conduct be of the general kind the employee is hired to perform. "[T]he employee must be about the employer's business and the duties assigned by the employer, as opposed to being wholly involved in a personal endeavor." *Birkner*, 771 P.2d at 1056-57.

On summary judgment, Mrs. Brown disputed the material facts presented by Mrs. Nelson. However, even if those facts are taken as true, her motion for summary judgment established no facts that show either party was about their employer's business. (R. at 101-104). On the contrary, Mrs. Nelson's own facts clearly show that they were not about their employer's business:

"Mrs. Brown was walking from the parking lot to the building to report for work" (R. at 103 ln. 10);

Mrs. Brown was scheduled to work that day and was heading to the building to work. She had not yet clocked in". *Id.* at ln. 11;

"Alice Nelson was in the parking lot to report for work when the accident happened." *Id.* at ln. 18.

On summary judgment, the moving party must show that there are no disputed facts on an issue, and that based on those facts, she is entitled to judgment as a matter of law. Here, the only facts presented show that the parties were not about their employer's business. They had not clocked in. They had not started work.

At best, there is a question for the jury. The more appropriate finding is that Mrs. Nelson did not establish facts on the first *Birkner* criterion, thus precluding her summary judgment.

ii. Second Criterion – There is a factual dispute

The second *Birkner* criterion states that the employee's conduct must occur substantially within the hours and ordinary spatial boundaries of the employment. 771 P.2d at 1057.

This criterion raises two distinct issues: time and place. Mrs. Brown will again focus on Mrs. Nelson's version of the facts. As to time, the undisputed facts are that this happened before work:

"Mrs. Brown was walking from the parking lot to the building to report for work" (R. at 103, ln. 10);

Mrs. Brown was scheduled to work that day and was heading to the building to work. She had not yet clocked in". *Id.* at ln.11;

"Alice Nelson was in the parking lot to report for work when the accident happened." *Id.* at ln. 18.

With such clear evidence that they were outside the temporal boundaries of employment, the Court must find, at a minimum, that a question of fact exists on this issue. However, because these facts are the non-moving party's, the court should find that there are insufficient facts to entitle the defendant to a judgment as a matter of law.

As to spatial boundaries, the record is more unclear. As pointed out in *Clover*, this is precisely the issue raised by the premises rule.

"The building where Mrs. Brown worked has a designated parking lot for the employees." (R. at 102, ln. 4);

"The building and parking lot are surrounded by a fence with a single entrance into the fenced area." (R. at ln. 5);

"The building and parking lot are secured and not open to the public." (R. at ln. 6);

"In order to gain access to the parking area, a driver has to show a security badge to the guard". (R. at ln. 8);

"On the morning of the accident, Mrs. Brown parked her van in the parking lot for the IRS building." (R. at ln. 9).

These facts were presented to show that the IRS had ownership or control of the parking lot. Mrs. Brown disputed these facts. (R. at 176, lns. 3, 4, 6, 8, and 9).

"Plaintiff disputes that the IRS owns the building." (R. at ln.3);

"Yes, that is the security team. They don't work for [the] IRS. They're part of the building, because the building is a rented facility." (R. at 176);

"Q. And, whoever owns it [the building] also runs the parking lot?

A. Security, Yes”. *Id.*

As noted above, these facts raise questions as to who owns or controls the parking lot. Was the parking lot within the spatial boundaries of their employment? Who owned it? Who controlled it? The answer is unclear. Because it is factually unclear who owns the parking lot, this question cannot be decided as a matter of law. It must go to the jury.

However, even if the Court could go so far as to find the parking lot within the spatial boundaries of their employment, that finding still conflicts with the temporal boundaries. The undisputed facts are that this happened before work. Therefore, even if the crash happened within the spatial boundaries, it happened outside the temporal boundaries. This conflict cannot be decided as a matter of law, summary judgment must be denied.

iii. Third Criterion – There are insufficient facts for summary judgment

Under the third criterion of *Birkner*, “the employee’s conduct must be motivated, at least in part, by the purpose of serving the employer’s interest.” 771 P.2d at 1057.

Below, the defendant did not raise any facts suggesting that the defendant driving her car in the parking lot served her employer’s interest. Indeed, the coming and going rule directly opposes that argument. Does driving serve the employer in some way that riding the bus does not? What about riding a bike to

work? Car-pooling? Walking? There simply are no facts suggesting that driving conferred any benefit to the employer. At best it becomes a question of fact. The better reading is that there are insufficient facts to meet the burden on summary judgment.

In looking at the three criteria as a whole, to the extent that there are even sufficient facts, there are factual disputes throughout. Based on a factual analysis of the *Birkner* criteria, a summary judgment on remand must be denied.

Conclusion

The trial Court applied the wrong law. The premises rule, as described in *Hope*, is not controlling law in Utah for determining whether employees are in the course and scope of their employment when bringing a third-party action. This Court should explicitly reverse *Hope*.

The trial Court should have analyzed this case under the three-part *Birkner* test. Having applied the wrong law, this Court must reverse the summary judgment and analyze the facts of this case using *Birkner* in order to avoid further proceedings on remand.

Dated this 4th day of March, 2016



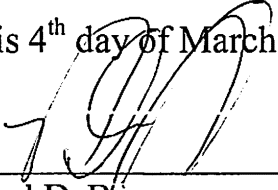
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This brief is in compliance with the type-volume limitations of Utah R. App. P. 24(f)(1). It contains 6,277 words, not including parts exempted by Utah R. App. P. 24(f)(1)(B).

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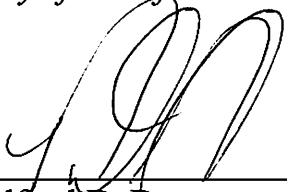


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Proof of Service

I hereby certify that on March 7th 2016, I caused to be mailed, first class,
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Addendum

- 1) Order Granting Defendant's Motion for Summary Judgment



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IN THE SECOND DISTRICT COURT, WEBER COUNTY
STATE OF UTAH, OGDEN DEPARTMENT

MARJORIE ANN BROWN,

Plaintiffs,

v.

THE ESTATE OF ALICE NELSON,

Defendant.

**ORDER GRANTING DEFENDANT'S
MOTION FOR SUMMARY JUDGMENT**

Civil No. 130906495
Judge Ernest Jones

This matter came before the Court on February 25, 2015, for hearing on Defendant Estate of Alice Nelson's (Defendant) Motion for Summary Judgment. J. Bradford Debry and Michael L. Banks appeared on behalf of plaintiff. J. Bradford Debry made arguments to the Court. Michael J. Walk appeared on behalf of defendant and made arguments to the Court. Having reviewed the matter, including the briefs and submissions of the parties, the relevant case law, having heard argument from the parties, and for good cause appearing, the Court hereby issues the following Ruling and Order Granting Defendant's Motion for Summary Judgment.

FINDINGS OF FACT:

The Court makes the following findings of undisputed material facts:

1. Plaintiff Marjorie Brown (Plaintiff) was involved in an auto/pedestrian accident on

January 30, 2012 at approximately 4:55 am.

2. Plaintiff had worked for the Internal Revenue Service (IRS) since 2007.
3. The IRS office where plaintiff worked is located at 1973 North Rulon White Boulevard, Ogden, Utah.
4. On the morning of January 30, 2012, plaintiff parked her car in the parking lot at 1973 North Rulon White Boulevard, which was designated for IRS employees to park while at work.
5. Plaintiff was walking through the parking lot to report to work when she was struck by a private vehicle driven by Alice Nelson.
6. Defendant Alice Nelson worked for the IRS for approximately 14 years.
7. Defendant worked at the IRS office located at 1973 North Rulon White Boulevard, Ogden, Utah.
8. Defendant was driving in the parking lot located at 1973 North Rulon White Boulevard, to park and report to work when the accident occurred.
9. The accident occurred in the parking lot designated for employees of the IRS.

CONCLUSIONS OF LAW

This Court makes the following conclusions of law:

1. The case of *Hope v. Berrett*, 756 P.2d 102 (Ut. App. 1988) is controlling law. Additionally, the *Hope* case is factually similar in all material respects to the facts of the instant case.
2. Applying the “premises rule” as stated in *Hope*, both plaintiff and defendant were on the employer’s premises and in the course of their employment when this

accident occurred.

3. Plaintiff sustained an on-the-job injury which was caused by a co-worker on the employer's parking lot which was designated for employees to park.
4. Plaintiff is only entitled to pursue a workers' compensation claim pursuant to Utah statutes.
5. Plaintiff cannot maintain a personal injury lawsuit against her co-employee, defendant Nelson.

For the foregoing reasons, IT IS HEREBY ORDERED, ADJUDGED AND DECREED that:

1. Defendant's Motion for Summary Judgment is GRANTED.
2. Plaintiff's exclusive remedy was under the workers compensation statutes.
3. Accordingly, all claims by plaintiff in the complaint against defendant are hereby DISMISSED, with prejudice and on the merits. This is a full and final order of this Court disposing of all issues alleged in the complaint.

The Order of the Court is approved and dated as indicated above in the upper right-hand corner of this document with the Court's Official Stamped Order and Date.

Approved as to form:

J. Bradford DeBry
Michael L. Banks
Attorneys for Plaintiff

CERTIFICATE OF E-FILING

I hereby certify that on the ___26th___ day of February, 2015, I served a true and correct copy of the foregoing proposed **ORDER GRANTING DEFENDANT'S MOTION FOR SUMMARY JUDGMENT**, by email, to the following counsel of record:

Michael L. Banks
ROBERT J. DEBRY & ASSOCIATES
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/s/Michael J. Walk

Michael J. Walk