

2015

Alan Hoskins, Jr., Plaintiff/Appellant, vs. Ogden Auto Body

Utah Court of Appeals

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IN THE UTAH COURT OF APPEALS

ALAN HOSKINS, JR.,

Plaintiff/Appellant,

vs.

OGDEN AUTO BODY,

Defendant/Appellee.

Case No. 20150381-CA

Second District Court No. 130904254

APPEAL FROM THE SECOND DISTRICT COURT,
WEBER COUNTY, STATE OF UTAH
THE HON. ERNIE W. JONES, CIVIL NO. 130904254

BRIEF OF APPELLANT

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LIST OF PARTIES TO THE PROCEEDING

Alan Hoskins, Jr., Individually,

vs.

Michael James Shannon, Individually,
Ogden Auto Body, a Utah Corporation.

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STATEMENT OF JURISDICTION

The Court has jurisdiction over this appeal pursuant to Utah Code § 78A-4-103(2)(j). The case was properly transferred under Utah Code § 78A-3-102(4) from the Utah Supreme Court, which had jurisdiction under Utah Code § 78A-3-102(3)(j).

ISSUES PRESENTED FOR REVIEW

ISSUE NO. 1: Whether the trial court erred when it concluded there was no material issue of fact that Appellant/Defendant Michael James Shannon was acting in the course and scope of his employment with Appellee/Defendant Ogden Auto Body, and thereby, granted summary judgment in favor of Ogden Auto Body.

Standard of review: A trial court's ruling on summary judgment presents a question of law, and the legal conclusions and ultimate grant or denial of summary judgment are reviewed for correctness. *Massey v. Griffiths*, 2007 UT 10 ¶ 8, 152 P.3d 312 (*cited in Fire Ins. Exch. v. Oltmanns*, 2012 UT App. 230, ¶ 4, 285 P.3d 802).

Preservation: Issues No. 1 was preserved in the parties' briefing of Ogden Auto Body's Motion for Summary Judgment (R. 604, R. 853, R. 1061, R. 1321, R. 1371), and exhibits thereto.

DETERMINATIVE STATUTES, RULES, AND ORDINANCES

None.

STATEMENT OF THE CASE

Nature of the case, course of proceedings, and disposition below

On October 23, 2012, Appellant/Defendant Michael James Shannon and Appellant/Plaintiff Alan Hoskins were involved in an automobile-pedestrian accident at 20th Street and Washington Avenue in Ogden, Utah. On July 17, 2013, Hoskins filed a negligence action against Shannon and his employer, Ogden Auto Body. Hoskin's Complaint included causes of action against Ogden Auto Body for *respondeat superior* and negligence and/or recklessness (in the training, monitoring, retaining, entrustment of vehicles and/or supervision of Shannon).

After the close of fact discovery, Ogden Auto Body filed a motion for summary judgment. (R. 601.) Ogden Auto Body argued that it was entitled to summary judgment (1) on Hoskins' *respondeat superior* claim because Shannon was not acting in the "course and scope" of his employment at the time of the accident based on the "coming and going" exception, and on (2) Hoskins' negligent hiring, training, and entrustment claims because there was no evidence Ogden Auto Body knew Shannon posed a threat to pedestrians, or that Ogden Auto Body's hiring, training, or supervision was the proximate cause of the accident. (R. 604-622.) The trial court agreed with Ogden Auto Body's analysis and granted its motion for summary judgment. (R. 1061-1091.)

Ogden Auto Body subsequently filed a motion to certify order granting summary judgment as final, pursuant to Rule 54(b) of the Utah Rules of Civil Procedure. (R. 1438.) Shannon joined in the motion. (R. 1457.) Ogden Auto Body and Shannon argued that the trial court should certify the order granting summary judgment to promote the speedy resolution of claims against Ogden Auto Body “by forcing an appeal” and as a matter of judicial economy. (R. 1441-1446, R. 1457-1459.)

The trial court agreed with Ogden Auto Body’s and Shannon’s arguments and signed an order granting its motion to certify order granting summary judgment as final, pursuant to Utah R. Civ. P. 54(b). (R. 1743-1745.) This appeal followed. (R. 1764.)

Statement of facts

The accident

On Tuesday, October 23, 2012, an automobile-pedestrian accident occurred between Shannon, an employee of Ogden Auto Body, and Hoskins. Shannon, driving an Ogden Auto Body tow truck, made a left turn on a green light and struck Hoskins, who was crossing the street in the crosswalk. (R. 629, pp. 58:25-60:18.) For purposes of the motion at issue on appeal, the Defendants did not dispute that Shannon negligently caused the accident. (R. 604-621, R. 853-875.)

Scope of Shannon's employment with Ogden Auto Body

Shannon resided in South Ogden, Utah, at all relevant times involved in this matter. (R. 1117, p. 6:16-22.) He began working as a tow truck driver for Ogden Auto Body in 2004. (R. 1117, p. 13:2-15; R. 667-668.) At the time of the accident, he was a salaried employee. (R. 1120, p. 21:6-14.) As part of his employment, Shannon drove a 5500 GMC 2009 tow truck which was owned and maintained by Ogden Auto Body. (R. 904; R. 918:20-21; R. 1125, p. 41:14-25.)¹ He did not pay for oil, gas, mechanical work, or automobile insurance on the tow truck out-of-pocket or for which Ogden Auto Body didn't reimburse him. (R. 1284, Request No. 10 and Shannon's Response.)

Ogden Auto Body assigned Shannon to handle vehicle service calls ("calls") mainly in the Layton area, but he also responded to calls in the Ogden area when called by Ogden Auto Body. (R. 1123, pp. 31:16-24, 33:3-22.) During the day, Shannon drove the tow truck to various parking lots in the area to await and respond to calls from Ogden Auto Body. (R. 1123, pp. 32:15 – 33:2.)

Ogden Auto Body's clients require that its drivers respond to calls within 20 to thirty 30 minutes within the geographic territory. (R. 1109, p. 43:6-19; R. 1196, p. 26:15-25.) Accordingly, Ogden Auto Body's response time is critical to its

¹ The oil, gas, maintenance and liability insurance expended for the tow truck was identified on Ogden Auto Body's financial books as an asset to the business. (R. 1278, Request No. 11, and Ogden Auto Body's Response.)

compensation and its position for client calls. (R. 1196, p. 26:15-25.) In 2012, Ogden Auto Body communicated with its drivers using a remote “Ranger” system which used a global positioning system (GPS) to identify the location of its tow trucks. Ogden Auto Body then contacted the drivers by phone to assign calls. (R. 1102, pp. 15-16:15; R. 1196, pp. 28:21 – 30:1.)

Ogden Auto Body dispatched service calls to the drivers geographically closest to each call. (R. 1102, p. 14:2-15:6; R. 1196, pp. 26:6-13, 27:13 – 28:6.) Ogden Auto Body drivers now use a tablet computer to accept calls. They take it out of their truck and into their homes in anticipation of a call. (R. 1102, pp. 14:22 – 15:6.) In 2012, Ogden Auto Body communicated with Shannon using his personal cell phone. (R. 1105, pp. 26:23 – 27:5.)

Ogden Auto Body knew about and allowed employees to run personal errands, pick-up food and eat meals in their tow trucks. (R. 1198, p. 37:1-25.) Shannon would eat meals in his tow truck. (R. 1124, pp. 35:22 – 36:14.) Shannon did not have his own personal vehicle and, on occasion, used the Ogden Auto Body tow truck to run personal errands. (R. 1118, pp. 10:18 – 11:23.) Ogden Auto Body’s owner, Tom Baur, told Shannon that he could use the tow truck for personal errands anytime, but Shannon always asked for permission before performing any personal errand. (R. 1118, p. 11:10-16.)

It was Shannon's duty to drive the tow truck for its use by Ogden Auto Body's business. (R. 1284, Request No. 11 and Shannon's Response; R. 1285, Request No. 16 and Shannon's Response.) The tow truck was necessary to fulfill the duties of his employment with Ogden Auto Body, as it contained the tools and other instruments necessary to perform his work. (R. 1283-1284, Request No. 9 and Shannon's Response.) He could not perform most of his work duties for Ogden Auto Body without the tow truck. (R. 1285, Request No. 15 and Shannon's Response.)

The nature of Shannon's work was unpredictable, and he did not have a strict schedule. (R. 1132, pp. 66:24 – 68:3; R. 1141, p. 103:1-12; R. 1141, p. 104:4-21; R. 1195, p. 25:12-17.) He usually started his workday around 7:00 a.m. and worked until around 7:00 p.m. He would clear a call after 7:00 p.m. on average once or twice per week and was called out after 9:00 p.m. once every two or three months. (R. 1103, p. 18:9-19; R. 1104, pp. 22:14 – 23:1.) Shannon had no particular "check out" time for his territory. (R. 1195, p. 25:12-17.) He usually cleared his last call of the day between 6:00 p.m. and 8:00 p.m. (R. 1104, p. 22:14-21.)

Shannon regularly worked after 7:00 p.m. Between July 1 2012 and December 1, 2012, Shannon completed 44 calls after 7:00 p.m. (R. 1252-1272.) In the two months immediately preceding the accident, he cleared 26 calls from

Ogden Auto Body after 6:00 p.m. (R. 1252-1272.) Of those calls, Shannon cleared 16 calls after 7:00 p.m. and 7 calls after 8:00 p.m. (R. 1252-1272.)

The tow truck was required to always be available for Ogden Auto Body's use. (R. 1285, Request No. 13 and Shannon's Response.) Taking the Ogden Auto Body tow truck home was "just part of the job" for Ogden Auto Body's drivers so they could quickly respond to service calls. (R. 1103, p. 21:14-20, R. 1117, pp. 9:22 – 10:3; R. 1131, p. 62:17-25; R. 1191, pp. 9:22 – 1192, p. 10:6; R. 1196, p. 28:7-23.) Shannon took the tow truck home in order to respond to calls as soon as possible. (R. 1131, p. 62:1-25; R. 1133, pp. 70:20 – 71:2.) Taking the Ogden Auto Body tow truck home benefitted Ogden Auto Body by having the vehicle ready to go when needed. (R. 1131, p. 62:17-25; R. 1133, pp. 70:20 – 71:2.)

Ogden Auto Body expected its drivers to be "always on call" 24 hours a day and to respond to an Ogden Auto Body towing call unless they had pre-arranged time off. (R. 1131, p. 62:1-16; R. 1196, pp. 28:7 – 29:12; 1285, Request No. 14 and Shannon's Response.) As long as Shannon was in the tow truck, he was expected to respond to a call. (R. 1196, pp. 28:25 – 29:12.) Shannon also remained on-call from his home. (R. 1122, pp. 28:14 – 29:4; R. 1131, p. 62:1-16; R. 1132, pp. 67:5 – 68:3.) There was no set time during the week when Shannon could refuse to take a call to respond with the Ogden Auto Body tow truck. (R. 1122, p. 28:14 – 29:4; R. 1131, p. 62:1-16; R. 1196, pp. 28:7 – 29:9.) He never

refused to respond to Ogden Auto Body calls after picking up dinner or going home. (R. 1133, pp. 70:20 – 71:2.)

After Shannon's final tow or "call" during usual hours of a work day, he would call the Ogden Auto Body office to inform it that he completed a final tow (to "clear the call") before heading home. (R. 1124, p. 34:11 – 35:12.) He would call Mr. Baur every day, after Ogden Auto Body's office hours, to clear a call before heading home. (R. 1124, p. 35:5-6; R. 1104, p. 22:14-21.) This usually occurred between 6:00 p.m. and 7:00 p.m. (R. 1124, p. 35:7-9.)

Shannon's work the afternoon of the accident

On the day of the accident, Shannon towed a vehicle to a Big O Tire shop in Brigham City and dropped it off around 6:30 p.m. (R. 1129, p. 55:11-23.) He called Mr. Baur from Brigham City to clear the call at 6:36 p.m. (R. 1129, pp. 57:8 – 58:2; R. 1140, pp. 98:9 – 100:5.) Mr. Baur did not ask him to tow another job at that time, so he began driving from Brigham City to his home in Ogden. (R. 1141, p. 105:5-11.) Shannon remained on-call, and, as required, had he received another call from Ogden Auto Body after completing the tow in Brigham City, he would have responded. (R. 1141, pp. 102:8 – 103:6.) Along the way, Shannon stopped at a drive through window at a Kneaders restaurant in Ogden to pick up dinner. (R. 1129, p. 56:13-22; R. 1130, p. 58:3-10; R. 1133, p. 71:3-7.) He then continued toward home. (R. 130, p. 59:3-14.)

Shannon pulled onto Washington Boulevard and headed south. As he turned left at a green light on 20th Street, he struck Hoskins, who was crossing the street in the cross-walk. (R. 1130, pp. 59:3 – 60:18.) Weber Area Dispatch received a 911 call reporting the accident at 7:19 p.m. (R. 702.) Approximately 41 minutes elapsed between the time he finished the call in Brigham City and the accident. (R. 1140, pp. 99:22 – 100:10.) Shannon received a citation for the accident. (R. 1127, p. 48:12-17; R. 1134, p. 76:5-7.) Despite the accident, had Shannon been asked by Ogden Auto Body to respond to a call in the hours after the accident, he would have responded as required. (R. 1133, p. 71:8-11; 1141, pp. 103:1 – 104:21.) It is Shannon's position that he was acting within the course and scope of his employment with Ogden Auto Body at the time of the accident. (R. 1210, Request No. 4 and Shannon's Response.)

Ogden Auto Body's actions after the accident

Shannon returned to work for Ogden Auto Body the day after the accident. (R. 684, p. 38:11-17.) Ogden Auto Body did not reprimand, suspend or take any disciplinary action against Shannon, and Mr. Baur only told him he needed to "be careful." (R. 684, p. 38:5-10.) Ogden Auto Body paid Shannon's citation and hired an attorney to assist him with that citation. (R. 642, p. 71:8-11; 650, p. 103:1-12; 683, pp. 37:21 – 38:4; 917:7-18.) Shannon remained employed by Ogden Auto Body as of April 2014. (R. 1202, p. 52:2-4.)

The Defendants' motions and the trial court's orders

Ogden Auto Body filed a motion for summary judgment, asking the trial court, in part, to dismiss Hoskins' claims because Shannon was not acting in the course and scope of his employment at the time of the accident. Specifically, Ogden Auto Body argued that the "coming and going" exception precluded liability because Shannon had completed a tow approximately forty-one (41) minutes prior to the accident, picked up dinner, and was driving home. (R. 601.)

The trial court granted Ogden Auto Body's motion for summary judgment, ruling as a matter of law that "Shannon's operation of the tow truck was not in the course and scope of his employment and was not advancing the interests of Ogden Auto Body at the time of the accident." (R. 1061-1091, R. 1951, pp. 52:6 – 54:15.)

Ogden Auto Body subsequently filed a motion to certify order granting summary judgment as final. (R. 1438.) Shannon joined in the motion. (R.1457.) Ogden Auto Body and Shannon argued the trial court should certify the order granting summary judgment to promote the speedy resolution of claims against Ogden Auto Body "by forcing an appeal" as to one of the two defendants.² (R. 1441-1446, R. 1457-1459, R. 1949, pp. 1 – 24.)

² The defendants argued that this would serve judicial economy. It is unclear how forcing a piecemeal appeal against one party would be judicially economic.

The trial court agreed with Ogden Auto Body's argument and granted its motion to certify order granting summary judgment as final, pursuant to Utah R. Civ. P. 54(b). (R. 1743-1745, R. 1949, pp. 24:22 – 27:9.)

SUMMARY OF ARGUMENT

The trial court committed legal error in a number of respects. As a threshold matter, the trial court erred by taking from the jury the question of whether Shannon was acting within the course and scope of his employment with Ogden Auto Body at the time of the subject accident. Scope of employment questions are fact bound and typically reserved for the fact-finder.

Ogden Auto Body's motion for summary judgment exclusively argued that, because Shannon was traveling home at the time of the accident, Utah's "coming and going" exception to liability, based on the doctrine of *respondeat superior*, applied, thereby removing Shannon from the course and scope of his employment as a matter of law. The "coming and going" exception required the trial court to weigh Ogden Auto Body's benefit from and control of Shannon conduct at the time of the accident versus the personal nature of the subject trip. In granting summary judgment, the trial court erred by failing to properly weigh these considerations in light of the undisputed facts, and erred by failing to apply

Instead, trial of the case will be delayed one to two years, after which a second appeal may result.

exceptions to the “coming and going” exception under the circumstances of this case.

Moreover, the trial court committed legal error by failing to find that an issue of fact existed, for the fact finder to determine, as to whether Ogden Auto Body’s post-accident actions regarding Shannon’s conduct, amounts to ratification, placing Shannon within the course and scope of his employment at the time the accident for purposes of *respondeat superior*.

The Court should reverse the trial court’s granting of Ogden Auto Body’s motion for summary judgment because (1) Utah’s “coming and going” exception to the doctrine of *respondeat superior* is only a general exception, which is not always applicable, and to which exceptions exist, (2) Ogden Auto Body received a substantial benefit from and had control over Shannon at the time of the accident, either making the “coming and going” exception inapplicable or necessitating the application of exceptions to the “coming and going” exception in this case, including Utah’s “dual purpose exception” and “instrumentality exception,” and (3) even if Shannon was not within the course and scope of his employment at the time of the accident, Ogden Auto Body’s ratification of his conduct placed him back within the course and scope of his employment for purposes of *respondeat superior*.

ARGUMENT

I. THE TRIAL COURT ERRED IN RULING AS A MATTER OF LAW THAT SHANNON WAS NOT ACTING IN THE COURSE AND SCOPE OF HIS EMPLOYMENT BASED UPON UTAH'S "COMING AND GOING" EXCEPTION.

A. Utah's "Coming and Going" Exception to the Doctrine of *Respondeat Superior* is Only a General Exception, which is Not Always Applicable, and to which Exceptions Exist.

Under the doctrine of *respondeat superior*, "an employer may be held vicariously liable for the acts of its employee if the employee is in the course and scope of his employment at the time of the act giving rise to the injury." *Castellanos v. Tommy John, LLC*, 2014 UT App. 48, ¶ 39, 219 P.3d 218 (citing *Newman v. White Water Whirlpool*, 2008 UT 79, ¶ 8, 197 P.3d 654). In Utah, an employee is generally not acting within the course and scope of his employment for purposes of third-party negligence claims when he is traveling to and from work. *Whitehead v. Variable Annuity Life Ins. Co.*, 801 P.2d 934, 936 (Utah 1989). "This exception [to vicarious liability] is known as the 'coming and going' rule." *Newman*, 2008 UT 79, ¶ 8 (citations omitted). "The major premise of the 'going and coming' rule is that it is unfair to impose unlimited liability on an employer for conduct of its employees over which it has no control and from which it derives no benefit." *Whitehead*, 801 P.2d at 937.

Because this "coming and going" policy is an exception in determining whether an employee is in the course and scope of his employment, the burden of

proof resets upon the party claiming the exception. *See State v. 633 E. 640, 942 P.2d 925, 933 (1997)* (one who claims an exception to a general rule must bear the burden of proving that he or she comes within the exception.); *see also i.e. Jones & Trevor Mktg. v. Lowry*, 2012 UT 39, ¶ 31, 284 P.3d 630, 639 (where liability is based on an alter ego theory, the burden of proof is on the party seeking to have the court apply the exception to the general rule and disregard the corporate entity.); *Browning v. Equitable Life Assurance Soc'y*, 94 Utah 570, 586 (Utah 1938) (when an insurance company pleads an exception provided in the policy, it is an affirmative defense, and as in all other pleas of affirmative defense, the burden of proof is on the defendant to sustain it.)³

³ The “coming and going” policy is an exception to Utah’s test in determining whether an employee is in the course and scope of employment – the three part “Birkner Test”:

First, an employee’s conduct must be of the general kind the employee is employed to perform. . . . Second, the employee’s conduct must occur within the hours of the employee’s work and the ordinary spatial boundaries of the employment. Third, the employee’s conduct must be motivated, at least in part, by the purpose of serving the employer’s interests.

Birkner v. Salt Lake County, 771 P.2d 1053, 1056-57 (Utah 1989) (internal citations omitted). Whether an employee is in the course and scope of his employment under the Birkner Test is typically a question for the fact finder (*Newman*, 2008 UT 79, ¶ 10), and Ogden Auto Body’s summary judgment did not contest that Shannon met the Birkner Test. (R. 613-619.)

Pursuant to this “coming and going” exception, to be within the course and scope of his employment, an employee “must be acting to benefit his employer and subject to his control.” *Id.* at 938. This does not mean that an employer will be liable if it receives *any* benefit or has *any* control over the employee. *Ahlstrom v. Salt Lake City Corp.*, 2003 UT 4, ¶ 9, 73 P.3d 315. Instead, the court must “weigh the benefit and control against the personal nature of the trip in order to determine where it is appropriate to place liability.” *Id.*

Utah’s “coming and going” exception was originally imported from its worker’s compensation jurisprudence. *Ahlstrom*, 2003 UT 4, at n.1. Whether an injury arises out of or within the scope of employment depends on the particular circumstances of the case. *Kinne v. Industrial Comm’n*, 609 P.2d 926, 927 (Utah 1980). A number of exceptions have been recognized to the “coming and going” policy in the context of worker’s compensation, including where transportation was furnished by the employer for the benefit of the employer, where the employer requires the employee to use a vehicle as an instrumentality of the business, where the employee is injured while on a “special errand” or “special mission” for the employer, where ingress and egress at the place of business are inherently dangerous, and where the employee combined pleasure and business on a trip, and the business part predominates. *State Tax Comm’n v. Industrial Comm’n*, 685 P.2d 1051, 1053 (Utah 1984) (citations omitted).

While the scope of employment question arises in both worker's compensation and negligence cases, the Utah Supreme Court has differentiated the method by which the question is answered. In evaluating employer liability under the Worker's Compensation Act, the scope of employment question "should be liberally construed and applied to provide coverage. Any doubt regarding the right of compensation will be resolved in favor of the injured employee. *Id.* at 1053 (quoting *State Tax Comm'n v. Indus. Comm'n of Utah*, 685 P.2d 1051, 1053 (Utah 1984)). On the other hand, negligence cases require proof by the preponderance of the evidence that the employee was acting within the scope of employment. *Id.* Accordingly, the court has observed that "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.*; see also *Salt Lake City Corp. v. Labor Comm'n*, 2007 UT 4, ¶ 22, 153 P.3d 179 (rejecting superimposing allocation of benefits standard applicable in negligence cases onto worker's compensation cases).

While recognizing the distinction between worker's compensation and negligence cases, the Utah Supreme Court has adopted applicable exceptions to the "coming and going" policy under worker's compensation law and has recognized

exceptions to the policy in negligence cases. In *Ahlstrom*, for example, the Utah Supreme Court recognized in general that

where an employee engages in conduct benefitting the employer or which is controlled by the employer, [courts] weigh the benefit and control against the personal nature of the trip in order to determine where it is appropriate to place liability.

2003 UT 4, ¶ 9.

In *Whitehead*, the court implicitly adopted the “dual purpose exception” in negligence cases. 801 P.2d at 937. Under that exception, if an employee’s personal conduct benefits an employer, the employer may be held liable where the predominant purpose of the conduct was not personal. *Id.* In determining the “predominant purpose,” the court determined that one “useful test” to determine the predominant purpose is to examine “whether the trip is one which would have required the employer to send another employee over the same route or to perform the same function if the trip had not been made.” *Id.*

The Utah Supreme Court has left open the issue of whether other exceptions to the “coming and going” policy, recognized under worker’s compensation law, should be applied in negligence cases. In *Ahlstrom*, the court examined the application of the “special errand exception” and the “employer-provided transportation exception” to the facts of that negligence case. 2003 UT 4 at ¶¶ 16-17 (holding the city was not vicariously liable for negligence of off-duty police officer who caused an accident while driving home). Under Utah worker’s

compensation law, a “special errand” occurs “when the employee engages in a special activity which is within the course of his employment, and which is reasonably undertaken at the request or invitation of the employer.” *Id.* at ¶ 16 (citing *Drake v. Indus. Comm'n of Utah*, 939 P.2d 177, 183 (Utah 1997) (quoting *Dimmig v. Workmen's Comp. Appeals Bd.*, 495 P.2d 433, 439 (Cal. 1972))). “Under [the employer-provided transportation] exception, employers have been liable for injuries to their employees when they have required their employees to use the employer's vehicle.” *Id.* at ¶ 17 (citing *State Tax Comm'n*, 685 P.2d at 1053 (citing *Kinne*, 609 P.2d 926 and *Bailey v. Indus. Comm'n of Utah*, 398 P.2d 545 (Utah 1965))). The court found neither exception applicable to the circumstances of that case, and was not required to address the adoption of either exception in negligence cases at that time. *Id.* at ¶ 18.

B. Because Ogden Auto Body Received a Substantial Benefit from and had Control over Shannon at the Time of the Accident, the “Coming and Going” Exception is Either Inapplicable or the Facts of This Case Justify the Application of Exceptions to Such, Including the “Dual Purpose Exception” and the “Instrumentality Exception.”

The trial court erred in applying the “coming and going” exception in this case. In *Ahlstrom*, the Utah Supreme Court adopted a framework to determine whether such by weighing the benefit received and the control of the employer against the personal nature of the trip on a case by case basis. *Ahlstrom*, 2003 UT 4, ¶ 9.

In the trial court, Ogden Auto Body's presented no argument that Shannon failed to meet the Birkner Test, and exclusively argued that summary judgment was appropriate based on the "coming and going" exception. (R. 613-619.)⁴ As set forth below, Ogden Auto Body failed to carry its burden of proof that the "coming and going" exception applied under the facts of this case. Moreover, the circumstances of Shannon's employment and conduct justify the application of exceptions to such based upon (1) the benefit received by Ogden Auto Body and (2) its control over Shannon's employment.

1. The trial court should be reversed because Ogden Auto Body received a substantial benefit by having Shannon on-call while in its tow truck.

"In almost every instance," the question of whether an employee is in the course and scope of employment "can be reduced to one unit of measure—benefit." *Salt Lake City Corp*, 2007 UT 4, ¶ 20. The substantial benefit Ogden Auto Body received by having its tow truck in the possession of Shannon justifies the reversal of the trial court's decision on Ogden Auto Body's motion for summary judgment because the circumstances of this case fall outside of the "coming and going" exception and based on the 'dual purpose exception.'

⁴ "These opinions from the Utah Supreme Court demonstrate that where, as here, it is undisputed that a driver is commuting home, an employer cannot be vicariously liable to third-parties for injuries resulting from an automobile accident. Therefore, Ogden is entitled to summary judgment on Mr. Hoskins' *respondeat superior* claim." (R. 618-619.)

a. The “dual purpose exception” is recognized as an exception to the “coming and going” exception.

Sister state jurisdictions have adopted various approaches in determining the liability of employers for tortious conduct of employees, under *respondeat superior*, based on the employee’s travel to and from work. I.e. *Helena Wholesale Grocery Co. v. Bell*, 112 S.W.2d 416, 439 (Ark. 1938) (examining the convenience and benefit derived in prosecution of the business in driving vehicle home); *Duffee v. Rader*, 344 S.E.2d 258 (Ga. Ct. App. 1986) (when vehicle is supplied by employer to facilitate the progress of work, employment begins when the workman enters the vehicle and ends when he leaves it on the termination of the labor); *Re-Mark Chemical Co. v. Ross*, 101 So. 2d 163, 165 (Fla. Dist. Ct. App. 3d Dist. 1958) (employer may be liable for negligence of employee using vehicle with the knowledge and consent of employer having such dominion and control of vehicle); *Wilson v. Edwards*, 138 W. Va. 613, 637 (W. Va. 1953) (generally, where an employee has permission to use employer’s vehicle to better execute his business to go to and from his meals and home, he is acting within the scope of employment); *Gebert v. Clifton*, 553 S.W.2d 230, 230 (Tex. Civ. App. Houston 14th Dist. 1977) (exceptions to the “coming and going” exception apply where the employee has undertaken a special mission at the direction of the employer, or where the employee is performing a service in furtherance of the employer’s business with express or implied approval of the employer).

Under the “dual purpose” exception, an employee’s diversion from employment duties may still be within the scope of employment even if the tortious conduct was partly performed to serve the purposes of the employee or a third party. *See* 27 AM. JUR. 2d, Employment Relations § 467. Some sister state jurisdictions have adopted this exception as a means to determine the liability of employers for tortious conduct of employees while traveling to and from work. I.e. *Merchants Nat’l Bank v. Waters*, 447 F.2d 234, 237-238 (8th Cir. Iowa 1971) (whether the conduct of employee was done in furtherance of the employer’s business); *Wolfe v. Harms*, 413 S.W.2d 204, 216 (Mo. 1967) (if the employee’s work creates the necessity for the travel, he is in the course of his employment, even though at the same time he is serving some purpose of his own. The business purpose does not have to be primary.); *Matos v. Michele DePalma Enterprises, Inc.*, 160 A.D.2d 1163, 1164 (N.Y. App. Div. 3d Dep’t 1990) (if the travel would still have occurred even through the business purpose was canceled, then the employer cannot be held liable.); *Lazar v. Thermal Equip. Corp.*, 148 Cal. App. 3d 458 (Cal. App. 2d Dist. 1983) (if the employee’s trip to or from work involves an incidental benefit to the employer, not common to commute trips made by ordinary members of the work force, the “coming and going” exception will not apply).

Utah’s approach to the “dual purpose exception” was set forth in *Whitehead*. Therein, the Utah Supreme Court implied that an employer may be held liable in

third-party negligence claims where the predominant purpose of the conduct was not personal. 801 P.2d at 937. In examining this exception, the court adopted its analysis of the “dual purpose exception” as applied in the workman’s compensation context:

[I]f the predominant motivation and purpose of the activity is in serving the social aspect, or other personal diversion of the employee, even though there may be some transaction of business or performance of duty merely incidental or adjunctive thereto, the person should not be deemed to be in the course of his employment. . .

Id. (quoting *Martinson v. W-M Insurance Agency, Inc.*, 606 P.2d 256, 258 (Utah 1980)).

One “useful test” utilized by the court to determine when an employee’s conduct comes under the “dual purpose exception” is “whether the trip is one which would have required the employer to send another employee over the same route or to perform the same function if the trip had not been made.” *Id.* (citations omitted). In *Ahlstrom*, an off-duty officer traveling from a regularly scheduling meeting, with her infant son in a patrol car, was involved in an automobile accident.⁵ While using the vehicle, the officer was required to keep certain items in the car, wear appropriate attire, to monitor the radio, and be ready to respond

⁵ After examining multiple cases involving the vicarious liability of cities for the accident caused by commuting officers, the court noted that “[t]he lesson of these cases is that cities are not held liable for commuting accidents of officers in city cars unless there are unique circumstances that tip the balance from a personal trip to one that primarily benefits the department.” *Id.* at ¶ 13.

while driving the car. In coming to its decision not to apply the “dual purpose exception,” the Court compared the facts of the case with those in the Louisiana Court of Appeal’s decision in *Johnson v. Dufrene*, another officer-related vehicle accident. 2003 UT at ¶ 14 (citing *Johnson v. Dufrene*, 433 So. 2d 1109 (La. Ct. App. 1983)).⁶ Unlike the *Johnson* case, the court in *Ahlstrom* found that “it did not appear vitally necessary to the City that she be accessible while on personal errands,” and the benefit the City received was only “tangential” to the officer’s purpose of commuting home.

b. The “coming and going” exception does not apply because the predominant purpose of Shannon’s conduct was for Ogden Auto Body’s benefit, and/or his conduct meets the “dual purpose exception.”

In this case, possession of Ogden Auto Body’s tow trucks by its drivers, at all hours, was mandatory and vitally necessary for the financial success of its business, and reasonable minds could differ as to whether Shannon was simply commuting from work, providing a necessary function, or both. In the alternative, the “dual purpose exception” applies because Ogden Auto Body would have been required to send another driver to perform the same function of driving the truck home in place of Shannon.

⁶ In *Johnson*, an officer, on-call 24 hours a day, with special training and exclusive access to vital records was involved in an accident while transporting his mother-in-law on personal errands in his department car. 433 So. 2d at 1111. The court found the city vicariously liable because the officer’s accessibility was vital to the department. *Id.* at 1113.

In *Newman*, a plaintiff was injured in an automobile accident by a White Water employee who was driving to work in his personal vehicle and was carrying materials belonging to his employer. The trial court granted summary judgment in favor of White Water, ruling that the employee fell within the “coming and going” exception, and was not acting within the course and scope of his employment at the time of the accident. On appeal, the Utah Supreme Court reversed because reasonable minds could differ as to whether the employee had been “involved wholly or partly in the performance of his master’s business or within the scope of employment.” 2008 UT ¶ 12 (quoting *Carter v. Bessey*, 93 P.2d 490, 493 (Utah 1939)). The court focused on the fact that the employee’s job responsibilities included hauling materials to job sites, then returning those materials to White Water. At the time of the accident, the employee was carrying work-related materials, and reasonable minds could differ as to whether the employee was simply commuting to work, returning materials to his employer, or both. *Id.*

In this case, Shannon’s conduct falls outside of the “coming and going” exception because the predominant purpose of Shannon’s conduct was not personal and substantially benefitted Ogden Auto Body. In order to keep its clients, Ogden Auto Body required its drivers to take their tow trucks home and remain on-call and ready to respond to service calls at all hours. The ability and urgency to timely respond to Ogden Auto Body’s clients within 20 to 30 minutes

directly affected its compensation and future business. Shannon's primary motivation for driving the tow truck home was to benefit Ogden Auto Body, by complying with its requirement to be able to timely respond to calls from its clients as soon as possible.⁷ As long as he was in the tow truck, he was expected to respond to any and all calls. In short, Ogden Auto Body received what they asked for – the substantial benefit of having Shannon on-call and in possession of its tow truck 24 hours a day.⁸

⁷ In *Valeo v. E. Coast Furniture Co.*, 95 So. 921 (Fla. Dist. Ct. App. 2012), the Florida Court of Appeals found an issue of fact as to whether an employer was vicariously liable when its employee driver, between locations with the company truck, threw a padlock and injured the plaintiff. The court concluded that if the battery occurred "during the course of the employment and to further a purpose or interest, however excessive or misguided, of the employer, then a plaintiff still may impose vicarious liability on the employer." *Id.* at 925 (citation and internal quotation omitted).

⁸ The fact that Shannon picked up dinner from a drive through before the accident occurred is insignificant to the Court's benefit analysis or application of the "dual purpose exception" to the "coming and going" exception. In *Lane v. Messer*, the Utah Supreme Court found that vicarious liability did not exist where a pedestrian was struck by a van owned by the employer, despite the employee's continuous custody of the van to enable him to respond to service calls after regular work hours. 731 P.2d 488, 489 (1986). Specifically, the employee took the van from his home to a club to drink with friends, and was involved in the accident on the return trip home. The court found that he was not performing any act he was hired to perform and was not motivated in any way to serve his employer at the time of the accident, and accordingly, was not acting in the scope of his employment at the time of the accident. *Id.* at 490.

In contrast to *Lane*, Shannon's decision to pick up dinner at a drive-through, prior to the occurrence of the accident, was only a minor deviation from his on-call, in truck, duties to Ogden Auto Body, which was both foreseeable and permitted by Ogden Auto Body, and was an inevitable toll of a lawful enterprise and the benefit given to Ogden Auto Body. See *Lazar v. Thermal Equip. Corp.*,

Shannon's job was to drive the tow truck. He did not work at any one location, and the tow truck was, in essence, his office and place of work. He could not perform most of his work duties for Ogden Auto Body without it, because it was a specialized vehicle which allowed him to service and tow vehicles that otherwise could not easily be towed by a normal truck or car. It contained the tools and instruments necessary to perform his work on behalf of Ogden Auto Body, enabling the company to respond to its clients 24 hours a day for its benefit.

The "dual purpose exception" applies in this case because of the substantial benefit Ogden Auto Body received by having Shannon drive the tow truck home, and predominant purpose of his trip at the time of the accident was to fulfill his duty to Ogden Auto Body. Moreover, if Shannon had refused to either take the tow truck home or respond to calls while in the truck or at home, Ogden Auto Body would have had to replace him with someone else to perform the same

148 Cal. App. 3d 458, 466-467 (Cal. App. 2d Dist. 1983) (employee was involved in an accident while on a detour to purchase food on the way home from work and driving the employer's vehicle. The detour was foreseeable and reasonable, and permitted the application of the doctrine of *respondeat superior*); *see also Wilson*, 138 W. Va. at 637 (generally, if an employee has permission to use the employer's vehicle to travel to and from meals to better execute his business, he is acting within the scope of his employment.) Under the facts of this case, a jury could find that Ogden Auto Body was aware, and expected, that Shannon would regularly use the tow truck to travel to and from restaurants to pick up food and meals while on-call. There is no evidence that Shannon had any other objective in mind than a brief stop at the restaurant, and there is no evidence that his was anything but a minor deviation from his route home.

function – to be on-call at all time and ready to timely respond to its clients by taking the tow truck home at night. Accordingly, the district court should be reversed.

2. **Because the Ogden Auto Body retained substantial control of Shannon while he remained in the tow truck, either the “coming and going” exception does not apply or the Court should adopt the Utah “instrumentality exception” in negligence actions.**

Pursuant to the “coming and going” exception, to be within the course of scope of employment, an employee must be subject to the employer’s control. *Whitehead*, 801 P.2d at 937. In so doing, a court weighs the control against the personal nature of the trip. *Ahlstrom*, 2003 UT 4, ¶ 9. The trial court erred in determining the exception applied in light of the substantial control Ogden Auto Body actively exerted over Shannon at the time of the accident. Further, Ogden Auto Body’s substantial control over Shannon necessitates the adoption of Utah’s “instrumentality exception” in this case.

- a. **The “instrumentality exception” to the “coming and going” exception.**

The Utah Supreme Court has previously recognized an exception to the “coming and going” exception in the worker’s compensation context where an employee is required to use the employer’s vehicle as an instrumentality of the employer’s business and the vehicle is subject to that use. *See Bailey*, 398 P.2d at 547. This particular exception is a blending of exceptions to the “coming and

going” exception – the “required vehicle” and “instrumentality” exceptions – recognized by courts in some other jurisdictions.

In these jurisdictions, the “required vehicle exception” has been applied to the “coming and going” exception if the employer requires the employee to use a particular vehicle for the employer’s benefit, and the employer exerts control of the operation of the vehicle. *See e.g. Oaks v. Connors*, 339 Md. 24, 27 (Md. 1995) (although employee was required to have a personal vehicle as a condition of employment, he was not performing any designed job responsibilities at the time of the accident and employer exerted no control over the method or means of the vehicle’s operation.); *Pfender v. Torres*, 765 A.2d 208, 217 (N.J. Super Ct. App. Div. 2001) (the required vehicle exception applied where an employee was required to drive a demonstrator car to work which was also used to run work-related errands); *Carter v. Reynolds*, 815 A.2d 460, 468 (N.J. 2003) (when an employer requires an employee to use a personal vehicle, it receives a benefit and exercises meaningful control over the method of the commute by denying other methods of travel); *Lobo v. Tamco*, 105 Cal Rptr. 3d. 718, 720-72 (Cal. App. 4th Dist. 2010) (application where the required vehicle gives some incidental benefit to the employer).

In *Huntsinger v. Glass Containers Corp.*, 99 Cal. Rptr. 666, 666 (Cal. App. 4th Dist. 1972), the California Court of Appeal imported the “required vehicle

exception” from worker’s compensation cases and applied it to tort cases. Applying an enhanced risk analysis, the court concluded that when a business requires an employee to drive to and from its office in order to have his vehicle available for company business during the day, “accidents on the way to or from the office are statistically certain to occur eventually, and, the business enterprise having required the driving to and from work, the risk of such accidents are risks incident to the business enterprise.” *Id.* at 670. Such use constituted a benefit to the employer, creating a question of fact as to whether the vehicle was within the scope of employment. *Id.*

The “instrumentality exception” addresses the circumstance where the employer the use of a vehicle was of such vital importance in furthering the employer’s business that his control over it might reasonably be inferred. *See Lessard v. Coronado Paint & Decorating Ctr., Inc.*, 2007-NMCA-122, 142 N.M. 583, 590, 168 P.3d 155 (N.M. Ct. App. 2007). In such circumstances, the question of control over the operation of the vehicle is for the fact finder. *Id.* In contrast, the Restatement (Second) of Agency § 239 acknowledges

[a] master is not liable for injuries caused by the negligence of a servant in the use of an instrumentality which if [sic] of a substantially different kind from that authorized as a means of performing the master’s service, or over the use of which it is understood that the master is to have no right of control.

RESTATEMENT (SECOND) OF AGENCY, § 239 (1958).

In *Davis v. Bjorenson*, 293 N.W. 829 (Iowa 1940), the Iowa Supreme Court addressed the instrumentality exception in the worker's compensation context, where an employee was injured while driving his car to the employer's business where the car was used by the employee and other employees for business purposes. The court concluded that the car was an instrumentality of the business at all hours of the day and was subject to that use at night. "[T]his duty was regular and definite. . . . In so doing he was performing for his employer a substantial service required by his employment at the place and in the manner so required." *Id.* at 830. Accordingly, the employee was within the course and scope of his employment. *Id.* at 830-831.

In *Bailey*, the court adopted a blended version of the required vehicle and instrumentality exceptions to the "coming and going" exception, holding that a deceased driver sustained his injuries in the course of his employment. 398 P.2d at 547. This position is in line with comment d of the Restatement (Second) of Agency § 229, which states:

If the master supplies a servant with a vehicle in order that the servant may go to or from work, it is important to ascertain whether the vehicle is supplied primarily for the purpose of assisting the master's work or for the purpose of assisting the employee to perform what is essentially his own job of getting to or from work. . . . If employees are required to use a particular vehicle and particularly if they are paid while in it, it would ordinarily be found that the driver of the vehicle is acting as the employer's servant.

RESTATEMENT (SECOND) OF AGENCY, § 229 cmt. d (1958).

In *Bailey*, Mr. Bailey had the dual status of employer and employee of a service station, and was killed in a one-car accident while traveling to work. He used the station wagon to respond to emergency calls at all hours, carried necessary tools and implements to service or repair automobiles, and was used by customers while their vehicles were serviced. Based on these facts, and adopting the analysis of the Iowa Supreme Court in *Davis*, the Utah Supreme Court found that it was the employee's "regular and definite duty to take the vehicle [and use the car] in the business, and the subject station wagon was an instrumentality of the business by "performing for his employer (himself) a substantial service required by his employment (business) at the place and in the manner so required." *Id.* at 547.

In contrast to the outcome in *Bailey*, in *Vanleeuwen v. Industrial Comm'n*, 901 P.2d 281, 282 (Utah Ct. App. 1995), this Court found no vicarious liability for an automobile accident under the facts of the case. While the employer furnished the employee with a company truck to commute to and from the employer's business office, the Court found no exception to the "coming and going" exception, because, in part, the primary benefit to the employer was the employee's mere arrival at work, which was not a substantial benefit to the employer. *Id.* (citing *Lundberg v. Cream O'Weber*, 465 P.2d 175, 176 (Utah 1970)). The employee was not required to perform any job-related service or use

the vehicle as a business instrumentality while traveling to and from the employer's business office, and accordingly was not performing service arising out of and in the course of his employment. *Id.*⁹

- b. Ogden Auto Body retained substantial control of Shannon while he remained in the tow truck and the "instrumentality exception" should be applied in this case.**

The Court should reverse the trial court's decision granting summary judgment based on the "coming and going" exception, because the circumstances of this case fall outside of that due to Ogden Auto Body's control of Shannon versus the personal nature of his trip home. In the alternative, the Court should adopt the "instrumentality exception" in this action because Ogden Auto Body exercised substantial control over Shannon and how he conducted its business.

Shannon's job, as a salaried employee of Ogden Auto Body, was to be in and to drive the tow truck to service clients. He had no control over what vehicle he drove each day – he was required to drive Ogden Auto Body's tow truck. The tow truck was not interchangeable with other modes of transportation to fulfill his site-to-site service calls. Because immediate access to the tow truck was

⁹ In coming to its decision, the Utah Supreme Court cited *Rinehart v. Mossman-Gladden, Inc.*, 423 P.2d 991, 992 (N.M. 1967) for the position that "injury is compensable only where the journey is an inherent part of the service for which the employee is compensated or where the travel itself is a substantial part of the service performed." *Id.*

mandatory at all hours, he had to exclusively utilize it for work, and drive it to and from his home.

Ogden Auto Body exerted substantial control over Shannon throughout any given day. Shannon was required to go and wait in the tow truck at various locations in the Layton area during the day. Ogden Auto Body used a GPS system to know the exact location of its tow trucks in relation to a call, and directed the nearest driver to respond to the call, regardless of the hour. Shannon's acceptance of a call at any time was mandatory, and he could not say no to any call unless he first obtained permission for time-off.

It was Shannon's requisite, regular and definite duty, regardless of the hour, to go where Ogden Auto Body directed him to go, to perform services in the manner Ogden Auto Body required, and then to return home with the truck to await further instructions. As evidenced by Shannon's testimony and Ogden Auto Body's call records, he responded to all of Ogden Auto Body's calls, went where it told to him to go, and remained on-call at all times. Shannon never shirked his job or refused to comply with Ogden Auto Body's directives and calls – regardless of the location or hour, whether he had just picking up dinner or was driving home when a call was received. Had Shannon received a call the evening of the accident, he would have responded as required, regardless of the accident, whether he was driving home or if was already at home.

As in *Bailey*, Ogden Auto Body's control of Shannon conferred a substantial benefit on it, because its control was continual and directive, regardless of the location or hour. Through its control of Shannon, its salaried employee, Ogden Auto Body had continual access to its tow truck, which carried the tools and implements to service its clients' vehicles, and thus the continual ability and means to respond to service calls and conduct its business at all hours. To further enable it to receive this benefit, Ogden Auto Body maintained the tow truck and paid for its fuel. See in contrast, *Jex v. Utah Labor Comm'n*, 2013 UT 40, 306 P.3d 799 (the "instrumentality exception" did not apply because the benefits to the employer were "sporadic, slight, and employee-initiated," and lacked employer control and direction).

Ogden Auto Body's control of Shannon gave it what it sought – the instrumentality to conduct its business at all hours. Accordingly, the Court should reverse the trial court because the circumstances of this case fall outside of the "coming and going" exception or adopt the "instrumentality exception" in this case.

C. Even if Shannon was Not Initially within the Course and Scope of His Employment, Ogden Auto Body's Ratification of His Conduct Makes It Liable Under *Respondeat Superior*.

Apart from whether Shannon was initially acting within the course and scope of his employment, an issue of fact exists regarding whether Ogden Auto Body is liable under *respondeat superior* based on its post-accident ratification of Shannon's actions. "Ratification is the affirmance of a prior act done by another, whereby the act is given effect as if done by an agent acting with actual authority." RESTATEMENT (THIRD) OF AGENCY § 4.01 (2006). When one ratifies an act performed for and in its behalf by one unauthorized to do so, the validity of the act relates back to the time when the unauthorized act occurred, rendering it effective as though it had previously been authorized. *See Jones v. Mutual Creamery Co.*, 17 P.2d 256, 259 (Utah 1932).

RESTATEMENT (THIRD) OF AGENCY § 7.04 provides:

A principal is subject to liability to a third party harmed by an agent's conduct when the agent's conduct is within the scope of the agent's actual authority **or ratified by the principal**; and

(1) the agent's conduct is tortious, or

(2) the agent's conduct, if that of the principal, would subject the principal to tort liability.

RESTATEMENT (THIRD) OF AGENCY § 7.04 (2006) (emphasis added). "Mere ratification" by an employer is precisely what justifies an employer's liability for the agent's actions." *Diversified Holdings, L.C. v. Turner*, 2002 UT 129, ¶ 36, 63 P.3d 686, 701 (quoting RESTATEMENT (SECOND) OF TORTS § 909(a) (1979)).

Ratification may be proved by evidence of a course of conduct indicating the sanctioning or confirmation the conduct at issue. *Smith v. Printup*, 866 P.2d 985, 1003 (Kan. 1993).

In *Jones*, the Utah Supreme Court recognized the concept of ratification in the law of agency and analyzed whether Mutual Creamery Co. was liable for its driver, who was not in the course and scope of his employment at the time of an accident, based on its alleged subsequent ratification of his conduct. 17 P.2d at 259 - 261. While the court concluded that no ratification transpired in *Jones*, it identified the requirements for a ratification to occur, including (1) that the principal or the person making the ratification has full knowledge, at the time of the ratification, of all material facts and circumstances relative to the unauthorized act or transaction, and (2) ratification can be shown either by an express or implied ratification. *Id.* at 259.

In the present case, the trial court erred in finding there was no factual dispute regarding whether Ogden Auto Body ratified the acts of Shannon. Shannon was on-call and purports to have been within the scope and course of his employment at the time of the accident. Ogden Auto Body benefitted by having Shannon take the truck home each day, thus enabling him to fulfill his duties and have the truck available at all hours for Ogden Auto Body's use. Ogden Auto Body had actual knowledge of the material facts surrounding the accident and still

ratified Shannon's conduct by hiring him an attorney, paying his citation, continuing to retain him as an employee, and failing to reprimand or take any disciplinary action against him.

Reasonable minds could differ as to whether Shannon was within the course and scope of his employment at the time of the accident, pursuant to Ogden Auto Body's ratification of his actions, subjecting it to liability under *respondeat superior*.

II. BECAUSE THE TRIAL COURT ERRED IN RULING THAT SHANNON WAS NOT ACTING WITHIN THE COURSE AND SCOPE OF HIS EMPLOYMENT, SUMMARY JUDGMENT MUST BE REVERSED.

The trial court's sole basis for granting summary judgment of Plaintiff's claims of *respondeat superior* was that Shannon was not acting within the course and scope of his employment. Because that ruling was erroneous, as discussed above, the judgment must be reversed, in part.

CONCLUSION

Hoskins respectfully urges the Court to reverse the trial court's Order Granting Defendant Ogden Auto Body's Motion for Summary Judgment as to Hoskins' *respondeat superior* claim, and remand this case for trial.

DATED this 29th day of October, 2015.

CHRISTENSEN & JENSEN, P.C.

A handwritten signature in black ink, appearing to read 'Karra J. Porter', is written over a horizontal line.

Karra J. Porter

Scott P. Evans

Stephen D. Kelson

Attorneys for Plaintiff/Appellant


CERTIFICATE OF SERVICE

I hereby certify that on the 29th day of October, 2015 two true and correct copies of the **BRIEF OF APPELLANT**, were mailed to the following:

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CERTIFICATE OF COMPLIANCE

Pursuant to U.R.A.P. 24(f), Counsel for Defendants/Appellants hereby certifies that the foregoing brief contains a proportionally spaced 14-point typeface and contains 9,393 words, as determined by an automatic word count feature on Microsoft Word 2010, including headings and footnotes, and excluding the table of contents, table of authorities, and the addendum.



Karra J. Porter
Attorneys for Plaintiffs/Appellants

ADDENDUM

**Exhibit A Order Granting Defendant Ogden Auto Body's Motion for
Summary Judgment, dated February 10, 2015**

**Exhibit B Order Granting Defendant Ogden Auto Body's Motion to Certify
Summary Judgment Order as Final Pursuant to Utah R. Civ. P.
54(b), dated April 9, 2015**

Tab A

Exhibit A

**Order Granting Defendant Ogden Auto Body's
Motion for Summary Judgment, dated February 10, 2015**

The Order of Court is stated below:

Dated: February 10, 2015

11:17:59 AM

/s/ Ernie W. Jones

District Court Judge

ANDREW M. MORSE (4498)
SCOTT YOUNG (10695)
SNOW, CHRISTENSEN & MARTINEAU
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Post Office Box 45000
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Telephone: (801) 521-9000
Attorneys for Defendant Ogden Auto Body

IN THE SECOND JUDICIAL DISTRICT COURT
IN AND FOR WEBER COUNTY, STATE OF UTAH

ALAN HOSKINS,

Plaintiffs,

vs.

MICHAEL JAMES SHANNON, OGDEN
AUTO BODY,

Defendants.

**ORDER GRANTING DEFENDANT
OGDEN AUTO BODY'S MOTION FOR
SUMMARY JUDGMENT**

Civil No. 130904254

Judge Ernie W. Jones

Defendant Ogden Auto Body moved for summary judgment on November 17, 2014. Plaintiff Alan Hoskins and Defendant Michael Shannon opposed the motion. The briefing was completed on December 15, 2014, and the Court heard oral argument on the motion on December 24, 2014. For the reasons set forth by the Court at oral argument, the analysis submitted by Ogden Auto Body in its briefing, and for good cause shown, the Court hereby rules that Ogden Auto Body is entitled to summary judgment on Plaintiff's claim for *respondeat*

superior because Defendant Shannon's operation of the tow truck was not in the course and scope of his employment and was not advancing the interests of Ogden Auto Body at the time of the accident, and that Defendant Ogden Auto Body is entitled to summary judgment on Plaintiff's claim for negligent hiring, training and supervision for lack of evidence. For these reasons, the Court hereby GRANTS Ogden Auto Body's motion for summary judgment.

IT IS SO ORDERED.

DATED this ____th day of _____, 2015.

SECOND DISTRICT COURT - UTAH

/s/ Ernie Jones

Honorable Ernie Jones

Approved as to Form:

DATED this _____ day of February, 2015.

SIEGFRIED & JENSEN

[Plaintiff filed an objection to the Rule 54(b)
certification portion of this order on 2.4.15]

Joseph Steele
C. Ryan Christensen
Attorneys for Plaintiff

DATED this 5th day of February, 2015.

SNOW, CHRISTENSEN & MARTINEAU

/s/ Scott Young

Andrew M. Morse
Scott Young
Attorneys for Defendant Ogden Auto Body

DATED this 5th day of February, 2015.

STRONG & HANNI

/s/ Robert Janicki

Robert L. Janicki
Michael A. Stahler
Attorneys for Defendant Michael Shannon

Tab B

Exhibit B

**Order Granting Defendant Ogden Auto Body's Motion to
Certify Summary Judgment Order as Final Pursuant to
Utah R. Civ. P. 54(b), dated April 9, 2015**

The Order of Court is stated below:

Dated: April 09, 2015
11:40:01 AM

/s/ Ernie W. Jones
District Court Judge

yANDREW M. MORSE (4498)
SCOTT YOUNG (10695)
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IN THE SECOND JUDICIAL DISTRICT COURT
IN AND FOR WEBER COUNTY, STATE OF UTAH

ALAN HOSKINS,

Plaintiffs,

vs.

MICHAEL JAMES SHANNON, OGDEN
AUTO BODY,

Defendants.

**ORDER GRANTING DEFENDANT
OGDEN AUTO BODY'S MOTION TO
CERTIFY SUMMARY JUDGMENT
ORDER AS FINAL PURSUANT TO
UTAH R. CIV. P. 54(b)**

Civil No. 130904254

Judge Ernie W. Jones

Defendant Ogden Auto Body ("Ogden") moved for certification of the Court's order granting summary judgment for Ogden as final pursuant to Utah R. Civ. P. 54(b) on February 5, 2015. Co-Defendant Michael Shannon joined Ogden's motion for certification on February 10, 2015. Plaintiff Alan Hoskins filed a memorandum in opposition to certification on February 18, 2015. Ogden and Shannon each filed a reply memorandum on February 25, 2015. The Court heard oral argument on April 1, 2015. For the reasons set forth by the Court at oral argument, the analysis set forth in the briefing, and for good cause shown, the Court hereby grants Ogden's motion and certifies

its Order granting Ogden's motion for summary judgment as final pursuant to Utah R.
Civ. P. 54(b).

IT IS SO ORDERED.

----- END OF ORDER-----
JUDGES ELECTRONIC SIGNATURE APPEARS AT THE TOP
OF THE FIRST PAGE OF THIS DOCUMENT

Approved as to Form:

DATED this 7th day of April, 2015.

SIEGFRIED & JENSEN

/s/ C. Ryan Christensen

Joseph Steele
C. Ryan Christensen
Attorneys for Plaintiff

DATED this 7th day of April, 2015.

SNOW, CHRISTENSEN & MARTINEAU

/s/ Scott Young

Andrew M. Morse
Scott Young
Attorneys for Defendant Ogden Auto Body

DATED this 7th day of April, 2015.

STRONG & HANNI

/s/ Robert Janicki

Robert L. Janicki

Michael A. Stahler
Attorneys for Defendant Michael Shannon