2016

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

Utah Court of Appeals

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

REPLY BRIEF OF APPELLANT

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I. OGDEN AUTO BODY FAILS TO MEET ITS BURDEN OF PROOF AND ISSUES OF FACT EXIST AS TO WHETHER THE "COMING AND GOING" EXCLUSION APPLIES IN THE PRESENT CASE

A. Summary of primary and responsive arguments.

In his opening brief, Appellant/Plaintiff Alan Hoskins, Jr. argued that the trial court committed legal error by taking from the jury the question of whether Appellant/Defendant Michael James Shannon was acting within the course and scope of his employment with Appellee/Defendant Ogden Auto Body at the time of the subject accident.[1] Indeed, 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 inapplicable.

In response, Ogden Auto Body begins by arguing that the "undisputed facts" show that the "coming and going" exception applies in this case because Shannon was not fulfilling a task for it at the moment of the accident, and contends that the "coming and going" exception applies, as a matter of law, to all "on-call" employees who drive company vehicles outside of work hours, but are not actively responding to a service call. Ogden Auto Body also contends that the district court did not err in taking the decision of whether Shannon was acting within the course

[1] Ogden Auto Body does not dispute that it bears the burden of proving that the "coming and going" exception applies in this case. *See* Appellant's Brief pp. 13 – 14.

and scope his employment from the jury because, as a matter of law, it did not receive a substantial benefit from having Shannon on-call and had no control over him at the time of the accident.

B. Utah's "coming and going" exception to the doctrine of *respondeat superior* is only a general exception, which is not always applicable.

Ogden Auto Body contends that the "coming and going" exception automatically applies to all on-call employees who drive company vehicles outside of work hours, but who are not actively responding to a service call at the time of the accident. Appellee's Brief p. 10. This blanket argument is an over generalized conclusion unsupported by case law.

First, Ogden Auto Body's conclusion relies upon the outcome in *Ahlstrom v. Salt Lake City Corp.*, 2003 UT 4, 73 P.3d 315, which was discussed in Hoskin's opening brief. In *Ahlstrom*, the Supreme Court applied the "coming and going" exception to an off-duty police officer who was involved in an accident while driving home with her infant son in a city owned police car, during off hours. Contrary to Ogden Auto Body's argument, the court did not suggest that the outcome in *Ahlstrom* applied in all on-call cases. First, the Supreme Court indicated that its application of the "coming and going" exception in that case was specific to police car cases:

> We may gleam from relevant opinions the conclusion that cities will not be liable for commuting officers' accidents in the absence of

> unique circumstances giving rise to a definite need for the officer to use the patrol car while off-duty. Thus a mere benefit to the city, or the city's exercise of some control over the use of the vehicle, is not enough to overcome the general premises of the coming and going rule.

Id. at ¶ 8.

Second, both *Ahlstrom* and applicable case law make it clear that whether the "coming and going" exception applies in a given case depends upon the circumstances of the particular case. *Ahlstrom,* 2003 UT 4, at ¶ 8.

Ogden Auto Body nonetheless contends, that as a blanket rule, "if an on-call employee is not actively pursuing his work duties (*i.e.*, responding to a service call), then the coming-and-going rule applies to bar vicarious liability against the employer." Appellee's Brief p. 10. This conclusion is unsupported by Ogden Auto Body's cited case law, including *Lane v. Messer*, 731 P.2d 488 (Utah 1986), *Herndon v. Neil*, 424 So.2d 1180 (La. Ct. App. 1982), and *Short v. Miller*, 304 S.E.2d 434 (Ga. Ct. App. 1983). Ogden Auto Body cites no non-police accident-related case to support its argument that Shannon is required to have personal "unique" set of skills to overcome the "coming and going" exception.

In *Lane*, an employee was driving his employer's van at the time of an accident. However, the employee first driven home after completing work, and then, hours later, drove to a bar. When he eventually drove home he was legally intoxicated. The accident occurred a total of seven hours after the employee had

left work. The court concluded that the employee "was not performing any act he was hired to perform and was not motivated in any way by a purpose to serve his employer at the time of the accident. Therefore as a matter of law, he was not acting within the scope of his employment at the time the accident occurred." *Id.* (*citations omitted*).

Similarly, in *Herndon v. Neil*, 424 So.2d 1180 (La. Ct. App. 1982), the Louisiana Court of Appeals found that the employee's "informal type of 'on-call' situation" placed him within the course and scope of employment. He closed the business at 9:00 a.m., left in a personal car, drove to a lounge to visit a girlfriend, and remained there until mid or late afternoon. "It would be ludicrous to say at the time of this accident Mr. Neil was in any way pursuing his duties as an employee...." *Id.*

Moreover, in *Short v. Miller*, 304 S.E.2d 434 (Ga. Ct. App. 1983), the employee, while on-call, went for a Saturday morning joy ride with a friend. The employee had not left any work location and was not required to identify where he could be reached. He was socializing, and was not pursuing any benefit for the employer. *Id.* at 434-435.

The outcomes in these cases do not support an across-the-board conclusion that that the "coming-and going" exception applies unless an employee is responding to a service call. Instead, these cases show that the facts and particular

circumstances of each case must be examined individually. *See Kinne v. Industrial Comm'n*, 609 P.2d 926, 927 (1980).

In factual contrast to Ogden Auto Body's above-cited cases, Shannon had recently completed the final call for the day and was on his way home.[2] He was performing an act that he was hired to perform and was primarily motivated by the purpose to serve his employer at the time of the accident, and his employer had control over him. Shannon was required to drive the truck home every day and to have the truck with him at all times. He complied with this mandatory requirement. Ogden Auto Body benefited from him having the truck in his possession, so he could respond to any and all calls during the evening and could leave directly from his house to respond to calls. The truck was not permitted to be used for any other purpose without explicit permission from Ogden Auto Body. Shannon complied with this rule and only used the truck for personal errands with permission from Ogden Auto Body's owner. Appellant's Brief pp. 5, 7.

Ogden Auto Body attempts to draw similarities between this case and *Lane, supra*. However, the facts in this case are materially different. Unlike in *Lane*, Shannon did not first go home and then drive elsewhere to spent hours socializing

[2] Ogden Auto Body fails to acknowledge that in contrast with *Lane*, *Herndon*, and *Short*, the time that passed between Shannon's last call and the accident, was primarily travel time, while in these cited cases, many hours had passed and the employees were returning home from social activities.

or to use the tow truck for any personal use before the accident occurred. Instead, Shannon was performing an act he was hired to accomplish for the benefit of Ogden Auto Body. In further contrast to *Lane*, Shannon's decision to pick-up dinner at a drive-thru prior to the accident was only a minor deviation from his on-call, in truck duties, which was both foreseeable and permitted by Ogden Auto Body (Appellant's Brief p. 9) and was an inevitable toll of a lawful enterprise and benefit it. *See e.g. Lazar v. Thermal Equip. Corp.*, 148 Cal. App. 3d 458, 466-467 (Cal. App. 2d Dist 1983) (employee who 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 v. Edwards*, 138 W. Va. 613, 637 (W. Va. 1953).

Under the facts of this case, a reasonable juror could find that Ogden Auto Body was aware, and expected, that Shannon would use the tow truck to travel to and from drive-thrus to pick-up food while on call, traveling to and from work. There is no evidence that Shannon had any other objective in mind than a brief stop at a drive-thru, or that this was anything but a minor deviation from his route home.

C. The trial court erred in applying the "coming and going" exception in this case as a matter of law because a jury could find that Ogden Auto Body received a substantial benefit from and had control over Shannon at the time of the accident.

Whether an injury arises out of or within the scope of employment depends on the particular circumstances of the case. *Kinne*, 609 P.2d at 927. In *Ahlstrom*, the Utah Supreme Court adopted a framework to determine whether the "coming and going" exception applies 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. The circumstances of Shannon's employment and conduct would permit a jury to apply exceptions to the "coming and going" exception based upon (1) the benefit received by Ogden Auto Body and (2) its control over Shannon's employment.

1. Ogden Auto Body received a substantial benefit from Shannon driving its tow truck home.

Ogden Auto Body contends that, as a matter of law, it did not receive a substantial benefit by having Shannon drive its tow truck home. Appellee's Brief pp. 12 – 14 (citing *Lane*, 731 P.2d at 489-490). However, in this case, the benefit Ogden Auto Body received was much more than Shannon's ability to drive home. It was a vital necessity that Shannon drive the tow truck home nightly. Ogden Auto Body required its drivers to take their tow trucks home and remain on-call and ready in order to respond to service calls at all hours.

A jury could find that Shannon was providing a substantial benefit to his employer by being in possession of the tow truck 24 hours a day and remaining on-call, as the employer itself required. The ability and urgency to quickly respond to Ogden Auto Body's clients 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 mandatory employment requirement to be able to timely respond to calls as soon as possible. In *Lane*, by contrast, the employee was performing no benefit at all for the employer at the time of the accident. *Lane*, 731 P.2d at 489-490.

In short, Ogden Auto Body received the exact benefit that it demanded – the substantial benefit of having Shannon on-call and in possession of its tow truck 24 hours a day to respond directly to any and all calls as needed. Shannon could not perform most of his work duties without the tow truck. It was a specialized truck which allowed him to service and tow vehicles. If Shannon did not have the tow truck, he could not have responded to calls during the time limitations required by Ogden Auto Body's clients.

A reasonable juror could conclude that Ogden Auto Body failed to meet its burden of proof, particularly where Shannon regularly does receive calls while on-call, regardless of the time of day, and would have responded if he had received a call the evening of the accident. Shannon's work history shows the significance of

his on-call status and the benefit Ogden Auto Body received by his retention of the tow truck after hours.[3] The fact that Shannon had not (yet) received a call after hours on the day of the accident is not determinative of whether the coming and going exception applies.

2. Ogden Auto Body retained control of Shannon while he drove its tow truck home.

Ogden Auto Body retained control of Shannon while he remained in the truck. 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, which it maintained and for which it paid all fuel. He had no control over when he'd receive a call and where Ogden Auto Body would send him. The tow truck was not interchangeable with other modes of transportation to fulfill his site-to-site service calls. 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. Shannon also had no control of the location from which he would commence driving home.

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[3] Between July 1, 2012 and December 1, 2012, Shannon completed 44 calls after 7:00 p.m. In the two months immediately preceding the accident, he cleared 26 calls from Ogden Auto Body after 6:00 p.m. Of those calls, Shannon cleared 16 calls after 7:00 pm and 7 calls after 8:00 p.m. Appellant's Brief pp. 6 – 7.

On the other hand, Ogden Auto Body's control of Shannon gave it continual access to its tow truck and the tools to fulfill its services, and thus the continual ability and means to conduct its business at all hours.[4] It used a GPS system to know the exact location of its trucks in relation to calls, regardless of the hour. Ogden Auto Body's control included its maintenance and paying for its fuel.

Ogden Auto Body cites no case law with similar facts to justify taking the issue of control from the jury. Reasonable minds could differ as to whether Ogden Auto Body retained control over Shannon while he remained in the tow truck, placing him within the course and scope of his employment at the time of the accident. A reasonable juror could conclude that Shannon was fulfilling a task for Ogden Auto Body, as directed at the time of the accident – by complying with its directive to take the tow truck home to support its business purposes.

Accordingly, reasonable minds could differ as to whether Shannon was "involved wholly or partly in the performance of his master's business or within the scope of employment." *Newman v. Whitewater Whirlpool*, 2008 UT 79, at ¶ 12 (*quoting Carter v. Bessey*, 93 P.2d 490, 493 (Utah 1939)).

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[4] Call records show that Shannon responded to all of Ogden Auto Body's calls day and night, went where he was told to go, and remained on-call at all times. Shannon always complied with Ogden Auto Body's directives.

II. THE DISTRICT COURT ERRED BY RULING AS A MATTER OF LAW THAT THE "DUAL PURPOSE EXCEPTION" TO THE "COMING AND GOING" EXCEPTION DOES NOT APPLY IN THIS CASE

A. Summary of primary and responsive arguments.

Hoskins has argued that even if the "coming and going" exception does apply, the predominant purpose of Shannon's conduct was for Ogden Auto Body's benefit and his conduct meets the "dual purpose exception." Ogden Auto Body argues that the "dual purpose exception" does not apply in this case because Shannon's predominant motivation and purpose at the moment of the accident was to return home and not to perform any immediate task for his employer.

B. A jury could find that the "dual purpose exception" applies in this case.

In *Whitehead v. Variable Annuity Life Insur. Co.*, 801 P.2d 934, 937 (Utah 1989), the Utah Supreme Court adopted an analysis of the "dual purpose exception," examining the predominant motivation and purpose of the activity of the employee, and found that a "useful test" utilized 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.* at 937 (*citations omitted*).

The dual purpose exception applies in the present case. In the substance of its argument, Ogden Auto Body focuses solely on what Shannon would do once he arrived home. This argument fails to acknowledge Shannon's motivation and purpose in driving the tow truck home, as he was doing at the time of the accident. The predominant purpose of Shannon's trip was for the benefit of Ogden Auto Body. His conduct was not personal. As long as he was in the tow truck, he was expected to respond to any and all calls. This was not a tangential benefit to Ogden Auto Body. As noted above, in order to retain its clientele, Ogden Auto Body required all of its drivers to take their tow trucks home and remain on-call at all hours.

If Shannon had refused to either take the tow truck home or to 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 exact same function. Contrary to Ogden Auto Body's contention, this was not a "tangential benefit." It was an essential benefit, which enabled Ogden Auto Body to meet its clientele's 20 to 30 minute response requirement at all hours of the day. It also allowed Shannon to leave his home and immediately be at work the moment he got into the truck.

Moreover, Ogden Auto Body's argument that the predominant purpose and function of Shannon's commute was to pick-up food at Kneader's is unsupported by the record. Reasonable minds could differ as to whether Shannon had any other

objective in mind than a brief stop at the drive-thru. Ogden Auto Body was aware, and expected, that Shannon would make minor deviations from his route to pick up meals and there is no evidence that his visit to a drive-thru was anything but a minor deviation from his route home. This minor deviation 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*, 148 Cal.App.3d at 466-467; *see also Wilson*, 138 W.Va. at 637.

III. IN THE ALTERNATIVE, THE COURT SHOULD ADOPT THE "INSTRUMENTALITY EXCEPTION" IN THIS CASE

A. Summary of primary and responsive arguments.

Hoskins has argued that "instrumentality exception" to the "coming and going" exception to vicarious liability should be applied in this case because a jury could find that Ogden Auto Body's control of Shannon outweighs the personal nature of his journey at the time of the accident. Ogden Auto Body argued that it derived no benefit from Shannon's drive home (other than having the tow truck available if needed) and had no control of how and when he arrived home.

B. The "instrumentality exception" should be presented to the jury in this case.

Application of the "instrumentality exception" in this case is in line with the Restatement (Second) of Agency § 229 cmt. d (1958), and the Utah Supreme Court's decision in *Bailey v. Utah State Indus. Comm'n.*, 398 P.2d 545 (Utah

1965).[5] Contrary to Ogden Auto Body's argument, *VanLeeuwen v. Industrial Comm'n. of Utah*, 901 P.2d 281 (Utah Ct. App. 1995) is disparate from the present case, the only similarity being that the employer furnished the employee with a company vehicle. In *VanLeeuwen*, however, the primary benefit to the employer was the employee's mere arrival at work, which not a substantial benefit to the employer. *Id.* at 282. *(Citation omitted)*. 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. In the present case, the tow truck was not merely a vehicle used for Shannon to drive to and from work. It was his office and provided the instruments to perform his work. The moment he is in the tow truck, he is at work, and Ogden Auto Body had substantial control over him.[6]

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[5] Ogden Auto Body quotes Restatement (Second) of Agency § 229 cmt. d, which states: "The mere fact that the employer supplies a vehicle does not establish that those who avail themselves of it are within the scope of employment while upon it, especially if the use is merely casual." But a jury could easily find that Shannon's purpose in driving the tow truck the evening of the accident was not "merely casual." Ogden Auto Body's reliance on Restatement (Second) of Agency § 235 ("an act of a servant is not within the scope of employment if it is done with no intention to perform it as a part of or incident to a service on account of which he is employed") is similarly not applicable in the present case.

[6] Ogden Auto Body argues that the instrumentality exception should not be applied in the present case because it was not applied in *Ahlstrom*. *See* Appellee's Brief p. 24. However, the "instrumentality exception" was not before the court in *Ahlstrom*. Accordingly, Ogden Auto Body's argument is irrelevant.

IV. A JURY COULD FIND THAT OGDEN AUTO BODY RATIFIED SHANNON'S CONDUCT.

A. Summary of primary and responsive arguments.

Hoskins argued that even if Shannon was not initially 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. Ogden Auto Body argued that there is no authority in Utah or elsewhere supporting the application of ratification to hold it vicariously liable for the negligent act of Shannon outside the course and scope of his employment. Ogden Auto Body also contends that its actions are insufficient as a matter of law to amount to ratification of Shannon's actions.

B. Utah case law recognizes the application of ratification to hold an employer Liable for the Negligent Acts of an Employee.

Ogden Auto Body contends that there is no authority in Utah or elsewhere supporting the application of the doctrine of ratification to hold it vicariously liable for the negligent act of Shannon outside the course and scope of his employment. This position is contrary to *Jones v. Mutual Creamery Co.*, 17 P.2d 256, 259 (1932), where the requirements for ratification were established in a negligence case. Ogden Auto Body does not dispute that Utah law recognizes the application of ratification in employment cases. *See Jones*, 17 P.2d at 259; *see also Bradshaw v. McBride*, 649 P.2d 74, 78 (Utah 1982); Restatement (3d.) of Agency § 7.04.

Ogden Auto Body also contends that Shannon was not "actively doing anything else for its benefit when he hit Mr. Hoskins." This argument ignores that at the time of the accident, Shannon was complying with mandatory job requirements to take the tow truck home, and Ogden Auto Body received the benefit by requiring the tow truck be taken home for business purposes.

Ogden Auto Body finally contends that ratification should not be applied in this case because the courts in the cases of *Lane, Whitehead, Ahlstrom, and Newman* did not apply it. Ratification was not argued as a theory for vicarious liability in any of those cases; however, accordingly, Ogden Auto Body's contention is incorrect.

C. There is a factual dispute whether Ogden Auto Body ratified Shannon's actions.

Regardless of whether Shannon was initially acting with 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. Ogden Auto Body contends that the doctrine of ratification does not apply because "[m]ere continuance of employment after the accident is insufficient to show the approval necessary to trigger liability, and legal representation in a court proceeding does not constitute ratification.

Hoskins does not dispute that continued employment "standing alone, cannot be sufficient to find ratification." *Hughes v. Rivera-Ortiz*, 187 N.C. App.

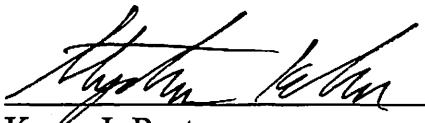
214, 653 S.E.2d 165 (2007), *aff'd in part*, 362 N.C. 501, 666 S.E.2d 751 (2008). However, Ogden Auto Body fails to address the additional facts justifying ratification in the present case, including the undisputed fact that Ogden Auto Body had actual knowledge of material facts surrounding the accident, and paid Shannon's citation. Moreover, Ogden Auto Body failed to reprimand or take any disciplinary action against Shannon.[7]

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 8th day of March, 2016.

CHRISTENSEN & JENSEN, P.C.



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[7] Ogden Auto Body's reliance upon *Maier v. Patterson*, 553 F. Supp. 150 (E.D. Pa. 1982) for the general position that an employer has no duty to discipline an employee is unsupported. In that case, the employer (a Union) could not initiate disciplinary action without a Plaintiff first activating the disciplinary action in filing a complaint. *Id.* at 155. Failure to discipline is at least one factor that a jury may consider on the issue of ratification.

CERTIFICATE OF SERVICE

I hereby certify that on the 8th day of March, 2016 two true and correct copies of the **REPLY BRIEF OF APPELLANT,** were mailed to the following:

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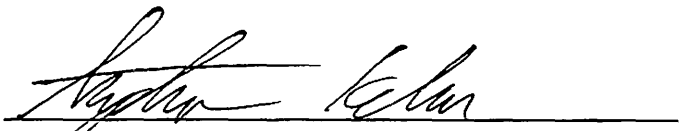
CERTIFICATE OF COMPLIANCE

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 4,237 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.



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