

2016

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,

v.

OGDEN AUTO BODY,

Defendant/Appellee.

Case No. 2015-0381-CA

Dist. Ct. No. 130904254

BRIEF OF APPELLEE OGDEN AUTO BODY

Appeal from the Second Judicial District Court, Weber County, Utah
Honorable Ernie W. Jones, Presiding

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FILED
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ISSUE PRESENTED FOR REVIEW

Whether the district court erred in granting summary judgment to Defendant Ogden Auto Body (“Ogden”) and holding that it is not vicariously liable for Co-Defendant Michael Shannon because he was not acting in the course and scope of his employment at the time of the auto accident.

Standard of Review: Correctness. In order to sustain a grant of summary judgment, there must be “no genuine issue as to any material fact and ... the moving party must be entitled to judgment as a matter of law.” Utah R. Civ. P. 56(c). Appellate courts “review a district court’s grant of summary judgment de novo, considering the record as a whole, with no deference afforded to the legal conclusions of the district court.” *Innerlight, Inc. v. Matrix Group, LLC*, 2009 UT 31, ¶ 8, 214 P.3d 854 (citations omitted). The determination about whether an employee is acting within the scope of employment is ordinarily a question of fact, and summary judgment is appropriate only “when the employee’s activity is so clearly within or outside the scope of employment that reasonable minds cannot differ.” *Newman v. White Water Whirlpool*, 2008 UT 79, ¶ 10, 197 P.3d 654 (Citations omitted). In determining whether reasonable minds might differ, “the standard to be applied is an objective one,” in other words, “whether reasonable jurors, having been properly instructed by the trial court, would be unable to come to any other conclusion regarding the employee’s conduct.” *Id.* ¶ 11. When the underlying facts are undisputed the appellate court reviews the district court’s determination about whether an employee was acting within the scope of employment for correction of error. *See Ahlstrom v. Salt Lake City Corp.*, 2003 UT 4, ¶ 5, 73 P.3d 315.

Preservation: This issue was fully briefed in the district court as part of Appellee's Motion for Summary Judgment, (R. 604, R. 853, R. 1061, R. 1321, R. 1373), and was argued in the hearing on December 24, 2014. (R. 1951, pp. 52-54).

STATEMENT OF THE CASE

This appeal concerns whether the district court correctly held that Ogden is not liable to Plaintiff Alan Hoskins for the auto accident of its employee, Michael Shannon, under the doctrine of *respondeat superior*. The district court found the following facts to be material and undisputed.

Mr. Shannon is a tow truck driver for Ogden. (R. 1951, p. 52). He drives a tow truck owned by Ogden. (*Id.*) He typically works from 7 a.m. to 6 or 7 p.m. (R. 607, R. 857, R. 1066, R. 1327-1328, R. 1377-1378). He takes the tow truck home with him each night, and he is required to respond to service calls after hours, if necessary. (R. 1951, p. 52). Each day, when Mr. Shannon finishes his last tow, he calls his boss, Tom Bauer, and confirms that he has finished work for the day and can go home. (R. 609, R. 859-60, R. 1068-70, R. 1331-33, R. 1380-81). Mr. Shannon occasionally responds to calls from Ogden to tow vehicles after 7 p.m.; however, "[n]ormally, there's like, eight guys or so that work on the wrecker trucks and the only time they call me after 7:00 or so is if they're swamped." (R. 607-08, R. 857-58, R. 1066-67, R. 1328, R. 1342, R. 1378-1379).

At 6:36 p.m. on October 23, 2012, Mr. Shannon towed a vehicle to a Big O Tire Shop in Brigham City, Utah. (R. 1951, p. 53, R. 608, R. 858-59, R. 1067-68, R. 1329-1331, R. 1379-80). After unloading the vehicle, Mr. Shannon called Mr. Bauer and confirmed that he had finished work for the day. (R. 1951, p. 53, R. 609-10, R. 860-61,

R. 1070-1071, R. 1333-35, R. 1381-83). Mr. Shannon then began driving to his home in Ogden, Utah. (R. 1951, pp. 52-53, R. 610, R. 861, R. 1072, R. 1335, R. 1383). Ogden had no control over the route Mr. Shannon chose or the manner in which he drove the tow truck on his way home. (See R. 609-11, R. 860-62, R. 1070-72, R. 1333-36, R. 1381-1385.) On his way home, Mr. Shannon stopped at a Kneaders restaurant and picked up dinner. (R. 1951, p. 53, R. 610, R. 861, R. 1072, R. 1335, R. 1383-84). After leaving Kneaders, he pulled onto Washington Boulevard and headed south. (R. 1951, pp. 52-53, R. 611, R. 861-62, R. 1072, R. 1335, R. 1384). Mr. Shannon turned left on 20th Street on a green light and hit Mr. Hoskins, who was walking across the street at approximately 7:17 p.m. (R. 1951, pp. 52-53, R. 611, R. 861-62, R. 1072, R. 1335-36, R. 1384-85). Mr. Shannon was not responding to a call from Ogden, travelling to the location of another vehicle that needed to be towed, or performing any other task for Ogden at the time of the accident. (R. 1951, p. 54, R. 1327-28, R. 1377-78).

SUMMARY OF ARGUMENT

The district court ruled that the driver, Mr. Shannon, was “not doing anything at the time of the accident that benefits the employer. He is on-call but he was not responding to a call and so to me that’s the critical thing here is to be within the scope of employment I think he has to be doing something that actually benefits the employer and as I mentioned before I think the answer is no in this case.” (R. 1951, p.54). Appellants Mr. Hoskins and Mr. Shannon argue that this ruling was error for four reasons.

They first argue that summary judgment should not have been awarded because a reasonable juror could conclude that the coming-and-going rule did not apply. Generally

under the coming-and-going rule, “an employee is not in the scope of his employment for purposes of third-party negligence claims when he is traveling to and from work.”

Ahlstrom v. Salt Lake City Corp., 2003 UT 4, ¶ 6 (citations omitted). The rule applies to on-call employees who drive company vehicles outside of work hours, but are not actively responding to a service call. *See Lane v. Messer*, 731 P.2d 488, 489 (Utah 1986). The relevant inquiry in on-call employee cases is what the driver was doing at the time of the accident. If he was not performing any act he was hired to perform and was not primarily motivated by a purpose serving his employer’s interests at the time of the accident, then he was not acting within the scope of his employment as a matter of law.

Id. The undisputed evidence shows Mr. Shannon was commuting home from work at the time of the accident. He completed his last tow 41 minutes before the accident, he had confirmed with his boss that he was done working for the day, he was on his way home and he had stopped at a restaurant to purchase dinner. Even though Mr. Shannon was on-call, he was not performing any task or completing any errand for Ogden at the time of the accident. Thus, no reasonable juror could conclude that the coming-and-going rule does not apply.

Mr. Hoskins and Mr. Shannon next argue that even if the coming-and-going rule does apply, the dual purpose exception precludes summary judgment. The dual purpose exception “has been applied in cases where the employer is benefited by the employee’s conduct, even though the employee may have some personal motivation for his actions.” *Whitehead v. Variable Annuity Life Insur. Co.*, 801 P.2d 934, 937 (Utah 1989) (citations omitted). It does not apply in this case because Mr. Shannon’s predominant motivation

and purpose at the time of the accident was to return home, not to perform any task for Ogden.

Mr. Hoskins and Mr. Shannon next argue that the instrumentality exception to the coming-and-going rule precludes summary judgment. This argument fails because the instrumentality exception has only been applied in worker's compensation cases. It has not been applied in third-party negligence cases such as this and there is no basis to import it here. Even if the instrumentality exception applied to negligence cases, it would not apply here based on the undisputed facts. The critical inquiries for the instrumentality exception are the control the employer exercises over the employee, and the benefit the employer receives from the employee's conduct. Ogden derived no benefit from Mr. Shannon's drive home other than the fact that Mr. Shannon had a tow truck available if needed, and it did not control how and when he arrived home.

Finally, Mr. Hoskins and Mr. Shannon argue that Ogden ratified that Mr. Shannon was operating the vehicle in the course and scope of his employment by continuing to employ him, paying his ticket, and providing him a legal defense. There is no authority in Utah or elsewhere supporting the application of ratification to hold Ogden vicariously liable for the alleged negligent act of one of its employees that occurred outside the course and scope of his employment. Even if Utah law allowed it, there would be no ratification as a matter of law based on Ogden's actions. Mr. Hoskins and Mr. Shannon cannot use ratification to circumvent the present jurisprudence of course and scope of employment.

For these reasons, Mr. Hoskins' and Mr. Shannon's arguments for reversal fail and Ogden respectfully submits that the district court's holding should be affirmed.

ARGUMENT

I. THE DISTRICT COURT CORRECTLY HELD THAT OGDEN IS ENTITLED TO SUMMARY JUDGMENT ON MR. HOSKINS' CLAIM FOR *RESPONDEAT SUPERIOR*.

A. The Material Facts Underlying the District Court's Determination that Mr. Shannon Was Not Acting in the Course and Scope of His Employment Are Undisputed.

The district court found that the material facts underlying its ruling were undisputed. Neither Mr. Hoskins nor Mr. Shannon argues that this was error, and they do not argue that any material facts were in dispute. Instead, they argue that the district court incorrectly applied the coming-and-going rule to the undisputed facts to find that Mr. Shannon was not acting in the course and scope of his employment at the time of the accident. Thus, the question for this Court is whether the district court correctly applied the coming-and-going rule to the undisputed facts, and correctly held that Ogden is not vicariously liable for the accident because Mr. Shannon was not operating the tow truck in the course and scope of his employment at the time of the accident.

B. The District Court Correctly Applied the Coming-And-Going Rule to this Case.

Generally under the coming-and-going rule, "an employee is not in the scope of his employment for purposes of third-party negligence claims when he is traveling to and from work." *Ahlstrom v. Salt Lake City Corp.*, 2003 UT 4, ¶ 6 (citing *Whitehead v. Variable Annuity Life Insur. Co.*, 801 P.2d 934, 936 (Utah 1989)). The rule "applies to

bar vicarious liability against an employer for commuting accidents caused by employees.” *Id.*, ¶ 18. In *Whitehead*, the Court explained that the critical question is whether the employee is fulfilling a work function and under the employer’s control at the time of the accident:

Anderson basically worked a nine-to-five schedule. He had a fixed office where the bulk of his work was performed. He frequently left the office for sales calls or meetings; however, at the time of the accident he was not on a sales call, an errand, or a special mission for his employer. VALIC had no control over Anderson’s decision to commute to and from work, the route he chose, or the manner in which he drove his automobile. The fact that Anderson frequently used his car for business purposes does not make VALIC liable for all accidents he may be involved in. Liability for an employee’s negligence is imposed only when the employee is acting for the benefit of the employer and under his control. Anderson’s commute on the evening in question did not possess these essential characteristics; therefore, we apply the general rule that an employee is not within the course and scope of his employment while going to and coming home from his place of employment.

801 P.2d at 937 (emphasis added).

The coming-and-going rule applies to this case because the undisputed evidence establishes that Mr. Shannon was not fulfilling a task for Ogden, but rather was driving home from work at the time of the accident. Mr. Shannon completed his last tow of the day at 6:36 p.m. in Brigham City. *See* R. 608, R. 858-59, R. 1067-68, R. 1329-1331, R. 1379-80. Mr. Shannon called his boss, Tom Bauer, as was his practice, to confirm that he was done working for the day. *See* R. 609-10, R. 860-61, R. 1070-1071, R. 1333-35, R. 1381-83. Mr. Shannon then began driving to his home in Ogden, stopping at a Kneaders restaurant to get dinner. *See* R. 1951, p. 53, R. 610, R. 861, R. 1072, R. 1335, R. 1383-84. After getting his dinner, he continued toward his home and hit Mr. Hoskins

while making a left turn. *See* R. 1951, pp. 52-53, R. 611, R. 861-62, R. 1072, R. 1335-36, R. 1384-85. The accident occurred 41 minutes after Mr. Shannon completed his last tow and confirmed with his boss that he was done working for the day. *See id.* Although Mr. Shannon was on-call if Ogden needed him to respond to an after-hours service call, he had not been called, and he was not travelling to another location to tow another vehicle or performing any task for Ogden when the accident occurred. *See* R. 1951, pp. 52, 54, R. 1327-28, R. 1377-78. Furthermore, Ogden had no control over the route he chose or the manner in which he drove the tow truck on his way home. (*See* R. 609-11, R. 860-62, R. 1070-72, R. 1333-36, R. 1381-1385.) Therefore, no reasonable juror could conclude that the coming-and-going rule does not apply here to bar vicarious liability against Ogden.

- i. *The coming-and-going rule applies to "on-call" employees who drive company vehicles outside of work hours, but are not actively responding to a service call.*

Mr. Hoskins and Mr. Shannon argue that the coming-and-going rule either does not apply to Mr. Shannon, or should be applied differently, because he drove a company vehicle home from work and he would have responded to an after-hours service call from Ogden, if necessary.

A survey of cases from Utah and other jurisdictions involving on-call employees who drive company vehicles outside of work hours, but are not actively responding to a service call, demonstrates that the coming-and-going rule is generally applied to those situations to prevent vicarious liability. The Utah Supreme Court reached this conclusion in *Lane v. Messer*, 731 P.2d 488 (Utah 1986). In *Lane*, the employee/driver was an on-

call alarm system installer who took a company van home to enable him to respond to service calls after regular working hours. *Id.* at 489. The employee finished his shift at 5:00 p.m. and went home. Later that night, he drove the company van to a bar to get drinks with some friends at 9:00 p.m., and was involved in an accident while driving home from the bar shortly after midnight. *See id.* Although the driver was on-call at the time of the accident, he was not responding to a call, and had not made any service calls that night. *See id.* The Court ruled:

Under these facts, there is only one reasonable conclusion that can be drawn. [The driver] 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. (Citations omitted). Therefore, as a matter of law, he was not acting within the scope of his employment at the time of the accident.

Id.

In *Ahlstrom v. Salt Lake City Corp.*, the Utah Supreme Court applied the coming-and-going rule to an off-duty police officer driving a city vehicle, who was on-call if needed for emergencies. *See* 2003 UT 4, ¶¶ 2, 8, 73 P.3d 315. The Court noted that other jurisdictions generally apply the coming-and-going rule to these officers to prevent vicarious liability, and that they follow the same general framework as Utah, which weighs the benefit and control exercised by the employer against the personal nature of the trip in order to determine where it is appropriate to place liability. *See id.*, ¶¶ 8-9. The Court concluded that for cases involving off-duty police officers, “liability should not attach unless there are unique circumstances,” that would “tip the balance from a personal trip to one that primarily benefits the department.” *Id.*, ¶ 13.

The principle that can be discerned from *Lane* and *Ahlstrom* is that even though an employer derives some benefit from having on-call employees, merely being on-call while driving a company vehicle is not enough to find that an employee was acting in the course and scope of employment. *See Ahlstrom*, 2003 UT 4, ¶ 9 (“This does not mean that if the employer derives *any* benefit or exercises *any* control over the conduct it will be liable”). Instead, the court must look at what the on-call employee is doing at the time of the accident. If the employee “was not performing any act that 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,” then the employee is not acting within the course and scope of employment as a matter of law. *See Lane*, 731 P.2d at 490. In other words, 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.

Other jurisdictions follow a similar approach when dealing with on-call employees. For example, the Louisiana Court of Appeals has ruled that merely being on-call could not invoke vicarious liability in *Herndon v. Neal*, 424 So.2d 1180 (La. Ct. App. 1982). In *Herndon*, the employee/driver was a welder who “readily accepted any call, regardless of the time of day or the day of the week.” *Id.*, at 1182. The driver finished work for the day and stopped at a local lounge to visit a girlfriend on his way home from work. He was involved in an accident immediately after leaving the lounge. *See id.* The Court concluded that the driver was clearly “engaged in a personal mission when the collision occurred.” *Id.* The Court rejected the plaintiff’s argument that the employer was liable because the driver was on-call 24 hours a day, holding, “[w]e conclude this

informal type of “on-call” situation does not mean the employee is within the course and scope of the employment every second of every day.... It would be ludicrous to say at the time of this accident [the driver] was in any way pursuing his duties as an employee of Cajun Welding.” *Id.*

The Georgia Court of Appeals reached the same conclusion in *Short v. Miller*, 304 S.E.2d 434 (Ga. Ct. App. 1983). In *Short*:

Appellant relie[d] heavily upon the fact that at the time of the accident, Miller was subject to 24-hour call by Nixdorf, where he worked as a computer technician. While Miller’s regular hours were 8:30 a.m. to 5:00 p.m., Monday through Friday, he was on standby for emergency service calls through the entire 7-day week during which the accident occurred. Miller’s pay for this week included an additional four hours at the overtime rate, which was the standard compensation for the inconvenience of being on standby. Standby employees were not required to check in or to leave word as to where they could be reached, but they were provided with beepers. Evidence was undisputed that Miller took no calls and performed no service for his employer on the weekend of the accident.

Id., at 434-435. The trial court granted summary judgment, and the appellate court affirmed, holding, “Appellant has produced no evidence that Miller had received or was responding to any call of duty immediately prior to or at the time of the collision, or that he was in the performance of any duty as such employee at the time and place of the collision ... the trial court did not err in granting summary judgment.” *Id.*, at 435.

The facts in this case are nearly identical to those in *Lane*. Mr. Shannon was driving a company vehicle. He went on a personal errand (to get dinner at Kneaders) and was on his way home at the time of the accident. Although he was an on-call employee, he was not on a service call at the time of the accident. He had been off work since he finished his last tow in Brigham City, 41 minutes earlier. He had not received any

additional service calls since finishing his work for the day. Like the driver in *Lane*, Mr. Shannon was not performing any service for Ogden, and was not motivated in any way to serve Ogden at the time of the accident. The district court correctly applied the coming-and-going rule to these facts to find as a matter of law that Mr. Shannon was not acting within the scope of his employment.

ii. *The district court did not err in taking this decision from the jury.*

Mr. Hoskins and Mr. Shannon argue that “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.” (Hoskins Brief, 11). They contend that a reasonable juror could find that Mr. Shannon was acting within the course and scope of his employment because 1) Ogden received a substantial benefit from having Shannon on-call and in possession of its truck; 2) Shannon would have responded to a call on the night of the accident if he had been called; and 3) Ogden exercised control over Shannon’s use of the truck. Each of these arguments fail.

Mr. Hoskins’ primary argument is that Ogden should be liable because it received “the substantial benefit of having Shannon on-call and in possession of its tow truck 24 hours a day.” (Hoskins Brief, 25). However, the Utah Supreme Court has ruled that this is not sufficient to impose liability on the employer for a commuting accident. In *Lane*, the employee “was driving a van provided to him by Honeywell ... [and] Honeywell for its own benefit required its employees to take their service vans home with them.” *Lane v. Messer*, 731 P.2d at 489-490. Yet, the Court ruled that the driver “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.*, at 490.

The Court reached a similar conclusion in *Ahlstrom*, ruling:

Although the City received some benefit from Ross’s trip home from work on the day of her accident, the facts before the trial court were not sufficient to make that benefit the predominant purpose of Ross’s trip ... [I]t did not appear vitally necessary to the City that she be accessible while on personal errands. There is no indication that the City would have sent anyone else on the trip had Ross not gone. Thus, it is apparent, based on the proof to date, that the benefits the City received from Ross’s commute were only tangential to Ross’s purpose of commuting home from work that day. Such tangential benefits are not enough to result in *respondeat superior* liability for the City

Ahlstrom, 2003 UT 4, ¶ 15. The facts here are nearly identical to those in *Ahlstrom*.

While Ogden benefitted from Mr. Shannon driving its truck, this benefit was tangential to Mr. Shannon’s predominant purpose of commuting home at the time of the accident.

The *Ahlstrom* Court explained that unique circumstances would be necessary to impose vicarious liability on an employer for an accident while commuting home. Citing *Hanson v. Benelli*, 719 So.2d 627 (La.App. 1998), the *Ahlstrom* Court stated,

In *Hanson*, the court held that the city was not vicariously liable because, although the officer was on-call twenty four hours a day and the city received a benefit from his use of the city car, the officer had no special skills and was thus very different from the officer in *Johnson*.

Ahlstrom, 2003 UT 4, ¶10 (citations omitted). The unique circumstances that brought the employee in *Johnson* within the course and scope of employment were that the officer “was the only NOPD employee trained to correct malfunctions in the Department’s specialized filing machines, which had to be operational at all times. He was also the

only officer who had after hours access to a room containing major felony reports.”

Hanson v. Benelli, 719 So.2d at 634 (emphasis in original).

There is no evidence of such circumstances here. There is no evidence that Mr. Shannon possessed a unique set of skills that Ogden regularly relied upon after hours. To the contrary, Mr. Shannon testified that he typically finishes work between 6-7 p.m. (R. 607, R. 857, R. 1066, R. 1327-1328, R. 1377-1378) and that he usually doesn’t have to tow vehicles after that because “there’s, like, eight guys or so that work on the wrecker trucks and the only time they call me after 7:00 or so is if they’re swamped; otherwise, you know, Tom leaves me alone.” (R. 607-08, R. 857-58, R. 1066-67, R. 1328, R. 1342, R. 1378-1379). Mr. Shannon possesses no unique skills or job requirements that would turn his commute home into a task that primarily benefitted Ogden. Thus, merely driving an Ogden vehicle is not a basis for reversing summary judgment.

Mr. Hoskins and Mr. Shannon next argue that a reasonable juror could conclude Mr. Hoskins was operating the tow truck within the course and scope of his employment at the time of the accident because “[h]ad 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 [he] was already at home.” (Hoskins Brief, 33). Such speculation is irrelevant because it did not occur. At the time of the accident, Mr. Shannon had not received such a call. Accepting this argument would effectively nullify the coming-and-going rule because Mr. Shannon and other similarly situated drivers can always be called upon to perform a task. The decisions of the Utah Supreme Court make clear that

vicarious liability hinges on the driver's primary purpose at the time of the accident, not whether the driver could have been called for another purpose later on.

Finally, Mr. Hoskins and Mr. Shannon argue that Ogden should be liable because Mr. Shannon was under Ogden's control at the time of the accident, as demonstrated by Ogden's use of the Ranger GPS system which "allowed Ogden to identify the exact location of their trucks, at any time of day, and to use that system to assign calls...." (Shannon Brief, 15.) This argument fails because the GPS system is irrelevant. Mr. Shannon admits he did not use the GPS system, and that instead Ogden "directly called his personal cell phone to assign calls to him." (Shannon Brief, 15). Further, there is no evidence that Ogden was exercising any control over Mr. Shannon *at the time of the accident*. To the contrary, the undisputed evidence is that Shannon was commuting home at the time, after having just purchased dinner. He was not on an errand for Ogden, or performing any service for them. The fact that there was a GPS system in the truck does not establish a level of control sufficient to reverse summary judgment.

The Utah Supreme Court recently explained when summary judgment in the context of the coming-and-going rule would be inappropriate in *Newman v. White Water Whirlpool*, 2008 UT 79. This decision demonstrates when a reasonable juror could conclude that the driver was operating within the course and scope of his or her employment. In *Newman*, the driver, "was on his way to White Water's offices in a truck and trailer he personally owned, [and] collided with Newman." *Id.* The district court granted summary judgment for the employer, but the Supreme Court ruled that this was inappropriate because:

Sundquist's regular job responsibilities included hauling materials to various job sites, installing the materials, and then returning the remainder of the materials to White Water's warehouse. Reasonable minds, therefore, could differ as to whether Sundquist was actually returning materials to White Water—an act that would bring him within the course of his employment—or whether he was simply commuting to work, or perhaps both. Accordingly, an issue of material fact remained, and it should have been submitted to a jury for determination of whether Sundquist was “involved wholly or partly in the performance of his master's business or within the scope of his employment.”

Id., at ¶ 13.

Unlike *Newman*, reasonable minds cannot differ as to whether Mr. Shannon was fulfilling a task for Ogden at the time of the accident. It is undisputed that Mr. Shannon was commuting home at the time of the accident. It is also undisputed that Mr. Shannon had called his boss and confirmed that he was done working for the day. Unlike the driver in *Newman*, he was not returning materials to the Ogden shop, or going to tow another car. Thus, there is no evidence from which a reasonable juror could conclude that Mr. Shannon was fulfilling a task for Ogden at the time of the accident. Based on this, the district court correctly held that Ogden was entitled to summary judgment.

C. The District Court Correctly Held That The Dual Purpose Exception To The Coming-And-Going Rule Does Not Apply.

Mr. Hoskins and Mr. Shannon argue that the dual purpose exception to the coming-and-going rule precludes summary judgment and warrants reversal. “The so-called ‘dual purpose exception’ has been applied in cases where the employer is benefited by the employee's conduct, even though the employee may have some personal motivation for his actions.” *Whitehead v. Variable Annuity Life Insur. Co.*, 801 P.2d 934, 937 (Utah 1989). “If 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.* (citations omitted). “One useful test 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 *Whitehead*, the plaintiffs argued that because the driver “testified he intended to make some phone calls after supper, his trip home had a “dual purpose,” since his employer would have benefited from the phone calls.” *Id.* However, the Utah Supreme Court rejected this argument and ruled that the “dual purpose” exception did not apply, stating, “The fact that Anderson stated that he had planned to make some phone calls later that evening did not turn his daily commute into a trip primarily motivated by a business purpose.” *Id.*

It is even clearer in this case than in *Whitehead* that the dual purpose exception does not apply because there is no evidence that Mr. Shannon intended to do anything related to his employment once he arrived home. Both Mr. Shannon and Mr. Bauer testified that Mr. Shannon’s shift ends after he completes his last tow around 6-7 p.m. and he is rarely called out on other tow jobs. He was not called out on any other tow jobs after he finished his last job in Brigham City, 41 minutes prior to the accident. It is undisputed that Mr. Shannon’s predominant purpose at the time of the accident was personal—getting dinner and driving home.

The Utah Supreme Court also considered the dual purpose exception in *Ahlstrom*.

However, the Court found that,

Although the City received some benefit from [the officer's] trip home from work on the day of her accident, the facts before the trial court were not sufficient to make that benefit the predominant purpose of [her] trip. Unlike the *Johnson* case, it did not appear vitally necessary to the City that she be accessible while on personal errands. There is no indication the City would have sent anyone else on the trip had [she] not gone. Thus, it is apparent, based on the proof to date, that the benefits the City received from [the officer's] commute were only tangential to [her] purpose of commuting home from work that day. *Such tangential benefits are not enough to result in respondeat superior liability for the City under the dual purpose exception to the coming and going rule.*

Ahlstrom v. Salt Lake City Corp., 2003 UT 4, ¶ 15, 73 P.3d 315, 319 (emphasis added).

As in *Ahlstrom*, the tangential benefit that Ogden received from having Mr. Shannon on-call is not enough to apply the dual purpose exception.

Mr. Hoskins argues that “[i]n 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.” (Hoskins Brief, 23). As in *Ahlstrom*, there is no indication here that Ogden would have sent anyone else to Kneaders, and then to Mr. Shannon’s home if Mr. Shannon had not done so himself. *See* 2003 UT 4, ¶ 15. The only way that Ogden would have been required to send another driver in Mr. Shannon’s place is if he had been called out after hours to tow another vehicle. It is undisputed that this did not occur. Therefore, this argument fails.

Mr. Shannon argues that the dual purpose exception applies because the accident occurred at a time when he was “normally working.” (Shannon Brief, 10). This appears to be a reference to 44 calls that Mr. Shannon completed after 7 p.m. in the six months

before the accident (which is less than a quarter of the days in that time period). This argument fails because “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.” *Newman v. White Water Whirlpool*, 2008 UT 79, ¶ 8 (citations omitted) (emphasis added). Whether Mr. Shannon completed calls later than 7 p.m. *on days other than the subject accident* is irrelevant. Mr. Shannon concedes that “there were no calls that night.” (Shannon Brief, 16) Thus, he was not acting on behalf of Ogden after he finished his tow to Brigham City.

Mr. Shannon argues that the employer benefit required to invoke the dual purpose exception “does not have to be significant.” (Shannon Brief, 13, citing *Valeo v. E. Coast Furniture Co.*, 95 So. 3d 921, 925 (Fla. Dist. Ct. App. 2012)). This argument is contrary to Utah law as expressed in *Ahlstrom*, 2003 UT 4, ¶ 15, and is not supported by the Florida case that Mr. Shannon cites to. In *Valeo*, the court found there was a triable issue of fact over whether an employee was acting in the course and scope of his employment when he committed a battery, because there was evidence that the employee believed he was being robbed and may have been acting to protect his employer’s money. *See* 95 So. 3d 921 at 925. *Valeo* did not involve the coming and going rule, or the dual purpose exception, and, therefore, is irrelevant. *See id.*

For these reasons, the Court should affirm the district court’s determination that the dual-purpose exception to the coming-and-going rule does not apply as a matter of law.

D. The District Court Correctly Held that the Instrumentality Exception to the Coming-And-Going Rule Does Not Apply.

Mr. Hoskins and Mr. Shannon also argue that the instrumentality exception to the coming-and-going rule warrants reversal of summary judgment. The instrumentality exception is applied in worker's compensation cases, and holds that "even in going and coming a vehicle may be in the course of employment if it is an instrumentality of the employer's business in light of the employer's benefit and control over it." *Jex v. Utah Labor Comm'n*, 2013 UT 40, ¶ 19, 306 P.3d 799. Thus, "an employee is in 'the course and scope of her employment' if she is injured while subject to her employer's control and while benefiting the employer." *Id.*, ¶ 26 (citations omitted). "[B]oth factors—control and benefit—are relevant to the instrumentality inquiry." *Id.*, ¶ 37. It does not apply here for several reasons.

The instrumentality exception has never been applied in third-party tort cases such as this one. It has only been applied to worker's compensation cases. *See Bailey v. Utah State Industrial Comm'n*, 398 P.2d 545 (Utah 1965), *Jex v. Utah Labor Comm'n*, 2013 UT 40, 306 P.3d 799. The Utah Supreme Court has cautioned against importing new exceptions from the worker's compensation arena to third-party negligence cases:

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 ... 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. We have said that the Worker's Compensation Act "should be liberally construed and applied to provide coverage. Any doubt respecting the right of compensation will be resolved in favor of the injured employee." (Citations omitted). Negligence cases require proof by the preponderance of the evidence that the employee was acting within the scope of employment. 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.

Ahlstrom v. Salt Lake City Corp., 2003 UT 4, ¶ 7, FN1, 73 P.3d 315, 317. This is why the Court stated that "cases addressing worker's compensation rules, even when the issue is the same, are of little use" in analyzing third-party negligence claims. *Id.*, ¶ 7. Absent express authority allowing it to do so, this Court should not apply the instrumentality exception here.

In addition, it would not make sense to apply the instrumentality exception because it considers the same factors as the dual purpose exception, which has been expressly applied to third-party negligence cases. *See Ahlstrom v. Salt Lake City Corp.*, 2003 UT 4, ¶¶ 14-15. Both exceptions require the court to weigh the benefits to the company with the control it had over the vehicle at the time of the accident. Applying the instrumentality exception would be redundant of the dual purpose exception.

Even if this Court considers the instrumentality exception, the worker's compensation cases from this Court and the Utah Supreme Court demonstrate that it would not apply here. In 1965, the Utah Supreme Court first applied the instrumentality exception in *Bailey v. Utah State Indus. Comm'n*, 398 P.2d 545 (Utah 1965). It ruled that an employee's widow was entitled to worker's compensation benefits for her husband's death while driving to the service station where he worked because the vehicle was an instrumentality of his work. The Court cited some facts that are similar to those here to support its decision, such as the "use for emergency calls at all hours," "carried the

station wagon upon his books as a business asset,” and “[t]he oil and gas which it used was charged as a business expense.” *Id.*, at 201. However, even under the more liberal workers’ compensation framework, the Court stated “admittedly the question is a close one.” *Id.* In a third-party tort action, such as this one, the question is not close.

Mr. Hoskins attempts to bolster the applicability of *Bailey* by asserting that its holding “is in line with comment d of the Restatement (Second) of Agency § 229.” (Hoskins Brief, 30) However, he omits the following statement from his citation of comment d, “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.” *Id.* Commuting home and purchasing dinner at a restaurant are just the type of casual behavior that fall outside the scope of employment. This is confirmed by Restatement (Second) of Agency § 235, which states, “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.”

This Court affirmed denial of worker’s compensation benefits under the instrumentality exception in a case with facts nearly identical to those here in *VanLeeuwen v. Industrial Comm’n of Utah*, 901 P.2d 281 (Utah Ct. App. 1995). In *VanLeeuwen*, the employee was driving a company truck to work at the time of the accident. An Administrative Law Judge and the Industrial Commission ruled that the driver was not operating the company truck within the course and scope of his employment at the time of the accident. The driver appealed, arguing that driving a company truck to work brought him within the course and scope of employment. This

Court disagreed, ruling, “A review of the record indicates that the primary benefit to Custom in providing VanLeeuwen with a company-owned truck was his arrival at work. However, mere arrival at work is not considered a substantial benefit to the employer.”

Id., at 285. This Court also noted:

VanLeeuwen was not performing any service arising out of and in the course and scope of his employment on the morning of the accident. Custom did not require VanLeeuwen to perform any job-related service or use the vehicle as a business instrumentality while traveling to or from work. VanLeeuwen was not on an employment related “special errand” or “special mission” at the time of the accident. VanLeeuwen was not being compensated for his time spent traveling between his home and Custom’s office. The accident did not occur on Custom’s premises, nor did VanLeeuwen’s duties require him to be at the place where the accident occurred. The risk that caused the accident was one common to the traveling public and was not created by duties connected to his employment.

Id. These same factors are present here and compel the same result, particularly under the heightened standard applied in third-party tort cases.

Importantly, this Court noted that the employer did not control the driver at the time of the accident:

[A]t the time of the accident, VanLeeuwen was merely traveling to work. He had not yet arrived at work to receive his daily assignments after which he would be under the control of Custom. VanLeeuwen chose his route each day and occasionally engaged in personal errands while traveling to and from work. Custom’s control over VanLeeuwen was no greater than its control over any other employee traveling to and from work.

Id. Similarly, Ogden did not control Mr. Shannon’s route home and Mr. Shannon had, in fact, embarked on the personal errand of purchasing dinner before the accident. Thus, the mere fact that Mr. Shannon was commuting in an Ogden truck would not be sufficient to

prevail under the more forgiving worker's compensation framework, let alone in this third-party negligence case.

Mr. Shannon argues that this Court should adopt the instrumentality exception for employer-owned cars in negligence cases because his "use of an employer-provided vehicle was of such vital importance in furthering the employer's business that the employer's control over Shannon could reasonably be inferred." (Shannon Brief, 17). However, the police car in *Ahlstrom* was much more imperative to the employer's work than Mr. Shannon's tow truck, and the Utah Supreme Court did not apply the instrumentality exception there. Moreover, Mr. Shannon himself testified that his vehicle was not vitally important at night because there were "eight guys or so that work on the wrecker trucks and the only time they call me after 7:00 or so is if they're swamped." (R. 607-08, R. 857-58, R. 1066-67, R. 1328, R. 1342, R. 1378-1379). Because Mr. Hoskins' truck was interchangeable with eight others that were available at night, the instrumentality exception does not apply to his commute home.

The Utah Supreme Court's recent ruling in *Jex v. Utah Labor Comm'n*, 2013 UT 40, 306 P.3d 799, further illustrates that the instrumentality exception does not apply here. In *Jex*, the Utah Supreme Court reigned in the instrumentality exception, noting that "[m]ere incidental benefit is not sufficient, standing alone, to sustain invocation of the instrumentality exception" in worker's compensation cases. *Id.*, at ¶ 33. It then held that the question of whether the instrumentality exception applies "must be answered by considering and balancing both the benefit to the employer and the nature and extent of the employer's control." *Id.*, at ¶ 38 As set forth above, Ogden exercised no control over

Mr. Shannon's commute and the Utah Supreme Court reaffirmed in *Jex* that traveling to and from work does not provide a substantial benefit to the employer. *See id.*, at ¶ 49 (citations omitted). Therefore, the instrumentality exception would not apply here even if it could be imported from the worker's compensation arena.

E. The District Court Correctly Held that the Doctrine of Ratification Does Not Apply.

Mr. Hoskins and Mr. Shannon argue that Ogden is liable under *respondeat superior* based on its post-accident ratification of Mr. Shannon's actions.

Ratification is an agency doctrine that may be a basis for imputing liability of an actual wrongdoer to another. *See* 57B Am. Jur. 2d Negligence § 1120. It is normally applied in Utah to contract actions. *See Bradshaw v. McBride*, 649 P.2d 74, 78 (Utah 1982). In *Bradshaw*, the Court described the requirements for ratification as follows:

A principal may impliedly or expressly ratify an agreement made by an unauthorized agent. Ratification of an agent's acts relates back to the time the unauthorized act occurred and is sufficient to create the relationship of principal and agent. *Zeese v. Estate of Siegel*, Utah, 534 P.2d 85 (1975); *Moses v. Archie McFarland & Son*, 119 Utah 602, 230 P.2d 571 (1951). A deliberate and valid ratification with full knowledge of all the material facts is binding and cannot afterward be revoked or recalled. *Stark v. Starr*, 94 U.S. 477, 24 L.Ed. 276 (1876). However, a ratification requires the principal to have knowledge of all material facts and an intent to ratify. *Jones v. Mutual Creamery Co.*, 81 Utah 223, 17 P.2d 256 (1932). Under some circumstances failure to disaffirm may constitute ratification of the agent's acts.

Id.

Mr. Hoskins and Mr. Shannon seek to stretch ratification beyond its reasonable limits and apply it to hold Ogden vicariously liable for an alleged negligent act that Mr. Shannon was involved in during his commute home, which was outside of the course and

scope of his employment as a matter of law. Neither Mr. Hoskins nor Mr. Shannon cite a single case applying ratification in the way they argue it should be applied. In fact, an 1891 case from Massachusetts is the only case in all of American jurisprudence that has applied it in that way, and it is easily distinguished. *See Dempsey v. Chambers*, 154 Mass. 330, 333, 28 N.E. 279, 280 (1891); 85 A.L.R. 915, *Doctrine of ratification invoked to charge one person with responsibility for the negligence of another not authorized to act for him* (originally published in 1933) (“[t]here is little direct authority on the questions under consideration, however, and in only one of the cases disclosed have the facts been held to establish a ratification.”)

In *Dempsey*, a man broke a glass window while delivering coal that had been ordered by the defendant. 28 N.E. at 279. The Court found that although the man was not the defendant’s servant, the defendant was liable for the cost of the window because he had ratified the man’s conduct by accepting delivery of the coal. *See id.* Even then, the Court was extremely reluctant to apply the doctrine of ratification. It noted that “[i]f we were contriving a new code today we might hesitate to say that a man could make himself a party to a bare tort in any case merely by assenting to it after it had been committed.” *Id.* The Court also noted that the “ratification was not directed specifically to [the man’s] trespass, and that act was not for the defendant’s benefit, if taken by itself....” *Id.*, at 2801. *Dempsey* is distinguishable from the case at hand because, unlike the man who was delivering coal at the time of the incident, Mr. Shannon had already finished work and was commuting home. He was not making a delivery to Ogden, or

actively doing anything else for its benefit when he hit Mr. Hoskins. There was no act that Mr. Shannon purportedly did on Ogden's behalf in this case for Ogden to ratify.

Mr. Hoskins relies primarily on *Jones v. Mutual Creamery Co.*, 81 Utah 223 (Utah 1932), to argue that ratification applies. (Applt's Brief, 35). *Jones* involved a similar fact pattern to the *Dempsey* case—where a companion of an employee hit and killed a boy while driving to pick up some eggs. The boy's parents sued the employer and argued that the subsequent purchase of the eggs ratified that the driver was an agent of the company and driving in the course and scope of employment. However, the Court in *Jones* disagreed, ruling that ratification did not apply. *See Id.*, at 260. Thus, the authority Mr. Hoskins cites does not support his argument. Moreover, ratification makes less sense here because Mr. Shannon was not on a company errand at the time of the accident, like the driver in *Jones*.

The other cases that Mr. Hoskins cites are inapposite because they address ratification in the context of a punitive damage award against employers for the intentional torts of their employees—a context entirely different from that in this case, where Mr. Hoskins seeks to apply ratification to the allegedly negligent acts of an employee that occur outside of work hours. *See Smith v. Printup*, 254 Kan. 315, 342, 866 P.2d 985, 1003 (1993) (dealing with ratification in the context of a punitive damage award against an employer under Kansas's punitive damages statute); *Diversified Holdings, L.C. v. Turner*, 2002 UT 129, ¶ 36, 63 P.3d 686, 701 (dealing with ratification in the context of a punitive damage award against an employer for the intentional tort of its employee). Mr. Shannon's citation of *Dillon v. S. Mgmt. Corp.*, 2014 UT 14, 326 P.3d

656, suffers from the same flaw. *Dillon* involved punitive damages arising from a beneficiary ratifying an agent's authority to payoff and reconvey a trust deed. *See* 2014 UT 14, ¶ 23. This is entirely different than applying ratification to Mr. Shannon's actions on his commute home.

Even if Utah law supported applying ratification to this case, Ogden's actions cannot be sufficient to find ratification. It is widely held that "[m]ere continuance of employment after the accident is insufficient to show the approval necessary to trigger liability." 57B Am. Jur. 2d Negligence § 1120; *see also Hughes v. Rivera-Ortiz*, 187 N.C. App. 214, 222-23, 653 S.E.2d 165, 171 (2007), *aff'd in part*, 362 N.C. 501, 666 S.E.2d 751 (2008); *Crowley v. Knutson Const. Co.*, 829 N.W.2d 193 (Iowa Ct. App. 2013) ("merely continuing to employ an individual is not sufficient to indicate ratification"). If the Court were to hold otherwise, employers would be forced to choose between terminating every employee against whom a complaint is filed when the alleged negligent act occurred even arguably within the course of the employee's work, or risk ratifying the employee's conduct. Thus, the fact that Ogden did not fire Mr. Shannon after the accident is not evidence of ratification.

Courts have also held that "legal representation in a court proceeding does not constitute ratification." 57B Am. Jur. 2d Negligence § 1120; *Maier v. Patterson*, 553 F. Supp. 150, 155 (E.D. Pa. 1982) (finding that Union's failure to discipline its member for an alleged intentional tort, and providing a legal defense to the member could not be used as evidence of ratification); *Potter Title & Trust Co. v. Knox*, 381 Pa. 202, 209, 113 A.2d 549, 552 (1955) (providing a legal defense and re-hiring the employee after he was

released from prison could not be used as evidence of ratification). Thus, the fact that Ogden paid Mr. Shannon's ticket and provided a legal defense for him is not evidence of ratification either.

Finally, ratification does not apply here because whether Mr. Shannon was driving in the course and scope of his employment is a legal determination made by the court or jury. *See Newman v. White Water Whirlpool*, 2008 UT 79, ¶ 10. Tellingly, the Utah Supreme Court did not even consider the doctrine of ratification in *Lane* (1986), *Whitehead* (1989), *Ahlstrom* (2003), or *Newman* (2008). Mr. Hoskins cannot use ratification to circumvent the present jurisprudence of course and scope of employment. For these reasons, the doctrine of ratification should not prevent affirming summary judgment.

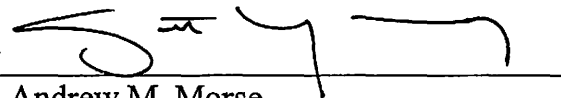
CONCLUSION

Based on the foregoing, Ogden Auto Body respectfully requests that this Court affirm summary judgment.

DATED this 4th day of February, 2016.

SNOW, CHRISTENSEN & MARTINEAU

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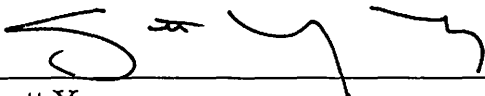
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I hereby certify that two true and correct copies of the foregoing **BRIEF OF APPELLEE OGDEN AUTO BODY** were served by U.S. Mail on February 4, 2016 as follows:

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