

1992

# Jeff Christensen and Kyle James Fausett v. Gloria Swenson and Burns International Security Services : Brief of Appellee

Utah Court of Appeals

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BRIEF

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DOCKET NO.

920172-CA

IN THE UTAH COURT OF APPEALS

JEFF CHRISTENSEN and  
KYLE JAMES FAUSETT,

Plaintiffs/Appellants,

v.

GLORIA SWENSON and  
BURNS INTERNATIONAL  
SECURITY SERVICES,

Defendants/Appellees.

BRIEF OF APPELLEE

Appellate No. 920172-CA

Priority No. 16

Appeal from the Fourth Judicial District Court, Utah County  
Honorable Cullen Y. Christensen, Civil No. CV 89-278

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Clerk of the Court  
Utah Court of Appeals

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## JURISDICTION

The Utah Court of Appeals has jurisdiction over this appeal pursuant to Utah Code Ann. § 78-2a-3(2)(j) (1992).

## STATEMENT OF ISSUE AND STANDARD OF REVIEW

ISSUE: Was the trial court correct in ruling that defendant Burns International Security Services ("Burns") was entitled to summary judgment as a matter of law and that there were no issues of material fact which would preclude summary judgment?

STANDARD OF REVIEW: The Court of Appeals in its review of a trial court's grant of summary judgment as a matter of law gives no deference to the trial court's view of the law, but reviews it for correctness. West v. Thomson Newspapers, 188 Utah Adv. Rep. 31, 32 (Ct. App. May 28, 1992).

A mere dispute to some question of fact does not preclude the granting of summary judgment. The disputed factual issue must be one which is material in the sense that resolving it is necessary to determine the parties' legal rights. F.M.A. Financial Corp. v. Build, Inc., 12 Utah 2d 80, 404 P.2d 670, 673 (1965).

## DETERMINATIVE RULE

Utah R. Civ. P. 56(c).

(c) **Motion and proceedings thereon.** The motion shall be served at least 10 days before the time fixed for the hearing. The adverse party prior to the day of hearing may serve opposing affidavits. The judgment sought shall be rendered forthwith if the pleadings, depositions, answers to interrogatories and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law. A summary judgment, interlocutory in character, may be rendered on the issue of liability alone although there is a genuine issue as to the amount of damages.

## STATEMENT OF THE CASE

### A. Nature of Case

On July 26, 1988, defendant, Gloria Swenson, a security guard for Burns at the Geneva Steel Plant in Utah County, Utah, drove her automobile to the Frontier Cafe located approximately at 1600 South, Lindon (1600 North, Orem), and purchased a cup of soup for her lunch. On the return trip from the cafe, Ms. Swenson was involved in an accident with a motorcycle ridden by plaintiffs Jeff Christensen and Kyle James Fausett. Plaintiffs filed this lawsuit naming both Ms. Swenson and Burns as defendants, alleging that Swenson was acting within the course and scope of her employment for Burns at the time of the accident.

### B. Course of Proceedings

On July 17, 1991, Burns filed a Motion for Summary Judgment based on the argument that defendant Swenson was not within the course and scope of her employment at the time of the accident. (R. 106.)

### C. Disposition at Trial Court

Following submission of memoranda by the parties, and oral argument to the trial court on November 1, 1991 (R. 204), the Honorable Cullen Y. Christensen issued a Ruling granting Defendant Burns' Motion for Summary Judgment dated November 5, 1991. (R. 206.) A Summary Judgment and Rule 54(b) Certification of Final Order was signed by Judge Christensen and filed in the Fourth Judicial District Court Clerk's Office on November 21, 1991. (R. 214.) It was from this Summary Judgment that plaintiffs appealed.

### STATEMENT OF RELEVANT FACTS

The following relevant facts are presented as a means of adding to the Statement of Facts set forth in Appellants' Brief. It should be noted that many of the references to the record in Appellants' Brief merely refer to general page numbers of Plaintiffs' Memorandum "Statement of Facts," without specifically citing to the original source of the facts. To avoid confusion, all references in Appellee's Brief will be to the specific source in the record, including specific references to depositions which have been published in this action.

1. On July 26, 1989, defendant Gloria Swenson was assigned as a security guard for Burns at Gate 4 of the Geneva Steel Plant in Utah County, State of Utah, and to no other assignments.<sup>1</sup>

2. The Geneva Plant boundaries were contained within a fenced area, bounded on the east by fence and railroad tracks located on the west side of Geneva Road.<sup>2</sup>

3. At the time of the accident, Ms. Swenson, as a security guard at Gate 4, had responsibilities to work between the island station and Gate 4, which were within the spatial boundaries of the Geneva Steel Plant.<sup>3</sup>

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<sup>1</sup> Deposition of Gloria Swenson, p. 11, lines 4-7; p. 12, lines 2-25. A copy of relevant portions from Gloria Swenson's deposition cited herein is attached hereto as Addendum 1.

<sup>2</sup> Gloria Swenson Deposition, p. 19, lines 7-14; p. 20, lines 1-15.

<sup>3</sup> Gloria Swenson Deposition, p. 22, lines 1-11.



4. Shortly after 11:00 a.m. on July 26, 1988, Gloria Swenson called by telephone to the Frontier Cafe located at approximately 1600 South, Lindon (1600 North, Orem), east of Geneva Road, outside the spatial boundaries of the Geneva Steel Plant, and ordered a cup of soup for lunch.<sup>4</sup>

5. The security guards were allowed to take short breaks in the area of their appointed posts. Lunch was expected to be taken on the job.<sup>5</sup>

6. Ms. Swenson drove her personal car across the highway to go to the Frontier Cafe in order to pick up her lunch.<sup>6</sup>

7. Ms. Swenson did not buy or pick up any lunch for any other person or guard of Burns.<sup>7</sup>

8. Ms. Swenson admitted that she made a personal choice to go outside the spatial boundaries of the Geneva Plant to the Frontier Cafe to obtain the soup for her lunch and that she was not directed by anyone at Burns to go to the Frontier Cafe.<sup>8</sup>

9. After picking up her cup of soup at the Frontier Cafe, Ms. Swenson was involved in a collision between her motor vehicle and

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<sup>4</sup> Deposition of Gloria Swenson, p. 17, lines 16-25; p. 24, lines 23-25.

<sup>5</sup> Deposition of Mike Transtrum, p. 68, lines 5-6. Relevant portions of the deposition of Mike Transtrum are attached hereto as Addendum 2.

<sup>6</sup> Deposition of Gloria Swenson, p. 25, lines 1-7.

<sup>7</sup> Deposition of Gloria Swenson, p. 25, lines 11-17.

<sup>8</sup> Deposition of Gloria Swenson, p. 23, line 24 through p. 24, line 4; also p. 72, lines 9 through p. 73, line 1.

the motorcycle upon which plaintiffs were riding on Geneva Road.  
(R. 11.)

10. After hearing oral argument, and reviewing the file and the memoranda submitted by counsel, Judge Cullen Christensen entered the following written ruling granting Summary Judgment in this matter:

This matter comes before the Court, under Rule 4-501, on the motion of Def[endant] Burns International Security Services seeking Summary Judgment. The Court has reviewed the file, considered the memoranda of counsel, entertained argument of counsel, and upon being advised in the premises, now makes the following:

#### RULING

1. Said motion is granted for the following reasons:
  - (a) In the view of the Court there is no genuine issue as to any material fact and that said Def[endant] is entitled to Judgment as a matter of law.
  - (b) That in going to the Frontier Cafe to buy lunch, Gloria Swenson's conduct was not as a matter of law of the general kind for which she was employed to perform by Def[endant] Burns.
  - (c) That the conduct of Swenson in going to the Frontier Cafe was not as a matter of law within the ordinary spatial boundaries of her employment with Burns.
  - (d) That the conduct of Swenson in going to the Frontier Cafe was not as a matter of law motivated in whole or in part by the purpose of serving Burns' interest as the employer of Swenson.
  - (e) That in the opinion of the Court the activity of Swenson in leaving her post at Gate 4 to go to the Frontier Cafe to purchase lunch was so clearly without the scope of her employment with Burns that reasonable minds could not differ as to such conclusion.

The following facts are presented to clarify those statements set forth in Appellants' Statement of Facts which are mischaracterized, misleading or immaterial to the issues presented by the Motion for Summary Judgment.

11. Plaintiffs stated that the district manager testified that he had picked up and distributed lunch to his employees by referring to the Trial Record at 142. (Appellants' Brief at 4.) Paragraph 17 (R. 142) states that historically (before Geneva was reopened under new management after closure by USX) when Mr. Mayne worked directly for USX as a roving patrolman, part of his job was to pick up and distribute lunches throughout the mill to USX employees. That is no longer the practice and is irrelevant.<sup>9</sup>

12. Gloria Swenson stated that she brought back food to her lieutenant at times (see Appellants' Brief at 4); however, she testified she would only do that while on graveyard shift when things were slowed. She never testified that she was instructed to or brought back food for her lieutenant at any time during the day shift, which is the shift she was working at the time of the accident.<sup>10</sup>

13. Plaintiffs stated that Ms. Swenson testified that her lieutenant told her to check with other employees before she went to pick up her lunch. (See Appellants' Brief at 4.) The reference

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<sup>9</sup> Deposition of Kenneth H. Mayne, p. 41, line 5 through p. 42, line 7. Relevant portions of the deposition of Kenneth Mayne are attached hereto as Addendum 3.

<sup>10</sup> Deposition of Gloria Swenson, p. 56, line 19 through p. 57, line 5.

to Trial Record page 139 in turn refers to pages 57 and 58 of Ms. Swenson's Deposition. Ms. Swenson's testimony regarding picking up lunches for single staffed posts refers to her post-accident assignment as a rover in Car 7 and Car 8, during the graveyard shift. Again, these were not the job duties or areas of responsibility at the time of the accident when Ms. Swenson was assigned strictly to daytime guard duty at Gate 4.<sup>11</sup> Any reference to duties of rovers during graveyard shift is immaterial to the issue at hand.

14. Oreon Olson, the guard on duty with Ms. Swenson at Gate 4 at the time of the accident, testified that during his day shift at Gate 4, he could not recall any guard calling to request another guard to pick up lunch for them at the Frontier Cafe.<sup>12</sup>

15. On occasion, company officials from Salt Lake City held meetings at the Frontier Cafe with lieutenants, but Gloria Swenson and the other security guards were never invited to or attended any meetings or training by the company at the Frontier Cafe. (See Appellants' Brief at 4.) Any references to such meetings are immaterial to the issue of course and scope of the employment of Ms. Swenson at the time of the accident.<sup>13</sup>

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<sup>11</sup> Deposition of Gloria Swenson, p. 57, line 4 through p. 58, line 5.

<sup>12</sup> Deposition of Oreon G. Olson, p. 27, line 20 through p. 28, line 4. Relevant portions of the Deposition of Oreon Olson are attached hereto as Addendum 4.

<sup>13</sup> Deposition of Gloria Swenson, p. 43, line 9 through p. 44, line 6.

16. If lieutenants occasionally picked up food in their own cars at the Frontier Cafe, they did not do so for any of the Burns employees acting as security guards, but perhaps for meetings of lieutenants and captains.<sup>14</sup>

17. Whenever a security guard decided to pick up lunch at the Frontier Cafe, that security guard considered that trip to be a personal errand, and it was not an assigned duty of his or her job.<sup>15</sup>

18. Plaintiffs have argued that Mr. Transtrum observed Burns guards using the cafe for various breaks including latrine and lunch breaks. However, Mr. Transtrum stated that he was aware that this happened at times, but was limited to the "rover" in the automobile, not a Gate 4 or Gate 1 guard. At the time of the accident, Gloria Swenson was not a rover, but was later assigned to that duty. Therefore, any references to lunch or latrine breaks by rovers is immaterial to the issue at hand.<sup>16</sup>

#### SUMMARY OF THE ARGUMENT

Burns submitted sufficient material facts in connection with its original Memorandum and Reply Memorandum in Support of its Motion for Summary Judgment to allow the Court to review the facts and determine that there was no genuine issues of material fact.

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<sup>14</sup> Deposition of Gloria Swenson, p. 56, lines 11-18.

<sup>15</sup> Deposition of Eugene S. Bezzant, p. 23, line 25 through p. 24, line 5. Relevant portions of the deposition of Eugene S. Bezzant are attached hereto as Addendum 5.

<sup>16</sup> Deposition of Mike Transtrum at p. 42, line 6 through p. 43, line 21.

Despite plaintiffs' arguments of insufficient facts submitted by defendant Burns, the Court had ample opportunity to view the facts which potentially might be considered to create a genuine material fact. Even with plaintiffs' efforts to create an issue through 26 pages of factual summaries and presentation of "facts," plaintiffs have failed to create an issue of material fact upon which reasonable minds could differ that would preclude summary judgment in favor of defendant.

A mere dispute as to a fact does not preclude the granting of summary judgment unless the issue is a material fact. An issue that creates a dispute precluding summary judgment must be one whose resolution is necessary to determine the legal rights of the parties. F.M.A. Financial Corp., 404 P.2d at 673. Facts presented by plaintiffs relating to acts by management of Burns, including lieutenants, or job assignments different than Ms. Swenson's at the time of the accident, or subsequent job assignments of Ms. Swenson, are immaterial and cannot be considered to create a material dispute of fact that would justify overturning summary judgment in this matter.

Judge Christensen recognized the established tests for determining the issue of course and scope of an employee. The Court found, based on material facts, that Ms. Swenson's personal trip to the Frontier Cafe was not the general kind for which she had been employed to perform for Burns. Ms. Swenson was wholly involved in a personal endeavor at the time of the accident.

Clearly, the excursion of Ms. Swenson, to obtain lunch for herself at the time of the accident, took her substantially outside the ordinary spatial boundaries of her employment at Gate 4 within the Geneva Plant.

Finally, the "dual purpose" doctrine explained by the Utah Supreme Court in Clover v. Snowbird Ski Resort, 808 P.2d 1037 (Utah 1991) demonstrates that the primary motivation for Ms. Swenson's trip to the Frontier Cafe was personal, and that any benefit to Burns as her employer was purely incidental. The company would not have been forced to send another employee over the same route to perform the same function if she had decided not to get lunch for herself. For those reasons the Court was justified in granting summary judgment to Burns.

#### ARGUMENT

##### DEFENDANT BURNS IS ENTITLED TO SUMMARY JUDGMENT AS A MATTER OF LAW.

###### A. There are no genuine issues of material fact.

Despite plaintiffs' best efforts to recharacterize the evidence and create issues of fact which are immaterial, plaintiffs have failed to create an issue of material fact that precludes summary judgment. Well established Utah law requires that an issue in dispute "must be one which is material in the sense that resolving it is necessary to determine the legal rights of the parties." F.M.A. Financial Corp., 404 P.2d at 673. Any disputed issues that might exist in the record are issues that are unnecessary to determine the legal rights of the parties. In other words, they are unrelated to the core issues required by the Utah

Supreme Court to establish liability of an employer under the doctrine of respondeat superior.

Summary judgment is appropriate if the pleadings and testimony demonstrate there to be no genuine issue of any material fact and that the moving party is also entitled to judgment as a matter of law. This rule does not preclude summary judgment simply because some fact is still in dispute, "but only when a material fact is genuinely controverted." Heglar Ranch Inc. v. Stillman, 619 P.2d 1390, 1391 (Utah 1980) (citing Kesler v. Kesler, 583 P.2d 87 (Utah 1978)).

Even under the standard of review required of this Court to view the facts and inferences drawn from those facts in the light most favorable to the losing party, this Court must draw reasonable and logical inferences from those facts. An appellate court cannot merely adopt plaintiff's arguments for inferences or assertions of materiality for clearly immaterial facts in order to create an argument for preclusion of summary judgment. Inferences must be logical and consistent with the material facts applied by the trial judge in granting summary judgment.

Defendant will demonstrate that the facts established by the record ably support its argument that the conduct of Gloria Swenson fell outside the scope of her employment at the time of the accident.

B. Gloria Swenson's conduct fell outside the scope of her employment.



Before Utah Courts may determine liability of an employer for the accident of an employee, that employee's conduct must be shown to have complied with the following three criteria:

"First, an employees conduct must be of the general kind the employee is employed to perform. . . . In other words, the employee must be about the employer's business and the duties assigned by the employer, as opposed to being wholly involved in a personal endeavor." Second, the employee's conduct must occur substantially within the hours and 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 interest."

Clover v. Snowbird Ski Resort, 808 P.2d 1037, 1040 (Utah 1991) (quoting Birkner v. Salt Lake County, 771 P.2d 1053, 1056-57 (Utah 1989) (footnotes omitted).

The Supreme Court has also recognized that under specific fact situations, "such as when the employee's conduct serves a dual purpose, or when the employee takes a personal detour in the course of carrying out his employer's directions," the Court has used variations of the above three-pronged test. Id. The Court has indicated that these variations are not to be considered departures from the Birkner criteria. "Rather, they are methods of applying the criteria in specific factual situations." Id. at 1041. Wisely, the Court realized that not all facts can be neatly compartmentalized. The following brief discussion will demonstrate the trial court's correctness in applying the Birkner test, as refined by the Clover decision, to the facts of this case.

1. Gloria Swenson was wholly involved in a personal endeavor.

The first requirement of the Birkner test is that employee's conduct is "of the general kind the employee is employed to perform." 771 P.2d at 1056-57. The Supreme Court supplied additional direction in interpreting this requirement by stating:

In other words, the employee must be about the employer's business and the duties assigned by the employer as opposed to being wholly involved in a personal endeavor.

Id. at 1057 (emphasis added). The deposition testimony of both Gloria Swenson and the of the other Gate 4 guards, demonstrates that lunch guards' trips to the Frontier Cafe were not daily occurrences, but only an occasional practice. For instance, Mr. Eugene Bezzant testified that on average he would go to the Frontier Cafe once a month. See Addendum 5, p. 19, lines 16-21. He also was of the opinion that he was involved in a personal errand when he was getting himself lunch, rather than performing some duty assigned or required by the company. Id., p. 19, line 22 through p. 20, line 12.

Even Gloria Swenson admitted that she had the personal choice to either bring a lunch or to pick something up to eat from the Frontier Cafe, off premises. See Addendum 1, p. 24, lines 6-7, 16-18. She was never instructed by anyone at Burns to get lunch at the Frontier Cafe rather than bringing her own lunch to work. Id., p. 23, lines 3-15. Also, Ms. Swenson admitted that she was not picking up food for anyone other than for herself on the day of the accident. Id., p. 72, lines 9-23. Oreon Olson, the Burns Security guard who was working at Gate 4 with Ms. Swenson on the day of the accident, stated that he would consider a Burns guard to be on his

own time if she went to the Frontier Cafe to pick up lunch for herself. See Addendum 4, p. 35, lines 1-8.

By quoting the following excerpt from Comment (c) of the Restatement (Second) of Agency § 229, at page 15 of their Brief, plaintiffs unwittingly establish the appropriateness of the summary judgment granted by the trial court in support of their argument that a lunch may be part of the work that is considered employment duties of the employee:

If, however, such acts [such personal matters as eating and cleaning of the person] are for the personal convenience of the employees and are merely permitted by the master in order to make the employment more desirable, the acts are not within the scope of employment.

Restatement (Second) of Agency § 229, Comment (c) (1958) (emphasis added). The established facts, even when viewed in the light most favorable to plaintiff, demonstrate that the lunch break taken by plaintiff, was a matter of personal convenience to Ms. Swenson.

To understand what factors are deemed important under this first criterion of Birkner, a review of the Supreme Court's decision in Clover v. Snowbird Resort would be beneficial. The Supreme Court, in Clover, reversed an order of summary judgment in favor of defendant after careful analysis of the Birkner criteria for respondeat superior claims. In Clover, Chris Zulliger, was employed by Snowbird as a chef at the Plaza Restaurant and was supervised by his father, Hans Zulliger, who was head chef of the Plaza Restaurant located at the base of the resort and the Mid-Gad Restaurant located halfway to the top of the mountain. Id. at 1038. Chris was instructed as part of his job to

monitor the operation of the Mid-Gad Restaurant on an ongoing basis and was specifically directed to inspect the Mid-Gad Restaurant on the day of the accident before returning to work later in the day at the Plaza Restaurant. Id. at 1038-39. Chris went skiing during that day and in the middle of his first run stopped at Mid-Gad and performed his inspection. Thereafter, he skied four additional runs before skiing down the mountain to begin his work at the Plaza Restaurant. During his final run on a route often taken by Snowbird employees traveling from the top of the mountain to the Plaza, Chris struck Ms. Clover seriously injuring her. Id.

In applying the first criterion of the Birkner test to the facts in Clover, the Supreme Court found it important that one of Chris Zulliger's assignments was to monitor the operations of the Mid-Gad, and that he was specifically directed to inspect those operations on the very day of the accident. Id. at 1041. The Court also noted that the employer, Snowbird, intended that Zulliger use ski lifts and ski runs while travelling to Mid-Gad. Therefore, the Court concluded "that Zulliger's actions could be considered to 'be of the general kind that the employee is employed to perform.'" Id. (quoting Birkner, 771 P.2d at 1057).

The facts of this case demonstrate that Ms. Swenson's conduct did not meet the first criterion. There was no directive by Burns to Swenson to travel off the premises to the Frontier Cafe. There were no duties of Swenson to perform at the Frontier Cafe, and there was no errand to perform on behalf of Burns of any of its employees. It is clear that Ms. Swenson chose to obtain her lunch

off the work premises for a wholly personal reasons. Burns employees were encouraged to bring their own lunch, and even though Burns guards at Gate 4 occasionally chose to travel to the Frontier Cafe to obtain lunch, this cannot be considered to fall within the general conduct the employee was employed to perform. These trips were merely done for the guard's own personal convenience. Therefore, given the Clover analysis, plaintiffs have failed to demonstrate that reasonable minds could find that the conduct of Ms. Swenson fit within the first criterion of the Birkner test. Because of such failure, Gloria Swenson cannot be considered to have been within the course and scope of her employment at the time of the accident. On this basis alone, summary judgment was properly granted.

2. Gloria Swenson's trip to the Frontier Cafe and the accident occurred substantially outside the ordinary spatial boundaries of her employment as a security guard at Gate 4 on the Geneva Property.

The second criterion of the Birkner test, as refined by Clover, requires an employee to be substantially within both the hours and the normal spatial boundaries of her employment at the time any action arises. See Clover, 808 P.2d at 1040. Again, under this criterion, an analysis of the facts illustrates plaintiffs' failure in the case at hand to demonstrate that an issue exists which would preclude summary judgment.

Under Clover, Chief Justice Hall, writing for the unanimous Court, pointed out that young Zulliger was expected to monitor the Mid-Gad Restaurant operations during the time the lifts were

operating while he was not working a shift at the Plaza. The Court recognized, as a key element, the fact that "throughout the trip he would have been on his employer's premises." Id. at 1041.

In contrast to Clover, plaintiffs in this appeal "acknowledge that the cafe does not lie within the geographical boundaries of the Geneva plant . . . ." (Appellants' Brief at 8.) However, in their attempt to qualify Ms. Swenson's conduct under the second criterion of the Birkner test, plaintiffs appear to restrict the analysis of the Clover case, ironically, in order to convince this Court that it must broaden its analysis of the spatial boundaries of the Geneva plant. Plaintiffs mistakenly argue that the Supreme Court ignored the fact that Mr. Zulliger's spatial boundaries of his employment restricted him to the Plaza Restaurant. This ignores the facts of Clover and the Court's analysis that Zulliger had specific responsibilities as well as general responsibilities at both the Plaza and the Mid-Gad Restaurants, which required him to work at and between those restaurants. That included riding the ski lifts as well as skiing the slopes as part of his normal job responsibilities, all of which were included within the normal spatial boundaries of his employment, namely the entire Snowbird Ski Resort. Id.

It would be disingenuous for plaintiffs to argue that the normal spatial boundaries of the employment of Ms. Swenson were beyond the physical boundaries of the Geneva plant, while she performed her duties as a security guard at Gate 4 at the time of the accident. Any facts which do not relate to Ms. Swenson's

assignments while at Gate 4, or which involve acts by other employees, assigned to other jobs such as roving guards, lieutenants or company management employees are clearly immaterial and cannot be deemed to create any issue of material fact.

In failing to provide any evidence beyond the obvious limitations of spatial boundaries, plaintiffs have also failed to demonstrate that reasonable minds could differ as to the application of the second criterion of the Birkner test to Gloria Swenson. This failure further supports an independent basis for summary judgment in favor of defendant Burns.

3. The primary motivation for Swenson's trip to the Cafe was personal, and, therefore, outside the scope of her employment.

The Clover decision also serves as a useful framework for analysis of the third criterion of the Birkner test which requires the employee's conduct to "be motivated at least in part, by the purpose of serving the employer's interest." Clover, 808 P.2d at 1040 (quoting Birkner, 771 P.2d at 1057). In Clover, the Court recognized that specific fact situations may require occasional use of a variation, which is not a departure from the criteria formulated by Birkner, but is, rather, a method of applying a more flexible approach to certain factual situations. Id. at 1040-41.

The first variation forwarded by the Supreme Court in Clover is to be utilized where "the employee's conduct serves a dual purpose." Id. at 1041. The Court recognized that difficulties were created from the fact that Zulliger did not immediately return to the Plaza after completing his inspection of the Mid-Gad

facility, but skied four more runs and rode the lift to the top of the mountain before his return to the Plaza Restaurant. It was argued by Snowbird that these actions demonstrated that Zulliger's primary purpose for skiing was for his own pleasure, and therefore he could not be considered to be acting within the scope of his employment. Id. The Court recognized that its previous decision in Whitehead v. Variable Annuity Life Insurance, 801 P.2d 934 (Utah 1989) held that "if the primary motivation for an activity is personal, 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 scope of his employment." Clover, 808 P.2d at 1041 (quoting Whitehead, 801 P.2d at 937) (bracketed language in original).

Recognizing the dual purpose doctrine as explained in Whitehead, the Court in Clover suggested a useful test that could be utilized to determine if a transaction that might arguably have a business purpose, actually appeared incidental to the overwhelming personal motive. In that test, a trip will not be deemed to be personal if it "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. (quoting Whitehead, 801 P.2d at 937).

The Supreme Court distinguished the Clover case from the Whitehead case in that in Whitehead, an employee who was involved in an accident during his commute home was held to be outside the scope of his employment, even though he planned to make business



calls from his home, thereby creating a dual purpose question. However, the Court in Whitehead indicated that those business calls could have been made as easily from any place as from his home. The Court in Clover distinguished Whitehead from the Clover facts by finding that the activity of inspecting the Mid-Gad Restaurant necessitated travel to the restaurant. They then provided the key to the analysis under this test with the following:

If Zulliger had not inspected the restaurant, it would have been necessary to send a second employee to accomplish the same purpose. Furthermore, the second employee would have most likely used the ski lifts and ski runs in travelling to and from the restaurant.

Clover, 1808 P.2d at 1041.

Clearly, under the facts of this appeal, Burns would not have been required to send a second employee to accomplish the purpose of Gloria Swenson in going to the Frontier Cafe. She decided to go there for purely personal reasons, namely to obtain her lunch. She was not directed by anyone at Burns to leave her post to obtain lunch, and she did not obtain lunch for any other employee. Even if this Court is to accept plaintiffs' averment that Ms. Swenson was motivated out of a sense of serving her employer's interest by obtaining lunch as quickly as possible, the predominant purpose of the trip was personal, and merely incidentally related to business. Hence, under application of this dual purpose approach suggested in Clover and Whitehead, plaintiffs fail to establish that Swenson was within the course of her employment at the time of the accident.

Plaintiffs have also erroneously argued for application of the "personal detour" approach under the dual purpose doctrine, as set

forth in Clover. The Court applied that approach because they found there was "ample evidence that there was a predominant business purpose for Zulliger's trip to Mid-Gad." Id. at 1042. That is not the case in this appeal before this Court. Where there is a predominant personal motivation, the first variation of the "dual purpose" test set forth in Clover should be applied. Gloria Swenson had not been sent to the Frontier Cafe, as compared to Zulliger in Clover, who had been sent to the Mid-Gad Restaurant, and was on his way back to the Plaza Restaurant at the time of his accident. Admittedly, if Ms. Swenson had been sent by Burns off the premises on some errand and she, on her return trip, had stopped by the Frontier Cafe to pick up soup, and then resumed her travel back to her post at Gate 4 prior to the accident, the "personal detour" test would apply. However, those are not the facts of this case. Because plaintiff's trip was predominantly personal, it is clear the "personal detour" approach is inapposite and the "second employee" approach suggested in Clover and Whitehead should be applied to this case. In its application of this approach, the trial court correctly ruled that Swenson's trip to the Frontier Cafe "was not motivated in whole or in part by the purpose of serving Burns' interests as the employer of Swenson." (R. 207).

#### CONCLUSION

The trial court properly viewed the material facts of this case in finding that the activities of Ms. Swenson at the time of the accident were "so clearly without the scope of her employment

with Burns that reasonable minds could not differ as to such conclusion." (R. 207.) Under the criteria set forth by the Utah Supreme Court in Birkner and Clover, defendant has established that Ms. Swenson falls short of qualifying as an employee under any of the three criteria. First, Gloria Swenson was not involved in the general kind of conduct she was employed to perform. She made a personal choice to travel off premises in order to obtain lunch and was not involved in any duty inherent in her job as a security officer at Gate 4. Second, the accident occurred substantially outside the ordinary spatial boundaries of her employment off of Geneva property. Attempts by plaintiffs to argue applicability of facts relating to jobs other than Gate 4 security guard are immaterial and should not be considered in the context of this Motion for Summary Judgment. Finally, Gloria Swenson's trip to the Frontier Cafe was predominantly, if not wholly, motivated by personal interests. Even if this Court were to accept plaintiffs' arguments that there was an incidental business motivation to her trip, the dual purpose approach established under Clover illustrates that this trip was purely personal. Reasonable minds cannot differ on application of these facts to the law.

This defendant adequately established and proved that Gloria Swenson could not be considered within the scope of her employment at the time of the accident, since she failed to qualify under any of the three criteria required by the Utah Supreme Court. Hence, the Court was correct in granting Burns' Motion for Summary

Judgment. This defendant respectfully submits this Court should affirm the trial court's ruling.

DATED this 30<sup>th</sup> day of June, 1992.

HANSON, EPPERSON & SMITH



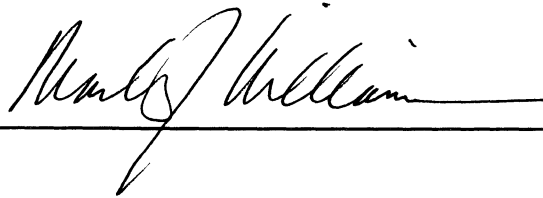
Mark J. Williams  
Attorneys for Defendant/Appellant  
Burns International Security Services

CERTIFICATE OF SERVICE

I certify that I caused to be mailed, postage prepaid on this 30<sup>th</sup> day of June 1992, four (4) true and correct copies of the foregoing Appellee's Brief, to each of the following:

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h:\wp\misc.chr

**ADDENDUM 1**

**EXCERPTS OF DEPOSITION OF GLORIA SWENSON**

COPY

1 IN THE FOURTH JUDICIAL DISTRICT COURT OF UTAH COUNTY

2 STATE OF UTAH

3 \* \* \*

4 JEFF CHRISTENSEN, and KYLE :  
JAMES FAUSETT,

5 :

6 Plaintiff, : Civil No. CV 89-278

7 vs. : Deposition of:

8 GLORIA SWENSON and BURNS : GLORIA SWENSON  
INTERNATIONAL SECURITY :  
9 SERVICES, :

10 :

11 Defendant.

\* \* \*

12  
13  
14  
15 BE IT REMEMBERED that on the 19th day of June, 1991,  
16 the deposition of GLORIA SWENSON, produced as a witness herein  
17 at the instance of the defendant, Burns, in the above-entitled  
18 action now pending in the above-named court, was taken before  
19 Jennifer A. Russell, a Certified Shorthand Reporter (Certificate  
20 No. 125), Registered Professional Reporter, and Notary Public  
21 in and for the State of Utah, commencing at the hour of 9:35  
22 a.m. of said day at 3325 N. University, Provo, Utah.

23 \* \* \*

24  
25 Reporter: Jennifer A. Russell



(801) 322-3742

5 DAY DELIVERY

1           A       Guard duty, fire fighting, EMT.

2           Q       Were you located in one particular area?

3           A       At first I was assigned to Gate 4.

4           Q       So that's when you first started?

5           A       When I first started.

6           Q       And how long did that assignment last?

7           A       Oh, gosh, I was there quite awhile.

8                   BOYD SWENSON: Can I say -- we was both hired at  
9 the same time down there at Burns.

10          Q       Okay. What we will do is we are just taking her depo  
11 here. And if we feel like it's necessary, maybe we can go off  
12 the record and see if there is anything you have to add to it  
13 and we can decide whether we can go on the record.

14                  MR. HARRIS: The main point is that we are here  
15 today to see what she remembers, and if there are some things  
16 you can help with that she can't remember, we will go off the  
17 record and do it.

18                  BOYD SWENSON: All right.

19                  MR. WILLIAMS: And we appreciate that. We will  
20 kind of follow up afterwards but --

21                  BOYD SWENSON: When you are talking about how long  
22 we was assigned to this area or this area, you was all over down  
23 there a lot.

24                  MR. WILLIAMS: Okay, we will find out what she  
25 recalls.

1                   BOYD SWENSON: Okay.

2           Q       Your main assignment was Gate 4 when you first  
3 started; is that right?

4           A       I did not understand that until I was put there, and  
5 a week later I asked Ben Olsen why I was stationed at Gate 4  
6 only. My interpretation was I would go in and be EMT, fire  
7 fighter.

8           Q       And now who is Ben Olsen?

9           A       He was a lieutenant.

10          Q       What was his response to you while you were?

11          A       He had no idea. He thought I was hired as a gate  
12 floor person only and he did get in touch with Kim Hansey to  
13 find out what was going on.

14          Q       What did you understand Kim Hansey to have told Ben  
15 Olsen about your responsibilities at that time?

16          A       She was going to move me in the plant when I had some  
17 fire training. That's what he come back and told me.

18          Q       So at that time you hadn't received your fire  
19 training; is that right?

20          A       I started the week after I was hired in school.

21          Q       How long did you remain at Gate 4, if you can recall?

22          A       Probably about six months.

23          Q       So at the time of the accident on 7-26-88 you were  
24 still at Gate 4?

25          A       Yes.



1           A       Who was the lieutenant on duty?

2           Q       Did you look to him as your supervisor?

3           A       Nobody ever come bothered us at Gate 4. We didn't  
4 see the lieutenants and stuff when we were up there. They were  
5 mostly down with the guys inside.

6           Q       Who was the lieutenant on duty that day, if you  
7 recall?

8           A       I think it was Jim Hoyt, but I'm not sure.

9           Q       Jim Hoyt?

10          A       Yes.

11          Q       Tell me, if you could, just how your day progressed  
12 from the time you came on the job up to the time of the  
13 accident, on the day of the accident.

14          A       Okay. It was busy, usually is at that station.  
15 Trucks are coming real heavy. They are backed up clear to the  
16 highway. About quarter after 11:00 it just -- you almost --  
17 like there is 20 minutes you will get a break. I guess the  
18 truckers go to lunch is all we can figure.

19          Q       But it was pretty consistent that you would have a  
20 break?

21          A       Well, it would come at different times, but at about  
22 a quarter after I asked Oly, I says, Are you ready for lunch.  
23 And he says, No, I don't think I have or want one today. And I  
24 says, Okay, it looks like there is a break out there. I think I  
25 will go get me a cup of soup.

1 watched the lower gate because the part timer would go home.

2 Q Now the lower gate is, again, the one further in the  
3 property?

4 A Farther into the plant, and we would push a button  
5 and let them go through the gate, so we watched from the highway  
6 in.

7 Q Did you understand your -- well, let me ask it this  
8 way. Where did you understand the plant boundaries to be?

9 A The plant boundaries are from the railroad track in.

10 Q Is there a gate or a fence there?

11 A That crosses it?

12 Q Yes.

13 A Yes. The gate crosses this way and this way, the  
14 track.

15 Q Just to be clear, why don't you draw that, if you  
16 could. And, again, I'm not asking you to be an artist but just  
17 to get an idea. At the top of the page mark north or whichever  
18 direction you consider north.

19 A This is north here.

20 Q And just draw the island gate and show where you  
21 understood the boundaries of the Geneva property to be.

22 A That's -- the island down here is Gate 4. And then  
23 it goes on into Geneva from that point on. There is fences that  
24 close over the railroad tracks this way.

25 Q So why don't you write "railroad tracks" along the

1 place where the railroad tracks actually run. Okay, you have  
2 marked that with little lines.

3 A Yes.

4 Q And that runs from north to south; is that right?

5 A Yes.

6 Q And they are located, as you have drawn them, right  
7 on the boundaries, on the east boundaries of the Geneva plant?

8 A This extends out just a bit to the highway. This is  
9 the highway, Geneva Road.

10 Q Okay. So is it your understanding then that the  
11 railroad tracks are west of the highway, Geneva Road?

12 A Yes. They are on the west side.

13 Q And from the railroad tracks west is the Geneva  
14 property?

15 A Yes.

16 Q Was it your understanding that your work as a guard  
17 was to be on the Geneva property?

18 MR. HARRIS: Objection. Leading.

19 Q Go ahead. You can answer that. We do this for the  
20 record.

21 A Okay. My job consisted of doing my job. We had no  
22 designated lunch hour at any time. No designated break at any  
23 time. We took them as we could get them, and that was few and  
24 far between. There was many days there was never a lunch, if  
25 that's what you are asking me.

1 Q Where was your post as you understood it when you  
2 were on Gate 4?

3 A There and there.

4 Q Okay. You have marked Gate 4.

5 A Gate 4 island.

6 Q And the island. Okay. So when you were on Gate 4,  
7 your responsibilities were between the island and Gate 4?

8 A Yes.

9 Q Okay. That is all within the spatial boundaries and  
10 I'm talking about the entire Geneva area.

11 A Yes. That one is inside the boundary.

12 Q You indicated that you would take a lunch when you  
13 could get it; is that right?

14 A Yes.

15 Q And normally you would take it when there was a break  
16 in the traffic; is that correct?

17 A Yes.

18 Q And sometimes you would bring your lunch and eat it  
19 --

20 A Yes.

21 Q -- at your post; is that right?

22 A We always ate it at the post, always. Even if we  
23 went and got it, we ate it at the post.

24 Q When you would go get your lunch across the way, that  
25 was a choice that you made, whether you would go across or bring

1 your lunch; is that a fair assessment?

2 A Yes.

3 Q That was up to the guard to determine whether he or  
4 she would go off the premises and get the lunch or just bring  
5 their lunch in?

6 MR. HARRIS: Objection. Leading.

7 Q Do you understand the question?

8 A Well, I can tell -- what I can tell you, there is  
9 some days we had lunches, some days we did not. One or the  
10 other of us went for a cup of soup. That was our lunch. That's  
11 what you had time for.

12 Q Sometimes the guard would bring his or her own lunch  
13 in; is that right?

14 A Yes. A lot of time it was shared because you never  
15 got a break to have anything.

16 Q Did you consider that if you chose to go across and  
17 get a cup of soup that you were on a personal errand?

18 MR. HARRIS: That's leading again.

19 A No. I was doing my job.

20 Q Were you told to go get a cup of soup?

21 A No, I was never told to go get a cup of soup.

22 Q Did you consider that part of your --

23 A But I know that you are entitled to a lunch hour.

24 Q Okay. Let me ask you this. And you made the  
25 personal choice to go get a cup of soup, right?

1           A       I went for lunch, yes.

2           Q       And you were not directed to go get a cup of soup by  
3 anyone at Burns?

4           A       No.

5                   MR. HARRIS: Objection. Leading still.

6           Q       That was your personal choice, was it not?

7           A       I guess if you are hungry, that's your choice.

8           Q       Sure. And that wasn't part of your job description  
9 to go get a lunch at the Frontier, was it?

10                   MR. HARRIS: Same objection. Leading.

11          A       I don't know what you are reaching for other than --

12          Q       Just answer the question is all I'm asking.

13                   MR. HARRIS: If you don't understand the question,  
14 don't answer it. Have him reask it.

15          A       Reask it again.

16          Q       Was it your understanding that you had the personal  
17 choice to either bring your lunch in or to go off and get it?

18          A       Yes.

19                   MR. HARRIS: Objection. Leading.

20          Q       Tell me what you did from the time that you left to  
21 the time that you got involved in the accident. Tell me what  
22 happened. Just walk us through that sequentially.

23          A       I made a phone call over to have the cup of soup  
24 ready. That's what I had, one cup of soup. And I walked in  
25 picked it up.

1 Q How did you get there?  
2 A In my car.  
3 Q Okay. You drove?  
4 A I walked out and the traffic was heavy on the highway  
5 and I come back and got my car and drove over.  
6 Q And you drove across the highway?  
7 A Yes.  
8 Q You pulled in to the restaurant, got out of your car?  
9 A Yes.  
10 Q And you got a cup of soup. Is that all?  
11 A One cup of soup.  
12 Q You didn't get anything for any other guards?  
13 A No.  
14 Q And it wasn't your habit, was it, to go buy lunch for  
15 other guards?  
16 MR. HARRIS: Objection. Leading.  
17 A No.  
18 Q You got back in your car?  
19 A Yes.  
20 Q Tell me what transpired from the time you got back  
21 into your car.  
22 A I got back in the -- I set the soup between my bucket  
23 seats.  
24 Q What kind of car were you driving?  
25 A It was a Dodge.

1 under glass with other stuff. We had it on the wall. We had it  
2 down at the gate.

3 Q It was even in both locations?

4 A Yes. It's at all the gates. There is a posting of  
5 all the restaurants around.

6 Q Is that where you got the phone number is off that  
7 menu so you could call?

8 A Yes.

9 Q Now prior to the time of this accident, did you have  
10 knowledge one way or another as to whether the lieutenants, the  
11 supervisors, the people above you knew that you and, to your  
12 knowledge, others had gone, were going over to Frontier on  
13 occasion to get their lunch?

14 MR. WILLIAMS: Objection.

15 A I'm sure they did. The lieutenants themselves went  
16 there.

17 Q There has been some testimony from other witnesses  
18 that there were even meetings held at the Frontier Cafe between  
19 the lieutenants and the captain and company officials from Salt  
20 Lake. Were you aware of that?

21 A Yes, I was. I know a time Burns people have met and  
22 went there.

23 Q Did you personally ever attend any type of a meeting,  
24 formal or informal, at the Frontier Cafe?

25 A On duty? While I was on duty?



1 Q Well, let's take it -- break it in half. On duty and  
2 off duty.

3 A On duty, no. Off duty, yes.

4 Q When off duty, was that a situation where you were  
5 receiving some kind of instruction or training or information --

6 A Never.

7 Q -- from one of the supervisors and that's why you met  
8 at the cafe?

9 A No.

10 MR. WILLIAMS: Objection. Leading.

11 Q You state that you did have informal meetings at the  
12 cafe. I'm confused.

13 A One.

14 Q Tell me who was there and when was it and what  
15 happened.

16 A It was concerning a case that had happened to another  
17 employee down there that was taking Burns to court.

18 Q Was it with that employee?

19 A No. It was with a lieutenant.

20 Q It was with the lieutenant. And was it a -- I'm  
21 interested -- what was the context of the meeting? Did he call  
22 and ask you to come to the cafe and have the meeting, chance  
23 meeting?

24 A He had just got off duty and we went there right  
25 after. I was on duty. He was off duty.

1 Program and Burns Regulations, Policies and procedures, I wasn't  
2 able to find anything that specifically dealt with lunch breaks  
3 or coffee breaks or --

4 A I don't recall anything either.

5 Q Do you remember any policy one way or another on  
6 lunch breaks or -- and by policy I mean oral policy, spoken or  
7 written, on lunch breaks or coffee breaks or potty breaks,  
8 anything to do with that.

9 A When you can get them, you take them. That's all I  
10 was ever told and that was, like I say, many days if --

11 Q Do you know if during the time you were employed at  
12 Burns as to whether the lieutenants themselves in their own cars  
13 went to the Frontier Cafe and picked up food or lunches for any  
14 of the Burns employees?

15 A In their own car?

16 Q In their company car while they were on duty.

17 A Not for us, but maybe for the lieutenants and the  
18 captain's meeting.

19 Q As I understand it, there are occasions when there is  
20 --

21 A I brought food back to my own lieutenant many times.

22 Q From Frontier Cafe?

23 A Yes.

24 Q And he would pick that up and eat it in his car or  
25 sit there in the island post?

1           A       We would usually meet at the fire station. This is,  
2 like I say, on graveyard when things were slow or something, but  
3 I did actually bring food back for my lieutenant.

4           Q       Gate 4 during the day shift has two people, correct?

5           A       Yes.

6           Q       Then there are times when there is only one person?

7           A       Swing shift.

8           Q       And other gates there is only one person at the gates  
9 when they are open, correct?

10          A       Yes.

11          Q       Do you have any information one way or another if the  
12 lieutenants would have picked up lunches for the single staff  
13 people, in other words, where they couldn't leave the place  
14 unmanned and go over and get something to eat?

15          A       My lieutenant didn't. Usually Car 7 and Car 8  
16 brought it back to all of us.

17          Q       Including the other --

18          A       We would always check with the one on the gate, Would  
19 you like something.

20          Q       And that's not just Gate 4; that would be the other  
21 gates as well?

22          A       Yes. Sometimes on the graveyard we would always  
23 check with Gate 4. My lieutenant was a real stickler, you keep  
24 in touch with everybody, make sure everybody is okay. We always  
25 would check in on the Gate 4 person up there by themself. Gate

1 2 is clear down the other end of the plant.

2 Q And as you saw it, in Car 7 and 8 that was part of  
3 your responsibilities, to check on these folks and make sure  
4 they are all right?

5 A Yes.

6 Q Including if they need something to eat or something  
7 to drink? There are occasions --

8 A I don't understand that as policy, no, but if we were  
9 going to get us a drink, yes, we would ask them.

10 Q And that came from instructions from your lieutenant?

11 MR. WILLIAMS: Objection. Leading.

12 A To make sure everyone is okay, yes. We had radios.  
13 Even if it was -- there was many times we would be called, Hey,  
14 go check Gate 4. I can't reach him on the radio. He had no  
15 relief. If he went to the restroom or something else and we  
16 couldn't reach him, of course you suspected something is wrong.

17 Q There has been some testimony in this record about  
18 radios and it's still not -- at least not clear in my mind. At  
19 the time of this accident in '88, July of '88, what type of  
20 radio system did you have there between the --

21 A Absolutely none to the island gate.

22 Q My question was there is some documents about little  
23 hand-held walkie-talkies, hip-held walkie-talkies.

24 A Yes.

25 Q Were those in existence as of July of '88?

1 wearing helmets?

2 A Neither of them had helmets on.

3 Q How were they clothed, do you recall?

4 A Levis and shirts.

5 Q Do you know what the speed limit is on Geneva Road?

6 A I believe it's 50 miles an hour.

7 Q 50?

8 A Down at that area.

9 Q I believe that in answer to my original questions  
10 concerning your trip over to the cafe, you were not picking up  
11 food for anybody at that time; is that right?

12 A Not that day, no.

13 Q And no one --

14 MR. HARRIS: Or anybody else -- you mean picking up  
15 food for herself?

16 A I was picking it up for myself.

17 Q Sure. I think that's implicit in the question. You  
18 weren't picking it up for anyone else at that time; is that  
19 right?

20 A Not that day, no.

21 Q And you had not been instructed to pick up any food  
22 for anyone else that day; is that right?

23 A No.

24 Q And you had not been assigned to go over there that  
25 day; is that right?

1           A       Nobody ever assigned you to go.

2           Q       All right. And as I understood you, you had made two  
3 or three trips prior to the date of the accident over to the  
4 cafe in the time that you had been working for Burns.

5           A       Yes.

6           Q       I also understood you to say in answer to my original  
7 question that before that time, before the date of the accident,  
8 you had not gone over to pick up any food for anyone; is that  
9 right?

10                   MR. HARRIS: Let me enter an objection. I don't  
11 think there has been a question on that nor has she testified  
12 that way. That would be a mischaracterization or  
13 misunderstanding by you.

14           Q       All right. Do you remember when I originally asked  
15 you about the trip on the day in question whether or not you had  
16 gone over prior to that time to pick up food for anyone else?  
17 Had you ever done that before the time of the accident?

18           A       Before the -- yes, I had.

19           Q       When was the last time you had done that?

20                   MR. HARRIS: Prior to the accident, you mean?

21           Q       Yes.

22           A       A date?

23           Q       Yes.

24           A       I don't know a date. I mean, we worked -- the only  
25 time we went over was when we were on the day shift.

**ADDENDUM 2**

**EXCERPTS OF DEPOSITION OF MICHAEL TRANSTRUM**

# CERTIFIED COPY

IN THE FOURTH JUDICIAL DISTRICT COURT OF UTAH COUNTY

STATE OF UTAH

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JEFF CHRISTENSEN and	:	
KYLE JAMES FAUSETT,	:	
	:	
Plaintiffs,	:	Civil No. 89-278
vs.	:	
	:	
GLORIA SWENSON and	:	
BURNS INTERNATIONAL	:	
SECURITY SERVICES,	:	
	:	
Defendants.	:	

---

DEPOSITION UPON ORAL EXAMINATION

OF

MICHAEL TRANSTRUM

Taken Pursuant to Notice and the Utah Rules of  
Civil Procedure

Wednesday, April 4, 1990, 9:00 a.m.

---

At the law office of:

Lynn C. Harris  
Attorney at Law  
3325 University Avenue, Suite 200  
Provo, Utah 84604

By: Peggy Grover, R.P.R., C.M., Notary Public



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10 West Broadway / Suite 200 / Salt Lake City, Utah 84101



1     which one, they indicated that these security guards  
2     did interchange positions; sometimes they are a rover,  
3     and sometimes they are at Gate 1, and sometimes they  
4     are at another gate. Is that true?

5             A     That is true.

6             Q     And you want to make it some kind of a  
7     proviso that the people at Gate 4 routinely stayed at  
8     Gate 4?

9             A     Yes.

10            Q     Are you aware as to whether ever the people  
11     at Gate 4 also interchanged into the rover even  
12     occasionally?

13            A     The people that are assigned to Gate 4, the  
14     answer to that is no, they don't perform the job as  
15     rover, No. 1, because they are not EMTs, firefighters,  
16     they are guards. The job of that rover has to include  
17     the fact that they are Emergency Medicine Technicians  
18     and a firefighter. That is the reason that he has the  
19     car.

20            Q     Do you know that Gloria Swenson is an EMT and  
21     a firefighter?

22            A     Yes, she was.

23            Q     Do you know if she ever performed the  
24     function of a rover?

25            A     Yes, she did.

1           Q     Now, are you aware that when someone is doing  
2     the job of rover, as to whether it was authorized or  
3     whether it was okay for them to stop and take a coffee  
4     break or a rest room break at either of those  
5     restaurants?

6           A     To my knowledge, that has never been okay  
7     based on my understanding of the post orders.

8           Q     Okay.

9           A     Specifically based on the January 11 Memo to  
10    Post.

11          Q     Thank you. And I will try to ask a better  
12    question. Prior to the January 11, 1990 Post Order,  
13    were you aware as to whether there was a practice of  
14    the rovers that they did in fact take their coffee  
15    break, or rest room break, or pick up a sandwich. I'm  
16    talking about a small break, I'm not talking about an  
17    hour break, or lunch hour, that type of thing, and the  
18    rover, not Gate 4 or Gate 1, the rover took that break  
19    at either of the restaurants?

20          A     I am aware that I think at times that that  
21    had happened.

22          Q     And that was something that the lieutenants  
23    were aware of, it was common knowledge?

24          A     I would say, yes, common knowledge. I can't  
25    tell you what they were aware of. I don't know what

1           Q     Now, in your definition of breaks, is that  
2 also concerning either eating lunch, or dinner, or  
3 breakfast, if any, I guess depending on what shift you  
4 are on?

5           A     A meal. Lunch is expected to be taken on the  
6 job.

7           Q     And again, that is not in writing, that is  
8 just your understanding of what the practice is?

9           A     That is my understanding of what the practice  
10 is.

11          Q     And when is it to be eaten?

12          A     No specific time.

13          Q     "When there is a hole in the action"?

14          A     That would be reasonable.

15          Q     And that would be involving 10 or 15 minutes  
16 or longer?

17          A     I mean depending on what happens. It could  
18 take an hour and a half to eat a sandwich if the  
19 traffic didn't allow it quicker than that.

20          Q     Let me ask you another question. Gate 4, and  
21 talking with Mr. Mayne and Ms. Hancey, they indicated  
22 there are busy times and slow times at Gate 4, there  
23 are shift changes?

24          A     During day shift there are no nonbusy times  
25 at Gate 4.

**ADDENDUM 3**

**EXCERPTS OF DEPOSITION OF KENNETH MAYNE**

# CERTIFIED COPY

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

JEFF CHRISTENSEN and	)	
KYLE JAMES FAUSETT,	)	
	)	
Plaintiffs,	)	Deposition of:
	)	
vs.	)	<u>KENNETH H. MAYNE</u>
	)	
GLORIA SWENSON and	)	Civil No. 89-278
BURNS INTERNATIONAL	)	
SECURITY SERVICES,	)	
	)	
Defendants.	)	Judge Cullen Christensen

BE IT REMEMBERED that on the 2nd day of March 1990, commencing at the hour of 9:00 a.m., the deposition of KENNETH H. MAYNE, produced as a witness at the instance of the Plaintiff in the above-entitled action now pending in the above-named court, was taken before Judy Edmonds, a Certified Shorthand Reporter holding License No. 27218018, and Notary Public in and for the State of Utah, at the offices of Hanson, Epperson & Smith, 4 Triad Center, Suite 500, Salt Lake City, Utah; that said deposition was taken pursuant to notice and stipulation and in accordance with the Federal Rules of Civil Procedure.

\* \* \*



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1 truck stop, cafe or it's predecessor -- I know that's gone  
2 through a lot of construction -- was it opened during that  
3 period of time?

4 A Yes, it was.

5 Q And did you personally ever have occasion to  
6 frequent that establishment for coffee breaks or lunch  
7 breaks in your eight month --

8 A In the scope of my duty, yes.

9 Q And in the scope of your duty would be what?

10 A At the time that it was a USX operation it was  
11 the responsibility of one of the roving patrolman to pick  
12 up and distribute lunches throughout the -- mill throughout  
13 the USX employees that were being held over for overtime  
14 and I on numerous occasions have picked up and distributed  
15 lunches.

16 Q Okay. And that would be -- and that was done  
17 either by you or by whoever was involved in the roving --

18 A Correct.

19 Q -- assignment? While you were working at gate  
20 4, ever have an occasion while you were on shift still  
21 booked in and not booked out to personally, not for  
22 overtime people or for -- as in the roving capacity, ever  
23 go to that cafe or its predecessor for a break, coffee  
24 break or lunch break?

25 A It's possible. I don't recall specifically.

1 Let's clarify that also. Are you referencing as a USX  
2 employee or as a Burns employee?

3 Q If they are different answers tell me.

4 A Okay. As a Burns employee I never -- I don't  
5 recall ever working the north gate as a Burns employee. My  
6 time and tenure on that gate would have been as a USX  
7 employee.

8 Q And that is the time where it would have been  
9 possible you could have gone over there, you don't remember  
10 specific?

11 A As a USX employee, yes. There's no  
12 possibilities. I definitely did go over when I was a USX  
13 employee.

14 Q For coffee breaks or lunch breaks?

15 A Picking up lunches and distributing lunches.

16 Q All right. And I understand that question and I  
17 don't need to ask that question again. I'm talking  
18 specifically when you worked gate 4 as a gate person.

19 A I don't recall.

20 Q Are you personally aware, other than on this  
21 instance of this case, as to whether in your experience for  
22 Burns Security as to whether any of your employees have,  
23 while being assigned at gate 4, have utilized that  
24 establishment for a latrine break, coffee break or to pick  
25 up their own individual meal?

**ADDENDUM 4**

**EXCERPTS OF DEPOSITION OF OREON OLSON**





1           Q     So it was not unreasonable to think that the guard  
2 in the car might go get lunch over at the cafe and bring it to  
3 you? Would that be true?

4           A     Well, if the time came, and once in awhile it may  
5 happen, but --

6           Q     Did it happen once in awhile?

7           A     Well, never to me, but I can't answer the others,  
8 but that would --

9           Q     Did you ever see it happen for anybody else at gate  
10 four? That one's tough, isn't it?

11          A     Yeah.

12          Q     That one's tough because it calls for you to  
13 remember a long time back, and also that's a tough one because  
14 that's really the construction of the whole lawsuit, right,  
15 everything here in a nutshell? Do you personally know of  
16 other people going over to the Frontier Cafe to get lunches  
17 for guards at gate four?

18               MR. WILLIAMS: Are you saying for other guards other  
19 than themselves personally?

20          Q     (By Mr. Patton) I'm saying do you know of any  
21 guards going over there for themselves or going over there for  
22 others to get lunches for guards who are working gate four?  
23 Now, you've indicated it never happened for you, and I'm  
24 assuming that's why you're still working there, okay? Because  
25 obviously they're very happy with you, all right? But I want

1 to know if you ever personally saw it happen.

2 A No, because during my time of the shift I had, no,  
3 there was no time that I can recall someone else that I worked  
4 with calling to have anybody go pick them up a lunch.

5 Q Do you ever remember seeing anyone working your  
6 shift run across the street or drive across the street and get  
7 their own?

8 A Well, yes.

9 Q And who was that?

10 A Well, that's when this accident happened, the day  
11 that Gloria went.

12 Q Was there anyone besides Gloria who ever went and  
13 did that? Not you, but did you see anyone else ever do that  
14 besides Gloria?

15 A Well, I know of incidents where some have done it.

16 Q Do you know the names of some of these people who  
17 have done it?

18 A Well, there's only two or three of us that have  
19 worked that gate very long and there's others come and go, and  
20 for three, four years to try and remember their names, I just  
21 don't remember them.

22 Q Do you know if Gloria saw other people doing it?

23 A I can't answer that for her.

24 Q Well, see, I know for a fact that there was that  
25 little communication that came out after the accident that

1 Q Do you consider that to be off your post?

2 A Well, yeah, it would have to be off because it's not  
3 on the premises.

4 Q If anyone went over on their time as a Burns guard,  
5 would you consider that to be on their own time, if they went  
6 over to the cafe to pick up lunch for themselves?

7 A Well, yes, I'd have to say that they would be on  
8 their own time.

9 Q Would you consider that to be their personal errand  
10 for themselves, as opposed --

11 MR. PATTON: Objection, calls for speculation, calls  
12 for a legal conclusion. That's what the issues are all about.

13 MR. WILLIAMS: You can go ahead and answer. You've  
14 answered his questions about legal conclusions.

15 THE WITNESS: Repeat that for me.

16 Q (By Mr. Williams) Would you consider a guard going  
17 over to pick up lunch to be on their own time, personal  
18 errand, as opposed to company business?

19 MR. PATTON: Same objection.

20 THE WITNESS: Well, let me put it this way. It's a  
21 little different than running over to the billing office to go  
22 to the john, but I think that it takes about the same amount  
23 of time. The only difference that I can see is the fact that  
24 the cafe is off the premises.

25 MR. WILLIAMS: Okay. No further questions.

**ADDENDUM 5**

**EXCERPTS OF DEPOSITION OF EUGENE BEZZANT**

IN THE FOURTH JUDICIAL DISTRICT COURT FOR UTAH COUNTY

\* \* \*

[illegible]

EUGENE S. BEZZANT

\* \* \*

That said deposition was taken pursuant to notice.

\* \* \*



1           A     That's correct.

2           Q     Do you know of anyone ever being reprimanded for  
3 doing that?

4           A     No, sir.

5           Q     So even though a supervisor might show up at the  
6 gate and one of the guards has gone up to the Frontier Cafe to  
7 pick up lunch and come back, you know of no one ever being  
8 reprimanded for doing it?

9           A     No, sir.

10          Q     And you know of no one ever being told not to do  
11 that until after Gloria's accident; isn't that true?

12          A     That's correct.

13               MR. PATTON: No further questions.

14                               EXAMINATION

15   BY MR. WILLIAMS:

16          Q     How many times during the time, let's say around  
17 1988, during the year would you personally go up and get any  
18 food at the cafe?

19          A     Oh, just as an estimate, average, once a month.

20          Q     It wasn't a regular practice?

21          A     No, sir.

22          Q     Did you consider yourself on your own personal  
23 errand at the time you'd go and get food, or would you  
24 consider yourself on company time?

25               MR. PATTON: Objection, calls for a legal

1 conclusion.

2 MR. WILLIAMS: Go ahead and answer.

3 THE WITNESS: I was still on company time. I mean I  
4 was being paid for it during that time, yes.

5 Q (By Mr. Williams) Let me ask you this. Company  
6 time is during the time of your job. Do you consider it  
7 something you were doing for the company or something you were  
8 doing for yourself?

9 A Well, something doing for myself, I was getting a  
10 lunch.

11 Q All right. So you consider that a personal errand?

12 A That's correct.

13 MR. WILLIAMS: No further questions.

14 FURTHER EXAMINATION

15 BY MR. PATTON:

16 Q I am going to read to you from the deposition of  
17 Michael Transtrum that was taken April 4, 1990 at 9:00 a.m. by  
18 Mr. Harris, and I believe you were present, counsel. I'm not  
19 sure but I believe you were.

20 MR. WILLIAMS: Probably was.

21 Q (By Mr. Patton) Referring to page 81. Question by  
22 Mr. Harris: "Whether they be relieving themselves or getting  
23 some nourishment, or just a few minutes of quiet time, it is  
24 helpful for the employee?" Answer: "It would be helpful."  
25 To the best of your recollection if the employee is going down



1    their --" and he's meaning security officers -- "break would  
2    be taken in that type of manner so that they can perform their  
3    job adequately, yes." You would agree with his answer; is  
4    that true?

5           A     Correct.

6           Q     And the next question was, "And the fact that they  
7    would get a break would help them perform their job  
8    adequately?" And the answer was, "I would say yes." Would  
9    you agree with that same answer?

10          A     Yes, sir.

11          Q     And the next question was, "It would help everything  
12    from their disposition to how they treat customers and the  
13    clients?" And the answer was, "Yes, they are people and  
14    people do like breaks." To the best of your knowledge that's  
15    still true?

16          A     That's correct.

17          Q     And the next question was, "And there is no question  
18    that there is some benefit to these breaks to Burns Security,  
19    the employer?" And Mr. Transtrum's answer was "Yes."

20               MR. WILLIAMS: I'll just lodge an objection to the  
21    extent that calls for a legal conclusion.

22          Q     Would you agree with Mr. Transtrum's conclusion?

23          A     Yes.

24               MR. PATTON: No further questions.

25          Q     (By Mr. Williams) Following up on my question I

1 asked you before, if you go over to the cafe and get some food  
2 to eat, do you consider yourself on your own time? Excuse me,  
3 let me strike the use of the own time. Do you consider  
4 yourself on a personal errand?

5 A Yes, sir.

6 MR. WILLIAMS: No further questions.

7 Q (By Mr. Patton) But the reason you went to the  
8 Frontier Cafe and not to, say, McDonald's on Center Street in  
9 Orem is because you still wanted to be very close to the  
10 proximity of gate four and be gone the shortest possible time  
11 so you could be back at the gate as soon as possible; isn't  
12 that true?

13 A Well, logistically I would say yes.

14 MR. PATTON: Thank you. No further questions.

15 Q (By Mr. Williams) The cafe is not within the  
16 boundaries of the Geneva Steel plant; is that correct?

17 A No, sir.

18 MR. WILLIAMS: Okay.

19 Q (By Mr. Patton) Mr. Olsen remembers an occasion  
20 when there was a truck/train accident or something that was  
21 off the Geneva premises. Do you remember that accident?

22 A No, sir.

23 Q Do you remember any accidents taking place on the  
24 roadway in front of Geneva or off the premises?

25 A No, sir. I wasn't on duty at the time.