

2003

Honi Thompson and David Thompson v. Jaren L. Nielsen : Reply Brief

Utah Court of Appeals

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ARGUMENT

I. INTRODUCTION

If one steps back and looks objectively at the opposing brief filed by Ray's Gardening, the observation is immediately made that the brief talks all around the issue presented and never squarely addresses the issue. Instead, there is a cry that plaintiffs seek to set aside 80 years of case law and run contrary to everything the appellate courts of Utah have said on the doctrine of *respondeat superior*. A more calm objective view shows that plaintiffs here are asking the Court to refine the law to fit a fact situation that has not yet been presented.

In fact, plaintiffs do not disagree with any of the legal principles stated in the opposing brief. The problem is that the principles appellee relies upon do not apply squarely to what is presented. Refinement of the law occurs by looking at the underlying policies and applying it to the new fact situation. Plaintiffs did that in their principal brief and will briefly show herein why the opposition is not convincing.

II. THIS CASE PRESENTS AN OPPORTUNITY TO REFINE THE LAW

Ray's Gardening argues in its brief that plaintiffs here seek to overturn eighty years of *respondeat superior* doctrine in Utah. In making this bold statement, Ray's Gardening ignores that plaintiffs do not ask this court to change anything about Utah law. Instead, plaintiffs are pointing out to the courts that the situation presents facts not earlier considered by Utah law.

The problem of the reasoning of the Appellee arises from the case law being broader than automobile accident cases generally, and cases in which the vehicle is a form of payment to the employee, specifically. For example, Ray's Gardening cites to the following cases which have a fact basis different from that presented here:

Cannon v. Goodyear Tire & Rubber Co., 508 P. 519 (Utah 1922) – the driver here was operating a vehicle which was not given to him as part of the payment compensation of the employer.

Birkner v. Salt Lake County, 771 P.2d 1053 (Utah 1989) – this was a suit involving a therapist.

Christensen v. Swenson; 874 P.2d 125 (Utah 1994) – this involved a motorcycle accident with a factual issue of whether the guard was within the scope of employment at the time.

Combes v. Montgomery Ward & Co., 228 P.2d 272 (Utah 1951) – this is a slander action.

Wilcox v. Wunderlich, 272 P.2d 207 (Utah 1928) – this case focused on negligent entrustment without compensation.

Lane v. Messer., 731 P.2d 488 (Utah 1986) – this involved a company van not part of a formal compensation to the employee.

Put simply, plaintiffs agree with all of the foregoing case law but points out to the Court that these cases involve actions broader than automobile accidents; and none of the cases involve consideration of when liability attaches when the vehicle at issue is part of the pay package of the employee.

In short, plaintiffs do not ask this Court to reverse anything or modify anything. Instead, the facts presented require the formulation of a new set of guidelines under *respondeat superior* doctrine. As pointed out in the primary brief, the Utah Supreme Court has impliedly recognized this open question of law by reserving for the future the consideration of what the rules will be when the vehicle is provided as compensation. *Ahlstrom v. Salt Lake City, Corp.*, 2003 UT 4, 73 P.3d, 315.

III. APPELLANTS' POLICY ARGUMENTS REMAIN UNREFUTED

An examination of the structure of the argument made by the Appellee shows that a lot of space in the brief is spent reciting rules with which nobody disagrees in talking around the argument made by the Thompsons as to why policy would lead to an attribution of liability under these facts.

The logic of the Thompsons is clear and straight forward. An employer gets a benefit out of the services of each employee. A fundamental principle of capitalism is that the employer, in fact, attempts to maximize the profit off of each employee, or else there is no logical reason to have a particular employee. Ray's Gardening made an obvious economic decision that the services of Jaren Nielsen would be profitable if they gave him a salary and other benefits, including unlimited use of a company-owned vehicle. Ray's Gardening made a business decision to put the

vehicle on the road and thereby derive a profit from its operation under all circumstance by employee Nielsen.

The business decision to place a vehicle on the road in exchange for the profit received from the efforts of the employee operating that vehicle justifies allocation of the risk to the employer. As explained in the primary brief, the law has long accepted that allocation of risk to employers is part of the public policy of the law and the only question is when should it be done.

Ray's Gardening pushes the concept to the absurd by suggesting that an employer who pays cash to an employee who buys a vehicle would thereby be derivatively liable for the employee's driving. The line of liability does not go that far because the employer is not making an economic decision to buy the vehicle, to own the vehicle, to insure the vehicle, or to retain the power to take it back at any time. The traditional test for scope of employment would be appropriate in those circumstances.

The Thompsons cite to Restatement (Second) of Torts, Section 317 (1965) to show this Court that the concept being advanced is actually well-accepted in the law but just has not been applied to these particular circumstances. That is, § 317 contemplates and states, as the general summary of the law of the land, that a master may be responsible where a servant is using a chattel of the master. Section

317 is not exactly on point for the automobile case presented here but, standing alone, presents factual issues for consideration of whether Ray's Gardening knew or should have known about problems in giving a vehicle to Jaren Nielsen to use.

Probably an extraordinarily significant point which the Appellee misses entirely is that this set of factual circumstances doesn't fit the so-called 80 years of case law because those cases focused almost entirely on the conduct of the employee. What the Thompsons present here is a question that is resolved by looking at the conduct of the employer. That is, Ray's Gardening becomes responsible for the driving of Nielsen not because Nielsen may be in the scope of his employment, but because Ray's Gardening made a conscious business decision to promote its profitability by putting a vehicle on the road, in the hands of Nielsen, with unrestricted use.

The other side of the analytical coin is that a ruling along the lines argued by Ray's Gardening - - that one simply apply the standard, scope-of-employment test to determine liability, invites employers to provide vehicles to persons who meet the minimum standard of having a driver's license without regard to any risk, unless the accident occurs within the scope of employment. The scope of employment risk is such that it does not matter who owns or provides the vehicle. In economic language, such a rule shifts risk of loss to the employee while the employer profits for using the vehicle as compensation.

That the risk of loss has shifted to an employee is not merely hypothetical. That shift has occurred in this litigation. Ray's Gardening provides the truck to Jaren Nielsen because it brings Ray's Gardening profit. Nielsen gets into an accident and his own counsel, who jointly represents Nielsen and Ray's Gardening, are making arguments that Nielsen has whatever responsibility exists for the accident. This shift in loss allocation to Nielsen is not consistent with the public policies discussed in the primary brief. Nielsen takes the risk of loss and thereby protects the profits of Ray's Gardening and the policy that risk may be shifted to an employer to assure plaintiffs have a remedy, is ignored.

CONCLUSION

There is no case law exactly on point found in any jurisdiction concerning the allocation of liability when the employer provides the vehicle as part of the compensation package. However, the Thompsons do not claim that this court needs to reverse any prior case law. The Thompsons do claim that the prior case law does not apply exactly to the fact situation here, and that a new rule needs to be drawn consistent with the public policies of allocating risk.

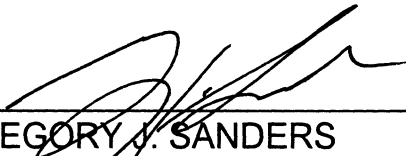
The new rule needs to be that an employer that provides a vehicle as part of the compensation package of the employee is derivatively responsible for the liability of that employee. Perhaps, as an afterthought, it is unnecessary even to call it

respondeat superior in these circumstances so as to avoid confusion with the scope of employment issues. However, the rule consistent with the public policy is to allocate the loss to the person who anticipated receiving the profits from the use of the vehicle.

This Court should reverse the district court and remand the case with Ray's Gardening as an active defendant at trial.

DATED this 8th day of June, 2004.

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CERTIFICATE OF MAILING

The undersigned hereby certifies that on the 8th day of June, 2004, two true and correct copies of the foregoing **REPLY BRIEF OF APPELLANTS** was mailed, first class, postage pre-paid to the following:

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