

2006

Kenneth D. Newman v. White Water Whirlpool and Bradley J. Sundquist : Reply Brief

Utah Court of Appeals

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KENNETH D. NEWMAN,

Plaintiff and Appellant,

VS.

Case No. 20061001-CA

WHITE WATER WHIRLPOOL and
BRADLEY J. SUNDQUIST,

Defendants and Appellees.

APPEAL FROM A GRANT OF SUMMARY JUDGMENT
THE HON. LESLIE A. LEWIS
THIRD JUDICIAL DISTRICT COURT
IN AND FOR SALT LAKE COUNTY, STATE OF UTAH

REPLY BRIEF OF APPELLANT

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IN THE UTAH COURT OF APPEALS

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ARGUMENT

I. THE COMING AND GOING RULE ANALYSIS WEIGHS IN FAVOR OF FINDING SUNDQUIST WITHIN THE COURSE AND SCOPE OF HIS EMPLOYMENT AT THE TIME OF THE ACCIDENT

Appellee White Water asserts on appeal that Sundquist was not acting within the course and scope of his employment at the time of the accident because he was merely traveling from home to work.¹ Relying on the coming and going rule, White Water argues that the personal nature of Sundquist's trip outweighs any benefit White Water derived from the trip or any control it exercised over Sundquist's travel. Because White Water acknowledges that it stood to benefit from the trip—although it does attempt to minimize the benefits it derived from the trip—it appears that the parties essentially agree that whether the coming and going rule applies in this case turns on the correct weighing of the benefits to White Water from the trip and the control it had over the trip versus any personal benefit the trip had for Sundquist. See Ahlstrom v. Salt Lake City Corp., 2002 UT 4, ¶ 9, 73 P.3d 315 (2003) (“[W]here the employee engages in conduct benefitting the employer or which is controlled by the employer, we weigh the benefit and control against the personal nature of the trip in order to determine where it is appropriate to place liability.”).

Appellant Newman does take issue in several respects, however, with White

¹White Water does not take issue with the analysis in Newman's opening brief of the facts of this case under the Birkner criteria for determining whether an employee's actions fall within the course and scope of his employment. See generally Birkner v. Salt Lake County, 771 P.2d 1053 (Utah 1989).

Water's benefits analysis and its argument that the personal nature of the Sundquist's trip to White Water's offices outweighs any benefit to White Water or any control White Water exercised over Sundquist's conduct. First, in analyzing who was benefitting from Sundquist's trip to White Water the day of the accident, White Water has incorrectly included on the scale the personal benefits Sundquist derived from being able to travel directly home from the job-site at the end of the work day instead of being required to return the materials to White Water before going home. Any personal benefit Sundquist gained from his return trip home the night before the accident has no bearing on who was benefitting from his trip to White Water the next day when the accident occurred. The benefits of the his trip home the night before would only properly come into play as a personal benefit if the accident had occurred while Sundquist was traveling to his home from the job site and the issue to be decided was whether the trip to his home fell within the course and scope of his employment. With the accident here occurring the following day during the trip from his home to White Water's offices and the issue being whether Sundquist was in the course and scope of his employment at the time of that particular trip, the only benefits that should be considered in the analysis are those that either party was deriving from that day's travel at the time of the accident and not the benefits from any other trip not at issue.

Newman also takes issue with White Water's attempts to minimize the benefit it was receiving from Sundquist's trip the day of the accident by arguing that Sundquist

simply could have returned the materials the night before and that his job responsibilities did not include transporting the materials to and from his home. White Water does not explain how the fact that the materials could have been returned the night before or the fact that White Water allowed Sundquist the leeway of keeping materials with him overnight at his home and returning them the next day would somehow eliminate or lessen the benefit that White Water nevertheless gained from having Sundquist return the materials to headquarters. Just because Sundquist's responsibilities did not technically include transporting materials to and from his home does not mean that once the materials are nevertheless transported to White Water that White Water would not benefit from their return. It is clear that White Water needed to have the materials returned for later use and that if Sundquist did not transport them back to headquarters, White Water would have had to send some other employee to retrieve them.

White Water's argument also overlooks the fact that White Water sanctioned, or at least tacitly approved, Sundquist's practice of returning home with materials following work on a job rather than requiring him to return the products the same evening. White Water cannot simply hide behind the fact that it was aware of Sundquist's—and other installer's—practice of taking materials home and then returning with them to work the next day and claim that it had no control over the actions or that it did not nevertheless benefit from the return of its products. The Utah Supreme Court has indicated Christensen v. Swenson, 874 P.2d 125 (Utah 1994), that it is possible for an employer to

tactically sanction or approve employee conduct that would normally fall outside of the employer's business or be an employee's personal endeavor and have exposure to vicarious liability for the conduct. Id. at 128.

In Christensen, the employer was aware that its employees would occasionally travel to a restaurant across the street from the workplace during unscheduled breaks to get food, but the employer had never disciplined the employees for their conduct nor had it sought to put an end to the practice. Id. In analyzing the Birkner criteria, the Christensen Court found that there was a question for the jury whether the employer had tacitly sanctioned or at least contemplated the practice so as to not be able to hide behind the practice and argue that an employee was on a personal endeavor or outside the scope of the employer's business when an employee was involved in an accident while making the trip to the restaurant. Id.

The Court's analysis in Christensen is instructive in this case, as it is clear that White Water was aware of Sundquist's practice of returning home from a job site with unused materials that he would transport to White Water the next day and that the practice was not exclusive to Sundquist. White Water had therefore tactically approved or had, at least, not taken any affirmative steps to put an end to.² It follows in this case, then, that

²In his deposition testimony, Mr. Kirk Williamson of White Water was asked "if it's typical for installers to keep materials in their trucks or trailers overnight at their home" and if Sundquist's practice for going home directly from a job site and not go back to White Water until the next morning was typical of installers at the company. Mr. Williamson answered that it "probably happens" and that practice "would be typical." (Deposition of Mr. Williamson pg. 28, lines 20-23, pg. 29 lines 2-7).

White Water should not be allowed to hide behind the coming and going rule and call Sundquist's trip the day of the accident a mere commute to work because it exercised no control over Sundquist's trip and because the materials could have been returned the night before, when White Water had not required Sundquist to return the products the night before and allowed him the option of returning them the next day.

Indeed, it is clear that had Sundquist been required to return the products the night before and had the accident occurred, he would have clearly have remained in the course and scope of his employment for that return trip. The same would likely be true had White Water allowed Sundquist to return to the job site the next morning to retrieve the unused materials and then make the same trip to White Water, even though Sundquist may have been required to also report to work. The fact that White Water allowed Sundquist the courtesy of returning home with its materials with the understanding he would return them the next day should not be used to alleviate the company from any liability it would normally have been exposed to had they not allowed the practice. The fact that the products had been to Sundquist's home does not minimize the fact that White Water was to benefit from their return during Sundquist's return trip when the accident occurred.

II. THE DUAL PURPOSE RULE PREVENTS APPLICATION OF THE COMING AND GOING RULE

The foregoing analysis makes it clear that White Water stood to benefit from having Sundquist return its materials at the time of the accident. As such, it is clear that

the dual purpose exception to the coming and going rule comes into play, requiring an inquiry into the predominant purpose of Sundquist's trip. See Ahlstrom, 2002 UT at ¶14 (“If an employee's personal conduct benefits an employer, we have implied that the employer may be held liable where the predominant purpose of the conduct was not personal.”).

Despite White Water's arguments to the contrary, the fact that Sundquist was returning materials from the previous day's job to White Water while also traveling to work to receive new assignments did not just pose a tangential benefit to White Water. To determine “whether business was the predominant purpose for the trip,” the Utah Supreme Court has stated that “[t]he inquiry 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. White Water again attempts to cloud the inquiry by asserting that the fact that Sundquist had taken the materials home to be returned the next day—and the fact that his job duties did not include transporting materials to his home—somehow eliminates White Water's need to nevertheless have the products returned. The fact still remains, however, that if Sundquist did not return the materials when he did, White Water would have been required to send someone else to retrieve the same materials and travel the same route that Sundquist was traveling at the time of the accident.

Moreover, as pointed out above, the fact that White Water allowed Sundquist to take the materials home before returning them, instead of insisting that they be returned at the end of the work day, prohibits White Water from arguing that Sundquist's trip starting at his home somehow changes the benefit that White Water stood to gain from having the materials transported the day of the accident. White Water, at a minimum, tacitly approved Sundquist's practice of taking materials from a job site to his home for delivery the next day, and, as such, White Water should not be allowed to now hide behind the "coming and going rule" and thwart liability when it still stood to benefit from the return of the materials, having essentially approved the practice that gave Sundquist's daily trip to White Water a dual purpose.

It remains undisputed that at the time of the accident, Sundquist was transporting materials that needed to be returned to White Water, alleviating any need for White Water to send someone else to retrieve the items, thereby establishing that the predominant purpose of the trip was White Water's business. According to the dual purpose exception, then, the coming and going rule should not be applied.

III. APPLICABILITY OF PERSONAL DETOUR

While White Water argues that the personal detour or personal errand rule is inapplicable to this case, nothing in Utah law dictates that the principle behind the rule should not be applied in this case. The principle behind the rule is that an employer may not be held liable for an employee's conduct if that employee makes a personal detour or

errand and an accident occurs while the employee is on that detour or errand. See, e.g., Clover v. Snowbird Ski Resort, 808 P.2d 1037 (Utah 1991). Utah cases have also recognized, however, that liability reattaches when the employee resumes his employment after the detour or errand. Id.

White Water essentially argues that due to the overnight duration of Sundquist's deviation from carrying White Water's materials from the job-site to its offices according to his job duties, liability should not reattach when he is back en route to White Water. The duration of the detour or personal errand does not necessarily determine whether liability reattaches once the detour has ended. The inquiry "[i]n situations where accidents have occurred substantially within the normal spatial boundaries of employment," as in this case, instead focuses on whether the employee has "return[ed] to their duties and an accident occurs." Id. at 1042. No case has otherwise placed explicit time limits on the duration of personal errands or detours.

Here, at the time of the accident, Sundquist had returned to his duty from the previous day's job to return unused materials to White Water's offices at the time of the accident. His stopover at home with the materials in his possession was a personal detour—allowed by White Water—which ended once he began his return trip to White Water.³

³ The personal detour rule would only preserve White Water from liability in this case had the accident occurred while Sundquist was traveling to his home the night before. In that instance, Sundquist's travel would be considered a personal detour or errand during which White Water would not be liable for his actions. Once Sundquist left his home and returned to the route

IV. ANDERSON

Newman has not argued that Anderson v. Gobe, 501 P.2d 453 (Ariz. Ct. App. 1972) is controlling in this case, but nevertheless insists that it is persuasive and instructive in the present matter. White Water attempts to distinguish the case by asserting that the employee in Anderson was asked to perform an activity that was different from his other activities as an employee and that he was thus on a special errand. The facts set forth in Anderson do not clearly indicate, however, that the employee's actions were at all different from what his job normally required. Instead, all that is found in the facts cited is that the employee "was employed as a handyman and delivery man for appellee" and that for a particular job he was charged with the transportation and safekeeping of an air compressor needed on the job. Id. at 457. What is more, the Arizona court did not analyze the case as a special errand situation but as a dual purpose scenario where "the work of the employee create[d] the necessity for travel . . . , though he [was] serving at the same time some purpose of his own." Id. at 457-458.

Consequently, Anderson is not as readily distinguishable on its facts as White Water suggests and instead offers an insightful example of how the issue before this Court has been approached in other jurisdictions; it should be considered in Newman's argument accordingly.

he would have been required to travel to return the materials the night before—had White Water insisted on their return rather than allowing him to carry them home first—Sundquist returned to his duties, ending the detour and once again attaching liability to White Water for his actions.

V. Applicability of AHLSTROM

In addressing Newman's analysis of the applicability of the Ahlstrom case, White Water asserts that there is no factual support in the record for the assertion that Sundquist was being paid to transport White Water's materials. White Water asserts that Sundquist instead was merely paid for the installation of White Water's materials, receiving a percentage of each job he worked on only for installation and not hauling the product installed to and from the job site. It is nevertheless undisputed that Sundquist's job responsibilities specifically included transporting White Water's products to and from job sites, (R.60, ¶¶ 2 and 3), and that he was paid a percentage of each job he worked on.

Given the undisputed facts—when viewed in the light most favorable to Newman and all the reasonable inferences to be drawn therefrom—it goes without saying that included in the percentage of pay Sundquist received for the installation of White Water's products was remuneration for transporting the products to the job site. While true, as White Water points out, that without actual installation there would be no payment, it is also true that without transportation of the materials there would be no installation. And as Sundquist was required to haul materials to the job site and install them and then return any unused products to White Water, it would certainly theoretically not be unthinkable for White Water to withhold Sundquist's percentage of any job he worked on where he did not transport unused materials back to White Water from a job-site, at least until such items were returned, as it was clearly part of his job duties to do so..

As such, Sundquist's job duties and the payment he received for fulfilling his duties cannot be separated into finite categories with the payment he received attached solely to one category of job duty over the other. According to his employment arrangement with White Water, Sundquist could not selectively fulfill some of this job duties and still complete the projects as assigned; his pay was accordingly rendered for all of his job duties and not merely limited to installation.

In addition, the analysis of the Ahlstrom case in Newman's opening brief does not draw a distinction between the size of the items Sundquist was carrying versus those the officer was carrying in Ahlstrom, as White Water argues. As argued, Newman's analysis focuses on the distinction that Sundquist did not just "happen" to be carrying with him tools or materials related to his job while commuting to or from work, like the officer in Ahlstrom, but he was deliberately transporting White Water products from the job-site to White Water's offices as required by his job. Ahlstrom is further distinguishable as it deals with the liability of cities for commuting accidents of police officers using city cars where the trip poses no benefits to the police department itself. Ahlstrom, 2002 UT 4 at ¶13. Indeed, the off-duty officer in Ahlstrom was traveling home from a required meeting, a trip that presented no obvious benefit to the police department. Id. at ¶¶ 2, 15.

Here, however, there is a clear benefit to White Water from Sundquist's trip at the time of the accident, distinguishing the present matter from the Ahlstrom case.

VI. AT A MINIMUM THERE IS AN ISSUE OF FACT FOR THE JURY/REASONABLE MINDS COULD DIFFER.

White Water's final argument asserts—as the trial court held—that no reasonable mind could find that Sundquist was in the course and scope of his employment and that the question of whether Sundquist was acting within the scope of his employment was properly taken from the jury by summary judgment. Given the facts of the case, though, reasonable minds could certainly differ as to whether at the time of the accident Sundquist was involved wholly or partly in the performance of White Water's business and whether the predominant purpose of his trip benefitted White Water and outweighed any personal benefit to Sundquist. The scope of employment question should not therefore have been taken from the jury on summary judgment.

Utah case law is clear that the inquiry into “[w]hether an employee is acting within the scope of her employment is ordinarily a question of fact.” *Id.* Thus, “[t]he question must be submitted to the jury ““whenever reasonable minds may differ as to whether the [employee] was at a certain time involved wholly or partly in the performance of [the employer's] business or within the scope of employment.’ ” *Id.* (quoting Carter v. Bessey, 97 Utah 427, 432, 93 P.2d 490, 493 (1939)). Consequently, it is only in the clearest of circumstances that an “employee's activity is so clearly within or outside the scope of employment that reasonable minds cannot differ, the court may decide the issue as a matter of law.” *Id.*; Birkner v. Salt Lake County, 771 P.2d 1053, 1057 (Utah 1989); Christensen v. Swenson, 874 P.2d 125, 127 (Utah 1994). For example, an employee's

conduct amounting to assault and battery is conduct that is so clearly outside the scope of employment that a trial court could decide the issue as a matter of law. See, e.g., D.D.Z. v. Molerway Freight Lines, Inc., 880 P.2d 1, 5 (Utah Ct. App. 1994). Otherwise, the question is properly one for the jury to decide.

At a minimum, this case presents a situation where reasonable minds could clearly differ as to whether Sundquist was within the course and scope of his employment at the time of the accident. Summary judgment was incorrectly granted and should be reversed.


CONCLUSION

Sundquist was in the course and scope of his employment at the time of the accident. Consequently, Newman's motion for summary judgment on the issue should have been granted. Newman respectfully requests that this court accordingly reverse the trial court's ruling and enter summary judgment in his favor on the issue.

At a minimum, the issue of whether Sundquist was within the course and scope of his employment should have been left for the jury to decide as reasonable minds could differ on the issue. In no event should the trial court have ruled, as a matter of law, that Sundquist was not in the course and scope of his employment.

RESPECTFULLY SUBMITTED this 22nd day of May 2007.

MORGAN, MINNOCK, RICE & JAMES, L.C.

A handwritten signature in black ink, appearing to read "Paul C. Farr", written over a horizontal line.

Paul C. Farr

Attorneys for Plaintiff/Appellant

CERTIFICATE OF MAILING

I hereby certify that on this 23rd day of May 2007, I caused a true and correct copy of the foregoing **REPLY BRIEF OF APPELLANT**, to be mailed via first-class mail, postage prepaid, to the following individuals:

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