

2006

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

Utah Court of Appeals

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IN THE UTAH COURT OF APPEALS

KENNETH D. NEWMAN,

Plaintiff/Appellant,

Appellate Case No. 20061001-CA

vs.

WHITE WATER WHIRLPOOL and
BRADLEY J. SUNDQUIST,

District Court No. 050911477

Defendants/Appellee.

BRIEF OF APPELLEE

APPEAL FROM THE THIRD DISTRICT COURT OF SALT LAKE COUNTY
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LIST OF PARTIES TO THE PROCEEDINGS

1. Plaintiff/Appellant Kenneth D. Newman (hereinafter “Newman”).
2. Defendant/Appellee White Water Whirlpool (hereinafter “White Water”).
3. Defendant Bradley J. Sundquist (hereinafter “Sundquist”) was a party to the underlying proceeding, but is not a party to this appeal.

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STATEMENT OF JURISDICTION

This matter comes within the jurisdiction of the Court of Appeals pursuant to Utah Code Ann. § 78-2a-3(2)(j) (2001).

STATEMENT OF THE ISSUES

Pursuant to Rule 24(b)(1) of the Utah Rules of Appellate Procedure, White Water does not include a Statement of the Issues because it is satisfied with Newman's statement, with the following addition regarding the Standard of Review: "[W]hen the 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." Christensen v. Swenson, 874 P.2d 125, 127 (Utah 1994).

DETERMINATIVE STATUTES AND RULES

There are no determinative statutes or rules. The issues raised in this appeal are governed by case law.

STATEMENT OF THE CASE

Pursuant to Rule 24(b)(1) of the Utah Rules of Appellate Procedure, White Water does not include a Statement of the Case because it is satisfied with Newman's statement, with the following exceptions to Newman's Statement of Facts:

- (1) The recitation of Newman's disability and medical expenses is not only unsupported by appropriate citation to the record, it is irrelevant to the issues on appeal.

- (2) Sundquist did not receive a percentage of each job “he worked on.” He received a percentage of each job that he “installed.” (R. 61, ¶ 10; 78; 80, lines 7-16.)
- (3) There is no citation to the record in support of Newman’s “fact” that Sundquist was compensated for transporting products, nor is there any basis in the record for this assertion.
- (4) Sundquist was not hauling White Water’s products from a “job site.” Sundquist was hauling products from his home at the time of the accident. (R. 98, ¶ 11; 110; 121, lines 23-25; 122, lines 1-25.)

In addition to the facts not excepted set forth in Newman’s Statement of Facts, White Water adds the following Statement of the Facts:

Sundquist was required to go to White Water’s offices every day. (R. 99, ¶ 19; 110; 111, lines 9-11.) Once at White Water’s office, Sundquist picked up his assignments for the day, completed paperwork, loaded materials for that day’s work, and headed out to his various assignments. (R. 99, ¶¶ 20-21; 110; 111, lines 14-20.) He did not know at which job site he would work on a particular day until he went to White Water’s offices in the morning to receive his assignments. (R. 100, ¶ 33; 110; 123, lines 15-25; 128, lines 12-14.) At the time of the accident, Sundquist was driving a truck that he owned and that he insured. (R. 99, ¶¶ 22, 25; 110; 111, lines 21-25; 112, lines 1-10.) Sundquist owned the trailer he was pulling. (R. 101, ¶ 40; 133; 135, lines 15-17.) Other installers were

able to do their work without the use of a trailer, which was not required as part of Sundquist's employment. (R. 97, ¶ 7; 110; 128, lines 7-11; 133, 136, lines 2-8.) Sundquist owned his own tools and hauled them in his trailer. (R. 99, ¶¶ 28, 31; 110; 117, lines 14-22; 120, lines 21-23.) Sundquist commonly had materials in his trailer when he went home in the evening, and White Water was aware of this activity. (R. 100, ¶¶ 34, 39; 110; 124, lines 11-17; 139; 141, lines 20-23.) At the end of the work day, Sundquist never returned to White Water's offices; he always went home after his last job. (R. 100, ¶ 37; 110; 129, lines 22-25; 130, lines 1-9.)

SUMMARY OF THE ARGUMENT

At the time of the accident, Sundquist was commuting from home to work. His trip was personal in nature. The personal benefits to Sundquist heavily outweigh the mere benefit to, and lack of control by, White Water. As such, Sundquist was not in the course and scope of his employment per the coming and going rule and White Water cannot be vicariously liable for his negligence. The trial court was correct in granting summary judgment to White Water pursuant to the coming and going rule and its decision should be affirmed.

No exception to the coming and going rule changes the outcome. There was no dual purpose involved, as Sundquist's primary motivation for the trip was to get to work as required to receive the day's assignments and materials. There was no personal detour

or errand, as Sundquist went home at the end of the day and was not on a temporary or slight deviation.

Newman's reliance upon Anderson is misplaced. Anderson v. Gobe, 501 P.2d 453, 457 (Ariz. App. 1972). Not only is this case from the Arizona Court of Appeals, but it is factually different from what we have here because the employer asked the employee to conduct a special errand, during which an accident occurred. On the other hand, White Water's reliance upon Ahlstrom is appropriate. Ahlstrom v. Salt Lake City Corp., 2002 UT 4, 73 P.3d 315. It is the Utah Supreme Court case most on point. It sets forth the analysis of the coming and going rule under factual circumstances similar to those found here and holds that the coming and going rule applies. The fact that a later decision allowed the employee to collect workers' compensation benefits resulting from the same accident does not make Ahlstrom "precarious." Third party negligence cases are decided under a different standard of review than workers' compensation cases.

Sundquist's commute is so outside the course and scope of his employment pursuant to the coming and going rule that reasonable minds could not differ. As such, it was appropriate for the trial court to grant White Water's motion for summary judgment as a matter of law and dismiss Newman's action against it. The trial court's decision should be affirmed.

ARGUMENT

I. THE COMING AND GOING RULE ESTABLISHES THAT SUNDQUIST WAS NOT IN THE COURSE AND SCOPE OF HIS EMPLOYMENT AT THE TIME OF THE ACCIDENT.

It is undisputed that Sundquist was commuting from his home to his work at the time of the accident. He was traveling to the offices of his employer, White Water, in his own vehicle pulling his own trailer. Sundquist was required to check in each work day at White Water's offices to, among other things, pick up his assignments and materials for that day's work. Sundquist was doing what he did every work day: travel in his own vehicle to his place of employment. As such, he falls within the coming and going rule and was not in the course and scope of his employment at the time of the accident.

Under the doctrine of *respondeat superior*, an employer can be held vicariously liable for the acts of its employee only if the employee was in the course and scope of his employment at the time of the act. Christensen, 874 P.2d at 127; Whitehead v. Variable Annuity Life Ins. Co., 801 P.2d 934, 935 (Utah 1989). Generally, there are three criteria used to determine if an employee is in the course and scope of his employment. Birkner v. Salt Lake County, 771 P.2d 1053, 1056 (Utah 1989). The criteria are: (1) "an employee's conduct must be of the general kind the employee is employed to perform;" (2) "the employee's conduct must occur within the hours of the employee's work and the ordinary spatial boundaries of the employment;" and (3) "the employee's conduct must be motivated, at least in part, by the purpose of serving the employer's interest." Id. at 1057.

However, when an employee is traveling to or from work, he is generally not considered to be in the course and scope of his employment. “As a general rule, an employee is not acting within the course and scope of his employment when he is traveling in his own automobile to and from work.” Whitehead, 801 P.2d at 935 (citations omitted). This is known as the coming and going rule and it is applicable in third party negligence claims like the lawsuit here. Id. at 936, 938.

The rationale for the coming and going rule is sound.

The major premise of the “going and coming” rule is that it is unfair to impose unlimited liability on an employer for conduct of its employees over which it has no control and from which it derives no benefit.

Whitehead, 801 P.2d at 937. “Therefore, the major focus in determining whether or not the general rule should apply in a given case is on the benefit the employer receives and his control over the conduct.” Id. This is the focus because an employer is liable for its employee’s negligence only if the employee is acting for the benefit of the employer and under the employer’s control. Id. Where an employer has no control over the employee’s decision to commute to and from work, the route chosen, or the manner in which the employee drives his vehicle, the employer is not liable for the employee’s negligence. Id.

The Utah Supreme Court case most on point is Ahlstrom. In that case, a police officer was involved in an accident while driving a city-owned marked police car from a mandatory work meeting to her home. Ahlstrom v. Salt Lake City Corp., 2002 UT 4, ¶ 2, 73 P.3d 315. At the time of the accident, the officer was carrying certain items owned by

her employer. Id. She was required to monitor her employer's radio and respond to any emergency calls. Id. The Utah Supreme Court reversed the trial court's grant of summary judgment to the injured plaintiffs, and in doing so held that, absent "unique circumstances," liability should not attach to an employer for the negligent acts of its employee when traveling to or from work, in accordance with the coming and going rule. Id. at ¶ 13.

In order to properly analyze the applicability of the coming and going rule, one must weigh the benefit to and control by the employer against the personal nature of the employee's trip to or from work.

[W]here an 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.

Ahlstrom, 2002 UT 4 at ¶ 9.

Typically, courts have adopted the methodology of dissecting the circumstances of the trip that resulted in the injury, assaying each for indicia of benefit, assigning the element of benefit to either the employer or the employee, and tallying up the final allocation of benefits.

Salt Lake City Corp. v. Labor Commission, 2007 UT 4, ¶ 20, 153 P.3d 179. If the benefits to the employer from the employee's trip to or from work are insufficient to "tip the balance" of benefits to the side of the employer, the coming and going rule applies and the employee is not in the course and scope of employment. Id. at ¶ 21. In weighing the benefits, one must keep in mind that a "mere benefit" to the employer, or the exercise of "some control" "is not enough to overcome the general premises of the coming and

going rule.” Ahlstrom, 2002 UT 4 at ¶ 8. Liability to the employer will not attach simply because “the employer derives *any* benefit or exercises *any* control over the conduct” Id. at ¶ 9.

The personal nature of Sundquist’s commute to work outweighs any mere benefit to White Water and the lack of control it exercised over Sundquist’s conduct on the morning of the accident. Sundquist’s travel was personal in nature and for his own personal benefit. In order to maintain his employment, he had to travel to and arrive at work. He had to do so to receive his assignments and materials so that he could install the products and receive payment on the installations. He was traveling in his own vehicle, which he insured, and was pulling his own trailer. Simply arriving at work is not a substantial benefit to an employer. Van Leeuwen v. Industrial Commission of Utah, 901 P.2d 281, 285 (Utah App. 1995). It is personal in nature and benefits the employee.

In addition, the fact that Sundquist was able to travel with his employer’s unused materials in his trailer, along with his own tools, to his home at the end of the work day, instead of being required to return them that same day before returning home, is to the benefit of Sundquist, not White Water. He was able to get home earlier, with the obvious benefits associated therewith. It was common for Sundquist to take advantage of this opportunity, and to then return White Water’s items when he traveled to work, as he was required to do every work day anyway. He was not a paid delivery driver, as suggested by Newman. Sundquist’s job was to install White Water’s products, and that is what he

was paid to do. His responsibilities did include transporting White Water's materials to and from job sites - so that he could install them. His responsibilities did not include transporting those materials to and from his home.

In comparison, there is minimal benefit to White Water found in Sundquist's commute to work on the morning of the accident, and there is a complete lack of control over his conduct. The mere benefit to White Water is the return of its unused products and materials, which could have been done the night before. In addition, there is no evidence that White Water controlled any aspect of Sundquist's travel. It did not dictate Sundquist's route or how he drove. White Water did not choose the time for Sundquist's departure from home or whether or not he made any stops before arriving at work. Any argument that because Sundquist drove a truck and pulled a trailer to transport the materials shows White Water's control over his activities is misplaced. Sundquist could have chosen any number of means of transport. He was not required to use a trailer. White Water did not dictate the means of transport chosen and owned by Sundquist. In any event, when weighing the benefits the focus is on the particular trip involving the accident. Ahlstrom, 2002 UT 4 at ¶ 9; Salt Lake City Corp., 2007 UT 4 at ¶ 20. White Water did not control Sundquist's conduct on any particular trip to or from work, including the one at issue.

Also, Newman's suggestion that Sundquist would not have been traveling south on I-15 in his own vehicle if not for the fact that he was hauling White Water's products is

simply incorrect. Whether or not he had already returned the products the night before, he still had to travel the same route on I-15 to report to work as required.

If carrying items belonging to your employer was all that it took to get outside the coming and going rule, employers would be open to the unlimited liability against which the rule is designed to protect. Whitehead, 801 P.2d at 937. A school teacher grading papers at home at night and returning them the next morning would expose her employer to liability if she is in an accident. A plumber unable to install a sink before the end of the day might create vicarious liability for his employer if he goes straight home for dinner with the sink in his truck and then gets in an accident on the way back to the shop the next day. So it is here. Sundquist was merely traveling to work with some of his employer's products in his trailer. There is nothing unique about his circumstances.

The personal nature of Sundquist's trip is not outweighed by the one fact that he was carrying some of his employer's products during his commute to work. In Ahlstrom, it was not enough to overcome the coming and going rule that the police officer traveled in a city-owned vehicle, carried numerous items owned by the city, and was required to use the vehicle and items off-duty if called upon. There is even less here in support of any argument against the application of the coming and going rule. "The conclusion that liability should not attach unless there are unique circumstances is in accord with the stated purposes of the coming and going rule" Ahlstrom, 2002 UT 4 at ¶ 13. After

weighing and tallying the benefits, the scale tips heavily toward Sundquist. As a result, the coming and going rule applies.

Therefore, because Sundquist was simply commuting to work in his own vehicle, he falls within the coming and going rule. As such, he was not in the course and scope of his employment at the time of the accident and the trial court's grant of summary judgment to White Water was proper and should be affirmed.

II. THE DUAL PURPOSE RULE IS NOT APPLICABLE.

Newman argues that, even if Sundquist was not in the course and scope of his employment pursuant to the coming and going rule, White Water should still be vicariously liable for his conduct under the dual purpose rule. The rule is not applicable, however, because Sundquist's purpose was primarily to benefit himself by getting to work to start another work day.

The dual purpose rule is an exception to the coming and going rule. Ahlstrom, 2002 UT 4 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.

Id.

However, if the primary motivation for the employee's 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 v. Snowbird Ski Resort, 808 P.2d 1037, 1041 (Utah 1991) (quoting Whitehead, 801 P.2d at 937 (quoting Martinson v. W-M Insurance Agency, Inc., 606 P.2d 256, 258 (Utah 1980))). If an employee's trip to or from work is not predominantly motivated to benefit the employer, the dual purpose rule does not apply. Ahlstrom, 2002 UT 4 at ¶ 15. If the benefits to the employer are only tangential to the employee's purpose of commuting to or from work, the dual purpose rule is inapplicable. Id. "Such tangential benefits are not enough to result in respondeat superior liability for the [employer] under the dual purpose exception to the coming and going rule." Id.

As set forth above in detail, Sundquist's predominant motivation for his commute was to get to work as required. That he carried with him some of White Water's materials is only a tangential benefit to White Water, but a substantial benefit to Sundquist. Newman's suggestion that there is no evidence that Sundquist's primary motivation was traveling to work, as opposed to transporting the materials, is inaccurate. Sundquist testified that he had to go to White Water's offices every work day to obtain his assignments and pick up his materials for that day. He also had to complete paperwork. The primary motivation for the trip was to report to work and receive the day's assignments, not to transport materials.

Newman also relies upon a test set forth in Whitehead in support of his argument for the applicability of the dual purpose exception to the coming and going rule.

One useful test is whether the trip is one which would have required the employer to send another employee over the same route or to perform the same function if the trip had not been made.

Whitehead, 801 P.2d at 937. However, Newman's reliance assumes that one of Sundquist's job duties was to transport White Water's products to and from his home. This was not one of his job duties. Instead, his duties included transporting the items to and from job sites for installation. Sundquist should not be able to create a dual purpose exception by taking materials home for his convenience when such conduct is outside the scope of his job duties. The fact that Sundquist took the products home to be returned the next day since he was going into work anyway "did not turn his daily commute into a trip primarily motivated by a business purpose, nor would [White Water] have needed to send someone else over the same route to accomplish any of its purposes." Id. White Water did not need the materials at Sundquist's home, nor did it request him to bring the items to his home. Sundquist could have simply returned the products to White Water's offices the night before, and then returned home for the evening. Id. It was merely incidental to White Water, but significantly beneficial to Sundquist, that he chose to take them home instead. Id. Such a circumstance should not create a dual purpose so as to thwart the purposes of the coming and going rule.

As such, the dual purpose rule does not create vicarious liability on the part of White Water for Sundquist's conduct. The coming and going rule applies and the trial court's ruling should be upheld.

III. SUNDQUIST WAS NOT ON A PERSONAL DETOUR; HE WENT HOME FOR THE EVENING.

Newman suggests that White Water attempts to invoke a personal detour or personal errand rule. This is inaccurate. White Water does, however, argue that Sundquist was not in the course and scope of his employment at the time of the accident, as set forth above. It is accurate to say that Sundquist went home after his last assignment the night before the accident. He was not temporarily on a personal errand or personal detour, any more than any person could be considered on such a detour when they go home at night after work.

Newman's reliance upon Clover is misplaced. In that case, a ski resort employee had taken a couple of ski runs in between his job duties managing restaurants at a ski resort. Clover, 808 P.2d at 1038. During the ski run back to work he was involved in an accident. Id. In reaching its decision, the court considered what the predominant motivation was for the ski run. Id. at 1042. Newman also cites Burton in support. In that case, the employee simply stopped at the dentist for thirty (30) minutes during the work day. Burton v. La Duke, 210 P. 978, 980 (Utah 1922). After returning to work, the employee was involved in a car accident. Id. The court considered the "short visit" to the dentist and the "slight deviation" from the employee's direct route in determining that the employee had resumed his work duties. Id. at 981.

Here, in contrast, Sundquist went home for the day. He was not making a short visit home for lunch, for example, nor was he making a slight deviation from his duties.

He was done for the day and went home. This is not the type of temporary personal detour or errand Clover and Burton analyzed.

In situations where the detour was such a substantial diversion from the employee's duties that it constituted an abandonment of employment, we held that the employee, as a matter of law, was acting outside the scope of employment.

Clover, 808 P.2d at 1042. Sundquist abandoned his work for the day and went home. He was in the course of commuting to work to resume his work responsibilities when the accident occurred. Any reference to a personal detour or errand is inapplicable to the circumstances found here and should not be the basis for overturning the trial court's decision in favor of the coming and going rule.

IV. ANDERSON IS NOT CONTROLLING OR PERSUASIVE.

Newman places much emphasis on Anderson in support of his arguments. In that case, the employee was asked by his employer to take a compressor mounted on a trailer home from a job site for safekeeping and to return it the next day. Anderson v. Gobe, 501 P.2d 453, 457 (Ariz. App. 1972). The Arizona Court of Appeals found that the employee was in the course and scope of his employment and that, as such, his employer was liable for his negligence in an accident that occurred on the way back to the job site the next day. Id. at 458-459.

Newman's emphasis on this case is misplaced, and his interpretation of its holding is incorrect, for several reasons. First, this is a case from the Arizona Court of Appeals and is not controlling here. Second, it was decided approximately seventeen (17) years

prior to Whitehead, in which the coming and going rule was adopted for use in third party negligence cases. Whitehead, 801 P.2d at 936, 938. Third, the employee in Anderson was on a special errand requested by his employer, a fact omitted by Newman in his brief. The coming and going rule has an exception for a special errand requested by an employer. Ahlstrom, 2002 UT 4 at ¶ 16. However, Newman does not invoke the special errand exception in this appeal.

Even ignoring these issues, the facts supporting the decision in Anderson are not found here. In that case, the employee was specifically asked by his employer on this particular day to perform an activity that was different from his other activities. The employer controlled the employee's conduct in doing so and benefitted by the employee's actions. In contrast, Sundquist was merely doing what he commonly did when he had his employer's products with him while commuting to work. No special request was made of Sundquist by White Water on that particular day. Anderson is distinguishable on its facts and should not be relied upon to overrule the trial court's grant of summary judgment in favor of White Water.

V. AHLSTROM IS APPLICABLE AND CONTROLLING.

As set forth above, Ahlstrom is the case most on point with this matter. Ahlstrom v. Salt Lake City Corp., 2002 UT 4, ¶ 2, 73 P.3d 315. Newman argues that it is not applicable because of certain factual distinctions. In fact, if there are any distinctions, they tend to favor the applicability of the coming and going rule in this case.

Newman suggests several times in his brief that because Sundquist was paid a percentage for each job that he somehow was being paid for his travel in transporting White Water's materials to and from job sites. Newman does not, however, provide any reference to the record in support of this contention nor does he cite any case law wherein an employee paid on a percentage was considered in the course and scope of employment in an analysis of the coming and going rule. The fact is, Sundquist was paid for the installation of the products, not the transportation thereof. Without installation, there would be no payment. In any event, Newman's point on payment for travel is misplaced. The police officer in Ahlstrom was not paid for her travel time. There is no evidence that Sundquist was paid for his travel time, and certainly no evidence he was paid for his commute to and from work.

In addition, Newman attempts to draw a distinction between the size and types of items carried by the officer in Ahlstrom and the materials being carried by Sundquist during his commute. While it is true that a few of the products carried by Sundquist were probably larger than those carried by the officer, and that a few of the materials were sold to customers and to be installed at a later date, Newman fails to cite to any case law wherein such distinctions removed an employee's conduct from the coming and going rule. Also, the officer's radio, gun, sirens, lights, and the like were not merely "incidentals," but were the tools by which she performed her employment duties. The same can be said for the tools and products carried by Sundquist.

Finally, Newman argues that Ahlstrom is “precarious” because the Utah Supreme Court held that, for purposes of workers’ compensation benefits for the officer, she was in the course and scope of her employment and that the coming and going rule did not apply. Salt Lake City Corp., 2007 UT 4 at ¶¶ 23-24. In fact, there is nothing “precarious” about Ahlstrom. There are different standards of review when considering the scope and course of employment in third party liability cases and workers’ compensation cases. Id. at ¶ 18.

Our obligation to adopt an employee-friendly perspective on scope-of-employment cases from the Commission highlights the material difference between this case and the earlier case involving this accident, Ahlstrom v. Salt Lake City Corp., 2002 UT 4, 73 P.3d 315. Unlike [the officer’s] quest for benefits, the Ahlstrom plaintiffs were not entitled to a sympathetic application of the going and coming rule in aid of their effort to make Salt Lake City vicariously liable for [the officer’s] negligence. Thus, the elements of the take-a-car-home program that were insufficient to render [the officer] an employee for the purpose of Salt Lake City’s vicarious liability were nevertheless adequate to make [the officer] eligible to receive workers’ compensation benefits.

Id. at ¶ 17. While the allocation of benefits standard, as set forth above, is applicable in negligence cases, it is not in workers’ compensation cases. Id. at ¶ 23. “[W]e have long indicated that the benefit to an employer need not be predominant over those of an employee before the employee becomes eligible for workers’ compensation benefits.” Id. The focus in workers’ compensation cases, instead, is whether or not the employer derived “sufficient” benefits from the employee such that the employee’s injury arose out of the course and scope of her employment. Id. at ¶¶ 24-25.

The fact that there are different outcomes in the third party negligence and workers’ compensation claims for the same accident underlying Ahlstrom does not make

its decision “precarious.” It is the natural result of the different standards applied, as set forth in the decision in Salt Lake City Corp., 2007 UT 4, ¶¶ 23-24.

Ahlstrom is applicable and is controlling. As such, the trial court’s reliance upon it was appropriate and its decision should be affirmed.

VI. REASONABLE MINDS COULD NOT DIFFER.

No reasonable mind could find that Sundquist was in the course and scope of his employment. He was traveling to work as he did every day to receive his day’s assignments and to retrieve the necessary materials. He drove his own truck pulling his own trailer. He chose when to leave for work and the route to be taken. He chose the means of transport. He would have traveled the same route to work regardless of what he carried, or if he carried nothing. He was not paid for his travel time or his commute. While Sundquist did carry some of White Water’s products, this was at his choice, for his benefit, and merely incidental to his commute. He commonly did this. His job duties did not include transporting products to his home. There was nothing unusual about this trip, nor did his employer make any special requests of him.

Given the personal nature of Sundquist’s commute, and the fact that the benefits to him for the trip are not outweighed by the mere benefit to White Water of the return of products (and the fact that it did not control his conduct), the coming and going rule applies and, as such, Sundquist was not in the course and scope of his employment at the time of the accident. “[W]hen the 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.” Christensen, 874 P.2d at 127. Because reasonable minds cannot differ, the trial court was correct in granting White Water’s motion for summary judgment.

CONCLUSION

Sundquist was simply commuting to work at the time of his accident with Newman. Pursuant to the coming and going rule, he was not in the course and scope of his employment. The facts weigh so heavily in favor of the coming and going rule that no reasonable mind could differ. As such, the trial court was correct in granting White Water’s motion for summary judgment dismissing Newman’s claims against it as a matter of law. The trial court’s decision should be affirmed.

ADDENDUM

No addendum is required and appellee refers the Court to appellant’s addendum.

DATED this 20th day of April, 2007.

SNOW, CHRISTENSEN & MARTINEAU

A handwritten signature in black ink, appearing to read "Robert W. Thompson", written over a horizontal line.

Robert W. Thompson
Attorneys for Defendant/Appellee

CERTIFICATE OF SERVICE

I hereby certify that on the 20th day of April, 2007, I caused two true and correct copies of the foregoing Brief of Appellee to be **HAND DELIVERED** to the following:

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