

2006

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

Utah Court of Appeals

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KENNETH D. NEWMAN,

VS.

Case No. 20061001-CA

Defendants and Appellees.

FILED
UTAH APPELLATE COURTS
MAR 21 2007

IN THE UTAH COURT OF APPEALS

KENNETH D. NEWMAN,
Plaintiff and Appellant,
vs.
WHITE WATER WHIRLPOOL and
BRADLEY J. SUNDQUIST,
Defendants and Appellees.

KENNETH D. NEWMAN,
Plaintiff and Appellant,
vs.
WHITE WATER WHIRLPOOL and
BRADLEY J. SUNDQUIST,
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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

BRIEF OF APPELLANT

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LIST OF PARTIES TO THE PROCEEDINGS

1. Plaintiff/Appellant, Kenneth D. Newman (hereafter, “Newman”).
2. Defendant/Appellee, White Water Whirlpool (hereafter, “White Water”).
3. Defendant Bradley J. Sundquist (hereafter “Sundquist”) was a party to the underlying proceeding. Plaintiff’s claims against Sundquist were dismissed pursuant to stipulation, and he is not a party to this appeal.

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JURISDICTION

The Utah Court of Appeals has jurisdiction over this appeal pursuant to Utah Code Ann., § 78-2-3(2)(j), as a case transferred by the Utah Supreme Court.

ISSUES PRESENTED FOR REVIEW BY APPEAL & CROSS-APPEAL

ISSUE ON APPEAL: Whether Sundquist was in the course and scope of his employment at the time of the subject accident, thereby making White Water vicariously liable; and,

Whether the trial court erred in granting White Water's motion for summary judgment, and denying Newman's motion for partial summary judgment, ruling that as a matter of law Sundquist was not in the course and scope of his employment.

STANDARD OF REVIEW: Appellate courts review a grant of summary judgment "for correctness, viewing the facts and inferences to be drawn therefrom in the light most favorable to the nonmoving party." Ahlstrom v. Salt Lake City Corp., 73 P.3d 315, 317 (Utah 2003). As the Court further clarified, "This standard is somewhat complicated in this case because determinations about whether an employee is acting within the scope of employment are questions of fact. Nevertheless, in this case the facts are undisputed and we review such matters for correction of error. Thus, in this case, we review the district court's grant of partial summary judgment for correctness." *Id.* (citations omitted.)

ISSUE PRESERVED: This issue was raised in the trial court by Plaintiff Newman's motion for partial summary judgment (R. 58) and Defendant White Water's cross-motion for summary judgment (R. 92 and 95.)

DETERMINATIVE STATUTES AND RULES

None. The issues raised in this appeal are governed by case law.

STATEMENT OF THE CASE

Nature of the Case, Course of Proceedings and Disposition Below

This case involves a claim for personal injuries arising from an auto accident where the primary issue, for purposes of this appeal, is whether the tortfeasor was within the course and scope of his employment at the time of the accident. Newman, the Plaintiff, brought suit against the tortfeasor, Sundquist, and his employer, White Water.

The material facts in this case were undisputed. Therefore, Newman filed a motion for partial summary judgment arguing that Sundquist was in the course and scope of his employment as a matter of law. White Water filed a cross-motion for summary judgment arguing that he was not, and that Newman's claims against White Water should be dismissed. The trial court held a hearing on June 1, 2006, and subsequently issued a Memorandum Decision on August 2, 2006 (Included in the Addendum hereto). In its Memorandum Decision, the trial court denied Newman's motion and granted White

Water's, ruling that Sundquist was not in the course and scope of his employment at the time of the accident, but was merely commuting to work. That decision was finalized in an Order and Summary Judgment filed on September 5, 2006.

Statement of Facts

On June 29, 2004, around 5:00 to 5:30 a.m., Newman was driving southbound on I-15 near the Point of the Mountain when he was involved in a collision with a truck and trailer being driven by Sundquist. (R. 62, ¶ 14.) Newman and his passenger were ejected from the vehicle. Newman's passenger died as a result of his injuries. Newman suffered catastrophic injuries, including numerous fractures, and severe traumatic brain injury, resulting in strokes and seizures. (R. 62, ¶ 15.) Newman is permanently disabled and has incurred somewhere in the neighborhood of \$200,000 in medical expenses. Prior to this appeal, Newman settled with Sundquist's insurer (specifically reserving the issue of White Water's liability) for policy limits of \$25,000. Therefore, Sundquist is not a party to this appeal.

At all relevant times, Sundquist was an employee of White Water. (R. 60, ¶ 1.) White Water's business includes the manufacture, sale and installation of various cultured marble products, counter tops, tile, and other similar products. (R. 60, ¶ 2.) Sundquist was employed by White Water as an "installer." (R. 60, ¶ 1.) As an installer, Sundquist would typically pick up White Water's products at their facility in Utah County, travel to various job sites (in northern Utah County, Salt Lake County and Davis County) install the products, and return extra, unused or unwanted products to White Water's facilities. (R. 61, ¶ 9.) Sundquist's job responsibilities specifically included transporting White Water's products to and from job sites. (R. 60, ¶ 2 and 3.) Sundquist did not receive an

hourly wage, but rather received a percentage of each job he worked on. (R. 61, ¶ 10.)

As a result, Sundquist was compensated for not only installing White Water's products at the job sites, but also transporting those products to and from those sites.

As an installer, Sundquist was required to, "have some ability to take the material to the job site, but we don't specify what those requirements are." (R. 60, ¶ 4.) To fulfill this requirement, White Water provided its installers, including Sundquist, with a monthly allowance for vehicle and gas expenses. (R. 60, ¶ 5.) In order to meet the job requirements (i.e., transporting material to and from job sites) Sundquist purchased a pickup truck in early 2003. (R. 60, ¶ 6.) Later, in March 2004, Sundquist purchased a Haulmark trailer from White Water, also to be used in hauling products to and from job sites. (R. 61, ¶ 7.) White Water financed the purchase of the trailer for Sundquist, the agreement for which required Sundquist to pay interest of 12% to White Water, and White Water subsequently withheld \$76.68 from Sundquist's paychecks for a period of four years. (R. 61, ¶ 8.)

Sundquist's typical work day would begin between 4:00 a.m and 5:00 a.m., when he would travel from his home in Salt Lake City to the White Water facility in Utah County, where he would return products from the prior day's jobs, learn what jobs he had for that day, and pick up products for those new jobs. He would then travel from White Water's facility to his various job sites delivering and installing the products. Sundquist would typically work until 6:00 p.m. or 8:00 p.m. at these sites. Because of the late hour,

and the fact that he lived in Salt Lake County, he would then go to his home, in Salt Lake County, taking any remaining products from that day's jobs with him, rather than immediately returning to White Water. The following morning he would resume where he left off, traveling to White Water to return the products, and pick up new. (R. 61, ¶ 9.)

On the day of the accident, June 29, 2004, Sundquist was traveling southbound on I-15 near the point of the mountain around 5:00 to 5:30 a.m., as was his custom. (R. 61, ¶ 11.) Sundquist was driving his pickup and pulling the Haulmark trailer. (R. 62, ¶ 12.) Sundquist was traveling to White Water's facility in Utah County. (R. 62, ¶ 12.) On that day, Sundquist had White Water's products in his trailer, including "custom vanity counter tops and a few window sills and back splashes. . ." that he was returning to White Water's facility. (R. 62, ¶ 12 and 13.) Sundquist was returning those products to White Water because the installation jobs from the prior day were not ready, and the products "had to go back to White Water." (R. 62, ¶ 13.) He was hauling White Water's products from a job site, as per his job requirements.

As Newman and Sundquist were both proceeding southbound on I-15, near the Point of the Mountain, they collided. Newman suffered significant injury in that accident, and filed suit against Sundquist, and his employer, White Water. Newman has alleged that Sundquist was in the course and scope of his employment at the time of the accident and that White Water should be held vicariously liable.

SUMMARY OF ARGUMENT

Newman argues that Sundquist was in the course and scope of his employment at the time of the accident, and that this should have been found, as a matter of law. This conclusion is reached by applying the facts of this case to the criteria established in the case of Birkner v. Salt Lake County, 771 P.2d 1053 (Utah 1989). Birkner is the seminal case in Utah for determining when an employee is within the course and scope of his employment. In this case, Sundquist was about his employer's business, was within his ordinary hours and spatial boundaries of his employment, and was serving his employer's interest. Birkner dictates that Sundquist be found to be within the course and scope of his employment.

Not only did the trial court deny Newman's motion, but it granted White Water's motion, ruling that, as a matter of law, Sundquist was not in the course and scope of his employment, and dismissing Newman's claims against White Water. In effect, the trial court ruled that no reasonable person could find that Sundquist was in the course and scope of his employment. To reach this decision, the trial court relied on the case of Ahlstrom v. Salt Lake City Corp., 73 P.3d 315 (Utah 2003). In this case, the court ruled that the tortfeasor was not in the course and scope of her employment because she was commuting from work, and the coming and going rule applied. However, Ahlstrom is readily distinguishable and does not apply to the facts of this case. In this case, Sundquist

was not just commuting to work, rather he was hauling his employer's commercial products pursuant to his job duties, and for which he was being paid.

Newman argues that the trial court should have found, as a matter of law, that Sundquist was in the course and scope of his employment, and granted Newman's motion. However, at the very least, the trial court should have denied both motions and left this issue for the jury. In no event should the trial court have held that Sundquist was not in the course and scope of his employment and granted White Water's motion.

ARGUMENT

I. THE BIRKNER CRITERIA ESTABLISH THAT SUNDQUIST WAS IN THE COURSE AND SCOPE OF HIS EMPLOYMENT

The undisputed facts establish that Sundquist's job duties included hauling White Water's products and materials to and from job sites. Sundquist was paid for hauling these materials, since he received a percentage or commission from each job. Sundquist was also driving a vehicle for which he received a monthly allowance from White Water, and was pulling a trailer that White Water was financing for him. Most importantly, however, at the time of the accident Sundquist was hauling White Water products and returning them to White Water's facility.

Under the doctrine of *respondeat superior*, an employer is vicariously liable for the torts committed by its employee when that employee is, "acting within the course and scope of his employment." Christensen v. Swenson, 874 P.2d 125, 127 (Utah 1994). The issue that must be decided by this Court, is whether Sundquist was acting within the course and scope of his employment at the time of the accident, so as to make White Water vicariously liable for Sundquist's negligence.

In Birkner v. Salt Lake County, 771 P.2d 1053 (Utah 1989), the Utah Supreme Court set forth three "criteria" to be used in determining whether an employee is acting in the course and scope of his employment. The use of these criteria has been repeatedly affirmed by the Utah Supreme Court. See Christensen, Id., and Clover v. Snowbird Ski Resort, 808 P.2d 1037 (Utah 1991). As the Utah Supreme Court has stated:

We articulated three criteria [in Birkner] helpful in determining whether an employee is acting within or outside the scope of her employment. First, the employee's conduct must be of the general kind the employee is hired to perform, that is, 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. Finally, the employee's conduct must be motivated, at least in part, by the purpose of serving the employer's interest.

Christensen, *supra* at 127. The application of these criteria to the facts of this case demonstrate that Sundquist was acting within the course and scope of his employment at the time of the accident.

1. Sundquist was About His Employer's Business

The first Birkner criterion states that, to be found within the course and scope of employment, the "employee's conduct must be of the general kind the employee is hired to perform, that is, 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." Christensen, *Id.* In the present case, Sundquist was hauling White Water's products and materials, and was returning those products to White Water's facility. The hauling of these items was part of Sundquist's job duties, and he was being compensated to complete that task. Sundquist was not "wholly involved in a personal endeavor." He was about White Water's business. The first Birkner criteria supports Newman's argument that Sundquist was in the course and scope of his employment at the time of the accident.

2. Sundquist Was Within His Ordinary Hours and Spatial Boundaries

The second Birkner criterion states that the employee's conduct must, "occur substantially within the hours and ordinary spatial boundaries of the employment." In this case, Sundquist transported White Water's products to and from, and installed products at job sites located in, northern Utah County, Salt Lake County, and Davis County. He routinely traveled from White Water's facilities in Utah County to various job sites in all three of these counties. He performed his transportation duties using a pickup truck for which he received a monthly allowance from White Water. Sundquist's conduct, which gives rise to this case, occurred while Sundquist was driving that pickup truck on southbound I-15, at the point of the mountain. Sundquist's conduct took place in the ordinary spatial boundaries of his employment (i.e., inside his vehicle, and on a roadway routinely traveled in performing his job duties).

Sundquist's conduct took place at approximately 5:00 to 5:30 a.m. Sundquist testified that it was his routine to travel to White Water's facilities, at this time of the morning, to return White Water's products to their facility. Therefore, Sundquist's conduct took place within the ordinary hours of his employment. Based upon the foregoing, the second criterion supports Newman's claim that Sundquist was within the course and scope of his employment at the time of the accident.

3. Sundquist Was Serving His Employer's Interest

The third Birkner criterion states that, “the employee’s conduct must be motivated, at least in part, by the purpose of serving the employer’s interest.” In this case, Sundquist was traveling to White Water’s facilities, at least in part, because he was hauling White Water products that had to go back to their facility. Even if he had other motives, or a dual purpose, at least part (and a significant part at that) of Sundquist’s motivation was to return products to White Water’s facility. The third criterion also supports Newman’s argument that Sundquist was in the course and scope of his employment.

All three of the criteria established by Birkner suggest that Sundquist was acting in the course and scope of his employment at the time of the accident. The Court should then look to determine if a variation from the Birkner analysis is warranted in this case. As the Utah Supreme Court has recognized:

Under specific factual 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, this court has occasionally used variations of this approach. These variations, however, are not departures from the criteria advanced in Birkner. Rather, they are methods of applying the criteria in specific factual situations.

Clover v. Snowbird Ski Resort, 808 P.2d 1037, 1040. (Utah 1991).The “variations”

identified in Clover are discussed below, with specific reference to the facts of this case.

However, those variations do not change the conclusion dictated by Birkner that Sundquist was acting within the course and scope of his employment.

II. DUAL PURPOSE, PERSONAL DETOUR, AND GOING AND COMING RULES DO NOT CHANGE THE RESULT

1. Dual Purpose Rule

In the present case, it can be argued that Sundquist was serving dual purposes at the time of the accident. He was hauling White Water's products back to their facility. He was also traveling to work, to pick up his jobs and materials for the new work day (albeit in required and subsidized transportation). The former would benefit White Water, whereas the latter could arguably serve Sundquist's personal interest. As the Utah Supreme Court has articulated regarding the dual purpose doctrine:

Under this doctrine, if an employee's actions are motivated by the dual purpose of benefitting the employer and serving some personal interest, the actions will usually be considered within the scope of employment. However, if the primary motivation for the 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). In this case, Sundquist was arguably motivated by the dual purposes of returning White Water's product to their facility, and by traveling to work. As a result, his actions would "usually" be considered within the scope of employment. This conclusion would only change if Sundquist's "primary" motivation was to serve his personal interest. In the present case there is no evidence suggesting Sundquist's "primary" interest was traveling to work. Rather, he testified that he was returning White Water's products to their facility because they had to go back.

In Whitehead v. Variable Annuity Life Ins. Co., 801 P.2d 934 (Utah 1989), the Court announced another test to use in a dual purpose case for determining whether an employee's conduct served his own, or his employer's interests. The Court stated, "One useful test is whether the trip is one which would have required the employer to send another employee over the same route or to perform the same function if the trip had not been made." *Id.* at 937. In the present case, Sundquist had to return White Water's products from the job site in Salt Lake County to White Water's facility in Utah County. If Sundquist had not performed that task, White Water would have had to send another employee to get those products and return them to their facility.

Even under the dual purpose doctrine, Sundquist's conduct should be found to be within the course and scope of his employment.

2. Personal Detour/Errand Rule

In the present case, White Water has argued that Sundquist went home after his last delivery, rather than traveling directly to White Water's facility, and that this was a personal detour that releases White Water from liability. Utah cases have recognized the principle 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. However, those cases have also recognized that liability reattaches when the employee resumes his employment after the detour or errand. The Court explained this doctrine in Clover v. Snowbird Ski Resort, 808 P.2d 1037, 1042

(Utah 1991). In that case, a Snowbird employee was employed as a chef at a restaurant at the base of the resort, as well as one mid-way up one of the lifts. As with other employees, he would ski from the upper restaurant to the lower restaurant when necessary. On the day of the accident, the employee had finished working at the upper restaurant. The employee then made four runs down the mountain (i.e., a personal detour) before heading down the mountain to begin work at the lower restaurant. The employee injured another skier as he was heading down the mountain to go to, but before he reached, the lower restaurant. The Court ultimately held that whether the employee was acting within the course and scope of his employment or not was a question of fact for the jury. However, the Court's analysis is helpful here. The Court stated:

In past cases, in holding that the actions of an employee were within the scope of employment, we have relied on the fact that the employee had resumed the duties of employment prior to the time of the accident. This is an important factor because if the employee has resumed the duties of employment, the employee is then 'about the employer's business' and the employee's actions will be 'motivated' at least in part, by the purpose of serving the employer's interest.

The Court continued, "we have held that employees may be within the scope of employment if, after a personal detour, they return to their duties and an accident occurs."

Id. The Court subsequently held that the employee's, "action were not, as a matter of law, outside the scope of his employment. . ." but were to be left for the jury.

Based upon Clover, *Id.*, an employer may still be held liable for an employee's actions if, after taking a personal detour or errand, the employee resumes his job duties.

See also Burton v. LaDuke, 210 P. 978, 981 (Utah 1922)(“While he had. . . attended to a purely personal matter at the dentist’s office, nevertheless he had, when the accident happened, again assumed [his job] duties,” and the employer could be held vicariously liable.)

In the present case, Sundquist did make a personal detour (as he regularly did, and as was known and approved by his employer) to his home. However, the following morning Sundquist again resumed the duties of his employment. In fact, Sundquist was traveling southbound on I-15, hauling White Water’s products in the exact location he would have been had he traveled directly from his last job site to White Water’s facilities. At the time of the accident Sundquist had completed his personal detour, and had resumed his job duties. Pursuant to the cases cited above, White Water should be found vicariously liable for Sundquist’s conduct that occurred after he had again resumed his job duties.

3. Coming and Going Rule

White Water has argued that Sundquist was merely commuting to work at the time of the accident, and that the “coming and going” rule excludes liability on their part. This rule was recognized by the Utah Supreme Court in Wilson v. Industrial Comm’n, 207 P.2d 1116, 1117 (Utah 1949), when it stated, “The rule in this jurisdiction and in the United States generally is that an injury sustained by an employee while going to or returning from work is not an injury arising out of or in the course of his employment.” This doctrine has also been applied outside the workers compensation setting. *See* Whitehead

v. Variable Annuity Life Ins. Co., 801 P.2d 934, 935 (Utah 1989) (“As a general rule, an employee is not acting within the course and scope of his employment when his is traveling in his own automobile to and from work.”)

The coming and going rule does not apply to the facts of the present case. First, the Court in Whitehead stated, “The major premise of the ‘going and coming’ rule is that it is unfair to impose liability on an employer for conduct of its employees over which it has no control and from which it derives no benefit.” *Id.* at 937. In the present case, White Water did derive benefit from Sundquist’s actions. Sundquist was returning White Water’s product to its Utah County facility. Had Sundquist not performed this task, White Water would have had to send another employee to retrieve the products. Therefore, Sundquist was not merely traveling to work. At the very least, Sundquist was serving a dual purpose of traveling to work, as well as delivering products for his employer. As indicated in the cases cited above, when an employee is serving dual purposes, he should generally be found to be in the course and scope of his employment unless the business interests were only trivial (which is not the case here).

Additional evidence dictates that Sundquist was not merely commuting to work. Sundquist was required to have the ability to haul White Water’s products to and from job sites. White Water did not dictate exactly how this requirement had to be met. Sundquist could have purchased a box truck, a flat-bed, or a different model of truck and/or trailer. However, a Volkswagon obviously would not work. Sundquist was driving the pickup

truck in question because it was required of his employer. He was not driving a passenger car to his employer's office. Additionally, the only reason Sundquist was hauling a trailer was to fulfill his job requirements. There can be no argument that Sundquist would have been hauling a 20-foot Haulmark trailer just to commute to work. Again, White Water gave Sundquist a monthly allowance to pay for the truck, and financed the trailer for him.

The Arizona Court of Appeals case of Anderson v. Gobeau, 501 P.2d 453 (Ariz. Ct. App. 1972) is instructive in this matter. In that case the employee was a construction worker for Desert Guild, Inc. Desert Guild required the employee to use his own truck to pick up a rented air compressor to use on a job site. That night, the employee hauled the air compressor to his home. The following day, the employee was returning to the job site, with the air compressor, when he was involved in an accident, and a lawsuit followed. Desert Guild attempted to make the same argument that White Water is making, namely that the employee was commuting, and that the "going and coming" rule precluded liability. The Court disagreed, holding that the "going and coming" rule did not preclude Desert Guild's liability. The Court identified a test by which such cases can be decided. It stated:

To establish liability, the inference must be permissible that the trip would have been made though the private errand had been canceled. The test in brief is this: If the work of the employee creates the necessity for travel, he is in the course of his employment, though he is serving at the same time some purpose of his own.

Id. at 457-458. The Court continued:

[I]t is readily apparent that had he decided he was no longer going to work for his employer, it would have had to send another employee on a special mission to secure the air compressor so that it could be used to break down the concrete and then to return it to the rental company.

Id. at 459.

In the present case, Sundquist was serving dual purposes. He was traveling to work, as well as hauling White Water's products. Had Sundquist decided not to commute to work, and not returned these products to White Water, White Water would have had to send another employee to pick it up and return it. Therefore, the "going and coming" rule should not be applied to this case.

Anderson is persuasive in this case. Anderson recognized the liability of an employer under criteria nearly identical to Utah's Birkner test. See Anderson at 456. The Court also recognized, and specifically rejected the application of, the "going and coming" rule to such a situation.

The public policy reasons behind the doctrine of *respondeat superior* are also served by finding that White Water is vicariously liable under the facts of this case. In Krukiewicz v. Draper, 725 P.2d 1349, 1351 (Utah 1986), the Court recognized that:

The employer is liable under the doctrine of *respondeat superior*, not because of the employer's actionable fault, but because the employee acts for the employer who reaps the benefits of the employee's acts. Furthermore, the employer can spread the cost of accidents and negligent acts, while the employee cannot.

In the present case, Sundquist would not have been traveling southbound on I-15 in a pickup truck, hauling a 20 foot trailer, if not for the fact that he was hauling products for

White Water. White Water received direct benefit from Sundquist's conduct (i.e., payment from its customers). It is only equitable that White Water, which was reaping the benefits of Sundquist's conduct, should also be liable for that conduct. Further, White Water can more easily absorb and spread the costs of such accidents through insurance and by passing the costs along to the consumer. Should the court find that Sundquist was not acting within the course and scope of his employment, Newman will be left to face permanent disability and around \$200,000 of medical bills with no recovery other than the grossly inadequate \$25,000 policy limits of Sundquist. White Water, which directly benefitted from Sundquist's conduct, and was the reason Sundquist was on the road with a pickup truck and 20-foot trailer, would escape all responsibility.

Based upon the foregoing, the Court should find that the "coming and going" rule does not apply, as Sundquist was performing a job duty and serving his employer's interest (at least in substantial part) at the time of the accident, and not merely commuting to work.

III. AHLSTROM DOES NOT APPLY HERE

In its brief in support of its Motion for Summary Judgment, White Water relied primarily upon the case of Ahlstrom v. Salt Lake City Corp., 73 P.3d 315 (Utah 2003), calling it the "most similar case and the controlling case." The Trial Court subsequently applied Ahlstrom as the basis for its decision. In fact Ahlstrom is the only case cited by the Trial Court in its decision. However, Ahlstrom deals solely with the coming and

going rule, which as argued above, does not apply to this case. Therefore, the Trial Court's reliance on Ahlstrom was misplaced.

As argued above, Newman was not merely commuting to work, but was performing his job duties at the time of the accident. Because the basis of the Ahlstrom decision is the coming and going rule, it is easily distinguishable, and does not apply here

In Ahlstrom, the tortfeasor was a Salt Lake City police officer. Pursuant to a "take-home" program, participating officers were allowed to use their police car to drive between work and home by paying a "small amount" to the department for that opportunity. *Id.* at 316. The tortfeasor had a meeting she had to attend on an otherwise off-duty day. She was compensated for her attendance at the meeting, but was "not compensated for either time driving to the meeting or mileage for the trip in the City's car." *Id.* at 316. The tortfeasor attended the meeting, and was returning to her home in the police car when she was involved in an accident. The Court analyzed these facts under the coming and going rule, and determined that the tortfeasor was not in the course and scope of employment, but was commuting home from work. The Court then looked to several exceptions (dual purpose, special errand and employer-provided transportation) to determine if any of them apply.

Before proceeding to a discussion of the exceptions, Newman notes that Ahlstrom is already distinguishable, and not applicable, based upon the foregoing. First, the tortfeasor in Ahlstrom was not being compensated for her travel time. Sundquist, on the

other hand, was performing part of his job duties, and was being compensated, since he received a percentage of each job and part of that job included transporting products to and from job sites. The Ahlstrom tortfeasor was required to pay her employer for the opportunity to use the department's car while on personal business. Sundquist, on the other hand, was receiving payment from his employer (i.e., monthly allowance) to pay for his vehicle. White Water, and the Trial Court, made a big deal of the fact that the Ahlstrom tortfeasor was carrying some of her employer's property at the time of the accident. This included a police radio, gun, and other such items. Sundquist argued that this is no different than Sundquist's hauling of White Water's property. As it would apply to tools, clip boards and the like, Newman would agree. The big difference, however, is that Sundquist was not merely transporting tools to be used at the job site. Rather, Sundquist was hauling White Water's product, which they sold and which Sundquist was being paid to transport to and from job sites. He did not merely have incidentals from his employment with him. Rather, he was transporting White Water's commercial products for customers. Ahlstrom is distinguishable, and not applicable, based upon the foregoing. Nevertheless, Newman also analyzes the exceptions discussed in Ahlstrom, below.

First, the Ahlstrom Court analyzed the dual purpose doctrine. The Court cited Whitehead 801 P.2d 934, *Supra*, stating, "The 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.” Ahlstrom, at 319. The Court found that the dual purpose doctrine did not apply, stating:

There is no indication the City would have sent any one else on the trip had Ross not gone. Thus it is apparent, based on the proof to date, that the benefits the City received from Ross’s commute were only tangential to Ross’s purpose of commuting home from work that day.

Id. at 319. In contrast, White Water would have had to send someone to return its products if Sundquist had not made that trip. Therefore, even if the Court finds that Ahlstrom is applicable, the dual purpose exception would apply.

While the Ahlstrom Court also analyzed the special errand and employer provided transportation exceptions, Newman does not argue that these exceptions would apply to the facts of this case.

Based upon the foregoing, Newman argues that Ahlstrom does not apply to the facts of this case, and that even if it did, the dual purpose exception would remove this case from the applicability of the coming and going rule. There is also another reason to question Ahlstrom’s authority. Ahlstrom dealt with a third-party’s liability claim against the employee/tortfeasor. That employee/tortfeasor was also injured in that accident, and sought workers compensation benefits for herself. That claim for workers compensation benefits resulted in the case of Salt Lake City Corp. v. Labor Commission, – P.3d –, 569 Utah Adv. Rep. 17, 2007 UT 4, 2007 WL 79236 (Utah 2007). In that case, the administrative law judge ruled that the claimant was in the course and scope of her employment, and therefore entitled to benefits. The Utah Supreme Court agreed. This

time, under the exact same facts, and still analyzing the case under the coming and going rule, the Utah Supreme Court determined that the employee/tortfeasor *was* in the course and scope of her employment. The Court reached this seemingly contradictory result by “applying different standards of review” to liability and workers compensation cases. The court indicated that it was to liberally construe the law in favor of coverage in the workers compensation context, but that no such requirement existed in a third-party case. Nevertheless, this case demonstrates the precarious nature of the Ahlstrom decision.

Not only did the trial court deny Newman’s motion, but it relied on Ahlstrom to grant White Water’s motion, holding that Sundquist was merely commuting to work.

The trial court specifically stated:

[T]he Court determines that Mr. Sundquist was not acting within the course and scope of his employment at the time of the accident. Mr. Sundquist was going to work at the time of the accident and therefore falls within the clear ambit of the coming and going rule. The plaintiff’s theory is incorrect because it would render the coming and going rule obsolete in the case of employees who happen to be carrying materials or equipment during their commute to work.

(Memorandum Decision, pg. 2, attached in Addendum hereto.) Contrary to the trial court’s assertion, Sundquist did not just “happen” to be carrying White Water’s equipment with him on his commute. Rather, he was a paid delivery driver who was returning White Water’s commercial products to their facility. Newman argues that the trial court’s finding in this regard was in error.

In Carter v. Bessey et al., 93 P.2d 490, 493 (Utah 1939), the Utah Supreme Court stated, “Whenever reasonable minds may differ as to whether the servant was at a certain time involved wholly or partly in the performance of his master’s business or within the scope of his employment, the question is one for the jury.”

By granting White Water’s motion, the trial court was ruling that no reasonable person could believe that Sundquist was in the course and scope of his employment. Newman argues that this was clear error. Sundquist was hauling products for his employer, for which he was being compensated. His employer was receiving the benefit of his conduct. He was driving a vehicle for which he was being paid a monthly allowance. He was pulling a trailer that he used to transport his employer’s products, and which was being financed by his employer. These facts are readily distinguishable from those in Ahlstrom. Reasonable minds could find that Sundquist was in the course and scope of his employment. At the very least, the trial court should have denied both motions and left this matter for the jury.

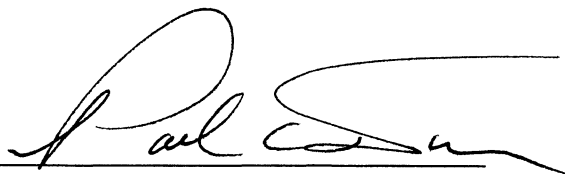
CONCLUSION

Sundquist was in the course and scope of his employment at the time of the accident. At the very least, this issue should have been left to the jury. 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. Not only do the Birkner criteria suggest that Newman was in the course and scope of his employment, but such a finding would further the public

policy reasons behind the doctrine of *respondeat superior*. For the reasons argued above, Newman respectfully request that this Court find that the trial court erred in denying Newman's motion, and granting White Water's motion, and overturn that decision.

RESPECTFULLY SUBMITTED this 21 day of March 2007.

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



Paul C. Farr
Attorneys for Plaintiff/Appellant

CERTIFICATE OF MAILING

I hereby certify that on this 21 day of March 2007, I caused a true and correct copy of the foregoing BRIEF OF APPELLANT, to be mailed via first-class mail, postage prepaid, to the following individuals:

Robert W. Thompson
SNOW, CHRISTENSEN & MARTINEAU
10 Exchange Place, Eleventh Floor
Salt Lake City, UT 84145



ADDENDUM

1. Memorandum Decision, dated August 2, 2006.

FILED DISTRICT COURT
Third Judicial District

AUG 8 2006

By SALT LAKE COUNTY
Deputy Clerk

IN THE DISTRICT COURT OF THE THIRD JUDICIAL DISTRICT

IN AND FOR SALT LAKE COUNTY, STATE OF UTAH

KENNETH D. NEWMAN,	:	MEMORANDUM DECISION
	:	
Plaintiff,	:	CASE NO. 050911977
	:	
vs.	:	
	:	
BRADLEY J. SUNDQUIST and WHITE	:	
WATER WHIRLPOOL, a Utah	:	
corporation,	:	
	:	
Defendants.	:	

This matter came before the Court for a hearing on June 1, 2006, in connection with the parties' cross-Motions for Partial Summary Judgment. At the conclusion of the hearing, the Court took the matter under advisement to further consider the parties' written submissions, the relevant legal authority and counsels' oral argument. Being now fully informed, the Court rules as stated herein.

LEGAL ANALYSIS

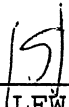
At the outset, the Court notes that during oral argument, counsel agreed that there are no factual disputes presented by their dual Motions and that the Court can determine, as a matter of law, whether defendant Sundquist was acting within the course and scope of his employment at the time of the accident which is the subject of this action. Through the Court's dialogue with counsel at the hearing, it also became clear that this case is governed by the "coming and going" rule and the Utah Supreme

Court's broad interpretation of that rule in Ahlstrom v. Salt Lake City Corp., 73 P.3d 315 (Utah 2002). In fact, the plaintiff's counsel, while apparently recognizing the implications of the Ahlstrom decision, attempted to distinguish this case on the basis that Mr. Sundquist was transporting materials in his truck at the same time that he was commuting to work. According to counsel, Mr. Sundquist's commute essentially served dual purposes, with the primary purpose being the return of his employer's materials. As the Court indicated during oral argument, it is not persuaded by this argument.

Instead, the Court determines that Mr. Sundquist was not acting within the course and scope of his employment at the time of the accident. Mr. Sundquist was going to work at the time of the accident and therefore falls within the clear ambit of the coming and going rule. The plaintiff's theory is incorrect because it would render the coming and going rule obsolete in the case of employees who happen to be carrying materials or equipment during their commute to work. As the defendants correctly argue, if carrying an item belonging to an employer were enough to overcome the coming and going rule, the result would be a tremendous expansion of liability for employers; an expansion which the Utah Supreme Court specifically rejected in the Ahlstrom case. Therefore, the defendants' Motion for Partial Summary Judgment is granted and the plaintiff's Motion for Partial Summary Judgment is denied.

Counsel for the defendants is to prepare an Order consistent with, but not limited to, this Memorandum Decision and submit the same to the Court for review and signature.

Dated this 2 day of August, 2006.



LESLIE A. LEWIS
DISTRICT COURT JUDGE

MAILING CERTIFICATE

I hereby certify that I mailed a true and correct copy of the foregoing Memorandum Decision, to the following, this 5 day of August, 2006:

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A handwritten signature, possibly "SJ", is written over a horizontal line.