

**IN THE DISTRICT COURT OF STEVENS COUNTY, KANSAS**

PAUL LOGAN CLARK,	)	
	)	
and	)	
	)	
JEFFERY WEAVER and KATHRYN	)	
WEAVER, individually, and as Special	)	Case No.: 07-CV-16
Co-Administrators of the Estate of DANIEL	)	Consolidated with Case No.
J. WEAVER, a deceased minor,	)	07-CV-18
	)	Division No.: 1
Plaintiffs	)	Chapter 60
	)	
v.	)	
	)	
ARTURO CABEZAS, et al,	)	
	)	
Defendants	)	

**PLAINTIFFS’ REPLY TO DEFENDANT MURFIN DRILLING COMPANY, INC.’S  
RESPONSE TO PLAINTIFFS’ CROSS-MOTION FOR SUMMARY JUDGMENT**

COME NOW plaintiffs, by and through their counsel of record, Shamberg, Johnson & Bergman, Chtd., and Hutton & Hutton Law Firm, LLC, in accordance with K.S.A. § 60-256, Supreme Court Rule 141, and the Court’s Agreed Upon Order regarding summary judgment briefing deadlines, and respectfully request that this Court grant Plaintiffs’ Cross-Motion for Summary Judgment. Defendant Arturo Cabezas joins plaintiffs in this Reply brief.

**I. Background**

Despite the volumes of summary judgment briefs and accompanying exhibits in these consolidated personal injury and wrongful death causes of action, the parties have asked the Court to make a straight forward determination—whether defendant Cabezas was on the job when he collided with plaintiffs’ vehicle while driving his crew members home from an oil drilling rig on June 14, 2005, killing Daniel J. Weaver and severely injuring plaintiff Paul Logan Clark. Of course, this Court must analyze this question through the legal framework of Kansas case law and pattern jury instructions, which employ terms such as “scope and course of

employment” and “reasonably incidental to employment.” But the ultimate determination of whether defendant Murfin Drilling Co. is vicariously liable for the June 14, 2005, accident comes down to whether the evidence shows that defendant Cabezas was or was not on the job when the accident occurred.

Defendant Murfin, Mr. Cabezas’ employer, suggests that the Court answer this question by applying an artificially narrow and rigid view that ignores evidence developed during discovery. Under defendant Murfin’s argument, Mr. Cabezas, an oil field driller, was not on the clock when the accident occurred, therefore, he was not on the job.

Plaintiffs, on the other hand, urge the Court to take a more realistic view—one that conforms with the evidence, with Kansas case law, and with oil field customs and practices. Under plaintiffs’ theory, defendant Cabezas was on the job at the time of the accident, because he was transporting his crew members home and was receiving reimbursement from defendant Murfin for doing so.

By this point in the briefing cycle, the Court is no doubt familiar with the parties’ numerous factual assertions. Plaintiffs, therefore, will not digress into hairsplitting the various uncontroverted facts, responses and replies asserted by defendants. Suffice to say, the facts developed in this litigation establish that defendant Cabezas was, as a matter of law, within the scope and course of his employment with defendant Murfin at the time of the accident. Or, at best for defendant Murfin, the evidence suggests that a genuine issue of fact exists as to whether defendant Cabezas was on the job, and, hence, a jury should decide this question. Either way, defendant Murfin cannot escape the fact that it acknowledged in a separate legal proceeding that defendant Cabezas was within the scope and course of employment at the time of the accident. Defendant Murfin should not now be permitted to argue to the contrary in order to avoid legal liability.

Because plaintiffs' Cross-Motion for Summary Judgment was limited to the issue of whether defendant Cabezas was in the scope and course of his employment with defendant Murfin at the time of the accident, this reply brief is also limited to that issue. As such, the absence of arguments in this brief concerning the other issues before this Court on summary judgment—plaintiffs' claim of direct negligence against defendant Murfin for negligent hiring, supervision, training and retention, and plaintiffs' Weaver survival claim—should not be construed as concessions of summary judgment on said issues.

## **II. Arguments and authorities**

Contrary to defendant Murfin's claims, defendant Cabezas was not a mere average worker driving home from the office when the June 14, 2005, accident occurred. He was an oil field driller with supervisory capacities over his crew members, two of whom he was driving home at the time of the accident. His job place was Murfin Rig 22, which, by its very nature, frequently changed locations. He received reimbursement from defendant Murfin for the mileage he incurred driving to and from the rig site, as well as for the mileage incurred by the two crew members he was driving home. As such, and as acknowledged by defendant Cabezas himself, he was obligated by virtue of his employment with defendant Murfin to drive those employees homes at the time of the accident. Therefore, under any test or definition—"scope and course of employment," "reasonably incidental to employment," etc.—defendant Cabezas was on the job at the time of the accident, and defendant Murfin is vicariously liable for his actions.

### **A. The facts of the case establish that defendant Cabezas was on the job at the time of the accident.**

In its Motion for Summary Judgment and in its Reply brief, defendant Murfin continues to suggest that vicarious liability on the part of employers is an exotic legal theory that courts should seek to limit. However, the very case that defendant Murfin claims plaintiffs failed to

acknowledge on this issue, Schmidt v. Martin, clearly states that vicarious liability, in the context of master-servant relationships is an “approved and accepted” doctrine. 212 Kan. 373, 375-76, 510 P.2d 1244 (Kan. 1973).<sup>1</sup> Further, according to commentary to the Pattern Instruction of Kansas, “[t]here is no question better settled than that the acts of an agent within the scope or apparent scope of his authority are binding on his principal.” PIK 4<sup>th</sup> 107.07 Comment.

Unfortunately, the case law provides no clear-cut formula or test for determining when an employee’s actions should be imputed to his or her employer. As best illustrated by PIK 107.06 and decisions discussing this issue, an employee is in the scope and course of his employment when he or she is doing something that is “reasonably incidental” to their employment and that should be “reasonably foreseen” from the nature of their employment. For further inquiry, courts have looked into whether the employee was under the direction and control of the employer at the time of the incident. See Girard v. Trade Professionals, 50 F.Supp.2d 1050,1053 (D. Kan. 1999). Defendant Murfin attempts to argue that the “reasonably incidental” language from PIK 107.06 applies only to the issue of whether an employee is in the scope of his or her employment, suggesting that course of employment falls under an entirely different inquiry. This argument splits hairs and does not reflect the law. In fact, the Girard decision, which defendant Murfin frequently cites in its briefs, analyzes whether vicarious liability should apply by discussing “scope of employment,” specifically PIK 107.06, and its “reasonably incidental” language. Id. at 1052.

Under this analysis, defendant Murfin must show that defendant Cabezas’ transport of crew members from Rig 22 on the morning of June 14, 2005, was not reasonably incidental to his employment and not reasonably foreseeable by defendant Murfin. Faced with a plethora of facts to the contrary, defendant Murfin has attempted to shift the dispositive analysis to whether

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<sup>1</sup> This case was cited in plaintiffs’ Response/Cross-Motion for Summary Judgment and was included in the authorities provided to this Court by plaintiffs.

defendant Cabezas was under the direction and control of defendant Murfin at the time of the accident. Under either analysis, the facts make clear that defendant Cabezas was on the job at the time of the accident and that vicarious liability applies.

Defendant Murfin's factual arguments regarding direction/control are summed up toward the end of its Reply/Response brief, where defendant states:

Cabezas was not furnished a vehicle; he was not required to provide transportation to other employees; he furnished transportation as a personal matter between himself and the other employees; he was not under the control of Murfin after he left work at the rig site; he was on his way home after leaving work, and the trip home was personal to him, having no connection to his employment.

Page 47, Defendant's Reply/Response.

With scant exception—the fact that defendant Cabezas was not provided with a company vehicle—those assertions are incorrect. Defendant Cabezas was required to drive his crew members home by virtue of being their supervisor, by virtue of having driven them to the job site, and by virtue of those crew members assigning him their mileage reimbursements through defendant Murfin's accounting department. (Plaintiffs' Statement of Additional Uncontroverted Facts, Nos. 31, 34-35, 38). Defendant Cabezas furnished transportation to his crew members as a result of the above factors, not as a purely personal matter. The act of driving his crew members, receiving mileage reimbursement for himself, and receiving mileage reimbursement for his crew members put him under the control of his employer, defendant Murfin. It strains credulity to argue that the June 14, 2005, trip home had no connection to defendant Cabezas' employment with defendant Murfin. Defendant Cabezas could not complete his duties as a driller if he did not have his crew members at the job site. He was duty-bound to ensure that those crew members travelled to and from work. If they had no transportation, as was the case of passenger Eldon Bedford, defendant Cabezas had to drive them to and from work.

This obligation was recognized by defendant Cabezas' immediate supervisor, Kelly Wilson, who testified that drillers were responsible for roughnecks being at the rig sites, and that the drillers usually ensured their presence by picking crew members up and driving with them to the rig sites. (Plaintiff SOF No. 31). Logically then, if defendant Cabezas was responsible for getting his crew members to a rig site, he was also responsible for getting them home if he had taken them to the site. Thus, he was under the direction and control of defendant Murfin at the time of the accident. Put more simply, he was fulfilling his job duties while driving his crew members home.

Defendant Cabezas himself acknowledged this duty in his answers to Plaintiff's Requests for Admissions, which defendant Murfin now contends are contradictory to his prior testimony. At best for defendant Murfin, defendant Cabezas offered what might be viewed as equivocal deposition testimony on this topic, at one time stating he was not obligated to drive workers to and from rig sites but moments later explaining his duties as a driller to get roughnecks to and from work. (Cabezas Deposition, Exhibit C to Plaintiff Response/Cross-Motion, 33:6-35:3). For this reason, plaintiff served Requests for Admission on defendant Cabezas.<sup>2</sup> On this topic alone, plaintiffs have demonstrated a genuine issue of material fact as to whether defendant Cabezas was on the job at the time of the accident. However, plaintiffs argue that defendant Cabezas' more thorough discussion of his supervisory duties as a driller (found on Page 34 of his deposition), combined with his legal admissions, are a more accurate reflection of whether he was obligated to drive crew members to and from rig sites. This description, combined with other facts and legal admissions developed in this litigation, demonstrate that defendant Cabezas was, as a matter of law, on the job at the time of the accident, and thus, vicarious liability applies.

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<sup>2</sup> Defendant Murfin fails in its attempt to argue that defendant Cabezas' Responses to plaintiff's Requests for Admission are inappropriate. First, as argued above, the Responses did not contradict his depositions testimony. Second, the Responses were filed on July 1, 2008, well in advance of defendant Murfin's summary judgment. Mays

In any event, it is beyond refute that defendant Murfin injected itself into the transport of employees to and from rig sites. Defendant Murfin paid mileage reimbursements, which, despite its counsel's repeated arguments, were calculated based on the distance between an employee's home and their rig site and thus can only be viewed as compensating employees for miles travelled. Defendant Murfin facilitated the transfer of mileage reimbursements from passengers to drivers, ensuring that in some cases, such as defendant Cabezas and some of his crew members, the mileage reimbursements never went to passengers but instead went directly to the driver. And defendant Murfin's drillers instructed some roughnecks to assign their mileage reimbursements. At least one Murfin roughneck testified that these assignments were company policy, despite defendant Murfin's denial of this fact in response to Plaintiffs' SOF No. 43:

Q: In regard to assigning the per diems, you said you were instructed to do the assignments by the driller and you said that's the way they had it set up over there.

A: Since day one that's how we were informed. You're riding with me. Can you sign here so you can get your gas money, yes.

Q: Okay. And then you said that the driller, whoever you would ride with would say if you'd carpool with somebody then they'd get your per diem; correct?

A: Correct.

Q: Do you understand that to be the way the company did it for everybody?

A: Yes.

Q: **Understood that to be company policy?**

A: **Yes.**

Josh Miranda deposition, Exhibit I to Plaintiffs' Response/Cross-Motion, 34:5-24 (emphasis added).

This testimony, along with other facts referenced above, establishes that defendant Murfin, through its supervisors, controlled what its employees did with regard to their transportation to and from rig sites. By logical extension then, to have the authority to order the assignments of mileage reimbursements, supervisors such as defendant Cabezas had to be in the scope and course of their employment with defendant Murfin while transporting crew members

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v. Ciba-Geigy Corp., which plaintiffs have cited, states that a party cannot present contradictory evidence on summary judgment. 233 Kan. 38, 42, 44, 661 P.2d 348 (Kan. 1983).

to and from rig sites. Simply put, defendant Cabezas would not be entitled to defendant Murfin's mileage reimbursement for his crew members unless he was on the job while taking them to and from work.

**B. Defendant Murfin should not be permitted to dismiss its acknowledgement that defendant Cabezas was on the job for workers compensation purposes.**

As discussed at length in Plaintiff's Response/Cross-Motion, defendant Murfin, through its agent for workers compensation purposes, determined that defendant Cabezas and the crew members he was driving home were on the job at the time of the June 14, 2005, accident. This amounts to an admission of fact and law, and defendant Murfin should not now be permitted, on summary judgment, to argue that defendant Cabezas was not on the job at the time of the June 14, 2005, accident. To that end, plaintiffs cited numerous Kansas workers compensation cases holding that oil field workers are generally in the scope and course of their employment while driving to and from rig sites.

In response, defendant Murfin raises two responses. First, it argues that the standard for determining scope and course of employment for workers compensation purposes is different than for vicarious liability purposes. Plaintiffs agree, as argued in their Response/Cross-Motion. A close reading of PIK 4<sup>th</sup> 107.06 and of the Kansas workers compensation statutes, particularly K.S.A. § 44-501(a), indicates that a higher burden exists for establishing scope and course of employment for workers compensation purposes, at least in the context of employees going to and coming from work. Defendant Murfin argues the opposite, that the burden of proving scope and course of employment is lower for workers compensation purposes. But the primary and only Kansas state case that defendant Murfin cites for this argument actually addresses a different issue. In Thies v. Cooper, an injured party sought to impose liability on an employer who gave alcohol to its employee prior to a drunk driving accident. 243 Kan. 149, 753 P.2d 1280 (Kan. 1988). Thus, the opinion analyzed the difference between public policy behind

workers compensation as opposed to public policy imposing third-party liability for drunk driving. Id. at 154.

Regardless of this argument, any difference in the scope and course burdens between workers compensation and vicarious liability is not critical. Rather, the importance of the Kansas workers compensation cases regarding oil field workers lies in the factors those cases analyze in determining whether employees are on the job—factors unique to the oil industry, such as the customary practice of paying drillers to drive their crews, that workers without transportation would not be hired,<sup>3</sup> the long distances travelled from home to rig sites, the reimbursement of travel expenses based on mileage, that travel to and from moving rig sites is an integral part of the job, and that drillers are responsible for rounding up their crews. See, e.g., Bell v. A.D. Allison Drilling, 175 Kan. 441, 264 P.2d 1069 (Kan. 1953); Messenger v. Sage Drilling, 9 Kan.App.2d 435, 680 P.2d 556 (Kan. App. 1984). These factors are not specific or applicable to only workers compensation claims. They are employment factors used to determine whether an employee is on or off the job, regardless of the nature of the legal proceeding or the accompanying legal burdens. Using these factors, it is clear that defendant Cabezas was on the job, and thus in the scope and course of his employment with defendant Murfin, at the time of the June 14, 2005, accident.

Defendant Murfin's second argument as to why it should not be bound by its prior admission that defendant Cabezas was within the scope and course of his employment at the time of the accident is that estoppel is not appropriate in this case, as plaintiffs have requested.<sup>4</sup> By way of brief background, plaintiffs have argued that defendant Murfin should not be permitted to

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<sup>3</sup> Despite defendant Murfin's unsupported assertion on Page 44 of its Reply/Response that having transportation to and from the job site is not a factor in hiring decisions, defendant Murfin did not controvert Plaintiffs' Additional Statement of Uncontroverted Fact No. 28, which states that defendant Murfin's employment application forms ask applicants if they "have dependable multi-passenger transportation."

<sup>4</sup> Defendant Murfin has cited Black's Law Dictionary and one Kansas case in arguing that "equitable estoppel" is not appropriate in the instant matter. Plaintiffs are not seeking "equitable estoppel," as it is defined by Black's Law

deny on summary judgment that defendant Cabezas was on the job after previously acknowledging, through the ratification of its workers compensation agent's acts, that defendant Cabezas and his passengers were on the job at the time of the accident. See Mays v. Ciba-Geigy Corp., 233 Kan. 38, 41, 661 P.2d 348 (Kan. 1983) (party may not raise a fact issue on summary judgment by advancing facts contrary to those previously asserted). Doing so unfairly permits defendant Murfin to seek immunity from common law tort actions brought by its employees for defendant Cabezas's actions while now seeking Court-ordered immunity, through summary judgment, for actions brought by injured third parties. Defendant Murfin cannot have it both ways. Its material statements and responses of uncontroverted fact regarding this issue should be struck, and summary judgment is appropriate for plaintiffs, because defendant Murfin cannot demonstrate any material issue of fact that defendant Cabezas was not within the scope and course of his employment on the morning of June 14, 2005.

The only legal authority defendant Murfin cites in arguing against being estopped from now advancing a contradictory legal position is Herl v. State Bank of Parsons, a real estate case that appears to actually undercut defendant Murfin's argument. In Herl, the Kansas Supreme Court held that a land owner who had lost a prior action in replevin brought by a mortgage holder could not subsequently recover damages from the mortgage holder under a claim of conversion for selling the land owner's property. 195 Kan. 35, 403 P.2d 110 (Kan. 1965). The Supreme Court determined that the replevin action was *res judicata* and bestowed the right to sell the property upon the mortgage holder. Id. at 39. Defendant Murfin attempts to cite Herl for the proposition that "courts cannot be bound by a party's alleged admission of law." (Defendant Murfin's Reply/Response, Page 48). But defendant Murfin's proposition is contained in dissenting dicta and, thus, has limited authoritative value. Id. at 48. Even if the

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Dictionary in defendant's brief. Rather, plaintiffs have argued that as an equitable issue, defendant Murfin should be estopped from now arguing a position to which it previously admitted.

