

**COURT OF APPEALS OF TEXAS, THIRTEENTH DISTRICT, CORPUS
CHRISTI–EDINBURG**

**Regina Kay Smith and Jeffrey Scott Grove, as Surviving Parents of
Brittany Dawn Grove v. USI Industrial Services, Inc.**

Smith v. USI Industrial Services · No. 13-20-00004-CV · Decided November 18, 2021

SUMMARY

The Thirteenth Court of Appeals of Texas affirmed summary judgment for USI Industrial Services, Inc. in a wrongful-death action arising from an automobile accident involving former USI employees. The court held that the employees were no longer employed by USI at the time of the accident and that USI did not control their return travel, defeating claims based on respondeat superior and non-employee mission liability.

CASE DETAILS

COURT	Court of Appeals of Texas, Thirteenth District, Corpus Christi–Edinburg
WRITING FOR THE COURT	Justice Gina M. Benavides; Justice Benavides; Justice Longoria; Justice Tijerina
JURISDICTION	Texas
DECIDED	November 18, 2021
DOCKET	13-20-00004-CV
DISPOSITION	affirmed
PROCEDURAL POSTURE	Appeal from the grant of USI Industrial Services, Inc.'s amended traditional and no-evidence motions for summary judgment on the Groves' claims for respondeat superior and non-employee mission liability, and on related negligence claims.
STANDARD OF REVIEW	Summary judgment is reviewed de novo. No-evidence summary judgment is reviewed under the legal-sufficiency standard applicable to a directed verdict, requiring the nonmovant to produce more than a scintilla of evidence on each challenged element. Traditional summary judgment requires the movant to conclusively establish entitlement to judgment as a matter of law or negate an essential element. Evidentiary rulings are reviewed for abuse of discretion, and any error is subject to harmless-error review.

PRECEDENTIAL VALUE	published
PARTIES	Regina Kay Smith and Jeffrey Scott Grove, as surviving parents of Brittany Dawn Grove v. USI Industrial Services, Inc.

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QUESTIONS PRESENTED

1. Whether a genuine issue of material fact existed that Rodriguez was an employee of USI at the time of the accident for purposes of respondeat superior.
2. Whether USI could be vicariously liable under the doctrine of non-employee mission liability when Rodriguez's return trip was not subject to USI's direction or control.
3. Whether the trial court erred by relying on allegedly conclusory statements in USI supervisor Sherman Smith's affidavit in granting summary judgment.

HOLDINGS

1. The Groves failed to raise a genuine issue of material fact that Rodriguez was a USI employee when the accident occurred because the undisputed evidence showed that USI terminated him before the trip home. Without employee status, the respondeat superior claim could not proceed.
2. USI was not liable under non-employee mission liability because the return trip was not conducted subject to USI's direction or control. Because the control element failed, the court did not reach whether the trip benefited USI.
3. Any error in considering allegedly conclusory portions of Smith's affidavit was harmless because the court's disposition rested on two undisputed facts: Rodriguez and Ayala were released from employment before the trip, and USI did not control the manner or route of travel.

KEY QUOTATIONS

“For an employee’s conduct to be within the course and scope of employment, the conduct must be: (1) within the general authority given to the employee; (2) in furtherance of the employer’s business; and (3) to accomplish the object for which the employee was hired.” (5)

“We have previously found that merely compensating an employee for mileage without directing or controlling their means of travel or the particular route taken does not place the employee in the course and scope of employment while traveling to and from work.” (9)

FACTUAL BACKGROUND

USI employed Roberto Rodriguez and Alejandro Ayala as boilermakers and directed them to travel from the Rio Grande Valley to a Phillips 66 refinery in Borger, Texas. On April 18, 2016, USI terminated both men around 8:00 a.m. because of a reduction in force and paid them a lump-sum mileage allowance based on the distance between the Rio Grande Valley and Borger. Later that day, while Rodriguez was driving Ayala's truck toward the Rio Grande Valley, the truck collided with Brittany Grove's vehicle; Rodriguez and Brittany died and Ayala was injured. USI did not direct the route or manner of travel, and the men could have traveled to a different location for subsequent employment.

PROCEDURAL HISTORY

The Groves filed suit after a fatal automobile accident and later added USI as a defendant. USI moved for traditional and no-evidence summary judgment, attaching a supervisor's affidavit. The trial court granted USI's amended motion in its entirety. The Groves appealed, challenging summary judgment on respondeat superior and non-employee mission liability and arguing that USI's affidavit contained conclusory statements.

DISPOSITION

affirmed

CASES CITED

- Lujan v. Navistar, Inc., 555 S.W.3d 79, 84 (Tex. 2018)
- Provident Life & Accident Ins. Co. v. Knott, 128 S.W.3d 211, 215 (Tex. 2003)
- SeaBright Ins. Co. v. Lopez, 465 S.W.3d 637, 641–42 (Tex. 2015)
- Comm'rs Ct. of Titus Cnty. v. Agan, 940 S.W.2d 77, 81 (Tex. 1997)
- Merriman v. XTO Energy, Inc., 407 S.W.3d 244, 248 (Tex. 2013)
- Nassar v. Liberty Mut. Fire Ins. Co., 508 S.W.3d 254, 257 (Tex. 2017)
- Sci. Spectrum, Inc. v. Martinez, 941 S.W.2d 910, 911 (Tex. 1997)
- City of Keller v. Wilson, 168 S.W.3d 802, 816 (Tex. 2005)
- Bryant v. Baker, 580 S.W.3d 408, 412 (Tex. App.—Houston [1st Dist.] 2019, pet. denied)
- City of Houston v. Clear Creek Basin Auth., 589 S.W.2d 671, 678–79 (Tex. 1979)
- Valence Operating Co. v. Dorsett, 164 S.W.3d 656, 661 (Tex. 2005)
- Hawthorne v. Guenther, 461 S.W.3d 218, 221 (Tex. App.—San Antonio 2015, pet. denied)
- Davis v. West, 433 S.W.3d 101, 109 (Tex. App.—Houston [1st Dist.] 2004, pet. denied)
- St. Joseph Hosp. v. Wolff, 94 S.W.3d 513, 540 (Tex. 2002)
- Painter v. Ameritex Drilling I, Ltd., 561 S.W.3d 125, 131, 135–39 (Tex. 2018)
- Arbelaez v. Just Brakes Corp., 149 S.W.3d 717, 720 (Tex. App.—Austin 2004, no pet.)
- Clanton v. Interstate Telecomms., Inc., No. 13-19-00107-CV, 2020 WL 1887759, *5 (Tex. App.—Corpus Christi–Edinburg Apr. 16, 2020, no pet.) (mem. op.)
- Tex. Emps.' Ins. Ass'n v. Inge, 208 S.W.2d 867, 870 (Tex. 1948)
- SeaBright Ins. Co. v. Lopez, 465 S.W.3d 637, 644–45 (Tex. 2015)

- Arvizu v. Estate of Puckett, 364 S.W.3d 273, 275 n.3 (Tex. 2012)
- Wilson v. H.E. Butt Grocery Co., 758 S.W.2d 904, 907–08 (Tex. App.—Corpus Christi–Edinburg 1988, no writ)
- London v. Tex. Power & Light Co., 620 S.W.2d 718, 720 (Tex. App.—Dallas 1981, no writ)
- Columbia Rio Grande Reg'l Hosp. v. Stover, 17 S.W.3d 387, 395–96 (Tex. App.—Corpus Christi–Edinburg 2000, no pet.)
- Starwood Mgmt., LLC v. Swaim, 530 S.W.3d 673, 678 (Tex. 2017)
- Pipkin v. Kroger Tex., L.P., 383 S.W.3d 655, 669–70 (Tex. App.—Houston [14th Dist.] 2012, pet. denied)

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