IN THE CIRCUIT COURT OF THE EIGHTEENTH JUDICIAL CIRCUIT IN AND FOR SEMINOLE COUNTY, FLORIDA

CASE NO: 2012-CA-2181-10-G

CARLOS DIEZ-ARGUELLES, as Personal Representative of the Estate of MANUEL BRINGAS-MEJIA, and RAFAEL JAIMES-MEJIA,

Plaintiffs,

vs.

CHEMWAPUWA AKILAH JACKSON and REDLANDS CHRISTIAN MIGRANT ASSOCIATION, INC.,

Defendants.

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PLAINTIFFS' AMENDED MOTION FOR PARTIAL SUMMARY FINAL JUDGMENT ON THE ISSUES OF LIABILITY AND VICARIOUS LIABILITY AND MEMORANDUM OF LAW IN SUPPORT THEREOF

COME NOW the Plaintiffs, CARLOS DIEZ-ARGUELLES, as Personal Representative of the Estate of MANUEL BRINGAS-MEJIA, and RAFAEL JAIMES-MEJIA, through their undersigned attorneys, and under Florida Rule of Civil Procedure 1.510, move this Honorable Court for Partial Summary Final Judgment on the issues of liability and vicarious liability against Defendants, CHEMWAPUWA AKILAH JACKSON and REDLANDS CHRISTIAN MIGRANT ASSOCIATION, INC., and submit this Memorandum of Law In Support of Motion for Summary Judgment :

INTRODUCTION

The Complaint alleges negligence by Defendant, CHEMWAPUWA A. JACKSON, and vicarious liability by Defendant, REDLANDS CHRISTIAN MIGRANT ASSOCIATION, INC. (REDLANDS) under principles of master-servant doctrine and *respondeat superior*. As to Defendant, CHEMWAPUWA A. JACKSON, the issue germane to this motion is whether there are any genuine issues of material fact to dispute she was negligent in the operation of her motor vehicle when she rear-ended Plaintiffs on Interstate 4 at a high rate of speed. As to the Defendant, REDLANDS, the issue is whether there are any genuine issues of material fact to dispute Plaintiff's contention that Ms. Jackson was acting in the course and scope of her employment at Redlands Christian Migrant Association when she rear-ended the vehicle occupied by Plaintiffs, killing Manuel Bringas-Mejia and severely injuring Rafael Jaimes-Mejia.

FACTS

1. On November 16, 2011, Chemwapuwa Jackson was employed by REDLANDS as a health coordinator.[1]

2. Ms. Jackson's duties included providing technical assistance and training regarding health and safety to a group of child care centers owned and operated by REDLANDS.[2]

3. Ms. Jackson was a salaried employee, who worked out of REDLANDS' Zellwood, Florida office considered her "base" office as a matter of company policy and the terms of her employment.[3]

[1] Deposition of Chemwapuwa Jackson, Page 5, lines 19-25, attached.
[2] Deposition of Chemwapuwa Jackson, Page 6, lines 2-4.
[3] Deposition of Chemwapuwa Jackson, Page 8, lines 18-23. Deposition of Gyla Wise, Page 17, Lines 6-20.

4. On the days Ms. Jackson was not at the Zellwood "base" office, she was required to visit child care center locations in her assigned geographic zone.[4] Her job description required travel, and she was required to have a valid Florida driver's license and dependable transportation that could be used for business purposes as a part of her job. She was required to travel to other offices in her geographic cluster as a part of her job. She was a full time salaried employee required to work more than the normal 40 hour work week.[5] Job travel to the Seville child care center was anticipated by her job and job description and required of her, and her "regular commute" was to and from the Zellwood office.[6]

5. Ms. Jackson used her personal vehicle to travel to the child care centers for her site visits.[7]

6. Ms. Jackson was reimbursed for the mileage for her personal vehicle during the site visits to her assigned locations and was reimbursed for travel expenses.[8] When calculating her reimbursement for such travel, she was required by REDLANDS' written company policy to deduct the round trip mileage she would have driven to her "base" office in Zellwood, Florida, when instead of traveling to the base office, she travelled to one of the other child care centers in her assigned geographic zone, including the Seville, Florida child care center.

7. On November 16, 2011, Ms. Jackson did not report to work at her "base" office in Zellwood, Florida (her regular commute under company policy) but rather was required by her

[4] Deposition of Chemwapuwa Jackson, Page 9, lines 1-7. Deposition of Gyla Wise, Page 17, Lines 6-20.
[5] Deposition of Gyla Wise, Pages 18-20.
[6] Deposition of Gyla Wise, Pages 28-29.
[7] Deposition of Chemwapuwa Jackson, Page 9, line 25-Page 10, line 1.
[8] Deposition of Chemwapuwa Jackson, Page 10, lines 2-4.

employer to travel to the childcare center in Seville, Florida for a site visit as a part of her regular duties and job responsibilities.[9]

8. At the time of the accident, Ms. Jackson was travelling to her home in Altamonte Springs from her "on the job" travel to and from REDLANDS' child care center in Seville, Florida and this trip required her to return to Altamonte Springs by traveling west on I-4 near Lake Mary, the route taken at the time of the accident.[10] She would not have been required to travel that route if she had been directly en route to or from her "base" office in Zellwood.[11]

9. There is no dispute that it was part of Ms. Jackson's official duties in her position as health care coordinator to travel to various day care centers, including the child care center in Seville, Florida. This travel was required, necessary for her to maintain her employment at REDLANDS, and conducted solely for the benefit of her employer.

10. Ms. Jackson had to possess a valid driver's license and vehicle for furtherance of REDLANDS' business objectives. Ms. Jackson's Job Description form from REDLANDS provided she was required to, "possess a valid Florida Driver's License and dependable transportation that can be used for business purposes."

12. The only evidence is that Ms. Jackson was on I-4 at that time and place as a part of the traveling responsibilities of carrying out her job duties for REDLANDS, visiting child care centers like the one in Seville, when the accident occurred.

13. Ms. Jackson was in the course and scope of her employment at the time of the accident as a matter of law, and there is no factual support for any finding otherwise. While Defendant, REDLANDS, contends she was not in the course and scope of her employment at the time of the accident merely because her next destination was her home, it cannot be disputed that

[9] Deposition of Chemwapuwa Jackson, Page 19, lines 2-15.
[10] Deposition of Chemwapuwa Jackson, Page 24, lines 11-15.
[11] Deposition of Gyla Wise, Page 28-31, 34-35.

her job requirements were those of a traveling employee, that REDLANDS' company policies treated her as a traveling employee when she was traveling to and from the Seville office, that REDLANDS' had treated travel to the Seville office as "job travel" in the past, and that she was not on a regular commute to her "base" office in Zellwood at the time of the accident.

14. Gyla Wise, a Senior Adviser at REDLANDS' home office in Immokalee, Florida,[12] signed and filed an affidavit in opposition to Plaintiff's Motion for Summary Judgment stating in paragraph 9 that "JACKSON was reimbursed for mileage to these facilities *with the exception that JACKSON was not reimbursed for mileage within a 15 mile radius of her home*." Ms. Wise was deposed by Plaintiff to develop this allegation in her affidavit. She admitted she did not personally prepare the affidavit provided to her by REDLANDS' attorneys, that JAKCSON was indeed required to travel in her personal vehicle to childcare facilities like Seville, that REDLANDS even offered to reimburse JACKSON for extra business liability insurance if she purchased it, and that in signing the affidavit, and specifically paragraph 9, she simply meant that in calculating her mileage reimbursement, JACKSON and any other employee would be required to deduct her regular round trip "commute" mileage to and from her Zellwood base office. She also acknowledged she had no information that JACKSON had stopped anywhere on her way back from Seville on any personal errand and that the timing of the accident suggests she was on her way directly back home from the Seville "job travel."[13] Plaintiff contends the affidavit is, therefore, false and inaccurate in the sense it is an inaccurate, conclusory and self-serving statement with which even the affiant does not agree when placed under oath. The Affidavit of Gyla Wise, therefore, should be ignored, or stricken from the record entirely.

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[12] Deposition of Gyla Wise Page 6 Lines 1-5.
[13] Deposition of Gyla Wise, Page 31-34, 40-43.

15. Before the accident, JACKSON was regularly reimbursed travel expenses and paid for travel to and from the Seville office where she had worked on the date of the accident.[14] Gyla Wise was not involved in the development of travel policy for REDLANDS but she was involved in development of the job descriptions of employees like JACKSON.[15] Based on her own job experience, however, she knew that REDLANDS changed its travel reimbursement policy in about 2009 as a money savings measure.[16] She was aware and testified that the company's travel reimbursement policy required employees to deduct the round trip of their regular commute to their "base" office from any "job travel" miles when calculating their reimbursement.[17] The written travel policy at the time of the accident provided, *inter alia*, :

1. <u>Local Travel</u>

> **a) Mileage Reimbursement.** RCMA will reimburse actual business related expenses. This includes mileage in a privately owned vehicle, related tolls and parking…
> **Procedure:** *Every staff will have an assigned worksite base* as their work location. This will serve as the point of origin and *any miles normally traveled to this location from the staff's home will be designated as "regular commuting miles*." A staff's regular commuting miles to/from is/her home to the worksite base, in accordance with IRS rules, will not be reimbursed by RCMA. If a staff is traveling to an approved work location other than his/her worksite base, the regular commuting miles must be deducted when calculating the reimbursable miles…[Emphasis supplied].

Clearly, this written travel policy is not substantively identical to the conclusory and self-serving affidavit provided to Ms. Wise to sign in opposition of Plaintiff's Motion for Summary Judgment and to support Defendant's Motion for Summary Judgment. The affidavit should be ignored, if not stricken.

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[14] Deposition of Gyla Wise, Pages 23-24.
[15] Deposition of Gyla Wise, Page 10, Lines 20-25, Page 11, Lines 1-24.
[16] Deposition of Gyla Wise, Page 13, Lines 2-20.
[17] Deposition of Gyla Wise, Page 26, 28.

More importantly, JACKSON was "on the job" and engaged in "job travel" that was not a part of her "regular commute" at the time of the accident. There is no genuine issue of material fact that JACKSON was in the course and scope of her employment at the time of the accident.

16. JACKSON rear-ended Plaintiff's vehicle and had no excuse for it while traveling west on Interstate 4 during heavy traffic. She suggested she must have fallen asleep.[18]

SUMMARY OF ARGUMENT

There is no genuine issue of material fact that overcomes the presumption of negligence by Defendant, CHEMPWUWA A. JACKSON. Plaintiffs are entitled to Partial Summary Final Judgment on liability.

There are no genuine and disputed issues of material fact that Ms. Jackson was in the course and scope of her employment at the time of the accident. Ms. Jackson had no reason to be where she was, when she was, but for conducting a child care center visit for her employer. Under REDLANDS' own written company policy and routine practice, the travel to the Seville office was not considered a "regular commute" to work, was considered on the job travel and was reimbursed as such. Even if the "going and coming" rule applied to the circumstances, one or all of the exceptions to that rule apply where Ms. Jackson was engaged in travel specifically for her employer, was being reimbursed for such travel, was on a special errand at the time of the accident and had dual purposes for being on the route and location at which the accident occurred. There is no evidence she had any personal reason for being where she was, when she was, when she struck the Plaintiffs' vehicle. Rather, she was there only because she had a business purpose for being there, i.e. returning from a childcare center visit for her employer.

[18] Deposition of Chemwapuwa Jackson, Pages 23-27, 38-44.

Plaintiffs are entitled to partial summary judgment on vicarious liability against REDLANDS. The only real issues for the jury in this matter are the damages of each Plaintiff.

MEMORANDUM OF LAW IN SUPPORT OF PLAINTIFF'S MOTION FOR SUMMARY JUDGMENT

I. NEGLIGENCE OF CHEMWAPUWA A. JACKSON

A presumption of negligence attaches to the driver of the rear vehicle in a rear-end collision. The rear driver can rebut this presumption by presenting evidence that fairly and reasonably shows the presumption of negligence is misplaced.

When a vehicle is stopped in a roadway, but it is stopped at a place and time where such stop could reasonably be expected, such as an intersection with a red light, then the presumption of negligence by the rear vehicle's driver is not rebuttable, and the Plaintiff is entitled to judgment as a matter of law. *Clampitt v. D.J. Spencer Sales*, 786 So.2d 570 (Fla. 2001); *Wright v. Ring Power Corp*., 834 So.2d 329 (Fla. 5th DCA 2003); *Hunter v. Ward*, 812 So.2d 601 (Fla. 1st DCA 2002); *Tacher v. Asmus*, 743 So.2d 157 (Fla. 3rd DCA 1999). See also *Gulle v. Boggs,* 174 So.2d 26 (Fla. 1965).

When a leading vehicle is located within its proper place on a highway, proof of a rear-end collision raised a presumption of negligence by the overtaking vehicle. *Baughman v. Vann,* 390 So.2d 750 (Fla. 5th DCA 1980); *Stephens v. Dichtenmueller,* 207 So.2d 718 (Fla. 4th DCA 1968). This presumption provides a *prima facie* case which shifts to the defendant the burden of offering evidence to contradict or rebut the presumed negligence. If the defendant produces evidence that fairly and reasonably shows he was not negligent, the effect of the presumption disappears and

negligence then becomes a jury question. *Baughman v. Vann, Id.* and *Gulle v. Boggs, Id.* The burden on the defendant is not just to come up with just any explanation, but one which is "substantial and reasonable". *Baughman v Vann, Id.* and *Brethauer v. Brassell,* 347 So.2d 656 (Fla. 4th DCA 1977).

Defendant has wholly failed to produce a scintilla of evidence that CHEMWAPUWA A. JACKSON was not negligent as presumed under *Clampitt*. The Plaintiff is entitled to partial summary judgment on liability as a matter of law.

II. VICARIOUS LIABILITY OF REDLANDS CHRISTIAN MIGRANT ASSOCIATION

Introduction:

There are no facts creating any genuine issue of material fact on whether Chemwapuwa Jackson was in the course and scope of her employment at the time of the accident. Ms. Jackson was in the course and scope of her employment as a matter of law because she was engaged in travel for a business purpose, returning home from the Seville childcare center visit, rather than her "regular commute" home from her base office in Zellwood. As a matter of written company policy and company routine practices, Ms. Jackson was expected to and traveled, outside of her "regular commute" to her "base" office in Zellwood, Florida and was reimbursed for mileage when traveling to other destinations while on the job, including travel to other child care centers, such as the Seville, Florida child care center from which she was returning on the day of the accident. The travel to the Seville and other child care centers in her geographic zone were "job travel" anticipated by her employer and contemplated by her job description and job duties as health coordinator.

As a matter of company policy, Ms. Jackson's travel to and from the Zellwood child care center was her "regular commute" from home to work and back. Ms. Jackson was not reimbursed for travel to and from her base office in Zellwood, Florida and this travel was not considered "on the job" travel. However, as travel to and from other child care center locations was an expected part of Ms. Jackson's job duties, she was reimbursed for travel to those other centers, and such travel was "job travel." When calculating their reimbursement and turning in their mileage vouchers, company policy required Redland employees to deduct the round trip mileage of their "regular commute" to their "base" office, i.e. in Ms. Jackson's case, the Zellwood child development center. Employees were reimbursed mileage expenses for visits to other Redland child development centers that were not the employee's "base office". Employees were reimbursed for any "on the job" travel in a personal car performed for a business purpose. When calculating reimbursement, an employee's "regular commute" to their "base" office was deducted from the total "on the job" miles traveled as a matter of company travel reimbursement policy.

Ms. Jackson was reimbursed by Redlands for the travel expenses to and from the Seville center regularly before the accident and travel to the Seville center was for her employer's benefit. Travel to the Seville child care center was "on the job" travel for which mileage was reimbursed regularly before the accident. Ms. Jackson was a salaried employee whose job description specifically acknowledged she would be required to use her personal vehicle for business purposes. Ms. Jackson was returning from an employer-mandated visit to the Seville child care center when the accident occurred.

Ms. Jackson had to travel to the Seville child care center for a site visit and inspection as a part of her job and at the direction of her employer on the date of the accident. There can be no

doubt that she was in the course and scope of her employment at the time of the accident, and that she was on her way home from this "on the job" travel does not remove her driving activity from the "course and scope" of her employment. There is no evidence of even a slight deviation from her job duties during this trip. She had no personal reason to be on Interstate 4 at all, but for being required to travel to an inspection in Seville, rather than on her unreimbursed regular commute to her "base" office in Zellwood.

There is no evidence she had deviated for any purely personal reason from the route necessary to satisfy her job travel requirements. There is no evidence that Ms. Jackson had any reason to be on Interstate 4, the route on which the accident occurred, or at the site of the accident on Interstate 4 when the accident occurred, other than the business purpose of returning from her assigned task of traveling to one of several child care centers in her geographic zone.

As to the Defendant's apparent defense that vicarious liability does not apply due to the "going and coming" rule, the most that can be said is that Ms. Jackson had dual purposes for being on I-4 at the time of the accident, i.e. returning from the Seville site visit and returning home. Under the traveling employee, special errand, and dual purpose exceptions to the "going and coming" rule, Ms. Jackson was in the course and scope of her employment as a matter of law.

When Course and Scope of Employment is a Question of Law:

Where there are no factual disputes, whether an employee is acting within the course and scope of employment is a question of law. *Adams v. Mitchell G. Hancock, Inc.,* 74 So.3d 1113, 1114 (Fla. 5th DCA 2011); *Sussman v. Fla. E. Coast Props., Inc.,* 557 So.2d 74, 76 (Fla. 3d DCA 1990). Whether or not the employee is acting within the scope of his employment in a particular

instance is a question of law for the court if there is no conflict in the facts. *Whetzel v. Metropolitan Life Insurance Co.,* 266 So.2d 89 (Fla. 4th DCA 1972). The rule is well settled in Florida that whether an employee's tortious acts are within the scope of his employment relationship is normally to be determined by the jury, except where a jury could reach only one conclusion that could be sustained. *Tuberville v. Concrete Construction Company,* 270 So.2d 431 (Fla. 1st DCA 1972). Accord, *Gordils v. DeVilliers,* supra; *Alsay-Pippin Corp. v. Lumert,* 400 So.2d 834 (Fla. 4th DCA 1981); *Gold Coast Parking, Inc. v. Brownlow,* 362 So.2d 288 (Fla. 3rd DCA 1978), cert. dismissed, 368 So.2d 1367 (Fla.1979). The rule is well settled in Florida that whether an employee's tortious acts are within the scope of his employment relationship is normally to be determined by the jury, except where a jury could reach only one conclusion that could be sustained. *Saudi Arabian Airlines Corp. v. Dunn,* 438 So.2d 116, 121 (Fla. 1st DCA 1983).

Respondeat Superior and Course and Scope of Employment:

It is well established that under the doctrine of respondeat superior an employer may be liable in damages for the negligence of an employee which results in injuries to, or death of, another, if the wrongful act transpired while the employee was acting within the course of her employment. *Thurston v. Morrison,* 141 So.2d 291 (Fla. 2nd DCA 1962). To establish an employee's conduct was within the course and scope of his or her employment for purposes of a negligence action against employer, **the plaintiff must establish that: (1) the conduct is of the kind the employee is hired to perform; (2) the conduct occurs substantially within the time and space limits authorized or required by the work to be performed; and (3) the conduct is activated at least in part by a purpose to serve the master.** *Fernandez v. Florida National*

College, Inc., 925 So.2d 1096 (Fla. 3rd DCA 2006). For an employer to be vicariously liable for acts of his or her employee, the employee's conduct must further interest of employer or be motivated by those interests. *Bennett v. Godfather's Pizza, Inc.,* 570 So.2d 1351 (Fla. 3rd DCA 1991). See also *Perez v. Zazo,* 498 So.2d 463 (Fla. 3rd DCA 1986) and *Traynor v. Super Test Oil & Gas Co.,* 245 So.2d 916 (Fla. 2d DCA 1971). The law that an employer is responsible for the wrongful acts of his servant while the servant is acting within the scope of his employment is clear. *Stinson v. Prevatt,* 1922, 84 Fla. 416, 94 So. 656; *Weiss v. Jacobson*, 62 So.2d 904, (Fla. 1953).

Determining Course And Scope When Employee Is Driving:

The test for determining whether an employee is in the course and scope of employment when driving is found in *Nichols v. McGraw,* 152 So.2d 486 (Fla. 1st DCA 1963) and other Florida case law. The following principles involving the negligent operation of a motor vehicle apply in determining whether an employee is in the course and scope of employment when driving a motor vehicle:

> 1. An owner is liable when the vehicle is operated with his knowledge and consent, which may be either express or implied. Bare legal title is not conclusive as to ownership, and under certain factual situations, a person or other legal entity may be estopped from denying ownership.
>
> 2. Where the relationship of master and servant or principal and agent, exists, the theory of respondeat superior may be applicable, and in an appropriate case the superior is liable ***when the vehicle, without regard to ownership, is used in the business of the superior with his consent (express or implied) for a business purpose; and*** **that** ***slight deviation does not take the use out of the business purpose.***

Sample Case Applications:

A leading Supreme Court of Florida case seems dispositive here. In *Merwin v. Kellems,* 78 So.2d 865 (Fla. 1955) a traveling salesman employed by Blanchard Machinery collided with a third party while the salesman was on his way home from West Palm Beach, a part of his territory. The accident happened not far from his home. The Supreme Court of Florida observed, "If Merwin had been on his way to the company plant instead of home, it could not have been successfully contended that he was not still on his company's business. **Until he returned home, he was just as much on his master's business as if he had gone to the place of business instead**." A jury verdict in favor of the injured plaintiff not disturbed.

In *Carroll Air Systems, Inc. v Greenbaum,* 629 So.2d 914 (Fla. 4th DCA 1994) a salesman was on way home after a trade meeting and was driving intoxicated. The company required attendance and paid expenses of attending the trade meeting, and the court stated an inference could be made that company also paid expenses of traveling home from meeting. This evidence supported the jury's finding the salesman was in course and scope of his employment at the time of the accident.

In *Saudi Arabian Airlines Corporation v. Dunn,* 438 So.2d 116 (Fla. 2nd DCA 1983) the court addressed whether a jury question of course and scope existed for a traveling employee from Saudi Arabia attending school required by employer, left to buy groceries at Albertson's and was on his way back to school when the accident occurred. The court stated the following when analyzing "course and scope" where traveling is a required part of the employee's job:

> The rule is well settled in Florida that whether an employee's tortious acts are within the scope of his employment relationship is normally to be determined by the jury, except in those cases in which a jury could reach only one conclusion that could be sustained. *Tuberville v. Concrete Construction Company,* 270 So.2d 431 (Fla. 1st DCA 1972). Accord, *Gordils v. DeVilliers,* supra; *Alsay-Pippin Corp. v. Lumert,* 400 So.2d 834 (Fla. 4th DCA 1981); *Gold Coast Parking, Inc. v.*

Brownlow, 362 So.2d 288 (Fla. 3rd DCA 1978), cert. dismissed, 368 So.2d 1367 (Fla.1979).

In *N. and L. Auto Parts Company v. Doman,* 111 So.2d 270 (Fla. 1st DCA 1959), cert. discharged, 117 So.2d 410 (Fla.1960), this court was called upon to determine the compensability of an injury to a route salesman for a parts company. The claimant was required to travel through various communities in Georgia and South Carolina calling on customers of the company. On the day of the injury, claimant and a fellow employee drove to the outskirts of Savannah, where they registered at a motel. The two took a taxi into Savannah to see a movie after which they had a late night snack and returned to the motel. After exiting from the taxi and before returning to the motel room, the claimant was injured. In holding that the injury arose out of and in the course of the salesman's employment, the court cited the following rule:

The general rule is that an employee whose work entails travel away from the employer's premises is within the course of his employment at all times during the trip other than when there is a distinct departure for a non-essential personal errand. Injuries incurred during such travel and while attending to the normal creature comforts and reasonably comprehended necessities, as distinguished from those incurred in the course of amusement ventures are usually held to be compensable. Compensation in such areas is predicated on the premise that these acts do not take the employee out of the scope of employment because they are necessary to his health and comforts; that although such acts are personal to the employee, nevertheless they are expected incidents of his away-from-home employment and indirectly if not directly benefit the employer; that such acts, therefore, are not in fact deviations from the course of employment. 111 So.2d at 271-72. Applying this rule to the facts in this case, **the jury could have found that Al-Faqeer's employment with Saudi entailed travel away from his home in Saudi Arabia to the United States; that when Al-Faqeer drove to Albertsons to buy groceries, he was attending to the normal creature comforts and reasonably comprehended necessities; that his trip to Albertsons was not a non-essential personal errand, and thus, he was not deviating from the course and scope of his employment**. Although not binding on this court, several decisions from other states support this analysis. *See,* e.g., *Houghton v. Babcock and Wilcock Company,* 189 N.Y.S.2d 436, 9 A.D.2d 575 (1959), motion for leave to appeal denied, 193 N.Y.S.2d 1025, 7 N.Y.2d 705, 162 N.E.2d 752 (1959); and *Schreiber v. Revelon Products Corp.,* 171 N.Y.S.2d 122, 5 A.D.2d 207 (N.Y.App.Div.1958). Admittedly these cases were decided under the "arising out of and in the course of employment" standard in workers' compensation, but they are nevertheless instructive in determining the limits of the common law doctrine of respondeat superior. *Harris v. Trojan Fireworks Co.,* 174 Cal.Rptr. 452, 455, 120 Cal.App.3d 157, 162 (4th Dist.1981); *Thurston v. Morrison,* 141 So.2d 291 (Fla. 2nd DCA 1962).

> Whether the employee's tortious acts are within the course and scope of his employment relationship is normally to be determined by the jury, except in those cases where the jury could reach only one conclusion that could be sustained. *Tuberville v. Concrete Construction Company,* 270 So.2d 431 (Fla. 1st DCA 1972). Accord, *Gordils v. DeVilliers,* supra; *Alsay-Pippin Corp. v. Lumert,* 400 So.2d 834 (Fla. 4th DCA 1981); *Gold Coast Parking, Inc. v. Brownlow,* 362 So.2d 288 (Fla. 3rd DCA 1978), cert. dismissed, 368 So.2d 1367 (Fla.1979).

In *Sussman v. Florida East Coast Properties, Inc.,* 557 So.2d 74 (Fla. 3rd DCA 1990), the court applied the criteria for determining when a driver was in the course and scope of employment and found the employee was not in the course and scope of employment when she was **merely on her way to work and stopped to get a birthday cake for a co-employee's birthday celebration**. Even though the employee received workers compensation benefits and was considered in the course and scope of employment for workers compensation purposes, the court affirmed summary judgment for the employer in the third party tort action stating in part:

> Different considerations dictate the results in analyzing whether an employer is legally responsible for the conduct of an employee which results in harm to the employee or a fellow employee, and conduct of an employee which results in harm to third persons. *Johnson v. Gulf Life Ins. Co.,* 429 So.2d 744 (Fla. 3d DCA 1983). The policy goal of the workers' compensation statute is to provide prompt and limited compensation benefits for job-related injuries and to facilitate the employee's speedy return to employment without regard for fault. *Winn Dixie Stores, Inc. v. Akin,* 533 So.2d 829, 831 (Fla. 4th DCA 1988) (Anstead, J. concurring specially), *rev. denied,* 542 So.2d 988 (Fla.1989). Those policy considerations are not at work in cases where third parties make claims against the employer under principles of respondeat superior for injuries caused by the employee. Instead, a narrower analysis is undertaken which relies strictly on tort principles. *Id. See also Anderson v. Falcon Drilling Co.,* 695 P.2d 521 (Okl.1985); *Kang v. Charles Pankow Assoc.,* 5 Haw.App. 1, 675 P.2d 803 (1984); *Beard v. Brown,* 616 P.2d 726 (Wyo.1980); *Driscoll v. Harmon,* 124 Ariz. 15, 601 P.2d 1051 (1979).[19]

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[19] Of course, the fact is that the going and coming rule is indeed a workers compensation doctrine found in both the workers compensation statute and in workers compensation case law in Florida. *See Section 440.092(2), Fla. Stat.* and cases construing it. The cases applying the going and coming rule to liability cases cite workers compensation doctrines and case law as instructive only.

The test for determining whether an employee is in the course and scope of employment when driving a motor vehicle is not the "going and coming rule" which is a creature of the workers compensation code and cases construing it, although the courts have considered those cases instructive. The conduct of an employee is within the scope of his employment, for the purpose of determining the employer's vicarious liability to third persons injured by the employee, only if: **(1) the conduct is of the kind the employee is hired to perform, (2) the conduct occurs substantially within the time and space limits authorized or required by the work to be performed, and (3) the conduct is activated at least in part by a purpose to serve the master.** *Kane Furniture Corp. v. Miranda,* 506 So.2d 1061 (Fla. 2d DCA), *rev. denied,* 515 So.2d 230 (Fla.1987); *Whetzel v. Metropolitan Life Ins. Co.,* 266 So.2d 89 (Fla. 4th DCA 1972).

Additional Sample Florida Federal Court Cases:

Hertz Corporation v. Ralph M. Parsons Company, 292 F. Supp. 108 (M.D. Fla. 1968):

An employee whose work entails travel away from the employers' premises is within the course and scope of his employment at all times during the trip other than when there is a distinct departure for nonessential personal errands. Citing *N & L Auto Parts* and *Thurston*.

Eberhardy v. General Motors Corporation , 404 F. Supp. 826 (M.D. Fla. 1975):

Under the law of Florida, **an employee whose work requires travel away from his employer's premises remains within the course and scope of his employment, except for nonessential personal errands**. Citing *N & L Auto Parts.*

Ashworth v. U.S.A.. 772 F. Supp. 1268 (S.D. Fla. 1991):

Seaman in course and scope of duty when transferring belongings to new station of duty even though he was on leave at the time of the accident, intended to pass by his mother's home on his way to the new station and planned to store some of his belongings at his mother's home. He was hired to travel to the new duty station as ordered by his superiors. **Slight deviations do not relieve employer of liability for accident committed in course and scope of employment under Florida law**.

St. Paul Guardian Insurance Company as subrogee of Alice I. Cherry v. U.S.A., 117 F. Supp. 1349 (S.D. Fla. 2000):

As a Naval Reservist, Sloane was employed to follow orders, including orders directing him to report for two weeks of annual training at a station selected by the Navy. By orders dated May 3, 1995, Sloane was so ordered to report to the Naval Air Station in Key West, Florida no later than May 21, 1995 at 7:30 a.m. for his two weeks of annual training. The orders directed travel to the training session via Sloane's privately owned vehicle. Under the orders, Sloane was paid by the Navy one day of constructive travel for his drive to Key West, and was entitled to be reimbursed for his mileage and per diem because he was driving his private automobile. Sloane was <u>on duty status</u> and subject to the Military Code of Justice once he entered his vehicle and drove to Key West on May 20, 1995. Had Sloane not elected to drive his personal vehicle to the training, the United States would have had to provide transportation for him. Under the circumstances, Sloane, while fulfilling his orders by traveling to Key West in his private automobile, was engaged in conduct of the kind he was hired to perform. (*Holloway* distinguished by this Court because that was no longer employed, an inactive duty case and was not subject to the Military Code of Justice at the time.) Under his orders dated May 3, 2000, Sloane was not "going to

work," but was, for purposes of this inquiry, already "at work," doing that which he had been ordered to do, while traveling to the Naval Air Station in Key West. **Under Florida's respondeat superior law, an employee is acting within the scope of his employment if his conduct: (1) is the kind he is employed to perform; (2) occurs substantially within the time and space limits of the employment; and (3) was activated at least in part by a purpose to serve the master.** *See Lawrence v. Dunbar,* 919 F.2d 1525, 1528 (11th Cir.1990) (*citing Rabideau v. State,* 391 So.2d 283 (Fla.Dist.Ct.App.1980), *aff'd,* 409 So.2d 1045 (Fla.1982)); *Ashworth v. United States,* 772 F.Supp. 1268, 1271 (S.D.Fla.1991). The Court found Sloane was acting in the course and scope of his employment at the time of the accident.

Travel Rule:

The so-called "going and coming rule" finds its basis in Florida's Workers Compensation Code and case law construing it.[20] If the "going and coming rule" applies here to provide Defendant an argument that Jackson was not in the course and scope of employment, all of the provisions and exceptions of the "going and coming rule" should be considered. Another provision pertinent is found in section 440.092(4), Florida Statutes (1997):

> An employee who is required to travel in connection with his or her employment who suffers an injury while in travel status shall be eligible for benefits under this chapter only if the injury arises out of and in the course of employment while he or she is actively engaged in the duties of employment. This subsection applies to travel necessarily incident to performance of the employee's job responsibility but does not include travel to and from work as provided in subsection (2). *Id.*

[20] Of course, the fact is that the going and coming rule is indeed a workers compensation doctrine found in both the workers compensation statute and in workers compensation case law in Florida. *See Section 440.092(2), Fla. Stat.* and cases construing it.

If the "going and coming rule" is applied here, then the rule was not intended to apply to circumstances where, as here, the employee was actively engaged in the duties of employment, i.e. she was traveling where she was traveling and when she was traveling due to the explicit travel requirements of the job. The travel requirements of the job are undisputed here. Jackson was required by written policy and routine practice to travel to child care centers at times, such as on the date of the accident, was reimbursed for that travel, and was doing so at the time of this accident. She was not on her "regular commute" to work from Altamonte Springs to Zellwood.

***Special Errand Rule**:*

If the "going and coming rule" applies to create an argument that the driver was not traveling in the course and scope of employment, and rather, was merely on her way home, the circumstances meet the "special errand" exception to the "going and coming rule". She was clearly on a special errand for her employer that took her away from her normal commute to work. She would still be considered in the course and scope of her employment at the time of the accident. The law is well settled that an employer is not liable for torts of its employees committed while the employee is either going to work or returning home, unless the employee is on a special errand for the employer. *Eady v. Medical Personnel Pool,* 377 So.2d 693 (Fla.1979); *Everett Ford Co. v. Laney,* 189 So.2d 877 (Fla.1966); *Foremost Dairies, Inc. of the South v. Godwin,* 158 Fla. 245, 26 So.2d 773 (1946). *Robelo v. United Consumers Club, Inc.,* 555 So.2d 395 (Fla. 3rd DCA 1989).

In *Sussman v. Florida East Coast Properties, Inc.,* supra, the Third District Court of Appeal defined the principles applicable in determining whether an employee was in the course and scope of employment when harm occurs:

> The conduct of an employee is within the scope of his employment, for the purpose of determining the employer's vicarious liability to third persons injured by the employee, only if (1) the conduct is of the kind the employee is hired to perform, (2) the conduct occurs substantially within the time and space limits authorized or required by the work to be performed, and (3) the conduct is activated at least in part by a purpose to serve the master. *Kane Furniture Corp. v. Miranda,* 506 So.2d 1061 (Fla. 2d DCA), *rev. denied,* 515 So.2d 230 (Fla.1987); *Whetzel v. Metropolitan Life Ins. Co.,* 266 So.2d 89 (Fla. 4th DCA 1972).

As a general rule, injuries sustained by an employee when going to or coming from her regular place of work are not considered to have arisen out of and in the course of his employment.[21] *Alvarez v. Sem-Chi Rice Products System Corp.,* 861 So.2d 513 (Fla. 1st DCA 2003); *George v. Woodville Lumber Co.,* 382 So.2d 802, 803 (Fla. 1st DCA 1980). This rule, "is grounded in the recognition that injuries suffered while going to or coming from work are essentially similar to other injuries suffered off duty away from the employer's premises and, like those injuries, are usually not work related." *Eady v. Med. Pers. Pool,* 377 So.2d 693, 695 (Fla.1979). The principle is commonly known as the "going and coming rule" and is codified in section 440.092(2), Florida Statutes (1999), which provides that an injury suffered while going to or coming from work is not a compensable work related injury "unless the employee was engaged in a special errand or mission for the employer." Here, the driver was engaged in a special mission for the employer when traveling to the Seville site for an inspection, rather than

[21] Although this doctrine is codified in the workers compensation statutes, Florida courts often apply it to tort cases in civil courts in making the determination of whether an employee is in the course and scope of employment for purposes of tort liability for the employee's conduct. See *e.g. Alvarez v. Sem-Chi Rice Products System Corp., supra.* One case has held that while the workers' compensation doctrine may occasionally be instructive in tort actions involving vicarious liability, *e.g., Freeman v. Manpower, Inc.,* 453 So.2d 208 (Fla. lst DCA 1984), the governing principles are not always identical and workers' compensation doctrine should not necessarily control such tort actions. *Sussman v. Florida East Coast Properties,* 557 So.2d 74 (Fla. 3d DCA 1990); See *Pearce v. Lott,* 720 So.2d 587 (Fla. 1st DCA 1998).

being on her regular commute to Zellwood, in which case she would have "merely" been traveling to or from work and in which case, she would never have been on Interstate 4 at the time of the accident.

Dual Purpose Doctrine:

Often acting in conjunction with the "special errand" rule, the dual purpose exception to the "going and coming rule" recognizes that an employee may be in the course and scope of employment while engaged in conduct that serves the employer's as well as employee's interests. Even when a trip is made for ***both a business and a personal motive***, it is deemed an employment activity for workers' compensation purposes. *Spartan Food Systems & Subsidiaries v. Hopkins,* 525 So.2d 987 (Fla. 1st DCA 1988); *See Nikko Gold Coast Cruises v. Gulliford,* 448 So.2d 1002 (Fla.1984); *Krause v. West Lumber Co.,* 227 So.2d 486 (Fla.1969). This is the dual purpose doctrine. In *Swartz v. McDonald's Corporation*, 788 So.2d 937 (Fla. 2001), the Supreme Court of Florida explained the special errand and dual purpose doctrine exceptions to the "going and coming rule":

> Despite the broad application of the "going and coming" rule, section 440.092 delineates several exceptions. Because the term "dual purpose doctrine" does not appear in section 440.092, the respondents question whether the statutory phrase "special errand or mission" incorporates both the special errand exception and the dual purpose doctrine. The special errand exception includes employees who, at the time of injury, were on a special errand in response to a call from their employers, and is usually characterized by irregularity and suddenness. *See Eady v. Medical Personnel Pool,* 377 So.2d 693 (Fla.1979). The dual purpose doctrine provides that an injury which occurs as the result of a trip, *a concurrent cause of which was a business purpose,* is within the course and scope of employment, even if the trip also served a personal purpose, such as going to and coming from work. *See Nikko,* 448 So.2d at 1005.

In *Swartz*, the Supreme Court of Florida explained the special errand and dual purpose doctrines:

> Although the special errand exception and the dual purpose doctrine can be applied independent of each other, they have also become interconnected in case law. In determining whether to apply the special errand exception, courts consider various factors, including the relative burden of the journey on the employee in light of his or her employment duties, the irregularity of the timing and nature of the journey, the suddenness of the employer's request, the time and length of the journey, and any other special circumstances. *See Eady,* 377 So.2d at 696. Applying these factors, the court in *El Viejo Arco Iris, Inc. v. Luaces,* 395 So.2d 225 (Fla. 1st DCA 1981), held that an employee's trip home, after picking up plumbing supplies at the request of his employer, did not fall within the special errand exception because his journey was regular and frequent, the employer's request was not sudden, the burden of the request was minor in light of his route home, and he had already completed the employer's request at the time of the accident. In *New Dade Apparel, Inc. v. De Lorenzo,* 512 So.2d 1016, 1018 (Fla. 1st DCA 1987), the court held that an injured employee who returned early from vacation to work at the special request of his employer fell within the special errand exception. In determining compensability, the court recognized that irregularity and suddenness were essential elements of the special errand exception. *See also Eady,* 377 So.2d at 695 ("As a practical matter, the irregularity and suddenness of a call from the employer will almost always qualify it as a special errand exempt from the going and coming rule."); *Susan Loverings Figure Salon v. McRorie,* 498 So.2d 1033 (Fla. 1st DCA 1986).
>
> Despite the fact that the special errand exception can be an independent basis for finding an injury compensable under the workers' compensation laws, several cases applying this exception have also used this exception when referring to the dual purpose doctrine. For example, in *Spartan Food Systems v. Hopkins,* 525 So.2d 987 (Fla. 1st DCA 1988), the court concluded that the special errand exception applied to an employee who received a sudden call requiring her to pick up supplies and was injured after she resumed her normal route to work. In determining whether to apply the special errand exception, the court concluded that the concurrent business and personal purposes rendered the employee's trip compensable. *See id.* at 989. In so doing, it applied the dual

purpose doctrine to buttress its conclusion that the employee fell within the special errand exception. Similarly, in *D.C. Moore & Sons v. Wadkins,* 568 So.2d 998, 999 (Fla. 1st DCA 1990), the court explained the special errand exception by noting that concurrent personal and business purposes may establish liability. In so doing, the court did not distinguish between the special errand and dual purpose exceptions. Likewise, in *Tampa Airport Hilton Hotel v. Hawkins,* 557 So.2d 953 (Fla. 1st DCA 1990), the court simultaneously applied special errand and dual purpose principles, noting that because the employee was responding to a request by her employer, and she had both business and personal purposes, she fell within an exception to the "going and coming" rule.

Nevertheless, other cases apply the dual purpose doctrine without regard to the special errand exception. In *Nikko,* the employee had been taking cash home and returning it to the store for several years. There was no finding of suddenness and irregularity, as is required to trigger the special errand exception. Nonetheless, we applied the dual purpose doctrine to determine compensability. Similarly, in *Cook,* the employees were performing business duties, but not in response to a sudden or irregular request. In determining whether the employees' injuries were compensable, we merely discussed the existence of both business and personal purposes, and did not discuss factors typifying special errand cases. Thus, *Cook,* like *Nikko,* involved a straightforward application of the dual purpose doctrine. In *Krause v. West Lumber Co.,* 227 So.2d 486, 488 (Fla.1969), we applied the dual purpose doctrine to provide compensation without discussing the special errand exception. *See also Hages v. Hughes Elec. Serv., Inc.,* 654 So.2d 1280 (Fla. 1st DCA 1995) (applying dual purpose rationale to facts not involving suddenness or irregularity). In short, the foregoing cases indicate that the special errand exception and dual purpose doctrine can operate either in tandem or independently. As McDonald's correctly points out, in some cases courts have used the phrases "special errand" and "special errand or mission" interchangeably in cases that were exclusively applying the special errand exception. *See Eady,* 377 So.2d at 695; *New Dade Apparel,* 512 So.2d at 1017; *Susan Loverings,* 498 So.2d at 1034; *Gray v. Dade County School Bd.,* 433 So.2d 1009 (Fla. 1st DCA 1983). Nevertheless, other courts have used that term when concomitantly applying both the special errand exception and the dual purpose doctrine. *See Spartan,* 525 So.2d at 989; *D.C. Moore,* 568 So.2d at 999; *Tampa Airport Hilton,* 557 So.2d at 954. Indeed, the application of these exceptions is often dependent upon similar principles. Consequently, the varied use of the phrase "special

> errand or mission" clearly indicates that the statute incorporates both the special errand exception and the dual purpose doctrine. Our conclusion renders resort to other interpretive aids suggested by the parties unnecessary.

Jackson was serving dual purposes in traveling where she was, when she was, at the time of the accident. She had no personal reason and only business reasons to be on Interstate 4 at the location where the accident occurred. Assuming the "going and coming rule" applies to provide Defendant an argument that Jackson was not in the course and scope of her employment at the time of the accident, the dual purpose exception applies to establish Jackson was in the course and scope of her employment at the time of the accident.

Course and Scope of Employment/Respondeat Superior Analysis In This Case

Ms. Jackson had no personal reason to be on I-4 westbound at the time of this accident. She was returning from a child care center visit in Seville, Florida, as required by her job and a travel expense reimbursed trip. There is no evidence of any other reason for her to be at the place where the accident occurred at the time of the accident. Ms. Jackson was returning from her site visit and was not on her regular route home from work in her "base" office in Zellwood. Under Redlands' company policy and routine business practice, travel to and from the "base" office in Zellwood was her "regular commute" to and from work and was not reimbursable as a business travel expense. Here, Ms. Jackson was on I-4 to make the Seville site visit, travel necessarily incident to performance of the employee's job responsibility. Ms. Jackson's employment and job description with REDLANDS provided that she would need to use her personal vehicle for business purposes. She was entitled to be reimbursed for the mileage for this "on the job" travel, unlike travel on her regular commute to the Zellwood office. Had she been traveling on her "regular commute" as defined by REDLANDS written policy, she would not

have encountered Plaintiffs vehicle at all.

Ms. Jackson's conduct clearly: (1) was of the kind the employee is hired to perform, i.e. traveling to various child care sites; (2) occurred substantially within the time and space limits authorized or required by the work to be performed, i.e. on I-4 shortly after visiting the child care center; and (3) was activated at least in part by a purpose to serve the master, i.e. she was on a route she was required to take as part of her travel to and from a site visit for her employer and for no other purpose. See *e.g. Merwin v. Kellems,* 78 So.2d 865 (Fla. 1955) and *Fernandez v. Florida National College, Inc.,* 925 So.2d 1096 (Fla. 3rd DCA 2006). Assuredly, Ms. Jackson was furthering her employer's interest in performing her job duties by travelling to and from the Seville child care center. Ms. Jackson took that route and returned by that route purely for business purposes. Her trek westbound on I-4 did not magically become personal the second that she left the Seville child care facility. *Cf. Merwin v. Kellems, supra.* She had no personal reason to be on I-4 in that location at all. But for the work requirement of her employer, she would have not taken that route and would have had no business taking that route to work in her base office in Zellwood. There is no genuine issue of material fact about whether Ms. Jackson was in the course and scope of her employment with Redlands at the time of the accident. Plainly, she was.

If the "going and coming" rule applies, the instant case falls within the travel, special errand and dual purpose exceptions. Ms. Jackson's trip involved either travel for the employer, a special errand or a dual purpose and was in the course and scope of her employment. There is no evidence she had any purpose for being where she was, when she was, other than the purpose of completing an inspection and child care center visit for her employer and as required by her job description and duties. At best, there was a dual purpose for her being at the location of the accident.

There are many cases construing the going and coming rule, a workers compensation doctrine, in which courts have held an employee to be in the course and scope of employment although the employee was on his/her way home at the time of the accident. In *Tampa Airport Hilton Hotel v. Hawkins,* 557 So.2d 953 (Fla. 1st DCA 1990), the claimant was employed as a banquet waitress at the Tampa Airport Hilton Hotel. At the employer's request, she returned to the employer's premises to attend a staff meeting called by the employer. *Id.* at 954. After the meeting ended, while on her direct route home from the meeting, the claimant was involved in an automobile accident. *Id.* On appeal, the court affirmed the JCC's findings that the accident was compensable because the purpose of the trip during which the claimant was injured served a business purpose for the employer as well as the personal convenience of the claimant. *Id.* at 955.

In *Spartan Food Systems & Subsidiaries v. Hopkins,* 525 So.2d 987 (Fla. 1st DCA 1988), the claimant was employed at a Hardee's restaurant in Pensacola. On the day of the accident, the claimant received a telephone call from her supervisor asking her to stop at a Hardee's in Milton to obtain extra beverage cups and bring them with her to work. *Id.* at 988. The claimant left home thirty-five minutes early to complete the errand, and the trip to Milton required her to depart from her usual route to work. The claimant went to Milton as requested by the employer and obtained the cups. After resuming her normal route to work, her vehicle was rear-ended while she was stopped in traffic. *Id. Even though the claimant had returned to her usual route to work at the time of the accident, this circumstance did not negate the errand for her employer***.** This court stated that "[w]hen a trip is made for both a business and personal motive, it is deemed to be an employment activity for workers' compensation purposes." *Id.* at 989; *see also Bruck v. Glen Johnson, Inc.,* 418 So.2d 1209, 1211 (Fla. 1st DCA 1982) (holding the special

errand exception applied to a worker injured on his way to work after making a ten mile detour at the request of his employer and the accident was therefore compensable).

In *Alvarez v. Sem-Chi Rice Products Corp.,* 861 So.2d 513 (Fla. 1st DCA 2003), although at the time of the accident the claimant was going home on the same route he usually took, the purpose of the trip during which the claimant was injured served a business purpose for the employer as well as the personal convenience of the claimant*,* taking a table home with him to assemble because it was more convenient to do so. Likewise, although the special errand of picking up the table had been completed and *the claimant had returned to his normal route home when the accident occurred*, the claimant made special arrangements and went out of his way to perform a special errand for his employer.

In determining whether a special errand for an employer has been completed and therefore that the employee is no longer in the course and scope of employment, the court must analyze whether both the objective of the errand has been attained and its burden upon the employee has ended**.** See e.g. *Electronic Service Clinic v. Barnard,* 634 So.2d 707 (Fla. 1st DCA 1994). In *Barnard,* the claimant worked for appellant/employer as a TV repairman. On the morning of a typical workday, the claimant would drive the employer's van from his home in Valrico to the employer's shop in Bradenton. There, he would pick up a list of customers whom he would telephone to make appointments for the day's service calls. The claimant would then drive the employer's van to the customers' homes, where he would pick up, deliver or service their television sets. After making his last service call of the day, usually around 5 or 5:30 p.m., but sometimes as late as 6:30 or 7, the claimant would go directly home to Valrico in the company van without returning to the shop in Bradenton.

In *Barnard,* February 4, 1992, was an unusual workday. The employer's van was being repaired, so the employer provided a rented automobile for claimant to drive to work and to make his service calls. Because the van had been out of service for some time, and the claimant could not deliver repaired sets in the rented car, a backlog had developed in delivery. On February 4, the claimant left the rented car at the shop after driving to work, and then made his calls with a delivery person in the employer's delivery truck. This was the first time the claimant was accompanied by a coworker when making his service calls. The day also involved an unusually large number of calls, the last of which the claimant finished at 10:30 p.m. Although the claimant's last service call was in Plant City, approximately 20 minutes from his home, claimant could not complete his day by driving home. Rather, the claimant and the coworker, on their way back to the employer's shop in Bradenton, stopped by claimant's house to inform his wife he would be late. The men proceeded to the shop where the claimant dropped off his coworker and the delivery truck to begin the drive home to Valrico in the rented car. On the way home, the claimant was seriously injured in an automobile accident. A claim for benefits was filed, which the e/c controverted based upon the "going and coming rule." The court concluded the claimant was still engaged in a special errand for the employer at the time of the accident and was still in the course and scope of the employment at the time of the accident. In responding to the employer/carrier's argument that the special errand had ended and the client was on the way home such that the going and coming rule applied to determine the employee was not in the course and scope of employment, the court stated:

> "The e/c's argument that the errand was complete once the tasks were performed, and their reliance upon *El Viejo,* suggests that ***the e/c have confused the attainment of the errand's objective with the more critical question of the completion of the errand's burden.*** Thus, in *El Viejo,* the claimant was deemed to have

> completed his special errand not because the objective had been accomplished once the supplies were purchased; indeed, one could argue that the objective was not accomplished until the claimant delivered the supplies to the jobsite the next day. Rather, the errand was complete at the time of the purchase because the additional burden the errand placed upon the claimant had been performed at that time, and nothing remained but the claimant's resumption of his ordinary trip home. In the instant case by contrast, the burden of the errand included the lengthy round-trip, and the errand could not be deemed complete until the trip ended.

Similarly in *Canfield v. Weaver,* 768 So.2d 1205 (Fla. 1st DCA 2000) the claimant was the medical staff manager and a nurse at the employer's medical office, and her various duties included receiving patient calls. When the doctor is unavailable or out of town the claimant was the on-call contact person who monitored patient calls for prescription renewals and referrals to other doctors or emergency facilities. The employer's medical office was closed while the doctor was on vacation, and the claimant took her own vacation during that time. However, the claimant had to contact the employer's answering service every day, and she continued to handle patient calls. Because the claimant would spend her vacation on a small island which did not have telephone service, the employer arranged for the rental of a cellular telephone on Great Abaco Island. The employer provided the funds for the lease of the phone, and the claimant had to complete the paperwork and obtain the phone on Great Abaco, using it for numerous patient calls and several prescription renewals during her stay on the small island.

The claimant subsequently made the boat trip from the small island back to Great Abaco to return the phone. The claimant's husband piloted the boat and attended to personal matters on Great Abaco while the claimant returned the telephone and arranged to conclude the transaction. The claimant and her husband began their return boat trip to the small island, but while they were leaving the harbor the boat crossed a wake from another vessel and the claimant was thrown from her seat and sustained injury. In denying the claim the judge relied on section 440.092(2),

which indicates that an injury sustained while going to or coming from work does not arise out of and occur in the course of the employment unless the employee was engaged in a special errand or mission for the employer. Noting the claimant was the employer's regular on-call contact person and that she chose her own vacation destination, the judge found that the boat trip between the small island and Great Abaco was not a journey required by the employer. The judge further reasoned that once the claimant returned the telephone her employment duty ceased, and that she was no longer in the course and scope of her employment when injured while on the return trip back to the small island. The First District Court of Appeal reversed noting this reasoning did not comport with a proper application of the going and coming rule as delineated in cases such as *Electronic Service Clinic v. Barnard,* 634 So.2d 707 (Fla. lst DCA 1994), and *Tampa Airport Hilton Hotel v. Hawkins,* 557 So.2d 953 (Fla. lst DCA 1990).

The First District Court of Appeal held that though the claimant was the regular contact person, the trip between the small island and Great Abaco was a special errand or mission for the employer as it was an unusual and necessary component of the service by the arrangement which the employer made for the claimant to perform the on-call function while on vacation. As in *Barnard* and *Hawkins*, the burden of the journey and the attendant employment relation encompassed the round-trip back to the point of origin, and the injury which the claimant sustained while returning back to the small island arose out of and occurred in the course and scope of the employment.

In the instant case involving Ms. Jackson, she had only a business purpose to be on I-4 in Lake Mary and not on her regular route home from Zellwood. Under REDLANDS' company policy, she was eligible to be reimbursed for the travel by her employer as part of her official duties as an employee. The burden of the travel and special errand included going out of her

way and travelling to a child care center that was not her "base" office in Zellwood. It cannot be said that the burden of the travel or the special errand had ended until, at least, she was no longer travelling on a unique route back from that special assignment.

Finally, there is no apparent assertion by the Defendant and no evidence that Ms. Jackson deviated from he on the job travel or special errand by any distinct departure from the route or job duties. See e.g. *Standard Distribution Company v. Johnson*, 445 So.2d 663 (Fla. 1st DCA 1984).

As a matter of law, there is no factual basis upon which a jury could conclude she was not in the course and scope of her employment. The jury need not decide this issue because there is no genuine issue of material fact upon which they could find that Ms. Jackson was not in the course and scope of her employment. As a matter of law, she was in the course and scope of her employment at the time of the accident. Submitting vicarious liability to the jury risks appellate error on a non-issue.

Alternatively, The Determination Is A Jury Question:

Should the Court deny Plaintiff's Motion for Partial Summary Judgment on the issue of vicarious liability, it is clear from the above case law that there is, at worst, a jury question on the issue that precludes granting Defendant's Motion for Summary Judgment on this issue.

CONCLUSION

For the foregoing reasons, there are no genuine issues of material fact that overcome the presumption of negligence by Defendant, CHEMPWUWA A. JACKSON. Plaintiffs are entitled to Partial Summary Final Judgment on liability.

Likewise, there are no genuine issues of material fact to dispute that Ms. Jackson was in

the course and scope of her employment at the time of the accident. Ms. Jackson had no reason to be where she was, when she was, but for conducting a child care center visit for her employer. Under REDLANDS' own written company policy and routine practice, the travel to the Seville office was not a "regular commute" to work, was considered "on the job" travel and was treated and reimbursed as such. Even if the "going and coming" rule applied to the circumstances, one or all of the exceptions to that rule apply where Ms. Jackson was engaged in travel for her employer, was being reimbursed for such travel, was on a special errand at the time of the accident and had dual purposes for being on the route and location at which the accident occurred. Indeed, there is no evidence she had any personal reason for being where she was, when she was, at the time she struck the Plaintiffs' vehicle. Rather, she was there only because she had a business purpose for being there, i.e. returning from a child care center visit for her employer. Plaintiffs are entitled to partial summary judgment on the count of vicarious liability against Redlands.

Alternatively, issues of fact on vicarious liability preclude entry of summary judgment on this issue for either party.

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing has been filed using the Florida Courts E-Filing Portal on this _____ day of September, 2014, which will automatically provide a copy to: KENDALL B. RIGDON, ESQ., Rigdon Alexander, 125 Tangerine Avenue, Merritt Island, FL 32953, at krigdon@rigdonalexander.com and PAUL S. JONES, ESQ., Luks, Santaniello, Petrillo & Jones, 255 South Orange Avenue, Suite 750, Orlando, FL 32801 at LUKSOrl-Pleadings@ls-law.com.

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