IN THE CIRCUIT COURT OF THE SEVENTH JUDICIAL CIRCUIT, IN AND FOR VOLUSIA COUNTY, FLORIDA

CASE NO: 2010 21016 CINS

BARBARA PIPPIN, AS PERSONAL REPRESENTATIVE OF THE ESTATE OF ROBERT F. PIPPIN,

Plaintiffs,

vs.

BELLA NAPOLI OF NSB, LLC, A FLORIDA LIMITED LIABILITY COMPANY, AND THOMAS P. FOLENO,

Defendants.

_____ /

PLAINTIFF'S MEMORANDUM OF LAW IN SUPPORT OF PLAINTIFF'S MOTION FOR PARTIAL SUMMARY JUDGMENT ON THE ISSUE OF VICARIOUS LIABILITY

COMES NOW, Plaintiff, BARBARA PIPPIN, as Personal Representative of the ESTATE OF ROBERT F. PIPPIN, and on behalf of his sole survivor, Barbara Pippin, and submits this Memorandum Of Law In Support of Motion for Partial Summary Judgment on the Issue of Vicarious Liability/Course and Scope of Employment and states as follows:

ISSUE

WHETHER THERE IS ANY GENUINE ISSUE OF MATERIAL FACT THAT THOMAS P. FOLENO WAS IN THE COURSE AND SCOPE OF HIS EMPLOYMENT AT THE TIME OF THE ACCIDENT THAT KILLED THE PEDESTRIAN ROBERT PIPPIN

STATEMENT OF THE CASE AND FACTS

On January 10, 2009 Thomas Foleno was working for Bella Napoli as an employee at their restaurant. His duties included pizza and meal deliveries. His hours were usually 11:00 a.m. to closing time. On the evening of January 10 2009, there is no dispute that he had left the restaurant, located on U.S. 1, traveled south to the causeway in his car, crossed the intracoastal waterway, and then proceeded south on A1A to make a pizza/restaurant food delivery at on the 6700 block of A1A on the beachside of New Smyrna Beach. There is also no dispute that he completed that delivery and was northbound on A1A returning from making the delivery when the accident happened on A1A at a well-marked crosswalk. He struck Mr. Pippin, a pedestrian who was crossing A1A eastbound for a walk on the beach.

Mr. Foleno contends he was on his way back to the restaurant for a final delivery. Bella Napoli contends he had made his last delivery and had been released or discharged to go home after making the delivery. For the reasons that follow, that factual dispute is immaterial to determining whether or not Mr. Foleno was in the course and scope of his employment at the time of the accident, and Plaintiff is entitled to partial summary judgment finding that Mr. Foleno was in the course and scope of his employment at the time of the accident. There is no evidence that Mr. Foleno had anything other than a business purpose for being where he was, when he was, when the accident occurred. He had no personal reason to be at that location at that time. Even if it is assumed that he was on his way home from that delivery, there is also no genuine issue of material fact that he was on a special errand for his employer and had a dual purpose for being on the A1A route and at the location on A1A where the accident occurred. Thus, under any

scenario, he was in the course and scope of his employment at the time of the accident as a matter of law, and there is no factual support for any finding otherwise under the law.

APPLICABLE 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.,* 2011 WL 5243303 (Fla. 5th DCA 2011); *Sussman v. Fla. E. Coast Props., Inc.,* 557 So.2d 74, 76 (Fla. 3d DCA 1990). The question as to 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 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). 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. *Saudi Arabian Airlines Corp. v. Dunn,* 438 So.2d 116 (Fla. 1st DCA 1983).

Plaintiff contends that there are no facts creating a jury issue or genuine issue of material fact on whether Thomas Foleno was in the course and scope of his employment at the time of the accident. It is Plaintiff's contention that, regardless of whether Mr. Foleno had made his last meal/pizza delivery before the accident occurred, he was still in the course and scope of his employment as a matter of law because he was returning from the delivery and had not yet begun his normal route home. There is no evidence that Mr. Foleno had any reason to be on the route on which the accident occurred or at the site of the accident when the accident occurred, other than the business purpose of returning from the special errand of pizza delivery that took him away from his normal route home. The very most that can be said is that Mr. Foleno had dual purposes for being on A1A at the time of the accident, i.e. returning from the delivery and returning to his normal route home. Pursuant to the special errand and dual purpose exceptions to the "going and coming" rule, Mr. Foleno was in the course and scope of his employment as a matter of law, even if the "going and coming" rule is applicable and even if he was indeed on his way home from the pizza delivery.

Plaintiff contends that Mr. Foleno was in the course and scope of his employment when his vehicle struck the decedent, Mr. Pippin, a pedestrian, since Mr. Foleno was delivering meals ordered from his restaurant owner/employer, Bella Napoli, at the time. Defendant, Bella Napoli, contends Foleno had delivered his last order, was off the clock and was on his way home. Plaintiff contends that this fact is not material to this legal issue given the other undisputed facts and circumstances. The facts are not in dispute that he had no reason to be on A1A at the time other than to return from the delivery so that he could cross the causeway and begin to take up his normal route home, even if

Defendant, Bella Napoli's, contentions that he had delivered his last pizza and was going directly home are true.

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 his employment. *Thurston v. Morrison,* 141 So.2d 291 (Fla. 2nd DCA 1962). To establish that an employee's conduct was within the course and scope of his 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 in some way 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,* Fla.1953, 62 So.2d 904.

The law also appears clear that an agent going to or returning from a business

meeting or convention where there is no clear-cut deviation is within the scope of his employment. The conduct of a servant is within the 'scope of his employment' only if it is of the kind he is employed to perform, it occurs substantially within authorized time and space limits and it is activated at least in part by a purpose to serve the master. *Brazier v. Betts,* 1941, 8 Wash.2d 549, 113 P.2d 34.

It appears that the general principles of law enunciated stand for the following principles involving the negligent operation of 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.***

Nichols v. McGraw, 152 So.2d 486 (Fla. 1st DCA 1963).

Going and Coming Rule:

Special Errand Exception:

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., Sussman v. Florida East Coast Properties,* 557 So.2d 74 (Fla. 3d DCA 1990) 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).

While 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, there is liability where the employee is on a special errand for the employer. *Robelo v. United Consumers Club, Inc.,* 555 So.2d 395 (Fla. 3rd DCA 1990); *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).

Defendant argues that the "going and coming" provision of section 440.092(2), Florida Statutes (2009), operated to establish, as a matter of law, that Foleno was not in the course and scope of his employment at the time of the accident because he had purportedly been released from work and was on his way home at the time of the

accident. On the contrary, the going and coming rule dictates the opposite finding here, as a matter of law.

Defendant concedes that Foleno had, at least in Defendant's view, made his last delivery of the day and was released to be on his way home. As a general rule, injuries sustained by an employee when going to or coming from his regular place of work are not considered to have arisen out of and in the course of his employment.[1] *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."

As noted by the court in *Florida Hospital v. Garabedian*, 765 So.2d 987 (Fla. 1st DCA 2000), the going-and-coming rule, previously recognized in case law, has been

[1] 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).

codified in section 440.092(2), Florida Statutes (1997), as follows:

> GOING OR COMING.-An injury suffered while going to or coming from work is not an injury arising out of and in the course of employment whether or not the employer provided transportation if such means of transportation was available for the exclusive personal use by the employee, unless the employee was engaged in a special errand or mission for the employer.

Another provision of the statute pertinent to this case 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.*

The special errand exception was explained in *D.C. Moore & Sons v. Wadkins,* 568 So.2d 998 (Fla. 1st DCA 1990) as follows:

> The going and coming rule does not apply to employees who are on special errands or missions for the employer. A special errand exists if the journey was a substantial part of the service performed for the employer. *Eady v. Medical Personnel Pool,* 377 So.2d 693 (Fla.1979). A special errand exists where the employee is instructed by the employer to perform a special errand which grows out of and is incidental to his employment. *Bruck v. Glen Johnson, Inc.,* 418 So.2d 1209, 1211 (Fla. 1st DCA 1982).

Dual Purpose Doctrine:

Even when a trip is made for ***both a business and a personal motive***, it is deemed to be 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 known as 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" as follows:

> 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 went on to provide the following historical explanation of 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 caselaw. 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.

ARGUMENT

Course and Scope of Employment/Respondeat Superior:

Mr. Foleno had no personal reason to be on A1A on the beachside of New Smyrna at the time of this accident. He was returning from a pizza delivery there. There is no evidence of any other reason for him to be at the place where the accident occurred at the time of the accident. He was on A1A to deliver pizza to a customer of Bella Napoli. There is simply no genuine issue of material fact about these facts.

He was returning from that delivery and would not have been on his normal route home, even assuming *arguendo* that he was not returning to the restaurant, until he had crossed the causeway and turned south on U.S. 1. Mr. Foleno's conduct clearly (1) was of the kind the employee is hired to perform, i.e. delivering pizzas; (2) occurred substantially within the time and space limits authorized or required by the work to be performed, i.e. on A1A shortly after making a delivery; and (3) was activated at least in part by a purpose to serve the master, i.e. even if he was going home as Defendant, Bella Napoli contends, he was on a route that he was required to travel to return from a delivery for his employer and for no other purpose. See *Fernandez v. Florida National College, Inc.,* 925 So.2d 1096 (Fla. 3rd DCA 2006). Assuredly, Mr. Foleno was furthering his employer's interest by taking that route and returning by that route and was there purely for business purposes. His trek to south A1A did not magically become personal the second that he dropped off the pizza and drove from the customer's residence driveway. He had no personal reason to be on A1A at all. But for the errand for his employer, he would have not taken that route and would have had no business taking that route. There is no genuine issue of material fact that he was, therefore, necessarily in the course and

scope of his employment at the time and place of the accident.

Going and Coming Rule Inapplicable:

To the extent that the "going and coming" rule is applicable, the instant case falls within the dual purpose and special errand exceptions. Clearly, under any set of facts as argued by Defendant to be true, i.e. that Mr. Foleno had delivered his last pizza/food order on A1A in New Smyrna Beach and was returning home at the time of the accident that occurred on A1A, his trip involved either a special errand or a dual purpose and was thus in the course and scope of his employment. There is no evidence at all that he had any purpose for being where he was when he was, other than the purpose of returning from the delivery while en route back to a point where he could then begin his normal route home. At best, there was a dual purpose for him being at that location at that time. The mere fact that Defendant contends Mr. Foleno was told he would be off the clock after the "last" pizza was dropped off does not establish an issue of fact on whether Foleno was in the course and scope of his employment, even if it is true. The "going and coming" rule is not so simplistic or absolute as Defendant would have the Court believe. Far from it, the "going and coming" rule has a much narrower and specific application that is simply inapplicable here.

There are many cases in which courts have held an employee to be in the course and scope of employment despite the fact that 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, this 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 in order 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 that the special errand exception applied to a worker who was 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***

that 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 reaching her decision, the JCC relied on this First District Court of Appeal's decision in *Viejo Arco Iris, Inc. v. Luaces,* 395 So.2d 225 (Fla. 1st DCA 1981). In *Luaces*, a plumber who usually returned home at 4:00 p.m. left work at 3:55 p.m. The employer had requested that the claimant pick up plumbing materials at the supply store which was on his route home. After picking up the materials, the claimant resumed his trip home and was involved in an automobile accident at 4:05 p.m. The special errand exception to the going and coming rule did not apply because the plumbing supply store was directly on the claimant's route home, the employee was not subject to a sudden call by the employer, and the burden of picking up the materials was minor when viewed in the context of the claimant's usual duties and his usual route home. *Id.* at 226.

This court in *Hopkins* distinguished *Luaces* on the facts. Unlike in *Hopkins,* the employee in *Luaces* was injured on a regular and frequent journey, was not on a sudden call by the employer, and the burden of picking up the materials was minor when viewed in the context of the employee's usual route home. *Hopkins,* 525 So.2d at 989. The claimant in *Hopkins,* on the other hand, responded to a sudden call that required travel on an unusual route in order to bring the supplies to work, thus increasing the burden. *Id.*

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, for example, 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. Consequently, 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.2 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 that 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 that 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 as follows:

> "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 was required to contact the employer's answering service every day, and she continued to be responsible for handling 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, thereafter 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 in order 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 made the necessary arrangements to conclude the transaction. The claimant and her husband thereafter 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 generally 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 that 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 that 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 virtue of 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 thus arose out of and occurred in the course and scope of the employment.***

In the instant case involving Mr. Foleno, he had no business purpose to be on A1A in New Smyrna Beach and that was not on his normal route home. The burden of the special errand included going out of his way and away from his normal route home. His normal route home would have been south on U.S. 1. The errand took him across the causeway and intracoastal waterway and south on A1A. He was returning North on A1A when he ran over Mr. Pippin, a pedestrian at a well marked legal crosswalk. It cannot be said that the burden of the special errand had ended until, at least, he resumed his normal route home from work. Even if he had reached his normal route, the above cases suggest

he would still be considered in the course and scope of his employment following completion of the special errand.

At a minimum, the burden of the special errand had not ended until he reached his normal route home. There is no genuine issue of material fact that he had not resumed his normal route and was not on that normal route when the accident occurred since he did not have to take A1A to get from work at Bella Napoli to his home in Edgewater. Rather, his normal route home would have been south on U.S. 1 from the restaurant. He was nowhere near his normal route home at the time of the accident, and in fact, he had not even reached the causeway that would take him back over the intracoastal waterway from A1A beachside in New Smyrna Beach.

It should be further noted that in this case there is no apparent assertion by the Defendant and no evidence that Mr. Foleno deviated from his employment duties or the special errand by any distinct departure from the usual route or duties. See e.g. *Standard Distribution Company v. Johnson*, 445 So.2d 663 (Fla. 1st DCA 1984). The most that can be said is that he had a dual purpose at the time of the accident, i.e. to complete the return trip from his New Smyrna Beach beachside delivery so that he could resume his normal route home. As a matter of law, there is no factual basis upon which a jury could conclude that he was in the course and scope of his employment, even assuming the facts to be as contended by Defendant, although it should be noted that Foleno contends he was on his way back to the restaurant to make another delivery and had not made his last delivery at the time. Whether or not he had made his last delivery, he had no personal reason to be at the place of the accident at the time of the accident. He was there purely for a business purpose for his employer, i.e. to deliver a pizza.

Defendant, Bella Napoli, wants the *respondeat superior* issue to go to the jury for one reason. Defendant, Bella Napoli, hopes to exploit the natural prejudice of jurors with no legal knowledge or training to be reluctant to impose liability vicariously, even though it is the law. In this case, the jury need not decide this issue because there is no genuine issue of material fact upon which they could find that Mr. Foleno was not in the course and scope of his employment. As a matter of law, he was in the course and scope of his employment at the time of the accident. Submitting the issue of vicarious liability to the jury risks appellate error on a non-issue.

CONCLUSION

For the foregoing reasons, there is no genuine issue of material fact that Mr. Foleno was in the course and scope of his employment at the time of the accident. He had no reason to be where he was, when he was, but for delivering pizza and returning from that delivery. Moreover, even if the "going and coming" rule applied to the circumstances, there is no genuine issue of material fact that Mr. Foleno was engaged on a special errand at the time of the accident and had dual purposes for being on the return route and location at which the accident occurred. Indeed, there is no evidence he had any personal reason for being where he was, when he was, at the time he struck the pedestrian, Mr. Pippin, ultimately causing his death. Rather, he was there only because he had a business purpose for being there, i.e. returning from a delivery for his employer. Plaintiff is entitled to a partial summary judgment on the "course and scope of employment" issue.

Respectfully submitted,

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