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.

_____ /

AMENDED MOTION FOR PARTIAL SUMMARY JUDGMENT ON THE ISSUE OF WHETHER DEFENDANT, THOMAS FOLENO WAS IN THE COURSE AND SCOPE OF EMPLOYMENT AT THE TIME OF THE SUB JECT ACCIDENT

COMES NOW, Plaintiff, Barbara Pippin, by and through her undersigned counsel and pursuant to Rule 1.510, Fla. R. Civ. P. and moves this Honorable Court for entry of partial summary judgment against Defendant, BELLA NAPOLI NSB, LLC, hereinafter "Bella Napoli", on the legal issue of whether Defendant, THOMAS P. FOLENO, hereinafter "Thomas Foleno", was in the course and scope of his employment at the time and place alleged in the Complaint, on the following grounds:

The facts of this wrongful death action are simple. Plaintiff's decedent was lawfully crossing a well-marked crosswalk on S.R. A1A in New Smyrna Beach, Volusia County, Florida when Defendant, Thomas Foleno, was operating his vehicle northbound and struck the pedestrian, killing him. Plaintiff contends that Mr. Foleno, an employee of Defendant, Bella

Napoli, was in the course and scope of his employment making restaurant meal deliveries at the time. Defendant, Bella Napoli, denies this.

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).

Although the existence of an agency relationship is usually a question of fact that must be resolved by the trier of fact, when a party bearing the burden of proof on an issue fails to produce any supportive evidence, or when all of the evidence presented by both parties is so unequivocal that reasonable persons could reach but one conclusion, a question that is ordinarily one of fact becomes a question of law, to be determined by the court. *Id.* Whether an employee is acting within the course and scope of his employment is a question of law when there are no factual disputes. *Id.* Concerning scope of employment, only where facts are completely settled and inferences to be drawn from facts lead to but one conclusion can it be said that issue is one which may be decided by court as matter of law. *Burroughs Corporation v. American Druggists' Insurance Co.,* 450 So.2d 540 (Fla. 2nd DCA 1984).

"Ordinarily the existence of an agency relationship is a question of fact to be resolved by

the factfinder." *Eberhardy v. General Motors Corp.,* 404 F.Supp. 826, 830 (M.D.Fla.1975). "When, however, a party bearing the burden of proof on an issue, fails to produce any supportive evidence, or when (as here) all of the evidence presented by both parties is so unequivocal that reasonable persons could reach but one conclusion, a question that is ordinarily one of fact becomes a question of law, to be determined by the court." *Id.* Such is the case here. *Gillet v.Watchtower Bible & Tract Society of Pennsylvania, Inc.,* 913 So.2d 618 (Fla. 3rd DCA 2005). 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. *Johnson v. Gulf Life Insurance Co., 429 So.2d 744 (Fla. 3rd DCA 1983); 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. *Saudi Arabian Airlines Corp. v. Dunn,* 438 So.2d 116 (Fla. 1st DCA 1983).

For employer to be vicariously liable for acts of his or her employee, 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. The question as to whether or not the servant in a particular instance was acting within the scope of his employment 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).

It appears that the general principles of law enunciated therein stand for the following principles involving the negligent operation of a motor vehicle:

> 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).

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 a somewhat similar fact pattern, it has been held that the employee was in the course and scope of employment, even if on the way home from an errand. In *Alsay-Pippin Corporation v. Lumert,* 400 So.2d 834 (Fla. 4th DCA 1981), Peterson was employed by Alsay as a mechanic. It was Peterson's duty to repair motors and other equipment used by Alsay in its industrial drilling business. On the date in question Peterson received permission from his

supervisor to leave work early because he was going to take a carburetor to United Auto Service (Delco) for repairs. Since he would not be returning to work that day, he drove his own car. Alsay's place of business was on Lantana Road, a number of miles south of Peterson's home. United Auto Service is located north and east of Peterson's home, so that the errand for his employer could not be fulfilled along his usual route from work to home. After leaving the carburetor with United Auto Service, Peterson started home but then decided to stop by Rinker Materials Corporation's place of business to see if Rinker had a needed part for an engine he was repairing. Rinker did not have the part, so Peterson continued his trip home. En route he struck Lumert. The appellate court held that the evidence was sufficient to support the jury's verdict finding the Peterson was in the course and scope of his employment with Alsay at the time of the accident.

Plaintiff will not exhaust all the many reported cases on the topic in this Motion for Partial Summary Judgment, but there are many cases in which employees have been held to be in the course and scope of their employment in much more tenuous circumstances that even Defendant, Bella Napoli, contends here. See, for example, the following cases:

> *Carroll Air Systems, Inc. v. Greenbaum,* 629 So.2d 914 (Fla. 4th DCA 1993).
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> Evidence supported finding that salesman was in the course and scope of his employment when he was returning home after trade meeting, so that employer could be held liable for death caused by his drunken driving, where there was evidence that employer told employees to attend functions of the organization and that several company employees including the president were at the meeting, with expenses paid by the company, and where salesman's car expenses were reimbursed and inference could be made that expenses of traveling to and from his home during the meeting were paid by the company. Employer could properly be held liable for death of third party caused by drunken driving of employee in course and scope of employment after leaving meeting at which expenses, including drinks, were paid for by the employer and where there was evidence that employee was slurring his words while company officers were present.
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> *Standley v. Johnson,* 276 So.2d 77 (Fla. 1st DCA 1973).

It is the well-recognized rule that an employee driving to or from work is not within the scope of employment so as to impose liability on the employer. This is true even though the car driven by the employee is used in his work and partly maintained by the employer, *Foremost Dairies, Inc. of the South v. Godwin,* 158 Fla. 245, 26 So.2d 773 (1946). However, in the case at bar, Johnson was doing more than merely driving to work. He adduced evidence that he had been instructed to keep the lawn mower filled with gas and was in fact transporting gas to the nursery as part of his job and for the benefit of his employer.

Swartz v. McDonald's Corp., 788 So.2d 937 (Fla. 2001).

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.

"Going And Coming" Rule:

Generally, an employer is not liable for the torts of an employee committed while the employee is either going to work or returning home because this activity is generally not within the scope of employment. The general rule is applicable even though the automobile driven by an employee in going to and coming from work is used in the employee's work and is partly maintained by the employer. There are exceptions to the "going and coming" rule where such going and coming is part of the service to the employer or where the employee is on a special errand for the employer. See *Robelo v. United Consumers Club, Inc.*, 555 395 (Fla. 3rd DCA 1989); 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)

Deviations from business:

For the employer to assert the defense of the employee's deviation from the employment, there must be more than a slight deviation or departure from the

employer's business. Orr v. Avon *Florida Citrus Corp.,* 130 Fla. 306, 177 So. 612 (1937); *Nichols v. McGraw,* 152 So. 2d 486 (Fla. Dist. Ct. App. 1st Dist. 1963). 2A *Fla. Jur 2d Agency and Employment* § 279

Slight deviations by an employee will not alter the course of the employer's business or defeat his or her responsibility. *Eberhardy v. General Motors Corp.,* 404 F. Supp. 826 (M.D. Fla. 1975).

The rule contemplates a deviation or departure amounting to an abandonment of the master's business and the undertaking of an unrelated enterprise or mission of the servant. *Western Union Telegraph Co. v. Michel,* 120 Fla. 511, 163 So. 86 (1935); *Orr v. Avon Florida Citrus Corp.,* 130 Fla. 306, 177 So. 612 (1937); *Nichols v. McGraw,* 152 So. 2d 486 (Fla. Dist. Ct. App. 1st Dist. 1963).

An employee or agent going to or returning from a business meeting or convention, where there is no clear-cut deviation, is within the scope of his or her employment. *Whetzel, supra.*

Dual Purpose Doctrine:

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. *Swartz v. McDonald's Corp.,* 788 So.2d 937 (Fla. 2001).

No Requirement to Be "Clocked In":

A grocery store employee was acting within the course and scope of his employment when he was struck and killed by a co-employee's truck after parking his motorcycle at the grocery store parking lot, precluding him from recovering from employer and co-employee in negligence action; although employee had not yet "clocked in" there was no reason to suppose personal motive for employee's early arrival, and employee may have been sent on a delivery if he was available. *Winn Dixie Stores, Inc. v. Akin,* 533 So.2d 829 Fla. 4th DCA 1988).

Employee Performing Errand Directed By Employer:

Where the employee was involved in an accident at a point along the route he would have driven home after finishing work, but the point was also en route to a location where the employee was sometimes sent to pick up equipment for use by his employer, and there was evidence that the employee's manager had directed the employee to go to the location, the court rejected the employer's contention that the employee was using his car solely and entirely for his own personal purpose because he was driving along the route he would have driven home, and held that the jury could infer that the employer's work required the travel

involved and that the trial court properly refused to direct a verdict for the employer. *Massey v. Berlo Vending Co.,* 329 SW2d 772 (Mo. 1959).

Where an employee of a liquor store was called late at night to bring liquor from one store to another and the employee, having attempted the delivery, stopped at his ex-wife's house, then, on his return trip home, was involved in an accident while driving his own car, the court reversed a judgment in favor of the employer, noting that an employee who has gone upon a special errand is in the course and scope of his employment during the entire trip. The court concluded that the jury had not been properly instructed as to whether the employee had completely departed from the course of his employment and then resumed his duty to the employer. The court pointed out that there may be a combination of a mission for the employer with a personal mission of the employee, and that such a combination would exist in the present case if, at the time of the accident, the employee was returning from both the errand to the store and the visit to his ex-wife's home. *Trejo v. Maciel,* 239 Cal. App. 2d 487, 48 Cal. Rptr. 765, 31 Cal. Comp. Case 462 (1st DCA 1966).

Where the employee left the employer's office on an assignment, taking her own automobile for which she was paid mileage expenses for making the trip, and, after making the trip to the job site was proceeding to her home when the accient occurred, the court reversed a judgment in favor of the employer, noting that the question whether the employee was acting within the course and scope of the employment at the time of the accident for was for the trier of fact. *Jones v. Aldrich Co.,* 188 Ga. App. 581, 373 S.E.2d 649 (Ga. App. 1988).

Where the employee, a gold technician for a dental laboratory, was asked by the company secretary to make a delivery to a customer, and the accident occurred as the employee was returning to his regular route to his home, the court concluded that the evidence supported the jury's finding that the employee was acting within the scope of his employment. *Burks v. Leap,* 413 SW2d 258 (Mo. 1967).

In the instant case, even if all facts supporting Plaintiff's theory are ignored and the testimony of Claire Hebert, owner of Bella Napoli are accepted as true, the jury could only reach one conclusion if the common law master servant principles are followed. Clearly, Mr. Foleno was on an errand for his employer and in the course and scope of his employment on his return from a customer delivery when he failed to yield to pedestrians in a properly marked crosswalk, struck Mr. Pippin, and killed him. Defendant, Bella Napoli, seeks to exploit juror prejudice

against the doctrine of vicarious liability and seeks to convince this Court that there is an issue of fact, where this is none, in an effort to seek victory from a jury by appealing to the passion and prejudice of the jurors selected to hear the case. There being no genuine issue of material fact on the issue of whether Mr. Foleno was in the course and scope of his employment at the time of the accident, Plaintiff moves this Honorable Court for entry of partial summary judgment finding that Defendant, Thomas Foleno, was in the course and scope of his employment at the time of the accident as a matter of law.

WHEREFORE, Plaintiff, BARBARA PIPPIN, as Personal Representative of the Estate of Robert Pippin, moves this Honorable Court for entry of partial summary judgment on the issue of whether Defendant, THOMAS P. FOLENO, was in the course and scope of this employment at the time of the subject accident, as a matter of law, pursuant to *Rule 1.510, Fla. R. Civ. P.*

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing has been furnished, by U.S. Mail – postage paid, this _____ day of October, 2011, to: Gregory J. Prusak, Esquire, Kubicki Draper, 201 S. Orange Avenue, Suite 475, Orlando, FL 32801; Joseph T. Metzger, Esq., Metzger Law Group, P.A., 4100 West Kennedy Blvd., Ste. 213, Tampa, FL 33609.

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