

IN THE SUPREME COURT OF FLORIDA

BOY SCOUTS OF AMERICA

Petitioner,

Supreme Court Case No. SC14-1274

Fifth DCA Case No. 5D13-1350

vs.

L.T. Case No. 2012-CA-455

CHRIS G. HUBNER and
ALAN NORTON,

Respondents.

PETITIONER, BOY SCOUTS OF AMERICA'S JURISDICTIONAL BRIEF AND APPENDIX

On Review from the District Court of Appeal of the State of Florida, Fifth District

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STATEMENT OF THE CASE AND FACTS

This case concerns an insurance coverage dispute over whether a Registered Volunteer of the Boy Scouts of America was acting within the scope of his duties at the time of his automobile accident.

Respondent, Chris Hubner, was a passenger in a car that collided with an automobile driven by co-Respondent, Alan Norton. [Opinion attached as Appx. A at p. 2]. Hubner filed a personal injury action against Norton for damages sustained in that accident. Norton sought insurance coverage as a Registered Volunteer of the BSA at the time of the accident under a policy issued to the Boy Scouts of America (“BSA”) by Old Republic Insurance Company (“Old Republic”). *Id.* The Policy names as insureds, “Registered Volunteers of Boy Scouts of America, but only while ‘participating in an Official Scouting Activity and in the scope of their duties as such.’” *Id.* Old Republic then filed a declaratory judgment action on the coverage issue. *Id.*

Norton was a Registered Volunteer in scout Troop 370. *Id.* A boy scout in that Troop organized and directed a cemetery cleanup to earn the rank of Eagle Scout. *Id.* at p. 4. The event ended at noon on the day of the accident. *Id.* at p. 2. After the project ended and all scouts left the cemetery, Norton drove home to obtain his camera, returned to the cemetery, and photographed the completed project. *Id.* He did so absent direction or authorization from the boy scout who

directed the event. *Id.* at p. 4. Norton testified that his intended “purpose” was to assist the scout on the project. *Id.* at pp. 3-4. The accident occurred while Norton was driving from the cemetery to his home. *Id.* at p. 2.

The trial court granted Old Republic’s Motion for Summary Judgment in the declaratory judgment action. *Id.* It found that Norton was not participating in an official scout activity at the time of the accident. *Id.*

Hubner and Norton appealed summary final judgment to the Fifth District Court of Appeal. That court reversed the entry of summary final judgment and held, in part, that Norton was acting within the scope of his duties at the time of the accident. *Id.* at pp. 3-4. It based this decision solely on Norton’s testimony that his “purpose” for the second trip of driving from home to the cemetery and back was to assist with the Eagle Scout project. *Id.* Rehearing was denied on June 4, 2014, and the BSA’s notice to invoke the discretionary jurisdiction of this court was timely filed on June 24, 2014.

SUMMARY OF THE ARGUMENT

In finding coverage under the Policy, the court below applied “scope of employment” analysis to determine whether Norton was acting within the “scope of his duties” at the time of the accident. It utilized a **one-part** test in holding that Norton was acting within the scope of his duties, because his sole “purpose” was to assist the scout. Third District Court of Appeal holds that a **three-part** test is

required to determine whether one was acting within the scope of his employment at the time of the incident. *Sussman v. Fla. E. Coast Props., Inc.*, 557 So.2d 74, 75-76 (Fla. 3d DCA 1990). The Opinion, therefore, expressly and directly conflicts with *Sussman*, by reducing the three-part “scope of employment” test to one-part.

The conclusion by the court below that Norton was acting within the scope of his duties based solely on his subjective “purpose” also expressly and directly conflicts with *Duff v. Vazquez*, 544 So.2d 1124 (Fla. 3d DCA 1989). *Duff* holds that the subjective intent and private thoughts of the driver/employee are irrelevant in terms of the “time and space” prong of the “scope of employment” test and does not create an exception to the “going and coming” rule.

JURISDICTIONAL STATEMENT

The Florida Supreme Court has discretionary jurisdiction to review a decision of a district court of appeal that expressly and directly conflicts with the decision of the supreme court or another district court of appeal on the same point of law. Art. V, §3(b)(3) Fla.Const. (1998); Fla.R.App.P. 9.030(a)(2)(A)(iv).

ARGUMENT

THE DECISION OF THE DISTRICT COURT OF APPEAL IN THIS CASE EXPRESSLY AND DIRECTLY CONFLICTS WITH THE DECISIONS OF THE THIRD DISTRICT COURT OF APPEAL IN *SUSSMAN v. FLA. E. COAST*, 557 So.2d 74 (Fla. 3d DCA 1990) AND *DUFF v. VAZQUEZ*, 544 So.2d 1124 (Fla. 3d DCA 1989).

Third District Court of Appeal holds that a three-part test is required to determine whether one was acting within the scope of his employment at the time of the incident.

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.

Sussman v. Fla. E. Coast Props., Inc., 557 So.2d 74, 75-76 (Fla. 3d DCA 1990).

The court below engaged in a scope of employment analysis to determine whether Norton was acting within the scope of his duties for insurance coverage purposes. However, it utilized a one-part test in holding that Norton was acting within the scope of his duties, because his sole “purpose” was to assist the scout. The court below reasoned, “It is **only** when an employee or agent ‘steps aside from his employment to . . . accomplish some purpose of his own’ that the act is said to

be outside the scope of employment.” Opinion at p. 4 (emphasis added) (quoting *City of Miami v. Simpson*, 172 So.2d 435, 437 (Fla. 1965)).¹

The Opinion, therefore, expressly and directly conflicts with *Sussman* by reducing the three-part “scope of employment” test to one-part. It requires only that Norton testify that his conduct was activated by a purpose to serve his role as a Registered Volunteer to satisfy the “scope of employment” test (i.e. prong three in *Sussman*). The decision did not require Norton to establish that his conduct “occurred substantially within the time and space limits authorized or required by the work to be performed.” See *Sussman* at 75-76.

The time and space limitations are established in this case. The Eagle Scout candidate authorized and directed members of his Troop to assist with the cleanup until noon on August 14, 2010. Everyone left the cemetery at the conclusion of the event. Norton went home, picked up his camera, and drove back to photograph the cemetery on his own volition absent direction from the boy scout. The accident occurred later in the day while Norton was driving from the cemetery to his home the second time. The opinion below does not place any relevance on the “time and space” of the accident; rather, the decision rests solely on the subjective intent and

¹ The court below relied upon *City of Miami v. Simpson*, 172 So.2d 435, 437 (Fla. 1965). However, the *Simpson* Court did not consider the “time and space” prong of the scope of employment analysis. This is likely because the conduct complained of was a false arrest, assault, and battery by police officers presumably on duty at the time of the incident. See *Simpson v. City of Miami*, 155 So.2d 829 (Fla. 3d DCA 1963) *cert. discharged*, 172 So.2d 435 (Fla. 1965).

purpose of Norton while driving home from the cemetery. Thus, the decision below conflicts with *Sussman* by removing the “time and space” requirement from the “scope of employment” test.

To that end, the decision below also expressly and directly conflicts with *Duff v. Vazquez*, 544 So.2d 1124 (Fla. 3d DCA 1989), which concerns the “time and space” prong as it relates to the “going and coming” rule.²

The accident occurred while Norton was driving from the cemetery to his home. The decision below holds that Norton’s “purpose” at the time of the accident (i.e. driving to the cemetery to assist the boy scout with his Eagle Scout project), necessarily renders his actions within the scope of his duties. This ruling directly and expressly conflicts with *Duff v. Vazquez*, which holds that the private thoughts behind the driver/employee’s “intent” does not create an exception to the “going and coming” rule. *Duff v. Vazquez* at 1124-1125; *see also Stewart v. Lakeland Funeral Home*, 86 So.3d 1205, 1206-07 (Fla. 1st DCA 2012) (holding that claimant’s “purpose” of his drive, to attend a funeral service even though not asked to do so by his employer, did not create an exception to the “going and coming” rule).

² “The ‘going and coming’ rule . . . provides that injuries sustained while going to or coming from work do not arise out of or in the course and scope of employment.” *Gilbert v. Publix Supermarkets, Inc.*, 790 So.2d 1057, 1059 (Fla. 2001) (emphasis added).

In *Duff v. Vazquez*, an employee drove to work on his day off “to check on something related to company business while he was at the north store.” *Id.* at 1124. He claimed this intent brought him within the “special errand” exception to the “going and coming” rule. There was no evidence that the employer told the employee to conduct this errand and no evidence that the employer even knew the employee was driving to the north store. *Id.* The appellate court rejected the employee’s argument and concluded that his intent did not create an exception to the “going and coming rule.”

If we were to accept appellant’s contentions, we would be required to hold that Defendant’s liability depended on the private thoughts of the employee/driver. According to appellant’s theory, Defendant would be liable for an accident that might occur on a strip of the roadway being driven by the employee/driver while he was thinking of discussing business upon his arrival at the north store. . . . Clearly, neither the law nor common sense would allow the question of Defendant’s liability to depend on the fluctuating subjective and personal thoughts of the employee/driver over whom Defendant has no control during the course of his travels on his day off.

Id. at 1125.

The decision below directly and expressly conflicts with *Duff v. Vazquez*. The accident occurred when Norton was driving home. Axiomatically, the “going and coming” rule renders the accident outside the scope of Norton’s duties. *Duff v. Vazquez* holds that the driver’s purpose does not create an exception to the “going and coming” rule. However, the court below held that Norton was acting within

the scope of his duties based solely on the private thoughts behind Norton's "purpose" of returning to the cemetery.

CONCLUSION

The ruling of the Fifth District Court of Appeal has far-reaching and unintended implications. It will eviscerate the need of a driver/employee/volunteer to prove that his accident occurred within the "time and space" limitations of his duties in a scope of employment analysis. *See Sussman* at 75-76. It will improperly allow the "scope of employment/duties" analysis to depend on the "fluctuating subjective and personal thoughts" of a particular driver/employee/volunteer. *See Duff* at 1125. Finally, it will undermine the "going and coming" rule. For example, if an employee or volunteer spontaneously decides to buy pencils at a convenience store, he would be acting within the scope of his duties/employment for an accident that occurred on his way home from the store, as long as he claims that his "purpose" or "intent" was to provide writing utensils to his employer for use at work. "[N]either the law nor common sense" should allow such a result. *See Duff* at 1125.

Accordingly, this Honorable Court can and should accept jurisdiction to review this case on its merits.

CERTIFICATE OF SERVICE

WE HEREBY CERTIFY that a true copy of the foregoing was electronically filed through e-DCA and was served by e-mail on July 3, 2014 to: David L. Holbrook, Esq., Counsel for Norton, Dholbrooklaw@aol.com; George Germann, Esq., Counsel for Leanne Germann, georgegermannesq@att.net; and Mark D. Tinker, Esq., Counsel for Hubner, mtinker@bankerlopez.com, service-mtinker@bankerlopez.com; Shelley H. Leinicke, Esq., Counsel for Old Republic Insurance Company, SHLeinicke@wickersmith.com; flcrtpleadings@wickersmith.com.

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CERTIFICATE OF COMPLIANCE

I HEREBY CERTIFY that this Jurisdictional Brief complies with the type style and size requirements of Florida Rule of Civil Procedure 9.100(l) and 9.210.

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