

A-67152-7

IN THE SUPREME COURT OF FLORIDA

OLD REPUBLIC INSURANCE
COMPANY and BOY SCOUTS
OF AMERICA,

Petitioners,

CASE NO. SC 14-1275

5th DCA CASE NO.: 5D 13-1350;
L.T. No.: 2012-CA-0455

vs.

CHRIS G. HUBNER and ALAN
NORTON

Respondents.

_____ /

**JURISDICTIONAL BRIEF OF PETITIONER,
OLD REPUBLIC INSURANCE COMPANY
AND APPENDIX**

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STATEMENT OF THE CASE AND FACTS¹

In this insurance coverage dispute arising from an auto accident, it is respectfully submitted that the Fifth District determined the issue of “course and scope” in a manner that conflicts with settled law. The Fifth District’s decision focuses on a person’s private thoughts and subjective purpose as controlling whether someone is entitled to insurance coverage while driving home after an event concludes.

Hubner was a passenger in a car that collided with a vehicle driven by Norton. After he was sued, Norton sought excess insurance coverage under a policy issued by Old Republic to the Boy Scouts of America (“BSA”). Norton claimed entitlement to coverage under this policy because he was going home after participating in a scouting activity. The BSA policy provides coverage for “Registered Volunteers of the Boy Scouts of America, but *only* while participating in an Official Scouting Activity and *in the scope of their duties* as such.” (A. 2, 4)

On the morning of the accident Norton (a Registered Volunteer with the BSA), had participated in a cemetery clean up organized and directed by a Troop member working on his Eagle Scout rank. The event ended at noon

¹ The symbol “A” refers to the attached appendix containing the opinion in issue. All *emphasis* is added unless noted to appear in the original text.

and everyone left the cemetery. (A. 2) Norton decided to go home, pick up his camera, and return to photograph the completed project. (A. 2) The accident occurred while Norton was returning home for the second time after taking the photos. (A. 2) Norton said that his “sole purpose for the trip was to photograph the cemetery for the scout’s project workbook.” (A. 2-3) The BSA submitted evidence that “Norton was acting outside the scope of his duties when he returned to the cemetery to take the pictures because scout rules required the scout to direct the work himself, and the scout did not direct Norton to photograph the cemetery cleanup.” (A. 4) The district court said that because Norton’s subjective purpose was to assist the scout and “not to further some personal purpose” that his act was within the scope of employment. (A. 4)

Old Republic and the BSA seek discretionary review on the basis that the instant opinion expressly and directly conflicts with settled law holding that an incident occurring on the way to or from work is excluded from coverage under the “coming and going rule,” and that a person’s private thoughts and intent for his actions cannot constitute a “special errand” or “dual purpose” that avoids this rule.

ISSUE ON APPEAL

WHETHER THE INSTANT DECISION EXPRESSLY AND DIRECTLY CONFLICTS WITH DECISIONS OF *DUFF v. VAZQUEZ*, 544 So.2d 1124 (Fla. 3rd DCA 1989), *SUSSMAN v. FLA. E. COAST PROPERTIES, INC.*, 557 So.2d 74 (Fla. 3rd DCA 1990), *SWARTZ v. McDONALD'S CORP.*, 788 So.2d 937 (Fla. 2001), and *CITY OF MIAMI v. SIMPSON*, 172 So.2d 435 (Fla. 1965)

JURISDICTIONAL STATEMENT

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

Conflict certiorari is appropriate in the instant case because there is direct conflict between and among the instant decision and the cited cases. *Ford Motor Co. v. Kikis*, 401 So.2d 1341 (Fla. 1981). Review is appropriate because of the need for uniformity in decisions as precedent. *Mystan Marine, Inc. v. Harrington*, 339 So.2d 200 (Fla. 1976). Permitting the instant decision to stand as legal precedent causes confusion in the body of case law of this state.

ARGUMENT SUMMARY

Until the instant opinion was issued, Florida law uniformly held that, except in very limited circumstances, accidents occurring on the way to or from work are barred from coverage under the “coming and going” rule. The opinions discussing exceptions for travel that serves either a dual purpose or special errand also conflict with the instant opinion. The instant opinion also fails to follow the body of law holding that the driver’s private thoughts about the nature of his travel are insufficient to avoid the rule and create coverage. The opinion creates further confusion by improperly relying on a decision of this Court that, with respect, does not stand for the proposition for which it is cited.

ARGUMENT

THE INSTANT DECISION EXPRESSLY AND DIRECTLY CONFLICTS WITH DECISIONS OF *DUFF v. VAZQUEZ*, 544 So.2d 1124 (Fla. 3rd DCA 1989), *SUSSMAN v. FLA. E. COAST PROPERTIES, INC.*, 557 So.2d 74 (Fla. 3rd DCA 1990), *SWARTZ v. McDONALD’S CORP.*, 788 So.2d 937 (Fla. 2001), and *CITY OF MIAMI v. SIMPSON*, 172 So.2d 435 (Fla. 1965)

The instant opinion conflicts with case law regarding the “coming and going” rule

To reach its decision, the district court said that “course and scope” of work should be similarly treated for a volunteer as for an employee. (A. 4)

Until the instant decision, the case law has long and uniformly held that “the

‘going and coming’ rule provides that injuries sustained while traveling to or from work do not arise out of and in the course of employment.” *Swartz v. McDonald’s Corp.*, 788 So.2d 937, 942 (Fla. 2001). “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.” *Alvarez v. Sem-Chi Rice Products Corp.*, 861 So.2d 513, 516 (Fla. 1st DCA 2003). In conflict with decisions such as these, the Fifth District’s opinion provides coverage to Norton for his drive home after accomplishing his personal decision to return to the cemetery to photograph the completed project. The body of Florida law is now inconsistent.

The instant opinion conflicts with case law regarding the narrow application of either the dual purpose or special errand exception to the coming and going rule

The dual purpose doctrine requires an accident to occur while the individual is “pursuing both work-related and personal travel” on the way to or from work. *Gilbert v. Publix Supermarkets, Inc.*, 790 So.2d 1057, 1060 (Fla. 2001). If the individual is not required to make the trip, there can be no dual purpose. *Id.* A dual purpose generally requires the individual to be performing a “task that was essential to the employer’s business.” *Id.*, discussing *Nikko Gold Coast Cruises v. Gulliford*, 448 So.2d 1002 (Fla.

1984). Norton's photography was neither essential nor required. The instant opinion notes that his photographs were neither requested by, nor used by, the Eagle Scout candidate.

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." *Swartz v. McDonalds Corp*, 788 So.2d at 943; *see also: Stewart v. Lakeland Funeral Home*, 86 So.3d 1205 (Fla. 1st DCA 2012); *Susan Loverings Figure Salon v. McRorie*, 498 So.2d 1033 (Fla. 1st DCA 1986) (irregularity of hours worked is insufficient to avoid coming and going rule); *Sussman v. Florida East Coast Properties, Inc*, 557 So.2d 74, 76 (Fla. 3d DCA 1990) (employee was asked to stop and buy birthday cake for fellow employee; auto accident occurring between store and work was nevertheless "outside the scope of the employer's business as a matter of law").

In *Duff v. Vazquez*, 544 So.2d 1124 (Fla. 3d DCA 1989), as in the instant case, "the record contains nothing to suggest that the employer either sent the employee/driver on any 'special errand' or, for that matter, that Defendant even knew that the employee/driver was going to go to the north store on that date." The instant case, however, reaches the opposite result as *Duff* and fails to follow the precedent established by *Duff*.

The instant decision conflicts with the cited law because it finds Norton to be in the course and scope of his work as a scout volunteer based on his personal decision to return to the now-completed cemetery work. Further, there is no indication of any pressing need to photograph the work, as the clean-up was no longer in progress and the condition would not be changing.

The instant decision creates a clear conflict in the law by failing to follow the precedent set by reported decisions.

The instant opinion conflicts with case law holding that a driver's private thoughts about the purpose of his travel are irrelevant to applying the coming and going rule

Case law prior to the instant decision holds that an employee's "private thoughts" as the reason for his travel cannot create any special errand or other exception to the coming and going rule. *Duff v. Vazquez*, 544 So.2d at 1124, 1125. In deciding *Duff*, the Third District said that "if we were going to accept appellant's contentions [that he was making the drive to help his employer], we would be required to hold that Defendant's liability depended on the private thoughts of the employee/driver." *Id.* at 1125. The instant opinion is in conflict because it allows Norton's subjective statement of his personal purpose to control his entitlement to coverage.

The instant opinion misconstrues an opinion of this Court

The instant opinion cites *City of Miami v. Simpson*, 172 So.2d 435, 437 (Fla. 1965) as holding that an individual remains in the course of employment unless he “steps aside from his employment to ... accomplish some purpose of his own.” (A. 4) With respect, *Simpson* is mis-cited. *Simpson* involved actions clearly occurring within the hours of a police officer’s employment, and the question considered by this Court was whether an employer is liable only for negligent acts of its employees or whether it can also be liable for intentional torts committed within the scope of employment.

The Fifth District also used this restrictive view of *Simpson* to cause conflict in the law by creating a one-part test for determining that an individual is in the course and scope of his employment: the individual acting outside of his employment “*only* when an employee or agent steps aside from his employment ... to accomplish some purpose of his own.” With respect, this is not what *Simpson* holds, and moreover, it conflicts with the *three*-part test for determining whether conduct is within the individual’s scope of employment: “(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, 557 So.2d at 76.

CONCLUSION

For the reasons set forth herein, it is respectfully requested that this Honorable Court accept jurisdiction, order briefing on the merits, and upon review, quash the decision of the Fifth District and remand with instructions to reinstate the summary final judgment in favor of this petitioner.

Respectfully submitted,

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CERTIFICATE OF SERVICE

WE HEREBY CERTIFY that a copy hereof has been furnished to
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CERTIFICATE OF COMPLIANCE PURSUANT TO
Fla. R. App. P. 9.210(a)(2); 9.100(1)

Counsel for the Petitioner, Old Republic Insurance Company, certifies the following:

Pursuant to Fla. R. App. P.9.210(a)(2) and 9.100(1), the attached brief for Petitioner is printed using a proportionally spaced 14 point Times New Roman typeface.

Dated: July 3, 2014

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