SUPERIOR COURT OF NEW JERSEY APPELLATE DIVISION

ALEX M. SECCIA, Plaintiff/Respondent, v. RANGDUNU CORPORATION, JOHN/JANE DOE 1-10, JOHN DOE COMPANY 2-10, JOHN/JANE DOE 11-20 AND JOHN DOE COMPANY 12-20 Defendants/Respondents.	SUPERIOR COURT OF NEW JERSEY APPELLATE DIVISION DOCKET NO. A-001065-24-T2 ON APPEAL FROM LAW DIVISION DOCKET NO. GLO-L-779-19 ON APPEAL FROM: AN ORDER OF THE SUPERIOR COURT, LAW DIVISION, ENTERED ON NOVEMBER 22, 2024, DENYING THE MOTION FOR RECONSIDERATION OF THE OCTOBER 11, 2024 ORDER GRANTING SUMMARY JUDGMENT TO DEFENDANT RANGDUNU CORPORATION, AND THE OCTOBER OCTOBER 11, 2024 ORDER GRANTING SUMMARY JUDGMENT SAT BELOW: HON. BENJAMIN D. MORGAN, J.S.C.

BRIEF ON BEHALF OF APPELLANT ALEX M. SECCIA

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PRELIMINARY STATEMENT

This case arises out of a motor vehicle crash in which Cooney, an employee of Rangdunu Corporation, during the course of working his shift at a 7- Eleven store of Rangdunu, crashed his vehicle into a vehicle driven by Plaintiff. Plaintiff has appealed the grant of summary judgment to Rangdunu on the issue of respondeat superior liability.

Pursuant to Sections 228 and/or 229 of the Restatement of Agency 2nd, and scope of employment principles, analysis of scope of employment consists of multiple factors to be considered and weighed relative to all relevant facts. It is well understood that scope of employment questions can be particularly fact-sensitive and not readily susceptible to summary judgment resolution. This is added to by the "dual purpose" doctrine, pursuant to which, solely because a personal interest as well as an interest of the employer are being served, does not put conduct outside the scope of employment.

Within the foregoing framework, the present case is one not susceptible to summary judgment resolution in favor of the moving Defendant. In fact, despite the factual particulars of this case, Plaintiff was able to locate and present a case with substantial factual parallels, in which the Delaware Supreme Court, applying Section 228 of the Restatement of Agency 2nd and the

"dual purpose doctrine", ruled that summary judgment was inappropriate. See Wilson v. Joma, 537 A.2d 187 (Del. 1987).

The Court in Wilson readily found that summary judgment should have been denied by the trial court, as the scope of employment question on the relevant facts was to be decided by the factfinder. Simply, the Court, as is required on a summary judgment motion, reached that decision by properly applying the applicable legal principles, considering the relevant facts and construing the facts most favorably to the non-moving party.

The trial court did not do the foregoing three things and resisted Plaintiff's invitation to decide the present case along the lines of Wilson. Regarding the applicable scope of employment law, the court, after correctly setting forth Sections 228 and/or 229 of the Restatement 2nd of Agency as the applicable decision framework, then did not mention this again and appeared to ignore it. This is unfortunate, as this provided a framework for fully assessing employer control and/or benefit, and for consideration of the "dual purpose" doctrine.

The court instead then created an incorrect framework and formula for decision as to whether vicarious liability could attach, arising from the court's perception of how a general "proposition" regarding an employee "going to" and/or "coming from" the workplace applied to the present matter. Essentially,

the court's formulation was to the effect that the present case was outside the scope of employment unless one of three "exceptions" applied. The court determined that such an exception did not apply.

The foregoing erroneous formulation did not allow for proper consideration of all relevant facts relative to the concepts of employer benefit and control. The court subsequently, in another section of the decision, engaged in a discussion of benefit and control, and somehow concluded that there was no evidence in the entire record of either benefit or control. The court did not explain any connection between this analysis and the foregoing formulation. However, the court concluded that summary judgment must be granted.

The decision reflects that overall, the trial court restrictively viewed the concepts of employer control and benefit in consideration of facts, did not properly consider all the relevant facts and did not consider the facts in the light most favorable to Plaintiff. The decision demonstrates that the different results in Wilson and the present case can be explained by the foregoing, and not due to any differences in the law or the facts of the Wilson case.

PROCEDURAL HISTORY

On or about July 1, 2017, Defendant Jarrod J. Cooney crashed his vehicle into the vehicle being driven by Plaintiff Alex M. Seccia. (Pa16-17; Pa132-135). On or about June 25, 2019, Mr. Seccia commenced suit by complaint against Defendant Cooney in the Gloucester County Law Division. (Pa16). Cooney filed his answer on July 29, 2019. (Pa23).

Defendant Jarrod Cooney, in his March 3, 2020 deposition, testified that when the subject crash occurred, he was on the clock and in the process of returning to the 7-Eleven where he was working after picking up pizza for himself and his co-workers. (Pa141-142).

On June 3, 2020, Plaintiff moved to amend the complaint to identify and name, in the place of "John Doe Company 1", Rangdunu Corporation ("Rangdunu") as employer of Mr. Cooney. (Pa30). The motion was resolved by consent order entered June 15, 2020. (Pa42). Plaintiff filed the Amended Complaint on June 15, 2020. (Pa44).

After Defendant Rangdunu failed to answer the Amended Complaint, Plaintiff applied for entry of default on August 19, 2020. (Pa52). Default was entered by the Court on August 20, 2020. (Pa55).

Following entry of default against Rangdunu, Plaintiff moved to amend the Amended Complaint to name USAA Casualty Insurance Company

("USAA"), Plaintiff's UIM (Underinsured Motorist) carrier. (Pa56). Plaintiff's unopposed motion was granted on February 5, 2021. (Pa73). Plaintiff filed the Second Amended Complaint on February 10, 2021. (Pa74).

On January 27, 2022, the case was arbitrated in accordance with the Court's arbitration program. (Pa97). Defendant Cooney then filed a request for trial de nova on February 15, 2022. (Pa98).

On December 12, 2022, a partial stipulation of dismissal with prejudice was filed as to only Defendants USAA and Cooney (as rights against Rangdunu were reserved), with the stipulation referring to settlement documents by which terms were more particularly set forth. (Pa99). Among other things, claims against Rangdunu were reserved. (Pa4).

With settlement having been reached as to Defendants USAA and Cooney, and with Rangdunu in default, Plaintiff filed a request for proof hearing on January 18, 2023. The Law Division then issued a notice dated January 19, 2022, filed January 20, 2022, for a remote proof hearing for February 28, 2022 before the Honorable Timothy W. Chell, P.J.S.C.. (Pa102). The Law Division then issued a notice dated February 20, 2023, filed February 21, 2023, for a re-scheduled remote proof hearing for March 22, 2023, before the Honorable Anne McDonnell, J.S.C.

On March 21, 2023, the day before the scheduled remote proof hearing, a request for adjournment of the proof hearing was filed by MD Shahjahan, described in the request as "Agent" for Rangdunu Corporation. (Pa104). On the same date, this request was denied by Judge McDonnell. (Pa105).

On March 22, 2023, over the remote hearing connection, with MD Shahjahan present, Judge McDonnell stated, *inter alia*, that as Rangdunu Corporation is a corporation, that counsel was needed, and that the hearing would be postponed to allow Mr. Shahjahan the opportunity to retain counsel and apply to vacate the default.(1T).[1] Judge McDonnell further sought briefing, relative to the proof hearing proceedings, on the New Jersey Supreme Court companion decisions of Carter v. Reynolds, 175 N.J. 402 (2003) and O'Toole v. Carr, 175 N.J. 421 (2003). (1T).

The Law Division then issued a notice dated March 23, 2023, filed March 24, 2023, for a re-scheduled remote proof hearing for April 21, 2023, before the Honorable Timothy W. Chell, P.J.S.C. (Pa106). The Law Division then issued a notice dated April 19, 2023, filed April 20, 2023, for a re-scheduled remote proof hearing for May 5, 2023, before the Honorable Timothy W. Chell, P.J.S.C. (Pa106).

[1] 1T = transcript of March 22, 2023.

On April 27, 2023, prior to the May 5, 2023 proof hearing, Rangdunu Corporation, through counsel, filed a Motion to Vacate Default and Extend Time to Answer. (Pa108). The Honorable Timothy W. Chell, P.J.S.C., granted the motion by Order dated and filed June 23, 2023. (Pa110).

On July 24, 2023, Defendant Rangdunu filed its Answer to the Second Amended Complaint. (Pa113).

On August 23, 2024, Defendant Rangdunu moved for summary judgment, arguing, inter alia, that Cooney's actions were "unauthorized" and outside the scope of employment. (Pa118).

On October 11, 2024, the Honorable Benjamin D. Morgan, J.S.C. heard oral argument, and thereafter on that day entered an order with decision attached granting the motion of Defendant Rangdunu for summary judgment on the issue of liability. (Pa1; 2T).[2]

On October 31, 2024, Plaintiff moved for reconsideration. (Pa218). On November 22, 2024, after oral argument, Judge Morgan entered an order denying the motion. (Pa15, 3T).[3]

On December 16, 2024, Plaintiff filed a Notice of Appeal (Pa220). On December 18, 2024, Plaintiff filed an Amended Notice of Appeal. (Pa226).

[2] 2T = transcript of October 11, 2024
[3] 3T = transcript of November 22, 2024

STATEMENT OF FACTS

This case arises out of a motor vehicle crash in which Cooney, an employee of Rangdunu Corporation, during the course of working his shift at a 7- Eleven store of Rangdunu, crashed his vehicle into a vehicle driven by Plaintiff. (Pa2).

Rangdunu moved for summary judgment on the grounds that Cooney, although admittedly an employee of Rangdunu, was outside the scope of employment relative to the motor vehicle crash. (Pa4,6-7,8; Pa118) As such, Rangdunu asserted respondeat superior liability could not attach. Id.

What follows is a recitation of the facts leading up to and surrounding the crash of relevance to the summary judgment motion. The disputed facts pertained to whether Cooney was permitted to leave the store, when the employer was told of his leaving the store and the incident and the nature and source of the employer's alleged "work rule" or "rules". According to Defendant, employees such as Cooney and apparently Tara Vohringer, a co-worker, were paid "straight time" where they remained clocked in for 8 hours, and where lunch was to be consumed in the store at the counter or in the "back room", and this was apparently to "better serve the customers." (Pa4,9; Pa124-126)).

As to such disputed facts, for purposes of the summary judgment motion, as to which facts are to be construed most favorably to Plaintiff, the trial court assumed that Cooney was permitted to leave the premises and relatedly, it appears that the trial court was assuming that the employer was told about Cooney leaving and was aware on the date the incident occurred what had happened. (Pa9).

The following are undisputed facts, together with the foregoing disputed facts expressed most favorably to Plaintiff.

1. Cooney was working his shift at 7 Eleven on July 1, 2017. (Pa140, Pa141).
2. Cooney was to remain clocked in for the length of his shift. (Pa140-141).
3. Vohringer was working her shift at 7 Eleven on July 1, 2017. (Pa174).
4. Vohringer was to remain clocked in for the length of her shift. (Pa171).
5. Cooney and Vohringer were permitted to eat during their shifts. (Pa140-141, Pa124).
6. Cooney and Vohringer were required even while/if eating to tend to customers and/or the register and/or see that this was being done. (Pa140-141, Pa124).
7. It is the employer who determined the foregoing parameters. (Pa124, Pa140-141).

8. The employer's interest, according to the employer, was better serving the interests of the customers. (Pa124).

9. Cooney, although required to remain clocked in, was permitted to leave, such as to pick up food if there was someone to tend to customers. Cooney testified that while he was permitted to do the foregoing, in general or otherwise he was to remain clocked in and on premises. (Pa140-141).

10. Vohringer had a coupon for a free Papa John's pizza. (Pa140).

11. There was a Papa John's in the vicinity, but that location did not deliver. (Pa175).

12. Cooney had a vehicle available. (Pa174)

13. Vohringer and Cooney decided that the pizza would be ordered and Cooney would pick up the pizza while Vohringer remained at the store. (Pa174, Pa140).

14. The intention regarding the pizza was that Vohringer and Cooney would consume the pizza at the store after Cooney returned. (Pa140, 174, 183-184).

15. Because Cooney was going to pick up the food and bring it back to the store, this allowed for Vohringer to remain at the store and to not have to make other arrangements or do anything else inside or outside the store in connection with eating. (Pa174).

16. Cooney left the store premises to pick up the pizza while Vohringer remained at the store. (Pa174).

17. Cooney, mindful of his employment, was "trying" to only be half an hour away from the store. (P141).

18. Cooney, after picking up the pizza and on his way back to the store, caused a motor vehicle crash by striking the vehicle of Plaintiff. (Pa174, Pa141, Pa2).

19. According to Cooney, the employer knew where Cooney was, and Cooney would always notify the employer when/if leaving the premises. (Pa141).

20. The employer was aware of the crash on the day of the crash. (Pa142).

21. Cooney contacted Vohringer shortly after the crash to let her know he would not be returning to the store that day and had Vohringer clock him out for the day. (Pa142, 174, 179).

22. Vohringer remained at the store and completed her shift. (Pa174).

Plaintiff opposed the summary judgment motion of Rangdunu. On October 11, 2024, the trial court heard oral argument on the motion, and then issued its written order and decision granting the motion.

In the opening section of the decision, entitled "Decision", the trial court stated: "Because this court finds Cooney was not operating within the scope of

his employment when he left to pick up the pizza, the court hereby grants the motion for summary judgment and orders Plaintiffs claims against Defendant Rangdunu Corporation be dismissed." (Pa2).

The trial court then set forth "Background Facts". In the next section, "Parties' Arguments", the court set forth what the parties argued in their written submissions, including their briefs. (Pa2-7). Under "Standard of Review", the court set forth the summary judgment standard, including that summary judgment requires for there to be no genuine issue of material fact, and that the court must consider whether the competent evidential materials, viewed in a light most favorable to the non-moving party, are sufficient to permit a rational factfinder to find in favor of the non-moving party. (Pa7-8).

At the beginning of the "Discussion" section of the decision, the trial court stated that the ultimate issue" was "whether Defendant Cooney was acting within the scope of his employment at the time he was involved in an automobile accident with the Plaintiff, which could establish vicarious liability against Defendant Rangdunu. (Pa8). The court provided regarding the question of vicarious liability that what is required is that there be an employment relationship and that the alleged tort occurred within the scope of employment. (Pa8). As to the first part, the court stated that "There is no question that Cooney was employed by Rangduu at the time of the accident",

but stated further that this relationship alone does not create an inference that the subject actions were within the scope of employment. (Pa8).

The court then stated that the analysis to be performed was as follows:

> Our scope of employment analysis must bedone under Restatement (Second) of Agency section 228 and 229. Section 228 provides that an employee's conduct falls within the scope of employment if:
> (a) It is of the kind he is employed to perform;
> (b) It occurs substantially within the authorized time and space limits;
> (c) It is actuated. at least in part, by a purpose to serve the master.
> Section 229 of the Restatement provides that:
> (1) To be within the scope of the employment.conduct must be of the same general nature as that authorized, or incidental to the conduct authorized.
> (2) In determining whether or not the conduct. although not authorized. is nevertheless so similar to or incidental to the conduct authorized as to be within the scope of employment. the following matters of fact are to be considered:
> a. Whether or not the act is one commonly done by such servants;
> b. The time, place, and purpose of the act;
> c. The previous relations between the master and the servant;
> d. The extent to which the business of the master is apportioned between different servants;
> e. Whether or not the act is outside the enterprise of the master or, if within the enterprise, has not been entrusted to the servant;
> f. Whether or not the master has reason to expect that such an act will be done;
> g. The similarity in quality of the act done to the act authorized;
> h. Whether or not the instrumentality by which the harm is done has been furnished by the master to the servant;
> i. The extent of departure from the normal method of accomplishing an authorized result; and
> j. Whether or not the act is seriously criminal.

(Pa8) (citing Carter v. Reynolds, 175 N.J. 402, 411 (2003)).

Although stating that the foregoing was the analysis to be performed, the court did not subsequently mention this analysis or the foregoing Sections 228 or 229.

The court next stated that "The focus of the present matter pertains to an employee's actions while driving his vehicle outside of the employment premises." (Pa9). Regarding the above-described factual dispute regarding whether Cooney had authorization to leave the store, the trial court provided that viewing the facts most favorably to Plaintiff meant using as fact that Cooney was allowed "to leave the store so long as Ms. Vohringer or another employee could tend to the register." (Pa9). The trial court thus stated: "Thus, any analysis must be confined to whether Cooney's driving in and of itself, regardless of authorization, was within the scope of his employment." (Pa9).

The court then discussed a "general proposition" that an employee "going to" or "coming from" their place of employment is not considered to be acting within the scope of employment. The court explained as one rationale a concept of suspension of employment during the time that the employee is away from the premises. Another rationale was lack of benefit to the employer from the "commute". (Pa10).

The court described the foregoing as a "general rule" with "limited exceptions" of 1) the employee is engaged in a special errand or mission; 2)

the employer requires the employee to drive their personal vehicle to work for use for work-related tasks; or 3) the employee is "on call." (Pa10). The court stated that these have been called "dual purpose" exceptions due to involving a personal and employer interest. The court observed that the New Jersey Supreme Court in Carter viewed these as sensible in that they involve some control over the employee's actions and a "palpable benefit to be reaped by the employer." (Pa10) (citing Carter, 175 N.J. at 414).

The court then, relative to the foregoing, appeared to present its own formulation for deciding the present case, based on select facts. The court stated that "There is no dispute of fact that Defendant Cooney was driving his own vehicle outside the store's property when the accident occurred during his attempt to pick up food for lunch for him and his coworker." (Pa11). The court continued that "As such, the general rule regarding when an employee is "going to" or "coming from" their employment must apply." (Pa11). Regarding such "general rule", the court continued by stating that "That general rules states that when Cooney is driving his vehicle away from work to pick up lunch, he is not operating that vehicle within the scope of employment." (Pa11). The court concluded with "Therefore, no vicarious liability can attach to Defendant Rangdunu unless some exception applies" (Pa11). The court declared that "Even looking at the facts of this case in the

light most favorable to the Plaintiff, this court cannot find that Defendant Cooney's actions fall within any of these exceptions." (Pa10).

The court next turned to discussion of the Delaware case of Wilson v. Joma, which was brought to the attention of the court by Plaintiff. As summarized by the court earlier in the decision, when summarizing the arguments briefed by counsel:

> Plaintiff [ ] argues Cooney's actions were within the scope of his employment because his actions had a "dual purpose." Plaintiff relies entirely upon a decision from the Delaware Supreme Court, Wilson v. Joma, 537 A.2d 187 (Del. 1987), which found a dispute of material facts existed in a case where a tire and gas station manager had a motorcycle accident after he left work on an authorized lunch break to pick up lunches for employees who could not leave the station. Under those facts, the Delaware court held a jury could find the manager had a "dual purpose" in picking up lunches for both himself and the other workers. Plaintiff argues the same result should occur here.

(Pa5).

Although not mentioned by the court in the foregoing passage or elsewhere in the decision, and given the applicable law in that case also included Section 228 of the Restatement of Agency, discussed by the trial court here at the beginning of its analysis, the Delaware Supreme Court in the Wilson case applied Section 228 in conjunction with the "dual purpose" doctrine.

The court stated that it "disagrees with" Plaintiff's "reliance" on Wilson for "several reasons." One reason was that it is "a non-binding out-of-jurisdiction decision and this court may readily disregard it."

Regarding the second reason, the court continued by stating that "Moreover, the court notes two factual distinctions in Wilson that are not found here." The first "distinction", and although the court stated previously that it needed to be assumed for summary judgment purposes that Cooney had the authority to leave the premises as he did, was that "the manager in Wilson was expressly permitted to leave the premises for his half-hour break", whereas "Cooney's ability to leave the store is in dispute in this case." (Pa11).

The second distinction in the view of the court was that "more importantly", in Wilson, the manager, who was "without restraint to the store", was "the one" that picked up the food for his co-worker(s) and this was a "usual routine". The court ascertained a "distinction" on the grounds that the court found nothing in the record here "to show that Cooney leaving the store to pick up pizzas from Papa Johns for himself and his co-workers was a "usual routine". (Pa12).

The third and last reason provided by the court for "disagreeing" with reliance on Wilson was the court's view as follows:

> Lastly, this Delaware decision fails to apply New Jersey's jurisprudence and appreciation of the "going to" and "coming from" rule or the employer "control" aspect of the exceptions, where the dual purpose requires the employer to retain some aspect of control over the employee during the act. The decision is silent on these concepts. Failure to apply these legal principles which would be binding on a New Jersey court makes Wilson's holding inapplicable here. See also Rogers v. Jordan, 339 N.J.

> Super. 581 ,589-90 (App. Div. 2001) (holding that employer was not vicariously liable for employee police officer's vehicle accident that occurred while on a lunch break even though officer could have been considered on-duty if certain circumstances arose).

(Pa12).[4]

The court then proceeded to discuss the concepts of employer "benefit" and "control", apparently with some intended to relation to the foregoing, although not further explained.[5] Regarding benefit, while the court in Wilson specifically opined that the factfinder could ascertain from the facts an employer benefit, the trial court here stated that it could not find any employer benefit in either Wilson or the present case, even in reviewing the facts in the light most favorable to Plaintiff. (Pa12). The trial court stated its view that there was "simply no logical merit", apparently to an idea that the employer benefits from the arrangements in the two cases whereby an employee remains on site as lunch/food is picked up for them. (Pa12). The court stated it "can find no 'palpable benefit' being reaped by the employer as a result of the employee's decision to leave the store." (Pa12).

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[4] The court also a little further down in the decision stated its view that "Wilson also fails to address the "control" issue that is critical to how a New Jersey court would decide the case." (Pa13).

[5] The concepts of control and benefit are inherent in Sections 228 and 229 of the Restatement Second of Agency discussed elsewhere.

The court then turned to "control", stating that "Wilson also fails to address the "control" issue that is critical to how a New Jersey court would decide the case." (Pa13). The court stated its view that in neither Wilson nor the present case did the employer direct the employee to leave the store. (Pa13). In addition, the court stated that in "neither action did the employer have any control over where the employee would go once they left the store." (emphasis in original). (Pa13).

The court also stated that "In Wilson, there was at least a 30-minute time frame imposed, but there is no evidence in this record that a jury could consider to determine what time frame Rangdunu imposed on employees that left the store during their shift." (Pa13). In a related footnote, the court stated, relative to certain testimony: "Cooney may have believed 30 minutes was an appropriate amount of time, but there is nothing in the record showing the employer set forth that restriction. Indeed, Rangdunu's position is that there was no time frame in which they could leave during their shift." (Pa13).[6]

The court then proceeded to conclude that "control", which it stated is "the cornerstone for why these exceptions exist", in apparent reference to the "dual purpose" exceptions the court discussed previously, is "conspicuously

[6] As discussed above, the court elsewhere stated that it must be assumed for purposes of the motion that Cooney was permitted to leave.

lacking from any evidence in this record before the court." The court then stated and held:

> These facts, even viewed in the light most favorable to the Plaintiff, show that Rangdunu did not direct Cooney to leave store and that Rangdunu had no control whatsoever over what [Cooney] did when he did leave. As such, this court finds that Defendant Rangdunu is entitled to summary judgment on Plaintiff's vicarious liability claims and that these claims must be dismissed.

(Pa13).

ARGUMENT

I. THE SUMMARY JUDGMENT DECISION IN FAVOR OF DEFENDANT IS SUBJECT TO DE NOVO REVIEW

Rule 4:46-2 mandates that summary judgment shall be granted where there is "no genuine issue as to any material fact challenged and that the moving party is entitled to a judgment or order as a matter of law." R. 4:46-2(c). The trial court's role is to decide whether "the competent evidential materials presented, when viewed in the light most favorable to the non-moving party, are sufficient to permit a rational factfinder to resolve the alleged disputed issues in favor of the non-moving party." Brill v. Guardian Life Ins. Co., 142 N.J. 520, 540 (1995).

On appeal of a summary judgment decision, this court adopts the same standard as the trial judge. Prudential Prop. & Cas. Ins. Co. v. Boylan, 307 N.J.

Super. 162, 167 (App. Div.), cert. denied, 154 N.J. 608 (1998). Absent a genuine factual dispute, the appellate court employs a de novo review to decide whether the trial court's decision was correct. Walker v. Alt. Chrysler Plymouth, 216 N.J. Super. 255, 258 (App. Div. 1987). Graziano v. Grant, 326 N.J. Super 328 (App. Div. 1999).

II. SUMMARY JUDGMENT SHOULD NOT HAVE BEEN GRANTED AS DEFENDANT DID NOT AND CANNOT SHOW THAT THERE IS NO GENUINE ISSUE OF MATERIAL FACT AND THAT DEFENDANT WAS ENTITLED TO JUDGMENT AS A MATTER OF LAW (RAISED BELOW: Pa1)

Pursuant to applicable law and summary judgment principles, the burden of the moving Defendant here was to demonstrate that there was no genuine issue of material fact and that it was entitled to judgment as a matter of law on the issue of scope of employment, going to the issue of vicarious liability. Here, this meant demonstrating that notwithstanding that there was no issue that Cooney was an employee of Defendant, that the tortious conduct that injured Plaintiff should be deemed not within the scope of employment, thereby cutting off this avenue of relief for Plaintiff against the employer.

Plaintiff submits that in essence, under applicable law, the fundamental question is whether there is sufficient employer control and/or interest such that vicarious liability attaches. The touchstone for the foregoing is Sections

228 and/or 299 of the Restatement 2nd of Agency. As set forth above, these sections consist of multiple factors to be used in addressing the question, relative to the multiple facts present in this case. Further, due to the "dual purpose" doctrine, the employer cannot avoid application of vicarious liability solely because there may be a personal interest at play in addition to an employer interest.

Therefore, Defendant's formidable burden on summary judgment was and is to demonstrate that notwithstanding the fact-sensitive nature of the present case, the multiple factors to be considered and weighed relative to the various facts, the "dual purpose" doctrine, and the requirement that all facts be construed most favorably in favor of Plaintiff (and thus against Defendant), that the issue of whether there is sufficient employer control and/or interest such that vicarious liability attaches is so clearly in favor of Defendant that the question should not go to the jury, because that is the one and only conclusion that a reasonable factfinder could reach, whereas it would take an unreasonable factfinder to find otherwise. Understandably, here, Defendant did not and cannot meet this burden, although the trial court erred in finding otherwise.

Consideration of the various factual particulars of the present case within the foregoing applicable summary judgment and applicable framework readily leads to the conclusion that the essential issue of whether there was sufficient

employer control and/or interest such that a factfinder could find that vicarious liability attaches must go to the factfinder, as a factfinder clearly could so find.

Defendant made arguments such as that Cooney was not permitted to leave the premises and that there was only a personal interest of Cooney being served and no interest of the employer. However, as explained above, the trial court appropriately concluded that viewing facts most favorably to Plaintiff for purposes of the motion, it must be assumed that Cooney was permitted to leave. Thus, any argument of Defendant to the contrary is nullified for purposes of the motion. Generally regarding any argument of personal interest, Defendant due to the "dual purpose" doctrine must, *inter alia*, show that there was insufficient evidence for a reasonable factfinder to find that there was any employer interest sufficiently being served, even if there was also a personal interest involved. It is evident from the facts that it would be overreach for Defendant to attempt to argue that a reasonable factfinder could find nothing but purely personal interest. The foregoing demonstrates why, even if the Defendant believes it has arguments to make about facts going to its control and/or interest, at best, these are arguments Defendant needs to make to the jury. That is precisely what the Court ruled in Wilson, where the moving Defendant also attempted to avoid the jury by arguing that only a purely personal interest could be found to exist.

There are simply too many facts and questions for resolution by summary judgment. Viewed most favorably for Plaintiff, the employer's ends were being served under and in accordance with the framework established by the employer, including the employer's a stated goal of the employer to "better serve the customers." The employer's control and/or right of control over Cooney and Vohringer was present at all relevant times, including in that they were on the clock and charged with carrying out their duties and/or concerning themselves with the business of the store as they carried out arrangements for eating. Cooney and Vohringer were together in their decisions and actions doing so and/or endeavoring to do so. For them to do so in the circumstances at issue, Vohringer (and the employer) needed Cooney to pick up the food for her (and Cooney's consumption) so she could remain on the premises and tend to customers directly, while Cooney (and the employer) needed Vohringer to do the foregoing so that he could pick up the food for consumption by him and Vohringer back at the store. Indeed, viewing the facts most favorably to Plaintiff, Cooney and Vohringer were performing in their job exactly as the employer directed and intended.

The foregoing helps to illustrate the fact-sensitive nature of this case, and the various facts upon which a jury could ascertain the presence of sufficient control and/or interest/benefit relative to the employer. Such aspects

of control and/or interest are only brought into further relief when considered against how the employer could have proceeded instead. Specifically, the employer could have elected to provide a break to employees allowing them complete freedom to do as they wished for their own interests, without any requirement to have any concern for the store or to "be on the clock", etc. Of course, this might have required the employer as a result to have more people on shift, to hire more people or to allow for more "inconvenience" to customers, etc. This shows that the employer here chose control and/or benefit to itself, or more of the foregoing, in service of the employer's own ends and interests, which in turn imposed more restrictions, obligations, etc. on the employees. This of course supports and is more than sufficient to create a fact question as to a case for vicarious liability here.

III. THE DELAWARE SUPREME COURT CASE OF WILSON, CONTAINING SUBSTANTIALLY ANALOGOUS FACTS, PROVIDES THE BLUEPRINT FOR DENIAL OF SUMMARY JUDGMENT IN THE CASE AT BAR (RAISED BELOW: Pa5)

The Wilson case serves as a template – a blueprint – for decision in the present case. Although it is a decision by a sister court, rendered by the highest court in that state, the decision could have been rendered by a New Jersey

court. Delaware, like New Jersey, in general used and recognized, where and as applicable in scope of employment cases, Sections 228 and 229 of the Restatement of Agency and the "dual purpose" doctrine, as well as standard summary judgment principles. Therefore, the Wilson Court was in effect not just applying Delaware law, but New Jersey law in all relevant respects. As such, given the analogous factual circumstances, the Wilson case is sufficiently legally and factual similar to essentially to serve as the framework for decision of both cases, leading to the same result. The trial court decision in Wilson granting summary judgment led to the appeal to the Delaware Supreme Court, which was compelled to reverse the trial court. Because the trial court here appeared to resist rather than embrace the Wilson decision as applicable to this case, the present case is now in the same appellate posture.

Plaintiff respectfully submits that the present appeal likewise requires reversal of the trial court.

In Wilson, an employee endeavored to pick up lunch for himself as well as for other employees who, for the convenience of customers, could not leave the premises for lunch and were to eat on site. That employee was authorized to leave for lunch and to eat off premises, and he had half an hour to do so. The employee was not required to pick up food for the other employees, but he endeavored to do so on the occasion in question, and this was a usual routine.

As in the present case, the employee got into a motor vehicle accident off premises with a third party during his endeavor. Also, as in the present case, the employer argued, notwithstanding all the foregoing facts, that the employee was serving a purely personal interest. In that case, there was no dispute that the employee was authorized to leave or that what the employee was doing was a routine that the employer was aware of.

The Court made its determination based upon Section 228 of the Restatement of Agency 2nd and the "dual purpose" doctrine. In finding that a jury could, in line with the dual-purpose doctrine, find that the actions at issue were within the scope of employment, the Court recognized that there is an interpretation of the facts which established sufficient employer control and/or interest. The Court specifically described facts it found pertinent relative to the foregoing, in addition to indicating that there were credibility issues pertaining to arguments of the employer. served. The Wilson case and its sound analysis also support denial of summary judgment here.

IV. THE TRIAL COURT APPLIED AN INCORRECT LEGAL STANDARD IN DECIDING THE MOTION (RAISED BELOW: Pa10-11)

The trial court here, unlike the court in Wilson, applied an incorrect legal standard, which it formulated. At first, the trial court correctly set forth

Sections 228 and/or 229 of the Restatement 2nd of Agency as the governing standard. However, the court then appeared to abandon the foregoing and set forth a standard that Plaintiff could only avoid vicarious liability if Plaintiff could demonstrate that the conduct fit within one of three "exceptions" relative to the trial court's assessment of applicability of the "coming and going" "rule". This standard was incorrect. The trial court subsequently attempted to distinguish Wilson by indicating that it was Wilson that did not comport with applicable legal principles. The opposite was the case.

The court provided, as one of three reasons it "disagreed" with the "reliance" by Plaintiff on Wilson, the following statements regarding the law:

> Lastly, this Delaware decision fails to apply New Jersey's jurisprudence and appreciation of the "going to" and "coming from" rule or the employer "control" aspect of the exceptions, where the dual purpose requires the employer to retain some aspect of control over the employee during the act. The decision is silent on these concepts. Failure to apply these legal principles which would be binding on a New Jersey court makes Wilson's holding inapplicable here. See also Rogers v. Jordan, 339 N.J. Super. 581 ,589-90 (App. Div. 2001) (holding that employer was not vicariously liable for employee police officer's vehicle accident that occurred while on a lunch break even though officer could have been considered on-duty if certain circumstances arose).

(Pa12).[78]

However, there is no apparent daylight between Delaware and New Jersey jurisprudence to differentiate Wilson from the present case. The legal analysis and reasoning in Wilson is sound, whether actually rendered by a

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[7] The court also a little further down in the decision stated its view that "Wilson also fails to address the "control" issue that is critical to how a New Jersey court would decide the case." (Pa13).

[8] In this section of the decision, after stating the foregoing, the trial court proceeded to engage in an analysis of benefit and control. Beyond what might be gleaned from the foregoing statements, the trial court did not provide any insight as to why it engaged in this analysis, including after it had already set forth its formulation and reached the conclusion that no "exceptions" applied. While the term "benefit" is not mentioned above, the trial court did discuss this term elsewhere as, together with "control", a feature of the "exceptions." It is possible, although not clear, that the trial court was analyzing benefit and control here due to their being features of the exceptions. Further, it is also possible that, given the formulation the court created, which only allowed for consideration of whether three exceptions applied, that the trial court's analysis here was intended to be limited to the justification for the exceptions relative to the court's construction regarding the "coming and going" "rule". The court, at the end of the analysis, stated: "These facts, even viewed in the light most favorable to the Plaintiff, show that Rangdunu did not direct Cooney to leave store and that Rangdunu had no control whatsoever over what [Cooney] did when he did leave. As such, this court finds that Defendant Rangdunu is entitled to summary judgment on Plaintiff's vicarious liability claims and that these claims must be dismissed." (Pa13). The foregoing potentially contradicts the concept of the formulation the court used previously. Further, any intended relation to or deviation from the formulation is not expressed by the trial court. The fact that the trial court acknowledges that control and/or benefit have a certain relevance, if anything, tends to support the arguments of Plaintiff regarding the proper analysis pursuant to the Restatement. Overall, this further analysis by the trial court goes to the unreliable and flawed nature of the decision, and supports reversal.

court sitting as a Delaware or New Jersey court, and whether applying Delaware or New Jersey law. Section 228 of the Restatement 2nd of Agency and the "dual purpose" doctrine, *inter alia*. are the law.

In addition, where and as applicable, the "going to" and "coming from" "rule" are relevant and applicable in both Delaware and New Jersey. Regarding the "dual purpose" doctrine, this doctrine is not tied in either state solely to so called "dual purpose" "exceptions" to the "coming and going rule". In general terms, the "dual purpose" doctrine is to the effect that where there are sufficient facts relative to employer interest, vicarious liability on the part of the employer is not avoided because there is also a personal interest being served or at play. To the extent it is applicable to so called "dual purpose" "exceptions" to the "coming and going" "rule", then these are merely specific instances of, or a subset of, where it applies. Indeed, the "dual purpose" doctrine, to apply, can apply anywhere – it is not limited to specific circumstances such as where one might be traveling or "off premises".

Indeed, the court in Wilson does not discuss the "coming and going" "rule" or any so called or related "dual purpose" "exceptions". The court, pursuant to the "dual purpose" doctrine, correctly concluded that a factfinder could find that in addition to any personal interest, an interest of the employer

was being served sufficient for vicarious liability to attach. That was all that was required for the court to find that summary judgment had to be denied.

There is no inconsistency or conflict with the "coming and going" "rule". The "coming and going" "rule" can only properly apply, when it applies at all, when there is no or insufficient employer control or interest in the first instance. As such, this "rule" is better and more properly understood as a conclusion that can only exist after it has been determined, after consideration of the facts, that there is no employer control and/or interest. Given that in Wilson, there was already sufficient employer control and/or interest to create a fact issue, then such a conclusion simply could not have been reached in Wilson.

Further, if in Wilson, the facts were different such that there was no employer control and/or interest, then such would be the case and could be determined in the absence of the "coming and going" "rule". In other words, lack of control and/or benefit is lack of control and/or benefit. The only qualification to the foregoing may be regarding principles that have developed around the concept of the "coming and going" "rule" relative to determining what is recognized as control and/or benefit relative to ascertaining whether such is deemed to exist in the first instance under a scope of employment analysis.

Thus, for example, a party arguing in favor of vicarious liability may want to argue that evidence of employer control and/or benefit during an employee's commute to work is that the employee is only on the road because the employee is going to work for the employer's benefit, and/or that an interest of the employer is being served prior to arrival at work because the employee needs to travel to get to the workplace on time, which is in the employer's interest. While these may be arguments, existing law is to the effect that even if these can be considered control and/or benefit, they are not so considered in the scope of employment context. This does not mean that there aren't other arguments that could be made for control and/or benefit if there are other facts or circumstances allowing for this, only that the existing law for the foregoing arguments is in place.

On the flip side, the same applies in the other direction for any recognized, so called "exceptions" or "dual purpose" "exceptions" to the "coming and going rule". Where the conduct at issue involves the employee 1) being on a special errand or mission; 2) being on call; or 3) using the employee's own personal vehicle for use for the employer's purpose, these have been recognized as "exceptions" to the "coming and going" "rule". Therefore, where these exceptions apply, the employer may want to argue that these exceptions should not exist, but the state of the law is that they do. Thus,

"going in" to a case, these "exceptions" pertaining to "coming and going" "rule" analysis already exist. As the trial court observed in the decision, the New Jersey Supreme Court has stated that these exceptions appear sensible, in that they involve some degree of control and benefit on the part of the employer.

The foregoing demonstrates that the fundamental, relevant inquiry for scope of employment is with regard to employer control and/or interest, including pursuant to the framework of Sections 228 and 229 of the Restatement 2nd of Agency. The foregoing also demonstrates that just because employee conduct at issue may include "going to" or "coming from" a workplace does not mean that there is a different inquiry other than whether, considering all of the facts, there is employer control and/or interest. Generally speaking, solely by considering employer control and/or interest in the context of applicable principles, the proper result can and should be reached. Regarding the foregoing three "exceptions", control and/or interest are components of these exceptions, as the New Jersey Supreme Court has observed. Thus, even if these "exceptions" did not exist, a litigant might be able to successfully argue that vicarious liability should attach due to such employer control and/or interest. As explained above, the only difference due

to their existence is that the argument must prevail due to their existence already having been recognized.

The ”coming and going” “rule” or the “general proposition” can be understood as being nothing more than that if an employee is commuting to and from the workplace before the start of and after the end of the workday, that this state of affairs by itself, without more, does not implicate employer control and/or benefit. This does not on the other hand, mean that there is not, or it has been pre-determined that there is not, employer control and/or benefit due to other or additional facts or circumstances. That would depend upon what those may be. It is also the law that the three “exceptions” are one way in which control and/or benefit exists due to the other or additional facts these add relative to a commute. Further, as explained above, the law has determined that arguments such as that the employer has some control and/or benefit going to vicarious liability solely because the employee is on his way to or from work at the beginning or end of the day are not considered to be something going to control and/or benefit relative to vicarious liability. Since the ultimate and controlling inquiry is that if there is sufficient employer control and/or benefit, there is either a fact question as to vicarious liability under a scope of employment analysis, or there is no fact question and vicarious liability applies, then it does not or should not matter whether one

starts the inquiry as stated at the beginning of this paragraph, or whether one simply starts with the general inquiry of whether there is control and/or benefit. Provided that the inquiry is made and properly done, one ends up in the same place.

Also of note is that the foregoing discusses a commute to and from work at the beginning and end of the day. The first sentence of the above paragraph makes sense in that context. A situation where one leaves a workplace location in the middle of the workday is different. In the present case, one might talk about the "lunch hour" "rule". At most, it might be said, similar to above, that simply leaving for lunch or to pick up food does not, without more, implicate employer control and/or benefit. Of course, this is again just another way of saying that whether there may be vicarious liability depends upon the question of any employer control and/or benefit.

The foregoing illustrates the error made by the trial court in its formulation of a framework. As the above illustrates, any inquiry which does not consist of or allow for a full inquiry as to control and/or benefit risks an erroneous outcome. It cannot be said that merely because someone is in the process of commuting to or from work at the beginning or end of the workday, they are not within the scope of employment in the absence of one of three "exceptions" applying. Neither can it be said that this is the case for someone

who has left to pick up food for lunch with the intention of returning to the workplace.

Yet, that is what the trial court did. According to the trial court:

1. "There is no dispute of the fact that Defendant Cooney was driving his own vehicle outside the store's property when the accident occurred during his attempt to pick up food for lunch for him and his coworker."

2. "As such, the general rule regarding when an employee is "going to" or "coming from" their employment must apply."

3. "That general rule states when Cooney is driving his vehicle away from work to pick up lunch, he is not operating that vehicle within the scope of employment."

4. "Therefore, no vicarious liability can attach to Defendant Rangdunu unless some exception applies."

(Pa10-11)

Regarding "some exception", in context, the trial court was referring only to the three exceptions it identified as being "recognized." The trial court determined that no such exception applied.

As explained above, any inquiry which does not allow the question of whether there was employer control and/or benefit to be answered risks an erroneous outcome. The foregoing formulation was far from that. Under the trial court's formulation, the only way that Plaintiff can survive summary judgment would be to show that one of three situations existed; i.e., that the

employee was "on call", or an a "special errand or mission", or the "own vehicle" "exception" applies.

This formulation is flawed on its face. Implicit in the formulation is an assumption or conclusion that the only employer control and/or benefit that could exist would only be that which could comes under one of three exceptions. This is simply not something that can be determined to be the case based solely upon the fact that "Cooney [was] driving his vehicle away from work to pick up lunch" and/or "that Defendant Cooney was driving his own vehicle outside the store's property when the accident occurred during his attempt to pick up food for lunch for him and his coworker". In fact, the foregoing on its face, such as that he was picking up for his coworker, raises at least the prospect of employer control and/or benefit.

As such, the most the trial court could have accomplished under the foregoing formulation was to determine whether one or more of the three "exceptions" existed here. The trial court determined they did not. Underlying such determination was nothing more than a determination that control and/or benefit was not present under these specific scenarios.

Even assuming the correctness of such a determination, this left unreviewed and unanalyzed all the other ways in which control and/or benefit could be found present, including from proper consideration of not just the

limited fact(s) the trial court included in the formulation, but all other facts that the trial court did not. Further, it must be noted that as explained above, the fact that there are three "exceptions" that have been recognized, which have control and/or benefit, does not mean that other situations, "exceptions" or scenarios where there is control and/or benefit are excluded. To the contrary, sufficient control and/or benefit is just that. Yet, the trial court artificially limited even its "exceptions" analysis to three specific scenarios. Plaintiff maintains that whether considered an "exception" or something else, where control and/or benefit are present, that is what matters.

V. THE NEW JERSEY APPELLATE DIVISION CASE OF ROGERS V. JORDAN, CITED BY THE TRIAL COURT, SUPPORTS THE PROPOSITIONS THAT THE TRIAL COURT APPLIED AN INCORRECT LEGAL STANDARD AND THAT WILSON IS AN APPROPRIATE BLUEPRINT FOR DECISION (RAISED BELOW: Pa12)

The trial court, in its above statements regarding applicable law and Wilson, cited to a New Jersey Appellate Division case "holding that employer was not vicariously liable for employee police officer's vehicle accident that occurred while on a lunch break even though officer could have been considered on-duty if certain circumstances arose." See Rogers v. Jordan, 339 N.J. Super. 581, 589-90 (App. Div. 2001). That case, which granted summary judgment

on the facts of that case, is fully consistent with the foregoing analysis by Plaintiff here. In Rogers, the Plaintiff argued that the employee who got into an accident was within the scope of employment. The Appellate Division applied the principles of Section 228 and/or 229, while cognizant of the "coming and going rule". This is in contrast to the trial court here, which used it as a "shortcut" or "substitute" for a full analysis. The court did not, as the trial court did here, create its own formulation for decision, such as starting with a framework such as that just because the employee left the premises during his lunch break, that he was therefore not within the scope of employment, and that no vicarious liability could attach absent an exception.

Indeed, Rogers demonstrates the fact-sensitive nature of scope of employment cases. Rogers, with its factual differences, serves as a point of reference for the present case, just as Wilson serves as a point of reference due to its factual similarities to the present case. There is consistency in the analysis in Rogers and Wilson, with the difference in result explained by the factual differences. The problem that arose in the present case is that the trial court did not, as did the courts in Rogers and Wilson, seek to follow the existing legal framework grounded in Sections 228 and 229 of Restatement 2nd of Agency that would have led to a proper result of denial of summary judgment.

VI. THE INCORRECT DECISION REACHED BY THE TRIAL COURT IS ATTRIBUTABLE TO A FLAWED APPROACH TO AND ASSESSMENT OF THE RELEVANT FACTS IN THE POSTURE OF A SUMMARY JUDGMENT MOTION (RAISED BELOW: Pa1)

The trial court decision reflects that the court applied such a restrictive view of employer benefit and control, and of the facts, that, *inter alia*, the court did not even find evidence of benefit or control in the record. This restrictive approach was made only more apparent through the trial court's assessment and discussion of, and comparison to, the facts of Wilson. Further, Wilson, which illustrates a proper approach to the concepts of control and benefit and to the facts on a summary judgment application, is instructive here by its contrast. The decision reflects that the trial court did not view facts most favorably to Plaintiff, as was required. The discussion that follows addresses various ways in which the foregoing was manifested. Further, the discussion that follows further demonstrates the reasons behind the different result reached by the trial court here versus the court in Wilson. They are not due to any differences in the law or the facts, but rather due to the approach of the two courts.

One way the that the fact that the trial court found no control and/or benefit while the court in Wilson apparently did can be assessed by comparison to other scenarios, as Plaintiff did above in discussing the facts of

this case. Specifically, the fact scenarios of the present case and of Wilson can be compared to scenarios such as where an employer affords employees meal breaks which are completely off the clock, where the employee can spend the time however they wish, where the employer does not impose any obligations, direct, indirect, mental or physical or otherwise upon the employees during that time, and the employer does not impose restrictions on other employees which create a situation where an employee might as a result spend their time in service of the employer even if not required.

In those situations, an employer should have a relatively better argument towards avoiding a vicarious liability finding. Obviously, the employers in the present case and in Wilson were more restrictive by reason of wanting to advance their own perceived interest, which they are apparently entitled to do. However, this implicates more control and/or benefit relative to scope of employment analysis, consistent with the policy considerations surrounding potential liability.

The court in Wilson, inherently at least, recognized the foregoing. The court evidently ascertained that the restriction imposed by the employer on certain employees who were expected not to leave the store and were expected to eat on site could be viewed as serving the employer interest in convenience of and service to customers. In addition, as the employees are restricted, this

reflects control being exerted over the employees connected to that interest. The foregoing further reflects benefit to the employer who could have addressed the interest in another way that does not so restrict the employees, such as by hiring more employees or having more employees on site at a time. By comparison to the foregoing analysis and explanation, the trial court here stated that it "cannot find any additional benefit being conferred" in either Wilson or the present case, such as might create a fact question. The trial court stated that there was "simply no logical merit" to an argument or idea that the employer receives a benefit from an employee remaining at the store while someone else picks up their food. Under the trial court's logic, "The employees needed to remain on the job site regardless of whether an employee left to get food or not", such that "Leaving the premises adds no value."

Similarly, the trial court here stated that it could find no evidence of "control" anywhere in the record. However, as explained above, the control is evident in the restrictions placed upon the employees in the present case. This includes having to remain on the clock and being required to ensure customers are tended to even as they eat or make arrangements to do so.

The court posited as evidence going to lack of control its view that the employer did not direct the employees in either case to leave and that in neither case did the employer have control over where they went once they

left. However, in Wilson, the restrictions/control exercised over certain employees is what resulted in the employee who left the premises and got into an accident picking up food for himself as well as others, on the day in question as well as other days, to the point that it was a "usual routine". Because of this restriction, there was control over where the employee went in that he went to pick up food versus doing something else. Further, the employee who could leave was restricted to half an hour off premises, and he was so restricted even when picking up food for the others. Further, the trial court states that the employer did not "direct the employee to leave". However, the employer, by its restrictions, created and/or contributed to the situation where the employee did leave, including for purposes of picking up food. Similar analysis applies for the present case.

As such, whatever the trial court may mean by whether the employer "directed" the employee to leave, or by whether the employer controlled "where" the employee went, this does not result in whatever "lack of control" the trial court might be suggesting. Certainly, this is not evidence of some complete "lack of control" as the trial court appears to conclude is so in the present case. Further still, the trial court's characterization appears to go even further than lack of control over "where" the employee would go, as the trial

court subsequently states that the employer here had "no control whatsoever over what Cooney did when he did leave."

Likewise, the court did not consistently or clearly afford Plaintiff the benefit of most favorable view of the facts relative to the disputed issue of whether Cooney could leave the store, even for purposes of picking up food when someone was there to watch the register. The trial court early in its analysis said that it indeed for purposes of the motion needed to be accepted that Cooney could so leave the store. However, the trial court then subsequently posited that one of only two "factual distinctions" the court found between Wilson and the present case was that in Wilson, the employee that left was explicitly permitted to do so, whereas "Cooney's ability to leave the store is in dispute in this case." While this is an accurate statement, there should be no "distinction" to speak of here because the facts are to be construed most favorably to Plaintiff as the court already found. In addition, this appears to carry over to what the trial court characterizes as the second "distinction", which it perceives as "more important". The court posits that in Wilson, it was "the manager", who was "without restraint to the store" (being explicitly permitted to leave), who was "the one" that picked up the food as part of a "usual routine". By comparison, the court stated that the record in the present case did not contain evidence that Cooney picking up pizza from Papa

Johns for himself and others was a "usual routine". The foregoing at least could be interpreted as the court again impermissibly weighing and considering the fact that Cooney's "ability to leave" was in dispute as something negative, even after explicitly stating this could not be done for this summary judgment motion. This at minimum calls into question whether the court indeed construed this fact issue most favorably to Plaintiff as required.

This issue is compounded by the fact that while the court posits these two "factual distinctions", and only these two, as one of the three reasons given for the court "disagreeing" with the "reliance" by Plaintiff on Wilson, the court does not go beyond presenting these as "distinctions." Therefore, the court does not explain any apparent significance of this "distinction" or how this did or did not impact its decision.

Further, "disagreeing" with "reliance" on Wilson based on the "usual routine" "distinction", whether or not also tainted by the authority to leave question, also indicates error by the court and unreliability of the decision. The court indicates that there is evidence of a "usual routine" in Wilson, compared with there not being evidence of the same in the present case (and the court indicates, evidence suggesting the contrary). If as is required, the trial court is assuming that Cooney was permitted to leave, then the only

apparent "distinction" is that it was a "usual routine" in one case, and perhaps not so in the other, but permitted in either case.

Given the foregoing, it is even more unclear why this could cause a court to "disagree" with "reliance" upon Wilson. Rather, at most, this suggests one fact difference, not uncommon amongst scope of employment inquiry cases, which is to be considered together with all other facts applicable to the subject case. If anything, the fact that the court may perceive a certain difference between two cases, without more, simply illustrates why fact-sensitive inquiries tend to be for the jury and not the court to resolve.

Also, notably, while the court ascertains what are ultimately posited as three distinctions between the two cases, these are all presented or suggested as being more favorable to the Plaintiff in Wilson, even as such may not be proper, such as where facts are to be construed most favorably to Plaintiff. Overall, the decision appears to reflect that the court has undertaken effort to identify items it posits as relatively more favorable for the Wilson Plaintiff, while it on the other hand does not address the topic of any facts in the other direction.

Indeed, the decision at various points appears to assess facts in a manner indistinguishable from how the moving Defendant might argue them at trial versus viewing them in a light most favorable to Plaintiff. Relatedly, as

another example of the foregoing and of making conclusory statements potentially calling things into question on Plaintiff's end, the court made the general comment that "An employee cannot tend to customers if they are not there." (Pa10) relative to "suspension" of employment being a rationale for the "coming and going" "rule". This is another example of a restrictive view of facts when the procedural posture of requires a sufficiently open view of facts. The facts at issue, inter alia, show how Cooney and Vohringer together needed to coordinate in looking after customers, and in the context of the restrictions imposed by the employer that included that they remain clocked in and that making arrangements for food were also to be done together with taking customers into account. Jumping to a conclusion like the above forecloses such considerations.

CONCLUSION

For all these reasons, Plaintiff respectfully requests that this Honorable Court reverse the trial court's orders granting summary judgment and denying reconsideration.

Respectfully submitted,

NASH LAW FIRM, LLC

Dated: July 14, 2025

By: /s/ Alan A. Reuter
ALAN A. REUTER, ESQ.

SUPERIOR COURT OF NEW JERSEY APPELLATE DIVISION

ALEX M. SECCIA Plaintiff/Appellant, VS RANGDUNU CORPORATION, JOHN/JANE DOE1-10, JOHN DOE COMPANY 2-10, JOHN/JANE DOE 11-20,AND JOHN DOE COMPANY12-20 Defendant/Respondent	: SUPERIOR COURT OF NEW JERSEY : APPELLATE DIVISION : DOCKET NO. A-001065-24-T3 : ON APPEAL FROM LAW DIVISION :GLOUCESTER COUNTY : Docket No. GLO-L-0779-19 : ON APPEAL FROM: AN ORDER OF THE :SUPERIOR COURT, LAW DIVISION, :ENTERED ON NOVEMBER 22, 2024, :DENYING THE MOTION FOR :RECONSIDERATION OF THE :OCTOBER 11, 2024 :ORDER GRANTING SUMMARY : JUDGMENT TO DEFENDANT :RANGDUNU CORPORATION, AND THE :OCTOBER 11, 2024 ORDER GRANTING :SUMMARY JUDGMENT : : : : SAT BELOW: HON. BENJAMIN D. : MORGAN, J.S.C. :

BRIEF ON BEHALF OF RESPONDENT RANGDUNU CORPORATION

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PRELIMINARY STATEMENT

This case arises out of a motor vehicle accident in which Cooney, an employee of Rangdunu Corporation, left his place of employment, the 7-11 physical store location at 200 West Browning, Bellmawr, during his shift, without the knowledge or consent of the owner, driving his personal vehicle to the Papa John's store located at 1000 Cooper Street Deptford, at least 5 miles from the 7-Eleven store, picked up a pizza for himself and a co-worker and during the return trip from Deptford back to his place of employment, struck the vehicle driven by plaintiff. The motion Judge, Honorable Benjamin Morgan, found that Cooney was not acting within the course and scope of his employment when he left the store to pick up the pizza. The Court granted Rangdunu's Motion for Summary Judgment and therefore dismissed plaintiff's vicarious liability claims against Rangdunu Corporation. Plaintiff has appealed the grant of summary judgment to Rangdunu on the issue of respondent superior liability.

PROCEDURAL HISTORY

On or about July 1, 2017, Defendant, Jarrod J. Cooney, without authority, from his employer, left his place of employment in his personal vehicle, picked up a free pizza at Pappa John's 5 miles from his place of employment and during his return, struck the vehicle being driven by Plaintiff Alex M. Seccia. (Pa16-17; Pa132-135). On or about June 25, 2019, Mr. Seccia commenced suit by complaint against Defendant Cooney in the Gloucester County Law Division. (Pa16). Cooney filed his answer on July 29, 2019. (Pa23).

Defendant, Jarrod Cooney, in his March 3, 2020 deposition, testified that when the subject accident occurred, he was on the clock because he was being paid straight time and in the process of returning to the 7-Eleven where he was working after picking up the free pizza for himself and his co-worker. (Pa141-142). The only reason Cooney went to Pappa Johns was because the co-worker had a coupon and the Pizza was free. (Pa 140).

On June 3, 2020, Plaintiff moved to amend the complaint to identify and name, in the place of "John Doe Company 1", Rangdunu Corporation ("Rangdunu") as employer of Mr. Cooney. (Pa30). The motion was resolved by consent order entered June 15, 2020. (Pa42). Plaintiff filed the Amended Complaint on June 15, 2020. (Pa44).

After Defendant Rangdunu failed to answer the Amended Complaint, Plaintiff applied for entry of default on August 19, 2020. (Pa52). Default was entered by the Court on August 20, 2020. (Pa55). Following entry of default against Rangdunu, Plaintiff moved to amend the Complaint to name USAA Casualty Insurance Company ("USAA"), Plaintiff's UIM (Underinsured Motorist) carrier. (Pa56). Plaintiff's unopposed motion was granted on February 5, 2021. (Pa73). Plaintiff filed the Second Amended Complaint on February 10, 2021. (Pa74).

On January 27, 2022, the case was arbitrated in accordance with the Court's arbitration program. (Pa97). Defendant Cooney then filed a request for trial de nova on February 15, 2022. (Pa98).

On December 12, 2022, a partial stipulation of dismissal with prejudice was filed as to only Defendants USAA and Cooney (rights against Rangdunu were reserved), with the stipulation referring to settlement documents by which terms were more particularly set forth. (Pa99). Among other things, claims against Rangdunu were reserved. (Pa4).

With settlement having been reached as to Defendants USAA and Cooney, and with Rangdunu in default, Plaintiff filed a request for proof hearing on January 18, 2023. The Law Division then issued a notice dated January 19, 2022, filed January 20, 2022, for a remote proof hearing for February 28, 2022 before the Honorable Timothy W. Chell, P.J.S.C. (Pa102). The Law Division then issued a notice dated

February 20, 2023, filed February 21, 2023, for a re-scheduled remote proof hearing for March 22, 2023, before the Honorable Anne McDonnell, J.S.C.

On March 21, 2023, the day before the scheduled remote proof hearing, a request for adjournment of the proof hearing was filed by MD Shahjahan, described in the request as "Agent" for Rangdunu Corporation. (Pa104). On the same date, this request was denied by Judge McDonnell. (Pa105). On March 22, 2023, over the remote hearing connection, with MD Shahjahan present, Judge McDonnell stated, inter alia, that as Rangdunu Corporation is a corporation, that counsel was needed, and that the hearing would be postponed to allow Mr. Shahjahan the opportunity to retain counsel and apply to vacate the default.(1T). Judge McDonnell further sought briefing, relative to the proof hearing proceedings, on the New Jersey Supreme Court companion decisions of Carter v. Reynolds, 175 N.J. 402 (2003) and O'Toole v. Carr, 175 N.J. 421 (2003). (1T).

The Law Division then issued a notice dated March 23, 2023, filed March 24, 2023, for a re-scheduled remote proof hearing for April 21, 2023, before the Honorable Timothy W. Chell, P.J.S.C. (Pa106). The Law Division then issued a notice dated April 19, 2023, filed April 20, 2023, for a re-scheduled remote proof hearing for May 5, 2023, before the Honorable Timothy W. Chell, P.J.S.C. (Pa106).

On April 27, 2023, prior to the May 5, 2023 proof hearing, Rangdunu Corporation, through counsel, filed a Motion to Vacate Default and Extend Time to Answer. (Pa108). The Honorable Timothy W. Chell, P.J.S.C., granted the motion by Order dated and filed June 23, 2023. (Pa110). On July 24, 2023, Defendant Rangdunu filed its Answer to the Second Amended Complaint. (Pa113).

On August 23, 2024, Defendant Rangdunu moved for summary judgment, arguing, inter alia, that Cooney's actions were "unauthorized" and outside the scope of employment. (Pa118).

On October 11, 2024, the Honorable Benjamin D. Morgan, J.S.C. heard oral argument, and thereafter on that day entered an order with decision attached granting the motion of Defendant Rangdunu for summary judgment on the issue of liability. (Pa1; 2T)

On October 31, 2024, Plaintiff moved for reconsideration. (Pa218).

On November 22, 2024, after oral argument, Judge Morgan entered an order denying the motion. (Pa15, 3T). On December 16, 2024, Plaintiff filed a Notice of Appeal (Pa220).

On December 18, 2024, Plaintiff filed an Amended Notice of Appeal. (Pa226).

STATEMENT OF FACTS

This case arises out of a motor vehicle accident occurring on July 1, 2017 in which Cooney, an employee of Rangdunu Corporation, while working his "straight time" shift at the 7- Eleven store owned and operated by Rangdunu, without authorization from his employer, drove away from the store premises at 200 W. Browning Road in Bellmawr and drove his personal vehicle to the Pappa John's at 1000 Cooper Street in Deptford, a distance of at least 5 mi., to pick up a free pizza he and another employee had ordered using a coupon. (Pa 140) The accident occurred when Cooney was returning to his workplace in his personal vehicle with the "free" pizza. (Pa 140) The owner/operator of the 7-11 franchise store, M.D. Shahjahan, had no knowledge that Cooney had left the store during his shift, had no knowledge of his employees` secret plan to get a free pizza, and had posted work rules that employees were not to leave the store area during their straight time shift. (Pa 158)

Rangdunu moved for summary judgment on the grounds that Cooney, although admittedly an employee of Rangdunu, was outside the scope of employment at the time and place of the motor vehicle accident (Pa 4,6-7,8; Pa 118) As such, Rangdunu asserted that respondent /superior liability could not be imposed on the facts of this case. Id.

Given the posted work place rules that employees were not to leave the store area, a disputed fact pertains to whether Cooney was permitted to leave the store but the motion judge gave plaintiff the benefit of a finding that Cooney was permitted to leave the store during his shift. Appellant asserts a factual dispute as to if and when the employer was clearly and unequivocally informed that on July 1, 2017 Cooney had left the store in his car during his shift and was involved in an accident 5 miles from the workplace while picking up a "free" Pappa John's Pizza. However, it is undisputed that the employer was not informed prior to the time Cooney left the store and that the employer did not authorize Cooney to leave the store during his shift on July 1, 2017. (Pa 124-126). The employee's 10 mile round trip for the free pizza was wholly unauthorized by and unknown to the employer.

Plaintiff apparently disputes the nature and source of the employer's alleged "work rule" or "rules". However, it is undisputed that the work rules, including the rule not to leave the store area, were posted at the counter on July 1, 2017. (Pa 158) Moreover, it is undisputed that employees such as Cooney and Tara Vohringer, a coworker, were paid "straight time" where they remained clocked in for 8 hours, and where lunch was to be consumed in the store at the counter or in the "back room", and this was to execute the employer's object to "better serve the customers." (Pa4,9; Pa124- 126))

Despite the above evidence to the contrary, the motion judge accepted that Cooney was permitted to leave the store premises and relatedly, it appears that Judge Morgan further accepted that the employer was told about Cooney leaving after the fact and was aware on the date of the accident what had happened. (Pa9). The employer vigorously disputes that assertion. (Pa 124-26). Again, Judge Morgan gave the plaintiff the benefit of all inferences.

JUDGE MORGAN'S DECISION

On October 11, 2024, the trial court heard oral argument on the motion, and then issued its written order and decision granting the motion.

In the opening section of the decision, entitled "Decision", the trial court stated: "Because this court finds Cooney was not operating within the scope of his employment when he left to pick up the pizza, the court hereby grants the motion for summary judgment and orders Plaintiffs claims against Defendant Rangdunu Corporation be dismissed." (Pa2).

The trial court then set forth "Background Facts". In the next section, "Parties' Arguments", the court set forth what the parties argued in their written submissions, including their briefs. (Pa2-7). The court next sets forth the summary judgment standard, including that summary judgment requires that there to be no genuine issue of material fact, and that the court must consider whether the

competent evidential materials, viewed in a light most favorable to the non-moving party, are sufficient to permit a rational factfinder to find in favor of the non-moving party. (Pa7-8).

At the beginning of the "Discussion" section of the decision, Judge Morgan stated that the ultimate issue" was "whether Defendant Cooney was acting within the scope of his employment at the time he was involved in an automobile accident with the Plaintiff, which could establish vicarious liability against Defendant Rangdunu. (Pa8). The court stated regarding the question of vicarious liability that what is required is that there be an employment relationship and that the alleged tort occurred within the scope of employment. (Pa8). As to the first part, the court stated that "There is no question that Cooney was employed by Rangdunu at the time of the accident", but stated further that this relationship alone does not create an inference that the subject actions were within the scope of employment. (Pa8). Respondent does not contest the existence of an employment relationship.

The court then stated that the analysis to be performed was as follows:

> Our scope of employment analysis must be done under Restatement (Second) of Agency section 228 and 229.
>
> Section 228 provides that an employee's conduct falls within the scope of employment if:
> (a) It is of the kind he is employed to perform;
> (b) It occurs substantially within the authorized time and space limits;
> (c) It is actuated, at least in part, by a purpose to serve the master.
>
> Section 229 of the Restatement provides that:

> (1) To be within the scope of employment. conduct must be of the same general nature as that authorized, or incidental to the conduct authorized.
> (2) In determining whether or not the conduct, although not authorized, is nevertheless so similar to or incidental to the conduct authorized as to be within the scope of employment. the following matters of fact are to be considered:
>
> a. Whether or not the act is one commonly done by such servants;
> b. The time, place, and purpose of the act;
> c. The previous relations between the master and the servant;
> d. The extent to which the business of the master is apportioned between different servants;
> e. Whether or not the act is outside the enterprise of the master or, if within the enterprise, has not been entrusted to the servant;
> f. Whether or not the master has reason to expect that such an act will be done;
> g. The similarity in quality of the act done to the act authorized;
> h. Whether or not the instrumentality by which the harm is done has been furnished by the master to the servant;
> i. The extent of departure from the normal method of accomplishing an authorized result; and
> j. Whether or not the act is seriously criminal.

(Pa8) (citing Carter v. Reynolds, 175 N.J. 402, 411 (2003)).

The court next stated that "The focus of the present matter pertains to an employee's actions while driving his vehicle outside of the employment premises." (Pa9). Regarding the above-described factual dispute regarding whether Cooney had authorization to leave the store, the trial court opined that viewing the facts most favorably to Plaintiff meant finding as a fact that Cooney was allowed "to leave the store so long as Ms. Vohringer or another employee could tend to the register." (Pa9). The trial court thus stated: "Thus, any analysis must be confined to

whether Cooney's driving in and of itself, regardless of authorization, was within the scope of his employment." (Pa9).

The court then discussed the "general proposition" that an employee "going to" or "coming from" their place of employment is not considered to be acting within the scope of employment. The court explained as one rationale a concept of suspension of employment during the time that the employee is away from the premises. Another rationale was lack of benefit to the employer from the "commute". (Pa10). This is entirely consistent with applicable New Jersey law which is based upon the going and coming rule.

The court described the foregoing as a "general rule" with "limited exceptions" 1) the employee is engaged in a special errand or mission; 2) the employer requires the employee to drive their personal vehicle to work for use for work-related tasks; or 3) the employee is "on call." (Pa10). The court stated that these have been called "dual purpose" exceptions due to simultaneously involving a personal and employer interest. The court observed that the New Jersey Supreme Court in Carter viewed these as sensible in that they involve some control over the employee's actions and a "palpable benefit to be reaped by the employer." (Pa10) (citing Carter, 175 N.J. at 414).

The court then properly analyzed the facts and applied applicable New Jersey jurisprudence. The court stated that "There is no dispute of fact that Defendant

Cooney was driving his own vehicle outside the store's property when the accident occurred during his attempt to pick up food for lunch for him and his coworker." (Pa11). The court continued that "As such, the general rule regarding when an employee is "going to" or "coming from" their employment must apply." (Pa11). Regarding such "general rule", the court continued by stating that "That general rule states that when Cooney is driving his vehicle away from work to pick up lunch, he is not operating that vehicle within the scope of employment." (Pa11). The court concluded with "Therefore, no vicarious liability can attach to Defendant Rangdunu unless some exception applies" (Pa11). The court declared that "Even looking at the facts of this case in the light most favorable to the Plaintiff, this court cannot find that Defendant Cooney's actions fall within any of these exceptions." (Pa10).

The court next turned to discussion of the Delaware case of Wilson v. Joma, which was brought to Judge Morgan`s attention by Plaintiff and upon which appellant now bases his appeal. As summarized by the court earlier in the decision, when summarizing the arguments briefed by counsel:

> Plaintiff [ ] argues Cooney's actions were within the scope of his employment because his actions had a "dual purpose." Plaintiff relies entirely upon a decision from the Delaware Supreme Court, Wilson v. Joma, 537 A.2d 187 (Del. 1987), which found a dispute of material fact existed in a case where a tire and gas station manager had a motorcycle accident after he left work on an authorized lunch break to pick up lunches for employees who could not leave the station. Under those facts, the Delaware court held a jury could find the manager had a "dual purpose" in

picking up lunches for both himself and the other workers. Plaintiff argues the same result should occur here. (Pa5).

Judge Morgan then stated that he "disagree{d} with" Plaintiff's "reliance" on Wilson for "several reasons." One reason was that it is "a non-binding out-of jurisdiction decision and this court may readily disregard it."

Regarding the second reason, the court continued by stating that "Moreover, the court notes two factual distinctions in Wilson that are not found here." The first "distinction" was that "the manager in Wilson was expressly permitted to leave the premises for his half-hour break", whereas "Cooney's ability to leave the store is in dispute in this case." (Pa11).

The second distinction made by Judge Morgan was that "more importantly", in Wilson, the manager, who was "without restraint to the store", was "the one" that picked up the food for his co-worker(s) and this was a "usual routine". The court ascertained a "distinction" on the grounds that the court found nothing in the record here "to show that Cooney leaving the store to pick up pizzas from Papa Johns for himself and his co-workers was a "usual routine". (Pa12).

The third and last reason provided by the court for "disagreeing" with reliance on Wilson was Judge Morgan's view that:

Lastly, this Delaware decision fails to apply New Jersey's jurisprudence and appreciation of the "going to" and "coming from" rule or the employer "control" aspect of the exceptions, where **the dual purpose requires the employer to retain some aspect of control over the employee during the act**. The decision is silent on these concepts. Failure to apply these legal principles which would be

binding on a New Jersey court makes Wilson's holding inapplicable here. See also Rogers v. Jordan, 339 N.J. Super. 581 ,589-90 (App. Div. 2001) (holding that{the} employer was not vicariously liable for {the}employee police officer's vehicle accident that occurred while on a lunch break even though {the} officer could have been considered on-duty if certain circumstances arose). (Pa12).4

LEGAL ARGUMENT

I. THE MOTION JUDGE PROPERLY GRANTED SUMMARY JUDGMENT GIVING THE NON-MOVING PARTY THE BENEFIT OF ALL INFERENCES AND THE FACTUAL FINDINGS OF JUDGE MORGAN ARE BINDING ON APPEAL AS THESE FINDINGS WERE SUPPORTED BY ADEQUATE, SUBSTANTIAL, CREDIBLE EVIDENCE IN THE RECORD

Rule 4:46-2 mandates that summary judgment shall be granted where there is "no genuine issue as to any material fact challenged and that the moving party is entitled to a judgment or order as a matter of law." R. 4:46- 2(c). The trial court's role is to decide whether "the competent evidential materials presented, when viewed in the light most favorable to the nonmoving party, are sufficient to permit a rational factfinder to resolve the alleged disputed issues in favor of the non-moving party." Brill v. Guardian Life Ins. Co., 142 N.J. 520, 540 (1995).

The motion judge held:

These facts, even viewed in the light most favorable to the Plaintiff, show that Rangdunu did not direct Cooney to leave the store and that Rangdunu had no control whatsoever over what [Cooney] did when he did leave. As such, this court finds that Defendant Rangdunu is entitled to summary judgment on Plaintiff's vicarious liability claims and that these claims must be dismissed. (Pa13).

"The general rule is that findings by a trial court are binding on appeal when supported by adequate, substantial, credible evidence." Gnall v. Gnall 222 N.J. 414,428 (2015) ("we will not disturb the trial court's findings; in an appeal, we defer to findings that are supported in the record and find roots in credibility assessments by the trial court.") Motorworld Inc. v.Benkendorf, 228 NJ 311, 329 (2017) (we review the trial court's factual findings under a deferential standard; those findings must be upheld if they are based on credible evidence in the record.) " Thieme v. Aucoin- Thieme, 227 N.J. 269,283 (2016) (findings by the trial court are binding on appeal when supported by adequate, substantial, credible evidence); State v KW., 214 N.J. 499, 507(2013) ("we defer to the trial court's findings so long as those findings are supported by sufficient credible evidence in the record").

The deferential standard is applied because an appellate court's review of a cold record is no substitute for the trial court's opportunity to hear and see the witnesses who testified on the stand." Balducci v. Cige, 240 N.J. 574, 595(2020) Limiting the role of a reviewing court is necessary because permitting appellate courts to substitute their factual findings for equally plausible trial court findings is likely to undermine the legitimacy of trial courts in the eyes of litigants." State v McNeil-Thomas 238 N.J. 256, 272 (2019).

The key factual finding in the instant case is that during his "straight time" shift employee Cooney, without authorization, drove his personal automobile 5 miles away from the store (10 mi. roundtrip) and struck another vehicle. Judge Morgan stated that "There is no dispute of fact that Defendant Cooney was driving his own vehicle outside the store's property when the accident occurred during his attempt to pick up food for lunch for him and his coworker." (Pa11). This factual finding is undisputed and must be upheld.

It is plain on this record that Judge Morgan correctly applied summary judgment law and procedure giving the non-moving party the benefit of all legitimate inferences.

II. **NEW JERSEY LAW IS THE " GOING AND COMING" RULE AND THE MOTION JUDGE PROPERLY AND CORRECTLY CITED IT AND APPLIED IT IN HIS DECISION**

In Carter v. Reynolds, 175 N.J. 402, 411 (2003)). the New Jersey Supreme Court discussed, in detail, the origins and rationale of the going and coming rule as a foundational principle of New Jersey Workers Compensation law which has been imported into tort law. Generally, an employee who is going to or coming from his place of employment is not considered to be acting within the scope of employment. Mannes v. Healey, 306 NJ. Super. 351, 353 -54 (App. Div. 1997) (citations omitted). That rule had its genesis in workers compensation law and has

been imported into tort law. Courtless v. Jolliffe, 507 S.E. 2d 136, 141 (W. Va. 1998) (per curium) (citing 1 Larson Workers Compensation Law 16.10(1972)). Indeed, most jurisdictions apply the general rule that an employee who is driving his personal vehicle to and from the employer's workplace is not within the scope of employment for the purpose of imposing vicarious liability on the employer. Mannes, supra, 306 NJ. Super. at 353-54 (citations omitted); See, e.g. Freeman v. Manpower, Inc., 453 So. 2d 208, 209 (Fla. Div. Ct. App. 1984); Jones v. Blair, 387 N. W. 2d 349, 355 (Iowa 1986); Logan v. Phillips, 891, S.W. 2d 542, 544 (Mo. Ct. App. 1995); Lundberg v. State, 255 N. E. 2d 177, 179 (NY. 1969); Windsor Ins. Co. v. American States Ins. Co., 22 P. 3d 1246, 1248 (Utah Ct. App.), cert. denied, 29 P.3d 1 (Utah 2001); Vaeth, supra, 27A. L.R. 5th at 233- 39 (collecting cases). The restatement addresses the going and coming rule in section 229, comment d: [i]t is essentially the employee`s own job to get to and from work. Franklin, supra, 39S.D. L. Rev./u >. at 587, (quoting Restatement (Second) of Agency 229 comment d (1968)).

Two rationales exist to support the going and coming rule. Mannes, supra, 306 NJ. Super. at 354. The first is that employment is suspended from the time the employee leaves the workplace until he returns. Ibid. That suspension occurs because the element of control is deemed lacking. Ibid (citing Jones, supra, 387 N. W. 2d 355; Logan, supra, 891 S. W. 2d at 545). The second is that the employer

derives no benefit from the commute. Kester v. Mattis, Inc., 2O4 N. W. 2d 741, 742 (Mich. Ct. App. 1972) (per curium); Logan, supra, 891 S. W. 2d 544; Klopp v. Rape, 271 N. E. 2d 315,317 (Ohio Ct. App. 1970)
(per curium). As was stated by our Supreme Court in Carter "the rationales are essentially inversions of the Restatement standards for vicarious liability." Carter at 413.

One commentator has explained that the purpose that underlies the going and coming rule is that it is unfair to impose unlimited liability on an employer for the conduct of its employee over which it has no control and from which it derives no benefit. (citations omitted), When an employee travels to or from work, he is deemed to be acting in his own interests without constraints by the employer regarding the method or means of the commute.

It is exactly so in the instant case in that the employer had no control or knowledge of Cooney's personal jaunt to leave his workplace for a free pizza. The free pizza was purely a personal benefit to the employee. Moreover, there was no benefit to the employer as once Cooney left the store, he was no longer able to serve customers which was the purpose of his employment and the purpose of being paid "straight time" in the first instance.

After the motion judge correctly stated that "There is no dispute of fact that Defendant Cooney was driving his own vehicle outside the store's property when

the accident occurred during his attempt to pick up food for lunch for him and his coworker." (Pa11). The court then stated New Jersey black letter law continuing that "As such, the general rule regarding when an employee is "going to" or "coming from" their employment must apply." (Pa11). The "general rule", is that an employer cannot be vicariously liable for the negligence of his employee if that employee is "going to" or "coming from" his place of employment. This rule is stated in the Restatement of Agency 2nd in Section 228 which provides in pertinent part:

Section 228 provides that an employee's conduct falls within the scope of employment if:

(a) It is of the kind he is employed to perform;
(b) It occurs substantially within the authorized time and space limits;
(c) It is actuated. at least in part, by a purpose to serve the master.

In two companion cases decided on the same day, Carter v Reynolds, 175 NJ. 492 (2003) and O'Toole v Carr, 175 NJ. 421 (2003), our Supreme court held that the Restatement (Second) remains the law and refused to adopt the broader principle of enterprise liability. In O'Toole an attorney was driving in a leased vehicle to his part-time municipal judgeship in Tuckerton when he was involved in an automobile accident with plaintiff. Plaintiff's counsel attempted to assert vicarious liability on the law firm on the basis that prior to the accident the lawyer had been making phone calls and checking his diary, actions that arguably

benefited the firm. However, the Supreme Court found no liability on the law firm for the lawyer's negligence.

In Carter v Reynolds, 175 NJ 492 (2003), Reynolds worked for a CPA firm and was required to make client visits using her own personal vehicle. The accident occurred while she was on her way home from a client visit. The Supreme Court held the accounting firm liable under the doctrine of respondeat superior because Reynolds use of her personal automobile to advance her employer's business interests fell within an exception to the "going and coming" rule and placed her squarely within both the employment relationship and the scope of employment at the time of the accident.

New Jersey Law remains that the imposition of vicarious liability must be based upon principles of control and fault. In this case, the master had no control over the actions of his servant. In fact, the master had no knowledge of the actions of the servant. The employer vehemently disputes that it was ever clearly and unequivocally told all of the facts of the accident by its employees. The owner/manager learned bits and pieces over time. The information was never complete and was purposely kept incomplete by Cooney. This was part of Cooney's deception. He concealed the fact that he had become involved in an automobile accident after leaving the 7/11 store during his shift at least 5 miles from the store while picking up a Papa John's Pizza. He kept all of the facts a

secret because he knew he had violated both the clearly posted work rule, the quid pro quo for being paid straight time and the employer's trust. He knew his actions were clearly a personal jaunt from the workplace and therefore concealed his actions from the employer. The text messages (Pa 128) conclusively demonstrate that in May, 2020, 3 years after the accident, Cooney was still being dishonest with his employer because Cooney never disclosed all of the facts concerning the accident.

It was not until Rangdunu Corporation retained counsel in 2023, 6 years after the accident, that Mr. ShahJahan learned all of the relevant facts. The motion Judge clearly gave plaintiff the benefit of all inferences on the motion because the motion Judge found that Cooney had permission to leave the store in the first place, a finding of fact that Respondent vehemently disputes.

III. NONE OF THE EXCEPTIONS TO THE GOING AND COMING RULE APPLY

" The general rule states that when Cooney is driving his vehicle away from work to pick up lunch, he is not operating that vehicle within the scope of employment." (Pa11). The court concluded "Therefore, no vicarious liability can attach to Defendant Rangdunu unless some exception applies" (Pa11). The court declared that "Even looking at the facts of this case in the light most favorable to

the Plaintiff, this court cannot find that Defendant Cooney's actions fall within any of these exceptions." (Pa10).

The possible exceptions are if Cooney was on some kind of "Special Mission" for the employer. However, that is impossible on these facts since he left the store without the owner's knowledge or consent for his own purposes and benefit in violation of a clearly established work rule posted at the store counter by the owner, a rule which Cooney admitted was known to him.

In the case at bar, it is unequivocal and undisputed that there was no special mission here. Nor was there a pattern or practice here of leaving the store to pick up lunch 5 miles from the store (10 Mi. roundtrip). There is no evidence that either Cooney or Vohlinger had ever left the store before the date of the accident during their straight time shift. It is precisely so they would be present in the store to serve customers that Cooney and Vohlinger were paid "straight time" but the quid pro quo for that was that they remain in the store. There is clearly no benefit to the employer and no advancement of the employer's business interests in Cooney driving 5 miles away from the store to get a free pizza.

Appellant's argument that there was a marginal benefit is simply a post hoc justification for an unauthorized personal jaunt. The decision to leave the store was in furtherance of a purely unilateral, personal plan concocted by the 2 employees, without the employer's knowledge or consent. The actions of Cooney clearly

violate the "going and coming" rule which is the basis of New Jersey law. The motion judge was entirely correct in applying the general legal rule, analyzing the exceptions thereto, and finding that none of the exceptions applied on these facts. Therefore, Judge Morgan properly denied vicarious liability.

IV. DELAWARE LAW IS INAPPLICABLE AS IT FAILS TO ADDRESS THE CONCEPTS CRITICAL TO NEW JERSEY JURISPRUDENCE

The court quite properly proceeded to distinguish the Delaware Supreme Court case of Wilson v Joma 537 A.2d 187 (Del 1987) relied upon by Appellant below both on the basis that it is an out of jurisdiction case and that it fails to properly discuss the concepts of employer "control" and "benefit" in the context of the "going and coming" rule.

The court stated it "can find no 'palpable benefit' being reaped by the employer as a result of the employee's decision to leave the store." (Pa12). The court further stated its view that "Wilson also fails to address the "control" issue that is critical to how a New Jersey court would decide the case." (Pa13). The concepts of control and benefit are inherent in Sections 228 and 229 of the Restatement Second of Agency discussed elsewhere. Judge Morgan emphasized that in neither Wilson nor the instant case did the employer direct the employee to leave the store. (Pa13). That is an undisputed fact. In addition, the court stated that in "neither action did the employer have any control over where the employee

would go once they left the store." (emphasis in original). (Pa13). Respondent again emphasizes that the employer never knew Cooney had left the store so it is certainly true that the employer had no control over either where he went or how long he would be away from his duties at the store.

The court also stated that "In Wilson, there was at least a 30-minute time frame imposed, but there is no evidence in this record that a jury could consider to determine what time frame Rangdunu imposed on employees that left the store during their shift." (Pa13). In a related footnote, the court stated, relative to certain testimony: "Cooney may have believed 30 minutes was an appropriate amount of time, but there is nothing in the record showing the employer set forth that restriction. Indeed, Rangdunu's position is that there was no time frame in which they could leave during their shift." (Pa13). (emphasis supplied).

The court then proceeded to conclude that "control", which it stated is "the cornerstone for why these exceptions exist," in apparent reference to the "dual purpose" exceptions the court discussed previously, is "conspicuously lacking from any evidence in this record before the court." The court then held that the dual purpose exception is inapplicable to these facts. That conclusion must be affirmed because, if it is not, on the facts of this case, there are no discernable limits to the dual purpose exception. The instant case is precisely why the cornerstone of New Jersey jurisprudence in this area is the time honored going and

coming rule. Moreover, as there was neither control by nor benefit to the employer here, Judge Morgan properly concluded that the dual purpose exception did not apply. He saw the case for what it is, a scheme by the employees to benefit themselves concealed from the employer for years after the accident.

CONCLUSION

For all the foregoing reasons, the motion judge gave plaintiff the benefit of all legitimate inferences and correctly applied New Jersey jurisprudence in deciding the Summary Judgment Motion in favor of Respondent, Rangdunu Corporation, and therefore the Summary Judgment Order of Honorable David Morgan should be affirmed.

Respectfully submitted,

LAW OFFICES OF JOHN M. CHOMKO

/s/John M. Chomko

By: John M. Chomko

Date: September 26, 2025

SUPERIOR COURT OF NEW JERSEY APPELLATE DIVISION

ALEX M. SECCIA, Plaintiff/Respondent, v. RANGDUNU CORPORATION, JOHN/JANE DOE 1-10, JOHN DOE COMPANY 2-10, JOHN/JANE DOE 11-20 AND JOHN DOE COMPANY 12-20 Defendants/Respondents.	SUPERIOR COURT OF NEW JERSEY APPELLATE DIVISION DOCKET NO. A-001065-24T3 ON APPEAL FROM LAW DIVISION DOCKET NO. GLO-L-779-19 ON APPEAL FROM: AN ORDER OF THE SUPERIOR COURT, LAW DIVISION, ENTERED ON NOVEMBER 22, 2024, DENYING THE MOTION FOR RECONSIDERATION OF THE OCTOBER 11, 2024 ORDER GRANTING SUMMARY JUDGMENT TO DEFENDANT RANGDUNU CORPORATION, AND THE OCTOBER OCTOBER 11, 2024 ORDER GRANTING SUMMARY JUDGMENT SAT BELOW: HON. BENJAMIN D. MORGAN, J.S.C.

REPLY BRIEF ON BEHALF OF APPELLANT ALEX M. SECCIA

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Date of Submission to the Court: December 1, 2025

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ARGUMENT

I. THE STANDARD OF REVIEW ON APPEAL OF A MOTION FOR SUMMARY JUDGMENT IS DE NOVO AND NOT A DEFERENTIAL OR OTHER STANDARD

Although a de novo standard governs this summary judgment motion appeal, Respondent erroneously asserts a deferential standard wherein this court "must uphold" any "findings" supported by "sufficient credible evidence". Db15.

II. RESPONDENT'S ENTITLEMENT TO SUMMARY JUDGMENT MUST BE EVALUATED UNDER THE ASSUMPTION THAT RESPONDENT HAD PRIOR KNOWLEDGE OF ITS EMPLOYEES' ACTIONS AND INTENTIONS

Respondent asserts it did not have knowledge beforehand of Cooney leaving the premises on the day in question, that this is "undisputed" and that the court appeared to assume no prior knowledge for purposes of the motion. Yet, the record demonstrates and the court decision acknowledges this is disputed. Further, the court construing the facts as Respondent interprets would be reversible error and/or raises ambiguity concerns. Any argument that Respondent lacked knowledge prior to Cooney leaving is unavailable on a summary judgment application.

Respondent's cited source for its "undisputed" claim is its own Affidavit below alleging that "it is undisputed that the employer was not informed prior to the time Cooney left the store". Rb7. Inexplicably, Respondent ignores

Appellant's opposition in the proceedings below, as well as the rest of the record. The court stated that "Plaintiff argues a fact issue exists with regards to Shajahan's knowledge of Cooney leaving the store …", that "Shahjahan claims Cooney never told him he was leaving the store…", and that "Cooney disputes this and stated in his deposition that 'my boss knew exactly where I was. I would always let him know before I left. I was the assistant manager." (emphasis supplied). Pa3,5,6.

Despite the foregoing, and the requirement of favorable construction for Appellant, Respondent posits that "it appears that Judge Morgan … accepted that the employer was told about Cooney leaving after the fact and was aware on the date of the accident what had happened." Db8. This "after the fact" interpretation possibly stems from the court's statement that "At best, Shajahan was only notified of [Cooney's and Vohringer's] decision" versus there being any claim that Respondent "directed" Cooney to leave, such that in the court's view, the "at the behest of the employer" element of the "special mission" exception was not satisfied. (emphasis supplied). Pa11. For Respondent to rely upon this would mean that although one cannot ascertain from the foregoing alone whether such "notification" would be before or after Cooney leaving, Respondent settles on "after". This would be notwithstanding that the opposite is required based on the other statements of the court above

and the requirement of favorable construction to Appellant. At best, Respondent's interpretation demonstrates error and/or ambiguity on the part of the court. Separately and regardless, Respondent's claim that it is "undisputed" that Respondent did not know beforehand is baseless.

Simply, Respondent has no viable argument on summary judgment that it lacked knowledge prior to Cooney leaving. To the contrary, the record and summary judgment principles require that it be assumed 1) that prior to and including on the day in question, Cooney had permission to leave the premises for the reasons that he did on the day in question, whether or not Respondent was told or was aware that day what he was going to do or did; 2) that Respondent nevertheless was told beforehand on the day in question what the intended actions of Cooney and Vohringer were; and 3) that after Respondent was so informed, those actions were undertaken. In other words, full knowledge on the part of Respondent was required to be assumed, such that if it was not so assumed throughout the decision, or if there were any question about this, this alone would make the court's decision problematic.

III. RESPONDENT'S ENTITLEMENT TO SUMMARY JUDGMENT MUST BE EVALUATED UNDER THE ASSUMPTION THAT THERE WAS AUTHORIZATION FOR THE ACTIONS OF RESPONDENT'S EMPLOYEES

Respondent also has no viable argument on summary judgment of lack of permission/authorization. Respondent incorrectly asserts that it is

"undisputed" that there was a lack of authorization (and/or consent and/or permission) and that the court so determined via "The key factual finding in the instant case."[1] However, the record demonstrates and the court decision acknowledges this is disputed. Further, as Respondent itself acknowledges elsewhere in its brief, the court specifically stated that it was required to assume that there was permission to leave the premises.

Respondent's cited source for its "undisputed" claim is its own Affidavit below, alleging it "did not authorize Cooney to leave the store during his shift on July 1, 2017". Db7. Inexplicably, Respondent ignores Appellant's opposition in the proceedings below, as well as the rest of the record. The court clearly expressed as follows that there was a dispute and that Appellant as the non-moving party required favorable construction:

> Defendant's first argument is that Cooney was expressly barred from leaving the store during his shift, therefore, any conduct outside of the store must automatically have been beyond the scope of his employment. Plaintiff presents a factual dispute as to whether that bar still applies when another employee can remain at the store to tend to customers while the other leaves. Given the standard in which this court must view the facts of this case on a motion for

[1] Terms such as "permission", "authorization" and "consent" are used by the court in its decision and by the parties. Respondent, in using all three, does not posit or appear to indicate that there is a meaningful distinction relative to resolution of the issues on appeal. For sake of brevity, including to avoid use or repetition of designations such as "permission/authorization/consent" or setting forth multiples of the foregoing words, Appellant submits that where only one or less than all are used, it is not intended as a distinction or omission absent clear indication.

> summary judgment, this court will view the fact in the light most favorable to the Plaintiff, which allows Cooney to leave the store so long as Ms. Vohringer or another employee could tend to the register. Thus, any analysis must be confined to whether Cooney's driving in and of itself, regardless of authorization, was within the scope of employment. Pa9.
>
> Respondent in essence parrots the foregoing in relevant part, stating:
>
> Given the posted work place rules that employees were not to leave the store area, a disputed fact pertains to whether Cooney was permitted to leave the store but the motion judge gave plaintiff the benefit of a finding that Cooney was permitted to leave the store during his shift.[2] Db7.

Respondent also subsequently repeated that the court "accepted that Cooney was permitted to leave the store premises" and "found that Cooney had permission to leave the store in the first place." Db8,21.

Respondent, contrary to all the foregoing, and in conjunction with its erroneous standard of review assertion as to "factual findings" which "must be upheld", represented that somehow the trial court made "The key factual finding" providing there was not authorization:

> The key factual finding in the instant case is that during his "straight time" shift employee Cooney, without authorization, drove his personal automobile 5 miles away from the store (10 mi. roundtrip) and struck another vehicle. Judge Morgan stated that "There is no dispute of fact that Defendant Cooney was driving his own vehicle outside the store's property when the accident occurred

[2] The record reflects that Appellant raised various issues of fact below, only further precluding summary judgment, pertaining to Respondent's assertions regarding "work place rules" and alleged posting of a rule. These include credibility questions as to Respondent.

> during his attempt to pick up food for lunch for him and his coworker." (Pa11). This factual finding is undisputed and must be upheld. Db16.

Simply, this circle cannot be squared. The actual words of the court, in quotes above, appear as precise, carefully chosen words. Indeed, they are connected to the court's formulation challenged by Appellant in briefing for the reasons presented there. Pb, Point IV. These words, in contrast to the preceding discussion of permission, do not even hint at the concept. Yet, Respondent asserts that "The key factual finding", which does not exist, "must be upheld" by this court via an erroneous standard of review. Such is also contrary to what the court stated it was required to assume. Indeed, Respondent itself acknowledges the court's obligation to give all favorable inferences to Appellant multiple times in its brief. Of course, if the court did not do so, this would be reversible error. Further, if Respondent is somehow raising the specter of ambiguity, this also only invites revisiting of the decision. Respondent is without any viable argument on summary judgment that permission/authorization/consent was lacking.

IV. RESPONDENT'S UNEXPECTED POSITIONS ON THIS APPEAL MILITATE IN FAVOR OF QUESTIONING RATHER THAN AFFIRMING THE GRANTING OF SUMMARY JUDGMENT

Respondent's approach in its brief to facts, fact questions and the court's construing of the facts is inconsistent with what is relevant or expected in a

summary judgment appeal. The various fact arguments and "disputes" Respondent advances are such that, *inter alia,* they in effect question the underlying decision and raise questions about Respondent's own position to the point that they invite the Court here to revisit rather than affirm the court's decision. Respondent surprisingly asserts a deferential versus de novo review standard. Respondent interprets a construction of facts by the court regarding knowledge and authorization that would not be most favorable to Appellant. See, e.g,Db8,16. Respondent also, inconsistently, acknowledges a different construction regarding authorization which it believes is construed most favorably to Appellant. Db16. As to the court constructions of knowledge and authorization that it agrees are construed most favorably to Appellant, it nevertheless "disputes" both.[3] Db8,20,21.

[3] Possibly. there is confusion on Respondent's part stemming from its erroneous assertion that the court made "factual findins" which "must be upheld" if sufficiently undergirded by "sufficient credible evidence" in accordance with an incorrect and inapplicable deferential standard of review. One proceeding under such a misunderstanding might, for example, perceive a court's required construction of facts most favorably to the non-moving party not as the end that it is pursuant to summary judgment, but as a "factual finding" subject to some challenge implicating argument as to the facts, including disputed facts. One proceeding under such a misunderstanding might also, as Respondent does in its brief, go around, ignore or supplement a perceived determination of the court on summary judgment by inserting its own fact arguments on appeal.

In Point I, Respondent takes what the court actually said and converts it unrecognizably into "The key factual finding." In Point II, Respondent acknowledges that the court, required to construe facts most favorably to Appellant, did so in assuming that Cooney was permitted to leave. Yet, Respondent also "disputes" this and poses multiple disputed fact arguments and claims. In Point III, Respondent ignores the court's reasoning in finding the "special mission" exception inapplicable, instead presenting paragraphs of factual arguments and claims with or without apparent relation to the "exception".[4] Respondent then, after having inserted its own material, incongruently states that the court, whose reasoning it failed to discuss, was "correct", potentially inviting the reader to attribute Respondent's reasoning to the court. In Point IV, Respondent claims lack of control over where Cooney went and for how long based upon asserting it lacked knowledge, despite what the decision provides regarding knowledge. Respondent also ignores one of the three bases the court gave for distinguishing Wilson by not discussing the court's "two factual distinctions" reason in the decision. See Pa11-12.

[4] Such includes an inaccurate claim out of nowhere that there is "no evidence that either Cooney or Voh[r]inger had ever left the store before the date of the accident during their straight time shift." Db22. To the contrary, such evidence included Cooney's deposition testimony specifically identified by the court, discussed above in Point II, providing "I would always let [Shajahan] know before I left."

Ironically, if anything and at best, Respondent's presentation only demonstrates the fact-sensitive nature of this matter and of scope of employment cases in general, and why summary judgment is inappropriate. Respondent's right and opportunity to argue disputed facts is for trial rather than at this juncture.

V. FACTS PERTAINING TO KNOWLEDGE AND AUTHORIZATION PROVIDE INDICIA OF EMPLOYER "CONTROL", AS SUPPORTED BY RESPONDENT'S BRIEF, PRECLUDING SUMMARY JUDGMENT

Respondent's brief demonstrates that it does not have a viable argument for lack of control at the summary judgment stage, as any of its arguments impermissibly assume lack of knowledge and/or authorization, and as any reliance on the court's reasoning is equally unhelpful.[5] Respondent, as to the

[5] Appellant, including in Points V and VI herein, addresses how Respondent's and/or the court's framing and consideration of control and/or benefit are deficient. However, this is always against the existing backdrop that Respondent's and the court's overall framing and consideration is deficient. This was addressed extensively by Appellant in its initial briefing. Such deficiency is inadvertently emphasized by Respondent itself who claims with regards to its view that the court "held that the dual purpose exception is inapplicable to these facts" and that "That conclusion must be affirmed, because, if it is not, on the facts of this case, there are no discernable limits to the dual purpose exception." Db24. Of course, however, the issue is not with the adequacy of the proper, applicable legal framework and principles or with what Respondent might consider the "facts" as to which denial of summary judgment could not abide in Respondent's view. The problem is that the court and/or Respondent did not proceed in accordance with what was required, as Appellant explained in detail in his initial brief, and as Respondent's brief and the within brief only further make clear.

court's view that Respondent had "no control" over "where" Cooney went once he left the premises, asserts that "Respondent again emphasizes that the employer never knew Cooney had left the store so [i.e., therefore] it is certainly true that the employer had no control over either where he went or how long he would be away from his duties at the store." Db24(emphasis and bracketed text supplied).[6] Respondent approvingly cites as a "finding" the court's statement after discussing "control" that Respondent is entitled to summary judgment given that certain "facts" "show" that Respondent did not "direct" Cooney to leave the premises and "had absolutely no control over what [Cooney] did" once he did. Db14.

Such is the limited reasoning of the court and Respondent. Respondent's statement that it made assuming lack of knowledge and/or authorization only demonstrates that the inverse conclusion as to "control" applies here. By extension, this negates Respondent's sole reliance upon the court's analysis that fails to directly address knowledge and/or authorization.

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[6] Respondent's wording of "away from his duties at the store" is subject to scrutiny. First, such would need to be supported by evidence, and even if it were, Appellant is entitled to all favorable inferences. Further, if construed as only meaning he was engaged in his duties, but off premises, such may be acceptable. This could not be construed on summary judgment as meaning he was not engaged in his duties because he was not in the store.

Even the court indirectly demonstrates that such is relevant by identifying the employer's setting of a 30-minutes off premises time frame in Wilson as relevant to control. Pa13. Such recognizes control possessed by an employer, including as to what an employee does off premises. This alone contradicts and calls into question a "no control" assessment when there is knowledge and/or authorization, of which the court failed to directly consider. [7] [8]

[7] Particularly in situations where an employee's actions involve furtherance of an employer's objectives, as could be found by a factfinder, it cannot be that how an employer might decide to allocate discretion alone determines questions of "control" in the scope of employment context, such that a court simply assigns an "employer has no control" designation to anything allowing for employee discretion. However, there is no indication that the court's "control" analysis is more than that, such that it is flawed for this reason as well.

[8] As noted, Respondent's Point IV, which addresses the court distinguishing Wilson and the present case, acknowledges only two of the court's three "reasons" for "disagreeing" with reliance upon Wilson. That "reason" only amplifies concerns about the court's "control" analysis as part of the third reason. The court noted "two factual distinctions", stating that the Wilson employee was a manager with express permission to leave, while Cooney's "ability to leave" was disputed, and that "more importantly", what occurred in Wilson on the day in question was a "usual routine", whereas the court did not see evidence of Cooney going to Papa John's for pizza being a usual routine. Pa11-12. While the court does not explain further, any significance to be given the foregoing, which appears at least in part to get at knowledge and/or authorization, is questionable when such is to be assumed here.

VI. RESPONDENT'S BRIEF SUPPORTS THE CASE THAT THE EVIDENCE OF EMPLOYER BENEFIT AND INTEREST PRECLUDES SUMMARY JUDGMENT

Respondent's brief demonstrates that it does not have a viable argument for lack of "benefit" at the summary judgment stage, including due to required assumptions of knowledge and/or authorization. Beginning with Respondent's own claims, Respondent asserts that it chose to have a setup wherein, in order to "better serve" customers, employees were on the clock throughout their shift, employees were to remain at the store through the shift, and the focus of the employer's purpose was such that employees were to consume their meals during such time in the back room and/or at the register. In essence, Respondent's only disagreement or dispute is with evidence that, including affording all favorable inferences, the parameters of the foregoing included actions such as an employee procuring food off premises for himself and an employee who remained at the store, and returning to the store with it, and that Respondent knew of and permitted the foregoing in general as well as specifically on the day in question prior to Cooney leaving.

Respondent claims a lack of employer benefit, apparently only in the "off premises" scenario on the day in question.[9] Respondent essentially self-

[9] Respondent claims "there was no benefit to the employer as once Cooney left the store, he was no longer able to serve customers which was the purpose of his employment and the purpose of being paid "straight time" in the

servingly appears to frame the concept of "benefit" only as "serve customers" (which Respondent does not define or describe) while present in the store, and also ignores that one of the two employees, acting in tandem in serving Respondent's interests, was "present in the store." Db22. Such is opposite of affording all favorable inferences and as part of the appropriate broad inquiry of whether there is sufficient employer control and/or interest. Respondent considers only Cooney being off premises (and ignoring that Vohringer was on premises) and not why, under its own claimed setup, it would have no issue if Cooney was instead in the back room procuring food for the same amount of time.[10] Respondent's "benefit" test cannot withstand even the scrutiny of Respondent's own positions.[11]

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first instance." Db18. Also, "It is precisely so they would be present in the store to serve customers that Cooney and Vohringer were paid "straight time" but the quid pro for that was that they remain in the store." Db22.

[10] Even assuming there could be some difference, depending on circumstances, that does not substantiate a leap to "no benefit." Also, even if the setup generally contemplates employees "present in the store", but allows off premises activity as is required to be assumed, it does not mean that even if a theoretical potential diminishment in "benefit" is possible while an employee is "present in the store" and another is procuring food for both off premises as opposed to, say, in the back room, that such would be of any consequence. Nor, as stated, can it be assumed that such potential exists only in an off-premises scenario if at all.

[11] Respondent's claims are further internally inconsistent in that on the one hand, it argues "no benefit" starts and exists the moment Cooney might be

The court's framing is similarly deficient. Respondent asserts that "The court stated it "can find no 'palpable benefit' being reaped by the employer as a result of the employee's decision to leave the store." Db23. First, the employer interest (or "benefit") served, per Respondent itself, included and involved essentially concurrent activities of employees throughout the alleged "straight time" shift, including food procurement and consumption. As such, there is Respondent "benefit" and/or "palpable benefit" and/or and/or interest served. As explained, such can be served via on and/or off premises activity, including therefore "as a result of the employee's decision to leave the store".

Whether there is sufficient employer control and/or interest is the axiomatic inquiry as to scope of employment. Appellant has identified how a factfinder could ascertain such, which is more than adequate at the summary judgment stage. Any grant of summary judgment which may be tied to a court not "finding" sufficient "benefit" cannot co-exist with the foregoing. Rather, the court's statement and related analysis is but further evidence of the court's flawed formulation and/or analysis. [12]

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off premises, but also that how far he drove or whether the pizza was "free" factor in somehow.

[12] Respondent's brief appears to interpret the third explanation of the court for disagreeing with reliance upon Wilson as an examination of whether the "dual purpose exception" applies through an examination of the concepts

CONCLUSION

For all these reasons, Plaintiff respectfully requests that this Honorable Court reverse the trial court's orders granting summary judgment and denying reconsideration.

Respectfully submitted,
NASH LAW FIRM, LLC

Dated: December 1, 2025

By: /s/ Alan A. Reuter
ALAN A. REUTER, ESQ

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of "control" and "benefit." Respondent characterizes the discussion as one which posits that the Wilson case fails to properly discuss benefit and control, and that the court held that the dual-purpose exception is inapplicable. At best, Respondent is attempting to fill in lines which, at minimum, are not explicitly there. However, taking Respondent's interpretation at face value, it supports the idea that the court did not in its decision overall go outside of basing it on whether this case fell within one of three "exceptions". Further, if it was indeed an analysis limited to applicability of three "exceptions", this only emphasizes the question of why there is a "second" discussion of the same topic. Further, such would also emphasize lack of clarity regarding the discussion of "benefit" and "control", including the court artificially limiting its consideration of these broad concepts to less than all relevant facts and circumstances. Of course, Appellant has explained in detail the error of the court's approach, including how the court's analysis, rather than being tethered to Sections 228 and 229 of the Restatement 2nd, for example, was done in a kind of a vacuum of the court's own making.