**SUPERIOR COURT**
**OF THE**
**STATE OF DELAWARE**

RICHARD R. COOCH
RESIDENT JUDGE

NEW CASTLE COUNTY COURTHOUSE
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**Re: Joyce Clough v. William F. Comly, Jr., Interline Brands, Inc., and Wilmar a/k/a Wilmar Industries.**
**C.A. No. 05C-03-263 RRC**

Submitted: August 14, 2006
Decided: August 31, 2006

On Defendants Interline Brands, Inc. and Wilmar Industries' Motion for Summary Judgment.
**GRANTED.**

Dear Counsel:

Before this Court is a Motion for Summary Judgment filed by Defendants Interline Brands, Inc. and Wilmar Industries ("Moving Defendants"). The issue is whether Defendant William F. Comly, Jr. ("Comly"), a traveling salesperson employed by Moving Defendants, was acting within the scope of his employment when he was involved in a motor vehicle accident with the Plaintiff Joyce Clough ("Plaintiff") while driving home from his final business appointment for the day. For the reasons set

forth below this Court finds that he was not acting within the scope of his employment when he was driving home after the completion of his workday; therefore, Moving Defendants are not vicariously liable for Comly's actions and the Motion for Summary Judgment is **GRANTED**.

## I. FACTS AND PROCEDURAL HISTORY

The parties agree that there are no material facts in dispute.

On September 9, 2003, the day of the accident, Comly was employed by Moving Defendants as a sales representative.[1] Each week Comly visited the Moving Defendants' home office in Mount Laurel, New Jersey. However, Comly was frequently required to travel to scattered sales locations throughout New Castle County, Delaware.[2] Comly used his personal vehicle for required travel, was insured by a policy he purchased on the vehicle, and was not reimbursed by Moving Defendants for any travel or automobile maintenance expenses.[3]

At his first pretrial deposition in this case, Comly testified as follows:

| | |
|---|---|
| Question: | What do you do for a living, sir? |
| Answer: | Sales rep. |
| Question: | Were you working at the time of this accident? |
| Answer: | Yes. |
| Question: | And who were you working for? |
| Answer: | Worked for Wilmar.[4] |

In a second deposition, Comly testified further so as to attempt to make clear whether he was in the scope of his employment at the time of his accident. Comly testified at his second deposition that, prior to the accident, he was on a sales call in New Castle County, Delaware.[5] Comly was driving his personal vehicle at the time of the accident.[6] Due to the nature of his job, Comly had no specific beginning and ending time to his workday.[7]

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[1] Comly Dep. 5-6 (Jan. 30, 2006), at Ex. D of Moving Def.'s Mot. Summ. J.

[2] *Id.* at 7, 8.

[3] *Id*. at 22; Ciniglia Dep. 15-16 (Feb. 16, 2006), at Ex. E of Moving Def.'s Mot. Summ. J.

[4] Comly Dep. 9 (June 1, 2005), Ex. C to Moving Def.'s Mot. Summ. J.

[5] Comly Dep. 14-15 (Jan. 30, 2006).

[6] Comly Dep.12-13 (Jan. 30, 2006).

[7] Ciniglia Dep., at 9.

Generally, Comly finished his workday after he completed his final sales call.[8] Comly's supervisor also testified that Comly's workday was ended upon the conclusion of his last sales call.[9] The accident occurred after Comly had finished his final sales call for that day, and was traveling to his home in Sea Isle City, New Jersey.[10] Comly stated he believed he was finished his workday when he had the accident.[11] Comly did not report the accident to his employer.[12]

The combination of the answers given by Comly at his two depositions gives rise to the issue of whether Comly was in the scope of his employment at the time of the accident. If the answer is yes, then Moving Defendants may potentially be held liable. If the answer is no, then summary judgment must be granted as a matter of law in favor of Moving Defendants.

## II. CONTENTIONS OF THE PARTIES

Moving Defendants assert that summary judgment is appropriate because 1) there are no genuine issues of material fact and 2) they are entitled to judgment as a matter of law as they are not liable for Comly's actions at the time of the accident because he was not at that moment acting within the scope of his employment.[13] Moving Defendants assert that they are protected from liability by the so-called "premises rule," which states that employers are not liable for the torts committed by their employees while their employees are traveling back and forth from work to home.[14] In support of this proposition, Moving Defendants rely in particular on *Barnes v. Towlson*,[15] a Delaware Superior Court case that held that an exception to the "premises rule" exists where an employee is using a car in furtherance of the employer's business and is traveling to a business appointment.[16] Moving Defendants argue that this narrow exception to the "premises rule"

[8] Comly Dep. 22-23 (Jan. 30, 2006).
[9] Ciniglia Dep., at 9-10
[10] Comly Dep. 18 (Jan. 30, 2006).
[11] *Id*. at 22-25.
[12] *Id.* at 18.
[13] Moving Def.'s Mot. Summ. J., D.I. 47, ¶ 14.
[14] Moving Def.'s Reply to Pl.'s Resp., D.I. 50, ¶ 2.
[15] 405 A.2d 137, 140 (Del. Super. Ct. 1979).
[16] Moving Def.'s Reply to Pl.'s Resp., D.I. 50, ¶ 4.

does not apply here because Comly was not traveling to a business appointment at the time of the accident.[17]

Plaintiff does not dispute any material facts. However, Plaintiff argues the exception to the "premises rule" should apply because Comly, as an "outside" salesperson, had no specified work premises or work hours.[18] Plaintiff contends that the *Barnes* exception states that a traveling salesperson using a car for business related travel is acting within the scope of their employment from the time the employee leaves home in the morning until the employee returns home at night.[19]

Plaintiff also argues that certain doctrines found in workers' compensation cases are applicable, by analogy, here. Plaintiff relies on the case of *Devine v. Advanced Power Control, Inc.*,[20] an appeal from the Industrial Accident Board, "for the proposition that an employee on the road at the time of the accident is substantially within the course of his employment whether or not he is actually performing work at the time."[21]

Moving Defendants, on the other hand, argue that Delaware's workers' compensation does not affect Plaintiff's claim, as there is no employer/employee privity between Moving Defendants and Plaintiff.[22] Moving Defendants argue that Plaintiff is attempting to force the application of workers' compensation law analysis into a tort action, assert assert that Delaware's "workers' compensation act was meant to protect victim workers, not provide tort plaintiffs a windfall recovery that would otherwise not be available under Delaware tort law."[23]

## III. STANDARD OF REVIEW

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[17] *Id.* at ¶ 6.

[18] Pl.'s Resp., D.I. 49, ¶ 8.

[19] *Id.* at ¶ 6.

[20] 663 A.2d 1205, 1213 (Del. Super. Ct. 1995) (reversing a decision of the Industrial Accident Board that held that the claimant was not entitled to benefits stemming from an injury that occurred while claimant was driving home, even though claimant had a "semi-fixed place of employment and his travels, including his travel at the time of the accident, were a substantial part of his employment").

[21] Pl.'s Suppl. Resp., D.I. 52, ¶ 5.

[22] Moving Defs.' Reply to Suppl. Resp., D.I. 51, ¶ 3.

[23] *Id.* ¶¶ 5, 7.

Summary judgment is appropriate where "the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law."[24] Although the moving party has the burden of demonstrating that no material issues of fact are in dispute and it is entitled to judgment as a matter of law, the facts must be viewed "in the light most favorable to the nonmoving party."[25]

## IV. DISCUSSION

As a general rule, an employer will only be held liable for the torts committed by an employee where the employee's actions are within the scope of employment, as the actions are presumed to be "committed in the furtherance of the master's business."[26] A corollary to that tenet is that "a master is not liable for the torts of his agent committed while driving to and from his place of employment."[27] This is referred to as the "premises rule." However, and of critical importance in this case, an exception to the "premises rule" exists where an employee does not have an established work premises, but uses his or her own car to drive to a "business appointment."[28] The *Barnes* court adopted the following language from a New York case:

> [A]n exception to this [premises] rule would exist, in case of an employee who uses his car in furtherance of his work and while he is driving to a business appointment, since such a person is working and under his employer's control from time he leaves the house in the morning until he returns at night.[29]

In such a situation, the employee would be held to be within the scope of employment and an employer would potentially be held liable for any torts committed by the employee.[30]

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[24] Super. Ct. Civ. R. 56(c).

[25] *Mason v. United Servs. Auto. Ass'n*, 697 A.2d 388, 392 (Del. 1997).

[26] *Conn v. Vanheckle*, 2004 WL 2191027, at *1 (Del. Super. Aug. 25, 2004) (quoting *Draper v. Olivere Paving & Constr. Co*., 181 A.2d 565, 569 (Del. 1962)).

[27] *Barnes*, 405 A.2d at 139.

[28] *Id.* at 139-140.

[29] *Rappaport v. International Playtex Corp*., 43 A.2d 393, 396 (N.Y. App. Div. 1974).

[30] *Barnes*, at 140.

This exception to the "premises rule" would be potentially applicable to a traveling salesperson such as Comly, who lacks an established work premises. However, to trigger the exception and possible impose liability on an employer, the employee must be engaged in some activity to further the employer's business.[31] One commentator has compiled various cases from across the country dealing with the issue of an employer's liability for the negligence of the employee who drives his or her own car; this collection of cases evidences that although there are cases that have imposed liability on an employer for the negligence of an employee while the employee is driving home, those courts have all found, in one form or another, that the employee was then acting in furtherance of his employer's interest.[32]

Further, Plaintiff's reliance on *Barnes* is misplaced. The language in *Barnes* specifically contemplates application of the exception to the "premises rule" where "an employee [] uses his own car in furtherance of his job … while driving to a business appointment."[33] The *Barnes* case has also been recognized as "suggesting that although commuting to and from work is personal, driving one's own car to meet an employer may be within the scope of employment."[34] The latter is an example of conduct done in furtherance of the employer's business; it would trigger the exception to the so-called "premises rule" and would potentially impose liability on the employer.

Although, in his first deposition, Comly stated that he was working for Wilmar at the time of the accident, that answer seems directed at a question more along the lines of whether Comly was "working" for Wilmar at that time, in general. There is nothing in Comly's answer to suggest that he intended to state that he felt that at the exact time of the accident that he was acting within the scope of his employment. The second deposition is

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[31] *Cf. Coates v. Murphy*, 270 A.2d 527 (Del. 1970) (holding, in a wrongful death case, that a traveling salesman was not within the scope of employment while driving to and from home for lunch as such a trip was not in furtherance of employer's business).

[32] Christopher Vaeth, Annotation, *Employer's Liability for Negligence of Employee in Driving His or Her Own Automobile*, 27 A.L.R. 5th 174, 355-59 (1995).

[33] *Barnes*, at 139.

[34] Stacy Dansk, Note, *Eliminating Strict Employer Liability in Quid Pro Quo Sexual Harrassment Cases*, 76 Tex. L. Rev. 435, 448 n.50 (1997). *See also* Rhett B. Franklin, Comment, *Pouring Old Wine into a New Bottle: A Recommendation for Determining Liability of an Employer Under Respondeat Superior*, 39 S.D. L. Rev. 570, 582 n.88 (citing *Barnes* for approval of Restatement (Second) of Agency § 228).

sufficient, in the Court's mind, to clear up any ambiguity in Comly's first deposition testimony. The Court further finds that there is no internal inconsistency in Comly's responses to questions concerning whether he was in the scope of employment at the time of the accident. Thus, and looking at these facts in the light most favorable to the non-moving party, there is no indication that Comly felt that, at the time of the accident, he was in the scope of employment or acting "in the furtherance of the master's business."[35]

This Court holds that Moving Defendants are entitled to summary judgment as a matter of law. Although Comly was using his personal car in furtherance of his work earlier in the day of the accident, he was not driving to a business appointment at the time of the accident. Instead, Comly was driving home after completing his final sales call for the day when the accident happened. Thus, the purpose of his travel was not in furtherance of Moving Defendants' business.

This Court also finds that the doctrines relating to potential liability of employers to employees applicable in the case law of workers' compensation claims do not pertain to the present case. As Moving Defendants point out, Professor Larson has observed that

> [a]lmost every major error that can be observed in the development of compensation law, whether judicial or legislative, can be traced either to the importation of ideas, or, less frequently, to the assumption that the right to compensation resembles the right to the proceeds of a personal insurance policy…. Among common-law trained lawyers and judges, it has naturally been the tort-connection fallacy that has been most prevalent.
> …
> [An] example of the distortion of compensation law by tort concepts will be seen in the attempt to define an employee, for compensation purposes, by tests which were developed to determine when a master should be liable for the torts of a servant to a third person.[36]

This Court finds that the reverse is equally true that the concepts of workers' compensation law cannot be used to determine liability in the context of a tort. Thus, Plaintiff's reliance on *Devine* is not persuasive here.

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[35] *Conn v. Vanheckle*, 2004 WL 2191027, * 1.

[36] 1 Arthur Larson & Lex K. Larson, Larson's Workers' Compensation Law § 1.02 (2006).

## V. CONCLUSION

For all the aforementioned reasons, Moving Defendants' Motion for Summary Judgment is **GRANTED.**

**IT IS SO ORDERED.**

Very truly yours,

oc: Prothonotary