

**COURT OF APPEALS
DECISION
DATED AND RELEASED**

NOTICE

September 25, 1997

A party may file with the Supreme Court a petition to review an adverse decision by the Court of Appeals. See § 808.10 and RULE 809.62, STATS.

This opinion is subject to further editing. If published, the official version will appear in the bound volume of the Official Reports.

No. 96-3393

STATE OF WISCONSIN

**IN COURT OF APPEALS
DISTRICT IV**

**JANE A. BEARD, INDIVIDUALLY AND AS SURVIVING
SPOUSE OF CHARLES R. BEARD,**

PLAINTIFF-APPELLANT,

V.

**LEE ENTERPRISES, INC., THE LA CROSSE TRIBUNE,
AND LIBERTY MUTUAL INSURANCE CO.,**

DEFENDANTS-RESPONDENTS.

APPEAL from a judgment of the circuit court for La Crosse County:
MICHAEL J. MULROY, Judge. *Affirmed.*

Before Dykman, P.J., Roggensack and Deininger, JJ.

DYKMAN, P.J. Jane Beard appeals from a summary judgment dismissing her lawsuit against The La Crosse Tribune, Lee Enterprises, Inc., which owns The La Crosse Tribune, and Liberty Mutual Insurance Company, their

insurer (hereinafter collectively “The Tribune”). Beard brought suit against The Tribune after her husband, Charles Beard, was killed in a head-on collision with sixteen-year-old Anthony Kropelin. Beard argues that: (1) The Tribune was negligent per se for employing Anthony in a hazardous activity and during prohibited hours; and (2) The Tribune was negligent for permitting Anthony to operate a motor vehicle in the middle of the night. We reject Beard’s arguments and affirm.

BACKGROUND

On Thursday, July 9, 1992, Anthony Kropelin, then sixteen-years of age, drove his father’s van to The Tribune around midnight to pick up bundles of Friday newspapers to deliver on his father’s bundle route.¹ Anthony’s father, Douglas Kropelin, had entered into a bundle delivery agreement with The Tribune under which he agreed to pick up bundles of newspapers at The Tribune and deliver the bundles to route carriers, vending machines and businesses for retail sale. Anthony delivered the papers in north La Crosse.

On Friday, July 10 at approximately 3:00 a.m., Anthony returned to The Tribune to pick up bundles of The Tribune’s Sunday supplement, which consisted of the comics and advertisements, so that his father could deliver the supplements on Sunday, July 12. Anthony also picked up newspapers for his brother, James Kropelin, which needed to be delivered to houses on James’s carrier route. On behalf of his brother, Anthony delivered the newspapers, finishing at approximately 4:00 a.m.

¹ Anthony was accompanied by a friend at the time.

After delivering the newspapers, Anthony began to drive back home with the Sunday supplements in the van. At approximately 4:15 a.m., Anthony's vehicle collided with the vehicle of Charles Beard. Beard died as a result of injuries suffered in the collision.

On July 27, 1993, Jane Beard, the surviving spouse of Charles Beard, released Anthony from liability by executing a *Pierringer* release.² Thereafter, on May 1, 1995, Beard filed this action against The Tribune, asserting three grounds for recovery. First, Beard alleged that The Tribune was negligent per se for using a minor in a street trade during prohibited hours of employment, in violation of Wisconsin's child labor laws. Second, Beard alleged that The Tribune was negligent for using a minor lacking sufficient age, experience, maturity or training to deliver newspapers during the hours of midnight to 5:00 a.m. Third, Beard alleged that The Tribune was liable for Anthony's negligence under the doctrine of respondeat superior.

The Tribune moved for summary judgment. The circuit court granted the motion, concluding that the *Pierringer* release barred all claims against The Tribune under a theory of respondeat superior and that, under the facts and circumstances of the case, Beard could not bring a cause of action against The Tribune based on a violation of the child labor laws. Beard appeals. She does not continue to argue that The Tribune is liable for Anthony's negligence under the doctrine of respondeat superior. Rather, she argues that the trial court erred in dismissing her negligence per se and common law negligence claims against The Tribune.

² See *Pierringer v. Hoger*, 21 Wis.2d 182, 124 N.W.2d 106 (1963).

STANDARD OF REVIEW

We review motions for summary judgment *de novo*, using the same methodology as the circuit court. *Envirologix Corp. v. City of Waukesha*, 192 Wis.2d 277, 287, 531 N.W.2d 357, 362 (Ct. App. 1995). Summary judgment “shall be rendered if 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 judgment as a matter of law.” Section 802.08(2), STATS.

NEGLIGENCE PER SE

Beard argues that the circuit court erred in dismissing her negligence per se cause of action against The Tribune. Beard argues that The Tribune was negligent per se by permitting Anthony to deliver the newspapers in violation of WIS. ADM. CODE §§ IND 70.06 and 71.04(3).³ Section IND 71.04(3) provides that “[n]o minors 16 or 17 years of age shall be employed or permitted to work at any street trade ... before 6:00 a.m., except for the delivery of newspapers 5:00 a.m., nor after 9:00 p.m. on days preceding school days and not later than 11:00 p.m. on days not preceding school days.”⁴ Section 70.06(13) provides that, except for

³ These sections have been renumbered WIS. ADM. CODE §§ DWD 270.06 and 271.04(3), respectively.

⁴ Section 103.24, STATS., authorizes the Department of Industry, Labor and Human Relations (DILHR) to “determine and fix reasonable hours of employment for minors in street trades.” Although Anthony did not have an employment contract with The Tribune, Beard argues that § 103.21(1), STATS., makes him an employee of The Tribune for purposes of § 103.24 and WIS. ADM. CODE § IND 71.04(3). Section 103.21(1) provides that, as used in §§ 103.21 to 103.31, STATS.:

(1) Every minor selling or distributing newspapers or magazines on the streets or other public place, or from house to house, is in an “employment” and an “employee,” and each

(continued)

incidental and occasional driving, the occupation of motor vehicle driver is “deemed to be dangerous or prejudicial to the life, health, safety, and/or welfare of minors ... and their employment may be dangerous or prejudicial to the life, health, safety and/or welfare of other employes or frequenters and no employer shall employ or permit such minors to work in such employments.”⁵

When an administrative agency prescribes what particular acts shall or shall not be done, the rule may be interpreted as establishing a standard of care, deviation from which constitutes negligence. *McGarrity v. Welch Plumbing Co.*, 104 Wis.2d 414, 418, 312 N.W.2d 37, 39 (1981). The standard for determining whether the violation of a statute or administrative rule constitutes negligence per se is as follows:

For the violation of a safety statute to constitute negligence per se, a plaintiff must show: (1) the harm inflicted was the type the statute was designed to prevent; (2) the person injured was within the class of persons sought to be protected; and (3) there is some expression of legislative intent that the statute become a basis for the imposition of civil liability. When determining whether there is some

independent news agency or (in the absence of all such agencies) each selling agency of a publisher or (in the absence of all such agencies) each publisher, whose newspapers or magazines the minor sells or distributes, is an “employer” of the minor.

Because we dispose of this appeal on other grounds, we do not address whether Anthony was an “employee” and whether The Tribune was his “employer” under § 103.21(1). See *Sweet v. Berge*, 113 Wis.2d 61, 67, 334 N.W.2d 559, 562 (Ct. App. 1983) (if a decision on one point disposes of appeal, we will not decide other issues raised).

⁵ This rule was promulgated under § 103.66(1), STATS., which provides in relevant part:

(1) [DILHR] may investigate, determine and fix reasonable classifications of employments, places of employment and minimum ages for hazardous employment for minors, and may issue general or special orders prohibiting the employment of minors in employments or places of employment prejudicial to the life, health, safety or welfare of minors, and may carry out the purposes of ss. 103.64 to 103.82.

expression of legislative intent that the statute become a basis for civil liability, the court must keep in mind that “[s]tatutes are not to be construed as changing the common law unless the purpose to effect such change is clearly expressed therein.”

Tatur v. Solsrud, 174 Wis.2d 735, 743-44, 498 N.W.2d 232, 235 (1993) (citations omitted).

Both WIS. ADM. CODE § IND 70.06 and § IND 71.04(3) prohibit employers from permitting minors to work in certain circumstances. Section IND 71.04(3) provides that no minor “shall be employed or permitted to work” before 5:00 a.m. when delivering newspapers. Section 70.06(13) provides that “no employer shall employ or permit ... minors to work” in the occupation of motor vehicle driver. The Tribune argues that Anthony was not acting within the scope of these laws when the accident occurred because he was driving home at the time.

Generally, when an employee is traveling between his home and place of employment, the relation of master and servant does not exist. *Geldnich v. Burg*, 202 Wis. 209, 210, 231 N.W. 624, 624 (1930). In *DeRuyter v. Wisconsin Elec. Power Co.*, 200 Wis.2d 349, 361-62, 546 N.W.2d 534, 540 (Ct. App. 1996), we set forth the exception to this general rule:

[O]nly when the employer exercises control over the method or route of the employee’s travel to or from work can the employee be said to be acting within his or her employment. This is the rule because without such control, the employee is not actuated by a purpose to serve the employer, but is solely promoting the employee’s “own convenience.”

(Citations omitted.)

It is undisputed that Anthony was driving home when the collision occurred. Therefore, under *Geldnich* and *DeRuyter*, Anthony could have been

acting within the scope of his employment at the time of the accident only if The Tribune exercised control over the method or route of his travel home. The record before us provides no evidence that The Tribune exercised such control. Therefore, we conclude that Anthony was acting outside the scope of his employment at the time of the accident. Because Anthony was acting outside the scope of his employment when the accident occurred, The Tribune could not have been violating WIS. ADM. CODE §§ IND 70.06 and 71.04(3) at that time. Accordingly, we conclude that The Tribune cannot be held liable for its alleged violation of these sections.

The dissent concludes that *Geldnich*, *DeRuyter* and many other “going and coming” cases are inapplicable because Anthony was a minor working in a street trade. But, this analysis still requires that Anthony be an employee of The Tribune, no matter how he achieves that status. Wisconsin’s child labor laws do not create an employment relationship when none exists. And for long before *Geldnich* and *DeRuyter*, the test for whether an employer-employee relationship existed when the employee was driving to or from work was whether the employer exercised control over the method or route of the employee’s travel. *DeRuyter*, 200 Wis.2d at 361, 546 N.W.2d at 540. The analysis used by the dissent is a variation of the “special mission” exception to the “going and coming” rule. We declined to recognize exceptions to that rule in *DeRuyter*, a case in which an employee was traveling from home to a place of employment, carrying equipment required by the employer. We are not free to reverse our field now.

Beard argues that Anthony was still acting within the scope of his employment at the time of the accident because the Sunday supplements were in the vehicle when the collision occurred. Wisconsin courts have only recognized

an exception to the *Geldnich* rule for situations in which the employer controls the employee's method or route of travel. They have not recognized an exception for the situation at hand. In *DeRuyter*, the plaintiff argued that the court should recognize a "special mission" exception to the general rule for situations in which an employee is "on a special errand either as part of his regular duties or at the specific order or request of his employer." *DeRuyter*, 200 Wis.2d at 362, 546 N.W.2d at 540. We declined to recognize such an exception and "reaffirm[ed] the inveterate rule of law in Wisconsin that an employee is acting within the scope of his or her employment while driving to or from work only if the employer exercises control over the method or route of the employee's travel." *Id.* at 354-55, 546 N.W.2d at 537. Likewise, we will not recognize an exception to the general rule in this instance. We are an error-correcting court. See *State ex rel. Swan v. Elections Bd.*, 133 Wis.2d 87, 93, 394 N.W.2d 732, 735 (1986). An exception to a rule is really a partial overruling of the case which adopted the rule. We do not have the power to overrule, modify or withdraw language from *Geldnich* or *DeRuyter*. See *Cook v. Cook*, 208 Wis.2d 166, 190, 560 N.W.2d 246, 256 (1997). We would step outside the bounds of our error-correcting function were we to recognize the exception that Beard proposes.

COMMON LAW NEGLIGENCE

Beard argues that the trial court erred in dismissing her common law negligence claim against The Tribune. In her complaint, Beard alleged that The Tribune was negligent in that it "employed or utilized a child lacking sufficient age, experience, maturity, training (and other like qualities) to perform such work during the hours of midnight to 5:00 a.m. when a reasonably prudent person would have foreseen the risk of injury to the public in general and users of the highway in

particular.” Notwithstanding the lack of a direct employment relationship between Anthony and The Tribune, Beard argues that The Tribune was negligent because it knew that Anthony was picking up and delivering the papers for his father and brother.

In order to sustain a cause of action in negligence against The Tribune, Beard must establish: (1) a duty of care on the part of The Tribune; (2) a breach of that duty; (3) a causal connection between the conduct and the injury; and (4) an actual loss or damage as a result of the injury. *See Lisa’s Style Shop, Inc. v. Hagen Ins. Agency, Inc.*, 181 Wis.2d 565, 572, 511 N.W.2d 849, 852 (1994). The question of whether a duty exists is a question of law. *Id.*

Independent of the child labor laws, which we have already determined that The Tribune was not violating at the time of the accident, we conclude that The Tribune did not have any duty to prevent a minor from delivering newspapers by vehicle before 5:00 a.m. The statutes provide the circumstances in which a person may obtain a driver’s license. The legislature has provided that a minor may obtain a driver’s license after reaching sixteen years of age. *See* § 343.06(1), STATS. The statutes do not limit the times at which a licensed minor may operate a motor vehicle. The legislature has already weighed the risks inherent to operating a motor vehicle and concluded that a properly-trained sixteen-year old is qualified to operate a motor vehicle, regardless of the time of day. We conclude, as a matter of law, that The Tribune cannot be held negligent for permitting Anthony to deliver newspapers before 5:00 a.m. by vehicle when the legislature has already determined that licensed minors may operate motor vehicles at any time. Accordingly, we conclude that the trial court properly granted The Tribune’s motion for summary judgment.

By the Court.—Judgment affirmed.

Not recommended for publication in the official reports.

No. 96-3393(D)

ROGGENSACK, J. (*dissenting*). Because I conclude that Jane Beard has stated a claim for relief for a violation of the child labor laws by The La Crosse Tribune and Lee Enterprises, Inc. (Tribune) that has not been negated by the answer or the proofs offered in support of summary judgment, which claim, if proven, would result in absolute liability⁶ for the Tribune, I would reverse and remand for trial. Therefore, I must respectfully dissent.

Anthony Kropelin was sixteen years old at the time of the accident at issue here. According to portions of his deposition submitted in the summary judgment proceedings in circuit court, Anthony picked up newspapers from the employees of the Tribune who worked in the distribution tower. He had done so often enough that they knew him by name. He distributed newspapers in order to assist his father, Douglas Kropelin, who had a bundle delivery agreement with the Tribune.⁷ On the night of the accident, Andrew received newspapers from the Tribune at 12:00 a.m. and 3:00 a.m.; and, in a van which he drove, delivered them to merchants, vending machines, pick-up points for individual carriers and house to house. At approximately 4:15 a.m. while going home and bringing bundles of

⁶ Beard terms her claim “negligence *per se*,” but the Wisconsin Supreme Court has instructed that the correct nomenclature for liability which flows from a violation of the child labor laws is “absolute liability.” *D.L. v. Huebner*, 110 Wis.2d 581, 640, 329 N.W.2d 890, 917 (1983).

⁷ According to the portions of Douglas Kropelin’s deposition which were submitted in the summary judgment proceedings in circuit court, Douglas did not purchase the newspapers he distributed from the Tribune and he never collected money for the papers from individual carriers, merchants or vending machines. Rather, he was paid by the Tribune on a per trip basis for his distribution services.

newspapers to his father for further delivery, he struck a vehicle driven by Beard's husband, who died from the injuries he received.

Although Andrew was not directly paid for his services by the Tribune, Beard contends that Anthony was an employee of the Tribune because his deliveries came within the ambit of § 103.21(1), STATS. It states in relevant part:

Every minor selling or distributing newspapers or magazines on the streets or other public place, or from house to house, is in an "employment" and an "employee," and each independent news agency or (in the absence of all such agencies) each selling agency of a publisher or (in the absence of all such agencies) each publisher, whose newspapers or magazines the minor sells or distributes, is an "employer" of the minor.

Because the statute creates an employer-employee relationship with a newspaper publisher for "every minor" who distributes newspapers on the streets, in a public place or from house to house, unless there is an intervening agency of the type listed in the statute, and because it is uncontested that Andrew had distributed newspapers on the evening of the accident,⁸ I first examine whether Andrew's father, Douglas, was either an independent news agency or a selling agency of the publisher.

No Wisconsin case defines either type of agency. The Tribune does not contend that Douglas was an independent news agency,⁹ but it does contend

⁸ Whether Andrew was still distributing newspapers at the time of the accident is a fact in dispute.

⁹ Cases from other jurisdictions do address this term in the context of well known independent news agencies, which gather knowledge of recent events and distribute reports of this information to many newspapers, *e.g.*, *International News Service v. Associated Press*, 248 U.S. 215 (1918).

Douglas was a selling agency of the publisher. However, it gives no factual or legal support for that conclusion and this writer could find none. What the facts of record do show is that Douglas neither bought nor sold newspapers; rather, he delivered bundles of newspapers to locations selected by the Tribune. Therefore, I conclude that Douglas' relationship to the Tribune was not that of a selling agency for a publisher. In so concluding, I also conclude that the Tribune was Anthony's employer, when he was delivering newspapers. Therefore, the Tribune had the obligation to comply with Wisconsin's child labor laws, as set forth in sections 103.19 to 103.32 and sections 103.64 to 103.82, STATS.

Section 103.65, STATS., establishes the general standards which an employer must follow when employing minors. It provides:

(1) A minor shall not be employed or permitted to work at any employment or in any place of employment dangerous or prejudicial to the life, safety, or welfare of the minor or where the employment of the minor may be dangerous or prejudicial to the life, health, safety or welfare of other employes or frequenters.

(2) No minor shall be employed or permitted to work at any employment for such hours of the day or week, or such days of the week, or at such periods of the day as shall be dangerous or prejudicial to the life, health, safety or welfare of such minor.

These provisions are applicable to the street trades by virtue of § 103.22, STATS. Under the authority granted in § 103.66(1), STATS., the Department of Industry Labor and Human Relations¹⁰ promulgated administrative regulations which define motor vehicle driver as an occupation which is dangerous or prejudicial to the life, safety or welfare of minors and frequenters. A driver is defined as an

¹⁰ This department has been renamed the Department of Workforce Development.

individual who, during the course of employment, drives a motor vehicle at any time, with only incidental and occasional driving exempted.¹¹ And, pursuant to the authority granted in § 103.24, STATS., the department has established hours earlier in the day than 5:00 a.m. as dangerous or prejudicial to the life, health, safety or welfare of the minor. *See* WIS. ADM. CODE §§ IND 70.06(13) and 71.04(3).¹²

In order to assess the liability that could flow from the facts alleged in the amended complaint, I review the development of the predicates necessary to liability in the area of child labor law violations. It is important to note that Wisconsin has a long history of strong support for child welfare issues, enacting its first child labor laws in 1867 to protect children from hazards which they were too young to appreciate and over which they had no control. *D.L. v. Huebner*, 110 Wis.2d 581, 637, 329 N.W.2d 890, 916 (1983); *Warshafsky v. Journal Co.*, 63 Wis.2d 130, 135, 216 N.W.2d 197, 198 (1974). Wisconsin courts have refused

¹¹ WISCONSIN ADM. CODE § IND 70.06(13) states in relevant part:

MOTOR VEHICLE DRIVER ... (a) *Finding and declaration of fact.* Except as provided in par. (b), the occupations of motor vehicle driver ... on any public road, highway ... are particularly hazardous.

(b) *Exemptions.* Incidental and occasional driving. The finding and declaration in par. (a) shall not apply to the operation of automobiles or trucks not exceeding 6,000 pounds gross vehicle weight if such driving is restricted to daylight hours: Provided, such operation is only occasional and incidental to the minor's employment

The majority opinion concludes that the legislature has “determined that licensed minors may operate motor vehicles at any time.” I believe that conclusion is in conflict with § IND 70.06(13).

¹² The Code provisions have been renumbered as §§ DWD 270.06 and 271.04(3), respectively.

to construe child labor laws narrowly because to do so would be contrary to the statutes' stated purpose of protecting children, *Huebner*, 110 Wis.2d at 636, 329 N.W.2d at 915 (citing *Leora v. Minneapolis, St. P. & S.S.M.R. Co.*, 156 Wis. 386, 393, 146 N.W. 520, 523 (1914)), and in the instance of § 103.65(1), STATS., of also protecting frequenters.

Under current jurisprudence, violating a child labor law is more serious than violating other safety statutes because the child labor laws subject the employer to criminal penalties. Section 948.015(1), STATS. The courts recognize this difference. As Chief Justice Abrahamson pointed out in *Huebner*:

The legislature viewed violators of the child labor act as having acted wilfully (comparable to gross negligence), and violators were not exempt from damages by reason of any contributory negligence of the injured person. In contrast, the safe place statute was designed to encourage the performance of duties imposed by the statute; failure to comply with the statute was not viewed as a wilful act in violation of the law, and violators were liable only for civil forfeitures.

Huebner, 110 Wis.2d at 645, 329 N.W.2d at 920.

An employer who violates a safety statute may be liable under the doctrine of negligence per se, which is a type of ordinary negligence. Under negligence per se, the violation of the statute is the breach of a duty, thereby providing one element of the claim, but the issues of causation and contributory negligence remain. *Id.* at 640, 329 N.W.2d at 917. However, the liability which flows from a violation of a child labor law is absolute liability. As the Wisconsin Supreme Court has held:

[O]nce the jury finds that the employer has violated the child labor law, the circuit court must hold, as a matter of law, that the injury was caused by the violation and that contributory negligence is not a defense.

Id. at 639, 329 N.W.2d at 916.

An employer who violates a child labor law, at or about the time of injury to a child who was employed in contravention of the law, will be held absolutely liable. *Id.* at 640, 329 N.W.2d at 917. No reported Wisconsin case has determined whether absolute liability¹³ should be applied when a child labor law is violated and a person, other than the employed child, is injured. However, when a person for whom the statute provides protection is injured, the reasoning of *Huebner* provides guidance to the correct conclusion.

Here, Anthony was driving a motor vehicle throughout his employment. His driving was not occasional or incidental because it was necessary to accomplish the distribution of the newspapers. Therefore, his employment violated WIS. ADM. CODE § IND 70.06(13) and § 103.65(1), STATS., which include “frequenters” in the class of persons protected. It is reasonable to conclude that when the legislature proscribed minors from being employed or permitted to work driving motor vehicles on the public roadways, other users of those roadways, such as Beard’s husband, would be “frequenters” within the scope of the statute and the administrative code. *See McGarrity v. Welch Plumbing Co.*, 104 Wis.2d 414, 425, 312 N.W.2d 37, 42 (1981). A violation of § 103.65(1) is a crime as well as the violation of a civil statute. Section 948.015(1), STATS. Therefore, the violation is deemed wilful, resulting in absolute liability for the employer when a frequenter is injured.

¹³ In *McGarrity v. Welch Plumbing Co.*, 104 Wis.2d 414, 312 N.W.2d 37 (1981), a child other than the employee was injured and negligence *per se* was applied. However, the theory of absolute liability was neither briefed nor argued. *Huebner*, 110 Wis.2d at 641 n.11, 329 N.W.2d at 917 n.11.

If Anthony was driving to distribute newspapers at or about 4:15 a.m. when the fatal accident occurred, and was therefore employed by the Tribune at or about the time of the injury to Beard's husband, the Tribune violated § 103.65(1), STATS.¹⁴ And, with regard to Beard's husband, it is absolutely liable for his injuries. Whether Anthony was employed in violation of the child labor laws at or about the time the accident occurred is a fact question. *Huebner*, 110 Wis.2d at 639, 329 N.W.2d at 917.

The majority opinion focuses on Andrew's statement that he was on his way home at the time of the accident. It then concludes that under *DeRuyter v. Wisconsin Elect. Power Co.*, 200 Wis.2d 349, 546 N.W.2d 534 (Ct. App. 1996), once Andrew started for home, the Tribune could have no liability for his actions, even if he was its employee because he was no longer acting within the scope of any employment relationship. I disagree for several reasons. First, as set forth above, the child labor laws were specifically drawn to change the common law in regard to the employment of children. That change causes newspapers to become employers, even when they do not pay the children and thus expands the normal employment relationship. More importantly, the liability of the employer in *DeRuyter*, and the line of cases on which it is grounded, is dependent on the doctrine of *respondeat superior*.¹⁵ But here, if the child is found to be the employee of the newspaper at or about the time of the injury, the liability of the newspaper flows from the newspaper's act of breaking the law, not from the

¹⁴ I do not reach the legal issues presented by the Tribune's violation of § 103.65(2), STATS., because Beard's husband does not fall within the class of persons whom the statute protects.

¹⁵ *Respondeat superior* causes the employer to be liable in certain cases for the wrongful acts of its employees done within the scope of the employment. **BLACK'S LAW DICTIONARY** (6th ed. 1994).

doctrine of *respondeat superior*. Stated another way, when a newspaper breaks a child labor law at or about the time of the injury, its liability arises from its own violation of the law; not from the child's negligence.

Second, even if the scope of employment test used by the majority were applied to determine whether Andrew's conduct at or about the time of the accident flowed from violation of the statute, *DeRuyter* and the line of cases upon which it rests are not dispositive. They apply the traveling to or from work defense to liability when the "employee works for another at a given place of employment." *Id.* at 361, 546 N.W.2d at 540. However, when no designated place of employment exists, the test for determining whether a specific act falls within the scope of a particular employment relationship depends upon "the relation which the act done bears to the employment." *Seidl v. Knop*, 174 Wis. 397, 400, 182 N.W. 980, 981 (1921). That is, it must appear that the act which caused the injury occurred while the employee was promoting the business or interest of the employer. *Mittleman v. Nash Sales, Inc.*, 202 Wis. 577, 581, 232 N.W. 527, 529 (1930). Conversely, "[c]onduct of a servant is not within the scope of employment if it is different in kind from that authorized, far beyond the authorized time or space limits, or too little actuated by a purpose to serve the master." *Scott v. Min-Aqua Bats Water Ski Club, Inc.*, 79 Wis.2d 316, 321, 255 N.W.2d 536, 538 (1977).

Whether an employee's act is part of the service contemplated, or disconnected from it, is a triable question of fact. *Frewe v. Dupons Constr. Co.*, 37 Wis.2d 676, 685, 155 N.W.2d 595, 600 (1968). Thus, it is appropriate to instruct a jury "to consider whether the employee was actuated by a purpose to serve the employer." *Olson v. Connerly*, 156 Wis.2d 488, 497, 457 N.W.2d 479, 483 (1990). However, once it is proved "that the act tended to accomplish an

authorized purpose and was done at an authorized place and time, there is an inference that it was within the scope of employment.” *Scott*, 79 Wis.2d at 322, 255 N.W.2d at 539. This is true even if the employee had a dual purpose for his actions. See RESTATEMENT (SECOND) OF AGENCY § 236 (1957). And finally, contrary to the assertion in the majority opinion, my conclusion does not create a special mission exception to the going and coming from work rule. Rather, it is what the law requires when the employee operates a delivery service and has no single location as his job site. *Stephenson v. United States*, 771 F.2d 1105, 1008 (7th Cir. 1985) citing *Finsland v. Phillips Petroleum Co.*, 57 Wis.2d 267, 272, 204 N.W.2d 1, 3-4 (1973).

In this case, Anthony was given bundles of newspapers by the Tribune in order to deliver them to his father. It just so happened that Anthony lived with his father. Notwithstanding that fact, I conclude there is a material factual dispute in regard to whether Anthony’s driving to his father’s house with the bundles in the truck was intended, even in part, to accomplish the Tribune’s purpose of distribution of newspapers. If so, the “going home” shield to liability set forth in *DeRuyter*, and adopted by the majority, does not apply here as an absolute bar to liability if there was a violation of § 103.65(1), STATS., at or about the time of the accident. As a result, I conclude summary judgment should not have been granted, and respectfully dissent.

