IN THE CIRCUIT COURT OF THE 9TH JUDICIAL CIRCUIT IN AND FOR ORANGE COUNTY, FLORIDA

DEVONTREA TYLER as personal representative of the ESTATE OF ROITIKI TAMERA TYLER, deceased and MICKEL WILLIAMS SR. as father and guardian of his minor son, MICKEL TERMAINE WILLIAMS, JR.,

Plaintiffs,

vs.

GIBBS & REGISTER, INC., a Florida for Profit Corporation, and JOSHUA LOREN BELL,

Defendants.
_____/

CIVIL DIVISION

CASE NO.: 2014-CA-013239

PLAINTIFFS' AMENDED MOTION FOR SUMMARY JUDGMENT AS TO THE VICARIOUS LIABILITY OF THE DEFENDANT, GIBBS & REGISTER, INC. FOR THE ACTIONS OF THEIR EMPLOYEE, THE DEFENDANT, JOSHUA LOREN BELL BECAUSE HE WAS "IN THE COURSE AND SCOPE" OF HIS EMPLOYMENT AT THE TIME OF THE CRASH

COMES NOW, the Plaintiffs, DEVONTREA TYLER, as personal representative of the estate of ROITIKI TAMERA TYLER (hereinafter "ROITIKI TYLER"), deceased, on behalf of the Estate and on behalf of all lawful beneficiaries and survivors of the deceased, and MICKEL WILLIAMS, SR., as father and guardian of his minor son, MICKEL WILLIAMS, JR., by and through their undersigned counsel, and pursuant to Fla. R Civ. P., Rule 1.510 (d), and hereby file this, their Amended Motion for Summary Judgment, and as grounds therefore would show as follows:

There are no disputed issues of material fact and the Plaintiffs are entitled to the entry of Summary Final Judgment as a matter of law.

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PRELIMINARY STATEMENT

Plaintiff's Amended Motion for Summary Judgment requests this Court to find that, as a matter of law, the Defendant, GIBBS & REGISTER, INC. (hereinafter "GIBBS & REGISTER"), is vicarious liable for the actions of their employee, the Defendant, JOSHUA LOREN BELL (hereinafter "BELL"), in causing the death of ROITIKI TYLER, because he was in the "course and scope" of his employment at the time he caused the crash that took her life. The basis of Plaintiff's Motion is that the Defendant, BELL, was engaged in an "out of town" business trip for his employer at the time of the crash. Therefore, as a matter of law, he was "in the course and scope" of his employment at the time of the crash so as to render his employer, the Defendant, GIBBS & REGISTER, vicarious liable for his actions.

Any time an employee is traveling "out of town" on business for his employer the employee is considered to be "in the course and scope" of his employment as a matter of law, during the entire time of such travel. Only, if the employee committes a "distinct departure", such as going "off on his own" to perform some personal errand, would the employee not be considered to be "in the course and scope" of his employment. It is undisputed that, at the time of the crash, the Defendant, BELL was traveling "out of town" for business and was not engaged in performing some personal errand.

Despite the clear, and undisputed evidence that the Defendant, BELL, was traveling to an "out of town" job assignment and was therefore "in the course and scope" of his employment at the time of the crash, as a matter of law, the Defendant, GIBBS & REGISTER, refuses to accept liability and responsibility for the actions of their employee, the Defendant, BELL, in causing the crash.

The only reason that the Defendant, GIBBS & REGISTER, is refusing to accept liability and responsibility for the actions of their employee, is because they know that if they do so they

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will automatically be "on the hook" and will have to pay out millions of dollars to the Plaintiffs for the negligence of their employee, the Defendant, BELL, in causing the crash that took the life of ROITIKI TYLER.

While this is "understandable" and may be the "reason" or "explanation" for why the Defendant, GIBBS & REGISTER, refuses to accept liability and responsibility for their employee's actions in causing the death of ROITIKI TYLER, it in no way justifies such a refusal.

Under the facts and circumstances of this case, a "reasonable" and "responsible" company would "step up to the plate" and accept responsibility for their employee's actions. However, the Defendant, GIBBS & REGISTER is not such a company. In an effort to shirk that responsibility the Defendant, GIBBS & REGISTER, will undoubtedly "try" to convince this Court that their employee, the Defendant, BELL, was not in the "course and scope" of his employment at the time of the crash and that they are therefore not responsible for his actions.

The Defendant, GIBBS & REGISTER, will undoubtedly assert that, at the time of the crash, the Defendant, BELL was not yet "at work" and was merely "traveling to work" from his home and that under the "going and coming" rule he should not be considered to be in the "course and scope" of his employment.

In addition, the Defendant, GIBBS & REGISTER, will undoubtedly assert that because they did not "specifically insist" or "require" that he go to the job site the night before, that the Defendant, BELL, was not in the "course and scope" of his employment.

The Defendant, GIBBS & REGISTER'S arguments are "wrong" because they ignore the undisputed fact that, at the time of the crash, the Defendant, BELL was, in fact, traveling to an "out of town" job assignment for the Defendant, GIBBS & REGISTER. "Out of town" travel is specifically excluded from the "going and coming rule". Any time an employee travels "out of

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town" for business, he is considered to be "in the course and scope" of his employment the entire time he is traveling.

The Defendant, GIBBS & REGISTER, is also "wrong" because, their arguments ignore the undisputed fact that even though they did not "specifically insist" or "require" that he go to the job site the night before, they did in fact give the Defendant, BELL, their express permission, consent and approval to do so and they received a benefit by his doing so in the form of increased productivity.

Thus, at the time of the crash the Defendant, BELL, was on "an errand or mission for his employer" to stay overnight Sunday evening in a hotel located in Punta Gorda, Florida, so as to be "in town" and ready to begin work at GIBBS & REGISTER'S "out of town job site" early the following Monday morning. All of this was done with the Defendant, GIBBS & REGISTER'S express permission, consent and approval and for their benefit.

The Defendant, GIBBS & REGISTER, is also "wrong" because their arguments ignore the undisputed fact that this was not "the first time" the Defendant, BELL, had gone to the jobsite the Sunday before to stay overnight. He had done so on "numerous" occasions during the prior six (6) months while working at this same "out of town" job site, and that the Defendant, GIBBS & REGISTER, had approved and paid for all of his stays on all of these prior occasions. The Defendant, GIBBS & REGISTER, paid for all these prior trips because they were all valid and approved "business trips", just like this one.

The only thing that makes this occasion "different" is that on this occasion the Defendant, BELL, caused a crash that killed ROITIKI TYLER, and the Defendant, GIBBS & REGISTER, now does not want to have to pay for this.

In addition, the Defendant, GIBBS & REGISTER, is also "wrong" because their arguments ignore the undisputed fact that the Defendant, BELL, was himself seriously injured in

the crash and had applied for and was paid Workers Compensation benefits. The Defendant, GIBBS & REGISTER, never objected to or contested the payment of such Workers Compensation benefits to the Defendant, BELL, for the injuries that he suffered in the crash.

An injured employee is only entitled to receive such Workers Compensation benefits, as a matter of law, if he is injured "in the course and scope" of his employment.

Thus, the Defendant, GIBBS & REGISTER, is being "duplicitous" when they stand before this Court and now try to argue that the Defendant, BELL, was somehow not "in the course and scope" of his employment at the time of the crash.

STATEMENT OF UNDISPUTED MATERIAL FACTS

1. ROITIKI TYLER, was killed on Sunday, November 9, 2014, at approximately 10:40 PM when the vehicle she was driving was struck "head on" by a vehicle being driven by the Defendant, BELL. *See, Deposition of Corporal Albert Middleton, FHP Crash Investigator, Page 9 lines 2-13; and Page 21 lines 20-24. See, Deposition of Corporal Louis Smith, FHP Traffic Homicide Investigator, Page 24 lines 8-12. See, Deposition of Christopher Mckinniss, DeSoto County Fire Rescue, Page 19 Lines 19-21.*

2. At the time of the crash ROITIKI TYLER was driving her vehicle at approximately 55-60 MPH, Northbound in the Northbound lane on US 17 (SR 35), approximately 2 miles South of Arcadia, in Desoto County, Florida. *See, Deposition of Corporal Albert Middleton, FHP Crash Investigator, Page 18 lines 8-15; Page 37 lines 23-25; and Page 38 lines1-3. See, Deposition of Corporal David Brunner, FHP Traffic Homicide Investigator, Page 16 lines 2-8. See, Deposition of Corporal Louis Smith, FHP Traffic Homicide Investigator, Page 27 lines 15-17. See, Deposition of Joshua Loren Bell, at Page 41 Lines 3-21*

3. At this same time and place, the Defendant, BELL, was driving his vehicle between approximately 63-65 MPH, Southbound in the Northbound lane on US 17 (SR 35). *See,*

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Deposition of Corporal Albert Middleton, FHP Crash Investigator, Page 18 lines 16-18; and Page 39 lines 10-16; Page 70 Lines 17-19. See, Deposition of Corporal David Brunner, FHP Traffic Homicide Investigator, Page 16 lines 9-18; and Page 33 Lines 2-15. See, Deposition of Corporal Louis Smith, FHP Traffic Homicide Investigator, Page 27 lines 18-24, Page 92 lines 13-16. See, Deposition of Joshua Loren Bell, at Page 41 Lines 3-21.

4. In this area, US 17 (SR 35) consisted of two (2) lanes, one (1) Northbound lane and one (1) Southbound lane. *See, Deposition of Corporal Albert Middleton, FHP Crash Investigator, Page 13 lines 8-18. See, Deposition of Corporal David Brunner, FHP Traffic Homicide Investigator, Page 13 lines 20-24. See, Deposition of Corporal Louis Smith, FHP Traffic Homicide Investigator, Page 24 line 25; Page 25 lines 1-25, Page 26 lines 1-23. See, Deposition of Heather Winters at Page 70 lines 12-16 and 20-22. See, Deposition of Joshua Loren Bell, at Page 44 Lines 10-16.*

5. There was road construction ongoing in the "area" where the crash occurred. However, the construction was not on road where the crash occurred. That part of the road was the same. What were being constructed were two (2) new Northbound lanes. At the time of the crash the two (2) new Northbound lanes were not yet opened. Once the two (2) new Northbound lanes were completed, the two (2) existing lanes would have been converted into two (2) Southbound lanes. However, this had not yet occurred. *See, Deposition of Corporal Albert Middleton, FHP Crash Investigator, Page 13 lines 19-25; and Page 14 lines 1-25; Page 15 line 1; and Page 16 lines 3-24; Page 70 lines 23-25; Page 71 lines 1-10; See, Deposition of Corporal Louis Smith, FHP Traffic Homicide Investigator, Page 24 line 25; Page 25 lines 1-25, Page 26 lines 1-23 . See, Deposition of Joshua Loren Bell, at Page 44 Lines 17-25; Page 45 Lines 1-8.*

6. The speed limit on the road is 60 MPH. Based upon the information downloaded from the Defendant, BELL'S air bag computer control module he was speeding at the time of the

crash. *See, Deposition of Corporal Albert Middleton, FHP Crash Investigator, Page 37 lines 23-25; and Page 38 lines 16-18. See, Deposition of Corporal David Brunner, FHP Traffic Homicide Investigator, Page 16 lines 19-21. See, Deposition of Corporal Louis Smith, FHP Traffic Homicide Investigator, Page 92 lines 13-16, and Page 93 lines 2-7.*

7. Prior to the crash, the Defendant, BELL, moved to his left, into the Northbound lane of travel to pass several vehicles driving Southbound that were ahead of him. *See, Deposition of Corporal Albert Middleton, FHP Crash Investigator, Page 19 lines 19-25; Page 20 lines 1-17; and Page 21 lines 3-16. See, Deposition of Heather Winters at Page 55 Lines 14-24; Page 71 Lines11-25; Page 72 Lines 1-8. See, Deposition of Joshua Loren Bell, at Page 46 Lines 5-13; Page 47 Lines 2-25; Page 48 Lines 1-8 and 13-22; Page 49 Lines 8-15; Page 95 Lines 23-25; and Page 96 Lines 1-19.*

8. After doing so, the Defendant, BELL, failed to move back to his right, into the Southbound lane of travel. *See, Deposition of Corporal Albert Middleton, FHP Crash Investigator, Page 19 lines 19-25; Page 20 lines 1-17 and Page 21 lines 3-16. See, Deposition of Heather Winters at Page 55 Lines 14-24; Page 72 Lines 9-15. See, Deposition of Joshua Loren Bell, at Page 46 Lines 5-13; Page 47 Lines 2-25; Page 48 Lines 1-8 and 13-22; Page 49 Lines 8-15; Page 95 Lines 23-25; and Page 96 Lines 1-19.*

9. The Defendant, BELL, remained in the Northbound lane of travel, driving Southbound when he looked down inside the car to look at his radio and took his eyes off the road and when he looked up he saw headlights coming at him and collided "head on" with ROITIKI TYLER'S vehicle. *See, Deposition of Corporal Albert Middleton, FHP Crash Investigator, Page 19 lines 19-25; Page 20 lines 1-17 and Page 21 lines 3-16. See, Deposition of Corporal David Brunner, FHP Traffic Homicide Investigator, Page 15 lines 11-25; Page 16 Line 1. See, Deposition of Corporal Louis Smith, FHP Traffic Homicide Investigator, Page 46*

lines 1-23. See, Deposition of Heather Winters at Page 55 Lines 14-24; Page 72 Lines 16-25; Page 73 Lines 1-18. See, Deposition of Joshua Loren Bell, at Page 46 Lines 5-13; Page 47 Lines 2-25; Page 48 Lines 1-8 and 13-22; Page 49 Lines 8-15; Page 52 Line 25; Page 53 Lines 1-2; Page 54 Lines 23-25; Page 55 Lines 1-5; Page 124 Lines 16-25; and Page 125 Lines 1-6.

10. The impact occurred right in the middle of the Northbound lane of travel because the Defendant, BELL, was in the wrong lane of travel. *See, Deposition of Corporal Albert Middleton, FHP Crash Investigator, Page 19 lines 9-18. See, Deposition of Corporal David Brunner, FHP Traffic Homicide Investigator, Page 13 lines 3-10 and 25; Page 14 Lines 1-15; See, Deposition of Corporal Louis Smith, FHP Traffic Homicide Investigator, Page 17 lines 6-15, Page 27 lines 6-14, Page 41 lines 18-25; Page 60 Lines 3-13. See, Deposition of Joshua Loren Bell, at Page 52 Lines 10-15.*

11. The force of the two (2) vehicles colliding "head on" each doing approximately 60 MPH (the equivalent of a 120 MPH impact) was devastating. *See, Deposition of Corporal Albert Middleton, FHP Crash Investigator, Page 41 lines 12-20. See, Deposition of Corporal Louis Smith, FHP Traffic Homicide Investigator, Page 82 lines 19-25, Page 83 lines 1-4.*

12. The impact caused ROITIKI TYLER'S vehicle to rotate and flip over and crush the roof of the vehicle down. *See, Deposition of Corporal David Brunner, FHP Traffic Homicide Investigator, Page 21 lines 3-25; Page 22 Lines 1-5. See, Deposition of Corporal Louis Smith, FHP Traffic Homicide Investigator, Page 73 lines 15-24, Page 83 Lines 1-10; Page 84 lines 3-13.*

13. Both vehicles were a total loss.

14. ROITIKI TYLER died from blunt force trauma resulting from the crash. *See, Deposition of Corporal Louis Smith, FHP Traffic Homicide Investigator, Page 91 lines 11-*

25.Page 92 lines 1-5. See, Deposition of Christopher Mckinniss, DeSoto County Fire Rescue, Page 19 Lines 19-21.

15. ROITIKI TYLER'S 11 year old son, MICKEL WILLIAMS, JR., who was seated in the front passenger seat with her at the time of the crash survived, but had to witness the death of his mother. *See, Deposition of Corporal Albert Middleton, FHP Crash Investigator, Page 18 lines 19-25. See, Deposition of Corporal Louis Smith, FHP Traffic Homicide Investigator, Page 22 lines 11-19.*

16. At the time of the crash ROITIKI TYLER and her son, MICKEL WILLIAMS, JR., were driving home from the airport after just returning from a trip to Iowa to watch her older son, DEVONTREA TYLER, play in a college football game for the college he was attending there at the time.

17. The Defendant, GIBBS & REGISTER, is a civil construction company with its main office located in Winter Garden, Orange County, Florida. *See, Deposition of John Rodriguez, Vice President of Operations for Gibbs & Register at Page 9 Lines15-20. See, Deposition of Joshua Loren Bell, at Page 16 Lines 17-21.*

18. The Defendant, GIBBS & REGISTER, is engaged in building civil construction projects located throughout the State of Florida. *See, Deposition of John Rodriguez, Vice President of Operations for Gibbs & Register at Page 9 Lines 21-25; Page10 Line 1.*

19. The Defendant, BELL, did not work at the Defendant, GIBBS & REGISTER'S, main office, but work in the field at whichever construction project he was working on at the time. *See, Deposition of Joshua Loren Bell, at Page 16 Lines 22-25; Page 17 Lines 1-4.*

20. One such construction project was a road widening highway construction project known as the "Burnt Store Road" project, located in Punta Gorda, Charlotte County, Florida.

See, Deposition of John Rodriguez, Vice President of Operations for Gibbs & Register at Page 16 Line25; Page 17 Lines 1-11.

21. At the time of the crash, the Defendant, BELL, was employed by the Defendant, GIBBS & REGISTER, as a construction supervisor on the Burnt Store Road construction project. *See, Deposition of John Rodriguez, Vice President of Operations for Gibbs & Register at Page 17 Lines 6-11; Page 26 Lines 10-20. See, Deposition of Joshua Loren Bell, at Page 17 Lines 5-16.*

22. As part of his employment compensation package the Defendant, BELL, received $750.00 as a monthly auto allowance payment from the Defendant, GIBBS & REGISTER, which covered the cost of the monthly payment for his work truck and his auto insurance. *See, Deposition of Heather Winters at Page 31 Lines 10-25; See, Deposition of John Rodriguez, Vice President of Operations for Gibbs & Register at Page 42 Lines 20-25.* See, *Deposition of Joshua Loren Bell at Page 23, Lines 5-22*

23. The Defendant, GIBBS & REGISTER, specifically required the Defendant, BELL, to insure this work truck "for business purposes" under a commercial insurance policy and to list GIBBS & REGISTER, as an additional insured on this commercial insurance policy, which he did. *See, Deposition of Heather Winters at Page 32 Lines 1-16; See, Deposition of John Rodriguez, Vice President of Operations for Gibbs & Register at Page 44 Lines 1-25; Page 46 Lines 4-10; Page76 Lines 18-25; and Page 77 Lines 1-3.* See, *Deposition of Joshua Loren Bell at Page 23, Lines 23-25; Page 24 Lines 1-10; Page 37 Lines 10-20. See also, Declarations page from the Defendant, BELL'S Auto Insurance listing GIBB'S & REGISTER as an additional insured; Exhibit 2 at Page 40 Lines 15-18.*

24. The Defendant, GIBBS & REGISTER, provided the Defendant, BELL, with a company credit card to charge work related expenses on such as his hotel bills when he was

staying out of town on company business. *See, Deposition of Joshua Loren Bell at Page 25 Lines 6-19.*

25. The company would then pay the charges on the bills upon receipt. *See, Deposition of Heather Winters at Page 42 Lines 11-21.* See *Deposition of Joshua Loren Bell, at Page 26 Lines 7-17. See also, copies of Hotel Bills reflecting Sunday night stays paid by GIBB'S & REGISTER.*

26. The Defendant, GIBBS & REGISTER, also provided the Defendant, BELL, with a company gas credit card to charge gas on for work related trips, such as when he was driving out of town from his home in Debary, Volusia County, Florida to the hotel in Punta Gorda, Charlotte County, Florida, when he was staying out of town on company business. *See, Deposition of Heather Winters at Page 32 Lines 1-3; Page 33 Lines 17-24; Page 34 Lines 1-11. See, Deposition of John Rodriguez, Vice President of Operations for Gibbs & Register at Page 50 Lines 20-25; Page 51 Lines 1-3. See, Deposition of Joshua Loren Bell, at Page 26 Lines 17-25; Page 27, Lines 1-2, Page 85 Lines 8-13.*

27. The company would then pay the charges on the gas credit card bills upon receipt. S*ee, Deposition of Joshua Loren Bell, at Page 26 Lines 17-25; Page 27 Lines 1-2.*

28. The Defendant, GIBBS & REGISTER did not reimburse the Defendant, BELL, for direct mileage while he was driving his truck for work because they considered it to be included as part of his monthly auto allowance and because they paid for his business gas usage. *See, Deposition of Heather Winters at Page 33 Lines 8-11.*

29. However, the Defendant, GIBBS & REGISTER required the Defendant, BELL, to keep a log of his business mileage and personal mileage so that they could allocate between business and personal mileage and allocate any personal mileage to him for tax purposes. *See, Deposition of Heather Winters at Page 34 Lines 12-25; Page 35 Lines 1-25; Page 36 Lines 1-4.*

See, Deposition of John Rodriguez, Vice President of Operations for Gibbs & Register at Page 63 Lines 22-25; Page 64 Lines 1-9, Page 65 Lines 2-8; Page 73 Lines 3-10; Page 74 Line 25; Page 75 Lines 1-10 and 13-21.

30. The Defendant, BELL'S mileage log which he turned into the Defendant, GIBB'S & REGISTER, listed all his "long distance out of town driving trips" like his trip to Punta Gorda, Charlotte County, Florida as "Business trips" for "Business purposes". *See, Deposition of John Rodriguez, Vice President of Operations for Gibbs & Register at Page 65 Lines 9-25; Page 66 Lines 1-25; Page 67 Lines 1-25; Page 68 Lines 1-25;Page 69 Lines 1-25; Page 70 Lines 1-25; Page 71 Lines 1-25; Page 72 Lines 1-6.*

31. The Defendant, GIBB'S & REGISTER, never objected to the Defendant, BELL'S mileage logs and never indicated that they were wrong.

32. The Defendant, BELL, lived in Debary, Volusia County, Florida. *See, Deposition of Heather Winters at Page 29 Lines 17-23; See, Deposition of John Rodriguez, Vice President of Operations for Gibbs & Register at Page 64 Lines 21-25, Page 65 Line 1. See, Deposition of Joshua Loren Bell, at Page 15 Lines 10-14.*

33. The distance from Debary, Florida to Punta Gorda, Florida is approximately 180 miles and takes approximately 3 ½ hours to drive from one city to the other. *See, Deposition of Joshua Loren Bell, at Page 19 Lines 21-25; Page 20 Lines 1-4.*

34. The trip from the Defendant, BELL'S home in Debary, Florida to the job site in Punta Gorda, Florida was considered by the Defendant, GIBB'S & REGISTER to be a "business trip" being made for a "company purpose", *See, Deposition of Heather Winters at Page 34 Lines 12-15; Page 36 Lines 5-25; Page 37 Lines 1-2:* "He needed to be at his job". *"All our superintendents have to travel". "They consider that business mileage". "That mileage is not considered personal". "That would be a business purpose trip". "Not a personal trip". "So*

specifically the trip that he was engaged in at the time of the crash was a business purpose trip- correct". "Not a personal trip". See also, Deposition of John Rodriguez, Vice President of Operations for Gibbs & Register at Page 59 Lines 20-25; Page 60 Lines 1-10.

35. Due to the distance between Debary, Florida and/or Winter Garden, Florida to Punta Gorda, Florida, the Burnt Store Road construction jobsite was considered to be an "out of town job" by the Defendant, GIBBS & REGISTER. See, *Deposition of Heather Winters, at Page 36, Line 21. See, Deposition of John Rodriguez, Vice President of Operations for Gibbs & Register at Page 79 Lines 8-25;Page 80 Lines 1-12; and Page 82 Lines 5-11.*

36. The Defendant, BELL, was working on this construction project for approximately six (6) months prior to the crash. *See, Deposition of John Rodriguez, Vice President of Operations for Gibbs & Register at Page 64 Lines 17-20. See, Deposition of Joshua Loren Bell, at Page 18 Lines 6-11.*

37. Work on the project was generally five (5) days a week, Monday through Friday. Work generally started early in the morning at approximately 7:00 AM until approximately 5:30 PM. *See, Deposition of John Rodriguez, Vice President of Operations for Gibbs & Register at Page 82 Lines 12-24; and Page 84 Lines 15-21.*

38. Many of the workers on the "Burnt Store Road" construction project lived "out of town". Due to the distance from the worker's homes to the construction project job site, in order to lessen the travel time back and forth from their homes to the construction project job site, and due to the early start time, for safety reasons, and specifically to increase productivity for the company, the Defendant, GIBBS & REGISTER, specifically authorized, approved and paid for their employees, including the Defendant, BELL, to stay in a hotel in Punta Gorda, Charlotte County, Florida, overnight, during the work week days (Monday night through Thursday night). *See, Deposition of John Rodriguez, Vice President of Operations for Gibbs & Register at Page*

87 Lines 18-23; Page 88 Lines 1-25; Page 89 Lines 1-6. See, Deposition of Joshua Loren Bell, at Page 20 Lines 10-25; Page 21 Lines 1-25; Page 24 Lines 11-25; Page 25 Lines 1-5.

39. For the same reasons, for safety and specifically to increase productivity for the company, the Defendant, GIBBS & REGISTER, also specifically authorized, approved and paid for their employees, including the Defendant, BELL, to travel from their homes to Punta Gorda, Charlotte County, Florida, on any given Sunday, and to stay in a hotel in Punta Gorda, Charlotte County, Florida, overnight, so as to be close to the job site ready to start work early Monday morning the next day. *See, Deposition of Heather Winters at Page 39 Lines 8-15;Page 40 Lines 23-25; Page 41 Lines 1-25; Page 42 Lines 1-4, Page 98 Lines 23-25; Page 99 Lines 1-14 . See, Deposition of John Rodriguez, Vice President of Operations for Gibbs & Register at Page 90 Lines 17-25; Page 95 Lines16-25; Page 96 Lines 1-25; Page 97 Lines 1-25; Page 98 Lines 1-25; Page 99 Lines 1-2; and Lines 18-25, Page 100 Lines 1-20; Page 110 Lines 6-25; Page 111 Lines 1-25; Page112 Lines 1-11 and Lines 18-25; Page 113 Lines 1-11; Page 114 Lines 20-25; and Page 115 Lines 1-4 . See, Deposition of Joshua Loren Bell, at Page 20 Lines 10-25; Page 21 Lines 1-25; Page 24 Lines 11-25; Page 25 Lines 1-5; Page 109 Lines 12-23; Page 135 Lines 3-7; Page 143 Lines 22-25; Page 144 Lines 1-13; Page 149 Line 25; and Page 150 Lines 1-18.* See also, *Defendant, BELL'S Affidavit, Page 5.*

40. The Defendant, GIBB'S & REGISTER, was the one that performed the function of making the hotel reservations for the Defendant, BELL, for his "out of town" travel and overnight stays as well as for all other employees. *See, Deposition of Heather Winters at Page 40 Lines 13-22; Page 42 Lines 2-4.*

41. The Defendant, GIBB'S & REGISTER, ultimately paid the bills for their employee's "out of town" hotel stays. *See, Deposition of Heather Winters at Page 42 Lines 11-*

21. See, Deposition of John Rodriguez, Vice President of Operations for Gibbs & Register at Page 118 Lines 5-7, and 8-25 and Page 119 Lines 4-10.

42. This "arrangement" had been specifically authorized, approved and ongoing for approximately six (6) months prior to the crash. See, *Deposition of Joshua Loren Bell at Page 29, Line 25; Page 131, Lines 23-25; Page 132 Lines 1-4; Page 143 Lines 22-25; and Page 144 Lines 1-13.* See also, the Defendant, BELL'S hotel bills. See also, *Deposition of Heather Winters at Page 98 Lines 23-25; Page 99 Lines 1-14. See, Deposition of John Rodriguez, Vice President of Operations for Gibbs & Register at Page 115 Lines 14-25; Page 116 Lines 6-25; Page 117 Lines 1-24.*

43. At the time of the crash the Defendant, BELL, was driving from his home located in Debary, Volusia County, Florida to a hotel located in Punta Gorda, Charlotte County, Florida. *See, Deposition of Heather Winters at Page 29 Lines 17-23;Page 30 Lines 1-3; Page 101 Lines 19-25; Page 102 Lines 1-9 . See, Deposition of John Rodriguez, Vice President of Operations for Gibbs & Register at Page 115 Lines 6-13. See, Deposition of Joshua Loren Bell, at Page 29 Lines 8-21.*

44. The Defendant, BELL, was going to stay overnight Sunday evening so as to be in town ready to start work early the following Monday morning. *See, Deposition of Heather Winters at Page 30 Lines 4-7; Page 101 Lines 19-25; Page 102 Lines 1-9. See, Deposition of John Rodriguez, Vice President of Operations for Gibbs & Register at Page 115 Lines 6-13. See, Deposition of Joshua Loren Bell, at Page 29 Lines 8-21; Page 33 Lines 3-13.*

45. The Defendant, BELL, had made this same trip on numerous prior occasions in the past six (6) months, all of which had been specifically authorized and approved by the Defendant, GIBBS & REGISTER. *See, Deposition of John Rodriguez, Vice President of Operations for Gibbs & Register at Page 118 Lines 8-25; Page119 Lines 4-10; and Page 121*

Lines 15-25; Page 122 Lines 1-25; Page 123 Lines 1-5. See, Deposition of Joshua Loren Bell, at Page 29 Lines 8-25; Page 30 Lines 1-25; Page 31 Lines 1-25; Page 32 Lines 1-6; Page 104 Lines 20-25; Page 105 Lines 1-8; Page 109 Lines 12-23; and Page 130 Lines 23-25; and Page 131 Lines 1-4.

46. Unfortunately, on this occasion the Defendant, BELL, never made it, and crashed "head on" into the vehicle being driven by ROITIKI TYLER, killing her instantly.

47. The Defendant, BELL, never deviated during the business trip to perform any personal errand. See *Deposition of Joshua Loren Bell, Page 33, Lines 13-17; and Page 146, lines 16-25; Page 146 Lines 24-25; Page 147 Lines 1-6.*

48. The Defendant, BELL'S sole reason for being on the road driving to Punta Gorda, Florida, at the time of the crash, was to serve the business purposes of his employer, GIBB'S & REGISTER. See, *Deposition of Joshua Loren Bell, Page 33, Line 25; Page34 Lines 1-16.*

49. It should be noted that the Defendant, BELL, was also seriously injured in the crash and incurred significant medical bills for his care and treatment. *See, Deposition of Joshua Loren Bell, at Page 59 Lines 10-17; Page 74 Lines 17-23.* See also, *Defendant, BELL'S Response to Requests for Admissions, Page 2.*

50. Due to the injuries he suffered in the crash the Defendant, BELL, was out of work for approximately three (3) months and lost significant wages as well. *See, Deposition of Joshua Loren Bell, at Page 60 Lines 19-22; Page 78 Lines 19-23; and Page 79 Lines 3-7.* See also, *Defendant, BELL'S Response to Requests for Admissions, Page 2.*

51. As a result, the Defendant, BELL, made a claim for Workers Compensation Benefits. See, *Defendant, BELL'S Response to Requests for Admissions, Page 2.*

52. The Defendant, GIBBS & REGISTER, was aware that the Defendant, BELL made a claim for Workers Compensation Benefits and did not object to, contest or otherwise

oppose the Defendant, BELL"S claim for Workers Compensation benefits. See, *Deposition of Heather Winters, at Page 18 Lines 12-25; Page 19 Lines 1-25; Page 20 lines 1-25; Page 21 Lines 1-19; Page 23 lines 1-7; Page 25 Lines 16-23; Page 45 Lines 20-25; Page 46, Lines 3-8 and 24-25; and Page 47 Lines 1-4; Page 48 Lines 2-7; Page 51 Lines 7-14; Page 59 Lines 4-25; Page 60 Lines 1-9. See, Deposition of Joshua Loren Bell, at Page 104 Lines 5-9..*

53. The Defendant, BELL, received payment of Workers Compensation benefits for the injuries suffered in the crash and for his lost wages. See, *Deposition of Heather Winters, at Page 46 Lines 9-23. See, Deposition of Joshua Loren Bell, at Page 60 Lines 19-25; Page 78 Lines 19-23; Page 79 Lines 3-7.*

54. The Defendant, GIBB'S & REGISTER, acknowledged and accepted that such benefits are only paid or payable if an employee is injured while "on the job" or "in the course and scope of their employment". See, *Deposition of Heather Winters, at Page 51 Lines 22-25; Page 52 Line 1; Page 53 Lines 2-16; Page 59 Lines 4-25; Page 60 Lines 1-9; Page 66 Lines 8-1; Page 68 Lines 6-20. See, Deposition of Joshua Loren Bell, at Page 104 Lines 10-19.*

55. The Defendant, BELL, steadfastly agrees with the Plaintiff's position and maintains that at the time of the crash he was within the "course and scope of employment" for Defendant, GIBBS & REGISTER. See also *Deposition of Joshua Loren Bell, Page 103, Lines 15-20; Page 107 Lines 17-22; and Lines 23-25; Page 108 Lines 1-3; Page 115, Lines 6-20; and Page 138 Lines 4-16. See, Defendant, BELL'S Affidavit, Page 5;* See also, *Defendant, BELL'S Response to Plaintiff's Request for Admissions, Responses to Questions 2, 3, 4, 8, 9, 10, 11, 12, 14, 15, 16, 17, 18, 21, 22, 23, 24.*

MEMORANDUM OF LAW

POINT ONE

STANDARD OF REVIEW FOR SUMMARY JUDGMENT

A party to a civil suit is entitled to summary judgment when the pleadings, depositions, answers to interrogatories and admissions on file together with any affidavits filed show that there are no genuine issues of material facts in dispute and that the moving party is entitled to a judgment as a matter of law. Fla. R. Civ. P., Rule 1.510(c); ***Moore v. Morris***, 475 So. 2d 666 (Fla. 1985); ***Jones v. Directors Guild of America, Inc.,*** 584 So. 2d 1057 (Fla. 1st DCA 1991); ***Snyder v. Cheezem Dev. Corp.***, 373 So. 2d 719 (Fla. 2d DCA 1979); and ***Mejiah v. Rodriguez***, 342 So. 2d 1066 (Fla. 3d DCA 1977).

The burden is on the moving party to make this initial showing. ***Visingardi v. Tirone***, 193 So. 2d 601 (Fla. 1966).

Once the moving party shows that there are no issues of material fact in dispute, then the burden shifts to the non-moving party to demonstrate why summary judgment is improper. If the non-moving party fails to meet its burden, then the entry of summary judgment is proper. ***Freeman v. Fleet Supply, Inc.,*** 565 So. 2d 870 (Fla. 1st DCA 1990).

POINT TWO

VICARIOUS LIABILITY

Vicarious liability is the imputation of fault on one party that is free from blame, based upon the fault of another party, due to the relationship between the two parties. ***American Home Assurance Co. v. National Railroad Passenger Corp.,*** 908 So. 2d 467 (Fla. 2005). See also, Restatement (Third) of Torts: Apportionment of Liability § 13 (2000).

The Florida Supreme Court in ***American Home Assurance Co.*** elaborated on the doctrine when they said:

> Thus, the vicariously liable party is liable for the entire share of the fault assigned to the active tortfeasor. The vicariously liable party has not breached any duty to the plaintiff; its liability is based solely on the legal imputation of responsibility for another party's tortious acts. The vicariously liable party is liable only for the amount of liability apportioned to the tortfeasor.

Under the doctrine of respondeat superior, employers are vicariously liable to third parties for damages and injuries caused by their employee's negligent acts when committed "within the course and scope" of their employment. ***Bennet v. Godfather's Pizza, Inc.,*** 570 So. 2d 1351 (Fla. 3d DCA 1990).

Thus, if the Defendant, BELL was acting "within the course and scope" of his employment at the time of the crash, the Defendant, GIBBS & REGISTER, is liable, as a matter of law, for his actions in causing the crash.

Thus, the question that we must now answer is whether the Defendant, BELL, was acting "within the course and scope" of his employment at the time of the crash?

POINT THREE

FLORIDA LAW ON COURSE AND SCOPE OF EMPLOYMENT AND OUT OF TOWN TRAVEL

An employee is generally considered to be acting "within the course and scope" of his employment if his conduct was the kind which:

1. the employee is hired to perform;
2. the conduct substantially occurred within the time and space limits authorized or required by the work to be performed; and
3. was activated, at least in part, by a purpose to serve the employer.

Sussman v. Florida East Coast Properties, Inc., 557 So. 2d 75 (Fla. 3d DCA 1990).

A. THE GOING AND COMING RULE:

Normally, an employee who is traveling from his home to his employer's office or normal place of business is not considered to be in the "course and scope" of his employment

while he is driving to work. The same is true when he is returning home from work. This is generally known as the "going and coming rule". See, ***Swartz v. McDonald's Corp.***, 788 So.2d 937 (Fla. 2001); and ***Grillo v. Gorney Beauty Shopes Co.*** 249 So.2d 13 (Fla. 1971)..

B. THE SPECIAL ERRAND OR DUAL PURPOSE TRIP EXCEPTION:

There are several well recognized exceptions to the "going and coming rule" that are applicable in this case. The first exception is the "special errand" or "dual purpose trip" which holds that when the "going or coming trip" also serves an additional or concurrent purpose to benefit the employer, it is considered a "business trip" and the employee will be considered to be "in the course and scope" of his employment. See, ***Swartz, Supra; Gilbert v. Publix Supermarkets, Inc.***, 790 So.2d 1057, (Fla.2001); and ***Alvarez v. Sem-Chi Rice Products Corp.***, 861 So.2d 513 (Fla 1st DCA 2003).

Thus, even assuming arguendo that the Defendant, BELL's trip fell within the "going and coming" rule because he was "on his way to work" at the time of the crash, it would fit within the "special errand" or "dual purpose trip" exception because he was also traveling "out of town" on a Sunday, so as to be "in town" and ready to start work at the jobsite early the following day and he was going with his employer's express permission, consent and approval, and for their benefit.

C. THE TRAVELING EMPLOYEE EXCEPTION:

The second exception to the "going and coming rule" is where the employee's work entails "out of town" travel away from the employer's premises. This is known as the "traveling employee exception". In all cases, where an employee has to travel out of town for business, the employee is considered to be acting within the "course and scope of his employment, at all times, unless he is engaged in a "distinct departure" for a non-essential personal errand. See, ***Swartz, Supra; and Grillo, Supra. See also, McCormick v. State-Auditor General/Division of Risk***

Management, 772 So.2d 612 (Fla. 1st DCA 2000); ***N. & L. Auto Parts Co. v. Doman***, 111 So. 2d 271 (Fla. 1st DCA 1959); and ***Griffith v. Budget Rent-A-Car Systems, Inc.***, 692 So. 2d 294, 295 (Fla. 3d DCA 1997).

The "traveling employee's rule" has been uniformly applied by Court's in the worker's compensation context as well as in cases of third-party injuries. *See, e.g.*, ***North American Training Academy v. Grooms***, 476 So. 2d 753 (Fla. 1st DCA 1985) (traveling employee rule applied in worker's compensation context, finding employee within course and scope of employment at the time of accident in which employee was injured); ***Saudi Arabian Airlines Corp.***, 438 So. 2d 116 (Fla. 1st DCA 1983) (traveling employee rule applied in third-party injury context, finding employee within course and scope of employment at the time of accident in which employee injured a third person). Moreover, Courts of Appeal have specifically held that cases arising in the worker's compensation context are "instructive in determining the limits of the common law doctrine of respondeat superior." ***Saudi Arabian***, at Page 122.

In ***McCormick,*** the claimant was an auditor. The claimant lived in Tampa and worked out of the State Auditor General's Tampa office. However, the claimant spent the majority of her time out of the office doing field audits. On the day of her accident, the claimant was conducting a field audit in Bushnell. This was a 136 mile round trip from her home. The claimant had completed work and was driving home when she was involved in an accident. The claimant Ms. McCormick made a claim for compensation which was denied. The trial Court held that the only way she would be entitled to compensation was if she was driving between jobs, not coming home from one. The First District Court disagreed and held that the traveling employee exception applied because she was regularly required to travel to audit sites in connection with her employment. The First District reached this decision even though she was traveling to her

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home at the time. See also, ***Standard Distribution Co. v. Johnson***, 445 So.2d 663 (Fla. 1st DCA 1984).

In ***N. & L. Auto Parts Co.*** the First District Court held that a traveling employee on a business trip will be considered to be acting within the course and scope of his employment:

> The general rule is that an employee whose work entails travel away from the employer's premises is *within the course of his employment at all times during the trip other than when there is a distinct departure for a non-essential personal errand. Injuries incurred during such travel and while attending to the normal creature comforts and reasonably comprehended necessities, as distinguished from those incurred in the course of amusement ventures* are usually held to be compensable. Compensation in such areas is predicated on the premise that these acts do not take the employee out of the scope of employment because they are necessary to his health and comfort ... and indirectly if not directly benefit the employer; that such acts, therefore, are not in fact deviations from the course of employment.

It should be noted that it is immaterial whether the employee had other means of accomplishing the task, (such as leaving early Monday morning and not going the night before) so long as the employee's conduct was authorized by the employer. (BELL'S trip was specifically authorized and approved by GIBB'S & REGISTER). Also relevant to this inquiry is whether the trip would have been made absent a business purpose. (BELL would never have been driving to Punta Gorda, but for his need to do so for business). Likewise, when out of town travel is an essential part of the job, then the "going and coming rule" does not apply. See, ***Florida Hospital v. Garabedian*** 765 So.2d 987 (Fla. 1st DCA 2000); and ***Schoenfelder v. Winn & Jorgensen, P.A.,*** 704 So.2d 136 (Fla. 1st DCA 1997).

In ***North American Training***, the employee was "en route from his home to the house of a prospective client of his employer" when the employee was killed in an automobile accident. A substantial part of the employee's job included conducting sales interviews at the homes of prospective clients, thus necessitating travel to the clients' homes. On certain days, the employee

would be required to go the employer's office first, but on the day in the question, the employee was headed to a client's home.

The compensation court in ***North American*** found that the employee was within the course and scope of his employment at the time of the accident. The employer appealed arguing that the compensation court had erred in its holding because the employee had not been compensated for travel expenses. The First District rejected the employer's position, specifically noting that compensation for travel expenses is not a prerequisite to a finding that an employee was within the course and scope of employment at the time of the travel. The First District set out the rationale for its holding that an employer may not point to the lack of compensation for travel expenses and time to defeat liability.

Courts have held that traveling employees are deemed to be in the continuous course and scope of their employment while traveling. This is so even though they may not be performing actual work or business at the time. This rule also extends to the traveling employee performing normal and necessary activities of travel such as driving and eating. See, ***Leonard v. Dennis***, 465 So. 2d 538 (Fla. 2nd DCA 1985). See also, ***Liberty Mutual Ins. Co. v. Elec. Systems, Inc.,*** 813 F.Supp. 806 (S.D. Fla. 1993); ***Longo v. Associated Limo***, 871 So. 2d 943 (Fla. 1st DCA 2004) (limousine driver with "no fixed site of employment" held a traveling employee); ***Advanced Diagnostics v. Walsh***, 437 So. 2d 778 (Fla. 1st DCA 1983) (medical supply salesman held to be a traveling employee where travel to client/customer offices was essential part of job); ***Schoenfelder v. Winn & Jorgensen***, 704 So. 2d 136 (Fla. 1st DCA 1997) (lawyer in the course and scope of employment while en route from home to deposition).

In ***Leonard***, the employee got into an accident when he traveled to a restaurant "located two to four miles from the motel where they were staying". The Second District Court held that the traveling employee going "four miles out of way in order to obtain dinner at a restaurant and

was injured in automobile accident while on the trip did not establish that the employee was on personal errand at time of accident." See, ***Leonard, Supra*** at Page 538. See also, ***Gray v. Eastern Airlines, Inc.,*** 475 So.2d 1290 (Fla. 1st DCA 1985) (where an employee was exercising at a nearby gym facility and suffered injuries while he was traveling on behalf of his employer, it was still considered within the course and scope of his employment since "exercise at a nearby gym facility should be regarded as necessary...for personal health and comfort"). See also, ***Jean Barnes Collections v. Elston***, 413 So.2d 797 (Fla. 1st DCA 1982) (when an employee was asked by the employer to travel in order to obtain further training, and suffered an injury "as a result of an attack and rape...the injury was deemed to be one arising out of and in the course of her employment". The injury and was a compensable injury under the "traveling employee rule" because there was "no evidence to show a personal errand by the claimant at the time of her rape.".

D. <u>THE DISTINCT DEPARTURE TEST:</u>

To determine whether an act by an employee traveling on a business trip is within the course and scope of his employment courts have used what is called the "distinct departure test". ***Howland v. Hertz Corp.,*** 431 F.Supp.2d 1241 (M.D. Fla. 2006). An employee traveling on a business trip will be considered to be acting within the course and scope of his employment when:

> The general rule is that an employee whose work entails travel away from the employer's premises is within the course of his employment at all times during the trip other than when there is a *distinct departure for a non-essential personal errand. Injuries incurred during such travel and while attending to the normal creature comforts and reasonably comprehended necessities, as distinguished from those incurred in the course of amusement ventures* are usually held to be compensable. Compensation in such areas is predicated on the premise that these acts do not take the employee out of the scope of employment because they are necessary to his health and comfort ... and indirectly if not

> directly benefit the employer; that such acts, therefore, are not in fact deviations from the course of employment.

See, ***N. & L. Auto Parts Co.***, 111 So. 2d 271.

The "distinct departure test" has been applied not just in the Worker's Compensation context, but also to tort claims in cases involving third parties. In ***Hertz Corp. v. Ralph M. Parsons Co.,*** 292 F.Supp. 108, 110 (M.D. Fla. 1968), *aff'd,* 419 F.2d 783 (5th Cir. 1969) an employee, Nugent, flew into the Orlando Airport on a business trip and rented a car from Hertz so that he could drive to Cape Kennedy. Nugent's employer had "made his plane and motel reservations" but when Nugent arrived he "arranged for the rental of an automobile...for the purpose of transporting himself from the Orlando Airport to the motel." Nugent used a credit card provided by his employer to rent the automobile and "his employer subsequently paid the rental charge." During the drive, Nugent was involved in a head-on collision which resulted in his death, as well as two people in the other car. Four people were also seriously injured in the other car.

Nugent's employer filed a motion for summary judgment, and the trial court held as follows:

> Considering the undisputed evidence on the motion for summary judgment, there is no factual dispute on this issue and that, therefore, the employment issue can be determined as a matter of law in this suit." The trial court found there was "no evidence that Nugent, at the time of the accident, had made any deviation from the business purpose of the trip, nor is there any evidence that he was in Florida for any purpose other than to serve his employer.

In determining whether Nugent was acting within the course and scope of his employment, the court referenced the distinct departure test when it held, "an employee whose work entails travel away from the employer's premises is within the course of his employment at all times during the trip other than when there is a distinct departure for nonessential personal

errands." The court held that, as a matter of law, "Nugent at the time of the accident was acting in the course and scope of his employment."

Therefore, an employee whose work entails traveling away from the employer's premises will remain within the course and scope of his employment at all times unless there is a "distinct departure" for a non-essential personal errand. ***N&L Auto Parts Co.,*** Supra, at p. 72. The distinct departure test was expressly characterized as a general legal principle by the district court in ***Eberhardy v. General Motors Corp.***, 404 F.Supp. 830 (M.D. Fla. 1975) when it held that "further refinements of employment liability law in Florida have established that an employee whose work requires travel away from his employer's premises remains within the scope of his employment, except for non-essential personal errands."

E. <u>DEFENDANT'S TENTH AFFIRMATIVE DEFENSE:</u>

In the case at bar, the Defendant, GIBBS & REGISTER has asserted as their Tenth Affirmative Defense the following:

> Defendant expressly denies that JOSHUA LOREN BELL was within the course and scope of his employment with Defendant at the time of the subject incident and affirmatively asserts that it is not liable for the damages alleged in Plaintiffs' Complaint.

The Defendant, GIBBS & REGISTER'S, Tenth Affirmative Defense is a mere denial of the allegations of Plaintiff's Complaint. It merely denies that their employee, the Defendant, BELL, was within the course and scope of his employment at the time of the subject incident. It is important to note that the Defendant, GIBBS & REGISTER does not assert any "factual basis" that would take the Defendant, BELL'S actions outside the course and scope of his employment. The Defendant, GIBBS & REGISTER does not assert any facts that the Defendant, BELL, committed a "distinct departure" from his employment or that he was engaged in or performing some personal errand at the time. Indeed, it is undisputed that this is not the case.

The Defendant, BELL'S actions and conduct at the time of the crash fit squarely within the course and scope of his employment, for the following reasons:

(1) It was of the kind of conduct that the Defendant, BELL, was hired to perform (out of town travel was a requirement of the job since GIBBS & REGISTER had construction projects all over the State);

(2) The accident occurred substantially "within the time and space limits authorized or required by the work to be performed" (GIBBS & REGISTER specifically consented to, authorized and approved the out of town travel, not just on this trip but on numerous prior occasions);

(3) It was "activated at least in part by a purpose to serve the employer" (to be in town ready to start work early the next morning); and

(4) During the business trip, Defendant, BELL, did not deviate from the purpose of the trip or make a "distinct departure for a non-essential personal errand." (He was driving to his hotel that GIBBS & REGISTER had arranged for and paid for).

As in ***Nugent, supra,*** the Defendant, BELL, at the moment of the crash, was driving in Arcadia, on his way to Punta Gorda, *for no other reason or purpose than to serve his employer*. The Defendant, BELL, was driving to Punta Gorda on a Sunday evening to stay in a hotel in Punta Gorda with the express permission, consent and approval of his employer, the Defendant, GIBBS & REGISTER, so as to be in town ready to start work at the job site in Punta Gorda early the following morning. The, Defendant, BELL, made no distinct departure from his business travel when the accident occurred. The Defendant, BELL, was not engaged in some personal errand. But for his need to be in Punta Gorda, Florida at his employer, the Defendant, GIBBS & REGISTER'S job site, early the following Monday morning, the Defendant, BELL, would never have been driving down US-17 (SR 35) in Arcadia at the time of the crash.

The Defendant, BELL, himself steadfastly agrees with the Plaintiff and maintains that at the time of the crash he was, *at all times,* within the course and scope of employment for Defendant, GIBBS & REGISTER.

Under these facts and circumstances, the Defendant, GIBBS & REGISTER, must be held vicariously liable for the acts of their employee, the Defendant, BELL, since it is clear that he was acting within the course and scope of his employment at the time of the crash.

CONCLUSION

Based upon the forgoing reasons and authorities it is clear that the Defendant, BELL, was in the course and scope of his employment at the time of the crash so as to render the Defendant, GIBBS & REGISTER, vicariously liable for his actions.

WHEREFORE, the Plaintiffs, DEVONTREA TYLER as personal representative of the ESTATE OF ROITIKI TAMERA TYLER, deceased and MICKEL TYLER SR. as father and guardian of his minor son, MICKEL TERMAINE TYLER, JR. respectfully request that this Court enter an Order granting the Plaintiffs' Motion for Partial Summary Judgment and for any other and further relief this Court deems just and proper under the circumstances.

CERTIFICATE OF SERVICE

WE HEREBY CERTIFY that a true and correct copy of the foregoing was furnished via email to: Charles E. McKeon, Esq. (pleadings@mckeonlaw.net, jwilliams@mckeonlaw.net) and Elizabeth C. Tosh, Esq. (elizabeth.tosh@csklegal.com, carlos.morales@csklegal.com, nicole.stevenson@csklegal.com) on this 11 day of **March, 2016.**

Shaked Law Firm, P.A.
19950 West Country Club Drive
Suite 100
Miami, FL 33180
Telephone No.: (305) 937-0191

Joel L. Roth, Esquire
Florida Bar No.: 0373567
Sagi Shaked, Esquire.
Florida Bar No.: 0195863