

SUPREME COURT  
STATE OF FLORIDA  
TALLAHASSEE, FLORIDA

**FILED**

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JAN 11 1999

CLERK, SUPREME COURT

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Chief Deputy Clerk

**TESSANN SWARTZ,**

Petitioner,

v.

**McDONALD'S CORPORATION AND  
CORPORATE SYSTEMS,**

Respondents.

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CASE NUMBER: 94,409

CLAIM NO: 265-35-3261

D/A: 03/01/96

RESPONDENTS' BRIEF ON JURISDICTION

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This is a Petition for Discretionary Review from an Order of the First District Court **of**, Appeal, Tallahassee, FL, Opinion filed 11/12/98.

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PRELIMINARY STATEMENT

The Petitioner, **TESSANN SWARTZ**, shall be referred to herein as the "claimant".

The Respondents, McDONALD'S CORPORATION AND CORPORATE SYSTEMS, shall be referred to herein as the "**E/C**" or by their separate names.

The Judge of Compensation Claims shall be referred to herein as the "**JCC**".

References to **the Record** on Appeal shall be abbreviated by the letter "**V**" and followed by the applicable volume and page number.

References to the Appendix attached hereto shall be referred to by the letter "**A**" and followed by the applicable appendix page number. The Appendix contains the Order of the JCC dated **6/30/97** and the Opinion filed by the First District Court of Appeal on **11/12/98**.

STATEMENT OF THE CASE AND FACTS

The Respondents stipulate to the facts as recited by the Petitioner in her Initial Brief. A more specific reference to the facts will be made during argument.

POINT ON APPEAL

I

WHETHER THE DECISION **OF** THE FIRST DISTRICT COURT OF APPEAL EXPRESSLY AND DIRECTLY CONFLICTS WITH THE DECISION OF THIS HONORABLE COURT IN NIKKO GOLD COAST CRUISES V. GULLIFORD, 448 **So.2d** 1002 (FLA. **1984**), AND COOK V. HIGHWAY CASUALTY CO., 82 **So.2d** 679 (FLA. **1955**).

SUMMARY OF ARGUMENT

The Petition for Discretionary Review should be denied. The decision of the First District Court of Appeal does not expressly and directly conflict with the decisions of this Honorable Court in Nikko Gold Coast Cruises v. Gulliford, 448 **So.2d** 1002 (Fla, **1984**), and Cook v. Highway Casualty Co., 82 **So.2d** 679 (Fla. 1955). The decision below rests upon facts which are not "on all **fours**" with the decisions in Gulliford and Cook, supra. In fact, the decision below is careful to make a factual distinction between the situation in the case at bar and circumstances which led to the decisions in Gulliford and Cook. Therefore, the First District Court of Appeals' decision in the case at bar does not pose a real conflict of opinion and authority which requires the correction of this Court.

ARGUMENT

I

THE DECISION OF THE FIRST DISTRICT COURT OF APPEAL DOES NOT EXPRESSLY AND DIRECTLY CONFLICT WITH THE DECISIONS OF THIS HONORABLE COURT IN NIKKO GOLD COAST CRUISES V. GULLIFORD, 448 **So.2d** 1002 (FLA. 1984), AND COOK V. HIGHWAY CASUALTY CO., 82 **So.2d** 679 (FLA. 1955).

The Petitioner seeks discretionary or "conflict" jurisdiction from this Honorable Court based upon Article V, Sec. **3(b)(3)**, Fla. Const., which provides:

"(b) JURISDICTION - THE SUPREME COURT: . . .(3) may review any decision of a District Court of Appeal. . .**that** expressly and directly conflicts with a decision of another District Court of Appeal or of the Supreme Court on the same question of law."

In order to properly apply the principles of jurisdiction contained within Article V, Sec. **3(b)(3)**, Fla. Const., we must explore the historical development of this Section and the intent of the framers and the adopters of this language. Prior to the amendment of Article V, of the Fla. Const. **occurring** in 1956, the Florida **Supreme** Court was experiencing an almost intolerable congestion of cases. Lake v. Lake, 103 **So.2d** 639, (Fla. 1958). To correct this problem, the Florida Bar, through its legislative committee, committed a judicial council which studied the problem and designed a system to modernize the appellate process. Id. at p. 641. The end result was the 1956 amendment to Article V, of the Fla. Const. which established the District Courts of Appeal. Id. In order to justify the expense of this new Court system, great pains were taken to ensure that the District Courts of Appeal were Courts of final appellate jurisdiction and not merely **"way** stations on the

road to the Supreme Court." Id. at p. 642. Yet, in order to protect the litigants, the drafters created discretionary jurisdiction in the Supreme Court for any decisions which directly conflict with a decision of another District Court of Appeal or the Supreme Court on the same point of law. Id.

From the onset, this Court has emphasized that the powers of this Court to review decisions of the District Courts of Appeal are limited and strictly prescribed. Ansin v. Thurston, 101 **So.2d** 808 (Fla. 1958). Speaking through Justice Drew, this Court has said:

"It was never intended that the District Courts of Appeal should be intermediate Courts... To fail to recognize that these are Courts primarily of final appellate jurisdiction and to allow such Courts to become intermediate Courts of appeal would result in a condition far more detrimental to the general welfare and the speedy and efficient administration of justice than that which the system is designed to remedy."  
Id. at p. 810.

In discussing the "conflict" jurisdiction in particular, Justice Drew clarified that:

"A limitation of review to decisions in 'direct conflict' clearly evinces a concern with decisions as precedents as opposed to adjudications of the rights of particular litigants... and in cases where there is a real and embarrassing conflict of opinion and authority between decisions." Id. at p. 811.

Finally, Justice Drew explains that:

"A conflict of **decisions...must** be on a question of law involved and determined, and such that one decision would overrule the other if both were rendered by the same Court; in other words, the decisions must be based practically on the same state of facts and announce antagonistic conclusions." Id. (citing, 21 C.J.S. Courts Sec. 462).



Effective April 1, 1980, the Fla. Const. was amended once again to restrict even further the discretionary jurisdiction of this Court. The 1980 amendment was apparently prompted by an erosion of the original rule regarding conflict jurisdiction in cases where the conflict was only found in a dissenting opinion to a per **curiam** majority decision rendered without opinion. Jenkins v. State, 385 **So.2d** 1356 (Fla. 1980). Prior to the amendment of 1980, several members of this Court expressed a dissatisfaction with the erosion of the original rule and observed:

"When facts and testimony are set forth in a majority opinion, they are assumed to be an accurate presentation upon which the judgment of the Court is based. However, a dissent does not rise to a similar level of dignity and is not considered as precedent; note, for example, that West Publishing Company does not offer **headnotes** for dissents, regardless of their legal scholarship. By definition, a dissent contains information, interpretations or legal analysis which has been rejected in whole or part, by the majority." Id. at p. 1358.

With this background and in face of a staggering case load, this Court urged the legislature to enact the proposed amendment which eventually became effective on April 1, 1980, and which reads that this Court may review "any decision of a District **Court** of Appeal that expressly and directly conflicts with a decision of another District Court of Appeal or the Supreme Court on the same question of law. Article V, Sec. **3(b)(3)**, Fla. Const. (emphasis added). Therefore, "conflict" jurisdiction will not be found based upon the reasoning contained in a dissent. "**It** is conflict of decisions, not conflict of opinions or reasons that supplies jurisdiction for

review by certiorari." Jenkins at p. 1359.

The alleged conflict in the case at bar stems from the First District Court of Appeals' application of the dual purpose doctrine. The First District Court of Appeals described the dual purpose doctrine as providing: "that an injury which occurs during travel serving both business and personal purposes is considered within the course of employment if the travel involves the performance of a service essential to the business of the employer such that the travel would be required to be undertaken by someone on the employer's behalf if it had not coincided with the claimant's personal journey." (A-7). The First District Court of Appeals proceeded to distinguish the case of Gulliford v. Nikko Gold Coast Cruises, 423 **So.2d** 588 (Fla. 1st DCA 1982) from the facts of the case at bar. The Court focused upon the fact that the claimant in Gulliford was performing a concurrent task which was essential to the employer's operation. (A-8) (Emphasis added). A review of the Gulliford decision supports this interpretation:

"There was a complete understanding between himself and his employer as to the essential nature of his task...it was absolutely necessary that the cash be returned to the business each morning in order for the ticket sellers to be able to open their windows. The Record establishes that, in fact, another employee had to be sent to the accident site to get the cash on the day of the accident because the business could not begin operation without it. Gulliford at p. 1004. (emphasis added).

In the decision below, the majority opinion failed to find any facts in the Record which support that the claimant's task of carrying the job fair booth was essential to the operation of the

employer's business. (A-9). In fact, the majority opinion specifically states that: "to the contrary, the evidence shows that McDonald's routinely participated in job fairs without using a display booth." Id. Therefore, the alleged conflict in the case at bar does not involve principles of law announced in the respective decisions, but depends entirely on the quantum and character of proof.

Article V, sec. 3(b)(3), Fla. Const. does not provide jurisdiction to resolve a conflict unless it results from an application of law to facts which are in essence on "all fours" without any issue as to quantum and character of proof. Trustees of Internal Improvement Fund v. Lobeau, 127 So.2d 98 (Fla. 1961); Florida Power and Light Company v. Bell, 113 So.2d 697 (Fla. 1969). This point is illustrated well in the case of N & L Auto Parts Co. v. Doman, 117 So.2d 410 (Fla. 1960) in which this Court denied jurisdiction to review an Order from a workers' compensation proceeding.

Interestingly, the Doman case also involves a very similar point of law which gives rise to the alleged conflict in the case at bar. Id. Specifically, in the District Court case under review in Doman, the Deputy Commissioner found from the facts that the claimant was, at the time of the accident, not engaged upon a purely personal mission, and therefore was in the scope of his employment. Id. at p. 412. The Petitioner cited to a conflict based upon a converse holding in three cases involving the same point of law. Id. This Court denied jurisdiction and stated that

in the cases involving the converse decision "**the** conflict [was] not in the law as laid down in those decisions but in the conclusion reached in each as to whether the employee was on a purely personal mission at the time of the injury." Id. at p. 411. In explaining the denial of jurisdiction, this Court went on to emphasize that "our concern is with the decision under review as a legal precedent to the end that conflicts in the body **of** the law of this State will be reduced to an absolute minimum, and that the law announced in the decision of the appellate Courts of this State shall be uniform throughout." Id. In other words, when there are factual distinctions between appellate decisions and Supreme Court decisions, there is no concern with uniformity or confusion among precedents. There must be a "**real** and embarrassing conflict of opinion and authority between decisions". Ansin v. Thurston, 101 **So.2d** 808 (Fla. 1958). Moreover, the conflict must be such that "**one** decision would overrule the other if both were rendered by the same Court. Id. at p. 811.

The case at bar does not present any confusion nor does it threaten the uniformity of the prior decisions of Nikko Gold Coast Cruises v. Gulliford, 448 **So.2d** 1002 (Fla. 1984) and Cook v. Highway Casualty Co., 82 **So.2d** 679 (Fla. 1955). The majority below clearly describes the factual distinction between the case at bar and the prior precedent. The Petitioners seem to imply that the First District Court of Appeals incorrectly applied the dual purpose doctrine by weighing the relative importance of the personal motive vs. the business motive. (A-7). However, a close

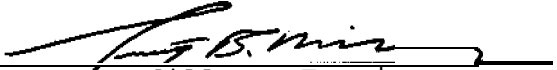
examination of the majority opinion reveals that the Court did not compare the relative importance of the business motive to the personal motive. Instead, the opinion focuses upon the requirement established in Nikko Gold Coast Cruises v. Gulliford, 448 **So.2d** 1002 (Fla. 1984) that the business task be essential to the operation of the employer's business. (A-8-9). Finally, the Petitioner repeatedly cites to the Honorable Judge **Benton** in his dissenting opinion who quotes treatises which allegedly conflict with the majority's opinion. Yet, as this Court has clearly stated: "the language and expressions found in a dissenting or concurring opinion cannot support jurisdiction under Sec. **3(b)(3)** because they are not the decision of the District Court of Appeal. Jenkins. v. State, 385 **So.2d** 1356 (Fla. 1980).

### CONCLUSION

In order to maintain the integrity of the appellate process, Article V, Sec. **3(b)(3)**, Fla. Const. must be narrowly construed. Every person is entitled to a fair trial and to an appeal which is provided as a matter of right. However, every litigant is not automatically entitled to two appeals. When a party wins in a trial Court, he must be prepared to face his opponent in the appellate Court, but if he succeeds there, he should not be compelled the second time to undergo the expense and delay of another review. Lake v. Lake, 103 **So.2d** 639 (Fla. 1958). We must assume that an appeal to the District Court of Appeal will receive an earnest, intelligent, fearless consideration and decision. Id. Except for the limited avenues of relief for "conflict" jurisdiction, this Court must give every judgment from the appellate Court the verity and finality it deserves. Accordingly, it is respectfully requested that this Honorable Court deny the Petitioner's Notice to Invoke Discretionary Jurisdiction.

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true copy hereof has been furnished by U.S. Mail to Alfred J. Hilado, Esquire, P.O. Box 944, Orlando, FL 32802-0944, and Bill McCabe, Esquire, Shepherd, McCabe & Cooley 1450 West S.R. 434, Suite 200, Longwood, FL 32750, on this 8/6 day of January, 1999.

  
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IN THE DISTRICT COURT OF APPEAL  
FIRST DISTRICT, STATE OF FLORIDA

**TESSANN SWARTZ,**  
Appellant,

**NOT FINAL** UNTIL TIME EXPIRES TO  
FILE MOTION FOR REHEARING AND  
DISPOSITION THEREOF IF FILED.

v.

CASE NO, : 97-3023

MCDONALD'S CORPORATION and  
CORPORATE SYSTEMS,

Appellees.

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Opinion filed November 12, 1998.

An appeal from an order of the Judge of Compensation Claims  
Joseph Murphy, Judge.

Alfred J. Hilado, Orlando; Bill McCabe, **Longwood**, for Appellant.

Scott B. Miller and Jason D. Lazarus of **Hurley, Rogner**, Miller,  
Cox & Waranch, P.A., Orlando, for Appellees.

VAN NORTWICK, J.

In this worker's compensation appeal, **Tessann Swartz**, the claimant below and a former **human resources** trainee for **appellee**, McDonald's **Corporation** (the employer), **appeals an** order of the Judge of Compensation Claims (JCC) denying compensability of her petition for benefits on the ground that her claim was barred by

APPENDIX



. the operation of the going **and** coming rule, section **440.092(2)**, Florida Statutes (**1995**). We affirm on **all** issues, although we write to address only one: Whether claimant's carrying in her car the employer's display booth for use in her employment at a job fair turned otherwise noncompensable travel from work to home into compensable employment travel? Our review of the record leads us to the conclusion that claimant established nothing more than she was carrying the paraphernalia or tools useful in her employment when she was injured in an automobile accident on her way home from work. Competent, substantial evidence supports the **JCC's** finding that claimant was not involved in employment related travel.

#### Factual and Procedural Background

Claimant, who lives in Orlando, commuted to Tampa where her human resources training primarily occurred. Much of claimant's training was on-the-job and her duties included the recruitment of new **store** managers, requiring her attendance representing **McDonald's** at various job fairs. On Friday, March 1, 1996, **claimant** attended a regional McDonald's **meeting** in Tampa. Barbara Lenco, another McDonald's human resources employee, and claimant were required to attend a job fair starting in Orlando on Monday, March 4 at **1:30** p.m. After the Friday meeting ended at **3:50** p.m., Lenco and claimant placed in claimant's car a part of a booth used to advertise McDonald's at job fairs. The

**remaining** part of the booth was put in **Lenco's** car. Claimant **testified that** she planned to store the part of the booth for which she was responsible at home over the weekend and on Monday travel to the job fair site with the booth. The job fair booth is normally stored in McDonald's Tampa offices when not in use.

After leaving her office on March 1, claimant began the drive to her home **in** Orlando. En route home, she was involved in an automobile accident on Interstate Highway 4 at approximately **5:30 p.m.** the same day.

Claimant filed a petition seeking temporary disability benefits. The employer/carrier defended on the grounds that claimant's injuries did not arise out of and in the course and scope of her employment.

At the hearing, claimant testified that, when the promoters of a job fair give prospective employers enough space, McDonald's would set up a display booth advertising its name and services. At this particular Orlando job fair, McDonald's was allowed **to** have a **booth**. Both claimant and her supervisor testified that it **was** the responsibility of the **human resources** staff to take **the** booth to the job fair. Lenco and claimant planned to set **the** booth up at the job fair location on Monday. **In** fact, despite the accident, claimant did attend the job. fair on Monday, March 4, 1996, bringing her part **of** the job fair booth with her.

The JCC ruled in pertinent part:

The fact that the **claimant** had a booth in the back of her car on the date of accident which she intended to use the following Monday in Orlando does not turn this otherwise non-compensable going and coming case [into] a compensable event. The claimant made no special trip to Tampa to secure this "tool." At the time of the claimant's accident she was on a journey which was regular and frequent and was not prompted by any sudden call by her employer. The **burden** of placing a tool in her car to transport with her for **use** in her job the following Monday was minor when viewed in context of the claimant's usual duties and route home. The fact is abundantly clear that at the time of the accident the claimant was off work and not engaged in any employment related duty nor was she on any employer requested errand, The accident and injuries sustained therein were personal to the claimant and occurred at [al time when claimant was returning home from work at her usual, normal, and customary place of employment.

#### Going and Coming Rule

**Under the** going and coming rule, "injuries sustained by employees **when** going to or returning from their regular place of work **are not deemed to arise out of and in the** course of **their** employment." ~~Sweat v. Allen~~, 145 Fla. 733, 200 So. 348, 350 (1941). The going and coming rule has been codified in section **440.092(2)**, Florida Statutes (1995), **as follows:**

Going or Coming - An injury suffered while going to or coming from work is not an injury arising out of and in the course of employment whether or not the employer provided transportation if such means of transportation was available for the exclusive personal use by the

employee, unless the employee was engaged in a special errand or mission for the employer.

"In the course of employment" refers "to the time, place and circumstances under which the accident occurs," Spivey v. Battaslia Fruit Co., 138 So. 2d 308, 311 (Fla. 1962), and "arising out of" refers to "origin or cause." Id.

Since industry must carry the burden [of the expenses incident to the hazards of employment], there must then be some causal connection between the employment and the injury, or it must have had its origin in some risk incident to or connected with the employment, or have followed from it as a natural consequence.

Glasser v. Youth Shop, 54 So. 2d 686, 687 (Fla. 1951).

The going and coming rule does not apply to employee travel which is undertaken to perform a special errand or mission for the employer. D.C. Moore & Sons v. Wadkins, 568 So. 2d 998, 999 (Fla. 1st DCA 1990). A special errand may exist "if the journey was a substantial part of the service performed for the employer [or] . . . where the employee is instructed to perform a special errand which grows out of and is incidental to his employment." Id. (citations omitted).

We find unavailing claimant's contention that the record evidence below compels a finding that she was on a special errand or mission for her employer at the time of her injury. To the contrary, although carrying a booth to job fair sites was an employment duty of claimant, below even claimant's own attorney

characterized the transportation of the booth as a "minimal job duty." Further, the particular journey to Orlando on March 1 was not undertaken as a service for the employer. We find competent, substantial evidence to support the JCC's finding that claimant's travel to Orlando did not arise out of her employment or involve the performance of a special errand or mission or task outside regular hours at the request of the employer and for the employer's benefit. See Eadv v. Medical Personnel Pool, 377 So. 2d 693, 695 (Fla. 1979); D.C. Moore & Sons v. Watkins, 568 So. 2d 998-99 (Fla. 1st DCA 1990); Bruck v. Glen Johnson, Inc., 418 So. 2d 1209, 1211 (Fla. 1st DCA 1982). As stated in Eadv, 377 So. 2d at 696, compensation will be denied under the going and coming rule where the journey is essentially for personal reasons, as the JCC found in the instant case.

Claimant also argues that under Schoenfelder v. Winn & Jorgensen, P.A., 704 So. 2d 136 (Fla. 1st DCA 1997), her travel to Orlando was excepted from the going and coming rule and, therefore, was within the course of her employment. We cannot agree. In Schoenfelder, the claimant, an attorney, began preparing for a deposition at home in the morning, and was struck by a vehicle while walking to his car to drive to the scheduled deposition of the physician at the physician's office. The claimant established that travel to various locations was a necessary part of his job. Thus, the record evidence supported

that he was not simply commuting between his house and his regular office, but was within the "**time and place**" of his employment at the time of his injury.

Dual Purpose Doctrine

Finally, we disagree with claimant that her drive the evening of March 1 was compensable because it had dual purposes, a business one as well as the personal one of **commuting** home from work. The so-called "dual purpose doctrine" provides that an injury which occurs during travel serving both business and personal purposes is considered within the course of employment if the travel involves the performance of a service essential to the business of the employer such that the travel would be required to be undertaken by someone on the employer's behalf if it had not coincided with the claimant's personal journey. ~~D.C. Moore & Sons~~, **568** So. 2d at 999. The parameters of the dual purpose doctrine are demonstrated by ~~Gulliford v. Nikko Gold Coast Cruises~~, 423 So. 2d 588, **589** (Fla. 1st DCA 1982), approved sub nom., Nikko Gold Coast Cruises v. Gulliford, 448 So. -2d 1002 (Fla. 1984). In Gulliford, the claimant's duties included emptying the cash drawers used by the employer's ticket sellers, locking the money in his car, safekeeping the cash at home at night, and returning it to work in the morning. The ticket sellers were unable to open for business until the operating cash was returned. Id. 448 So. **2d** at 1003. **Claimant** was involved in

an automobile accident while he **was** on his way to work with the money in his possession. This court, in ruling the accident compensable, focused on the fact that taking the employer's operating funds home was an employment duty which was part of the claimant's contract of employment. Id. 423 So. 2d at 590.

On review in the Florida Supreme Court, however, the Court explained that, in Florida, the focus should not simply be on whether the travel might have included an incidental employment responsibility, but rather whether the concurrently undertaken task is so important to the business of the employer that the trip would have been required in any event. Nikko Gold Coast Cruises v. Gulliford, 448 So. 2d at 1004 (Fla. 1984). The Court found that the concurrent task in Gulliford **was** essential to the employer's operations. "**Even** if Gulliford had not intended to come to work for the day, he would have still had to make the same trip in order to return the operational cash to the business or, make **arrangements** for someone else to do **so.**" Id. The Supreme Court adopted the rationale of then Judge Cardozo in Marks' Dependents v. Gray, 251 N.W. 90, 167 N.E. 181 (N.Y. 1929), where he explained an analytical approach to the dual purpose doctrine, as follows:

To establish liability, the inference must be permissible that the trip would have been made though the private errand had been canceled. . . . The test in brief is this: If the work of the employee creates the necessity for travel, he is in the course of

**employment**, though he is serving at the same time some purpose of his **own**. If, however, the work has had no part in creating the necessity for travel, if the journey would have gone forward though the business errand had **been** dropped, and would have been canceled upon failure of the private purpose, though the business errand was undone, the travel is then personal, and personal the risk.

167 N.E. at 183 (citation omitted).

In the instant case, the claimant failed to establish that she was performing a necessary or essential part of her service to her employer by carrying the job fair booth home with her the evening of March 1. For example, there is no evidence in the record that McDonald's participation in **the** job fair could not have occurred without **the** booth **or** that, if claimant had failed to transport the booth on her commute home, a special trip for the booth would have been required. To the contrary, the evidence shows that McDonald's **routinely participated in** job fairs without using a display booth. It certainly was not established that **the** claimant's **trip from Tampa to Orlando on** March 1 would have been required even if the claimant's personal motive of going home had been removed. Merely carrying paraphernalia or tools of her employment does not convert the claimant's trip from personal to employment travel. See United States **Fidelity & Guar. Co. v. Rowe**, 126 So. 2d 737 (Fla. 1961).

AFFIRMED.

**PADOVANO, J., CONCURS; and BENTON, J., DISSENTS WITH WRITTEN OPINION.**



**BENTON, J.**, dissenting,

I cannot subscribe to the majority opinion's thesis that the trip on which Ms. Swartz had an automobile accident on March 1, 1996, did not serve a business purpose of her employer. That it also served a personal purpose I quite agree. But the rule is that an injury is compensable if the injury "**occurred** as the result of a trip, a concurrent cause of which was a business purpose." Nikko Gold Coast Cruises v. Gulliford, 448 SO. 2d 1002, 1005 (Fla. 1984).

In training for work as a "**human** resources consultant" for McDonald's, Ms. Swartz attended a meeting in Tampa on Friday, March 1, 1996. After the meeting, she and Barbara Lenco, a McDonald's employee helping with the training, loaded half of a portable recruiting booth into the **company car assigned to** Ms. Swartz. The booth was to be used at an Orlando job fair the following Monday. Ms. Lenco testified:

," Q. . . . Ms. Jones has indicated in her testimony that she thought transporting the booths **w[as]** part of **your** job responsibility as an [human resources] consultant. Would you agree **or** disagree?

A. I would agree that it is part of our job responsibility to make sure the materials that we need for the job fair . . . (are] there with us.

Q. Was Ms. Swartz transporting [part of] a booth on March 1, 1996 to Orlando?

A. Yes, she was.

Q. And it was necessary in order to have it ready for the job fair; is that right?

A. Yes, that started on Monday.

**Ms. Lenco** indicated that two vehicles were needed to transport the

recruiting booth to Orlando **so that** she needed **Ms. Swartz's** help to accomplish the task. McDonald's counsel stipulated that "we told her to bring the booth and . . . . that was the arrangement." Carolyn Jones, Ms. **Swartz's supervisor**, counted on the employees she supervised to take recruiting booths to job fairs. She testified:

Q. . . . Now how would [the] booths ordinarily make it to the location of the job fair?

A. Whoever doing the job fair would carry them.

Q. Would the job fairs typically require a setup of a booth?

A. Typically, yes.

Q. Did you have any role of scheduling **th[e]** job fair [on March 4, 1996], meaning putting it down on either Barbara **Lenco's** and/or **Tessann Swartz's** calendar?

A. Yes

Q. Okay. How did you expect **th[e]** booth to arrive at the job fair?

A. I expected the employees to **carry** it.

Q. Was that part of [Ms. **Swartz's**], although minimal job duty, is that still something you would expect an [human resources] consultant to transport with them **if** they are going to a job **fair**?

A. Yes.

Plainly one of Ms. **Swartz's** job duties was to bring her portion of the booth to the job fair. That is what she **was** doing when the accident occurred on I-4 at the I-75 **interchange**, well before she reached Orlando and the **point at which she would have left the** highway to go home. See generally Standard Distrib. Co. v. Johnson, 445 so. 2d 663, 664 (Fla 1st DCA 1984) (holding that, where an employee intends to **deviate** from his route, he remains

within the course and scope of employment until a deviation actually occurs); El Viejo Arcô Iris, Inc. v. Luaces, 395 So. 2d 225, 226 (Fla. 1st DCA 1981) (stating that an employee traveling his regular route home remained within the course and scope of his employment until he had completed an errand assigned by his employer).

The Workers' Compensation Law now treats even traveling employees as outside the scope of their employment, while they are going to and coming from work, Ch. 93-415, Laws of Fla., § 6, at 78 (amending section 440.092(4), Florida Statutes (1995)), but only if an exception to the going and coming rule does not apply. Although section 440.092(2), Florida Statutes (1995), states broadly that an "injury suffered while going to or coming from work is not an injury arising out of and in the course of employment," the cases are clear that the statutory codification of the going and coming rule, chapter 90-201, Laws of Florida, section 14, at 920 (reenacted in chapter 91-1, Laws of Florida, section 10, at 35), does not abrogate the exception for trips that serve a dual purpose. See Hases v. Hushes Elec. Serv., 654 So. 2d 1280 (Fla. 1st DCA 1995). See also Securex, Inc. v. Couto, 627 So. 2d 595 (Fla. 1st DCA 1993).

The trip Ms. Swartz was making at the time of the accident had two purposes. She was going home (although she had not yet deviated from the route that led to the job fair) at the same time that she was performing her job by transporting part of the booth.

As one commentator has explained,

it is not necessary, under [the dual purpose doctrine], that, on failure of the personal motive, the business trip would have been taken by this particular employee at this particular time. It is enough that someone sometime would have had to take the trip to carry out the business mission. Perhaps another employee would have done it; perhaps another time would have been chosen; but if a special trip would have had to be made for this purpose, and if the employer got the necessary item of travel accomplished by combining it with this employee's personal trip, it is accurate to say that it was a concurrent cause of the trip, rather than an incidental appendage or afterthought.

1 Arthur Larson & Lex K. Larson, Larson's Workers' Compensation Law § 18.13, at 4-368 to 69 (1997) (footnotes omitted). Ms. Swartz might have stayed the weekend in Tampa and driven directly to the job fair on Monday. But she or someone else "sometime would have had to take the trip" to transport her half of the booth to the job fair. McDonald's policies dictated that the booth be at that job fair and created the need for the trip. See Marks' Dependents v. Gray, 251 N.Y. 90, 93-94 (N.Y. 1929).

The judge of compensation claims found "that the booth was a tool which they used to give brand identity to their display at these job fairs." It was adorned with the corporate logo. Whatever the benefit to recruiting may have been, transporting the booth was not "minimal" in the sense of being perfunctory or optional for an employee like Ms. Swartz. The booth was too big for one car. It appears two people loaded one half into Ms. Swartz's car. The booth differs, moreover, from a plumber's

wrenches or a salesman's sample case which is unlikely to be put to use apart from its bearer. See generally 1 Larson's, supra, § 18.24, at 4-387 to 406. Even in Ms. Swartz's absence, her employer's interests would be advanced--or so its officers and managers evidently thought--by the presence of the booth at the job fair, at least if Ms. Lenco or another was on hand to (wo)man it.

Our supreme court has said that "it is not necessary that the dominant purpose of a trip be business. All that need be determined is that an injury occurred as the result of a trip, a concurrent cause of which was a business purpose." Nikko Gold Coast Cruises, 448 So. 2d at 1005. See Cook v. Highway Casualty co., 82 So. 2d 679, 682 (Fla. 1955). Because today's decision conflicts with these controlling precedents, I respectfully dissent.