IN THE SUPREME COURT
STATE OF FLORIDA

CASE *No. 94,998*

CAROLINE GILBERT,

Petitioner,

v.

PUBLIX SUPERMARKETS and
CARE ADMINISTRATORS SERVICES,

Respondents .

BRIEF ON JURISDICTION
OF
PUBLIX SUPERMARKETS and CARE ADMINISTRATORS SERVICES

**ON DISCRETIONARY REVIEW FROM THE
FIRST DISTRICT COURT OF APPEAL**

Arthur J. England, Jr., Esq.
Brenda K. Supple, Esq.
Greenberg Traurig, P.A.
122 1 Brickell Avenue
Miami, Florida 33 13 1
Telephone: (305) 579-0500
Facsimile: (305) 579-0723

Counsel for Respondents

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STATEMENT OF JURISDICTIONAL PRINCIPLES

Caroline Gilbert has asked the Court to review a decision of the First District Court of Appeal — ***Gilbert v. Publix Supermarkets, 724 So.*** 2d 1222 (Fla. 1st DCA 1998) — on the basis of an alleged conflict between that decision and two decisions of this court. (A copy of the district court's decision is provided as an appendix to this brief,) The jurisdictional principles for "conflict" review require a showing that the district court's decision "expressly and directly" conflicts,' and the Court has repeatedly declared that this limitation on the Court's jurisdiction requires that any alleged conflict must appear within the "four corners" of the district court's decision. ***Reaves v. State, 485 So.*** 2d 829, 830 (Fla. 1986). In that case, the Court pointed out as "a common error made in preparing jurisdictional briefs based on alleged decisional conflict . . . [that] it is pointless and misleading to include a comprehensive recitation of facts not appearing in the decision below, with citations to the record." 485 So. 2d at 830 n.3.

Ms. Gilbert evidenced her awareness of this requirement,[2] but she nonetheless disregarded that requirement by relying on factual recitations which are not found in the district court's decision and which, she claims, are established by testimony from the trial. Her representation of record-based "facts" may not be considered by the Court for two reasons. For one thing, she impermissibly asks the Court to accept a version of the facts which is not contained in the district court's decision[3] and which, because the Court does not

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1 Art. V, § 3(b)(3), Fla. Const.

2 Jurisdictional brief at p. 7.

3 England, Hunter and Williams, ***Constitutional Jurisdiction of the Supreme Court of Florida: 1980 Reform, 32*** U. FLA. L. REV. 147, 176-83 (1980).

have the record, it cannot verify. For another, the key "facts" on which Ms. Gilbert relies for conflict are not just absent from the district court's opinion; they are contradicted by express statements contained in that court's decision.

Inasmuch as the Court's "jurisdiction" is dependent on decisional conflict apparent from ***the face*** of the district court's decision alone, Publix Supermarkets and Care Administrators Services (collectively "Publix") provide the following restatement of the facts on which the Court's review must be predicated,

STATEMENT OF THE CASE AND FACTS

The following facts are recited in the district court's decision. Emphasis is given to those facts which contradict the factual foundation for Ms. Gilbert's assertion of decisional conflict.

Caroline Gilbert was injured in an automobile accident at 3:45 a.m. on January 26, 1995, while driving from her home to her place of employment at Publix. The purpose of her commute that morning was to carry out her responsibility, as assistant manager, to open the Publix store at 4:00 a.m.

At the time of her accident, Ms. Gilbert had in her car a newsletter for the store, which she had prepared at her home ***for her own convenience.*** The preparation of a newsletter was one of Ms. Gilbert's employment duties, but ***it was not necessary that she bring that newsletter to work on the morning of January 26. Ms. Gilbert would not have made the trip to the store at that hour of the morning simply to deliver the newsletter, and her transport of the newsletter was incidental to her obligation, as assistant manager, to open the store for the day 's business.***

Ms. Gilbert brought a workers' compensation claim against Publix asserting, among other reasons, that her home was a "second job site" because she had prepared the newsletter there, and that delivery of her home-generated

newsletter on the day of the accident was a "concurrent" cause of her travel along with her personal, non-business purpose of commuting to open the store. A Judge of Compensation Claims denied her claim against Publix on all grounds, and the district court affirmed on the basis that competent substantial evidence supported the factual findings of the Judge of Compensation Claims.

SUMMARY OF ARGUMENT

The district court determined from the record that Ms. Gilbert had not proven with competent substantial evidence that delivery of the Publix newsletter was required on the morning of the accident, so that the "dual purpose" exception to the going and coming rule did not apply. That determination by the district court, made on the basis of record review, is impenetrable here for the purpose of discretionary, conflict review. The facts on which Ms. Gilbert relies do not appear within the four corners of the district court's decision. On the face of its decision, the court has applied the going and coming rule, and rejected the dual purpose exception, exactly as the Court has painstakingly prescribed.

Ms. Gilbert offers the Court no policy reason to provide her with a second level of appellate review. She suggests no policy in the law of workers compensation that is in disharmony as a result of the district court's decision. She merely asks that this Court provide her with a new look at the trial record in order to change the outcome of her proceeding, The role of the Court in exercising its discretion to review decisions alleged to be in conflict, however, is to harmonize the law, not to provide a second opinion on factual sufficiency, The district court's decision does nothing to destabilize the going and coming rule or the dual purpose exception to the rule. Consequently, even if there had been "conflict" (which there is not), the Court should exercise its discretion to deny review.

ARGUMENT'

I. There is no decisional conflict that would support review.

Ms. Gilbert alleges conflict in application of the "dual purpose" exception to the going and coming rule between the district court's decision and this Court's decisions 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). There is no decisional conflict, however. The district court has held, based on its review of the record, that the dual purpose exception to the going and coming rule was not proved by Ms. Gilbert. Its decision neither expressly nor directly conflicts with the principles applied in ***the Nikko*** or ***Cook*** decisions.[4]

Ms. Gilbert's reliance on citations to the trial transcript demonstrates that she has relied for conflict on facts which do not appear within the four corners of the district court's decision. Unmistakably, she seeks only a second appellate ***record*** review. That is not constitutionally available, of course. Her citation to some portions of the transcript of testimony provides a legally insufficient showing that the district court was wrong in concluding that competent substantial evidence supported the critical factual findings of the Judge of Compensation Claims on the issue of dual purpose.

Review of the district court's decision necessarily proceeds from two propositions: any determination regarding the going and coming rule is factually intensive; and the standard for appellate review applied in this area is "competent

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[4] Ms. Gilbert offers nothing from the ***Cook*** case other than the fact it was cited with approval in ***Nikko.*** The ***Cook*** decision would be relevant only because it was the first decision of the Court to articulate the dual purpose doctrine (see 82 So. 2d at 680), but it is not relevant because the district court did not challenge the viability of that doctrine.

substantial evidence. " ***See e.g., Tampa Airport Hilton Hotel v. Hawkins, 557 So.*** 2d 953, 954 (Fla. 1st DCA 1990), which in turn relied on ***Krause v. West Lumber*** Co., 227 So. 2d 486 (Fla. 1969), and on ***Eady v. Medical Personnel Pool,*** 377 So, 2d 693 (Fla. 1979).

So far as is relevant to the jurisdictional argument made in this case,[5] Ms. Gilbert had argued that the going and coming rule did not apply to her trip to the Publix store because delivery of the newsletter she had prepared at home was a concurrent cause of her early morning trip to the store. A "concurrent cause" for travel, which constitutes an exception to the going and coming rule, is a cause for which the trip would have been made even if the private cause (commuting in this case) had not taken place. ***Nikko Gold Coast Cruises v. Gulliford, 448 So.*** 2d at 1004-05. The district court expressly held, however, based on its review of the record, that Ms. Gilbert would ***not*** have made the trip to Publix just to deliver the newsletter. Its decision reflects a failure of her factual proof, in no way implicating the principles which underlie the dual purpose exception to the going and coming rule.

The two critical "facts" on which Ms. Gilbert relies to assert her claim of conflict with ***Nikko*** would not support her claim even if they were evident from the district court's decision.[6] She states there was no typewriter at the Publix

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5 Ms. Gilbert made multiple arguments to the Judge of Compensation Claims and to the district court, including the two identified in the district court's decision: that her home was a "second job site"; and that she was covered by the dual purpose exception to the going and coming rule. She seeks review here only on the latter contention,

6 In her jurisdictional brief at p. 9, Ms. Gilbert offers the Court a discussion of the dual purpose doctrine which is contained in a dissenting opinion of Judge Benton in *Swartz* ***v. McDonald's Corp.,*** 23 Fla. L. Weekly D2521 (Fla. 1st DCA Nov. 12, 1998). There are two reasons that the Court (continued . . .)

store so that she had to type the newsletter at home, and that there was "unrefuted" testimony that she would bring the newsletter to the store on Thursdays even if she was not scheduled to work.[7] Neither fact, even if it had been indeed been established at trial, would trigger the dual purpose doctrine.

The absence of a typewriter at the Publix store did not mean there was no other means of generating a one-page newsletter on the premises, such as by means of a computer. Thus, though Ms. Gilbert relies on trial testimony which the Court has not seen and cannot review, the district court had the *entire* record when it determined that there was

> [c]ompetent substantial evidence in the record [which] supports the finding that claimant prepared the newsletter at home for *her own convenience.*

724 So. 2d at 1222 (emphasis added).

Similarly, testimony that she would bring the newsletter to work even when she was not scheduled to work, even if uncontested at trial (which Publix does not acknowledge), does not mean that it was essential that she do so. The district court expressly found competent evidence that

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(. . . continued)

cannot draw any conclusions from that dissent. First, Judge Benton was one of the panelists in this case who rejected Ms. Gilbert's claim, so he obviously did not think the principle discussed in his almost-contemporaneous dissent required a reversal of the Judge of Compensation Claims. Second, conflict jurisdiction cannot be predicated on a dissenting opinion. ***Jenkins v. State,*** 385 So. 2d 1356, 1358-59 (Fla. 1980).

[7] Jurisdictional brief at p. 4, 9. The term "unrefuted" is Ms. Gilbert's characterization; one with which neither the Judge of Compensation Claims nor the district court judges agreed.

> it was ***not*** necessary that the newsletter be brought to work the morning of [the accident] . . . [and that Ms. Gilbert] would ***not*** have made the drive if the personal motive (going to work) was removed.

724 So. 2d at 1222 (emphasis added) .[8] The Court simply cannot accept Ms. Gilbert's selective record references as a basis for determining that, in ruling against her, both the district court and the Judge of Compensation Claims had both misstated the facts.

The ***Nikko*** decision poses no conflicting view of ***the*** law, In ***Nikko,*** as here, an employee was injured in an auto accident en route to work with items in the car that related to the employer's activities. The similarity between the cases ends there, however. ***Nikko*** involved an employee for a tour bus company, Gulliford, who had the specific job responsibility **"[i]n** addition to [his] other routine duties" to

> empty the cash drawers used by the employer's tour ticket sellers, lock the money in his car, and take the money home for the evening. . . . The next morning he would take the cash back to work so that the ticket sellers would have a ready supply of money on hand to make change for customers. ***The ticket sellers were unable to open for business until the money was brought in.***

448 So. 2d at 1003 (emphasis added), Noting that Gulliford would have had to make the same trip to his business locale or make alternate arrangements if he

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[8] Ms. Gilbert recognizes that it was her job responsibility to open the store at 4 a.m. on the day of the accident. (Jurisdictional brief at 3, 4). The district court reflected that predicate for her commute:

> The purpose of claimant's commute early that morning was to carry out her responsibilities relating to opening the store at ***4:00*** a.m.

724 So, 2d at 1222.

had not intended to come to work for the day, so that the business could function, and observing that he was paid a monthly auto allowance in part for his responsibility to protect the tour company's cash overnight, the Court held that his responsibility with respect to the transport of cash was an "essential" feature of his job. Id. at 1004.

Quite obviously, there are stark and compelling differences between the facts of that case and the facts here. Gilbert's ***at home*** preparation of the newsletter was allowed by Publix *for her convenience,* and it was *not* essential that she bring it in on Thursday mornings.

> Her delivery of the newsletter was merely ***an incidental part*** of the trip. She would not have made the drive if the personal motive (going to work) was removed.

724 So. 2d at 1222 (emphasis added). The district court merely determined from its record review that Ms. Gilbert failed to establish the essentiality requirement of ***Nikko.***

A case parallel to this one, where the Court applied the going and coming rule to hold that a ***non-essential*** job function was being performed when the employee was injured in ***the*** course of his commute, is ***U.S. Fidelity & Guar. Co.*** v. ***Rowe,*** 126 So. 2d 737 (Fla. 1961). In that case, the employee was incidentally in possession of business funds *not* required to operate the employer's business. The Court sagely observed:

> If there can be recovery under the facts of this case, then there could be recovery in the case of any employee who carried about with him 'any of the paraphernalia' of his employment, and who sustained an injury while absent for any reason from his work.

126 So. 2d at 738.

The *Rowe* decision reflects the going and coming rule as applied to facts which do not justify a finding of necessity for transporting work-related material. It was that principle which the district court applied in this case when it held that Ms. Gilbert's delivery of the newsletter was merely "an incidental part" of the trip. 724 So. 2d at 1222.

II. There is no policy reason for the Court to accept this case for review.

Even if the district court's decision gave an appearance of conflict with *Nikko* (which it does not), Ms. Gilbert offers no policy reason for the Court to exercise its discretion to accept this case for review. Ms. Gilbert suggests no justification for an expenditure of the Court's resources and energy to provide plenary review in search of facts she claims will support her twice-rejected claim. She does not suggest that the district court announced or applied an aberrant legal standard, and she does not contend that the Court need revisit the *Rowe* decision as it bears on the going and coming rule. That decision remains fully intact, and unmuddied by the district court's decision.

On its face, the district court's decision reflects nothing more than an evaluation of record facts to determine whether the dual purpose doctrine or the incidental paraphernalia doctrine is applicable to Ms. Gilbert's particular factual situation. No policy reason exists for the Court to wade into the evidence or to re-weigh it a third time, simply to provide Ms. Gilbert with another bite at the jurisprudential apple.

Ms, Gilbert's plea for Court review is nothing but an expression of dissatisfaction with the result in her case, and the district court's record-based determination that she simply failed to establish a viable claim of compensability for her commute to work.

CONCLUSION

Ms. Gilbert's request for discretionary review of the district court's decision should be denied.

Respectfully submitted,

Arthur J. England, Jr., Esq.
Florida Bar No. 022730
Brenda K. Supple, Esq.
Florida Bar No, 12494 1
Greenberg Traurig, P.A.
122 1 Brickell Avenue
Miami, Florida 3 3 13 1
Telephone: (305) 579-0500
Facsimile: (305) 579-0723

Counsel for Respondents

CERTIFICATE OF SERVICE

I certify that a copy of this respondents' brief on jurisdiction was mailed on March 31, 1999 to:

Michael Wall Jones, Esq.
Pyle, Jones & Hurley, P.A.
1069 West Morse Boulevard
Winter Park, Florida 32789
Co-counsel for Respondents

Bill McCabe, Esq.
Shepard, McCabe & Cooley
1450 State Road 434, Suite 200
Longwood, Florida 32750
Co-counsel for Caroline Gilbert

Thomas A. Vaughan, Esq.
Vaughan, Donohoe & Williams
20 North Orange Avenue
Suite 1307
Orlando, Florida 3280 1
Co-counsel for Caroline Gilbert

Brenda K. Supple

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ATTACHMENT

Caroline GILBERT, Appellant,
v.
PUBLIX SUPERMARKETS and Care Administrators Services, Appellees.

No. 97-1573

District Court of Appeal of Florida,
First District.

Dec. 28, 1998.

Rehearing Denied Jan. 28, 1999.

Claimant appealed decision of Joseph E. Willis, Judge of Compensation Claims (JCC), denying benefits. The District Court of Appeal held that fact that claimant had completed preparation of employer's newsletter at home and that newsletter was present in her automobile did not render her injuries resulting from automobile accident compensable.

Affirmed.

WORKERS' COMPENSATION ⚿726
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That workers' compensation claimant had completed preparation of employer's newsletter at home, and that newsletter was present in her automobile at time of accident, did not render her injuries compensable under going and coming rule; claimant prepared newsletter at home for her own convenience, it was not necessary that newsletter be brought to work on that particular morning, and purpose of claimant's commute was to open store.

Thomas A. Vaughan of Vaughan, Donohoe & Williams, Orlando; Bill McCabe of Shepherd, McCabe & Cooley, Longwood, for Appellant.

Arthur J. England, Jr. and Brenda K. Supple of Greenberg, Traurig, Hoffman, Lipoff, Rosen & Quentel. P.A., Miami, for Appellees.

PER CURIAM.

*1 Caroline Gilbert, the claimant and a former assistant manager for the employer-appellee, Publix Supermarkets, appeals an order of the Judge of Compensation Claims denying compensability for the injuries she sustained in an automobile accident which occurred at approximately 3:45 a.m. on January 26, 1995, en route from her home to her place of employment at Publix. We affirm on all issues, but write briefly to address the compensability question.

Although claimant had completed preparation of a newsletter for Publix at home before embarking on her journey to work, and the newsletter was present in her car at the time of the accident, these facts are not sufficient to compel compensability of her injuries. Competent. substantial evidence in the record supports the finding that claimant prepared the newsletter at home for her own convenience. This fact was not sufficient to constitute her home a second job site. Thus, it cannot be said that she was injured while traveling between two employment premises and was thereby excepted from the going and coming rule. See Santa Rosa Junior College v. Workers' Compensation Appeals Bd., 40 Cal.3d 345, 220 Cal.Rptr. 94, 708 P.2d 673 (Cal.1985). Similarly, although preparation of the newsletter was au employment duty, it was not necessary that the newsletter be brought to work the morning of January 26, 1995. The purpose of claimant's commute early that morning was to carry out her responsibilities relating to opening the store at 4:00 a.m. Her delivery of the newsletter was merely an incidental part of the trip. She would not have made the drive if the personal motive (going to work) was removed. Swartz v. McDonald's Corporation, --- So.2d ----, 1998 WL 821772, 23 Fla. L. Weekly D2521 (Fla. 1st DCA, November 12, 1998).

AFFIRMED.

BENTON, VAN NORTWICK and **PADOVANO, JJ., CONCUR.**

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