COMMONWEALTH OF MASSACHUSETTS

MIDDLESEX, SS.

SUPERIOR COURT
CIVIL ACTION NO: MICV2004-03252

MARY HOPKIN
KEITH HOPKIN

Plaintiffs,

v.

MATTHEW WILHELM
and MART BROS., INC.,

Defendants.

Plaintiffs' Opposition to
Mart Bros., Inc.'s Motion
for Summary Judgment
and
Memorandum in Support
of Opposition
and
Request for Hearing and
Oral Argument.

Mary Hopkin ("Hopkin") and Keith Hopkin ("Keith Hopkin") (collectively "Plaintiffs"), oppose the motion of defendant Mart Bros., Inc. ("Mart") for summary judgment because there exist genuine issues of material fact and the undisputed facts do not entitle Mart to judgment as a matter of law. The grounds for this opposition are more fully set forth in the following memorandum.

Memorandum.

Plaintiffs submit this memorandum of law in opposition to Mart's motion for summary judgment. In this action, Plaintiffs seek damages for personal injuries suffered by Hopkin as the proximate result of an automobile accident in which her vehicle was hit by a vehicle driven by Matthew Wilhelm ("Wilhelm") when he negligently backed out of a driveway and impacted the passenger side of Hopkin's vehicle as she was driving on Greenwood Road in Ashburnham, Massachusetts.

Greenwood Road is the main road in the Ashburnham Highland residential subdivision (the "Subdivision") constructed by Mart, at which Wilhelm was employed to do minor repairs. Wilhelm, who

used his own vehicle to drive from house to house in the Subdivision, kept his tools in the vehicle and was eligible for reimbursements from Mart, was leaving a house at which he had worked, and starting his drive home, at the time of the accident.

The accident occurred on a hill and resulted in the back of Wilhelm's car being wedged against the side of Hopkin's car. Due to the collision, Hopkin became confused, anxious, shaken up and upset. As a result of the mental disturbance created by Wilhelm's negligence, Hopkin may have failed to secure her vehicle either by operating the emergency brake or by placing the transmission of the vehicle in "Park" when she left her vehicle to exchange information with Wilhelm. She knew that the car was stationary on a hill, but was unaware that this was the result of Wilhelm's car being wedged against her car. When Hopkin had partially reentered her vehicle after the parties exchanged information, Wilhelm moved his car, breaking contact with Hopkin's vehicle, which then began to roll backwards down hill, seriously injuring Hopkin.

Mart bases its motion for summary judgment on two incorrect arguments, one of which has already been rejected by this court when it denied Wilhelm's motion for summary judgment. See Clerk's Notice, annexed to Plaintiffs' "...Statement of Disputed Material Facts ..." as Exhibit "A". First, while Mart does not deny that Wilhelm was negligent, Mart claims that it cannot be held vicariously liable because Wilhelm was not acting within the scope of his employment when he caused the collision with Hopkin's vehicle. Yet, the facts establish that Wilhelm was acting in the scope of his employment at the time of the accident. See §2.2, infra.

Second, Mart asserts that any negligence by Wilhelm in causing the initial collision was not the proximate cause of Hopkin's injuries, based on the false premise that Hopkin was involved in two separate automobile accidents that day, the initial collision and the later rolling of her car. Mart argues that Wilhelm's conduct in moving his car out of contact with Hopkin's car, as she was reentering her car, was not negligent because he could not have foreseen that her car would start rolling.

This court has already rejected that argument, which was the basis of Wilhelm's earlier filed motion for summary judgment. See Clerk's Notice, Exhibit "A". In any event, Mart misses the point. Wilhelm's

and Mart's liability for Hopkin's injuries caused by the rolling car flows directly from Wilhelm's negligence which caused the initial collision. The two events are not separate. As set forth more fully below, even assuming, for the sake of argument, that Hopkin was negligent in failing to secure her vehicle after the accident, Wilhelm and Mart are liable for the injuries to Hopkin because her negligence, if any, and the rolling of her car, was a direct result of her being confused, anxious, shaken up, upset, panicked and shocked, all mental disturbances which resulted from the collision negligently caused by Wilhelm and for which Mart is vicariously liable.

1. Facts.

The accident occurred at approximately 5:15 p.m. on Wednesday, October 10, 2001, at the driveway of 49 Greenwood Road in Ashburnham, Massachusetts. Plaintiff, Mary Hopkin's Answers to Defendant's First Set of Interrogatories ("Hopkin's Answers to Interrogatories"), annexed to Plaintiffs' "...Statement of Disputed Material Facts ..." as Exhibit "B", at Answer 11; Deposition of Mary Hopkin, February 7, 2005 ("Hopkin Deposition"), excerpts from which are annexed to Plaintiffs' "...Statement of Disputed Material Facts ..." as Exhibit "C", at p. 65, ll. 21-24, p. 66, l.1. 49 Greenwood Road is located in the Subdivision at which Wilhelm was employed by Mart as a Service Technician, performing routine household repairs. "Responses of the Defendant Mart Bros., Inc. to Plaintiff's Interrogatories" ("Mart Answers to Interrogatories"), annexed to Plaintiffs' "... Statement of Disputed Material Facts..." as Exhibit "D", at No. 7. The Subdivision contained 81 lots (id. at Answer No. 26), most of which fronted on Greenwood Road, which had been constructed in connection with the Subdivision and was the main road within it. Deposition of Mathew Wilhelm, March 2, 2005 ("Wilhelm Deposition"), excerpts from which are annexed to Plaintiffs' "...Statement of Disputed Material Facts ..." as Exhibit "E", p. 15, ll. 11-16, p. 43, ll. 20-24, p. 44, ll. 1-5. Greenwood Road was a private road (Mart Answers to Interrogatories at Answer No. 23), which Mart used to access the Subdivision. Id. at Answer No. 29.

Wilhelm's employment required him to travel throughout the 81 lot subdivision, making repairs to multiple homes each day. On the day of the accident, Wilhelm had worked on three homes prior to 49

Greenwood Road. Wilhelm Deposition, Exhibit E, p. 44, ll. 15-20. In order to travel between homes in the Subdivision, Wilhelm used his own vehicle, a 1987 Nissan Sentra. Id. at p. 12, ll. 5-18, p. 16, ll. 11-18, p. 18, ll. 3-5, p. 52, ll. 4-9, p. 45, ll. 11-17. He kept his tools in his car and was eligible for mileage reimbursement from Mart. Id. at p. 20, ll. 18-22, p. 19, ll. 13-17. A vehicle was necessary to travel between homes in the Subdivision. Id. at p. 20, ll. 10-12, 15.

Although Mart did not explicitly require Wilhelm to use his vehicle for transportation during the work day, Mart provided no alternative transportation within the Subdivision. Wilhelm testified only that he would not need his car if he was working with someone else and they took a "site truck." Id. at p. 20, ll. 10-15.

Mart employees normally parked at or hear the homes where they were working, and Mart had no policy prohibiting parking in the 49 Greenwood Road driveway. Mart Answers to Interrogatories, Exhibit D, Answer No. 24. The 49 Greenwood Road driveway was the only means by which employees who parked at the 49 Greenwood Road worksite, could exit the worksite. Id. at Answer No. 25.

At the time of the accident, Wilhelm was exiting the 49 Greenwood Road driveway, intending to back up across one lane of Greenwood Road into the opposite lane, to begin his commute home. Wilhelm Deposition, Exhibit E, p.122, ll. 19-24, p. 123, ll. 1-4. Hopkin "was returning home from work on Greenwood Road in Ashburnham, Massachusetts, where [she] reside[d]...." Hopkin's Answers to Interrogatories, Exhibit B, at Answer 12; Hopkin Deposition, Exhibit C, at p. 26, ll. 2-3. Where the accident took place Greenwood Road is steeply sloped (Hopkin Deposition, Exhibit C, at p.87, ll. 20-24, p. 88, ll. 1-15) and Hopkin was proceeding up hill at the time of the accident. Wilhelm Deposition, Exhibit E, p. 81, ll. 17-22. Wilhelm, "who was coming out of the driveway at 49 Greenwood Road, backed into [her] car." Hopkin's Answers to Interrogatories, Exhibit B, at Answer 12. He was "backing up at a high rate of speed and hit the passenger side of" Hopkin's car. Id. Wilhelm testified in his deposition that he backed into Greenwood Road despite the fact that he could not see what oncoming vehicles were approaching. Wilhelm Deposition, Exhibit E, p. 60, ll. 20-24. While Wilhelm had been to the 49 Greenwood Road property

before, knew that backing out of the driveway onto Greenwood Road was dangerous, and knew that this danger could be avoided if he backed into the driveway upon his arrival (enabling a forward exit from the driveway), Wilhelm elected to enter the driveway forward and back out because doing so was more convenient. Id. at p. 64, ll. 15-18.

"Wilhelm's car hit Hopkin's car and became "wedged into the passenger side of" Hopkin's car. Hopkin's Answers to Interrogatories, Exhibit B, at Answers 12, 24; Hopkin Deposition, Exhibit C, at p.109, ll. 1-2. The collision caused Hopkin's car to stop at the point of impact. Hopkin Deposition, Exhibit C, at p. 102, ll. 15-17. Hopkin's car stopped almost immediately after the collision, facing up hill. Wilhelm Deposition, Exhibit E, p. 85, ll. 7-15. Wilhelm testified that his car was either three to four feet, or halfway onto Greenwood Road from the driveway when the collision occurred. Id. at p. 66, ll. 16-24, p. 67, ll. 1-10. The length of Wilhelm's Nissan Sentra was 166.7 inches (13.9 feet). See Specifications, annexed to Plaintiffs' "...Statement of Disputed Material Facts ..." as Exhibit "F".

As a result of the collision with Wilhelm's vehicle, Hopkin became confused[1], anxious[2], shaken up[3] and upset[4], as evidenced by the fact that her body began to shake. Hopkin Deposition, Exhibit C, at p. 104, ll. 2-4. She was "panicking and shocked." Id. at p. 103, l.10, p. 106, ll. 17-22.

Hopkin left her car to survey the damage and to exchange drivers license and insurance information with Wilhelm. Hopkin's Answers to Interrogatories, Exhibit B, Answer 12. At that time, the engine of Hopkin's car was not running. Wilhelm Deposition, Exhibit E, p. 97, ll. 15-18. She has no memory of securing her vehicle either by operating its emergency brake or shifting the transmission to "park." Hopkin's Answers to Interrogatories, Exhibit B, at Answers 13, 15; Hopkin Deposition, Exhibit C, at p.121, ll. 2-4. However, she did know that the car remained stationary although stopped on a hill.

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[1] Hopkin Deposition, Exhibit C, p. 133, ll. 10-11.
[2] Wilhelm Deposition, Exhibit W, p. 92, ll. 1-2.
[3] Id., p. 92, ll. 3-4.
[4] Id., p. 92, ll. 7-8.

"Upon returning to [her] vehicle, [Hopkin] started to get in and placed [her] right foot in [her] vehicle. As [she] was doing this, [Wilhelm] moved his vehicle, disengaging his vehicle" from Hopkin's vehicle "and causing [Hopkin's] vehicle to roll" backward down the hill. Hopkin's Answers to Interrogatories, Exhibit B, Answer 12; Hopkin Deposition, Exhibit C, at p.129, ll. 9-14. With her "right foot in my car but [her] body ... halfway out ..., [she] could not stop [the] car and fell out while it was moving. [Hopkin] was hit by the driver's side door [of her car] and dragged along the roadway." Hopkin's Answers to Interrogatories, Exhibit B, Answer 12; Hopkin Deposition, Exhibit C, at p. 129, ll. 9-14; Wilhelm Deposition, Exhibit E, p. 100, ll. 6-13.

2. Argument.

2.1 The standard for summary judgment.

Summary judgment is proper only if there exists no genuine issue of material fact and, based upon the undisputed facts, the moving party is entitled to judgment as a matter of law. Mass.R.Civ.P. 56(c).[5] "[G]ranting summary judgment is error where the party opposing the motion has alleged facts relating to the transaction on which suit has been brought which raise issues entitling him to trial." Wheatly v. American Telephone and Telegraph Company, 418 Mass. 394, 397 (1994).

The party moving for summary judgment initially has the burden of "affirmatively demonstrating that there is no genuine issue of material fact on every relevant issue, even if he would not have the burden on an issue if the case were to go to trial."[6] Only after the moving party has successfully made an initial demonstration that there is no genuine issue of material fact, does the burden shift to the non-moving party to respond by alleging facts which would establish the existence of such a genuine issue.[7] In determining if a

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[5] See, also, Massachusetts Hospital Association, Inc. v. Department of Public Welfare, 419 Mass. 644, 649 (1995); SCA Services, Inc. v. Transportation Insurance Company, 419 Mass. 528, 531 (1995); Marenghi v. Mobil Oil Corp., 416 Mass. 643, 646-47 (1993); Theran v. Rokoff, 413 Mass. 590, 591 (1992); McGuinness v. Cotter, 412 Mass. 617, 620 (1992); Willitts v. Roman Catholic Arch Bishop, 411 Mass. 202, 203 (1991).

[6] SCA Services, 419 Mass. at 531; Pederson v. Time, Inc., 404 Mass. 14, 17 (1989).

[7] SCA Services, 419 Mass. at 531.

genuine issue of material fact exists, a court must view the record in the light most favorable to the non-moving party and must draw all reasonable inferences in favor of that party.[8]

In the present case, Wilhelm's motion for summary judgment should be denied because there are genuine issues of material fact and Wilhelm is not entitled to judgment as a matter of law.

2.2 Mart is vicariously liable for Wilhelm's negligence because Wilhelm was acting within the scope of his employment when the accident occurred.

To determine whether an employee's tortuous conduct occurred within the scope of his or her employment, a Massachusetts court will ask generally "is this the kind of thing that in a general way employees of this kind do in employment of this kind.[9] The "conduct of an agent is within the scope of employment if it is of the kind he is employed to perform ...; if it occurs substantially within the authorized time and space limits...; and if it is motivated, at least in part, by a purpose to serve the employer." Burroughs, 423 Mass. at 877, citing Restatement (second) of Agency, §228.[10] In support of its assertion that Wilhelm was not within the scope of his employment, Mart claims that Wilhelm did not satisfy the three part test set forth in Burroughs, and invokes the so-called "going and coming rule," developed in workers compensation cases, which provides that, generally, an employee is not acting within the scope of his employment when commuting to or from work.[11]

Mart misinterprets the applicable law. First, in cases where an exception to the going and coming rule applies (e.g. the exception where the employee, although coming to or exiting work at the time of the accident, was injured on the employers premises), the employee is within the course or scope of employment as a matter of law, and the court need not apply the Burroughs test.[12] In any event, Wilhelm's conduct did satisfy all three parts of that test.

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[8] SCA Services, 419 Mass. At 531; Kelley v. Rossi, 395 Mass. 659, 661 (1985); Coveny v. President and Trustees of the College of the Holy Cross, 388 Mass. 16, 17 (1983); Attorney General v. Bailey, 386 Mass. 367, 371 (1982).
[9] Burroughs v. Commonwealth, 423 Mass. 874, 877 (1996), quoting Kansallis, 421 Mass. at 666.
[10] See also Wang lab., Inc. v. Business Incentives, Inc., 398 Mass. 854, 859 (1986).
[11] Kelly v. Middlesex Corp., 35 Mass.App.Ct. 30, 33 (1993).
[12] Where an employee, before starting or after completing his shift, is on a parking lot provided by his employer for the convenience of employees who drive to work (whether or not the employees are required to drive to work), the

2.2.1 Wilhelm's conduct obviously was the kind he was employed to perform and was motivated, at least in part, by a purpose to serve his employer, Mart.

Without question, in driving his vehicle at the time of the collision, Wilhelm was doing something he was employed to do. While colliding with Hopkin was not part of his job, the act of driving from a worksite onto Greenwood Road was one Wilhelm did many times as part of his employment. It does not matter that Wilhelm intended to drive home. As noted above, where an exception to the going and coming rule applies, the employee is within the scope of employment as a matter of law. If the mere fact that an employee was beginning a commute home (or ending a commute to work) could, by itself, render the employee no longer within the course or scope of employment, then none of the well established exceptions to the going and coming rule, discussed below, could ever apply.

Nor can there be any doubt that Wilhelm was acting for his employer, at least in part. In Baran's Case, 336 Mass. 342, 344 (1957), the Supreme Judicial Court noted that an employee is "occupying himself consistently with his contract of hire in [a] manner pertaining to or incidental with his employment" when he leaves the premises at the end of the day. Any other interpretation of the motivation requirement of the Burroughs test would render the going and coming rule absolute and would be inconsistent with the various common law exceptions to that rule recognized by the courts. In any event, when an exception to the going and coming rule applies, the employee is within the scope of employment as a matter of law and motivation need not be shown.

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employee is deemed, as a matter of law, to be within the scope of his employment. In Roger's Case, 318 Mass. 308, 309 (1945), the Supreme Judicial Court stated: "These facts require as matter of law a decree for the employee. Although the employee was not obliged to come to work in an automobile, and the employer was not obliged by contract to furnish the "parking lot," yet it is plain that it did furnish the lot as an incident of the employment, and that the employee, while actually on his employer's premises and on his way to the place where his day's work was to be performed by a route which he was permitted and expected to take, fell and was injured. It is of no consequence that a street intervened between the part of the employer's premises where the employee fell and the part where he was to work. The "parking lot" was used as an adjunct to the factory. The case stands just as it would if the automobile had been parked on the same lot on which the factory building stood and the employee had fallen while walking from the automobile to the factory door. The injury arose out of and in the course of the employment."(Emphasis added). See also Mikel v. MBTA, 14 Mass. Workers' Comp. Rep. 84, 2000 MA Wrk. Comp. LEXIS 20 (2000).

2.2.2 Wilhelm's conduct occurred within the time and space limits of his employment and the going and coming rule does not apply.

Although the going and coming rule usually means that employees commuting to or from work are not acting in the course or scope of employment, there are important exceptions to the rule which apply in this case.[13]

2.2.2(A) Wilhelm was within the scope of his employment because the accident occurred while he was still on Mart's worksite at 49 Greenwood Road.

An employee who is injured before or after the work day while on the employer's premises, including a parking lot, is deemed, as a matter of law, to have been injured in the course of employment.[14] Here, the evidence makes clear that Wilhelm was still on the 49 Greenwood Road worksite at the time of the accident. Wilhelm testified that his vehicle was three or four feet onto the road. Yet the specifications of the 1987 Nissan Sentra indicate a length of 13.9 feet. Thus, at least two-thirds of the vehicle, including the actual position in which Wilhelm was sitting, remained on the 49 Greenwood Road worksite, indisputably Mart's

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[13] Mart argues that the exceptions to the going and coming rule relied upon by Plaintiffs were developed in workers compensation cases and have no application to the present tort action. This is a classic attempt to "have its cake and eat it too." Mart relies on the going and coming rule, developed in the workers' compensation context, but simultaneously asserts that the exceptions to that rule, also developed in the workers' compensation context, do not apply. However exceptions to the going and coming rule also apply in tort cases. In Mendes v. Tin Kee Ng, 400 Mass. 131, 134-35 (1987), the Supreme Judicial Court applied the "on premises" exception to the going and coming rule in a tort action to determine whether an employee was acting within the scope of employment. The court cited workers compensation case law. Moreover, in both Lord v. Panaro, 2001 WL 1470352 (Mass. Super. 9/18/01), and Deleon v. Oteri, 1997 WL 430833 (Mass. Super. 7/21/97), courts applied well recognized exceptions to the going and coming rule in tort cases. Lord declined to apply the going and coming rule because the employee was traveling at the direction of her employer, while the Deleon court held that the going and coming rule was inapplicable because an employee traveling from his place of employment to obtain medical treatment is fulfilling an implied obligation of the employment contract. Deleon expressly relied upon Case of McElroy, 397 Mass. 743 (1986), a workers' compensation decision, as authority for this exception. There is no reason why the on premises exception should not also apply in tort cases. See also, Carter v. Reynolds, 175 N.J. 402, 413-14, 815 A.2d 460, 467 (2003) (noting that workers compensation exceptions to going and coming rule have been "engrafted onto tort law."

Mart's reliance on a footnote in Clickner v. City of Lowell, 422 Mass. 539 (1996), is misplaced. While that court did draw a distinction between tort and workers compensation cases, it did not hold that exceptions to the going and coming rule never apply in tort cases, and made no mention of Mendes. In addition, both Lord and Deleon were decided after Clickner yet still applied those exceptions in tort cases. Finally, it simply makes no sense to apply the going and coming rule itself to tort cases yet not apply the exceptions to that rule.

[14] Mendes, 400 Mass. at 134 ("An employee who is struck by an automobile at the conclusion of his work, in a parking lot which is part of his employer's premises, has been injured in the course of his employment.... Furthermore, `[a]n employee is covered for injuries sustained after arriving on the premises before work, or waiting to leave after work'"); Murphy v. Miettinen, 317 Mass. 633, 634-35 (1945); Smith v. LeBoeuf, Jr., 2002 Mass. Super. LEXIS 220, *5 (Mass.

premises. Wilhelm also testified that one-half of the vehicle was on the road and one-half still on the worksite. Even if that were true, where one-half of a vehicle remains on the employer's premises, the on-premises exception to the going and coming rule applies and the employee is deemed to be within the scope of employment as a matter of law.[15]

2.2.2(B) Greenwood Road, in general, was part of Mart's premises.

Even if the court finds that the Wilhelm vehicle was on Greenwood Road when the accident occurred, Wilhelm was still on Mart's premises, the going and coming rule does not apply and Wilhelm was acting in the scope of his employment as a matter of law, because all of Greenwood Road was part of Mart's premises. Greenwood road was a private road, was constructed as part of the Mart Subdivision, was bordered on both sides along its entire length by Mart properties in the Subdivision, and served as Mart's access road while constructing the Subdivision. It also was the road by which Mart employees like Wilhelm traveled between homes in the Subdivision in order to do their work. Moreover, Wilhelm regarded the Subdivision, as a whole, as his place of employment. Under these circumstances, the only reasonable conclusion is that Greenwood Road functioned, for all practical purposes, as part of Mart's Subdivision and was a part of its premises.

Therefore, while on Greenwood Road within the Subdivision, Wilhelm remained on his employer's premises and was within the scope of his employment as a matter of law.

2.2.2(C) As the only avenue by which to exit the 49 Greenwood Road worksite necessarily utilized the portion of Greenwood Road on which the accident occurred, Mart's 49 Greenwood Road premises must be deemed to include that portion of the Road.

Mart stated in its answers to interrogatories that the 49 Greenwood Road driveway was the only means by which employees who parked at the 49 Greenwood Road worksite, could exit the worksite. Mart

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Super. 6/10.02); Mikel v. MBTA, 14 Mass. Workers' Comp. Rep. 84, 2000 MA Wrk. Comp. LEXIS 20, *4-13 (4/3/00).

[15] Pacific Indemnity Co. v. Industrial Accident Commission, 28 Cal.2d 329, 337, 170 P.2d 18, 23 (1946) ("The evidence shows that the Henslick vehicle was halfway into the lot when the impact occurred and was shoved against another automobile parked on the lot. Under such circumstances, it may reasonably be said that, at the time of the accident, the employee was on premises maintained by the employer.").

Answers to Interrogatories, Exhibit D, at Answer No. 25. Obviously, any employee using that driveway would also be forced to utilize that portion of Greenwood Road directly abutting the end of the driveway in order to complete a turn onto Greenwood Road. It was on this portion of the Road that the accident occurred. Thus, Wilhelm was at the location of the accident because the only means of egress provided by Mart required him to be there.

In such circumstances, the employee is deemed, as a matter of law, to be within the course or scope of employment even if the location of the accident is not on the employer's property or within the employer's control. The court in In re Sundine, 218 Mass. 1, 4-5 (1914), held that an employee had been injured in the course of employment despite the fact that the accident occurred on a flight of stairs not controlled by the employer. The court stressed that the stairs offered the only means of going to and from the employer's workroom, and that under such circumstances the employer had practically invited the employee to use those stairs. Similarly, in Mahan's Case, 350 Mass. 777, 777 (1966), the court, citing Sundine, held that an employee was in the course of her employment when injured in a bus parking lot not owned or controlled by the employer but contiguous to the employer's premises, when the employee was walking directly to the workplace across the lot.

Case law from other jurisdictions makes clear that an employer's "premises" does not end at the property line, but includes a reasonable margin of space necessary to allow ingress and egress.[16] Where an employer provides only one way to enter or exit the workplace, the premises is deemed to include the required route, even if that route is located off the employer's property and beyond the employer's control. PPG Industries. Inc. v. Workmen's Compensation Appeal Board, 116 Pa.Cmwlth. 597, 598-602, 542 A.2d 621, 621-23 (1988) (portion of public street over which employees had to drive to exit employers parking lot

[16] Barnett v. Britling Cafeteria Co., 225 Ala. 462, 143 So. 813, 813 (1932); Pacific Indemnity, 28 Cal.2d at 336, 170 P.2d at 22; Hafner v. A. G. Edward & Sons, 903 S.W.2d 197, 200 (Mo.App. 1995); Wetzel's Painting and Wallpapering v. Price, 19 Va.App. 158, 160, 449 S.E.2d 500, 501 (1994).

was deemed part of employer's premises).[17] Notably, the premises may extend to include portions of a public road where employees must cross those portions to exit the workplace.[18]

In the present case, Mart provided only one way out of the 49 Greenwood Road worksite. Because that avenue of egress necessarily required employees to cross the portion of Greenwood Road where the accident occurred, Wilhelm was still "on premises" at the time of the accident, the going and coming rule does not apply, and Wilhelm was within the scope of his employment as a matter of law.

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[17] See also Barnett, 225 Ala 462, 143 So. at 813-14 (portion of public sidewalk in front of employer's store was only way to enter building and was therefore part of employer's premises); Bales v. Service Club No. 1, Camp Chaffee, 208 Ark. 692, 701-02, 187 S.W.2d 321, 326 (1945) (citing Barnett and holding that location 31 feet from entrance of employer's club was on premises where the employee was following the only or most practical route to enter the club); De Howitt v. Hartford Fire Ins. Co., 99 Ga. App. 147, 148, 108 S.E.2d 280, 282 (1959) (two entrances provided by landlord to building in which employer's place of business were deemed part of employer's premises); May Department Stores v. Harryman, 65 Md.App. 534, 546, 501 A.2d 468, 474 (1985) (holding that shopping center parking lot was part of premises of employer whose place of business was in the shopping center, despite employer's lack of ownership, control or maintenance, where lot was "normal and customary means to and from the employer's premises". Court found relevant "the extent to which the nature of the business and its location contemplated or required the employee to be where the injury occurred"); Hafner, 903 S.W.2d at 200 ("The extended premises doctrine provides that an employer's premises may extend by implication to property 'so appropriated by the employer or so situate, designated and used by the employer and his employees incidental to their work as to make [it], for all practical intents and purposes, a part and parcel of the employer's premises and operation.'... 'Property is sufficiently "appropriated" to make it a part of the employer's extended premises if it is used by employees as a route of access to the employer's premises, and such use is known to and acquiesced in by the employer.' "); Rosenwasser v. Lanes Lake Success, 9 A.D.2d 1001, 1001, 195 N.Y.S.2d 74, 76 (1959) (where employer required employees who arrived for work by bus to cross lot to gain access to employee entrance, lot was part of premises regardless of employer's lack of control of lot); Brown v. Workmen's Compensation Appeal Board, 505 Pa. 35, 39-42, 476 A.2d 900, 902-04 (1984) (where employee had to cross lobby of multipurpose building in which employer was tenant in order to leave work, lobby was part of employer's premises regardless of ownership or control); Epler v. North American Rockwell Corporation, 482 Pa 391, 398-99, 393 A.2d 1163, 1166-67 (1978) (employee was on premises when struck by car on public street between employer's parking lot and employer's factory, regardless of employer's lack of ownership or control); Schofield v. Workmen's Compensation Appeal Board, 39 Pa. Cmwlth. 282, 284, 395 A.2d 328, 329 (1978) (employer's premises included private railroad crossing at which employee was hit by train while driving to work, where crossing was used as usual means of ingress and egress and therefore constituted an integral part of employer's property); Eberle v. Union Dental Co., 182 Pa.Super. 519, 523-24, 128 A.2d 136, 139 (1957) ("where the employee must traverse property of the employer... to reach or leave work ... then such entrance or exit, whether located on property under the control of the employer or not, is a part of the employer's 'premises'."); Wetzel's, 19 Va.App. at 160-62, 449 S.E.2d at 501 (concrete apron around employer's construction site, though located on public property, was part of employer's premises where worker was required to cross apron in order to gain access to worksite from street); Hamilton v. Department of Labor, 77 Wash.2d 355, 363, 462 P.2d 917, 922 (1969) (railroad crossing was on employer's premises even though crossing was not on employer's property, where employee had to cross tracks in order to go from employer provided parking lot to workplace).

[18] Barnett, 225 Ala 462, 143 So. at 813-14; Greydanus v. Industrial Accident Commission, 63 Cal.2d 490, 492-93, 407 P.2d 296, 298-99 (1965); Pacific Indemnity, 28 Cal.2d at 338, 170 P.2d at 24; Brown, 505 Pa. at 39-42, 476 A.2d at 902-04; Epler, 482 Pa. at 398-99, 393 A.2d at 1166-67; PPG Industries, 116 Pa.Cmwlth. at 598-602, 542 A.2d at 621-23.

2.2.2(D) The Mart premises at 49 Greenwood Road extended to include the part of Greenwood Road where the accident occurred because the condition of the Mart premises (the down-sloping driveway creating a blind turn for anyone backing onto the Road) created a special hazard for Mart employees like Wilhelm.

In addition to the on-premises exception, the going and coming rule is subject to a special hazard exception. Where a condition on the employer's premises creates a special hazard to the employee when entering or exiting the workplace the employee is deemed to be in the course or scope of employment when doing so, even if outside of the employer's premises. In a remarkably similar case, the Supreme Judicial Court of Maine held that an employee was in the course of employment when she was involved in a collision while exiting the employer's private road onto the public road because a special hazard existed on the employer's premises which made the employee's exit dangerous. As in the present case, the hazard was that the turn onto the public street was "blind." Oliver v. Wyandotte Industries Corp., 308 A.2d 860, 862-63 (1973). The court stated:

> It was the contention of the present Petitioner that the private way over which she traveled to reach the public street was so situated as to present her with a blind entrance to the public street which made it impossible for her to determine whether traffic was approaching from her left until she was actually so far into the street that she was already exposed to the danger. In the words of the Minnesota Court, she claimed that a hazard on the premises of the employer spilled over into the public street....
>
> We believe that the Commissioner's position on the state of the law excluded effective consideration of Petitioner's claim that a dangerous condition existed on the premises maintained by her employer to provide ingress to or egress from the place of work-to wit, a blind exit from the premises into the public street-which was a hazard not common to the traveling public and which was a cause of her accident.
>
> In our opinion, the Petitioner's accident would be compensable if it is found that a condition existed on the employer's premises which made hazardous the employee's exit into the public street and was in fact a cause of the employee being injured after she had reached the street.

Id. Numerous other courts have applied the special hazard exception.[19]

Here, the layout of the 49 Greenwood Road worksite, specifically the down sloping driveway which made it impossible for employees backing from the driveway onto the road to see oncoming traffic, created

[19] See e.g. Parks v. Workers' Compensation Appeals Board, 33 Cal.3d 585, 589-92, 660 P.2d 382, 384-86 (1983); Greydanus, 63 Cal.2d at 492-93, 407 P.2d at 298-99; Pacific, 28 Cal.2d at 336-38, 170 P.2d at 23-24; Husted v. Seneca

such a special hazard. Wilhelm remained in the scope of his employment while exiting the worksite until he had completed his entry onto Greenwood Road and was no longer threatened by that hazard.

2.2.2(E) Because Wilhelm had to make an effective left turn to exit the Mart worksite at 49 Greenwood Road, his employment exposed him to a special hazard on the Road and Wilhelm was still in the scope of his employment at the time of the accident because he was still subject to that work related hazard.

Wilhelm testified at deposition that at the time of the accident, he was exiting the 49 Greenwood Road driveway, intending to back up across one lane of Greenwood Road into the opposite lane. This approximates a forward facing left turn in that both turns involving crossing a lane of oncoming traffic. The necessity of making such a "left turn" in order to begin his commute home was an additional special hazard to which Wilhelm was exposed by his employment at the 49 Greenwood worksite, and, like the blind driveway risk discussed in the preceding section, Wilhelm remained in the scope of his employment until he had competed this "left turn".[20]

2.2.2(F) Wilhelm remained in the scope of his employment throughout his commute home because his employer, Mart, effectively required him to bring his vehicle to work so that it would be used for work related travel within the Subdivision.

The going and coming rule also is inapplicable where the employee is driving his vehicle at the direction of the employer, as when the employer requires the employee to drive to work so that the employee can use the vehicle for work related purposes during the day.[21, 22]

Steel Service, Inc., 41 N.Y.2d 140, 144-45, 391 N.Y.S.2d 78, 81-82 (1976).

[20] Greydanus, 63 Cal.2d at 492-93, 407 P.2d at 298-99; Pacific, 28 Cal.2d at 336-38, 170 P.2d at 23-24; Husted, 41 N.Y.2d at 144-45, 391 N.Y.S.2d at 81-82.

[21] Maguire's Case, 16 Mass.App.Ct. 337, 339-40 (1983) ("where it appears that it was the employment which impelled the employee to make the trip, the risk of the trip is a hazard of the employment"); Lord, 2001 WL 1470352, *3 (holding employer of traveling home health aid vicariously liable for aid's negligence, noting that employer not only knew of the trip but "required that [the aid] own or have access to a vehicle to make such trips"); Carter v. Reynolds, 175 N.J. at 414-17, 815 A.2d at 467-69 (there is an exception to the going and coming rule where the employer requires the employee to drive to work so that he can use the vehicle for work related tasks).

[22] Gwaltney's Case, 355 Mass. 333 (1969), is not to the contrary. The court declined to apply an exception to the going and coming rule although the employee had brought his vehicle to work in order to use it during the day for work related purposes. However, the injuries in that case had nothing to do with the vehicle and were suffered while the employee was walking from the parking garage to his office.

In the present case, Mart effectively required Wilhelm to drive to work in order to use his vehicle for work related purposes. While Mart did not expressly order Wilhelm to do so, the nature of the work made use of Wilhelm's vehicle essential. Wilhelm's employment required him to travel throughout the 81 lot Subdivision, making repairs to multiple homes each day. A vehicle was necessary to travel between homes in the Subdivision. Wilhelm Deposition, Exhibit E, p. 20, ll. 10-12, 15. Although Mart did not explicitly require Wilhelm to use his vehicle for transportation during the work day, Mart provided no alternative transportation within the Subdivision. Wilhelm testified only that he would not need his car if he was working with someone else and they took a "site truck." Id. at p. 20, ll. 10-15. That use of a personal vehicle was necessary is evidenced by the fact that Mart had a policy of reimbursing employees for their use of personal vehicles. He kept his tools in his car and was eligible for mileage reimbursement from Mart. Id. at p. 19, ll. 13-17.

As Wilhelm was required to drive to work, his commute was in the scope of his employment and Mart is vicariously liable.

2.3 Wilhelm is liable for Hopkin's injuries even if she failed to secure her vehicle because the collision negligently caused by Wilhelm rendered Hopkin confused, anxious, shaken up, upset, panicked and shocked, and those mental disturbances caused her failure to secure the car.

2.3(a) The rolling of Hopkin's car was not so extraordinarily abnormal as to break the chain of causation between the collision caused by Wilhelm and Hopkin's injuries.

Mart's position, like Wilhelm's in his previously denied motion for summary judgment, appears to be that alleged negligence on Hopkin's part in failing to secure her vehicle was a superseding intervening cause which broke the chain of causation between the initial collision, which Wilhelm negligently caused, and the later rolling of Hopkin's car. However, even assuming, for the sake of argument, that Hopkin was negligent, only extraordinary negligence by a third party will excuse the original tortfeasor's liability. A.L. v. Comm., 402 Mass. 234, 244 (1988). Massachusetts courts look to foreseeability as the critical factor in determining whether an act of a person other than the defendant is a superseding cause. Fiduciary Trust Co. v. Bingham, Dana & Gould, 58 Mass. App. Ct. 245, 253 (2003). The Fiduciary Trust court cited the Restatement (second)