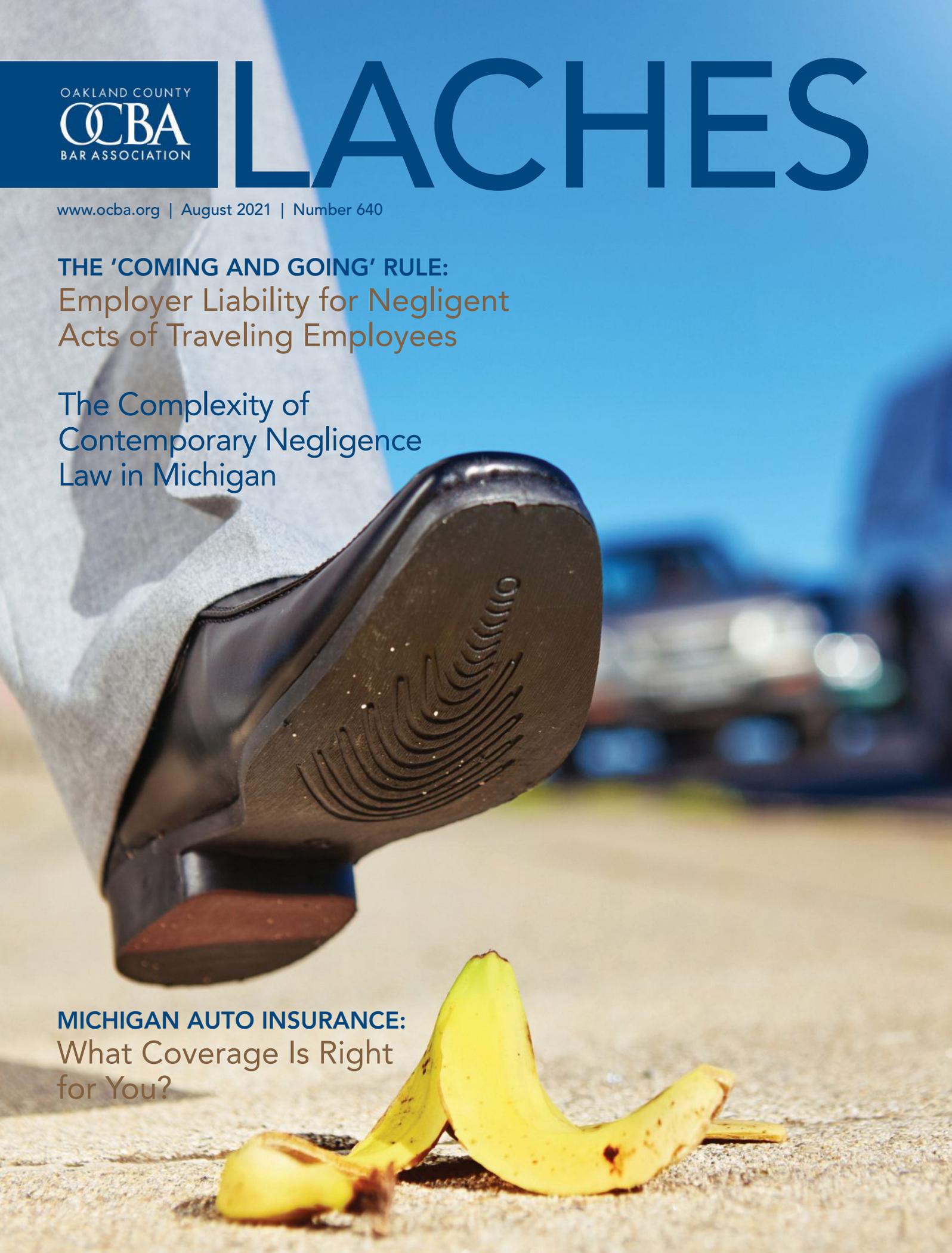


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Employer Liability for Negligent
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The Complexity of
Contemporary Negligence
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THE 'COMING AND GOING' RULE: Employer Liability for Negligent Acts of Traveling Employees

By Gregory LaVoy and Meriam Choulagh

Millions of Americans have transitioned to working from their homes since the start of the COVID-19 pandemic in early 2020. With the flexibility of working from home, many employees are able to work at any time and any place. As offices sit empty, many employers across the United States are reevaluating the need for the high cost of a communal working space. In fact, companies like Google, Twitter, Microsoft, and numerous other smaller companies have announced that they plan to permit some or all of their workforces to work at home once the pandemic is over. While employers enjoy several benefits from eliminating or downsizing office space, they could also risk increased liability for their employees' negligent acts while working outside the four walls of an office.



It is a well-established rule in Michigan that employers are vicariously liable for the negligent acts of their employees while those employees are acting in their “scope of employment.” Beyond this general rule, however, determining exactly *when* an employee is in the scope of employment, or if the employee’s activity is actually benefiting the employer, has led to several judicially created doctrines, along with exceptions to the general rules and further exceptions to the exceptions. One exception to the “scope of employment” doctrine where employers have historically been able to escape vicarious liability arises when an employee commits a negligent act while commuting to or from work. This so-called “coming and going” exception as applied to general negligence cases has never had clearly defined edges and thus can present a source of confusion to both practitioners and courts. Adding to the confusion, a similar “course of employment” standard and a related “coming and going” exception exist for claims

for worker’s compensation benefits. Indeed, many attorneys are unaware that there are two different courses and scopes of employment tests: one covering claims for statutory worker’s compensation benefits and another for determining *respondent superior* liability against an employer for the negligent acts of an employee.

This article discusses issues surrounding the required analysis for determining whether an employee’s acts are within the scope of employment for purposes of employee travel. More specifically, this article focuses on the so-called “coming and going” rule of employer non-liability and its exceptions. Special attention must also be paid to how that rule is applied to claims of vicarious liability as opposed to worker’s compensation claims. This is particularly true in light of the lack of clear standards or discussion in published case law and where both attorneys and courts have a tendency to mix discussion of the two systems where they serve different purposes, have different scopes, and

thus are not coterminous in application. Ultimately, understanding these principles and the reasons by which they were developed will aid practitioners in assessing claims and defenses to alleged vicarious liability in an increasingly complex and evolving work world.

RESPONDEAT SUPERIOR LIABILITY GENERALLY

Under the common law doctrine of *respondent superior*, an employer can be held vicariously liable for the negligent acts of an employee that cause injuries to third parties if the employee’s conduct at the time of the occurrence was within the “scope of employment.”¹ An employee acts within the scope of his employment when performing tasks generally assigned to him in furtherance of the employer’s business.

At a basic level, questions pertaining to the “scope of employment” ask whether an employee’s actions during an accident were part of the job or, instead, whether those actions fall outside of the employee’s job duties. This doctrine is founded on the principle that one who expects to derive benefit from an act done by an agent must answer for any injury that a third party may sustain from it. This “scope of employment” standard thus encompasses a broad range of negligent conduct committed by employees while at work, with resultant liability to employers on a vicarious basis. As a corollary, though, an employer is not vicariously liable for acts committed by its employees outside the scope of employment because the employee is not acting for the employer or under the employer’s control.²

THE ‘COMING AND GOING’ RULE AND ITS EXCEPTIONS

Michigan and many other jurisdictions recognize a general rule that traveling to and from work is not within the scope of employment for purposes of imposing vicarious liability upon an employer for the negligence of an employee-driver. This rule, also known as the “coming and going” rule, is based on the concept that a sufficient causal connection between work and an employee’s activities does not exist during travel time because an employer ordinarily does not derive any specific and work-related benefit from the employee’s commute to and from work alone.

The so-called “coming and going” rule of employer non-liability is not absolute, as Michigan courts have recognized some

exceptions where an employer may be held liable for injuries caused while driving to or from work. For example, Michigan common law recognizes a “dual purpose” exception where an employer can be liable for the negligence of its employee committed while going to and coming from work if the employee’s trip also “involved a service of benefit to the employer.”³ In *Kester v. Mattis, Inc.*, the Court of Appeals applied this exception to the “coming and going” rule, holding that an accident that occurred while an employee was delivering end-of-the-day sales receipts for the employer while also driving home for the day involved a separate service of benefit, thereby giving rise to liability.⁴ Thus, because the employee was performing a special errand for his employer at the same time as his commute, the employee may fairly be said to be acting within the scope of his employment such that the employer would be deemed vicariously liable.

Michigan courts have also recognized another exception to the “coming and going” rule of employer non-liability in situations when the employer creates the necessity for travel. By way of example, an employee may be within the scope of employment when traveling from home to an out-of-town work meeting or business conference. In those circumstances, the commute is considered to be in the “scope of employment” because the employer again derives a benefit from the employee’s attendance at such conferences and meetings, particularly if required by the employer.⁵ Because there is a benefit to the employer, Michigan law provides that negligence by the employee during his commute can therefore also fairly be charged to the employer.

CONTRASTING RESPONDEAT SUPERIOR LIABILITY WITH WORKER’S COMPENSATION LIABILITY

Similar to the doctrine of *respondent superior*, Michigan’s Worker’s Disability Compensation Act uses a “course of employment” analysis to determine where an employer’s liability starts and ends for purposes of injuries sustained by an employee while working and which must then be compensated under Michigan’s worker’s compensation disability system.⁶ The test for establishing whether an employee’s injuries “ar[ose] out of and in the course of employment” for worker’s compensation coverage, however, is much less restrictive than the test for finding an employer vicariously liable under general tort principles at common law. Indeed,

issues regarding the compensation of injured workers are entirely different than questions of tort liability to provide compensation to third parties injured by employees. Michigan courts have reasoned that the worker’s compensation “course of employment” standard is to be “liberally construed to grant rather than deny benefits”⁷ to ensure recovery *regardless of fault* for workers injured while on the job. There is no similar purpose in “scope of employment” questions in the *respondent superior* context for imposing *fault-based tort liability* on an employer for the actions of its employee.⁸

Beyond the separate purposes of the two liability systems, Michigan’s worker’s compensation statute also expressly provides exceptions to the “coming and going” rule for claims made under the Act. This includes a statutorily recognized exception for an employee going to or from work while on the premises where the employee’s work is to be performed.⁹ Under this “premises exception,” an employee is said to be in the course of employment as soon as the employee enters the employer’s premises, even if the employee has not yet clocked in, reached the work location, or begun performing any job function. Thus, consider a situation where an employee is involved in an accident in

the employer’s parking lot prior to beginning a morning shift; that employee may be within the “course of his employment” for purposes of worker’s compensation, but not within the “scope of employment” for purposes of vicarious liability if a third party is also injured in the accident.

In addition to the “premises exception,” Michigan courts have also crafted judicially created exceptions to the “coming and going” rule in the worker’s compensation context in furtherance of the remedial purposes of that statute. These include extending worker’s compensation benefits where (1) the employee is on a special mission for the employer, (2) the employer derives a special benefit from the employee’s activity at the time of the injury, (3) the employer paid for or furnished employee transportation as part of the employment contract, (4) the travel comprised a dual purpose combining employment-related business needs with the personal activity of the employee, (5) the employment subjected the employee to excessive exposure to traffic risks, or (6) the travel took place as a result of a split-shift working schedule or employment requiring a similar irregular nonfixed working schedule.¹⁰ While some of these exceptions may also be relevant to consider on a common



law tort claim, no published authority in Michigan has adopted the worker’s compensation “course of employment” framework to determine “scope of employment” for *respondent superior* liability.

At present, the vast majority of published authority in Michigan concerning the “coming and going” rule discusses the rule and its exceptions in relation to worker’s compensation claims. In contrast, the few published decisions discussing the “coming and going” rule as it relates to *respondent superior* liability claims are rather dated. While historically cases arising under these separate systems have been analyzed separately, some recent cases have blurred the lines, conflating the broader, no-fault worker’s compensation standards with what was originally intended to be a narrower, fault-based employer liability test.

For example, in an unpublished decision, the Michigan Court of Appeals in *Wu v. Johnson*²¹ interjected the worker’s compensation exceptions to the “coming and going” rule into a case without worker’s compensation issues that raised questions arising solely in tort at common law. In *Wu*, a legal aid attorney was driving to the courthouse in his own vehicle prior to beginning work for the day when he was involved in an accident with the plaintiff. Analyzing the worker’s compensation exceptions to the “coming and going” rule as part of its extensive analysis, the court ultimately determined that the employee was not within the scope of his employment where the employee was merely driving to his work site at the courthouse. While the employer in *Wu* thus avoided vicarious liability for an employee not operating in the scope of his employment even though the court considered the broader factors of the worker’s compensation context, blending standards can contribute to a risk for greater confusion in case law used to guide both practitioners and courts in future cases.

DETERMINING WHETHER A TRAVELING EMPLOYEE IS WITHIN SCOPE OF EMPLOYMENT

While broad liability concepts relevant to worker’s compensation claims should not necessarily be utilized to determine “scope of employment” for vicarious liability for a traveling employee, the relevant analysis also extends beyond the general “coming and going” rule of employer non-liability, particularly as work becomes increasingly remote and work relationships more complex. The

most critical factor will always be whether an employee is rendering a specific benefit to an employer’s business at the time of travel or commute. By way of unpacking this standard further, though, case law addressing potential *respondent superior* liability suggests that the following basic questions can be used to determine whether an employee is acting within the scope of his employment at the time of an alleged negligent act:

- Was the employee driving to a required business trip or out-of-town work meeting?²²
- Does the employee have a designated work location, or is the employee a traveling salesperson?²³
- Did the employee make or receive any work calls (or emails or text messages) while driving?²⁴
- Was the employee running an errand for the employer?²⁵
- In addition to potential factors showing an employer benefit, was the employee being

compensated or reimbursed during the commute?²⁶

- Was the employee traveling between two work locations?²⁷
- Was the employer receiving a direct and nongeneric benefit from the travel?²⁸

While the above inquiries present a good starting point for practitioners, ultimately the application of the “coming and going” rule and its exceptions is fact-specific. Additionally, the lack of direct guidance on the rule from Michigan’s higher courts gives practitioners room to be creative when crafting arguments either for or against finding an employer vicariously liable.

CONCLUSION: A CAUTIONARY TALE FOR PRACTITIONERS TO KEEP SEPARATE PRINCIPLES SEPARATE

With employers potentially facing increasing liability from allowing employees to work from home or in other nontraditional



settings, attorneys may reasonably expect to see more diverse fact patterns alleging vicarious liability for employees while driving. The test for determining whether worker's compensation benefits should be paid to employees for injuries sustained has historically been less restrictive than the test for imposing *respondet superior* liability for injuries sustained by third parties. Yet, contemporary case law has increasingly blended the tests and distinctions. Notably, the published decisions from Michigan have not explicitly recognized the worker's compensation exceptions to the "coming and going" rule in vicarious liability cases or, frankly, analyzed the extent to which statutory provisions of the worker's compensation regime may be (in)applicable in a common law tort context. Ultimately, statutory exceptions or judicially created exceptions raised in furtherance of the (no-fault) worker's compensation statute should arguably be limited to that statute absent binding authority from Michigan's appellate courts extending those principles at common law in the context of tort claims.

The potential ambiguity that exists as a result should raise concerns to practitioners for both the plaintiff and defense when evaluating tort claims with potential vicarious liability. For the plaintiff bar, potential new claims or cases should be analyzed with a critical eye to the appropriate standard and, in particular, whether a potential case can satisfy a more exacting common law standard. For the defense, cases must likewise be analyzed to determine whether the plaintiff has a provable vicarious liability claim under the appropriate standard or, instead, whether liability may be altogether avoided on this basis. Thus, practitioners should use caution to avoid intermixing relevant standards, including by relying upon potentially inapplicable worker's compensation law when addressing common law issues of vicarious liability to an employer.

By way of example, after more than two years in litigation, the authors of this article recently achieved total dismissal of a third-party/auto-negligence lawsuit on the basis that the plaintiff could not establish a right of recovery against the defendant-employer at common law. The plaintiff had relied upon analogous but ultimately distinguishable statutory provisions and case law from the worker's compensation context, while defense counsel successfully argued that dismissal of the tort claim was appropriate under the applicable "coming and going" scope of employment common

law principles. Understanding the applicable principles, the underlying purposes of the resultant rules, and thus the likelihood of success in applying those principles and rules to the merits of an individual case can help practitioners on both sides of the aisle examine the strengths and weaknesses of the claims/defenses and develop a litigation strategy accordingly. 42



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Footnotes:

1. *Rogers v. J.B. Hunt Transport, Inc.*, 466 Mich. 645, 651; 649 N.W.2d 23 (2002).
2. *Id.*
3. *Kester v. Mattis, Inc.*, 44 Mich. App. 22, 24; 204 N.W.2d 741 (1972).
4. *Id.* at 23.
5. See *Long v. McKay*, 295 Mich. 494, 498; 295 N.W. 239 (1940); *Ten Brink v. Mokma*, 13 Mich. App. 85, 87; 163 N.W.2d 687 (1968).
6. MCL 418.301(1).
7. *McCaul v. Modern Tile and Carpet, Inc.*, 248 Mich. App. 610, 619; 640 N.W.2d 589 (2001).
8. See *Thomas v. Certified Refrigeration, Inc.*, 392 Mich. 623, 629-630; 221 N.W.2d 378 ("[P]erhaps the most important guide for the interpretation of the expression 'arising out of and in the course of his employment' [in the Worker's Compensation Act] is to realize that it should be sharply differentiated from the

technical phrase 'scope of employment' designed to circumscribe the area of vicarious liability to third persons" [quotation marks and citation omitted]).

9. See MCL 418.301(3).
10. *Bowman v. R.L. Coolsaet Constr. Co.*, 275 Mich. App. 188, 191; 738 N.W.2d 260 (2007).
11. *Wu v. Johnson*, unpublished per curiam opinion of the Court of Appeals, issued March 15, 2011 (Docket No. 294250).
12. See, e.g., *Ten Brink*, 13 Mich. App. at 87 (holding that a question of fact existed as to whether an employee who was involved in an accident while driving to a mandatory out-of-town business meeting was within scope of his employment).
13. See, e.g., *Fontaine v. Hersey*, unpublished per curiam opinion of the Court of Appeals, issued October 23, 2014 (Docket No. 315410) (holding that a question of fact existed as to whether the employee was in the scope of his employment as a "traveling salesman" at the time of the accident because, at the time of the accident, the employee was traveling home after just completing a sales call scheduled by his employer).
14. See, e.g., *Id.*
15. See, e.g., *Kester*, 44 Mich. App. at 24 (holding that a question of fact existed as to whether a gas station employee was acting within scope of his employment while en route to his manager's home to deposit receipts after completing his shift).
16. See, e.g., *Daniels v. Clark*, unpublished per curiam opinion of the Court of Appeals, issued Dec. 15, 2009 (Docket No. 288403), *lv den* 488 Mich. 864 (2010) (holding that a question of fact existed as to whether an employee was acting within the scope of her employment as a salesperson when she collided with another vehicle on her way to a weekly work meeting because a majority of her duties involved making sales calls to clients outside the location to which she was driving at the time of the accident; and further noting that the employee received an annual car allowance as part of her compensation).
17. See, e.g., *Backus v. Kauffman (On Rehearing)*, 238 Mich. App. 402, 409-410; 605 N.W.2d 690 (1999) (holding that a schoolteacher, who worked at two schools, was acting in the scope of her employment when she was involved in an automobile accident as she shuttled between the two schools).
18. See, e.g., *Stark v. L E Myers Co.*, 58 Mich. App. 439, 443-444; 228 N.W.2d 411 (1975) (rejecting the argument that an employee's mere travel to work was a benefit to the employer giving rise to vicarious liability as instead "a benefit common to all employers").