

*Moradi v. Marsh USA, Inc.*, 2013 Cal. App. LEXIS 736

**Because an employee was required to use her personal vehicle to travel to and from the office and make other work-related trips during the day, she was acting within the scope of her employment when she was commuting to and from work.**

**FACTS AND PROCEDURAL POSTURE**

Judy Bamberger worked for Marsh USA, Inc. as a salesperson. Her primary responsibilities were cold-calling, forming relationships with potential clients, providing seminars, making presentations, and becoming involved with local organizations such as the Rotary Club and the Chamber of Commerce. Bamberger regularly travelled to events and meetings away from her office. Bamberger was required to use her personal vehicle to reach her destinations, and she was allowed to stop for client meetings on her way home from work. She also used her vehicle to transport Marsh executives, clients, and other employees to meetings, appointments, and seminars.

All 10 Marsh employees in the same or similar sales positions were required to use their personal vehicles. When Bamberger began working with Marsh in 1997, Marsh had provided vehicles to its salespersons. In 2005 Marsh switched to a “car allowance” policy where the company made a monthly payment towards the lease or loan of the salesperson. Under the new policy, salespersons were also reimbursed for business mileage.

On April 15, 2010 Bamberger used her personal vehicle to transport herself and some coworkers to a company sponsored program. After the program they returned to the office. Planning to meet with a client the next day, Bamberger had put materials for the meeting, and her laptop, in her car so that she could review the materials that night. When the work day ended, Bamberger left to drive home, planning to stop for frozen yogurt and a yoga class on the way. Bamberger’s home was about 27 miles from the office; the yogurt shop and yoga studio were within 3 miles of her house. When Bamberger took a left turn across the oncoming lanes into the yogurt shop parking lot, she collided with a motorcycle driven by Majid Moradi.

Moradi filed suit against Bamberger, later amending the complaint to add Marsh. Marsh moved for summary judgment, which both Moradi and Bamberger opposed. The trial court granted summary judgment for Marsh. Moradi appealed, Bamberger did not.

**DISCUSSION**

Under the “going and coming” rule, employers are generally exempt from liability for tortious acts committed by employees while on their way to and from work. An exception to the “going and coming” rule is the “required vehicle exception.” The required vehicle exception arises where the employee’s use of his or her personal vehicle gives some incidental benefit to the employer. The exception requires that the use of the personal vehicle be an express or implied condition of employment, or that the employee has made the vehicle available as an accommodation to the employer and the employer has come to rely on its use.

The reasoning behind the required vehicle exception is that because the employee is required to use the vehicle at work, the employee is acting within the scope of employment while transporting the

vehicle to and from work. An employee that is not required to use his vehicle for work, could choose any means of travel to and from the workplace. But an employee that *is* required to use his personal vehicle for work, *must* drive that vehicle to and from the workplace so that it is available to be used. Thus, the employer exercises *control* over the employee's method of commuting, and the employer also draws a *benefit* from the use of the employee's vehicle.

In this case, however, another fact complicates the analysis: Bamberger's decision to make stops outside of her normal commute. The court relied heavily on *Lazar v. Thermal Equipment Corp.* (1983) 148 Cal. App. 3d 458 in explaining that the test for whether an employee is still within the course and scope of employment when she has deviated from her commute, is whether the deviation was foreseeable. Quoting *Lazar*, the court explained that losses caused by the torts of an employee: are placed upon the employer because, having engaged in an enterprise which will, on the basis of past experience, involve harm to others through the torts of employees, and sought to profit by it, it is just that he, rather than the innocent injured plaintiff, should bear them; and because he is better able to absorb them, and to distribute them, through prices, rates or liability insurance, to the public, and so to shift them to society, to the community at large.

Foreseeability in this context, according to the *Lazar* court, is whether the employee's conduct is not so unusual or startling that it would seem unfair to include the loss resulting from it among other costs of the employer's business.

Thus, the court explained, although Bamberger was pursuing a personal objective in stopping for yogurt and yoga, those activities did not constitute an unforeseeable and substantial departure from her commute. They "were a foreseeable and minor deviation on her drive home." Furthermore, because she was driving her vehicle home, as a condition of employment, she was either combining her own business with that of her employer, or attending to both at the same time. When an employee is engaging in both personal and work business, courts will not inquire as to which business the employee is actually engaged when a third person is injured.

Marsh argued that, rather than the required vehicle exception, this case fell under the special errand exception. Under the special errand exception, an employee is within the scope of his employment while travelling to the location of the errand and returning to the place of work; the special errand exception may also apply where the employee is asked to perform a special errand on the way home from work. The exception does not apply when the employee deviates from the special errand for personal reasons. The court did not agree that the special errand rule should apply in this case, but explained that even if it were to be applied, the deviation was not substantial enough to preclude a finding of liability on the part of the employer.

*Held:* Bamberger was acting within the course and scope of her employment when she struck Moradi. The trial court erred in granting summary judgment for Marsh.