Bingener v. City of Los Angeles (1/9/20; 2nd Appellate District, Div. 3, No. B291112)
"Going and coming rule" under *respondeat superior* theory prevented employer from being vicariously liable when employee hit and killed pedestrian while driving to work in his personal vehicle

FACTS/PROCEDURE

Kim Rushton worked for the City of Los Angeles testing water samples at their Hyperion Water Treatment Plant. On the dark morning of February 25, 2015, Rushton drove to work in his personal vehicle. Rushton hit pedestrian Ralph Bingener with his vehicle as Bingener was entering a crosswalk. Bingener ultimately died from the injuries he received.

Rushton recently recovered from a debilitating back injury he got at work and had only recently been cleared to return. He also had other chronic health problems including neuropathy, tremors, and occasional seizures which caused him to have a few seconds of *déjà vu.* He testified that these conditions did not impact his driving and he work up on February 25 feeling normal.

Bingener's heirs filed a lawsuit against the City under a *respondeat superior* theory. The City moved for summary judgment, arguing that the "going and coming rule" negated vicarious liability because Rushton was on his way to work and was not driving under the City's supervision. The court granted the City's summary judgment motion and Bingener's heirs appealed.

HOLDING/DISCUSSION

Affirmed. An employee is generally not considered to be acting within the scope of his employment when going to or coming from his regular place of work. The uncontroverted facts presented support the application of the going and coming rule. There is no dispute that when Rushton collided with Bingener, Rushton was on his normal morning commute to work. Rushton's work did not require him to use his personal car in the performance of his job, nor was he performing a special errand for his employer. He rarely left the laboratory for any work-related trips.

Plaintiff's argued the "work-spawned risk" exception to the "going and coming rule" applied. This exception applies when an employee endangers others with a risk arising from or related to the work enterprise. For example, if an employee gets into a car accident on the way home after drinking alcohol at work with his supervisor's permission, this would constitute a "work-spawned risk." Plaintiff argued the City knew about Rushton's health conditions and how it would impair his ability to drive because certain medical expenses were being paid for through the City's workers' compensation program. The court rejected Plaintiff's application of the work-spawned risk exception because the City did not create a foreseeable danger by allowing Rushton to drive to work while injured or medicated. Even assuming for the sake of argument that Plaintiffs proved Rushton's injury impaired his driving that morning, it was his physicians—not the City—who administered medication and cleared him to return to work.