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CROSS MOVANT'S STATEMENT OF MATERIAL FACTS

1. Plaintiff Filemon DaCruz was struck by defendants' vehicle in a residential section of Ocean Township on October 12, 2005, at 8:15 am. At the time of impact Filemon DaCruz stood in the street near the curb in front of his house. He was seeing his nine year old daughter off to school which was located a block away. Seconds before the impact defendant Cammarano, who was driving a large Sea Coast Chevrolet Suburban showcase vehicle, drove past a sign warning drivers of pedestrian school traffic in the area. Plaintiffs maintain Cammarano disregarded this sign, failed to maintain proper lookout and swerved his vehicle into the back of Filemon DaCruz. (*Exhibit A, Police Report*)

2. Cammarano is the general manager of Sea Coast Chevrolet, an auto dealership located in Ocean Township, New Jersey. He has held that position since October, 1991. (*Exhibit C, 3/12/07 Deposition of Cammarano at 7*) He has been in the car dealership business since 1968. (*Exhibit D, 11/24/08 Deposition of Cammarano at 4-5*)

3. Martin Cammarano lives in Oceanport, New Jersey. (*Exhibit A, Police Report*)

4. As the general manager of the dealership, Cammarano is responsible for managing, supervising, performance and profitability of the sales, service and parts teams. (*Exhibit C, 3/12/07 Deposition of Cammarano at 7*) (*Exhibit D, 11/24/08 Deposition of Cammarano at 6*)

5. At the time of the 2005 accident Cammarano was driving a brand new 2006 Chevy Suburban sport utility vehicle owned by Sea Coast Chevrolet. (*Exhibit A, Police Report*) (*Exhibit D, 11/24/08 Deposition of Cammarano at 7-8*) (*Exhibit E, Report of David Stivers at 6-7*)

6. Minutes before the accident Cammarano had left his home on his way to work at the auto dealership. Along the route Cammarano intended to drop his two grandchildren off at the Dow

Avenue Grammar School in Ocean Township and then continue on to the dealership. (*Exhibit C, 3/12/07 Cammarano deposition at 50-51*)

7. The vehicle Cammarano was driving had not been separately registered with the Division of Motor Vehicles ("DMV") and instead had dealer plates. Dealer plates are used by car dealers on new cars and allow them to transfer the plates from vehicle to vehicle without having to independently register each vehicle with DMV. This assists the dealer in demonstrating such vehicles for sale. (*Exhibit A, Police Report*) (*Exhibit E, Report of David Stivers at 8*)

8. The vehicle Cammarano was driving at the time of the accident was what is known in the auto industry as a "demonstrator vehicle" or "demo." (*Exhibit D, 11/24/08 Deposition of Cammarano at 8*) (*Exhibit E, Report of David Stivers at 6-7*)

9. As is typical in the business, Sea Coast Chevrolet management engaged in the business sales strategy of placing its automobiles in "demo" service for the purpose of familiarizing the vehicles to dealership personnel and for the purpose of advertising them to the car-shopping public; to gain exposure of the product. The demo vehicle is a "showcase" vehicle (*Exhibit D, 11/24/08 Deposition of Cammarano at 6-15, 17-19*) (*Exhibit E, Report of David Stivers at 1-10*)

10. Visibility of new automobiles stimulates interest and is often the first step in attracting prospective buyers to the dealer's lot and showroom. Actually seeing a display vehicle, whether it is in motion or setting still, or by driving a "demo," imparts a three-dimensional impression to a consumer. This is much more effective than showing people a two-dimensional brochure. (*Exhibit E, Report of David Stivers at 4*)

11. As the general manager at Sea Coast, Cammarano is involved in setting the dealer's policies as it relates to its demo vehicles. (*Exhibit D, 11/24/08 Deposition of Cammarano at 12*)

12. Dealership managers who are offered a demonstrator vehicle are expected to accept it, and to drive it in the market area, especially in their daily commute to and from the dealership. This serves to show to the general public that these dealership managers have confidence in Sea Coast's auto models that are being offered for sale or lease. Managers provided with a demonstrator vehicle are expected to keep it clean to impart a positive impression on people who view the demonstrator vehicles. (*Exhibit E, Report of David Stivers at 4*) (*Exhibit D, 11/24/08 Deposition of Cammarano at 9, 13*)

13. Cammrano has never worked at a car dealer where he was not assigned a demo vehicle. (*Exhibit D, 11/24/08 Deposition of Cammarano at 9*)

14. The demo vehicles are for promotional benefit to the dealership in terms of exposing the vehicles the dealership sells. (*Exhibit D, 11/24/08 Deposition of Cammarano at 14*)

15. Dealership personnel assigned a demo vehicle are allowed to use them for business and personal errands. Unrestricted use of a demonstrator auto encourages a manager to drive it for non-business purposes. This additional driving of a "demo" increases the exposure of this new vehicle model to more people in the community, within the dealership's market area, and serves as an effective advertising strategy. (*Exhibit D, 11/24/08 Deposition of Cammarano at 14-15*) (*Exhibit E, Report of David Stivers at 5*)

16. Automobile dealerships display and employees try to sell vehicles daily, whereas consumers, on the average, wait years before trading cars. Demonstration drives and/or observing a "demo" can assist and sometimes motivate a car shopper in deciding when to buy, what to buy, and from whom. This is well known throughout the U.S. auto sales industry. (*Exhibit E, Report of David Stivers at 10*)

17. The demo vehicles at Sea Cost Chevrolet have a number of advertising placard displays which include the dealership contact information. This is part of the overall demo vehicles sales strategy. (*Exhibit D, 11/24/08 Deposition of Cammarano at 15*) (*Exhibit E, Report of David Stivers at 4*) (*Exhibit F, Photos of Accident Vehicle Depicting Advertising Placards*)

18. The Sea Coast demo vehicles are available for sale to the public at any time. After they are driven for about 5000-6000 miles, they are taken out of demo service and placed exclusively for sale. (*Exhibit D, 11/24/08 Deposition of Cammarano at 11*)

19. Demonstrator vehicles at Sea Coast are also used by the dealership for product familiarization purposes to its employees to better enable sales. By actually driving on a daily basis the vehicles the dealership sells, the employee is better able to impart knowledge of the vehicles to prospective buyers. (*Exhibit E, Report of David Stivers at 6, 15*) (*Exhibit D, 11/24/08 Deposition of Cammarano at 17-18*)

20. As general manager of Sea Coast, Cammarano himself is often involved in sales activities of the business. This includes his image and voice being used in commercials and advertisements as well as direct involvement in showroom sales. And his actually driving the demo vehicles better enables him to do this. (*Exhibit D, 11/24/08 Deposition of Cammarano at 17-18*)

21. Filemon DaCruz sustained severe injuries including injuries to his chest, left hand, left wrist, neck, back, right knee, face, cervical spine and, most significantly, injuries to his abdominal area. He continues to undergo extensive surgical intervention to address his injuries. Mr. DaCruz requires life long care; the medical expense claim alone exceeds $1,000,000. (*Exhibit B, Damage Photographs, Selected Narrative Reports, PIP Exhaustion Letter and Life Care Report Excerpts*)

22. At one time in this litigation the carrier for both Cammarano and the defendant dealership, Sea Coast, assigned one attorney to represent them. Separate counsel has since been assigned to represent the two respective defendants. Additionally, Cammarano has retained personal counsel to represent his interests.

23. On or about, October 26, 2006, prior counsel for both defendants provided interrogatory responses on behalf of both defendants. In pertinent part, Form C Interrogatory #13 requires defendants to disclose "whether there are any insurance agreements including excess policies under which . . . an insurance business may be liable to satisfy . . . a judgment that may be entered in this action[.]" Subsection (e) of Form C Interrogatory #13 requires disclosure of the "personal injury limits" for the identified policy. Both defendants responded as follows: "$500,000 ($10 Million umbrella as to defendant Sea Coast only)". (*Exhibit G, Defendants' Answers to Form C Interrogatories*).

24. The dealership defendant now moves for summary judgment on liability. If that motion were granted, and defendant were correct as to the coverage limits, then Cammrano would be personally exposed beyond the $500,000 coverage limits.

25. If on the other hand the dealership remains a defendant in the case and vicariously liable under the principle of *respondeat superior*, then Cammarano, as an employee, would be indemnified by the dealership and thus protected under its $10 million umbrella policy.

RESPONSE TO MOVANT'S STATEMENT OF MATERIAL FACTS

1. Admit.

2. Admit.

3. Admit.

4. Admit.

5. Admit.

6. Admitted in part and denied in part. The demo vehicles are issued to Cammarano for the dual purpose of both personal and business use. *(See Cross Movant's Statement of Material Facts, numbers 5-20 above*)

7. Admit.

8. Admit.

9. Admit.

10. Admit.

11. Admit.

12. Objection, this is not a material fact as required by R. 4:46-2 because where the employee is driving an employer owned vehicle, agency is presumed. *Gilborges v. Wallace*, 78 N.J. 342, 351-52 (1978) (summary judgment to employer not appropriate where employee was driving to work in company owned vehicle) and where the employer benefits from that use, *respondeat superior* will be found. At the time of the accident Cammarano was on his way too work in Ocean Township; along the route he was stopping off at the Dow Avenue School (also in Ocean Township) to drop off his grandchildren. The same was essentially the case in *Pfender v. Torres* where at the time of the accident, Torres was pulling into a gas station to fill up on gas, while on his way to work. *Pfender*, 336 N.J.Super. at 383-84. Furthermore for example, in *Gottlieb v. Stern*, 852 N.Y.S.2d 146 (2nd Dept. 2008), summary judgment to the dealer was inappropriate under the *Pfender, Carter* and *Gilborges* reasoning even though the dealer employee who was driving a demo vehicle was involved in an accident *on his day off*. (*Convenience Copy Attached Hereto as Exhibit H*)

13. See #12 above.

14. See #12 above.

LEGAL DISCUSSION

I. Since the Dealership Derived Benefit from Cammarano's Use of the Showcase Demonstration Vehicle at the Time of the Accident, Defendant's Motion for Summary Judgment Should Be Denied and Plaintiff's Cross Motion for Partial Summary Judgment Should Be Granted

Although as a general rule of tort law, liability must be based on personal fault, the doctrine of *respondeat superior* recognizes a vicarious liability principle pursuant to which a master will be held liable in certain cases for the wrongful acts of his servants or employees. *Carter v. Reynolds*, 175 N.J. 402, 408 (2003) To establish a master's liability for the acts of his servant, a plaintiff must prove (1) that a master-servant relationship existed and (2) that the tortious act of the servant occurred within the scope of that employment. *Id.* at 409 Here there is no question Cammarano was an employee of Sea Coast and that a master-servant relationship exists.

Rather, the dealership resists a finding of *respondeat superior* on the scope of employment prong only. At the Supreme Court in *Carter* explained:

> "Scope of employment" is a commonly cited principle, but its contours are not easily defined.
>
> This highly indefinite phrase, which sometimes is varied with "in the course of employment," is so devoid of meaning in itself that its very vagueness has been of value in permitting a desirable degree of flexibility in decisions. It is obviously no more than a bare formula to cover the unordered and unauthorized acts of the servant for which it is found to be expedient to charge the master with liability, as well as to exclude other acts for which it is not. It refers to those acts which are so closely connected with what the servant is employed to do, and so fairly and reasonably incidental to it, that they may be regarded as methods, even though quite improper ones, of carrying out the objectives of the employment.

Carter, 175 N.J. at 411. New Jersey derives guidance on the scope of employment question from the Restatement. Among the factors the Restatement looks to are: weather it is the kind he is employed to perform; if it is done at least in part for the benefit of the master; whether the master

has reason to expect it will be done; whether or not the instrumentality of the act is furnished by the master. *Id.* at 412-13.

Generally, an employee driving a *personal* vehicle not owned or provided by the employer, who is "going to" or "coming from" his or her place of employment is not considered to be acting within the scope of employment. *Carter*, 175 N.J. at 411, *citing, Mannes v. Healy,* 306 N.J.Super. 351, 353, 355 (App.Div. 1997) However, New Jersey recognizes a number of exceptions to the "going and coming" rule. These so called "dual purpose" exceptions cover situations where at the time of the alleged negligent act the employee can be said to be serving some interest or purpose of the employer, as well as his own personal interests. *Carter*, at 414, *citing, Gilborges v. Wallace*, 78 N.J. 342 (1978).

In New Jersey, *Pfender v. Torres*, 336 N.J.Super. 379 (App. Div. 2001), *cert. denied*, 167 N.J. 637 (2001), controls the scope of employment question where a car dealer employee is involved in an accident while driving a dealer owned showcase demonstration vehicle, as was the case in the instant matter. In that case plaintiff Katherine Pfender was injured at a gas station when defendant Joseph Torres drove his employer's car over her foot as he pulled into the station to get gas.

Torres was a salesman for a BMW dealership known as Don Rosen Imports ("DRI"). Like Sea Coast in this case, DRI in *Pfender* furnished Torres with a BMW demo vehicle for business and personal use, while it retained ownership of the car. The testimony in *Pfender* reflected that such cars would usually be used by the staff until sold at the dealership. The cars were used for customers as "demonstrators" during sales hours and to run work related errands. At all other times the cars were for "personal use." *Pfender*, 336 N.J.Super. at 393.

DRI's general sales manager explained that the salesmen were provided with the cars for two

reasons, as "an incentive for them to be here and two, is a transportation need. Because a lot of them, the sales people here are experienced sales people and they come from dealerships that have had demo programs. So a number of them don't have cars." He also indicated that the cars bore DRI identification and that one of the reasons for providing them was "to obtain promotional and advertising benefits which are derived when the salesmen drive the cars the dealership sells[.]" *When the accident occurred, Torres was not engaged in any business-related errand*, but he was driving to work. *Pfender*, 336 N.J.Super. at 393.

In *Pfender* the trial court granted a motion for a directed verdict in favor of the dealership finding that since the defendant Torres was not in the scope of his employment at the time of the accident, it had no liability. The Appellate Division reversed and instead remanded the matter for entry of partial summary judgment in favor of the plaintiff on the issue of *respondeat superior.* The appellate court found that Torres was in the scope of his employment, even though he was not at work nor running any kind of business-related errand at the time of the accident. In rendering that decision, the Court recounted New Jersey law that when an employee is acting in furtherance of his own interests and those of the employer, the employer is subject to "dual purpose" *respondeat superior* liability. *Pfender*, 336 N.J.Super. at 393, *citing Gilborges*, 78 N.J. at 351.

The Court explained that Torres was driving a company owned vehicle. As part the dealership's demo program, the car was to be used as a demonstrator to encourage sales and run work related errands. The Court reasoned that therefore the employer received, at least in part, a benefit at the time of the accident and therefore the employer was liable as a matter of law for the negligent acts of its employee. The Appellate Division thus concluded that not only was a dismissal of the dealership not appropriate, but that plaintiff was actually entitled to partial summary judgment

as a matter of law on the *respondeat superior* liability issue. *Pfender*, 336 N.J.Super. at 393-94.

The facts of the instant case are even more compelling and like in *Pfender,* plaintiff here too should be granted partial summary judgment on the *respondeat superior* issue. The facts here are clear the dealership defendant received benefit from Cammarano's use of the showcase demo vehicle in question. At the time of the 2005 accident Cammarano was driving a top of the line 2006 Chevy Suburban vehicle the dealership owned. He was on his way to work, dropping his grandchildren off at school along the route. Cammarano was driving within the market area of Sea Coast. Indeed, the accident happened in Ocean Township, where the Sea Coast dealership is also located. (*Exhibit A, Police Report*) (*Exhibit C, 3/12/07 Cammarano deposition at 50-51*) (*Exhibit D, 11/24/08 Deposition of Cammarano at 7-8*) (*Exhibit E, Report of David Stivers at 6-7*)

The vehicle adorned dealer plates which are used by car dealers in demonstrating such vehicles for sale. (*Exhibit A, Police Report*) (*Exhibit E, Report of David Stivers at 8*)[1] As is typical in the business, Sea Coast Chevrolet management engaged in the business sales strategy of placing its automobiles in "demo" service for the purpose of familiarizing the vehicles to sales staff and for the purpose of advertising them to the car-shopping public; to gain exposure of the product. The demo vehicle is a "showcase" vehicle (*Exhibit D, 11/24/08 Deposition of Cammarano at 6-15, 17-19*) (*Exhibit E, Report of David Stivers at 1-10*)

Visibility of new automobiles stimulates interest and is often the first step in attracting prospective buyers to the dealer's lot and showroom. Actually seeing a display vehicle, whether it is in motion or sitting still, or by driving a "demo," imparts a three-dimensional impression to a

[1]See also, *N.J.A.C.* 13:21-15.11 (d) "Dealer Plates" which states: "No dealer plates may be affixed to a vehicle that would otherwise require registration as a commercial vehicle unless the vehicle is held solely for sale and is driven solely for demonstration purposes to prospective purchasers."

consumer. This is much more effective than showing people a two-dimensional brochure. (*Exhibit E, Report of David Stivers at 4*) Dealership managers who are offered a demonstrator vehicle are expected to accept it, and to drive it in the market area, especially in their daily commute to and from the dealership. This serves to show to the general public that these dealership managers have confidence in Sea Coast's auto models that are being offered for sale or lease. Managers provided with a demonstrator vehicle are expected to keep it clean to impart a positive impression on people who view the demonstrator vehicles. (*Exhibit E, Report of David Stivers at 4*) (*Exhibit D, 11/24/08 Deposition of Cammarano at 9, 13*) In fact, in his forty years in the business, Cammrano has never worked at a car dealer where he was not assigned a demo vehicle. (*Exhibit D, 11/24/08 Deposition of Cammarano at 9*)

Dealership personnel assigned a demo vehicle are allowed to use them for business and personal errands. This additional driving of a "demo" increases the exposure of this new vehicle model to more people in the community, within the dealership's market area, and serves as an effective advertising strategy. (*Exhibit D, 11/24/08 Deposition of Cammarano at 14-15*) (*Exhibit E, Report of David Stivers at 5*) Demonstration drives and/or observing a "demo" can assist and sometimes motivate a car shopper in deciding when to buy, what to buy, and from whom. This is well known throughout the U.S. auto sales industry. (*Exhibit E, Report of David Stivers at 10*)

The demo vehicles at Sea Cost Chevrolet have a number of advertising placard displays which include the dealership contact information. This was part of the overall demo vehicles sales strategy. (*Exhibit D, 11/24/08 Deposition of Cammarano at 15*) (*Exhibit E, Report of David Stivers at 4*) (*Exhibit F, Photos of Accident Vehicle Depicting Advertising Placards*) The Sea Coast demo vehicles are available for sale to the public at any time. (*Exhibit D, 11/24/08 Deposition of*

Cammarano at 11)

Thus, there is no doubt that at the time of the accident, the dealership was attaining benefit from Cammarano's use of the demonstration vehicle as it relates to the marketing and public exposure of the product. *Pfender,* 336 N.J.Super. at 383-84; *Gottlieb v. Stern*, 852 N.Y.S.2d 146 (2nd Dept. 2008) But this is not the only way in which the dealership received benefit from Cammarano's use of the vehicle at issue at the time of the accident.

As the record further shows, demonstrator vehicles are also used by the Sea Coast dealership for product familiarization purposes to its employees to better enable sales. By actually driving on a daily basis the vehicles the dealership sells, the employee is better able to impart knowledge of the vehicles to prospective buyers. Thus, assigning demo vehicles to employees, the dealership receives the benefit of a better informed staff that is then able to better perform its sales functions to buyers. (*Exhibit E, Report of David Stivers at 6, 15*) (*Exhibit D, 11/24/08 Deposition of Cammarano at 17-18*)

As general manager of Sea Coast, Cammarano himself is often involved in sales activities of the business. This includes his image and voice being used in commercials and advertisements as well as direct involvement in showroom sales. And his actually driving the demo vehicles better enables him to do this. (*Exhibit D, 11/24/08 Deposition of Cammarano at 17-18*) In fact, as Cammarano himself related, when it comes to cars "you're selling 24 hours a day." (*Exhibit D, 11/24/08 Deposition of Cammarano at 17) (See also Exhibit C, 3/12/07 Cammarano deposition at 57,* "I do business on golf courses, football fields, stands. I do business all over. I have no set outside responsibilities. I represent the corporation whenever I'm out.")

Thus under the reasoning set forth in *Pfender*, *Carter*, and *Gilborges*, the dealership's

motion for summary judgment should be denied and plaintiff's cross-motion for partial summary judgment on the *respondeat superior* issue should be granted.

II. The Dealership's Invitation to Disregard Controlling Precedent it Believes Was "Wrongfully Decided" and Instead to Rely upon the Law of Other States and Insignificant or non Existent Factual Differences Should Be Rejected

In arguing for summary judgment, the dealership defendant primarily argues this Court should disregard the controlling New Jersey precedent of *Pfender v. Torres*, 336 N.J.Super. 379 (App. Div. 2001), *cert. denied*, 167 N.J. 637 (2001) and should instead follow its interpretation of the law of other states such as Montana, Georgia and Kentucky. Defendant argues, "First of all, it is defendant's contention that *Pfender* was wrongly decided." (*Defendant's brief at 12th page, no page numbers in original*) Defendant's contention is of no moment, particularly where the defendant in *Pfender* made the same argument to the Supreme Court, which petition was rejected at 167 N.J. 637 (2001). And as recently as 2003, the Supreme Court recounted with favor the reasoning of the *Pfender* decision. *Carter v. Reynolds*, 175 N.J. 402, 414-15 (2003) This Court should decline defendant's invitation to break with binding precedent.

Defendant next seeks to circumvent *Pfender* by arguing for what are in actuality insignificant or non-existent factual differences. For example, defendant argues the instant case is different because at the time of the accident, Cammarano was not on his way to work, but instead was driving his grandchildren to school. This argument is without merit for a number of reasons.

First, the essence of the applicable "dual purpose" exceptions to the going and coming rule center on the fact that at the time of the accident the employee was driving a vehicle furnished and owned by the employer. Indeed, as the Court in *Gilborges* made clear:

> [W]here the instrumentality being used by the servant is owned by the master, such use raises a rebuttable presumption that the servant was acting within the scope of

employment.

Gilborges v. Wallace, 78 N.J. 342, 351-52 (1978) (summary judgment to employer not appropriate where employee was driving to work in company owned vehicle) (emphasis added). Here defendant has not and can not overcome that presumption given the clear purpose and intent of the Sea Coast demonstrator vehicle program as it relates to its promotional sales exposure and product familiarization goals. Thus, regardless of the hair splitting, non-meritorious argument of whether or not Cammarano was "on his way to work" at the time of the accident, the essential and indisputable fact remains the dealership benefitted from Cammarano's use of the vehicle within the Sea Coast market area as is set forth in detail throughout this submission.

Indeed, and although it would be a distinction without a difference, were defendant correct in its incorrect characterization that Cammarano was not on his way to work at the time of the accident, then under that same fallacious reasoning Torres also would not have been on his way to work in *Pfender*. In our case, Cammarano was on his way too work in Ocean Township; along the route he was stopping off at the Dow Avenue School (also in Ocean Township) to drop off his grandchildren. The same is essentially the case in *Pfender*; at the time of the accident Torres was pulling up to a gas station island when he ran over Pfender's foot. *Pfender*, 336 N.J.Super. at 383-84. Despite running this personal errand before arriving at the dealership, the Court characterized Torres as, "driving to work when the accident happened." *Id.* at 394. The argument of Sea Coast that it should be entitled to summary judgment because Cammarano was not on his way to work is factually and legally off the mark.

Similarly, Sea Coast argues that it received no benefit from Cammarano's use of the demo vehicle because Cammarano was somehow not required to use the vehicle for demonstration

purposes to encourage sales. This argument too should fail as it is also without factual or legal merit. Both Cammarano himself and the auto industry expert, David Stivers, explained in extensive detail how the purpose of the demo vehicle program is overwhelmingly to benefit the dealership in its promotional sales exposure and product familiarization goals. (*Exhibit D, 11/24/08 Deposition of Cammarano at 6-15, 17-19*) (*Exhibit E, Report of David Stivers at 1-10*)

As the general manager of the dealership, Cammarano oversees the sales, service and parts departments. His duties include responsibility for recruiting knowledgeable staff, training employees, formulating policy, setting dealership goals, promoting advertising of the dealership's products and marketing. Cammarano's voice and image is used in advertisements and he is personally involved in selling cars. The overwhelming purpose of assigning demo vehicles to Mr. Cammarano was in furtherance of these job duties. Thus to say Mr. Cammarano was somehow not required to use the demo vehicles the dealership assigned him to promote the sales and employee familiarization training goals of the business is a virtual oxymoron.[2] To argue that Cammarano was somehow free to not make the vehicle available for demonstration, test drives, or sale at any time, and that he was somehow free to keep the vehicle locked down in his garage, defies the plain record in this case and is simply without merit.

The fact of the matter here is that Cammarano was driving a dealer owned showcase demo vehicle in the dealership market area at the time of the accident in furtherance of the dealership's marketing and product familiarization goals. The vehicle had multiple dealer advertisement placards

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[2]A "demo vehicle" is defined as, "a vehicle, never previously titled, which is used by a dealership to demonstrate the qualities and features of new motor vehicles to prospective consumers." *See, e.g, Fisher v. Classic Ford Company*, 1993 WL 840678 (Ohio Com. Pl. 1993) Also, "'Demo'" means a motor vehicle used exclusively by a dealer or dealer's employee that has never been titled to which the new vehicle warranty still applies." *N.J.A.C.* 13:45A-26A.3

which was part of the overall demo marketing program. (*Exhibit F, Photos of Accident Vehicle Depicting Advertising Placards*) The vehicle was driven for about 5000 miles and then taken out of demo service, and another new demo vehicle assigned to Cammarano, consistent with this marketing plan. And while Cammarano also was allowed to use the vehicle for the dual purpose of running personal errands, the same was the case in *Pfender* and does not detract from the reality of these demonstration vehicles so as to eviscerate the "dual purpose" exception so prominently presented here.

The essence of the "dual purpose" doctrine as articulated in *Pfender, Carter* and *Gilborges* is centered on the principle that when the employee is driving an employer owned vehicle, *respondeat superior* is presumed, *Gilborges*, 78 N.J. at 351-52 (summary judgment to employer not appropriate where employee was driving to work in company owned vehicle) and when the employer derives at least some benefit from the employee's use of that vehicle, it will be found as a matter of law. This is further shown in a recent appellate opinion from 2008 applying the principles of *Pfender, Carter* and *Gilborges* to another situation where a car dealer employee was involved in an accident while driving a dealer owned demonstrator vehicle, *Gottlieb v. Stern*, 852 N.Y.S.2d 146 (2nd Dept. 2008) (*Convenience Copy Attached Hereto as Exhibit H*)

In *Gottlieb,* the defendant Jerry Stern struck the plaintiff, Teri Gottlieb, in a head on collision. Stern was an employee of the Paramus Auto Mall/Chevy Geo. The vehicle he was driving was a demonstration vehicle assigned to him by the dealer. The defendant dealership filed a motion for summary judgment at the trial level making essentially the same arguments Sea Coast makes in this case, i.e., that the employee was not acting in the scope of his employment at the time of the accident and therefore it is entitled to a dismissal. *Gottlieb*, 852 N.Y.S.2d at 147-148.

Applying New Jersey law, the trial court denied the summary judgment motion and the appellate court affirmed. The motion was denied on the basis of the "dual purpose" principles of *Pfender, Carter* and *Gilborges* which the Court restated as follows:

> This ["dual purpose"] rule provides that an employer may be held vicariously liable for the tortious conduct of its employee when the employee was acting to advance both his own personal interests and those of his employer (see *Gilborges v Wallace*, 78 N.J. 342, 350-352 (1978); *see also Pfender v Torres*, 336 N.J. Super 379, 393-394 (2001)).

Gottlieb, 852 N.Y.S.2d at 148 (*full citations omitted*). The legal insignificance of the factual differences Sea Coast argues about between the instant matter and the *Pfender* decision (which in reality are non-existent differences) is further shown in the *Gottlieb* decision.

For example, Sea Coast, in red herring fashion, argues it should prevail because Cammarano was not on his way to work at the time of the accident. Putting aside Cammarano was in fact on his way to work, in *Gottlieb* not only was the defendant employee not on his way to work, and not on any work related errand, but it was his day off from work entirely. In fact, not only was Gottlieb not working that day, but he was actually drunk at the time of the accident. Nevertheless, since the dealer employee was driving a vehicle owned and furnished by the employer, and since that vehicle was a demo vehicle used as a "selling tool" to benefit the dealer's marketing efforts (as is the case in the instant matter), the dealership was not entitled to summary judgment. *Gottlieb*, 852 N.Y.S.2d at 147-148.

While Sea Coast tries to trivialize the legal significance of the advertising placards it had on the vehicle, the *Gottlieb* Court pointed out the connection of this to the demonstrator vehicle marketing program and the advertising benefit the dealership gets from it. The Court also explained other facets to this marketing program, including that the demo vehicles are to be kept clean and

allowed to be used for otherwise personal uses (just like the instant matter). The Court explained:

> Toward that effort, Paramus Auto, among other things, placed signs on the front and back of the vehicle with its name, required Stern to maintain the vehicle's appearance, and authorized him to use the vehicle during his "reasonable off hours" and within Paramus Auto's marketing region. Although at the time of the accident Stern was using the vehicle for personal use and not commuting to or from Paramus Auto, it is undisputed that he was operating the vehicle within Paramus Auto's marketing region during his day off.

Under such circumstances, the "dual purpose" benefit to the dealership of the employee driving the dealership owned vehicle on his day off was evident, and summary judgment in its favor was inappropriate. *Gottlieb*, 852 N.Y.S.2d at 147-148 As the facts in the instant matter are even more compelling, defendant's motion for summary judgment should be denied and plaintiff's cross-motion should be granted.[3]

[3]It should be noted that in *Gottlieb,* unlike the instant case, no cross motion for summary judgment was made by the plaintiff. However, the Court indicated that the only question of fact that could potentially transgress the clear agency relationship was the fact that the employee was intoxicated at the time of the accident. *Id.* at 148. As no such allegation of intoxication of Cammarano is present in this case, there is no basis to transgress the clear agency relationship and the cross motion for summary judgment should be granted.

CONCLUSION

For all these reasons it is respectfully requested that Defendant Sea Coast Chevrolet's Motion for Summary Judgment be denied and that Plaintiffs' Cross Motion for Partial Summary Judgment on the *respondeat superior* issue be granted.

Respectfully submitted,

By: _____

GERALD H. CLARK
Counsel for Plaintiffs

Dated: December 9, 2008

December 17, 2008

Via Fax 732-677-4192 and Lawyers Service
The Honorable Jamie S. Perri J.S.C.
Monmouth County Superior Court
71 Monument Park
Freehold, N.J. 07728

Re: Filomen DaCruz v. Martin Cammarano, et al.
Docket No. MON-L-3765-06
Our File No.: 61-8058

Motion for Summary Judgment of Defendant Sea Coast Chevrolet and Cross-Motion For Partial Summary Judgment of Plaintiffs

Dear Judge Perri:

Please accept the following reply brief in support of Plaintiffs' Cross-Motion for Partial Summary Judgment and in further opposition to defendant Sea Coast's Chevrolet's Motion for Summary Judgment in the above captioned matter[4].

Where, as here, the employee is driving a dealer owned vehicle, *respondeat superior* is presumed and the burden shifts to the dealer defendant to disprove agency. *Gilborges v. Wallace*, 78 N.J. 342, 351-52 (1978) Here defendant Sea Coast has only offered naked denials in opposition to the cross motion and has not overcome this presumption. In seeking to avoid summary judgment, defendant still clings to misstatements of New Jersey law, such as that the dealer employee must be engaged in a business related task at the time of the accident for agency to apply. Defendant argues, "driving grandchildren to school, is not the type of act" that falls within his the scope of employment at the dealership. (*Db at 7th counted page, no page numbers in original*)

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[4]The above is the correct captioned matter. Plaintiffs mistakenly captioned their previous submission under the related coverage action. Enclosed herewith correctly captioned papers including Notice of Cross-Motion, Brief Cover and Order.

Plaintiff does not dispute that driving one's grandchildren to school is not in and of itself a work related errand– but that is not the test. If it were, summary judgment in favor of the dealership in *Pfender v. Torres*, 336 N.J.Super. 379, 393 (App. Div. 2001), *cert. denied*, 167 N.J. 637 (2001) would have been affirmed because in *Pfender* it was established that at the time of the accident, "Torres was not engaged in any business-related errand..." In fact, in *Gottlieb v. Stern*, 852 N.Y.S.2d 146, 147-148 (2nd Dept. 2008), applying New Jersey law, not only was it his day off, but the dealer employee was actually intoxicated during his "personal use" of the vehicle at the time of the accident. Thus, Sea Coast's argument that plaintiff should not prevail because Cammarano was not engaged in any work task at the time of the accident is simply of no legal merit.

Defendant next seeks to avoid summary judgment by attempting to engraft yet another standard into its vision of what New Jersey law should be- i.e., that there must be a written "demonstrator agreement" before *respondeat superior* agency can be found. Again, there is simply no such requirement under New Jersey law. The Court in *Gottlieb* did not hinge its decision on the existence of a demonstrator agreement. Rather, the decision was based on the circumstances of the dealer employee driving the dealer demo vehicle, which happen to be the same circumstances here, "as a selling tool for the benefit of [the dealer]." *Id.* at 147; (*Exhibit D to Cross-Moving Papers, 11/24/08 Deposition of Cammarano at 6-15, 17-19*) (*Exhibit E to Cross-Moving Papers, Report of David Stivers at 1-10*)

Defendant's other attempts to distinguish *Pfender* and *Gottlieb* are equally without merit. For example, whether or not the demo vehicle is issued to the employee as "an incentive to come to work" is simply of no legal significance.[5] What matters is whether the dealer receives a benefit from the employee's use of the vehicle. Here it is incontestable this was a demo vehicle which by definition, and by the facts of this case, is used by the dealer to "demonstrate the qualities and features of new motor vehicles."[6] (*Exhibit D to Cross-Moving Papers, 11/24/08 Deposition of Cammarano at 6-15, 17-19*) (*Exhibit E to Cross-Moving Papers, Report of David Stivers at 1-10*) Defendant's argument that Cammarano was somehow not required to use the demo vehicle he was assigned for promotional purposes is an oxymoron- that would defeat the whole purpose of the demo marketing sales strategy. Since Sea Coast received this benefit from Cammarano's use, partial summary judgment for plaintiff is proper.

Defendant's naked denial that this was a demo vehicle is typical of its overall presentation to this Court. Plaintiffs established this was a demo vehicle in Cross Movant's Statement of Material Facts, #8. (*See Cross-Moving Brief at 2*) And while Sea Coast in its response to that fact said "Denied.," it offered nothing to contest Stiver's report nor Cammarano's clear testimony:

Q So the '06 Chevy you were driving that day was a demo vehicle?
A Yes, it was.

(*Exhibit D to Cross-Moving Papers, 11/24/08 Deposition of Cammarano at 8*) Stivers and Cammarano were further clear that the demo vehicles were assigned to Cammrano and others for

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[5]Even if it were, furnishing a brand new car to an employee for business and personal use as part of his "employment package" can hardly be called a "disincentive." (*Exhibit C, 3/12/07 Deposition of Cammarano at 57*) Unless Sea Coast is a charity and Cammarano a volunteer, his compensation package is his incentive to be there.

[6]A "demo vehicle" is defined as, "a vehicle, never previously titled, which is used by a dealership to demonstrate the qualities and features of new motor vehicles to prospective consumers." *See, e.g, Fisher v. Classic Ford Company*, 1993 WL 840678 (Ohio Com. Pl. 1993) Also, "'Demo'" means a motor vehicle used exclusively by a dealer or dealer's employee that has never been titled to which the new vehicle warranty still applies." *N.J.A.C.* 13:45A-26A.3 *See also*, *N.J.A.C.* 13:21-15.11 (d) "Dealer Plates" which states: "No dealer plates may be affixed to a vehicle that would otherwise require registration as a commercial vehicle unless the vehicle is held solely for sale and is driven solely for demonstration purposes to prospective purchasers."

promotional and product familiarization benefit to the dealership:

> Q And based on your experience and being the general manager of Sea Coast Chevy, what is the purpose of the demonstrator vehicles? What is the purpose of that program in terms of allowing sales and other key personnel to drive it.
> ***
> A To gain exposure of our product.
>
> Q When the vehicles are given to employees and key personnel, are the personnel and employees expected to keep the vehicles clean and in good appearance, condition?
> A Most definitely.
>
> Q And why is that?
> A For exposure of our product.
> ***
>
> Q When you say exposure of the product, do you mean exposure to the general public and potential buyers?
> A Yes.
>
> Q Is the demo program at Sea Coast also, in part, for promotional benefit to the dealership in terms of promoting the vehicle that the dealership sells?
> ***
> A Well, the exposure of the product would be for promotion and to give public awareness to the availability of such product.

(*Exhibit D, 11/24/08 Cammarano Deposition at 12-14*) In response to these key facts, defendant merely said "Denied." It pointed to nothing in support. (*See Defendant's Response to Cross Movant's Statement of Material Facts, #9, 14*) Cammrano further testified:

> Q Does driving the various demo vehicles that the dealership offers for sale, does actually driving them help you learn the car, you know, the various features, how it drives, that kind of thing, by actually driving it and using it?
> A It does definitely help demonstrate some of the benefits of the vehicle.
>
> Q And does the dealership also provide the demo vehicles to people involved in sales so that these people can be better familiar with the actual vehicles that they're supposed to be selling?
> A Sure. Yes.

(*Exhibit D, 11/24/08 Cammarano Deposition at 17-18*) Again, defendant could offer nothing more than "Denied." in response. (*See Defendant's Response to Cross Movant's Statement of Material Facts, #19*)

Such naked denials are not sufficient to meet their burden on the agency issue and overcome summary judgment. *Rule* 4:46-5(a) (party against whom summary judgment motion is made may not rest upon the mere denials, but his response by affidavits or otherwise "must set forth specific facts showing that there is a genuine issue for trial." *Brae Asset Fund, L.P. v. Newman*, 327 N.J. Super. 129 (App. Div. 1999) (bare conclusions in answering papers are insufficient to defeat a meritorious application for summary judgment). There is no question Sea Coast received the promotional and product familiarization benefits from Cammarano's use of the demo vehicle at issue. Sea Coast can not overcome its burden of proof on the agency issue and partial summary judgment in favor of plaintiff should be granted. *Carter*, 175 N.J. 402; *Gilborges*, 78 N.J. 342, 350-52; *Pfender*, 336 N.J.Super. at 393-394; *see also Gottlieb v. Stern*, 852 N.Y.S.2d at 147-148.

When a motion for summary judgment is made and adequately supported with briefs, affidavits, pleadings, depositions, answers to interrogatories and/or admissions on file, an adverse party can no more rest upon on the law of foreign jurisdictions than it can on upon unsupported denials. If the adverse party does not respond with competent, relevant evidence properly presented, then summary judgment shall be entered against him. *R.* 4:46-5(a); *Brae Asset Fund*, 327 N.J. Super. 129. As defendant Sea Coast has not so responded, plaintiff's motion should be granted.

Respectfully submitted,

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