June 15, 2021

<u>VIA ELECTRONIC FILING</u>
Union County Courthouse
2 Broad Street
Elizabeth, New Jersey 07201
Attn: Honorable Daniel R. Lindemann, J.S.C.

Re: <u>Joseph Wardell v. Manuel Perez</u>
Docket No.: UNN-L-1720-18
Our File No: 16-69

Opposition to Defendant On Target Staffing, LLC's
Motion for Summary Judgement

Dear Judge Lindemann:

Please be advised we represent Plaintiff Joseph Wardell in the above-referenced matter. Plaintiff submits the following letter brief in opposition to Defendants' Motion for Summary Judgment.

<u>PRELIMINARY STATEMENT</u>

This motion for summary judgment is Defendant's fourth application for relief on the same issue previously denied by the Honorable James Hely, J.S.C. and rejected by the Appellate Division. Indeed, Judge Hely denied Defendant's initial motion for summary judgment and subsequent motion for reconsideration on the very issue now before this Court. Likewise, the Appellate Division denied Defendant's application for interlocutory review, thus signaling their stance on the merits of Defendant's arguments. Unhappy with both Judge Hely <u>and</u> the Appellate Division's rulings, Defendant's again file the present motion, which should be unequivocally denied.

This matter arises out of a single car crash which occurred on July 1, 2016. Joseph Wardell was a passenger in a utility van operated by Manuel Perez when the vehicle hydroplaned off the road and crashed into a cement barrier, severely injuring Mr. Wardell along with a number of other passengers. Mr. Wardell was not compensated for or during his travel time and instead paid his employer, On Target Staffing, LLC, for transportation via this van to and from his job site at the Mr. Cookie Face factory. Mr. Perez was paid by On Target Staffing to operate the van.

Under basic premises liability and workers' compensation laws, Mr. Wardell was not in the scope of his employment when this crash occurred. Defendant On Target, possibly recognizing their potential exposure to a third-party law suit, stipulated in workers' compensation court vis-a-vis a Consent Order that Mr. Wardell was injured in the course of his employment. This stipulation occurred on December 9, 2016, more than a year and a half before suit was even filed in the Law Division.

Years of discovery and litigation thereafter took place in the Law Division which made clear Mr. Wardell was not in the scope of his employment at the time of the crash. Judge Hely correctly decided this issue while denying Defendant's initial motion for summary judgment and motion for reconsideration on these same issues, and aptly held, the Workers' Compensation Consent Order did not constitute a litigated issue decided on its merits which would preclude his finding Plaintiff was not in the scope of his employment at the time of the crash.

On July 30, 2020, Defendant filed an interlocutory appeal of Judge Hely's decisions. On August 28, 2020, their application was denied. Defendants now attempt to take a fourth bite of the apple by filing a substantially similar Motion for Summary Judgement on the same issues already ruled on by the trial court and rejected by the Appellate Division.

STATEMENT OF FACTS AND PROCEDURAL HISTORY[1]

This incident occurred on July 1, 2016. As Mr. Wardell testified:

Q. All right. Do you recall the date of the accident which we're here for today?
A. I will never forget. July the 1st, 2016. You don't forget the day you almost died.

Q. Now, what roadway were you on when this accident occurred?
A. We was on the Parkway . . . . I was coming from work.

Exhibit B: Wardell Deposition 38:23-39:5 (emphasis added). Mr. Wardell was not compensated for his travel time to and from work. Instead, a fee was taken out of his paycheck for transportation. *Id*. at 42:14-43:6.

Regarding the vehicle that transported him, Mr. Wardell testified:

Q. Now did this vehicle have seat belts available to your knowledge?
A. I'm not sure, sir.

Q. Okay. So you just don't know one way or the other?
A. There's so many people in the van, you cannot put a seat belt on . . . every day the van is so crowded you don't have–there's no seat belt.

Q. All right. So this was not a one off event in terms of the overcrowding of the van?
A. No, sir.

Q. This was an ongoing issue if you will?
A. Yes, sir.

Q. Had you ever been in that van in the calendar year 2016, when it did not appear to be overcrowded?
A. No, sir.

Q. So it's basically every single time?

[1] For the sake of brevity and to avoid burdening the Court with duplicative submissions, Plaintiff Wardell adopts the Response to Defendants' Statement of Material Facts and Counter Statement of Material Facts as set forth in the previous Motions for Summary Judgement and Motion for Reconsideration.

A. Yes.

. . .

Q. . . . What was the typical seating arrangement in the van when you would go back and forth to Mister Cookie Face?
A. There's no seating arrangement because there's so many people. Everybody rushed to the van when you get out of work.

. . .

Q. Where would people be sitting?
A. I explained earlier. I remember a guy sitting on the floor right above the tire

. . .

Q. Okay. What about not necessarily the day of the incident, but before the day of the incident, would that be common that people would be sitting on the floor?
A. Yes. Somebody would sit on the floor. If there's not enough spots on the chair, somebody going to sit on the floor.

Q. Was that every time that someone was sitting on the floor?
A. Yes. Every time I rode in the van I saw someone on the floor.

Id. at 56:7-57:6; 143:23-144:21.

As a result of this crash, Mr. Wardell sustained multiple severe and permanent injuries necessitating multiple surgeries, a month long hospital stay and extensive inpatient rehabilitation. *Id.* at 145:16-146:21.

Mr. Wardell, along with co-plaintiffs McCormick and Cordova instituted workers compensation cases, which initially Defendants contested. On December 9, 2016, Defendants reversed course and "agreed" vis-a-vis a Consent Order the crash occurred in the scope of the employment. *Exhibit A: Consent Order*. While the Compensation Court heard background facts from Mr. Wardell regarding the incident and dealt with a Motion for Medical Treatment and

Temporary Disability Benefits, the Court never ruled on the employment status of Mr. Wardell, instead ending the proceeding by stating, "I'm going to ask you to come back and we will have [a] discussion about the case." *Exhibit C: November 18, 2016 Transcript* 48:7-8. No written or oral decision was ever rendered and instead, Defendant's "agree[d]" the incident was compensable. *Exhibit A: Consent Order*.

In May of 2018, Plaintiff Wardell filed a Complaint in the Law Division, naming among other Defendants, On Target Staffing, LLC. *Exhibit D: Complaint*. Following extensive fact discovery, Defendants moved on April 10, 2020 for summary judgment, in essence arguing they were Plaintiffs employer, Plaintiffs were in the scope of their employment at the time of the crash and Plaintiffs' claims against them were barred by the workers' compensation bar. *Exhibit E: Notice of Motion for Summary Judgement*.

Judge Hely denied Defendants' Motion for Summary Judgment and the subsequent Motion for Reconsideration, finding the evidence clearly showed Plaintiff was not in the scope of his employment at the time of the crash, there was no threshold determination on the merits of this issue and the workers' compensation bar was not applicable:

> The law is about truth. Without truth, there's no trust. Without trust, there's no rule of law. With no rule of law, there's no democracy. The truth is these three gentlemen were not working at the time of this accident. It's undisputed. And there is nothing in the workers' compensation transcript or order where the workers' compensation judge was asked to make a ruling on the merits because it's a little bit subtle here because clearly these people were employed by On Target, but just not at the time of the accident . . . . There's nothing that the worker's compensation judge did on the merits.
>
> I'll repeat again, no one has said to me or shown to me a decision made on all the facts that I have that, [] under these circumstances they should not be considered an employee. No judge has made that determination.

Exhibit F: May 22, 2020 Transcript 4:2-18; 8:13-16 and *Exhibit G: May 22, 2020 Order*.

On July 30, 2020, Defendants filed a Motion for Leave to File an Interlocutory Appeal of Judge Hely's decisions. The application was denied on August 28, 2020. *Exhibit H: August 28, 2020 Order*. Defendants again file virtually the same application which has been denied multiple times. The motion, once again, should be denied.

LEGAL DISCUSSION

Motions for summary judgment are filed pursuant to *R.* 4:46, *et seq*. Summary judgment is an extraordinary measure that is opposed to the policy of law that each litigant be afforded the opportunity to air fully his or her case in a court of law. *Hearon v. Burdette Tomlin Memorial Hospital*, 213 *N.J.Super*. 98 (App. Div. 1986). As such, these motions should be granted only with extreme caution. *Ruvolo v. American Casualty Co.*, 38 *N.J.* 490 (1963). In deciding a motion for summary judgment, the reviewing court is to examine "whether the competent evidential materials presented, when viewed in the light most favorable to the non-moving party, are sufficient to permit a rational fact finder to resolve the alleged disputed issues in favor of the non-moving party." *Brill v. Guardian Life Ins. Co. of Am.*, 142 *N.J.* 520, 540 (1995) (emphasis added); *see also R*. 4:46-2(c). Only where the evidence is "'so one-sided that one party must prevail as a matter of law,'" should summary judgment be granted. *Brill, supra*, 142 *N.J.* at 540 (*quoting Anderson v. Liberty Lobby, Inc.*, 477 *U.S.* 242, 252, 106 *S. Ct.* 2505, 2512 (1986)).

The moving party has the burden of excluding any reasonable doubt as to the existence of any genuine issue of material fact. *Costa v. Josey*, 83 *N.J.* 49 (1980). The absence of undisputed material facts must appear palpably, and all inferences of doubt are to be drawn against the movant in favor of the non-moving party. *Brill*, *supra* 142 *N.J.* at 530; *Judson v. Peoples Bank & Trust Co.*

of Westfield, 17 *N.J.* 67, 74 (1954). The papers supporting the motion are to be closely scrutinized while the opposing papers are to be indulgently treated. *Ibid.* Further, it is not to be concluded that "no genuine issue as to any material fact exists solely because the evidence opposing the claimed fact strikes the judge as being not credible, since issues of credibility are for the trier of fact, which is not the judge's function in determining a motion for summary judgment." *Ibid.* The question at the summary judgment stage is not whether its likely a plaintiff will prevail given the facts at trial, but whether an "adequate basis on which a jury could make favorable findings" exists. *Cavanaugh v. Morris*, 273 *N.J. Super.* 38, 42 (App. Div. 1994).

POINT I[2]

The Workers' Compensation Bar Does Not Apply to this Suit

Workers' Compensation is typically the exclusive remedy–albeit with certain exceptions–against an employer for an individual injured in the scope of their employment. This characterization is only broadly accurate, however. In fact, not every worker injured on the job receives compensation benefits and not all conduct by an employer is immune from common-law suit. The Legislature has declared that certain types of conduct by the employer and the employee will render the Workers' Compensation bargain a nullity. *Laidlow v. Hariton Machinery Co., Inc.*, 170 *N.J.* 602, 606-7 (2002).

One such exception to the workers' compensation bar is the going and coming rule, which applies to this case. *See, e.g. N.J.S.A.* 34:15-36 ("Employment shall be deemed to commence when an employee arrives at the employee's place of employment to report to work and shall terminate when the employee leaves the employer's place of employment . . . the employee shall be deemed

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[2] Point I of Plaintiff's Opposition is responsive to Point IA of Defendants' Brief.

to be in the course of employment when the employee is engaged in the direct performance of duties assigned or directed by the employer; but the employment of employee paid travel time by the employer for time spent traveling to and from a job site . . . shall commence and terminate with the time spent traveling to and from a job site . . . .) (emphasis added).

Under the rule, accidents occurring while an employee is traveling to and from work are not considered within the course of employment unless "the employee is engaged in the direct performance of duties assigned or directed by the employer." *N.J.S.A.* 34:15-36; *see also Cressey v. Campus Chefs, Div. of CVI Serv., Inc.*, 204 *N.J. Super.* 337, 342 (App. Div. 1985)("The 'going and coming rule' is a rule of workers' compensation which denies compensation for injuries incurred while traveling to and from work.") (*citing Hammond v. The Great Atl. & Pac. Tea Co.*, 56 *N.J.* 7, 11 (1970)); *1 Larson, The Law of Workmen's Compensation*, § 15.11 (1985). An employee is not injured in the course of his or her employment if he or she is not receiving wages for his or her travel to and from work. *Nebesne v. Crocetti*, 194 *N.J. Super.* 278, 281(App. Div. 1984)("a traveling employee is not in the course of his employment and any accident does not arise out of that employment unless the employee is receiving employment wages for the time thus spent traveling[.]")(emphasis added).

Here, there is no dispute Mr. Wardell was not compensated for his time traveling in Mr. Perez's van to and from the Mister Cookie Face Factory. To the contrary, funds were taken from his paycheck to pay for travel costs. He was in no way reimbursed for travel or compensated for the two-hours he spent traveling back and forth to work. Judge Hely appropriately honed in on this fact:

> The workers during the transportation were not compensated for that time. They were compensated for the time actually spent at the Cookie Face job site . . . . Although the passengers were employed by On Target for the time they were working

at Cookie Face, they were not employees as defined by the worker's compensation law at the time of the accident.

Exhibit F: May 22, 2020 Transcript 10:1-25 (emphasis added). This ruling is perfectly in line with the workers' compensation statute and is the correct decision under the facts of the case. Nonetheless, Defendants ask this Court to overturn both Judge Hely's and the Appellate Court's decisions on the exact same set of facts. Defendants' Motion for Summary Judgement should be denied.

POINT II[3]

Judicial Estoppel Is Inapplicable as the Worker's Compensation Court Did Not Decide the Contested Issue of Plaintiff's Employment Status on the Merits

Our Supreme Court clearly recognizes the trial court's right to decide the issue of whether an incident is compensable. As set forth in *Estate of Kotsovska, ex rel. Kotsovska v. Liebman*, 221 *N.J.* 568 (2015), "'the Superior Court has jurisdiction to determine the existence of the employment relationship and such other employment issues as are raised by way of defense to the employee's tort action.'" *Id.* at 587 (quoting Pressler & Verniero, *Current N.J. Court Rules*, comment 42.1 on *R.* 4:5-4 at 1414 (2014)). Indeed, the issue of a litigant's employment status at the time of an incident "falls well within the ken of the Superior Court." *Id.* at 590. As recognized by our Supreme Court:

> First, the question of a worker's employment status is a matter that is often determined by trial judges and juries. *See, e.g.*, *Re/Max of N.J. v. Wausau Ins. Cos.*, 162 *N.J.* 282, 286 (2000) (affirming Chancery Division's determination of real estate agents as "employees" under Compensation Act); *see also Hargrove v. Sleepy's, LLC*, 220 *N.J.* 289, 295 (2015) (addressing test for a plaintiff's employment status for purposes of Wage Payment Law and Wage and Hour Law); *D'Annunzio, supra*, 192 *N.J.* at 120-25 (reaffirming criteria for trial court's determination of plaintiff's

[3] Point II of Plaintiff's Opposition is responsive to Point 1B of Defendant's Brief

employment status in claims arising under Conscientious Employee Protection Act); *Pukowsky v. Caruso*, 312 *N.J. Super.* 171, 180-83 (App. Div.1998) (addressing trial court's determination of a plaintiff's employment status in the context of the Law Against Discrimination). Indeed, as Professor Larson has observed, in addition to workers' compensation, "[t]he definition of the term 'employee' for purposes of vicarious liability, employers' liability, . . . labor legislation, unemployment compensation, social security and miscellaneous enactments applicable to employees, has probably produced more reported cases than any definition of status in the modern history of law." 3 Larson, *supra*, § 60.01.

> Second, while we acknowledge that "[t]he forum best suited to decide employment issues is the Compensation Court," *Wunschel, supra*, 90 *N.J.* at 664, the Compensation Court is in no better position to make the threshold determination of a worker's employment status than the Superior Court. As discussed above, the Superior Court is often tasked with making this determination in a variety of contexts. Thus, this determination is not "peculiarly within the agency's discretion," or one which "requires agency expertise," *Boldt, supra*, 320 *N.J. Super.* at 85.

Id. at 588-89. As set forth above, the trial court was not only authorized to rule on the employment issue in dispute, it was in a far superior position to do so.

Here, Judge Hely succinctly summarized the purpose of our system of justice and how it fits in to this case:

> The law is about truth. Without truth, there's no trust. Without trust, there's no rule of law. With no rule of law, there's no democracy. The truth is these three gentlemen were not working at the time of this accident. It's undisputed. And there is nothing in the workers' compensation transcript or order where the workers' compensation judge was asked to make a ruling on the merits because it's a little bit subtle here because clearly these people were employed by On Target, but just not at the time of the accident . . . . There's nothing that the worker's compensation judge did on the merits.

Exhibit I: July 10, 2020 Transcript 4:2-18 (emphasis added). Indeed while noticing Defendants–perhaps strategically–consented that Plaintiff was injured in the scope of his employment, the Compensation Court never reached this issue on the merits, the Superior Court did:

> As the trial court appropriately noted, "no one has said to me or shown to me a decision made on all the facts that I have, [] under these circumstances they should

> not be considered an employee. No judge has made that determination. And of course, [] the comp carrier would be entitled to reimbursement of all, you know, minus attorney fees, of all benefits that have been paid. That's known as a comp lien. We do that all the time.

Exhibit F: May 22, 2020 Transcript 8:13-21 (emphasis added).

Extensive fact discovery was completed and presented to the trial court to resolve the disputed issue of Plaintiffs' employment status. Conversely, at the time the consent order was issued in Compensation Court, virtually no discovery had taken place. Likewise, there was no dispute or controversy for the Compensation Court to resolve as On Target merely "agreed" the incident at issue was compensable. In contrast, the trial court dealt with numerous summary judgment motions, this motion being virtually identical, and a motion for reconsideration which were fully briefed by the parties. Only after reviewing same and conducting oral argument did the trial court render its well-informed decisions.

Significantly, the trial court was in a much better position to prevent inconsistent results and duplication of litigation as well as the patently unjust result of having some Plaintiff's subject to the Compensation Bar and others not, all under the same set of facts. As our Appellate Division points out, albeit in a different yet equally applicable context, "[t]he Rules are written to require uniformity as a means of providing equal justice." *Vitanza v. James, 397 N.J. Super. 516, 519* (App. Div. 2008). To have some plaintiffs barred by the compensation act when it is clear the act does not apply and to have others permitted to move forward with their third-party cases would be patently unfair, undermine principles of equal justice and be wholly inequitable.

For many of the same reasons set forth above, Defendants' judicial estoppel arguments fails. Judicial estoppel is an "extraordinary remedy" which should be "invoked only to prevent a

miscarriage of justice." *Bhagat v. Bhagat,* 217 N.J. 22, 37 (2014); *see also Kimball Int'l, Inc. v. Northfield Metal Prods.,* 334 N.J. Super 596, 606 (App. Div. 2000), *certif. denied*, 167 N.J. 88 (2001). The doctrine is not invoked unless (1) a Court has accepted the previously advanced inconsistent position, and (2) the party advancing the inconsistent position prevails in the earlier litigation. *Bhagat*, *supra*, 217 N.J. at 37. "[T]he doctrine does not apply when the matter settles prior to judgement because no court has accepted the position advanced in the earlier litigation." *Id*.

Here, as in *Bhagat*, our Supreme Court expressly stated that judicial estoppel does not apply when a settlement has been reached because no court has accepted the position advanced in earlier litigation. *Bhagat*, *supra*, 217 N.J. at 37. The Consent Order entered into by Defendants is just like the settlement in *Bhagat* as the parties mutually agreed without the Court making a judgement. The Court never made a finding on this issue, thereby never accepting a previously advanced inconsistent position by either Defendant or Plaintiff. *See Exhibit F: May 22, 2020 Transcript* 8:13-21. Judge Hely previously dealt with Defendants' substantially similar arguments of collateral estoppel and res judicata, and was not moved by Defendants' previous arguments. The Appellate Division likewise did not find them worthy of consideration.

Furthermore, the Defendants' argument concerning the binding effect of a Consent Order is misplaced. Neither party is debating whether Defendants are bound to the Consent Order, rather the question is whether the Court accepted a party's proposition as to the employment status of Plaintiff. The Court, as noted *supra*, never made such a finding as the question was not decided by Judge Yang and instead was "consented to." *Exhibit C: November 18, 2016 Transcript* 48:7-8 and *Exhibit A: Consent Order*. Judicial estoppel does not apply and Defendants' Motion for Summary Judgement should be denied.

POINT III[4]

The Ridesharing Act Does Not Apply to Defendants

As this Court is well aware, the task when interpreting any statute is to determine and effectuate the Legislature's intent. *See, e.g. D'Annunzio v. Prudential Ins. Co. of Am.*, 192 N.J. 110, 119 (2007). In carrying out this role, courts are to "look first to the plain language of the statute, seeking further guidance only to the extent that the Legislature's intent cannot be derived from the words that it has chosen." *Pizzullo v. N.J. Mfrs. Ins. Co.*, 196 N.J. 251, 264 (2008). As the Supreme Court in *Bosland v. Warnock Dodge, Inc*. 197 N.J. 543 (2009) highlights:

> We will, in this effort, read the words selected by the Legislature in accordance with their ordinary meaning, *D'Annunzio, supra*, 192 N.J. at 119-20, unless the Legislature has used technical terms, or terms of art, which are construed "in accordance with those meanings," *In re Lead Paint Litig.*, 191 N.J. 405, 430 (2007). See N.J.S.A. 1:1-1 (declaring that "words ... having a special or accepted meaning in the law, shall be construed in accordance with such ... meaning."). Nor will we "rewrite a plainly-written enactment of the Legislature ... [or] presume that the Legislature intended something other than that expressed by way of the plain language." *O'Connell v. State*, 171 N.J. 484, 488 (2002).
>
> If, however, the plain language of a statute is not clear or if it is susceptible to more than one possible meaning or interpretation, the Court looks to extrinsic secondary sources to serve as its guide. We have traditionally looked to a variety of such sources to aid us in our interpretation, including, for example, legislative history, *see Daidone, supra*, 191 N.J. at 565-66, statements of the sponsor or sponsors of bills that were enacted, *see Panzino v. Continental Can Co.*, 71 N.J. 298, 301-03 (1976), and, where relevant, a Governor's press release, *see Cox v. Sears, Roebuck & Co.*, 138 N.J. 2, 15 (1994), or his or her conditional veto message, *see Roberts v. State, Div. of State Police*, 191 N.J. 516, 521-22 (2007).
>
> Regardless of whether the language is plain or whether ambiguities cause us to seek guidance from sources other than the words the Legislature has chosen, our "primary task . . . is to effectuate the legislative intent in light of the language used and the objects sought to be achieved." *State v. Hoffman*, 149 N.J. 564, 578 (1997) (*quoting Merin v. Maglaki*, 126 N.J. 430, 435 (1992) (internal quotation marks omitted)). This

[4] Point III is responsive to Defendants' Point II

> task is often assisted by interpreting a statute consistently with the overall statutory scheme in which it is found. *See Merin, supra*, 126 N.J. at 436.

Id. at 553-54.

The New Jersey Ridesharing Act, *N.J.S.A.* 27:26-1 *et seq*. (the "Ridesharing Act"), was enacted to protect employers in fact-specific circumstances–none of which apply to the case at bar. *N.J.S.A.* 27:26-3(a) defines "ridesharing" as "transportation in a motor vehicle, with a maximum carrying capacity of not more than 15 passengers, including the driver, where such transportation is incidental to the purpose of the driver." *Id*. Defendants seek to use *Wyzykowsku v. Rizas*, 132 N.J. 509, 519 (1993), which is a case that defines "incidental" as it pertains to zoning ordinances and customarily incidental accessory use. *Rizas* does not cite to the Ridesharing Act, and concerns itself solely with property law. Plaintiff sees no reason the word "incidental" should be read as anything other than its plain meaning. "Incidental," as defined by Merriam-Webster, means "being likely to ensure as a chance or minor consequence" and "occurring merely by chance or without intention or calculation." *Merriam-Webster Dictionary*, (last visited June 8, 2021), https://www.merriam-webster.com/dictionary/incidental. Mr. Perez was not transporting Plaintiff and others by chance or minor consequence, Mr. Perez was doing so as it was part of his job with On Target.

______During Mr. Perez's deposition, he was asked question directly about his employment with On-Target:

> Q. Is this an L.L.C., an incorporated company, or does your wife just pay you monies for driving?
>
> A. There is a company. She's incorporated, and she pays me for driving $300 in cash.
>
> Q. What is the name of the company?

A. She works for On Target, and I drive for one or two companies at once.

....

Q. Are you still an employee of On Target, or no?
A. No

Q. And that ceased in June of 2018?
A. No. That ended immediately after the accident.

Q. Okay. But through your wife are you still transporting On Target employees in some capacity?
A. Yes.

...

Q: Do you have an understanding of how On Target obtained the monies to compensate you for this transportation?
A: Yes.

Q: What is your understanding?
A: Well, On Target used to deduce [sic] the transportation monies weekly from every passenger that I would transport, and then they would pay me the amount weekly cash.

Q: Okay. And the answer may be I don't know or no [sic], but do you know how the monetary figure of the deduction from the employee's paycheck was determined
A; No, that I don't know.

Q: But was it different for each passenger?
A: Yes.

...

Q. Now, were you compensated for transporting those On Target employees to job sites?
A. Yeah, <u>On Target paid me.</u>

Exhibit J: Perez Deposition 21:2-21:9; 22:18-23:1; 28:6-28:21; 27:24-28:5 (emphasis added).

Here, On Target paid Mr. Perez to transport Plaintiff and other employees. By Mr. Perez's own testimony, this is not "incidental" but a primary purpose of his employment. It is not "merely by chance" that Mr. Perez had passengers in his van on July 1, 2016, Mr. Perez had Plaintiff and others in his van because On Target paid him to do so.

Additionally, the Ridesharing Act does not insulate On Target from liability since under *N.J.S.A.* 27:26-4(a):

> An employer shall not be liable for injuries or damages sustained by passengers and other persons resulting from the operation or use of a motor vehicle not owned, leased or contracted for by the employer, when his or her employee is in a ridesharing arrangement between his or her place of residence and place of employment or termini near such place.

Ibid.

First, Defendants position no contract existed between On Target and Mr. Perez to transport the Plaintiff and other employees is contradictory to Mr. Perez's own testimony. As highlighted *supra*, On Target, not the employees, paid Mr. Perez for his services. On Target would pay Mr. Perez $300.00 a week to transport other On Target employees, as a function of his employment. Furthermore, On Target then charged Plaintiff and other passengers for the service by removing a set amount from their paychecks. In doing so, On Target was able to minimize the costs of their service contract between Mr. Perez and On Target. Since Defendants contracted this van to transport employees, the Ridesharing Act does not apply.

Second, *N.J.S.A.* 27:26-4(a) clearly states that ridesharing is only covered "between [an employee's] place of residence and place of employment or termini near such place." *Ibid*. Mr. Perez's testimony establishes that the transportation arrangement was from a place of employment to a job site:

Q: Okay. After waking up and having breakfast what did you do?
A: I went to the agency to work.

Q: On Target?
A: Yes.
...
Q: When you arrived at On Target at approximately 5:20 in the morning on July 1st, 2016, what did you do?
A: You wait for the people to come in so you can take them to the job site.
....
Q: And do you recall on the date of the accident, July 1st, 2016, when you left from the On Target location in Elizabeth, and began driving to the Mister Cookie Face plant?
A: Yes.

Exhibit J: Perez Deposition at 47:17-48:15.

Plaintiff also testified he would travel from his home to On Target's offices via public transportation. Then, he would wait at On Target and from there, be transported from On Target to the job site:

Q. Okay. Now, when you were hired by On Target, did you have any type of car available to you to get to job sites?
A. They supplied transportation.

Q. And how do you know that, or how did you know that at the time?
A. If I didn't know that, I wouldn't be here.

Q. I understand that, but when you went in there, let's say in the earlier part of 2016, before the accident happened, did they explain to you that they had some type of car or van service?
A. Yes.

Q. Okay. And how did they explain that yo you?
A. When you fill out the application they explain–it explains on the application they take out a fee every week for the transportation.

...

Q. Okay. So this van that would take you down to Mister Cookie Face plant from the On Target office, do you know the name of the driver of that van?
A. Emanuel.

...

Q. And every time that you went to the Mister Cookie Face plant, you would be driven down there with the On Target van, fair?
A. Yes.

Q. And then every time coming back from the Mister Cookie Face plant to On Target, you would be driven in a van?
A. Yes, sir.

Q. And these vans were always provided by On Target?
A. Yes, sir.

Q. And would the driver of the On Target van also work inside of Mister Cookie Face plant after you had dropped off all of the workers?
A. No, sir. The wife did. I never seen hm working there. I saw the wife.

Q. So Manuel Perez, you never saw him work inside the plant?
A. No, sir.

Exhibit K: Wardell Deposition 42:14-48:24 (emphasis added).

Plaintiff and other workers would be driven from the On Target office to the Mister Cookie Face plant, by either Mr. Perez or another worker. The transportation provided by On Target was from Plaintiff's place of employment, the On Target office, to another job site. This type of transportation is expressly outside the bounds of *N.J.S.A.* 27:26-4(a) which requires the transportation to be between an employee's residence and place of employment. For this reason, Defendants do not meet the requirements of *N.J.S.A.* 27:26-4(a) and their motion should be denied.

Finally, the carve out of *N.J.S.A.* 27:26-4(b) also does not apply. The statute reads:

> An employer shall not be liable for injures or damages sustained by the passages and other persons because he provides information, incentive, or otherwise encourages his or her employees to participate in ridesharing arrangements.

Ibid. (emphasis added). As explained *supra*, the term "ridesharing" is defined and does not cover the type of transportation that Mr. Perez provided to On Target. On Target paid Mr. Perez $300 a week to transport Plaintiff and other On Target employees from On Target to various job sites. This was not an incidental part of Mr. Perez's job, but rather a contracted service, paid for by On Target. As Plaintiff testified, workers understood that they were paying for transportation services at the time they filed job applications. As the actions of Mr. Perez and Defendants do not meet the requirements to be considered a "ridesharing" agreement, Defendants' motion should be denied.

CONCLUSION

Defendants attempt to once again re-litigate issues that have long since been decided and upheld. This Motion for Summary Judgement is little more than an attempt to overturn both Judge Hely's and the Appellate Division's previous decisions. For all the reasons *supra*, it is respectfully requested that Defendants' Motion for Summary Judgement be dismissed with prejudice.

Respectfully,

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cc: Civil Motions Clerk (Via Electronic Filing)
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