**IN THE UNITED STATES DISTRICT COURT**

**FOR THE NORTHERN DISTRICT OF ALABAMA**

ALEXIS MOSS, |

 |

 Plaintiff, |

 |

v. | CIVIL ACTION NO. CV-2016-22 CAH

 |

HITCH, INCORPORATED., and | **ORAL ARGUMENT REQUESTED**

PIPER PETERSON, Individually, |

 |

 Defendants. |

**PLAINTIFF’S OPPOSITION TO DEFENDANTS’**

**MOTION FOR SUMMARY JUDGMENT**

 COMES NOW Plaintiff Alexis Moss and requests that this Court deny Defendants’ Hitch Inc., and Piper Peterson’s (“Defendants”) Motion for Summary Judgment. Defendants ask this court to dismiss Plaintiff’s vicarious liability claim, as stated in Count I of Plaintiff’s Complaint. Defendants contend that Hitch Inc. (“Hitch”) was not vicariously liable because Peterson was not an employee of Hitch, and thus could not be operating within the scope of her employment. Furthermore, Defendants contend Hitch lacked significant control of Peterson. Additionally, the Defendant contends that Plaintiff was not a customer of Peterson, or Hitch, at the time of the accident.

However, based on the evidence, a reasonable juror could conclude that Hitch did assert significant control over Peterson, who was an employee working in the scope of her employment, and that Plaintiff was a customer of Peterson at the time of the accident. Moreover, there are genuine disputes of material fact regarding each of the previously mentioned assertions. Accordingly, Plaintiff respectfully requests that this court deny Defendant Hitch Inc. and Piper Peterson’s Motion for Summary Judgment.

In support of this Opposition to Summary Judgment, Plaintiff submits the following Memorandum Brief in Opposition to Defendant’s Motion for Summary Judgment together with an Evidentiary Submission.

WHEREFORE, PREMISES CONSIDERED, Plaintiff respectfully prays that this Honorable Court deny Defendants’ Hitch and Peterson’s Motion for Summary Judgment and set this case for trial.

 RESPECTFULLY SUBMITTED, this 29th day of February, 2016.



 Victoria Burnett

 Attorney for Plaintiff

OF COUSEL:

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Samford City, Samford 32222

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**PLAINTIFF’S BRIEF IN OPPOSITION TO DEFENDANTS’**

**MOTION FOR SUMMARY JUDGMENT**

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**PLAINTIFF’S BRIEF IN OPPOSITION TO DEFENDANTS HITCH, INC. AND PIPER PETERSON’S MOTION FOR SUMMARY JUDGMENT**

Plaintiff respectfully submits this Memorandum Brief in Opposition to Defendants’ Motion for Summary Judgment. For the reasons discussed below, Summary Judgment must be denied.

**INTRODUCTION**

On June 13, 2015, Plaintiff Alexis Moss was severely injured in a car accident while riding with Defendant Piper Peterson. Peterson was visibly not paying attention to the road and was distracted by a cell phone and loud music, when she swerved into an oncoming traffic lane and sideswiped another vehicle. This accident resulted in a magnitude of injuries to Moss and gives rise to this claim of vicarious liability against Hitch, Peterson’s employer.

The defendants seek Summary Judgment on the claim, contending that Moss cannot provide evidence on each element of the claim sufficient to send the issue to the jury, and that no disputes of material fact exist. The defendants allege that Hitch and Peterson did not have an employee-employer relationship because Peterson was an independent contractor, and thus she could not have been within the line and scope of her employment. Furthermore, the defendants allege Hitch lacked control of Peterson because Peterson drove her own car and she created her own work schedule. These allegations are false and are genuine disputes of material fact. The plaintiff offers evidence to prove Peterson was a Hitch employee, working in the line and scope of her employment, and that Hitch had significant control of Peterson. Each of these disputed facts could substantially alter the outcome of the case.

Viewing the evidence in the light most favorable to the non-movant, the disputes of material fact are sufficient to require submission to a jury, because a reasonable juror could conclude that Peterson was a Hitch employee, working within the line and scope of her employment, and was directly controlled by Hitch. Therefore, because a reasonable juror could find Peterson was an employee of Hitch, that she was acting within the scope of her employment at the time of the accident, and that Hitch maintained significant control over her, defendants are not entitled to Summary Judgment as a matter of law. Furthermore, because genuine disputes of material fact exist, Summary Judgment must be denied. Accordingly, the plaintiff respectfully requests the Court to deny Summary Judgment in this case.

**STATEMENT OF FACTS**

At the time of the accident in question, Alexis Moss was visiting her childhood friend, Piper Peterson, in Birmingham, Alabama. [Moss Depo 3]. Moss had moved to Florida and the two friends frequently made trips together to rekindle their friendship. [Moss Depo 3]. On June 13, 2015, Moss was departing Birmingham and needed a ride to the airport for a late flight. [Moss Depo 3]. Moss asked Peterson to drive her to the airport and offered her fifteen dollars in exchange. [Moss Depo 3]. The two were enjoying the evening together, when Peterson got two text messages from her employer, Hitch, around 7 p.m. [Moss Depo 3].

Hitch is a local technology company that allows drivers to use their personal cars to transport passengers for hire. [Peterson Depo 3]. The drivers are matched with passengers through Hitch’s application (app) on smart mobile phones by passengers downloading the app and disclosing their current location and their desired destination. [Referral Service Agreement 2]. Hitch then refers the passenger information to the drivers who then have 15 minutes to either accept or reject passengers through the app. [Referral Service Agreement 2]. If accepted, the driver then places a glitter thumb on his or her personal 4-door car, with their own insurance. [Referral Service Agreement 2]; [Peterson Depo 3]. The driver then proceeds to pick up, transport, and deliver the passenger to the destination. [Referral Service Agreement 2]. Hitch receives payment from passengers through the app and later pays the driver 80% of the passenger’s fee after the task is completed. [Referral Service Agreement 2].

Peterson was a driver for Hitch and the two text messages she received were referrals for two separate passengers that she could accept or deny. [Peterson Depo 4]. Peterson thought about denying the referrals, but ultimately Peterson decided to accept them and allow Moss to “tag along” with her in the passenger seat to “see [her] in action as a Hitch driver.” [Peterson Depo 4]. Peterson displayed Hitch’s “glitter thumb” placard on her car so that it was visible to the public, and departed to pick up the first Hitch passenger. [Peterson Depo 3,4]. Peterson admitted to drive with the music blaring while engaged in taking “selfies” on Moss’ phone, before picking up her first passenger. [Peterson Depo 4]. She picked up one man from Homewood and delivered him to the Birmingham Jefferson Convention Complex. [Peterson Depo 4]. After the first passenger was delivered, Moss placed the camera on the dashboard and resumed video recording the two of them dancing and singing. [Peterson Depo 4]. Peterson continued to sing and dance while driving onto highway 280, en-route to pick up the second passenger in Greystone. [Peterson Depo 4].

Peterson was looking at the camera and dancing around when her car collided with an oncoming car with the driver’s side of her vehicle. [Moss Depo 4, 5]. Peterson’s car veered to one side, was thrown off the road, and eventually flipped. [Peterson Depo 4]. The other car crashed into a tree on the opposite side of the road, killing the driver. [Peterson Depo 4]. The phone was still recording Moss and Peterson when the accident occurred, resulting in a video of the collision from the dashboard. [Moss Depo 5]. Moss was ejected from the car and suffered several severe injuries including several broken bones, a broken leg, massive brain swelling, cracked vertebra, and psychological issues. [Moss Depo 8]. She spent nearly eight weeks in the hospital and is experiencing ongoing rehabilitation for her leg and hand, and psychological counseling for her lack of concentration, focus, and memory retention. [Moss Depo 4].

Moss was an active athlete since she was 10 years old. [Peterson Depo 6]. Moss was attending Florida State University on a softball scholarship. [Moss Depo 8]. This scholarship enabled her to pursue a chemical engineering degree and obtain an internship with Dow Chemical the previous two summers. [Moss Depo 3]. Moss was exceptionally successful while at Florida State; She was highly ranked in her class and had already received a lucrative job offer with Dow Chemical as a Junior Chemical Analyst upon her completion of her degree. [Dow Chemical Corporation Letter]. As a result of her injuries, Moss was forced to withdraw from Florida State University and was unable to complete her chemical engineering degree and continue her career. [Moss Depo 8]. Moss is experiencing ongoing distress regarding her inability to finish college, her financial distress, and her lack of brain function. [Moss Depo 8]. Moss incurred, and will incur in the future, expenses related to doctor, hospital, drug, and rehabilitation treatment for her injuries. [Plaintiff Exhibit A, B, C]. She has suffered, and will continue to suffer, from physical pain, emotional stress, and mental anguish for a significant time in the future. [Moss Depo 8, 9].

Peterson admits to taking pictures and video recording herself with Moss singing and dancing on a phone while driving. [Peterson Depo 4, 5]. Peterson also admits to having the Hitch “glitter thumb” placard on her car when the accident occurred. [Peterson Depo 6]. Peterson further admits to driving the car when the two cars collided. [Peterson Depo 4]. Because the evidence shows a genuine dispute of material fact, and because a reasonable juror could find for the plaintiff as a matter of law, Moss respectfully requests this Court deny Defendants’ Motion for Summary Judgment.

**SUMMARY JUDGMENT STANDARD OF REVIEW**

Under Federal Rule of Civil Procedure 56(a), summary judgment is only proper if “there is no genuine dispute as to any material fact and the movant is entitled to judgment as a matter of law.” Fed. R. Civ. P. 56(a). The party seeking summary judgment “always bears the initial responsibility of informing the district court of the basis for its motion, and identifying those portions of [the record] which it believes demonstrate the absence of a genuine [dispute] of material fact.” *Celotex Corp. v. Catrett*, 477 U.S. 317, 323 (1986). Once the moving party has met their burden, Rule 56(c) shifts the burden to the non-movant to show that the record reveals the presence of a genuine dispute of material fact. Fed. R. Civ. P. 56(c). *See Celotex*, 477 U.S. at 324. After the nonmoving party has properly responded to a motion for summary judgment, the court may only grant the motion if there is no genuine dispute of material fact and the moving party is entitled to judgment as a matter of law. Fed. R. Civ. P. 56(a). A dispute is genuine “if the evidence is such that a reasonable jury could return a verdict for the nonmoving party.” *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 248 (1986). “[T]he judge’s function is not himself to weigh the evidence and determine the truth of the matter but to determine whether there is a genuine issue for trial.” *Id.* at 249. His guide is the same standard necessary to direct a verdict: “whether the evidence presents a sufficient disagreement to require submission to a jury.” *Id.* at 251-52; *see also Bill Johnson’s Restraunts, Inc. v. N.L.R.B.*, 461 U.S. 731, 745 (1983). Additionally, the court always construes evidence in the light most favorable to the party opposing the motion. Fed. R. Civ. P. 56(a). This means determinations of credibility, weight of the evidence, and any factual inferences are construed in the plaintiff’s favor. *Anderson*, 477 U.S. at 251-52. Therefore, the court must deny the motion if there is sufficient evidence on which the jury could reasonably find for the non-movant. *Id.* at 254; *Cottle v. Storer Commc’n, Inc.*, 849 F.2d 570, 575 (11th Cir. 1988).

In this case, there are numerous genuine disputes of material fact. The Plaintiff offers evidence to disprove Hitch’s allegations that Peterson was not a Hitch employee, she was not working in the line and scope of her employment, and that Hitch did not have significant control of Peterson. The Defendants admit that Peterson was a driver for Hitch, that she had just delivered a Hitch passenger and confirmed the delivery with the Hitch app, that she was using the glitter thumb placard, Hitch’s logo, when the accident occurred, and that she was listening to loud music and dancing while driving when the two cars collided. [Defendant Answer 3]; [Peterson Depo 3, 4, 6]. The Defendants failed to establish that these facts should be granted as a matter of law. Viewing the evidence in the light most favorable to the non-movant, these disputes are sufficient to require submission to a jury. Accordingly, this Court must deny Summary Judgment because there is sufficient evidence on which the jury could reasonably find for the non-movant.

**ARGUMENT**

1. THIS COURT MUST DENY SUMMARY JUDGMENT BECAUSE A REASONABLE JUROR COULD FIND THAT PETERSON WAS AN EMPLOYEE FOR HITCH INC. AND ACTING WITHIN THE LINE AND SCOPE OF HER EMPLOYMENT AT THE TIME OF THE ACCIDENT.

Under the theory of *respondeat superior*, an employer can be held vicariously liable for injuries resulting from their employee’s acts or omissions when the employee is acting within the scope of their employment. *See* *Pritchett v. Milstid*, 891 F. Supp. 1541, 1545 (S.D. Ala. 1995); *Hollis v. City of Brighton*, 885 So. 2d 135, 142 (Ala. 2004). To prevail under the theory of *respondeat superior*, the plaintiff must establish two things: (1) there was an employee and employer relationship and (2) the act was done within the scope of employment.  *Hendley v. Springhill Memorial Hospital*, 575 So. 2d 547, 550 (Ala. 1990).

Based on the evidence, there are genuine disputes of material fact regarding whether Peterson was Hitch’s employee and whether she was acting within the scope of her employment. Viewing the evidence in the light most favorable to the non-movant, a reasonable juror could find Hitch vicariously liable for Moss’ injuries. Therefore, Defendants’ Motion for Summary Judgment must be denied.

1. As a matter of law, Peterson and Hitch established an employee- employer relationship because Hitch exercised control over Peterson’s work and the manner in which the work was performed.

An employer-employee relationship is present when the employer has exercised, or reserved, the right to control how business is performed and the results; in other words, “[n]ot only *what* shall be done, but *how* it shall be done.” *See* *Solmica of the Gulf Coast, Inc. v. Braggs*, 232 So. 2d 638, 639 (Ala. 1970); *N.L.R.B. v. United Ins. Co. of America*, 390 U.S. 254, 259 (1968) (finding debt agents were employees because they performed under the company’s name, instructions, and rules as stated in a contract).

For example, in *Solmica v. Braggs*, Cornelson was employed by Solmica, to apply aluminum sidings to homes. 232 So. 2d at 639*.*  Solmica referred employees to specific homes, paid employees a fee per unit of work performed, held a percentage of their earnings, and reserved the right to terminate employment.  *Id.* at 641. Further, Cornelson used his own car and worked in a manner he chose, as long as the company’s work was completed. *Id.* The Alabama Supreme Court held there was sufficient evidence for an employer-employee relationship because Solmica controlled the work performed and how it was performed, reserved pay, withheld a percentage, and reserved the right to terminate employees. *Id.*

In the present case, Peterson’s duties are similar to Cornelson’s. Peterson used her own car to perform work, worked at her discretion, and was paid an 80% fee per passenger. Similar to Solmica, Hitch withheld twenty percent of Peterson’s income, referred Peterson to specific jobs, and controlled how Peterson accepted passengers with an app. Hitch made Peterson sign their service agreement, which reserved the right to terminate employees, and “to increase or revise” promotions, positions, roles, responsibilities, and pay, at their discretion. Hitch disclosed to Peterson the location and time to receive and deliver passengers, held a time limit for her to accept or reject passengers, and instructed her to use the company’s glitter “thumb’s up” placard when driving for the company. Peterson drove under Hitch’s instructions, rules, and name and her driving benefitted Hitch and furthered their development, and a reasonable juror could find Peterson was an employee.

Furthermore, Hitch’s glitter “thumbs up” on Peterson’s car was evidence of control sufficient to form an employer-employee relationship because courts have held drivers of cars bearing their employers logos infer an employee-employer relationship. *Barber Pure Milk Company v. Holmes*, 84 So. 2d 345, 350 (Ala. 1956) (holding a milk truck bearing the company’s name, the employees’ driving, and the proximity of the company’s location, was sufficient to infer an employee-employer relationship between the driver and the milk company). Similarly, Hitch’s requirement of their glitter “thumbs up” decal on the front of Peterson’s car, and the accident being in an area continuously serviced by Hitch, should provide sufficient evidence to infer an employee and employer relationship.

Notably, the California Supreme Court recently held that a company provides transportation services through mobile apps that connect drivers and customers, the drivers were presumed to be employees. *O’Connor v. Uber Tech.*, 82 F. Supp. 3d. 1133, 1135 (N.D. Cal. 2015). In this case, the technology company, Uber, uses an app that allows passengers to request rides from Uber drivers by notifying drivers, who then pick passengers up and deliver them to their desired destination. *O’Connor*, 82 F. Supp. 3d. at 1135.

The court held Uber drivers were employees because Uber connects drivers with passengers through their app and profits from the rides. *Id*. at 1142 (stating Uber “*only* makes money if the drivers actually transport the passengers”). Furthermore, the court held that even though hired drivers sign a contract explaining job details, such as Uber’s right to terminate drivers and the driver’s status as independent contractors, rather than employees, the drivers are considered employees because they perform services for Uber. *Id.* at 1143*.* Even though drivers create their own schedules and use their personal cars and insurance, the court held drivers were employees. *Id*.The court noted policy factors that influenced their decision; the drivers, being “active instruments of [the company]”, provided “an indispensible ‘service’ to [the company]” and “[the company] could no more survive without them than it could without working cabs.” *Id*.

Similar to Uber, Hitch claims to be a technology company that pairs passengers with drivers to acquire rides, and pay, through the Hitch app. Hitch also makes drivers sign a contract that designates them as independent contractors who use their own car and insurance, create their own schedules, and are not to solicit rides outside of Hitch. Hitch determines passenger’s fees, the driver’s pay, and holds the right to terminate drivers. Similar to an Uber driver, Peterson was a driver for Hitch, performed services to transport Hitch passengers, and generated revenue for Hitch. Therefore, a reasonable juror could find, as a matter of law, that Peterson renders services to Hitch, and thus is Hitch’s presumptive employee.

In the present case, genuine dispute of material facts exist regarding Hitch’s control over Peterson and Peterson’s title as a Hitch employee. A court could find Hitch reserved the right to control, at their discretion, Peterson’s work and the way she worked including her means for obtaining passengers through the app, payment, performance, duties, and responsibilities. Viewed in a light most favorable to the non-movant, a court could find Defendants’ established an employer-employee relationship as a matter of law, and thus this court must deny Defendants’ motion for Summary Judgment.

1. As a matter of law, a reasonable juror could find Peterson was working within the scope of her employment for Hitch at the time of the accident because she was en-route to pick up a Hitch passenger, while displaying Hitch’s logo.

An employee acts within the scope of their employment if the acts are related to those they are paid to perform, and if they carry out the objectives of their employment, and not personal objectives. *Merrell v. Joe Bullard Oldsmobile, Inc.*, 529 So. 2d 943, 947 (Ala. 1998). When an agent is “engaged to perform a certain service” and acting in furthering their employment services, they are “within the scope of employment.” *Id.* at 947. Usually the determination of scope is a question for the jury but the court has held, as a matter of law, that an employee was within their scope of employment when there is only “slight and not unusual” deviations from “executing the [employer’s] business.” *Hendley v. Springhill Memorial Hospital*, 575 So. 2d 547, 550 (Ala. 1990).

A driver en-route between job sites is considered to be working within the scope of their employment. For example, in *Vulcan Freight Lines, Inc. v. Buckelew*, a contractor was sued for their employee driving a tractor into a home. 386 So. 2d 433, 434 (Ala. 1980). When the driver delivered one load of freight and was “en-route to another load” at the time of the accident, the court held the contractor was liable for injuries because the driver was the contractor’s employee and working within the scope of their employment. *Id.* at 43, 436. Because the driver was operating on Vulcan’s behalf and benefitting Vulcan, the court ruled, as a matter of law, the driver was acting within the scope of employment. *Id.* at 437.

Similarly, in the case at hand, Peterson had just dropped off one passenger, and was en-route to pick up another, under direct referral from Hitch. Peterson had accepted the passenger through the Hitch app, and displayed Hitch’s glitter “thumb’s up” placard on her car, visibly noticeable for the public to see and indicating her work for the company at the time of the accident. Peterson was Hitch’s employee and working within the scope of her employment because she was en-route to pick up another Hitch passenger when the accident occurred.

Furthermore, Peterson claimed to allow Moss to “tag along” to “see [her] in action as a Hitch driver”. Courts have held if the ride purpose is to benefit the driver, the rider is considered a passenger and not a guest, and is a jury question. *Wagnon v. Patterson*, 70 So.2d 244, 246 (Ala. 1954). In this case, the ride incurred a benefit for Peterson, and a reasonable juror could find Moss was a passenger. Thus, Peterson was within the line and scope of her employment.

Genuine disputes of material fact exist regarding whether Peterson was acting within the scope of her employment. A court could find Peterson was driving for Hitch, was en-route to pick up a Hitch passenger, and displayed Hitch’s logo on her car. Viewed in a light most favorable to the non-movant, a court could find that Peterson was working within the scope of her employment as a matter of law. Therefore, Defendants’ motion for Summary Judgment should be denied.

1. DISPUTED MATERIAL FACTS

There are several disputed material facts in this case. While Defendants allege Hitch could not be held vicariously liable for Peterson’s conduct because they did not assert significant control over Peterson to establish an employee-employer relationship and Peterson was an independent contractor, the Plaintiff offers contradicting evidence. Hitch made Peterson sign a contract that controlled Peterson’s work and how she performed including how she obtained passengers, her payment, duties, and responsibilities, and Hitch’s right to terminate her employment at any time. As previously mentioned, courts have found this conduct to be significant control that would determine an employer-employee relationship. Thus, viewed in light most favorable to the non-movant, a court could find, Peterson was Hitch’s employee as a matter of law.

Furthermore, Hitch alleges Peterson was not acting within the scope of her employment at the time of the accident because Moss was not a passenger. The Plaintiff offers contradicting evidence. Peterson was en-route to pick up a Hitch passenger, who was accepted through the Hitch app, with the Hitch placard on her car. Therefore, viewed in the light most favorable to the non-movant, a court could find Peterson was acting within the scope of her employment as a matter of law.

Each of these disputed facts contradicts elements of the claim, and would materially alter the outcome of the case. Under Federal Rule of Civil Procedure 56(a), a court may grant summary judgment, as a matter of law, only if the moving party shows that there is no genuine dispute of material fact. Fed. R. Civ. P. 56(a). The judge determines whether the evidence should be submitted to the jury. In this case, there is more than a scintilla of evidence to indicate the contrary of the Defendant’s allegations such as Peterson was Hitch’s employee and Peterson was within the scope of her employment and that these disputed material facts should be submitted to a jury. The defendant cannot prevail, as a matter of law, because a reasonable jury could find in favor of the non-movant.

**CONCLUSION**

In light of the facts presented above, this court must deny defendant’s motion for Summary Judgment for Moss’ vicarious liability claim. Summary Judgment is improper because the disputed material facts show Peterson was an employee for Hitch Inc. and was working within the scope of her employment, thus allowing Hitch Inc. to be vicariously liable for Moss’ injuries.

These facts are materially relevant in determining Hitch’s vicarious liability for Moss’ injuries sustained from Peterson’s distracted driving. Accordingly, Moss requests this court to deny Summary Judgment on Moss’ vicarious liability claim and submit these disputes of material fact to a jury.

 RESPECTFULLY SUBMITTED this 29th day of February, 2016.



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**ORAL ARGUMENT REQUESTED**

**CERTIFICATE OF SERVICE**

I hearby certify that I have on February 29, 2016, served a copy of the foregoing on counsel of record for all parties to this proceeding by mailing the same by United States mail, properly addressed and first class postage prepaid:

Piper Peterson Hitch Incorporated

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Birmingham, AL. 35243 Nashville, TN. 37204