

IN THE
SUPREME COURT OF OHIO **13-0892**

VISITING NURSE ASSOCIATION)
OF MID-OHIO, *et al.*)
)
Appellant,)
)
v.)
)
TAMARA FRIEBEL,)
)
Appellees.)

SUPREME COURT OF OHIO
CASE NO.:

On Appeal from the Richland County
Court of Appeals, Fifth Appellate
District – Case No.: 2012-CA-56

**APPELLANT VISITING NURSE ASSOCIATION OF MID-OHIO'S
MEMORANDUM IN SUPPORT OF JURISDICTION**

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EXPLANATION OF WHY THIS CASE IS A CASE OF PUBLIC OR GREAT GENERAL INTEREST AND INVOLVES A SUBSTANTIAL CONSTITUTIONAL QUESTION

This case presents propositions of law -- one novel, the other well-settled, but both issues decided incorrectly by the Fifth District Court of Appeals in a 2-1 decision. *Friebel v. Visiting Nurse Assn. of Mid Ohio*, 5 Dist. No. 2012-CA-56, -- N.E.2d --, 2013-Ohio-1646. This Court's well-established standard to grant discretionary appeals is "whether the cause presents a question or questions of public or great general interest as distinguished from questions of interest primarily to the parties." *Williamson v. Rubich*, 171 Ohio St. 253, 254 (1960).

The first and novel question of law involves a whole class of employers and claimants in the burgeoning area of home health care and has much wider implications for the workers' compensation system as a whole. See, *Noble v. Colwell*, 44 Ohio St. 3d 92, 94 (1989) ("Novel questions of law or procedure appeal not only to the legal profession but also to this court's collective interest in jurisprudence."). The general question to be addressed is simply: In Ohio workers' compensation, can a claimant have "dual intent," simultaneously being on a personal errand and acting in the scope of their employment? The 2-1 decision of the Fifth Appellate District held that a claimant driving from her home with the intent to stop at a mall for her personal benefit of dropping off her two minor children, their minor friends, and her adult friend, all before heading to her first patient visit of the day, had "dual intent" of simultaneously performing a personal errand and being in the course of her employment. Their opinion reversed the summary judgment granted in favor of VNA and created a previously non-existent concept in Ohio workers' compensation. In his dissent, Judge Wise correctly opined:

{¶ 35} I respectfully dissent from the majority opinion. The majority finds that appellant was in the course of employment because she had a dual intent at the time she left her house. One intent was to go to her first scheduled appointment of the day. Appellant's other intent was to take her daughter and a friend to the mall, which was en route to her first appointment. The majority analyzes this fact

pattern under a frolic and detour theory finding that she had not yet left the route leading to her first job site, as she had not yet turned onto the route entering the mall when the accident occurred.

{¶ 36} I agree with the majority that the facts determine the legal outcome in “course of employment” cases; however, I disagree with the majority's application of the facts in this case. I do not believe “frolic and detour” is the proper legal analysis under these facts. The majority speaks to the dual intent of appellant and applies that concept to the “frolic and detour” analysis. I disagree with this analysis for two reasons. First, I do not find any case law to support the concept of dual intent. I believe that an employee has a purpose which may change during the course of the day's employment, i.e. “frolic and detour”. Second, I believe intent or purpose analysis becomes very difficult when trying to determine what is in the mind of the employee. Instead, I believe a strict application of the facts best determines whether the employee was in the course of employment or on a personal errand. In this case, the facts indicate that the employee was headed to the mall to drop off her daughter and her friend. Only after she had dropped off her passengers at the mall was she going to begin her travel in the course of her employment. Therefore, there could be no “frolic and detour” from a course upon which she had not yet set out. (Emphasis added.)

As Judge Wise correctly noted, “dual intent” is not a concept found in Ohio workers' compensation law. As will be demonstrated herein, the instant matter should be analyzed under the existing “in the course of” and “arising out of” test and its progeny. R.C. 4123.01(C); *Fisher v. Mayfield*, 49 Ohio St.3d 275, 551 N.E.2d 1271 (1990). Presenting a novel question of law, this issue has great public and general interest. *Noble*. Never before has Ohio workers' compensation law created a doctrine of “dual intent.” This question should be reviewed and reversed to provide greater guidance to the lower courts, lower administrative tribunals, employers, and claimants.

The second and well-settled question of law involves the general prohibition against granting of a summary judgment in favor of a non-moving party and denial of due process. The polestar case for this issue is *Marshall v. Aaron*, 15 Ohio St.3d 48, 472 N.E. 2d 335 (1984). *Marshall* holds that “a party who has not moved for summary judgment is not entitled to such an order[.]” In the instant matter VNA filed for summary judgment presenting the facts “most strongly in favor of the nonmoving” claimant. *Temple v. Wean United, Inc.*, 50 Ohio St.2d 317,

327 (1977). In response, claimant opposed VNA's motion, but did not file her own motion. The trial court granted summary judgment in favor of VNA. Claimant appealed arguing that there were questions of fact to be resolved. The Fifth District, viewing facts most favorably to the claimant, reversed the trial court and determined as a matter of law that claimant was injured in the course of and arising out of her employment. [*Friebel*, 2013-Ohio-1646, at ¶¶22 and 27.]

A moving party seeking summary judgment frames facts and law in a way distinctly different than one defending a summary judgment. A moving party should be secure in knowing that a court will not summarily decide the action against it and in favor of a non-moving party. The procedure followed by the majority below revealed the manifest injustice in granting summary judgment to a non-moving party. First, the majority construed the facts most strongly in favor of the non-moving claimant. Then, using claimant-favorable facts, effectively granted summary judgment for the non-moving claimant. A summary judgment cannot be granted by construing the facts in favor of the prevailing claimant. Civ.R. 56. If claimant had filed a summary judgment motion and VNA not filed one, the facts would be construed in favor of VNA. These would show that a question of fact existed. Most notably, claimant had two other, more direct routes available to travel from her home to the patient's home that did not involve going past the mall. Having had no notice or opportunity defend against a summary judgment, VNA was denied its due process. This discretionary appeal to the Supreme Court affords VNA its first opportunity to assert the necessary facts and arguments against granting summary judgment in favor of claimant. Thus, the majority's failure to apply the proper procedure in its *de novo* review of the summary judgment is reversible error which this Court should correct.

STATEMENT OF THE CASE AND FACTS

As a home health nurse, claimant provided in-home health care services to the clients of

VNA. *Friebel* at ¶2. Claimant testified her typical day consisted of going from patient home to patient home and occasionally stopping at the office for supplies, mail, or attending meetings. *Id.* Claimant traveled in her personal vehicle to the patient's homes. *Id.* at ¶3. Only during the weekend, did VNA pay claimant for travel time and mileage from her home to the first patient's home until she returned to her home from the last patient's house. *Id.*

On Saturday, January 22, 2011, claimant's first patient was a woman that lived on Park Avenue, West, in Ontario, Ohio. *Id.* at ¶4. Claimant confirmed she was generally paid for travel time and mileage on the weekends from the time she left her home to go to the first patient's home.¹ *Id.* That morning claimant left her home with her two children and two family friends. *Id.* Claimant's "daughter had shopping to do," so claimant decided to transport her daughter, son, and two family friends to the mall. (Claimant's Depo. 53:12-25, 54:1-25, 55:1-14.) After claimant dropped off her family and friends at the mall, claimant then intended to drive to her first patient's home in Ontario. *Friebel* at ¶4. Claimant testified that she had never travelled (or could not recall ever) travelling directly from her home to the patient's home. (Cl. Depo. 59:5-20, 61:17-25, 62:1.)² However, there were at least two other more direct routes available for the claimant to take. *Friebel* at ¶4. On her way to the mall, claimant was going to take the second entrance road to the mall off of Lexington–Springmill Road, drop off her passengers, and proceed on the same access road to return southbound on Lexington–Springmill Road. *Id.* Claimant testified after she dropped off her passengers at the mall, she would have taken Lexington–Springmill Road to Park Avenue West, where the patient's home was located. *Id.*

¹ Claimant submitted her time, but not her mileage on this occasion. (Cl. Depo. 49:1-6.)

² The Fifth District stated that claimant testified she planned to take her "normal route" to the patient's home, Lexington–Springmill Road to Park Avenue West. *Friebel* at ¶4. That does not coincide with the claimant's testimony. Compare, (Cl. Depo. 59:5-20, 61:17-25, 62:1.)

That Saturday morning claimant left her home in Shelby, Ohio with family and friends in her vehicle and traveled south on Lexington–Springmill Road towards the Richland Mall. Id. at ¶5. Claimant bypassed the two, more direct routes to get to the Richland Mall. While stopped at a traffic light at the corner to the mall on Fourth Street and Lexington–Springmill Road, claimant's car was hit from behind. Id. Claimant testified she had not yet turned into the mall entrance. Id. As a result of the accident that occurred while driving her friends and family to the mall, claimant sought the right to participate in the workers' compensation system for a cervical sprain. Id. at ¶6. VNA disputes that an injury occurred. Id. The BWC tentatively allowed claimant's workers' compensation for a sprain of the neck. Id. at ¶7. A district hearing officer issued an order finding the claimant was a fixed situs employee and did not begin her substantial employment until she arrived at the patient's house and thus was not in the course and scope of her employment at the time of the accident. Id. A staff hearing officer vacated the district hearing officer's order and the claim was allowed for a cervical sprain. Subsequently, VNA filed Notice of Appeal in Richland County Common Pleas Court. Claimant filed a complaint and VNA filed an answer denying the allegations. Id. at ¶8. The trial court granted summary judgment to VNA on June 22, 2012, finding, as a matter of law, claimant's injury did not arise out of her employment and was not received in the course of her employment because as a matter of undisputed facts she was on the personal errand of transporting family and friends to the mall. Id.

Claimant appealed the trial court's June 22, 2012 summary judgment. Id. at ¶9. Claimant raised the following assignment of error on appeal: “As A Matter Of Law, The Trial Court Erred By Overturning The Sound Discretion Of The Industrial Commission Of Ohio And Granting Summary Judgment In Favor Of Defendant–Appellee, Visiting Nurse Association Of Mid

Ohio.” Id. at ¶10.³ Although claimant assigned error "as a matter of law," claimant's argument was centered upon there being issues of facts to be resolved by a jury.

In a 2-1 decision, the Fifth District decided on April 19, 2013 to reverse the trial court's summary judgment in VNA's favor. The majority found, as a matter of law: (1) that claimant had "dual intent" of being simultaneously on a personal errand and in the course of her employment [Id. at ¶¶21-22]; (2) that claimant's accident arose out of her employment as she would not have been at the accident scene next to the mall but-for her employment duties [Id. at ¶27]; and, (3) that claimant was not a fixed situs employee. [Id. at ¶30.] By finding as a matter of law that claimant's accident occurred in the course of and arose out of her employment, the split decision effectively granted summary judgment in favor of the non-moving claimant.

ARGUMENT IN SUPPORT OF PROPOSITIONS OF LAW

Proposition of Law No. 1: THE DOCTRINE OF "DUAL INTENT" DOES NOT EXIST IN OHIO WORKERS' COMPENSATION LAW, AND THE APPROPRIATE REVIEW IS WHETHER OR NOT CLAIMANT'S INJURIES WERE RECEIVED IN THE COURSE OF AND ARISING OUT OF HER EMPLOYMENT WITH VNA.

A. THERE IS NO "DUAL INTENT" DOCTRINE IN OHIO.

The 2-1 majority held a claimant driving from her home with intent to stop at a mall for her personal benefit of dropping off her family and friends, before heading to her first patient visit of the day, had a "dual intent" of simultaneously performing her personal errand and being "in the course of" her employment. *Friebel* at ¶21. Their opinion reversed the summary judgment granted in favor of VNA finding claimant was on a personal errand and created a previously non-existent doctrine in Ohio workers' compensation law.

³ Claimant's assignment of error made an erroneous and misleading statement regarding the "sound discretion of the Industrial Commission" since a R.C. 4123.512 appeal is *de novo* and the findings of the Industrial Commission are irrelevant to the trial court. R.C. 4123.512.

As Judge Wise correctly noted, "dual intent" is not a concept found in Ohio workers' compensation law. The instant matter should be analyzed under the already existing "in the course of" and "arising out of" tests. R.C. 4123.01(C); *Fisher*. Never before has Ohio workers' compensation law addressed the concept of "dual intent." The new doctrine -- left undefined without any supporting citation [*Friebel*, at ¶21] -- obliterates the "in the course of" element and makes a claim compensable no matter how tangential a claimant's actions are to their employment duties -- like taking their family to the mall before going to work. This question must be reviewed to provide direction to the lower courts, Industrial Commission, Bureau of Workers' Compensation, employers, and claimants.

B. ANALYZING THIS CASE UNDER THE ESTABLISHED "IN THE COURSE OF AND ARISING OUT OF" DOCTRINE AND ITS PROGENY SHOWS THAT THIS CLAIM IS NOT COMPENSIBLE AND MANDATES THE TRIAL COURT'S ORDER BE REINSTATED.

1. CLAIMANT WAS NOT "IN THE COURSE OF" HER EMPLOYMENT

The trial court properly found that claimant's injury was not received in the course of her employment with VNA, but while on a personal errand. To prove her injury was work related, claimant must show her injury was received "in the course of" employment. R.C. 4123.01. This requirement is the first of two prongs to determine compensability. *Fisher*. The requirement that the injury be received "in the course of" one's employment refers to the "time, place, and circumstances" of the injury. *Id.* An injury is not received in the course of employment if it occurs when an employee is not engaged in a "pursuit of undertaking consistent with the contract of hire which is related in some logical manner, or is incidental to, his or her employment. *Id.* at 278, fn. 1, citing, *Sebek v. Cleveland Graphite Bronze*, 148 Ohio St. 693 (1947).

Claimant's conduct reveals that she was not acting in a manner consistent with her employment as a home health nurse for VNA. On January 22, 2011, claimant's "daughter had

shopping to do,” so claimant decided to transport her daughter, son, and two family friends to the mall. On the way to the mall, claimant's car was rear-ended. Claimant's mission at the time of the accident was solely personal. Claimant intent to drop off her four passengers in the mall parking lot. Only then, after dropping off her passengers at the mall, would claimant have proceeded (physically and with mental intent) towards her client's home to provide treatment in connection with her employment. Therefore, at the time of the accident, claimant was not *in the course of* her employment because she was not engaged in the service of her employer, nor was she acting in a manner consistent with her employment. The act of transporting four passengers to the mall, so that they can go shopping, is not a duty consistent with her contract of hire. The court of appeals determination to the contrary must be vacated and the trial court's order reinstated.

2. CLAIMANT'S INJURIES DID NOT "ARISE OUT OF" HER EMPLOYMENT.

The trial court properly found that Plaintiff's injury did not arise out of her employment with VNA. The second prong of the test is whether the injury arose out of the plaintiff's employment. R.C. 4123.01; *Fisher*. Both prongs, *i.e.*, “in the course of” and “arising out of,” must be satisfied for a claim to be compensable under R.C. 4123.01. *Fisher*. The “arising out of” element refers to the causal nexus between a plaintiff's injury and their employment. *Id.* at 277. To determine whether plaintiff has demonstrated a sufficient relationship to show the injury arose from the employment, “depends on the totality of circumstances surrounding the accident, including, (1) the proximity of the scene of the accident to the place of employment, (2) the degree of control the employer had over the scene of the accident, and (3) the benefit the employer received from the injured employee's presence at the scene of the accident.” *Id.* These primary factors should be considered, but are not exhaustive. *Id.* at fn. 2.

The *Crockett* case is factually similar to the present case. *Crockett v. HCR Manorcare, Inc.* 4th Dist. No. 03CA2919, 2004-Ohio-3533. A home health care aide was injured driving

between two different work sites. Id. at ¶¶2-4. At the time of the accident, her infant goddaughter was a passenger in her car. Id. The employee, at the time of the accident, “intended to take the child to her mother where they were meeting at a service station” less than one mile from the second work site, which was a client’s home. Id. The court’s analysis focused on whether or not the injury arose from the employee’s employment. Id. at ¶¶21-28. Using totality of circumstances test, the facts did not support the employee’s workers’ compensation claim. Id. at ¶24. First, the accident occurred on a public highway. Id. Second, the employer exercised no control over the scene of the accident. Id. Third, the employee’s “presence at the scene of the accident served little benefit to the employer.” Id. The court acknowledged that “her presence may have been beneficial in the sense that it was to further her employment goal of reaching her next customer,” however, this was not a sufficient benefit. Id. See, also, *Ruckman v. Cubby Drilling*, 81 Ohio St.3d.117, 122 (1998)(finding the accident did not occur at a location where the employees could carry on their employer’s business). The court did not analyze the fact that the employee was/was not compensated for travel time or mileage.⁴ *Crockett* at ¶¶21-28.

The *Crockett* court continued its analysis beyond the three factors. One such factor was at the time of the accident, the *Crockett* “was on her way to drop off her goddaughter to a caregiver.” Id. at ¶24. “Although the drop-off point **happened to be on her way to her next work site**, the fact remains that at the time of the accident, she was **fulfilling a personal purpose**.” (Emphasis added) Id. The court held that under the totality of the circumstances test,

⁴ In *Crockett*, the claimant was not compensated for her time or expenses to and from her patients; whereas Friebel was compensated to and from her patients’ homes on the weekends. See, also, *Gilham v. Cambridge Home Health Care*, 5th Dist. 2008CA211, 2009-Ohio-2842. This was the sole distinguishing factor for the *Friebel* court. Id. at ¶24. **Regardless of pay for time or mileage generally, this claimant, like *Crockett*, was not on her way to or from her patient’s home at the time of this non-work related accident.** See, *Crockett* and *Gilham*.

the employee failed to show that her injuries arose from her employment. *Id.*

When the totality of circumstances test is applied in the present case, the undisputed facts show claimant's injury did not arise from her employment. First, the accident occurred on a public roadway. Second, VNA exercised no control over the accident scene on a public roadway. Third, VNA did not receive a benefit from Plaintiff's presence at the scene of the accident because, as stated by *Crockett*: "Although the drop-off point **happened to be on her way to her next work site,**⁵ the fact remains that at the time of the accident, she was **fulfilling a personal purpose.**" (Emphasis added) *Id.* at **13. Therefore, claimant was seeking a *personal* benefit at the time of the accident, her injuries did not arise from her employment with VNA, the appellate court's order must be vacated, and the trial court's order reinstated.

3. CLAIMANT WAS A FIXED-SITUS EMPLOYEE SUBJECT TO THE "COMING AND GOING" RULE, AND THEREFORE HER INJURIES DID NOT "ARISE OUT OF" OR "IN THE COURSE OF" HER EMPLOYMENT.

An injury sustained by an employee is compensable under the Act only if it was received in the course of, and arising out of, their employment." R.C. 4123.01(C). As a general rule, where an employee, having a fixed place of employment, sustains an injury while traveling to and from their place of employment, such injury does not have the required causal connection to the employment and therefore does not arise out of and in the course of her employment. *Lohnes v. Young*, 175 Ohio St. 291, 194 N.E.2d 428 (1963). In *Ruckman*, this Court set forth the test for determining whether an employee is a fixed-situs employee. This Court stated that "[i]n determining whether an employee is a fixed-situs employee and therefore within the 'coming-and-going' rule, the focus is on whether the employee commences his substantial employment

⁵ With regard to the instant matter, this is a fact assumed in light most favorable to claimant. As this Court will recall, claimant drove past two more-direct routes available to claimant in order to take the third route near the mall.

duties only after arriving at a specific and identifiable work place designated by his employer.” Id. at 119. The coming-and-going rule was applied in the *Gilham* case. In *Gilham*, the employee appealed the grant of summary judgment in favor of the employer. The employee, a home health aide, was found to be a fixed-situs employee and the court affirmed summary judgment in favor of the employer. The employee was injured in a motor vehicle accident while driving between clients’ homes. Her substantial employment duties commenced only after she arrived at clients’ homes. The employee was not paid for travel or expenses, but, more importantly, the court stated she had “no duties to perform outside of the homes of her patients.” The court held she was a fixed-situs employee and her claim was barred because no exceptions applied.

Similar to the employee in *Gilham*, this claimant is a fixed-situs employee. Her schedule could change on a daily basis, (Cl. Depo. 24:9-12.) but per *Ruckman*, one can be a fixed-situs employee even if the employee’s schedule varies from day to day. Claimant’s substantial job duties began after she arrived at her patients’ homes, to provide treatment or perform assessments. (Cl. Depo. 23:2-9.) She discussed her work as being “out there in the field and making decisions with these patients as far as their health goes.” (Cl. Depo. 20:9-11.) Claimant’s pay for travel time and mileage on weekends, bears no weight in the determination of “whether an employee was in the course of his or her employment while traveling to a job site.” *Ruckman*, 81 Ohio St.3d at 121, fn. 1. Further, this fact is distinguishable from billable services resulting from care provided to the patient in their client’s home.

Based on the facts in the present case, claimant is a fixed-situs employee and the coming-and-going rule applies to bar her claim. For this reason, VNA was entitled to judgment as a matter of law on this ground as well.

Proposition of Law No. 2: THE APPELLATE COURT ERRED IN SUA SPONTE ENTERING SUMMARY JUDGMENT ON APPEAL IN FAVOR OF THE NON-MOVING CLAIMANT AND AGAINST THE MOVING DEFENDANT VNA AND, IN DOING SO, CONSTRUING FACTS IN A LIGHT MOST FAVORABLE TO PREVAILING CLAIMANT.

In, *Marshall v. Aaron*, 15 Ohio St.3d 48, 472 N.E. 2d 335 (1984), this Court held that "a party who has not moved for summary judgment is not entitled to such an order[.]" See, also, *Bowen v. Kil-Kare, Inc.*, 63 Ohio St.3d 84, 585 N.E.2d 384 (1992); *Conley v. Smith*, 5th Dist. No. 2004CA285, 2005-Ohio-1433, ¶12-13 (The 5th district enforced the prohibition against granting summary judgment for non-moving party, noting a non-moving party's argument inherently raises and argues questions of fact.) This notion is ingrained into the summary judgment rule which refers to "seeking" and "defending" parties, and states, in pertinent part:

A summary judgment shall not be rendered unless it appears from the evidence or stipulation, and only from the evidence or stipulation, that reasonable minds can come to but one conclusion and that conclusion is adverse to the party against whom the motion for summary judgment is made, that party being entitled to have the evidence or stipulation construed most strongly in the party's favor.

(Emphasis added.) Explicit in the rule is that summary judgments may only be granted against the non-moving party. In the instant matter, VNA filed for summary judgment. Claimant did not, but opposed VNA's motion stating there were material questions of fact to be decided. The trial court granted summary judgment in favor of VNA. Claimant appealed arguing that there were questions of fact to be resolved. Viewing the facts most favorably to the claimant, the Fifth District reversed the trial court and determined, as a matter of law, that claimant was injured in the course of and arising out of her employment. [*Friebel* at ¶¶22 and 27.] With no issues remaining to be tried, the appellate court effectively granted summary judgment, *sua sponte* on appeal, in favor of the non-moving claimant. Such a grant violates the *Marshall* doctrine.

This Court has granted a very limited exception to the general rule in *Marshall*. *State ex*

rel. *J.J. Detweiler Enter. v. Warner*, 103 Ohio St. 3d 99, 2004-Ohio-4659 (2004). Once a party files a motion for summary judgment, a trial court may *sua sponte* grant summary judgment for a nonmoving party if (1) all relevant evidence is before the court, (2) no genuine issue of material fact exists, and (3) the nonmoving party is entitled to judgment as a matter of law. *Todd Dev. Co. v. Morgan*, 116 Ohio St.3d 461, 2008-Ohio-87, ¶16-17. Elaborating upon the exception, *State ex rel. Moyer v. Montgomery Cty. Bd. of Commrs.*, 102 Ohio App.3d 257, 656 N.E.2d 1366 (2nd Dist., 1995), appeal not allowed, 73 Ohio St.3d 1428, recon. denied, 74 Ohio St.3d 1410, stated:

Upon consideration of all of these decisions, we believe that, as a *general rule*, courts should refrain from granting summary judgment to a nonmoving party. Nevertheless, a grant of summary judgment to a nonmoving party is appropriate “where all relevant evidence is before the court, no genuine issue as to any material fact exists, and the nonmoving party is entitled to judgment as a matter of law.” *State ex rel. Cuyahoga Cty. Hosp.*, *supra*, citing *Houk*, *supra*. A court which is considering granting summary judgment to a nonmoving party must make sure, however, that the party whom it is considering entering summary judgment against has had a fair opportunity to present both evidence and arguments against the grant of summary judgment to the nonmoving party. (Emphasis added.)

Furthermore, “because a grant of summary judgment to a non-moving party deviates from ordinary Civ.R. 56 procedure, courts should rarely resort to it.” (Emphasis added.) *Columbus v. Bahgat*, 10th Dist. No. 10AP943, 2011-Ohio-3315, ¶11, citing, *Byers v. Robinson*, 10th Dist. No. 08AP204, 2008-Ohio-4833, ¶36.

Here the appellate court failed to follow *Marshall* or the strict mandates of its exception. Foremost, when a trial court grants summary judgment to a non-moving party, there is an avenue for review in the appellate courts. To the extent the exception has been applied, it was the trial court granting for the non-moving party (frequently in writs), not the appellate court. When an appellate court *sua sponte* grants summary judgment, the only remedy is a discretionary appeal to this Court. Thus, the procedure followed by the appellate court in this matter reveals the manifest injustice in granting summary judgment to a non-moving party. Unless this Court

accepts jurisdiction over this matter, there is no opportunity for review.

Second, VNA filed its motion for summary judgment presenting the facts "most strongly in favor of the nonmoving" claimant. *Temple*, 50 Ohio St.2d at 327. A moving party should feel secure that when it files a summary judgment motion -- thus framing facts and argument in a way distinctly different than defending from a summary judgment -- that a trial or appellate court will not summarily decide the action against the moving party's interest in favor of the non-moving party. VNA never received its constitutional due process and was denied its "fair opportunity to present both evidence and arguments against the grant of summary judgment to the nonmoving party." *Moyer*. VNA prevailed at the trial level and claimant did not file for summary judgment. On appeal, no party argued facts or law supporting judgment against VNA. VNA was blind-sided by two appellate judges construing the facts most strongly in favor of the claimant and then finding, as a matter of law, that claimant was injured in the scope of her employment. That finding effectively granted summary judgment in her favor.

Third, the majority declared its findings of facts based on the rule that the evidence must be construed in most strongly in favor of the non-moving claimant. There is no indication in the court's decision that they construed facts favorably to VNA in *sua sponte* granting judgment against it. Using the claimant-favorable facts, the majority ruled for the non-moving claimant. A summary judgment cannot be granted by construing the facts in favor of the prevailing party. Considering the obverse makes this point more clear. If claimant had filed a summary judgment motion, then in construing the evidence the court would be obliged to most strongly favor VNA. As such, the Court's analysis would have been necessarily different and shown questions of fact existed. **Most notably that claimant had two other, shorter and more direct routes available to travel from her home to the patient's house that did not involve going by the mall where**

she had to drop off family and friends for her personal benefit. Thus, had claimant filed for summary judgment, a jury question existed whereby VNA could argue facts evidencing two shorter, quicker routes existed, and that the third route claimant chose that day involved a personal errand for the sole benefit of dropping off her family at the mall. See, generally, *Saunders v. Holzer Hosp. Found.*, 176 Ohio App.3d 275, 2008-Ohio-1032, ¶15, citing *Osborne v. Lyles*, 63 Ohio St.3d 326, 334, 587 N.E.2d 825 (1992) (Ordinarily, the issue of whether an employee is acting within the course of employment is a question of fact.) In determining the final merits of a claim, the court cannot extend to the plaintiff an advantage based on her failure to file for summary judgment. Thus, the majority's failure to apply the proper inference of facts and the holding in *Marshall* and its exception is reversible error which this Court should correct.

CONCLUSION

For all of the foregoing reasons, this case is one of public and great general interest and presents Constitutional issues of due process. Appellant Visiting Nurses Association requests that this Court accept jurisdiction over this case so that the important issues presented will be reviewed on the merits.

Respectfully submitted,



TIMOTHY A. MARCOVY, ESQ. (0006518)

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**ATTORNEYS FOR APPELLANT
VISITING NURSES ASSOCIATION OF MID-OHIO**

CERTIFICATE OF SERVICE

A copy of the foregoing Memorandum in Support of Jurisdiction of Appellant Visiting Nurse Association of Mid-Ohio's has been served this 31st day of May 2013, by ordinary mail,

upon:

Counsel for Appellee
Tamara Friebel

Paul W. Flowers, Esq.
Paul W Flowers Co Lpa
Terminal Tower, 35th Floor
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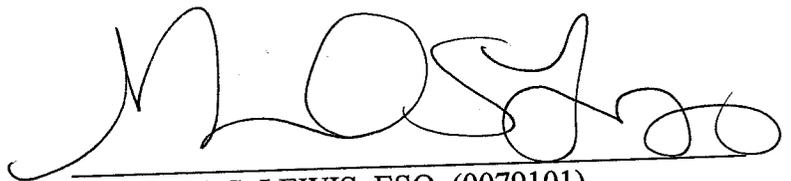
and,

Frank L. Gallucci III, Esq.
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and,

Counsel for Administrator

Kevin J. Reis, Esq.
Assistant Attorney General
Office of Attorney General
Workers' Compensation Division
30 West Spring Street
Columbus, Ohio 43266.

A handwritten signature in black ink, appearing to read "Michael S. Lewis", written over a horizontal line.

MICHAEL S. LEWIS, ESQ. (0079101)

APPENDIX

COURT OF APPEALS
RICHLAND COUNTY, OHIO
FIFTH APPELLATE DISTRICT

COURT OF APPEALS
RICHLAND COUNTY OHIO
FILED
2013 APR 19 AM 10:59
LINDA H. FRARY
CLERK OF COURTS

TAMARA L. FRIEBEL

Plaintiff-Appellant

-vs-

VISITING NURSE ASSOCIATION OF
MID OHIO, ET AL

Defendant-Appellee

JUDGES:

Hon. Patricia A. Delaney, P.J.
Hon. W. Scott Gwin, J.
Hon. John W. Wise, J.

Case No. 2012-CA-56

OPINION

CHARACTER OF PROCEEDING:

Civil appeal from the Richland County Court
of Common Pleas Case No. 2011CV0939

JUDGMENT:

Reversed and Remanded

DATE OF JUDGMENT ENTRY:

APPEARANCES:

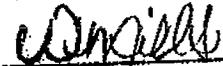
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Journalized on the court's
docket on 4-19-13


Deputy Clerk

Gwin, J.

{¶1} Appellant Tamara Friebel appeals from the June 22, 2012 Judgment Entry issued by the Richland County Court of Common Pleas.

FACTS & PROCEDURAL HISTORY

{¶2} As a home health nurse, appellant provided in-home health care services to the clients of appellee, Visiting Nurse Association of Mid-Ohio. Her job duties included visiting homes of geriatric patients to assess their physical condition, reviewing medications, and tending to medical needs. Each morning, appellant received her schedule identifying the patients she needed to visit. She typically visited six to eight patients per day during the week and sometimes visited patients on the weekends, depending on the needs of the patient. Appellant testified her typical day consisted of going from patient home to patient home and she only had occasion to stop at the office when she needed to pick up a form or medical supplies, check her mailbox, or attend meetings. Each nurse saw patients within a specified territory, though adjustments could be made when necessary.

{¶3} Appellant traveled in her personal vehicle to the patient's homes. During the week, appellant subtracted mileage and time for travel to and from home. On the weekends, appellee paid appellant for travel time and mileage from the time she left her home to the time she returned to her home.

{¶4} On Saturday, January 22, 2011, appellant's first patient was a woman she had visited approximately eight times previously. The patient lived on Park Avenue, West, in Ontario, Ohio. Appellant confirmed she was being paid for both travel time and mileage during this trip from the time she left her home to the time she returned to her

home. Appellant's children and two family friends were in the car with appellant because appellant intended to drop them off at the Richland Mall and then continue on to see her patient at the patient's home in Ontario. Appellant testified she planned to take her normal route to the patient's home, Lexington-Springmill Road to Park Avenue West. On her way, she was going to take the second entrance road to the mall off of Lexington-Springmill Road, drop off her passengers, and proceed on the same access road to return southbound on Lexington-Springmill Road. Appellant stated after she dropped off her passengers at the mall, she would have taken Lexington-Springmill Road to Park Avenue West, the street on which her patient's home was located.

{115} Appellant left her home in Shelby, Ohio and traveled south on Lexington-Springmill Road. Prior to arriving at the mall entrance, appellant's car was hit from behind while stopped at a traffic light at Fourth Street and Lexington-Springmill Road. Appellant testified she had not yet departed from the route to her patient's house when the vehicle was struck, as she had not yet turned into the mall entrance.

{116} Appellant sought the right to participate in the workers' compensation system for a cervical sprain she sustained in the motor vehicle accident. Though appellant states that appellee does not dispute appellant sustained an injury, the record in this case indicates appellee disputes that an injury occurred.

{117} On February 11, 2011, appellant's workers' compensation claim was allowed for a sprain of the neck. After an employer appeal, a hearing officer issued an order on March 22, 2011, finding that appellant was a fixed situs employee and did not begin her substantial employment until she arrived at the patient's house and thus was not in the course and scope of her employment at the time of the accident. A staff

hearing officer vacated the district hearing officer's order on May 12, 2011, and the claim was allowed for a cervical sprain.

{18} Appellant filed a complaint in Richland County Common Pleas Court on August 12, 2011, after appellee commenced the proceedings on July 25, 2011. Appellee filed an answer denying the allegations. The Bureau of Workers' Compensation filed an answer stating appellant should be allowed to participate in the fund for allowed conditions only. The trial court granted summary judgment to appellee on June 22, 2012, finding, as a matter of law, appellant's injury did not arise out of her employment and was not received in the course of her employment because she was on the personal errand of transporting passengers to the mall.

{19} Appellant filed an appeal of the trial court's June 22, 2012 judgment entry granting summary judgment to appellee and raises the following assignment of error on appeal:

{10} " AS A MATTER OF LAW, THE TRIAL COURT ERRED BY OVERTURNING THE SOUND DISCRETION OF THE INDUSTRIAL COMMISSION OF OHIO AND GRANTING SUMMARY JUDGMENT IN FAVOR OF DEFENDANT-APPELLEE, VISITING NURSE ASSOCIATION OF MID OHIO."

Summary Judgment

{11} Civ. R. 56 states in pertinent part:

"Summary judgment shall be rendered forthwith if the pleadings, depositions, answers to interrogatories, written admissions, affidavits, transcripts of evidence, and written stipulations of fact, if any, timely filed in the action, show that there is no genuine issue of material fact and that

the moving party is entitled to judgment as a matter of law. No evidence or stipulation may be considered except as stated in this rule. A summary judgment shall not be rendered unless it appears from the evidence or stipulation, and only from the evidence or stipulation, that reasonable minds can come to but one conclusion and that conclusion is adverse to the party against whom the motion for summary judgment is made, that party being entitled to have the evidence or stipulation construed mostly strongly in the party's favor. A summary judgment, interlocutory in character, may be rendered on the issue of liability alone although there is a genuine issue as to the amount of damages."

{¶12} A trial court should not enter a summary judgment if it appears a material fact is genuinely disputed, nor if, construing the allegations most favorably towards the non-moving party, reasonable minds could draw different conclusions from the undisputed facts. *Hounshell v. Am. States Ins. Co.*, 67 Ohio St.2d 427, 424 N.E.2d 311 (1981). The court may not resolve any ambiguities in the evidence presented. *Inland Refuse Transfer Co. v. Browning-Ferris Inds. Of Ohio, Inc.*, 15 Ohio St.3d 321, 474 N.E.2d 271 (1984). A fact is material if it affects the outcome of the case under the applicable substantive law. *Russell v. Interim Personnel, Inc.*, 135 Ohio App.3d 301, 733 N.E.2d 1186 (1999).

{¶13} When reviewing a trial court's decision to grant summary judgment, an appellate court applies the same standard used by the trial court. *Smiddy v. The Wedding Party, Inc.*, 30 Ohio St.3d 35, 506 N.E.2d 212 (1987). This means we review

the matter de novo. *Doe v. Shaffer*, 90 Ohio St.3d 388, 2000-Ohio-186, 738 N.E.2d 1243.

{¶14} The party moving for summary judgment bears the initial burden of informing the trial court of the basis of the motion and identifying the portions of the record which demonstrate the absence of a genuine issue of fact on a material element of the non-moving party's claim. *Drescher v. Burt*, 75 Ohio St.3d 280, 662 N.E.2d 264 (1996). Once the moving party meets its initial burden, the burden shifts to the non-moving party to set forth specific facts demonstrating a genuine issue of material fact does exist. *Id.* The non-moving party may not rest upon the allegations and denials in the pleadings, but instead must submit some evidentiary materials showing a genuine dispute over material facts. *Henkle v. Henkle*, 75 Ohio App.3d 732, 600 N.E.2d 791 (1991).

Workers' Compensation

{¶15} Pursuant to R.C. 4123.54(A), every employee who is injured or contracts an occupational disease in the course of employment is entitled to receive compensation for loss sustained a result of the disease or injury as provided for in the Ohio Revised Code. R.C. 4123.01(C) provides that in order for an employee's injury to be compensable under the workers' compensation fund, the injury must be "received in the course of, and arising out of, the injured employee's employment." The claimant must show the injury was received both in the course of and arising out of the injured employee's employment. *Fisher v. Mayfield*, 49 Ohio St.3d 275, 551 N.E.2d 1271 (1990). However, this rule is to be liberally construed in favor of awarding benefits. *Id.* at 278, 551 N.E.2d 1271.

"In the Course of" Employment

{¶16} Appellee argues the trial court properly found as a matter of law appellant's injury was not received in the course of her employment with appellee. We disagree. The requirement that an injury be in the course of employment involves the time, place, and circumstances of the injury. *Fisher*, 49 Ohio St.3d 275, 551 N.E.2d 1271. An injured employee does not actually have to be performing his or her duties for the injury to be in the course of employment. *Stair v. Mid-Ohio Home Health Ltd.*, 5th Dist. No. 2010-CA-0114, 2011-Ohio-2351. An employee "must be engaged in a pursuit or undertaking consistent with the contract of hire which is related in some logical manner, or is incidental to, his or her employment." *Id.* at ¶ 32.

{¶17} Appellee states appellant was on a personal errand and thus not in the course of employment at the time of her accident because her conduct at the time of the accident involved transporting passengers to the mall. Appellee further argues appellant's act of transporting passengers to the mall took her conduct outside the course of her employment.

{¶18} In *Houston v. Liberty Mutual Fire Insurance Company*, an employee working as a merchandiser tending to merchandise displays in various stores went to lunch and Wal-Mart on a personal errand, but had resumed work and was traveling on her original route to a store when she was involved in an accident. 6th Dist. No. L-04-1161, 2005-Ohio-4177. The court held that, "when a frolic and detour is ended and the employee returns to his or her original route, the employee is again within the scope of employment." *Id.* at ¶ 47.

{¶19} In *Slack v. Karrington Operating Company*, this court found that while an employee would arguably be within the course of her employment while on a break visiting a park with her boss, she was not in the course of her employment when she stepped away from her boss onto another walkway. 5th Dist. No. 99-COA-01337, 2000 WL 1523285 (Sept. 28, 2000). On the other hand, in *Stair v. Mid Ohio Home Health Ltd.*, we found an employee injured slipping on ice in the parking lot while en route to picking up her paycheck was in the course of employment because she was required by the employer to pick up her paycheck from the office. 5th Dist. No. 2010-CA-0114, 2011-Ohio-2351.

{¶20} In this case, appellant's children and two family friends were in the car with appellant because appellant intended to drop them off at the Richland Mall. However, appellant testified she would have traveled the same route to her patient's home whether or not she had been dropping her passengers off at the mall. She testified she had not yet turned into the mall when her vehicle was struck from behind. Once the light turned green, she intended to proceed straight through the intersection on Lexington-Springmill Road and then turn into the mall entrance before returning to Lexington-Springmill Road and continuing on this route to her patient's home.

{¶21} These facts present a unique situation in which appellant had dual intentions when she left her home on the morning of Saturday, January 22, 2011. She intended to travel to her patient's home via a certain defined route. She also intended to drop her passengers off at the mall and return to the route to her patient's home. We find it significant that while, at the time of the accident, she had a future intent to divert her vehicle into the mall entrance, she had not yet diverted off the route from her home

to the patient's home. Appellant did not have the opportunity to end any potential "frolic and detour" that might have occurred, as she was not yet in the process of any "frolic and detour" or personal errand when her vehicle was hit from behind. She was still on the path to the patient's home at the time of the accident. Appellant had not detoured from her path to the patient's home and appellee was paying her travel time and mileage during this time. Simply because appellant dually intended to both travel to her patient's home and drop her passengers off at the mall when she left her house does not disqualify appellant from being in the course of employment since the accident occurred prior to appellant's deviation from the route to the patient's house.

{¶22} Accordingly, we find appellant was injured while engaged in specific acts appellee required her to do regularly as part of her weekend employment -- traveling to her patient's home. Thus, as a matter of law, appellant's injury was received in the course of her employment with appellee.

"Arising Out of" Employment

{¶23} Appellant argues the trial court erred in finding her injury did not arise out of her employment. We agree. To satisfy this prong, there must be a sufficient causal connection between the alleged injury and the employment. *Fisher*, 49 Ohio St.3d 275, 551 N.E.2d 1271. Whether there is sufficient causal connection between an injury and her employment depends on the totality of the facts and circumstances surrounding the accident, including: "(1) the proximity of the scene of the accident to the place of employment; (2) the degree of control the employer had over the scene of the accident; and (3) the benefit the employer received from the injured employee's presence at the scene of the accident." *Lord v. Daugherty*, 66 Ohio St.2d 441, 423 N.E.2d 96 (1980).

This list of factors is not exhaustive and may continue to evolve, but the list is "illustrative of the factors that need to be considered." *Fisher*, 49 Ohio St.3d at 279, 551 N.E. 2d 1271.

{¶24} Appellee relies on *Gilham v. Cambridge Home Health Care, Inc.* and *Crockett v. HCR Manorcare*, to argue appellant cannot meet the totality of the circumstances test because the accident occurred on a public roadway, the employer did not exercise control over the accident scene, and the employer did not receive a sufficient benefit from appellant's presence at the scene of the accident. 5th Dist. No. 2008CA00211, 2009-Ohio-2842; 4th Dist. No. 03CA2919, 2004-Ohio-3533. The key distinction between appellant in the instant case and the employees in the *Gilham* and *Crockett* cases cited by appellee is that in *Gilham* and *Crockett*, the employees were not paid for travel time or reimbursed for travel expenses. In this case, both parties agree that, on the weekends, appellee paid appellant for travel time and mileage from the time she left her home to the time she returned to her home.

{¶25} Travel was an integral part of appellant's employment as a visiting nurse. Appellee knew appellant used her vehicle to travel to and from job sites and acquiesced in its use. Unlike on the weekdays when appellant was not paid for mileage or travel time to and from her home, on the Saturday when the accident occurred appellant was paid for travel time and mileage from the time she left her home to the time she returned to her home. Appellee waived direct control of appellant's "tools of the trade," such as her automobile. *Hampton v. Trimble*, 101 Ohio App.3d 282, 655 N.E.2d 432 (2d Dist. 1995). An employer's lack of control over an accident scene is not dispositive of causation because "the absence of this one factor [i.e., degree of employer's control

over the accident scene] cannot be considered controlling to deny coverage." *Cossin v. Ohio State Home Servs., Inc.*, 10th Dist. No. 12AP-132, 2012-Ohio-5664, quoting *Griffith v. Miamisburg*, 10th Dist. No. 08AP-557, 2008-Ohio-6611, ¶ 13.

{¶26} While appellee had no control over the scene of the accident, appellee reaped the benefits of appellant's travel to the homes of patients as its business centers around nurses traveling to visit patients in their homes. As noted above, appellant was on the route to the patient's home, prior to exiting the route to the patient's home to drop off her passengers at the mall and thus was still in her zone of employment. She had not yet diverted from the route to the patient's home to seek a personal benefit at the time of the accident. Further, the record demonstrates the accident site was only a few miles from the home of the patient.

{¶27} The totality of the circumstances shows appellant would not have been present at the scene of the accident if she was not performing her employment duties. Accordingly, we find, as a matter of law, appellant has established the causation prong of *Fisher*.

"Coming and Going" Rule

{¶28} "As a general rule, an employee with a fixed place of employment, who is injured while traveling to or from his place of employment, is not entitled to participate in the Workers' Compensation Fund because the requisite causal connection between injury and the employment does not exist." *Ruckman v. Cubby Drilling, Inc.*, 81 Ohio St.3d 117, 119, 689 N.E.2d 917 (1998). When determining whether an employee is a fixed situs employee, the "focus is on whether the employee commences his or her substantial employment duties only after arriving at a specific and identifiable workplace

designated by his employer." *Id.* Further, "where traveling itself is part of the employment, either by virtue of the nature of the occupation or by virtue of the contract of employment, the employment situs is non-fixed, and the coming-and-going rule, is by definition, inapplicable." *Bennett v. Goodremont's, Inc.*, 6th Dist. No. L-08-1193, 2009-Ohio-2920 at ¶ 19.

{¶29} Appellee argues the coming and going rule prevents appellant from participating in the workers' compensation fund. We disagree. Appellant testified her typical day consisted of traveling from patient home to patient home and she only had occasion to stop at the office when she needed to pick up a form, pick up medical supplies, check her mailbox, or for meetings. Her work day did not begin and end in one location. In addition, unlike in the *Gilham* case, appellant was compensated for travel time and mileage from the time she left her home until the time she returned to her home. The facts in this case are similar to those in *Stair v. Mid-Ohio Home Health Ltd.*, where the employee traveled to homes to complete household chores and was paid hourly for the chores and travel time between clients. 5th Dist. No. 2010-CA-0114, 2011-Ohio-2351. Appellant's travel to and from the patients' homes was a fundamental and necessary part of her employment duties.

{¶30} We conclude as a matter of law appellant was not a fixed situs employee and the coming and going rule does not apply to prevent appellant from participating in the workers' compensation fund.

Special Hazard Exception

{¶31} Appellant argues the special hazard exception applies in this case if the coming and going rule bars her claim. Analysis of the special hazard exception is only

relevant if appellant is a fixed situs or semi-fixed situs employee. *Ruckman*, 81 Ohio St.3d 117, 689 N.E.2d 917 (1998). Because we found as a matter of law the coming and going rule does not apply and appellant was not a fixed or semi-fixed situs employee, the special hazard exception is not applicable.

Conclusion

{¶132} We find the trial court erred as a matter of law in determining appellant was not entitled to participate in the workers' compensation fund.

{¶133} Appellant's assignment of error is sustained.

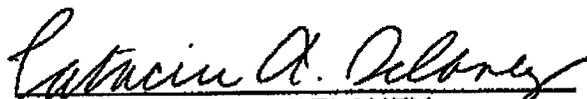
{¶134} For the foregoing reasons, the judgment of the Court of Common Pleas of Richland County is reversed, and the cause is remanded to the court for further proceedings in consistent with this decision.

By Gwin, J., and

Delaney, P.J. concur

Wise, J., dissents


HON. W. SCOTT GWIN


HON. PATRICIA A. DELANEY

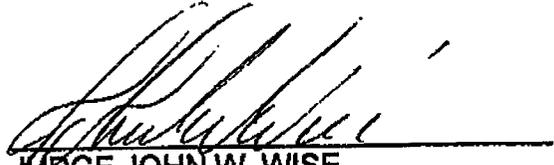
HON. JOHN W. WISE

WSG:clw 0325

Wise, J., dissenting

{¶35} I respectfully dissent from the majority opinion. The majority finds that appellant was in the course of employment because she had a dual intent at the time she left her house. One intent was to go to her first scheduled appointment of the day. Appellant's other intent was to take her daughter and a friend to the mall, which was en route to her first appointment. The majority analyzes this fact pattern under a frolic and detour theory finding that she had not yet left the route leading to her first job site, as she had not yet turned onto the route entering the mall when the accident occurred.

{¶36} I agree with the majority that the facts determine the legal outcome in "course of employment" cases; however, I disagree with the majority's application of the facts in this case. I do not believe "frolic and detour" is the proper legal analysis under these facts. The majority speaks to the dual intent of appellant and applies that concept to the "frolic and detour" analysis. I disagree with this analysis for two reasons. First, I do not find any case law to support the concept of dual intent. I believe that an employee has a purpose which may change during the course of the day's employment, i.e. "frolic and detour". Second, I believe intent or purpose analysis becomes very difficult when trying to determine what is in the mind of the employee. Instead, I believe a strict application of the facts best determines whether the employee was in the course of employment or on a personal errand. In this case, the facts indicate that the employee was headed to the mall to drop off her daughter and her friend. Only after she had dropped off her passengers at the mall was she going to begin her travel in the course of her employment. Therefore, there could be no "frolic and detour" from a course upon which she had not yet set out.



JUDGE JOHN W. WISE

IN THE COURT OF APPEALS FOR RICHLAND COUNTY, OHIO
FIFTH APPELLATE DISTRICT

COURT OF APPEALS
RICHLAND COUNTY OHIO
FILED
2013 APR 19 AM 10:39
LINDA H. FRARY
CLERK OF COURTS

TAMARA L. FRIEBEL

Plaintiff-Appellant

-vs-

VISITING NURSE ASSOCIATION OF
MID OHIO, ET AL

Defendant-Appellee

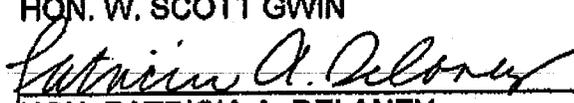
JUDGMENT ENTRY

CASE NO. 2012-CA-56

For the reasons stated in our accompanying Memorandum-Opinion, the judgment of the Court of Common Pleas of Richland County is reversed, and the cause is remanded to the court for further proceedings in consistent with this decision. Costs to appellee.



HON. W. SCOTT GWIN



HON. PATRICIA A. DELANEY

HON. JOHN W. WISE

RICHLAND COUNTY
CLERK OF COURTS
FILED
IN THE COURT OF COMMON PLEAS
RICHLAND COUNTY, OHIO
JUN 12 11:11:01

TAMARA L. FRIEBEL,)	LINDA H. FRAFY
)	CLERK OF COURTS
Plaintiff,)	CASE NO. 2011 CV 939
)	
v.)	
)	Order on Motion for
VISITING NURSE ASSOCIATION)	Summary Judgment
OF MID OHIO, et al.,)	
)	
Defendants,)	

This workers' compensation appeal is brought before this court by the summary judgment motion of defendant Visiting Nurse Association of Mid Ohio ("VNA") filed on May 8, 2012. In evaluating this motion, the court has considered the arguments of the parties, the applicable Ohio law, and all properly submitted evidentiary materials.

Factual Discussion:

Based upon the record in this matter, the following facts are not in dispute. At all times relevant, plaintiff Ms. Friebel was employed as a home health nurse for VNA. Her job duties included visiting the homes of geriatric patients to assess their physical condition, review medications, and tend to their medical needs. She typically visited 6 to 8 patients each day, Monday through Friday, but sometimes, based on the needs of her patients, she would visit a couple of patients over the week-end. During the week, Ms. Friebel was not paid for travel time to and from home and was not reimbursed for mileage to and from home. However, on the week-ends, VNA paid Ms. Friebel for travel and mileage to and from her home.

On Saturday, January 22, 2011, Ms. Friebel was scheduled to see a patient on Park Avenue West in Ontario, Ohio. Because her daughter had shopping to do, Ms. Friebel took her daughter and son and two family friends in her car with the intent of dropping them off at the Richland Mall. She left her home in Shelby and traveled south on Lexington-Springmill Road. She had planned to take the second entrance road to the mall, drop her passengers off at the mall, and then proceed out the same access road to return to southbound Lexington-Springmill. From there, she would have proceeded to Park Avenue West. However, before reaching the mall, Ms. Friebel's car was hit from behind while she was stopped at a traffic light heading southbound on Lexington-Springmill Road at 4th Street.

Legal Discussion:

In order for Ms. Friebel to be eligible for workers' compensation benefits for this injury, she must show that the injury 1) was received in the course of her employment and 2) arose out of her employment.¹ There is no dispute that at the time of the accident, Ms. Friebel was on her way to drop 4 passengers off at the mall and then was going to drive to her patient's home on Park Avenue West. Because she was engaged in a personal errand of transporting passengers to the mall, Ms. Friebel was not injured in the course of her employment, and the injury did not arise out of her employment. The fact that Ms. Friebel was typically paid for travel time and mileage to and from work on week-ends is immaterial, as the undisputed facts demonstrate that she was not traveling to work at the time of the injury; she was traveling to the mall.

¹ Ohio Rev. Code § 4123.01(C); Stair v. Mid Ohio Home Health Ltd., 2011 Ohio App. LEXIS 2000, *6-7 (Richland Cty., May 13, 2011); Price v. Goodwill Industries of Akron, 192 Ohio App. 3d 572, 577 (Richland Cty. 2011).

Accordingly, the uncontested facts in this case demonstrate that Ms. Friebel's injury did not arise out of her employment and was not received in the course of her employment. As a matter of law, there are no disputed issues of fact for trial, and VNA's motion for summary judgment is well-taken. Furthermore, because Ms. Friebel's injury was not sustained in the course of her employment and did not arise out of her employment, summary judgment is also appropriate as to her claims against the Bureau of Workers' Compensation.

Judgment Entry:

It is therefore ordered:

1. The motion for summary judgment filed by VNA is hereby granted, and judgment is entered in favor of the defendants on all claims raised against them in plaintiff's complaint.
2. Costs are taxed to plaintiff.
3. The clerk shall serve copies of this order on the following attorneys and parties telling them the date it was entered on the court's journal,

Melissa A. Black

Frank L. Gallucci

Kevin Rejs



Judge James DeWeese