

ORIGINAL

IN THE SUPREME COURT OF OHIO

CASE NO. 13-0892

TAMARA FRIEBEL  
Plaintiff-Appellee,

-vs-

VISITING NURSE ASSOCIATION OF MID-OHIO, *et al.*  
Defendant-Appellant.

ON APPEAL FROM THE FIFTH APPELLATE DISTRICT,  
RICHLAND COUNTY, OHIO, CASE NO. 2012-CA-56

MEMORANDUM OPPOSING JURISDICTION OF  
PLAINTIFF-APPELLEE, TAMARA FRIEBEL

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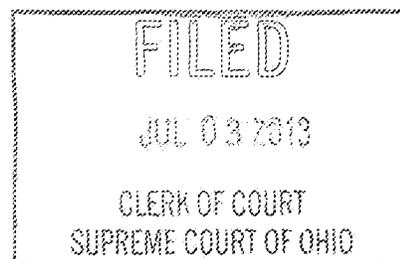
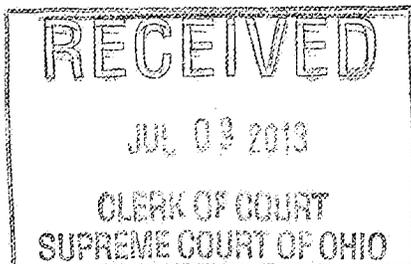
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**TABLE OF CONTENTS**

TABLE OF CONTENTS .....ii

EXPLANATION OF WHY THIS CASE PRESENTS NO ISSUES OF PUBLIC  
AND GREAT GENERAL IMPORTANCE ..... 1

STATEMENT OF THE CASE AND FACTS .....2

ARGUMENT .....6

PROPOSITION OF LAW I: 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.....6

PROPOSITION OF LAW II: 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 ..... 12

CONCLUSION ..... 15

CERTIFICATE OF SERVICE..... 16

**EXPLANATION OF WHY THIS CASE PRESENTS NO ISSUES  
OF PUBLIC AND GREAT GENERAL IMPORTANCE**

There is nothing unusual about this fact-intensive workers compensation proceeding, save only for the relentless effort to salvage an untenable summary judgment ruling. In order to manufacture an intriguing issue of law where none exists, Defendant-Appellant Visiting Nurse Association of Mid-Ohio has not only distorted the scant evidentiary record, but has also exaggerated the scope of the Fifth District's sensible and seemingly unobjectionable ruling. This Court should not be misled.

Defendant's First Proposition of Law hinges upon their representation that at least two shorter and more convenient routes were available to Plaintiff-Appellee, Tamara Friebel, to reach her patient's house, but she decided instead to head in an entirely different direction to take her children and their friends to the mall. *Appellant Visiting Nurse Association of Mid-Ohio's Memorandum in Support of Jurisdiction dated June 3, 2013 ("Defendant's Memo.")*, pp. 4-11. Citing no admissible evidence at all, the employer has declared that: "Claimant's mission at the time of the accident was solely personal." *Id.*, p. 8 (emphasis original). But nothing could be further from the truth. The testimony was actually undisputed that the traveling nurse was following one of her usual routes to the patient's residence, which happened to pass by Richland Mall. She was injured in the rear end collision before she had departed from this course by turning into the shopping center parking lot. Her travels to that point in time had thus furthered two purposes, the most important of which was the assignment she had received from Defendant. The employer has yet to cite any authorities even remotely suggesting that the work-related nature of the trip was immediately lost, as a matter of law no less, as soon as the visiting nurse agreed to make a stop at the mall while on her way to the patient's home.

Contrary to what Defendant appears to believe, the Fifth District did not adopt a

revolutionary new “dual intent” doctrine in the opinion that was issued below. *Defendant’s Memo.*, pp. 1, 6-8. The majority had remarked merely that: “These facts present a unique situation in which [Plaintiff] had dual intentions when she left her home on the morning of January 22, 2011.” *Friebel v. Visiting Nurse Assoc. of Mid Ohio*, 5<sup>th</sup> Dist. No. 2012-CA-56, 2013-Ohio-1646, 2013 W.L. 1777247, ¶21 (April 19, 2013). A reference was simply being made to the unusual circumstances of the accident, nothing more. The appellate court proceeded to dutifully analyze the undisputed facts under the familiar “arising out of” and the “in the course of” employment tests imposed by R.C. 4123.01(C). *Id.*, ¶15-27. Since no new legal precedents were established, no justification exists for entertaining further review of this relatively straightforward case.

The Second Proposition of Law is equally unfounded as all of Defendant’s authorities address whether summary judgment can be granted in favor of a non-moving party. *Defendant’s Memo.*, pp. 12-15. The Fifth District stopped well short of either entering such an order in favor of Plaintiffs or directing the trial judge to do so. After resolving the undisputed factual issues as Defendant had requested, the appellate court simply announced that the final order was reversed and the workers’ compensation case was remanded for further proceedings. *Friebel*, 2013-Ohio-1646, ¶34. Summary judgment has not been entered in favor of Plaintiff, and a full and complete defense can still be offered at trial consistent with the appellate court’s opinion.

Accordingly, no issues of public or great general importance are at stake in this routine workers compensation appeal.

#### **STATEMENT OF CASE AND FACTS**

This appeal arises out of a workers’ compensation claim in which a visiting nurse maintains that she had been injured in a rear-end automobile accident while driving to a patient’s home. *BWC Claim No. 11-803658*. A District Hearing Officer initially

accepted Defendant's position that Plaintiff was a "fixed situs" employee, who had not yet begun her substantial employment duties at the time of the accident. *Complaint, Exhibits, p. 4-5.*

Further proceedings were conducted, and Defendant acknowledged to a Staff Hearing Officer that "the Injured Worker was paid mileage as well as her travel time, from the time she left her house on the weekend." *Complaint, Exhibits, p. 8.* The Hearing Officer then determined that:

\*\*\* The Staff Hearing Officer finds that the Injured Worker was paid both mileage (travel expense) as well as her travel time, from the time she left her house on 01/22/2011, which was a Saturday. As such, the instant claim is distinguishable on its facts from the Court of Appeals cases submitted by the Employer's representative, namely *Gwendolyn Gilham v. Cambridge Home Health Care Inc.* and *Dawn Crockett v. HCR Manorcare*. In those cases, the Court specifically reflected the fact that the Employer did not reimburse those Injured Workers for time spent travelling and did not reimburse mileage/travel expenses. As the instant claim is distinguishable as to those major facts in the claim, the above cited cases are not found to be persuasive or controlling with regard to the fact pattern in the instant claim.

*Id.* Plaintiff's workers' compensation claim was thus reinstated. *Id.*

Defendant pursued a further appeal before the Industrial Commission of Ohio. In an order that was issued on June 4, 2011, the Commission refused to disturb the Staff Hearing Officer's determination. *Complaint, Exhibits, p. 10.*

Dissatisfied with the Industrial Commission's determination that Plaintiff had been injured in the course and scope of her job duties as a visiting nurse, Defendant commenced the instant administrative appeal on July 25, 2011 as permitted by R.C. 4123.512. The employer then filed a Motion for Summary Judgment on May 8, 2012 that was based entirely upon selected portions of Plaintiff's deposition testimony, most of which was misconstrued. No other proof was offered in support of the contention that the traveling nurse had been engaged in a purely personal errand that was of no

benefit to the employer at the time she was injured in the rear-end automobile accident.

Plaintiff responded with a Memorandum in Opposition on June 15, 2012 (“Plaintiff’s Memorandum”) that established that she is a resident of Shelby, Ohio. *Deposition of Tamara L. Friebel taken April 4, 2012 (“Friebel Depo”), p. 8.*<sup>1</sup> She is divorced and lives with her two children. *Id., pp. 8-9.* Plaintiff attended nursing school and graduated with a Licensed Practical Nurse (LPN) degree in 2003. *Id., p. 12.*

Plaintiff was hired by Defendant in November 2006. *Friebel Depo., p. 18.* As the company’s name conveys, she and the other nurses traveled to patients’ homes and provided services, such as reviewing their medications, checking vital signs, assessing their conditions, and otherwise tending to their medical needs. *Id., pp. 19-20.* Any unusual findings would be reported back to the Registered Nurse in charge. *Id., p. 20.*

Plaintiff explained that:

\*\*\* Basically, we’re on our own out there in the field and making decisions with these patients as far as their health goes.

*Id., p. 20.*

Each morning, Plaintiff received her schedule that identified the patients who needed to be visited. *Friebel Depo., pp. 23-24.* Each nurse typically cared for 60 patients a week. *Id., pp. 24-25.* They drove from house to house, as required. *Id., pp. 23-24.* Sometimes the nurses had to stop at the office to pick up a form or supplies. *Id., pp. 23-24.* Their mailboxes were also located there, and they occasionally held meetings at the facility. *Id., pp. 24-26.* After the last patient was seen, they returned home. *Id., p. 24.*

Each nurse saw patients within a specified territory. *Friebel Depo., pp. 25-26.* Plaintiff was primarily responsible for the west side of Mansfield, all of Ontario, and a portion of Lexington. *Id., p. 25.* Adjustments were made to the territories when

<sup>1</sup> The deposition of Tamara L. Friebel was filed with the Clerk on May 4, 2012.

necessary. *Id.*, p. 26.

On Saturday January 22, 2011, Plaintiff's first patient was a woman she had visited approximately eight times previously. *Friebel Depo.*, pp. 49-50 & 56-57. She lived on Park Avenue, West in Ontario, Ohio. *Id.*, pp. 52-54.

Plaintiff confirmed during her deposition that she was being paid both "for the mileage and travel time" during the trip. *Friebel Depo.*, p. 29. The nurses were "paid from the time we left our home on the weekend until the time we arrived back in our home on the weekends." *Id.*, 28.

Plaintiff's daughter had shopping she needed to do that day. *Friebel Depo.*, p. 55. Plaintiff agreed to drop her off, as well as her son and their two friends, at Richland Mall along the way. *Id.*, pp. 54-55. Her intention was then to continue on to the patient's home in Ontario. *Id.*, p. 73. The mall is situated off Lexington-Springmill Road, and was only a few miles away from the patient's residence. *Plaintiff's Memorandum, Exhibits B, C, D, and E.*<sup>2</sup> As far as Plaintiff could recall, this was the first time she had taken passengers with her while she was traveling to see a patient. *Friebel Depo.*, p. 77.

Plaintiff stopped at the traffic light at Fourth Street and while heading Southbound on Lexington-Springmill Road in Ontario. *Friebel Depo.*, p. 71. Her plan was to turn into the second mall entrance. *Id.*, p. 72. According to the official Traffic Crash Report, Linda M. Sweval ("Sweval"), crashed her automobile into the rear of Plaintiff's stationary vehicle. *Plaintiff's Memorandum, Exhibit A, p. 1.* Sweval was cited for Assured Clear Distance/Accident by the investigating officer. *Id.*, p. 1. Plaintiff sustained significant injuries as a result of the impact and has yet to be able to return to regular work duties. *Friebel Depo.*, p. 30.

In an order dated June 22, 2012, the trial judge granted summary judgment in

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<sup>2</sup> Exhibits A through E to Plaintiff's Memorandum were marked by defense counsel and authenticated by Plaintiff during her deposition.

favor of Defendant. Plaintiff filed her Notice of Appeal on July 18, 2012. In a decision that was released on April 19, 2013, the Fifth District reversed the final order and remanded the administrative appeal for further proceedings. *Friebel*, 2013-Ohio-1646. Defendant is now seeking further review in this Court.

### ARGUMENT

Defendant's two Propositions of Law will be separately addressed in the remainder of this Memorandum. Neither is worthy of this Court's time and attention.

**PROPOSITION OF LAW I: 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**

As previously noted, this first Proposition of Law is founded upon the representation that "there were at least two other more direct routes available for Claimant to take. *Friebel* at ¶4." *Defendant's Memo.*, p. 4 (*emphasis original*). Although difficult to tell, Defendant appears to be citing ¶4 of the Fifth District decision. *Id.* But the majority never once suggested anywhere in the opinion that "at least two other more direct routes" could have been taken to the patient's home. *Friebel*, 2013-Oho-1646, ¶1-34. To the contrary, the majority properly recognized that:

\*\*\* 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-Spring 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.

*Id.*, ¶4. Not even the dissenting judge found that "at least two other more direct routes" existed that avoided the mall. *Id.*, ¶35-36 (Wise, J., dissenting). There is no point in

accepting a Proposition of Law for review that is founded upon manufactured facts.

The only admissible evidence that was furnished in support of Defendant's Motion for Summary Judgment was Plaintiff's deposition. None of Defendant's managers or employees were apparently willing to sign an affidavit confirming that the visiting nurse was indeed exceeding her authority when she agreed to drop the teenagers off at the mall on her way to the patient's home. And no evidence was ever offered of any reprimands that were issued or disciplinary action that was taken against Plaintiff.

There has never been any serious dispute that, under normal circumstances, Plaintiff would be acting in the course and scope of employment while driving her automobile to an assignment. As noted by the Staff Hearing Officer, the visiting nurse was being paid for her travel time that day as well as her mileage. *Friebel Depo.*, p. 28-29.

Plaintiff's "dual intentions" were mentioned by the Fifth District only to reference her state of mind, which was an undisputed fact. *Friebel*, 2013-Ohio-1646, ¶21. Neither Defendant nor the dissenting judge has cited any statutes or judicial authorities supporting the illogical view that the work-related nature of the trip was forfeited once the visiting nurse agreed to transport passengers along the way. Such a nonsensical standard would produce nothing more than an undeserved windfall for employers that do not prohibit their employees from combining personal and work-related activities in a manner that does not interfere with their job assignments.

Far from establishing any new legal standards, the Fifth District did indeed proceed to examine whether the "in the course of" and "arising out of" requirements had been satisfied. *Friebel*, 2013-Ohio-1646, ¶15-27. Ohio courts have long recognized that there are no "bright-line test[s]" to be mechanically applied in evaluating the facts of a case." *Smith v. City of Cleveland*, 8<sup>th</sup> Dist. No. 78889, 2001 W.L. 1612101 (Dec. 13, 2001), p.\*4 (citation omitted). "An employee need not necessarily be injured in the

actual performance of work for the employer.” *Griffith v. City of Miamisburg*, 10<sup>th</sup> Dist. No. 08AP-557, 2008-Ohio-6611, 2008 W.L. 5235168 (Dec. 16, 2008), p. \*3, ¶ 9 (holding that police officer who was injured while playing basketball at an offsite training academy was entitled to benefits).

While an employee is performing the obligation of his contract of employment, he/she is considered to be in the course and scope of employment. *Fletcher v. Northwest Mech. Contr., Inc.*, 75 Ohio App.3d 466, 471, 599 N.E.2d 822 (6<sup>th</sup> Dist. 1991). The Eighth District court has further cautioned that:

Because of the liberal standard for approving workers’ compensation claims, we agree the necessary causal connection is something less than that required to show proximate cause. Although that standard is not clear, the most that need be found is that the injury was foreseeable from the employer’s conduct; there is no need, in a worker’s compensation case, to find the conduct negligent. [footnotes omitted].

*Caponi v. Convention & Visitors Bur. of Cleveland*, 8<sup>th</sup> Dist. No. 81456, 2003-Ohio-1954, 2003 W.L. 1900956 (Apr. 17, 2003), p. \*2. When the pertinent facts are in dispute, the issue is ultimately one for the jury to decide. *Osborne v. Lyles*, 63 Ohio St. 3d 326, 329-330, 587 N.E.2d 825, 829 (1992); *Smith*, 2001 W.L. 1612101, \*4.

Home healthcare professionals who are required to travel from one patient to another are not held to the same standards as the typical fixed-situs worker. Analogous circumstances were examined in *Hampton v. Trimble*, 101 Ohio App.3d 282, 655 N.E.2d 432 (2<sup>nd</sup> Dist. 1995), where a home health care nurse had slipped and fallen on ice after she exited her vehicle in her driveway. The nurse, like Plaintiff here, was not required to report to her employer’s office every day. *Id.*, 101 Ohio App.3d at 284. She made house calls to her patients from her home. *Id.* Significantly, the plaintiff was reimbursed by her employer for her travel expenses. *Id.* at 289. The *Hampton* court reasoned that the trial court erred in granting summary judgment in favor of the

employer:

[W]e do not believe the trial court viewed the evidence in the light most favorable to [plaintiff]. Her place of employment was not the business premises of [her employer], but was rather [plaintiff]'s own house, automobile, and the homes of the patients she visited on behalf of her employer. In this situation, it is clear that the employer has waived any direct control of [plaintiff]'s driveway as well as her "tools of the trade," such as her automobile. The trial court also believed that her employer received no benefit from [plaintiff]'s presence in her driveway that night, but it can also be reasonably inferred that her employer was actually receiving the benefit of her travel in the course of her employment and that her travel had not ended at the time of her injury.

*Id.* at 287. As Defendant has acknowledged, and *Hampton* confirms, whether a party is entitled to participate in the workers' compensation fund is a typically "very fact specific" inquiry. *Defendant's Motion for Summary Judgment*, p. 5.

In a similar case, *Rankin v. Thomas Sysco Food Sers.*, 1<sup>st</sup> Dist. No. C-950904, 1996 W.L. 682184 (Nov. 27, 1996), the First District upheld the trial court's decision denying summary judgment in favor of the employer of a traveling salesman plaintiff who sustained injuries when he was rear-ended on his way back to his home. Specifically, the court agreed that genuine issues of material fact existed whether the salesman's injuries occurred in the course of and arose out of his employment. *Id.* at p. \*5. The court opined that the salesman was not a fixed-situs employee because "[t]ravel was an integral part of his employment." *Id.* at p. \*4. Moreover, the court explained:

[Defendant] knew that [plaintiff] used his vehicle to travel upon the highways and acquiesced in its use. The company reaped the benefits of [plaintiff's] constant travel on the highway to make sales calls, travel that increased the risk to [plaintiff] far beyond that of the general public simply traveling to and from a fixed site of employment. See *Lohnes v. Young* (1963), 175 Ohio St. 291, 293, 194 N.E.2d 428, 430; *Siegen, supra*. He was leaving his last sales call and taking the shortest direct route to his home, where he intended to continue working. That his next job site happened to be his home is not dispositive. He was not on a "frolic of his own" separate from his employment. See *Lord, supra*, at 445, 423 N.E.2d at 98; *Fletcher, supra*, at 475, 599 N.E.2d at 827.

Consequently, the evidence showed that there was a causal connection between [plaintiff]'s employment and the injury, and the trier of fact could reasonably conclude that the injury "arose out of" [plaintiff]'s employment. [emphasis added].

*Id.* See also *Bennett v. Goodremont's, Inc.*, 6<sup>th</sup> Dist. No. L-08-1193, 2009-Ohio-2920, 2009 W.L. 1719355 (June 19, 2009), p. \*3 ("Consideration of an employee's "substantial employment duties" requires more than just a look at what the employee was doing when the incident that precipitated the claim occurred; rather, it requires examination of the employee's duties as a whole and consideration of whether such duties were such as to make travel to and from the employee's home an integral part of the employee's employment.").

Defendant's authorities do not support their contrived position. In *Crockett v. HCR Manorcare, Inc.*, 4<sup>th</sup> Dist. No. 03CA2919, 2004-Ohio-3533, 2004 W.L. 1486082 (June 24, 2004), the plaintiff sustained injuries in an accident that occurred while she was between two of her employer's work sites. She was not reimbursed for her travel expenses between the two locations and she was not compensated for her travel time. *Id.* at p. \* 1. These facts distinguish *Crockett* and its holding from the facts of this case. Here, Plaintiff did not have two fixed work sites. In fact, she rarely went to her employer's office. Her work requires her, unlike the plaintiff in *Crockett*, to travel to patients' homes. And, Plaintiff received mileage reimbursement. In view of these critical factual distinctions, *Crockett* does not compel a similar conclusion in this matter.

Defendant also relies on *Gilham v. Cambridge Home Health Care, Inc.*, 5<sup>th</sup> Dist. No. 2008 CA 00211, 2009-Ohio-2842, 2009 W.L. 1677838 (June 15, 2009). There, the plaintiff was employed as a home health aide, who saw patients in their homes. She was only paid for the time she actually spent with her patients. Her compensable time began when she arrived at a patient's home and ended when she left. There was, as in

*Crockett*, no reimbursement for the plaintiff's travel time or travel expenses. The court found this significant in determining that the plaintiff was not entitled to workers' compensation for injuries she sustained in an auto accident after leaving one of her patient's homes and before arriving at the next one.

*Slack v. Karrington Operating Co., Inc.*, 5<sup>th</sup> Dist. No. 99-COA-01337, 2000 W.L. 1523285 (Sept. 28, 2000), is similarly distinguishable. That employee was an administrative assistant, whose regular job duties for did not involve travel, let alone traveling to various patients in her own car. She did not even sustain her injuries while in a car on a business trip. Rather, she was hurt after parking and exiting the car to view scenery. *Id.* at p. \*3. *Slack* simply has no bearing on the outcome of this particular matter.

Plaintiff has always acknowledged that she had planned a brief detour in her trip to the patient's house, but has steadfastly maintained that the accident occurred before she departed from the route she had planned to take to perform her duties that day. Consistent with the totality of circumstances tests, Ohio courts have never held that a "frolic and detour" is sufficient without more to preclude a finding that an injury was sustained in the course and scope of employment. The pertinent question has always been whether the claimant's activities were sufficiently work-related at the moment that the injury was suffered.

This sound principle was confirmed in *Houston v. Liberty Mut. Fire Ins. Co.*, 6<sup>th</sup> Dist. No. L-04-1161, 2005-Ohio-4177, 2005 W.L. 1926513 (Aug. 12, 2005), where the court reversed summary judgment in favor of an employer, concluding that genuine issues of material fact existed whether the employee was on her employer's business at the time of the accident. The evidence demonstrated that the employee had gone to lunch and a Wal-Mart on a personal errand, but she had resumed and was traveling along her original route when the accident occurred. *Id.* at pp. \*7-8. The court observed

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 p. \*7.

Similarly, in *Switzer v. Sewell Motor Express Co.*, 12<sup>th</sup> Dist. No. CA2009-02-026, 2009-Ohio-3825, 2009 W.L. 2370838 (Aug. 3, 2009), the court concluded that genuine issues of material fact existed whether the employee had completed his detour at the time of an accident in which he sustained injury. At the time, the employee was returning to his direct route after dropping off a co-worker at a courthouse. *Id.* at p. \*4. In this case, the evidence that the Plaintiff was not engaged in a frolic and detour at the time of her accident is even stronger than in *Houston* and *Switzer*. Here, the employee never actually left the route of travel to her first patient. This was not only the same route, *i.e.*, no detour from her travel path, it was a route and travel for which the Defendant was paying Plaintiff. At worst, the question of whether Plaintiff’s dropping off her passengers at a stop along the way to first patient appointment is one for jury resolution. At best, there is simply no issue because no “frolic and detour” actually occurred and the Plaintiff never left the course of her employment for Defendant.

This Court should therefore decline to accept this first Proposition of Law.

**PROPOSITION OF LAW II: 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.**

The second Proposition of Law is predicated upon nothing more than a misstatement of the Fifth District’s decision. Summary judgment was never granted in favor of Plaintiff. *Defendant’s Memo.*, pp. 12-15. She and her counsel expect that upon remand a jury trial will be held, during which Defendant will be entitled to present whatever arguments remain available consistent with the appellate court ruling. Recognizing this reality, Defendant contends instead that the majority “effectively

granted summary judgment for the non-moving claimant.” *Defendant’s Memo., p. 3*. Yet, none of its authorities suggest that “effectively” entering summary judgment against the moving party upon an undisputed issue is somehow improper. *Id., pp. 12-15*.

Defendant insists that it “was blind-sided by two appellate judges” but the only example of any additional proof that would have been offered if a cross-motion was filed is **“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 members and friends for her personal benefit.”** *Defendant’s Memo., pp. 14-15* (emphasis original). The employer had insisted earlier in this same Memorandum that the existence of “two other, more direct routes” was an undisputed fact. *Id., pp. 3-4*. It should now be evident that Defendant has no intention of being candid with this Court.

The truth is that Defendant had argued during the summary judgment proceedings that Plaintiff was engaged in a personal errand but was unable to refute her testimony that Richland Mall was on her way to her patient’s home. *Motion of Defendant Visiting Nurse Association of Mid-Ohio for Summary Judgment, pp. 7-8 & 10-11; Reply of Defendant Visiting Nurse Association to Plaintiff’s Memorandum in Opposition to Defendant’s Motion for Summary Judgment, pp. 1-3*. If defense counsel did indeed possess evidence of “two other, more direct routes” that were available, that was their opportunity to present it. The insinuation that they opted to withhold relevant proof that supported the otherwise unsubstantiated “personal errand” theory because Plaintiff had not filed a cross-motion for summary judgment is truly far-fetched.

Defendant had made the strategic decision to invoke Civ. R. 56 in the proceedings below, and now is in no position to complain that the trial judge resolved undisputed issues of fact in favor of Plaintiff. The employer’s reliance upon *Marshall v. Aaron*, 15 Ohio St. 3d 48, 472 N.E. 2d 335 (1984), is misplaced as that decision concerns the

complete extinguishment of all claims that had been brought by a non-moving plaintiff against a non-moving defendant. Only the co-defendants had sought summary judgment. At no point did this Court hold that trial judges are precluded from resolving issues that have been raised in the motion adversely to the movant.

The present situation falls squarely within the purview of *State ex rel. Cuyahoga Cnty. Hosp. v. Ohio Bur. of Worker' Comp.*, 27 Ohio St. 3d 25, 28, 500 N.E. 2d 1370 (1986), which established the following principle:

While Civ.R. 56 does not ordinarily authorize courts to enter summary judgment in favor of a non-moving party, *Marshall v. Aaron* (1984), 15 Ohio St.3d 48, 472 N.E.2d 335, syllabus, an entry of summary judgment against the moving party does not prejudice his due process rights where all relevant evidence is before the court, no genuine issue as to any material fact exists, and the non-moving party is entitled to judgment as a matter of law. *Houk v. Ross* (1973), 34 Ohio St.2d 77, 296 N.E.2d 266 [63 O.O.2d 119], paragraph one of the syllabus.

*Id.*, 27 Ohio St. 3d at 28. There can be no serious disagreement that the instant Defendant could have, and should have, presented all available evidence of the supposed “personal errand” when summary judgment was demanded upon this issue. If the employer’s counsel actually did decide to withhold relevant evidence from the court, they only have themselves to blame for the predictable result that followed.

In *State ex rel. Lowery v. Cleveland*, 67 Ohio St. 3d 126, 616 N.E. 2d 233 (1993), the same specious argument was forcefully rejected. In that mandamus proceeding, the respondent-city had filed a motion to dismiss that was converted into a motion for summary judgment. *Id.*, 67 Ohio St. 3d at 127. After considering the evidence that was submitted, the court granted the writ in part in favor of the relator. *Id.* The city complained on appeal, just like Defendant in the case *sub judice*, that it had been denied an opportunity to submit additional evidence. *Id.* This Court observed that the city had been responsible for initiating the summary judgment proceedings and reasoned that:

Since the court did as the city asked, the city cannot complain now about the lack of opportunity to present evidence. As we reaffirmed in *Center Ridge Ganley, Inc. v. Stinn*(1987), 31 Ohio St.3d 310, 313, 31 OBR 587, 590, 511 N.E.2d 106, 109, “[u]nder the ‘invited error’ doctrine, ‘[a] party will not be permitted to take advantage of an error which he himself invited or induced the trial court to make.’ *Lester v. Leuck* (1943), 142 Ohio St. 91, 26 O.O. 280, 50 N.E.2d 145, paragraph one of the syllabus.”

*Id.*, at 128.

Here, Defendant moved for summary judgment and specifically sought a determination of whether Plaintiff’s injuries were sustained in the course of, and arose out of, her job responsibilities as required by R.C. 4123.01(C). *Defendant’s Motion*, pp. 5-11. If the employer’s counsel possessed evidence bearing upon this issue – including proof of “two other, more direct routes” – then that was the opportunity to present it. Having invited the lower courts to resolve undisputed factual elements as a matter of law, Defendant must accept the adverse decision that was rendered.

No issues of public or great general importance are presented by the second Proposition of Law.

### CONCLUSION

Because the Fifth District’s reversal of the trial court’s untenable entry of summary judgment in this relatively unique workers compensation proceedings is unassailable, this Court should decline further review.

Respectfully Submitted,

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CERTIFICATE OF SERVICE

I certify that a copy of the foregoing **Memorandum** has been sent by e-mail on this 2<sup>nd</sup> day of July, 2013 to:

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