

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

MOTION TO STRIKE UNTIMELY MEMORANDUM
BY PLAINTIFF-APPELLEE, TAMARA FRIEBEL

Frank Gallucci, III Esq. (#0072680)
PLEVIN & GALLUCCI
55 Public Square, Suite 2222
Cleveland, Ohio 44113
(216) 861-0804
FAX: (216) 861-5322

Paul W. Flowers, Esq. (#0046625)
[COUNSEL OF RECORD]
PAUL W. FLOWERS Co., L.P.A.
Terminal Tower, 35th Floor
50 Public Square
Cleveland, Ohio 44113
(216) 344-9393
FAX: (216) 344-9395

*Attorneys for Plaintiff-Appellee,
Tamara Friebe*

Timothy A. Marcovy, Esq.
Michael S. Lewis, Esq.
WILLACY, LOPRESTI & MARCOVY
1468 West Ninth Street, Suite 330
Cleveland, Ohio 44113

*Attorney for Defendant-Appellant,
Visiting Nurse Association of Mid-
Ohio, et al.*

Kevin J. Reis, Esq.
Office of Attorney General
Assistant Attorney General
30 West Spring Street, 22nd Floor
Columbus, Ohio 43266

*Attorney for Administrator-Appellee,
Industrial Commission of Ohio*

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MOTION

Plaintiff-Appellee, Tamara Friebel, requests that this Court strike the Memorandum in Response to Jurisdiction of Appellee Stephen P. Buehrer, Administrator, Ohio Bureau of Workers' Compensation dated July 2, 2013 ("Administrator's Memorandum") as untimely under S. Ct. Prac. R. 7.01(A)(1) & (2). Since this Defendant is urging this Court to accept jurisdiction over these proceedings and reverse the Fifth District Court of Appeals, both a notice of appeal and a supporting memorandum should have been filed no later than June 13, 2013 in accordance with S. Ct. Prac. R. 7.01(A)(2). As a result of this violation of longstanding procedural rules, Plaintiff-Appellant has been denied an opportunity to respond to the arguments that have been belatedly asserted by Defendant Stephen P. Buehrer, Administrator, Ohio Bureau of Workers' Compensation ("Administrator").

This relatively straightforward proceeding arises from a decision that was issued by the Industrial Commission of Ohio finding that Plaintiff-Appellee, Tamara Friebel, was injured in the course and scope of her employment with Defendant-Appellant, Visiting Nurse Association of Mid Ohio ("VNA"). The employer commenced an administrative appeal in the Stark County Court of Common Pleas as permitted by R.C. 4123.512, and convinced the trial judge to grant summary judgment against Plaintiff. The Fifth District reversed this untenable determination and remanded the action for a jury trial. *Friebel v. Visiting Nurse Assn. of Mid Ohio*, 5th Dist. No. 2012-CA-56, 2013-Ohio-1646. 2013 W.L. 1777247 (April 19, 2013).

On June 3, 2013, Defendant VNA commenced the instant proceedings in this Court by filing a Notice of Appeal and Memorandum in Support of Jurisdiction. Although S. Ct. Prac. R. 7.01(A)(2) afforded another ten days for additional notices and memoranda to be submitted, Defendant Administrator did not do so. This was hardly

surprising, as the Administrator is expected to vigorously defend the rulings of the Industrial Commission. Plaintiff therefore assumed that the Administrator would be participating (if at all) as an appellee in this proceeding.

But on July 2, 2013 the Administrator served and filed a “Response” that announced that he “should be realigned as an Appellant for purposes of this appeal.” *Administrator’s Memorandum*, p. 1. He then proceeded to furnish this Court with his own justifications for why the Fifth District had erred in overturning the entry of summary judgment. *Id.*, pp. 1-5. In effect, the Administrator is now seeking to be treated as a “appellant” without filing a notice of appeal as required by S. Ct. Prac. R. 7.01(A)(2) or complying with the deadline for submitting jurisdictional memoranda imposed by S. Ct. Prac. R. 7.02(A).

By all appearances, the Administrator appears to be under the impression that his “Response” was not due until thirty days following Defendant VNA’s filing of its own Notice of Appeal. But S. Ct. Prac. R. 7.03(A)(1) directs that:

Within thirty days after the appellant’s memorandum in support of jurisdiction is filed, the appellee may file a memorandum in response. [emphasis added]

Because the Administrator is seeking a reversal of the Fifth District, he is an appellant and not an appellee. His reliance upon S. Ct. Prac. R. 7.03(A)(1) is thus misplaced. In order to afford sufficient time for legitimate appellees to respond, appellants are required to file their jurisdictional memoranda with the notice of appeal. *S. Ct. Prac. R. 7.02(A)*. In effect, the Administrator expects to be treated as an “appellant” while arguing the merits but as an “appellee” for purposes of calculating his due dates.

The prejudice that has been inflicted upon Plaintiff-Appellee is readily apparent. She has been denied a meaningful opportunity to respond to the Administrator’s criticisms of the Fifth District ruling. As reflected in their respective Certificates of

Service, the Memoranda that were submitted by Plaintiff and the Administrator were served by e-mail on the same afternoon. Had the Administrator complied with S. Ct. Prac. R. 7.02, Plaintiff would have had a full thirty days in which to examine and address his arguments in support of jurisdiction.

CONCLUSION

Because the Administrator of the Bureau of Workers' Compensation is in fact an appellant but never filed a notice of appeal within the additional ten days afforded by S. Ct. Prac. R. 7.01(A)(2) and proceeded to submit his jurisdictional memorandum well past the deadline set by S. Ct. Prac. R. 7.02(A), to Plaintiff-Appellee's considerable detriment, his untimely memorandum should be stricken.

Respectfully Submitted,

Frank L. Gallucci, III, (per authority)

Frank L. Gallucci, Esq. (#0072680)
PLEVIN & GALLUCCI

*Attorneys for Plaintiff-Appellee,
Tamara Friebe, Administrator*



Paul W. Flowers, Esq. (#0046625)
[COUNSEL OF RECORD]
PAUL W. FLOWERS CO., L.P.A.

CERTIFICATE OF SERVICE

I certify that a copy of the foregoing **Motion** has been sent by e-mail on this 10th day of July, 2013 to:

Timothy A. Marcovy, Esq.
Michael S. Lewis, Esq.
WILLACY, LOPRESTI & MARCOVY
1468 West Ninth Street, Suite 330
Cleveland, Ohio 44113

*Attorney for Defendant-Appellant
Visiting Nurse Association of Mid-Ohio,
et al.*

Kevin J. Reis, Esq.
Office of Attorney General
Assistant Attorney General
30 West Spring Street, 22nd Floor
Columbus, Ohio 43266

*Attorney for Administrator-Appellee
Industrial Commission of Ohio*



Paul W. Flowers, Esq., (#0046625)
PAUL W. FLOWERS CO., L.P.A.

*Attorney for Plaintiff-Appellee,
Tamara Friebe*