

ORIGINAL

In the
Supreme Court of Ohio

VISITING NURSE ASSOCIATION
OF MID-OHIO,

Defendant-Appellant,

v.

TAMARA L. FRIEBEL, et al.,

Appellees.

: Case No. 2013-0892
:
: On Appeal from the
: Richland County Court of Appeals,
: Fifth Appellate District
:
: Case No: 2012-CA-56
:
:
:

**MOTION OF APPELLEE STEPHEN P. BUEHRER, ADMINISTRATOR,
OHIO BUREAU OF WORKERS' COMPENSATION,
TO REALIGN AS APPELLANT**

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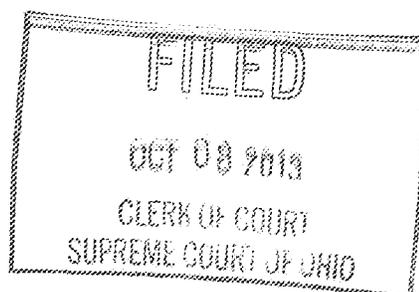
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**MOTION OF APPELLEE STEPHEN P. BUEHRER, ADMINISTRATOR,
OHIO BUREAU OF WORKERS' COMPENSATION, TO REALIGN AS APPELLANT**

Appellee Administrator, Ohio Bureau of Workers' Compensation, moves the Court to realign him as an Appellant in this case. He was named as an Appellee at the jurisdictional stage because he did not file an appeal. But, as he said in his response at that stage, his legal position aligns him with the Appellant here. In his view, the appeals court misstated the law and reached an incorrect judgment, and its decision should be reversed. Moreover, that position also means that realignment is fairest to the parties, as it gives Plaintiff-Appellee Tamara Friebel the chance to respond to the Administrator's brief, which seeks to reverse her victory below. For these reasons, the Court should realign the Administrator as an Appellant.

First, the Administrator disagrees with the Fifth District's decision below, and urges the Court to reverse—and a party urging reversal, of course, is an Appellant. The Fifth District said that Friebel could participate in the workers' compensation system because she had “dual intentions” as she drove her children to the mall with plans to then proceed to her first appointment as a traveling in-home health aide. *See Friebel v. Visiting Nurse Assn. of Mid-Ohio*, 2013-Ohio-1646 ¶ 21 (“App. Op.”). The Administrator urges the Court to reject any “dual intent” doctrine, which has never existed in workers' compensation law.

In addition, the appeals court erred in its result, as it not only created this incorrect “dual intent” standard, but essentially granted summary judgment to Friebel. It did so by concluding that “as a matter of law, [Friebel's] injury was received in the course of her employment,” App. Op. ¶ 22, that “as a matter of law, [Friebel] has established the causation prong” between her employment and injury, *id.* ¶ 27, and that “as a matter of law [Friebel] was not a fixed situs employee and the coming and going rule does not apply to prevent [Friebel] from participating in the workers' compensation fund,” *id.* ¶ 30. The appeals court combined these legal conclusions

into an ultimate conclusion that “the trial court erred as a matter of law in determining [Friebel] was not entitled to participate in the workers’ compensation fund.” *Id.* ¶ 32. To be sure, the court said that it remanded for further proceedings, *id.* ¶ 34, but such proceedings mean little if the trial court must accept “as a matter of law” all of the above conclusions. Thus, even if the appeals court left room for *some* procedure in the trial court, it improperly limited the scope of such proceedings, so the Administrator seeks reversal of the decision below. Most important, even if the Administrator is somehow wrong on all this, he *seeks* reversal—and that is all that matters for rendering him an Appellant.

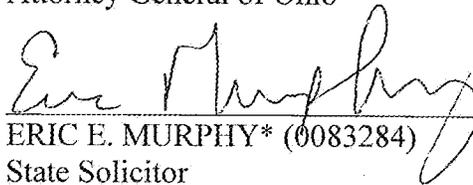
Second, and equally important, fairness to all parties, and efficiency for the Court, requires the Administrator to be realigned as an Appellant. This realignment is good for Friebel, who will then have a chance to respond to the Administrator’s arguments. Indeed, at the jurisdictional stage, Friebel moved to strike the Administrator’s brief on the basis of her inability to respond. *See* Motion of Tamara Friebel to Strike Untimely Memorandum (July 11, 2013). The Court denied that motion, as striking the Administrator’s brief was not required. But the timing point on the merits is a fair one (as the Administrator recognized when noting in his jurisdictional brief that he should be realigned at the merits stage), and realignment will ensure the proper sequence. Of course, the Administrator’s position might not be identical to the Appellant employer either, but that is always possible when there are two appellants. The Administrator supports the employer’s efforts to reject “dual intent” and reverse the appeals court’s de facto grant of summary judgment, and that is sufficient to realign. Not only is that most fair to the parties, but it also allows the Court to better review the parties’ positions.

CONCLUSION

For all these reasons, the Administrator asks the Court to realign him as an Appellant.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I certify that a copy of the foregoing Motion of Appellee Stephen P. Buehrer, Administrator, Ohio Bureau of Workers' Compensation, to Realign as Appellant was served by U.S. mail this 8th day of October, 2013, upon the following counsel:

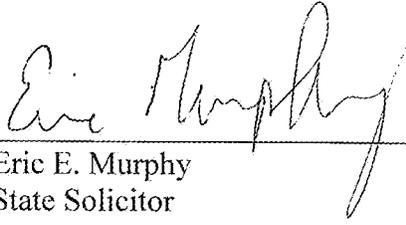
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