

In The
Supreme Court of Ohio

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

SUPREME COURT OF OHIO
CASE NO.: 2013-0892

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

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MERIT BRIEF

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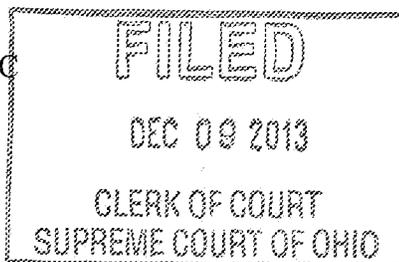
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STATEMENT OF THE CASE

The employer, Visiting Nurses Association of Mid-Ohio (“VNA”), as Defendant-Appellant, urges the Court to reverse the 2-1 decision of the Fifth Appellate court and reinstate the decision of the trial court granting summary judgment in VNA’s favor.

This Court has accepted this appeal filed by VNA on two propositions of law. The first question is simply: In Ohio workers' compensation, can a claimant have "dual intent," simultaneously being on a personal errand and acting “in the course of and arising out of” their employment? The 2-1 decision of the Fifth Appellate court 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. It’s opinion reversed summary judgment 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.)

[Appx. p.19.] *Friebel v. Visiting Nurse Assoc. of Mid-Ohio*, 5th Dist. Richland No. 2012-CA-56, 2013-Ohio-1646.

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); *Lord v. Daugherty*, 66 Ohio St. 2d 441, 20 Ohio Op. 3d 376, 423 N.E.2d 96 (1981).

The second proposition involves the general prohibition against granting of a summary judgment in favor of a non-moving party and denial of due process. This Court held "a party who has not moved for summary judgment is not entitled to such an order[.]" *Marshall v. Aaron*, 15 Ohio St.3d 48, 472 N.E. 2d 335 (1984). 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 lower appellate court, however, viewed 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* at ¶¶22 and 27. [Appx. pp.14 and 16.]

Having had no notice or opportunity defend against a summary judgment, VNA was denied due process. This appeal affords VNA its first opportunity to assert the necessary facts and arguments against granting summary judgment in favor of claimant. Thus, the appellate court's failure to apply the proper procedure in its *de novo* summary judgment review is reversible error which this Court must correct.

STATEMENT OF THE FACTS

A. CLAIMANT'S EMPLOYMENT AND THE JANUARY 22, 2011 INCIDENT

As a home health nurse, Tamara Friebel ("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. [Trial Record "Tr.R."#21 (Deposition of Tamara Friebel "Cl. Depo." at 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. [Tr.R.#21 (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. [Tr.R.#21 (Cl. Depo. at 62:18-25, 63-68 and Exhibits B, C, D, and E, attached thereto.)] 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. *Friebel* at ¶4. Claimant testified that 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.*

That Saturday morning claimant left her home in Shelby, Ohio with family and

¹ Claimant submitted her time, but not her mileage on this occasion. [Tr.R.#21 (Cl. Depo. at p.49:1-6.)]

² The Fifth District incorrectly stated claimant 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 wherein she stated she had never gone from her home to the patient's home. Compare, [Tr.R.#21 (Cl. Depo. 59:5-20, 61:17-25, 62:1.)] Claimant cannot have a "normal route" between two points if she never drove the route between those two points before.

friends in her vehicle and -- after bypassing the two more direct routes -- traveled south on Lexington–Springmill Road towards the Richland Mall. *Id.* at ¶5; [Tr.R.#21 (Cl. Depo. 62:18-25, 63-68, and Exhibits B, C, D, and E, attached thereto.) 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. *Friebel* at ¶5. 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.*

B. PROCEDURAL FACTS

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. VNA then timely filed its Notice of Appeal to the Richland County Common Pleas Court. Tr.R.#1. Claimant filed a complaint and VNA filed an answer denying the allegations. *Friebel* at ¶8; Tr.R.#6 and 12, respectively. 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. *Friebel* at ¶8; Tr.R.#35; Appx. pp. 20-22.

Claimant appealed the summary judgment entered against her. *Friebel* at ¶9;

Tr.R.#36; Court of Appeals Record "CAR"# 1. 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.

Friebel at ¶10; CAR# 6.³ Although claimant assigned error "as a matter of law," claimant's argument was that questions of fact existed to be resolved by a jury.

In the 2-1 decision issued on April 19, 2013, the appellate court reversed the trial court's summary judgment in VNA's favor. *Friebel*; CAR# 15; Appx. pp. 5-19. The majority did not address claimant's "abuse of discretion" contention at all; rather, it decided, without notice to the parties, to create its own, new legal doctrine, and then apply it to the facts of this case. 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 [*Friebel* 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.

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. See, R.C. 4123.512.

ARGUMENT

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

A. THE "DUAL INTENT" DOCTRINE HAS PREVIOUSLY BEEN CONSIDERED AND REJECTED BY THIS COURT.

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 of "dual intent" in Ohio workers' compensation law.

Other states' courts and legislatures have addressed the concept of "dual intent" or "dual purpose" to address whether an employee is or is not in the scope of their employment at the time of injury. In those other jurisdictions where the concept of dual intent/purpose has been adopted in workers' compensation, all case law cites to *Marks' Dependents v. Gray*, 251 N.Y. 90, 167 N.E. 181 (1929). The only Ohio court to definitively follow New York's *Marks* case was *Cardwell v. Indus. Comm.*, 98 N.E.2d 326, 59 Ohio L. Abs. 125 (1st Dist. 1950). In applying the *Marks* case, the appellate court decided plaintiff was entitled to participate under the Act. On appeal to this Court, the appellate court's decision that was reliant upon *Marks*, was reversed in *Cardwell v. Indus. Comm.*, 155 Ohio St. 466,

99 N.E.2d 306, 44 Ohio Op. 424 (1951). While this Court in *Cardwell* did not reject *Marks* by name, it stated “None of the decisions of this court, relied upon by plaintiff, would justify a decision in his favor.” *Cardwell*, 155 Ohio St. at 468. Furthermore, since the decision in *Cardwell* reversing the appellate court’s decision relying on *Marks*, no court in Ohio has cited to or relied upon *Marks*. Thus, to the extent *Marks* and the concept of dual intent/purpose has ever been addressed in Ohio, it has been rejected. In the six decades following *Cardwell*, Ohio’s workers’ compensation jurisprudence forged its own, distinct path culminating in the factors test outlined in *Fisher* and *Lord*.

A further examination of *Cardwell* shows its facts are somewhat analogous to the instant matter. In *Cardwell* the plaintiff and his wife went on purely personal errand at 3 p.m. and drove to see a home they were interested in purchasing. At 7 p.m., plaintiff was to go to his employer’s place of business and turn on the parking lot lights. After finishing their personal business, *Cardwell* began driving home to retrieve work-related messages and then intended to head to work to turn on the lights. On his way home, *Cardwell* was hit by a train and injured. On these facts this Court held that the plaintiff “at least until he reached his home, would not, under any theory, have gotten back to a place where [he] * * * would have been in the course of his employment.” *Id.*, 155 Ohio St. at 468. This Court reasoned this to be so because there was “no causal relationship between the plaintiff’s employment and his injuries, at least until after his trip for personal purposes had ended.” *Id.* As in *Cardwell*, the instant matter involves motor vehicle travel with family for personal benefit. Here, as in *Cardwell*, this court should hold that there is no causal relationship to claimant’s employment until the personal errand is completed.

Thus, not only was Judge Wise correct in noting "dual intent" is not a concept found in Ohio workers' compensation law, but it has been rejected by this Court. Ohio workers' compensation law has not and should not adopt the concept of dual intent/purpose. 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*.

This new doctrine proposed the appellate court -- without any supporting citation or definition [*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 one's family to the mall before work. The appellate court's decision must be reversed and the trial court's entry of summary judgment in VNA's favor be reinstated.

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. Tr.R.#35. 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, 76 N.E.2d 892 (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's intent was 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. See, generally, *Cardwell*, 155 Ohio St. 466. 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 INJURY DID NOT "ARISE OUT OF" HER EMPLOYMENT

The second prong of the compensability test is whether the injury arose out of the plaintiff's employment. R.C. 4123.01; *Fisher; Lord*. 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. The trial court properly found that claimant's injury did

not “arise out of” her employment with VNA. Tr.R.#35; Appx. pp. 20-22.

To determine whether a plaintiff has demonstrated a sufficient relationship to show the injury arose out of 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.” *Fisher* at 277, citing, *Lord*, 66 Ohio St. 2d 441. These primary factors should be considered, but are not exhaustive. *Fisher* at fn.2. Claimant’s previous arguments have not focused on those primary factors. Instead, she has relied almost solely on claimant being eligible for compensation/reimbursement when the motor vehicle accident occurred. Ohio jurisprudence, however, has held a claimant-worker's work status – being on or off duty -- is not dispositive of whether or not an injured worker is entitled to workers' compensation benefits. See, generally, *Elsass v. Commercial Carriers, Inc.*, 73 Ohio App.3d 112, 115, 596 N.E.2d 599 (3d Dist.1992).

Analogous to the instant matter is *Crockett v. HCR Manorcare, Inc.*, 4th Dist. Scioto No. 03CA2919, 2004-Ohio-3533, *appeal not accepted*, 103 Ohio St. 3d 1526, 2004-Ohio-5852, 817 N.E.2d 409. In *Crockett*, a home health care aide was injured driving between two different work sites. *Id.* at ¶¶2-4. At the time of the accident, Crockett’s infant goddaughter was a passenger in her car whom she “intended to take *** to her mother where they were meeting at a service station” which was on the way to and less than one mile from the second work site, which was a client’s home. *Id.*

The court’s analysis focused on whether Crockett’s injury arose from her

employment. *Id.* at ¶¶21-28. Applying totality of circumstances test, the court found Crockett’s injuries were not compensable. *Id.* at ¶24. First, Crockett’s accident occurred on a public highway. *Id.* Second, the employer exercised no control over the scene of the accident. *Id.* Third, the Crockett’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,” but it was not a sufficient benefit to place Crockett in the scope of her employment. *Id.* See, e.g., *Ruckman v. Cubby Drilling*, 81 Ohio St.3d.117, 122, 1998-Ohio-455, 689 N.E.2d 917, 922 (1998)(“[A]t the time of the accidents, none of the riggers had yet arrived at a place where the work was to be performed. Although the riggers' travel was necessitated by the employer's business obligations, the accident did not occur at a location where the riggers could carry on their employer’s business.” (Emphasis added.))

The *Crockett* court continued its analysis beyond the three factors. The most important factor was that 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 under the totality of the circumstances, the employee failed to show her injuries arose from her employment and not a personal errand. *Id.* The *Crockett* court did not analyze as a factor whether plaintiff was/was not compensated for travel time or mileage, but focused on the *Lord* factors and Crockett’s intent as evidenced by her testimony and actions. *Crockett* at ¶¶21-28.

Applying the totality of circumstances test to the instant matter, the facts, when

viewed in a light most favorable to the claimant, show this claimant's injury did not arise from her employment. First, the accident occurred on a public roadway near the Richland Mall. This was miles from claimant's situs of employment, the patient's home, where she would carry out her duties as a home health aide. Second, VNA exercised no control over the accident scene on a public roadway, nor over the other driver that impacted the vehicle claimant was transporting her family in, nor over the route claimant drove that day. Third, VNA did not receive a benefit from Claimant's presence at the scene of the accident. As in *Crockett*, this claimant was performing a personal errand which could – in an elongated path – lead to her patient's home; however, at the time of the accident, claimant's clear intent to transport and drop off her family and friends at the Richland Mall. This was personal in nature. Claimant never began work that day, nor entered the scope of her employment. As the court reasoned in *Crockett*:

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.* at **13. Analogously, although the Richland Mall happened to be a way to the Claimant's first work site of the day (viewing facts most favorable to claimant), the indisputable fact is that at the time of the accident she was fulfilling a personal purpose of taking her friends and family to the mall.

The Claimant, and the court below, distinguished *Crockett* from the instant matter because *Crockett* was not compensated for her time or expenses to and from her patients whereas, on the weekends, this claimant was compensated. *Friebel* 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*. There was no case law cited by the court below, nor by the claimant at any time, that holds compensation during or mileage reimbursement for travel to and from work is a penultimate determinative factor superseding the *Lord* test and placing a claimant in the scope of her employment. Compensation for travel may be a factor to be considered, but it, alone, is not determinative. Certainly the converse has proven to be true. *Elsass*, 73 Ohio App.3d at 115 (Court found that being "off-duty" or not compensated is not dispositive on eligibility to participate under the Act; instead, the court relied upon those factors enumerated by the *Lord* court.)

Therefore, claimant's injury did not arise from her employment with VNA, the appellate court's decision must be vacated, and the trial court's summary judgment order in favor of VNA 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. See, 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 duties only after arriving at a specific and identifiable work place designated by his employer.” *Ruckman*, 81 Ohio St.3d. at 119.

The coming-and-going rule was applied in the *Gilham* case. *Gilham v. Cambridge Home Health Care*, 5th Dist. Stark No. 2008CA211, 2009-Ohio-2842, *appeal not accepted*, 123 Ohio St. 3d 1425, 2009-Ohio-5340, 914 N.E.2d 1065. 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. *Gilham*’s 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. Although, claimant’s schedule could change on a daily basis [Tr.R.#21 (Cl. Depo. 24:9-12)], *Ruckman* held that 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. (Tr.R.#21 (Cl. Depo. 23:2-9.)) She discussed her job duties as being “out there in the field and making decisions with these patients as far as their health goes.” [Tr.R.#21 (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, claimant driving to her first patient of the day is distinguishable from her substantial job duties of rendering care to the patient.

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. No exceptions apply. For this reason too, VNA was entitled to judgment as a matter of law on this ground as well.

4. CLAIMANT WAS A FIXED SITUS EMPLOYEE SUBJECT TO THE "COMING AND GOING" RULE, AND NO EXCEPTIONS APPLY.

As established in the foregoing section, claimant was a fixed situs employee. The only exception to the coming and going rule argued in claimant’s brief in opposition to summary judgment was the special hazard rule. Tr.R.#26. Analysis of special hazard exception is relevant if this Court finds the claimant to be a fixed-situs or semi-fixed situs employee and applies the coming-and-going rule. For the special hazard exception to be applicable, a plaintiff must show: (1) “but for” the employment, the employee would not have been at the location where the injury occurred, and (2) the risk is distinctive in nature or quantitatively greater than the risk common to the public. *MTD Prods. v. Robatin*, 61 Ohio St.3d 66, 68, 572 N.E.2d 661 (1991). See, *Crockett*; *Ruckman*. Ohio Workers’ Compensation statutes do not consider injuries compensable that occur due to hazards or risks the general public similarly encounter; rather, compensability is geared toward “hazards encountered in the discharge of employment duties.” *Ruckman* at 119.

In the instant matter, claimant fails both prongs of the special hazard exception. First, regardless of her employment claimant would have been at this location where the

injury occurred. Claimant's testimony established that her daughter needed to go shopping at the mall. Second, as in *Crockett*, the trial court found the employee's duties as a home health aide who was required to drive as part of her job did not "significantly increase her exposure to traffic risks as compared to the risks that the public encounters." *Crockett* at 15. *Crockett* noted the plaintiff's job assignments did not require "interstate travel or lengthy intrastate commutes." *Id.* As in *Crockett*, claimant's commute to patient's homes contained risks similar to what the general public encounters, mostly travel near her home, and were not distinctive in nature or quantitatively greater than the risk common to other drivers in the general public. Further, driving to the mall is definitively not a hazard encountered in the discharge of this claimant's employment duties and is equally hazardous to the general public in the execution of its personal errands. Therefore, claimant's employment did not create a special hazard that would exempt her from the application of the coming-and-going rule. For this reason too, VNA was entitled to summary judgment.

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.

This Court has held that "a party who has not moved for summary judgment is not entitled to such an order[.]" *Marshall*, 15 Ohio St.3d 48. See, also, *Bowen v. Kil-Kare, Inc.*, 63 Ohio St.3d 84, 585 N.E.2d 384 (1992); *Conley v. Smith*, 5th Dist. Stark 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 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) Civ.R. 56(C). Explicit in the civil rule is that summary judgment may only be granted against the non-moving party. In the instant matter, VNA filed for summary judgment. Tr.R.#22. Claimant did not, but opposed VNA's motion stating there were material questions of fact to be decided. Tr.R.#22, 26, and 35. The trial court granted summary judgment in favor of VNA. Tr.R.#35; Appx. pp. 20-22. Claimant appealed arguing that there were questions of fact to be resolved. CAR#6 and 12. The Fifth District reversed the trial court, but did not determine a factual issue existed. Rather, it 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; Appx. pp. 14 and 16. With no issues remaining to be tried, the appellate court de facto 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. Once a party files a motion for summary judgment, a trial court may 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 accepted*, 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. Franklin No. 10AP943, 2011-Ohio-3315, ¶11, citing, *Byers v. Robinson*, 10th Dist. Franklin No. 08AP204, 2008-Ohio-4833, ¶36.

Here the appellate court failed to follow *Marshall* or the narrow exception thereto. 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 narrow exception has been applied, it was the trial court granting for the non-moving party (frequently in extraordinary writ actions), not a court reviewing on appeal. When an appellate court *sua sponte* grants summary judgment against the moving party, 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.

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 by construing the facts 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 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.

Most notably that claimant had two other, shorter and more direct routes available

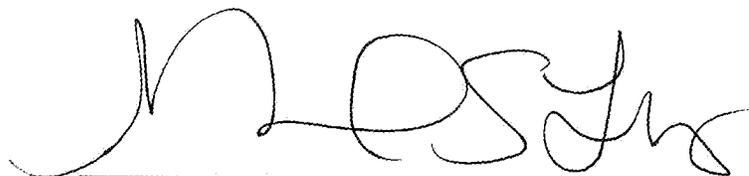
to travel from her home to the patient's house that did not involve going by the mall where she had to drop off family and friends for her personal benefit. [Tr.R.#21 (Cl. Depo. at 62:18-25, 63-68 and Exhibits B, C, D, and E, attached thereto.)]

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 narrow exception is reversible error. Wherefore, this court should vacate the appellate court's decision and reinstate the trial court's order granting summary judgment in favor VNA.

CONCLUSION

For all of the foregoing reasons the judgment of the court of appeals must be reversed and the trial court's entry of summary judgment in VNA's favor and against the claimant be reinstated, thus determining, upon the merits, that claimant "is not entitled to participate under the Workers' Compensation Act."

Respectfully submitted,



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CERTIFICATE OF SERVICE

A copy of the foregoing Merit Brief of Appellant Visiting Nurse Association of Mid-Ohio's has been served this 9th day of December 2013, electronically and by ordinary mail, upon:

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APPENDIX

ORIGINAL

IN THE
SUPREME COURT OF OHIO 13-0892

VISITING NURSE ASSOCIATION)	SUPREME COURT OF OHIO
OF MID-OHIO, <i>et al.</i>)	CASE NO.:
)	
Appellant,)	
)	On Appeal from the Richland County
v.)	Court of Appeals, Fifth Appellate
)	District - Case No.: 2012-CA-56
TAMARA FRIEBEL,)	
)	
Appellees.)	

APPELLANT VISITING NURSE ASSOCIATION OF MID-OHIO'S
NOTICE OF APPEAL

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FILED
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CLERK OF COURT
SUPREME COURT OF OHIO

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NOTICE OF APPEAL OF APPELLANT
VISITIN NURSE ASSOCIATION OF MID-OHIO

Appellant Visiting Nurse Association of Mid-Ohio ("VNA") hereby gives notice of appeal to the Supreme Court of Ohio from the opinion of the Richland County Court of Appeals, Fifth Appellate District, entered in Court of Appeals Case Number 2012-CA-56 dated April 19, 2013, which reversed the trial court's grant of summary judgment in VNA's favor and effectively *sua sponte* granted summary judgment on appeal to the non-moving Tamara Friebel ("claimant").

This case raises a substantial constitutional question of due process and is one of public or great general interest as it raises novel theories of "dual intent" in Ohio Workers' Compensation law .

Respectfully submitted,



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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

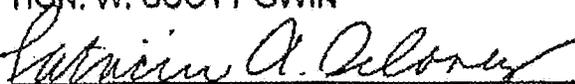
JUDGMENT ENTRY

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

COURT OF APPEALS
RICHLAND COUNTY, OHIO
FIFTH APPELLATE DISTRICT

COURT OF APPEALS
RICHLAND COUNTY OHIO
FILED
2013 APR 19 AM 10:53
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

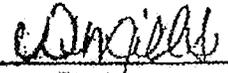
JUDGMENT: Reversed and Remanded

DATE OF JUDGMENT ENTRY:

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

Deputy Clerk

Gwin, J.

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

FACTS & PROCEDURAL HISTORY

{12} 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.

{13} 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.

{14} 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:

{110} " 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

{111} 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-188, 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 as 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.

{¶122} 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

{¶123} 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 travelling 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

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

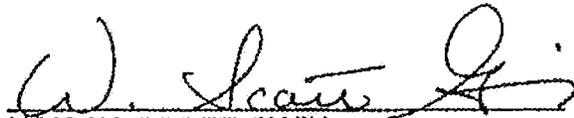
{¶33} Appellant's assignment of error is sustained.

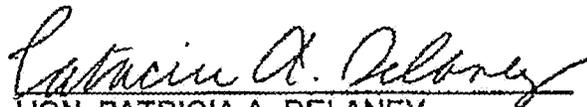
{¶34} For the foregoing reasons, the judgment of the Court of Common Pleas of Richland County is reversed, and the cause is remanded to the court for further proceedings in consistent with this decision.

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

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:

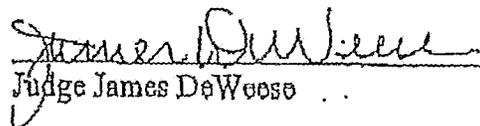
It is therefore ordered;

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



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§ 1.16 Redress in courts (1851, amended 1912)
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All courts shall be open, and every person, for an injury done him in his land, goods, person, or reputation, shall have remedy by due course of law, and shall have justice administered without denial or delay.

[Suits against the state.] Suits may be brought against the state, in such courts and in such manner, as may be provided by law.

(As amended September 3, 1912.)

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RULE 56. Summary Judgment

(A) For party seeking affirmative relief. A party seeking to recover upon a claim, counterclaim, or cross-claim or to obtain a declaratory judgment may move with or without supporting affidavits for a summary judgment in the party's favor as to all or any part of the claim, counterclaim, cross-claim, or declaratory judgment action. A party may move for summary judgment at any time after the expiration of the time permitted under these rules for a responsive motion or pleading by the adverse party, or after service of a motion for summary judgment by the adverse party. If the action has been set for pretrial or trial, a motion for summary judgment may be made only with leave of court.

(B) For defending party. A party against whom a claim, counterclaim, or cross-claim is asserted or a declaratory judgment is sought may, at any time, move with or without supporting affidavits for a summary judgment in the party's favor as to all or any part of the claim, counterclaim, cross-claim, or declaratory judgment action. If the action has been set for pretrial or trial, a motion for summary judgment may be made only with leave of court.

(C) Motion and proceedings. The motion shall be served at least fourteen days before the time fixed for hearing. The adverse party, prior to the day of hearing, may serve and file opposing affidavits. 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 as to any 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 most 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.

(D) Case not fully adjudicated upon motion. If on motion under this rule summary judgment is not rendered upon the whole case or for all the relief asked and a trial is necessary, the court in deciding the motion, shall examine the evidence or stipulation properly before it, and shall if practicable, ascertain what material facts exist without controversy and what material facts are actually and in good faith controverted. The court shall thereupon make an order on its journal specifying the facts that are without controversy, including the extent to which the amount of damages or other relief is not in controversy, and directing such further proceedings in the action as are just. Upon the trial of the action the facts so specified shall be deemed established, and the trial shall be conducted accordingly.

(E) Form of affidavits; further testimony; defense required. Supporting and opposing affidavits shall be made on personal knowledge, shall set forth such facts as would be admissible in evidence, and shall show affirmatively that the affiant is competent to testify to the matters stated in the affidavit. Sworn or certified copies of all papers or parts of papers referred

to in an affidavit shall be attached to or served with the affidavit. The court may permit affidavits to be supplemented or opposed by depositions or by further affidavits. When a motion for summary judgment is made and supported as provided in this rule, an adverse party may not rest upon the mere allegations or denials of the party's pleadings, but the party's response, by affidavit or as otherwise provided in this rule, must set forth specific facts showing that there is a genuine issue for trial. If the party does not so respond, summary judgment, if appropriate, shall be entered against the party.

(F) When affidavits unavailable. Should it appear from the affidavits of a party opposing the motion for summary judgment that the party cannot for sufficient reasons stated present by affidavit facts essential to justify the party's opposition, the court may refuse the application for judgment or may order a continuance to permit affidavits to be obtained or discovery to be had or may make such other order as is just.

(G) Affidavits made in bad faith. Should it appear to the satisfaction of the court at any time that any of the affidavits presented pursuant to this rule are presented in bad faith or solely for the purpose of delay, the court shall forthwith order the party employing them to pay to the other party the amount of the reasonable expenses which the filing of the affidavits caused the other party to incur, including reasonable attorney's fees, and any offending party or attorney may be adjudged guilty of contempt.

[Effective: July 1, 1970; amended effective July 1, 1976; July 1, 1997; July 1, 1999.]

Staff Note (July 1, 1999 Amendment)

Rule 56(C) Motion and proceedings thereon

The prior rule provided that "transcripts of evidence in the pending case" was one of the items that could be considered in deciding a motion for summary judgment. The 1999 amendment deleted "in the pending case" so that transcripts of evidence from another case can be filed and considered in deciding the motion.

Staff Note (July 1, 1997 Amendment)

Rule 56(A) For party seeking affirmative relief.

The 1997 amendment to division (A) divided the previous first sentence into two separate sentences for clarity and ease of reading, and replaced a masculine reference with gender-neutral language. The amendment is grammatical only and no substantive change is intended.

Rule 56(B) For defending party.

The 1997 amendment to division (B) added a comma after the "may" in the first sentence and replaced a masculine reference with gender-neutral language. The amendment is grammatical only and no substantive change is intended.

Rule 56(C) Motion and proceedings thereon.

The 1997 amendment to division (C) changed the word "pleading" to "pleadings" and replaced a masculine reference with gender-neutral language. The amendment is grammatical only and no substantive change is intended.

Rule 56(E) Form of affidavits; further testimony; defense required.

The 1997 amendment to division (E) replaced several masculine references with gender-neutral language. The amendment is grammatical only and no substantive change is intended.

Rule 56(F) When affidavits unavailable.

The 1997 amendment to division (F) replaced several masculine references with gender-neutral language. The amendment is grammatical only and no substantive change is intended.

Rule 56(G) Affidavits made in bad faith.

The 1997 amendment to division (G) replaced a masculine reference with gender-neutral language. The amendment is grammatical only and no substantive change is intended.

4123.01 Workers' compensation definitions.

As used in this chapter:

(A)

(1) "Employee" means:

(a) Every person in the service of the state, or of any county, municipal corporation, township, or school district therein, including regular members of lawfully constituted police and fire departments of municipal corporations and townships, whether paid or volunteer, and wherever serving within the state or on temporary assignment outside thereof, and executive officers of boards of education, under any appointment or contract of hire, express or implied, oral or written, including any elected official of the state, or of any county, municipal corporation, or township, or members of boards of education.

As used in division (A)(1)(a) of this section, the term "employee" includes the following persons when responding to an inherently dangerous situation that calls for an immediate response on the part of the person, regardless of whether the person is within the limits of the jurisdiction of the person's regular employment or voluntary service when responding, on the condition that the person responds to the situation as the person otherwise would if the person were on duty in the person's jurisdiction:

(i) Off-duty peace officers. As used in division (A)(1)(a)(i) of this section, "peace officer" has the same meaning as in section 2935.01 of the Revised Code.

(ii) Off-duty firefighters, whether paid or volunteer, of a lawfully constituted fire department.

(iii) Off-duty first responders, emergency medical technicians-basic, emergency medical technicians-intermediate, or emergency medical technicians-paramedic, whether paid or volunteer, of an ambulance service organization or emergency medical service organization pursuant to Chapter 4765. of the Revised Code.

(b) Every person in the service of any person, firm, or private corporation, including any public service corporation, that (i) employs one or more persons regularly in the same business or in or about the same establishment under any contract of hire, express or implied, oral or written, including aliens and minors, household workers who earn one hundred sixty dollars or more in cash in any calendar quarter from a single household and casual workers who earn one hundred sixty dollars or more in cash in any calendar quarter from a single employer, or (ii) is bound by any such contract of hire or by any other written contract, to pay into the state insurance fund the premiums provided by this chapter.

(c) Every person who performs labor or provides services pursuant to a construction contract, as defined in section 4123.79 of the Revised Code, if at least ten of the following criteria apply:

(i) The person is required to comply with instructions from the other contracting party regarding the manner or method of performing services;

(ii) The person is required by the other contracting party to have particular training;

(iii) The person's services are integrated into the regular functioning of the other contracting party;

(iv) The person is required to perform the work personally;

(v) The person is hired, supervised, or paid by the other contracting party;

- (vi) A continuing relationship exists between the person and the other contracting party that contemplates continuing or recurring work even if the work is not full time;
- (vii) The person's hours of work are established by the other contracting party;
- (viii) The person is required to devote full time to the business of the other contracting party;
- (ix) The person is required to perform the work on the premises of the other contracting party;
- (x) The person is required to follow the order of work set by the other contracting party;
- (xi) The person is required to make oral or written reports of progress to the other contracting party;
- (xii) The person is paid for services on a regular basis such as hourly, weekly, or monthly;
- (xiii) The person's expenses are paid for by the other contracting party;
- (xiv) The person's tools and materials are furnished by the other contracting party;
- (xv) The person is provided with the facilities used to perform services;
- (xvi) The person does not realize a profit or suffer a loss as a result of the services provided;
- (xvii) The person is not performing services for a number of employers at the same time;
- (xviii) The person does not make the same services available to the general public;
- (xix) The other contracting party has a right to discharge the person;
- (xx) The person has the right to end the relationship with the other contracting party without incurring liability pursuant to an employment contract or agreement.

Every person in the service of any independent contractor or subcontractor who has failed to pay into the state insurance fund the amount of premium determined and fixed by the administrator of workers' compensation for the person's employment or occupation or if a self-insuring employer has failed to pay compensation and benefits directly to the employer's injured and to the dependents of the employer's killed employees as required by section 4123.35 of the Revised Code, shall be considered as the employee of the person who has entered into a contract, whether written or verbal, with such independent contractor unless such employees or their legal representatives or beneficiaries elect, after injury or death, to regard such independent contractor as the employer.

(d) Every person to whom all of the following apply:

- (i) The person is a resident of a state other than this state and is covered by that other state's workers' compensation law;
- (ii) The person performs labor or provides services for that person's employer while temporarily within this state;
- (iii) The laws of that other state do not include the provisions described in division (H)(4) of section 4123.54 of the Revised Code.

(2) "Employee" does not mean:

- (a) A duly ordained, commissioned, or licensed minister or assistant or associate minister of a church in the exercise of ministry;

(b) Any officer of a family farm corporation;

(c) An individual incorporated as a corporation; or

(d) An individual who otherwise is an employee of an employer but who signs the waiver and affidavit specified in section 4123.15 of the Revised Code on the condition that the administrator has granted a waiver and exception to the individual's employer under section 4123.15 of the Revised Code.

Any employer may elect to include as an "employee" within this chapter, any person excluded from the definition of "employee" pursuant to division (A)(2) of this section. If an employer is a partnership, sole proprietorship, individual incorporated as a corporation, or family farm corporation, such employer may elect to include as an "employee" within this chapter, any member of such partnership, the owner of the sole proprietorship, the individual incorporated as a corporation, or the officers of the family farm corporation. In the event of an election, the employer shall serve upon the bureau of workers' compensation written notice naming the persons to be covered, include such employee's remuneration for premium purposes in all future payroll reports, and no person excluded from the definition of "employee" pursuant to division (A)(2) of this section, proprietor, individual incorporated as a corporation, or partner shall be deemed an employee within this division until the employer has served such notice.

For informational purposes only, the bureau shall prescribe such language as it considers appropriate, on such of its forms as it considers appropriate, to advise employers of their right to elect to include as an "employee" within this chapter a sole proprietor, any member of a partnership, an individual incorporated as a corporation, the officers of a family farm corporation, or a person excluded from the definition of "employee" under division (A)(2) of this section, that they should check any health and disability insurance policy, or other form of health and disability plan or contract, presently covering them, or the purchase of which they may be considering, to determine whether such policy, plan, or contract excludes benefits for illness or injury that they might have elected to have covered by workers' compensation.

(B) "Employer" means:

(1) The state, including state hospitals, each county, municipal corporation, township, school district, and hospital owned by a political subdivision or subdivisions other than the state;

(2) Every person, firm, professional employer organization as defined in section 4125.01 of the Revised Code, and private corporation, including any public service corporation, that (a) has in service one or more employees or shared employees regularly in the same business or in or about the same establishment under any contract of hire, express or implied, oral or written, or (b) is bound by any such contract of hire or by any other written contract, to pay into the insurance fund the premiums provided by this chapter.

All such employers are subject to this chapter. Any member of a firm or association, who regularly performs manual labor in or about a mine, factory, or other establishment, including a household establishment, shall be considered an employee in determining whether such person, firm, or private corporation, or public service corporation, has in its service, one or more employees and the employer shall report the income derived from such labor to the bureau as part of the payroll of such employer, and such member shall thereupon be entitled to all the benefits of an employee.

(C) "Injury" includes any injury, whether caused by external accidental means or accidental in character and result, received in the course of, and arising out of, the injured employee's employment. "Injury" does not include:

(1) Psychiatric conditions except where the claimant's psychiatric conditions have arisen from an injury or occupational disease sustained by that claimant or where the claimant's psychiatric conditions have arisen from sexual conduct in which the claimant was forced by threat of physical harm to engage or participate;

(2) Injury or disability caused primarily by the natural deterioration of tissue, an organ, or part of the body;

(3) Injury or disability incurred in voluntary participation in an employer-sponsored recreation or fitness activity if the employee signs a waiver of the employee's right to compensation or benefits under this chapter prior to engaging in the recreation or fitness activity;

(4) A condition that pre-existed an injury unless that pre-existing condition is substantially aggravated by the injury. Such a substantial aggravation must be documented by objective diagnostic findings, objective clinical findings, or objective test results. Subjective complaints may be evidence of such a substantial aggravation. However, subjective complaints without objective diagnostic findings, objective clinical findings, or objective test results are insufficient to substantiate a substantial aggravation.

(D) "Child" includes a posthumous child and a child legally adopted prior to the injury.

(E) "Family farm corporation" means a corporation founded for the purpose of farming agricultural land in which the majority of the voting stock is held by and the majority of the stockholders are persons or the spouse of persons related to each other within the fourth degree of kinship, according to the rules of the civil law, and at least one of the related persons is residing on or actively operating the farm, and none of whose stockholders are a corporation. A family farm corporation does not cease to qualify under this division where, by reason of any devise, bequest, or the operation of the laws of descent or distribution, the ownership of shares of voting stock is transferred to another person, as long as that person is within the degree of kinship stipulated in this division.

(F) "Occupational disease" means a disease contracted in the course of employment, which by its causes and the characteristics of its manifestation or the condition of the employment results in a hazard which distinguishes the employment in character from employment generally, and the employment creates a risk of contracting the disease in greater degree and in a different manner from the public in general.

(G) "Self-insuring employer" means an employer who is granted the privilege of paying compensation and benefits directly under section 4123.35 of the Revised Code, including a board of county commissioners for the sole purpose of constructing a sports facility as defined in section 307.696 of the Revised Code, provided that the electors of the county in which the sports facility is to be built have approved construction of a sports facility by ballot election no later than November 6, 1997.

(H) "Public employer" means an employer as defined in division (B)(1) of this section.

(I) "Sexual conduct" means vaginal intercourse between a male and female; anal intercourse, fellatio, and cunnilingus between persons regardless of gender; and, without privilege to do so, the insertion, however slight, of any part of the body or any instrument, apparatus, or other object into the vaginal or anal cavity of another. Penetration, however slight, is sufficient to complete vaginal or anal intercourse.

(J) "Other-states' insurer" means an insurance company that is authorized to provide workers' compensation insurance coverage in any of the states that permit employers to obtain insurance for workers' compensation claims through insurance companies.

(K) "Other-states' coverage" means insurance coverage purchased by an employer for workers'

compensation claims that arise in a state or states other than this state and that are filed by the employees of the employer or those employee's dependents, as applicable, in that other state or those other states.

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4123.512 Appeal to court.

(A) The claimant or the employer may appeal an order of the industrial commission made under division (E) of section 4123.511 of the Revised Code in any injury or occupational disease case, other than a decision as to the extent of disability to the court of common pleas of the county in which the injury was inflicted or in which the contract of employment was made if the injury occurred outside the state, or in which the contract of employment was made if the exposure occurred outside the state. If no common pleas court has jurisdiction for the purposes of an appeal by the use of the jurisdictional requirements described in this division, the appellant may use the venue provisions in the Rules of Civil Procedure to vest jurisdiction in a court. If the claim is for an occupational disease, the appeal shall be to the court of common pleas of the county in which the exposure which caused the disease occurred. Like appeal may be taken from an order of a staff hearing officer made under division (D) of section 4123.511 of the Revised Code from which the commission has refused to hear an appeal. The appellant shall file the notice of appeal with a court of common pleas within sixty days after the date of the receipt of the order appealed from or the date of receipt of the order of the commission refusing to hear an appeal of a staff hearing officer's decision under division (D) of section 4123.511 of the Revised Code. The filing of the notice of the appeal with the court is the only act required to perfect the appeal.

If an action has been commenced in a court of a county other than a court of a county having jurisdiction over the action, the court, upon notice by any party or upon its own motion, shall transfer the action to a court of a county having jurisdiction.

Notwithstanding anything to the contrary in this section, if the commission determines under section 4123.522 of the Revised Code that an employee, employer, or their respective representatives have not received written notice of an order or decision which is appealable to a court under this section and which grants relief pursuant to section 4123.522 of the Revised Code, the party granted the relief has sixty days from receipt of the order under section 4123.522 of the Revised Code to file a notice of appeal under this section.

(B) The notice of appeal shall state the names of the claimant and the employer, the number of the claim, the date of the order appealed from, and the fact that the appellant appeals therefrom.

The administrator of workers' compensation, the claimant, and the employer shall be parties to the appeal and the court, upon the application of the commission, shall make the commission a party. The party filing the appeal shall serve a copy of the notice of appeal on the administrator at the central office of the bureau of workers' compensation in Columbus. The administrator shall notify the employer that if the employer fails to become an active party to the appeal, then the administrator may act on behalf of the employer and the results of the appeal could have an adverse effect upon the employer's premium rates.

(C) The attorney general or one or more of the attorney general's assistants or special counsel designated by the attorney general shall represent the administrator and the commission. In the event the attorney general or the attorney general's designated assistants or special counsel are absent, the administrator or the commission shall select one or more of the attorneys in the employ of the administrator or the commission as the administrator's attorney or the commission's attorney in the appeal. Any attorney so employed shall continue the representation during the entire period of the appeal and in all hearings thereof except where the continued representation becomes impractical.

(D) Upon receipt of notice of appeal, the clerk of courts shall provide notice to all parties who are appellees and to the commission.

The claimant shall, within thirty days after the filing of the notice of appeal, file a petition containing a statement of facts in ordinary and concise language showing a cause of action to participate or to continue to participate in the fund and setting forth the basis for the jurisdiction of the court over the action. Further pleadings shall be had in accordance with the Rules of Civil Procedure, provided that service of summons on such petition shall not be required and provided that the claimant may not dismiss the complaint without the employer's consent if the employer is the party that filed the notice of appeal to court pursuant to this section. The clerk of the court shall, upon receipt thereof, transmit by certified mail a copy thereof to each party named in the notice of appeal other than the claimant. Any party may file with the clerk prior to the trial of the action a deposition of any physician taken in accordance with the provisions of the Revised Code, which deposition may be read in the trial of the action even though the physician is a resident of or subject to service in the county in which the trial is had. The bureau of workers' compensation shall pay the cost of the stenographic deposition filed in court and of copies of the stenographic deposition for each party from the surplus fund and charge the costs thereof against the unsuccessful party if the claimant's right to participate or continue to participate is finally sustained or established in the appeal. In the event the deposition is taken and filed, the physician whose deposition is taken is not required to respond to any subpoena issued in the trial of the action. The court, or the jury under the instructions of the court, if a jury is demanded, shall determine the right of the claimant to participate or to continue to participate in the fund upon the evidence adduced at the hearing of the action.

(E) The court shall certify its decision to the commission and the certificate shall be entered in the records of the court. Appeals from the judgment are governed by the law applicable to the appeal of civil actions.

(F) The cost of any legal proceedings authorized by this section, including an attorney's fee to the claimant's attorney to be fixed by the trial judge, based upon the effort expended, in the event the claimant's right to participate or to continue to participate in the fund is established upon the final determination of an appeal, shall be taxed against the employer or the commission if the commission or the administrator rather than the employer contested the right of the claimant to participate in the fund. The attorney's fee shall not exceed forty-two hundred dollars.

(G) If the finding of the court or the verdict of the jury is in favor of the claimant's right to participate in the fund, the commission and the administrator shall thereafter proceed in the matter of the claim as if the judgment were the decision of the commission, subject to the power of modification provided by section 4123.52 of the Revised Code.

(H)

(1) An appeal from an order issued under division (E) of section 4123.511 of the Revised Code or any action filed in court in a case in which an award of compensation or medical benefits has been made shall not stay the payment of compensation or medical benefits under the award, or payment for subsequent periods of total disability or medical benefits during the pendency of the appeal. If, in a final administrative or judicial action, it is determined that payments of compensation or benefits, or both, made to or on behalf of a claimant should not have been made, the amount thereof shall be charged to the surplus fund account under division (B) of section 4123.34 of the Revised Code. In the event the employer is a state risk, the amount shall not be charged to the employer's experience, and the administrator shall adjust the employer's account accordingly. In the event the employer is a self-insuring employer, the self-insuring employer shall deduct the amount from the paid compensation the self-insuring employer reports to the administrator under division (L) of section 4123.35 of the Revised Code.

(2)

(a) Notwithstanding a final determination that payments of benefits made to or on behalf of a claimant should not have been made, the administrator or self-insuring employer shall award payment of medical or vocational rehabilitation services submitted for payment after the date of the final determination if all of the following apply:

(i) The services were approved and were rendered by the provider in good faith prior to the date of the final determination.

(ii) The services were payable under division (I) of section 4123.511 of the Revised Code prior to the date of the final determination.

(iii) The request for payment is submitted within the time limit set forth in section 4123.52 of the Revised Code.

(b) Payments made under division (H)(1) of this section shall be charged to the surplus fund account under division (B) of section 4123.34 of the Revised Code. If the employer of the employee who is the subject of a claim described in division (H)(2)(a) of this section is a state fund employer, the payments made under that division shall not be charged to the employer's experience. If that employer is a self-insuring employer, the self-insuring employer shall deduct the amount from the paid compensation the self-insuring employer reports to the administrator under division (L) of section 4123.35 of the Revised Code.

(c) Division (H)(2) of this section shall apply only to a claim under this chapter or Chapter 4121., 4127., or 4131. of the Revised Code arising on or after the effective date of this amendment.

(3) A self-insuring employer may elect to pay compensation and benefits under this section directly to an employee or an employee's dependents by filing an application with the bureau of workers' compensation not more than one hundred eighty days and not less than ninety days before the first day of the employer's next six-month coverage period. If the self-insuring employer timely files the application, the application is effective on the first day of the employer's next six-month coverage period, provided that the administrator shall compute the employer's assessment for the surplus fund account due with respect to the period during which that application was filed without regard to the filing of the application. On and after the effective date of the employer's election, the self-insuring employer shall pay directly to an employee or to an employee's dependents compensation and benefits under this section regardless of the date of the injury or occupational disease, and the employer shall receive no money or credits from the surplus fund account on account of those payments and shall not be required to pay any amounts into the surplus fund account on account of this section. The election made under this division is irrevocable.

(I) All actions and proceedings under this section which are the subject of an appeal to the court of common pleas or the court of appeals shall be preferred over all other civil actions except election causes, irrespective of position on the calendar.

This section applies to all decisions of the commission or the administrator on November 2, 1959, and all claims filed thereafter are governed by sections 4123.511 and 4123.512 of the Revised Code.

Any action pending in common pleas court or any other court on January 1, 1986, under this section is governed by former sections 4123.514, 4123.515, 4123.516, and 4123.519 and section 4123.522 of the Revised Code.

Amended by 129th General Assembly File No.16, HB 123, §101, eff. 7/29/2011.

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