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INTRODUCTION

This case should have involved the application of settled workers' compensation law to particular facts, not the development of new law—and this Court should restore settled law and put the case back on that path for proper resolution in the courts below. This Court has already established sufficient general principles for deciding whether an employee's injury occurred in the course of and arising from her employment, R.C. 4123.01(C), and thus whether the employee may participate in the workers' compensation system. The Court's rules provide guidance for the frequent scenario of an employee's car accident when she is traveling and not "at" a fixed work site, addressing questions that arise over whether an employee is on the job, based on the particular facts of her employment and of the accident. *See, e.g., Ruckman v. Cubby Drilling, Inc.*, 81 Ohio St. 3d 117 (1998). The Court need not develop new law in this area, as the settled law works, and the many variations that occur must be resolved on each case's facts.

But here, the appeals court created a new legal standard involving an employee's subjective "intent"—including a purported "dual intent" to head to work and to do a personal errand at the same time—and this Court should reverse that improper legal approach. *See Friebel v. Visiting Nurse Ass'n*, 2013-Ohio-1646 ¶ 22 ("App. Op.," Ex. 4). This Court directs courts to look at objective facts, not subjective "intent." And this Court has already outlined a framework for considering whether an employee is a "fixed-situs" employee, and thus generally outside the scope of employment while traveling to work, under the "coming and going" rule, unless a "special hazard" exists and triggers coverage. *See Ruckman*, 81 Ohio St. 3d at 121-25. The Court has also acknowledged that non-fixed-situs employees, for whom travel is a constant part of the job, are generally, but not always, covered while traveling. *Lohnes v. Young*, 175 Ohio St. 291, 293 (1963). None of this Court's cases authorizes looking at subjective "intent," however, and the appeals court's novel approach should be reversed.

The appeals court's "dual intent" approach is not only unsupported by precedent, but also unworkable. Intent is a subjective mental state, and while some areas of the law necessarily address intent, it does not work in this context. As this Court observed long ago, "[s]urely the claimant cannot bring himself within the scope of his employment by the mere subsequent announcement that at the time of the accident he had in his mind an intent and purpose to do some act . . . that would thereafter be used in the service and possibly for the benefit of his employer." *Ashbrook v. Indus. Comm'n*, 136 Ohio St. 115, 120-121 (1939). That remains true today, so the appeals court's "intent" approach should again be rejected.

Further, the appeals court did not just use the wrong legal test, but also got the result wrong. It not only reversed the trial court's grant of summary judgment to the employer here, Defendant-Appellant Visiting Nurses Association of Mid-Ohio ("VNA"), but also essentially granted summary judgment to the employee-claimant, Plaintiff-Appellee Tamara Friebel. Friebel, a home health aide, was in an accident while she was transporting her children and some friends to a shopping mall. Friebel said—but VNA disputes—that the path she took was the same path she would have taken if she were heading to a patient's home. The appeals court said that, because Friebel "dually intended to both travel to her patient's home and drop her passengers off at the mall," App. Op. ¶ 21, she was "as a matter of law . . . in the course of her employment," *id.* ¶ 22, and the court further concluded that "as a matter of law, [Friebel] has established the causation prong" between her employment and injury, *id.* ¶ 27. Only after the appeals court concluded this, "as a matter of law," did it even look to questions of the "coming and going" rule and other aspects of the proper legal framework, holding that "as a matter of law [Friebel] was not a fixed-situs employee and the coming and going rule does not apply to prevent [Friebel] from participating in the workers' compensation fund." *Id.* ¶ 30. To be sure, the court

remanded for further proceedings, *id.* ¶ 34, but those proceedings mean little if the trial court must accept “as a matter of law” all of the above conclusions. Everything about that mistaken approach, from the novel “dual intent” standard to the conclusion, should be reversed.

Finally, the Court should remand to the trial court for fresh review under the proper legal standard, including the potential consideration of factual issues that might still lead to summary judgment for *either* party. The Administrator (“BWC”) takes no position on the ultimate outcome of this case, but just wants to see the right law applied. Here, VNA disputes whether Friebel was on the job during *any* travel, regardless of the disputed personal errand involved, because VNA says she was a fixed-situs employee and barred from participation by the coming-and-going rule. VNA Jur. Mem. at 10-11. VNA also says that the path Friebel took could not have been a direct path to her first patient that day anyway. *Id.* at 4-5. BWC does not know whether VNA or Friebel is right on those points, and perhaps either side could be entitled to summary judgment upon showing that these disputes are not material or not supported by a scintilla of evidence to dispute them. That is for the trial court to review.

In sum, we do not know whether Friebel was on the job when she was in an accident, and we do not know whether she was on the “right path” to work or on a personal detour. But we do know that the appeals court departed from the right legal path for resolving this case when it adopted a “dual intent” standard and that legal error can and should be fixed. This Court can and should put the case, and the law, back on the right legal framework, and let the lower courts see where that framework ultimately leads.

STATEMENT OF THE CASE AND FACTS

- A. **Friebel, a home health aide, left home with her children and friends, planning to drop them off at the mall before going to her first patient, but she got in a car accident before reaching the mall.**

Plaintiff-Appellee Tamara Friebel worked for Defendant-Appellant VNA as a home health aide. App. Op. ¶ 2. Her job was to visit patients in their homes, assess their health and medical needs, review medications, and so on. *Id.* She “typically visited six to eight patients” per weekday, and she “sometimes visited patients on weekends.” *Id.* She used her personal car to go home to home. On weekdays, VNA “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.” *Id.* ¶ 3.

On Saturday, January 22, 2011, Friebel had two clients to visit. Her first patient was one she had visited several times before, but she had never gone straight from her own house to that patient’s house, or could not recall doing so. VNA Jur. Mem. at 4 (citing Friebel Depo. at 59, 61-62). That Saturday, Friebel planned to drop her teenage daughter and son, as well as some friends of theirs, at a nearby shopping mall before travelling to the first patient’s house. App. Op. ¶ 4.

The parties dispute whether Friebel’s initial route was a plausible one if she were not planning the mall stop. Friebel says that she would have taken the same path she was generally on regardless of the mall stop, and that the only deviation would have been turning from her route onto the mall access road—a turning point she never reached. *Id.*; see Friebel Depo. at 55, BWC Supplement (“Supp.”) at S-3 (describing mall as “on the way” to patient’s home). VNA says, instead, that the route she took that day was not the most direct route from her home to the patient’s house, but was a route taken only to incorporate the mall stop. VNA Jur. Mem. at 4-5; see Friebel Depo. at 63, Supp. at S-5 (asking about shorter routes by mileage); Friebel Depo. Ex.

B-D, Supp. at S-6-S-8 (comparing shorter routes on maps). Friebel said she would not have taken a shorter route because it was winter, and the shorter route was a country road that might have more snow and ice than the route she took. Friebel Depo. at 63, Supp. at S-5.

Friebel was stopped at a light just before reaching the mall when another car struck Friebel's car from behind. App. Op. ¶ 5. She says she suffered a cervical sprain as a result. (VNA also disputed whether any injury occurred, separate from whether any injury was employment-related, *id.* ¶ 6, but that issue is not part of this appeal.)

Friebel applied for workers' compensation benefits for the injury. The Ohio Bureau of Workers' Compensation ("BWC") initially allowed the claim. *Id.* ¶ 7. VNA appealed to the Industrial Commission of Ohio ("Commission"), and a district hearing officer denied the claim, finding that Friebel was a "fixed-situs employee and did not begin her substantial employment until she arrived at the patient's house" and, thus, was not injured in the course of, and arising out of, her employment. *Id.* Friebel appealed next, and a staff hearing officer vacated that determination. *Id.* The staff hearing officer reasoned that because VNA reimbursed for mileage and travel time on weekends, Friebel's entire travel that day was in the course of and arising out of her employment. *Id.* The Commission refused VNA's further appeal.

B. The trial court granted summary judgment to VNA.

VNA appealed to the Richland County Common Pleas Court under R.C. 4123.512, which provides for de novo review of whether Friebel is entitled to participate in the workers' compensation system. On VNA's motion, the trial court granted summary judgment. *See* Order on Motion for Summary Judgment (Richland County Com. Pl., Jun. 22, 2012) ("Com. Pl. Op."), Appx. Ex. 5. The court did not address whether Friebel was a "fixed-situs" employee, whether she was "coming and going," or whether her general route could have been a plausible route to her first patient. *Id.*

The trial court reasoned that Friebel was on a “personal errand” in taking her children and their friends to the mall, and that alone was enough to deny participation. Specifically, the court said that “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.” Com. Pl. Op. at 2. “[T]hat Ms. Friebel was typically paid for travel time and mileage to and from work on weekends is immaterial,” the Court added, because the undisputed facts demonstrate that she was not traveling to work at the time of the injury; she was traveling to the mall.” *Id.*

C. The appeals court reversed, finding that Friebel had “dual intentions” that were both personal and work-related, and holding that Friebel’s injury was work-related “as a matter of law.”

The Fifth District Court of Appeals reversed, in a 2-1 decision. App. Op. ¶ 21. The appeals court’s decision involved a discussion of Friebel’s “dual intentions” while travelling, *id.*, and the court concluded that Friebel was acting in the course and scope of her employment “as a matter of law” at the time of the accident. *Id.* ¶¶ 22, 27.

The court began its analysis by discussing Friebel’s route and her intent along that route. First, the court said that she “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.” *Id.* ¶ 20. The court did not mention VNA’s dispute with Friebel over the initial choice of route. VNA says that “there were at least two other more direct routes available for [Friebel] to take,” VNA Jur. Mem. at 4, and that she “bypassed the two, more direct routes to get to the Richland Mall” first, *id.* at 5. VNA also says that Friebel’s deposition testimony supports its view. *Id.*; see Supp. at S-5-S-8.

The appeals court then reasoned that Friebel “had dual intentions when she left her home,” including an intent to take her passengers to the mall and to go to her first patient. App. Op. ¶ 21. “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." *Id.* The court found 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." *Id.* Thus, said the court, she was still within one of her "dual intentions"—namely, to go her patient's house—and "was not yet in the process of any 'frolic and detour' or personal errand when her vehicle was hit from behind." *Id.* In other words, Friebel "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." *Id.* The court therefore concluded that "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," she was "in the course of employment since the accident occurred prior to [Friebel's] deviation from the route to the patient's house." *Id.*

The court further concluded that Friebel "was injured while engaged in specific acts [VNA] required her to do regularly as part of her weekend employment—traveling to her patient's home. Thus, as a matter of law, [Friebel's] injury was received in the course of her employment with [VNA]." *Id.* ¶ 22.

The court also held that the accident was "arising from" her employment, as well as in the course of employment. It explained that 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* [v. *Mayfield* 49 Ohio St. 3d 275, 280 (1990)]." App. Op. ¶ 27.

Having already found that Friebel met both prongs of the test, the court turned to, and rejected, VNA's argument that Friebel was a fixed-situs employee and barred from participation

under the coming-and-going rule. *Id.* ¶¶ 28-30. The court opined that her “travel to and from the patients’ homes was a fundamental and necessary part of her employment duties.” *Id.* ¶ 29. Thus, it “conclude[d]” that “as a matter of law appellant was not a fixed-situs employee and the coming and going rule does not apply to prevent [Friebel] from participating in the workers’ compensation fund.” *Id.* ¶ 30.

The appeals court remanded for proceedings consistent with its decision.

Judge Wise dissented, objecting primarily to the “dual intent” approach. He explained that he did “not find any case law to support the concept of dual intent.” App. Op. ¶ 36 (Wise, J., dissenting). He further noted that “intent or purpose analysis becomes very difficult when trying to determine what is in the mind of the employee.” *Id.* Instead of intent, he said, “a strict application of the facts best determines whether the employee was in the course of employment or on a personal errand.” *Id.* Looking at those facts rather than intent, he opined that “the facts indicate that the employee was headed to the mall to drop off” her passengers, and “[o]nly after she had dropped off her passengers at the mall was she going to begin her travel in the course of her employment.” *Id.* Thus, he concluded, “there could be no ‘frolic and detour’ from a course upon which she had not yet set out.” *Id.*

VNA appealed, and this Court granted review. The BWC, which was automatically named as an appellee under the Court’s rules, moved to re-align as an appellant. *See* BWC Motion to Realign As Appellant (filed Oct. 8, 2013). The BWC explained that it did not take sides on the ultimate resolution of the case, but it disagreed with the court’s use of “dual intent,” so it sought a reversal. *Id.* The Court granted that motion. *See* Entry (Oct. 29, 2013), Appx. Ex. 2.

ARGUMENT

Appellant BWC's Proposition of Law:

An injury to an employee while traveling is compensable under workers' compensation law only if an employee's injury was sustained "in the course of and arising out of" the employment, as defined in R.C. 4123.01(C). That inquiry turns on the objective facts of the situation, and not upon an employee's subjective intent.

The BWC does not ask the Court to make new law, but simply to re-affirm established law and to reject the novel "dual intent" approach that the appeals court used. The Court's existing case law is enough to resolve cases such as this, and consideration of "intent" at all—let alone "dual intent"—sows confusion. The "dual intent" approach would confuse existing doctrine and thus decrease predictability in the workers' compensation system. That would be bad for the BWC, for the litigants, and for the courts. Moreover, the "dual intent" approach has no countervailing benefits. Such an approach could just as easily thwart legitimate claimant entitlement as it can grant entitlement where none is warranted. Thus, the Court should reverse the appeals court's view and reject "dual intent."

Further, the appeals court did not just state a wrong legal standard, but also reached the wrong result when it held that Friebel "as a matter of law" suffered injury both in the course of and arising from her employment. The court essentially resolved the case in Friebel's favor, and that was premature, at best. Even if summary judgment in VNA's favor was premature, an affirmative summary judgment in Friebel's favor was also improper. That is especially so in light of VNA's arguments that Friebel was a fixed-situs employee to begin with, or that she took an entire route that was for a personal errand, not a work-related route that would have involved only a slight detour at a point not yet reached. Either of those issues, on which the BWC takes no position, could resolve the case regardless of the dispute that the appeals court reached.

Finally, in light of all that, the Court should, in addition to vacating the Fifth District's judgment, remand directly to the trial court for further proceedings. The trial court should apply the Court's established framework, freed of the unnecessary and conflicting dual-intent approach. The court could perhaps grant summary judgment to either Friebel or VNA, and could perhaps allow clarification from further discovery before doing so. But in any event, more work should be done at the trial-court level before the case can be reviewed or resolved on appeal.

A. The Court should re-affirm the established framework for analyzing whether injuries to employees while traveling are within the course of their employment, and it should reject any conflicting dual-intent analysis.

Re-affirming existing law, and rejecting the appeals court's conflicting approach, is the heart of this case. Reference to an employee's intent, and, worse yet, allowing for some hybrid work-and-personal "dual intent," clashes with the established case law for analyzing injuries to employees while traveling. Established case law shows that the analysis of whether an employee is in the course of employment at the time of injury focuses on objective facts regarding the employment relationship and the employee's actions, not intent. This is true whether the traveling employee is a fixed-situs employee or a non-fixed-situs employee. That approach is all that is needed here, and the dual-intent approach improperly interfered with that.

1. Established law governs questions of employees injured while traveling.

Of course, the Court's case law starts with the statute, which asks whether the employee was injured while "in the course of" and "arising out of" the employment. R.C. 4123.01(C). "The test of right to award from the insurance fund under the Workmen's Compensation Law, for injury in the course of employment is . . . whether the employment had some causal connection with the injury, either through its activities, its conditions, or its environments." *Indus. Comm'n v. Weigant*, 102 Ohio St. 1, syllabus ¶ 2 (1921).

The Court summarized and clarified how this general test applies more specifically to traveling employees in *Ruckman v. Cubby Drilling, Inc.*, 81 Ohio St. 3d 117 (1998). In *Ruckman*, the Court reiterated that “the phrase ‘in the course of employment’ limits compensable injuries to those sustained by an employee *while performing a required duty in the employer’s service.*” *Id.* at 120 (citing *Indus. Comm’n v. Gintert*, 128 Ohio St. 129, 133-134 (1934)) (emphasis added). Further, “[a]n injury is compensable if it is sustained by an employee while that employee *engages in activity* that is consistent with the contract for hire and logically related to the employer’s business.” *Ruckman*, 81 Ohio St. 3d at 120 (citing *Kohlmayer v. Keller*, 24 Ohio St. 2d 10, 12 (1970)) (emphasis added).

Ruckman provides a full roadmap for assessing claims of injury by employees traveling on the road. First, it directs a court to start with the question whether the employee works at a fixed location—and is thus called a “fixed-situs employee”—or is a traveling employee. If the employment is fixed, the coming-and-going rule generally bars recovery. “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*, 81 Ohio St. 3d at 119. By contrast, traveling employees such as “salesm[e]n, servicem[e]n or insurance adjuster[s]” “have no fixed place of employment,” *Lohnes v. Young*, 175 Ohio St. 291, 293 (1963), and are “continuously in the discharge of [their] duties” when traveling, *Indus. Comm’n v. Heil*, 123 Ohio St. 604, 606-607 (1931).

Second, a court must determine if an exception to one of the general rules applies. Both rules—i.e., fixed-location employees are not covered while traveling to work, but traveling employees are—have exceptions. The fixed-location employee might still satisfy the

requirements of “in the course of employment” of R.C. 4123.01(C) if the travel falls within exceptions detailed in *Ruckman*. These include exceptions under the “totality of the circumstances” (often called the *Lord* test after *Lord v. Daugherty*, 66 Ohio St. 2d 441 (1981)), the “zone of employment,” and the “special hazard” exceptions, *see, e.g., MTD Prods., Inc. v. Robatin*, 61 Ohio St. 3d 66 (1991). *See Ruckman*, 81 Ohio St. 3d at 121-23. Conversely, for traveling employees, although they are generally covered for accidents during the whole trip, they are not covered if “a distinct departure on a personal errand” interrupts the travel. *See, e.g., Lippolt v. Hague*, 2008-Ohio-5070 ¶ 17 (10th Dist.) (internal citation and quotation marks omitted).

Thus, the established framework *starts* with the categorization of the employee, and looks to possible exceptions within either category, with an eye always on the ultimate statutory prongs of “in the course of” and “arising out of” employment. R.C. 4123.01(C). That framework looks at those factors on the facts, not on an employee’s intent. As detailed below, the dual-intent approach is not just an unnecessary graft onto the existing framework, but it conflicts with that framework.

2. Any dual-intent approach conflicts with established law in several ways.

The appeals court erred in looking to intent at all, and it further erred in putting that intent-based approach at the beginning of its analysis. It relegated established tests such as the coming-and-going rule to essentially a post-script after already concluding that Friebel was injured in the course of, and arising out of, her employment, based on her “intent” to head to a work site after dropping off passengers at the mall. That approach conflicts with established law in several distinct, though overlapping, ways.

First, the appeals court’s approach is wrong in even looking to the employee’s intent as the requisite inquiry for whether the employee was in the course of her employment. This Court has always held that this phrase is analyzed in terms of the employee’s actions, not intent.

Second, any dual-intent test conflicts with established analysis to the extent it offers a single-question inquiry instead of review of the Court’s several factors, as workers’ compensation cases are too varied for a one-size-fits-all approach. In other words, the dual-intent doctrine offers the false promise of a single, simple solution to divergent facts. That clashes with this Court’s repeated reminders that “a reviewing court must examine the separate and distinct facts” of every workers’ compensation case, *Fisher v. Mayfield* 49 Ohio St. 3d 275, 280 (1990), and that “no one test or analysis can be said to apply to each and every factual possibility,” *Ruckman*, 81 Ohio St. 3d at 122 (internal citation and quotation marks omitted).

This case shows how a focus on intent, and especially the suggestion that an employee can travel with dual intents while retaining an employment connection, lets courts and litigants gloss over the “separate and distinct” facts of a given case by reducing the analysis to a single inquiry—namely, did the travel have some business ingredient as part of an employee’s “intent”? Here, the Fifth District, by asking and answering whether Friebel had “dual intentions,” or both personal and business goals while traveling, supplanted the orderly process of deciding first whether an employee is fixed-situs or not and then applying the corresponding exceptions. That dual-intent approach too easily cast aside the long-evolved tests that require courts and fact-finders to make the necessary factual distinctions common in workers’ compensation cases. That is especially shown here by the sequence of the appeals court’s analysis, which already starts concluding in Friebel’s favor “as a matter of law” based on its intent analysis, before finally looking at the coming-and-going rule and the issue of fixed-situs employment. *Compare App.*

Op. ¶¶ 22, 27 (concluding that FriebeI satisfied both the “course of employment” and “arising out of employment” prongs), with ¶¶ 28-30 (rejecting fixed-situs status and rejecting application of coming-and-going rule).

Third, a dual-intent analysis specifically conflicts with the established multi-factor framework for analyzing whether injuries to employees while traveling “arise out of” the employment. Just as dual intent improperly trumps a multi-pronged approach to “course of employment,” so, too, does it narrow the multi-factored “arising out of” element of R.C. 4123.01(C) to a single “but-for” inquiry. That element “contemplates a causal connection between the injury and the employment,” not a simple but-for causal relationship. *Ruckman*, 81 Ohio St. 3d at 121-122 (internal citation and quotation marks omitted). The “arising out of” element examines “(1) the proximity of the scene of the accident to the place of employment, (2) the degree of control the employer had over the scene of the accident, and (3) the benefit the employer received from the injured employee’s presence at the scene of the accident.” *Id.* at 122 (internal citation and quotation marks omitted) (the *Lord* factors). If the only question is whether the travel involved business and personal purposes, these three inquiries reduce to one. That is exactly what the Fifth District majority did while ostensibly applying these factors. The majority concluded that FriebeI “would not have been present at the scene of the accident” but for her employment duties. App. Op. at ¶ 27. Of course, any commuter could satisfy this test; most are only on the road during the morning or evening rush because they are headed to work. The dual-intent approach swallows the more nuanced *Lord* inquiry and upends the coming-and-going rule.

Moreover, the dual-intent framework would turn the special-hazard rule into a single-prong test. The special-hazard rule is an exception to the coming-and-going rule. It applies where “(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.*, 61 Ohio St. 3d at 68. Focusing on whether employee travel had two purposes turns this two-step inquiry into one, asking *only* whether the employee would have been at the scene of the accident but for her employment. That single question eliminates the second prong outlined in *MTD Products*, deleting the “distinctive-risk” inquiry. That deletion also suggests that all, or almost all, commuters could meet the test, as it is that second prong that separates the average commuter from the less-common traveler who can claim coverage under this exception.

Fourth, another doctrinal problem with dual intent is that it permits virtually *any* business ingredient to turn an otherwise personal trip into travel covered by the workers’ compensation system. To be sure, the Fifth District said only that Friebel “dually intended” personal and business errands on her trip, App. Op. ¶ 21, and it did not attempt to quantify those dual intents into a primary or secondary intent, or to rule out de minimis intents, etc. But by not quantifying it, it implicitly *allowed* for any minor business purpose to bring someone’s trip into being employment-related. After all, the court did not deny that Friebel had a personal purpose; it endorsed that characterization by saying she had simultaneous “dual intentions.” The court expressly said that a personal intent, blended with some business purpose, “does not disqualify” someone “from being in the course of employment.” That means, implicitly, that someone is *qualified* as long as *any* business “intent” is present.

But it would not be a workable standard to allow any inconsequential business purpose to control the question whether the trip is business or personal under the established framework of fixed-location and traveling employees. Indeed, the Court long ago rejected the premise that any business ingredient can transform otherwise personal travel into travel covered under the

workers' compensation system. "Surely the claimant cannot bring himself within the scope of his employment by the mere subsequent announcement that at the time of the accident he had in his mind an intent and purpose to do some act . . . that would thereafter be used in the service and possibly for the benefit of his employer." *Ashbrook v. Indus. Comm'n*, 136 Ohio St. 115, 120-121 (1939). Thus, the appeals court's approach is unworkable as well as contrary to precedent.

Finally, the doctrinal uncertainty that dual intent would inject into this area of law would harm all workers' compensation litigants. While the appeals court invoked it to favor Friebel here, a dual-intent approach could easily disadvantage claimants, too, because the test is more malleable than the established framework for analysis of such cases. For example, in *Crockett v. HCR Manorcare, Inc.*, 2004-Ohio-3533, ¶ 24 (4th Dist.), the claimant was injured while "fulfilling a personal purpose" that happened to be "on the way to her next worksite." The Fourth District reversed summary judgment for the claimant and specifically sidestepped what should be the first question—was this claimant a fixed-site worker or a traveling employee. *See id.* ¶ 28. If the court had first answered the fixed-versus-traveling question, the result may have been different and may have favored the claimant. Fact-based rules, rather than intent-based, are better for everyone.

In sum, the dual-intent approach is contrary to precedent and is unworkable, and it should be rejected.

B. The appeals court's mistaken approach led it to reach the wrong judgment here, as it overlooked critical factors that could lead to a different outcome independent of the dispute over Friebel's "intended" turn into the mall.

The appeals court did not just adopt the wrong legal test in ways that conflict with established law, as explained above. It also reached the wrong result in this case. That further confirms why the legal approach is mistaken, and it also explains why reversal of the judgment is

needed. And the court's procedural approach—granting judgment to Friebel in effect, rather than merely vacating the summary judgment VNA won in the trial court—was mistaken as well.

The court's application of its dual-intent analysis to the facts of Friebel's case reveals several problems, culminating in its conclusion that Friebel's trip—a trip that was cut short to include only the leg heading to the mall with four passengers—was “in the course of her employment” as a “matter of law.” App. Op. ¶ 22. In several ways, the underlying factual record shows that the case should not have begun and ended with Friebel's “dual intent” to head to her first patient's house after going to the mall.

First, by going directly to the question of whether the intended turn-off into the mall would have been a detour from an otherwise-assumed work trip, the majority glossed over the factual dispute about whether the overall route Friebel traveled, or the time she traveled on the day of the accident, would have been the same but for her actions in arranging to drop the children at the Richland County Mall. App. Op. ¶ 20. The majority concludes that she acted in the course and scope of her employment “as a matter of law,” but on the broader route question, it cited only Friebel's deposition testimony that her route that day would have been the same regardless of the trip to the mall. *Id.* ¶ 22. But VNA disputes that. See VNA Jur. Mem. at 3-4. And VNA can point to record evidence to establish at least a dispute that renders questionable whether Friebel wins that point “as a matter of law.” Exhibits to Friebel's deposition—maps of the area around Mansfield—show what appear to be at least two more direct routes between Friebel's house and her patient's house. See Friebel Depo Exs. B-D, Supp. at S-6-S-8 (showing, on map B, the route Friebel planned to take and started on; and showing, on maps C and D, shorter routes, by mileage, between her house and her work destination at first patient's house).

That is not to say that the BWC believes that VNA's view prevails as a matter of law, as perhaps Friebel can show a material dispute over whether the seemingly shorter route carried more risk of snow and ice or had other issues. *See* Friebel Depo at 63, Supp. at S-5. That is why it was ultimately for the trial court to assess whether there was a material factual dispute in that regard. To be sure, the trial court was not necessarily remiss in leaving that dispute about the overall route unresolved, as *its* resolution made the issue irrelevant. By finding the mall trip to be a personal errand that would have taken Friebel out of the scope of employment even if she would otherwise have been in the scope, the trial court did not need to resolve it. But the appeals court, having reversed on that point, was then obliged to address it. Instead, by saying her "intent" to go to a work site after the mall ended the matter, the appeals court overlooked a potentially decisive issue.

Second, the appeals court's focus on dual intent distorted the analysis of whether the coming-and-going rule should cover Friebel because it led the majority to focus on Friebel's travel reimbursement. *See* App. Op. ¶¶ 24, 29. That analysis conflicts with the directive in *Ruckman* that travel reimbursement should not "serve as a leading factor in the course-of-employment inquiry." 81 Ohio St. 3d at 121 n.1. Cleaving to dual intent as a conclusive factor led the majority to overlook considerations such as "whether [she] . . . commence[d] [her] substantial employment duties only after arriving at a specific and identifiable work place," whether she had "arrived at a place where the work was to be performed," whether Friebel's travel "significantly" increased her "exposure to traffic risks" above typical commuting, *id.* at 119, 122, 125, or whether travel between home and a client and travel between clients are both part of the workday, *see Gilham v. Cambridge Home Health Care, Inc.*, 2009-Ohio-2842, ¶ 29 (5th Dist.) (Hoffman, J., dissenting) (explaining that he would allow coverage for home health

aide traveling between patients' homes, but perhaps exclude coverage between aide's home and first or last patient's home). The creation of a dual-intent theory led the appeals court to the wrong questions, not just the wrong answers.

Third, the Fifth District's dual-intent focus meant that it did not consider evidence that could otherwise have been relevant regarding whether Friebel was a fixed-situs employee to begin with, in which case none of her travel from home to her first site—regardless of a mall-directed detour—would be covered. While the appeals court said that travel was plainly required, App. Op. ¶ 29, that is not enough. (And, as noted above, the court was wrong in addressing this last, when it had already concluded both core statutory prongs in Friebel's favor, based on "intent.") This Court has explained that a worksite might change as often as "daily," but the employees may be subject to the coming-and-going rule. *Ruckman*, 81 Ohio St. 3d at 120. Friebel's worksites did change, but they were arguably more static than the fixed worksites in *Ruckman*, which changed every three to ten days. *Id.* at 124; *see Gilham*, 2009-Ohio-2842, ¶ 18 (finding home health aide was fixed-situs employee because work was done at multiple patient sites). Friebel testified that the patient's house where she was headed on the day of the accident was a worksite she visited eight times in the prior two weeks. *See* Friebel Depo. at 57, Supp. at S-4. That question was not critical in the trial court, as with the overall route issue, because the trial court ruled for VNA on the errand-to-mall issue. But the appeals court, having reversed on that point (albeit improperly), was obliged to address it, and to do it on *Ruckman*'s terms, not after resolving "intent" as conclusive. Again, the "dual intent" view led the appellate court to ask the wrong questions and reach the wrong answers.

And intertwined with all of these mistaken points was the court's repeated conclusion that Friebel won each factor, prong, or test "as a matter of law." On all points, even if VNA's

trial-court victory on summary judgment should have been vacated, that did not mean that Friebel was entitled to summary judgment. Indeed, Friebel said in opposing summary judgment that “genuine issues of material fact exist” as to whether she was “in the course and scope of employment.” Friebel Mem. in Opp. to VNA Motion for SJ at 1. And even now, she says that she “expect[s] that upon remand a jury trial will be held,” and she says that the appeals court never gave summary judgment to her, not that it did so properly. Friebel Mem. in Opp. to Jur. at 12-13. But, as explained above, the appeals court, though it did not formally order the procedural conclusion that summary judgment should be entered, said “as a matter of law” that Friebel was in the course and scope of employment. That legal conclusion leaves no room for the trial court to do anything but enter summary judgment, and that conclusion was wrong.

And while that misstep was a procedural one, the BWC clarifies that its view is based the *substance* of the several workers’ compensation factors and law that the appeals court overlooked in flipping fully from judgment for VNA to judgment for Friebel. Thus, the BWC expresses no view on VNA’s purely procedural argument that Friebel was ineligible for summary judgment because she did not move for summary judgment in the trial court. That is not to say that it disagrees either, but only that the procedural issue is not the type of issue BWC is concerned with; workers’ compensation law is. Even if Friebel was procedurally eligible for summary judgment, or even if she had cross-moved, she could not have succeeded—at least not solely by showing her “intent,” without somehow establishing, *at a minimum*, that she was truly not a fixed-situs employee and was on a legitimate straight-to-work path. That is not apparent here, and that is why the case should be remanded for proper resolution.

C. A remand is necessary for trial proceedings free of the dual-intent framework, but vacating the judgment below does not necessarily mean that VNA wins instead, as either side could still win.

Whether Friebel is entitled to participate in the workers' compensation system remains an open question. The BWC's concern in this appeal is twofold—to protect the development of the law that applies to thousands of claimants, and to preserve a process that lets fact-finders distinguish different types of employee travel. The dual-intent doctrine thwarts both. It upends settled doctrine for evaluating cases involving employee travel and it encroaches on fact-finders' roles to distinguish, for example, employee travel that is truly like a commute from employee travel that is core to the job. But once that problem is resolved, it is up to the trial court to assess whether summary judgment is appropriate for either party. The BWC expresses no view on that resolution, other than to stress that there is trial-court work to be done, so remand should be to that court, not to the appeals court to re-review what the trial court did the first time.

Whether Friebel is a fixed-location employee or not, whether she would have travelled to the mall regardless of her work duties, and what route she would have travelled for work if her daughter did not need to go shopping are all questions a fact-finder has yet to resolve. Evidence about Friebel's contract, work rules about her travel to and from patient homes, the frequency that Friebel's travel routes changed, travel-reimbursement policies when travel combined work and personal errands, the number and geographic spread of Friebel's patients, and other information might all bear on whether Friebel has a right to participate in the workers' compensation system.

The answers to those issues—including the legal meaning of any or all of that evidence and the factual answers to questions about Friebel's route and what she would have done if she did not have passengers—are not resolvable though the shortcut of dual intent as a matter of law. Friebel might well prevail on remand, and again, the BWC takes no position about what further

fact development might mean for the ultimate outcome in this case. In addition, that further fact development does not necessarily mean a trial, as perhaps further factual development through further discovery could lead to a successful summary judgment motion by either side. Or it might not even require further factual discovery, as perhaps either side could frame the issue, based on the already-developed record, in a way that summary judgment is already possible. Again, that is best for the trial court to sort out.

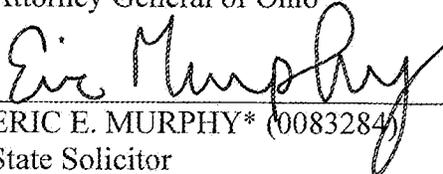
But for the sake of the law and the workers' compensation system, the BWC urges the Court to reverse the judgment below and remand to the common pleas court for proceedings consistent with established statutory and case law and freed from the unnecessary dual-intent overlay.

CONCLUSION

For these reasons, the BWC asks the Court to vacate and remand for further proceedings in the common pleas court.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I certify that a copy of the foregoing Merit Brief was served by U.S. mail this 9th day of

December, 2013, upon the following counsel:

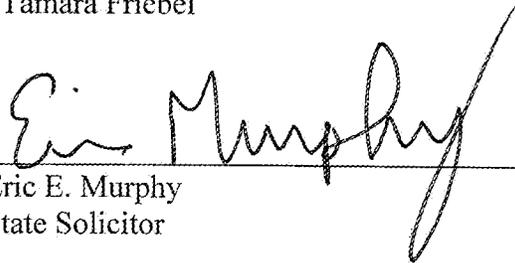
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APPENDIX

EXHIBIT 1

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
JUN 03 2013
CLERK OF COURT
SUPREME COURT OF OHIO

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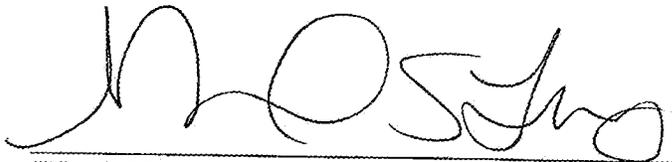
COUNSEL FOR APPELLEE
TAMARA FRIEBEL

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 Friebe ("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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CERTIFICATE OF SERVICE

A copy of the foregoing Notice of Appeal of Appellant Visiting Nurse Association of Mid-Ohio's has been served this 31st day of May 2013, by ordinary mail, upon:

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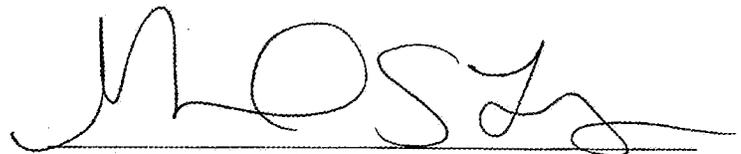
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MICHAEL S. LEWIS, ESQ. (0079101)

EXHIBIT 2

FILED

OCT 29 2013

CLERK OF COURT
SUPREME COURT OF OHIO

The Supreme Court of Ohio

Tamara L. Friebel

Case No. 2013-0892

v.

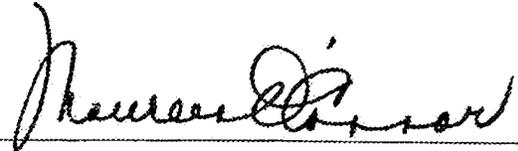
ENTRY

Visiting Nurse Association of Mid Ohio, et
al.

This cause is pending before the court as an appeal from the Court of Appeals for Richland County.

Upon consideration of the motion to realign as appellant of appellee, Stephen P. Buchrer, Administrator, Ohio Bureau of Workers' Compensation, it is ordered by the court that the motion is granted. Stephen P. Buchrer, Administrator, Ohio Bureau of Workers' Compensation is designated an appellant for this appeal.

(Richland County Court of Appeals; No. 2012-CA-56)



Maureen O'Connor
Chief Justice

EXHIBIT 3

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

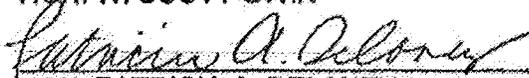
Defendant-Appellee

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

EXHIBIT 4

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

L. H. Frary
Deputy Clerk

Gwin, J.

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

FACTS & PROCEDURAL HISTORY

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

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

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

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

{15} 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.

{16} 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.

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

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

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

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

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

Summary Judgment

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

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

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

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

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

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

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

Workers' Compensation

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

"In the Course of" Employment

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

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

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

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

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

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

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

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

"Arising Out of" Employment

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

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

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

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

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

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

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

"Coming and Going" Rule

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

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

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

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

Special Hazard Exception

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

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

Conclusion

{¶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.

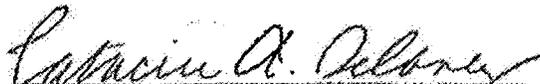
{¶34} For the foregoing reasons, the judgment of the Court of Common Pleas of Richland County is reversed, and the cause is remanded to the court for further proceedings in consistent with this decision.

By Gwin, J., and

Delaney, P.J. concur

Wise, J., dissents


HON. W. SCOTT GWIN


HON. PATRICIA A. DELANEY

HON. JOHN W. WISE

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.

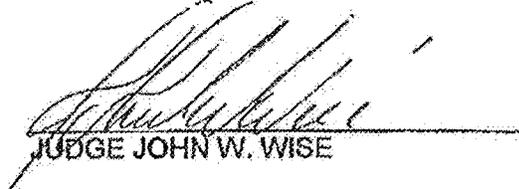

JUDGE JOHN W. WISE

EXHIBIT 5

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 Reis



Judge James DeWeese