

ORIGINAL

**IN THE SUPREME COURT OF OHIO**

**CASE NO. 2013-0892**

**TAMARA FRIEBEL  
Plaintiff-Appellee,**

**-vs-**

**VISITING NURSE ASSOCIATION OF MID-OHIO;  
STEPHEN P. BUEHRER, ADMINISTRATOR,  
OHIO BUREAU OF WORKERS COMPENSATION  
Defendant-Appellants.**

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

**MERIT BRIEF OF  
PLAINTIFF-APPELLEE, TAMARA FRIEBEL**

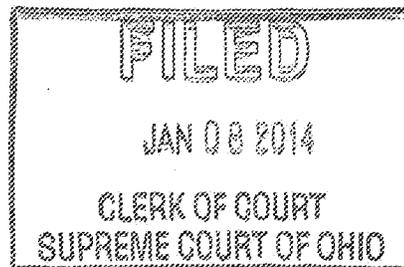
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## INTRODUCTION

This appeal arises out of an employer's determined efforts to undermined a seemingly unobjectionable administrative determination that a traveling nurse is entitled to participate in the workers compensation system for a neck sprain she sustained while driving toward to a patient's home. There is no dispute that she was wearing her uniform, carrying all her necessary medical equipment, and otherwise fully complying with her employer's rules and regulations. Although she had agreed to drop some passengers off at a mall along the way, she had yet to depart from her usual weekend route to the assignment. But for an intervening automobile accident, she would have reached her destination, provided the necessary medical care, and enabled Defendant-Appellant, Visiting Nurse Association of Mid-Ohio, to generate a bill for her services.

In an effort to avoid any responsibility for the neck sprain, Defendant has devised a novel theory that is unprecedented in Ohio. According to this misguided logic, workers compensation benefits are only available to employees who are injured while they are engaged solely and exclusively in furthering the employer's business. The General Assembly has never seen fit to adopt such an unyielding restriction, and for sound reasons. As long as the injury was "received in the course of" and "arising out of" the employment as required R.C. 4123.01(C), it does not matter whether the worker's activities also furthered a personal objective.

Contrary to what Defendant appears to believe, the Fifth District did not adopt a revolutionary new "dual intent" doctrine in the opinion that was issued below. The majority had remarked merely that: "These facts present a unique situation in which [Plaintiff] had dual intentions when she left her home on the morning of Saturday January 22, 2011." *Friebel v. Visiting Nurse Assoc. of Mid-Ohio*, 2013-Ohio-1646, 991

N.E. 2d 279 (5<sup>th</sup> Dist.). A reference was simply being made to the unusual – and undisputed – circumstances of the accident, nothing more. The appellate court proceeded to dutifully analyze the facts under the familiar “arising out of” and the “in the course of” employment tests imposed by R.C. 4123.01(C). *Id.*, ¶15-27. The result that was rendered should not have been surprising, as the Industrial Commission had reached the same unassailable conclusion after analyzing the same facts under long-accepted workers’ compensation standards. Defendant’s misguided objections therefore should be overruled.

## STATEMENT OF CASE AND FACTS

### A. THE ADMINISTRATIVE PROCEEDINGS

In this straightforward workers' compensation claim, a visiting nurse maintains that she had been injured in a rear-end automobile accident while driving to a patient's home. *BWC Claim No. 11-803658*. A District Hearing Officer initially accepted Defendant's position that Plaintiff was a "fixed situs" employee, who had not yet begun her substantial employment duties at the time of the accident. *Complaint, Exhibits, p. 4-5*. The claim was therefore denied preliminarily. *Id.*

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

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

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

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

## B. THE ADMINISTRATIVE APPEAL

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

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

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

Plaintiff explained that:

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

*Id.*, p. 20.

Each morning, Plaintiff received her schedule that identified the patients who

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

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

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

On Saturday January 22, 2011, Plaintiff's first patient was a woman she had visited approximately eight times earlier. *Friebel Depo.*, pp. 49-50 & 56-57. She lived on Park Avenue, West in Ontario, Ohio. *Id.*, pp. 52-54. Although Plaintiff did not recall driving directly from her home to the patient's residence on a weekday, she had done so previously on the weekend. *Id.*, pp. 61-62. That was when the patient required her injections. *Id.*, p. 62. The route Plaintiff had taken on those occasions took her directly by Richland Mall on Lexington-Springmill Road. *Id.*, pp. 61-62 & 70, Exhibits B & E.

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

Plaintiff's daughter had shopping she needed to do that Saturday afternoon. *Friebel Depo.*, p. 55. Plaintiff agreed to drop her off, as well as her son and their two friends, at Richland Mall along the way. *Id.*, pp. 54-55. Her intention was then to continue on to the patient's home in Ontario. *Id.*, p. 73. The mall is situated off

Lexington-Springmill Road, and was only a few miles away from the patient's residence. *Plaintiff's Memorandum, Exhibits B, C, D, and E.*<sup>2</sup> As far as Plaintiff could recall, this was the first time she had taken passengers with her while she was traveling to see a patient. *Friebel Depo., p. 77.*

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

In an Order dated June 22, 2012, the trial judge granted summary judgment in favor of Defendant. Plaintiff filed her Notice of Appeal on July 18, 2012. In a decision that was released on April 19, 2013, the Fifth District reversed the final order and remanded the administrative appeal for further proceedings. *Friebel, 2013-Ohio-1646.* Defendant is now seeking to undermine that ruling, as well as the Industrial Commission's approval of the claim, in this Court.

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

## ARGUMENT

Defendant's two Propositions of Law will be separately addressed in the remainder of this Brief. Neither possesses merit.

**PROPOSITION OF LAW I: THE DOCTRINE OF  
"DUAL INTENT" DOES NOT EXIST IN OHIO  
WORKERS' COMPENSATION LAW, AND THE  
APPROPRIATE REVIEW IS WHETHER OR NOT  
CLAIMANT'S INJURIES WERE RECEIVED "IN THE  
COURSE OF" AND" ARISING OUT OF" HER  
EMPLOYMENT WITH VNA**

**A. THE DUAL INTENT DOCTRINE**

Defendant's primary contention under this Proposition of Law is: **"THE 'DUAL INTENT' DOCTRINE HAS PREVIOUSLY BEEN CONSIDERED AND REJECTED BY THIS COURT."** *Defendant's Merit Brief*, p. 7 (emphasis original). The only authority that has been cited in support of this emphatic declaration is *Cardwell v. Industrial Commn.*, 155 Ohio St. 466, 99 N.E. 2d 306 (1951). That decision never mentions "dual intent" in any form. There was no dispute in that instance that the manager of a used car dealership "and his wife left their home in his employer's automobile on a trip which was admittedly strictly personal to [him] and his wife and in no respect connected with or in the furtherance of his employer's business." *Id.*, 155 Ohio St. at 466-467. They were heading east when they were struck by a train at a railroad crossing. *Id.*, at 467. In an effort to ascribe a work-related purpose to the accident, the manger claimed that he was "on duty 24 hours a day" and still had to turn on the lights in the parking lot as instructed by his employer. *Id.*, at 467-468. Not surprisingly, this Court rejected these contentions. *Id.*, at 468. Since he was traveling away from the parking lot when the collision occurred, the trip could not have acquired a work-related purposed until he returned home. *Id.*, at 468-469.

Defendant never argued below that *Cardwell*, 155 Ohio St. 466, has any relevance

in this particular proceeding, which is entirely understandable. This Court stopped well short of suggesting that there can only ever be one purpose to an employee's activities. Under the facts of that case, there had been no plausible explanation for how the manager was furthering the employer's business while heading away from the used car parking lot.

Defendant's hysterics over the purported "dual intent doctrine" are designed to convince this Court that an egregious legal error was perpetrated that must now be corrected. But nothing could be further from the truth. The Fifth District simply observed that Plaintiff possessed "dual intentions when she left her home[,] " which is an undisputed fact. *Friebel*, 2013-Ohio-1646, ¶21. Far from establishing any novel new legal standards, the majority observed that: "Simply because [Plaintiff] 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 [her] from being in the course of employment since the accident occurred prior to [her] deviation from the route to the patient's house." *Id.*, ¶21. The *Friebel* decision thus recognizes that dual intentions are irrelevant in an appeal that has been brought under R.C. 4123.512. The only issue to be resolved is whether a compensable injury or occupational disease was sustained in the course of and arising out of the scope of employment. *State ex rel. Liposchak v. Industrial Comm'n. of Ohio*, 90 Ohio St. 3d 276, 278-279, 2000-Ohio-73, 737 N.E. 519, 522; *Ortiz v. G&S Metal Prods. Co.*, 8<sup>th</sup> Dist. No. 91811, 2009-Ohio-1781, 2009 W.L. 1019878 (Apr. 16, 2009) p.\*2; *Robinson v. AT&T Network Sys.*, 10<sup>th</sup> Dist. No. 01AP-817, 2002-Ohio-1455, 2002 W.L. 479762 (Mar. 29, 2002) pp. \*1-2.

The dissenting judge misread the majority's analysis, and fell under the sway of Defendant's diversionary logic. He accepted the specious theory that because no Ohio courts have ever accepted a "dual intent" standard, that must mean that an employee

can only ever have one objective for an activity. *Friebel*, 2013-Ohio-1646, ¶36 (Wise, J., dissenting). But as the undisputed evidence in the record demonstrates, that is not so in this case. Plaintiff's travels to the point of the accident not only enabled her to drop the teenagers off at the mall, but also brought her on a direct path toward her work assignment. *Friebel Depo.*, pp. 69-73. Because the back roads were a concern as a result of the wintertime conditions, she would have taken the same route even if she did not have any passengers. *Id.*, pp. 61-63. As the majority properly recognized, Plaintiff's dual intentions did not necessarily disqualify her from participating in the workers' compensation fund so long as she could still establish a sufficient causal connection to her job responsibilities as required by R.C. 4123.01(C). *Starkey v. Builders FirstSource Ohio Valley, L.L.C.*, 130 Ohio St. 3d 114, 118, 2011-Ohio-3278, 956 N.E. 2d 267, ¶17 ("As long as the injury has a causal connection – whether direct or aggravated – to the claimant's employment, the claimant is entitled to benefits.")

The Fifth District's opinion thus adheres to establish precedent, which has long recognized that the claimant must be "engaged in a purely personal pursuit or errand" in order for the claim to be denied. *Kohlmayer v. Keller*, 24 Ohio St. 2d 10, 11, 263 N.E. 2d 231, 232-233 (1970) (emphasis added) (holding that employee had fractured his neck in the course and scope of employment while attending a company sponsored picnic). Undoubtedly for this reason, several respected legal treatises have cited *Friebel* as consistent with the prevailing standards governing "coming and going" injuries. 99 *CORPUS JURIS SECUNDUM, WORKERS' COMPENSATION*, §§415 & 1208; 94 *OHIO JURISPRUDENCE 3D, WORKERS COMPENSATION*, §§129-131 & 142; *BALDWIN'S OHIO PRAC., OHIO TORT LAW, WORKERS' COMPENSATION (2d Ed.) §42:105.35*. As far as the undersigned counsel has been able to determine, only Appellants are complaining that the Fifth District "create[d] its own, new legal doctrine[.]" *Defendant's Merit Brief*, p. 6.

But their motivations are not difficult to discern.

It is thus the Defendant that is seeking to substantially alter Ohio workers' compensation law by imposing an artificial "single intent" restriction. Even where (as here) the employer allows the employees to combine personal errands with work responsibilities, those who do so will discover with dismay when they are injured in the process that they have unwittingly forfeited their right to benefits. As but one example, coverage would have to be denied to a plant worker who was seriously injured when nearby equipment exploded while he was taking a drink from a fountain. The same harsh result would be necessary if a worker was struck by an out-of-control tow motor while she was returning her husband's emergency phone call with her supervisor's permission. The sole objective of Defendant's ill-conceived "single intent" restriction is to allow countless workers' compensation claims to be defeated in a manner that the General Assembly has never approved.

#### **B. THE PROPER TEST**

Plaintiff is in agreement with Appellant Stephen P. Buehrer, Administrator, Ohio Bureau of Workers Compensation ("Bureau"), that Plaintiff's workers' compensation claim should be analyzed under the familiar "in the course of" and "arising out of" standard established by R.C. 4123.01(C). *Bureau's Merit Brief*, pp. 10-12. The claimant's purely "subjective intent" should never control, as all the surrounding facts and circumstances must be considered in determining whether the injury or fatality is sufficiently work-related. *Id.*

In accordance with these standards, employers often challenge a claim that an injury or occupational disease is work-related in summary judgment proceedings by submitting affidavits, depositions, or other Rule 56(E) compliant proof establishing that the claimant was violating a company directive, engaged in a strictly personal venture,

or had otherwise sustained the condition outside the employment environment. But no such evidence was offered below, as Defendant's Motion cited nothing more than Plaintiff's uncontradicted deposition testimony. There was thus no dispute in the evidentiary record, considered in its entirety, that she was headed along her normal weekend route to the patient's home on Park Avenue West with the intention of completing her work assignment, as well as dropping her passengers off at the mall along the way. *Friebel Depo.*, pp. 54-55, 58-59, 61-62 & 70-74.

Those were the same unquestioned facts that were examined by a Staff Hearing Officer, who approved the workers compensation claim. *Complaint, Exhibits*, p. 8. Notwithstanding Defendant's vigorous objections, the Industrial Commission refused to disturb this sound ruling. *Id.*, p. 10. As directed in R.C. 4123.512(C) and 4123.92, the Ohio Attorney General is supposed to be defending the Industrial Commission against the employer's appeal. *Wasil & Mastrangelo, OHIO WORKERS' COMP. LAW* (2009-10 Ed.) 981, §14:85. But this Court is now being advised - even though none of the employer's officials, managers, or employees are apparently willing to contradict Plaintiff in a sworn statement - that the State "does not know whether [Defendant] or [Plaintiff] is right on those points[.]" *Bureau's Merit Brief*, p. 3.

Oddly, the Bureau appears to be arguing that a remand is necessary for a do-over in the trial court. *Bureau's Merit Brief*, pp. 3 & 18-20. But that would be a pointless exercise, given that Plaintiff's deposition testimony has never been contradicted through either defense witnesses or the circumstances surrounding the claim. Defendant had represented to both the trial judge and the appellate court that the facts were "undisputed." *Motion of Defendant Visiting Nurse Association of Mid-Ohio for Summary Judgment (Defendant's Motion for Summary Judgment)*, p. 11; *Reply of Defendant Visiting Nurse Association to Plaintiff's Memorandum in Opposition to*

*Defendant's Motion for Summary Judgment*, p. 3; *Brief for Defendant-Appellee, Visiting Nurse Association of Mid-Ohio ("Defendant's Court of Appeals Brief")*, p. 16. The very purpose of Civ. R. 56 is to weed out unfounded claims and defenses. *Pettiford v. Aggarwal*, 126 Ohio St. 3d 413, 419, 2010-Ohio-3237, 934 N.E. 913, 919, ¶36. Far too much cost and effort already has been expended upon the travelling nurse's neck sprain claim, which should be brought to a prompt and just conclusion.

Just like the Commission's Staff Hearing Officer, the Fifth District carefully analyzed the admitted facts under the time-tested "in the course of" and "arising out of" employment standard. *Friebel*, 2013-Ohio-1646, ¶15-27. This Court has explained that:

Whether there is a sufficient "causal connection" between an employee's injury and his employment to justify the right to participate in the Worker's[sic] Compensation Fund 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 (1981), syllabus. This requirement has been explained in terms of showing a causal nexus between the employment and the injury, with a focus on the time, place, and circumstances of the injury. *Parrott v. Industrial Commn.*, 145 Ohio St. 66, 69, 60 N.E. 2d 660, 662 (1945); *Fisher v. Mayfield*, 49 Ohio St.3d 275, 277, 551 N.E.2d 1271, 1274 (1990); *Ruckman v. Cubby Drilling, Inc.*, 81 Ohio St.3d 117, 120, 1998-Ohio-455, 689 N.E.2d 917. While an employee is performing the obligation of his contract of employment, he/she is considered to be in the course and scope of employment. *Fletcher v. Northwest Mech. Contr., Inc.*, 75 Ohio App.3d 466, 471, 599 N.E.2d 822 (6<sup>th</sup> Dist. 1991). The Eighth District court has further cautioned that:

Because of the liberal standard for approving workers' compensation claims, we agree the necessary causal connection is something less than that required to show proximate cause. Although that standard is not clear, the

most that need be found is that the injury was foreseeable from the employer's conduct; there is no need, in a worker's compensation case, to find the conduct negligent. [footnotes omitted].

*Caponi v. Convention & Visitors Bur. of Cleveland*, 8<sup>th</sup> Dist. No. 81456, 2003-Ohio-1954, 2003 W.L. 1900956, \*2 (Apr. 17, 2003).

Ohio courts have long recognized that there are no "bright-line test[s] to be mechanically applied in evaluating the facts of a case." *Smith v. City of Cleveland*, 8<sup>th</sup> Dist. No. 78889, 2001 W.L. 1612101 (Dec. 13, 2001), p.\*4 (citation omitted). "An employee need not necessarily be injured in the actual performance of work for the employer." *Griffith v. City of Miamisburg*, 10<sup>th</sup> Dist. No. 08AP-557, 2008-Ohio-6611, 2008 W.L. 5235168 (Dec. 16, 2008), p. \*3, ¶ 9 (holding that police officer who was injured while playing basketball at an offsite training academy was entitled to benefits). When the pertinent facts are in dispute, the issue is ultimately one for the jury to decide. *Osborne v. Lyles*, 63 Ohio St.3d 326, 329-330, 587 N.E.2d 825 829 (1992); *Smith*, 2001 W.L. 1612101, p. \*4.

There is thus no reason to fear, as the Bureau purportedly does, that the workers compensation fund will soon be depleted if a claimant can attach "any inconsequential business purpose" to an otherwise personal trip and collect undeserved benefits. *Bureau's Merit Brief*, p. 15. In no uncertain terms, the Fifth District reaffirmed that the "received in the course of" and "arising out of" requirements must be satisfied in every case, regardless of whether there was more than one purpose to the worker's activities. *Friebel*, 2013-Ohio-1646, ¶15. That legislative precondition for coverage has served well over the last several decades, and there is no legitimate justification for judicially modifying R.C. 4123.01(C) with the contrived "single intent" test.

### C. PLAINTIFF'S WORK-RELATED ACTIVITIES

Later in its Brief, Defendant appears to appreciate that Plaintiff must be "engaged in a purely personal pursuit or errand" in order for benefits to be denied. *Kohlmayer*, 24 Ohio St. 2d at 11. Citing no record evidence at all, the employer has declared that: "Claimant's mission at the time of the accident was solely personal." *Defendant's Merit Brief*, p. 10 (emphasis original). As has been its penchant throughout these proceedings, the employer is simply ignoring Plaintiff's undisputed deposition testimony. Plaintiff had actually explained to defense counsel that:

Originally, because Shelby and Ontario is probably 15 minutes apart, my daughter had shopping to do, and since it was on the way I was going to drop them off at the mall, continue on to my patient's home. [emphasis added]

*Friebel Depo.*, p. 55. Moments later in the deposition, Plaintiff confirmed again that her plan had been to return to Lexington-Sawmill Road and head Southbound toward the patient's home after leaving the mall. *Friebel Depo.*, pp. 58-59 & 73. As is hardly uncommon, Plaintiff had simply decided to kill two birds with one stone by dropping the teenagers off while en route to the patient's home, which was nearby the mall. *Id.*

Lacking any evidence to contradict Plaintiff's sworn testimony, Defendant has persisted in playing fast-and-loose with the evidentiary record. For instance, the employer has represented that:

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.)]

*Defendant's Merit Brief*, p. 4 (footnote omitted). Indeed, the Fifth District has been chastised for finding that the visiting nurse was taking her "normal route" since she had purportedly testified that "she had never gone from her home to the patient's home."

*Id.*, p. 4, fn. 2 (citations omitted).

But Defendant is basing these misleading assertions upon Plaintiff's description

of her weekday practices. The travelling nurse had initially expressed that she was experiencing difficulty remembering the patient she was supposed to treat that Saturday afternoon, which is understandable given that she never reached the assignment as a result of the accident. *Friebel Depo.*, pp. 58-61. Once the confusion was rectified, she explained that she did not recall leaving her house to visit this particular patient “except for on the weekends.” *Id.*, pp. 61-62. That was when the patient required her injections. *Id.*, p. 62. Plaintiff then testified without equivocation that:

Q. So you have left your house before January 22<sup>nd</sup>, 2011 to go to this patient’s house directly?

A. Yes.

Q. Did you take a route different than the route shown on Exhibit B?

A. Not that I’m aware of, no.

Q. And the route on Exhibit B, it looks like you leave Shelby and you eventually end up on Lexington – Springmill Road; is that right?

A. Correct. [emphasis added]

*Id.*, p. 62. Deposition Exhibit B displays the route that leads from Plaintiff’s residence, past Richland Mall, and ends at the patient’s home. *Friebel Depo.*, pp. 58-59. Exhibit E confirms how this course took Plaintiff and her passengers right around the shopping center on the way to the work assignment. *Id.*, pp. 69-73. Given that the accident occurred on a Saturday afternoon, the Fifth District was indeed correct that Plaintiff was following her “normal” weekend route as she had in the past without any passengers. *Friebel*, 2013-Ohio-1646, ¶4

Defendant has also cited Plaintiff’s deposition testimony, and the exhibits that had been marked, in support of the proposition that: there were at least two other more direct routes available for the claimant to take.” *Defendant’s Merit Brief*, p. 4

(excessive emphasis original, misplaced citations omitted). But that was not the witnesses' testimony, it is merely the opinion of defense counsel. *Id.* Plaintiff had explained, and no one has disputed, that she opted against taking a back road that Defendant's counsel had identified due to the hazardous wintertime conditions. *Friebel Depo.*, pp. 63 & 66-67. Risking the more dangerous route would have been contrary to her employer's interests, as she might not have reached the patient at all. If her decision to take the well-maintained highways (State Routes 39 and 309) had been the slightest bit questionable, any one of the employer's officials or managers could have so stated in an affidavit. The fact that none was submitted during the summary judgment proceedings speaks volumes.

#### **D. THE FROLIC AND DETOUR EXCEPTION**

Plaintiff has always acknowledged that she had planned a brief detour in her trip to the patient's house, but has steadfastly maintained that the accident occurred before she turned off the normal route to the patient's home and into the mall parking lot. *Friebel Depo.*, pp. 54-55 & 73. Consistent with the totality of circumstances test, Ohio courts have never held that a planned "frolic and detour" is sufficient without more to preclude a finding that an injury was sustained in the course and scope of employment. The pertinent question has always been whether the claimant's activities were sufficiently work-related at the moment that the injury was suffered. *Parrott*, 145 Ohio St. at 69. There is thus no need for this court to engage in any "frolic and detour" analysis since that part of the trip was never reached.

This sound principle was confirmed in *Houston v. Liberty Mut. Fire Ins. Co.*, 6<sup>th</sup> Dist. No. L-04-1161, 2005-Ohio-4177, 2005 W.L. 1926513 (Aug. 12, 2005), where the court reversed summary judgment in favor of an employer, concluding that genuine issues of material fact existed whether the employee was on her employer's business at

the time of the accident. The evidence demonstrated that the employee had gone to lunch and a Wal-Mart on a personal errand, but she had resumed and was traveling along her original route when the accident occurred. *Id.* at pp. \*7-8. The court observed that “when a ‘frolic and detour’ is ended and the employee returns to his or her original route, the employee is again within the scope of employment.” *Id.* at p. \*7.

Similarly, in *Switzer v. Sewell Motor Express Co.*, 12<sup>th</sup> Dist. No. CA2009-02-026, 2009-Ohio-3825, 2009 W.L. 2370838 (Aug. 3, 2009), the court concluded that genuine issues of material fact existed whether the employee had completed his detour at the time of an accident in which he sustained injury. At the time, the employee was returning to his direct route after dropping off a co-worker at a courthouse. *Id.* at p. \*4.

In this case, the evidence that the Plaintiff was not engaged in a frolic and detour at the time of her accident is even stronger than in *Houston* and *Switzer*. Here, the visiting nurse never actually left her normal weekend route of travel to her first patient. *Friebel Depo.*, pp. 61-62 & 73-74. This was not only the same route, *i.e.*, no detour from her travel path, it was a route and travel for which the Defendant was paying Plaintiff. *Id.*, pp.28-29.

#### **E. FIXED SITUS EMPLOYMENT**

Although the notion that a “visiting nurse” who spends her day traveling from one patient’s home to another could be described as “fixed situs” strains credulity, Defendant remains undaunted. *Defendant’s Merit Brief*, pp. 14-17. The employer insists that in *Ruckman*, 81 Ohio St. 3d 117, this Court held that “one can be a fixed-situs employee even if the employee’s schedule varies from day to day.” *Defendant’s Merit Brief*, p. 15. The theory then goes that such status has nothing to do with where the job duties are to be performed (as the phrase unmistakably implies) and extends to all workers who perform a variety of tasks each day. *Id.*, p. 15. In an attempt to

demonstrate that traveling nurses really are fixed situs employees, Defendant has cited Plaintiff's testimony that she would conduct different types of assessments and furnish an assortment of nursing services depending upon the patient's needs. *Id.*, pp. 15-16.

Rather obviously, Defendant has grossly misconstrued *Ruckman*. As one would expect, fixed situs status does indeed focus "on whether the employee commences his substantial employment duties only after arriving at a specific and identifiable work place designated by his employer." *Id.*, 81 Ohio St. 3d at 119 (citation omitted). A travelling nurse is the antithesis of this categorization. The drilling crew riggers in *Ruckman* performed their duties every day and all day at the same drilling sites, although they were relocated from time to time. *Id.*, 117-118. In contrast to Plaintiff, they were not expected to travel between sixty job sites a week. *Friebel Depo.*, pp. 24-25.

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

[W]e do not believe the trial court viewed the evidence in the light most favorable to [plaintiff]. Her place of employment was not the business premises of [her employer], but was rather [plaintiff]'s own house, automobile, and the homes of the patients she visited on behalf of her employer. In this situation, it is clear that the employer has waived any direct

control of [plaintiff]'s driveway as well as her "tools of the trade," such as her automobile. The trial court also believed that her employer received no benefit from [plaintiff]'s presence in her driveway that night, but it can also be reasonably inferred that her employer was actually receiving the benefit of her travel in the course of her employment and that her travel had not ended at the time of her injury.

*Id.* at 287.

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

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

*Id.* See also *Bennett v. Goodremont's, Inc.*, 6<sup>th</sup> Dist. No. L-08-1193, 2009-Ohio-2920, 2009 W.L. 1719355 (June 19, 2009), p. \*3 ("Consideration of an employee's "substantial employment duties" requires more than just a look at what the employee was doing

when the incident that precipitated the claim occurred; rather, it requires examination of the employee's duties as a whole and consideration of whether such duties were such as to make travel to and from the employee's home an integral part of the employee's employment.").

Defendant's authorities do not support its contrived position. In *Crockett v. HCR Manorcare, Inc.*, 4<sup>th</sup> Dist. No. 03CA2919, 2004-Ohio-3533, 2004 W.L. 1486082 (June 24, 2004), the plaintiff sustained injuries in an accident that occurred while she was between two of her employer's work sites. She was not reimbursed for her travel expenses between the two locations and she was not compensated for her travel time. *Id.* at p. \* 1. These facts distinguish *Crockett* and its holding from the facts of this case. Here, Plaintiff did not have fixed work sites. *Friebel Depo.*, pp. 23-26. In fact, she rarely went to her employer's office. *Id.* Her work requires her, unlike the plaintiff in *Crockett*, to travel to patients' homes. *Id.* And Plaintiff received mileage reimbursement. *Id.*, pp. 28-29. In view of these critical factual distinctions, *Crockett* does not compel a similar conclusion in this matter.

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

Although Defendant has been insisting throughout these proceedings that *Gilham v. Cambridge Home Health Care, Inc.*, 5<sup>th</sup> Dist. No. 2008 CA 00211, 2009-Ohio-2842, 2009 W.L. 1677838 (June 15, 2009), is directly on-point, the Staff Hearing

Officer distinguished the case on the grounds that the nursing aide had been injured in her automobile but was not being paid or reimbursed for her travel time. *Complaint, Exhibits, p. 8*. That was indeed a key consideration, as the Fifth District took care to explain that:

\*\*\* In each case, the appellant's billable time begins when the appellant reaches the residence and terminates when appellant leaves the residence. Furthermore, appellant is not compensated for travel time or travel expenses between client visits. Appellant sustained her injuries in an automobile accident which occurred between client visits, i.e. after she left one client's residence, picked up a sandwich for lunch and was traveling to the second client's home. Moreover, appellant had no duties to perform outside of the homes of her patients. As noted by appellee, appellant "commenced her 'substantial employment duties' only after arriving at her patient's residence and ended those duties when she left the residence." Therefore, we find that the trial court properly concluded that appellant was a fixed-situs employee. \*\*\* [emphasis added]

*Gilham*, 2009-Ohio-2842, ¶18. If the aide had been paid for traveling from one appointment to another, a very different result undoubtedly would have been reached in *Gilham*.

Roughly two years after *Gilham* was issued, the Fifth District returned to the question of whether a visiting nurse could qualify as a fixed situs employee in *Stair v. Mid Ohio Home Health Ltd.*, 5<sup>th</sup> Dist. No. 2010-CA-0114, 2011-Ohio-2351, 2011 W.L. 1944267 (May 13, 2011). The nurse's job duties were indistinguishable from those that had been assigned to the instant Plaintiff, as she was paid not only for the time spent at the clients' homes, but also for her travels. *Id.*, ¶4. The court found these facts to be significant in determining whether she qualified as a fixed-situs employee. *Id.*, ¶254. The panel unanimously rejected the employer's attempts to invoke the "coming and going rule" after she slipped and fell while picking up her paycheck at the office. *Id.*, ¶24-27. Triable issues of fact were found to exist over whether the injury arose out of

and was sustained in the course of her employment. *Id.*, ¶28-36.

The *Stair* opinion was not only discussed at length in Plaintiff's briefing below, but was also prominently cited in the Fifth District's decision. *Friebel*, 2013-Ohio-1646, ¶16, 19 & 29. To its credit, Defendant is no longer attempting to distinguish or criticize the unerring ruling. *Defendant's Merit Brief*, pp. 7-21. It should thus be evident, if it was not substantially earlier, that it is not the appellate court that is attempting to rework established workers' compensation law. The Fifth District was dutifully abiding by established precedent.

This Proposition of Law should be rejected since, as both the Industrial Commission and the Fifth District properly found, an employee's "dual intentions" does not automatically exclude a claim for workers' compensation benefits.

**PROPOSITION OF LAW II: THE APPELLATE COURT ERRED IN *SUA SPONTE* ENTERING SUMMARY JUDGMENT ON APPEAL IN FAVOR OF THE NON-MOVING CLAIMANT AND AGAINST THE MOVING DEFENDANT VNA AND, IN DOING SO, CONSTRUING FACTS IN A LIGHT MOST FAVORABLE TO PREVAILING CLAIMANT.**

The Second Proposition of Law is fundamentally flawed. Defendant had made the strategic decision to invoke Civ. R. 56 in the proceedings below, and now is in no position to complain that certain findings were rendered in favor of Plaintiff as a matter of law. *Defendant's Merit Brief*, pp. 17-21. It seems to have been forgotten that the employer had assured the trial judge that an immediate termination of the claim was justified because "the facts are undisputed[.]" *Defendant's Motion for Summary Judgment*, p. 11. Likewise, the Fifth District was advised that "the facts are undisputed that the accident occurred as Plaintiff was en route to complete the personal errand of dropping off her passengers (who were not even co-workers) at the mall." *Defendant's Court of Appeals Brief*, p. 16. But now that Plaintiff has prevailed upon some aspects of

her claim as a result of the "undisputed facts," Defendant is insisting that an opportunity should have been afforded to submit even more evidence despite the absence of any request for such an accommodation. *Defendant's Merit Brief*, pp. 17-21.

The employer's reliance upon *Marshall v. Aaron*, 15 Ohio St. 3d 48, 472 N.E. 2d 335 (1984), is misplaced as that decision concerns the complete extinguishment of all claims that had been brought by a non-moving plaintiff against a non-moving defendant. Only the co-defendants had sought summary judgment. At no point did this Court hold that appellate judges are precluded from resolving issues that have been raised in the motion adversely to a movant who has represented, on multiple occasions, that the facts are undisputed.

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

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

*Id.*, 27 Ohio St. 3d at 28. There can be no serious disagreement that the instant Defendant represented that the facts were "undisputed" and never requested an opportunity to supplement the record. Nor has the employer identified any additional evidence that was omitted for some justifiable reason. If defense counsel actually did decide to withhold relevant proof from the trial court, they only have themselves to blame for the predictable result that followed.

In *State ex rel. Lowery v. Cleveland*, 67 Ohio St. 3d 126, 616 N.E. 2d 233 (1993),

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

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

*Id.*, at 128.

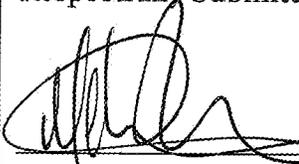
Here, Defendant moved for summary judgment, represented that the facts were “undisputed,” and specifically sought a determination of whether Plaintiff’s injuries were sustained in the course of, and arose out of, her job responsibilities as required by R.C. 4123.01(C). *Defendant’s Motion for Summary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

Since Defendant has no right to dispute “undisputed” facts only after an unfavorable ruling has been rendered, particularly when such an opportunity was never requested, this Proposition of Law should be rejected and the Fifth District should be affirmed.

**CONCLUSION**

Because the Fifth District's reversal of the trial court's untenable entry of summary judgment in this relatively unique workers compensation proceedings is unassailable, this Court should reject the two Propositions of Law.

Respectfully Submitted,



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**CERTIFICATE OF SERVICE**

I certify that a copy of the foregoing **Brief** has been sent by e-mail on this 8<sup>th</sup> day

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