

ORIGINAL

In The
Supreme Court of Ohio

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

SUPREME COURT OF OHIO
CASE NO.: 2013-0892

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

APPELLANT VISITING NURSE ASSOCIATION OF MID-OHIO'S
REPLY BRIEF

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JAN 28 2014
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SUPREME COURT OF OHIO

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Reply Re: Claimant's "Introduction" and "Statement of Facts and Case"

The first sentence of the claimant's merit brief misleads this Court. Claimant falsely states that there was a "seemingly unobjectionable administrative determination," intimates that this only goes to her right to participate for a "neck sprain," and that the injury "was sustained while driving towards a patient's home." First, the administrative determination was not "unobjectionable." The first hearing officer determined claimant was a fixed situs employee acting outside her duties of employment and ordered the claim denied. [Tr.R.#6 (Cl. Complaint and Exhibits attached thereto.)] The second incorrectly allowed the claim. [Id.] Both of the administrative decisions, however, were irrelevant to the trial court as workers' compensation appeals are heard de novo. See, R.C. 4123.512. Claimant's reliance upon an administrative decision throughout her brief bears no weight on the matter and is a red herring meant to mislead the Court. Second, this matter does not involve a right to participate for just a neck sprain. It also goes to claimant's right to participate under the Act for the conditions of substantial aggravation of pre-existing C4-5 and C5-6 stenosis (which were administratively denied and are pending on claimant's appeal in a Richland County Case 2012 CV 0294) and any other future injuries and compensation claimant may seek against VNA. Third, it is undisputed that at the time of the accident claimant was headed to the mall, not a patient's home. After the mall, she then intended on going to the patient's home. Claimant's first sentence sets the tone for claimant's inaccurate recitation of facts and law littered throughout her brief.

Claimant falsely contends that "it does not matter whether the workers' activities also furthered a personal objective." [Cl.Merit Br. at 1.] It always matters if a workers' activity was personal or work related. The pertinent question is: whether the employee was injured in the course of and arising out of her employment? If the activity performed at the time of injury was

personal, then the injury is not compensable. Claimant wants this Court to ignore that she was driving to the mall, not a patient's home, when her accident occurred. Her intent is clearly stated within claimant's merit brief at page 5, where she summarizes her deposition testimony stating:

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. ***

(Emphasis added.) Claimant's testimony evidences she had a *future* intent to act for the benefit of VNA only after she completed her personal errand of taking her friends and family to the mall. Claimant's personal mission was not complete when her vehicle was rear-ended with her friends and family still in the vehicle. Transporting family and friends created a distinct departure/deviation from the duties of claimant's employment. Claimant's deviation existed from the moment she left her home. She never entered the course of her employment with VNA. The focus of this Court's examination must be on the major activity claimant was accomplishing at the time of her injurious event – i.e., taking friends and family to the mall -- not her alleged subsequent intent to perform work related activity at some point in the future.

Claimant's "Introduction" and "Statement of Facts and Case" sections present no truthful information to this Court evidencing her accident on the way to the mall was in the course of or arising out of her employment with VNA.

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

Reply Re: Proposition of Law I

Reply re: "A. The Dual Intent Doctrine"

Claimant falsely contends it is an undisputed fact that she had dual intentions when she left her home. [Cl.Merit. Br. at 8.] Neither the Bureau nor VNA has conceded she had dual intent. As argued above, claimant had one intent at the time of her accident. Claimant had the present intent of driving her passengers to the mall. Had the accident not occurred, Claimant alleges that subsequent to dropping her passengers at the mall she then intended to go to a patient's home. Claimant's future intent to go anywhere is irrelevant. Claimant likely intended to pick her passengers up from the mall that day, drive everyone home, and maybe eat dinner. Claimant's future intentions are not relevant to the analysis. An employee's intent to do work in the future does not make their present non-work related activity compensable. The Court's analysis must focus on: whether claimant's activity of driving family and friends to the mall at the time of the accident entitles her to compensation under the Act? VNA contends it does not.

Claimant's statement that *Cardwell v. Indus. Comm.*, 155 Ohio St. 466, 99 N.E.2d 306, 44 Ohio Op. 424 (1951) was not addressed in prior proceedings is correct, but misleadingly so. Until the Fifth District issued its opinion regarding the dual intent doctrine, VNA had no cause to address the case or dual intent. No parties argued the "doctrine," because the doctrine does not exist in Ohio. Further, her assertion that *Cardwell* does not reject the dual intent doctrine is wrong. *Cardwell*, 155 Ohio St. 466 reversed the lower court's decision in *Cardwell v. Indus. Comm.*, 98 N.E.2d 326, 59 Ohio L. Abs. 125 (1st Dist. 1950) which relied upon the extra-

jurisdictional “dual intent” case of *Marks' Dependents v. Gray*, 251 N.Y. 90, 167 N.E. 181 (1929). From the proceedings in *Cardwell* until the Fifth District’s decision in *Friebel*, no other Ohio court referred to the rejected dual intent doctrine.

From claimant’s brief it is clear she agrees with VNA’s position that there is and should be no dual intent doctrine. The only pertinent question is whether the injury was received in the course of and arising out of her employment. [Cl.MeritBr. at 8.] Although stating the doctrine does not exist, claimant continuously (and nonsensically) argues she had dual intent of simultaneously going to the mall and a patient’s home. She cites to *Starkey v. Builders FirstSource Ohio Valley, LLC*, 130 Ohio St.3d 114, 2011-Ohio-3278, ¶17, for the proposition that possessing dual intent makes a claim compensable if one of claimant’s intentions has some tenuous causal connection to her job duties. [Cl.Merit Br. at 9.] *Starkey*, however, has nothing to do with the pending issue of dual intent. *Starkey* determined a claimant in a 4123.512 action may present differing theories of causation – direct or aggravation – regardless of what was presented administratively. Claimant’s reliance on *Starkey* is unfounded and misleading.

To support her specious position of simultaneously working and being on a personal errand, claimant argues that a claimant must be “engaged in a purely personal pursuit or errand” for the claim to be denied. [Cl.Merit Br. at 9, citing to *Kohlmayer v. Keller*, 24 Ohio St.2d 10, 11 (1970).] Claimant’s quotation is taken out of context.¹ The cherry-picked quotation in *Kohlmayer*

¹ The whole quotation reads: “An injured employee need not be in the actual performance of his duties in order for his injury to be in the ‘course of employment,’ and thus compensable. *Marlow v. Goodyear Tire & Rubber Co.* (1967), 10 Ohio St. 2d 18, 23; *Sebek v. Bronze Co.* (1947), 148 Ohio St. 693, 698. Statements to the contrary which have been uttered by this court, e. g., *Indus. Comm. v. Lewis* (1932), 125 Ohio St. 296, *Ashbrook v. Indus. Comm.* (1939), 136 Ohio St. 115, and *Indus. Comm. v. Ahern* (1928), 119 Ohio St. 41, must be read in light of the particular facts of those cases. In all three cases the injury occurred during a period when claimant was *engaged in a purely personal pursuit or errand.*” (Emphasis added.)

simply noted that claimants in the three cases, just referenced by the court, were injured during purely personal pursuits. *Kohlmayer* does not support the proposition for which it was cited.

Further, *Kohlmayer* is substantially different from the instant matter. In *Kohlmayer* the claimant was injured at a company sponsored picnic. The Court found the picnic was substantially related to the contract of employment because its primary purpose was as a business function for improving employee relations. *Id.* at 13. In the instant matter, claimant's drive to the mall was not sponsored by the employer, but was for her own, and her family and friend's, benefit. Claimant's assertion that VNA permitted claimant "to combine personal errands with work responsibilities" [Cl.Merit Br. at 10] is utterly without support in the record. Claimant's false statement is meant to mislead this Court into believing this personal errand was approved by VNA and work related. There is no evidence VNA condoned claimant's non-work related activities on that or any other day.

Contrary to claimant's accusation, VNA is not looking to create a single intent restriction in response to Fifth District's dual intent ruling. VNA wants the established statutory and case law to be applied to this case, not the non-existent dual intent doctrine. Under the proper standard, claimant's injuries are not compensable and the trial court's entry of summary judgment must be reinstated.

Reply Re: "B. The Proper Test" and "C. Plaintiff's Work-Related Activities"

All parties before the Court agree the claim should be analyzed under the "in the course of" and "arising out of" standard. There is no dual intent in Ohio. In fact, the Fifth District's departure from the proper standard was so egregious that the Bureau realigned itself in this appeal. All parties agree the claimant's "subjective intent" does not control, but that the surrounding objective facts and circumstances must be weighed to determine if claimant's

injuries were work-related. [Cl.Merit Br. at 10, citing BWC Merit Br. at 10-12.] The proper test is stated in the *Fisher* and *Lord* cases. *Fisher v. Mayfield*, 49 Ohio St.3d 275, 551 N.E.2d 1271 (1990); *Lord v. Daugherty*, 66 Ohio St. 2d 441, 423 N.E.2d 96 (1981). Those cases hold: whether a claimant has demonstrated a sufficient relationship to show the injury arose out of the employment “depends on the totality of circumstances surrounding the accident, including (1) the proximity of the scene of the accident to the place of employment, (2) the degree of control the employer had over the scene of the accident, and (3) the benefit the employer received from the injured employee’s presence at the scene of the accident.” *Fisher* at 277, citing, *Lord* at 441.

Claimant wants *Fisher* and *Lord* to apply. VNA agrees. VNA’s summary judgment motion applied the proper tests to the evidence claimant gave at deposition. It needed no other evidence. That evidence, presented in a light most favorable to the claimant, finds that:

- 1.) At the time of the accident, claimant was driving her family and friends to the mall.
- 2.) The accident occurred on a public road near the Richland Mall.
- 3.) VNA exercised no control over the public roadway.
- 4.) VNA exercised no control over the vehicle that rear-ended claimant.
- 5.) After she went to the mall, claimant *then* intended on going to her patient’s home.
- 6.) The scene of the accident was miles from claimant’s patient’s home.
- 7.) Claimant’s work was inside her patient’s home caring for the patient.

No other facts are pertinent. Claimant does not dispute those facts. That claimant had two other, more direct routes that did not go by the mall was/is not a fact necessary to address VNA’s summary judgment motion. It is a fact that would have been material to a summary judgment motion against VNA and, thus, is germane to VNA’s second proposition of law.

Claimant cited the *Lord* and *Fisher* cases, but made no attempt to apply the facts to the law. That is because (1) the accident occurred on a public roadway near the Richland Mall. This was miles from the patient's home where claimant could carry out her duties of employment; (2) VNA exercised no control over the accident scene on a public roadway, nor over the other driver that impacted the vehicle claimant was transporting her family in, nor over the route claimant drove that day; and, (3) VNA did not receive a benefit from Claimant's presence at the scene of the accident. Claimant's trip to the mall did not place her in scope of her employment. Compare, *Crockett v. HCR Manorcare, Inc.*, 4th Dist. Scioto No. 03CA2919, 2004-Ohio-3533 (Crockett, a home health aide, was injured while "on her way to drop off her goddaughter to a caregiver. [, and] [a]lthough the drop-off point happened to be on her way to her next work site, the fact remains that at the time of the accident, she was fulfilling a personal purpose." (Emphasis added.) *Id.* at ¶24. [See, VNA Merit Br. at 11-14, for a more in depth discussion of *Crockett*.]

Claimant attempts to distinguish *Crockett* by again arguing an irrelevant administrative order, [Cl.Merit Br. at 20-21] and alleging the distinguishing factor is that she was paid for time and reimbursed mileage on the weekends. Just because a claimant's time may be compensable at or near the time of injury does not mean the injury occurred in the course of and arising out of her employment. It is a nominal factor to be considered under *Lord's* totality of the circumstances test. Compensation, however, is not a primary, determinative factor. It is not discussed as a primary factor in *Lord*. Compensation is insignificant in the determining the allowance or denial of a claim. Claimant cited to *Kohlmayer* (the company sponsored picnic case). The claimant in *Kohlmayer* was not being compensated when he was injured, but the court found a sufficient causal connection with claimant's employment. Cases in Ohio have found that a claimant may participate in the Act despite not being compensated at the time of the injury.

See, generally, *Elsass v. Commercial Carriers, Inc.*, 73 Ohio App.3d 112, 115, 596 N.E.2d 599 (3d Dist.1992) (A claimant-worker's work status -- being on or off duty -- is not dispositive of whether or not an injured worker is entitled to workers' compensation benefits.)

Comparatively, many claims are not causally related despite claimant receiving compensation during or near the time of the injury. See, R.C. 4123.54(A)(1) (purposely self-inflicted injuries on the job); R.C. 4123.54(A)(2) (job site injuries proximately caused by drugs or alcohol); *Davis v. Industrial Com. of Ohio*, 148 N.E.2d 100, 76 Ohio L. Abs. 474 (10th Dist. 1957) (injury resulting from work-place assault where claimant is an instigator); *Industrial Com. of Ohio v. Bankes*, 127 Ohio St. 517, 189 N.E. 437 (1934) (at-work injuries the result of horseplay are not compensable); and, *Kohn v. Trimble*, 11th Dist. Trumbull No. 95-T-5210, 1995 Ohio App. LEXIS 5105, *8 (at-work "injuries that are occasioned by an employee's misconduct, 'deviant behavior,' or 'horseplay' are not compensable because such actions fall beyond the scope of employment.")

One of the most well-cited cases where a claimant was injured while being paid is *Industrial Com. of Ohio v. Ahern*, 119 Ohio St. 41, 162 N.E. 272, 6 Ohio L. Abs. 385, 59 A.L.R. 367 (1928). In *Ahern*, the claimant was injured while she was being compensated, on the employer's premises, and purchasing items in her employer's store for her personal use. This Court found compensation to be inconsequential. The Court held:

At the time of her injury the defendant in error was not acting for her employer, nor engaged in its service: she was exercising a personal privilege which in no wise fell within the employment for which she had been engaged; she was seeking a personal benefit, and at the time of her injury occupied the relation of a customer to her employer, and not the relation of an employee; she was not under her employer's control. * * *

(Emphasis added.) The *Ahern* Court focused on what duty of employment was being performed at the time of injury. There is no focus on what work Ahern was doing just prior to her injury.

There is no relevance to what Ahern would have after she performed her personal errand. All analysis is focused on the activity being performed at the time of the injury, not a future activity or whether compensation was paid at the time of the injury.

In the instant matter, claimant's drive to a patient's home may have been compensable, but driving her friends and family to the mall at the time of the accident was not compensable. At the time of her injury claimant's activity was personal and related to familial obligations. Driving to the mall was not an undertaking of VNA's business. Claimant underplays the undisputed fact she was driving her friends and family to the mall at the time of the accident by analogizing the case as killing two birds with one stone. [Cl.MeritBr.14.] Claimant's analogy is meritless. Under claimant's "two bird, one stone" analogy, she argues that since she had a future intent to do a work related activity that any preceding personal task becomes work related. This is inconsistent with Ohio law. Claimant's choice to put an interceding personal objective between her residence and her first patient's home kept her from ever entering the course of employment. Her injuries are not compensable. Claimant's remedy lies against the tort-feasor that rear-ended her vehicle on the public street next to the mall, not VNA or the State Insurance Fund.

Applying the tests advocated but not demonstrated by her brief, claimant's claim is not compensable and the trial court's summary judgment in favor VNA must be reinstated.

Reply Re: "D. The Frolic and Detour Exception"

Claimant's frolic and detour argument presents an interesting question, but one not raised by VNA or Bureau. In its "In the Course of" section, the court of appeals majority's decision intertwined the "frolic and detour" exception with the alleged dual intent doctrine. [*Friebel* at ¶16-22.] Claimant has latched onto that faulty reasoning. As Judge Wise aptly stated in his dissent, the frolic and detour analysis is improper. [*Id.* at ¶35-36.] Claimant's clear, objective

intent from the moment she left her home until the time of the accident was to go to the mall. Claimant never entered the course of her employment, thus could not go on a frolic and detour.

The Fifth District's and claimant's discussion and analysis of the frolic and detour doctrine is further flawed. Claimant and the Fifth District cited to *Houston v. Liberty Mut. Fire Ins.*, 6th Dist. No. L-04-1161, 2005-Ohio-4177, and *Switzer v. Sewell Motor Express*, 12th Dist. No. CA2009-02-026, 2009-Ohio-3825. *Houston* is a personal injury, not workers' compensation matter. In both cases, the claimants had completed their personal errands and had returned to their employment activities. Thus, the holdings are inapplicable. This claimant left her home with friends and family in her vehicle. She never entered the course of her employment. Claimant argues that this was same route she intended to take. That is irrelevant. Assuming, *pro arguendo*, taking the same route put claimant "in the course," she was simultaneously removed from the course (or on a frolic and detour) by her friends and family entering her vehicle. She was not and could not perform the obligations of employment going to the mall with the passengers in her car. The course of employment would begin, or her frolic end, upon her passengers departing her vehicle. The lower appellate court's and claimant's analysis of in the course of and frolic and detour is flawed. Claimant was either never in the course of employment or was on an immediate frolic when passengers entered her vehicle. In either case, the the lower court's decision must be vacated and the trial court's grant of summary judgment be reinstated.

Reply Re: "E. Fixed Situs Employment"

Claimant begins this section stating it "strains credulity" to believe a visiting nurse is a fixed situs employee. It does not strain credulity. It is the law. During the irrelevant administrative proceedings to which claimant so often refers in her brief, a hearing officer determined that claimant was a fixed situs employee. [Tr.R.#6 (Cl. Complaint and Exhibits

attached thereto.)) Claimant's schedule changed on a daily basis [Tr.R.#21 (Cl. Depo. 24:9-12)]. An employee can be a fixed-situs employee even if their schedule varies from day to day. *Ruckman v. Cubby Drilling*, 81 Ohio St.3d.117, 122, 1998-Ohio-455, 689 N.E.2d 917, 922 (1998). Claimant's substantial job duties began after she arrived at her patients' homes, to provide treatment or perform assessments. (Tr.R.#21 (Cl. Depo. 23:2-9.)) She discussed her job duties as being "out there in the field and making decisions with these patients as far as their health goes." [Tr.R.#21 (Cl. Depo. 20:9-11.)] Claimant's job was to care for patients. Her situs of employment was inside the patients' homes where she could perform billable work for VNA's benefit. Claimant was a fixed situs employee and no exceptions apply.

Claimant's argument against being a fixed situs employee quickly descends into a conversation about compensation and, yet again, reliance on an irrelevant administrative order. [Cl. Merit Br. at 20-22.] As stated in prior sections, compensation is a nominal, ancillary factor to be considered in applying the *Lord* test; however, no case law finds compensation to be a determinative factor. Claimant's reasoning about the importance of compensation would result in an illogical conclusion. If compensation changes the threshold of fixed situs to non-fixed situs, as claimant's argument suggests, then claimant would be a fixed situs on the weekdays when her expenses and time are not compensated, and a non fixed situs on the weekends when they are. It is illogical. Compensation is not important.

The fixed situs test in *Ruckman* does not inquire into if a claimant receives payment for driving to worksites. The determination of a fixed situs employee focuses on "whether the employee commences his substantial employment duties only after arriving at a specific and identifiable work place designated by his employer." *Ruckman* at 119, citing, *Indus. Comm. v. Heil*, 123 Ohio St. 604, 606-607, 176 N.E. 458, 459 (1931). *Heil* is analogous to the instant

matter. In *Heil* the claimant's travel expenses traveling to and from the plant were reimbursed by his employer. This Court determined that was an irrelevant fact stating:

* * * The mere fact that the company elected to reimburse Heil for his expenses in traveling between his home and the abattoir plant, on account of the distance he had to travel, and on account of the early hour he was to reach the plant in the morning, cannot affect the situation in the least.

Id. at 606-07.

Like *Heil*, Claimant's employment duties occurred at a specific location – her patients' homes. That this claimant was compensated or reimbursed by VNA to drive to her first patient's home on weekends is inconsequential to whether her duties of employment were performed when the accident occurred. The instant matter is much simpler than *Heil*. Heil was headed to work. This claimant was not driving to her work site, but to the mall for her personal benefit. No one disagrees the mall was not a place claimant could carry out her contract of employment.

In her fixed situs section, claimant erroneously argues against the application of *Crockett*, supra, to determine if she was a fixed situs employee. However, that case makes no determination as to whether that claimant was or was not a fixed situs employee. Id. at ¶21.² As discussed in VNA's Merit Brief at pp. 11-14, *Crockett* is an arising out of case. Claimant's discussion of *Crockett* as a fixed situs case is improper.

Claimant also wants this Court to believe that because she went from patient's home to patient's home as a healthcare provider that she cannot have a fixed situs. Claimant relies on *Stair v. Mid-Ohio Hom Health*, 5th Dist. No. 2010-CA-00114, 2011-Ohio-2351. Claimant fallaciously contends VNA is “no longer attempting to distinguish or criticize the unerring

² *Crockett* stated that whether claimant was or was not a fixed situs she must prove her claim arose out of her employment. Thus, *Crockett* applies the totality of the circumstances test under *Ruckman* and *Lord*. It is not a fixed situs case, but an “arising out of” case, which is where VNA thoroughly discussed *Crockett* in this brief and its Merit Brief. [VNA Merit Br. at pp. 11-14.]

ruling” of *Stair*. [Cl.Merit Br. at 22.] This is yet another ludicrous assertion by claimant. VNA did not address *Stair* in its Merit Brief because it has no merit. The case has only been followed by the Fifth District in *Friebel*. In *Stair* the claimant drove, during the workday to the main office to pick up her paycheck. While there she retrieved a work assignment and fell on her way back to her car. The *Stair* court found the claim was compensable because she was on the employer’s property, during her work hours, and returning to her vehicle with another work assignment. The facts in the present case bear no resemblance to *Stair*.

Unlike *Stair*, this claimant’s injury happened before work during a personal errand, on a public highway, on her way to the mall to drop off family and friends. The Fifth District’s decision in *Stair* does not apply and its fixed situs analysis was inconsistent with other jurisdictions as well as the Fifth’s own decision in *Gilham v. Cambridge Home Health Care*, 5th Dist. Stark No. 2008CA211, 2009-Ohio-2842, *appeal not accepted*, 123 Ohio St. 3d 1425, 2009-Ohio-5340, 914 N.E.2d 1065. In *Gilham*, the Fifth District found a home healthcare worker, who was injured in a car accident between patient’s homes, was a fixed situs employee because she had “no duties to perform outside of the homes of her patients.” Like this claimant, Gilham was an employee that drove to and from patients’ homes every day and had no duties in her employer’s main office. In *Gilham*, the Fifth District found Gilham to be a fixed situs employee. The facts of the instant matter warranted a finding consistent with *Gilham*. See, also, *Mitchell v. Cambridge Home Health Care, Inc./PRI*, 9th Dist. Summit No. 24163, 2008-Ohio-4558. In *Mitchell* a home health aide was injured when she tripped on a mat outside her patient’s apartment while walking to the elevator. Mitchell intended to head home. The court determined that claimant was a fixed situs because all of duties of employment occurred within the patient’s

home. The claim was not compensable because claimant exited the situs of employment and began a personal trek home.

Claimant's arguments against being a fixed situs employee are not meritorious. Claimant was a fixed situs employee. No exceptions apply. Claimant does not argue against any exceptions. VNA's First Proposition of Law, and all argument made therein, warrant this Court vacating the lower appellate court's opinion and reinstating the trial court's grant of summary judgment in favor of VNA.

Proposition of Law No. 2: THE APPELLATE COURT ERRED IN SUA SPONTE ENTERING SUMMARY JUDGMENT ON APPEAL IN FAVOR OF THE NON-MOVING CLAIMANT AND AGAINST THE MOVING DEFENDANT VNA AND, IN DOING SO, CONSTRUING FACTS IN A LIGHT MOST FAVORABLE TO PREVAILING CLAIMANT.

Reply Re: Proposition of Law II

Claimant believes she should receive the benefit of not filing a motion for summary judgment and having the facts construed in her favor. Claimant contends VNA's position is that all the facts are undisputed and, had it wanted to, VNA could have put forth more evidence. Foremost, VNA needs no more evidence than claimant's deposition testimony and the exhibits attached thereto. Claimant's testimony establishes she has no legal right to participate in worker's compensation benefits. When VNA filed its summary judgment against the claimant, it presented the facts "most strongly in favor of the nonmoving" claimant. *Temple v. Wean United, Inc.*, 50 Ohio St.2d 317, 327, 364 N.E.2d 267 (1977). The uncontroverted evidence, presented in a light most favorable to the claimant, finds that:

1. At the time of the accident, claimant was driving her family and friends to the mall.
2. The accident occurred on a public road near the Richland Mall.
3. VNA exercised no control over the public roadway.

4. VNA exercised no control over the vehicle that rear-ended claimant.
5. After she went to the mall, claimant then intended on going to her patient's home.
6. The scene of the accident was miles from claimant's patient's home.
7. Claimant's work was inside her patient's home caring for the patient.

Those are the material facts for determining summary judgment against claimant. Those material facts are what VNA has argued as "undisputed." [VNA's Appellee Brief in Response, at p.13.] Other facts arising from this claim were/are not material to VNA's summary judgment motion.

The appellate court majority declared its findings of facts by construing the facts most strongly in favor of the non-moving claimant. In doing so, it found claimant was injured in the course and scope of her employment "as a matter of law." *Friebel* at ¶¶22 and 27. There is no indication in the court's decision that they construed facts favorably to VNA in granting judgment against it. Nor did the appellate court give VNA an opportunity to present material facts in opposition to a summary judgment that the claimant did not file. Using the claimant-favorable facts, the majority ruled for the non-moving claimant. In doing so, the appellate court did not review or address that the claimant had two other, shorter and more direct routes available to travel from her home to the patient's house that did not involve going by the mall where she had to drop off family and friends for her personal benefit. [Tr.R.#21 (Cl. Depo. at 62:18-25, 63-68 and Exhibits B, C, D, and E, attached thereto.)] Acknowledged by claimant in deposition, the alternative routes raise questions of fact which VNA would have presented *if* claimant had moved for summary judgment against VNA. Claimant, however, never moved for summary judgment. Even on appeal, claimant contended there were questions of fact to be resolved. [CAR#6 and 12.] Arguing the availability of alternative routes was irrelevant to the question VNA put before the trial court, who was obligated to assume all facts most favorably to

the claimant – i.e., the court would assume claimant would not have taken alternative routes. Thus, it was not a material fact for VNA's motion.

Contrary to claimant's argument that this evidence is not in the record or that VNA did not supplement the record, claimant's deposition and the exhibits attached thereto containing the alternative routes are in the record. [Tr.R.#21 (Cl. Depo. at 62:18-25, 63-68 and Exhibits B, C, D, and E, attached thereto.)] Further, claimant's opposition to VNA's motion for summary judgment additionally put the alternative routes into the record. [Tr.R.#26 (Cl.'s Brief in Opposition to Summary Judgment, at p.6 and Exhibits attached to brief).] The alternative routes were not thoroughly discussed because they were not material to VNA's motion and were contrary to the assumptions made in favor of non-moving parties.

Claimant erroneously analogizes the instant matter to *State ex rel. Lowery v. Cleveland*, 67 Ohio St.3d 126, 616 N.E.2d 233(1993). *Lowery* was a mandamus action which originated in the court of appeals. Claimant's brief falsely represents the respondent filed a motion to dismiss, which was converted to a motion for summary judgment [Cl.Merit Br. at 24.] This is a fabrication. The actual underlying facts of that case are the respondent initially filed a motion to dismiss, which was abandoned. Then, the respondent asked the 8th District to make an in camera inspection of documents related to a homicide arrest and decide which records could be released as public records. Respondent did not assert exemptions to the release of any documents. The 8th District reviewed the documents and determined what could be released. In *Lowery*, this Court noted that the respondent's failure to raise exemptions to the documents' release, meant they could not complain that 8th District failed to consider such exemptions not evidenced upon the face of the documents themselves. *Lowery*, therefore, has no bearing on the instant case. Additionally, as noted in VNA's Merit Brief, original actions present a unique situation where

the appellate court sits as a trial court and there is an appeal as of right to this Court. Granting summary judgment for the non-moving party, during the appeal of a unilateral summary judgment motion, deprives the moving party of due process and leaves it with a discretionary appeal to this Court.

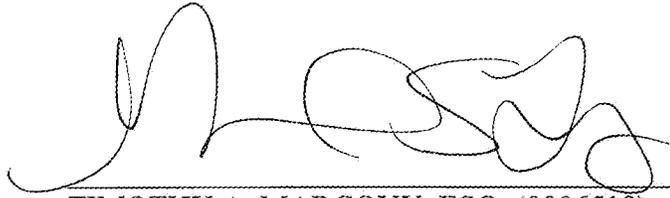
Claimant did not cite any case where this court held an appellate court should grant summary judgment in favor of a non-moving party. Courts are generally prohibited from such actions by rule and case law. See, Civ.R. 56(C) (“A summary judgment shall not be rendered unless it appears from the evidence 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,***”); *Marshall v. Aaron*, 15 Ohio St.3d 48, 472 N.E. 2d 335 (1984) (This Court held that “a party who has not moved for summary judgment is not entitled to such an order[.]”). See, also, *State ex rel. Moyer v. Montgomery Cty. Bd. of Commrs.*, 102 Ohio App.3d 257, 656 N.E.2d 1366 (2nd Dist. 1995).

The Fifth District’s decision deprived VNA of due process, violated the general rule in *Marshall*, and violated its own holding in *Conley v. Smith*, 5th Dist. Stark No. 2004CA285, 2005-Ohio-1433, ¶12-13 (Court enforced prohibition against granting summary judgment for non-moving party, noting a non-moving party’s argument inherently raises questions of fact.) The lower appellate court’s decision must be reversed and the trial court’s order reinstated.

CONCLUSION

For all of the foregoing reasons, and for those cited in VNA’s Merit Brief, the judgment of the court of appeals must be reversed and the trial court’s entry of summary judgment in VNA’s favor and against the claimant be reinstated, thus determining, upon the merits, that claimant “is not entitled to participate under the Workers’ Compensation Act.”

Respectfully submitted,

A handwritten signature in black ink, appearing to read 'Timothy A. Marcovy', written over a horizontal line.

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CERTIFICATE OF SERVICE

A copy of the foregoing Reply Brief of Appellant Visiting Nurse Association of Mid-Ohio's has been served this 28th day of January 2014, electronically and by ordinary mail, upon:

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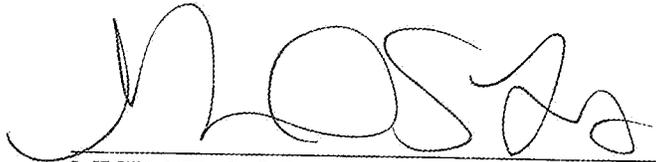
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APPENDIX

4123.54 Compensation in case of injury or death - agreement if work performed in another state.

(A) Except as otherwise provided in divisions (I) and (K) of this section, every employee, who is injured or who contracts an occupational disease, and the dependents of each employee who is killed, or dies as the result of an occupational disease contracted in the course of employment, wherever such injury has occurred or occupational disease has been contracted, provided the same were not:

(1) Purposely self-inflicted; or

(2) Caused by the employee being intoxicated or under the influence of a controlled substance not prescribed by a physician where the intoxication or being under the influence of the controlled substance not prescribed by a physician was the proximate cause of the injury, is entitled to receive, either directly from the employee's self-insuring employer as provided in section 4123.35 of the Revised Code, or from the state insurance fund, the compensation for loss sustained on account of the injury, occupational disease, or death, and the medical, nurse, and hospital services and medicines, and the amount of funeral expenses in case of death, as are provided by this chapter.

(B) For the purpose of this section, provided that an employer has posted written notice to employees that the results of, or the employee's refusal to submit to, any chemical test described under this division may affect the employee's eligibility for compensation and benefits pursuant to this chapter and Chapter 4121. of the Revised Code, there is a rebuttable presumption that an employee is intoxicated or under the influence of a controlled substance not prescribed by the employee's physician and that being intoxicated or under the influence of a controlled substance not prescribed by the employee's physician is the proximate cause of an injury under either of the following conditions:

(1) When any one or more of the following is true:

(a) The employee, through a qualifying chemical test administered within eight hours of an injury, is determined to have an alcohol concentration level equal to or in excess of the levels established in divisions (A)(1)(b) to (i) of section 4511.19 of the Revised Code;

(b) The employee, through a qualifying chemical test administered within thirty-two hours of an injury, is determined to have one of the following controlled substances not prescribed by the employee's physician in the employee's system that tests above the following levels in an enzyme multiplied immunoassay technique screening test and above the levels established in division (B)(1)(c) of this section in a gas chromatography mass spectrometry test:

(i) For amphetamines, one thousand nanograms per milliliter of urine;

(ii) For cannabinoids, fifty nanograms per milliliter of urine;

(iii) For cocaine, including crack cocaine, three hundred nanograms per milliliter of urine;

(iv) For opiates, two thousand nanograms per milliliter of urine;

(v) For phencyclidine, twenty-five nanograms per milliliter of urine.

(c) The employee, through a qualifying chemical test administered within thirty-two hours of an injury, is determined to have one of the following controlled substances not prescribed by the employee's physician in the employee's system that tests above the following levels by a gas chromatography mass spectrometry test:

(i) For amphetamines, five hundred nanograms per milliliter of urine;

(ii) For cannabinoids, fifteen nanograms per milliliter of urine;

(iii) For cocaine, including crack cocaine, one hundred fifty nanograms per milliliter of urine;

(iv) For opiates, two thousand nanograms per milliliter of urine;

(v) For phencyclidine, twenty-five nanograms per milliliter of urine.

(d) The employee, through a qualifying chemical test administered within thirty-two hours of an injury, is determined to have barbiturates, benzodiazepines, methadone, or propoxyphene in the employee's system that tests above levels established by laboratories certified by the United States department of health and human services.

(2) When the employee refuses to submit to a requested chemical test, on the condition that that employee is or was given notice that the refusal to submit to any chemical test described in division (B)(1) of this section may affect the employee's eligibility for compensation and benefits under this chapter and Chapter 4121. of the Revised Code.

(C)

(1) For purposes of division (B) of this section, a chemical test is a qualifying chemical test if it is administered to an employee after an injury under at least one of the following conditions:

(a) When the employee's employer had reasonable cause to suspect that the employee may be intoxicated or under the influence of a controlled substance not prescribed by the employee's physician;

(b) At the request of a police officer pursuant to section 4511.191 of the Revised Code, and not at the request of the employee's employer;

(c) At the request of a licensed physician who is not employed by the employee's employer, and not at the request of the employee's employer.

(2) As used in division (C)(1)(a) of this section, "reasonable cause" means, but is not limited to, evidence that an employee is or was using alcohol or a controlled substance drawn from specific, objective facts and reasonable inferences drawn from these facts in light of experience and training. These facts and inferences may be based on, but are not limited to, any of the following:

(a) Observable phenomena, such as direct observation of use, possession, or distribution of alcohol or a controlled substance, or of the physical symptoms of being under the influence of alcohol or a controlled substance, such as but not limited to slurred speech, dilated pupils, odor of alcohol or a controlled substance, changes in affect, or dynamic mood swings;

(b) A pattern of abnormal conduct, erratic or aberrant behavior, or deteriorating work performance such as frequent absenteeism, excessive tardiness, or recurrent accidents, that appears to be related to the use of alcohol or a controlled substance, and does not appear to be attributable to other factors;

(c) The identification of an employee as the focus of a criminal investigation into unauthorized possession, use, or trafficking of a controlled substance;

(d) A report of use of alcohol or a controlled substance provided by a reliable and credible source;

(e) Repeated or flagrant violations of the safety or work rules of the employee's employer, that are determined by the employee's supervisor to pose a substantial risk of physical injury or property damage and that appear to be related to the use of alcohol or a controlled substance and that do not appear attributable to other factors.

(D) Nothing in this section shall be construed to affect the rights of an employer to test employees for alcohol or controlled substance abuse.

(E) For the purpose of this section, laboratories certified by the United States department of health and human services or laboratories that meet or exceed the standards of that department for laboratory certification shall be used for processing the test results of a qualifying chemical test.

(F) The written notice required by division (B) of this section shall be the same size or larger than the certificate of premium payment notice furnished by the bureau of workers' compensation and shall be posted by the employer in the same location as the certificate of premium payment notice or the certificate of self-insurance.

(G) If a condition that pre-existed an injury is substantially aggravated by the injury, and that substantial aggravation is documented by objective diagnostic findings, objective clinical findings, or objective test results, no compensation or benefits are payable because of the pre-existing condition once that condition has returned to a level that would have existed without the injury.

(H)

(1) Whenever, with respect to an employee of an employer who is subject to and has complied with this chapter, there is possibility of conflict with respect to the application of workers' compensation laws because the contract of employment is entered into and all or some portion of the work is or is to be performed in a state or states other than Ohio, the employer and the employee may agree to be bound by the laws of this state or by the laws of some other state in which all or some portion of the work of the employee is to be performed. The agreement shall be in writing and shall be filed with the bureau of workers' compensation within ten days after it is executed and shall remain in force until terminated or modified by agreement of the parties similarly filed. If the agreement is to be bound by the laws of this state and the employer has complied with this chapter, then the employee is entitled to compensation and benefits regardless of where the injury occurs or the disease is contracted and the rights of the employee and the employee's dependents under the laws of this state are the exclusive remedy against the employer on account of injury, disease, or death in the course of and arising out of the employee's employment. If the agreement is to be bound by the laws of another state and the employer has complied with the laws of that state, the rights of the employee and the employee's dependents under the laws of that state are the exclusive remedy against the employer on account of injury, disease, or death in the course of and arising out of the employee's employment without regard to the place where the injury was sustained or the disease contracted. If an employer and an employee enter into an agreement under this division, the fact that the employer and the employee entered into that agreement shall not be construed to change the status of an employee whose continued employment is subject to the will of the employer or the employee, unless the agreement contains a provision that expressly changes that status.

(2) If any employee or the employee's dependents pursue workers' compensation benefits or recover damages from the employer under the laws of another state, the amount awarded or recovered, whether paid or to be paid in future installments, shall be credited on the amount of any award of compensation or benefits made to the employee or the employee's dependents by the bureau. If an employee or the employee's dependents pursue or receive an award of compensation or benefits under this chapter or Chapter 4121., 4127., or 4131. of the Revised Code for the same injury, occupational disease, or death for which the employee or the employee's dependents pursued workers' compensation benefits and received a decision on the merits as defined in section 4123.542 of the Revised Code under the laws of another state or recovered damages under the laws of another state, the administrator or any employer, by any lawful means, may collect the amount of compensation or benefits paid to or on behalf of the employee or the employee's dependents by the administrator or a self-insuring employer pursuant to this chapter or Chapter 4121., 4127., or 4131. of the Revised Code for that award. The administrator or any employer also may collect from the employee or the

employee's dependents any costs and attorney's fees the administrator or the employer incurs in collecting that payment and any attorney's fees, penalties, interest, awards, and costs incurred by an employer in contesting or responding to any claim filed by the employee or the employee's dependents for the same injury, occupational disease, or death that was filed after the original claim for which the employee or the employee's dependents received a decision on the merits as described in section 4123.542 of the Revised Code. If the employee's employer pays premiums into the state insurance fund, the administrator shall not charge the amount of compensation or benefits the administrator collects pursuant to this division to the employer's experience. If the administrator collects any costs, penalties, interest, awards, or attorney's fees incurred by a state fund employer, the administrator shall forward the amount of such costs, penalties, interest, awards, and attorney's fees the administrator collects to that employer. If the employee's employer is a self-insuring employer, the self-insuring employer shall deduct the amount of compensation or benefits the self-insuring employer collects pursuant to this division from the paid compensation the self-insuring employer reports to the administrator under division (L) of section 4123.35 of the Revised Code.

(3) Except as otherwise stipulated in division (H)(4) of this section, if an employee is a resident of a state other than this state and is insured under the workers' compensation law or similar laws of a state other than this state, the employee and the employee's dependents are not entitled to receive compensation or benefits under this chapter, on account of injury, disease, or death arising out of or in the course of employment while temporarily within this state, and the rights of the employee and the employee's dependents under the laws of the other state are the exclusive remedy against the employer on account of the injury, disease, or death.

(4) Division (H)(3) of this section does not apply to an employee described in that division, or the employee's dependents, unless both of the following apply:

(a) The laws of the other state limit the ability of an employee who is a resident of this state and is covered by this chapter and Chapter 4123. of the Revised Code, or the employee's dependents, to receive compensation or benefits under the other state's workers' compensation law on account of injury, disease, or death incurred by the employee that arises out of or in the course of the employee's employment while temporarily within that state in the same manner as specified in division (H)(3) of this section for an employee who is a resident of a state other than this state, or the employee's dependents;

(b) The laws of the other state limit the liability of the employer of the employee who is a resident of this state and who is described in division (H)(4)(a) of this section for that injury, disease, or death, in the same manner specified in division (H)(3) of this section for the employer of an employee who is a resident of the other state.

(5) An employee, or the dependent of an employee, who elects to receive compensation and benefits under this chapter or Chapter 4121., 4127., or 4131. of the Revised Code for a claim may not receive compensation and benefits under the workers' compensation laws of any state other than this state for that same claim. For each claim submitted by or on behalf of an employee, the administrator or, if the employee is employed by a self-insuring employer, the self-insuring employer shall request the employee or the employee's dependent to sign an election that affirms the employee's or employee's dependent's acceptance of electing to receive compensation and benefits under this chapter or Chapter 4121., 4127., or 4131. of the Revised Code for that claim that also affirmatively waives and releases the employee's or the employee's dependent's right to file for and receive compensation and benefits under the laws of any state other than this state for that claim. The employee or employee's dependent shall sign the election form within twenty-eight days after the administrator or self-insuring employer submits the request or the administrator or self-insuring employer shall suspend that claim until the administrator or self-insuring employer receives the signed election form.

(I) If an employee who is covered under the federal "Longshore and Harbor Workers' Compensation Act," 98 Stat. 1639, 33 U.S.C. 901 et seq., is injured or contracts an occupational disease or dies as a result of an injury or occupational disease, and if that employee's or that employee's dependents' claim for compensation or benefits for that injury, occupational disease, or death is subject to the jurisdiction of that act, the employee

or the employee's dependents are not entitled to apply for and shall not receive compensation or benefits under this chapter and Chapter 4121. of the Revised Code. The rights of such an employee and the employee's dependents under the federal "Longshore and Harbor Workers' Compensation Act," 98 Stat. 1639, 33 U.S.C. 901 et seq., are the exclusive remedy against the employer for that injury, occupational disease, or death.

(J) Compensation or benefits are not payable to a claimant during the period of confinement of the claimant in any state or federal correctional institution, or in any county jail in lieu of incarceration in a state or federal correctional institution, whether in this or any other state for conviction of violation of any state or federal criminal law.

(K) An employer, upon the approval of the administrator, may provide for workers' compensation coverage for the employer's employees who are professional athletes and coaches by submitting to the administrator proof of coverage under a league policy issued under the laws of another state under either of the following circumstances:

(1) The employer administers the payroll and workers' compensation insurance for a professional sports team subject to a collective bargaining agreement, and the collective bargaining agreement provides for the uniform administration of workers' compensation benefits and compensation for professional athletes.

(2) The employer is a professional sports league, or is a member team of a professional sports league, and all of the following apply:

(a) The professional sports league operates as a single entity, whereby all of the players and coaches of the sports league are employees of the sports league and not of the individual member teams.

(b) The professional sports league at all times maintains workers' compensation insurance that provides coverage for the players and coaches of the sports league.

(c) Each individual member team of the professional sports league, pursuant to the organizational or operating documents of the sports league, is obligated to the sports league to pay to the sports league any workers' compensation claims that are not covered by the workers' compensation insurance maintained by the sports league.

If the administrator approves the employer's proof of coverage submitted under division (K) of this section, a professional athlete or coach who is an employee of the employer and the dependents of the professional athlete or coach are not entitled to apply for and shall not receive compensation or benefits under this chapter and Chapter 4121. of the Revised Code. The rights of such an athlete or coach and the dependents of such an athlete or coach under the laws of the state where the policy was issued are the exclusive remedy against the employer for the athlete or coach if the athlete or coach suffers an injury or contracts an occupational disease in the course of employment, or for the dependents of the athlete or the coach if the athlete or coach is killed as a result of an injury or dies as a result of an occupational disease, regardless of the location where the injury was suffered or the occupational disease was contracted.

Amended by 129th General Assembly File No.127, HB 487, §101.01, eff. 9/10/2012.

Effective Date: 04-10-2001; 09-23-2004; 10-13-2004; 2006 SB7 10-11-2006; 2008 SB334 09-11-2008; 2008 HB562 09-22-2008