

ORIGINAL

In the
Supreme Court of Ohio

VISITING NURSE ASSOCIATION	:	Case No. 2013-0892
OF MID-OHIO, et al.,	:	
	:	On Appeal from the
Appellants,	:	Richland County Court of Appeals,
	:	Fifth Appellate District
v.	:	
	:	Case No: 2012-CA-56
TAMARA L. FRIEBEL,	:	
	:	
Appellee	:	

REPLY BRIEF OF APPELLANT STEPHEN P. BUEHRER, ADMINISTRATOR,
OHIO BUREAU OF WORKERS' COMPENSATION

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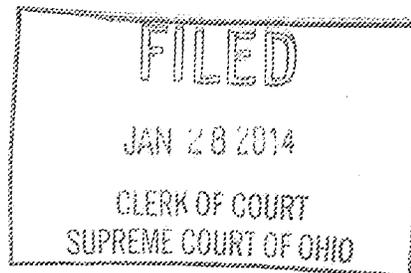


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INTRODUCTION

The Administrator reiterates that his concern here is with the law, not the outcome of this case. Who should prevail, and after what procedure, are beyond the scope of the Administrator's institutional interests. Instead, the Administrator urges the Court to vacate the decision below because it injects doctrinal uncertainty into the law. As the head of an agency that handles and litigates thousands of matters each year, the Administrator values doctrinal certainty. From the Administrator's perspective, doctrinal certainty and stability benefit employers and employees alike. It also benefits the Bureau of Workers' Compensation as the agency that evaluates and processes claims according to that doctrine. To avoid even the possibility of doctrinal uncertainty, the Court should vacate and remand to the trial court so that it can apply the well-established precedents for injuries to employees while traveling.

Friebel largely avoids responding to the Administrator's explanations of how the Fifth District majority opinion destabilizes the law about injuries to employees while traveling. Instead, Friebel caricatures the Administrator's position, questions why the Administrator is not supporting her, and makes a final pitch to salvage the appellate court's sua-sponte award of summary judgment to her even though she never moved for such a judgment. Along the way, she proves the problem with the lower court's approach by showing that it announced a theory that allows workers' compensation coverage when employee travel has any business ingredient, no matter how slight. Friebel frames the dispute as a choice between compensating *all* injuries with any business ingredient or compensating *no* injuries with any personal ingredient. The Administrator's position is not so one-dimensional. He recognizes, as this Court has for decades, that workers' compensation cases present almost endless factual variety and therefore require a nuanced approach. Existing doctrine, as developed through several cases in this Court, accounts for that variety. The Fifth District majority's approach does not. And Friebel's argument

reducing the Administrator's position to a one-dimensional mirror of the appellate court's approach (allowing participation for all but purely personal travel) simply proves that dual intent adds an unnecessary and confusing facet to the law about injuries to employees while traveling.

The Administrator urges the Court to vacate the Fifth District's judgment.

I. The Fifth District's opinion creates doctrinal uncertainty because it permits recovery for injuries with tenuous business relationships and usurps established, workable precedents for injuries arising from employee travel

The Administrator's opening brief detailed how the Fifth District's approach causes uncertainty. Specifically, the Administrator explained how the Fifth District's analysis conflicts with and distorts established doctrine at a general and specific level. On a general level, dual intent improperly adds intent to the mix, compresses the multi-factor inquiry about work relatedness into a single question, and upends the coming-and-going rule and its exceptions. Admin. Br. at 13-15. On a specific level, the dual-intent framework short-circuits questions such as whether Friebel was on a work-related travel route, whether her travel-reimbursement took her outside the coming-and-going rule, and whether she was a fixed-situs employee. *Id.* at 17-20. Friebel does not seriously engage these lurking problems.

The doctrinal uncertainty created by the dual-intent test is magnified by the fact that the test is itself ambiguous. Friebel's own brief, for example, displays confusion about what the Fifth District majority's decision means. Friebel contends that there is "no need" for a frolic-and-detour analysis. Br. at 16. The majority below was less certain, believing that frolic-and-detour was the right framework, but concluding that Friebel was "not yet in the process" of any frolic. App. Op. ¶ 21. And for its part, the dissent criticized the majority for applying Friebel's "dual intent" to the frolic and detour "analysis." *Id.* ¶ 36 (Wise, J., dissenting). All of this shows why the decision below breeds uncertainty, and why vacating the Fifth District's judgment will return doctrinal stability to this corner of law.

Add to that doctrinal uncertainty the problem that the Fifth District majority's approach could easily harm claimants as often as it helps them. Dual intent can disadvantage claimants because the test is more malleable than the established *Ruckman* framework. See *Ruckman v. Cubby Drilling, Inc.*, 81 Ohio St.3d 117 (1998). Another case involving a home-healthcare worker illustrates that danger. The claimant in that case was injured while "fulfilling a personal purpose" that happened to be on the "way to her next worksite." *Crockett v. HCR Manorcare, Inc.*, No. 03CA2919, 2004-Ohio-3533 ¶ 24 (4th Dist.) (emphasis added). The Fourth District reversed summary judgment for the claimant and specifically sidestepped what should have been the first question—was this claimant a fixed-situs worker or a traveling employee. See *id.* at ¶ 28 (declining to address assignment of error regarding fixed-situs status). If the Court had first answered the fixed-versus-traveling question directly, the result may have been different and may have favored the claimant.

Rather than respond to the Administrator's concerns (shared by dissenting Judge Wise), Friebel largely demurs. Instead of engaging these doctrinal problems, she takes a swipe at the Administrator's position in this case, claiming that the Administrator (through the Attorney General) "is supposed to be defending the Industrial Commission against the employer's appeal." Br. at 11. But the Administrator and the Commission are separate entities, and the litigating party in court is the Administrator, not the Industrial Commission. The Administrator is the head of the agency charged with overseeing the system. See generally R.C. 4121.121 (duties of Administrator). The Industrial Commission is a separate entity that adjudicates disputes between employers and employees and, in some cases, between employees and the Administrator. The differences do not end there. The Administrator is a necessary party to an appeal to a common pleas court. The Commission's participation is optional. R.C. 4123.512(B);

see also Spencer v. Freight Handlers, Inc., 131 Ohio St. 3d 316, 2012-Ohio-880 ¶ 22 (inclusion of Administrator a “requirement” for appeal). And the unique appellate right in the common pleas court means that neither the Administrator’s nor the Commission’s administrative decisions have any weight in court. Those appeals proceed “de novo,” and the “claimant bears the burden of proving his or her right to participate in the fund regardless of an Industrial Commission decision.” *Bennett v. Admin., Oh. Bur. of Workers’ Comp.*, 134 Ohio St. 3d 329, 2012-Ohio-5639 ¶ 17. Because the courts consider the matter anew, the Administrator is not bound by the Commission’s administrative decision in the courts.

To be sure, the Administrator’s litigating position usually matches the Commission’s determinations, but it is not inevitably so. Sometimes the de novo trials in court reveal information not available to the Commission. And sometimes the Administrator’s obligation to the system as a whole must trump the particular decision the Commission made in an individual case. Here, system-wide concerns compel the Administrator to take a position other than simply affirming the Commission’s ruling for Friebel. The Fifth District’s unprompted and unexpected addition of dual intent to the analytic mix elevated the case from a fact-bound holding about one claim to a judgment with bigger legal implications. But even in this Court, the Administrator’s position is not necessarily inconsistent with Friebel’s. It may well be that Friebel prevails when the right doctrine and the necessary facts are before the trial court. Again, the Administrator takes no position about who should ultimately prevail after remand.

For her part, Friebel points to two statutes for the idea that the Administrator cannot take the position he takes in this appeal. Br. at 11 (citing R.C. 4123.512(C) and 4123.92). Neither statute supports that claim. Revised Code 4123.512 governs the procedure for appealing from the Industrial Commission to a common pleas court. And subsection “C” unremarkably

designates the Attorney General as the representative of the Administrator (and the Commission in the rare case that it requests party status in a common-pleas appeal). Of course, the Attorney General represents virtually every administrative agency in the State, so the statute simply confirms the Attorney General's role as the lawyer for these agencies in common-pleas appeals. The statute says nothing about *requiring* the Attorney General to automatically defend the outcome of the Commission's independent adjudication (especially when the Commission is not a party to the appeal). Revised Code 4123.92 offers even less support to Friebel. Again confirming the Attorney General's usual role as attorney for state actors, the statute codifies the default duty of the Attorney General to "defend" the Commission (or the Administrator) if it is sued. R.C. 4123.92. The statute says nothing about defending *decisions* of the Industrial Commission appealed to court, only defending the entities themselves. This is not a suit *against* the Industrial Commission, so the statute does not apply.

The Administrator is concerned that the judgment below threatens established doctrine for resolving certain kinds of workers' compensation appeals. The Administrator urges the Court to vacate that judgment and remand despite the result of the hearings before the Industrial Commission.

II. Existing doctrine recognizes that a mix of business and personal ingredients can lead to different outcomes about workers' compensation coverage for employee travel. Friebel's one-dimensional approach allows coverage so long as there is any business ingredient.

The Administrator recognizes—as this Court has for decades—that the result in a particular case requires assessing the “totality of the facts and circumstances.” *Lord v. Daugherty*, 66 Ohio St. 2d 441, syl. (1981). Abiding that teaching, the Administrator takes the position that existing doctrine accounts for the totality and avoids shortcuts that eliminate the necessary flexibility to account for “the separate and distinct facts” of every workers’

compensation case. *Fisher v. Mayfield*, 49 Ohio St. 3d 275, 280 (1990). The Administrator's position also recognizes that "no one test or analysis can be said to apply to each and every factual possibility." *Ruckman*, 81 Ohio St. 3d at 122 (internal citation and quotation marks omitted).

Contrary to the lessons of those cases, Friebel argues this case as if she and the Administrator were offering competing one-dimensional tests. For example, she raises the specter of an employee denied compensation for stepping away from her immediate work tasks to take a drink of water or answer an emergency call from a spouse. Br. at 10. That is, Friebel paints the Administrator's position as denying employees recovery whenever travel contains a personal ingredient, no matter how small.

Friebel's hypotheticals bear no resemblance to the established doctrines that the Administrator says should govern this case. Numerous cases make this point. A building inspector who took a personal break to buy coffee while traveling to a jobsite was entitled to benefits. *Miller v. Bur. of Workers' Comp.*, No. 24805, 2010-Ohio-1347 (9th Dist.). Another employee likewise received benefits even though injured while taking a restroom break. *Bauder v. Mayfield*, 44 Ohio App. 3d 91, 93 (3d Dist. 1988). Breaks for personal comfort while working do not transform work activity into personal activity, so compensation is available even if an employee is injured during one of these breaks.

The idea that breaks do not eliminate workers' compensation coverage is sometimes called the "personal-comfort doctrine," and it is fully compatible with the doctrines that should govern this case. *See, e.g., Jobe v. Conrad*, No. 18459, 2001 WL 62516, at *2 (2d Dist. Jan. 26, 2001). The personal-comfort doctrine works alongside the primary categories for evaluating injury during employee travel, the coming-and-going rule, and the rules for traveling employees.

So a fixed-situs employee cannot convert a lunch break (really a commute away from and back to work) into covered travel by pointing to the personal-comfort doctrine. *Jobe*, 2001 WL 62516. And a traveling employee may take a break to buy coffee without converting the travel into a personal errand that destroys the right to recover. *Cf. Miller*, 2010-Ohio-1347. Friebel's hypotheticals—intended to make the Administrator's position one-dimensional—do not reflect established doctrine, and do not refute the Administrator's core point on appeal. Again, the Administrator urges that dual intent distorts existing doctrine that accounts for both employee travel and the breaks they must necessarily take for personal comfort.

When it is Friebel's turn to articulate doctrine, she offers a one-dimensional approach that confirms the Administrator's point about the problems with the Fifth District's decision. Friebel puts the rule this way: an act must be a "purely" personal errand to be outside compensability. Br. at 9. But that is not the rule in Ohio. It is contradicted by the coming-and-going rule itself and by numerous cases compensating employees injured while traveling for business. If all travel with some business ingredient enjoys workers' compensation coverage, then injuries incurred while traveling to work would be compensable because commuting is not purely personal. "[C]ommuting distance to a fixed work site is *largely* a personal choice," *Ruckman*, 81 Ohio St. 3d at 125, but not a "purely" personal choice, as the employer selects the worksite and the hours. And if Friebel's approach were right that only "purely personal" errands are non-compensable, all injuries while traveling for work would be covered because that travel includes some business ingredient. The employee would not be in the place of injury absent the work assignment to travel.

Numerous cases disprove Friebel's view that nearly all injuries while traveling for work are compensable. *See, e.g., Roop v. Centre Supermarkets, Inc.* No. L-86-206, 1987 WL 10167

(6th Dist. April 24, 1987) (employee was not in the course of employment after visiting a nightclub upon the conclusion of his work-related convention schedule); *Marbury v. Indus. Comm'n*, 62 Ohio App. 3d 786 (2d Dist. 1989) (employee was not in the course of employment when she entered a souvenir shop at the end of a bus tour while attending an out-of-town conference); *Elsass v. Commercial Carriers, Inc.*, 73 Ohio App. 3d 112 (3d Dist. 1992) (employees were not in the course of employment when, during off-duty time, they traveled from their motel to another city for food and entertainment). In each case, the injury was not purely personal because the employee was out of town for business reasons. But under Friebel's "purely personal" approach, these employees should have been compensated.

Friebel's "purely personal" formulation shows in yet another way the doctrinal problem with dual intent. She extracts the "purely personal" formulation from *Kohlmayer v. Keller*, but disconnects the language from the lesson of that case. 24 Ohio St. 2d 10, 12 (1970) (injury while diving at company picnic compensable). That language is neither a holding of the Court nor even a suggestion that all injuries are compensable unless purely personal. Instead, the language is a way to distinguish early cases that could have been read to say that an injury is non-compensable unless the employee was in the "actual performance of his duties." *Id.* at 11. The three cases cited in connection with the "purely personal" language confirm this point. They are cases where the employees *were* engaged in personal pursuits, but had an arguable claim of work relatedness (traveling to secure employment for another, but possibly as part of a trip to collect debt for employer; traveling away from work at the end of a shift, but part of travel was to buy batteries for use on the job; department store employee injured while making a purchase in another department). See *Indus. Comm'n v. Lewis*, 125 Ohio St. 296 (1932); *Ashbrook v. Indus. Comm'n*, 136 Ohio St. 115 (1939); *Indus. Comm'n v. Ahern*, 119 Ohio St. 41 (1928). These

cases teach that workers' compensation coverage may be denied even when the injury has some business ingredient.

Later cases confirm the point. Even when there is some business ingredient, compensation may be denied if the business connectedness is too tenuous. Consider, for example, a holding denying workers' compensation coverage for an injury stemming from a fight at an employer's Christmas party. *Ray v. Formitex Plastic Fabrications, Div. of Coate Floor Co., Inc.*, No. 76AP-3, 1976 WL 189657, at *3 (10th Dist. May 11, 1976). Or a holding denying workers' compensation coverage for tripping over a forklift at work because the employee was at the time collecting recycling for a personal competition with another employee. *Wissman v. Pro-Fab Indus., Inc.*, No. 02CA0002, 2002-Ohio-3038 (9th Dist.); *see also Gibson v. Tri-City Nursery, Inc.*, No. CA94-02-020, 1994 WL 424101 (12th Dist. Aug. 15, 1994) (denying workers' compensation coverage for injury stemming from helping a co-worker load company equipment, on company property, where the coworker planned a personal use for the equipment); *Tamarkin Co. v. Wheeler*, 81 Ohio App. 3d 232 (9th Dist. 1992) (denying workers' compensation coverage for injury in company parking lot when employee went to check on break-in to his car). Friebel's "purely personal" approach would make these cases wrongly decided because there is nothing purely personal about injuries incurred at a company event, on company property, in a company parking lot, or from handling company equipment.

Friebel makes one last pitch for her view that the Fifth District's approach is pedestrian, rather than a one-dimensional test that upends established and more nuanced doctrine. Friebel turns to several secondary sources to suggest that the Fifth District's decision is a ho-hum application of the coming-and-going rule. But those sources are the kinds of texts that do little more than catalogue results; they do not evaluate trends or bother with future doctrinal problems.

Even so, one source Friebel lists does focus on the dual-intent language. *See* Baldwin’s Ohio Practice Tort Law § 42:105.35 (2d ed. 2013) (“A claimant is not disqualified simply because she may have had dual intentions—to travel for work and to undertake a detour—when traveling along a given work-related route.”). That source, unlike the Fifth District itself, adds the qualifier that the travel must be along a “work-related route.” *Id.* The Fifth District was not as careful, and, as the Administrator pointed out in his opening brief, whether Friebel was on a work-related route is an open question on this record.

At bottom, Friebel’s approach confirms the problem with the Fifth District majority’s dual-intent approach. Her argument for a “purely personal” test proves the fears of Judge Wise and the Administrator that dual intent opens the door to workers’ compensation coverage for travel with any subjective business ingredient. After all, emphasizing that an injury is excluded only if it arises from a “purely” personal injury is just the flip side of saying that any business ingredient will do. If Friebel is right and the Fifth District judgment stands, some claimants will be able to bring themselves “within the scope of [the act] . . . by the mere subsequent announcement that at the time of the accident [they] had in [their] mind an intent and purpose to do some act . . . that would thereafter be used in the service and possibly for the benefit of [their] employer.” *Ashbrook*, 136 Ohio St. at 120-121.

The Administrator’s sole reason for appearing in this Court, and appearing as an appellant, is to correct the appellate court’s analytical framework, which has the real potential of destabilizing appeals involving employee travel. In a field with thousands of appeals every year, even a slight risk of doctrinal misdirection is intolerable. This Court should vacate the decision below and remand to the trial court to apply the settled doctrines governing claims involving employee travel.

III. Once the Fifth District's doctrinal error is vacated, open questions require a remand to the trial court so that it can apply settled law to this case

Perhaps the key place where the right doctrine will matter on remand is assessing whether Friebel was a fixed-situs employee. Dual intent obscures the right analysis. Friebel challenges the Administrator's suggestion that she may be a fixed-situs employee. Br. at 17. Ohio courts, though, routinely conclude that employees have a fixed worksite despite some traveling component to their job. This includes both traveling nurses and others such as building inspectors and landscapers. *See, e.g., Gilham v. Cambridge Home Health Care, Inc.*, No. 2008 CA 00211, 2009-Ohio-2842 ¶ 18 (5th Dist.) (home-healthcare worker treated as fixed-location employee because she "had no duties to perform outside of the homes of her patients"); *Mitchell v. Cambridge Home Health Care, Inc.*, No. 24163, 2008-Ohio-4558 ¶ 10 (9th Dist.) (home-healthcare worker admitted she was a fixed-location worker); *cf. Crockett*, 2004-Ohio-3533, at ¶ 28 & n.1 (assessing injury to home-healthcare worker but declining to decide whether she was a fixed-location employee or not); *see also Miller*, 2010-Ohio-1347, at ¶¶ 25, 7 (building inspector was "fixed situs" employee even though he "drove his own vehicle" each day to two different inspection sites (which differed each day)); *Smith v. City of Akron*, No. 22101, 2004-Ohio-5174 ¶ 12 (9th Dist.) (landscaper was fixed-situs employee because "each landscaping project was at a specific and fixed location").

Despite these authorities, Friebel assigns undeserved significance to the fact that she was reimbursed for travel and mileage on the weekends, and the accident happened on a Saturday. That is both illogical on the facts of this case and inconsistent with the Court's considered evaluation of mileage reimbursements in *Ruckman*. The point is illogical because it would lead to the absurd result that Friebel would have to admit that she would have been outside the scope of workers' compensation coverage had the trip to the mall and resulting accident happened on a

Monday. Friebel's travel to start her workday was no different on weekdays or weekends; only the reimbursement differed. Surely a policy of paying a 9-5 office worker's parking if he came in on the weekend does not bring the usual commute (excluded by the coming-and-going rule) within workers' compensation coverage. The notion that Friebel's weekend reimbursement makes her a traveling employee also conflicts with *Ruckman* because her employer's policy is exactly the kind of benefit that the Court addressed when it observed that "compensation [for travel] may be made part of [a] benefit package, just as an employer may choose to pay a parking allowance." *Ruckman*, 81 Ohio St. 3d at 121 n.1.

Friebel next points to two cases as support for the idea that she was a traveling employee as a matter of law. Br. 18-20. But both cases prove the opposite. In one case, the appeals court reversed summary judgment for the employer where a home-health nurse slipped in her own driveway at the end of the day. *Hampton v. Trimble*, 101 Ohio App. 3d 282 (2nd Dist. 1995). That is consistent with the Administrator's position that summary judgment *for either party* is improper in light of the currently developed record. In the other case, the appeals court affirmed a ruling for an employee *after trial* because "reasonable minds could reach different conclusions" as to whether the injury "occurred in the course of and arose out of [the] employment." *Rankin v. Thomas Sysco Food Servs.*, No. C-950904, 1996 WL 682184, at *5 (1st Dist. Nov. 27, 1996).

The *Rankin* decision deserves additional comment because it affirmatively supports the Administrator's position, despite Friebel's description of the holding. Friebel describes the case as affirming a trial court's decision denying summary judgment to the employer. Br. at 19. That is true only in a technical (and misleading) sense because, after the summary judgment denial, the "matter was tried to the court *de novo*." 1996 WL 682184, at *1. The subsequent trial

superseded any error in the summary-judgment analysis. *See Continental Ins. Co. v. Whittington*, 71 Ohio St. 3d 150, syl. (1994) (“Any error by a trial court in denying a motion for summary judgment is rendered moot or harmless if a subsequent trial on the same issues raised in the motion demonstrates that there were genuine issues of material fact supporting a judgment in favor of the party against whom the motion was made.”). On appeal, the First District rejected the employer’s request for judgment as a matter of law because “reasonable minds could reach different conclusions as to whether [the employee’s] injuries occurred in the course of and arose out of his employment” even though the “totality of the circumstances shows that [the employee] simply would not have been present at the scene of the accident if he were not performing his employment duties.” *Id.* at *5, 3. The case proves the Administrator’s point, not Friebel’s, because it recognizes that summary judgment would have been improper for either party. *See id.* at * 1 (noting that both parties moved for summary judgment) Indeed, Friebel’s claim is weaker because there is some dispute as to whether she would have been at the scene of the accident absent her personal mission to drop her passengers at the mall. That is exactly the point the Administrator makes here—on this record open questions remain that show the error of the Fifth District’s de-facto summary judgment ruling for Friebel. The Administrator’s point is that summary judgment in favor of the employee cannot be affirmed using the legal structure the Fifth District erected.

Whether Friebel was a fixed-situs employee or a traveling employee is just one of several open questions that are obscured, rather than clarified, by the Fifth District’s doctrinal detour. Other questions include whether Friebel’s travel route that day changed because she was taking passengers to the mall and whether any exception to the coming-and-going rule would apply. The Administrator takes no position about the answers to those questions. He is concerned

only—as the Court should be as well—that courts answer those questions by applying settled doctrine instead of a dual-intent test.

* * * *

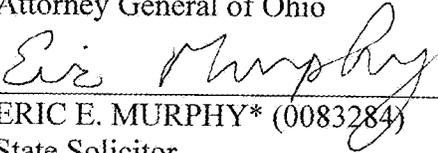
Two judges of the Fifth District offered a new test for assessing injuries to employees arising from travel. Their dissenting colleague and the Administrator agree that the majority's approach is inconsistent with settled doctrine in this area and will breed unneeded confusion. Friebel does not seriously challenge that point. The Court should vacate the judgment below and remand to the trial court to apply the appropriate doctrine.

CONCLUSION

For these reasons, the Administrator asks the Court to vacate the Fifth District's judgment and remand for further proceedings in the common pleas court.

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CERTIFICATE OF SERVICE

I certify that a copy of the foregoing Reply Brief of Appellant Stephen P. Buehrer, Administrator, Ohio Bureau of Workers' Compensation was served by U.S. mail this 28th day of January, 2014, upon the following counsel:

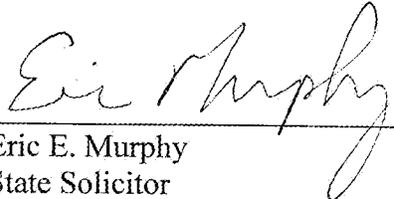
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