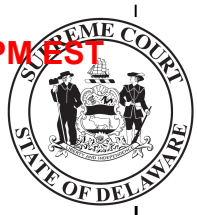

IN THE SUPREME COURT OF THE STATE OF DELAWARE

MARY SPELLMAN,	:	**No.: 315, 2012**
Employee-Below, Appellant,	:	**Court Below: Industrial Accident Board of the State of Delaware in and for Sussex County C.A. No. S11A-08-001 RFS**
v.	:	
CHRISTIANA CARE HEALTH SERVICES.,	:	
Employer-Below, Appellee.	:	

EMPLOYEE-BELOW, APPELLANT'S
OPENING SUPPLEMENTAL MEMORANDA

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I. INTRODUCTION

At Oral Arguments, counsel for the Employer/Appellee suggested that the matter before this Court is not a case of first impression, and that this Court has previously ruled on the issue of whether or not injuries sustained by traveling employees on a trip home are in the course and scope of their employment for Worker's Compensation purposes. In support of this contention, Counsel cited two cases, Clough v. Interline Brands, Inc. 929 A.2d 783 (Del.2007), and Coates v. Murphy, 270 A.2d 527 (Del.1970). These cases were not discussed at any point of Employer's Answering Brief; the Court asked that Counsel for both parties prepare memoranda addressing these decisions. This is Employee/Appellant's Opening Supplemental Memoranda.

II. BY VIRTUE OF THE HOLDING OF CLOUGH, BOTH *CLOUGH* AND *COATES* ARE ARE INAPPLICABLE IN THE PRESENT MATTER

Employer/Appellee argues that, not only are Clough and Coates on point, but that they demonstrate the Rule the Court should be applying in this matter. At oral arguments, Employer stated that both cases dealt with traveling salesmen and the going and coming rule, adding that in both cases, "compensability was denied." Accordingly, Employer believes that this Court should similarly find that Ms. Spellman was not in the course and scope of her employment at the time of the accident which is the subject of this appeal. However, in explaining the relevance of those cases to the Court, counsel for the Employer misstated the respective holdings; "compensability" was never denied, because compensability was not at issue. Coates and Clough were not appeals from Industrial Accident Board decisions seeking the compensability of allegedly work related injuries. They were appeals from Superior Court on motions for summary judgment against third party Plaintiffs attempting to *establish tort liability against the employers of the traveling employees*. This is a critical distinction, and one which renders them inapplicable to the case presently before the Court.

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In Coates v. Murphy, Plaintiff/Appellant Coates was killed in a motor vehicle accident caused by Defendant/Appellee Murphy. Mr. Murphy was an employee of fellow

Defendant/Appellee, Litton Business Systems. Mr. Murphy's job duties for Litton required him to use his own vehicle to travel to the locations of clients to service and sell typewriters. While on a trip home to have lunch, Mr. Murphy was involved in the fatal accident underlying that litigation. Despite Coates' argument that Mr. Murphy's travel advanced his employer's interest and placed him in the course and scope of his employment at the time of the accident, the Supreme Court found that Murphy was not in the course and scope of his employment and affirmed that there was no tort liability against Litton Business Systems.

36 years later, a similar argument was raised, first in Superior Court in Clough v. Comly, C.A. No. 05C-03-263, 2006 WL 2560119, Cooch, R.J. (August 31, 2006) and then before this Court in Clough v. Interline Brands, Inc., 929 A.2d 783 (Del. 2007). In the intervening time, the Superior Court had decided Devine v. Advanced Power Control, Inc., 663 A.2d 1205 (Del. Super. 1995), and established the "traveling employee exception" to the general going and coming rule of employer non-liability. The Plaintiff/Appellant in Clough suffered personal injuries as a result of a motor vehicle accident involving Defendant Comly, an employee of Defendant/Appellee Interline Brands. Mr. Comly, having completed his workday as a traveling salesperson for Interline, was on his way home at the time of the accident. Like the Plaintiff/Appellant in Coates, Ms. Clough sought to establish tort liability against Interline on the grounds that, as a traveling employee, Comly was acting in the course and scope of his employment while on his way home. Clough provided a number of arguments, however the one most notable for purposes of this matter was the one based on Devine. Clough argued that, because Mr. Comly fell into the travelling employee exception to the going and coming rule outlined in Devine, the same rule should, by analogy, establish tort liability against Interstate Brands.

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The Superior Court rejected this argument. In rendering its opinion, the court looked to Professor Larson who observed that:

> Almost every major error that can be observed in the development of compensation law, whether judicial or legislative, can be traced to the importation of ideas, or, less frequently, to the assumption that the right to compensation resembles the right to the proceeds of a personal insurance policy...Among common-law trained lawyers and judges, it has naturally been the tort-connection fallacy that has been most prevalent.

1 Arthur Larson & Lex K. Larson, Larson's Workers' Compensation Law §1.02 (2006).

Professor Larson cites a number of examples of the "tort-connection fallacy," but most notable for purposes of the issues both in Clough and the case at hand is the following:

> A less conspicuous example of the distortion of compensation law by tort concepts will be seen in the attempt to define an employee, for compensation purposes, by tests which were developed to determine when a master should be liable for the torts of a servant to a third person.

Larson's §1.02

By asserting that Clough and Coates represent the Rule that the Court should be applying to the matter of Ms. Spellman, the Employer is urging the Court to do precisely that which Professor Larson warns of in the above passage; conflating the principles of worker's compensation with those of tort. In affirming the Superior Court's well reasoned decision, the Supreme Court states that "Devine is a worker's compensation case. As the Superior Court explained, 'the doctrines relating to potential liability of employers to employees applicable in the case of workers compensation claims do not pertain to the present case.'" Clough v. Interline Brands, Inc., 929 A.2d 783, 783 n.1 (Del. 2007) (citing Clough v. Comly, C.A. No. 05C-03-263, 2006 WL 2560119, Cooch, R.J. (August 31, 2006)).

It is evident from both the Superior Court and Supreme Court rulings on Clough that it is inappropriate to apply tort law to worker's compensation cases and *vice versa*. Accordingly, the Court should not apply the rule of law as set forth in Coates and Clough, both tort matters, to the case of Ms. Spellman, a worker's compensation matter.

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III. CONCLUSION

For the reasons stated above, Appellant Mary Spellman urges this Court to reject Employer's argument that Coates and Clough are applicable to the case at bar. In light of the holding of the subsequent Clough cases, Coates has no relevance to this matter. Aside from rendering Coates inapplicable in the case of Ms. Spellman, the relevance of the Clough decisions to the matter presently on appeal is tangential at best. The Clough decisions, by virtue of their holdings, are inapplicable to this case. The dicta of these decisions acknowledge the applicability of the rule set forth in Devine to the case of a traveling employee injured on the way home, but the issues on appeal do not call for the Court to either formally adopt or reject Devine as a piece of worker's compensation doctrine.

In light of the forgoing, Appellant respectfully prays that this Honorable Court reject the arguments offered by the Employer, and hold that the Employee/Appellant Mary Spellman was in the course and scope of her employment when she was injured.

Respectfully submitted,

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