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Case Number 315,2012

IN THE SUPREME COURT OF THE STATE OF DELAWARE

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

EMPLOYER-BELOW, APPELLEE'S

SUPPLEMENTAL ANSWERING MEMORANDA

Dated: 2/15/13

By: **/ S / Maria Paris Newill**

MARIA PARIS NEWILL, ESQUIRE
Attorney I.D. 2929
Heckler & Frabizzio
The Corporate Plaza
800 Delaware Avenue, Suite 200
P.O. Box 128
Wilmington, DE 19899-0128
Attorney for Employer,
Appellee Below, Appellee

ARGUMENT

It is the Appellant's position that the Decisions of Coates v. Murphy, 270 A.2d 527 (Del. 1970) and Clough v. Interline Brands, Inc., 925 A.2d 477 (Del. 2007) should not be considered by the Supreme Court during its analysis of the issues set forth in this present matter pending on Appeal to the Supreme Court based upon the Appellant's contention that these cases deal with tort liability, as opposed to workers' compensation benefit entitlement owed to the employee. Appellant argues relying upon Larson's that tort concepts should somehow be kept entirely separate from workers' compensation benefit entitlement law. 1 Arthur Larson & Lex K. Larson, Larson's Workers' Compensation Law §1.02 (2006). Appellant is taking this proposition too far. While there are many differences between tort law and workers' compensation law, there are areas where there must be consistencies and overlap in the laws.

Unlike tort law, workers' compensation law is a no-fault system. If an individual is at work in the "course and scope" of his employment and an injury occurs, that employee is compensated regardless of their employer's or their own negligence, contributory negligence and/or assumption of the risk. There is no requirement under Delaware law that an employer in any way negligently cause or contribute to the injury for that employer to be found liable for workers' compensation benefits to their employee. An example of this is that an employee may choose to wear ridiculously high-heeled shoes to work, may be walking down the hall of their employer's premises, stumble over their own footwear, fall to the ground and sustain an injury and that injury will be found compensable merely because while walking down the hall, the

employee was in the "course and scope" of their employment and they were on their employer's premise at the time of the injury. This is a stark contrast to tort law where there needs to be a duty, breach of duty and negligence to ultimately result in liability and the payment of compensation.

Just because there are many areas where tort law and workers' compensation may be polar opposites, that does not mean that there are not areas where there should be consistency in tort liability and workers' compensation liability. The Decisions in Coates v. Murphy, 270 A.2d 527 (Del. 1970) and Clough v. Interline Brands, Inc., 925 A.2d 477 (Del. 2007) represent areas where there is a common sense requirement that consistency is required. Delaware workers' compensation law requires that for an injury to be compensable with benefits paid to the employee, the injury must have arisen by accident, occurring "out of and in the course of employment." 19 Del. C. §2304. Simultaneously, for an employer to have tort liability to a third-party, the employee's actions must also be within the "course and scope" of employment. Coates v. Murphy, 270 A.2d 527 (Del. 1970) and Clough v. Interline Brands, Inc., 925 A.2d 477 (Del. 2007). It seems entirely fundamental that the test for being "within" the course and scope of employment should be the same test. An employer should not be liable to anyone, be it their own employee or to any third-party for actions of an individual which do not arise out of and in the "course and scope" of employment.

While the Appellant correctly points out that caution should be observed when comparing and analyzing tort and workers' compensation law, the Appellant has failed to put forth any position or argument as to why there should be inconsistency between

tort law and workers' compensation law on the issues with which we are presently confronted. The Appellant seems to be arguing that for third-party liability, the Decisions in Coates v. Murphy, 270 A.2d 527 (Del. 1970) and Clough v. Interline Brands, Inc., 925 A.2d 477 (Del. 2007) are accurate in that the employer should not be liable to a third-party for the actions of an employee who is determined not to be in the "course and scope" of employment, but then that same employee should be covered for workers' compensation benefits under Devine v. Advanced Power Control, Inc., 633 A.2d 1205 (Del. Super. 1995). The same employee who was not in the "course and scope" of their employment, for tort law, but merely was a traveling employee performing their routine daily commute, should be found for workers' compensation purposes as in the course and scope of employment and covered by workers' compensation benefits, even though non-traveling employees are not provided with such entitlement and compensation during their routine commutes. Why should the employer be held liable to the employee, who apparently was negligent towards a third-party, but not liable to the third-party? The answer is: the employer should not be liable in any situation for any type of benefits, when the employee is not "in the course and scope of their employment."

The Appellant's arguments are misplaced because the Decisions in Coates v. Murphy, 270 A.2d 527 (Del. 1970) and Clough v. Interline Brands, Inc., 925 A.2d 477 (Del. 2007) represent a two-part analysis. The first part is whether the individual is in the "course and scope" of their employment and the second is whether third-party liability is triggered by the employee being in the "course and scope" of their

employment. It is the first part of this analysis upon which Appellee relies. Coates v. Murphy, 270 A.2d 527 (Del. 1970) and Clough v. Interline Brands, Inc., 925 A.2d 477 (Del. 2007). These Decisions should be utilized by this Supreme Court to analyze questions of "course and scope" and it is agreed that tort liability is inapplicable in this case, so the second part of the analysis can be disregarded. No legal justification has been put forth as to why there should be different standards for determining whether someone is in the "course and scope" of their employment for purposes of tort law and that that test or standard should be different for purposes of workers' compensation law. An individual is either in the "course and scope" of their employment or they are not. The Courts should have a consistent rule for making that determination regardless of the reason why they are making that determination. Once it is found that an individual is in the "course and scope of their employment," then the Courts can proceed with whatever analysis is appropriate to determine workers' compensation benefit entitlement and/or separate third-party tort liability. Regardless of whether an employee is bound by the "going and coming" rule or a "traveling employee" exception, there remains the requirement that the employee be injured "arising out of" and "in the course of" employment. Dravo Corp. v. Strosnider, 45 A.2d 542 (Del. Super. 1945). Nothing in any of the legal arguments presented by the Appellant has established why the Appellant, who was found not to be in the course and scope of her employment by the factual finding of the Industrial Accident Board [hereinafter "Board"], should be compensated contrary to the statutory requirements of 19 Del. C. §2304. You do not need to get to the "going and coming" rule or the "traveling

employee" exception if it is determined that at the time of the accident, the employee is not in the course and scope of her employment, as required by 19 Del. C. §2304. Sometimes, the Board might have to consider the "going and coming" rule or the "traveling employee" exception to determine whether or not the employee is in the "course and scope" of employment at the time of an accident, but this is not always the case.

While the Superior Court in the Devine v. Advanced Power Control, Inc., 633 A.2d 1205 (Del. Super. 1995) case recognizes there are times when travel itself is a large part of the course and scope of employment, the Supreme Court Decisions in Coates v. Murphy, 270 A.2d 527 (Del. 1970) and Clough v. Interline Brands, Inc., 925 A.2d 477 (Del. 2007) correctly conclude in answering the question of "course and scope" of employment that there is no reason to entirely exempt traveling employees from the "going and coming" rule or the personal deviation rules in order to trigger employer liability in a third-party tort. A traveling employee's risk in "commuting" or during a personal deviation is no different from any other employee including, but not limited to, those having a fixed employer's premise. These Supreme Court Decisions recognize that there is no legal justification for traveling employees to bind their employer for third-party liability just as there is no legal justification for traveling employees to be covered for workers' compensation benefits merely because they are "traveling employees" and regardless of whether they are or are not about their employer's business.

Despite all of the briefing, oral arguments and legal memorandas in this case, no legal basis has been provided to establish why the mere fact that an individual travels when they are in the course and scope of their employment entitles them to be covered by workers' compensation benefits during a time they are determined through the factual finding of the Board to be outside of the course and scope of their employment, which is the threshold requirement for workers' compensation compensability to attach. All injuries "on the road" are not compensable, only those reasonably related to the employer's business are compensable and the Workers' Compensation Statute should not cover traveling employees at all times when they are not in their homes but, rather, only when they are engaged in acts that further their employer's business. Bedwell v. Brandywine Carpet Cleaners, 684 A.2d 306 (Del. Super. 1996).

CONCLUSION

Reading the record as a whole, there is substantial evidence to support the factual conclusion of the Board that the Appellant's accident did not arise out of or in the "course and scope" of her employment, when she was "off the clock," on her way home for coffee and then to a personal doctor appointment. The Superior Court and Board found that the Appellant's departure to go home and to a doctor's appointment was so great a deviation as to be a temporary abandonment of her job. Only by this Court replacing its own factual finding for those of the Board would there be a basis to overturn this Decision. Therefore, the Board's and Superior Court's Decisions should be affirmed in their entirety.

Dated: 2/15/13

Respectfully submitted,

/ S / Maria Paris Newill

Maria Paris Newill, Esquire
Attorney I.D. 2929
Heckler & Frabizzio
800 Delaware Avenue, Suite 200
Wilmington, DE 19801
Attorney for Employer–Appellee