IN THE SUPREME COURT OF THE STATE OF NEVADA

Case No. 82894

SUSAN HOPKINS,

Appellant,

v.

CANNON COCHRAN MANAGEMENT SERVICES, INC., D/B/A CCMSI; AND WASHOE COUNTY,

Respondent.

Appeal From Order Denying Petition for Judicial Review
District Court Case No. CV20-01650
Second Judicial District Court of Nevada

PETITION FOR REHEARING

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DISCLOSURE STATEMENT

Pursuant to NRAP 26.1, the undersigned counsel of record certifies that the following are persons and entities as described in NRAP 26.1(a) and must be disclosed. These representations are made in order that the justices of the Supreme Court may evaluate possible disqualification or recusal.

Respondent Washoe County is a political subdivision of the State of Nevada and therefore a governmental entity that is exempt from the disclosures required by NRAP 26.1(a). Respondent Cannon Cochran Management Services, Inc. has no parent companies and no party owns ten percent (10%) or more in stock in the company.

In the course of the proceedings leading up to and including this appeal, Respondents have been represented by the law firm of McDonald Carano LLP.

Dated: April 5, 2022

McDONALD CARANO LLP

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Respondents Cannon Cochran Management Services, Inc., and Washoe County (collectively, "Respondents") petition this Court for rehearing of the Court's Order of Reversal and Remand entered in the above-entitled matter on March 18, 2022 (the "Order"). The request is made pursuant to NRAP 40.

INTRODUCTION

Respondents respectfully submit that the Court's Order exceeds the bounds of the Nevada Industrial Insurance Act (the "NIIA") and improperly applies common law concepts to conclude that Petitioner Susan Hopkins' ("Hopkins") injuries "arose out of" her employment and fall within an exception to the going-and-coming rule. As the Court recognized in *MGM Mirage v. Cotton*, the going-and-coming rule provides that "injuries sustained by employees while going to or returning from their regular place or work are not deemed to arise out of and in the course of their employment." 121 Nev. 396, 399, 116 P.3d 56, 57-58 (2005). The Court's Order also loses sight of the statutory purpose behind the NIIA, which is not to make an employer liable for any injury that might occur while an employee is at work, but rather to provide coverage for injuries that both arise out of ***and*** occur within the course of employment. The Court's application of the "premises-related" or

"parking lot" exception to Hopkins' injuries is contrary to precedent and swallows the going-and-coming rule entirely.[1]

By overlooking the fundamental principle enshrined in the going-and-coming rule, the Court arrives at the erroneous conclusion that Hopkins' injuries were in the course of her employment. Moreover, the Court misapplied concepts from tort law to determine that Hopkins' injury "arose out of" her employment and therefore satisfied the first factor of the two-part inquiry required by NRS 616C.150(1). The Court's Order is contrary to the statutory purpose of the NIIA as clearly and unambiguously expressed by the legislature and recognized in the Court's prior case law. Accordingly, Respondents respectfully contend rehearing is warranted.

ARGUMENT

I. The Applicable Standard for Rehearing

NRAP 40(c)(2) sets forth when rehearing may be considered by the Court:

> **(c) Scope of Application; When Rehearing Considered.**
> (2) The court may consider rehearings in the following circumstances:

[1] The Court states that Washoe County failed to contest the merits of the parking-lot exception before the district court. (Order at n.2.) This is inaccurate. While the term "parking lot exception" was not used in Washoe County's briefing, it discussed the exceptions to the going-and-coming rule and *MGM Mirage v. Cotton* in its Answering Brief. (*See* I AA at 244-245.) Washoe County also addressed the parking lot exception concept at the hearing before the district court. (*See* II AA 377-378.)

> (A) When the court has overlooked or misapprehended a material fact in the record or a material question of law in the case, or
> (B) When the court has overlooked, misapplied or failed to consider a statute, procedural rule, regulation or decision directly controlling a dispositive issue in the case.

Respondents respectfully submit rehearing should be granted in this case because the Court has overlooked fundamental principles of the NIIA and case law resulting in a conclusion that contradicts well-established precedent.

II. Compensability of an Industrial Injury Under NRS 616C.150(1)[2]

The NIIA provides that workers' compensation is the exclusive remedy for an employee against his employer where the employee sustains an injury "arising out of and in the course of the employment." NRS 616A.020(1); *Wood v. Safeway*, 121 Nev. 724, 729 (2005) ("The NIIA provides the exclusive remedy for employees injured on the job, and an employer is immune from suit by an employee for injuries 'arising out of and in the course of employment.'") In exchange for provisions and protections provided for by the NIIA, employees and employers give up their common law remedies and defenses for workplace injuries. *See* NRS 616A.010(3). Thus, where an employee is injured within the course and scope of their employment, the employee may not sue the employer for negligence.

[2] This issue was raised in Respondents' Answering Brief at pages 25-26.

The NIIA requires a workers' compensation claimant to "establish more than merely being at work and suffering an injury in order to recover." *Rio Suite Hotel & Casino v. Gorsky*, 113 Nev. 600, 605, 939 P.2d 1043, 1046 (1997). NRS 616C.150(1) provides:

> An injured employee of the dependents of the injured employee are ***not entitled to receive compensation*** pursuant to the provisions of chapters 616A to 616D, inclusive, of NRS ***unless the employee or the dependents establish by a preponderance of the evidence that the employee's injury arose out of and in the course of his or her employment.***

The Court's Order improperly applies common law premises liability concepts to conclude that Hopkins' injury satisfies the first part of the two-part compensability analysis required by NRS 616C.150(1). The Court concluded that because Respondent employer Washoe County (the "County") controlled the public sidewalk where Hopkins fell, it presented an employment, rather than a neutral risk and thus her injuries "arose out of" her employment. The Court's Order relies on the fact that the County placed a work order to repair the sidewalk where Hopkins fell to prevent that type of accident from occurring again. This analysis, however, ignores that the defective sidewalk was in a public area where Hopkins was not required to walk as part of her employment. The Order overlooks the Court's holding in *Gorsky* that to "arise out of the claimant's employment" the injury must be "fairly traceable to the nature of the employment or workplace environment."

113 Nev. at 604, 939 P.2d at 1046. Similarly, the Court misapplies *Baiguen*, which held that "[a]n injury arises out of the employment 'where there is a causal connection between the employee's injury and the nature of the work or workplace.'" *Baiguen v. Harrah's Las Vegas, LLC*, 134 Nev. 597, 600, 426 P.3d 586, 590 (2018.)

The Court further cites *Buma v. Providence Corp. Development* in support of its conclusion. (Order at p.5.) However, Respondents respectfully submit that *Buma* addressed when a ***traveling employee's injury*** is covered by the NIIA. *Buma v. Providence Corp. Development*, 135 Nev. 448, 455, 453 P.3d 904, 910 (2019). In *Buma*, the Court adopted the personal-comfort rule, extending the NIIA's coverage for a traveling employee "because of the risks associated with travel from home." *Id.* at 452, 453 P.3d at 909 (citing *Ball-Foster Glass Container Co. v. Giovanelli*, 177 P.3d 692, 701 (Wash. 2008)). Here, however, Hopkins was not traveling on behalf of the County at the time of her trip-and-fall injury. Rather, she was walking during her personal break time. Thus, the analysis under *Buma* is inapposite.

III. The Purpose of the Going-and-Coming Rule[3]

The Court's Order expands the coverage of the NIIA and allows the "parking lot" exception to erode the going-and-coming rule expressed by the Court in *Cotton*

[3] This issue was raised in Respondents' Answering Brief at pages 18-19.

to the point where it is meaningless. The purpose of the going-and-coming rule is to "free[] employers from liability for the dangers employees encounter in daily life" when they are beyond the reach of their employer's control. *Cotton*, 121 Nev. at 399-400, 116 P.3d at 58. The parking-lot exception to the rule provides that "injuries sustained on the employer's premises while the employee is proceeding to or from work, within a reasonable time, are sufficiently connected with the employment to have occurred 'in the course of employment.'" *Id.* at 400, 116 P.2d at 58. The parking-lot exception recognizes that an employee is required to proceed to and from work in the course of their employment. Here, however, Hopkins chose to walk during a 15-minute break from her employment in an area where she was not required by her job to be. The Court's extension of the parking-lot rule to deem Hopkins' injury "in the course of employment" is an unprecedented expansion of the NIIA's coverage and Petitioners respectfully submit that rehearing is warranted.

CONCLUSION

The Nevada Legislature enacted the NIIA to compensate employees injured on the job and to prevent costly personal injury lawsuits against employers. The Court's Order ignores the purpose of the NIIA and improperly looks to common law to reach its conclusion regarding whether the injury "arose out of" employment. The Order expands the parking-lot exception to cover an employee injured during a break from work and the result renders meaningless the going-and-coming rule recognized

in this Court's precedent. For these reasons, Respondents respectfully request rehearing of the Court's March 18, 2022 Order.

AFFIRMATION

Pursuant to NRS 239B.030, the undersigned does hereby affirm that the preceding document does not contain the social security number of any person.

Respectfully submitted this 5th day of April 2022.

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CERTIFICATE OF COMPLIANCE

I hereby certify that this brief complies with the formatting requirements of NRAP 32(a)(4), the typeface requirements of NRAP 32(a)(5) and the type-style requirements of NRAP 32(a)(6) because this brief has been prepared in a proportionally spaced typeface using Microsoft Word 2016 in 14-point font, Times New Roman style. I further certify that this brief complies with the type-volume limitation of NRAP 32(a)(7) because, excluding the parts of the brief exempted by NRAP 32(a)(7)(c), it is proportionally spaced, has a typeface of 14 points or more, and contains 1,392 words.

Pursuant to NRAP 28.2, I hereby certify that I have read this brief, and to the best of my knowledge, information, and belief, it is not frivolous or interposed for any improper purpose. I further certify that this brief complies with all applicable Nevada Rules of Appellate Procedure, in particular NRAP 28(e), which requires every assertion regarding matters in the record to be supported by a reference to the page and volume number of the transcript or appendix where the matter relied on is to be found. I understand that I may be subject to sanctions in the event that this

brief is not in conformity with the requirements of the Nevada Rules of Appellate Procedure.

Dated this 5th day of April, 2022.

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CERTIFICATE OF SERVICE

I hereby certify that I am an employee of McDonald Carano LLP; that on April 5, 2022, the foregoing was electronically filed with the Clerk of the Court for the Nevada Supreme Court by using the Nevada Supreme Court's E-Filing system (Eflex). Participants in the case who are registered with Eflex as users will be served by the Eflex system.

Dated: April 5, 2022.

/s/Carole Davis
Employee of McDonald Carano LLP