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,

Respondents.

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

PETITION FOR EN BANC RECONSIDERATION

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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: May 2, 2022

McDONALD CARANO LLP

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Pursuant to NRAP 40A, respondents Cannon Cochran Management Services, Inc. and Washoe County (collectively, "Respondents") hereby petition this Court for en banc reconsideration of the April 18, 2022 Order by a three justice panel of this Court denying rehearing of the Court's Order of Reversal and Remand entered in the above-entitled matter on March 18, 2022.

POINTS AND AUTHORITIES

I. INTRODUCTION

En banc reconsideration is necessary to secure and maintain uniformity of the Court's decisions and to prevent serious precedential and public policy consequences for employers and insurers statewide. The panel's reversal of the district court's denial of the Petition for Judicial Review filed by Petitioner/Appellant Susan Hopkins ("Hopkins") is contrary to prior, published opinions of the Court, including *MGM Mirage v. Cotton, Rio Suite Hotel & Casino v. Gorsky*, *Rio All Suite Hotel & Casino v. Phillips*, *Baiguen v. Harrah's Las Vegas, LLC*., and *Buma v. Providence Corp. Development*. It raises important precedential and public policy issues regarding whether coverage under the Nevada Industrial Insurance Act ("NIIA") extends to a non-traveling employee who is injured while walking for recreation during a break from employment.

The panel disregarded the purpose of the "going-and-coming" rule, recognized in this Court's prior case law to preclude workers' compensation liability

for employees who are injured while proceeding to or from their jobs. The district court correctly interpreted the Court's precedent and held that Hopkins' injury, which occurred when she tripped while walking for recreation during a break from work, did not fall under any recognized exception to the going-and-coming rule. The panel's application of the "parking lot" exception to the going-and-coming rule to the injury here swallows the rule entirely by extending the exception to an injury that occurred during a recreational walk taken by an employee over a break period, rather than when proceeding to or from work as required by her employer.

This is a purely legal issue, under NRS 616C.150(1) and case law interpreting this statute, that has great significance for employers and insurers across the state especially public employers. The panel's Order is a significant departure from precedent and puts every one of the state's employers at risk for incurring liability for employees injured ***during a break period when the employee is not acting within the scope of employment***. Such injuries result from the dangers employees encounter in daily life and do not "arise out of and in the course of the employment" as defined by this Court's precedent. For an injury to "arise out of employment" there must be a causal connection and, further, an employee must demonstrate that the origin of the injury ***is related to some risk involved within the scope of employment.***

The panel's Order also results in different outcomes depending on the nature of the employer; if the employer is a public employer responsible for maintaining sidewalks (or public streets for that matter), and the employee is injured while undertaking recreational activity on the sidewalk (or street) during a break, workers compensation liability follows; if the employer is a private entity with no responsibility for the maintenance of public sidewalks and the employee is similarly injured, there would be no liability. These competing results illustrate the flaw in the panel's Order. Workers' compensation liability does not turn on the nature of the employer (public or private); it turns on the extent to which the risk giving rise to the injury is endemic to the nature of *employment*. The Order also improperly conflates premises liability with workers' compensation liability such that the extent of an employer's (public or private) control over the premises upon which an injury takes place dictates liability even where there is no employment risk inherent in the employee's actions. This potentially gives rise to slip and fall liability for employers under workers compensation law which, in the absence of facts yielding the conclusion that the slip and fall was due to an employment risk, is contrary to the Court's case law.

Full court review and affirmance of the district court's decision is warranted to rectify the panel's disregard of controlling authority and to prevent the deleterious public policy, legal liability and fiscal consequences to employers and insurers

throughout the state. Respondents therefore respectfully request en banc reconsideration.

II. LEGAL STANDARD FOR EN BANC RECONSIDERATION

Under NRAP 40A(a), the Court may reconsider a decision of a panel of the Supreme Court "when (1) reconsideration by the full court is necessary to secure or maintain uniformity of decisions of the Supreme Court or Court of Appeals, or (2) the proceeding involves a substantial precedential, constitutional or public policy issue." NRAP 40A(a); *see also Huckabay Props. v. NC Auto Parts*, 130 Nev. 196, 201, 322 P.3d 429, 432 (2014); *Recontrust Co. v. Zhang*, 130 Nev. 1, 10, 317 P.3d 814, 819 (2014). Both of the bases for en banc reconsideration apply here.

III. ANALYSIS

A. The Purpose of 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 of work ***are not deemed to arise out of and in the course of their employment***,' unless the injuries fall under an exception to the rule." 121 Nev. 396, 399, 116 P.3d 56, 57-58 (2005) (quoting *Nev. Indus. Comm'n v. Dixon*, 77 Nev. 296, 298, 362 P.2d 577, 578 (1961)) (emphasis added). One such exception is the "parking lot" or "premises related" exception, under which "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.3d at 58 (internal quotation marks omitted).

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. *Id.* at 399-400, 116 P.3d at 57-58. Hopkins was beyond the reach of her employer's control when she chose to walk for recreation in a public area of the County's premises where her employment did not require her to be, where the nature of her work did not include walks, and when she was on a break. The panel's application of the "premises-related" or "parking lot" exception in this case renders the going-and-coming rule meaningless and is contrary to precedent.[1] Unlike in *Cotton* where a very limited exception to the going-and-coming rule is provided, Hopkins was not walking immediately before the start of her shift along the required route she needed to take to get from where her car was parked in a parking lot to the front entrance of the building she worked in to start her job. *Cf.*

[1] The panel states that Washoe County failed to contest the merits of the parking-lot exception before the district court. (Order of Reversal and Remand 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.)

Cotton, 121 Nev. at 398, 116 P. 3d at 57. Rather, Hopkins took a voluntary and recreational walk on a break leaving her building through the back entrance of Building B at 1001 East 9th Street and walked around the Reno Sparks Livestock Event Center and tripped on the sidewalk while walking. (I AA 38-41, 131-135.) This was not the route she was required to take to get to her office and was not a task within her job duties or nature of her work as an Office Support Specialist.[2]

By overlooking the fundamental principle enshrined in the going-and-coming rule, that an employer should not be liable for injuries incurred while an employee is proceeding to or from work, the panel arrives at the erroneous conclusion that Hopkins' injuries arose out of and in the course of her employment. Accordingly, Respondents respectfully contend en banc reconsideration is warranted to secure or maintain uniformity of decisions of the Court under NRAP 40A(a)(1).

B. Compensability of an Industrial Injury Under NRS 616C.150(1)[3]

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, 732, 121 P.3d 1026, 1031 (2005) ("The NIIA provides the exclusive

[2] As stated in the notice of claim denial, "[h]ealth initiatives are encouraged by Washoe County but are not required. Employee engagement is voluntary." (I AA 47.)

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

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'" and tort claims for personal injuries by an employee are barred under NRS 616A.020(1) and NRS 616B.612(4).) In exchange for the 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).

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). The NIIA is not a mechanism which makes employers absolutely liable for injuries suffered by employees who are on the job. *Id.* 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.***

NRS 616C.150(1) (emphasis added).

For an injury to "arise out of" employment under NRS 616C.150(1), which is the first of two prongs in this subsection, "the employee must show that the origin of the injury is related to some risk involved within the scope of employment." *Rio All Suite Hotel & Casino v. Phillips*, 126 Nev. 346, 350, 240 P.3d. 2, 5 (2010)

(quoting *Mitchell v. Clark Cty. Sch. Dist.*,121 Nev. 179, 182, 111 P.3d 1104, 1106 (2005)); *see also Gorsky*, 113 Nev. at 604, 939 P.2d. at 1046 (there must be a causal connection between the injury and the employee's work and further, "a claimant must demonstrate that the origin of the injury is related to some risk involved within the scope of employment"). In contrast, the second prong of this subsection is whether an injury occurs within the course of the employment and refers merely to the time and place of employment, *i.e.*, whether the injury occurs at work, during working hours, and while the employee is reasonably performing his or her duties. *Baiguen v. Harrah's Las Vegas, LLC*, 134 Nev. 597, 599, 426 P.3d 586, 590 (2018); *Gorsky*, 133 Nev. at 604, 939 P.2d at 1046. Both factors must be satisfied for an injury to be compensable under the NIIA. *See MGM Mirage v. Cotton*, 121 Nev. 396, 400, 116 P.3d 56, 58 (2005) (explaining "that the inquiry is two-fold").

1. The Panel Misapplied Controlling Authority to Find That Hopkins' Injury Arose Out of Her Employment.

This Court has classified four types of workplace risk relevant to workers' compensation under Nevada law: (1) employment risk, (2) personal risk, (3) neutral risk, and (4) mixed risk. *Baiguen*, 134 Nev. at 600-01, 426 P.3d at 588. However, a risk, regardless of which type, is only deemed to "arise out of" the employment pursuant to NRS 616C.150 when "the origin of the injury is related to some risk involved within the scope of employment." *See id.*, 134 Nev. at 600, 426 P.3d at 590

(internal citations omitted). Employment risks are solely related to the employment and include what can be characterized as "classic" industrial injuries, like machinery breaking or objects falling. *Phillips*, 126 Nev. at 351, 240 P.3d at 5; 1 Arthur Larson and Lex K. Larson, *Larson's Workers' Compensation Law* § 4.01, at 4-2 (rev. ed. 2017)).) Personal risks include injuries caused by underlying personal disabilities or illnesses and do not arise out of the employment. *Phillips*, 126 Nev. at 351, 240 P.3d at 6. Finally, a neutral risk is neither an employment risk nor a personal one, but rather is a risk "such as a fall that is not attributable to premise defects or a personal condition." *Phillips*, 126 Nev. at 351, 240 P.3d at 5; Larson, § 4.03, at 4-2. A neutral risk arises out of the employment (and is therefore compensable) only if the employee was subjected to an increased or greater risk than the general public due to the employment. *See Phillips*, 126 Nev. at 353, 240 P.3d at 7.

The panel'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 panel concluded that because Respondent employer Washoe County (the "County") "controlled" the defective public sidewalk where Hopkins fell, it presented an "employment risk." (Order of Reversal and Remand at 4-5.) This carte blanche finding of liability due solely to a sidewalk defect ignores that the risk ***must also arise out of the scope of employment***.

The panel's analysis misclassifies the risk presented by the defective sidewalk and the act of walking to be an "employment risk" rather than a "neutral risk" subject to an "increased-risk test" as set forth in *Phillips*. The panel'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. (Order of Reversal and Remand at 5.) 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 and therefore was not a risk that was distinctively employment as there was no casual connection between the injury and the scope of work.[4,5] In *Phillips*, the employee fell and broke her ankle on the stairs to the employee break room. 126 Nev. at 347, 240 P.3d at 3. Phillips was required to traverse two flights of stairs over an eight-hour shift to get to the break room for her six periodic breaks, and therefore she used the staircase far more frequently than did the general public. *Id.* at 354, 240 P.3d at 7. The *Phillips* court characterized this as a "neutral risk" and therefore applied the

[4] It should also be noted that, on September 23, 2019, the County warned employees who were known to walk during breaks of unsafe areas for walking near the adjacent Reno Sparks Livestock and Event Center due to construction. (I AA 81.) The email did not require employees to walk during their breaks and warned "[a]s always use caution and be aware of your surroundings." (*Id.*)

[5] In contrast, for example, had Hopkins' toe been fractured due to her desk falling apart because of defective screws and a piece of the desk landing on her foot, that defect could be considered an "employment risk" as the risk of injury from her desk while working as an Office Support Specialist could be within the nature of her work.

increased-risk test to the activity of taking the stairs, which is not a risk peculiar to employment, to determine if the injury caused by a neutral risk arose out of employment. *Id.* The Court concluded the injury was compensable because Phillips was required to use the stairs as part of her job at a high frequency which resulted in a significantly greater risk of injury than faced by the general public. *Id.* The Court noted, "whether a fall is explained or unexplained is irrelevant. The key inquiry is whether the risk faced by the employee was greater than the risk faced by the general public." *Id.*

Here, walking outside for recreation on a break ***was not*** an employment risk to Hopkins as it was not within the nature of her work or scope of her duties. Whether the County is in control of a defective sidewalk that Hopkins is not required to walk on or utilize as part of her job duties is not dispositive of the analysis under the first prong of NRS 616C.150(1) as to whether the injury "arose out of" employment. While the sidewalk where Hopkins tripped happened to be maintained by the County, it was public sidewalk that was not in an area that she had to traverse when going to or coming from work, or that her job duties required her to visit.

Under *Phillips* this is a neutral risk that must be analyzed under the increased-risk test. Hopkins testified that her job duties were as "an office support with Washoe County and I work in environmental health dealing with plans." (I AA 131.) No job duty involving recreational walks or utilizing this specific sidewalk is

identified by Hopkins. (*Id.*) Nor could it be. An Office Support Specialist by definition works in an office. Thus, Hopkins did not present evidence, as mandated by this Court's precedent, to establish a causal connection between the injury and a risk inherent in the nature of her employment or the workplace environment. Nor did Hopkins present evidence that her job required her to use this sidewalk or to use it at a greater frequency than the general public as required in *Phillips*. Rather, it was a neutral risk and one which employees encounter in daily life. Hopkins was not required by her employer to go on a walk on this sidewalk over her break period. *Cf. Cannon Cochran Mgmt. Svcs., Inc. v. Figueroa*, 136 Nev. 442, 443-446, 468 P. 3d 827, 828-31 (2020) (a police officer on the clock was allowed to go home early but was deemed to have incurred an injury that arose out of employment on his drive home because he was following orders to get "seat time" and was not fully discharged of his job duties); *Bob Allyn Masonry v. Murphy*, 124 Nev. 279, 279-89, 183 P. 3d 126, 126-33 (2008) (discussing that when an employee is on streets or roadways outside of the workplace and injured, the analysis of whether the injury "arose out of" employment depends on whether the employee was completing a special errand for the employer thereby establishing a causal connection between the injuries and risk of employment making an injury an employment risk, or whether the employee was on a personal journey which is not compensable.); *cf. Dixon v. State Indus. Ins. Sys*., 111 Nev. 994, 997, 899 P.2d 571, 573 (1995) (quoting *Nev.*

Indus. Comm'n v. Holt, 83 Nev. 497, 434 P.2d 423 (1967) (stating, "In *Holt*, this court reversed the district court's finding that the employee was entitled to compensation when he was injured on his day off at a golf driving range which his employer provided for employee use. *Id.* at 498, 434 P.2d at 423. We stated that Holt was 'pursuing a private interest on his own time wholly unconnected with the work for which he was hired.' *Id.* We also plainly set out the policy reasons supporting the decision— '[t]o allow compensation in these circumstances is to penalize the employer for providing a recreational facility. The legislature did not intend that result.' *Id.* at 500–01, 434 P.2d at 425 (citation omitted).")

In sum, the panel's Order overlooks the Court's holding in *Gorsky* and its progeny (including *Phillips*) in holding 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.

2. The Panel Misapplied Controlling Authority to Find That Hopkins' Was Injured in the Course of Her Employment.

Similarly, the Court misapplies *Baiguen*, in which the Court relied on the "parking lot" exception to the going-and-coming rule to find that an employee's stroke, which occurred while he was in the clock-in area waiting to receive his keys and radio before his shift, was in the course of his employment. 134 Nev. at 600, 426 P.3d at 590. Here, the sidewalk where Hopkins tripped was in a public part of

the Washoe County Health District complex where Hopkins was not required to walk in the course of her employment duties as an Office Support Specialist. (I AA 131-132.) She did not trip in an area that she had to traverse in order to clock in or out, like the claimants in *Phillips* and *Baiguen*. Rather, she was walking there for her own recreation during a break period. (*Id.*) Thus, the panel's conclusion that Hopkins was acting "in the course of her employment," thereby satisfying the second prong of NRS 616C.150(1), is also contrary to precedent. (Order of Reversal and Remand at 7.)

The panel further cites *Buma v. Providence Corp. Development*, 135 Nev. 448, 455, 453 P.3d 904, 910 (2019), in support of its conclusion that Hopkins' injury occurred in the course of her employment. *Id.* at 5. However, Respondents respectfully submit that *Buma* addressed when a ***traveling employee's injury*** is covered by the NIIA. 135 Nev. at 455, 453 P.3d at 910. In *Buma*, the Court applied the personal-comfort rule, extending the NIIA's coverage to certain personal needs of a traveling employee, "including sleeping, eating, and seeking fresh air and exercise . . . because of the risks associated with travel from home." *Id.* at 452, 453 P.3d at 908-909 (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 for recreation. Under *Cotton*, the going-and-coming rule should

apply to preclude workers' compensation liability as she had left the County's control and was attending to her own needs. However, the panel's application of the parking lot exception to the going-and-coming rule suggests, for the first time, that the expanded personal-comfort doctrine recognized under *Buma,* may apply to a non-traveling employee. For these reasons, Respondents submit en banc reconsideration is warranted to secure or maintain uniformity of decisions the Court under NRAP 40A(a)(1).

C. The Panel's Order of Reversal and Remand Warrants Reconsideration as it Involves Substantial Precedential and Public Policy Issues.

Finally, this matter involves a substantial precedential and public policy issue – should the "parking lot" exception apply to an employee who is injured while walking for recreation during a break from work in an area controlled by her employer, but where she is not required by her employment to be? The clear answer is "no". While the panel's order does not directly address the personal comfort rule, its application of the "parking lot" exception to the going-and-coming rule results in a breathtaking expansion of the NIIA's coverage. This Court has recognized that "the legislators did not intend the [NIIA] to make employers absolutely liable for any injury that might happen while an employee was working." *Cotton*, 121 Nev. at 398, 116 P.3d at 57. The Order's expansion of liability is thus contrary to legislative intent. *See Holt,* 83 Nev. at 500-501, 434 P.2d at 425 ("To allow

compensation in these circumstances is to penalize the employer for providing a recreational facility. The legislature did not intend that result.") It also has wide-ranging repercussions for workers' compensation insurers and employers in this State who permit their employees go for walks or leave the premises during paid breaks. The panel's Order has a chilling effect on such activities, as the State's employers and insurers will fear the workers' compensation liability.

While finding coverage of Hopkins' fractured toe due to a recreational walk might appear to have a minor impact at first blush, this decision creates a substantial precedent including the creation of an affirmative duty of employers and insurers to anticipate the personal and recreational trips of their employees on break periods and to ensure all possible sidewalks under their "control" are free of defects. For public entities that have a significant amount of buildings, streets, and infrastructure, this obligation is daunting. This expansion of "employment risks" to include defects existing outside the scope of work, as opposed to applying the "increased risk test" to a "neutral risk," rounds afoul of *Phillips.* For these reasons, Respondents respectfully contend en banc reconsideration is warranted under NRAP 40A(a)(2).

IV. CONCLUSION

For all these reasons, Respondents respectfully request the Court grant the petition for en banc reconsideration in this case, reverse the Order of Reversal and

Remand, affirm the district court's denial of the Petition for Judicial Review, and grant such other and further relief as the Court deems proper.

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 2nd day of May, 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 4,219 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 2nd day of May, 2022.

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CERTIFICATE OF SERVICE

I hereby certify that I am an employee of McDonald Carano LLP; that on May 2, 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: May 2, 2022.

/s/Carole Davis
Employee of McDonald Carano LLP