[Cite as *Caponi v. Convention & Visitors Bur. of Cleveland*, 2003-Ohio-1954.]

COURT OF APPEALS OF OHIO, EIGHTH DISTRICT
COUNTY OF CUYAHOGA
No. 81456

KAREN CAPONI,	:	
Plaintiff-Appellant	:	JOURNAL ENTRY
vs.	:	AND
CONVENTION & VISITORS BUREAU OF CLEVELAND,	:	OPINION
Defendant-Appellee	:	
	:	
DATE OF ANNOUNCEMENT OF DECISION		APRIL 17, 2003
	:	
	:	
CHARACTER OF PROCEEDING	:	Civil appeal from Common Pleas Court Case No. CV-446676
JUDGMENT	:	REVERSED AND REMANDED
DATE OF JOURNALIZATION	:	

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ANNE L. KILBANE, P.J.:

{¶1} This is an appeal from an order of Judge Nancy A. Fuerst that granted summary judgment to the Convention & Visitors Bureau of Greater Cleveland ("CVB") and the Administrator of the Bureau of Workers' Compensation ("BWC") on Karen Caponi's claim for workers' compensation. Caponi claims that whether her injuries were sustained in the scope of her employment was a material issue of fact in dispute. We reverse and remand.

{¶2} From the record we glean the following: On February 12, 1999, less than a month after she began work as a corporate sales manager for the CVB, Caponi participated in "Heartland Travel Showcase," an event designed to solicit business from motorcoach companies that organize tour groups, held at a banquet facility in the Powerhouse complex in Cleveland's Flats. She arrived early to help prepare, participated in the event, stayed to help clean when it ended, and then went to a bar elsewhere in the complex where other CVB employees were meeting. While the CVB claims that the meeting at the bar was only a social gathering, Caponi testified

that she believed she was attending a required meeting to discuss the event and its results.

{¶3} It was snowing when she left the bar to walk to her car and, when she stepped into a snow-covered pothole in the parking lot, she fell and sustained serious injuries to her arm. She filed a workers' compensation claim which was denied, as were her administrative appeals, and she appealed the ruling to the common pleas court.[1] The judge found that the injury "did not occur within the zone of employment and there is no causal connection between the injury and employment[,]" and granted summary judgment to the CVB and the BWC.

{¶4} Caponi's sole assignment of error challenges the ruling that, as a matter of law, she failed to show a causal connection between her employment and her injury. We review a grant of summary judgment de novo using the same standard as the trial judge, which requires that we consider the evidence in the light most favorable to the non-moving party to determine whether a material dispute of fact exists.[2] Although the CVB cites evidence to show that Caponi knew she was not required to meet the other employees at the bar after the Heartland event, her testimony and affidavits can be viewed as evidence that she believed the meeting

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[1]R.C. 4123.512.

[2]Civ.R. 56(C); *Stephens v. A-Able Rents Co.* (1995), 101 Ohio App.3d 20, 26, 654 N.E.2d 1315.

mandatory, at least until she arrived at the bar and learned otherwise.

{¶5} In its brief the CVB cited testimony from Caponi's deposition in a separate lawsuit against Jacob Investments Management Co., Inc., which owned or operated the Powerhouse complex. The CVB quoted a portion of the deposition, as follows:

> **"Q. Did you have anything else alcoholic to drink at Howl at the Moon?**
> **A. Actually, Dave ordered a round of drinks. I ordered a wine. I drank a quarter of it. I was not required to be there."**

{¶6} The CVB's brief emphasizes Caponi's admission that she was not required to be at the bar, but omits the final sentence from Caponi's response to the question. Her full response stated:

> **A. Actually, Dave ordered a round of drinks. I ordered a wine. I drank a quarter of it. I was not required to be there. I realized that, so I left because I like to try to be home by midnight or so for the kids because my mom was watching the kids that night.**

{¶7} Caponi admitted then, as she does now, that she was not required to attend the meeting at the bar, but her full response in the prior deposition indicates that she did not understand that attendance was optional until sometime after she arrived at the bar. Contrary to the dissent, the prior deposition testimony is not inconsistent with her deposition testimony or affidavit in this case. Therefore, we assume, for purposes of review, that she was

injured while walking to her car after completing her employment duties, rather than after attending a social gathering.[3]

{¶8} To be eligible for workers' compensation, a worker must show that an injury occurred both "in the course of" employment and that it "arises out of" that employment.[4] Under the first requirement one analyzes factors of "time, place, and circumstance * * * to determine whether the required nexus exists between the employment relationship and the injurious activity[.]"[5] If an employee's job is performed at a fixed work site, the commute to and from that site normally is not considered within the course of employment.[6] Because a fixed site may be temporary,[7] Caponi admits that this doctrine applies because her job duties did not begin until she arrived at the banquet facility. Nevertheless, because she was walking in the facility's parking lot and had not yet reached her car, she might still be able to show that her commute had not yet begun and that her injury occurred in the course of her

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[3]At oral argument, BWC contended that, as soon as Caponi exited the threshold of the banquet facility, she was outside of her employment and that her visit to the bar before leaving the complex was immaterial to the denial of her claim.

[4]*Ruckman v. Cubby Drilling, Inc.*, 81 Ohio St.3d 117, 121, 1998-Ohio-455, 689 N.E.2d 917, citing *Fisher v. Mayfield* (1990), 49 Ohio St.3d 275, 277, 551 N.E.2d 1271.

[5]*Ruckman*, 81 Ohio St.3d at 120.

[6]Id. at 119-120.

[7]Id.

employment.[8] Even if the walk to her car was considered part of her coming and going, however, she might still satisfy this requirement because she traveled to the complex as a function of her employer's business.[9] Therefore, Caponi has presented sufficient evidence to withstand summary judgment on this prong of the analysis.

{¶9} The second requirement for eligibility, that the injury arise out of employment, assesses "the causal connection between the injury and the employment."[10] Because of the liberal standard for approving workers' compensation claims,[11] we agree the necessary causal connection is something less than that required to show proximate cause.[12] Although that standard is not clear, the most that need be found is that the injury was foreseeable from the employer's conduct; there is no need, in a worker's compensation case, to find the conduct negligent.[13]

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[8]*Griffin v. Hydra-Matic Div., Gen. Motors Corp.* (1988), 39 Ohio St.3d 79, 529 N.E.2d 436, syllabus; *Marlow v. Goodyear Tire & Rubber Co.* (1967), 10 Ohio St.2d 18, 39 O.O.2d 11, 225 N.E.2d 241, syllabus.

[9]*Ruckman*, 81 Ohio St.3d at 121.

[10]Id. at 121-122, citing *Fisher*, 49 Ohio St.3d at 277-278.

[11]*Fisher*, 49 Ohio St.3d at 278.

[12]*Stivison v. Goodyear Tire & Rubber Co.*, 80 Ohio St.3d 498, 502, 1997-Ohio-321, 687 N.E.2d 458 (Resnick, J., dissenting).

[13]Cf. *Strother v. Hutchinson* (1981), 67 Ohio St.2d 282, 287, 21 O.O.3d 177, 423 N.E.2d 467 (in negligence action standard of proximate cause concerns foreseeability of harm from negligent act).

{¶10} The causation requirement here is comparable to that of proximate cause in that it is normally a factual issue and can be determined as a matter of law only where the evidence is found insufficient to allow any reasonable jury to find that cause exists.[14] While such questions should be argued at the margins to avoid taking legitimate issues from factfinders, there must be a point at which one can safely state that a factual issue is not in a penumbra, but stands solely in light or darkness. In this case, however, the lack of sufficient cause was not so apparent that the judge should have taken the issue from the jury.

{¶11} We first examine whether the totality of circumstances supports a causal connection by analyzing three factors: "(1) the proximity of the scene of the accident to the place of employment, (2) the degree of control the employer had over the scene of the accident, and (3) the benefit the employer received from the injured employee's presence at the scene of the accident."[15] If the employee's injury fails this test, causation may still be shown under the "special hazard" exception or by showing that the injury occurred within the "zone of employment."[16] Just as one can be confused by the distinction between "in the

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[14]*Ratliff v. Colasurd* (Apr. 27, 1999), Franklin App. No. 98AP-504.

[15]*Ruckman*, 81 Ohio St.3d at 122, citing *Lord v. Daugherty* (1981), 66 Ohio St.2d 441, 20 O.O.3d 376, 423 N.E.2d 96, syllabus.

[16]*Ruckman*, 81 Ohio St.3d at 123.

course of" and "arising out of" employment,[17] it is not always clear what the special hazard or zone of employment exceptions add to the totality of circumstances analysis. The special hazard exception allows compensation if the employee's injury occurred while he was engaged in some activity not normally encountered by the general public,[18] while the zone of employment exception applies where the employee has no meaningful choice in conduct because of the nature of the employer's policy or premises.[19] Because both of these doctrines concern the control factor of the totality of circumstances test,[20] they appear to be clarifications of that test rather than exceptions to it. Therefore, although Caponi focuses her argument on the existence of a special hazard, that argument is just a part of the broader question of whether the CVB exercised sufficient control over the time, place, and circumstances of Caponi's injury to satisfy the causation standard.

{¶12} Although Caponi traveled to the Powerhouse complex as a CVB employee, it is unclear whether her zone of employment or, alternatively, the CVB's "zone of control" at that location extended to the complex's parking lot. The CVB might have had

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[17]The *Lord* factors appear to require analysis of the time, place and circumstances of the injury to determine causation.

[18]*Ruckman*, supra.

[19]*Marlow*, 10 Ohio St.2d at 20-22.

[20]*MTD Prods., Inc. v. Robatin* (1991), 61 Ohio St.3d 66, 69-70, 572 N.E.2d 661.

actual or constructive control over the banquet facility itself and, having chosen the bar as the site for a meeting, it might have had actual or constructive control over that location (assuming Caponi reasonably believed the meeting was related to her employment). While it is less clear whether the CVB had constructive control over the complex's parking facilities simply because it held an event at a banquet facility in the complex, Caponi has provided evidence showing that she had no legitimate choice but to drive to the complex and enter it through its parking lot. A jury could find it foreseeable that Caponi could not avoid the parking lot and that, therefore, the parking lot was within her zone of employment or was a special hazard that the CVB created when it chose a banquet facility inside the gated complex.[21] The assignment of error is sustained.

Judgment reversed and remanded.

ANTHONY O. CALABRESE, Jr., J., CONCURS

COLLEEN CONWAY COONEY, J., DISSENTS (DISSENTING OPINION ATTACHED).

ANNE L. KILBANE
PRESIDING JUDGE

[21]*Marlow*, supra; *Ruckman*, 81 Ohio St.3d at 124-125.

COLLEEN CONWAY COONEY, J., DISSENTING:

{¶13}I respectfully dissent because I disagree with the majority's conclusion that there are genuine issues of material fact as to whether Caponi's injuries were received in the course of, and arising out of, her employment.

{¶14}The majority finds sufficient evidence demonstrating Caponi was injured "in the course of employment" to withstand summary judgment because they assume she was required to meet with other CVB employees at the Howl at the Moon ("the bar") after cleaning up the Heartland trade show. In making this assumption, the majority relies on Caponi's affidavit wherein she states that the invitation to meet at the bar "did not seem in any way to be a voluntary request that I was free to decline."[22]

{¶15}However, at a prior deposition, Caponi stated under oath that she was not required to go to the bar. A party cannot defeat a motion for summary judgment by providing an affidavit which contradicts and is inconsistent with prior sworn testimony. *Reasoner v. Bill Woeste Chevrolet, Inc.* (1999), 134 Ohio App.3d 196. Moreover, an affidavit cannot be used if it contradicts the affiant's prior sworn testimony. *D'Agostino v. Uniroyal-Goodrich Tire Co.* (1998), 129 Ohio App.3d 281. Therefore, this court cannot consider Caponi's affidavit and must accept her prior deposition

[22]Caponi's counsel admitted during oral argument that Caponi was not required to go to the bar.

testimony, where she testified she was not required to go to the gathering at the bar.

{¶16}In *Fisher v. Mayfield* (1990), 49 Ohio St.3d 275, 277, the Ohio Supreme Court held that "'to be compensable, an injury must arise out of employment, in the sense of causation and be in the course of employment, in the sense of ***continuity of time***, space, and circumstances.'" (Emphasis added.) Here, the continuity of time is broken by the hour Caponi spent socializing with coworkers at the bar. As a result of this interruption, Caponi was outside the scope of her employment when she left the bar.

{¶17}The majority also finds that the Powerhouse parking lot may have been within the "zone of employment" or may constitute a "special hazard" because they find the evidence unclear as to whether the CVB "might have had actual or constructive control over * * * that location." However, there is no evidence in the record to suggest that the CVB might have had actual or constructive control over the Powerhouse parking lot. Further, Caponi's risk of falling in the parking lot was not distinctive in nature or qualitatively greater than the risk to the general public and, thus, was not a "special hazard." See *Powers v. Frank Z Chevrolet* (1995), 100 Ohio App.3d 718, 721. Moreover, because the hour Caponi spent socializing at the bar broke the continuity of time spent in work-related activity and took her outside the scope of her employment, she was not within the "zone of employment" when she fell. Therefore, I find no genuine issue of material fact and

I would affirm the trial court's decision granting summary judgment.