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SUPREME COURT OF TEXAS
BLAKE A. HAWTHORNE, CLERK

No. 14-0272

IN THE

The Supreme Court of Texas

SEABRIGHT INSURANCE COMPANY,

Petitioner,

v.

MAXIMA LOPEZ, BENEFICIARY OF CANDELARIO LOPEZ, DECEASED,

Respondent.

Appealed from the Fourth Court of Appeals, Case No. 04-12-00863-CV

and

229TH Judicial District Court of Starr County, Texas

Trial Court No. DC-08-484

Ana Lisa Garza, Presiding Judge

PETITIONER'S REPLY BRIEF

Respectfully submitted,

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TABLE OF CONTENTS

TABLE OF CONTENTS ii

INDEX OF AUTHORITIES iii

REPLY POINTS 1

I. No other Texas Court of Appeals has applied the nexus/but for test used by the Fourth Court of Appeals in this case. 1

II. Under the Respondent's analysis every worker who takes a job away from his home would in the course and scope of employment when traveling to and from work 3

PRAYER 8

CERTIFICATE OF SERVICE AND SIGNATURE 9

CERTIFICATE OF COMPLIANCE 10

INDEX OF AUTHORITIES

CASES

Aetna Cas. & Sur. Co. v. Orgon,
721 S.W.2d 572 (Tex. App.—Austin 1986, writ. ref'd, n.r.e.).....6

Amer. Home Assur. Co. v. De Los Santos,
2012 Tex. App. Lexis 7891
(Tex. App.—San Antonio 2012, pet. filed) 3, 4, 8

Integrity Staffing Solutions, Inc. v. Busk,
No. 12-433 (U.S. December 9, 2014).....2

Leordeanu v. American Protections Insurance Company,
330 S.W.3d 239 (Tex. 2010). 2, 3, 5

SeaBright Ins. Co v. Lopez,
2014 Tex. App. Lexis 905 (Tex. App.—San Antonio 2014) .....*passim*

Shelton v. Standard Ins. Co.,
389 S.W.2d 290 (Tex. 1965).....3, 5

Texas Mutual Insurance Company v. Jerrols,
385 S.W.3d 619
(Tex. App.—Houston [14th Dist.] 2012, pet. denied).....8

Zurich American Insurance Company v. McVey,
339 S.W.3d 724 (Tex. App.—Austin 2011, pet. denied) 3, 4, 8

STATUTES

TEX. LAB. CODE
§ 401.011(12).....2

REPLY POINTS

I. No other Texas Court of Appeals has applied the nexus/but for test used by the Fourth Court of Appeals in this case.

In deciding this case, the Fourth Court of Appeals determined that Lopez's travel to work originated in the business of his employer by applying a newly created nexus/but for test:

> Here, the accident occurred (1) during Lopez's commute from his de facto employer provided housing to his employer's premises, (2) in an employer provided vehicle, and (3) in an area of Texas where Lopez would not have otherwise been but for his employment with Interstate. These circumstances present a strong nexus between Lopez's employment and travel on the day of the accident.

SeaBright Ins. Co v. Lopez, 2014 Tex. App. Lexis 905, *13 (Tex. App.—San Antonio 2014, pet. filed).

Respondent does not identify any other Texas Court of Appeals that has engaged in a nexus/but for test to determine if travel originates in the business of the employer. Rather, Respondent embraces the nexus/but for analysis arguing that Lopez would not have been traveling on the day of the accident but for his employment. But this goes to the crux of SeaBright's concern with the nexus/but for test. All travel to and from work meets this test. Respondent does not identify a circumstance that would fall outside of the nexus/but for test used by the Fourth Court of Appeals.

Respondent argues that "but for" Lopez's employment, he would not have been driving to work. This is true for every person that drives to work every day as part of his or her employment. The very reason an employee travels to work is to attend work. In *Leordeanu v. American Protections Insurance Company* this Court rejected the notion that traveling to work for the purpose of employment originates in the business of the employer precisely because the risks associated with traveling to and from work "do not arise as a result of the work of employers." 330 S.W.3d 239, 242 (Tex. 2010). The concept that employers are not responsible for an employee coming and going to work is broad and extends far beyond workers' compensation law. *See Integrity Staffing Solutions, Inc. v. Busk*, No. 12-433, slip. op. at 9 (U.S. December 9, 2014) (holding that activities relating to ingress and egress to work are not actual work of the employer).

If the standard to be used to determine if travel originates in the business of the employer is whether the employee was traveling "but for" his or her employment, then all travel to and from work meets this test for origination. In *Leordeanu* the Court also noted that all travel to and from work "makes employment possible and thus furthers the employer's business." *Id*. If all travel to and from work both originates and furthers the business of the employer, then under Texas Labor Code § 401.011(12) the mere furnishing of transportation to an employee would make travel to and from work within the course and scope of

employment. This was obviously not the intent of the Court in *Leordeanu* and would make the risks associated with traveling to and from work born by the employer.

II. Under Respondent's analysis every worker who takes a job away from his home would be in the course and scope of employment when traveling to and from work.

The Respondent mistakenly views this case as if Lopez was traveling out of town for work, as if Lopez was on a specific out of town work assignment. This does not accurately reflect the record in this case and minimizes the impact of the Fourth Court of Appeals analysis. Notably, Respondent repeatedly compares the present case to *Zurich American Ins. Co. v. McVey* referring to the facts as "almost identical." 339 S.W.3d 724 (Tex. App.—Austin 2011, pet. denied). The present case is not almost identical to *McVey*. Rather, the distinction between the two cases highlights that under the Fourth Court of Appeals analysis a workers' compensation carrier faces certain liability for employees who take jobs away from their homes.

In *McVey* the travel at issue was away from the employer's premises. *Id*. at 727. McVey's daily work with his employer was in Austin. *Id*. When the accident occurred McVey was traveling away from his employer's premises in Austin to a mandatory conference in Houston. *Id*. Further, McVey was traveling pursuant to a company efficiency mandate and failure to comply with the efficiency mandate

could result in dismissal. *Id.* Unlike McVey, Lopez was not traveling away from his employer's premises to attend a special assignment when the accident occurred. Lopez was merely engaged in his daily commute to work.

Whether an employee is traveling "out of town" for work should be consistently evaluated from whether the travel was remote to the employer's premises. Texas courts in evaluating the circumstances of whether travel originates in work have looked to an employee's actual work requirements. *McVey*, 339 S.W.3d at 730; *American Home Assurance Company v. De Los Santos*, 2012 Tex. App. Lexis 7891, *9 (Tex. App.—San Antonio 2012, pet. denied).

The only job requirement identified in Respondent's brief was that Lopez was required to attend work at the employer's premises in Ridge, Texas. Lopez's work in Ridge, Texas was not a special trip, a conference, or out of the ordinary travel as in *McVey*. Lopez's regular work assignment every day was in Ridge, Texas. The Fourth Court of Appeals acknowledged that "the company truck was furnished to Lopez gratuitously" and that Respondent failed to identify "any evidence in the record to suggest otherwise." *Lopez*, 427 S.W.3d at 449. Respondent distorts the record in this case in an attempt to make Lopez's daily commute to work appear as mandatory out of town travel controlled by his employer. But there is no evidence to support these contentions by Respondent:

- There is no evidence in the record that Lopez was required to live or stay in Marlin, Texas as part of his employment.
- There is no evidence that the employer was directly paying for Lopez to live in Marlin, Texas.
- There is no evidence in the record that Lopez was required to use a company vehicle to travel to and from work each day.
- There is no evidence in the record that Lopez was required to transport tools or other workers as part of his employment or pursuant to a company policy, such as in *McVey*.

Respondent labels Lopez's daily commute to work as "out of town" travel. The Fourth Court of Appeals labels Lopez's daily commute to work at "work away from home." *Id*. Under this analysis every day of Lopez's employment with Interstate Treating, Inc. when he drove to work each morning he was traveling "out of town" from his home and in the course and scope of his employment. However, in determining whether Lopez was "out of town" for work only the location of the employer's premises should be considered. *Shelton v. Standard Ins. Co.*, 389 S.W.2d 290, 293 (Tex. 1965). Respondent cites no Texas case law in opposition to *Shelton*. Respondent actually compares the current case factually to *Shelton*, while ignoring the analysis in *Shelton* considering out of town travel to be work that "entails travel away from the employer's premises." *Id*. The encompassing

argument set forth repeatedly by Respondent is that Lopez was in the course and scope of his employment because he was away from Rio Grande City, his domicile. However, Respondent fails to cite any case law supporting the underlying proposition that an employee's domicile and not the employer's premises determines the nature of an employee's travel.

Respondent's brief incorrectly states that SeaBright argues that Fourth Court of Appeals was erroneous because the continuous coverage rule applies. The Fourth Court of Appeals correctly recognized that the continuous coverage rule does not apply in this case. *Lopez*, 2014 Tex. App. Lexis 905 at *13, n. 2. Respondent quotes *Aetna Cas. & Sur. Co. v. Orgon* that "[e]mployees whose work entails travel **away from the employer's premises** are held in the majority of jurisdictions to be within the course of their employment continuously during the trip." 721 S.W.2d 572, 574-75 (Tex. App.—Austin 1986, writ. ref'd, n.r.e.) (emphasis added). Respondent then argues that Lopez met this requirement because he "was required by his employer to be away from his home." RESPONDENT'S BRIEF ON THE MERITS, p. 47. Respondent completely ignores the location of employer's premises. Respondent's Brief wholly fails to address the argument that Lopez's travel to work should be evaluated from the location of his employment, not the location of his domicile or home.

While the Fourth Court of Appeals recognized that the continuous coverage rule did not apply in this case, it then created a test to be used that creates continuous coverage for all employee travel. The very notion of the nexus/but for test used by the Fourth Court of Appeals is that because Lopez was away from Rio Grande City and traveling to work his travel originates in his employment. The nexus/but for test abandons the idea of evaluating the travel from whether the employee was away from the employer's premises. The nexus/but for test also abandons the idea that an employee travel to work does not originate in work. The nexus/but for test created by the Fourth Court of Appeals creates a test that a workers' compensation carrier cannot possibly meet.

Respondent attempts to obscure the central issue in this case by focusing on unrelated issues. This case does not concern avoiding workers' compensation payments. There is no basis in the record for that type of assertion. This case concerns what the proper legal standard is to evaluate travel course and scope cases. Respondent argues that the Fourth Court of Appeals ruling is not usable by future parties and unrelated to other course and scope travel cases. It is unclear how a published opinion from the Fourth Court of Appeals setting forth a legal test to be used to evaluate employee travel is unimportant as claimed by Respondent. At issue in this case is the legal test to be used to evaluate whether employee travel is in the course and scope of employment. This issue repeatedly is raised in cases

by parties filing cross motions for summary judgment, as in the present case. *See Lopez*, 2014 Tex. App. Lexis 905 at *2; *McVey*, 339 S.W.3d at 726; *Texas Mutual Insurance Company v. Jerrols*. 385 S.W.3d 619, 622 (Tex. App.—Houston [14th Dist.] 2012, pet. denied); *De Los Santos*, 2012 Tex. App. Lexis 7891 at *2. Without clarifying the requirements of Texas Labor Code § 401.011(12) courts will continue to use or create legal tests for evaluating course and scope travel cases without any consistent application of the law.

PRAYER

SeaBright Insurance Company respectfully requests the Court grant its Petition for Review, reverse the trial court's judgment, render judgment for Petitioner, SeaBright Insurance Company, and for all other relief to which Petitioner may be entitled.

Respectfully submitted,

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CERTIFICATE OF SERVICE

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CERTIFICATE OF COMPLIANCE

I certify that as counsel for Appellant that the number of words in this document is 1,791 as calculated by Microsoft Word.

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