INTRODUCTION

Workers' compensation provides the sole remedy against an employer for an employee injury arising out of and in the course of employment.1 Under Nebraska's Workers' Compensation Act (the "Act"), a claimant must establish his injury causing accident or occupational disease arose out of and occurred in the course of employment, as these phrases operate as separate elements under the Act.2 To arise out of employment, the injury must occur within the scope of the employee's employment in terms of its character, cause, and origin.3 To occur in the course of employment, an injury must occur within the time, place, and circumstances of employment while the employee is engaged in a task related to the employment.4

An employee injury sustained while the employee is going to or from a fixed workplace is not compensable under the going to and from work rule.5 However, the Nebraska Supreme Court has carved some exceptions from the compensation prohibition of the going to and from work rule.6 One exception allows compensation for employee injuries if they occur on the employer's premises even if the employee has left work or has not arrived at work.7 The Nebraska Supreme Court reasoned property the employer owns or maintains is considered the employer's premises under workers' compensation law and the premises exception.8

3. Zoucha, 269 Neb. at 93, 690 N.W.2d at 615.
4. Id. at 93, 690 N.W.2d at 615.
5. La Croix v. Omaha Pub. Sch., 254 Neb. 1014, 1017, 582 N.W.2d 283, 285 (1998). The court stated the rule is also known as the premises rule. Id.
6. Zoucha, 269 Neb. at 94, 690 N.W.2d at 615.
7. Id. at 94, 690 N.W.2d at 615.
8. Id. The Nebraska Workers' Compensation Act provides "[p]roperty maintained by an employer is considered the premises of such employer for purposes of determining whether the injury arose out of employment." Neb. REV. STAT. § 48-151(6) (2004).
A second exception to the going to and from work rule allows compensation for injuries occurring while an employee is traveling to or from work if an employer-created condition forms a distinct causal connection between the employee's injury and the employment. This exception does not require the employee injury to occur on the employer's premises for the injury to be compensable. The distinct causal connection exception is an additional exception that supplements, rather than takes the place of, the premises exception to the going to and from work rule.

In Zoucha v. Touch of Class Lounge, the Supreme Court of Nebraska decided Stephanie Zoucha's ("Zoucha") injury, sustained in a common strip mall parking lot while Zoucha was leaving work, was compensable. The court reversed the Nebraska Court of Appeals' decision that Zoucha's injury was not compensable under the going to and from work rule based on the determination that Zoucha was no longer on her employer's premises when her injury occurred. Relying on reasoning from other jurisdictions, the Supreme Court of Nebraska decided Zoucha's parking lot injury occurred on her employer's premises because her employer was a tenant in a strip mall with a common parking lot.

In making its decision, the court adopted what it referred to as the "parking lot rule," which the majority of jurisdictions purportedly apply. According to the court, the parking lot rule expands an employer's premises for workers' compensation purposes and provides "parking lots in strip malls are part of the premises of employers whose main premises are located within the mall." Under the court's formulation, the parking lot rule enlarges the premises exception to the going to and from work rule, and allows compensation for employee injuries that occur in mall parking lots while an employee is going to or leaving work. The court therefore decided Zoucha's injury was compensable because it occurred on her employer's prem-

9. Zoucha, 269 Neb. at 94, 690 N.W.2d at 615.
10. Id. at 94, 690 N.W.2d at 615.
11. Id.
14. Zoucha, 269 Neb. at 92, 97, 690 N.W.2d at 614, 617. The court of appeals deter-
15. Id. at 94-97, 690 N.W.2d at 617-18.
16. Id. at 95-96, 690 N.W.2d at 616.
17. Id. at 95, 690 N.W.2d at 616.
18. Id.
In reaching this conclusion, the court discussed no evidence the employer controlled or maintained the lot.

This Note will begin by reviewing the facts and holding of Zoucha v. Touch of Class Lounge. This Note will then detail relevant provisions of the Nebraska Workers’ Compensation Act and examine cases discussing and applying the going to and from work rule and the parking lot rule exception to the going to and from work rule. Finally, this Note will demonstrate how the Supreme Court of Nebraska erred in deciding Zoucha’s injury was compensable under the parking lot rule exception. This Note will show (1) the Supreme Court of Nebraska wrongly decided Zoucha’s injury occurred on her employer’s premises, (2) the court’s application of the parking lot rule in Zoucha departed from the rule’s customary application in other jurisdictions, and (3) the court could have concluded Zoucha’s injury was compensable under the distinct causal connection exception to the going to and from work rule without adopting the parking lot rule exception.

FACTS AND HOLDING

In Zoucha v. Touch of Class Lounge, Stephanie Zoucha ("Zoucha"), a regular employee of the Touch of Class Lounge ("Lounge"), arrived at work around 4:30 p.m. on the afternoon of June 4, 2001. Zoucha was the only employee bartending at the Lounge that night. Among the patrons who entered the Lounge on June 4 was William Nunez ("Nunez").

Zoucha took Nunez’s drink away from him at some point that night because he had consumed too much alcohol. Later, Zoucha refused Nunez’s request that she smoke marijuana with him. During the hours before closing, only Nunez and Bob Parish ("Parish"), a regular at the Lounge on Monday nights, remained in the Lounge. Parish offered to walk Zoucha to her car after closing, as he usually did on Monday nights, but left early when Zoucha told him she would be fine.

19. Id. at 97, 690 N.W.2d at 617.
20. See Zoucha, 269 Neb. 89, 690 N.W.2d 610.
21. See infra notes 25-92 and accompanying text.
22. See infra notes 93-288 and accompanying text.
23. See infra notes 289-421 and accompanying text.
24. See infra notes 289-421 and accompanying text.
27. Zoucha, 269 Neb. at 90, 690 N.W.2d at 613.
29. Zoucha, 269 Neb. at 91, 690 N.W.2d at 613.
30. Zoucha, 269 Neb. at 91, 690 N.W.2d at 613.
without him. Zoucha's regular employment responsibilities ended when she cleaned, locked, and exited the Lounge at about 2:15 a.m.

After locking the Lounge that morning, Zoucha walked directly to her car, which she had parked about 20 yards from the Lounge's door in a strip mall parking lot next to the Lounge. While she put her bags into her car, Nunez struck her on the head with a blunt object. The blow fractured Zoucha's skull and caused other serious injuries, including memory loss and cognitive impairment. In addition, Zoucha's purse containing tip money was stolen.

The owner of the Lounge, Patricia Bauer ("Bauer"), leased part of the building in which the Lounge was located. The Lounge building, which contained a second business, and neighboring businesses were arranged like an outdoor shopping center or strip mall. Due to this arrangement, employees and customers from businesses adjacent to the Lounge also parked in the lot where Zoucha regularly parked. Bauer did not own the strip mall parking lot where Zoucha's injury occurred and had no authority or control over the lot. Bauer expected Zoucha would park in the lot because it was convenient, but she did not require Lounge employees to park there.

To recover for her injuries, Zoucha filed a petition for workers' compensation on December 3, 2001 with the Nebraska Workers' Compensation Court. Judge Michael P. Cavel dismissed Zoucha's petition on October 9, 2002, finding Zoucha's injuries did not arise out of and in the course of her employment as required by the Nebraska Workers' Compensation Act.


The workers' compensation statute provides the following: "When personal injury is caused to an employee by accident or occupational disease, arising out of and in the course of his or her employment, such employee shall receive compensation therefor from his or her employer if the employee was not willfully negligent at the time of receiving such injury." NEB. REV. STAT. § 48-101 (2004).
sation for injuries sustained in a parking lot outside their employment.45 The court noted the Lounge parking lot was a common parking area over which the Lounge had no control or authority.46 According to the court, Zoucha's injuries did not arise in the course of her employment because the Lounge did not provide or sponsor parking for its employees and Zoucha was no longer on her employer's premises.47 The court applied the general rule that when an employee's injury occurs off the employer's premises while the employee is going to or from work, the injury does not arise out of and in the course of employment.48

Zoucha appealed the dismissal of her claim to a review panel of the Nebraska Workers' Compensation Court.49 Judges J. Michael Fitzgerald, Laureen Van Norman, and John R. Hoffert unanimously affirmed the workers' compensation court's dismissal.50 The review panel explained Nebraska abandoned the bright-line premises exception to the going to and from work rule, which allowed employee recovery for injuries sustained while going to or from work only if the injury occurred on their employer's premises.51 Under the review panel's expanded premises analysis, tenant employers could be liable for an employee's off-premises injury only if the employer had some degree of control over or responsibility for the area where the injury occurred.52 The court explained if the lease agreement granted the employer the right to park in the lot, if the employer paid fees pursuant to a lease to use the common parking lot, or if the landlord charged the employer a fee for maintenance or use of common areas, an injured employee could establish employer control or responsibility over the lot.53 The review panel found nothing in the record showing any lease provision regarding parking or maintenance of common areas and therefore decided the Lounge had no control or responsibility for the parking lot and could not be liable for Zoucha's injury.54 As such, the review

46. Id. at *1.
47. Id. at *2.
48. Id.
51. Id. at *1 to *2. The review panel also noted a formerly non-compensable off-premises injury was now compensable if the employer created a condition that caused or contributed to the injury. Id. at *2.
52. Id. at *2.
53. Id. The court stated any fees a tenant employer paid to a landlord for parking lot use or maintenance would give the employer some degree of control or responsibility because it could withhold payments for the parking lot if the landlord did not properly maintain the lot. Id.
panel affirmed the workers’ compensation court’s decision that Zoucha’s injury was not compensable under the going to and from work rule.\(^5\)

Zoucha then appealed the decision of the review panel to the Court of Appeals of Nebraska.\(^5\) Judges Theodore Carlson, Frankie Moore, and William Cassel unanimously affirmed the decision of the workers’ compensation court and review panel.\(^5\) Judge Carlson wrote for the court and applied the going to and from work rule, which the workers’ compensation court and review panel had also applied.\(^5\) According to the court of appeals, the current rule stated employee injuries that occurred while the employee was going to or from work did not arise out of and in the course of employment unless an employer-created condition formed a distinct causal connection with the injury.\(^5\) The court of appeals explained there was no evidence of a distinct causal connection between a condition the Lounge created and Zoucha’s injuries.\(^6\) Judge Carlson further explained no causal connection existed because the Lounge did not encourage its employees to park in the lot, did not facilitate employee parking in the lot, and did not exercise control or authority over the lot.\(^6\) The court therefore affirmed the review panel’s and workers’ compensation court’s decisions that Zoucha’s injury was not compensable under the going to and from work rule.\(^6\)

Zoucha appealed the court of appeals’ decision to the Supreme Court of Nebraska, contending the court erred in finding her injuries did not occur on the Lounge’s premises.\(^6\) Zoucha also argued her injuries were compensable because a causal connection existed between an employer-created condition and her injuries.\(^6\) Finally, Zoucha claimed the mall parking lot was part of the Lounge’s premises and therefore her injury qualified for compensation under the premises exception to the going to and from work rule.\(^6\)

The Supreme Court of Nebraska agreed with Zoucha and reversed the workers’ compensation court’s decision.\(^6\) The court reasoned a

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55. Id. at *2.
57. Id. at *4. Six judges sit on the Nebraska Court of Appeals and three of the six judges heard Zoucha’s appeal. Id. at *1.
58. Id. at *3 (citing La Croix v. Omaha Pub. Sch., 254 Neb. 1014, 528 N.W.2d 283 (1998)).
60. Id. at *4.
61. Id.
62. Id.
63. Zoucha, 296 Neb. at 92, 690 N.W.2d at 614.
64. Id. at 92, 690 N.W.2d at 614.
65. Id. at 94-95, 690 N.W.2d at 615-16.
66. Id. at 96, 690 N.W.2d at 616.
shopping center parking lot is part of an employer's premises under the parking lot rule if the landlord provides the lot for the employees' use and convenience and the employees of businesses in the shopping center use the parking lot. 67 Justice John Gerrard, writing for the court, explained the rule for recovery under Nebraska workers' compensation law is that an employee is eligible for workers' compensation for injuries caused by an occupational disease or accident that arises out of and in the course of the employee's employment. 68

The court explained arises out of and in the course of operate as separate elements in Nebraska workers' compensation law, and a plaintiff must prove both elements to recover. 69 For an injury to arise out of employment under the first element, Justice Gerrard reasoned the injury must occur within the scope of the injured employee's work with respect to origin, cause, and character. 70 The court noted such an injury must result from the risks associated with the employment. 71 Under the in the course of element, Justice Gerrard stated an injury must be connected to the employment in location, time, and activity. 72 The court determined an injury takes place in the course of employment if it occurs within the time and space of employment and while the employee performs a task related to the employment. 73 Finally, the court reasoned an injury satisfies both elements if the injury occurs during work hours, in a place the employee has reason to be, and while the employee performs employment duties or duties related to employment. 74

The court then explained employee injuries sustained while going to or from work do not arise out of or in the course of employment unless "a distinct causal connection exists between an employer-created condition and the cause of the injury." 75 The court made clear it recently abandoned the confines of a "bright-line" premises rule exception to the going to and from work rule and adopted the distinct causal connection exception. 76 Under the former premises exception, the court explained employees could only recover for injuries sustained go-

67. Id.
68. Id. at 93, 690 N.W.2d at 614-15. The injured employee's willful negligence that contributes to the injury is a defense to a workers' compensation claim. Id.
69. Id. at 93, 690 N.W.2d at 614. The court explained Nunez's assault on Zoucha was characterized as an accident as contemplated by the Neb. Rev. Stat. § 48-101. Id. at 93, 690 N.W.2d at 615.
70. Id.
71. Id.
72. Id.
73. Id. (citing Misek v. CNG Fin., 265 Neb. 837, 660 N.W.2d 495 (2003)).
74. Id. (citing Misek v. CNG Fin., 265 Neb. 837, 660 N.W.2d 495 (2003)).
75. Id. at 93-94, 690 N.W.2d at 615 (citing Torres v. Aulick Leasing, Inc., 261 Neb. 1016, 628 N.W.2d 212 (2001)).
76. Id. at 94, 690 N.W.2d at 615.
ing to and from work if the injury occurred on employer-owned premises.\textsuperscript{77} In clarifying its rejection of the bright-line premises rule's rigidity, the court stated the distinct causal connection exception, adopted in \textit{La Croix v. Omaha Public Schools},\textsuperscript{78} expanded rather than replaced the former bright-line premises exception to the going to and from work rule.\textsuperscript{79} The court reasoned the former premises exception applied when employees sustained injuries on their employer's premises, and the distinct causal connection rule supplemented the premises rule when an employee sustained an injury while going to or from work on premises the employer did not own.\textsuperscript{80} Under its new going to and from work rule, the court explained an employee injury occurring on the way to or from work is compensable if (1) it occurred on the employer's premises, or (2) a distinct causal connection existed between an employer-created condition and the injury.\textsuperscript{81}

In its examination of Zoucha's case, the court applied the premises exception to the going to and from work rule and subsequently adopted the parking lot rule.\textsuperscript{82} The court explained under the parking lot rule employee injuries sustained while going to or from work in landlord-provided common parking lots and shopping center parking lots arise out of and in the course of employment.\textsuperscript{83} As such, the court reasoned the parking lot rule expands an employer's premises to allow compensation for injuries sustained in mall parking lots simply because the employer's main premises is located in the mall.\textsuperscript{84} To reach this conclusion, the court cited eleven cases from other jurisdictions in which courts decided shopping center parking lots were part of an employer's premises.\textsuperscript{85} The court agreed with the Court of Appeals of Ohio in \textit{Frishkorn v. Flowers},\textsuperscript{86} reasoning it was unreasonable to require independent businesses in a shopping center or mall to own mall parking lots as tenants in common for an employee parking lot injury to be compensable under an exception to the going to and from work rule.\textsuperscript{87} The court cited multiple cases it determined were in accord with the court's application of the parking lot rule in \textit{Frishkorn}.\textsuperscript{88}

\textsuperscript{77} \textit{Id.}
\textsuperscript{78} 254 Neb. 1014, 582 N.W.2d 283 (2001).
\textsuperscript{79} \textit{Zoucha}, 269 Neb. at 94, 690 N.W.2d at 615.
\textsuperscript{80} \textit{Id.} at 94, 690 N.W.2d at 615.
\textsuperscript{81} \textit{Id.}
\textsuperscript{82} \textit{Id.} at 95-96, 690 N.W.2d at 616.
\textsuperscript{83} \textit{Id.}
\textsuperscript{84} \textit{Id.} at 95, 690 N.W.2d at 616.
\textsuperscript{85} \textit{Id.} at 94-95, 690 N.W.2d at 616.
\textsuperscript{86} 270 N.E.2d 366 (Ohio Ct. App. 1971).
\textsuperscript{87} \textit{Zoucha}, 269 Neb. at 95, 690 N.W.2d at 616.
\textsuperscript{88} \textit{Id.} at 94-95, 690 N.W.2d at 616.
After adopting the parking lot rule, the court reversed the court of appeals' decision that Zoucha's injuries did not arise out of and in the course of her employment. The court determined the strip mall parking lot was part of the Lounge's premises at the time and place of Zoucha's injury. As such, the court reasoned the parking lot rule expanded the Lounge's premises and created an exception to the compensation bar of the going to and from work rule. Accordingly, the court decided Zoucha's injuries occurred on the Lounge's premises while she was leaving work and qualified for workers' compensation benefits under the premises exception to the going to and from work rule.

BACKGROUND

A. NEBRASKA'S WORKERS' COMPENSATION STATUTE GOVERNING THE COMPENSABILITY OF EMPLOYEE INJURIES

In Nebraska, statutory workers' compensation actions have replaced tort actions as the exclusive remedy for employee injuries related to employment. Nebraska's Workers' Compensation Statute defines when injured employees can recover workers' compensation benefits for such injuries. Nebraska Revised Statute section 48-101 provides employee injuries caused by accidents or occupational diseases are compensable if the injury arises out of and in the course of employment and if the employee's willful negligence is not a cause of the injury.

Section 48-151 of the Nebraska Revised Statutes defines terms used in Nebraska's Workers' Compensation Act. This section provides injuries arise out of and in the course of employment when they

89. Id. at 96, 690 N.W.2d at 616.
90. Id.
91. Id. at 96, 690 N.W.2d at 616-17.
92. Id. at 96-97, 690 N.W.2d at 617. The Nebraska Supreme Court's formulation of the going to and from work rule in Zoucha stated that injuries an employee sustains while going to and from work arise out of and in the course of employment if the injury occurs on the employer's premises or if there is a distinct causal connection between an employer-created condition and the employee's injury. Id. at 94-97, 690 N.W.2d at 615-17.
95. NEB. REV. STAT. § 48-101 (2004). Nebraska's workers' compensation statute provides the following: "When personal injury is caused to an employee by accident or occupational disease, arising out of and in the course of his or her employment, such employee shall receive compensation therefore from his or her employer if the employee was not willfully negligent at the time of receiving such injury." Id.
96. Id.
occur "in, on, or about the premises where" employment requires the employee to be, during hours of employment, and not while the employee is on a personal errand outside employment duties. The Nebraska Revised Statute section 48-151(6) defines premises as property the employer maintains. 

**B. Pertinent Rules Regarding Court Interpretation of Statutes**

The plain meaning rule governs a court's interpretation of a statute and provides a court must construe a statute according to its provisions' "plain and ordinary meaning." Further, statutory construction rules provide a court must attempt to take all relevant parts of a statute into account when applying a statute. The Supreme Court of Nebraska has stated statutory rules of construction require it to interpret the provisions of a statute according to their plain meaning and to account for all relevant provisions of a statute.

**C. The Supreme Court of Nebraska Adopted The Distinct Causal Connection Exception to the Going To and From Work Rule When an Employer-Created Condition Formed a Distinct Causal Connection with the Injury**

In *La Croix v. Omaha Pub. Sch.*, the Supreme Court of Nebraska decided an employee's injury sustained in a public parking lot while the employee was going to work was compensable when the employer sponsored employee parking in the public lot and provided

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97. *Neb. Rev. Stat.* § 48-151(6) (2004). The statute provides the following: Throughout the Nebraska Workers' Compensation Act, the following words and phrases shall be considered to have the following meaning, respectively, unless the context clearly indicates a different meaning in the construction used: . . . Without otherwise affecting either the meaning or the interpretation of the abridged clause, personal injuries arising out of and in the course of employment, it is hereby declared not to cover workers except while engaged in, on, or about the premises where their duties are being performed or where their service requires their presence as a part of such service at the time of the injury and during the hours of service as such workers, and not to cover workers who on their own initiative leave their line of duty or hours of employment for purposes of their own. Property maintained by an employer is considered the premises of such employer for purposes of determining whether the injury arose out of employment.


100. *See Rodriguez*, 262 Neb. at 808, 635 N.W.2d at 446.

101. *Id.*

shuttle transportation. In *La Croix*, Diane La Croix ("La Croix") sued Omaha Public Schools ("OPS") in a workers' compensation action in the Nebraska Workers' Compensation Court. OPS employed La Croix as a bus driver attendant. La Croix suffered an injury when she slipped and fell in a city-owned parking lot. The evidence at trial showed OPS shuttled employees from the city-owned lot to the place of employment and instructed employees to park in the city lot when the OPS lot was full. OPS did not require employees to use the city lot but encouraged them to park there and ride the shuttle service.

The workers' compensation court dismissed La Croix's petition, stating employee injuries must occur on the employer's premises to be compensable under workers' compensation law. Judge James R. Coe reasoned La Croix's injury did not occur on her employer's premises because OPS did not own the city lot. La Croix appealed the dismissal of her claim to a review panel of the workers' compensation court, arguing the workers' compensation court erred by applying a bright-line premises rule in barring her recovery.

The review panel affirmed the workers' compensation court's decision, determining employees must be on their employer's premises at the time of their injury to recover workers' compensation benefits. The review panel Judges Ronald L. Brown and Laureen Van Norman recognized other jurisdictions applied an employer-sponsored parking lot exception to the going to and from work rule, but stated the court was bound to apply the bright-line premises exception under Ne-

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104. *La Croix*, 254 Neb. at 1015, 582 N.W.2d at 284.
105. *Id.* at 105, 582 N.W.2d at 284.
106. *Id.*. The court noted the city of Omaha rather than OPS owned the lot and made no mention of any affiliation between the city of Omaha and OPS. *Id.*. La Croix slipped in mud and grass clippings while boarding the shuttle and could not work for nearly three months because of her injury. *Id.* at 1016, 582 N.W.2d at 284.
107. *Id.* at 1015-16, 582 N.W.2d at 284.
108. *Id.* at 1016, 582 N.W.2d at 284.
109. *Id.* at 1016, 582 N.W.2d at 285.
111. *La Croix*, 254 Neb. at 1015-16, 582 N.W.2d at 285. Although the court's opinion does not directly state La Croix's argument, the opinion alludes to the argument by noting the workers' compensation panel affirmed because the panel decided it was bound to apply the bright-line premises rule. *Id.* at 1015-16, 582 N.W.2d at 288.
112. *Id.*
La Croix appealed the review panel's decision to the Supreme Court of Nebraska, challenging the panel's application of the bright-line premises rule. The Supreme Court of Nebraska reversed the review panel's decision, deciding employee injuries that occurred off an employer's premises while the employee was going to or from work were compensable if the employer sponsored employee parking in the off-premises parking lot. Justice Connolly, writing for a unanimous court, reasoned OPS's sponsoring of the off-premises lot and the provided shuttle transportation were employer-created conditions forming a distinct causal connection to La Croix's injury. Thus, the court adopted the distinct causal connection exception to the going to and from work rule. The court decided the causal connection existing in La Croix meant the injury arose out of and in the course of employment and was therefore compensable even though it did not occur on the employer's premises.

D. The Court of Appeals of Ohio Adopted the Parking Lot Rule Exception to the Going To and From Work Rule When the Employer Did Not Control or Own the Parking Lot

In Frishkorn v. Flowers, the Court of Appeals of Ohio concluded an injury an employee sustained in a mall parking lot arose out of an in the course of his employment. In Frishkorn, a high school student worked as a carry out boy for Pick-n-Pay, a coffee shop, located in an Ohio shopping center. The student, Frishkorn, sued Pick-n-Pay in the Court of Common Pleas for workers' compensation when a vehicle struck him in the shopping center parking lot while he was going to work. Frishkorn and other employees had Pick-n-Pay's permission to park their vehicles anywhere in the shopping center parking lot.

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114. Id., 254 Neb. at 1016, 582 N.W.2d at 285.

115. Id. at 1019, 582 N.W.2d at 286.

116. Id.

117. Id. at 1018-19, 582 N.W.2d at 286.

118. Id.


121. Frishkorn, 270 N.E.2d at 367. The court did not disclose the delivery boy's first name in its opinion. Id. at 367.

122. Id.
center lot but the court noted Pick-n-Pay had no control or ownership over the lot.\textsuperscript{123}

The court of common pleas decided the mall parking lot was not part of Pick-n-Pay's zone of employment and Frishkorn's injury was therefore not compensable under Ohio workers' compensation law.\textsuperscript{124} Frishkorn appealed the court of common pleas' decision to the Court of Appeals of Ohio, Cuyahoga County.\textsuperscript{125} The court of appeals reversed the decision of the court of common pleas, reasoning Pick-n-Pay was liable to Frishkorn under workers' compensation law because it had created a field of risk in which Frishkorn's injury occurred.\textsuperscript{126}

Judge John M. Manos, writing for the court of appeals, reasoned Pick-n-Pay's premises included the mall parking lot because, as a mall tenant, Pick-n-Pay had a reciprocal right and privilege to use the parking area.\textsuperscript{127} Judge Manos explained the reciprocal rights and privileges justified expanding an employer's premises to include the parking lot for workers' compensation purposes.\textsuperscript{128} The court decided Frishkorn's injury was compensable because his employment with Pick-n-Pay created a field of risk in the mall parking lot and Frishkorn's injury occurred in that field of risk while he was going to work.\textsuperscript{129}

E. **PERTINENT CASES IN WHICH COURTS APPLIED THE PARKING LOT RULE WHEN EMPLOYEES WERE INSTRUCTED WHERE TO PARK**

1. *The Supreme Court of New Jersey Applied the Parking Lot Rule When the Employer Instructed Employees Where to Park*

In *Livingstone v. Abraham & Straus, Inc.*,\textsuperscript{130} the Supreme Court of New Jersey determined an employee's injury sustained in a shopping mall parking lot while she was on her way to work arose out of and in the course of her employment and was therefore compensable.\textsuperscript{131} In *Livingstone*, Marlene Livingstone ("Livingstone") sued her employer Abraham & Straus, Inc. ("Abraham & Straus") in the New Jersey Division of Workers' Compensation for injuries she sustained in the parking lot of the shopping mall in which Abraham & Straus

\begin{footnotes}
\begin{enumerate}
\item \textsuperscript{123} *Id.*
\item \textsuperscript{124} *Id.* The court of common pleas gave no reason for its decision the parking lot where Frishkorn's injury occurred was not in Pick-n-Pay's zone of employment. *Id.*
\item \textsuperscript{125} *Id.* at 366-68.
\item \textsuperscript{126} *Id.* at 370.
\item \textsuperscript{127} *Id.* at 369.
\item \textsuperscript{128} *Id.*
\item \textsuperscript{129} *Id.* at 370.
\item \textsuperscript{130} 543 A.2d 45 (N.J. 1988).
\item \textsuperscript{131} Livingstone v. Abraham & Straus, Inc., 543 A.2d 45, 46 (N.J. 1988).
\end{enumerate}
\end{footnotes}
was a tenant. Livingstone was on her way to work and had parked her car near the outer reaches of the mall parking lot to allow space for customer parking near the mall entrance. A fellow employee driving through the lot struck and injured Livingstone as Livingstone walked from her car to the mall entrance. Abraham & Straus did not own, rent, or have maintenance responsibilities for the area of the mall lot where its employees parked, but paid fees under its lease for use of the lot. In addition, Abraham & Straus directed its employees, through a written notice, to park near the outer edge of the lot.

The workers' compensation judge determined Livingstone's injury did not arise out of and in the course of her employment because Abraham & Straus did not have control over the parking area. The compensation judge reasoned Livingstone was in a common public area when she sustained her injury, as opposed to an area Abraham & Straus leased or controlled. As a result, the court determined Livingstone's injury was not compensable. Livingstone appealed the workers' compensation judge's decision to the Appellate Division, arguing she had established Abraham & Straus exercised the necessary control over the parking lot to allow compensation.

The appellate division reversed the division of workers' compensation court's judgment, deciding Abraham & Straus had sufficient control over the parking to connect Livingstone's injury to her employment. Judge Landau, writing for the appellate division ma-

132. Livingstone, 543 A.2d at 46-47.
133. Id. at 46-47.
134. Id.
135. Id.
136. Id. at 47.
137. Id.
138. Id.
139. Id.
140. Id. The court did not directly state Livingstone's argument, but stated the workers' compensation judge ruled against her because she had not established Abraham & Straus had any control over the lot. Id. The court noted the New Jersey workers' compensation statute, N.J.S.A. 34:15-36, provided the following:

Employment shall be deemed to commence when an employee arrives at the employer's place of employment to report for work and shall terminate when the employee leaves the employer's place of employment, excluding areas not under the control of the employer; provided, however, when the employee is required by the employer to be away from the employer's place of employment, the employee shall be deemed to be in the course of employment when the employee is engaged in the direct performance of duties assigned or directed by the employer; but the employment of employee paid travel time by an employer for time spent traveling to and from a job site or of any employee who utilizes an employer authorized vehicle shall commence and terminate with the time spent traveling to and from a job site or the authorized operation of a vehicle on business authorized by the employer.

(emphasis added) Id. at 47.
141. Id. at 47-48.
jority, reasoned although customers could park in the same mall lot where employees parked, Abraham & Straus's written directive required employees to travel further between their vehicles and the mall's entrance.\textsuperscript{142} The appellate division explained the parking directive was essential to its finding Livingstone's injury was compensable because it established Abraham & Straus's control over the lot as required by New Jersey's workers' compensation statute.\textsuperscript{143}

Judge Michels dissented and advised against the majority's decision, reasoning the plain meaning of New Jersey's workers' compensation statute did not allow compensation.\textsuperscript{144} According to the dissent, Livingstone did not present enough evidence to establish Abraham & Straus had sufficient control over the lot to fall within the meaning of the statute.\textsuperscript{145} Abraham & Straus appealed the appellate division's decision to the Supreme Court of New Jersey, arguing it lacked the control necessary for liability under the statute.\textsuperscript{146}

The Supreme Court of New Jersey affirmed the conclusion of the appellate division, deciding parking "lots owned, maintained, or used by employers for employee parking are part of the employer's premises."\textsuperscript{147} Justice Gary S. Stein, writing for the majority, reasoned the New Jersey Legislature impliedly acquiesced to the conclusion that parking lots employers used or maintained for employee parking were within the control of the employer and as such were part of the employer's premises for workers' compensation purposes.\textsuperscript{148} The court indicated Abraham & Straus's lack of ownership, maintenance, or right to exclusive use of the lot did not preclude recovery for employee injuries sustained in the lot.\textsuperscript{149} Moreover, the court reasoned Abraham & Straus's directive that employees park in a remote portion of the lot made that area equal to an Abraham & Straus-owned lot.\textsuperscript{150}

Justice Robert L. Clifford dissented, reasoning the plain meaning of New Jersey's workers' compensation statute did not allow for employer liability for employee injuries occurring on property the employer did not control.\textsuperscript{151} Justice Clifford explained although Abraham & Straus established control over its employees by directing them to park in a specific area, Abraham & Straus did not control the

\begin{footnotes}
\item[142] Id. at 48.
\item[143] Id.
\item[144] Id. Judge Michels wrote the dissenting opinion. Id.
\item[145] Id.
\item[146] Id.
\item[147] Id. at 52, 54.
\item[148] Id.
\item[149] Id. at 53.
\item[150] Id. at 53-54.
\item[151] Id. at 54-55.
\end{footnotes}
accident site. Therefore, Justice Clifford reasoned Livingstone's injury was not compensable under the plain meaning of the statute.

2. The Supreme Court of Oklahoma Applied the Parking Lot Rule When the Employer Acquiesced in Employee Parking and Admitted It Wanted Employees to Park Further From the Employer's Store to Reserve Space for Customers

In *Turner v. B Sew Inn*, the Supreme Court of Oklahoma held an employee could recover workers' compensation benefits for her injury sustained in a mall parking lot. In *Turner*, Stephanie Ann Turner ("Turner") sued B Sew Inn (the "Inn"), her employer, in Workers' Compensation Court. On January 30, 1999, Turner arrived in the shopping center parking lot fifteen minutes before work as her employer requested. She broke her leg when she slipped while stepping from the shopping center parking lot onto a sidewalk. According to Turner, the Inn directed her to reserve storefront parking spaces for customers. At trial, the Inn's owner admitted she did not want store employees parking in spots convenient for customers near the store entrance. The parties did not dispute the Inn acquiesced in the employee use of the shopping center lot.

The workers' compensation court judge decided Turner's injuries did not arise out of and in the course of her employment. Turner appealed the workers' compensation court's decision to the Court of Civil Appeals, which sustained the judgment. Turner then appealed the court of civil appeals' decision to the Supreme Court of Oklahoma, arguing the Inn need not have complete control of the parking lot to find the parking lot part of the Inn's premises under workers' compensation law.

152. Id. at 54-56.
153. Id. at 55-56.
154. 18 P.3d 1070 (Okla. 2000).
156. Id. at 1072.
157. Id. at 1071-72.
158. Id. at 1072.
159. Id.
160. Id.
161. Id.
162. Id. The Supreme Court of Oklahoma did not discuss the workers' compensation court's reasoning in its opinion. Id.
163. Id.
164. Id.
The Supreme Court of Oklahoma reversed the court of civil appeals' decision and decided employee injuries occurring in shopping center parking lots while the employee was going to or from work were compensable if employment related risks caused the injury. Justice Yvonne Kauger, writing for the court, reasoned the shopping center parking lot was part of the Inn's premises because Turner was in the lot pursuant to her work responsibilities and the Inn acquiesced in her use of the lot. Justice Kauger explained the Supreme Court of Oklahoma consistently held since 1944, when an accident occurs in an area the employer owns or controls while an employee is going to or from work, the injury is compensable. Noting the court had limited the premises exception to the going to and from work rule by requiring a causal connection between an employee's injury and employment, Justice Kauger reasoned when the Inn acquiesced in its employees' use of the lot, the Inn created the necessary connection between Turner's injury and her employment. The court therefore decided Turner's injury was compensable.

3. The Supreme Court of Virginia Applied the Parking Lot Rule When the Employer Directed Employees Where to Park

In Barnes v. Stokes, the Supreme Court of Virginia held an employee's parking lot injury arose out of and in the course of employment when the tenant-employer directed its employees to park in an allocated area. In Barnes, Brenda A. Barnes ("Barnes") brought a negligence action against William H. Stokes, III ("Stokes") in the Circuit Court of Fairfax County, Virginia. Stokes, Barnes's co-worker, struck Barnes in an office-building parking lot while driving through the lot. Barnes and Stokes worked in an office adjacent to the parking area and were leaving work when the accident occurred. Barnes's employer did not own or maintain the lot but leased part of the office building next to the lot. The employer's agreement with the landlord required Barnes and her fellow employees to park in a

165. Id. at 1076.
166. Id. at 1071, 1076.
167. Id. at 1074.
168. Id. at 1074, 1076.
169. Id. at 1076-77.
173. Id. at 330.
174. Id. at 330-31.
175. Id. at 331.
designated portion of the common lot. Barnes was in the designated area when she sustained her injury.

The circuit court denied Barnes's claim against Stokes, deciding her exclusive remedy was against her employer under the Virginia Workers' Compensation Act. The court determined Barnes could not sue her fellow employee in negligence because her injury arose out of and in the course of her employment. Barnes appealed the circuit court's decision to the Supreme Court of Virginia. On appeal, Barnes argued she could maintain an action for negligence because her employer did not own or maintain the parking lot as required for compensation under Virginia's workers' compensation statute. As such, Barnes contended workers' compensation law was not her exclusive remedy against her co-worker.

The Supreme Court of Virginia affirmed the circuit court's decision. Justice Christian Compton, writing for the unanimous court, determined the site of the injury was part of the employer's premises for workers' compensation purposes because the building owner provided the nearby lot as a benefit to the employer and employees. The court noted Barnes's injury occurred in an allocated area where the employer required employees to park. The court reasoned employers who did not own or maintain lots should be liable for injuries sustained in such common parking lots because they benefited from their employees' use of a designated area of the lot. As such, the court decided Barnes's exclusive remedy was under the Virginia Workers' Compensation Act because her injury arose out of and in the course of her employment.

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176. Id.
177. Id.
178. Id.
179. Id. The court distinguished Barnes's claim from a case where the court denied workers' compensation benefits to an employee who sustained an injury in a common parking lot while returning on a personal mission after he had already left work. Id.
180. Id.
181. Id.
182. Id.
183. Id. at 332.
184. Id. at 330, 332.
185. Id. at 332. The court noted parking lots next to an employer's workplace were an employee benefit that indirectly benefited the employer. Id.
186. Id.
187. Id.
4. **The Superior Court of Delaware for Kent County Applied the Parking Lot Rule When the Employer Directed Employees Where to Park and Installed a Parking Lot Surveillance System**

In *Rose v. Cadillac Fairview Shopping Ctr. Prop. Inc.*, the Superior Court of Delaware for Kent County determined an employee injury sustained from an abduction and a rape in a mall parking lot arose out of and in the course of employment. In *Rose*, Jane L. Rose ("Rose") sued her employer, Sears, in negligence for failing to provide enough security in a mall parking lot. Rose was on her way to work and parked where Sears instructed store employees to park when the assault occurred. An unknown assailant abducted, raped, and robbed Rose, then dropped her off in the mall parking lot. Sears's lease with the mall required Sears to instruct its employees to park in a designated area but delegated parking lot security and maintenance to mall management. Nevertheless, Sears had installed a parking lot surveillance camera and provided security officers to escort employees.

The Superior Court granted Sears's Motion to Dismiss for failure to state a claim upon which relief can be granted. Judge N. Maxson Terry, writing for the court, reasoned Rose's exclusive remedy was under Delaware workers' compensation law, rather than in tort, because her injury arose out of and in the course of her employment. The court explained the workers' compensation law's exclusive remedy provision governed the injury because Delaware's going to and from work rule allowed compensation of employee injuries if they occurred on an employer's premises.

The court stated persuasive case law established common parking lots were part of an employer's premises for workers' compensation purposes if evidence revealed the employer had sufficient control of the lot. In deciding the parking lot was part of Sears's premises, the court noted the employee-parking instructions, security cameras,

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190. *Rose*, 668 A.2d at 784-85. Rose also sued the mall owners and managers and the mall security company. *Id.* at 784-85.
191. *Id.* at 785.
192. *Id.*
193. *Id.*
194. *Id.*
195. *Id.* at 784, 790-91.
196. *Id.* at 790-91.
197. *Id.* at 787-88.
198. *Id.* at 788.
and security officers established a degree of control over the lot. The court determined Rose's injury arose out of and in the course of employment under the parking lot rule because her injury occurred when she was in the parking lot over which Sears had established control. Therefore, the court dismissed Rose's negligence claim because Delaware workers' compensation law provided the exclusive remedy for injuries arising out of and in the course of employment.

5. The Court of Appeals of New Mexico Applied the Parking Lot Rule When the Employer Instructed Employees Where to Park

In Lovato v. Maxim's Beauty Salon, Inc., the Court of Appeals of New Mexico decided the going to and from work rule did not bar an employee's workers' compensation claim. In Lovato, Martha Lovato ("Lovato") filed a claim for workers' compensation against her employer, Maxim's Beauty Salon, Inc. (the "salon"), under New Mexico's Workers' Compensation Act. Lovato fell and sustained an injury while walking through a mall anchor store on her way to the salon. Lovato was instructed to park in a particular area of the mall lot and to walk through the anchor store on her way to the salon.

The hearing officer presiding over Lovato's claim decided her injury was not compensable because it occurred while she was on her way to work in an area not part of the salon's premises. The officer reasoned Lovato's injury did not occur within the scope of her employment and the going to and from work rule therefore barred her claim. Lovato appealed the hearing officer's decision to the Court of Appeals of New Mexico.

The Court of Appeals reversed the decision of the hearing officer, deciding Lovato's claim was compensable because Lovato was walking between two parts of her employer's premises—the parking lot and

199. Id.
200. Id.
201. Id. at 790-91. The court also discussed whether the time of Rose's arrival allowed compensation and whether an attack by a third party was compensable. Id. at 788-90.
204. Lovato, 782 P.2d at 392.
205. Id. at 392.
206. Id. The court did not state who instructed the employees to park in the lot east of Montgomery Ward. Id.
207. Id. at 393.
208. Id.
209. Id.
the salon. Judge Apodoca, writing for the court, reasoned the mall parking lot was part of the salon’s premises under the parking lot rule. The court further explained under New Mexico law, when an employee sustains an injury while traveling between two parts of an employer’s premises, the injury is compensable. The court stated Lovato was traveling between two parts of her employer’s premises and her injury was therefore compensable because the parking lot was part of the salon’s premises.

F. Pertinent Cases in which Courts Applied the Parking Lot Rule When the Employer Paid a Common Area or Maintenance Fee

1. The Court of Appeals of Oregon Applied the Parking Lot Rule When the Employer Paid a Common Area Fee and Could Demand Parking Lot Repairs

In Montgomery Ward v. Cutter, the Court of Appeals of Oregon determined an employer had sufficient control of a common parking lot to allow workers’ compensation benefits when an employee sustained an injury while walking to her employer’s store. In Montgomery Ward, Pauline Cutter (“Cutter”) sought workers’ compensation benefits from her employer, Montgomery Ward, through an order of an Oregon Workers’ Compensation Referee. Cutter injured her ankle when she stepped in a hole in a mall parking lot while returning to work from her lunch break. The Montgomery Ward where Cutter worked was located inside a shopping mall and Cutter parked in a designated area of the mall lot for which Montgomery Ward paid a fee. Under the terms of its lease agreement with the mall owner, Montgomery Ward could also require the mall owner to repair its designated portion of the lot.

The workers’ compensation referee ruled Cutter’s injury was compensable under Oregon workers’ compensation law. Montgomery

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210. *Id.* at 394.
211. *Id.* at 392, 393. The court’s opinion did not state the authoring judge’s first name. *Id.* at 391-95.
212. *Id.* at 393-94.
213. *Id.* at 394.
217. *Id.* at 1182. The court noted Cutter’s injury occurred within a few feet of an area she had to pass through every day to get from Montgomery Ward’s main store to its automotive department. *Id.*
218. *Id.*
219. *Id.*
220. *Id.* The Court of Appeals of Oregon did not discuss the referee’s reasoning in its opinion. *Id.*
Ward appealed the referee's decision to the Workers' Compensation Board, but the board affirmed the referee's decision.\textsuperscript{221} Montgomery Ward then appealed the workers' compensation board's decision to the Court of Appeals of Oregon, arguing Cutter's injury did not arise out of and in the course of employment.\textsuperscript{222}

The court of appeals unanimously affirmed the decision of the workers' compensation board, reasoning Montgomery Ward had sufficient control of the mall parking lot to render Montgomery Ward liable for Cutter's injury under the workers' compensation statute.\textsuperscript{223} Presiding Judge John Buttler explained Oregon courts consistently found employee parking lot injuries compensable if the employer owns or maintains the lot.\textsuperscript{224} The court reasoned Montgomery Ward had sufficient control of the lot because it could require repairs and had directed employees where to park.\textsuperscript{225} Judge Buttler therefore decided Cutter's injury was compensable.\textsuperscript{226} However, the court noted when the employer has no control over the lot and does not own the lot, the parking lot injury is not compensable.\textsuperscript{227} The court specifically declined to extend its parking lot rule to allow compensation regardless of the employer's level of maintenance or control over the mall parking lot.\textsuperscript{228}

2. The Supreme Court of Minnesota Applied the Parking Lot Rule When the Employer Instructed Employees Where to Park and Paid a Pro Rata Share of Parking Lot Maintenance Expenses

In Merrill v. J.C. Penney,\textsuperscript{229} the Supreme Court of Minnesota held an employee's injury occurred on the premises of her employer when the employee fell in a shopping center parking lot while on her way to work.\textsuperscript{230} In Merrill, Theresa J. Merrill ("Merrill") sued her employer J.C. Penney's for workers' compensation in the Minnesota Worker's Compensation Court.\textsuperscript{231} Merrill sustained her injury when she fell in a shopping mall parking lot near her employer's J.C. Pen-

\textsuperscript{221} Id. The court of appeals did not discuss the workers' compensation board's reasoning. Id.
\textsuperscript{222} Id.
\textsuperscript{223} Id. at 1183.
\textsuperscript{224} Id. at 1182-83.
\textsuperscript{225} Id. at 1183.
\textsuperscript{226} Id.
\textsuperscript{227} Id.
\textsuperscript{228} Id.
\textsuperscript{229} 256 N.W.2d 518 (Minn. 1977).
\textsuperscript{230} Merrill v. J. C. Penney, 256 N.W.2d 518, 519-21 (Minn. 1977).
\textsuperscript{231} Merrill, 256 N.W.2d at 519.
Shortly before Merrill's fall, J.C. Penney's instructed its employees to park in an overflow lot to free parking spaces for customers near the store entrance. In addition, although the mall owner retained control of the parking areas, the tenant lease required J.C. Penney's to pay a pro rata share of parking lot maintenance costs.

The workers' compensation court decided Merrill's injury was compensable because it arose out of and in the course of her employment. J.C. Penney's appealed the workers' compensation court's decision to the Workers' Compensation Court of Appeals, which affirmed. Subsequently, J.C. Penney's appealed the workers' compensation court of appeals decision to the Supreme Court of Minnesota. On appeal, J.C. Penney's contended the appeals court erred in deciding Merrill's injury arose out of and in the course of her employment because the injury occurred off J.C. Penney's premises and Merrill did not face any risks peculiar to her employment when she fell.

The Supreme Court of Minnesota affirmed the workers' compensation court of appeals. In a per curiam opinion, the court reasoned if an employer did not own, maintain, or control a mall parking lot but the lease terms made the lot available to tenant-employers and required tenants to pay a pro-rata share of parking lot maintenance expenses, an employee injury sustained in the lot was compensable. The court noted requiring tenant-employers to have actual control over mall parking lots before employee injuries could be compensable was impractical and illogical. Therefore, the court reasoned Merrill's injury was compensable because J.C. Penney's control over her work activity was more determinative than J.C. Penney's control over the common parking lot.

232. Id. at 519.
233. Id.
234. Id.
235. Id. The court did not explain the reasoning of the workers' compensation court or workers' compensation court of appeals. Id.
236. Id.
237. Id.
238. Id.
239. Id. at 519-21.
240. Id.
241. Id. at 520. The court quoted Frishkorn in its reasoning. Id.
242. Id. The court quoted Frishkorn in its reasoning. Id.
3. The Court of Appeals of Arizona Applied the Parking Lot Rule When the Employer Paid Additional Fees for Parking Spaces

In *P.B. Bell & Assoc. v. Indus. Comm’n of Arizona*, the Court of Appeals of Arizona found an employee injury sustained in a parking lot arose out of and in the course of employment when the employer leased space in a multi-tenant building and paid additional fees for parking spaces in a common lot. In *P.B. Bell & Assoc.*, Jean Sandrone (“Sandrone”) sought workers’ compensation benefits from her employer, P.B. Bell & Associates (“Bell”), through the Arizona Industrial Commission. Sandrone broke her hip when she fell while stepping from a sidewalk to a common parking lot on her way to three covered parking spaces reserved for Bell employees. In addition to the covered spaces, Bell employees could park in uncovered spaces in a southern lot the building owner provided. Bell paid an additional fee for use of the three covered parking spaces.

The industrial commission decided Sandrone’s injury was compensable, explaining when an employer provides specific employee parking spaces, employee injuries that occur between those spaces and the employer’s premises arise out of and in the course of employment. Bell and its insurance carrier filed a request for review with an administrative law judge who affirmed the decision of the industrial commission. Upon a petition for special action review with the Court of Appeals of Arizona, Bell argued Sandrone’s injury was not compensable under Arizona’s going to and from work rule. Bell contended the leased spaces were not part of its premises because it had no control over the spaces.

The court of appeals affirmed the administrative judge’s decision, concluding direct control or maintenance of the lot was not essential to determining the lot was part of Bell’s premises. Judge Jack L. Ogg, writing for the court, reasoned the lot was part of Bell’s premises not only because the office-building owner provided parking for tenants, but also because Bell paid additional charges for use of the three cov-

246. *Id.* at 804.
247. *Id.*
248. *Id.*
249. *Id.* at 804-05.
250. *Id.* at 805.
251. *Id.*
252. *Id.* at 806.
253. *Id.* at 807, 810.
ered spaces. Chief Judge Eino M. Jacobson dissented, reasoning the employer must have at least some level of control over the accident site for a workers' compensation award to be proper. Judge Jacobson warned the majority was rejecting the requirement of control, which was essential to the concept of premises liability.

G. Pertinent Cases in Which Courts Applied the Parking Lot Rule When the Employer's Lease Provided for Employee Use of the Mall Parking Lot

1. The Court of Appeals of Mississippi Applied the Parking Lot Rule When the Employer's Lease Provided for Employee Use of the Mall Parking Lot

In Adams v. Lemuria, Inc., the Court of Appeals of Mississippi determined workers' compensation liability existed for an employee injury occurring in a common parking lot when the lease between the employer and landlord provided for use of the lot. In Adams, Katherine A. Adams petitioned an administrative law judge for workers' compensation from her employer, Lemuria, Inc. ("Lemuria"). Banner Hall leased space to Lemuria and other tenants in the same building. An assailant kidnapped Adams when she was about to exit her car in the Banner Hall parking lot on her way to work at Lemuria. The kidnapper pushed Adams into the car and drove out of the parking lot. Adams sustained serious injuries to her ankle when she escaped by jumping out of the moving car.

The administrative law judge decided Adams's injury was not compensable under workers' compensation because the injury occurred off Lemuria's premises. Adams appealed the administrative law judge's decision to the Full Workers' Compensation Commission, which affirmed the judge's conclusion. Adams appealed the full commission's decision to the First Judicial District of the Hinds County Circuit Court. The circuit court affirmed the compensation

254. Id. at 804, 807.
255. Id. at 810, 812.
256. Id. at 812.
259. Adams, 738 So. 2d. at 296.
260. Id. at 298.
261. Id. at 296.
262. Id.
263. Id. The court noted Adams's injuries included a crushed ankle joint, pavement burns, abrasions, and cuts. Id.
264. Id. at 296-97.
265. Id. at 297.
266. Id.
commission's judgment and Adams appealed the circuit court's decision to the Court of Appeals of Mississippi. On appeal, Adams argued the evidence did not support the lower court's determination Lemuria lacked control of the parking lot where the kidnapping occurred.

The court of appeals reversed the decision of the circuit court, reasoning a tenant-employer may be liable for workers' compensation for employee parking lot injuries if the employer has a license to use a mall parking lot. Judge Oliver Diaz, writing for the court, explained although Lemuria did not own the parking lot, Lemuria's lease provisions and the legislature's purpose in passing the Mississippi Workers' Compensation Act were sufficient to find Lemuria liable for workers' compensation. Judge Diaz reasoned the administrative law judge and the full workers' compensation commission had "overlooked the lease provisions between Lemuria and [the landlord] and the humanitarian aims of the [Workers' Compensation Act]." Therefore, the court reasoned Adams's injury arose out of and in the course of employment and was compensable.

2. The Court of Appeals of Maryland Applied the Parking Lot Rule When the Employer's Lease Provided for Employee Use of the Mall Parking Lot

In May Dep't Stores Co. v. Harryman, the Court of Appeals of Maryland held the Maryland Workers' Compensation Act covered a mall tenant employee injury sustained in a mall parking lot. In Harryman, Muriel E. Harryman ("Harryman") sought workers' compensation benefits from her employer, May Department Stores Company ("May"), before the Maryland Workers' Compensation Commission. On November 28, 1983, an assailant injured Harryman in a mall parking lot outside May's store by throwing her to the ground when he attempted to steal her purse. Harryman had parked in an area where she was expected to park. At oral argu-

267. Id.
268. Id.
269. Id. at 298.
270. Id. at 296, 298. Chief Judge McMillin, and Judges King, Southwick, Bridges, Coleman, Irving, Lee, Payne, and Thomas concurred. Id.
271. Id. at 298.
272. Id.
273. 517 A.2d 71 (Md. 1986).
275. May Dep't Stores Co., 517 A.2d at 71. May conducted business as Hecht Company. Id. at 71.
276. Id. at 71.
277. Id. The court did not state who expected or required employees to park in the specific part of the lot. Id.
ment, May admitted a provision in its lease with the mall gave May employees the right to park in the mall parking lot.\textsuperscript{278}

The workers' compensation commission entered judgment for Harryman and May filed an appeal with the Circuit Court for Baltimore County.\textsuperscript{279} After the circuit court entered summary judgment for Harryman, May appealed the circuit court's decision to the Court of Special Appeals.\textsuperscript{280} The court of special appeals affirmed the circuit court's decision and May took a final appeal of the court of special appeals' decision to the Court of Appeals of Maryland.\textsuperscript{281} On appeal, May argued the store's premises did not include the mall parking lot because it did not control or maintain the lot.\textsuperscript{282} May claimed parking lots next to businesses should not fall under the premises exception to the going to and from work rule simply because of their proximity to an employer's business.\textsuperscript{283}

The court of appeals affirmed the decision of the court of special appeals, holding Harryman's injury arose out of and in the course of her employment.\textsuperscript{284} Judge Marvin H. Smith, writing for the unanimous court, reasoned it was illogical to require mall tenant employers to own or control mall parking lots in order to find employers liable for employee injuries sustained in such parking lots.\textsuperscript{285} The court articulated a broad interpretation of control was preferable so employer premises would include adjacent mall parking lots if the employer leased a store in the mall.\textsuperscript{286} The court relied in large part on \textit{Frishkorn} to justify its decision that Harryman's injury was compensable.\textsuperscript{287} Judge Smith agreed with the \textit{Frishkorn} court that although some courts traditionally required actual employer ownership or control to find parking lot injuries compensable, multi-tenanted shopping malls created a unique work environment justifying an exception to the usual rule.\textsuperscript{288}
In Zoucha v. Touch of Class Lounge, the Supreme Court of Nebraska decided an employee's injury occurring in the parking lot of a strip mall qualified for workers' compensation. In Zoucha, Stephanie Zoucha ("Zoucha") sued her employer, the Touch of Class Lounge (the "Lounge"), for workers' compensation benefits for an injury she sustained in a strip mall parking lot while leaving work. The court analyzed Nebraska's going to and from work rule in deciding whether Zoucha's injury was compensable under the Nebraska Workers' Compensation Act (the "Act"). The court adopted the reasoning of case law from other jurisdictions in which courts stated injuries occurring in shopping center parking lots while an employee is going to or from work are compensable. After stating the reasoning of other courts was consistent with Nebraska workers' compensation principles, the court decided Zoucha's injury was compensable because it had occurred on her employer's premises.

In Zoucha, the Supreme Court of Nebraska overlooked provisions of the Nebraska Workers' Compensation Act and incorrectly adopted the reasoning of other courts under the parking lot rule. This Analysis will show the Nebraska Workers' Compensation Act required the Supreme Court of Nebraska to find the Lounge maintained the strip mall parking lot before deciding Zoucha's injury occurred on the Lounge’s premises. Further, this Analysis will demonstrate even if the Act did not limit an employer's premises, the court incorrectly interpreted and applied the parking lot rule set forth by the majority of cases the court cited in support of its decision. Finally, this Analysis will show the court could have used the distinct causal connection analysis it posited in previous cases to conclude Zoucha's injury was compensable.

291. Zoucha, 269 Neb. at 90, 690 N.W.2d at 613.
292. Id. at 93-96, 690 N.W.2d at 615-16.
293. Id. at 94-96, 690 N.W.2d at 615-16.
294. Id. at 95-97, 690 N.W.2d at 616-17.
295. See infra notes 300-96 and accompanying text.
296. See infra notes 300-21 and accompanying text.
297. See infra notes 322-96 and accompanying text.
298. See infra notes 398-416 and accompanying text.
A. The Supreme Court of Nebraska Ignored the Statutory Definition of Premises in the Nebraska Workers' Compensation Act

The Supreme Court of Nebraska incorrectly decided Zoucha's injury occurred on her employer's premises because it ignored the definition of premises in Nebraska Revised Statute section 48-151(6). The court in Zoucha decided Zoucha's injury was compensable despite the fact she had already left work because the court determined her injury occurred on her employer's premises under the parking lot rule exception to the going to and from work rule. However, the Nebraska Legislature expressly limited the scope of an employer's premises in Nebraska Revised Statute section 48-151(6). Section 48-151(6) states “[p]roperty maintained by an employer is considered the premises of such employer for purposes of determining whether the injury arose out of employment.”

Under Nebraska Revised Statute section 48-151(6), an employer's premises consists of property the employer maintains. Section 48-151(6) therefore requires a court to determine an employer's premises for workers' compensation purposes by examining whether the employer maintains the area where the injury occurred. West's Legal Thesaurus/Dictionary provides the definition of “maintains”: “To make repairs or perform other acts to prevent a decline from the present state or condition (maintain the premises).” The plain meaning of section 48-151(6) therefore requires an employee injury occur in an area that the employer repairs or performs acts necessary to care for the property to find the injury occurred on the employer's premises.

Section 48-151(6) and rules of statutory construction obligated the court to attempt to apply all relevant provisions of the Nebraska Workers' Compensation Act in determining what constitutes an employer's premises. In Zoucha, the court decided the compensability of Zoucha's injury based on an analysis of the Lounge's premises.
The court failed to mention or apply Section 48-151(6) although it was clearly relevant because it defines an employer’s premises for workers’ compensation purposes.\textsuperscript{309} In contrast to the rules of statutory construction and Nebraska Revised Statutes section 48-151(6), which limits an employer’s premises to employer-maintained property, the \textit{Zoucha} court did not discuss whether the Lounge maintained the lot when it decided Zoucha’s injury occurred on the Lounge’s premises.\textsuperscript{310} Therefore, the court incorrectly based its decision that the strip mall parking lot was the Lounge’s premises on the parking lot rule rather than on the plain meaning of employer premises provided in Nebraska Revised Statute section 48-151(6).\textsuperscript{311}

Section 48-151(6) and the plain meaning rule obligated the \textit{Zoucha} court to base its decision regarding the Lounge’s premises on whether the Lounge maintained the property.\textsuperscript{312} In \textit{Zoucha}, the court made no finding the Lounge possessed the lot, repaired the lot, or had any maintenance responsibilities over the lot as required by Nebraska Revised Statutes section 48-151(6).\textsuperscript{313} Instead, the court analyzed the compensability of Zoucha’s injury under the parking lot rule, which states shopping center parking lots are premises of employers who are tenants in the shopping center.\textsuperscript{314} Contrary to the terms of section 48-151(6) and the plain meaning rule, the court decided the strip mall parking lot was the Lounge’s premises simply because the Lounge was a tenant in the mall.\textsuperscript{315} As such, the \textit{Zoucha} court incorrectly determined Zoucha’s injury occurred on Lounge premises when the court made no finding the Lounge repaired, possessed, or maintained the common parking lot.\textsuperscript{316}

\textsuperscript{309}. \textit{See Zoucha}, 269 Neb. 89, 690 N.W.2d 610 (demonstrating a lack of discussion of Neb. Rev. Stat. § 151(6)).

\textsuperscript{310}. \textit{Compare} Neb. Rev. Stat. § 48-151(6) (2004) (stating an employer’s premises consists of property the employer maintains when deciding whether an injury arose out of employment), \textit{with Zoucha}, 269 Neb. at 91, 96, 690 N.W.2d at 614, 616 (stating the Lounge had no control, ownership, or authority over the lot where Nunez attacked Zoucha, and lacking discussion of the Lounge’s maintenance responsibilities for the lot).

\textsuperscript{311}. \textit{See supra} notes 300-10 and accompanying text.

\textsuperscript{312}. \textit{See infra} notes 313-16 and accompanying text.

\textsuperscript{313}. \textit{See Zoucha}, 269 Neb. 89, 89-97, 690 N.W.2d 610, 610-17 (demonstrating the court’s lack of discussion of the Lounge’s parking lot maintenance responsibilities).

\textsuperscript{314}. \textit{Zoucha}, 269 Neb. at 95-96, 690 N.W.2d at 616.

\textsuperscript{315}. \textit{Compare Zoucha}, 269 Neb. at 95-96, 690 N.W.2d at 616 (stating Zoucha’s injury occurred on Lounge premises under the parking lot rule because the Lounge was located in a strip mall), \textit{with Rodriguez}, 262 Neb. 800, 808, 653 N.W.2d 439, 446 (stating the court was required to give effect to the ordinary and plain meaning of a statute and must further attempt to apply all relevant provisions of a statute), \textit{and} Neb. Rev. Stat. § 48-151(6) (2004) (stating an employer’s premises consists of property the employer maintains when deciding whether an injury arose out of employment).

\textsuperscript{316}. \textit{See supra} notes 300-15 and accompanying text.
The Supreme Court of Nebraska erred in deciding Zoucha's injury occurred on her employer's premises.\textsuperscript{317} Rules of statutory construction required the court to apply all relevant provisions of the Nebraska Workers' Compensation Act and to give effect to the plain meaning of the Act.\textsuperscript{318} Nebraska Revised Statutes section 48-151(6) applied to the Zoucha court's analysis and confined an employer's premises to areas the employer maintains.\textsuperscript{319} However, the Zoucha court decided the strip mall's common parking lot was part of the Lounge's premises under the parking lot rule without finding the Lounge maintained the lot.\textsuperscript{320} Therefore, the court erroneously determined Zoucha's injury occurred on her employer's premises.\textsuperscript{321}

B. \textbf{EVEN IF NEBRASKA LAW DID NOT RESTRICT AN EMPLOYER'S PREMISES, THE SUPREME COURT OF NEBRASKA MISINTERPRETED CUSTOMARY APPLICATION OF THE PARKING LOT RULE WHEN IT APPLIED THE RULE TO THE FACTS OF ZOUCHA}

Even if the Nebraska Workers' Compensation Act did not expressly limit an employer's premises, the Supreme Court of Nebraska departed from the customary application of the parking lot rule found in other jurisdictions.\textsuperscript{322} Although the court referred to the rule it adopted as the majority rule, ten of the eleven cases the court cited applied the rule to facts distinguishable from the facts of Zoucha.\textsuperscript{323} In each of the ten distinguishable cases, one or more vital factors accompanied the cited courts' use of the rule.\textsuperscript{324} First, in some cases the employer required its employees to park in a designated area of the common parking lot.\textsuperscript{325} In other cases, the employer paid a common area fee or additional fee under the terms of the lease for use or maintenance of the parking lot.\textsuperscript{326} Finally, some courts noted the tenant-employer's lease specifically provided for employee use of the parking lot.\textsuperscript{327} In contrast, all of these significant facts were absent from Zoucha.\textsuperscript{328}

\textsuperscript{317} See supra notes 300-16 and accompanying text.
\textsuperscript{318} See supra notes 307-16 and accompanying text.
\textsuperscript{319} NEB. REV. STAT. § 48-151(6) (2004) (stating an employer's premises consists of property the employer maintains when deciding whether an injury arose out of employment).
\textsuperscript{320} See supra notes 307-16 and accompanying text.
\textsuperscript{321} See infra notes 300-20 and accompanying text.
\textsuperscript{322} See infra notes 323-96 and accompanying text.
\textsuperscript{323} See infra notes 324-96 and accompanying text.
\textsuperscript{324} See infra notes 325-96 and accompanying text.
\textsuperscript{325} See infra notes 329-53 and accompanying text.
\textsuperscript{326} See infra notes 354-72 and accompanying text.
\textsuperscript{327} See infra notes 373-87 and accompanying text.
\textsuperscript{328} See infra notes 329-96 and accompanying text.
In Zoucha, the Supreme Court of Nebraska incorrectly based its application of the parking lot rule on cases in which the deciding courts noted the employer instructed employees to park in a designated area of a common lot.329 In Livingstone v. Abraham & Straus, Inc.,330 the Supreme Court of New Jersey stated the employer directed its employees to park in the outermost parts of the parking lot, which satisfied the element of employer control required for injury compensability.331 In Zoucha, the court stated the Lounge owner did not require employees to park anywhere in the strip mall parking lot.332 Unlike the court in Livingstone, the Zoucha court noted the Lounge owner did not request or direct its employees to park in a designated area of the lot but decided the lot was part of the Lounge's premises despite the absence of a parking directive.333 Therefore, the Zoucha court incorrectly cited Livingstone in support of its decision to apply the parking lot rule.334

Similar to the Livingstone court, in Montgomery Ward v. Cutter,335 the Court of Appeals of Oregon stated the employer's directive that employees park in a designated area established sufficient control to decide the parking lot was part of the employer's premises.336 In Zoucha, the court explained Zoucha's employer gave no parking directives but only expected employees to park in the strip mall lot due to the lot's convenience.337 Unlike the court in Montgomery Ward, the Zoucha court noted the employer gave no parking instructions and failed to discuss whether the Lounge established any control over the parking lot.338 In contrast to the court in Montgomery Ward, the Zoucha court made no finding the Lounge had any control over the strip mall parking lot, yet decided the lot was Lounge premises for

329. See infra notes 330-53 and accompanying text.
332. Zoucha, 269 Neb. at 91, 690 N.W.2d at 614.
333. Compare Livingstone, 543 A.2d at 54 (stating the employer directed employees where to park), with Zoucha, 269 Neb. at 91, 690 N.W.2d at 614 (stating the employer did not direct employees where to park).
334. See supra notes 330-33 and accompanying text.
337. Zoucha, 269 Neb. at 91, 690 N.W.2d at 614.
338. Compare Montgomery Ward, 669 P.2d at 1183 (stating the employer had sufficient control over the lot where the employee sustained the injury to decide the injury was compensable), with Zoucha, 269 Neb. at 89-97, 690 N.W.2d at 610-17 (lacking any discussion of the significance of the employer's lack of control over the strip mall parking lot).
workers' compensation purposes. Therefore, the Zoucha court inaccurately cited Montgomery Ward in support of its parking lot rule application.

Further, in Turner v. B Sew Inn, Barnes v. Stokes, Merrill v. J. C. Penney, Rose v. Cadillac Fairview Shopping Ctr. Prop., Inc., and Lovato v. Maxim's Beauty Salon, Inc., each court stated the injured employee parked in a designated area in compliance with definite parking instructions. In Zoucha, the court stated the employer did not require employees to park in any particular area of the strip mall parking lot. In contrast to the courts in Turner, Barnes, Merrill, Rose, and Lovato, the court in Zoucha specifically noted the employer gave no parking instructions to employees. Therefore, the Zoucha court incorrectly cited Turner, Barnes, Merrill, Rose, and Lovato in support of its decision to apply the parking lot rule.

In Livingstone, Montgomery Ward, Turner, Barnes, Merrill, Rose, and Lovato the courts decided employee injuries occurring on the way to or from work were compensable when the injured employees were directed to park in designated areas of the lot. In Zoucha, the court
noted the employer gave no parking instructions to employees.\textsuperscript{351} Unlike the courts in \textit{Livingstone}, \textit{Montgomery Ward}, \textit{Turner}, \textit{Barnes}, \textit{Merrill}, \textit{Rose}, and \textit{Lovato}, which applied the parking lot rule when employees followed parking directives, the Supreme Court of Nebraska in \textit{Zoucha} stated the employer did not require employees to park in a specific area.\textsuperscript{352} Therefore, the Supreme Court of Nebraska erred in basing its application of the parking lot rule in \textit{Zoucha} on cases in which the employer directed the injured employee to park in a designated area.\textsuperscript{353}

2. The Supreme Court of Nebraska Incorrectly Relied on Cases in Which the Employer Paid Additional Fees for Use or Maintenance of the Common Parking Lot

The \textit{Zoucha} court incorrectly based its adoption and application of the parking lot rule on cases in which the employer paid an additional fee or common area fee for the use or maintenance of the parking lot.\textsuperscript{354} In \textit{Montgomery Ward v. Cutter}, the Supreme Court of New Jersey stated the employer could require the mall owner to repair the parking lot and the employer paid a common area fee for use of parking lots.\textsuperscript{355} The New Jersey court declined to extend its parking lot rule to instances when the employer did not have at least some degree

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\item \textsuperscript{351} \textit{Zoucha}, 269 Neb. at 91, 690 N.W.2d at 614.
\item \textsuperscript{352} Compare \textit{Zoucha}, 269 Neb. at 91, 690 N.W.2d at 614 (stating the Lounge owner did not require \textit{Zoucha} to park in a specific area but only expected she would use the strip mall lot because it was convenient), \textit{with Livingstone}, 543 A.2d at 46 (stating the employer directed its employees to park near the edge of the lot), \textit{and Montgomery Ward}, 669 P.2d at 1182 (stating the employee parked in a designated area of the mall lot and the employer paid a fee for use of common areas), \textit{and Turner}, 18 P.3d at 1071-72 (stating the employee asserted the employer instructed her to park away from storefront spaces and the employer admitted she did not want employees to park in front of the store), \textit{and Barnes}, 355 S.E.2d at 331 (stating the employer instructed its employees to park in a designated area of the lot), \textit{and Merrill}, 256 N.W.2d at 519 (stating the employer directed employees to park in a distant lot to make space for customers near the mall stores), \textit{and Rose}, 668 A.2d at 785 (stating the employer directed its employees to park in a designated area, provided security officers, and installed surveillance cameras), \textit{and Lovato}, 782 P.2d at 392 (stating employees parked in an area where they were directed to park).
\item \textsuperscript{353} See supra notes 329-52 and accompanying text.
\item \textsuperscript{354} See infra notes 355-72 and accompanying text.
\item \textsuperscript{355} \textit{Montgomery Ward}, 669 P.2d at 1182, 1183.
\end{itemize}
of control over the lot.\textsuperscript{356} In \textit{Zoucha}, the court did not discuss any fees the Lounge may have paid for access to the strip mall parking lot or whether the Lounge established any element of control over the lot.\textsuperscript{357} Unlike the court in \textit{Montgomery Ward}, the \textit{Zoucha} court did not discuss any degree or element of control the Lounge may have exerted over the strip mall parking lot.\textsuperscript{358} Therefore, the \textit{Zoucha} court inaccurately cited \textit{Montgomery Ward} in support of its decision to apply the parking lot rule.\textsuperscript{359}

Similar to the court in \textit{Montgomery Ward}, in \textit{P.B. Bell & Assoc. v. Indus. Comm'n of Arizona},\textsuperscript{360} the court stated it was uncontroverted the employer leased the pertinent area of the lot for an additional fee.\textsuperscript{361} The \textit{Zoucha} court made no mention of parking related fees.\textsuperscript{362} Contrary to the court in \textit{P.B. Bell & Assoc.}, the court in \textit{Zoucha} made no finding the Lounge paid any maintenance fees or additional fees under its lease related to use of parking spaces in the strip mall lot.\textsuperscript{363} Therefore, the \textit{Zoucha} court incorrectly cited \textit{P.B. Bell & Assoc.} in support of its parking lot rule application.\textsuperscript{364}

Finally, in \textit{Merrill v. J.C. Penney}, the court noted the employer paid a pro rata share of parking lot maintenance expenses.\textsuperscript{365} The \textit{Zoucha} court failed to discuss any evidence the Lounge paid a proportionate share of parking lot maintenance costs.\textsuperscript{366} Unlike the court in \textit{Merrill}, the \textit{Zoucha} court discussed no evidence the Lounge paid any

\textsuperscript{356} \textit{Id.} at 1183.

\textsuperscript{357} \textit{See Zoucha}, 269 Neb. 89, 690 N.W.2d 610 (demonstrating the court's lack of discussion of the employer establishing control over the parking lot or paying fees related to the parking lot).

\textsuperscript{358} \textit{Compare Zoucha}, 269 Neb. 89, 690 N.W.2d 610 (for the court's lack of discussion of the employer establishing control over the parking lot or paying fees related to the parking lot), with \textit{Montgomery Ward}, 669 P.2d at 1182-83 (stating the employer could require the mall owner to repair the parking lot and the employer paid a fee for use of common areas).

\textsuperscript{359} \textit{See supra} notes 355-58 and accompanying text.


\textsuperscript{362} \textit{See Zoucha}, 269 Neb. at 89-97, 690 N.W.2d at 610-17 (demonstrating the court's lack of discussion of fees related to the strip mall parking lot).

\textsuperscript{363} \textit{Compare P.B. Bell & Assoc.}, 690 P.2d at 804 (stating the employer paid an additional fee to use covered parking spaces), with \textit{Zoucha}, 269 Neb. at 89-97, 690 N.W.2d at 610-17 (lacking discussion of evidence the Lounge paid any fee for use of the parking lot or for parking lot maintenance costs).

\textsuperscript{364} \textit{See supra} notes 361-63 and accompanying text.

\textsuperscript{365} \textit{Merrill}, 256 N.W.2d at 519.

\textsuperscript{366} \textit{See Zoucha}, 269 Neb. at 89-97, 690 N.W.2d at 610-17 (for the court's lack of discussion of pro rata or proportionate maintenance fees the Lounge paid for use of the parking lot).
share of maintenance fees. Therefore, the Zoucha court erred in citing Merrill in support of its parking lot rule application.

In Montgomery Ward, P.B. Bell & Assoc., and Merrill, the courts noted the employers' lease terms required the employer to pay fees for parking lot maintenance or use. In Zoucha, the court made no mention of parking lot fees under the employer's lease. Unlike Montgomery Ward, P.B. Bell & Assoc., and Merrill, in Zoucha the court discussed no evidence of lease terms requiring the employer to pay additional fees for maintenance or use of the lot. Therefore, the Supreme Court of Nebraska erred in basing its decision to adopt and apply the parking lot rule on cases in which the employer paid additional fees for use or maintenance of common parking lots.

3. The Supreme Court of Nebraska Incorrectly Relied on Cases in Which the Employer's Lease Provided for Employee Use of the Common Parking Lot

In Zoucha, the Supreme Court of Nebraska incorrectly based its adoption and application of the parking lot rule on cases in which the employer's lease provided for employee use of the parking lot. In Adams v. Lemuria, Inc., the court stated the employer's lease granted a revocable license for use of parking lot facilities. In Zoucha, the court did not discuss an employer lease provision allowing for employee use of the strip mall parking lot. In contrast to the

367. Compare Zoucha, 269 Neb. at 89-97, 690 N.W.2d at 610-17 (lacking discussion of employer maintenance fees in connection with the strip mall parking lot), with Merrill, 256 N.W.2d at 519 (stating the employer paid a pro rata share of parking lot maintenance expenses).

368. See supra notes 365-67 and accompanying text.

369. See Montgomery Ward, 669 P.2d at 1182 (stating the employer paid a fee for use of common areas); P.B. Bell & Assoc., 690 P.2d at 804 (stating the employer paid an additional fee to use covered parking spaces); Merrill, 256 N.W.2d at 519 (stating the employer paid a pro rata share of parking lot maintenance expenses).

370. See Zoucha, 269 Neb. at 89-97, 690 N.W.2d at 610-17 (for the court's lack of discussion of pro rata or proportionate maintenance fees the Lounge paid for use of the parking lot).

371. Compare Zoucha, 269 Neb. at 89-97, 690 N.W.2d at 610-17 (lacking evidence the Lounge paid additional maintenance or use fees related to the strip mall parking lot), with Montgomery Ward, 669 P.2d at 1182 (stating the employer paid a fee for use of common area maintenance and supervision services and could require the mall owner to make parking lot repairs), and P.B. Bell & Assoc., 690 P.2d at 804 (stating the employer paid an additional fee for use of covered parking spaces), and Merrill, 256 N.W.2d at 519 (stating the employer had to pay a pro rata share of parking lot maintenance costs).

372. See supra notes 354-71 and accompanying text.

373. See infra notes 375-87 and accompanying text.


376. See Zoucha, 269 Neb. at 89-97, 690 N.W.2d at 610-17 (for the court's lack of discussion of any provision in the employer's lease allowing for employee use of the strip mall parking lot).
Adams court, the Zoucha court made no mention of the employer's lease with the strip mall owner. Therefore, the Zoucha court inaccurately cited Adams in support of its decision to apply the parking lot rule.

In May Dep't Stores Co. v. Harryman, the court stated the employer conceded its lease gave employees the right to park in the mall parking lot. In Zoucha, the court did not state the employer made any concessions regarding whether the lease allowed its employees to use the strip mall parking lot. Unlike May Dep't Stores Co., the Zoucha court stated the employer expected employees to park in the mall lot for convenience, but failed to mention whether the employer's lease provided for employee parking in the strip mall lot. Therefore, the Zoucha court incorrectly cited May Dep't Stores Co. in support of its application of the parking lot rule.

In Adams and May Dep't Stores Co., the courts noted the employer's lease provided for employee use of the mall parking lot. In Zoucha, the court neglected to examine any part of the employer's lease in its opinion. Contrary to Adams and May Dep't Stores Co., the court in Zoucha did not discuss any lease provision allowing for employee use of the strip mall parking lot. Therefore, the Zoucha court erred in basing its decision on cases in which the employer's lease provided for employee use of common parking lots.

In Zoucha, the Supreme Court of Nebraska erred in its adoption and application of the parking lot rule as customarily applied in other

377. Compare Zoucha, 269 Neb. at 89-97, 690 N.W.2d at 610-17 (lacking discussion of a lease provision allowing employees to use the strip mall's common parking lot), with Adams, 738 So. 2d at 296 (stating the employer's lease contained a provision creating a revocable license for employee use of common areas, including the mall parking lot).

378. See supra notes 375-77 and accompanying text.

379. 517 A.2d 71 (Md. 1986).


381. See Zoucha, 269 Neb. at 89-97, 690 N.W.2d at 610-17 (for the court's lack of discussion of the Lounge's lease with the strip mall owner).

382. Compare Zoucha, 269 Neb. at 89-97, 690 N.W.2d at 610-17 (lacking discussion of a lease provision allowing employees to use the strip mall's common parking lot), with May Dep't Stores Co., 517 A.2d at 71 (stating the employer's lease provided store employees with the right to park in the mall parking lot).

383. See supra notes 379-82 and accompanying text.

384. Adams, 738 So. 2d at 296; May Dep't Stores Co., 517 A.2d at 71.

385. See Zoucha, 269 Neb. at 89-97, 690 N.W.2d at 610-17 (for the court's lack of discussion of the Lounge's lease with the strip mall owner).

386. Compare Zoucha, 269 Neb. at 89-97, 690 N.W.2d at 610-17 (lacking discussion of a lease provision allowing employees to use the strip mall's common parking lot), with Adams, 738 So. 2d at 296 (stating the employer's lease contained a provision creating a revocable license for employee use of common areas, including the mall parking lot), and May Dep't Stores Co., 517 A.2d at 71 (stating the employer's lease provided store employees with the right to park in the mall parking lot).

387. See supra notes 373-86 and accompanying text.
The court cited seven cases in which employees parked in a designated area of the lot pursuant to parking directions, unlike the facts of Zoucha. The court cited three cases in which the employer paid additional fees for the use or maintenance of common parking lot areas, contrary to the facts of Zoucha. Finally, the court cited two cases in which the employer’s lease contained provisions allowing for employee use of the common parking lot, in contrast to the facts of Zoucha. Frishkorn v. Flowers was the only case the Supreme Court of Nebraska cited in which the employees had no parking directions, the employer paid no additional fees related to parking, and there was no discussion of a lease provision providing for employee use of the common lot. However, the Zoucha court failed to analyze or discuss any of the distinguishing facts discussed in the other cited cases. Unlike ten of the eleven cited cases, the Zoucha court made no mention of key facts supporting application of the parking lot rule. Therefore, the Supreme Court of Nebraska incorrectly departed from the majority application of the parking lot rule.

C. THE SUPREME COURT OF NEBRASKA COULD HAVE USED THE DISTINCT CAUSAL CONNECTION EXCEPTION TO FIND ZOUCHA’S INJURY COMPENSABLE

In Zoucha, the Supreme Court of Nebraska could have analyzed Zoucha’s claim under the distinct causal connection exception to the going to and from work rule because it already adopted and applied the exception in La Croix v. Omaha Pub. Sch. in 1998. In La Croix, the court established an injury occurring while the employee was going to or from work was compensable when an employer-created condition formed a distinct causal connection with the injury. Therefore, the Supreme Court of Nebraska could have analyzed

388. See supra notes 322-87 and accompanying text.
389. See supra notes 329-53 and accompanying text.
390. See supra notes 354-72 and accompanying text.
391. See supra notes 373-87 and accompanying text.
394. See supra notes 322-87 and accompanying text.
395. See supra notes 322-87 and accompanying text.
396. See supra notes 322-95 and accompanying text.
398. See infra notes 399-416 and accompanying text.
Zoucha's claim under the distinct causal connection part of the going to and from work rule.\textsuperscript{400}

Under the distinct causal connection exception to the going to and from work rule, the \textit{Zoucha} court could have found Zoucha's injury compensable without contravening the premises definition in the Nebraska Workers' Compensation Act.\textsuperscript{401} In \textit{La Croix}, the court stated the employer instructed its employees to park their vehicles in a city lot and provided shuttle transportation to and from the city lot.\textsuperscript{402} The \textit{La Croix} court reasoned the employer's provision of transportation to and from the parking lot created a condition that caused employees to encounter hazards while traveling to and from work.\textsuperscript{403} In \textit{Zoucha}, the court noted the employer required Zoucha to close and lock the Lounge as part of Zoucha's employment duties when her shift ended.\textsuperscript{404} The \textit{Zoucha} court mentioned no evidence showing the Lounge provided any security for Zoucha when she closed and locked the Lounge at 2:15 a.m.\textsuperscript{405} Similar to the employee in \textit{La Croix}, the employee in \textit{Zoucha} faced employer-created hazards when leaving work because the employee's duties involved closing a bar at 2:15 a.m. with the employer providing no parking lot security.\textsuperscript{406} Therefore, the \textit{Zoucha} court could have found Zoucha's injury compensable under the distinct causal connection exception to the going to and from work rule.\textsuperscript{407}

Further, the \textit{Zoucha} court could have found Zoucha's injury compensable under the distinct causal connection exception to the going to and from work rule because Zoucha encountered more employer-created conditions than the one in \textit{La Croix}.\textsuperscript{408} In \textit{La Croix}, the court stated the employer's provision of transportation from the parking lot and request that employer's use the off-premises lot established a dis-

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\item \textsuperscript{400} See supra notes 398-99 and accompanying text.
\item \textsuperscript{401} See infra notes 402-16 and accompanying text.
\item \textsuperscript{402} \textit{La Croix}, 254 Neb. at 1019, 582 N.W.2d at 286.
\item \textsuperscript{403} \textit{Id.} at 1019, 582 N.W.2d at 286.
\item \textsuperscript{404} \textit{Zoucha}, 269 Neb. at 90, 690 N.W.2d at 613.
\item \textsuperscript{405} See \textit{Zoucha}, 269 Neb. at 90-92, 690 N.W.2d at 613-14 (for the court's lack of discussion of evidence that the Lounge provided security for employees). In fact, the Court of Appeals of Nebraska noted a bar patron offered to walk Zoucha to her car after her shift, but made no mention the Lounge provided any security. \textit{Zoucha v. Touch of Class Lounge}, No. A-03-971, 2004 WL 943219, at *1 (Neb. Ct. App. May 4, 2004).
\item \textsuperscript{406} Compare \textit{Zoucha}, 269 Neb. at 90-92, 690 N.W.2d at 613-14 (stating Zoucha's employment duties required her to close and lock the Lounge at 2:15 a.m. and demonstrating the court's lack of discussion of evidence the Lounge provided security for employees), with \textit{La Croix}, 254 Neb. at 1019, 582 N.W.2d at 286 (stating the employer's provision of transportation to and from the parking lot created a condition where employees would encounter hazards while traveling to and from work).
\item \textsuperscript{407} See supra notes 401-06 and accompanying text.
\item \textsuperscript{408} See infra notes 409-12 and accompanying text.
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tinct causal connection to the off-premises injury. In Zoucha, Zoucha's employment duties required her to close and lock the Lounge at 2:15 a.m., the Lounge provided no parking lot security, Zoucha's tip money was stolen in the parking lot, and Zoucha was the only bartender working. Unlike the facts of La Croix, in which the court noted only two facts supporting an employer-created distinct causal connection to the injury, the facts of Zoucha reveal at least four facts supporting a distinct causal connection between an employer-created condition and Zoucha's injury. Therefore, the court could have decided Zoucha's injury was compensable because a distinct causal connection existed between an employer-created condition and the injury.

In Zoucha, the Supreme Court of Nebraska could have complied with the premises definition of Nebraska's Workers' Compensation Act by finding Zoucha's injury compensable under the distinct causal connection exception to the going to and from work rule. In La Croix, the court applied the distinct causal connection analysis to find an employee's injury compensable because an employer instructed its employees where to park and provided shuttle transportation from the lot to work. In Zoucha, numerous employer-created conditions caused Zoucha to face hazards that led to her injury when she left work. Thus, the court could have decided Zoucha's injury was compensable by analyzing the case under La Croix's distinct causal connection exception to the going to and from work rule.

In Zoucha, the Supreme Court of Nebraska distorted provisions of the Nebraska Workers' Compensation Act and unnecessarily adopted and misapplied the parking lot rule. The court erred in deciding Zoucha's injury occurred on her employer's premises because Nebraska Revised Statute section 48-151(6) provides an employer's premises consists of property the employer maintains for workers'.

409. La Croix, 254 Neb. at 1019, 582 N.W.2d at 286.
410. Zoucha, 269 Neb. at 90, 690 N.W.2d at 613.
411. Compare Zoucha, 269 Neb. at 90-91, 690 N.W.2d at 613-14 (stating Zoucha was the only employee tending bar that night, Zoucha's tip money from her bartending shift was stolen, and part of Zoucha's employment duties were to close and lock the Lounge at 2:15 a.m. but failing to state the Lounge provided any security), with La Croix, 254 Neb. at 1019, 582 N.W.2d at 286 (stating OPS's instruction to La Croix to park in the city lot and OPS's provision of the shuttle created a condition where OPS employees would face hazards while going to and from work and La Croix's injury was therefore compensable).
412. See supra notes 408-11 and accompanying text.
413. See supra notes 398-412 and accompanying text.
414. See supra notes 402-03 and accompanying text.
415. See supra notes 404-11 and accompanying text.
416. See supra notes 398-415 and accompanying text.
417. See supra notes 290-416 and accompanying text.
compensation purposes. In addition, the court erred in its interpretation and application of the parking lot rule because the facts of Zoucha lacked key factors justifying the rule's application in other cases. Finally, the court could have found Zoucha's injury compensable under the distinct causal connection exception to the going to and from work rule without distorting the definition of "premises" under the Nebraska Workers' Compensation Act. As such, the Zoucha court distorted the plain meaning of "premises" under the Nebraska Workers' Compensation Act, unnecessarily adopted the parking lot rule, and misapplied the rule to the facts of Zoucha.

CONCLUSION

In Zoucha v. Touch of Class Lounge, the Supreme Court of Nebraska determined an employee injury occurring in a strip mall parking lot when the employee was leaving work was compensable under the Nebraska Workers' Compensation Act because the injury occurred on the employer's premises. The court stated the going to and from work rule did not allow compensation for employee injuries occurring on the way to or from work unless (1) the injury occurred on the employer's premises, or (2) a distinct causal connection existed between an employer-created condition and the injury.

Nebraska Revised Statute section 48-151(6) provides an employer's premises consists of premises the employer maintains. Rather than analyzing the Zoucha facts under section 48-151(6), the court adopted and applied the parking lot rule from other jurisdictions. The parking lot rule the court adopted provides shopping mall parking lots that employees use for convenience are part of a mall-tenant employer's premises under workers' compensation law. Based on the parking lot rule, the court stated Zoucha's injury occurred on her employer's premises and was therefore compensable.

However, the Zoucha court erred in deciding Zoucha's injury occurred on her employer's premises. The court in Zoucha noted the employer did not own, control, or have authority over the lot and made

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418. See supra notes 299-321 and accompanying text.
419. See supra notes 322-96 and accompanying text.
420. See supra notes 398-412 and accompanying text.
421. See supra notes 290-420 and accompanying text.
424. Zoucha, 269 Neb. at 94, 690 N.W.2d at 615.
426. Zoucha, at 94-95, 690 N.W.2d at 616.
427. Id. at 96, 690 N.W.2d at 616.
428. Id. at 97, 690 N.W.2d at 617.
429. See supra notes 300-21 and accompanying text.
no finding the employer had maintenance responsibilities for the lot. Thus, the court incorrectly overlooked the provisions of section 48-151(6) that requires a finding that the employer maintains the property in order to determine the property is part of the employer's premises. Further, the court did not comply with majority application of the parking lot rule because it (1) failed to find the Lounge directed Zoucha to park in a designated area of the lot, (2) failed to find the Lounge paid parking fees or maintenance fees, and (3) failed to find a lease provision allowing Lounge employees to use the strip mall lot. Finally, the court could have found Zoucha's injury compensable without distorting the provisions of Nebraska Revised Statute section 48-151(6) by deciding the Lounge created a condition that formed a distinct causal connection to Zoucha's injury.

In *Zoucha*, the Supreme Court of Nebraska incorrectly decided the strip mall parking lot was part of the Lounge's premises, contrary to the definition of an employer's premises in Nebraska Revised Statute section 48-151(6). The court ignored the statutory requirement of employer maintenance and the common law element of employer control, which are fundamental to premises liability principles. The *Zoucha* court was misleading and careless in deciding Zoucha's injury occurred on the Lounge's premises when the court failed to find the Lounge maintained the lot, directed employees to park in the lot, or had rights to use the lot under a lease provision. As a result, Nebraska attorneys must attempt to reconcile conflicting common law and statutory rules when determining what property is an employer's premises for workers' compensation purposes. Rather than easily determining an employer's premises under statutory law, attorneys must navigate an already complex body of workers' compensation case law with volumes of imprecise judge-created exceptions and exclusions. The court further confused an already unsettled area of worker's compensation law by adopting a rule it did not need and applying it to facts distinguishable from those in cases the court cited. By not following the requirements of statutory law in its decision, the

430. See supra notes 310, 313-15 and accompanying text.
431. See supra notes 299-321 and accompanying text.
432. See supra notes 322-96 and accompanying text.
433. See supra notes 397-416 and accompanying text.
434. See supra notes 299-321 and accompanying text.
435. See supra notes 322-96 and accompanying text.
436. See supra notes 299-321 and accompanying text.
437. See supra notes 290-421 and accompanying text.
438. See supra notes 1-421 and accompanying text.
439. See supra notes 290-421 and accompanying text.
court undermined the predictability of workers’ compensation law and made it difficult for Nebraska attorneys and judges to understand and apply workers’ compensation principles and rules.\textsuperscript{440}

\textit{Kevin S. Tuininga—'07}

\textsuperscript{440} See \textit{supra} notes 290-421 and accompanying text.