IN THE
SUPREME COURT OF ARKANSAS

NO. 12-922

REYNOLDS METALS COMPANY **PETITIONER**

v.

CIRCUIT COURT OF
CLARK COUNTY, ARKANSAS
and BILLY C. KIRKSEY **RESPONDENTS**

ON PETITION FOR WRIT OF PROHIBITION
FROM THE CIRCUIT COURT
OF CLARK COUNTY

THE HONORABLE JOHN R. LINEBERGER,
CIRCUIT JUDGE

BRIEF OF AMICUS CURIAE ARKANSAS AFL-CIO IN SUPPORT OF RESPONDENTS

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INTEREST OF AMICUS CURIAE ARKANSAS AFL-CIO

The Arkansas American Federation of Labor and Congress of Industrial Organizations ("Arkansas AFL-CIO") serves as the umbrella organization for 178 local unions, central labor councils, building and construction trade councils, and subordinate bodies in Arkansas whose parent international unions are affiliated with the national AFL-CIO. The Arkansas AFL-CIO thus represents more than 30,000 working people in diverse occupations in Arkansas. The Arkansas AFL-CIO strives to support the interests of Arkansas workers through political action, legislative action, education, and community service. From time to time, the Arkansas AFL-CIO also participates as an amicus curiae to insure that the perspective of organized labor is presented in judicial proceedings that may affect the rights of workers.

As part of its mission to protect workers' rights, the Arkansas AFL-CIO has an interest in preserving the right of workers to a reasonable opportunity to obtain compensation for work-related injuries through proper application of Arkansas statutes, including the Arkansas Worker's Compensation Act. Although the Arkansas AFL-CIO expects Respondent Billy C. Kirksey to present a

comprehensive defense of the Circuit Court's exercise of jurisdiction over his work-related personal injury claims, it believes that its discussion of the controlling rules of statutory interpretation and cases from other jurisdictions addressing similar issues will be helpful to the court in resolving this proceeding. The Arkansas AFL-CIO therefore urges the Court to grant permission to file this amicus curiae brief pursuant to Arkansas Supreme Court Rule 4-6(a).

ARGUMENT

The Arkansas AFL-CIO respectfully submits that the Circuit Court correctly ruled that because the Arkansas Workers' Compensation Act failed to provide Billy C. Kirksey with a remedy or even a realistic chance to obtain a remedy, the exclusive remedy provision in the Act does not bar Kirksey's common-law tort claim against his employer.

I. THE TRIAL COURT CORRECTLY RULED THAT BECAUSE THE WORKERS' COMPENSATION ACT PROVIDES NO REMEDY TO BILLY C. KIRKSEY FOR HIS BLADDER CAUSED BY HIS OCCUPATIONAL EXPOSURE TO CARCINOGENS, KIRKSEY MAY SEEK DAMAGES FROM HIS EMPLOYER REYNOLDS UNDER ARKANSAS COMMON LAW.

A. Both the Terms of the Workers' Compensation Act and the Policy Interests That the Act Promotes Allow Kirksey To Pursue a Common-Law Tort Claim Against His Employer.

This Court has long recognized that the purpose and effect of Arkansas' statutory system of no-fault compensation for work-related injuries "was to substitute, as to employment embraced within its terms, the liability created by it for any and all liability of the master arising from the death or injury of his servant." *Odom v. Arkansas Pipe & Scrap Material Co.*, 208 Ark. 678, 681, 187 S.W.2d 320, 321 (1945). The Act is intended to replace, not eliminate, tort remedies.

Consequently, this Court has repeatedly observed that "a worker whose injury is not covered by the WCA is not precluded from filing a claim in tort against his employer." *Automated Conveyor Sys. v. Hill*, 362 Ark. 215, 218, 208 S.W.3d 136, 139 (2005); *see also Travelers Ins. Co. v. Smith*, 329 Ark. 336, 344-45, 947 S.W.2d 382, 386 (1997) ("Because Anna Smith had no remedy under the Worker's Compensation Act her claim cannot be thwarted for election-of-remedy reasons."); *Davis v. Dillmeier Enter., Inc.*, 330 Ark. 545, 554, 956 S.W.2d 155, 159 (1997) ("from the decision in *Travelers*, it is clear that in determining whether an action involving a work-related injury may be filed in circuit court, an important consideration is whether the Workers' Compensation Act provides a remedy to the plaintiff.").

In this case, the Worker's Compensation Act did not provide Kirksey with a remedy for his work-related bladder cancer. The Act requires claims for occupational diseases other than asbestosis and silicosis to be filed within one year of the last injurious exposure. ARK. CODE ANN. § 11-9-601(g)(1)(B). The last possible date that Kirksey was injuriously exposed is the date his employment with Reynolds ended, August 3, 1989. R 80-81, Add. 80-81. Kirksey was not diagnosed with bladder cancer until July 1, 2004, R. 77, Add. 777,

and thus did not have an opportunity to file a worker's compensation claim until more than one year after his last possible injurious exposure. Thus, as the Arkansas Worker's Compensation Commission found, Kirksey's worker's compensation claim was time-barred, and he had no remedy available under the Act. R.77-81, Add. 77-81. Accordingly, the Circuit Court ruled that because the Act provided no remedy for Kirksey's work-related cancer, Kirksey's disease was "not covered" by the Act, its exclusive remedy provision did not apply, and Kirksey was entitled to pursue his common-law suit for damages. R. 106-115, Add. 106-115.

Petitioner Reynolds Metals Company ("Reynolds") has filed a writ of prohibition arguing that the Circuit Court lacks jurisdiction because the Worker's Compensation Act provides the exclusive remedy for Kirksey's work-related injuries even though, because of the time restrictions in the Act, the Act allows Kirksey no recovery. Reynolds argues that Arkansas law distinguishes between situations in which a work-related injury is *covered but not compensable* under the Workers' Compensation Act and those in which the injury is *simply not covered* under the Act. In the former situation, according to Reynolds, the Act is the exclusive remedy for the injury (even

though, as a practical matter, it provides no remedy at all); in the latter situation, the worker is free to pursue tort remedies. For this reason, Reynolds contends, cases like *Automated Conveyor Systems v. Hill* and *Travelers Insurance Company v. Smith* are distinguishable: both of those cases, they suggest, involve work-related injuries that were not *covered* by the Act, not injuries that were *covered but not as a practical matter compensable*, as are those alleged in this case.

The problem with this argument is that this elaborate distinction simply does not appear in the Workers' Compensation Act. Nothing in the text of the statute or in Arkansas case law differentiates between work-related injuries that are "covered but not compensable" and those that are not "covered" at all. The exclusive remedy statute states that "rights and remedies that are granted to an employee subject to a provision of this chapter" bar common law tort claims, not that "covered injuries" may not be the basis of tort claims. Inarguably, the statute does not grant "rights and remedies" to Billy C. Kirksey for his latent cancer; thus, under the terms of the statute, it is not "exclusive."

Reynolds' reliance on *Automated Conveyor Systems v. Hill* for the proposition that the exclusive remedy provision allows suits for work-related injuries that are not "covered" by the Act but not for injuries that are "covered but not compensable" reads too much into the language of the case. In *Automated Conveyor*, the plaintiff Dooley sustained a gradual onset neck injury while employed by Automated Conveyor and sought workers' compensation benefits. The Arkansas Workers' Compensation Commission held that the injury was not compensable under the Act because the Act "*covers* only those gradual onset neck injuries that are caused by rapid and repetitive motion, and although Dooley had proven that his duties were repetitive, he failed to present evidence of the rapidity of the duties." 362 Ark. at 216, 208 S.W.3d at 137 (emphasis added). But nothing in the Court's opinion attaches any special significance to the word "covered"; the Court may just have easily said that gradual onset neck injuries in general are "covered" but those not caused by rapid and repetitive motion are not compensable. Similarly, in this case, there is no dispute that latent occupational cancers, *in general*, are covered, but the occurrence of the disease more than one year after

the last occupational exposure renders the disease non-compensable. ARK. CODE ANN. § 11-9-601(g)(1)(B).

On the other hand, language in *Travelers Insurance Company v. Smith* supports Kirksey's argument that his ineligibility for workers' compensation benefits establishes his right to bring a tort action for his work-related illness. In *Travelers*, the widow of a worker who sustained fatal injuries in a work-related trucking accident sued the worker's compensation insurance carrier in tort for misrepresentation and outrage, alleging that the carrier falsely advised her that she needed to obtain an autopsy to qualify for workers' compensation benefits. The carrier argued that because the tort claim involved the payment or non-payment of workers' compensation benefits, the exclusive remedy provision in the Workers' Compensation Act barred the claim. This Court rejected the argument. Although the Court could have said simply that the exclusive remedy provision did not apply because the claim did not "arise out of and in the course of employment," ARK. CODE ANN. § 11-9-102(4)(A), it used broader language establishing that the exclusivity provision did not apply because the Act provided no compensation for the harm alleged. Quoting from Professor Larson's authoritative

treatise, the Court recognized to hold otherwise would undermine the *quid pro quo* upon which the workers' compensation system is based:

> If . . . the exclusiveness defense is a 'part of the quid pro quo by which the sacrifices and gains of employees and employers are to some extent put in balance,' it ought logically to follow that the employer should be spared damage liability only when compensation liability has actually been provided in its place, or, to state the matter from the employee's point of view, rights of action for damages should not be deemed taken away except when something of value has been put in their place.

329 Ark. at 343, 947 S.W.2d at 385-86 (internal citations omitted). The Court concluded that the test for whether the exclusive remedy provision bars a claimant from seeking a common law remedy is whether the claimant "either received or could have received compensation for her injury under the Workers' Compensation Act." 329 Ark. at 344, 947 S.W.2d at 386. Under that test, Kirksey, like the plaintiff in *Travelers*, is authorized to pursue a common law tort claim.

The Arkansas Court of Appeals' decision in *Hickey v. Gardisser*, 2010 Ark. App. 464, 375 S.W.3d 733 (2010) does not suggest a contrary result. In *Hickey*, a worker fell off a roof and was injured. He tested positive for methamphetamine, and thus was ineligible for workers' compensation benefits under ARK. CODE ANN. § 11-9-

102(4)(B)(iv)(a-d) (providing that a compensable injury does not include an injury where the accident was substantially occasioned by the use of illegal drugs). He then brought a tort suit against his employer, arguing that because he had no remedy under the Workers' Compensation Act, he should be allowed to pursue a common law tort claim. The Court of Appeals rejected the argument, reasoning that the worker "did have a remedy under the Act, but he failed to overcome the presumption invoked by Gardisser's intoxication defense in order to receive the remedy." 2010 Ark. App. at * 8, 375 S.W.3d at 737.

Reynolds argues that the result in *Hickey* dictates the outcome of this case, but is wrong for at least two reasons. First, *Hickey* is a decision of an intermediate appellate court and does not bind this Court. Second, the worker's ineligibility for compensation benefits, based on his ingestion of illegal drugs, was a matter entirely within his control. In contrast, Kirksey had no control over the circumstance responsible for his ineligibility for worker's compensation benefits. Kirksey alleged, and Reynolds does not dispute, bladder cancer caused by occupational toxins is a latent occupational disease that rarely if ever occurs within one year of the cessation of exposure. By

indulging in the use of illegal drugs, Hickey effectively waived his right to recover benefits for a work-related injury. The same cannot be said of Kirksey, who could not have maintained a workers' compensation claim within the one year period following his last injurious exposure because he did not yet have the disease, and could not do so beyond the one year period because of the statutory limitation.

Reynolds insists that to deny application of the exclusivity provision in this case would "produce an absurd result, reading a provision limiting liability to create a dramatic expansion of it." Reynolds' Substituted Br. at Arg. 19. But the Workers' Compensation Act's one year limitation provision limits liability only for *no-fault benefits under the Act*, not for general tort liability with its built-in common-law limitations such as the need to prove negligence and the defense of contributory negligence. Indeed, this Court has described the bargain codified in the Workers' Compensation Act as an exchange by the worker of the potential for unlimited tort liability—with the accompanying risk of receiving no compensation due to the application of common-law defenses—for limited benefits awarded without regard to fault. *See, e.g., Craven v. Fulton Sanitation Serv.*,

Inc., 361 Ark. 390, 396, 206 S.W.2d 842, 846 (2005) ("employers gave up the common-law defenses of contributory negligence, fellow servant, and assumption of the risk, while employees gave up the chance of recovering unlimited damages in tort actions in return for certain recovery in all work-related cases.")[1] The bargain did not contemplate or provide that when there is no practical possibility of obtaining any compensation for a work-related injury, common-law claims would nevertheless be abolished. The Arkansas Worker's Compensation Act, and the "right to remedy" guarantee in Article II, Section 13 of the Arkansas Constitution, does not authorize employers like Reynolds to enjoy the *quid*—freedom from common-law tort liability—without giving up the *quo*—a reasonable opportunity to obtain compensation.

[1] Of course, the last phrase of this quotation is generally but not literally accurate; as Kirksey's experience demonstrates, recovery under the Act is not "certain," and, as *Automated Conveyor* and the intentional tort exception (see *Heskett v. Fisher Laundry & Cleaners Co.*, 217 Ark. 350, 230 S.W.2d 28 (1950) indicate, the Act does not govern recovery in "all work-related cases."

B. The Court Should Interpret the Workers' Compensation Act To Comply with Article II, Section 13 of the Arkansas Constitution, Which Guarantees a Right to a Remedy.

As the United States Supreme Court has explained, the "canon of constitutional avoidance" is "a tool for choosing between competing plausible interpretations of a statutory text, resting on the reasonable presumption that [the legislature] did not intend the alternative which raises serious constitutional doubts." *Clark v. Martinez*, 543 U.S. 371, 381 (2005). Under this "elementary" and "cardinal" rule of statutory interpretation, "every reasonable construction must be resorted to, in order to save a statute from unconstitutionality." *Edward J. DeBartolo Corp. v. Florida Gulf Coast Bldg. & Const. Council*, 485 U.S. 568, 575 (1988) (quoting *Hooper v. California*, 155 U.S. 648 (1895). Arkansas follows the canon of constitutional avoidance. *See, e.g., Clark v. Johnson Reg'l Med. Ctr.*, 2010 Ark. 115, 362 S.W.3d 311, 316-17 (2010) ("If possible, this court will construe a statute so that it is constitutional."); *Cato v. Craighead County Circuit Court*, 2009 Ark. 334, 322 S.W.3d 484, 489 (2009) (same).

In *Automated Conveyor*, this Court observed that Article II, Section 13 of the Arkansas Constitution guarantees to every person "a

certain remedy in the laws for all injuries or wrongs he may receive in his person, property, or character . . . ." 362 Ark. at 218, 208 S.W.3d at 139 (quoting ARK. CONST. art. II, § 13). The Court found it "clear from our case law *and our constitution* that a worker whose injury is not covered by the WCA is not precluded from filing a claim in tort against his employer." *Id*. (emphasis added). The Court's determination to apply the exclusive remedy provision in a way that would not violate the "right to remedy" provision of the Arkansas Constitution is consistent with the rule of "constitutional avoidance" followed by the Arkansas courts. In this case, as in *Automated Conveyor*, the Court should embrace an interpretation of the exclusive remedy provision that avoids a conflict with the constitutional guarantee of a right for every wrong, and hold that the exclusive remedy provision does not bar a common-law tort claim when no remedy is available under the Workers' Compensation Act.

C. Other Jurisdictions Recognize the Right To Bring a Common-Law Tort Claim in the Absence of a Meaningful Opportunity To Recover Benefits Under a Workers' Compensation Statute.

Highlighting two recent decisions from intermediate appellate courts in Pennsylvania, Reynolds asserts that other courts have held

that similar exclusive remedy provisions bar common law claims even if the worker is ineligible for workers' compensation benefits. Reynolds' Substituted Br. at Arg. 14-15, citing *Sedlacek v. A.O. Smith Corp.*, 990 A.2d 801 (Pa. Super Ct. 2010) and *Ranalli v. Rohm and Haas Co.*, 983 A.2d 732 (Pa. Super. Ct. 2009). But the Pennsylvania Supreme Court has granted review on the decisive issue in *Sedlacek* and *Ranalli*, effectively nullifying the persuasive force of these opinions. *See Tooey v. AK Steel Corp.*, 610 Pa. 405, 20 A.3d 1184 (Pa. 2011) (granting review on the questions of whether the exclusive remedy provision in the Pennsylvania Worker's Compensation Act bars common law tort suits for work-related injuries for which benefits under the Act are unavailable, and, if so, whether such a result violates the constitutionally guaranteed right to a remedy.).

Reynolds also cites four cases from other jurisdictions in which the court held that a worker who could not comply with the timing requirements of the worker's compensation act was nonetheless barred by the exclusive remedy provision from pursuing a tort claim. Reynolds' Substituted Br. at Arg. 16, citing *Ganske v. Spahn & Rose Lumber Co.*, 580 N.W.2d 812, 816 (Iowa 1998), *Tomlinson v. Owens-Corning Fiberglas Corp.*, 244 Kan. 506, 510, 770 P.2d 833, 837 (Kan.

1989), *Bunker v. Nat'l Gypsum Co.*, 441 N.E.2d 8, 13-14 (Ind. 1982), and *Bogner v. Airco, Inc.*, No. 02-1157, 2003 WL 24121083 at *10 (C.D. Ill. Apr. 1, 2003). *Ganske* has been staunchly criticized. See Kevin R. Sander, *The Cold Shoulder of Occupational Disease Recovery*: *Ganske v. Spahn & Rose Lumber Co.*, 25 J. CORP. L. 407, 420 (2000) ("The total denial of recovery that result's from the court's analysis in *Ganske* flies in the face of the quid pro quo rationale of workers' compensation,"). *Tomlinson* drew a sharp dissent noting that the worker's compensation scheme is constitutional "only because, in taking away the worker's common-law remedy, it substituted a remedy for the benefit of the worker by providing liability without fault," and that victims of latent disease "have lost their common-law remedy without receiving the required substitute remedy under the Act." 244 Kan. at 515-16, 770 P.2d at 841 (Herd, J., concurring and dissenting). *Bunker* held only that the limitations period applicable to silicosis claims in the worker's compensation statute was constitutional and did not explicitly address the issue of whether the absence of a remedy under the worker's compensation act allowed the worker to bring a common-law tort claim. 441 N.E.2d at 13-14. And *Bogner* is an unreported

federal district court decision which merely cited *Tomlinson* and *Ganske* without analysis. 2003 WL 24121083 at *10. None of these opinions is persuasive authority for the proposition that Arkansas has effectively abolished an established tort claim without providing any realistic prospect for a substitute remedy.

Moreover, other states with constitutional provisions similar to Article 2, Section 13 of the Arkansas Constitution have shared this Court's concern in *Automated Conveyor* that application of a worker's compensation exclusivity provision to bar a common law claim when the injured worker has no reasonable opportunity to obtain compensation under the workers' compensation statute would violate the worker's constitutional right to a remedy. In *Smothers v. Gresham Transfer, Inc.*, 23 P.3d 333 (Ore. 2001), the Oregon Supreme Court held that the application of an exclusivity provision to preclude the plaintiff's common law claim when the plaintiff was unable to satisfy the strict causation standards for obtaining workers' compensation benefits violated an open courts/right to remedy clause similar to Article II, Section 13 of the Arkansas Constitution. The plaintiff in *Smothers* alleged that his exposure to chemical fumes while working as a lube technician caused him to develop pneumonia

and other serious respiratory problems. He brought a workers' compensation claim against his employer, but the claim was denied because the plaintiff could not show that his workplace exposure was a "major contributing cause" of his condition. Under the common law, plaintiffs merely had to prove that the defendant's conduct was a "contributing cause" of injury; thus, the plaintiff's claim against the employer was potentially viable under common law. The Oregon Supreme Court had held in a prior case (*Errand v. Cascade Steel Rolling Mills, Inc.*, 888 P.2d 544 (Ore. 1995)) that the exclusive remedy provision in the Oregon workers' compensation act did not bar claims that did not allege compensable injuries under the act, so the plaintiff filed a common law negligence suit against his employer. But the Oregon Legislature had amended its workers' compensation act to state expressly that the exclusive remedy provision applied even if the work-related injury was not compensable under the act. *See* ORE. REV. STAT. 656.018 (1995). Thus, unlike this case, *Smothers* squarely presented the court with the question of whether application of the exclusivity provision to bar a common law claim even though the workers' compensation act provided no remedy for the alleged

injury violated the open courts/right to remedy provision of the state's constitution, ORE. CONST. art. I, § 10.

After a lengthy analysis of the history of the open courts and right to remedy provisions in the constitutions of Oregon and other states, the Oregon Supreme Court held that application of the exclusivity provision to bar a claim for injuries not compensable under the workers' compensation statute but viable under the common law is unconstitutional. The court emphasized that its holding "is a narrow one"; the plaintiff did not challenge the constitutionality of the workers' compensation system as a whole or of the exclusivity provision as written, but challenged only the application of the exclusivity provision to preclude the plaintiff from seeking *any* remedy. 23 P.3d at 357. The court concluded that having "alleged an injury of the kind that the remedy clause protects, and having demonstrated that there was no remedial process available under present workers' compensation law, plaintiff should have been allowed to proceed with his negligence action." *Id.* at 362.

The Louisiana Supreme Court interpreted its open courts/right to remedy constitutional provision to dictate the same result in *O'Regan v. Preferred Enterprises, Inc.*, 758 So.2d 124 (La. 2000). In

that case, the plaintiff alleged that her exposure to chemicals while working at a dry cleaning company caused her to develop a form of aplastic anemia. Under the Louisiana workers' compensation law, because she was employed at the company for less than twelve months her injuries were presumed to be non-occupational unless she could show a causal relationship between her employment and her injuries by an "overwhelming preponderance of the evidence," a higher standard than that required by Louisiana tort law. 758 So.2d at 127. She was unable to make such a showing and her workers' compensation claim was denied. She then brought a tort suit against the employer, arguing that because her injuries were not compensable under the workers' compensation statute, the exclusive remedy provision in the statute did not bar her claim.

The Louisiana Supreme Court held that the exclusive remedy provision did not apply to preclude the tort claim. The court reasoned that the "exclusive remedy provision refers only to injuries for which the employee or his dependent is entitled to be compensated, and the Act becomes the exclusive remedy for employees against their employers *only* for such diseases." 758 So.2d at 134 (emphasis in original). In construing the statute, the court

considered the "basic history and policy of the compensation movement." *Id.* at 128. Significantly, however, the court also suggested that to adopt an interpretation that would bar the plaintiff's tort claim while providing her with no realistic opportunity to obtain workers' compensation benefits would violate Louisiana's constitutional guarantee of open courts and the right to a remedy:

> LA. CONST. art. 1, § 22 inscribes in our Constitution that "[a]ll courts shall be open, and every person shall have an adequate remedy by due process of law and justice, administered without denial, partiality, or unreasonable delay, for injury to him in his person, property, reputation, or other rights." Nonetheless, it has long been the jurisprudence of this Court that the Legislature has the authority to limit codal remedies *as long as it does not leave the injured party entirely without a remedy*. *A fortiori*, the Legislature cannot completely deprive citizens of the right to seek a remedy either under the Act or under our general law.

758 So. 2d at 134 (emphasis added; footnote and citation omitted). To preclude the plaintiff's tort claim, the court added, would "place the plaintiff in the position of having a significant injury with no available avenue to address the damages that have befallen her." *Id.* at 135. The court interpreted the Louisiana exclusivity provision to avoid this constitutionally impermissible result.

In *O'Regan*, the Louisiana Supreme Court pointed out that by elevating the standard for obtaining worker's compensation benefits

to the point that they are unattainable as a practical matter, the legislature "has, in effect, withdrawn the *quid pro quo* between labor and industry for this class of laborers." *O'Regan*, 758 So.2d at 134-35. As one commentator has observed, to preclude "tort recourse when an injury is covered by, but not compensable under, workers' compensation, threatens to unravel the statutory tradeoff that provides justification for the entire system. Without the proper quid pro quo, the constitutional propriety of the system becomes extremely suspect." Eston W. Orr, Jr., Note, *The Bargain Is No Longer Equal: State Legislative Efforts to Reduce Workers' Compensation Costs Have Impermissibly Shifted the Balance of the Quid Pro Quo in Favor of Employers*, 37 GA. L. REV. 325, 354 (2002). Application of the exclusivity provision to bar plaintiffs' tort claims when plaintiffs have no realistic chance to satisfy the requirements for collecting workers' compensation benefits similarly denies them the quid pro quo promised by the workers compensation act.

Like the Louisiana Supreme Court in *O'Regan*, and unlike the Oregon Supreme Court in *Smothers*, this Court need not invalidate the exclusivity provision of the worker's compensation act to protect Kirksey's right to a remedy. It need merely adopt the plausible

conclusion that in prohibiting tort claims by workers who are provided a reasonable opportunity for a remedy under the Arkansas Worker's Compensation Act, the exclusivity provision does *not* nullify tort claims of workers who are *not* afforded such an opportunity.

II. TO THE EXTENT THAT BILLY C. KIRKSEY'S BLADDER CANCER WAS CAUSED BY HIS EXPOSURE, AT HOME, TO CARCINOGENS THAT HE ENCOUNTERED AT WORK AND UNKNOWINGLY BROUGHT HOME ON HIS WORK CLOTHES, HIS CLAIM FOR DAMAGES IS NOT BARRED BY THE EXCLUSIVE REMEDY PROVISION OF THE ARKANSAS WORKERS' COMPENSATION ACT.

It is axiomatic that the exclusivity provision of the Arkansas Workers' Compensation Act, ARK. CODE ANN. § 11-9-105(a), applies to bar only suits brought "on account of injury or death arising out of and in the course of . . . employment." *VanWagoner v. Beverly Enterprises*, 334 Ark. 12, 16, 970 S.W.2d 810, 812 (1998). In this case, Billy C. Kirksey alleges that his bladder cancer was caused in part by his exposure to carcinogens not at the work place but at his home. Kirksey initially encountered carcinogens in coal pitch tar and other substances at work; unbeknownst to Kirksey, he brought these substances home on his work clothes and continued his exposure to the carcinogens at home. The part of his occupational disease caused by these home exposures is not covered by the Arkansas Workers'

Compensation Act and may be redressed by this tort suit free from the application of the exclusivity provision in the Act.

By its terms, the Worker's Compensation Act does not cover injuries or diseases "inflicted upon the employee at a time when employment services were not being performed . . .." ARK. CODE ANN. § 11-9-102(4)(B)(iii). Thus, the Act does not cover injuries sustained by workers while traveling to and from the workplace (*see, e.g.*, *Olsten Kimberly Quality Care v. Pettey*, 328 Ark. 381, 385-86, 944 S.W.2d 524, 527 (1997)), while engaging in or traveling to and from an optional snack or smoke break (*see, e.g.*, *Hill v. LDA Leasing, Inc.*, 2010 Ark. App. 271, 374 S.W.3d 268, 272-73 (2010); *McKinney v. Trane Co.*, 84 Ark. App. 424, 429, 143 S.W.3d 581, 585 (2004)), or while performing personal errands of little or no benefit to the employer (*see, e.g., Smith v. City of Fort Smith*, 84 Ark. App. 430, 432-35, 143 S.W.3d 593, 594-97 (2004)). This Court has stated that "the test for determining whether an employee was acting within the 'course of employment' at the time of the injury requires that the injury occur within the time and space boundaries of the employment, when the employee is carrying out the employer's purpose or advancing the employer's interest directly or indirectly."

White v. Georgia-Pacific Corp., 339 Ark 474, 478, 6 S.W.3d 98, 100 (1999); *see also Texarkana Sch. Dist. v. Connor*, 373 Ark. 372, 377, 284 S.W.3d 57, 61 (2008) (in cases "where an injury occurs outside the time and space boundaries of the employment, the critical inquiry is whether the employer's interests were being advanced, either directly or indirectly.").

There can be no reasonable contention that Kirksey's exposures to carcinogens at his home occurred "within the time and space boundaries of his employment" at Reynolds. Nor can Reynolds reasonably assert that its interests were being advanced, directly or indirectly, by Kirksey's home exposures. Put another way, had Kirksey not continued his exposure to Reynolds' carcinogens through his work clothes at home, Reynolds would not have derived the slightest benefit. Thus, under the test announced by this Court in *White* and *Connor*, the part of Kirksey's injuries caused by his home exposures to the carcinogens that he encountered at the Reynolds worksite are not covered by the Workers' Compensation Act, and his common-law claim based on those injuries is not barred by the Act's exclusivity provision.

At least one court has used similar reasoning in concluding that the type of "take-home exposure" alleged by Kirksey does not trigger application of a workers' compensation act's exclusivity provision. In *Ball v. Joy Mfg. Co.*, 755 F. Supp. 1344 (S.D.W. Va. 1990), *aff'd sub nom. Ball v. Joy Technologies, Inc.*, 958 F.2d 36 (4th Cir. 1991), a federal district court considered the contention of several employees of the defendant that claims based on their exposure to PCBs away from the defendant's work site were not barred by the West Virginia analog to the Arkansas exclusivity provision. The court concluded that "[b]ecause such exposures cannot reasonably be deemed to have arisen out of and in the course of their employment, this Court agrees that the [Workers' Compensation] Acts would not be a bar to a civil action based on these claims." 755 F. Supp. at 1364 n. 15.

As in *Ball*, Kirksey's off-premises exposure to Reynolds' carcinogens "cannot reasonably be deemed to have arisen out of and in the course of" his employment. Thus, even aside from the one-year limitations bar, the Workers' Compensation Act did not cover the part of Kirksey's bladder cancer caused by his off-site exposure. A plain reading of the Act, and simple justice, require that Kirksey be

permitted to proceed with his common-law claim for damages against Reynolds.

CONCLUSION

The Arkansas Workers' Compensation Act provides a remedy for work-related injuries that replaces the right to recover damages under the common law. If the Act does not provide a remedy for a particular injury, then it does not effectively replace the common-law right. To hold otherwise would be to grant employers a complete, undeserved immunity for certain types of workplace injuries, while denying workers the right to obtain any relief for those injuries. Such a result is neither authorized by the Act nor tolerable under the Arkansas Constitution. The Court should deny Reynolds' petition.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that a true and correct copy of the foregoing was served via U.S. Mail upon all counsel of record on the attached list on this 28th day of March, 2012.

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