

IN THE SUPREME COURT OF OHIO

CASE NO. 2012-0244

**SHAUN ARMSTRONG
Plaintiff-Appellant,**

-vs-

**JOHN R. JURGESON, ET. AL.
Defendants-Appellees.**

**ON APPEAL FROM CLARK COUNTY
COURT OF APPEALS, SECOND APPELLATE DISTRICT**

**BRIEF OF *AMICUS CURIAE*,
OHIO ASSOCIATION FOR JUSTICE
URGING REVERSAL ON BEHALF OF PLAINTIFF-APPELLANT**

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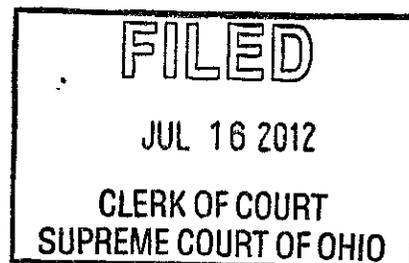


TABLE OF CONTENTS

TABLE OF CONTENTS.....2

TABLE OF AUTHORITIES.....3

INTRODUCTION AND INTERESTS OF *AMICUS CURIAE*.....4

ARGUMENT.....5

Proposition of Law 1:
THE REQUIREMENT IN R.C. 4123.01(C)(1) THAT A PSYCHIATRIC CONDITION
MUST HAVE ARISEN FROM AN INJURY OR OCCUPATIONAL DISEASE DOES
NOT MEAN THAT THE PHYSICAL INJURY MUST CAUSE THE PSYCHIATRIC
CONDITION5

CONCLUSION.....11

CERTIFICATE OF SERVICE.....12

TABLE OF AUTHORITIES

CASES:

Banks v. LTV Steel Co., 100 Ohio App.3d 585, 654 N.E.2d 439 (1995).....5

Dunn v. Mayfield, 66 Ohio App.3d 336, 584 N.E.2d 37 (1990).....5

Fassig v. State, 95 Ohio St 232, 116 N.E. 104 (1917).....6

Karavolos v. Brown Derby, Inc., 99 Ohio App.3d 548, 651 N.E.2d 435 (1994).....5

McCrone v. Bank One Corp., 107 Ohio St.3d 272, 2005-Ohio-6505,
839 N.E.2d 1.....5, 7, 8, 9

Oswald v. Conner, 16 Ohio St.3d 38, 476 N.E.2d 658 (1985).....5

Ryan v. Conner, 28 Ohio St.3d 406, 503 N.E.2d 1379 (1986).....5, 8, 9

State ex rel. Clark v. Indus. Comm., 92 Ohio St.3d 455(2001).....7, 8

RULES AND STATUTES:

R.C. 4123.01(C).....5, 8, 9, 10, 11

R.C. 4123.95.....10

OTHER:

Philip J. Fulton, *Ohio Workers Compensation Law* (3d Ed. 2008).....5, 6

Larson, *Workmen's Compensation Law* (1997).....6, 8, 9

INTRODUCTION AND INTERESTS OF *AMICUS CURIAE*

The National Association of Claimants' Counsel (NACCA), Ohio Chapter, was founded in 1954. It was an organization created with the purpose "to help injured persons, especially in the field of workers' compensation."

In 1963, the NACCA was changed to the Ohio Academy of Trial Lawyers. Now known as the Ohio Association for Justice (OAJ), it is an organization with over 1,500 lawyers dedicated to the protection of Ohio's consumers, workers, and families.

The OAJ files this merit brief to ask this Court to reverse the decision of the Court of Appeals for the Second Appellate District. The OAJ adopts the statement of facts set forth in Plaintiff-Appellant, Shaun Armstrong's, merit brief.

ARGUMENT

Proposition of Law 1:

THE REQUIREMENT IN R.C. 4123.01(C)(1) THAT A PSYCHIATRIC CONDITION MUST HAVE ARISEN FROM AN INJURY OR OCCUPATIONAL DISEASE DOES NOT MEAN THAT THE PHYSICAL INJURY MUST CAUSE THE PSYCHIATRIC CONDITION.

R.C. 4123.01(C) defines “injury” as:

[A]ny injury, whether caused by external accidental means or accidental in character and result, received in the course of, and arising out of, the injured employee’s employment. Injury does not include: (1) psychiatric conditions except where the claimant’s psychiatric conditions have arisen from an injury or occupational disease sustained by the claimant . . .

Accordingly, “R.C. 4123.01(C) prohibits the award of compensation for psychiatric conditions unless they are found to have “arisen from” a physical injury, i.e. they were the proximate result of a physical injury received in the course of employment.” Philip J. Fulton, *Ohio Workers Compensation Law*, § 7.4, at 241 (3d Ed. 2008), *citing Banks v. LTV Steel Co.*, 100 Ohio App.3d 585, 654 N.E.2d 439 (1995); *Karavolos v. Brown Derby, Inc.*, 99 Ohio App.3d 548, 651 N.E.2d 435 (1994); *Dunn v. Mayfield*, 66 Ohio App.3d 336, 584 N.E.2d 37 (1990). “The proximate cause of an event is that which in a natural and continuous sequence, unbroken by any new, independent cause, produces the event and without which the event would not have occurred.” Philip J. Fulton, *Ohio Workers Compensation Law*, § 7.4, at 241 (3d. Ed. 2008), *citing Oswald v. Conner*, 16 Ohio St.3d 38, 476 N.E.2d 658 (1985). Moreover, “[t]he rationale for the legislative requirement of a physical contact injury is that the cause of the physical injury is more readily discernible than the cause of a stress-related injury.” Philip J. Fulton, *Ohio Workers Compensation Law*, § 7.4, at 241 (3d. Ed. 2008), *citing Ryan v. Conner*, 28 Ohio St.3d 406, 503 N.E.2d 1379 (1986); *see also McCrone v. Bank One Corp.*, 107 Ohio

St.3d 272, 2005-Ohio-6505, 839 N.E.2d 1, at ¶ 33 (“In mental injury claims, the problem arises out of establishing the existence of the injury itself. Although a physical injury **may or may not cause** a psychological or psychiatric condition, it may furnish some proof of a legitimate mental claim.”).

Further, the phrase “arising out of employment” is not synonymous with the phrase “legally caused by the employment.” Philip J. Fulton, *Ohio Workers Compensation Law*, § 7.14, at 264-65 (3d. Ed. 2008), *citing* 1 Larson, *Workmen’s Compensation Law*, § 6.60 (1997). The term “employment” is used more as the condition out of which the event arises than as the force that affirmatively produced the event. Philip J. Fulton, *Ohio Workers Compensation Law*, § 7.14, at 264-65 (3d. Ed. 2008), *citing* 1 Larson, *Workmen’s Compensation Law*, § 6.60 (1997). In fact, “the Ohio Supreme Court initially developed the ‘arising out of employment’ requirement to allay employer fears that claimants might not have to establish a causal connection between the injury and employment.” Philip J. Fulton, *Ohio Workers Compensation Law*, § 7.13, at 264 (3d. Ed. 2008), *citing* *Fassig v. State*, 95 Ohio St 232, 116 N.E. 104 (1917). In other words, “[a]ctive physical causation by the surroundings is not required in order to satisfy what is implied by the expression ‘arising out of the employment.’” Philip J. Fulton, *Ohio Workers Compensation Law*, § 7.14, at 265 (3d. Ed. 2008), *citing* 1 Larson, *Workmen’s Compensation Law*, § 6.60 (1997) (citation omitted). As such, “arising out of” refers to the causal origin of the injury, while “course of” refers to the time, place, and circumstances of the accident in relation to the employment. 1 Larson, *Workmen’s Compensation Law*, § 3.01 (1997).

In *McCrone v. Bank One Corp.*, 107 Ohio St.3d 272, 2005-Ohio-6505, 839 N.E.2d 1, the Ohio Supreme Court held that psychological or psychiatric conditions that do not arise from a compensable physical injury or occupational disease are excluded from the definition of injury and that this exclusion does not violate the Equal Protection Clause. More importantly, the Court did not find that the psychological condition must be caused by the physical injury in order to be compensable, instead writing, “[p]sychological or psychiatric conditions, **without an accompanying** physical injury or occupational disease, are not compensable under R.C. 4123.01(C).” *McCrone*, 107 Ohio St.3d 272, at ¶ 29; *see also id.* at ¶ 30 (“The General Assembly has determined that those who have mental conditions **along with** compensable physical injury or occupational disease are covered within the workers compensation system.”). The language is clear throughout the decision that the physical injury does not need to legally cause a psychological condition: “[r]equiring that a mental disorder **be incident** to a physical injury . . . is rationally related to legitimate governmental interests.” *McCrone*, 107 Ohio St.3d 272, at ¶ 37.

In the instant case, the Court of Appeals found that a psychiatric condition must have been started by and therefore result from a physical injury or occupational disease that the claimant suffered. (Ct. of Appeals Decision at 9). It also found that “[n]either *State ex rel. Clark* nor *McCrone v. Bank One Corp.*, hold that a psychiatric or psychological condition arises from a physical injury because the two coincide in time.” (Ct. of Appeals Decision at 10). Last, the Court found that “there was competent, credible evidence from which the court could find that Armstrong’s psychiatric condition did not arise from the physical conditions he suffered, but was instead the result of the

horrific injuries that caused the death of the other driver when their vehicles collided.”
(*Id.*).

However, these findings are legally flawed because the Court applied the incorrect legal standard as a physical injury does not need to legally cause the psychiatric condition. First, the statutory language of R.C. 4123.01(C)(1) shows that a physical injury does not need to cause a psychiatric condition as the phrase “arise from” does not require active physical causation. 1 Larson, *Workmen’s Compensation Law*, § 6.60 (1997). The physical injury does not need to be the force that affirmatively produces the psychiatric condition; rather, a physical injury must be present because the cause of the physical injury is more readily discernible than the cause of a stress-related injury, making it more likely that the latter is compensable under R.C. 4123.01(C)(1). *Ryan v. Conner, McCrone v. Bank Corp.*

Moreover, case law clearly shows that Mr. Armstrong does not need to prove that his PTSD was caused by his compensable physical injuries. The Ohio Supreme Court has never required this standard and in fact, its decision in *McCrone* makes clear that one only needs to have an accompanying physical injury with a psychiatric condition in order to be compensable. The Court of Appeals misconstrued the holding in *McCrone* because this Court has never held that a physical injury must cause a psychological condition. (See Court of Appeals Decision at 10) (“Both cases [*McCrone v. Bank Corp.* and *State ex rel. Clark*] hold that the condition must also be a product of a physical injury.”). Instead, *McCrone*, 107 Ohio St.3d 272, at ¶ 30, merely held that a physical injury must be present **along with** a psychological condition in order for the latter to be compensable under R.C. 4123.01(C). Additionally, the requirement that a claimant sustain a physical injury in

addition to a psychological injury under R.C. 4123.01(C)(1) for is for proof purposes, not to create a causal requirement that the former caused the latter. *Ryan v. Conner, McCrone v. Bank Corp.*

Affirming the Court of Appeals holding would create such a narrow interpretation of R.C. 4123.01(C)(1) that proving a compensable psychiatric injury would be nearly impossible. If someone was robbed in a bank but only suffered contusions from being pushed by the robber, would they need to show that their PTSD was caused by their bruises and not the trauma of their workplace injury? This interpretation misconstrues the definition of injury as “injury” embraces the episode or accident from start to finish. 1B Larson, *Workmen’s Compensation Law* § 42.21(a). What is more, affirming the decision of the Court of Appeals would prevent claimants from getting compensated for trauma-related psychological and psychiatric conditions because the causative factor of these conditions is not necessarily the physical injury itself.

Justice Resnick’s dissent in *McCrone* shows why this flawed and narrow interpretation is far from the Supreme Court’s interpretation of R.C. 4123.01(C)(1):

And yet this same injury—posttraumatic stress disorder—would be fully covered under the statute if only the bank robber had been considerate enough of appellee’s compensation position to have shoved her during the robbery so that she could stub her toe and acquire the physical element that is deemed so essential to her recovery.

McCrone v. Bank One Corp., 107 Ohio St.3d 272, 2005-Ohio-6505, 839 N.E.2d 1, ¶ 43 (Resnick, dissenting). Indeed, in *McCrone*, the majority of the Court did not find a psychological injury compensable in the absence of a physical injury, but the majority did make clear that there only needs to be a physical *element* present in order for a psychiatric condition to be compensable.

Moreover, the Court of Appeals' interpretation would judicially overrule the second part of R.C. 4123.01(C)(1), which includes psychiatric conditions under the definition of "injury" that have "arisen from sexual conduct in which the claimant was forced by threat of physical harm to engage or participate." Under this statutory section, someone can have a compensable psychological condition without the presence of a physical injury. It would make little sense, then, to allow a stress-stress exception to the statute but require that all other psychological conditions, except in cases involving rape, be caused by the physical injury itself. Further, under the Court of Appeals' interpretation of "arising from," a claimant would need to show that their psychological condition was caused by the actual sexual conduct rather than the overall traumatic experience. This interpretation is inconsistent with the language of the statute, makes little sense, and again creates an unfair burden on injured workers.

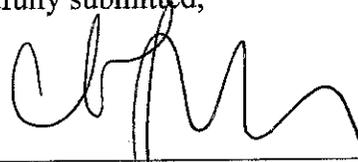
Last, such a narrow interpretation of R.C. 4123.01(C)(1) runs afoul of R.C. 4123.95,¹ which states that the law should be liberally interpreted in favor of the injured worker. Again, having to show that a physical injury was the cause of a psychiatric condition creates an impossible burden on the injured worker, runs afoul of this Court's precedent, and is not in line with the statutory language of R.C. 4123.01(C)(1). Accordingly, the decision of the Court of Appeals must be reversed.

¹ Following narrow judicial interpretations of "compensable injury," the General Assembly clarified the definition in 1959 by adding this statutory provision.

CONCLUSION

For the foregoing reasons, the Ohio Association for Justice urges this Court to reverse the decision of the Clark County Court of Appeals because a physical injury does not need to cause a psychiatric condition in order to be compensable under R.C. 4123.01(C)(1).

Respectfully submitted,



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CERTIFICATE OF SERVICE

This is to certify that a copy of the foregoing was mailed by regular U.S. Mail, postage prepaid, to Jeffrey W. Harris, Harris & Burgin, LPA, 9545 Kenwood Road, Ste. 301, Cincinnati, OH 45242, Corey Crognale, Ice Miller, LLP, 250 West Street, Columbus, OH 43215, and Colleen Erdman, Assistant Attorney General, Workers' Compensation Section, 150 East Gay Street, 22nd Floor, Columbus, OH 43215, postage prepaid, the 16th day of July, 2012.



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