

ORIGINAL

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

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

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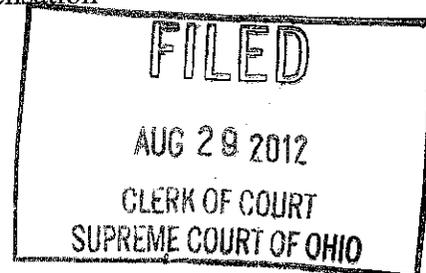


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REPLY ARGUMENT

Proposition of Law 2:

THE JUDGMENT OF THE TRIAL COURT WAS AGAINST THE MANIFEST WEIGHT OF THE EVIDENCE AS THE “PHYSICAL TRAUMA” OF AN INJURY DOES NOT NEED TO CAUSE THE PSYCHIATRIC CONDITION UNDER R.C. 4123.01(C)(1)

Contrary to Appellee’s position, the Ohio Supreme Court has never held that a claimant’s physical injury must cause their psychiatric or psychological condition; instead, it has always held that the psychiatric or psychological condition must merely accompany a physical injury in order to be compensable. *McCrone v. Bank One Corp.*, 107 Ohio St.3d 272, 2005-Ohio-6505, 839 N.E.2d 1, at ¶ 29; *see Bunger v. Lawson Co. et.al.*, 82 Ohio St.3d 463, 467, 199-Ohio-407, 696 N.E.2d 1029, (Stratton, J., concurring) (“A psychological condition may be as real and devastating as a physical injury. . . .Yet psychological injuries **without an accompanying** physical injury are specifically excluded from compensable injuries under the workers’ compensation statute.”); *see also Bailey v. Republic Engineered Steels, Inc. et.al.*, 91 Ohio St.3d 38, 45, 2001-Ohio-236, 741 N.E.2d 121 (Cook, J., dissenting) (“In *Bunger*, this Court acknowledged that the limited scope of the workers’ compensation system requires **the existence** of a physical injury to the claimant.”). Moreover, Professor Larson, the foremost national authority on workers compensation, has expounded on the fact that the term, “arise from” does not require active physical causation; in other words, the physical injury does not need to be the force that affirmatively produces the psychological condition. 1 Larson, *Workmen’s*

Compensation Law, § 6.60 (1997), quoting Haldane, L.J. in *Upton v. Great Cent Ry.* (1924), A.C. 302 (H.L.).¹

What is more, the testimony of Dr. Howard, the only expert witness who the trial court relied upon to conclude that “plaintiff’s PTSD did not arise out of his physical injuries,” (Ct. of Appeals Decision at 6), actually supports the fact that Mr. Armstrong’s psychological condition arose out his physical injury when the correct legal standard is utilized. In his testimony, Dr. Howard stated:

Q: Then do you believe, within a reasonable degree of psychological certainty and probability, as to whether Armstrong’s physical injuries had no impact on the proximate cause of his posttraumatic stress disorder?

A: Yes. That’s—yeah, I guess that’s what I was saying earlier, that the—even if he didn’t have any injury, physical injury, I think he still would have a posttraumatic stress disorder because of, you know, the life-threatening nature of the incident, the fact that someone else died during the accident. **It’s all the experience of the injury or the incident, not the actual physical trauma.**”

(Ct. of Appeals Decision at 9, quoting deposition tr., pp. 20-21). But the actual physical trauma does not need to be the active physical cause of the psychological condition as the phrase “arise from” does not require active physical causation. 1 Larson, *Workmen’s Compensation Law*, § 6.60 (1997). Instead, the psychological condition can arise from the experience of the injury or the incident. See 1B Larson, *Workmen’s Compensation Law* § 42.21(a) (“injury” embraces the episode or accident from start to finish). As such, the Court of Appeals erred in determining that “there was competent, credible evidence from which the court could find that Armstrong’s psychiatric condition did not arise from the physical injuries he suffered, but was instead the result of horrific injuries that caused the death of the other driver when their vehicles collided.”

¹ Contrary to Appellee’s brief, this is not a distortion of the term, “arise from.” Ohio courts have quoted and deferred to Professor’s Larson’s expertise in the workers’ compensation field for decades.

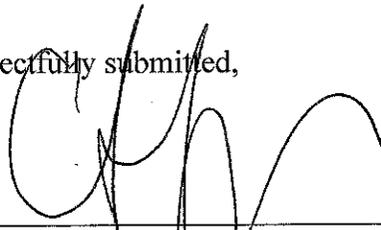
(Ct. of Appeals Decision at 10). Rather, his psychological condition arose from his injury, which is all that is required under the statute. Accordingly, the trial court's judgment was against the manifest weight of the evidence.

Last, adopting Appellee's argument would preclude individuals who have suffered minor physical conditions with concurrent mental conditions from getting compensated for a work-related injury. As the facts of the instant case demonstrate, it would be extremely difficult to prevail on a claim if the claimant had to show that their contusions were the cause of their post-traumatic stress disorder rather than the work-related accident itself. *See* Appellee Brief at 21, quoting *Armstrong*, 2nd Dist. No. 2011-CA-6, 2011-Ohio-6708 at ¶ 39 ("However, the automobile accident resulted in only minor physical injuries to Appellant and those physical injuries did not cause his PTSD."). While Appellee argues that this class of persons could sue in tort, this is not the solution; the workers compensation system was started precisely because the common law system was not providing adequate protection from the often-devastating effects of work-related injuries. Philip J. Fulton, *Ohio Workers Compensation Law*, § 1.1, at 1 (3d. Ed. 2008). Appellee's proposal would also eliminate *any* remedy for those employees who cannot prove negligence, again destroying the exact purpose of the Workers Compensation Act.

CONCLUSION

For the foregoing reasons, the Ohio Association for Justice respectfully requests that this Court reverse the decision of the Clark County Court of Appeals as the Trial Court's judgment was against the manifest weight of the evidence.

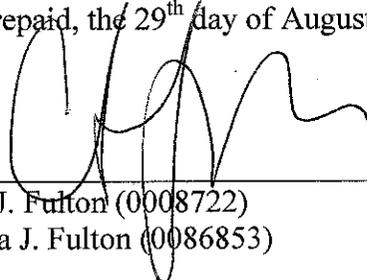
Respectfully submitted,



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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 29th day of August, 2012.



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