

[Cite as *Rader v. Fifth Third Bancorp*, 2010-Ohio-1327.]

IN THE COURT OF APPEALS OF OHIO
TENTH APPELLATE DISTRICT

Deborah K. Rader,	:	
	:	
Plaintiff-Appellee,	:	
	:	
v.	:	No. 09AP-821
	:	No. 09AP-1007
	:	(C.P.C. No. 07CVD06-8266)
Fifth Third Bancorp and	:	
Marsha P. Ryan, Administrator	:	(REGULAR CALENDAR)
Bureau of Workers' Compensation,	:	
	:	
Defendants-Appellants.	:	

D E C I S I O N

Rendered on March 30, 2010

Renny J. Tyson Co., LPA, and Renny J. Tyson, for appellee.

Vorys, Sater, Seymour & Pease, LLP, and Robert A. Minor,
for appellant Fifth Third Bancorp.

Richard Cordray, Attorney General, and *Sandra E. Pinkerton*,
for appellant Marsha P. Ryan, Administrator Bureau of
Workers' Compensation.

APPEALS from the Franklin County Court of Common Pleas.

SADLER, J.

{¶1} In these consolidated appeals, appellants Fifth Third Bancorp ("Fifth Third") and the Administrator of the Bureau of Workers' Compensation ("BWC") (collectively

"appellants"), seek reversal of a judgment by the Franklin County Court of Common Pleas denying Fifth Third's appeal from an order by the Industrial Commission of Ohio ("commission") granting the right-to-participate claim of appellee, Deborah K. Rader ("appellee"). For the reasons that follow, we affirm.

{¶2} Appellee's right-to-participate claim arose from her employment at a Fifth Third branch in Franklin County. On January 6, 2005, Columbus Police Officer Bryan Hurst was shot and killed while serving as a special duty officer at that branch, which appellee witnessed. Appellee did not incur any physical injuries as a result of the incident, but the commission allowed appellee's claim for psychological injuries she suffered as a result of witnessing Officer Hurst's death.¹

{¶3} The trial court conducted a de novo review of the commission's order. Fifth Third argued that appellee's psychological injuries were not compensable under Ohio workers' compensation law in the absence of any physical injuries suffered by appellee. The trial court disagreed, finding that the case was controlled by the decision of the Supreme Court of Ohio in *Bailey v. Republic Engineered Steels, Inc.*, 91 Ohio St.3d 38, 2001-Ohio-236. In reaching this conclusion, the trial court rejected Fifth Third's argument that *Bailey* was overruled by the Supreme Court of Ohio in *McCrone v. Bank One Corp.*, 107 Ohio St.3d 272, 2005-Ohio-6505. Thus, the trial court affirmed the commission's decision granting appellee the right to participate based on her psychological injuries.

¹ The various cases and statutory provisions relevant to the question before us appear to use "psychological," "psychiatric," and "mental" interchangeably. Because the parties here use the term "psychological" in describing appellee's injuries, we will use that term when referring to her claim, but will otherwise employ the term used in the case or statute discussed.

{¶4} Fifth Third and BWC each appealed. For its assignment of error, Fifth Third alleges:

The trial court erred in finding that plaintiff-appellee was entitled to participate in the compensation and benefits provided under the Ohio workers' compensation laws for a psychological condition which did not result from a physical injury sustained by plaintiff-appellee.

{¶5} BWC alleges as its assignment of error:

Bailey v. Republic Engineered Steels, Inc. (2001), 91 Ohio St.3d 38 was effectively overruled by the Ohio Supreme Court's decision in McCrone v. Bank One Corp. (2005), 107 Ohio St.3d 272, 2005-Ohio-6505.

{¶6} Appellants' assignments of error are essentially identical, and will therefore be addressed together. Resolution of these appeals depends upon a determination of whether *Bailey* continues to have any validity after the Supreme Court's decision in *McCrone*.

{¶7} An "injury" for purposes of Ohio's workers' compensation law is defined in R.C. 4123.01(C). Under the version of R.C. 4123.01(C)(1) in effect at the time appellee incurred her injuries, the definition of "injury" excluded "[p]sychiatric conditions except where the conditions have arisen from an injury or occupational disease."²

{¶8} Prior to the *Bailey* decision, the Supreme Court of Ohio generally concluded that the exclusion from the definition of "injury" set forth in R.C. 4123.01(C)(1) meant that solely mental conditions suffered by a claimant, in the absence of any physical injuries to

² In S.B. 7 of the 126th General Assembly, R.C. 4123.01(C)(1) was amended to make it clear that the exclusion from the definition of "injury" does not apply to a claimant's psychiatric conditions arising from an injury or occupational disease suffered by the claimant. The trial court concluded that the provisions of S.B. 7 could not be applied retroactively to appellee's conditions, a conclusion with which appellants take no issue on appeal.

that claimant, were not compensable under the workers' compensation laws. See *Bunger v. Lawson Co.*, 82 Ohio St.3d 463, 1998-Ohio-407. However, in *Bailey*, the court reached a different conclusion. In that case, the court held that a psychiatric injury suffered by a claimant that arose as a result of a compensable injury or occupational disease suffered by a third party is a compensable injury. *Bailey* at syllabus.

{¶9} *Bailey* involved a claimant seeking workers' compensation for depression suffered as the result of an accident in which the claimant was operating a tow motor that ran over and killed a co-worker. The court concluded that, since the version of R.C. 4123.01(C)(1) in effect at the time did not specify that the psychiatric conditions had to arise from an injury suffered by the claimant, a psychiatric condition resulting from an injury to a third party was covered. *Bailey* at 42.

{¶10} The Supreme Court revisited the issue of compensability of psychological or psychiatric injuries in *McCrone*. That case involved an employee who sought workers' compensation for purely psychological or psychiatric injuries suffered as a result of a pair of bank robberies in which neither the employee nor any third person was physically injured. The employee argued that the R.C. 4123.01(C) exclusion of psychiatric injuries in the absence of any physical injuries was unconstitutional. The court rejected that argument, and found the employee's purely psychiatric injuries were not compensable. *McCrone*, paragraph one of the syllabus.

{¶11} In its decision, the Supreme Court questioned the continuing validity of *Bailey*, describing the holding as "atypical." *Id.* at ¶22. The court further stated that "in allowing workers' compensation for a mental condition arising from a third party's injury, *Bailey* created an aberration." *Id.* at ¶28. However, the court did not specifically overrule

Bailey, because the psychiatric condition suffered by the employee did not result from any physical injury to either the employee or a third party. *Id.*

{¶12} Some courts after *Bailey*, including cases decided after *McCrone*, have sought to distinguish *Bailey* on factual grounds. For example, in *Sanden v. Cincinnati*, 174 Ohio App.3d 280, 2007-Ohio-6866, the First District Court of Appeals considered a case in which a police officer sought workers' compensation for psychological conditions arising from the deaths of three fellow officers in two separate incidents in which the officer was directly involved. The court distinguished *Bailey* on the grounds that the officer had neither directly witnessed nor caused the deaths of any of the three fellow officers. *Sanden* at ¶17.

{¶13} However, we do not see any factual distinction that allows us to avoid *Bailey's* applicability to the cases before us. The logic of the statutory interpretation engaged in by the *Bailey* court would appear to apply to any situation in which a psychological or psychiatric condition has resulted from physical injury to a third party, regardless of whether the claimant seeking recovery for the psychological or psychiatric condition witnessed the physical injury. Moreover, under the facts of these cases, appellee did witness the injury to Officer Hurst, rendering the distinction set forth by the First District Court of Appeals in *Sanden* inapplicable.

{¶14} Notwithstanding *McCrone's* discussion questioning the continued validity of *Bailey*, in the absence of any Supreme Court ruling specifically overruling *Bailey*, we are constrained to continue to adhere to that decision when considering cases involving injuries occurring after *Bailey*, but prior to the S.B. 7 amendment to R.C. 4123.01(C)(1), until or unless the Supreme Court takes further action.

{¶15} Accordingly, we overrule the assignments of error asserted by appellants, and affirm the judgment of the Franklin County Court of Common Pleas.

Judgment affirmed.

TYACK, P.J., and FRENCH, J., concur.
