In The

Supreme Court of Virginia

RECORD NO. 131162

PATRICIA KOHN,
Administrator of the Estate of JOHN KOHN, deceased,

Appellant,

v.

BRUCE P. MARQUIS, SHARON CHAMBERLIN, LELDON DIONNE SAPP, STEPHEN BAILEY, MICHAEL REARDON, and L. L. TESSIER,

Appellees.

REPLY BRIEF OF APPELLANT

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The heart of the defendants' position here is that even where injury results from a series of traumas, the injury is still "by accident" if the last such trauma in the series is a proximate cause of the injury:

> The inquiry for the court below was not whether the blow or blows to the head suffered by Mr. Kohn on December 9, 2010, were the sole cause of his death, the issue was whether he had suffered an injury by accident on December 9, 2010, that was *a* cause of his death.

Appellees' brief at 10 (emphasis original); *see also id*. at 6.

The defendants thus propose that if the last event in a series of traumas contributed to the injury, then the injury is by accident and the bar of Code §65.2-307 applies.

This principle would wipe out generations of repetitive-trauma jurisprudence. It would make each separate instance of trauma an injury by accident, even where (as here) the mechanical or structural change in the body is a result of an accumulation of numerous traumas. This Court has always rejected such efforts at judicial amendment of the Workers' Compensation Act. *Merillat Indus., Inc. v.*

Parks, 246 Va. 429, 433-34 (1993). Accord, *Middlekauf v. Allstate Ins. Co.*, 247 Va. 150, 154 (1994) ("A gradually incurred injury is not an 'injury by accident' within the meaning of the Act.").

The widow alleged that John Kohn's fatal injuries – subdural hematomas on both sides of his brain – resulted from a series of blows over a period of several weeks. The complaint asserted that these numerous blows cumulatively caused the death, and the medical examiner's report cannot exclude that multiple-cause theory.

A denied allegation in a pleading is sufficient to create a triable issue. *See* brief of appellant at 8-9. The defendants have not addressed this doctrine in their brief. They merely insist that since Kohn collapsed on a given date, the blow he received just before that collapse must have been the cause of his bilateral hematomas.

Leaving aside the obvious riposte – it is difficult to conceive how a single punch can cause hematomas on *two* sides of the brain – the parties are at issue on the triable

dispute of whether death resulted from a single, identifiable incident or a series of blows over many days. This is a question of fact, not law, and must be submitted to a jury.

PATRICIA KOHN, Administrator
of the Estate of JOHN KOHN,
deceased

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CERTIFICATE

I hereby certify that on this 12th day of May, 2014, pursuant to Rules 5:26(h), fifteen paper copies of the foregoing Reply Brief of Appellant, along an electronic copy on CD-Rom, have been hand-filed with the Clerk of the Supreme Court of Virginia. The required copies of the Brief, along with one copy on CD-Rom, have been served, via UPS Ground, upon:

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