IN THE SUPREME COURT OF OHIO

CASE NO. 2011-2040

JEFF HOLMES
Plaintiff-Appellant

-vs-

CRAWFORD MACHINE, INC., et. al.
Defendants-Appellees.

ON APPEAL FROM CRAWFORD COUNTY
COURT OF APPEALS, THIRD APPELLATE DISTRICT

BRIEF OF *AMICI CURIAE*, OHIO ASSOCIATION OF CLAIMANTS' COUNSEL AND OHIO ASSOCIATION FOR JUSTICE URGING REVERSAL ON BEHALF OF PLAINTIFF-APPELLANT

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INTRODUCTION AND INTERESTS OF *AMICI 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.

In 2008, the Ohio Association of Claimants' Counsel (OACC) was created to advance the founding ideals of the NACCA and to educate the public and legal community on workers' compensation issues. The OACC is a statewide organization of workers' compensation attorneys.

The OACC and OAJ are filing this brief on behalf of Plaintiff-Appellant Jeff Holmes. The OACC and OAJ adopt the statement of facts set forth in Plaintiff-Appellant, Jeff Holmes,' merit brief.

ARGUMENT

In these proceedings, the following issue was certified by the Court of Appeals for Crawford County:

> "When a claimant/employee petitions the common pleas court to participate in the workers' compensation fund for multiple claims/conditions and the trier of fact finds that the claimant/employee is entitled to participate in the fund for at least one of those claims/conditions but not all of the claims, conditions, does the trial court abuse its discretion under R.C. 4123.512(F) by taxing an opposing party attorney's fee and costs that are strictly related to the claims/conditions for which the trier of fact determined that the claimant/employee was ineligible to participate in the fund?"

On behalf of its constituents, OATL and OACC hereby request that this Court find that the trial court did not abuse its discretion based upon (1) the plain language of R.C. 4123.512(F); (2) this Court's history of interpreting R.C. 4123.512(F) liberally on behalf of claimants, and (3) the language of R.C. 4123.95, which mandates that 4123.512(F) be construed in favor of injured workers.

I. THIS COURT SHOULD REVERSE THE APPELLATE COURT'S DECISION BECAUSE THE TRIAL COURT DID NOT ABUSE ITS DISCRETION UNDER R.C. 4123.512(F) BY TAXING AN OPPOSING PARTY ATTORNEY'S FEES AND COSTS THAT ARE STRICTLY RELATED TO CONDITIONS FOR WHICH THE TRIER OF FACT DETERMINED THAT THE CLAIMANT WAS INELIGIBLE TO PARTICIPATE IN SINCE IT NONETHELESS DETERMINED THAT THE CLAIMANT WAS SUCCESSFUL IN PROVING THEIR RIGHT TO PARTICIPATE.

While the Court of Appeals for the Third District (hereinafter "the Court of Appeals") recognized that the plain language of R.C. 4123.512(F) does not direct courts to tax attorney fees and costs to the opposing party based upon the number of conditions that the claimant prevails upon at trial, (Crawford County Court of Appeals Decision at 31 (hereinafter "Appeals Decision at X")), it nonetheless found this to be a correct reading of the section, justifying its interpretation by explaining that "the Court of Appeals has recognized that trial courts have

discretion in awarding attorney's fees and costs under R.C. 4123.512(F). . . .trial courts should be vigilant in exercising their discretion." (*Id.* at 31 and 34) (citations omitted). The Court of Appeals then proceeded to find that the trial court abused its discretion, a standard that is only met when a court's attitude is unreasonable, arbitrary, or unconscionable, *Blakemore v. Blakemore*, 5 Ohio St.3d 217, 450 N.E.2d 1140 (1983), because it taxed fees and costs to Crawford Machine, Inc. (hereinafter "Employer") that were "associated" with five conditions that Jeff Holmes (hereinafter "Claimant") did not prevail upon at trial (though he ultimately succeeded in proving his right to participate).

Amici agree that trial courts have discretion in awarding costs and fees, but this discretion should be governed by the plain language of R.C. 4123.512(F), the Ohio Supreme Court's construction of the term, 'cost of any legal proceedings' under R.C. 4123.512(F), which it has found should be liberally interpreted in favor of claimants, as well as R.C. 4123.95, which directs courts to interpret R.C. 4123.512(F) in favor of injured workers. Moreover, there is no legal basis to apportion attorney's fees according to those claims successfully proven in court; the court in *Booher* never addressed attorney fees but limited its opinion to costs under R.C. 4123.512(F). Accordingly, Amici request that this Court reverse the decision of the Court of Appeals because the trial court did not abuse its discretion by following the plain language of the statute as well as Supreme Court precedent by taxing costs and attorney fees to the Employer after the Claimant had successfully proven his right to participate in the workers' compensation system.

A. The Plain Language of R.C. 4123.512(F) States That the Cost of any Legal Proceeding, Including an Attorney's Fee, Shall Be Taxed Against the Employer or Commission In The Event the Claimant's Right to Participate or to Continue to Participate In The Fund is Established; It Does Not Say that the Payment of these Costs and Fees is Contingent Upon How Many Conditions the Claimant is Successful Upon Proving At Trial.

"Pursuant to R.C. 4123.512, claimants and employers can appeal Industrial Commission orders to a common pleas court only when the order grants or denies the claimants right to participate." *State ex rel. Liposchak v. Indus. Comm.*, 90 Ohio St.3d 276, 278, 2000-Ohio-73, 737 N.E.2d 519. "The only right-to-participate question that is appealable is whether an employee's injury, disease, or death occurred in the course of and arising out of his or her employment." *Id.* at 279. In other words, by establishing a right to participate in the system, claimants have shown that the commission has jurisdiction to award subsequent benefits. *Id.* "The issue is no longer whether the commission has jurisdiction to award benefits in the employee's case; the question instead becomes how much the system must pay." *Id., citing Zavatsky v. Stringer,* 56 Ohio St.2d 386, 396, 384 N.E.2d 693 (1978).

R.C. 4123.512(F) governs how a claimant, who is successful on proving the right to participate, can recover costs of an appeal. *Id.* R.C. 4123.512(F) reads:

> The cost of any legal proceedings authorized by this section, including an attorney's fee to the claimant's attorney to be fixed by the trial judge, based upon effort expended, in the event the claimant's right to participate in the fund is established upon the final determination of an appeal, shall be taxed against the employer or the commission if the commission or the administrator rather than the employer contested the right of the claimant to participate in the fund. The attorney's fee shall not exceed forty-two hundred dollars.

Moreover, "[i]t is a court's responsibility to enforce the literal language of a statute wherever possible; to interpret, not legislate. Unless a statute is ambiguous, the court must give effect to its plain meaning." *Ohio Bur. of Workers' Comp. v. Dernier*, 6th Dist. No. L-10-1126,

2011-Ohio-150, ¶ 26, *citing Cablevision of the Midwest, Inc. v. Gross*, 70 Ohio St.3d 541, 544, 639 N.E.2d 1154 (1994). If a word in a statute is not defined, the Court uses "its common, ordinary, and accepted meaning unless it is contrary to clear legislative intent." *Cincinnati School Dist. Bd. of Edn v. State Bd. of Edn.*, 122 Ohio St.3d 557, 2009-Ohio-3628, 913 N.E.2d 421, ¶15.

In the instant case, the Court of Appeals explicitly found that "according to R.C. 4123.512(F)'s plain language, the trial court's mandatory duty to access costs and attorney's fees is not contingent upon how many claims/conditions the claimant is successful upon at trial." (Appeals Decision at 27). Moreover, it made clear that "[b]y using the term 'shall,' the General Assembly made mandatory the trial court's duty to tax costs to the applicable party once the claimant established his/her right to participate or continue to participate in the fund." (*Id.* at 26) (citations omitted). However, it nonetheless found that the trial court abused its discretion by failing to apportion costs and fees based upon those conditions proven at court pursuant to *Booher v. Honda of America Mfg, Inc.*, 113 Ohio App.3d 798, 682 N.E.2d 657 (3d Dist. 1996) (holding that litigation costs should be apportioned based upon those conditions successfully proven in court).

But this interpretation is flawed because the Court of Appeals failed to follow its own legal rules and proceeded to read additional language into the statute. The only issue of a R.C. 4123.512 appeal is the right to participate in the worker's compensation fund, *State ex rel. Liposchak v. Indus. Comm.*, 90 Ohio St.3d 276, and it does not matter how many conditions the claimant can prove as long as they have shown that *an injury* occurred in the course of, and arose out of, their employment. *Id.* It is this determination that gives the commission jurisdiction to

grant a claimant additional benefits, so it makes little sense to limit attorney's fees or costs based upon only those conditions proven.

In addition, the plain language of R.C. 4123.512(F) directs the trial court to tax costs against the employer in the event that the claimant's right to participate in the fund is established. The language does not state that these costs are contingent upon proving specific conditions, and there is no legal basis to insert this additional language. *Ohio Bur. of Workers' Comp. v. Dernier*, 6th Dist. No. L-10-1126, 2011-Ohio-150, 26. Similarly, the statute directs that the trial judge fix an attorney's fee, in the event that the claimant's right to participate is established, based upon effort expended. Again, the plain language does not state that the fee is contingent upon those conditions successfully proven; instead, it states that an attorney's fee is based upon effort expended, something that should be correlated with a claimant's successful appeal and not with conditions which were not ultimately proven. Importantly, there is no prior decision, in the Third District or anywhere else, holding that attorney's fees should be apportioned pursuant to those conditions proven at court. In fact, the court never addressed attorney's fees in *Booher*, only some litigation costs (the *Booher* Court did not address the filing fee or juror fees either).

In short, the trial court followed the plain language of the statute by taxing costs and fees to the Employer after the Claimant had successfully proven his right to participate. Accordingly, the decision of the Court of Appeals should be reversed because there was no abuse of discretion.

B. R.C. 4123.95 and Ohio Supreme Court Precedent Direct that R.C. 4123.512 (F) Be Liberally Interpreted in Favor of the Injured Worker.

"The Ohio Supreme Court has consistently construed the term 'cost of any legal proceedings' [under R.C. 4123.512(F)] liberally in favor of employees." *Wasinski v. Peco II, Inc.*, 189 Ohio App.3d 550, 2010-Ohio-4293, 939 N.E.2d 883, ¶ 15, (3d Dist.), *citing Cave v.*

Conrad, 94 Ohio St.3d 299, 301, 2002-Ohio-793, 762 N.E.2d 991. Central to the Court's rationale is that statutes providing for reimbursement of costs to successful claimants in workers compensation appeals are 'designed to minimize the actual expense incurred by an injured employee who establishes his or her right to participate in the fund.'" *Kilgore v. Chrysler Corp.*, 92 Ohio St.3d 184, 186, 2001-Ohio-166, 749 N.E.2d 267, *citing Moore v. Gen Motors Corp.*, 18 Ohio St.3d 259, 262, 480 N.E.2d 1101 (1985). "The overarching consideration . . . is the requirement imposed by R.C. 4123.95 that workers' compensation statutes are to be 'liberally construed in favor of employees.'" *Kilgore v. Chrysler Corp.*, 92 Ohio St.3d 184, 186, 2001-Ohio-166, 749 N.E.2d 267.

For example, in *Kilgore v. Chrysler Corp.*, 92 Ohio St.3d 184, this Court found that an attorney's travel expenses incurred in taking the deposition of an expert witness was a reimbursable cost of a legal proceeding under R.C. 4123.512(F). The Court reasoned that R.C. 4123.512(F) applied as Kilgore was successful in proving his right to participate and it explained that the section provided a broad grant of reimbursement:

> R.C. 4123.512(F) applies to claimants who may rightfully participate in the fund but have been denied that right and have been forced to appeal. These claimants incur out-of-the-ordinary expense in order to establish their right to participate, additional expense that other claimants do not incur. While just as worthy, their award becomes functionally less than other claimants with the same injury. R.C. 4123.512(F) serves to diminish that incongruity.

Id. at 187.

In the case at hand, the Court of Appeals paid lip service to R.C. 4123.95 but qualified its applicability to R.C. 4123.512(F): "A liberal construction directive, however, does not empower us to read into a statute something that cannot reasonably be implied from the statute's language." (Appeals Decision at 24) (citations omitted). But this reading of the statute is incorrect for a multitude of reasons. First, R.C. 4123.95 explicitly states that "[s]ections 4123.01

to 4123.94, inclusive, of the Revised Code **shall** be liberally construed in favor of employees and the dependents of deceased employees." Accordingly, this provision applies to R.C. 4123.512(F), and it mandates that this section be interpreted in favor of the claimant. *See State ex rel. Adams v. Aluchem, Inc.*, 104 Ohio St.3d 640, 2004-Ohio-6891, 821 N.E.2d 547, ¶ 12, *citing Ohio Dept. of Liquor Control v. Sons of Italy Lodge 0917*, 65 Ohio St.3d 532, 534, 605 N.E.2d 368 (1992) ("When it is used in a statute, the word 'shall' denotes that compliance with the commands of that statute is mandatory.").

Moreover, the Ohio Supreme Court has consistently construed the term, 'cost of any legal proceedings' liberally in favor of the injured employee, so the Court of Appeals ignored Supreme Court precedent when it interpreted the statutory section in favor of the employer. *See Moore v. Gen Motors Corp.*, 18 Ohio St.3d 259, 480 N.E.2d 1101 (1985) (finding that the 'cost of any legal proceedings' included the fees charged by an expert witness and were reimbursable to claimant); *Cave v. Conrad*, 94 Ohio St.3d 299, 2002-Ohio-793, 762 N.E.2d 991 (finding that reasonable videotaped deposition expenses may be taxed as costs and awarded to successful claimant); *Kilgore v. Chrysler Corp.*, 92 Ohio St.3d 184, 2001-Ohio-166, 749 N.E.2d 267 (finding that an attorney's travel expenses incurred in taking a deposition of an expert are reimbursable 'costs of any legal proceedings'); and *Schuller v. United States Steel Corp.*, 103 Ohio St.3d 157, 2004-Ohio-4753, 814 N.E.2d 857 (finding that an expert witness fee for live testimony is a reimbursable cost of a legal proceeding if the trial court deems the fee to be reasonable).[1]

Last, the unjustness of the Court of Appeals decision becomes even more clear when the facts of this case are discussed. Here, Claimant was successful in proving his right to participate

[1] Reasonable litigation expenses have been defined by the Ohio Supreme Court as bearing "a direct relation to a claimant's appeal that lawyers traditional charge to clients and that also have a proportionally serious impact on a claimant's award." *Kilgore v. Chrysler Corp.*, 92 Ohio St.3d 184, 188, 2001-Ohio-166, 749 N.E.2d 267.

at the administrative level when a Staff Hearing Officer allowed his claim for the following conditions: (1) left shoulder strain; (2) electrical shock; (3) low back strain; (4) left rotator cuff; (5) left posterior shoulder dislocation; and (6) abrasion right fifth finger. (Appeals Decision at 3). Employer appealed to the Industrial Commission, wherein its appeal was refused, and it subsequently appealed into the Crawford County Court of Common Pleas pursuant to R.C. 4123.512. (*Id.* at 4). After a jury trial, the jury concluded that claimant was entitled to participate in the workers compensation fund for the abrasion of the right fifth finger, but not for the other conditions. (*Id.*). Therefore, Claimant, after successfully proving his right to participate in the fund administratively, had to defend his right to participate in the trial court, again successfully proved his right to participate, and is now fighting for attorney fees and costs to be assessed against Employer. *Contra Wasinski v. Peco II, Inc.*, 189 Ohio App.3d 550, 2010-Ohio-4293, 939 N.E.2d 883 (3d Dist.) (finding that two depositions, even though excluded from trial, were reimbursable litigation expenses since they were used to advance claimant's successful appeal).

In short, apportioning costs and fees according to those conditions allowed by the trial court runs afoul of R.C. 4123.95 and Ohio Supreme Court precedent because it punishes a successful claimant for those conditions ultimately not proven at trial. Even more importantly, failing to apportion costs and fees according to those conditions allowed is not an abuse of discretion. Affirming the Court of Appeals decision would deter claimants from contesting their right to participate at the trial level because it would be too costly for many of them to absorb. *See Moore v. Gen Motors Corp.*, 18 Ohio St.3d 259, 262, 480 N.E.2d 1101 (1985) (Unlike a tort action where more than mere economic loss is sought, "[u]nder the terms of participation in the State Insurance Fund, a claimant may recover relatively modest amounts."). Moreover, it may

lead claimants to only appeal certain conditions because of the risk and cost associated with the appeal, violating their due process rights.

Accordingly, the decision of the Court of Appeals must be reversed to preserve claimants' right to appeal as well the substantial body of Ohio Supreme Court case law construing R.C. 4123.512(F) in favor of the injured worker.

C. Apportioning Costs and Fees Based Upon Those Conditions That Are Successfully Proven In Court Creates an Unworkable Rule.

A claimant's filing fees and court costs for a R.C. 4123.512 appeal can be the same for one claim or four or five claims. Additionally, a claimant may use one expert witness to testify about one claim or four or five claims, and another claimant may use four experts to testify about four claims. In short, apportioning costs and fees based upon only those claims that are successfully proven in court creates an unworkable standard because it would be extremely difficult for a trial court to determine what percentage of a doctor's testimony was relevant to a particular condition and equally difficult to discern a reasonable percentage of apportionment for expert fees and costs. *Azbell v. Newark Group, Inc.*, 5th Dist. No. 07 CA 00001, 2008-Ohio-2639. Accordingly, implementing such a rule creates too much discretion that could not be reviewed under an abuse of discretion standard.

For example, the Court of Appeals for the Fifth District declined to follow *Booher* in *Azbell v. Newark Group, Inc.*, 5th Dist. No. 07 CA 00001, 2008-Ohio-2639, ¶ 29, because the claimant, who was successful in being awarded participation for cervical strain, one of four claims, only presented the videotaped testimony of one medical expert for all four claims. The court explained its reasoning in taxing the employer for the cost of the expert witness fee, the videotape deposition fee, the court's filing fee, and the jury fee: "[i]t would be difficult, if not impossible for the trial court to determine what percentage of the doctor's testimony was relevant

to a particular injury. It would be equally difficult to then determine a percentage of apportionment for medical expert fees and costs." *Id.* at ¶ 42. It also construed R.C. 4123.512(F) in favor of the claimant pursuant to R.C. 4123.95:

> With regard to the costs of the action, the statute states that a successful claimant shall be awarded '[t]he costs of any legal proceedings authorized by this section,' (i.e. 4123). R.C. 4123.512(F). The record indicates that appellant's filing fees and other court costs for the case sub judice would have been the same for one claim as they were for four. Additionally, the decision that appellant could participate in the Workers' Compensation Act for cervical strain, makes him a successful claimant entitled to full reimbursement for all reasonable costs associated with the litigation. We believe that this conclusion is in accordance with the philosophy that the workers' compensation statutes are to be liberally construed in favor of the claimant. See R.C. 4123.95.

Id. at ¶ 45. As such, it found that the trial court abused its discretion in failing to award the claimant the expert witness fee and reasonable litigation expenses, including court costs for the jury and the filing fee.

In the instant case, the Court of Appeals found that the trial court committed an abuse of discretion by taxing Employer with the expert witness fee of Dr. Zuesi, who testified strictly about the five unsuccessful conditions at trial. (Appeals Decision at 36). However, the Court quoted the same doctor for the definition of the allowed condition, which makes Amici question the Court's finding that Dr. Zuesi's testimony did not address the allowed condition or influence the jury in any way. (*See id.*) ("Dr Zuesi testified that an 'abrasion' occurs when 'the epidermis is breached so that there's some bleeding coming either from the lower dermal layers or sometimes even just under the surface of the skin."). Even assuming that Dr. Zuesi's testimony exclusively covered the five conditions that were not allowed, every case will not be as easy to apportion. *Azbell v. Newark Group, Inc.*, 5th Dist. No. 07 CA 00001, 2008-Ohio-2639. What is more, finding that the "expert witness fee ($1,600.00) was especially unreasonable in light of Holmes' minimal injury," (Appeals Decision at 36), has no basis in precedent and again punishes

the claimant even though he was successful in proving his right to participate in the system. The magnitude of the injury is inconsequential as long as the injury is work-related; reducing costs based upon the severity of a particular injury runs afoul of R.C. 4123.512 and R.C. 4123.95. *See State ex rel. Liposchak v. Indus. Comm.*, 90 Ohio St.3d 276, 278, 2000-Ohio-73, 737 N.E.2d 519 ("The only right-to-participate question that is appealable is whether an employee's injury, disease, or death occurred in the course of and arising out of his or her employment.").

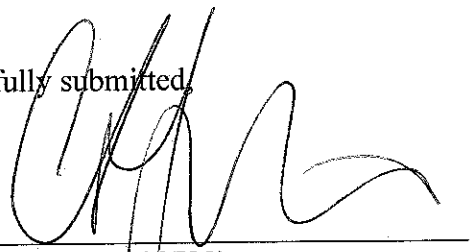
Similarly, limiting attorney's fees based upon those conditions proven in court, (*see* Appeals Decision at 42)("The trial court should not tax Crawford Machine with any attorney's fees that are strictly related to Holmes' unsuccessful claims/conditions"), makes little sense since the claimant still won his appeal by proving his right to participate. In addition, there is no formula for quantifying fees based upon certain successful conditions, which would lead to arbitrary and unreasonable results.

Because the Court of Appeals invented a new standard that has no basis under R.C. 4123.512 or this Court's decisions when it determined that attorney's fees and litigation costs should be apportioned according to those conditions proven at court, the trial court did not abuse its discretion and the Court of Appeals' decision must be reversed.

CONCLUSION

For the foregoing reasons, the Ohio Association for Justice and Ohio Association of Claimants' Counsel urge this Court to reverse the Crawford County Court of Appeals and reinstate the costs assessed against Employer by the Crawford County Common Pleas Court.

Respectfully submitted,



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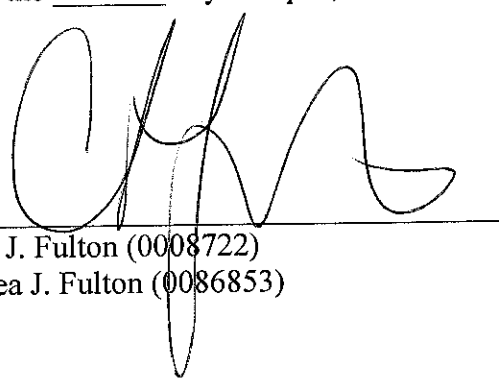
CERTIFICATE OF SERVICE

This is to certify that a copy of the foregoing was mailed by regular U.S. Mail, postage prepaid, to Barbara A. Knapic and Denise A. Gary, Oldham Kramer, 195 South Main Street, Suite 300, Akron, OH 44308, and Jerald A. Schneiberg, Jennifer L. Lawther, and Christopher B. Ermisch, Nager, Romaine & Schneiberg, 27730 Euclid Avenue, Cleveland, OH 44132, and Kevin J. Reis, Assistant Attorney General, Workers' Compensation Section, 150 East Gay Street, 22nd Floor, Columbus, OH 43215, postage prepaid, the 25th day of April, 2012.



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