ORIGINAL

IN THE SUPREME COURT OF OHIO

CASE NO. 2010-2138

JAMES SPENCER
Plaintiff-Appellee,

-vs-

FREIGHT HANDLERS, INC, ET AL.
Defendants-Appellants

ON APPEAL FROM MIAMI COUNTY
COURT OF APPEALS, SECOND APPELLATE DISTRICT

BRIEF OF *AMICUS CURIAE*, OHIO ASSOCIATION OF CLAIMANTS' COUNSEL AND OHIO ASSOCIATION FOR JUSTICE URGING AFFIRMANCE ON BEHALF OF PLAINTIFF-APPELLEE

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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 of 1,500 lawyers dedicated to the protection of Ohio's consumers, workers, and families.

In 2008, the Ohio Association of Claimants' Counsel (OACC) was founded to advance the founding ideals of the NACCA and to promote the education of workers' compensation issues. The OACC is a statewide organization of workers' compensation attorneys.

The OACC and OAJ file this amicus brief to ask this Court to accept the decision of the Court of Appeals for the Second Appellate District and deny the Appellant's request to reverse the Second Appellate District's determination. The OACC and OAJ adopt the statement of facts set forth in Appellee James Spencer's merit brief.

INTRODUCTION

Workers' compensation is a creature of statute. Principles of statutory interpretation therefore apply. When a Court engages in statutory interpretation, a statute's text is the starting point, and where the statute is clear, it ***must*** be followed. *Hubbard v. Canton City School Bd. of* Education (2002), 97 Ohio St.3d 451, 780 N.E.2d 543. As workers' compensation is statutorily based, it is the General Assembly's responsibility to make policy choices. *McCrone v. Bank One Corp.*, 107 Ohio St.3d 272, 2005-Ohio-6505, 839 N.E. 1, ¶ 37.

Here, the text of R.C. 4123.512 clearly establishes the jurisdictional requirements for a party to appeal from an Industrial Commission order. Filing the notice of appeal is the only act required to perfect an appeal. R.C. 4123.512(A). R.C. 4123.512(B) identifies what the notice must contain in order to be valid: the names of the claimant and the employer; the number of the claim; the date of the order appealed from; and the fact that the appellant appeals therefrom. So long as a party substantially meets these requirements, the notice of appeal is perfected and the jurisdictional requirements are therefore met. Although R.C. 4123.512(B) does make the Administrator, Bureau of Workers' Compensation ("BWC"), a mandatory party to the appeal, this provision is contained in a separate paragraph announcing which parties are subject to the appeal, ***not*** what the notice of appeal must contain.

Here, John Spencer filed a notice of appeal that met the above requirements. *Spencer v. FHI, LLC, et al.*, Case No. 09-CA-44, at 5-6 (hereinafter "Second District at X."). Mr. Spencer did not, however, include the BWC as a party, nor serve the BWC with a notice of appeal. (Id. at 6). The Defendant-Employer, FHI, filed a motion to dismiss for lack of subject matter jurisdiction based upon Mr. Spencer failing to name the BWC as a party. (Id.).

The Second Appellate District rejected this motion, holding that the plain language of R.C. 4123.512(B) provides what must be contained in a notice of appeal to be valid. (Id. at 7). Since naming the BWC is not included in that provision, James Spencer met R.C. 4123.512(B)'s requirements under the statute's plain text, granting the Court of Common Pleas jurisdiction. (Id. at 7-8).

The Appellant, however, asserts that the Second District (and the Ninth, Tenth, and Eleventh Districts) is incorrect in finding that a party need not name the Administrator, Bureau of Workers' Compensation, as a party to perfect a notice of appeal and convey jurisdiction. Instead, Appellant asserts that naming the Administrator is an additional requirement. But Appellant's argument is misplaced. Appellant's contention is premised upon the proposition that the purpose of R.C. 4123.512 is to place all parties on notice that an appeal has been filed and that, because the General Assembly ***intended*** for the Administrator to be a party in every jurisdictional appeal, R.C. 4123.512 mandates the inclusion of the BWC for jurisdiction to be met. However, R.C. 4123.512 provides a clear textual mandate for what establishes jurisdiction, which does not include naming the BWC. The Appellant may have a public policy rationale for its inclusion, but that is a decision for the General Assembly and not this Court. This Court must enforce the clear textual language of R.C. 4123.512 and leave such policy determinations to the General Assembly.

ARGUMENT

I. THE TEXT OF R.C. 4123.512 ENUNCIATES WHAT IS REQUIRED TO PERFECT A NOTICE OF APPEAL AND PROVIDE JURISDICTION

The General Assembly established the Ohio Workers' Compensation system to supplant unsatisfactory existing common law remedies, not merely to supplant those previously available.

Indus. Comm. v. Weigandt (1921), 102 Ohio St. 1, 130 N.E. 38. The rights and duties thus created are purely statutory, resting exclusively on the grant of legislative authority by the enabling Workers' Compensation Act. *State ex rel. Koger v. Indus. Comm.* (1942), 48 N.E.2d 1372. As this is a statutory scheme, the General Assembly is entrusted with determining workers' compensation policy. *McCrone,* 2005-Ohio-6505 ("The General Assembly is the branch of state government charged by the Ohio Constitution to make public policy choices for the workers' compensation fund.").

Because workers' compensation is a statutory creature, the application of workers' compensation law necessitates statutory construction. *State ex rel. Brilliant Electric Sign Co. v. Indus. Comm.* (1939), 135 Ohio St. 211, 20 N.E.2d 252. General principles of statutory construction therefore inform the application of workers' compensation statutes. Id. The starting point is the statute's text, and when it is clear it must be enforced as written. *Hubbard v. Canton City School Bd. of Education*, (2002), 97 Ohio St.3d 451, 780 N.E.2d 543. "This court has stated that where the language of a statute is clear and unambiguous, it is the duy of the court to enforce the statute as written, ***making neither additions to the statute nor subtractions*** therefrom." Id.

R.C. 4123.512 is but one example of the exclusive statutory nature of Ohio workers' compensation law. A party does not have an automatic right to file a claim in the common pleas court, *Jenkins v. Keller* (1966), 6 Ohio St.2d 122, 216 N.E 2d 379, or an automatic right to appeal from an Industrial Commission order to a court of common pleas. *Cadle v. General Motors Corp.* (1976), 45 Ohio St.2d 28, 340 N.E.2d 403. Instead, R.C. Chapter 4123 provides the exclusive manner by which a common pleas court may gain jurisdiction over a workers' compensation appeal. *Wagner v. Krouse* (1983), 7 Ohio App. 378, 455 N.E.2d 717. R.C.

4123.512 provides the exclusive process by which a common pleas court gains jurisdiction over the appeal of a party (claimant or employer) from an Industrial Commission decision. Id.

R.C. 4123.512(A) provides that the "claimant or employer may appeal an order of the industrial commission . . . in any injury or occupational disease other than a decision as to the extent of disability." The provision then pronounces that:

> The appellant shall file the notice of appeal with a court of common pleas within sixty days after the date of the receipt of the order appealed from or the date of receipt of the order of the commission refusing to hear an appeal of a staff hearing officer's decision . . . ***The filing of the notice of the appeal with the court is the only act required to perfect the appeal.***

R.C. 4123.512(B) additionally provides what the notice of appeal must contain:

> The notice of appeal ***shall*** state the names of the claimant and the employer, the number of the claim, the date of the order appealed from, and the fact that the appellant appeals therefrom.

R.C. 4123.512(B) continues,

> The administrator of workers' compensation, the claimant, and the employer shall be parties to the appeal and the court, upon the application of the commission, shall make the commission a party. The party filing the appeal shall serve a copy of the notice of appeal on the administrator at the central office . . .

As the Second Circuit correctly held, the text of R.C. 4123.512 clearly lays out what is required for jurisdiction. (Second District at 7). R.C. 4123.512(A) announces that only a notice of appeal is needed to perfect an appeal for jurisdiction. R.C. 4123.512(B)'s first paragraph, in turn, identifies the five factors that must be included for a valid notice of appeal. This Court in *Fisher v. Mayfield* (1987), 30 Ohio St.3d 8, 9, 505 N.E.2d 975—a case cited with approval by the Appellant—supports this position, holding that:

> R.C. 4123.519 (the predecessor to R.C. 4123.512) sets forth five elements to be ***included*** in the notice of appeal:

> Notice of appeal shall state the names of the claimant and the employer, the number of the claim, the date of the decision appeal from, and the fact that the appellant appeals therefrom.

Id. at 9. So long as these five factors are included in the notice of appeal, the notice of appeal is valid, and therefore the appeal (and jurisdiction) is perfected pursuant to R.C. 4123.512(A).

Pointedly, naming the BWC as a party is ***not*** one of those factors that R.C. 4123.512(B) mandates must be included. Although the BWC may be a mandatory party to a workers' compensation case, R.C. 4123.512(B) provides separate paragraphs laying out what is required for a valid notice of appeal, and who are mandatory parties for that appeal. *Jarmon v. Ford Motor Co.* (April 30, 1996), Franklin Co. No. 95APE10-1377, 1996 WL 221533, citing *Milkenvoice v. Drummond* (1961), 88 Ohio Law. Abs. 103, 104, 181 N.E.2d 814. As the Second District correctly held, "the second paragraph of R.C. 4123.512(B), wherein the requirements concerning naming and serving the Administrator are established, were set apart from the 'contents' requirement of the first paragraph by the General Assembly." (Second District at 8). R.C. 4123.512(B)'s text makes evident that the first paragraph speaks to what a notice of appeal "shall include," while the second paragraph addresses who "shall be parties to the appeal." This text naturally demonstrates that the contents contained in the second paragraph are different and apart from the contents required in a notice of appeal as delineated by R.C. 4123.512(B).

To read the BWC into what "shall be included" in the notice of appeal is to simply ignore the clear language of R.C. 4123.512(B). Under the canon *expressio unius est exclusio alterius*, items not included for what must be included for a notice of appeal are assumed to not be covered by the statute. *Summerville v. Forest Park*, 128 Ohio St.3d 221, 2010-Ohio-6280, 943 N.E.2d 522, at ¶ 35. As the claimant, employer, and BWC are in the same associated group, it justifies the finding that the BWC was purposefully excluded. Id.

Courts are nearly universal in agreeing with the Second District that a notice of appeal only contain those items that R.C. 4123.512(B)'s text announces must be included, and therefore the failure to name the BWC is not a jurisdictional defect. As the Tenth District held in *Jarmon*, 1996 WL 221533 at *3, "R.C. 4123.512(B) provides separate requirements for a valid notice of appeal and for naming parties to the appeal itself." The Tenth District continued, "according to the ***plain language of the statute***, the notice of appeal must state only the five factors set forth above; it need not state the administrator's name." Id. The Tenth District made clear that naming the appropriate parties to a workers' compensation claim is a separate requirement since it is placed in a separate paragraph. Id. Accord *Karnofel v. Cafaro Management Co.* (June 26, 1998), Trumbell App. No. 97-T-0072; *Groicki v. General Motors Corp.* (Dec. 31, 1985), Trumbull App. No. 3527. As noted, this Court has also held that a valid notice of appeal only includes the five items listed in the first paragraph of R.C. 4123.512(B), which notably does not include the BWC. *Fisher*, 30 Ohio St.3d at 9.

In sum, the text of R.C. 4123.512 is clear. R.C. 4123.512(A) announces that filing a notice of appeal is the only act necessary to perfect that appeal. R.C. 4123.512(B) provides what must be included in that notice to be valid. The BWC is not included in this provision. Instead, the BWC is listed in the subsequent paragraph as a mandatory party, but is clearly not a factor that must be included within the notice of appeal. *Fisher*, 30 Ohio St.3d at 9. As this statutory text is clear, it must be followed as written.

II. THE APPELLANT'S RELIANCE UPON THE GENERAL ASSEMBLY PURPORTED INTENT IS MISPLACED

Appellant seeks to overcome the clear language of R.C. 4123.512 by focusing on the statute's purported 'purpose' or intent to advise the parties that an appeal of a particular claim is

coming. (Appellant Merit Brief at 1; 9). Such a purpose is not enunciated in the statute. Further, Appellant's focus on purpose when the statute's text is clear is faulty and must be rejected.

As noted, statutory text is the starting point of interpretation, and when it is clear it must be followed. *Hubbard v. Canton City School Bd. of* Education (2002), 97 Ohio St.3d 451, 780 N.E.2d 543. A Court's role is not to read purpose into a statute when the text is clear. Id. As this Court has held, "based upon these rules of statutory construction, we refuse to recast the language of R.C. 2744.02(B)(4) so that the subsection may accommodate some unstated meaning or purpose." Id. Instead, it is presumed that the Legislature's intent is expressed through the statute's text. *Vieth v. Ohio Dept. of Job & Family Services* (Ohio App. 10 Dist.), 2009 WL 2331870, 2009-Ohio-3748, at ¶ 31, citing Rosenberg v. XM Ventures (3d. Cir. 2001), 274 F.3d 137, 141. See also *I.N.S. v. Cardoza-Fonseca*, 480 US 421, 452-53 (Scalia, J. Concurring) ("Judges interpret laws rather than reconstruct legislators' intentions. Where the language of those laws is clear, we are not free to replace it with unenacted legislative intent."). As Justice Scalia announced, the Court here has no need to reconstruct the General Assembly's intent with R.C. 4123.512 when the statute's text is plain. Appellant's focus on the General Assembly's intent simply underscores that the plain text is contrary to its desired policy outcome.

Moreover, it is by no means clear that Appellant has correctly stated the General Assembly's intent. Perhaps the General Assembly's purpose was to make the procedural steps to perfect the notice of appeal as simple and straightforward as possible, in line with the "fundamental tenet . . . that courts should decide cases on their merits." *Fisher*, 30 Ohio St.3d at 11. The General Assembly has made significant changes to R.C. 4123.512 to reduce

jurisdictional requirements. Most significantly, R.C. 4123.512 (at that time 4123.519) formerly mandated that a claimant file their appeal in the correct county venue as a jurisdictional requirement. Philip J. Fulton, OHIO WORKERS' COMPENSATION LAW (3d Ed.), § 12.4. The General Assembly subsequently amended R.C. 4123.512 to explicitly make venue non-jurisdictional and created a "safe harbor provision" that allowed the Court *sua sponte* to transfer a case to the correct venue. Id. Similarly, in *Fisher*, this Court held that a notice of appeal that is in "substantial compliance" with R.C. 4123.512 is sufficient to grant jurisdiction. 30 Ohio St.3d 8. Both examples are consistent with R.C. 4123.95, which instructs that the workers' compensation law be liberally construed in favor of the injured worker. It would be incongruous to interpret an additional jurisdictional requirement here, where the clear emphasis is to ***reduce*** jurisdictional burdens upon injured workers. Indeed, it would represent a drastic turn away from this Court's jurisprudential preference to deciding cases on the merits by instead placing an additional jurisdictional burden upon claimants, all without any legislative indication that this additional jurisdictional burden is necessary.

The larger point is that the Court need not reconstruct intent when it can simply apply R.C. 4123.512's clear text. The BWC may believe it is bad "public policy" to not require the Administrator's name on the notice of appeal because mandating this requirement would make things "efficient and predictable for the Administrator." (Appellant Merit Brief at 15). But it is not this Court' purview to set workers' compensation policy. *McCrone*, 2005-Ohio-6505, ¶ 37. Instead, the BWC should seek redress with the General Assembly, where it has adequate input. Moreover, as the Second Appellate District held, the Ohio R. Civ. P. 19(A) provision regarding necessary joinder provides an easy tool for a party or the court to join the Administrator as a

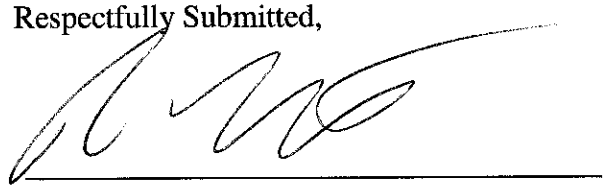
necessary party, preventing any potential R.C. 4123.512 problem or harm to the BWC. (Second District at 9).

The underlying principle is that this is the General Assembly's decision, and this Court should not be substituting its policy preferences for that of the legislature. The General Assembly's policy determination is best evidenced by the text of R.C. 4123.512. *Vieth*, 2009 WL 2331870, 2009 Ohio 3748, ¶ 31. R.C. 4123.512(A) makes evident that a valid notice of appeal is the only necessary document to grant jurisdiction, and R.C. 4123.512(B) makes clear what a notice of appeal ***shall include*** to be valid. The Administrator's name is not amongst that information. While the Administrator is included in the next paragraph of R.C. 4123.512(B), this second paragraph is clearly devoted to who are necessary parties in a workers' compensation appeal—not what a notice of appeal must include to establish a valid appeal. Plus, the Rules of Civil Procedure provide an easy remedy to join the Administrator as a necessary party. In sum, the language of R.C. 4123.512 is clear and must be followed.

CONCLUSION

For the foregoing reasons, OACC and OAJ urge this Court to affirm the Second Appellate District's decision and deny Appellant's motion.

Respectfully Submitted,



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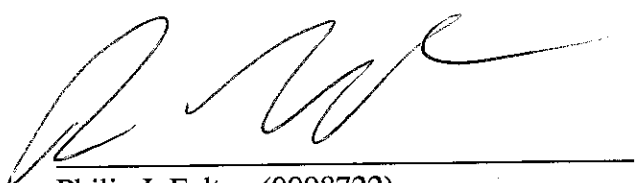

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