

ORIGINAL

IN THE SUPREME COURT OF OHIO

STATE OF OHIO,

Plaintiff-Appellee,

-vs-

LINDA S. COOK,

Defendant-Appellant.

* Case No. 2009-2122
* Certified Conflict from the
* Lucas County Court of Appeals
* Sixth Appellate District
*
* C.A. Case No. L08-1301
* C.P. Case No. CR07-2498
*

MERIT BRIEF OF PLAINTIFF-APPELLEE

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JULIA R. BATES, PROSECUTING ATTORNEY
LUCAS COUNTY, OHIO

By: Evy M. Jarrett, #0062485
Assistant Prosecuting Attorney
Lucas County Courthouse
Toledo, Ohio 43604
Phone No.: (419) 213-4700
Fax No.: (419) 213-4595
ejarrett@co.lucas.oh.us

JOHN F. POTTS, #0033846
405 Madison Ave., Ste. 1010
Toledo, Ohio 43604
Phone No.: (419) 255-2800
Fax No.: (419) 255-1105

COUNSEL FOR DEFENDANT-APPELLANT

COUNSEL FOR PLAINTIFF-APPELLEE

RICHARD CORDRAY (0038034)
Ohio Attorney General
BENJAMIN C. MIZER (0083089)
BRANDON J. LESTER (0079884)
ROBERT KENNETH JAMES (0078761)
30 East Broad Street, 17th Floor
Columbus, Ohio 43215
Phone No.: (614) 466-8980
Fax No.: (614) 466-5087
benjamin.mizer@ohioattorneygeneral.gov

PETER GAYLARDT, #0085439
Assistant State Public Defender
Office of the Ohio Public Defender
250 E. Broad Street, Suite 1400
Columbus, Ohio 43215
Phone No.: (614) 466-5394
Fax No.: (614) 752-5167
Peter.Galyardt@opd.ohio.gov

COUNSEL FOR AMICUS CURIAE,
OHIO PUBLIC DEFENDER

COUNSEL FOR AMICUS CURIAE
OHIO ATTORNEY GENERAL RICHARD CORDRAY

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INTRODUCTION

This case is before the Court for resolution of a certified question:

Whether R.C. 2901.13(F) operates to toll the six-year period of limitations provided for in R.C. 2901.13(A) so that it extends beyond six years from the date upon which a felony offense was committed where the corpus delicti of the offense is discovered within the period of limitations and more than one year prior to expiration of the limitations period.

The State submits that R.C. 2901.13(F) itself answers the certified question.

The discovery provision contained in R.C. 2901.13(F) is not conditioned upon a particular kind of offense or upon the time the offense is discovered. R.C. 2901.13(F) applies to all offenses. It applies regardless of whether an offense is discovered before or after the expiration of the period of limitations. And it applies regardless of whether an offense is discovered more than one year prior to expiration of the limitations period. Quite simply, the discovery provision in R.C. 2901.13(F) provides that the statute of limitations does not run so long as an offense remains undiscovered.

In this case, the Sixth Appellate District properly gave effect to the discovery provision in R.C. 2901.13(F), holding that when a falsified deed was recorded on July 12, 2001, the statute of limitations was tolled until the falsification was discovered in 2004. Appellant and appellant's amicus contend that application of the discovery rule was erroneous, and that this Court should hold that the discovery rule does not apply "where the corpus delicti of an offense of which an element is fraud is discovered by legal representatives of the aggrieved person within the period of limitations and more than one year prior to expiration of the limitations period." (Merit Brief of Defendant-Appellant at p.7.)

Appellant's argument is premised on the assumption that the "aggrieved party" in this case was an elderly woman whose real property was the subject of a falsified deed that appellant prepared and filed. (See, e.g., Merit Brief of Defendant-Appellant at p. 11.) However, the State notified appellant by way of its Bill of Particulars that the element of fraud specified in the tampering charge related to appellant's intended fraudulent avoidance of a Medicaid look-back period. The State, or a subdivision of the State, was the "aggrieved party" with respect to that contemplated fraud, and the State filed the indictment within one year of receiving notice that appellant had filed a falsified deed in order to facilitate that fraud.

Because there is no reason to bar the indictment in this case as having been filed more than a year past an aggrieved party's discovery of a crime involving fraud, the certified question should be resolved in accordance with the statute's plain language. Full effect should be given to the discovery provision set forth in R.C. 2901.13(F), and the decision of the Sixth Appellate District should be affirmed.

STATEMENT OF THE CASE AND FACTS

At Christmas Eve services in 2000, the pastor of the Metamora United Methodist Church announced that Esther Benfer planned to make a gift of her farm to the church. (Tr. July 8, 2008, hereinafter referred to as "Tr.," at p. 61, 65.) The farm was located in Metamora, Ohio, and consisted of a farmhouse, barn, various outbuildings, an orchard, and 28 acres of farmland. (Tr. at p. 61, 65.) Ms. Benfer, who was born¹ on October 30, 1911, had no immediate family. See *Toledo Bar Association v. Cook*, 114 Ohio St.3d 108, 2007-Ohio-3253, ¶¶6-8. She was present at the services when the announcement was made. (Tr. at p.61.)

Sometime in 2001, Ms. Benfer met with defendant-appellant Linda Cook, an attorney practicing in Sylvania, Ohio. Id. Appellant was expected to draw up documents transferring Ms. Benfer's farm to the church. (Tr. at p. 63.) Ms. Benfer's client information paperwork was dated May 8, 2001, and appellant prepared various estate planning documents for Ms. Benfer, all of which purported to have been executed on June 8, 2001. (Findings of Fact, Exhibit C to Tr. at ¶3; *Cook*, supra, 2007-Ohio-3253 at ¶7-8.)

In 2003, the church's board of trustees notified appellant that they had not received any documents related to the transfer of the property. (Tr. at p. 64.) In 2004, the church received a contract and had it reviewed by an attorney. (Id. at p. 66.) The attorney recommended that the church contact the county recorder's office to find out how the property was held. (Id.) The church did so in February, 2004. (Id. at p. 78.)

¹Ms. Benfer died on April 11, 2009 at age 97.

An inspection of Fulton County records revealed no deed transferring the property to the church. (Id. at p. 66.) However, several deeds related to the property had been filed. The first deed, recorded on July 12, 2001, transferred the property to "Linda S. Cook as trustee." (Id. at pp. 72, 97; defendant's Exhibit A.) That deed purported to have been executed and witnessed on May 20, 1998, but was notarized at a later date. (Id. at p. 98.) The second deed, recorded on September 10, 2001, was the same as the first, except that the word "trustee" had been redacted, and the word "married" was inserted with an asterisk. An addition on the side said "[b]eing re-recorded to correct grantee marital status." (Id. at p. 100.) The third deed purported to transfer title from Cook as a married individual to the church, with a life estate reserved to Benfer. The third deed was dated December 25, 2000, and recorded on December 13, 2001. (Id.; attachments to defendant's Exhibit A.)

In April, 2004, Attorney Jeffrey L. Robinson wrote to appellant and advised her that he had been retained to represent Ms. Benfer. The letter questioned appellant's handling of Ms. Benfer's assets and instructed appellant not to contact Ms. Benfer. (Findings of Fact, Exhibit C to Tr. at ¶27.) On the same day that she received the letter from Attorney Robinson, appellant filed a Petition for Appointment of Guardian of Incapacitated Individual in the Probate Court of Lenawee County, Michigan. (Id. at ¶17; *Cook*, 2007-Ohio-3253 at ¶28.) The application represented that Ms. Benfer lacked both physical and mental capacity. (Id. at ¶28.)

In mid-April, 2004, Jan Stamm, a title agent and attorney, reviewed the deeds at the request of the Metamora United Methodist Church. Attorney Stamm determined,

based on his review of the original deed, that the deed filed on July 12, 2001 was in fact notarized later than the date indicated on the face of the document. (Tr. at p.110-111.)

Shortly after Attorney Stamm reviewed the deed, a complaint was filed against Cook with the Toledo Bar Association. (Tr. at p. 29.) The complaint was certified on April 18, 2005, and from that point forward, the proceedings were open to the public. (Tr. at p. 31, 37.) The Toledo Bar Association reported the findings to the Lucas County Prosecutor's Office in October, 2006.²

On July 18, 2007, a two count indictment was filed against appellant in Lucas County Common Pleas Court. The first count of the indictment charged defendant with tampering with records in violation of R.C. 2913.42(A)(1) and (B)(4)³, a felony of the third degree, based on acts committed "on or about the 12th day of July, 2001." The

²Although testimony at the evidentiary hearing indicated that the Bar Association reported its findings to the Lucas County Prosecutor's Office in the summer of 2007, the State does not dispute that it received a letter dated October 26, 2006 regarding the findings. (Tr. at p. 27.)

³ R.C. 2913.42 provides in relevant part:

(A) No person, knowing the person has no privilege to do so, and with purpose to defraud or knowing that the person is facilitating a fraud, shall do any of the following:

(1) Falsify, destroy, remove, conceal, alter, deface, or mutilate any writing, computer software, data, or record;

(B)***

(4) If the writing, data, computer software, or record is kept by or belongs to a local, state, or federal governmental entity, a felony of the third degree.

second count of the indictment charged defendant with theft from an elderly person, a violation of R.C. 2913.02(A)(2) and (B)(3).

The prosecution provided appellant with a Bill of Particulars that noted the tampering charge related to an intended circumvention of a Medicaid look-back period:

b. The Defendant has admitted to recording a deed in 2001, in Fulton County, which purported the transfer of the real estate to have occurred in 1998 when the transaction actually occurred three years later, in the year 2001.

c. The Defendant has admitted that this transaction occurred with an understanding that Medicaid laws provide for a mechanism to undo real estate transfers between individuals when the grantor begins receiving Medicaid benefits sooner than three years after the real estate transfer.

(Bill of Particulars, ¶1; see also Exhibit C to Tr. at ¶9.)

Appellant filed a motion to dismiss the tampering charge on grounds that it was filed after the expiration of the statute of limitations. At an evidentiary hearing on the motion to dismiss, Attorney Stamm testified that he examined the deed for an hour in order to detect the evidence of falsification. He also testified that the function of the county auditor and recorder's office would not permit such falsification to be detected. (Tr. at p. 135.) He acknowledged that public offices might record 10 or 20 documents in an hour and could not give each document the same level of scrutiny that he applied in reviewing the deed. (Id.) He stated that the auditor's function is to examine the legal description contained in a deed in order to permit placement in the proper index. Finally, he testified that in his experience, the auditor does not typically look for "a defect in the executing" of the deed. (Id. at pp. 131-135.)

On August 22, 2008, the trial court granted the motion to dismiss Count One of the indictment, reasoning that "the State was aware of the allegations against Cook

before the statute of limitations expired but did not indict Cook until after the expiration of the statute of limitations." The State appealed the dismissal, and the Sixth Appellate District reversed. See *State v. Cook*, 184 Ohio App.3d, 2009-Ohio-4917, 921 N.E.2d 258. The case was accepted by this Court for review of a certified conflict among the districts of the Court of Appeals.

ARGUMENT

Proposition of Law: Pursuant to R.C. 2901.13(F), the six-year period of limitations applicable to a felony does not run while the corpus delicti of the offense remains undiscovered, even if the offense is discovered more than one year prior to the expiration of the limitations period.

R.C. 2901.13 is conceptually simple. Division (A) provides the basic limitations periods applicable to an offense and notes that the applicable period begins when the offense is committed. Prosecution of a felony offense, such as the tampering charge in this case, must begin within six years of the offense. R.C. 2901.13(A)(1)(a).

Two divisions of the statute are explicitly limited to circumstances involving particular kinds of offenses for which the limitation period set forth in division (A) has expired. Division (B) provides that if the limitation period set forth in division (A) has expired, prosecution of an offense involving an element of fraud must commence within one year of the discovery of the offense by the aggrieved party or that party's representative. Similarly, division (C) provides that if the limitation period set forth in division (A) has expired, prosecution of an offense involving misconduct in office by a public servant may be commenced "at any time while the accused remains a public servant, or within two years thereafter."

Other divisions of the statute provide specific circumstances that will trigger the limitation periods set forth in division (A). R.C. 2901.13(D) provides that the period of limitations for an offense with an element of continuing course of conduct "does not begin to run until such course of conduct or the defendant's responsibility for it terminates." R.C. 2901.13(I) provides that an offense involving abuse or neglect shall not begin to run until either the victim reaches the age of majority or a public children services agency or a peace officer has been notified of an allegation of abuse or neglect.

Finally, the statute provides several circumstances in which the statute of limitations will be tolled. In addition to the discovery provision contained in R.C. 2901.13(F), the statute also provides that the period of limitations does not run "during any time when the accused purposely avoids prosecution" or "during any time a prosecution against the accused based on the same conduct is pending in this court." See R.C. 2901.13(G) and (H).

A. The plain wording of R.C. 2901.13(F) provides that the statute of limitations does not run while the crime remains undiscovered.

This Court has recognized that "[t]he first rule of statutory construction is that a statute which is clear is to be applied, not construed." *Vought Industries v. Tracy*, 72 Ohio St. 3d 261, 265, 648 N.E.2d 1364. R.C. 2901.13(F) is exactly the sort of clear and unambiguous provision that requires application, not construction.

R.C. 2901.13(F) unconditionally provides that the applicable "period of limitation shall not run during any time when the corpus delicti remains undiscovered." This Court has defined the phrase "corpus delicti" to include the act itself and the criminal agency

of the act. See *State v. Edwards* (1976), 49 Ohio St.2d 31, 34, 358 N.E.2d 1051, paragraph 1 of the syllabus; *State v. Hensley* (1991), 59 Ohio St.3d 136, 138, 571 N.E.2d 711; *State v. Black* (1978), 54 Ohio St.2d 304, 307, 376 N.E.2d 948. The corpus delicti is discovered when "any competent person other than the wrongdoer or someone *** [equally at fault] with him has knowledge of both the act and its criminal nature." *Hensley*, supra, 59 Ohio St.3d at 138. R.C. 2901.13(F) requires actual, as opposed to constructive, discovery of the act and its criminal nature. *State v. Turner* (1993), 91 Ohio App.3d 153, 156 at note 4, 631 N.E.2d 1117.

R.C. 2901.13(F) does not condition its operation on expiration of the statute of limitations before discovery of the corpus delicti. The statute's treatment of the discovery exception in (F) stands in sharp contrast to the statute's divisions that are explicitly conditioned on the expiration of the period of limitations applicable to the offense. See R.C. 2901.13(B) and (C). When one provision of a statute is explicitly conditioned on the expiration of the time period provided in (A)(1), and another provision of the statute is not, it must be inferred that the legislature did not intend to condition the second provision upon the expiration of that time period. See, e.g., *Wheeling Steel Corp. v. Porterfield* (1970), 24 Ohio St.2d 24, 28, 263 N.E.2d 249 (where the General Assembly included a requirement in one provision of the Revised Code but failed to do so in another, a court could not add the missing requirement to the latter provision).

R.C. 2901.13(F) also does limit its operation to any particular class of offenses. It does not list any offenses to which it applies, nor does it exclude any offenses from its

operation. Basic rules of statutory construction demand that courts not delete or insert words. *Cline v. Ohio Bur. of Motor Vehicles* (1991), 61 Ohio St.3d 93, 97, 573 N.E.2d 77. Rather, where the language of a statute is clear and unambiguous, it is the duty of the court to enforce the statute as written, making neither additions to the statute nor subtractions therefrom. *Bernardini v. Conneaut Area City School Dist. Bd. of Edn.* (1979), 58 Ohio St. 2d 1, 4, 387 N.E.2d 1222; *Spartan Chem. Co., Inc. v. Tracy* (1995), 72 Ohio St.3d 200, 202, 648 N.E.2d 819. " 'There is no authority under any rule of statutory construction to add to, enlarge, supply, expand, extend or improve the provisions of the statute to meet a situation not provided for.' " *Vought Industries, supra*, 72 Ohio St. 3d at 265, quoting *State ex rel. Foster v. Evatt* (1944), 144 Ohio St. 65, 56 N.E.2d 265, paragraph eight of the syllabus.

On its face, R.C. 2901.13(F) is unambiguous and unconditioned on anything more than non-discovery of an offense. Accordingly, the statute need not be construed against the State.⁴ However, lower courts, including the trial court in this case, have occasionally construed the discovery provision to apply only when discovery occurs after the expiration of the applicable limitation period or within one year of the expiration

⁴The State is mindful that this Court has suggested that R.C. 2901.04(A) requires strict construction of R.C. 2901.13 against the State. See *State v. Swartz* (2000), 88 Ohio St.3d 131, 132, 2000-Ohio-277, 723 N.E.2d 1084. However, R.C. 2901.04(A) applies to "sections of the Revised Code defining offenses or penalties." Statutes of limitation do not define offenses or penalties, but are properly viewed as procedural, rather than substantive, provisions. See, e.g., *State v. Dycus*, 10th Dist. No. 04AP-751, 2005-Ohio-3990, ¶20; *State v. Bentley*, 11th Dist. No. 2005-A-0026, 2006-Ohio-2503, ¶¶50-57. Because R.C. 2901.13 is procedural, it should not be construed against the State and in favor of the accused pursuant to R.C. 2901.04(A). Rather, any construction of the statute should be "to effect the fair, impartial, speedy, and sure administration of justice." R.C. 2901.04(B).

of the limitation period. See, e.g., *State v. Dauwalter* (C.P., 1988), 43 Ohio Misc.2d 17, 540 N.E.2d 336; and *State v. Mitchell* (1992), 78 Ohio App.3d 613, 605 N.E.2d 978.

Such a result is inconsistent with the statute's provisions and is not required pursuant to this Court's prior decisions.

B. This Court's prior precedents of *Hensley* and *Climaco* do not preclude application of the discovery provision in this case.

This Court recognized the important policy concerns served by the discovery rule by giving full effect to R.C. 2901.13(F) in cases where, although the victim of a crime is aware of the acts in question, and may even appreciate the wrongfulness of the conduct in question, he or she may nevertheless face psychological, familial or other barriers to reporting the crime. See *State v. Hensley*, supra, 59 Ohio St.3d at 138. *Hensley* recognized the importance of statutes of limitations, but noted that a proper balance should be struck "between the need to place some restriction on the time period within which a criminal case may be brought, and the need to ensure that those who abuse children do not escape criminal responsibility for their actions." *Id.* at 139. Consequently, *Hensley* held that the corpus delicti of abuse of a child is not "discovered" until a person with a statutory reporting duty learns of the crime.

Hensley supports giving full effect to the discovery rule in this case. The individual most likely to have discovered the offense in this case was an elderly woman whom appellant sought to have declared incompetent, so that there were both legal and practical impediments to her reporting the crime. The normal policies and procedures employed by the State agency charged with recording deeds would not have detected

the falsified deed. Under the circumstances, it is appropriate to strike the *Hensley* balance in favor of ensuring that appellant does not escape criminal responsibility.

Appellant and appellant's amicus argue that *State v. Climaco*, 85 Ohio St.3d 582, 1999-Ohio-408, 709 N.E.2d 1192, precludes application of the discovery rule set forth in (F). The facts of *Climaco* are not analogous to this case, however, and *Climaco* should not be construed to preclude application of the discovery exception, other than in the limited circumstances described in that case.

Climaco involved charges of falsification in violation of R.C. 2921.13 related to the practice of under-reporting by lobbying groups of honoraria received by legislators. In February 1994, the media had publicized allegedly false public filings made in June and October, 1993. Four months later, the prosecutor's office initiated an investigation and appointed a special prosecutor, who issued a report in December, 1994. Nothing further was done until the Joint Legislative Ethics Committee wrote the prosecutor at the end of February, 1995, requesting that the matter be pursued. An indictment was finally filed a year after that request, in 1996, almost two years after the publicity surrounding the filings, and more than two years after the first, erroneous filings were made.

After noting that statutes of limitations are intended "to discourage inefficient or dilatory law enforcement, rather than to give offenders the chance to avoid criminal responsibility for their conduct," the Supreme Court refused to apply the discovery rule in R.C. 2901.13(F):

If we were to apply subsection (F) as urged by the State, thereby affording it two years from the discovery of the offense to begin prosecution, the

purposes and principles governing criminal statutes of limitations would be defeated. This is glaringly evident, considering the facts produced in the record.

The "facts produced in the record" referred to what the Court viewed as unnecessary delay by the State:

Contemporaneously with the media attention in February, 1994, appellant questioned whether its statements needed to be amended. After appellant was advised by Sherman that Sherman believed that appellant's interpretation was incorrect, appellant filed an amended statement. Then appellant, on its own, reviewed other filings and amended three other statements as well . . . We agree with appellant that the state had everything it needed to indict for falsification, at the very latest, on March 22, 1994, when the second amended reports were sent. Thus, we reject, as incredible, the state's claim that extraordinary amounts of work accounted for the delays. In fact, the record suggests just the opposite, i.e., that not much was being done to investigate the matter.

Id. at 587. Significantly, *Climaco* did not overrule *Hensley*. Rather, *Climaco* cited *Hensley* with approval. *State v. Climaco*, supra, 85 Ohio St.3d at 586.

Read in the context of *Hensley*, *Climaco* suggests merely that in that particular case, where the crime was evident from the amendments to the initial filings, and where there was evidence that the crime was known to the general public shortly after it occurred, the Supreme Court struck the balance in favor of strict enforcement of the statute of limitations, without application of the exception for discovery of the corpus delicti as provided in R.C. 2901.13(F).

Climaco is factually distinguishable from this case on several levels, so the balancing of interests considered in *Climaco* will have a different result in this case. First and most significantly, the defendant in *Climaco* filed amended statements and reports, which gave the State "everything it needed to indict for falsification." In

contrast, here the falsified deed did not provide officials with the information required to bring an indictment. As noted by Attorney Stamm, the standard operating procedures of the auditor and recorder's offices would not have detected the defect in the deed. See also, e.g., *State v. Edwards* (1997), 119 Ohio App.3d 237, 240, 695 N.E.2d 23 (filings in probate court were insufficient to put the State on notice that the defendant might have committed the crime of bigamy); and *State v. Lester* (1996), 111 Ohio App.3d 736, 738, 676 N.E.2d 1270 (rejecting the argument that auditor's knowledge of defendant's employment should be imputed to the Department of Human Services for purposes of discovery of fraud by an "aggrieved party or his representative").

Moreover, the subsequent amendments to the deed in this case, unlike the amended statements at issue in *Climaco*, did not correct the original falsification. In fact, those amendments compounded the falsification by laying a foundation for Cook to commit more criminal acts in wrongfully claiming personal income tax deductions.

Finally, the first notice to the State⁵ of Cook's misconduct occurred when the Bar Association notified the Lucas County Prosecutor's Office of its recommendations. Although the bar association's disciplinary proceedings were considered "public" after certification of the complaint, "public" does not mean "publicized." Any number of legal proceedings or professional organization's proceedings may be "public," but without

⁵The State does not suggest that notice to the prosecutor's office triggered the statute of limitations. Rather, the State has consistently acknowledged that certain individuals became aware of the falsified deed as early as February or March, 2004, and that the statute of limitations was triggered no earlier than this date. However, the date of the actual notice to the prosecutor's office does constitute a significant and relevant distinction between this case and *Climaco*. The timing of the notice to the State is also relevant for purposes of determining the applicability of R.C. 2901.13(B), as will be explained *infra*.

additional facts to suggest that the proceedings involve criminal conduct, the mere fact of "public" proceedings involving a professional is insufficient to put the State on notice that a crime was committed. In this case, there is simply no evidence of record to indicate that the State would have been on notice of any facts suggestive of criminal activity until after the Bar Association notified the Lucas County Prosecutor's Office of its recommendations on October 26, 2006.

These distinctions are significant. *Climaco* emphasized that the purpose of statutes of limitations is to encourage prompt action by law enforcement officials, but not to give offenders an opportunity to avoid criminal responsibility:

. . . such a time limit has the salutary effect of encouraging law enforcement officials to promptly investigate suspected criminal activity. . . . We recognized these purposes in [*Hensley*], where we found that the intent of R.C. 2901.13 is to discourage inefficient or dilatory law enforcement rather than to give offenders the chance to avoid criminal responsibility for their conduct.

Climaco, 85 Ohio St.3d at 586. In contrast with *Climaco*, the indictment in this case was filed within less than a year after notice to the prosecutor's office, so that there is no evidence of inefficient or dilatory law enforcement. Accordingly, *Climaco* fails to provide any guidance to this Court under the facts of this case.

Because of the material factual distinctions between this case and *Climaco*, the Sixth District reversed the trial court in this case. See *Cook*, supra, at ¶42. In doing so, the Sixth District joined the Eighth District in refusing to apply *Climaco* and in giving effect to R.C. 2901.13(F) where the record revealed no evidence of undue delay in the prosecution of a crime. See *State v. Caver*, 8th Dist. No. 91443, 2009-Ohio-1272, ¶28 (distinguishing *Climaco* where a church congregation discovered a fraud in 2003, the

case was turned over to the sheriff's office in 2006, and an indictment was filed on November 30, 2007).

The State's position is that the discovery exception is unconditioned on the expiration of the statute of limitations, and that there is no statutory authorization for scrutinizing delay in prosecuting claims to determine whether the discovery exception applies. Nevertheless, and regardless of the absence of statutory authority for the balance struck in *Climaco*, application of *Climaco* will not have the same result in this case. Neither the initial deed nor the subsequent amendments to the initial deed put the State on notice of a crime. Furthermore, the first notice to the State was in October, 2006, and the indictment was filed less than a year later, without any suggestion of the unwarranted delay that was evident in *Climaco*. *Climaco* should therefore be held not to bar application of the discovery exception R.C. 2901.13(F), so that the statute of limitations began to run, at the earliest, in 2004, and did not expire until 2010.

- C. R.C. 2901.13(B) does not bar the indictment, because the indictment was filed within one year of notice to the State, the aggrieved party of the fraud contemplated in the initial recording of the falsified deed.**

At the time⁶ of the trial court's decision, R.C. 2901.13 provided:

⁶R.C. 2901.13(B) was amended effective September 1, 2008, but the amendments do not materially affect the issues before this Court. Division (B) of the current version states:

(1) Except as otherwise provided in division (B)(2) of this section, if the period of limitation provided in division (A)(1) or (3) of this section has expired, prosecution shall be commenced for an offense of which an element is fraud or breach of a fiduciary duty, within one year after discovery of the offense either by an aggrieved person, or by the aggrieved person's legal representative who is not a party to the offense.

(continued...)

(A) (1) Except as provided in division (A)(2) or (3) of this section or as otherwise provided in this section, a prosecution shall be barred unless it is commenced within the following periods after an offense is committed:

(a) For a felony, six years;

(B) If the period of limitation provided in division (A)(1) or (3) of this section has expired, prosecution shall be commenced for an offense of which an element is fraud or breach of a fiduciary duty, within one year after discovery of the offense either by an aggrieved person, or by the aggrieved person's legal representative who is not a party to the offense.

R.C. 2901.13(B) does not bar the indictment in this case because suit was filed within one year of the discovery of the fraud by the aggrieved party. While the case was still before the trial court, the prosecution provided appellant with a Bill of Particulars explaining that the fraud element of the tampering charge was appellant's intent to avoid a Medicaid look-back period. As the Sixth Circuit of the United States Court of Appeals stated:

When Ms. Benfer first engaged Cook's services, Ms. Benfer expressed her desire to leave her farm as a gift to the United Methodist Church. Cook was concerned, however, that transferring the property to the Church would jeopardize Ms. Benfer's eligibility for Medicaid benefits because the value of the property would be included in Ms. Benfer's Medicaid eligibility should she need to move to an assisted living facility. See 42 U.S.C. §1396p(c)(1) (providing that the transfer of non-exempt "assets," such as an applicant's home, for less than fair market value within the required "look-back" period renders the applicant ineligible for assistance). Medicaid eligibility determinations require a five-year "look-back" period for assets transferred to a trust, but only a three-year "look-

⁶(...continued)

(2) If the period of limitation provided in division (A)(1) or (3) of this section has expired, prosecution for a violation of section 2913.49 of the Revised Code shall be commenced within five years after discovery of the offense either by an aggrieved person or the aggrieved person's legal representative who is not a party to the offense.

back" period for assets transferred to an individual. *Id.* at §1396p(c)(1)(B)(i). Consequently, because the Benfer Trust was established on June 8, 2001, any assets not divested to an individual before at least June 8, 1998 potentially would count against Ms. Benfer's Medicaid eligibility. In this context, if the backdating was an honest mistake, it seems a remarkable coincidence that the May 20, 1998 date, when taken together with the fact that the altered deed transferred the Benfer Farm to Cook as an individual rather than a trustee, effectively removed the value of the property from Ms. Benfer's Medicaid eligibility determination.

In re Cook (C.A. 6, 2009), 551 F.3d 542, 545.

The "aggrieved party" was thus the State or Medicaid, a subdivision of the State. See, e.g., *United States v. Adam* (C.A. 4, 1995), 70 F.3d 776, 781-82; and *Rehkop v. Berwick Healthcare Corp.* (C.A. 3, 1996), 95 F.3d 285, 289. However, the aggrieved party did not receive notice of the crime until, at the earliest, October, 2006, when the State Bar Association notified the prosecutor's office of the proceedings. The indictment was filed within a year of this notification. In this respect, the present case is factually distinct from appellant's authorities applying R.C. 2901.13(B). See, e.g., *State v. Mitchell*, *supra* (theft charges were properly dismissed when an indictment was filed more than six years after an offense and the relevant administrative agency became aware of improper receipt of food stamp benefits more than two years before the indictment was filed); and *State v. Stephens* (July 25, 1997), Clark App. No. 96 CA 0117, 1997 Ohio App. LEXIS 3424 (charge of falsification was properly dismissed when the indictment was filed more than six years after the defendant improperly received public assistance and more than three years after the relevant state agency discovered through a state audit that the defendant was employed while she received public assistance).

Of course, as the Sixth Appellate District concluded in this case, Ohio case law does not support imputing knowledge to the State based on the recording of the deed. Ohio courts have held that the public filing of a document, without more, is insufficient to put the State on notice that a crime has been committed. See *State v. Edwards*, supra, 119 Ohio App.3d at 240. Even if standard government procedures would reveal criminal activity, the statute of limitations does not begin to run until the State has actual notice of the crime. See, e.g., *United States v. Gordon* (C.A. 7, 2008), 513 F.3d 659, 665. Likewise, one governmental entity's knowledge of criminal activity should not be imputed to another. See *State v. Lester*, supra, 111 Ohio App.3d at 738; *United States v. Uribe-Rios* (C.A. 4, 2009), 558 F.3d 347, 352; and *United States v. Clarke* (C.A. 11, 2002), 312 F.3d 1343, 1347,

D. Rules of statutory construction giving effect to a "specific" provision instead of a "general" provision are inapplicable to R.C. 2901.13(B) and (F) under the facts of this case.

Despite the absence of any limiting or exclusionary language in R.C. 2901.13(F), appellant and appellant's amicus now argue that in this case, the "general" discovery provision of (F) must yield to the "specific" provision of (B) governing crimes with an element of fraud. The argument was not raised by either appellant or the State in the trial court or Court of Appeals, and neither of the lower courts' decisions was based on this purported distinction.

Moreover, the distinction between general and specific provisions fails to offer any meaningful rationale for resolving the question certified for this Court's consideration. The authorities relied upon by appellant, R.C. 1.12 and R.C. 1.51, both

operate to permit interpretation only when a "general" provision is in conflict with a "specific" provision. No such conflict is apparent in the facts of this case.

First and most importantly, the discovery provision in R.C. 2901.13(F) is not conditioned upon expiration of the statute of limitations set forth in (A). Division (B), on the other hand, operates only "[i]f the period of limitation provided in division (A)(1) or (3) of this section has expired." Second, the discovery provision operates upon the discovery of a crime by anyone, while the fraud provision operates upon discovery of a crime by the aggrieved party or the aggrieved party's representative. See, e.g., *State v. Martin*, 4th Dist. No. 00CA28, 2001-Ohio-2547 (when discovery occurred after the six-year statute of limitations period had expired, the state had a year from discovery to prosecute a charge of theft by deception).

The discovery provision applies in all circumstances and to all offenses, so long as the corpus delicti of an offense is undiscovered. Division (B) applies only in limited circumstances, and those circumstances do not exist in this case. There is no conflict between the provisions under the facts of this case, and therefore no need to apply the "general" versus "specific" distinction drawn by appellant based on R.C. 1.12 and 1.51.

Additionally, the argument is inconsistent with Ohio jurisprudence applying other provisions of R.C. 2901.13. The logical extension of appellant's argument is that **only** R.C. 2901.13(B), and no other tolling or triggering provisions of R.C. 2901.13, would apply to an offense involving an element of fraud. In fact, however, Ohio courts have not hesitated to apply R.C. 2901.13's other tolling provisions, even to offenses involving an element of fraud. The Eighth Appellate District, for example, applied the tolling

provision in R.C. 2901.13(G) when a defendant failed to appear at arraignment on charges of tampering. *State v. Rodriguez*, 8th Dist. No. 89198, 2007-Ohio-6835, ¶¶29-34. See also *State v. Roberts*, 8th Dist. No. 84949, 2005-Ohio-2615, ¶14 (charges of fraud, identity theft, and tampering with government records were tolled pursuant to R.C. 2901.13(G) by the defendant's concealing her identity and holding herself out to be another person). Similarly, the delayed triggering provisions in R.C. 2901.13(D) have been applied to a charge of theft when the defendant made a fraudulent application of social security benefits for her minor son and collected benefits over a number of years. *State v. Wallace*, 160 Ohio App.3d 528, 2005-Ohio-1746, ¶¶29, 828 N.E.2d 125. Finally, in *State v. Caver*, supra, 2009-Ohio-1272, ¶¶25, the tolling provision of division (F) and the continuing course of conduct provision in division (D) were applied to several offenses, including forgery in violation of R.C. 2913.31, an element of which is fraud.

Appellant argues that the Sixth Appellate District has previously "recognized that the tolling provision of R.C. 2901.13(B) is controlling in cases involving an offense of which fraud is an element." (Merit Brief of Defendant-Appellant at p.14.) In support of this assertion, appellant relies upon *State v. Gravelle*, 6th Dist. Nos. H-06-042, H-06-043, H-06-044, H-06-045, 2008-Ohio-4031. In fact, *Gravelle* did not involve any analysis of R.C. 2901.13(F) and only cited the discovery provision in a summary of the *Climaco* case. *Id.* at ¶¶19-20. *Gravelle* held that under the facts of that case, neither R.C. 2901.13(B) nor R.C. 2901.13(D) was applicable. *Id.* at ¶¶23, 27, 41. However, *Gravelle* did not conclude that R.C. 2901.13(B) was the only means by which the statute of limitations for a fraud offense may be extended or tolled.

As already noted, the allegedly "specific" provision in R.C. 2901.13(B) does not apply to bar the indictment in this case, because the indictment was filed within one year of the aggrieved party (the State) receiving notice of the offense. The general/specific distinction advanced by appellant is unnecessary because the discovery and fraud provisions do not conflict. Moreover, the distinction is inconsistent with Ohio case law applying other provisions of R.C. 2901.13 to cases involving an element of fraud. The distinction advanced by appellant and appellant's amicus should therefore be rejected.

CONCLUSION

In his dissent in *Climaco*, Chief Justice Moyer noted:

. . .in Ohio too, pursuant to R.C. 2901.13(A), a criminal statute of limitations "normally" begins to run when the crime is complete--but not always. This is so because R.C. 2901.13 includes exceptions to the normal rule, including subsection (F), which provides: "The period of limitation shall not run during any time when the corpus delicti remains undiscovered." This language, by its own clear and express terms, means that the clock in criminal cases simply does not begin to run for statute-of-limitations purposes until the corpus delicti is discovered.

Climaco, supra, 85 Ohio St.3d at 590. In this case, where there is no suggestion of undue delay by the State in prosecuting the case once it received notice of the crime, both the clear language of the statute and the holdings of *Climaco* and *Hensley* require a finding that the limitations period did not begin running until, at the earliest, 2004. The State's indictment, filed well before 2010, was therefore timely.

Appellee therefore requests that this Court affirm the district of the Sixth Appellate District and hold that the discovery provision of R.C. 2901.13(F) applies to toll the statute of limitations as long as the offense remains undiscovered.

Respectfully submitted,

JULIA R. BATES, PROSECUTING ATTORNEY
LUCAS COUNTY, OHIO

By: 
Evy M. Jarrett, #0062485
Assistant Prosecuting Attorney

CERTIFICATION

I certify that a copy of the foregoing was sent via ordinary U.S. Mail this 24th day of May, 2010, to John F. Potts, 405 Madison Avenue, Suite 1010, Toledo, Ohio 43604; to Peter Galyardt, Office of the Ohio Public Defender, 250 E. Broad Street, Suite 1400, Columbus, Ohio 43215; and to Benjamin C. Mizer, Ohio Attorney General, 30 East Broad Street, 17th Floor, Columbus, Ohio 43215.


Evy M. Jarrett, #0062485
Assistant Prosecuting Attorney



Case: 2010 0926
Docket: 666237
Date Filed: 05/24/10
Description: Memorandum in support of jurisdiction

**Clerk's Office
Scanning Cover Sheet**

ORIGINAL

IN THE SUPREME COURT OF OHIO

CHARLES R. POWELL,

Appellee/Cross-Appellant

vs

TOLEDO PUBLIC SCHOOLS,

Defendant,

and,

MARSHA P. RYAN, ADMINISTRATOR
BUREAU OF WORKERS' COMP.

Appellant/Cross-Appellee

CASE NO. 10-0926

ON APPEAL FROM THE LUCAS
COUNTY COURT OF APPEALS
SIXTH APPELLATE DISTRICT

Court of Appeals Case No. L-09-1140

MEMORANDUM IN SUPPORT OF JURISDICTION OF
APPELLANT CHARLES POWELL

Marc G. Williams-Young (0009825)
Elaine B. Szuch (0080332)
Spitler & Williams-Young Co., L.P.A.
1000 Adams Street, Suite 200
Toledo, Ohio 43604-7551
Phone: (419) 242-1555
Fax: (419) 242-8827
Counsel for Plaintiff/Appellee/
Cross-Appellant
Charles R. Powell

Joshua W. Lanzinger (0069260)
Assistant Attorney General
One Government Center, Suite 1340
Toledo, Ohio 43604-2261
Phone: (419) 245-2550
Fax: (419) 245-2520
Counsel for Defendant/Appellant/
Cross-Appellee Administrator, Bureau
of Workers' Compensation

John P. Hayward (0065070)
Spengler Nathanson P.L.L.
608 Madison Avenue, Suite 1000
Toledo, Ohio 43604-1169
Phone: (419) 241-2201
Fax: (419) 241-8599
Counsel for Defendant
Toledo Public Schools

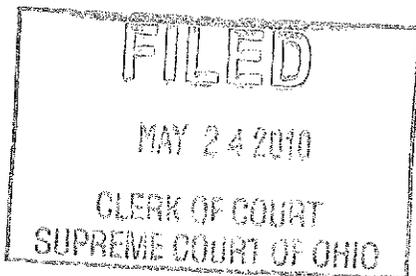


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Explanation Of Why This Case Is A Case Of Public Or Great General Interest

This workers' compensation case presents three issues of great public or general interest. Each issue presents a matter of first impression before the Ohio Supreme Court.

First, Ohio Revised Code Section 4123.512 Subsection (F) provides payment of general costs, including attorney fees "to be fixed by the trial judge" if the claimant's "right to participate" in the Workers' Compensation Fund established upon final determination of an appeal". The trial court below ordered the employer to pay plaintiff's counsel attorneys fees upon granting plaintiff's motion for summary judgment. However, the trial court further ordered that execution of payment of fees be stayed "pending any appeal of this order." When the court of appeals reversed the motion for summary judgment, they reversed the order awarding attorney fees. This decision is contrary to 4123.512(F) as the meaning of "appeal" as contemplated by the statute is the appeal to the common pleas court. To uphold this interpretation of the statute would have the effect of penalizing a successful claimant and goes against the language of the statute and the intent of the General Assembly.

Second, when an employer contests a workers' compensation matter in the court of common pleas, R.C. 4123.512(F) requires that the attorney fees be taxed against the employer and not the Bureau of Workers' Compensation. The trial court below taxed the attorney fees to the Bureau despite the employer actively contesting the claim. To allow an employer to participate in a case and then not tax the costs and attorney fees against them would permit employers to routinely contest workers' compensation actions without

any consequence. Then, on a regular basis, the injured worker would face double the opposition without requiring the employer to pay the costs as specifically required under the statute. It is a matter of public policy to "level the playing field" in workers' compensation cases.

Thirdly, this court in both State ex rel. Zamora v. Indus. Comm. (1989), 45 Ohio St.3d 17, 543 N.E.2d 87 and State ex rel. Crocker v. Indus. Comm. (2006), 111 Ohio St.3d 202, 855 N.E.2d 848 found that medical evidence cannot be used to accept one issue and reject another for the same medical opinion. This "Zamora principle" should be applied in the instant matter in a "right to participate" scenario. This theory needs to be put in place to avoid being unfair to injured workers and to stop the commission from using medical evidence as it deems fit with inconsistent results and to the detriment of injured workers. Mr. Powell is requesting that this court use the same principles in the case law and apply it to all workers' compensation cases and not solely "extent of disability" issues.

Statement Of The Case And Facts

This is a Workers' Compensation case. Plaintiff/Appellee/Cross-Appellant Charles R. Powell is the claimant. Toledo Public Schools is the Employer, but it did not file an appeal in the instant matter. The Administrator of the Bureau of Workers' Compensation is the Defendant/Appellant/Cross-Appellee.

On February 29, 2003, Charles Powell was an employee of the Toledo Public Schools when he sustained an injury in the course of, and arising out of, his employment. (Complaint, para. 4) He filed a claim for workers' compensation benefits which was assigned claim number 03-319032. (Complaint, para. 5) This claim was approved for the

medical conditions of "sprain/strain right shoulder (840.8); contusion right knee (924.11), and tear right supraspinatous (840.6)." (Complaint, para. 6)

On July 1, 2004, Mr. Powell filed a C-86 Motion seeking to amend his claim for the following medical conditions: "aggravation of pre-existing osteochondritis dessicans, mild degenerative spur, lateral joint space, and osteoarthritis right knee." (See Spitler Affidavit attached to Plaintiff's Motion for Summary Judgment) This motion was supported by the following documents: (1) the response of Dr. Saddemi to a February 2, 2004, questionnaire; (2) a September 5, 2002, chart note by Dr. Saddemi; (3) an October 22, 2003, chart note by Dr. Saddemi; and (4) the February 19, 2003, x-ray report. (See exhibits attached to Spitler Affidavit.)

On August 11, 2004, or 42 days later, Toledo Public Schools filed with the Bureau of Workers' Compensation an application for relief pursuant to R.C. 4123.343, commonly referred to as a handicap reimbursement, asserting that Charles Powell had a pre-existing condition of "arthritis" which contributed to the cost of the claim by way of causation or aggravation. (See Depo. of Cynthia Davis and Depo. Exhibits 1 and 3.)

The evidence included with Toledo Public Schools' application, and the evidence cited by the BWC adjudicator, Staff Attorney Cynthia Davis, is *identical* to the evidence attached to Mr. Powell's C-86 Motion seeking amendment for the aggravation of these medical conditions. (See Depo. of Cynthia Davis and Depo Exhibits 1, 8, 11.)

By Order dated September 29, 2004, this handicap reimbursement application was granted by Defendant Bureau of Workers' Compensation thru its Staff Attorney, Cynthia Davis. (See Depo of Cynthia Davis as well as Depo Exhibits 1 and 6.)

Despite the September 29, 2004 Order of the Bureau of Workers' Compensation,

Mr. Powell's C-86 Motion, filed July 1, 2004, seeking the additional right to participate for aggravation of these pre-existing conditions, was denied throughout the commission hearings. These denials led to an appeal to the Lucas County Court of Common Pleas pursuant to R.C. 4123.512. On December 28, 2006, Plaintiff Powell filed a Voluntary Notice of Dismissal of the 2005 case pursuant to Civ. Rule 41(A).

On November 14, 2007, Charles Powell timely filed a complaint with the Lucas County Court of Common Pleas. Charles Powell filed a motion for summary judgment on theories of causation and aggravation. In the Opinion and Judgment Entry journalized October 29, 2008, the trial court granted summary judgment holding in pertinent part:

"[T]he Court adopts and incorporates Powell's proffered authority and arguments and finds that Powell is entitled to summary judgment with respect to his claim that his February 19, 2003 industrial injury either aggravated his pre-existing arthritic conditions or directly caused them because the BWC, in its September 29, 2004 Order granting TPS's application for handicap reimbursement, determined the dispositive issues in Powell's favor. Accordingly, there is no genuine issue of material fact that Powell is entitled to participate in the State Insurance Fund for these conditions and that the March 25, 2005 and August 14, 2007 Orders of the Industrial Commission's Staffing Hearing Officers denying Powell's motions to amend his workers' compensation claim to include aggravation or causation of arthritic conditions, from which Powell appeals, will be reversed."

On November 5, 2008 Charles Powell filed a motion for attorneys fees pursuant to Section 4123.512(F) and requested an order from the trial court granting attorney fees to plaintiff's counsel in the sum of \$2,500.00.

The trial court held a hearing on April 15, 2009 on Mr. Powell's motion and on April 23, 2009 an Order was filed finding:

[T]hat the plaintiff's right to participate in the fund is established, that Defendant Toledo Public Schools contested the plaintiff's right to participate, and that the effort expended by counsel for plaintiff is sufficient to find the

motion well taken and therefore grants same.

The trial court ordered Toledo Public Schools to pay plaintiff's counsel attorneys fees in the sum of \$2,500.00. The trial court further ordered that execution of payment of fees be stayed "pending any appeal of this order."

However, with leave of court, the Bureau of Workers' Compensation filed a Motion To Correct Court's Order in the trial court on September 16, 2009. The trial court granted the motion and revised its April 23, 2009, order to assess the payment of the \$2500.00 attorney fees to the Administrator, Bureau of Workers' Compensation. It is the decision of the trial court staying the attorney fees that Charles Powell appealed to the Sixth District. The Administrator appealed the granting of summary judgment. Toledo Public Schools did not appeal.

The Lucas County Court of Appeals, Sixth Appellate District reversed the granting of summary judgment and the trial court's order awarding attorney fees.

Arguments In Support Of Propositions Of Law

PROPOSITION OF LAW 1: Where a claimant's right to participate is established in the court of common pleas, an award of statutory attorney fees is payable under Section 4123.512(F), Revised Code irrespective of any further appeal.

Where an injured worker is successful before a court of common pleas, the General Assembly granted that injured worker the entitlement to statutory attorney fees. In the instant matter, Mr. Powell's motion for summary judgment was granted by the trial court, and he was awarded attorney fees. However, the Sixth District Court of Appeals, in reversing summary judgment found that "we must also reverse the trial court's April 23,

2009 order awarding attorney fees.” (Decision and Judgment) Mr. Powell’s position is that the statute provides for attorney fees irrespective of any further appeal.

At least since the Supreme Court’s holding in Ginnis v. Atlas Painting & Sheeting Co. (1992), 63 Ohio St.3d 754, there has been no dispute that the statute, Section 4123.519 (now Section 4123.512), grants authority to the trial court to award attorney fees. Indeed, the plaintiff is not required to prevail on all conditions for an award of attorney fees and costs, nor is it necessary that an actual verdict be rendered in the case. McGeehan v. State BWC, 2000 WL 1877586 (Ohio App. 10 Dist.) Hollar v. Pleasant Township, 2003 WL 22989243 (Ohio App. 10 Dist.) Ramirez v. Toledo Stamping & Mfg. (1996), 114 Ohio App.3d 12. The purpose of the statute is to “minimize the expenses incurred by an injured worker who is ultimately successful in his claim for compensation.” Ramirez, at 15.

The award of attorney fees under R.C. 4123.512(F) is based on success a party has in the common pleas court irregardless of an appeal.

Section 4123.512(F), Revised Code, provides as follows:

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 the effort expended, in the event the claimant’s right to participate or to continue 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. (Emphasis Added)

The Ohio Supreme Court has also explained that a verdict itself is not a prerequisite to the award of attorneys fees. In its syllabus, the court in Hospitality Motor Inns, Inc., v. Gillespie (1981), 66 Ohio St.2d206, held:

The “legal proceeding” contemplated by R.C. 4123.519 is the act of appeal, itself, and once such appeal is perfected, the Court of Common Pleas has

authority to award attorney's fees to the successful claimant, notwithstanding the fact that the appeal is subsequently dismissed for lack of jurisdiction.

The rationale for a stay of payment of attorney fees under Section 5123.512, Revised Code, is the mistaken belief that if defendants' prevail on appeal, no attorney or expert fee award is necessary pursuant to R.C. 4123.512(F). Notably absent from defendants' request to the court was any case authority for the proposition for the stay.

Indeed the authority is to the contrary. In Cunningham v. Goodyear Tire & Rubber Co., (1995), 104 Ohio App.3d 385, the court of appeals stated the following:

Defendant has argued that costs and attorney fees should not have been awarded in this case because it appealed the decision of the court of common pleas to this court. In support of its argument, it has claimed that the restriction to "final determination of an appeal" in Subsection (F) [Section 4123.512] means that costs and attorney fees may not be taxed until the exhaustion of all appeals from the decision of the court of common pleas. When reviewed with the statutory framework, however, "final determination of an appeal" *refers to the decision of the court of common pleas.* (Emphasis Added)

Pursuant to the statutory workers' compensation scheme, decisions of the Industrial Commission are appealed to the courts of common pleas. In Hospitality Motor Inns, Inc. V. Gillespie (1981), 66 Ohio St.2d 206, 20 O.O.3d 209, 421 N.E.2d 1134, syllabus, the Ohio Supreme Court stated, "the legal proceedings' contemplated by R.C. 4123.519 [now 4123.512] is the act of appeal [to the court of common pleas], itself." In addition, the statute's express language authorizes a court of common pleas to determine the amount of the costs and attorney fees. Accordingly, the "final determination on appeal" referred to in R.C. 4123.512(F) is the appeal from the industrial commission's decision to the court of common pleas. Therefore, to the extent that costs and attorney fees were awarded pursuant to 4123.512(F), the award was not premature. (*Id* p.394-395.)

It remains Mr. Powell's position that where a claimant's right to participate is established in the court of common pleas, an award of statutory attorney fees is payable under Section 4123.512(F), Revised Code irrespective of any further appeal.

PROPOSITION OF LAW 2: Section 4123.512(F), Revised Code mandates, that when the employer contests a workers' compensation claim in the court of common pleas, the attorney fees shall be taxed against the employer and not the Bureau of Workers' Compensation.

Again looking at 4123.512(F), the statute provides in pertinent part as follows:

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 the effort expended, in the event the claimant's right to participate or to continue 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. (Emphasis Added)

The language chosen by the General Assembly in 4123.512(F) is clear that, where an employer contests the right of the claimant to participate in the fund, it *shall* be taxed with the obligation to pay the injured workers' statutory attorney fees. It is only in the event that the commission or the bureau, *rather than the employer*, contest the injured workers' right to participate that the fees may be taxed against either the commission or bureau.

The Supreme Court has long held that "words used in a statute must be taken in their usual, normal or customary meaning...[and] it is the duty of the court to give effect to the words used and not insert words not used." State ex rel. Richard v. Bd. of Trustees of the Police & Firemen's Disability & Pension Fund (1994), 69 Ohio St.3d 409, 411 N.E.2d 1292. The trial court in the instant matter failed to do so.

In its Answer to Mr Powell's complaint, throughout the case discovery and in its motion and memorandum in opposition to Mr. Powell's motion for summary judgment, Toledo Public Schools contested Mr. Powell's right to participate in the fund before the trial court. This is a matter of record. As such, the statute mandates that Toledo Public

Schools *shall* be taxed for the costs of the legal proceedings.

It is also important to note that Toledo Public Schools did not appeal the trial court's April 23, 2009, Order which assessed costs against it. It apparently understands that the trial court actually followed the statutory requirements when the written April 23, 2009, Order was issued by the trial court. The "revised" Judgment Entry and Order filed September 24, 2009, however, does not comply with the statutory directives.

The implications of allowing employers to participate in the workers compensation fund without having to pay the requisite statutory attorney fees has the potential to create problems for any member of the general public who gets hurt at work and must request workers' compensation benefits. The trial court below taxed the attorney fees to the Bureau despite the employer actively contesting the claim. To allow an employer to participate in a case and then not tax the costs and attorneys fees against them would permit employers to routinely contest workers' compensation actions without any consequence. Then, on a regular basis, the injured worker would face double the opposition without requiring the employer to pay the costs as specifically required under the statute.

PROPOSITION OF LAW 3: When the Bureau of Workers' Compensation accepts the medical records and opinions to grant the employer a handicap reimbursement, it cannot reject the same medical records and opinions and deny the motion filed by the injured worker to amend the claim for the same medical condition.

The medical evidence included with Toledo Public Schools' handicap application, and the medical evidence cited by the BWC adjudicator, Staff Attorney Cynthia Davis, in granting the award is *identical* to the medical evidence attached to Mr. Powell's C-86

Motion seeking amendment for the aggravation of these medical conditions. (See Depo. of Cynthia Davis and Depo Exhibits 1, 8, 11.)

The facts and issues underlying both the hearing on the handicap application and the hearings on Mr. Powell's C-86 motion are the same. Charles Powell had medical evidence of arthritic conditions that preexisted his date of work injury in his claim. The same doctor's opinion was introduced and relied upon to support a medical/legal conclusion that the work injury aggravated the pre-existing conditions. The law in effect at the time required only 'aggravation' (not substantial aggravation). The Administrator, Charles Powell and the Toledo Public Schools -whether actually present or not-were, by operation of law, parties to the proceedings. The BWC made a determination that, based on such evidence – *the very same evidence advanced by the plaintiff in his motion at issue in this proceeding* – the work injury did aggravate the pre-existing conditions.

The purpose of the handicap provision of the workers' compensation law is to encourage employers to hire persons with handicaps by providing financial relief where the handicap condition contributes to the cost of claim. The opening language of R.C. 4123.343 reflects this purpose:

This section shall be construed liberally to the end that employers shall be encouraged to employ and retain in their employment handicapped employees as defined in this section.

R.C. 4123.343(A) then defines what it means by "handicapped employee":

(A) As used in this section, "handicapped employee" means an employee who is afflicted with or subject to any physical or mental impairment, or both, whether congenital or due to an injury or disease of such character that the impairment constitutes a handicap in obtaining reemployment if the employee should become unemployed and whose handicap is due to any of the following diseases or conditions...

It is also stated in Concord Food, Inc. v. Ohio Bureau of Workers' Compensation (1996), 108 Ohio App.3d 675, that:

Handicap reimbursement to employer is a substantive right that vests when Industrial Commission determines causal relationship between the handicap and the injury or disability which entitles employer to handicap reimbursement for that claim.

The issue of aggravation or causation of the handicap condition is essential in the determination and final judgment in a handicap reimbursement proceeding as that is the purpose of such an application and proceeding. Therefore, a determination was made as a result of a legal proceeding that Charles Powell's handicap condition was aggravated or caused by his industrial injury such that Toledo Public Schools was entitled to the relief it sought under R.C. 4123.343.

Subsection (D) of R.C. 4123.343 provides, in pertinent part:

(2) Whenever a handicapped employee is injured or disabled or dies as a result of an injury or occupation disease and the administrator finds that the injury or occupation disease would have been sustained or suffered without regard to the employee's pre-existing impairment but *that the resulting disability or death was caused at least in part through aggravation of the employee's pre-existing disability*, the administrator shall determine in a manner that is equitable and reasonable and based upon *medical evidence* the amount of disability or proportion of the cost of the death award that is attributable to the employee's pre-existing disability and the amount found shall be charged to the statutory surplus fund. (Emphasis added).

Therefore, when granting a handicap reimbursement the administrator is required to make the findings as set forth above in R.C. 4123.343(D) and the September 29, 2004 Order *did* in fact make those findings in saying:

It is the finding that the claimant herein had the following pre-existing condition(s): Arthritis. It is further the finding that the pre-existing handicapped condition(s) contributed to the cost of the claim by way of causation or aggravation. (Ohio Bureau of Workers' Compensation Handicap

Reimbursement Determination)

The medical evidence relied upon by the Toledo Public Schools to support its application for handicapped reimbursement is the very same evidence that was submitted by Mr. Powell with his C-86 Motion seeking to prove aggravation of his pre-existing disability. The adjudicator of the handicap application relied specifically upon that evidence as reflected in Ms. Davis deposition testimony and as documented in the exhibits attached thereto.

This Court has addressed similar circumstances in two prior instances. It is these holdings Mr. Powell is requesting this Court to clarify and/or extend to workers' compensation matters that do not involve extent of disability issues.

First, in State ex rel. Zamora v. Indus. Comm. (1989), 45 Ohio St.3d 17, a physically injured claimant moved simultaneously for an additional psychiatric allowance and permanent total disability based in part on the claimant's depression. Two doctors agreed that the claimant suffered from depression. One of the doctors, Dr. Mann, found that Zamora was "suffering from depression in the severe range" and "permanently and totally disabled". The other doctor, Dr. Kogut, thought the depression predated the injury. The Commission granted the additional allowance and, in doing so, in effect rejected Dr. Kogut's opinion. It later denied permanent total disability (PTD) based in part on Dr. Kogut's report. The claimant challenged the decision and prevailed judicially, as "it would be inconsistent to permit the commission to reject the Kogut report at one level, for whatever reason, and rely on it at another." Zamora, 45 Ohio St.3d at 19

In State ex rel. Crocker v. Indus. Comm. (2005), 111 Ohio St.3d 202 the court expounded on the "Zamora principle". On the question of whether the injured worker,

Crocker, had reached maximum medical improvement, the Industrial Commission rejected the opinion of the claimant's treating doctor, Dr. Clague, and found the claimant's condition had become permanent and denied further temporary total disability (TTD) compensation. Subsequently, in a proceeding on the question of a loss-of-use award, the Commission then turned around and found Dr. Clague's opinion of expected improvement in functioning to be persuasive and denied the loss-of-use award on the basis that the claimant's condition was not permanent.

In the mandamus action, the appellate court ruled that the Commission had abused its discretion under the concept of Zamora as it was error to reject Dr. Clague's opinion that Crocker's condition was not permanent by denying TTD and then reviving and relying upon that same opinion to deny Crocker's motion for a loss-of-use award.

In affirming the appellate court's grant of the writ of mandamus, the Ohio Supreme Court discussed the treatment by the Commission of the medical opinion of Dr. Clague and the unfairness and inappropriateness of the Commission's actions. The Supreme Court points out that the focus should not on the content of the medical evidence not the chronology of the reports.

Zamora would be meaningless if it were concerned only with chronology and not content. If only chronology mattered, a doctor could simply copy an old report, put a new date on it, and submit it as new evidence. Zamora instead seeks to prohibit exactly what happened here. In all three reports, Dr. Clague consistently issued the same opinion on the subject of further improvement: Crocker would get better with additional treatment. When Clague made that statement in February, it was deemed unpersuasive, and temporary total compensation was accordingly denied. When Dr. Clague made the statement in June, the commission suddenly deemed it persuasive and used it to deny Crocker's loss-of-use application. Crocker, *supra*.

Most importantly the Supreme Court focused on the danger of allowing medical

evidence to be rejected at one stage and then found persuasive at another:

This result is *unfair and inappropriate*. Dr. Clague's opinion of future improvement is either persuasive or it is not. The commission cannot have it both ways, particularly to Crocker's dual detriment. (Emphasis Added) Crocker, supra.

This is exactly the situation plaintiff Mr. Powell finds himself. The opinion of Dr. Saddemi was found persuasive for purposes of the handicapped reimbursement for the condition of arthritis, but is then found unpersuasive for purposes of Mr. Powell's C86 motion to amend his claim for the same conditions. This is grossly "unfair and inappropriate" and clearly is to Mr. Powell's detriment.

It is hypocritical for the employer herein, Toledo Public Schools, to benefit from the Mr. Powell's handicapped conditions through the relief of R.C. 4123.343, having utilized Mr. Powell's *own medical expert's opinion*, and then turn around and claim such medical opinion is not persuasive. It is equally hypocritical of the BWC to advance this same argument in defense of the Commission's orders in this case from which Powell has taken appeal.

This "Zamora principle" should be applied in the instant matter in a "right to participate" scenario. This theory needs to be put in place to avoid being unfair to injured workers and to discontinue the commission to use medical evidence as it deems fit with inconsistent results to the detriment of injured workers Mr. Powell urges this Court to extend or clarify the holding in Zamora and Crocker to workers' compensation matters not limited to the "extent of disability" issues.

Conclusion

Charles R. Powell respectfully requests that the court accept this case for a decision on the merits. The questions posed are of public or general interest to the people of Ohio.

Respectfully Submitted,

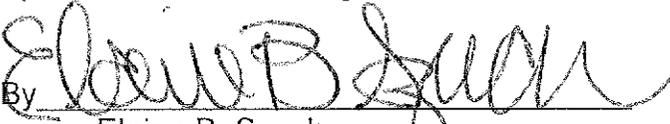
Spitler & Williams-Young Co., L.P.A.

By 
Elaine B. Szuch

CERTIFICATE OF SERVICE

This is to certify that the foregoing Memorandum in Support of Jurisdiction was mailed to Joshua W. Lanzinger, Assistant Attorney General, One Government Center, Suite 1340, Toledo, Ohio 43604-2261, and to John P. Hayward, Spengler Nathanson, P.L.L., Four SeaGate, Suite 400, Toledo, Ohio, 43604-2622 this 21st day of May, 2010.

Spitler & Williams-Young Co., L.P.A.

By 
Elaine B. Szuch

Appendix

FILED
COURT OF APPEALS

2010 APR -9 A 8:04

COMMON PLEAS COURT
BERNIE QUILTER
CLERK OF COURTS

IN THE COURT OF APPEALS OF OHIO
SIXTH APPELLATE DISTRICT
LUCAS COUNTY

Charles R. Powell

Court of Appeals No. L-09-1140

Appellee/Cross-Appellant

Trial Court No. CI07-7464

v.

Toledo Public Schools, etc., et al.

Defendant

DECISION AND JUDGMENT

[Administrator, Bureau of Workers
Compensation - Appellant/Cross-Appellee]

Decided: APR 09 2010

* * * * *

Marc G. Williams-Young and Elaine B. Szuch, for appellee-cross-appellant.

John P. Hayward, for defendant.

Richard Cordray, Ohio Attorney General and Joshua W. Lanzinger, Assistant
Attorney General, for appellant/cross-appellee.

* * * * *

E-JOURNALIZED

OSOWIK, J.

{¶ 1} This is an appeal and cross-appeal from judgments of the Lucas County Court of Common Pleas that granted summary judgment in favor of appellee/cross-appellant Charles Powell in his administrative appeal from the denial of his claim seeking to amend his workers' compensation benefits and the granting of appellant's request for a stay of payment of attorney fees pending appeal. For the reasons that follow, the judgment of the trial court is reversed as to summary judgment. Further, the trial court's judgment awarding attorney fees and ordering a stay of the payment of the fees pending appeal is also reversed.

{¶ 2} Appellant/cross-appellee, Administrator, Bureau of Workers' Compensation ("BWC"), sets forth the following assignment of error:

{¶ 3} "The trial court erred as a matter of law when it granted Plaintiff-Appellee's motion for summary judgment and found that the Defendants were precluded from arguing that the Plaintiff did not sustain an aggravation of his pre-existing arthritis based upon the doctrine of collateral estoppel."

{¶ 4} The following undisputed facts are relevant to the issues raised on appeal. In February 2003, Powell was injured during the course of, and arising out of, his employment with the Toledo Public Schools ("TPS"). Powell filed a claim for workers' compensation benefits with the BWC and his claim was allowed. On July 2, 2004, Powell filed a motion, commonly referred to as a "C-86 motion," to amend his claim to

include additional medical conditions arising from the aggravation of his pre-existing arthritis. On August 11, 2004, the TPS filed with the BWC an application for relief, commonly referred to as a "handicap reimbursement," pursuant to R.C. 4123.343. The TPS asserted that Powell's pre-existing condition of arthritis had contributed to the cost of the claim by way of causation or aggravation. On September 29, 2004, the BWC granted the handicap reimbursement application. Despite the order granting the TPS application, Powell's C-86 motion was denied by the Industrial Commission ("Commission") on February 16, 2005. Powell appealed the decision and was denied again; further appeal to the Commission was refused. On June 15, 2005, Powell filed a complaint and appeal in the Lucas County Court of Common Pleas, pursuant to R.C. 4123.512, seeking allowance of the additional medical conditions denied by the Commission. In December 2006, however, Powell filed a voluntary notice of dismissal of the case. Also in December 2006, Powell filed another C-86 motion asking that his claim be amended. The motion was denied by the district hearing officer on July 3, 2007; upon appeal, it was again denied on August 14, 2007. By order dated September 12, 2007, a staff hearing officer of the Commission refused Powell's appeal from the August 14, 2007 order. On November 14, 2007, Powell filed an appeal in the trial court from the August 14, 2007 order.

{¶ 5} On August 5, 2008, Powell filed a motion for summary judgment in which he argued that the handicap reimbursement granted to the TPS by the BWC constituted an automatic allowance of the additional medical conditions he requested. On October 29, 2008, the trial court granted summary judgment, finding that the TPS and the BWC were precluded by collateral estoppel from arguing that Powell did not sustain an aggravation of his pre-existing arthritis. The trial court ordered that Powell was entitled to participate in the State Insurance Fund for the aggravation of his arthritis sustained as a result of his employment with the TPS. Defendant Administrator, BWC, filed a notice of appeal; the TPS has not appealed.

{¶ 6} In support of its sole assignment of error, the BWC argues that collateral estoppel does not apply here since the doctrine requires an identity of issues and the issues in the two administrative proceedings were separate and distinct. Appellant further asserts that there was no privity of parties as required for res judicata to apply.

{¶ 7} An appellate court's review of a summary judgment determination is conducted on a de novo basis, applying the same standard used by a trial court. Summary judgment will be granted when there remains no genuine issue of material fact and, considering the evidence most strongly in favor of a nonmoving party, reasonable minds can only conclude that the moving party is entitled to judgment as a matter of law. Civ.R. 56(C).

{¶ 8} The doctrine of res judicata has been described by the Ohio Supreme Court as encompassing both claim preclusion (historically called estoppel by judgment in Ohio) and issue preclusion (traditionally known as collateral estoppel). *Grava v. Parkman*, 73 Ohio St.3d 379, 381, 1995-Ohio-331. Collateral estoppel precludes the re-litigation of claims or issues that have been previously litigated in a judicial setting. *Fort Frye Teachers Assn. v. S.E.R.B.*, 102 Ohio St.3d 283, 2004-Ohio-2947, ¶ 10, citing *Krahn v. Kinney* (1989), 43 Ohio St.3d 103, 107.

{¶ 9} The case before us arises from the results of two separate administrative proceedings conducted to address two distinct issues. The first was Powell's C-86 motion for an additional allowance heard by the Commission. That hearing and Powell's subsequent appeals of the denial were limited to Powell's right to participate in the workers' compensation fund for additional conditions. Totally unrelated to Powell's C-86 motion was the TPS administrative motion seeking handicap reimbursement under R.C. 4123.343. This motion was adjudicated in a separate hearing by the BWC to determine a separate issue: whether the TPS should receive a handicap reimbursement.

{¶ 10} Powell's appeal to the trial court arose from two applications regarding two distinct issues, examined in separate hearings and determined by separate state agencies. The handicap reimbursement is not related to the Commission's determination of a claimant's participation in the workers' compensation system. This distinction is reflected by language contained in the Industrial Commission's Hearing Officer Manual. In

"Memo A2," promulgated pursuant to R.C. 4123.343, captioned "Handicap Relief vs. Additional Allowance," the guidelines state, in relevant part, that "[t]he granting of handicap relief does not constitute an automatic additional allowance in the claim. Instead, the determination of whether or not an additional condition should be allowed in the claim is to be made *by a separate determination* that is not based on the fact that handicap relief may or may not have been granted." (Emphasis added.)

{¶ 11} Thus, we see that a handicap reimbursement granted to an employer is unrelated to, and has no influence on, the Commission's determination of whether a claim should be allowed for a particular medical condition. We further note that R.C. 4123.343(D), which sets forth a procedure for determining whether an employer is eligible for reimbursement, does not provide for a claimant's right to be heard and Powell was not a party to that proceeding.

{¶ 12} Based on the foregoing, we find that the doctrine of collateral estoppel was incorrectly applied herein and the trial court erred by granting summary judgment in favor of Powell. Accordingly, appellant/cross-appellee BWC's sole assignment of error is well-taken.

{¶ 13} Appellee/cross-appellant Powell asserts as his sole assignment of error on cross-appeal that the trial court erred by ordering that the payment of attorney fees to Powell's counsel by the TPS be stayed pursuant to R.C. 4123.512, pending any appeal. The record reflects that Powell filed a motion for attorney fees following the trial court's

decision granting summary judgment in his favor. On April 23, 2009, the trial court granted Powell's motion but, upon the BWC's request, ordered that the payment of attorney fees be stayed pending any appeal of the October 29, 2008 judgment. The BWC appealed, resulting in Powell's cross-appeal challenging the stay, in which he argues simply that there is "no justification" for it.

{¶ 14} The trial court's decision to award attorney fees and to stay the execution thereof clearly was within the court's discretion. See R.C. 4123.512(F). Further, it is within a trial court's discretion to grant the government a stay of judgment during the pendency of an appeal. See *State ex rel. Fire Marshal v. Curl*, 87 Ohio St.3d 568, 2000-Ohio-248, holding that Civ.R. 62 allows the government a stay of judgment pending appeal as a matter of right. Accordingly, Powell's cross-assignment of error is not well-taken. However, in light of our decision to reverse and remand as to summary judgment, we must also reverse the trial court's April 23, 2009 order awarding attorney fees.

{¶ 15} On consideration whereof, the judgment of the Lucas County Court of Common Pleas is reversed and remanded for further proceedings consistent with this decision. Costs of this appeal are assessed to appellee pursuant to App.R. 24.

JUDGMENT REVERSED.

Charles R. Powell
v. Toledo Public Schools, etc., et al.

[Administrator, Bureau of Workers'
Compensation - appellant/cross-appellee]
L-09-1140

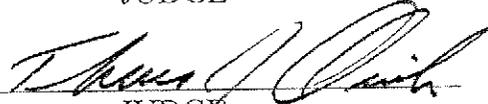
A certified copy of this entry shall constitute the mandate pursuant to App.R. 27.
See, also, 6th Dist.Loc.App.R. 4.

Arlene Singer, J. _____



JUDGE

Thomas J. Osowik, P.J. _____



JUDGE

Keila D. Cosme, J. _____
CONCUR.



JUDGE

This decision is subject to further editing by the Supreme Court of
Ohio's Reporter of Decisions. Parties interested in viewing the final reported
version are advised to visit the Ohio Supreme Court's web site at:
<http://www.sconet.state.oh.us/rod/newpdf/?source=6>.