

ORIGINAL

IN THE SUPREME COURT OF OHIO

<b>JEFF HOLMES,</b>	)	<b>CASE NO.: 11-2040</b>
	)	
<b>Plaintiff-Appellant,</b>	)	<b>Court of Appeals Case No. 3-11-12</b>
	)	
<b>vs.</b>	)	
	)	
<b>CRAWFORD MACHINE, INC., et al.</b>	)	
	)	
<b>Defendants-Appellees.</b>	)	
	)	

AMICUS CURIA BRIEF OF OHIO MANUFACTURERS' ASSOCIATION

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## **INTRODUCTION AND INTERESTS OF AMICI CURIAE**

The Ohio Manufacturers' Association ("OMA") is an organization consisting of Ohio Manufacturers, funded solely by Ohio manufacturers. The mission is to protect and grow Ohio manufacturing.

For 100 years, the OMA has help Ohio's manufacturers succeed and grow in Ohio. OMA members work together to create global competitive advantage for Ohio manufacturing and to enhance the quality of life across the state. Today the OMA is supporting the evolution of modern manufacturing as Ohio companies adapt to global competition by creating and applying innovative technologies.

OMA members consist of Ohio employers all along the manufacturing continuum – from transportation of raw materials to manufacturing and design and production, to delivery of finished products.

Working to ensure manufacturing competitiveness in Ohio is the business of the OMA.

The OMA is filing this brief on behalf and in support of its member company, Crawford Machine, Inc. and on behalf of all its members. The OMA hereby adopts the statement of facts set forth in the Appellee Crawford's brief. In addition, the OMA incorporates by reference here the Law and Argument contained in Appellee Crawford's brief.

## ARGUMENT

On behalf of the OMA and its members, the OMA urges this honorable court to uphold and affirm the decision of the Third District Court of Appeals in this case and hold that it is within the discretion of the trial court and in fact the duty of the trial court to determine the award of costs and fees according to which conditions are allowed in a claim on appeal.

Jeff Holmes (“Appellant”) in his brief, and in the brief of the *amicus curia* Ohio Academy of Trial Lawyers and Ohio Association of Claimant’s Counsel argue for a strict literal reading of O.R.C. 4123.512(F) in this case, stating that the “plain language” of the code section does not direct the court to tax attorney fees or costs between allowed and disallowed conditions.

However, this court has recognized ambiguities in this exact statute, O.R.C. 4123.512(F) previously and, through interpretation of the statute, has expanded upon the literal reading of the statute. See *Miller v. General Motors* (1985) 18 Ohio St.3d 259 at 262 (expert witness deposition fee); *Kilgore v. Chrysler Corp.* (2001), 92 Ohio St.3d 184, 749 N.E.2d 267. (attorney’s travel expenses in taking the deposition of an expert); *Cave v. Conrad* (2002) 94 Ohio St.3d 299, 762 N.E. 2d 991 (videotaped deposition expenses) ; and *Schuller v. United States Steel Corp.*, 103 Ohio St.3d 157, 2004-Ohio-4753, 814 N.E.2d 857 (expert witness fees for in-court testimony).

This court and others have always recognized the need for judicial discretion in applying this statute *Wasinsk v. Peco II, Inc.*, (3d Dist), 189 Ohio App.3d 550, 2010-Ohio-4293, N.E.2d 883 at paragraph 13, citing *Kilgore, supra*. “A trial court’s discretion in awarding attorney’s fees and costs under O.R.C. 4123.512(F) must be in determining the *extent and amount* of the attorney’s fees and costs awarded”, the Court of Appeals in this case at page 34 citing *Dean v. Conrad* (1990), 134 Ohio App.3d 367, 372, 731 N.E.2d 212 (“The amount to be awarded *and*

*whether the testimony was reasonably necessary* rests in the trial court's discretion"). (emphasis added ). *Fulton, Ohio Workers' Compensation* at 526, citing Section 12.7, citing *Moore v. General Motors Corp.* (1985), 18 Ohio St. 3d 259, 480 N.E.2d 1101. In that case this court held that a trial court may limit the award of costs for an expert witness even if his/her testimony was reasonably related to the successful prosecution of the claimant's appeal.

The underlying decision of the Court of Appeals relies upon its prior decision in *Booher v. Honda of America, Mfg., Inc.* (1996), 113 Ohio App.3d 798, 682 N.E. 2d 657, appeal denied in *Booher v. Honda of America Mfg., Inc.*, (1997), 77 Ohio St.3d 1525, 674 N.E.2d 376. *Booher* allows for the trial court to "...exercise its discretion and holds that the trial court *should* consider the fact that a claimant prevailed upon some but not all of his/her claims/conditions where consideration of the same is both equitable and practicable." Court of Appeals decision at page 36. In *Booher* the costs were easily apportioned with respect to which expert testified to which condition. The same situation exists in this case, even more so since the Appellant's expert witness specifically stated he did not examine the right fifth finger and that he *could not* testify to that condition.

By not apportioning costs in this case, the trial court abused its discretion. This court has held that "an abuse of discretion is more than an error in judgment, it implies that the court's attitude is unreasonable, arbitrary or unconscionable." *Blakemore v Blakemore*, (1983) 5 Ohio St.3d 217, 450 N.E.2d 1140. In the case at bar there is no question that the trial court abused its discretion by failing to hold a hearing or require additional evidence in support of the Appellant's motion. The trial court also abused its discretion by failing to apportion costs according to the condition allowed and those conditions denied by the jury. This decision was

unreasonable and appears to be arbitrary and should be reversed, as the Third District Court of Appeals found.

Appellant's argument rests heavily on O.R.C. 4123.95 requiring that statutes be read liberally in favor of the claimants in a workers' compensation matter. "A liberal construction directive, however, does not require us to read into the statute something that cannot reasonably be implied from the statute's language." *State ex rel. Williams v. Colusard* (1995), 71 Ohio St.3d 642, 644, 646 N.E.2d 830, citing *Szekely v. Young* (1963), 174 Ohio St.213, 188 N.E.2d. 424. In the case at bar it can be reasonably implied that the court could apportion costs between those "claims" or conditions in which the claimant is successful and those in which he/she is not. It is reasonable, particularly in a case like this, to imply that a "successful claim" is that condition for which the claimant was successful – not the conditions in which he/she was unsuccessful.

A liberal construction of the statute also does not call for inequitable results such as requiring an employer to pay nearly \$12,000 for a Band-Aid that, without the disallowed conditions, would have been a first aid injury and no workers' compensation claim would have been filed. The bottom line is that no money, let alone \$12,000 was expended by the Appellant in proving the right fifth finger abrasion.

In addition, a liberal construction directive "is supposed to favor only deserving employees." *Fulton, Ohio Workers' Compensation Law* (3 Ed.2008) 10, Section 1.7, citing *Maurer v. Industrial Commission of Ohio* (1989), 47 Ohio St.3d 62, 547 N.E.2d 979. In this case, the claimant is not deserving. He was given exactly what he deserved and what he was entitled to for the right fifth finger abrasion – a Band-Aid. Furthermore, he was not required to go to court to receive that Band-Aid.

The Amici for Appellant cite to *Liposchak v. Industrial Commission*, 90 Ohio St.3d 276, 2000-Ohio-73, 737 N.E.2d 519 as well as to *Zavatsky v. Stringer* (1978) 56 Ohio St2d 386, 396, 384 N.E.2d 693. However, those cases have no relationship to or bearing on the case at bar. Those cases go to awards made by the Industrial Commission once a claim has been allowed in court. They do not address the award of fees and costs for prevailing in court or how those fees and costs are to be allocated or assessed.

Amici and Appellant rely heavily not only on the liberal construction directive but on legislative intent. Amici and Appellant would have this court only give a literal reading to a statute when it does not favor the claimant and a liberal reading to a statute when it does favor them. That is not the directive of O.R.C. 4123.95. As to legislative intent, it could not have been the intent of the legislature when drafting and passing O.R.C. 4123.512 to so penalize Ohio employers upon their appeal of a claim or to charge them \$12,000 for a Band-Aid. That result is clearly inequitable and sends a sign to Ohio employers and others who may be looking to come to Ohio that this is not a business friendly state.

Amici for Appellant cites *Kilgore supra*. for the proposition that this court allowed for a broad grant of fees and costs to the claimant. However, this case is distinguishable from *Kilgore*. The court in *Kilgore* was addressing a situation where the claimant's claim was denied administratively and the claimant was required to appeal into court. In the case at bar, Appellant's case was allowed administratively and he received several years of compensation and medical benefits for conditions which were ultimately determined not to have arisen in the course and scope of his employment with Crawford. In this case, Appellant received a windfall as opposed to having to pay costs personally in a claim in which he had not yet received any compensation and benefits. Appellant's award was in no way diminished, nor was it functionally

less than other claimants with the same injury. In fact it was functionally more, since the only condition granted was a right fifth finger abrasion and he received compensation and medical benefits for the other conditions.

Amici for Appellant argues the decision of the Court of Appeals is “unjust”. Yet, as the OMA just pointed out, Appellant was paid several years of compensation and medical benefits for conditions that were subsequently denied. How is that unjust to the Appellant? However, Crawford paid premiums that increased and they were let go from their group due to this claim. As a result, Crawford’s premiums were significantly higher. Even once Crawford’s risk was credited for what was paid out in this claim, there still is no recovery for the increased premiums paid while Crawford was paying while fighting the claim.

In addition, there is no recovery for the costs associated with defending against this claim. In fact, many employers will not fight workers’ compensation claims, even if they feel they are not legitimate claims, just because of the costs involved. Yet, this employer, Crawford, stuck to its principles and defended against this claim and was ultimately vindicated by a jury. To make this employer pay \$12,000 in addition to its costs to defend the claim – which it won except for a first aid condition – is truly unjust.

The OATC and the OACC argue that the Court of Appeals decision punishes the “successful” claimant. However, to do anything other than follow the Court of Appeals decision and to require trial courts to analyze and consider the allowed versus the disallowed conditions punishes the successful employers. Allowing for apportionment is the most equitable approach. Amici for Appellant argues that following the Court of Appeals decision would deter claimants from filing into court because it would be “too costly for them to absorb.” On the contrary, those claims that are good claims that would be upheld by the jury and would result in no

additional costs to the claimants. What it might do is discourage some of the marginal claims that are filed into court just to see if a settlement can be reached.

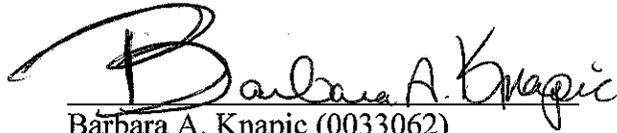
Following the Court of Appeals decision would not create an unworkable rule nor would it create “too much discretion”. We urge this court to give the trial courts credit where Appellant and Appellant’s Amici do not. Trial court judges are perfectly capable of apportioning costs and, where costs can’t be apportioned, explaining in detail why they cannot be apportioned. This is not too much to expect from intelligent judges who make decisions and use their discretion on a daily basis. Each case for costs and fees could and should be determined on its own facts by judges who determine cases on their facts every day.

To adopt Appellant’s and Appellant’s Amici’s position would send a message to Ohio employers and potential Ohio employers that it is too costly to do business in Ohio, where a first aid only Band-Aid injury can cost an employer almost \$12,000 in addition to increased premiums and defense costs. It would, quite simply, have a chilling effect on all Ohio employers. Ohio employers simply want to be able to have their day in court on these claims without being unjustly penalized.

### **CONCLUSION**

On the basis of the foregoing arguments and law, combined with the law and argument cited in Crawford’s brief, the Ohio Manufacturing Association urges this Court to affirm the decision of the Third District Court of Appeals and require that the trial court use its discretion and order the payment of fees as costs only as they directly relate to the allowed condition of “right fifth finger abrasion.”

Respectfully Submitted,

A handwritten signature in black ink that reads "Barbara A. Knapic". The signature is written in a cursive style with a large, prominent initial "B".

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**CERTIFICATE OF SERVICE**

I certify that a copy of the **AMICUS CURIA BRIEF OF OMA** was sent by regular U.S. mail to Counsel for Plaintiff-Appellant, Jeff Holmes and a copy by regular U.S. mail and to the Assistant Attorney General, Kevin Reis this 3<sup>rd</sup> day of July, 2012:

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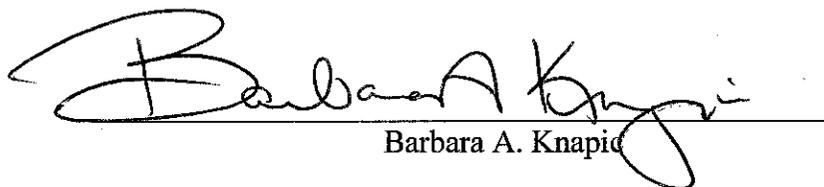
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