

**IN THE SUPREME COURT OF OHIO**

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**CASE NO. 2011-2040**

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**JEFF HOLMES**  
**Plaintiff-Appellant**

**-vs-**

**CRAWFORD MACHINE, INC., et. al.**  
**Defendants-Appellee.**

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

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

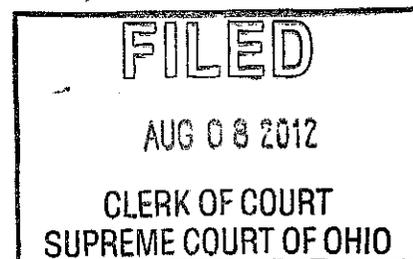
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**I. THE STATUTORY LANGUAGE OF R.C. 4123.512(F) DOES NOT SAY “PARTICULAR INJURY” OR “ALLOWANCE OF A CONDITION” FOR A REASON.**

**A. Case Law That Does Not Involve the Workers Compensation Statute is Not Relevant to This Case or Any Workers Compensation Case.**

“The principal barrier to understanding the nature of workers compensation lies in attempting to analogize it too closely to more familiar legal concepts. Such attempts must fail because workers compensation comprises a unique area of law with its own unique characteristics.” Philip J. Fulton, *Ohio Workers Compensation Law*, § 1.3, at 2 (3d. Ed. 2008). “Unlike an action brought in tort, the compensation system has never attempted to restore to the claimant what has been lost, but only to provide benefits necessary to shield the injured worker from destitution.” Philip J. Fulton, *Ohio Workers Compensation Law*, § 1.3, at 6 (3d. Ed. 2008), *citing Indus. Comm. v. Drake*, 103 Ohio St. 628, 134 N.E. 465 (1921). This compromise is known as the compensation bargain: “[t]he employer has the obligation to contribute to the maintenance of a common fund but receives in return immunity from full liability exposure in tort action based upon a work-related injury.” Philip J. Fulton, *Ohio Workers Compensation Law*, § 1.3, at 5 (3d. Ed. 2008).

In the instant case, Administrator continually cites to general principles of Ohio law (and cases unrelated to the workers’ compensation system) to help bolster its argument that .512(F) awards must be divided to exclude costs or fees connected to those conditions not successfully proven at court. (Administrator Brief at 8). However, these analogies cannot be compared to the instant case or any workers compensation case because successful claimants do not receive any monetary awards in a .512 appeal. Instead, a successful claimant exclusively receives the right to participate in the fund and their attorney gets a fee of \$4200 pursuant to R.C. 4123.512(F). It

is inconsequential if the claimant has been paralyzed, sprained their ankle, or bruised their pinkie in the work-related accident, their attorney is statutorily limited to a fee of \$4200 and the claimant gets the right to participate in the fund as a result of their appeal. In other words, there are no damages in a workers compensation appeal so the claimant is never made whole. The costs reimbursed to their attorney pursuant to R.C. 4123.512(F) merely allows them to pay for the legal work involved. This is the compensation bargain: employers receive immunity from a tort suit and employees do not get punitive damages or any damages at all. It is this trade-off that makes Appellees' arguments about a supposed windfall nonsensical: "The purpose [of R.C. 4123.512(F)], however, is not to penalize the party who contested the claimant's right to participate or provide a windfall to sympathetic claimants." (Administrator Brief at 8). How can a claimant be receiving a windfall if they are not entitled to *any* damages?

Cases like *Bittner v. Tri-County Toyota, Inc.*, 58 Ohio St.3d 143 (1991) and *Hensley v. Eckerhart*, 461 U.S. 424 (1983) that Administrator cites relate to other issues unrelated to the workers compensation statute. *See Hensley*, 461 U.S. 424, 434-435 ("In some cases a plaintiff may present in one lawsuit distinctly different claims for relief that are based on different facts and legal theories . . . . Accordingly, work on an unsuccessful claim cannot be deemed to have been "expended in pursuit of the ultimate result achieved.""). Accordingly, this line of reasoning does not apply to the current set of facts because claimants in workers compensation cases always seek the same relief: the right to participate in the workers compensation fund. There are no damages and the issue is always the same: did the employee's injury occur in the course of and arise out of his or her employment? The simplicity of issues is why many attorneys consolidate more than one disputed condition or claim into one .512 appeal.

But under Appellees' line of reasoning, there would be no purpose in consolidating any condition or claim because if a claimant was to lose one of two appealed conditions, their attorney would not receive the full \$4200 in attorney fees. Instead, appealing one condition into court could result in the full amount of fees while appealing two could not. This result would lead to inefficiency and could penalize employers because they could theoretically be forced to pay twice the costs. In the same vein, winning both conditions at one trial should theoretically result in \$8400 in attorney fees if they are awarded based upon a successful request to participate in the workers compensation fund *for a particular injury*. This nonsensical result is why the statute does not include the words "particular injury" or "allowance of a condition," but is limited to the phrase, "the claimant's right to participate." R.C. 4123.512(F).

Moreover, there is no legal basis to apportion attorney's fees according to those conditions successfully proven in court; the court in *Booher v. Honda of America Mfg, Inc.*, 113 Ohio App.3d 798, 682 N.E.2d 657 (3d Dist. 1996) never addressed attorney fees but limited its opinion to costs under R.C. 4123.512(F). Importantly, none of the Appellees have cited to any legal authority that stands for the apportionment of legal fees based upon those conditions allowed.<sup>1</sup> Neither did the Court of Appeals; it conceded to inventing this new legal standard:

The relevant case law only discusses the trial court's discretion in taxing costs. Nevertheless, we find the case law also applicable to attorney's fees since both costs and attorney's fees are governed under the same statute, and the trial court's duty to tax both are triggered by the same statutory language, i.e., "in the event

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<sup>1</sup>Neither *Schuller v. United States Steel Corp.*, 103 Ohio St.3d 157, 2004-Ohio-4753, 814 N.E.2d 857 nor *Ward v. Kroger Co.*, 106 Ohio St.3d 35, 2005-Ohio-3560, 830 N.E.2d 1155, held that awarding costs and fees is contingent upon a claimant successfully proving their right to participate *for a specific injury*. Instead, *Schuller*, 103 Ohio St.3d 157, ¶ 13, held "that an expert witness's fee for live in-court testimony is a reimbursable cost of legal proceedings pursuant to R.C. 4123.512(F), subject to the trial court's determination that the fee is reasonable" while *Ward*, 2005-Ohio-3560, ¶ 17, held "that claimant on appeal could seek to participate in the fund only for those medical conditions that had been addressed in the administrative order."

the claimant's right to participate or continue to participate in the fund is established upon the final determination of an appeal.”

(Appeals Decision at 27, fn 2).

Further, if attorney fees are limited to the magnitude of the injury (Appellees keep focusing on the specific injured allowed, the abrasion of the finger), there will be even less incentive to appeal or defend minor injuries in court. What will happen if a claimant who has won administratively is forced to defend (i.e. appeal) a minor injury in court and no attorney will represent them due to the miniscule amount of possible attorney fees?

In short, workers compensation is a unique area of law because it exclusively stems from the workers compensation statute, something that has its genesis in the compensation bargain. The plain language of R.C. 4123.512(F) says “right to participate” for a reason; inserting additional language into the statute would ultimately penalize both claimants and employers. Accordingly, the trial court did not abuse its discretion in awarding costs and fees to Mr. Holmes and the Court of Appeals’ decision must be reversed.

**B. The Trial Court Did Not Abuse its Discretion By Following the Plain Text of R.C. 4123.512(F) and Taxing Fees and Costs to the Unsuccessful Employer.**

Mr. Holmes won administratively—for all six conditions. He did not appeal this case, his employer did. Yet Administrator continues to discuss how Mr. Holmes needed to weigh the costs of litigating against the potential benefits of a victory. (Administrator Brief at 18). This statement ignores the workers compensation statute.

Pursuant to the unique nature of R.C. 4123.512, Mr. Holmes had to be the plaintiff in the case that his employer appealed and was required to meet the burden of proof (preponderance of the evidence) and show that his injuries arose out of his employment. The Attorney General, responsible for representing the Bureau of Workers Compensation and the Industrial

Commission, did not help or assist Mr. Holmes or his attorney during the jury trial although Mr. Holmes had been successful at the Industrial Commission.<sup>2</sup> Mr. Holmes had no choice but to litigate the case.<sup>3</sup> Again, it was the Employer who pursued the litigation. When the jury found that Mr. Holmes was able to participate in the fund, albeit for abrasion of his finger, his lawyer was awarded attorney fees and costs pursuant to R.C. 4123.512(F) and within the sound discretion of the trial court.

The trial court did not abuse its discretion in awarding these costs and fees—a standard that is only met when a court’s attitude is unreasonable, arbitrary, or unconscionable. *Blakemore v. Blakemore*, 5 Ohio St.3d 217, 450 N.E.2d 1140 (1983). The statutory text of R.C. 4123.512(F) is clear and the trial court simply enforced the literal language of the statute. *See Ohio Bur. of Workers’ Comp. v. Dernier*, 6th Dist. No. L-10-1126, 2011-Ohio-150, ¶ 26, *citing Cablevision of the Midwest, Inc. v. Gross*, 70 Ohio St.3d 541, 544, 639 N.E.2d 1154 (1994) (“It is a court’s responsibility to enforce the literal language of a statute wherever possible; to interpret, not legislate.”).

### CONCLUSION

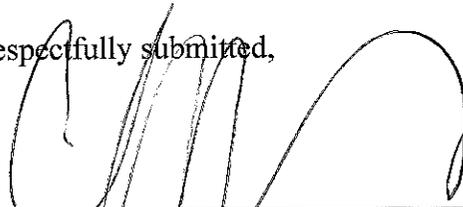
For the foregoing reasons, the Ohio Association for Justice and Ohio Association of Claimants’ Counsel respectfully request this Court to reverse the decision of the Crawford County Court of Appeals.

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<sup>2</sup> Thus, it is quite audacious when the Attorney General attempts to lecture on how Mr. Holmes’ attorney should have litigated the case. Since this was the employer’s appeal, Mr. Holmes had to solely defend each and every condition.

<sup>3</sup> Even though claimants have an affirmative duty to file a complaint, employers are not obliged to defend cases when the claimant files a complaint as the appellant. *Taylor v. Keller, Admr.*, 6 Ohio St.2d 9, 215 N.E.2d 597(1966). Instead, the Administrator defends the Fund with all the resources at its disposal. *Id.* In contrast, when a claimant defends an appeal in court, the Attorney General will not assist in their defense and their only recourse for reimbursement for legal costs is through R.C. 4123.512(F). How can the Administrator facetiously argue that the Trial Court’s reading of the statute provides a windfall to employees?

Respectfully submitted,



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**CERTIFICATE OF SERVICE**

This is to certify that a copy of the foregoing was mailed by regular U.S. Mail, postage prepaid, to Barbara A. Knapic and Denise A. Gary, Oldham Kramer, 195 South Main Street, Suite 300, Akron, OH 44308, and Jerald A. Schneiberg, Jennifer L. Lawther, and Christopher B. Ermisch, Nager, Romaine & Schneiberg, 27730 Euclid Avenue, Cleveland, OH 44132, and Alexandra T. Schimmer, Solicitor General, Michael J. Hendershot, Chief Deputy Solicitor, Elisabeth A. Long, Deputy Solicitor, Elise Porter, Kevin J. Reis, Assistant Attorneys General, 30 East Broad Street, 17<sup>th</sup> Floor, Columbus, OH 43215, postage prepaid, the 8<sup>th</sup> day of August, 2012.



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