

[Cite as *Cakic v. Ridge Pleasant Valley, Inc.*, 2015-Ohio-2523.]

# Court of Appeals of Ohio

EIGHTH APPELLATE DISTRICT  
COUNTY OF CUYAHOGA

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JOURNAL ENTRY AND OPINION  
No. 102278

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**NADA CAKIC**

PLAINTIFF-APPELLEE

vs.

**RIDGE PLEASANT VALLEY, INC. D.B.A.  
PLEASANTVIEW CARE CENTER, ET AL.**

DEFENDANTS-APPELLANTS

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**JUDGMENT:  
REVERSED AND REMANDED**

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Civil Appeal from the  
Cuyahoga County Court of Common Pleas  
Case No. CV-13-813157

**BEFORE:** E.A. Gallagher, J., Jones, P.J., and Boyle, J.

**RELEASED AND JOURNALIZED:** June 25, 2015

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EILEEN A. GALLAGHER, J.:

{¶1} Defendant-appellant Ridge Pleasant Valley, Inc. d.b.a. Pleasantview Care Center (“RPV”) appeals from an order of the Cuyahoga County Court of Common Pleas awarding plaintiff-appellee Nada Cakic \$4,200 in statutory attorney fees after a jury determined that she was entitled to participate in the Ohio workers’ compensation system for the condition of lumbar strain/sprain. RPV argues that Cakic was not entitled to an attorney fee award under R.C. 4123.512(F) because (1) she initiated the appeal to the common pleas court, i.e., the attorney fees did not result from an employer’s appeal to overturn a ruling by the Industrial Commission of Ohio and (2) her appeal was unsuccessful with respect to the more serious of the two conditions for which she sought the right to participate in the Ohio workers’ compensation system. RPV also argues that the attorney fee award should be vacated because the trial court failed to conduct the proper analysis in determining the amount of fees to be awarded under R.C. 4123.512(F). For the reasons that follow, we reverse and remand the case for further proceedings on this issue.

### **Procedural History and Facts**

{¶2} Cakic filed an application for workers’ compensation benefits, seeking to recover for a back injury she allegedly sustained on December 21, 2012, while working for RPV. An Ohio Bureau of Workers’ Compensation (“BWC”) administrator disallowed Cakic’s claim for “sprain lumbar region,” and Cakic appealed to the Industrial Commission of Ohio (the “IC”). After a hearing on the matter, a district hearing officer

vacated the administrator's order and allowed Cakic's claim for the conditions of lumbar sprain/strain and L5-S1 disc herniation. RPV appealed. A staff hearing officer vacated the order of the district hearing officer and disallowed the claim in its entirety. Cakic appealed the determination of the staff hearing officer but the IC refused to hear her appeal.

{¶3} Pursuant to R.C. 4123.512(A), Cakic appealed the staff hearing officer's order to the Cuyahoga County Court of Common Pleas. On September 3, 2013, Cakic filed a complaint against RPV and Stephen Buehrer, Administrator, BWC, seeking (1) participation in Ohio workers' compensation system for the conditions of lumbar sprain/strain and L5-S1 disc herniation and (2) an award of attorney fees and costs. RPV filed an answer in which it denied the allegations related to Cakic's entitlement to participate in the Ohio workers' compensation system and requested that the complaint be dismissed with prejudice at Cakic's cost. The BWC filed a similar answer.

{¶4} A jury trial commenced on August 25, 2014. Due to the unavailability of the originally assigned trial judge, the case was transferred to a visiting judge for trial. On August 27, 2014, the jury returned its verdict. The jury found that Cakic was entitled to participate in the Ohio workers' compensation system for the condition of lumbar sprain/strain but not for the condition of L5-S1 disc herniation. The trial court entered judgment on the jury's verdict and ordered that costs be assessed against RPV.

{¶5} Cakic thereafter filed a motion for the taxation of costs, requesting \$1,881.50 in costs related to the videotaped deposition of her medical expert, Dr. John Fortuna, and a motion for statutory attorney fees under R.C. 4123.512(F). RPV opposed the motions.

{¶6} The originally assigned trial judge granted both motions without a hearing. On September 23, 2014, the trial court entered an order awarding Cakic \$1,881.50 in costs, and on November 4, 2014, it entered an order awarding Cakic the statutory maximum, \$4,200, in attorney fees. The trial court did not explain the basis for its attorney fee award other than to state that “[Cakic], as a prevailing party, is entitled to an award of statutory attorney fees of \$4,200.00.”

{¶7} RPV appeals the trial court’s November 4, 2014 order awarding \$4,200 in statutory attorney fees to Cakic,<sup>1</sup> presenting two assignments of error for review:

**ASSIGNMENT OF ERROR NO. 1:**

The trial court erred by entering an order for costs and fees to the Plaintiff when the matter was the result of the Claimant’s Appeal.

**ASSIGNMENT OF ERROR NO. 2:**

The trial court erred by entering the maximum allowable fees, when the Defendant prevailed on a portion of the claim and when [the] same was done without consulting the presiding Judge or providing any analysis.

**Law and Analysis**

**Statutory Attorney Fees Awards in Workers’ Compensation Appeals**

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<sup>1</sup>In its notice of appeal, RPV asserted that it was appealing both the trial court’s September 23, 2014 order relating to costs and its November 4, 2014 order relating to attorney fees. Although it references both “costs and fees” in its first assignment of error, RPV’s arguments and requested relief are limited to the trial court’s November 4, 2014 order relating to attorney fees. Accordingly, we do not address the trial court’s order relating to costs in this appeal. App.R. 12(A)(2), 16(A)(7).

{¶8} R.C. 4123.512(F) governs the award of statutory attorney fees in cases involving workers' compensation claims appealed to the common pleas court. R.C. 4123.512(F) provides:

The cost of any legal proceedings authorized by this section, including an attorney's fees 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 fees shall not exceed forty-two hundred dollars.

{¶9} We review a trial court's award of attorney fees under R.C. 4123.512(F) for abuse of discretion. *Smith v. Franciscan Communities Inc.*, 8th Dist. Cuyahoga No. 101451, 2014-Ohio-5291, ¶ 6, citing *Hairston v. Baltimore Ravens, Inc.*, 8th Dist. Cuyahoga No. 91339, 2008-Ohio-5341, ¶ 19. An abuse of discretion occurs where the trial court's decision was unreasonable, arbitrary or unconscionable. *Blakemore v. Blakemore*, 5 Ohio St.3d 217, 219, 450 N.E.2d 1140 (1983).

### **Propriety of Attorney Fees Award**

{¶10} In his first assignment of error, RPV argues that Cakic was not entitled to an award of statutory attorney fees under R.C. 4123.512(F) because the appeal was the result of Cakic seeking to overturn the IC's rulings, rather than an appeal by RPV. RPV argues that R.C. 4123.512(F) was designed to protect only those claimants who were "forced to litigate" an appeal of a workers' compensation claim, i.e., where a claimant is forced to *defend* an appeal to the common pleas court, and that because the common pleas action

“was [Cakic’s] decision” and she was not “only in [c]ourt due to the employer,” she was not entitled to a statutory attorney fees award under R.C. 4123.512(F).<sup>2</sup> We disagree.

{¶11} We must apply R.C. 4123.512(F) “in a manner consistent with the plain meaning of the statutory language; we cannot add words.” *Holmes v. Crawford Mach., Inc.*, 134 Ohio St.3d 303, 2012-Ohio-5380, 982 N.E.2d 643, ¶ 10, citing *State ex rel. Burrows v. Indus. Comm.*, 78 Ohio St.3d 78, 81, 676 N.E.2d 519 (1997). When a claimant’s right to participate in the workers’ compensation system is established on appeal, R.C. 4123.512(F) requires that the trial court award the claimant his or her costs, including attorney fees. The award of attorney fees under the statute is mandatory. *Hairston* at ¶ 22; *Powers v. N. Royalton*, 103 Ohio App.3d 269, 273, 659 N.E.2d 338 (8th Dist.1995). “[T]he event that triggers the availability of reimbursement under R.C. 4123.512(F) is the establishment on appeal that a claimant has the right to participate or continue to participate in the fund.” *Holmes* at ¶ 9.

{¶12} In clear and ambiguous language, R.C. 4123.512(F) states that “[t]he cost of any legal proceedings authorized by this section, including an attorney’s fees to the claimant’s attorney” “ shall be taxed against the employer” or the IC, as applicable, “in the event the claimant’s right to participate or to continue to participate in the fund is

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<sup>2</sup>Although RPV asserts that it had no role in the litigation of Cakic’s claim, i.e., that “[w]e are here only because the [c]laimant/[e]mployee sought to overturn the Industrial Commission’s rulings,” this is not, in fact, correct. The record reflects that Cakic ultimately had to litigate her workers’ compensation claim because RPV contested her claim for workers’ compensation benefits. Although RPV prevailed in the round of IC appeals immediately preceding Cakic’s appeal to the common pleas court, the record also reflects that Cakic prevailed as to both conditions at issue in the first round of appeals before the district hearing officer, which RPV then appealed.

established upon the final determination of an appeal.” R.C. 4123.512(F) “does not delineate additional factors that must be satisfied by the claimant” in order for the claimant to be entitled to an award of statutory attorney fees. *Holmes* at ¶ 9. Specifically, R.C. 4123.512(F) does not limit a prevailing claimant’s right to recover statutory attorney fees to cases in which a claimant is “forced to defend” an appeal to the common pleas court filed by his or her employer or the IC. Rather, under the plain language of R.C. 4123.512(F), a claimant has a right to recover attorney fees in “any legal proceedings” authorized by the statute in which “*the claimant’s right to participate or to continue to participate in the fund is established upon the final determination of an appeal.*” (Emphasis added.)

{¶13} The purpose of awarding costs under R.C. 4123.512(F) is “to minimize the actual expense incurred by an injured employee who establishes his or her right to participate in the fund,” and “to ensure that a successful claimant is not penalized for pursuing his or her appeal.” (Emphasis added.) *Schuller v. United States Steel Corp.*, 103 Ohio St.3d 157, 2004-Ohio-4753, 814 N.E.2d 857, ¶ 7, quoting *Moore v. Gen. Motors Corp., Terex Div.*, 18 Ohio St.3d 259, 261-262, 480 N.E.2d 1101 (1985); see also *Kilgore v. Chrysler Corp.*, 92 Ohio St.3d 184, 187, 749 N.E.2d 267 (2001) (“R.C. 4123.512(F) applies to claimants who may rightfully participate in the fund but have been denied that right and have been forced to appeal.”); *Sanford v. D&T Limousine Serv.*, 108 Ohio App.3d 520, 524-525, 671 N.E.2d 299 (8th Dist.1996) (“The purpose of R.C. 4123.512(F) is to furnish an injured employee relief from litigation expenses upon the



ultimate establishment of the right to participate in the workers' compensation fund *as a result of either the employee's winning of his or her appeal, or of successfully defending against the employer's appeal.*" (Emphasis added.), citing *Wickline v. Ohio Bell Tel. Co.*, 9 Ohio App.3d 32, 35, 457 N.E.2d 1192 (10th Dist.1983). Accordingly, a prevailing claimant is entitled to recover statutory attorney fees from his or her employer where the employer contested the claimant's right to participate in the workers' compensation system and the claimant's right to participate is established upon the final determination of the appeal.

{¶14} Here, there is no dispute that Cakic's appeal to the common pleas court was a "legal proceeding" authorized under R.C. 4123.512, that RPV contested her right to participate in the workers' compensation for the conditions at issue and that Cakic's "right to participate in the fund" for the condition of lumbar strain/sprain was "established upon the final determination of [her] appeal" below. Therefore, the trial court did not abuse its discretion in determining that Cakic was eligible to receive an award of statutory attorney fees under R.C. 4123.512(F). RPV's first assignment of error lacks merit and is overruled.

**Determining the Amount of Attorney Fees Awarded under R.C. 4123.512(F)**

{¶15} In its second assignment of error, RPV challenges the amount of attorney fees awarded and the process by which the trial court determined the amount of attorney fees awarded to Cakic. RPV asserts that an award of attorney fees under R.C. 4123.512(F) is "not automatic" and that the trial court abused its discretion in awarding

the “statutory maximum” attorney fees to Cakic without segregating the attorney fees related to the condition of lumbar sprain/strain (on which Cakic prevailed at trial) from those related to the “more serious” condition of disc herniation (as to which the jury found Cakic was not entitled to participate in the Ohio workers’ compensation system). RPV further argues that the trial court erred in failing to consider the “reasonable necessity” of the attorney fees requested and to solicit input from the visiting judge who presided over the trial in determining the amount of fees to be awarded.

{¶16} Under R.C. 4123.512(F), attorney fees are to “be fixed by the trial judge, based upon the effort expended,” i.e., the effort spent by the claimant’s attorney in litigating the appeal, and cannot exceed \$4,200. *Holmes*, 134 Ohio St.3d 303, 2012-Ohio-5380, 982 N.E.2d 643, at ¶ 12. When determining the amount of attorney fees to award a prevailing claimant under R.C. 4123.512(F), the trial court must, therefore, consider “the effort expended” and “set the \* \* \* award accordingly.” *Id.* The fees awarded must “bear[] a direct relation to a claimant’s appeal that lawyers traditionally charge to clients,” *Id.* at ¶ 13, quoting *Kilgore*, 92 Ohio St.3d at 188, 749 N.E.2d 267 (reimbursement of costs, including attorney fees, under R.C. 4123.512(F), “is subject to the trial court’s determination of their reasonable necessity to the presentation of the claimant’s appeal”), and the amount must be “reasonable.” *Holmes* at ¶ 13, citing *Schuller*, 103 Ohio St.3d 157, 2004-Ohio-4753, 814 N.E.2d 857, at syllabus. The trial court’s attorney fees award must also be supported by the record. *Smith*,

2014-Ohio-5291, at ¶ 8, citing *Rubebauer v. C.W. Zumbiel Co.*, 1st Dist. Hamilton No. C-120486, 2013-Ohio-929, ¶ 11.

{¶17} With respect to RPV’s contention that the trial court was required “to take into account the non-meritorious claim in determining the amount of any fees awarded,” a similar argument was rejected by the Ohio Supreme Court in *Holmes, supra*. In *Holmes*, the employer appealed a staff hearing officer’s order allowing an employee’s workers’ compensation claim for six conditions — left shoulder strain, electrical shock, low back strain, left rotator cuff tear, left posterior shoulder dislocation and abrasion of the right fifth finger — to the court of common pleas and the employee filed a complaint seeking participation in the Ohio workers’ compensation system for all his injuries and an award of attorney fees and costs. *Holmes* at ¶ 2-3.

{¶18} Following a trial, the jury found that the employee was entitled to participate in the Ohio workers’ compensation system only for the condition of “abrasion of right fifth finger.” *Id.* at ¶ 4. Over the employer’s objection, the trial court granted the employee’s post-trial motion for attorney fees and costs. *Id.* The trial court ordered that the employee’s attorney be paid \$4,200 in attorney fees and that the employee be reimbursed \$7,551.23 in costs. *Id.* The employer appealed the award of attorney fees and costs, and the Third District reversed. *Id.* at ¶ 5. The employee appealed. To resolve a conflict between the Third and Tenth Districts, the Ohio Supreme certified the following question:

When a claimant/employee petitions the common pleas court to participate in the workers’ compensation fund for multiple claims/conditions and the

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

*Id.* The court answered the question in the negative, holding that a trial court “does not abuse its discretion by awarding costs under R.C. 4123.512(F) when it reimburses a claimant for costs incurred on appeal without regard to the outcome of a particular claim and/or condition,” and reversed the judgment of the Third District. *Id.* at ¶ 1, 5. As the court explained:

[W]hen a claimant's right to participate in the workers' compensation fund is established on appeal, R.C. 4123.512(F) requires the trial court to award the claimant his or her costs. \* \* \*  
[A] trial court is not required to apportion costs based on the outcome of a particular claim and/or condition. \* \* \*

We would impermissibly add language to the statute if we were to hold that a claimant must be reimbursed for costs only when his or her right to participate or to continue to participate in the fund is established upon the final determination of an appeal and when the costs are related to a particular claim and/or condition.

Therefore, we hold that the plain language of R.C. 4123.512(F) requires a trial judge to order reimbursement of costs to a claimant for any legal proceeding authorized under R.C. 4123.512 once the claimant's right to participate or to continue to participate in the workers' compensation fund is established on appeal. When a claimant's right to participate in the fund is established, the trial court is not required under R.C. 4123.512(F) to apportion costs based on the outcome of a particular claim and/or condition.

\* \* \*

[W]e refuse to hold that courts should use the outcome of a claimant's particular claim to determine whether the “effort expended” on appeal on that claim was reasonable. The outcome of an appeal is not the

conclusive indicator of whether effort was reasonably expended on a claimant's behalf. \* \* \*

The plain language of R.C. 4123.512(F) requires a trial judge to order reimbursement to a claimant for costs, including attorney fees up to \$4,200, if the claimant's right to participate in the fund is established or upheld on appeal. In this case, Holmes was adjudged to be entitled to participate in the fund for a fifth-finger abrasion. Therefore, pursuant to R.C. 4123.512(F), the trial court was required to reimburse him for his costs, including attorney fees, associated with his appeal. Since R.C. 4123.512(F) does not require an apportionment of these costs based on the outcome of Holmes's particular conditions, the trial court did not abuse its discretion when it made no such division of costs.

*Holmes* at ¶ 1, 10-11, 13-14.

{¶19} Accordingly, the trial court in this case was not required to conduct an analysis of the hours spent on Cakic's successful claim versus the hours spent on her unsuccessful claim in determining the amount of attorney fees to award Cakic under R.C. 4123.512(F).

{¶20} With respect to RPV's remaining arguments, upon a careful review of the record, there is nothing that indicates that the trial court based its attorney fees award "upon the effort expended" as required under R.C. 4123.512(F). The trial court's November 4, 2014 order states simply that Cakic "as a prevailing party, is entitled to an award of statutory attorney fees of \$4,200 in addition to the previously awarded costs." The order contains no reference to R.C. 4123.512(F), the "effort expended," or any findings related to the trial court's attorney fees award. Further, R.C. 4123.512(F) is based on the notion that a successful claimant should be "reimbursed" for litigation expenses, including attorney fees, incurred in connection with the preparation and

presentation of a successful appeal. *See, e.g., Holmes* at ¶ 15; *Schuller*, 103 Ohio St.3d 157, 2004-Ohio-4753, 814 N.E.2d 857, at ¶ 7 (“In order to ensure that a successful claimant is not penalized for pursuing his or her appeal, and in comports with the legislative mandate that workers’ compensation statutes are to be liberally construed, R.C. 4123.95, we have consequently allowed reimbursement for a variety of litigation expenses connected with the preparation and presentation of a successful appeal.”). Before a claimant may be properly reimbursed for such costs, he or she should first present evidence of those costs. Although Cakic supported her motion for costs with copies of invoices evidencing the specific expenses she incurred in connection with the videotape deposition of her medical expert, no such documentation was submitted in support of her motion for attorney fees.

{¶21} In her “bare bones” motion for attorney fees, Cakic simply asserted that as the “prevailing party \* \* \* on at least one of her claims,” she was “entitled to statutory attorney fees in the amount of \$4,200” under R.C. 4123.512(F). Cakic submitted no affidavit from counsel, no time sheets or billing records detailing the time spent by counsel or counsel’s hourly rate or any other information or documentation supporting her request for attorney fees. No hearing was requested or held on the motion.

{¶22} Based upon our review of the docket in this case, it appears that this case involved four pretrial conferences, the depositions of two doctors and a three-day trial. Under such circumstances, a \$4,200 attorney fees award based upon the effort expended may very well be reasonable and appropriate. Although we do not read R.C.

4123.512(F) as requiring the trial court to hold a hearing on the issue, to solicit input from the judge who presided over the trial (as RPV contends) or to undertake any specific type of analysis or make any specific findings in determining the amount of attorney fees to be awarded a successful claimant based upon “the effort expended,” there must be some evidence or finding in the record supporting the trial court’s attorney fees award based upon the effort expended. Where, as here, there is no evidence in the record supporting the amount of attorney fees awarded or any findings related to that determination, the trial court abuses its discretion in awarding such attorney fees. *See, e.g., Rubenbauer*, 2013-Ohio-929, at ¶ 11 (where counsel failed to submit a timesheet and accompanying affidavit detailing the hours expended on the case and counsel’s hourly rate and there was no other competent evidence in the record to support the trial court’s attorney fees award under R.C. 4123.512(F), trial court abused its discretion in awarding attorney fees); *see also Smith*, 2014-Ohio-5291, at ¶ 9 (where claimant asserted in a “bare bones” motion for attorney fees that counsel was entitled to \$4,200 in fees because of the amount of time counsel spent on the case but failed to submit any supporting documentation detailing the hours spent on the case, counsel’s hourly rate or costs incurred in preparation for trial, trial court did not abuse its discretion in denying motion for attorney fees); *Raymond v. Shaker Produce, Inc.*, 8th Dist. Cuyahoga Nos. 84885 and 85391, 2005-Ohio-1670, ¶ 33-36 (trial court did not abuse its discretion in awarding maximum statutory attorney fees under R.C. 4123.512(F) where employee failed to present “sworn proof” in support of the motion for attorney fees but the trial court made a specific finding that “given the

numerous proceedings, including dispositive motions, hearing and trial,” the attorney was entitled to the maximum fees award; “[i]n light of the voluminous and tortured history of this case, we cannot find that the trial court abused its discretion in determining that [the maximum] fee was obviously reasonable”).

{¶23} Thus, based on the record in this case, we find that the trial court abused its discretion in awarding Cakic \$4,200 in statutory attorney fees without a hearing, any evidence having been submitted supporting the attorney fees requested or any findings having been made by the trial court supporting the attorney fees awarded. We reverse and remand this case for further proceedings to determine the amount of attorney fees to be awarded to Cacik based upon the effort expended and vacate the \$4,200 award.

It is ordered that appellant and appellee share the costs herein taxed.

The court finds there were reasonable grounds for this appeal.

It is ordered that a special mandate be sent to said court to carry this judgment into execution.

A certified copy of this entry shall constitute the mandate pursuant to Rule 27 of the Rules of Appellate Procedure.

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EILEEN A. GALLAGHER, JUDGE

LARRY A. JONES, SR., P.J., and  
MARY J. BOYLE, J., CONCUR