

STATE OF MICHIGAN
SUPREME COURT

FREDIE STOKES
Plaintiff-Appellee,

v

DAIMLERCHRYSLER CORPORATION
Defendant-Appellant.

Supreme Court no.
prior no. 130667

Court of Appeals no. 268544

Lower Court no. 02-000388

132648(63)

1/23

39840

NOTICE OF HEARING
MOTION FOR LEAVE TO FILE BRIEF AMICI CURIAE

BRIEF AMICI CURIAE
MICHIGAN SELF-INSURERS' ASSOCIATION
MICHIGAN MANUFACTURERS ASSOCIATION AND
MICHIGAN CHAMBER OF COMMERCE

PROOF OF SERVICE

Martin L. Critchell (P26310)
Counsel for amici curiae
30700 Telegraph Road, Suite 2580
Bingham Farms, Michigan 48025
(248) 593-2450

FILED

JAN 17 2007

CORBIN R. DAVIS
CLERK
MICHIGAN SUPREME COURT

STATE OF MICHIGAN
SUPREME COURT

FREDIE STOKES
Plaintiff-Appellee,

v

DAIMLERCHRYSLER CORPORATION
Defendant-Appellant.

Supreme Court no.
prior no. 130667

Court of Appeals no. 268544

Lower Court no. 02-000388

MOTION FOR LEAVE TO FILE BRIEF AMICI CURIAE


The Michigan Self-Insurers' Association, Michigan Manufacturers Association, and the Michigan Chamber of Commerce ask the Court for leave to file a brief amici curiae because

1. The Michigan Self-Insurers' Association and Michigan Manufacturers Association are non-profit associations that were organized under the laws of Michigan whose members are employers that have thousands of cases in which an employee claims compensation for the kind of disability that is described by the first sentence of MCL 418.301(4).

2. The Michigan Chamber of Commerce is a non-profit entity having 6,700 members that are businesses, trade and professional associations, and local chambers of commerce that represents the interests of employers in Michigan.

3. The brief amici curiae provides a depth of perspective for the Court as it deliberates the *Application for leave to appeal*.

4. The lawyers for the parties were contacted by telephone on (Tuesday) December 12, 2006, and none expressed opposition to the participation of the MSIA, MMA, and Chamber of Commerce as amici curiae.


Martin L. Critchell (P26310)
Counsel for amici curiae
30700 Telegraph Road, Suite 2580
Bingham Farms, Michigan 48025
(248) 593-2450

STATE OF MICHIGAN
SUPREME COURT

FREDIE STOKES
Plaintiff-Appellee,

v

DAIMLERCHRYSLER CORPORATION
Defendant-Appellant.

Supreme Court no.
prior no. 130667

Court of Appeals no. 268544

Lower Court no. 02-000388

**BRIEF AMICI CURIAE
MICHIGAN SELF-INSURERS' ASSOCIATION
MICHIGAN MANUFACTURERS ASSOCIATION AND
MICHIGAN CHAMBER OF COMMERCE**

Martin L. Critchell (P26310)
Counsel for amici curiae
30700 Telegraph Road, Suite 2580
Bingham Farms, Michigan 48025
(248) 593-2450

TABLE OF CONTENTS

INDEX OF AUTHORITIES ii

STATEMENT OF THE BASIS FOR THE
JURISDICTION OF THE COURT iii

STATEMENT OF QUESTION PRESENTED iv

STATEMENT OF FACTS 1

ARGUMENT

**I THE "PRINCIPLED OUTCOME" STANDARD APPLIES WHEN
 DECIDING THAT THERE WAS AN ABUSE OF DISCRETION
 BY THE BOARD IN REFUSING DISCOVERY 2**

RELIEF 7

APPENDIX

A. OPINION OF THE COURT OF APPEALS AA

INDEX OF AUTHORITIES

CONSTITUTIONAL PROVISIONS

Const 1963, art 3, sec 2	4
--------------------------------	---

STATUTES

MCL 418.859a(1)	4
MCL 418.861a(1)	4

CASES

<i>Boggetta v Burroughs Corp</i> , 368 Mich 600; 118 NW2d 980 (1962)	5
<i>Hagerman v Gencorp Automotive</i> , 457 Mich 720; 579 NW2d 347 (1998)	5
<i>Maldonado v Ford Motor Co</i> , 476 Mich 372; 719 NW2d 809 (2006)	2, 3, 4, 5
<i>Mudel v Great Atlantic & Pacific Tea Co</i> , 462 Mich 691; 614 NW2d 607 (2000)	5
<i>Paige v City of Sterling Heights</i> , 2004 Mich ACO 136	5
<i>People v Babcock</i> , 469 Mich 247; 666 NW2d 231 (2003)	2, 3
<i>Robinson v City of Detroit</i> , 462 Mich 439; 613 NW2d 307 (2000)	5
<i>Spalding v Spalding</i> , 355 Mich 382; 94 NW2d 810 (1959)	3
<i>Stokes v DaimlerChrysler Corp</i> , 2006 Mich ACO 24	5, 6

**STATEMENT OF THE BASIS FOR THE
JURISDICTION OF THE COURT**

MCR 7.301(2) gives the Court jurisdiction to review *Stokes v DaimlerChrysler Corp*, - Mich App - ; - NW2d - (2006).

The application for leave to appeal was filed with the Court and the fee was paid on December 7, 2006, which was less than forty-two days after *Stokes* was decided.

STATEMENT OF QUESTION PRESENTED

I

DOES THE "PRINCIPLED OUTCOME" STANDARD APPLY WHEN DECIDING THAT THERE WAS AN ABUSE OF DISCRETION BY THE BOARD IN REFUSING DISCOVERY?

Plaintiff-appellee Stokes answers "No."

Defendant-appellant DaimlerChrysler answers "Yes."

Amici curiae answer "Yes."

Court of Appeals did not answer.

Workers' Compensation Appellate Comm did not answer.

STATEMENT OF FACTS

Fredie Stokes filed an application for mediation or hearing with the Bureau of Workers' and Unemployment Compensation claiming compensation from DaimlerChrysler Corporation for a disability from a condition in the neck and upper back. DaimlerChrysler opposed this claim and the Bureau remitted the case to the Board of Magistrates for hearing and disposition. Transcript of the hearing before the Board of Magistrates on June 10, 2002, 4-5.

At the hearing, Stokes said that he had left the only job that he ever had — driving a hi-lo at DaimlerChrysler for twenty-eight years — because of advancing rheumatoid arthritis in the neck and could not resume that job even after the surgery that repaired the damage. 2002 Transcript 16-17, 34, 39-40, 41. Nothing was said about what other work might be pursued.

The Board ordered DaimlerChrysler to pay compensation with the decision that Stokes had a continuing disability because "plaintiff could not return to that job given the residuals of his cervical myelopathy (weakness, spasticity and loss of fine motor coordination) despite a good result from surgery." *Stokes v DaimlerChrysler Corp*, unpublished order and opinion of the Board of Magistrates, decided on August 27, 2002 (Docket no. 082702019), 6.

The Workers' Compensation Appellate Commission remanded the case for the Board to decide disability with the standard that was announced in the case of *Sington v Chrysler Corp*, 467 Mich 144; 648 NW2d 624 (2002). *Stokes v DaimlerChrysler Corp*, 2003 Mich ACO 141.

At a hearing on remand, Stokes elaborated on his education, some jobs held as a youth before working for DaimlerChrysler, some details of his job as a hi-lo driver at DaimlerChrysler, and recreational pursuits. Transcript of the hearing before the Board of Magistrates conducted on October 7, 2003, 9, 10, 11-12, 15, 16, 17, 18, 19. Robert B. Seals — a vocational case manager — could not say what Stokes could earn at

another job because the Board had barred a meeting with Stokes that had been proposed by DaimlerChrysler. 2003 Transcript 39-40, 44.

The Board again said that Stokes had a disability because "he cannot perform any of his previous jobs." *Stokes v DaimlerChrysler Corp (On Remand)*, unpublished opinion of the Board of Magistrates, decided on October 17, 2003 (Docket no. 101703008), 3.

The Commission affirmed, 3-1-1, saying that the Board was right to bar the meeting between Stokes and Seals because there was no "discovery" available in a contested compensation case except for a medical exam and right to allow compensation because Stokes had a disability because of "a serious medical impairment which precludes perform[ing] of any and all work the record reveals he has ever performed." *Stokes v DaimlerChrysler Corp (After Remand)*, 2006 Mich ACO 24, slip op., 63, 90.

The Court denied review before a decision by the Court of Appeals but directed the Court of Appeals to grant the application for leave to appeal that was pending there. *Stokes v DaimlerChrysler Corp*, 475 Mich 875; 714 NW2d 347 (2006).

The Court of Appeals reprovved the rulings by the Commission about the availability of discovery and what could inform disability but then affirmed saying that there was no abuse of discretion by the Board in barring the meeting between Stokes and Seals before that hearing. *Stokes v DaimlerChrysler Corp*, - Mich App - ; - NW2d - (2006).
Appendix AA.

ARGUMENT

I

THE "PRINCIPLED OUTCOME" STANDARD APPLIES WHEN DECIDING THAT THERE WAS AN ABUSE OF DISCRETION BY THE BOARD IN REFUSING DISCOVERY.

In the case of *Maldonado v Ford Motor Co*, 476 Mich 372, 388; 719 NW2d 809 (2006), the Court adopted a "principled outcome" standard for determining an abuse of discretion by a trial court that had been expressed in the case of *People v Babcock*, 469 Mich

247, 269; 666 NW2d 231 (2003),¹ over the "palpably and grossly violative of fact and logic" that was described in the case of *Spalding v Spalding*, 355 Mich 382, 384-385; 94 NW2d 810 (1959)² by stating that, "we prefer the articulation of the abuse of discretion standard in *Babcock* to the *Spalding* test and, thus, adopt it as the default abuse of discretion standard."

The problem now is in recognizing that this "principled outcome" standard applies when reviewing the exercise of discretion by the Board to decide a procedural question during a compensation case. This is jurisprudentially significant for five reasons. First, the problem is pervasive. The problem occurs when any officer in the Executive Branch exercises discretion to decide a procedural or evidentiary question during any administrative proceeding.

Second, the problem is novel. The case of *Babcock* involved an exercise of discretion by a court. The trial court decided to depart from established guidelines when imposing a sentence for a crime. *Babcock*, p 251-253. And the case of *Maldonado* involved

¹ "At its core, an abuse of discretion standard acknowledges that there will be circumstances in which there will be no single correct outcome; rather, there will be more than one reasonable and principled outcome. See *People v Talley*, 410 Mich 378, 398; 301 NW2d 809 (1981) (LEVIN, J., concurring), quoting *Langes v Green*, 282 US 531, 541; 51 S Ct 243; 75 L Ed 520 (1931) (' ' The term 'discretion' denotes the absence of a hard and fast rule.' '). When the trial court selects one of these principled outcomes, the trial court has not abused its discretion and, thus, it is proper for the reviewing court to defer to the trial court's judgment. An abuse of discretion occurs, however, when the trial court chooses an outcome falling outside this principled range of outcomes. See *Conoco, Inc, v JM Huber Corp*, 289 F3d 819, 826 (CA Fed, 2002) ('Under an abuse of discretion review, a range of reasonable determinations would survive review. '); *United States v Penny*, 60 F3d 1257, 1265 (CA 7, 1995) ('a court does not abuse its discretion when its decision 'is within the range of options from which one would expect a reasonable trial judge to select' ') (citation omitted)."

² "to have an 'abuse' in reaching such determination, the result must be so palpably and grossly violative of fact and logic that it evidences not the exercise of will but perversity of will, not the exercise of judgment but defiance thereof, not the exercise of reason but rather of passion or bias."

an exercise of discretion by a court. The trial court decided to dismiss the lawsuit because Maldonado and her lawyer publicized the conviction of a defendant that had been expunged and declared inadmissible at trial. *Maldonado*, p 377-378. The Court has never before considered applying the "principled outcome" standard when reviewing the exercise of discretion by an officer of the Executive Branch during an administrative law case such as a compensation claim.

Third, the problem engages the separation of powers that is established by Const 1963, art 3, sec 2. The more the Court requires an officer in the Executive Branch to account for an exercise of discretion, the more the Judiciary can fulfill its function to check an abuse of power by the Executive because an exercise of discretion is an exercise of power. The less the Court requires an officer to explain an exercise of discretion, the greater the potential for unchecked abuse of discretion by the Executive.

Fourth, the problem is not only judicial. To be sure, the Court and Court of Appeals have a responsibility to review an exercise of discretion by a trial court and the Board, which is the trial court in a compensation case. However, the Commission also has a responsibility to review an exercise of discretion by the Board as the first tribunal available for review and the only tribunal that must review that exercise.³ This requires the Court to establish the standard for the courts *and* the Commission.

Finally, the Court of Appeals failed to recognize that the "principled outcome" standard applied. Indeed, the Court of Appeals failed to recognize that the "principled outcome" standard even existed. The Court of Appeals did *not* quote the "principled outcome" standard to review the exercise of discretion by the Board. The Court of Appeals did *not* cite the case of *Maldonado* as the standard to review the exercise of discretion by the

³ The second sentence of MCL 418.859a(1) establishes that the Commission is the first review of any decision by the Board by stating that, "A claim for review shall be filed with the commission not more than 30 days after the date of the order of the worker's compensation magistrate." Appeal to the commission is by right as MCL 418.861a(1) states that, "Any matter for which a claim for review under section 859a has been filed shall be heard and decided by the commission."

Board. And the case cited by the Court of Appeals — *Mudel v Great Atlantic & Pacific Tea Co*, 462 Mich 691; 614 NW2d 607 (2000) — is *not* a standard of discretion.

The Court may address this problem in one of several ways. The Court might grant leave to appeal or argument of the application for leave to appeal to fully explore the dynamics of applying the "principled outcome" standard in a case arising from an administrative agency. Or the Court might remand the case for the Board of Magistrates to exercise discretion in deciding the request that Robert B. Seals interview Freddie Stokes in person and then testify about the qualifications and training of Stokes. The Court must recognize that the Board did not exercise any discretion at all when denying the request. The Board thought that the law barred the request and the Commission affirmed on that basis. The Board and Commission never thought that such a request could be granted.⁴

The Court cannot allow the decision by the Court of Appeals to stand as it is. First, the decision by the Court of Appeals is *stare decisis* having been released for publication but it is quite problematic what is *stare decisis* when the standard for abuse of discretion was not actually expressed.

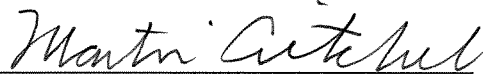
And second, the difference between "principled outcome" instead of for "palpably and grossly violative of fact and logic" matters and is exemplified by this case. It is not a "principled outcome" for the Board to deny a request for the discovery of information

⁴ If so, the Court should also declare that the decision by the Board must be a "principled outcome" per *Maldonado* whether the interview of Stokes by Seals is allowed or again denied. The Court cannot rely on the Commission to recognize the "principled outcome" standard after *Stokes v DaimlerChrysler Corp*, 2006 Mich ACO 24 and *Paige v City of Sterling Heights*, 2004 Mich ACO 136. In the case of *Stokes*, the Commission reprobated the ruling in the case of *Boggetta v Burroughs Corp*, 368 Mich 600; 118 NW2d 980 (1962) about the availability of discovery. And in the case of *Paige*, the Commission adhered to the exposition of **the proximate cause** in the case of *Hagerman v Gencorp Automotive*, 457 Mich 720; 579 NW2d 347 (1998) over the exposition of the same term in the case of *Robinson v City of Detroit*, 462 Mich 439; 613 NW2d 307 (2000) because *Hagerman* arose under the Workers' Disability Compensation Act of 1969, not the Governmental Immunity Act as *Robinson* had, and *Hagerman* had not been overruled, even though the dissent was the foundation for the ruling in the case of *Robinson*. The same truculence towards *Maldonado* should be expected as it lowers the deference due by the Commission to an exercise of discretion by the Board from its current jurisprudence.

— the proposed meeting between Stokes and Seals — and then reproach DaimlerChrysler for not still pursuing the subject with Seals and without Stokes. Exactly *why* would DaimlerChrysler "pursue the matter with its expert" after having been erroneously barred. It is remarkable that DaimlerChrysler did this even after the bar by the Board. There is no reason at all for the Court of Appeals to indulge the hypothesis that "the magistrate would have permitted the expert time to integrate the added information provided at trial into his opinion." *Stokes, slip op.*, 15. While perhaps not palpable or gross, the outcome was in no way principled.

RELIEF

Amici curiae Michigan Self-Insurers' Association, Michigan Manufacturers Association, and Michigan Chamber of Commerce ask the Supreme Court to grant leave to appeal or, in lieu of leave to appeal, remand the case for the Board of Magistrates.


Martin L. Critchell (P26310)
Counsel for amici curiae
30700 Telegraph Road, Suite 2580
Bingham Farms, Michigan 48025
(248) 593-2450