

IN THE
SUPREME COURT OF OHIO

07-1588

ROBERT THORTON,)
Appellee,)
)
-vs-)
)
MONTVILLE PLASTICS & RUBBER, INC.,)
Appellant,)
)
and)
)
ADMINISTRATOR OF THE BUREAU)
OF WORKERS' COMPENSATION,)
Appellee.)

Supreme Court Case No. _____
ON APPEAL FROM THE
GEAUGA COUNTY COURT
OF APPEALS, ELEVENTH APPELLATE
DISTRICT
Court of Appeals Case No. 2006-G-2744

MEMORANDUM IN SUPPORT OF JURISDICTION OF
APPELLANT MONTVILLE PLASTICS & RUBBER, INC.

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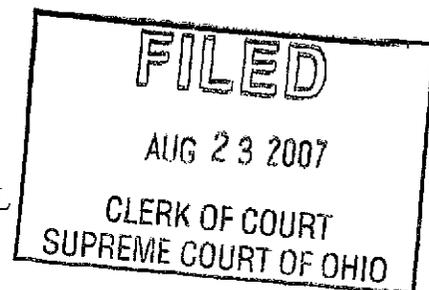


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EXPLANATION OF WHY THIS CASE IS A CASE OF
PUBLIC OR GREAT GENERAL INTEREST AND
INVOLVES A SUBSTANTIAL CONSTITUTIONAL QUESTION

This workers' compensation case presents two principal issues for resolution by this Honorable Supreme Court, both of which are questions of first impression in this State and the latter of which is of constitutional dimension. The first such issue is whether a claimant-plaintiff who voluntarily dismissed his complaint, *without* his employer's consent, *after* the August 25, 2006, effective date of the "employer's consent" amendment to R.C. §4123.512(D), thereby "*abandoned*" his claim to the right of participation, such that it could not later be refiled even though he included the words, "*without prejudice*," in his Civ. R. 41(A)(1)(a) notice of dismissal. That issue arises due to R.C. §4123.512(D)'s "employer's consent" provision, added in Am. Sub. Sen. Bill 7 (2006), which precludes a claimant-plaintiff from voluntarily dismissing his complaint in an appeal instituted by his employer without his employer's consent.

The second issue presented is whether App. R. 4(A)'s thirty day time limitation upon the filing of an appeal *from a trial court's final order* which expressly approves the "without prejudice" aspect of such a statutorily prohibited dismissal commences to run from the date of journalization of the trial court's order thus appealed or from the date on which the notice of dismissal was filed. This issue arises because the court of appeals dismissed Montville Plastics & Rubber, Inc.'s, appeal from the trial court's October 31, 2006, order on the ground that its appeal was untimely, even though Montville's notice of appeal was filed within thirty days of the trial court's entry of the final order from which it appealed, as Appellate Rules 4(A) and 4(D) specify. Additionally, the court of appeals' holding that Montville should have filed its notice of appeal within thirty days of appellee Thorton's filing of his notice of dismissal raises the question of whether the court of appeals violated Montville's rights to Equal Protection and Due Process under the Federal and Ohio constitutions.

The provision giving the Supreme Court authority to order courts of appeals of this state to certify their records to it in "*cases of public or great general interest*" first came into our Constitution on January 1, 1913, as a result of the efforts of the Constitutional Convention of 1912.¹ *Akron v. Roth* (1913), 88 Ohio St. 456, 458-460. This provision was intended to provide the Supreme Court with a mechanism for limiting those lower court decisions it was compelled to review, in contrast to the procedure in existence from 1851 to 1912, since that earlier procedure was popularly viewed as delaying the ultimate resolution of litigation in Ohio. *Proceedings and Debates of the Constitutional Convention of 1912*, C. B. Galbreath, Secretary, Clarence E. Walker, Reporter, F. J. Heer Printing Co., Columbus, Ohio (1912), Vol. I, at pp. 1029-1030.

In those debates, the chief proponent of the amendment, Delegate Hiram Peck of Hamilton County, defined the term, "cases of public or great general interest," in these words:

The words "In cases of public or great general interest," have been partially construed, and what the committee means is cases of "public interest" in which *the public* is interested -- *state, county or city, some public body* -- or of "great general interest," cases which involve questions affecting a good many people and that have aroused general interest. [Id. at 1030.]

Over the next-following ninety-five years, Delegate Peck's definition of the phrase has been augmented and amplified by this Court so as to include cases which involve *the new application or extension of a constitutional right, duty or principle* [*State v. Bolan* (1971), 27 Ohio St.2d 15, 17]; "*the duty and authority of public officials in a situation which is likely to recur*" [*In re Popp* (1973), 35 Ohio St.2d 142, 144]; "[*n*]ovel questions of law or procedure" [*Noble v. Colwell* (1989), 44 Ohio St.3d 92, 94]; and *the resolution of what this Court sees as a conflict between courts of appeals, even*

¹ Emphasis, in the form of italicization, throughout this memorandum is added unless the contrary is indicated.

though no appellate court has certified such a conflict. [Flury v. The Central Publishing House (1928), 118 Ohio St. 154, 159.]

Here, we respectfully submit, this case meets all but one of the various, alternative definitions of a case which is of *both* “public interest” *and* of “great general interest,” even though satisfying only one of those two constitutional alternatives is sufficient for jurisdictional purposes.

The issue of whether, under current R.C. §4123.512(D), a claimant-plaintiff’s filing a voluntary dismissal of his complaint in his employer’s R.C. §4123.512 proceeding *without* his “employer’s consent” results in an irretrievable abandonment of his claimed right to participate is one of first impression, as the “employer’s consent” provision first took effect on August 25, 2006. This Court’s determination of that issue will, of necessity, define what “*the duty and authority of public officials in [that] situation*” are; the public officials thus affected being the judges of our various courts of common pleas to whom workers’ compensation appeals are assigned. Until it is definitively answered by this Court, that question “*is likely to recur*” because counsel representing claimants in such workers’ compensation appeals have routinely utilized Civ. R. 41(A)(1)(a) dismissals in order to delay the day of determination upon employers’ appeals; thus guaranteeing their clients at least one additional year of eligibility to receive compensation and benefits payments from the BWC while the employer’s appeal to court remained stalled in limbo. The import of the appellate court’s decision is that they may continue to do so despite the General Assembly’s contrary mandate, as that court determined that appellee’s dismissal was effective to achieve the result which our legislature has prohibited. [2007-Ohio-3475 at ¶¶3 and 4.]

Our General Assembly’s newly-enacted prohibition of such unilateral dismissals in workers’ compensation matters, except in the instance where the employer consented to it, presents a “[*n*]ovel questions of law or procedure,” as that prohibition swept aside *all* of the decisional precedent which

this Court issued on the point from *Lewis v. Connor* (1985), 21 Ohio St.3d 1, through *Fowee v. Wesley Hall, Inc.* 108 Ohio St.3d 533, 2006-Ohio-171; thus returning the law on the effect of such dismissals to that which this Court found it to be in *Siegfried v. New York, L. E. & W. Railroad Co.* (1893), 50 Ohio St. 294, 296, wherein a plaintiff's voluntary dismissal constituted an irretrievable, voluntary abandonment of his claim for relief.

Additionally – aside from the questions regarding (i) what “*the duty of public officials*” (viz., appellate judges) who undertake to determine whether an appeal from a trial court's confirmation of the “*without prejudice*” aspect of a Civ. R. 41(A)(1)(a) dismissal is, where no legal right to dismiss “*without prejudice*” exists, and (ii) the “[*n*]ovel questions of law or procedure” raised by the appellate court's subject decision on that issue in this case – the issue of what is the appropriate tolling date for jurisdictional determinations under Appellate Rules 4(A) and 4(D) is one as to which the instant court of appeals' decision is in irreconcilable conflict with the decisions of two other Ohio appellate courts upon precisely the same issue. Those two conflicting decisions are *Lovins v. Kroger Co.*, 150 Ohio App.3d 656, 2002-Ohio-6526 at ¶6; and *Reinbolt v. National Fire Ins. Co. of Hartford*, 158 Ohio App.3d 453, 2004-Ohio-4845, 816 N.E.2d 1083 at ¶11}.

In *Lovins*, the trial court's record (Montgomery Com. Pl. No. 2000-CV-00758) reveals that plaintiff's Civ. R. 41(A) notice of dismissal “without prejudice” was filed on *November 29, 2001*; the trial court's *order* overruling defendant's “Motion for Judgment in Accordance with Arbitration Award” was *journalized* on *December 20, 2001*; and the notice of appeal to the Court of Appeals was filed on *January 17, 2002*. In other words, plaintiff-Lovins' filing of his Civ. R. 41(A) dismissal *antedated* defendant's filing of its notice of appeal by *forty-eight* days. Yet the Montgomery County Court of Appeals had no problem with the *timeliness* of defendant's notice of appeal from the trial court's refusal to grant final judgment in defendant's favor, as that notice of

appeal was filed within thirty (30) days of the journalization of the trial court's order from which the appeal was taken – i.e., *on the twenty-eighth day next-following the journalization of the trial court's adverse order.*

Similarly, in *Reinbolt* the trial court's record (Fulton Com. Pl. Case No. 01-CV-000115) discloses that plaintiffs' notice of voluntary dismissal was *filed* on *November 7, 2003*; the trial court's order dismissing "all pending claims and cross claims" was *journalized* on *November 26, 2003*, and the notice of appeal to the Court of Appeals was filed on *Monday, December 29, 2003*. In other words, plaintiffs-Reinbolts' filing of their Civ. R. 41(A) dismissal *antedated* defendants Northfield Insurance Company's and the Ohio County Risk Sharing Authority's filing of their notice of appeal by *fifty-two (52) days*. However – just as occurred in *Lovins* – the Fulton County Court of Appeals had no problem with the *timeliness* of defendants' notice of appeal from the trial court's refusal to grant final judgment in their favor, as that notice of appeal was filed within thirty (30) days of the journalization of the trial court's order from which the appeal was taken – i.e., *on the thirtieth day next-following the journalization of the trial court's adverse order.*

Analytically, Montville's appeal to the court of appeals in the instant case was no different from the *Lovins* and *Reinbolt* cases insofar as the application of Appellate Rules 4(A) and 4(D) is concerned. Thus, the timeliness of Montville's filing of its notice of appeal to that court should have been assayed under the same standard – i.e., being measured *from the October 31, 2006*, date of journalization of the trial court's order that Montville appealed *to the November 30, 2006*, date upon which Montville filed its notice of appeal. When thus measured by the same standard which *all* other Ohio appellate courts which have confronted the same timeliness issue have applied to appeals challenging the propriety of *judicially approved* "without prejudice" dismissals, it is indisputable

that Montville's notice of appeal to the appellate court below *was* timely filed and, therefore, was *properly* before that court for merit determination.

The analytical error embodied in the court of appeals's determination that the timeliness of Montville's notice of appeal to this Court was to be computed by using a tolling date *other than* the date on which the final order from which it appealed was journalized is of constitutional dimension, because Section 3(B)(2), Article IV, of the Ohio Constitution only affords courts of appeals the power to "review and affirm, modify, or reverse *judgments or final orders* of the courts of record inferior to the court of appeals[.]" As this Court held in *State ex rel. A & D Limited Partnership v. Keefe* (1996), 77 Ohio St.3d 50, 52:

Under Section 3(B)(2), Article IV of the Ohio Constitution, courts of appeals have "such jurisdiction as may be provided by law to review and affirm, modify, or reverse judgments or final orders of the courts of record inferior to the court of appeals within the district * * *." R.C. 2505.03(A) limits the appellate jurisdiction of courts of appeals to the review of final orders, judgments or decrees. ****

Stated otherwise, neither by Constitution nor by statute has the Eleventh District Court of Appeals been empowered to provide appellate review of appellee-Thorton's *filing* of a notice of dismissal. Thus, the court of appeals' assertion that Montville should have appealed from such filing absurdly presupposes that, if such had been done, the court of appeals somehow would have had the power not only to *review* the propriety of appellee-Thorton's said filing but also the further power to affirm, modify, or reverse that filing.

That the court of appeals below found it necessary to disregard Section 3(B)(2), Article IV, of the Ohio Constitution and App. R. 4(D) in order that it might misapply App. R. 4(A) and, thereby, *avoid* deciding the key merit issue presented to it necessarily raises the further question of why Montville was singled out for such disparate, unequal treatment upon a "question" of law as to which there could be no question whatsoever. We respectfully submit that *ad hoc* decision-making of that

ilk unpardonably violates the thus-defeated litigant's constitutional right to the Equal Protection of the Laws and, thus, to Due Process of Law in exactly the same constitutional sense that Justice Resnick pointed out in her concurring opinion in *State ex rel. Mirlisena v. Hamilton Cty. Bd. of Elections* (1993), 67 Ohio St.3d 597, 602, at fn. 1:

Relator, in the motion for rehearing, raised his general concerns about possible inconsistent treatment, although he was unable to specifically address why the court was wrong in its apparent lack of consistency in the treatment of the two cases. *Relator's principal point was that 'cases involving the same facts ought to be decided in the same way.'*

The latter constitutional concern is further highlighted and reinforced in situations where, as here, the judicial action taken is so patently erroneous that it gives rise to an inference that the reason it was taken was for reasons unworthy of any tribunal; reasons which, if candidly articulated, would undermine public confidence in the judiciary and, thus, our system of government by law.

STATEMENT OF THE CASE AND FACTS

Montville owns and operates a plastics manufacturing facility in Parkman, Ohio. It is a merit-rated, state fund employer under the Workers' Compensation Act. On June 27, 2005, appellee Thorton sustained extensive physical harm while working at Montville. Although Montville contested his claim on the ground that Thorton's harm did not arise out of his employment, the Industrial Commission allowed it. On March 1, 2006, Montville filed a timely R.C. §4123.512 appeal to the trial court below. On July 19, 2006, the trial court scheduled a jury trial therein for November 27, 2006.

On March 28, 2006, the 126th General Assembly passed Am. Sub. S. B. 7, which, among other changes, revised R.C. §4123.512(D) so as to make that section further provide:

***** Further pleadings shall be had in accordance with the Rules of Civil Procedure, provided that service of summons on such petition shall not be required *and provided that the claimant may not dismiss the complaint without the employer's consent***

if the employer is the party that filed the notice of appeal to court pursuant to this section.

Although Governor Taft signed that enactment on March 28, 2006, due to an ultimately unsuccessful referendum initiative the “employer’s consent” provision did not become effective until August 25, 2006. [See, *Mahaffey v. Blackwell* (October 11, 2006), Franklin App. No. 06AP-963, 2006-Ohio-5319 at {¶¶4, 24, and 43}, *juris. mot. overruled*, 111 Ohio St.3d 1438, 2006-Ohio-5475. Compare, *Thornton v. Salak*, 112 Ohio St.3d 254, 2006-Ohio-6407 at the syllabus and at {¶23}.]

On October 14, 2006, Montville served notice that it would take plaintiff’s deposition on October 20, 2006. On *October 19, 2006*, appellee Thornton filed a “Notice of Voluntary Dismissal,” asserting therein that such dismissal was “without prejudice.” *At no time before appellee filed that dismissal notice – nor at any time after appellee did so – did Montville consent to such dismissal.*

On *October 31, 2006*, the trial court journalized its acceptance of plaintiff’s “without prejudice” dismissal entry by endorsing the notation, “**It is so ordered**[.]” upon the face thereof, signing same, and filing it with the Clerk.

On November 20, 2006, Montville filed a combined motion for (i) relief from the trial court’s October 31, 2006, order and (ii) for the entry of a final judgment in its favor on the grounds of appellee Thornton’s want of prosecution and failure to provide discovery. However, due to App. R. 4(A)’s strict, thirty-day time limitation upon direct appeals, Montville was forced to file an appeal *from the trial court’s October 31 order* to the court of appeals below on *November 30, 2006* – i.e., before the trial court had an opportunity to rule upon its November 20 motion.²

² By order journalized January 18, 2007, the court of appeals authorized a limited remand to the trial court in order to allow the trial court to rule upon Montville’s Civ. R. 60 motion. On February 12, 2007, the trial court overruled Montville’s Civ. R. 60(B) motion. On February 23, 2007, Montville filed a separate appeal from the trial court’s said February 12 judgment, which is
(continued...)

After merit briefing upon both of Montville's appeals to the court of appeals was completed, the court of appeals entered its subject July 9, 2007, Judgment Entry, dismissing Montville's appeal as untimely filed. That judgment was accompanied by a "Memorandum Opinion" [2007-Ohio-3475], which predicated that dismissal determination on the theory that Montville should have filed its appeal within *thirty days from the date on which appellee filed his notice of dismissal*:

{¶4} In the matter at hand, the time-stamped notice of voluntary dismissal filed by appellee Robert Thorton is dated October 19, 2006. The trial court was not required to issue a subsequent order as it did on October 31, 2006. In any event, *even though the trial court did issue an entry on October 31, that order was a nullity since appellee Robert Thorton voluntarily dismissed his complaint pursuant to Civ.R. 41(A)(1)(a) on October 19, 2006.* Therefore, pursuant to App.R. 4(A), appellant had thirty days from that date to file its notice of appeal.

{¶5} *Appellant's notice of appeal, which was filed on November 30, 2006, was filed forty-two days after the notice of voluntary dismissal was filed with the trial court. The notice of appeal was due by Monday, November 20, 2006, which was not a holiday or a weekend.*

{¶ 10} Here, appellant has not complied with the thirty-day rule set forth in App.R. 4(A) nor has appellant alleged that there was a failure by the trial court clerk to comply with Civ.R. 58(B). The time requirement is jurisdictional in nature and may not be enlarged by an appellate court. *State ex rel. Pendell v. Adams Cty. Bd. of Elections* (1988), 40 Ohio St.3d 58, 60; App.R. 14(B).

{¶ 11} Accordingly, this appeal is dismissed sua sponte pursuant to App. R. 4(A).

On July 18, 2007, Montville filed both an App. R. 26(A) application for reconsideration and a motion for conflict certification, pursuant to Section 3(B)(4), Article IV, Ohio Const., and App. R. 25. Although neither of same has been opposed to date, the court of appeals has not announced any ruling upon either of same.

²(...continued)
currently pending as Case No. 2007-G-2760.

ARGUMENT IN SUPPORT OF PROPOSITIONS OF LAW

Proposition of Law No. 1:

Due to R.C. §4123.512(D)'s "employer's consent" requirement, a claimant-plaintiff who files a Civ. R. 41(A)(1)(a) notice of dismissal of his complaint upon his employer's appeal to the court of common pleas without his employer's consent thereby abandons his claim to the right of participation and cannot later refile such complaint despite his inclusion of the words, "without prejudice," in his notice of dismissal.

While it is the general rule in Ohio that, "Ordinarily, a dismissal without prejudice is not an adjudication on the merits and, therefore, is not a final, appealable order[,]" an exception to that general rule exists where a trial court's order *erroneously* determines that a plaintiff is legally entitled to dismiss his complaint "without prejudice," in derogation of a legal provision which requires that such a dismissal can only be one "with prejudice." See, *Lovins v. Kroger Co.*, 150 Ohio App.3d 656, 2002-Ohio-6526 at ¶¶4 through 6; *Reinbolt v. National Fire Ins. Co. of Hartford*, 158 Ohio App.3d 453, 2004-Ohio-4845 at ¶11; *Pheils v. Black* (October 13, 1995), Wood App. No. WD-95-028, 1995 WL 604615. Here, that exception was triggered by the trial court's October 31, 2006, journalization of his acceptance of the "without prejudice" feature of appellee Thorton's notice of dismissal because R.C. §4123.512(D)'s "employer's consent" requirement not only precluded *appellee* from unilaterally dismissing his complaint in the proceeding commenced by Montville's filing its R.C. §4123.512(A) appeal but also deprived *the trial court* of authority to grant "without prejudice" status to Thorton's said dismissal.

Conceptually, a claimant-plaintiff who voluntarily dismisses his complaint without his employer-appellant's consent places himself into a procedural circumstance identical to that of a civil plaintiff who, having once previously dismissed his complaint, ignores Civ. R. 41(A)'s "double dismissal" provision by filing yet a *second* voluntary dismissal of the same complaint. In that circumstance, the filing of such a second dismissal entitles his defendant to judgment even though

both dismissal notices recited that they were being taken “without prejudice” because, “a second notice dismissal acts as an adjudication on the merits *despite contrary language in the notice.*” *Mays v. Kroger Co.* (Butler 1998), 129 Ohio App.3d 159, at 161-162. Accord, *Forshey v. Airborne Freight Corp.* (Clinton 2001), 142 Ohio App.3d 404, 408. The two procedural circumstances are conceptually identical because, although there is a basic “right” to dismiss, in neither of them does the right to dismiss “*without* prejudice” exist – a *second* “without prejudice” dismissal being precluded in the ordinary civil case by Civ. R. 41(A)’s “double dismissal” provision; and, in workers’ compensation matters appealed by employers, a *first* “without prejudice” dismissal being precluded by R.C. 4123.512(D)’s “employer’s consent” requirement.

Section 4123.512(D)’s specific *excision* of unilateral dismissals from that statute’s general provision that “the rules of Civil Procedure” shall apply after the filing of the complaint forecloses a trial court’s ability to afford “without prejudice” status to unilateral dismissals by claimants where the employer is the appellant. This is so because, “A designation of ‘without prejudice’ presupposes that the party whose claim is being dismissed still has a valid claim,” [*Reinbolt, supra*, at ¶11]; i.e., a claim susceptible of being refiled at any time within one year, pursuant to R.C. §2305.19, because it had not theretofore been determined with finality. *Chadwick v. Barba Lou, Inc.* (1982), 69 Ohio St.2d 222, 226, at fn. 4. However, R.C. §2305.19 applies *only* where “the plaintiff *fails* otherwise than upon the merits[.]” *Fry singer v. Leech* (1987), 32 Ohio St.3d 38. It does not authorize the refiling of cases in which a plaintiff “voluntarily abandons” his claim and then seeks to refile it. *Siegfried v. New York, L. E. & W. Railroad Co.* (1893), 50 Ohio St. 294, 296.

The common fundament of this Court’s *Chadwick* and *Fry singer* formulations – i.e., that plaintiff-instigated dismissals under both Civ. R. 41(A)(1) and (2) constitute failures “otherwise than upon the merits” and, therefore, are protected by R.C. §2305.19(A) – was that Civ. R. 41(A)

authorized affording both of same “without prejudice” status. This Court relied upon the same rationale in the line of workers’ compensation cases running from *Lewis v. Connor* (1985), 21 Ohio St.3d 1, through *Kaiser v. Ameritemps, Inc.* (1999), 84 Ohio St.3d 411, and extending up to *Fowee v. Wesley Hall, Inc.* 108 Ohio St.3d 533, 2006-Ohio-1712. Now, however, the General Assembly has legislatively removed and forbidden resort to that rationale, insofar as the limited class of cases involving *unilateral* dismissals into which this one falls is concerned.³ Therefore, it can only be concluded that (i) appellee’s putative Civ. R. 41(A)(1)(a) dismissal constituted a *Siegfried*-type “abandonment” of his claim, as to which R.C. §2305.19 does not apply, because the General Assembly’s outlawing such unilateral dismissals eliminated the entire body of decisional law by which the filing of such a dismissal might be excused by the judiciary, and (ii) that the only response to appellee’s October 19 filing which the trial court was statutorily authorized to enter was an order dismissing his complaint “with prejudice” and, thus, determining that appellee was “not entitled to participate.”

Proposition of Law No. 2:

Where a party appeals to a court of appeals from a trial court’s order which erroneously determines that a Civ. R. 41(A)(1)(a) dismissal was “without prejudice,” such appellant’s notice of appeal must be filed within thirty days of the trial court’s entry of the order from which that appeal is taken.

Proposition of Law No. 3:

A plaintiff’s filing of a Civ. R. 41(A)(1)(a) notice of dismissal, of itself, is neither appealable nor reviewable by a court of appeals and the date upon which such notice of dismissal is filed is of no moment for purposes of determining whether an appeal from the trial court’s entry of an order accepting or rejecting such dismissal was timely.

³ In this regard, the maxim, “*Cessante ratione legis, cessat et ipsa lex,*” applies; thereby legislatively overruling the reasoning set forth in the line of cases running from *Lewis* through *Kaiser* up to *Fowee*, to the extent that any of same authorized affording “without prejudice” status to claimants’ unilateral dismissals in employers’ appeals based upon the content of Civ. R. 41(A).

Because these two propositions of law are interrelated, Montville's arguments regarding them are set forth together.

The court of appeals' dismissal of Montville's appeal to it on the ground that it was not timely filed flies in the face of the most fundamental tenets of Ohio law – both constitutional and statutory. *First*, Ohio law is clear and unmistakable that the appellate jurisdiction afforded to our courts of appeals exists only with respect to *judgments and orders* entered by trial courts – not as to *filings* of any kind which a party might make. See, Section 3(B)(2), Article IV, Ohio Const.; R.C. §2505.03(A); and App. Rules 3(D), 4(A), and 4(D). Cf., *State ex rel. A & D Limited Partnership*, *supra*. Even in those instances in which the point of the appeal is to challenge a plaintiff's claimed "right" to effectuate a voluntary dismissal of his complaint "without prejudice," the law is clear that appellate jurisdiction over that issue exists only where the trial court has entered a *judgment or final order* which either grants or denies "without prejudice" status to the dismissal thereby effectuated. See, *Lovins, Reinbolt, and Pheils*, *supra*. That was precisely the circumstance in Montville's appeal to the court of appeals below; Montville having appealed from the trial court's October 31, 2006, *order* because that *order granted judicial approval* to the "without prejudice" aspect of appellee's unilateral dismissal of his complaint in derogation of R.C. 4123.512(D)'s "employer consent" requirement. Yet, per the court of appeals, Montville should have taken its appeal from appellee's said October 19 *filing*, even though that court would have been powerless to entertain such an appeal from something which was *neither* a "judgment" *nor* an "order" entered by the trial court.

Ohio law is also pellucidly clear that the *timeliness* of the filing of a notice of appeal must be measured from the date upon which the trial court "enters" – i.e., journalizes – the order from which the appeal is taken. See, App. Rules 4(A) and 4(D); *Harris v. Anderson*, 109 Ohio St.3d 101, 2006-Ohio-1934 at ¶9; *Key v. Mitchell* (1998), 81 Ohio St.3d 89, 91; *State ex rel. Durkin v.*

Ungaro (1988), 39 Ohio St.3d 191; *Bosco v. City of Euclid* (Cuya. 1974), 38 Ohio App.2d 40, 42-44. Thus, the court of appeals' ad hoc creation, and application against Montville, of a radically different standard for determining the timeliness of Montville's filing of its notice of appeal to that appellate court was patently erroneous and jurisdiction over Montville's instant appeal should be accepted in order that same might be reviewed and reversed by this Supreme Court.

Montville further notes that the court of appeals' creation, and application against it, of this new and different standard for assessing the timeliness of an appeal gives the clear impression that such creativity was exercised in order to avoid the duty of pronouncing a ruling upon the merits of its initial appeal to that court and in order to afford that court a *Bosco v. City of Euclid*-type "escape" from the duty of pronouncing a ruling upon the merits of Montville's still-pending, timely-filed appeal to that court from the trial court's subsequent, February 12, 2007, judgment, which overruled Montville's Civ. R. 60(B) motion regarding the same October 31, 2006, order. Montville draws such inference not only because the reasoning which the court of appeals set forth as the basis for its judgment runs contrary to well settled tenets of constitutional, statutory, court-rule based, and decisional law, but also because the underlying facts in this case are such as engender deep sympathy for appellee Thorton, whose counsel opted to file a statutorily prohibited notice of dismissal.

Regarding the latter factor, however, Montville respectfully suggests that judicial decisions whose reasoning gives rise to such an inference are antithetical to our system of government, as they serve no purpose other than "diminish[ing] public confidence in the judiciary and thereby do[] injury to the system of the government under law[,]"⁴ and by so doing provoke the kind of public sentiment for which Section 2, Article I, Ohio Const., provides our citizenry the ultimate right to

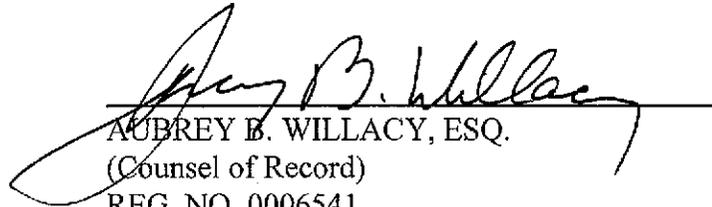
⁴ Code of Judicial Conduct (December 20, 1973, as amended through February 1, 2007), Commentary to Canon 1.

correct by altering, reforming, or abolishing the system which is supposed to – but too often fails to – afford them “*equal protection and benefit.*”

CONCLUSION

For all of the foregoing reasons, this case is one of public and great general interest and presents a substantial constitutional question. Therefore, appellant requests that this Court grant jurisdiction and allow this case so that the important issues presented in this case will be reviewed on the merits.

Respectfully submitted,



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SERVICE

Copies of appellant Montville Plastics & Rubber, Inc.’s, foregoing Memorandum in Support of Jurisdiction have been served, by ordinary mail, upon Mitchell A. Stern, Esq., 27730 Euclid Avenue, Cleveland, Ohio 44132, counsel for plaintiff-appellee, and upon Virginia Egan Fisher, Esq., Assistant Attorney General, 615 Superior Avenue, West, 11th Floor, Cleveland, Ohio 44113, counsel for defendant-appellee, Administrator of the Bureau of Workers’ Compensation, this 22nd day of August, 2007.



AUBREY B. WILLACY, ESQ.

APPENDIX

FILED

IN COURT OF APPEALS

JUL 15 2007

DENISE M. KAMINSKI
CLERK OF COURTS
GEAUGA COUNTY

302
[Signature]
JUL 15 2007

STATE OF OHIO

COUNTY OF GEAUGA

ROBERT THORTON,

Appellee,

- vs -

MONTVILLE PLASTICS & RUBBER,
INC.,

Appellant,

ADMINISTRATOR, OHIO BUREAU OF
WORKERS' COMPENSATION,

Appellee.

IN THE COURT OF APPEALS

ELEVENTH DISTRICT

JUDGMENT ENTRY

CASE NO. 2006-G-2744

For the reasons stated in the Memorandum Opinion of this court, it is hereby ordered that this appeal is dismissed sua sponte pursuant to App.R. 4(A).

Cynthia Westcott Rice

PRESIDING JUDGE CYNTHIA WESTCOTT RICE

FOR THE COURT

COLLEEN MARY O'TOOLE, J., concurs,

MARY JANE TRAPP, J., concurs in judgment only with a Concurring Opinion.

12/299

THE COURT OF APPEALS
ELEVENTH APPELLATE DISTRICT
GEAUGA COUNTY, OHIO

FILED
IN COURT OF APPEALS

JUL 09 2007

DENISE M. KAMINSKI
CLERK OF COURTS
GEAUGA COUNTY

ROBERT THORTON, : MEMORANDUM OPINION
Appellee, :
- vs - : CASE NO. 2006-G-2744
MONTVILLE PLASTICS & RUBBER, INC., :
Appellant, :
ADMINISTRATOR, OHIO BUREAU OF :
WORKERS' COMPENSATION, :
Appellee. :

Administrative Appeal from the Court of Common Pleas, Case No. 06 W 000219.

Judgment: Appeal dismissed.

Mitchell A. Stern, 27730 Euclid Avenue, Cleveland, OH 44132 (For Appellee, Robert Thorton).

Aubrey B. Willacy, Willacy, LoPresti & Marcovy, 700 Western Reserve Building, 1468 West Ninth Street, Cleveland, OH 44113 (For Appellant, Montville Plastics & Rubber, Inc.).

Marc E. Dann, Attorney General, State Office Tower, 17th Floor, 30 East Broad Street, Columbus, OH 43215-3428, and *Virginia Egan Fisher*, Assistant Attorney General, State Office Building, 11th Floor, 615 West Superior Avenue, Cleveland, OH 44113-1899 (For Appellee, Administrator, Ohio Bureau of Workers' Compensation).

{¶1} On November 30, 2006, appellant, Montville Plastics & Rubber, Inc., filed a notice of appeal from an October 31, 2006 entry of the Geauga County Court of Common Pleas.

{¶2} On October 19, 2006, appellee, Robert Thorton, filed a notice of voluntary dismissal pursuant to Civ.R. 41(A)(1)(a). Thereafter, on October 31, 2006, the trial court noted "it is so ordered" on appellee's voluntary dismissal.

{¶3} Dismissals under Civ.R. 41(A)(1)(a) are self-executing. *Selker & Furber v. Brightman* (2000), 138 Ohio App.3d 710, 714. Furthermore, these dismissals are fully and completely effectuated upon the filing of a notice of voluntary dismissal by plaintiff, and the mere filing of the notice of dismissal automatically terminates the case without intervention by the court. *Id.* Because a Civ.R. 41(A)(1)(a) dismissal is self-executing, "the trial court's discretion is not involved in deciding whether to recognize the dismissal." *Id.* Hence, when a Civ.R. 41(A)(1)(a) dismissal is filed, the time-stamped date on that document is controlling, not a subsequent court entry. See *Parker v. Cleveland Pub. Library*, 8th Dist. No. 83666, 2004 WL 1902549, 2004-Ohio-4492, at ¶16.

{¶4} In the matter at hand, the time-stamped notice of voluntary dismissal filed by appellee Robert Thorton is dated October 19, 2006. The trial court was not required to issue a subsequent order as it did on October 31, 2006. In any event, even though the trial court did issue an entry on October 31, that order was a nullity since appellee Robert Thorton voluntarily dismissed his complaint pursuant to Civ.R. 41(A)(1)(a) on

October 19, 2006. Therefore, pursuant to App.R. 4(A), appellant had thirty days from that date to file its notice of appeal.

{¶5} Appellant's notice of appeal, which was filed on November 30, 2006, was filed forty-two days after the notice of voluntary dismissal was filed with the trial court. The notice of appeal was due by Monday, November 20, 2006, which was not a holiday or a weekend.

{¶6} App.R. 4(A) states that:

{¶7} "A party shall file the notice of appeal required by App.R. 3 within thirty days of the later of entry of the judgment or order appealed or, in a civil case, service of the notice of judgment and its entry if service is not made on the party within the three day rule period in Rule 58(B) of the Ohio Rules of Civil Procedure."

{¶8} Loc.R. 3(D)(2) of the Eleventh District Court of Appeals provides:

{¶9} "In the filing of a Notice of Appeal in civil cases in which the trial court clerk has not complied with Ohio Civ.R. 58(B), *and the Notice of Appeal is deemed to be filed out of rule*, appellant shall attach an affidavit from the trial court clerk stating that service was not perfected pursuant to Ohio App.R. 4(A). The clerk shall then perfect service and furnish this Court with a copy of the appearance docket in which date of service has been noted. Lack of compliance shall result in the sua sponte dismissal of the appeal under Ohio App.R. 4(A)."

{¶10} Here, appellant has not complied with the thirty-day rule set forth in App.R. 4(A) nor has appellant alleged that there was a failure by the trial court clerk to comply with Civ.R. 58(B). The time requirement is jurisdictional in nature and may not be

enlarged by an appellate court. *State ex rel. Pendell v. Adams Cty. Bd. of Elections* (1988), 40 Ohio St.3d 58, 60; App.R. 14(B).

{¶11} Accordingly, this appeal is dismissed sua sponte pursuant to App. R. 4(A).

{¶12} Appeal dismissed.

COLLEEN MARY O'TOOLE, J., concurs,

MARY JANE TRAPP, J., concurs in judgment only with a Concurring Opinion.

MARY JANE TRAPP, J., concurs in judgment only with Concurring Opinion.

{¶13} While I agree that the appeal should be dismissed, I respectfully disagree with the majority's decision that the notice of appeal was not timely filed.

{¶14} Prior to June, 30, 2006, which was the effective date of amended R.C. 4123.512(D), it was well-settled that a workers' compensation claimant could employ Civ.R. 41(A)(1)(a) to voluntarily dismiss an appeal to the court of common pleas brought by an employer under R.C. 4123.512. *Kaiser v. Ameritemps, Inc.* (1989), 84 Ohio St.3d 411.

{¶15} After that date, R.C. 4123.512(D) was amended to provide that "[f]urther pleadings shall be had in accordance with the Rules of Civil Procedure *** provided that the claimant may not dismiss the complaint without the employer's consent if the employer is the party that filed the notice of appeal to the court pursuant to this section ***," which is the fact in this case.

{¶16} Although a notice of voluntary dismissal filed pursuant to Civ.R. 41(A)(1)(a) normally would automatically terminate the case without further intervention

by the trial court, this is an administrative appeal, a creation of statute, and for that reason the case law interpreting Civ.R. 41(A), must be viewed in the context of the statute.

{¶17} It would appear that by entering an order granting appellee, Robert Thorton's, Notice of Voluntary Dismissal, the trial court construed the notice as a motion to dismiss and granted a Civ.R. 41(A)(2) dismissal without prejudice, which order was journalized on October 31, 2006. Thus, the employer's Notice of Appeal in this court was timely filed.

{¶18} However, inasmuch as the dismissal was without prejudice, it did not operate as an adjudication upon the merits, and appellee, Robert Thorton, may refile the petition within one year pursuant to R.C. 2305.19; thus the October 31, 2006 order is not a final appealable order. *Ebbets Partners, Ltd. v. Day*, 2d Dist. No. 21556, 2007-Ohio-1667.

IN THE
SUPREME COURT OF OHIO

07-1588

ROBERT THORTON,)
Appellee,)
)
-vs-)
)
MONTVILLE PLASTICS & RUBBER, INC.,)
Appellant,)
)
and)
)
ADMINISTRATOR OF THE BUREAU)
OF WORKERS' COMPENSATION,)
Appellee.)

Supreme Court Case No. _____
ON APPEAL FROM THE
GEAUGA COUNTY COURT
OF APPEALS, ELEVENTH APPELLATE
DISTRICT
Court of Appeals Case No. 2006-G-2744

APPELLANT MONTVILLE PLASTICS & RUBBER, INC.'S
NOTICE THAT A MOTION TO CERTIFY A CONFLICT
IS PENDING IN THE COURT OF APPEALS

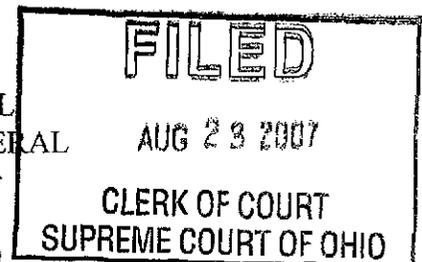
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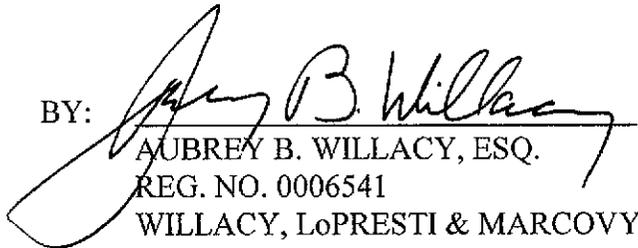
COUNSEL FOR DEFENDANT-APPELLEE
ADMINISTRATOR OF THE BUREAU OF
WORKERS' COMPENSATION

APPELLANT MONTVILLE PLASTICS & RUBBER, INC.'S,
NOTICE THAT A MOTION TO CERTIFY A CONFLICT IS
PENDING IN THE COURT OF APPEALS

In accordance with S. Ct. Prac. Rules II, Section 2(B)(3) and IV, Section 4(A), appellant Montville Plastics & Rubber, Inc., hereby gives notice that on July 18, 2007, it filed a timely motion to certify a conflict with the Geauga County Court of Appeals, Eleventh Appellate District, in Court of Appeals Case No. 2006-G-2744; which motion remains pending and undetermined as of the date hereof.

Respectfully submitted,

BY:



AUBREY B. WILLACY, ESQ.

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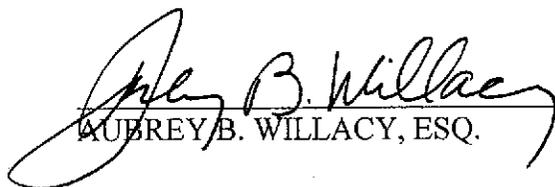
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COUNSEL FOR APPELLANT
MONTVILLE PLASTICS & RUBBER, INC.

SERVICE

Copies of defendant-appellant Montville Plastics & Rubber, Inc.'s, foregoing Notice That a Motion to Certify a Conflict Is Pending in the Court of Appeals have been served, by ordinary mail, upon Mitchell A. Stern, Esq., 27730 Euclid Avenue, Cleveland, Ohio 44132, counsel for plaintiff-appellee, and upon Virginia Egan Fisher, Esq., Assistant Attorney General, 615 Superior Avenue, West, 11th Floor, Cleveland, Ohio 44113, counsel for defendant-appellee, Administrator of the Bureau of Workers' Compensation, this 22nd day of August, 2007.


AUBREY B. WILLACY, ESQ.