In The
SUPREME COURT OF OHIO

ROBERT THORTON, Appellee, -vs- MONTVILLE PLASTICS & RUBBER, INC., Appellant, -and- ADMINISTRATOR, BUREAU OF WORKERS' COMPENSATION, Appellee.	)))))))))))))))))	CASE NO. 2007-1588 On Appeal From the Court of Appeals, Eleventh Appellate District Case No. 2006-G-2744

APPELLEE ADMINISTRATOR, BUREAU OF WORKERS' COMPENSATION'S MEMORANDUM IN OPPOSITION TO JURISDICTION

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II. A claimant's notice of voluntary dismissal pursuant to Civ.R. 41(A) is self executing and terminates the case without intervention of the court and any subsequent status form filed by the court is of no effect with regard to the voluntary dismissal 5

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INTRODUCTION

The Court should deny jurisdiction here, as the appeal is jurisdictionally barred, and in any case, is an attempt by an employer to re-litigate this Court's decisions in *Kaiser v Ameritmeps, Inc,* (1999), 84 Ohio St.3d 411 and *Fowee v. Wesley Hall*, 108 Ohio St.3d 533, 2006-Ohio-1712.

Appellant Montville Plastics, Inc, ("Montville") filed an employer's appeal from the Industrial Commission's grant of a workers' compensation claim. Prior to the trial date and in accordance with the firmly-established precedent of *Kaiser* and *Fowee*, the claimant, Robert Thorton, voluntarily dismissed the action without prejudice under Civ.R. 41(A)(1). Montville filed a late appeal.

In addition to the appeal being late, Montville mistakenly asserts that Am. Sub. S.B.7, which legislatively overruled *Kaiser* and *Fowee*, applies here. However, the statute clearly applies only to claims arising after its effective date, and Thorton's claim clearly arose before the effective date of the statute.

In short, the case raises no legal issue at all. Jurisdiction should be denied.

STATEMENT OF THE CASE AND OF THE FACTS

A. Before October 11, 2006, the claimant in an employer appeal under R.C. 4123.512 could dismiss without prejudice under Civ. R. 41 (A)(1)(a).

In *Kaiser v Ameritmeps, Inc,* (1999), 84 Ohio St.3d 411, the Court ruled that a claimant may employ Civ.R.41(A)(1) to voluntarily dismiss an appeal to the court of common pleas brought by an employer under R.C. 4123.512. The Court reaffirmed the holding in *Fowee v. Wesley Hall*, 108 Ohio St.3d 533, 2006-Ohio-1712 Thus, in an employer-initiated workers'

compensation appeal under 4123.512, after the claimant has filed the initial petition he or she is entitled to dismiss the claim and refile within the year allowed by the saving statute, R.C. 2305.19.

B. The General Assembly legislatively overruled *Kaiser* and *Fowee.*

On March 8, 2006, the General Assembly passed Am Sub.S.B.7. One of the changes adopted under the bill was an amendment to R.C. 4123.512(*D*) that took away the claimant's right to dismiss without prejudice in an employer's appeal:

> 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.

The General Assembly directed that the new rule should apply to claims arising after the effective date of the bill:

> Section 3: This act applies to all claims pursuant to Chapter 4121., 4123.,4127.,and 4131., of the Revised Code *arising on and after the effective date of this act,* except that division (H) of section 4123.512 as amended by this act also applies to claims that are pending on the effective date of this act.

Am. Sub S.B. 7 was later the subject of a failed referendum and finally became effective on October 11, 2006.

C. Thorton filed a workers' compensation claim, and Montville appealed under R.C. 4123.512.

Thorton filed a worker's compensation claim for injuries he sustained on June 27, 2005 while working for Montville. Montville administratively contested the claim, but it was ultimately allowed by the Industrial Commission. Montville filed a Notice of Appeal, under R.C.

4123.512, to the Geauga County Court of Common Pleas. In accordance with the statute, Thorton timely filed a complaint and Montville and the Administrator of the Bureau of Workers' Compensation timely filed answers.

On October 19, 2006, Thorton's counsel filed a Notice of Voluntary Dismissal Without Prejudice under Civ.R. 41(A)(1). On October 31, 2006, the trial court journalized an order approving and confirming the dismissal without prejudice. On November 20, 2006, Montville filed a motion for relief from the trial court's *October 31, 2006* entry and for an entry of judgment on the grounds of want of prosecution. On November 30, 2006, Montville filed an appeal, again from the trial court's entry of October 31, 2006, to the Eleventh District Court of Appeals. Montville never filed an appeal to Thorton's October 19, 2006 notice of voluntary dismissal.

On July, 9, 2006 the court of appeals *sua sponte* dismissed Montville's appeal for being untimely filed and not in compliance with App.R. 3, as it was filed 42 days after the notice of voluntary dismissal. Montville has asked this Court to take jurisdiction and reverse.

EXPLANATION OF WHY THIS CASE IS NOT ONE OF PUBLIC OR GREAT GENERAL INTEREST

This case should be denied for at least two reasons. First, the Court's holdings in *Kaiser* and *Fowee* were in effect at the time Thorton filed his Rule 41(A)(1) dismissal, and therefore that dismissal was effective.

Thorton's claim arose well before the effective date of Am. Sub.S. B. 7. Section 4123.84 (A) makes clear that workers' compensation claims arise on the date of injury:

(A) In all cases of injury or death, *claims* for compensation or benefits for the specified parts of the body injured shall be forever barred unless, *within two years after the injury or death*:

(1) Written or facsimile notice of the specific part or parts of the body claimed to have been injured has been made to the Industrial Commission or the Bureau of Workers' Compensation;

R.C. 4123.84 (emphasis added). Thus, the date of injury controls with respect to when a workers' compensation claim arises. Thorton's claim arose on June 27, 2005, the date of his injury. As explained above, the Am.Sub. S.B. 7 amendment to R.C. 4123.512 applies only to claims arising after October 11, 2006. Thorton therefore did not require Montville's permission to voluntarily dismiss his complaint, and Montville's attempt to apply Am.Sub.S.B. 7 to this case is clearly wrong.

Because *Kaiser* and *Fowee* controlled when Thorton filed his dismissal, this case is merely an attempt to relitigate issues previously, and recently, decided by this court. Any such relitigation would apply to a rapidly vanishing number of cases, and does not warrant the Court's attention.

Second, the law is well settled that a Civ.R. 41(A) dismissal is self-executing and requires no subsequent order of the court. 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. *Parker v. Cleveland Publ. Library*, 8th Dist. No. 83666, 2004-Ohio-4492 at 16. The trial courts' entry of October 31, 2006 was of no effect; it was merely an internal ministerial act of the trial court recognizing what had already occurred. The court below was therefore correct in dismissing the appeal *sua sponte* for untimeliness.

CONCLUSION

The appellate court's decision does not run afoul of, and is not in conflict with, any prior decisions of this Court or other appellate jurisdictions. The court's decision was based on a correct application of the workers' compensation law and Am. Sub. 7. For the foregoing reasons, this Honorable Court should decline jurisdiction to hear Montville's discretionary appeal.

Respectfully submitted,

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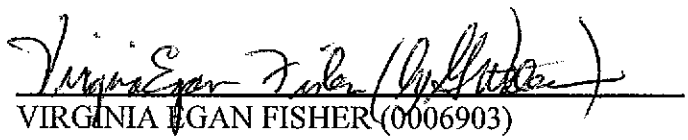
CERTIFICATE OF SERVICE

I hereby certify that a true copy of the foregoing Appellee, Administrator, Bureau of Workers' Compensation's Memorandum in Response, was sent by regular U.S. mail, to Aubrey B. Willacy, Esq., Attorney for Appellant, 700 Western Reserve Building, 1468 W 9th St., Cleveland, Ohio 44113 and Mitchell A. Stern, Esq., Attorney for Appellee, Robert Thorton, 27730 Euclid Avenue, Cleveland, Ohio 44132, on this 21st day of September, 2007.



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