

IN THE
SUPREME COURT OF OHIO

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

Supreme Court Case No. 2007-1588

ON APPEAL FROM THE
GEAUGA COUNTY COURT
OF APPEALS, ELEVENTH APPELLATE
DISTRICT

Court of Appeals Case No. 2006-G-2744

BRIEF OF APPELLANT MONTVILLE PLASTICS & RUBBER, INC.

AUBREY B. WILLACY, ESQ.
REG. NO. 0006541
WILLACY, LoPRESTI & MARCOVY
700 Western Reserve Building
1468 West Ninth Street
Cleveland, Ohio 44113
(216) 241-7740 Fax: (216) 241-6031
E-Mail: ABWillacy6541@aol.com

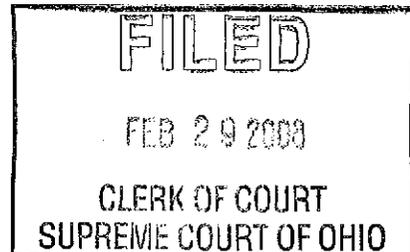
COUNSEL FOR DEFENDANT-APPELLANT
MONTVILLE PLASTICS & RUBBER, INC.

MITCHELL A. STERN, ESQ.
REG. NO. 0023582
27730 Euclid Avenue
Cleveland, Ohio 44132
(216) 861-0006 Fax: (216) 289-4743
E-Mail: mstern1717@aol.com

COUNSEL FOR PLAINTIFF-APPELLEE
ROBERT THORTON

VIRGINIA EGAN FISHER, ESQ.
REG. NO. 0006903
ASSISTANT ATTORNEY GENERAL
OFFICE OF THE ATTORNEY GENERAL
615 Superior Avenue, West, 11th Floor
Cleveland, Ohio 44113
(216) 787-3030 Fax: (216) 787-3480
E-Mail: vfisher@ag.state.oh.us

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



I. TABLE OF CONTENTS

	<u>Page</u>
I. TABLE OF CONTENTS	i
II. TABLE OF AUTHORITIES	v
III. STATEMENT OF THE FACTS	1
a. Statement of the Case	1
b. Merit Facts	2
IV. ARGUMENT	8

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. 8

1) The Amendment in Issue	10
2) The Effective Date of that Amendment	10
3) The General Assembly's Mandate that the Amendment Apply to All Pending Cases	11
4) Dismissal of Appellee's Claim " <i>With Prejudice</i> " Is Required	15
a) Dismissal With Prejudice is Required by R.C. §4123.512(D) and Public Policy	15
b) Dismissal With Prejudice is Required by R.C. §§4123.512(A) and 4123.512(D)	19

c)	Dismissal With Prejudice is Also Required Because R.C.§4123.512(D) Imposes a Limitation Upon the Trial Court’s Jurisdiction to Enter a Contrary Order	22
d)	Dismissal With Prejudice is Required by the Rule in <i>Zuljevic v. Midland-Rose Corp.</i> (1980), 62 Ohio St. 2d 116, and the Public Policy Consideration Upon which that Decision Turned	24

Proposition of Law No. 2:

Where a claimant-plaintiff is precluded from filing a Civ. R. 41(A)(1)(a) notice dismissal of his complaint by R.C. §4123.512(D)’s “employer’s consent” requirement, but does so nonetheless, a trial court’s order refusing to enter final judgment for the defendant-employer is a final appealable order.	25
---	----

V.	CONCLUSION	32
VI.	SERVICE	33
VII.	APPENDIX	34

Appx. Page No.

(A) NOTICE OF APPEAL

Notice of Appeal to the Supreme Court, August 23, 2007	1
--	---

(B) JUDGMENT ENTRIES AND OPINION OF THE COURT OF APPEALS

Judgment of the Court of Appeals, July 9, 2007	4
--	---

Decision of the Court of Appeals, July 9, 2007	5
--	---

Judgment Entry of the Court of Appeals re: Denial of Conflict Certification, August 28, 2007	10
---	----

Judgment Entry of the Court of Appeals re: Denial of Reconsideration, August 28, 2007	14
--	----

Judgment Entry of the Court of Appeals re: Severance of Appeals, June 13, 2007	18
---	----

Judgment Entry of the Court of Appeals re: Strike Brief due to Footnotes , April 23, 2007	19
Judgment Entry of the Court of Appeals re: Consolidation of Appeals, March 13, 2007	20
Judgment Entry of the Court of Appeals re: Strike Exhibits from Brief, February 7, 2007	21
(C) <u>JUDGMENT ENTRY AND ORDER OF THE COURT OF COMMON PLEAS</u>	
Judgment Entry of the Court of Common Pleas, February 12, 2007	22
Judgment Entry of the Court of Common Pleas, October 31, 2006	23
(D) <u>AGENCY RULES AND REGULATIONS</u>	
Ohio Administrative Code §4123-17-62	24
Industrial Commission of Ohio Inter-Office Communication (September 27, 2002) “Processing Issues in Claims When a Separate Issue is in Court”	28
(E) <u>CONSTITUTIONS, STATUTES AND RULES</u>	
Ohio Constitution, Section 35, Article II	30
Ohio Constitution, Section 3, Article IV	31
Ohio Revised Code §1.51	32
Ohio Revised Code §2305.19	32
Ohio Revised Code §2505.03	32
Ohio Revised Code §4123.511	33
Ohio Revised Code §4123.512 (2006)	38
Ohio Revised Code §4123.512 (2007)	41
Ohio Revised Code §4123.519 (Former)	45

Ohio Appellate Rule 4	47
Ohio Appellate Rule 12	49
Ohio Civil Rule 1	51
Ohio Civil Rule 41	52
Ohio Civil Rule 60	54
 (F) <u>UNREPORTED DECISIONS</u>	
 <i>Bamber v. General Motors Corporation,</i> Cuya. App. No. 33046 Cuya. Com. Pl. No. 917026	
	55
 <i>Clingerman v. Mayfield</i> (August 24, 1990), Ashtabula App. No. 89-A-1477, 1990 WL 124645	
	60
 <i>Karnofel v. Cafaro Management Co.</i> (June 26, 1998), Trumbull App. No. 97-T-0072, 1998 WL 553491	
	64
 <i>Mahaffey v. Blackwell</i> (October 11, 2006), Franklin App. No. 06AP-963, 2006-Ohio-5319	
	69
 <i>Matthews v. General Motors Corp.</i> (March 30, 1984), Trumbull App. No. 3289, 1984 WL 6306	
	77
 <i>Olynyk v. Andrish,</i> Cuya. App. No. 86009, 2005-Ohio-6632	
	79
 <i>Pheils v. Black</i> (October 13, 1995), Wood App. No. WD-95-028, 1995 WL 604615	
	83
 <i>Rohloff v. FedEx Ground,</i> Lucas App. No. L-07-1182, 2007-Ohio-6530	
	86
 <i>Sesock v. Aluminum Company of America,</i> Cuya. App. No. 33182 Cuya. Com. Pl. No. 883769	
	89
 <i>Vazquez v. Cuyahoga County Court of Common Pleas,</i> Cuya. App. No. 90755, 2007-Ohio-6629	
	93

II. TABLE OF AUTHORITIES

Page(s)

A. CASES

<i>American Restaurant & Lunch Co. v. Glander</i> (1946) 147 Ohio St. 147	23
<i>American Sales, Inc. v. Boffo</i> (Montgomery 1991) 71 Ohio App.3d 168	17
<i>Arth Brass and Aluminum Castings, Inc. v. Conrad</i> 104 Ohio St.3d 547, 2004-Ohio-6888	18
<i>Bamber v. General Motors Corporation</i> Cuya. App. No. 33046 Cuya. Com. Pl. No. 917026	8
<i>Briedenbach v. Mayfield</i> (1988) 37 Ohio St.3d 138	23
<i>Chadwick v. Barba Lou, Inc.</i> (1982) 69 Ohio St.2d 222	20
<i>Clingerman v. Mayfield</i> (August 24, 1990) Ashtabula App. No. 89-A-1477, 1990 WL 124645	11
<i>Couchot v. State Lottery Comm.</i> (1996) 74 Ohio St.3d 417	27
<i>Dafco, Inc. v. Reynolds</i> (Franklin 1983) 9 Ohio App.3d 4	17
<i>Fowee v. Wesley Hall, Inc.</i> 108 Ohio St.3d 533, 2006-Ohio-1712	10, 19, 21
<i>Frysinger v. Leech</i> (1987) 32 Ohio St.3d 38	20

<i>Jenkins v. Keller</i> (1966) 6 Ohio St.2d 122	23
<i>Kaiser v. Ameritemps, Inc.</i> 84 Ohio St.3d 411, 1999-Ohio-360	18, 21
<i>Karnofel v. Cafaro Management Co.</i> (June 26, 1998) Trumbull App. No. 97-T-0072, 1998 WL 553491	24
<i>Lewis v. Connor</i> (1985) 21 Ohio St.3d 1	9, 10, 19, 20, 21
<i>Lovins v. Kroger Co.</i> , 150 Ohio App.3d 656, 2002-Ohio-6526	28, 29, 30
<i>Mahaffey v. Blackwell</i> (October 11, 2006) Franklin App. No. 06AP-963, 2006-Ohio-5319	4, 11
<i>Martin v. OmniSource Corp.</i> 143 Ohio Misc2d 1, 2007-Ohio-3523	11, 14, 31
<i>Matthews v. General Motors Corp.</i> (March 30, 1984) Trumbull App. No. 3289, 1984 WL 6306	16, 24
<i>Morgan v. Western Electric</i> (1982) 69 Ohio St.2d 278	11
<i>Myers v. Toledo</i> 110 Ohio St.3d 218, 2006-Ohio-4353	21
<i>Olynyk v. Andrish</i> Cuya. App. No. 86009, 2005-Ohio-6632	28, 29
<i>Olynyk v. Scoles</i> 114 Ohio St.3d 56, 2007-Ohio-2878	16, 20, 24, 28, 29, 31
<i>Pheils v. Black</i> (October 13, 1995) Wood App. No. WD-95-028, 1995 WL 604615	31
<i>Reinbolt v. National Fire Ins. Co. of Hartford</i> 158 Ohio App.3d 453, 2004-Ohio-4845	20, 28, 30

<i>Robinson v. BOC Group</i> (1998) 81 Ohio St.3d 361	10, 17
<i>Rohloff v. FedEx Ground</i> Lucas App. No. L-07-1182, 2007-Ohio-6530	11, 14, 31
<i>Schreiner v. Karson</i> (1977) 52 Ohio App.2d 219	16
<i>Sesock v. Aluminum Company of America</i> Cuya. App. No. 33182 Cuya. Com. Pl. No. 883769	8
<i>Siegfried v. New York, L.E. & W Railroad Co.</i> (1893) 50 Ohio St. 294	20, 22
<i>State ex rel. A & D Limited Partnership v. Keefe</i> (1996) 77 Ohio St.3d 50	27
<i>Thornton v. Salak</i> 112 Ohio St.3d 254, 2006-Ohio-6407	4, 10
<i>Tokles & Son, Inc. v. Midwestern Indemn. Co.</i> (1992) 65 Ohio St.3d 621	16
<i>Vazquez v. Cuyahoga County Court of Common Pleas</i> Cuya. App. No. 90755, 2007-Ohio-6629	12, 23
<i>Volz v. Volz</i> (1957) 167 Ohio St. 141	23
<i>Zuljevic v. Midland-Ross Corp.</i> (1980) 62 Ohio St.2d 116	9, 16, 19, 24, 31

B. CONSTITUTIONS, STATUTES and RULES

CONSTITUTIONS

Ohio Constitution Section 35, Article II	21
Ohio Constitution Section 3, Article IV	26

STATUTES

(a) OHIO REVISED CODE

Amended Substitute Senate Bill 7 (2006) 4, 10, 11, 14

Amended Substitute House Bill 100 (2007) 18

 R.C. §1.51 22

 R.C. §2505.03 26, 27

 R.C. §2305.19 18, 19, 20, 22, 24

 R.C. §4123.511 11, 18, 19

 R.C. §4123.512 1, 3, 4, 8, 9, 10, 11, 12, 14, 15, 16, 17,
 18, 19, 20, 22, 23, 24, 25

 R.C. §4123.514 12

 R.C. §4123.515 12

 R.C. §4123.516 12

 R.C. §4123.519 8, 9, 10, 12, 14, 18, 19, 24

 R.C. §4123.522 12

(b) OHIO ADMINISTRATIVE CODE

Ohio Admin. Code §4123-17-62 5

RULES

(a) OHIO RULES OF APPELLATE PROCEDURE

Appellate Rule 3 26

Appellate Rule 4 6, 25, 26, 28, 30, 31

Appellate Rule 12 25

(b) OHIO RULES OF CIVIL PROCEDURE

Civil Rule 1 21

Civil Rule 41 2, 8, 10, 15, 16, 17, 18, 20, 21, 22, 23, 24, 25, 28, 29

Civil Rule 58 26

Civil Rule 60 6

OTHER AUTHORITIES

Industrial Commission of Ohio, InterOffice Communication 9

III. Statement of the Facts

a. Statement of the Case

Appellant Montville Plastics & Rubber, Inc.'s, ("Montville's") appeal in this workers' compensation matter was taken from the July 9, 2007, judgment of the Eleventh District Court of Appeals (CAR. 29, Appx. 4), which – like the trial court below (R. 20 and R. 30, Appx. 23 and 22) – refused to apply the General Assembly's 2006 amendment to R.C. §4123.512(D) to this case.¹ That amendment expressly precludes claimant-appellees in R.C. §4123.512 cases from dismissing their complaints upon appeal *unilaterally* – i.e., "without the employer's consent." Here, both the trial and appellate courts permitted appellee Robert Thorton ("Thorton") to *unilaterally* dismiss his complaint "without prejudice" – i.e., without Montville's consent – even though Montville was the appellant in the trial court.

The trial court's refusal to apply the General Assembly's "employer's consent" provision was *direct*; that court initially having endorsed the notation, "IT IS SO ORDERED," upon Thorton's October 19, 2006, "Notice of Voluntary Dismissal," and journalized same on October 31, 2006, thereby confirming Thorton's proviso that his unilateral dismissal was "*without prejudice*" (R. 20, Appx. 23.) Thereafter, on February 12, 2007, the trial court entered a further order which overruled Montville's Civ. R. 60 motion for relief from and correction of its October 31, 2006, order. (R. 30,

¹ For purposes of brevity, parenthetical references to items within the trial court's record (as indexed in the transcript of Docket and Journal Entries) transmitted by the clerk of the trial court to the court of appeals are abbreviated as "R. #"; using the same handwritten, sequential number assigned by the Clerk to specify a particular filing.

Similarly, parenthetical references to items within the court of appeals record (as indexed in that appellate court's transcript of Docket and Journal Entries) transmitted by the clerk of the court of appeals to this Supreme Court are abbreviated as "CAR. #"; using the same handwritten, sequential number assigned by the court of appeals' clerk to specify a particular filing.

Appx. 22.)

Upon Montville's appeal from the trial court's said October 31 order, the court of appeals *indirectly* refused to apply that "employer's consent" provision – instead, nullifying the General Assembly's "employer's consent" requirement *sub silentio*, by affording legal effect to Thorton's statutorily prohibited dismissal through its holdings that Thorton's "filing of the notice of dismissal automatically terminate[d] the case without intervention by the [trial] court"; that the trial court's October 31, 2006, "order was a nullity since appellee Robert Thorton voluntarily dismissed his complaint pursuant to Civ.R. 41(A)(1)(a) on October 19, 2006[,]"; and that, Montville's November 30, 2006, notice of appeal from the trial court's October 31, 2006, order was untimely because it "was filed forty-two days after the notice of voluntary dismissal was filed with the trial court." (CAR. 29, Appx. 5, 2007-Ohio-3475, at ¶¶3, 4, 5, and 11.)

The matter is now before this Honorable Supreme Court for review upon the merits pursuant to this Court's December 12, 2007, acceptance of jurisdiction over Montville's appeal from the court of appeals' judgment which dismissed its appeal to that court.

b. Merit 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. (R. 21 at Exhibit "F." Supp. 7.)

On June 27, 2005, appellee Thorton, a Montville employee, sustained physical harm while working for it. (R. 3 at attachment 2; R. 21 at Exhibit "A.") On June 28, 2005, a workers' compensation claim regarding same – Claim No. 05-840278 – was filed with the Bureau of Workers' Compensation ("BWC") on his behalf. (R. 21 at Exhibit "A.") On July 1, 2005, the BWC published

an order granting him the right to participate. (R. 6 at ¶4; R. 11 at ¶5.) On July 8, 2005, Montville timely appealed from that BWC order; thereby transferring jurisdiction over the matter to the Industrial Commission of Ohio for formal administrative adjudication. (Id.)

On January 4, 2006, following formal hearing, a staff hearing officer of the Industrial Commission granted plaintiff the right to participate under the Workers' Compensation Act. (R. 3 at attachment 2; R. 6 at ¶5; R. 11 at ¶5.) After first exhausting its right to a further administrative appeal (R. 3 at attachment 1; R. 6 at ¶6; R. 11 at ¶5), Montville appealed to the trial court below, pursuant to R.C. §4123.512, on March 1, 2006. (R. 3.) Appellee Thorton then filed his complaint (R. 6) following which Montville and the BWC's Administrator filed their respective answers. (R. 11 and R. 12, respectively.) In its answer, Montville specifically contested two separate aspects of Thorton's claim: his allegations that (i) the physical harm which he had sustained at work "arose out of" his employment (R. 11 at ¶¶2, 3, and 5); and (ii) that he actually had some of the physical conditions which he had been medically diagnosed as having. (R. 11 at ¶3.)

Shortly after it filed its answer, Montville's counsel advised appellee Thorton's attorney that Montville wished to take Mr. Thorton's deposition and requested his cooperation in establishing a mutually convenient date and time for same. (R. 21 at Exhibit "C," Supp. 4.) Appellee Thorton's counsel failed to respond to that request. (R. 15 at p. 2, ¶2; R. 21, at attachment 1, Affidavit of counsel, at ¶¶6, 8, and 9, and Exhibits "C" and "E" thereto, Supp. 1-2, 4, and 5.)

By Order journalized July 19, 2006, the trial court directed that a jury trial upon the issues joined commence on November 27, 2006. (R. 18.)

Throughout calendar year 2006, Montville was eligible for – and participated in – a "group rating" program sponsored by The Ohio Manufacturer's Association; through which it obtained

substantial monetary savings on its annual premium obligations for State Fund workers' compensation insurance coverage. (R. 21 at attachment 1, ¶¶ 11 through 15, and Exhibit "F" thereto.) For Montville, the dollar amount of such "group rating" program *savings* exceeds one hundred thousand dollars per year. (R. 21 at attachment 1, ¶15.)

On March 28, 2006, the 126th General Assembly passed Am. Sub. S. B. 7, which, among other changes, amended 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.*

Governor Taft signed that enactment on March 28, 2006. However, due to an ultimately unsuccessful referendum initiative, the "employer's consent" provision did not become effective until *August 25, 2006*.²

On October 14, 2006, Montville served notice that it would take plaintiff's deposition on October 20, 2006. (R. 21 at Exhibit "E.") On October 19, 2006, plaintiff filed his subject "Notice of Voluntary Dismissal," asserting therein that such dismissal was "without prejudice." (R. 19.) *At no time before appellee filed that dismissal notice – nor at any time after appellee did so – did Montville consent to such dismissal.* (R. 21 at attachment 1, ¶10.)

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. (R. 20.)

² 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}.

By letter dated November 2, 2006, The Ohio Manufacturer's Association notified Montville that, effective July 1, 2007, it *probably* would not be eligible for continued inclusion in that Association's "group rating" program, "because your claims experience does not meet our eligibility criteria." (R. 21 at Exhibit "F.") In the same letter, however, The Ohio Manufacturer's Association further advised Montville that:

The Bureau of Workers' Compensation (BWC) will release new claims data for your company one more time before the group-rating deadline. **We will re-evaluate your company when we receive it.**

We will receive the December 2006 quarter-end data around the fourth week of January. Please give us at least a week after we receive the data to re-review your company.

We will continue to make every effort to qualify your company for our group-rating plan.

As soon as we can qualify your company for our group-rating plan, we will contact you. If your company is eligible, we promise to contact you in time to enroll for the 07-08 plan year. [Emphasis sic.³]

Because the deadline for group rating group sponsors' submission of the "rosters" of their final "group rating" groups' members is "*the last business day of February of the year of the July 1 beginning date for the rating year*" [Ohio Admin. Code §4123-17-62(B), (E)], the trial court's October 31, 2006, acceptance and approval of appellee Thorton's "without prejudice" dismissal of his complaint (R. 20) and accompanying vacation of the previously established November 27, 2006, trial date assignment operated to (i) foreclose Montville's right to obtain a judicial determination of appellee's ineligibility to participate under the Workers' Compensation Act upon the basis that his

³ Emphasis throughout is supplied unless the contrary is noted.

alleged “injury” did not “aris[e] out of [his] employment” before February 28, 2007, and, thus, to (ii) preclude Montville from re-establishing its eligibility for continued inclusion in The Ohio Manufacturer’s Association’s “group rating” program for the BWC’s fiscal (“policy”) year 2007 to 2008, which commenced on July 1, 2007.

More simply stated, at the time the trial court’s October 31, 2006, acceptance of the “without prejudice” feature of appellee Thorton’s dismissal was entered, same threatened to cost Montville a sum of money in excess of one hundred thousand dollars, for which loss it would have no legal recourse if trial upon its appeal to the trial court was not concluded prior to February 29, 2008.

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 Thorton’s want of prosecution and failure to provide discovery. (R. 21.) However, due to App. R. 4(A)’s strict, thirty-day time limitation upon appeals, Montville was forced to file an appeal *from the trial court’s October 31 order* to the court of appeals below before the trial court had an opportunity to rule upon its November 20 motion. Montville’s said notice of appeal was filed on *November 30, 2006.*⁴ (R. 22.)

In the proceedings before the court of appeals, Montville requested that court to enter the order which the trial court should have entered on October 31, 2006; viz., that, as a matter of law,

⁴ 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. (CAR 13.) On February 12, 2007, the trial court overruled Montville’s Civ. R. 60(B) motion. (R. 30.) On February 23, 2007, Montville filed a separate appeal [Geauga App. Case No. 2007-G-2760] from the trial court’s said February 12 judgment. (R. 31.) On December 31, 2007, that separate appeal was dismissed on the ground that the trial court’s February 12, 2007, ruling upon Montville’s motion was not a final appealable order. See, 2007-Ohio-7115. That dismissal determination has also been appealed to this Supreme Court and is denominated as Sup. Ct. Case No. 2008-0298.

Thorton's October 13, 2006, filing of his "Notice of Voluntary Dismissal" constituted a dismissal *with prejudice* of the claim asserted in his complaint and, thus, entitled Montville to a final judgment in its favor, that Thorton was "not entitled to participate."

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, dismissing Montville's appeal as untimely filed. (CAR. 29, App. 4.) That judgment was accompanied by a "Memorandum Opinion" (CAR. 29, App. 5, 2007-Ohio-3475), which predicated the appellate court's 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*, rather than within thirty days from the date *on which the trial court entered the order* from which Montville appealed:

{¶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).

IV. Argument

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.

This appeal focuses upon a procedural problem which has existed since at least mid-1970, when the first known occurrence of a claimant who had prevailed before the Industrial Commission's blocking the progress of his employer's R.C. §4123.519 appeal to the court of common pleas occurred. See, *John Sesock v. Aluminum Company of America*, Cuya. Com. Pl. No. 70-883769 (filed, June 1, 1970), as reversed in (May 2, 1974), Cuya. App. No. 33182. Cf., *Edward M. Bamber v. General Motors Corp.*, Cuya. Com. Pl. No. 70-883769 (filed, May 3, 1973), as reversed in (May 2, 1974), Cuya. App. No. 33046. At that time, this Court had not authorized resort to the "dismiss-and-refile" gambit in workers' compensation appeals. Therefore, claimant-appellees who, upon their employers' appeals, wished to avoid the risk of their administrative allowances' being vacated through the trial process resorted to the expedient of refusing to file the statutorily mandated "petition," which the appeals statute required in order to begin the process of framing the issue to be tried.

Confronted with such claimant-created stagnation of cases commenced by employers' appeals, the trial judges in those two cases cleared same from their dockets by dismissing the employers' appeals. Upon appeal, however, the Eighth District Court of Appeals reversed such dismissals; formulating the rule that:

*** If the claimant does not file the petition within 30 days after notice, or at a latter time allowed by the Court of Common Pleas, then it would appear to this Court that the employer should be given final judgment.

*** Failure to file upon the part of the claimants would constitute grounds for final judgment for the employers[.]

and further noting that, “It seems grossly unfair to permit an employer to be tossed out of Court, on appeal, for ‘want of prosecution’ when it, having felt aggrieved, complies with O.R.C. Section 4123.519.”

The Eighth District’s formulation of the law on that point was later adopted by this Court in *Zuljevic v. Midland-Ross Corp.* (1980), 62 Ohio St.2d 116 (syllabus), and remained the law until 1985, when this Court decided *Lewis v. Connor* (1985), 21 Ohio St.3d 1, in which the alternative of claimants’ utilizing the “dismiss and refile” gambit to forestall trial upon such appeals was first recognized.

Between 1985 and 2006, *Lewis* and its progeny resulted in claimants’ resorting to the “dismiss and refile” gambit in response to employers’ appeals becoming the prevailing practice; thus, not only multiplying the expense of an employer’s prosecuting such an appeal and the number of separate cases upon common pleas courts’ dockets but also subjecting employers in such cases to one or more years of increased State Fund premium charges attributable to the Bureau’s and Commission’s policies of refusing to refrain from further administrative processing upon such claims while employers’ appeals to court remained undetermined. (Appx. 28.) Not until early 2006 did the General Assembly take action aimed at eliminating the multi-faceted harm worked against employers by the judicially created availability of delay inherent in the “dismiss and refile” gambit, when it amended R.C. §4123.512(D) so as to forbid such delay unless the employer-appellant consented to it.

1) The Amendment in Issue

One of many changes which Am. Sub. Sen. Bill No. 7 (2006) made to Ohio's previously-existing Workers' Compensation Act was the amendment to the third sentence of former R.C. §4123.512(D), which was thereby made to 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.*

The addition of that "employer's consent" limitation solved a judicially-created problem [*Lewis v. Connor* (1985), 21 Ohio St.3d 1; *Robinson v. BOC Group* (1998), 81 Ohio St.3d 361; *Fowee v. Wesley Hall, Inc.*, 108 Ohio St.3d 533, 2006-Ohio-1712 at ¶¶8-9] which contravened the long-standing public policy that the judiciary *promptly* determine workers' compensation matters appealed into the court system. See, R.C. §4123.512(D)'s "within thirty days" provision and R.C. §4123.512(H)'s "preference" provision; both of which were also present in former R.C. 4123.519. The plain language of that amendment not only forecloses the kind of purely unilateral Civ. R. 41(A)(1)(a) dismissal involved in this case but also the kind of Civ. R. 41(A)(2) dismissal "*at the plaintiff's instance*" upheld in *Robinson v. BOC Group*, *supra*, unless the employer-appellant consents to same.

2) The Effective Date of that Amendment

Because a referendum petition challenging this particular amendment was timely filed, it did not become effective on June 30, 2006, when those portions of Am. Sub. Sen. Bill No. 7 which were not so challenged took effect. See, *Thornton v. Salak*, 112 Ohio St.3d 254, 2006-Ohio-6407 at the syllabus and at ¶23. Rather, this "employer's consent" amendment became effective on August

25, 2006, when the Secretary of State notified the referendum petitioners that their petitions did not have a sufficient number of valid signatures to place their referendum upon the ballot. *Mahaffey v. Blackwell*, 2006-Ohio-5319 at {¶¶4, 24, and 43.}

3) The General Assembly's Mandate that the Amendment Apply to All Pending Cases

Notably, the General Assembly specifically directed that all of the amendments to R.C. §4123.512 which it made in Am. Sub. Sen. Bill No. 7 apply to all cases pending in court on the effective date of the amendment; thereby making same applicable to the case originated by Montville's filing of its appeal to the court below. The General Assembly so specified in three separate ways.

First, using language which it has repeatedly re-enacted since 1959, the General Assembly so directed in the next-to-last sentence of amended R.C. §4123.512, stating: "This *section* applies to all decisions of the commission or the administrator on *November 2, 1959, and all claims filed thereafter are governed by sections 4123.511 and 4123.512* of the Revised Code." This Court itself has previously held that the legal effect of that particular statutory directive is to mandate that an amendment to the appeals statute apply to any proceeding conducted after its adoption, *even though the underlying claim for participation accrued prior to its enactment*. See, *Morgan v. Western Electric* (1982), 69 Ohio St.2d 278, 282-283, and fn. 8 at 282.⁵ Indeed, even the Eleventh District Court of Appeals itself recognized the validity of that legal point in *Clingerman v. Mayfield* (August 24, 1990), Ashtabula App. No. 89-A-1477, 1990 WL 124645, at *3:

⁵ Montville recognizes that, despite this Court's decision in *Morgan*, the courts in *Rohloff v. FedEx Ground*, Lucas App. No. L-07-1182, 2007-Ohio-6530, and *Martin v. OmniSource Corp.*, 143 Ohio Misc.2d 1, 2007-Ohio-3523, held exactly the same statutory provision upon which this Court relied in *Morgan* to be of no moment for purposes of determining whether amendments to the appeal statute are applicable to claims already pending upon the amendment's effective date.

It is clear that the time and place of injury appeal requirements of R.C. 4123.519 are remedial in providing a method of review. Lewis v. Connor, supra. Since R.C. 4123.519 is remedial and not substantive, it may be applied retroactively to any proceeding conducted after its adoption, even though the original action accrued and the complaint was filed prior to its enactment. *** [Citations omitted.]

Here, the record is clear that appellee Thorton's workers' compensation claim was "filed" after "November 2, 1959," Thus, it is indisputable that the subject amendment to R.C. §4123.512(D) applies to appellee's "claim," because the next-to-last sentence of amended R.C. §4123.512(H) expressly so directs, in language which is plain, clear, and unambiguous.

Second, in the last sentence of the thus-amended statute, the General Assembly set forth yet a further directive that, "Any *action pending in common pleas court* or any other court *on January 1, 1986, under this section* is governed by former sections 4123.514, 4123.515, 4123.516, and 4123.519 and section 4123.522 of the Revised Code." The plain language of this second directive, expressly *restricts* the applicability of prior versions of the appeal statute to cases which were pending in court "on January 1, 1986." Here, the record is also clear that Montville's appeal to the court below was not "*pending in common pleas court* or any other court *on January 1, 1986.*" Therefore, the provisions of such former versions of the appeal statute as antedated the General Assembly's re-enactment thereof in 2006, are inapplicable to this case. See, *Vazquez v. Cuyahoga County Court of Common Pleas*, Cuya. App. No. 90755, 2007-Ohio-6629 at {¶¶2 to 5}:

{¶ 2} On December 1, 2006, Avalon Precision Casting Co. ("Avalon") filed an appeal, in the Cuyahoga County Court of Common Pleas pursuant to R.C. 4123.512(A), from a decision of the Industrial Commission of Ohio, which allowed Vazquez to receive compensation for injuries sustained as a result of his employment. On December 8, 2006, Vazquez filed a complaint, which contained "a statement of facts in ordinary and concise language showing a cause of action to participate or to continue to participate in the fund and setting forth the basis for the jurisdiction of the court over the action." See R.C. 4123.512(D). On October 3, 2007, Vazquez filed a notice of "voluntary dismissal without prejudice" of the complaint.

Avalon, however, refused to sanction Vazquez's voluntary dismissal on the basis that R.C. 4123.512(D), as amended by Am.Sub. S.B. No. 7, no longer allowed for the unilateral dismissal of the complaint and specifically 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." On October 12, 2007, Vazquez filed a brief in support of his notice of voluntary dismissal and argued that the amendment of R.C. 4123.51(D), which eliminated the ability of an injured employee to unilaterally dismiss an employer's appeal, could only be applied prospectively to injuries suffered after the amendment of R.C. 4123.51(D). Vazquez further argued that since his injuries occurred prior to the amendment of R.C. 4123.51(D), he was permitted to voluntarily dismiss the complaint filed pursuant to Avalon's notice of appeal. On December 7, 2007, Vazquez filed his complaint for a writ of prohibition, in an effort to prevent the trial court from proceeding to trial with regard to the worker's compensation appeal as filed by Avalon.

{¶ 3} Herein, Vazquez argues that this court is required to issue a writ of prohibition since the " * * * Respondents had no jurisdiction over Cuyahoga County Case No. CV-06-608742 after Relator filed his notice of dismissal pursuant to Civ.R. 41(A)(1)(a) and a writ of prohibition must issue prohibiting Respondents from continuing to exercise jurisdiction * * *." Specifically, Vazquez argues that the amendment of R.C. 4123.511(D), which currently prevents an employee from unilaterally dismissing a worker's compensation appeal, as brought in a court of common pleas by an employer, cannot be retroactively applied to any claim for injury that occurred prior to the effective date of the amendment. Vazquez argues that the amendment to R.C. 4123.512 can only be applied prospectively to a person that has suffered injury after the effective date of the amendment. It is readily apparent that Vazquez, in addition to his request for a writ of prohibition, seeks a writ of mandamus in order to compel the trial court to dismiss the underlying worker's compensation appeal. In paragraph 14 of his complaint, Vazquez alleges that "[r]elator has a clear legal right to voluntarily dismiss his Complaint in case number CV-06-608742, pursuant to Ohio Civ.R. 41(A)(1)(a), and Respondents have a clear legal duty to honor said dismissal; however Respondents refuse to do so and are forcing Relator to proceed to trial." We shall thus proceed on the basis that Vazquez seeks a writ of mandamus and a writ of prohibition. Cf. *Royal Indemn. Co. v. J.C. Penney Co.* (1986), 27 Ohio St.3d 31, 501 N.E.2d 617. See, also, *Vance v. Davis*, Agt. (1923), 107 Ohio St. 577, 140 N.E. 588.

{¶ 4} In order for this court to issue a writ of mandamus, Vazquez must demonstrate that: (1) Vazquez possesses a clear legal right to the relief requested; (2) the trial court possesses a clear legal duty to perform the requested act; and (3) there exists no plain and adequate remedy in the ordinary course of the law. *State ex rel. Ney v. Niehaus* (1987), 33 Ohio St.3d 118, 515 N.E.2d 914; *State ex rel. Middleton Bd. of Edn. v. Butler Cty. Budget Comm.* (1987), 31 Ohio St.3d 251, 510 N.E.2d 383; *State*

ex rel. Westchester v. Bacon (1980), 61 Ohio St.2d 42, 399 N.E.2d 81. It must also be noted that mandamus is an extraordinary remedy, “to be issued with great caution and discretion and only when the way is clear.” *State ex rel. Kriss v. Richards* (1921), 102 Ohio St. 455, 132 N.E. 23. Mandamus is not a substitute for an appeal and will not issue in doubtful cases. *State ex rel. Keenan v. Calabrese* (1994), 69 Ohio St.3d 176, 631 N.E.2d 119; *State ex rel. Taylor v. Glasser* (1977), 50 Ohio St.2d 165, 364 N.E.2d 1.

{¶ 5} Initially, we find that Vazquez has failed to establish that he possesses a clear legal right to dismiss his complaint in the underlying action or that the trial court possesses a clear legal duty which requires dismissal of the complaint vis-a-vis the notice of voluntary dismissal. R.C. 4123.511(D) [sic.] clearly provides that Vazquez does not possess the right to unilaterally dismiss his complaint as filed in the worker’s compensation appeal. ***

Notably, neither *Rohloff* nor *Martin*, both *supra*, addressed this second statutory directive. Thus, both of same pronounced results *diametrically opposite* to that which the General Assembly thereby required; incongruously holding that actions *pending* in common pleas court *after* January 1, 1986, be governed by the *pre-2006* version of R.C. §4123.512(D), which was identical to former section 4123.519 insofar as not prohibiting unilateral notice dismissals is concerned.

Third, the General Assembly also set forth its directive that its amendments to R.C. §4123.512 apply to *all* claims pending on the effective date of that enactment by reiterating same in uncodified Section 3 of Am. Sub. Sen. Bill No. 7. That provision states:

SECTION 3. This act applies to all claims pursuant to Chapters 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.*

As previously noted, it is within “division (H) of section 4123.512” that the General Assembly affirmatively specified that all of its amendments to that “section” applied to *all claims filed after* November 2, 1959; *exempting* only those court actions which were “pending in common pleas court or any other court on January 1, 1986.” Thus, since (i) appellee Thorton’s claim falls within the

former class and (ii) the case before the trial court did *not* fall within the latter class, the conclusion is inescapable that R.C. §4123.512(D)'s "employer consent" requirement applied not only to his *claim* but also to Montville's R.C. §4123.512 *appeal* on and after August 25, 2006 (the date on which the referendum initiative failed) and, thus, precluded both appellee and the trial court from dismissing appellee's complaint on a "*without prejudice*" basis without Montville's consent.

4) Dismissal of Appellee's Claim "*With Prejudice*" Is Required

a) Dismissal With Prejudice is Required by R.C. §4123.512(D) and Public Policy

Montville respectfully submits that under R.C. §4123.512(D)'s recent amendment a claimant-appellee who voluntarily dismisses his complaint without his employer-appellant's consent places himself into a procedural circumstance identical to that of the plaintiff in any other civil case 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 civil cases falling within the trial court's general jurisdiction, a plaintiff's 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:

It is well established that when a plaintiff files two unilateral notices of dismissal under Civ.R. 41(A)(1)(a) regarding the same claim, the second notice of dismissal functions as an adjudication of the merits of that claim, regardless of any contrary language in the second notice stating that the dismissal is meant to be without prejudice. See, e.g., *EMC Mtge. Corp. v. Jenkins*, 164 Ohio App.3d 240, 2005-Ohio-5799, 841 N.E.2d 855, ¶ 32; *Robinson v. Allstate Ins. Co.*, 8th Dist. No. 84666, 2004-Ohio-7032, 2004 WL 2980489, ¶ 29; *Forshey v. Airborne Freight Corp.* (2001), 142 Ohio App.3d 404, 408, 755 N.E.2d 969; *Mays v. Kroger Co.* (1998), 129 Ohio App.3d 159, 161-162, 717 N.E.2d 398; *Internatl. Computing & Electronic Eng. Corp. v. Ohio Dept. of Adm. Servs.* (May 9, 1996), 10th Dist. No. 95API11-1475, 1996 WL 239590. In that situation, the second dismissal is with prejudice under the double-dismissal rule, and *res judicata* applies if the plaintiff files a third complaint asserting the same cause of action. See 1970 Staff Note to Civ.R.

41 (When a dismissal is with prejudice, “the dismissed action in effect has been adjudicated upon the merits, and an action based on or including the same claim may not be retried”).

Olynyk v. Scoles, 114 Ohio St.3d 56, 2007-Ohio-2878 at ¶10.

The two procedural circumstances are legally identical because, although there is a basic “right” to dismiss, in neither of them does the right to dismiss “without prejudice” exist – a *second* unilateral “without prejudice” dismissal being precluded in the ordinary civil case by Civ. R. 41(A)’s “double dismissal” provision [id.]; and, in workers’ compensation matters appealed by employers, a *first* unilateral “without prejudice” dismissal being precluded by R.C. 4123.512(D)’s “employer’s consent” requirement and the duty enjoined upon the plaintiffs in all civil cases to prosecute their cases diligently and expeditiously. See, Civ. R. 41(B)(1); *Tokles & Son, Inc. v. Midwestern Indemn. Co.* (1992), 65 Ohio St.3d 621, 632, quoting *Schreiner v. Karson* (1977), 52 Ohio App.2d 219, 223; *Matthews v. General Motors Corp.* (March 30, 1984), Trumbull App. No. 3289, 1984 WL 6306 at *1:

Where a claimant, in an R.C. 4123.519 appeal of certain workers’ compensation administrative decisions and orders, fails to “within thirty days after the filing of the notice of appeal, file a petition containing a statement of facts in ordinary and concise language showing a cause of action to participate in the fund and setting forth the basis for the jurisdiction of the court over the action”, the proper remedy for the employer is a motion to dismiss, pursuant to Civ.R.41(B)(1), for failure and refusal of a claimant to prosecute his claim.

Accord, *Zuljevic v. Midland-Ross Corp.* (1980), 62 Ohio St.2d 116, 119-120:

The law does not, however, permit a claimant to disregard with impunity his statutory obligation to timely prosecute his R.C. 4123.519 claim. Were this court to hold that a claimant may file an untimely complaint in a R.C. 4123.519 appeal without first obtaining leave of court, the 30-day statutory time limit would be

rendered meaningless. Having failed to comply with the statute, it becomes the claimant's burden to show that his failure is due to excusable neglect or other good cause.

Notably, the only reason for Thorton's filing of his October 19 notice dismissal which appears upon the record is that he did so in order to avoid submitting to Montville's taking of his deposition. A plaintiff's refusal to submit to the deposition process has, of itself, been held sufficient reason to warrant dismissal on want of prosecution grounds. See, *American Sales, Inc. v. Boffo* (Montgomery 1991), 71 Ohio App.3d 168, 173; *Dafco, Inc. v. Reynolds* (Franklin 1983), 9 Ohio App.3d 4.

Montville's submission that dismissal *with* prejudice is required when a claimant-appellee dismisses in violation of the "employer's consent" provision is supported by the clear public policy purpose which prompted the General Assembly's adoption of the "employer's consent" amendment – i.e., to eliminate claimant-induced delays in the determination of employers' R.C. §4123.512 appeals because:

[T]o permit a claimant to unilaterally dismiss the employer's appeal under Civ.R. 41(A) to delay or thwart the rights of an employer that is contesting the findings of the Industrial Commission defeats the purpose of the appeals process and is an abuse of Civ.R. 41(A). *** Further, permitting this dismissal frustrates the statutory purpose of R.C. 4123.512[.]

Robinson v. B.O.C. Group Gen. Motors Corp. (1998), 81 Ohio St.3d 361, 372-373 (Lundberg Stratton, J., dissenting); and because, "a voluntary dismissal under Civ.R. 41(A)(1)(a) *** unfairly burdens an employer, as a claimant can dismiss his or her claim while continuing to receive benefits until the claimant refiles another petition." *Kaiser v. Ameritemps, Inc.*, 84 Ohio St.3d 411, 415,

That *prompt* adjudication of workers' compensation matters appealed into our common pleas courts has long been the public policy of Ohio is incontrovertible; the provisions of former R.C. §4123.519 and all versions of R.C. §4123.512 not only affording employer-appellants in such matters the right to *obtain* a determination from a trial court of a claimant's *ineligibility* to receive workers' compensation benefits, where the underlying facts do not warrant participation, but also to have such determinations made as *expeditiously* as is judicially possible. Specifically, R.C. §4123.512(H) expressly mandates that the courts afford this class of cases expedited treatment: "All actions and proceedings under this section which are the subject of an appeal to the court of common pleas or the court of appeals *shall be preferred over all other civil actions except election causes, irrespective of position on the calendar.*"

⁶ Notably, this Court rejected Ameritemps' "unfair burden" submission on the ground that, under then-existing R.C. §4123.511(H), "*the employer ultimately suffers no prejudice, as any illegitimate benefits paid during the interim between the original filing and the refiling of a voluntarily dismissed action are repaid if the employee's claim does not prevail.*" As the record in the case at bar demonstrates, however, that "no prejudice" conclusion *may* have been inaccurate when it was pronounced, as it did not contemplate the significant, adverse, economic effect upon state fund employers' eligibility for inclusion in a group rating group during the interim period of delay. See, *Arth Brass and Aluminum Castings, Inc. v. Conrad*, 104 Ohio St.3d 547, 2004-Ohio-6888 at ¶¶40-52.

Additionally, the reasoning from which that "no prejudice" conclusion resulted did not anticipate current R.C. §§4123.511(J) and 4123.512(H) [as amended in Am. Sub. H. B. 100 (2007)] which appear to preclude recoupment of lost *group rating premium savings*; the former section now mandating *immediate charging* of all amounts paid out on a given claim against the employer's risk account, and the latter section appearing to *restrict* such employer's reimbursement rights solely to recoupment of "*compensation or benefits, or both[.]*" Thus, it appears that the due process guarantee underlying ¶¶40-52 of this Court's *Arth Brass* decision, which provided for recoupment of lost *group rating* premium savings, may also have been legislatively removed in 2007 [see, *Legislative Service Commission, Final Analysis for Am. Sub. H.B. 100 (2007)*, at pp. 28-29, and fn. 4 thereto] due to the General Assembly's recognition that, through its adoption of the "employer's consent" amendment in 2006, it had *already* outlawed any possibility of claimants' unilaterally visiting economic prejudice upon their employers through resort to Civ. R. 41(A)(1)(a) and R.C. §2305.19.

Three further reasons unique to Ohio workers' compensation practice also require that the lower courts' acceptance of appellee's October 19, 2006, voluntary dismissal of his complaint operate as an adjudication upon the merits of his workers' compensation claim. *First*, the sixty day statute of limitations contained in R.C. §4123.512(A) requires same. *Second*, the jurisdictional limitation embodied in R.C. §4123.512(D)'s "employer's consent" requirement necessitates the same result. *Third*, dismissal of appellee's claim with prejudice is required by the long-settled rule in *Zuljevic v. Midland-Ross Corp.* (1980), 62 Ohio St.2d 116, and the statutorily-mandated, public policy of *prompt* resolution of workers' compensation appeals upon which that decision was founded.

b) Dismissal With Prejudice is Required by R.C. §§4123.512(A) and §4123.512(D)

The statute of limitations applicable to appeals from final orders of the Industrial Commission is sixty days, measured from the latter of the date of receipt of (i) the order upon the merits thus appealed, if such was made pursuant to R.C. §4123.511(E), or (ii) the Commission's refusal of an appeal from a prior order upon the merits, issued pursuant to R.C. §4123.511(D). See, R.C. §4123.512(A); *Lewis v. Connor* (1985), 21 Ohio St.3d 1, at the syllabus, and at 2-4; *Fowee*, supra, at the syllabus. Here, that limitations period expired on or about March 28, 2006, as the Commission's "refusal" order was mailed to the parties on January 25, 2006. (R. 3 at attachment 1.) Accordingly, the period of limitations applicable to appellee's right to commence a proceeding in common pleas court upon the claim determined by the Commission's January 4, 2006, and January 23, 2006, orders (R. 3 at attachments 1 and 2) expired on or about March 28, 2006. Thus, unless the savings provision of R.C. §2305.19(A) applies to appellee's October 19, 2006, notice dismissal or to the trial court's October 31, 2006, order which terminated the case, any subsequent

attempt by appellee to refile his claim before the court will be barred by that sixty day statute of limitations and, thus, also be barred by res judicata. Compare, *Olynyk*, supra, at {¶10}, addressing the effect of the “double-dismissal rule” in ordinary civil cases: “*** the second dismissal is with prejudice under the double-dismissal rule, and *res judicata* applies if the plaintiff files a third complaint asserting the same cause of action.”

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 v. National Fire Ins. Co. of Hartford*, 158 Ohio App.3d 453, 2004-Ohio-4845 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[.]” *Frysinger 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 later 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 *Frysinger* 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. However, now that 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, the maxim, “*Cessante ratione legis, cessat et ipsa lex,*” applies; thus 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).

The General Assembly’s prerogative to overturn Supreme Court decisions regarding the Workers’ Compensation Act is unquestionable. Section 35, Article II, Ohio Const.,⁷ vests the power to make the Civil Rules applicable to workers’ compensation matters in the General Assembly. Additionally, the Civil Rules themselves recognize the paramount authority of the General Assembly to determine whether all or any part of such rules will apply in “special statutory proceedings.” See, Civ. R. 1(C)(7). Workers’ compensation matters of the type in issue here clearly fall within the definition of “special statutory proceedings.” See, *Myers v. Toledo*, 110 Ohio St.3d 218, 2006-Ohio-4353 at ¶15, holding:

¶ 15 Workers’ compensation did not exist at common law or in equity, but was established by special legislation. See S.B. No. 127, 102 Ohio Laws 524; Am.S.B. No. 48, 103 Ohio Laws 72. See, generally, Fulton, Ohio Workers Compensation Law (2d Ed.1998) 20-21, Sections 2.10-2.11. Therefore it falls within the definition of a special proceeding under R.C. 2505.02(A)(2).

⁷ “For the purpose of providing compensation to workmen *** laws may be passed establishing a state fund to be created by compulsory contribution by employers, and administered by the state, determining the terms and conditions upon which payment shall be made therefrom.”

Further, R.C. §1.51 directs that any perceived conflict between R.C. §4123.512(D)'s general provision that, "further pleadings shall be had in accordance with the Rules of Civil Procedure," and its recently added, specific provision 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*" be resolved by a determination that the, "special *** provision prevails as an exception to the general provision[.]" Therefore, it can only be concluded that 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 "employer's consent" amendment not only outlawed such unilateral dismissals but also eliminated the entire body of decisional law predicated upon Civ. R. 41(A)(1)(a) by which the filing of such a dismissal might be viewed as anything other than a *Siegfried*-type "voluntary abandonment" of the plaintiff's claim.

Accordingly, due to the most recent amendment to R.C. §4123.512(D), the only response to Thorton's October 19 filing which the trial court was statutorily authorized to journalize was an order dismissing his complaint "with prejudice" and, thus, determining that appellee was "not entitled to participate." And, due to same, the court of appeals' decision and judgment which not only afforded "*without prejudice*" efficacy to Thorton's said unilateral dismissal but also refused to enter the judgment in Montville's favor to which it was entitled were equally erroneous.

c) Dismissal With Prejudice is Also Required Because R.C. §4123.512(D) Imposes a Limitation Upon the Trial Court's Jurisdiction to Enter a Contrary Order

Neither the parties to R.C. §4123.512 appeals nor the courts in which same are filed are at liberty to disregard the terms and conditions for the conduct thereof which the General Assembly has established. The *parties* are bound to prosecute such appeals in conformity with the General

Assembly's mandates. See, *American Restaurant & Lunch Co. v. Glander* (1946), 147 Ohio St. 147, at paragraph one of the syllabus: "Where a statute confers the right of appeal, adherence to the conditions thereby imposed is essential to the enjoyment of the right conferred." Accord, *Volz v. Volz* (1957), 167 Ohio St. 141. And our courts are similarly bound by the circumstance that the statutory requirements and limitations contained within the appeals statute are *jurisdictional* in nature. See, *Breidenbach v. Mayfield* (1988), 37 Ohio St.3d 138, 140 [quoting paragraph four of the syllabus in *Jenkins v. Keller* (1966), 6 Ohio St.2d 122] for its holding that, "Courts of Common Pleas do not have inherent jurisdiction in workmen's compensation cases but only such jurisdiction as is conferred on them under the provisions of the Workmen's Compensation Act[.]" and further holding that, "The jurisdiction of the court of common pleas over workers' compensation claims is not included within its general jurisdiction. However, jurisdiction over such claims is provided by R.C. 4123.519." Due to same, it is clear that, absent Montville's consent, not only did appellee have no legal "right" in October 2006 to halt the progress of Montville's appeal towards resolution through the device of a Civ. R. 41(A)(1)(a) dismissal of his complaint "without prejudice," but, more importantly, that the trial court had no lawful "authority" – i.e., "jurisdiction" – to approve and confirm appellee's characterization of his dismissal as being "without prejudice" to his right to reinstitute his claim on some future date.

Since appellee Thorton had no legal right to dismiss his complaint unilaterally on October 19, 2006, the court paper which he filed on that date, though styled as a "dismissal," could only constitute an abandonment of his *claim*, because (i) his supposed "right" to effectuate such a unilateral dismissal of his complaint did not exist [*Vazquez*, supra] and (ii) nowhere within R.C. §4123.512 has the General Assembly authorized any procedure for dismissing and later refileing such

an appeal or action. Accordingly, it cannot be postulated that R.C. §2305.19 operates to confer or preserve any “right” on appellee’s part to refile his complaint. And, since nothing within R.C. §4123.512 confers, affords, or preserves any such “right” of refiling either, it can only be concluded that no such “right” exists.

From the cases previously cited which analyzed what the legally required result of a plaintiff’s refusing to file a complaint *or* of filing a legally prohibited Civ. R. 41(A)(1)(a) dismissal “without prejudice” must be, it can only be concluded that the only response to a unilateral notice dismissal which the “employer’s consent” amendment permits trial and appellate courts to enter is a judgment which determines such “without prejudice” dismissal as being one “*with* prejudice.” See, *Olynyk*, supra, at ¶10, and cases cited therein. Therefore, that result must obtain in this case, as any judgment other than one denying the right to participate would contravene R.C. §4123.512(D).

d) Dismissal With Prejudice is Required by the Rule in *Zuljevic v. Midland-Ross Corp.* (1980), 62 Ohio St.2d 116, and the Public Policy Consideration Upon which that Decision Turned

Finally, dismissal with prejudice is likewise required by the rule in *Zuljevic*, supra, and the public policy principle of *prompt determination* upon which that decision was founded; i.e., that permitting, “a claimant to disregard with impunity his *statutory obligation to timely prosecute* his R.C. 4123.519 claim [would render] *** *the 30-day statutory time limit* *** meaningless.” [Id. at 119-120.] Accord, *Karnofel v. Cafaro Management Co.* (June 26, 1998), Trumbull App. No. 97-T-0072, 1998 WL 553491 at *4: “[A]ppellant failed to file the requisite petition within the thirty-day period set forth in R.C. 4123.512(D). While *this thirty-day period* has been held not to be a jurisdictional requirement, it *must nonetheless be met at some reasonable point* ***”; *Matthews v. General Motors Corp.*, supra.

That public policy principle is unavoidably implicated in this case because appellee's filing of his statutorily-prohibited dismissal irretrievably removed Montville's right to have the case proceed to trial upon the merits on November 27, 2006. The trial and appellate courts' acceptance of that filing caused Montville's opportunity to *re-establish its eligibility* for inclusion in the Ohio Manufacturer's Association's group rating program during fiscal year 2007-2008 to be irretrievably lost, because the case was thereby prevented from proceeding to trial before the end of February 2007, when the deadline for Montville's inclusion in The Ohio Manufacturers' Association's group rating program arrived.

Thus, for all of the previously listed reasons, that part of the court of appeals' judgment which refused to provide App. R. 12(B) relief to Montville was prejudicially erroneous and must be reversed, and final judgment must be entered in Montville's favor.

Proposition of Law No. 2:

Where a claimant-plaintiff is precluded from filing a Civ. R. 41(A)(1)(a) notice dismissal of his complaint by R.C. §4123.512(D)'s "employer's consent" requirement, but does so nonetheless, a trial court's order refusing to enter final judgment for the defendant-employer is a final appealable order.

The court of appeals avoided addressing the legal effect of the General Assembly's "employer consent" amendment through the expedient of its theorem that Montville's November 30, 2006, notice of appeal from the trial court's October 31, 2006, order was not filed within App. R. 4(A)'s thirty day time limit; reasoning that Montville's said notice of appeal should have been filed within thirty days of Thorton's October 19, 2006, filing of 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.

{¶ 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."

{¶ 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).

That theorem, though novel, is plainly erroneous because it contravenes Section 3(B)(2), Article IV, of the Ohio Constitution, which 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"; the provisions of Appellate Rules 4(A) and 4(D);⁸ R.C. §2505.03(A), (C);⁹ the well settled rule of

⁸ (A) **Time for appeal.**

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 period in Rule 58(B) of the Ohio Rules of Civil Procedure.

(continued...)

decisional law that, “R.C. 2505.03(A) limits the appellate jurisdiction of courts of appeals to the review of final orders, judgments or decrees” [*State ex rel. A & D Limited Partnership v. Keefe* (1996), 77 Ohio St.3d 50, 52]; and the holdings of several other appellate courts which have decided appeals taken from orders in analogous procedural circumstances.

Here, the simple fact of the matter is that under Ohio’s Constitution, the enabling statute which authorizes courts of appeals to engage in appellate review, the rules of court which this Supreme Court adopted to establish the procedure by which appeals are taken and determined, and the body of decisional law which amplifies same, (i) appeals may *only* be taken from *judgments or final orders* entered by an inferior court¹⁰ and (ii) courts of appeals have no authority to engage in appellate review of any of the numerous types of filings which a party to a civil action might make, until such a filing is carried into the inferior court’s *judgment or final order* via that *court’s* adoption or rejection of the party’s request presented in such filing. Thus, it is for those two reasons that App.

⁸(...continued)

(D) Definition of “entry” or “entered.”

As used in this rule, “entry” or “entered” means when a *judgment or order* is entered under Civ. R. 58(A) or Crim. R. 32(C).

⁹ 2505.03 Appeal of final order, judgment, or decree.

(A) Every final order, judgment, or decree of a court and, when provided by law, the final order of any administrative officer, agency, board, department, tribunal, commission, or other instrumentality may be reviewed on appeal by a court of common pleas, a court of appeals, or the supreme court, whichever has jurisdiction.

(C) An appeal of a final order, judgment, or decree of a court shall be governed by the Rules of Appellate Procedure or by the Rules of Practice of the Supreme Court, whichever are applicable, and, to the extent not in conflict with those rules, this chapter.

¹⁰ See, e.g., *Couchot v. State Lottery Comm.* (1996), 74 Ohio St.3d 417, 423: “*Appeals are from judgments, not the opinions explaining them.*”

R. 4(A) and App. R. 4(D) mandate that the thirty day time period within which an appeal must be filed is to be measured from the date of entry of *the judgment or final order* from which the appeal is taken – *not* from the date upon which the application or other filing, the request whereof the trial court accepted or rejected, was *received* by the trial court.

The court of appeals’ theorem that the timeliness of an appeal from an order affording “without prejudice” status to a dismissal which the law required to be one “with prejudice” must be measured from the date on which the notice of dismissal was filed is in conflict with the decisions of four other Ohio courts upon precisely the same issue. Those four conflicting decisions are *Lovins v. Kroger Co.*, 150 Ohio App.3d 656, 2002-Ohio-6526 at ¶6; *Reinbolt v. National Fire Ins. Co. of Hartford*, 158 Ohio App.3d 453, 2004-Ohio-4845, 816 N.E.2d 1083 at ¶11; *Olynyk v. Andrish*, Cuya. App. No. 86009, 2005-Ohio-6632; and *Olynyk v. Scoles*, 114 Ohio St.3d 56, 2007-Ohio-2878.

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 found 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*.

In the *Olynyk* cases, {¶4} of the court of appeals' decision reveals that Olynyk's Civ.R. 41(A)(1)(a) notice of dismissal "without prejudice" was filed on *January 13, 2005*, and that the trial court converted same to a dismissal with prejudice by entry journalized *January 24, 2005*. Reference to the trial court's record (Cuyahoga Com. Pl. No. 02-463860) reveals that Olynyk's notice of appeal to the court of appeals was filed on *February 23, 2005*. In other words, plaintiff-Olynyk's filing of her Civ. R. 41(A) dismissal *antedated* her filing of her notice of appeal by *forty-one days*. Yet neither the Cuyahoga County Court of Appeals nor this Supreme Court found any problem with the *timeliness* of plaintiff's notice of appeal from the trial court's refusal to recognize her procedural right to take a Civ.R. 41(A)(1)(a) dismissal, as her notice of appeal was filed within thirty (30) days of the journalization of the trial court's order from which her 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 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.

Beyond the foregoing, the court of appeals's computing the timeliness of Montville's notice of appeal to it by using a tolling date *other than* the date on which the final order from which Montville appealed was journalized was also at odds with the fact that Montville was *not* appealing from *Thorton's filing* of his October 19 notice dismissal; but, rather, from *the trial court's October 31, 2006*, judgement which *ratified* Thorton's unilateral characterization of his dismissal as being “without prejudice.” In this regard, the court of appeals' assertion that Montville should have appealed from Thorton's October 19 filing absurdly presupposes that, if Montville had done so, 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 Thorton's said October 19 filing even though the trial court had neither accepted nor rejected same.

The absurdity of the court of appeals' said supposition becomes even more apparent when the manner in which the “double dismissal” rule ordinarily operates is recalled: “res judicata applies

if the plaintiff files a *third* complaint asserting the same cause of action.” *Olynyk v. Scoles*, supra, at ¶10}. In short, if the trial court *abstains from* issuing an order which confirms and accepts the notice dismissal as being one “*without prejudice*,” then the defendant cannot, and need not, file any appeal because there would be no “*judgment or final order*” from which an appeal could be taken. In that instance, no judicial determination of the legal effect of the notice dismissal is made until the plaintiff refiles his complaint, the defendant moves for judgment on res judicata grounds, and the trial court either grants or denies such motion and enters a final judgment.

Where the trial court does not enter an order responding to the notice dismissal, the issue of whether the law required such dismissal to be viewed as one “*with prejudice*” or “*without prejudice*” can be raised in any of three ways – the trial court’s grant or denial of (1) a motion to strike the notice dismissal due to the unavailability of any right to unilaterally dismiss without prejudice [e.g., *Rohloff* and *Martin*, both supra]; (2) a motion requesting the entry of final judgment in defendant’s favor on want of prosecution grounds [*Zuljevic*, supra], as Montville did here (R. 21); or (3) a motion for judgment on the ground that the notice dismissal was procedurally impermissible, as Montville also did here. [R. 21. Cf., *Pheils v. Black* (October 13, 1995), Wood App. No. WD-95-028, 1995 WL 604615.]

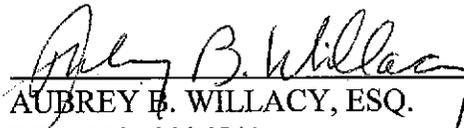
Notably, however, each of those alternatives requires that the trial court enter some *judgment* or other form of *final order* which either ratifies or rejects plaintiff’s assertion that his notice dismissal is “*without prejudice*” before any right of appeal accrues; thereby commencing the running of App. R. 4(A)’s thirty day time limit for perfecting an appeal upon the date on which such judgment or final order is entered. Here, the trial court entered such a *final order* on October 31, 2006, and Montville filed its notice of appeal therefrom on the thirtieth day next-following same.

Thus, the court of appeals' dismissal of Montville's appeal on the ground that same was not timely filed was plainly erroneous and must also be reversed.

V. Conclusion

For all of the foregoing reasons the judgment of the court of appeals must be reversed and final judgment must be entered in Montville's favor, pronouncing that appellee Thorton's attempted dismissal of his complaint constituted an abandonment of his workers' compensation claim and resulted in a determination upon the merits of that claim that appellee Thorton "is not entitled to participate under the Workers' Compensation Act."

Respectfully submitted,



AUBREY B. WILLACY, ESQ.

REG. NO. 0006541

WILLACY, LoPRESTI & MARCOVY

700 Western Reserve Building

1468 West Ninth Street

Cleveland, Ohio 44113

(216) 241-7740 Fax: (216) 241-6031

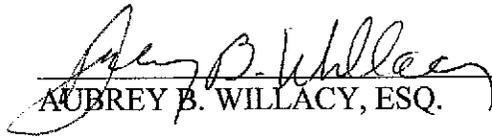
E-Mail: ABWillacy6541@aol.com

COUNSEL FOR APPELLANT

MONTVILLE PLASTICS & RUBBER, INC.

VI. SERVICE

Copies of appellant Montville Plastics & Rubber, Inc.'s, foregoing Brief 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 29th day of February, 2008.


AUBREY B. WILLACY, ESQ.

VII. APPENDIX

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. 07-1588

ON APPEAL FROM THE
GEAUGA COUNTY COURT
OF APPEALS, ELEVENTH APPELLATE
DISTRICT

Court of Appeals Case No. 2006-G-2744

NOTICE OF APPEAL OF
APPELLANT MONTVILLE PLASTICS & RUBBER, INC.

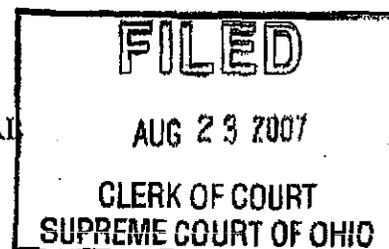
AUBREY B. WILLACY, ESQ.
REG. NO. 0006541
WILLACY, LoPRESTI & MARCOVY
700 Western Reserve Building
1468 West Ninth Street
Cleveland, Ohio 44113
(216) 241-7740 Fax: (216) 241-6031
E-Mail: ABWillacy6541@aol.com

MITCHELL A. STERN, ESQ.
REG. NO. 0023582
27730 Euclid Avenue
Cleveland, Ohio 44132
(216) 861-0006 Fax: (216) 289-4743
E-Mail: mstern1717@aol.com

COUNSEL FOR PLAINTIFF-APPELLEE
ROBERT THORTON

COUNSEL FOR DEFENDANT-APPELLANT
MONTVILLE PLASTICS & RUBBER, INC.

VIRGINIA EGAN FISHER, ESQ.
REG. NO. 0006903
ASSISTANT ATTORNEY GENERAL
OFFICE OF THE ATTORNEY GENERAL
615 Superior Avenue, West, 11th Floor
Cleveland, Ohio 44113
(216) 787-3030 Fax: (216) 787-3480
E-Mail: vfisher@ag.state.oh.us



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

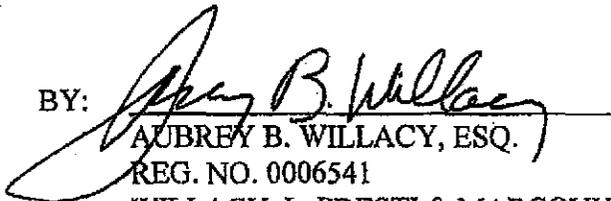
**NOTICE OF APPEAL OF APPELLANT
MONTVILLE PLASTICS & RUBBER, INC.**

Appellant Montville Plastics & Rubber, Inc., hereby gives notice of appeal to the Supreme Court of Ohio from the judgment of the Geauga County Court of Appeals, Eleventh Appellate District, entered in Court of Appeals Case No. 2006-G-2744 on July 9, 2007.

This case raises a substantial constitutional question and is one of public or great general interest.

Respectfully submitted,

BY:

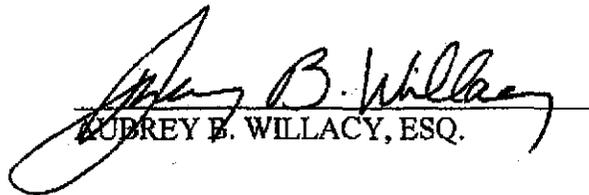

AUBREY B. WILLACY, ESQ.
REG. NO. 0006541

WILLACY, LoPRESTI & MARCOVY
700 Western Reserve Building
1468 West Ninth Street
Cleveland, Ohio 44113
(216) 241-7740 Fax: (216) 241-6031
E-Mail: ABWillacy6541@aol.com

COUNSEL FOR APPELLANT
MONTVILLE PLASTICS & RUBBER, INC.

SERVICE

Copies of defendant-appellant Montville Plastics & Rubber, Inc.'s, foregoing Notice of Appeal 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.

JUL 11 2007

FILED

IN COURT OF APPEALS

STATE OF OHIO

IN THE COURT OF APPEALS

JUL 11 2007

COUNTY OF GEAUGA

ELEVENTH DISTRICT

DENISE M. KAMINSKI
CLERK OF COURTS
GEAUGA COUNTY

ROBERT THORTON,

JUDGMENT ENTRY

Appellee,

CASE NO. 2006-G-2744

- VS -

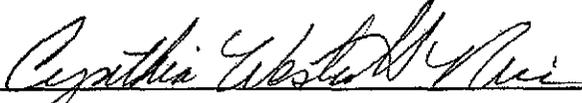
MONTVILLE PLASTICS & RUBBER,
INC.,

Appellant,

ADMINISTRATOR, OHIO BUREAU OF
WORKERS' COMPENSATION,

Appellee.

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).


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).

CYNTHIA WESTCOTT RICE, P.J.,

{¶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.* (1999), 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.

2007 AUG 28 10:45 AM
8

STATE OF OHIO)
) SS.
COUNTY OF GEAUGA)

IN THE COURT OF APPEALS
ELEVENTH DISTRICT

ROBERT THORTON,
Appellee,

JUDGMENT ENTRY

CASE NO. 2006-G-2744

- vs -

MONTVILLE PLASTICS & RUBBER,
INC.,

Appellant,

FILED
IN COURT OF APPEALS

AUG 28 2007

DENISE M. KAMINSKI
CLERK OF COURTS
GEAUGA COUNTY

ADMINISTRATOR, OHIO BUREAU OF
WORKERS' COMPENSATION,

Appellee.

On July 18, 2007, appellant, Montville Plastics & Rubber, Inc., filed a motion to certify this case to the Supreme Court of Ohio on the basis of a conflict pursuant to App.R. 25. No brief in opposition has been filed.

On July 9, 2007, this court issued its opinion in *Thorton v. Montville Plastics & Rubber, Inc.*, 11th Dist. No. 2006-G-2744, 2007-Ohio-3475, dismissing the appeal pursuant to App.R. 4(A).

Section 3(B)(4), Article IV, of the Ohio Constitution states that in order to certify a conflict, a judgment must be "in conflict" with a judgment of another court. In *Whitelock v. Gilbane Bldg. Co.* (1993), 66 Ohio St.3d 594, paragraph one of the syllabus, the Supreme Court of Ohio held that "[p]ursuant to Section 3(B)(4), Article IV of the Ohio Constitution and S.Ct.Prac.R. III, there must be an actual conflict between appellate judicial districts on a rule of law before

12/341

certification of a case to the Supreme Court for review and final determination is proper.”

In its motion to certify, appellant argues that this court's decision is in conflict with the Second, Third, Fifth, Sixth, Eighth, and Tenth District Courts of Appeal. See *Lovins v. Kroger Co.*, 150 Ohio App.3d 656, 2002-Ohio-6526; *Goodwin v. Better Brake Parts, Inc.*, 3d Dist. No. 1-04-37, 2004-Ohio-5095; *Hughes v. Fed. Mogul Ignition Co.*, 5th Dist. No. 06 CA 27, 2007-Ohio-2021; *Reinbolt v. Natl. Fire Ins. Co. of Hartford*, 158 Ohio App.3d 453, 2004-Ohio-4845; *Smith v. Continental Airlines, Inc.*, 8th Dist. No. 81010, 2002-Ohio-4181; *Ciomek v. LTV Steel Co.* (Jan. 27, 2000), 8th Dist. Nos. 74646 and 74647, 2000 Ohio App. LEXIS 226; *Rice v. Stouffer Foods Corp.* (Nov. 6, 1997), 8th Dist. No. 72515, 1997 Ohio App. LEXIS 4872; *Yates v. Retail Services Inc.* (Dec. 10, 1998), 8th Dist. No. 74908, 1998 Ohio App. LEXIS 5928; *Horn v. Ford Motor Co.* (Dec. 12, 1991), 8th Dist. No. 59409, 1991 Ohio App. LEXIS 5925; *Robinson v. Kokosing Constr. Co., Inc.*, 10th Dist. No. 05AP-770, 2006-Ohio-1532 and *McKinney v. Bur. of Workers' Comp.*, 10th Dist. No. 04AP-1086, 2005-Ohio-2330.

Appellant asserts that in *Goodwin*, *Hughes*, *Smith*, *Ciomek*, *Rice*, *Yates*, *Horn*, *Robinson*, and *Kokosing*, the Third, Fifth, Eighth, and Tenth Districts determined that a trial court is not divested of jurisdiction over the subject matter of an employer's R.C. 4123.512 appeal by the claimant-plaintiff's filing of a Civ.R. 41(A)(1)(a) notice of dismissal.

12/342

Appellant also raises a second issue for certification to the Supreme Court of Ohio. Appellant claims that in *Lovins* and *Reinbolt*, the Second and Sixth Districts determined that "a voluntary dismissal without prejudice normally is not a final, appealable order because it is not an adjudication on the merits and it leaves the parties as if the action never had been commenced."

We do not find that our position on either of these issues is in conflict with any of the districts listed by appellant. In *Thorton*, this court never addressed the issues that appellant states are in conflict with the other districts.

In *Thorton*, supra, at ¶4, we stated:

**** [T]he time-stamped notice of voluntary dismissal filed by [appellee] 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] 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."

We further explained in *Thorton*, supra, at ¶3, that:

"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

12/343

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."

Therefore, it is our position that none of these cases is in conflict on "a rule of law," as each was decided on its own facts giving full consideration to the law. A factual distinction between cases is not a basis for conflict certification. *Whitelock*, supra, at 599. "This is so even though we may not agree with the ultimate judgment of a court of appeals on the facts before it." Id.

For the foregoing reasons, we do not believe that our decision in *Thorton* is in conflict with *Goodwin, Hughes, Smith, Ciomek, Rice, Yates, Horn, Robinson, Kokosing, Lovins and Reinbolt*.

Appellant's motion to certify a conflict is overruled.



PRESIDING JUDGE CYNTHIA WESTCOTT RICE
FOR THE COURT

COLLEEN MARY O'TOOLE, J.,

MARY JANE TRAPP, J.,

concur.

121344

2007
J

STATE OF OHIO)
) SS.
COUNTY OF GEAUGA)

IN THE COURT OF APPEALS
ELEVENTH DISTRICT

ROBERT THORTON,
Appellee,

JUDGMENT ENTRY

CASE NO. 2006-G-2744

- vs -

MONTVILLE PLASTICS & RUBBER,
INC.,

FILED
IN COURT OF APPEALS

Appellant,

AUG 28 2007

ADMINISTRATOR, OHIO BUREAU OF
WORKERS' COMPENSATION,

DENISE M. KAMINSKI
CLERK OF COURTS
GEAUGA COUNTY

Appellee.

On July 18, 2007, appellant, Montville Plastics & Rubber, Inc., filed a motion requesting this court to reconsider our decision in *Thorton v. Montville Plastics & Rubber, Inc.*, 11th Dist. No. 2006-G-2744, 2007-Ohio-3475.

In its application for reconsideration, appellant contends that this court's decision was in error and that we should, therefore, reconsider the opinion pursuant to App.R. 26(A).

App.R. 26 does not provide specific guidelines to be used by an appellate court when determining whether a prior decision should be reconsidered or modified. *State v. Owens* (1996), 112 Ohio App.3d 334, 335. However, *Matthews v. Matthews* (1981), 5 Ohio App.3d 140, has been generally accepted as the standard to be employed in this situation. In *Matthews*, the court stated that the test generally applied is whether the motion for reconsideration calls to

12/337

the attention of the court an obvious error in its decision or raises an issue for our consideration that was either not considered at all or was not fully considered by us when it should have been. *Id.* at 143.

Importantly, an application for reconsideration is not designed to be used in situations where a party simply disagrees with the logic employed or the conclusions reached by an appellate court. *Owens*, 112 Ohio App.3d at 336. Instead, App.R. 26 is meant to provide "a mechanism by which a party may prevent miscarriages of justice that could arise when an appellate court makes an obvious error" or renders a decision that is not supported by the law. *Id.*

In its application, appellant seeks reconsideration of this court's memorandum opinion, in which appellant's appeal was dismissed pursuant to App.R. 4(A). According to appellant, this court erred because nothing in the majority's memorandum opinion "points out that the *specific nature of the case* in the trial court below was a ***workers' compensation appeal, instituted by [appellant]*** pursuant to R.C. 4123.512." (Emphasis sic.) Appellant explains that that omission was critical to the dismissal of the appeal since "a special rule of law *** is applicable to one of the foundational questions which this Court decided ***." Appellant stated that "[t]he question to which that special rule of law applies is whether the trial court retains jurisdiction to act upon the R.C. 4123.512 case before it *after* the claimant-[appellee] files a Civ.R. 41(A)(1)(a) notice of voluntary dismissal." (Emphasis sic.)

Appellant further argues that this court's opinion omitted any disclosure of the fact that what appellant was appealing from was "***neither*** (i) [appellee's] filing

12/338

of his statutorily prohibited *** dismissal notice *nor* (ii) [appellee's] *assertion* in such notice that his dismissal was 'without prejudice'; but, rather, the trial court's October 31, 2006, journalization of its blanket acceptance and approval of [appellee's] said dismissal in its entirety ***." (Emphasis sic.)

We disagree with the logic employed by appellant. As this court indicated in *Thorton*, supra, at ¶3-4:

"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.

"In the matter at hand, the time-stamped notice of voluntary dismissal filed by [appellee] 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] 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."

12/339

Therefore, as we explained in *Thorton*, the filing of the notice of dismissal automatically terminated the case without intervention by the court. Hence, since the trial court's discretion was not involved, the trial court was not required to issue a subsequent order.

Since appellant has not called any obvious or prejudicial errors to the attention of this court or raised an issue that was not fully considered in our memorandum opinion, the arguments set forth in appellant's application for reconsideration are without merit.

Accordingly, the motion for reconsideration is hereby overruled.



PRESIDING JUDGE CYNTHIA WESTCOTT RICE
FOR THE COURT

COLLEEN MARY O'TOOLE, J., concurs,

MARY JANE TRAPP, J., concurs in judgment only.

12/340

JUN 13 2007

STATE OF OHIO)
) SS.
COUNTY OF GEAUGA)

IN THE COURT OF APPEALS
ELEVENTH DISTRICT

ROBERT THORTON,

Appellee,

JUDGMENT ENTRY

-vs-

CASE NO. 2006-G-2744

MONTVILLE PLASTICS &
RUBBER, INC.,

Appellant,

FILED
IN COURT OF APPEALS

JUN 13 2007

ADMINISTRATOR, OHIO
BUREAU OF WORKERS'
COMPENSATION,

DENISE M. KAMINSKI
CLERK OF COURTS
GEAUGA COUNTY

Appellee.

This court, sua sponte, vacates its prior entry of March 13, 2007, in which this appeal was consolidated with 11th Dist. No. 2007-G-2760.

It is further ordered that this appeal shall not be consolidated with 11th Dist. No. 2007-G-2760; therefore, each appeal shall be treated separately. Any future filings shall include separate appellate case numbers.


CYNTHIA WESTCOTT RICE
ADMINISTRATIVE JUDGE

12/26/

APR 25 2007

STATE OF OHIO
COUNTY OF GEAUGA

FILED
IN COURT OF APPEALS
APR 23 2007

IN THE COURT OF APPEALS
ELEVENTH DISTRICT

ROBERT THORTON,
Appellee,

DENISE M. KAMINSKI
CLERK OF COURTS
GEAUGA COUNTY

JUDGMENT ENTRY

-vs-

CASE NOS. 2006-G-2744
and 2007-G-2760

MONTVILLE PLASTICS
& RUBBER, INC., et al.,
Appellant,

ADMINISTRATOR, OHIO BUREAU
OF WORKERS' COMPENSATION,

Appellee.

By order of this Court, the Brief of Appellant, filed with this Court on April 9, 2007, is hereby sua sponte stricken from the record of this Court. From a review of the brief, this Court notes that it appears that Appellant has abused the use of footnotes and has used a reduced font size. Relevant and concise references in the text of the brief are more than sufficient. See Loc.R. 16(B)(2) of the Eleventh District Court of Appeals.

The Clerk of Courts is instructed to strike Appellant's brief from the record of this appeal.

Appellant is granted leave to file a corrected brief which complies with the rules of court on or before May 14, 2007.

Pursuant to this entry, Appellees' briefs are due to be filed within twenty (20) from the filing of Appellant's corrected brief.

JUDGE WILLIAM M. O'NEILL

12/210

MAR 13 2007

STATE OF OHIO) IN THE COURT OF APPEALS
) ss.
COUNTY OF GEauga) ELEVENTH DISTRICT

ROBERT THORTON,
Appellee,

- vs -

MONTVILLE PLASTICS &
RUBBER, INC.,
Appellant,

ADMINISTRATOR, OHIO BUREAU
OF WORKERS' COMPENSATION,
Appellee.

FILED
IN COURT OF APPEALS JUDGMENT ENTRY

MAR 13 2007
10:15 AM
DENISE M. KAMINSKI
CLERK OF COURTS
GEAUGA COUNTY
CASE NOS. 2006-G-2744
and 2007-G-2760

This Court, sua sponte, consolidates 11th Dist. Nos. 2006-G-2744 and 2007-G-2760 for purposes of briefing, oral argument, and disposition. Any future filings shall include both appellate case numbers.

Appellant's brief in 11th Dist. No. 2007-G-2760 will be due to be filed within twenty (20) days from the filing of the record in 11th Dist. No. 2007-G-2760.

Appellees' briefs in these consolidated appeals will be due to be filed within twenty days after Appellant files his brief in 11th Dist. No. 2007-G-2760.


ADMINISTRATIVE JUDGE CYNTHIA WESTCOTT RICE

12/123

STATE OF OHIO)
)
COUNTY OF GEAUGA)

SS.

IN THE COURT OF APPEALS

ELEVENTH DISTRICT

ROBERT THORTON,

Appellee,

-vs-

MONTVILLE PLASTICS
& RUBBER, INC., et al.,

Appellant.

FILED
IN COURT OF APPEALS

FEB 07 2007

DENISE M. KAMINSKI
CLERK OF COURTS
GEAUGA COUNTY

JUDGMENT ENTRY

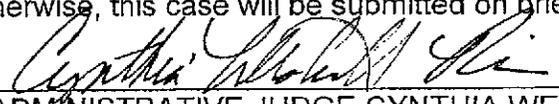
CASE NO. 2006-G-2744

By order of this Court, the September 8, 2006 Ohio Secretary of State Directive 2006-62 and the 2006 Official General Election Ballot, contained in the Appendix attached to the Brief of Appellant is hereby stricken pursuant to Loc.R. 16(B)(1) of the Eleventh District Court of Appeals since these items have either already been made a part of the trial court record and, therefore, attachment to Appellant's brief is not necessary, or are not part of the trial court record and, therefore, cannot be considered by this Court on appeal.

The Clerk of Courts is instructed to strike the September 8, 2006 Ohio Secretary of State Directive 2006-62 and the 2006 Official General Election Ballot, contained in the Appendix attached to Appellant's brief, filed with this Court on January 22, 2007.

In addition, the brief fails to comply with Loc.R. 21 of the Eleventh District Court of Appeals for failure to specify counsel's preference on the cover page of the brief to orally argue or submit this matter on the record and briefs.

Counsel shall notify this Court, in writing, within ten (10) days from the date of this judgment entry. Otherwise, this case will be submitted on briefs.


ADMINISTRATIVE JUDGE CYNTHIA WESTCOTT RICE

12/121

FILED
IN COMMON PLEAS COURT

2007 FEB 12 PM 11:38

ROBERT THORTON
PLAINTIFF
GEAUGA COUNTY

IN THE COURT OF COMMON PLEAS
GEAUGA COUNTY, OHIO

CASE NO. 06W000219

vs.

JUDGE FORREST W. BURT

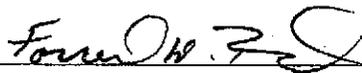
MONTVILLE PLASTICS & RUBBER,
INC., et al,
DEFENDANTS

JUDGMENT ENTRY

This matter came on for consideration upon the Motion for Relief from Judgment filed by Defendant Montville Plastics & Rubber, Inc.

The Court agrees with Plaintiff's contention that the General Assembly specifically intended prospective application of the amendments to R.C. §4123.512(D).

Defendant's Motion for Relief from Judgment is overruled.


FORREST W. BURT, JUDGE

cc: Mitchell Stern, Esq. ✓
Aubrey Willacy, Esq. ✓
Virginia Fisher, Esq. ✓

FILED
IN COMMON PLEAS COURT
IN THE COURT OF COMMON PLEAS
GEAUGA COUNTY, OHIO
2006 OCT 19 AM 11:16

J

ROBERT THORTON, ^{THORNTON}
CLERK OF COURTS
GEAUGA COUNTY
Plaintiff-Appellee,

-vs-

MONTVILLE PLASTICS RUBBER CO.

Defendant-Appellant,

and

WILLIAM E. MABE
CEO/ADMINSTRATOR
Bureau of Workers' Compensation

Defendant-Appellee.

Case No.: 06 W000 219
Judge: FORREST W. BURT

- AR -

NOTICE OF VOLUNTARY DISMISSAL

Now comes Robert Thornton, Plaintiff-Appellee, and hereby gives notice to this Court and counsel of the voluntary dismissal, without prejudice, of his complaint, pursuant to Civil Rule 41 (A)(1)(a).

Respectfully submitted,

IT IS SO ORDERED

Forrest W. Burt
FORREST W. BURT, JUDGE

Mitchell A. Stern

Mitchell A. Stern (0023582)
55 Public Square, Suite 1717
Cleveland, Ohio 44113
Phone: (216) 861-0006
Fax: (216) 771-8404

*Cc: Aubrey B. Willacy, Esq. ✓
Virginia Lynn Fisher, AAG ✓*

FILED
IN COMMON PLEAS COURT
2006 OCT 31 AM 10:10
THORNTON
CLERK OF COURTS
GEAUGA COUNTY

BALDWIN'S OHIO ADMINISTRATIVE CODE ANNOTATED
4123 WORKERS' COMPENSATION BUREAU
CHAPTER 4123-17. GENERAL RATING FOR STATE INSURANCE FUND

Copr. (C) 2008 Thomson/West. No Claim to Orig. U.S. govt. Works.

Rules are current to February 17, 2008;
Appendices are current to January 7, 2008

4123-17-62 Application for group experience rating

(A) A sponsoring organization shall make application for group experience rating on a form provided by the bureau and shall complete the application in its entirety with all documentation attached as required by the bureau. If the sponsoring organization fails to include all pertinent information, the bureau will reject the application.

(1) The group application shall be signed each year by an officer of the sponsoring organization to which the members of the group belong, and the sponsoring organization shall identify each individual employer in the group in the AC-25 application and shall provide information on each employer as follows:

(a) All employers which were in the group in the previous rating year. The employer does not need to file an AC-26 form.

(b) All employers which were not in the group in the previous rating year, but were in another group of the same sponsoring organization for the previous rating year. The employer does not need to file an AC-26 form.

(c) All employers which were not in the group in the previous rating year, and were not in another group of the same sponsoring organization for the previous rating year. The employer must file an AC-26 form for the group.

(2) In a separate report, or on the AC-25 form in a manner that clearly distinguishes the employers which are in the group from those which are not in the group, the sponsoring organization shall provide information on each employer as follows:

Ohio Admin. Code § 4123-17-62

(a) All employers which were in the group in the previous rating year and are no longer in the group, but are in another group of the same sponsoring organization. The employer does not need to file an AC-26 form.

(b) All employers which were in the group in the previous rating year, are no longer in the group, and are not in another group of the same sponsoring organization. If the employer is participating in group rating with another sponsoring organization, the employer must file an AC-26 form for that group.

(3) An individual employer's application for group rating (AC-26) is applicable for the upcoming policy year and all subsequent policy years where the employer remains in the same group or another group sponsored by the same sponsoring organization. The employer does not need to file a new AC-26 each year where the employer remains in any group sponsored by the same sponsoring organization, whether it is the same group as the previous rating year or a new group of the same sponsoring organization. The employer must file an AC-26 if the employer applies for group rating with a different sponsoring organization or was not participating in group rating the previous rating year. Where an employer files a new AC-26 during an application period, it shall be presumed that the latest filed AC-26 of the employer indicates the employer's intentions for group rating. The employer's AC-26 shall remain effective until any of the following occurs:

(a) The employer timely files a subsequent AC-26 indicating the desire to participate in a group with a different sponsor for the upcoming policy year;

(b) The sponsoring organization for the group does not include the employer on the group roster (AC-25);

(c) The group does not reapply for group rating or is rejected for failure to meet group eligibility requirements; or

(d) The employer fails to meet individual eligibility requirements and is rejected from participation in the group for the purpose of group rating by the bureau.

(4) The bureau may request of individual employers or the group additional information necessary for the bureau to rule upon the application for group coverage. Failure or refusal of the group to provide the requested information on the forms or computer formats provided by the bureau shall be sufficient grounds for the bureau to reject the application and refuse the group's participation in group experience rating. Individual employers who are not included on the final group roster or do not have an individual employer application (AC-26) for the same group or another group sponsored by the same sponsoring organization on file by the application deadline will not be considered for the group plan for that policy year; however, the bureau may waive this requirement for good cause shown due to clerical or administrative error, so long as no employer is added to a group after the application deadline. All rosters, computer formats or typewritten, must be submitted by the

Ohio Admin. Code § 4123-17-62

application deadline.

(5) A sponsoring organization shall notify an employer that is participating in a group of that sponsoring organization if the employer will not be included in a group by that sponsoring organization for the next rating year. For private employer groups, the sponsoring organization shall notify the employer in writing prior to the first Monday in February of the year of the group application deadline. For public employer taxing district groups, the sponsoring organization shall notify the employer in writing prior to the second Friday of August of the year of the group application deadline. If an employer notifies the bureau that a sponsoring organization has not complied with this rule and the sponsoring organization fails to prove that the notice was provided in a timely manner, the bureau will, without the approval of the sponsoring organization, allow the employer to remain in the group for the rating year for which the notice was required. If that group no longer exists the bureau will, without the approval of the sponsoring organization, place the employer in a homogeneous group with the same sponsoring organization or take other appropriate action.

(B) For public employer taxing districts, applications for group coverage shall be filed on or before the last Friday of August of the year immediately preceding the rating year. For private employers, applications for group coverage shall be filed on or before the last business day of February of the year of the July 1 beginning date for the rating year.

(C) A group's application for group rating is applicable to only one policy year. The group must reapply each year for group coverage. Continuation of a plan for subsequent years is subject to timely filing of an application on a yearly basis and the meeting of eligibility requirements each year; however, an individual employer member of a continuing group who initially satisfied the homogeneous requirement of paragraph (B)(3) of rule 4123-17-61 of the Administrative Code shall not be disqualified from participation in the continuing group for failure to continue to satisfy such requirement.

(D) The application shall be filed in the risk technical services section of the bureau of workers' compensation, Columbus, Ohio.

(E) The application for any group to participate in group experience rating is optional with the group, subject to acceptance by the bureau. Once a group has applied for group rating, the organization may not voluntarily terminate the application during the bureau's evaluation period. All changes to the original application must be filed on a bureau form provided for the application for the group experience rating plan and must be filed prior to the filing deadline. Any rescissions made must be completed in writing, signed by an officer of the organization to which the members of the group belong, and filed prior to the filing deadline. The group may make no changes in the application after the last day for filing the application. Any changes received by the bureau after the filing deadline will not be honored. The latest application form or rescission received by the bureau prior to the filing deadline will be used in determining the premium obligation.

(F) In reviewing the group's application, if the bureau determines that individual employers in the group do not meet the eligibility

Ohio Admin. Code § 4123-17-62

requirements for group rating, the bureau will notify the individual employers and the group of this fact, and the group may continue in its application for group coverage without the disqualified employers, if the group still satisfies the minimum requirements for group rating as provided in rule 4123-17-61 of the Administrative Code.

(G) After the group application deadline but before April first for a private employer group or before October first for a public employer taxing district group, the sponsoring organization may notify the bureau that it wishes to remove an employer from participation in the group. The sponsoring organization may request that the employer be removed from the group after the application deadline only for the employer's gross misrepresentation on its application to the group.

(1) "Gross misrepresentation" is an act by the employer that would cause financial harm to the other members of the group. Gross misrepresentation is limited to the following:

(a) Where the sponsoring organization discovers that the employer applicant for group rating has recently merged with one or more entities, such that the merger adversely affects the employer's experience modification and adversely affects the experience modification of the group, and the employer did not disclose the merger on the employer's application for membership in the group.

(b) Where the sponsoring organization discovers that the employer applicant for group rating has failed to disclose the true nature of the employer's business pursuit on its application for membership in the group, and this failure adversely affects the experience modification of the group.

(2) The bureau shall review the request to remove the employer from the group, and the employer shall be removed from the group only upon the bureau's consent.

HISTORY: 2002-03 OMR 1160 (A), eff. 12-1-02; 2001-02 OMR 3191 (A), eff. 7-1-02; 2001-02 OMR 1540 (A), eff. 1-1-02; 2000-2001 OMR 2295 (A), eff. 7-1-01; 1999-2000 OMR 628 (A), eff. 11-8-99; 1997-98 OMR 1274 (A), eff. 11-17-97; 1996-97 OMR 865 (A), eff. 12-10-96; 1995-96 OMR 2356 (A), eff. 7-1-96; 1994-95 OMR 1047 (A), eff. 1-1-95; 1992-93 OMR 399 (A), eff. 9-14-92; 1991-92 OMR 369 (A), eff. 11-11-91; 1990-91 OMR 374 (E), eff. 10-2-90

INTER-OFFICE COMMUNICATION

TO: George Oryshkewych, Akron Regional Manager
Mike Gilday, Cincinnati, Regional Manager
Greg Gibbons, Cleveland, Regional Manager
Ellen Dickhaut, Columbus Regional Manager
Scott Hines, Toledo Regional Manager
Barb McNeil, Manager Commission Level Hearings
Jayne Beachler, Supervisor, Hearing Administrators
Denise Clark, Manager, Claims Management
Rick Tilton, Hearing Officer Trainer

FROM: Tom Connor, Director of Hearing Services

SUBJECT: Processing Issues in Claims When a Separate Issue is in Court

DATE: September 27, 2002

Many questions have arisen as to what issues in a claim should be processed while a court appeal is pending. Hearing Officer Manual Policy E.7 speaks to some issues, but does not completely clarify how all issues should be handled. The attached grid, I believe, will provide all the necessary information and guidance as to how issues should be processed.

Should an issue that must be processed arise in a claim that is designated as "paperless," it is only necessary to do a print of images and is not necessary to request the file from the Attorney General's office. However, where an issue must be processed and the claim is at the AG's office in a "non-paperless" situation, we must request the file from the AG's office as we would any other issue. Should we have difficulty obtaining the file from the AG's office, the Litigation Management Section should be contacted so that they may assist in obtaining the file.

If you have questions or concerns, please feel free to contact me.

TSC:bjb
Attachment

Pc: William Thompson, Chairperson
Patrick Gannon, Commission Member
Donna Owens, Commission Member
Paul Walker, Legal Counsel
David Binkovitz, Manager, Litigation Section
Phil Haddad, Executive Director

Processing of Subsequent Requests for Payment of Compensation and/or Benefits
Pending .512 Appeals for Compensation

	Original Allowance .512 Appeals	Additional Conditions .512 Appeals
T.T.	Yes	Yes
PTD	Yes	Yes
Medical Expenses	Yes	Yes
% PPD	No	No, except if request is based on original allowance
Scheduled Loss	No	No, except if request is based on original allowance
I.E.C.	No	No, except if request is based on original allowance
W.L.	Yes	Yes
Motion for additional Condition ¹	Yes	Yes
Living Maintenance	Yes	Yes
Living Maintenance Wage Loss	Yes	Yes

Yes = Process and/or adjudicate request for compensation and/or benefits
 No = Do not process and/or adjudicate request for compensation and/or benefits

¹ Request for additional condition may be for a totally separate condition from the original allowance such as a request for a psychological condition where the original condition was a physical condition or the request may be for a condition that is for the same body part, for example, aggravation of degenerative disc disease, where the original condition was for low back strain.

Ohio Constitution, Section 35, Article II

§ 2.35 Workmen's compensation

For the purpose of providing compensation to workmen and their dependents, for death, injuries or occupational disease, occasioned in the course of such workmen's employment, laws may be passed establishing a state fund to be created by compulsory contribution thereto by employers, and administered by the state, determining the terms and conditions upon which payment shall be made therefrom. Such compensation shall be in lieu of all other rights to compensation, or damages, for such death, injuries, or occupational disease, and any employer who pays the premium or compensation provided by law, passed in accordance herewith, shall not be liable to respond in damages at common law or by statute for such death, injuries or occupational disease. Laws may be passed establishing a board which may be empowered to classify all occupations, according to their degree of hazard, to fix rates of contribution to such fund according to such classification, and to collect, administer and distribute such fund, and to determine all right of claimants thereto. Such board shall set aside as a separate fund such proportion of the contributions paid by employers as in its judgment may be necessary, not to exceed one per centum thereof in any year, and so as to equalize, insofar as possible, the burden thereof, to be expended by such board in such manner as may be provided by law for the investigation and prevention of industrial accidents and diseases. Such board shall have full power and authority to hear and determine whether or not an injury, disease or death resulted because of the failure of the employer to comply with any specific requirement for the protection of the lives, health or safety of employes, enacted by the General Assembly or in the form of an order adopted by such board, and its decision shall be final; and for the purpose of such investigations and inquiries it may appoint referees. When it is found, upon hearing, that an injury, disease or death resulted because of such failure by the employer, such amount as shall be found to be just, not greater than fifty nor less than fifteen per centum of the maximum award established by law, shall be added by the board, to the amount of the compensation that may be awarded on account of such injury, disease, or death, and paid in like manner as other awards; and, if such compensation is paid from the state fund, the premium of such employer shall be increased in such amount, covering such period of time as may be fixed, as will recoup the state fund in the amount of such additional award, notwithstanding any and all other provisions in this constitution.

(As amended November 6, 1923. To take effect January 1, 1924.)

Ohio Constitution, Section 3, Article IV

§ 4.03 Court of appeals

(A) The state shall be divided by law into compact appellate districts in each of which there shall be a court of appeals consisting of three judges. Laws may be passed increasing the number of judges in any district wherein the volume of business may require such additional judge or judges. In districts having additional judges, three judges shall participate in the hearing and disposition of each case. The court shall hold sessions in each county of the district as the necessity arises. The county commissioners of each county shall provide a proper and convenient place for the court of appeals to hold court.

(B)(1) The courts of appeals shall have original jurisdiction in the following:

(a) Quo warranto;

(b) Mandamus;

(c) Habeas corpus;

(d) Prohibition;

(e) Procedendo;

(f) In any cause on review as may be necessary to its complete determination.

(2) Courts of appeals shall 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, except that courts of appeals shall not have jurisdiction to review on direct appeal a judgment that imposes a sentence of death. Courts of appeals shall have such appellate jurisdiction as may be provided by law to review and affirm, modify, or reverse final orders or actions of administrative officers or agencies.

(3) A majority of the judges hearing the cause shall be necessary to render a judgment. Judgments of the courts of appeals are final except as provided in section 2(B)(2) of this article. No judgment resulting from a trial by jury shall be reversed on the weight of the evidence except by the concurrence of all three judges hearing the cause.

(4) Whenever the judges of a court of appeals find that a judgment upon which they have agreed is in conflict with a judgment pronounced upon the same question by any other court of appeals of the state, the judges shall certify the record of the case to the supreme court for review and final determination.

(C) Laws may be passed providing for the reporting of cases in the courts of appeals.

(Amended November 8, 1994)

Ohio Revised Code

§1.51 Special or local provision prevails over general; exception

If a general provision conflicts with a special or local provision, they shall be construed, if possible, so that effect is given to both. If the conflict between the provisions is irreconcilable, the special or local provision prevails as an exception to the general provision, unless the general provision is the later adoption and the manifest intent is that the general provision prevail.

(1971 H 607, eff. 1-3-72)

§2305.19 Saving in case of reversal

(A) In any action that is commenced or attempted to be commenced, if in due time a judgment for the plaintiff is reversed or if the plaintiff fails otherwise than upon the merits, the plaintiff or, if the plaintiff dies and the cause of action survives, the plaintiff's representative may commence a new action within one year after the date of the reversal of the judgment or the plaintiff's failure otherwise than upon the merits or within the period of the original applicable statute of limitations, whichever occurs later. This division applies to any claim asserted in any pleading by a defendant.

(B) If the defendant in an action described in division (A) of this section is a foreign or domestic corporation, and whether its charter prescribes the manner or place of service of process on the defendant, and if it passes into the hands of a receiver before the expiration of the one year period or the period of the original applicable statute of limitations, whichever is applicable, as described in that division, then service to be made within one year following the original service or attempt to begin the action may be made upon that receiver or the receiver's cashier, treasurer, secretary, clerk, or managing agent, or if none of these officers can be found, by a copy left at the office or the usual place of business of any of those agents or officers of the receiver with the person having charge of the office or place of business. If that corporation is a railroad company, summons may be served on any regular ticket or freight agent of the receiver, and if there is no regular ticket or freight agent of the receiver, then upon any conductor of the receiver, in any county in the state in which the railroad is located. The summons shall be returned as if served on that defendant corporation.

(2004 H 161, eff. 5-31-04; 1953 H 1, eff. 10-1-53; GC 11233)

§2505.03 Final order may be appealed; determination of which procedural rules will govern appeal

(A) Every final order, judgment, or decree of a court and, when provided by law, the final order of any administrative officer, agency, board, department, tribunal, commission, or other instrumentality may be reviewed on appeal by a court of common pleas, a court of appeals, or the supreme court, whichever has jurisdiction.

(B) Unless, in the case of an administrative-related appeal, Chapter 119. or other sections of the Revised Code apply, such an appeal is governed by this chapter and, to the extent this chapter does

not contain a relevant provision, the Rules of Appellate Procedure. When an administrative-related appeal is so governed, if it is necessary in applying the Rules of Appellate Procedure to such an appeal, the administrative officer, agency, board, department, tribunal, commission, or other instrumentality shall be treated as if it were a trial court whose final order, judgment, or decree is the subject of an appeal to a court of appeals or as if it were a clerk of such a trial court.

(C) An appeal of a final order, judgment, or decree of a court shall be governed by the Rules of Appellate Procedure or by the Rules of Practice of the Supreme Court, whichever are applicable, and, to the extent not in conflict with those rules, this chapter.

(1986 H 412, eff. 3-17-87; 1986 H 158; 129 v 582; 1953 H 1; GC 12223-3)

§4123.511 Claims procedure, notice, investigation, orders; appeals to district officer, staff officer, and commission; payments; withholding; claims files

(A) Within seven days after receipt of any claim under this chapter, the bureau of workers' compensation shall notify the claimant and the employer of the claimant of the receipt of the claim and of the facts alleged therein. If the bureau receives from a person other than the claimant written or facsimile information or information communicated verbally over the telephone indicating that an injury or occupational disease has occurred or been contracted which may be compensable under this chapter, the bureau shall notify the employee and the employer of the information. If the information is provided verbally over the telephone, the person providing the information shall provide written verification of the information to the bureau according to division (E) of section 4123.84 of the Revised Code. The receipt of the information in writing or facsimile, or if initially by telephone, the subsequent written verification, and the notice by the bureau shall be considered an application for compensation under section 4123.84 or 4123.85 of the Revised Code, provided that the conditions of division (E) of section 4123.84 of the Revised Code apply to information provided verbally over the telephone. Upon receipt of a claim, the bureau shall advise the claimant of the claim number assigned and the claimant's right to representation in the processing of a claim or to elect no representation. If the bureau determines that a claim is determined to be a compensable lost-time claim, the bureau shall notify the claimant and the employer of the availability of rehabilitation services. No bureau or industrial commission employee shall directly or indirectly convey any information in derogation of this right. This section shall in no way abrogate the bureau's responsibility to aid and assist a claimant in the filing of a claim and to advise the claimant of the claimant's rights under the law.

The administrator of workers' compensation shall assign all claims and investigations to the bureau service office from which investigation and determination may be made most expeditiously.

The bureau shall investigate the facts concerning an injury or occupational disease and ascertain such facts in whatever manner is most appropriate and may obtain statements of the employee, employer, attending physician, and witnesses in whatever manner is most appropriate.

The administrator, with the advice and consent of the bureau of workers' compensation board of directors, may adopt rules that identify specified medical conditions that have a historical record of

4123.511, cont'd,

being allowed whenever included in a claim. The administrator may grant immediate allowance of any medical condition identified in those rules upon the filing of a claim involving that medical condition and may make immediate payment of medical bills for any medical condition identified in those rules that is included in a claim. If an employer contests the allowance of a claim involving any medical condition identified in those rules, and the claim is disallowed, payment for the medical condition included in that claim shall be charged to and paid from the surplus fund created under section 4123.34 of the Revised Code.

(B)(1) Except as provided in division (B)(2) of this section, in claims other than those in which the employer is a self-insuring employer, if the administrator determines under division (A) of this section that a claimant is or is not entitled to an award of compensation or benefits, the administrator shall issue an order no later than twenty-eight days after the sending of the notice under division (A) of this section, granting or denying the payment of the compensation or benefits, or both as is appropriate to the claimant. Notwithstanding the time limitation specified in this division for the issuance of an order, if a medical examination of the claimant is required by statute, the administrator promptly shall schedule the claimant for that examination and shall issue an order no later than twenty-eight days after receipt of the report of the examination. The administrator shall notify the claimant and the employer of the claimant and their respective representatives in writing of the nature of the order and the amounts of compensation and benefit payments involved. The employer or claimant may appeal the order pursuant to division (C) of this section within fourteen days after the date of the receipt of the order. The employer and claimant may waive, in writing, their rights to an appeal under this division.

(2) Notwithstanding the time limitation specified in division (B)(1) of this section for the issuance of an order, if the employer certifies a claim for payment of compensation or benefits, or both, to a claimant, and the administrator has completed the investigation of the claim, the payment of benefits or compensation, or both, as is appropriate, shall commence upon the later of the date of the certification or completion of the investigation and issuance of the order by the administrator, provided that the administrator shall issue the order no later than the time limitation specified in division (B)(1) of this section.

(3) If an appeal is made under division (B)(1) or (2) of this section, the administrator shall forward the claim file to the appropriate district hearing officer within seven days of the appeal. In contested claims other than state fund claims, the administrator shall forward the claim within seven days of the administrator's receipt of the claim to the industrial commission, which shall refer the claim to an appropriate district hearing officer for a hearing in accordance with division (C) of this section.

(C) If an employer or claimant timely appeals the order of the administrator issued under division (B) of this section or in the case of other contested claims other than state fund claims, the commission shall refer the claim to an appropriate district hearing officer according to rules the commission adopts under section 4121.36 of the Revised Code. The district hearing officer shall notify the parties and their respective representatives of the time and place of the hearing.

4123.511, cont'd,

The district hearing officer shall hold a hearing on a disputed issue or claim within forty-five days after the filing of the appeal under this division and issue a decision within seven days after holding the hearing. The district hearing officer shall notify the parties and their respective representatives in writing of the order. Any party may appeal an order issued under this division pursuant to division (D) of this section within fourteen days after receipt of the order under this division.

(D) Upon the timely filing of an appeal of the order of the district hearing officer issued under division (C) of this section, the commission shall refer the claim file to an appropriate staff hearing officer according to its rules adopted under section 4121.36 of the Revised Code. The staff hearing officer shall hold a hearing within forty-five days after the filing of an appeal under this division and issue a decision within seven days after holding the hearing under this division. The staff hearing officer shall notify the parties and their respective representatives in writing of the staff hearing officer's order. Any party may appeal an order issued under this division pursuant to division (E) of this section within fourteen days after receipt of the order under this division.

(E) Upon the filing of a timely appeal of the order of the staff hearing officer issued under division (D) of this section, the commission or a designated staff hearing officer, on behalf of the commission, shall determine whether the commission will hear the appeal. If the commission or the designated staff hearing officer decides to hear the appeal, the commission or the designated staff hearing officer shall notify the parties and their respective representatives in writing of the time and place of the hearing. The commission shall hold the hearing within forty-five days after the filing of the notice of appeal and, within seven days after the conclusion of the hearing, the commission shall issue its order affirming, modifying, or reversing the order issued under division (D) of this section. The commission shall notify the parties and their respective representatives in writing of the order. If the commission or the designated staff hearing officer determines not to hear the appeal, within fourteen days after the filing of the notice of appeal, the commission or the designated staff hearing officer shall issue an order to that effect and notify the parties and their respective representatives in writing of that order.

Except as otherwise provided in this chapter and Chapters 4121., 4127., and 4131. of the Revised Code, any party may appeal an order issued under this division to the court pursuant to section 4123.512 of the Revised Code within sixty days after receipt of the order, subject to the limitations contained in that section.

(F) Every notice of an appeal from an order issued under divisions (B), (C), (D), and (E) of this section shall state the names of the claimant and employer, the number of the claim, the date of the decision appealed from, and the fact that the appellant appeals therefrom.

(G) All of the following apply to the proceedings under divisions (C), (D), and (E) of this section:

- (1) The parties shall proceed promptly and without continuances except for good cause;
- (2) The parties, in good faith, shall engage in the free exchange of information relevant to the claim

4123.511, cont'd,

prior to the conduct of a hearing according to the rules the commission adopts under section 4121.36 of the Revised Code;

(3) The administrator is a party and may appear and participate at all administrative proceedings on behalf of the state insurance fund. However, in cases in which the employer is represented, the administrator shall neither present arguments nor introduce testimony that is cumulative to that presented or introduced by the employer or the employer's representative. The administrator may file an appeal under this section on behalf of the state insurance fund; however, except in cases arising under section 4123.343 of the Revised Code, the administrator only may appeal questions of law or issues of fraud when the employer appears in person or by representative.

(H) Except as provided in section 4121.63 of the Revised Code and division (K) of this section, payments of compensation to a claimant or on behalf of a claimant as a result of any order issued under this chapter shall commence upon the earlier of the following:

(1) Fourteen days after the date the administrator issues an order under division (B) of this section, unless that order is appealed;

(2) The date when the employer has waived the right to appeal a decision issued under division (B) of this section;

(3) If no appeal of an order has been filed under this section or to a court under section 4123.512 of the Revised Code, the expiration of the time limitations for the filing of an appeal of an order;

(4) The date of receipt by the employer of an order of a district hearing officer, a staff hearing officer, or the industrial commission issued under division (C), (D), or (E) of this section.

(I) Payments of medical benefits payable under this chapter or Chapter 4121., 4127., or 4131. of the Revised Code shall commence upon the earlier of the following:

(1) The date of the issuance of the staff hearing officer's order under division (D) of this section;

(2) The date of the final administrative or judicial determination.

(J) The administrator shall charge the compensation payments made in accordance with division (H) of this section or medical benefits payments made in accordance with division (I) of this section to an employer's experience immediately after the employer has exhausted the employer's administrative appeals as provided in this section or has waived the employer's right to an administrative appeal under division (B) of this section, subject to the adjustment specified in division (H) of section 4123.512 of the Revised Code.

(K) Upon the final administrative or judicial determination under this section or section 4123.512 of the Revised Code of an appeal of an order to pay compensation, if a claimant is found to have

4123.511, cont'd,

received compensation pursuant to a prior order which is reversed upon subsequent appeal, the claimant's employer, if a self-insuring employer, or the bureau, shall withhold from any amount to which the claimant becomes entitled pursuant to any claim, past, present, or future, under Chapter 4121., 4123., 4127., or 4131. of the Revised Code, the amount of previously paid compensation to the claimant which, due to reversal upon appeal, the claimant is not entitled, pursuant to the following criteria:

- (1) No withholding for the first twelve weeks of temporary total disability compensation pursuant to section 4123.56 of the Revised Code shall be made;
- (2) Forty per cent of all awards of compensation paid pursuant to sections 4123.56 and 4123.57 of the Revised Code, until the amount overpaid is refunded;
- (3) Twenty-five per cent of any compensation paid pursuant to section 4123.58 of the Revised Code until the amount overpaid is refunded;
- (4) If, pursuant to an appeal under section 4123.512 of the Revised Code, the court of appeals or the supreme court reverses the allowance of the claim, then no amount of any compensation will be withheld.

The administrator and self-insuring employers, as appropriate, are subject to the repayment schedule of this division only with respect to an order to pay compensation that was properly paid under a previous order, but which is subsequently reversed upon an administrative or judicial appeal. The administrator and self-insuring employers are not subject to, but may utilize, the repayment schedule of this division, or any other lawful means, to collect payment of compensation made to a person who was not entitled to the compensation due to fraud as determined by the administrator or the industrial commission.

(L) If a staff hearing officer or the commission fails to issue a decision or the commission fails to refuse to hear an appeal within the time periods required by this section, payments to a claimant shall cease until the staff hearing officer or commission issues a decision or hears the appeal, unless the failure was due to the fault or neglect of the employer or the employer agrees that the payments should continue for a longer period of time.

(M) Except as otherwise provided in this section or section 4123.522 of the Revised Code, no appeal is timely filed under this section unless the appeal is filed with the time limits set forth in this section.

(N) No person who is not an employee of the bureau or commission or who is not by law given access to the contents of a claims file shall have a file in the person's possession.

(O) Upon application of a party who resides in an area in which an emergency or disaster is declared, the industrial commission and hearing officers of the commission may waive the time frame within

4123.511, cont'd,

which claims and appeals of claims set forth in this section must be filed upon a finding that the applicant was unable to comply with a filing deadline due to an emergency or a disaster.

As used in this division:

(1) "Emergency" means any occasion or instance for which the governor of Ohio or the president of the United States publicly declares an emergency and orders state or federal assistance to save lives and protect property, the public health and safety, or to lessen or avert the threat of a catastrophe.

(2) "Disaster" means any natural catastrophe or fire, flood, or explosion, regardless of the cause, that causes damage of sufficient magnitude that the governor of Ohio or the president of the United States, through a public declaration, orders state or federal assistance to alleviate damage, loss, hardship, or suffering that results from the occurrence.

Current through 2008 File 50 of the 127th GA (2007-2008),
apv. by 2/21/08, and filed with the Secretary of State by 2/21/08.

§4123.512 Appeal to court of common pleas; venue; notice of appeal; petition; costs

[As Amended by Am. Sub. S.B. 7 (2006)]

(A) The claimant or the employer may appeal an order of the industrial commission made under division (E) of section 4123.511 of the Revised Code in any injury or occupational disease case, other than a decision as to the extent of disability to the court of common pleas of the county in which the injury was inflicted or in which the contract of employment was made if the injury occurred outside the state, or in which the contract of employment was made if the exposure occurred outside the state. If no common pleas court has jurisdiction for the purposes of an appeal by the use of the jurisdictional requirements described in this division, the appellant may use the venue provisions in the Rules of Civil Procedure to vest jurisdiction in a court. If the claim is for an occupational disease, the appeal shall be to the court of common pleas of the county in which the exposure which caused the disease occurred. Like appeal may be taken from an order of a staff hearing officer made under division (D) of section 4123.511 of the Revised Code from which the commission has refused to hear an appeal. The appellant shall file the notice of appeal with a court of common pleas within sixty days after the date of the receipt of the order appealed from or the date of receipt of the order of the commission refusing to hear an appeal of a staff hearing officer's decision under division (D) of section 4123.511 of the Revised Code. The filing of the notice of the appeal with the court is the only act required to perfect the appeal.

If an action has been commenced in a court of a county other than a court of a county having jurisdiction over the action, the court, upon notice by any party or upon its own motion, shall transfer the action to a court of a county having jurisdiction.

4123.512, as amended by Am. Sub. S.B. 7 (2006), cont'd,

Notwithstanding anything to the contrary in this section, if the commission determines under section 4123.522 of the Revised Code that an employee, employer, or their respective representatives have not received written notice of an order or decision which is appealable to a court under this section and which grants relief pursuant to section 4123.522 of the Revised Code, the party granted the relief has sixty days from receipt of the order under section 4123.522 of the Revised Code to file a notice of appeal under this section.

(B) The notice of appeal shall state the names of the claimant and the employer, the number of the claim, the date of the order appealed from, and the fact that the appellant appeals therefrom.

The administrator of workers' compensation, the claimant, and the employer shall be parties to the appeal and the court, upon the application of the commission, shall make the commission a party. The party filing the appeal shall serve a copy of the notice of appeal on the administrator at the central office of the bureau of workers' compensation in Columbus. The administrator shall notify the employer that if the employer fails to become an active party to the appeal, then the administrator may act on behalf of the employer and the results of the appeal could have an adverse effect upon the employer's premium rates.

(C) The attorney general or one or more of the attorney general's assistants or special counsel designated by the attorney general shall represent the administrator and the commission. In the event the attorney general or the attorney general's designated assistants or special counsel are absent, the administrator or the commission shall select one or more of the attorneys in the employ of the administrator or the commission as the administrator's attorney or the commission's attorney in the appeal. Any attorney so employed shall continue the representation during the entire period of the appeal and in all hearings thereof except where the continued representation becomes impractical.

(D) Upon receipt of notice of appeal, the clerk of courts shall provide notice to all parties who are appellees and to the commission.

The claimant shall, within thirty days after the filing of the notice of appeal, file a petition containing a statement of facts in ordinary and concise language showing a cause of action to participate or to continue to participate in the fund and setting forth the basis for the jurisdiction of the court over the action. 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 clerk of the court shall, upon receipt thereof, transmit by certified mail a copy thereof to each party named in the notice of appeal other than the claimant. Any party may file with the clerk prior to the trial of the action a deposition of any physician taken in accordance with the provisions of the Revised Code, which deposition may be read in the trial of the action even though the physician is a resident of or subject to service in the county in which the trial is had. The bureau of workers' compensation shall pay the cost of the stenographic deposition filed in court and of copies of the stenographic deposition for each party from the surplus fund and charge the costs thereof against the unsuccessful party if the claimant's right to participate or

4123.512, as amended by Am. Sub. S.B. 7 (2006), cont'd,

continue to participate is finally sustained or established in the appeal. In the event the deposition is taken and filed, the physician whose deposition is taken is not required to respond to any subpoena issued in the trial of the action. The court, or the jury under the instructions of the court, if a jury is demanded, shall determine the right of the claimant to participate or to continue to participate in the fund upon the evidence adduced at the hearing of the action.

(E) The court shall certify its decision to the commission and the certificate shall be entered in the records of the court. Appeals from the judgment are governed by the law applicable to the appeal of civil actions.

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

(G) If the finding of the court or the verdict of the jury is in favor of the claimant's right to participate in the fund, the commission and the administrator shall thereafter proceed in the matter of the claim as if the judgment were the decision of the commission, subject to the power of modification provided by section 4123.52 of the Revised Code.

(H) An appeal from an order issued under division (E) of section 4123.511 of the Revised Code or any action filed in court in a case in which an award of compensation has been made shall not stay the payment of compensation under the award or payment of compensation for subsequent periods of total disability during the pendency of the appeal. If, in a final administrative or judicial action, it is determined that payments of compensation or benefits, or both, made to or on behalf of a claimant should not have been made, the amount thereof shall be charged to the surplus fund under division (B) of section 4123.34 of the Revised Code. In the event the employer is a state risk, the amount shall not be charged to the employer's experience. In the event the employer is a self-insuring employer, the self-insuring employer shall deduct the amount from the paid compensation the self-insuring employer reports to the administrator under division (L) of section 4123.35 of the Revised Code.

A self-insuring employer may elect to pay compensation and benefits under this section directly to an employee or an employee's dependents by filing an application with the bureau of workers' compensation not more than one hundred eighty days and not less than ninety days before the first day of the employer's next six-month coverage period. If the self-insuring employer timely files the application, the application is effective on the first day of the employer's next six-month coverage period, provided that the administrator shall compute the employer's assessment for the surplus fund due with respect to the period during which that application was filed without regard to the filing of the application. On and after the effective date of the employer's election, the self-insuring employer shall pay directly to an employee or to an employee's dependents compensation and benefits under

4123.512, as amended by Am. Sub. S.B.7 (2006), cont'd,

this section regardless of the date of the injury or occupational disease, and the employer shall receive no money or credits from the surplus fund on account of those payments and shall not be required to pay any amounts into the surplus fund on account of this section. The election made under this division is irrevocable.

All actions and proceedings under this section which are the subject of an appeal to the court of common pleas or the court of appeals shall be preferred over all other civil actions except election causes, irrespective of position on the calendar.

This section applies to all decisions of the commission or the administrator on November 2, 1959, and all claims filed thereafter are governed by sections 4123.511 and 4123.512 of the Revised Code.

Any action pending in common pleas court or any other court on January 1, 1986, under this section is governed by former sections 4123.514, 4123.515, 4123.516, and 4123.519 and section 4123.522 of the Revised Code.

(2006 S 7, eff. 6-30-06; 1999 H 180, eff. 8-6-99; 1997 H 361, eff. 12-16-97; 1997 H 363, eff. 9-29-97; 1993 H 107, eff. 10-20-93)

4123.512 Appeal to court of common pleas; venue; notice of appeal; petition; costs

[As Amended by Am. Sub. H.B. 100 (2007)]

(A) The claimant or the employer may appeal an order of the industrial commission made under division (E) of section 4123.511 of the Revised Code in any injury or occupational disease case, other than a decision as to the extent of disability to the court of common pleas of the county in which the injury was inflicted or in which the contract of employment was made if the injury occurred outside the state, or in which the contract of employment was made if the exposure occurred outside the state. If no common pleas court has jurisdiction for the purposes of an appeal by the use of the jurisdictional requirements described in this division, the appellant may use the venue provisions in the Rules of Civil Procedure to vest jurisdiction in a court. If the claim is for an occupational disease, the appeal shall be to the court of common pleas of the county in which the exposure which caused the disease occurred. Like appeal may be taken from an order of a staff hearing officer made under division (D) of section 4123.511 of the Revised Code from which the commission has refused to hear an appeal. The appellant shall file the notice of appeal with a court of common pleas within sixty days after the date of the receipt of the order appealed from or the date of receipt of the order of the commission refusing to hear an appeal of a staff hearing officer's decision under division (D) of section 4123.511 of the Revised Code. The filing of the notice of the appeal with the court is the only act required to perfect the appeal.

If an action has been commenced in a court of a county other than a court of a county having jurisdiction over the action, the court, upon notice by any party or upon its own motion, shall transfer

4123.512, as amended by Am. Sub. H.B. 100 (2007), cont'd,

the action to a court of a county having jurisdiction.

Notwithstanding anything to the contrary in this section, if the commission determines under section 4123.522 of the Revised Code that an employee, employer, or their respective representatives have not received written notice of an order or decision which is appealable to a court under this section and which grants relief pursuant to section 4123.522 of the Revised Code, the party granted the relief has sixty days from receipt of the order under section 4123.522 of the Revised Code to file a notice of appeal under this section.

(B) The notice of appeal shall state the names of the claimant and the employer, the number of the claim, the date of the order appealed from, and the fact that the appellant appeals therefrom.

The administrator of workers' compensation, the claimant, and the employer shall be parties to the appeal and the court, upon the application of the commission, shall make the commission a party. The party filing the appeal shall serve a copy of the notice of appeal on the administrator at the central office of the bureau of workers' compensation in Columbus. The administrator shall notify the employer that if the employer fails to become an active party to the appeal, then the administrator may act on behalf of the employer and the results of the appeal could have an adverse effect upon the employer's premium rates.

(C) The attorney general or one or more of the attorney general's assistants or special counsel designated by the attorney general shall represent the administrator and the commission. In the event the attorney general or the attorney general's designated assistants or special counsel are absent, the administrator or the commission shall select one or more of the attorneys in the employ of the administrator or the commission as the administrator's attorney or the commission's attorney in the appeal. Any attorney so employed shall continue the representation during the entire period of the appeal and in all hearings thereof except where the continued representation becomes impractical.

(D) Upon receipt of notice of appeal, the clerk of courts shall provide notice to all parties who are appellees and to the commission.

The claimant shall, within thirty days after the filing of the notice of appeal, file a petition containing a statement of facts in ordinary and concise language showing a cause of action to participate or to continue to participate in the fund and setting forth the basis for the jurisdiction of the court over the action. 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 clerk of the court shall, upon receipt thereof, transmit by certified mail a copy thereof to each party named in the notice of appeal other than the claimant. Any party may file with the clerk prior to the trial of the action a deposition of any physician taken in accordance with the provisions of the Revised Code, which deposition may be read in the trial of the action even though the physician is a resident of or subject to service in the county in which the trial is had. The bureau of workers' compensation shall pay the cost of the stenographic deposition

4123.512, as amended by Am. Sub. H.B. 100 (2007), cont'd,

filed in court and of copies of the stenographic deposition for each party from the surplus fund and charge the costs thereof against the unsuccessful party if the claimant's right to participate or continue to participate is finally sustained or established in the appeal. In the event the deposition is taken and filed, the physician whose deposition is taken is not required to respond to any subpoena issued in the trial of the action. The court, or the jury under the instructions of the court, if a jury is demanded, shall determine the right of the claimant to participate or to continue to participate in the fund upon the evidence adduced at the hearing of the action.

(E) The court shall certify its decision to the commission and the certificate shall be entered in the records of the court. Appeals from the judgment are governed by the law applicable to the appeal of civil actions.

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

(G) If the finding of the court or the verdict of the jury is in favor of the claimant's right to participate in the fund, the commission and the administrator shall thereafter proceed in the matter of the claim as if the judgment were the decision of the commission, subject to the power of modification provided by section 4123.52 of the Revised Code.

(H) An appeal from an order issued under division (E) of section 4123.511 of the Revised Code or any action filed in court in a case in which an award of compensation or medical benefits has been made shall not stay the payment of compensation or medical benefits under the award, or payment for subsequent periods of total disability or medical benefits during the pendency of the appeal. If, in a final administrative or judicial action, it is determined that payments of compensation or benefits, or both, made to or on behalf of a claimant should not have been made, the amount thereof shall be charged to the surplus fund under division (A) of section 4123.34 of the Revised Code. In the event the employer is a state risk, the amount shall not be charged to the employer's experience, and the administrator shall adjust the employer's account accordingly. In the event the employer is a self-insuring employer, the self-insuring employer shall deduct the amount from the paid compensation the self-insuring employer reports to the administrator under division (L) of section 4123.35 of the Revised Code.

A self-insuring employer may elect to pay compensation and benefits under this section directly to an employee or an employee's dependents by filing an application with the bureau of workers' compensation not more than one hundred eighty days and not less than ninety days before the first day of the employer's next six-month coverage period. If the self-insuring employer timely files the application, the application is effective on the first day of the employer's next six-month coverage period, provided that the administrator shall compute the employer's assessment for the surplus fund

4123.512, as amended by Am. Sub. H.B. 100 (2007), cont'd,

due with respect to the period during which that application was filed without regard to the filing of the application. On and after the effective date of the employer's election, the self-insuring employer shall pay directly to an employee or to an employee's dependents compensation and benefits under this section regardless of the date of the injury or occupational disease, and the employer shall receive no money or credits from the surplus fund on account of those payments and shall not be required to pay any amounts into the surplus fund on account of this section. The election made under this division is irrevocable.

All actions and proceedings under this section which are the subject of an appeal to the court of common pleas or the court of appeals shall be preferred over all other civil actions except election causes, irrespective of position on the calendar.

This section applies to all decisions of the commission or the administrator on November 2, 1959, and all claims filed thereafter are governed by sections 4123.511 and 4123.512 of the Revised Code.

Any action pending in common pleas court or any other court on January 1, 1986, under this section is governed by former sections 4123.514, 4123.515, 4123.516, and 4123.519 and section 4123.522 of the Revised Code.

(2007 H 100, eff. 9-10-07; 2006 S 7, eff. 6-30-06; 1999 H 180, eff. 8-6-99; 1997 H 361, eff. 12-16-97; 1997 H 363, eff. 9-29-97; 1993 H 107, eff. 10-20-93)

4123.519 Appeal to court of common pleas.

The claimant or the employer may appeal a decision of the industrial commission in any injury case, other than a decision as to the extent of disability, to the court of common pleas of the county in which the injury was inflicted or in which the contract of employment was made if the injury occurred outside the state. Like appeal may be taken from a decision of a regional board from which the commission has refused to permit an appeal to the commission provided that the claimant may take an appeal from a decision of the administrator on application for reconsideration or from a decision of a regional board. Notice of such appeal shall be filed by the appellant with the commission and the court of common pleas within sixty days after the date of the receipt of the decision appealed from or the date of receipt of the order of the commission refusing to permit an appeal from a regional board of review. Such filings shall be the only act required to perfect the appeal and vest jurisdiction in the court.

Notice of appeal shall state the names of the claimant and the employer, the number of the claim, the date of the decision appealed from, and the fact that the appellant appeals therefrom.

The administrator of the bureau of workmen's compensation, the claimant, and the employer shall be parties to such appeal and the commission shall be made a party if it makes application therefor.

The attorney general or one or more of his assistants or special counsel designated by him shall represent the administrator and the commission. In the event the attorney general or his designated assistants or special counsel are absent, the administrator or the commission shall select one or more of the attorneys in the employ of the administrator or the commission as his or its attorney in such appeal. Any attorney so employed shall continue his representation during the entire period of the appeal and in all hearings thereof except where such continued representation becomes impractical.

Upon receipt of notice of appeal the commission shall

cause notice to be given to all parties who are appellees.

The claimant shall, within thirty days after the filing of the notice of appeal, file a petition containing a statement of facts in ordinary and concise language showing a cause of action to participate or to continue to participate in the fund and setting forth the basis for the jurisdiction of the court over the action. 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. The clerk of the court shall, upon receipt thereof, transmit by certified mail a copy thereof to each party named in the notice of appeal other than the claimant. Any party may file with the clerk prior to the trial of the action a deposition of any physician taken in accordance with the provisions of the Revised Code, which deposition may be read in the trial of the action even though such physician is a resident of or subject to service in the county in which the trial is had. The cost of the deposition filed in court and of copies of such deposition for each party shall be paid for by the industrial commission from the surplus fund and the costs thereof charged against the unsuccessful party if the claimant's right to participate or continue to participate is finally sustained or established in such appeal. In the event such a deposition is taken and filed, the physician whose deposition is taken shall not be required to respond to any subpoena issued in the trial of the action. The court, or the jury under the instructions of the court, if a jury is demanded, shall determine the right of the claimant to participate or to continue to participate in the fund upon the evidence adduced at the hearing of such action.

The court shall certify its decision to the commission and such certificate shall be entered in the records of the court and appeal from such judgment shall be governed by the law applicable to the appeal of civil actions.

The cost of any legal proceedings authorized by this section, including an attorney's fee to the claimant's attorney to be fixed by the trial judge 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 industrial commission if the industrial commission or the administrator rather than the employer contested the right of the claimant to participate in the fund. Such attorney's fee shall not exceed twenty percent of an award up to three thousand dollars and ten percent of all amounts in excess thereof, but in no event shall such fee exceed seven hundred and fifty dollars.

If the finding of the court or the verdict of the jury is in favor of the claimant's right to participate in the fund, the commission and the administrator shall thereafter proceed in the matter of the claim as if such judgment were the decision of the commission, subject to the power of modification provided by section 4123.52 of the Revised Code.

An appeal from a decision of the commission in which an award of compensation has been made shall not stay the payment of compensation under such award or payment of compensation for subsequent periods of total disability during the pendency of the appeal. In the event payments are made to a claimant which should not have been made under the decision of the appellate court, the amount thereof shall be charged to the surplus fund under division (B) of section 4123.34 of the Revised Code. In the event the employer is a state risk, such amount shall not be charged to the employer's experience. In the event the employer is a self-insurer, such amount shall be paid to the self-insurer from said surplus fund. All actions and proceedings under this section which are the subject of an appeal to the court

of common pleas or the court of appeals shall be preferred over all other civil actions except election causes, irrespective of position on the calendar.

This section applies to all decisions of the commission, the administrator, or a regional board of review on November 2, 1959 and all claims filed thereafter shall be governed by sections 4123.512 to 4123.519, inclusive, of the Revised Code.

Any action pending in common pleas court or any other court on November 7, 1957 under section 4123.519 of the Revised Code shall be governed by sections 4123.514, 4123.515, 4123.516, 4123.519, and 4123.522 of the Revised Code. (132 v H 268. Eff. 12-11-67. 130 v H 1; 128 v 743; 127 v 900; 126 v 1015)

RULE 4. Appeal as of Right--When Taken

(A) Time for appeal

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 period in Rule 58(B) of the Ohio Rules of Civil Procedure.

(B) Exceptions

The following are exceptions to the appeal time period in division (A) of this rule:

(1) Multiple or cross appeals

If a notice of appeal is timely filed by a party, another party may file a notice of appeal within the appeal time period otherwise prescribed by this rule or within ten days of the filing of the first notice of appeal.

(2) Civil or juvenile post-judgment motion

In a civil case or juvenile proceeding, if a party files a timely motion for judgment under Civ. R. 50(B), a new trial under Civ. R. 59(B), vacating or modifying a judgment by an objection to a magistrate's decision under Civ. R. 53(E)(4)(c) or Rule 40(E)(4)(c) of the Ohio Rules of Juvenile Procedure, or findings of fact and conclusions of law under Civ. R. 52, the time for filing a notice of appeal begins to run as to all parties when the order disposing of the motion is entered.

(3) Criminal post-judgment motion

In a criminal case, if a party timely files a motion for arrest of judgment or a new trial for a reason other than newly discovered evidence, the time for filing a notice of appeal begins to run when the order denying the motion is entered. A motion for a new trial on the ground of newly discovered evidence made within the time for filing a motion for a new trial on other grounds extends the time for filing a notice of appeal from a judgment of conviction in the same manner as a motion on other grounds. If made after the expiration of the time for filing a motion on other grounds, the motion on the ground of newly discovered evidence does not extend the time for filing a notice of appeal.

(4) Appeal by prosecution

In an appeal by the prosecution under Crim. R. 12(K) or Juv. R. 22(F), the prosecution shall file a notice of appeal within seven days of entry of the judgment or order appealed.

(5) Partial final judgment or order

If an appeal is permitted from a judgment or order entered in a case in which the trial court has not disposed of all claims as to all parties, other than a judgment or order entered under Civ. R. 54(B), a party may file a notice of appeal within thirty days of entry of the judgment or order appealed or the judgment or order that disposes of the remaining claims. Division (A) of this rule applies to a judgment or order entered under Civ. R. 54(B).

(C) Premature notice of appeal

A notice of appeal filed after the announcement of a decision, order, or sentence but before entry of the judgment or order that begins the running of the appeal time period is treated as filed immediately after the entry.

(D) Definition of “entry” or “entered”

As used in this rule, “entry” or “entered” means when a judgment or order is entered under Civ. R. 58(A) or Crim. R. 32(C).

[Effective: July 1, 1971; amended effective July 1, 1972; July 1, 1985; July 1, 1989; July 1, 1992; July 1, 1996; July 1, 2002.]

Staff Note (July 1, 2002 Amendment)

Appellate Rule 4

Appellate Rule 4(B)(4)

Appeal as of Right—How Taken

Exceptions: Appeal by prosecution

The July 1, 2002, amendment to Appellate Rule 4 corrected two errors. First, in App. R. 4(B)(4), a cross-reference was changed from Criminal Rule 12(J) to Criminal Rule 12(K), which was necessitated by an amendment to Criminal Rule 12 that was effective July 1, 2001.

Second, in App. R. 4(D), a cross-reference was changed from Criminal Rule 32(B) to Criminal Rule 32(C), which was necessitated by an amendment to Criminal Rule 12 that was effective July 1, 1998.

No substantive amendment to Appellate Rule 4 was intended by either amendment.

RULE 12. Determination and Judgment on Appeal

(A) Determination.

(1) On an undismissed appeal from a trial court, a court of appeals shall do all of the following:

(a) Review and affirm, modify, or reverse the judgment or final order appealed;

(b) Determine the appeal on its merits on the assignments of error set forth in the briefs under App. R. 16, the record on appeal under App. R. 9, and, unless waived, the oral argument under App. R. 21;

(c) Unless an assignment of error is made moot by a ruling on another assignment of error, decide each assignment of error and give reasons in writing for its decision.

(2) The court may disregard an assignment of error presented for review if the party raising it fails to identify in the record the error on which the assignment of error is based or fails to argue the assignment separately in the brief, as required under App. R. 16(A).

(B) Judgment as a matter of law. When the court of appeals determines that the trial court committed no error prejudicial to the appellant in any of the particulars assigned and argued in appellant's brief and that the appellee is entitled to have the judgment or final order of the trial court affirmed as a matter of law, the court of appeals shall enter judgment accordingly. When the court of appeals determines that the trial court committed error prejudicial to the appellant and that the appellant is entitled to have judgment or final order rendered in his favor as a matter of law, the court of appeals shall reverse the judgment or final order of the trial court and render the judgment or final order that the trial court should have rendered, or remand the cause to the court with instructions to render such judgment or final order. In all other cases where the court of appeals determines that the judgment or final order of the trial court should be modified as a matter of law it shall enter its judgment accordingly.

(C) Judgment in civil action or proceeding when sole prejudicial error found is that judgment of trial court is against the manifest weight of the evidence. In any civil action or proceeding which was tried to the trial court without the intervention of a jury, and when upon appeal a majority of the judges hearing the appeal find that the judgment or final order rendered by the trial court is against the manifest weight of the evidence and do not find any other prejudicial error of the trial court in any of the particulars assigned and argued in the appellant's brief, and do not find that the appellee is entitled to judgment or final order as a matter of law, the court of appeals shall reverse the judgment or final order of the trial court and either weigh the evidence in the record and render the judgment or final order that the trial court should have rendered on that evidence or remand the case to the trial court for further proceedings; provided further that a judgment shall be reversed only once on the manifest weight of the evidence.

(D) All other cases. In all other cases where the court of appeals finds error prejudicial to the appellant, the judgment or final order of the trial court shall be reversed and the cause shall be remanded to the trial court for further proceedings.

[Effective: July 1, 1971; amended effective July 1, 1973; July 1, 1992.]

RULE 1. Scope of Rules: Applicability; Construction; Exceptions

(A) **Applicability.** These rules prescribe the procedure to be followed in all courts of this state in the exercise of civil jurisdiction at law or in equity, with the exceptions stated in subdivision (C) of this rule.

(B) **Construction.** These rules shall be construed and applied to effect just results by eliminating delay, unnecessary expense and all other impediments to the expeditious administration of justice.

(C) **Exceptions.** These rules, to the extent that they would by their nature be clearly inapplicable, shall not apply to procedure (1) upon appeal to review any judgment, order or ruling, (2) in the appropriation of property, (3) in forcible entry and detainer, (4) in small claims matters under Chapter 1925, Revised Code, (5) in uniform reciprocal support actions, (6) in the commitment of the mentally ill, (7) in all other special statutory proceedings; provided, that where any statute provides for procedure by a general or specific reference to all the statutes governing procedure in civil actions such procedure shall be in accordance with these rules.

[Effective: July 1, 1970; amended effective July 1, 1971; July 1, 1975.]

RULE 41. Dismissal of Actions

(A) Voluntary dismissal: effect thereof.

(1) **By plaintiff; by stipulation.** Subject to the provisions of Civ. R. 23(E), Civ. R. 23.1, and Civ. R. 66, a plaintiff, without order of court, may dismiss all claims asserted by that plaintiff against a defendant by doing either of the following:

(a) filing a notice of dismissal at any time before the commencement of trial unless a counterclaim which cannot remain pending for independent adjudication by the court has been served by that defendant;

(b) filing a stipulation of dismissal signed by all parties who have appeared in the action.

Unless otherwise stated in the notice of dismissal or stipulation, the dismissal is without prejudice, except that a notice of dismissal operates as an adjudication upon the merits of any claim that the plaintiff has once dismissed in any court.

(2) **By order of court.** Except as provided in division (A)(1) of this rule, a claim shall not be dismissed at the plaintiff's instance except upon order of the court and upon such terms and conditions as the court deems proper. If a counterclaim has been pleaded by a defendant prior to the service upon that defendant of the plaintiff's motion to dismiss, a claim shall not be dismissed against the defendant's objection unless the counterclaim can remain pending for independent adjudication by the court. Unless otherwise specified in the order, a dismissal under division (A)(2) of this rule is without prejudice.

(B) Involuntary dismissal: effect thereof.

(1) **Failure to prosecute.** Where the plaintiff fails to prosecute, or comply with these rules or any court order, the court upon motion of a defendant or on its own motion may, after notice to the plaintiff's counsel, dismiss an action or claim.

(2) **Dismissal; non-jury action.** After the plaintiff, in an action tried by the court without a jury, has completed the presentation of the plaintiff's evidence, the defendant, without waiving the right to offer evidence in the event the motion is not granted, may move for a dismissal on the ground that upon the facts and the law the plaintiff has shown no right to relief. The court as trier of the facts may then determine them and render judgment against the plaintiff or may decline to render any judgment until the close of all the evidence. If the court renders judgment on the merits against the plaintiff, the court shall make findings as provided in Civ. R. 52 if requested to do so by any party.

(3) Adjudication on the merits; exception. A dismissal under division (B) of this rule and any dismissal not provided for in this rule, except as provided in division (B)(4) of this rule, operates as an adjudication upon the merits unless the court, in its order for dismissal, otherwise specifies.

(4) Failure other than on the merits. A dismissal for either of the following reasons shall operate as a failure otherwise than on the merits:

- (a) lack of jurisdiction over the person or the subject matter;
- (b) failure to join a party under Civ. R. 19 or Civ. R. 19.1.

(C) Dismissal of counterclaim, cross-claim, or third-party claim. The provisions of this rule apply to the dismissal of any counterclaim, cross-claim, or third-party claim. A voluntary dismissal by the claimant alone pursuant to division (A)(1) of this rule shall be made before the commencement of trial.

(D) Costs of previously dismissed action. If a plaintiff who has once dismissed a claim in any court commences an action based upon or including the same claim against the same defendant, the court may make such order for the payment of costs of the claim previously dismissed as it may deem proper and may stay the proceedings in the action until the plaintiff has complied with the order.

[Effective: July 1, 1970; amended effective July 1, 1971; July 1, 1972; July 1, 2001.]

Staff Note (July 1, 2001 Amendment)

Civil Rule 41 Dismissal of Actions

This rule was amended (1) to reflect more precisely its interpretation by the Supreme Court in *Denham v. City of New Carlisle*, 86 Ohio St. 3d 594 (1999); (2) to conform Civ. R. 41(D) with Civ. R. 41(A) as amended; and (3) to reflect that Civ. R. 23.1 provides that a shareholder derivative action "shall not be dismissed or compromised without the approval of the court."

In divisions (B) and (C), masculine references were changed to gender-neutral language, the style used for rule references was changed, and other grammatical changes were made. No substantive amendment to divisions (B) and (C) was intended.

RULE 60. Relief From Judgment or Order

(A) **Clerical mistakes.** Clerical mistakes in judgments, orders or other parts of the record and errors therein arising from oversight or omission may be corrected by the court at any time on its own initiative or on the motion of any party and after such notice, if any, as the court orders. During the pendency of an appeal, such mistakes may be so corrected before the appeal is docketed in the appellate court, and thereafter while the appeal is pending may be so corrected with leave of the appellate court.

(B) **Mistakes; inadvertence; excusable neglect; newly discovered evidence; fraud; etc.** On motion and upon such terms as are just, the court may relieve a party or his legal representative from a final judgment, order or proceeding for the following reasons: (1) mistake, inadvertence, surprise or excusable neglect; (2) newly discovered evidence which by due diligence could not have been discovered in time to move for a new trial under Rule 59(B); (3) fraud (whether heretofore denominated intrinsic or extrinsic), misrepresentation or other misconduct of an adverse party; (4) the judgment has been satisfied, released or discharged, or a prior judgment upon which it is based has been reversed or otherwise vacated, or it is no longer equitable that the judgment should have prospective application; or (5) any other reason justifying relief from the judgment. The motion shall be made within a reasonable time, and for reasons (1), (2) and (3) not more than one year after the judgment, order or proceeding was entered or taken. A motion under this subdivision (B) does not affect the finality of a judgment or suspend its operation.

The procedure for obtaining any relief from a judgment shall be by motion as prescribed in these rules.

[Effective: July 1, 1970.]

NO. 33046

EDWARD M. BAMBER

APPEAL FROM

APPELLEE

COMMON PLEAS

COURT

-vs-

No. 917,026

GENERAL MOTORS CORPORATION, ETC.,
ET AL.

JOURNAL ENTRY

APPELLANTS

MAY 2 1974

DATE

This cause came on to be heard upon the pleadings and the transcript of the evidence and record in the Common Pleas Court, and was argued by counsel; on consideration whereof, the court certifies that in its opinion substantial justice has not been done the party complaining, as shown by the record of the proceedings and judgment under review, and judgment of said Common Pleas Court is reversed. Each assignment of error was reviewed by the court and upon review the following disposition made:

Both Cases Nos. 33046 and 33182 present the same issue for this Court to resolve and were consolidated for purposes of appeal (by order of this Court). Mr. Bamber (Case No. 33046) was allowed, by the Cleveland Regional Board of Review, to collect from General Motors (self-insured) for injuries sustained on the job. Mr. Sesock (Case No. 33182) was also allowed, by the Cleveland Regional Board of Review, to collect from Alcoa (self-insured) for injuries sustained on the job. The Industrial Commission refused to review Bamber's claim. It did affirm Sesock's claim after review of the decision of the Cleveland Regional Board.

Both employer () pursuant to O.R.C. 4123(19) appealed to the Cuyahoga County Court of Common Pleas. The claimants did not file a petition, as required by O.R.C. 4123.519, in the Common Pleas Court. As a result, the Common Pleas Court dismissed, sua sponte, General Motors' appeal. The same Court overruled a motion for summary judgment filed by Alcoa and dismissed the appeal. Both appeals were dismissed for "want of prosecution".

Here is the issue:

Where the employer duly appeals to the Court of Common Pleas, pursuant to O.R.C. 4123.519, from an adverse decision of the Industrial Commission pertaining to matters other than the extent of claimant's disability and the claimant-plaintiff fails to file his "petition" within the thirty days next following the filing of such notice of appeal, is it prejudicial error for the Court of Common Pleas to dismiss the employer's appeal sua sponte by reason of claimant's default?

We answer in the affirmative and reverse the orders before this Court for review. (Cases Nos. 33182 and 33046). The employer clearly has the right to appeal (O.R.C. 4123.519). Notice is the only jurisdictional requirement. Following notice, the claimant (Bamber and Sesock) shall, within 30 days, file a petition as required by the same statute. If the claimant does not file the petition within 30 days after notice, or at a latter time allowed by the Court of Common Pleas, then it would appear to this Court that the employer should be given final judgment.

This cause is remanded to the Common Pleas Court with instructions to allow claimants leave to file the required petition, within a reasonable time, serving notice of such order upon them. Failure to file upon the part of the claimants would constitute grounds for final judgment for the employers. (See Helkin v. Bianci, 33 O.O.2d 337).

It seems grossly unfair to permit an employer to be tossed out of

Court, on appeal () "want of prosecution" in it, having felt aggrieved, complies with O.R.C. 4123.519.

It is not necessary to pass upon whether or not the Administrator of the Bureau of Workmen's Compensation has standing in this Court for purposes of appeal.

Judgment reversed and remanded.

RECEIVED FOR FILING

MAY 2 1974

E.L. MASGAY, CLERK
By: *[Signature]* Dep.

No other error appearing in the record, this cause is remanded to the Common Pleas Court ~~for~~ with instructions to allow claimant's leave to file the required petition.
(~~for judgment entered for appellant.~~)

It is therefore considered that said appellant recover of said appellee their costs herein.

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. Exceptions.

GEORGE M. JONES, P. J.,

EDWIN T. HOFSTETTER, J.,

ROBERT E. COOK, J., Concur.

Eleventh District, Sitting by Assignment

in Eighth District.

N.B. This entry is made pursuant to the third sentence of Rule 22D, Ohio Rules of Appellate Procedure. This is an announcement of decision, (see Rule 26). Ten (10) days from the date hereof this document will be stamped to indicate journalization, at which time it will become the judgment and order of the court and time period for review will begin to run.

For plaintiff appellee:
For defendant appellant:

James McGarry, Asst. Atty. Genl.
Aubrey Willacy

[Signature]
PRESIDING JUDGE
GEORGE M. JONES

ALL PARTIES. COSTS TAXED. 2-4/5

Case Number: CV-73-917026

Case Title: EDWARD M BAMBER vs. GENERAL MOTORS CORPORATION FISHER BODY CLEVELAND D

Case Summary

Case Number: CV-73-917026
Case Title: EDWARD M BAMBER vs. GENERAL MOTORS CORPORATION FISHER BODY CLEVELAND D
Case Designation: WORKMANS COMP. ADM. APPEAL
Filing Date: 05/03/1973
Judge: ROY F MCMAHON
Magistrate: N/A
Room: N/A
Next Action: N/A
File Location: DEAD FILES
Last Status: INACTIVE
Last Status Date: 07/16/1975
Last Disposition: DISP.COURT TRIAL
Last Disposition Date: 07/16/1975
Prayer Amount: \$.00

Service

Party Role	Name	Service Date	Response Date
P(1)	EDWARD M BAMBER	N/A	
D(1)	GENERAL MOTORS CORPORATION FISHER BODY CLEVELAND DIVISION	N/A	
D(2)	STRINGER, ANTHONY R., ADMR. BUR. OF WORKMEN'S COMPENSATION	N/A	

Case Parties

PLAINTIFF (1)	EDWARD M BAMBER 6489 KIMBERLY DR CLEVE, OH 44125-0000	ATTORNEY R PATRICK BAUGHMAN (0005138) BAUGHMAN HENDERSON & JOYCE 2500 BROOKPARK RD STE E CLEVELAND, OH 44134-1400 N/A Answer Filed: N/A
DEFENDANT (1)	GENERAL MOTORS CORPORATION FISHER BODY CLEVELAND DIVISION E 140TH AND COIT RD CLEVE, OH 44110-0000	ATTORNEY AUBREY B WILLACY (0006541) 700 WESTERN RESERVE BLDG. 1468 W. 9TH ST. CLEVELAND, OH

44113-0000
Ph: 216-241-7740
Answer Filed: N/A

DEFENDANT (2) STRINGER, ANTHONY
R., ADMR. BUR. OF
WORKMEN'S
COMPENSATION
STATE OFFICE BLDG
COLUMBUS, OH 43215-
0000

Docket Information

DOCKET INFORMATION

No dockets found for case.

Case Cost Detail

There are no costs currently assigned to this case.

Not Reported in N.E.2d
Not Reported in N.E.2d, 1990 WL 124645 (Ohio App. 11 Dist.)
(Cite as: Not Reported in N.E.2d)

Clingerman v. Mayfield Ohio App., 1990. Only the Westlaw citation is currently available.

CHECK OHIO SUPREME COURT RULES FOR REPORTING OF OPINIONS AND WEIGHT OF LEGAL AUTHORITY.

Court of Appeals of Ohio, Eleventh District, Ashtabula County.

Ronald M. CLINGERMAN, Plaintiff-Appellant,
v.

James L. MAYFIELD, Administrator, Bureau of Workers' Compensation, et al.,
Defendants-Appellees.

No. 89-A-1477.

Aug. 24, 1990.

Civil Appeal from Ashtabula County Court of Common Pleas, Case No. 88095.

Thomas D. Thompson, Columbus, Samuel L. Kirkland, Salem, for plaintiff-appellant.
David R. Cook, Cleveland, for defendant-appellee Carter Jones Lumber Company.
William M. O'Neill, Assistant Attorney General, Cleveland, for defendant-appellee, Administrator, Bureau of Workers' Compensation.

Before CHRISTLEY, P.J., and FORD, J., and CHARLES J. BANNON, J., Mahoning County Court of Common Pleas, sitting by assignment for JOSEPH E. MAHONEY, J.

OPINION

BANNON, Judge, Sitting by Assignment.

*1 Appellant, Ronald Clingerman, appeals the trial court's dismissal of his appeal from the industrial commission's order denying his claim for workers' compensation benefits.

The appellant was an oil field worker for the appellee, Carter Jones Lumber Company, where he attended to

the pumping operations of oil wells. The appellant alleges that he injured his lower back while working alone in a remote oil field on August 11, 1986.

The appellant filed a claim for workers' compensation benefits which was denied by the district hearing officer. The board of review reversed the hearing officer, granting appellant's claim. On appeal, the industrial commission reversed the board of review and denied the claim on February 12, 1988.

On March 18, 1988, the appellant filed a notice of appeal and complaint in the Geauga County Court of Common Pleas, the county in which he believed he was injured. However, in the course of discovery, the appellant learned that the oil well where he was injured was actually located in Ashtabula County and not in Geauga County, as he mistakenly believed. The appellee filed a motion for summary judgment, alleging that the Geauga County Court of Common Pleas lacked jurisdiction to hear the matter, pursuant to R.C. 4123.519, since the injury occurred in Ashtabula County. On December 12, 1988, prior to the court's ruling on appellee's summary judgment motion, the appellant voluntarily dismissed his notice of appeal and complaint from the Geauga County Court of Common Pleas.

Subsequently, on December 19, 1988, the appellant refiled the identical notice of appeal and complaint in the Ashtabula County Court of Common Pleas. On January 17, 1989, the appellee filed a motion to dismiss on the ground that the Ashtabula County Court of Common Pleas lacked subject matter jurisdiction because the appeal was not filed within sixty days' receipt of the industrial commission's decision, as mandated by R.C. 4123.519.

On August 31, 1989, the trial court granted appellee's motion and dismissed the appeal. This timely appeal followed. Appellant presents one assignment of error:

"The trial court erred in granting appellee's motion to dismiss on the basis of lack of jurisdiction."

The assignment of error is overruled, and the judgment of the trial court dismissing the appeal is affirmed.

Appellant asserts two reasons why the trial court erred in dismissing this appeal: 1) The "saving statute," R.C. 2305.19, applies to this case and that he had a right to voluntarily dismiss his appeal in Geauga County and refile it in Ashtabula County after the sixty-day time limit had expired for filing an appeal to common pleas court in a workers' compensation case; and 2) R.C. 4123.519, effective November 3, 1989, has been amended to provide that, where an affidavit of a workers' compensation case has been filed in the wrong common pleas court, the trial court shall transfer the action to a court of a county having jurisdiction.

*2 In *Jenkins v. Keller, Admr.* (1966), 6 Ohio St.2d 122, the court stated in paragraph four of the syllabus:

"Courts of Common Pleas do not have inherent jurisdiction in workmen's compensation cases but only such jurisdiction as is conferred on them under the provisions of the Workmen's Compensation Act."

Both sides of this appeal have cited *Lewis v. Connor* (1985), 21 Ohio St.3d 1, and *Hartsock v. Chrysler Corp.* (1989), 44 Ohio St.3d 171.

In *Lewis, supra*, the court held that the right of review granted by R.C. 4123.519 must be classed as a remedy-a statutorily created remedy-and not as a limitation on a substantive right. The court held that R.C. 4123.519 contains a time limitation upon a remedy, not a limitation on a substantive right created by statute. Therefore, in the absence of any provision to the contrary in R.C. 4123.519, the saving statute applies to a timely filed notice of appeal in a workers' compensation case.

In *Hartsock, supra*, the court said that nothing in *Lewis* diminishes the jurisdictional vitality of the county of injury requirement of R.C. 4123.519. The court further held that "by their terms," the Ohio Civil Rules cannot extend jurisdiction. Civ.R. 82. In *Hartsock*, the appeal was dismissed as mistakenly filed in the appellant's county of residence instead of the county where the injury occurred. The court clearly stated that, "We

continue to hold that the requirement of R.C. 4123.519 that the notice of appeal be filed in the county specified in the statute is jurisdictional."

Applying *Lewis* and *Hartsock* then to the facts of the case *sub judice*, the saving statute does apply to workers' compensation appeals, but the appeal must have been filed in the jurisdictionally proper court in the first place. As the court said in *Hartsock* with the identical question, but in the context of an appeal from the Unemployment Compensation Board of Review, pursuant to R.C. 4141.28(O), in *Hansford v. Steinbacher* (1987), 33 Ohio St.3d 72,:

"*** We conclude the statute controls subject-matter jurisdiction and, therefore, an appeal can only be perfected if the requisites of R.C. 4141.28(O) are satisfied. ***"

"The reasoning that controlled in *Hansford* applies here as well. ***"

The appellant here was injured in Ashtabula County. The workers' compensation appeal was filed in Geauga County. Appellant voluntarily dismissed his appeal and refiled it in Ashtabula County, the county having jurisdiction, some ten months after his claim was finally denied by the industrial commission, obviously far beyond the sixty-day time limitation provided in R.C. 4123.519. The Geauga County Common Pleas Court having no jurisdiction to entertain this appeal, the appeal never was perfected and, therefore, could not be the proper subject of R.C. 2305.19, the saving statute.

Appellant notes, however, that during the pendency of the appeal in this county, R.C. 4123.519 was amended, effective November 3, 1989, and now provides in pertinent part:

*3 "(A) The claimant or the employer may appeal a decision of the industrial commission or of its staff hearing officer made pursuant to division (B)(6) of section 4121.35 of the Revised Code in any injury or occupational disease case, other than a decision as to the extent of disability, to the court of common pleas of the county in which the injury was inflicted or in which the contract of employment was made if the injury

occurred outside the state, or in which the contract of employment was made if the exposure occurred outside the state. In the event that no common pleas court has jurisdiction for the purposes of an appeal by the use of the jurisdictional requirements described in this paragraph, the appellant then may resort to the venue provisions in the Rules of Civil Procedure to vest jurisdiction in a court. If the claim is for an occupational disease the appeal shall be to the court of common pleas of the county in which the exposure which caused the disease occurred. Like appeal may be taken from a decision of a regional board from which the commission or its staff hearing officer has refused to permit an appeal to the commission. Notice of the appeal shall be filed by the appellant with a court of common pleas within sixty days after the date of the receipt of the decision appealed from or the date of receipt of the order of the commission refusing to permit an appeal from a regional board of review. *The filings shall be the only act required to perfect the appeal.*

"If an action has been commenced in a court of a county other than a court of a county having jurisdiction over the action, the court, upon notice by any party or upon its own motion, shall transfer the action to a court of a county having jurisdiction.

"This section applies to all decisions of the commission, the administrator, or a regional board of review on November 2, 1959, and all claims filed thereafter shall be governed by sections 4123.512 [4123.51.2] to 4123.519 [4123.51.9] of the Revised Code.

"Any action pending in common pleas court or any other court on January 1, 1986 under this section shall be governed by sections 4123.514 [4123.51.4], 4123.515 [4123.51.5], 4123.516 [4123.51.6], 4123.519 [4123.51.9], and 4123.522 [4123.52.2] of the Revised Code." (Emphasis added.)

The LSC analysis of the amended statute provides that:

"The bill establishes that if an action has been commenced in a court of a county not having

jurisdiction over the action, the court, upon notice by any party or upon its own motion, must transfer the action to a court of a county having jurisdiction (rather than dismissing the action)."

Baldwin's Ohio Legislative Service, 1989 Laws of Ohio, H222-LSC Analysis, p. 5-839.

It is clear that the time and place of injury appeal requirements of R.C. 4123.519 are remedial in providing a method of review. *Lewis v. Connor, supra*. Since R.C. 4123.519 is remedial and not substantive, it may be applied retroactively to any proceeding conducted after its adoption, even though the original action accrued and the complaint was filed prior to its enactment. *State, ex rel. Slaughter, v. Industrial Commission of Ohio* (1937), 132 Ohio St. 537; *Van Fossen v. Babcock & Wilcox Co.* (1988), 36 Ohio St.3d 100.

*4 Even if this court would hold that R.C. 4123.519, as amended effective November 3, 1989, applied to this case, the Geauga County Common Pleas Court could not be required to transfer this appeal to Ashtabula County because there was nothing to transfer. The notice of appeal and complaint had been voluntarily dismissed.

Hence, this court holds that R.C. 4123.519, as amended effective November 3, 1989, has no application to the facts of this case. Further, although the saving statute, R.C. 2305.19, is applicable to workers' compensation cases, that statute also has no application to the facts of this case.

The decision of the Ashtabula County Common Pleas Court in dismissing this appeal is affirmed.

Judgment affirmed.

CHRISTLEY, P.J., and FORD, J., concur.
Ohio App., 1990.

Clingerman v. Mayfield

Not Reported in N.E.2d, 1990 WL 124645 (Ohio App. 11 Dist.)

END OF DOCUMENT

Not Reported in N.E.2d
Not Reported in N.E.2d, 1990 WL 124645 (Ohio App. 11 Dist.)
(Cite as: Not Reported in N.E.2d)

Page 4

Only the Westlaw citation is currently available.

CHECK OHIO SUPREME COURT RULES FOR
REPORTING OF OPINIONS AND WEIGHT OF
LEGAL AUTHORITY.

Court of Appeals of Ohio, Eleventh District,
Trumbull County.
Delores M. KARNOFEL, Appellant,
v.
CAFARO MANAGEMENT CO., Appellee.
No. 97-T-0072.

June 26, 1998.

11th District Court of Appeals of Ohio, Trumbull
County. Administrative Appeal from the Court of
Common Pleas, Case No. 96 CV 2112

ATTY. ANGELO E. QUARANTA, 976 Perry
Highway, Pittsburg, PA 15237, For Appellant

ATTY. DAVID A. FANTAUZZI, 2445 Belmont
Avenue, P.O. Box 2186, Youngstown, OH 44504, For
Appellee

Before CHRISTLEY, P.J., and NADER and O'NEILL,
JJ.

OPINION

CHRISTLEY, P.J.

*1 This is an accelerated calendar appeal. Appellant,
Delores M. Karnofel, appeals the judgment of the
Trumbull County Court of Common Pleas which
dismissed her appeal of a decision of the Industrial
Commission ("the Commission") at the request of
appellee, Cafaro Management Company. For the
reasons that follow, we affirm the judgment of the
common pleas court.

On November 26, 1996, appellant filed a document
captioned "APPEAL FROM THE FINDINGS OF
FACT AND ORDER OF THE INDUSTRIAL
COMMISSION OF OHIO" in the common pleas court.
It appears that appellant proceeded *pro se* in the
drafting and filing of this document. The document
listed only appellant and appellee as the parties to the
case. The administrator was not listed or served.

The document consisted of five numbered paragraphs
whereby appellant appeared to be sounding a complaint
in negligence for alleged injuries to her feet, knees,
legs, and other adjacent portions of her body sustained
while working as a tour guide in a mall operated by
appellee. At the close of the document, appellant prayed
for judgment against appellee and for "a sum of money
that will fully, fairly and adequately compensate her for
the injuries and damages she sustained as a direct and
proximate result of the negligence and carelessness" of
appellee.

Appellant did not indicate that she desired to
participate in the workers' compensation fund. Attached
to the document and incorporated by reference therein
were several exhibits, one of which was a copy of the
findings of fact and order of the Commission mailed to
appellant on November 19, 1996.

This order of the Commission indicated that it was a
refusal of an appeal taken by appellant of an order
issued on October 22, 1996 by the Staff Hearing
Officer. Although not in the record itself, the briefs of
both parties indicate that this order denied appellant's
workers' compensation claim. The order of the
Commission contained the claim number in the case,
96-402634.

On January 22, 1997, after requesting and receiving an
additional thirty days to answer, appellee filed an
answer asserting, in part, that appellant failed to state a
claim upon which relief could be granted, failed to join
all necessary parties, and failed to comply with the
statutory requirements of R.C. 4123.512. Appellee
requested that appellant's "Complaint" be dismissed

with prejudice.

On January 24, 1997, appellee filed a motion to dismiss appellant's "Complaint" pursuant to Civ.R. 12(B)(6) and (7) on the same grounds indicated above. In particular, appellee argued that appellant failed to request the right to participate in the workers' compensation fund; to show a cause of action to participate in the fund; to set forth a basis for jurisdiction; to name the administrator as a party; and to file a petition within thirty days of filing her notice of appeal.

Appellant responded to appellee's motion to dismiss on February 5, 1997 by simply requesting that the case not be dismissed, that she be given a hearing on the matter, and by asserting that she did state a claim upon which relief could be granted. The next day, on February 6, 1997, without leave of court, appellant filed a document captioned "AMENDED COMPLAINT." In this document, appellant indicated that she was amending her "Complaint" by adding "The Industrial Commission of Ohio" as a party, and thereafter resubmitted "the same Complaint that was initially served" on appellee. The administrator was still not added as a party.

*2 Nevertheless, on March 4, 1997, the administrator and the Industrial Commission of Ohio filed an answer, asserting that the "Complaint" failed to state a claim upon which relief could be granted and that the common pleas court lacked subject-matter jurisdiction to hear the appeal.

On April 11, 1997, the common pleas court journalized a judgment entry dismissing appellant's November 26, 1996 filing. The common pleas court indicated that it "must assume the intent was to file [a] notice of appeal pursuant to the provisions of [R.C.] 4123.512." The common pleas court noted that appellant used the term "appeal" in relation to the order of the Commission and that she established the name of the employer and the date of the order appealed. However, the common pleas court noted that appellant failed to designate the administrator and the number of the claim on the "appeal."

The common pleas court also noted that appellant filed

an "amended complaint" after appellee answered without leave of court. The common pleas court further noted that as of March 6, 1997, appellant had failed to file a petition containing facts establishing the cause of action and jurisdiction.

In dismissing appellant's "appeal," the common pleas court found that the pleading did not meet the minimum procedural requirements and was "fatally defective--both as to the notice of appeal and failure to file [a] timely petition." The common pleas court further noted that it could find "no authority to combine [a] notice of appeal and petition which appears to be plaintiff-appellant's attempt."

Appellant perfected a timely appeal and has since retained counsel to represent her before this court. [FN1] She asserts two assignments of error:

FN1. Appellant's out-of-state attorney requested and received permission to represent appellant in the instant appeal.

"[1.] The court below erred in granting the defendant's motion to dismiss and in failing to grant plaintiff leave to amend her complaint.

"[2.] The court below erred in granting the defendant's motion to dismiss for failure to comply with R.C. 4123.512."

As appellant's first and second assignments of error are interrelated, they will be addressed together. In the first and second assignments of error, appellant argues that appellant should have been granted leave to amend her "Complaint" to include the proper parties as defendants; that appellant as a *pro se* litigant should not be held to the same standard as a trained attorney-at-law; and that appellant substantially complied with R.C. 4123.512 by the single filing of November 26, 1996. We disagree, in part.

Initially, we note that this court adheres to the rule established in *Meyers v. First Natl. Bank of Cincinnati* (1981), 3 Ohio App.3d 209, 444 N.E.2d 412 which states: "*Pro se* civil litigants are bound by the same rules and procedures as those litigants who retain counsel. They are not to be accorded greater rights and

must accept the results of their own mistakes and errors." (Citations omitted.) *Meyers* at 210, 444 N.E.2d 412. Indeed, we recently reaffirmed our adherence to this rule in another case brought by the same appellant. See *Karnofel v. Cafaro Mgt. Co.* (Mar. 13, 1998), Trumbull App. No. 97-T-0110, unreported, at 9, 1998 Ohio App. LEXIS 996. None of appellant's attempts to distinguish the instant case in this regard are persuasive.

*3 We further note that contrary to appellant's assertions, the common pleas court did not deny appellant leave to amend her "complaint." This is appellant's own interpretation of the decision of the common pleas court, and her assertion is not supported by a reading of the judgment entry.

This leaves us with the crux of the matter, namely whether the common pleas court erred by dismissing the case upon its finding that the pleading did not meet the minimum procedural requirements and was "fatally defective--both as to the notice of appeal and failure to file [a] timely petition."

R.C. 4123.512 governs appeals to the common pleas court of the type of order present in the instant case. R.C. 4123.512(A) provides that a claimant has sixty days in which to file notice of the appeal with the common pleas court and that "[t]he filing of the notice of the appeal with the court is the only act required to perfect the appeal."

R.C. 4123.512(B) provides that the notice of appeal "shall state the names of the claimant and the employer, the number of the claim, the date of the order appealed from, and the fact that the appellant appeals therefrom." The same section further provides that "[t]he administrator, the claimant, and the employer shall be parties to the appeal * * *."

R.C. 4123.512(D) also provides that the claimant "shall, within thirty days after the filing of the notice of appeal, file a petition containing a statement of facts in ordinary and concise language showing a cause of action to participate or to continue to participate in the fund and setting forth the basis for the jurisdiction of the court over the action."

We believe that appellant's November 26, 1996 filing must be characterized as either a notice of appeal pursuant to R.C. 4123.512(A) and (B) or a petition pursuant to R.C. 4123.512(D). It cannot be both. The plain language of the statute dictates that two separate filings are required. Indeed, this court has previously indicated the same in *Gdovichin v. Geauga Cty. Hwy. Dept.* (1993), 90 Ohio App.3d 805, 808, 630 N.E.2d 778 where we held: "[I]t is clear that an appeal pursuant to R.C. 4123.519 is to proceed with the filing of a notice of appeal, with a subsequent filing of a complaint." [FN2]

FN2. R.C. 4123.519 was amended and renumbered as R.C. 4123.512 effective October 20, 1993. The two-part notice of appeal and petition filing procedure remained essentially unchanged.

That being said, we agree with the common pleas court's conclusion that appellant filed a notice of appeal on November 26, 1996, rather than a petition. However, we disagree with the common pleas court as to the adequacy of appellant's notice of appeal.

As a matter of law, the notice of appeal substantially complied with the statutory requirements of R.C. 4123.512(B). In *Fisher v. Mayfield* (1987), 30 Ohio St.3d 8, 505 N.E.2d 975, paragraph two of the syllabus, the Supreme Court of Ohio held:

"Substantial compliance for jurisdictional purposes occurs when a timely notice of appeal filed pursuant to R.C. 4123.519 includes sufficient information, in intelligible form, to place on notice all parties to a proceeding that an appeal has been filed from an identifiable final order which has determined the parties' substantive rights and liabilities."

*4 In this regard, the Supreme Court indicated that the statute sets forth *five* elements to be included in a notice of appeal, *e.g.*, the names of the claimant and employer, the number of the claim, the date of the decision appealed from, and the fact that the appellant appeals therefrom. *Id.* at 9. Conspicuously absent is the requirement that the administrator be named a party. Indeed, this court has previously acknowledged that the naming of the administrator as a party is *not a*

jurisdictional requirement in the filing of a notice of appeal. See *Goricki v. General Motors Corp.* (Dec. 31, 1985), Trumbull App. No. 3527, unreported, at 2, 1985 WL 4944, citing *Milenkovich v. Drummond* (1961), 181 N.E.2d 814, 88 Ohio Law Abs. 103; accord *Lucy v. Ford Motor Co.* (Apr. 30, 1996), Franklin App. No. 95APE10- 1377, unreported, at 8-9, 1996 Ohio App. LEXIS 1769.

In addition, the Supreme Court of Ohio has been arguably quite lenient in interpreting whether filings of claimants actually contain the requisite five factors. In particular, we note that in *Wells v. Chrysler Corp.* (1984), 15 Ohio St.3d 21, 472 N.E.2d 331, the Supreme Court found that a claimant's specification of the name of his employer in the caption of the notice, rather than in the body of the notice of appeal, was sufficient.

Applying the foregoing to the case at bar, we conclude that appellant substantially complied with the jurisdictional requirements of R.C. 4123.512(B). As indicated in the common pleas court's judgment entry, the only disputed issues were appellant's failure to indicate the claim number and the failure to name the administrator as a party. We have already indicated that the naming of the administrator was not a jurisdictional requirement. [FN3]

FN3. Nevertheless, the administrator had to be added as a party at some point and was certainly entitled to service.

As to the lack of the claim number, the logic of the decision in *Wells* compels this court to conclude that the fact that the claim number was indicated on the copy of the order from which appellant took her appeal sufficed for the purposes of R.C. 4123.512(B). While we certainly do not expect common pleas courts to rummage through an appellant's documents to ensure that the claim number is present, the claim number was readily apparent on the order of the Commission which she attached and incorporated by reference as the very first exhibit. In this instance, *Wells* is arguably controlling, and the claim number should have been deemed to be established.

However, any error in this regard is ultimately

harmless as the trial court did not otherwise abuse its discretion in dismissing the appeal. The trial court noted that appellant failed to file the requisite petition within the thirty-day period set forth in R.C. 4123.512(D). While this thirty-day period has been held not to be a jurisdictional requirement, it must nonetheless be met at some reasonable point, after obtaining leave of court. *Zuljevic v. Midland-Ross* (1980), 62 Ohio St.2d 116, 403 N.E.2d 986.

*5 The Supreme Court of Ohio has stated that a court may, in the exercise of sound discretion, permit a claimant to file his complaint after the thirty-day period. *Id.* at 119, 403 N.E.2d 986, citing *Thompson v. Reibel* (1964), 176 Ohio St. 258, 199 N.E.2d 117. However, the Supreme Court also indicated that a claimant may not disregard with impunity his statutory obligation to timely prosecute his R.C. 4123.519 claim. *Zuljevic* at 119, 403 N.E.2d 986. Additionally, having failed to comply with the statute, the claimant must bear the burden of showing that his failure was due to excusable neglect or other good cause. *Id.* at 120, 403 N.E.2d 986.

The question in *Zuljevic* was whether the claimant had been given notice and an opportunity to show cause why the proceedings should not be dismissed against him. *Id.*; see, also, *Givens v. Garlando* (1985), 27 Ohio App.3d 287, 289, 500 N.E.2d 913. Noting that the claimant did not receive a copy of the employer's motion to dismiss or other notice from the court, the Supreme Court held that the common pleas court abused its discretion in dismissing the claim.

In *Givens*, on the other hand, the Ninth Appellate District noted that the claimant was served with a copy of the motion to dismiss; that the common pleas court did not act on the motion for more than five weeks; and that there was ample time for the complainant to seek leave to file the petition instanter. *Givens* at 289, 500 N.E.2d 913. Accordingly, the *Givens* court found no abuse of discretion in the dismissal of the complainant's appeal.

Like the complainant in *Givens*, the record indicates that appellant received a copy of appellee's motion to dismiss. Indeed, she responded to it by filing the "AMENDED COMPLAINT." [FN4] The common

pleas court did not immediately act on appellee's motion, rather it waited more than two months after the filing of appellee's motion to render its decision. Ample time existed for appellant to seek leave to file a proper petition, yet she did not. [FN5] While the explanation for these failings is undoubtedly found in appellant's decision to proceed *pro se*, she does not acquire any greater rights as a result of that decision.

FN4. Again, the administrator was never made a party, and the claim number was not separately referenced.

FN5. On this point, we note that appellant's amended complaint could not act as the required petition because, first of all, the filing was more than thirty days after the notice of appeal, and appellant failed to obtain leave of court for the filing. Second, appellant failed to set forth the basis for the jurisdiction of the court over the action and to show a cause of action to participate in the fund. R.C. 4123.512(D).

In light of the foregoing, we cannot say that the trial court abused its discretion in dismissing the complaint. Appellant's two assignments of error are without merit. The judgment of the common pleas court is affirmed.

NADER, J., concurs.

O'NEILL, J., dissents.

Not Reported in N.E.2d, 1998 WL 553491 (Ohio App. 11 Dist.)

END OF DOCUMENT

Mahaffey v. Blackwell Ohio App. 10 Dist., 2006.
CHECK OHIO SUPREME COURT RULES FOR
REPORTING OF OPINIONS AND WEIGHT OF
LEGAL AUTHORITY.

Court of Appeals of Ohio, Tenth District, Franklin
County.

Lloyd C. MAHAFFEY, et al., Plaintiffs-Appellees,
v.

J. Kenneth BLACKWELL, Ohio Secretary of State,
et al., Defendants-Appellants.

No. 06AP-963.

Decided Oct. 11, 2006.

Appeal from the Franklin County Court of Common
Pleas.

McTigue Law Group, Donald J. McTigue, and Mark A.
McGinnis, for appellees.

Chester, Wilcox & Saxbe, LLP, Donald C. Brey,
Elizabeth J. Watters, and Deborah A. Scott, for
appellants.

Bricker & Eckler, LLP, Anne Marie Sferra, and Maria
J. Armstrong, for amici curiae Ohio Manufacturers
Association, National Federation of Independent
Business/Ohio, Ohio Chamber of Commerce, Ohio
Farm Bureau, Ohio Retail Merchants Association, Ohio
Business Roundtable, and Council of Smaller
Enterprises.

Squire, Sanders & Dempsey L.L.P., Steven M.
Loewengart, and Greta M. Kearns, for amicus curiae
Council of Smaller Enterprises.

FRENCH, J.

*1 ¶ 1 Defendants-appellants, Ohio Secretary of State
J. Kenneth Blackwell (the "Secretary") and Ohio
Assistant Secretary of State Monty Lobb (collectively
referred to as "appellants"), appeal from the judgment
of the Franklin County Court of Common Pleas, which
granted the motion for preliminary injunction filed by
plaintiffs-appellees, Lloyd C. Mahaffey, James W.
Harris, Sarah Ogdahl, and Stephen E. Mindzak

("appellees"). For the following reasons, we reverse.

¶ 2 In March 2006, the General Assembly passed,
and the Governor signed, S.B. 7, which made changes
to workers' compensation laws in Ohio. On June 29,
2006, one day before the effective date of S.B. 7,
appellees filed a referendum petition with the office of
the Secretary, seeking to place a referendum against the
enactment of a portion of S.B. 7 before Ohio voters on
the November 7, 2006 ballot.

¶ 3 The Secretary forwarded the part-petitions of the
referendum petition to the county boards of elections to
verify that the signatures contained in the part-petitions
were valid. The reports of the boards indicated that
some of the signatures submitted were not valid.

¶ 4 Appellees filed protest actions against the boards'
actions in 11 counties. Before those protest actions
were resolved, on August 25, 2006, appellant Lobb, on
behalf of the Secretary, issued to appellees a letter
certifying "that petitioners submitted 120,778 valid
signatures on behalf of the proposed referendum and
valid signatures from 20 of the 88 counties have met or
exceeded 3% of the total number of votes cast for
governor in the respective counties at the last
gubernatorial election." The letter listed the number of
valid signatures for each of the remaining 68 counties
and the number of signatures by which the
part-petitions were deficient in each of those counties.
The letter then concluded: "[Appellees] will need to
submit an additional 72,962 valid signatures and meet
the 3% requirement in an additional 24 counties.
Therefore, in accordance with R.C. 3519.16, your
committee shall have ten additional days from the
receipt of this notification to file additional signatures
with this office."

¶ 5 On August 29, 2006, appellees filed a complaint
and motion for temporary restraining order ("TRO")
and preliminary injunction in the trial court. In essence,
appellees argued that appellants should not have issued
the August 25, 2006 notice-of-insufficiency letter until
after all the protests had been resolved. They further

argued that, since appellants issued the notice-of-insufficiency letter prematurely, the letter was invalid, and the ten-day period in which the committee could submit additional signatures and correct the inefficiency had not yet begun to run. The court denied the motion for TRO and held a preliminary injunction hearing on September 14, 2006.

{¶ 6} On September 15, 2006, before the trial court had issued a decision on the motion for preliminary injunction, appellees filed supplemental signatures. On September 18, 2006, appellants notified the court of appellees' supplemental filing. Later that same day, the court issued its decision, which granted appellees' motion for preliminary injunction. On September 26, 2006, the court issued a preliminary injunction order. The order provided that the August 25, 2006 notice-of-insufficiency letter "is hereby stayed pursuant to Civ.R. 65(B) pending final determination of this action or until further order of the Court." The order also stated:

*2 *** This Order shall not prevent [appellants] from certifying a sufficient number of signatures for the referendum question to be placed on the November 7, 2006 general election ballot in the event that such is determined by [appellants] from the supplemental signatures filed by the petition committee on September 15, 2006. ***

{¶ 7} Appellants filed a timely appeal and raise a single assignment of error:

The trial court erred in issuing its September 18, 2006 "Decision and Entry Sustaining Plaintiffs' Motion for Preliminary Injunction Hearing, Filed August 29, 2006" and its September 26, 2006 "Preliminary Injunction Order."

{¶ 8} As an initial matter, we consider appellants' assertion that the trial court's September 26, 2006 preliminary injunction order is final and appealable. Appellees do not argue otherwise, and we agree that the order is final and appealable.

{¶ 9} R.C. 2505.02 defines the types of orders that may be reviewed on appeal. R.C. 2505.02(B) states, in

pertinent part:

An order is a final order that may be reviewed, affirmed, modified, or reversed, with or without retrial, when it is one of the following:

(4) An order that grants or denies a provisional remedy and to which both of the following apply:

(a) The order in effect determines the action with respect to the provisional remedy and prevents a judgment in the action in favor of the appealing party with respect to the provisional remedy.

(b) The appealing party would not be afforded a meaningful or effective remedy by an appeal following final judgment as to all proceedings, issues, claims, and parties in the action.

{¶ 10} We agree with appellants that the trial court's preliminary injunction order meets the requirements of R.C. 2505.02(B)(4). As we detail below, the court's order stayed the August 25, 2006 letter, which declared that the petition at issue in this case did not contain a sufficient number of signatures, and enjoined appellants from taking action on the letter "until further order of the Court." The court issued its decision on September 18, 2006, and its order on September 26, 2006.

{¶ 11} The Ohio Constitution provides that the petition and signatures shall be presumed to be sufficient unless proven otherwise not later than 40 days before the election. See Section 1g, Article II, Ohio Constitution. The 40th day before the November 7, 2006 election was September 28, 2006. In the absence of appellants' letter declaring the petition insufficient or other action by the Secretary, then, appellees' petition and the signatures contained within it were presumed valid after that date.

{¶ 12} Ohio law further provides that a vote rejecting a law submitted to voters pursuant to a referendum petition may not thereafter be invalidated "on account of the insufficiency of the petitions by which such submission of the same was procured[.]" Section 1g, Article II, Ohio Constitution. Thus, if the voters reject those portions of S.B. 7 on the November 7, 2006 ballot before appellants have fully litigated the sufficiency of the underlying petition, the November 7, 2006 vote will

stand, even if appellants are ultimately successful.

*3 {¶ 13} Given these circumstances, we conclude that, if appellants were denied an immediate appeal from the trial court's order, appellants would be denied meaningful relief altogether. Therefore, the requirements of R.C. 2505.02(B) are met, and we consider appellants' assignment of error.

{¶ 14} The standards by which a trial court must judge a motion for preliminary injunction are well-established. A moving party is entitled to injunctive relief if that party establishes: (1) a substantial likelihood of prevailing on the merits; (2) irreparable injury in the absence of injunctive relief; (3) no unjustifiable harm to third parties; and (4) that the injunction would serve the public interest. *Vanguard Transp. Sys., Inc. v. Edwards Transfer & Storage Co., Gen. Commodities Div.* (1996), 109 Ohio App.3d 786, 790, citing *Valco Cincinnati, Inc. v. N & D Machining Service, Inc.* (1986), 24 Ohio St.3d 41.

{¶ 15} The standard of review on appeal from the granting of injunctive relief is whether the trial court abused its discretion. *Prairie Twp. Bd. of Trustees v. Ross*, Franklin App. No. 03AP-509, 2004-Ohio-838, at ¶ 11, citing *Perkins v. Village of Quaker City* (1956), 165 Ohio St. 120, 125. "Injunction is an extraordinary remedy equitable in nature, and its issuance may not be demanded as a matter of strict right; the allowance of an injunction rests in the sound discretion of the court and depends on the facts and circumstances surrounding the particular case[.]" *Perkins*, at syllabus. The term "abuse of discretion" connotes more than an error of law or judgment; it implies that the court's attitude is unreasonable, arbitrary or unconscionable. *Blakemore v. Blakemore* (1983), 5 Ohio St.3d 217, 219. "Absent such a showing, this court cannot reverse." *Prairie Twp.* at ¶ 11. With this standard in mind, we turn now to the constitutional and legislative scheme for the filing and processing of a referendum petition.

{¶ 16} With some exceptions not relevant here, the Ohio Constitution reserves for the people of the state of Ohio the power to adopt or reject, by vote at a general election, any law or section of law proposed by the General Assembly. Sections 1, 1 c, Article II, Ohio

Constitution. The constitution sets out specific requirements for approving or rejecting a law by referendum. These requirements, the constitution provides, "shall be self-executing, except as herein otherwise provided. Laws may be passed to facilitate their operation, but in no way limiting or restricting either such provisions [that is, provisions for initiative and referendum] or the powers herein reserved." Section 1g, Article II.

{¶ 17} The referendum petition process begins when a committee of three to five people submits a written petition signed by 1,000 electors to the secretary of state with the full text and summary of the law to be referred to the voters. Once the secretary verifies the signatures and the attorney general verifies the accuracy of the summary, the committee drafts and circulates the petition or part-petitions for signature.

*4 {¶ 18} The constitution provides that, in order to be submitted to the voters, the total number of signatures on the referendum petition or part-petitions must equal at least six percent of the total votes cast for the office of governor at the last gubernatorial election. In addition, the signatures must be obtained from at least 44 of the 88 counties in Ohio and, from each of these 44 counties, there must be signatures equal to at least three percent of the total gubernatorial votes cast in that county. As applied here, appellees were required to submit a petition or part-petitions containing a total number of at least 193,740 valid signatures, which represents six percent of the total votes cast in the 2002 gubernatorial election, and those signatures must have been obtained from at least 44 counties and, for each of those counties, must have represented three percent of the total gubernatorial vote cast.

{¶ 19} As for the time for filing a referendum petition, the committee must file a petition with the secretary of state within 90 days after the governor has filed with the secretary the law or section of law to be referred. Here, appellees filed the petition or part-petitions on June 29, 2006, one day prior to the 90-day deadline.

{¶ 20} Pursuant to R.C. 3519.15, once a referendum petition is filed with the secretary, "he shall forthwith separate the part-petitions by counties and transmit such

part-petitions to the boards of elections in the respective counties. The several boards shall proceed at once to ascertain whether the signatures on the part-petitions are valid. The boards must submit a report to the secretary indicating the sufficiency or insufficiency of the signatures and whether the part-petition has been verified. Here, the Secretary transmitted the part-petitions to the boards of elections, the boards made their determinations as to the validity of the signatures, and the boards submitted their reports to the Secretary.

{¶ 21} Appellants' August 25, 2006 notice-of-insufficiency letter reflects the results of the boards' reports. As noted, appellees submitted 120,778 valid signatures, and valid signatures from 20 counties met or exceeded the three percent requirement. Thus, based on the boards' reports, appellees' part-petitions were deficient by 72,962 total votes and short by 24 counties having signatures representing three percent of the last gubernatorial vote.

{¶ 22} As permitted by statute, appellees protested some of the boards' findings. R.C. 3519.16 provides that a circulator, the committee or an elector may protest a board's finding. The protest must be in writing and must state the reasons for the protest. "Once a protest is filed, the board shall proceed to establish the sufficiency or insufficiency of the signatures and of the verification of those signatures" in an action in the common pleas court in the county. R.C. 3519.16 also provides, in pertinent part:

*5 * * * The action shall be brought within three days after the protest is filed, and it shall be heard forthwith by a judge of that court, whose decision shall be certified to the board. The signatures that are adjudged sufficient or the part-petitions that are adjudged properly verified shall be included with the others by the board, and those found insufficient and all those part-petitions that are adjudged not properly verified shall not be included.

The properly verified part-petitions, together with the report of the board, shall be returned to the secretary of state not less than fifty days before the election * * *. The secretary of state shall notify the chairperson of the committee in charge of the circulation as to the sufficiency or insufficiency of the petition and the

extent of the insufficiency.

If the petition is found insufficient because of an insufficient number of valid signatures, the committee shall be allowed ten additional days after the notification by the secretary of state for the filing of additional signatures to the petition.

{¶ 23} The Ohio Constitution does not explicitly provide for a protest process. It does, however, state: "The petition and signatures upon such petitions shall be presumed to be in all respects sufficient, unless not later than forty days before the election, it shall be otherwise proved and in such event ten additional days shall be allowed for the filing of additional signatures to such petition." Section 1g, Article II.

{¶ 24} Here, appellees filed protests in 11 counties and, pursuant to R.C. 3519.16, the 11 boards of elections filed actions in their respective common pleas courts. As noted, after appellees filed the protests, but before those protests were resolved, appellants issued the August 25, 2006 notice-of-insufficiency letter, which advised appellees of the petition's deficiencies. Appellees argued below, and the trial court found, however, that appellants issued the notice letter prematurely. R.C. 3519.16, the court found, requires the secretary to wait until all protest actions are resolved before issuing the notice-of-insufficiency letter and triggering the ten-day deadline for submitting supplemental signatures.

{¶ 25} Before this court, appellants argue that the secretary need not delay issuance of a ten-day letter until after all protest actions have been resolved. In support, appellants direct us to the Supreme Court's recent opinion in *State ex rel. Evans v. Blackwell*, --- Ohio St.3d ---, 2006-Ohio-4334. In *Evans*, members of a committee responsible for a state initiative petition appealed from a judgment denying writs of prohibition and mandamus. The committee had filed with the secretary an initiative petition containing over 167,000 signatures from all 88 counties. The secretary transmitted part-petitions to the respective boards of elections for review, and the boards submitted their reports to the secretary. Beginning on December 21, 2005, protests were filed challenging the sufficiency of

the boards' findings. Notably, in contrast to this case, the protests in *Evans* sought to prove that some of the signatures verified by the boards were not valid and, therefore, that the number of verified signatures was lower than that reported by the boards. On December 28, 2005, before the pending protests had been resolved, the secretary notified the committee that the petition contained 117,026 valid signatures and that this number was sufficient for the secretary to transmit the petition to the General Assembly. That same day, the secretary transmitted to the General Assembly the text and summary of the law proposed in the petition.

*6 ¶ 26} The protestor, Jacob Evans, filed a complaint in this court for an emergency writ of prohibition or, in the alternative, for a writ of mandamus against the secretary and the legislative clerks. Evans argued that, by not waiting to transmit the proposed law to the General Assembly until after the protests had been resolved and the boards of elections made any necessary supplemental reports, the secretary violated Section 1b, Article II, of the Ohio Constitution and/or usurped the role of the common pleas courts in determining the validity of the signatures. Although a magistrate of this court determined that the secretary was not prohibited from transmitting the petition to the general assembly before the protests were resolved, the court held that Evans was not entitled to a writ of prohibition because neither the secretary nor the clerks were exercising quasi-judicial authority in transmitting or accepting the petition. Evans appealed to the Ohio Supreme Court.

{¶ 27} After disposing of Evans' claim in mandamus and a claim in prohibition he had not raised below, the court turned to Evans' "primary prohibition claim," in which he asserted that this court erred in denying a writ of prohibition "because the Secretary of State was required to wait for the completion of the common pleas court protest proceedings before he could transmit the initiative petition to the General Assembly." *Id.* at ¶ 26. The court reviewed the applicable constitutional and statutory provisions, including the language in Section 1g, Article II, providing that "[t]he petition and signatures upon such petitions shall be presumed to be in all respects sufficient, unless not later than forty days before the election, it shall be otherwise proved and in

such event ten additional days shall be allowed for the filing of additional signatures to such petition." R.C. 3519.15 and 3519.16, the court noted, are laws passed to "facilitate the operation of Sections 1 b and 1g, Article II, of the Ohio Constitution." *Evans* at ¶ 28.

{¶ 28} Turning to its analysis of these provisions, the court found that Evans' claim—that the secretary lacked authority to transmit the petition to the general assembly before the protests were resolved—"lacks merit." *Id.* at ¶ 32. Instead, the court found:

* * * Section 1b, Article II of the Ohio Constitution does not expressly condition the Secretary's duty to transmit the petition to the General Assembly upon receipt of reports after the completion of R.C. 3519.16 protest proceedings. After all, R.C. 3519.16 sets no deadline by which an interested party must file a protest against a statewide initiative or referendum petition. Therefore, making the Secretary wait for a second set of verification reports from boards of elections that may never arrive unreasonably fails to advance the constitutional right of initiative. * * * Indeed, even R.C. 3519.16, when read in *pari materia* with R.C. 3519.15, does not explicitly command the Secretary to await the conclusion of all protest proceedings before transmitting the petition to the General Assembly. * * *

*7 *Id.*

{¶ 29} "The Secretary of State's interpretation of the pertinent constitutional and statutory provisions[.]" the court found, "is not unreasonable. We must therefore defer to the Secretary's reasonable interpretation." *Id.* at ¶ 34.

{¶ 30} As applied here, appellants argue, *Evans* compels a finding in this case that the Secretary's interpretation of the pertinent constitutional and statutory provisions is not unreasonable. In other words, appellants' issuance of the August 25, 2006 notice-of-insufficiency letter, without first waiting for the pending protests to be resolved, was reasonable.

{¶ 31} Appellees argue, however, that *Evans* is not controlling here. *Evans*, appellees note, dealt with the power of the secretary of state to transmit a law proposed by initiative petition to the general assembly

under Section 1b, Article II, of the Ohio Constitution, not the power of the secretary to send a letter of deficiency regarding a law proposed by referendum petition under Section 1g, Article II, of the Ohio Constitution. Section 1b, requires the secretary to transmit an initiative petition to the general assembly once it is "verified as herein provided[.]" In contrast, appellees note, Section 1g, presumes a referendum petition and signatures upon the petition "to be in all respects sufficient," unless "it shall be otherwise proved" not later than 40 days before the election. We find, however, that our beginning point is not Section 1g of Article II, but Section 1 c of Article II.

{¶ 32} Section 1c, Article II, designates the referendum power as the "second aforesaid power reserved by the people[.]" Section 1 c provides, in pertinent part:

* * * When a petition, signed by six per centum of the electors of the state and verified as herein provided, shall have been filed with the secretary of state within ninety days after any law shall have been filed by the governor in the office of the secretary of state, ordering that such law, section of such law or any item in such law appropriating money be submitted to the electors of the state for their approval or rejection, the secretary of state shall submit to the electors of the state for their approval or rejection such law, section or item, in the manner herein provided, at the next succeeding regular or general election * * *.

{¶ 33} In short, Section 1c of Article II provides that the secretary of state "shall submit to the electors of the state for their approval or rejection such law, section or item" once a petition, signed by six percent of the electors of the state "and verified as herein provided" has been filed. As the court found in *Evans*, Section 1b of Article II similarly provides that the secretary "shall transmit" to the general assembly a law proposed by initiative petition once a petition, signed by three percent of the electors "and verified as herein provided" has been filed. And, we note that Section 1 a of Article II also provides that the secretary "shall submit for the approval or rejection of the electors" a proposed constitutional amendment once a petition, signed by ten percent of the electors of the state and "verified as herein provided," is filed. Thus, Article II of the Ohio

Constitution expressly requires the secretary to act immediately-by submitting a proposed constitutional amendment to the voters under Section 1a, transmitting an initiated law to the General Assembly under Section 1 b or submitting a proposed approval or rejection of a law to the voters under 1c-upon the filing of a petition with the requisite number of signatures "verified as herein provided[.]"

*8 {¶ 34} In *Cappelletti v. Celebrezze, Jr.* (1979), 58 Ohio St.2d 395, 396, the Supreme Court of Ohio recognized that the phrase "verified as herein provided" "is a phrase used throughout Article II of the Constitution." That phrase, the court found, requires the secretary of state "as chief elections officer to first determine that the petition contains the purported signatures of [3 percent] of the electors of the state, for that requirement is fundamental to the constitutional reservation of the right of initiative to the people." *Id.* The court then expressly "reject[ed] relators' argument that the presumption of sufficiency of the petition and its signatures, contained in Section 1g of Article II, eliminates the further steps of determining whether the petition has been properly verified and establishing the eligibility of the signers as electors." *Id.* at 396-397. Rather, "[v]erification and the determination of the status of the signers can best be, and is by statute to be, performed by sending the petitions * * * to the county boards of election to be viewed together with the records there kept for the purpose of assisting the Secretary of State in arriving at his verification of the signatures and his determination of the qualifications as elector of the individual resident signers." *Id.* at 397.

{¶ 35} In short, as used throughout Article II, the phrase "verified as herein provided" refers to the secretary's initial verification, as well as the boards' initial reports, whether used in Section 1a, 1b or 1c of Article II. This language is not unique to Section 1b, and we reject appellees' attempt to distinguish Section 1c, and *Evans*, on that basis.

{¶ 36} We turn now to Section 1g of Article II, which applies to both initiative petitions under Section 1b and referendum petitions under Section 1c. As noted, Section 1g provides, in pertinent part: "The petition and signatures upon such petitions shall be presumed to be

in all respects sufficient, unless not later than forty days before the election, it shall be otherwise proved and in such event ten additional days shall be allowed for the filing of additional signatures to such petition.” According to appellees, this language, along with R.C. 3519.16, precludes the secretary from acting until the protest actions, by which the boards may “otherwise prove” the insufficiency of the signatures, have been resolved.

{¶ 37} We return to *Cappelletti*, wherein the Supreme Court considered the connection between the boards' verification process and the “presumed sufficient” language in Section 1g of Article II. The court found: “The fact that such inquiry [by the boards of elections] is contemplated by the language of the constitutionally provided presumption is implicit in its terms, for they provide that the presumption is subject to disproof up until 40 days before an election.” *Cappelletti* at 397. And, most importantly for our purposes here, the court stated: “It is evident that such disproof might be accomplished in various ways, but it is accomplished most effectively by the boards of elections, which have control of the election and registration records and poll books of those whose addresses have been given in connection with the signing, comparing the purported signatures with those enrolled in these records.” *Id.* Thus, the board reviews alone are sufficient to disprove the sufficiency of a petition and signatures under Section 1g.

*9 {¶ 38} We acknowledge, as appellees argue, that R.C. 3519.16 appears to provide a straightforward process for the filing of protests: a protestor files a protest with a board of elections; the board files an action in common pleas court within three days; the court hears the action “forthwith” and certifies its decision to the board; the board submits a new report to the secretary no later than 50 days before the election; the secretary notifies the committee as to the sufficiency or the extent of the insufficiency of the petition; and, if the petition is insufficient, the committee is allowed ten days to submit additional signatures. As we have often stated, an “unambiguous statute is to be applied, not interpreted.” *Northfield Park Assoc. v. Ohio State Racing Comm.*, Franklin App. No. 05-749, 2006-Ohio-3446, at ¶ 18, quoting *Sears v. Weimer*

(1944), 143 Ohio St. 312, paragraph five of the syllabus.

{¶ 39} Nevertheless, we conclude that the Supreme Court has interpreted R.C. 3519.16 and found that it does not command the secretary to await the conclusion of all protest proceedings before transmitting a petition to the general assembly. For this court to find in this case that R.C. 3519.16 does command the secretary to await the conclusion of all protest proceedings before notifying a petition committee of a deficiency would be inconsistent with the *Evans* holding and reasoning. While *Evans* involved an initiative petition under Section 1b, and this case involves a referendum petition under Section 1c, the applicable constitutional and statutory language at issue is precisely the same.

{¶ 40} Moreover, as the *Cappelletti* court found, the boards' review itself is a method of proving or disproving the sufficiency of the signatures. While the petition and signatures may have been presumed sufficient at the time of their filing, the boards' reports disproved their sufficiency, thus triggering notice from the Secretary of the ten-day timeframe for filing additional signatures under Section 1g of Article II.

{¶ 41} Finally, we address appellees' argument that appellants' August 25, 2006 letter was invalid because it did not indicate “the extent of the insufficiency,” as R.C. 3519.16 requires. We find, however, that appellants' letter did indicate the extent of the insufficiency, at least as determined by the boards of elections. The extent of the insufficiency might have changed after August 25, 2006, depending on the outcome of the protests pending at that time, as well as any other protests that might have followed. The possibility of subsequent change, however, does not preclude the secretary from issuing a notice-of-insufficiency letter, nor does it invalidate such a letter. As the court found in *Evans*, R.C. 3519.16 “sets no deadline by which an interested party must file a protest against a statewide initiative or referendum petition. Therefore, making the Secretary wait for a second set of verification reports from boards of elections that may never arrive unreasonably fails to advance the constitutional right of initiative.” *Evans* at ¶ 32. We likewise find that making the secretary wait

for a second set of verification reports unreasonably fails to advance the constitutional right of referendum.

*10 {¶ 42} In the end, based on the plain language of Article II and the Supreme Court's interpretation of Article II in *Cappelletti*, we find that the reports of the boards of elections "otherwise proved" that the referendum petition at issue here was insufficient, thus triggering the secretary's letter, which gives notice of the ten-day timeframe for filing supplemental signatures under Section 1g of Article II. In order to read R.C. 3519.16 in pari materia with Section 1g, and consistent with the Supreme Court's interpretation of R.C. 3519.16 in *Evans*, we find that the secretary need not wait for protest actions filed under R.C. 3519.16 to be resolved before certifying the number of valid signatures contained on part-petitions, certifying that a referendum petition is insufficient for placement on the ballot, and notifying the petition committee that it may file supplemental signatures to correct the insufficiency within ten days. The trial court having come to a contrary conclusion in determining that appellants were not likely to succeed on the merits of their appeal, we find that the trial court abused its discretion when it granted appellees' motion for preliminary injunction and issued its preliminary injunction order. Therefore, we sustain appellants' assignment of error.

{¶ 43} Having sustained appellants' assignment of error, we reverse the September 18, 2006 decision of the trial court, and we lift the stay imposed on appellants' August 25, 2006 letter by the trial court's September 26, 2006 order.

Judgment reversed.

BROWN and SADLER, JJ., concur.
Ohio App. 10 Dist., 2006.
Mahaffey v. Blackwell
Slip Copy, 2006 WL 2885029 (Ohio App. 10 Dist.),
2006 -Ohio- 5319

END OF DOCUMENT

Only the Westlaw citation is currently available.

CHECK OHIO SUPREME COURT RULES FOR REPORTING OF OPINIONS AND WEIGHT OF LEGAL AUTHORITY.

Court of Appeals of Ohio, Eleventh District,
Trumbull County.

JAMES B. MATTHEWS, Plaintiff-Appellant

v.

GENERAL MOTORS CORPORATION, GENERAL MOTORS ASSEMBLY DIVISION, ET AL.,

Defendant-Appellees.

CASE NO. 3289.

March 30, 1984.

Civil Appeal from the Court of Common Pleas Case No. 81 CV 1112.

Reversed and remanded for further proceedings.

ATTY. STEVEN D. MAAS, 21 N. Wickliffe Circle, Youngstown, OH 44515, (For Plaintiff-Appellant).

ATTY. ROBERT D. WARNER, 55 Public Square, Suite 2215, Cleveland, OH 44113, (For Defendant-Appellee General Motors Corporation).

ATTY. J. THOMAS HENRETTA, ASST. ATTORNEY GENERAL, Fir Hill Plaza, 27 South Forge Street, Akron, OH 44304, (For Defendant-Appellee Raymond Connor, Admin.)

OPINION

Before HON. ROBERT E. COOK, P.J., HON. ALFRED E. DAHLING, J., HON. DONALD R. FORD, J.

COOK, P.J.

*1 James B. Matthews, appellant, sustained injuries on June 16, 1980 while employed by General Motors Corporation, appellee. He filed a claim with the Bureau of Workers' Compensation which was allowed for an "aggravation of pre-existing lumbo sacral strain with resulting degenerative disc disease."

Appellee filed a notice of appeal to the Trumbull County Court of Common Pleas, pursuant to R.C. 4123.519, on December 1, 1981. On March 2, 1983, appellee filed a motion for summary judgment on the ground appellant had failed to file a complaint in common pleas court as required by R.C. 4123.519. The motion was denied on April 21, 1983. On April 22, 1983, the court ordered appellant to file a complaint pursuant to R.C. 4123.519 before May 23, 1983. Appellant failed to do so. On June 1, 1983, appellee filed a motion "to renew its motion for summary judgment". In its motion, appellee requested "that the motion for summary judgment previously filed be granted, directing that the plaintiff is not entitled to participate in the Workers' Compensation Fund of Ohio." On June 21, 1983, the trial court granted appellee's "Motion for Summary Judgment".

On July 1, 1983, appellant filed a "motion for leave to file complaint to employer's notice of appeal". On the same date, appellant's motion was denied as being moot. Again, on the same date, the court entered a judgment entry which found appellant had failed to file his complaint by May 23, 1983 and granted appellee's motion for summary judgment. The court further held that appellant was not eligible to participate in the Workers' Compensation Fund.

On July 8, 1983, appellant filed a motion for reconsideration which was overruled by the court.

Appellant has appealed the judgment of the trial court. The sole issue presented by this appeal is whether the trial court erred in granting appellee's motion for summary judgment.

The appeal authorized by R.C. 4123.519 is in the

nature of a new trial in the common pleas court. *Crabtree v. Young* (1965), 1 Ohio St. 2d 93. At such a trial, the right of the claimant to participate or to continue to participate in the Workers' Compensation Fund is determined. R.C. 4123.519. At such a trial, claimant has both the burden of going forward with evidence and the burden of proof. *Swift & Co. v. Wreede* (1959), 110 Ohio App. 252. Thus, where an employer appeals an unfavorable administrative decision to the court pursuant to R.C. 4123.519, claimant must re-establish his claim in the court of common pleas.

END OF DOCUMENT

Where a claimant, in an R.C. 4123.519 appeal of certain workers' compensation administrative decisions and orders, fails to "within thirty days after the filing of the notice of appeal, file a petition containing a statement of facts in ordinary and concise language showing a cause of action to participate in the fund and setting forth the basis for the jurisdiction of the court over the action", the proper remedy for the employer is a motion to dismiss, pursuant to Civ.R.41 (B) (1), for failure and refusal of a claimant to prosecute his claim. *Zuljevic v. Midland-Ross Corp. Unitcast Division* (1980), 62 Ohio St. 2d 116.

*2 In determining whether to dismiss a claimant's claim for failure to file a petition (now a complaint), as required by R.C. 4123.519, a court should exercise sound discretion. *Singer Sewing Machine v. Puckett* (1964), 176 Ohio St. 32; *Thompson v. Reibel* (1964), 176 Ohio St. 258.

In the instant cause, appellee did not file a motion to dismiss for failure to prosecute but filed a motion for summary judgment. It was error for the court to grant summary judgment, the granting of which is not a matter of discretion.

Judgment reversed and cause remanded for further proceedings.

DAHLING, J., FORD, J., concur.

Not Reported in N.E.2d, 1984 WL 6306 (Ohio App. 11 Dist.)

Olynyk v. Andrish Ohio App. 8 Dist., 2005.
CHECK OHIO SUPREME COURT RULES FOR
REPORTING OF OPINIONS AND WEIGHT OF
LEGAL AUTHORITY.

Court of Appeals of Ohio, Eighth District, Cuyahoga
County.

Sarah Anastasia OLYNYK Plaintiff-Appellant

v.

Jack T. ANDRISH, M.D. Defendant-Appellee.

No. 86009.

Decided Dec. 15, 2005.

Civil appeal from Common Pleas Court, Case No.
CV-463860, Reversed and Remanded.

David R. Pheils, Jr., Pamela K. Murd, Pheils &
Wisniewski, Perrysburg, for plaintiff-appellant.

Alan B. Parker, Michael D. Schrage, Michelle J.
Sheehan, Reminger & Reminger Co., Cleveland, for
defendant-appellee, L.P.A.

SEAN C. GALLAGHER, Presiding J.

*1 ¶ 1 Plaintiff-appellant Sarah Olynyk appeals the
ruling of the Cuyahoga County Court of Common Pleas
that entered a journal entry dismissing with prejudice
Olynyk's claims against defendant-appellee Dr. Jack
Andrish.

¶ 2 In January 1994, Olynyk, a minor, by and through
her mother and natural guardian, filed a complaint
against numerous defendants claiming medical
negligence. In October 1997, Olynyk filed a motion for
dismissal of the complaint pursuant to Civ.R. 41(A)(2).
The trial court dismissed the complaint without
prejudice.

¶ 3 In February 2002, Olynyk refiled her complaint
adding Dr. Andrish as an individual defendant.
Eventually, all defendants were dismissed except
defendants Dr. Peter Scoles and Dr. Andrish. Both filed
motions for summary judgment that were granted. On

appeal, the trial court's decision was affirmed as to
defendant Dr. Scoles but reversed and remanded as to
Dr. Andrish. See *Olynyk v. Scoles*, Cuyahoga App. No.
83525, 2004-Ohio-2688.

¶ 4 After remand, Olynyk filed a notice of dismissal
pursuant to Civ.R. 41(A)(1)(a) on January 13, 2005. On
January 24, the trial court entered a journal entry
dismissing Olynyk's case with prejudice. Olynyk
appeals, advancing two assignments of error for our
review. We will address only the first assignment of
error because it is dispositive of the case.

¶ 5 Olynyk's first assignment of error states:

¶ 6 "1. The trial court was without jurisdiction to
enter its January 24, 2005, journal entry dismissing
plaintiff's claims against defendant Jack T. Andrish,
M.D., with prejudice when plaintiff had already filed
her Civ.R. 41(A)(1) notice of dismissal without
prejudice on January 13, 2005."

¶ 7 Under her first assignment of error, Olynyk
contends that the trial court was without jurisdiction to
dismiss the case with prejudice because she had already
filed a "notice dismissal" in accordance with Civ.R.
41(A)(1)(a). Consequently, Olynyk asserts that her
dismissal should be without prejudice. Furthermore,
Olynyk argues that the "double dismissal" rule is
inapplicable here because the dismissal in the first case
was a Civ.R. 41(A)(2) dismissal by court order, not a
dismissal solely by the plaintiff.

¶ 8 Dr. Andrish argues that the double dismissal rule
applies to all voluntary dismissals under Civ.R. 41(A),
not just notice dismissals. As a result, Dr. Andrish
contends that the January 13, 2005 dismissal was
Olynyk's second dismissal and subject to the double
dismissal rule, in other words, with prejudice.

¶ 9 Civ.R. 41(A) provides for three types of
voluntary dismissals: (1) by notice, (2) by stipulation,
and (3) by court order.

{¶ 10} Civ.R. 41(A) states:

“(1) By plaintiff; by stipulation. Subject to the provisions of Rule 23(E) and Rule 66, an action may be dismissed by the plaintiff without order of court (a) by filing a notice of dismissal at any time before the commencement of trial unless a counterclaim which cannot remain pending for independent adjudication by the court has been served by the defendant or (b) by filing a stipulation of dismissal signed by all parties who have appeared in the action. Unless otherwise stated in the notice of dismissal or stipulation, the dismissal is without prejudice, *except that a notice of dismissal operates as an adjudication upon the merits of any claim that the plaintiff has once dismissed in any court.* “(2) By order of court. Except as provided in subsection (1) an action shall not be dismissed at the plaintiff's instance except upon order of the court and upon such terms and conditions as the court deems proper. If a counterclaim has been pleaded by a defendant prior to the service upon him of the plaintiff's motion to dismiss, the action shall not be dismissed against the defendant's objection unless the counterclaim can remain pending for independent adjudication by the court. Unless otherwise specified in the order, a dismissal under this paragraph is without prejudice.”

*2 (Emphasis added.)

{¶ 11} Pursuant to Civ.R. 41(A)(1)(a), a plaintiff may voluntarily and unilaterally dismiss an action without prejudice by filing a notice with the trial court at any time before trial. *Forshey v. Airborne Freight Corp.* (2001), 142 Ohio App.3d 404, 408. These dismissals are known as “notice dismissals.” *Id.* The mere filing of the notice by the plaintiff automatically terminates the case without court intervention or approval and generally without the consent of the opposing party. *Mays v. Kroger Co.* (1998), 129 Ohio App.3d 159, 161. This notice dismissal, however, is available to the plaintiff only once, and a second notice dismissal acts as an adjudication on the merits despite contrary language in the notice. *Id.* at 161-162; see, also, Civ.R. 41(A)(1).

{¶ 12} Thus, in order for the notice of dismissal filed by Olynyk on January 13, 2005 to have operated as an

adjudication on the merits, Olynyk must have previously dismissed the action unilaterally (i.e., without stipulation by the defense or by court order). The prior dismissal, however, was not dismissed by the plaintiff; rather, a Civ.R.41(A)(2) dismissal was done by “order of the court.” Therefore, the second dismissal could not have operated as an adjudication on the merits. See *Forshey*, 142 Ohio App.3d at 409; see, also, *Heskett v. Paulig* (1999), 131 Ohio App.3d 221, 225 (finding the double dismissal rule did not apply where an action was first dismissed by action of the court pursuant to Civ.R. 41(A)(2)); *Ham v. Park* (1996), 110 Ohio App.3d 803, 814 (recognizing the “two-dismissal rule” does not apply to Civ.R. 41(A)(2)(B)); *Bowen v. Tony Perry Chevrolet* (Aug. 16, 1995), Medina App. No. 2415-M (recognizing same); *Bonskowski v. Kinsinger* (Nov. 14, 1985), Cuyahoga App. No. 49631 (holding that only a notice dismissal is limited by the two-dismissal rule).

{¶ 13} Consistent with the above opinions, other courts have held that both dismissals must be Civ.R. 41(A)(1)(a) “dismissals by notice” in order for the double dismissal rule to apply. See *Robinson v. Allstate Ins. Co.*, Cuyahoga App. No. 84666, 2004-Ohio-7032; *International Computing v. State Dep't of Admin. Servs.* (May 9, 1996), Franklin App. No. 95API11-1475; see, also *Riley v. Med. College of Ohio Hosp.* (1992), 83 Ohio App.3d 139, 141 (double dismissal rule inapplicable when first dismissal was by court order pursuant to stipulation); *Nemeth v. Aced* (Feb. 22, 1996) Franklin App. No. 95APE06-768 (double dismissal rule inapplicable when first dismissal was by stipulation); *Hershiser v. BOS Corp.* (1990), 69 Ohio App.3d 186, 189 (double dismissal rule inapplicable when first dismissal was by stipulation); *Bowen*, *supra* (double dismissal rule inapplicable when first dismissal was by journal entry upon agreement of the parties); *All Structures, Inc. v. Hensley* (Mar. 31, 1992), Lake App. No. 91-L-075, (double dismissal rule inapplicable when first dismissal was by court order); *Graham v. Pavarini* (1983), 9 Ohio App.3d 89, 93-94 (double dismissal rule inapplicable when two prior dismissals were by court order or stipulation); *Hatcher v. City of Cleveland* (Dec. 10, 1992), Cuyahoga App. No. 63668 (double dismissal rule inapplicable when second dismissal was by stipulation).

*3 ¶ 14} Finally, we note that Civ.R. 41 was written to abolish the broad liberty given to plaintiffs under R.C. 2323.05(A), which allowed plaintiffs to dismiss any number of times so long as the statute of limitations had not run. See Civ.R. 41 Staff Notes. In order for a plaintiff to obtain more than one dismissal, Civ.R. 41(A)(1)(b) and (A)(2) require that a plaintiff convince the defendant to stipulate to a dismissal and/or the court to agree and order a dismissal without prejudice.^{FN1} Id. Hence, Olynyk's notice dismissal is without prejudice, because her first dismissal was by court order.

FN1. A Civ.R. 41(A)(2) dismissal does not implicate the double dismissal rule unless stated otherwise in the court's order. It is incumbent upon the defense to raise objections to a court-ordered dismissal.

¶ 15} Olynyk's first assignment of error is sustained. This case is reversed and remanded to the trial court for further proceedings consistent with this opinion.

Judgment reversed and case remanded.

This cause is reversed and remanded to the lower court for further proceedings consistent with this opinion.

It is, therefore, considered that said appellant recover of said appellee costs herein.

It is ordered that a special mandate issue out of this court directing the Cuyahoga County Common Pleas 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.

MARY EILEEN KILBANE, J., concurs.
CHRISTINE T. MCMONAGLE, J., concurs (see attached concurring opinion).

N.B. This entry is an announcement of the court's decision. See App.R. 22(B), 22(D) and 26(A); Loc.App.R. 22. This decision will be journalized and will become the judgment and order of the court pursuant to App.R. 22(E) unless a motion for

reconsideration with supporting brief, per App.R. 26(A), is filed within ten (10) days of the announcement of the court's decision. The time period for review by the Supreme Court of Ohio shall begin to run upon the journalization of this court's announcement of decision by the clerk per App.R. 22(E). See, also, S.Ct.Prac.R. II, Section 2(A)(1).

CHRISTINE T. MCMONAGLE, J., concurring.
¶ 16} I concur completely with the well-reasoned analysis of the majority in this matter and their discussion of the difference between Civ.R. 41(A)(1) and 41(A)(2) dismissals. I write separately to address two additional factors that should cause the reversal and remand of this matter. It is important to note that in Case No. 328030, filed January 24, 1997 (the First Complaint), Dr. Andrish was never named as a party, nor served with a Complaint. The first time Dr. Andrish was named as a defendant by Sarah Olynyk was in the instant case, Case No. 463860, and that case has only been dismissed once.

¶ 17} Further, in the case before us, Dr. Andrish was dismissed by notice, subject to refiling within one year of January 13, 2005. At that point, the trial court was wholly divested of jurisdiction to enter orders in regard to Dr. Andrish; hence the court's sua sponte dismissal with prejudice of claims against Dr. Andrish 11 days later was void, as the court was then without jurisdiction. Once a plaintiff files a notice of dismissal, the trial court is deprived of further jurisdiction over the case. *Briggs v. Fedex Ground Package Sys.*, 157 Ohio App.3d 643, 2004-Ohio-3320. This court has ruled that a Civ.R. 41(A)(1)(a) dismissal is self-executing and gives a plaintiff an absolute right to terminate his or her cause of action voluntarily and unilaterally at any time prior to commencement of trial without order of the court and without giving notice to opposing counsel. *Rini v. Rini*, Cuyahoga App. No. 80225, 2002-Ohio-648. The mere filing of the notice of dismissal with the clerk of courts completely divests the court of jurisdiction. In short, even if this were a second-time notice of voluntary dismissal, the court was without jurisdiction at that instance to convert it to a dismissal with prejudice. The issue of whether Olynyk could refile could only be addressed if and when there was a subsequent filing.

Slip Copy
Slip Copy, 2005 WL 3436343 (Ohio App. 8 Dist.), 2005 -Ohio- 6632
(Cite as: Slip Copy)

Ohio App. 8 Dist.,2005.
Olynyk v. Andrish
Slip Copy, 2005 WL 3436343 (Ohio App. 8 Dist.),
2005 -Ohio- 6632

END OF DOCUMENT

Pheils v. Black
Ohio App. 6 Dist., 1995.

Only the Westlaw citation is currently available.
CHECK OHIO SUPREME COURT RULES FOR
REPORTING OF OPINIONS AND WEIGHT OF
LEGAL AUTHORITY.

Court of Appeals of Ohio, Sixth District, Wood
County.

Joanne L. PHEILS, et al. Appellants
v.

Betty C. BLACK, et al. Appellees.
WD-95-028

Oct. 13, 1995.

David R. Pheils, Jr., pro se.
Philip L. Dombey and Timothy J. Brown, for appellees.

**DECISION AND JUDGMENT ENTRY
GLASSER.**

*1 This accelerated case comes before the court on
appeal from the Wood County Court of Common Pleas.
The facts giving rise to this appeal are as follows.

On February 11, 1994, appellants, JoAnne L. and David
R. Pheils, filed a complaint for money damages and
injunctive relief against appellee and neighbor, Betty C.
Black. Appellants alleged appellee had been using a
portion of her property illegally as a landfill thereby
causing natural drainage to flow onto appellants'
property. Appellants alleged the drainage constituted
trespass and was a nuisance. Appellants sought
removal of the landfill and damages over \$25,000.
Appellee's husband, George Black, was granted leave
to intervene as a party defendant.

On September 30, 1994, appellees filed a motion for
summary judgment arguing that appellants had
overestimated the amount of money they were owed for
damages. Appellees argued that much of the damage
to appellants' property was the result of a tree disease

rather than drainage waters. On October 17, 1994,
appellants filed a motion for partial summary judgment
arguing that the drainage either caused or contributed to
the death of the trees. Both parties submitted expert
affidavits in support of their arguments. The trial court
denied the motions of both parties. Upon agreement of
the parties, the court ordered the case to proceed to
arbitration. On January 31, 1995, the arbitrators found
in favor of appellees.

On March 1, 1995, appellants filed a demand for a trial
de novo. On March 22, 1995, appellants filed a notice
of dismissal pursuant to Civ.R. 41. On March 23,
1995, appellees filed a motion to dismiss appellants'
demand arguing that appellants had failed to comply
with Loc.R. 7.11(I) of the Court of Common Pleas of
Wood County. In response, appellants argued the trial
court had no jurisdiction to dismiss the case in that
appellants had filed a Civ.R. 41 notice of dismissal.
The trial court held that because appellants had failed to
comply with Loc.R. 7.11 in filing a demand for a trial
de novo, the arbitration order was now the order of the
court. Appellants now appeal setting forth the
following assignments of error:

"I. THE TRIAL COURT LACKED JURISDICTION
TO ENTER JUDGMENT AGAINST PLAINTIFFS
ON THE MERITS OF THEIR COMPLAINT AFTER
SUCH COMPLAINT HAD BEEN DISMISSED
PURSUANT TO CIV.R. 41(A)(1).

"II. THE TRIAL COURT ERRED IN FINDING
THAT, AS OF APRIL 5, 1995, PLAINTIFFS HAD
FAILED TO FILE AN AFFIDAVIT THAT THE
APPEAL FROM THE ARBITRATORS' AWARD
WAS NOT TAKEN FOR DELAY.

"III. THE TRIAL COURT ERRED AND ABUSED
ITS DISCRETION IN HOLDING THAT
PLAINTIFFS' FAILURE TO FILE A NO DELAY
AFFIDAVIT CONTEMPORANEOUSLY WITH THE
DEMAND FOR A TRIAL DE NOVO JUSTIFIED
DENYING PLAINTIFFS THEIR
CONSTITUTIONAL RIGHT TO A JURY TRIAL.

"IV. THE TRIAL COURT ERRED IN DENYING
APPELLANTS MOTION FOR
RECONSIDERATION. "

Appellants' first two assignments of error will be addressed together. Appellants contend the court was without jurisdiction to enter judgment in favor of appellees following the filing of appellants' Civ.R. 41 notice of dismissal. We disagree.

*2 Loc.R. 7.11, governing summary arbitration in the Wood County Court of Common Pleas, states in pertinent part:

" * * * H(2) The Arbitrators shall file the award with the Clerk of Courts promptly following the close of the hearing and in any event not more than 7 days following the close of the hearing. The chair shall cause the service of a file stamped copy of the award on all parties or their counsel."

The record in this case shows that an arbitration hearing was held on January 31, 1995. The record in this case contains a copy of the arbitrators' award in favor of appellees file-stamped January 31, 1995.

Loc.R. 7.11 H(5) states:

"Unless a party has filed a demand for trial de novo within 30 days following the filing of the award, the award shall become the judgment of the Court and shall have the same force and effect as a judgment of the Court any other civil action."

Loc.R. 7.11 I(1) states:

"Any party may appeal the award to the Court if, within thirty days after the filing of the award with the Clerk of the Court, he files a "Demand for a Trial De Novo" with the Clerk of Courts and serves a copy thereof on the adverse party or parties *accompanied* by an affidavit that the appeal is not taken for delay." (Emphasis added).

Rule 15 of the Rules of Superintendence for Courts of Common Pleas, specifically adopted by the Wood County Common Pleas Court and governing civil arbitration, states that a party shall file: " * * * a notice of appeal with the clerk of courts and [serve] a copy on the adverse party or parties *accompanied by an affidavit that the appeal is not being taken for delay.*"

(Emphasis added). In that both of these rules specifically state that a party's notice of appeal should be accompanied by an affidavit, we cannot say, as appellants have argued, that Loc.R. 7.11 I(1) is ambiguous.

The record in this case shows that appellants filed a "Demand for a Trial De Novo" on March 1, 1995, or within thirty days of the filing of the arbitration award.

The record *does not show* that appellants also filed an affidavit stating the appeal was not being taken for delay within thirty days of the arbitration award. The record does contain such an affidavit which appellants referred to as a copy of the original, file stamped March 29, 1995. Appellants filed a "second affidavit" file stamped April 7, 1995, so that an original copy would be filed with the court. However, neither of these affidavits were timely pursuant to Loc.R. 7.11 I(1). It follows that appellants failed to perfect their appeal. Pursuant to Loc.R. 7.11 H(5), after the requisite thirty days, the arbitrators' award in this case became the judgment of the Court having "the same force and effect as a judgment of the Court in any civil action."

Civ.R. 41(1) states: "[S]ubject to the provisions of Rule 23(E) and Rule 66, an action may be dismissed by the plaintiff without order of court (a) by filing a notice of dismissal at any time before the commencement of trial * * *"

*3 Appellants filed their Civ.R. 41 notice of dismissal on March 22, 1995, or after the arbitrators' award had become the order of the court. This clearly is not "before the commencement of trial." Accordingly, appellants' first two assignments of error are found not well-taken. Given our disposition of appellants' first two assignments of error, we need not address appellants' remaining assignments of error.

On consideration whereof, the court finds that substantial justice has been done the party complaining, and the judgment of the Wood County Common Pleas Court is affirmed. Costs assessed to appellants.

GLASSER, RESNICK and SHERCK, JJ., concur.
Ohio App. 6 Dist., 1995.
Pheils v. Black

Not Reported in N.E.2d
Not Reported in N.E.2d, 1995 WL 604615 (Ohio App. 6 Dist.)
(Cite as: Not Reported in N.E.2d)

Not Reported in N.E.2d, 1995 WL 604615 (Ohio App.
6 Dist.)

END OF DOCUMENT

Rohloff v. FedEx Ground
Ohio App. 6 Dist., 2007.

CHECK OHIO SUPREME COURT RULES FOR
REPORTING OF OPINIONS AND WEIGHT OF
LEGAL AUTHORITY.

Court of Appeals of Ohio, Sixth District, Lucas
County.

Darlene K. ROHLOFF, Appellee

v.

FedEX GROUND, et al., Appellant.

No. L-07-1182.

Decided Dec. 7, 2007.

Robert W. Fiedler, Jr., for appellee.
John T. Landwehr and Sarah E. Pawlicki, for appellant.
OSOWIK, J.

*1 ¶1 This is an appeal from a judgment of the Lucas
County Court of Common Pleas, which denied
appellant's motion to strike appellee's notice of
voluntary dismissal. For the reasons set forth below,
this court affirms the judgment of the trial court.

¶2 Appellant, FedEx Ground ("FedEx"), sets forth
the following single assignment of error:

¶3 "The Trial Court erred in denying FedEx's
Motion to Strike Plaintiff/ Appellee Darlene Rohloff's
("Rohloff's") Notice of Dismissal in violation of R.C.
4123.512."

¶4 The following undisputed facts are relevant to the
issues raised on appeal. Appellee's claim originates
from a June 25, 2003 workplace incident. As a result of
this incident, appellee filed a workers' compensation
claim.

¶5 On March 27, 2006, the Industrial Commission of
Ohio ruled in favor of appellee. Pursuant to R.C.
4123.512(A), FedEx appealed the Industrial

Commission's decision to the Lucas County Court of
Common Pleas.

¶6 R.C. 4123.512(D) provides that when a claim is
appealed from the Industrial Commission, the
employee/claimant becomes the plaintiff. The employer
becomes the defendant. This is done regardless of
which party files the appeal.

¶7 The employee, being the plaintiff, is required to
submit a complaint to the trial court. Prior to the
enactment of Am. Sub. S.B. No. 7 on October 11, 2006,
this scenario created unique results. "[W]hen an
employer has appealed a decision of the Industrial
Commission to a court of common pleas under R.C.
4123.512, the court of common pleas may subsequently
grant a motion to voluntarily dismiss the employee's
complaint without prejudice under Civ.R.
41(A)(2)." *Kaiser v. Ameritemps, Inc.* (1999), 84 Ohio
St.3d 411, 414, citing *Robinson v. B.O.C. Group, Gen.
Motors Corp.* (1998), 81 Ohio St.3d 361, parenthesis
removed. The court clarified that this analysis also
applied to employees/plaintiffs under Civ.R.
41(A)(1)(a). Further, the employer could not block an
employee's use of Civ.R. 41 to dismiss his/her
employer's appeal. Employees utilizing this tactic were
required to refile within one year. *Kaiser*, 84 Ohio St.3d
at 415.

¶8 On October 11, 2006, after a six month statewide
referendum, Am.Sub.S.B. No. 7 went into effect.
Am.Sub.S.B. No. 7 made several changes to R.C.
4123.512 and directly addressed the above described
dismissal issue in R.C. 4123.512(D). The legislature
modified division (D) to state, "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."

¶9 On March 15, 2007, appellee filed a notice of
voluntary dismissal pursuant to Civ.R. 41(A)(1). On
March 21, 2007, appellant, acting in response to
Am.Sub.S.B. No. 7, filed a motion to strike appellee's
notice of voluntary dismissal. On April 23, 2007, the

trial court denied appellant's motion to strike. Appellant has filed a timely notice of appeal.

*2 {¶ 10} This court has determined that this appeal is taken from a final appealable order. The key to be addressed in this appeal is whether the amendments to R.C. 4123.512(D) apply retroactively to the present case. Appellee asserts that the changes to R.C. 4123.512(D) are inapplicable because they were not enacted until after her cause of action accrued. Appellee's position is that Am.Sub.S.B. No. 7 expressly requires that legislative changes made pursuant to R.C. 4123.512(D) are prospective. Such changes apply only to claims arising on and after the effective date of Am.Sub.S.B. No. 7. Appellant responds by arguing that an existing provision in R.C. 4123.512(H), unaltered by Am.Sub.S.B. No. 7, expressly requires that all amendments to R.C. 4123.512(D) date back to November 2, 1959.

{¶ 11} R.C. 1.48 provides, "A statute is presumed to be prospective in its operation unless expressly made retrospective." To apply an act or amendment retrospectively, the legislature must have clearly expressed retroactive intent. *State v. Williams*, 103 Ohio St.3d 112, 2004-Ohio-4747, ¶ 8, citing *State v. Cook* (1998), 83 Ohio St.3d 404, 410.

{¶ 12} When determining legislative intent, courts can look to uncodified law. Courts can also use uncodified law to determine when an act takes effect, and uncodified law often shows whether the legislature intended an act to be applied retroactively. If the legislature is silent, the act must only be applied prospectively. See *State v. Consilio*, 114 Ohio St.3d 295, 2007-Ohio-4163, ¶ 19.

{¶ 13} This court now has the task of determining whether the legislature intended to apply the amendments to R.C. 4123.512(D) retrospectively or prospectively.

{¶ 14} Uncodified language in Section 3 of Am. Sub. S.B. No. 7 specifically singles out division (H) of R.C. 4123.512 as applying to pending claims. No other sections of R.C. 4123.512 are specifically stated as applying in that fashion. Am.Sub.S.B. No. 7 states,

"This act applies to all claims pursuant to Chapters 4121., 4123., 4127., and 4131. of the Revised Code arising on and after the effective date of this act." Accordingly, it is apparent to this court that the current legislature intended the amendments to division (D) to apply prospectively.

{¶ 15} Appellant asserts that the analysis should not end here. In support, appellant cites *Morgan v. Western Electric Co. Inc.* (1982), 69 Ohio St.2d 278 and argues that R.C. 4123.512 contains a provision that makes all amendments to it retrospective. In pertinent part, the provision states, "all decisions of the commission or the administrator on November 2, 1959, and all claims filed thereafter are governed by sections 4123.511 and 4123.512 of the Revised Code."

{¶ 16} In *Morgan*, the Ohio Supreme Court was asked to determine whether amendments made to R.C. 4123.419 by Am.Sub.S.B. No. 545, enacted January 1, 1979, applied retrospectively. When *Morgan* was decided, the November 2, 1959 statement read, "This section applies to all decisions of the commission, the administrator, or the Regional Board of Review on November 2, 1959, and all claims filed thereafter shall be governed by Sections 4123.512 to 4123.519 of the Revised Code."

*3 {¶ 17} In interpreting the November 2, 1959 statement, the *Morgan* court concluded, "The legislative intent is evident: in controlling all claims filed after November 2, 1959, the statute and all its amendments were 'expressly made retrospective.'" *Id.* at 282-283. However, upon closer examination of the *Morgan* decision, we find that it is inapplicable to the present case.

{¶ 18} Am.Sub.S.B. No. 545 did not give the *Morgan* court any indication of the legislature's prospective or retrospective intent. *Id.* at 283. The court was forced to consider the November 2, 1959 provision. In contrast, Am.Sub.S.B. No. 7 is not silent on the legislature's intent. Section 3 of Am.Sub.S.B. No. 7 contains a clear provision stating that modifications to R.C. 4123 are to be applied prospectively, after the date of enactment. Am.Sub.S.B. No. 7 specifically singles out division (H) of R.C. 4123.512 as the only division of R.C. 4123.512

to apply retrospectively.

{¶ 19} The November 2, 1959 statement is a generalized provision. Section 3 of Am.Sub.S.B. No. 7 is a specific statutory provision. It expressly identifies the sections of R.C. 4123.512 that apply retroactively and the sections that apply prospectively. When two provisions are in conflict, specific statutory provisions take precedent over general provisions. *Springdale v. CSX Ry. Corp.* (1994), 68 Ohio St.3d 371, 376, citing *State v. Volpe* (1988), 38 Ohio St.3d 191, 193. Thus, Section 3 of Am.Sub.S.B. No. 7 is controlling on the issue of prospective or retrospective application of R.C. 4123.512(D).

{¶ 20} Further, the *Morgan* court restricted its analysis to occupational disease claims arising under Am. Sub. S.B. 545. The court limited its holding by stating, "Any contrary result ignores this very intent by imposing an arbitrary cut-off date before which occupational disease claims cannot be appealed." *Morgan*, 69 Ohio St.2d at 283.

{¶ 21} Appellant next argues that the application of amended R.C. 4123.512(D) would not actually be retrospective. Appellant states that because appellee filed the Civ.R. 41(A)(1) motion to dismiss several months after the effective date of amended R.C. 4123.512(D), appellee's cause of action did not accrue until after the effective date of Am. Sub. S.B. No. 7.

{¶ 22} We are not convinced by this argument. It is established in workers' compensation claims that the cause of action accrues when the claim is initially filed with the Ohio Industrial Commission. "A 'claim' in a workers' compensation case is the basic or underlying request by an employee to participate in the compensation system because of a specific work-related injury or disease." *Felty v. AT & T Technologies, Inc.* (1992), 65 Ohio St.3d 234, 239.

{¶ 23} In this case, appellee's claim was proceeding through the workers' compensation system well before Am. Sub. S.B. No. 7 became effective. To apply amended R.C. 4123.512(D) to her claim would be a retrospective application.

*4 {¶ 24} Wherefore, for the reasons stated herein, we find that appellant's assignment of error is not well-taken. The legislature clearly intended for amended R.C. 4123.512(D) to apply prospectively.

{¶ 25} On consideration whereof, the judgment of the Lucas County Court of Common Pleas is affirmed. Appellant is ordered to pay costs of this appeal pursuant to App.R. 24. Judgment for the clerk's expense incurred in preparation of the record, fees allowed by law, and the fee for filing the appeal is awarded to Lucas County.

JUDGMENT AFFIRMED.

A certified copy of this entry shall constitute the mandate pursuant to App.R. 27. See, also, 6th Dist.Loc.App.R. 4.

Ohio App. 6 Dist., 2007.
Rohloff v. FedEx Ground
Slip Copy, 2007 WL 4277886 (Ohio App. 6 Dist.),
2007 -Ohio- 6530

END OF DOCUMENT

COURT OF APPEALS OF OHIO, EIGHTH DISTRICT
COUNTY OF CUYAHOGA

MAY 03 1974

No. 33182

JOHN SESOCK

APPEAL FROM

APPELL EE

COMMON PLEAS COURT

-vs-

No. 883,769

ALUMINUM COMPANY OF AMERICA,

ET AL.,

JOURNAL ENTRY

APPELLANTS

MAY 2 1971

DATE _____

This cause came on to be heard upon the pleadings and the _____ transcript of the evidence and record in the Common Pleas Court, and was argued by counsel; on consideration whereof, the court certifies that in its opinion substantial justice has not been done the party complaining, as shown by the record of the proceedings and judgment under review, and judgment of said Common Pleas Court is reversed. Each assignment of error was reviewed by the court and upon review the following disposition made:

Both Case No. 33046 and No. 33182 present the same issue for this Court to resolve and were consolidated for purposes of appeal (by order of this Court). Mr. Bamber (Case No. 330⁴6) was allowed, by the Cleveland Regional Board of Review, to collect from General Motors (self-insured) for injuries sustained on the job. Mr. Sesock (Case No. 33182) was also allowed, by the Cleveland Regional Board of Review, to collect from Alcoa (self-insured) for injuries sustained on the job. The Industrial Commission refused to review Bamber's claim. It did affirm Sesock's claim after review of the decision of the Cleveland Regional Board.

Both employers pursuant to O.R.C. 4123.519, appealed to the Cuyahoga County Court of Common Pleas. The claimants did not file a petition, as required by O.R.C. 4123.519, in the Common Pleas Court. As a result, the Common Pleas Court dismissed, sua sponte, General Motors' appeal. The same Court overruled a motion for summary judgment filed by Alcoa and dismissed the appeal. Both appeals were dismissed for "want of prosecution".

Here is the issue:

Where the employer duly appeals to the Court of Common Pleas, pursuant to O.R.C. 4123.519, from an adverse decision of the Industrial Commission pertaining to matters other than the extent of claimant's disability and the claimant-plaintiff fails to file his "petition" within the thirty days next following the filing of such notice of appeal, is it prejudicial error for the Court of Common Pleas to dismiss the employer's appeal sua sponte by reason of claimant's default?

We answer in the affirmative and reverse the orders before this Court for review. (Cases Nos. 33182 and 33046). The employer clearly has the right to appeal (O.R.C. 4123.519). Notice is the only jurisdictional requirement. Following notice, the claimant (Bamber and Sesock) shall, within 30 days, file a petition as required by the same statute. If the claimant does not file the petition within 30 days after notice, or at a latter time allowed by the Court of Common Pleas, then it would appear to this Court that the employer should be given final judgment.

This cause is remanded to the Common Pleas Court with instructions to allow claimants leave to file the required petition, within a reasonable time, serving notice of such order upon them. Failure to file upon the part of the claimants would constitute grounds for final judgment for the employers. (See Helkin v. Bianci, 33 O.O.2d 337).

It seems grossly unfair to permit an employer to be tossed out of

Court, on appeal, for "want of prosecution" when it, having felt aggrieved, complies with O.R.C. 4123.519.

It is not necessary to pass upon whether or not the Administrator of the Bureau of Workmen's Compensation has standing in this Court for purposes of appeal.

Judgment reversed and remanded.

RECEIVED FOR FILING

MAY 2 1974

E. J. MASGAY, CLERK
By [Signature] Dep.

No other error appearing in the record, this cause is remanded to the Common Pleas

Court ~~xxx~~ with instructions to allow claimants leave to file the required petition.
(or judgment entered for appellant.)

It is therefore considered that said appellant recover of said appellee their costs herein.

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. Exceptions.

GEORGE M. JONES, P. J.,

EDWIN T. HOFSTETTER, J.,

ROBERT E. COOK, J.,

Eleventh District, Sitting by
Assignment in Eighth District.

[Signature: George M. Jones]
PRESIDING JUDGE

GEORGE M. JONES

N.B. This entry is made pursuant to the third sentence of Rule 22D, Ohio Rules of Appellate Procedure. This is an announcement of decision, (see Rule 26). Ten (10) days from the date hereof this document will be stamped to indicate journalization, at which time it will become the judgment and order of the court and time period for review will begin to run.

For plaintiff appellee: James McGarry, Asst. Atty. Genl.
For defendant appellant: Aubrey B. Willacy

ALL PARTIES. COSTS TAXED.



Case Number: CV-70-883769

Case Title: JOHN SESOCK vs. ALUMINUM CO.OF AMERICA

Case Summary

Case Number: CV-70-883769
Case Title: JOHN SESOCK vs. ALUMINUM CO.OF AMERICA
Case Designation: WORKMANS COMP. ADM. APPEAL
Filing Date: 06/01/1970
Judge: GEORGE W WHITE
Magistrate: N/A
Room: N/A
Next Action: N/A
File Location: DEAD FILES
Last Status: INACTIVE
Last Status Date: 11/27/1974
Last Disposition: DISP.COURT TRIAL
Last Disposition Date: 11/27/1974
Prayer Amount: \$.00

Service

Party	Role Name	Service Date	Response Date
P(1)	JOHN SESOCK	N/A	
D(1)	ALUMINUM CO.OF AMERICA	N/A	
D(2)	JAY C FLOWERS	N/A	

Case Parties

PLAINTIFF (1) JOHN SESOCK
DEFENDANT (1) ALUMINUM CO.OF AMERICA
DEFENDANT (2) JAY C FLOWERS ADM

Docket Information

DOCKET INFORMATION
No dockets found for case.

Case Cost Detail

There are no costs currently assigned to this case.

State ex rel. Vazquez v. Cuyahoga Cty. Court of
Common Pleas
Ohio App. 8 Dist.,2007.

CHECK OHIO SUPREME COURT RULES FOR
REPORTING OF OPINIONS AND WEIGHT OF
LEGAL AUTHORITY.

Court of Appeals of Ohio,Eighth District, Cuyahoga
County.

STATE of Ohio, ex rel., SantosVAZQUEZ, Relator
v.

COURT OF COMMON PLEAS CUYAHOGA
COUNTY, et al., Respondents.
No. 90755.

Decided Dec. 12, 2007.

Matthew A. Palnik, Shapiro, Marnecheck & Reimer,
Cleveland, OH, for relator.
William D. Mason, Cuyahoga County Prosecutor,
Cleveland, OH, for respondents.
JAMES J. SWEENEY, P.J.

*1 ¶ 1 SantosVazquez, the relator, has filed a
complaint for a writ of prohibition. Vasquez argues that
the Cuyahoga County Court of Common Pleas and
Judge Nancy McDonnell, the respondents and herein
after referred to as "the trial court," are devoid of
jurisdiction to proceed to trial in the underlying
worker's compensation appeal as filed in *Vazquez v.
Avalon Precision Casting Co., et al.*, Cuyahoga County
Court of Common Pleas Case No. CV-06-608742.For
the following reasons, we sua sponte dismiss Vazquez's
complaint.

¶ 2 On December 1, 2006, Avalon Precision Casting
Co. ("Avalon") filed an appeal, in the Cuyahoga County
Court of Common Pleas pursuant to R.C. 4123.512(A),
from a decision of the Industrial Commission of Ohio,
which allowed Vazquez to receive compensation for
injuries sustained as a result of his employment. On
December 8, 2006, Vazquez filed a complaint, which

contained "a statement of facts in ordinary and concise
language showing a cause of action to participate or to
continue to participate in the fund and setting forth the
basis for the jurisdiction of the court over the
action."See R.C. 4123.512(D). On October 3, 2007,
Vazquez filed a notice of "voluntary dismissal without
prejudice" of the complaint. Avalon, however, refused
to sanction Vazquez's voluntary dismissal on the basis
that R.C. 4123.512(D), as amended by Am.Sub. S.B.
No. 7, no longer allowed for the unilateral dismissal of
the complaint and specifically 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."On October 12, 2007,
Vazquez filed a brief in support of his notice of
voluntary dismissal and argued that the amendment of
R.C. 4123.51(D), which eliminated the ability of an
injured employee to unilaterally dismiss an employer's
appeal, could only be applied prospectively to injuries
suffered after the amendment of R.C. 4123.51(D).
Vazquez further argued that since his injuries occurred
prior to the amendment of R.C. 4123.51(D), he was
permitted to voluntarily dismiss the complaint filed
pursuant to Avalon's notice of appeal. On December 7,
2007, Vazquez filed his complaint for a writ of
prohibition, in an effort to prevent the trial court from
proceeding to trial with regard to the worker's
compensation appeal as filed by Avalon.

¶ 3 Herein, Vazquez argues that this court is required
to issue a writ of prohibition since the " * *
* Respondents had no jurisdiction over Cuyahoga
County Case No. CV-06-608742 after Relator filed his
notice of dismissal pursuant to Civ.R. 41(A)(1)(a) and
a writ of prohibition must issue prohibiting
Respondents from continuing to exercise jurisdiction *
* *." Specifically, Vazquez argues that the amendment
of R.C. 4123.511(D), which currently prevents an
employee from unilaterally dismissing a worker's
compensation appeal, as brought in a court of common
pleas by an employer, cannot be retroactively applied to
any claim for injury that occurred prior to the effective
date of the amendment. Vazquez argues that the
amendment to R.C. 4123.512 can only be applied

prospectively to a person that has suffered injury after the effective date of the amendment. It is readily apparent that Vazquez, in addition to his request for a writ of prohibition, seeks a writ of mandamus in order to compel the trial court to dismiss the underlying worker's compensation appeal. In paragraph 14 of his complaint, Vazquez alleges that "[r]elator has a clear legal right to voluntarily dismiss his Complaint in case number CV-06-608742, pursuant to Ohio Civ.R. 41(A)(1)(a), and Respondents have a clear legal duty to honor said dismissal; however Respondents refuse to do so and are forcing Relator to proceed to trial." We shall thus proceed on the basis that Vazquez seeks a writ of mandamus and a writ of prohibition. Cf. *Royal Indemn. Co. v. J.C. Penney Co.* (1986), 27 Ohio St.3d 31, 501 N.E.2d 617. See, also, *Vance v. Davis*, Agt. (1923), 107 Ohio St. 577, 140 N.E. 588.

*2 ¶ 4} In order for this court to issue a writ of mandamus, Vazquez must demonstrate that: (1) Vazquez possesses a clear legal right to the relief requested; (2) the trial court possesses a clear legal duty to perform the requested act; and (3) there exists no plain and adequate remedy in the ordinary course of the law. *State ex rel. Ney v. Niehaus* (1987), 33 Ohio St.3d 118, 515 N.E. 2d 914; *State ex rel. Middleton Bd. of Edn. v. Butler Cty. Budget Comm.* (1987), 31 Ohio St.3d 251, 510 N.E.2d 383; *State ex rel. Westchester v. Bacon* (1980), 61 Ohio St.2d 42, 399 N.E.2d 81. It must also be noted that mandamus is an extraordinary remedy, "to be issued with great caution and discretion and only when the way is clear." *State ex rel. Kriss v. Richards* (1921), 102 Ohio St. 455, 132 N.E. 23. Mandamus is not a substitute for an appeal and will not issue in doubtful cases. *State ex rel. Keenan v. Calabrese* (1994), 69 Ohio St.3d 176, 631 N.E.2d 119; *State ex rel. Taylor v. Glasser* (1977), 50 Ohio St.2d 165, 364 N.E.2d 1.

¶ 5} Initially, we find that Vazquez has failed to establish that he possesses a clear legal right to dismiss his complaint in the underlying action or that the trial court possesses a clear legal duty which requires dismissal of the complaint vis-a-vis the notice of voluntary dismissal. R.C. 4123.511(D) clearly provides that Vazquez does not possess the right to unilaterally dismiss his complaint as filed in the worker's

compensation appeal. In addition, Vazquez possesses an adequate remedy in the ordinary course of law through a direct appeal of the trial court's refusal to dismiss the underlying action. *State ex rel. Tran v. McGrath*, 78 Ohio St.3d 45, 1997-Ohio-245, 676 N.E.2d 108. The Supreme Court of Ohio has established that any potential delay and expense of an appeal to the court of appeals does not render the remedy inadequate. *State ex rel. Casey Outdoor Advertising v. Ohio Dept. Of Transportation* (1991), 61 Ohio St.3d 429, 575 N.E.2d 181.

¶ 6} Of greater importance however, is the fact that Vazquez actually seeks a declaratory judgment with regard to the prospective and/or retroactive application of the amendment to R.C. 4123.511(D). The Supreme Court of Ohio has consistently held that "if the allegations of a complaint for a writ of mandamus indicate that the real objects sought are a declaratory judgment and a prohibitory injunction, the complaint does not state a cause of action in mandamus and *must* be dismissed for lack of jurisdiction." (Emphasis added.) *State ex rel. Grendell v. Davidson*, 86 Ohio St.3d 629, 634, 1999-Ohio-130, 716 N.E.2d 704; See, also, *State ex rel. Obojski v. Perciak*, 113 Ohio St.3d 486, 2007-Ohio-2453, 866 N.E.2d. 1070. Herein, it is abundantly clear that the primary relief sought by Vazquez is: (1) a judgment declaring that R.C. 4123.512, as amended by Am.Sub. S.B. No. 7 cannot be retroactively applied to any claim for injury that occurred prior to the effective date of the amendment and that the amendment to R.C. 4123.512 can only be applied prospectively to a person that has suffered injury after the effective date of the amendment; and (2) a prohibitory injunction which prevents the trial court from proceeding to trial. Since Vazquez seeks relief in the nature of a declaratory judgement and a prohibitory injunction, we lack jurisdiction over Vazquez's complaint for a writ of mandamus. *State ex rel. Evans v. Blackwell*, 111 Ohio St.3d 1, 2006-Ohio-4334, 854 N.E.2d 1025.

*3 ¶ 7} Finally, we find that Vazquez has failed to state a claim for a writ of prohibition. In order for this court to issue a writ of prohibition, Vazquez must establish that: (1) the trial court is about to exercise judicial power; (2) the trial court's exercise of judicial

power is not authorized by law; and (3) the denial of the writ will cause injury for which no other adequate remedy in the ordinary course of the law exists. *State ex rel. White v. Junkin*, 80 Ohio St.3d 335, 1997-Ohio-340, 686 N.E.2d 267; *State ex rel. Largent v. Fisher* (1989), 43 Ohio St.3d 160, 540 N.E.2d 239. Furthermore, a writ of prohibition may only be used with great caution and shall not be issued in doubtful cases. *State ex rel. Merion v. Court of Common Pleas of Tuscarawas Cty.* (1940), 137 Ohio St. 273, 28 N.E.2d 641. The Supreme Court of Ohio has held that if a trial court possesses general subject matter jurisdiction of a cause of action, the court has the authority to determine its own jurisdiction and an adequate remedy at law, thru a direct appeal, exists to challenge any adverse decision. *State ex rel. Enyart v. O'Neill*, 71 Ohio St.3d 655, 1995-Ohio-145, 646 N.E.2d 1110; *State ex rel. Pearson v. Moore* (1990), 48 Ohio St.3d 37, 548 N.E.2d 945. Finally, before this court will issue a writ of prohibition, Vazquez is required to demonstrate that the trial court *patently and unambiguously* lacks jurisdiction over the cause. (Emphasis added.) *State ex rel. Rogers v. Brown*, 80 Ohio St.3d 408, 1997-Ohio-334, 686 N.E.2d 1126; *State ex rel. Fogle v. Steiner*, 74 Ohio St.3d 158, 1995-Ohio-278, 656 N.E.2d 1288.

{¶ 8} Herein, we find that Vazquez has failed to demonstrate that the trial court is patently and unambiguously without jurisdiction to proceed to trial in the underlying worker's compensation appeal. See R.C. 4123.512; *State v. Walls*, 96 Ohio St.3d 437, 2002-Ohio-5059, 775 N.E.2d 829. Consequently, we find that the trial court possesses the judicial authority to determine its own jurisdiction and Vazquez can raise the issue of the lack of jurisdiction to proceed to trial by way of an appeal. *State ex rel. Pearson v. Moore* (1990), 48 Ohio St.3d 37, 548 N.E.2d 945.

{¶ 9} Accordingly, we sua sponte dismiss Vazquez's complaint. Costs to Vazquez. It is further ordered that the Clerk of the Eighth District Court of Appeals serve notice of this judgment upon all parties as required by Civ.R. 58(B).

Complaint dismissed.

ANN DYKE, J., and MARY J. BOYLE, J., Concur.
Ohio App. 8 Dist., 2007.
State ex rel. Vazquez v. Cuyahoga Cty. Court of
Common Pleas
Slip Copy, 2007 WL 4340834 (Ohio App. 8 Dist.),
2007 -Ohio- 6629

END OF DOCUMENT