

IN THE SUPREME COURT OF OHIO

CASE NO. 08-0315

ROBERT MEYER, :
 :
 :
 Plaintiff-Appellee, : On Appeal from the Hamilton County Court
 : of Appeals, First Appellate District
 v. :
 :
 : Court of Appeals Case No. C-06-0772
 UNITED PARCEL SERVICE, INC., :
 :
 :
 Defendant-Appellant. :

**MEMORANDUM OF APPELLANT/CROSS-APPELLEE
UNITED PARCEL SERVICE, INC. IN RESPONSE TO MEMORANDUM
IN SUPPORT OF JURISDICTION FOR THE CROSS-APPEAL**

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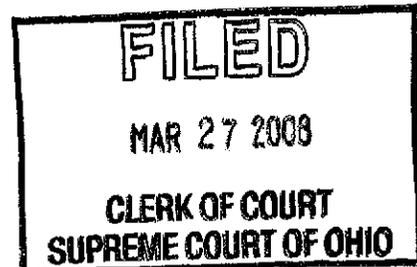


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A. THE CROSS-APPEAL PRESENTS NO MATTER OF GENERAL OR PUBLIC INTEREST, NOR DOES IT INVOLVE A CONSTITUTIONAL ISSUE.

This Court should not accept jurisdiction over the cross-appeal of Appellee/Cross-appellant Robert Meyer for three reasons. First, the cross-appeal presents no matter of public or general interest because Ohio courts are unanimously contrary to Meyer's position. Second, this case presents no constitutional issue because R.C. 2311.04 and Civ.R. 39(C) do not conflict; rather, Ohio courts have interpreted the two provisions harmoniously. Third, Meyer's cross-appeal asks this Court to disregard the legislature's policy decision that claims for workers' compensation retaliation under R.C. 4123.90 should be decided by a court, not a jury.

1. The cross-appeal presents no matter of general or public interest because Ohio jurisprudence unanimously supports the decision below.

This is not a case where the public has an interest in having the Court accept jurisdiction to resolve a conflict among Ohio courts. To the contrary, a century of Ohio case law undermines Meyer's contention in this case. Meyer contends that the trial court had unfettered discretion to submit his claim to a jury. (See Combined Mem. Opp. and Supp. Jurisd. at 9.) But Ohio law is very well-settled that Meyer had no right to a jury trial on his workers' compensation retaliation claim.

The cross-appeal addresses the appellate court's reversal of a jury verdict in Meyer's favor on his claim under R.C. 4123.90 and particularly focuses on whether the trial court properly submitted that claim to a jury. The law is well-settled that R.C. 4123.90 affords only equitable remedies and therefore provides no right to a jury trial. Indeed, courts unanimously hold that no right to a jury trial exists for a claim under R.C. 4123.90. *Coon v. Tech. Constr. Specialties, Inc.*, 9th Dist. App. No. 22317, 2005-Ohio-4080, ¶¶30-31; *Sidenstricker v. Miller Pavement Maintenance, Inc.*, 158 Ohio App.3d 356, 2004-Ohio-4653, 815 N.E.2d 736, ¶¶10-11

discretionary appeal allowed and reserved, 104 Ohio St.3d 1459, 2005-Ohio-204, 821 N.E.2d 576, appeal dismissed, 2006-Ohio-4203; *Mullet v. Sunset Golf Inc.* (Oct. 2, 2000), 5th Dist. No. 00COA01365, 2000 Ohio App. LEXIS 4617, *5-6; *Boyd v. Winton Hills Med. & Health Ctr., Inc.* (1999), 133 Ohio App.3d 150, 162, 727 N.E.2d 137, discretionary appeal not allowed, 86 Ohio St.3d 1421, 711 N.E.2d 1014; *Brown v. Premix, Inc.* (July 27, 1990), 11th Dist. No. 88-A-1414, 1990 Ohio App. LEXIS 3062, *6; *Gallaher v. Western Southern Life Ins. Co.* (Dec. 10, 1986), 1st Dist. No. C-860062, 1986 Ohio App. LEXIS 9769, *4-5; *Hanna v. Brinks, Inc.* (Oct. 3, 1985), 8th Dist. No. 49387, 1985 Ohio App. LEXIS 7257, *4-5; *Millhoff v. Manchester Local School Dist. Bd. Ed.* (Aug. 28, 1985), 9th Dist. App. No. 11941, 1985 Ohio App. LEXIS 8634, at *19-20.

For over a century, the law in Ohio has remained that an equitable claim like Meyer's cannot be tried to a jury. *Pierce v. Stewart* (1900), 61 Ohio St. 422, 425, 56 N.E. 201; *Gleason v. Gleason* (1991), 64 Ohio App.3d 667, 671-72, 582 N.E.2d 657, motion to certify record overruled (1991), 62 Ohio St.3d 1434, 578 N.E.2d 825. Consequently, Ohio courts have consistently held that a trial court commits reversible error when it submits claims under R.C. 4123.90 to a jury. *Coon* at ¶31; *Rachubka v. St. Thomas Hosp. Med. Ctr.* (Oct. 10, 1984), 9th Dist. App. No. 11596, 1984 Ohio App. LEXIS 12180, *10-11.

There is no conflict among Ohio courts for this Court to resolve by accepting jurisdiction over Meyer's cross-appeal. Indeed, Meyer concedes that no court in Ohio has accepted the arguments presented in his cross-appeal. (See Combined Mem. at 10.) The decision below garners support from nearly every court in Ohio. The First District properly held that the trial judge committed reversible error by allowing a jury to decide Meyer's R.C. 4123.90 claim. *Meyer v. United Parcel Service, Inc.*, 1st Dist. No. A-0403705, 2007-Ohio-7063, ¶40.

The issue presented by Meyer's cross-appeal is already well-settled and therefore does not involve a matter of general or public interest. Thus, the Court should not accept jurisdiction over the cross-appeal.

2. The cross-appeal presents no constitutional conflict because Civ.R. 39(C) and R.C. 2311.04 can be, and have been, interpreted consistently.

Meyer attempts to create a constitutional issue in this case by alleging that R.C. 2311.04 conflicts with Civ.R. 39(C) and arguing that Civ.R. 39(C) is thereby invalid under Section 5(B), Article IV of the Ohio Constitution. Contrary to Meyer's allegation, Civ.R. 39(C) and R.C. 2311.04 do not conflict.

Pursuant to Civ.R. 39(C), when a claim does not include a right to a jury trial, a trial court cannot submit that claim to a jury unless: (1) the jury's verdict is advisory, or (2) the parties consent to the jury. R.C. 2311.04 provides in relevant part that issues of fact involving only money shall be tried to a jury, but "[a]ll other issues of fact shall be tried by the court, subject to its power to order any issue to be tried by a jury, or referred." Meyer claims that this language in R.C. 2311.04 gives courts absolute power to submit all issues to a jury. Notably, Meyer concedes that courts in Ohio have neither recognized a conflict between Civ.R. 39(C) and R.C. 2311.04 nor accepted the supposed constitutional issue presented by his cross-appeal. (See Combined Mem. at 10.)

It is unnecessary for the Court to accept jurisdiction over Meyer's cross-appeal because, as numerous courts have noted, these two provisions are consistent. Courts have repeatedly interpreted R.C. 2311.04 and Civ.R. 39(C) harmoniously. Some courts have held that parties must consent before a judge can allow a jury to decide an equitable claim pursuant to R.C. 2311.04. See, e.g., *Gleason*, 64 Ohio App.3d at 671. Other courts have held that a jury sitting in an equitable case pursuant to R.C. 2311.04 issues an advisory verdict, and the judge must

ultimately decide the case. See, e.g., *Pioneer Mut. Casualty Co. v. Betton* (1958), 78 Ohio L. Abs. 25, 152 N.E.2d 454, 1958 Ohio Misc. LEXIS 364, *8-9 (citing *Morgan & Co. v. Spangler* (1870), 20 Ohio St. 38). In other words, R.C. 2311.04 has been interpreted as limiting a trial court's power to order a jury trial in the same manner as Civ.R. 39(C).

A trial court does not have "unqualified power" to order a jury to decide an equitable claim, as Meyer contends. (Combined Mem. at 9.) Instead, R.C. 2311.04 and Civ.R. 39(C) qualify that power, and they do so in a consistent way. This Court should not accept jurisdiction to address a fictional conflict between the two provisions.

Nevertheless, even assuming a conflict existed, jurisdiction would still not be warranted in this case because the Ohio Constitution articulates the proper resolution for this alleged conflict. Section 5(B), Article IV of the Constitution provides that procedural rules prevail on matters of procedure, and substantive statutes prevail on matters of substance. *State ex rel. Thompson v. Spon* (1998), 83 Ohio St.3d 551, 555, 1998-Ohio-298, 700 N.E.2d 1281. Rule 39(C) is procedural, not substantive, because it does not provide Meyer the right to a jury and does not infringe on any of Meyer's substantive rights. *Beacon Journal Publishing Co. v. Waters* (1993), 67 Ohio St.3d 321, 323, 1993-Ohio-77, 617 N.E.2d 1110. Because it is procedural, Civ.R. 39(C) prevails over R.C. 2311.04 with respect to the procedure a trial court must follow to order a jury trial for a claim under R.C. 4123.90.

The First District properly applied Civ.R. 39(C) and held that the trial court committed reversible error by allowing a jury to decide Meyer's R.C. 4123.90 claim. *Meyer* at ¶40. Jurisdiction should not be granted to address the supposed constitutional issue proposed by Meyer.

3. The Court should deny jurisdiction in order to preserve the legislature's policy decision to have judges, not juries, decide claims under R.C. 4123.90.

Meyer's cross-appeal asks this Court to give a trial court the unrestrained discretion to grant the right to a jury trial. To accept Meyer's premise, this Court must reject a clear policy decision made by the General Assembly – that R.C. 4123.90 claims should be tried to a judge, not a jury.

“There is no right to a jury trial . . . unless that right is extended by statute or existed at common law prior to the adoption of our state Constitution.” See *Hoops v. United Tel. Co.* (1990), 50 Ohio St.3d 97, 101, 553 N.E.2d 252; *Kneisley v. Lattimer-Stevens Co.* (1988), 40 Ohio St.3d 354, 356, 533 N.E.2d 743. Because no action under R.C. 4123.90 existed at common law, Meyer's right to a jury trial “is limited to that which the General Assembly confers.” *Arrington v. DaimlerChrysler Corp.*, 109 Ohio St.3d 539, 2006-Ohio-3257, 849 N.E.2d 1004, ¶27. The General Assembly conferred only equitable remedies on R.C. 4123.90 claimants and did not grant the right to a jury trial for such claims; thus, Meyer has no statutory or constitutional right to a jury trial. *Coon* at ¶29; *Webb v. Ohio Casualty Ins. Co.* (Apr. 16, 1990), 12th Dist. No. CA89-07-109, 1990 Ohio App. LEXIS 1465, *7; *Gallaher*, 1986 Ohio App. LEXIS 9769 at *4-5; *Brunecz v. Houdaille Industries Inc.* (1983), 13 Ohio App.3d 106, 106-08, 468 N.E.2d 370, motion to certify record overruled (Feb. 22, 1984), Case No. 83-1938.

The General Assembly made a conscious policy decision to provide Meyer with only equitable remedies. See *Hoops*, 50 Ohio St.3d at 101-02 (analyzing R.C. 4101.17's failure to provide for a jury trial and noting “[t]he General Assembly is presumed to have known that its designation of a remedy would be construed to exclude other remedies”). In doing so, the Ohio legislature expressed its intent that claims like R.C. 4123.90 should be tried by a court, not a jury. Meyer wants this Court to reject that policy decision by the legislature. He asks this Court

to give trial courts the absolute power to allow jury trials, even where the legislature chose not to allow them. This Court and others have consistently rejected the notion that trial courts wield such power. See, e.g., *Pokorny v. Local No. 310* (1974), 38 Ohio St.2d 177, 180-81, 311 N.E.2d 866. If neither the Constitution nor the legislature provides the right to a jury trial, a trial court's authority to submit claims to a jury is limited under R.C. 2311.04 and Civ.R. 39(C) to circumstances where the parties consent or the jury is advisory. *Rachubka*, 1984 Ohio App. LEXIS 12180 at *8-10; *Gleason*, 64 Ohio App.3d at 671. This Court should not grant jurisdiction to hear Meyer's argument that seeks to undermine the legislature's policy choice regarding the availability of jury trials for claims under R.C. 4123.90.

B. ARGUMENT AGAINST PROPOSITION OF LAW PRESENTED IN CROSS-APPEAL.

Proposition of Law: To the extent a trial court's power to submit "any issue" to a jury under R.C. 2311.04 is abridges [sic] by Civ.R. 39(C), Civ.R. 39(C) is invalid under Art. IV, § 5(B).

This case presents no constitutional issue under Section 5(B), Article IV of the Ohio Constitution because no conflict exists between R.C. 2311.04 and Civ.R. 39(C). Courts have interpreted those provisions harmoniously. Moreover, even if an actual conflict existed, Section 5(B), Article IV would resolve that conflict in favor of Rule 39(C). Thus, the First District was correct – the trial court erred by allowing a non-advisory jury to decide Meyer's claim under R.C. 4123.90.

1. Civ.R. 39(C) and R.C. 2311.04 do not conflict, so they do not violate Section 5(B), Article IV.

Meyer interprets R.C. 2311.04 as giving trial courts unfettered discretion to order any issue to be tried to a jury. This interpretation conflicts with the limitations in Civ.R. 39(C) and implicates Section 5(B), Article IV of the Constitution. But Meyer's interpretation of R.C.

2311.04 is incorrect. Meyer's interpretation ignores this Court's mandate that the two provisions must be harmonized if at all possible. See *Spon*, 83 Ohio St.3d at 555; *State v. Weitbrecht* (1999), 86 Ohio St.3d 368, 370, 1999-Ohio-113, 715 N.E.2d 167. In order for a conflict to exist under Section 5(B), Article IV of the Constitution, it must appear to the court "beyond a reasonable doubt" that R.C. 2311.04 and Civ.R. 39(C) are "clearly incompatible." *State ex rel. Loyd v. Lovelady*, 108 Ohio St. 3d 86, 2006-Ohio-161, 840 N.E.2d 1062, ¶13. This case does not present a constitutional issue because Civ.R. 39(C) and R.C. 2311.04 are not clearly incompatible.

In the context of equitable claims, such as Meyer's claim, courts have consistently interpreted both R.C. 2311.04 and Civ.R. 39(C) as limiting a trial court's discretion to allow jury trials to situations where: (1) the parties consent, or (2) the jury's verdict is advisory. In *Gleason v. Gleason* – a decision Meyer uses to support his cross-appeal – the appellate court held that a trial court was permitted to refer an issue to a jury under both R.C. 2311.04 and Civ.R. 39(C). *Id.*, 64 Ohio App.3d at 671. Relying upon this Court's opinion in *Pokorny*, the *Gleason* court stated that the power to order a jury trial "is not absolute" and was only permissible under R.C. 2311.04 because no party objected to a jury trial. *Id.* See also *Black v. Pheils*, 6th Dist. No. WD-03-045, 2004-Ohio-4270, ¶¶23-24.

Similarly, in *Crane v. Cheek*, the appellate court stated that a trial court had the power to refer an equitable issue to a jury under R.C. 2311.04. However, the court stated "the verdict of the jury is not conclusive or binding upon the court, whose duty it is to determine finally the issue of fact tried by the jury, their verdict being merely evidence." (1970), 27 Ohio App.2d 27, 28-29, 272 N.E.2d 159. See also *Pioneer Mut. Casualty*, 78 Ohio L. Abs. 25 at *8-9 (citing *Spangler*, 20 Ohio St. 38); *Acme Mortg. Co. v. Parker* (Feb. 22, 1934), 17 Ohio L. Abs. 97, 1934

Ohio Misc. LEXIS 1334, *4. These cases demonstrate that a trial court does not have unbridled authority under R.C. 2311.04 or Civ.R. 39(C) to refer an issue to a jury.

Moreover, in *Pokorny*, this Court held that a trial court does not have absolute power to refer an equitable issue to a jury. According to this Court, a trial court commits reversible error when it refers an equitable issue to a non-advisory jury over a party's objection. *Id.*, 38 Ohio St.2d 177 at 180-81. The Court need not grant jurisdiction in this case to revisit *Pokorny* in light of R.C. 2311.04, as Meyer requests. (Combined Mem. at 10-11.) The *Pokorny* decision is consistent with the cases that have addressed the intersection of R.C. 2311.04 and Civ.R. 39(C). Indeed, the *Pokorny* Court interpreted Rule 39(C) in the same way that Ohio courts have repeatedly interpreted R.C. 2311.04.

Ohio courts have interpreted R.C. 2311.04 and Rule 39(C) in a way that avoids questioning their constitutionality. Thus, there is no constitutional issue, and this Court should not grant jurisdiction to address Meyer's fictional conflict between R.C. 2311.04 and Civ.R. 39(C).

2. Even assuming a conflict existed, Civ.R. 39(C) would prevail over R.C. 2311.04 because the former is procedural, not substantive.

Jurisdiction over Meyer's cross-appeal is unnecessary because, even assuming Meyer is correct that Civ.R. 39(C) and R.C. 2311.04 conflict, Section 5(B), Article IV already provides a method for resolving the alleged conflict. Because Civ.R. 39(C) is a procedural rule, it would control over R.C. 2311.04, and the First District's application of Rule 39(C) would remain intact.

Article IV of the Ohio Constitution authorizes the Court to set rules of procedure, and Section 5(B) resolves conflicts between those procedural rules and substantive statutes. Under Section 5(B), the Civil Rules prevail on matters of procedure and practice, while substantive

statutes prevail on matters regarding substantive rights. *Spon*, 83 Ohio St.3d at 555; *Loyd* at ¶13; *Morgan v. W. Elec. Co., Inc.* (1982), 69 Ohio St.2d 278, 281, 432 N.E.2d 157.

This Court has defined “substantive” matters as “that body of law which creates, defines, and regulates the rights of the parties.” *Proctor v. Kardassilaris*, 115 Ohio St.3d 71, 2007-Ohio-4838, 873 N.E.2d 872, ¶17; *Beacon*, 67 Ohio St.3d at 323. “The word substantive refers to common law, statutory and constitutionally recognized rights.” *Krause v. State* (1972), 31 Ohio St.2d 132, 145, 285 N.E.2d 736. A rule of procedure that enlarges or abridges a substantive right is not procedural and must give way to the substantive statute. *State v. Hughes* (1975), 41 Ohio St.2d 208, 209-211, 324 N.E.2d 731.

Procedural matters “pertain to the method of enforcing rights” but do not affect the substantive rights themselves. *Alexander v. Buckeye Pipe Line Co.* (1977), 49 Ohio St.2d 158, 159-160, 359 N.E.2d 702. When addressing the right to a jury trial, this Court stated that a rule is procedural, not substantive, if it does not restrict, limit, or violate the right to a jury trial, but “merely regulates the method” of invoking or waiving that right. *Cassidy v. Glossip* (1967), 12 Ohio St.2d 17, 20-21, 231 N.E.2d 64. See also *State v. Greer* (1988), 39 Ohio St.3d 236, 245-46, 530 N.E.2d 382 (stating that a rule of procedure may have “an occasional substantive effect” on a right without changing its inherent procedural nature). Where no statute provides a particular right to be affected, then a governing rule of practice or procedure is “inherently procedural” under Section 5(B), Article IV of the Constitution. See *Beacon*, 67 Ohio St.3d at 323.

Civ.R. 39(C) is a procedural rule. Meyer had no substantive right to a jury trial for his claim under R.C. 4123.90. Because Rule 39(C) does not enlarge, abridge, or affect any of Meyer’s substantive rights, it is procedural and need not yield to R.C. 2311.04. *Hughes*, 41 Ohio

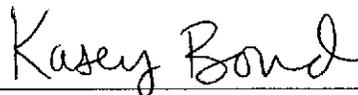
St.2d at 209-11; *Beacon*, 67 Ohio St.3d at 323. Rather, as a procedural rule, Civ.R. 39(C) would control over R.C. 2311.04, if a conflict existed between the two provisions.

Because Civ.R. 39(C) would control, the First District Court of Appeals was correct in applying Rule 39(C). The appellate court determined that the trial court failed to follow the procedures outlined in Civ.R. 39(C), and that error resulted in an improper verdict against UPS. Jurisdiction over the cross-appeal is not warranted because the court below applied the proper rule and reached the appropriate outcome on Meyer's claim under R.C. 4123.90.

CONCLUSION

This Court should not accept jurisdiction over Meyer's cross-appeal because it lacks support in Ohio law and presents a fictional conflict. Over a century of Ohio jurisprudence supports the decision of the First District Court of Appeals. Thus, this Court should not grant jurisdiction over Meyer's cross-appeal.

Respectfully submitted,

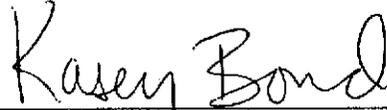


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CERTIFICATE OF SERVICE

A true and correct copy of the Memorandum of Appellant/Cross-Appellee United Parcel Service, Inc. in Response to Memorandum in Support of Jurisdiction for the Cross-Appeal was served upon Marc D. Mezibov and Stacy A. Hinnners at Law Office of Marc Mezibov, 401 E. Court Street, Suite 600, Cincinnati, OH, 45202, by first-class mail on this 27th day of March, 2008.



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