

IN THE SUPREME COURT OF OHIO

STATE OF OHIO ex rel.
DILLARD DEPARTMENT STORES,
INC.,

Appellant,

vs.

MARSHA P. RYAN, ADMINISTRATOR,
OHIO BUREAU OF WORKERS'
COMPENSATION, and PAMELA S.
SCOTT,

Appellees.

Case No. 07-2225

On Appeal from the Franklin County
Court of Appeals
Tenth Appellate District

REPLY BRIEF OF APPELLANT DILLARD DEPARTMENT STORES, INC.

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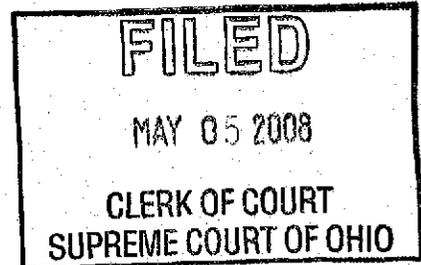
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TABLE OF CONTENTS

	<u>Page</u>
TABLE OF AUTHORITY.....	ii
INTRODUCTION.....	1
ARGUMENT.....	2
A. BWC, Not Dillard's, Have Raised New Arguments And Mandamus Before this Court.....	2
B. BWC Has Never Before Argued that A Putative Amended Settlement Term Bears On A Self-Insured Employer's Right To Reimbursement From The Surplus Fund.....	2,3
CONCLUSION.....	3
PROOF OF SERVICE.....	4

TABLE OF AUTHORITIES

Page

RULES

Ohio Civil Rule 41(A).....2

STATUTES

Ohio Revised Code §2731.11.....3

INTRODUCTION

Appellee, the Ohio Bureau of Workers' Compensation Administrator ("BWC"), wrongly and, it seems desperately, tries to re-cast and cloud the true issues before this Court.

But a few examples should suffice. Critical of the settlement terms that gave rise to the issue on appeal, BWC takes to referring to the unquestionably ICO approved settlement as a "private" agreement. This characterization too ignores that BWC and the Attorney General's office knew well before approval that the terms of the settlement entitled Dillard's, the self-insured employer, to surplus fund reimbursement. Despite notice and this knowledge, BWC allowed the statutory review elapse without objection.

The Administrator also conveniently ignores admissions made in past oral arguments before the Appellate Court. Her representative has previously acknowledged paying surplus fund reimbursements to self-insured employers even though settlement agreements have been involved. The BWC has also reimbursed self-insured employers from the surplus fund where a plaintiff/claimant has simply abandoned an employer's court appeal by unilaterally and voluntarily filing a Notice of Dismissal with nothing more.

Finally, the record and reality bear another undeniable fact: the Assistant Attorney General assigned to the Trumbull County Common Pleas Court Appeal may rightly be called counsel of record for the Administrator, but any reference as "trial" counsel grossly misrepresents his role in that litigation. Other than filing an Answer, AAG Aronoff had no involvement in the Dillard's court appeal up until the time of its settlement, including especially bearing any time, effort, or expense of preparing the

additional allowance claim at issue for the scheduled late 2003 trial. By contrast, counsel for Dillard's and plaintiff were actively engaged in trial preparation before deciding to negotiate settlement terms.

ARGUMENT

A. BWC, Not Dillard's, Have Raised New Arguments And Mandamus Before this Court.

The plain language of Civil Rule 41(A) provides that the second voluntary dismissal of a plaintiff's claim operates as an adjudication on the merits. Applied here, plaintiff Scott forfeited her right to prove anew any entitlement to participate for the contested L4-5 disc bulge in the Trumbull County Common Pleas Court appeal that Dillard's initiated. BWC, however, now claims despite the rule's express language that a third complaint must be filed before that occurs. This is a novel and baseless claim to be sure.

Secondly, BWC relies on a decision rendered late last year by the Trumbull County Common Pleas Court – now appealed – as support for its arguments, which opinion in turn, heavily relies on the divided Franklin County Appeals Court decision that is the subject of this appeal. The evident tautology, however, belies the purported precedential value of either ruling to this issue of first impression before the Court, which BWC has previously acknowledged to be the case.

B. BWC Has Never Before Argued that A Putative Amended Settlement Term Bears On A Self-Insured Employer's Right To Reimbursement From The Surplus Fund.

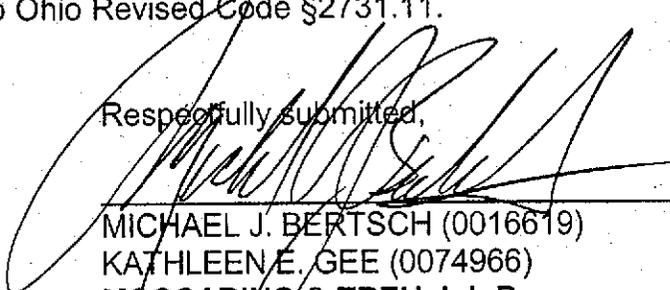
Consistent with the general tenor of the appellee's claims, yet another issue is interjected into these proceedings for the first time. Dillard's is now accused of post facto amending the terms so as to somehow turn this ICO approved settlement into

something less than that. Again, this is the first suggestion by any reviewing body, including three BWC intra-agency deciders, that the party's approved and concluded settlement is negated because of the plaintiff's voluntary dismissal, instead of a Court initiated dismissal entry. Of course, BWC has previously acknowledged in writing and by its conduct that there is no legal difference between a double dismissal of a complaint and a court order disallowing a condition in a court appeal.

CONCLUSION

For all the reasons set forth in its Merit Brief, Appellant Dillard's Department Stores, Inc. hereby respectfully request that the Court of Appeal's judgment be reversed and this Court enter judgment in its favor. Specifically, Dillard's urges this Court to issue a Writ of Mandamus ordering Appellee Marsha P. Ryan, Administrator of the Bureau of Workers' Compensation to vacate, set aside, and hold for naught her April 20, 2006 order denying Dillard's surplus fund reimbursement as well as for attorneys' fees and costs herein, pursuant to Ohio Revised Code §2731.11.

Respectfully submitted,



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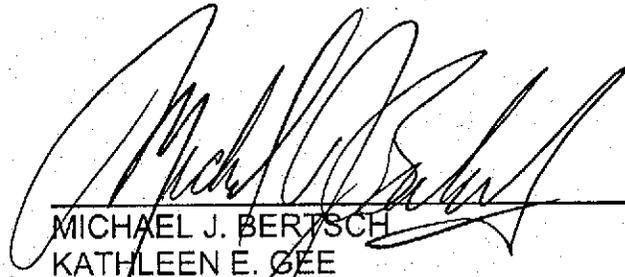
I hereby certify that on this 5th day of May, 2008 a copy of Appellant Dillard Department Stores, Inc.'s Reply Brief was sent by ordinary U.S. Mail, first-class postage prepaid, to:

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