IN THE SUPREME COURT OF OHIO

ROBERT THORTON	)	
	)	**CASE NUMBER 2007-1588**
Plaintiff-Appellee,	)	
	)	
	)	
v.	)	
	)	
MONTVILLE PLASTICS, INC.	)	**ON APPEAL FROM**
	)	**COURT OF APPEALS**
Defendant-Appellant,	)	**ELEVENTH APPELLATE**
	)	**DISTRICT Case No. 2006-G-2744**
and	)	
	)	
ADMINSTRATOR, BUREAU OF WORKERS' COMPENSATION, *ET.AL.*	)	
	)	
Defendant-Appellee.	)	

BRIEF OF APPELLEE ROBERT THORTON

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FILED
MAY 12 2008
CLERK OF COURT
SUPREME COURT OF OHIO

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STATEMENT OF THE CASE AND THE FACTS

On June 27, 2005, Appellee Robert Thorton (hereinafter referred to as Thorton) was seriously injured while working for Appellant Montville Plastics & Rubber, Inc. (hereinafter referred to as Montville). On that date, a tow motor chain broke, and struck him about the head, face and neck. On June 28, 2005 he filed a workers' compensation claim for such injuries which was assigned claim number 05-840278. On July 1, 2005 the Bureau of Workers' Compensation published an order allowing his claim and granting him the right to participate in the workers' compensation fund. Montville filed an appeal from that BWC order and the matter went to the Industrial Commission of Ohio for formal administrative adjudication. On January 4, 2006 a Staff Hearing Officer for the Industrial Commission granted Thorton the right to participate under the Workers' Compensation Fund for the conditions of "fracture mandible, fracture left malar/maxillary-open; fracture left facial bone; fracture right facial bone; bilateral nasal bone fracture and traumatic brain injury." Montville exhausted its administrative appeals and on March 1, 2006, appealed to the Geauga County Court of Common Pleas pursuant to R.C. §4123.512. The case was assigned Case Number 06W219. Thorton filed his complaint on March 13, 2006. Subsequently, Montville and the Administrator of the Bureau of Workers' Compensation filed their answers. In his answer, the Administrator of the Bureau of Workers' Compensation contended that the claim should be allowed.

On October 19, 2006, Thorton's counsel filed a Notice of Voluntary Dismissal Without Prejudice pursuant to Civil Rule 41(A)(1)(a). On October 31, 2006, the trial court noted "it is so ordered' on Thorton's Notice of Voluntary Dismissal. On November 30, 2006 Montville filed a Notice of Appeal to the Eleventh District Court of Appeals from the filing of Thorton's Notice of Voluntary Dismissal. The case was assigned Case Number 2006-G-2744. On July 9, 2007 The

Court of Appeals issued a Judgment Entry dismissing Montville's appeal *sua sponte* pursuant to App. R. 4 (A). The Court of Appeals indicated in the Memorandum of Opinion that Montville's appeal was not timely filed. On October 23, 2007 Montville filed a Notice of Appeal to this Court which this Court accepted on December 12, 2007.

The sole issue before this Court is whether the Court of Appeals erred in dismissing Montville's November 30, 2006 Notice of Appeal to the Eleventh District Court of Appeal. Despite Montville's argument's to the contrary, the Court of Appeals has not addressed the basis for the appeal; that the employer's consent was required in order to file a Notice of Voluntary Dismissal, pursuant to Civil Rule 41(A)(1)(a).

ARGUMENT

Proposition of Law No. 1

A Notice of Voluntary Dismissal, filed pursuant to Civil Rule 41(A)(1)(a), is not a final appealable order.

A Notice of Voluntary Dismissal, filed pursuant to Civil Rule 41(A)(1)(a) is not a final appealable order. Civil Rule 41(A)(1) states:

> (A) Voluntary dismissal: effect thereof.
>
> (1) By plaintiff; by stipulation. Subject to the provisions of 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.

The law in Ohio is well-settled that a claimant has the right to voluntarily dismiss his complaint in a case brought pursuant to Section 4123.512, Revised Code even though the employer had filed the Notice of Appeal. *Kaiser v. Ameritemps, Inc.* (1999) 84 Ohio St.3d 411; *Fowlee v. Wesley Hall, Inc.* (2006) 108 Ohio St.3d 533

According to the plain language of Civil Rule 41(A)(a) a notice of dismissal is not a final appealable order because it is not an adjudication on the merits. Within the context of a trial court granting relief, pursuant to Civil Rule 60(B) after a voluntary dismissal has been filed, this Court held in *Hensley v. Henry* (1980) 61 Ohio St.2d 277, 279.

> Under Civ.R.41(A)(1), plaintiff's notice of dismissal does not operate "as an adjudication upon the merits" because plaintiff had not previously "dismissed in any court, an action based on **the same claim," and because the notice of dismissal did not "otherwise" state that it should so operate. As such, it is not a final judicial determination from which Civ.R.60 (B) can afford relief.

A voluntary dismissal is neither final nor an order from which an appeal can be taken. The term "final order" is defined in Section 2502.02(B)(1)-(7), Revised Code.

Under Section 2505.02(B)(1) and (2) a final order must be one that affects a substantial right that effectively determines or terminates an action. A voluntary dismissal merely postpones a final adjudication. It does not determine it. In *Fowlee, supra,* the employer filed a notice of appeal to Common Pleas Court. The claimant filed her complaint but subsequently voluntarily dismissed it. The claimant did not re-file her complaint within one year. The employer filed a motion for judgment on the pleadings which was granted by the trial court. This Court affirmed the decision of the trial court holding in *Fowlee*, *supra* at 537:

> We hold that in an employer-initiated workers' compensation appeal, after the employee-claimant files the petition as required by R.C. 4123.512 and voluntarily dismisses it as allowed by Civ. R. 41(A), if the employee-claimant fails to re-file within the year allowed by the saving statute, R.C. 2305.19, the employer is entitled to judgment on its appeal.

It was the failure of the claimant to re-file her case within the time provided by the savings statute which effectively determined or terminated the action.

Furthermore, a voluntary dismissal does not meet the definition of a final order under any of the remaining sub-sections of Section 2505.02, Revised Code. It is not an order that vacates or sets aside a judgment or grants a new trial under subsection (3). It is not an order that grants or denies a provisional remedy, as defined in Section 2505.02(A)(3) and under subsection (4). A voluntary dismissal does not determine a class action or an appropriation proceeding under subsections (5) – (7).

As indicated above, a voluntary dismissal is not a final appealable order. Therefore, the Court of Appeals lacked jurisdiction to hear Montville's appeal.

Proposition of Law No. 2

The filing of a Notice of Voluntary Dismissal, pursuant to Civil Rule 41(A)(1)(a) is self-executing. An appeal to the Court of Appeals must be filed within thirty (30) days of the filing of the Notice of Voluntary Dismissal.

App. R. 4(A)states:

> "A party shall file the notice of appeal required by App. R. 3 with 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 58(B) of the Ohio Rules of Civil Procedure."

The Court of Appeals properly held that the filing of a Notice of Voluntary Dismissal, pursuant to Civil Rule 41(A)(1)(a) is self-executing. Thorton's Notice of Voluntary Dismissal was filed on October 19, 2006. Montville did not file its Notice of Appeal until November 30, 2006 which failed to comply with App. R. 4(A).

In *Selker & Furber v. Brightman* (2000) 138 Ohio App.3d 710 (Eighth District Court of App.), the Court held at 714:

> It is axiomatic that, "Dismissals pursuant to Civ. R. 41(A)(1) are fully and completely effectuated upon filing of the notice of voluntary dismissal by the plaintiff. In other words, the mere filing of the notice of dismissal by the plaintiff automatically terminates the case without intervention by the court." Payton v. Rehberg (1997), 119 Ohio App.3d 183, 192, 694 N.E.2d 1379, 1384.
>
> Such a voluntary dismissal is self-executing. Id. Citing Andrews v. Sajar Plastics, Inc. (1994), 98 Ohio App.3d 61, 66, 647 N.E.2d 854, 857. Being self-executing, the trial court's discretion is not involved in deciding whether to recognize the dismissal. Hence, the trial court's subsequent status form entry of December 14, 1998, dismissing the plaintiff's complaint, was of no effect with regard to the plaintiff's voluntary dismissal. It was merely an internal ministerial act of housekeeping by the trial court recognizing what had already occurred.

See also, *Bridge v. Morley*, Eleventh District Court of Appeals 2008-Ohio-1998

Civil Rule 41(A)(1)(a) specifically states that the dismissal is "without order of court". Once the dismissal is filed, the trial court loses jurisdiction over the case. The court held in *Kaiser, supra* at 416:

> Because Kaiser could properly dismiss his complaint pursuant to Civ. R. 41(A)(1)(a), the trial court was without jurisdiction to enter judgment in favor of Ameritemps as a sanction for Kaiser's failure to prosecute.

Assuming, *arguendo*, that Thorton's Notice of Voluntary Dismissal can be construed as a final appealable order, Montville failed to appeal the dismissal within thirty (30) days of its filing. Therefore, the decision of the Court of Appeals must be affirmed.

Proposition of Law No.3

The Amendment to Am.Sub.S.B.7(2006) requirement requiring the Employer's consent to dismiss the complaint when the Employer filed the notice of appeal is prospective in operation.

Given the procedural history of the case at bar, it would be improper for this Court to determine whether the amendment to Am.Sub.S.B.7(2006) requiring the employer's consent to dismiss the complaint when the employer filed the notice of appeal is prospective or retrospective in operation. First, the filing of a Notice of Voluntary Dismissal is not a final appealable order. Second, Montville failed to file its notice of appeal in a timely manner. By properly dismissing the appeal, the Court of Appeals never reached the issue sought to be addressed by Montville. The sole issue, before this Court, is whether the Court of Appeals erred in dismissing Montville's appeal.

Nevertheless, as the following will demonstrate, the General Assembly clearly indicated that the relevant amendment be prospectively applied. On June 27, 2005, Thorton was injured in the court of and arising out of his employment with Montville when he was struck in the face and chest by a chain on a tow motor. On March 1, 2006, Montville, filed a Notice of Appeal to this Court, pursuant to Section 4123.512(A), Revised Code, from a January 4, 2006 Order of a Staff

Hearing Officer granting Thorton the right to participate in the benefits of the Ohio Workers' Compensation Act. On March 13, 2006, pursuant to Section 4123.512(D), Revised Code Thorton filed his Complaint and pursuant to the decision of this Court and *Kaiser, supra* Thorton, on October 19, 2006, filed a Notice of Voluntary Dismissal, without prejudice, under Civil Rule 41(A)(1)(a).

Article II, Section 28 of the Ohio Constitution states:

> "The General Assembly should have no power to pass retroactive laws, or laws impairing the obligation of contracts; but may, by general laws, authorize courts to carry into effect, upon such terms as shall be just and equitable, the manifest intention of parties, and officers, by curing omission, defects, and errors, in instruments and proceedings, arising out of their want of conformity with the laws of the state."

Section 1.48, Revised Code states:

> The statute is presumed to be prospective in its operation unless expressly made retrospective.

The Supreme Court in *Van Fossen v. Babcock & Wilcox* (1988) 36 Ohio St.3d 100, has succinctly set forth the procedure to be followed by courts to determine the retroactive applicability of a statutory amendment. Furthermore, the Court reiterated the historical disdain towards retroactive application.

The initial inquiry, pursuant to Section 1.48, Revised Code, is to whether the General Assembly intended the amendment to be applied retroactively. The Court stated in *Van Fossen, supra* at 106:

> The issue of whether a statute may constitutionally be applied retrospectively does not arise unless there has been prior determination that the General Assembly has specified that the statute so applied. Upon its face, R.C.1.48 establishes an analytical threshold which must be crossed prior to inquiry under Section 28, Article II as we pronounced I
>
> *Kiser v. Coleman* (1986), 28 Ohio St.3d 259, 262, 28 LBR 337, 339, 503 N.E. 2d 753, 756, where "there is no clear indication of retroactive application, then the statute may only apply to cases which arise subsequent to its enactment." (fn7). (Emphasis added).

This Court's attention is directed to Section 3 of Am.Sub.S.B.7 (2006) which 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 the 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 indicated by the plain language of this section, the General Assembly specifically intended prospective application of the amendments with the sole exception of Section 4123.512(H), Revised Code. The case at bar does not involve Section 4123.512(H), Revised Code.

The effective date of the amendments is June 30, 2006. (Due to a referendum petition containing an insufficient number of valid signatures, the effective date of the challenged amendments is October 11, 2006.) *Thornton vs. Salak* (2006) 112 Ohio St.3d 254. Thorton's claim arose on June 27, 2005, the date on which he was injured. Section 4123.84 (A) states in pertinent part:

> (A) In all cases of injury or death, claims for compensation or benefits for the specific parts of the body injured shall be forever barred unless, within two years after the injury or death:
>
> (1) Written or facsimile notice of the specific part or parts of the body claimed to have been injured has been made to the Industrial Commission or the Bureau of Workers' Compensation.

The date of injury controls with respect to when the claim arose. In the case at bar, the law in effect on June 27, 2005 did not require an employer's permission to voluntarily dismiss the complaint in an employer's appeal to Common Pleas Court. Assuming, *arguendo*, that the date of injury is not the date the claim arose, the only other potential date would be the date of filing. In this case, Montville filed its Notice of Appeal on March 2, 2006 which is still prior to the effective date of the amendments.

CONCLUSION

Based upon the foregoing, the Appellee, Robert Thorton respectfully requests this Court to affirm the decision of the Court of Appeals.

Respectfully submitted,

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CERTIFICATE OF SERVICE

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