

IN THE
SUPREME COURT OF OHIO

ROBERT THORTON,)
Appellee,) Supreme Court Case No. 2007-1588
)
)
-vs-)
) ON APPEAL FROM THE
) GEAUGA COUNTY COURT
MONTVILLE PLASTICS & RUBBER, INC.,) OF APPEALS, ELEVENTH APPELLATE
Appellant,) DISTRICT
)
and)
)
ADMINISTRATOR OF THE BUREAU)
OF WORKERS' COMPENSATION,) Court of Appeals Case No. 2006-G-2744
Appellee.)

REPLY BRIEF OF APPELLANT MONTVILLE PLASTICS & RUBBER, INC.

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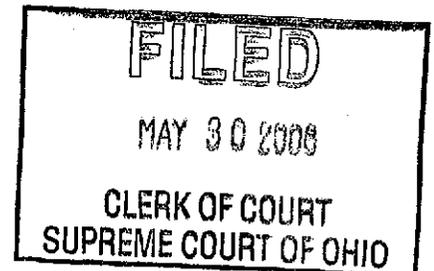
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B. CONSTITUTIONS, STATUTES and RULES

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APPELLANT'S REPLY BRIEF

Having carefully reviewed the contents of appellees' respective briefs, appellant Montville Plastics & Rubber, Inc. ("Montville"), must note at the outset of its instant reply brief that appellees' briefs are more remarkable for what they *do not* contain than they are for what they do contain. Succinctly stated, in lieu of taking issue with the pertinent facts or principles of law which Montville set forth in its merit brief, appellees have largely ignored same – focusing their attention upon assertions of claimed "fact" not supported by the record and matters of law which are not in issue. Accordingly, Montville's principal focus in this reply brief is upon those critical points of fact and law which appellees thus chose to ignore and, secondarily, upon those few points as to which appellees actually did respond by positing erroneous propositions of fact or law.

III. Reply Regarding Appellees' Assertions of Fact

Notably, except in one respect, neither appellee Thorton nor his co-appellee Administrator disagreed with Montville on the essential, procedural facts. The sole exception lies in Thorton's assertion that, "On November 30, 2006 Montville filed a Notice of Appeal to the *** Court of Appeals *from the filing of Thorton's Notice of Voluntary Dismissal.*"¹ Thorton's Brief at 1.²

Thorton's understanding of the fact in such regard is erroneous because Montville was not appealing from the fact that Thorton had *filed* such a notice of dismissal, but from the trial court's

¹ Emphasis throughout is added unless the contrary is noted.

² In this regard, Thorton's comprehension of the case is at odds with the court of appeals' statement of the case: "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." 2007-Ohio-3475 at ¶1. Further, Thorton's comprehension of the case is at odds with his co-appellee's view that, "Montville never filed an appeal to Thorton's October 19, 2006 notice of voluntary dismissal." Administrator's Brief at 5.

journalized *acceptance* of the *statutorily-prohibited, unilateral, “without prejudice” proviso* which Thorton inserted into his notice of dismissal. As was previously briefed at length in Montville’s opening brief, Montville’s appeal to the appellate court below was addressed solely to the fact that *the trial court’s endorsement of its acceptance* of Thorton’s said “without prejudice” proviso was forbidden by R.C. §4123.512(D)’s “employer’s consent” provision and, thus, was plainly erroneous.

In all likelihood, Thorton’s erroneous comprehension of this single fact arises from the circumstance that his brief appears to have been written without first reviewing the record; his brief being devoid of any reference to the record to support the fact thus claimed.

More notable, however, is the circumstance that neither Thorton nor the Administrator disagrees with Montville on the facts that: (i) prior to the 2006 amendment to R.C. §4123.512(D), Civ. R. 41(A) dismissals were routinely being taken in employer appeal cases for purely dilatory purposes, in order to prolong the continued flow of benefits for as long as was possible before submission to merit determination by the trial court occurred [Montville’s brief at p. 9]; (ii) that Thorton’s notice dismissal was filed in order to avoid Montville’s taking his deposition [id. at p. 17] and (iii) that the Commission’s internal operating policies encouraged same by directing that nearly all claim-related matters proceed as if no appeal were pending. [Id. at p. 9; Appx. at 28-29.]

Even more worthy of note is the further fact that neither appellee disagrees with Montville’s duly supported submission that the delay occasioned by Thorton’s dismissal *severely prejudiced* Montville in a manner which cannot be undone, rectified, or “set right” by the Surplus Fund reimbursement provisions of R.C. §§4123.511 and 4123.512. [Montville’s brief at pp. 3-6.]

Last, and most important, appellees do not dispute the key fact that R.C. §4123.512(D)’s “employer’s consent” amendment became effective *before* October 19, 2006 – the date on which

Thorton filed his notice of dismissal.

IV. Reply Regarding Appellees' Assertions of Law

Also more remarkable for what they *do not* contain than they are for what they state are appellees' legal arguments. In this regard it is particularly notable that nowhere within their briefs do appellees take issue with Montville's central submissions that (i) procedurally, this case falls within the recognized *exception* to the general rule of the non-appealability of Civ. R. 41(A)(1)(a) dismissals whereby *judgments or orders which confirm the validity* of such "without prejudice" dismissals are rendered appealable when such judicial confirmations accord "*without prejudice*" status to dismissals which are not entitled to be afforded that status [Montville's brief at pp. 28-32]; (ii) that when it outlawed claimants' taking voluntary dismissals unilaterally in response to employers' appeals, the General Assembly did so in order to prevent two interrelated evils which necessarily result from claimant-instigated protraction of the adjudication process -- (1) financial victimization of employers while the one-year re-filing period runs its course and (2) the agencies' practices of continuing the payment of unwarranted benefits and disregarding the pendency of the employers' appeals during the same one-year period [id. at pp. 3-6 and 9]; and (iii) that entering a final judgment in the employer's favor is the legally required response to a claimant's violation of R.C. §4123.512(D)'s "employer's consent" provision because such an unauthorized dismissal constitutes an abandonment of the underlying claim to the right of participation. [Id. at pp. 8-25.]

Most remarkable of all, however, are (i) appellees' joint failure to explain how the judiciary's application of the "employer's consent" provision to procedural events which occurred *after* that provision's effective date might be characterized as "retroactive" and (ii) appellees' simultaneous *inability to identify a single substantive right* on Thorton's or the BWC's part which, supposedly,

was affected or nullified by the General Assembly's directive that its subject, "employer's consent" provision apply to all cases pending in court on the amendment's effective date.

In the first such regard, if it is appellees' thesis that *the judiciary's applying* the General Assembly's **August 25, 2006**, "employer's consent" provision to Thorton's **October 19, 2006**, notice dismissal would be to afford same "retroactive" effect, then their submission in that regard is foreclosed by the same reasoning which this Court articulated in *Morgan v. Western Electric Co., Inc.* (1982), 69 Ohio St.2d 278, at 282:

While finding retroactive application of the amended statute permissible *its use here is not retroactive*. Amended R.C. 4123.519 became effective January 1, 1979. As such, it is applicable to all decisions rendered by the Industrial Commission on or after January 1, 1979. Again, quoting from Holdridge, supra: "**Laws of a remedial nature providing rules of practice, courses of procedure, or methods of review are applicable to any proceedings conducted after the adoption of such laws.**" ***

Here, the same *Morgan* rationale is applicable because the record is unmistakably clear upon – and appellees do not even attempt to dispute – one critical, outcome determinative fact: The effective date of R.C. §4123.512(D)'s "employer consent" amendment **preceded** the October 19, 2006, date on which Thorton filed his notice of dismissal. Thus, application of that amendment to the procedural facts in this case cannot pose any issue of "retroactive" application of that new statutory provision, because:

The terms "retroactive" and "retrospective" may be used interchangeably to refer to **a law that affects "acts or facts occurring, or rights accruing, before it came into force."** *State v. Consilio*, 114 Ohio St.3d 295, 2007-Ohio-4163, 871 N.E.2d 1167, ¶ 1, fn. 1 (quoting Black's Law Dictionary (6th Ed.1990) 1317).

Hyle v. Porter, 117 Ohio St.3d 165, 2008-Ohio-542 at {¶7}, fn. 2.

Alternatively, if it is appellees' thesis that the General Assembly's express directive in R.C. §4123.512(H) 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[.]" of itself constituted "retroactive" legislation, their submission in that regard is not only foreclosed by the definitions of the terms "retroactive" and "retrospective" which this Court enunciated in *State v. Consilio*, 114 Ohio St.3d 295, 2007-Ohio-4163, and reiterated in *Hyle*, *supra*, but is also precluded by this Court's further holdings in *Consilio* that, "Retroactivity is not to be inferred. *** If the retroactivity of a statute is not expressly stated in plain terms, the presumption in favor of prospective application controls[.]" and that, "The duty to clearly proclaim retroactivity in plain terms must require more than a fleeting cross-reference, if statutes are to be consistently understood and applied." [Id. at ¶¶15 and 24].]

Here, the only "acts or facts" which the "employer's consent" provision affected were (i) Thorton's *October 19, 2006*, act of filing a notice of voluntary dismissal and (ii) the trial court's *October 31, 2006*, journalization of its determination that such dismissal was "without prejudice." However, because all parties concur on the fact that both such "acts or facts" occurred *after* the effective date of the "employer's consent" provision, the conclusion that "retroactivity" is plainly absent from the facts herein is inescapable.³

In the second regard – i.e., appellees' inability to identify a *substantive* right which, supposedly, was affected or nullified by the General Assembly's directive for application to all

³ Although Montville and appellees disagree over what the exact date upon which the subject "employer's consent" provision took effect was – Montville asserting that the effective date was August 25, 2006 [Montville's brief at p. 4, fn. 2]; appellees, October 11, 2006 [Thorton's brief at p. 8; Administrator's brief at p. 4] – there is no disagreement on the point that the provision's effective date *preceded* Thorton's *October 19, 2006*, filing of his notice dismissal.

pending cases – while appellees have, indeed, regaled this Court with lengthy perorations to the effect that applying the purely procedural change worked by R.C. §4123.512(D)'s “employer’s consent” provision to the procedural facts in this case would, in some unexplained way, run afoul of Section 28, Article II, Ohio Const. [Thorton’s Brief at pp. 6-8; Administrator’s Brief at pp. 1 through 19] neither of them has pointed out any right of the kind which that constitutional provision protects; viz., a *vested, substantive* right. See, *Consilio*, supra, at ¶9 (“Section 28, Article II of the Ohio Constitution prohibits the retroactive impairment of *vested substantive rights*.”); *Bielat v. Bielat*, 87 Ohio St.3d 350, 354-356, 2000-Ohio-451: “**Legislation is remedial, and therefore permissibly retroactive, when the legislation seeks only to avoid ‘the necessity for multiplicity of suits and the accumulation of costs [or to] promote the interests of all parties.’**” [Citing *Rairden v. Holden* (1854), 15 Ohio St. at 211.]

Here, it cannot be postulated that Thorton’s previously existing ability to effectuate a voluntary dismissal “without prejudice” unilaterally was a “right” which “*accrued*” *before* the “employer’s consent” provision took effect because (i) he did not avail himself of such “right” *before* that provision took effect and (ii) it is axiomatic that, “There is no vested right in a mode of procedure. Each succeeding legislature may establish a different one, providing, only, that in each is preserved the essential elements of protection.” *Backus v. Fort St. Union Depot Co.* (1898), 169 U.S. 557, 570, 18 S.Ct. 445. Accord, *Slocum v. Mutual Bldg. & Inv. Co.* (1935), 130 Ohio St. 312, 317. Cf., *Smith v. New York Central R. Co.* (1930), 122 Ohio St. 45, 49-50 [quoting *Terry v.*

Anderson (1877), 95 U.S. 628, at 633];⁴ *State v. Barlow* (1904), 70 Ohio St. 363, 374-375;⁵ *Rairden v. Holden* (1864), 15 Ohio St. 207, 211.⁶

Thus, due to all of the foregoing, appellees' various Section 28, Article II, submissions are utterly without merit, as the subject amendment to R.C. §4123.512(D) was purely remedial and did not affect any "vested *substantive* right" afforded to Thorton or the BWC under prior law which had "accrued" to the benefit of either of these appellees before October 19, 2006.

4

"The parties to a contract have no more a vested interest in a particular limitation which has been fixed, than they have in an unrestricted right to sue. They have no more a vested interest in the time for the commencement of an action than they have in the form of the action to be commenced; and as to the forms of action or modes of remedy, it is well settled that the legislature may change them at its discretion, provided adequate means of enforcing the right remain."

5

[A]s to the matter of remedy it cannot be said that the mere beginning of a suit gives the party a vested right in any special form of remedy or entitles him to have the same conducted at every stage according to the course of procedure which was prescribed by law when the suit was commenced. The rule is well settled by repeated adjudications that no one has a vested interest in any particular remedy for the enforcement of a right. The remedies which one legislature may have prescribed a subsequent legislature may modify provided a substantial and adequate remedy is left.

6

The statute is purely remedial in its effect, operates on pre-existing legal rights, obligations, duties, and interests, and by avoiding the necessity for multiplicity of suits and the accumulation of costs, will tend to promote the interests of all parties. Laws of this character are not within the mischiefs against which the prohibitory clause of our constitution was intended to guard, and therefore not within a just construction of its terms.

One of the legally erroneous arguments which appellee Thorton has raised postulates that this Court cannot consider the “employer’s consent” provision at all, because: “[T]he Court of Appeals never reached the issue sought to be addressed by Montville.” Thus, Thorton submits: “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 *** Court of Appeal.” Thorton’s Brief at pp. 2 and 6. (Emphasis sic.) Such argument is erroneous because the *basis* of the appellate court’s dismissal of Montville’s appeal rested upon its implicit holding that Thorton’s dismissal – of itself – *had* legal effect *despite* the General Assembly’s express directive to the contrary in R.C. §4123.512(D)’s “employer’s consent” provision. [2007-Ohio-3475 at ¶¶3-12.] Had the court of appeals not thus “judicially repealed” the General Assembly’s “employer’s consent” mandate, the trial court’s error in accepting Thorton’s “*without prejudice*” proviso would have been corrected upon Montville’s appeal to that court. It is from the error thus made at the intermediate appellate level from which Montville has appealed to this Supreme Court.

Both Thorton and the Administrator have joined in the similarly erroneous argument that the court of appeals lacked jurisdiction over Montville’s appeal; asserting that, “[A Civ. R. 41(A)(1)(a)] notice of dismissal is not *** an adjudication on the merits.” Thorton’s Brief at pp. 3-4; Administrator’s Brief at pp. 2 and 12. In most circumstances, appellees’ arguments to such effect correctly state Ohio law. In other circumstances, however, appellees’ said arguments are clearly erroneous. The case at bar falls into the latter category.

Appellees’ said submission is correct when it refers to a Civ. R. 41(A)(1)(a) notice of dismissal filed by a plaintiff who has the right to effectuate a dismissal “without prejudice”; which right ordinarily exists where a plaintiff has not previously voluntarily dismissed his complaint *and*

either (i) the statutorily-prescribed period of limitations has not expired at the time he presents his complaint for refiling or (ii) R.C. §2305.19 operates to extend the time within which such refiling may be accomplished.

Appellees' said argument is glaringly incorrect, however, when it refers to (i) a plaintiff who, having previously filed a Civ. R. 41(A)(1)(a) notice of dismissal, files yet a *second* notice dismissal [Civ. R. 41(A)(1); *Olynyk v. Scoles*, 114 Ohio St.3d 56, 2007-Ohio-2878 at {¶10}]; (ii) a plaintiff who fails to refile within the time permitted by law to effectuate such a refiling [*Fowee v. Wesley Hall, Inc.*, 108 Ohio St.3d 533, 2006-Ohio-1712 at the syllabus]; or (iii) *a plaintiff who has no legal right to effectuate a first voluntary dismissal on a "without prejudice" basis*. See, *Reinbolt v. National Fire Ins. Co. of Hartford*, 158 Ohio App.3d 453, 2004-Ohio-4845 at {¶11}; *Lovins v. Kroger Co.*, 150 Ohio App.3d 656, 2002-Ohio-6526 at {¶¶5-6}; *Pheils v. Black* (October 13, 1995), Wood App. No. WD-95-028, 1995 WL 604615. This last-mentioned circumstance arises when some other provision of law operates to preclude a plaintiff from dismissing without prejudice. Due to R.C. §4123.512(D)'s "employer's consent" provision, this case falls into the last-mentioned of those three classes.

Appellee Thorton also raises two additional points of law which are equally erroneous. At page 4 of his brief he postulates that, "*A voluntary dismissal merely postpones a final adjudication. It does not determine it.*" Insofar as R.C. §4123.512 appeals instituted by employers are concerned, Thorton's said submission is erroneous for two reasons. *First*, if a dismissal is one to which legal significance attaches – either a second dismissal in an ordinary civil matter or, as here, a dismissal unauthorized by the law governing a special proceeding – it operates as an adjudication upon the merits and, thus, *does* determine the case. *Second*, and even more to the point at issue in this case,

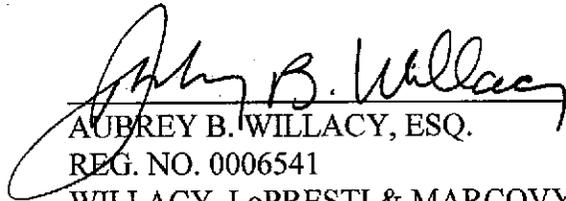
in State Fund claims in which participation has been administratively allowed, Thornton's use of the word, "merely," blithely ignores the fundamentally unfair, economic results which the General Assembly's "employer's consent" requirement was added to prohibit – financial prejudice to employers occasioned by claimant-instigated delay. Such delay prejudices the employer in the case because it lengthens the time before a judicial declaration of the claim's *non-compensability* – and, thus, the employer's (i) *non-liability* to the BWC for risk account charges, (ii) *non-liability* to the BWC for increased premiums based on such risk account charges, and (iii) ineligibility for group rating group inclusion and related premium savings – can be obtained. Indeed, this Court itself recently recognized the fact that delay in the adjudication of R.C. §4123.512 appeals is antithetical to the administration of justice and "inherently injurious" to the parties affected thereby. *Disciplinary Counsel v. Sargeant*, __ Ohio St.3d __, 2008-Ohio-2330 at {¶¶19-21, 29-30, and 34}.

Last, Thornton's assertion at page 6 of his brief that, "Once the dismissal is filed, the trial court loses jurisdiction over the case[,]” must be addressed. Simply stated, while Thornton's submission on that point accurately recapitulates the general rule applicable in most ordinary civil cases, not only do exceptions to that rule exist [*Reinbolt, Lovins, and Pheils, supra*] but also the point thus asserted cannot be squared with *Fowee, supra*, which postulates that if the complaint is *not* refiled within one year after such a dismissal, then the court *has jurisdiction* to issue a judgment in favor of the employer. Here, once again, the logical fallacy inherent in blindly applying rules of practice established through – and for – the adjudication of ordinary civil cases to special proceedings under R.C. §4123.512 becomes readily apparent; as under Thornton's last-mentioned submission the result mandated by this Court's syllabus in *Fowee* could not obtain because the trial court would lack jurisdiction to enter such a judgment.

V. Conclusion

For all of the foregoing reasons, and for those originally stated, the judgment of the court of appeals below 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,



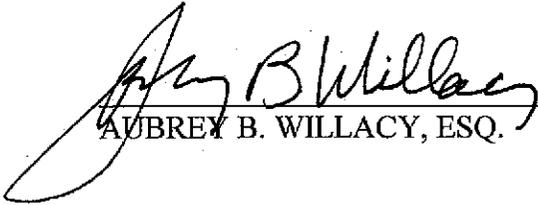
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VI. SERVICE

Copies of appellant Montville Plastics & Rubber, Inc.'s, foregoing Reply Brief have been served, by ordinary mail, upon Mitchell A. Stern, Esq., 27730 Euclid Avenue, Cleveland, Ohio 44132, counsel for plaintiff-appellee, and upon William P. Marshall, Esq., Solicitor General, Office of the Attorney General, 30 East Broad Street, 17th Floor, Columbus, Ohio 43215, counsel for defendant-appellee, Administrator of the Bureau of Workers' Compensation, this 29th day of May, 2008.


AUBREY B. WILLACY, ESQ.

VII. APPENDIX

CONSTITUTION OF THE STATE OF OHIO

§ 28 Retroactive laws

The general assembly shall 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 omissions, defects, and errors, in instruments and proceedings, arising out of their want of conformity with the laws of this state.

OHIO REVISED CODE

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.

Effective Date: 03-02-2004

4123.511 Notice of receipt of claim.

(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 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.

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 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 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 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.

Effective Date: 06-14-2000; 06-21-2005; 2007 HB100 09-10-2007

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

(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.

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 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 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)

OHIO RULES OF CIVIL PROCEDURE

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.]

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.)

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