In the

Supreme Court of Ohio

ROBERT THORTON, Plaintiff-Appellee, v. MONTVILLE PLASTICS AND RUBBER, INC., Defendant-Appellant and ADMINSTRATOR, BUREAU OF WORKERS' COMPENSATION, et al., Defendant-Appellee.	:	Case No. 2007-1588 On Appeal from the Geauga County Court of Appeals, Eleventh Appellate District Court of Appeals Case No. 2006-G-2760

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ADMINISTRATOR'S RESPONSE TO MOTION FOR RECONSIDERATION

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INTRODUCTION

Appellant Montville Plastics and Rubber, Inc.'s ("Montville's") motion for reconsideration fails to satisfy the basic criteria for reconsideration motions because it attempts to reargue the merits of the case and is not confined to the grounds urged for reconsideration. The Court correctly held that, with the exception of one provision, Amended Substitute Senate Bill No. 7 of the 126th General Assembly ("Am. Sub. S.B. 7") is only prospective in effect. 2009-Ohio-360. Specifically, the Court held that Appellee Robert Thorton's ("Thorton's") right in this employer appeal voluntarily to dismiss his complaint without prejudice in the trial court remains intact under former R.C. 4123.512(D). Montville wants the Court to reconsider its decision, based on the Court's alleged "misclassification of an outcome determinative fact." But Montville's request should be denied because it articulates no reasonable grounds for reconsideration, and no new argument for overruling the Court's original decision.

LAW AND ARGUMENT

The Court's reconsideration rule states that "[a] motion for reconsideration shall be confined strictly to the grounds urged for reconsideration, [and] shall not constitute a reargument of the case." S. Ct. Prac. R. 11 §2(B). Montville's motion falls short of both criteria because it asserts no reasonable grounds for reconsideration; it merely rehashes the arguments Montville already made in merits briefing. Specifically, Montville urges the Court to reconsider its decision because the Court "misclassif[ied] . . . an outcome determinative fact." Montville points to no "fact," however, that the Court "misclassified." Instead, Montville simply argues that the Court wrongly decided legal issues—namely, that the Court erred in finding that the amended provision at issue here substantive, not procedural; that the Court misconstrued the uncodified language in Am. Sub. S.B. 7 regarding retroactivity; and that the Court was wrong in finding that the dismissal by Thorton was not a final appealable order.

A. Montville's reconsideration motion ignores the first step of the Court's well-established two-step analysis regarding retroactivity.

Montville asserts that the Court should find that the provision at issue here is procedural rather than substantive, but this is a legal question, not a factual one, and it therefore does not qualify as a "misclassified fact." Moreover, the substantive-procedural argument was made by Montville in its merits reply brief at pages 3 through 7. It therefore constitutes a "reargument of the case," and not a valid argument for reconsideration.

Even if the Court were to reconsider the substantive-procedural question, it puts the cart before the horse. This argument ignores the first, threshold step of the Court's two-step analysis to determine the retroactive effect of a statute. See *Van Fossen v. Babcock & Wilcox Company* (1988), 36 Ohio St. 3d 100. The analysis first requires a determination whether the General Assembly intended that the statute apply prospectively or retrospectively. *Id.* at 106. Only if the legislature's intent was for the statute to apply retroactively does the analysis progress to the second step: whether the provision at issue is substantive or procedural.

The two-part analysis is based in the Ohio Constitution, in that the substantive-procedural determination is required to ensure that a person's substantive right is not retroactively destroyed: "Every statute which takes away or impairs vested rights acquired under existing laws, or creates a new obligation, imposes a new duty, or attaches a new disability, in respect to transactions or considerations already past, must be deemed retrospective or retroactive." 36 Ohio St. 3d at 106 (quoting *Cincinnati v. Seasongood* (1889), 46 Ohio St. 296, 303). But the constitutional issue never arises where the General Assembly intends the statute to apply prospectively:

> The issue of whether a statute may constitutionally be applied retrospectively does not arise *unless there has been a prior determination that the General Assembly has specified that the statute so apply.* 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 in *Kiser v. Coleman* (1986), 28 Ohio St. 3d 259, 262 . . . where "there is no clear indication of retroactive application, then the statute may *only* apply to cases which arise subsequent to its enactment."

36 Ohio St. 3d at 106 (emphasis added). Thus, only if a court first determines that the General Assembly intended the statute to be applied retrospectively does the need for the substantive-procedural determination arise.

As explained in the Bureau's original brief and reiterated below, the Court correctly found that the intent of the legislature was for the amendment at issue here to be prospective only in effect, and therefore the substantive-procedural issue never arises.

B. Montville's argument regarding the General Assembly's intent should be rejected it constitutes reargument of the merits.

When it does argue the threshold issue of the legislature's intent, Montville adds nothing new to the arguments it made in the original briefing. Montville asserts, without significant analysis, that Am. Sub. S.B. 7 applies to cases *pending* in court on the effective date, not those that arise after the effective date. Montville's only rationale for treating the law as retroactive is one argued at pages 11 through 15 of its merits brief. The Court considered and rejected Montville's argument in its opinion. Montville offers no new arguments, and no rationale for the Court to reconsider its decision here.

As the Court recognized, the uncodified language in Am. Sub. S.B. 7 leaves no doubt that only R.C. 4123.512(H) is to be applied retroactively:

> This act applies to *all claims* pursuant to Chapters 4121., 4123., 4127., and 4131. of the Revised Code *arising on and after the effective date of this act,* except that division (H) of section 4123.512 as amended by this act also applies to claims that are pending on the effective date of this act.

Section 3 of Am. Sub. S.B. 7 (emphasis added). Thus, as the Court held, "the General Assembly clearly intended that most of Am. Sub. S.B. No. 7's provisions are to be applied only prospectively." 2009-Ohio-360 at ¶16.

Montville's arguments to the contrary are the same as those already rejected by the Court. Montville argues that because subsection (H) has language that makes all of .511 and .512—including .512(D)—retroactive to November 1959, that reference makes *all* of the amendments to .512 in Am. Sub. S.B. 7 retroactive as well.

But as the Court already held, "[h]ad the General Assembly intended all of the provisions in Am. Sub. S.B. No. 7 to be retroactive, it could have so provided." 2009-Ohio-360 at ¶16. Moreover, the Court recognized that it is only the *amendments* to subsection (H) that are made retroactive by the exception. "[T]he provisions *amending* R.C. 4123.512(H) apply retroactively." 2009-Ohio-360 at ¶19.

In short, Montville's arguments regarding retroactivity and the language in Am. Sub. S.B. 7 were argued below, thoroughly considered, and decided by the Court.

C. Montville's argument regarding the appealability of a Rule 41(A)(1)(a) dismissal should be rejected as it is a reargument of the case.

Finally, Montville reargues its views regarding the appealability of Thorton's dismissal under R Civ. R. 41(A)(1)(a). Montville made these arguments in its brief on the merits at pages 25 through 31 and in its reply brief at pages 8 through 10.

Moreover, the Court's resolution of the Rule 41 issue is a direct consequence of the Court's resolution of the retroactivity question. The Court correctly held that Am. Sub. S.B. 7 applies only to cases arising on or after its effective date. It therefore follows that Thorton, whose case arose long before the amendments' effective date, may dismiss his claim without prejudice under Rule 41 and that such a dismissal is not an adjudication on the merits.

In short, the Court has already considered all of Montville's arguments and found them wanting. And Montville asserts no new argument that justifies the Court's reconsideration.

CONCLUSION

For the above reasons, the Administrator urges the Court to deny Montville's Motion for Reconsideration.

Respectfully submitted,

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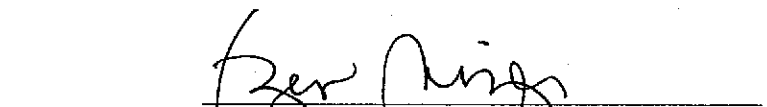

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CERTIFICATE OF SERVICE

I certify that a copy of the foregoing Memorandum in Response to Motion for Reconsideration of Defendant-Appellee Administrator, Bureau of Workers' Compensation was served by U.S. mail this 25th day of February, 2009, upon the following counsel:

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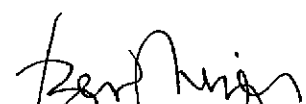

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