

ORIGINAL

IN SUPREME COURT OF OHIO

John Haight, et al.,	:	Supreme Court Case No. 2014-1241
	:	
Plaintiffs,	:	Appeal from the Montgomery County
v.	:	Court of Appeals, 2 nd District
	:	
The Cheap Escape Company, et al.,	:	Appeal No. CA 25983
	:	
Defendants.	:	Trial No. 2012 CV 00946

PLAINTIFFS/APPELLEES' MOTION TO DISMISS APPEAL AS IMPROVIDENTLY ACCEPTED

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FILED

NOV 13 2014

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**PLAINTIFFS/APPELLEES' MOTION TO DISMISS APPEAL AS IMPROVIDENTLY
ACCEPTED**

Plaintiffs/Appellees ask the Court to dismiss this jurisdictional appeal as having been improvidently accepted. The Second District Court of Appeals held that R.C. § 4111.14(B)(1) does not apply to this case because the action is brought under Article II, Section 34a of the Ohio Constitution, which the Second District determined was self-executing. Defendants/Appellants have not challenged these determinations.

Ignoring their own failure to assign as error or otherwise properly dispute the lower court's ruling that the statute does not apply to this case, Defendants/Appellants now ask the Court to rule on the constitutionality of R.C. § 4111.14(B)(1). Consequently, Defendants/Appellants are expressly asking this Court to issue an advisory opinion. Because this Court does not issue advisory opinions, this appeal should be dismissed as having been improvidently accepted.

A memorandum in support is attached hereto.

Respectfully submitted,



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**MEMORANDUM IN SUPPORT OF PLAINTIFFS/APPELLEES' MOTION TO DISMISS
APPEAL AS IMPROVIDENTLY ACCEPTED**

I. Introduction

In this case, the Second District Court of Appeals found that R.C. § 4111.14(B)(1) was unconstitutional. The court of appeals also found that R.C. § 4111.14(B)(1) does not apply to this action because this lawsuit is brought under Article II, Section 34a of the Ohio Constitution, not R.C. § 4111.14.

Appellants/Defendants have only appealed the court of appeals' determination regarding R.C. § 4111.14(B)(1)'s constitutionality. Appellants/Defendants' jurisdictional memorandum did not address the threshold issue of whether R.C. § 4111.14(B)(1) applies to the case at all. Accordingly, that issue is not properly before this Court.

Deciding the constitutionality of a statute no longer at issue in this case would be an advisory opinion. Consequently, the Court should dismiss this appeal as having been improvidently accepted.

II. Nature of the Case

This lawsuit is primarily an action to collect unpaid minimum wages due under Article II, Section 34a of the Ohio Constitution.

Plaintiffs/Appellees are former sales representatives for The Cheap Escape Company. Appellees' main job duty was to sell advertising space in the company's coupon magazine and website. Cheap Escape paid Appellees commissions based on the ad space that Appellees sold. If

Appellees did not sell enough ad space in a week, Cheap Escape paid Appellees less than minimum wage. Often times, this resulted in Cheap Escape not paying anything to Appellees.

Defendants/Appellants Robert and Joan Minchak (“Appellants”) were Cheap Escape’s principals and owners. Defendant Mark Kosir was Cheap Escape’s president. Appellees sued all three people as employers under Article II, Section 34a of the Ohio Constitution.

III. Background of the Procedural and Legal Issues

A critical issue in this case is whether Appellees are “employees” because only “employees” are entitled to minimum wage under Article II, Section 34a of the Ohio Constitution (“§34a”). Because §34a’s implementing legislation, R.C. § 4111.14(B)(1) (“§B1”), defines “employee” more narrowly than §34a, a worker can be an “employee” under §34a but not under §B1. Appellees fall into this category of workers.

Appellees asked the trial court to resolve the difference between §34a and §B1 by issuing a declaratory judgment that

- (1) §34a is self-executing, Appellees may proceed under §34a alone, and §B1 does not apply to an action brought under §34a, and/or
- (2) §B1 is unconstitutional.¹

The trial court denied Appellees’ motion on both points of law. *See Haight v. Cheap Escape Co.*, Montgomery C.P. No. 2012-cv-946, 2012 WL 7808347 (Aug. 2, 2012).

Appellees subsequently appealed both issues to the Second District Court of Appeals. On June 6, 2014, the Second District Court of Appeals reversed the trial court’s declaratory

¹ *See* Plaintiffs’ Motion for Declaratory Judgment Regarding the Applicability and Constitutionality of Ohio Revised Code Section 4111.14(B)(1), filed February 19, 2013.

judgment on both points of law. *See Haight v. Cheap Escape Co.*, 2014-Ohio-2447, 11 N.E.3d 1258 ¶¶25-26 (2nd Dist.).

The court of appeals' decision first notes that §34a is self-executing. *See Haight v. Cheap Escape Co.*, 2014-Ohio-2447 ¶2. ("The amendment did not require any action by the Ohio General Assembly to implement its protections...") Next, the decision addresses both assignments of error (whether §B1 applies to a §34a action and whether §B1 is unconstitutional) together. *Id.*, ¶8. Ultimately, the court of appeals sustained Appellees' two assignments of error, finding that §B1 does not apply to this §34a action and that §B1 is unconstitutional. *Id.*, ¶¶24-25.

On July 21, 2014, Appellants filed in this Court a notice of appeal and a memorandum in support of jurisdiction. The jurisdictional memorandum raised two propositions of law:

- (1) The meaning of the term 'employee' under R.C. 4111.14(B)(1) is constitutionally valid because it does not clearly conflict with or restrict the meaning of that same term under Article II, Section 34a of the Ohio Constitution.
- (2) If the statutory definition of 'employee' under R.C. 4111.14(B)(1) is unconstitutional and invalid, that conclusion and ruling should apply prospectively only under the three-part test propounded in *DiCenzo v. A-Best Products Co.*²

Appellants' jurisdictional memorandum does not address the court of appeals' holding that §B1 does not apply to this action because §34a is self-executing. Even Appellants' second proposition of law is limited to a scenario where §B1 is found to be unconstitutional, either by this Court or the court of appeals.³

On October 22, 2014, this Court accepted Appellants' appeal on both propositions of law.

² *See* Appellants' Memo in Support of Jurisdiction, pp. 6, 10.

³ *Id.*, p. 9.

IV. Argument

The court of appeals decided two issues when it sustained both of Appellees' assignments of error, holding: (1) §34a is self-executing, and §B1 does not apply to this §34a action, and (2) §B1 is unconstitutional. Appellants only challenge the second holding. As a result, Appellants' challenge asks the Court to rule on the constitutionality of a statute that undisputedly does not apply to this case. Making such a determination would be an advisory opinion, and it is axiomatic that the Court will not issue advisory opinions. *See N. Canton v. Hutchinson*, 1996-Ohio170, 75 Ohio St. 3d 112, 114, 661 N.E.2d 1000, 1002. Thus, this appeal should be dismissed.

By not raising the issue of whether §B1 applies to a §34a action, Appellants waived their ability to put that issue before the Court. An issue that an appellant does not raise or allude to in his or her memorandum in support of jurisdiction is not properly before the Court. *See In re Timken Mercy Med. Ctr.*, 61 Ohio St. 3d 81, 87, 572 N.E.2d 673, 677 (1991). The Court should not rule on an issue that is not properly before it. *Id.*

Accordingly, the only issue Appellants can challenge in this case is whether §B1 is constitutionally valid. But that issue cannot be reached because the unchallenged law of this case is that §B1 does not apply to Appellees' claims. It would be improper to rule on a statute's constitutionality when the statute does not apply to the case before the Court. "[C]onstitutional questions will not be decided until the necessity for decision arises on the record before the court." *State ex rel. Herbert v. Ferguson*, 142 Ohio St. 496, 503, 52 N.E.2d 980 (1944).

At best, Appellants can only hope to receive either an advisory opinion on §B1's constitutionality or a ruling that the court of appeals should have never reached the constitutional

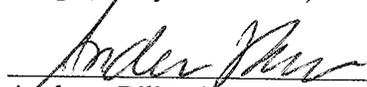
issue because the court of appeals had already found that §B1 does not apply to this case. Either way, there is no justiciable issue.

Moreover, although the court of appeals addressed both the issue of §B1's applicability and constitutionality together, the relevant standards regarding both issues are not the same. A finding that §B1 unconstitutionally conflicts with §34a requires the court to be convinced of the conflict beyond a reasonable doubt. In contrast, after determining the threshold issue of whether §34a is self-executing, a finding that §B1 does not apply to this action relies on simple statutory construction rules. No particular deference to the statute is required. In other words, there was no reason for the court of appeals to analyze §B1 under a lesser standard of review having already found it conflicts with §34a under the most rigorous standard. Thus, even if this Court was not convinced beyond a reasonable doubt as to §B1's unconstitutionality, it would not bear on whether §B1 applies to a case brought under §34a.

V. Conclusion

The issue of whether §B1 applies to this case is not properly before this Court because Appellants have not challenged that point of law. Because §B1 does not apply to this lawsuit, there is no reason for the Court to rule on its constitutionality. To do so would be to issue an advisory opinion. The Court should decline to issue an advisory opinion and, instead, the Court should dismiss this appeal as having been improvidently accepted.

Respectfully submitted,



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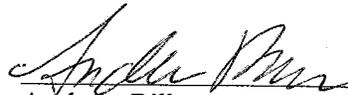
The undersigned hereby certifies that on the 12th day of November, 2014, a copy of the foregoing was served upon the following and by regular mail.

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