

ORIGINAL

IN THE SUPREME COURT OF OHIO

JOHN HAIGHT, et al.,)	Supreme Court Case No.: 2014-1241
)	
Plaintiffs/Appellees,)	On appeal from the Montgomery
)	County Court of Appeals, Second
vs.)	Appellate District
)	
The Cheap Escape Company, et al.,)	Court of Appeals Case No. 25983
)	
Defendants/Appellants.)	Trial Court Case No. 2012 CV 00946
)	
)	

APPELLANTS ROBERT MINCHAK AND JOAN MINCHAK'S MEMORANDUM IN
OPPOSITION TO APPELLEES' MOTION TO DISMISS THIS APPEAL

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SUPREME COURT OF OHIO

Haight¹ filed a Motion to Dismiss this appeal, alleging this Court “improvidently accepted” jurisdiction. This Court should deny Haight’s Motion for three reasons. First, Haight’s Motion is a disguised Motion for Reconsideration that is not permitted by Supreme Court Rule of Practice 18.02 because this Court accepted jurisdiction. Second, the Motion is untimely. Third, Haight’s Motion is an attempt to re-argue whether this Court should have accepted jurisdiction. In doing so, Haight distorts the Appellate Court’s holding, which focused on one single issue: In light of Article II Section 34a² of the Ohio Constitution, is R.C. § 4111.14 constitutional?

I. LAW AND ARGUMENT

A. Haight’s Motion is not permitted by the Rules of Practice.

Although Haight’s Motion is captioned as a Motion to Dismiss, it should instead be captioned a Motion for Reconsideration as it is his second attempt to oppose jurisdiction. But S. Ct. Prac. R. 18.02(B) only permits a party to move this court to reconsider four decisions:

- (1) Refusal to accept a jurisdictional appeal;
- (2) The sua sponte dismissal of a case;
- (3) The granting of a motion to dismiss;
- (4) A decision on the merits of a case.

Haight is requesting that this Court reconsider its decision to accept – not refuse – a jurisdictional appeal. This is not permitted under the Rules of Practice and, as such, Haight’s Motion should be denied.

¹ Although there are multiple Plaintiffs/Appellees in this matter, their interests are aligned and their Motion was filed collectively. For ease in reading, the Plaintiffs/Appellees will be referred to collectively in this brief as “Haight.”

² Article II, Section 34a of the Ohio Constitution will be referred to as “Constitution Section 34a” for the purposes of this brief.

B. Haight's Motion is untimely.

Even if this Court were to permit motions to reconsider decisions granting certiorari, this Motion would still fail on procedural grounds because it is untimely. To be timely, motions for reconsideration “must be filed **within ten days** after the Supreme Court’s judgment entry or order is filed with the Clerk of the Supreme Court.” S. Ct. Prac. R. 18.02(A) (emphasis added). Here, the Clerk journalized this Court’s entry accepting the appeal on October 22, 2014. *See* Docket. Therefore, Rule 18.02(A) dictates that Haight’s Motion needed to be filed by November 3, 2014. Instead, Haight delayed until November 13 – ten days after the deadline to file. Accordingly, his Motion is untimely and should be denied.

C. Jurisdiction is proper because this appeal addresses a significant constitutional issue and involves a matter of great public interest.

If this Court addresses Haight’s Motion on the merits, his Motion should still be denied because it simply re-argues his brief in opposition to jurisdiction and, in addition, it improperly attempts to unravel the Appellate Court’s single constitutional holding into multiple parts.

It is undisputed that Haight, as a commissioned salesman, would be exempt from receiving minimum wage under R.C. 4111.14(B)(1) if this statute is constitutional. But, the Appellate Court decided R.C. 4111.14 conflicted with Constitution Section 34a, and therefore declared R.C. 4111.14 unconstitutional. The Minchaks appealed the Second District’s decision that R.C. 4111.14 is unconstitutional and this Court accepted jurisdiction over the entire case, not simply a single proposition of law.

When the Second District declared R.C. 4111.14 unconstitutional, it opened a Pandora’s Box of employment compensation issues in the state. In fact, this appeal both directly “involves

questions arising under the” Ohio constitution and addresses issues of “great general interest”, both of which compel Supreme Court review. *See* Article IV, Section 2(B)(2) of the Ohio Constitution; *see also* S. Ct. Prac. R. 5.02.

The Second District’s decision, as it stands, is directly contrary to the instructions given to employers by the Ohio Department of Commerce Division of Industrial Compliance. For example, the Minimum Wage fliers provided by the Department – and posted in places of employment statewide – specifically exclude outside sales representatives from minimum wage requirements! This form can be found on the state government’s website, and is attached for the Court’s convenience as Exhibit A.³ In relevant part, this flier states: “**any individual employed as an outside salesman compensated by commissions** or in a bona fide executive, administrative, or professional capacity, or computer professionals” **is exempt from minimum wage**. *See* Ex. A at No. 3. This supports the Minchaks’ argument that Haight was properly compensated.

Since Ohio employers are now, because of the Second District Court of Appeals’ opinion, receiving conflicting messages about who is protected and who is exempt, this Court needs to provide guidance. Ohio employers should not be forced to decide for themselves whether they can rely upon R.C. 4111.14 and guidance from the Department of Commerce in addressing compensation for commissioned salesmen or if the decision of the Second District Court of Appeals controls even in counties not subject, on a *stare decisis* basis, to the decision of the Second District Court of Appeals.

Additionally, Haight’s motion should be denied because Defendants’ propositions of law

³ The URL is http://www.com.ohio.gov/documents/dico_2014minimumwageposter.pdf.

are proper. Haight's Motion seemingly confuses a "proposition of law" with an "assignment of error." S. Ct. Prac. R. 16.02(B)(4) states that a proposition of law is intended to serve as a proposed "syllabus for the case if the appellant prevails." This is different from an assignment of error, which requires an appellant to specify alleged errors a trial court made that justify reversing, modifying, or vacating an adverse judgment. *See* Assignment of Error, BLACK'S LAW DICTIONARY (9th ed. 2009). Moreover, for Haight to suggest the Second District decided a "threshold" determinative issue that Constitution Section 34a was self-executing, and thus that Defendants' proposition of law regarding the constitutionality of R.C. 4111.14 seeks an advisory opinion is simply wrong. The Second District determined there was only one issue before the court – the constitutionality of R.C. 4111.14. The court stated the issue as follows:

The pivotal question posed by the assignments of error is whether the trial court erred in concluding that the definition of an "employee" set forth in R.C. 4111.14(B)(1) is not in conflict with the definition of an "employee" contained in Ohio Constitution, Article II, Section 34a, and that R.C. 4111.14(B)(1) permissibly implements Section 34a. This question turns on whether the definition of an "employee" in the statute is incompatible with the definition of that term in Section 34a. If the statute, or any part of it, conflicts with the constitutional provision, it is unconstitutional.

Haight v. Cheap Escape Co., 11 N.E.3d 1258, 2014-Ohio-2447, *appeal allowed*, 140 Ohio St.3d 1466 at ¶ 9. The fundamental issue that was before the Appellate Court and is before this court is the relationship between R.C. 4111.14 and Constitution Section 34a. The Second District concluded there was a conflict between them, and therefore declared R.C. 4111.14 unconstitutional. *See id.* at ¶¶ 20, 24. It is precisely this holding that the Minchaks appealed.

Haight attempts to unravel the Second District's holding into contrived component parts and argues that the Second District Court of Appeals found Constitution Section 34 to be self-executing. But, this issue was not addressed by the Second District Court of Appeals.

Moreover, even if the Second District had held Constitution Section 34a to be self-executing, Defendants' appeal is proper.

This Court has stated that non-conflicting statutory provisions apply to self-executing constitutional provisions. *See State ex rel. Vickers v. Summit Ct. Council*, 97 Ohio St.3d 204 at ¶¶ 30-31. In fact, in *Vickers* this Court stated the self-executing constitution provisions “may still be limited by relevant charter, statutory, or constitutional provisions” if the constitution and the statute do not conflict. *Id.* at ¶¶ 24 and 31. Thus, even if Constitution Section 34a were to be deemed self-executing such that Haight could proceed under the provision, the definition of “employee” under R.C. 4111.14(B)(1) would still apply to implement Constitution Section 34a, if the two are not irreconcilably in conflict. Simply stated and contrary to the claim of Haight, even if Constitution Section 34 is self-executing, that alone does not mean that R.C. 4111.14 is unconstitutional.

Here, payment of minimum wage to Haight rises or falls based upon the constitutionality of R.C. 4111.14 and the employer is responding to a classic Article III controversy. The Minchaks are not seeking an advisory opinion and this appeal should not be dismissed.

III. CONCLUSION

Haight's Motion is an unauthorized, untimely Motion for Reconsideration that should be denied by this Court. Furthermore, his Motion misinterprets both the Second District's holding and Defendants' propositions of law. The Second District ruled upon a single issue – whether R.C. 4111.14 conflicts with Constitution Section 34a – and declared R.C. 4111.14 unconstitutional. This is the epitome of a dispute that this Court should promptly resolve for the good of all Ohio employers and employees. Finally, this appeal involves a true Article III case or controversy and the Minchaks are not seeking an advisory opinion.

Haight's Motion to Dismiss Appeal should be denied.

Respectfully Submitted,

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CERTIFICATE OF SERVICE

The undersigned does hereby certify that on this 24th day of November, 2014, a copy of the foregoing was served upon the following by regular mail:

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STATE OF OHIO

2014 MINIMUM WAGE

OHIO DEPARTMENT OF COMMERCE
DIVISION OF INDUSTRIAL COMPLIANCE

JOHN R. KASICH
Governor

ANDRE T. PORTER
Director

www.com.ohio.gov

NON-TIPPED EMPLOYEES

A Minimum Wage of
\$7.95 per hour

"Non-Tipped Employees" includes any employee who does not engage in an occupation in which he/she customarily and regularly receives more than thirty dollars (\$30.00) per month in tips.

"Employers" who gross under \$292,000.00 shall pay their employees no less than the current federal minimum wage rate.

"Employees" under the age of 16 shall be paid no less than the current federal minimum wage rate.

"Current Federal Minimum Wage" is \$7.25 per hour.

TIPPED EMPLOYEES

A Minimum Wage of
\$3.98 per hour **PLUS TIPS**

"Tipped Employees" includes any employee who engages in an occupation in which he/she customarily and regularly receives more than thirty dollars (\$30.00) per month in tips. Employers electing to use the tip credit provision must be able to show that tipped employees receive at least the minimum wage when direct or cash wages and the tip credit amount are combined.

OVERTIME

1. An employer shall pay an employee for overtime at a wage rate of one and one-half times the employee's wage rate for hours in excess of forty hours in one work week, except for employers grossing less than \$150,000 per year.

HANDICAPPED RATE

To prevent the curtailment of opportunities for employment and avoid undue hardship to individuals whose earning capacity is affected or impaired by physical or mental deficiencies or injuries, a sub-minimum wage may be paid, as provided in the rules and regulations set forth by the Director of the Ohio Department of Commerce.

RECORDS TO BE KEPT BY THE EMPLOYER

1. Each employer shall keep records for at least three years, available for copying and inspection by the Director of the Ohio Department of Commerce, showing the following information concerning each employee:

- A. Name
- B. Address
- C. Occupation
- D. Rate of Pay
- E. Amount paid each pay period
- F. Hours worked each day and each work week

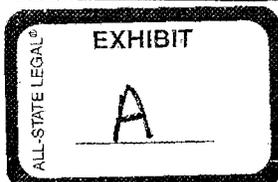
2. The records may be opened for inspection or copying at any reasonable time and no employer shall hinder or delay the Director of the Ohio Department of Commerce in the performance of these duties.

INDIVIDUALS EXEMPT FROM MINIMUM WAGE

1. Any individual employed by the United States;
2. Any individual employed as a baby-sitter in the employer's home, or a live-in companion to a sick, convalescing, or elderly person whose principal duties do not include housekeeping;
3. Any individual employed as an outside salesman compensated by commissions or in a bona fide executive, administrative, or professional capacity, or computer professionals;
4. Any individual who volunteers to perform services for a public agency which is a State, a political subdivision of a State, or an interstate government agency, if
 - (i) the individual receives no compensation or is paid expenses, reasonable benefits, or a nominal fee to perform the services for which the individual volunteered; and
 - (ii) such services are not the same type of services which the individual is employed to perform for such public agency;
5. Any individual who works or provides personal services of a charitable nature in a hospital or health institution for which compensation is not sought or contemplated;
6. Any individual in the employ of a camp or recreational area for children under eighteen years of age and owned and operated by a non-profit organization or group of organizations.
7. Employees of a solely family owned and operated business who are family members of an owner.

For further information about minimum wage issues, please contact: The Ohio Department of Commerce, Division of Industrial Compliance, 6606 Tussing Road, Reynoldsburg, Ohio 43068. Phone: (614) 644-2239. TTY/TDD: 1-800-750-0750.

POST IN A CONSPICUOUS PLACE



Ohio

Department of Commerce

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(REV. 09/25/13)