IN THE
SUPREME COURT OF OHIO

SHANNON FERGUSON,	)	SUPREME COURT OF OHIO
	)	CASE NO.: **2015-1975**
Appellee,	)	
	)	
v.	)	On Appeal from the Cuyahoga County
	)	Court of Appeals, Eighth Appellate
STATE OF OHIO, *et al.*,	)	District – Case No.: CA-15-102553
	)	
Appellants.	)	

BRIEF OF *AMICUS CURIAE* AUTOMATION TOOL & DIE, INC. IN SUPPORT OF DEFENDANTS-APPELLANTS STATE OF OHIO AND ATTORNEY GENERAL MICHAEL DeWINE'S MERIT BRIEF

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III. STATEMENT OF INTEREST

This brief is submitted by Automation Tool & Die, Inc. ("Automation") in support of Appellants State of Ohio and Ohio Attorney General Michael DeWine. Founded in 1974, Automation is a small, family owned metal-forming business with approximately seventy employees. In recent years, Automation has been diligently fighting for its and other employers' rights to be expeditiously heard in employer's workers' compensation appeals. See, *Dillard* (I) *v. Automation Tool & Die, Inc.*, 9th Dist. Medina No. 12CA0091-M, 2013-Ohio-5645; *Dillard* (II) *v. Automation Tool & Die, Inc.*, 9th Dist. 15CA0055-M, 2016-Ohio-529. Automation's particular interest in this matter arises out of *Dillard* (II), wherein the Ninth District held there was no separation of powers violation by the General Assembly's 2006 amendment to R.C. 4123.512(D) (the "Consent Provision"). Arguments regarding due process and equal protection were waived by plaintiff's failure to raise them before the trial court. *Dillard* (II) at ¶14. Dillard (who is represented by the same counsel as Ferguson, Mr. Meyerson) has appealed the Ninth District's decision to this Court. That matter is awaiting a decision on jurisdiction in Supreme Court of Ohio case number 2016-0434.

This Court's review of *Ferguson* has a potentially chilling, negative-effect on all employers in workers' compensation appeals. *Ferguson*, unlike *Dillard* (II), involved a claimant filing a declaratory judgment action to invalidate the Provision. By filing a declaratory judgment action, Ferguson sought to (and effectively did) eliminate from arguments and proceedings a party that the amendment was intended to protect – employers. Thus, this Court's decision in *Ferguson* will not only have a significant impact on all employer's R.C. 4123.512 appeals, but specifically on Automation and the decision entered in its favor by the Ninth District in *Dillard* (II). Automation is deeply concerned over the significant impact this decision can have in its and

all employers' workers' compensations appeals in the absence of an employer's perspective on this important legal issue. Hence, the submission of Automation's *amicus* brief.

For these reasons and those that follow, Automation urges a reversal of the Eighth District's decision and the judgment of the Cuyahoga Court of Common Pleas.

IV. STATEMENT OF THE CASE AND FACTS

Automation concurs in the Statement of the Case and Facts presented in the Appellants' Merit Brief.

V. ARGUMENT IN SUPPORT OF APPELLANT'S PROPOSITIONS OF LAW

Automation concurs in the well-researched and compelling arguments set forth in Appellants' Merit Brief. Automation, as a small employer greatly who could be affected by the Eighth District's erroneous decision, would briefly add the following observations, concerns, and argument in further support of why the Consent Provision does not violate the constitutional provisions of due process, equal protection, or separation of powers.

Proposition of Law No. 1: PROHIBITING A CLAIMANT FROM DISMISSING THEIR COMPLAINT IN AN EMPLOYER'S APPEAL DOES NOT INVADE SEPARATION OF POWERS PROTECTIONS

The Eighth District erred by holding that the Consent Provision violated separation of power principles. Ohio workers' compensation laws arise entirely from laws enacted by the General Assembly pursuant to its explicitly granted authority by Ohio Const. Article II, Section 35. The creation of the workers' compensation system represented a bargain between employers and employees. *Arrington v. DaimlerChrysler Corp.*, 109 Ohio St.3d 539, 2006-Ohio-3257, ¶¶14-18 (Court held that the right to a jury trial in workers' compensation appeals is conferred by the General Assembly's enactment of the statute, not the constitution.) This Court has stated that it "consistently ha[s] held that the rights associated with the [workers' compensation] act are

solely those conferred by the General Assembly." *Arrington* at ¶26. In fact, the General Assembly's enactment of R.C. 4123.512 is the sole reason trial courts have jurisdiction to review "right to participate" issues in employers' and claimants' appeals. R.C. 4123.512(D); *Szekely v. Young*, 174 Ohio St. 213, 214 (1963). Ohio courts' authority in workers' compensation matters is entirely derived by statute. See, *Jenkins v. Keller*, 6 Ohio St.2d 122 (1966) (wherein this Court held, "The common pleas courts do not have inherent jurisdiction over workers' compensation claims. They only have such jurisdiction as is conferred upon them by R.C. 4123.51[2].")

Civil Rule 1(C) provides that the rules, "to the extent that they would by their nature be clearly inapplicable, shall not apply to procedure *** (8) in all other special statutory proceedings * * *." Workers' compensation appeals are "special statutory proceedings" under Rule 1(C). *Robinson v. B.O.C. Group, Gen. Motors Corp.*, 81 Ohio St.3d 361, 366 (1998). This Court must address whether this civil rule is "clearly inapplicable" to employers' R.C. 4123.512 appeals. According to the 1971 Staff Notes for Civil Rule 1, "the Civil Rules [are] applicable to special statutory proceedings adversary in nature unless there is a good and sufficient reason not to apply the rules." A rule is clearly inapplicable if its "use will alter the basic statutory purpose for which the specific procedure was originally provided in the special statutory action." *Price v. Westinghouse Elec. Corp.*, 70 Ohio St.2d 131, 133 (1982), quoting *State ex rel. Millington v. Weir*, 60 Ohio App.2d 348, 349 (10th Dist.1978).

Prior to the Consent Provisions enactment in 2006, the General Assembly, through R.C. 4123.512, had previously limited the application of the Civil Rules in workers' compensation by:

> (1) requiring a notice of appeal be filed to initiate the action [R.C. 4123.512(A) is contrary to Civ.R. 3(A)];
>
> (2) requiring the notice of appeal be filed in the county where the injury occurred or where the contract of employment was made, and then, if those special statutory provisions cannot be met should the venue rules of the Rules be followed [R.C.

4123.512(A) is contrary to Civ.R. 3(B)];

(3) requiring that an action commenced in the wrong county be transferred to a county having jurisdiction [R.C 4123.512(A) has its own separate provision for venue/jurisdiction transfer, which although similar to Civ.R. 3(C), does not permit a court to assess costs or reasonable attorney fees];

(4) denotes the parties as appellant, appellee, claimant and employer, not plaintiff and defendant [although the terms are used interchangeably, R.C. 4123.512(A), (B) & (D) differentiate the nomenclature from what is generally used under the Civil Rules],

(5) requires the claimant to file a petition alleging a right to participate – not a complaint – regardless of which party filed the notice of appeal [R.C 4123.512(A) contrary to Civ.R. 3(A)];

(6) requires the clerk of courts to provide notice to the Industrial Commission – a non-party [R.C. 4123.512(D) has no analogue under the Rules that requires a clerk to serve a non-party with notice of an appeal from an administrative decision];

(7) abates the requirement that a petition – the pleading equivalent of a complaint – be served with a summons [R.C. 4123.512(D) is contrary to Civ.R. 4];

(8) requires the clerk to serve the notice of appeal by certified mail [R.C. 4123.512(D) is contrary to Civ.R. 4.1, which permits a party to choose its method of service]; and,

(9) states that the Civil Rules do not apply until after the filing of the notice of appeal and a petition.

See, generally, *Moore v. Van Wert,* 34 Ohio App. 2d 187 (Restrictions on venue and jurisdiction in R.C. 4123.512 appeals were held to not run afoul of the Modern Courts Amendment.)

The Ninth District recently addressed the separation of powers issue in employers' workers' compensation appeals, holding:

{¶11} In *Hambuechen v. 221 Mkt. N., Inc.*, 143 Ohio St.3d 161, 2015-Ohio-756, 35 N.E.3d 502, the Ohio Supreme Court applied the civil rules regarding service to a special statutory proceeding because the General Assembly had not specified a different time limit. Id. at ¶ 7. In *O'Farrell v. Landis*, 135 Ohio St.3d 181, 2013-Ohio-93, 985 N.E.2d 458, it held that the civil rules for discovery did not apply to election contests because Section 3515.12 contained specific language regarding procedure in those cases and "the expeditious and special nature of the elections contest—does not admit the strict application of the rules of procedure." Id. at ¶ 9. In *State ex rel. Fowler v. Smith*, 68 Ohio St.3d 357, 1994 Ohio 302, 626 N.E.2d 950 (1994), the Supreme Court concluded that Rule 41(A) did not apply to parentage actions because Chapter 3111 required such

actions to result in a judgment or a compromise. Id. at 360-361. In *Ramsdell*, it rejected an argument that former Rule 6(E) could extend the time for filing a civil rights appeal, explaining that, if "the right to appeal is conferred by statute, the appeal can be perfected only in the mode prescribed by statute." 56 Ohio St. 3d at 27. In *Tower City Props. v. Cuyahoga County Bd. of Revision*, 49 Ohio St.3d 67, 551 N.E.2d 122 (1990), it held that a property owner could not dismiss its tax appeal under Rule 41(A)(1)(a) because the dismissal would "render ineffective the board of education's right to review of a board of revision's valuation" and, thus, altered "the basic statutory design set forth in the statutes regarding tax valuations[.]"Id. at 70. In *Anson v. Tyree*, 22 Ohio St.3d 223, 22 Ohio B. 372, 490 N.E.2d 593 (1986), it concluded that the methods of service outlined in Section 2703.20 did not conflict with Civil Rule 4.4(A) because actions under Section are special statutory proceedings. Id. at 225-226.

{¶12} In Section 4123.512(A), the General Assembly provided a specific method for perfecting workers' compensation appeals. Although subsection (D) indicates that further pleadings "shall be had in accordance with the Rules of Civil Procedure," it includes two exceptions, which are "that service of summons * * * shall not be required and * * * 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 * * *." R.C. 4123.512(D). Examining the way the Ohio Supreme Court has applied Civil Rule 1(C)(8), it appears that the Court has allowed procedural requirements that the General Assembly has specifically written into a statute to supersede the civil rules if the statute creates a special statutory proceeding. *O'Farrell*, 135 Ohio St. 3d 181, 2013-Ohio-93, at ¶ 9, 985 N.E.2d 458; *Ramsdell*, 56 Ohio St. 3d at 27; *Anson*, 22 Ohio St.3d at 226. **For this reason, we conclude that, because Section 4123.512(D) now specifically prohibits a workers' compensation plaintiff from dismissing his appeal without his employer's consent if the employer was the party who filed a notice of appeal, Civil Rule 41(A)(1)(a) no longer applies to such actions under Section 4123.512.**

* * *

{¶14} [Claimant] argues that the new exception in Section 4123.512(D) cannot be applied because it violates separation of powers, equal protection, and due process. **With respect to his separation of powers argument, in light of Civil Rule 1(C)(8)'s language that applies to special statutory proceedings, there is no conflict between Section 4123.512(D) and Civil Rule 41(A)(1)(a). See Ohio Constitution, Article IV, Section 5(B) ("The supreme court shall prescribe rules governing practice and procedure in all courts of the state, which rules shall not abridge, enlarge, or modify any substantive right. * * * All laws in conflict with such rules shall be of no further force or effect after such rules have taken effect.").* * *

Dillard (II), 2016-Ohio-529. (Emphasis added.)

The Consent Provision does not violate Section 5(B), Article IV of the Ohio Constitution. Instead, the amendment is a valid act of the General Assembly exercising its power under Article II, §35 which constitutionally grants workers' compensation authority exclusively to the

Legislative branch. The Consent Provision does not violate Ohio Const. Art. II, §32, nor any inherent "separation of powers" clause to the Constitution. The General Assembly holds broad control over workers' compensation matters and has Constitutional authority to expand, limit, and balance employers and employees access to the courts. The General Assembly acted constitutionally and within its power when enacting the Consent Provision.

Proposition of Law No. 2: PROHIBITING A CLAIMANT FROM DISMISSING THEIR COMPLAINT IN AN EMPLOYER'S APPEAL DOES NOT VIOLATE EQUAL PROTECTION GUARANTEES

The Eighth District also egregiously erred in invalidating the Consent Provision based upon proclaimed violations of the United States and Ohio Equal Protection Clauses. Inexplicably and without any justified legal support, the Eighth finds there is no rational basis for the General Assembly's enactment of an amendment which forecloses a claimant's right to take a voluntary dismissal in an administrative workers' compensation appeal initiated by an employer. Contrary to Eighth's decision, the amendment accomplishes the legitimate and important State objectives of protecting (1) the state insurance fund, (2) the state surplus funds, (3) and employers, in employer initiated appeals, from claimants whose right to participate is being judicially challenged. The Consent Provision easily satisfies a rational basis test. Compare, *Wickline v. Ohio Bell Telephone Co.,* 9 Ohio App.3d 32, 34-35 (10th Dist. 1983) (held there is no violation of equal protection for claimants to be awarded attorney's fees in a successful workers' compensation appeal, but not employers if their appeals were successful.)

The result of the Eighth District's decision is chilling, very harmful, and prejudicial to employers and the State of Ohio. The Consent Provision has, in fact, corrected an injustice. Before, on any appeal, the plaintiff could cause a dismissal under Civ.R. 41(A)(1)(a) without the employer's consent. Now, the party that filed the notice of appeal controls the ability to dismiss.

Both parties are treated equally based upon who filed the R.C. 4123.512(A) Notice of Appeal. If the Eighth's decision in *Ferguson* is upheld, employers will bear the burden of increased risk ratings and premiums for three years or longer[1] on claims where it contests right to participate issues. See, R.C. 4123.512(H), which indicates that employers are assessed costs during the pendency of their appeals. Employers, like Automation, will not only bear increased risk ratings and premiums, but can lose Group Rating benefits and discounts due to these contested claims. The Eighth District's decision also puts financial burden and risk on the State of Ohio's State Insurance and Surplus Funds (the "Funds"). If an employer appeals and the claimant prevails, there is little risk to the Funds. However, if an employer appeals and prevails, the *Ferguson* decision exposes the Funds to increased and extended liability. For one, the State Insurance Fund will have paid out benefits to the claimant which are not recoverable. Instead of one year, the Eighth District will expose the Funds to three years or more of liability for which there is no recovery. Two, the State Surplus Fund will have to reimburse the employer for the increased premiums. Again, *Ferguson*'s striking of the General Assembly's amendment increases the length, thus likely the amount, of financial exposure.

The Consent Provision accomplished the legitimate and important State objectives of protecting employers, protecting the State, protecting the Funds, and treats the parties equally by giving control over the use of Civ.R. 41 dismissals to the party that filed the Notice of Appeal. It serves the rational purpose to protect the state insurance and surplus funds and employers, in employer initiated appeals. It is constitutional.

[1] One year for date of initial filing to date of claimant's dismissal. Another year for the saving statute. And a third year for the matter to be reset for trial upon re-filing.

Proposition of Law No. 3: PROHIBITING A CLAIMANT FROM DISMISSING THEIR COMPLAINT IN AN EMPLOYER'S APPEAL DOES NOT VIOLATE DUE PROCESS GUARANTEES

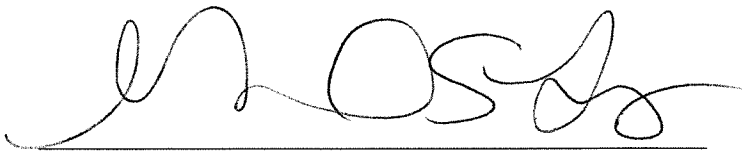
The Eighth District's decision on due process is unsupported. The Eighth District's decision glosses over or ignores relevant law and, instead, substitutes its own *ipse dixit* reasoning for the long-standing due process analysis developed by this Court and the United States Supreme Court. The right to due process "requires an opportunity granted at a meaningful time and in a meaningful manner." *Groch v. General Motors Corp.*, 117 Ohio St.3d 192, 2008-Ohio-546, ¶52. See, generally, *Mathews v. Eldridge*, 424 U.S. 319 (1976). As no fundamental right is involved, the rational basis test applies and the Consent Provision easily passes. Again, the General Assembly's has a legitimate interest in limiting claimants' access to Civ.R. 41(A)(1)(a) in employer-initiated workers' compensation appeals and balances the need for expeditious appeal for an employer, controlling the exposure of the BWC's state and surplus fund, while maintaining the right of an employee to be meaningfully heard. This is consistent with due process and the statutory scheme promulgated by the General Assembly to which this Court has long been deferential.

No plaintiff is denied due process by being required to present their case without filing a dismissal. The Consent Provision guarantees the claimant's due process by giving them the opportunity to be heard expeditiously, as is consistent with R.C. 4123.512(I). Id. (Workers' compensation actions are to be expedited and preferred above most actions.)

VI. CONCLUSION

For the reasons set forth above, as well as those in Appellant's Merit Brief, Automation respectfully urges this Court to reverse the Eighth District's decision.

Respectfully submitted,



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CERTIFICATE OF SERVICE

A copy of the foregoing Amicus Brief of Automation Tool and Die, Inc. has been served this 13th day of June, 2016 by ordinary mail, upon:

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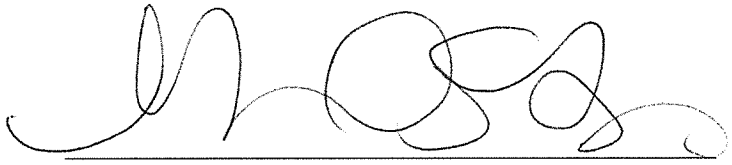

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