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IN THE SUPREME COURT OF OHIO

SHANNON FERGUSON **Plaintiff-Appellee,** **vs.** **STATE OF OHIO** **Defendant-Appellant.**	**Case No. 2015-1975** **Appeal from the Cuyahoga County Court of Appeals, Eighth Appellate District Court of Appeals Case No. CA-15-102553**

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INTRODUCTION

This Court has repeatedly held that an injured worker is treated like a plaintiff in an appeal filed under R.C. 4123.512, and is afforded all the rights that plaintiffs have under the civil rules of procedure– which includes the right to voluntarily dismiss their complaint without prejudice, under Civ. R. 41(A)(1)(a) – because:

- the injured worker has to file the complaint;
- the injured worker has to re-litigate all of the facts in a trial de novo; and
- the injured has the burden of proof.

Kaiser v. Ameritemps, Inc., 84 Ohio St.3d 411, 704 N.E.2d 1212 (1999); *Robinson v. B.O.C. Grp.*, 81 Ohio St.3d 361, 691 N.E.2d 667 (1998); *Fowee v. Wesley Hall, Inc.*, 108 Ohio St.3d 533, 2006-Ohio-1712, 844 N.E.2d 1193; *Arth Brass & Aluminum Castings, Inc. v. Conrad*, 104 Ohio St.3d 547, 2004-Ohio-6888, 820 N.E.2d 900.

This Court has also repeatedly rejected the argument that an employer is harmed by an injured workers' use of Civ. R. 41(A) because:

- any benefits paid during the interim are repaid to the employer from the Surplus Fund if the injured worker does not prevail;
- the risk is not assessed unless the injured worker prevails; and
- the savings statute prevents an injured worker from perpetually delaying their claim.

Id.

In 2006 the General Assembly attempted to override this Court's rulings with Senate Bill 7's amendment to R.C. 4123.512(D), which provides that an injured worker cannot voluntarily dismiss their complaint under Civ. R. 41(A)(1)(a) without the employer's consent, if the employer initiated appeal. The issue now is whether SB 7's amendment is unconstitutional,

given that this Court has previously held that 1) Civ. R. 41(A)(1)(a) and the civil rules are applicable to workers' compensation appeals because the injured worker has to file the complaint and carries the burden of reproving their case in a trial de novo; 2) the exceptions listed in Civ. R. 1(C)(8) do not apply to workers' compensation appeals; 3) R.C. 4123.512(D) is a procedural statute – not a substantive law; and 4) the employer is not harmed by an injured workers' use of Civ. R. 41(A)(1)(a).

STATEMENT OF THE CASE

A. Overview of Workers' Compensation System.

In understanding why injured workers are treated like plaintiffs in a R.C. 4123.512 appeal, and afforded all of the rights that plaintiffs have under the civil rules of procedure, it is important to consider the history and purpose behind Ohio's workers' compensation system.

Section 35, Article II of the Ohio Constitution establishes the workers' compensation system in Ohio, stating, in part:

> For the purpose of providing compensation to workmen and their dependents, for death, injuries or occupational disease, occasioned in the course of such workmen's employment, laws may be passed establishing a state fund to be created by compulsory contribution thereto by employers, and administered by the state, determining the terms and conditions upon which payment shall be made therefrom… Laws may be passed establishing a board which may be empowered to classify all occupations, according to their degree of hazard, to fix rates of contribution to such fund according to such classification, and to collect, administer and distribute such fund, and to determine all right of claimants thereto…

Created in 1913, Ohio's workers' compensation system is a statutory agreement between employers and injured workers. *See Ferguson v. State of Ohio*, Cuyahoga Court of Common Pleas, Case No. CV-810584, Decision Entry * 2-3; *see also* Fulton, Ohio Workers' Compensation Law, 2nd Edition, Sections 2, 12. Its fundamental purpose is to protect injured workers and employers from losses that result from workplace accidents, compensate injured

workers and their beneficiaries, promote workplace safety and accident prevention, and ensure that each employer participating in the workers' compensation system pays an amount in premiums that reasonably corresponds with the risk that employer presents to the system. *See State ex rel. Crystal Tissue Co. v. Indus. Comm. of Ohio*, 129 Ohio St. 320, 322, 195 N.E. 546 (1935); *State ex rel. Powhatan Mining Co. v. Indus. Comm. of Ohio*, 125 Ohio St. 272, 275-277, 11 Ohio Law Abs. 608, 181 N.E. 99 (1932); *State ex rel. Superior Foundry, Inc. v. Indus. Comm. of Ohio*, 168 Ohio St. 537, 542, 156 N.E.2d 742 (1959).

Prior to its implementation, an injured worker could sue its employer for negligence, but was required to present proof of negligence to recover. *See* Fulton, Ohio Workers' Compensation Law, 2nd Edition; *see also Ferguson v. State of Ohio*, Cuyahoga Court of Common Pleas, Case No. CV-810584. Employers were also faced with potentially large judgments if a worker was seriously injured.

With the creation of the workers' compensation scheme, injured workers relinquished their right to sue their employer for negligence in return for a "no fault" system, which allowed recovery for injuries sustained in the course and scope of employment. *Id*. The amount that a worker could recover for their injuries was also limited to certain benefits. *Id*. Unlike with a tort claim where the goal is to restore to the claimant what has been lost, an injured worker is only provided the benefits that are necessary to shield them from destitution. *Indus. Comm. v. Drake*, 103 Ohio St. 628, 134 N.E. 465 (1921). An injured worker, for instance, is not entitled to any damages for pain or suffering, and can only receive a limited amount in lost wages. *See* Fulton, Sections 2, 12; *see also Ferguson v. State of Ohio*, Cuyahoga Court of Common Pleas, Case No. CV-810584.

Employers have two options for obtaining workers' compensation coverage. *Id*. The most common form of coverage is through the State Fund, which is essentially insurance coverage for claims. For State Fund coverage, an employer has to pay premiums. *Id*. Those premiums are based upon the nature of the work performed by the employees, and the employer's "experience" rating. *Id*. The State Fund determines an employer's "experience" rating by looking at the type of claims filed against the employer, and the employer's safety record. *Id*. An employer can receive a discount if it has a limited number of claims and a good safety record. *Id*. An employer can be charged more than the standard rate if it has multiple or serious claims, or a poor safety record. The experience period for each claim is 5 years for most state fund insured employers. *Id*.

The other form of coverage is called Self-Insurance. *Id*. Under this coverage, an employer must demonstrate that it can pay the claims that occur against it, due to its size and financial resources. *Id*. A Self-Insured employer pays all compensation directly for the life of the claim, and there are no "experience" periods. *Id*.

The State, however, cannot charge a payment of medical benefits to an employer's risk account until there is a final determination of the claimant's right to participate in the State fund. R.C. 4123.512(F); *Kaiser*, 84 Ohio St.3d 411; *Robinson*, 81 Ohio St.3d 361; *Fowee*, 108 Ohio St.3d 533, 2006-Ohio-1712; *Arth Brass & Aluminum Castings, Inc.*, 104 Ohio St.3d 547, 2004-Ohio-6888; *See also State ex rel. Sysco Food Servs. v. Indus. Comm'n,* 89 Ohio St.3d 612, 2000-Ohio-1, 734 N.E.2d 361 (2000)(holding that the right to reimbursement satisfies the right to remedy guaranteed by Section 16, Article I, of the Ohio Constitution, and does not require employers to pay benefits for conditions which are not work-related). The State must also reimburse an employer for an increase in premiums that occurred as a result of an improper charge to a risk account. *Id*. Thus, if a claim is initially allowed administratively, but later denied

on appeal in a final determination, the employer will be repaid from the Surplus Fund for any costs that the employer incurred on the claim. *Id*. This includes costs related to benefit payments and increased experience rates. *Id*.

Contested claims are initially adjudicated through the Industrial Commission's administrative process. The first hearing occurs before the District Hearing Officers. R.C. 4123.511; *see also* Fulton, Section 4.5. The parties can appeal that decision to the Staff Hearing Officer. *Id*. A third appeal may be made with the Industrial Commission, but those appeals are discretionary and subject to acceptance by the Industrial Commission. *Id*.

There is an exception, however, where the issues only involve whether the worker was injured in the course and scope of their employment, and not the extent of their disability. *See* Fulton, Section 12.8. An employer or injured worker (but not the administrator) can appeal these issues to the court of common pleas, pursuant to R.C. 4123.512. *Id* at Section 12.3; *see also* *Mims v. Lennox-Haldeman Co.*, 8 Ohio App. 2d 266, 199 N.E. 2d 20 (1964).

B. Overview of R.C. 4123.512.

1. History of the workers' compensation judicial appeal.

The original workers' compensation law of 1913 provided for a right of a judicial appeal from any decision concerning whether the employee was entitled to participate in the fund. The injured worker was entitled to a de novo trial review, in accordance with the rules of civil procedure. *See* 102 Ohio Laws 524. The injured worker was also the only party that could file a judicial appeal.

In 1921, the General Assembly restricted the evidence admissible in a judicial proceeding to the records contained in the Commission, and later to a rehearing on the administrative transcript. *See* 109 Ohio Laws 291. In 1955, the General Assembly abandoned the rehearing

procedure and reinstated the right to a trial de novo in a judicial appeal. At this time, the General Assembly also gave the employer a right to file for a judicial appeal. *See* 126 Ohio Laws 1015.

R.C. 4123.512 now provides that the injured worker or the employer can appeal a decision to a court of common pleas, where the issues only concern the allowance of the claim or an additional allowance of a condition.[1] Any other issues, such the extent of disability, benefits, compensation, and coverage rates are within the sole jurisdiction of the Industrial Commission, and can only be challenged by means of a mandamus action.

2. Although the employer may invoke jurisdiction under R.C. 4123.512 through filing a Notice of Appeal, the action belongs to the claimant.

To begin the appeal process under R.C. 4123.512, either the claimant or the employer must file a Notice of Appeal within 60 days from the final order of the Industrial Commission. The Notice of Appeal, however, only vests jurisdiction in the court of common pleas. Regardless of whether the injured worker or the employer filed the notice, the injured worker must still file a complaint, which must state why the injured worker is entitled to participate or continue to participate in the fund. Moreover, even if the employer initiated the appeal, the injured worker still has the burden of reproving their case, without any reference to the administrative hearings:

> [Where] an employer appeals an unfavorable administrative decision to the court the claimant must, in effect, re-establish his workers' compensation claim to the satisfaction of the common pleas court even though the claimant has previously satisfied a similar burden at the administrative level."

Zuljevic v. Midland-Ross Corp., 62 Ohio St. 2d 116, 118, 403 N.E.2d 986 (1980).

For these reasons, this Court has held that an action under R.C. 4123.512 belongs to the injured worker once the appeal is filed, even if the employer initiated the appeal.

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[1] Injured workers are also free to join additional employers as necessary parties, even after the limitations period has expired, since the issue on appeal is solely the right to participate in the state fund, and not the employer's duty to provide compensation. *State ex rel. Burnett v. Industrial Commission*, 6 Ohio St. 3d 266, 452 N.E.2d 1341 (1983).

> Regardless of who files the notice of appeal, the action belongs to the claimant. It is the claimant who must file a petition 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. It is the claimant who must plead all "the jurisdictional facts, i.e., injury in the course of and arising out of employment, disability, causal relationship, the filing of a claim, the required administrative processing terminating in an appealable order and the venue, situs of the injury or contract." It is also the claimant's burden to prove all these facts.

Robinson, 81 Ohio St.3d 361, 336.

Thus, although the employer may trigger jurisdiction to hear an appeal, the appeal belongs to the injured worker, who has the burden of filing the complaint and reproving their case. *Id*.

3. Revised Code 4123.512 is unlike other administrative appeals and statutory actions; it is not considered a special proceeding under Civ. R. 1(C)(8).

Normally, Civ. R. 1(C)(8) governs whether rules of civil procedure apply in a statutory proceeding, which states that the Rules of Civil Procedure apply unless clearly inapplicable because their use would undermine the basic statutory purpose of the specific procedure. *Price v. Westinghouse Elec. Corp.*, 70 Ohio St.2d 131, 435 N.E.2d 1114 (1982). This Court, however, has deemed an appeal under R.C. 4123.512 as being "unique" and unlike other administrative appeals in that it "is not a record review or an error proceeding," but instead "necessitates a new trial, without reference to the administrative claim file or consideration of the results of the administrative hearings:"

> R.C. 4123.519 [now 4123.512] contemplates not only a full and complete de novo determination of both facts and law but also contemplates that such determination shall be predicated not upon the evidence adduced before the Industrial Commission but, instead, upon evidence adduced before the common pleas court as in any civil action, which may involve a jury trial if demanded. The proceedings are de novo both in the sense of receipt of evidence and determination. The common pleas court, or the jury if it be the factual determiner, makes the determination de novo without consideration of, and without deference to, the decision of the Industrial Commission. R.C. 4123.519 [now 4123.512] contemplates a full de novo hearing and determination. * * *

> ***With respect to an R.C. 4123.519 [now 4123.512] appeal, there are no words such as review, affirm, modify, or reverse as are contained in R.C. 2505.02, nor even the word affirm or the words reverse, vacate, or modify as set forth in R.C. 119.12 with respect to administrative appeals generally. Rather, the express language of R.C. 4123.519 is that contained in division (C) [now section (D) of R.C. 4123.512] that the court or jury 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 (citations omitted).

Robinson, 81 Ohio St.3d 361 at 368 (quoting *Marcum v. Barry* (1991), 76 Ohio App. 3d 536, 539-540, 602 N.E.2d 419, 421-422 (1991).

This is important to remember when comparing an appeal under R.C. 4123.512 to other administrative appeals, where the trial court merely reviews the administrative record. There is a heightened burden on the injured worker, who has to re-litigate all of the facts and reprove that they are entitled to participate in the workers' compensation system, without any reference to the administrative record. *Id.* And unlike other administrative error proceedings, there is also a requirement that the Civil Rules of Procedure apply once the injured worker files their complaint. *Id.*

For these reasons, this Court has held that an appeal under R.C. 4123.512 is not a special proceeding under Civ. R. 1(8) once the injured worker files their complaint. *Id; see also Kaiser* 84 Ohio St.3d 411. Rather, an injured worker is treated as a plaintiff, and is afforded all of the same privileges that a plaintiff has under the Rules of Civil Procedure. *Id.*

C. This Court has held that Civ. R. 41(A) applies to workers' compensation appeals initiated by the employer.

Civil Rule 41(A)(1)(a) provides:

> [A] plaintiff, without order of court, may dismiss all claims asserted by that plaintiff against a defendant by * * * 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 * *

Under Civ. R. 41(A)(1)(a), a plaintiff has an absolute right, regardless of motive, to terminate their action voluntarily and unilaterally at any time prior to the commencement of trial. No court approval is necessary. Nor is consent required from the defendant.

In a workers' compensation appeal, a voluntary dismissal under Civ. R. 41(A)(1)(a) does not dismiss the notice of appeal, as that would divest the court jurisdiction. Rather, voluntary dismissals only relate to the complaint filed by the injured worker. It does not affect the employer's notice of appeal, which remains pending until the injured worker refiles their complaint. *Kaiser,* 84 Ohio St.3d 411, 415.

Various challenges have been raised concerning whether an injured worker could dismiss their complaint, pursuant to Civ. R. 41(A)(1)(a), when the employer initiated the appeal. In response to this challenge, this Court has routinely held that a workers' compensation claimant is afforded the privileges provided to plaintiffs under the civil rules, which includes the right to use Civ. R. 41(A)(1)(a), because: 1) the claimant still has to file the complaint; 2) the claimant still has the heavier burden of going forward with the action; and 3) the claimant must still prove their right to participate in the workers' compensation fund in a trial de novo, without any consideration of the prior administrative proceeding. *Kaiser*, 84 Ohio St.3d 411; *Robinson*, 81 Ohio St.3d 361; *Fowee*, 108 Ohio St.3d 533, 2006-Ohio-1712; *Arth Brass & Aluminum Castings, Inc.*, 104 Ohio St.3d 547, 2004-Ohio-6888. Thus, even though the employer created jurisdiction by filing a notice of appeal, the appeal belongs to the injured worker who must file a complaint and carry the heavier burden of reproving their case in a de novo trial. *Id*.

In making this determination, this Court considered the argument that granting an injured worker access to Civ. R. 41(A)(1)(a) would unfairly burden employers because an injured

worker could voluntarily dismiss their claim while continuing to receive benefits for an additional year, pursuant to the savings statute. This Court has repeatedly rejected this argument:

> [Employer] overlooks R.C. 4123.512(H), which guarantees that if, in a final judicial action, it is determined that the payments of compensation or benefits or both paid to a claimant should not have been made, then the amounts will not be charged to the employer's experience, or in event of a self-insured employer, the self-insured employer may deduct the amounts of compensation paid on its statutory reporting forms. Thus, the employer ultimately suffers no prejudice, as any illegitimate benefits paid during the interim between the original filing and the re-filing of a voluntarily dismissed action are repaid if the employee's claim does not prevail.
>
> Furthermore, an employee cannot perpetually delay re-filing after a voluntary dismissal because the savings statute, R.C. 2305.19, precludes claims re-filed beyond a year from the time of the dismissal of the original complaint. *Lewis v. Connor* (1985), 21 Ohio St. 3d 1, 21 Ohio B. Rep. 266, 487 N.E.2d 285; *Ross v. Wolf Envelope* Co., 1990 Ohio App. LEXIS 3179 (Aug. 2, 1990), Cuyahoga App. No. 57015, unreported, 1990 WL 109082. If an employee does not refile his complaint within a year's time, he can no longer prove his entitlement to participate in the workers' compensation system. *Rice v. Stouffer Foods* Corp., 1997 Ohio App. LEXIS 4872 (Nov. 6, 1997), Cuyahoga App. No. 72515, unreported, 1997 WL 691156. The voluntary dismissal of the claimant's complaint does not affect the employer's notice of appeal, which remains pending until the refiling of claimant's complaint.
>
> Pursuant to *Robinson*, a claimant is considered the plaintiff regardless of who brings the appeal under R.C. 4123.512 and can dismiss the complaint pursuant to Civ.R. 41(A)(2). Likewise, we believe in this case that a claimant, as the plaintiff, may also voluntarily dismiss his complaint under Civ.R. 41(A)(1)(a). It would be inconsistent to imply that a workers' compensation claimant is a plaintiff for purposes of Civ.R. 41(A)(2) but not a plaintiff under Civ.R. 41(A)(1)(a). *See, e.g., Robinson*, 81 Ohio St. 3d at 367, 691 N.E.2d at 671-672. As plaintiff, a claimant under R.C. 4123.512 should be afforded all of the rights provided to him or her by the Rules of Civil Procedure.

Kaiser, 84 Ohio St.3d 411, 415-416.

> As noted in *Robinson*, "[r]egardless of who files the notice of appeal, the action belongs to the claimant." 81 Ohio St.3d at 366, 691 N.E.2d 667. The claimant has the burden of going forward with evidence and proof to the satisfaction of the common pleas court, despite already having satisfied a similar burden before the Industrial Commission. *Id*. Given the definitional analyses of R.C. 2305.17 and 2305.19, and recognizing that in all other aspects of the case the employee-claimant is considered the plaintiff, we hold that for the limited purposes of R.C. 2305.17 and 2305.19, the employee-claimant commences the action.

***

> Today's holding should come as no surprise. Our opinions have consistently held that employee-claimant, despite having proven her claim before the Industrial Commission, continues to carry the burden of initially filing the petition and proving her cause of action in what is essentially a trial de novo. *Youghiogheny & Ohio Coal Co. v. Mayfield* (1984), 11 Ohio St.3d 70, 71, 11 OBR 315, 464 N.E.2d 133. This remains true even when the employer seeks the appeal. As a result of the adjudication structure in these cases, some of the privileges of plaintiff status are conferred on the employee-claimant. This decision makes clear that with those privileges come some of the plaintiff's responsibilities as well.

Fowee, 108 Ohio St.3d 533, 538.

> R.C. 4123.512(H) clearly requires that the decision to impose a charge on experience must follow "a final administrative or judicial action." R.C. 4123.512(H) does not open the door to an immediate charge to an employer's risk account; to the contrary, it slams the door shut for such a charge until a final determination.

Arth Brass & Aluminum Castings, 104 Ohio. St.3d 547, 554.

Thus, an employer's concerns over voluntary dismissals unduly burdening them or being used to arbitrarily delay the proceedings are non-existent under Civ. 41(A)(1)(a). *Kaiser*, 84 Ohio St.3d 411; *Robinson*, 81 Ohio St.3d 361; *Fowee*, 108 Ohio St.3d 533, 2006-Ohio-1712; *Arth Brass & Aluminum Castings, Inc.*, 104 Ohio St.3d 547, 2004-Ohio-6888. An employer does not suffer any harm under Civ. R. 41(A)(1)(a) because there is no risk. *Id*. An employer will be able to have any amount paid "written off," will not have the medical costs associated with the alleged condition assessed to its risk unless it loses at trial, and will be able to recoup all of the money paid out from the Surplus Fund if it is determined that the Industrial Commission improperly awarded the claimant benefits. *Id.* The savings statute additionally alleviates any concerns over a claimant perpetually prolonging the proceedings because it precludes claims re-filed after a year from the time of the dismissal of the original complaint. *Id*. If a claimant does not re-file within a year, they can no longer prove their entitlement to participate in the workers' compensation system. *Id*.

D. Senate Bill 7's amendment to R.C. 4123.512 removed a claimant's right to Civ. R. 41(A)(1)(a) where the employer initiated the appeal.

In 2006, the Ohio General Assembly amended R.C. 4123.512(D) through Senate Bill 7, and added the provision stating that an injured worker cannot dismiss their complaint, pursuant to Civ. R. 41(A)(1)(a), without consent from the employer, if the employer initiated the appeal. The amended version of R.C. 4123.512(D) now provides:

> 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.

There is no codified or uncodified language in statute that states the purpose behind SB 7's amendment to R.C. 4123.512(D). Moreover, the statute still provides that all of the Rules of Civil Procedure apply, other than the rules for serving the summons and petition. The statute also still provides that the injured worker has to file a complaint, and has the burden of re-litigating and proving their case in a de novo trial, regardless of the fact that the injured worker already proved their case administratively.

E. The Cuyahoga Court of Common Pleas and the Eighth District Court of Appeals unanimously held that SB 7's amendment is unconstitutional.

This declaratory action originally stems from a workers' compensation claim that Ferguson filed in *Shannon Ferguson v. Ford Motor Co. et al.*, CV 12 782018 (consolidated with CV 11-766230). Ferguson sustained injuries arising out of the course and scope of his employment with his employer, Ford Motor Company. The claim was initially allowed for injuries described as a left shoulder sprain/strain. It was subsequently allowed for injuries described as a left rotator cuff tear. Ford Motor Company appealed the industrial commission

decision granting the left shoulder sprain/strain to the court of common pleas and appealed the industrial commission decision granting the left rotator cuff tear to the court of common pleas. The appeals were then consolidated.

In *Ferguson v. Ford Motor Co*., Ferguson requested a voluntary dismissal without prejudice, pursuant to Civ. R. 41(A)(2), because his expert was unavailable and he needed to undergo surgery, which would have placed the parties in a better position to settle. Ferguson additionally requested leave to amend the complaint to include a declaratory judgment action seeking to find R.C. 4123.512(D) unconstitutional. In its discretion, the trial court denied Fergusons' requests.

Ferguson then filed a separate declaratory judgment action against the State of Ohio asking the court to find the SB 7 amendment to R.C. 4123.512(D) unconstitutional because: 1) it conflicts with Civil Rule of Procedure 41(A)(1) and improperly intrudes into the Ohio Supreme Court's power to govern courtroom procedure; 2) it violates the equal protection clause contained in Section 2, Article I of the Ohio Constitution; and 3) deprives the plaintiff due process.

On December 31, 2014, following cross motions for summary judgment, the trial court granted declaratory judgment in favor of Ferguson and found the SB 7 amendment to R.C. 4123.512(D) unconstitutional on all three grounds. *Ferguson v. State of Ohio*, Cuyahoga Court of Common Pleas, Case No. CV-810584. In the trial court opinion, Judge Robert C. McClelland relied heavily on this Court's previous holding that "as plaintiff, a claimant under R.C. 4123.512 should be afforded all of the rights provided to him or her by the Rules of Civil Procedure." In reaching his decision that SB 7 violated the doctrines of due process and equal protection, Judge McClelland found that the amendment was arbitrary on its face, and that there was no rational

purpose in singling out a workers' compensation plaintiff from any other kind of plaintiff, and removing their right to Civ. R. 41(A)(a)(1). Judge McClelland noted that the State's reasoning behind SB 7, which is to prevent the continued payment of benefits when a claimant voluntarily dismisses a complaint, involves an issue distinctly different from and not within the statutory purpose R.C. 4123.512, which is strictly limited to determining whether the claimant suffered an injury in the course and scope of his employment:

> The appeal is limited solely to the right to participate in the Workers' Compensation Act. Any consideration of benefits is within the exclusive jurisdiction of Industrial Commission of Ohio. Any dispute related to those benefits can only be challenged by a filing of a Writ of Mandamus in Franklin County. The reason for the amendment to R.C. 4123.512 in 2006 was to prevent the ability to continue to seek benefits during the potential one-year hiatus from litigation available by means of the savings statute. There already is a remedy with regard to any challenge to benefits. Nothing prevents challenges to those benefits during the pendency of the appeal to the Common Pleas Court and in the event the employer is ultimately successful in having the claim denied at trial, recovery of the benefits paid is available, *State ex rel. Sysco Food Services v. Industrial Commission*, 89 Ohio St. 3d, 612, 200 Ohio 1, 734 NE2d 361.

Judge McClelland further held that since this Court has already determined that the Ohio Rules of Civil procedure apply once a claimant file their complaint, the General Assembly cannot override the application of the civil rules. Allowing otherwise, "would essentially leave the Courts of Common Pleas in a procedural vacuum insofar as appeals under [R.C. 4123.512] are concerned." *Id* at 6 (quoting *Price,* 70 Ohio St. 2d 131).

The State subsequently appealed this decision, but the Eighth District Court of Appeals unanimously affirmed the trial court's decision on all three constitutional grounds. *Ferguson v. State*, 2015-Ohio-4499 (8th Dist.)("App. Op."). The Eighth District held that since an injured worker has the status of a plaintiff like any other plaintiff in civil case, there is no rational purpose or valid state interest in restricting injured workers of their rights under the civil rules merely because the injured workers successfully proved their claim administratively. The Eighth

District noted that even though the State developed the statutory scheme for the workers' compensation system, employees gave up substantial litigation rights to participate in the system, and that "the employer ultimately suffers no prejudice, as any illegitimate benefits paid during the interim between the original filing and the refiling of a voluntary dismissed action are repaid if the employee's claim does not prevail." App. Op. ¶¶28-30 (quoting *Kaiser*, 84 Ohio St.3d 411, 415).

LAW AND ARGUMENT

Proposition of Law: The SB 7's amendment to R.C. 4123.512(D) is unconstitutional because it conflicts with Civil Rule of Procedure 41(A)(1)(a) and improperly intrudes into the Ohio Supreme Court's power to govern courtroom procedure.

Post World War II America witnessed an explosion in litigation, glutting the court system and grinding its administration to a halt. *See* Ohio Constitution, Article IV, cmt. 1990. A haphazard amalgam of common law, chancery procedure and statutory legislation dictated court room procedure. *Id*. As a result, the Ohio Constitution was amended in 1968 with Article IV, Section 5(B), which provides in relevant part:

> 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.

Article IV, which is commonly referred to as the Modern Courts Amendment, centralized and simplified this arcane system. *See* Ohio Constitution, Article IV, cmt. 1990. It placed the rules governing practice and procedure firmly within the Ohio Supreme Court's control. Under the Modern Courts Amendment, this Court has the power to draft rules governing procedures in Ohio's Courts, and the General Assembly is prohibited from enacting conflicting statutes that effect practice and procedure in Ohio courts. Thus, where rules and statutes conflict, rules will control procedural matters and the statute will control matters of substantive law. *State ex rel.*

Sapp v. Franklin Cty. Court of Appeals, 118 Ohio St.3d 368, 2008-Ohio-2637, ¶ 28, 889 N.E.2d 500.

This Court and intermediate appellate courts of Ohio have not hesitated to strike down non-substantive statutory provisions as being unconstitutional when it conflicts with procedural rules. *See e.g*. *Dir. of Highways v. Kleines*, 38 Ohio St.2d 317, 320, 313 N.E.2d 370 (1974)(striking down provisions in R.C 4419.02 and R.C 163.09(E) that required consent to bifurcation in a special proceeding action, because it conflicted with Civ. R. 42(A); *Rockey v. 84 Lumber* Co., 66 Ohio St. 3d 221, 225, 611 N.E.2d 789 (1993)(holding that R.C. 2309.01, which precluded a tort action plaintiff from specifying in the complaint the amount of damages sought, was unconstitutional as it conflicted with Civ. R. 8(A)'s requirement that the complaint contain "a demand for judgment for the relief to which [the plaintiff] deems himself entitled."); *see also Alexander v. Buckeye Pipe Line Co*., 49 Ohio St.2d 158, 159-160, 359 N.E.2d 702 (1977); *State ex rel. Botkins v. Laws*, 69 Ohio St.3d 383, 632 N.E.2d 897 (1994); *In re Coy*, 67 Ohio St.3d 215, 616 N.E.2d 1105 (1993).

For instance, in *Briggs v. Fedex Ground Package System, Inc*., 157 Ohio App.3d 643, 647, the Tenth District Court of Appeals held that a local rule that required a plaintiff to submit voluntary dismissals to a bailiff before filing conflicted with a plaintiff's right under Civ. R. 41(A)(1)(a) to terminate their case without the trial court's intervention, and thus could not be followed:

> While we recognize a valid administrative purpose behind Loc. R. 22.04, we nonetheless are compelled to conclude that Loc. R. 22.04 is inconsistent with Civ. R. 41(A)(1). By requiring that a Civ. R. 41(A)(1) notice of dismissal be presented to the court's bailiff prior to filing, Loc. R. 22.04 undermines a plaintiff's unilateral authority to dismiss a case under Civ. R. 41(A)(1). In effect, it adds a condition to Civ. R. 41(A)(1) and requires court review, if not approval.

Like in *Briggs*, where the requirement that the bailiff approve a voluntary dismissal prior to filing conflicts with Civ. R. 41(A)(1)(a), SB 7's requirement that an employer consent to a voluntary dismissal before a plaintiff can file it also conflicts with Civ. R. 41(A)(1)(a). As such, SB 7's amendment to R.C. 4123.512(D) is unconstitutional.

Nevertheless, the State raises two flawed arguments as to why it believes SB 7 is constitutional: 1) R.C. 4123.512(D) does not conflict with Civ. R. 41(A)(1)(a) because it is considered a special statutory proceeding under Civ. R. 1(C)(8), and Civ. R. 41(A)(1)(a) is clearly inapplicable to an appeal under R.C. 4123.512; and 2) R.C. 4123.512(D) is a substantive law, pursuant *Havel v. Villa St. Joseph*, 131 Ohio St.3d 235, 2012 Ohio 552, 963 N.E.2d 1270.

A. SB 7's amendment to R.C. 4123.512(D) conflicts with Civ. R. 41(A)(1)(a).

Civ. R. 1 provides the following:

> (A)Applicability. These rules prescribe the procedure to be followed in all courts of this state in the exercise of civil jurisdiction at law or in equity, with the exceptions stated in division (C) of this rule…
>
> (C) Exceptions. These rules, to the extent that they would by their nature be clearly inapplicable, shall not apply to procedure (1) upon appeal to review any judgment, order or ruling, (2) in the appropriation of property, (3) in forcible entry and detainer, (4) in small claims matters under Chapter 1925 of the Revised Code, (5) in uniform reciprocal support actions, (6) in the commitment of the mentally ill, (7) in adoption proceedings under Chapter 3107 of the Revised Code, (8) in all other special statutory proceedings; provided, that where any statute provides for procedure by a general or specific reference to all the statutes governing procedure in civil actions such procedure shall be in accordance with these rules.

As discussed earlier, this Court has already held that appeals under R.C. 4123.512 are not considered a special proceeding under Civ. R. 1(C)(8), since the injured worker is treated as a plaintiff, and is afforded all of the rights a plaintiff has under the civil rules. *See Kaiser* 84 Ohio St. 3d 411, 414. The State, however, argues that this Court's previous decisions were wrong, and that R.C. 4123.512 should be considered a special statutory proceeding under Civ. R. 1(C). The

State further argues that R.C. 4123.512(D) does not conflict with Civ. R. 41(A)(1)(a) because the civil rule is clearly inapplicable and contrary to the purpose of R.C. 4123.512(D).

Assuming *arguendo* that this Court accepts the State's argument and overrules its previous decisions, SB 7's amendment is still unconstitutional under Civ. R. 1(C).
As amended on July 1, 1971, Civ. R. 1(C) states a rule of inclusion by which the Civil Rules are deemed applicable to special statutory proceedings unless they would by their nature be "clearly inapplicable" –i.e. "alter the basic statutory purpose for which the specific procedure was originally provided in the special statutory action." *Cuyahoga Metro. Hous. Auth. v. Jackson*, 67 Ohio St.2d 129, 423 N.E.2d 177 (1981); *Price,* 70 Ohio St.2d 131, 132; *Robinson,* 81 Ohio St.3d 361; *See also* Staff Notes (1971) to Civ. R. 1(C)("..the Civil Rules will be applicable to special statutory proceedings adversary in nature unless there is a good and sufficient reason not to apply the rules.").

Prior to being amended on July 1, 1971, former Civ. R. 1(C) provided a much narrower application of the Civil Rules to special statutory proceedings. *See* Staff Notes (1971) to Civ. R. 1(C). Former Civ. R. 1(C) provided an exception to the Civil Rules if a "specific procedure is provided by law." *Id*. Thus, under the former version of Civ. R. 1(C), the General Assembly could override the application a civil rule in a special statutory proceeding by simply enacting a statute that provided the procedure - for whatever reason – which is exactly what the General Assembly did here with SB 7's amendment.

But, as noted in 1971 Staff Notes, this language was deleted because it allowed the legislature to enact laws that were difficult for practitioners, overly complicated, and inconsistent with the Court's rules. It prevented the broad application of the Civil Rules, which have been developed over the past hundred-years to simplify procedure. The former permissive language

Civ. R. 1(C) also permitted the enactment of more special proceedings in the future, which created additional pitfalls in procedure and further limited the application of the Civil Rules.

It is worth looking at Staff Note 1971 in full detail, as it applies directly to the issue of whether the General Assembly can override a civil rule in a special proceeding where the civil rule is clearly applicable to the proceeding:

> Rule 1(C), governing exceptions concerning application of the Civil Rules to special statutory proceedings, has been amended. Although the amendment involves merely the deletion of the words "specific procedure is provided by law" from the first sentence of the rule, nonetheless the amendment by deletion effects a substantial change in the application of the Civil Rules to special statutory proceedings. In short, the amendment by deletion permits a much broader application of the Civil Rules to special statutory proceedings.
>
> Prior to its amendment Rule 1(C) had provided that the Civil Rules would or would not apply to special statutory proceedings depending upon three considerations. First, before amendment, Rule 1(C) had provided that the Civil Rules would not apply to a special statutory proceeding "to the extent that specific procedure is provided by law....." The amendment deletes the quoted language. Second, prior to amendment, Rule 1(C) had provided that the Civil Rules would not apply to a special statutory proceeding "to the extent that they would by their nature be clearly inapplicable....." The amendment does not affect the quoted language. Third, before amendment, Rule 1(C) provided that the Civil Rules would apply to a special statutory proceeding when "any statute… provides for procedure by a general or specific reference to the statutes governing procedure in civil actions such procedure shall be in accordance with these rules." The quoted reference back language is necessary because the Civil Rules have superseded "the statutes governing procedure in civil actions....." The amendment of Rule 1(C) does not affect the quoted language.
>
> The language of Rule 1(C) to the effect that the Civil Rules do not apply to special statutory proceedings to the extent that specific procedure is provided by law has been deleted by amendment for several reasons. First, because the legislature as of July 1, 1971, has repealed more than three hundred procedure statutes, a practitioner would find it impossible to comply with many of the "special procedures" contained within particular statutory proceedings. Thus, § 163.08, R.C. (in the chapter on appropriation of property), calls for the filing of an answer on the third Saturday after return day. The return day statute, § 2309.41, R.C., has been repealed, consequently there is no return day and of necessity the practitioner must follow the answer day provided by the Civil Rules. Second, when the system of code procedure was adopted more than one hundred years ago, the purpose was to simplify procedure. But over the years innumerable special statutory proceedings were adopted to satisfy particular special interests and as a result procedures, inconsistent with the basic Field Code, proliferated. The Civil Rules, like the

> Field Code adopted more than one hundred years ago, are intended to simplify procedure. The language of Rule 1(C), now deleted, perpetuated the inconsistencies of special statutory proceedings and prevented the broad application of the rules to special proceedings. Third, the language of Rule 1(C), now deleted, would have permitted the enactment of more special statutory proceedings in the future which in turn would have limited the application of the Civil Rules and have further added to the pitfalls of procedure.
>
> As a result of the amendment of Rule 1(C) the Civil Rules will be applicable to special statutory proceedings except "to the extent that they would by their nature be clearly inapplicable." Certainly the Civil Rules will not be applicable to those many special statutory proceedings which are non-adversary in nature. On the other hand, the Civil Rules will be applicable to special statutory proceedings adversary in nature unless there is a good and sufficient reason not to apply the rules.

As discussed above, the prior version of Civ. R. 1(C) stated that the Civil Rules would not apply to a special statutory proceeding where a specific procedure was provided by statute. The prior version of Civ. R. 1(C) granted the general assembly full authority to override any civil rules enacted by the Ohio Supreme Court by turning an action into a special proceeding, and then providing their own statutory procedure. This caused several problems and "pitfalls" in the court system. Specifically, the General Assembly was enacting special proceedings actions that conflicted with this Court's rules, and caused confusion in courtroom practice. The General Assembly was also enacting these special proceeding statutes for the purpose of "satisfying particular special interests," and not for the purpose of simplifying procedure.

As a result, the Ohio Supreme Court amended Civ. R. 1(C) to prevent the General Assembly from overriding a civil procedure rule for the purpose of "satisfying particular special interests." This, however, is exactly what the General Assembly is attempting to do with SB 7's amendment to R.C. 4123.512(D). In the special interest of employers over claimants, the General Assembly is attempting to override a Civil Rule that the Supreme Court has already determined applies to workers' compensation appeals. *Kaiser*, 84 Ohio St.3d 411; *Robinson*, 81 Ohio St.3d 361; *Fowee*, 108 Ohio St.3d 533, 2006-Ohio-1712 (holding that the claimant is the

plaintiff in the action, bears the burden of going forward, and is therefore afforded all the rights provided to the plaintiff under the civil rules).

This is unconstitutional and contrary to the purpose of Civ. R. 1(C). The General Assembly cannot simply change a procedural rule in an adversarial special proceeding by enacting a new statute that removes the application of a civil rule, unless the civil rule is "clearly inapplicable" – i.e. alters the basic statutory purpose of the special proceedings.

For guidance, consider this Court's decision in *Dir. Of Highways v. Kleines*. That case involved Civ. R. 42(B)'s application in a special statutory proceeding, where two separate statutes provided that the parties had to consent to the consolidation of appropriation cases. The appellant claimed that the statutes did not conflict with Civ. R. 42(B) because the appropriation cases were special proceedings. This Court rejected that argument, and found the statutes improper because they conflicted with a civil procedure rule that was applicable to the special proceeding:

> In the opinion of this court, the management of cases lies within the discretion of the court, and not with the parties so long as the rights of the parties are adequately protected. This court concludes that, notwithstanding the provisions of R. C. 5519.02 and 163.09, Civ. R. 42(A) is not "clearly inapplicable" to the consolidation of causes in appropriation cases, and that the consent of the parties is not essential to the issuance of an order of consolidation by the trial court in cases falling within the purview of Civ. R. 42(A).

Dir. of Highways v. Kleines, 38 Ohio St. 2d 317, 320, 313 N.E.2d 370, 372 (1974).

Moreover, holding otherwise would mean that the General Assembly could change almost any civil rule it wants in a special proceeding. For instance, the General Assembly could shorten the time a claimant has to respond to discovery or dispositive motions, or prohibit a claimant from requesting a continuance without an employer's consent. As this Court discussed in *Price v. Westinghouse*, this legal standard would leave the court in a procedural vacuum:

> [I]f Price's argument is adopted, none of the Civil Rules, other than perhaps Civ. R. 7, will be applicable to appeals under R.C. 4123.519 [former 4123.512]. As a result, courts would be deprived of the entire panoply of procedures contained in the Civil Rules. To affirm the judgment of the Court of Appeals would essentially leave the Courts of Common Pleas in a procedural vacuum insofar as appeals under R.C. 4123.519 are concerned. Such a situation is foreign both to the intent of the General Assembly and the philosophy of the courts concerning the Civil Rules.

Id at 133; *see also* 1971 Staff Notes, Civ. R. 1(C).

Accordingly, the Eighth District correctly held that the SB 7’s amendment to R.C. 4123.512(D) is unconstitutional and contrary to the purpose of a workers’ compensation appeal. There is simply no “good and sufficient reason to not apply” Civ. R. 41(A)(1) to an employer’s appeal under R.C. 4123.512 just because the claimant successfully pursued their claim administratively. *Price,* 70 Ohio St.2d, 132 at 133 (1982).

B. This Court has already held R.C. 4123.512 is a procedural statute.

In an attempt to overcome this Court’s well-established holding that Civ. R. 41(A)(1)(a) applies to a R.C. 4123.512 appeal, the State argues that R.C. 4123.512(D) is a substantive law, rather than a procedural law, because it involves an employer’s right to control its appeal and prevent delay.

The State’s argument is without merit. This Court has repeatedly held that R.C. 4123.512 is procedural, and not substantive, because it only affects the course of procedure and method of review in a workers’ compensation case; it does not affect an injured workers’ right to collect benefits, or the employers’ responsibility to pay benefits:

> The amendment to R.C. 4123.519 [formerly R.C. 4123.512], creating a right of appeal for occupational disease claims from the Industrial Commission to the common pleas court is remedial in nature…We deal here not with the substantive right to seek and be awarded compensation, but the procedure by which such claims may be effectuated. The amendment at issue here provides a method of review for occupational disease claims. To hold such a change to be remedial is consistent with a long line of decisions of this court.

Morgan v. W. Elec. Co., 69 Ohio St.2d 278, 280, 432 N.E.2d 157 (1982).

> Ohio Rev. Code Ann. 2305.19 applies to save a workers' compensation claim even though such a claim is a creature of statute and the Workers' Compensation Act contains its own limitations period. Former Ohio Rev. Code Ann. 4123.519, now Ohio Rev. Code Ann. 4123.512, is a remedial statute, not a right-creating statute.

Osborne v. AK Steel/Armco Steel Co., 96 Ohio St.3d 368, 2002-Ohio-4846, 775 N.E.2d 483, ¶ 1.

> We cannot agree that R.C. 4123.519 [formerly 4123.512] creates a substantive right of action. Rather, we have long held that "[a] statute undertaking to provide a rule of practice, a course of procedure or a method of review, is in its very nature and essence a remedial statute." (Emphasis added.) *Miami v. Dayton* (1915), 92 Ohio St. 215, 219. Indeed, in *State, ex rel. Slaughter, v. Indus. Comm*. (1937), 132 Ohio St. 537 [8 O.O. 531], this court, asked to determine whether a precursor to R.C. 4123.519 was remedial in nature, stated, "[i]t is * * * difficult to avoid the conclusion that any right of appeal or review given by statute from an order of the Industrial Commission to a court must be classed strictly as a remedy." (Emphasis added.) *Id*. at 544. *See, also, State, ex rel. Michaels, v. Morse* (1956), 165 Ohio St. 599, 606 [60 O.O. 531]. Thus, R.C. 4123.519 contains a limitation on a remedy, not a limitation on a right of action. Consequently, we may now consider the application of the savings statute to appellant's complaint.

Lewis v. Connor, 21 Ohio St.3d 1, 3, 487 N.E.2d 285 (1985); *see also Arbar Corp. v. Wellmeier*, 2d Dist. Greene No. 94-CA-99, 1995 Ohio App. LEXIS 4090, at *14-15 (Sep. 20, 1995)(concluding that R.C. 4123.512 is not a substantive statute, as it only affects the "course of procedure" or "method of review" in a workers' compensation case, and not one which affects any substantive rights of claimants or employers); *State ex rel. Kilbane v. Indus. Comm'n of Ohio*, 91 Ohio St.3d 258, 744 N.E.2d 708 (2001) (holding that the settlement-hearing provisions of former R.C. 4123.65, involving workers' compensation claims, constituted a remedial right that the legislature could change or revoke without offending the Constitution).

In line with those above opinions, this Court also analyzed SB 7 as being a procedural law in determining whether the amendment applied retrospectively or prospectively. *Thorton v. Montville Plastics & Rubber, Inc*., 121 Ohio St. 3d 124, 2009-Ohio-360, 902 N.E. 2d 482. Although the majority found that SB 7 applied prospectively based on the uncodified language of

the statute, *Thorton* held that the General Assembly could have made it retroactive. *Id* at 128 ("Had the General Assembly intended all of the provisions in Am.Sub.S.B. No. 7 to be retroactive, it could have so provided."). This could only happen if amendment was procedural, and did not affect a substantive right. *State v. Consilio*, 114 Ohio St.3d 295, 2007 Ohio 4163, 871 N.E.2d 1167, ¶ 9(holding that the General Assembly could only make legislation retroactive where it is merely remedial in nature).

In his dissenting opinion, Justice O'Donnell also stated that SB 7 was a procedural statute, and did not affect a substantive right:

> [T]he provision of R.C. 4123.512(D) prohibiting the claimant from dismissing the employer's appeal by dismissing the complaint without the employer's consent is procedural, affecting a remedial, rather than a substantive right. It does not affect any right Thorton may have to collect workers' compensation benefits, but changes the procedures available to enforce that right. Therefore, retroactive application of R.C. 4123.512(D) will not offend Ohio's constitutional prohibition against the retroactive impairment of vested substantive rights.

Thorton v. Montville Plastics & Rubber, Inc., 121 Ohio St. 3d 124, 130 (O'Donnell, J., dissenting).

This Court, therefore, should reject the State's argument that R.C. 4123.512(D) is a substantive statute. This Court has already ruled that it is procedural law, and only affects procedural rights. The General Assembly cannot overturn this holding by merely amending the statute to take away an injured workers' procedural right under the civil rules. *See also State ex rel. Ohio Acad. of Trial Lawyers v. Sheward*, 86 Ohio St.3d 451, 479, 715 N.E.2d 1062 (1990) (holding that the General Assembly cannot make a law substantive that the trial court already determined was procedural).

C. R.C. 4123.512 and Civ. R. 41(A)(1)(a) are procedural and concern machinery for carrying out the claim.

Where a conflict arises between a rule and a statute, this Court's rule will control for procedural matters; the statute will control for matters of substantive law. *State ex rel. Sapp v. Franklin Cty. Court of Appeals*, 118 Ohio St.3d 368, 2008-Ohio-2637, ¶ 28, 889 N.E.2d 500; *State v. Slatter*, 66 Ohio St.2d 452, 454, 423 N.E.2d 100 (1981). Substantive laws or rules relate to rights and duties giving rise to a cause of action, while procedural rules concern the "machinery" for carrying on the suit. *Norfolk S. Ry. Co. v. Bogle*, 115 Ohio St.3d 455, 2007-Ohio-5248, 875 N.E.2d 919, ¶ 16 (holding that the prima facie filing requirements of R.C. 2307.92 are procedural in nature). The fact that rules of procedure may have an occasional substantive effect, does not necessarily mean that the rule is substantive in nature, as this Court discussed in *State v. Greer*, 39 Ohio St.3d 236, 245, 530 N.E.2d 382, 395 (1988):

> While we recognize that rules of procedure may have an occasional substantive effect, it is yet generally true that laws which relate to procedures are ordinarily non-substantive in nature. These would include *rules* of practice, *courses* of procedure and *methods* of review, but not the rights themselves. The present case presents a classic example of an underlying substantive right, the right to peremptorily challenge jurors during voir dire, which application is regulated by a Rule of Criminal Procedure which sets forth the time and manner as well as the number of times such right may be exercised. The number of allowable peremptory challenges has, with near unanimity, been declared a matter of procedure.

Id. (holding that Crim R. 24(C), rather than R.C. 2945.21(A)(2) governed the number of peremptory challenges granted to a defendant)(emphasis in original).

Moreover, by enacting or amending a statute, the General Assembly cannot resurrect a statutory provision that has been previously held to be invalid under Ohio Const. Article IV, § 5(B). *State ex rel. Ohio Acad. of Trial Lawyers v. Sheward*, 86 Ohio St.3d 451, 479, 715 N.E.2d 1062(1999)("The notion that the General Assembly can direct our trial courts to apply a legislative rule that this court has already declared to be in conflict with the Civil Rules simply

by denominating it "jurisdictional" or "substantive" is so fundamentally contrary to the principle of separation of powers that it deserves no further comment.").

The State argues that 4123.512(D) is substantive because it involves an employer's right to pursue their appeal without delay. This argument fails for several reasons. First, as previously discussed, this Court has already held that R.C. 4123.512(D) and Civ. R. 41(A)(1)(a) are procedural laws. Both provisions concern only the requirements needed for a plaintiff to file a voluntary dismissal without prejudice. This goes to the "machinery" for carrying out the suit; not the rights and duties giving rise to the cause of action. *Bogle*, 115 Ohio St.3d 455 ¶ 16.

Second, R.C. 4123.512(D) does not give an employer the substantive right to pursue its appeal without delay, as the State contends. Although the employer can invoke jurisdiction in the court of common pleas, the appeal belongs to the injured worker, who must file the complaint and reprove their case. *Fowee*, 108 Ohio St.3d 533, 538 ("regardless of who files the notice of appeal, the action belongs to the claimant"). Indeed, this is why a voluntary dismissal only dismisses the complaint, and not the appeal. *See Kaiser*, 84 Ohio St.3d 411, 414.

Lastly, nothing in the plain text of statute, or the uncodified law, states that the General Assembly is giving the employer this substantive right, or that its purpose is to give employers a right to control an injured workers' claim in the court of common pleas. Rather, the State is inferring this reasoning based on previous arguments that employers raised in the Ohio Supreme Court, which this Court rejected.

1. Unlike in *Havel*, there is no uncodified language from the General Assembly indicating that the statute was substantive in nature.

In support of its argument that R.C. 4123.512(D) is a substantive statute, the State relies heavily upon *Havel v. Villa Saint Joseph*, 131 Ohio St.3d 235, 2012-Ohio-552, 963 N.E.2d 127. In *Havel*, this Court determined whether Civ. R. 42(B) conflicted with R.C. 2315.21, which

required trial courts, upon the request of any party, to bifurcate tort actions into compensatory and punitive damages stages. This Court found that even though there were some instances where the statute could be applied without conflict R.C. 42(B), the inconsistency between R.C. 2315.21 and the civil rule created a conflict because it took away the trial court's discretion in bifurcating claims or issues at trial. *Id.* at 240.

Despite this conflict, this Court held that the statute was constitutional because it created a substantive right. In determining that the statute was constitutional, *Havel* first applied an "operative effect test." *Id*. Under this test a statute is substantive if its application results in the creation of a right that addresses a potential injustice; it is procedural if its application results in the creation or regulation of the proceedings of a court. Because R.C. 2315.21 did not state whether it intended on creating a substantive right, the Court looked to the uncodified language of the statute. Based on the uncodified language of the statute, which included a "statement of findings and intent," this Court determined that the General Assembly intended the statute to create a substantive right.

This case is distinguishable *Havel*. First, this Court has already decided that R.C. 4123.512(D) is a procedural statute, and does not create any substantive rights. *See also Ewert v. Holzer Clinic, Inc*., 2013-Ohio-5609, 5 N.E.3d 705, ¶ 11 (4th Dist.)(the court refused to apply *Havel*'s analysis in determining whether R.C. 2311.39 conflicted with Civ. R. 3 because the Ohio Supreme Court already decided that venue is a procedural matter). There is no reason why this Court's previous holding should not still apply.

Second, in *Havel*, this Court relied on the uncodified language of the statute in determining that the General Assembly intended on creating a substantive right. This uncodified language included a "statement of findings and intent" for the statute. Unlike with R.C. 2311.19,

there is nothing in the language in SB 7 amendment to R.C. 4123.512(D) – either codified or uncodified - that indicates that the General Assembly intended on creating a substantive right, or that even discusses the General Assembly's intent with SB 7. Thus, unlike in *Havel*, the State is merely presuming the General Assembly's intent based on arguments that employers made in prior cases. This unsupported assumption should not be the basis for determining the General Assembly's intent.

Therefore, this Court should reject the State's reliance on *Havel*. That decision has no application in this case because: 1) this Court has already decided that R.C. 4123.512 involves only procedural matters; and 2) the codified and uncodified language of R.C. 4123.512 does not indicate that the General Assembly intended on creating a substantive right for employers.

D. This Court should not further extend the holding in *Havel*.

Although the General Assembly likely amended R.C. 4123.512 for special interest reasons, this does not automatically mean that it created a substantive right for an employer. Indeed, if this is the law under *Havel*, as the State suggests, then that would mean that the General Assembly could freely override this Court's constitutional authority to govern civil rules of procedure, so long as there is some special interest purpose behind the statute, no matter how far removed the procedural rule is from the special interest. The General Assembly would not even be required to include language in the statute, either uncodified or codified, that they intended to enact a substantive law. Rather, under the State's view, this Court should automatically infer that General Assembly creates a substantive right to "address potential injustice" when it creates a statute that removes or limits access to a procedural rule.

The State is essentially asking this Court to expand its holding in *Havel*, which limited its focus on the codified and uncodified language of the statute. According to the State, this Court should automatically assume that the General Assembly intended on a creating substantive laws.

This Court should not expand the holding of *Havel*, as this would create an unworkable standard. It would make all substantive statutes controlling over procedural rules, unless the General Assembly indicated that the statute wasn't substantive. This would essentially make the Modern Courts Amendments, as well as Civ. R. 1, meaningless and without any enforcement power.

It is also worth noting that this Court's holding in *Havel* has been rejected in Ohio's Federal Courts. *See e.g. Piskura v. Taser Int'l, Inc.*, S.D.Ohio No. 1:10-cv-248-HJW, 2013 U.S. Dist. LEXIS 89682, at *5 (June 26, 2013); *Patel Family Trust v. AMCO Ins. Co*., S.D.Ohio No. 2:11-cv-1003, 2012 U.S. Dist. LEXIS 97412, at *3 (July 13, 2012). The *Havel* decision has also been criticized in various legal articles:

> Under *Havel*, there is no limit to the legislature's ability to transform a matter of procedure into a substantive right. All it need do is make the procedure mandatory and articulate an intent to rectify some injustice it perceives on behalf of its favored constituency. Rules of pleading, rules of evidence, matters as mundane as the order in which witnesses may be called at trial, can all be deemed "substantive" should the legislature divine a need to put a finger on the scales of justice to help a particular constituency.
>
> But how can the *Havel* rationale be reconciled with the Modern Courts Amendment? The Ohio Constitution trumps legislative intent; and the Constitution says that all laws in conflict with rules governing practice and procedure prescribed by the Supreme Court "shall be of no further force or effect[.]" The Constitution, quite simply, makes the Ohio Supreme Court supreme in matters of procedure. If procedure can be magically transformed into substance by a legislative wave of the wand, where does that leave the Modern Courts Amendment? If all the legislature needs to do to change procedure into substance is "intend" it to be so, then legislative intent trumps a Constitutional mandate.

See Kathleen J. St. John, *The Havel Anomaly*, CATA NEWS, Spring 2012, http://www.nphm.com/pdf/article-kathleen.pdf(citations omitted).

> Under the Ohio Constitution, the judiciary possesses "both the power and the solemn duty to determine the constitutionality and validity of acts by other branches of the government and to ensure that the boundaries between branches remain intact." The constitution recognized not only the centrality of judicial review to the performance of the function of the judiciary, but also the need to guard the judiciary in the exercise of this power against legislative encroachment. Specifically, it provides that "[t]he general assembly shall [not]. . . exercise any judicial power, not herein expressly conferred." The court's holding in *Havel* violates this doctrine by allowing the legislature to infringe on the core constitutional power of the judiciary. The majority declared that the Statute is substantive, and hence constitutional, because the legislature so intended. Justice McGee Brown in her dissenting opinion rightly asserted that this manner of legislative deference amounted to allowing the legislature to make a law and simultaneously determine its constitutionality. The majority's holding allows the legislature to divest the judiciary of its constitutional role of judicial review. Moreover, by virtue of this holding, the legislature can enact statutes to trump the Ohio Rules of Civil Procedure in its entirety, so long as it includes language in the legislative history that suggests that it intended to enact substantive laws. In this way, the legislature becomes a quasi-judicial body, which can predetermine the constitutionality of its enactments.

See Oyesanmi F. Alonge, *Survey of Ohio Law: 2012 Supreme Court of Ohio Decisions: Havel v. Villa St. Joseph*, 39 Ohio N.U.L. Rev. 943(citations omitted).

Although we are not asking this Court to overturn it's holding in *Havel* - since it does not apply in this case - this Court should not further expand the holding, as the State suggests. Doing so would effectively do away with the Modern Courts Amendment, and turn all procedural statutes into a substantive law that trumps this Court's rules.

Proposition of Law: SB 7's amendment to R.C. 4123.512(D) is unconstitutional because it violates the equal protection clause of the Ohio Constitution.

All laws, including workers' compensation statutes, are subject to the limitations imposed by the Equal Protection Clauses of the United States and Ohio Constitutions, which are designed to prohibit "governmental decision makers from treating differently persons who are in all relevant respects alike." *Pickaway Cty. Skilled Gaming L.L.C. v. Cordray*, 127 Ohio St.3d 104, 2010-Ohio-4908, 96 N.E.2d 944 ¶17; *Ferguson v. State*, 2015-Ohio-4499, 42 N.E.3d 804, ¶ 19 (8th Dist.). The Equal Protection Clause is implicated here, as SB 7 treats an injured worker

unequally based on whether the injured worker or the employer initiated the appeal. The State does not dispute that this classification exists.

Since amended R.C. 4123.512(D) implicates the Equal Protection Clause by treating injured workers differently, this Court must conduct a "rational basis review" to determine whether this classification "bears a rational relationship to a legitimate governmental interest." *Roseman v. Firemen & Policemen's Death Benefit Fund*, 66 Ohio St.3d 443, 447, 613 N.E.2d 574 (1993). In determining whether there is a rational relationship to a legitimate governmental interest in a workers' compensation statute, this Court has held that legislation could only survive constitutional scrutiny if it is "rationally related to the accomplishment of some state objective at least as important as the purpose contained in the Constitution [Section 35, Article II] and reflected in the statute." *State ex rel. Nyitray v. Indus. Com.*, 2 Ohio St.3d 173, 176, 2 OBR 715, 717, 443 N.E.2d 962, 965 (1983). This Court further "requires the existence of reasonable grounds for making a distinction between those within and those outside a designated class." *State ex rel. Doersam v. Indus. Com. of Ohio*, 45 Ohio St.3d 115, 120, 543 N.E.2d 1169 (1989).

Where the governmental interest behind the classification is not as important as the purpose behind the workers' compensation system, this Court has not hesitated in finding a violation of the equal protection clause.[2] *Caruso v. Aluminum Co. of America*, 15 Ohio St. 3d 306, 473 N.E.2d 818, 1984 Ohio LEXIS 1292 (Ohio 1984); *State, ex rel. Nyitray v. Indus. Comm.*, 2 Ohio St. 3d 173, 443 N.E.2d 962 (1983); *State ex rel. Doersam v. Indus. Com. of Ohio*, 45 Ohio St.3d 115, 120, 543 N.E.2d 1169 (1989); *Kinney v. Kaiser Aluminum & Chem. Corp.*,

[2] In its Brief, the State cites to several non-workers' compensation cases that determined questions of equal of protection and due process. These cases, however, are of little guidance here, as a workers' compensation appeal is distinguishable from most other types of statutory actions.

41 Ohio St.2d 120, 322 N.E.2d 880 (1975); *see also State ex rel. Patterson v. Industrial Comm'n*, 77 Ohio St. 3d 201, 672 N.E.2d 1008 (1996).

For instance, in *Kinney*, this Court held that "administrative ease" was not a sufficient rational basis for creating different jurisdictional prerequisites for injured workers who died of work-related causes. *Kinney*, 41 Ohio St.2d 120, 121. In *Nyitray*, this Court held that "conserving funds" was not a sufficient rational basis treating injured workers differently based on whether they died of work related or non-work related causes. *Nyitray*, 2 Ohio St. 3d 173, 178 ("Clearly, the workers' compensation system is designed to aid workers and their dependents and not intended to penalize victims by denying compensation where due."). In *Patterson*, this Court refused to accept as a rational basis "continued financial stability of the workers' compensation fund" as the reason for treating injured workers differently. *Patterson v. Industrial Comm'n*, 77 Ohio St. 3d 201, 206-207, quoting *Indus. Com. of Ohio v. McWhorter*, 129 Ohio St. 40, 193 N.E. 620 (1934)(" It seems to this court more in harmony with the spirit of work-relief legislation to hold the claimant to be an employee than to hold him to be a pauper or ward. A sound public policy prompts the efforts of the state to preserve the self-reliance of its citizens, even if at extra expense.").

Nevertheless, in this case, the State argues that the classification is valid and rational because: 1) the workers' compensation appeal is "unique"; 2) the employer is legally responsible for compensation or benefits to which a claimant is not entitled; 3) the employer has a right to an expeditious appeal; and 4) it returns control of the employer's appeal to the employer. The State's arguments are without merit and based on several false assumptions.

First, although this Court has defined workers' compensation appeals as being "unique", the State misrepresents the reasons why. As discussed earlier, this Court used the term "unique"

to describe R.C. 4123.512 because it is unlike other administrative appeals and error proceedings, since it: 1) “necessitates a new trial, without reference to the administrative claim file or consideration of the results of the administrative hearings”; and 2) places the burden on the injured worker to file a complaint and reprove their case. *Robinson*, 81 Ohio St.3d at 368. This “uniqueness” is partly why this Court has held that an injured worker is entitled to all the procedures due to plaintiffs under the Civil Rules, including Civ. R. 41(A)(1)(a). Thus, the State’s “uniqueness” argument is actually contrary to its position that SB 7 is constitutional.

Second, the State’s arguments portray the injured worker as improperly leeching money from his employer, in the form of benefits for lost wages and medical treatment. This is untrue. The Industrial Commission already determined that the injured worker was entitled to participate in the claim because the injured proved that they suffered a work-related injury in the course and scope of their employment. It is incorrect, therefore, to assume that the benefits awarded to an injured worker are improper when the award is based on a valid State administrative order.

Third, the State’s argument falsely assumes that an action under R.C. 4123.512 belongs to the employer when the employer initiates the appeal. This Court has already rejected this argument. The employer only has control over invoking jurisdiction. The appeal belongs to the injured worker, who must file the complaint and reprove their case. *Fowee v. Wesley Hall, Inc.*, 108 Ohio St.3d 533, 538, 2006-Ohio-1712, 844 N.E.2d 1193("regardless of who files the notice of appeal, the action belongs to the claimant").

Fourth, the State’s argument ignores the purpose behind Civ. R. 41(A)(1)(a), which is to give plaintiffs the opportunity to voluntarily dismiss and refile their claim because they carry the burden in prosecuting the claim. This is the same burden that injured workers carry in workers’ compensation appeal. This is why the Ohio Supreme Court has routinely held that injured

workers are treated as plaintiffs and are entitled to all the civil rules afforded to plaintiffs, which includes Civ. R. 41(A)(1)(a).

Fifth, the State's argument ignores that an injured worker and employer are not on equal footing since their risks and burdens are not the same. As discussed before, an injured worker continues to have a higher burden at trial, even though it is the employer's appeal. The employer's risks are only financial and non-existent if the claimant is ultimately unable to prove their claim. The injured worker's risks, on the other hand, are much greater. The injured worker needs these benefits in order to receive medical treatment. Without this medical treatment, the injured worker may likely be unable to sustain remunerative employment or afford basic needs.

Sixth, the State's argument ignores that the SB 7 is unfairly prejudicial to injured workers. It forces injured workers to go to trial even though they are still treating and the full extent of the injury is still unknown, their medical expert or essential fact witnesses are unavailable, they lack sufficient money to pay costs or schedule all the necessary trial depositions for medical experts, or they are unable to participate in their prosecution due to health issues or psychological issues. Although the State will likely argue that the employer has similar concerns, these concerns are not the same because the burden of prosecuting and reproving the claim is still on the injured worker.

Seventh, the State's rationale behind SB 7, which is to prevent the continued payment of benefits when a claimant voluntarily dismisses a complaint, involves an issue distinctly different from and not within the statutory purpose R.C. 4123.512. As discussed earlier, any consideration of benefits is within the exclusive jurisdiction of Industrial Commission of Ohio. Any dispute related to those benefits can be challenged during the pendency of the appeal, and - if the employer is still unsatisfied - by a filing of a Writ of Mandamus. R.C. 4123.512, on the other

hand, is strictly limited to the determination of whether the injured worker is entitled to participate in the workers' compensation fund. R.C. 4123.512 does not determine an employers' obligation to pay for benefits or an employer's experience rates.

Eighth, nothing in R.C. 4123.512 states that employer has a special right to an "expeditious appeal" over injured workers. *See also Rogers v. Ford Motor Co*. 8th Dist. Cuyahoga No. 66118, 1994 Ohio App. LEXIS 3613 ("R.C. 4123.519 does not create a right to an expeditious appeal."); *Rice v. Stouffer Foods Corp. Nka Nestle Frozen Food Co.* (November 6, 1997), 8th Dist. No., 97-LW-54265, 7251. Rather, R.C. 4123.512(I) provides only that a R.C. 4123.512 appeal will be preferred over most of the other civil actions on the trial court docket. It applies to appeals initiated by a claimant or employer. It does not give an employer a special benefit or right to expeditious appeal. In fact, this section is actually for the benefit of claimants, pursuant to R.C. 4123.95, which states that "Sections 4123.01 to 4123.94 of the Revised Code shall be liberally construed in favor of employees and the dependents of deceased employees." Moreover, this Court already acknowledged and rejected the "expeditious appeal" argument in *Kaiser* and *Robinson*.

Ninth, SB 7 actually encourages separate appeals and more trials. For instance, where multiple conditions are denied and allowed in one order of the Industrial Commission, an injured worker would be in a better position appealing first if they anticipate that their employer will appeal, in order preserve their right to use a Civ. R. 41(A) dismissal. In those situations, an injured worker will also be encouraged to fight consolidation of the appeals because they might lose their right to voluntarily dismiss their complaint without the employer's consent, even though both claims involved the same set of facts and witnesses.

SB 7 would also have a negative effect on settlement negotiations because the employer has less incentive to make a reasonable offer. In situations such as this case where the injured worker is still undergoing treatment or is unable to bring the matter to trial, the employer can simply try to push the case to trial as quickly as possible in hopes that the injured worker either accepts a lowball offer or loses at trial due to lack of time to properly prepare his case.

Thus, the interests of employers and injured workers are not balanced with the removal of a claimants right to use Civ. R. 41(A)(1)(a) in a R.C. 4123.512 appeal. SB 7 actually achieves the opposite and creates an imbalance in favor of employers. It punishes the claimant by taking away their right to use Civ. R. 41(A)(1)(a) merely because they successfully prosecuted their case administratively.

Lastly, this Court has already considered – and rejected – all of the State's arguments about the employer suffering prejudice, or undue delay. Specifically, this Court held that "the employer ultimately suffers no prejudice, as any illegitimate benefits paid during the interim between the original filing and the refiling of a voluntarily dismissed action are repaid if the employee's claim does not prevail." *See Kaiser*, 84 Ohio St.3d at 415. Any medical treatment paid for the alleged condition will not be assessed to the risk of the state fund employer unless the claimant-plaintiff prevails at trial. *Id.* And the savings statute already prevents a claimant from perpetually delaying the re-filing of his complaint and requires default judgment should the complaint not be re-filed.

Accordingly, the Eighth District Court of Appeals correctly held that the Provision violates the equal protection clause. There is no rational reason to take away an injured worker's right to Civ. R. 41(A) merely because they were successful with their case administratively. The reasons for and purposes of Civ. R. 41(A) apply equally to an injured worker as to any other

plaintiff in a civil action. As any other plaintiff in a civil action, an injured worker is subject to the uncertainties and exigencies of litigation. Injured workers also face the same obstacles and unpredictable circumstances, which occasionally make it impossible for the plaintiff to go forward. *See also Robinson*, 81 Ohio St.3d 361, 367 (“It is inconsistent to withhold from claimant the voluntary dismissal provisions of Civ. R. 41(A), on the basis that it is *not* his action to dismiss, yet apply against claimant the involuntary dismissal provisions of Civ. R. 41(B), on the basis that it *is* claimant’s action to prosecute.”).

Proposition of Law: SB 7’s amendment to R.C. 4123.512(D) is unconstitutional because it violates the due process clause of the Ohio Constitution.

Ohio's Due Process Clause states that "[a]ll court shall be open, and every person, for an injury done him in his land, goods, person, or reputation, shall have remedy by due course of law, and shall have justice administered without denial or delay." Ohio Constitution, Article I, Section 16. *See also Sorrell v. Thevenir*, 69 Ohio St.3d 415, 422, 1994 Ohio 38, 633 N.E.2d 504 (1994) ("[t]he 'due course of law' provision is the equivalent of the 'due process of law' provision in the Fourteenth Amendment to the United States Constitution").

This Court has held that the Ohio due process clause prohibits statutes that effectively prevent individuals from pursuing relief for their injuries. *Arbino v. Johnson & Johnson*, 116 Ohio St.3d 468, 2007-Ohio-6948, 880 N.E.2d 420, ¶ 44. A statute, however, “need not completely abolish the right to open courts to run afoul of this section.” *Id.* at ¶ 45. Rather, any enactment that eliminates an individual's right to a judgment or to a verdict properly rendered in a suit will also be unconstitutional." *Id.*

In determining whether a statute violates the due process clause, this Court uses a rational-basis review. At a minimum, a statute "comports with due process if it bears a real and substantial relation to the public health, safety, morals or general welfare of the public and if it is

not unreasonable or arbitrary." *Fabrey v. McDonald Village Police Dept*., 70 Ohio St.3d 351, 354, 639 N.E.2d 31, 1994 Ohio 368 (1994)

SB 7's amendment to R.C. 4123.512(D) restricts the right of an injured worker in an employer-initiated workers' compensation appeal to voluntarily dismiss his complaint without obtaining the consent of the employer. SB 7 also restricts the right of an injured worker to utilize the savings statute and refile their case within one year of a voluntary dismissal. These rights are afforded to plaintiffs in all other civil cases. *See Kaiser*, 84 Ohio St.3d at 415-416. Thus, there can be no question here that SB 7 compromises an injured workers' property interest in their legal cause of action.

As previously discussed in the equal protection section of this Brief, there is also no rational reason for stripping injured workers of their civil procedure rights. This Court has already concluded that a "as a plaintiff, a claimant under R.C. 4123.512 should be afforded all of the rights provided to him or her by the Rules of Civil Procedure," and that "workers' compensation claimant may employ Civ.R. 41(A)(1)(a) to voluntarily dismiss an appeal to the court of common pleas by an employer." *Kaiser*, 84 Ohio St.3d at 414. This Court's holding still remains true, even after SB 7's amendment to R.C. 4123.512. *See also Robinson,* 81 Ohio St.3d 361, 371(finding that it would be "both anomalous and fundamentally unfair" to eliminate a claimant's right to use Civ. R. 41(A), merely because the employer filed the appeal).

Accordingly, the Eighth District Court of Appeals correctly held that the SB 7's amendment violates the Due Process Clause of Ohio Constitution, as it unnecessarily denies claimants the right to a fair trial where they carry the burden of proof. It is also unnecessary because the employer does not suffer any prejudice and already has an administrative remedy to challenge the issues dealing with the extent of disability, compensation, and benefits.

CONCLUSION

The reasoning and law behind this Court's decisions in *Fowee*, *Kaiser*, and *Robinson* still apply today. An injured worker still has the heightened burden of filing the complaint and proving their case in a trial de novo, pursuant to the Civil Rules of Procedure, like any other plaintiff in a civil action. And an employer is still not harmed by an injured workers' use of Civil R. 41(A), since: 1) any benefits paid during the interim are repaid to the employer from the Surplus Fund if the injured worker does not prevail; 2) the risk is not assessed unless the injured worker prevails; and 3) the savings statute prevents an injured worker from perpetually delaying their claim.

For the forgoing reasons, this Court should uphold the Eighth District Court of Appeals' opinion, and find that SB 7's amendment to R.C. 4123.512 is unconstitutional because it violates the basic principles of separation of powers, equal protection, and due process.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that on this 2nd day of August 2016, a copy of the foregoing document was filed electronically. Notice of this filing will be sent to all parties by operation of the Court's electronic filing system and by email.

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