

**THE COURT OF APPEALS  
ELEVENTH APPELLATE DISTRICT  
GEAUGA COUNTY, OHIO**

|                                    |   |                             |
|------------------------------------|---|-----------------------------|
| ROBERT THORTON,                    | : | <b>MEMORANDUM OPINION</b>   |
| Appellee,                          | : |                             |
| - vs -                             | : | <b>CASE NO. 2006-G-2744</b> |
| MONTVILLE PLASTICS & RUBBER, INC., | : |                             |
| Appellant,                         | : |                             |
| ADMINISTRATOR, OHIO BUREAU OF      | : |                             |
| WORKERS' COMPENSATION,             | : |                             |
| Appellee.                          | : |                             |

Administrative Appeal from the Court of Common Pleas, Case No. 06 W 000219.

Judgment: Appeal dismissed.

*Mitchell A. Stern*, 27730 Euclid Avenue, Cleveland, OH 44132 (For Appellee, Robert Thorton).

*Aubrey B. Willacy*, Willacy, LoPresti & Marcovy, 700 Western Reserve Building, 1468 West Ninth Street, Cleveland, OH 44113 (For Appellant, Montville Plastics & Rubber, Inc.).

*Marc E. Dann*, Attorney General, State Office Tower, 17<sup>th</sup> Floor, 30 East Broad Street, Columbus, OH 43215-3428, and *Virginia Egan Fisher*, Assistant Attorney General, State Office Building, 11<sup>th</sup> Floor, 615 West Superior Avenue, Cleveland, OH 44113-1899 (For Appellee, Administrator, Ohio Bureau of Workers' Compensation).

CYNTHIA WESTCOTT RICE, P.J.,

{¶1} On November 30, 2006, appellant, Montville Plastics & Rubber, Inc., filed a notice of appeal from an October 31, 2006 entry of the Geauga County Court of Common Pleas.

{¶2} On October 19, 2006, appellee, Robert Thorton, filed a notice of voluntary dismissal pursuant to Civ.R. 41(A)(1)(a). Thereafter, on October 31, 2006, the trial court noted “it is so ordered” on appellee’s voluntary dismissal.

{¶3} Dismissals under Civ.R. 41(A)(1)(a) are self-executing. *Selker & Furber v. Brightman* (2000), 138 Ohio App.3d 710, 714. Furthermore, these dismissals are fully and completely effectuated upon the filing of a notice of voluntary dismissal by plaintiff, and the mere filing of the notice of dismissal automatically terminates the case without intervention by the court. *Id.* Because a Civ.R. 41(A)(1)(a) dismissal is self-executing, “the trial court’s discretion is not involved in deciding whether to recognize the dismissal.” *Id.* Hence, when a Civ.R. 41(A)(1)(a) dismissal is filed, the time-stamped date on that document is controlling, not a subsequent court entry. See *Parker v. Cleveland Pub. Library*, 8th Dist. No. 83666, 2004 WL 1902549, 2004-Ohio-4492, at ¶16.

{¶4} In the matter at hand, the time-stamped notice of voluntary dismissal filed by appellee Robert Thorton is dated October 19, 2006. The trial court was not required to issue a subsequent order as it did on October 31, 2006. In any event, even though the trial court did issue an entry on October 31, that order was a nullity since appellee Robert Thorton voluntarily dismissed his complaint pursuant to Civ.R. 41(A)(1)(a) on

October 19, 2006. Therefore, pursuant to App.R. 4(A), appellant had thirty days from that date to file its notice of appeal.

{¶5} Appellant's notice of appeal, which was filed on November 30, 2006, was filed forty-two days after the notice of voluntary dismissal was filed with the trial court. The notice of appeal was due by Monday, November 20, 2006, which was not a holiday or a weekend.

{¶6} App.R. 4(A) states that:

{¶7} "A party shall file the notice of appeal required by App.R. 3 within thirty days of the later of entry of the judgment or order appealed or, in a civil case, service of the notice of judgment and its entry if service is not made on the party within the three day rule period in Rule 58(B) of the Ohio Rules of Civil Procedure."

{¶8} Loc.R. 3(D)(2) of the Eleventh District Court of Appeals provides:

{¶9} "In the filing of a Notice of Appeal in civil cases in which the trial court clerk has not complied with Ohio Civ.R. 58(B), *and the Notice of Appeal is deemed to be filed out of rule*, appellant shall attach an affidavit from the trial court clerk stating that service was not perfected pursuant to Ohio App.R. 4(A). The clerk shall then perfect service and furnish this Court with a copy of the appearance docket in which date of service has been noted. Lack of compliance shall result in the sua sponte dismissal of the appeal under Ohio App.R. 4(A)."

{¶10} Here, appellant has not complied with the thirty-day rule set forth in App.R. 4(A) nor has appellant alleged that there was a failure by the trial court clerk to comply with Civ.R. 58(B). The time requirement is jurisdictional in nature and may not be

enlarged by an appellate court. *State ex rel. Pendell v. Adams Cty. Bd. of Elections* (1988), 40 Ohio St.3d 58, 60; App.R. 14(B).

{¶11} Accordingly, this appeal is dismissed sua sponte pursuant to App. R. 4(A).

{¶12} Appeal dismissed.

COLLEEN MARY O'TOOLE, J., concurs,

MARY JANE TRAPP, J., concurs in judgment only with a Concurring Opinion.

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MARY JANE TRAPP, J., concurs in judgment only with Concurring Opinion.

{¶13} While I agree that the appeal should be dismissed, I respectfully disagree with the majority's decision that the notice of appeal was not timely filed.

{¶14} Prior to June, 30, 2006, which was the effective date of amended R.C. 4123.512(D), it was well-settled that a workers' compensation claimant could employ Civ.R. 41(A)(1)(a) to voluntarily dismiss an appeal to the court of common pleas brought by an employer under R.C. 4123.512. *Kaiser v. Ameritemps, Inc.* (1999), 84 Ohio St.3d 411.

{¶15} After that date, R.C. 4123.512(D) was amended to provide that "[f]urther pleadings shall be had in accordance with the Rules of Civil Procedure \*\*\* 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 the court pursuant to this section \*\*\*," which is the fact in this case.

{¶16} Although a notice of voluntary dismissal filed pursuant to Civ.R. 41(A)(1)(a) normally would automatically terminate the case without further intervention

by the trial court, this is an administrative appeal, a creation of statute, and for that reason the case law interpreting Civ.R. 41(A), must be viewed in the context of the statute.

{¶17} It would appear that by entering an order granting appellee, Robert Thorton's, Notice of Voluntary Dismissal, the trial court construed the notice as a motion to dismiss and granted a Civ.R. 41(A)(2) dismissal without prejudice, which order was journalized on October 31, 2006. Thus, the employer's Notice of Appeal in this court was timely filed.

{¶18} However, inasmuch as the dismissal was without prejudice, it did not operate as an adjudication upon the merits, and appellee, Robert Thorton, may refile the petition within one year pursuant to R.C. 2305.19; thus the October 31, 2006 order is not a final appealable order. *Ebbets Partners, Ltd. v. Day*, 2d Dist. No. 21556, 2007-Ohio-1667.