[Cite as *State ex rel. Die Co., Inc. v. Lake Cty. Court of Common Pleas*, 2011-Ohio-5232.]

IN THE COURT OF APPEALS

ELEVENTH APPELLATE DISTRICT

LAKE COUNTY, OHIO

STATE ex rel. DIE CO., INC.,	:	**O P I N I O N**
Relator,	:	**CASE NO. 2010-L-107**
- vs -	:	
COURT OF COMMON PLEAS LAKE COUNTY, EUGENE A. LUCCI, et al.,	:	
Respondents.	:	

Original Action for Writ of Mandamus.

Judgment: Petition dismissed.

Natalie F. Grubb and *John S. Lobur*, Grubb & Associates, L.P.A., 437 West Lafayette Road, Suite 260-A, Medina, OH 44256 (For Relator).

Charles E. Coulson, Lake County Prosecutor, and *Benjamin J. Neylon*, Assistant Prosecutor, Administration Building, 105 Main Street, P.O. Box 490, Painesville, OH 44077 (For Respondent, Eugene A. Lucci).

Michael J. Feldman, Lallo & Feldman Co., L.P.A., Interstate Square Building I, 4230 State Route 306, Suite 240, Willoughby, OH 44094 (For Respondent, Jerry Ackley, III).

Richard Cordray, Ohio Attorney General, and *Jeffrey B. Duber*, Assistant Attorney General, State Office Building, 11th Floor, 615 West Superior Avenue, Cleveland, OH 44113-1899 (For Respondent, Industrial Commission of Ohio).

MARY JANE TRAPP, J.

{¶1} This action in mandamus is presently before this court for consideration of the three separate motions to dismiss of respondents, Judge Eugene Lucci of the Lake

County Court of Common Pleas, the Industrial Commission of Ohio, and Jerry Ackley, III. As the primary contention under two of these motions, Judge Lucci and Mr. Ackley maintain that the petition of relator, Die Co., Inc., fails to state a viable claim for the writ because its factual allegations support the conclusion that there is another adequate remedy it could pursue to resolve the underlying dispute. For the following reasons, we hold that this contention has merit and that the dismissal of the sole claim as to all three respondents is warranted.

{¶2} **Procedural History**

{¶3} A review of relator's petition indicates that its mandamus claim for relief is predicated upon the following basic allegations. In August 2005, Mr. Ackley submitted a claim for workers' compensation benefits, asserting that he had sustained a new injury to his back as a result of an accident that occurred during his employment with relator. Ultimately, a staff hearing officer for the Industrial Commission granted the claim in part, and Mr. Ackley was awarded temporary total compensation. The Industrial Commission rejected relator's appeal of the staff hearing officer's decision in February 2007.

{¶4} Approximately ten days after the release of the Commission's final order, relator instituted an appeal before the Lake County Court of Common Pleas. Pursuant to the procedure delineated in R.C. 4123.512, Mr. Ackley filed a complaint for benefits in May 2007. However, seven months later, he voluntarily dismissed that particular action without prejudice under Civ.R. 41(A)(1).

{¶5} In December 2008, Mr. Ackley re-filed his "benefits" complaint under Lake C.P. No. 08-CV-03807. This second action was assigned to Judge Lucci, who later set the matter for a jury trial on October 5, 2009. Three days before that date, though, Mr.

Ackley informed Judge Lucci that he intended to move for the dismissal of the second action under Civ.R. 41(A)(2). As the basis for this request, Mr. Ackley asserted that he would not be available to attend the trial because he was incarcerated at that time.

{¶6} Although the manner of communication is not clear, relator was informed that Judge Lucci intended to grant Mr. Ackley's motion once it was properly filed. As a result, on October 5. 2009, relator submitted a motion to reconsider the dismissal of the action. One day later, Mr. Ackley filed his motion under Civ.R. 41(A)(2), and Judge Lucci immediately released a judgment entry granting the motion and dismissing the second case in its entirety. As part of the entry, Judge Lucci specifically stated that the dismissal was without prejudice.

{¶7} Relator immediately appealed the dismissal entry to this court. In *Ackley v. Ryan*, 11th Dist. No. 2009-L-143, 2010-Ohio-477, we dismissed that particular appeal for the reason that the subject entry was not a final appealable order. Our opinion noted that, since a dismissal without prejudice was not an adjudication upon the merits of the underlying case, it left both sides in the same relative position they had been prior to the filing of the case. Id. at ¶4. This court also emphasized that, even though Mr. Ackley had the ability to re-file his complaint for benefits, the delay in the final resolution of the case was not prejudicial to relator because the new proceeding had to be initiated within one year under R.C. 2305.19. Id. at ¶8, quoting *Thorton v. Montville Plastics & Rubber, Inc.*, 121 Ohio St.3d 124, 126-127, 2009-Ohio-360.

{¶8} Although relator attempted to appeal our decision, the Supreme Court of Ohio denied jurisdiction. *Ackley v. Ryan*, 125 Ohio St.3d 1463, 2010-Ohio-2753. Approximately three months following the conclusion of the Supreme Court proceeding,

relator instituted the instant mandamus action against Judge Lucci, Mr. Ackley, and the Industrial Commission. As the grounds for its sole claim, relator alleged that Judge Lucci violated Ohio statutory and case law when he granted Mr. Ackley's motion to dismiss the second case without conducting a full hearing on the matter. As to the "statutory law" aspect of its allegations, relator also asserted that, under R.C. 4123.512(D), the dismissal of the case was improper because Mr. Ackley did not obtain its consent to the Civ.R. 41(A)(2) dismissal prior to the issuance of Judge Lucci's judgment entry. Based upon this, relator essentially seeks a writ which would mandate that the filing of the Civ.R. 41(A)(2) motion to dismiss had the legal effect of completely terminating Mr. Ackley's underlying claim for benefits.

{¶9} **The Industrial Commission's Motion to Dismiss**

{¶10} As was noted above, each of the three named respondents have moved to dismiss on the basis that relator's allegations are legally insufficient to state a viable claim in mandamus. Even though each of the motions have raised a similar argument under Civ.R. 12(B)(6), this court would indicate that the Industrial Commission's motion has asserted a distinct contention which warrants our initial consideration. Specifically, the Industrial Commission submits that it should be dismissed as a party to this action because relator's petition does not state a claim for relief against it. The Commission further submits that if it is not dismissed separately as a party, the instant action must be transferred to the Tenth Appellate District because the proper venue for any lawsuit against it is Franklin County, Ohio.

{¶11} Our review of the prayer for relief in relator's petition readily confirms that no specific relief has been sought in regard to the Industrial Commission. As part of its

factual allegations, relator has provided a description of the determination rendered by the staff hearing officer and the Commission itself. Moreover, the petition does contain the general assertion that the Commission abused its discretion in granting temporary total compensation to Mr. Ackley. However, in requesting the issuance of a writ in its prayer, relator focuses solely upon the propriety of the procedure employed by Judge Lucci in granting the Civ.R. 41(A)(2) motion to dismiss. No reference to the Commission is made in relator's prayer for relief.

{¶12} Obviously, the Industrial Commission does not have the ability to amend the judgment entry that dismissed the second "benefits" action without prejudice. Only Judge Lucci would have that authority. To this extent, the issuance of a writ in regard to the Commission would serve no legal purpose. For this reason alone, the Commission is not a proper party to this mandamus proceeding, and its dismissal as a respondent is justified under Civ.R. 12(B)(6). In light of this, this court concludes that Lake County is the proper venue for this action.

{¶13} As to the remaining two respondents, our review of their separate motions to dismiss demonstrate that Judge Lucci and Mr. Ackley have not raised any argument contesting this court's ability to proceed on the merits of the mandamus claim. Rather, their arguments focus solely upon the substance of relator's various assertions.

{¶14} First, in relation to the relator's contention that the "benefits" action could not be dismissed without its consent, Judge Lucci and Mr. Ackley contend that the requirements of R.C. 4123.512(D) were not controlling because the statute could not be applied retroactively to Mr. Ackley's claim. Second, as to the propriety of the procedure employed by Judge Lucci in granting the Civ.R. 41(A)(2) motion to dismiss, they submit

that this point cannot be litigated in the context of a mandamus action because relator has the ability to contest Judge Lucci's acts in a proper direct appeal.

{¶15} **Applicability of Amended R.C. 4123.512(D)**

{¶16} Concerning the first aspect of the remaining respondents' argument, under the current version of R.C. 4123.512(D), the claimant in a workers' compensation appeal is no longer entitled to unilaterally dismiss the complaint before the common pleas court. Rather, the statute provides that if the appeal was instituted by the employer, the employee can only voluntarily dismiss the complaint with the consent of the employer. As Judge Lucci and Mr. Ackley correctly note, in considering the general provisions of the legislative act that amended R.C. 4123.512(D) in August 2006, the Supreme Court of Ohio has already held that the statute's current version can only be applied prospectively. *Thorton v. Montville Plastics & Rubber, Inc.*, 121 Ohio St.3d 124, 2009-Ohio-360, syllabus. In applying its holding to the facts of that action, the *Thorton* court concluded that, since the employee's claim for benefits arose prior to the effective date of the statute, he had the right to dismiss the complaint without the consent of the employer. Id. at ¶21.

{¶17} In responding to the two remaining motions to dismiss, relator attempts to argue that the *Thorton* holding is not applicable to the facts of the instant action. Citing *Rock v. The Inn at Medina Management Co., Inc.*, 9th Dist. No. 07CA0072-M, 2008-Ohio-1992, relator asserts that a prior Supreme Court decision regarding the legal effect of a voluntary dismissal in a "benefits" case, *Fowee v. Wesley Hall, Inc.*, 108 Ohio St.3d 533, 2006-Ohio-1712, is still controlling in this instance because Mr. Ackley's underlying claim arose prior to the enactment of the new statute. According to relator, *Rock* stands

for the proposition that the *Fowee* holding must be applied retroactively to any workers' compensation claim which was pending when *Fowee* was released.

{¶18} In concluding that relator's argument is unpersuasive, this court would first indicate that the *Rock* opinion does not contain the analysis attributed to it by relator; in fact, a review of that opinion readily shows that the Ninth Appellate District did not even address the question of the application of *Fowee*. Second, it must be emphasized that, even if *Rock* did stand for the proposition cited by relator, that opinion was issued prior to the release of the Supreme Court's new decision in *Thorton*.

{¶19} At the time the *Thorton* decision was rendered in February 2009, no final adjudication had been made by Judge Lucci as to the merits of Mr. Ackley's claim. As a result, the new decisional law set forth in *Thorton* would not only apply to his claim, but would also be controlling over any prior precedent. See *Dennison v. LTV Steel Co.*, 8th Dist. No. 65890, 1994 Ohio App. LEXIS 3223, at *13-14. Furthermore, this court would reiterate that, in *Thorton*, the Supreme Court expressly held that the "consent" provision of the amended R.C. 4123.512(D) could not be applied retroactively to a claim that had arisen in June 2005, approximately twenty-six months before the amendment became effective.

{¶20} In the instant matter, relator's own petition alleged that Mr. Ackley's claim for benefits arose in August 2005. Given that the relevant facts of the two cases are almost indistinguishable, the *Thorton* holding is clearly applicable; i.e., since Mr. Ackley's claim was based upon facts which arose before the present version of R.C. 4123.512(D) took effect, it was not necessary for Mr. Ackley to obtain relator's consent prior to moving for a voluntary dismissal under Civ.R. 41(A)(2).

{¶21} **Procedure when confronted with a Civ.R. 41(A)(2) Dismissal**

{¶22} Even though the allegations in the mandamus petition focused primarily upon the "consent" question under the statute, relator also asserted that the issuance of a writ is warranted because Judge Lucci failed to employ the required procedure for dismissing a civil case under Civ.R. 41(A)(2). That is, relator has maintained that, in addition to committing prejudicial error in granting Mr. Ackley's motion to dismiss, Judge Lucci further erred in not conducting a full hearing on the dismissal request prior to making a ruling on the matter. As was noted above, Judge Lucci and Mr. Ackley contend that the merits of the foregoing points cannot be addressed in a mandamus action because relator has an adequate remedy at law.

{¶23} In dismissing relator's original appeal from Judge Lucci's decision on the Civ.R. 41(A)(2) motion, this court indicated that we lacked proper jurisdiction to review the ruling because the dismissal of the underlying action had been without prejudice. *Ackley*, 2010-Ohio-477, at ¶9. Nevertheless, our research pertaining to Civ.R. 41(A)(2) readily shows that a trial court's determination under the rule can be subject to appellate scrutiny at an appropriate time.

{¶24} For example, the Supreme Court of Ohio has held that the failure to allow the defendant to be heard on such a dismissal request can result in reversible error. *Logsdon v. Nichols* (1995), 72 Ohio St.3d 124, 127. Moreover, it has generally been held that the decision to grant or deny a Civ.R. 41(A)(2) dismissal will be overturned if an abuse of discretion can be established. See, e.g., *Vistula Management Co. v. Shoemake*, 6th Dist. No. L-07-1204, 2008-Ohio-365, at ¶17; *Douthitt v. Garrison* (1981), 3 Ohio App.3d 254, 256.

{¶25} Given that a dismissal without prejudice is not immediately appealable, the question then arises as to what procedure a defendant must follow in order to obtain appellate review of how and why a Civ.R. 41(A)(2) dismissal was granted. In answering this query, this court would first note that the majority of voluntary dismissals in workers' compensation cases invoke Civ.R. 41(A)(1)(a), which allows a plaintiff/claimant to file a notice of dismissal at any time before the beginning of trial. Unlike a motion to dismiss under Civ.R. 41(A)(2), the procedure under Civ.R. 41(A)(1)(a) does not involve any action or step by the trial court; i.e., the mere filing of the notice is sufficient for the action to be dismiss, and the trial court generally loses jurisdiction to go forward. See *State ex rel. Hunt v. Thompson* (1992), 63 Ohio St.3d 182. However, Civ.R. 41(A)(1)(a) expressly states that a notice of dismissal will only be deemed to be without prejudice the first time it is employed by a plaintiff/claimant. According to the rule, if the "notice" procedure is used a second time as to a specific claim, the dismissal will constitute an "adjudication upon the merits ***."

{¶26} Under well-established precedent, a dismissal under Civ.R. 41(A)(1)(a) is not considered a final appealable order because, under most circumstances, it does not have any prejudicial effect upon the parties' future rights. *Thorton*, 2009-Ohio-360, at ¶24. Thus, if the filing of a notice of dismissal constitutes a plaintiff/claimant's second use of the procedure as to a particular claim, the defendant cannot raise the application of the "two-dismissal" rule in a direct appeal from the dismissal. Rather, the defendant must wait to see if the plaintiff/claimant attempts to file his "benefits" complaint a third time, and then move for summary judgment based upon the fact that Civ.R. 41(A)(1)(a) has already been twice invoked.

{¶27} In the instant matter, Judge Lucci's dismissal order under Civ.R. 41(A)(2) was likewise without prejudice. As a result, the foregoing analysis would also apply in this instance. That is, if Judge Lucci did not follow the correct procedure or abused his discretion in granting Mr. Ackley's motion, relator cannot assert such issues in a direct appeal from the dismissal order. Instead, relator must wait to see if Mr. Ackley chooses to assert his claim for benefits again. If he does, the possibility for prejudice to relator will then be fully ripe, and it can re-assert its arguments concerning the Civ.R. 41(A)(2) in a dispositive motion before the common pleas court. Furthermore, if relator disagrees with Judge Lucci's ruling on the dispositive motion, it can pursue a direct appeal on the matter at the conclusion of the entire proceeding.

{¶28} As one of the three elements for a writ of mandamus, the relator must be able to prove that there is no other adequate remedy at law he could seek to resolve the underlying dispute. *State ex rel. Humr v. Pittman*, 11th Dist. No. 2010-P-0066, 2011-Ohio-403, at ¶9. In relation to this element, this court has consistently indicated that a direct appeal from a final appealable order constitutes an adequate legal remedy which forecloses the issuance of such a writ. Id. Therefore, in light of the foregoing analysis, we conclude that relator has an adequate legal remedy in this instance. That is, even though relator could not appeal the merits of Judge Lucci's dismissal order at the time it was rendered in October 2009, such an appeal may be feasible if Mr. Ackley ultimately succeeds on the actual merits of his "benefits" claim or after successful dispositive motion practice by relator.

{¶29} As an aside, it should also be noted that even if the "consent" requirement of R.C. 4123.512(A) could be applied retroactively to the facts of the underlying case,

any error in Judge Lucci's disposition of the Civ.R. 41(A)(2) motion to dismiss would be subject to appellate review in a direct appeal from the ultimate final judgment. Thus, as to both grounds of the instant mandamus claim, our review of relator's factual assertions conclusively shows that it will never be able to prove a set of facts under which it could satisfy the "adequate legal remedy" element for the writ. For this reason, the dismissal of the mandamus petition is warranted under Civ.R. 12(B)(6) because relator has failed to state a viable claim for relief as to Judge Lucci and Mr. Ackley.

{¶30} Consistent with the foregoing discussion, all three motions to dismiss, as filed by Judge Eugene A. Lucci, the Industrial Commission of Ohio, and Jerry Ackley, III, are granted. It is the order of this court that relator's entire mandamus petition is hereby dismissed as to all three respondents.

CYNTHIA WESTCOTT RICE, J., concurs,

THOMAS J. WRIGHT, J., concurs in judgment only.