

[Cite as *Johnson v. Cuyahoga Cty.*, 2017-Ohio-4304.]

Court of Appeals of Ohio

EIGHTH APPELLATE DISTRICT
COUNTY OF CUYAHOGA

JOURNAL ENTRY AND OPINION
No. 105040

ROBERT JOHNSON

PLAINTIFF-APPELLEE

vs.

CUYAHOGA COUNTY, OHIO, ET AL.

DEFENDANTS-APPELLANTS

JUDGMENT:
AFFIRMED

Civil Appeal from the
Cuyahoga County Court of Common Pleas
Case No. CV-16-861770

BEFORE: Jones, J., E.A. Gallagher, P.J., and Stewart, J.

RELEASED AND JOURNALIZED: June 15, 2017

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LARRY A. JONES, SR., J.:

{¶1} Defendant-appellant, Cuyahoga County, appeals the trial court's dismissal of plaintiff-appellee's, Robert Johnson, complaint pursuant to Civ.R. 41(A). We affirm.

{¶2} Robert Johnson claimed he was injured on September 8, 2015, during the course and scope of his employment with Cuyahoga County. He filed a claim with appellee, Ohio Bureau of Workers' Compensation ("BWC"), and his claim was allowed for "partial thickness tear of the Achilles tendon right ankle."

{¶3} In April 2016, the county appealed to the court of common pleas. After the county filed its appeal to the common pleas court, Johnson, as mandated, filed his complaint for benefits in compliance with the procedure that places the burden on him to start anew in the common pleas court and prove his claim.

{¶4} In September 2016, Johnson filed a notice of voluntary dismissal of his complaint under Civ.R. 41(A) and the trial court dismissed the case. Johnson did not obtain his employer's consent before dismissing his complaint.

{¶5} Cuyahoga County now appeals, raising one assignment of error for our review:

The trial court erred in allowing a dismissal under Civil Rule 41(A) of the Ohio Rules of Civil Procedure when the appeal in the trial court was instigated.

{¶6} In 2006, the Ohio General Assembly enacted Am.Sub.S.B. No. 7 (S.B. 7). In relevant part, S.B. 7 amended R.C. 4123.512(D) and "ended an employee-claimant's

unilateral ability to voluntarily dismiss the complaint in an appeal brought by an employer.” *Thorton v. Montville Plastics & Rubber, Inc.*, 121 Ohio St.3d 124, 2009-Ohio-360, 902 N.E.2d 482, ¶ 5. Pursuant to the amendment, an employer must now consent to the voluntary dismissal of the appeal without prejudice. *Id.* at ¶ 14. Cuyahoga County and the BWC both argue that, pursuant to the plain language of R.C. 4123.512(D), the trial court should have denied Johnson’s notice to dismiss his complaint.

{¶7} This court has held, however, that the requirement in amended R.C. 4123.512(D) that a plaintiff obtain an employer’s consent prior to filing a motion to dismiss an appeal, violates the Ohio Constitution, Article IV, Section 5(B) because it is in contravention of Civ.R. 41(A)(1)(a). *Ferguson v. State*, 2015-Ohio-4499, 42 N.E.3d 804, ¶ 18 (8th Dist.), *appeal accepted*, 145 Ohio St.3d 1421, 2016-Ohio-1173, 47 N.E.3d 165. In *Ferguson*, this court found the amended statute unconstitutional because it violates the basic principles of separation of powers, equal protection, and due process. *Id.* at ¶ 37.

{¶8} We note that *Ferguson* has been accepted by the Ohio Supreme Court as a discretionary appeal. Until such time as *Ferguson* is decided by the Ohio Supreme Court, the holding in *Ferguson* remains binding precedent in this district. Thus, the requirement that an injured worker obtain his or her employer’s consent before dismissing his or her complaint under Civ.R. 41 is not the law in this district. As such, the trial court did not err in accepting Johnson’s notice of voluntary dismissal under Civ.R. 41 or in dismissing the case without prejudice.

{¶9} The sole assignment of error is overruled.

{¶10} Judgment affirmed.

It is ordered that appellee recover of appellant costs herein taxed.

The court finds there were reasonable grounds for this appeal.

It is ordered that a special mandate issue out of this court directing the Cuyahoga County Court of Common Pleas to carry this judgment into execution.

A certified copy of this entry shall constitute the mandate pursuant to Rule 27 of the Rules of Appellate Procedure.

LARRY A. JONES, SR., JUDGE

EILEEN A. GALLAGHER, P.J., CONCURS;
MELODY J. STEWART, J., DISSENTS WITH
SEPARATE OPINION

MELODY J. STEWART, J., DISSENTING:

{¶11} There is nothing rational about a workers' compensation administrative appeals process that allows an employee to unilaterally dismiss his or her complaint, required in an employer's workers' compensation appeal, all the while collecting workers' compensation benefits, and then be able to take advantage of the one-year savings clause to refile the case. The legislature remedied this anomalous situation in R.C. 4123.512(D) by requiring an employee to obtain an employer's consent before voluntarily dismissing a complaint in an employer's administrative appeal. Nonetheless, in *Ferguson v. State*, 2015-Ohio-4499, 42 N.E.3d 804 (8th Dist.), a panel of this court found that R.C.

4123.512(D) violates due process, equal protection, and the separation of powers. I respectfully disagree with *Ferguson*. Review of that decision is currently pending with the Ohio Supreme Court, so a full statement of the reasons for my disagreement with *Ferguson* is unnecessary.

{¶12} The Ohio Constitution not only establishes the workers’ compensation system, *see* Article II, Section 35 of the Ohio Constitution, it gives “wide latitude to the General Assembly to enact laws” to serve the purposes of the workers’ compensation system. *Indus. Comm. of Ohio v. Warnke*, 131 Ohio St. 140, 150, 2 N.E.2d 248 (1936). The General Assembly employed this wide latitude to create an undeniably unique appellate process where it is the obligation of the employee to file a complaint after an employer files a notice of appeal with the common pleas court from an adverse administrative ruling and can voluntarily dismiss the complaint and thus delay the appeal. That the legislature likewise used its wide latitude to create a consent provision to prevent an employee from unilaterally dismissing an employer’s appeal is not only rational, that provision resulted from judicial recognition of how irrational the prior system had been. *Fowee v. Wesley Hall, Inc.*, 108 Ohio St.3d 533, 2006-Ohio-1712, 844 N.E.2d 1193, ¶ 29 (O’Donnell, J., concurring in judgment only).

{¶13} I likewise find *Ferguson’s* separation-of-powers analysis — that the consent provision impedes upon the right of voluntary dismissal under Civ.R. 41(A) — to be misplaced. To the extent that the Ohio Supreme Court has the power to promulgate procedural rules, *see* Article IV, Section 5(B) of the Ohio Constitution, the Ohio Supreme

Court exercised that rule-making authority to state that the Rules of Civil Procedure do not apply to “special statutory proceedings.” See Civ.R. 1(C)(8). The workers’ compensation appeals process is a special proceeding, *Myers v. Toledo*, 110 Ohio St.3d 218, 2006-Ohio-4353, 852 N.E.2d 1176, ¶ 15, so the consent provision makes Civ.R. 41(A) “clearly inapplicable.” For these reasons, I dissent.