

[Cite as *Rembert v. Ohio Dept. of Rehab. & Corr.*, 2005-Ohio-6311.]

IN THE COURT OF CLAIMS OF OHIO
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ALBERT L. REMBERT :
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Plaintiff : CASE NO. 2003-01148
Judge J. Craig Wright
v. : Magistrate Steven A. Larson

DEPARTMENT OF REHABILITATION : JUDGMENT ENTRY
AND CORRECTION :
:
Defendant
: : : : : : : : : : : : : : : : :

{¶ 1} This case was tried to a magistrate of the court, and on September 6, 2005, the magistrate issued a decision recommending judgment for defendant. The magistrate also recommended that the court issue a determination that Dr. Albert Loescher is entitled to civil immunity pursuant to R.C. 9.86 and 2743.02(F) and that the courts of common pleas do not have jurisdiction over any civil actions that may be filed against him based upon the allegations in this case.

{¶ 2} Rather than filing objections to the magistrate's decision, plaintiff filed a motion on September 15, 2005, to dismiss his case without prejudice. Defendant filed a response on September 16, 2005. Plaintiff filed a reply on September 26, 2005.

{¶ 3} Civ.R. 41(A)(2) states that "a claim shall not be dismissed at the plaintiff's instance except upon order of the court and upon such terms and conditions as the court deems proper." In *Beckner v. Stover* (1969), 18 Ohio St.2d 36, the court explained that the rule was designed to discourage a practice "*** whereby litigants could substitute a voluntary dismissal without

prejudice for an appeal from claimed errors occurring during a trial." The court warned that "[u]nder such a practice, parties could try and retry their causes indefinitely until the most favorable circumstances for submission were finally achieved. In our opinion, Section 2305.19, neither provides for nor permits such a practice." *Id.* at 40. See, also, *Chadwick v. Barba Lou, Inc.* (1982), 69 Ohio St.2d 222.

{¶ 4} As stated above, plaintiff did not file his motion to dismiss until after his case had been tried to a magistrate of the court and after the magistrate had recommended judgment in favor of defendant. To allow plaintiff to dismiss his case without prejudice just prior to the submission of the case to the court pursuant to Civ.R. 53(E)(4)(a) would promote the very practice proscribed by Civ.R. 41(A) and it would unfairly prejudice defendant. See *Beckner*, *supra*. Accordingly, plaintiff's motion to dismiss is DENIED.

{¶ 5} Civ.R. 53 states: "A party may file written objections to a magistrate's decision within fourteen days of the filing of the decision, regardless of whether the court has adopted the decision pursuant to Civ.R. 53(E)(4)(c)." As stated above, plaintiff did not file an objection within the time prescribed by Civ.R. 53(E)(4)(c).

{¶ 6} Upon review of the record and the magistrate's decision, the court determines that there is no error of law or other defect on the face of the magistrate's decision. Therefore, the court adopts the magistrate's decision and recommendation as its own including the findings of fact and conclusions of law contained therein. Judgment is rendered in favor of defendant. Additionally, the court determines that Dr. Albert Loescher is

entitled to civil immunity pursuant to R.C. 9.86 and 2743.02(F) and that the courts of common pleas do not have jurisdiction over any civil actions that may be filed against Dr. Albert Loescher based upon the allegations in this case. Court costs are assessed against plaintiff. The clerk shall serve upon all parties notice of this judgment and its date of entry upon the journal.

J. CRAIG WRIGHT
Judge

Entry cc:

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