[Cite as *Hewston v. AT&T Teleholdings, Inc.*, 2018-Ohio-294.]

Court of Appeals of Ohio

EIGHTH APPELLATE DISTRICT
COUNTY OF CUYAHOGA

JOURNAL ENTRY AND OPINION
No. 105986

CURTIS L. HEWSTON

PLAINTIFF-APPELLEE

vs.

AT&T TELEHOLDINGS, INC., ET AL.

DEFENDANTS-APPELLANTS

JUDGMENT:
REVERSED AND REMANDED

Civil Appeal from the
Cuyahoga County Court of Common Pleas
Case No. CV-16-868937

BEFORE: McCormack, J., Kilbane, P.J., and Stewart, J.

RELEASED AND JOURNALIZED: January 25, 2018

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TIM McCORMACK, J.:

{¶1} Defendant-appellant AT&T Teleholdings, Inc./The Ohio Bell Telephone Company ("AT&T") appeals from the Cuyahoga County Court of Common Pleas' dismissal of plaintiff-appellee, Curtis L. Hewston's complaint. For the reasons that follow, we reverse and remand the decision of the trial court.

{¶2} Hewston filed a claim with the Bureau of Workers' Compensation ("BWC") for injuries allegedly incurred during the course and scope of his employment with AT&T. The BWC allowed the claim for "left knee contusion; concussion with loss of consciousness; traumatic optic nerve injury; cervical sprain/strain; lumbar sprain/strain; left shoulder sprain; full thickness tear of left supraspinatus tendon; and left biceps tendinopathy." AT&T appealed the allowance to the Industrial Commission, which refused the appeal.

{¶3} On September 13, 2016, AT&T filed a notice of appeal in the common pleas court pursuant to R.C. 4123.512. Thereafter, as required by the statute, Hewston filed a complaint on October 7, 2016. The court scheduled the matter for trial on August 14, 2017. However, on June 15, 2017, Hewston filed a notice of voluntary dismissal pursuant to Civ.R. 41(A), without AT&T's consent. The court then dismissed the case without prejudice by a journal entry dated June 16, 2017.

{¶4} AT&T now appeals from this judgment, raising one assignment of error: "The trial court erred by dismissing the case without prejudice because Defendant AT&T

did not consent to a voluntary dismissal of plaintiff's court complaint as required by R.C. 4123.512(D)."

{¶5} The so-called "consent provision" of the workers' compensation statute provides as follows:

> 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.*

(Emphasis added.) R.C. 4123.512(D).

{¶6} This provision of the statute, enacted by the Ohio General Assembly in 2006, "'ended an employee-claimant's unilateral ability to voluntarily dismiss the complaint in an appeal brought by an employer.'" *Johnson v. Cuyahoga Cty.*, 8th Dist. Cuyahoga No. 105040, 2017-Ohio-4304, ¶ 6, quoting *Thorton v. Montville Plastics & Rubber, Inc.*, 121 Ohio St.3d 124, 2009-Ohio-360, 902 N.E.2d 482, ¶ 5. Under this amendment, an employer must consent to the voluntary dismissal of the appeal without prejudice. *Johnson*, quoting *Thorton* at ¶ 14.

{¶7} At the time of the filing of this appeal, the Ohio Supreme Court was considering a challenge to the constitutionality of R.C. 4123.512(D) in *Ferguson v. State*, 151 Ohio St.3d 265, 2017-Ohio-7844, __ N.E.3d ___. This case was stayed pending the Supreme Court's decision in *Ferguson*. On September 28, 2017, the Supreme Court released its decision, finding 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 does not violate the basic principles of separation of powers, equal protection, or due process. *Id.* On December 11, 2017, appellee Hewston filed a notice of conceded error, acknowledging the Supreme Court's position in *Ferguson*.

{¶8} The Supreme Court in *Ferguson* concluded that an R.C. 4123.512 appeal constitutes a special proceeding and, therefore, there is no conflict between the consent provision and Civ.R. 41:

> The Civil Rules allow the General Assembly to implement procedural rules in special statutory proceedings and recognize that such statutes take precedence when they render the Civil Rules inapplicable. An R.C. 4123.512 appeal is a special statutory proceeding. The consent provision renders Civ.R. 41(A) clearly inapplicable because the consent provision does not allow dismissals of employer-initiated appeals without the consent of the employer. Therefore, the consent provision does not violate Article IV, Section 5(B) of the Ohio Constitution.

Id. at ¶ 27.

{¶9} The Supreme Court also concluded that the consent provision does not violate the equal-protection guarantees of the constitution or substantive due process protections because the provision is rationally related to a legitimate state interest. *Id.* at ¶ 43. In upholding R.C. 4123.512, the court explained that

> [t]he General Assembly saw what it viewed as an area of concern — that a claimant in an employer-initiated workers' compensation appeal could unilaterally prolong the appeal process for the sole purpose of guaranteeing the continued receipt of benefits for at least an additional year. This resulted in a needless extension of a process designed to run quickly, financial effects on the system as a whole, and a waste of judicial resources. And so, the General Assembly changed the law.

Id. at ¶ 44.

{¶10} Accordingly, in light of *Ferguson*, and in accordance with R.C. 4123.512(D), we must find here that the trial court erred by dismissing Hewston's complaint. Plaintiff-appellee Hewston filed a notice of voluntary dismissal of its complaint without AT&T's consent. Under the consent provision of R.C. 4123.512(D), Hewston could not voluntarily dismiss an employer-initiated appeal without the employer's consent. *Marrero v. Blaze Constr.*, 8th Dist. Cuyahoga No. 91660, 2009-Ohio-965.

{¶11} AT&T's sole assignment of error is sustained.

{¶12} The judgment of the trial court is reversed and the matter is remanded to the trial court for adjudication of AT&T's administrative appeal on the merits.

It is ordered that appellant recover of said appellee 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 common pleas court 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.

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TIM McCORMACK, JUDGE

MARY EILEEN KILBANE, P.J., and
MELODY J. STEWART, J., CONCUR