In the

Supreme Court of Ohio

ROBERT THORTON, Plaintiff-Appellee, v. MONTVILLE PLASTICS AND RUBBER, INC., Defendant-Appellant and ADMINSTRATOR, BUREAU OF WORKERS' COMPENSATION, et al., Defendant-Appellee.	:	Case No. 2007-1588 On Appeal from the Geauga County Court of Appeals, Eleventh Appellate District Court of Appeals Case No. 2006-G-2760

MERIT BRIEF OF DEFENDANT-APPELLEE ADMINISTRATOR, BUREAU OF WORKERS' COMPENSATION

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TABLE OF CONTENTS

Page

TABLE OF AUTHORITIES

Cases **Page(s)**

Statutes and Rules **Page(s)**

Other **Page(s)**

INTRODUCTION

The Administrator of the Bureau of Workers' Compensation (Administrator), as Defendant-Appellee, urges the Court hold that, with the exception of one provision, Amended Substitute Senate Bill No. 7 of the 126th General Assembly ("Am. Sub. S.B. 7") is prospective in effect. Because the new law is prospective only, Plaintiff-Appellee Robert Thorton's ("Thorton's") right to voluntarily dismiss his complaint in the trial court in this employer appeal remains intact under former law, as articulated in *Fowee v. Wesley Hall, Inc.*, 108 Ohio St. 3d 533, 2006-Ohio-1712 and *Kaiser v. Ameritemps, Inc.*, 84 Ohio St. 3d 411, 1999-Ohio-360.

The Court should not find the law retroactive, for at least three reasons. First, the law itself says that it is prospective only. The General Assembly stated its intent in an uncodified section of the bill, which says that the "act applies to all claims . . . arising on and after the effective date of this act," with only one exception, not relevant here. Second, the sole exception serves to emphasize that the General Assembly knew how to make provisions prospective or retrospective, and chose to make most provisions prospective only. And third, the Legislative Service Commission's commentary confirms the legislative intent that the bill be prospective.

Thorton's employer, Appellant Montville Plastics and Rubber, Inc. ("Montville") is mistaken in its argument that older statutory language makes the amendments of Am. Sub. S.B. 7 retrospective. The language pertaining to retroactivity in Am. Sub. S.B. 7 is both later and more specific than the statutory language relied on by Montville. Therefore, under R.C. 1.51, the uncodified language making the amendments prospective controls.

Further, if the Court were to find the amendments retroactive, such a holding would do more than render Thorton's right to dismiss contingent on permission from Montville. Applying Am. Sub. S.B. 7 retroactively would broadly affect issues beyond voluntary dismissal, because the bill amended several workers' compensation statutes, affecting many programs and

procedures. Retroactive application would affect issues as diverse as the determination and payment of benefits, coverage for employers, definition of injuries, public records, disputes and appeals, anti-fraud provisions, fines and penalties, limitations on the investment policies of the Bureau and statutory attorney fees. The General Assembly would not have made such sweeping changes retroactive without a clear statement of intent to do so.

Moreover, the court below was correct when it dismissed Montville's appeal, because a voluntary dismissal is neither an adjudication on the merits nor a final appealable order. *Hensley v. Henry* (1980), 61 Ohio St. 2d 277, 279; R.C. 2505.02(A), (B).

In short, the Court should affirm the Court of Appeals.

STATEMENT OF THE CASE AND FACTS

A. Under the Court's decisions in *Fowee v. Wesley Hall, Inc.*, 108 Ohio St. 3d 533 2006-Ohio-1712 and *Kaiser v. Ameritemps, Inc.*, 84 Ohio St. 3d 411, 1999-Ohio-360, a workers' compensation claimant could voluntarily dismiss the complaint in an appeal under R.C. 4123.512, even when the employer had brought the appeal.

When an employer appeals an order of the Commission allowing a workers' compensation claim, the claimant must file the complaint and act as the plaintiff in the ensuing *de novo* court proceeding, even though the employer has initiated the case:

> 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.

R.C. 4123.512(D). See also *Zuljevic v. Midland-Ross Corp.* (1980), 62 Ohio St. 2d 116, 118. A trial under R.C. 4123.512 proceeds under the Civil Rules:

> 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 . . .

R.C. 4123.512(D).

Under the law that applied before the amendments at issue, the Court had held that a claimant could use Civ. R. 41(A)(1)(a) to voluntarily dismiss a complaint, regardless of whether the claimant or his employer filed the appeal. *Fowee v. Wesley Hall, Inc.*, 108 Ohio St. 3d 533, 2006-Ohio-1712, ¶ 22; *Kaiser v. Ameritemps, Inc.*, 84 Ohio St. 3d 411, 1999-Ohio-360; *Price v. Westinghouse Electric Corp.* (1982), 70 Ohio St. 2d 131. That is, even if an employer filed an appeal under R.C. 4123.512, the claimant could still use Civ. R. 41(A) to voluntarily dismiss because the claimant was still formally the plaintiff in the case.

Under that regime, when a claimant voluntarily dismissed, he could do so with or without a court order, and could refile the action later. He could take up to a year after the voluntary dismissal, as that is the time permitted by Ohio's "savings statute," R.C. 2305.19. Once he did, the court would have jurisdiction and the matter would proceed. Indeed, it was reversible error for a trial court not to honor a claimant's Civ. R. 41(A)(1)(a) notice of voluntary dismissal. 84 Ohio St. 3d at 416.

In addition, a voluntary dismissal under Civ. R. 41(A)(1)(a) under prior law was self-executing and left the court without jurisdiction to proceed. "Because [the claimant] could properly dismiss his complaint pursuant to Civ. R. 41(A)(1)(a), the trial court was without jurisdiction to enter judgment in favor of [the employer] as a sanction for [the claimant's] failure to prosecute." 84 Ohio St. 3d at 416.

B. The General Assembly superseded the *Kaiser/Fowee* rule in Am Sub. S.B. 7, and the new statute expressly provides that it applies only to claims arising after the law's effective date.

The General Assembly passed Am. Sub. S.B. 7 on March 8, 2006. The Governor signed it on March 28, 2006. The bill amended a number of provisions of the workers' compensation laws, but two provisions are relevant to the facts in this case.

First, the bill modified R.C. 4123.512(D) to take away the ability of workers' compensation claimants to voluntarily dismiss the complaint in an employer appeal. The new law, as amended in Am. Sub. S.B. 7, requires that in an employer appeal, the claimant seek the employer's permission to dismiss:

> 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 pursuant to this section* . . .

R.C. 4123.512(D) as amended by Am. Sub. S.B. 7 (emphasis added to amended language). Thus, under the new law a claimant can no longer dismiss a complaint in an employer appeal without consent of the employer.

Second, the amendments in Am. Sub. S.B. 7 included an uncodified provision indicating that, with one exception, the act was to be prospective in effect:

> This act applies to all claims pursuant to Chapters 4121., 4123., 4127., and 4131. of the Revised Code arising on and after the effective date of this act, except that division (H) of section 4123.512 as amended by this act also applies to claims that are pending on the effective date of this act.

Section 3 of Am. Sub. S.B. 7. Thus, the amendments, with one exception not relevant here, were to apply only to "claims arising on and after the effective date" of the act.

Before its original effective date of June 30, 2006, some, but not all, of the provisions in Am. Sub. S.B. 7 were the subject of a voter-initiated referendum petition that ultimately failed. Relevant here, the amendment to R.C. 4123.512(D) was challenged along with some others.[1] The effective date of the challenged provision is October 11, 2006. *Mahaffey v. Blackwell*, 2006-Ohio-5319.

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[1] The other provisions involved in the challenge were 4121.10 (public records); 4121.12 (oversight commission authority); 4121.131 (access to criminal justice databases); 4123.01 (injury definition); 4123.52 (continuing jurisdiction); 4123.54 (coverage); 4123.56 (wage loss);

C. Thorton was injured in June 2005, the year before the new statute was passed; he filed a workers' compensation claim, and Montville appealed.

Thorton filed a worker's compensation claim for injuries he sustained on June 27, 2005 while working for Montville. Montville administratively contested the claim, but it was ultimately allowed by the Industrial Commission. Montville filed a Notice of Appeal, under R.C. 4123.512, to the Geauga County Court of Common Pleas. In accordance with the statute, Thorton timely filed a complaint and Montville and the Administrator of the Bureau of Workers' Compensation timely filed answers.

D. Thorton voluntarily dismissed the complaint under the *Kaiser/Fowee* rule, the court journalized an order approving the dismissal, and Montville appealed.

On October 19, 2006, Thorton's counsel filed a Notice of Voluntary Dismissal Without Prejudice under Civ. R. 41(A)(1). On October 31, 2006, the trial court journalized an order approving and confirming the dismissal without prejudice. On November 30, 2006, Montville filed an appeal from the trial court's entry of October 31, 2006, to the Eleventh District Court of Appeals. Montville never filed an appeal to Thorton's October 19, 2006 notice of voluntary dismissal.

On July 9, 2007, the court of appeals sua sponte dismissed Montville's appeal for being untimely filed and not in compliance with App. R. 3, as it was filed 42 days after the notice of voluntary dismissal. Montville asked this Court to take jurisdiction and reverse. The Court accepted jurisdiction, resulting in this appeal.

4123.58 (permanent total); 4123.61 (average weekly wage); 4123.65 (settlement) and 4123.88 (public records).

E. Montville moved for relief from the trial court's order, the Court of Appeals remanded to allow consideration of Montville's motion, the trial court denied the motion and Montville appealed.

On November 20, 2006, Montville filed in the trial court a motion under Civ. R. 60(B) for relief from that court's October 31, 2006 entry and for an entry of judgment on the grounds of want of prosecution. Because Montville appealed the journal entry on November 30, the trial court did not consider the Civ. R. 60 motion until a limited remand was issued by the court of appeals on January 18, 2007. The trial court denied the motion on February 12, 2007. Montville filed a separate appeal to that denial, and the court of appeals dismissed that second appeal, holding that the denial by the trial court was not a final appealable order. Montville has appealed that denial of the Rule 60(B) motion to this Court, but the Court has yet to accept or reject jurisdiction. Case No. 2008-0298.

ARGUMENT

Administrator's Proposition of Law No 1:[2]

The amendments to Ohio law in Am. Sub. S.B. 7, with one exception, are exclusively prospective in operation.

A. With the exception of one provision not at issue here, uncodified language in Am. Sub. S.B. 7 makes it exclusively prospective in effect.

The provisions of Am. Sub. S.B. 7 are, with one exception, prospective only. Here, the General Assembly expressly intended the statute to apply only prospectively, and not retrospectively. "A statute is presumed to be prospective in its operation unless expressly made retrospective." R.C. 1.48. Thus, unless the General Assembly expressly made Am. Sub. S.B. 7

[2] This proposition is in response to Montville's Proposition of Law No. 1, which reads: Due to R.C. § 4321.512(D)'s "employer's consent" requirement, a claimant-plaintiff who files a Civ. R. 41(A)(1)(a) notice of dismissal of his complaint upon his employer's appeal to the court of common pleas without his employer's consent thereby abandons his claim to the right of participation and cannot later refile such complaint despite his inclusion of the words, "without prejudice," in his notice of dismissal.

retrospective, it is assumed to be prospective in operation. For at least three reasons, the General Assembly intended that the statute be prospective only, with the exception of a single provision.

First, as noted above, an uncodified section of the law expressly states that the law is to have prospective effect:

> Section 3. This act applies to all claims pursuant to Chapters 4121., 4123., 4127., and 4131. of the Revised Code *arising on and after the effective date of this act, except that division (H) of section 4123.512 as amended by this act also applies to claims that are pending on the effective date of this act.*

Section 3 of Am. Sub. S.B. 7 (emphasis added). The one exception to the General Assembly's express intention that the statute be prospective only is R.C. 4123.512(H), a section not at issue here. R.C. 4123.512(H) deals with the timing of payment of compensation and medical benefits in disputed cases, and reimbursement to employers for disallowed claims.

Second, Section 3's specific exception to the prospective nature of Am. Sub. S.B. 7 serves to emphasize that the General Assembly was intentionally making most provisions of the new law prospective only. The General Assembly knew how to make a provision retrospective, and did so with the amendments to R.C. 4123.512(H). It could have done so with other provisions, but chose not to.

Third, the Bill Analysis from the Legislative Service Commission of Am. Sub. S.B. 7 confirms the General Assembly's intent that the statute be solely prospective in effect. "The act's provisions apply to claims arising on and after the act's effective date . . .." LSC Analysis, Appendix at A8 ("Apx at A8"). "The act's provisions apply only to claims arising on and after the act's effective date, except . . . section (H)." LSC Analysis, Apx at A9.

In short, the unambiguous language of the act itself makes Am. Sub. S.B. 7 solely prospective in all but one of its provisions.

B. Where, as here, the General Assembly specifically indicates an intent that amendments apply only prospectively, that specific language controls over earlier, more general language.

Montville's argument in favor of the retroactive application of Am. Sub. S.B. 7 is mistaken. Montville argues that retroactivity is mandated by *Morgan v. Western Electric Co. Inc.* (1982), 69 Ohio St. 2d 278. *Morgan* noted that language in R.C. 4123.512(H) made all of .511 and .512, as it then existed, retrospective in operation to November 2, 1959. Specifically, subsection (H) said, and still says, that section .512 generally applies to all cases since 1959:

> This section applies to all decisions of the commission or the administrator on November 2, 1959, and all claims filed thereafter are governed by sections 4123.511 . . . and 4123.512 . . . of the Revised Code.

R.C. 4123.512(H). Although the *Morgan* Court was right in noting that the 1979 amendments at issue there were retroactive, the *Morgan* decision does not support Respondents' argument that the 2006 amendments here have retroactive effect. To the contrary, *Morgan* supports the State's view that the amendment at issue here is prospective only.

First, the issue in *Morgan* was not whether the General Assembly *intended* retroactivity, as no one disputed that intent; the issue was whether such retroactive application was constitutionally permissible. See *Morgan*, 68 Ohio St. 2d at 281. Ohio's Constitution, in Section 28 of Article II, forbids the passage of retroactive laws, but it has long been settled that the prohibition applies only to substantive laws. *Id.* Procedural or remedial laws may be applied retroactively without offending the prohibition, and the Court in *Morgan* held that the provision at issue was remedial, and thus was constitutional. *Id.* In *Morgan*, the party opposing retroactive application did not, apparently, even contest the Assembly's intent to apply the 1979 amendments retroactively, but challenged only the constitutionality of doing so. See *id.* at 283 ("Appellee Morgan contends that the amendment creates a substantive right and therefore may

not be retroactively applied . . . ."). Thus, *Morgan* includes no holding that applies to the question here, which is solely one of legislative intent.

Second, *Morgan*'s brief discussion of legislative intent, although dicta, strongly supports the State's view here, not Montville's. The Court in *Morgan* noted, in regard to the 1979 amendments, "the legislative intent is evident: in controlling all claims filed after November 2, 1959, the statute and all its amendments were 'expressly made retrospective.'" *Id.* at 282-83. In a supporting footnote to that passage, the Court cited language from a dissent in an earlier case, which had concerned 1977 amendments to the same statute.[3] See *id.* at 283 n.9, citing *Tague v. Bd. of Trustees* (1980), 61 Ohio St. 2d 136, 140-41 (Locher, J., dissenting). That earlier language from *Tague*, cited with approval in *Morgan*, noted the "clear legislative intention" to apply the 1977 amendments retroactively to all claims going back to 1959, citing the statutory language that Respondents here seek to rely on.

But notably, that same passage went on to stress that the General Assembly could have overcome the statutory reference to the 1959 date by specifically providing that the amendments at issue would apply only from a newer date:

> The Legislature could easily have stated that the amended procedure was valid only for claims filed after January 17, 1977, the effective date of Am. Sub. S.B. No. 545. The failure to change a November 2, 1959, date clearly establishes the intention to make the admitted provision applicable to all pending claims.

Id. In *Morgan*, the legislation at issue did not include any language setting a newer date for prospective-only operation, so the old 1959 reference was the only language available indicating the General Assembly's intent.

Unlike in *Morgan*, the legislation here expressly stated that the 2006 amendments (with one exception) would apply only to claims arising after the effective date; in other words, this

case involves precisely the scenario that the *Morgan/Tague* language foresaw and distinguished. As the State's opening brief explained, the uncodified language leaves no doubt that only R.C. 4123.512(H) is to be applied retroactively:

> This act applies to all claims pursuant to Chapters 4121., 4123., 4127., and 4131. of the Revised Code arising on and after the effective date of this act, except that division (H) of section 4123.512 as amended by this act also applies to claims that are pending on the effective date of this act.

Section 3 of Am. Sub. S.B. 7. In short, *Morgan* notes that the Assembly has the power to set a different date, and in this case the Assembly has done so.

Montville tries to get around Section 3's express language by relying on Section 3's exception for division (H), but that argument fails. Montville argues that because subsection (H) contains the language at issue in *Morgan*—the November 2, 1959 language that makes all of .511 and .512 retroactive—and is itself made retroactive by Section 3 of Am. Sub. S.B. 7, that reference thus sweeps in *all* of the amendments to .512 in Am. Sub. S.B. 7, making all of them retroactive as well. Thus, says Montville, the particular provision at issue here—the new rule about voluntary dismissal—is swept into the exception for subsection (H) and is retroactive.

That argument cannot hold, as it would literally provide for a case in which the exception, i.e., the exception for subsection (H), would swallow the rule, i.e., the rule establishing prospective application for all the amendments, including those to R.C. 4123.512, other than those to R.C. 4123.512(H). Surely the General Assembly did not go to the trouble of indicating in plain language that it intended for *all* the amendments to be prospective, except for one, but then contradict that plain intent by arranging for the one reference to sweep in all the other amendments to R.C. 4123.512 and make those other amendments retroactive after all. If the Assembly had wanted the new voluntary dismissal rule, or some or all of the other amendments

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[3] The statute at issue in both *Morgan* and *Tague* was numbered as R.C. 4123.519, but the current

to R.C. 4123.512, to be retroactive, then it could have, and would have, simply said so directly by listing any such provisions expressly, as it did with subsection (H). The General Assembly did not do so; instead, it said what it meant and it meant what it said—that all the *amendments* were to be prospective only, with the exception of the amendments to subsection (H).

Finally, even if there were any tension between the uncodified language of Section 3 and the older 1959 reference in R.C. 4123.512, the language of Section 3 prevails. When two provisions of law are in conflict, the more specific prevails over the general, unless the more general is enacted later, and the manifest intent is that the general provision prevails. R.C. 1.51. Here, Section 3 of Am. Sub. S.B. 7 is both more recent and more specific than the November 2, 1959 language in the statute, so it controls. See *City of Springdale v. CSX Ry. Corp.*, 68 Ohio St. 3d 371, 376 (explaining general principle); *Rohloff v. FedEx Ground* (6th Dist.), 2007-Ohio-6530, ¶ 19 (applying principle to Section 3 and R.C. 4123.512 and concluding that Section 3 prevails and renders the voluntary-dismissal amendment prospective only).

Consequently, the voluntary-dismissal amendment, R.C. 4123.512(D), applies prospectively only to claims arising after the effective date of the 2006 amendments.

C. In this case, the claim arose before the effective date of the statute, so the old law applies.

As explained above, the new law unambiguously precludes a claimant from filing a voluntary dismissal in an employer appeal without the employer's consent. Thus, if the new law applies in a case, the claimant may not voluntarily dismiss an employer's complaint. However, just as a claimant plainly cannot voluntarily dismiss anymore, a claimant plainly could do so under the old *Kaiser/Fowee* rule. Thus, Am. Sub. S.B. 7 cut off Thorton's right to dismiss only if Thorton's claim is governed by the new law rather than the old law. But Thorton's claim

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R.C. 4123.512 is the equivalent of the old R.C. 4123.519.

cannot come under the new law under any plausible theory, because his claim arose in June 2005, long before the new law was even passed, let alone effective.

The Court has held that a workers' compensation claim arises on the date of injury. "The cause of action of an injured employee accrues at the time he receives an injury in the course of his employment," *State ex rel. Schmersal v. Indus. Comm.* (1944), 142 Ohio St. 477, 478 (quoting *Indus. Comm. v. Kamrath* (1928), 118 Ohio St. 1, at paragraph three of the syllabus). Thus, Thorton's claim arose on the date of his injury, June, 27, 2005.

The former version of 4123.512 and the holdings of *Kaiser* and *Fowee* therefore apply to his case. Thorton may voluntarily dismiss the complaint without first getting Montville's consent, and properly did so below.

Administrator's Proposition of Law No 2:[4]

A trial court's journalization of a voluntary dismissal without prejudice under Civ. R. 41(A)(1)(a) is not an adjudication on the merits or a final appealable order.

The court below dismissed Montville's appeal on the basis that Thorton's notice of voluntary dismissal was self-executing, so the time for Montville to appeal started running on the date that the notice was filed, not the date that the trial court journalized. Because Montville filed its notice of appeal more than thirty days from Thorton's dismissal, the court below reasoned that its appeal was out of time, so it dismissed the appeal.

But before even reaching the issue of timeliness, the appeal should have been dismissed because, as this Court has already held, a voluntary dismissal is not an adjudication on the merits. Therefore, it is not a final appealable order. Montville argues that Thorton's voluntary

[4] This proposition is in response to Montville's Proposition of Law No. 2, which reads: Where a claimant-plaintiff is precluded from filing a Civ. R. 41(A)(1)(a) notice [of] dismissal of his complaint by R.C. §4321.512(D)'s "employer's consent" requirement, but does so nonetheless, a trial court's order refusing to enter final judgment for the defendant-employer is a final appealable order.

dismissal was an adjudication on the merits, because Montville assumes that Thorton did not have a legal right to dismiss his complaint without permission from either Montville or the court. As explained above, Section 3 of Am. Sub. S.B. 7 makes the law prospective only, and Thorton's claim arose long before the effective date of the bill.

Moreover, a voluntary dismissal is neither an adjudication on the merits nor a final appealable order.

A. A voluntary dismissal is not a final appealable order.

For several reasons, a voluntary dismissal is not a final appealable order. It is not a final appealable order because it is not an adjudication or a final determination of anything. *Hensley v. Henry* (1980), 61 Ohio St. 2d 277, 279. Second, it is not a final appealable order because it does not meet the definition of a final appealable order under R.C. 2505.02(B); it neither "affects a substantial right" as required by subsections (1) and (2) of the statute, nor the definition of a "final appealable order" under any of the statute's other subsections. The Court has already held that a proper filing of a Civ. R. 41(A)(1)(a) notice of dismissal is not a final determination for purposes of Civ. R. 60(B):

> Under Civ. R. 41(A)(1), plaintiff's notice of dismissal does not operate as "an adjudication upon the merits" because plaintiff had not previously "dismissed in any court, an action based on . . . the same claim," and because the notice of dismissal did not otherwise state that it should so operate.

Hensley v. Henry (1980), 61 Ohio St. 2d 277, 279. While this appeal does not directly involve Montville's later Civ. R. 60(B) appeal, the logic of *Hensley* applies nevertheless. A proper voluntary dismissal under Civ. R. 41(A)(1)(a) is not an adjudication on the merits, and therefore not an "order" at all.

Further, even if it can be considered an "order," a voluntary dismissal is not a final appealable order because, as explained below, it does not satisfy any of the requirements of R.C.

2505.02(B). That statute requires that the order be one of six types of orders for a court order to be final and appealable. The dismissal fails to satisfy any of the six. Order types (5) and (6) are not at issue here, as they deal with, respectively, class actions, and the constitutionality of statutes irrelevant to this case. As explained below, order types (1) through (4) also do not apply.

1. A voluntary dismissal is not a final appealable order under R.C. 2505.02(B)(1) and (2) because it does not "affect a substantial right."

Both types of orders that are made final orders under R.C. 2505.02(B)(1) and (2) require that the order "affect a substantial right." Type (1) requires that to be final, an order must affect a substantial right in an action that determines the action and prevents a judgment:

> (1) . . . affect[] a substantial right made in an action that in effect determines the action and prevents a judgment; . . .

R.C. 2505.02(B)(1). Order type (2) of R.C. 2505.02(B) requires that to be final, an order must affect a substantial right in a special proceeding or summary application after judgment:

> (2) . . . affect[] a substantial right made in a special proceeding or upon a summary application in an action after judgment; . . .

R.C. 2505.02(B)(2). Thus, to be a final appealable order under subsections (1) or (2) of R.C. 2505.02(B), an order must "affect a substantial right," that either "in effect determines the action and prevents a judgment," or that was made "in a special proceeding or upon a summary application in an action after judgment." The Administrator urges, as explained below, that a voluntary dismissal does not "affect a substantial right," so neither (B)(1) nor (B)(2) is satisfied. But, for completion, before turning to the substantial right analysis, the Administrator explains why the other prong of (B)(1) is not met here, while the other prong of (B)(2) is satisfied.

Voluntary dismissal is not a final order under (B)(1), regardless of the substantial right analysis, because voluntary dismissal does not determine the action or prevent a judgment here. Voluntary dismissal only postpones prosecution of the suit; it does not end it. If the claimant

fails to re-file his complaint within the time allowed by R.C. 2305.19, the employer is entitled to a judgment in its favor. See *Fowee v. Wesley Hall, Inc.*, 108 Ohio St. 3d 533, 2006-Ohio-1712 at ¶ 19. So, while the employer might, at most, have the trial or judgment in its favor postponed, a voluntary dismissal under Civ. R. 41(A)(1)(a) does not "determine the action and prevent[] a judgment." Thus, no final order existed here under (B)(1).

By contrast, Thorton's voluntary dismissal here does satisfy part of (B)(2), because a workers' compensation appeal under R.C. 4123.512 is a "special proceeding," *Myers v. City of Toledo*, 110 Ohio St. 3d 218, 2006-Ohio-4353, ¶¶ 15-16. Thus, under R.C. 2505.02(B)(2), if a voluntary dismissal of a worker's compensation appeal "affects a substantial right," it is a final appealable order.

Montville most likely does have a substantial right here, but its problem is that any such right was not "affected" by Thorton's voluntary dismissal. A "substantial right" is defined in the statute as a right that the law entitles a person to protect:

> "Substantial right" means a right that the United States Constitution, the Ohio Constitution, a statute, the common law, or a rule of procedure entitles a person to enforce or protect.

R.C. 2505.02(A)(1). Montville undoubtedly has a statutory right to appeal, under R.C. 4123.512, the Industrial Commission's decision granting Thorton the right to participate.

Thorton's voluntary dismissal does not "affect" Montville's ultimate right to appeal under R.C. 4123.512. The Court held just last year that an order that "affects a substantial right" is one that "if not immediately appealable, would foreclose appropriate relief in the future." *Southside Community Development Corp. v. Levin*, 116 Ohio St. 3d 1209, 2007-Ohio-6665 ¶ 7, citing *Bell v. Mt. Sinai Med. Ctr.* (1993), 67 Ohio St. 3d 60, 63, modified on other grounds by *Moskovitz v. Mt. Sinai Med. Ctr.* (1994), 69 Ohio St. 3d 638. By that definition, Montville's right to appeal under R.C 4123.512 is not "affected," because if it is not immediately appealable, it will not

foreclose appropriate relief for Montville in the future. As explained above, a voluntary dismissal at most postpones the trial; it does not prevent the employer from getting a trial, or obtaining a final judgment.

Separately, Montville has no other "rights" that amount to a substantial right at all, let alone any "affected" right. For example, Montville has no "right" to veto Thorton's dismissal, because as explained above, the pre-Am. Sub. S.B. 7 statute—the one that applies here—does not give an employer that right to enforce. In other words, any final order theory premised on this "right" requires Montville to bootstrap a win on its merits theory as well.

Nor can Montville, as a state-fund employer, claim as a "right" foreclosure of relief for the compensation and other benefits Thorton receives during the one-year period that the case is dismissed but before the reinstatement required by the "savings statute," R.C. 2305.19. Under *Arth Brass*, the Bureau cannot charge the claim to Montville's risk account under R.C. 4123.512(H) until all appeals in the case have been exhausted. *Arth Brass & Aluminum Castings, Inc. v. Conrad*, 104 Ohio St. 3d 547, 2004-Ohio-6888 ¶ 50. Therefore, Montville's right is not "affected" by Thorton's voluntary dismissal—the voluntary dismissal only postpones the trial or final judgment.

In sum, a voluntary dismissal does not "affect a substantial right," and therefore, it is not a "final appealable order" under R.C. 2505.02(B)(1) or (2).

2. A voluntary dismissal is not a final appealable order because it fails to meet any of the other criteria of R.C. 2505.02(B).

Nor does a voluntary dismissal fall under any of the other categories of orders in R.C. 2505.02(B). Order type (3) requires that to be final, an order must vacate or set aside a judgment or grant a new trial:

(3) . . . vacate[] or set[] aside a judgment or grant[] a new trial; . . .

R.C. 2505.02(B)(2). A voluntary dismissal before trial does not vacate or set aside a judgment because it happens before trial, and therefore before any judgment exists. It does not grant a new trial, but merely postpones the trial. Therefore, a voluntary dismissal is not the type of order contemplated by R.C. 2505.02(B)(3).

Order type (4) requires that to be final, an order must grant or deny a provisional remedy that either determines the action with respect to the provisional remedy or where the appealing party would not be afforded a meaningful remedy by an appeal following final judgment:

> (4) . . . grant[] or den[y] a provisional remedy . . . to which both of the following apply:
>
> > (a) The order in effect determines the action with respect to the provisional remedy and prevents a judgment in the action in favor of the appealing party with respect to the provisional remedy.
> >
> > (b) The appealing party would not be afforded a meaningful or effective remedy by an appeal following final judgment as to all proceedings, issues, claims, and parties in the action.

R.C. 2505.02(B)(4). A voluntary dismissal does not grant or deny a provisional remedy, because no "provisional remedy" is involved. First, the court takes no action when a party voluntarily dismisses the case, and therefore the court has not "granted or denied" any remedy. And second, voluntary dismissal does not otherwise meet the definition of "provisional remedy" in R.C. 2505.02(A)(3), which is a proceeding ancillary to the action:

> (3) "Provisional remedy" means a proceeding ancillary to an action, including, but not limited to, a proceeding for a preliminary injunction, attachment, discovery of privileged matter, suppression of evidence, a prima-facie showing pursuant to section 2307.85 or 2307.86 of the Revised Code, a prima-facie showing pursuant to section 2307.92 of the Revised Code, or a finding made pursuant to division (A)(3) of section 2307.93 of the Revised Code.

R.C. 2505.02(A)(3). A voluntary dismissal is not "ancillary" to an action, in the sense that a proceeding for preliminary injunction, a decision to suppress evidence, or any of the other listed proceedings are. None of the listed proceedings determines or postpones the entire action, but

rather determine matters secondary to it, such as injunctions, and evidentiary matters. On the other hand, a voluntary dismissal either ends the matter entirely, if the plaintiff fails to re-file within the one-year deadline, or it postpones the *entire* action, not just a subsidiary issue.

Thus, a voluntary dismissal is not a final appealable order at all, and therefore the court of appeals lacked jurisdiction to hear this appeal.

B. If a voluntary dismissal is somehow appealable, the appeal time must run from the party's notice and not from a later trial court entry, as the notice itself divests the court of jurisdiction and renders later entries irrelevant.

The appeals court ruled that Montville's appeal was untimely because, the court said, Montville's thirty-day appeal period ran from Thorton's notice on October 19, not from the trial court's journalization affirming that dismissal on October 31. See App. Op. at ¶ 3. The Administrator disagrees that any appeal period was triggered, whether from Thorton's notice or from the trial court's entry, because, as explained in Part A above, the dismissal was not a final appealable order. Further, the Court has held that a dismissal under Civ. R. 41(A)(1)(a) prevents a court of appeals from acting on the merits of a case, or ruling on an order of the trial judge in the case. *State ex rel. Ahmed v. Costine*, 99 Ohio St. 3d 212, 2003–Ohio-3080 at ¶ 5.

In other words, the appeal was premature, or not allowed at all, not too late. Nevertheless, the Administrator urges that *if* the dismissal was appealable at all, the appeal time properly ran from the date of Thorton's notice, so that Montville's appeal, if not premature, was too late.

Montville frames the question as a choice between two dates—that of Thorton's notice and that of the trial court's entry—but its framework presents a false choice, because the trial court's entry was simply irrelevant. Thus, that entry cannot be one of the options under consideration. That result flows from the nature of a voluntary dismissal. A proper dismissal under Civ. R. 41(A)(1)(a) is self-executing, and leaves the trial court without jurisdiction to proceed. "Because [the claimant] could properly dismiss his complaint pursuant to Civ. R. 41(A)(1)(a), the trial

court was without jurisdiction to enter judgment in favor of [the employer] as a sanction for [the claimant's] failure to prosecute." *Kaiser*, 84 Ohio St. 3d at 416. The Court has reiterated this principle as recently as last year. *Olynyk v. Scoles*, 114 Ohio St. 3d 56, 2007-Ohio-2878 at ¶ 28 ("once *Olynyk* dismissed under Civ. R. 41(A)(1)(a), the trial court's jurisdiction over the merits of her case was terminated, and the trial court had no authority to rule that the dismissal was with prejudice.").

Thus, after a proper voluntary dismissal, a trial court's later purported entries are irrelevant, regardless of the nature of the entry. That is true if the entry purports to be a judgment despite the dismissal, as in *Kaiser*, or a ruling that the dismissal was with prejudice, as in *Olynyk*, or a ruling affirming the dismissal as proper and as without prejudice, as here. Nothing in *Kaiser* or *Olynyk* distinguishes between trial court entries based on what they seek to do with regard to the dismissal; all post-dismissal entries are nullities. The mere fact that the trial court here affirmed Thorton's notice, rather than rejecting it in some way, does not change the conclusion that the journalization of the dismissal was irrelevant in all respects. And since it was irrelevant, it could not be the basis for an appeal period to run.

Thus, even if Montville could appeal the dismissal at all, it should have filed its appeal—as the court of appeals held—within 30 days of the dismissal, not the court's journalization of that dismissal. See App. Op. at ¶ 3. Therefore, even if the dismissal had acted as a final appealable order, Montville's appeal was out of time, and should be dismissed.

CONCLUSION

For the above reasons, the Administrator urges the Court to affirm the Court of Appeals.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I certify that a copy of the foregoing Merit Brief of Defendant-Appellee Administrator, Bureau of Workers' Compensation was served by U.S. mail this 12th day of May, 2008, upon the following counsel:

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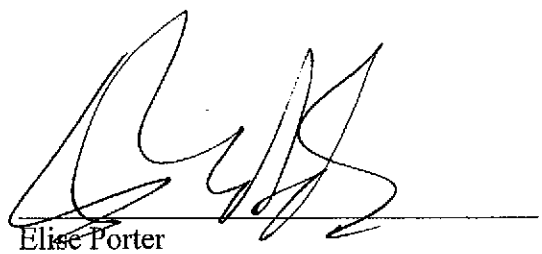

Elise Porter
Assistant Solicitor

APPENDIX

(126th General Assembly)
(Amended Substitute Senate Bill Number 7)

AN ACT

To amend sections 2913.48, 3121.034, 3121.037, 4111.02, 4121.10, 4121.12, 4121.44, 4121.441, 4123.01, 4123.29, 4123.32, 4123.35, 4123.512, 4123.52, 4123.54, 4123.56, 4123.57, 4123.58, 4123.61, 4123.65, 4123.88, 5703.21, and 5747.18, to enact sections 3121.0311, 4121.131, 4121.444, 4123.271, and 4123.311 of the Revised Code to make various changes to the Workers' Compensation Law and the state minimum wage.

Be it enacted by the General Assembly of the State of Ohio:

SECTION 1. That sections 2913.48, 3121.034, 3121.037, 4111.02, 4121.10, 4121.12, 4121.44, 4121.441, 4123.01, 4123.29, 4123.32, 4123.35, 4123.512, 4123.52, 4123.54, 4123.56, 4123.57, 4123.58, 4123.61, 4123.65, 4123.88, 5703.21, and 5747.18 be amended and sections 3121.0311, 4121.131, 4121.444, 4123.271, and 4123.311 of the Revised Code be enacted to read as follows:

Sec. 2913.48. (A) No person, with purpose to defraud or knowing that

(1) "Unvoted debt capacity" means the amount of money that a public employer may borrow without voter approval of a tax levy;

(2) "State institution of higher education" means the state universities listed in section 3345.011 of the Revised Code, community colleges created pursuant to Chapter 3354. of the Revised Code, university branches created pursuant to Chapter 3355. of the Revised Code, technical colleges created pursuant to Chapter 3357. of the Revised Code, and state community colleges created pursuant to Chapter 3358. of the Revised Code.

Sec. 4123.512. (A) The claimant or the employer may appeal an order of the industrial commission made under division (E) of section 4123.511 of the Revised Code in any injury or occupational disease case, other than a decision as to the extent of disability to the court of common pleas of the county in which the injury was inflicted or in which the contract of employment was made if the injury occurred outside the state, or in which the contract of employment was made if the exposure occurred outside the state. If no common pleas court has jurisdiction for the purposes of an appeal by the use of the jurisdictional requirements described in this division, the appellant may use the venue provisions in the Rules of Civil Procedure to vest jurisdiction in a court. If the claim is for an occupational disease, the appeal shall be to the court of common pleas of the county in which the exposure which caused the disease occurred. Like appeal may be taken from an order of a staff hearing officer made under division (D) of section 4123.511 of the Revised Code from which the commission has refused to hear an appeal. The appellant shall file the notice of appeal with a court of common pleas within sixty days after the date of the receipt of the order appealed from or the date of receipt of the order of the commission refusing to hear an appeal of a staff hearing officer's decision under division (D) of section 4123.511 of the Revised Code. The filing of the notice of the appeal with the court is the only act required to perfect the appeal.

If an action has been commenced in a court of a county other than a court of a county having jurisdiction over the action, the court, upon notice by any party or upon its own motion, shall transfer the action to a court of a county having jurisdiction.

Notwithstanding anything to the contrary in this section, if the commission determines under section 4123.522 of the Revised Code that an employee, employer, or their respective representatives have not received written notice of an order or decision which is appealable to a court under this section and which grants relief pursuant to section 4123.522 of the Revised Code, the party granted the relief has sixty days from receipt of the order under section 4123.522 of the Revised Code to file a notice of appeal under this section.

(B) The notice of appeal shall state the names of the claimant and the employer, the number of the claim, the date of the order appealed from, and the fact that the appellant appeals therefrom.

action.

(E) The court shall certify its decision to the commission and the certificate shall be entered in the records of the court. Appeals from the judgment are governed by the law applicable to the appeal of civil actions.

(F) The cost of any legal proceedings authorized by this section, including an attorney's fee to the claimant's attorney to be fixed by the trial judge, based upon the effort expended, in the event the claimant's right to participate or to continue to participate in the fund is established upon the final determination of an appeal, shall be taxed against the employer or the commission if the commission or the administrator rather than the employer contested the right of the claimant to participate in the fund. The attorney's fee shall not exceed ~~twenty-five~~ forty-two hundred dollars.

(G) If the finding of the court or the verdict of the jury is in favor of the claimant's right to participate in the fund, the commission and the administrator shall thereafter proceed in the matter of the claim as if the judgment were the decision of the commission, subject to the power of modification provided by section 4123.52 of the Revised Code.

(H) An appeal from an order issued under division (E) of section 4123.511 of the Revised Code or any action filed in court in a case in which an award of compensation has been made shall not stay the payment of compensation under the award or payment of compensation for subsequent periods of total disability during the pendency of the appeal. If, in a final administrative or judicial action, it is determined that payments of compensation or benefits, or both, made to or on behalf of a claimant should not have been made, the amount thereof shall be charged to the surplus fund under division (B) of section 4123.34 of the Revised Code. In the event the employer is a state risk, the amount shall not be charged to the employer's experience. In the event the employer is a self-insuring employer, the self-insuring employer shall deduct the amount from the paid compensation the self-insuring employer reports to the administrator under division (L) of section 4123.35 of the Revised Code. ~~All~~

A self-insuring employer may elect to pay compensation and benefits under this section directly to an employee or an employee's dependents by filing an application with the bureau of workers' compensation not more than one hundred eighty days and not less than ninety days before the first day of the employer's next six-month coverage period. If the self-insuring employer timely files the application, the application is effective on the first day of the employer's next six-month coverage period, provided that the administrator shall compute the employer's assessment for the surplus fund due with respect to the period during which that application was filed without regard to the filing of the application. On and after the effective date of the employer's election, the self-insuring employer shall pay directly to an employee or to an employee's dependents compensation and benefits under this section regardless of the date of the injury or occupational disease, and the

employer shall receive no money or credits from the surplus fund on account of those payments and shall not be required to pay any amounts into the surplus fund on account of this section. The election made under this division is irrevocable.

All actions and proceedings under this section which are the subject of an appeal to the court of common pleas or the court of appeals shall be preferred over all other civil actions except election causes, irrespective of position on the calendar.

This section applies to all decisions of the commission or the administrator on November 2, 1959, and all claims filed thereafter are governed by sections 4123.511 and 4123.512 of the Revised Code.

Any action pending in common pleas court or any other court on January 1, 1986, under this section is governed by former sections 4123.514, 4123.515, 4123.516, and 4123.519 and section 4123.522 of the Revised Code.

Sec. 4123.52. The jurisdiction of the industrial commission and the authority of the administrator of workers' compensation over each case is continuing, and the commission may make such modification or change with respect to former findings or orders with respect thereto, as, in its opinion is justified. No modification or change nor any finding or award in respect of any claim shall be made with respect to disability, compensation, dependency, or benefits, after ~~six~~ five years from the date of injury in the absence of the payment of medical benefits under this chapter~~, in which event the modification, change, finding, or award shall be made within six years after the payment of medical benefits,~~ or in the absence of payment of compensation under section 4123.57, 4123.58, or division (A) or (B) of section 4123.56 of the Revised Code or wages in lieu of compensation in a manner so as to satisfy the requirements of section 4123.84 of the Revised Code, in which event the modification, change, finding, or award shall be made within ~~ten~~ five years from the date of the last payment of compensation or from the date of death, nor unless written notice of claim for the specific part or parts of the body injured or disabled has been given as provided in section 4123.84 or 4123.85 of the Revised Code~~, and the~~. The commission shall not make any modification, change, finding, or award which shall award compensation for a back period in excess of two years prior to the date of filing application therefor. This section does not affect the right of a claimant to compensation accruing subsequent to the filing of any such application, provided the application is filed within the time limit provided in this section.

This section does not deprive the commission of its continuing jurisdiction to determine the questions raised by any application for modification of award which has been filed with the commission after June 1, 1932, and prior to the expiration of the applicable period but in respect to which no award has been granted or denied during the applicable period.

The commission may, by general rules, provide for the destruction of

official purposes, or as provided by section 3125.43, 4123.271, 4123.591, 4507.023, or 5101.182, division (B) of section 5703.21 of the Revised Code, or in accordance with a proper judicial order. The tax commissioner may furnish the internal revenue service with copies of returns or reports filed and may furnish the officer of a municipal corporation charged with the duty of enforcing a tax subject to Chapter 718. of the Revised Code with the names, addresses, and identification numbers of taxpayers who may be subject to such tax. A municipal corporation shall use this information for tax collection purposes only. This section does not prohibit the publication of statistics in a form which does not disclose information with respect to individual taxpayers.

SECTION 2. That existing sections 2913.48, 3121.034, 3121.037, 4111.02, 4121.10, 4121.12, 4121.44, 4121.441, 4123.01, 4123.29, 4123.32, 4123.35, 4123.512, 4123.52, 4123.54, 4123.56, 4123.57, 4123.58, 4123.61, 4123.65, 4123.88, 5703.21, and 5747.18 of the Revised Code are hereby repealed.

SECTION 3. This act applies to all claims pursuant to Chapters 4121., 4123., 4127., and 4131. of the Revised Code arising on and after the effective date of this act, except that division (H) of section 4123.512 as amended by this act also applies to claims that are pending on the effective date of this act.

SECTION 4. The Workers' Compensation Oversight Commission shall establish new objectives, policies, and criteria for the investment program of the Bureau of Workers' Compensation, in accordance with section 4121.12 of the Revised Code, as amended by this act, not later than August 1, 2006.

SECTION 5. Section 4123.54 of the Revised Code is presented in this act as a composite of the section as amended by both Am. Sub. H.B. 163 and Sub. H.B. 223 of the 125th General Assembly. The General Assembly, applying the principle stated in division (B) of section 1.52 of the Revised Code that amendments are to be harmonized if reasonably capable of simultaneous operation, finds that the composite is the resulting version of the section in effect prior to the effective date of the section as presented in this act.

Julie A. Rishel
Virginia McInerney
Legislative Service Commission

Am. Sub. S.B. 7

126th General Assembly
(As Passed by the General Assembly)

Sens. Cates, Spada, Austria, Mumper, Wachtmann, Schuler, Padgett, Clancy, Niehaus, Coughlin, Hottinger, Armbruster, Jacobson, Harris

Reps. Buehrer, Uecker, Aslanides, Blessing, Calvert, Coley, Combs, Dolan, Evans, D., Faber, Gibbs, Gilb, Hagan, Hoops, Martin, Reinhard, Schaffer, Schneider, Setzer, Taylor, Webster, White, Widowfield

Effective date: June 30, 2006

ACT SUMMARY

Determination and payment of workers' compensation benefits

- Reduces the 40-week waiting period for the filing of an application for permanent partial disability compensation (PPD) to 26 weeks.
- Changes the amount of time an employee may receive payments for wage loss suffered as a result of returning to employment other than the employee's former position of employment or for being unable to find employment consistent with the employee's physical capabilities.
- Specifies reasons an employee is not entitled to permanent total disability compensation (PTD).
- Increases the threshold for the Bureau of Workers' Compensation (BWC) medical-only claim program to $5,000 from $1,000.
- Requires the Administrator of Workers' Compensation to establish a program for group-rated employers with significant claims to mitigate the impact of those claims and requires the Administrator to establish eligibility criteria and requirements an employer must satisfy to participate in this program.
- Allows any party to void a settlement agreement if an employee dies during the 30-day period after approval of a final settlement agreement.

- Specifies that the act's provisions apply to claims arising on and after the act's effective date and specified pending claims.

Minimum Wage Law

- Increases the basic state minimum wage, which was $4.25 per hour under former law, to equal the basic federal minimum wage rate specified in the federal Fair Labor Standards Act, which currently is $5.15 per hour.

- Eliminates, except for tipped employees and hand harvest laborers, the various minimum wages paid to different categories of employees and requires employers to pay those employees the basic minimum wage specified in the federal Fair Labor Standards Act.

- Changes the manner in which the wage payable to tipped employees is calculated by requiring that it be calculated in the manner specified for tipped employees in the federal Fair Labor Standards Act.

TABLE OF CONTENTS

Applicability of act's provisions

The act specifies that the act's provisions apply only to claims arising on and after the act's effective date, except that the provisions explained above concerning a self-insuring employer's ability to elect to opt out of receiving reimbursements from the surplus fund also applies with respect to claims relative to that election that are pending on the act's effective date. (Section 3.)

XI. Minimum Wage Law

Minimum hourly wage

The act raises the basic minimum wage under the state Minimum Fair Wage Standards Law (R.C. Chapter 4111.) from $4.25 per hour to the wage rate specified in the federal Fair Labor Standards Act (29 U.S.C. 201, *et seq.*), as now or hereafter amended beginning on the act's effective date, which currently is $5.15 per hour. (Sec. 4111.02(A).) Except for hand harvest laborers and tipped employees, the act eliminates the various minimum wages applicable to employers for other categories of employees and requires those employers to pay the basic minimum wage rate specified in the federal Fair Labor Standards Act.

Similar to the changes described above for all other employees, the act requires all tipped employees to be paid the wage rate specified for tipped employees in the federal Fair Labor Standards Act, as now or hereafter amended. Currently, the federal minimum wage law defines tipped employees in the same manner as former Ohio law and requires that tipped employees be paid at least $2.13 per hour. Thus, the act does not change the wage rate of tipped employees of employers whose gross annual sales are more than $500,000. However, if an employer's gross annual sales are less than $500,000, then the act increases the minimum wage the employer must pay from $2.01 per hour to $2.13 per hour for tipped employees. The act also removes the requirement that an employee receive $30 per month in tips to qualify as a tipped employee. (Sec. 4111.02(D) to (G) and 29 U.S.C. 203, not in the act.)

The table below compares the minimum wage rates that an employer formerly was required to pay and now is required to pay under the act. The act does not increase the minimum wage rate paid to hand harvest laborers.

Revised Code 2505.02

Final order.

(A) As used in this section:

(1) "Substantial right" means a right that the United States Constitution, the Ohio Constitution, a statute, the common law, or a rule of procedure entitles a person to enforce or protect.

(2) "Special proceeding" means an action or proceeding that is specially created by statute and that prior to 1853 was not denoted as an action at law or a suit in equity.

(3) "Provisional remedy" means a proceeding ancillary to an action, including, but not limited to, a proceeding for a preliminary injunction, attachment, discovery of privileged matter, suppression of evidence, a prima-facie showing pursuant to section 2307.85 or 2307.86 of the Revised Code, a prima-facie showing pursuant to section 2307.92 of the Revised Code, or a finding made pursuant to division (A)(3) of section 2307.93 of the Revised Code.

(B) An order is a final order that may be reviewed, affirmed, modified, or reversed, with or without retrial, when it is one of the following:

(1) An order that affects a substantial right in an action that in effect determines the action and prevents a judgment;

(2) An order that affects a substantial right made in a special proceeding or upon a summary application in an action after judgment;

(3) An order that vacates or sets aside a judgment or grants a new trial;

(4) An order that grants or denies a provisional remedy and to which both of the following apply:

(a) The order in effect determines the action with respect to the provisional remedy and prevents a judgment in the action in favor of the appealing party with respect to the provisional remedy.

(b) The appealing party would not be afforded a meaningful or effective remedy by an appeal following final judgment as to all proceedings, issues, claims, and parties in the action.

(5) An order that determines that an action may or may not be maintained as a class action;

(6) An order determining the constitutionality of any changes to the Revised Code

made by Am. Sub. S.B. 281 of the 124th general assembly, including the amendment of sections 1751.67, 2117.06, 2305.11, 2305.15, 2305.234 [2305.23.4], 2317.02, 2317.54, 2323.56, 2711.21, 2711.22, 2711.23, 2711.24, 2743.02, 2743.43, 2919.16, 3923.63, 3923.64, 4705.15, and 5111.018 [5111.01.8], and the enactment of sections 2305.113 [2305.11.3], 2323.41, 2323.43, and 2323.55 of the Revised Code or or any changes made by Sub. S.B. 80 of the 125th general assembly, including the amendment of sections 2125.02, 2305.10, 2305.131 [2305.13.1], 2315.18, 2315.19, and 2315.21 of the Revised Code.

(7) An order in an appropriation proceeding that may be appealed pursuant to division (B)(3) of section 163.09 of the Revised Code.

(C) When a court issues an order that vacates or sets aside a judgment or grants a new trial, the court, upon the request of either party, shall state in the order the grounds upon which the new trial is granted or the judgment vacated or set aside.

(D) This section applies to and governs any action, including an appeal, that is pending in any court on July 22, 1998, and all claims filed or actions commenced on or after July 22, 1998, notwithstanding any provision of any prior statute or rule of law of this state.

Revised Code 1.48

Statute presumed prospective.

A statute is presumed to be prospective in its operation unless expressly made retrospective.

Revised Code 1.51

Special or local provision prevails over general; exception.

If a general provision conflicts with a special or local provision, they shall be construed, if possible, so that effect is given to both. If the conflict between the provisions is irreconcilable, the special or local provision prevails as an exception to the general provision, unless the general provision is the later adoption and the manifest intent is that the general provision prevail.