ORIGINAL

In the

Supreme Court of Ohio

JAMES SPENCER, Plaintiff-Appellee, v. FREIGHT HANDLERS, INC., et al., Defendants-Appellants.	:	Case No. 10-2138 On Appeal from the Miami County Court of Appeals, Second Appellate District Court of Appeals Case No. 09CA00044

MEMORANDUM IN SUPPORT OF JURISDICTION OF DEFENDANT-APPELLANT MARSHA RYAN, ADMINISTRATOR, BUREAU OF WORKERS' COMPENSATION

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INTRODUCTION

This case involves a critical issue in workers' compensation litigation: whether a notice of appeal vests a common pleas court with jurisdiction under R.C. 4123.512 when the appealing party neither names the Administrator of the Bureau of Workers' Compensation ("Administrator") as a party in the notice of appeal, nor serves the Administrator with notice. The Second District Court of Appeals held that omitting the Administrator from the notice and failing to serve her were not fatal defects. Yet, as other appeals courts correctly have held, R.C. 4123.512(B) indicates the General Assembly's contrary intent that these notice requirements be jurisdictional.

This case is of public and great general interest for two important reasons. First, the case implicates a fundamental question of jurisdiction in workers' compensation appeals, and the Second District's view thwarts the General Assembly's intent that the Administrator play an active role in all appeals under R.C. 4123.512. Revised Code 4123.512(B) mandates that the Administrator be a party to these appeals and contemplates a specific role for her in the litigation. When the Administrator receives notice of an appeal, she must notify the employer that she may act on the employer's behalf if the employer does not actively participate in the appeal, which could adversely affect the employer's premiums. *Id.* If the Administrator is unaware of an appeal, she cannot provide an employer with timely notice. More important, if the Administrator lacks notice of an appeal at the outset, she cannot ascertain whether she needs to take an active role in the litigation to safeguard the interests of the workers' compensation fund. By holding that R.C. 4123.512(B)'s notice requirements are not jurisdictional, the ruling below impairs the Administrator's ability to perform these functions and improperly allows a common pleas court to exercise jurisdiction before the most important party in every workers' compensation appeal—the Administrator—is even on notice of the litigation.

Second, regardless of how the Court resolves the jurisdictional question, it should resolve a split in the appeals courts and clarify the requirements for invoking jurisdiction under R.C. 4123.512. Although the Court has abandoned a strict compliance standard for R.C. 4123.512(B) notices of appeal, see *Fisher v. Mayfield* (1987), 30 Ohio St. 3d 8, 10-11 (overruling *Cadle v. Gen. Motors Corp.* (1976), 45 Ohio St. 2d 28), it has yet to spell out the precise requirements for that notice. As a result, a split has emerged in the appeals courts on whether R.C. 4123.512's notice requirements are jurisdictional. See Motion to Certify Conflict (Ex. 3). This Court's guidance is needed to resolve the split and clarify—for the sake of claimants, employers, and courts—the jurisdictional requirements for instituting an appeal.

For all the reasons below, the Court should accept jurisdiction and decide that R.C. 4123.512's notice requirements are jurisdictional.

STATEMENT OF THE CASE AND FACTS

In 2009, the Industrial Commission of Ohio ("Commission") denied Plaintiff-Appellee James Spencer's workers' compensation claim against Freight Handlers, Inc. ("FHI"), for a shoulder injury that allegedly occurred while Spencer was working for FHI. *Spencer v. FHI, LLC* (2d Dist.), No. 09-CA-44, 2010-Ohio-5288 ("App. Op."), ¶ 2.

Spencer filed a notice of appeal in the common pleas court under R.C. 4123.512, naming only FHI as a defendant. *Id.* at ¶ 3. Spencer did not include the Administrator as a party to the appeal, and he did not serve the Administrator with the notice of appeal. *Id.* Spencer similarly failed to name the Administrator as a party in his subsequent petition under R.C. 4123.512(D), and he did not serve her with a copy of the petition. *Id.*

FHI moved to dismiss for lack of subject matter jurisdiction and failure to join a necessary party. *Id.* at ¶ 4. According to FHI, Spencer's notice of appeal was fatally defective under R.C.

4123.512 because Spencer failed to name the Administrator as a party or serve her with a copy of the notice of appeal. *Id.*

In turn, Spencer moved for leave to amend his petition. *Id.* at ¶ 5. He attached a revised petition to the motion, naming the Administrator as a party. *Id.* Without receiving leave to amend, Spencer served a copy of the revised petition on the Administrator, thereby giving her actual notice of the appeal for the first time. *Id.*

Upon learning of the appeal, the Administrator answered Spencer's petition—more than eleven weeks after Spencer filed his notice of the appeal, see *id.* at ¶¶ 3, 6—arguing that the trial court lacked jurisdiction, *id.* at ¶ 6.

The common pleas court granted FHI's motion to dismiss for lack of subject matter jurisdiction and denied Spencer leave to amend his petition. *Id.* The court also denied Spencer's subsequent motion for reconsideration. Order Overruling Plaintiff's Motion for Reconsideration, *Spencer v. FHI, LLC*, No. 09-CA-44 (Miami C.P. Dec. 11, 2009).

The Second District reversed, App. Op. at ¶ 29, holding that "failure to name the Administrator in the notice of appeal or to serve the Administrator with the notice of appeal does not deprive a court of common pleas of subject matter jurisdiction to hear an R.C. 4123.512 appeal," *id.* at ¶ 22.

FHI and the Administrator moved to certify a conflict, citing a Sixth District Court of Appeals decision that reached the opposite outcome on similar facts. See Motion to Certify Conflict (Ex. 3); *Olaru v. Fed Ex Custom Critical* (6th Dist.), No. L-03-1143, 2003-Ohio-6376. The certification motion is still pending.

The Administrator now urges this Court to accept discretionary jurisdiction.

THIS CASE IS OF PUBLIC AND GREAT GENERAL INTEREST

The Court should accept jurisdiction for two reasons. First, the case involves a fundamental question of jurisdiction in workers' compensation law, and the answer to that question affects the Administrator's ability to fulfill her statutory obligations as the General Assembly intended. Second, a conflict has emerged among Ohio's intermediate appeals courts about whether R.C. 4123.512's notice requirements are jurisdictional. As a result, it is unclear what appealing parties must do to properly invoke a court's jurisdiction under R.C. 4123.512. The Court's guidance is needed to provide clarity for all parties to these appeals and to promote consistent results in the lower courts.

A. This case raises a fundamental question of jurisdiction under R.C. 4123.512, and the Second District's resolution of that question significantly impairs the Administrator's ability to fulfill her statutory obligations.

This case warrants review because the Second District's holding that R.C. 4123.512(B)'s notice requirements are not jurisdictional disregards the statute's language and intent. Further, the lower court's holding improperly sidelines the Administrator in R.C. 4123.512 appeals and impairs her ability to safeguard the workers' compensation fund.

Ohio's common pleas courts have jurisdiction over workers' compensation matters only where such jurisdiction is expressly conferred by statute. *Jenkins v. Keller* (1966), 6 Ohio St. 2d 122, syl. ¶ 4. R.C. 4123.512 sets forth the jurisdictional requirements for appeals filed under that section. As the Court has explained, these "requirements are satisfied by the filing of a timely notice of appeal which is in substantial compliance with the dictates of [the] statute." *Fisher*, 30 Ohio St. 3d at syl. ¶ 1.

At issue here is whether two specific requirements in R.C. 4123.512 are jurisdictional. Namely, R.C. 4123.512 states that (1) the Administrator must be a party to the appeal, and (2) the appealing party must serve the Administrator with the notice of appeal:

> The administrator of workers' compensation, the claimant, and the employer shall be parties to the appeal and the court, upon the application of the commission, shall make the commission a party. The party filing the appeal shall serve a copy of the notice of appeal on the administrator at the central office of the bureau of workers' compensation in Columbus.

R.C. 4123.512(B). If these requirements are jurisdictional—as the Administrator contends—then a party must comply in order to *invoke* the jurisdiction of the common pleas court at the outset of an appeal; if they are not jurisdictional, then—under the Second District's theory—these defects can be corrected later in the litigation.

By holding that these requirements are not jurisdictional, the Second District has impaired the Administrator's ability to fulfill her statutory obligations under R.C. 4123.512(B) and Chapter 4123 more broadly. In the same breath that R.C. 4123.512(B) sets forth the above notice requirements, it imposes an affirmative duty on the Administrator to notify employers of the consequences of failing to actively participate in the litigation:

> The administrator shall notify the employer that if the employer fails to become an active party to the appeal, then the administrator may act on behalf of the employer and the results of the appeal could have an adverse effect upon the employer's premium rates.

R.C. 4123.512(B). The Administrator also has a broader "duty . . . to safeguard and maintain" the workers' compensation fund, which comes into play in every workers' compensation appeal. R.C. 4123.34.

The Second District's view that an appealing party can correct notice defects later in the litigation is illusory because the Administrator requires notice at the outset of an appeal. For example, if the Administrator receives notice after an appeal is well underway, her notice to an employer will arrive too late for an employer to make an informed decision about whether to actively participate. Similarly, if the Administrator is not made a party until the appeal is already underway, then she may be unable to adequately protect the fund. The Administrator would not

be able to represent the fund in any early dispositive motions or settlement discussions between an employer and claimant. Further, the Administrator's ability to act on behalf of a specific employer, see R.C. 4213.512(B), would be contingent upon when an appealing claimant decided to join her as a party or serve her with notice.

In short, this issue is of high importance because it both implicates the jurisdiction of the common pleas courts over workers' compensation appeals under R.C. 4123.512, and it substantially affects the Administrator's ability to fulfill her statutory obligations. Accordingly, the Court should accept jurisdiction to determine when a court has jurisdiction under R.C. 4123.512 and to ensure that the Administrator can play an effective role in these appeals.

B. The appeals courts are divided on the issue, which has created uncertainty for parties and courts about what is required to invoke jurisdiction under R.C. 4123.512.

The Court's guidance is also needed to provide clear rules for workers' compensation parties about how to properly invoke a court's jurisdiction in an appeal under R.C. 4123.512, and to clarify when a court of common pleas can exercise jurisdiction. This question has divided Ohio's appellate courts, and the Court has yet to decide the issue. Accordingly, the Court should accept jurisdiction to resolve the confusion.

The Sixth District Court of Appeals has held that an appealing party's failure to name the Administrator as a party or serve her with the notice of appeal is a fatal jurisdictional defect. *Olaru*, 2003-Ohio-6376, at ¶ 2 & Ex. A. Endorsing the lower court's reasoning, the Sixth District concluded that "the 'appeal' [did] not satisfy the requirements for notice of appeal set forth in [R.C.] 4123.512(B)" because "[w]ithout naming the administrator as a party, or serving him with a copy of the notice of appeal, the commission cannot be properly represented in this matter." *Id.* at Ex. A. Similarly, the Fifth District has held that a filing cannot "constitute a notice of appeal as required by R.C. 4123.512(A) and (B)" if it "did not name the

Administrator . . . as a party nor indicate that it was served on the Administrator." *Day v. Noah's Ark Learning Ctr.* (5th Dist.), No. 01-CVE-12-068, 2002-Ohio-4245, ¶ 15 (also noting other serious flaws in the purported notice of appeal). Because the appellant in *Day* did not file a proper notice of appeal, the Fifth District held that "the trial court was never vested with jurisdiction" and that the trial court properly denied the appellant's subsequent motion to add the Administrator as a party to the action. *Id.* at ¶ 20.

By contrast, like the Second District below, the Tenth and Eleventh Districts have held that failing to name the Administrator as a party in a notice of appeal is not fatal to invoking a court's jurisdiction. *Karnofel v. Cafaro Mgmt. Co.* (11th Dist. June 26, 1998), No. 97-T-0072, 1998 Ohio App. Lexis 2910, at *10 (citing *Goricki v. Gen. Motors Corp.* (11th Dist. Dec. 31, 1985), No. 3527, 1985 Ohio App. Lexis 9986, and *Milenkovich v. Drummond* (Summit C.P. 1961), 88 Ohio L. Abs. 103); *Jarmon v. Ford Motor Co.* (10th Dist. Apr. 30, 1996), No. 95APE10-1377, 1996 Ohio App. Lexis 1769, at *9.

Recognizing this split, FHI and the Administrator moved the Second District to certify a conflict on the following issue:

> A notice of appeal does not substantially comply with R.C. 4123.512(B), thus never vesting the trial court with jurisdiction, where the notice of appeal fails to name as a party or serve as a party the Administrator.

See Motion to Certify Conflict at 6 (Ex. 3). This motion is still pending.

In the current legal landscape, it is not clear either to workers' compensation parties or the common pleas courts what is required to invoke jurisdiction under R.C. 4123.512. Regardless of what the right answer is, some parties are being held to the wrong standard in an area of law in which thousands of appeals are filed annually. If the Administrator is correct, then courts in the Second, Tenth, and Eleventh Districts are acting where they lack jurisdiction. Conversely, if the Administrator is wrong, parties in the Fifth and Sixth Districts are improperly having their cases

dismissed. The Court should accept jurisdiction in this case to resolve the split and to clarify R.C. 4123.512's jurisdictional requirements.

ARGUMENT

Administrator's Proposition of Law:

> *R.C. 4123.512(B)'s requirements that the Administrator be a party to the appeal and be served with a notice of appeal are jurisdictional, and noncompliance with these requirements cannot be cured later.*

A. In light of the statute's plain language and the Administrator's broader statutory role, R.C. 4123.512(B)'s notice requirements are jurisdictional.

R.C. 4123.512(B)'s notice requirements are jurisdictional for at least two reasons. First, the statutory language describing the requirements for a notice of appeal clearly mandates both service on the Administrator and the Administrator's inclusion as a party. Second, this conclusion is bolstered by the General Assembly's decision to ensure the Administrator's involvement in every appeal under R.C. 4123.512, consistent with her broader statutory obligations to the workers' compensation fund.

The statute explains how to file a notice of appeal under R.C. 4123.512. Among other things, the General Assembly included the following mandatory requirements:

> *The administrator of workers' compensation,* the claimant, and the employer *shall be parties to the appeal* and the court, upon the application of the commission, shall make the commission a party. The party filing the appeal *shall serve* a copy of the notice of appeal on the administrator at the central office of the bureau of workers' compensation in Columbus.

R.C. 4123.512(B) (emphases added). "[W]hen it is used in statute, the word 'shall' denotes that compliance with the commands of that statute is *mandatory*." *Dep't of Liquor Control v. Sons of Italy Lodge 0917*, 65 Ohio St. 3d 532, 534, 1992-Ohio-17 (emphasis in original). Accordingly, the Administrator *must* be a party to the appeal, and the claimant *must* serve her with the notice of appeal.

Compliance with these requirements is vital because the notice of appeal is *the* critical document for establishing jurisdiction under R.C. 4123.512(B): "The filing of the notice of the appeal with the court is the *only act* required to perfect the appeal." R.C. 4123.512(A) (emphasis added). Because this filing is *the act* that actually vests a common pleas court with jurisdiction, a defective notice of appeal cannot suffice to invoke jurisdiction. See *Jenkins*, 6 Ohio St. 2d at 127 (explaining that it is especially important to comply with jurisdictional requirements where a court's jurisdiction is limited to that conferred by statute).

The conclusion that these notice requirements are jurisdictional is confirmed by the General Assembly's decision to make the Administrator *the* most important party in every workers' compensation appeal. In every appeal, the Administrator must notify the employer of the consequences of failing to actively participate in litigation and decide whether to actively participate in the litigation herself. R.C. 4123.512(B). The Administrator's ability to actively participate in every appeal is necessary because the Administrator has a statutory responsibility "to safeguard and maintain the solvency of the state insurance fund." R.C. 4123.34.

In short, the Administrator cannot effectively administer the workers' compensation laws and protect the workers' compensation fund if a party can invoke jurisdiction under R.C. 4123.512 without satisfying the statute's naming and service requirements.

B. If the notice requirements in R.C. 4123.512(B) are jurisdictional, then an appealing party must serve a notice of appeal on the Administrator and name her as a party to invoke a court's jurisdiction; a party's failure to do so cannot be cured later.

R.C. 4123.512(B)'s notice requirements are jurisdictional, and an appealing party's initial noncompliance cannot be cured by subsequently amending the notice of appeal or serving notice on the Administrator.

This Court has held that to invoke jurisdiction under R.C. 4123.512(B), an appealing party must timely file a notice of appeal and substantially comply with the requirements of that

section. *Fisher*, 30 Ohio St. 3d at 10. "Substantial compliance for jurisdictional purposes occurs when a timely notice of appeal field pursuant to R.C. 4123.519z [renumbered R.C. 4123.512] includes sufficient information, in intelligible form, *to place on notice all parties* to a proceeding that an appeal has been filed from an identifiable final order which has determined the parties' substantive rights and liabilities." *Id.* at 11 (emphasis added).

"Substantial compliance" is not possible, however, when an appealing party does not name the Administrator in the notice of appeal or serve her with a copy of the notice. See *Olaru*, 2003-Ohio-6376, at Ex. A. As the *Fisher* Court explained, a notice of appeal "substantially complies" when it puts *all parties* on notice that an identifiable order has been appealed. *Id.* at syl. ¶ 2. As discussed above, the Administrator is a necessary party—and, arguably, *the* necessary party—to any R.C. 4123.512 appeal. See R.C. 4123.512(B) ("The administrator . . . shall be [a] part[y] to the appeal"). Therefore, a notice of appeal that fails to comply with R.C. 4123.512(B)'s notice requirements cannot satisfy *Fisher*'s "substantial compliance" standard.

The Second District's holding that an appealing party can correct notice defects later in the litigation is illusory, because General Assembly contemplated—and the Administrator requires—notice at the *outset* of an appeal. For example, the Administrator must notify employers of the consequences of failing to actively participate in an appeal:

> The administrator *shall notify* the employer that if the employer fails to become an active party to the appeal, then the administrator may act on behalf of the employer and the results of the appeal could have an adverse effect upon the employer's premium rates.

R.C. 4123.512(B) (emphasis added). If the Administrator is not timely served, she cannot fulfill this duty early in the litigation, and an employer may suffer the consequences of making a decision without the Administrator's warning.

More important, the Administrator's other statutory obligations may be compromised if she is unable to participate in R.C. 4123.512 appeals at an early stage. The Administrator is responsible for "safeguard[ing] and maintain[ing] the solvency of the state insurance fund." R.C. 4123.34. If she never receives notice, she cannot possibly represent the fund's interests in litigation. And even if the Administrator becomes aware of an action later, her failure to participate in early dispositive motions could limit her subsequent ability to weigh in on workers' compensation issues in the common pleas court or on appeal.

Every time a party fails to comply with R.C. 4123.512(B)'s notice requirements, litigation can proceed in ways that are unfavorable to the Administrator and the fund. For example, if the Administrator lacks notice that an employer is appealing the Commission's approval of a workers' compensation claim, the employer could—without the Administrator's opposition—prevail in a motion to dismiss or motion on the pleadings, overturn the Commission's decision, and apply for a premium rate adjustment. Alternatively, if a claimant appeals the Commission's denial of a claim without giving notice to the Administrator and prevails, the workers' compensation fund would be liable for the costs of the claim, even though the Administrator had no opportunity to oppose the motion.

Even more troublesome, if appeals can proceed without notice to the Administrator, then an employer and claimant could settle without the Administrator's participation, causing additional difficulties related to fund administration. See, e.g., *State ex rel. Dillard Dep't Stores v. Ryan*, 122 Ohio St. 3d 241, 2009-Ohio-2683 (employer unable to get reimbursement after settling with claimant when the parties failed to notify the bureau of the settlement). In all these situations, the Administrator, lacking notice, is least able to protect the one resource that all parties want to access and the Administrator is charged to protect: the state fund.

Admittedly, even when the Administrator is not named in a notice of appeal or served with notice, she may discover and join pending actions later, as here. Sometimes the Administrator may even be able to reverse or correct earlier actions. However, thousands of workers' compensation appeals are filed every year, and the Administrator cannot monitor every common pleas court on the off-chance that an appeal is filed without notice. Requiring the Administrator to play catch-up, to seek reversal of earlier erroneous actions, or to invalidate settlements would result in significant fund expenditures, and consume unnecessary legal and judicial resources. Conversely, requiring compliance with what the statute's plain language already *requires*—serving the Administrator with a notice of appeal that names her as a party—is efficient and predictable for the Administrator, the parties, and the courts.

CONCLUSION

For the above reasons, the Administrator urges the Court to grant jurisdiction in this case, and ultimately to reverse the decision below.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I certify that a copy of the foregoing Memorandum in Support of Jurisdiction of Appellant Marsha Ryan, Administrator, Bureau of Workers' Compensation's was served by U.S. mail this 9th day of December, 2010 upon the following counsel:

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APPENDIX

IN THE COURT OF APPEALS OF MIAMI COUNTY, OHIO

JAMES SPENCER Plaintiff-Appellant	:	C.A. CASE NO. 09-CA-44
vs.	:	T.C. CASE NO. 09-988
FHI, LLC, et al. Defendants-Appellees	:	(Civil Appeal from Common Pleas Court)

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OPINION

Rendered on the 29th day of October, 2010.

. . . . . .

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GRADY, J.:

Plaintiff, James Spencer, appeals from an order dismissing his R.C. 4123.512 appeal from a decision of the Industrial Commission and overruling his motion for leave to amend his petition.

Spencer filed a workers' compensation claim against Freight

Handlers, Inc. ("FHI") for a left shoulder injury he allegedly suffered on October 23, 2008, while lifting at his employment with FHI in Miami County. Spencer's claim ultimately was denied by the Industrial Commission on June 6, 2009.

On August 7, 2009, Spencer filed a notice of appeal pursuant to R.C. 4123.512 in the Court of Common Pleas of Darke County. Spencer's notice of appeal did not name the Administrator of the Bureau of Workers' Compensation ("Administrator") as a party to the appeal, and Spencer failed to serve a copy of the notice of appeal on the Administrator "at the central office of the bureau of workers' compensation in Columbus" as required by R.C. 4123.512(B). On September 3, 2009, Spencer filed the petition required by R.C. 4123.512(D), but he neither served a copy on the Administrator nor named the Administrator as a party in the petition.

On September 11, 2009, FHI filed a motion to dismiss for lack of subject matter jurisdiction and/or for failure to join a necessary party based on Spencer's failures to name the Administrator as a party and serve the Administrator with a copy of the notice of appeal. Alternatively, FHI's motion sought to transfer the case to the Common Pleas Court of Miami County for decision on its motion to dismiss, because Spencer's injury occurred in Miami County, not in Darke County. R.C. 4123.512(A) requires the notice of appeal to be filed in "the court of common pleas of the county in which the injury was inflicted ***."

In response to FHI's motion, Spencer filed a motion for

leave to amend his petition and to transfer the case to the Miami County Court. Spencer attached an amended petition to his motion for leave to amend and served a copy of the amended petition on the Administrator at the central office of the bureau of workers' compensation in Columbus. On October 8, 2009, the Court of Common Pleas of Darke County transferred the case to the Court of Common Pleas of Miami County pursuant to R.C. 4123.512(A).

On October 27, 2009, the Administrator filed an Answer to Spencer's amended petition. Two days later, the Court of Common Pleas of Miami County granted FHI's motion to dismiss for lack of subject matter jurisdiction and overruled Spencer's motion to amend his petition. Spencer filed a timely notice of appeal.

ASSIGNMENT OF ERROR

"THE TRIAL COURT ERRED WHEN IT HELD IT LACKED SUBJECT MATTER JURISDICTION TO HEAR APPELLANT JAMES SPENCER'S NOTICE OF APPEAL."

The trial court found that it lacked subject matter jurisdiction to decide Spencer's appeal "because the Plaintiff did not name the Administrator as a party in the notice of appeal and did not serve the notice as required by O.R.C. 4123.512(B)." The trial court concluded:

"Since neither Court had jurisdiction, the defect cannot be corrected by the amendment of the pleadings or otherwise. The safe harbor provision of O.R.C. 4123.512(A) which allows the transfer of the case to a court with proper venue and jurisdiction does not apply because neither the Darke County Common Pleas Court or this Court ever had subject matter

jurisdiction.

"Accordingly, the Court lacks subject matter jurisdiction. The motion for leave to amend the complaint is moot and therefore overruled." (Dkt. 3.)

R.C. 4123.512(A) confers a right on a claimant to appeal from an order of the Industrial Commission to the court of common pleas of the county in which the alleged injury occurred. R.C. 4123.512(A) further provides:

"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."

Spencer filed a notice of appeal in the Court of Common Pleas of Darke County. The notice should have been filed in the Court of Common Pleas of Miami County, where the injury occurred. Although at one point in time this would have resulted in a dismissal for lack of subject matter jurisdiction, *Heskett v. Kenworth Truck Co.* (1985), 26 Ohio App.3d 97, R.C. 4123.512(A)

now contains a safe harbor provision that required the transfer of Spencer's appeal from Darke County to Miami County. Further, R.C. 4123.512(A) provides that "[t]he filing of the notice of appeal with the court is the only act required to perfect the appeal." Therefore, if Spencer's notice of appeal complied with the jurisdictional requirements of R.C. 4123.512(B), he could rely on his filing date in Darke County and his notice of appeal would be timely filed pursuant to R.C. 4123.512(A).

R.C. 4123.512(B) provides for the contents of the notice of appeal and identifies the parties to the appeal:

"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.

"The administrator of workers' compensation, the claimant, and the employer shall be parties to the appeal and the court, upon the application of the commission, shall make the commission a party. The party filing the appeal shall serve a copy of the notice of appeal on the administrator at the central office of the bureau of workers' compensation in Columbus. The administrator shall notify the employer that if the employer fails to become an active party to the appeal, then the administrator may act on behalf of the employer and the results of the appeal could have an adverse effect upon the employer's premium rates."

It is undisputed that the contents of Spencer's notice of appeal satisfied the five requirements that the first paragraph

of R.C. 4123.512(B) imposes. However, neither the notice of appeal nor the subsequent petition that Spencer filed pursuant to R.C. 4123.512(D) named the Administrator as a party. Neither was the Administrator served with a copy of the notice of appeal in the manner that R.C. 4123.512(B) requires. Instead, copies were mailed to an attorney in Cincinnati who apparently represented the Bureau of Workers' Compensation in the proceedings before the Industrial Commission.

In *Jarmon v. Ford Motor Company* (April 30, 1996), Franklin App. No. 95APE10-1377, the Tenth District held that the failure to name the Administrator as a party did not deprive the court of common pleas of subject matter jurisdiction:

"In oral argument, Ford relied upon the R.C. 4123.512(B) language that 'the administrator [of the bureau of worker's compensation], the claimant, and the employer shall be parties to *the appeal* ***,' asserting plaintiff's letter did not comply with R.C. 4123.512(B) because the letter did not name the administrator as a party. Despite Ford's construction, R.C. 4123.512(B) provides separate requirements for a valid *notice of appeal* and for naming parties to *the appeal* itself. *Milenkovich v. Drummond* (1961), 88 Ohio Law Abs. 103, 104, 181 N.E.2d 814; *Goricki v. General Motors Corp.* (Dec. 31, 1985), Trumbull App. No. 3527, unreported, citing *Milenkovich*, supra. According to the plain language of the statute, the notice of appeal must state only the five factors set forth above; it need not state the administrator's name. *Goricki*, supra. The court's

jurisdiction depends on timely filing the notice of appeal, not on naming within the notice the administrator or the necessary parties to the appeal itself. *Goricki*, supra, citing *Singer Sewing Machine*, supra.[] Accordingly, plaintiff's failure to name the administrator in her letter does not warrant dismissal for lack of jurisdiction." (Emphasis in original.)

As noted in *Jarmon*, the Ninth and Eleventh Districts have also held that the naming of the Administrator as a party is not a jurisdictional requirement when filing a notice of appeal. *Karnofel v. Cafaro Management Co.* (June 26, 1998), Trumbull App. No. 97-T-0072 (citations omitted); *Goricki v. General Motors Corp.* (Dec. 31, 1985), Trumbull App. No. 3527; *Milenkovich v. Drummond* (1961), 88 Ohio Law Abs. 103, 181 N.E.2d 814.

We agree with these other appellate districts that a failure to name the Administrator in the notice of appeal or to serve the Administrator with the notice of appeal does not deprive a court of common pleas of subject matter jurisdiction to hear an R.C. 4123.512 appeal. R.C. 4123.512(A) provides that the filing of a notice of appeal perfects an appeal authorized by that section. The first paragraph of R.C. 5123.512(B) identifies the matters the notice must contain in order to be valid: 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. Failure to include these matters in a notice of appeal which is filed may be fatal to the court's jurisdiction because the notice is then not valid. The content requirement is

analogous to App.R. 3(D), which specifies the contents of a notice of appeal to this court.

The second paragraph of R.C. 4123.512(B), wherein the requirements concerning naming and serving the Administrator are established, were set apart from the "contents" requirements of the first paragraph by the General Assembly when it adopted R.C. 4123.512(B). That separation suggests a different purpose. That purpose is addressed by that section: to allow the Administrator to advise the employer of possibly adverse consequences if the employer fails to actively participate in the appeal, instead relying on the Administrator. That purpose may yet be served by allowing the appellant to amend the notice of appeal and the subsequent petition required by R.C. 4123.512(D) and subsequently to serve the Administrator.

Alternatively, an appearance by the Administrator, as in the present case, demonstrates that the Administrator was put on notice to the extent that R.C. 4123.512(B) requires. In *Wells v. Chrysler Corporation* (1984), 15 Ohio St.3d 21, the claimant filed a timely notice of appeal but failed to include the name of the employer in the text of the notice of appeal. The trial court granted the employer's motion to dismiss on jurisdictional grounds. The Supreme Court reversed, holding:

"[T]he purpose of a notice of appeal is to set forth the names of the parties and to advise those parties that an appeal of a particular claim is forthcoming. This notice of appeal clearly satisfied this purpose. Indeed, Chrysler Corporation

answered this notice with a motion to dismiss. There was no demonstrated surprise or prejudice." Id. at 24.[1]

Although the requirements in the second paragraph of R.C. 4123.512(B) regarding the Administrator are not jurisdictional, they nevertheless establish the Administrator as a necessary party for purposes of Civ.R. 19(A). That rule provides that if a necessary party is not joined "the court shall order that he be made a party upon timely assertion of the defense of failure to join a party as provided in Rule 12(B)(7)." That result is the preferred alternative to a dismissal for failure to join a necessary party. *Congress Lake Club v. Witte*, Stark App. No. 05CA0037, 2006-Ohio-59.

The trial court cited the following cases in support of its decision to dismiss the appeal on jurisdictional grounds: *Olaru v. Fed Ex Custom Critical*, Lucas App. No. L-03-1143, 2003-Ohio-6376; *Brown v. Liebert Corp.*, Franklin App. No. 03AP-437, 2004-Ohio-841; *Day v. Noah's Ark Learning Center*, Delaware App. No. 01-CVE-12-068, 2002-Ohio-4245; and *Gdovichin v. Geauga Cty. Hwy. Department* (1993), 90 Ohio App.3d 805. We believe these cases are inapposite and unpersuasive.

In *Brown*, *Day*, and *Gdovichin*, the plaintiffs failed to file a notice of appeal at all. Rather, the plaintiffs instead filed petitions or complaints contemplated by R.C. 4123.512(D). The

[1] Accord: *Wethington v. University of Cincinnati Hospital* (April 9, 1999), Hamilton App. No. C-980656 (noting that the University of Cincinnati, like Chrysler, answered the notice of appeal with a motion for summary judgment, demonstrating that it had actual notice of the appeal).

R.C. 4123.512 appeals were dismissed on jurisdictional grounds because the petitions or complaints were insufficient to constitute a notice of appeal. There is no question, however, that Spencer filed a notice of appeal. Therefore, we believe that the trial court's reliance on *Brown*, *Day*, and *Gdovichin* is misplaced. Further, in *Olaru*, the Sixth District adopted the judgment of the trial court as its own. The trial court in turn relied on the decision in *Day*, which we believe is inapposite to the facts before us.

The assignment of error is sustained. The judgment of the trial court will be reversed and the cause is remanded for further proceedings consistent with this Opinion.

DONOVAN, P.J. and BROGAN, J. concur.

Copies mailed to:

Jeffrey D. Wilson, Esq.
William H. Barney, III, Esq.
Abigail K. White, Esq.
Colleen Erdman, Esq.
Hon. Jeffrey M. Welbaum

IN THE COURT OF APPEALS OF MIAMI COUNTY, OHIO

JAMES SPENCER
Plaintiff-Appellant : C.A. CASE NO. 09-CA-44

vs. : T.C. CASE NO. 09-988

: FINAL ENTRY

FHI, LLC, et al.
Defendants-Appellees :

. . . . . .

Pursuant to the opinion of this court rendered on th 29th day of October, 2010, the judgment of the tria court is Reversed and the matter is Remanded to the trial cou for further proceedings consistent with the opinion. Costs ar to be paid as provided in App.R. 24.

Mary E. Donovan

MARY E. DONOVAN, PRESIDING JUDGE

James A Brogan

JAMES A. BROGAN, JUDGE

Thomas J. Grady

THOMAS J. GRADY, JUDGE

JR. 12 P9.39

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SPF

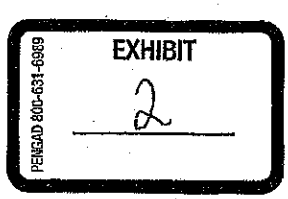
IN THE COMMON PLEAS COURT OF MIAMI COUNTY, OHIO
GENERAL DIVISION

JAMES SPENCER	:	CASE NO. 09-988
Plaintiff	:	Judge Welbaum
vs.	:	
FHI, LLC	:	
Defendant	:	

ORDER OF DISMISSAL FOR LACK OF JURISDICTION AND
ORDER OVERRULING PLAINTIFF'S MOTION TO AMEND COMPLAINT

On September 11, 2009, Defendant Freight Handlers, Inc. filed a motion to dismiss while the case was pending in Darke County Common Pleas Court. On September 24, the Plaintiff filed a memorandum in opposition and his own motion for leave to amend the complaint and to transfer the case to Miami County. On that date the Plaintiff also filed an amended petition without leave. Defendant Freight Handlers Inc. filed a reply memorandum on October 2. On October 8, Defendant Freight Handlers filed a memorandum in opposition to Plaintiff's motions.

On October 8, the Darke County Court of Common Pleas found that it did not have venue and this Court does. On that date it transferred the case to this Court and the entry was



filed in this Court on October 21. The entry of transfer did not address the jurisdictional challenge or the Plaintiff's motion for leave to amend the complaint so those motions are pending.

The said Defendant says that the Court lacks subject matter jurisdiction because the Plaintiff did not name the Administrator as a party in the notice of appeal and did not serve the Administrator with the notice as required by O.R.C. 4123.512(B). Substantial compliance is required. It has been held that omitting the Administrator as a party and failing to serve the Administrator with the notice of appeal does not substantially comply with the statute. *Olaru v. Fed Ex Custom Critical*, 2003 Ohio 6376, *Brown v. Liebert Corp*, 2004 Ohio 841, *Days v. Noah's Ark Learning Center*, 2002 Ohio 4245, *Gdovichin v. Geauga Cty Hwy Department*, (1993) 90 Ohio App. 3d 805.

Since neither Court had jurisdiction, the defect cannot be corrected by the amendment of the pleadings or otherwise. The safe harbor provision of O.R.C. 4123.512(A) which allows transfer of the case to a court with proper venue and jurisdiction does not apply because neither the Darke County Common Pleas Court or this Court ever had subject matter jurisdiction.

Accordingly, the Court lacks subject matter jurisdiction. The motion for leave to amend the complaint is moot and therefore overruled. The said Defendant's motion is granted. The case is dismissed.

IT IS SO ORDERED.

JEFFREY M. WELBAUM, JUDGE

cc: All Counsel of Record

Pursuant to Civil Rule 58(B), the Clerk of this Court is hereby directed to serve upon all parties not in default for failure to appear, notice of this judgement and the date of entry upon the journal of its filing.

Judge

IN THE COURT OF APPEALS
SECOND APPELLATE DISTRICT
MIAMI COUNTY, OHIO

JAMES SPENCER,	:	
	:	CASE NO. 09 CA 00044
Appellant,	:	
	:	
vs.	:	
	:	
FREIGHT HANDLERS, INC, et al.	:	
	:	
Appellees.	:	

MOTION TO CERTIFY A CONFLICT
UNDER APPELLATE RULE 25

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Appellant, Administrator, Bureau of Workers' Compensation ("Administrator"), under Rule 25 of the Ohio Rules of Appellate Procedure, hereby moves the court to certify that its Decision and Judgment entered in this case on October 29, 2010, is in conflict with the decision of the 6th District Court of Appeals in *Olaru v. Fed Ex Custom Critical*, Lucas App. No. L-03-1143, 2003-Ohio-6376.

I. Statement of Facts and of the Case

Following a June 4, 2009, administrative adjudication by the Industrial Commission of Ohio ("commission") of an injury allegedly sustained at work, Appellant, James Spencer ("Spencer"), filed a "notice of appeal" and "complaint," through counsel, in the Darke County Court of Common Pleas. Spencer filed these documents on August 7, 2009, ostensibly pursuant to R.C. 4123.512, which requires that the Administrator be made a party to a R.C. 4123.512 appeal. However, neither pleading named the Administrator as a party to the action, nor was the Administrator served a copy of either the notice of appeal or complaint. Instead, Spencer served Joseph C. Gruber, who is neither an employee nor agent of the Bureau of Workers' Compensation ("bureau"), at an address that is not affiliated with the bureau.

Accordingly, Appellee, Freight Handlers, Inc. ("FHI"), the employer in the claim, moved to dismiss the matter for lack of subject matter jurisdiction for a fatally defective notice of appeal. In response, Spencer moved for leave to amend his complaint and transfer the case to the correct county, as the action was also filed in the incorrect county. Subsequently, Darke County transferred the case to the Miami County Court of Common Pleas.

Spencer did not name the Administrator as a party to the action until he filed the motion to amend his complaint on September 25, 2009. That pleading was the first time he attempted to serve the bureau.

The Miami County trial court granted FHI's motion to dismiss for lack of subject matter jurisdiction. Spencer's motion for reconsideration was also denied. Spencer then appealed to this Court, which issued a decision on October 29, 2010, sustaining Spencer's assignment of error, and finding that the notice requirements in R.C. 4123.512(B) are not jurisdictional. The Administrator now moves to certify a conflict based on a decision issued in the 6th district.

II. Law and Argument

Section 3(B)(4), Article IV of the Ohio Constitution provides, "[w]henever the judges of a court of appeals find that a judgment upon which they have agreed is in conflict with a judgment pronounced upon the same question by any other court of appeals of the state, the judges shall certify the record of the case to the supreme court for review and final determination."

In *Whitelock v. Gilbane Bldg. Co.* (1993), 66 Ohio St.3d 594, 596, the Ohio Supreme Court set forth three requirements that must be met in order for a case to be certified:

> First, the certifying court must find that its judgment is in conflict with the judgment of a court of appeals of another district and the asserted conflict must be "upon the same question." Second, the alleged conflict must be on a rule of law – not facts. Third, the journal entry or opinion of the certifying court must clearly set forth that rule of law which the certifying court contends is in conflict with the judgment on the same question by other district courts of appeals.

The facts of this case and issue presented are nearly identical to the case of *Olaru v. Fed Ex Custom Critical*, Lucas App. No. L-03-1143, 2003-Ohio-6376. In *Olaru*, at the trial court level, a pro se claimant filed a document called "Appeal from the industrial commission Ohio." Id. at ¶2. The claimant neither named the Administrator as a party to the action in the notice of appeal, nor did he serve the document on the Administrator. Id. at 5. In other respects, the *Olaru*

claimant complied with R.C. 4123.512(B) by stating the claimant's and employer's names, the claim number, the date of the commission order appealed, and that the claimant was, in fact, appealing the order. Id.

The trial court granted the defendant's motion to dismiss based on a defective notice of appeal. In doing so, the trial court noted that other appellate courts, including the 9th and 11th districts, had found that naming the Administrator as a party was not jurisdictional. Id. at 5-6. However, the trial court pointed out that,"[s]trangely those same decisions recognize the fact that notice requirements exist to place all potential parties on notice, and that any action in which the administrator was not made a party would be subject to a justifiable motion to dismiss." Id. at 6 (referencing *Karnofel v. Carfaro Management Co.*, Trumbull App. No. 97-T-0072; *Milenkovich v. Drummond*, Summit County Court of Common Pleas No. 229111, 1961 Ohio Misc. LEXIS 269; *Fisher v. Mayfield* (1987), 30 Ohio St.3d 8).

Although the *Olaru* trial court analyzed *Day v. Noah's Ark Learning Center,* Delaware App. No. 01-CVE-12-068, 2002-Ohio-4245, in rendering its decision, its analysis of *Day* focused on the fact that the claimant, there, had failed to substantially comply with the notice requirements in R.C. 4123.512. *Olaru,* 2003-Ohio-6376 at 6. Admittedly, the claimant in *Day* did not file a notice of appeal at all. Rather, just a petition was filed. However, the analysis remains the same regardless of whether a claimant fails to name or serve the Administrator in a proper notice of appeal, or fails to name or serve the Administrator because no notice of appeal was filed. Either way, the party initiating the appeal in common pleas court has failed to put a **necessary party** on notice that an appeal has been filed. Notably, the *Olaru* appellate court adopted "the well-reasoned opinion and judgment entry of the" trial court, which "properly determine[d] and correctly dispose[d] of the material issues in this case." Id. at ¶4.

In this Court's decision, it distinguished *Olaru* for relying on *Day* because the *Day* claimant had not filed a notice of appeal at all, unlike Spencer. Yet, in *Olaru*, *Day*, and this case, the Administrator, who is a mandatory party to the action, was not named in or served with a notice of appeal. If naming the Administrator is jurisdictional as the 6th district found in *Olaru*, then the notice of appeal which omits her as a party is fatally defective and unable to vest jurisdiction with the trial court **just the same as if the claimant had never filed the notice of appeal at all**. This is because Ohio common pleas courts do not have inherent jurisdiction over workers' compensation matters. *Jenkins v. Keller* (1966), 6 Ohio St.2d 122, paragraph 4 of the syllabus. Jurisdiction is conferred by filing a notice of appeal that substantially complies with R.C. 4123.512. Id; R.C. 4123.512(A); *Fisher*, 30 Ohio St.3d at 11.

Both this Court and the 6th district in *Olaru* had to decide whether the notice of appeal failed to vest the trial court with jurisdiction for omitting the Administrator as a party, and for not serving the Administrator with that document or the complaint. This inquiry is not fact-based, but rather based on an analysis of the notice requirements in R.C. 4123.512(B) and whether they are jurisdictional. This Court found that the notice requirements were not jurisdictional, and appears to distinguish *Olaru* because *Olaru* relied on *Day*, which this Court found inapposite. However, it remains that both this case and *Olaru* have nearly identical facts, and it is irrelevant that *Olaru* adopted the *Day* court's legal analysis, for the reasons mentioned above.

In short, while this Court found that the failure to name or serve the Administrator was not jurisdictional, the *Olaru* court found that this omission was fatal to the case, and did not properly vest the trial court with jurisdiction. Opinion at p. 7; *Olaru*, 2003-Ohio-6376 at 8. Thus, this Court's decision stands in opposition to the 6th district decision in *Olaru*. The

Administrator respectfully requests that this Court issue an order certifying a conflict to the Ohio Supreme Court on the following issue:

> Whether a notice of appeal substantially complies with R.C. 4123.512(B), thus vesting the trial court with jurisdiction, even where the notice of appeal fails to name as a party or serve as a party the Administrator?

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that a copy of the foregoing Motion to Certify a Conflict Pursuant to Appellate Rule 25 of Appellee, Administrator, Bureau of Workers' Compensation, was sent by regular U.S. Mail service, this 5th day of November, 2010, to the following:

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