[Cite as *Greene v. HOC Transport*, 2023-Ohio-2867.]

STATE OF OHIO	)	IN THE COURT OF APPEALS
	)ss:	NINTH JUDICIAL DISTRICT
COUNTY OF SUMMIT	)	

HENRY GREENE Appellee v. HOC TRANSPORT Appellant and JOHN LOGUE, ADMINISTRATOR, BUREAU OF WORKER'S COMPENSATION Appellee	C.A. No. 30552 APPEAL FROM JUDGMENT ENTERED IN THE COURT OF COMMON PLEAS COUNTY OF SUMMIT, OHIO CASE No. 2021-05-1441

DECISION AND JOURNAL ENTRY

Dated: August 16, 2023

HENSAL, Judge.

{¶1} HOC Transport appeals an order of the Summit County Court of Common Pleas that dismissed its workers' compensation appeal. This Court reverses.

I.

{¶2} Mr. Greene was a truck driver when he was injured in a car accident. He filed a claim for workers' compensation benefits alleging that he was employed by HOC Transport when the accident occurred, but the claim was disallowed. A staff hearing officer of the Ohio Industrial Commission vacated that decision, however, determining that Mr. Greene was an employee rather than an independent contractor. HOC Transport appealed that decision to the Summit County

Court of Common Pleas as provided by Revised Code Section 4123.512(A). As required by Section 4123.512, Mr. Greene filed a complaint to establish his right to participate in the workers' compensation system. The trial court set the matter for trial after denying a motion for summary judgment filed by HOC Transport and referred the case to a magistrate with the parties' consent.

{¶3} On July 26, 2021, HOC Transport moved for default judgment as a discovery sanction, arguing that Mr. Greene had failed to comply with the trial court's case management order requiring identification of expert witnesses. Mr. Green opposed the motion, maintaining that HOC Transport already had access to all of his medical records and knew who his expert witnesses would be. After conducting a hearing, the magistrate issued a journal entry that concluded a discovery violation had occurred. The magistrate denied the motion for a default judgment but, as a discovery sanction, prohibited Mr. Greene from introducing any expert testimony.

{¶4} Because it was unclear whether that journal entry was a magistrate's order or a magistrate's decision, Mr. Greene filed a motion to set it aside under Civil Rule 53(D)(2)(b) and objections under Rule 53(D)(3)(b). The trial court concluded that the journal entry was a magistrate's decision and, based on its independent review of the matter, modified the discovery sanction. The trial court denied the motion for default judgment but ordered that "[t]his matter is hereby DISMISSED without prejudice and otherwise than on the merits, pursuant to Civ.R. 41(A)(2)" and "[t]his case shall be marked closed, and all future dates shall be canceled." HOC Transport appealed, assigning three errors for this Court's review.

II.

{¶5} As an initial matter, this Court must determine whether it has jurisdiction to consider this appeal. On December 29, 2022, Mr. Greene moved to dismiss the appeal, arguing that because the trial court dismissed the case without prejudice, the order from which HOC

Transport has appealed is not a final appealable order. HOC Transport opposed the motion, and this Court deferred the matter for resolution after oral argument.

{¶6} This Court's jurisdiction is limited to appeals from judgments or final orders. Article IV, Section 3(B)(2), Ohio Constitution; R.C. 2505.02. A "final order" is defined, in part, as an order that "affects a substantial right made in a special proceeding * * *." R.C. 2505.02(B)(2). A "[s]pecial proceeding" is "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." R.C. 2505.02(A)(2). Appeals taken under Section 4123.512 are special proceedings. *See Ferguson v. State*, 151 Ohio St.3d 265, 2017-Ohio-7844, ¶ 27. A "[s]ubstantial right" is defined as "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). Because Section 4123.512 expressly provides the means of appealing certain orders of the Industrial Commission, courts have concluded that the dismissal of a complaint under that section involves substantial rights. *See Antoun v. Shelly Co.*, 7th Dist. Mahoning Nos. 16 MA 0040, 16 MA 0042, 2016-Ohio-5392, ¶ 5-8.

{¶7} Section 2505.02(B)(2), however, provides that an order is final and appealable only if it "*affects* a substantial right made in a special proceeding * * *." (Emphasis added.) "An order affects a substantial right for the purposes of R.C. 2505.02(B)(2) only if an immediate appeal is necessary to protect the right effectively." *Wilhelm-Kissinger v. Kissinger*, 129 Ohio St.3d 90, 2011-Ohio-2317, ¶ 7. In other words, an order affects a substantial right "only if 'in the absence of immediate review of the order [the appellant] will be denied effective relief in the future.'" (Alterations in original.) *Thomasson v. Thomasson*, 153 Ohio St.3d 398, 2018-Ohio-2417, ¶ 10, quoting *Bell v. Mt. Sinai Med. Ctr.*, 67 Ohio St.3d 60, 63 (1993).

{¶8} Section 4123.512(A) provides that an employer or claimant may appeal certain orders of the Industrial Commission to the court of common pleas. Regardless of whether the appeal is filed by the employer or the claimant, the claimant must then file a petition to determine his or her eligibility to participate in the workers' compensation system—in the context of the existing appeal—within thirty days. R.C. 4123.512(D). "The petition is for all intents and purposes a complaint" and "[r]egardless of who files the appeal, it is the claimant's burden to prove his or her case before the trial court." *Ferguson* at ¶ 12.

{¶9} Interpreting a previous version of Section 4123.512, the Supreme Court of Ohio concluded that a claimant could voluntarily dismiss a petition filed in an appeal under Civil Rule 41(A)(1)(a) and invoke the saving statute to refile the petition within one year. *Kaiser v. Ameritemps, Inc.*, 84 Ohio St.3d 411, 415 (1999). In that situation, "[t]he voluntary dismissal of the claimant's complaint does not affect the employer's notice of appeal, *which remains pending until the refiling of claimant's complaint*." (Emphasis added.) *Id.* The Supreme Court observed that when a claimant fails to refile the petition within one year, "he can no longer prove his entitlement to participate in the workers' compensation system." *Id. See also Fowee v. Wesley Hall, Inc.* 108 Ohio St.3d 533, 2006-Ohio-1712, ¶ 19.

{¶10} In 2006, Section 4123.512 was amended and, in its current form, it requires a claimant to obtain the consent of the employer before dismissing the complaint if the employer initiated the appeal. R.C. 4123.512(D). The consent requirement "operate[s] as a check on undue delay and expense" that can result when a claimant voluntarily dismisses the petition. *Ferguson* at ¶ 25, citing *Robinson v. B.O.C. Group, Gen. Motors Corp.*, 81 Ohio St.3d 361, 370 (1998). It also expresses a substantial right of employers in Section 4123.512 appeals. *Antoun*, 2016-Ohio-5392, at ¶ 7. For that reason, courts have concluded that when a petition is dismissed without the

consent of the employer in an employer-initiated appeal, a substantial right of the employer is affected for purposes of Section 2505.02(B)(2). *Id*. at ¶ 7, citing *Anderson v. Sunoco Prods. Co.*, 112 Ohio App.3d 305, 309 (2d Dist.1996).

{¶11} The same substantial rights are implicated in this case but with one significant difference: The trial court did not merely dismiss Mr. Greene's petition without prejudice, leaving HOC Transport's appeal pending. Instead, the trial court dismissed the entire action and marked the case closed. HOC Transport's ability to have its appeal heard under Section 4123.512 in a timely manner—and, indeed, heard at all—is hindered by the trial court's decision. Because Section 4123.512(A) imposes timelines upon the party who initiates an appeal that prevent refiling in this case, "an immediate appeal is necessary to protect the right effectively." *Wilhelm-Kissinger*, 129 Ohio St.3d 90, 2011-Ohio-2317, at ¶ 7. Accordingly, the trial court's order is one that "affects a substantial right made in a special proceeding[.]" R.C. 2505.02(B)(2). Mr. Greene's motion to dismiss is, therefore, denied.

III.

ASSIGNMENT OF ERROR I

> THE TRIAL COURT ERRED WHEN IT DISMISSED A [SECTION] 4123.512 APPEAL.

{¶12} HOC Transport's first assignment of error argues that the trial court erred by dismissing the entire action—including its appeal—as a sanction for Mr. Greene's discovery violation. This Court agrees.

{¶13} Initially, this Court must consider the nature of the magistrate's August 26, 2022, journal entry. Magistrates are permitted to act in two ways under Rule 53.[1] A "[m]agistrate's [o]rder" may be entered without judicial approval to regulate proceedings when not dispositive of a claim or defense. Civ.R. 53(D)(2)(a)(i). "A magistrate's order must be identified as such in the caption and must be signed by the magistrate and filed and served by the clerk of courts." *Reisinger v. Reisinger*, 9th Dist. Lorain No. 18CA011444, 2019-Ohio-2268, ¶ 10, citing Civ.R. 53(D)(2)(a)(ii). A party who disagrees with a magistrate's order must file a motion with the trial court to set the order aside that explains the party's reasons for disagreement with particularity. Civ.R. 53(D)(2)(b). In contrast, a magistrate's decision—which is permitted by Rule 53(D)(3)—requires action by the trial court. *Reisinger* at ¶ 11, citing Civ.R. 53(D)(4). *See also Harkai v. Scherba Industries, Inc.*, 136 Ohio App.3d 211, 218 (9th Dist.2000). "A party must preserve error in connection with a magistrate's decision by filing timely objections with the trial court" * * * and "[a] notation to this effect is among the requirements provided by rule for the form of a magistrate's decision[.]" *Reisinger* at ¶ 11, citing Civ.R. 53(D)(3). The purpose of this Rule is to provide parties with a notice of their obligations under Rule 53(D)(3) so that they have a meaningful opportunity to object to a magistrate's decision. *Ulrich v. Mercedes-Benz USA, LLC*, 9th Dist. Summit No. 23550, 2007-Ohio-5034, ¶ 13, quoting *Ford v. Gooden*, 9th Dist. Summit No. 22764, 2006-Ohio-1907, ¶ 13.

{¶14} The magistrate's journal entry was not identified in the caption as a magistrate's order and, for that reason, did not comply with Rule 53(D)(2)(a)(ii). Instead, the caption stated that it was a "magistrate's decision." Despite that notation, it did not comply with Rule

[1] Rule 53(C)(2) describes different procedures to be followed when the parties unanimously consent in writing to a referral to a magistrate. Although the trial court indicated that the parties had consented to such a referral, no written consent appears in the record.

53(D)(3)(a)(iii) by conspicuously indicating that errors cannot be assigned on appeal unless timely and specific objections are filed. *See Reisinger* at ¶ 11. Presumably because the magistrate's actions were unclear, Mr. Greene filed both a motion to set aside the action and timely objections. The trial court concluded that the magistrate's action was a magistrate's decision and proceeded to conduct an independent review as provided by Rule 53(D)(4)(d). HOC Transport has not assigned error in connection with this characterization, and, in any event, it appears that no prejudice resulted. Similarly, in conducting its review under Rule 53(D)(4)(d), the trial court failed to specifically address any of Mr. Greene's twelve objections to the magistrate's decision. Mr. Greene, however, did not appeal the trial court's judgment, and "the appropriate mechanism to challenge a trial court's failure to rule on the objections * * * [is] via an assignment of error[.]" *Miller v. Miller*, 9th Dist. Medina No. 10CA0034-M, 2011-Ohio-4299, ¶ 19.

{¶15} Accordingly, the matter left for this Court to resolve is whether the trial court erred by dismissing HOC Transport's appeal as a sanction for Mr. Greene's discovery violation. This Court reviews discovery sanctions for an abuse of the trial court's discretion. *Nakoff v. Fairview Gen. Hosp.*, 75 Ohio St.3d 254 (1996), syllabus. Although this case does not involve a voluntary dismissal by an employee, Section 4123.512(D) and the cases that interpret it are instructive. When an employer initiates the appeal, Section 4123.512(D) permits a claimant to voluntarily dismiss "the complaint" with the employer's consent. The Supreme Court of Ohio has observed that when a claimant does so, the employer's appeal is unaffected: it remains pending, and the claimant can refile the petition required by Section 4123.512(A) subject to the saving statute. *Kaiser*, 84 Ohio St.3d at 415. Section 4123.512(A), also requires the initial notice of appeal to be filed within sixty days, and this requirement is jurisdictional. *Ravotti v. Corcoran Tile & Marble, Inc.*, 8th Dist. Cuyahoga No. 82725, 2003-Ohio-5250, ¶ 4.

{¶16} In this case, the trial court did not dismiss Mr. Greene's *petition* without prejudice. Had the trial court done so, HOC Transport's appeal would have remained pending. *See generally Arthur v. Sequent, Inc.*, 5th Dist. Delaware No. 19 CAE 02 0017, 2019-Ohio-3075, ¶ 15-16 (summarizing cases). Mr. Greene could have refiled his petition within the time provided by the saving statute and, if he did not, HOC Transport could still obtain a favorable judgment on its appeal. *Compare Fowee*, 108 Ohio St.3d 533, 2006-Ohio-1712, at ¶ 19 ("[I]f the employee-claimant fails to refile within the year allowed by the saving statute, R.C. 2305.19, the employer is entitled to judgment on its appeal."). Instead, the trial court dismissed the entire action, marked the case closed, and canceled all future proceedings. HOC Transport's timely appeal has been dismissed, and the jurisdictional requirement provided by Section 4123.512 bars it from being refiled. Given the posture of this case, this decision was an abuse of discretion by the trial court. HOC Transport's first assignment of error is, therefore, sustained.

ASSIGNMENT OF ERROR II

> THE TRIAL COURT ERRED WHEN IT DISMISSED A [SECTION] 4123.512 APPEAL WITHOUT THE EMPLOYER'S CONSENT.

{¶17} HOC Transport's second assignment of error argues that the trial court erred by dismissing its appeal without obtaining its consent. In light of this Court's resolution of HOC Transport's first assignment of error, its second assignment of error is moot. *See* App.R. 12(A)(1)(c).

ASSIGNMENT OF ERROR III

> THE TRIAL COURT ERRED WHEN IT DID NOT GRANT [HOC TRANSPORT'S] MOTION FOR DEFAULT JUDGMENT, AS THE RECORD REFLECTS THAT [MR. GREENE] CANNOT SUCCEED AT TRIAL.

{¶18} HOC Transport's third assignment of error is that the trial court erred by denying its motion for default judgment as a discovery sanction. This assignment of error is premature in light of our resolution of HOC Transport's first assignment of error.

IV.

{¶19} HOC Transport's first assignment of error is sustained. Its second assignment of error is moot, and its third assignment of error is premature. The judgment of the Summit County Court of Common Pleas is reversed, and this matter is remanded to the trial court for proceedings consistent with this opinion.

Judgment reversed
and cause remanded.

There were reasonable grounds for this appeal.

We order that a special mandate issue out of this Court, directing the Court of Common Pleas, County of Summit, State of Ohio, to carry this judgment into execution. A certified copy of this journal entry shall constitute the mandate, pursuant to App.R. 27.

Immediately upon the filing hereof, this document shall constitute the journal entry of judgment, and it shall be file stamped by the Clerk of the Court of Appeals at which time the period for review shall begin to run. App.R. 22(C). The Clerk of the Court of Appeals is instructed to mail a notice of entry of this judgment to the parties and to make a notation of the mailing in the docket, pursuant to App.R. 30.

Costs taxed to Appellee.

JENNIFER HENSAL
FOR THE COURT

SUTTON, P. J.
FLAGG LANZINGER, J.
CONCUR.

APPEARANCES:

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