

# Court of Appeals of Ohio

EIGHTH APPELLATE DISTRICT  
COUNTY OF CUYAHOGA

---

JOURNAL ENTRY AND OPINION  
No. 102553

---

**SHANNON FERGUSON**

PLAINTIFF-APPELLEE

vs.

**STATE OF OHIO, ET AL.**

DEFENDANTS-APPELLANTS

---

---

**JUDGMENT:  
AFFIRMED**

---

---

Civil Appeal from the  
Cuyahoga County Court of Common Pleas  
Case No. CV-13-810584

**BEFORE:** Blackmon, J., McCormack, P.J., and Laster Mays, J.

**RELEASED AND JOURNALIZED:** October 29, 2015



**ATTORNEYS FOR APPELLANTS**

Mike DeWine  
Ohio Attorney General

Nicole M. Norcia  
Renata Y. Staff  
Assistant Attorneys General  
Constitutional Offices Section  
30 E. Broad Street, 16th Floor  
Columbus, Ohio 43215

**ATTORNEY FOR APPELLEE**

David L. Meyerson  
Seaman & Garson, L.L.C.  
1400 Rockefeller Building  
614 Superior Avenue, N.W.  
Cleveland, Ohio 44113

PATRICIA ANN BLACKMON, J.:

{¶1} Appellant, state of Ohio (“the state”) appeals the trial court’s decision finding the amendment to R.C. 4123.512(D) pursuant to Am.Sub.S.B. No. 7 (amended R.C. 4123.512(D)) unconstitutional. The state assigns the following errors for our review:

I. The trial court erred in finding that the 2006 Amendment to Ohio Revised Code § 4123.512(D) violates the due process clause of the Ohio Constitution. (Decision and Journal Entry granting Plaintiff-Appellee Shannon Ferguson’s declaratory judgment action at pp.6-8 (12/31/14).

II. The trial court erred in finding that the 2006 Amendment to Ohio Revised Code § 4123.512(D) violates the equal protection clause of the Ohio Constitution. (Decision and Journal Entry granting Plaintiff-Appellee Shannon Ferguson’s declaratory judgment action at p. 8 (12/31/14).

III. The trial court erred in finding that the 2006 Amendment to Ohio Revised Code § 4123.512(D) usurps judicial powers in violation of the authority and jurisdiction of the court regarding civil matters and the Ohio Rules of Civil Procedure. (Decision and Journal Entry granting Plaintiff-Appellee Shannon Ferguson’s declaratory judgment action at p. 8 (12/31/14).

{¶2} After reviewing the record and relevant law, we affirm the trial court’s decision. The apposite facts follow.

{¶3} On January 29, 2009, Shannon Ferguson (“Ferguson”) sustained injuries arising out of the course and scope of his employment with Ford Motor Company (“Ford Motor”). Ferguson filed a workers’ compensation claim, which the Industrial Commission (“the Commission”) allowed for the condition of left

shoulder sprain/strain. The Commission allowed a further claim for the condition of left rotator cuff tear. On May 4, 2012, Ford Motor appealed both decisions of the Commission to the Cuyahoga County Common Pleas Court, pursuant to R.C. 4123.512(A); the court consolidated both cases.

{¶4} After Ford Motor filed its appeal to the common pleas court, Ferguson as mandated, filed his complaint for benefits in compliance with the procedure that places the burden on him to start anew in the common pleas court and prove his claim.

{¶5} In January 2013, Ferguson moved to voluntarily dismiss his complaint without prejudice; therein, he argued that his expert was unavailable. He also argued that he needed to undergo surgery. He also moved to amend his complaint to add a declaratory judgment action, wherein he argued that amended R.C. 4123.512(D) was unconstitutional because it required the injured worker obtain his employer's consent before he could dismiss his complaint under Civ.R. 41. The trial court denied both motions.

{¶6} Thereafter, on July 12, 2013, Ferguson filed a separate declaratory judgment action against the state seeking a determination that amended R.C. 4123.512(D) be held unconstitutional because: 1) it conflicts with Civ.R. 41(A)(1) and improperly intrudes into the Ohio Supreme Court's power to govern courtroom procedure; 2) it violates the Equal Protection Clause contained in the Ohio Constitution; and 3) it deprives the injured worker of due process of law.

{¶7} On December 31, 2014, following cross-motions for summary judgment, the trial court declared amended R.C. 4123.512(D) unconstitutional. The state now appeals.

### Am.Sub.S.B. No. 7

{¶8} In 2006, the Ohio General Assembly enacted Am.Sub.S.B. No. 7 (S.B. 7). In relevant part, S.B. 7 amended R.C. 4123.512(D) and “ended an employee-claimant’s unilateral ability to voluntarily dismiss the complaint in an appeal brought by an employer.” *Thorton v. Montville Plastics & Rubber, Inc.*, 121 Ohio St.3d 124, 2009-Ohio-360, 902 N.E.2d 482, ¶ 5. Pursuant to the amendment, an employer must consent to the voluntary dismissal of the appeal without prejudice. *Id.* at ¶ 14. This appeal concerns the constitutionality of the amendment and is a case of first impression in Ohio.

### Constitutionality of Amended R.C. 4123.512(D)

#### 1) The Separation of Powers

{¶9} We agree with the trial court’s conclusion that amended R.C. 4123.512(D) violates the separation of powers doctrine because it conflicts with Civ.R. 41(A)(1)(a).<sup>1</sup>

---

<sup>1</sup>Ohio does not have a separation of powers clause defining the separation of powers. However, “this doctrine is implicitly embedded in the entire framework of those sections of the Ohio Constitution that define the substance and scope of powers granted to the three branches of state government.” *State v. Bodyke*, 126 Ohio St.3d 266, 2010-Ohio-2424, 933 N.E.2d 753, ¶ 42, quoting *S. Euclid v. Jemison*, 28 Ohio St.3d 157, 158-159, 503 N.E.2d 136 (1986).

{¶ 10} Section 5(B), Article IV of the Ohio Constitution provides:

The Supreme Court shall prescribe rules governing practice and procedure in all courts of the state, which rules shall not abridge, enlarge, or modify any substantive right. \* \* \* All laws in conflict with such rules shall be of no further force or effect after such rules have taken effect.

{¶ 11} As a result, where a conflict arises between a rule and a statute, the court's rule will control for procedural matters; the legislature's statute will control for matters of substantive law. *State ex rel. Sapp v. Franklin Cty. Court of Appeals*, 118 Ohio St.3d 368, 2008-Ohio-2637, 889 N.E.2d 500, ¶ 28; *State v. Slatter*, 66 Ohio St.2d 452, 454, 423 N.E.2d 100 (1981). Substantive laws or rules relate to rights and duties giving rise to a cause of action, while procedural rules concern the "machinery" for carrying on the suit. *Norfolk S. Ry. Co. v. Bogle*, 115 Ohio St.3d 455, 2007-Ohio-5248, 875 N.E.2d 919, ¶ 16.

{¶ 12} A statute is invalid and has no force or effect if it conflicts with the Ohio Rules of Civil Procedure. *Rockey v. 84 Lumber Co.*, 66 Ohio St.3d 221, 223, 611 N.E.2d 789 (1993); *In re Coy*, 67 Ohio St.3d 215, 219, 616 N.E.2d 1105 (1993).

{¶ 13} Amended R.C. 4123.512(D) states in pertinent part as follows:

[P]leadings shall be had in accordance with the Rules of Civil Procedure, provided that service of summons on such petition shall not be required and provided that the claimant may not dismiss the complaint without the employer's consent if the employer is the party that filed the notice of appeal to court pursuant to this section.

{¶ 14} Civ.R. 41(A)(1)(a), on the other hand, allows a plaintiff to dismiss a claim without obtaining the defendant's consent. Civ.R. 41(A)(1)(a) provides:

(1) [A] plaintiff, without order of court, may dismiss all claims asserted by that plaintiff against a defendant by \* \* \*

(a) filing a notice of dismissal at any time before the commencement of trial unless a counterclaim which cannot remain pending for independent adjudication by the court has been served by that defendant \* \* \*.

{¶ 15} Both provisions deal with a procedural versus a substantive matter because they concern the requirements needed for a plaintiff to file a motion to dismiss without prejudice and do not concern "the rights and duties giving rise to a cause of action." *Bogle*, 115 Ohio St.3d 455, 2007-Ohio-5248, 875 N.E.2d 919, ¶ 16. Because the court's rules prevail over conflicting statutes, the requirement that the plaintiff obtain the defendant's consent prior to dismissal as set forth in amended R.C. 4123.512(D), is invalid.

{¶ 16} The state argues that the Civil Rules are inapplicable to workers' compensation proceedings because workers' compensation proceedings constitute "special proceedings" under Civ.R. 1(C)(7), which states in pertinent part:

(C) Exceptions. These rules, to the extent that specific procedure is provided by law or to the extent that these rules would by their nature be clearly inapplicable, shall not apply to procedure \* \* \* (7) in all other special statutory proceedings; provided, that where any statute provides for a procedure by a general or specific reference to the statutes governing procedure in civil actions such procedure shall be in accordance with these rules.

{¶17} In *Kaiser v. Ameritemps, Inc.*, 84 Ohio St.3d 411, 704 N.E.2d 1212 (1999), the Ohio Supreme Court addressed whether workers' compensation proceedings were "special proceedings" as set forth under Civ.R. 1. In *Kaiser*, the Supreme Court determined the constitutionality of former R.C. 4123.512(D), which completely prohibited a plaintiff from dismissing an appeal by the employer. The court found that "as a plaintiff, a claimant under R.C. 4123.512 should be afforded all of the rights provided to him or her by the Rules of Civil Procedure," and found that Civ.R. 41(A) applied to the workers' compensation proceedings. *Id.* at 416. *See also Robinson v. B.O.C. Group*, 81 Ohio St.3d 61, 691 N.E.2d 667 (1998) (Civ.R. 41(A)(2) applies to workers' compensation proceedings.) Thus, workers' compensation proceedings do not constitute "special proceedings" under the exceptions listed in Civ.R. 1.

{¶18} Accordingly, the requirement in amended R.C. 4123.512(D), that the plaintiff obtain an employer's consent prior to filing a motion to dismiss an appeal, violates the Ohio Constitution, Article IV, Section 5(B) because it is in contravention of Civ.R. 41(A)(1)(a).

## **2) Equal Protection Clause**

{¶19} We also agree with the trial court's finding that amended R.C. 4123.512(D) is unconstitutional under the Equal Protection Clauses of both the state and federal constitutions. In *Pickaway Cty. Skilled Gaming L.L.C. v. Cordray*, 127 Ohio St.3d 104, 2010-Ohio-4908, 96 N.E.2d 944, ¶ 17, the Ohio

Supreme Court made it clear that “[t]he federal and Ohio equal-protection provisions are ‘functionally equivalent.’” *Id.*, citing *State v. Williams*, 126 Ohio St.3d 65, 2010-Ohio-2453, 930 N.E.2d 770, ¶ 38.

{¶20} Ohio’s Equal Protection Clause states, “All political power is inherent in the people. Government is instituted for their equal protection and benefit \* \* \*.” Ohio Constitution, Article I, Section 2. The Equal Protection Clause is designed to prohibit “governmental decision makers from treating differently persons who are in all relevant respects alike.”(Citation omitted.) *Williams* at ¶ 16.

{¶21} Amended R.C. 4123.512(D) implicates the Equal Protection Clause because it requires employer consent before an injured worker can dismiss his or her complaint in an appeal initiated by the employer. Typically, a plaintiff may unilaterally and voluntarily dismiss his or her complaint without prejudice pursuant to Civ.R. 41(A)(1). This rule, read in conjunction with R.C. 2305.19, allows plaintiffs to refile their case one time within one year of dismissal. This is commonly referred to as the savings statute.

{¶22} Both the state and Ferguson agree that the rational basis analysis applies in the resolution of this case. They also agree that Ferguson has the burden of proving that amended R.C. 4123.512(D) is unconstitutional.

{¶23} In *Pickaway*, 127 Ohio St.3d 104, 2010-Ohio-4908, 96 N.E.2d 944, ¶ 19-20, the Supreme Court set forth the following:

The rational-basis test involves a two-step analysis. We must first identify a valid state interest. Second, we must determine whether the method or means by which the state has chosen to advance that interest is rational.

Under the rational-basis standard, a state has no obligation to produce evidence to sustain the rationality of a statutory classification. [S]tatutes are presumed to be constitutional and \* \* \* courts have a duty to liberally construe statutes in order to save them from constitutional infirmities. The party challenging the constitutionality of a statute bears the burden to negate every conceivable basis that might support the legislation.

{¶24} Even under the weight of this heavy burden, we cannot find a rational basis for the amendment. Amended R.C. 4123.512(D) was enacted after the Ohio Supreme Court decided *Kaiser*, 84 Ohio St.3d 411, 704 N.E.2d 1212. In the instant case, in declaring amended R.C. 4123.512(D) unconstitutional, the trial court made the following observation:

The obvious genesis of the move to amend this statute at issue was the reality that employers were being required to pay benefits and compensation for a period of up to 3 years in a claim that the employer felt was not a properly allowed claim. The employers felt that this procedure, permitted by statute and rule, allowed the claimant to unfairly take advantage and result in either direct cost to self-insured employers or increased premiums to state-funded employers. This had previously been argued under the prior form of R.C. 4123.512 and the same argument was rejected by the Ohio Supreme Court [in] *Kaiser v. Ameritemps* \* \* \*.

{¶25} Once the Ohio Supreme Court settled the issue of whether injured workers were plaintiffs entitled to all the processes due to plaintiffs under the Civil Rules, including Civ.R. 41(A)(1)(a), which is the privilege to voluntarily

dismiss a complaint and rely on the savings statute to refile an employer workers' compensation appeal, the matter was resolved.

{¶26} In *Pickaway*, the Ohio Supreme Court made it clear that not all classifications are violative of the Equal Protection Clause. However, this classification is within the purview of equal protection, because the classification applies only to an injured worker who wins his claim at the Industrial Commission, and the employer subsequently appeals. The employer in this scenario is given a benefit over the injured worker under amended R.C. 4123.512(D), i.e., the right to control the injured worker's complaint on appeal.

{¶27} Pursuant to *Kaiser*, the injured worker has the status of a plaintiff like any other plaintiff in a civil case. However, plaintiffs in civil cases, except a successful claimant-injured employee in a workers' compensation case, have the privilege to utilize a voluntary dismissal, without the consent of the defendant under Civ.R. 41(A)(1)(a).

{¶28} We fail to see how the state has a valid governmental interest in this statutory classification. Although the state developed the statutory scheme for the workers' compensation system, both employees and employers gave up substantial litigation rights to participate in the system. The state argues that employers have a "right to an expeditious appeal" and that by "requiring the employee to seek the employer's consent before voluntarily dismissing the petition," the legislature "reached a balance" in amending R.C. 4123.512(D). The

state further argues that its right to “prompt and efficient resolution” of workers’ compensation appeals is based on “the undeniable prejudice to an employer (in an employer-initiated appeal) for having been held legally responsible, for an indeterminate period of time, for benefits to which an employee is not entitled.”

{¶29} The Ohio Supreme Court, however, has specifically rejected this argument, holding that “the employer ultimately suffers no prejudice, as any illegitimate benefits paid during the interim between the original filing and the refiling of a voluntarily dismissed action are repaid if the employee’s claim does not prevail.” *Kaiser* at 415.

{¶30} In *Kaiser*, the Ohio Supreme Court concluded that a “workers’ compensation claimant may employ Civ.R. 41(A)(1)(a) to voluntarily dismiss an appeal to the court of common pleas by an employer \* \* \*.” *Id.* at 412. The Ohio Supreme Court further stated what is still true, even after the amendment to R.C. 4123.512, that, “As plaintiff, a claimant under R.C. 4123.512 should be afforded all of the rights provided to him or her by the Rules of Civil Procedure.” *Id.* at 415-416.

{¶31} Consequently, under the *Pickaway* two-part rational basis test, we see no valid state interest. We hold as a matter of law that this method of stripping injured workers of the privilege under *Kaiser* to voluntarily dismiss their complaint under Civ.R. 41(A)(1) has no rational relationship to amended R.C. 4123.512(D) and is offensive to the equal protection clause.

### 3) Due Process Clause

{¶32} Finally, we agree with the trial court's finding that amended R.C. 4123.512(D) violates the Due Process Clauses of both the state and the federal constitutions. Ohio's Due Process Clause states that "[a]ll court shall be open, and every person, for an injury done him in his land, goods, person, or reputation, shall have remedy by due course of law, and shall have justice administered without denial or delay." Ohio Constitution, Article I, Section 16. *See also Sorrell v. Thevenir*, 69 Ohio St.3d 415, 422, 633 N.E.2d 504 (1994) ("[t]he 'due course of law' provision is the equivalent of the 'due process of law' provision in the Fourteenth Amendment to the United States Constitution").

{¶33} A legal "cause of action is a species of property protected by the \* \* \* Due Process Clause." *Logan v. Zimmerman Brush Co.*, 455 U.S. 422, 428, 102 S.Ct. 1148, 71 L.Ed.2d 265 (1982). Courts traditionally have "held that the Due Process Clauses protect civil litigants who seek recourse in the courts, either as defendants hoping to protect their property or as plaintiffs attempting to redress grievances." *Id.* at 429. The Ohio Supreme Court has interpreted Ohio Constitution, Article I, Section 16 "to prohibit statutes that effectively prevent individuals from pursuing relief for their injuries." *Arbino v. Johnson & Johnson*, 116 Ohio St.3d 468, 2007-Ohio-6948, 880 N.E.2d 420, ¶ 44. "A statute need not 'completely abolish the right to open courts' to run afoul of this section. Any enactment that eliminates an individual's right to a judgment or

to a verdict properly rendered in a suit will also be unconstitutional.” (Citation omitted.) *Id.* at ¶ 45.

{¶34} In the case at hand, it is undisputed that amended R.C. 4123.512(D) restricts the right of an injured employee in an employer-initiated workers’ compensation appeal to voluntarily dismiss his complaint without obtaining the consent of the employer. Additionally, the statute also restricts the right of this same injured worker to utilize the savings statute and refile his case within one year of a voluntary dismissal. It is also undisputed that plaintiffs in all other civil cases are afforded these rights by Civ.R. 41(A)(1) and R.C. 2305.19. *See Kaiser*, 84 Ohio St.3d at 415-416.

{¶35} Having determined that an injured employee’s property interest in his or her legal cause of action is compromised under amended R.C. 4123.512(D), the next step is to characterize that right to determine the level of scrutiny applicable to its justification. “[T]he development of this Court’s substantive-due-process jurisprudence \* \* \* has been a process whereby the outlines \* \* \* specially protected by the Fourteenth Amendment — never fully clarified, to be sure, and perhaps not capable of being fully clarified — have at least been carefully refined by concrete examples involving fundamental rights found to be deeply rooted in our legal tradition.” *Washington v. Glucksberg*, 521 U.S. 702, 722, 117 S.Ct. 2258, 138 L.Ed.2d 772 (1997).

{¶36} At a minimum, a statute “comports with due process ‘if it bears a real and substantial relation to the public health, safety, morals or general welfare of the public and if it is not unreasonable or arbitrary.’” (Citation omitted.) *Fabrey v. McDonald Village Police Dept.*, 70 Ohio St.3d 351, 354, 639 N.E.2d 31 (1994) (citation omitted). As we determined in our analysis of equal protection and amended R.C. 4123.512(D) — and as the Ohio Supreme Court has determined in *Kaiser* — there is no rational relationship between stripping injured workers of their rights provided under the Rules of Civil Procedure and the fundamental purposes of workers’ compensation, which “include protecting injured workers and employers from losses that result from workplace accidents, compensating injured workers and their beneficiaries, promoting workplace safety and accident prevention, and ensuring that each employer participating in the workers’ compensation system pays an amount in premiums that reasonably corresponds with the risk that employer presents to the system.” *San Allen v. Buehrer*, 8th Dist. Cuyahoga No. 99786, 2014-Ohio-2071, ¶ 102.

{¶37} Accordingly, we find that amended R.C. 4123.512(D) is unconstitutional, because it violates the basic principles of separation of powers, equal protection, and due process. The state’s first, second, and third assigned errors are overruled, and we affirm the trial court’s decision.

{¶38} Judgment affirmed.

It is ordered that appellee recover from appellant costs herein taxed.

The court finds there were reasonable grounds for this appeal.

It is ordered that a special mandate be sent to said court to carry this judgment into execution.

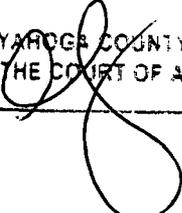
A certified copy of this entry shall constitute the mandate pursuant to Rule 27 of the Rules of Appellate Procedure.

  
PATRICIA ANN BLACKMON, JUDGE

TIM McCORMACK, P.J., and  
ANITA LASTER MAYS, J., CONCUR

FILED AND JOURNALIZED  
PER APP.R. 22(C)

OCT 29 2014

CUYAHOGA COUNTY CLERK  
OF THE COURT OF APPEALS  
By  Deputy