

[Cite as *Terpenning v. Comfortrol, Inc.*, 2009-Ohio-6418.]

IN THE COURT OF APPEALS OF OHIO

TENTH APPELLATE DISTRICT

Lawrence R. Terpenning,	:	
	:	
Plaintiff-Appellee,	:	
	:	
v.	:	No. 09AP-315
	:	(C.P.C. No. 08CVD12-17269)
	:	
Comfortrol, Inc.,	:	(REGULAR CALENDAR)
	:	
Defendant-Appellant,	:	
	:	
and	:	
	:	
Administrator, Ohio Bureau of	:	
Workers' Compensation,	:	
	:	
Defendant-Appellee.	:	
	:	

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D E C I S I O N

Rendered on December 8, 2009

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*Agee, Clymer, Mitchell & Laret, Eric B. Cameron and Robert M. Robinson*, for appellee Lawrence R. Terpenning.

*Earl, Warburton, Adams & Davis, and Christopher R. Walsh*, for appellant.

*Richard Cordray, Attorney General, Latawnda N. Moore and Sandra E. Pinkerton*, for appellee Administrator, Ohio Bureau of Workers' Compensation.

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APPEAL from the Franklin County Court of Common Pleas.

BRYANT, J.

{¶1} Defendant-appellant, Comfortrol, Inc., appeals from an order of the Franklin County Court of Common Pleas, denying its motion for summary judgment. Defendant assigns a single error:

The Trial Court erred to the prejudice of Defendant/Appellant, Comfortrol, Inc., when it denied Comfortrol's Motion for Summary Judgment on the issue of res judicata.

Because defendant appeals from an order that is not final, leaving this court without jurisdiction to decide the assigned error, we dismiss defendant's appeal.

### **I. Procedural History**

{¶2} On December 4, 2008, plaintiff-appellee, Lawrence R. Terpenning, filed a re-filed complaint in the Franklin County Court of Common Pleas pursuant to R.C. 4123.512 and R.C. 2305.19. Alleging plaintiff suffered an injury while in the course of and arising out of his employment with defendant, the re-filed complaint sets out the procedural history of plaintiff's case. For purposes of this appeal, it is largely undisputed.

{¶3} Plaintiff's re-filed complaint alleges that following plaintiff's industrial incident on December 22, 2005, he applied for compensation benefits pursuant to statute. After defendant-appellee, Administrator of the Bureau of Workers' Compensation ("Administrator"), allowed plaintiff's claim for specified conditions, the Bureau of Workers' Compensation set plaintiff's full weekly wage and average weekly wage. Defendant appealed. On appeal, the Industrial Commission's district hearing officer modified the Administrator's order, allowing the claim for additional conditions and reducing plaintiff's full weekly wage. Defendant appealed the district hearing officer's order to an Industrial Commission staff hearing officer, who affirmed the district hearing officer's order and

allowed plaintiff's claim for the specified conditions. Although defendant sought review before the Industrial Commission, the commission refused the appeal. Defendant then appealed pursuant to R.C. 4123.512 to the common pleas court in Franklin County.

{¶4} In response to defendant's appeal and in compliance with the requirements of R.C. 4123.512, plaintiff filed a complaint on November 7, 2006, in the Franklin County Court of Common Pleas, seeking the right to participate in the Ohio Workers' Compensation Fund. The case progressed until plaintiff dismissed his complaint on December 17, 2007 pursuant to Civ.R. 41(A)(1)(a).

{¶5} Prior to re-filing his complaint, plaintiff filed a complaint on December 14, 2007 against Lora M. Bowman, the driver whose motor vehicle struck plaintiff and gave rise to his workers' compensation claim. After defendant filed its own action against Bowman, defendant moved to consolidate the two cases and to intervene in the action plaintiff initiated against Bowman; the motions were granted. On December 4, 2008, plaintiff re-filed his R.C. 4123.512 complaint within the one-year time period allowed under R.C. 2305.19. He subsequently filed a Civ.R. 41(A)(1)(a) notice of voluntary dismissal in his action against Bowman.

{¶6} After it answered plaintiff's re-filed complaint, defendant filed a motion for summary judgment on January 30, 2009. Defendant's summary judgment motion noted that plaintiff not only dismissed his original R.C. 4123.512 complaint but also dismissed his personal injury action against Bowman. Defendant's motion argued that because plaintiff "has now dismissed his December 22, 2005 injury claim voluntarily on two separate occasions, the second dismissal operates as an adjudication on the merits making the 2008 Complaint res judicata." (Motion for Summary Judgment, 3.)

{¶7} In a decision and entry filed March 9, 2009, the trial court denied defendant's summary judgment motion. While the court recognized plaintiff once dismissed his R.C. 4123.512 complaint, the court also noted plaintiff timely re-filed it pursuant to R.C. 2305.19. The court also acknowledged *res judicata* bars a complaint twice dismissed pursuant to Civ.R. 41(A)(1)(a), but concluded the rule did not apply. See *Chadwick v. Barba Lou, Inc.* (1982), 69 Ohio St.2d 222, 226 (concluding a complaint twice-dismissed pursuant to Civ.R. 41(A)(1)(a) is barred).

{¶8} The court reasoned the re-filed complaint sought a determination about whether plaintiff is entitled to participate in the Workers' Compensation Fund, while plaintiff's action against Bowman raised different issues through common law personal injury claims. Even though the court realized the underlying claim for workers' compensation benefits arose from the same automobile accident subject of plaintiff's action against Bowman, the court concluded "the issues involved in the separate cases are unrelated." (Decision & Entry, 1.) Accordingly, the trial court denied the motion for summary judgment.

{¶9} Defendant timely appeals, contending in its single assignment of error that the trial court wrongly concluded Civ.R. 41(A)(1)(a) does not bar plaintiff's re-filed complaint.

## **II. Jurisdiction**

{¶10} Before addressing the assigned error, we must determine the Administrator's motion to dismiss for lack of a final appealable order. The Administrator contends the trial court's decision denying defendant's motion for summary judgment is not a final appealable order, leaving this court without jurisdiction to consider defendant's

assigned error. Defendant acknowledges the rule that "[t]he denial of a motion for summary judgment generally is considered an interlocutory order not subject to immediate appeal." *Stevens v. Ackman*, 91 Ohio St.3d 182, 186, 2001-Ohio-249, citing *Celebrezze v. Netzley* (1990), 51 Ohio St.3d 89, 90, and *State ex rel. Overmeyer v. Walinski* (1966), 8 Ohio St.2d 23. It, however, contends its appeal falls outside the general rule.

{¶11} Pursuant to Section 3(B)(2), Article IV, Ohio Constitution, and R.C. 2505.03, appellate courts have jurisdiction to review only final orders, judgments or decrees. *Browder v. Shea*, 10th Dist. No. 04AP-1217, 2005-Ohio-4782, ¶10. R.C. 2505.02(B), in turn, defines a final order, specifying those orders which may be reviewed, affirmed, modified or reversed on review in the court of appeals. As relevant here, only R.C. 2505.02(B)(1), (2) or (4) possibly may apply.

**A. R.C. 2505.02(B)(1)**

{¶12} An order is final and appealable under R.C. 2505.02(B)(1) if it "affects a substantial right in an action that in effect determines the action and prevents the judgment." Here, the trial court's order meets neither branch of R.C. 2505.02(B)(1). "[T]he order did not determine the action, as the merits of the employer's appeal have yet to be addressed." *Ferrell v. Standard Oil Co. of Ohio* (1984), 11 Ohio St.3d 169, 171 (holding "[a]n order overruling a motion to dismiss an appeal to the court of common pleas pursuant to R.C. 4123.519 [now R.C. 4123.512] is not a final, appealable order within the meaning of R.C. 2505.02").

{¶13} Moreover, the trial court's order does not affect a substantial right. R.C. 2505.02(A)(1) defines substantial right 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." Thus "[a] substantial right is a legal right that is entitled to enforcement and protection by law." *Browder* at ¶13, citing *Chef Italiano Corp. v. Kent State Univ.* (1989), 44 Ohio St.3d 86. Even if defendant correctly asserts it has a substantial right in seeing the "double-dismissal rule" under Civ.R. 41(A)(1)(a) is applied appropriately, the issue here is whether the trial court's order *affects* the substantial right defendant asserts. See *Browder* at ¶13. If it does not, the order is not final. *Id.*, citing *Burt v. Harris*, 10th Dist. No. 03AP-194, 2004-Ohio-756, ¶12. "An order affecting a substantial right is 'one which, if not immediately appealable, would foreclose appropriate relief in the future.'" *Id.*, quoting *Bell v. Mt. Sinai Med. Ctr.* (1993), 67 Ohio St.3d 60, 63.

{¶14} Here, the trial court's order does not affect defendant's substantial right. Delaying review of the trial court's decision will not deny defendant full and complete relief. Once the action is determined fully in the common pleas court, defendant will have the right to appeal the entire action, including the trial court's determination that the double-dismissal rule does not apply here. Since the trial court's order neither determines the action nor affects a substantial right, it is not final under R.C. 2505.02(B)(1).

**B. R.C. 2505.02(B)(2)**

{¶15} R.C. 2505.02(B)(2) defines a final order as one that "affects a substantial right made in a special proceeding." R.C. 2505.02(A)(2) defines a special proceeding as "an action or proceeding that is specially created by statute and that prior to 1853 was not denoted as an action at law or suit in equity." Because "[w]orkers' compensation did not exist at common law or in equity, but was established by special legislation[,] \* \* \* it falls within the definition of a special proceeding under R.C. 2505.02(A)(2)." *Myers v. Toledo*,

110 Ohio St.3d 218, 2006-Ohio-4353, ¶15. The issue then is whether the trial court's order affects a substantial right.

{¶16} As noted, the trial court's order does not affect a substantial right because defendant has an opportunity for meaningful review, by way of appeal, after the trial court adjudicates the parties' rights. *Browder* at ¶16. As a result, even though the trial court's decision was entered in a special proceeding, the trial court's order is not appealable pursuant to R.C. 2505.02(B)(2).

**C. R.C. 2505.02(B)(4)**

{¶17} R.C. 2505.02(B)(4) defines a final order as one "that grants or denies a provisional remedy," provided two conditions also are met. Initially, the order subject of appeal must determine the action with respect to the provisional remedy and prevent a judgment in favor of the appealing party regarding the provisional remedy. R.C. 2505.02(B)(4)(a). Secondly, an appeal following judgment must not afford a meaningful and effective remedy to the appealing party. R.C. 2505.02(B)(4)(b).

{¶18} R.C. 2505.02(A)(3) defines a provisional remedy as "a proceeding ancillary to the action, including, but not limited to, a proceeding for a preliminary injunction, attachment, discovery of privileged matter, suppression of evidence," or prima facie showings with respect to specified statutes. Neither plaintiff's action under R.C. 4123.512, nor the trial court's application of the two-dismissal rule under Civ.R. 41(A)(1)(a), is specifically mentioned in R.C. 2505.02(A)(3). Nor is it like any of the other proceedings the legislature listed in R.C. 2505.02(A)(3) as examples of provisional remedies. Rather than being ancillary to plaintiff's R.C. 4123.512 complaint, defendant's motion goes to the merits of the complaint and argues a procedural bar that precludes plaintiff's entire claim

for relief. As a result, defendant's motion for summary judgment arguably is not a proceeding ancillary to the actions on plaintiff's complaint.

{¶19} Even if we could conclude a provisional remedy is at issue here, defendant nonetheless could not meet the requirements of R.C. 2505.02(B)(4)(a) and (b) because the trial court's order, as noted, neither determines the action nor deprives defendant of a meaningful and effective remedy on appeal following final judgment. Accordingly, the trial court's decision does not present a final order under R.C. 2505.02(B)(4).

{¶20} Because defendant does not appeal from a final order of the trial court, this court lacks jurisdiction to consider defendant's assigned error. *Browder*, supra, at ¶11, citing *Davison v. Rini* (1996), 115 Ohio App.3d 688, 692. We therefore grant the Administrator's motion and dismiss defendant's appeal for lack of jurisdiction.

*Motion granted;  
appeal dismissed.*

BROWN and McGRATH, JJ., concur.

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