

STATE OF VERMONT  
WASHINGTON COUNTY

FILED  
2007 SEP -4 P 1:40  
SUPERIOR COURT  
WASHINGTON COUNTY

Penny L. Shaw (Fontaine),  
Plaintiff,

v.

Ethan Allen Inc., et al.,  
Defendants.

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Washington Superior Court  
Docket No. 639-10-06 Wncv

ENTRY

Defendants seek reconsideration of the court's July 18, 2007 denial of their Rule 38 jury request as out of time. On further review, the court concludes that the jury request was timely filed and should have been granted.

This case is a 21 V.S.A. § 670 workers' compensation appeal. The procedure applicable to such an appeal is governed by Rule 74. See V.R.C.P. 74(a).

Rule 74(e) addresses the jury trial issue as follows:

Any question as to which there is a right to trial by jury shall be tried to a jury if one is demanded in accordance with Rule 38. Otherwise, all questions as to which by law review is available shall be tried to the court. Proceedings under this rule shall be ripe for listing on the hearing calendar in accordance with Rule 40(a) when the time for filing the record provided in subdivision (d) of this rule, and any extension thereof, have expired.

In the Reporter's Notes, the reader is referred to the Reporter's Notes to Rule 72(d), which is analogous to Rule 74(e). See Reporter's Notes, V.R.C.P. 74.

The Reporter's Notes to Rule 72(d) include the following: "Since no pleadings are required, probate appeals are ripe for trial at any time after the record is complete." That is, the Notes equate the time at which pleadings are complete, in cases where there are pleadings, with the time at which the record is complete, in cases where there are no pleadings.

Equating the time at which pleadings are complete with the time at which the record is complete, in these circumstances, is consistent with the interplay between relevant provisions of Rule 38 and Rule 40. Ordinarily, under Rule 40(a)(1), an action is placed on the hearing calendar when the pleadings are complete. Under Rule 38, a party may request a jury trial within ten days of when the pleadings are complete. The completion of the pleadings marks the point in time that makes these provisions of Rules 38 and 40 congruent. It makes sense to equate them where there are no pleadings.

Rule 74(e) addresses the operation of both Rule 38 and 40. With regard to Rule 40(a),

Rule 74(e) specifically indicates that the point in time that matters is not the completion of the pleadings—there are no pleadings—but the completion of the record under Rule 74(d). See Rule 74(d) (“No pleadings shall be required in the superior court.”). Rule 38(b) cannot meaningfully be applied in the Rule 74 context unless the same accommodation applies. Compare V.R.C.P. 74(e) with V.R.C.P. 75(d), which does not modify Rule 40—pleadings are required under Rule 75(b).


The record that must be complete under Rule 74(d) includes, among other things, “where required by law, a statement of the questions.” V.R.C.P. 74(d).

Under 21 V.S.A. § 671, an appeal under 21 V.S.A. § 670 “shall be limited to a review of questions of fact or questions of fact and law certified . . . by the commissioner.” The court concludes that the commissioner’s certification of questions operates as a statement of questions for purposes of Rule 74(d).

Defendants’ demand for a jury trial was filed in a timely manner because it was filed on June 29, 2007, prior to the filing of the certified questions by the Commissioner on August 3, 2007.

For the foregoing reasons, Defendants’ Motion for Reconsideration is *granted*, and Appellee’s demand for a jury trial is *granted*.

Dated at Montpelier, Vermont this 29<sup>th</sup> day of August 2007.

  
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Mary Miles Teachout  
Superior Court Judge