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IN THE SUPREME COURT OF OHIO

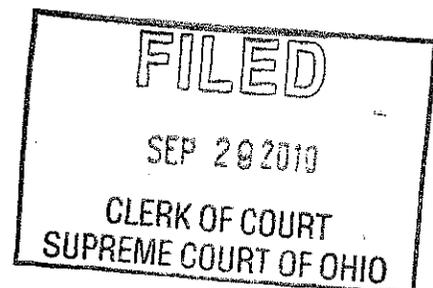
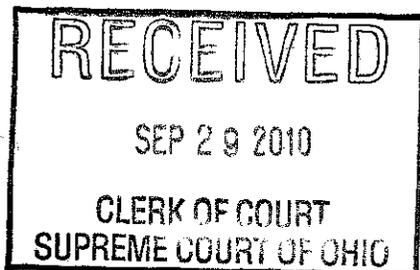
WELSH DEV. CO., INC., et al., : **Case No. 2010-0611**
 : **Case No. 2010-0858**
Appellants, :
vs. : **Certified Conflict and on Appeal from**
 : **the Warren County Court of Appeals,**
 : **Twelfth Appellate District,**
WARREN CTY. REGIONAL : **Judgment filed February 22, 2010**
PLANNING COMM., :
 : **Court of Appeals Case No:**
Appellee. : **CA2009-07-101**

**COMBINED MERIT BRIEF OF APPELLEE
WARREN COUNTY REGIONAL PLANNING COMMISSION
ON CERTIFIED CONFLICT AND DISCRETIONARY APPEAL**

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INTRODUCTION

To be sure, the parties agree that the instant appeal involves the proper interpretation of the plain language of R.C. 2505.04. The Twelfth District Court of Appeals held to a correct reading of the statute when it affirmed that the Appellants failed to perfect their administrative appeal. Unfortunately, in their effort to secure a reversal from this Court, the Appellants relegate the holding below to enforcing “picayune” distinctions. Although Appellants seek to marginalize the appellate opinion as majoring on the minor issue of “who delivered the notices of appeal to the agency,” (Appellants' Br. at 1), the real issue is who, other than an appellant, may invoke appellate jurisdiction.

The fact that it was the administrative appellant in *Dudukovich v. Lorain Metropolitan Housing Auth.* (1979), 58 Ohio St.202, 389 N.E.2d 1113, who mailed the notice of appeal to the agency is no trifle. The *Dudukovich* Court was concerned with a method of *filing* – not merely *notice*. *Id.* at 204. Furthermore, when the General Assembly amended the administrative appellate procedure in 1986, post-*Dudukovich*, the legislature specifically applied the Rules of Appellate Procedure to appeals such as the subject appeal and, for purposes of those Rules, viewed the agency as a trial court or the clerk thereof. R.C. 2505.03(B); see R.C. 2505.04.

The Appellants' interpretation blurs the distinction between filing and service of process and raises significant constitutional questions, not the least of which is: By what authority may a clerk of courts invoke appellate jurisdiction on behalf of a litigant? The answer is quite clear – there is no such authority; therefore, *Dudukovich* does not and could not stand for the proposition that a clerk of courts may perfect an appeal on behalf of a litigant. The Twelfth District has the proper view of the required procedure to

perfect an administrative appeal; therefore, this Honorable Court should affirm the appellate court's judgment.

STATEMENT OF FACTS

The Appellee, Warren County Regional Planning Commission ("WCRPC"), agrees with most of the Appellants', Welsh Development Company, Inc., *et al.* ("Welsh"), Statement of Facts. (Appellants' Br. At 2-3). The WCRPC cannot agree, however, with Welsh's effort to argue within its Statement that the "court of appeals offered a cramped reading of this Court's *Dudukovich* opinion[.] * * *" (*Id.* at 2). As the WCRPC will establish, *infra*, the Twelfth District appropriately held that Welsh's efforts at filing did not comply with the procedure required by R.C. 2505.04, (App. 56 to Appellants' Br.), and, therefore, failed to perfect service.

ARGUMENT

Certified Conflict Issue: "Is a service of summons by a clerk of courts upon an administrative agency, together with a copy of a notice of appeal filed in the common pleas court, sufficient to perfect an administrative appeal pursuant to R.C. 2505.04 as long as the agency receives the notice within the time prescribed by R.C. 2505.07?"

The WCRPC agrees that this case presents the Court with a pure issue of law, which is subject to *de novo* review. *State v. Consilio*, 114 Ohio St.3d 295, 2007-Ohio-4163, at ¶ 8, 871 N.E.2d 1167 (interpretation of statutory authority); see *State ex rel. Bush v. Spurlock* (1989), 42 Ohio St.3d 77, 80, 537 N.E.2d 641 (subject matter jurisdiction).

- 1. To perfect an administrative appeal pursuant to Chapter 2506 of the Ohio Revised Code, an administrative appellant must file a written notice of appeal with the appropriate administrative agency.**

In Ohio, appeals from the administrative agencies of a political subdivision or that are themselves political subdivisions are governed by Ohio Revised Code Chapter 2506:

Except as otherwise provided * * * every final order, adjudication, or decision of any officer, tribunal, authority, board, bureau, commission, department, or other division of any political subdivision of the state may be reviewed by the court of common pleas of the county in which the principal office of the political subdivision is located as provided in Chapter 2505. of the Revised Code.

R.C. 2506.01(A). In turn, to invoke appellate jurisdiction, an administrative appellant must satisfy one requirement:

An appeal is perfected when a *written notice of appeal is filed*, in the case of an appeal of a final order, judgment, or decree of a court, in accordance with the Rules of Appellate Procedure or the Rules of Practice of the Supreme Court, or, in the case of an administrative-related appeal, *with the administrative officer, agency, board, department, tribunal, commission, or other instrumentality involved*. * * * After being perfected, an appeal shall not be dismissed without notice to the appellant, and no step required to be taken subsequent to the perfection of the appeal is jurisdictional.

R.C. 2505.04 (emphasis added); see *Louden v. A.O. Smith Corp.*, 121 Ohio St.3d 95, 2009-Ohio-319, at ¶ 27, 902 N.E.2d 458 (whether electronically-filed notice of appeal “should invoke jurisdiction”); *Inter-City Foods, Inc. v. Kosydar* (1972), 30 Ohio St.2d 159, 162, 283 N.E.2d 161 (notice of appeal was “adequate to vest jurisdiction in the Court of Appeals”). A proper filing of a notice of appeal with, in this instance, the administrative agency, is the only step necessary to perfect a Chapter 2506 appeal. *In re S.J.*, 106 Ohio St.3d 11, 2005-Ohio-3215, 829 N.E.2d 1207, at ¶ 9 (citing R.C. 2505.04); *John Roberts Mgt. Co. v. Village of Obetz*, --- Ohio App.3d ---, 2010-Ohio-3382, at ¶ 11, --- N.E.2d ---; *Tisdale v. A-Tech Automotives Mobile Serv. & Garage*, 8th Dist. No. 92825, 2009-Ohio-5382, at ¶ 13.

2. This Court held a clerk of courts is not responsible for a “filing.”

Only recently, this Court reaffirmed what constitutes a “filing” from both a party’s and a clerk of court’s perspective. In *Louden*, the Court confronted the technological advance of electronic filing, specifically where a trial court order mandated electronic filing but the respective district court of appeals had no local rule providing for electronic filing of the notice of appeal. 2009-Ohio-319, at ¶ 1. The Court held that, without a local rule that permitted electronic filing, “an appeal requires *an appellant to present a paper copy of the notice of appeal to the clerk of the trial court*[.] * * *” *Id.* (emphasis added). Indeed, juxtaposed with the issue of modern technology, the Court reverted to a well-established definition of “filing.” “[H]istorically, ‘filing’ occurs when a person manually presents a paper pleading to the clerk of courts.” *Id.* at ¶ 15.

Subsequently, the Court held a clerk of courts has no responsibility for “filing”; the act is a party’s obligation:

We observe, however, that *the filing of a document does not depend on the performance of a clerk's duties*. A document is “filed” when it is deposited properly for filing with the clerk of courts. The clerk's duty to certify the act of filing arises only after a document has been filed. This is implicit in the statutes and rules regarding filing. See R.C.1901.31, 2303.08, 2303.10, and 2303.31, and Sup.R. 26.05 and 44. For instance, Sup.R. 44(E) provides that “ ‘[f]ile’ means to deposit a document with a clerk of court, *upon the occurrence of which* the clerk time or date stamps and docket the document.” (Emphasis added.) *Thus, a party “files” by depositing a document with the clerk of court, and then the clerk's duty is to certify the act of filing*. In short, the time or date stamp does not cause the filing; the filing causes the certification.

Zanesville v. Rouse, 126 Ohio St.3d 1, 2010-Ohio-2218, at ¶ 7, 929 N.E.2d 1044 (vacated in part on reconsideration on other grounds, 126 Ohio St.3d 1227, 2010-Ohio-3754, 933 N.E.2d 260) (emphasis added).

Against this backdrop, Welsh reads too much into *Dudukovich*. In that case, the Court determined that, under the former version of R.C. 2505.04, the administrative appellant perfected her appeal by mailing her notice of appeal by certified mail to the agency. “The issue thus becomes whether [*the administrative appellant*] Dudukovich sufficiently complied with R.C. 2505.04 *by mailing a copy of the notice of appeal* to LMHA.” 58 Ohio St.2d at 204 (emphasis added). The Court held that because certified mail was a “method productive of certainty of accomplishment” of filing, the appellant perfected her appeal. *Id.* (citing *Columbus v. Upper Arlington* (1964), 201 N.E.2d 305, 308, 94 Ohio Law Abs. 392, 397). *Dudukovich*, therefore, is inapposite to the instant case. Welsh did not mail its notices of appeal to the WCRPC; rather, it filed its notices with the trial court and relied on the clerk of courts to “perfect” its appeal by mailing service of process to the agency. (See Supp. to Appellants’ Br. at 1-17, 18-33).

3. The General Assembly amended Chapter 2505 in 1986 and provided that the Rules of Appellate Procedure govern Welsh’s appeal.

Dudukovich, decided in 1979, interpreted the former version of R.C. 2505.04. At the time, the statute provided:

An appeal is perfected when written notice of appeal is filed with the lower court, tribunal, officer, or commission. Where leave to appeal must be first obtained, notice of appeal shall also be filed in the appellate court. After being perfected, no appeal shall be dismissed without notice to the appellant, and no step required to be taken subsequent to the perfection of the appeal is jurisdictional.

Fmr R.C. 2505.04. Understandably, the Court viewed the former statute as lacking clarity:

Although R.C. 2505.04 is, admittedly, not explicit on this point, it appears to require that written notice be filed, within the time limit prescribed by R.C. 2505.07(B), with the agency or board from which the appeal is being taken, in order for the appeal to be perfected. As a practical

matter, such notice must also be filed, within the same time limit, with the Court of Common Pleas, in order for it to assume jurisdiction.

Dudukovich, 58 Ohio St.2d at 204.

In 1986, the General Assembly provided additional clarity when it enacted Am. Sub. H.B. 412. The legislature amended R.C. 2505.04 to make specific provision for appeals of court judgments and “administrative-related appeals[.] * * *” R.C. 2505.04. Under its current iteration, the statute makes the filing requirements of the Rules of Appellate Procedure or the Rules of Practice of the Supreme Court applicable to respective appeals of a “court order, judgment, or decree of a court[.] * * *” *Id.* Concerning administrative appeals, on the face of this statute, there is no specification of an applicable procedural rule. Nevertheless, a conclusion that the General Assembly did not provide any particular method of filing an administrative-related appeal would be incorrect.

In Am. Sub. H.B. 412, the General Assembly also amended R.C. 2505.03. The relevant section now provides:

Unless, in the case of an administrative-related appeal, Chapter 119, or other sections of the Revised Code apply, such an appeal is governed by this chapter and, *to the extent this chapter does not contain a relevant provision, the Rules of Appellate Procedure.* When an administrative-related appeal is so governed, if it is necessary in applying the Rules of Appellate Procedure to such an appeal, *the administrative officer, agency, board, department, tribunal, commission, or other instrumentality shall be treated as if it were a trial court whose final order, judgment, or decree is the subject of an appeal to a court of appeals or as if it were a clerk of such a trial court.*

R.C. 2505.03(B) (emphasis added) (App. 1). The instant administrative appeal arises from a decision of the WCRPC, which is a political subdivision of the State of Ohio. R.C. 2744.01(F). Chapter 119 of the Ohio Revised Code applies to administrative

appeals from state agencies, not to appeals from political subdivisions. *Karrick v. Board of Ed. of Findlay School Dist.* (1963), 174 Ohio St. 467, 469, 190 N.E.2d 256 (“only agencies at the state level of government are covered by the [Administrative Procedure Act].”) No other section of the Revised Code applies to this type of appeal.

As discussed, *supra*, R.C. 2505.04 does not specify an applicable procedural rule for administrative-related appeals; therefore, pursuant to R.C. 2505.03(B), the Rules of Appellate Procedure apply. *Cleveland Bd. of Zoning Appeals v. Abrams*, 186 Ohio App.3d 590, 2010-Ohio-1058, at ¶ 40, 929 N.E.2d 509 (Gallagher, J., concurring); *McCann v. Lakewood* (1994), 95 Ohio App.3d 226, 232, 642 N.E.2d 48; see *In re Namey* (1995), 103 Ohio App.3d 322, 326, 659 N.E.2d 372 (“Clearly, R.C. 2505.03 does provide that R.C. Chapter 2505 and the Appellate Rules may be applied, *but only if* R.C. 119.12 fails to address the issue.”); cf. *Southside Community Dev. Corp. v. Levin*, 116 Ohio St.3d 1209, 2007-Ohio-6665, at ¶ 5, 878 N.E.2d 1048 (Chapter 2505 may be superseded by more specific provisions).

4. Welsh was required to comply with the appellate rules to perfect its appeal but failed to comply.

As provided by statute, Welsh was required to abide by the appellate rules. Furthermore, again as provided by statute, Welsh was required to treat the WCRPC “as if it were a trial court whose final order, judgment, or decree is the subject of an appeal to a court of appeals or as if it were a clerk of such a trial court.” R.C. 2505.03(B). Welsh had no discretion to attempt perfection of service by any other means. “This court has consistently held that when a statute confers a right of appeal, the appeal can only be perfected in the manner prescribed by that statute.” *Griffith v. J.C. Penney Co., Inc.* (1986), 24 Ohio St.3d 112, 113, 493 N.E.2d 959. Sometimes, the results are harsh.

Louden, 2009-Ohio-319, at ¶ 32-33 (appeal dismissed for want of jurisdiction because “the appellants’ notices of appeal filed electronically were invalid [and their] subsequently filed paper notices of appeal were untimely.”)

The appellate rules clearly delineate the procedure required to file an appeal. “An appeal as of right shall be taken by filing a notice of appeal with the clerk of the trial court [in this case, the WCRPC] within the time allowed[.] * * *” App.R. 3(A). Chapter 2505 does supply the specific “time allowed”: thirty days. R.C. 2505.07. In this instance, therefore, Welsh was required to view the WCRPC as the trial court or as the clerk of the trial court and to file its notice of appeal with the WCRPC. Therefore, while R.C. 2505.04 arguably does not prescribe “a particular *method* of delivery” to accomplish filing, *Dudukovich*, 58 Ohio St.2d at 204 (emphasis added), the legislature made it clear *who* must deliver the notice: the administrative appellant. Because Welsh failed to comport with the statutory process it failed to perfect its appeal.

- a. **A clerk of courts has no authority to “file” an appeal on an appellant’s behalf nor may a clerk act as a party’s agent to invoke jurisdiction.**

Welsh attempts to skirt these clear provisions by arguing that, by filing its notices of appeal in the common pleas court, which serves an appellate court for purposes of reviewing an administrative decision, R.C. 2506.01, and then by directing the reviewing court’s clerk to serve WCRPC with process, the clerk, as Welsh’s “agent,” (Appellants’ Br. at 6), “filed” and, therefore, perfected the appeal. Welsh’s position raises serious concerns. As mentioned, this Court only recently reiterated a party – not a clerk – files a case. *Zanesville*, 2010-Ohio-2218, at ¶ 7; see *Louden*, 2009-Ohio-319, at ¶ 1, 15. Next, Welsh’s procedure is not supported by Appellate Rule 3. The Rule places the obligation

on the trial court clerk (the agency in this instance) to “mail or otherwise forward a copy of the notice of appeal * * * to the clerk of the court of appeals named in the notice,” App.R. 3(E),¹ not the converse as contemplated by Welsh.²

More pertinent, however, is the fact that Welsh’s propositions: 1) that a clerk may “file” an appeal on behalf of a litigant; and 2) that a clerk is an appellant’s agent for purposes of filing, have no support at law. “The clerk of courts is an elected public official whose duties are regulated by statute.” *State ex rel. Smith v. Culliver*, 186 Ohio App.3d 584, 2010-Ohio-339, at ¶ 43, 929 N.E.2d 465. Included among the clerk’s duties are: administration of oaths and acknowledgments; indorsing the time of filing on pleadings or paper files; entering orders and similar decisions from the court; making a complete judicial record when ordered; filing and preserving any papers delivered to the clerk; issuing process pursuant to praecipe and the keeping of books and entries. R.C. 2303.07 - .14. The clerk’s duties are performed under the direction of the court. R.C. 2303.26. Conspicuously absent from a clerk’s duties is “filing” or invoking jurisdiction on behalf of a litigant. Neither is there any support for the position that a clerk may be a litigant’s agent. “Initially, we observe that neither the Clerk of Courts nor the trial judge is obliged or permitted by law to act as plaintiffs’ agent or advocate.” *Carter v. Carter* (Sept. 19, 1989), 3rd Dist. No. 11-88-13, at *2. (App. 2).

Welsh’s argument necessarily conflates “filing” with service of process. The actual distinction between the two is not insignificant. In *Genesis Outdoor Advertising*,

¹ The trial court clerk’s obligation under App.R. 3(E) to forward “docket entries” is supplanted by R.C. 2506.02, which requires an administrative appellate to file a praecipe with the agency to prepare the administrative record.

² To the extent that *Dudukovich’s* comment that filing with the common pleas court is required within R.C. 2505.07’s deadline “[a]s a practical matter *** in order for it to assume jurisdiction,” 58 Ohio St.2d at 204, survives the amendment of Chapter 2505, it does not alter these provisions.

Inc. v. Deerfield Twp. Bd. of Zoning Appeals (“Genesis”), the Eleventh District relied on *Dudukovich* to uphold an appeal where *the appellant* filed its notice of appeal with the common pleas court and also mailed its notice of appeal to the *agency secretary* at her home address. 11th Dist. No. 2001-P-0137, 2002-Ohio-7272, at ¶ 3. The court noted its holding was in apparent conflict with earlier decisions, which found similar appeals not perfected, and explained the seeming discrepancy:

At first blush, it would appear that *Dudukovich, BP Exploration and Oil, Inc. v. The Planning Comm. of the Village of Oakwood*, 8th Dist. No. 80510, 2002-Ohio-4163], and this opinion conflict with our decisions in *Trickett v. Randolph Twp. Bd. of Zoning Appeals* (Aug. 18, 1995), 11th Dist. No. 94-P-0007, 1995 Ohio App. LEXIS 3394, and *Leifheit v. Bd. of Zoning Appeals of Palmyra Twp.* (June 22, 2001), 11th Dist. No. 99-P-0112, 2001 Ohio App. LEXIS 2804. These former cases are, however, factually distinguishable.

In *Leifheit*, the appellant filed a notice of appeal with the court of common pleas and requested the Clerk of Courts to issue a summons and a copy of the notice of appeal for service on the BZA. The clerk did as appellant requested. In *Trickett*, though the record is unclear as to precisely what procedural measures were taken by the appellant, it appears that the notice of appeal was also filed in the court of common pleas and was served on the BZA. In both cases, the notice of appeal was accompanied by an affidavit of service, which attested that a copy of the notice of appeal had been served on the BZA.

Thus, in both cases, *the Clerk of Courts caused the notice of appeal to be personally served on the BZA, rather than filed with it by the appellant.* Because “[s]ervice is not the equivalent of filing the notice with the [BZA],” we determined that both *Trickett* and *Leifheit* failed to satisfy the filing requirements of R.C. 2505.04. * * *

In the present case, however, appellant mailed the notice of appeal directly to the secretary of the BZA by overnight courier. *Because appellant actually delivered its notice of appeal to the BZA, rather than having the clerk cause it to be served, these cases are distinguishable.* We follow *Dudukovich* and conclude that appellant did file his notice of appeal with the BZA.

Id. at ¶ 16-19 (emphasis added). Thus, even construing “actual delivery,” where an appellant substitutes clerk of courts’ service of process for its own obligation to file the appeal with the agency, the appeal is not perfected. In other words, “actual delivery” does not obviate an appellant’s obligation to make the actual delivery itself.

This result is supported by a plain reading of R.C. 2505.04 in concert with R.C. 2505.03(B) and App.R. 3. As this Court recognized, “R.C. 2505.04 * * * states that an appeal is perfected by the timely filing of the notice of appeal with the particular agency.” *Nibert v. Ohio Dept. of Rehabilitation and Correction*, 84 Ohio St.3d 100, 101, 1998-Ohio-506, 702 N.E.2d 70. As the Twelfth District correctly held, “Directing a clerk of courts to serve a copy of a notice of appeal upon an agency is not the equivalent of filing a notice of appeal with the agency from which a party is appealing, as expressly set forth in R.C. 2505.04.” *Welsh Dev. Co. v. Warren Cty. Regional Planning Comm.*, 186 Ohio App.3d 56, 2010-Ohio-592, 926 N.E.2d 357, at ¶ 22, 926 N.E.2d 357 (“*Welsh*”). Since the WCRPC filed its motion to dismiss for lack of subject matter jurisdiction in 2005, see *id.* at ¶ 7, it has argued that *Welsh* failed to perfect its appeal. The General Assembly’s amendment to Chapter 2505 supports the WCRPC’s argument.

b. Permitting *Welsh*’s procedure would alter a jurisdictional statute and produce conflict with the appellate rules.

The consequence of a contrary holding would be far-reaching. Chapter 2505 applies not only to administrative-related appeals but to all appeals, *Cleveland Elec. Illuminating Co. v. Public Utilities Commission* (1976), 46 Ohio St.2d 105, 110 n.3, 346 N.E.2d 778, except where governed by another statute, e.g., R.C. Chapter 119. Moreover, R.C. 2505.04 is a jurisdictional statute. *Richards v. Industrial Commission* (1955), 163 Ohio St. 439, 445, 127 N.E.2d 402. “If the statute is jurisdictional, it is a

substantive law of this state, and cannot be abridged, enlarged, or modified by” rules of procedure. *City of Akron v. Gay* (1976), 47 Ohio St.2d 164, 166, 351 N.E.2d 475. The General Assembly determined that the appellate procedural rules apply to “an appeal of a final order, judgment, or decree of a court,” R.C. 2505.04, and to administrative appeals, such as the instant appeal, where no other procedure is specified, R.C. 2505.03(B); see 2505.04. Therefore, if Welsh is permitted to perfect an appeal by filing its notice in the reviewing court and then having that court’s clerk “file” with the trial court (agency) by serving the agency with process, it would alter the substantive law; moreover, all appeals subject to the Rules of Appellate Procedure must be similarly treated.

In other words, despite App.R. 3(A)’s requirement that a timely notice of appeal must be filed “with the clerk of the trial court,” under Welsh’s view, appellants would be permitted to file appeals of common pleas courts’ judgments in the court of appeals, with the appellate court clerk “perfecting” the appeal on behalf of the appellant by serving process on the trial court. There is no authority that would support such a convoluted procedure, especially considering the jurisdictional nature of R.C. 2505.04. Therefore, Welsh’s procedure is fraught with significant constitutional maladies, from expanding the clerk of court’s role into an advocate for an appellant to invalidating the appellate rules.

5. The conflict cases do not discuss the consequences of Welsh’s chosen procedure or the amendment to Chapter 2505.

These difficulties and even the 1986 amendment to Chapter 2505 are not addressed in the conflict cases. In *Evans v. Greenview* (Jan. 4, 1989), 2nd Dist. No. 88 CA 40, the court of appeals held that, based upon *Dudukovich*, the same procedure followed by Welsh was sufficient to perfect an administrative appeal. *Id.* at *1-2. The Second District did not distinguish that in *Dudukovich*, the appellant filed the notice of

appeal with the agency whereas in *Evans*, the appeal was “perfected” by the clerk. Furthermore, the court stated that the sole reason it did not follow its earlier contrary decision in *Kettering Bd. Of Educ. v. Gollnitz* (Mar. 6, 1980), Mont. App. No. 6376, was that the *Gollnitz* appellant filed a ““*Complaint of Appeal from Administrative Decision of Board of Education*” with the clerk of courts rather than a ““*notice of appeal.*”” *Evans* at *1 (emphasis added).³ As mentioned, the Second District did not engage in an analysis of the appropriate procedure in view of the amendments to Chapter 2505.

In *Price v. Margaretta Twp. Bd. Of Zoning Appeals*, 6th Dist. No. E-02-029, 2003-Ohio-221, although it cited to R.C. 2505.04, the Sixth District did not include a complete citation with reference to the appellate rules or to R.C. 2505.03(B), which made them applicable to that appeal. *Id.* at ¶ 8-9. The court cited *Dudukovich* but did not mention that the appellant herself filed the notice with the agency. *Id.* at ¶ 19. The court was also, at least indirectly, critical of the Fourth District’s contrary holding in *Guysinger v. Chillicothe Bd. of Zoning Appeals* (1990), 66 Ohio App.3d 353, 584 N.E.2d 48, as was the dissent below, *Welsh*, 2010-Ohio-592, at ¶ 65 (Ringland, J., dissenting), because the court did not discuss *Dudukovich*. See *Price*, 2003-Ohio-221, at ¶ 13, 18. Although it is correct that the *Guysinger* court did not construe *Dudukovich*, it did cite the entirety of R.C. 2505.04 and interpreted its provisions, which it found to be explicit. “The language used in the statute clearly and succinctly requires that the notice of appeal be filed *with* the board appealed from, as opposed to the court appealed to.” *Guysinger*, 66 Ohio App.3d at 357 (emphasis in original). Thus, *Guysinger* is the better view of Chapter 2505’s amended provisions.

³ Respectfully, this distinction poses a more-appropriate example of the “ultimate exultation of form over substance,” (Appellants’ Br. at 6), than the Twelfth District’s *Welsh* holding.

So, too, is the *Welsh* Court's interpretation, which is the majority view in the appellate districts. The Court initially recognized that R.C. 2505.04 is jurisdictional. *Welsh*, 2010-Ohio-592, at ¶ 15. The court below construed *Dudukovich* in view of the settled position that "[t]he right to appeal is conferred by statute and can be perfected only in the manner prescribed by that statute." *Id.* at ¶ 20 (citing, *inter alia*, *Midwest Fireworks Mfg. Co. v. Deerfield Twp. Bd. of Zoning Appeals* (2001), 91 Ohio St.3d 174, 177, 743 N.E.2d 894; *Zier v. Bur. of Unemployment Comp.* (1949), 151 Ohio St. 123, 38 O.O. 573, 84 N.E.2d 746, paragraph one of the syllabus; *McCruter v. Bd. of Review, Bur. of Emp. Serv.* (1980), 64 Ohio St.2d 277, 279, 18 O.O.3d 463, 415 N.E.2d 259). Because the "language of R.C. 2505.04 expressly requires that the notice of appeal be filed with the board from which *Welsh* appeals," *id.* at ¶ 21, and because the statutory requirements cannot be altered, the court rejected *Welsh's* "actual delivery" argument, *id.* at ¶ 19-22, specifically distinguishing *Dudukovich* on its facts, *id.* at ¶ 23. As the court of appeals recounted, the Twelfth District's view is consistent with the majority of the state's intermediate appellate courts. *Id.* at ¶ 24-32.

6. The *Hanson* case is inapposite and its analysis omits a key provision from amended R.C. 2505.03.

Welsh cites *Hanson v. City of Shaker Hgts.*, 152 Ohio App.3d 1, 2003-Ohio-749, 786 N.E.2d 487, for the proposition that, because local agencies may have different rules on "accepting filings," "R.C. 2505.04 is intentionally flexible as to the manner of delivery of the notice of appeal." (Appellants' Br. at 8). While the manner of delivery may be flexible, the identity of the deliverer is not, as the WCRPC has established, *supra*. *Welsh* apparently discounts the fact that, by the time an appeal is required, the appellant likely had significant interaction with the agency and/or officer with whom it must file an

appeal and likely had become or had opportunity to become familiar with any particularized rules concerning acceptance of appeals.

Furthermore, *Hanson* is distinguishable. In *Hanson*, the appellants attempted an appeal from passage of an ordinance granting various zoning permits and variances. *Hanson*, 2003-Ohio-749, at ¶ 2. The court recounted the procedure the appellants followed:

the Hansons drafted a notice of appeal and praecipe, which *they sent* by facsimile to the clerk of city council and the board of zoning appeals before filing it with the clerk of the common pleas court. *The Hansons then sent copies of the notice and praecipe*, now time-stamped by the common pleas court, to the city by certified mail. The city received both the facsimile transmission and the certified mail copies within the 30-day period allowed for filing the notice of appeal.

Id. at ¶ 3 (emphasis added). The city argued the Hansons did not perfect their appeal because they did not file their “original” notice of appeal with the city. The issue was, therefore, whether an appellant could file a notice of appeal with an administrative agency that bore a common pleas court time-stamp. *Id.* at ¶ 10. The court rejected the argument and reversed the trial court’s dismissal for lack of jurisdiction. In *Hanson*, unlike the instant matter, the appellants were the ones who sent notice to the agency -- not the clerk of courts. Welsh relied on the clerk – it did not mail anything to the WCRPC.

In addition, it is noteworthy that, although the *Hanson* court cited to the General Assembly’s amendment of Chapter 2505, the court included only an incomplete citation to R.C. 2505.03 and did not discuss the appropriate post-amendment procedure:

Even though a 1987 amendment to R.C. 2505.03 added a reference making the Rules of Appellate Procedure applicable “to the extent this chapter does not contain a relevant provision,” and App.R. 3(E) would

appear to require that the administrative body file the notice of appeal with the common pleas court, the *Dudukovich* requirement has been continued.

Id. at ¶ 11 n.14. The court did not address or explain its omission of the plain language that the agency “shall be treated as if it were a trial court * * * or as if it were a clerk of such a trial court.” R.C. 2505.03(B). Moreover, it did not discuss App.R. 3(A), which requires filing of the notice of appeal with the trial court clerk. Although correct that App.R. 3(E) requires the agency to file a copy of the notice of appeal with the common pleas court, the *Hanson* panel did not discuss why the agency need serve a copy of the notice if it was already copied with the notice filed in the reviewing court. The *Hanson* view would render App.R. 3(E) mere surplusage. Finally, the court did not address *Dudukovich* in view of the legislature’s 1986 amendment.

In view of the WCRPC’s argument, as set forth, *supra*, this Honorable Court should answer the certified question in the negative.

Response to Appellants’ Proposition of Law: To perfect an administrative appeal pursuant to R.C. 2505.04 when the Rules of Appellate Procedure apply, an appellant must treat the administrative agency or officer as a trial court or clerk thereof and file the appeal directly with the agency or officer.

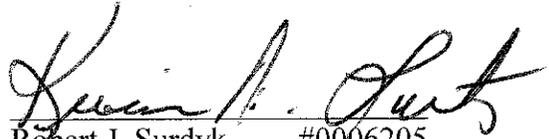
Because the WCRPC has responded to the issues germane to Welsh’s Proposition of Law within its discussion of the certified conflict question, and in the interest of judicial economy, the WCRPC respectfully requests that the Court permit it to incorporate its previous argument in response to Welsh’s Proposition of Law.

CONCLUSION

The General Assembly has clearly established the appropriate procedure for filing administrative appeals when the procedure is governed by the Rules of Appellate Procedure. The procedure employed by Welsh did not comport with the established

procedure. Therefore, the judgment of the Twelfth District Court of Appeals, which dismissed Welsh's administrative appeal for lack of subject matter jurisdiction, was correct. This Honorable Court should affirm the Twelfth District's judgment.

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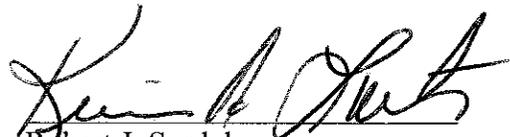
Attorneys for Appellee

Warren County Regional

Planning Commission

CERTIFICATE OF SERVICE

I hereby certify that a copy of the foregoing was mailed by ordinary U.S. Mail to Mr. Matthew C. Blickensderfer, Frost Brown Todd LLC, 2200 PNC Center, 201 East Fifth Street, Cincinnati, Ohio 45202 and to Messrs. Scott D. Phillips and Benjamin J. Yoder, Frost Brown Todd LLC, 9277 Centre Pointe Drive, Suite 300, West Chester, Ohio 45069, on this 28th day of September, 2010.



Robert J. Surdyk

Kevin A. Lantz

APPENDIX

App. Page

R.C. 2505.03(B).....1
Carter v. Carter (Sept. 19, 1989), 3rd Dist. No. 11-88-13.....2
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C

Baldwin's Ohio Revised Code Annotated Currentness

Title XXV. Courts--Appellate

▣ Chapter 2505. Procedure on Appeal (Refs & Annos)

▣ Final Order

→ 2505.03 Final order may be appealed; determination of which procedural rules will govern appeal

(A) Every final order, judgment, or decree of a court and, when provided by law, the final order of any administrative officer, agency, board, department, tribunal, commission, or other instrumentality may be reviewed on appeal by a court of common pleas, a court of appeals, or the supreme court, whichever has jurisdiction.

(B) Unless, in the case of an administrative-related appeal, Chapter 119. or other sections of the Revised Code apply, such an appeal is governed by this chapter and, to the extent this chapter does not contain a relevant provision, the Rules of Appellate Procedure. When an administrative-related appeal is so governed, if it is necessary in applying the Rules of Appellate Procedure to such an appeal, the administrative officer, agency, board, department, tribunal, commission, or other instrumentality shall be treated as if it were a trial court whose final order, judgment, or decree is the subject of an appeal to a court of appeals or as if it were a clerk of such a trial court.

(C) An appeal of a final order, judgment, or decree of a court shall be governed by the Rules of Appellate Procedure or by the Rules of Practice of the Supreme Court, whichever are applicable, and, to the extent not in conflict with those rules, this chapter.

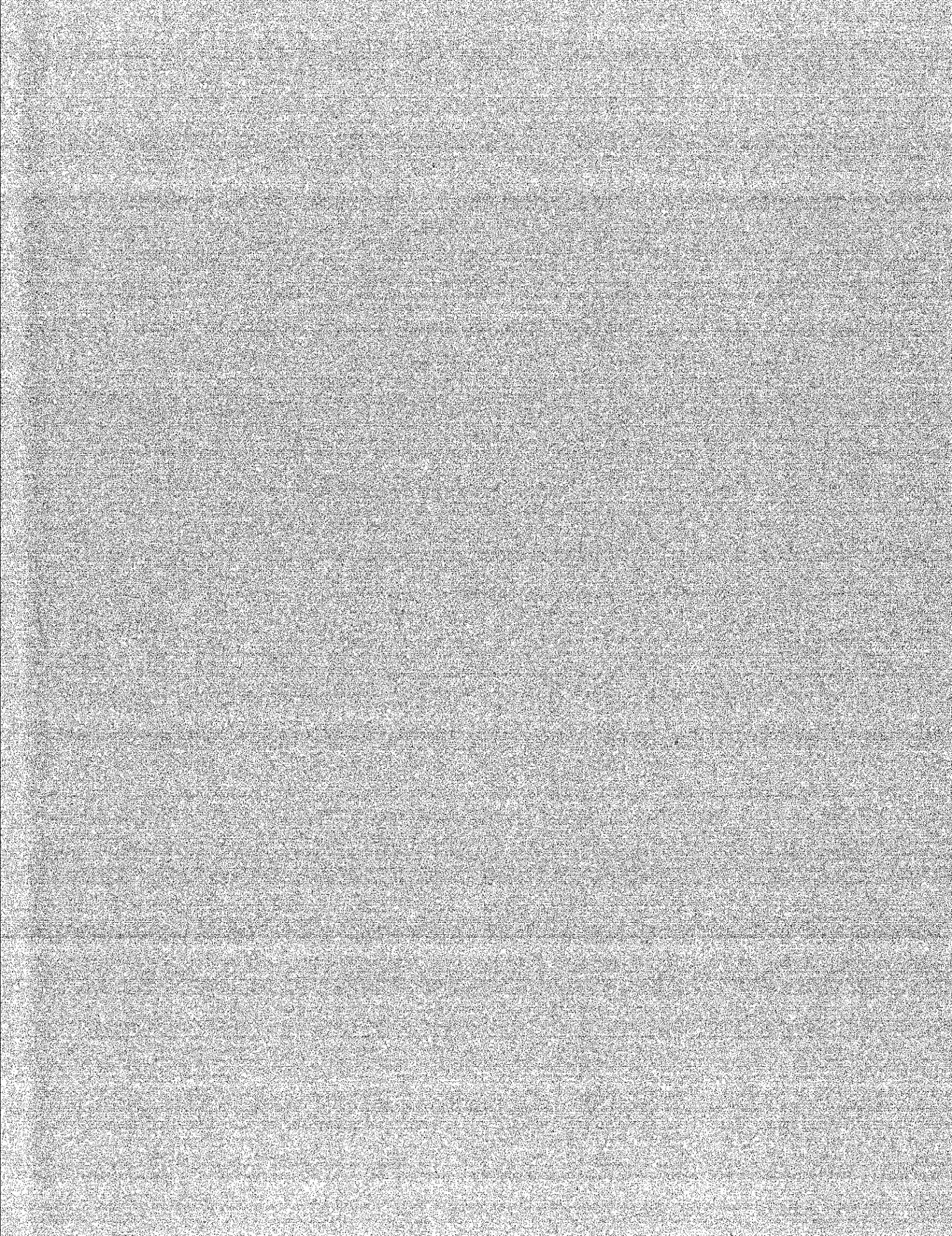
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(1986 H 412, eff. 3-17-87; 1986 H 158; 129 v 582; 1953 H 1; GC 12223-3)

R.C. § 2505.03, OH ST § 2505.03

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Not Reported in N.E.2d, 1989 WL 108692 (Ohio App. 3 Dist.)
 (Cite as: 1989 WL 108692 (Ohio App. 3 Dist.))

C
 Only the Westlaw citation is currently available.

CHECK OHIO SUPREME COURT
 RULES FOR REPORTING OF OPINIONS AND WEIGHT OF LEGAL AUTHORITY.

Court of Appeals of Ohio, Third District,
 Paulding County.
 Kenneth L. CARTER, Plaintiff-Appellant,
 v.
 Debra R. CARTER AKA Debra R. Burris,
 Defendant-Appellee.
 No. 11-88-13.

Sept. 19, 1989.

Kenneth L. Carter, in propria persona.

Debra R. Burris, in propria persona.

OPINION

BRYANT, Judge.

*1 This is an appeal by plaintiff Kenneth L. Carter from a judgment of the Court of Common Pleas of Paulding County denying without prejudice Carter's *pro se* complaint for a declaratory judgment.

Carter's complaint filed July 17, 1987, sets forth assertions of fact, citations to Judicial decisions, and a demand for judgment declaring "his rights, status, and relationship to defendant. As to marital status."

On November 23, 1987, Carter filed a motion for default judgment, based on defendant's failure to file an answer to the complaint within the time allowed by the rules.

On April 26, 1988, the trial court entered its judgment entry "that the Plaintiff's Petition is denied without prejudice, at the Plaintiff's costs," finding that it lacked personal jurisdiction of the defendant for want of service of process. The court observed in its entry "that the Plaintiff has not supplied the Clerk of Courts with an address where the Defendant could be served ..."

For his first assignment of error, plaintiff claims the trial court abused its discretion in finding no service of process upon the defendant.

The entire record on appeal consists of the various pleadings filed by plaintiff and the judgment entries of the trial court. Although plaintiff in his brief on appeal refers to evidence, persons and other litigation, none of such matters, if relevant, are contained in the record here and therefore may not be considered by this reviewing court.

The record before us discloses the absence of any return of summons or other evidence of service of process upon defendant as required by the rules of procedure. Therefore, we are unable to find any abuse of discretion by the trial court in finding no service of process and hence no personal jurisdiction of defendant.

The record on appeal does not demonstrate the error complained of and accordingly the first assignment of error is overruled.

For his second assignment of error, plaintiff asserts:

"THE TRIAL COURT ERRED ON RULING PETITIONERS [SIC] DID NOT PROVIDE AN ADDRESS TO CLERK OF COURTS."

Not Reported in N.E.2d, 1989 WL 108692 (Ohio App. 3 Dist.)
 (Cite as: 1989 WL 108692 (Ohio App. 3 Dist.))

Initially, plaintiff argues that “the petition contains the last know [sic] address of defendant.” Examination of the complaint reveals a caption which sets forth no addresses of any of the parties. Closer scrutiny of the body of the handwritten complaint discloses that on page two, among the complaint’s allegations, is “Defendant [sic] last known address 122 Dix St., Paulding, Ohio 45879.” The third page of the complaint sets forth among other things a “Request” that “Clerk please send a copy of this petition to all interested parties.”

In Ohio, a civil action is commenced, pursuant to Civ.R. 3(A) by filing a complaint if service of process upon the named defendant is obtained within one year.

Service of process may be obtained by any of the methods provided by the Ohio Rules of Civil Procedure, but all those methods require actual or constructive delivery of summons and a copy of the complaint to the person to be made a defendant. For this reason, Civ.R. 10(A) provides that the caption of the complaint *shall* contain the names and addresses of the parties, Civ.R. 4(A) requires the Clerk to issue a summons for service upon each defendant “listed in the caption”, and Civ.R. 4.1(1) provides that for certified mail, the preferred method of service, the Clerk shall address the envelope to the person to be served at the address set forth in the caption or at the address set forth in separate written instructions furnished to the Clerk.

*2 Clearly, these rules require the plaintiff to furnish to the Clerk an address at which the proposed defendant is to be served with the documents necessary to commence an action in the court. Just as clearly, these rules do not require the Clerk to take any affirmative action to seek out or otherwise speculate about the identity or the where-

abouts of plaintiff’s intended defendants.

Here the plaintiff has failed to comply with the rules by providing an address in the caption of the complaint or by separate written instructions to the Clerk. The Clerk has no duty to screen the various allegations of the complaint for instructions for service of process on a proposed defendant. Likewise, the Clerk has no duty to speculate about the identity or addresses of “interested parties” to be served or furnished with process.

Plaintiff, in his brief on appeal, claims that both the Clerk and the trial judge knew the correct address of his intended defendant and should have acted upon their personal knowledge in the absence of instructions by plaintiff. Among the reasons for which this argument must fail, two stand out.

Initially, we observe that neither the Clerk of Courts nor the trial judge is obliged or permitted by law to act as plaintiffs’ agent or advocate. Further, we note that even if such a duty might be inferred from any set of circumstances, those circumstances are not a part of the record before this reviewing court on appeal.

Plaintiff’s second assignment of error is overruled.

In his third assignment of error, plaintiff claims the trial court violated his right to equal protection of laws as guaranteed by the Fourteenth Amendment to the United States Constitution and by Article I, Section 2 of the Constitution of the State of Ohio, and that it did so by violating R.C. § 2701.02.

Upon our review of the record, we conclude that the constitutional provisions cited by plaintiff are not implicated on this

Not Reported in N.E.2d, 1989 WL 108692 (Ohio App. 3 Dist.)
 (Cite as: 1989 WL 108692 (Ohio App. 3 Dist.))

appeal, however, we address this assignment of error for clarification in compliance with App.R. 12(A).

In his brief plaintiff asserts that R.C. § 2701.02 required the trial judge to “answer said petition within the thirty day manatory [sic] time limit.” This objection relates to the passage of time between the filing of plaintiff’s complaint and the filing date of the judgment entry dismissing the complaint without prejudice. Plaintiff has calculated this lapse of time to be 270 days.

The provisions of R.C. § 2701.02 are directory to the trial judge, only, and are not mandatory. *Kyes v. Pennsylvania Rd. Co.* (1952), 158 Ohio St. 362. The provisions of R.C. § 2701.02 apply to judicial action to be taken upon matters at issue in a pending case. Here, plaintiff did not meet the requirements of Civ.R. 3(A), for commencing a lawsuit. The trial court, therefore, did not acquire personal jurisdiction of the proposed defendant necessary to create a pending case to which R.C. § 2701.02 might apply. Indeed, the trial court might properly have dismissed the complaint without prejudice pursuant to Civ.R. 4(E) because plaintiff failed to take proper action to prosecute his claim.

*3 Finally, plaintiff advises the court in his brief, that the trial court’s dismissal came only after he filed an action in mandamus against the trial judge. The record does not disclose that course of proceedings. However, the record does reveal that plaintiff after filing his complaint, filed an unsuccessful affidavit of prejudice against the trial judge as well as an unsuccessfully attempted interlocutory appeal to this court. We are convinced, therefore, that for all the foregoing reasons, plaintiff has experienced no delay as a result of any invidiously class-based discriminatory animus,

but rather has caused such delay by his own actions and inaction. Indeed, it seems that plaintiff’s misunderstanding and misapplication of law and procedure has resulted in an incredibly wasteful expenditure of judicial time and public resources. We find no violation of plaintiff’s rights as alleged.

The third assignment of error is overruled.

We find no error prejudicial to plaintiff as assigned and argued. The judgment of the Court of Common Pleas of Paulding County dismissing plaintiff’s complaint without prejudice is affirmed.

Judgment affirmed.

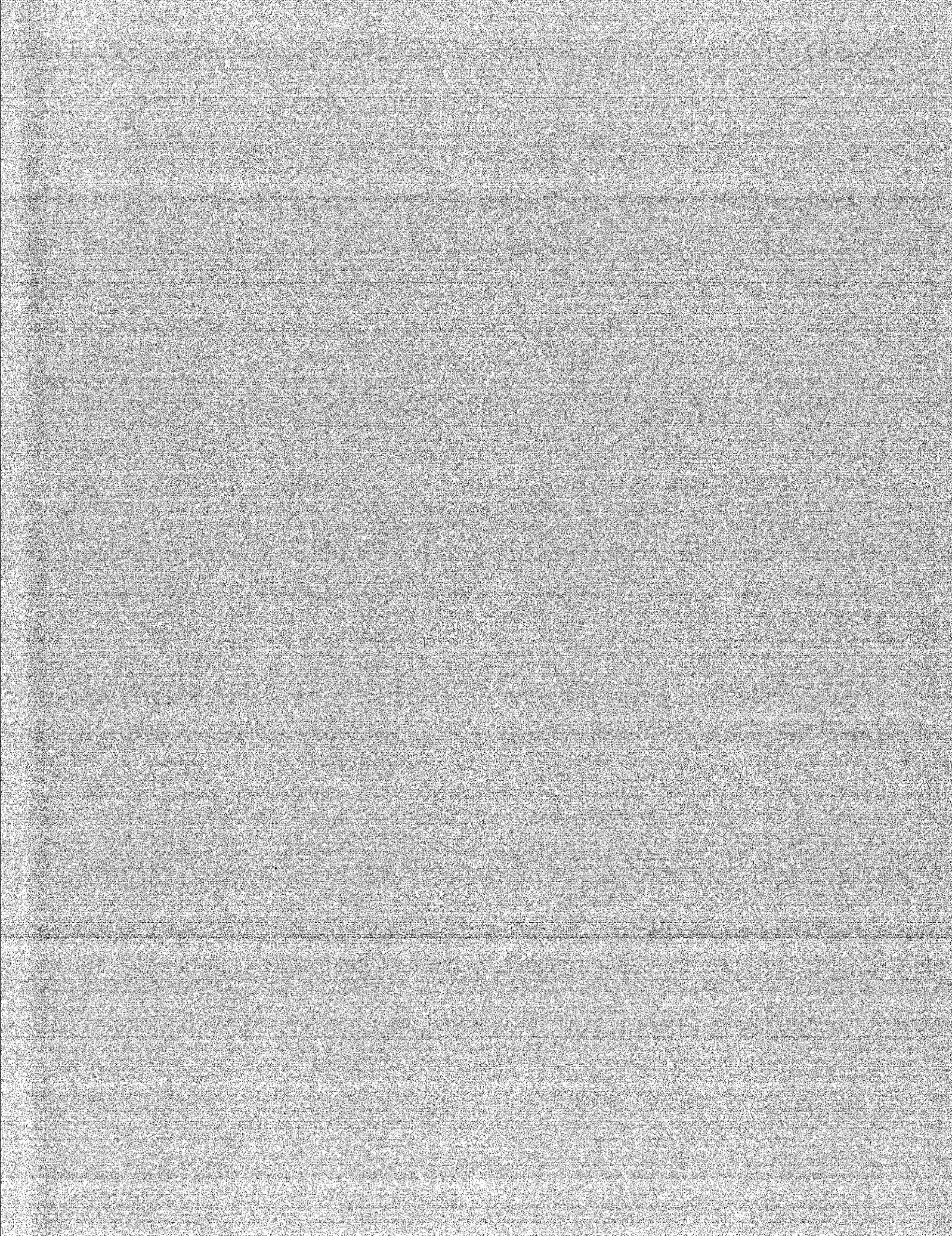
EVANS, P.J., and SHAW, J., concur.

Ohio App., 1989.

Carter v. Carter

Not Reported in N.E.2d, 1989 WL 108692
 (Ohio App. 3 Dist.)

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C

Baldwin's Ohio Revised Code Annotated Currentness
Rules of Appellate Procedure

▣ Title II. Appeals from Judgments and Orders of Court of Record

→ **App R 3 Appeal as of right--how taken**

(A) Filing the notice of appeal

An appeal as of right shall be taken by filing a notice of appeal with the clerk of the trial court within the time allowed by Rule 4. Failure of an appellant to take any step other than the timely filing of a notice of appeal does not affect the validity of the appeal, but is ground only for such action as the court of appeals deems appropriate, which may include dismissal of the appeal. Appeals by leave of court shall be taken in the manner prescribed by Rule 5.

(B) Joint or consolidated appeals

If two or more persons are entitled to appeal from a judgment or order of a trial court and their interests are such as to make joinder practicable, they may file a joint notice of appeal, or may join in appeal after filing separate timely notices of appeal, and they may thereafter proceed on appeal as a single appellant. Appeals may be consolidated by order of the court of appeals upon its own motion or upon motion of a party, or by stipulation of the parties to the several appeals.

(C) Cross appeal

(1) Cross appeal required. A person who intends to defend a judgment or order against an appeal taken by an appellant and who also seeks to change the judgment or order or, in the event the judgment or order may be reversed or modified, an interlocutory ruling merged into the judgment or order, shall file a notice of cross appeal within the time allowed by App.R. 4.

(2) Cross appeal not required. A person who intends to defend a judgment or order appealed by an appellant on a ground other than that relied on by the trial court but who does not seek to change the judgment or order is not required to file a notice of cross appeal.

(D) Content of the notice of appeal

The notice of appeal shall specify the party or parties taking the appeal; shall designate the judgment, order or part thereof appealed [*sic*] from; and shall name the court to which the appeal is taken. The title of the case shall be the same as in the trial court with the designation

of the appellant added, as appropriate. Form 1 in the Appendix of Forms is a suggested form of a notice of appeal.

(E) Service of the notice of appeal

The clerk of the trial court shall serve notice of the filing of a notice of appeal and, where required by local rule, a docketing statement, by mailing, or by facsimile transmission, a copy to counsel of record of each party other than the appellant, or, if a party is not represented by counsel, to the party at the party's last known address. The clerk shall mail or otherwise forward a copy of the notice of appeal and of the docket entries, together with a copy of all filings by appellant pursuant to App. R. 9(B), to the clerk of the court of appeals named in the notice. The clerk shall note on each copy served the date on which the notice of appeal was filed. Failure of the clerk to serve notice shall not affect the validity of the appeal. Service shall be sufficient notwithstanding the death of a party or a party's counsel. The clerk shall note in the docket the names of the parties served, the date served, and the means of service.

(F) Amendment of the notice of appeal

The court of appeals within its discretion and upon such terms as are just may allow the amendment of a timely filed notice of appeal.

(G) Docketing statement

If a court of appeals has adopted an accelerated calendar by local rule pursuant to Rule 11.1, a docketing statement shall be filed with the Clerk of the trial court with the notice of appeal. (See Form 2, Appendix of Forms.)

The purpose of the docketing statement is to determine whether an appeal will be assigned to the accelerated or the regular calendar.

A case may be assigned to the accelerated calendar if any of the following apply:

- (1) No transcript is required (e.g., summary judgment or judgment on the pleadings);
- (2) The length of the transcript is such that its preparation time will not be a source of delay;
- (3) An agreed statement is submitted in lieu of the record;
- (4) The record was made in an administrative hearing and filed with the trial court;

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- (5) All parties to the appeal approve an assignment of the appeal to the accelerated calendar; or
- (6) The case has been designated by local rule for the accelerated calendar.

The court of appeals by local rule may assign a case to the accelerated calendar at any stage of the proceeding. The court of appeals may provide by local rule for an oral hearing before a full panel in order to assist it in determining whether the appeal should be assigned to the accelerated calendar.

Upon motion of appellant or appellee for a procedural order pursuant to App. R. 15(B) filed within seven days after the notice of appeal is filed with the clerk of the trial court, a case may be removed for good cause from the accelerated calendar and assigned to the regular calendar. Demonstration of a unique issue of law which will be of substantial precedential value in the determination of similar cases will ordinarily be good cause for transfer to the regular calendar.

CREDIT(S)

(Adopted eff. 7-1-71; amended eff. 7-1-72, 7-1-77, 7-1-82, 7-1-91, 7-1-92, 7-1-94)

Rules App. Proc., Rule 3, OH ST RAP Rule 3

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