

IN THE SUPREME COURT OF OHIO

AT&T COMMUNICATIONS OF )  
OHIO, INC., )  
) )  
Plaintiff-Appellee, )  
) )  
vs. )  
) )  
NASSIM M. LYNCH, )  
) )  
Defendant-Appellant. )

Case No: 2011-0337

On Appeal from the Cuyahoga  
County Court of Appeals,  
Eighth Appellate District

Court of Appeals  
Case No. CA-09-094320

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REPLY BRIEF OF APPELLANT NASSIM M. LYNCH

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Barbara A. Langhenry (0038838)  
Interim Director of Law  
Linda L. Bickerstaff (0052101) (COUNSEL OF RECORD)  
Assistant Director of Law  
City of Cleveland Department of Law  
205 W. St. Clair Avenue  
Cleveland, Ohio 44113  
(216) 664-4406  
(216) 420-8299 (facsimile)  
lbickerstaff@city.cleveland.oh.us

COUNSEL FOR APPELLANT,  
NASSIM M. LYNCH

Richard C. Farrin (0022850) (COUNSEL OF RECORD)  
Thomas M. Zaino (0041945)  
McDonald Hopkins, LLC  
41 S. High Street, Suite 3550  
Columbus, Ohio 43215  
(614) 458-0035  
(614) 458-0028 (facsimile)  
rfarrin@macdonaldhopkins.com

COUNSEL FOR APPELLEE,  
AT&T COMMUNICATIONS OF OHIO, INC.

<b>FILED</b>
NOV 14 2011
CLERK OF COURT SUPREME COURT OF OHIO

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- I. That the Constitution of Ohio vests all judicial power of this state in the court is not debatable.

Section 1, Article IV of the Ohio Constitution states that: "The judicial power of the state is vested in a supreme court, courts of appeal, courts of common pleas and divisions thereof, and such other courts inferior to the supreme court as may from time to time be established by law." As this Court stated in *Thompson v. Redington* (1915), 92 Ohio St. 101, 107, 110 N.E.2d 652, 654, "section 1, article 4 [] vests all judicial power in the court[.]" It does so "unconditionally and irrevocably[.]" *Id.* at 110, 100 N.E.2d at 655.

- II. The exercise of "appellate jurisdiction" involves a continuation of the judicial process and therefore clearly requires a previous exercise of judicial power.

Ohio's court system consists of trial courts, intermediate appellate courts and one Supreme Court. This court system is "designed to provide every litigant with one trial and one review, while permitting further review in cases of particular importance." Painter and Pollis, *Ohio Appellate Practice* (2010-2011 Ed.) §1:2. Although this Court in *Piqua Bank v. Kroup* (1856), 6 Ohio St. 341 was discussing the judicial power of the United States, there is no reason why its teachings are not just as applicable to the judicial power of Ohio. As the Court explained: "Appellate jurisdiction is [] a continuation of the same judicial process which has been exercised in the court of original jurisdiction, [and] it necessarily implies that the original and appellate courts are capable of participating in the same judicial process." *Id.* at 391.

True "appellate jurisdiction" generally only resides with the courts of appeals and this Court and is referring to an appeal from the "court of first instance."

III. There is absolutely no merit to AT&T's contention that a common pleas court exercises "appellate jurisdiction" in a R.C. Chapter 2506 appeal.

One heading in Appellee, AT&T Communications of Ohio Inc.'s ("AT&T") brief to this Court reads: "In an Appeal from an Administrative Decision Pursuant to R.C. Chapter 2506, a Court of Common Pleas Exercises Appellate Jurisdiction." (Appellee's Merit Brief at p. 9.) Similarly, another heading in said brief reads: "Courts of Common Pleas have Appellate Jurisdiction and Hear Administrative Appeals under that Appellate Jurisdiction, not under their Original Jurisdiction." (Appellee's Merit Brief at p. 19.) However, since AT&T never took the explicit position it now takes in this appeal with either of the courts below (or in its memorandum in response to this Court)—that in a R.C. Chapter 2506 administrative appeal the common pleas court exercises "appellate jurisdiction"—does it really believe what it *now* claims? More importantly, does this Court?

A. Section 4(B), Article IV of the Ohio Constitution clearly does not confer appellate jurisdiction on courts of common pleas.

The Ohio Constitution expressly confers jurisdiction on this Court, courts of appeals and courts of common pleas.

With respect to this Court, the Ohio Constitution provides in pertinent part:

The Supreme Court shall have *appellate jurisdiction* as follows:

(a) In appeals from the court of appeals as a matter of right in the following:

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(iii) Cases involving questions arising under the constitution of the United States or of this state.

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- (d) Such revisory jurisdiction of the proceedings of administrative officers or agencies as may be conferred by law;
- (e) In cases of public or great general interest, the Supreme Court may direct any court of appeals to certify its record to the Supreme Court, and may review and affirm, modify, or reverse the judgment of the court of appeals;
- (f) The Supreme Court shall review and affirm, modify, or reverse the judgment in any case certified by any court of appeals pursuant to section 3(B)(4) of this article [dealing with conflict].

Section 2(B)(2), Article IV, Ohio Constitution (emphasis added).

As this Court has recognized “[t]he appellate jurisdiction of the Courts of Appeals is set forth in Section 3(B)(2), Article IV of the Ohio Constitution[.]” *Cincinnati Gas & Electric Co. v. Pope* (1978), 54 Ohio St.2d 12, 15, 374 N.E.2d 406, 408. That section reads as follows:

Courts of appeals shall have such jurisdiction as may be provided by law to review and affirm, modify, or reverse judgments or final orders of the courts of record inferior to the court of appeals within the district[] \*\*\* [and] shall have such appellate jurisdiction as may be provided by law to review and affirm, modify, or reverse final orders or actions of administrative officers or agencies.

Section 3(B)(2), Article IV, Ohio Constitution.

The jurisdiction of the court of common pleas is set forth in Section 4(B), Article IV, which reads as follows: “The courts of common pleas and divisions thereof shall have such original jurisdiction over all justiciable matters and such powers of review of proceedings of such administrative officers and agencies as may be provided by law.”

Section 4(B), Article IV, Ohio Constitution.

While the Ohio Constitution clearly provides that courts of appeals and this Court have "appellate jurisdiction," the same is not true with respect to courts of common pleas. The review of proceedings of administrative officers and agencies authorized by the Ohio Constitution is not "appellate jurisdiction." Clearly, if the framers of the Constitution intended to confer "appellate jurisdiction" on courts of common pleas it would have provided as follows: "The courts of common pleas and divisions thereof shall have such original jurisdiction over all justiciable matters and *appellate jurisdiction over* such administrative officers and agencies as may be provided by law." The fact that there had been laws which existed that had once given common pleas court appellate jurisdiction clearly demonstrates that the framers likely knew how to give appellate jurisdiction had they intended to do such. See 22 Ohio Laws, sec. 4, p. 50-51.<sup>1</sup> (Appx. 1.) Section 4(B), Article IV clearly does not confer "appellate jurisdiction."

B. R.C. 2305.01 which provides for the statutory jurisdiction of courts of common pleas also does not confer appellate jurisdiction.

AT&T notes on page 21 of its brief that "R.C. 2305.01 confers original jurisdiction upon the courts of common pleas over civil actions." That is true. As this Court has

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<sup>1</sup> This statute which had been enacted in 1824 but repealed in 1831 had provided as follows:

That the courts of common pleas \*\*\* shall have original jurisdiction in all civil cases both in law and equity, where the sum or matter in dispute exceeds the jurisdiction of justices of the peace, and appellate jurisdiction from the decisions of the justices of the peace in their respective counties in all cases[.]

22 Ohio Laws, sec. 4, p. 50-51 (Appx. 1).

noted, "R.C. 2305.01 [] confers general subject matter jurisdiction to common pleas courts in civil actions." *State ex rel. Cleveland Elec. Illum. Co. v. Cuyahoga Cty. Court of Common Pleas* (2000) 88 Ohio St.3d 447, 449, 727 N.E.2d 900, 903.

Revised Code Section 2305.01 defines the jurisdiction of the court of common pleas and states that "[with certain exceptions] the court of common pleas has original jurisdiction in all civil cases in which the sum or matter in dispute exceeds the exclusive original jurisdiction of county courts and *appellate jurisdiction from the decisions of boards of county commissioners.*" R.C. 2305.01 (emphasis added). Clearly, under R.C. 2305.03 courts of common pleas have been given no appellate jurisdiction by the Ohio General Assembly other than from decisions of boards of county commissioners.

- C. R.C. 2506.01-2506.04 dealing with administrative appeals further clearly do not confer appellate jurisdiction on courts of common pleas.

As one Ohio appellate court has noted, "[t]he [review of proceedings] provision is generally held to [simply] mean that the jurisdiction of the common pleas court is fixed by statute." *Green v. State Bd. of Registration for Prof'l Eng'rs & Surveyors*, Green App. No. 05CA121, 2006-Ohio-1581, at ¶18 (citing *Mattonne v. Argentina* (1931), 123 Ohio St. 291, 175 N.E. 603). The review in a R.C. Chapter 2506 appeal is governed by R.C. 2506.01-2506.04. Although these provisions call for the court of common pleas to "review" the decision of the administrative agency, they clearly do not confer "appellate jurisdiction" on said court.

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Section 2506.01 specifically grants the court of common pleas jurisdiction to review final orders or decisions of an administrative board of a political subdivision. It provides, in pertinent part, as follows:

Except as \*\*\* modified by this section and sections 2506.02 to 2506.04 of the Revised Code, every final order, adjudication or decision of any \*\*\* board \*\*\* of any political subdivision of the state may be reviewed by the common pleas court \*\*\* as provided in Chapter 2505. of the Revised Code.

R.C. 2506.01. The question for this Court then, is, whether this statute allowing an appeal from decisions of any agency of any political subdivision confers “appellate jurisdiction” on the common pleas court. That inquiry does not seem to be a difficult one. There is no reference in the statute to the common pleas court having “appellate jurisdiction.” If this had been the intent of the Ohio General Assembly they certainly knew how to do this. See R.C. 2305.03.

Additionally, it should be noted that although R.C. 2506.01 provides that the review is as provided by R.C. Chapter 2505, it makes clear that said Chapter only applies to the extent it is not modified by 2506.01 and the other statutory provisions in Chapter 2506—2506.02 through 2506.04. *Smith v. Chester Township Board of Trustees* (1979), 60 Ohio St.2d 13, 16, 396 N.E.2d 743, 746 (“R.C. 2506.01 [] provides, in essence, that R.C. Chapter 2505 applies, except to the extent it is modified by R.C. Chapter 2506”). Likewise, Chapter 2505 makes clear that its provisions do not apply when they conflict with specific statutes pertaining to “an administrative-related appeal.” In this regard, R.C. 2505.03(B) 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.” See *In re Namey* (1995), 103 Ohio App.3d 322, 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 [or R.C. Chapter 2506] fails to address the issue”) (emphasis by court). This is so since “R.C. Chapter 2505 applies to appeals from judgments of trial courts [while] R.C. Chapter 2506, was created by the General Assembly specifically to address appeals to the Court of Common Pleas from orders of administrative orders.” *Smith*, 60 Ohio St.2d at 16, 396 N.E.2d at 746. Although R.C. Chapter 2505 may apply to a R.C. Chapter 2506 appeal, it is clear that the provisions of R.C. 2506.01-2506.04 control and are determinative as to the jurisdiction of the court of common pleas in said appeal.

While R.C. 2506.01 grants the common pleas court authority to review final decisions of administrative agencies, R.C. 2506.02-2506.04 further describe the operation of such appeals.

R.C. 2506.02 states that “the officer or body from which the appeal is taken shall \*\*\* prepare and file in the court in which the appeal is taken a complete transcript of all the original papers, testimony and evidence[.]” Therefore, in a R.C. Chapter 2506 appeal, the court of common pleas has a complete transcript from the administrative body below. There is no option like in App. R. 9(b) which allows an appellant to only order a transcript of those parts of the proceedings that such appellant considers necessary for the appeal. See App. R. 9(b). As will be noted later herein, this is because the entire final order of the administrative agency is being brought before the common pleas court for review.

R.C. 2506.03 then provides that “[t]he hearing of [an] appeal \*\*\* shall proceed as in the trial of a civil action, but the court shall be confined to the transcript[.]” The

fact that this statute provides that the hearing of the appeal is to proceed "as in the *trial* of a civil action" and not "as in the *appeal* of a civil action" makes clear that the common pleas court is serving in a trial function more so than an appellate function. So too does the fact that R.C. 2506.03(B) permits additional evidence to be taken in the common pleas court under certain specified circumstances. This is not "appellate jurisdiction" that is being conferred on the common pleas court.

R.C. 2506.04 provides that "the [common pleas] court may find that the order, adjudication or decision is unconstitutional, illegal, arbitrary, capricious, unreasonable, or unsupported by the preponderance of substantial, reliable and probative evidence on the whole record." The burden of demonstrating the invalidity of the agency's decision rests with the contesting party. *C. Miller Chevrolet v. Willoughby Hills* (1974), 38 Ohio St.2d 298, 313 N.E.2d 400, paragraph two of the syllabus ("In an appeal, under R.C. Chapter 2506 \*\*\* the burden of showing invalidity of the [administrative agency's] determination rests on the party contesting that determination"). Once the common pleas court makes a ruling, the court's judgment "may be appealed by any party on questions of law as provided in the Rules of Appellate Procedure and, to the extent not in conflict with those rules, Chapter 2505. of the Revised Code." See R.C. 2506.04. Parties therefore clearly have a right to appeal to a traditional error proceeding at the conclusion of the trial.

R.C. 2506.01-2506.04 clearly do not confer "appellate jurisdiction" on common pleas courts.

- D. Although labeled "appeal," an action in the common pleas court under R.C. 2506 is not a traditional error proceeding.

AT&T's claim on page 10 of its brief that the "assertion that the review by a common pleas court of an administrative decision under R.C. Chapter 2506 is not appellate jurisdiction is [] rebutted by the express language throughout R.C. Chapters 2506 and 2505 referring to review as an 'appeal'" also does not assist it in that regard. The word "appeal" is used in a general sense to indicate simply the taking of a case from an inferior court to a superior court or an administrative agency to a court. The word also has a more specific meaning where in the Ohio court system, there are two stages of appeal; to wit, appeal from trial court to intermediate appellate court and then to this Court. AT&T's attempt to confuse this fact must fail.

"[C]ourts of common pleas \*\*\* are ones of original and general jurisdiction." *Schwarz v. Bd. of Trustees of Ohio State Univ.* (1987), 31 Ohio St.3d 267, 272, 510 N.E.2d 808, 812. And although this Court was referring to a workers' compensation appeal in *Robinson v. BOC Group, General Motors Corp.* (1998), 81 Ohio St.3d 361, 368, 691 N.E.2d 667, its teachings are equally valid here. In *Robinson*, this court explained that although labeled an appeal, an action in the common pleas court under R.C. 4123.512 that seeks "a redetermination of a decision of the Industrial Commission is not a traditional error proceeding." See *id.* at 368, 691 N.E.2d at 672. The same is true here despite AT&T's claim not to know what the term "traditional error proceeding" means. (See Appellee's Merit Brief at p. 16.)

IV. The perfection of an administrative-related appeal clearly is not required to be done in accordance with the Rules of Appellate Procedure.

It seems well established that the filing of a notice of appeal pursuant to R.C. Chapter 2505 is essential to vest a common pleas court with jurisdiction to hear an administrative appeal.

R.C. 2505.07 provides that an appeal from an administrative final decision must be perfected within thirty days after entry of the order "unless otherwise provided by law." And as stated in paragraph one of the syllabus in *Thomas v. Webber* (1968), 15 Ohio St.2d 177, 239 N.E.2d 26, 27:

Except to the extent that they may conflict with Chapter 2506, Revised Code (Administrative Appellate Procedure Act), Sections 2505.04 and 2505.05, Revised Code (Appellate Procedure Act), apply to the perfection of an appeal and the form of a notice of appeal, pursuant to Chapter 2506, from the decision of an agency of a political subdivision. (Parenthesis original.)

An examination of the two provisions (R.C. 2505.04 and R.C. 2505) show that they clearly distinguish between appeals from a court and appeals from an administrative body and that such distinction is meaningful. Also if R.C. 2505.07, which pertains to the time for perfecting an appeal with respect to an administrative decision, is contrasted with App. R. 4, which deals with the time for perfecting an appeal from a court judgment, one can see a difference in that regard as well.

A. There is clearly no cross-appeal requirement imposed in a R.C. 2506 appeal to the court of common pleas.

R.C. 2505.04 specifically deals with how an appeal is perfected. It provides:

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. \*\*\* [N]o step required to be taken subsequent to the perfection of the appeal is jurisdictional.

As indicated, to perfect an administrative-related appeal a written notice of appeal must be filed with the administrative body. The filing of such notice of appeal is the only jurisdictional step under Chapter 2505. See *Damar Realty Co. v. City of Cleveland* (1942) 140 Ohio St. 432, 45 N.E.2d 209.

As indicated in R.C. 2505.04, if appealing a court order it must be done in accordance with the Rules of Appellate Procedure (or the Rules of Practice of this Court). There is clearly a cross-appeal requirement in the appellate rules which govern procedure in appeals to courts of appeal from the trial courts of record in Ohio. In that regard, App. R. 3(C) provides in relevant part:

(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 \*\*\* 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 appeal.

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Neither the Rules of Appellate Procedure nor this Court's Rules of Practice are applicable to an appeal from an administrative body to the court of common pleas.

There is no mandate saying that an appellee in a Chapter 2506 appeal to the court of

common pleas “who intends to defend” an administrative decision taken up on appeal by an appellant and “who also seeks to change” the administrative decision must file a notice of cross appeal. There is simply no cross-appeal requirement in such appeals.

- B. An appealing party cannot just designate part of the administrative decision for review by the court of common pleas.

R.C. 2505.05 concerns the contents of the notice of appeal and states:

*The notice of appeal* described in section 2505.04 of the Revised Code shall conform, in the case of an appeal of a final order, judgment, or decree of a court, with the Rules of Appellate Procedure or the Rules of Practice of the Supreme Court and *shall designate, in the case of an administrative-related appeal, the final order appealed from and whether the appeal is on questions of law or questions of law and fact.* In the notice, the party appealing shall be designated the appellant, and the adverse party, the appellee. In the case of an administrative-related appeal, the failure to designate the type of hearing upon appeal is not jurisdictional, and the notice of appeal may be amended with the approval of the appellate court for good cause shown. (Emphasis added.)

As shown, the notice of appeal relating to a court order must be in conformity with the Rules of Appellate Procedure (or this Court’s Rules of Practice). In this regard, it is clear that App. R. 3(D) allows a notice of appeal to “designate” just a “part” of the judgment or order appealed from. The same is not true with respect to R.C. 2505.05. R.C. 2505.05 requires the notice of appeal in an administrative-related appeal to “designate” the “final order” not just a “part” thereof.

Not only is there nothing that permits the appealing party to designate just part of the final order from which to appeal, there is no requirement that the party appealing even state in the notice of appeal any of the grounds on which he is

appealing. See *Padrutt v. Peninsula*, Summit App. No. 2422, 2009-Ohio-843 at ¶32 (finding that the common pleas court erred in failing to address an issue because it was not raised in the notice of appeal).

In short, the jurisdiction of the common pleas court is of the entire final order not specified issues that may be raised during the pendency of the appeal.

- C. Unlike App. R. 4 there is nothing in R.C. 2505.07 about cross or multiple appeals of an administrative order.

Also, compare R.C. 2505.07 which addresses the time for perfecting an appeal from an administrative decision with App. R. 4 which addresses that same issue with respect to a court judgment. Both expressly require that a notice of appeal be filed within 30 days but examine the language of the two provisions.

R.C. 2505.07 states in its entirety as follows: "After the entry of a final order of an administrative officer, agency, board, department, tribunal, commission, or other instrumentality, the period of time within which the appeal shall be perfected, unless otherwise provided by law, is thirty days." App. R. 4, on the other hand, provides in pertinent part as follows:

**(A) Time for appeal.** A party shall file the notice of appeal required by App. R. 3 within thirty days of the later of entry of the judgment or order appealed or, in a civil case, service of the notice of judgment and its entry if service is not made on the party within the three day period in Rule 58(B) of the Ohio Rules of Civil Procedure.<sup>2</sup>

**(B) Exceptions.** The following are exceptions to the appeal time period in division (A) of this rule:

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<sup>2</sup> "The timely filing of a notice of appeal is a prerequisite to a civil appeal as of right." *Moldovan v. Cuyahoga Cty. Welfare Dept.* (1986), 25 Ohio St.3d 293, 294-295, 765 N.E.2d 466, 467.

(1) Multiple or cross appeals. If a notice of appeal is timely filed by a party, another party may file a notice of appeal within the appeal time period otherwise prescribed by this rule or within ten days of the filing of the first notice of appeal.

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By itself it may not seem significant that R.C. 2505.07 does not read more like App. R. 4(A) and say something to the effect such as: "A party shall file the notice of appeal required by R.C. 2505.04 within thirty days after entry of a final order of an administrative officer, agency, board, department, tribunal, commission, or other instrumentality." However, what about when App. R. 4(B)(1) is considered? The rule clearly contemplates that there can be multiple and/or cross appeals and in fact provides for a 10-day window for such appeals. The language in R.C. 2505.07 and the fact that there is no mention of possible multiple or cross appeals seems to strongly suggest that one appeal is contemplated with regard to an administrative order.

D. Once R.C. Chapter 2506 appeal perfected, the court of common pleas acquires jurisdiction over the entire decision for review.

The jurisdiction of the court of common pleas is invoked by the filing of a notice of appeal in accordance with R.C. 2505.04. The notice of appeal is from the entire final order and it brings such order as a whole to the common pleas court for review.<sup>3</sup>

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<sup>3</sup> Assuming that Ohio recognized the rule that a party cannot appeal from a judgment or so much of a judgment which is in that party's favor, such rule would not be applicable to the situation here because it does not involve a "judgment." See *Popow v. Wink Associates* (App. Div. 1993), 269 N.J. Super. 518, 528, 636 A.2d 74, 79; *N-Ren Corp. v. Illinois Commerce Comm.* (1981), 98 Ill. App.3d 1076, 1078, 423 N.E.2d 1386, 1388. Furthermore, even with respect to judgments, that rule is not absolute. Where a judgment gives the successful party only part of that which he seeks and denies him the balance with the result of a claimed injustice, the party may appeal from the entire judgment. *United States v. Dashiell* (1865), 70 U.S. 688, 701.

Again, R.C. 2506.01(A) provides that "every final order, adjudication, or decision \*\*\* may be reviewed by the court of common pleas[.]" R.C. 2506.01(C) defines "final order, adjudication, or decision" as "an order, adjudication, or decision that determines rights, duties, privileges, benefits, or legal relationships[.]" Further, a board "has the duty of reducing its ruling to writing before they become effective[.]" *State ex rel. Hanley v. Roberts* (1985), 17 Ohio St.3d 1, 4, 476 N.E.2d 1019, 1022 (quoting *Grimes v. Cleveland*, (1968), 17 Ohio Misc. 193, 195-96, 243 N.E.2d 777, 779).

As one appellate court noted "[t]he common pleas court ha[s] jurisdiction to review *any* issue upon which the [administrative agency] ruled." *Schack v. Geneva Civil Service Commission* (1993), 86 Ohio App.3d 689, 695, 621 N.E.2d 788, 792 (emphasis original).<sup>4</sup> Simply put, this is because as one common pleas court noted "Chapter [2506] vests the [common pleas] [c]ourt with authority to review the whole transaction[.]" *Shaker Coventry Corp. v. Shaker Heights Planning Comm.* (1961), 86 Ohio Law Abs. 47, 176 N.E.2d 332, 334-35.<sup>5</sup>

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<sup>4</sup> In *Schack*, a city civil service commission denied an employee's appeal on the ground that the employee was not a classified employee, and thus, had no right of appeal to the commission. After the employee appealed, the common pleas court dismissed his appeal holding that if the employee were a classified employee, the appeal from the commission decision was improper because the employee was required under R.C. 124.34 to appeal to the state personnel board of review. The court of appeals reversed finding that a R.C. Chapter 2506 appeal was permitted and that in such appeal "[t]he common pleas court had jurisdiction to review *any* issue upon which the commission ruled." 86 Ohio App.3d at 692, 621 N.E.2d at 792 (emphasis added).

<sup>5</sup> In *Shaker*, a city board of zoning appeals would, without a hearing, determine that it did not have jurisdiction over an applicant's request for a building permit. In the R.C. Chapter 2506 appeal, the common pleas court not only rejected the city's jurisdiction argument but proceeded to find for the applicant on the merits.

The Board of Review for the City of Cleveland ("Board") issued a written decision in this case containing its three rulings therein (Merit Brief of Appellant, Appx. 1-13). When AT&T appealed the Board's entire decision was brought before the Court of Common Pleas. The Common Pleas Court clearly had jurisdiction over all three rulings by the Board therein.

- V. The purpose of a notice of appeal is to inform the opposing party and to give notice to the administrative agency.

The Court recently discussed the purpose of a notice of appeal in an administrative-related appeal in *Welsh Development Co.v. Warren Cty. Regional Planning Comm.* (2011), 128 Ohio St.3d 471, 946 N.E.2d 216, 2011-Ohio-1604. In that case, the Court noted that it "ha[d] long held that the purpose of a notice of appeal is to inform the opposing party of the taking of an appeal." 128 Ohio St.3d at 477, 946 N.E.2d at 222, 2011-Ohio-1604 at ¶29. The Court explained that another "purpose of R.C. 2505.04 is to give timely notice of the appeal to the administrative agency." 128 Ohio St.3d at 479, 946 N.E.2d at 224, 2011-Ohio-1604 at ¶40. There is no dispute here that the notice of appeal that was filed in this case served both purposes: it informed AT&T's opposing party, the Tax Administrator, that an appeal of the Board's final order was being taken and it timely notified the Board of such.

- VI. There can be no doubt that the opposing but non-appealing party in the administrative proceeding remains "adverse" in R.C. Chapter 2506 appeal.

Paragraph one of the syllabus in the Court's *Thomas* case was referenced earlier; paragraph two should be referenced as well. It stated as follows:

Those freeholders and electors of an area in a township,  
who sign a petition for filing with the township trustees for

incorporation of that area as a village, are parties to the proceeding before those township trustees; and, on appeal from an order of such township trustees favorable to such petitioners, they become parties in the Common Pleas Court appeal proceedings, whether or not named or designated as appellees in the notice of appeal.

15 Ohio St.2d 177, 239 N.E.2d 26, 27, paragraph two of the syllabus. The Court would find that these township freeholders and electors "would be parties to the Common Pleas Court appeal" because they were "adverse and necessary parties." *Id.* at 181, 239 N.E.2d at 29. Following *Thomas*, the Court held in *Gold Coast Realty, Inc. v. Board of Zoning Appeals* (1971), 26 Ohio St.2d 37, 268 N.E.2d 280 that a party who participates in the administrative proceeding below remains "adverse and necessary" in further appeal to the court of common pleas under Chapter 2506 even though not named as such in appellant's notice of appeal filed therein. Clearly, a party who participates in the administrative proceeding below and is actually named in the notice of appeal must be considered "adverse and necessary" in a Chapter 2506 appeal to the court of common pleas as well. See *id.* at paragraph one of the syllabus ("Where an appeal is filed from a decision of a municipal commissioner of building to the municipality's board of zoning appeals, either the municipality or its commissioner of building is a party adverse to the appellant and necessary to the appeal").

Another observation regarding *Thomas* would seem especially noteworthy here. In *Thomas*, apparently none of the electors and freeholders who signed the petition participated in the proceedings before the common pleas court. After the common pleas court reversed the trustees' decision in the electors and freeholders' favor, one of the electors/freeholders would appeal to the court of appeals which would dismiss the

case since the elector/freeholder had not participated in the common pleas court proceedings. This Court would reverse finding that the freeholder/elector could appeal from the judgment of the common pleas court, see 15 Ohio St.2d at 182, 239 N.E.2d at 30, and further that he could "appeal not only on his own behalf but on behalf of all the petitioners" relying initially on (i) the fact that R.C. 2506.03 provided that "[t]he hearing of such appeal shall proceed as in the trial of a civil action" and then (ii) on the predecessor to Ohio Civ. R. 23 (former R.C. 2307.21) dealing with class actions. See 15 Ohio St.2d at 183, 239 N.E.2d at 30.

The Tax Administrator was an "adverse" party to this appeal which brought the Board's final decision before the Common Pleas Court for review. Why wouldn't he have a right to contest these issues that were adverse to him where his opponent appealed? Is this situation any different from the one where a plaintiff files a complaint against a party who may be able to assert a counterclaim?

VII. There is no requirement of briefs or assignments of error because a R.C. Chapter 2506 appeal is not a traditional error proceeding.

AT&T states on page 22 of its brief to this Court that it is "unclear what the point" is that there is no requirement of briefs or assignments of error in a R.C. Chapter 2506 appeal. The point is that a Chapter 2506 appeal is not a traditional error proceeding where there is an appellate rule that provides "The appeal shall be determined on its merits on the assignments of error set forth in the briefs required by Rule 16[.]" See App. R. 12. See also App. R. 16.

VIII. Local rules of court can properly give both parties in R.C. Chapter 2506 appeal an unqualified right to assert assignments of error.

Where did AT&T's right to assert assignments of error come from? It came from the same place that the Tax Administrator's right came from—namely, the local rules. That courts can make such rules seem well established. See Section 5(B), Article IV, Ohio Constitution. It should be noted that former R.C. 2505.45 specifically mandated that the courts of common pleas "shall make rules not inconsistent with the laws of this state." (Appx. 5.) As shown, a number of common courts have made such rules specifically to deal with administrative appeals. Such rules clearly give appellees an unqualified right to assert cross-assignments of error.

IX. AT&T cites to cases involving R.C. 2505.22 although it has conceded that statute is inapplicable to an appeal of an administrative order.

Both parties agree that R.C. 2505.22, which allows an appellee to file assignments of error even where such appellee has not filed a notice of appeal, is inapplicable to an administrative appeal. This statute reads:

In connection with an appeal of a *final order, judgment, or decree of a court*, assignments of error may be filed by an appellee who does not appeal, which assignments shall be passed upon by a reviewing court before the final order, judgment, or decree is reversed in whole or in part. The time within which assignments of error by an appellee may be filed shall be fixed by rule of court. (Emphasis added).

As AT&T properly noted in its appellate brief filed with the Court of Appeals:

[B]y its very terms, R.C. 2505.22 is not applicable to administrative appeals. That statute does authorize the filing of limited assignments of error by an appellee, but only '[i]n connection with an appeal of a final order, judgment, or decree of a court[.]' Unlike other sections of R.C. Chapter 2505, see, e.g., R.C. 2505.01, 2505.03, 2505.04, and

2505.05, R.C. 2505.22 does not contain any reference to final orders or decisions of an administrative officer, board or other body.

(Brief of Appellant AT&T Communications of Ohio at p. 20). Despite AT&T's concession, it cites to cases such as *Parton v. Weilnea* (1959), 169 Ohio St. 145 and *Duracote Corp. v. Goodyear Tire & Rubber Co.* (1993), 2 Ohio St.3d 160, 443 N.E.2d 184 on page 15 of its brief to this Court although they are based on that statute and therefore clearly inapposite.<sup>6</sup> Moreover, the suggestion by the Court of Appeals below that the local rule must be interpreted consistent with this provision was clearly misguided.

X. The Tax Administrator was deprived of judicial review on two rulings by the Board over which the Common Pleas Court had jurisdiction.

Under R.C. Chapter 2506, every final order may be reviewed. The Court of Appeals decision improperly denied access to that review in violation of Section 16, Article I of the Ohio Constitution under its misguided belief that the local rule had to be interpreted consistent with R.C. 2505.22 that pertains to a traditional error proceeding.

#### CONCLUSION

For the reasons set forth in the Merit Brief and this Reply Brief, the decision below must be reversed.

Respectfully submitted,  
Barbara A. Langhenry, Esq., #0038838  
Interim Director of Law

By:   
Linda L. Bickerstaff, Esq., #0052101  
Assistant Director of Law

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<sup>6</sup> The same is true of the federal cases it cites on page 16 as they embody this same principle.

CERTIFICATE OF SERVICE

I certify that a copy of this Reply Brief of Appellant, Nassim M. Lynch, was sent by ordinary U.S. mail to counsel for appellee, AT&T Communications of Ohio, Inc., Richard C. Farrin, Esq. and Thomas M. Zaino, Esq., McDonald Hopkins, LLC, 41 S. High Street, Suite 3550, Columbus, Ohio 43215 on November 14, 2011.



\_\_\_\_\_  
Linda L. Bickerstaff,  
Assistant Director of Law

Attorney for Appellee,  
Income Tax Administrator, Nassim M. Lynch

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APPENDIX

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*Cleveland Law Library Co.*

**ACTS**

OF

A GENERAL NATURE,

Enacted, revised and ordered to be re-printed,

AT THE FIRST SESSION

OF THE

**Twenty-Second General Assembly**

OF THE

**STATE OF OHIO,**

BEGUN AND HELD IN THE TOWN OF COLUMBUS,

**DECEMBER 1, 1823,**

AND IN THE TWENTY-SECOND YEAR OF SAID STATE.

=====  
VOL. XXII.

*7069*

—————  
PUBLISHED BY AUTHORITY.  
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**COLUMBUS:**

PRINTED BY P. H. OLMSTED.

1824.

and every officer whose office is created by law, and not otherwise provided for, shall be entitled to receive from the governor a commission to fill such office upon producing to the secretary of state a legal certificate of his being duly elected or appointed: *Provided*. That the election of all officers, elected or appointed by the legislature, shall be certified by the speakers of both houses.

MATTHIAS CORWIN,  
*Speaker of the House of Representatives.*  
PETER HITCHCOCK,  
*Speaker of the Senate.*

February 26, 1816.

\*\*\*\*\*

*AN ACT to organize the Judicial Courts and regulate their practice.*

*Supreme court to consist of four judges.* **Sec. 1.** *Be it enacted by the General Assembly of the State of Ohio,* That the supreme court shall consist of four judges, who shall have precedence according to the dates of their commissions, but in case either of said judges shall be elected for two or more terms in succession, then he shall take precedence according to the date of his commission for the first of said terms, and when the commissions of two or more judges shall be of the same date, they shall have precedence with respect to each other according to their respective ages, and the judge entitled to the precedence over all others shall be styled Chief Judge of said court.

*Exclusive jurisdiction of supreme court concurrent.* **Sec. 2.** That the supreme court shall have exclusive cognizance of all cases of divorce and allimony, and concurrent jurisdiction in all civil cases, both at law and in equity, where the cause or matter in dispute exceeds one thousand dollars, and appellate jurisdiction from the court of common pleas in all cases in which the court of common pleas has original jurisdiction.

*Appellate.* **Sec. 3.** That the supreme court shall have power, on good cause shewn, to issue writs of habeas corpus cum causa, certiorari, mandamus, prohibition, procedendo, error, supersedeas, habeas corpus, and all other writs not specially provided for by statute, which may be necessary to enforce the due administration of right and justice throughout the state, and for the exercise of its jurisdiction, agreeably to the usages and principles of law; and either of the judges of the supreme court, in vacation, shall, on good cause shewn, have power to grant writs of error, supersedeas and certiorari, and also to grant writs of habeas corpus, for the purpose of an enquiry into the cause of commitment.

*What writs supreme court may issue.* **Sec. 4.** That the courts of common pleas shall consist of a president and three associate judges, and shall have original jurisdiction in all civil cases both in law and equity, where the sum or matter in dispute exceeds the jurisdiction

*Courts of C. pleas to consist of president three associates.*

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of justices of the peace, and appellate jurisdiction from the decisions of the justices of the peace in their respective coun- ties in all cases; they shall have power to examine and to take the proof of wills, grant letters testamentary thereon and to grant letters of administration on intestate estates, and to hear and determine all causes of a probate and testa- mentary nature, to appoint guardians for minors, idiots and lunatics, and to call such guardians to an account; they shall have exclusive cognizance of all crimes, offences and misdemeanors, the punishment whereof is not capital, and shall have the same power to issue remedial and other pro- cess (writs of error and mandamus excepted) as the supreme court has; and the presidents of the courts of common pleas within their circuits, or any associate judge of the court of common pleas within his county, shall on good cause shewn, have power to allow writs of certiorari, directed to justices of the peace, to cause their proceedings to be brought be- fore such court in order that right and justice may be done.

Sec. 5. That the judges of the Supreme court and presi- dents and associate judges of the courts of common pleas, before they proceed to execute the duties of their respec- tive offices, shall each take an oath or affirmation to admin- ister justice without respect to persons, and to do equal right to the poor and to the rich, and faithfully and impar- tially to discharge and perform all the duties incumbent on him as a judge according to the best of his abilities and un- derstanding, agreeably to the constitution and laws of this state, and have the same endorsed on his commission.

Sec. 6. That the supreme court and courts of common pleas shall appoint clerks for their respective courts in each county; and each of the said clerks shall, before he enters upon the execution of his office, take an oath or affirmation that he will truly and faithfully enter and record all the or- ders, decrees, judgments and proceedings of the said court; and faithfully and impartially discharge and perform all the duties of his said office according to the best of his abilities and understanding; and the said clerks shall also severally give bond with sufficient sureties (to be approved of by the supreme and common pleas courts respectively) to the state of Ohio in the sum of two thousand dollars, conditioned that he will truly and faithfully enter and record all the orders, decrees, judgments and proceedings of said court, and faith- fully and impartially discharge and perform all the duties of his said office; which bond shall be lodged with the county treasurer, and it shall be lawful for the clerks of the several courts within this state to take depositions and administer oaths, in all matters appertaining to the business of their re- spective offices.

Sec. 7. That each and every clerk of the respective courts shall keep his office at the seat of justice in his proper county, and every clerk failing or neglecting so to do, shall be deem-

Jurisdiction, original.

Appellate.

May take proof of wills-- grant letters of administration appoint guar- dians; try crimes, &c. issue remedial and other pro- cess, except &c

Each judge to take an oath

Form.

Oath to be endorsed on commission:

Courts to appoint clerks in each county

Clerks to take an oath.

Form.

To give bond to state of Ohio.

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shall enter the same of record and proceedings thereon shall be had, as if such decision had been made in said county. isions to writ-  
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Sec. 114. That the judges shall make such rules for the transmitting of cases from the courts in the respective counties, to the said session in Columbus, as to them shall seem necessary and proper. Judges shall  
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mit cases.

Sec. 115. That the said judges shall appoint a reporter, who shall report all decisions made at said session in Columbus, and such other important decisions as he may be directed by said judges to report, and cause the same to be published, as soon as may conveniently be done after each session. Judges to ap-  
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His duty.

Sec. 116. That the reporter shall receive for his services, annually, a sum not exceeding three hundred dollars, to be allowed and certified by said judges and paid out of the state treasury, on the order of the auditor of state. Reporters  
salary.

Sec. 117. That the secretary of state shall subscribe on behalf of the state for one hundred copies of said reports subject to the disposal of the General Assembly: *Provided*, The subscription price to the state shall not exceed one cent for each page, of the size of Johnsons New York term reports. Secretary to  
subscribe for  
100 copies of  
report.  
Acts repealed

Sec. 118. That the act to organize the judicial courts and regulate their practice, passed February twenty third, eighteen hundred and sixteen, and the act to amend the act entitled an act to organize the judicial courts and regulate their practice passed January twentieth eighteen hundred and twenty three, be and the same are hereby repealed. Effect.

This act shall be in force, and take effect from and after the first day of June next.

JOSEPH RICHARDSON,  
*Speaker of the house of representatives.*  
ALLEN TRIMBLE,  
*Speaker of the Senate.*

February 13, 1824.

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*AN ACT directing the mode of proceeding in Chancery.*

Sec. 1. *Be it enacted by the General Assembly of the State of Ohio,* That the courts of common pleas shall have jurisdiction, in all cases properly cognizable by a court of chancery, in which plain, adequate and complete remedy, cannot be had at law. Jurisdiction of  
courts of com-  
mon pleas.

Sec. 2. That the supreme court shall have concurrent jurisdiction, in all cases cognizable by a court of chancery, where the title of land is in question, or the sum or matter in dispute exceeds one thousand dollars, and appellate jurisdiction in all cases, regularly brought before them from the chancery decisions of the courts of common pleas. of the supreme  
court.

Sec. 3. That all applicants to the chancery side of either

presented and acted upon in the court in which the mistake, neglect, or omission occurred.

HISTORY: GC § 12223-44; 116 v 104(114), § 1. Eff 10-1-53.

Analogous to former GC § 12280.

#### Research Aids

Harmless and prejudicial error:

O-Jur3d: Appel R § 612

Am-Jur2d: A&E §§ 308, 643, 644, 818, 937

**§ 2505.43** Premature judgment deemed clerical error. (GC § 12223-45)

Rendering judgment before the action stood for trial according to Titles XXIII [23], XXV [25], and XXVII [27] of the Revised Code shall be deemed a clerical error.

HISTORY: GC § 12223-45; 116 v 104(114), § 1. Eff 10-1-53.

Analogous to former GC § 12281.

#### Research Aids

Time of rendition:

O-Jur2d: Judgm § 68

Am-Jur2d: A&E § 818

**§ 2505.44** Transcripts of proceedings. (GC § 12223-46)

Courts may compel transcripts of proceedings, containing a judgment or final order sought to be reversed, to be furnished, completed, or perfected.

HISTORY: GC § 12223-46; 116 v 104(114), § 1. Eff 10-1-53.

Analogous to former GC § 12282.

#### Cross-References to Related Sections

Transcript to be furnished to indigent criminal defendant, RC § 2953.03.

#### CASE NOTES AND OAG

1. The provisions of RC § 2505.44 simply lodge power in the court to compel transcripts to be furnished, and provide no basis upon which the court could amend or add to the bill of exceptions; *Brewer v. Brewer*, 117 App 263, 24 O2d 60, 192 NE2d 106.

**§ 2505.45** Power of courts to make rules. (GC § 12223-47)

The supreme court may make and publish rules with respect to the procedure in the supreme court not inconsistent with the laws of the state.

The several judges of the courts of common pleas and the courts of appeals shall make rules, not inconsistent with the laws of the state, for regulating the practice and conducting the business of their respective courts, which they shall submit to the supreme court. The supreme court may alter and amend such rules and make other rules necessary for regulating the proceedings in any court.

HISTORY: GC § 12223-47; 116 v 104(114), § 1. Eff 10-1-53.

#### Editor's Note

See OConst art IV, § 5. As to the relationship between statutes and Rules, see Publisher's Note, page v.

#### Ohio Rules

For the local rules of the various courts of appeals, see RULES GOVERNING THE COURTS OF OHIO (Anderson, published annually).