

Case No. 2011-2147

IN THE SUPREME COURT OF OHIO

**APPEAL FROM
THE EIGHTH DISTRICT COURT OF APPEALS
CUYAHOGA COUNTY, OHIO
NO. CA 11 096646**

2200 CARNEGIE LLC

Appellee

-vs-

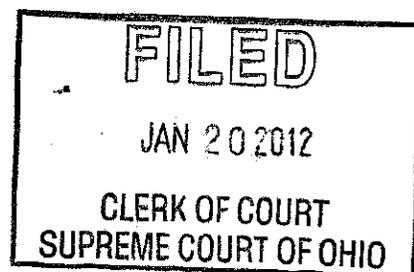
CUYAHOGA COUNTY BOARD OF REVISION, et al.

Appellant

**APPELLEE 2200 CARNEGIE LLC'S MEMORANDUM AND BRIEF IN OPPOSITION
IN RESPONSE TO APPELLANT'S MEMORANDUM IN SUPPORT OF
JURISDICTION**

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THIS CASE DOES NOT INVOLVE A SUBSTANTIAL CONSTITUTIONAL QUESTION

The Appellant, Cuyahoga County Board of Revision, et al., (hereinafter "Appellant"), does not allege that this case involves a substantial constitutional question. The Appellant does not identify, mention, or cite any constitutional provision that it believes this case involves. Nor does the Appellant specify any substantial constitutional question that it believes this Honorable Court must address.

As such, this Honorable Court must find that this case does not involve a substantial constitutional question and therefore decline jurisdiction to hear this appeal.

THIS CASE IS NOT A CASE OF GREAT PUBLIC OR GENERAL INTEREST

This Honorable Court must also decline jurisdiction to hear this appeal because Appellant also fails to establish that this case is a case of great public or general interest. Appellant merely asserts this case would be of great interest because it would address whether an administrative tribunal can be deprived of jurisdiction to consider a property tax complaint when the tribunal fails to provide notice of the complaint within the time period required by statute to either the property owner or board of education who may be affected by the complaint.

Appellee respectfully asserts that this case is not a case of great public or general interest because the number of individuals who would have any remote interest in this particular issue would be minimal. The only segment of the public who would likely have an interest in this particular issue would be property owners who have failed to receive notice of a property tax complaint from their county auditor within thirty days of the last date that such complaints could be filed by the board of education. Appellant does not provide any information, statistics, and/or data in support of their argument as to: 1) the number of occasions that a county auditor has failed to timely give notice of a property tax complaint to a property owner and/or a board of

education whose school's district may be affected by the complaint; 2) the number of property owners who actually file a complaint with the county auditor seeking to increase or decrease the value of real property in any given year; and/or 3) the number of properties that the board of education files a tax complaint against in any given year. Appellant also fails to claim that there has ever been a single occasion where the auditor failed to provide the Appellant with timely notice of a property owner's tax complaint. Accordingly, Appellant is unable to establish that this case is a case of great public or general interest.

Appellant also speculates that the Court of Appeals holding from which it appeals "will lead to the dismissal of valid complaints, quite possibly in mass." Through the use of word "possibly" Appellant itself acknowledges that the Court of Appeals' holding might not affect very many individuals. Thus, it is just as likely that the facts of the present matter, where the auditor failed to timely provide Appellee with notice of the tax complaint was an isolated incident that is unlikely to reoccur as it is that tax complaints could be dismissed in mass. It is the Appellant's burden to demonstrate that this case is a case of great public or general interest and it has simply failed to provide any verifiable evidence that it can satisfy said burden.

In addition, this Honorable Court should also reject the Appellant's assertion that the Court of Appeals' decision "threatens to create havoc with respect to all complaints requesting a change in assessed value greater than \$17,500.00." The Court of Appeals decision does not require anything more of the County Board of Revision than to simply follow the statutory law.

Further, Appellant's defined class of persons who it believes would be interested in this case as those who "wish" to file a complaint is overly broad. The class should be limited to only property owners who fail to timely receive notice of a tax complaint that has been filed against them by the board of education. As the Appellant has never set forth any evidence as to how

many individuals fall within said class, this Honorable Court should reject the Appellant's argument that this case is of great public or general interest as said assertion is entirely speculative.

Ohio Constitution Article IV, §§2 and 6, establish the discretionary jurisdiction of this Honorable Court. If a case does not present at least one issue of great public or general interest, or does not present at least one substantial constitutional issue, the judgment of the court of appeals, even if this Honorable Court might rule otherwise on the merits is final and not subject to review. *See State ex rel. Faber, Rec'r v. James*, (1917), 95 Ohio St. 357, 365-366.

The Appellant has failed to show that this is a case of great public or general interest and/or that it involves a substantial constitutional question. As such, this Honorable Court has no discretionary jurisdiction in this matter and should so rule.

STATEMENT OF THE FACTS AND CASE

On March 27, 2007, Appellant filed a Complaint against the valuation of real property against Appellee relative to Parcel Numbers 103-16-029 and 103-16-030. The "requested change in value" was purported to be justified due to "recent sale."

Neither a copy of this Complaint, nor a notice of the filing of this Complaint, was served upon Appellee. In fact, the first notice that Appellee received regarding the filing of this Complaint was a letter from the Cuyahoga County Board of Revisions (hereinafter "Board of Revisions") dated July 27, 2007, but post marked August 14, 2007. The post-mark on this letter established that the letter was not received by Appellee until after August 14, 2007.

On August 30, 2007, Appellee filed a motion to dismiss the Complaint with the Board of Revisions as the Complaint failed to comply with the notice requirements set forth in the Rules of Procedure of the Board of Revisions, and accordingly, the Board of Revisions had not

acquired jurisdiction of the Appellee. On that same date, a hearing was held before the Administrator of the Board of Revisions (hereinafter "Administrator") concerning the valuation of the property in question.

On October 11, 2007, the Administrator informed the Appellee that the Board of Revisions had decided to increase the value of the subject property by the amount of \$97,800.00 for the tax year 2006.

On November 8, 2007, the Appellee timely appealed this decision to the Cuyahoga County Court of Common Pleas. On September 8, 2008, the Cuyahoga County Court of Common Pleas remanded the matter back to the Board of Revisions "with instructions to send notice of the Board of Education complaint to the property owner pursuant to R.C. 5715.19(B) the parties shall then proceed accordingly after notice is properly given and jurisdiction is obtained".

Thus, the ruling in said appeal was, in relevant part, that the Board of Revisions had not obtained jurisdiction over Appellee relative to the Complaint filed on March 27, 2007.

On September 25, 2008, the Board of Revisions sent Appellee a notice that Appellant filed a valuation complaint. Although this notice made no reference to the filing date of the Complaint, Appellant did not file a new Complaint. Instead, the Board of Revisions mailed a notice of the filing of the valuation complaint, almost eighteen (18) months after the filing of said Complaint.

On or about April 16, 2009, a hearing was held before the Board of Revisions on Appellant's March 27, 2007 Complaint.

Subsequently, on August 6, 2009, the Board of Revisions issued its decision for the tax year 2006, increasing the property tax as stated in the decision, which is the subject of the within matter.

Thereafter, on August 31, 2009, Appellee timely appealed this decision to the Cuyahoga County Court of Common Pleas. On March 9, 2011, the trial court affirmed the Board of Revision's valuation of the taxable value of Appellee's property.

The Appellee subsequently timely appealed the trial court's decision to the Eighth District Court of Appeals. On October 11, 2011, this Honorable Court reversed the lower court's affirmance of the Board of Revisions' revised valuation, holding, in relevant part, that the Board "was without jurisdiction to consider the complaint."

On October 31, 2011, Appellant filed its Motion to Reconsider Judgment with the Eighth District Court of Appeals. The Court of Appeals denied said motion and this appeal followed.

**LAW AND ARGUMENTS IN OPPOSITION TO APPELLANT'S PROPOSITIONS OF
LAW**

This Honorable Court should reject each of the Appellant's propositions of law as: 1) the lack of service of a tax Complaint filed against a property owner constitutes a jurisdictional defect that cannot be cured and; 2) the law of the case doctrine is not applicable to the facts in the present matter because: 1) the trial court's original ruling that remanded the matter back to the Board of Revision failed to cure the jurisdictional defect and; 2) subject matter jurisdiction is never waived, and cannot be conferred by a court where jurisdiction did not originally exist.

1. Response in Opposition to Proposition of Law 1

Appellant's Proposed Proposition of Law 1: A failure by a board of revision to provide notice of the filing of a valid complaint as required by R.C. 5715.19(B) does not mandate the dismissal of the complaint, but instead requires the board of revision to provide notice prior to conducting a hearing and issuing a decision.

A. Response to Appellant's Summary of Proposition

Appellant erroneously asserts that the Court of Appeals' ruling that the notice provisions of R.C. 5715.19(B) are jurisdictional, is contrary to both statute and the holdings of the Ohio Supreme Court. As Appellee sets forth more fully below, the Ohio Revised Code and holdings of the Ohio Supreme Court and Ohio appellate courts clearly establish that the notice of provisions of R.C. 5715.19(B) are jurisdictional.

R.C. 5715.19 states, in relevant part:

(B) Within thirty days after the last date such complaints may be filed, the auditor shall give notice of each complaint in which the stated amount of overvaluation, undervaluation, discriminatory valuation, illegal valuation, or incorrect determination is at least seventeen thousand five hundred dollars to each property owner whose property is the subject of the complaint, if the complaint was not filed by the owner or the owner's spouse, and to each board of education whose school district may be affected by the complaint

In Gulf Oil Corp. v. Kosydar (1975), 44 Ohio St. 2d 208, the Supreme Court of Ohio stated, in relevant part, in the first paragraph of the syllabus:

Strict construction of taxing statutes is required, and any doubt must be resolved in favor of the citizen upon whom or the property upon which the burden is sought to be imposed.

This principle has been applied to R.C. 5715.19 by the Supreme Court of Ohio.

See Cincinnati School District Board of Education v. Hamilton County Board of Revision (1996), 74 Ohio St. 3d 639.

Thus, as mandated by ORC 5715.19(B), which must be strictly construed against Appellant's herein, the Cuyahoga County auditor was mandated to "give notice" of the

March 27, 2007 Complaint filed by Appellant to Appellee “[w]ithin thirty days after the last date such complaints may be filed”, or, in this case, within thirty days of March 31, 2007. It is undisputed that the Auditor failed to send this notice within that time period.

This failure to “give notice” to Appellee within thirty days of March 31, 2007 cannot be cured, as the mandates of ORC 5715.19(B) must be strictly construed against the Appellant.

Following the initial reversal and remand by the Cuyahoga County Court of Common Pleas, rather than requiring the Appellant to re-file its Complaint, the Board of Revisions mailed a new notice required by ORC 5715.19(B) on September 25, 2008 (relating to the March 27, 2007 Complaint), almost eighteen months after the filing of the March 27, 2007 Complaint. Thus, the Board of Revisions did not have jurisdiction to hear and rule on the March 27, 2007 Complaint.

The Supreme Court of Ohio addressed, and stressed, the importance of strict compliance with the mandates of ORC 5715.19 and how said compliance is necessary to confer jurisdiction to boards of revision in Elkem Metals Company v. Washington County Board of Revision (1998), 81 Ohio St. 3d 683:

In Seventh Urban, Inc. v. Univ. Circle Prop. Dev., Inc. (1981), 67 Ohio St. 2d 19, 22, 21 O.O. 3d 12, 14, 423 N.E. 2d 1070, 1073, we stated that jurisdiction is the authority to hear and determine a cause. See, also, Sheldon’s Lessee v. Newton (1854), 3 Ohio St. 494; State v. King (1957), 166 Ohio St. 293, 2 O.O. 2d 200, 142 N.E. 2d 222. The jurisdiction for boards of revision is set forth in R.C. 5715.01 and 5715.11. R.C. 5715.01 provides, “There shall also be a board in each county, known as the county board of revision, which shall hear complaints and revise assessments of real property for taxation.” R.C. 5715.11 provides “The county board of revision shall hear complaints relating to the valuation or assessment of real property ***. The board shall investigate all such complaints and may increase or decrease any such valuation ***.”

A review of the applicable statutes set forth above shows that a board of revision has been given jurisdiction to hear and rule on complaints submitted to it. As part of its jurisdiction to hear and rule on complaints, a board of revision must undertake a two-step analysis. First, the board of revision must examine the complaint to determine whether it meets the jurisdiction requirements set forth by the statutes. Second, if the complaint meets the jurisdictional requirements, then the board of revision is empowered to proceed to consider the evidence and determine the true value of the property.

The statutory requirements for filing and filling out a complaint are contained in R.C. 5715.13 and 5715.19. In Stanjim Co. v. Mahoning Cty. Bd. of Revision (1974), 38 Ohio St. 2d 233, 235 67 O.O. 2d 296, 298, 313 N.E. 2d 14, 16, we stated that “full compliance with R.C. 5715.19 and 5715.13 is necessary before a county board of revision is empowered to act on the merits of a claim.” Thus, only after a board of revision determines that the complaint meets the jurisdictional requirements can it proceed to the second step to determine the case on the merits. If the complaint does not meet the jurisdictional requirements, then the board of revision must dismiss it because the complaint has not invoked the power to proceed to a consideration of the merits.

See also, C.I.A. Properties v. Cuyahoga County Auditor (2000), 89 Ohio St. 3d 363.

The Ohio Supreme Court has noted that, upon the filing of a complaint with the board of revision, the board of revision must comply with the requirements of ORC 5715.19. In Sharon Village Limited v. Licking County Board of Revision (1997), 78 Ohio St. 3d 479, the Supreme Court stated:

... the complaint is filed for the purpose of initiating an adversarial proceeding just as any other complaint does. A board of revision is required by R.C. 5715.19 to give proper notice to property owners and boards of education when a complaint is filed by other parties. Under R.C. 5715.11, the board of revision hears and investigates all complaints. A board of revision is also required to give adequate notice of hearing dates and times so that all parties may participate. *Id.* at 481-482.

In IBM Corporation v. Board of Revision of Franklin County, 2006 Ohio 6258 (Franklin County, 2006), the Tenth District Court of Appeals held that the failure to file

timely complaints constituted jurisdictional failures and, as such, the complaints must be dismissed. In so holding, the Court stated:

Complaints filed under R.C. 5715.19 and 5715.13 are jurisdictional. Buckeye Foods v. Cuyahoga Cty. Bd. of Revision (1997), 78 Ohio St. 3d 459, 461. As such, the Ohio Supreme Court has held that “full compliance with R.C. 5715.19 and 5715.13 is necessary before a county board of revision is empowered to act on the merits of a claim.” Id. (quoting Stanjim Co. v. Mahoning Cty. Bd. of Revision (1974), 38 Ohio St. 2d 233, 235. Further, under Ohio law, “[s]ubject matter jurisdiction is never waived, and neither a court nor the parties may confer jurisdiction where none existed originally.: Hirt’s Greenhouse, Inc., v. City of Strongsville (Sept. 7, 1995), Cuyahoga App. No. 68374. Thus, “the lack of jurisdiction can be raised at any time, eve for the first time on appeal.” State ex rel. Tubbs Jones v. Suster (1998), 84 Ohio St. 3d 70, 75.

Further, the Eighth District Court of Appeals, in the decision from which Appellant appeals specifically held “the language of R.C. 5715.19 mandates notice to the property owner” and the failure to notify Appellee as outlined in the statute cannot be cured and resulted in the Board of Revision not having jurisdiction to consider the complaint.

Based on a review of the above statutes and court opinions, including Ohio Supreme Court opinions, the notice provisions of R.C. 5715.19 are jurisdictional.

Accordingly, R.C. 5715.19 must be strictly construed against the Appellant, and as the Board of Revision and/or Auditor failed to properly serve Appellee with notice of the filing of the March 27, 2007 Complaint within thirty days of March 31, 2007 as mandated by R.C. 5715.19(B), the Board of Revision did not have jurisdiction to rule on said Complaint.

B. Response to Appellant’s reliance on *Knickerbocker Properties, Inc. XLII v. Delaware Cty. Bd. of Revision* (2008), 119 Ohio St.3d 233, 2008-Ohio-3192.

Appellant’s reliance on Knickerbocker Properties, Inc., XLII v. Delaware Cty. Bd. of Revision (2008), 119 Ohio St.3d 233, is misplaced as the facts from that case are significantly

different from the facts of the present matter. The Eighth District Court of Appeals in this matter also ruled that “the instant case is factually distinguishable from *Knickerbocker*.”

In *Knickerbocker, supra*, the Supreme Court of Ohio held that the Board of Education’s failure to use the proper address of the property owner on the valuation complaint form did not deprive the Board of Revision of jurisdiction. The Supreme Court further held that the auditor, not a complainant, has the statutory burden of notice under R.C. 5715.19. Appellant argues that this decision stands for the proposition that the failure of the Board to “give notice” does not constitute a jurisdictional defect. Appellant’s interpretation of *Knickerbocker, supra*, is inaccurate and its reliance thereon is misplaced, as in *Knickerbocker, supra*, the property owner *did* receive timely notice of the filing of the complaint against valuation, despite the fact that the Board of Education listed the wrong address for Knickerbocker Properties: “On April 7, 2004, the auditor issued the statutory notice of the BOE’s complaint to Knickerbocker at the Eproperty address, not the Sentinel Real Estate address . . . Knickerbocker did receive the notice when the seller forwarded it to Knickerbocker”. *Knickerbocker, supra*, at 234. The instant matter is factually distinguishable on a crucial issue: here, there was absolutely no timely service of the complaint against valuation upon Appellee 2200 Carnegie. This failure of timely service of the complaint itself constitutes the jurisdictional defect at issue herein. In *Knickerbocker, supra*, this Honorable Court recognized the jurisdictional pre-requisite of serving the complaint upon the property owner by citing Cincinnati School Dist. Bd. of Edn. v. Hamilton Cty. Bd. of Revision (2000), 87 Ohio St. 3d 363 for the proposition of law that proper notice is required to obtain jurisdiction.

Accordingly, Knickerbocker is not analogous to the present matter and the lack of timely and statutory service of the Complaint herein constituted a jurisdictional defect that cannot be cured. Accordingly, this Honorable Court should decline jurisdiction over this appeal.

2. Response in Opposition to Proposition of Law II

Appellant's Proposition of Law 2: The doctrine of the law of the case applies to proceedings that originate with the board of revision, and a decision by a reviewing court is the law of that cause for all subsequent proceedings.

Appellant is incorrect in asserting that the law of the case doctrine prohibits a party from challenging subject matter jurisdiction after a case has been remanded by an appellate court. The Supreme Court of Ohio has held “a party cannot waive subject matter jurisdiction regardless of procedural sins.” *See Columbus City School Dist. Bd. of Edn. v. Wilkins*, 101 Ohio St. 3d 112, 2004 Ohio 296, 802 N.E. 2d 637 (quoting *Shawnee Twp. v. Allen Cty. Budget Comm.* (1991), 58 Ohio St. 3d 14, 567 N.E. 2d 1007.). Parties to a case may not waive subject matter jurisdiction upon a court. *See State ex rel. White v. Cuyahoga Metro. Hous. Auth.* (1997), 79 Ohio St. 3d 543, 1997 Ohio 366, 684 N.E. 2d 72.

Appellant misapprehends the doctrine of the law of the case as said doctrine does not preclude the consideration of the issue of subject matter jurisdiction as subject matter jurisdiction can be raised at any time and cannot be waived. Further, Appellant also fails to set forth any case law in which this Honorable Court or one of the Appellate Districts held that the law of the case doctrine bars a party from raising and a court from considering subject matter jurisdiction at any time. Thus, this Honorable Court should reject the Appellant's second proposition of law and decline jurisdiction in this matter.

CONCLUSION

This Honorable Court should decline jurisdiction over this appeal and find that this matter is not worthy of Supreme Court review. The Appellant has not identified any substantial constitutional question that this case involves nor has it set forth any basis for this Honorable Court to find this case is a case of great public or general interest. Accordingly, this Honorable Court should decline jurisdiction in this matter.

Respectfully Submitted,



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CERTIFICATE OF SERVICE

I hereby certify that a true copy of the forgoing was mailed, postage prepaid, by regular U.S. Mail, on this 20th day of January 2012 to the following:

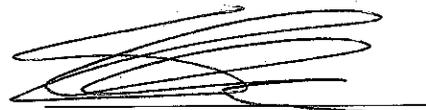
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