

IN THE SUPREME COURT OF OHIO

ORIGINAL

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

APPELLANT'S MOTION FOR RECONSIDERATION OF DECISION ON THE MERITS

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RECEIVED
MAY 17 2012
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FILED
MAY 17 2012
CLERK OF COURT
SUPREME COURT OF OHIO

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MOTION FOR RECONSIDERATION

Pursuant to S.Ct. Prac. R. 11.2(B)(4), Appellant, Nassim M. Lynch, hereby moves this Honorable Court to reconsider its decision and order journalized on May 8, 2012, to affirm the lower court's decision in this case. The grounds for this Motion are set forth in the attached Memorandum.

Respectfully submitted,



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MEMORANDUM IN SUPPORT

Appellant, Nassim M. Lynch, the City of Cleveland's Tax Administrator, urgently request the Court to reconsider its decision that a single notice of appeal of an administrative decision brought under R.C. 2506.01 does not vest the court of common pleas with jurisdiction to review errors raised by a party who did not file a "separate appeal." The Tax Administrator would make a number of observations in that regard.

First, although labeled an "appeal" it is clear that the "review" by the common pleas court under R.C. 2506.01 is something different. As stated by one state supreme court:

The term "appeal" indicates a re-examination by a higher tribunal of issues determined in the original trial, or at least issues which could have been so determined. It is a misnomer to call it an appeal where the appellate tribunal may hear and determine issues which the original could not have determined and where such determination has the effect of adjudicating such issues which could not be adjudicated by the decision of the original officer or tribunal. We know of no case of an appeal from the decision of an executive board or officer where the appellate tribunal adjudicates new issues not within the jurisdiction of the original tribunal to determine.

U.S. v. District Court of Fourth Judicial District in and for Utah County, 242 P.2d 774 (Utah 1952). Clearly, parties often raise constitutional issues in R.C. Chapter 2506 appeals. While such issues are not within an administrative agency's jurisdiction, see *Roosevelt Properties Co. v. Kinney* 12 Ohio St. 3d 7, 8, 465 N.E.2d 421, 422 (1984) and *Herrick v. Kosydar*, 44 Ohio St.2d 128, 130, 339 N.E.2d 626, 627-28 (1975), the common pleas court may properly exercise jurisdiction over constitutional issues raised in a R.C. Chapter 2506 appeal. This certainly is not "appellate jurisdiction."

Second, this Court in *Farrand v. State Medical Board*, 151 Ohio St. 222, 224, 85 N.E.2d 113, 114 (1949) termed the jurisdiction of the common pleas courts in administrative appeals as "revisory." Likewise in 2 Ohio Jurisprudence 3d, Section 179, it states that "the word 'appeal' in the Administrative Procedure Act merely confers revisory jurisdiction on the court." (citing *Farrand supra*; *Board of Liquor Control v. Tancer*, 62 Ohio L. Abs. 360, 107 N.E.2d 532 (2nd Dist. 1951); *Meyer v. Dunifon*, 88 Ohio App. 246, 57 Ohio L. Abs. 217, 94 N.E.2d 471 (2nd Dist. 1950) Wouldn't the same certainly have to be true of a Chapter 2506 appeal as well? Revisory jurisdiction is not the same as appellate jurisdiction. The term "appeal" as used in said Chapter does not denote appellate jurisdiction. This is important because the procedural devices in the normal appellate process are not necessarily applicable to revisory proceedings.

Third, since under the Ohio Constitution the courts of appeals have such appellate jurisdiction as is provided by law to review and affirm, modify, or reverse final orders or actions of administrative officers or agencies, see Ohio Const. Art. IV § 3(B)(2), isn't the Court's holding that "[c]ourts of [c]ommon [p]leas [e]xercise [a]ppellate [j]urisdiction under R.C. 2506.01" inconsistent with that fact? Would not any true appellate jurisdiction over final orders of administrative bodies have to reside with the courts of appeals? For example, since under the Constitution this Court has appellate jurisdiction in cases from the court of common pleas where the death penalty has been imposed, could the Ohio General Assembly give courts of appeals appellate jurisdiction to review such cases? Obviously, the answer is no. The same is true here.

Fourth, this Court in *Farrand* also recognized that the directive that “The hearing in the court of common pleas shall proceed as in the trial of a civil action['] ... requires a court to proceed as it would in any other civil action.” 151 Ohio St. at 225, 85 N.E.2d 115. In this regard, it should be noted that at one time an appeal from a decision of an administrative agency would result in a complete vacation of such decision. See *id.* As was explained in *Farrand*:

[I]n Ohio the appeal itself vacate[d] without revisal the whole proceeding as to findings of fact as well as law and the case is heard upon the same or other pleadings and upon such competent testimony as may be offered in that court; it takes up the subject of the action de novo in respect to pleadings, necessary parties, trial, and judgment in like manner as if the cause had never been tried before.

Id. at 225-26, 85 N.E.2d at 115. While Ohio law may no longer authorize a trial de novo of the matter which was before the administrative board or agency, such appeal nevertheless confers upon all parties to a proceeding before an administrative board or agency the right to seek the independent judgment of a court. And, clearly, cross-assignments of error are analogous to a counterclaim in a civil action.

Fifth, the Court should reconsider premising its decision on the fact that the appellant “perfected an appeal of the administrative decision in the court of common pleas, setting forth a single assignment of error that pertained to the 1999 refund request.” In a Chapter 2506 appeal, the appellant is not authorized to designate a particular part of a final order for review. Where a party attempts to do such, the review by the common pleas court may nevertheless be extended to other issues that were raised and briefed by the parties before the administrative board or agency.

Sixth, the Court's decision that a separate notice of appeal was required is wholly inconsistent with the Court's repeatedly pronounced disfavor of piecemeal appeals. See *Noble v. Colwell*, 44 Ohio St. 3d 92, 99, 540 N.E.2d 1381, 1387 (1989). See also *Wisintainer v. Elcen Power Strut Co.*, 67 Ohio St. 3d 352, 355, 617 N.E.2d 136, 1138 (1993) ("More important than the avoidance of piecemeal appeals is the avoidance of piecemeal trials.") Moreover, a single appeal in which all objections to the administrative agency's ruling are raised would clearly be much more efficient than multiple appeals, each requiring its own notice of appeal, record and set of briefs.

Seventh, why would it be necessary for an appellee to serve a separate notice of appeal to the same final order? Clearly, an appellant already knows the issues that an appellee is likely to raise in the court appeal since such issues would have been raised in the administrative proceeding. Further, by initiating the appeal, the appellant has, in effect, given explicit approval for the common pleas court's jurisdiction to review all such issues. In short, when one party in a Chapter 2506 appeal files a notice of appeal, there is no reason for the other party to do likewise.

Eighth, in this case a rule of court clearly gave both appellants and appellees in a Chapter 2506 appeal the right to file assignments of error. See Rule 28, Cuyahoga County Court of Common Pleas, Rules of the General Division. So too do the rules of other Ohio common pleas courts. See e.g., Rule 19, Summit County Court of Common Pleas, Rules of Practice and Procedure of the Court of Common Pleas; Rule 21, Local Rules of Court, Stark County Court of Common Pleas. The right of an appellee to assign cross-assignment of error can be given by such rules of court. See 4 Corpus

Juris Secundum (2007) 650, Appeal and Error, Section 718. Further, the fact that these rules of court allow an appellee to essentially assert a cross appeal is hardly unprecedented. See *id.* at 462 (“[I]t has also been held that a cross appeal may be raised in the appellee’s brief without filing notice of it, and that after an appeal has been perfected and lodged in the appellate court it is not required that a party desiring to file a cross appeal give notice of his or her intention to appeal.”) (citations omitted).

As one court has explained in this regard:

The notice of cross appeal [] is not a jurisdiction-invoking document, but instead is in the nature of a cross assignment of error. It therefore follows that the cross appeal must necessarily “piggy back” jurisdictionally on the notice of appeal, and is, accordingly, confined to those trial court orders or rulings adverse to the appellee which either “merge” into or which are an inherent part of the order or orders which are properly under review by the main appeal—much as the main appeal is confined to similar trial court orders or ruling which are adverse to the appellant.

Breakstone v. Baron’s of Surfside, Inc., 528 So.2d 437, 439 (Fla. Dist. Ct. App. 1988).

CONCLUSION

For these reasons, the Court should reconsider its decision that a single notice of appeal does not vest a common pleas court with jurisdiction to consider all issues determined by an administrative board or agency in a Chapter 2506 appeal.

Respectfully submitted,
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By: 
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CERTIFICATE OF SERVICE

I certify that a copy of this Motion for Reconsideration of Decision on the Merits 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 South High Street, Suite 3650, Columbus, Ohio 43215, on May 16, 2012.


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