



## MEMORANDUM IN OPPOSITION

Appellant Nassim M. Lynch has moved this Court to reconsider its unanimous decision issued on May 8, 2012, holding that in an administrative appeal to a court of common pleas pursuant to R.C. 2506.01, each party that seeks to reverse or modify the administrative decision must perfect a separate appeal to confer jurisdiction on the common pleas court to consider that party's assignments of error. A review of Appellant's memorandum in support reveals that Appellant is simply reiterating the same arguments that were presented to, addressed, and rejected by the Court.

Appellant's motion for reconsideration should be denied because it is nothing more than a reargument of the case. Sup. Ct. Prac. R. 11.2. cautions that "[a] motion for reconsideration shall not constitute a reargument of the case . . . ." Appellant raises no new arguments and does not assert that the Court failed to consider any of the arguments set forth by Appellant in his merit brief or reply brief filed with the Court. Appellant simply wants the Court to change its holding. Appellant's memorandum in support merely restates its arguments that a court of common pleas does not exercise appellate jurisdiction under R.C. 2506.01, and that in an administrative appeal the filing of an appeal by one party vests jurisdiction in the court of common pleas to consider all challenges to the underlying decision. The Court thoroughly addressed and rejected both of these arguments in its opinion. *AT&T Communications of Ohio, Inc, v. Lynch*, 2012-Ohio-302, ¶¶ 15, 22, syllabus. Each of the eight observations made in Appellant's memorandum in support are just truncated versions of these arguments that were presented and rejected.

Appellant's first observation repeats his argument that an appeal of an administrative decision is more akin to a retrial than an appeal and therefore, once an appeal is filed by one

party the court has jurisdiction to consider all issues determined by the administrative body. (Appellant's merit brief at 13; Appellant's reply brief at 9). This precise argument was discussed and rejected by the Court in its opinion. *Id.* at ¶¶ 11, 15.

In his second observation, Appellant reasserts his argument that the jurisdiction of common pleas courts in administrative appeals is not appellate jurisdiction. Appellant cites *Farrand v. State Medical Board*, 151 Ohio St. 222 (1949), as supporting that argument. Initially, *Farrand* does not support that argument. To the contrary, *Farrand* rejected the argument that an appeal under the Administrative Procedure Act was a de novo proceeding in which the court of common pleas could substitute its judgment for that of the administrative board. *Id.* at 225. The ruling in *Farrand* is essentially the same as the holding in *Dudukovich v. Lorain Metro. Hous. Auth.*, 58 Ohio St.2d 202 (1979), which this Court relied on in holding that courts of common pleas exercise appellate jurisdiction under R.C. 2506.01. 2012-Ohio-302, ¶ 13.

Appellant's fourth observation, which also erroneously relies upon *Farrand*, reasserts the argument made throughout its merit brief (at 7, 10, and 12) that the language in R.C. 2506.03 stating that the hearing in an administrative appeal shall proceed as in the trial of a civil action establishes that the common pleas court does not exercise appellate jurisdiction. The Court fully addressed and rejected that argument in its decision. 2012-Ohio-302, ¶¶ 12-15.

The argument stated in Appellant's third observation was also asserted in his merit brief (at 5). As he did in his merit brief, Appellant confuses the original jurisdiction conferred upon the courts by the Ohio Constitution with the revisory jurisdiction over administrative decisions conferred by the Ohio Constitution. Under Article IV of the Ohio Constitution, the General Assembly prescribes the jurisdiction of the courts to review decisions of administrative bodies;

that includes the jurisdiction of this Court and the courts of appeals and the courts of common pleas.

The answer to the question Appellant poses in his third observation – isn't the holding that courts of common pleas exercise appellate jurisdiction under R.C. 2506.01 inconsistent with the fact that courts of appeals have such appellate jurisdiction over administrative decisions as provided by law – is no. That question fails to comprehend that it is up to the General Assembly to decide upon which court it will confer appellate jurisdiction over administrative decisions. That body has chosen to confer appellate jurisdiction over certain administrative decisions upon the courts of appeals or upon this Court, such as appeals from the Ohio Board of Tax Appeals pursuant to R.C. 5717.04. With respect to most administrative decisions, however, the General Assembly has chosen to confer appellate jurisdiction on the courts of common pleas pursuant to R.C. 2506.01.

The Appellant's attempted analogy to appellate jurisdiction over death penalty cases fails. Appellant first asks whether the General Assembly could confer jurisdiction on courts of appeals to review judgments imposing the death penalty since the Ohio Constitution confers appellate jurisdiction on this Court over direct appeals in cases in which the death penalty has been imposed. Appellant states that the answer is no and then opines that for the same reason the same is true regarding the appellate jurisdiction over administrative decisions. This attempted analogy fails to perceive the reason that courts of appeals do not have appellate jurisdiction over death penalty cases. The reason is not because the constitution confers jurisdiction over such appeals upon this Court. The reason is because Article IV, Section 3(B)(2) of the Ohio Constitution states that the courts of appeals shall not have jurisdiction to review on direct appeal a judgment imposing the death penalty.

The argument advanced in Appellant's fifth observation – that the perfecting of an appeal by one party from an administrative decision confers jurisdiction on the common pleas court to consider all issues decided by the administrative body - is the same argument made in his merit brief (at 8) and in his reply brief (at 12). This argument was thoroughly considered by the Court and rejected. 2012-Ohio-302, ¶¶16-23.

Appellant's seventh observation repeats the argument made in his reply brief (at 16). It is actually posed as a question: why is it necessary for an appellee in an administrative appeal to file a separate appeal from rulings that were adverse to the appellee? The Court addressed this argument and rejected it, noting the purpose of requiring an appeal to be filed by each party. *Id.* at ¶ 22.

In his eighth observation, Appellant argues that a local rule of court, Loc. R. 28 of the Cuyahoga County Court of Common Pleas, conferred jurisdiction on the common pleas court to consider his cross assignments of error without the need to file a notice of appeal. This argument was made by Appellant in both his merit brief (at 15-19) and his reply brief (at 19). This argument was implicitly rejected by the Court. In any event, the argument is wholly without merit. It is beyond genuine dispute that the jurisdiction of the courts to review decisions of administrative tribunals is a matter within the exclusive province of the General Assembly. It is equally beyond contravention that the revisory jurisdiction of the courts of common pleas cannot be abridged or enlarged by a rule of court. *Akron v. Gay*, 47 Ohio St. 2d 164, 165-166 (1976) (a jurisdictional statute is a substantive law of the state, and cannot be abridged, enlarged, or modified by the Civil Rules). A rule in conflict with a substantive jurisdictional appeal statute is invalid. *State v. Hughes*, 41 Ohio St. 2d 208, 211 (1975) (rule providing an appeal of right in conflict with statute providing a limited appeal right must yield to the statute).

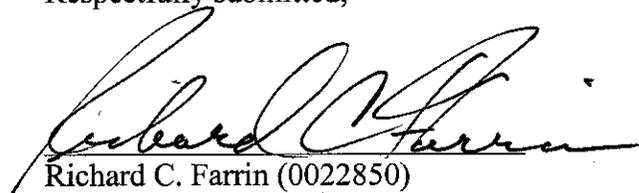
Appellant's sixth observation asserts that requiring each party to file a notice of appeal in an administrative appeal is inconsistent with this Court's pronounced disfavor of piecemeal appeals. But the cases cited are wholly inapposite. Both *Noble v. Colwell*, 44 Ohio St.3d 92 (1989), and *Wisintainer v. Elcen Power Strut Co.*, 67 Ohio St.3d 352 (1993), involved appeals from trial court judgments that were held not to be final appealable orders; neither involved administrative appeals. The reference to piecemeal appeals had nothing to do with requiring both parties who disagreed with portions of a decision to file a notice of appeal. The discussion of piecemeal appeals referred to allowing an appeal of an order that adjudicated less than all of the claims. Such an appeal would be piecemeal because the decision on the appeal would not end the matter. The case would be returned to the trial court to decide the remaining claims.

Obviously, that is not the result of the Court's holding in this case that each party that seeks to reverse or modify an administrative decision must perfect a separate appeal to confer jurisdiction on the common pleas court to consider that party's assignments of error. Imposing such a requirement will not result in the situation where the case will need to be returned to the administrative body after the determination of the appeal. The administrative body decided all of the issues before it; there are no matters left for it to decide. The appeal will determine the entire case. That is clear from the opinion of the Court in this case. The Court did not remand the matter for a determination of any other claims or issues. There will be no piecemeal appeal.

## CONCLUSION

For the reasons set forth above, the Court should deny Appellant's motion for reconsideration of the decision on the merits.

Respectfully submitted,

A handwritten signature in black ink, appearing to read "Richard C. Farrin", is written over a horizontal line.

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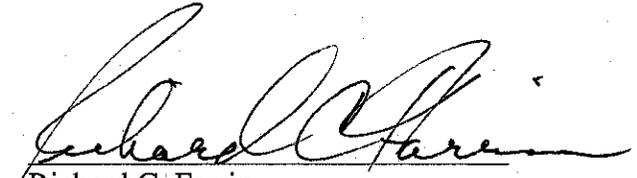
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COUNSEL FOR APPELLEE

**CERTIFICATE OF SERVICE**

The undersigned hereby certifies that a copy of the foregoing MEMORANDUM OF APPELLEE AT&T COMMUNICATIONS OF OHIO, INC. IN OPPOSITION TO APPELLANT'S MOTION FOR RECONSIDERATION OF DECISION ON THE MERITS was served upon Linda L. Bickerstaff, Assistant Director of Law, City of Cleveland Department of Law, 205 W. St. Clair Avenue, Cleveland, Ohio 44113, Counsel of Record for Appellant, by regular U.S. Mail, postage prepaid, this 29<sup>th</sup> day of May, 2012.

  
Richard C. Farrin