

ORIGINAL

IN THE SUPREME COURT OF OHIO

14043 BROOKPARK INC.

Appellant

v.

BEREA CITY SCHOOL DISTRICT
BOARD OF EDUCATION, *et al.*

CUYAHOGA COUNTY
BOARD OF REVISION

CUYAHOGA COUNTY
FISCAL OFFICER

Appellees

On appeal from the Cuyahoga County
Court of Appeals
Eighth Appellate District

Court of Appeals
Case No. 98286

13-0105

**MEMORANDUM IN SUPPORT OF JURISDICTION
OF APPELLANT 14043 BROOKPARK INC.**

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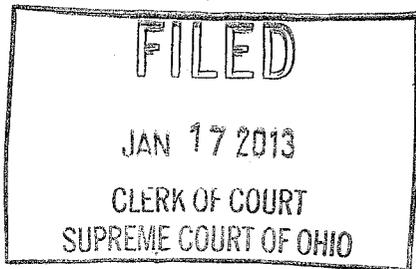


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EXPLANATION OF WHY THIS CASE IS A CASE OF PUBLIC OR
GREAT GENERAL INTEREST AND INVOLVES A SUBSTANTIAL
CONSTITUTIONAL QUESTION

The legal principals presented in this cause affects all property owners in the State of Ohio, and materially affect the standards of procedural due process for all Ohio litigants. The unprecedented decision of the court of appeals may lead to obtaining default judgment or other forfeiture of property rights, with no proof of notice required. It replaces a statutory requirement for certified mail notice with a mere intent to send a letter copy as sufficient for due process.

The specific issue here is whether a property owner can forfeit its right of appeal, if, without timely notice, a prior appeal of the same decision of the Board of Revision was filed in the Board of Tax Appeals and subsequently voluntarily dismissed. The property rights in this and other similar cases involve tens of thousands of dollars that are being taxed without due process.

The due process issues presented involve Sections 5717.01 and 5717.05 of the Ohio Revised Code, which set forth the procedure for perfecting appeals from decisions of county Boards of Revision. Both sections require service upon all other affected parties by certified mail. In R.C. 5717.05, certified mail notice is to be sent by the Appellant. In R.C. 5717.01, certified mail notice is required to be sent by the Board of Revision upon receipt of the notice of appeal.

The court of appeals vitiates the requirement that certified mail notice be sent upon receipt of the notice of appeal as mandated in R.C. 5717.01. Instead, it ruled that a notation at the bottom of a letter sent by the Board of Tax Appeals (BTA), addressed to counsel for the party that filed in the BTA, that a copy was to be sent to 14043 Brookpark Inc., is sufficient "notice."

This abrogation of the specific statutory certified mail notice requirement for due process will eventually be applied to all litigation, most notably regarding default judgments.

In making its decision, the court of appeals not only disregards the standards of procedural due process, but also ignores the rules of evidence.

The notation relied on by the court of appeals fails to indicate the address where the copy was supposed to be sent, or the method to be used. There is no evidence in the record to indicate that the copy was actually mailed, that it was delivered to the correct address, or that it was received by Appellant. The court of appeals provides no authority, and to Appellant's knowledge, reliance upon nothing more than a "cc" notation on a letter address to another party's counsel as a proof of service is not only unjust but unprecedented.

The court of appeals has also distorted the content requirement for adequate due process notice. The "notice" letter was not addressed to the party which is being deprived of its right to appeal. Moreover, it was not even meant to be a notice letter at all, since it is addressed to the counsel who filed the appeal in the first place. The purpose of the letter was not to provide notice, but to inform filing counsel that BTA has experience severe budget cuts. If such a letter passes muster as due process, then there will no longer be any standards at all for due process.

To reach its decision the court of appeals not only discards concepts of procedural due process, but it also ignores the plain language in the subject statutes. The words, "upon receipt," are redefined to mean forty-five (45) days. When it was pointed out that the Board of Revision (BOR) did not even meet that arbitrary standard, the mandatory words were ignored altogether. Similarly, the court of appeals morphed the word "perfected" and rendered it as meaning nullity. The implications of the court of appeal's decision are broad and ominous. Long standing standards of due process, rules of evidence, and statutory construction have been overturned. The legal concepts in this decision will eventually have to be rejected. It might as well be now.

STATEMENT OF THE CASE AND FACTS

The underlying subject matter of this appeal is a five story motel, approximately 65,205 square feet with 126 total units (dozens now inoperable), that was constructed in 1965, located at 14043 Brook Park Road, Brook Park Ohio 44142, operating as an America's Best Value Inn. Appellant purchased the motel and adjoining lot in November 2000 for \$2 million, and Cuyahoga County Auditor has essentially based its valuation of the property on that purchase price.

The economic aftershocks which began on September 11, 2001, caused motel occupancy to steadily decline, resulting in a downward spiral of disrepair and falling revenues.

Appellant filed an appeal with the BOR, where Appellant's principal testified regarding the substantially diminished occupancy rate, the total failure of the motel heating system, and the unavailability of dozens of room units due to disrepair, and presented an appraisal prepared a Certified General Appraiser, setting the fair market valuation at \$1,200,000. In a decision dated November 4, 2009, the Board of Revision set the new valuation for the property at \$1,850,000.

Appellant timely filed and perfected an appeal from that decision on December 3, 2009, in Cuyahoga County Court of Common Pleas (CCP) Case Number CV-09-711832, before Judge Nancy Margaret Russo.

On January 5, 2010, Appellant received notice from BOR that a prior dated appeal regarding the same decision, BOR Case Numbers 200902210378 and 200906020613, pertaining to Permanent Parcel Number 344-06-006, had been filed by the Berea City School District Board of Education (Berea) on November 17, 2009, with the Ohio Board of Tax Appeals (BTA).

On January 14, 2010, Berea filed a Motion to Dismiss Administrative Appeal. On January 21, 2010, Appellant filed a Brief in Opposition to Berea's Motion to Dismiss and a filed

a Motion to Remove Appeal to BTA. Appellant concurrently filed Notices of Appeal with BTA.

On January 29, 2010, Judge Russo in the CCP case ruled:

The Ohio Board of Tax Appeals has exclusive jurisdiction over this case at this time. Therefore case is removed to the Ohio Board of Tax Appeals for further proceedings.

Berea did not appeal Judge Russo's ruling in the CCP case.

On April 19, 2011, more than a year after CCP removed the appeal filed therein, BTA issued an Order denying the motion to remove appeal from the CCP, holding, "the court of common pleas never acquired jurisdiction over the appeal filed with it."

On March 12, 2012, as was obvious from the onset, Berea filed its Notice of Voluntary Dismissal. Appellant objected, but to no avail. BTA granted the dismissal on March 27, 2012.

The issue to be resolved is whether or not a timely administrative appeal filed and perfected in the Court of Common Pleas can be rendered a nullity by filing, without timely notice, a prior dated appeal with the Board of Tax Appeals. As such, the operative facts are contained in the time line provide above.

ARGUMENT IN SUPPORT OF PROPOSITIONS OF LAW

Proposition of Law No. 1: When a statute requires mandatory certified mail notice to be sent upon receipt of a notice of appeal, sending such notice fifty-four (54) days after receipt of the notice of appeal does not satisfy the statutory requirement, nor the constitutional requirements of procedural due process, and the affected party cannot be deprived of property or lose its statutory right to appeal as a result.

It is uncontroverted that Appellant duly filed and perfected its appeal of the decision of the Board of Revision (BOR) in the Court of Common Pleas (CCP) pursuant to ORC 5717.05. It is likewise uncontested that Appellee Berea Board of Education (Berea) had earlier filed an appeal with the Board of Tax Appeals (BTA) pursuant to ORC 5717.01, which provides in part:

Upon receipt of such notice of appeal such county board of revision **shall** by certified mail notify all persons thereof who were parties to the proceeding before such county board of revision, and shall file proof of such notice with the board of tax appeals.
[Emphasis added.]

Berea filed its appeal with BTA and BOR on November 18, 2009. Notice of that appeal was served by the BOR upon Appellant fifty-four (54) days later, on January 5, 2010, more than one month after the deadline for filing a notice of appeal from the BOR decision. Had BOR complied with its mandate under ORC §5717.01, Appellant would have had sufficient time to file its notice of appeal with the BTA, instead of blindly filing it with the CCP without notice.

The court of appeals erroneously states, “R.C. 5717.01 contains no time period in which the board must send a formal notice to interested parties. “Upon receipt” has a specific and plain meaning. The time period is unambiguous. The legislature intended notice as soon as possible.

The paramount goal of statutory construction is to ascertain and give effect to the legislature's intent in enacting the statute. *Yonkings v. Wilkinson*, 86 Ohio St.3d 225, 227 (1999);

Brooks v. Ohio State Univ., 111 Ohio App.3d 342, 349 (10th Dist.1996), citing *Featzka v. Millcraft Paper Co.*, 62 Ohio St.2d 245 (1980). In so doing, the court must first look to the plain language of the statute and the purpose to be accomplished. *State ex rel. Pennington v. Gundler*, 75 Ohio St.3d 171, 173 (1996) (internal quotations omitted).

The legislature's intent was unambiguously to give prompt notice by certified mail.

In *Miller v. Miller*, 2012 Ohio 2928 (Ohio, 2012), the Ohio Supreme Court had occasion to rule on the meaning of "upon receipt," and applied those words using their ordinary meaning.

Moreover, the word "shall" is ordinarily understood to mean mandatory. *Dorrian v. Scioto Conservancy Dist.*, 27 Ohio St.2d 102, 108, 271 N.E.2d 834 (1971) (quoting *Dennison v. Dennison*, 165 Ohio St. 146, 149, 134 N.E.2d 574 (1956)).

In the filing of appeals, the Ohio Supreme Court has held, "Where a statute confers the right of appeal, adherence to the conditions thereby imposed is essential to the enjoyment of the right conferred." *Am. Restaurant & Lunch Co. v. Glander* (1946), 147 Ohio St. 147, 34 O.O. 8, 70 N.E.2d 93, paragraph one of the syllabus.

The US standard of due process, was first enunciated in *Mullane v. Central Hanover Bank & Trust Co.*, 339 U.S. 306, at page 314, 70 S.Ct. 652, at page 657, 94 L.Ed. 865 (1950):

An elementary and fundamental requirement of due process in any proceeding which is to be accorded finality is **notice reasonably calculated, under all the circumstances**, to apprise interested parties of the pendency of the action and afford them an opportunity to present their objections. [Emphasis added.]

The standard of due process announced in *Mullane* was first adopted in Ohio in *Samson Sales, Inc. v. Honeywell, Inc.*, 421 N.E.2d 522, 66 Ohio St.2d 290 (1981) and has been consistently applied in numerous Ohio cases.

Procedural due process demands at a minimum that one who is to be deprived of property by the state be given notice of the action and an opportunity to be heard. Both the notice and the opportunity to be heard, " must be granted at a meaningful time and in a meaningful manner where the state seeks to infringe on a protected liberty or property interest." *State v. Hochhauser*, 76 Ohio St.3d 445, 459 (1996).

Accordingly, Appellant should not be denied due process and its right to appeal when the notice provision required by the applicable statute was not timely complied with by BOR.

Proposition of Law No. 2: When a statute requires mandatory certified mail notice, a mailing sent by ordinary mail does not satisfy the statutory requirement nor constitutional requirement of procedural due process, and the affected party cannot be deprived of property or lose its statutory right to appeal as a result.

The preferred method for serving process in Ohio is certified mail, which is evidenced by a signed return receipt. *New v. All Transp. Solution, Inc.*, 895 N.E.2d 606, 177 Ohio App.3d 620, 2008 Ohio 3949 (2008). Rule 4.6(D) of the Ohio Rules of Civil Procedure permits service to be made by ordinary mail if the attempted service by certified mail is returned unclaimed. In its Opinion, however, the court of appeals has eliminated the requirement that certified mail be first attempted and returned before ordinary mail can be used to deny a party of its right to appeal.

Sections 5715.01 and 5717.05 both have certified mail notice requirements. Neither has a provision for notice by ordinary mail. The court of appeals has, in effect, rewritten the statutes.

Even assuming *arguendo* that a copy of the letter addressed to Berea's attorney was sent to Appellant by ordinary mail, an assumed fact which is not supported in evidentiary form, such non-statutory notice is not reasonably calculated under all circumstances to apprise the interested party of the pendency of the appeal and to afford Appellant an opportunity to be heard.

In an analogous case, the court in *Black-Dotson v. Obetz*, 2006 Ohio 5301 (Ohio App. 10/10/2006), rejected the perfection of an appeal by ordinary mail. It held, “Appellant has not provided any case law in which a notice of appeal was sent by ordinary mail and found to satisfy the requirements of R.C. 2505.04.”

Proposition of Law No. 3: An indication at the bottom of a letter addressed to counsel for one party that a copy of the letter was to be sent to another party, but not to its counsel of record, with no evidence in the record of the method of transmission, the address used, or whether the letter was sent, delivered, or received, does not satisfy the constitutional requirements of procedural due process and the affected party cannot be deprived of property or lose its statutory right to appeal as a result..

Appellant was known to have been represented by counsel of record. The statutory notice subsequently sent by Board of Revision was appropriately copied to Appellant’s counsel. The letter addressed to Berea’s counsel by Board of Tax Appeals has no such indication.

In an analogous situation, the court in *City of Cincinnati v. York Rite Bldg. Assn.*, 843 N.E.2d 250, 164 Ohio App.3d 591 (2005), held that when violation notices were appropriately sent by a city to a property owner pursuant to statute, but notices were not sent to counsel when the city knew that the owner was represented by counsel, the issue of due process is applicable.

In the instant appeal, the “notice” from Board of Tax Appeals was not sent pursuant to statute, and there was no attempt to provide a copy of the notice to Appellant’s counsel, when the his identity and address were known or easily obtainable. Relying on such a notice for due process is made even more unreasonable in the context of a party who had retained counsel of record, where all similar notices have always gone directly to counsel

For the reasons set forth above, Appellant should not be denied its right to appeal without due process.

Court of Appeals of Ohio

EIGHTH APPELLATE DISTRICT
COUNTY OF CUYAHOGA

JOURNAL ENTRY AND OPINION
No. 98286

**BEREA CITY SCHOOL DISTRICT BOARD OF
EDUCATION**

PLAINTIFF-APPELLEE

vs.

**CUYAHOGA COUNTY BOARD OF REVISION,
ET AL.**

DEFENDANTS-APPELLEES

[APPEAL BY 14043 BROOKPARK, INC.]

**JUDGMENT:
AFFIRMED**

Civil Appeal from the
Ohio Board of Tax Appeals
Case Nos. 2009-A-3433 and 2009-A-3434

BEFORE: Rocco, J., Boyle, P.J., and Sweeney, J.

RELEASED AND JOURNALIZED: October 4, 2012

dismissing its appeal to the BTA over the objection of the other parties. Ohio Adm.Code 5717-1-17(A). *Compare Tower City Props. v. Cuyahoga Cty. Bd. of Revision*, 49 Ohio St.3d 67, 70, 551 N.E.2d 122 (prior version of statute prevented unilateral dismissal of court appeal).

{¶18} Neither the BTA nor this court has the authority to rewrite statutes. *Jefferson Golf & Country Club v. Leonard*, 10th Dist. No. 11AP-434, 2011-Ohio-6829, ¶ 29. R.C. 5717.01 contains no time period in which *the board* must send a formal notice to interested parties that an appeal of the board's decision has been filed with the BTA.³ *Compare Austin Co. v. Cuyahoga Cty. Bd. of Revision*, 46 Ohio St.3d 192, 546 N.E.2d 404 (1989) (filing of notice of appeal with board is jurisdictional requirement).

{¶19} The record of this case reflects the owner received notice of the district's appeal of the board's decision through the BTA by way of a carbon copy of the acknowledgment letter the BTA sent to the district. Rather than institute a timely appeal of its own with the BTA, the owner sought to take advantage of the board's tardiness in providing formal notification to the parties of the district's appeal, seeking to obtain another tribunal.

³This is not to say that this court approves of the board's tardiness in providing formal notice to the owner of the district's appeal to the BTA. In light of Ohio Adm.Code 5717-1-09(B), which requires the board to certify the transcript to the BTA within 45 days of the filing of a notice of appeal to the BTA, the formal notification of the appeal should be made to the parties within the same time period.

{¶20} Because the language of R.C. 5717.01 demonstrates the board's formal notification to parties that an appeal has been filed is not a jurisdictional requirement, the owner's effort did not, in itself, serve to confer jurisdiction on the BTA over the owner's R.C. 5717.05 appeal. *Trebmal*. Simply put, the district acted first to secure its tribunal; the owner did not.

{¶21} Under these circumstances, the BTA did not act in an unreasonable and unlawful manner in either refusing to entertain an appeal by the owner or allowing the district to dismiss its appeal.

{¶22} Accordingly, the owner's assignments of error are overruled.

{¶23} The BTA's decisions are affirmed.

It is ordered that appellees recover from appellant costs herein taxed.

The court finds there were reasonable grounds for this appeal.

It is ordered that a special mandate be sent to said court to carry this judgment into execution.

A certified copy of this entry shall constitute the mandate pursuant to Rule 27 of the Rules of Appellate Procedure.



KENNETH A. ROCCO, JUDGE

MARY J. BOYLE, P.J., and
JAMES J. SWEENEY, J., CONCUR

Court of Appeals of Ohio, Eighth District

County of Cuyahoga
Gerald E. Fuerst, Clerk of Courts

BEREA CITY SCH.DIST.BD. OF EDUCATION

Appellee

COA NO.
98286

LOWER COURT NO.
2009-A-3433
2009-A-3434

BOARD OF TAX APPEALS

-vs-

CUYAHOGA CTY.BD. OF REVISION, ET AL.

Appellee

MOTION NO. 459374

Date 12/03/12

Journal Entry

Motion by Appellant for reconsideration is denied.

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DEC X 3 2012

GERALD E. FUERST
CLERK OF THE COURT OF APPEALS
BY [Signature] DEP.

Presiding Judge MARY J. BOYLE, Concur

Judge JAMES J. SWEENEY, Concur

[Signature]
Judge KENNETH A. ROCCO

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