ORIGINAL

IN THE SUPREME COURT OF OHIO

Janine Lycan, et al.	:	Supreme Court Case No. 14-0358
	:	
Plaintiffs-Appellees,	:	On Appeal from the Cuyahoga County Court of Appeals, Eighth Appellate District (Case No. 99698)
v.	:	
City of Cleveland,	:	
	:	
Defendant-Appellant.	:	

REPLY BRIEF OF AMICUS CURIAE REDFLEX TRAFFIC SYSTEMS, INC. IN SUPPORT OF DEFENDANT-APPELLANT CITY OF CLEVELAND

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I. Appellees seek to disrupt settled Ohio law providing that if a party does not request or take part in an available administrative proceeding, she cannot later collaterally attack the result.

Appellees' position is that after receiving a notice of liability, they can knowingly decide not to oppose it, pay the civil fine, and then years later collaterally attack the final consent judgment. This upends decades of well-established Ohio jurisprudence. Whether the relevant legal basis is res judicata, waiver, or failure to exhaust administrative remedies, the case law reaffirms time and again that one cannot admit liability by paying a civil fine and then sue to recover that amount under equitable theories. Similarly, one cannot opt out of the administrative process only to collaterally attack the results of doing so.

These principles are fundamental to Ohio law. To circumvent them, Appellees focus on the res judicata element of "final judgment" and assert the flawed premise that failure to participate in an administrative process does not produce a valid final judgment. In fact, Ohio law is replete with examples in which the administrative process does produce a binding judgment even if individuals decline to participate. Once waived, the adverse determination is final the same as if the individual had participated and not prevailed on the merits.

For example, in *Wymsylo v. Bartec, Inc.*, 132 Ohio St.3d 167, 2012-Ohio-2187, 970 N.E.2d 898, ¶¶ 18-32, appellants had the opportunity to request an administrative hearing when they were cited for violating smoke-free laws, but failed to do so. This Court held that they had waived any right to challenge the citation and could not collaterally attack it in a later suit.

In *Perez v. Simkins*, 7th Dist. Mahoning No. 13-MA-146, 2014-Ohio-4006, Simkins received an order from the Mahoning County Child Support Enforcement Agency ("CSEA") increasing her monthly child support obligation. Despite having been provided with an opportunity to contest the increase, she failed to do so. The court held she could not later

challenge the increase in the child support because "she did not request an administrative hearing in response to the CSEA's administrative adjustment recommendation." *Id.* at ¶ 9.

Likewise, in *In re Rummel*, 194 Ohio App.3d 22, 2011-Ohio-2748, 954 N.E.2d 207 (10th Dist.), the appellate court held that res judicata prevented a father from later seeking to modify a determination of the county CSEA when he failed to challenge the CSEA's recommendations and failed to appeal the trial court's adoption of those recommendations. Specifically, the court found res judicata "bars further litigation of issues that were raised or could have been raised previously." *Id.* at ¶ 14. That is because "the father had the opportunity to litigate the [child support amount] in prior proceedings but failed to request an administrative hearing or object to the recommendation of the CSEA." *Id.* The entry adopting the recommendations of the CSEA—even in the absence of a hearing—was a binding, final, appealable order.

And in *Swartz v. ODJFS*, 12th Dist. Butler No. CA2014-01-004, 2014-Ohio-3552, ¶ 12, the Swartzes received a proposed adjudication order from ODJFS notifying them that it was planning to revoke the certification of their home as a foster home for children. They were informed in the notice that they could request a hearing on the matter within 30 days from the date the notice was mailed. Despite the notice, the Swartzes did not request a hearing and they received a final adjudication order revoking their certification. After the deadline for doing so, they attempted to appeal to the common pleas court pursuant to R.C. 119.12, which dismissed the appeal for lack of jurisdiction and failure to exhaust administrative remedies. The appellate court affirmed and found not only that the R.C. 119.12 appeal was untimely but that the underlying "failure to timely request an administrative hearing constitutes a failure to exhaust administrative remedies." *Id.*

In *Richmond v. Ohio Bd. of Nursing*, 10th Dist. Franklin No. 12AP-328, 2013-Ohio-110, ¶ 13, Richmond received notice from the Ohio Board of Nursing that her license was indefinitely suspended for abuse of drugs and alcohol. The notice advised of an opportunity for hearing if requested within 30 days, attached a consent agreement offering terms for her reinstatement with conditions, and advised that the Board was authorized to take action including permanent revocation of her license due to non-compliance with existing drug and alcohol-testing requirements. Richmond failed to request a hearing, and the Board permanently revoked her license to practice. She timely appealed pursuant to R.C. 119.12, claiming as-applied due process violations in the underlying administrative process. The trial court found no due process violations and affirmed the order of permanent license revocation; the appellate court agreed.

Here, again, the relevant order was entered without a hearing because the recipient failed to request one. Nonetheless the resulting order was final, binding, and upheld on appeal. This result was notwithstanding the fact that the order concerned a serious consequence—revocation of an individual's ability to work in her profession—compared to a relatively minor civil traffic fine.

Similarly, in *Jain v. Ohio State Medical Board*, 10th Dist. Franklin No. 09AP-1180, 2010-Ohio-2855, the appellant physician/surgeon received a notice from the State Medical Board of its intention to determine whether to take adverse action against her certificate to practice medicine and surgery on the basis that her California and Nevada medical licenses had been suspended. Although appellant's counsel sent a responsive letter to the notice, the Board determined it was not a request for hearing. Thereafter, the Board heard the matter and issued a non-permanent revocation of the appellant's license. *Id.* at ¶ 4. The physician appealed the order to the common pleas court, which dismissed the appeal for failure to exhaust

administrative remedies. On appeal, she claimed due process violations in the Board's failure to construe her lawyer's letter as a request for hearing. Accepting the basic premise that "a party generally waives the right to appeal an issue that could have been, but was not, raised in earlier proceedings," the Tenth District affirmed dismissal and found the doctrine of failure to exhaust administrative remedies had been properly applied by the trial court.

In *Nat'l Amusements, Inc. v. Union Twp. Bd. of Zoning Appeals*, 12th Dist. Clermont No. 2002-12-107, 2003-Ohio-5434, the owner of a property abutting other parcels for which zoning variances were approved could not appeal the variance decision when he was provided notice of a hearing and failed to participate. The owner lacked standing pursuant to R.C. 2506 because participation in the underlying hearing was necessary to preserve a right to appeal.

Here, the result is even more compelling than in many of these cases because most of the Appellees not only failed to request or participate in an administrative hearing, but they took affirmative actions to the contrary: *they chose to pay the fine without ever seeking to invoke the administrative process.*

This is not a novel concept. The principle requiring parties to raise their arguments or risk waiver, res judicata, or another preclusion theory is present in all levels of the judiciary. *See, e.g.,* Ohio R.Civ.P. 12(H) (providing for waiver of defenses if not raised in Rule 12 motion or responsive pleading); Ohio R.Civ.P. 53(A)(3)(a)(iii) (requiring party to raise any objection to magistrate's decision or be barred from assigning any error on appeal); *State ex rel. Gibson v. Indus. Comm.*, 39 Ohio St. 3d 319, 320, 530 N.E.2d 916 (1988) (party cannot raise new argument for first time on appeal).

Appellees have asserted only equitable claims—declaratory relief and unjust enrichment—and they claim it would be inequitable to allow Cleveland to retain fines it never

should have received. But it is Appellees who failed to exercise their rights and then sat on their claims. Equity does not come to those who sit on their rights. And it would be more inequitable to allow Appellees to recover monies they voluntarily paid long ago and to require Cleveland—which is essentially comprised of its taxpayers—to refund such monies. *See also United States v. 5074 Lebanon Road*, 1995 U.S. App. LEXIS 1603, *10 (6th Cir. Jan. 23, 1995) (finding individuals waived rights to claim status as "innocent owners" to reclaim government proceeds from sale of seized property that was used as a crack house because the individuals failed to timely submit a claim asserting lack of involvement in and knowledge of illegal drug activity).

The *5074 Lebanon Road* case demonstrates the well-established proposition that a refund of monies paid to a governmental entity is not available to individuals who fail to timely pursue their rights. Again, the instant case is even more persuasive here because (1) Appellees voluntarily paid the monies they seek to recover, and (2) the monies are for a relatively minimal civil traffic fine, not the value of a home.

II. Appellees could have raised the defense that they were not liable under the ordinance; they just chose not to.

Appellees claim that they did not have to request a hearing—that they can use equity to recover the civil fines they paid because they never should have been subjected to the ordinance because they were lessees rather than owners. But just because they may not have been subjected to the Ordinance does not mean they are entitled to their money back. This situation is no different than any other in which those who may not have been subjected to an ordinance chose to pay the fine voluntarily rather than contesting it. Here, *prima facie* defenses may have included: (1) "I was not an owner"; or (2) "I was not speeding/did not run a red light." Other *affirmative* defenses might have included emergency and weather conditions. A defense of being a lessee rather than an owner.

Appellees should have raised their defenses rather than merely paying. In fact, the former is exactly what the Dickson & Campbell firm did in *Dickson & Campbell L.L.C. v. Cleveland,* 181 Ohio App.3d, 2009-Ohio-3625, 910 N.E.2d 478 (8th Dist.) – and it won.

Appellees' further argument that the hearing would have been futile is neither correct nor persuasive. To that end, the Ordinance required an "owner" within the definition of the violation. Appellees cannot possibly know whether proof offered at a hearing that they were not "owners" would have excused them from the violation. And that is the point of having the hearing: to assert defenses.

Even assuming Cleveland misinterpreted the Ordinance and had a "policy" to issue notices of liability to both "owners" and "lessees," it does not automatically follow that an individual who proved they were not an "owner" at a hearing would still have been found liable. Again, this uncertainty is the whole point. Appellees needed to request a hearing, raised the defense, and, only if still liable, timely appeal.

Claiming futility is merely an after-the-fact contrivance to avoid the reality that after being fully advised of the right to a hearing, they chose to pay the fine without any protest. Allowing Appellees to receive refunds now upends all of the above Ohio jurisprudence and the administrative hearing system as a whole.

III. Appellees' claimed heavy cost and burden to pursue an administrative appeal is not legally relevant or factually correct.

Appellees contend that res judicata does not apply because the administrative appeal process is a "gauntlet"—the cost is allegedly too heavy and the burden is allegedly too great to require individuals to actually pursue an administrative appeal at the time they receive their notice of liability. (Appellees' Brief at 26-28.) They contend that the law firm in *Dickson &*

Campbell was successful because it was represented by *pro bono* counsel and possessed the resources to pay the filing fees.

First, this argument is legally irrelevant. This Court has held that "the mere fact that pursuing [an] administrative appeal may result in more delay and expense does not render it inadequate." *State ex rel. Kingsley v. State Employment Relations Board*, 130 Ohio St.3d 333, 2011-Ohio-5519, 958 N.E.2d 169, ¶ 20. This Court has held that this very administrative appeal is an adequate remedy at law for each person who received a notice of liability. *See State ex rel. Scott v. City of Cleveland,* 112 Ohio St.3d 324 (2006) ("appellants have an adequate remedy in the ordinary course of law by way of the administrative proceedings set forth in Section 413.031 and by appeal of the city's decision to the common pleas court.").

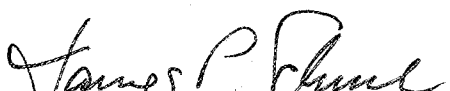
Moreover, this alleged "undue burden and cost" argument is belied by the fact that individuals have pursued administrative appeals under the Ordinance. For instance, Darrell Dawson had little problem securing counsel and appealing the finding of liability under the same ordinance—all the way to the Eighth District Court of Appeals. *See Dawson v. City of Cleveland,* 8th Dist. Cuyahoga No. 99964, 2014-Ohio-1636. Chemeca Davis likewise had no problem obtaining counsel—the same counsel that represented Darrell Dawson—to appeal from her finding of liability under the same ordinance. *See Davis v. City of Cleveland*, 8th Dist. Cuyahoga No. 99187, 2013-Ohio-2914. And in *City of Cleveland v. Cord*, 8th Dist. Cuyahoga No. 96312, 2011-Ohio-4262, Daniel Cord was represented by counsel in his administrative appeal under the ordinance.

As these cases demonstrate, it is fundamentally untrue that the cost and burden to pursue an administrative appeal under the Ordinance would be too great. Many have done it. Further, there is no reason this situation is different from any other in which additional time and/or

expense are a byproduct of pursuing an administrative appeal. In fact, it is difficult to imagine a scenario in which a further appeal would not require some time and expense. Therefore, there is no basis for differentiating this case from the many other administrative hearing and appeal contexts operating in Ohio every day.

For the reasons set forth above and set forth in the briefs of Defendant-Appellant and its amici, this Court should reverse the decision of the Eighth District Court of Appeals.

Respectfully submitted,



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