

**IN THE SUPREME COURT OF OHIO**

BOARD OF EDUCATION OF THE :  
COLUMBUS CITY SCHOOLS, :  
 : Case No. 2014-0839  
Appellee, :  
 : Appeal from Board of Tax Appeals  
v. : BTA Case Nos. 2012-3902 & 2012-3903  
 :  
FRANKLIN COUNTY BOARD OF :  
REVISION, et al., :  
 :  
Appellees, :  
 :  
& :  
 :  
770 WEST BROAD AGA, LLC, and :  
WBS COLUMBUS, LLC, :  
 :  
Appellants.

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APPELLEE COLUMBUS CITY SCHOOLS' MOTION TO STRIKE  
APPELLANTS' REQUEST FOR AFFIRMATIVE RELIEF IN ITS  
MEMORANDUM IN OPPOSITION TO MOTION TO DISMISS

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Now comes Appellee Columbus City Schools Board of Education (the “Board of Education”) and hereby moves this Honorable Court to strike that portion of Appellants’ response to Appellee Board of Education’s Motion to Dismiss Appeal that requests affirmative relief from this Court in violation of S.Ct.Prac.R. 4.01(A)(1).

#### STATEMENT OF FACTS

On January 22, 2015, the Board of Education filed a motion to dismiss Appellants’ appeal respectfully requesting that the Court dismiss the instant appeal since Appellants failed to strictly comply with R.C. 5717.04 in failing to name the Tax Commissioner as an appellee and timely serve him with a copy of the notice of appeal. *See* Appellee Columbus City Schools’ Motion to Dismiss Appeal (the “Motion to Dismiss”).

On February 2, 2015, Appellants filed their response pursuant to S.Ct.Prac.R. 4.01(B)(1) but requested additional affirmative relief in the form of a stay of this Court’s review of, and ruling upon, the Motion to Dismiss until such time as Appellants could obtain the Tax Commissioner’s consent to, and filing of, an untimely waiver of service of the notice of appeal. *See* Appellants 770 West Broad Street AGA, LLC and WBS Columbus, LLC’s Memorandum in Opposition to Motion to Dismiss (“Appellants’ Response”).

#### LAW AND ARGUMENT

Pursuant to S.Ct.Prac.R. 4.01(A)(1), all requests for affirmative relief must be made to the Court in the form of a formal motion:

“Unless otherwise addressed by these rules, an application for an order or other relief shall be made by filing a motion for the order or relief. The motion shall state with particularity the grounds on which it is based.”

S.Ct.Prac.R. 4.01(A)(1). The unmistakable intent of this Rule is to allow the opposing parties to respond to such request for relief as set forth in S.Ct.Prac.R. 4.01(B)(1):

“If a party files a motion with the Supreme Court, any other party may file a response to the motion within ten days from the date the motion is filed, unless otherwise provided in these rules or by order of the Supreme Court.”

S.Ct.Prac.R. 4.01(B)(1).

Appellants have requested affirmative relief in the form of a stay of the Court’s ruling upon the Motion to Dismiss: “We ask this Court to hold that the Tax Commissioner may issue a waiver of such service in this case up until the deadline for appellee’s to file their briefs, and on that basis, to stay ruling on Appellee Columbus School District’s Motion to Dismiss until that time.” See Appellants’ Response at p.5-6 (emphasis added). In so doing, they have deprived the Board of Education of an opportunity to respond to their request and fully develop its legal arguments in opposition.

In brief, the Board of Education opposes the requested stay for the following reasons: the Commissioner’s “waiver” of service would only be proper if obtained within the thirty-day appeal period; the Commissioner was prejudiced by Appellants’ failure to serve him; and the Court’s recent decision in *Columbus City Schools Bd. of Edn. v. Franklin Cty. Bd. of Revision*, Slip Op. 2015-Ohio-150 (Jan. 21, 2015) (“*Mike Ferris Properties*”) is indistinguishable.

*Berea City School Dist. Bd. of Edn. v. Cuyahoga Cty. Bd. of Revision*, 111 Ohio St. 3d 1219, 2006-Ohio-5601, 857 N.E.2d 145, ¶ 2, requires service upon the Commissioner to be “initiated” within the thirty-day appeal period to comply with R.C. 5717.04. This holding fully comports with the language of R.C. 5717.04 itself which permits any appellee, upon receiving service of a notice of appeal, to file a cross-appeal within ten days of filing of the notice of appeal, or within the thirty-day appeal period, whichever occurs later. R.C. 5717.04. The

Commissioner was prejudiced by Appellants' failure to properly serve him with the notice of appeal since he was deprived of the opportunity to file a cross-appeal pursuant to R.C. 5717.04. Accordingly, for the Commissioner's potential "waiver" to be effective, he must waive before the conclusion of thirty-day appeal period and in express recognition of the foregone ability to participate in the matter by filing both a cross-appeal and a brief.

*Mike Ferris Properties* is indistinguishable and the Court rejected the identical argument Appellants raise here regarding the Commissioner's ability to participate in briefing. There, upon the board of education's disclosure of its intent to seek dismissal of appellant's appeal, appellant promptly served the Commissioner, long before the briefs were due. *Mike Ferris Properties, supra*, at ¶ 2. The Court explicitly acknowledged that "the tax commissioner was served well in advance of the briefing of this case." *Id.* Notwithstanding, the Court held that dismissal was warranted by *Berea* since appellant failed to "initiate" service within the thirty-day appeal period. *Id.* at ¶ 5.

In conclusion, the Board of Education respectfully requests that the Court strike Appellants' motion for stay from Appellants' Response. Appellants have requested affirmative relief in violation of S.Ct.Prac.R. 4.01(A)(1) without adequate opportunity for the Board of Education to meaningfully respond and develop its merited objections summarily raised above.

Respectfully Submitted,

/s Kelley A. Gorry  
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CERTIFICATE OF SERVICE

The undersigned certifies that a true and accurate copy of the foregoing was served, by electronic mail transmission, and regular U.S. Mail, postage prepaid, upon: James V. Maniace, Esq., Taft Stetinius & Hollister, LLP, 65 East State Street, Suite 1000, Columbus, OH 43215; William J. Stehle, Esq., Assistant County Prosecutor, 373 South High Street, 20<sup>th</sup> Floor, Columbus, OH 43215; and Honorable Michael DeWine, Esq., Ohio Attorney General, 30 East Broad Street, 14<sup>th</sup> Floor, Columbus, OH 43215, this 4<sup>th</sup> day of January, 2015.

/s Kelley A. Gorry \_\_\_\_\_  
Kelley A. Gorry (0079210)