[Cite as *Horner v. Washington Twp. Bd. of Trustees*, 2011-Ohio-5871.]

IN THE COURT OF APPEALS

TWELFTH APPELLATE DISTRICT OF OHIO

CLERMONT COUNTY

TERRY G. HORNER, et al.,	:	
Appellants,	:	CASE NO. CA2011-02-008
	:	O P I N I O N
- vs -	:	11/14/2011
BOARD OF WASHINGTON TOWNSHIP TRUSTEES,	:	
	:	
Appellee.	:	

APPEAL FROM CLERMONT COUNTY COURT OF COMMON PLEAS
Case No. 2010 CVF 1669

T. David Burgess, 110 N. Third Street, Williamsburg, Ohio 45176-1322, for appellants

R. Aaron Maus, 302 East Main Street, Batavia, Ohio 45103, for appellee

HENDRICKSON, P.J.

{¶1} Plaintiffs-appellants, Terry and Barbara Horner (the Horners), appeal the decision of the Clermont County Court of Common Pleas dismissing their administrative appeal for failure to state a claim upon which relief can be granted. For the reasons set forth below, we reverse the lower court.

{¶2} The Horners filed an appeal to Court of Common Pleas of the Washington Township Board of Trustees' decision to grant the petition for a partition fence filed by

Horner's neighbor, Scott Benjamin. The petition sought the construction of a partition fence on the property line between their respective properties. On July 16, 2010 the Board held a hearing on Benjamin's petition, at which time it issued a unanimous decision granting the petition and assigning all costs of construction to the Horners.

{¶3} From this decision, the Horners filed an administrative appeal to the Clermont County Court of Common Pleas pursuant to R.C. 2506.01. The caption of their notice of appeal named themselves as appellant and the Board as the sole appellee. In response, the Board filed a Civ.R. 12(B)(6) motion to dismiss on the grounds that it was not the proper party to the appeal. In its motion, the Board suggested to the court that the Horners be permitted to "amend their notice of appeal to include [Benjamin.]"

{¶4} On November 1, 2010, the common pleas court granted the motion to dismiss on the grounds that the Board lacked an interest in the subject matter of the appeal and was therefore not a proper party to the action. The court explained that under R.C. 2505.03(B), the Board must be treated "as if it were a trial court," and as such, its only interest was in providing a forum for its citizens in resolving disputes. The court held that the other landowner, Benjamin, was the proper party to the appeal, and without him, no relief could be granted.

{¶5} The Horners timely appeal, raising one assignment of error for review:

{¶6} "THE TRIAL COURT COMMITTED ERROR IN GRANTING APPELLEE'S MOTION TO DISMISS UNDER CIV.R. 12(B)(6)."

{¶7} In their sole assignment of error, the Horners argue the common pleas court erroneously dismissed their appeal for failure to state a claim upon which relief can be granted pursuant to Civ.R. 12(B)(6).

{¶8} The Horners brought their administrative appeal pursuant to R.C. 2506.01, which states in pertinent part:

{¶9} "(A) Except as otherwise provided in sections 2506.05 to 2506.08 of the Revised Code, and except as modified by this section and sections 2506.02 to 2506.04 of the Revised Code, every final order * * * of any * * * board * * * may be reviewed by the court of common pleas of the county in which the principal office of the political subdivision is located as provided in Chapter 2505. of the Revised Code.

{¶10} "(B) The appeal provided in this section is in addition to any other remedy of appeal provided by law.

{¶11} "(C) As used in this chapter, 'final order, adjudication, or decision' means an order, adjudication, or decision that determines rights, duties, privileges, benefits, or legal relationships of a person[.]"

{¶12} While R.C. 2506.01 authorizes an administrative appeal, R.C. Chapter 2505 instructs as to the procedure for bringing the actual appeal. See *Thomas v. Webber* (1968), 15 Ohio St.2d 177, paragraph one of the syllabus.

{¶13} R.C. 2505.04 confers jurisdiction over the appeal to the reviewing tribunal, providing:

{¶14} "An appeal is perfected when a written notice of appeal is filed, * * * in the case of an administrative-related appeal, with the administrative officer, agency, board, department, tribunal, commission, or other instrumentality involved. * * * After being perfected, an appeal shall not be dismissed without notice to the appellant, and no step required to be taken subsequent to the perfection of the appeal is jurisdictional."

{¶15} R.C. 2505.05 then sets forth the required contents of the notice of appeal:

{¶16} "The notice of appeal described in section 2505.04 of the Revised Code * * * shall designate, in the case of an administrative-related appeal, the final order appealed from and whether the appeal is on questions of law or questions of law and fact. In the notice, the party appealing shall be designated the appellant, and the adverse party, the

appellee. In the case of an administrative-related appeal, the failure to designate the type of hearing upon appeal is not jurisdictional, and the notice of appeal may be amended with the approval of the appellate court for good cause shown." See, also, *Moore v. City of Cleveland Civ. Serv. Comm.* (1983), 11 Ohio App.3d 273, 275. Pursuant to R.C. 2505.07, a party must perfect its appeal within 30 days of the date the administrative body enters its final order.

{¶17} R.C. 2505.04 is a jurisdictional statute. *Richards v. Indus. Comm.* (1955), 163 Ohio St. 439, 445. Coupled with R.C. 2505.05, the statutory language clearly indicates that the only act necessary to perfect an administrative appeal brought under R.C. 2506.01 is the timely filing of a notice of appeal with the pertinent agency, board, commission, or other instrumentality. See *Woods v. Civ. Serv. Comm., City of Cleveland* (1983), 7 Ohio App.3d 304, 305 ("[u]nder R.C. 2505.04, the only jurisdictional requirement is the filing of the notice of appeal").

{¶18} In the instant case, the Horners filed a written notice of appeal with the Board on August 13, 2010, 29 days after the Board entered its decision. Under R.C. 2505.07, the appeal was timely. Pursuant to R.C. 2505.04, nothing further was procedurally required of the Horners in the perfection of their appeal, thus the common pleas court was vested with jurisdiction to initiate administrative review. Further, as required by R.C. 2505.05, the Horner's notice of appeal set forth the decision being appealed from and the grounds for the appeal.

{¶19} Regardless, the Board argued for and won a dismissal based on a purported defect in the notice of appeal, namely, the failure to identify Benjamin as an appellee.

{¶20} As to the identification of parties, R.C. 2505.05 requires only that the party appealing be identified as the appellant, while the adverse party is designated the appellee. The Board argues that as the other landowner, Benjamin was the proper

appellee because his interest in the action was "adverse" to the Horner's interest. We agree.

{¶21} The Supreme Court of Ohio has consistently held that once a party is present and participates in the original matter, that party remains a proper and necessary party in appellate proceedings, regardless of whether it is named in the notice of appeal. See *Webber*, 15 Ohio St.2d at 182 (petitioners present during original meeting were "proper parties to an appeal from an order of the township trustees favorable to them, whether or not they [were] named as parties and designated as appellees in the notice of appeal from that decision").

{¶22} The record shows Benjamin was present and participated in the proceedings before the Board on July 16, 2010, therefore he was a proper and necessary party to the appeal. Id. Further, the whole purpose of the Horners' appeal to the common pleas court was to reverse the Board's ruling in Benjamin's favor. Thus, Benjamin was also an adverse party within the meaning of R.C. 2505.05, and remained as such regardless of whether or not he was named as an appellee in the notice of appeal. Id.

{¶23} Pursuant to this rationale, it is clear the Board was *not* an adverse party because it had no conceivable interest in the outcome of a decision allocating fencing costs between private landholders. Cf. *Symmes Twp. Bd. of Trustees v. Hamilton Cty. Bd. of Zoning Appeals* (1996), 110 Ohio App. 3d 527, 528-30.

{¶24} This case is distinguishable from cases wherein a Board of Zoning Appeals, Tax Appeals, or Education, is named as a party to an administrative appeal. See, e.g., *Centerville Bd. of Tax Appeals v. Wright* (1991), 72 Ohio App. 3d 313; *Groff-Knight v. Bd. of Zoning Appeals of Liberty Twp.* (June 14, 2004), Delaware App. No. 03CAH08042, 2004 WL 3465744; *Columbus Bd. of Edn. v. Franklin Cty. Bd. of Revision*, 76 Ohio St.3d 13, 1996-Ohio-432. The distinguishing factor in these cases is the strong governmental

interest in the outcome of the appeal. For instance, in *Columbus*, the initial appeal stemmed from a decision by Franklin County Board of Revision ("BOR") determining the taxable value of appellant's real property. Id. at 14. The BOR remained a party to all subsequent appeals, and rightfully so, due to its duty to defend the valuation for purposes of determining tax revenue – a fundamental governmental interest.

{¶25} Similarly, in *Groff-Knight*, the Liberty Township Board of Zoning Appeals was not an improper party to the action in light of its "duty to * * * consider the impact of [a conditional use permit] on the surrounding area." Id., 2004 WL 3465744. In that case, the board clearly possessed an interest in defending its determination of whether a certain use served the zoning district's best interest, and whether the use would comport with applicable zoning regulations.[1]

{¶26} In the case at bar, there was simply no governmental interest to protect. Instead, the interest lay in the hands of two private landowners arguing over the cost of a fence. As such, the Board was not a proper adverse party to the action.

{¶27} Having made this determination, we now address whether the common pleas court properly dismissed the case pursuant to Civ.R. 12(B)(6). Because a Civ.R. 12(B)(6) motion has no place in an appellate proceeding, we find the court erred in this regard. See Civ.R. 1(C) ('"[t]hese rules, to the extent that they would by their nature be clearly inapplicable, shall not apply to procedure (1) upon appeal to review any judgment, order or ruling, [and] * * * (7) in all other special statutory proceedings"). See, also, *Grenga Machine & Welding Co. v. S. Pitt Tool & Die* (Apr. 27, 1998), Mahoning App. No. 93 CA 240, 1998 WL 271270, at *3.

1. While this court has addressed partition fences in prior cases, the question of proper adverse parties was never raised, therefore it remains a matter of first impression. See *Reeves v. Wayne Twp. Trustees*, Butler App. No. CA2007-12-318, 2008-Ohio-6891; *Duncan v. Vernon Twp. Trustees* (Jan. 16, 2001), Clinton App. No. CA2000-05-015, 2001 WL 32806; *Parks v. Wayne Twp. Trustees* (Jul. 19, 1999), Fayette App. No. CA99-01-005, 1999 WL 543838.

{¶28} In dismissing the Horners' appeal, the common pleas court found that Benjamin was the adverse and necessary party due to his interest in the subject matter of the appeal. The court found that under R.C. 2505.03, the Board should be viewed "as if it [was] a *trial court* whose final order * * * is the subject of an appeal to a court of appeals[.]" (Emphasis added.) As such, the court found the Board's sole interest was in "providing a forum for their citizens," and without Benjamin, the Horners failed to state a claim upon which relief could be granted.

{¶29} We agree that under R.C. 2505.03(B), the Board sat as the "trial court" during the proceedings held on July 16, 2010. However, it follows that the common pleas court sat as the "court of appeals," having jurisdiction to review the Board's final order. As previously noted, Civ.R. 12(B)(6) motions are not properly considered by a court of appeals in an appellate proceeding. *Grenga* at *3; *State ex rel. Soley v. Durrell*, 69 Ohio St.3d 514, 515, 1994-Ohio-103. Thus, once the Board's decision was appealed to the common pleas court, Civ.R. 12(B)(6) was no longer available to dispose of the case.

{¶30} Accordingly, we find the common pleas court erred in dismissing the appeal pursuant to Civ.R. 12(B)(6). We further find it was error to dismiss the appeal on any procedural grounds, where amending the notice of appeal to include Benjamin as the adverse party was a more desirable resolution.[2]

{¶31} In permitting the amendment, the court would prevent the loss of valuable rights held between the interested parties. See *Maritime Mfrs., Inc. v. Hi-Skipper Marina* (1982), 70 Ohio St.2d 257, 258-259 (prior decisions "consistently adhered to the policy of exercising all proper means to prevent the loss of valuable rights when the validity of a notice of appeal is challenged solely on technical, procedural grounds"). See, also,

2. We remind the reader that this conclusion is premised on our findings that: (1) the action was properly before the court pursuant to R.C. 2505.04; (2) Benjamin participated in the proceedings below; and (3) Benjamin's interest was adverse to the Horners' interest. See *Webber*, 15 Ohio St.2d at 182.

Moore, 11 Ohio App.3d at 275-276; *Woods*, 7 Ohio App.3d at 306 (R.C. 2505.05 has been liberally construed so as not to deny an appeal on technical grounds). Moreover, it was within the court's discretion to permit the suggested amendment. See *Moore* at 275-276; *C.J. Mahan Constr. Co. v. Jackson Twp. Bd. of Zoning Appeals* (May 9, 1989), Franklin App. No. 88AP-1062, 1989 WL 50566.

{¶32} We find our decision is in keeping with the "fundamental tenet of judicial review in Ohio that courts should decide cases on the merits and that an outright dismissal of an administrative appeal on procedural grounds absent a prejudice to the opposing party or the court constitutes an abuse of discretion." *Harvey v. Civ. Serv. Comm.* (Apr. 8, 1993), Cuyahoga App. No. 62335, 1993 WL 106985, at *6.

{¶33} Based on the foregoing, we sustain the Horner's single assignment of error. The judgment of the Clermont County Court of Common Pleas is reversed and the cause is remanded.

{¶34} On remand, the court may either: (1) construe the Board's motion to dismiss as a motion to amend the notice of appeal, or (2) allow the Horners additional time to file their own motion to amend the notice of appeal.

{¶35} Judgment reversed and remanded.

PIPER and HUTZEL, JJ., concur