[Cite as *Ostrander v. Grossman*, 2010-Ohio-4379.]

IN THE COURT OF APPEALS OF OHIO
SIXTH APPELLATE DISTRICT
LUCAS COUNTY

Charles & Bonnie Ostrander, etc.	Court of Appeals No. L-10-1083
Appellants	Trial Court No. CI0200907416
v.	
Dr. David Grossman, M.D., etc.	**DECISION AND JUDGMENT**
Appellee	Decided: September 17, 2010

* * * * *

Thomas D. Pigott, for appellants.

Julia R. Bates, Lucas County Prosecuting Attorney, John A. Borell and Lance M. Keiffer, Assistant Prosecuting Attorneys, for appellee.

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SINGER, J.

{¶ 1} Appellants, Charles and Bonnie Ostrander, appeal from a judgment of the Lucas County Court of Common Pleas granting a motion to dismiss for lack of jurisdiction. For the reasons that follow, we reverse.

{¶ 2} Appellants own and operate the Stone Oak Market, a gas station and retail food establishment in Holland, Ohio. Beginning in April 2009, the Board of Health for the Lucas County Regional Health District ("Health Department"), of which appellee David Grossman, M.D. is Health Commissioner, contacted appellants regarding the failed septic system at their establishment and the resulting surfacing of sewage. Appellants and appellee were in dispute over whether appellants had taken adequate measures to remedy the problem, and on September 24, 2009, the Board of Health entered an "Order of Suspension of Food Establishment License" for the Stone Oak Market.

{¶ 3} The order contained information on the appellants' right to appeal pursuant to R.C. 119.12, stating:

{¶ 4} "Pursuant to Section 119.12 of the Ohio Revised Code, you may appeal this Order of Suspension to the Lucas County Common Pleas Court. If you desire to file an appeal, you are required to file a notice of appeal with the Board of Health setting forth the order appealed from and the grounds for your appeal. A copy of the notice of appeal shall also be filed by you with the Court of Common Pleas. Your notice of appeal must be filed within fifteen (15) days after the mailing of the notice of this order, which is being done the same date as its entry. The filing of a notice of appeal shall not automatically operate as a suspension of the Order."

{¶ 5} On October 8, 2009, appellants filed their original notice of appeal with the Lucas County Court of Common Pleas at 2:02 p.m. At 2:41 p.m. of the same day, appellants transmitted a facsimile copy of the notice of appeal to the Health Department.

{¶ 6} On November 10, 2009, appellee moved to dismiss the administrative appeal with prejudice on the basis that the appellants failed to timely perfect their appeal as prescribed by R.C. 119.12, and thus the court did not have subject matter jurisdiction over the appeal. Appellee noted that in order to perfect their appeal, appellants were required to timely file their original notice of appeal with the Health Department and a copy of the notice of appeal with the court. Rather, appellants filed their original notice with the court and transmitted a facsimile copy of that notice to the Health Department. Appellee claimed that appellants thus failed to perfect their appeal and consequently the court did not acquire jurisdiction to hear the appeal. On February 24, 2010, the common pleas court granted the motion to dismiss for that same reason.

{¶ 7} From this judgment appellants now bring this appeal, setting forth two assignments of error:

{¶ 8} I. "The lower court erred in its interpretation of the jurisdictional requirements of R.C. 119.12 when it agreed with appellee's argument that one must file an **original** notice of appeal with the state agency and a **copy** of that

notice of appeal with the Court in order to vest the court with jurisdiction, WHERE;

{¶ 9} "a recently passed law, H.B. 215, amended R.C. 119.12 clarifying its requirements to show that the lower court's previous interpretation of R.C. 119.12 as requiring an individual to file their **original** notice of appeal with the state agency and a **copy** of that notice of appeal with the court in order to vest the court with jurisdiction as incorrect, where R.C. 119.12 as amended plainly states that an individual may file a copy **or** original notice of appeal with the court or state agency and that H.B. 215 states that the changes to R.C. 119.12 are procedural in nature and are therefore to be retroactively applied to the current case.

{¶ 10} "It is therefore stated that the lower court erred when it ruled that appellant did not vest the lower court with jurisdiction because he filed an **original** with the court and a **copy** with the state agency."

{¶ 11} II. "The lower court erred when it granted the plaintiff's motion to dismiss for lacked [sic] of jurisdiction based upon the argument that R.C. 119.12 requires an individual appealing the decision of a state agency to file an **original** notice of appeal with the state agency and a **copy** of that notice of appeal with the court in order to vest the court with jurisdiction to hear the appeal."

{¶ 12} Appellants contend that the trial court erred in granting the motion to dismiss for lack of jurisdiction.[1] The common pleas court followed the pronouncement of the Supreme Court of Ohio in *Hughes v. Ohio Dept. of Commerce,* 114 Ohio St.3d 47, 2007-Ohio-2877, which held, at paragraph two of the syllabus, that "[a] party aggrieved by an administrative agency's order must file the original notice of appeal with the agency and a copy with the court of common pleas." The rule enforces strict compliance with R.C. 119.12 which, for whatever reason, requires that the original notice of appeal goes to the agency. Failure to abide by this requirement is a jurisdictional defect, a condition precedent to the court acquiring authority to hear an R.C. Chapter 119 appeal. Id. at ¶ 18.

{¶ 13} Appellants' second assignment of error contends that if the amended R.C. 119.12 is not applied, the language of the statute should not be construed to require a distinction between filing an original and a copy of the notice of appeal with the agency. However, this argument is not persuasive, as the Ohio courts have been very clear that the statute should be strictly applied, and that a failure to file the original notice of appeal with the agency is a defect which results in a lack of jurisdiction for the court to hear the appeal. Id. Appellants' second assignment of error is not well-taken.

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[1]While both parties and the trial court refer to a lack of subject matter jurisdiction pursuant to Civ.R. 12(b)(1), this argument is improper. The issue is not a lack of subject matter jurisdiction, but rather jurisdiction did not vest with the court because appellants failed to timely perfect their appeal.

{¶ 14} Appellants' first assignment of error relies on a recent amendment to R.C. 119.12 that has been passed since the trial court granted the motion to dismiss. On June 13, 2010, the governor of Ohio signed H.B. 215 into law. H.B. 215 states that "in filing a notice of appeal with the agency or court, the notice that is filed may be either the original notice or a copy of the original notice." This amends the judicial interpretation of R.C. 119.12 requiring that the original notice of appeal be filed with the agency in order for an administrative appeal to be perfected and the court to have jurisdiction.

{¶ 15} H.B. 215 specifically provides for the retrospective application of the procedural amendments to R.C. 119.12 to appeals filed before the effective date of the amendment, September 13, 2010, but no earlier than May 7, 2009. Appellants urge that because of the legislature's clearly expressed intention for the amendment to act retrospectively, that it should be applied in this case. While appellants' appeal does fall within the appropriate time frame mandated by the legislature, as it was filed on October 8, 2009, the issue remains that the law does not technically go into effect until September 13, 2010.

{¶ 16} H.B. 215 was drafted with the specific intention that it should be applied retrospectively. Appellee believes that the interpretation of R.C. 119.12 as applied by the trial court should be used until September 13, 2010 when the law actually goes into effect. However, the clear intent in making the amendment apply retrospectively is that it should apply to appeals that were filed before the amendment takes force, and failure to

apply it to appeals decided between the signing date and effective date would be contrary to that intent.

{¶ 17} While the trial court was correct in applying R.C. 119.12 as it stood at the time of trial to this case, it cannot be ignored that since that holding the legislature has taken it upon itself to change the law. "It is in the general true that the province of an appellate court is only to enquire whether a judgment when rendered was erroneous or not. But if subsequent to the judgment and before the decision of the appellate court, a law intervenes and positively changes the rule which governs, the law must be obeyed, or its obligation denied." *Bradley v. School Bd. of City of Richmond* (1974), 416 U.S. 696, 94 S.Ct. 2006, 2016, citing *U.S. v. Schooner Peggy* (1801), 1 Cranch 103, 1801 WL 1069. R.C. 119.12 has clearly been changed to reflect that a copy of a notice of appeal delivered to an agency is sufficient to perfect an appeal and vest jurisdiction in the court.

{¶ 18} In this case, applying R.C. 119.12 as interpreted prior to the amendment would be unjust. Appellants would lose the opportunity to have their appeal heard on its merits simply because an amendment went into effect a couple of weeks too late, where the legislature has specifically provided for retrospective application of the amendment to avoid just such an injustice. Appellee would lose no substantial right if the law is enforced as amended. The purpose of strictly construing the statute under the old interpretation, according to the trial court, was to enable "both courts and administrative agencies to effectuate expeditious appeal and promote procedural efficiency and a simplified administrative appeals system." *Nibert v. Ohio Dept. of Rehab. and Corr.*

(1998), 84 Ohio St.3d 100, 702 N.E.2d 70. The legislature has shown by its amendment that the interest in efficiency on part of the court and agencies is not strong enough to enforce an interpretation that forces an appellant to forfeit its right to appeal based on the filing of a copy rather than an original notice of appeal with the agency.

{¶ 19} Appellee believes that allowing retrospective application of the amendment may pose a constitutional issue. But the constitutional prohibition against retroactivity applies to laws which would affect substantive rights, not to procedural or remedial laws. *Kilbreath v. Rudy* (1968), 16 Ohio St.2d 70, 242 N.E.2d 658. "A retroactive statute is substantive if it impairs vested rights, affects an accrued substantive right, or imposes new or additional burdens, duties, obligations, or liabilities as to a past transaction." *Rubbermaid, Inc. v. Wayne Cty. Aud.* (2002), 95 Ohio St.3d 358, 767 N.E.2d 1159 citing *Van Fossen,* 36 Ohio St.3d at 106-107, 522 N.E.2d 489. The amendment in this case is clearly one of a procedural, and not substantive, nature.

{¶ 20} The issue of constitutionality regarding retrospective application of new law is not merely the fact that it is retrospective, but rather retrospective application is disfavored because "elementary considerations of fairness dictate that individuals should have an opportunity to know what the law is and to conform their conduct accordingly; settled expectations should not be lightly disrupted." *Landgraf v. USI Film Products* (1994), 511 U.S. 244, 114 S.Ct. 1483. The prior interpretation of R.C. 119.12 required that an original notice of appeal be filed with the agency in order to vest jurisdiction with the court, although the word "original" does not appear in the statute. Allowing either an

original or a copy to be filed with the agency gives individuals clearer notice on how they may perfect their appeal given the language of the statute, and makes it easier for them to conform their conduct to it.

{¶ 21} Due to the amendment of R.C. 119.12 and the clearly expressed intent of the legislature that it be applied retrospectively, appellants' appeal should not be dismissed for a failure to perfect by delivering a copy of the notice of appeal, rather than an original, to the agency. Under the amended law, appellants' delivery of a copy of the notice of appeal to the agency would be sufficient to vest jurisdiction with the trial court. Appellants' first assignment of error is well-taken.

{¶ 22} The judgment of the Lucas County Court of Common Pleas is reversed, and the cause is remanded for further proceedings. Appellee is ordered to pay the costs of this appeal pursuant to App.R.24.

JUDGMENT REVERSED.

A certified copy of this entry shall constitute the mandate pursuant to App.R. 27. See, also, 6th Dist.Loc.App.R. 4.

Arlene Singer, J. _____
JUDGE

Thomas J. Osowik, P.J. _____
JUDGE

Keila D. Cosme, J. _____
CONCUR.
JUDGE