

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

State of Ohio, Department of Health

Court of Appeals Nos. L-14-1252
L-14-1266

Appellant

Trial Court No. CI0201101952

v.

Mayfly Tavern

DECISION AND JUDGMENT

Appellee

Decided: July 10, 2015

* * * * *

Mike DeWine, Ohio Attorney General, David M. Douglass and Sean F. Berney, Special Counsel to the Ohio Attorney General, for appellant.

* * * * *

JENSEN, J.

{¶ 1} Plaintiff-appellant, the state of Ohio, Department of Health (“ODH”), appeals the March 27, 2014 judgment of the Lucas County Court of Common Pleas granting partial summary judgment in favor of defendant-appellee, Mayfly Tavern. For the reasons that follow, we reverse the trial court’s judgment.¹

¹ Appeal Nos. L-14-1252 and L-14-1266 were consolidated for purposes of this appeal.

I. Background

{¶ 2} Ohio's Smoke Free Act ("the Act") was enacted in 2007, and codified in R.C. Chapter 3794. It prohibits smoking in public places and places of employment. ODH is charged with enforcing the Act. R.C. 3794.07. Under procedures enacted by ODH, if someone reports to ODH that a proprietor of an establishment has violated the Act, and ODH finds the report to have merit, it issues a written notice and a copy of the report to the proprietor. Ohio Adm.Code 3701-52-08(D). The proprietor may contest the report by submitting written statements or evidence to ODH. *Id.* After issuing the written notice, ODH must investigate. Ohio Adm.Code 3701-52-08(D)(2). If it finds a violation, and there has been no finding of violation against the proprietor in the previous two years, it must provide the proprietor a letter of warning. Ohio Adm.Code 3701-52-08(F). Otherwise, it must issue a written proposed finding of violation and a proposed civil fine. *Id.*

{¶ 3} Upon receiving a proposed finding of violation and proposed civil fine, the proprietor may request an administrative review. Ohio Adm.Code 3701-52-08(F)(2). During that review, the proprietor may present its case to a hearing officer. *Id.* The hearing officer must prepare a report and recommendation, including findings of fact and conclusions of law. Ohio Adm.Code 3701-52-08(F)(2)(a)(v). The proprietor may object to the hearing officer's report and recommendation. Ohio Adm.Code 3701-52-08(F)(2)(a)(vi). ODH must then approve, modify, or disapprove the report. *Id.* The

proprietor may appeal the final ODH decision to the Franklin County Common Pleas Court as provided in R.C. 119.12. R.C. 3794.09(C).

{¶ 4} In the present case, ODH received complaints that Mayfly violated the Act. Because of previous violations by Mayfly, those complaints ultimately resulted in proposed findings of violations and civil fines. Mayfly filed no appeals and the fines became due and owing. It did not pay the fines. After 45 days, ODH certified the amount due from Mayfly to the Ohio Attorney General's office ("OAG"), as required by R.C. 131.02 to begin collection efforts.

{¶ 5} On February 24, 2011, special counsel to the OAG filed a complaint against Mayfly on behalf of the state of Ohio, Department of Health. ODH sought fines in the amount of \$25,373.88, including certified collection costs and OAG interest under R.C. 131.02, as well as the costs of suit.

{¶ 6} Mayfly answered and counterclaimed for deprivation of property rights, unlawful administrative rulemaking, unlawful exercise of policymaking authority, and violation of due process. It sought a declaration that (1) relevant R.C. Chapter 3794 and Ohio Adm.Code 3701 provisions are unconstitutional on their face or as applied; (2) relevant ODH policies require R.C. Chapter 119 rulemaking and are invalid in the absence of such rulemaking; (3) relevant portions of ODH policies constitute unlawful agency policymaking and are unconstitutional, facially or as applied; (4) ODH's interpretation and application of the relevant provisions of R.C. Chapter 3794 and Ohio Adm.Code 3701 contravene the language of the statute; (5) both R.C. Chapter 3794 and

the OAG's collection efforts effectuate a taking of property without just compensation; and (6) because of the unlawful policy, the fines levied against Mayfly are not owed. Mayfly also sought injunctive relief to prevent ODH's enforcement of R.C. Chapter 3794 and Ohio Adm.Code 3701, as well as ODH's collection efforts.

{¶ 7} The case was placed on the trial court's inactive docket pending the Ohio Supreme Court's decision in *Wymyslo v. Bartec, Inc.*, 132 Ohio St.3d 167, 2012-Ohio-2187, 970 N.E.2d 898,² where the court was asked to consider the constitutionality of the Act. It was removed from the inactive docket on March 8, 2013. On September 19, 2013, Mayfly filed a motion for partial summary judgment on the basis that neither ODH nor its director was authorized to obtain an order from the court to collect unpaid fines. It argued that only the OAG could take such action. Mayfly argued that R.C. 3794.09(D) allows ODH to seek and obtain only equitable orders—not to recover outstanding fines. It contended that the legislature could have granted greater authority to ODH but chose not to. Instead, it maintained, the legislature vested the OAG with this authority under R.C. 131.02. Mayfly emphasized that its position was supported by *Wymyslo v. T Rips Ltd.*, Lucas County case No. CI0201003182 (June 3, 2013), where another Lucas County Common Pleas judge ruled that under R.C. 131.02, ODH lacked authority to collect past-due fines.

² The case in the Supreme Court was captioned *Wymyslo v. Bartec, Inc.* We note, however, that the correct spelling of ODH's director's last name is Wymyslo. The same spelling is contained in our decision in *Wymyslo v. T Rips Ltd.*, cited below.

{¶ 8} ODH opposed Mayfly’s motion, countering that under R.C. 3794.09(D), ODH was authorized to bring an equitable action. It argued that an action seeking payment of past-due fines is one for mandatory injunctive relief, thus ODH was authorized to bring the action. It also argued that under R.C. 131.02(A), ODH must certify the debt—not transfer ownership of it—to ODH, and that the OAG then acts as ODH’s collection attorney. ODH urged that *T Rips* was wrongly decided.

{¶ 9} The trial court granted Mayfly’s motion. It issued its decision on March 27, 2014, 20 days after we affirmed the trial court’s decision in *T Rips*. *Wymyslo v. T Rips Ltd.*, 6th Dist. Lucas No. L-13-1145, 2014-Ohio-1010. It held that our decision was controlling and compelled a finding that ODH lacked authority to collect past-due fines, collection costs, and interest owing under the Act.

{¶ 10} ODH moved the trial court for reconsideration on April 25, 2014, and appealed the March 27, 2014 judgment. We sua sponte dismissed ODH’s appeal as not final and appealable because Mayfly’s counterclaims remained pending. ODH moved for summary judgment on Mayfly’s counterclaims. Mayfly responded by filing a notice of dismissal, or in the alternative, response to ODH’s motion for summary judgment conceding that summary judgment should be granted in favor of ODH. The trial court held that ODH’s summary judgment motion became a nullity upon Mayfly’s voluntary dismissal, but to ensure that its March 27, 2014 judgment became final and appealable, it also denied ODH’s motion for reconsideration.

{¶ 11} ODH again appealed, assigning the following errors for our review:

I. The trial court erred by granting partial Summary Judgment dismissing the Complaint of the Plaintiff/Appellant based on the decision in *Wymyslo v. T Rips Ltd.*, 6th Dist. Lucas No. L-13-1145, 2014-Ohio-1010 and the trial court's interpretation of R.C. 131.02.

II. The trial court erred in extending the application of *Wymyslo v. T Rips Ltd.*, 6th Dist. Lucas No. L-13-1145, 2014-Ohio-1010 to the facts of this case.

II. Standard of Review

{¶ 12} Appellate review of a summary judgment is de novo, *Grafton v. Ohio Edison Co.*, 77 Ohio St.3d 102, 105, 671 N.E.2d 241 (1996), employing the same standard as trial courts. *Lorain Natl. Bank v. Saratoga Apts.*, 61 Ohio App.3d 127, 129, 572 N.E.2d 198 (9th Dist.1989). The motion may be granted only when it is demonstrated:

(1) that there is no genuine issue as to any material fact; (2) that the moving party is entitled to judgment as a matter of law; and (3) that reasonable minds can come to but one conclusion, and that conclusion is adverse to the party against whom the motion for summary judgment is made, who is entitled to have the evidence construed most strongly in his favor. *Harless v. Willis Day Warehousing Co.*, 54 Ohio St.2d 64, 67, 375 N.E.2d 46 (1978), Civ.R. 56(C).

{¶ 13} When seeking summary judgment, a party must specifically delineate the basis upon which the motion is brought, *Mitseff v. Wheeler*, 38 Ohio St.3d 112, 526 N.E.2d 798 (1988), syllabus, and identify those portions of the record that demonstrate the absence of a genuine issue of material fact. *Dresher v. Burt*, 75 Ohio St.3d 280, 293, 662 N.E.2d 264 (1996). When a properly supported motion for summary judgment is made, an adverse party may not rest on mere allegations or denials in the pleadings, but must respond with specific facts showing that there is a genuine issue of material fact. Civ.R. 56(E); *Riley v. Montgomery*, 11 Ohio St.3d 75, 79, 463 N.E.2d 1246 (1984). A “material” fact is one which would affect the outcome of the suit under the applicable substantive law. *Russell v. Interim Personnel, Inc.*, 135 Ohio App.3d 301, 304, 733 N.E.2d 1186 (6th Dist.1999); *Needham v. Provident Bank*, 110 Ohio App.3d 817, 826, 675 N.E.2d 514 (8th Dist.1996), citing *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 248, 106 S.Ct. 2505, 91 L.Ed.2d 201 (1986).

III. Analysis

{¶ 14} In its first assignment of error, ODH claims that we misinterpreted R.C. 131.02 in *T Rips*, 6th Dist. Lucas No. L-13-1145, 2014-Ohio-1010, thus the trial court erred in relying on *T Rips* in dismissing its complaint. It also seeks to distinguish the present case from *T Rips* so as to avoid its application here. In its second assignment of error, ODH insists that the statutory basis underlying the present case differs from that of *T Rips*, and it claims that the trial court improperly extended *T Rips*, thereby bringing

about absurd, unintended results. Ultimately, ODH's arguments in support of its first and second assignments of error are interrelated, therefore, we address them together.

{¶ 15} R.C. 3794.09(D) provides:

The director of health may institute an action in the court of common pleas seeking an order in equity against a proprietor or individual that has repeatedly violated the provisions of this chapter or fails to comply with its provisions.

{¶ 16} R.C. 131.02(A) provides:

[W]henever any amount is payable to the state, the officer, employee, or agent responsible for administering the law under which the amount is payable shall immediately proceed to collect the amount or cause the amount to be collected and shall pay the amount into the state treasury or into the appropriate custodial fund in the manner set forth pursuant to section 113.08 of the Revised Code. Except as otherwise provided in this division, *if the amount is not paid within forty-five days after payment is due, the officer, employee, or agent shall certify the amount due to the attorney general, in the form and manner prescribed by the attorney general, and notify the director of budget and management thereof.* * * *

The attorney general may assess the collection cost to the amount certified in such manner and amount as prescribed by the attorney general. * * *.

(Emphasis added.)

{¶ 17} We concluded in *T Rips* that R.C. 3794.09(D) permits ODH to institute a court action seeking an order in equity only against proprietors that have repeatedly violated or failed to comply with the provisions of the Act. We determined that according to the plain language of R.C. 131.02, once ODH has certified an overdue fine to the OAG, only the *attorney general* may bring an action to collect those unpaid fines—ODH is not authorized to do so.

{¶ 18} ODH argues that we misinterpreted R.C. 131.02. It claims that while R.C. 131.02(A) requires it to “certify” to the OAG amounts that remain unpaid after 45 days, the debt is not transferred to the OAG. It urges that the OAG acts as counsel to ODH, but ODH as the client remains in charge of how and when to litigate and whether to settle. Thus, it argues, ODH remains the real party in interest and suit may properly be brought in its name. Mayfly did not file a response brief.

{¶ 19} In analyzing a statute, we must give effect to the intent of the legislature as manifested in the words it chose. *Proctor v. Kardassilaris*, 115 Ohio St. 3d 71, 2007-Ohio-4838, 873 N.E.2d 872, ¶ 12. “Statutes that are plain and unambiguous must be applied as written without further interpretation.” *Id.* The terms of the statute must be given their usual, normal, or customary meanings. *Id.* “Rules for construing the language (such as *expressio unius*) may be employed only if the statute is ambiguous.” *Id.*

{¶ 20} ODH insists that R.C. 131.02 is unambiguous and must be applied, not interpreted, using its plain and ordinary meaning. It emphasizes that the statute requires it

to *certify* a debt to the OAG but does not require it to transfer it. “Certify,” ODH explains, is defined by Merriam Webster to mean “to attest authoritatively: as *a* : confirm[;] *b* : to present in formal communication[;] *c* : to attest as being true or as represented or as meeting a standard.” (See <http://www.merriam-webster.com/dictionary/certify>, accessed June 9, 2015). Thus, ODH argues, by its plain language, the statute requires ODH to confirm to OAG that a valid debt exists that should proceed to collection, but the debt remains owed to ODH and the OAG simply acts as ODH’s attorney.

{¶ 21} R.C. 109.02 provides that “[t]he attorney general is the chief law officer for the state and all its departments * * *.” “The attorney general may appoint special counsel to represent the state in connection with all claims of whatsoever nature which are certified to the attorney general for collection under any law or which the attorney general is authorized to collect.” R.C. 109.08.

{¶ 22} We agree with ODH that R.C. 131.02(A) does not state that the debt is “transferred” to the OAG. This is in contrast to R.C. 131.02(F)(1)(a), which permits the OAG, with the consent of the chief officer of the agency, to “sell, convey, or otherwise transfer” to a private collection agency a claim that is deemed uncollectible. R.C. 131.02 merely sets forth the process for collecting state agencies’ debts. That process contemplates that the OAG will consult, coordinate with, and obtain consent from the agency to which the debt is owed. The statute addresses procedures including determining the time when payment is due; providing notice to the debtor about the nature and amount of the indebtedness; assessing interest and costs; securing and

executing a judgment; compromising the claim; and deeming a claim uncollectible. R.C. 131.02. One detail not set forth in the statute, however, is in whose name suit must be brought. In *T Rips*, we held that because R.C. 3794.09(D) authorizes ODH to obtain equitable relief but is silent as to collecting fines, and because R.C. 131.02(A) specifically provides that the OAG shall collect fines that are more than 45 days past due, suit must be brought by the OAG—not by ODH.

{¶ 23} ODH claims that there is an important distinction between *T Rips* and the present case. It argues that while it sought injunctive relief under R.C. 3794.09(D) in *T Rips*, here it sought merely to reduce an administrative finding to a money judgement under R.C. 131.02. It contends that the trial court erred in extending *T Rips* to a situation involving a request for only monetary damages.

{¶ 24} ODH also argues that there are thousands of debt collection lawsuits that have been captioned in the name of the state agency to which the debt is owed. It cites a number of examples, including *State of Ohio, Dept. of Transp. v. Sullivan*, 38 Ohio St.3d 137, 137-138, 527 N.E.2d 798 (1988); *State of Ohio, Dept. of Mental Health v. Kilpatrick*, 5th Dist. Guernsey App. No. 683, 1982 WL 11269 (Aug. 12, 1982); and *State of Ohio, Univ. of Cincinnati Hosp.*, 57 Ohio App.3d 30, 566 N.E.2d 187 (1st Dist.1989). ODH insists that the Ohio Supreme Court has had numerous opportunities to dismiss appeals where the party to the collection action was a state agency and not the OAG, but has never done so. Accordingly, it concludes, the OAG has implicitly recognized the standing of the agency to sue in its own name.

{¶ 25} None of the cases cited by ODH expressly address the authority of the agency to bring suit in its own name. Our decision in *T Rips*, 6th Dist. Lucas No. L-13-1145, 2014-Ohio-1010, appears to be the only case addressing this issue. Nevertheless, we recognize that the Ohio Supreme Court affirmed the judgment of the Tenth District Court of Appeals in *Bartec*, 132 Ohio St.3d 167, 2012-Ohio-2187, 970 N.E.2d 898, which held that ODH was entitled to a statutory injunction under R.C. 3974.09(D) ordering the defendant to comply with the Act and to pay all outstanding fines.

{¶ 26} As to ODH's attempt to distinguish this case from *T Rips*, we are not persuaded by the distinction it asks us to draw. Specifically, ODH insists that despite the fact that R.C. 3794.09(D) expressly authorizes it to bring an action seeking an order in equity and is silent as to whether it can bring an action for monetary damages, *T Rips* prohibits it only from bringing an action for *injunctive relief* under R.C. 3794.09(D) in its own name—it does not prohibit it from bringing an action for *monetary damages* under R.C. 131.02. In other words, ODH wants us to limit *T Rips* to prohibit ODH from collecting unpaid fines via an action for injunctive relief, but allow it to collect unpaid fines in an action for money damages. Our holding in *T Rips* was not premised on the distinction between actions in equity versus actions at law. It was based on our interpretation that R.C. 131.02 authorizes only the OAG to file an action to collect unpaid fines. We, therefore, reject this distinction. Instead, however, we reconsider and overrule *T Rips*.

{¶ 27} As ODH points out, R.C. 131.02 simply requires ODH to certify to the OAG the amount of unpaid fines owed to it. The OAG, as attorney for ODH, then must make efforts to collect the amount due. The statute does not specify in whose name suit must be brought and, therefore, does not prohibit the OAG from captioning the case in ODH's name.

{¶ 28} In addition, although the interplay between R.C. 3794.09(D) and 131.02 was not expressly before it, the Supreme Court of Ohio in *Bartec* affirmed judgment in favor of ODH in an action to collect unpaid fines brought in ODH's name. This leads us to conclude that the Ohio Supreme Court would hold that the OAG as counsel for ODH may file a collection action naming ODH as plaintiff. While *Bartec*, like *T Rips*, involved an action in equity, we find that distinction to be unimportant under the facts of this case.

{¶ 29} Accordingly, we find ODH's assignments of error well-taken and we overrule *T Rips*.

IV. Conclusion

{¶ 30} We find ODH's assignments of error well-taken and reverse the March 27, 2014 judgment of the Lucas County Court of Common Pleas granting partial summary judgment to Mayfly. The costs of this appeal are assessed to Mayfly 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.

Thomas J. Osowik, J.

JUDGE

James D. Jensen, J.
CONCUR.

JUDGE

Arlene Singer, J., CONCURS AND
WRITES SEPARATELY.

JUDGE

SINGER, J.

{¶ 31} In consideration of appellant’s arguments, and reconsideration of this issue, I agree that the findings of the majority reach the better conclusions drawn from the law and the facts. I therefore concur with the majority, and overrule *Wymyslo v. T Rips Ltd.*, 6th Dist. Lucas No. L-13-1145, 2014-Ohio-1010, and find ODH’s assignments of error well-taken.

This decision is subject to further editing by the Supreme Court of Ohio’s Reporter of Decisions. Parties interested in viewing the final reported version are advised to visit the Ohio Supreme Court’s web site at:
<http://www.sconet.state.oh.us/rod/newpdf/?source=6>.