[Cite as *Bogan v. Mahoning Cty. Children Servs.*, 2021-Ohio-4665.]

IN THE COURT OF APPEALS OF OHIO

SEVENTH APPELLATE DISTRICT
MAHONING COUNTY

ALEXIS BOGAN,

Plaintiff-Appellant,

v.

MAHONING COUNTY CHILDREN SERVICES,

Defendant-Appellee.

OPINION AND JUDGMENT ENTRY
Case No. 21 MA 0002

Civil Appeal from the
Court of Common Pleas of Mahoning County, Ohio
Case No. 2020 CV 406

BEFORE:
Cheryl L. Waite, Carol Ann Robb, Judges and Michael D. Hess, Judge of the Fourth District Court of Appeals, Sitting by Assignment.

JUDGMENT:
Affirmed.

Atty. Percy Squire, 341 S. Third Street, Suite 10, Columbus, Ohio 43215, for Plaintiff-Appellant

Atty. Paul J. Gains, Mahoning County Prosecutor, *Atty. Gina DeGenova Zawrotuk* and *Atty. Raymond J. Hartsough*, Assistant Prosecuting Attorneys, 21 West Boardman Street, 5th Floor, Youngstown, Ohio 44503, for Defendant-Appellee.

Dated: December 22, 2021

WAITE, J.

{¶1} Appellant Alexis Bogan appeals a December 17, 2020 Mahoning County Common Pleas judgment entry dismissing her administrative appeal as untimely. Appellant attempts to argue that the time period to file her appeal of the decision of the Mahoning County Court of Common Pleas was tolled due to the filing of an appeal she claims is somewhat related in the Franklin County Court of Common Pleas. For the reasons provided, Appellant's argument is without merit and the judgment of the trial court is affirmed.

Factual and Procedural History

{¶2} As noted by the trial court, the underlying facts are limited. It appears that Appellant was involved in some sort of physical altercation with a minor in the care of Appellee, Mahoning County Children Services, on May 10, 2018 that led to allegations of physical abuse. Appellee investigated the incident and entered a finding of physical abuse. Appellee sent Appellant a letter informing her of its finding and described the appeal process:

> The alleged perpetrator of child abuse or neglect has the right to appeal the finding of this assessment. Appeals must be submitted, in writing, to the Executive Director of Children's Services, within 14 days upon receipt of notification. The case will be reviewed by an Administrator who has no

> direct involvement with the assessment, and the ability to overturn the decision. The alleged perpetrator will be informed as to the results of the appeal within 30 days of receipt of the request.

(2/19/21 Notice of Appeal, Exh. 1)

{¶3} On May, 9, 2019, Appellee held a hearing on the matter. On May 21, 2019, Appellee issued a decision upholding the finding of abuse. Appellee sent a letter and the decision to Appellant's attorney. On July 19, 2019, Appellee learned that the letter was incorrectly sent to Appellant's attorney and subsequently reissued the letter to Appellant. In relevant part, the letter stated: "[p]ursuant to Ohio Administrative Code Section 5101:2-33-20 (H), the decision of the PCSA regarding the report disposition appeal is final and not subject to state hearing review under section 5101.35 of the Revised Code nor subject to judicial review pursuant to the authority cited above." (2/19/21 Notice of Appeal, Exh. A)

{¶4} On July 2, 2019, Appellant filed an appeal with the Franklin County Court of Common Pleas pursuant to R.C. 119. Five months after the appeal was filed, Appellant filed a motion to change venue to Mahoning County, conceding that Franklin County had no jurisdiction. Appellant also recognized that her appeal was based on the incorrect statute and attempted to convert it to a notice of appeal filed pursuant to R.C. 2506. The Franklin County Court of Common Pleas dismissed her appeal. Appellant filed a further appeal of that decision with the Tenth District.

{¶5} At the same time, Appellant filed a notice of appeal with the Mahoning County Court of Common Pleas. On December 7, 2020, the Mahoning County court found that it had subject matter jurisdiction over the matter, but ultimately dismissed the

appeal as untimely. Appellant filed a motion for reconsideration which the court denied on January 6, 2021. It is from this entry that Appellant now appeals. We note that Appellant raises a "statement of the issues" prior to discussing the facts in her brief, but does not provide an actual assignment of error. We presume the statement of the issues constitutes her assignment of error.

ASSIGNMENT OF ERROR

> Whether the trial court erred when it determined this administrative appeal was commenced untimely.

{¶6} Appellant argues that a timely appeal of the administrative proceedings in this matter was filed on her behalf in Franklin County, and that Appellant then requested a change of venue to Mahoning County pursuant to R.C. 2506. It appears Appellant is arguing that the filing in Franklin County and motion for a change of venue acted as a tolling event in this case. Appellant also notes that an appeal of the Franklin County decision to deny her change of venue was filed with the Tenth District.

{¶7} Appellee responds by arguing that an appeal can only be perfected if filed in accordance with the relevant statute. Here, Appellant asserts that R.C. 2505.04 provides the process necessary to perfect an appeal of an administrative decision. That statute provides that an appeal must be filed, and notice of the filing must be sent to the relevant agency, within thirty days of the final order. If that process is not followed, the common pleas court does not have jurisdiction to hear the matter and must dismiss the appeal. Appellee explains that Appellant had thirty days following the July 19, 2019 decision to file any appeal. Appellant did not file in Mahoning County until January 22,

2020. Appellee contends that a motion to change venue does not constitute a tolling event pursuant to *Nibert v. Dept. of Rehab. & Corr*., 119 Ohio App.3d 431, 695 N.E.2d 781 (10th Dist.1997). In fact, Appellee contends that a court may only dismiss a notice of appeal filed in the wrong county, and may not entertain a motion to change venue. *Calo v. Ohio Real Estate Comm'n.,* 10th Dist. Franklin No. 10AP-595, 2011-Ohio-2413.

{¶8} A decision to dismiss an action for lack of subject matter jurisdiction is reviewed *de novo. Pyramid Enterprises L.L.C. v. City of Akron Dept. of Neighborhood Assistance,* 9th Dist. Summit No. 28623, 2018-Ohio-2178, ¶ 5, citing *Mellion v. Akron City School Dist. Bd. of Edn*., 9th Dist. Summit No. 23227, 2007-Ohio-242, ¶ 6.

{¶9} Pursuant to R.C. 2506.01(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, adjudication, or decision of any officer, tribunal, authority, board, bureau, commission, department, or other division of any political subdivision of the state 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} R.C. 2505.07 provides that "[a]fter the entry of a final order of an administrative officer, agency, board, department, tribunal, commission, or other instrumentality, the period of time within which the appeal shall be perfected, unless otherwise provided by law, is thirty days."

{¶11} Pursuant to R.C. 2505.04, "[a]n 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."

{¶12} In *Pyramid Enterprises,* the Ninth District reviewed subject matter jurisdiction as it pertains to the timeliness of perfecting an administrative appeal. *Id.* at ¶ 4. In that case, the appellant had until January 19, 2017 to perfect an appeal of an administrative decision. *Id.* at ¶ 9. The issue turned on the date the notice of the appeal was hand-delivered to the agency. If the appellant's date was correct, the appeal was perfected timely and if the appellee's date was accepted, it was untimely. *Id.* at ¶ 10. While the underlying facts are distinguishable from the instant matter, the law and analysis used by the court provides guidance.

{¶13} The court in *Pyramid Enterprises* determined the appellee's date of notice to the agency was correct. The court held that because notice was served on the agency after the thirty-day period, the appeal was not timely perfected. *Id.* at ¶ 17. The court stated that "[w]hen there is a lack of jurisdiction, a dismissal of the action is the only proper order." *Id.* at ¶ 18, quoting *Dilatush v. Bd. of Rev.*, 107 Ohio App. 551, 552-553, 160 N.E.2d 309 (2d Dist.1959); *Nord Community Mental Health Ctr. v. Cty. of Lorain*, 93 Ohio App.3d 363, 365, 638 N.E.2d 623 (9th Dist.1994). As such, the court held that the trial court properly dismissed the appeal as untimely in accordance with R.C. 2505.04. *Id.* at ¶ 18.

{¶14} Appellant argues that her timely filing in the Franklin County court and her subsequent filing for a motion for change of venue acted as a tolling event in this case.

Appellant provides no legal support for this argument and none can independently be found. However, as noted by Appellant, the Tenth District has held that "a motion to transfer venue is an inappropriate vehicle to correct the improper filing." *Nibert* at 433. As such, the *Nibert* court held that where an appeal was filed in the wrong county, the court could not consider a motion to change venue as the court lacked all subject matter jurisdiction over the matter. *Id.,* citing *Heskett v. Kenworth Truck Co.,* 26 Ohio App.3d 97, 498 N.E.2d 228 (1985).

{¶15} As Appellant concedes that the appeal was filed in the wrong county and no authority exist to permit a court to grant a motion to change venue in that scenario, Appellant's sole assignment of error is without merit and is overruled.

Conclusion

{¶16} Appellant filed her administrative appeal in the wrong county, but argues that her administrative appeal is timely filed where a motion to change venue is filed in the incorrect county, which tolled the time limits prescribed within R.C. 2505.07. For the reasons provided, Appellant's argument is without merit. Appellant's appeal was not timely filed in this matter, and the judgment of the trial court is affirmed.

Robb, J., concurs.

Hess, J., concurs.

For the reasons stated in the Opinion rendered herein, the assignment of error is overruled and it is the final judgment and order of this Court that the judgment of the Court of Common Pleas of Mahoning County, Ohio, is affirmed. Costs to be taxed against the Appellant.

A certified copy of this opinion and judgment entry shall constitute the mandate in this case pursuant to Rule 27 of the Rules of Appellate Procedure. It is ordered that a certified copy be sent by the clerk to the trial court to carry this judgment into execution.

NOTICE TO COUNSEL

This document constitutes a final judgment entry.