[Cite as *Davis v. Cleveland*, 2009-Ohio-4717.]

Court of Appeals of Ohio

EIGHTH APPELLATE DISTRICT
COUNTY OF CUYAHOGA

JOURNAL ENTRY AND OPINION
No. 92336

CHEMECA DAVIS

PLAINTIFF-APPELLANT

vs.

CITY OF CLEVELAND, ET AL.

DEFENDANTS-APPELLEES

JUDGMENT:
REVERSED AND REMANDED

Administrative Appeal from the
Cuyahoga County Court of Common Pleas
Case No. CV-639354

BEFORE: Stewart, P.J., Boyle, J., and Sweeney, J.

RELEASED: September 10, 2009

JOURNALIZED:

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MELODY J. STEWART, P.J.:

{¶ 1} Plaintiff-appellant, Chemeca Davis, received a notice of liability from defendant-appellee, city of Cleveland, claiming that an automated camera photographed a vehicle registered to her traveling at a speed in excess of the posted speed limit, in violation of Cleveland Codified Ordinance No. 413.031. Davis appealed the notice of liability, but a hearing officer still found her liable for the infraction. Pursuant to R.C. 2506.01, Davis filed an administrative appeal with the court of common pleas. When Davis did not file her assignments of error within 20 days after the city filed the administrative record as required by Loc.R. 28(A) of the Cuyahoga County Court of Common Pleas, the city moved the court to dismiss the appeal. The court granted the motion to dismiss and Davis appeals, arguing that the 20-day time period for filing her assignments of error did not begin to run because the clerk of the court had not given her notice that the record had been filed as required by App.R. 11(B).

{¶ 2} Loc.R. 28(A) states that in all appeals from administrative agencies, the appellant shall file assignments of error and a brief within 20 days "after the filing of the complete transcript * * * with the Clerk of the Common Pleas Court." Davis filed her notice of appeal with the court of common pleas on October 22, 2007. The city filed the complete record on November 20, 2007. Davis did not file her assignments of error within 20 days as required by Loc.R. 28(A), nor did she seek an extension of time in

which to file her assignments of error as allowed by Loc.R. 28(D) ("The Court shall for good cause shown have and exercise the power to extend or shorten the time within which assignments of error or briefs shall be filed."). The city filed a motion to dismiss on July 15, 2008 – seven months after the deadline for filing the assignments of error had expired. The court granted the motion to dismiss on grounds that Davis failed to comply with Loc.R. 28.

{¶ 3} Davis argues that the court erred by dismissing her appeal because she had no notice that the administrative record had been filed. She maintains that she failed to file assignments of error in accordance with Loc.R. 28(A) because she did not receive notice from the clerk of the court of common pleas that the administrative record had been filed.

{¶ 4} The clerk of the court has no statutory requirement under R.C. Chapter 2506 to issue notice that a record has been filed in an administrative appeal to the court of common pleas. In the related area of appeals under R.C. Chapter 119, the courts have held that R.C. 119.12 does not require the issuance of notice when an administrative record is filed. *Maggard v. Ohio Dept. of Commerce*, Lake App. No. 2002-L-042, 2003-Ohio-4098, ¶16; *Gammell v. Miami Univ.* (June 24, 1987), Montgomery App. No. CA 10320. Although there are some differences between appeals under R.C. Chapter 119 and R.C. 2506, the similarities in filing requirements between the two revised code chapters make a compelling analogy. Barring an express statutory

requirement, we find that the clerk of court had no obligation to send Davis separate notice that the administrative record had been filed.

{¶ 5} In any event, the court's docket shows notice that the parking violations bureau filed the administrative record on November 20, 2007 and Davis does not dispute that the court's docket reflects this filing. Litigants have the obligation to know what is on the court's docket. *MBA Realty v. Little G, Inc.* (1996), 116 Ohio App.3d 334, 338 ("the burden is on the parties to follow the progress of their own case"); *State Farm Mut. Auto. Ins. Co. v. Peeler* (1989), 63 Ohio App.3d 357, 361. Davis did not meet this obligation. And as the appellant in the court of common pleas, Davis knew or should have known by virtue of filing her appeal that under R.C. 2506.02, the bureau of parking violations had 40 days from the filing of a praecipe in which to file a complete transcript. Davis filed the praecipe, but allowed more than seven months to elapse without inquiring into whether the bureau filed the record within the 40-day time period. She cannot be heard to complain that she lacked notice of the record having been filed.

{¶ 6} We have, under some circumstances urged the courts of common pleas to restrain from dismissing administrative appeals for de minimis violations of Loc.R. 28(B). See, e.g., *A.G. & G. Co. v. Cuyahoga Cty. Bd. of Revision* (1988), 47 Ohio App.3d 117 (noting that a range of sanctions is available for violations of Loc.R. 28(B) and "the most drastic [sanction] must

be reserved for flagrant situations" and that "[o]nly a flagrant, substantial disregard for the court rules can justify a dismissal on procedural grounds."); *Harvey v. Civil Serv. Comm*. (Apr. 8, 1993), Cuyahoga App. No. 62335. However in *A.G. & G.*, the court of common pleas dismissed the appeal because a brief had been filed late. In this case, Davis did not simply file a late brief – she filed no brief at all. See *Burch v. City of Akron Housing Appeals Bd.* (Sept. 27, 1995), Summit App. No. 17201. Davis made no attempt to justify her failure to file a brief apart from tacitly conceding that she ignored the docket for more than seven months.

{¶ 7} We are aware that this court has held that a court of common pleas has no authority to dismiss an administrative appeal for any reason. In *Mastantuono v. Olmsted Twp. Bd. of Zoning Appeals*, Cuyahoga App. No. 91318, 2009-Ohio-864, we held that the trial court has no authority to dismiss an administrative appeal under R.C. Chapter 2506 without complying with the mandatory requirements of R.C. 2506.04 to hear the appeal and issue findings as to whether the administrative order was "unconstitutional, illegal, arbitrary, capricious, unreasonable, or unsupported by the preponderance of substantial, reliable, and probative evidence." Id. at ¶12. We stated:

{¶ 8} "R.C. Chapter 2506 provides the procedures to be followed in an appeal to the common pleas court from a final decision of any agency of a

political subdivision. Under R.C. 2506.03, the 'hearing of such appeal shall proceed as in the trial of a civil action.' After a hearing, the court 'may find that the order, adjudication, or decision is unconstitutional, illegal, arbitrary, capricious, unreasonable, or unsupported by the preponderance of substantial, reliable, and probative evidence on the whole record.' R.C. 2506.04. Consistent with its findings, the court may either 'affirm, reverse, vacate, or modify the order, adjudication, or decision, or remand the cause to the officer or body appealed from with instructions to enter an order, adjudication, or decision consistent with the findings or opinion of the court.'" Id. at ¶11.

{¶ 9} *Mastantuono* concluded that "the trial court had no authority to dismiss Mastantuono's appeal without complying with the mandatory requirements of R.C. 2506.04 to hear the appeal and issue findings regarding whether the BZA's order was 'unconstitutional, illegal, arbitrary, capricious, unreasonable, or unsupported by the preponderance of substantial, reliable, and probative evidence.'" Id. at ¶12.

{¶ 10} This decision and a case cited therein, *Minello v. Orange City School Dist. Bd. of Educ.* (Dec. 16, 1982), Cuyahoga App. No. 44659, parted with prior precedent from this court. In *Upper-View v. Village of Mayfield* (Feb. 17, 1977), Cuyahoga App. No. 35534, we considered the same issue

raised in this case – whether the court could dismiss an administrative appeal for want of prosecution under Loc.R. 28(A) – and stated:

{¶ 11} "R.C. §2506.03 states that the hearing on an administrative appeal 'shall proceed as in the trial of a civil action'. The Ohio Rules of Civil Procedure provide that where a plaintiff fails to prosecute an action, the court may dismiss the action. Civ.R.41(B)(1). Thus, an appeal from an administrative agency pursuant to R.C. §2506.01 and perfected under R.C. §2505.04 is subject to dismissal for failure to prosecute. After reading the record in this case, we believe it is clear that the lower court judge dismissed the appeal for failure to prosecute * * *. Appellants would have us hold that once the Court of Common Pleas obtains jurisdiction over an administrative appeal it is powerless to dismiss the appeal for failure to prosecute. Such a rule has no support in the law. Courts have inherent power to dismiss pending cases for lack of prosecution. *Link v. Wabash R. Co.* (1962), 370 U.S. 626, 82 S.Ct. 1386, 8 L.Ed.2d 734."

{¶ 12} We think *Upper-View* applies the better reasoning because it differentiates between the procedural and substantive aspects of an administrative appeal to the court of common pleas. Substantively, the court of common pleas "may find that the *order, adjudication, or decision* is unconstitutional, illegal, arbitrary, capricious, unreasonable, or unsupported by the preponderance of substantial, reliable, and probative evidence on the

whole record." R.C. 2506.04 (emphasis added). A procedural default, however, is not a decision on the merits of the order, adjudication, or decision at issue. When the court dismisses an appeal because an appellant has failed to file assignments of error in support of an administrative appeal as required by Loc.R. 28(A), it has for all practical purposes dismissed the appeal for want of prosecution under Civ.R. 41(B)(1). Dismissal under these circumstances requires no substantive ruling on the order, adjudication, or decision before the court – the court simply memorializes the appealing party's abandonment of the appeal without delving into the merits of the case.[1]

{¶ 13} Our interpretation is consistent with appellate practice in the court of appeals and the supreme court, both of which have limitations that are virtually identical to those imposed by R.C. 2506.04. Section 3(B)(2), Article IV of the Ohio Constitution states: "Courts of appeals shall have such jurisdiction as may be provided by law to review and affirm, modify, or reverse judgments or final orders of the courts of record inferior to the court of appeals within the district * * *." The Ohio Supreme Court is likewise limited by Section 2(B)(2)(d), Article IV of the Ohio Constitution, to "review

[1]It is true that in a civil action, a dismissal with prejudice operates as an adjudication on the merits under Civ.R. 41(B)(3), however, that rule has no application when the court of common pleas sits in an appellate capacity.

and affirm, modify, or reverse the judgment of the court of appeals[.]" This jurisdiction is virtually identical to the "affirm, reverse, vacate, or modify the order, adjudication, or decision" set forth in R.C. 2506.04. Yet the appellate courts routinely dismiss appeals for failure to file a brief, as noted by App.R. 19(C) ("If an appellant fails to file the appellant's brief within the time provided by this rule, or within the time as extended, the court may dismiss the appeal."). The supreme court may also dismiss an appeal for failure to file a brief. See S.Ct.Prac.R. VI(7) ("If the appellant fails to file a merit brief within the time provided by this rule or as extended in accordance with S.Ct.Prac.R. XIV, Sections 3 or 6(C), the Supreme Court may dismiss the appeal.").

{¶ 14} We are unaware of any authority that applies the reasoning employed in *Mastantuono* to restrict the supreme court and the court of appeals from dismissing cases for failing to file briefs because they are constitutionally limited to resolving cases by either affirming, reversing, or modifying the judgment of the lower courts from which the appeal issued.

{¶ 15} Finally, some courts have incorrectly held that barring a common pleas court from dismissing an appeal for failure to file a brief is justified because cases should be decided "on the merits." See *Mastantuono* at ¶18, quoting *Goehringer v. Cuyahoga Cty. Welfare Dept.* (Nov. 17, 1983), Cuyahoga App. No. 46700 ("fairness and justice are best served when a court

disposes of a case on the merits" and that "the common pleas court was without authority * * * to dismiss the appeal on the ground of plaintiff's failure to file his brief timely."). The idea that cases should be decided on their merits applies when the court of common pleas – or any court or entity with original jurisdiction – is vested with the authority to decide a matter on the merits. But when the common pleas court sits in its appellate capacity, the case on appeal has already been decided on the merits by an administrative body. While the court of common pleas may hear additional evidence on an appeal, its review is not de novo and it is limited to deciding whether "there exists a preponderance of reliable, probative and substantial evidence to support the agency decision." *Dudukovich v. Lorain Metro. Hous. Authority* (1979), 58 Ohio St.2d 202, 207. Any holding that a common pleas court sitting in an appellate capacity should strive to decide a case on its merits needlessly confuses the actual jurisdiction of the court of common pleas.

{¶ 16} We are aware that the Ohio Supreme Court recently touched on this matter in *MedCorp, Inc. v. Ohio Dept. of Job & Family Servs.*, 121 Ohio St.3d 622, 2009-Ohio-2058. In *MedCorp*, the supreme court held that to satisfy the "grounds of the party's appeal" requirement for an administrative appeal under R.C. 119.12, the notice of appeal must state the legal and/or factual reasons why the party is appealing, and the stated reasons must be

specific enough that the trial court and the opposing party can identify the objections and proceed accordingly. Id. at ¶20. During the course of its analysis on why specificity in the notice of appeal is required, the supreme court noted:

{¶ 17} "Finally, several courts of appeals have held that trial courts may not dismiss administrative-agency appeals for failure to prosecute, even when the trial court orders or the local rules require the appellant to file a brief and the appellant fails to do so. In these circumstances, the notice of appeal will be the trial court's only source of guidance regarding the specific issues for appeal. If the appellant has provided only a restatement of the standard of review, the trial court will be forced to waste time combing through the record to pinpoint appealable issues. It makes sense that the General Assembly would place on an appellant the burden of identifying the specific grounds of appeal to promote efficient management of the appeal." Id. at ¶19 (footnote omitted).

{¶ 18} We do not view this passage as suggesting that the supreme court tacitly agrees with the proposition that trial courts cannot dismiss administrative-agency appeals for want of prosecution. The supreme court was simply noting that the statutory language requiring an appellant to state grounds for an administrative appeal under R.C. 119.12 would be nullified if the appellant merely restated that the agency decision was not supported by

reliable, probative, and substantial evidence. Id. at ¶15. Indeed, if read literally, the supreme court's statements in paragraph 19 of the opinion would suggest that the court of common pleas has the duty to comb through the record to find potential errors even though the appealing party failed to raise assignments of error. This would not only contradict the long-established appellate principle that errors not raised and separately argued on appeal are considered waived, but would result in the kind of "inefficient management of the appeal" that the supreme court hoped to avoid by requiring legal and factual specificity in the notice of appeal. Id. at ¶19.

{¶ 19} We therefore disapprove of the reasoning in *Mastantuono* and hold that the court of common pleas, when sitting in its appellate capacity under R.C. 2506.04 may, in its discretion, dismiss an administrative-agency appeal under Loc.R. 28(A) when the appealing party fails to file timely assignments of error in support of the appeal.

{¶ 20} Although the trial court has the authority to dismiss an administrative appeal under Loc.R. 28(A), that authority must be exercised in conformity with R.C. 2506.03, which states that the hearing on an administrative appeal "shall proceed as in the trial of a civil action" As noted in *Upper-View*, a dismissal under Loc.R. 28(A) is akin to a Civ.R. 41(B)(1) dismissal for want of prosecution. Civ.R. 41(B)(1) states: "Where the plaintiff fails to prosecute, or comply with these rules or any court order, the court

upon motion of a defendant or on its own motion may, after notice to the plaintiff's counsel, dismiss an action or claim." The purpose of the notice requirement of Civ.R. 41(B)(1) is to "give a party an opportunity to obey the order." *Perotti v. Ferguson* (1983), 7 Ohio St.3d 1, 3. The court abuses its discretion by involuntarily dismissing an action for want of prosecution without first giving prior notice to the plaintiff. *Svoboda v. Brunswick* (1983), 6 Ohio St.3d 348, 350.

{¶ 21} The court did not give Davis notice of its intent to dismiss her appeal for failing to file her assignments of error. While we agree that Davis offered no justification for her more than seven-month delay in filing her assignments of error, she was nonetheless entitled to advance notice that her appeal would be dismissed. It follows then that the court abused its discretion by dismissing the appeal in violation of Civ.R. 41(B)(1).

{¶ 22} This cause is reversed and remanded for proceedings consistent with this opinion.

It is ordered that appellant recover of appellee her costs herein taxed.

It is ordered that a special mandate issue out of this court directing the Cuyahoga County Court of Common Pleas to carry this judgment into execution.

A certified copy of this entry shall constitute the mandate pursuant to Rule 27 of the Rules of Appellate Procedure.

MELODY J. STEWART, PRESIDING JUDGE

MARY J. BOYLE, J., and
JAMES J. SWEENEY, J., CONCUR