[Cite as *Evans v. Ohio Dept. of Ins.*, 2005-Ohio-3921.]

COURT OF APPEALS
DELAWARE COUNTY, OHIO
FIFTH APPELLATE DISTRICT

GLENN A. EVANS, II

Plaintiff-Appellant

-vs-

OHIO DEPARTMENT of INSURANCE

Defendant-Appellee

JUDGES:
Hon. Sheila G. Farmer, P. J.
Hon. John W. Wise, J.
Hon. Julie A. Edwards, J.

Case No. 04 CA 80

O P I N I O N

CHARACTER OF PROCEEDING:	Civil Appeal from the Court of Common Pleas, Case No. 04 CVF 09 648
JUDGMENT:	Affirmed
DATE OF JUDGMENT ENTRY:	July 25, 2005

APPEARANCES:

For Plaintiff-Appellant

ROBERT M. OWENS
46 North Sandusky Street
Suite 202
Delaware, Ohio 43015

For Defendant-Appellee

SCOTT MYERS
ASSISTANT ATTORNEY GENERAL
HEALTH & HUMAN SERVICES SECTION
30 East Broad Street, 26th Floor
Columbus, Ohio 43215-3400

Wise, J.

{¶1} Appellant Glenn A. Evans, II, ("appellant") appeals the decision of the Delaware County Court of Common Pleas that granted Appellee Ohio Department of Insurance's ("Department") motion to dismiss. The following facts give rise to this appeal.

{¶2} On July 14, 2003, the Department issued a Notice of Opportunity for Hearing to appellant. In the Notice, the Department alleged that appellant committed violations of the insurance laws and regulations of Ohio that rendered him unsuitable to retain his license to sell insurance. Specifically, the Department alleged that appellant failed to complete at least thirty hours of approved continuing education and that he submitted fraudulent documentation in an attempt to prove compliance.

{¶3} The Notice informed appellant that he had a right to a hearing and a right to be represented by counsel at said hearing. Appellant exercised his right to a hearing and following a two-day hearing, the hearing officer issued a report and recommendation concluding that appellant's license to sell insurance, in the State of Ohio be revoked. Following further review, the Superintendent issued an order on September 9, 2004, revoking appellant's license to sell insurance in Ohio.

{¶4} The Department served a certified copy of the Superintendent's order, upon appellant and his counsel, by certified mail, on September 10, 2004. The return receipt, for the certified mail, indicates that appellant and his counsel received the order on September 13, 2004. The letter accompanying the order contained the following language, in pertinent part:

{¶5} "Enclosed is a certified copy of the superintendent's order in the above referenced matter. As set forth in O.R.C. 119.12, any party adversely affected by an order may appeal, by filing a Notice of Appeal with the Department of Insurance and a copy with the appropriate court of common pleas within fifteen (15) days after the mailing of this notice and order." (Emphasis sic.)

{¶6} On September 20, 2004, appellant submitted two facsimile copies of notices of appeal to the Department. Both notices contain the following language in the certificates of service:

{¶7} "I certify that a true copy of the foregoing document was faxed and mailed by regular U.S. Mail to Scott Myers, Assistant Attorney General, Health and Human Services Section, 30 East Broad Street, 26th Floor, Columbus, Ohio 43215-3428 on this 20 day of September, 2004."

{¶8} The two facsimile copies are the only notices of appeal received by the Department. Thereafter, the Department moved to dismiss appellant's appeal for lack of subject matter jurisdiction. On November 1, 2004, the trial court granted the Department's motion to dismiss.

{¶9} Appellant timely filed a notice of appeal and sets forth the following assignments of error for our consideration:

{¶10} "I. THE TRIAL COURT COMMITTED ERROR PREJUDICIAL TO APPELLANT BY FAILING TO DISTINGUISH THE FACTS OF THIS CASE FROM THE FACTS IN CAMPBELL V. OHIO BMV (2004), 156 OHIO APP.3D 615.

{¶11} "A. APPELLANT MAILED & FAXED NOTICE OF APPEAL TO APPELLEE.

{¶12} "B. APPELLANT IS ENTITLED TO A PRESUMPTION OF TIMELY DELIVERY OF MAIL.

{¶13} "C. APPELLEE GAVE APPELLANT SPECIFIC AUTHORITY TO FAX DOCUMENTS FOR FILING.

{¶14} "II. THE TRIAL COURT COMMITTED ERROR PREJUDICIAL TO APPELLANT BY FAILING TO FIND APPELLEE'S SEPTEMBER 10, 2004 (SIC) STATUTORILY DEFECTIVE."

I

{¶15} In his First Assignment of Error, appellant maintains the facts in the case sub judice are distinguishable from this court's previous decision in *Campbell v. Ohio Bur. of Motor Vehicles*, 156 Ohio App.3d 615, 2004-Ohio-1575. We disagree.

{¶16} In *Rutherford v. Bd. of Cty. Commrs.* (Apr. 23, 2001), Licking App. No. 00 CA 00060, we discussed the applicable standard when reviewing a dismissal pursuant to Civ.R. 12(B)(1), lack of subject matter jurisdiction. We explained as follows:

{¶17} "The standard to apply * * * is whether the plaintiff has alleged any cause of action which the court has authority to decide. * * * This is generally a question of law we review independently of the trial court's decision. In determining whether the plaintiff has alleged a cause of action sufficient to withstand a Civ.R. 12(B)(1) motion to dismiss, a court is not confined to the allegations of the complaint and it may consider material pertinent to such inquiry without converting the motion into one for summary judgment. *Southgate Dev. Corp. v. Columbia Gas Transm. Corp.* (1976), 48 Ohio St.2d 211, paragraph one of the syllabus.

{¶18} Appellant sets forth three arguments in support of this assignment of error. First, appellant contends that he faxed and mailed an original notice of appeal, to the Department, five days before the expiration of the time period for filing the notice of appeal. Second, appellant argues he is entitled to a presumption of timely delivery by mail. Finally, appellant maintains the Department gave him authority to fax documents for filing. For the following reasons, we reject appellant's arguments and affirm the trial court's decision granting the Department's motion to dismiss.

{¶19} Prior to addressing the merits of appellant's arguments, we find it necessary to review our holding, in *Campbell*, and a recent decision from this court that disagrees with the *Campbell* decision. In *Campbell*, we determined a facsimile copy of a notice of appeal, to the Bureau of Motor Vehicles, did not meet the statutory requirement of an original copy pursuant to the language of R.C. 119.12. Id. at ¶ 21. We find that strict compliance with R.C. 119.12 was necessary because "[w]hen the right to appeal is conferred by statute, the appeal can be perfected only in the mode prescribed by statute." Id., quoting *Ramsdell v. Ohio Civ. Rights Comm.* (1990), 56 Ohio St.3d 24, 27. See, also, *Zier v. Bur. of Unemployment Comp.* (1949), 151 Ohio St. 123, paragraph one of the syllabus.

{¶20} Recently, in *Ohio Dept. of Alcohol & Drug Addiction Services v. Morris*, Richland App. No. 2004CA0067, 2005-Ohio-____, this court concluded that the filing of a copy of a notice of appeal, with the state agency, was sufficient to invoke the trial court's jurisdiction because to hold otherwise, gives precedence to form over substance. Id. at ¶ 13. The *Morris* decision found that many times, in Ohio, it has been held that all pleadings must be liberally construed to do substantial justice. Id.

{¶21} We respectfully continue to adhere to our decision, in *Campbell*, and rely upon it to address the arguments raised by appellants. In his first argument, appellant claims he mailed and faxed a notice of appeal, to the Department, five days prior to the expiration of the time period for purposes of appeal. This argument is contradicted by the affidavit of Sharon Green, a hearing officer for the Department, and the person who receives all incoming mail relative to appeals. Ms. Green opines, in her affidavit, that the two facsimile copies were the only notices received by the Department. Affid. Sharon Green at ¶ 6.

{¶22} Further, appellant's own certificate of service indicates that he served the notice of appeal, by facsimile and regular mail, on the Department's attorney, and not the Department as required by R.C. 119.12. Service is legally distinct from filing and does not satisfy the requirements of the statute. Courts have consistently held that service upon an assistant attorney general, who represents an agency, does not satisfy the requirements of R.C. 119.12. See *Blasko v. State Bd. of Pharmacy* (2001), 143 Ohio App.3d 191; *Guy v. Steubenville* (Jan. 15, 1998), Jefferson App. No. 97-JE-22; *Chorpenning v. Ohio Div. of Real Estate* (May 9, 1989), Washington App. No. 88 CA 7; *Anda-Brenner v. State Dental Bd.* (Aug. 11, 2000), Portage App. No. 99-P-0064. Also, the certificate of service indicates that a copy of the notice of appeal was mailed to the Department, not the original notice of appeal, as required by R.C. 119.12.

{¶23} Second, appellant argues he is entitled to a presumption of timely delivery of mail. Specifically, appellant claims that since the notice of appeal was mailed, from Delaware County, five days before the expiration of the time period for purposes of appeal, we should conclude the Department constructively received the original copy of

the notice of appeal. This argument was rejected in the *Blasko* case, supra, on the basis that it did not constitute strict compliance with a jurisdictional prerequisite. *Blasko* at 194. Further, even if we were to presume a timely delivery of the notice of appeal, as noted above, appellant failed to comply with R.C. 119.12. The certificate of service indicates that appellant sent a copy of the notice of appeal, instead of the original, and served it on the assistant attorney general rather than filing it with the Department.

{¶24} Third, appellant maintains the Department gave him authority to fax documents for filing. Appellant contends he called the Department and made specific arrangements for the acceptance of filings by fax. In fact, the following documents were faxed by appellant and accepted by the Department: Demand for Subpoena Duces Tecum; Written Closing Arguments; Motion for Extension of Time to File Objections; and Objections to the Hearing Officer's Findings of Fact and Conclusions of Law. Appellant argues that Department administrators have the authority to adopt a policy to accept filings by fax.

{¶25} Although the hearing officer exercised discretion and permitted appellant to file motions by facsimile, for counsel's convenience, the Department is not permitted to alter statutorily created jurisdictional prerequisites established by the General Assembly in R.C. 119.12. Appellant cites the decision of *Dayton Newspapers, Inc. v. City of Dayton* (1970), 23 Ohio Misc. 49, 65, wherein the trial court held that "* * * public officials * * * may, if not otherwise restrained by law, determine the rules by which they conduct governmental affairs entrusted to them." In the case sub judice, according to R.C. 119.12, an appeal is perfected only when a notice of appeal is filed with the

agency and a copy of the notice of appeal is filed with the court. The Department has no discretion to abrogate the specific requirements of the statute.

{¶26} Accordingly, we conclude that because appellant failed to file the original notice of appeal, with the Department, the facts of the case sub judice are not distinguishable from our decision in *Campbell*.

{¶27} Appellant's First Assignment of Error is overruled.

II

{¶28} Appellant maintains, in his Second Assignment of Error, the Department's letter of September 10, 2004, was defective pursuant to R.C. 119.09.

{¶29} R.C. 119.09 provides, in pertinent part, as follows:

"* * *

{¶30} "After such order is entered on its journal, the agency shall serve by certified mail, return receipt requested, upon the party affected thereby, a certified copy of the order and a statement of the time and method by which an appeal may be perfected. A copy of such order shall be mailed to the attorneys or other representatives of record representing the party."

{¶31} Appellant argues the letter was defective because the Department failed to indicate that the "original" notice of appeal must be filed with the Department and a "copy" of the notice of appeal with the court. In support of this argument, appellant cites *Rohr v. Ohio Dept. of Adm. Services* (2001), 114 Ohio Misc.2d 54. In *Rohr*, the court held that "* * * an agency's adjudication order does not properly state the 'method by which an appeal may be perfected' (*i.e*., does not comply with R.C. 119.09), unless it

clearly and unambiguously indicates that the 'original' notice of appeal must be filed with the agency and that a 'copy' must be filed with the court." Id. at 58-59.

{¶32} The Department's letter of September 10, 2004, did not contain the language found to be necessary by the *Rohr* decision. However, the *Rohr* decision is a municipal court decision, from Franklin County, and therefore, is not binding on this court. Further, the letter at issue stated that a "notice" must be filed with the Department and a "copy" must be filed with the court. This language mirrors the language used by the General Assembly in R.C. 119.12. Thus, we conclude the Department's letter of September 10, 2004, complies with R.C. 119.09 and appellant's failure to file an original notice of appeal, with the Department, within fifteen days, divested the trial court of jurisdiction.

{¶33} Appellant's Second Assignment of Error is overruled.

{¶34} For the foregoing reasons, the judgment of the Court of Common Pleas, Delaware County, Ohio, is hereby affirmed.

By: Wise, J.

Farmer, P. J., and

Edwards, J., concur.

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JUDGES

JWW/d 713

IN THE COURT OF APPEALS FOR DELAWARE COUNTY, OHIO
FIFTH APPELLATE DISTRICT

GLENN A. EVANS, II	:	
	:	
Plaintiff-Appellant	:	
	:	
-vs-	:	JUDGMENT ENTRY
	:	
OHIO DEPARTMENT of INSURANCE	:	
	:	
Defendant-Appellee	:	Case No. 04 CA 80

For the reasons stated in our accompanying Memorandum-Opinion, the judgment of the Court of Common Pleas of Delaware County, Ohio, is affirmed.

Costs assessed to Appellant.

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JUDGES