[Cite as *Ross Cty. Bd. of Health v. Heskett*, 2017-Ohio-7256.]

IN THE COURT OF APPEALS OF OHIO
FOURTH APPELLATE DISTRICT
ROSS COUNTY

BOARD OF HEALTH OF ROSS COUNTY, OHIO,	:	Case No. 16CA3575
Plaintiff-Appellee,	:	
v.	:	DECISION AND JUDGMENT ENTRY
DANIEL E. HESKETT,	:	
Defendant-Appellant.	:	**RELEASED: 07/27/2017**

APPEARANCES:

James K. Cutright, Cutright and Cutright, L.L.C., Chillicothe, Ohio, for appellant.

Matthew M. Schmidt, Ross County Prosecuting Attorney, and Judith Heimerl Brown, Ross County Assistant Prosecuting Attorney, Chillicothe, Ohio, for appellee.

Harsha, J.,

{¶1} Daniel E. Heskett appeals a summary judgment that found he violated the Ohio Administrative Code by installing and operating sewage treatment systems in four of his apartment units without an approved permit from the board of health. The judgment also granted an injunction against further operation of the systems.

{¶2} Based on Ohio Adm.Code 3701-29-01(C), which was amended effective January 1, 2015, Heskett initially asserts that the trial court lacked subject-matter jurisdiction to grant injunctive relief because he did not violate any applicable administrative rule. The board of health counters that Heskett waived his jurisdictional claim by failing to raise it below and that the Ohio Adm.Code 3701-29-06(E)(2) exception to Ohio Adm.Code 3701-29-02(C) applies.

{¶3} We reject the board's argument because the issue of the subject-matter jurisdiction of the trial court cannot be waived or forfeited.[1] And R.C. 3718.10(A) provides that a trial court's jurisdiction to grant injunctive relief in these cases is dependent upon a showing that the respondent named in the complaint is or was in violation of R.C. Chapter 3718 or rules issued under it. The trial court's injunction is premised upon its finding that Heskett violated Ohio Adm.Code 3701-29-06(B) by operating sewage treatment systems without a permit.

{¶4} On the merits of Heskett's claim, under Ohio Adm.Code 3701-29-02(C), his continued operation of the two non-permitted sewage treatment systems after the January 1, 2015 effective date of the rule could have resulted in deemed approval in the absence of evidence that any of the exceptions listed in the rules applied. But as the board of health argues, the exception in Ohio Adm.Code 3701-29-06(E)(2) applies because a sewage treatment system must comply with the conditions contained in an installation and/or operation permit issued by the board of health. The rule presupposes the issuance of and compliance with the permit before an existing sewage treatment system may be deemed approved under Ohio Adm.Code 3701-29-02(C). Because the board of health had not issued a permit for the sewage treatment systems Heskett installed and operated, Ohio Adm.Code 3701-29-06(E)(2) excepts him from claiming the benefit of the deemed approval of the systems under Ohio Adm.Code 3701-29-02(C). We overrule Heskett's first assignment of error.

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[1] Whereas forfeiture is the failure to make the timely assertion of a right, waiver is the 'intentional relinquishment or abandonment of a known right.' * * *. Mere forfeiture, as opposed to waiver, does not extinguish an 'error.'" *See United States v. Olano*, 507 U.S. 725, 733, 113 S.Ct. 1770, 123 L.Ed.2d 508 (1993), quoting *Johnson v. Zerbst*, 304 U.S. 458, 464, 58 S.Ct. 1019, 82 L.Ed. 1461 (1938); *see also State v. Gannon*, 4th Dist. Lawrence No. 15CA16, 2016-Ohio-1007, ¶ 23.

{¶5} Next Heskett argues that because he was previously fined by the board of health and paid those fines, he cannot be subjected to further fines or civil penalties based on double jeopardy. Because the trial court has not yet resolved the issue of additional fines or penalties, we decline to address Heskett's second assignment of error; it is premature.

{¶6} Therefore, we affirm the judgment of the trial court awarding injunctive relief to the board of health.

I. FACTS

{¶7} In August 2015, the Ross County Board of Health filed a verified complaint in the Ross County Court of Common Pleas against Daniel E. Heskett.[2] The board of health alleged that Heskett violated administrative rules by intentionally allowing the installation and operation of sewage treatment systems without the required permits. The board of health set forth two claims for relief in its complaint—(1) an injunction to abate Heskett's continuing violations of the rules, and (2) civil penalties for each of his multiple violations of R.C. Chapter 3718. Heskett filed an answer.

{¶8} The board of health filed a motion for summary judgment, and Heskett filed a memorandum in opposition. The parties' summary judgment evidence set forth the following facts.

{¶9} Heskett owns a parcel of real estate of approximately 51 acres on Robinson Road in Ross County. He constructed 14 buildings for use as residential rental units and installed individual sewage treatment systems for eight of the apartment

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[2] As discussed in our summary of the parties' summary judgment evidence, below, this was the board of health's second complaint against Heskett. The board of health voluntarily dismissed a prior complaint against him.

buildings. The board of health approved six of the systems, but sewage treatment systems for apartment units 1301 and 1302 in one duplex building and units 1401 and 1402 in a second duplex building had no permit.

{¶10} In April 2013, Heskett filed a permit application for the installation of a sewage treatment system for units 1301 and 1302. Ben Avery, the Director of Environmental Health of the Ross County Board of Health, conducted a lot evaluation. He observed that a large amount of fill material had been placed in the area where the system was to be installed and that there was no replacement area on the property for any of the existing apartment systems. Avery sent Heskett a letter explaining that based on his investigation, Heskett could not install a sewage treatment system at the site until: (1) he obtained a site and soil evaluation from a professional soil evaluator to assess the ability of the disturbed soil to treat the effluent from the proposed sewage treatment system; (2) he received a design for the proposed sewage treatment system based on the evaluation; and (3) the design evaluated and indicated a location on the property for the adequate and complete replacement of the sewage treatment system.

{¶11} According to the board of health Heskett did not respond to its letter. Heskett claimed that he informed Avery that his evaluation was incorrect because the sewage treatment system was not installed on fill and there was almost 52 acres of property available to site a replacement system.

{¶12} In July 2013 the board of health sent another employee to re-inspect the site; he reported that a sewage treatment system that serviced apartment units 1301 and 1302 had been installed and that unit 1301 appeared to be occupied. The board sent a certified letter to Heskett ordering him to cease and desist the operation of the

illegally installed sewage treatment system. After Avery confirmed the other board's employee's observations, he personally served Heskett with a second order to cease and desist and posted the orders on both apartments units 1301 and 1302, each of which appeared to be occupied. In August 2013, the board of health issued a public health order instructing Heskett to cease and desist the operation of the sewage treatment system because it had been installed without a board-issued installation permit and it continued to be maintained and operated without a board-issued operation permit. The board referred the matter to the prosecuting attorney, who commenced a civil action in the common pleas court against Heskett.

{¶13} In October 2013, Heskett applied for a permit for the installation of a sewage treatment system for the building housing apartment units 1401 and 1402. The board of health mailed a certified letter to Heskett advising him that it could not conduct a lot evaluation until the issues involving his non-permitted sewage treatment system for units 1301 and 1302 were resolved. In November 2013, a board employee inspected the new site and observed that a second sewage treatment system had already been installed and was operating for units 1401 and 1402. The board of health issued another public health order declaring both of the sewage treatment systems installed by Heskett for units 1301, 1302, 1401, and 1402 to be public health nuisances and ordering him to immediately abate their operation; the board immediately forwarded the matter to the prosecuting attorney for legal action. The order and a notice of violation were mailed to Heskett.

{¶14} Thereafter, the board of health referred the matter to the Ohio EPA because of the commercial nature of Heskett's property. The board agreed to dismiss

its initial common pleas court action against Heskett once he contacted the Ohio EPA and the agency started the permit application process for all of the apartment units that were serviced by the two non-permitted sewage treatment systems—units 1301, 1302, 1401, and 1402. Although the board of health received no verification that Heskett started the permit application process with the Ohio EPA, it voluntarily dismissed its first common pleas court action against Heskett in September 2014.[3]

{¶15} In December 2014, the board of health issued another public health order directing him to abate his violations by obtaining installation and operation permits for the two sewage treatment systems serving apartment units 1301, 1302, 1401, and 1402. The board mailed a copy of the order and a notice of violation to Heskett. The board has never issued a permit for the installation or operation of the sewage treatment systems. In Heskett's answers to the board's interrogatories, he admitted that he installed the sewage treatment systems for apartment units 1301 and 1302 in June-July 2013 and for apartment units 1401 and 1402 in October-November 2013, that these units became occupied in August 2013 and January 2014, and that he could not identify any permit from either the board of health or the Ohio EPA regarding these sewage treatment systems. This order became the basis for a second complaint against Heskett and was filed in August 2015.

{¶16} In October 2016, the trial court granted the board of health's motion for summary judgment The trial court determined that Heskett had violated Ohio Adm.Code 3701-29-06(B) by installing and operating sewage treatment systems for the

[3] According to Heskett, he filed an application for permits with the Ohio EPA in early 2016. (OP15, Heskett Aff., ¶ 10, Ex. F) The Ohio EPA indicated that it did not have regulatory authority to rule on Heskett's application because the OEPA does not regulate sewage treatment systems for one, two, or three-family homes. (OP16, Ex. 2, Deshaies Aff., ¶ 3-7.

four apartment units without an approved permit from the board of health. Therefore it granted an injunction requiring Heskett to cease and desist operation of the sewage treatment systems for the four units and to abate any further violations. The trial court did not decide the board's claim for civil penalties; instead, it indicated that "[a]ny further orders needed in aid of injunction or amount of any civil penalties shall be set for further hearing." Nevertheless, the court made an express determination "that there is no just cause for delay."[4]

II. ASSIGNMENTS OF ERROR

{¶17} Heskett assigns the following errors for our review:

I. THE APPELLEE AND TRIAL COURT LACKED SUBJECT MATTER JURISDICTION.

II. APPELLANT HAS BEEN FINED FOR NOT OBTAINING A PERMIT FOR THE SEWAGE TREATMENT SYSTEMS AND THEREFORE ANY FURTHER PENALTY IS UNCONSTITUTIONAL.

III. LAW AND ANALYSIS

A. Jurisdiction of the Trial Court

{¶18} In his first assignment of error Heskett asserts that the trial court lacked subject-matter jurisdiction to grant injunctive relief because he did not violate any applicable administrative rule in light of the January 1, 2015 amendment of Ohio Adm.Code 3701-29-02(C). The board of health claims that Heskett waived his jurisdictional claim by failing to raise it below.

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[4] The trial court's entry constituted a final appealable order. An order of a court is a final appealable order only if the requirements of both R.C. 2505.02 and, if applicable, Civ.R. 54(B), are met. *Chef Italiano Corp. v. Kent State Univ.*, 44 Ohio St.3d 86, 541 N.E.2d 64 (1989), syllabus. It affected Heskett's substantial rights and decided the action for the board of health's claim for injunctive relief. R.C. 2505.02(B). And although it did not decide the board of health's other claim for civil penalties, the trial court made an express determination that there was no just cause for delay. Civ.R. 54(B).

{¶19} We reject the board's argument because matters involving subject-matter jurisdiction of the trial court cannot be forfeited or waived. *See, e.g., State v. Ketterer*, 140 Ohio St.3d 400, 2014-Ohio-3973, 18 N.E.3d 1199, ¶ 8 ("objections to subject-matter jurisdiction cannot be waived"); *Fairland Association of Classroom Teachers, OEA/NEA v. Fairland Local School Board of Education* , 2017-Ohio-1098, __ N.E.3d __, ¶ 10 (4th Dist.) ("subject-matter jurisdiction goes to the power of the court to adjudicate the merits of a case; it can never be waived and may be challenged at any time").

{¶20} Moreover, the board of health does not disagree with Heskett that the issue he raises on appeal involves subject-matter jurisdiction. In fact, R.C. 3718.10(A) provides that a trial court's *jurisdiction* to grant injunctive relief in these cases is dependent upon a showing that the respondent named in the complaint is or was in violation of R.C. Chapter 3718 or the rules issued under it. That statute reads:

> (A) The prosecuting attorney of the county or the city director of law, village solicitor, or other chief legal officer of the municipal corporation where a violation has occurred or is occurring, upon complaint of the director of health or a board of health, shall prosecute to termination or bring an action for injunction or other appropriate relief against any person who is violating or has violated this chapter, any rule adopted or order issued under it, or any condition of a registration or permit issued under rules adopted under it. *The court of common pleas or the municipal or county court in which an action for injunction is filed has jurisdiction to grant such relief upon a showing that the respondent named in the complaint is or was in violation of the chapter or rules, orders, or conditions.*

(Emphasis added.)

{¶21} Therefore, we proceed to the merits of Heskett's jurisdictional claim. The trial court's injunction was premised upon its finding that Heskett was continuing to violate Ohio Adm.Code 3701-29-06(B) by operating two sewage treatment systems without a permit issued by the board of health. Under that rule, which became effective

on January 1, 2015, and under prior versions of other rules, a sewage treatment system "shall not be installed, altered, or operated without an approved permit from the board of health." *See also* R.C. 3718.01(F), defining "[h]ousehold sewage treatment system" to mean "any sewage treatment system, or part of such system, that receives sewage from a single-family, two-family, or three-family dwelling" and R.C. 3718.01(Q), defining "[s]ewage treatment system" to mean "a household sewage treatment system, a small flow on-site sewage treatment system, or both, as applicable."

{¶22} R.C. Chapter 3718 sets forth requirements for household sewage treatment systems and small flow on-site sewage treatment systems. Under R.C. 3718.02, the Director of Health has the duty to adopt rules of general application throughout the state to administer the chapter. R.C. 3718.08 prohibits any person from violating the chapter or any rule adopted or issued under it. Boards of health, including the Ross County Board of Health, have a duty to enforce the rules the Department of Health adopts. R.C. 3701.56.

{¶23} The board of health instituted this action for injunctive relief and civil penalties (the board's second action) in August 2015. By the time the action was filed, the Director of Health had adopted Ohio Adm.Code 3701-29-02(C), effective January 1, 2015, which provides:

> In accordance with section 3718.012 of the Revised Code, *a sewage treatment system that was in operation prior to the effective date of these rules shall not be required to be replaced with a new sewage treatment system, and shall be deemed approved* if the system does not cause a public health nuisance, or if the system is causing a public health nuisance as provided in section 3718.011 of the Revised Code, repairs are made to the system that eliminate the public health nuisance as determined by the applicable board of health. Repairs must be completed in accordance with the requirements of this chapter. A board of health may require components, [sic] be added or exposed to determine compliance with this

> chapter. Nothing in this section prohibits the required upgrade of an existing STS when additional flows are being added or when substantial changes to the structure occur. Additionally, *nothing in this section exempts a STS from compliance with the requirements specified in paragraph (E) of rule 3701-29-06 of the Administrative Code.*

(Emphasis added.)

{¶24} Heskett argues that this rule applies so that his two non-permitted sewage treatment systems for apartment units 1301, 1302, 1401, and 1402 were deemed approved on January 1, 2015, well before the board of health instituted its second action for injunctive relief based on a violation of Ohio Adm.Code 3701-29-06(B). The board of health claims that in this instance the exception set forth in the rule for Ohio Adm.Code 3701-29-06(E)(2) prevents approval by deeming or grandfathering.

{¶25} " 'The interpretation of statutes and administrative rules should follow the principle that neither is to be construed in any way other than as the words demand.' " *State ex rel. Baroni v. Colletti*, 130 Ohio St.3d 208, 2011-Ohio-5351, 957 N.E.2d 13, ¶ 18, quoting *Morning View Care Ctr.-Fulton v. Ohio Dept. of Human Servs.*, 148 Ohio App.3d 518, 2002-Ohio-2878, 774 N.E.2d 300, ¶ 36 (10th Dist.). Under Ohio Adm.Code 3701-29-02(C), unless any of the stated exceptions apply, Heskett's sewage treatment systems at issue were deemed approved effective January 1, 2015.

{¶26} The exception to the rule cited by the board of health is Ohio Adm.Code 3701-29-06(E)(2), which requires that sewage treatment systems "[s]hall comply with the conditions specified in an installation and/or operation permit issued by the board of health." The rule manifestly requires that: (1) there be permits issued by the board of health for sewage treatment systems; and (2) the systems comply with the conditions indicated in those permits. The apparent purpose of the rule is to prevent old systems

that meet standards when installed from automatically being required to upgrade to meet new stricter current standards unless they are causing a nuisance. It was not intended to grandfather old systems that were installed without a permit that certified the system met standards applicable at the time of the installation/operation.

{¶27} Heskett argues for an interpretation that defies the plain language of the rule: authorizing non-permitted sewage treatment systems to be treated as if permits had been approved, but requiring permitted sewage treatment systems to comply with the conditions in those permits. That is, he argues that sewage treatment systems that were installed and operated while flouting the permit requirements be treated more leniently than systems that had been properly permitted.

{¶28} Not only does this defy the plain language of Ohio Adm.Code 3701-29-06(E)(2), but assuming the provision is ambiguous, we are persuaded that the Director of Health could not have intended this absurd result. *See, e.g., State ex rel. Barley v. Ohio Dept. of Job & Family Servs.*, 132 Ohio St.3d 505, 2012-Ohio-3329, 974 N.E.2d 1183, ¶ 25 (courts construe statutes and rules to avoid unreasonable or absurd results); *State ex rel. Asti v. Ohio Dept. of Youth Servs.*, 107 Ohio St.3d 262, 2005-Ohio-6432, 838 N.E.2d 658, ¶ 28 (court construes statutes and administrative rules to avoid unreasonable or absurd results).

{¶29} Therefore, based on the language of Ohio Adm.Code 3701-29-02(C) and 3701-29-06(E)(2), Heskett violated Ohio Adm.Code 3701-29-06(B) after January 1, 2015 because Ohio Adm.Code 3701-29-02(C) did not operate to deem his non-permitted sewage water systems approved. The trial court thus correctly held that injunctive relief was warranted based on a violation of Ohio Adm.Code 3701-29-06(B)

and consequently possessed jurisdiction to grant injunctive relief under R.C. 3718.10(A). We overrule Heskett's first assignment of error.

B. Civil Penalties

{¶30} Heskett contends in his second assignment of error that because he was previously fined by the board of health and paid those fines, he cannot be subjected to further civil penalties because of double jeopardy. Because the trial court has not yet resolved the issue of additional fines or penalties, we decline to address Heskett's second assignment of error; it is premature. *See* fn. 2.

IV. CONCLUSION

{¶31} The trial court possessed jurisdiction to grant injunctive relief because Heskett's two non-permitted sewage treatment systems violated Ohio Adm.Code 3701-29-06(B). Having overruled Heskett's first assignment of error, we affirm the judgment of the trial court.

JUDGMENT AFFIRMED.

JUDGMENT ENTRY

It is ordered that the JUDGMENT IS AFFIRMED and that Appellant shall pay the costs.

The Court finds there were reasonable grounds for this appeal.

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

Any stay previously granted by this Court is hereby terminated as of the date of this entry.

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

Abele, J.: Concurs in Judgment and Opinion.
McFarland, J.: Dissents.

For the Court

BY: ________________________________
William H. Harsha, Judge

NOTICE TO COUNSEL

Pursuant to Local Rule No. 14, this document constitutes a final judgment entry and the time period for further appeal commences from the date of filing with the clerk.