

IN THE COURT OF APPEALS OF OHIO

TENTH APPELLATE DISTRICT

Brass Pole,	:	
	:	
Appellant-Appellant,	:	No. 08AP-1110
	:	(C.P.C. No. 08CVF-08-11383)
v.	:	
	:	
Ohio Department of Health et al.,	:	(ACCELERATED CALENDAR)
	:	
Appellees-Appellees.	:	

D E C I S I O N

Rendered on September 24, 2009

Sirkin, Pinales & Schwartz LLP, H. Louis Sirkin and Scott Ryan Nazzarine, for appellant.

Richard Cordray, Attorney General, and Angela M. Sullivan, for appellees Ohio Department of Health and Lorain County General Health District; Michael J. Schuler, for appellee Ohio Attorney General.

APPEAL from the Franklin County Court of Common Pleas.

McGRATH, J.

{¶1} Appellant-appellant, Brass Pole, appeals from a judgment of the Franklin County Court of Common Pleas dismissing its appeal from an order of appellees-appellees, the Lorain County General Health District ("LCGHD") and the Ohio Department of Health ("ODH") (collectively "ODH"). For the following reasons, we affirm.

{¶2} On May 7, 2008, the SmokeFree Coordinator for LCGDH sent Brass Pole a letter, which informed Brass Pole that it had been found in violation of Ohio's SmokeFree Workplace Law. By way of correspondence dated May 13, 2008, Brass Pole denied the

alleged violation. An administrative hearing was held on June 24, 2008. The next day, the Impartial Decision Maker ("IDM") for the LCGDH issued a report and recommendation, which found that Brass Pole had violated R.C. 3794.06(B). On July 3, 2008, Brass Pole filed objections to the IDM's report. In a letter dated July 22, 2008, the LCGDH overruled Brass Pole's objections and affirmed the IDM's findings.

{¶3} On August 5, 2008, Brass Pole placed an original and three copies of its notice of appeal addressed to the ODH, as well as four copies of its notice of appeal addressed to the Franklin County Court of Common Pleas, in DHL's drop box for overnight delivery. DHL, however, did not pick up the contents of its drop box until August 6 due to "heavy volume," causing Brass Pole's notice of appeal to be filed with the ODH on August 7, 2008.

{¶4} The ODH filed a motion to dismiss on the basis that the trial court lacked subject-matter jurisdiction. Specifically, the ODH argued that Brass Pole did not timely file its notice of appeal, as such was filed one day after the 15-day appeal period prescribed in R.C. 119.12. The trial court granted the motion, concluding that Brass Pole's failure to strictly comply with R.C. 119.12 left the court without jurisdiction to consider the appeal.

{¶5} Brass Pole appeals, raising a single assignment of error:

THE TRIAL COURT ERRED IN DISMISSING BRASS
POLE'S APPEAL FOR LACK OF JURISDICTION.

{¶6} An appeal from an administrative agency is governed by R.C. 119.12, which provides, in pertinent part:

Any party desiring to appeal shall file a notice of appeal with the agency setting forth the order appealed from and the grounds of the party's appeal. A copy of the notice of appeal

shall also be filed by the appellant with the court. Unless otherwise provided by law relating to a particular agency, notices of appeal shall be filed within fifteen days after the mailing of the notice of the agency's order as provided in this section.

{¶7} It is well-settled that the failure to file a notice of appeal with the appropriate agency within the 15-day limit provided for in R.C. 119.12 results in a divestiture of subject-matter jurisdiction. *Frasca v. State Bd. of Chiropractic Examiners* (July 30, 1998), 10th Dist. No. 97APE10-1387; *Harrison v. Ohio State Med. Bd.* (1995), 103 Ohio App. 3d 317, 322, citing *Arndt v. Scott* (App.1955), 72 Ohio Law Abs. 189, paragraph one of the syllabus; *Hayes v. Montgomery Cty. Bd. of Commrs.* (1994), 94 Ohio App.3d 597, 600. Subject-matter jurisdiction is the power conferred on a court to decide a particular matter on its merits and render an enforceable judgment over the action. *Morrison v. Steiner* (1972), 32 Ohio St.2d 86, paragraph one of the syllabus. The question of subject-matter jurisdiction is a question of law we review de novo. *Yusuf v. Omar*, 10th Dist. No. 06AP-416, 2006-Ohio-6657, ¶7.

{¶8} As a preliminary matter, we will address an issue first raised by Brass Pole at oral argument. Brass Pole contends that the ODH failed to comply with the procedural requirements of R.C. 119.09, and, therefore, its appeal was premature and its failure to comply with the 15-day appeal period prescribed in R.C. 119.12 was of no consequence.

{¶9} An agency's compliance with the procedural requirements of R.C. 119.09 is a condition precedent to the triggering of the 15-day appeal period set forth in R.C. 119.12. In pertinent part, R.C. 119.09 states:

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.

In *Hughes v. Ohio Dept. of Commerce*, 114 Ohio St.3d 47, 2007-Ohio-2877, the Supreme Court of Ohio held in part: "An administrative agency must strictly comply with the procedural requirements of R.C. 119.09 for serving the final order of adjudication upon the party affected by it before the 15-day appeal period prescribed in R.C. 119.12 commences." *Id.* at paragraph one of the syllabus.

{¶10} The *Hughes* decision was issued almost two years before the common pleas court issued its judgment. Brass Pole, however, failed to advance a claim of error based on *Hughes* to the trial court. Brass Pole's failure to raise this issue before the common pleas court forfeits this issue for appellate purposes. See, e.g., *Colonial Village Ltd. v. Washington Cty. Bd. of Revision*, 114 Ohio St.3d 493, 2007-Ohio-4641, ¶15 (stating that "[b]ecause the certification issue in *Hughes* had been raised in the lower tribunal, the issue was preserved; the failure to raise the jurisdictional issue at the [Board of Tax Appeals] in this case means that it is barred"); *Strausbaugh v. Ohio Dept. of Commerce*, 10th Dist. No. 07AP-870, 2008-Ohio-2456; *Johns 3301 Toledo Cafe, Inc. v. Liquor Control Comm.*, 10th Dist. No. 07AP-632, 2008-Ohio-394, ¶42-43 ("Because appellant failed to raise a claim of error based on *Hughes* before the common pleas court, we find that appellant has forfeited this issue for appellate purposes.") Thus, we will not consider the issue.

{¶11} Similarly, we will not consider Brass Pole's argument that R.C. 119.12 creates an undue burden on administrative appellants located outside of Franklin County by requiring their appeals to be filed in Franklin County, as such was not advanced before

the trial court. *Bailey v. Ohio State DOT*, 10th Dist. No. 07AP-849, 2008-Ohio-1513, ¶15, citing *State v. Awan* (1986), 22 Ohio St.3d 120 (stating in the syllabus that "[f]ailure to raise at the trial court level the issue of the constitutionality of a statute or its application, which issue is apparent at the time of trial, constitutes a waiver of such issue and a deviation from this state's orderly procedure, and therefore need not be heard for the first time on appeal").

{¶12} Turning our attention to the merits of this appeal, Brass Pole concedes that its notice of appeal was filed one day late, but argues that, because said notice was timely mailed, properly addressed, and contained the proper postage, it is entitled to a presumption of delivery and constructive receipt.

{¶13} Where a statute confers the right of appeal, an appeal may be perfected only in the manner prescribed by statute. *Camper Care, Inc. v. Forest River, Inc.*, 10th Dist. No. 08AP-146, 2008-Ohio-3300 (citations omitted). Ohio courts have consistently held that "a party adversely affected by an agency decision must * * * strictly comply with R.C. 119.12 in order to perfect an appeal." *Hughes*, at ¶17. And, as stated above, Ohio courts, including this one, have held that the failure to file a notice of appeal with the appropriate agency within the 15-day limit provided for in R.C. 119.12 is a jurisdictional defect. *Frasca; Harrison*.

{¶14} Depositing the notice of appeal in the mail does not constitute a filing under R.C. 119.12. To be timely filed, a notice a notice of appeal must be received within the time period set forth in R.C. 119.12. *Watts v. Ohio Dept. of Ins.*, 8th Dist. No. 87849, 2007-Ohio-81; *Leonard v. Ohio Bd. of Nursing* (June 8, 2000), 10th Dist. No. 99AP-1154; *Frasca; Burton v. Dept. of Agriculture* (Feb. 9, 1993), 10th Dist. No. 92AP-1499.

{¶15} In this case, the trial court determined that Brass Pole's failure to file its notice of appeal with the ODH within the time prescribed in R.C. 119.12 was a jurisdictional defect requiring dismissal of Brass Pole's appeal. Based on the case law cited above, we find that Ohio law supports the result reached by the trial court.

{¶16} We also find unpersuasive Brass Pole's reliance on *Gingo v. State Med. Bd.* (1989), 56 Ohio App.3d 111. In *Gingo*, the court found that a notice of appeal is presumptively timely delivered when it is shown to have been mailed within a sufficient time for it to have arrived at the agency before the 15-day limit. *Id.* This court, however, has previously refused to follow *Gingo*. See *Frasca; Capparell v. Love* (1994), 99 Ohio App.3d 624, 627. And, given that the Supreme Court of Ohio has mandated strict compliance with the statutory requirements for initiating an appeal under R.C. Chapter 119, we decline to depart from our previous treatment of *Gingo*. See, e.g., *Hughes; MedCorp, Inc. v. Ohio Dept. of Job & Family Servs.*, 121 Ohio St.3d 622, 2009-Ohio-2058.

{¶17} Accordingly, we overrule Brass Pole's assignment of error and affirm the judgment of the Franklin County Court of Common Pleas.

Judgment affirmed.

BRYANT and TYACK, JJ., concur.
