

NO. A11-2030

State of Minnesota
In Court of Appeals

In Re Application of
Skyline Materials, Ltd. for Zoning Variance

RESPONDENTS' BRIEF

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STATEMENT OF LEGAL ISSUES

1. For purposes of bringing an appeal pursuant to *Minn. Stat.* 394.27 Subd. 9 and Houston County Zoning Ordinance 0100.1104 Subd. 2 (3), is service of process governed under Rule 4.03 (e) (1), or Rule 5.02 of the Minnesota Rules of Civil Procedure?

- i. The issue was raised in the Trial Court via Houston County's Motion to Dismiss dated May 26, 2011.
- ii. The Trial Court ruled that Rule 5.02 of the Minnesota Rules of Civil Procedure applied.
- iii. The issue was preserved for appeal via Houston County's Notice of Appeal dated November 17, 2011.
- iv. Most apposite cases:

Curtis v. Otter Tail County Board of Adjustment, 455 N.W.2d 86 (Ct.App. 1990).

J.T. McMillan Co. v. State Board of Health, 124 N.W. 828, 110 Minn. 145 (Minn. 1910).

Most apposite Constitutional and statutory provisions:

Minn. Stat. 394.27 Subd. 9.

2. When a statute or ordinance does not prescribe the procedure to be utilized in bringing an appeal from a decision of a local Board of Adjustment, does the Trial Court have the right and duty to adopt appropriate and just procedural rules?

- i. The issue was raised in the Trial Court via Houston County's Motion to Dismiss dated May 26, 2011.
- ii. The Trial Court ruled in the affirmative.

iii. The issue was preserved for appeal via Houston County's Notice of Appeal dated November 17, 2011.

iv. Most apposite cases:

Curtis v. Otter Tail County Board of Adjustment, 455 N.W.2d 86 (Ct.App. 1990).

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State v. Hagerty, 189 N.W. 411, 152 Minn. 502 (Minn. 1922).

Most apposite Constitutional and statutory provisions:

Minn. Stat. 394.27 Subd. 9.

3. In determining appropriate and just procedural rules, does public policy favor the loss of substantive rights over procedural technicalities?

i. The issue was raised in the Trial Court via Houston County's Motion to Dismiss dated May 26, 2011.

ii. The Trial Court ruled in the negative.

iii. The issue was preserved for appeal via Houston County's Notice of Appeal dated November 17, 2011.

iv. Most apposite cases:

Independent School District No. 273 v. Gross, 190 N.W.2d 651 (Minn. 1971).

Kornberg v. Kornberg, 542 N.W.2d 379 (Minn. 1996).

Larson v. Hendrickson, 394 N.W.2d 524 (Minn.App. 1986).

Love v. Anderson, 61 N.W.2d 419, 240 Minn. 312 (Minn. 1953).

Most apposite Constitutional and statutory provisions:

Minn. Stat. 394.27 Subd. 9.

STATEMENT OF THE CASE

This matter is appealed from the District Court of Houston County, the Honorable Robert R. Benson.

The case involves a statutory appeal to the District Court by Respondents Michael and Diane Fields from a decision granting a rock quarry setback variance to Skyline Materials, Ltd. by the Houston County Board of Adjustment.

Appellant Houston County filed a Motion to Dismiss the proceeding, claiming defective service of the appeal upon Houston County. The Trial Court held:

1. Service of the appeal is governed by Rule 5.02 of the Minnesota Rules of Civil Procedure, authorizing service upon opposing counsel.
2. Respondents' timely service of the appeal upon the Houston County Attorney conferred jurisdiction upon the District Court.
3. When a statute or ordinance does not prescribe the procedure to be utilized in bringing an appeal from a decision of a local Board of Adjustment, the Trial Court has the right and duty to adopt appropriate and just procedural rules.
4. In determining appropriate and just procedural rules, public policy favors vindication of substantive rights over procedural technicalities.

STANDARD OF REVIEW

Respondents concur with the Standard of Review submitted by Appellant.

STATEMENT OF THE FACTS

1. Skyline Materials, Ltd. owns a rock quarry adjacent to lands owned by Respondents, Michael and Diane Fields.
2. Skyline Materials, Ltd. encroached within the fifty-foot setback requirement as prohibited under the Houston County Zoning Ordinance.
3. Skyline Materials, Ltd. next applied to the Houston County Board of Adjustment for a variance to the setback requirement.
4. The Houston County Board of Adjustment granted the variance at a hearing held March 11, 2011.
5. Respondents Michael and Diane Fields timely appealed the decision of the Board of Adjustment by serving their appeal upon the Houston County Attorney on April 7, 2011.
6. Houston County's Motion to Dismiss upon the grounds of insufficient service of process was denied by the Honorable Robert R. Benson, Judge of District Court, by Order dated September 14, 2011.
7. Houston County's appeal followed.

ARGUMENT

I. **RULE 5.02 OF THE MINNESOTA RULES OF CIVIL PROCEDURE GOVERNS SERVICE OF PROCESS FOR AN APPEAL TO THE DISTRICT COURT PURSUANT TO MINN. STAT. 394.27 SUBD. 9 AND HOUSTON COUNTY ZONING ORDINANCE 0110.1104 SUBD. 2 (3).**

Respondents agree that among the issues on appeal is whether Rule 4 or Rule 5 of the Minnesota Rules of Civil Procedure should apply when serving the notice of appeal in a District Court action challenging a decision of a County Board of Adjustment. (App. Brief, p. 10, fn. i.)

The District Court was correct in determining that service of the Fields' appeal was governed by MRCP 5.02, which provides in pertinent part:

Whenever under these rules service is required or permitted to be made upon a party represented by an attorney, the service *shall* be made upon the attorney unless service upon the party is ordered by the Court. (MRCP 5.02; emphasis supplied.)

Houston County contends that service of the appeal should have been accomplished pursuant to MRCP 4.03 (e) (1), (and presumably, MRCP 3.02) which, collectively, direct that a Summons and Complaint shall be served upon public corporations by:

... delivering a copy

(1) To the chair of the County Board or to the County Auditor of the Defendant county; (MRCP 4.03 (e) (1).)

There are various reasons that Appellant's reliance upon MRCP 4.03 (e) (1) is simply incorrect. First, MRCP 4.03 refers specifically to "[s]ervice of [a] *summons* within the State . . ." (MRCP 4.03; emphasis supplied.)

Appeals under *Minn. Stat.* 394.27 Subd. 9 and Houston County Zoning Ordinance 0110.1104 Subd. 2 (3), however, do not contemplate delivery of a summons. In fact, the Court of Appeals has previously held, with respect to *Minn. Stat.* 394.27 Subd. 9,

. . . that the Minnesota Rules of Civil Procedure do not specifically require that a summons be filed with a notice of appeal to perfect an appeal to the District Court. *Curtis v. Otter Tail County Board of Adjustment*, 455 N.W.2d 86, 87 (Ct.App. 1990).

Further,

The failure to serve and file a summons with the notice of appeal is not a jurisdictional defect. *Id.* at 87.

Thus, Houston County's reliance upon MRCP 4.03 (e) (1) is inapposite from the outset.

Second, MRCP 5.02 applies because an appeal from the Board of Adjustment to the District Court is *not* an original pleading, unlike a Summons and Complaint. This Court has held that the Appellant in a proceeding also arising under *Minn. Stat.* 394.27 Subd. 9, "was not commencing an action but was seeking review of a decision in an ongoing case." *Curtis v. Otter Tail County Board of Adjustment*, 455 N.W.2d 86, 87 (Ct.App. 1990). Thus, Appellant's attempt to frame the "narrow question" addressed in *Curtis* as "whether a summons must accompany the *original pleading* initiating a district

court appeal of a variance decision” is fundamentally misleading. (App. Brief, p. 9; emphasis supplied.)

Third, Appellant contends that *Curtis* is irrelevant to the Court’s analysis because it did not “address the issue of whether Rule 4 or Rule 5 governs service of process requirements . . .” (App. Brief, p. 9.) However, in determining that Appellant Curtis was “not ‘commencing’ an action but was seeking review of a decision in an ongoing case,” (*Curtis* at 87), the Court of Appeals mandated Rule 5.02 service requirements. That is to say, under MRCP 5.02, “Whenever . . . service is required or permitted to be made *upon a party represented by an attorney*, the service *shall* be made upon the attorney unless service upon the party is ordered by the Court. (MRCP 5.02; emphasis supplied.) Without question, at the time the appeal was taken, Houston County was represented by the Houston County Attorney, and there was certainly no Court Order requiring service upon a party.

The Minnesota Supreme Court has held that in a situation where the statute does not set out a particular procedure to appeal a board decision to the District Court,

The usual and well-understood method of giving notice of appeal . . . is by serving a written notice of appeal, stating that the party appeals from the order, describing it, on the adverse party or his attorney. *J.T. McMillan Co. v. State Board of Health*, 124 N.W. 828, 829, 110 Minn. 145, 149 (Minn. 1910). (Emphasis supplied.)

This is precisely the practice followed by the Respondents in this case.

Finally, with respect to this issue, it may be helpful to observe that the arguably uncertain state of the law respecting service of process in appeals pursuant to *Minn. Stat.*

394.27 Subd. 9 left Respondents in a peculiar quandary. On the one hand, if, as here, service is made upon the Houston County Attorney, Appellant will argue application of MRCP 4.03 (e) (1). On the other hand, if service had been made upon the Chairman of the County Board or County Auditor, Appellant might well argue application of MRCP 5.02, in reliance upon *Curtis*. Under this scenario, Respondents' substantive due process rights will be foiled in either event.

II. WHEN A STATUTE OR ORDINANCE DOES NOT PRESCRIBE THE PROCEDURE TO BE UTILIZED IN BRINGING AN APPEAL FROM A DECISION OF A LOCAL BOARD OF ADJUSTMENT, THE TRIAL COURT HAS THE RIGHT AND DUTY TO ADOPT APPROPRIATE AND JUST PROCEDURAL RULES.

Appellant made a passing reference in its Statement of the Case that the Trial Court concluded "that Minnesota law favors resolution of cases on their merits." (App. Brief, p. 2.) Yet, Appellant ignored this issue completely in both its Notice of Appeal and Brief. The Trial Court observed that in the absence of a specific statutory procedure, "it is within the Court's general powers to adopt appropriate and just procedural rules." (Tr. Ct. Order and Memo. of Sept. 14, 2011; App. Add., p. A-6.)

In exercising its general powers to formulate an appropriate procedure, the Trial Court must first, of course, determine whether or not a statutory procedure exists. The Trial Court did, in fact, determine that no such procedure was available under the statute. (Tr. Ct. Order and Memo. of Sept. 14, 2011; App. Add., p. A-6.) Further, this Court has already observed that *Minn. Stat.* 394.27 Subd. 9 establishes no specific procedure by which an appeal from a decision of a local Board of Adjustment shall be taken:

Although this statute provides a right to appeal to the district court from a decision of the board of adjustment, it does not specify the method by which the appeal is to be perfected. *Curtis v. Otter Tail County Board of Adjustment*, 455 N.W.2d 86, 87 (Ct.App. 1990).

Thus, where procedural guidelines are not specified,

“ . . . the court may proceed in any judicial way to determine the fact, and it is not restricted to any particular form of procedure.” *State v. Hagerty*, 189 N.W. 411, 412, 152 Minn. 502, 505 (Minn. 1922).

Further, in *Oronoco School District v. Town of Oronoco*, 212 N.W. 8, 170 Minn. 49 (Minn. 1927), the Supreme Court concluded:

Where jurisdiction over certain subject matter is conferred upon a court and no procedure is provided by the statute, the court will proceed under its general powers and adopt such procedure as is necessary to enable it to exercise and make effective the jurisdiction thus granted. [Citation omitted.] *Id.* at 9, 52.

Finally, in *J.T. McMillan Co. v. State Board of Health*, 124 N.W. 828, 110 Minn. 145 (Minn. 1910), the Minnesota Supreme Court addressed the constitutionality of a statute that did “not prescribe any proper or just procedure for taking an appeal” from a decision of the State Board of Health. The Court found that the statute in question was indeed constitutional, holding that it:

. . . gives absolutely the right of appeal and jurisdiction to the court to hear and determine it. This carries with it by necessary implication the right and duty of the court to adopt such rules of procedure as are reasonably essential to the discharge of the duty and power conferred, if the procedure prescribed by statute is inadequate. *Id.* at 829, 149.

It only stands to reason that in the absence of a specific statutory procedure, there can be no other result. Without a legislative pronouncement of procedural guidelines, it is the Trial Court that remains to “adopt appropriate and just procedural rules.”

III. IN DETERMINING APPROPRIATE AND JUST PROCEDURAL RULES, PUBLIC POLICY FAVORS VINDICATION OF SUBSTANTIVE RIGHTS OVER PROCEDURAL TECHNICALITIES.

The Trial Court further examined the public policy implications of granting Houston County's Motion to Dismiss.

First, the Trial Court observed that in conferring the right to a statutory appeal from a decision of a County Board of Adjustment, the Legislature has considered the interests of both the public and the individual. Thus, "[d]ismissal of the case based on a procedural technicality seems contrary to the Legislature's intended purpose of providing additional individual rights." (Tr. Ct. Order and Memo. of Sept. 14, 2011; App. Add., p. A-9.)

Second, the Trial Court noted the policies underlying MRCP 1:

[The Rules] shall be construed and administered to secure the just, speedy, and inexpensive determination of every action. MRCP 1.

We would emphasize that the Rules of Civil Procedure are to be given liberal construction so as to effectuate their purpose. *Kornberg v. Kornberg*, 542 N.W.2d 379, 384 (Minn. 1996). [Citation omitted.] "They reflect a well-considered policy to discourage technicalities and form . . . and should be liberally construed in the interests of justice." *Love v. Anderson*, 61 N.W.2d 419, 421, 240 Minn. 312, 314 (Minn. 1953).

To that end, the District Court noted the Minnesota Supreme Court's decision in *Independent School District No. 273 v. Gross*, 190 N.W.2d 651 (Minn. 1971):

In the absence of manifest finality or flagrant or inexcusable circumstances, courts are loath to permit substantive rights to be lost by a procedural lapse. It is the court's duty under such circumstances to examine in full the context of the issue to the end that controversies be determined on the merits and not upon procedural niceties. *Id.* at 657.

Apart from the District Court's analysis as summarized above, and in the context of vindicating a party's due process rights, one might ponder what, from a practical perspective, Houston County's exact complaint is. Appellant did not somehow go without notice of the Fields' appeal, and does not claim to have been prejudiced in any way. This Court, in *Larson v. Hendrickson*, 394 N.W.2d 524 (Minn.App. 1986) held:

When actual notice of the action has been received by the intended recipient, "the rules governing such service should be liberally construed." *Id.* at 526. [Citation omitted.]

The Trial Court record will, in all respects, show that this matter was simply proceeding in the ordinary course of any litigation. Houston County will get its day in Court. If, however, this case is decided solely upon what is, at best, an enigmatic procedural technicality, Mr. and Ms. Fields will not be heard, and the District Court will be kept from its duty to determine the case on its merits.

CONCLUSION

First, for purposes of bringing an appeal pursuant to *Minn. Stat.* 394.27 Subd. 9 and Houston County Zoning Ordinance 0100.1104 Subd. 2 (3), service of process is governed by Rule 5.02 of the Minnesota Rules of Civil Procedure, requiring service upon the County Attorney.

Second, when a statute or ordinance does not prescribe the procedure to be utilized in bringing an appeal from a decision of a local Board of Adjustment, the Trial Court has the right and duty to adopt appropriate and just procedural rules.

Third, in determining appropriate and just procedural rules, public policy favors vindication of substantive rights over procedural technicalities.

Consequently, the decision of the Trial Court must be affirmed, and the matter returned for further proceedings.

Dated: 11 January 2012

Respectfully submitted,



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