

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

Clyde Huddleston, et al.,	:	Case No. 09CA39
Plaintiffs-Appellants,	:	
v.	:	<u>DECISION AND</u>
	:	<u>JUDGMENT ENTRY</u>
Michael Mullen, et al.,	:	
Defendants-Appellees.	:	<b>Released 5/26/10</b>

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APPEARANCES:

Joseph H. Brockwell, Marietta, Ohio, for appellants.

Roland W. Riggs III, Marietta City Law Director, and Mark C. Sleeper, Marietta City Assistant Law Director, Marietta, Ohio, for appellees.

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Harsha, J.

{¶1} Clyde Huddleston and Sonnywood Addition (“Huddleston”) appeal from a summary judgment in favor of Michael Mullen, the Mayor of Marietta, the Marietta City Council, and the Marietta City Planning Commission (collectively “the City”). The litigation involved a proposed ordinance that would have allowed Huddleston to park recreational vehicles on their commercial property.

{¶2} The City Council forwarded the proposal to the Planning Commission, which disapproved the ordinance and sent it back to City Council for a final vote. Council effectively rejected the ordinance after three-fourths of the City Council failed to vote in its favor. Because Council’s procedure was based upon two statutes, R.C. 713.10 and R.C. 713.12, Huddleston sued, asserting two causes of action. Count One sought a declaratory judgment declaring that R.C. 713.10 and 713.12 are unconstitutional under the Ohio Constitution as they interfere with the municipal right of

self-government and because they are an improper delegation of legislative authority. Count Two alleged the zoning ordinance itself is unconstitutional because it is arbitrary, capricious, and impinges on Huddleston's property rights.

{¶3} The trial court granted summary judgment in the City's favor on the grounds that Huddleston failed to exhaust administrative remedies before suing and because neither of Huddleston's causes of action were "ripe" for adjudication.

{¶4} Huddleston appeals the dismissal of Count One, which he claims was ripe for review. Although we do not address the merits of this argument, we nonetheless reverse the summary judgment. Because Huddleston failed to serve the Attorney General with a copy of the complaint as required by R.C. 2721.12, the trial court lacked jurisdiction to issue any judgment in this case.

#### I. Summary of the Case

{¶5} Huddleston owns property in an area of Marietta zoned as "C-3 General Retail and Service District" and wanted to use this property as a parking area for recreational vehicles. Apparently at their request, an ordinance was introduced before City Council to amend the existing C-3 ordinance to add recreational vehicle parking to the list of approved uses. Council referred the ordinance to the Planning Commission, which ultimately disapproved it. Then the Planning Commission sent the proposed ordinance back to the City Council for a final vote. There, the ordinance failed to pass after it received only four out of seven votes. Apparently a three-fourths "super-majority" vote is required to pass any ordinance that is disapproved by the Planning Commission. The City Council followed this procedure as the result of the City of Marietta Law Director's interpretation of R.C. 713.10 and R.C. 713.12, which generally

concern city planning commissions and their involvement in changes in district or zoning measures.

{¶6} In response to the failure of the ordinance to pass, Huddleston filed a lawsuit in the Washington County Common Pleas Court against the Mayor of Marietta, members of the City Council, and members of the City Planning Commission. The record reflects that service was effected by delivering a copy of the complaint to the City Law Director. Count One sought a declaratory judgment proclaiming that R.C. 713.10 and R.C. 713.12 are unconstitutional under the Ohio Constitution because they interfere with the municipal right of self-government and because they are an improper delegation of legislative authority. Count Two sought a declaratory judgment declaring that the particular Marietta zoning ordinance, the C-3 area ordinance, is unconstitutional because it is arbitrary, capricious, unreasonable, and unenforceable, and it impinges on Huddleston's property rights. Huddleston also sought injunctive relief, asking that the City be enjoined from utilizing the procedures set forth in R.C. 713.10 and R.C. 713.12. Additionally, Huddleston requested attorney fees.

{¶7} The City filed a motion for summary judgment, arguing that Count One should fail on the merits, and cited cases for the proposition that R.C. Chapter 713 is constitutional in its operation. The City separately argued that Count Two should fail because Huddleston failed to exhaust all administrative remedies before filing the lawsuit, i.e., Huddleston failed to apply for a "special exemption" to the C-3 ordinance. The City Code apparently provides a mechanism for applying for a special exemption to zoning ordinances. The City alleged that Huddleston failed to utilize this mechanism, which may have permitted them to park recreational vehicles on their property.

{¶8} The City also filed a motion to dismiss, which was premised on Huddleston's failure to serve the Attorney General with a copy of the complaint. Huddleston filed a memorandum contra, admitting the error and requesting the court grant them leave to serve the Attorney General with a copy of the complaint.

{¶9} The trial court issued a written decision that found Huddleston failed to exhaust administrative remedies because they had not applied for a special exemption to the ordinance as allowed by the City Code. The court found that the other issues raised by the complaint were not ripe for adjudication, and granted summary judgment on both causes of action in favor of the City, dismissing the complaint in its entirety.

{¶10} The decision did not address the City's motion to dismiss. Nor is there evidence elsewhere in the record that the court ruled on the motion to dismiss or granted Huddleston leave to serve the Attorney General. And there is no evidence in the record that Huddleston ever served the Attorney General.

{¶11} Huddleston filed a timely appeal of the summary judgment decision.

## II. Assignment of Error

{¶12} Huddleston's sole assignment of error is:

THE TRIAL COURT ERRED WHEN IT RULED THAT FAILURE TO EXHAUST ADMINISTRATIVE REMEDIES CAUSED THE OTHER ISSUES IN THE CASE, INCLUDING APPELLANTS' FIRST CAUSE OF ACTION, TO BE NOT RIPE FOR ADJUDICATION.

III. The Failure to Serve the Attorney General is a Fatal Jurisdictional Defect.

{¶13} Neither party renewed their arguments concerning the motion to dismiss in the briefs filed with this Court. However, we are required to raise jurisdictional issues sua sponte. See *Whitaker-Merrell Co. v. Geupel Constr. Co.* (1972), 29 Ohio St.2d 184,

186, 280 N.E.2d 922; *State v. Geisler*, Athens App. No. 07CA35, 2008-Ohio-4836, at ¶11.

{¶14} R.C. 2721.12(A), a portion of the Declaratory Judgment Act, provides that “when declaratory relief is sought under this chapter[,] \*\*\* if any statute or the ordinance or franchise is alleged to be unconstitutional, the attorney general also shall be served with a copy of the complaint in the action or proceeding and shall be heard.”

{¶15} Interpreting R.C. 2721.12, we have held that “[w]hen challenging the constitutionality of a statute, the complaining party must raise the constitutionality issue in the complaint or in an amended complaint and must serve the Attorney General with the complaint.” *Carmon v. Nationwide Mut. Ins. Co.*, 144 Ohio App.3d 686, 690, 2001-Ohio-2526, 761 N.E.2d 134, citing *Cicco v. Stockmaster*, 89 Ohio St.3d 95, 97, 2000-Ohio-434, 728 N.E.2d 1066. “Failure to do so deprives the trial court of jurisdiction.” *Id.*

{¶16} In this case the Attorney General was never served with a copy of the complaint. Both parties realized the error and Huddleston even sought court permission to serve the Attorney General. That request was never addressed by the trial court. And the court never ruled on the City’s motion to dismiss premised on the failure to serve the Attorney General.

{¶17} Both Counts of Huddleston’s complaint asked for declaratory relief. Thus, the jurisdiction of the court was based on R.C. 2721.12. The failure to comply with the statute and serve the Attorney General is a fatal defect that deprived the trial court of jurisdiction to render a summary judgment decision on either Count. Consequently, we must reverse the judgment of the lower court and remand with instructions to dismiss

the complaint for lack of jurisdiction or to grant Huddleston leave to serve the Attorney General.

JUDGMENT REVERSED  
AND CAUSE REMANDED.

**JUDGMENT ENTRY**

It is ordered that the JUDGMENT IS REVERSED and that the CAUSE IS REMANDED. Appellees 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 Washington County Common Pleas Court 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. Exceptions.

Abele, J. & Kline, J.: Concur in Judgment and Opinion.

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.**