

IN THE COURT OF APPEALS
TWELFTH APPELLATE DISTRICT OF OHIO
MADISON COUNTY

WILLIAM M. STIDHAM, Treasurer, :
 :
 Plaintiff-Appellee, : CASE NO. CA2011-10-012
 :
 - vs - : OPINION ON
 : RECONSIDERATION
 : 8/6/2012
 WILLIAM P. WALLACE, et al., :
 :
 Defendants-Appellants. :

CIVIL APPEAL FROM MADISON COUNTY COURT OF COMMON PLEAS
Case No. CVE 20110076

Kirsten J. Gross, 59 North Main Street, London, Ohio 43130, for plaintiff-appellee

William P. and Lori A. Wallace, 185 Thorn Locust Lane, London, Ohio 43140, defendants-appellants, *pro se*

Choctaw lake Property Owners, 2875 Oneida Drive, London, Ohio 43140, defendant, *pro se*

Citibank, 11800 Spectrum Center Drive, Reston, VA 20190-3327, defendant, *pro se*

PIPER, J.

{¶ 1} The above cause is before the court pursuant to an application for reconsideration filed by counsel for appellee, William M. Stidham, Madison County Treasurer, on May 21, 2012. Appellee requests that this court reconsider its May 14, 2012 decision reversing a grant of summary judgment to appellee, who is seeking to collect

delinquent sewer assessment fees from appellants, William P. Wallace and Lori A. Wallace.

{¶ 2} In September 2002, appellants granted the Madison County Board of Commissioners ("the Board") a sewer easement. Several years passed without additional activity until August 2005, when the Board certified a special assessment to the Madison County Auditor in order to recoup the cost of constructing the sewer system. Starting in 2006, each property assessed would owe \$721.18 per year for a period of 25 years. Appellants' property was subject to the special assessment.

{¶ 3} From 2006 to 2010, appellants continually refused to pay the assessment. As a result, the county deducted the cost of the assessment from appellants' property tax payments, which caused significant arrearages in their tax record. In March 2011, appellee filed a tax foreclosure complaint against appellants' property. At the time of the complaint, appellants owed \$6,226.05 in assessment fees, plus accrued taxes, penalties, and interest.

{¶ 4} Appellants timely answered, arguing, among other things, that appellee acted in "bad faith and with unclean hands" in filing for foreclosure, and that the assessment was an unconstitutional taking of property.

{¶ 5} Appellee subsequently moved for summary judgment, claiming there were no genuine issues of material fact to be litigated because appellants had not paid the assessment, appellants' taxes were certified delinquent, and the county had the best and first lien on the property.

{¶ 6} The trial court awarded summary judgment to appellee, finding that he had attempted to collect appellants' unpaid assessment "as authorized by law," and that the county had a valid tax lien on appellants' property. The property was sold at auction on October 7, 2011.

{¶ 7} Appellants timely appealed, raising one assignment of error for review:

{¶ 8} THE TRIAL COURT ERRED TO THE PREJUDICE OF APPELLANTS BY

GRANTING APPELLEE SUMMARY JUDGMENT WHEN APPELLEE WAS NOT ENTITLED TO THE SAME AS A MATTER OF LAW.

{¶ 9} Appellants argued that the trial court erred in granting summary judgment where various issues of material fact remained, including (1) whether the assessment was levied in "bad faith," and (2) whether the assessment was an unconstitutional taking of appellants' property.

{¶ 10} By decision and judgment entry filed on May 14, 2012, this court reversed the trial court's decision. This court sua sponte found that appellee's reliance on R.C. Chapter 727 to collect the assessment was misplaced, and that the county could only act under R.C. Chapter 6117. Although conceding that application of the plain error doctrine in civil cases is not favored, we found plain error, concluding that by proceeding under R.C. Chapter 727 instead of Chapter 6117, appellee and the trial judge "seriously affected the basic fairness, integrity or public reputation of the judicial process, thereby challenging the legitimacy of the underlying judicial process itself."

{¶ 11} In support of his application for reconsideration, appellee admits that there is a mistaken reference to R.C. Chapter 727, but asserts that this was not an issue on appeal, and merely an inadvertent, nonprejudicial error.

{¶ 12} Upon reconsideration, the court finds that the erroneous reference to R.C. 727.30 did not so undermine the integrity and fairness of the judicial process that a finding of civil plain error was warranted. The issue before the trial court was not whether the assessment was properly levied under R.C. Chapter 6117; the issues were whether the tax was certified delinquent, remained unpaid, and whether appellee, the county treasurer, had the first and best lien on the property. The trial court found no genuine issue of material fact with regard to these issues, and upon review, this court agrees. The inadvertent citation to R.C. 727.30 does not change the analysis: The sewer assessment was properly made but

not paid. It was properly certified delinquent and deducted from appellants' property tax payments, resulting in a tax arrearage, foreclosure, and the county treasurer having the first and best lien on appellants' property.

{¶ 13} Accordingly, the motion for reconsideration is granted. This court's decision filed on May 14, 2012 is vacated. The assignment of error raised by appellants is overruled and the decision of the trial court is affirmed.

HENDRICKSON, P.J., concurs.

RINGLAND, J., dissents.

RINGLAND, dissenting.

{¶ 14} I respectfully dissent from the majority opinion on reconsideration.

{¶ 15} The majority concedes that the Treasurer incorrectly cited R.C. Chapter 727 to support the assessment on appeal, but believes that it was an "inadvertent" mistake. However, there is no evidence before us that the Treasurer's references to R.C. 727.30 were a mere mistake, other than the Treasurer's conclusory statement in his motion that, based upon a prior case purportedly upholding the same sewer easement, the assessment was "properly imposed under Title 61. of the Ohio Revised Code." [sic] *See Madison Cty. Bd. of Commrs. v. Bell*, 12th Dist. No. CA2005-09-036, 2007-Ohio-1373. Additionally, if the Treasurer's compliance with R.C. Chapter 6117 was not raised at trial or on appeal, and was therefore waived, I believe that it was error for this court to receive such evidence on reconsideration.

{¶ 16} Secondly, I believe that in filing the complaint under the wrong statute, the Treasurer may have created jurisdictional issues for the trial court, which can be raised *sua sponte* at any stage of the proceedings. Civ.R. 12(H)(3); *Forest Hills Local School Dist. Bd.*

of Edn. v. Huegel, 12th Dist. No. CA2002-07-050, 2003-Ohio-3444, ¶ 8; *Kinney v. Ohio Dept. of Adm. Servs.*, 30 Ohio App.3d 123, 124-25 (10th Dist.1986) ("[a] court is without power to grant summary judgment on a claim where subject matter jurisdiction is lacking").

{¶ 17} Lastly, I believe that the majority opinion establishes a bad precedent that supports granting summary judgment, despite the movant's irrefutable reliance on the improper statutory authority. In the most extreme sense, the Treasurer could have prevailed on summary judgment no matter what statute he cited, from R.C. 101.01 (commencement of legislative services) to R.C. 6301.10 (reports on Ohio work force) or any section within the perimeters of these code sections. I question where this cycle ends. Litigants may become careless in fashioning their arguments on appeal if they know they can possibly rely on a motion for reconsideration to cry harmless "inadvertence."

{¶ 18} For the foregoing reasons, I would remand this case to the trial court to permit the Treasurer to amend and re-file his complaint utilizing the proper statute.