ORIGINAL

IN THE SUPREME COURT OF OHIO

BETTY OLIVER,	:	
	:	Case No. 2018-0864
Plaintiff-Appellant,	:	
	:	
v.	:	On Appeal from the Union County Court of
	:	Appeals, Third Appellate District
THE CITY OF MARYSVILLE,	:	
	:	Court of Appeals
Defendant-Appellee.	:	Case No. 14-18-0001

MEMORANDUM IN RESPONSE OF DEFENDANT-APPELLEE THE CITY OF MARYSVILLE

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THIS CASE PRESENTS NO ISSUE OF PUBLIC OR GREAT GENERAL INTEREST

This case presents nothing more than a garden-variety nuisance abatement that is neither of substantial constitutional import nor of public or great general interest. In fact, this case is so unremarkable that Appellant does not even present a single argument why this case is one of public or great general interest. Rather, Appellant's arguments—although labeled propositions of law—are nothing more than her feeble attempts to again present her same arguments that have been thrice-rejected. First, by the trial court when it entered judgment in favor of the City; next, by the Third District when it affirmed the trial court's judgment; and finally, by the Third District when it denied Appellant's application for reconsideration. Because a party to litigation has a right to but one appellate review of her cause, Appellant cannot appeal to this Court for yet another opportunity to rehash her same failed arguments. *Williamson v. Rubich*, 171 Ohio St. 253, 253–254, 168 N.E.2d 876 (1960).

This Court's discretionary review is limited to appeals involving either a substantial constitutional question or a case of "public or great general interest." Ohio Constitution, Article IV, Sections 2(B)(2)(a)(ii), 2(B)(2)(e); *see also Wilson v. Brush Wellman, Inc.*, 103 Ohio St.3d 538, 2004-Ohio-5847, 817 N.E.2d 59, ¶ 12. Notably, both are absent in Appellant's three propositions of law.

Appellant's first proposition of law is simply Appellant's baseless attacks exhibiting her disagreement with the Third District's rejection of her incorrect reliance on R.C. 715.261—an inapplicable statute that was never invoked by the City—to dispute the validity of the City's tax lien. Further, her disputes concerning the reasonableness of the City's actions in abating the nuisance on her property were properly precluded, as she waived her arguments by failing to appeal

the 2012 Entry. The Third District—and the lower court—properly determined the City abided by the 2012 Entry. Appellant simply disagrees.

In Appellant's second proposition of law, she takes issue with the Third District's proper determination that Appellant was provided all the due process required, and she simply failed to take advantage of such. Appellant further relies upon inapplicable case law as support, that the Third District properly determined is inapposite to the instant case and thus refused to adopt Appellant's positions.

Finally, in her third proposition of law, Appellant requests this Court interpret a statute that was never invoked by the City and simply does not apply. The Third District already determined that R.C. 715.261 is not applicable to the instant case, and thoroughly explained that even if R.C. 715.261 did apply, the City complied with the certification requirements in effect at the time it incurred costs in abating the nuisance on Appellant's property. Further, because Appellant's argument requires retroactive application of R.C. 715.261—a prospective statute—the Third District properly rejected Appellant's contentions.

In short, the Third District—and the trial court below—properly granted judgment in favor of the City by applying the proper, applicable authority to the facts of this case. Appellant simply disagrees with that result, and seeks yet another opportunity to present her failed arguments—this time to this Court. That is not the role of this Court. *See State v. Noling*, 136 Ohio St.3d 163, 2013-Ohio-1764, 992 N.E.2d 1095, ¶ 63 (O'Donnell, J., dissenting) ("[O]ur role as the court of last resort is to clarify constitutional questions, resolve uncertainties in the law, and address issues of public or great general interest."). Accordingly, this Court should decline jurisdiction and reject Appellant's appeal.

STATEMENT OF THE CASE AND FACTS

This case stems from the City of Marysville (the "City") and the Union County Board of Health's (the "Board") 2011 complaint seeking declaratory judgment, injunctive relief, and nuisance abatement—pursuant to R.C. 3707.01—against Appellant. Despite receiving notice of the suit, Appellant failed to respond, and the trial court entered default judgment in favor of the City and the Board. On May 23, 2012, Appellant's property was judicially declared a nuisance, and Appellant was ordered to abate the nuisance on her property within thirty days. If Appellant failed to do so, the trial court authorized the City to take all necessary actions to abate the nuisance, and further ordered Appellant fully liable for all costs incurred by the City for nuisance abatement. Despite receiving notice of the trial court's 2012 Entry, Appellant never appealed the trial court's decision declaring Appellant's property a nuisance. Appellant failed to abate the nuisance and, as a result, the City abated the nuisance on Appellant's property. The City incurred $12,381.75 in abatement costs, and certified its costs to the Union County Auditor to be included as a tax lien on Appellant's property, as per the 2012 Entry.

On January 5, 2016—over four years after the City and the Board filed their original complaint regarding Appellant's property—Appellant brought suit against the City and the Board,[1] challenging the City's actions and seeking to declare the tax lien on her property invalid. Notably, Appellant did so *years after* (1) the City had filed the 2011 nuisance abatement action against Appellant; (2) the trial court had deemed Appellant's property a nuisance; (3) the City had abated the nuisance and incurred abatement costs; and (4) the City had certified the costs to the Union County Auditor.

[1] The Board was dismissed as a party via the trial court's September 8, 2016, Journal Entry granting the Board's Motion for Judgment on the Pleadings, and was not a party to Appellant's appeal.

On December 28, 2017, the trial court granted judgment in favor of the City, holding that the City complied with the 2012 Entry authorizing abatement and certification of costs. The trial court found the City's certification of costs was not time barred, as neither the 2012 Entry nor R.C. 715.261 establish a deadline for certification of costs. The trial court further determined that the City's certification of costs complied with R.C. 715.261, as effective at the time of the abatement of the nuisance on Appellant's property. Finally, the trial court found the City's tax lien valid, and dismissed Appellant's claims.

Appellant appealed the trial court's decision, and on May 21, 2018, the Third District affirmed the trial court's judgment in favor of the City. Appellant then sought reconsideration, and the Third District denied Appellant's application on June 14, 2018, finding that Appellant simply disagreed with the logic and conclusions of the Third District's decision. Appellant now seeks yet another opportunity to appeal the trial court's proper judgment in favor of the City, by asking this Court to exercise discretionary jurisdiction over her failed claims.

ARGUMENT IN OPPOSITION TO APPELLANT'S PROPOSITIONS OF LAW

I. Response to Appellant's Proposition of Law No. 1: Because the tax lien on Appellant's property is pursuant to, and in accordance with, the 2012 Entry—not R.C. 715.261 as Appellant incorrectly contends—Appellant's first proposition of law is baseless.

Appellant's arguments here do not adhere to the proposition of law she presents. (Appellant Mem. at 3–5). The gravamen of Appellant's position is her disagreement with the Third District rejecting her arguments relying on R.C. 715.261—an inapplicable statute that was never invoked by the City—to dispute the validity of the City's tax lien. (*See* Appellant Mem. at 3–5). She presents no constitutional issue or matter of public or great general interest necessary to invoke this Court's discretionary jurisdiction. Instead, she rehashes the same arguments presented in her failed application for reconsideration. (*See* Appellant Mem. at 3–5, App. 32).

As Appellant concedes, and the Third District properly held, the 2012 Entry "specifically authorized the City to certify its costs (of abating Appellant's nuisance) to the Union County Auditor and be assessed to her real estate taxes." (Opinion at 22; Appellant Mem. at 3). And the City certified its costs to the Union County Auditor "pursuant to the judgment entry issued by the trial court, *not pursuant to R.C. 715.261*, as Appellant claims." (Opinion at 26–27; Appellant Mem. at 5). Thus, Appellant's baseless accusation implying the Third District and the trial court went rogue in not adopting her position and applying R.C. 715.261—an inapplicable statute—is simply without merit. (*See* Appellant Mem. at 3–5).

Further, Appellant's claims that the Third District "dismissed precedent" is equally without merit, as the cases Appellant relies on are inapposite to the instant case. (*See* Appellant Mem. at 5). As the Third District properly concluded, because the City pursued its abatement costs pursuant to the 2012 Entry—not R.C. 715.261—*Thomas v. Bauschlinger*, 9th Dist. Summit No. 25868, 2011-Ohio-4940, which relied on R.C. 715.261 in collecting its abatement costs, is "distinguishable from the case *sub judice*." (Opinion at 26–27). Likewise, *Atwater Twp. Bd. of Trs. v. Welling*, 184 Ohio App.3d 201, 2009-Ohio-4451, 920 N.E.2d 183 (11th Dist.), is also inapposite. In *Welling*, the record was void of *any* certification of abatement costs by the township. *Welling*, 2009-Ohio-4451, ¶ 46. (Opinion at 27). Whereas here, the City properly certified its abatement costs pursuant to the 2012 Entry. (Opinion at 27).

Finally, Appellant's arguments regarding the "reasonableness" of the City's actions in abating the nuisance fail for two reasons. (*See* Appellant Mem. at 3–5). First, as the Third District properly concluded, Appellant is precluded from raising this issue on appeal. (*See* Opinion at 12–13). Appellant could have appealed the 2012 Entry deeming her property a nuisance, but failed to do so. (Opinion at 12). Thus, she waived this argument. *See Grava v. Parkman Twp.*, 73 Ohio

St.3d 379, 653 N.E.2d 226 (1995). (Opinion at 12–13). Second, the case law Appellant relies upon does not support her contentions. (*See* Appellant Mem. at 3–5). Her attempt to utilize *City of Lebanon v. McClure*, 12th Dist. Warren No. CA89-11-065, 1990 Ohio App. LEXIS 4454 (Oct. 15, 1990), as some sort of baseline for what actions Appellant believes the City should have taken before it abated the nuisance on her property is irrelevant and in direct conflict with the 2012 Entry. (*See* Appellant Mem. at 4). Notably, in *McClure*, the city presented proposals and bids to the court for the work to be done because the court stated in its order that the city was to have the violations corrected in accordance with bids submitted by independent contractors. *McClure*, 1990 Ohio App. LEXIS 4454, at *2. In contrast here, the 2012 Entry has no such requirement. Rather, as properly noted by the Third District, the 2012 Entry "authorized the City to take all necessary steps to abate th[e] nuisance" if Appellant failed to do so herself. (Opinion at 21).

In sum, it is clear that Appellant's first proposition of law is simply Appellant's attempt to rehash her arguments that the Third District properly rejected. Her proposition of law is nothing more than her disagreement with the Third District's proper conclusions. (*See* Appellant Mem. at 3–5). Because she fails to present any constitutional issue or matter of public or great general interest, Appellant's first proposition of law does not support this Court exercising jurisdiction over the instant case.

II. <u>Response to Appellant's Proposition of Law No. 2:</u> Because Appellant was provided all the due process required but she simply failed to take advantage of it, her second proposition of law is without merit.

The problem with Appellant's second proposition of law is that it has absolutely nothing to do with the facts of this case. (*See* Appellant Mem. at 6–7). Appellant was afforded due process—she simply failed to take advantage of the opportunities provided. And the case Appellant relies on to support her argument, *City of Englewood v. Turner*, 178 Ohio App.3d 179,

2008-Ohio-4637, 897 N.E.2d 213 (2d Dist.), is inapposite, as the Third District properly decided.[2] (Opinion at 11–13; Appellant Mem. at 6–7). In reaching its decision, the Third District was faced with the following undisputed facts:

- A judicial determination—the 2012 Entry—concluded that a nuisance existed on Appellant's property *prior* to the City's abatement of the nuisance. (Opinion at 3, 12).
- Appellant was afforded an opportunity to be heard, as she was provided notice that she could appeal the 2012 Entry. (Opinion at 3–4, 12).
- Appellant never appealed the 2012 Entry. (Opinion at 12, 21).
- After Appellant failed to abate the nuisance as required, the City abated the nuisance, and certified its costs of abatement to the Union County Auditor, in accordance with the 2012 Entry. (Opinion at 4–5, 22).

Given the above undisputed facts, Appellant's reliance on *Turner* to "support her view of due process" is unavailing because, as the Third District properly concluded, "Appellant's case is distinguishable from the *Turner* cases." (Opinion at 12, 21; Appellant Mem. at 6). In *Turner*, "there ha[d] never been a judicial determination of a public nuisance, nor did Turner have an opportunity to be heard at an administrative level with a judicial review of whether a public nuisance existed." *Turner*, 2008-Ohio-4637, ¶ 54. (Opinion at 12).

In contrast here, a judicial determination deemed Appellant's property to be a nuisance. (Opinion at 12). Appellant had an opportunity to be heard at the trial court level—in 2011—to dispute whether her property was a nuisance, but failed to do so. (Opinion at 12). She likewise could have appealed the trial court's 2012 judgment deeming her property a nuisance, but again failed to do so. (Opinion at 12). Because Appellant was provided notice and an opportunity to be heard, but simply failed to take advantage of such, Appellant was precluded from raising the issue

[2] Appellant also devotes one sentence to *City of Lebanon v. McClure*, 12th Dist. Warren No. CA89-11-065, 1990 Ohio App. LEXIS 4454 (Oct. 15, 1990), to argue that "evidence on options and proposed bids" should have been provided prior to the City abating the nuisance on Appellant's property. (Appellant Mem. at 7). As previously discussed, *McClure* is inapposite to the instant case because the 2012 Entry is devoid of any such requirement.

on appeal. (Opinion at 12–13). Likewise, any attack Appellant now lodges against the Third District's decisions regarding due process is also precluded. Accordingly, Appellant's second proposition of law is without merit.

III. <u>Response to Appellant's Proposition of Law No. 3:</u> Because Appellant's interpretation of R.C. 715.261—an inapplicable statute that was never invoked by the City—requires retroactive application in contravention of Ohio law, her third proposition of law is without merit.

Appellant's third proposition of law simply boils down to her request for this Court to interpret the plain language of statutes that do not apply to the instant case.[3] *See* R.C. § 715.26; R.C. § 715.261. (*See* Appellant Mem. at 8–10). This is not even a matter of great interest in this case—as Appellant does not even address the language of the statutes—much less a matter of public or great general interest. (*See* Appellant Mem. at 8–10). Indeed, Appellant's arguments reveal that she is impermissibly utilizing this opportunity to once again present her perceived flaws and alleged errors in the logic and conclusions of the Third District's Opinion. (*See* Appellant Mem. at 8–10).

First, Appellant contends that the Third District "summarily dismisses the Ninth District decision in *Thomas v. Bauschlinger* . . . in the interpretation of the statutory provision for creation of a tax lien." (Appellant Mem. at 8). This is incorrect. The Third District thoroughly explained that *Bauschlinger* is distinguishable from this case "because the City pursued its abatement costs in accordance with" the 2012 Entry—not R.C. 715.261. *See Bauschlinger*, 2011-Ohio-4940, ¶ 8. (Opinion at 26–27).

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[3] R.C. 715.26 grants municipalities the statutory authority to remove and repair any "insecure, unsafe, or structurally defective buildings or other structures." R.C. §715.26(B). R.C. 715.26 grants this authority to municipalities without the need to file an action or seek prior court approval. *See* R.C. § 715.26. Additionally, R.C. 715.261 allows a municipality to collect the costs incurred from abating a nuisance under R.C. 715.26. *See* R.C. §§ 715.261(B); (C). Because the 2011 underlying action was not brought pursuant to R.C. 715.26, both R.C. 715.26 and R.C. 715.261 are inapplicable.

Next, Appellant again relies upon *Welling* to attack the Third District for failing to address the alleged "multiple defects" with the City's certification of costs, arguing that *Welling* did not take "the approach of allowing the trial court to create a tax lien by ordering a certification of costs." (Appellant Mem. at 8–9). Appellant, again, is incorrect. The Third District not only found that "the City complied with the certification requirements," but also found that Appellant's reliance on *Welling* was "misplaced" because "*Welling* is factually inapposite from the case before us."[4] (Opinion at 27–28).

Finally, Appellant takes issue with the Third District's Opinion by arguing that it "omits any consideration of the case law submitted by the parties" concerning "retroactive versus prospective application" of R.C. 715.261. (Appellant Mem. at 9). Contrary to Appellant's contention, the Third District did address Appellant's arguments regarding the version of R.C. 715.261 that should be applied—assuming R.C. 715.261 were applicable to the City's actions. (*See* Opinion at 27–28). Appellant simply disagrees with the result.

It is well-established that "[a] statute is presumed to be prospective in its operation unless expressly made retrospective." R.C. § 1.48. This Court has held where "there is no clear indication of retroactive application, then the statute may only apply to cases which arise subsequent to its enactment." *Van Fossen v. Babcock & Wilcox Co.*, 36 Ohio St.3d 100, 106, 522 N.E.2d 489 (1988) (citing *Kiser v. Coleman*, 28 Ohio St.3d 259, 262, 503 N.E.2d 753 (1986)). It is undisputed that the City's abatement actions—for which it incurred abatement costs—all occurred *prior* to the 2014 amendment to R.C. 715.261. Thus, Appellant's advocacy for retroactive application of the 2014 amendment to R.C. 715.261 to the City's abatement actions is in contravention of R.C. 1.48

[4] *Welling* concerns cost recovery from persons causing environmental emergencies under R.C. 3745.13(A), and a township's failure to file *any* certification of costs. *Welling*, 2009-Ohio-4451, ¶¶ 43–44, 46.

and this Court's precedent. R.C. § 1.48; *Van Fossen*, 36 Ohio St.3d at 106. Accordingly, the Third District properly rejected Appellant's position. (Opinion at 27–28).

CONCLUSION

Appellant's propositions of law are lacking any issue of public or great general interest, and do not raise a substantial constitutional question for this Court to decide. Rather, this case presents a simple dispute over the routine application of well-established Ohio law to a specific set of facts. Appellant merely wants this Court to exercise its discretionary jurisdiction so Appellant has yet another opportunity to rehash her thrice-rejected arguments, as well as her disagreements with the Third District's logic and conclusions. Because this is not the role of this Court, this Court should decline jurisdiction over Appellant's proposed appeal.

Respectfully submitted,

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CERTIFICATE OF SERVICE

The undersigned hereby certifies that a true and accurate copy of the foregoing document was served via ordinary, U.S. Mail, postage pre-paid, this 19th day of July, 2018, upon:

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