ORIGINAL

Case No. 2013-1603

In The Supreme Court of Ohio

Appeal from the Court of Appeals
Fifth Appellate District
Stark County, Ohio
Case No. 2013CA00044

ANA M. HAMBUECHEN,
Respondent-Appellant,

v.

221 MARKET NORTH, INC. DBA
NAPOLI'S ITALIAN EATERY,
Petitioner-Appellee.

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Merit Brief of Appellee, 221 Market North, Inc. dba Napoli's Eatery

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Statement of the Case and Facts[1]

In March 2007, Ana Hambuechen filed a charge with the appellant Ohio Civil Rights Commission (Commission) alleging that the appellee 221 Market North, Inc., known as Napoli's Italian Eatery (Napoli's), fired her because she was pregnant. The Commission issued a complaint charging Napoli's with a violation of R.C. 4112.02(A). Napoli's denied the allegations and the case proceeded to trial in front of an administrative law judge ("ALJ") a year and a half later, in November 2008.

It took another three and a half years, until April 2012, for the ALJ to recommend that the Commission find a violation by Napoli's. The Commission waited another seven months before doing so on November 15, 2012. In all, the case remained pending in the Commission for almost *six years*—five years and eight months, to be precise.

Within 11 days of the Commission's order, on November 26, 2012, Napoli's filed a petition for judicial review in the Stark County Court of Common Pleas under R.C. 4112.06. At first, Napoli's attorney served the petition on the Commission and Ms. Hambuechen through regular mail, and not through the clerk of courts.

On Friday, December 28, 2012, barely a month after its filing, the Commission pounced, asking the court to dismiss Napoli's petition for lack of

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[1] The facts in this case are not in dispute.

subject matter jurisdiction. The Commission argued that Napoli's had to both initiate service through the clerk of courts in accordance with Rules of Civil Procedure 3 and 4, and do so within 30 days of the Commission's Order.

Within three days, on Monday, December 31, 2012, Napoli's did two things. First, it filed a praecipe for service to the clerk of courts for service of the petition in accordance with the Civil Rules. In other words, Napoli's requested service through the clerk about 35 days after it filed its petition. Second, Napoli's opposed the Commission's motion to dismiss, pointing out that if service was required under the Civil Rules, then those same Civil Rules allowed one year to obtain service under Civ.R. 3(A), which provides that a "civil action is commenced by filing a complaint with the court if service is obtained within one year."

The trial court, however, agreed with the Commission and dismissed Napoli's petition because it "did not property [sic] initiate service of its Petition on the Commission and Complainant through the Clerk of Courts within 30 days of the Commission's Final Order...."[2]

But on August 26, 2013, the unanimous Fifth Appellate District correctly reversed the trial court's decision. The Fifth District cited the Eighth District's opinion in *City of Cleveland v. Ohio Civil Rights Comm'n.* for the proposition that the Rules of Civil Procedure apply to an action commenced in common

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[2] Exhibit ("Exh.") 4, pp. 3–4, attached to the appellant's brief.

pleas court under R.C. 4112.06 absent a good and sufficient reason not to apply those rules. *Hambuechen v. 221 Market North, Inc.*, 5th Dist. No. 2013-CA-00044, 2013-Ohio-3717, at ¶ 13, citing 43 Ohio App.3d 153, 156, 540 N.E.2d 278 (1988). The Fifth District further correctly observed that, "R.C. 4112.06(H) provides only that the appeal be filed within 30 days; the statute does not clearly require that service be initiated within 30 days." *Id.* at ¶ 13. And because the statute does not clearly provide for the timing of service, a petitioner under R.C. 4112.06 has a year to "commence" the action in accordance with Civil Rules 3(A). *See Id.* at ¶¶ 14–16.

The Commission now appeals.

Law and Argument

Appellee's Proposition of Law:

Because the Rules of Civil Procedure are not "clearly inapplicable" to a petition for judicial review from a finding of the Ohio Civil Rights Commission under R.C. 4112.06, a petitioner has one year to perfect service on the parties according to Civ.R. 3(A).

1. *The Civil Rules apply to adversarial proceedings unless "clearly inapplicable."*

The issue in this case is straightforward: whether the Civil Rules apply to the service of a petition for review of a Commission's order under R.C. 4112.06. As such, the analysis must begin with Civ.R. 1(C), which provides: "These rules, *to the extent that they would by their nature be clearly inapplicable*, shall not apply to procedure...(7) in all other special statutory proceedings; provided, that where any statute provides for procedure by a general or specific reference to all the statutes governing procedure in civil actions such procedure shall be in accordance with these rules." (Emphasis added.)

The Staff Notes to the July 1, 1971 amendment to Civ.R. 1(C) state in pertinent part:

> As a result of the amendment of Rule 1(C) the Civil Rules will be applicable to special statutory proceedings except "to the extent that they would by their nature be clearly inapplicable...." [T]he Civil Rules will be applicable to special statutory proceedings adversary in nature unless there is a good and sufficient reason not to apply the rules.

Accord Price v. Westinghouse Electric Corp., 70 Ohio St.2d, 423 N.E.2d 1114

(1982). Ohio's courts have held—and not even the Commission appears to contest—that an action commenced in common pleas court according to R.C. 4112.06 is adversarial in nature. *E.g., City of Cleveland v. Ohio Civil Rights Com'n*, 43 Ohio App.3d 153, 156, 540 N.E.2d 278 (8th Dist.1988). As such, the Eighth District held in *City of Cleveland* that a petitioner under R.C. 4112.06 is required to serve opposing parties through the clerk of courts in accordance with Civil Rules 3 and 4. *Id.* at paragraph two of the syllabus; *Abbeyshire Constr. Co. v. Civil Rights Comm.*, 39 Ohio App.2d 125, 316 N.E.2d 893 (1975) ("The Rules of Civil Procedure apply to an action commenced in common pleas court pursuant to R.C. 4112.06.")

Still, Napoli's acknowledges that is not necessarily the end of the analysis. In *Ramsdell v. Ohio Civ. Rights Com'n.*, this Court observed that it has decided "both ways on the question of the applicability of the Civil Rules," and that the question must be decided on a "case-by-case basis, depending on the statute involved." 56 Ohio St.3d 24, 27, 563 N.E.2d 285 (1990). Therefore, a closer look at the statute is necessary.

2. *R.C. 4112.06 does not clearly require that service be initiated within 30 days, therefore the Civil Rules govern the time for service.*

R.C. 4112.06 governs an appeal from a decision of the Commission to the common pleas court, and it provides in relevant part:

> (A) Any complainant, or respondent claiming to be aggrieved by a final order of the commission, including a refusal to issue a com-

> plaint, may obtain judicial review thereof, and the commission may obtain an order of court for the enforcement of its final orders, in a proceeding as provided in this section....
>
> (B) Such proceedings shall be initiated by the filing of a petition in court as provided in division (A) of this section and the *service of a copy of the said petition upon the commission and upon all parties who appeared before the commission....*
>
> (H) If no proceeding to obtain judicial review is instituted by a complainant, or respondent within 30 days from the service of order of the commission pursuant to this section, the commission may obtain a decree of the court for the enforcement of such order....

(Emphasis added.)

The statute only specifies *who* must be served: "the commission and...all parties who appeared before the commission." R.C. 4112.06(B). But the statute is silent as to *how* or *when* service is required.

Ohio's courts seem to have settled the question of *how* service of a petition is to be made. For example, in *City of Cleveland*, the Eighth District held that R.C. 4112.06(B) is "silent as to whether the petition initiated the appeal must be served through the clerk of courts." *City of Cleveland*, 43 Ohio App.3d at 156. Therefore, because such an appeal is adversarial, and there was not a "good and sufficient reason not to apply" them, the court held that Civil Rules 3 and 4 were not "clearly inapplicable" by virtue of R.C. 4112.06, and therefore governed service of a petition, which must be accomplished through the clerk of courts. *Id. Accord Donn, Inc. v. Ohio Civil Rights Comm.*, 68 Ohio App.3d 561, 589 N.E.2d 110 (8th Dist.1991).

But few courts, until now, have decided *when* service of a petition for review must be served. The analysis, however, is not a difficult one. The *City of Cleveland* case previewed the answer to the question. After all, just as the statute is silent as to how a petition is served, it is every bit as silent as to when it must be served. As set forth above, the only provision that the General Assembly made regarding service is limited to identifying the parties who must be served with a copy of the petition: "the commission and...and all parties who appeared before the commission." R.C. 4112.06(B).

This belies the Commission's claim that the "plain text" requires service to be initiated within 30 days of the Commission's order. (Brief of Commission, p. 16). The fact is, the plain text of the statute requires nothing of the kind. The statute's only reference to service is in R.C. 4112.06(B), and the only purpose of that paragraph is to define *who* must be served, not *how*, and not *when.*

Had the General Assembly wanted to specify that service must be initiated within 30 days, or completed within a certain time, it could have done so—and done so very easily. But it chose not to.

As a result, the unanimous Fifth District's decision to apply the Civil Rules is no doubt the correct one. Therefore, the court correctly held that, according to Civ.R. 3(A), Napoli's had one year to perfect service on all parties, not 30 days to initiate it, as the Commission argued. *Hambuechen,* 2013-Ohio-3717, at ¶¶ 15–16.

The Eighth District's holding in *City of Cleveland* supports the Fifth District's holding. There, Cleveland appealed the Commission's determination that Cleveland discriminated against an employee based on a physical handicap. Just as in this case, Cleveland served the petition through ordinary mail; but unlike this case, never attempted to do so through the clerk within one year. So, more than a year after Cleveland filed its appeal, the complainant asked the court to dismiss the case because Cleveland failed to serve him within one year as required by Civ.R. 3(A) and 4(A). The court did so.

On appeal to the Eighth District, Cleveland argued that the Civil Rules governing service did not apply to R.C. 4112.06 appeals. As such, Cleveland argued it did not need to serve the petition through the clerk, or, by implication, do so within one year of the Commission's order. The court described the issue as "whether Civ.R. 3(A), 4(A) and 4(B) are applicable" to the parties to a R.C. 4112.06 appeal. *City of Cleveland*, 43 Ohio App.3d 153, 540 N.E.2d 278. The court held that they were, and that those rules required service through the clerk of courts. *Id.* at 158. And because Cleveland did not do so *within one year* the court held that its petition had to be dismissed. *Id.* at 157–158.

Though the issue in that case was *how* service was to be made and not *when*, this dictum supports the Fifth District's holding here. After all, the Eighth District observed that service was to be completed "within one year," not initiated within 30 days. The Commission's representation to the contrary

("...*City of Cleveland*...[found] that R.C. 4112.06(B)'s service requirement was subject to R.C. 4112.06(H)'s 30-day timeframe [sic]." (Brief, p. 13)) is incorrect and cannot be reconciled with the actual holding of *City of Cleveland*. To the contrary, *City of Cleveland* supports Napoli's position and the Fifth District's rationale, not the Commission's.

The Eighth District reached a similar result a few years later in *Donn, Inc. v. Ohio Civil Rights Com'n*. There, the court considered a R.C. 4112.06 appeal from the Commission's decision that a company illegally discriminated against one of its employees. But the company never served the employee, who did not even receive a copy of it for more than a year and a half following the company's appeal. The court dismissed the company's appeal based on its decision in the *City of Cleveland* case. *Donn, Inc.*, 68 Ohio App.3d. at 564, 589 N.E.2d 110.

The company appealed and argued that the *City of Cleveland* case did not apply. The Eighth District disagreed and affirmed its holding in *Cleveland*, holding that "This court has held that an action for judicial review pursuant to R.C. 4112.06 may be commenced only by proper service through the clerk of courts in accordance with Civ.R. 3 and 4...[which] further provide that a civil action is commenced by the filing of a complaint with the court and service upon the defendant through the clerk of courts *within one year of filing*." (Emphasis added.) *Id.* at 565. And because the company did not, the court held that dismissal was the appropriate remedy. *Id.*

Although this case too addressed only how service was to be made, the dictum clearly supports the application of the Civil Rules regarding when service is to be made.

The cases cited by the Commission, especially Ramsdell, do not help the Commission either.

The Commission relies heavily upon this Court's decision in *Ramsdell v. Ohio Civ. Rights Comm'n*—referring to it at least 35 times. The Commission claims that *Ramsdell* stands for the proposition that the "30-day deadline at issue sensibly applies to both the filing and service...." (Brief, p. 6). But the Commission's reliance on that case is entirely misplaced.

In *Ramsdell*, the claimant filed a petition for review 31 days after the Commission denied her charge of discrimination. Her petition was dismissed as untimely. On appeal to this Court, she argued that the "30-day period for filing a petition for judicial review of a commission order is not mandatory." *Ramsdell*, 56 Ohio St.3d at 24, 563 N.E.2d 285. This Court disagreed, holding that the 30-day time limit was, in fact, mandatory, reasoning that if it was not, a party seeking review would "be free to do so at any time," which, this Court noted, could be "months or even years" later. *Id.* at 25.

Having decided that R.C. 4112.06 imposes a mandatory 30-day time limit for filing an appeal from a Commission order, this Court then addressed when that time begins. Because the Commission mailed the order, the appellant

argued he had three additional days to file his appeal under Civ.R. 6(E). This Court disagreed, holding that the Civil Rules "may not be applied to extend or reactivate jurisdiction," which was limited to 30 days. *Id.* at 27–28. That was the extent of this Court's holdings in *Ramsdell.*

Ramsdell does not help the Commission here because there is no dispute that Napoli's filed its appeal within 30 days—in fact, it did so in only 11 days. Nor did Napoli's seek to use the Civil Rules to "extend" the 30-day jurisdictional deadline to file a petition. Instead, Napoli's only sought to act within the Civil Rules—including both Civ.R. 4(A), which requires service through the clerk of court, and Civ.R. 3(A), which allows one year to obtain service.

Ramsdell obviously had nothing to do with the timing of service of an appeal—the only issue in this case. That was the Fifth District's conclusion as well, finding that *Ramsdell* "did not address the applicability of the Civil Rules to service of a petition filed pursuant to R.C. 4112.06." *Hambuechen*, 2013-Ohio-3717, ¶ 15. The Fifth District was correct, *Ramsdell* does not help the Commission here.

Neither does *Ramudit v. Fifth Third Bank*, 1st Dist. No. C-030941, 2005-Ohio-374. There, the Commission found that it was "not probable" that a bank unlawfully disciplined an employee based on her national origin. The employee filed a petition under R.C. 4112.06 but never served the Commission.[3]

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[3] *Id.* at ¶¶ 1–3.

The court held that the petition "was not properly initiated through filing and proper service within thirty days as required by R.C. 4112.06(H)...."[4]

However, the issue in the case was not the time within which a petition must be filed. The only relevant fact was that the Commission was never served at all, not whether they were served on time. The court therefore did not decide the issue regarding timing of service, so it is of no relevance to the facts in this case and the Commission's reliance on *Ramudit* is likewise misplaced.

Finally, the Commission relies on the Eighth District's decision in *Muhammad v. Ohio Civ. Rights Comm'n.*, 8th Dist. No. 99327, 2013-Ohio-3730. But that case does not help the Commission either. There, the court dismissed pro-se Muhammad's appeal from the Commission's finding of "no probable cause" because he failed to even name and serve the employer, obviously a party to the action in the Commission (though apparently he did include Governor Kasich and "President Barack Hussein Obama" in his proof of service). *Id.* at ¶ 7. Muhammad never even argued that he had a year to complete service.

None of these cases support the Commission's proposition of law. To the contrary, the Commission's proposition of law cannot be reconciled with the rationale of those cases, which support the application of the Civil Rules to actions filed under R.C. 4112.06.

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[4] *Id.* at ¶ 11.

3. *The Commission's rationale is internally inconsistent and seeks an inconsistent application of the Civil Rules that is not justified by R.C. 4112.06.*

Lacking support from the plain language of the statute, or this Court's decision in *Ramsdell*, the Commission's argument does not even have the benefit of being internally consistent. At first, the Commission demanded the application of the Civil Rules regarding *how* service was to be made. In its motion to dismiss, the Commission argued that service by mail was not permitted, and that service could only be made through the clerk of courts through Civ.R. 4(A). In support of its argument, the Commission cited the *City of Cleveland* case, which, as set forth above, held that a petition under R.C. 4112.06 was required to be served through the clerk of courts according to Civil Rules 3 and 4. (Motion to dismiss, filed December 28, 2012).

But now, after Napoli's instituted service through the clerk of courts (only days after it filed its petition for review, and barely a month after the Commission's final order), the Commission wants to dodge the application of the very same Civil Rules it asked the court to embrace in the first place. The Commission claims the Civil Rules should apply only to *how* a petition for review is served, and not *when* it must be served—in other words, whenever the Commission benefits.

This cafeteria-style application of the Civil Rules is not supported by the statute, which, again, makes no reference whatsoever to service, except to specify *who* must be served. The Fifth District recognized this as well, holding:

"If Civil Rules 3 and 4 apply to the commencement and service of a petition filed pursuant to R.C. 4112.06, they apply in their entirety unless the statute clearly indicates otherwise." *Hambuechen*, 2013-Ohio-3717, at ¶ 15. Because it does not, both Civ.R. 3 and 4—not just the parts that benefit the Commission—apply to service. That includes Civ.R. 3(A), which only requires service within one year, not 30 days.

4. *If the possibility that service could take up to a year is too long in this type of case, the Commission should not permit cases to languish for almost six years before issuing an order. If that is insufficient, it should seek a change from the General Assembly, not advocate judicial legislation.*

From the time Ms. Hambuechen filed her charge in March 2007, it took an inexplicable *five years and eight months* for the Commission to issue a final order on November 26, 2012. The order, it should be noted, required Napoli's to pay Ms. Hambuechen her wages, including any raises and benefits, plus interest, retroactively to December 6, 2006. Napoli's, by contrast, filed their petition only 11 days after the Commission's order, and sought service through the clerk or courts only four weeks after that. If there is an undue delay here, the Commission alone bears responsibility for it.

Yet the Commission writes in its brief, without the slightest trace of irony, that waiting up to a year for service would be inconsistent with the "pragmatic need...to do its job," leaving the Commission "in limbo." (Brief, p.

2). Regardless of the irony, the Commission's argument is as inaccurate as it is melodramatic. It is inaccurate because the Commission only needs to wait 30 days to see if an appeal is filed. After all, even the Commission admits that the Fifth District "acknowledged the 30-day deadline to *file* the appeal...." So the Commission only needs to wait 30 days, not one year, to see if an appeal is taken—hardly what could be described as "limbo."

Moreover, the Commission's claim is exaggerated because an appellant being allowed a year to perfect service puts the appellee in no worse position than every other civil litigant, who are likewise governed by the one-year requirement in Civil Rules 3 and 4.

Here, the Commission did not have to wait very long since Napoli's filed its appeal within 11 days of the Commission's order and initiated service only a few weeks after that. The Commission was hardly languishing in a fog of suspense and confusion when it rushed to dismiss Napoli's appeal barely a month after it was filed. It was lying in wait.

In short, there is little substance to the Commission's policy argument. If there was an undue delay in this case, the Commission is responsible for it.

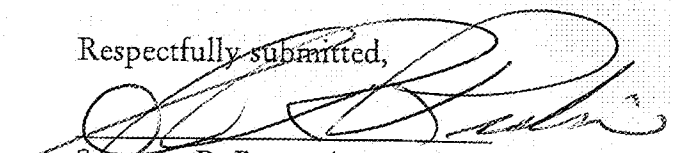
Moreover, Napoli's deserves the opportunity for judicial review if the Commission's determination was wrong, just as much as the Commission and Ms. Hambuechen deserve the right to enforce the order if it was correct. And Napoli's opportunity for judicial review should not be cut short due to the

Commission's request for this Court to add to the plain language of R.C. 4112.06, which, as the General Assembly provided, only defines *who* must be served with a copy of the petition for review, and does not currently require that service be initiated within 30 days—though the General Assembly could have easily done so if they had wanted to. The Commission's proposition of law requests nothing less than judicial legislation. If the Commission wants to change the statute so dramatically, it should seek change through the General Assembly, not this Court.

Conclusion

For the foregoing reasons, Napoli's requests that this Court affirm the August 26, 2013 decision of the Fifth Appellate District.

Respectfully submitted,



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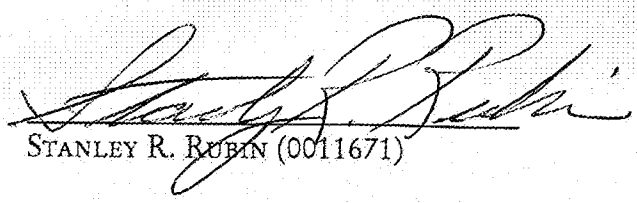

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