**IN THE SUPREME COURT OF OHIO**

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| FRANK GLIOZZO | ) | |
| | ) | CASE NO. 2006-1166 |
| | ) | |
| APPELLEE, | ) | |
| | ) | On Appeal from the Cuyahoga County |
| vs. | ) | Court of Appeals, 8th Appellate District |
| | ) | |
| UNIVERSITY UROLOGISTS OF CLEVELAND, INC., et al., | ) | |
| | ) | |
| APPELLANTS. | ) | |
| | ) | |

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# MERIT BRIEF OF APPELLANTS UNIVERSITY UROLOGISTS OF CLEVELAND, INC. AND MARTIN RESNICK, M.D.

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## I. STATEMENT OF THE FACTS

This medical malpractice action against Appellants University Urologists of Cleveland, Inc. and Martin Resnick, M.D. was filed on November 14, 2003. (Supp 1 Appx 5.) Appellee Frank Gliozzo's claim of negligence related to a procedure performed on June 3, 2002. On May 28, 2003, Appellee sent Appellants a 180-day letter extending the applicable statue of limitations to November 28, 2003.

The docket below reflects that on February 10, 2004, Appellants filed a stipulated leave to plead with the trial court. (Supp 53.) Thereafter, Appellants filed an answer to the complaint on February 12, 2004, in which the affirmative defense of insufficiency of service of process was expressly and unambiguously raised, as was the additional affirmative defense of failure to comply with the applicable statute of limitations. (Supp 5, 7.) Per Civ.R. 3(A), Appellee had until November 13, 2004 to perfect service. The trial court docket reflects that he did not do so. (Supp 49-53.)

On April 4, 2005, Appellants filed a motion to dismiss with the trial court, in which they raised the issue of the failure to perfect service. (Supp 13-18.) On April 13, 2005, Appellee filed a brief in opposition to the motion to dismiss. (Supp 19-29.) On April 14, 2005, the trial court granted Appellants' motion to dismiss with the following Judgment Entry:

> Parties in court for scheduled trial. Defendants' Motion for Leave to File Motion to Dismiss is granted in the interest of judicial economy. Arguments heard on the record in support of and in opposition to defendants' Motion to Dismiss plaintiff's complaint for failure to commence case within the applicable statute of limitations. The court finds that the case was never properly commenced as defendants were not served with the complaint and did not waive the affirmative defenses of statute of limitations and insufficiency of service of process. Defendants' Motion is therefore granted. Case dismissed with prejudice at plaintiff's cost. (Supp 30.)

On May 9, 2005, Appellee timely filed a Notice of Appeal from the decision of the trial court. (Supp 49,56.) After the matter was fully briefed, the Eighth District Court of Appeals, in a 2-1 decision, reversed the trial court, on April 6, 2006. (Appx 4, Supp 34.) Thereafter, Appellants filed a Motion to Certify Conflict and a Motion for Reconsideration. (Appx 15-16, Supp 45-46.) These motions were each denied, both with one dissenting vote, on May 5, 2006. (Appx 15-16, Supp 45-46.) The opinion of the court of appeals was journalized on May 5, 2006. (Supp 34, Appx 4.) See, *Gliozzo v. University Urologists of Cleveland*, Eighth App. No. 86371, 2006-Ohio-1726. (Supp 34, Appx 4.)

Appellants filed a Notice of Appeal and a Memorandum in Support of Jurisdiction with this Court on June 19, 2006. (Appx 1.) Appellee filed Memorandum in Response on July 19, 2006. Thereafter, on October 4, 2006, the within appeal was accepted by this Court. (Supp 48.)

## II. ARGUMENT IN SUPPORT OF PROPOSITION OF LAW

### Proposition of Law No. 1.

**A Defendant Does Not Waive The Properly Asserted Affirmative Defense Of Insufficient Service Of Process By Filing An Answer And Otherwise Participating In Litigation And Defending The Merits Of The Claim(s).**

### A. The Facts Of This Case Are Ideally Suited For A Decision From This Court Clarifying That A Defendant Does Not Waive A Defect In Service Of Process Where Failure Of Service Is Properly Raised As An Affirmative Defense In An Answer, Or Other Initial Pleading.

The legal issue presented in this case is straight forward. Appellee never perfected service on either Appellant. The trial court's docket unambiguously reflected that the sole attempt at service on each defendant failed and that notice of that fact was

mailed to plaintiff's attorneys. After obtaining leave to plead, Appellants filed an answer to the complaint, in which they properly raised the affirmative defense of insufficiency of service of process. None of these facts are disputed.

After the one year for perfecting service under Civ.R. 3(A) had elapsed, Appellants filed a Motion to Dismiss on the grounds that service had not been perfected. The trial court granted the Motion to Dismiss, finding that because the Appellants were not ever served, "the case was never properly commenced." (Supp 30, Appx 17.)

On appeal, the court of appeals reversed, holding that Appellants "waived" the properly asserted affirmative defense of insufficient service of process by "vigorously" defending the case "***on the merits***, up until the eve of trial." *Gliozzo*, supra, 2006-Ohio-1726 at ¶10. (Emphasis sic.) The court of appeals majority based its decision on its perception that the defense of the case at trial level by Appellants was thorough and complete. The court seemed to reason that a thorough defense was tantamount to an acquiescence to jurisdiction, despite the timely raising of an affirmative defense. The court of appeals majority opinion stated as follows on this point:

> While the record reflects appellees timely filed the affirmative defense of insufficiency of process, the record also shows appellees contacted Gliozzo's counsel and requested a leave to plead, filed an answer, attended a case management conference, conducted discovery, exchanged expert reports, attended pretrials, filed a dispositive motion and filed motions in limine. A review of the docket demonstrates that appellees vigorously defended this case *on the merits,* up until the eve of trial. Id. at ¶10. (Emphasis sic.)
>
> ***
>
> Here, not only were appellees fully aware of the medical malpractice lawsuit filed by Gliozzo and the allegations contained therein, appellees vigorously participated in the litigation of this action. It was only on the eve of trial, long after dispositive motions had been filed, that appellees

moved to dismiss for insufficiency of process. Id. at ¶12.

The language above can easily be read as an admonition to counsel to do as little as possible in defending a case where service has not been perfected, lest counsel cross the amorphous threshold of vigorous defense that, according to the appellate court, constitutes a waiver of the affirmative defense of failure of service.

In *Holloway v. General Hydraulic and Machine, Inc.*, 8th Dist. App. No. 82294, 2003-Ohio-3695, at ¶9, discretionary appeal not accepted, 100 Ohio St.3d 1487, 464 N.E.2d 567, per curiam, the Eighth District reached the exact opposite conclusion, under the identical factual scenario presented by the instant case, holding:

> In a similar case, the Ohio Supreme Court ruled that a defendant who had asserted the defense of failure of service of process in his answer had not waived it even though he actually proceeded so far as **to wait until the day of trial before moving for dismissal** for failure of service of process. *First Bank of Marietta v. Cline* (1984), 12 Ohio St.3d 317.
>
> * * *
>
> Because he had raised this defense in his answer, moreover, the **defendant's participation up to actual trial did not waive that defense**. (Emphasis added). (*Holloway at* ¶ 9.)

The attempt by the court of appeals to distinguish this case from all similar cases on the basis that Appellants "vigorously" defended the case on the merits "until the eve of trial" is truly no distinction at all. By stressing repeatedly that Appellants "vigorously" defended on the merits, after filing their answer containing the appropriate affirmative defense of insufficient service of process, the court below implied that its decision might have been different had Appellants merely filed an answer and then passively defended on the merits, or if Appellants had not "actively" participated in discovery and court proceedings, after filing their answer.

As a matter of public policy, the appellate court's emphasis on Appellants' purported energetic defense of the case as a factor that weighed in favor of finding Appellants "voluntarily submitted" to the trial court's jurisdiction and that they "waived" their affirmative defense of insufficiency of service of process, is ill-advised as such a standard will punish zealous advocacy by attorneys, while rewarding lackluster legal representation. Furthermore, the standard utilized by the court of appeals is inherently vague, ambiguous, and unworkable. There is no way to ascertain from the appellate court's opinion the amount of activity necessary to compel a finding of waiver of objection to service.

### B. The Opinion Below Misconstrued And Oversimplified The Purpose Of The Civil Rules.

With due respect to the majority below, it was not entirely correct where it stated that "the purpose of the civil rules is to provide notice to a defendant of any pending legal action and all allegations involved in that action." Id. The Civil Rules contemplate more than mere notice to a defendant. The Civil Rules provide very clear requirements for timely and properly commencing an action. Where an action is not timely or properly commenced, a plaintiff has no right to avail himself to the Civil Rules to assist in the prosecution of claims that were not commenced unde the guidelines of the Civil Rules. If only "notice" were required, much of the Civil Rules would be either obsolete or surplusage.

Appellee was provided "notice" of his failure of service on both Appellants, but did not remedy the situation, despite the remedy made available to him by operation of Civ.R. 4.6(D) (ordinary mail service where service unclaimed.) In *Women's Care Inc., v. Belcher*, 5th App. No. 2004-CA-0047, 2005-Ohio-543, at ¶30, the court stated that "the

spirit and purpose of the civil rules is to guarantee the efficient and equal administration of justice. Justice will not tolerate a blanket disregard of the rules." It has also been stated that another "purpose of the Civil Rules" is "to provide a *uniform* set of rules governing civil procedure which *** was to be uniformly applied throughout this state." (Emphasis sic.) *Vance v. Roedersheimer* (1992), 64 Ohio St.3d 552, 561, 597 N.E.2d 153, 160, (Douglas, J., concurring in part and dissenting in part.)

In *Bell v. Midwestern Educational Serv., Inc.* (1993), 89 Ohio App.3d 193, at 202-203, the court, citing this Court's decision in *Haley v. Hanna* (1915), 93 Ohio St.3d 49, 112 N.E.2d 149, also addressed the contention that simple notice is all that is required of parties bringing claims under the Civil Rules:

> It also does not matter that a party has actual knowledge of the lawsuit and has not in fact been prejudiced by the method of service. This court itself has held to that effect and reversed a judgment against a defendant where service was legally insufficient even though "the defendant had adequate notice of the filing of the motion" and "was [not] in any way prejudiced by the method of service used to notify him of the pending motion." *Price v. Price* (Feb. 4, 1985), Miami App. No. 84CA38, unreported, at 4, 1985 WL 7633. **That principle was enunciated by the Ohio Supreme Court in** *Haley v. Hanna* (1915), 93 Ohio St. 49, 112 N.E. 149, **and has been followed ever since in Ohio**. If such were not the case, the defense of lack of jurisdiction over the person or insufficiency of process could never be asserted by a defendant in an answer or a motion, as allowed now by Civ.R. 12(B), **because the mere assertion of such defenses would prove that the defendant knew about the pendency of the action and thus all rules relating to service of process would be nullities**. (Emphasis added.)

The logic of the *Bell* court in this regard is unassailable. If only adequate notice of the filing of a claim were required then the affirmative defenses of lack of jurisdiction and failure of service of process would indeed be nullities. Such a manifestly absurd

result is certainly not mandated by the Civil Rules, nor is it consistent with the "purpose" of the Civil Rules.

Because, there is no issue of fact that service was not perfected on Appellants or that Appellants properly and timely raised the affirmative defense of failure to perfect service, this case presents an ideal opportunity for this Court to reaffirm the principles articulated in *Cline* and *Haley*.

### C. The Court Of Appeals Both Ignored And Misinterpreted Binding Case Law Precedent

The court of appeals determined that the Appellants had voluntarily waived the properly asserted affirmative defense of insufficiency of service of process by "vigorously participat[ing] in the litigation of this action." *Gliozzo*, supra, at ¶12. The Court of Appeals further reasoned that by defending the merits of the action, including attending pretrials and depositions, Appellants had "voluntarily submitted themselves to the court's jurisdiction and waived [their] objection to defective service." Id. at ¶13, citing *Garnett v. Garnett* (August 7, 1986), 8th Dist. App. No. 50857.

Although the court of appeals relied on *Garnett*, supra, a case not even arguably on point with the instant case, it chose to ignore a long line of cases which had reached the exact opposite conclusion regarding waiving the affirmative of defense of insufficiency of process by participating in litigation. The court of appeals did note that its' decision was not consistent with the 2003 Eighth District Court of Appeals opinion of *Holloway v. Gen. Hydraulic and Machine, Inc.*, supra, 2003-Ohio-3965, appeal not accepted, 100 Ohio St.3d 1487, 2003-Ohio-5992. The appellate court below discussed the *Holloway* decision as follows:

> Appellees rely heavily on this court's more recent decision of

> *Holloway v. Gen Hydraulic & Machine, Inc.* ***. However, **after reviewing the legal authority upon which the *Holloway* court based its decision**, we are inclined to reassess our previous position. Id., at p. 5. (Emphasis added.)

As succinctly noted in the first two paragraphs of the dissenting opinion below, the "legal authority upon which the *Holloway* court based its decision" was this Court's decision in *First Bank of Marietta v. Cline* (1984), 12 Ohio St. 3d 317, 464 N.E.2d 567, per curiam. As also noted by the dissent below, there is no way to reconcile the holding of the majority opinion below with that of this Court in *Cline*, as the two decisions reach exact opposite conclusions in addressing and resolving identical factual scenarios. The opinion below simply cannot be squared with *Cline* on any level. This conclusion is buttressed by the fact that the majority opinion below, while concluding that *Holloway* misinterpreted "legal authority" cited in the *Holloway* opinion, makes no effort to articulate how this legal authority was misapplied, and does not even reference the case law that *Holloway* purportedly misconstrued.

In *Cline*, the defendant did not move to dismiss the complaint for want of personal jurisdiction and lack of service of process, **until after completion of all evidence at trial**. Id., 12 Ohio St.3d at 317. The motion to dismiss was then denied by the trial court, and the jury returned a verdict in favor of plaintiff, and against all defendants. This Court eventually reversed the jury's verdict, based on the fact that service had never been perfected. Plainly, this Court was fully aware, in reaching its conclusion in *Cline* that, at the trial court level, the defendant had engaged in discovery, had communicated with opposing counsel, had attended pretrials, had prepared for trial and had participated in trial. Nowhere in the *Cline* decision did this Court indicate that the relative vigor of the defense at the trial court level was in any way determinative of

whether the affirmative defense of failure of service had been waived. Comparing the facts below with those of *Cline*, it is evident that there is simply no meaningful distinction to be made. The court of appeals' below ineffectual attempt at distinction based on the respective facts of the cases appears to be an attempt to avoid the controlling authority of this Court. Thus, it was error for the appellate court to conclude that the timing of Appellants' motion to dismiss (i.e., "the eve of trial") somehow obviated or mitigated the holding of this Court in *Cline*.

### D. The Court Of Appeals Decision Is Also At Odds With Other Cases From Across The State.

In addition to departing from Ohio Supreme Court jurisprudence, the decision below was squarely at odds with the opinion of the Second Appellate District in *Bell v. Midwestern Educational Serv., Inc.* (1993), 89 Ohio App.3d 193, 203-204, the decision of the Ninth Appellate District in *Delarosa v. Taylor Edwards Addison Transp.*, 2005-Ohio-1130, 9th Dist. App. No. 04 CA 0047, the decisions of the Tenth Appellate District in *Blount v. Schindler Elevator Corp.*, 10th App. No. 02 AP-688, 2003-Ohio-2053 and *Coke v. Mayo* (Feb. 4, 1999), 10th App. No. 98AP-550, discretionary appeal not allowed 85 Ohio St. 3d 1499, and the decision of the First Appellate District in *Wise v. Qualified Emergency Specialists*, (Dec. 17, 1999), 1st Dist. App. No. C-980802. Each of these cases were cited and discussed in the dissenting opinion below. A quick review of each of these cases establishes that they each were based on a consistent and compelling interpretation of Civ.R. 3, R.C. § 2305.17, and Civ.R. 12(B)(5). Indeed, prior to the release of the decision below there had been no real disagreement between appellate districts on this issue. Furthermore, there has long been ample case authority providing guidance on this issue.

### 1. For a Civil Action to be Commenced, Service Must be Obtained Within One Year.

Pursuant to Civ.R. 3(A), service of process must be obtained within one year of the filing of a plaintiff's complaint. Civ.R. 3(A) states in pertinent part:

> A civil action is commenced by filing the Complaint with the court, **if service is obtained within one year** from such filing upon a named defendant... (Emphasis added.)

The Staff Notes to Civ.R. 3(A) explain the Rule's operation as follows:

> "Rule 3(A) sets forth two requirements for commencement of a civil action: (1) filing a complaint with the court and (2) obtaining service within one year from the filing. This rule differs from Federal Rule 3 in requiring service to be obtained in one year. In federal court the action is commenced by merely filing the complaint. The service within one year requirement is retained from § 2305.17, R.C., as amended in 1965, and is based on the philosophy that dockets should be cleared if, within the reasonable time of one year, service has not been obtained. The statute's one year requirement replaced a previous sixty day requirement. Unlike § 2305.17, R.C., Rule 3(A) does not require a praecipe or an affidavit for service by publication as a requirement for commencing a civil action. Civ.R. 3(A), Staff Notes, 1970, "Commencement."

The time limitation set forth in Civ.R. 3(A) may not be extended. *Fetterolf v. Hoffman-LaRoche, Inc.* (1995), 104 Ohio App. 3d 272, 277. In other words, if service of process is not obtained within one year of filing a complaint, there has been no commencement. Id. If an action has never commenced, it is as if the complaint was never filed and, as a result, the case is nullified. *Sperduti v. Bubuloo, Inc.* (May 28, 1992), 8th Dist. App. Nos. 60626, 61651 appeal not allowed 65 Ohio St.3d 1474, 604 N.E.2d 166; *Buckeye Union Ins. Co. v. Sheppard* (March 2, 1989), 8th Dist. App. No. 55782.

R.C. § 2305.17 defines commencement of an action as:

> An action is commenced within the meaning of sections 2305.03 to 2305.22 and sections 1302.98 and 1304.35 of the Revised Code by filing a petition in the office of the clerk of the proper court together with a praecipe demanding that summons issue or an affidavit for service by publication, if **service is obtained within one year**. (Emphasis added.) (Appx 18.)

"When an action fails of commencement, it is as if no complaint were ever filed." *Pogacsnik v. Jewett* (July 29, 1992), 9th Dist. No. 91CA005216, citing *Sperduti v. Bubuloo, Inc.,* supra. Insufficiency of service of process and failure of process are affirmative defense. See Civ.R. 12(B)(5); *Coke v. Mayo*, (February 4, 1999), 10th Dist. App. No. 98-AP-550, discretionary appeal not allowed, 85 Ohio St. 3d 1499. A defendant must raise the insufficiency or failure of service of process defense in a responsive pleading or by motion. Id. It is well established that trial courts lack jurisdiction to enter judgments against persons who are not served and who do not appear or waive proper service. *State ex rel. Ballard v. O'Donnell* (1990), 50 Ohio St.3d 182, syllabus paragraph 1; *Rite Rug Co., Inc. v. Wilson* (1995), 106 Ohio App.3d 59.

**2. Numerous Ohio Courts Have Held That A Party Who Files An Answer Including An Affirmative Defense For Insufficiency Of Service Of Process Retains Such Defense Throughout The Trial Court Proceedings.**

In *Blount v. Schindler Elevator Corp.*, 2003-Ohio-2053, at ¶27, 10th Dist. App. No. 02AP-688, the court addressed a very similar factual scenario and, in so doing, held that, under long standing Ohio law, a party who files an answer including an affirmative defense for insufficiency of process, before actively participating in a case, continues to have this defense throughout the trial court proceedings:

> [A]ppellants argue that the Schindler appellees voluntarily appeared before the trial court, thereby commencing the action and giving the trial court personal jurisdiction over the Schindler appellees. Again, we disagree. As we explained

> above, the operative issue here is whether appellants "commenced" their action within one year of the voluntary dismissal of their original complaint, as required by R.C. 2305.19. Pursuant to R.C. 2305.17 and Civ.R. 3(A), an action is *only* "commenced" by obtaining service within one year of the filing of the complaint. (Emphasis sic.) Even if a plaintiff could "commence" an action through a defendant's voluntary appearance, appellants failed to show that the Schindler appellees voluntarily submitted to the trial court's jurisdiction. **"A defendant who raises an affirmative defense for insufficiency of service of process *before*** (emphasis sic) **actively participating in the case continues to have an adequate defense relating to service of process."** (Emphasis added.) *Coke v. Mayo* (Feb. 4, 1999), Franklin App. No. 98AP-550. (Emphasis sic.) See also, *First Bank of Marietta v. Cline* (1984), 12 Ohio St.3d 317, 318, 466 N.E.2d 567; *Wise v. Qualified Emergency Specialists, Inc.* (Dec. 17, 1999), Hamilton App. No. C-980802 ("**one does not, by participating in a case, waive in personam jurisdiction once the defense of lack of proper service of process has been raised**") (Emphasis added.); *Bell v. Midwestern Educational Serv., Inc.* (1993), 89 Ohio App.3d 193, 203-204, 624 N.E.2d 196 **("[t]he appellees properly raised the issue of sufficiency of service as an affirmative defense in their first responsive pleading and they do not waive it by * * * going to trial on the merits")**. (Emphasis added.) Because the Schindler appellees asserted the affirmative defense of failure of service of process in their answer, they continued to have a valid defense, even though they participated in pre-trial litigation. Consequently, the Schindler appellees never voluntarily submitted to the trial court's jurisdiction.

The *Blount* court also analyzed a primary case relied on by the majority opinion below, *Maryhew v. Yova* (1984), 11 Ohio St.3d 154, and determined that it had no application to cases where a defendant files a responsive pleading raising the affirmative defense of insufficiency of process. Specifically, the *Blount* court concluded as follows:

> Appellants argue that *Maryhew v. Yova* (1984), 11 Ohio St.3d 154, 464 N.E.2d 538, compels this court to reach the opposite conclusion. We disagree. In *Maryhew* the Supreme Court held that personal jurisdiction may be acquired "either by service of process upon the defendant,

> the voluntary appearance and submission of the defendant or his legal representative, or by certain acts of the defendant or his legal representative which constitute an involuntary submission to the jurisdiction of the court." *Id.* at 156, 464 N.E.2d 538. **However, because the defendant in *Maryhew* did not file any responsive pleading, the Supreme Court did not address the determinative issue here, i.e., whether a defendant voluntarily submits to a trial court's jurisdiction by participating in litigation, even though the defendant asserts the defense of insufficiency of process in its first responsive pleading.** Therefore, the holding in *Maryhew* does not alter our conclusion that the Schindler appellees did not voluntarily submit to the trial court's jurisdiction. Accordingly, we overrule appellants' first assignment of error. (Emphasis added.) *Blount,* supra at ¶ 28.

In *Coke v. Mayo,* supra, one of the cases cited by the *Blount* court above, the court provided a detailed analysis of why a defendant who files a responsive pleading raising the appropriate affirmative defense of insufficiency of process cannot be found to have voluntarily submitted to the jurisdiction of the court, even where he actively defends the merits of the case, up to and through trial:

> In this case, appellant did not complete service of process upon appellee. Accordingly, **appellee raised the affirmative defense in his responsive pleading.** (Emphasis added.) As such, we find that appellee was correct to assert the affirmative defense for insufficiency of service of process in his responsive pleading. Similarly, **we conclude that appellee was not required to modify his defense and challenge whether the trial court obtained personal jurisdiction over him after he filed the responsive pleading.** (Emphasis added.)
>
> Furthermore, **contrary to appellant's assertions, appellee was not required to modify his affirmative defense and challenge whether the trial court obtained personal jurisdiction over him after he proceeded to actively participate in the case by filing motions, adding additional parties, serving subpoenas and taking a deposition.** (Emphasis added.)
>
> * * *

> In this case, appellee asserted the affirmative defense for failure of service of process in a responsive pleading before taking any other action relating to the case. *** **Therefore, appellee's affirmative defense for failure of service of process continued to be the proper defense throughout the case.** (Emphasis added.) Id. at *2-3.

The principles articulated in *Coke, Holloway,* and *Blount,* as well as the plethora of other cases cited in those opinions, were recently re-affirmed in *Delarosa v. Taylor Edwards Addison Transp.*, 2005-Ohio-1130, at ¶10, 9th Dist. App. No. 04CA0047, as follows:

> Therefore, the rule allows the pleader to assert the defense of lack of personal jurisdiction either by way of a motion prior to any pleading or in the responsive pleading to the complaint. Here, in a joint answer, counsel for Taylor and Auto-Owners asserted as a defense insufficiency of process and insufficiency of service of process. **In other words, Taylor asserted the lack of jurisdiction in its answer to the complaint before taking any other action relating to the case.** (Emphasis added.) "A defendant who raises an affirmative defense for insufficiency of service of process before actively participating in the case continues to have an adequate defense relating to service of process." *Coke v. Mayo* (Feb. 4, 1999), 10th Dist. No. 98AP-550, citing *First Bank of Marietta v. Cline* (1984), 12 Ohio St. 3d 317.

In *Delarosa* the plaintiff alleged that the defendants "waived any defect in service by entering a general appearance, filing an answer to the complaint and participating in the litigation of the matter for over a year and a half before filing a motion to dismiss the action," an argument almost identical to that made by Appellee herein. Id. at ¶5. The defendant in *Delarosa*, like Appellants in this matter, argued that by asserting the affirmative defenses of insufficiency of process and insufficiency of service of process in the answer to the complaint, those jurisdictional defenses remained valid and

enforceable up until the time the trial court dismissed the action. The Ninth District Court of Appeals agreed.

In *Bell v. Midwestern Educational Serv., Inc.* (1993), 89 Ohio App.3d 193, 203, the appellate court soundly rejected the identical argument, based on almost identical facts, as that advanced by Appellee in this appeal:

> The appellant would have us believe that the appellees waived any defect in the service of process on them by participating in the case and without specifying their objection to this service of process in detail or moving to quash it until the year had run. **This proposition is clearly not the law in Ohio.** The appellees properly raised the issue of sufficiency of service as an affirmative defense in their first responsive pleading and **they do not waive it by failing to request a pretrial hearing on the issue pursuant to Civ.R. 12(D) or even in fact by going to trial on the merits.** *First Bank of Marietta v. Cline* (1984), 12 Ohio St.3d 317, 12 OBR 388, 466 N.E.2d 567; *Haley v. Hanna, supra; Maryhew v. Yova* (1984), 11 Ohio St.3d 154, 11 OBR 471, 464 N.E.2d 538; *Duckworth v. Decker* (Aug. 26, 1991), Fairfield App. No. 47-CA-90, unreported, 1991 WL 184554, and citing *First Bank of Marietta v. Cline, supra.* **In Ohio it is not the defendant's job to assist the plaintiff in perfecting service of process upon the defendant.** It is the plaintiff's burden to be sure that proper service is accomplished within the one year provided by law. Civ.R. 4.6(E); *Long v. Hamel* (Mar. 19, 1992), Franklin App. No. 91AP-1078, unreported, 1992 WL 55446; *Haley v. Hanna, supra.*
>
> The appellant argues that to allow dismissal of the appellees in this case would be upholding "legal gamesmanship," but the Ohio Supreme Court has already found that even if such were the case it would be of no consequence. *Maryhew v. Yova, supra.* Whether the lawsuit is a game or a serious search for truth and the fixation of blame, **it is and must be played by certain rules and we cannot disregard those rules to assist a party who has failed to abide by them.** (Emphasis added.)

The majority opinion below disregards each and every admonition of the *Bell* decision. Per the majority opinion below, participating in the case without elucidating

upon a properly raised affirmative defense does constitute a waiver of defect in service. Pursuant to the majority opinion below, it will henceforth be a defendant's job (or the job of his counsel) to assist the plaintiff in perfecting service of process upon that defendant. Finally, under the holding of the majority opinion below, courts will be able to disregard the Civil Rules and case authority for the benefit of those who have disregarded the policies and procedures governing lawsuits in Ohio.

In *Wise v. Qualified Emergency Specialists, Inc.* (Dec. 17, 1999), First App. No. C-980802, discretionary appeal not allowed, 88 Ohio St.3d 1497, 727 N.E.2d 921, the First District Court of Appeals also rejected the suggestion that a defendant physician in a malpractice action had waived service of process by answering the complaint and by appearing for his deposition:

> Wise also argued that Dr. Hermecz waived service of process when he answered the complaint and appeared at his deposition. Wise was again mistaken, because one does not, by participating in a case, waive *in personam* jurisdiction once the defense of lack of proper service of process has been raised. See *First Bank of Marietta v. Cline* (1984), 12 Ohio St.3d 317, 466 N.E.2d 567; *Maryhew v. Yova* (1984), 11 Ohio St.3d 154, 464 N.E.2d 538. **Therefore, Dr. Hermecz's participation in the case, after he raised the defense of lack of service of process, did not act as a waiver of the service of process required for the commencement of a civil action.** (Emphasis added.)
>
> Since Dr. Hermecz never received proper service in this case and did not waive that defense (1) by filing an answer that incorporated that defense or (2) by participating in deposition testimony, Dr. Hermecz was never made a party to the action such that the trial court had *in personam* jurisdiction. Therefore, the trial court properly granted summary judgment to Dr. Hermecz.

The facts of the instant case are nearly identical in relevant part to those in *Wise*, as well as to those of numerous other cases cited herein. It is indeed unusual that there

are so many cases so directly on point, while at the same time there is a total absence of countervailing case authority. Given the majority's below departure from all existing case authority, the court should have at least admitted that it was attempting to chart a new course, rather than giving the plainly incorrect impression that this case was distinguishable based on a unique set of facts.

### E. The Case Law Relied On By The Majority Below Is Inapplicable And Not Instructive.

One of the principal cases cited in the majority opinion below, *Garnett v. Garnett* (Aug. 7, 1986), 8th Dist. App. No. 50857, is inapplicable to this case for a multitude of reasons. The central issue in *Garnett* was whether the domestic relations trial court had properly invoked its continuing jurisdiction for the purposes of a hearing on a Motion to Show Cause arising out of the failure of a father to pay court ordered child support. Id. at *1. The controlling Civil Rule in that case, upon which the court's decision was premised, was former Civ. R. 75(I), titled "Divorce, Annulment, and Legal Separation Actions." Id. The cases cited by the *Garnett* court dealt exclusively with the power of a Domestic Relations court to "hear a motion to show cause made subsequent to the divorce decree which is its subject." Id. Plainly, these are not issues present in this appeal.

The *Garnett* decision is factually and legally inapplicable to this case, especially given the plethora of case law directly on point. Nevertheless, the majority opinion cited *Garnett* with approval, even while ignoring the long line of cases directly on point, including *Cline*.

The record unequivocally demonstrates that, based on all pre-existing case law, there were no actions taken by Appellants below which equate to a "voluntary submission" to service. As the Court succinctly stated in *Holloway*, supra:

> Because [defendant] was never properly served, no action was ever commenced against him. Simply stated, **the lawsuit against [defendant] was a nonentity because it never existed without service on him**. 2003-Ohio-3965, at ¶ 11. (Emphasis added).

There was an abundance of case authority from this Court and appellate courts throughout the State, including the Eighth District, that mandated that the court of appeals affirm the trial court's decision. The appellate court's inexplicable decision to ignore this authority has itself become precedent, albeit ill-advised and confusing precedent.

### F. Civ. R. 12 Expressly Permits The Filing Of A Motion To Dismiss Raising The Issue Of Insufficiency Of Service Of Process Prior To Trial

The majority opinion below stated that it "[i]t was only on the eve of trial, long after dispositive motions had been filed, that appellees moved to dismiss for insufficiency of process." *Gliozzo*, supra, 2006-Ohio-1726 at¶12. In fact, this is the last substantive sentence in the majority opinion, as the majority apparently believed that merely referencing the timing of the motion to dismiss vis-a-vis the dispositive motion deadline was determinative of the issue(s) presented in the appeal, concluding immediately thereafter, "[a]ccordingly, we find that in the instant case, appellees voluntarily submitted themselves to the jurisdiction of the court and waived any objection to defective service. Id at ¶ 13. Yet, a reference to Civ. R. 12(D) and Civ.R. 12(H)(3) easily belies this determination.

Civ.R. 12(D), titled "Preliminary hearings" states in relevant part:

> The defenses specifically enumerated (1) to (7) in subdivision (B) of this rule, whether made in a pleading or by motion, and the motion for judgment mentioned in subdivision (C) of this rule shall be heard and determined before trial on application of any party.

Insufficiency of service of process is enumerated as an affirmative defense at Civ.R. 12(B)(5). Thus, per Civ.R. 12(D), a motion raising this defense "shall" be heard and determined "before trial" on application of any party. Appellants filed a motion to dismiss raising this issue on April 4, 2005, or approximately ten days prior to trial. The motion to dismiss was fully briefed prior to trial, and, per the trial court's judgment entry, "arguments (were) heard on the record in support of and in opposition to defendants' Motion to Dismiss plaintiff's complaint for failure to commence case within the applicable statute of limitations." Thus, the timing of the motion and the subsequent hearing were exactly as envisioned by the Civil Rules.

Additionally, Civ.R. 12(H)(3) states:

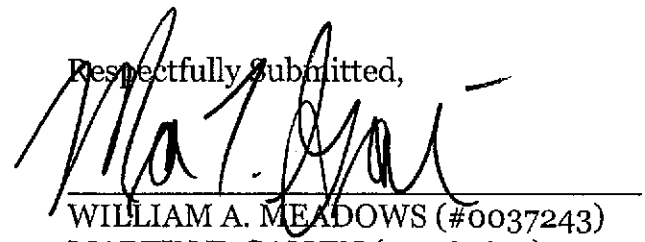
> Whenever it appears by suggestion of the parties or otherwise that the court lacks jurisdiction of the subject matter, the court shall dismiss the action.

Because, Appellee had indisputably failed to commence his action as that term is defined by Civ. R. 3(A) (because service was not obtained within one year of filing of the complaint), the trial court lacked jurisdiction to proceed, and, therefore, properly dismissed the action.

## III. CONCLUSION

For the reasons discussed above, the decision of the Eighth District Court of Appeals was clearly incorrect as a matter of law. Accordingly, this Court should reverse the decision of the court of appeals and re-instate the judgment of the trial court.

Respectfully Submitted,



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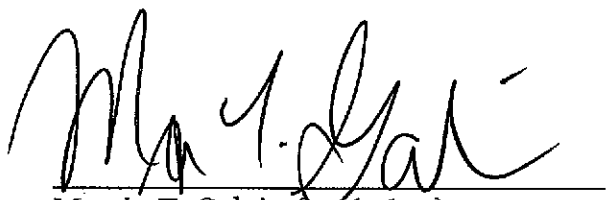
*Attorneys for Appellants, University Urologists of Cleveland, Inc., and Martin Resnick, M.D.*

## CERTIFICATE OF SERVICE

A copy of the foregoing Merit Brief of Appellants University Urologists of Cleveland, Inc. and Martin Resnick, M.D. was sent by regular U.S. mail on this 12th day of December 2006 to: William A. Carlin at 29325 Chagrin Blvd., Suite 305, Pepper Pike, Ohio 44122.



Martin T. Galvin (0063624)

# APPENDIX

IN THE SUPREME COURT OF OHIO

| | | |
|---|---|---|
| FRANK GLIOZZO<br><br>PLAINTIFF/APPELLEE,<br><br>vs.<br><br>UNIVERSITY UROLOGISTS OF CLEVELAND, INC., et al.,<br><br>DEFENDANTS/APPELLANTS. | ) | CASE NO. 06-1166<br><br>On Appeal from the Cuyahoga County Court of Appeals, 8th Appellate District<br><br>Case No.: CA 05 086371 |

**NOTICE OF APPEAL OF APPELLANTS, UNIVERSITY UROLOGISTS OF CLEVELAND, INC. AND MARTIN RESNICK, M.D.**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***Attorneys for Appellants, University Urologists of Cleveland, Inc. and Martin Resnick, M.D.***



FILED
JUN 19 2006
MARCIA J. MENGEL, CLERK
SUPREME COURT OF OHIO

Defendants/Appellants, University Urologists of Cleveland, Inc., and Martin Resnick, M.D., hereby give notice of appeal to the Supreme Court of Ohio from the Judgment of the Court of Appeals for the Eighth Appellate District, Cuyahoga County, Ohio (Case No. CA 05 86371), journalized on May 5, 2006.

This case presents questions of great general and public interest.

A true and complete copy of the Decision and Journal Entry of the Court of Appeals from which this notice of appeal is taken is attached hereto, marked exhibit "A", and is hereby incorporated by reference as if fully reproduced herein.

Respectfully Submitted,

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*Attorneys for Appellants, University Urologists of Cleveland, Inc., and Martin Resnick, M.D.*

APPENDIX-2

## CERTIFICATE OF SERVICE

A copy of the foregoing *Notice of Appeal of Appellants, University of Urologists of Cleveland, Inc., and Martin Resnick, M.D.* was sent by regular U.S. mail on this 19th day of June 2006 to:

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*Attorney for Appellee,*
*Frank Gliozzo*

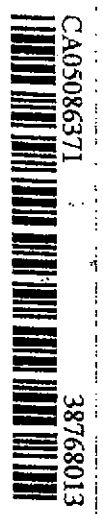
MARTIN T. GALVIN (#0063624)

MAY - 5 2006

COURT OF APPEALS OF OHIO, EIGHTH DISTRICT

COUNTY OF CUYAHOGA

NO. 86371




| | | |
|---|---|---|
| FRANK GLIOZZO, | : | |
| Plaintiff-Appellant | : | JOURNAL ENTRY |
| vs. | : | AND |
| UNIVERSITY UROLOGISTS OF CLEVELAND, INC., et al., | : | OPINION |
| Defendants-Appellees | : | |
| | : | |
| DATE OF ANNOUNCEMENT OF DECISION | : | April 6, 2006 |
| | : | |
| CHARACTER OF PROCEEDING | : | Civil appeal from Common Pleas Court Case No. CV-514796 |
| JUDGMENT | : | REVERSED |
| DATE OF JOURNALIZATION | : | MAY - 5 2006 |

APPEARANCES:

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ANTHONY O. CALABRESE, JR., J.:

Frank Gliozzo ("Gliozzo") appeals the trial court's decision granting the motion to dismiss filed by University Urologists of Cleveland, Inc. and Martin Resnick, M.D., (collectively referred to as "appellees"). For the following reasons, we reverse the decision of the trial court.

On November 14, 2003, Gliozzo filed a medical malpractice action against appellees. Gliozzo attempted unsuccessfully to serve the complaint via certified mail. The docket reflected the failure of the certified mail, and the Cuyahoga County clerk's office mailed a copy of this failure to Gliozzo's attorney. Gliozzo's attorney failed to make any further attempt to serve appellees.

Although not served with the complaint, appellees obtained leave to plead and filed an answer asserting various affirmative defenses, including that the claims were barred by the statute of limitations and insufficient service of process.

In April 2005, nine days prior to trial, appellees moved to dismiss the action, claiming that Gliozzo had failed to commence the action within the applicable statute of limitations.[1] Although recognizing that the motion might have merit, the court denied the motion as untimely because the dispositive motion deadline had

---

[1] It is undisputed that the one-year statute of limitations would have expired on November 28, 2003.

passed. On the day of trial, appellees orally moved for leave to renew their motion to dismiss. After hearing arguments from both sides, the trial court granted appellees' motion and dismissed the case with prejudice for failure to commence the action within the applicable statute of limitations.

Gliozzo appeals this decision, raising the three assignments of error contained in the appendix to this opinion.

In his first assignment of error, Gliozzo argues that the trial court committed reversible error in granting appellees' motion to dismiss. He claims that appellees voluntarily submitted themselves to the court's jurisdiction by fully litigating this matter. We agree.

A court must obtain personal jurisdiction over a defendant to consider and decide a case. *Coke v. Mayo* (Feb. 4, 1999), Franklin App. No. 98AP-550, citing *Maryhew v. Yova* (1984), 11 Ohio St.3d 154, 156. A court obtains personal jurisdiction over the defendant by one of three ways: 1) by service of process; 2) by the defendant voluntarily appearing and submitting to the court's jurisdiction; or 3) by the defendant involuntarily submitting to the court's jurisdiction by waiving affirmative defenses. *Maryhew*, supra at 156. "The latter may more accurately be referred to as a waiver of certain affirmative defenses." Id.

Service of process is the necessary prerequisite to the commencement of a civil action. *Gaul v. Crow* (Sept. 22, 1999),

Cuyahoga App. Nos. 74600, 74608-74612, citing *Lash v. Miller* (1977), 50 Ohio St.2d 63. Pursuant to Civ.R. 3(A), an action is commenced by filing a complaint with the court, if service is obtained on a defendant within one year. See, also, R.C. 2305.17. However, an action may be dismissed when service of process has not been obtained after the passage of more than one year. *Maryhew*, supra at 157, citing *Lash*, supra.

In the present case, Gliozzo admits the failure to perfect service upon appellees. However, Gliozzo argues that by participating in the litigation of this case almost to trial, appellees have submitted themselves to the jurisdiction of the trial court and waived their right to proper service. We agree with Gliozzo's argument.

The Ohio Supreme Court has held that judgment may be rendered against a defendant who is not properly served with process where the record shows he "has voluntarily submitted himself to the court's jurisdiction or committed other acts which constitute a waiver of the jurisdictional defense." *Maryhew*, supra; see, also, *Garnett v. Garnett*, Cuyahoga App. No. 50857, 1986 Ohio App. LEXIS 7778. While the record reflects appellees timely filed the affirmative defense of insufficiency of process, the record also shows appellees contacted Gliozzo's counsel and requested a leave to plead, filed an answer, attended a case management conference, conducted discovery, exchanged expert reports, attended pretrials,

filed a dispositive motion and filed motions in limine. A review of the docket demonstrates that appellees vigorously defended this case *on the merits*, up until the eve of trial.

We agree with this court's decision and rationale applied in *Garnett* and find that even though appellees raised the affirmative defense of insufficiency of process, the latter acts of appellees show that they "voluntarily submitted themselves to the court's jurisdiction and waived [their] objection to defective service." *Garnett*, supra.

Appellees rely heavily on this court's more recent decision of *Holloway v. Gen. Hydraulic & Machine, Inc.*, Cuyahoga App. No. 82294, 2003-Ohio-3965. However, after reviewing the legal authority upon which the *Holloway* court based its decision, we are inclined to reassess our previous position. The purpose of the civil rules is to provide notice to a defendant of any pending legal action and all allegations involved in that action. Here, not only were appellees fully aware of the medical malpractice lawsuit filed by Gliozzo and the allegations contained therein, appellees vigorously participated in the litigation of this action. It was only on the eve of trial, long after dispositive motions had been filed, that appellees moved to dismiss for insufficiency of process.

Accordingly, we find that in the instant case, appellees voluntarily submitted themselves to the jurisdiction of the court

and waived any objection to defective service.

Gliozzo's first assignment of error is sustained.

Our analysis of Gliozzo's first assignment of error renders his second and third assignments of error moot.

Judgment reversed. This matter is remanded for action consistent with this opinion.

It is ordered that the appellant recover from appellees costs herein taxed.

It is ordered that a special mandate issue out of this court directing the Cuyahoga County Court of Common Pleas to carry this judgment into execution.

A certified copy of this entry shall constitute the mandate pursuant to Rule 27 of the Rules of Appellate Procedure.

ANTHONY O. CALABRESE, JR.
JUDGE

MARY EILEEN KILBANE, J., CONCURS;

COLLEEN CONWAY COONEY, P.J., DISSENTS.
(SEE SEPARATE DISSENTING OPINION ATTACHED.)

ANNOUNCEMENT OF DECISION
PER APP. R. 22(B), 22(D) AND 26(A)
RECEIVED
APR 6 - 2006
GERALD E. FUERST
CLERK OF THE COURT OF APPEALS
BY _____ DEP.

FILED AND JOURNALIZED
PER APP. R. 22(E)
MAY 5 - 2006
GERALD E. FUERST
CLERK OF THE COURT OF APPEALS
BY _____ DEP.

N.B. This entry is an announcement of the court's decision. See App.R. 22(B), 22(D) and 26(A); Loc. App.R. 22. This decision will be journalized and will become the judgment and order of the court pursuant to App.R. 22(E), unless a motion for reconsideration with supporting brief, per App.R. 26(A) is filed within ten (10) days of the announcement of the court's decision. The time period for review by the Supreme Court of Ohio shall begin to run upon the journalization of this court's announcement of decision by the clerk per App.R. 22(E). See, also, S.Ct.Prac.R. II, Section 2(A)(1).

NOTICE MAILED TO COUNSEL
FOR ALL PARTIES-COSTS TAXED



VOL 0612 PG 0185

Appendix

Assignments of Error:

"I. The trial court committed reversible error when it failed to find that the plaintiff's action was commenced when the defendants voluntarily submitted themselves to the court's jurisdiction by fully litigating this matter.

II. The trial court committed reversible error when it granted the defendants' motion to dismiss.

III. The trial court committed reversible error when it abused its discretion by granting both the defendants' motion for reconsideration and motion to dismiss on the day of trial."

COURT OF APPEALS OF OHIO EIGHTH DISTRICT

COUNTY OF CUYAHOGA

NO. 86371

| | | |
|---|---|---|
| FRANK GLIOZZO | : | |
| Plaintiff-Appellant | : | D I S S E N T I N G |
| vs. | : | O P I N I O N |
| UNIVERSITY UROLOGISTS OF CLEVELAND, INC., ET AL. | : | |
| Defendants-Appellees | : | |

DATE: April 6, 2006

COLLEEN CONWAY COONEY, P.J., DISSENTING:

I respectfully dissent from the majority opinion which "reassesses [this court's] previous position" in *Holloway v. Gen. Hydraulic*, Cuyahoga App. No. 82294, 2003-Ohio-3965, appeal denied, 100 Ohio St.3d 1487, 2003-Ohio-5992.

The legal authority on which we relied in *Holloway* was the Ohio Supreme Court's decision in *First Bank of Marietta v. Cline* (1984), 12 Ohio St.3d 317. Holloway argued, just as Gliozzo does, that by participating in the litigation, the defendant waived his affirmative defense of lack of service of process. We followed the *First Bank of Marietta* case, which held that a defendant who asserts the defense of failure of service of process in his answer has not waived it even though he actually proceeds so far as to



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wait until the day of trial before moving for dismissal.

A long line of cases also follows *First Bank of Marietta*. See *Bell v. Midwestern Educational Serv., Inc.* (1993), 89 Ohio App.3d 193, 203-204, 624 N.E.2d 196 ("the appellees properly raised the issue of sufficiency of service as an affirmative defense in their first responsive pleading and they did not waive it by * * * going to trial on the merits"); *Blount v. Schindler Elevator Corporation*, Franklin App. No. 02AP-688, 2003-Ohio-2053 (defendant never voluntarily submitted to the court's jurisdiction because the assertion of the affirmative defense for failure of service of process continues the valid defense, even though a defendant participates in pretrial litigation); *Wise v. Qualified Emergency Specialists, Inc.* (Dec. 17, 1999), Hamilton App. No. C-980802 (a party, by participating in a case, does not waive in personam jurisdiction once the defense of lack of proper service of process has been raised); *Coke v. Mayo* (Feb. 4, 1999), Franklin App. No. 98AP-550 ("A defendant who raises an affirmative defense of insufficiency of service of process before actively participating in the case continues to have an adequate defense relating to service of process").

The majority relies on *Maryhew v. Yova* (1984), 11 Ohio St.3d 154. However, I agree with the Tenth District Court of Appeals which easily distinguished *Maryhew*, stating:

**"In *Maryhew*, the Supreme Court held that personal jurisdiction may**

be acquired 'either by service of process upon the defendant, the voluntary appearance and submission of the defendant or his legal representative, or by certain acts of the defendant or his legal representative which constitute an involuntary submission to the jurisdiction of the court.' Id. at 156. However, because the defendant in *Maryhew* did not file any responsive pleading, the Supreme Court did not address the determinative issue here, i.e., whether a defendant voluntarily submits to a trial court's jurisdiction by participating in litigation, even though the defendant asserts the defense of insufficiency of process in its first responsive pleading. Therefore, the holding in *Maryhew* does not alter our conclusion that the Schindler appellees did not voluntarily submit to the trial court's jurisdiction." *Blount*, supra at ¶28.

In the instant case, appellees asserted the affirmative defense of insufficient service of process in their answer. Although they participated in the case, this affirmative defense was never waived. "A defendant who raises an affirmative defense for insufficiency of service of process before actively participating in the case, continues to have an adequate defense relating to service of process." *Blount*, supra at ¶ 27, quoting *Coke*, supra. Therefore, appellees did not voluntarily submit themselves to the court's jurisdiction or involuntarily waive any affirmative defenses by participating in the case. Accordingly, I would affirm the trial court's dismissal.

# Court of Appeals of Ohio, Eighth District

County of Cuyahoga
Gerald E. Fuerst, Clerk of Courts

FRANK GLIOZZO

Appellant

COA NO. 86371 | LOWER COURT NO. CP CV-514796

COMMON PLEAS COURT

-vs-

UNIV. UROLOGISTS OF CLEVE. ET AL.

Appellee

MOTION NO. 383271

Date 05/05/2006

Journal Entry

APPELLEES UNIVERSITY UROLOGISTS OF CLEVELAND, INC. AND MARTIN RESNICK, M.D.'S MOTION FOR RECONSIDERATION FILED APRIL 17, 2006 IS DENIED.

RECEIVED FOR FILING

MAY 5 - 2006

GERALD E. FUERST
CLERK OF THE COURT OF APPEALS
BY _____ DEP.

APPENDIX-15

Presiding Judge COLLEEN CONWAY COONEY, DISSENTS

Judge MARY EILEEN KILBANE, Concurs

Judge
ANTHONY O. CALABRESE, JR.

# Court of Appeals of Ohio, Eighth District

County of Cuyahoga
Gerald E. Fuerst, Clerk of Courts

FRANK GLIOZZO

Appellant

COA NO. 86371 | LOWER COURT NO. CP CV-514796

COMMON PLEAS COURT

-vs-

UNIV. UROLOGISTS OF CLEVE. ET AL.

Appellee

MOTION NO. 383272

Date 05/05/2006

Journal Entry

APPELLEES UNIVERSITY UROLOGISTS OF CLEVELAND, INC. AND MARTIN RESNICK, M.D'S MOTION TO CERTIFY CONFLICT FILED APRIL 17, 2006 IS DENIED.

RECEIVED FOR FILING

MAY 5 - 2006

GERALD E. FUERST
CLERK OF THE COURT OF APPEALS
BY _____ DEP.

APPENDIX-16

Presiding Judge COLLEEN CONWAY COONEY, DISSENTS

Judge MARY EILEEN KILBANE, Concurs

Anthony O. Calabrese, Jr.
Judge
ANTHONY O. CALABRESE, JR.

MAY 0 8 2006

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# IN THE COURT OF COMMON PLEAS
# CUYAHOGA COUNTY, OHIO

FRANK GLIOZZO
Plaintiff

UNIVERSITY UROLOGISTS OF CLEVELAND INC. ET AL
Defendant

Case No: CV-03-514796

Judge: DICK AMBROSE

## JOURNAL ENTRY

PARTIES IN COURT FOR SCHEDULED TRIAL. DEFENDANTS MOTION FOR LEAVE TO FILE MOTION TO DISMISS IS GRANTED IN THE INTEREST OF JUDICIAL ECONOMY. ARGUMENTS HEARD ON THE RECORD IN SUPPORT AND IN OPPOSITION TO DEFENDANTS MOTION TO DISMISS PLAINTIFF'S COMPLAINT FOR FAILURE TO COMMENCE CASE WITHIN THE APPLICABLE STATUTE OF LIMITATIONS. THE COURT FINDS THAT THE CASE WAS NEVER PROPERLY COMMENCED AS DEFENDANTS WERE NOT SERVED WITH THE COMPLAINT AND DID NOT WAIVE THE AFFIRMATIVE DEFENSES OF STATUTE OF LIMITATIONS AND INSUFFICIENT SERVICE OF PROCESS. DEFENDANTS MOTION IS THEREFORE GRANTED. CASE DISMISSED WITH PREJUDICE AT PLAINTIFF'S COSTS.

Judge Signature 04/13/2005

APPENDIX-17

THE STATE OF OHIO } SS. I, GERALD E. FUERST, CLERK OF THE COURT OF COMMON PLEAS WITHIN AND FOR SAID COUNTY.
Cuyahoga County
HEREBY CERTIFY THAT THE ABOVE AND FOREGOING IS TRULY TAKEN AND COPIED FROM THE ORIGINAL JOURNAL ENTRY 311 PG 786 Dated April 14, 2005 NOW ON FILE IN MY OFFICE.
WITNESS MY HAND AND SEAL OF SAID COURT THIS 28 DAY OF April A.D. 20 05
GERALD E. FUERST, Clerk
By Deputy

04/13/2005

RECEIVED FOR FILING
04/14/2005 08:47:58
By: CLCMR
GERALD E. FUERST, CLERK

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R.C. § 2305.17

Baldwin's Ohio Revised Code Annotated Currentness
Title XXIII. Courts--Common Pleas
Chapter 2305. Jurisdiction; Limitation of Actions (Refs & Annos)
Miscellaneous Provisions
**2305.17 Commencement of action**

An action is commenced within the meaning of sections 2305.03 to 2305.22 and sections 1302.98 and 1304.35 of the Revised Code by filing a petition in the office of the clerk of the proper court together with a praecipe demanding that summons issue or an affidavit for service by publication, if service is obtained within one year.

(1994 S 147, eff. 8-19-94; 131 v H 106, eff. 10-30-65; 129 v 13; 1953 H 1; GC 11230, 11231)

HISTORICAL AND STATUTORY NOTES

**Pre-1953 H 1 Amendments:** RS 4987, 4988

**Amendment Note:** 1994 S 147 substituted "1304.35" for "1304.29".