

IN THE SUPREME COURT OF OHIO

FRANK GLIOZZO

APPELLEE,

vs.

UNIVERSITY UROLOGISTS
OF CLEVELAND, INC., et al.,

APPELLANTS.

CASE NO. 2006-1166

On Appeal from the Cuyahoga
County Court of Appeals, Eighth
Appellate District

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

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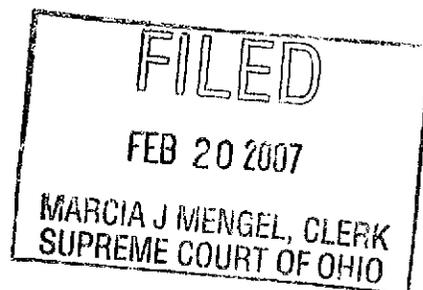


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A. Gliozzo Does Not Dispute That The Court of Appeals' Decision is Inconsistent With All Preexisting Case Law.

In his Merit Brief, Appellee Frank Gliozzo essentially concedes that the opinion of the Eighth District Court of Appeals below is irreconcilable with existing Ohio case law, and the Ohio Rules of Civil Procedure. Gliozzo further urges that this Court disregard all precedent on the determinative issues of this appeal, and rather adopt the reasoning of a dissenting justice in the case of *Maryhew v. Yova* (1984), 11 Ohio St.3d 154, 464 N.E.2d 538, as well as the reasoning of a handful of foreign jurisdictions, which have weighed in on issues similar, but by no means identical, to the issue at hand.

Particularly relevant to this Court's determination of the arguments raised in Gliozzo's Brief, is *Blount v. Schindler Elevator Corp.*, 2003-Ohio-2053, 10th Dist. App. No. 02AP-688, in which Tenth District Court of Appeals analyzed one of the cases relied on most heavily by Gliozzo, *Maryhew v. Yova*, supra, and in so doing, 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 in this respect 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.

After initially suggesting that the majority opinion in *Maryhew* “[left] the door open for a determination that ‘other acts’ constitute a submission to the court’s jurisdiction”, Gliozzo then switches gears and argues that the dissenting opinion in *Maryhew* is much more compelling than the majority opinion, and asks this Court to adopt Justice Brown’s reasoning in its holding herein. Gliozzo additionally concedes in his Brief that the opinion below is not even consistent with that court’s own relatively recent opinion in *Holloway v. General Hydraulic*, 8th App. No. 82294, 2003-Ohio-3965.¹

B. The Sole Issue Presented By This Appeal Is The Proper Application of Civ.R. 3(A) and R.C. 2305.17.

Gliozzo essentially admits in his Brief on the Merits that there are no legitimate issues of statutory interpretation or rules of construction for this Court to resolve. Accordingly, the only real question before this Court is whether the lower court erred by refusing to apply the plain and unambiguous language of Civ.R. 3(A), as well as R.C. 2305.17, in a manner consistent with the way that it has been applied by courts throughout the State of Ohio for many years prior to the release of the decision below.

If, indeed, Civ.R. 3(A), and R.C. 2305.17, are unfair, inequitable, or capricious as currently written and construed, then there are certainly avenues to be explored for rectifying that situation. Yet, by ignoring the plain language of the governing Civil Rule and the pertinent Ohio Revised Code statute, the court below has created an extremely dangerous precedent, - a precedent that has already caused, and will continue to cause, unrest and uncertainty amongst attorneys and their clients across the state of Ohio. If

¹ Gliozzo repeats the misstatement of fact found in the majority opinion below that *Holloway* was premised on a misinterpretation of this Court’s opinion in *First Bank of Marietta v. Cline* (1984), 12 Ohio St.3d 317, 464 N.E.2d 567.

the decision of the Eighth District Court of Appeals is not reversed, it is reasonable to believe that this confusion and uncertainty will become markedly worse and more problematic in the future.

The opinion below did not purport to change existing law, as now suggested to this Court by Gliozzo. Rather, the opinion below expressly (albeit incorrectly) stated that it was in keeping with this Court's decisions in *Maryhew* and *Cline*, as well as with other case authority from across the state. By obscuring its radical departure from long established precedent below, the majority opinion below served to foster much more confusion, than if the court had frankly stated its true intent and purpose. Practitioners are now left with the daunting task of reconciling the irreconcilable and are faced with a lose-lose proposition when encountering factual scenarios similar to those found in the present appeal.

C. The Record Plainly Reflects That Notice of Failure Of Service Was Mailed To Plaintiff's Counsel.

At page 1 of his Merit Brief, Gliozzo states that his attorney denies receiving notice that service was unclaimed. The record reflects that the fact of this notice being sent to Gliozzo's attorney is uncontroverted. Additionally, the record reflects that Gliozzo's attorneys' belated attempts to supplement the record with an affidavit on this issue was rejected by the court of appeals below.

D. Gliozzo's Claims of Unfair Surprise Are Unfounded.

Some of Gliozzo's arguments as to the inequities allegedly created by the purported delay in raising by motion the issue of Gliozzo's failure to timely commence his lawsuit are disingenuous. As Gliozzo concedes at one point in his Brief, the initial motion to dismiss was filed nine (9) days prior to trial, not on the "eve" of trial, or the

“day of trial” as referenced at other portions of the Brief. Thus, there can be no dispute that any alleged trial preparation cost incurred by Gliozzo in the last nine days prior to trial, were incurred despite full knowledge of the failure commencement of the case. Additionally, Gliozzo coyly avoids the issue of actual notice of the deficiency at some time prior to the filing of the motion to dismiss, choosing rather to invite this Court to believe that the issue had never been raised prior to the filing of the motion to dismiss.

E. The Case Authority Relied on By Gliozzo Is Generally Irrelevant To the Issue In This Appeal.

Gliozzo’s reliance on *Akron-Canton Regional Airport Authority v. Swinehart* (1980), 62 Ohio St.2d 403, 406 N.E.2d 811, is as misplaced in the briefing before this Court, as it was in the briefing to the court of appeals below.

The *Swinehart* decision is wholly inapplicable to this case, because the legal issues resolved in that case were entirely dissimilar from those presented herein.

Initially, the syllabus in *Swinehart* reads in its entirety as follows:

Service of process may be made at an individual’s business address pursuant to Civ.R. 4.1(1), but such service must comport with the requirements of due process.

Thus, the issue addressed by the Supreme Court in *Swinehart* is simply not present herein.

In *Swinehart*, the plaintiff-appellant airport authority filed a singular eminent domain action against the two owners of the same parcel of land. *Id.* at 403-404. The plaintiff in *Swinehart* clearly perfected service upon one of the owners, but not the other. *Id.* at 404. Although the court of appeals determined that a joint answer on behalf of both defendants amounted to consent to the personal jurisdiction of the trial court, neither defendant raised the affirmative defense of insufficiency of service. *Id.* at

407-408. Indeed, this issue was simply not considered or discussed by the *Swinehart* court. *Id.* Per the court's dicta, service was proper only as to one defendant, but the joint answer constituted voluntary submission to personal jurisdiction by both defendants. *Id.*

Likewise, *Garnett v. Garnett* (Aug. 7, 1986), 8th App. No. 50857, (which is another case cited by Gliozzo), has no relevance to the issues before this Court as that case involved the termination of the continuing jurisdiction of a domestic relations court to resolve a child support issue that arose years after the trial court's initial decision. *Garnett* is inapplicable to the instant appeal for a host of different reasons. Firstly, the central issue in *Garnett* was whether the Domestic Relations trial court had properly invoked its continuing jurisdiction for the purposes of conducting 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 this Court's decision was premised, was former Civ. R. 75(I). *Id.* Civ.R. 75 is titled "Divorce, Annulment, and Legal Separation Actions." The case law 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.*

Accordingly, the *Garnett* decision is of no conceivable relevance to the issues presently before this Court, as a cursory examination of that opinion aptly demonstrates. In his Brief, Gliozzo implies, but does not state, that the facts of *Garnett* are similar to those of this case. Tellingly, Gliozzo fails to inform this Court of the fundamental difference in the type of case appealed from in *Garnett*, as well as the fundamental difference in the legal issues presented. Obviously, if the case law existed

in support of Gliozzo's position on appeal, he would not be compelled to stretch and distort the impact of irrelevant case authority, such as *Swinehart* and *Garnett*.

F. The Foreign Case Decisions Relied Upon By Gliozzo Are Distinguishable And Are Not Persuasive.

The other case law relied upon by Gliozzo is generally from foreign jurisdictions, such as *East Mississippi State Hosp. v. Adams*, --So.2d--, 2007 WL 114190 (Mississippi, 2007), and *Watkiss & Campbell v. Foa & Son*, 808 P.2d 1061, (Utah, 1991).

In *Adams*, the Court found waiver of a timely raised affirmative defense where a defendant "participated fully in the litigation of the merits for over two years without actively contesting jurisdiction in any way." *Adams*, 2007 WL 114190, at ¶11. In the instant case, the issue of failure to perfect service, which was properly raised in the Appellants' Answer, could not have been raised for a second time until after one year had expired from the time of the filing of the Complaint, or November 14, 2004, - one year from the filing of the suit. Appellants' motion to dismiss was then filed less than five months from this date. Additionally, *Adams* is distinguishable from the instant case based on the operation of Civ.R. 12(D), which states that a motion such as the motion to dismiss granted by the trial court below "shall be heard and determined before trial on application of any party."

The holding in *Watkiss* was similarly based on facts fundamentally different than those found in this appeal. In *Watkiss* the Court stated that a defendant was "free to assert the defense of insufficiency of service of process by way of answer, or it had the option of raising it by motion." *Watkiss*, 808 P.2d at 1067. The Court went on to

determine that Rule 12(h) of the Utah Rules of Civil Procedure² precluded the filing of more than one more motion to dismiss. Thus, since the defendant had filed one prior motion to dismiss which did not raise the issue of insufficiency of service of process, it was precluded from filing a second motion on these grounds, despite having raised the appropriate affirmative defense in its Answer. Therefore, the issue decided by the *Watkiss* Court involving multiple motions to dismiss is not present in this case.

King v. Snohomish County (2002), 146 Wash.2d 420, 47 P.3d 563, does not even purport to address the issue before this Court, as Gliozzo admits in his Brief. In that case, the Defendant failed to answer interrogatories dealing with the basis for the affirmative defense at issue (i.e.) the existence of “claim filing deficiencies.” Contrary to Gliozzo’s implications to this Court, Appellants herein timely complied with all discovery requests. In answering the interrogatory dealing with the basis for asserted affirmative defenses, Appellants in no way abandoned the defense of insufficiency of service of process or suggested a waiver of this affirmative defense.

A careful reading of the afore-referenced decisions belies the suggestion that they are supportive of Gliozzo’s arguments herein. Plainly, Gliozzo’s failure to support his arguments relating to the Propositions of Law with relevant case law, or to distinguish the case law cited by Appellants, is indicative of the lack of merit of his position.

G. Conclusion

For all the foregoing reasons, this Court should reverse the decision of the Eighth District Court of Appeals and enter judgment in favor of Appellants.

² This Rule states in relevant part “**(h) Waiver of defenses.** A party waives all defenses and objections which he does not present either by motion as hereinbefore provided or, if he has made no motion, in his answer or reply....”

Respectfully Submitted,

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CERTIFICATE OF SERVICE

A copy of the foregoing Reply Brief of Appellants University Urologists of Cleveland, Inc. and Martin Resnick, M.D. was sent by regular U.S. mail on this 20 day of February 2007 to: William A. Carlin at 29325 Chagrin Blvd., Suite 305, Pepper Pike, Ohio 44122.

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