

IN THE SUPREME COURT OF OHIO

SISK & ASSOCIATES, INC.,

Appellee,

vs.

THE COMMITTEE TO ELECT  
TIMOTHY GRENDALL, et al.,

Appellants.

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On appeal from the Tenth District  
Court of Appeals

Case No. 07APE-12-1002

08-1265

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MEMORANDUM IN SUPPORT OF JURISDICTION OF APPELLANTS

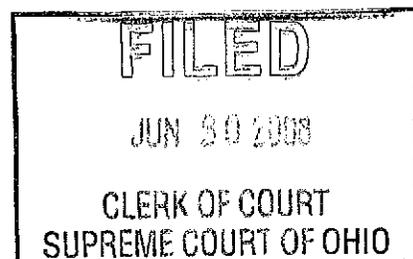
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## MEMORANDUM IN SUPPORT OF JURISDICTION

### I. EXPLANATION AS TO WHY THIS CASE IS OF PUBLIC OR GREAT GENERAL INTEREST.

This case concerns the failure of the Tenth District Court of Appeals to follow both its own established precedent and that of the Supreme Court of Ohio in determining whether a plaintiff's request for service of a complaint more than one year after the complaint was filed is equivalent to a "notice" dismissal under Civ. R. 41(A)(1)(a). Despite this Court's determination that it does constitute a "notice" dismissal, and the Tenth District's own acknowledgement that it does, the Tenth District in this case inexplicably held otherwise.

Ohio appellate courts are required to follow the precedent established by the Ohio Supreme Court.<sup>1</sup> This tenet is paramount to our judicial system and required for the orderly rule of law.

Appellate courts are also bound to follow their own established precedents to provide uniformity in the law, as well as to guide litigants as to their legal rights.<sup>2</sup> The Tenth District itself has recognized the importance of following precedent:

The doctrine of precedents, which is invoked in determining the law applicable in a given case, owes its origin and observance to a recognition of the importance of stability and uniformity in the construction and interpretation of the law. A rule of law once announced by the court should be followed until, by the opinion of at least a majority of the court, the law has been or should be changed.<sup>3</sup>

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<sup>1</sup> *State v. Daniels* (3<sup>rd</sup> Dist. No. 12-06-15), 2007-Ohio-2281, at ¶ 17.

<sup>2</sup> *State v. George* (10<sup>th</sup> Dist. 1975), 50 Ohio App. 3d 297, 309.

<sup>3</sup> *Id.* (citations omitted).

Indeed, the Tenth District Court of Appeals recognized the importance of following its own precedent:

It seems to be a well established general rule that what a given court has stated in the past on a subject is important to the litigants, as well as to the court. In this regard, legal precedents provide a guiding principle in the arguing and presenting of cases, as well as in their decisions.<sup>4</sup>

Accordingly, in cases where an Ohio appellate court does not follow its own established decisions for no apparent reason and also misapplies a decision set forth by the Ohio Supreme Court, the ruling must be reviewed for the interest of the public as a whole.

In this case, the Tenth District Court of Appeals ignored controlling decisions from this Court and its own prior decision. If allowed to stand, the Tenth District's erroneous decision in this case would leave litigants guessing as to the proper application of this Court's decision in *Goolsby v. Anderson Concrete Corp.* (1991), 61 Ohio St. 3d 549, and the Tenth District's own decision in *Shafer v. Sunsports Surf Co., Inc.* (10th Dist. Nos. 06AP-370, 06AP-4841), 2006-Ohio-6002. Consequently, some courts might follow the Tenth District's precedent set by *Shafer*, which applied *Goolsby* and affirmed a trial court's dismissal of a complaint *with prejudice* in circumstances similar to the case at bar, while other courts might follow the Tenth District's precedent below, which dismissed the complaint *without prejudice* under facts similar to those in *Shafer*. This jurisprudential uncertainty is precisely the reason courts are expected to follow precedents, especially precedents set by the Supreme Court.

## II. STATEMENT OF THE CASE AND FACTS

Defendant-Appellant The Committee to Elect Timothy Grendell (the "Committee") was formed as a political campaign committee to elect Defendant-Appellant Timothy Grendell

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<sup>4</sup> *Id.*

(“Grendell”) as a state senator. Defendant John Ralph (“Ralph”) was the Committee’s treasurer until his resignation in June, 2005.<sup>5</sup>

The Committee entered into an agreement (the “Agreement”) with Plaintiff-Appellee Sisk & Associates, Inc. (“Appellee”) on December 16, 2003, under which Appellee agreed to consult the Committee on campaign and fundraising issues. Appellee believes the Committee still owes fees under the Agreement and filed a complaint (the “First Complaint”) for breach of the Agreement against the Committee, Grendell, Ralph, and Defendant-Appellant John Doe (Ralph’s successor) on September 23, 2004 in the Franklin County Court of Common Pleas. Appellee attempted service by certified mail once, but that attempt failed. Appellee did not re-attempt service of the First Complaint within a year of its filing, as required by Civil Rule 3(A). Appellee then voluntarily dismissed the First Complaint on October 5, 2005.

On October 19, 2005, Appellee re-filed its action for breach of contract (the “Re-Filed Complaint”) and requested that the Clerk’s office serve Grendell, the Committee, and Ralph by personal service through a foreign sheriff’s office and serve John Doe by certified mail. Appellee obtained service of its Re-Filed Complaint on Ralph only. Appellee made no further attempts to serve the Re-Filed Complaint.

On January 10, 2006, the Committee and Grendell moved to quash service of process to preclude Appellee from asserting that service on Ralph constituted service on the Committee or Grendell. On January 10, 2006, Grendell, Ralph, and John Doe—without conceding they had been properly served—also moved to dismiss the Re-Filed Complaint for failing to state a claim upon which relief could be granted. On February 3, 2006, Appellee filed and served by regular mail upon Appellants’ counsel a virtually identical amended complaint (the “Amended

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<sup>5</sup> Ralph is not a party to this appeal.

Complaint”) on the mistaken belief that service of the Amended Complaint under Civ. R. 5 was a substitute for actual service of process under Civ. R. 4. Appellants, Grendell, the Committee, and John Doe (collectively, the “Appellants”), then moved to strike the Amended Complaint on the basis that the service of an amended complaint under Civ. R. 5 is not a substitute for service of process under Civ. R. 4. That motion has not been decided.

Appellee waited until March 26, 2007, to make its first request for service of the Amended Complaint.<sup>6</sup> This request, however, came more than a year after Appellee filed the Amended Complaint and eighteen months after Appellee filed the Re-Filed Complaint, well beyond the time permitted to accomplish service under Civ. R. 3(A). On April 26, 2007, Appellants filed a Motion to Dismiss Appellee’s Re-Filed and Amended Complaints for lack of personal jurisdiction pursuant to Civ. R. 12(B)(2) because of Appellee’s failure to accomplish service within the one-year deadline imposed by Civ. R. 3(A) and because of Appellee’s failure to prosecute its action diligently. Appellants requested that the dismissal be “with prejudice” because Appellee’s untimely request for service was akin to Appellee’s second “notice” dismissal, and because Appellee’s failure to prosecute was inexcusable.

The trial court granted Appellants’ Motion to Dismiss, but dismissed Appellee’s claims *without* prejudice, erroneously relying upon the Supreme Court’s decision in *Olynyk v. Scoles* (2007), 114 Ohio St. 3d 56. Appellants appealed to the Tenth District Court of Appeals from the trial court’s Decision and Entry filed September 19, 2007 (“Decision and Entry”), contending that the trial court should have followed the Tenth District Court of Appeals’ recent decision in *Shafer v. Sunsports Surf Co., Inc.* (10<sup>th</sup> Dist. Nos. 06AP-370, 06AP-4841), 2006-Ohio-6002, and

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<sup>6</sup> Appellee requested service by ordinary mail, which was inappropriate because Appellee had not attempted certified mail service first, a prerequisite for ordinary mail service under Civ. R. 4.6(C).

also that the trial court should have entered the dismissal with prejudice on account of Appellee's failure to diligently prosecute this action.

The Tenth District Court of Appeals denied Appellants' request for reversal and affirmed the trial court's dismissal of Appellee's claims without prejudice. Appellants are filing this appeal because this ruling is inconsistent with this Court's precedent in *Goolsby v. Anderson Concrete Corp.* and the Tenth District's decision in *Shafer v. Sunsports Surf Co., Inc.*

### III. ARGUMENTS IN SUPPORT OF PROPOSITION OF LAW

**Proposition of Law: The Supreme Court of Ohio's decision in *Goolsby v. Anderson Concrete Corp.* required the Tenth District Court of Appeals to dismiss Appellee's claims with prejudice.**

**A. THE COURT OF APPEALS SHOULD HAVE REVERSED THE TRIAL COURT'S DISMISSAL OF APPELLEE'S CLAIMS WITHOUT PREJUDICE BECAUSE APPELLEE CANNOT CURE ITS FAILURE TO SERVE APPELLANTS WITHIN A YEAR OF FILING ITS RE-FILED AND AMENDED COMPLAINTS.**

While a dismissal for failing to establish personal jurisdiction under Civ. R. 12(B)(2) is usually without prejudice, the dismissal here should have been *with prejudice* because Appellee cannot cure its failure to obtain service within one year of filing its Re-filed Complaint and Amended Complaint as required by Civ. R. 3(A). Under Civ. R. 3(A), "a civil action is commenced by filing a complaint with the court, *if service is obtained within one year from such filing upon a named defendant \* \* \**"<sup>7</sup> It is well-established that "no extension of time can be granted after the one-year limitations period for commencement of an action as required by Civ. R. 3(A) has run."<sup>8</sup>

The circumstances in this case virtually mirror those in *Shafer v. Sunsports Surf Co., Inc.* (10<sup>th</sup> Dist. Nos. 06AP-370, 06AP-4841), 2006-Ohio-6002. The plaintiff in that case filed a

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<sup>7</sup> (Emphasis added).

<sup>8</sup> *Fetterolf v. Hoffman-LaRoche, Inc.* (1995), 104 Ohio App. 3d 272, 277.

complaint on October 17, 2001 against the Sunsports Surf Co., Inc. (“Sunsports”), Robert J. Higgins (“Higgins”), and others, alleging the failure of the defendants to compensate the plaintiff for accounting services he provided.<sup>9</sup> The plaintiff had earlier filed the same complaint and voluntarily dismissed it without prejudice.<sup>10</sup>

The Clerk of Courts served the plaintiff’s re-filed complaint on each defendant by certified mail, but the complaints sent to Sunsports and Higgins were returned as undeliverable.<sup>11</sup> Service of the complaints against the remaining defendants was successful and the case proceeded as to those defendants in accordance with the case schedule.<sup>12</sup> When the plaintiff did not prosecute the action against the served defendants, those defendants filed a motion to dismiss for failure to prosecute under Civ. R. 41(B)(1), which the court granted on October 3, 2002.<sup>13</sup> The plaintiff then filed a Civ. R. 60(B) motion to vacate the dismissal, which the court granted on March 10, 2003. In its decision to vacate the dismissal, the trial court also ordered the parties to submit a case schedule setting the matter for trial or to schedule a status conference with the court during which a trial date would be set.<sup>14</sup>

The parties failed to follow the trial court’s order, however, and made no filings with the court for the next two years.<sup>15</sup> On May 24, 2005, the plaintiff filed a notice of dismissal of his claims against the served defendants and also filed an amended complaint against Sunsports and Higgins. The plaintiff then requested that the clerk of courts serve the amended complaint on Sunsports and Higgins, which the clerk did on June 24, 2005.

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<sup>9</sup> *Id.* at ¶ 2.

<sup>10</sup> *Id.*

<sup>11</sup> *Id.* at ¶ 3.

<sup>12</sup> *Id.* at ¶ 4.

<sup>13</sup> *Id.*

<sup>14</sup> *Id.*

<sup>15</sup> *Id.* at ¶ 5.

On December 22, 2005, Higgins, on behalf of Sunsports, filed a motion to dismiss all claims against Sunsports pursuant to Civ. R. 12(B)(2), contending that, because the plaintiff did not serve Sunsports within a year of filing the October 17, 2001 refiled complaint, the plaintiff never properly commenced his action pursuant to Civ. R. 3(A).<sup>16</sup> Sunsports argued, therefore, that the trial court never obtained personal jurisdiction over it and that the claims against it should be dismissed. The trial court granted the motion to dismiss and ordered that the case be dismissed against Sunsports *with prejudice*. The trial court found that the plaintiff's request for service of the amended complaint constituted a voluntary dismissal and re-filing after the plaintiff had already voluntarily dismissed his case once. The court then dismissed the plaintiff's claims with prejudice pursuant to Civ. R. 41(A).<sup>17</sup>

On appeal, the plaintiff argued that the Ohio Supreme Court in *Goolsby v. Anderson Concrete Corp.* (1991), 61 Ohio St. 3d 549, created an exception to the time limit in Civ. R. 3(A) whereby a plaintiff who has not obtained service within a year of filing its complaint and who has the ability to dismiss and re-file its complaint can simply request that the clerk serve the complaint. Under *Goolsby*, such a request would have the same legal effect as a voluntary "notice" dismissal under Civ. R. 41(A). The Tenth District Court of Appeals in *Shafer* declined to extend *Goolsby*, holding that a plaintiff who has failed to serve the complaint within a year of its filing "is only entitled to additional time in which to file his complaint if 'the subsequent re-filing of [a] \* \* \* complaint within rule would provide an additional year within which to obtain service and commence an action under Civ. R. 3(A)\* \* \*'" (quoting *Goolsby*, 61 Ohio St. 3d 549, at syllabus). The Court held that the plaintiff could not be afforded the additional time

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<sup>16</sup> *Id.* at ¶6.

<sup>17</sup> The trial court's Decision and Entry Granting Motion to Dismiss Claims Related to Sunsports is attached to Appellants' Motion to Dismiss filed April 26, 2007.

allowed under the *Goolsby* exception because he could not have subsequently re-filed his complaint due to the previous voluntary dismissal: “As [plaintiff] had previously dismissed his action before bringing the instant action, a second voluntary dismissal (necessary in order to refile) would have resulted in an adjudication upon the merits of his claims.”<sup>18</sup> The Court in *Shafer* then held that, without the ability to dismiss and re-file his complaint, the plaintiff could not obtain additional time in which to obtain service of process under the *Goolsby* exception by amending his complaint. The Tenth District then affirmed the trial court’s dismissal of the plaintiff’s claims *with prejudice* under Civ. R. 41(A) because the request for service of the amended complaint acted as an adjudication of the action.<sup>19</sup> The Tenth District should have reached the same result here.

What the Court of Appeals and the trial court in this case failed to recognize is that the double-dismissal rule operates by virtue of Appellee’s failure to obtain service within a year of filing its Re-Filed Complaint because Appellee did not have the ability to dismiss and re-file its action to obtain an additional year to serve Appellants. Because Appellee had previously dismissed its First Complaint before bringing its Re-filed Complaint, “a second dismissal (necessary to refile) would have resulted in an adjudication upon the merits of his claims.”<sup>20</sup> Likewise, Appellee could not obtain more time by asking the clerk of courts to serve the Amended Complaint because this Court has already recognized in *Goolsby* that such a request constitutes a “notice” dismissal and a re-filing of the complaint and extends the time to obtain service only if the plaintiff is able to voluntarily dismiss and re-file the complaint, which Appellee here is precluded from doing.

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<sup>18</sup> *Id.* (citing Civ. R. 41(A)).

<sup>19</sup> *Id.* at ¶ 16.

<sup>20</sup> *Id.* (citing Civ. R. 41(A))

Just as the plaintiff in *Shafer* could not gain additional time to obtain service of process by asking the clerk to serve the amended complaint after he had already dismissed the case once, so to is Appellee barred from obtaining additional time to obtain service on Appellants by asking the clerk to serve its Amended Complaint. The Court of Appeals, therefore, should have held that Appellee's request for service more than a year after filing its Re-Filed Complaint and Amended Complaint, and after it had already voluntarily dismissed its case once, constituted a "double dismissal," just as it did in *Shafer*.

**B. THE COURT OF APPEALS MISAPPLIED CONTROLLING AUTHORITY FROM THIS COURT AND IGNORED ITS OWN PRECEDENT IN RULING THAT APPELLEE'S CLAIMS SHOULD BE DISMISSED WITHOUT PREJUDICE.**

The Tenth District Court of Appeals held that Appellee's request for service of its Amended Complaint over one year after the service deadline imposed by Civ. R. 3(A) had expired did not equate to a "notice" dismissal pursuant to Civ. R. 41(A)(1)(a).<sup>21</sup> This ruling is directly contrary to this Court's decision in *Goolsby v. Anderson Concrete Corp.*, where this Court held that when service has not been obtained within a year of the filing of a complaint, "an instruction to the clerk to attempt service on the complaint will be the equivalent to a refiling of the complaint."<sup>22</sup>

The Tenth District Court of Appeals' ruling is also directly contrary to its decision in *Shafer v. Sunsports Surf Co., Inc.*,<sup>23</sup> where the Court of Appeals determined that the previous voluntary dismissal of the plaintiff's claims prevented the plaintiff from dismissing and refiling its complaint under the *Goolsby* exception because "a second voluntary dismissal (necessary in

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<sup>21</sup> *Sisk & Associates v. The Committee to Elect Timothy Grendell*, 10<sup>th</sup> Dist. No. 07AP-1002, 2008-Ohio-2342, at ¶7.

<sup>22</sup> *Goolsby v. Anderson Concrete Corp.* (1991), 61 Ohio St. 3d 549, at syllabus.

<sup>23</sup> *Shafer v. Sunsports Surf Co., Inc.* (10<sup>th</sup> Dist. No. 06AP-484), 2006-Ohio-6002, at ¶14-15.

order to refile) would have resulted in an adjudication upon the merits of his claims under Civ. R. 41(A).” The Court of Appeals then affirmed the trial court’s decision to dismiss the case *with prejudice* because the plaintiff could not have dismissed and refiled its complaint to obtain an additional year in which to perfect service.<sup>24</sup>

Instead of following the well-established precedent of this Court’s decision in *Goolsby* and the Court of Appeals’ decision in *Shafer*, the Court of Appeals ignored the holdings in both cases and determined that neither applied to the case at bar. As such, the Court of Appeals “decline[d] to find that appellee’s request for service was the equivalent to a notice of dismissal under Civ. R. 41(A)(1)(a), for purposes of determining the applicability of the double-dismissal rule.”

Moreover, the Court of Appeals distinguished its decision in *Shafer* on grounds unrelated to the issue presented in this case. The Court of Appeals in *Shafer* affirmed the trial court’s dismissal of the plaintiff’s claims *with prejudice*. In a footnote in the Opinion of *Sisk* (10<sup>th</sup> Dist. No. 07AP-1002), 2008-Ohio-2342, FN 2 (the “Opinion”), the Court of Appeals distinguished *Shafer* on the basis that “*Shafer* did not directly address the specific issue of whether the case should have been dismissed with or without prejudice” and that the “issue raised by the [*Shafer*’s] assignment of error was whether the case should have been dismissed.” This basis does not distinguish the decision in *Shafer* from this case, where the facts here are virtually identical to those in *Shafer*.

Indeed, in its Opinion, the Tenth District recognized that it held in *Shafer* that the plaintiff could not have dismissed and refiled his complaint because “[a]s [the plaintiff] has previously dismissed his action before bringing the instant action, a second voluntary dismissal

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<sup>24</sup> *Id.* at ¶15.

(necessary in order to refile) would have resulted in an adjudication upon the merits of his claims.”<sup>25</sup> The Court then recognized in the Opinion that Appellants asked the Court to determine the same issue that it affirmatively ruled upon in *Shafer*, which is that the request for service was the equivalent to an adjudication on the merits because of the previous voluntary dismissal:

Essentially, appellants urge this court to find that appellee’s request for service was the equivalent to a notice of dismissal under Civ. R. 41(A)(1)(a) for purposes of the double-dismissal rule.<sup>26</sup>

The Court of Appeals already resolved this issue in *Shafer* by holding that “the operation of Civ.R. 41(A) would have barred [the plaintiff] from reasserting his claims in a subsequent refiling,” and that without the ability to refile his complaint due to the previous voluntary dismissal, the plaintiff’s complaint in *Shafer* was properly dismissed *with prejudice* because he could not have obtained an additional year to obtain service.<sup>27</sup> Because the Tenth District Court of Appeals already decided the issue for which Appellants were seeking reversal of the trial court’s decision, the Court of Appeals should have followed its own established precedent and ruled the same way in this case as it did in *Shafer*.

#### IV. CONCLUSION

The Tenth District Court of Appeals erred by affirming the trial court’s dismissal of Appellee’s claims without prejudice instead of with prejudice. Both this Court’s *Goolsby* decision and the Tenth District’s own *Shafer* decision recognize that a request for service of a complaint after the expiration of the one-year limitations period in Civ. R. 3(A) is the equivalent of a “notice” dismissal. Because Appellee effectively filed two “notice” dismissals in this case,

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<sup>25</sup> *Sisk & Associates, Inc.*, 2008-Ohio-2342, at ¶ 12 (citing *Shafer*, at ¶ 15).

<sup>26</sup> *Sisk & Associates, Inc.*, 2008-Ohio-2342, at ¶ 17.

<sup>27</sup> *Shafer*, 2006-Ohio-6002, at ¶ 15.

the Tenth District should have recognized Appellee's second dismissal as an adjudication on the merits. Its failure to do so is inconsistent with the long-standing doctrine of precedents. This Court, therefore, should accept review of this case.

Respectfully submitted,

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**CERTIFICATE OF SERVICE**

The undersigned hereby certifies that a true and accurate copy of the foregoing document was served upon the following by ordinary U.S. mail this 30th day of June, 2008:

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IN THE COURT OF APPEALS OF OHIO  
TENTH APPELLATE DISTRICT

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COURT OF APPEALS  
FRANKLIN CO. OHIO  
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Sisk & Associates, Inc., :  
 :  
 Plaintiff-Appellee, : No. 07AP-1002  
 : (C.P.C. No. 05 CV 11517)  
 v. :  
 : (REGULAR CALENDAR)  
 The Committee to Elect Timothy Grendell :  
 et al., :  
 :  
 Defendants-Appellants. :

JUDGMENT ENTRY

For the reasons stated in the opinion of this court rendered herein on May 15, 2008, both of appellants' assignments of error are overruled, and it is the judgment and order of this court that the judgment of the Franklin County Court of Common Pleas is affirmed. Costs are assessed against appellants.

PETREE, SADLER & TYACK, JJ.

BY   
Judge Charles R. Petree

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IN THE COURT OF APPEALS OF OHIO  
TENTH APPELLATE DISTRICT

Sisk & Associates, Inc., :  
 :  
 Plaintiff-Appellee, : No. 07AP-1002  
 : (C.P.C. No. 05 CV 11517)  
 v. :  
 : (REGULAR CALENDAR)  
 The Committee to Elect Timothy Grendell :  
 et al., :  
 :  
 Defendants-Appellants. :  
 :

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O P I N I O N

Rendered on May 15, 2008

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and Timothy J. Owens, for appellee.*

*Buckingham, Doolittle & Burroughs, LLP, Peter W. Hahn,  
Nicole M. Loucks and Alan P. DiGirolamo, for appellants.*

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APPEAL from the Franklin County Court of Common Pleas.

PETREE, J.

{¶1} Defendants-appellants, The Committee to Elect Timothy Grendell (the "Committee"), Timothy Grendell, and John Doe, appeal from a judgment of the Franklin County Court of Common Pleas dismissing without prejudice the refiled complaint of plaintiff-appellee, Sisk & Associates, Inc. For the reasons that follow, we affirm the judgment of the trial court.

{¶2} Appellee originally filed a complaint against appellants on October 23, 2004, alleging breach of contract. Appellee voluntarily dismissed, by means of a notice of

dismissal, the complaint on October 5, 2005. Appellee refiled its breach of contract claim against appellants on October 19, 2005. Appellee requested that the Franklin County Clerk of Court's office serve the refiled complaint on the Committee and Grendell by personal service via a foreign sheriff's office and on John Doe by certified mail. The appellants did not receive service. On February 3, 2006, appellee filed an amended complaint, but it waited until March 26, 2007, to request service of the amended complaint. On April 26, 2007, appellants filed a motion to dismiss for lack of personal jurisdiction based on appellee's failure to obtain service within one year of filing the complaint pursuant to Civ.R. 3(A).

{¶3} On September 19, 2007, the trial court filed a decision and entry granting appellants' motion to dismiss as to the Committee, Grendell, and John Doe. In said decision, the trial court determined that appellee failed to obtain service within one year of filing the complaint pursuant to Civ.R. 3(A), and that appellants did not voluntarily submit to the jurisdiction of the court or waive service of process. The court analyzed whether it was necessary to dismiss the case with prejudice considering appellee had previously voluntarily dismissed its case. The court resolved that in view of the Supreme Court of Ohio decisions in *Olynyk v. Scoles*, 114 Ohio St.3d 56, 2007-Ohio-2878, and *Thomas v. Freeman* (1997), 79 Ohio St.3d 221, the dismissal of the refiled complaint must be without prejudice. Consequently, the trial court dismissed without prejudice appellee's refiled complaint as to the Committee, Grendell, and John Doe.

{¶4} Appellants appeal and set forth the following two assignments of errors for our review:

1. The trial court erred in dismissing Plaintiff/Appellee's claims against Defendants/Appellants *without* prejudice

instead of dismissing the claims *with* prejudice because it erroneously relied upon the Ohio Supreme Court case of *Olynyk v. Scoles* (2007), 114 Ohio St.3d 56, 2007-Ohio-2878, which is not relevant to this case, and instead should have followed this Court's decision in *Shafer v. Sunsports Surf Co., Inc.* (10<sup>th</sup> Dist. Nos. 06AP-370, 06AP-4841), 2006-Ohio-6002.

2. The trial court erred in dismissing Plaintiff/Appellee's claims against Defendants/Appellants without prejudice instead of with prejudice because Plaintiff/Appellee failed to prosecute this case with due diligence.

(Emphasis sic.)

{¶5} The central issue in this appeal is whether the trial court erred in dismissing the complaint without prejudice instead of with prejudice. Appellants argue that this court must apply *Schafer v. Sunsports Surf Co., Inc.*, Franklin App. No. 06AP-370, 2006-Ohio-6002, and the "double-dismissal" rule in Civ.R. 41(A), to this case, and find that the complaint should have been dismissed with prejudice. Appellants contend that the trial court erroneously applied *Olynyk* and *Thomas* to the facts of this case.

{¶6} The last sentence of Civ.R. 41(A)(1), which sets forth the double-dismissal rule, provides that a dismissal under Civ.R. 41(A) is generally without prejudice, "except that a notice of dismissal operates as an adjudication upon the merits of any claim that the plaintiff has once dismissed in any court." A dismissal with prejudice is the functional equivalent to an adjudication on the merits. See *Briggs v. Cincinnati Recreation Comm.* (1998), 132 Ohio App.3d 610, 611 (stating that "[a] dismissal with prejudice is a final judgment on the merits"). "Dismissal with prejudice is an extremely harsh sanction and contrary to the fundamental preference for deciding cases on their merits." *First Hungarian Benefit of Barberton v. Ohio Liquor Control Comm.*, Franklin App. No. 05AP-625, 2005-Ohio-6621, at ¶8, citing *Jones v. Hartranft* (1997), 78 Ohio St.3d 368, 371.

{¶7} In this case, the trial court dismissed appellee's complaint on the basis that appellee failed to obtain service on appellants. In effect, the trial court dismissed the complaint for lack of personal jurisdiction. Civ.R. 41(B)(4) states that a dismissal for lack of personal jurisdiction "operate[s] as a failure otherwise than on the merits." Furthermore, in *Thomas*, supra, the Supreme Court of Ohio stated that "where a case is dismissed because the court did not have jurisdiction, such as in this case where service has not been perfected, the dismissal is always otherwise than on the merits." *Id.* at 225.

{¶8} Notwithstanding Civ.R. 41(B)(4) and *Thomas*, appellants argue that the dismissal should have been with prejudice in view of appellee's March 26, 2007 request for service after the one-year deadline set forth in Civ.R. 3(A).<sup>1</sup> Appellants contend that, although generally a dismissal for failing to establish personal jurisdiction under Civ.R. 12(B)(2) is without prejudice, this case required a dismissal with prejudice "because Appellee cannot cure its failure to obtain service within one year of filing its Re-filed Complaint and Amended Complaint as required by Civ.R. 3(A)." (Appellants' merit brief, at 7.) Appellants reason that the request for service equated to a voluntary dismissal and refiling of the complaint, and that this voluntary dismissal was appellee's second voluntary dismissal, thereby triggering the double-dismissal rule of Civ.R. 41(A).

{¶9} In support of their first assignment of error, appellants rely heavily on this court's decision in *Shafer*, supra. In *Shafer*, this court was faced with the issue of whether the trial court erred in granting the defendant's motion to dismiss for lack of personal

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<sup>1</sup> Under Civ.R. 3(A), "[a] civil action is commenced by filing a complaint with the court, if service is obtained within one year from such filing[.]"

jurisdiction pursuant to Civ.R. 12(B)(2).<sup>2</sup> The plaintiff in *Shafer* relied upon *Goolsby v. Anderson Concrete Corp.* (1991), 61 Ohio St.3d 549, and argued that it had properly commenced its action against the defendant when it served the defendant with an amended complaint within a year of filing that complaint. *Id.*

{¶10} In *Goolsby*, the plaintiff filed a complaint but instructed the clerk of the court to refrain from serving it. Over 17 months later, and two days prior to the expiration of the statutory period for bringing the action, the plaintiff told the clerk to effect service, which was done. The issue before the *Goolsby* court was whether the action had been commenced before the expiration of the statutory period for bringing the action. In resolving this issue, the court reached the following conclusion:

When service has not been obtained within one year of filing a complaint, and the subsequent refiling of an identical complaint within rule would provide an additional year within which to obtain service and commence an action under Civ.R. 3(A), an instruction to the clerk to attempt service on the complaint will be equivalent to a refiling of the complaint.

*Id.* at syllabus.

{¶11} In reaching this conclusion, the *Goolsby* court reasoned that had the plaintiff dismissed her complaint and refiled it at the time instructions for service were given, the action would have been commenced according to Civ.R. 3(A). Additionally, the court considered the particular circumstances of the case and observed that "an application of Civ.R. 3(A) barring [the plaintiff] from obtaining a resolution on the merits would not comport with the spirit of the Civil Rules." *Id.* at 551, citing *Peterson v. Teodosio* (1973), 34 Ohio St.2d 161, 175. Thus, the "rationale underlying the *Goolsby* case was that

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<sup>2</sup> Contrary to appellants' suggestion, this court in *Shafer* did not directly address the specific issue of whether the case should have been dismissed with or without prejudice; the issue raised by the appellant's

nothing was gained by forcing a plaintiff to dismiss one lawsuit and file a new lawsuit which could be filed within the pertinent statute of limitations." *Moh v. Anderson* (Dec. 12, 1996), Franklin App. No. 96APE06-724.

{¶12} In *Shafer*, this court determined that the plaintiff could not have refiled his complaint, and, therefore, the *Goolsby* exception to the one-year requirement of Civ.R. 3(A) did not apply. This court reasoned as follows: "[a]s [the plaintiff] had previously dismissed his action before bringing the instant action, a second voluntary dismissal (necessary in order to refile) would have resulted in an adjudication upon the merits of his claims." *Shafer*, at ¶15, citing Civ.R. 41(A).

{¶13} Appellants cite *Shafer* for the proposition that two voluntary dismissals implicate the double-dismissal rule of Civ.R. 41(A). However, in *Olynyk*, the Supreme Court of Ohio clarified that two voluntary dismissals do not necessarily result in an adjudication on the merits. In *Olynyk*, the court outlined the three mechanisms by which a plaintiff can voluntarily dismiss his or her own case without prejudice under Civ.R. 41(A). See *id.* at ¶9. "First, the plaintiff can dismiss the case without approval of the court and without approval from any adverse party by simply filing a written notice of dismissal before the trial begins. Civ.R. 41(A)(1)(a). Second, the plaintiff can dismiss the case without court approval by filing a stipulation of dismissal agreed to by all parties. Civ.R. 41(A)(1)(b). Third, the plaintiff can ask the trial court to dismiss the case. Civ.R. 41(A)(2)." *Id.*, citing *Frynsinger v. Leech* (1987), 32 Ohio St.3d 38, 42-43.

{¶14} The *Olynyk* court noted that it is well-settled that when a plaintiff files two unilateral notices of dismissal under Civ.R. 41(A)(1)(a) regarding the same claim, the

second notice of dismissal functions as an adjudication on the merits of that claim, regardless of any contrary language in the second notice. See *id.* at ¶10. The court additionally observed that "[b]ecause the double-dismissal rule specifically mentions 'a notice of dismissal' when referring to the second dismissal, it is readily apparent that the second dismissal must be pursuant to Civ.R. 41(A)(1)(a) for the double-dismissal rule to operate." *Id.* at ¶11.

{¶15} The court then analyzed the issue of whether the language in the "last sentence of Civ.R. 41(A)(1) referring to the initial dismissal ('any claim that the plaintiff has once dismissed') countenances *any* previous dismissal initiated by a plaintiff under Civ.R. 41(A), or countenances only a previous dismissal under Civ.R. 41(A)(1)(a)." *Id.* at ¶11. (Emphasis sic.) As to this specific issue, the court determined that "the double-dismissal rule contained in Civ.R. 41(A)(1) does not apply to a plaintiff's dismissal of claims pursuant to Civ.R. 41(A)(2)." *Id.* at ¶31. The court also determined that when the first dismissal is by stipulation under Civ.R. 41(A)(1)(b), the double-dismissal rule is not implicated. *Id.* at ¶31. The court held: "The double dismissal rule of Civ.R. 41(A)(1) applies only when both dismissals were notice dismissals under Civ.R. 41(A)(1)(a)." *Id.* at syllabus.

{¶16} In the case at bar, appellee, on October 5, 2005, and pursuant to Civ.R. 41(A)(1)(a), voluntarily dismissed the originally filed complaint and two weeks later refiled its breach of contract claim. On February 3, 2006, appellee filed an amended complaint. Service of the amended complaint was not requested until March 26, 2007, and appellants filed a motion to dismiss based on appellee's failure to commence the action within one year of filing the complaint. The trial court dismissed the claim, finding that

appellee failed to obtain service within one year of filing the complaint. Thus, the case at bar is not one in which both dismissals were notice dismissals under Civ.R. 41(A)(1)(a); the second dismissal in this case was not a notice dismissal pursuant to Civ.R. 41(A)(1)(a).

{¶17} Essentially, appellants urge this court to find that appellee's request for service was the equivalent to a notice of dismissal under Civ.R. 41(A)(1)(a) for purposes of the double-dismissal rule. Although in certain circumstances a request for service could be equated to a voluntary dismissal and refiling of the complaint,<sup>3</sup> *Olynyk* makes clear that for the double-dismissal rule to apply, the voluntary dismissals must be notice dismissals under Civ.R. 41(A)(1)(a). Furthermore, in *Goolsby*, the Supreme Court of Ohio's decision to equate an instruction to the clerk regarding service with a refiling of the complaint was supported by the idea that cases should be resolved on their merits, not upon pleading deficiencies. Here, equating appellee's request as a notice of dismissal pursuant to Civ.R. 41(A)(1)(a) would require the application of the concept developed in *Goolsby* in a manner that would expand the reach of the double-dismissal rule of Civ.R. 41(A), as interpreted by the *Olynyk* court. For these reasons, we decline to find that appellee's request for service was the equivalent to a notice dismissal under Civ.R. 41(A)(1)(a), for purposes of determining the applicability of the double-dismissal rule.

{¶18} Based on the foregoing, appellants' first assignment of error is overruled.

{¶19} By their second assignment of error, appellants argue that the trial court erred in not dismissing the case with prejudice because appellee did not diligently

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<sup>3</sup> See *Goolsby*.

prosecute its case. Appellants contend that dismissal with prejudice was necessary considering appellee's conduct in failing to timely obtain service of process.

{¶20} Civ.R. 41(B)(1) provides authority for a trial court, in its discretion, to dismiss a case for a plaintiff's failure to prosecute or to comply with a rule of civil procedure or a court order. Specifically, Civ.R. 41(B)(1) provides: "Where the plaintiff fails to prosecute, or comply with these rules or any court order, the court upon motion of a defendant or on its own motion may, after notice to the plaintiff's counsel, dismiss an action or claim." Pursuant to Civ.R. 41(B)(3), a dismissal under Civ.R. 41(B)(1) "operates as an adjudication upon the merits unless the court, in its order for dismissal, otherwise specifies."

{¶21} In *Thomas*, supra, the Supreme Court of Ohio held: "When a plaintiff has failed to obtain service on a defendant, whether the court dismisses the case under Civ.R. 4(E) (failure to obtain service) or Civ.R. 41(B)(1) (failure to prosecute), the dismissal is otherwise than on the merits pursuant to Civ.R. 41(B)(4)." *Id.* at paragraph one of the syllabus. In the case at bar, the trial court dismissed the case without prejudice due to appellee's failure to obtain service. Other than citing appellee's failure to obtain service, appellants do not cite any conduct by appellee that would provide substantial grounds for dismissing the case pursuant to Civ.R. 41(B)(1).

{¶22} Upon reviewing the record, and following *Olynyk* and *Thomas*, we conclude that the trial court did not abuse its discretion in not dismissing the case with prejudice under Civ.R. 41(B)(1).

{¶23} Accordingly, appellants' second assignment of error is overruled.

{¶24} Having overruled appellants' two assignments of error, we affirm the judgment of the Franklin County Court of Common Pleas.

*Judgment affirmed.*

SADLER and TYACK, JJ., concur.

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