

IN THE SUPREME COURT OF OHIO

SISK & ASSOCIATES, INC.,) CASE NO. 08-1265
)
Appellee,)
vs.) On appeal from the Tenth District Court
) of Appeals Case No. 07APE-12-1002
)
THE COMMITTEE TO ELECT)
TIMOTHY GRENDALL, et al.,)
)
Appellants.)

MERIT BRIEF OF APPELLANTS TIMOTHY J. GRENDALL AND
THE COMMITTEE TO ELECT TIMOTHY GRENDALL

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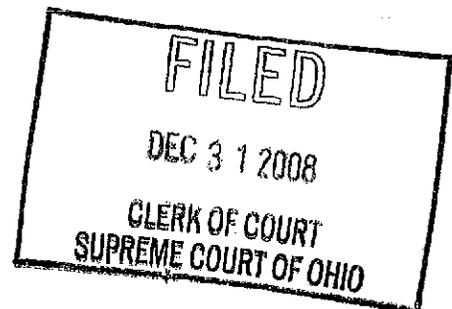


TABLE OF CONTENTS

Page No.

<u>TABLE OF AUTHORITIES</u>	iii
<u>STATEMENT OF THE CASE AND FACTS</u>	1
<u>ARGUMENTS AND LAW</u>	3
<u>INTRODUCTION</u>	3
<u>PROPOSITION OF LAW</u>	6
The Supreme Court of Ohio's decision in <i>Goolsby v. Anderson Concrete Corp.</i> required the Tenth District Court of Appeals to dismiss Appellee's claims with prejudice because Appellee's request for service of a complaint more than once a year after the complaint was re-filed, in an action already once previously voluntarily dismissed by Appellee constitutes a double dismissal	6
1. THE COURT OF APPEALS SHOULD HAVE REVERSED THE TRIAL COURT'S DISMISSAL OF APPELLEE'S CLAIMS <u>WITHOUT PREJUDICE</u> AND ADJUDICATED A DISMISSAL WITH PREJUDICE BECAUSE APPELLEE CANNOT CURE ITS FAILURE TO SERVE APPELLANTS WITHIN A YEAR OF FILING ITS ONCE VOLUNTARILY DISMISSED RE-FILED AND AMENDED COMPLAINT AS REQUIRED UNDER OHIO CIVIL RULE 3(A)	6
2. 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 WHEN THE CLAIMS SHOULD HAVE BEEN DISMISSED WITH PREJUDICE	11
<u>CONCLUSION</u>	13
<u>CERTIFICATE OF SERVICE</u>	16
<u>APPENDIX</u>	17
Date-Stamped Notice of Appeal (June 30, 2008)	17
Judgment from Which Appeal is Taken (May 15, 2008)	17
Tenth District Court of Appeals Opinion Being Appealed(May 15, 2008)	17
Franklin County Common Pleas Decision (September 13, 2007)	17
Entry of Ohio Supreme Court Accepting Appeal (October 23, 2008)	17

TABLE OF AUTHORITIES

Page No.

Cases

14 Ohio St. 3d at 63, 868 N.E. 2d at 260	10
Goolsby v. Anderson Concrete Corp (1991), 61 Ohio St 3d 549.	3, 5, 6, 8, 9, 11, 12, 14
Olynyk v. Scoles (2007), 114 Ohio St. 3d 56.	3, 10, 14
Shafer v. Sunsports Surf Co., Inc. (10th Dist. Nos. 06AP-370, 06AP-4841), 2006-Ohio-6002	3, 5, 6, 8, 9, 10, 11, 12, 13, 14
Sisk & Associates v. The Committee to Elect Timothy Grendell, 10th Dist. No 07AP-1002, 2008-Ohio-.....	11, 12
Sisk & Associates, Inc., 2008-Ohio-2342	12
State v. Daniels (3 rd Dist. No 12-06-15), 2007-Ohio-2281	4
State v. George (10 th Dist. 1975), 50 Ohio App. 3d 297	5

Rules

Ohio Civil Rule 3(A)	1, 2, 3, 4, 6, 8, 10, 11, 13, 14, 15
Ohio Civil Rule 60(B)	7
Ohio Civil Rule 12(B)(2)	2, 6, 8
Ohio Civil Rule 4	2
Ohio Civil Rule 41	4
Ohio Civil Rule 41(A)	8, 9, 10, 11, 13, 14
Ohio Civil Rule 41(B)(1), ..	7
Ohio Civil Rule 41(A)(1)(a) ..	3, 4, 10, 11, 12, 13, 14
Ohio Civil Rule 5	2

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 ("Grendell") as a state senator. Defendant John Ralph ("Ralph") was the Committee's treasurer until his resignation in June, 2005¹

The Committee allegedly 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 the primary campaign and assist in fundraising. Appellee claims 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. (Record Document 29) (References shall be to the documents as numbered in the record filed by the Appellate Court on November 21, 2008). Appellee attempted service by certified mail once, but that attempt failed. (*Id.*) Appellee did not reattempt service of the First Complaint within a year of its filing, as required by Civil Rule 3(A). (*Id.*) Appellee then voluntarily dismissed the First Complaint on October 5, 2005. (*Id.*)

On October 19, 2005, Appellee re-filed its second 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. (Record Documents 29, 37) Appellee obtained service of its Re-Filed Complaint on Ralph only. Appellee made no further attempts to serve the Re-Filed Complaint on Grendell or the Committee. (*Id.*)

¹ Ralph is not a party to this appeal

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.(Record Document 29) On February 3, 2006, Appellee filed and served by regular mail upon Appellants' counsel a virtually identical Amended Complaint (the "Amended Complaint") on the mistaken belief that service of the Amended Complaint under Civil Rule 5 was a substitute for actual service of process under Civil Rule 4. (*Id.*) Appellants, Grendell, the Committee, and John Doe (collectively, the "Appellants"), then moved to strike the Amended Complaint on the basis that the service of the Amended Complaint under Civil Rule 5 is not a substitute for service of process under Civil Rule 4. That motion has not been decided.

Appellee waited until March 26, 2007, to make its first request for service of the Amended Complaint.² 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 Civil Rule 3(A). (*Id.*) On April 26, 2007, Appellants filed a Motion to Dismiss Appellee's Re-Filed and Amended Complaints for lack of personal jurisdiction pursuant to Civil Rule 12(B)(2) because of Appellee's failure to accomplish service within the one-year deadline imposed by Civil Rule 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 of the voluntarily dismissed and then re-filed action was akin to Appellee's second voluntary dismissal, and because Appellee's untimely failure to prosecute was inexcusable

² 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).

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. (10th Dist. Nos. 06AP-370, 06AP-4841), 2006-Ohio-6002, and also that the trial court should have entered the dismissal with prejudice on account of Appellee's failure to diligently prosecute this action. (Record Documents 29 and 37)

The Tenth District Court of Appeals denied Appellants' request for reversal and affirmed the trial court's dismissal of Appellee's claims without prejudice. (Record Documents 45 and 46). The Appellate Court's ruling in this case is inconsistent with this Supreme Court's precedent in Goolsby v. Anderson Concrete Corp.³ and the Tenth District's decision in Shafer v. Sunsports Surf Co., Inc.

ARGUMENTS AND LAW

INTRODUCTION

Ohio Civil Rules 41(A)(1)(a) and 3(A), protect defendants from plaintiffs who do not prosecute actions timely or use lawsuits as weapons of coercion, but do not prosecute those lawsuits to conclusion. These rules also serve to protect busy court dockets from plaintiff manipulation and, therefore, seek to facilitate judicial economy. Under Civil Rule 41(A)(1)(a), a plaintiff can voluntarily dismiss a lawsuit once without prejudice. However, if the plaintiff does not pursue the litigation in a timely manner, Civil Rule 41(A)(1)(a), in conjunction with Civil Rule 3(A), requires that a second dismissal by the plaintiff results in a dismissal with prejudice. Consistent with the policy envisioned by the Ohio Civil Rules that lawsuits be pursued in a

³ Goolsby v Anderson Concrete Corp (1991), 61 Ohio St 3d 549

timely manner, Ohio Civil Rule 3(A) requires that a Complaint must be served upon the named defendants within one year from the filing of that Complaint. Otherwise, the Plaintiff must dismiss and refile pursuant to Civil Rule 41.

This case involved the situation where a plaintiff filed a Complaint, voluntarily dismissed that Complaint, re-filed the Complaint and failed to obtain service of that Re-Filed Complaint within a year of its filing. Since Appellee cannot comply with Civil Rule 3(A) with respect to the Re-Filed Amended Complaint in this case, any attempt by Appellee now to obtain service, after one year, is tantamount to yet another voluntary dismissal and refiling of this action. As such, Appellee's failure to obtain service of the second, re-filed action within a year of its filing⁴ constitutes a double dismissal, of Appellee's re-filed action, mandating a dismissal with prejudice.

In the instant case, the Tenth District Court of Appeals failed to follow both its own established precedent and that of this Ohio Supreme Court in determining whether a Plaintiff's request for service of a complaint more than after the Complaint was voluntarily dismissed and re-filed is equivalent to a "notice" dismissal under Civil Rule 41(A)(1)(a) and, therefore, subject to dismissal with prejudice. 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 and erroneously held otherwise.

Ohio appellate courts are required to follow the precedent established by the Ohio Supreme Court.⁵ This tenet is paramount to our judicial system and required for the orderly rule of law.

⁴ Appellee had ample opportunity to serve Grendell and the Committee either by certified mail, ordinary mail, publication or personal service within a year, especially since Grendell could be found in Columbus in his Statehouse office almost weekly during that time period.

⁵ State v Daniels (3rd Dist. No. 12-06-15), 2007-Ohio-2281, at ¶ 17.

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.⁶ 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.⁷

Indeed, the Tenth District Court of Appeals further explained 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.⁸

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., and the Tenth District's own decision in Shafer v. Sunsports Surf Co., Inc. 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

⁶ State v. George (10th Dist 1975), 50 Ohio App 3d 297, 309

⁷ Id. (citations omitted).

⁸ Id.

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 uncertainty in our system of jurisprudence is precisely the reason courts are expected to follow precedents, especially precedents set by this Supreme Court.

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 because Appellee's request for service of a complaint more than once a year after the complaint was re-filed, in an action already once previously voluntarily dismissed by Appellee constitutes a double dismissal.

1. THE COURT OF APPEALS SHOULD HAVE REVERSED THE TRIAL COURT'S DISMISSAL OF APPELLEE'S CLAIMS WITHOUT PREJUDICE AND ADJUDICATED A DISMISSAL WITH PREJUDICE BECAUSE APPELLEE CANNOT CURE ITS FAILURE TO SERVE APPELLANTS WITHIN A YEAR OF FILING ITS ONCE VOLUNTARILY DISMISSED RE-FILED AND AMENDED COMPLAINT AS REQUIRED UNDER OHIO CIVIL RULE 3(A).

While a dismissal for failing to establish personal jurisdiction under Civil Rule 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 Civil Rule 3(A). Under Civil Rule 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 ***⁹ 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 Civil Rule 3(A) has run."¹⁰

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

⁹ (Emphasis added).

¹⁰ *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.¹¹ The plaintiff had earlier filed the same Complaint and voluntarily dismissed it without prejudice.¹²

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.¹³ Service of the Complaints against the remaining defendants was successful and the case proceeded as to those defendants in accordance with the case schedule.¹⁴ When the plaintiff did not prosecute the action against the served defendants, those defendants filed a motion to dismiss for failure to prosecute under Civil Rule 41(B)(1), which the court granted on October 3, 2002.¹⁵ The plaintiff then filed a Civil Rule 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.¹⁶

The parties failed to follow the trial court's order, however, and made no filings with the court for the next two years.¹⁷ 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.

¹¹ *Id.* at ¶2.

¹² *Id.*

¹³ *Id.* at ¶3.

¹⁴ *Id.* at ¶4.

¹⁵ *Id.*

¹⁶ *Id.*

¹⁷ *Id.* at ¶5.

On December 22, 2005, Higgins, on behalf of Sunsports, filed a motion to dismiss all claims against Sunsports pursuant to Civil Rule 12(B)(2), contending that, because the plaintiff did not serve Sunsports within a year of filing the October 17, 2001 Re-Filed Complaint, the plaintiff never properly commenced his action pursuant to Civil Rule 3(A)¹⁸ 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 Civil Rule 41(A).¹⁹

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 Civil Rule 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 Civil Rule 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 refileing of [a] * * * complaint within rule would provide an additional year within which to obtain service and commence an action under Civil Rule 3(A)* ** (quoting Goolsby, 61 Ohio St. 3d 549, at syllabus). The Court held that the plaintiff could not be afforded the additional time allowed under the Goolsby exception because he could not have subsequently re-

¹⁸ Id. at ¶6.

¹⁹ 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

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."²⁰ 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 Civil Rule 41(A) because the request for service of the Amended Complaint acted as an adjudication of the action.²¹ 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."²² 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.

Recognizing that a failure to obtain service of a previously voluntarily dismissed, re-filed action within one year warrants dismissal with prejudice is consistent with this Court's ruling in

²⁰ *Id.* (citing Civ R. 41(A))

²¹ *Id.* at ¶ 16.

²² *Id.* (citing Civ R. 41(A))

Olynyk v. Scales.²³ In Olynyk, this Court focused on the fact that a Civil Rule 41(A)(1)(a) dismissal “is totally within a plaintiff’s control,” whereas the other types of Civil Rule 41(A) dismissal required the cooperation of the other parties or court approval.²⁴ Just as with respect to a Civil Rule (A)(1)(a) voluntarily dismissal, Appellee’s inexplicable failure to serve the Amended Complaint on Appellants within one year was “totally within a plaintiff’s [Appellee’s] control.” In fact, if a failure to comply with the one year service requirement under Civil Rule 3(A) is not treated as a voluntary dismissal for purposes of Civil Rule 41 (A)(1)(a), a plaintiff can either (i) similarly avoid Civil Rule 41(A)(1)(a) dismissal or (ii) totally ignore Civil Rule 3(A) by seeking service more than one year after filing without voluntarily dismissing and re-filing the action. Such result would render Civil Rule 3(A) a nullity in previously voluntarily dismissed and re-filed cases. Since Appellee totally controlled service and could have perfected service within one year, Appellee should not be allowed to ignore Civil Rule 3(A) or render that Civil Rule a nullity by his noncompliance. Consistent with Olynyk, Appellee’s failure to comply with the Civil Rules within Appellee’s control should result in a dismissal of this action with prejudice.

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 too 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

²³ 114 Ohio St. 3d 56, 868 N.E. 2d 254, 2007-Ohio-2878 Id at 63, 868 N E 2d at 260

²⁴ 14 Ohio St. 3d at 63, 868 N E. 2d at 260

"double dismissal," just as it did in Shafer. For that reason, the Appellate Court's ruling should be rendered and modified to reflect that Appellee's case is dismissed with prejudice.

2. 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 WHEN THE CLAIMS SHOULD HAVE BEEN DISMISSED WITH 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 Civil Rule 3(A) had expired did not equate to a "notice" dismissal pursuant to Civil Rule 41(A)(1)(a).²⁵ 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."²⁶

The Tenth District Court of Appeals' ruling is also directly contrary to its own decision in Shafer v. Sunsports Surf Co., Inc.,²⁷ where the Court of Appeals determined that the previous voluntary dismissal of the plaintiff's claims prevented the plaintiff from dismissing and refileing its Complaint under the Goolsby exception because "a second voluntary dismissal (necessary in order to refile) would have resulted in an adjudication upon the merits of his claims under Civil Rule 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 re-filed its Complaint to obtain an additional year in which to perfect service.²⁸

²⁵ Sisk & Associates v. The Committee to Elect Timothy Grendell, 10th Dist. No. 07AP-1002, 2008-Ohio-2342, at ¶7.

²⁶ Goolsby v. Anderson Concrete Corp. (1991), 61 Ohio St. 3d 549, at syllabus.

²⁷ Shafer v. Sunsports Surf Co., Inc. (10th Dist. No. 06AP-484), 2006-Ohio-6002, at ¶14-15

²⁸ Id. at ¶15.

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 Civil Rule 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 (10th 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 re-filed his Complaint because "[a]s [the plaintiff] has 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."²⁹ 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 adjudication on the merits because of the previous voluntary dismissal:

²⁹ Sisk & Associates, Inc., 2008-Ohio-2342, at ¶ 12 (citing Shafer, at ¶ 15)

Essentially, appellants urge this court to find that appellee's request for service was the equivalent to a notice of dismissal under Civil Rule 41(A)(1)(a) for purposes of the double-dismissal rule.³⁰

The Court of Appeals already resolved this issue in *Shafer* by holding that "the operation of Civil Rule 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.³¹ 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*, dismissing Appellee's second re-filed Amended Complaint with prejudice.

CONCLUSION

The Appellate Court's failure to dismiss Appellee's second untimely served re-filed Amended Complaint (re-filed after Appellee's previously voluntarily dismissed this claim) is fundamentally wrong in its inconsistent reasoning and dangerous to the purpose of the Ohio Civil Rules that lawsuits be prosecuted in a timely manner and in accordance with the Ohio Civil Rules. Appellee has no one to blame in this case but himself. Appellee voluntarily dismissed his first filing because he failed to perfect service within one year, Appellee re-filed his action, but yet again failed to make service on Appellants within eighteen months of that refiling. Appellee effectively filed two "notice" dismissals in this case because Appellee cannot comply with Ohio Civil Rule 3(A) with respect to his second re-filed action. The Ohio Civil Rules have been adopted for a reason – to facilitate a timely civil litigation process. Appellee has failed to

³⁰ *Sisk & Associates, Inc.*, 2008-Ohio-2342, at ¶ 17

³¹ *Shafer*, 2006-Ohio-6002, at ¶ 15.

comply with the Civil Rules in this case and, therefore, the untimely, Amended Complaint, not only should have been dismissed, it should have been dismissed with prejudice.

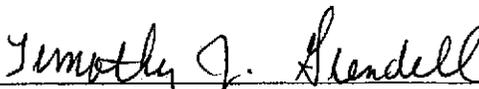
The Tenth District Court of Appeals erred by affirming the trial court's dismissal of Appellee's claims without prejudice instead of with prejudice. Both this Court's *Goolsby* decision and the Tenth District's own *Shaffer* decision recognize that a request for service of a complaint after the expiration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

Recognizing that a failure to obtain service of a previously voluntarily dismissed, re-filed action within one year warrants dismissal with prejudice is consistent with this Court's ruling in *Olynnyk v. Scoles*. In *Olynnyk*, this Court focused on the fact that a Civil Rule 41(A)(1)(a) dismissal "is totally within a plaintiff's control," whereas, the other types of Civil Rule 41(A) dismissals required the cooperation of the other party or court approval. Just as with respect to a Civil Rule 41(A)(1)(a) voluntary dismissal, Appellee's inexplicable failure to serve the Amended Complaint on Appellant's was "totally within a plaintiff's [Appellee's] control" since Appellee totally controlled service and could have perfected service within one year, Appellee should not be allowed to ignore Civil Rule 3(A) or render this Civil Rule a nullity by avoiding Civil Rule 41(A)(1)(a). Consistent with *Olynnyk*, Appellee's failure to comply with the Civil Rules within Appellee's control should result in a dismissal with prejudice.

The decisions of the lower courts to dismiss this action without prejudice should be reversed and judgment should be entered for Appellants in this case dismissing Appellee's action

with prejudice Such ruling is consistent with the Ohio Civil Rules. To hold otherwise would render Civil Rule 3(A) a complete nullity and give plaintiffs a license to ignore the one year service requirement in that civil rule. Such holding will not facilitate judicial economy and will adversely affect the already busy docketing schedule of Ohio courts.

Respectfully submitted,



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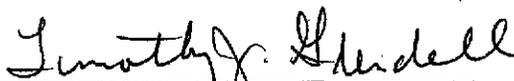
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CERTIFICATE OF SERVICE

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 31st day of December, 2008:

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Timothy J. Grendell(0005827)

APPENDIX

Appendix Page No.

Date-Stamped Notice of Appeal (June 30, 2008)	1
Judgment from Which Appeal is Taken (May 15, 2008).....	3
Tenth District Court of Appeals Opinion Being Appealed(May 15, 2008)	4
Franklin County Common Pleas Decision (September 13, 2007)	14
Entry of Ohio Supreme Court Accepting Appeal (October 23, 2008)	23

IN THE SUPREME COURT OF OHIO

SISK & ASSOCIATES, INC.,

Plaintiff/Appellee,

vs.

THE COMMITTEE TO ELECT
TIMOTHY GRENDELL, et al.,

Defendants/Appellants.

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On appeal from the Tenth District
Court of Appeals

Case No. 07APE-12-1002

08-1265

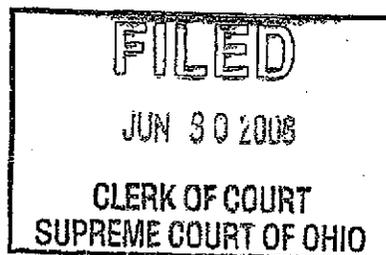
NOTICE OF APPEAL OF APPELLANTS

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NOTICE OF APPEAL OF APPELLANTS

Appellants, hereby give notice of appeal to the Supreme Court of Ohio from the judgment of the Franklin County Court of Appeals, Tenth Judicial District, in Court of Appeals Case No. 07APE-12-1002, filed on May 15, 2008.

This case raises a question of public or great general interest.

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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2008 MAY 15 PM 1:51
CLERK OF COURTS

IN THE COURT OF APPEALS OF OHIO
TENTH APPELLATE DISTRICT

Sisk & Associates, Inc., :

Plaintiff-Appellee, :

v. :

The Committee to Elect Timothy Grendell
et al., :

Defendants-Appellants. :

No. 07AP-1002
(C.P.C. No. 05 CV 11517)

(REGULAR CALENDAR)

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 Charles R. Petree
Judge Charles R. Petree

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CLERK OF COURTS

IN THE COURT OF APPEALS OF OHIO
TENTH APPELLATE DISTRICT

Sisk & Associates, Inc., :

Plaintiff-Appellee, :

v. :

The Committee to Elect Timothy Grendell
et al., :

Defendants-Appellants. :

No. 07AP-1002
(C.P.C. No. 05 CV 11517)

(REGULAR CALENDAR)

O P I N I O N

Rendered on May 15, 2008

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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.* (10th 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).¹ 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

¹ 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).² 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

² 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 *Fryssinger 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,³ *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

³ 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.

FILED
COMMON PLEAS COURT
FRANKLIN CO. OHIO

IN THE COURT OF COMMON PLEAS, FRANKLIN COUNTY, OHIO
CIVIL DIVISION

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CLERK OF COURTS

SISK & ASSOCIATES, INC.,

:

Plaintiff,

:

CASE NO. 05 CV 11517

vs.

:

JUDGE MCINTOSH

THE COMMITTEE TO ELECT
TIMOTHY GRENDELL, et al.,

:

Defendants.

:

Decision and Entry Granting Defendants' Motion to Dismiss as to Committee to Elect
Timothy Grendell, Timothy Grendell, and John Doe

Rendered this 13th day of September, 2007

This matter is before the Court on Motion by Defendants Timothy Grendell, the Committee to Elect Timothy Grendell, and John Doe (collectively, "defendants") to dismiss the original and amended complaints filed by Plaintiff Sisk & Associates, Inc. ("plaintiff"), based upon plaintiff's failure to obtain service within one year pursuant to Civ.R. 3(A).

Plaintiff originally filed a complaint against defendants on October 23, 2004 for breach of contract for services to be provided to the Committee for Grendell's reelection campaign. Upon failure to obtain service on any of the defendants, plaintiff voluntarily dismissed the complaint on October 5, 2005. Plaintiff immediately re-filed on October 19, 2005. Plaintiff requested that the Franklin County Clerk of Court's office serve the re-filed complaint on the Committee, Grendell, and Ralph by personal service via a foreign sheriff's office and on John Doe by certified mail. Only Ralph received service.

On January 10, 2006, the Committee and Grendell filed a motion to quash pursuant to Civ.R. 4.2(A) based upon failure to receive personal service. That same day, Grendell, Ralph, and John Doe filed a motion to dismiss pursuant to Civ.R. 12(B)(6) because they were never parties to the contract

On February 3, 2006, four months after re-filing the complaint, plaintiff filed an amended complaint. On February 7, 2007, counsel for the parties appeared for a status conference, at which time counsel for plaintiff requested additional time to perfect service and notified defendants that plaintiff intended to serve them by regular U.S. mail. Plaintiff did not request service of the amended complaint until March 26, 2007, when it was served by regular mail to counsel for defendants. On March 29, 2007, plaintiff initiated service by regular mail. The Clerk's file does not indicate the mail was returned. Defendant filed a motion to dismiss based upon failure to commence the action within one year of filing the complaint and lack of personal jurisdiction. Because this is a re-filed case, defendants contend that dismissal must be with prejudice.

Civ.R. 3(A) provides that an action is not deemed "commenced" unless service of process is obtained within one year from the date of filing of the complaint. The purpose of the one-year service requirement is to prevent clogging of the court dockets and to promote orderly resolution of litigation. *Saunders, et al. v. Choi, et al.* (1984), 12 Ohio St.3d 247, 250, 466 N.E.2d 889. "Completion of original process is necessary to clothe the trial court with jurisdiction to proceed. Thus, where service of process has not been accomplished, any judgment rendered is void *ab initio*." *Sampson v. Hooper Holmes, Inc.* (1993), 91 Ohio App.3d 538, 540, 632 N.E.2d 1338. Similarly, Civ.R. 4(E)

mandates that a an action shall be dismissed without prejudice if service of the complaint and summons is not made within six months.

The court may, however, acquire jurisdiction absent proper service where "the party * * * entered an appearance, affirmatively waived service, or otherwise voluntarily submitted to the court's jurisdiction." *Lucas v. Green* (October 21, 1999), Cuyahoga County App. Nos. 74295, 74913, 74914, *13 (unreported), *Maryhew v. Yova* (1984), 11 Ohio St.3d 154, 156-157, 464 N.E.3d 538. For a court to render judgment where the defendant has not been properly served with process, "there must be a showing upon the record that the defendant has voluntarily submitted himself to the court's jurisdiction or committed other acts which constitute a waiver of the jurisdictional defenses." *Maryhew*, 11 Ohio St.3d at 157.

Plaintiff does not dispute that service has not been completed pursuant to Civ.R. 3(A). In its memorandum contra, however, plaintiff asserts that Grendell, Ralph, and John Doe submitted themselves to and invoked the jurisdiction of this Court in their 12(B)(6) motion to dismiss.¹ Counsel for plaintiff further asserts that service by ordinary mail pursuant to Civ.R. 4.6 was justified in this case because he alleges that defendant refused certified mail in the original action and avoided personal service in this action. Plaintiff concludes that defendants are, therefore, precluded from insisting upon service by certified mail when they refused the same in the originally filed action.

Civ.R. 4.6 provides that service by ordinary mail is available upon notice to the clerk in the event that certified or express mail service is refused or unclaimed. Here, plaintiff attempted certified mail service of all parties of the first complaint and on John

¹ Ralph received service of the re-filed complaint and, therefore, is not a party in the within motion to dismiss.

Doe in the second complaint. Counsel for plaintiff appears to argue that, because defendants refused certified service of the first complaint and avoided personal service of the re-filed complaint, he was not required to attempt certified service of the re-filed and amended complaints. Significantly, plaintiff filed the amended complaint herein on February 3, 2006. More than one year later, at the February 26, 2007 status conference, counsel for plaintiff notified the Court and opposing counsel that he intended to perfect service against defendants via regular mail but required additional time. Notably, no request for service was made until March 26, 2007, over 13 months after the amended complaint was filed. Therefore, even if plaintiff could conclusively say that he achieved service of the amended complaint, he failed to do so within one year as required by the Civil Rules.

The pivotal question here is whether defendants invoked the jurisdiction of this Court when they filed the previous motions to dismiss, to quash, and to strike the amended complaint. In their motions to quash and to strike, defendants challenge procedural deficiencies. The initial motion to dismiss, however, challenges the within action on substantive grounds. Because of the substantive issues raised by defendants, plaintiff asserts that defendants invoked the jurisdiction of this Court and waived service. Defendants do not dispute the fact that they have appeared in this action. They do contend, however, that their participation thus far in no way constitutes submission to the jurisdiction of this Court.

When determining whether a court obtains jurisdiction over a defendant by virtue of appearance, a court only needs to establish whether the defendant waived jurisdictional defenses. The type of appearance, whether special or general, is no longer dispositive of

the issue. *Id.* at 156. In *Maryhew*, the Supreme Court of Ohio concluded that analysis of multiple Civil Rules was required in order to make such a determination. As in *Maryhew*, this Court must review defendants' actions in light of Civ.R. 12.

Significant to the issue herein, defendants filed a motion for an extension of time to move or plead, which this Court granted on January 9, 2006. On January 10, 2006, defendants filed a motion to dismiss for failure to state claim under Civ.R. 12(B)(6) and a motion to quash. Plaintiff herein points out that, upon receiving an extension to move or plead, defendants set forth substantive failures instead of procedural failures as reason for dismissal. However, it is well established that, once an affirmative defense for insufficient service of process is raised, a defendant does not submit to jurisdiction by actively participating in the case.

In reaching a determination in *Maryhew*, the Supreme Court of Ohio expressly relied upon numerous federal cases interpreting Fed.R.Civ.P. 12 and concluded that requests for extensions to move or otherwise plead do not constitute a waiver of service of process or a submission to jurisdiction. Additionally, the Tenth District Court of Appeals held in *Blount v. Schindler Elevator Corporation* (April 24, 2003), Franklin App. No. 02AP-688, 2003 Ohio 2053, P27, that defendants raised insufficient service of process in their answer and, therefore, continued to have a valid defense despite participating in pre-trial litigation. See also *First Bank of Marietta v. Cline* (1984), 12 Ohio St.3d 317, 466 N.E.2d 567; *Bell v. Midwestern Educational Serv., Inc.* (1993), 89 Ohio App.3d 193, 624 N.E.2d 196; *Coke v. Mayo* (Feb. 4, 1999), Franklin App. No. 98AP-550, unreported.

In the above-cited cases, the courts specifically noted that the defendants therein raised their affirmative defenses *prior* to participating in pre-trial litigation. Here, on the same day that they filed their Civ.R. 12(B)(6) motion, the Committee and Grendell filed a motion to quash service pursuant to Civ.R. 4.2(A). Although defendants' filed their procedural and substantive objections simultaneously, this Court finds that sufficient to determine that defendants did not voluntarily submit to the jurisdiction of this Court or waive service of process.

Dismissal based upon lack of personal jurisdiction is an adjudication other than on the merits. Civ.R. 41(B)(4). Therefore, dismissal is without prejudice. "Dismissal with prejudice is a very severe and permanent sanction, to be applied with caution." *Thomas v. Freeman* (1997), 79 Ohio St.3d 221,226, 1997 Ohio 395, 680 N.E.2d 997. In *Thomas*, plaintiff failed to obtain service on the defendant. The trial court later dismissed plaintiff's complaint for failure to prosecute pursuant to Civ.R. 41(B)(1) but did not indicate in the entry whether dismissal was with or without prejudice. The Supreme Court of Ohio held that, when reading Civ.R. 41(B)(1) and 4(E) together, "where the facts indicate that a plaintiff has not acquired service on the defendant, the court may characterize its dismissal as a failure to prosecute pursuant to Civ.R. 41(B)(1), or as a failure to obtain service under Civ.R. 4(E), but the dismissal under either rule will be otherwise than on the merits under Civ.R. 41(B)(4)." *Id.* As such dismissal is without prejudice. However, Civ.R. 41(A) states, in pertinent part: "Unless otherwise stated in the notice of dismissal or stipulation, the dismissal is 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." See also, *Schafer v. Sunsports Surf Co.*, Franklin App. No. 06AP-370, 2006 Ohio 6002.

In *Olynyk v. Scoles*, 114 Ohio St.3d 56, 2007-Ohio-2878, the Supreme Court of Ohio addressed the conundrum created by the "double-dismissal" rule in Civ.R. 41(A) that exists in this case. There, plaintiff's case was dismissed by order of the court pursuant to Civ.R. 41(A)(2). Plaintiff refiled her case, but subsequently submitted a notice of voluntary dismissal. It is well-established that a plaintiff may only dismiss a case once and reserve the right to refile. *Chadwick v. Barba Lou* (1982), 69 Ohio St.2d 222, 23 O.O.3d 232, 431 N.E.2d 660. The trial court ordered that dismissal was with prejudice because it was the second time the action had been dismissed. The question before the Supreme Court was whether plaintiff's first use of Civ.R. 41(A)(1)(a) dismissal was without prejudice despite the rule in *Chadwick*. The Court stated: "In answering the specific issue posed by this case, we determine 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)." *Olynyk* at ¶31.

Although the factual scenario herein is not entirely on point with *Olynyk*, the principle remains the same – whether the double-dismissal rule in Civ.R. 41(A) operates to strictly confine all plaintiffs to only "two bites at the apple" and whether a second dismissal, for any reason, must be with prejudice. Here, plaintiff voluntarily dismissed his case once, and has failed to obtain service in both cases, which begs the question now whether dismissal is with or without prejudice given seemingly the conflicting standards. The Court in *Olynyk* makes clear, however, that a second voluntary notice dismissal will be with prejudice. Plaintiff's case herein, is not being voluntarily dismissed, but by order

of the court for failure to obtain service under Civ.R. 41(B)(4) and Civ.R. 4(E). In light of the Supreme Court's holdings in *Thomas* and *Olyryk*, dismissal herein must be without prejudice

Based upon the foregoing, this Court finds that plaintiff failed to properly obtain service on the Committee, Grendell, and John Doe. Moreover, there is no evidence in the record to support a conclusion that said defendants waived service of process and voluntarily submitted to jurisdiction in this Court. Review of the record reveals that plaintiff failed to obtain service within one year of filing the complaint. Accordingly, pursuant to Civ.R. 3(A), plaintiff's re-filed complaint is DISMISSED without prejudice as to the Committee to Elect Timothy Grendell, Timothy Grendell, and John Doe.



STEPHEN L. MCINTOSH, JUDGE

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IN THE COURT OF COMMON PLEAS
FRANKLIN COUNTY, OHIO

SISK & ASSOCIATES, INC.,

Plaintiff,

vs.

THE COMMITTEE TO ELECT
TIMOTHY GRENDELI, *et al.*,

Defendants.

Case No. 05 CVH 10 11517

JUDGE MCINTOSH

FILED
COMMON PLEAS COURT
FRANKLIN CO. OHIO
2007 NOV 28 PM 2:41
CLERK OF COURTS-GV

**JUDGMENT ENTRY GRANTING DEFENDANTS' MOTION
FOR RULE 54(B) CERTIFICATION**

The Court entered judgment granting Defendant's Motion to Dismiss without prejudice on September 13, 2007. The September 13, 2007 Decision and Entry did not contain the language required in Civil Rule 54(B) that would make the judgment a final appealable order. Because the September 13, 2007 Decision and Entry affects a substantial right and prevents a judgment in favor of Defendants, the Court finds Defendants' Motion for Rule 54(B) Certification is well-taken. The Court, therefore, GRANTS Defendants' Motion for Rule 54(B) Certification and ORDERS that the September 13, 2007 Decision and Entry is a final appealable order since there is no just cause for delay.

IT IS SO ORDERED.

STEPHEN L. MCINTOSH, JUDGE

Submitted by:



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The Supreme Court of Ohio

FILED

OCT 29 2008

CLERK OF COURT
SUPREME COURT OF OHIO

Sisk & Associates, Inc.

Case No. 2008-1265

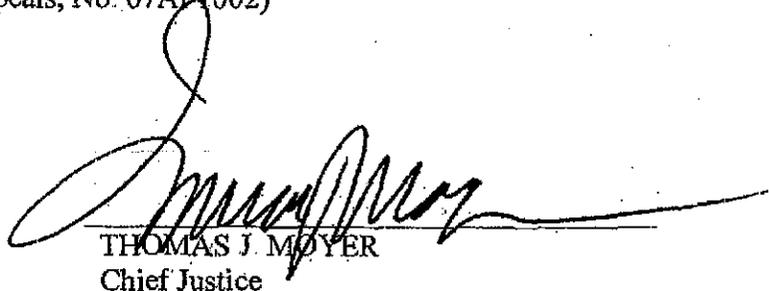
v.

ENIRY

The Committee to Elect Timothy Grendell
et al.

Upon consideration of the jurisdictional memoranda filed in this case, the Court accepts the appeal. The Clerk shall issue an order for the transmittal of the record from the Court of Appeals for Franklin County, and the parties shall brief this case in accordance with the Rules of Practice of the Supreme Court of Ohio.

(Franklin County Court of Appeals; No. 07AP1002)



THOMAS J. MOYER
Chief Justice

FILED
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2008 OCT 31 AM 8:50
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