IN THE

SUPREME COURT OF OHIO

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

MERIT BRIEF OF APPELLEE, SISK & ASSOCIATES, INC.

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TABLE OF CONTENTS

Page

TABLE OF AUTHORITIES ii

STATEMENT OF THE CASE AND THE FACTS 1

LAW AND ARGUMENT. 3

Proposition of Law 3

Plaintiff's instructions to clerk to serve an amended complaint in an action that had been voluntarily dismissed pursuant to Civ. R. 41(A)(1)(a), where such instructions were pursuant to an order of the trial court, shall not be considered the equivalent of a voluntary dismissal and refilling of the action for purposes of double dismissal rule of Civ. R. 41 (A).

CONCLUSION 8

APPENDIX 10

TABLE OF AUTHORITIES

Cases

Blakemore v. Blakemore (1983), 5 Ohio St. 3d 217, 219 5

Goolsby v. *Anderson Concrete Corp.* (1991), 61 Ohio St. 3d 549 ..... 3, 4

Olynk v. Scoles (2007), 114 Ohio State 3d 56 .....3, 4

Quonset Hut, Inc. v. Ford Motor Co.(1997), 80 Ohio St. 3d 46 5

Schafer v. Sunsports Surf Co., Inc. (10th Dist. Nos. 06AP-370, 06-AP-4841), 2006-Ohio-6002 .....3, 5

Thomas v. Freeman (1997), 79 Ohio St. 3d 221.....1, 5

Rules

Civ. R. 3(A) 2, 6

Civ. R. 4(E) 3, 4, 7

Civ. R. 4.6 (B) 5

Civ. R. 5 .....1, 7

Civ. R. 12(B)(6) 3

Civ. R. 41(A) 3

Civ. R. 41(A)(1) 4

Civ. R. 41(A)(1)(a) 1, 3, 4

Civ R. 41 (A)(2) 4, 7

Civ. R. 41(B)(3) 4

Civ. R. 41(B)(4) 3, 4

Statutes

R.C. 2305.06 ..... 6, 8

R.C. 2305.19 6,7

I. STATEMENT OF THE CASE AND THE FACTS

Appellee Sisk and Associates, Inc. ("Sisk") voluntarily dismissed its complaint in the original action on October 5, 2005 pursuant to Civil Rule 41 (A)(1) as Timothy Grendell and the Committee to Elect Grendell (individually, "Grendell" and "the Committee"; collectively, the "Appellants") had refused certified mail service. (Record Document 33)[1] Sisk re-filed its complaint in the action underlying this appeal on October 19, 2005 and requested that the clerk serve, *inter alia,* the Appellants by personal service through the sheriff's office in the county in Ohio in which the Appellants resided. (*Id.*)

Pursuant to an affidavit of Defendants' counsel, Peter W. Hahn, filed in connection with Defendants' December 13, 2005 motion for extension of time to move or otherwise plead, Defendants acknowledged service of the Complaint on November 15, 2005. Attorney Hahn acknowledged having personally received the summons and complaint on December 8, 2005. (December 13, 2005 Affidavit of Peter W. Hahn, at ¶ 3; Appendix at p. 1).

On January 10, 2006, the Appellants moved to quash service. (*Id.*) Simultaneously, Grendell, Ralph[2] and Doe, moved to dismiss Sisk's complaint pursuant to Civil Rule 12 (B)(6) for failure to state a claim. (*Id.*) Thereafter, on February 13, 2006, Grendell, the Committee and Doe, filed a motion to strike an amended complaint served upon them through their counsel pursuant to Civ R. 5. (*Id.*) Sisk and Appellants fully briefed all of these motions to the trial court on or before March 13, 2006. (*Id.*) Collectively, those motions put the issue of whether service had been perfected squarely before the trial

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[1] References shall be to the documents as numbered in the Record as Filed by the Court of Appeals on November 21, 2008.
[2] John Ralph, the treasurer for the Committee, is not a party to this appeal.

court. (*Id.*) The trial court took no action on any of these motions for roughly one year, presumably because Judge Crawford, the judge to whom this case had originally been assigned, retired and his appointed successor, Judge White, did not prevail in the November 2006 election. (*Id.*)

On February 27, 2007, shortly after Judge McIntosh was sworn in as the current trial court judge, the preliminary status conference was held in this case some sixteen and one-half months after the case was filed (the "Status Conference"). (*Id.*) Counsel for the parties discussed the procedural posture of the case, particularly with respect to the service issue. The trial court judge rendered a Decision and Entry on Status Conference on February 27, 2007 granting Sisk additional time to perfect service by ordinary mail. (Status Conference Entry; Appendix at p.3). Notably, the Status Conference took place over sixteen months after the case was re-filed , and more than one year after the filing of the amended complaint. (*Id.*) Counsel for Defendants did not raise either the Civ. R. 3 (A) issue or contest the trial court's decision to allow Sisk to perfect service by regular mail. (*Id.*)

Pursuant to the Status Conference Entry, Sisk requested the clerk to serve Grendell and the Committee with the amended complaint by regular mail. The clerk issued the summons and proof of service on those Defendants on March 29, 2007. (*Id.*) Thereafter, Appellants filed their April 26, 2007 motion to dismiss that resulted in the trial court's September 13, 2007 Decision and Entry that resulted in Appellants' appeal to the 10th District Court of Appeals whose decision underlies this appeal. Subsequently, pursuant to the September 13th Decision, Sisk requested the clerk to serve Appellants by certified mail and, after Appellants once again refused service, requested service by regular mail.

The clerk issued the summons and proof of service via regular mail and the Appellants finally had no choice other than to accept service on or about the date that they filed their notice of appeal in the Court of Appeals in this matter. (*Id.*)

II. LAW AND ARGUMENT

Proposition of Law

Plaintiff's instructions to clerk to serve an amended complaint in an action that had been voluntarily dismissed pursuant to Civ. R. 41(A)(1)(a), where such instructions were pursuant to an order of the trial court, shall not be considered the equivalent of a voluntary dismissal and refilling of the action for purposes of the double dismissal rule of Civ. R. 41 (A).

The Tenth District Court of Appeals correctly interpreted the applicable precedent of this Court[3] and its own precedent[4] in holding that Sisk's request for service of its amended complaint pursuant to the order of the trial court was not the equivalent of a notice dismissal under Civ. R. 41(A)(1)(a) for purposes of the double dismissal rule of Civ. R. 41(A). Similarly, the trial court appropriately relied upon *Olynk v. Scoles* (2007), 114 Ohio State 3d 56, and *Thomas v. Freeman* (1997), 79 Ohio St. 3d 221 in dismissing Sisk's claims against Grendell and the Committee without prejudice.

This Court's decision in *Freeman* is directly applicable to this case. In this case, Sisk voluntarily dismissed the original case pursuant to Civ. R. 41(A)(1)(a) and the trial court dismissed the re-filed action via court order pursuant to Civ. R. 41(B)(4). As such, the trial court's dismissal of Sisk's claims was other than on the merits under the exceptions contained in either Civ. R. 41(B)(4) or Civ. R. 4 (E) as the trial court

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[3] *Goolsby* v. *Anderson Concrete Corp.* (1991), 61 Ohio St. 3d 549 and *Olnyk v. Scoles* (2007), 114 Ohio St. 3d 56.

[4] *Shafer* v. *Sunsports Surf. Co., Inc.* (10th Dist. Nos. 06AP-370, 06AP-4841), 2006-Ohio-6002

specifically stated in its September 13, 2007 Decision. That specific reference by the trial court also invokes the exception of adjudication other than on the merits as set forth in Civ. R. 41 (B)(3). Accordingly, the dismissal of the refiled action was, according to this Court's holding in *Freeman*, other than on the merits.

Similarly, the reliance of both the Court of Appeals and the trial court in *Olynk* was appropriate as the instant case is the mirror image of the facts in *Olynk*. Specifically, in *Olynk*, the original dismissal was via court order pursuant to Civ. R. 41(A)(2) and the second dismissal was a voluntary dismissal pursuant to Civ. 41(A)(1)(a). In the instant case, the original dismissal was voluntary pursuant to Civ. R. 41(A)(1)(a) and the second dismissal was by the order of the trial court pursuant to Civ. R. 41(A)(2).[5] Regardless of the order of the dismissals, the one unassailable fact is that, as in *Olynk*, Sisk voluntarily and unilaterally dismissed this action only once. The second dismissal was via court order pursuant to Civ. R. 41 (A)(2). Thus, as this Court held in *Olynk*, the double dismissal rule contained in Civ. R. 41(A)(1) does not apply to the trial court's dismissal of those claims via Civ. R. 41(A)(2) as it was not a voluntary and unilateral dismissal.

Consequently, the Court of Appeals appropriately affirmed the trial court decision that the dismissal of Sisk's claims against Appellants was without prejudice. Indeed, the decisions of both the Court of Appeals and the trial court were not only in accordance with the applicable precedent of this Court and the Court of Appeals, but they were also in accordance with this Court's established position that because dismissal with prejudice

[5] The trial court specifically stated that the dismissal at issue was other than on the merits, thus invoking the exceptions set forth in Civ. R. 41(B)(3) and (B)(4) (a), as well as Civ. R. 4(E).

is a very severe and permanent sanction, it is to be applied with caution. *Freeman, supra,* at p. 226.

In affirming the trial court's decision to dismiss Sisk's claims without prejudice, the Court of Appeals recognized that such a decision was within the sound discretion of the trial court, *Quonset Hut, Inc. v. Ford Motor Co.*(1997), 80 Ohio St. 3d 46,47, and that absent a showing that the trial court's decision was unreasonable, arbitrary or unconscionable, the trial court's decision should not be overturned. *Blakemore v. Blakemore* (1983), 5 Ohio St. 3d 217, 219. Based upon the law and the facts, this Court should reach the same conclusion.

Appellants' appeal herein is premised almost wholly upon the contention that the Court of Appeals failed to properly interpret its own decision in *Shafer, supra.* Put simply, Appellants' contention is incorrect. The Court of Appeals properly interpreted its own precedent in *Shafer* as applied to the facts of the instant appeal. In *Shafer,* unlike the instant matter, there was blatant disregard of the trial court and its orders regarding case scheduling. In the instant matter, the alleged "lack of prosecution" is attributed to the inaction of the trial court regarding ruling on motions that addressed the issue of service for the reasons set forth above in Section I, not due to any lack of diligence by Sisk. Additionally, the request of the clerk to serve the amended complaint was pursuant to the order of the trial curt in its Status Conference Entry that constituted an amendment of service pursuant to Civ. R. 4 .6 (B).

Civ. R. 4.6 (B) reads as follows:

> The court within its discretion and upon such terms as are just, may at any time allow the amendment of any process or proof of service thereof,

> unless the amendment would cause material prejudice to the substantial rights of the party against whom its process was issued.

The trial court, in its Status Conference Entry, specifically provided for Sisk to serve the amended complaint upon Appellants via regular mail. Sisk complied with that Entry and caused Appellants to be served via regular mail, thus triggering the motion to dismiss filed in the trial court by the Appellants. The decision of the trial court on that motion, as affirmed by the Court of Appeals, underlies this appeal.

Moreover, Appellants cannot argue that they would have been materially prejudiced by such an amendment as they had notice of the claims against them in both the original and amended complaint and had pled defenses to such claims in their motion to dismiss for failure to state a claim. Their counsel was present at the Status Conference, and participated in the discussion and the agreed upon course of action without objection. Finally, the amendment did not provide Sisk with any benefit regarding a statute of limitations defense that might have been made available to Appellants because the complaint is for breach of a written contract whose statute of limitations still has not run. R.C. 2305.06. Accordingly, the savings statute, R.C. 2305.19, is not at issue

Appellants also contend that the Court of Appeals misinterpreted this Court's decision in *Goolsby*. Again, Appellants' contention is in error. *Goolsby* involved the issue of whether instructions to the clerk to effect service of the original complaint were the equivalent of refilling the complaint. Specifically, in the syllabus, this Court held:

> [w]hen service has not been obtained within one year of filing the complaint, and the subsequent refilling 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.

The facts in *Goolsby*, as well as this Court's holding in that case, have no applicability to this case. At issue in *Goolsby* was whether a plaintiff who achieved service of the original complaint more than one year after its filing was deemed to have commenced the action such that she could later dismiss that action and refile it pursuant to Civ. R. 41(A)(2) and R.C. 2305.19, collectively. This Court ruled that the plaintiff in that matter had commenced the action for purposes of being able to voluntarily dismiss and re-file the action under the savings statute. As stated above, the savings statute is not at issue in this case as the statute of limitations still has not run on the underlying claims in this matter such that service has been achieved on the Appellants shortly after the September 13, 2007 decision of the trial court.

Further, in the instant case, Sisk's instruction to the clerk was to serve an amended, not an original, complaint pursuant to the Status Conference Entry of the trial court. That amended complaint was filed as a matter of right pursuant to Civ. R. 15(A) and served upon Appellants via service on their counsel pursuant to Civ. R. 5 because, at the time of that service, it was reasonably believed that service of the original complaint had been accomplished upon the Appellants based upon the affidavit of Appellants' counsel and the fact that Appellants had filed a motion to dismiss that complaint.

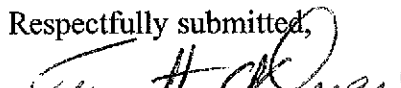
Finally, as noted by this Court in *Goolsby*, if the trial court had applied Civ. R. 4(E), this Court would not need to resolve this issue. Sisk either would have been able to show good cause as to why service had allegedly not been perfected (*i.e.,* the numerous motions pending for roughly a year or more that, either directly or indirectly, addressed the service issue) or, if the trial court did not find that to be good cause, the trial court would have dismissed the case without prejudice. Even in the latter event, Sisk would

have simply refiled the case as the statute of limitations on the underlying claim, breach of a written contract, as of today, still has not run. R.C. 2305.06. Indeed, that was the practical effect of the trial court's September 13, 2007 decision that allowed Sisk to finally achieve service on the Appellants, albeit via regular mail, as Appellants yet again refused certified mail service.

III. CONCLUSION

For all of the foregoing reasons, it is respectfully submitted that Appellants' appeal be denied and that the decisions of the Court of Appeals and the trial court be affirmed so that Sisk's claims against Appellants be allowed to go forward and be addressed on their merits.

Respectfully submitted,



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CERTIFICATE OF SERVICE

The undersigned hereby certifies that a true and accurate copy of the foregoing Merit Brief of Appellee was served via regular U.S. mail, postage prepaid, on February 6, 2009 upon the following:

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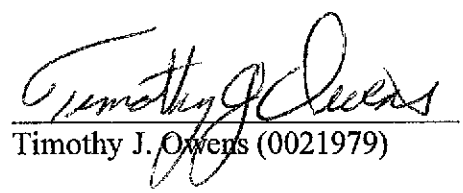

Timothy J. Owens (0021979)

APPELLEE'S APPENDIX

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TABLE OF CONTENTS

Affidavit of Peter W. Hahn A-1

Status Conference Entry A-3

IN THE COURT OF COMMON PLEAS
FRANKLIN COUNTY, OHIO

SISK & ASSOCIATES, INC.,	
Plaintiff,	Case No. 05CVH10-11517
vs.	JUDGE CRAWFORD
THE COMMITTEE TO ELECT TIMOTHY GRENDELL, et al.,	
Defendants.	

AFFIDAVIT OF PETER W. HAHN

State of Ohio
County of Franklin, ss:

I, Peter W. Hahn, after being sworn, depose and state as follows:

1. I am counsel for Defendants in the above-styled lawsuit, and an attorney with the law firm of Buckingham, Doolittle & Burroughs, LLP.

2. I have personal knowledge of the assertions set forth herein.

3. Defendants were served with the Complaint herein on November 15, 2005, making their Answer due December 13, 2005. I received the summons and complaint on December 8, 2005.

4. The Defendants and their counsel need additional time to investigate the factual allegations in the Complaint and the law applicable to those allegations, and to prepare an appropriate response. The Complaint raises several issues requiring investigation, including personal liability of a candidate, agency issues, and service issues. Defendants' motion for additional time to move or plead is not interposed for delay and will not affect the orderly progress of this case. No prior extensions have been sought.

5. I contacted Plaintiff's counsel on December 9, 2005 and asked for his consent to the requested extension. He stated he would speak to his client about the request and respond. As of the signing of this Affidavit, I have not received any response.

Peter W. Hahn

Sworn to before me and subscribed in my presence this ~~12th~~ 13th day of December, 2005.

Notary Public

«CO2:330833_v1»

TEFFANY R. PAINTER
Notary Public, State of Ohio
My Commission Expires 08-23-10

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

FILED
COMMON PLEAS COURT
FRANKLIN COUNTY, OHIO
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CLERK OF COURTS

SISK & ASSOCIATES, INC.,	:	
Plaintiff,	:	CASE NO. 05 CVH 11517
-vs-	:	**JUDGE MCINTOSH**
THE COMMITTEE TO, ELECT TIMOTHY GRENDELL, et al.	:	
Defendants.	:	

DECISION AND ENTRY ON STATUS CONFERENCE

Rendered this 27th day of February, 2007.

MCINTOSH, J.

This matter came before the Court for a status conference on **February 26, 2007 at 9:00 a.m.** Counsel for all parties were present.

The Plaintiff requested additional time to perfect service against the named Defendants by regular mail. The Court has extended the time. There are outstanding motions to quash, strike and dismiss. The motions to quash and strike may be resolved once service is perfected. Upon all Defendants being served, the Court must consider Defendants' motion to dismiss.

The court has set the following trial schedule:

Discovery Cut-Off	:	**July 31, 2007**
Dispositive Motions	:	**August 13, 2007**
Pretrial Conference	:	**September 4, 2007 9:00 a.m.**

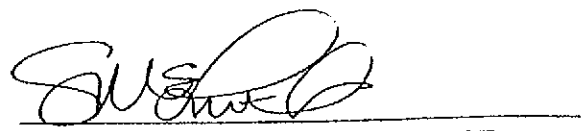
Trial Date : **October 9, 2007 10:00 a.m.**

Counsel will submit to the Court at least 20 days prior to trial the following:

1. Final pre-trial statements in accordance with Local Rule 41.04.
2. Jury Instructions; boiler plate is not necessary, the Court has OJI's, but anything unusual outside of the OJI's must be submitted with supporting case authority;
3. Any trial depositions (hard copy) so that the Court will have adequate time to rule on objections;
4. All documents that counsel intends to introduce should be exchanged by this time;
5. Any motions in limine must be filed by this time or they will not be ruled on;
6. Each trial attorney shall exchange with all other trial attorneys in advance of the trial, written reports of medical and expert witnesses expected to testify. The parties shall submit expert reports, if needed, at least thirty (30) days prior to the taking of any expert's deposition for trial and/or the expert's discovery deposition, which ever occurs sooner; and
7. It is the trial attorney's responsibility to take reasonable measures, including the procurement of supplemental reports, to insure that any expert's report adequately sets forth the expert's opinion. Unless "good cause" is shown, all supplemental reports must be supplied no later than thirty (30) days prior to trial. The report of an expert must reflect his/her opinions as to each issue on which the expert will testify. An expert will not be permitted to testify or provide opinions on issues not raised in his/her report. (See Local Rule 41.04(6) and Local Rule 43.03).

IF THE COURT HAS ANY MOTIONS IN LIMINE NOT FILED IN ACCORDANCE WITH THIS FINAL PRE-TRIAL ORDER, THEY WILL NOT BE CONSIDERED BY THE COURT.

ALL COUNSEL TO BE PRESENT.



STEPHEN L. MCINTOSH, JUDGE

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