

IN THE SUPREME COURT OF OHIO

SISK & ASSOCIATES, INC.,

Appellee,

vs.

THE COMMITTEE TO ELECT
TIMOTHY GRENDALL, et al.,

Appellants.

)
)
) CASE NO. 08-1265
)
) On appeal from the Tenth
) District Court of Appeals
) Case No. 07APE-12-1002
)
)

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

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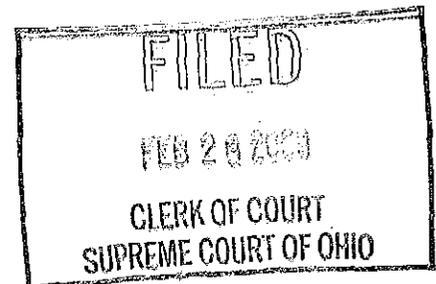


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INTRODUCTION

Appellee Sisk and Associates, Inc. (“Appellee” or “Sisk”) is laboring under the misperception that the trial court below somehow had the discretionary authority to rewrite Ohio Civil Rule 3(A). Appellee’s argument is meritless. No extension of the one year service deadline required under Civil Rule 3(A) can be granted by a trial court.¹ Moreover, Appellee cannot cure its failure of service upon Appellants Timothy J. Grendell (“Grendell”) and The Committee to Elect Timothy Grendell (the “Committee”) after that one year service period expired.² Ohio Civil Rule 3(A) specifically reads:

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.... (emphasis added)

Under Civil Rule 3(A), the one year service requirement is mandatory.³ There is no language in Civil Rule 3(A) that permits a trial court to extend that one year mandatory service requirement, as there is in other Civil Rules where a judge can grant exceptions to the Rule for “good reason”⁴ or “excusable neglect”.⁵ Absent any such express grant of discretionary authority in Civil Rule 3(A) to allow an exception to the one year service mandate, the trial court below had no authority to extend Civil Rule 3(A) in this case as it attempted to do in its March 1, 2007 Decision and Entry on Status Conference (Exhibit A-3 to Appellee’s Merit Brief). The lower court’s attempt to extend the time for Appellee’s compliance with Civil Rule 3(A) directly conflicts with Civil Rule 3(A) and constitutes an abuse of discretion.⁶

As the record clearly demonstrates, Appellee failed to comply with Civil Rule 3(A), not once, but TWICE. The first time, Appellee followed the Ohio Civil Rules and, as admitted by

¹ Civ. R. 3(A); *Saunders v. Choi* (1984), 12 Ohio St 3d 247, 250, 466 N.E. 2d 889, 892.

² Id Civ R 3(A); *Saunders v. Choi* (1984), 12 Ohio St 3d 247, 250, 466 N.E. 2d 889, 892

³ Id Civ R. 3(A); *Saunders v. Choi* (1984), 12 Ohio St 3d 247, 250, 466 N.E. 2d 889, 892

⁴ See e.g., Civ. R. 37(C)

⁵ See e.g., Civ. R. 60(B).

⁶ *Fetterolf v Hoffman-LaRoche, Inc* (11th Dist. 1994), 104 Ohio App 3d 272, 277.

Appellee at page 1 of its Merit Brief, voluntarily dismissed its unserved Complaint pursuant to Ohio Civil Rule 41(A)(1).⁷

Appellee refiled its Complaint on October 19, 2005.⁸ Unbelievably, Appellee again failed to perfect service of Summons and Complaint on Appellants Grendell and the Committee within one year of that refiling.⁹ Appellee did not seek ordinary service on Appellants until December 3, 2007. (Trial Docket Document pages 102, 103).

Contrary to Appellee's erroneous assertion, Appellants Grendell and the Committee never refused service or acted in bad faith in this matter. As demonstrated by Trial Docket Document No. 20, "service failed" on Appellants. In fact, Senator Grendell was present in his Statehouse office within the Franklin County Common Pleas Court's jurisdiction throughout the two one-year periods during which Appellee failed to perfect service on him as required by Civil Rule 3(A). Appellee only attempted service one time per Complaint filed. (See, e.g.: Trial Docket Document No. 65, and pages 102, 103).

Having faced the same failure to serve problem under Civil Rule 3(A) a second time, Appellee could not voluntarily dismiss its Complaint again under Civil Rule 41(A)(1) without prejudice attaching.¹⁰ To avoid this self-made problem, Appellee asked the trial court to extend the one-year service mandate in Civil Rule 3(A) and the lower court improperly attempted to do so. That action is clear error because Civil Rule 3(A) does not give the lower court the discretionary authority to extend or forgive the one-year service requirement.

Therefore, as discussed in Appellants' Merit Brief, Appellee's failure to perfect service in the refiled case results in the preclusion of any further action by Appellee in this action. To hold

⁷ See Appellee's Merit Brief at page 1.

⁸ Franklin County Common Pleas Decision (September 13, 2007), copy attached at Appendix page 14 of Appellant's Merit Brief.

⁹ Id.

¹⁰ Civ. R. 41(A)

otherwise would be contrary to the Ohio Civil Rules and would be prejudicial to good order and judicial efficiency in Ohio courts. Under Appellee's misguided argument, a plaintiff can fail to comply with Civil Rule 3(A) on multiple occasions with impunity. Indeed, Appellee even proffers the ridiculous argument that the one-year service mandate in Civil Rule 3(A) is somehow superseded by the longer statute of limitations governing contract actions. This argument lacks any merit. While a contract action can be brought at any time within the applicable statute of limitations, once that action is filed, the plaintiff must perfect service on the named defendant within one year of filing. In this case, Appellee has inexcusably failed to comply with Civil Rule 3(A) - - TWICE.

In this case, Appellee had ample time to serve Appellants.¹¹ Proper service of summons was a jurisdictional prerequisite.¹² No extension of the one-year service period could be granted by the trial court.¹³ Appellee could not cure its unjustified failure to serve the refiled Complaint within one year.¹⁴ Under these circumstances, dismissing Appellee's case with prejudice is consistent with the provisions and spirit of the Ohio Civil Rules,¹⁵ and would certainly "effect just results by eliminating delay, unnecessary expense and all other impediments to the expeditious administration of justice."¹⁶

For these reasons, the decision of the appellate court below to dismiss Appellee's untimely served refiled action without prejudice should be reversed and this action should be dismissed with prejudice.

¹¹ Over two years.

¹² *Saunders v Choi* (1984), 12 Ohio St 3d 247, 250, 466 N.E. 2d 889, 892

¹³ Id

¹⁴ *Matthew v Doe* (1996) 12th Dist., 116 Ohio App. 3d 61

¹⁵ *Fetterolf v Hoffman-La Roche, Inc.* (11th Dist 1994), 104 Ohio App. 3d 272, 277

¹⁶ *Bell v Midwestern Educational Services, Inc* (Montgomery Ct. 1993), 89 Ohio App. 3d 193, 2002-03

**CORRECTIONS TO APPELLEE'S STATEMENT OF
THE CASE AND THE FACTS**

Appellants Grendell and The Committee did not "refuse" certified mail service, as incorrectly asserted by Appellee at page 1 of its Merit Brief.¹⁷ Appellee simply failed to serve Appellants within one year of filing its Complaint and again after re-filing that once voluntarily dismissed the Complaint.

Appellee filed its initial Complaint on September 23, 2004. Appellee failed to serve Summons and the Complaint on Appellants Grendell and the Committee within one year and then dismissed the Complaint.¹⁸ 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 and the Committee by personal service through a foreign sheriff's office and serve John Doe by certified mail. Appellee made no further attempts to serve the Re-Filed Complaint on Appellants.¹⁹

On January 10, 2006, the Committee and Grendell moved to quash service of process to preclude Appellee from asserting that service on John Ralph²⁰ 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 sent to Appellants' counsel a virtually identical Amended Complaint (the "Amended Complaint") on the mistaken belief that service of the Amended Complaint under Civil Rule 5

¹⁷ Appellee cites to "Record Document" 33 as support for his assertion that document is a brief. Trial Docket Document No 20 evidences that "service failed" on Appellants.

¹⁸ Franklin County Common Pleas Decision (September 13, 2007), copy attached at Appendix page 14 of Appellant's Merit Brief

¹⁹ Id

²⁰ Mr. Ralph is not a party to this appeal

was a substitute for actual service of process under Civil Rule 4. 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

Appellee waited until March 26, 2007, to make its first request for service of the Amended Complaint.²¹ 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). On April 26, 2007, the Committee, Grendell and John Doe (collectively, the "Appellants") filed a Motion to Dismiss Appellee's Re-Filed and Amended Complaints for lack of personal jurisdiction 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 was equivalent to Appellee's second voluntary dismissal, and because Appellee's untimely failure to prosecute was inexcusable.

After the time for service under Civil Rule 3(A) expired, Appellee moved for an extension of time to comply with the service requirement under Civil Rule 3(A). On February 27, 2007, the trial court erroneously granted Appellee such additional time in direct contravention of Civil Rule 3(A).²² Counsel for Appellants was not required to raise any further issue with Appellee's failure to perfect service on Appellants because Appellants had already

²¹ 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).

²² See Appendix A-3 attached to Appellee's Merit Brief.

raised the failure to properly serve issue in its pending motions. Moreover, neither Appellants nor Appellees can authorize the trial court to violate Civil Rule 3(A).²³

Appellee's presumption as to what Judge Crawford did or did not do on page 2 of Appellee's Merit Brief is total conjecture and is not supported by any evidence in the record.²⁴ The Appellee's reference to "(Id.)" in support of Appellee's rank conjecture about Judge Crawford is misleading and disingenuous. The Affidavit referenced by that "Id." citation does not even mention Judge Crawford.²⁵

As admitted by Appellee in its Merit Brief, the undisputed fact remains: Appellee failed to serve Appellants Grendell and the Committee with the refiled Complaint or its amended Refiled Complaint within one year as required by Civil Rule 3(A).

The trial court granted Appellants' Motion to Dismiss, but incorrectly dismissed Appellee's claims without prejudice, erroneously relying upon the Supreme Court's decision in *Olynyk v Scoles*.²⁶ The Court of Appeals erroneously affirmed

LAW AND ARGUMENT

The parties do not dispute that the trial court's dismissal of Appellee's claims was warranted in this case. The only issue before the Court is whether that dismissal should have been *with* prejudice instead of *without* prejudice. It is undisputed that Appellee voluntarily dismissed its first Complaint, failed to serve its Re-Filed Complaint within the time required by Civ. R. 3, and requested that the Clerk issue service after the one-year deadline had passed. Appellee wants three opportunities to file its cause of action against Appellants when the Ohio Civil Rules only provide Appellee with two. Under the holding in *Shafer v Sunsports Co., Inc*

²³ *Saunders v Choi*, supra.

²⁴ There is no evidence in the record as to Judge Crawford's motivations. However, the record clearly demonstrates that Appellee did nothing to assure that service of Appellants would be perfected within one year.

²⁵ See Appendix A-1/A-2 attached to Appellee's Merit Brief.

²⁶ 114 Ohio St. 3d 56

²⁷, Appellee's request for service of the Amended Complaint constituted its second (and last) voluntary dismissal, invoking res judicata. For the reasons stated in Appellants' Merit Brief and below, the courts below should have followed *Shafer* and held that Appellee's claims are subject to res judicata and should have been dismissed with prejudice.

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 which such filing upon a named defendant* * * *"²⁸ 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."²⁹

A. Ohio Civil Rule 3(A) requires service of Appellee's Refined Complaint within one year of its filing.

Ohio Civil Rule 3(A) clearly mandates that a complaint must be served within one year from its filing. Civil Rule 3(A) provides for no exceptions to the one year service mandate and since Appellee "failed to obtain service of process within the time period allotted in Civ. R. 3(A), under the procedural devices governing service of process set forth in Civ. R. 3 et seq., [Appellee's] action must fail"³⁰ As this Court held in Saunders v. Choi³¹:

Among other things, the purpose of Civ. R. 3(A) is designed to promote the prompt and orderly resolution of litigation, as well as eliminating the unnecessary clogging of court dockets caused by undue delay. The rule puts litigants on notice that a reasonable time will be afforded in order to obtain service of process over

²⁷ (10th Dist. Nos. 06AP-370, 06AP-4841), 2006-Ohio-6002 ¶14-15

²⁸ Civ. R. 3(A) (Emphasis added)

²⁹ *Fetterolf v Hoffman-LaRoche, Inc.* (1995), 104 Ohio App. 3d 272, 277.

³⁰ *Saunders v. Choi* (1984), 12 Ohio St. 3d 247, 250, 466 N.E. 2d 889, 892.

³¹ *Id.*

defendants. Such a rule goes to the essence of civil procedure and is not, in our view, a mere technicality designed to deny parties their day in Court.

As in the instant matter, a plaintiff is the master of his or her cause of action. The failure of the plaintiff to comply with rules promulgated under our uniform modes of procedure should not compel this court to carve out a limited exception in order to grant such a litigant another opportunity to do that which he failed to do in the first place

These words by this Honorable Court are equally true in Appellee Sisk's case herein. In fact, in the instant action, Appellee also is seeking a limited exception to Civil Rule 3(A) for an opportunity to do that which Appellee Sisk has voluntarily failed to do twice - - perfect service on Appellants within one year.

As the Eleventh Appellate District correctly ruled "no extension can be granted after the one-year limitations period for commencement of an action as required by Civ R 3(A) has run."³² That Appellate Court based that ruling on this Court's decision in *Saunders* and the principle that the mandatory exclusive specific statutory provision embodied in Civil Rule 3(A) prevailed over the permissive general rule in Civil Rule 6(B).³³ Citing *Saunders*, the Appellate Court correctly noted that "the very purpose of Civ. R. 3(A), to speed up the dockets of courts, would be thwarted by such an extension."³⁴

Moreover, Appellee Sisk (1) had ample time and opportunity to serve Appellants Grendell and the Committee³⁵, (2) proffered no justifiable excuse for failing to serve Appellants while Senator Grendell was present in Columbus,³⁶ and (3) had no right to cure its failure to perfect timely service within one year as required under Civil Rule 3(A).³⁷ Appellee has failed

³² Fetterolf, 104 Ohio App 3d at 277

³³ Id

³⁴ Id

³⁵ Id at 278

³⁶ *Piccuito v. Lucas County Board of Commissioners* (Lucas Cty., 1990), 69 Ohio App 3d 788, 799.

³⁷ *Bell v. Midwestern Educational Services, Inc.* (Montgomery Cty. 1993), 89 Ohio App 3d 192, 2002-2003

to demonstrate that Appellants Grendell and the Committee caused Appellee to fail to serve Appellants by mail or personal service within the mandatory one-year period.

Under these circumstances, the striking of Appellee's Complaint, Refiled Complaint and Amended Complaint for failure of timely service of process does not violate the spirit of the Civil Rules. Appellee had plenty of notice that service was ineffective and yet Appellee failed to correct insufficient service for more than sixteen months. Appellee Sisk was the "master" of "his cause of action". Appellee Sisk's failure to comply with Civil Rule 3(A) should not compel this Court to carve out a non-existing exception "to do that which he failed to do in the first [and second] place."³⁸

B. Appellants' Filing of a Leave to Plead Did Not Submit Appellants to Personal Jurisdiction of the Trial Court.

Contrary to Appellee's misguided view, the Leave to Plead filed by Appellants' counsel did not subject Appellants to the jurisdiction of the trial court. In *Maryhew v Yova*,³⁹ this Court definitively held that the filing of a leave to plead or otherwise move is not a sufficient appearance in an action so as to submit a party to the jurisdiction of the court or obviate the requirement under Civil Rule 3(A) for service of the summons and complaint pursuant to the methods set forth in Civ. R. 4.1 through 4.6.⁴⁰ Service also was not achieved by sending a courtesy copy of the Complaint to the defendant's attorney.⁴¹

In Appellee Sisk's case, neither Appellant's filing of a Leave to Plead (Exhibit A-3 to Appellee's Merit Brief), nor Appellee's sending a copy of its Amended Complaint to Appellants' attorney satisfied Appellee's duty to serve the Summons and refiled Complaint on Appellants Grendell and the Committee pursuant to Civil Rule 3(A).

³⁸ *Saunders v Choi*, supra

³⁹ 11 Ohio St. 3d 154, 464 N.E. 2d 538

⁴⁰ *Id.* at 156-57, 464 N.E. 2d at 540-41

⁴¹ *Id.*

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. 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 Appellants' actions in light of Civ. R. 12.

Significant to the issue herein, Appellants filed a motion for an extension of time to move or plead, which this Court granted on January 9, 2006. On January 10, 2006, Appellants filed a motion to dismiss for failure to state claim under Civ. R. 12(B)(6) and a motion to quash. Appellee points out that, upon receiving an extension to move or plead, Appellants 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.⁴²

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*,⁴³ that defendants raised insufficient service of process in their answer and, therefore, continued to have a valid defense despite participating in pre-trial litigation.⁴⁴

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

⁴² *First Bank of Marietta v. Cline* (1984), 12 Ohio St. 3d 317, 466 N.E. 2d 567.

⁴³ (April 24, 2003), Franklin App. No. 02AP-688, 2003-Ohio-2053 at p. 27.

⁴⁴ *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.

they filed their Civ. R. 12 (B)(6) motion, Appellants, the Committee and Grendell, filed a motion to quash service pursuant to Civ. R. 4.2(A). In this case, the trial court correctly found that Appellants did not voluntarily submit to the jurisdiction of this Court or waive service of process.

C. Appellee's Request for Service was the Equivalent of a Voluntary Dismissal and Refiling of Appellee's Already Once Voluntarily Dismissed Complaint.

Appellee, as well as the lower courts, erroneously fail to recognize that Appellee's Request for Service of the Refiled Complaint more than one year after it was filed is the equivalent of a voluntary dismissal and third refiling of Appellee's already two time voluntarily dismissed action against Appellants Grendell and the Committee.

The purpose of Civil Rules 3(A) and 41 are to hinder the growth of pending cases on crowded dockets, to prevent the misuse of the civil process to harass defendants, and to promote the prompt and orderly resolution of litigation.⁴⁵ As this Court held in *Saunders*, Appellee is the "master of his cause of action."⁴⁶

Under Civil Rule 41, a plaintiff cannot file, voluntarily dismiss and refile a complaint without facing "with prejudice" consequences when the plaintiff fails to prosecute a refiled action in a timely manner.⁴⁷ Should the Plaintiff seek to dismiss the refiled case, such dismissal is with prejudice. The same result must apply to Appellee Sisk's dilatory conduct. Otherwise, Civil Rule 3(A) is meaningless in refiled, once voluntarily dismissed cases.

Under Ohio law, Appellee's instruction to the clerk of court to effect service of the untimely served Refiled Complaint and Amended Complaint was the equivalent of "refiling" the Complaint/Amended Complaint⁴⁸

⁴⁵ *Saunders v. Choi*, supra.

⁴⁶ Id

⁴⁷ Civ R. 41(A).

⁴⁸ 2007, 114 Ohio St 3d 56

Just as Appellee Sisk was required to dismiss his first Complaint under Civil Rule 41(A) because he failed to make service of that Complaint within one year as required by Civil Rule 3(A), Appellee would have to dismiss its refiled but unserved second Complaint before Appellee could restart the one year service clock by refileing, yet a third action. To hold otherwise would allow Appellee to have its second and third actions pending at the same time. That result is contrary to the purpose of and language in the Ohio Civil Rules. Moreover, under Appellee's erroneous theory, a plaintiff can file multiple complaints without disposing or dismissing pending complaints of record. This also is contrary to the Ohio Civil Rules.

D. 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 Refiled and 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)⁴⁹. 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 refileing of the Complaint."⁵⁰

The Tenth District Court of Appeals' ruling is also directly contrary to its own decision in *Shafer v. Sunsports Surf Co., Inc.*⁵¹, 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

⁴⁹ *Sisk & Associates v The Committee to Elect Timothy Grendell*, 10th Dist. No. 07AP-1002, 2008-Ohio-2342, at

¶7

⁵⁰ *Goolsby v. Anderson Concrete Corp* (1991), 61 Ohio st. 3d 549, at syllabus

⁵¹ *Shafer v Sunsports Surf Co., Inc* (10th Dist No 06AP-484), 2006-Ohio-6002, ¶14-15

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.⁵² The same "with prejudice" action is warranted in this appeal.

In dismissing Appellee's claims without prejudice, the trial court and appellate court erroneously relied upon *Olynyk v. Scoles*⁵³ and *Thomas v. Freeman*⁵⁴, neither one of which is relevant here. In *Olynyk*, this Court held that the "double-dismissal" rule did not apply to bar a plaintiff from refiling her action where the first dismissal was by court order under Civ. R. 41(A)(2), and not by a voluntary dismissal under Civ. R. 41(A)(1)(a)⁵⁵. This Court reasoned that a dismissal by the court under Civ. R. 41(A)(2) was not the same as a voluntary dismissal by the plaintiff under Civ. R. 41(A)(1)(a).

Here, in Sisk's case, on the other hand, Appellee's first dismissal was a voluntary dismissal under Civ. R. 41(A), and Appellee's request that the clerk serve the Amended Complaint after expiration of the one-year time bar on the second refiled action, constituted a second voluntary dismissal under Civ. R. 41(A). This case is, therefore, readily distinguishable from *Olynyk*.

*Thomas v. Freeman*⁵⁶ also is inapplicable to this case. In *Thomas*, this Court held that its dismissal of appellee's claims under Civ. R. 12(B)(2) motion had to be a dismissal pursuant to Civ. R. 41(B)(4), which is a dismissal otherwise than on the merits. This Court, in *Thomas*, never addressed the issue of lack of service under Civ. R. 3(A) and the effect that a previous

⁵² Id. at ¶15.

⁵³ (2007), 114 Ohio St. 3d 56.

⁵⁴ (1997), 79 Ohio St. 3d 221.

⁵⁵ *Olynyk*, 114 Ohio St. 3d at 64.

⁵⁶ (1997), 79 Ohio St. 3d 221.

voluntary dismissal by the plaintiff would have on Civ. R. 12(B) motion to dismiss when the plaintiff could not dismiss and re-file its action. In fact, Civ. R. 3(A) was not at issue in *Thomas* because the trial court dismissed both of the plaintiff's complaints for failure to prosecute when the plaintiff failed to obtain service after only six to seven months, and did not even allow the plaintiff an entire year's time to obtain service as permitted under Civ. R. 3(A).⁵⁷

Here, in Sisk's case, Appellants moved for the case to be dismissed under Civ. R. 12(B)(2) because Appellee failed to obtain service of the complaints under Civ. R. 3(A) and not for a failure to serve within six months under Rule 4(E). The decision in *Thomas*, therefore, does not preclude a ruling that Appellee's claims should be dismissed in this case with prejudice pursuant to the operation of Civ. R. 41(A) and the holding in *Shafer*.

E. The Lower Courts' Dismissal of Appellee's claims against Appellants should have been with prejudice because Appellee has not diligently prosecuted in this case.

A dismissal with prejudice also is warranted in this case because Appellee Sisk has been dilatory in attempting to obtain service and has not prosecuted this case with due diligence. In fact, over two-and-a-half years, Appellee has attempted to serve Appellants only once for each complaint filed. (Trial Docket No. 65 and pages 102, 103)

Appellee should not be permitted to continue filing complaint after complaint merely to prolong this case and politically harass Senator Grendell. Appellee has had ample opportunity to serve Appellants, but has chosen to let the case languish, waste judicial resources, and disregard the trial court's rules on timing of service. This is precisely the type of conduct that justifies a dismissal with prejudice under Civ. R. 41(B).⁵⁸ In this case, two-and-a-half years and three

⁵⁷ *Id.*

⁵⁸ See, e.g., *Graham v Audio Clinic et al* (3rd Dist. No. 5-04-35), 2005-Ohio-1088, ¶33 (holding that dismissal with prejudice proper where plaintiff proceeded in a dilatory fashion after voluntarily dismissing and re-filing action); *Carter v City of Lorain* (9th Dist. No. 04CA008537), 2005-Ohio-2564, ¶11 (holding that dismissal with prejudice warranted where plaintiff "took no action in [the] case during the year and a half during which it was pending")

complaints presented Appellee with sufficient opportunity to prosecute its cause of action. Therefore, the lower courts erred in not dismissing Appellee's untimely prosecuted claims with prejudice.

F. Civil Rule 4.6(B) Does Not Extend the One Year Service Requirement in Civil Rule 3(A).

Contrary to Appellee's argument on pages 5 and 6 of its Merit Brief, Civil Rule 4.6 (B) does not extend the one year service of summons requirement under Civil Rule 3(A). As previously discussed, "no extension can be granted after the one-year limitations period for commencement of an action as required by Civ. R. 3(A) has run."⁵⁹ Moreover, the mandatory provision in Civil Rule 3(A) prevails over any permissive general civil rule provision.⁶⁰ As the Eleventh Appellate District, citing this Court's opinion in *Saunders*, correctly noted: "The very purpose of Civ. R. 3(A) would be thwarted by such an extension."⁶¹ The same is true with respect to Civil Rule 4.6(B). Therefore, Appellee's argument that Civil Rule 4.6(B) allows the trial court to extend the one year service mandate in Civil Rule 3(A) is without legal merit⁶²

CONCLUSION

The primary purpose of the Ohio Civil Rules is to provide for the orderly resolution of litigation. The purposes of Civil Rule 3(A) are "to speed up the dockets of courts" and "to hinder the growth of pending cases on crowded courts."⁶³

Under Civil Rule 41, Plaintiffs, such as Appellee Sisk, are provided "two bites at the apple." Appellee Sisk, who sat on his hands twice, wants a third bite of the litigation apple. Since Plaintiffs, such as Appellee Sisk, are "masters" of their causes of action, they bear the

⁵⁹ *Fetterolf*, 104 Ohio App 3d at 277

⁶⁰ *Id*

⁶¹ *Id*

⁶² *Id*

⁶³ *Saunders v Choi*, *supra*; *Fetterolf v. Hoffman-LaRoche, Inc*, *supra*.

burden of prosecuting their cases in a timely manner. When plaintiffs, like Sisk, fail to do so, striking their complaints with prejudice is consistent with the Ohio Civil Rules.

The Tenth Appellate Court's failure to dismiss Appellee's second untimely served Re-filed Complaint and 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 Sisk has no one to blame in this case but himself. Appellee Sisk 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 re-filing. 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 and amended actions. Appellee failed to comply with the Civil Rules in this case and, therefore, the untimely, Re-filed Complaint and Amended Complaint, not only should have been dismissed, they 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 *Shafer* 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 double voluntary dismissal. Because Appellee effectively filed two "voluntary" dismissals in this case, the Tenth District should have recognized Appellee's second dismissal as a final adjudication. Its failure to do so is inconsistent with the long-standing doctrine of precedents and the ruling of this Court.

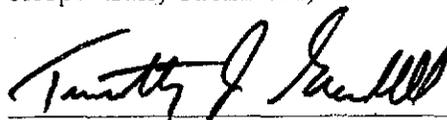
Recognizing that a failure to obtain service of a previously voluntarily dismissed, re-filed action within one year warrants dismissal with prejudice is consistent with this Court's ruling in

Olynyk v. Scoles. 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) 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 that Civil Rule a nullity by avoiding Civil Rule 41(A)(1)(a). Consistent with Olynyk, 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 Appellees 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. That one year requirement is a specific mandate and cannot be amended or extended by trial courts. Allowing Appellee and other plaintiffs to violate Civil Rule 3(A) will not facilitate judicial economy and will adversely affect the already busy docketing schedule of Ohio courts.

For these reasons, the decision of the courts below should be reversed and modified to reflect that Appellee’s case has been dismissed with prejudice.

Respectfully submitted,



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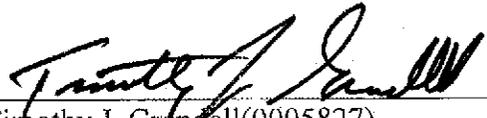
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CERTIFICATE OF SERVICE

The undersigned hereby certifies that a true and accurate copy of the foregoing *Reply Brief* was served upon the following by ordinary U.S. mail this 26th day of February, 2009:

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