In the Supreme Court of Ohio

Randy Shepherd,	**Case No.** 09-0546
Appellant,	
Vs.	**On Appeal from the Richland County Court of Appeals**
Richland County Child Support Enforcement Agency	**Fifth Appellate District Court of Appeals Case No. 08CA83**
Appellee.	

Randy Shepherd's Memorandum in Support of Jurisdiction

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This Case involves a Substantial Constitutional Question

This Case involves a substantial constitutional question and is of public or great general interest, because the Court of Appeals of Richland County, Fifth Appellate District decision is in direct conflict with the plain language of the Ohio Rules of Civil Procedure. In the instant case, The Court of Appeals held that the trial court in this matter did not err in overruling the Appellant's Motion for Default Judgment and then entertaining subsequent motions by the Appellee, where the Appellee admitted that it had not filed an answer to the original Complaint within 28 days after the service of summons and complaint upon him. Ohio Rules of Civil Procedure provide as follows:

RULE 12. Defenses and Objections--When and How Presented--by Pleading or Motion--Motion for Judgment on the Pleadings
(A) When answer presented.

(1) **Generally.** The defendant shall serve his answer within twenty-eight days after service of the summons and complaint upon him.

It is undisputed that the Appellee never filed an answer in this matter **after** service of the summons and Complaint upon him, in fact, Appellee admitted this fact. The Appellee filed a responsive pleading at some point **prior** to service of the summons and complaint upon him, however, such pleading does not satisfy the plain language of the rule.

The Court of Appeals held that "We know of no requirement the answer must be filed after service of process is perfected." See Opinion at p. 7. Clearly, the plain language of Ohio Rules of Civil Procedure, Rule 12(A)(1) state that the answer **shall** be served within 28 days **after service of the summons and complaint ...** (emphasis added). The language not only clearly states that service of the answer must be made after service of process, but also makes it mandatory by use of the word shall.

The Court of Appeals adoption of an interpretation of the Ohio Rules of Civil Procedure which conflicts with their plain language affects the substantive rights of all persons litigating in the Courts of Ohio in actions governed by the Ohio Rules of Civil Procedure. In addition, the interpretation of the Court of Appeals of Ohio Rules of Civil Procedure, Rule 12, creates a local rule of law which is in conflict with the Ohio Rules of Civil Procedure as duly adopted.

The "**Ohio Rules** of **Civil Procedure** were duly adopted pursuant to Article 4, Section 5 (B) of the Ohio Constitution. The Constitution specifies: 'All laws in conflict with such **rules** shall be of no further force or effect after such rules have taken effect.' "Under this provision all laws in existence at the time of the adoption of the rules, and all laws which are attempted to be adopted thereafter and which are in conflict with the Rules shall 'be of no [further] force or effect.'" **Hearing v. Delnay, 1976 Ohio App.** Ohio **LEXIS 8191.**

The interpretation of the Fifth District Court of Appeals in the instant case, that Civil Rule 12(A) does not require the service of an answer after service of process of summons and complaint upon the Defendant amounts to a rule of law which contradicts the plain language of the Ohio Rules of Civil Procedure and therefore is unconstitutional. This decision is of great public concern and general interest because all persons litigating in the state of Ohio rely upon the clear language of the Civil Rules to protect their rights and afford them the process of reliability and certainty in the judicial system. The decision in the instant case undermines reliability and certainty and allows for the possibility that the plain language of the Ohio Rules of Civil Procedure can be

undermined by variant interpretations by lower Courts. This Court, as the final arbiter of Ohio law, must set the standard and announce such variant interpretations as unconstitutional.

Statement of the Case and the Facts

This matter came before the Court of Appeals upon appeal by Randy Shepherd, of the denial of his motion for default judgment, and upon grant of summary judgment in favor of Appellee. Appellant filed a Complaint in the Richland County Common Pleas Court against Appellee, Richland County CSEA, for damages arising from various actions and inactions, including failure to perform its proprietary functions as a County Agency. On March 13 an Answer was filed **prior** to service of process of the complaint, Appellant filed an answer to the Complaint, although service had not yet been accomplished. Thereafter, Service of Process was perfected upon Appellee. (See Trial Court Docket and findings of the Fifth District Court of Appeals at p. 6 "the answer was filed prior to service of the complaint). Appellee admitted, through counsel, at oral argument, that no answer had been filed within the 28 day period after service of process was perfected.

The Court of Appeals held that "We know of no requirement the answer must be filed after of service of process is perfected." (Decision at 7). As set forth previously, the language of the Civil Rules is clear on this point. However, the Court of Appeals overruled the Appellant's Assignment of Error and found that the trial court did not err in denying Appellant's motion for default judgment as RCCSEA timely filed an answer in response to Appellant's complaint.

Argument in Support of Proposition of Law

Proposition of Law No. 1

A Decision by the Court of Appeals interpreting the Rules of Civil Procedure that contradicts the plain language of the Ohio Rules of Civil Procedure, violates the Ohio Constitution, and is therefore, unconstitutional.

Ohio Const. Article 4, § 5. provides in relevant part:

(B) The supreme court shall prescribe rules governing practice and procedure in all courts of the state, which rules shall not abridge, enlarge, or modify any substantive right. Proposed rules shall be filed by the court, not later than the fifteenth day of January, with the clerk of each house of the general assembly during a regular session thereof, and amendments to any such proposed rules may be so filed not later than the first day of May in that session. Such rules shall take effect on the following first day of July, unless prior to such day the general assembly adopts a concurrent resolution of disapproval. All laws in conflict with such rules shall be of no further force or effect after such rules have taken effect.

Courts may adopt additional rules concerning local practice in their respective courts which are not inconsistent with the rules promulgated by the supreme court.

The "**Ohio Rules** of **Civil Procedure** were duly adopted pursuant to Article 4, Section 5 (B) of the Ohio Constitution. The Constitution specifies: 'All laws in conflict with such **rules** shall be of no further force or effect after such rules have taken effect.' "Under this provision all laws in existence at the time of the adoption of the rules, and all laws which are attempted to be adopted thereafter and which are in conflict with the Rules shall 'be of no [further] force or effect.'" **Hearing v. Delnay, 1976 Ohio App.** Ohio **LEXIS 8191.**

The Courts of this State have consistently held that rules which are inconsistent with the rules of practice and procedure promulgated by this court are unconstitutional. See, e.g. **State ex rel Henneke v. Davis, 25 Ohio St.3d 23, 494 N.E.2d 1133(1986)** (A municipal court may not adopt local rules inconsistent with rules of practice and procedure promulgated by the Supreme Court); **Ohio Furniture Co. v. Mindala, 22**

Ohio St.3d 99, 488 N.E.2d 881 (1986)(A local rule of a court of common pleas providing a seven day limitation period within which responses to motions must be filed is constitutional); **Krupansky v. Pascual, 27 Ohio App.3d 90, 499 N.E.2d 899 (1985)** (The Rules of Superintendence of the Supreme Court and the local rules of courts of common pleas are applicable only so long as they are not in conflict with a statute or other governing supreme court rules) **State ex rel Mothers Against Drunk Drivers v. Gosser, 20 Ohio St.3d 30, 485 N.E.2d 706 (1985)**(A local rule of court cannot prevail when it is inconsistent with the express requirements of a statute); **Cole v. Central Ohio Transit Auth., 20 Ohio App.3d 312, 486 N.E.2d 140 (1984)**(Local rules of a court pertain to procedure, not jurisdiction of the court); **Civ R 41(B): In re Appeal of the Little Printing Company, Inc., 70 Ohio App.2d 182, 435 N.E.2d 687 (1980)** (A local rule of a court of common pleas is invalid if it provides for dismissal of an appeal from a decision of an administrative agency without prior notice to the appellant because such rule is in conflict with).

The interpretation of the Fifth District Court of Appeals in the instant case, that Civil Rule 12(A) does not require the service of an answer after service of process of summons and complaint upon the Defendant amounts to a rule of law which contradicts the plain language of the Ohio Rules of Civil Procedure and therefore is unconstitutional. This decision is of great public concern and general interest because all persons litigating in the state of Ohio rely upon the clear language of the Civil Rules to protect their rights and afford them the process of reliability and certainty in the judicial system. The decision in the instant case undermines reliability and certainty and allows for the possibility that the plain language of the Ohio Rules of Civil Procedure can be

undermined by variant interpretations by lower Courts. This Court, as the final arbiter of Ohio law, must set the standard and announce such variant interpretations as unconstitutional.

The decision of the Court of Appeals involves the adoption of a rule of law that directly contradicts the plain language of the Ohio Rules of Civil Procedure. The adoption of such a rule not only violates the constitution, but could potentially wreak havoc upon the entire system of civil justice. Imagine a situation in which a party could file a peremptory answer to an anticipated complaint? The Civil Rules obviously were designed to avoid this sort of preposterous situation, as well as establish some order to the progression of a civil case. It is only logical to assume that an Answer cannot predate the service of the Complaint. The Civil Rules progress upon the assumption that the Defendant has been served with the allegations in the Complaint, and therefore failure to respond or deny to such allegations gives rise to certain legal consequences . . . one of which is admission by default. Such an assumption would not be possible under the rules without proof of service through perfection as provided by the rules. Therefore, the conclusion of the Court of Appeals that service of process is simply a means of obtaining personal jurisdiction is incorrect. (Decision at 7). Rather the progression of events allows for the balance of the Civil Rules to proceed in a logical fashion and attach legal consequences to the subsequent actions or failure to act by the parties. The progression is set out by the Civil Rules in order for a distinct reason, not related solely to personal jurisdiction. Adoption of a Rule which contradicts this plain language of the Civil Rules is perilous, at best, for litigators. In addition, in is clearly unconstitutional, as set forth above.

Conclusion

For all of these reasons, Appellant submits that This Case involves a substantial constitutional question and is of public or great general interest, and prays that this Court grant jurisdiction to resolve the matter. This Court, as the final arbiter of Ohio law, must set the standard and announce such variant interpretations as unconstitutional.

Respectfully Submitted,

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Certificate of Service

I hereby certify that a true copy of the foregoing Memorandum in Support of Jurisdiction was served upon Andrew N. Yosowitz, Isaac, Brant, Ledman and Teetor, LLP, 250 East Broad Street, Suite 900, Columbus, Ohio 43215, Counsel for Appellee, by ordinary U.S. mail, this 23 day of March 2009.

Lori McGinnis-0060029
Counsel for Appellant, Randy Shepherd

COURT OF APPEALS
RICHLAND COUNTY OHIO
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COURT OF APPEALS
RICHLAND COUNTY, OHIO
FIFTH APPELLATE DISTRICT

RANDY SHEPHERD

Plaintiff-Appellant

-vs-

RICHLAND COUNTY CHILD
SUPPORT ENFORCEMENT AGENCY

Defendant-Appellee

JUDGES:
Hon. William B. Hoffman, P.J.
Hon. John W. Wise, J.
Hon. Patricia A. Delaney, J.

Case No. 08CA83

OPINION

CHARACTER OF PROCEEDING: Appeal from the Richland County Court of Common Pleas, Case No. 2008CV0294

JUDGMENT: Affirmed

DATE OF JUDGMENT ENTRY:

APPEARANCES:

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Hoffman, P.J.

{¶1} Plaintiff-appellant Randy Shepherd appeals the August 19, 2008 Judgment Entry of the Richland County Court of Common Pleas entering summary judgment in favor of Defendant-appellee Richland County Child Support Enforcement Agency.

STATEMENT OF THE CASE

{¶2} On December 31, 1991, Appellant was divorced from JoAnn Shepherd in the Richland County Court of Common Pleas, Division of Domestic Relations. The trial court ordered Appellant pay child support in the amount of $175.00 per month for each of the party's four children. The Richland County Child Support Enforcement Agency (hereinafter "RCCSEA") was not a party to the action. On October 17, 1997, a magistrate ordered Appellant pay $361.02 per month for two of the four children. Appellant filed objections to the magistrate's decision. On November 6, 1997, the trial court overruled Appellant's objections.

{¶3} In February of 2005, Appellant was found to be delinquent in his support obligation, and ordered he pay $60.00 per month until he became current. In March, 2005, Appellant filed a motion for compliance and for relief from judgment. The magistrate overruled the motions finding they were untimely and not supported by the evidence. On June 17, 2005, the trial court adopted the magistrate's decision.

{¶4} On February 4, 2008, Appellant filed a complaint against RCCSEA alleging RCCSEA erred in calculating his child support obligation, and did not properly complete a child support computation worksheet in various custody cases involving Appellant. On March 13, 2008, RCCSEA filed an answer to the complaint. On March

17, 2008, Appellant filed a motion for default judgment. The trial court overruled the motion on March 26, 2008.

{¶5} On April 18, 2008, Appellant filed a motion for relief from judgment relative to the denial of his motion for default judgment. On June 24, 2008, the trial court overruled the motion for relief from judgment.

{¶6} On July 14, 2008, RCCSEA filed a motion for summary judgment. On August 11, 2008, Appellant filed a response to the motion. Via Judgment Entry of August 19, 2008, the trial court granted summary judgment in favor of RCCSEA finding RCCSEA is a political subdivision immune from liability under R.C. 2744.02.

{¶7} Appellant now appeals, assigning as error:

{¶8} "I. CAASE (SIC) NUMBER 2008CV0294 WAS SET FOR TRIAL ON JUNE 20 (SIC) 2008. THE JURY TRIAL ORDER WAS FILED ON JUNE 23, 2008. THE APPELLEE FILED A MOTION FOR SUMMARY JUDGMENT PER CIV (SIC) R. 56 ON JULY 14, 2008. CIV R.56 (B) PROVIDES IN PERTINENT PART: 'IF THE ACTION HAS BEEN SET FOR PRETRIAL OR TRIAL, A MOTION FOR SUMMARY JUDGMENT MAY BE MADE ONLY WITH LEAVE OF THE COURT.' THE APPELLEE DID NOT SEEK LEAVE OF THE COURT NOR WAS LEAVE GRANTED. APPELLEE (SIC) MOTION FOR SUMMARY JUDGMENT MUST BE STRICKEN FROM THE RECORD AS IT FAILS TO MEET THE STATUTORY REQUIREMENT OF CIV. R. 56 (B).

{¶9} "II. THE TRIAL COURT ERRED IN DISMISSAL OF APPELLANTS' MOTION FOR DEFAULT JUDGMENT AS FILED ON MARCH 17, 2008, 42 DAYS AFTER THE CIVIL ACTION WAS COMMENCED ON FEBRUARY 4, 2008. CIV. R.3

(A) PROVIDES IN PERTINENT PART: A CIVIL ACTION IS COMMENCED BY FILING A COMPLAINT WITH THE COURT.

{¶10} "III. THE CLERK BREACHED ITS DUTY TO NOT ISSUE THE SUMMONS FORTHWITH CIV. R.4(A): PROVIDES IN PERTINENT PART: SUMMONS ISSUANCE. UPON THE FILING OF THE COMPLAINT THE CLERK SHALL FORTHWITH ISSUE A SUMMONS FOR SERVICE UPON EACH DEFENDANT LISTED IN THE CAPTION. THE RULE, THEREFORE, EXPLICITLY REQUIRES THE CLERK TO SERVE THE COMPLAINT UPON ALL LISTED DEFENDANTS IMMEDIATELY AND WITHOUT DELAY, AND GIVES THE CLERK NO DISCRETION TO SUSPEND THAT SERVICE.

{¶11} "IV. SERVICE OF THE SUMMONS WAS PERFECTED ON MARCH 14, 2008 VIA CERTIFIED MAIL. THE RULES CLEARLY DECLARE THAT AN ACTION IS COMMENCED WHEN SERVICE IS PERFECTED. CIV. R. 3(A). THE APPELLEE MADE NO APPEARANCE BETWEEN THE DATE SERVICE WAS PERFECTED AND APRIL 25 (SIC) 2008. THE COURT ERRED IN ACCEPTING ANY CONVEYANCES FROM THE APPELLEE AFTER APRIL 11 (SIC) 2008, 28 DAYS AFTER THE ACTION WAS COMMENCED. CIV. R. 12 (A-1) IN PERTINENT PART STATES: THE DEFENDANT SHALL SERVE HIS ANSWER WITHIN TWENTY-EIGHT DAYS AFTER SERVICE OF SUMMONS AND COMPLAINT UPON HIM. SUP CT. PRAC R. XIV IN PERTINENT PART STATES: THE CLERK SHALL REFUSE TO FILE A DOCUMENT THAT IS NOT TIMELY TENURED FOR FILING.

{¶12} "V. THE COURT ERRED IN TAXING COSTS TO THE PLAINTIFF/APPELLANT IN ITS JUDGMENT ON A MOTION FOR SUMMARY

JUDGMENT NOT PROPERLY RAISED AND NOT ALLOWED FOR REASONS SET FORTH IN ASSIGNMENTS OF ERROR 1-5."

I

{¶13} In the first assignment of error, Appellant maintains the trial court erred in granting summary judgment in favor of RCCSEA.

{¶14} Summary Judgment motions are to be resolved in light of the dictates of Civ.R. 56. Said rule was reaffirmed by the Supreme Court of Ohio in *State ex rel. Zimmerman v. Tompkins*, 75 Ohio St.3d 447, 448, 1996-Ohio-211:

{¶15} "Civ.R. 56(C) provides that before summary judgment may be granted, it must be determined that (1) no genuine issue as to any material fact remains to be litigated, (2) the moving party is entitled to judgment as a matter of law, and (3) it appears from the evidence that reasonable minds can come to but one conclusion, and viewing such evidence most strongly in favor of the nonmoving party, that conclusion is adverse to the party against whom the motion for summary judgment is made. State ex. rel. Parsons v. Fleming (1994), 68 Ohio St.3d 509, 511, 628 N.E.2d 1377, 1379, citing Temple v. Wean United, Inc. (1977), 50 Ohio St.2d 317, 327, 4 O.O3d 466, 472, 364 N.E.2d 267, 274."

{¶16} As an appellate court reviewing summary judgment motions, we must stand in the shoes of the trial court and review summary judgments on the same standard and evidence as the trial court. *Smiddy v. The Wedding Party, Inc.* (1987), 30 Ohio St.3d 35.

{¶17} Specifically, Appellant argues the within action had been set for pretrial or trial; therefore, RCCSEA was required to request leave of court before filing its motion for summary judgment.

{¶18} On June 23, 2008, the trial court entered a jury trial order setting dates in the within matter. The trial court scheduled a jury trial for October 9, 2008, and stated substantive and dispositive motions shall be filed by August 15, 2008 or must otherwise have written leave of court. RCCSEA filed its motion for summary judgment on July 14, 2008. Accordingly, RCCSEA filed the motion well within the time parameters set forth by the trial court's scheduling order, and RCCSEA was not required to seek leave of court in filing their motion for summary judgment.

{¶19} Appellant's first assignment of error is overruled.

II, IV

{¶20} Appellant's second and fourth assignments of error raise common and interrelated issues; therefore, we will address the arguments together.

{¶21} In the second and fourth assignments of error, Appellant asserts the trial court erred in denying his motion for default judgment, and RCCSEA failed to file an answer within the time provided by the civil rules, following service of process of the complaint.

{¶22} Upon review of the record, RCCSEA filed an answer on March 13, 2008, the same day service of process was sent. Therefore, the answer was filed prior to service of the complaint.

{¶23} In *Maryhew v. Yova* (1984), 11 Ohio St.3d 154, the Ohio Supreme Court held:

{¶24} "It is rudimentary that in order to render a valid personal judgment, a court must have personal jurisdiction over the defendant. This may be acquired either by service of process upon the defendant, the voluntary appearance and submission of the defendant or his legal representative, or by certain acts of the defendant or his legal representative which constitute an involuntary submission to the jurisdiction of the court. The latter may more accurately be referred to as a waiver of certain affirmative defenses, including jurisdiction over the person under the Rules of Civil Procedure."

{¶25} Accordingly, service of process is a means of obtaining personal jurisdiction over a defendant. However, personal jurisdiction is also acquired upon the voluntary appearance or submission of the defendant. In the case subjudice, RCCSEA voluntarily filed an answer prior to service of process waiving personal jurisdiction. We know of no requirement the answer must be filed after service of process is perfected. Therefore, the trial court did not err in denying Appellant's motion for default judgment as RCCSEA timely filed an answer in response to Appellant's complaint.

{¶26} The second and fourth assignments of error are overruled.

III

{¶27} In the third assignment of error, Appellant argues the Richland County Clerk of Courts breached its duty to issue the summons in accordance with Civil Rule 4(A). Said rule reads:

{¶28} **"(A) Summons: issuance**

{¶29} "Upon the filing of the complaint the clerk shall forthwith issue a summons for service upon each defendant listed in the caption. Upon request of the plaintiff separate or additional summons shall issue at any time against any defendant."

{¶30} We note Appellant has not made the Richland County Clerk of Courts a party in this action. We find no prejudice resulted from any alleged error on the part of the clerk in delay of service of Appellant's complaint on Appellee.

{¶31} Appellant's third assignment of error is overruled.

V

{¶32} In the final assignment of error, Appellant maintains the trial court erred in taxing costs to Appellant in the August 19, 2008 Judgment Entry granting summary judgment in favor of RCCSEA, whereas the summary judgment motion was not properly raised and not allowed as set forth in the proceeding assignments of error.

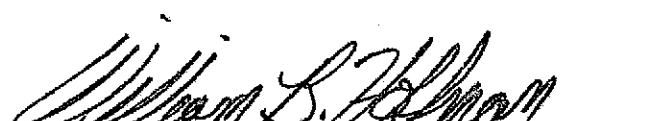
{¶33} In accordance with our analysis and disposition of Appellant's first, second, third and fourth assignments of error set forth above, we do not find the trial court abused its discretion in assessing costs to Appellant. The fifth assignment of error is overruled.

{¶34} For the foregoing reasons set forth above, the August 19, 2008 Judgment Entry of the Richland County Court of Common Pleas is affirmed.

By: Hoffman, P.J.

Wise, J. and

Delaney, J. concur



HON. WILLIAM B. HOFFMAN

HON. JOHN W. WISE

HON. PATRICIA A. DELANEY

COURT OF APPEALS
RICHLAND COUNTY OHIO
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CLERK

IN THE COURT OF APPEALS FOR RICHLAND COUNTY, OHIO
FIFTH APPELLATE DISTRICT

RANDY SHEPHERD	:	
Plaintiff-Appellant	:	
-vs-	:	JUDGMENT ENTRY
RICHLAND COUNTY CHILD SUPPORT ENFORECMENT AGENCY	:	
Defendant-Appellee	:	Case No. 08CA83

For the reasons stated in our accompanying Memorandum-Opinion, the judgment of the Richland County Court of Common Pleas is affirmed. Costs to Appellant.

HON. WILLIAM B. HOFFMAN

HON. JOHN W. WISE

HON. PATRICIA A. DELANEY