

ORIGINAL

In the
Supreme Court of Ohio

The State ex rel., RONALD A. ZILBERBRAND, et al.,	:	Case No. 2013-0051
	:	
	:	
Relators,	:	
	:	ORIGINAL ACTION
vs.	:	IN PROHIBITION
	:	
COURT OF COMMON PLEAS OF HAMILTON COUNTY, OHIO, et al.,	:	
	:	
Respondents.	:	

**RELATORS' MEMORANDUM IN OPPOSITION TO
INTERVENOR PNC EQUIPMENT FINANCE, LLC'S
MOTION FOR JUDGMENT ON THE PLEADINGS**

Charles E. Reynolds (0019935) *
**Counsel of Record*
 J. Robert Linneman (0073846)
 Brian P. O'Connor (0086646)
 SANTEN & HUGHES
 600 Vine St., Suite 2700
 Cincinnati, OH 45202
 (513) 721-4450 tel / (513) 721-0109 fax
 cer@santen-hughes.com
Attorneys for Relators

Joseph T. Deters (0012084)
 Christian J. Schaefer (0015494) *
** Counsel of Record*
 Charles W. Anness (0082194)
 PROSECUTING ATTORNEY
 HAMILTON COUNTY, OHIO
 230 E. Ninth Street, Suite 4000
 Cincinnati, Ohio 45202
 (513) 946-3041 tel / (513) 946-3017 fax
 chris.schaefer@hcpros.org
Attorneys for Respondents

RECEIVED
 FEB 11 2013
 CLERK OF COURT
 SUPREME COURT OF OHIO

FILED
 FEB 11 2013
 CLERK OF COURT
 SUPREME COURT OF OHIO

Glenn V. Whitaker, Esq.*

**Counsel of Record*

Erik B. Bond, Esq.

Vorys Sater Seymour & Pease

221 East Fourth Street

Suite 2000, Atrium Two

Cincinnati, OH 45202

(513) 723-4000 *tel* / (513) 723-4056 *fax*

gvwhitaker@vorys.com

-and-

Robert P. Simons, Esq.

Reed Smith LLP

225 Fifth Avenue

Pittsburgh, PA 15222

(412) 288-3131 *tel* / (412) 288-3063 *fax*

rsimons@reedsmith.com

Attorneys for Intervenor

PNC Equipment Finance LLC

**In the
Supreme Court of Ohio**

The State ex rel., RONALD A. ZILBERBRAND, et al.,	:	Case No. 2013-0051
	:	
	:	Original Action in Prohibition
Relators,	:	
	:	
vs.	:	RELATORS' MEMORANDUM
	:	IN OPPOSITION TO INTERVENOR
COURT OF COMMON PLEAS OF HAMILTON COUNTY, OHIO, et al.,	:	PNC EQUIPMENT FINANCE,
	:	LLC'S MOTION FOR JUDGMENT
	:	<u>ON THE PLEADINGS</u>
Respondents.	:	

I. STATEMENT OF FACTS

PNC's "Statement of Facts" is better characterized as a recitation of legal conclusions. PNC offers the following as "facts": "PNC served Relators" (Motion, p. 5); it "electronically serv[ed] counsel for Relators (*Id.*, p. 7); it "effected service by email" (*Id.* p. 8); and, that Relators were "served electronically" (*Id.* p. 10).

The term "served" has legal significance. To the extent "service" is read in the normal sense to mean "service of process pursuant to the Ohio Rules of Civil Procedure" each of these statements is untrue. The Civil Rules do not provide for service of process by electronic mail. Thus PNC's claims to have "served" Relators electronically are not facts, but rather an argument for deviating from the Civil Rules. The undisputed facts show that PNC never perfected service in any manner set forth in Civ.R. 4. No summons was ever delivered, no return of service was ever filed, and more than one year has passed since PNC filed its complaint.

These dispositive facts are uncontested.

II. LEGAL ARGUMENT

A. **THERE ARE NO CONTESTED ALLEGATIONS OF DEFECTIVE SERVICE**

PNC claims that there are contested allegations of defective service in the instant case, and argues that the existence of contested allegations provides the basis for this Court to dismiss the action entirely. This argument fails to take into account the current procedural posture of this case, and is founded on a standard inapplicable to the motion. In addition, PNC attempts to create an issue of fact where none exists. Even if the Court were to disregard the correct legal standard and consider PNC's factual allegations and exhibits, there would still be no dispute as to the one material fact evident from the Complaint: the absence of lawful service upon Relators. For these reasons, PNC's Motion should be denied.

1. **THE EXISTENCE OF "DISPUTED ALLEGATIONS OF SERVICE" CANNOT FORM THE BASIS FOR JUDGMENT ON THE PLEADINGS BECAUSE THE APPLICABLE STANDARD OF REVIEW REQUIRES THE COURT TO ACCEPT AS TRUE ALL ALLEGATIONS OF THE COMPLAINT.**

By asking this Court to consider the self-serving allegations and documentary evidence contained in and annexed to its proffered Answer, PNC urges this Court to violate the well-established standard of review for a motion for judgment on the pleadings. Under Civ.R. 12(C), "dismissal is appropriate where a court (1) construes the material allegations in the complaint, with all reasonable inferences to be drawn therefrom, in favor of the nonmoving party as true, and (2) finds beyond doubt that the plaintiff could prove no set of facts in support of his claim that would entitle him to relief." *State ex rel. Midwest Pride IV, Inc v. Pontious*, 75 Ohio St.3d 565, 570, 664 N.E.2d 931, 936 (1996). "A motion for judgment on the pleadings has been characterized as a belated Civ.R. 12(B)(6) motion for failure to state a claim upon which relief can be granted. Therefore, the same standard of review is applied to both motions." *Gawloski v.*

Miller Brewing Co., 96 Ohio App. 3d 160, 162-3; 644 N.E.2d 731, 733 (9th Dist.)(internal citations omitted). At the pleadings stage, the movant may not rely on allegations in an answer that contradict the facts alleged in a complaint. Nor may it do so with documents attached thereto. If a respondent does so, the motion is converted into one for summary judgment under Civ.R. 12(B) requiring all parties be given the opportunity to present further evidence. *See State ex rel. Freeman v. Morris*, 62 Ohio St.3d 107, 579 N.E.2d 702 (1991).

PNC's argument concerning "contested allegations" turns Ohio law concerning judgment on the pleadings on its head. "Civ. R. 12(C) requires a determination that no material factual issues exist and that the movant is entitled to judgment as a matter of law." *Midwest Pride. supra*, 75 Ohio St.3d at 570, 664 N.E.2d at 936. PNC's argument posits that the instant complaint must be dismissed simply because PNC has denied Relators' allegations, ostensibly creating "contested allegations of defective service." Precisely the opposite is true: the non-movant is entitled to have all material allegations in the complaint and all reasonable inferences therefrom construed in its favor. *See State, ex rel. Findlay Pub'g. Co. v. Hancock County Bd. of Comm'rs.* 80 Ohio St. 3d 134, 136, 684 N.E.2d 1222, 1224 (1997).

The correct application of this standard is all the more critical in an original action in the Supreme Court for two reasons. First, the Relator is expressly prohibited by S.Ct.Prac.R. 12.04(B)(1) from filing any response to an answer. Therefore, the relator has no opportunity to respond to new allegations contained in an answer, or new attachments to the same, both of which are contained in PNC's proffered Answer and relied upon in PNC's Motion.

Second, under S.Ct.Prac.R. 12.04(B)(3), neither party is permitted to file a motion for summary judgment. Yet, when a motion to dismiss includes materials outside the pleadings, such as affidavits or attachments, under Civ.R. 12(B), it must be treated as a motion for summary

judgment. Thus, to the extent that PNC asks this Court to consider its allegations and exhibits, it is making a motion for summary judgment which is barred by S.Ct.Prac.R. 12.04(B)(3). If PNC is permitted to proceed upon its Motion, it should be limited to the allegations of Relator's Complaint.

2. THE ONLY CONTESTED ALLEGATIONS THAT MAY EXIST RELATE TO PNC'S AFFIRMATIVE DEFENSE, NOT TO RELATORS' CLAIM.

Despite the denials contained in PNC's proffered Answer, there is no contested allegation of defective service among these parties. It is clear from the pleadings that PNC did not perfect service as prescribed by rule. The only matter contested between these parties is the legal effect of the undisputed facts.

Among dozens of pages of allegations and exhibits contained in PNC's Answer, there is no claim that PNC perfected service upon Relators by any of the methods authorized under Civ.R. 4. Under various provisions of that rule, service may be executed by, for example, certified mail, personal service, residence service, regular U.S. mail, or publication. PNC concedes that it did none of these.

In response to Relators' allegation that PNC received written notice of failure of service from the Clerk of Courts, PNC admits that "the docket [of the Court of Common Pleas] indicated that the clerk was unable to serve hard copies of materials on Relators..." See Complaint at ¶ 8 and Answer at ¶ 8. Among the many exhibits to PNC's Answer, there are none that bear the signature of any Relator showing receipt of a summons, or a Return of Service from any person authorized to accept service under Civ. R. 4.1(B). Thus, there are no "contested allegations" as to whether service was completed in a manner provided by the Civil Rules. It clearly was not.

Similarly, PNC makes no claim, nor even any legal argument about the effect of Civ.R. 3(A). It is well established by this Court's precedent, and apparently undisputed by PNC, that Civ.R. 3(A) requires service to be completed within one year, or the action is not commenced, and must be dismissed. *Glozzo v. Univ. Urologists of Cleveland, Inc.*, 114 Ohio St.3d 141, 2007-Ohio-3762, 870 N.E.2d 714.

The issue that PNC actually wishes to contest is separate: PNC wishes to proffer its justification for having failed to accomplish service. PNC's Motion is limited to providing an argument that Relators somehow waived the issuance of service. PNC is entitled to offer such arguments, but it is not entitled to have its self-serving allegations, legal conclusions and exhibits accepted as true for purposes of its own Motion for Judgment on the Pleadings. The proper avenue for PNC to offer proof of its affirmative defense is through the presentation of evidence pursuant to S.Ct.Prac.R. 12.06.

PNC's Motion for Judgment on the Pleadings should be denied because it relies entirely upon its own legal conclusions and materials outside the pleadings, and thereby fails to meet its burden.

3. THE CASE OF SUBURBAN CONSTRUCTION CO. v. SKOK DOES NOT COUNSEL FOR DISMISSAL OF THE INSTANT CASE.

PNC cites *State ex rel. Suburban Constr. Co. v. Skok*, 85 Ohio St.3d 645, 710 N.E.2d 710 (1999), and similar cases, in support of its request for dismissal of this prohibition case based on the general statement in *Suburban*, at 646, that "[i]f contested allegations of defective service of process are not premised upon a complete failure to comply with the minimum-contacts

requirement of constitutional due process, prohibition does not lie.” PNC’s argument is not well taken because *Suburban* does not apply to cases where defective service is uncontroverted.¹

In *Suburban*, unlike this case, the facts as to whether service was perfected were contested. In *Suburban*, the defendant claimed that he had not been home and had not actually received summonses which were admittedly served as authorized by the Civil Rules. *Id.* at 645. Thus, a question of fact remained for the trial court to resolve.

The same is true in each of the cases relied upon by this Court in *Suburban*. In *State ex rel. Gelman v. Lorain Cty. Court of Common Pleas*, 172 Ohio St. 73, 173 N.E.2d 31 (1961), this Court noted that service was made upon the relator by publication as permitted by the Civil Rules and, therefore, the trial court had authority to decide on its own jurisdiction. Similarly, in *State ex rel. Ruessman v. Flanagan*, 65 Ohio St. 3d 464, 605 N.E.2d 31 (1992) (also cited in *Suburban*), this Court found that the trial court was able to make an initial determination of its own jurisdiction where the trial court affirmatively claimed that proper service had been perfected.

Thus, the *Suburban* line of cases only precludes a writ of prohibition where the record from the trial court affirmatively shows that service in the manner prescribed by the Ohio Civil Rules has been perfected. That fact does not exist in the instant case. In their Motion to Dismiss, the Respondents Hamilton County Court of Common Pleas and Judge Norbert Nadel do not claim that service was perfected. Moreover, those Respondents even attached a docket statement which shows a failure of service on every Respondent. (See Respondents’ Motion to

¹ PNC’s Motion is redundant in that it separately argues that Relators have an adequate remedy at law. (See Motion at B(3), p. 15). In *Suburban*, this court denied a writ of prohibition on the grounds that the trial court had authority to decide its own jurisdiction, thus the relator had an adequate remedy at law. Thus both arguments urge the conclusion that relief should be denied because Relators have an adequate remedy at law.

Dismiss, Statement of Facts, p. 1-2; Exhibit A-1). The Relators' Complaint similarly alleges this complete failure of service. (Complaint at ¶ 8).

“Proper service of process is a prerequisite for personal jurisdiction.” *During v. Quico*, 2012-Ohio-2990, ¶ 25; 973 N.E.2d 838, 845 (10th Dist.). *Suburban* stands for the principle that the existence of contested allegations of service precludes a determination that the trial court patently and unambiguously lacks jurisdiction. Thus, in the uncontested absence of lawful service, a trial court patently and unambiguously lacks jurisdiction. Since it is undisputed in this case that no lawful service was perfected, the extraordinary relief of prohibition is appropriate.

PNC attempts to broaden the rule of *Suburban* to hold that any time an inferior tribunal has a pending motion considering a jurisdictional issue, prohibition will not lie. This view of *Suburban* has been directly rejected by this Court. This Court has strongly rebuked that argument as failing to acknowledge that the writ of prohibition is available whenever lack of jurisdiction is patent and unambiguous. See *State ex rel. Cuyahoga Cty. v. State Personnel Bd. of Review*, 82 Ohio St.3d 496, 497, 696 N.E.2d 1054 (1998)(quoting *State ex rel. Hunter v. Summit County Human Resource Comm'n*, 81 Ohio St.3d 450, 452, 692 N.E.2d 185 (1998)).

Cases like *Suburban* are properly read as denying a writ of prohibition in cases where the lack of jurisdiction is *dependent upon conflicting facts to be determined by the trial court*. See *State ex rel. Florence v. Zitter*, 106 Ohio St.3d 87, 2005-Ohio-3804, 831 N.E.2d 1003 (when resolution of a claimed jurisdictional issue is dependent upon facts to be determined by the trial court, the court's ruling that it has jurisdiction is mere error for which extraordinary relief in prohibition is not the appropriate remedy); see also *Goldstein v. Christiansen*, 70 Ohio St.3d 232, 238, 638 N.E.2d 541 (1994) (applying the same rule to a prohibition claim based on the alleged lack of personal jurisdiction).

PNC argues that *Suburban* should be read as adopting a blanket rule to deny litigants their right to extraordinary relief in prohibition in all insufficiency-of-service or failure-of-service claims, except for cases where a non-resident claims a lack of minimum contacts with Ohio. Such an interpretation would require the court to shirk its constitutional duty to decide the merits of a writ claim when the pertinent facts are uncontroverted and only the legal effect of those facts is at issue. This argument is inconsistent with this Court's precedent. See *State ex rel. Fattlar v. Boyle*, 83 Ohio St.3d 123, 125, 698 N.E.2d 987 (1998) ("courts in mandamus actions have a duty to construe constitutions, charters, and statutes, if necessary, and thereafter evaluate whether the relator has established the required clear legal right and clear legal duty," and in doing so, the courts have a "duty to resolve all doubts concerning the legal interpretation of these provisions").

The distinction between the facts in *Suburban* and the uncontroverted facts in the present case illustrates precisely how the trial court in the instant case patently and unambiguously lacks jurisdiction. The holding of *Suburban* does not counsel for dismissal of the Complaint at this stage of the proceedings.

B. RELATORS' COMPLAINT ALLEGES FACTS WHICH STATE THE BASIS FOR ISSUANCE OF A WRIT OF PROHIBITION.

1. THE COMPLAINT IS NOT PREMATURE

PNC contends that relators' prohibition case is premature because Respondents Judge Nadel and the Court of Common Pleas have not yet ruled on Relators' motion to dismiss for failure of service. PNC relies on *State ex rel. Cuyahoga Cty. Bd. of Commrs. v. State Personnel Bd. of Review*, 42 Ohio St.3d 73, 537 N.E.2d 212 (1989), and *State ex rel. B.F. Goodrich v. Griffin*, 59 Ohio St.2d 59, 391 N.E.2d 1018 (1979), in support of its contention.

As this Court has since emphasized, however, neither of the older cases cited by PNC involved, as here, a patent and unambiguous lack of jurisdiction. *See State ex rel. Hunter v. Summit Cty. Human Resources Comm.*, 81 Ohio St.3d 450, 452, 692 N.E.2d 185 (1998); *State ex rel. Cuyahoga Cty. v. State Personnel Bd. of Review*, 82 Ohio St.3d 496, 497, 696 N.E.2d 1054 (1998). Instead, in *Hunter* and *Cuyahoga Cty.*, the Supreme Court expressly rebuked courts of appeals' reliance on the cases cited here by PNC to dismiss prohibition cases based on pending motions to dismiss that had not been decided by the lower tribunals:

“When a tribunal patently and unambiguously lacks jurisdiction to consider a matter, a writ of prohibition will issue to prevent assumption of jurisdiction *regardless of whether the tribunal has ruled on the question of jurisdiction.*”

(emphasis added.) *Cuyahoga Cty.*, 82 Ohio St.3d at 497, 696 N.E.2d 1054 (quoting *Hunter*, 81 Ohio St.3d at 452, 692 N.E.2d 185).

Therefore, PNC's claim that this prohibition action is premature lacks merit.

2. JURISDICTION IS LACKING BECAUSE PNC HAS NOT SERVED RELATORS AS PRESCRIBED BY THE RULES OF CIVIL PROCEDURE

As the Ohio Supreme Court recently reiterated, “It is rudimentary that in order to render a valid personal judgment, a court must have personal jurisdiction over the defendant.” *State ex rel. Doe v. Capper*, 132 Ohio St.3d 365, 2012-Ohio-2686, 972 N.E.2d 553, ¶ 13, (quoting *Maryhew v. Yova*, 11 Ohio St.3d 154, 156, 464 N.E.2d 538 (1984)). “Proper service of process is a prerequisite for personal jurisdiction.” *During v. Quoico*, 2012-Ohio-2990, 973 N.E.2d 838 (10th Dist.).

Under Civ.R. 3(A), if service is not obtained within the one-year period after filing, the action has not commenced. *Saunders v. Choi*, 12 Ohio St.3d 247, 250, 466 N.E.2d 889 (1984);

Lash v. Miller, 50 Ohio St.2d 63, 65, 362 N.E.2d 642 (1977) (“Effective service of summons on the defendant is a necessary prerequisite to the commencement of a civil action”).

That is, “[i]f service on the defendant is not obtained within one year, the action was never commenced as to that defendant and must be dismissed.” *Gay v. Tarke*, 2d Dist. No. 14034, 1994 WL 100785, 1994 Ohio App. LEXIS 1285 at *2 (Mar. 9, 1994). The plaintiff has the duty to perfect service, and defendants’ “actual knowledge of a lawsuit’s filing and lack of prejudice resulting from the use of a legally insufficient method of service do not excuse a plaintiff’s failure to comply with the Civil Rules.” *LaNeve v. Atlas Recycling, Inc.*, 119 Ohio St.3d 324, 2008-Ohio-3921, 894 N.E.2d 25, ¶ 22. In order to comply with Rule 3(A), PNC must show either service of process or a waiver.

In attempting to establish service of process, PNC makes the following claims: that “PNC served Relators” (Motion, p. 5); [PNC] “electronically serv[ed] counsel for Relators (*Id.*, p. 7); [PNC] “Effected service by email” (*Id.* p. 8); and that Relators were “served electronically” (*Id.* p. 10). In the same cited paragraphs, PNC argues that counsel for Relators “accepted” or “waived” service. These arguments must fail, because they are based on an incorrect use of the term “service” as it is defined under Ohio law.

“Service of process is a method of formally commencing an action by giving the defendant notice of the action; it is the notice of the proceedings which the plaintiff causes to be made upon the defendant in the manner prescribed by law or by rule of court.” 76 Oh Jur Process § 1. Civ. R. 4, lists the only ways that service can be perfected. At no point does PNC argue that it perfected service of process in any manner set forth in Civ.R. 4. Accordingly, PNC’s attempts to equate “electronic delivery” with “service of process” are nothing more than legerdemain. PNC’s own exhibits show that its efforts to serve Relators were limited to a single

email to Relators' counsel, attaching a courtesy copy of PNC's Complaint, with no summons. This Court should regard these arguments accordingly.

Not surprisingly, PNC does not cite any authority to support its proposition that an attorney's email agreement to accept service on behalf of clients constitutes a waiver of the Civ.R. 3(A) requirement of service of process. Nor does PNC provide any authority showing that an attorney may in fact make such a waiver on behalf of a client. In fact, there is only authority rejecting this novel proposition. The email is not a "specific waiver of service pursuant to Civ.R. 4(D)." *Maryhew, supra*, 11 Ohio St.3d at 156, 464 N.E.2d 538. "Civ.R. 4(D) does not contemplate, e.g., that a party's attorney may waive service of summons under that provision." 1 Klein & Darling, *Baldwin's Ohio Civil Practice*, Section 4:6, at 244 (2d Ed.2004). Similarly, "[s]ervice of process by a party via ordinary mail is not 'service' pursuant to Civ.R. 3(A) because it is not effected through the office of clerk of the clerk of court." *Id.* at Section 3:4, 148. Again, there is no evidence or allegation that PNC ever instructed the clerk of the common pleas court to serve relators' lead counsel with the summons and complaint—or that the clerk ever perfected such service—within the one-year period specified in Civ.R. 3(A).

PNC did not obtain service of the summons and complaint on relators within the one-year period after PNC filed its complaint on December 6, 2011. Therefore, in the absence of any valid waiver of the Civ.R. 3(A) requirement, the Hamilton County Court of Common Pleas and Judge Nadel patently and unambiguously lack jurisdiction on PNC's claims against relators and relators are entitled to the requested writ of prohibition.

3. EVEN ACCEPTING AS TRUE ALL FACTS ASSERTED BY PNC, THE UNCONTESTED FACTS SHOW THAT THERE HAS BEEN NO WAIVER OF SERVICE.

PNC next claims that jurisdiction is not patently and unambiguously lacking because, it claims, Relators waived service of process: (a) by agreeing to accept service on behalf of Relators; (b) by making an admission in their answer; and (c) by filing of a notice of appearance and motion for more definite statement. For the following reasons, each of these arguments lacks merit.

a. THE EMAIL FROM RELATORS' COUNSEL WAS NOT A WAIVER.

PNC claims that Relators' counsel's email agreement to accept service on behalf of relators constituted a waiver of the Civ.R. 3(A) one-year service requirement. This claim is not supported by Ohio law.

The unambiguous terms of the email speak for themselves. In the pertinent email, Relators' lead counsel states only:

This email will confirm my agreement to accept service on behalf of the defendants we represented in the federal action.

(Resps. MTD, Ex, A-2, Ex. A)

The email does not *wave* service of the summons and complaint; it specifies only Relators' attorney's agreement to accept service on their behalf. There is no indication from the email that relators' counsel was served with process. Nor is there any evidence that PNC instructed the clerk of the common pleas court to serve Relators' counsel with the summons and complaint, or otherwise took any of the required steps under Civ.R. 4 to properly perfect service. Accordingly, Relators' uncontested allegations in their Complaint for Writ of Prohibition that service was never perfected must be taken as true.

Waiver may not be inferred lightly; it must be knowing and voluntary. This Court has specifically described the limited circumstances under which a party may waive available affirmative defenses of insufficiency of service of process and lack of personal jurisdiction, and an email agreement to accept service is not one of the specified circumstances. In *Glozzo v. Univ. Urologists of Cleveland, Inc.*, 114 Ohio St.3d 141, 2007-Ohio-3762, 870 N.E.2d 714, at ¶ 13, the Ohio Supreme Court explicitly wrote:

The only way in which a party can voluntarily submit to a court's jurisdiction, however, is by failing to raise the defense of insufficiency of service of process in a responsive pleading or by filing certain motions before any pleading. Only when a party submits to jurisdiction in one of these manners will the submission constitute a waiver of the defense.

Therefore, as a matter of law, Relators' counsel's agreement to accept service on behalf of relators did not constitute a waiver of service.

b. RELATORS' ANSWER DID NOT WAIVE SERVICE.

Next, PNC claims that by a response contained in Relators' Answer to PNC's First Amended Complaint in the Case, Relators' waived any claim of lack of personal jurisdiction. In support of this claim, PNC points to paragraph 2 of PNC's Amended Complaint, which Relators admitted as true:

[T]his court has personal jurisdiction over Defendants because the Defendants regularly conduct business in Ohio, the causes of action arose in Ohio, and/or the transactions and occurrences out of which the causes of action arose took place in Ohio.

PNC's contention lacks merit. First, the claimed "admission" must be construed in the context of relators' entire answer. *Reiff v. Mulholland*, 65 Ohio St. 178, 62 N.E. 124 at syllabus ¶ 1 (1901)("All of the allegations of a pleading should be considered in determining the effect of any of them"). At paragraphs twenty-nine and thirty of the affirmative defenses listed in their answer, Relators specified that PNC's claims "are barred by lack of jurisdiction over" them and

by “insufficiency of process, failure of process and failure of service of process.” (*See also* Complaint and Amended Complaint, ¶ 10). When read in context, the “admission” of paragraph two of PNC’s amended complaint did not concede personal jurisdiction in the case for all purposes, but only for any claim of personal jurisdiction based on Relators’ business contacts with the forum. Relators’ response did not relieve PNC of its obligation to perfect service and properly commence the action under Civ.R. 3.

Second, PNC’s attempt to characterize Relator’s assertion of affirmative defenses as “boilerplate” does not advance its argument. (See Motion for Judgment on the Pleadings, pp. 7, 12) As the United States Court of Appeals for the Sixth Circuit recently held in rejecting a comparable argument under the similar federal rules of civil procedure, “that the defense was listed along with a number of others that, according to plaintiffs, are ‘seen as a matter of course in nearly every answer’ cannot render the defense any less properly preserved under Rule 12(h)(1).” *King v. Taylor*, 694 F.3d 650, 658 (6th Cir.2012).

Third, at the time that Relators submitted their answer, although service of the summons had not been perfected on them [and still has not], the one-year period specified in Civ.R. 3(A) for PNC to perfect service had not yet elapsed. That is, PNC filed its complaint on December 6, 2011, and Relators filed their answer to PNC’s amended complaint on February 23, 2012, only two and one-half months after the complaint was filed. It was not until December 6, 2012, that their personal-jurisdiction claim ripened, and Relators promptly filed a motion to dismiss five days later, on December 11, 2012. (Complaint, ¶ 12) Relators were under no duty to raise the personal-jurisdiction claim at the time they submitted their answer because dismissal would have been premature at that time. *See* 1 Klein & Darling, Baldwin’s Ohio Civil Practice, Section 3:4, at 147-148 (2d Ed.2004) (“Dismissal under Civ.R. 3(A) is improper if service is obtained within

one year of filing, *or if one year had not yet elapsed.*” [emphasis added and footnotes omitted.]; *see also Pippin v. M.A. Hauser Enterprises*, 111 Ohio App.3d 557, 564-565, 676 N.E.2d 932 (6th Dist. 1996)(motion to dismiss for lack of service under Civ.R. 3(A) filed less than one year after the filing of a complaint is “simply premature”); *Marcinko v. Carson*, 2004-Ohio-3850, ¶ 30 (4th Dist.) (dismissing complaint for failure to perfect service in accordance with Civ.R. 3(A) when one-year period had not passed held to be premature).

Therefore, PNC’s reliance on any purported “admission” is misplaced and does not support dismissal of Relators’ prohibition claim.

c. RELATORS DID NOT WAIVE SERVICE BY APPEARING AND CONTESTING THE LITIGATION.

PNC next asserts that Relators’ December 21, 2011, notice of appearance and December 30, 2011, motion for a more definite statement without specifying the failure of service of process or lack of personal jurisdiction waived their legal right to preserve these defenses by raising them in their first responsive pleading on February 23, 2012.

PNC’s assertion is erroneous. In *Maryhew*, 11 Ohio St.3d at 156, the Ohio Supreme Court noted that the adoption of the Rules of Civil Procedure abrogated the need to determine whether a waiver had occurred by a party’s entry of a general appearance rather than a special appearance in a case:

To resolve the question presented, we no longer need to look to the facts to determine whether there has been a special or general appearance. Today we only have a general appearance under the Rules of Civil Procedure. To determine whether the trial court obtained personal jurisdiction over the defendant, pursuant to those rules, we need only address whether there has been a waiver of the jurisdictional defenses, rather than the type of appearance.

Consistent with the court’s holding in *Maryhew*, the United States Court of Appeals for the Sixth Circuit has similarly held that a notice of appearance in a case does not constitute a

forfeiture of the defense of lack of service. *See King v. Taylor*, 694 F.3d 650, 661, fn. 7 (6th Cir. 2012) (“The written appearance filed by Taylor’s counsel one month before Taylor moved for dismissal on the basis of the lack of service does not constitute forfeiture”).

Furthermore, in *Gliozzo v. Univ. Urologists of Cleveland, Inc.*, 114 Ohio St.3d 141, 2007-Ohio-3762, 870 N.E.2d 714, at ¶ 13, as noted earlier, the Ohio Supreme Court explicitly detailed the limited circumstances under which a party may waive available affirmative defenses of insufficiency of service of process and lack of personal jurisdiction. Just as an email agreement to accept service is not a waiver, so too is an entry of an appearance not one of the specified methods of waiver under *Gliozzo*.

PNC’s argument that Relators’ waived their Civ.R. 12(B) claims by filing a Civ.R. 12(E) motion is also incorrect. Civ.R. 12(G) requires only that:

[A] party who makes a motion under this rule must join with it other motions herein provided for and *then available to him*. If a party makes a motion under this rule and does not include therein all defenses and objections *then available to him* which this rule permits to be raised by motion, he shall not thereafter assert by motion or responsive pleading, any of the defenses or objections omitted, except as provided in subdivision (H) of this rule.” (emphasis added.)

The defenses of lack of personal jurisdiction and failure of service of process did not have to be raised at the time of either Relators’ December 21, 2011, notice of appearance or their December 30, 2011, motion for a more definite statement because they were not “then available” to Relators. As discussed earlier, these defenses were premature prior to the passage of the one-year period after the filing of PNC’s original complaint. *See* 1 Klein & Darling, Baldwin’s Ohio Civil Practice, Section 3:4, at 147-148 (2d Ed.2004); *see also Pippin*, 111 Ohio App.3d at 564-565, 676 N.E.2d 932; *Marcinko, supra*, 2004-Ohio-3850 at ¶ 30. In fact, at the time of the notice of appearance, there was no evidence in the Common Pleas Court record that the certified mail

service of the summons and complaint had failed. (See Hamilton Cty. Clerk of Courts Case Docket). And, at the time of Relators' December 30, 2011, motion for a more definite statement, notice of undelivered or refused service had not been entered on the Common Pleas Court docket except for as to Relator Lear 45210, Inc., and the notice of refused service for it had only been entered of record two days before the motion was filed. (*Id.*)

In *Glozzo*, at ¶ 9, the Ohio Supreme Court held that “the defense of insufficiency of process is waived if a motion is made raising other *Civ.R. 12(B) defenses* and it is not included in that motion or, if there is no such motion, if it is not raised by separate motion or included in the responsive pleading.” (emphasis added.) Under *Glozzo*, only a *Civ.R. 12(B)* motion that is made without joining the personal-jurisdiction and failure-of-service defenses waives those defenses. Since Relators did not file a *Civ.R. 12(B)* motion, they did not waive the defenses. This makes sense. A *Civ.R. 12(E)* motion for a definite statement is designed to assist the pleader in preparing a responsive pleading, and because the defenses of lack of personal jurisdiction, insufficiency of process, and insufficiency of service of process, (*Civ.R. 12(B)(2)*, (4), and (5)), must be raised by responsive pleading, a pre-answer *Civ.R. 12(E)* motion to help a defendant prepare his answer or *Civ.R. 12(B)* motion should not waive a *Civ.R. 12(B)* defense.

“Certain preliminary actions before a court do not qualify as the type of appearance during which a defendant must challenge the lack of personal jurisdiction to avoid submission to the court's jurisdiction.” *During v. Quoico*, 2012-Ohio-2990, 973 N.E.2d 838 (10th Dist.) (citing *Maryhew v. Yova*, 11 Ohio St.3d 154, 464 N.E.2d 538 (1984)). The filing of a notice of appearance and a motion for more definite statement are the precise type of preliminary actions that the court referred to in *During*. In *Maryhew*, this Court found that an appearance and making of pretrial motions for leave to answer by the defendant did not constitute a waiver of the

defense of lack of jurisdiction. Just like the defendants in *During* and *Maryhew*, Relators did not waive any defense nor submit to the jurisdiction of the Common Pleas Court.

C. RELATORS ARE NOT REQUIRED TO ESTABLISH THE LACK OF ADEQUATE REMEDY AT LAW BECAUSE THEY HAVE PROPERLY ALLEGED A PATENT AND UNAMBIGUOUS LACK OF JURISDICTION.

PNC has argued that Relators are not entitled to the extraordinary relief of a writ of prohibition because there is an adequate remedy at law. Yet, under Ohio law, Relators need not show that they lack a remedy at law so long as they can show that Respondents patently and unambiguously lack jurisdiction.

“Where jurisdiction is patently and unambiguously lacking, relators need not establish the lack of an adequate remedy at law because the availability of alternate remedies like appeal would be immaterial.’ ” *Chesapeake Exploration, L.L.C. v. Oil & Gas Comm.*, __ Ohio St.3d __, 2013-Ohio-224, __ N.E.2d __, ¶ 11 (quoting *State ex rel. Sapp v. Franklin Cty. Court of Appeals*, 118 Ohio St.3d 308, 2008-Ohio-2637, 889 N.E.2d 500, ¶ 15). As has been shown above, the failure of service on all Relators patently and unambiguously deprives Respondents of jurisdiction over Relators. Therefore, this element is satisfied and Relators need not prove the inadequacy of a remedy at law.

Yet, even if Relators are obligated to demonstrate the absence of an adequate remedy at law, they have pleaded facts that establish this. As shown by the Complaint, Respondents have not only the Hamilton County Case currently pending, but also a separate action in federal court in Illinois, which asserts claims against a family member of some of Relators, Bonnie Zilberbrand. That suit constitutes a cloud on the title of Ms. Zilberbrand’s home, and further subject Relators to claims of indemnification by Ms. Zilberbrand. PNC’s efforts to assert claims

against Relators' families and attach their assets in advance of the securing of a judgment show that Relators lack an adequate remedy at law.

Under the rule set forth in *Chesapeake Exploration, supra*, Relators are not required to show that they lack an adequate remedy at law because the Hamilton County Court of Common Pleas and Judge Nadel patently and unambiguously lack jurisdiction over the underlying cause. Even if such a requirement were imposed upon Relators by this Court, the Complaint has alleged sufficient facts to satisfy this element. For these reasons, PNC's argument should be rejected.

D. RELATORS' COMPLAINT IS SUPPORTED BY A PROPER AFFIDAVIT, OR IN THE ALTERNATIVE, RELATORS SEEK LEAVE TO AMEND THE AFFIDAVIT.

PNC contends that this case should be dismissed because the affidavit attached to Relators' complaint does not comply with the personal-knowledge requirement of S.Ct.Prac.R. 12.02(B)(2). Relators submit that the affidavit in support of the Complaint satisfies this Court's rules by its certification that the facts set forth in the complaint "are true to the best of [Affiant's] personal knowledge, information and belief." (Complaint, Affidavit).

However, any deficiency in the affidavit has been rectified by Relators contemporaneously filed motion for leave to amend the complaint to comply with this requirement. *See State ex rel. Hackworth v. Hughes*, 97 Ohio St.3d 110, 2002-Ohio-5334, 776 N.E.2d 1050, ¶ 26 (granting leave to amend complaint to file affidavit complying with personal-knowledge requirement). Therefore, dismissal on this basis is not warranted.

III. CONCLUSION

After presuming the veracity of the material factual allegations of Relators' complaint and construing all reasonable inferences therefrom most strongly in their favor, it is apparent that their claim for extraordinary relief in prohibition has merit. Relators have alleged with sufficient specificity that Respondents patently and unambiguously lack jurisdiction over PNC's claims

against them because PNC did not perfect service of process on Relators within the one-year period required by Civ.R. 3(A). PNC's arguments to the contrary are inconsistent with precedent and lack merit. PNC's Motion for Judgment on the Pleadings should therefore be denied.

Respectfully submitted,



Charles E. Reynolds (0019935) *

**Counsel of Record*

J. Robert Linneman (0073846)

Brian P. O'Connor (0086646)

SANTEN & HUGHES

600 Vine St., Suite 2700

Cincinnati, OH 45202

(513) 721-4450 *tel* / (513) 721-0109 *fax*

cer@santen-hughes.com

Attorneys for Relators

CERTIFICATE OF SERVICE

I hereby certify that a true and accurate copy of the foregoing has been served via electronic mail, this 8th day of February, 2013, upon the following:

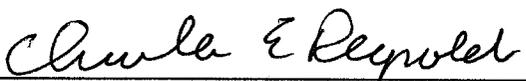
Joseph T. Deters (0012084)
Christian J. Schaefer (0015494) *
* *Counsel of Record*
PROSECUTING ATTORNEY
HAMILTON COUNTY, OHIO
230 E. Ninth Street, Suite 4000
Cincinnati, Ohio 45202
(513) 946-3041 *tel* / (513) 946-3017 *fax*
chris.schaefer@hcpros.org
Attorneys for Respondents

and

Glenn V. Whitaker (0018169)
Erik B. Bond (0087188)
Vorys Sater Seymour & Pease
Suite 2000, Atrium Two
Cincinnati, OH 45202

Robert P. Simons (0077212)
Reed Smith LLP
225 Fifth Avenue
Pittsburgh, PA 15222

Attorneys for Intervenor
PNC Equipment Finance, LLC



Charles E. Reynolds (0019935)