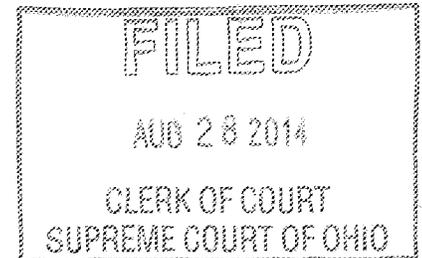


14-1500

IN THE SUPREME COURT OF OHIO

EVA ANN HUBIAK, ET AL.,
Plaintiffs-Appellees,
v.
OHIO FAMILY PRACTICE CENTER, INC., ET AL.,
Defendants-Appellants


On appeal from the Summit County Court of Appeals, Ninth Appellate District

Court of Appeals
Case No. CA-26949

MEMORANDUM IN SUPPORT OF JURISDICTION OF APPELLANTS, OHIO FAMILY PRACTICE CENTER, INC., AMY C. NEWMAN, PAC, RICHARD JAMES DOM DERA, M.D., AND KELLI SABIN, M.D.

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**EXPLANATION OF WHY THIS IS A CASE OF
PUBLIC OR GREAT GENERAL INTEREST**

Litigants in the Ninth District, and more precisely, the Summit County Court of Common Pleas, remain uncertain as to the state of the law for timely and appropriate commencement of an action and effectuating proper service. Numerous active and pending cases – those filed from June 23, 2009 to July 1, 2012 – are affected and hampered by uncertain law and inconsistent opinions of the Ninth District itself in trying to resolve the issue. In 2010, there were 8,497 new case filings in Summit County.¹ In 2011, another 7,309 were filed.² At least 20,000 cases are potentially affected and may be the current subject of pending motion or appellate practice arising out of Summit County Standing Order Misc. 325 (“Order 325”).

On June 23, 2009, the Summit County Common Pleas Court adopted Order 325, which purported to authorize service of a Summons and Complaint via Federal Express. However, Order 325 ran afoul of the clear provisions of Civ.R. 4 and impermissibly attempted to expand the scope of the Civil Rules beyond the procedures adopted and authorized by the Ohio Legislature. See *J. Bowers Constr. Co. Inc. v. Vinez*, 9th Dist. No. 25948, 2012-Ohio-1171. In *Vinez*, the Ninth District Court of Appeals found that unauthorized service by Federal Express did not confer jurisdiction over the defendant, rendering any judgment against that defendant void *ab initio*. Since the *Vinez* decision, a cottage industry of motion practice has grown in Summit County questioning whether

¹ Summit County Court of Common Pleas 2010 Annual Report, available at: <http://www.summitcpcourt.net/Annual%20Reports/2010%20ANNUAL%20REPORT.pdf>, last accessed, August 25, 2014.

² Summit County Court of Common Pleas 2011 Annual Report, available at: <http://www.summitcpcourt.net/Annual%20Reports/2011%20ANNUAL%20REPORT%20FINAL%20Rev1.pdf>, last accessed, August 25, 2014.

service by Federal Express before the amendment of the Civil Rules on July 1, 2012 results in commencement of an action. Counsel for Appellants is aware of numerous cases in which the Summit County Court of Common Pleas has considered the issue, but has reached divergent results, depending upon the identity of the trial judge. Many judges have vacated final judgment entries based exclusively on the previous pronouncement of the Ninth District in *Vinez*.³ However, in other cases, where *Vinez* dictates outright dismissal with prejudice, the Court has softened its position to allow the matter to proceed, in spite of *Vinez*.

The question raised in this appeal is a novel question of procedure and appeals not only to the legal profession in general, but this Court's "collective interest in jurisprudence" thereby making this a matter of public and/or great general interest. *Nobel v. Colwell* (1989), 44 Ohio St.3d 92, 94, 540 N.E.2d 1381. It is not just a novel issue. It is ubiquitous in a high-volume Court of Common Pleas and the subject of numerous reported appeals in the Ninth District. See *Vinez, supra*; *Emerson Family Ltd. Partnership v. Emerson Tool, L.L.C.*, 9th Dist. No. 26200, 2012-Ohio-5647; *Haley v. Nomad Preservation, Inc.*, 9th Dist. No. 26341, 2013-Ohio-86; *Philco Realty Ltd. v. Wells Fargo*

³ E.g., (1) 9/28/2012 Order Vacating Judgment of Judge Jones in Case No. CV-2011-05-2872; (2) 9/24/12 Judgment Entry of Judge Callahan in Case No. CV-2011-08-4312; (3) 9/14/2012 Order Granting Motion to Vacate of Judge Gallagher in Case No. CV-2011-05-2629; (4) 9/14/2012 Order Granting Motion to Vacate of Judge McCarty in Case No. CV-2011-08-4650; (5) 9/28/2012 Order Vacating Judgment of Judge O'Brien in Case No. CV-2011-09-5359; (6) 11/1/2012 Order Vacating Judgment of Judge Rowlands in Case No. CV-2011-12-6758; (7) 2/19/13 Order Vacating Judgment of Judge Shapiro in Case No. CV-2011-06-3117; (8) 8/31/2012 Order Vacating Judgment of Judge Stormer in Case No. CV-2011-06-3168; (9) 11/26/12 Order Vacating Judgment of Judge Teodosio in Case No. CV-2011-06-2967; (10) 9/14/2012 Judgment Entry Vacating Judgment of Judge Callahan in Case No. CV-2010-10-7128; 6/25/2012 Judgment Entry Vacating Judgment of Judge Callahan in Case NO. CV-2012-02-0845.

Bank, 9th Dist. No. 26289, 2012-Ohio-5400. It is respectfully submitted these cases, notably *Vinez*, are in conflict with the most recent finding of the Ninth District in the July 16, 2014 decision in this case.

There is a conflict of law in the Ninth District between *Vinez*, which was decided by the actual judges in the Ninth District and the decision of the court below here, which was decided by a panel from the Seventh and Eighth Districts sitting by assignment. Trial judges, the plaintiff's bar, and the defense bar are unclear of the state of the law due to this conflict.

As to the Appellants herein, this matter was never timely commenced and has never been "pending." Nor did Appellees cause service of process to be completed within the one year of filing the Complaint, as required by Civ.R. 3(A). And yet, pursuant to the Ninth District's July 16, 2014 Decision, this action remains pending against parties whom have never properly been brought before the Court via timely service of a Summons and Complaint. It is a matter of great public and general interest where the Rules of Procedure have not been followed and the statute of limitations has expired, but the action remains. This Court should examine and explain why Appellees herein are permitted to continue to pursue this matter in the courts where they have failed to timely commence.

The preference for deciding cases upon their merits, rather than procedure, is not an excuse to relieve parties of their most basic obligations to timely commence and complete service of process. As it stands, the Ninth District's decision condones proceeding to trial in the face of a complete lack of jurisdiction. Such a curious procedural posture merits review by the Court as a matter of public and great general interest.

STATEMENT OF THE CASE AND FACTS

Procedural Posture

On October 27, 2011, Appellees, Eva Ann Hubiak, Milissa Wikman, and Stephen Carter (“Appellees”), brought this action against Appellants, Ohio Family Practice Center, Inc., Amy C. Newman, PAC, Richard James Dom Dera, M.D., and Kelli Sabin, M.D. (collectively, “Ohio Family”) and others, alleging medical negligence. On January 16, 2013, Akron Radiology, Inc. and Jeffrey S. Unger, M.D. filed a Motion to Dismiss and a Motion for Judgment on the Pleadings. On January 16, 2013, Ohio Family filed a Motion for Judgment on the Pleadings. On April 26, 2013, Summit Ophthalmology, Inc. and Charles Peter, M.D. moved for summary judgment. The thrust of each of the Motions was the failure of jurisdiction and failure of Appellees to properly commence this action within the applicable limitations period. The motions were fully briefed and on May 6, 2013, the trial court granted the Motions.

Appellees timely appealed to the Ninth District Court of Appeals on May 31, 2013. After the matter was fully briefed, the Ninth District panel recused itself from hearing the argument and the matter was heard instead by a panel of judges sitting by assignment from the Seventh and Eighth Districts on May 21, 2014.

Following briefing and oral argument, on July 16, 2014, the Ninth District Court of Appeals reversed the trial court’s May 6, 2013 decision, thereby reviving the action as against Ohio Family and the other Defendants, despite the failure to commence against Ohio Family and the long-since expired statute of limitations for medical negligence.

Statement of the Facts

On October 27, 2011, Appellees filed a Complaint alleging medical malpractice against Ohio Family and others. The Complaint alleged the negligent medical treatment occurred between August 27, 2010 and October 29, 2010. Upon filing the Complaint, Appellees instructed the Summit County Common Pleas Court's Clerk's Office to complete service of process upon Ohio Family by Federal Express.

Ohio Family entered an appearance and in the Answer, among others, asserted the Affirmative Defenses of Lack of Personal Jurisdiction and Failure of Service of Process. On October 28, 2012, Appellees had not effectuated service of process pursuant to any of the applicable provisions of Civ.R. 4 and had not requested service by any permissible method under the governing Civil Rules. Based upon these undisputed facts, Ohio Family moved for judgment on the pleadings.

ARGUMENT IN SUPPORT OF PROPOSITIONS OF LAW

Proposition of Law No. I: The failure of a separate party to preserve an affirmative defense cannot serve as a waiver of that defense as to other parties who appropriately raise and preserve the defense in the Answer.

Alternative Proposition of Law No. II: An action that is "pending" as to unrelated co-defendants cannot revive the limitations period as to other Defendants against whom it is not "pending."

In effect, the Ninth District found that Ohio Family should be punished because other, **unrelated**, co-defendants did not preserve the same affirmative defenses as Ohio Family. The Court all but agreed with every argument of Ohio Family in its decision, finding that:

1. Federal Express Service, at the time it was attempted by Appellees as against Ohio Family “did not comply with Ohio’s former Civil Rules.” *Id.* at ¶11;
2. Service of Process by Appellees as to Ohio Family “was not completed according to the dictates of Civ.R. 4.1.” *Id.*;
3. Ohio Family preserved and did not waive the right to challenge jurisdiction due to failure of service of process. *Id.* at ¶19.

In spite of these findings, the court found that the defective and unauthorized service of process was rescued by the happenstance amendment of the Ohio Rules of Civil Procedure on July 1, 2012. In other words, by operation of an action of the Ohio Legislature, and without notice to Ohio Family, Appellees’ defective attempt to bring this action as against Ohio Family suddenly became proper.

The Court reached this conclusion by employing Civ.R. 86(II). The Rule provides that the amendments to the Civil Rules:

govern all proceedings in actions brought after they take effect and also all further proceedings in actions then pending, except to the extent that their application in a particular action pending when the amendments take effect would not be feasible or would work injustice, in which event the former procedure applies.

Although the Court reasoned that the action was not “pending” as to Ohio Family, it found that it was “pending” as to other co-defendants who had not preserved the defense of failure of service of process. By virtue of this finding, the Court revived the action as against all parties, including Ohio Family.

In reaching this decision, the Court also acknowledged that if service of process is not perfected within one year of filing the complaint (as required by Civ.R. 3(A)), then the action cannot be deemed “commenced” and was never “pending.” *Id.* at ¶26, citing *Mason*

v. Waters, 6 Ohio St.2d 212, 217 N.E.2d 213 (1966) and *LaNeve v. Atlas Recycling, Inc.*, 119 Ohio St.3d 324, 2008-Ohio-3921, 894 N.E.2d 25. The law as cited and argued by Ohio Family required a finding that the action was not “pending” or “commenced” as to Ohio Family, thereby rendering it time-barred and making judgment on the pleadings in its favor appropriate. The Court ignored this law and performed civil procedure gymnastics to bring Appellees’ defective pleading practices into compliance with an interpretation of the Civil Rules not supported by the case law.

It is a matter of public and great general interest that Appellees are able to pursue a claim against Ohio Family in spite of the fact that this action was never timely and properly commenced against it. Such an outcome is a strained application of the Rules of Procedure to breathe life into Appellees’ otherwise time-barred claims.

Proposition of Law No. III: Stripping a party defendant of its ability to contest jurisdiction and proper service of process is an “injustice” and deprivation of a fundamental right secured by the Rules of Procedure.

As the Court below readily acknowledged, Ohio Family took all the right steps to preserve a fundamental affirmative defense – the lack of jurisdiction due to failure of service of process. However, the Court justified stripping Ohio Family of this defense claiming no “injustice” pursuant to Civ.R. 86(II), as Ohio Family had appeared and defended the action. Respectfully, depriving Ohio Family of the elementary defense of “jurisdiction” is the definition of injustice. If the Ninth District’s findings below were the law, then Ohio Family would have been better served to have never answered the Complaint, only to later contest the inevitable default judgment that Appellees would have pursued against them. A risk no party would take, especially in high-stakes medical negligence cases.

Jurisdiction via proper service of process is a fundamental requirement of our Civil Rules. As the Ninth District has previously and appropriately stated:

Completion of original process is necessary to clothe the trial court with jurisdiction to proceed. Thus. Where service of process has not been accomplished, any judgment rendered is void *ab initio*.

Sampson v. Hooper Homes, Inc. (1993), 91 Ohio App.3d 538, 632 N.E.2d 1338.

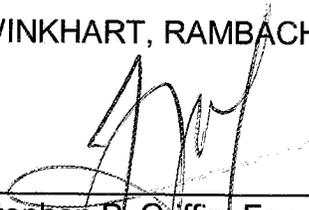
Nothing contained within the trial court or appellate records suggests that Ohio Family was ever timely and appropriately served. The trial court, if it proceeds, will not be clothed with jurisdiction. Even if Appellees prevailed at trial and secured a verdict in their favor, any judgment upon that verdict will be void *ab initio*. Depriving Ohio Family of its ability to contest jurisdiction now and assert an absolute and dispositive defense is an exercise in futility and portends further waste of judicial and party resources.

CONCLUSION

The depletion of legal resources as a result of Order 325 will only continue in further appeals and motion practice as already reflected on the Summit County and Ninth District dockets. It is a matter of public and great general interest to address the disputed state of the law in the Ninth District and relieve the pressure upon the bench and bar to continue to pursue and contest jurisdiction motions based upon faulty and improper service via Federal Express prior to July 1, 2012. This Court should accept jurisdiction to resolve these issues and paint bright lines to protect valid and justified defenses to claims that have never been appropriately served

Respectfully submitted,

WINKHART, RAMBACHER & GRIFFIN

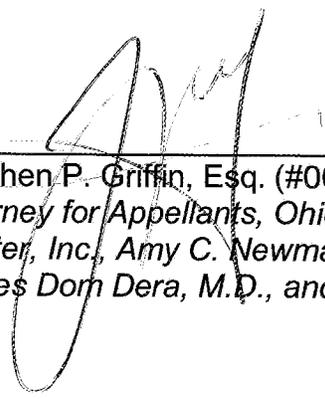


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Certificate of Service

The undersigned certifies that a copy of the foregoing NOTICE OF APPEAL was sent by regular U.S. Mail to Paul G. Perantinides, Esq. and Antonios P. Tsarouhas, Esq., Counsel for Appellants at 300 Courtyard Square, 80 South Summit Street, Akron, OH 44308; Stacy Delgros, Esq., Counsel for Appellees Akron Radiology, Inc. and Jeffrey S. Unger, M.D., 22 South Main Street, Akron, OH 44308; and, Marc Groedel, Esq., Counsel for Appellees Summit Ophthalmology, Inc. and Charles Peter, M.D., 101 West Prospect Ave., Suite 1400, Cleveland, OH 44115-1093 by ordinary mail this 27th day of August, 2014.



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APPENDIX

STATE OF OHIO)
)ss:
COUNTY OF SUMMIT)

IN THE COURT OF APPEALS
NINTH JUDICIAL DISTRICT
2014 JUL 16 10 00 AM

EVA ANN HUBIAK, ET AL.

C.A. No. 26949

Plaintiffs-Appellants

and

OHIO FAMILY PRACTICE
CENTER, INC., ET AL.

Defendants-Appellees

APPEAL FROM JUDGMENT
ENTERED IN THE
COURT OF COMMON PLEAS
COUNTY OF SUMMIT, OHIO
CASE No. CV 2011-10-6095

DECISION AND JOURNAL ENTRY

Dated: July 16, 2014

CELEBREZZE, Presiding Judge.

{¶1} Appellants, Eva Ann Hubiak, Milissa Wikman, and Stephen P. Carter, appeal from the trial court's dismissal of their medical malpractice suit. The trial court determined that appellants had failed to properly serve the defendants and dismissed the suit with prejudice. After a thorough review of the record and law, we reverse.

I. Factual and Procedural History

{¶2} On October 27, 2011, appellants filed their medical malpractice complaint against Ohio Family Practice Center, Inc. ("Ohio Family"); physician's assistant Amy C. Newman; Dr. Richard James Dom Dera; Dr. Kelli Sabin; Summit Ophthalmology, Inc. ("Summit"); Dr. Charles Peter; Akron Radiology, Inc. ("Akron Radiology"); Dr. Jeffrey S. Unger; and several John Doe health care providers. The

complaint alleged that these defendants negligently rendered services to Hubiak from August 24, 2010 through October 29, 2010, which caused injury to her and a loss of parental consortium to her and her two children, Wikman and Carter.

{¶3} Upon filing their complaint with the Summit County Clerk of Courts, the attorney representing appellants completed a form requesting service of the complaint via Federal Express. Service via Federal Express was completed on each named party within one month. Each named defendant filed an answer and various pleadings, pretrials were conducted, the process of discovery commenced, and depositions were conducted. After a few continuances, a trial date of December 2, 2013, was set.

{¶4} On January 16, 2013, Ohio Family, Newman, Dr. Dom Dera, and Dr. Sabin (the "Ohio Family defendants") filed a motion for judgment on the pleadings based on a lack of proper service. The motion set forth that the common pleas court issued a standing order making employees of Federal Express process servers for the court. However, the Ohio Rules of Civil Procedure did not, at the time the complaint was served, provide for initial service of a complaint other than by certified or express mail.¹ Akron Radiology and Dr. Unger (the "Akron Radiology defendants") filed a similar combined motion to dismiss and for judgment on the pleadings the following day. On January 24, 2013, appellants filed their opposition, arguing that service by Federal Express provided actual notice and fulfilled the spirit of the rule, and that the rule was amended effective July 1, 2012, to provide for service via Federal Express.

¹ The rules have since been amended, effective July 1, 2012, to allow service by commercial carries such as Federal Express.

On April 26, 2013, Summit and Dr. Peter (the "Summit defendants") filed a motion for summary judgment making the same argument regarding lack of proper service.

{¶5} On May 6, 2013, the trial court granted the motions to terminate the case filed by each group of defendants. Appellants then timely appealed from this decision assigning four errors:

- I. The trial court erred in dismissing Plaintiffs/Appellants' cause of action when Plaintiffs/Appellants were relying on Miscellaneous Order No. 325.
- II. The trial court erred in holding that Defendants/Appellees had not been served pursuant to the Ohio Rules of Civil Procedure.
- III. The trial court's decision to dismiss Plaintiffs/Appellants' cause of action was contrary to law.
- IV. The trial court's decision to dismiss the case with prejudice is unconstitutional in that it violates Section 16, Article I, of the Ohio Constitution.

II. Law and Analysis

A. Standard of Review

{¶6} Appellants' first three assignments of error all take issue with the trial court's decision to terminate appellants' case based on a lack of proper service. The trial court granted motions to dismiss filed by the Akron Radiology and Ohio Family defendants. The court also granted summary judgment in favor of the Summit defendants.

{¶7} The grant of a motion to dismiss under Civ.R. 12(B) or 12(C) motions for judgment on the pleadings are reviewed by this court de novo. *Cashland Fin. Servs.*,

Inc. v. Hoyt, 9th Dist. Lorain No. 12CA010232, 2013-Ohio-3663. A motion for judgment on the pleadings is confined to the allegations raised in the complaint. *Gawloski v. Miller Brewing Co.*, 96 Ohio App.3d 160, 163, 644 N.E.2d 731 (9th Dist.1994). It is not the proper vehicle to raise the issues argued by the parties in this case because they rely on evidence outside of the pleadings, including service records from the clerk of courts and a document filed by appellants with the clerk directing service via Federal Express. A Civ.R. 12(B)(2) motion to dismiss for lack of jurisdiction allows for a broader consideration of the record in rendering a decision including "other documentary evidence such as affidavits and answers to interrogatories." *Free v. Govt. Emps. Ins.*, 12th Dist. Butler No. CA89-09-135, 1990 Ohio App. LEXIS 1670, *4 (Apr. 30, 1990), citing *Price v. Wheeling Dollar Savs. & Trust Co.*, 9 Ohio App.3d 315, 460 N.E.2d 264 (12th Dist.1983).

{¶8} "Regardless of whether the motion is one under Civ.R. 12(B)(2) or 12(C), the material allegations of the complaint, with all reasonable inferences to be drawn therefrom, are to be construed in favor of the [nonmoving] party * * *." *Id.*, citing *Fischer v. Morales*, 38 Ohio App.3d 110, 526 N.E.2d 1098 (10th Dist.1987); *Giachetti v. Holmes*, 14 Ohio App.3d 306, 471 N.E.2d 165 (8th Dist.1984).

{¶9} An appellate court reviews a trial court's decision on a motion for summary judgment de novo. *Grafton v. Ohio Edison Co.*, 77 Ohio St.3d 102, 105, 671 N.E.2d 241 (1996). Summary judgment is proper when: (1) there is no genuine issue as to any material fact; (2) the moving party is entitled to judgment as a matter of law; and (3)

reasonable minds can come to but one conclusion, and that conclusion is adverse to the party against whom the motion for summary judgment is made, that party being entitled to have the evidence construed most strongly in his favor. *Leibreich v. A.J. Refrigeration, Inc.*, 67 Ohio St.3d 266, 268, 617 N.E.2d 1068 (1993); Civ.R. 56(C).

B. Service via Federal Express

{¶10} The Ohio Rules of Civil Procedure set forth the appropriate methods of service that must be used in order to obtain proper service on a party. See Civ.R. 4.1 et seq. The rules are designed to ensure, as much as possible, that parties receive adequate notice. Former Civ.R. 4.1(A) provided, “service of any process shall be by certified or express mail unless otherwise permitted by these rules.” At the time appellants served their complaint, the rules did not provide for initial service of a complaint via commercial carrier. In several decisions, this court made clear that service via Federal Express did not comport with service rules prior to July 1, 2012. *Haley v. Nomad Preservation, Inc.*, 9th Dist. Summit No. 26341, 2013-Ohio-86 (“At the time the notice and order of garnishment was served via Federal Express in 2010, Civ.R. 4.3(B) did not provide for service via Federal Express”); *Emerson Family Ltd. Partnership v. Emerson Tool, L.L.C.*, 9th Dist. Summit No. 26200, 2012-Ohio-5647, ¶ 32; *Philco Realty, Ltd. v. Wells Fargo Bank*, 9th Dist. Summit No. 26289, 2012-Ohio-5400; *J. Bowers Constr. Co. v. Vinez*, 9th Dist. Summit No. 25948, 2012-Ohio-1171. There are no conflicts in these cases.

[Former] Civ.R. 4.1(A) explicitly provided that “service of any process shall be by United States certified or express mail unless otherwise

permitted by these rules.” The term “express mail,” as used in Civ.R. 4.1(A) both then and now, refers only to express mail service via the United States Postal Service, not a commercial carrier. Prior to the July 1, 2012, effective date of amendments to Civ.R. 4.1 and 4.6, service of the complaint via a commercial carrier did not comply with the civil rules. Former Civ.R. 4.6(C) and (D) and 4.1.

Emerson Tool at ¶ 32.

{¶11} The manner in which appellants’ complaint was served did not comply with Ohio’s former civil rules. It is no matter that there existed a standing order of the court designating employees of Federal Express as process servers. That designation only comes into play under Civ.R. 4.6 after a failure of service that comports with Civ.R. 4.1(A). Therefore, at the time service was attempted, it was not completed according to the dictates of Civ.R. 4.1.

C. Waiver of Proper Service

{¶12} The above holding does not end the inquiry in this case. Service may be waived, and the court will have jurisdiction over a party who voluntarily submits thereto where lack of service is not properly preserved. Waiver occurs “(1) if a motion is made raising other Civ.R. 12(B) defenses and it is not included in that motion and (2) if there is no such motion, if it is not raised by separate motion or included in the responsive pleading.” *Shah v. Simpson*, 10th Dist. Franklin No. 13AP-24, 2014-Ohio-675, ¶ 15, quoting *Stewart v. Forum Health*, 190 Ohio App.3d 484, 2010-Ohio-4855, 942 N.E.2d 1117, ¶ 36 (7th Dist.), citing *Gliozzo v. Univ. Urologists of Cleveland, Inc.*, 114 Ohio St.3d 141, 2007-Ohio-3762, 870 N.E.2d 714, ¶ 9.

{¶13} Civ.R. 12 explains that certain defenses may be waived. Civ.R. 12(H)(1) provides:

A defense of lack of jurisdiction over the person, * * * insufficiency of process, or insufficiency of service of process is waived (A) if omitted from a motion in the circumstances described in subdivision (G), or (B) if it is neither made by motion under this rule nor included in a responsive pleading or an amendment thereof permitted by Rule 15(A) to be made as a matter of course.

{¶14} The Ohio Supreme Court has recently explained the confines of waiver of service and the means to properly preserve the defense. The court held, “[w]hen the affirmative defense of insufficiency of service of process is properly raised and properly preserved, a party’s active participation in the litigation of a case does not constitute waiver of that defense.” *Glozzo* at the syllabus, citing *First Bank of Marietta v. Cline*, 12 Ohio St.3d 317, 466 N.E.2d 567 (1984). It is necessary to raise the defense of insufficiency of service of process in a responsive pleading or in certain motions before a responsive pleading. *Glozzo* at ¶ 13, citing *Maryhew v. Yova*, 11 Ohio St.3d 154, 156-157, 464 N.E.2d 538 (1984). If the party does neither, then participation in the proceedings leads to waiver of proper service and the existence of personal jurisdiction over the party.

{¶15} In the present case, no defendant filed a motion to dismiss for lack of proper service before filing an answer. Therefore, we look to each party’s answer to determine whether the defense was raised therein.

{¶16} The Ohio Family defendants filed a joint answer where they raised several defenses, including that “[p]laintiffs have failed to obtain appropriate

jurisdiction due to lack of service, inadequacy of service and failure of appropriate service.”

{¶17} The Akron Radiology defendants filed a joint answer that asserted as a defense that “the Complaint was not served upon them in accordance with the Ohio Rules of Civil Procedure.”

{¶18} Finally, the Summit defendants filed a joint answer that did not raise lack of service as a defense. The closest defense raised states, “[t]his Court lacks jurisdiction of the within action by virtue of the Plaintiffs’ failure to comply with the pleading requirements as required by the Ohio Revised Code.”

{¶19} The answer of the Ohio Family and Akron Radiology defendants affirmatively raised lack of service as a defense. According to the holding in *Gliozzo*, this preserved the defense, which was later raised in the motions to dismiss of these defendants.

{¶20} However, Summit’s answer does not properly preserve the defense. The general statement quoted above does not address the lack of service or improper service at issue in this case. It also alleges a lack of jurisdiction based on the failure to comply with governing provisions of the Ohio Revised Code, not the Ohio Rules of Civil Procedure. Therefore, Summit and Dr. Peter waived the defense of proper service when they failed to timely raise the issue in a pre-answer motion or by raising the defense in their answer, and by appearing and participating wholly in the proceedings.

D. Subsequent Amendment During the Pendency of the Case

{¶21} Appellants ask this court to hold that the amendment of Civ.R. 4 et seq. during the pendency of this case means that service, which was not proper at the time it was tried, later became effective after Civ.R. 4.1 was amended to allow for service via commercial carrier.

{¶22} Civ.R. 86(II) specifically governs the applicability of these changes in the rules to pending cases. It provides:

The amendments to Civil Rules 4.1, 4.2, 4.3, 4.4, 4.5, 4.6, * * * shall take effect on July 1, 2012. They govern all proceedings in actions brought after they take effect and also *all further proceedings in actions then pending*, except to the extent that their application in a particular action pending when the amendments take effect would not be feasible or would work injustice, in which event the former procedure applies.

(Emphasis added.) *Id.*

{¶23} In the present case, the record indicates that all parties were served in November 2011 via Federal Express, evidenced by signed receipts. The modifications to Civ.R. 4.1, which now allow commercial carrier service, became effective on July 1, 2012. Civ.R. 4.1(B) provides, "As an alternative to service under Civ.R. 4.1(A)(1)(a), the clerk may make service of any process by a commercial carrier service utilizing any form of delivery requiring a signed receipt."

{¶24} The Ohio Family defendants moved for judgment on the pleadings on January 16, 2013. The Akron Radiology defendants moved for judgment on the pleadings and to dismiss on January 17, 2013. By the time these motions were filed,

the amendments had taken effect. This court must determine if the trial court erred when it failed to apply the amended rule to the action.

{¶25} The defendants argue that the action was not pending, relying on *Mason v. Waters*, 6 Ohio St.2d 212, 217 N.E.2d 213 (1966), and *Laneve v. Atlas Recycling, Inc.*, 119 Ohio St.3d 324, 2008-Ohio-3921, 894 N.E.2d 25.

{¶26} In *Mason*, the Ohio Supreme Court held that where proper service did not take place within the appropriate time, the action was deemed not to have commenced and there was no pending case. *Id.* at 215-216. Based on this precedent, if service was not perfected within the one-year time frame of Civ.R. 3(A), then the action cannot be deemed commenced and was never pending.

{¶27} The Ohio Supreme Court addressed Civ.R. 15 in *LaNeve* and held that failure to adhere to the requirements specified within the civil rules regarding service affected the jurisdiction of the trial court. The court stated, “the Civil Rules are not just a technicality, and we may not ignore the plain language of a rule in order to assist a party who has failed to comply with a rule's specific requirements.” *Id.* at ¶ 23.

{¶28} These cases do not deal with amendment of the civil rules and their application to a case. For instance, in *Pullar v. Upjohn Health Care Servs.*, 21 Ohio App.3d 288, 488 N.E.2d 486 (8th Dist.1984), the Eighth District applied amended civil rules to review a decision of the trial court in an age discrimination action. The defendant in that case filed for summary judgment raising issues of res judicata and estoppel that were not raised in its answer. After the motion for summary judgment

was filed, Civ.R. 12 was amended to clarify which defenses were subject to waiver.² The trial court granted summary judgment after the amendment took effect. The Eighth District ruled that the amendment applied to the then-pending proceedings. *Pullar* at 294, fn.1, citing Civ.R. 86(I). This situation is more analogous to the present case than those cited by the defendants.

{¶29} If we apply the amendments, what was previously improper service on July 1, 2012, became proper, and the action was commenced and pending on that date because it was within the statute of limitations and the one-year period for perfecting service. Even if that were not the case, defendants are incorrect that there was no pending case because service was not completed within one year. As explained above and more thoroughly in Section E of this opinion, there was a pending action because at least one group of defendants waived proper service, making the action “commenced” on the date of waiver, and therefore, pending. Also, the application of the amended rules to the present case would be in keeping with the long-standing tradition to, as much as possible, decide cases on their merits. *Patterson v. V & M Auto Body*, 63 Ohio St.3d 573, 577, 589 N.E.2d 1306 (1992).

{¶30} Civ.R. 86(II) directs courts to apply the amended rules to “all further proceedings in actions then pending” except where it would not be feasible or work an

² The rules governing waiver of affirmative defenses were amended to clarify that certain pleading defenses are waived while other motion defenses are not waived. See Civ.R. 12(H).

injustice. No injustice is found after an examination of the record for the application of the amended rules to the present case.

{¶31} All defendants received service in compliance with the updated rule within a month of filing the complaint, as evidenced by signed receipts. All defendants actively participated in the proceedings, attending pretrials and depositions, and filing documents as part of discovery. Defendants also do not assert any specific compelling injustice that would result in this case from application of the updated rule.

{¶32} The effect of applying the amended rules to this case is that the trial court lacked jurisdiction over the Akron Radiology and Ohio Family defendants on June 30, 2012, and then it had jurisdiction over those parties on July 1, 2012. The application of the amended rule does not work an injustice in this case because actual service was received by these defendants in a method in compliance with the amended rules, and the parties were actively involved in the litigation. No prejudice results other than relieving the defendants of a defense whose application to the present case is unjustified. Therefore, Civ.R. 86(II) dictates that the amended rule should apply.

E. Service Within One Year

{¶33} The Summit defendants relied on a different rule of civil procedure in support of their motion for summary judgment. Summit argued that because service was imperfect, appellants did not obtain service within one year of the filing of their complaint, in compliance with Civ.R. 3.

{¶34} "Civ.R. 3(A) provides that an action is not deemed to be 'commenced' unless service of process is obtained within one year from the date of the filing of the

action.” *Bentley v. Miller*, 9th Dist. Summit No. 25039, 2010-Ohio-2735, ¶ 10, citing *Jacobs v. Szakal*, 9th Dist. Summit No. 22903, 2006-Ohio-1312, ¶ 19.

[T]he Supreme Court stated that an action may be dismissed when service of process has not been obtained after the passage of more than one year. However, even without service of process, a defendant may commit acts that constitute waiver of the defense of lack of personal jurisdiction.

Sheets v. Sasfy, 10th Dist. Franklin No. 98AP-539, 1999 Ohio App. LEXIS 202, *2, (Jan. 26, 1999), citing *Maryhew*, 11 Ohio St.3d 154, 157, 464 N.E.2d 538.

{¶35} The trial court granted Summit’s motion for summary judgment because it found appellants had not obtained service within one year of filing the complaint. The court reasoned that this failure to comply with Civ.R. 3(A) subjected appellants’ complaint to dismissal and rendered the claim against the Summit defendants barred because the one-year statute of limitations period for medical malpractice had run and Ohio’s savings statute, R.C. 2305.19, was not applicable. That decision must be reversed because Summit and Dr. Peter waived proper service, and there is no dispute in the record that these defendants were served in November 2011.

{¶36} The date of commencement of an action for Civ.R. 3(A) purposes is the date of filing so long as service is obtained within one year. Where a waiver of service occurs, the date of service is the date of said waiver.³ The date that service is affirmatively or impliedly waived constitutes the date of service. This holding is

³ This must be distinguished from cases where there is no waiver and participation. See *Maryhew*, 11 Ohio St.3d 154, 157, 464 N.E.2d 538 (1984); *Emerson Tool, L.L.C.*, 9th Dist. Summit No. 26200, 2012-Ohio-5647.

derived from the principle that “a defendant may effectively or inferentially waive service of process by failing to assert his claim of lack of personal jurisdiction over him in the form and manner required of him by Civ. R. 12(H)(1).” *Carlisle v. Benner*, 5th Dist. Stark No. CA-6605, 1985 Ohio App. LEXIS 8262 (June 24, 1985).

{¶37} In the present case, Summit and Dr. Peter were served on November 11, 2011. Their combined answer, filed November 18, 2011, fails to raise the defense of improper service. Summit’s motion for judgment on the pleadings, filed December 7, 2011, also fails to raise the issue of improper service. Therefore, service was completed for Civ.R. 3(A) purposes when proper service was waived on November 18, 2011. This is well within the one-year period set forth in Civ.R. 3(A). Service could also be deemed perfected, as explained above, when Civ.R. 4.1 was amended effective July 1, 2012. This was also within Civ.R. 3(A)’s one-year limit.

{¶38} Summit supports its argument that the action was never commenced according to Civ.R. 3 with citations to cases where a waiver of service did not occur. *See, e.g., Bentley*, 9th Dist. Summit No. 25039, 2010-Ohio-2735, ¶ 10. This case and similar ones are inapposite where the lack of adequate service is waived.

{¶39} In *Bentley*, the defendant was never served, never appeared, and the plaintiff obtained a default judgment. That case is clearly distinguishable where Summit voluntarily submitted to the court’s jurisdiction on November 18, 2011. This is also distinguishable from other cases where a waiver of the defense occurred outside of one year from the date of filing. *See Gaul v. Crow*, 8th Dist. Cuyahoga Nos. 74600,

74608, 74609, 74610, 74611, and 74612, 1999 Ohio App. LEXIS 4088 (Sep. 2, 1999).

This is equivalent to obtaining proper service outside of the one-year period.

{¶40} Therefore, the trial court erred in granting Summit's motion for summary judgment.

F. Constitutionality of Civ.R. 4(A)

{¶41} Appellants argue that sustaining the trial court's decision dismissing its case is a violation of constitutional rights. Specifically, appellants argue that Section 5(B), Article IV, of the Ohio Constitution prohibited the county courts from adopting rules that were inconsistent with rules promulgated by the Ohio Supreme Court. Having sustained appellants' first three assignments of error, this argument is moot.

III. Conclusion

{¶42} The amendment of Civ.R. 4.1, which became effective during this case, rendered what was previously improper service effective to bestow jurisdiction on the trial court over defendants. The trial court erred in dismissing appellants' claims against the Akron Radiology and Ohio Health defendants for this reason. This also means that service was perfected within one year of filing, rendering the trial court's grant of summary judgment in favor of the Summit defendants in error.

Judgment reversed,
and cause remanded.

There were reasonable grounds for this appeal.

We order that a special mandate issue out of this Court, directing the Court of Common Pleas, County of Summit, State of Ohio, to carry this judgment into

execution. A certified copy of this journal entry shall constitute the mandate, pursuant to App.R. 27.

Immediately upon the filing hereof, this document shall constitute the journal entry of judgment, and it shall be file stamped by the Clerk of the court of appeals at which time the period for review shall begin to run. App.R. 22(C). The clerk of the Court of Appeals is instructed to mail a notice of entry of this judgment to the parties and to make a notation of the mailing in the docket, pursuant to App.R. 30.

Costs taxes to Appellees.


PRESIDING JUDGE FRANK D. CELEBREZZE, JR.
Eighth Appellate District,
Sitting by Assignment.

JOSEPH J. VUKOVICH, J.,
Seventh Appellate District,
Sitting by Assignment,

GENE DONOFRIO, J.,
Seventh Appellate District,
Sitting by Assignment,
concur.

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