

ORIGINAL

NO. 14-1500

In the Supreme Court of Ohio

APPEAL FROM THE COURT OF APPEALS  
NINTH APPELLATE DISTRICT  
SUMMIT COUNTY, OHIO  
CASE NO. CA-26949

EVA ANN HUBIAK, et al.

Plaintiffs-Appellants

v.

OHIO FAMILY PRACTICE CENTER, INC., ET AL.

Defendants-Appellees

MEMORANDUM IN SUPPORT OF JURISDICTION OF DEFENDANTS-APPELLANTS  
AKRON RADIOLOGY, INC. AND JEFFREY S. UNGER, M.D.

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**I. EXPLANATION OF WHY THIS CASE IS OF PUBLIC AND GREAT GENERAL INTEREST**

This case is of great public and general interest because the Ninth District's Decision relies upon legally flawed grounds in an apparent attempt to save Plaintiffs' case from being dismissed. The Ninth District issued a result-oriented Decision that is completely inconsistent with this Court's longstanding precedents pertaining to the commencement of actions and the proper procedure for raising affirmative defenses. The unjustifiable manner in which the Ninth District chose to reverse the Trial Court's dismissal of Plaintiffs' Complaint for lack of proper service has profound consequences throughout Ohio. This Court must take this opportunity to review the Ninth District's legally flawed Decision so that Ohio Courts and litigants alike will have the proper guidance with respect to raising affirmative defenses where a Defendant is never properly served and the action is never commenced against that Defendant. If the Ninth District's erroneous Decision remains intact, there will be legal authority that holds the commencement of an action against a co-Defendant means there exists commencement of an action against all the Defendants, even those who properly raise and prove the affirmative defense of a lack of proper service

The Ninth District's primary misinterpretation of law is that it truly believes that even though a Defendant is never properly served a Complaint and properly raises and proves the affirmative defense of a lack of service, a Plaintiffs' action against the non-served Defendant can be deemed commenced if a Co-Defendant has waived the same affirmative defense. The Ninth District mistakenly holds that even though a Defendant who was never properly served a Complaint, properly raised the affirmative defense of lack of proper service and filed the correct pleadings for a dismissal, a trial court can retain jurisdiction over that Defendant based upon a Co-Defendant's waiver of the same affirmative defense. In other words, if one Defendant

waives an affirmative defense, that Defendant's waiver of the affirmative defense can be used against all other Defendants who properly raised the applicable affirmative defense and were entitled to a dismissal of the Plaintiff's action.

The irony of the Ninth District's Decision is that it effectively holds that a Defendant who is never properly served, properly raises the affirmative defense of lack of proper service and then files the appropriate pleadings is still subjected to a trial court's jurisdiction because of another party's failure to take the same steps. The Ninth District in its Decision actually cites this Court's strict legal precedents that hold that if service is not properly perfected then the action cannot be deemed commenced and, thus, never pending. Yet, the Ninth District ignored this Court's precedents by erroneously holding that if one Defendant has waived the affirmative defense of lack of proper service, the action is deemed commenced for all of the Defendants despite the fact that the other Defendants were not properly served and the other Defendants raised the affirmative defense of lack of proper service.

The ramifications of the Ninth District Court of Appeals' Decision are very troublesome and will undoubtedly have a negative impact throughout Ohio. The Ninth District has completely ignored this Court's longstanding precedents on what constitutes the commencement of an action. If allowed to stand, the Ninth District's Decision will allow for the commencement of an action against a party who has never been properly served a Complaint so long as another party has waived the necessary affirmative defenses. A Defendant who does everything correctly to warrant a dismissal of a Plaintiff's action is now at the mercy of a Co-Defendant's decision as to what affirmative defenses are raised in the Co-Defendants Answer.

The confusion created by the Ninth District actually materialized recently. On August 28, 2014. The Trial Court in *Suiter v. Karimian*, Summit County Common Pleas Case

No. CV2010-05-3834 faced a virtually identical factual scenario involving Federal Express service in a multi-defendant medical negligence but reached a different result. In *Suiter*, the Trial Court dismissed one defendant who properly raised the affirmative defense because the plaintiffs did not commence the action against that defendant via Federal Express, even though the plaintiffs commenced their action against the Co-Defendants. Had the Trial Court followed the Ninth District's Decision, the action should have been deemed commenced against all the defendants and the one defendant should not have been dismissed. Obviously, this inconsistency created so soon after the Ninth District's Decision warrants this Court's review.

It is clear that the legal deficiencies in the Ninth District's jurisprudence requires guidance and clarification from this Court. This Court now has the opportunity to restore its own precedents and provide all Ohio Appellate Courts and Trial Courts with clarification on the commencement of actions and raising affirmative defenses. This Court should accept jurisdiction over this case in order to address the Ninth District's result-oriented and flawed Decision.

## **II. STATEMENT OF THE CASE AND FACTS**

On October 27, 2011, Plaintiffs-Appellants Eva Ann Hubiak, Melissa Wikman and Stephen Carter ("Plaintiffs") filed this medical negligence action against Defendants-Appellants Akron Radiology, Inc. and Jeffrey S. Unger, M.D. ("Akron Radiology"). Also named as Defendants were Ohio Family Practice Center, Inc., Keli Sabin, M.D., Richard James Dom Dera, M.D. and Amy C. Newman, PAC ("Ohio Family") and Summit Ophthalmology, Inc., and Charles Peter, M.D. ("Summit Ophthalmology"). Several John Doe health care providers were also named as Defendants. Plaintiffs alleged that all of the Defendants were negligent in their

care and treatment of Eva Ann Hubiak from August 2010 through October 2010, causing her permanent injury.<sup>1</sup>

Upon filing the Complaint, Plaintiffs instructed the Clerk of the Summit County Court of Common Pleas to effectuate service of process upon the Defendants via Federal Express. On December 21, 2011, Akron Radiology, Inc. was served with the Summons and Complaint via Federal Express and on November 11, 2011, Dr. Unger was served in the same manner. Service via Federal Express was also completed on the other named Defendants.

It is undisputed that at the time Plaintiffs served all of the Defendants via Federal Express that the Ohio Rules of Civil Procedure did not authorize such service (Appx. 4-5). Consequently, when all the Defendants were served Plaintiffs' Complaint, proper service was not obtained. (*Id.*)

On November 29, 2011, Akron Radiology filed its Answer. In its Answer, Akron Radiology explicitly asserted, among others, the affirmative defenses of failure of service of process, failure to state a claim upon which relief can be granted and failure to file the Complaint within the statute of limitations.

Similarly, Ohio Family filed an Answer on December 29, 2011 raising the affirmative defenses of lack of service, inadequacy of service and failure of appropriate service. In its Answer filed on November 18, 2011, Summit Ophthalmology raised the affirmative defenses that the Trial Court lacked jurisdiction by virtue of Plaintiffs' failure to comply with the pleading requirements of Ohio's Revised Code and that Plaintiffs' action was time-barred by the applicable statute of limitations.

On January 16, 2013, Akron Radiology filed a combined Motion to Dismiss and for Judgment on the Pleadings. Akron Radiology argued that since Plaintiffs improperly served

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<sup>1</sup> The underlying facts that give rise to Plaintiffs' allegations of medical negligence are not relevant to this appeal.

their Complaint via Federal Express, the Trial Court lacked personal jurisdiction. Additionally, as a result of Plaintiffs' failure to obtain proper service of process, Plaintiffs failed to timely commence their action against Akron Radiology within the applicable statute of limitations. More specifically, since Plaintiffs failed to obtain proper service within one year of the filing of their Complaint, Plaintiffs' action was not properly commenced against Akron Radiology as the statute of limitations had already expired.

Also on January 16, 2013, Ohio Family filed a similar Motion for Judgment on the Pleadings based upon a lack of proper service. On April 26, 2013, Summit Ophthalmology filed a Motion for Summary Judgment raising the same argument of a lack of proper service.

On May 16, 2013, the Trial Court correctly granted all of the Defendants' Motions which effectively terminated Plaintiffs' action. In its well-reasoned and in-depth Judgment Entry, the Trial Court held that Plaintiffs' service attempts upon the Defendants via Federal Express were invalid and, thus, Plaintiffs never properly commenced their action against Defendants.

With respect to the affirmative defenses raised by the Defendants, the Trial Court noted that Akron Radiology and Ohio Family both explicitly raised the affirmative defense of a lack of proper services. As to Summit Ophthalmology, although it did not explicitly raise the lack of proper service affirmative defense, it sufficiently raised the affirmative defense of the statute of limitations.

Plaintiffs timely appealed to the Ninth District Court of Appeals. On July 16, 2014, the Ninth District issued its Decision reversing the Trial Court's Journal Entry (Appx. 1-15). In doing so, the Ninth District issued a result-oriented Decision clearly intended to "save" Plaintiffs' medical negligence action. With respect to Akron Radiology, the Ninth District ignored the fact that Akron Radiology did everything legally and procedurally right in order to

establish that Plaintiffs failed to timely commence their action within the applicable statute of limitations. Although Akron Radiology properly raised and proved its lack of proper service affirmative defense, the Ninth District looked to Summit Ophthalmology's own affirmative defenses in order to reverse the Trial Court's proper dismissal of Plaintiffs' Complaint against Akron Radiology and, also, Ohio Family. More specifically, the Ninth District focused on Summit Ophthalmology's failure to raise the affirmative defense of a lack of proper service in order to impose jurisdiction upon Akron Radiology.

It is worth noting that the Ninth District actually agreed that Akron Radiology would have been properly dismissed but for the wording of Summit Ophthalmology's affirmative defenses. First, the Ninth District held that service of Plaintiffs' Complaint via Federal Express did not comply with Ohio's former Civil Rules.<sup>2</sup> (Appx. 4-5):

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.**

(Appx. 5). (Emphasis added).

Next, the Ninth District held that Akron Radiology properly raised the affirmative defense of lack of proper service:

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."

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<sup>2</sup> Effective July 1, 2012, amended Civ. R. 4.1 and Civ. R. 4.3 now allows for service by commercial carriers such as Federal Express.

**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.**

(Appx. 7). (Emphasis added).

Although the Ninth District's inquiry with respect to Akron Radiology should have ended at this time and it should have affirmed the dismissal of Akron Radiology, the Ninth District turned its attention to whether the amended Civil Rule applied to Akron Radiology based solely upon the language of Summit Ophthalmology's affirmative defenses. The Ninth District erroneously believed that the amended Civil Rules allowing for Federal Express service would apply to this case, retroactively, if it could determine that this particular action was "pending." In order to make this erroneous determination with respect to all Defendants, even those who properly raised and proved the affirmative defense of the lack of proper service, the Ninth District, incredibly, focused **only** on the Answer of Summit Ophthalmology and its failure to adequately raise the lack of proper service affirmative defense. (Appx. 9-14).

Of importance, the Ninth District went to great lengths to cite this Court's Decisions in *Mason vs. Waters*, 6 Ohio St.2d 212, 217 N.E.2d 213 (1966) and *Laneve vs. Atlas Recycling, Inc.*, 119 Ohio St.3d 324, 2008-Ohio-3921, 894 N.E.2d 25 for the proper law that "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." (Appx. 9). Once again, the Ninth District's inquiry with respect to Akron Radiology should have stopped here because it is undisputed that service upon Akron Radiology was not properly perfected within one-year of the filing of Plaintiffs' Complaint. As such, Plaintiffs' action could not have been deemed commenced against Akron Radiology and, thus, never pending for the purpose of Ohio's amended Civil Rules.

However, the Ninth District erroneously determined that Plaintiffs' action that was "not commenced" against Akron Radiology miraculously became commenced because Summit Ophthalmology, **not Akron Radiology**, waived the affirmative defense of lack of proper service. (Appx. 10). Although Akron Radiology did everything correctly in raising and proving the affirmative defense of lack of proper service and the Ninth District actually acknowledged this and also recognized that Plaintiffs did not actually commence their action against Akron Radiology, Summit Ophthalmology's wording of its own affirmative defenses constituted a "commenced action" against Akron Radiology. In essence, the Ninth District punished Akron Radiology for doing everything appropriately based upon the conduct of a Co-Defendant. In doing so, the Ninth District has set forth new law wholly inconsistent with this Court's precedents.

The issues presented herein regarding commencement of actions and affirmative defenses have implications far beyond the parties of this case and resolution and clarification of the issues will guarantee all litigants in Ohio with equitable treatment. The Ninth District has completely redefined what constitutes "commencement" of an action and has set forth legal authority that allows commencement of an action against a party that has never been properly served a Complaint and has raised and proven the affirmative defense of a lack of proper service. The Ninth District has ignored this Court's longstanding precedents by holding that commencement of an action against one party who did not raise the appropriate affirmative defenses automatically constitutes commencement of the action against all other parties regardless of whether the other parties have legitimate affirmative defenses.

Moreover, the Ninth District has held that one party's waiver of an affirmative defense can be used to negate another party's affirmative defense that is properly raised, pursued and

proven. The ramification of this holding is bothersome because now, pursuant to the Ninth District's Decision, even though one party properly raises and proves a legitimate affirmative defense, another party's failure to raise the same affirmative defense extinguishes the properly raised affirmative defense of the other party.

This Court now has the opportunity to restore and provide the proper guidance with respect to its longstanding precedents on "commencement" of actions and affirmative defenses. If the Ninth District's Decision is allowed to stand, the end result will be uncertainty, confusion and inconsistent applications of this Court's legal precedents. This Court should accept jurisdiction of this case in order to correct the obvious errors of the Ninth District's legally flawed Decision.

### **III. LAW AND ARGUMENT**

#### **PROPOSITION OF LAW NO. 1: The Ninth District's Holding That One Party's Waiver Of The Lack Of Proper Service Affirmative Defense Constitutes A Commencement Of The Entire Action Against All Parties, Even Those Who Properly Raised and proved The Affirmative Defense Of Lack Of Proper Service, Is Fatally Flawed And Inconsistent With This Court's Longstanding Precedents**

In determining that Summit Ophthalmology's waiver of the lack of proper service affirmative defense can be used to constitute a commencement of Plaintiffs' action against Akron Radiology, and Ohio Family, who properly raised and proved the affirmative defense of a lack of proper service, the Ninth District has completely redefined what constitutes a commencement of an action. The Ninth District misapplied this Court's longstanding precedents and, thus, has impermissibly created law that permits the commencement of an action against a party who has a legitimate ground for dismissal based upon a properly raised and proven affirmative defense.

Ironically, the Ninth District acknowledged this Court's strict precedents with respect to a Plaintiffs' duty to properly serve a defendant in order for there to be a commencement of an action:

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.

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.

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."

(Appx. 9)(Emphasis Added)

This Court's holdings in *Mason* and *Laneve* cannot be any clearer – if service of a Complaint is not perfected, the action cannot be deemed commenced and, thus, it was never pending. In this case, since Plaintiffs' action was never properly commenced against Akron Radiology through proper service of process, the Trial Court never obtained *in personam* jurisdiction over Akron Radiology. *Laneve, supra; Wise vs. Qualified Emergency Specialists, Inc.*, 1<sup>st</sup> Dist. No. C-980802, 1999 WL 1203797 (Dec. 17, 1999).

However, to reverse the dismissal of Akron Radiology, the Ninth District had to overcome several obstacles in order to improperly apply the amended Civil Rules with respect to Federal Express service of Plaintiffs' Complaint. Clearly, the Ninth District's clear intent was to save Plaintiffs' Complaint but in doing so, the Ninth District had to creatively find that Plaintiffs' action was properly commenced and pending against Akron Radiology, which it never was.

In its Decision, the Ninth District confirmed that 1) Plaintiffs failed to properly perfect service of the Complaint because service via Federal Express was not authorized; and 2) Akron Radiology's defense of lack of proper service of process was appropriately raised. (Appx. 5-6; 8, respectively). As such, Akron Radiology was never made a party to Plaintiffs' action such that the Trial Court had *in personam* jurisdiction over Akron Radiology. *Laneve, supra; Wise, supra*. This should have been the end of Plaintiffs' case against Akron Radiology but the Ninth District erroneously looked to Summit Ophthalmology's Answer and affirmative defenses in order to create *in personam* jurisdiction over Akron Radiology.

The Ninth District basically equated Summit Ophthalmology's waiver of the affirmative defense of lack of proper service with a waiver of the same defense by Akron Radiology. This was the only way the Ninth District could find that Plaintiff commenced its action against Akron Radiology and, therefore, pending for the purpose of applying the amended Civil Rules. However, this Court has explicitly held that:

**A party** who voluntarily submits to the Court's jurisdiction may waive available defenses, such as insufficiency of service of process or lack of personal jurisdiction. **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 process.... **Only when a party submits to jurisdiction...will the submission constitute a waiver of the defense.**

*Glozzo vs. Univ. Urologists of Cleveland, Inc.*, 114 Ohio St.3d 141, 2007-Ohio-3762, 870 N.E. 2d. 714, §13 (Emphasis added); See, also, *Halloway vs. General Hydraulic & Machine*, 8<sup>th</sup> Dist. No. 82294, 2003-Ohio 3965.

Pursuant to this Court's above cited authorities, there was no conceivable way for the Ninth District to impose *in personam* jurisdiction upon Akron Radiology based upon a Co-Defendant's failure to adequately raise the affirmative defense of lack of proper service. Since Akron Radiology properly raised the lack of proper service affirmative defense **and** Plaintiffs'

service of their Complaint via Federal Express was not authorized, Plaintiffs' action was neither commenced nor pending against Akron Radiology.

The Ninth District's error is glaringly evident in its desperate attempt to distinguish this Court's Decisions in *Mason* and *Laneve* from this case. (Appx 9-10). In order to avoid this Court's holdings that an action cannot be deemed commenced or pending if there is a lack of service, the Ninth District attempts to rely upon the Eighth District Court of Appeals Decision of *Pullar vs. Upjohn Health Care Services, Inc.*, 21 Ohio App. 3d 288, 488 N.W. 2d 486 (8<sup>th</sup> Dist. 1984). However, the Ninth District's reliance upon the *Pullar* Decision is clearly misplaced because it has nothing to do, whatsoever, with either the commencement of an action or the affirmative defense of a lack of proper service. The fact that the Ninth District relies upon a Decision that has no correlation to this Court's *Mason* and *Laneve* Decisions speaks volumes about its obvious intent to "save" Plaintiffs' medical negligence as opposed to applying this Court's precedents.

Just recently, on August 28, 2014, the Trial Court in *Suiter v. Karimian*, Summit County Common Pleas Case No. CV2010-05-3834 did the right thing under virtually identical facts, i.e., the Trial Court dismissed one defendant since the action was not properly commenced via Federal Express and, thus, not pending. Even though the Plaintiffs' action was deemed commenced and pending against the Co-Defendants, unlike the Ninth District, the Trial Court held that the action was not commenced or pending against the defendant who properly raised and proved the affirmative defense of lack of service:

Plaintiffs did not obtain proper or sufficient service of process upon Dr, Karimian to overcome his affirmative defense. And, **because proper service was not achieved. . .this action did not commence against Dr. Karimian. . . At the time of service of Plaintiffs' Amended Complaint this action was not pending against Dr. Karimian. . . Thus, in this case, Civ. 86 (II) cannot be applied to retroactively incorporate the amendment of Civ. R. 4.1.**

(Id. At 5) (*Emphasis added*).

The Ninth District's Decision and the *Suiter* holding are completely inconsistent.

The Ninth District's Decision erroneously imposes jurisdiction upon Defendants who justifiably raise the affirmative defense of lack of proper service and who have also proven that a Plaintiffs' action has not be commenced as a result of a lack of proper service. In holding that a Co-Defendant's waiver of the lack of proper service affirmative defense constitutes a commencement of a Plaintiffs' action against a Defendant deserving to be dismissed, the Ninth District has completely redefined this Court's longstanding precedents with respect to what constitutes a commencement of an action. This Court must accept jurisdiction over this case in order to correct this obvious error.

**PROPOSITION OF LAW NO. 2: The Ninth District's Holding That One Party's Waiver Of The Lack Of Proper Service Affirmative Defense Can Be Used To Eliminate The Same Affirmative Defense Properly Raised And Proven By Another Party Is Fatally Flawed And Inconsistent With This Court's Longstanding Precedents.**

A Defendant who raises an affirmative defense for insufficiency of service of process before actively participating in the case continues to have an adequate defense relating to service of process. *Maryhew v. Yova*, 11 Ohio St. 3d 154, 464 N.E. 2d 538 (1984); *First Bank of Marietta vs. Cline*, 12 Ohio St. 3N 317, 466 N.E. 2d 567 (1984). A Defendant who asserts the defense of failure of services of process in an Answer does not waive the affirmative defense even if that Defendant proceeds so far as to wait until the day of trial before moving for a dismissal for failure of service of process. *First Bank of Marietta*, supra.

Undoubtedly, this Court in *Maryhew* and *First Bank of Marietta* recognized that a properly raised affirmative defense of lack of proper service cannot be waived unless a Defendant has voluntarily submitted to the jurisdiction of the Court or committed other acts which constitute a waiver of the jurisdictional defense. See *Maryhew*. In this case, it is

undisputed that Akron Radiology did not waive the affirmative defense of lack of proper service. In fact, the Ninth District explicitly held that Akron Radiology properly raised and preserved the lack of proper service affirmative defense. (Appx 7). Yet, the Ninth District used Summit Ophthalmology's waiver of the affirmative defense of lack of proper service to effectively negate Akron Radiology's properly raised and proven affirmative defense.

By determining that Summit Ophthalmology waived the lack of proper service affirmative defense and, therefore, the case was pending against all Defendants for the purpose of Ohio's amended Civil Rules for Federal Express service, the Akron Radiology's affirmative defense of lack of proper service became meaningless. Clearly, when this Court held that a party's participation in litigation does not waive a properly raised affirmative defense, this Court never intended to allow the waiver of a Co-Defendant's affirmative defense to constitute the waiver of another party's properly raised affirmative defense. As previously discussed above, the Ninth District's Decision punishes a Defendant for properly raising an affirmative defense if a Co-Defendant has waived that same affirmative defense.

This Court should accept jurisdiction over this case in order to correct the Ninth District's legally flawed Decision that undoubtedly conflicts with this Court's precedents with respect to affirmative defenses and waiver of them.

#### **IV. CONCLUSION**

Undoubtedly, the Ninth District issued a legally flawed and resulted-oriented Decision in a desperate attempt to save Plaintiffs' action. In doing so, the Ninth District issued a Decision that is in direct conflict with this Court's precedents pertaining to the commencement of actions and raising affirmative defenses. The Ninth District has improperly set forth new law that effectively imposes jurisdiction over a party that has raised a legitimate affirmative defense of a

lack of service and has proven this affirmative defense on the basis that a Co-Defendant separately waived the affirmative defense.

The Ninth District inappropriately relied upon inapplicable case law to avoid this Court's precedents just to save Plaintiffs' medical negligence action. This Court now has the opportunity to correct the Ninth District's legally flawed Decision and restore this Court's precedents on commencement of an action and affirmative defenses. Accordingly, this Court should accept jurisdiction and allow this appeal to proceed so that the important legal issues presented can be reviewed on the merits and reconciled with the Court's precedents.

Respectfully submitted,



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**CERTIFICATE OF SERVICE**

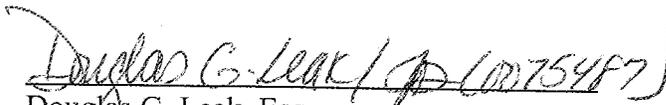
A copy of the foregoing **MEMORANDUM IN SUPPORT OF JURISDICTION OF DEFENDANTS-APPELLANTS AKRON RADIOLOGY, INC. AND JEFFREY S. UNGER, M.D.** was served on September 2, 2014 pursuant to Civ.R. 5(B)(2)(c) by mailing it by United States mail to:

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[Cite as *Hubiak v. Ohio Family Practice Ctr.*, 2014-Ohio-3116.]

STATE OF OHIO )  
 )ss:  
COUNTY OF SUMMIT )

IN THE COURT OF APPEALS  
NINTH JUDICIAL DISTRICT

EVA ANN HUBIAK, ET AL.

C.A. No. 26949

Plaintiffs-Appellants

and

OHIO FAMILY PRACTICE  
CENTER, INC., ET AL.

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

Defendants-Appellees

DECISION AND JOURNAL ENTRY

Dated: July 16, 2014

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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.<sup>1</sup> 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. 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:

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<sup>1</sup> The rules have since been amended, effective July 1, 2012, to allow service by commercial carriers such as Federal Express.

- 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 *Glozzo 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 *Glozzo*, 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.<sup>2</sup> 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).

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<sup>2</sup> 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).

[Cite as *Hubiak v. Ohio Family Practice Ctr.*, 2014-Ohio-3116.]

{¶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 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.

[Cite as *Hubiak v. Ohio Family Practice Ctr.*, 2014-Ohio-3116.]

{¶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.<sup>3</sup> The date that service is affirmatively or impliedly waived constitutes the date of service. This holding is derived from the principle that “a defendant may

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<sup>3</sup> 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.

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.

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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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