

ORIGINAL

IN THE SUPREME COURT OF OHIO

EVA ANN HUBIAK, *et al.*,
Plaintiffs/Appellees

JURISDICTIONAL APPEAL
CASE NO. 2014-1500

vs.

OHIO FAMILY PRACTICE CENTER, INC.,
et al.,
Defendants/Appellants

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

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THIS CASE IS NOT OF PUBLIC OR GREAT GENERAL INTEREST

The Ninth District properly decided a local issue regarding commercial carriers affecting only one court in Ohio, the Summit County Court of Common Pleas. No other court in the entire state faced this issue, which is now well-settled. The Ninth District's decision is in full accordance with applicable case law therein harmonizing the application of a civil rule change to the specific facts. The only issue of public or great general interest is service by commercial carriers generally, which this Court fully addressed and authorized in 2012. The Ninth District's decision merely deciphered the rule change and applied it to the Summit County Court of Common Pleas trial court error. The Ninth District's decision does not arise to public or great general interest since it is solely a Summit County Court of Common Pleas issue.

The issue in this case, is narrowly confined to a filing in the Summit County Court of Common Pleas before July 1, 2012 where service of process by commercial carrier under Miscellaneous Order No. 325 became effective on a defendant July 1, 2012 since it was within one year after a plaintiff's complaint was filed. Any attempt for the Defendants/Appellants to suggest that this decision reaches further than Summit County Court of Common Pleas cases is a gross mischaracterization.

The holding of the Ninth District properly applies a civil rule change to the facts of the dispute, which is not novel issue and is instead, a decision that aligns with this Court's case law and Eighth District Court of Appeals precedence. *See Van Fossen v. Babcock & Wilcox Co.*, 36 Ohio St.3d 100, 522 N.E.2d 489 (1998) ("pending" includes all actions or suits which have not yet reached final judgment); *Pullar v. Upjohn Health Care Servs.*, 21 Ohio App.3d 288, N.E.2d 486 (8th Dist.1984)(Civil Rule of Procedure change was retroactively applied to a pending case). The Defendants/Appellants contend that there was no pending case between the

Plaintiffs/Appellees and Defendants/Appellants when the civil rule change took effect. Flying in the face of those arguments, the Ninth District established multiple ways in which Plaintiff's case was pending for service to become proper thus establishing jurisdiction over all Defendants/Appellants.

The Defendants/Appellants arguments cover broad topics that do not resolve the case *sub judice*. Such arguments cover service of process, pleading requirements and how many cases are filed to the Summit County Court of Common Pleas in the past few years. Arguing these topics is misguided since the facts of this case begin with the passing of the flawed Miscellaneous Order 325 and change to Civ.R. 4.1. The exaggerated arguments made by Defendants/Appellants are dovetailed with conclusory statements claiming prejudice, injustice and litigation uncertainty without justifying those claims. The Defendants/Appellants argue that the Ninth District's decision imposes a higher pleading standard upon a defendant; yet nothing can be further from the truth. The Ninth District's decision shows, although specific to the pleadings *sub judice*, that the particular language was insufficient as an affirmative defense. No further guidance is needed on this issue.

Defendants/Appellants have also claimed that the Ninth District performed a 'gymnastic' effort to save Plaintiff's cause of action. However, the only gymnastics taking place in this matter was Defendants'/Appellants' conduct. After receiving Plaintiff's complaint, the Defendants/Appellants answered the complaint, proceeded in discovery by retaining ten (10) expert witnesses, conducted seven (7) depositions, participating in the pretrial conference all while counsel was billing the clients and exhausting judicial resources. Then Defendants/Appellants, in what appears to be premeditated and coordinated, filed for dismissal and/or judgment on the pleadings on the same day. Not surprisingly, Defendants/Appellants

filed the aforementioned motions once the one-year to serve the defendant had passed. Much different than the conduct in the case at bar, the defendants in *Carlisle* informed the plaintiffs three separate times that there was no service of process and that they would not waive service of process. See *Carlisle v. Benner*, 5th Dist. Stark No. CA-6605, 1985 Ohio App. LEXIS 8262 (June 24, 1985). The court in *Carlisle* ruled that such professional conduct did not arise to “laying in the weeds” or “sandbagging.” See *id.* The Defendants/Appellants conduct in the case at bar fell short of the professional conduct exhibited by the defendant in *Carlisle*.

The pretext for Defendants/Appellants argument for jurisdiction and review of this Court is to stop or prevent prejudice and injustice without explaining, exemplifying or illustrating such an effect. The reason for these empty statements is that there is no prejudice or injustice to the Defendants/Appellants. Civ.R. 86 (II) explicitly encourages retroactive application of civil rule changes to pending cases. Defendants/Appellants claim that injustice flows from the Ninth District decision due to the ruling that a co-defendant did not properly raise an affirmative defense therein establishing that the case was certainly and absolutely pending. This argument avoids the fact that the Ninth District established that the case met the “pending” standard by set forth by this Court’s precedent as well as multiple appellate districts. The fact that the case was pending, under multiple criteria, makes the Ninth Districts decision proper on numerous accounts. Simply because Defendants/Appellants do not benefit from the Ninth District’s decision is not prejudice and does not work any injustice.

The only potential prejudice or injustice arising from the case sub judice would be to the Plaintiffs. Such prejudice and injustice would occur if the trial court’s dismissal and judgment on the pleadings were ultimately upheld. Defendants/Appellants have likened the case *sub judice* with the *J. Bowers* decision. In *J. Bowers*, a default judgment was rendered against an

out-of-state defendant. *See J. Bowers Construction Co. Inc.*, 9th Dist. Summit No. 25948, 2012-Ohio-1171. The defendant in *J. Bowers* was prejudiced and worked injustice since that party did not have their day in court. The Defendants/Appellants in the case at bar, not only preserved the right to litigate the suit on its merits, they all engaged in answering the complaint, coordinating for discovery, retaining a total of ten (10) expert witnesses and participating in a pretrial conference. The Defendants/Appellants did not file for dismissal or a judgment on the pleadings until after *J. Bowers* was decided. Defendants/Appellants did not file the aforementioned motions due to prejudice or injustice, but instead, as a strategic aim to avoid the merits of this case and any potential liability. The only party who has been worked an injustice and has experienced prejudice is the Plaintiff, Mrs. Hubiak, since she has not had her day in court.

The Defendants/Appellants reliance on *J. Bowers* is further flawed since the Ninth District's decision foresaw the effect of the amendment and even made room for a circumstance like the case sub judice.

This is not to say that service via a commercial carrier such as Federal Express is not an effective or efficient means of effectuating service. Notably, the 2012 proposed amendments to Civ.R. 4.1(A) and 4.3(B) would allow service by commercial carrier. However, given the proposed amendment, it is logical to conclude that such service is not currently acceptable under the rules as no amendment would be necessary if such service were already acceptable under the current rules. 2012 Staff Note, Civ.R. 4.1-4.6, 30, 73. *Id* ¶15.

J. Bowers was decided by the Ninth District prior to the amendment's effective date therein allowing for commercial carrier once such service was acceptable and effective.

The issue properly identified and settled by the Ninth District was confined to confluent effect of the local order, civil rule changes and chronological circumstances of the case at bar. The Ninth District's decision does not change any requirements for pleading, perfecting service, and raising defenses like the Defendants/Appellants erroneously suggests. The Ninth District's

decision does not, and never will, be of public or great general interest. The facts and circumstances surrounding the local rule change, civil rule changes and chronology of this exact case can be distinguished from every case not filed in the Summit County Court of Common Pleas before July 1, 2012 where service of process by commercial carrier under Miscellaneous Order No. 325 became effective on a defendant July 1, 2012 since it was within one year after a plaintiff's complaint was filed. Ms. Hubiak, and other similarly situation plaintiffs in the Summit County Court of Common Pleas, are the only parties that could ever be prejudiced or worked an injustice on this issue.

STATEMENT OF FACTS

On October 29, 2010, Ms. Hubiak suffered a stroke at home after being treated by Defendants/Appellants. The stroke was caused by undiagnosed carotid artery disease and blockages which are typically treated surgically when timely diagnosed. Ms Hubiak's stroke has left her permanently disabled.

Prior to her stroke, Ms. Hubiak had developed transient symptoms of loss of vision in the right eye, numbness and parasthesias in the left hand, and headaches. She was evaluated by a physician assistant, Amy Newman, PA-C, who then discussed the care with the family doctors, Dr. James Dom Dera and/or Dr. Kelli Sabin, all of whom are employed at Ohio Family Practice Center, Inc. There should have been concern that Ms. Hubiak had either suffered a stroke or was demonstrating warning signs of a stroke (TIAs), followed by a diagnosis to determine the cause. Ms Newman, Dr. Dom Dera, and/or Dr. Sabin, all practicing at Ohio Family Practice, Inc., ordered a CT scan of the brain and sent Ms Hubiak to an ophthalmologist, Dr. Charles Peter, to evaluate her visual disturbance. The CT scan was performed on August 26, 2009 and was interpreted to be normal by radiologist Dr. Jeffrey Unger, while it was actually abnormal. Ms.

Hubiak claims that as a result of negligent medical care, she was left with life-long and disabling injuries as a result of her stroke. Had a correct diagnosis been timely made, Ms. Hubiak's carotid artery disease would have been treated, and the resulting stroke would never have happened. The Defendants therein rendered negligent medical treatment to Ms. Hubiak between August 24, 2010 and October 29, 2010.

STATEMENT OF THE CASE

On June 23, 2009, the Summit County Court of Common Pleas issued Miscellaneous Order No. 325 designating "FedEx Corporation and all Employees of FedEx Corporation who are 18 years of age and older, acting in their capacity as FedEx employees, as standing process servers...." Therein, the Summit County Court of Common Pleas clerks began using Federal Express as the default method of service over Certified Mail. A list of amendments to the Ohio Rules of Civil Procedure was filed with the General Assembly in January of 2012. *See Civ.R. 86(II)*. The amended Civ.R. 4.1 permits a court's clerk to make service of any process by a commercial carrier service utilizing any form of delivery requiring a signed receipt. *See Civ.R. 4.1(A)(1)(b)*. These amendments became effective on July 1, 2012 therein governing future actions and "actions then pending" unless it is not feasible or if applying the amendment prospectively would work injustice. *See Civ.R. 86(II)*.

Plaintiffs/Appellees commenced their malpractice action on October 27, 2011 due to the negligent medical care rendered by Defendants/Appellants. Instructions for Service provided for the Clerk to serve Defendants/Appellants via Federal Express. The docket reveals that Dr. Sabin, Summit Ophthalmology, Inc., Amy Newman, Dr. Dom Dera, Dr. Peter, Dr. Unger, and Ohio Family Practice Center, Inc. were all served on November 11, 2011 while Akron Radiology, Inc. was served on December 15, 2011.

All Defendants/Appellants filed an answer to Plaintiff's/Appellee's complaint and continued to engage in responsive and active discovery with depositions, retaining ten (10) expert witnesses, and participating in seven (7) depositions. January 16, 2013, Akron Radiology, Inc. and Dr. Unger filed a Motion to Dismiss and a Motion for Judgment on the Pleadings. Ohio Family Practice Center, Inc., Amy C. Newman, PAC, Richard James Dom Dera, M.D., and Kelli Sabin, M.D. filed a Motion for Judgment on the Pleadings on the same day. Plaintiffs/Appellees responded to these motions with Memorandums in Opposition dated January 29, 2013 and February 7, 2013. Thereafter on April 26, 2013, Summit Ophthalmology, Inc. and Charles Peter, M.D., filed a Motion for Summary Judgment. The trial court granted all Defendants'/Appellants' motions and dismissed the case with prejudice on May 6, 2013. On May 31, 2013, Plaintiffs/Appellees timely filed a Notice of Appeal over the May 6, 2013 Judgment Entry.

On appeal, the Ninth District reviewed the trial court's decision *de novo* reversing the judgment and remanding the cause. *See Hubiak v. Ohio Family Practice Ctr., Inc.*, 9th Dist. Summit No. CV 2011-10-6095, 2014-Ohio-3116. The sitting judges were Presiding Judge Frank D. Celebreeze, Jr. from the Eighth District, Judge Joseph, J. Vukovich and Judge Gene Donofrio, both from the Seventh District Court of Appeals. *See id.* These judges were assigned to this case since the Ninth District panel of judges recused themselves. Substantively, the court found that the amendment to Civil Rule 4.1, which became effective during the case *sub judice*, rendered what was previously improper service effective on July 1, 2012. *See id.* Since service of process became proper and effective within one year after Plaintiff's complaint, the trial court had acquired jurisdiction over the Defendants/Appellants. *See id.* The Ninth District found that the trial court erred in dismissing the claims against Defendants Akron Radiology and Ohio

Family Practice and also erred by granting summary judgment in favor of the Summit Ophthalmology. *See id.*

PROPOSITIONS OF LAW

I. FAIRNESS

Plaintiffs/Appellants would never have chosen to attempt to serve Defendants/Appellees via Federal Express had it not been for Miscellaneous Order No. 325 issued by the Summit County Court of Common Pleas. Judge Stormer, Judge Gallagher, Judge Callahan, Judge Parker, Judge Cosgrove, Judge Rowlands, Judge Hunter, Judge Teodosio, and Judge McCarty all signed this Order, as they were the presiding judges at the time it was issued. Ms Hubiak, and other similarly situated plaintiffs, relied on Miscellaneous Order No. 325.

There was no reason to anticipate that a dismissal with prejudice could result, especially since the Summit County Court of Common Pleas had specifically allowed this method of service. In essence, the Summit County Court of Common Pleas issued an Order allowing for opposing parties to be served via Federal Express, and then dismissed Plaintiffs' complaint for following it. Some judges have even gone on record to state that parties following this order were not at fault. For example, Judge Thomas Teodosio held, in a similar situation, that “[p]laintiff was not at fault. To dismiss this case under these circumstances would not accomplish justice and would not be within the spirit of the Civil Rules to resolve cases upon their merits and not upon pleading deficiencies.” *White v. Summa Health System Barberton Hospital, et al.*, Summit C.P. No. CV 2011-07-3870, *2-*3 (April 29, 2013) (emphasis added).

With respect to Miscellaneous Order No. 325, Judge Teodosio held:

The failure of the service was due **solely** to the policy of the Clerk of Courts at the time as reflected in the Local Rules because the use of FedEx service was later held to be in conflict with the Ohio Civil Rules of Procedure by the Ninth District...

Id. at *2 (emphasis added). In a similar situation, Judge Amy Corrigan Jones held that “...**this Court cannot punish Plaintiff for following an order of this Court regarding service of process.**” *Mary Ann Kruskamp v. Alfred V. Ciraldo, M.D., et al.*, Summit C.P. No. CV-2010-08-5880, *7 (February 12, 2013) (emphasis added). Furthermore, she held:

There is no dispute that absent the use of Federal Express service of process in this case that Plaintiff’s claims would be proceeding without challenges to the statute of limitations. The fact that an order of this Court authorizing Federal Express service of process when such was not authorized under the Civil Rules, would not accomplish justice and would not be within spirit of the Civil Rules to resolve cases upon their merits and not upon pleading deficiencies.

Id. at *8 (emphasis added).

This Court has held that “[t]he Ohio Rules of Civil Procedure were intended to promote the resolution of cases on their merits rather than on pleading deficiencies.” *Radio Parts Co. v. Invacare Corp.*, 178 Ohio App.3d 198, 2008-Ohio-4777, 897 N.E.2d 228, ¶10 (9th Dist.) (internal citations omitted). Additionally, the Ohio Supreme Court has held that “Civ. R. 1(B) requires that the Civil Rules shall be applied to effect just results.” *Peterson v. Teodosio*, 34 Ohio St.2d 161, 297 N.E.2d 113, 122 (1973). The Sixth District has held that “a cause of action will not be barred by failure to obtain service within the prescribed time when such failure is caused by unreasonable delay attributable to the clerk of courts or the court itself.” *Scott v. Orlando*, 2 Ohio App.3d 333, 442 N.E.2d 96 (6th Dist.1981). Other courts have held that a party should not be punished when they have done what the law requires but have failed due to an error by the clerk of courts or the court itself. *Welfare Finance Corp. v. Estep*, 170 Ohio St.391, 165 N.E.2d 789 (1960); *Pollock v. Rashid*, 117 Ohio App.3d 361, 690 N.E.2d 903 (1st Dist.1996).

Punishing a party for a problem created by the court or its clerks is against public policy and the purpose of the Ohio Rules of Civil Procedure. *See Radio Parts* at ¶10. Plaintiffs/Appellants did not pass the Order, alter the Ohio Rules of Civil Procedure and therefore are not at fault for

the issue arising in this case. The trial court's dismissal would have left Ms. Hubiak and her family without any opportunity for redress solely due to an issue that was borne by the local trial court and its clerks. Such a dismissal prevents justice on the merits and contradicts the purpose of the Ohio Rules of Civil Procedure.

II. Rule Changes

In January of 2012, the Ohio Supreme Court filed a list of amendments to the Ohio Civil Rules of Procedure with the General Assembly. These amendments changed the language of Civ.R. 4.1 and 4.3 to allow service by a "commercial carrier service," such as Federal Express. Civ.R. 86(II) states that the amendments are to become effective on July 1, 2012, and that 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..." (Ohio Civ.R. 86(II)). If service is obtained within one year after filing a complaint with the court, a civil action is commenced. *See* Civ. R. 3(A).

In the case *sub judice*, the Plaintiff/Appellees filed a complaint against all Defendants/Appellants on October 27, 2011. Federal Express notice of the complaint, or service, was delivered to all Defendants/Appellants by December 15, 2011. The amendments to the civil rules of procedure became effective on July 1, 2012, which were explicitly encouraged to apply retrospectively to pending actions. The Federal Express notice of Plaintiff's/Appellee's complaint delivered and accepted by all Defendants/Appellants thus became proper, effective and perfected on July 1, 2012. Plaintiff's/Appellants's complaint was filed well within one year of July 1, 2012 therein establishing that the case was commenced and pending.

III. Pending

The Defendants/Appellants contend that there was no pending case between the Plaintiffs/Appellees and Defendants/Appellants when the civil rule change took effect. The hope of that argument is to bar the retrospective application of the civil rule change. Defendants/Appellants have focused squarely on the failed attempt of Summit Ophthalmology, Inc. and Charles Peter, M.D. to raise the service of process affirmative defense. The Ninth District found that the case was “pending” and did so without solely relying on a Defendant/Appellant waiving the requirement for service of process.

It has been a long-standing position of this Court that the word “pending” includes all actions or suits, which have not yet reached final judgment. *See Van Fossen v. Babcock & Wilcox Co.*, 36 Ohio St.3d 100, 522 N.E.2d 489 (1988). This Court has also held that an action is “pending” after the lower tribunal has rendered a final adjudication where an appeal has not yet been filed. *See John Ken Alzheimer's Center v. Ohio Certificate of Need Review Bd.*, 65 Ohio App.3d 134, 583 N.E.2d 337, (10th Dist.1989) (internal citations omitted). The Ninth District cited to the *Pullar* case where a change to the civil rules was applied retrospectively to review the lower court’s decision. *See Pullar v. Upjohn Health Care Servs.*, 21 Ohio App.3d 288, 488 N.E.2d 486 (8th Dist.1984). The trial court in *Pullar* granted summary judgment after an amendment to the civil rules became effective. *See id.* That case was deemed pending for retrospective application of a civil rule change even after summary judgment had been entered. *See id.*

A new rule of Civil Procedure applies retrospectively to a pending matter. The very nature of the Civil Rules is “procedural” and therefore they can be applied retroactively. *See Denicola v. Providence Hosp.*, 57 Ohio St.2d 115, 387 N.E.2d 231(1979); *Kilbreath v. Rudy*, 16 Ohio St.2d 70, 242 N.E.2d 658(1968). The Ohio Supreme Court has held:

Procedural laws are only applied retrospectively to cases which have not come to trial prior to the effective date of the new law.

Hanson Machinery Co. v. Limbach, 22 Ohio St.3d 209, 211, 490 N.E.2d 582 (1986)(internal citations omitted).

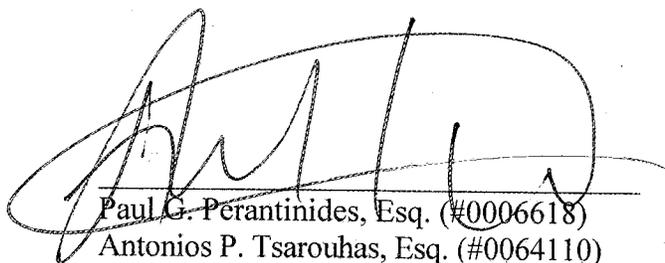
In the *Estate of Johnson*, the Ohio Supreme Court applied a statute that went into effect in 2004 retrospectively to conduct that occurred in 2001. *Estate of Johnson et al. v. Randall Smith, Inc.*, 135 Ohio St.3d 440, 445, 2013-Ohio-1507, 989 N.E.2d 35. In *State v. Mitchell*, 47 Ohio App.2d 61, 352 N.E.2d 636 (2nd Dist. 1975), the Second District Court of Appeals applied the Ohio Rules of Criminal Procedure to an action which was pending at the time a rules took effect. Prior to the July 1970 amendments taking effect, the court in *Stokes* held that the application of the ORCP amendments, effective July 1, 1970, were applicable to a libel action filed March 2, 1970 since it “would not work an injustice,” referring specifically to Civ. R. 86, stating that the rules “should be construed and applied to effect just results.” *Stokes v. Lorain Journal Co.*, 26 Ohio Misc. 219, 220, 266 N.E.2d 857 (C.P.1970) (citing Civ. R. 1(B)).

The trial court should have applied the 2012 amendments to the Ohio Civil Rules of Procedure retroactively since the rule change was procedural in nature and the case was pending. The case sub judice was a pending action in which the amendments to which the Civil Rules explicitly encouraged retrospective application. The complaint was filed to the court in October of 2011, and within one year as required by Civ.R. 3, service became effective and proper to establish jurisdiction over the Defendants/Appellants on July 1, 2012. The Plaintiffs/Appellees commenced their action properly and perfected service within one year of filing. The Ninth District properly rectified the issues in this case by applying the amendments retrospectively, which comports with the common law of this Court and multiple district courts. The trial court erred by granting Defendants/Appellants motions for dismissal and judgment on the pleadings

since the amendment to the civil rules of procedure became effective within one year after the complaint was filed. Defendants/Appellants knew of the civil action against them, participated in the pending action and came under the jurisdiction of the Summit County Court of Common Pleas.

CONCLUSION

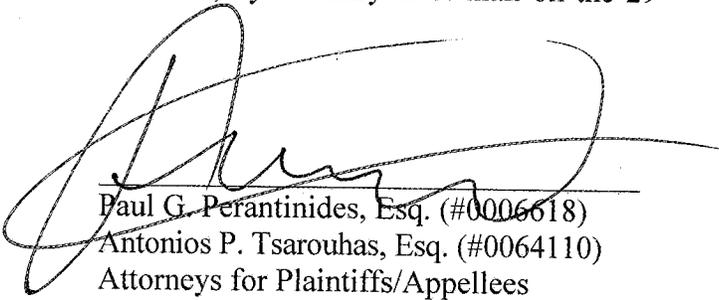
For the foregoing reasons, it is respectfully submitted that Defendants/Appellants prayer for jurisdiction is not of public or great general interest. Plaintiffs/Appellees respectfully move that this Court deny jurisdiction due to the limited reach and effect of the Ninth District Court of Appeals decision on this narrow matter.

A large, stylized handwritten signature in black ink, appearing to read 'Paul G. Perantinides', is written over a horizontal line.

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CERTIFICATE OF SERVICE

I hereby certify that a copy of the foregoing Brief and Opposition to Jurisdiction was sent to Appellants' counsel, Stacy Delgros, Esq., 222 South Main Street, Akron, OH 44308, David Best, Esq., 4900 West Bath Road, Akron, OH 44333, Stephen Griffin, Esq. and Michael Kahlenberg, Esq., 825 S. Main Street, North Canton, OH 44720, and Marc Groedel, Esq., 101 West Prospect Ave., Ste. 1400, Cleveland, OH 44115-1093, by ordinary U.S. mail on the 29th day of September, 2014.



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