

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

**DEFENDANTS-APPELLANTS AKRON RADIOLOGY, INC. AND JEFFREY S.
UNGER, M.D.'S MOTION FOR RECONSIDERATION**

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MOTION FOR RECONSIDERATION

This is a case in which the erroneous Decision of the Ninth District Court of Appeals unjustifiably and unprecedently allows for the commencement of an action against a defendant who was never properly served a complaint and who also raised and proved the affirmative defense of lack of service. The ramifications of the Ninth District's Decision are extremely bothersome, i.e. if the Ninth District's Decision is allowed to stand, defendants throughout all of Ohio who have not been properly served a complaint are at the risk of being subjected to a court's jurisdiction so long as another party has waived the applicable and necessary affirmative defenses. In other words, one defendant can conceivably do everything appropriately to warrant a dismissal but still be sued as a result of a co-defendant's decision as to what affirmative defenses to raise.

The fact that this case is of great public and general interest is supported by three justices of this Court who would accept jurisdiction of this case. In dissenting from the majority, three justices of this Court recognize that the Ninth District's Decision is at least worthy of this Court's attention and jurisdiction. As such, this entire Court should, likewise, accept jurisdiction over Defendants' Propositions of Law in order to restore the principles of substantial justice and due process guaranteed to all litigants throughout Ohio.

Once again, why this **entire case** is of public and great general interest necessitating this Court's review is already supported by three Justices of this Court who agree that all of Defendants' Propositions Of Law should be accepted for review. Justices O'Donnell, Kennedy and French correctly recognized the vital importance of this entire case and that this Court should accept jurisdiction over Defendants' Propositions of Law. This Court should similarly accept jurisdiction and review this entire case.

Pursuant to S.Ct. Prac. R. XI, §2(B)(1), Defendants hereby move this Court to reconsider its four-to-three decision of February 18, 2015 declining to accept jurisdiction over this appeal. Mindful that a motion for reconsideration shall not constitute a reargument of the issues, Defendants reemphasize the significant legal implications and collateral consequences for litigants throughout all of Ohio that will arise if the Ninth District's Decision is left undisturbed. This case presents important questions for this Court's clarification and guidance, i.e. (1) the proper commencement of actions; and (2) the effect of one party's waiver of an affirmative defense upon another party. The Ninth District's misinterpretation and misapplication of the applicable law pertaining to these areas of law is of such public and great general interest throughout **all** of Ohio that it warrants this Court's reconsideration of its denial of jurisdiction over Defendants' two Propositions of Law.

It is Defendants' intention to seek reconsideration in order to bring to the attention of all justices of this Court the substantial public and general interest of this entire case, as three justices have already acknowledged. Reconsideration should be granted and jurisdiction over this case should be accepted because the Ninth District essentially misapplied the law pertaining to the commencement of actions and the waiver of affirmative defenses. Permitting the Ninth District's Decision to stand will inevitably perpetuate the contradictory and inconsistent application of Ohio law. Ohio courts and litigants alike deserve fair, consistent and predictable application of Ohio law through this Court's guidance.

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

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 should accept jurisdiction over this case since the Ninth District has effectively misapplied this Court's precedents of *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. By ignoring this Court's precedents, the Ninth District has created law where the actions/inactions of a co-defendant can impose jurisdiction upon an unrelated defendant even though (1) there was a lack of proper service upon that unrelated defendant; (2) the applicable affirmative defenses were timely and properly raised by that unrelated defendant; and (3) there were justifiable grounds upon which that unrelated defendant should be dismissed. If the Ninth District's erroneous Decision is allowed to stand, even though a defendant is not properly served a Complaint and properly raises and proves the affirmative defense of lack of service, a plaintiff's action against the non-served defendant can be deemed commenced if a co-defendant has waived the applicable affirmative defenses.

This unfounded proposition of law created by the Ninth District undoubtedly warrants this Court's review.

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.

Similarly, the Ninth District's Decision is inconsistent with this Court's precedents of *Maryhew v. Yova*, 11 Ohio St. 3d 154, 464 N.E. 2d 538 (1984) and *First Bank of Marietta vs. Cline*, 12 Ohio St. 3N 317, 466 N.E. 2d 567 (1984). In these cases, this Court never contemplated that the waiver of a co-defendant's affirmative defense could constitute the same waiver of another defendant's properly raised affirmative defense. Yet, this is exactly what the Ninth District's Decision allows for, i.e. one defendants' waiver of the lack of proper service affirmative defense can be used against a co-defendant in order to invoke jurisdiction, despite the fact that the co-defendant properly raised the affirmative defense of a lack of proper service.

In conclusion, three justices of this Court recognize that the Ninth District's Decision is worthy of this Court's jurisdiction and review. Likewise, this entire Court should accept jurisdiction over this case, as already recognized by Justices O'Donnell, Kennedy and French. It is evident that the legally flawed reasoning of the Ninth District and the grave ramifications of its Decision must be reviewed by this Court.

Left undisturbed, the Ninth District's erroneous Decision will have a resounding effect on all litigants and courts throughout Ohio. There will inevitably be confusion throughout Ohio with respect to the commencement of actions, affirmative defenses and waivers of affirmative defenses.

Defendants request that this Court reconsider its 4-3 Decision denying jurisdiction and then allow this appeal to proceed so that these important legal issues can be reviewed and reconciled with this Court's precedents and the existing law in Ohio.

Respectfully submitted,

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PROOF OF SERVICE

A copy of the foregoing was served on March 2, 2015 pursuant to Civ.R. 5(B)(2)(f) by the Court's E-Filing System or via other electronic means to

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