

IN THE SUPREME COURT OF OHIO

ORIGINAL

EVA ANN HUBIAK, *et al.*,

Plaintiffs/Appellees

vs.

OHIO FAMILY PRACTICE CENTER, INC.,  
*et al.*,

Defendants/Appellants

JURISDICTIONAL APPEAL  
CASE NO. 2014-1500

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

PLAINTIFFS/APPELLEES, EVA ANN HUBIAK, ET AL., MOTION TO  
STRIKE AND OPPOSITION TO DEFENDANTS' MOTION FOR  
RECONSIDERATION OF FEBRUARY 18, 2015 DECISION DECLINING  
JURISDICTIONAL APPEAL

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## MOTION TO STRIKE

In a dispute belaboring “service” and its importance, the Defendants/Appellants have failed to serve Plaintiffs/Appellees with a copy of their Motion for Reconsideration. According to Ohio Family Practice’s Motion for Reconsideration the Certificate of Service certifies that Plaintiffs/Appellees have been served with a copy by ordinary mail. The fact is that Plaintiffs/Appellees have never received their service copy. If it were not for the motion that was filed and served by Summit Ophthalmology, Plaintiffs/Appellees would not have known a Motion for Reconsideration was ever filed by Ohio Family Practice.<sup>1</sup> Defendants/Appellants Ohio Family Practice’s Motion for Reconsideration should therefore be struck for failing to serve the pleading in accordance with the Ohio Civil Rule 5.

## MEMORANDUM IN OPPOSITION

### INTRODUCTION

Defendants/Appellants have asked this Court to reconsider its previous denial of jurisdictional review. *See Ohio Family Practice Motion for Reconsideration, Summit Ophthalmology Motion for Reconsideration.* Ohio Family Practice argues “...that additional facts and circumstances that occurred after the filing of its Jurisdictional Memorandum warrant further consideration of Ohio Family’s appeal.” *See Ohio Family Practice Motion for Reconsideration; see generally February 18, 2015 Entry* (declining to accept jurisdictional appeal). As its basis for “further consideration,” Ohio Family Practice relies solely on *Suiter*, a Summit County Court of Common Pleas trial court decision, as the new “facts and circumstances” warranting this Court’s reconsideration of its February 18, 2015 decision. *Id.*

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<sup>1</sup> *See Exhibit B* (email from Attorney Tsarouhas to Attorney Griffin).

citing *Nathan Suiter, et al. v. Hojatollah Karimian, M.D., et al., Summit C.C.P. No. CV2010-05-3834* (Aug. 28, 2014).

The *Suiter* case however, does not present new “facts and circumstances” as Defendants/Appellants Akron Radiology, Inc. and Jeffrey Unger, MD fully briefed and argued the *Suiter* decision when initially seeking jurisdictional review.<sup>2</sup> Not only have Defendants/Appellants Akron Radiology brought the *Suiter* decision before this Court already, the quoted language was left without pertinent portions regarding chronological and procedural differences from the case *sub judice*. The full quote from *Suiter* is,

**From May 27, 2010 to May 28, 2011 (the one year requirement to obtain proper service under Civ.R.3(A))** Plaintiffs did not obtain proper or sufficient service of process upon Dr. Karimian to overcome his affirmative defense. And, because of proper service was not achieved **within one year of the filing of the Complaint**, this action did not “commence” against Dr. Karimian. At the time of service of Plaintiffs [sic] Amended Complaint this action was not pending against Dr. Karimian **(or any other named defendant that had waived the affirmative defense of service of process)**. Thus, in this case, Civ.R. 86(II) cannot be applied to retroactively incorporate the amendment of Civ.R. 4.1.

*Suiter* at Page 5 (emphasis added showing portions excluded by Akron Radiology’s Memorandum in Support of Jurisdiction).

This Court denied jurisdiction after fully considering and knowing about the *Suiter* trial court decision as it was strategically quoted by Defendants/Appellants. *See Exhibit A, see generally February 18, 2015 Entry.*

Defendants/Appellants Ohio Family Practice never amended its Memorandum in Support of Jurisdiction and should not now be permitted to argue this case as “new facts and circumstances.” If each Defendant/Appellant could motion this Court for reconsideration on any case, doctrine, or argument previously argued by a co-Defendant/Appellant, this appeals process

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<sup>2</sup> *See Exhibit A* (Page 12 from Akron Radiology’s Memorandum in Support of Jurisdiction).

would never end. This Court has already fully considered all facts and circumstances in this matter before denying jurisdictional review.

## PROCEDURE

The Defendants/Appellants are essentially asking this Court to grant jurisdictional review of the case *sub judice* due to the trial court's decision in *Suiter* before allowing the Ninth District to hear and decide any appeal over the *Suiter* decision. Even if this Court were to revisit the previously considered decision made in *Suiter*, it is factually distinguishable in all material respects from the case *sub judice*.<sup>3</sup> The similarity between *Suiter* and the case at bar is merely that the dispute in each concerns service of process by commercial carrier in the Summit County Court of Common Pleas.

However, *Suiter* and the case *sub judice* present differing procedural postures and critical facts, i.e. the timing of service and the expiration of the one year service period, at the crux of each dispute, thereby requiring different results. The Plaintiff in *Suiter*, for example, was even given explicit permission to re-serve the Defendants.<sup>4</sup> *See Suiter*. In essence, different conclusions based on different facts between *Suiter* and the case at bar do not implicate "uncertainty" nor would they "portend uncertainty in jurisprudence for all litigants."<sup>5</sup> Defendants/Appellants argue that the Ninth District left uncertain precedent while also claiming that the decision hinged on one point. *See Ohio Family Practice Motion for Reconsideration*.

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<sup>3</sup> Defendants/Appellants are limited to suggesting that the case at bar and *Suiter* are only "largely similar." *See Ohio Family Practice Motion for Reconsideration*.

<sup>4</sup> The Plaintiffs in *Suiter* did not re-serve Defendants thereafter. *See Suiter*.

<sup>5</sup> Defendants/Appellants have so argued *Suiter*'s implications. *Ohio Family Practice Motion for Reconsideration*.

Even if the case did pivot on one point, i.e. affirmative defenses, the result and precedent thereafter would be clear and predictable for litigants. Defendants'/Appellants' arguments are inconsistent and, more importantly, wrongly state the basis for the Ninth District's decision in the case *sub judice*. See *Ohio Family Practice Motion for Reconsideration*; see generally *Ninth District's Decision*. While the Ninth District did consider affirmative defense pleadings generally, it was not essentially the "only reason" as the Defendants/Appellants argue.<sup>6</sup>

### **THIS CASE IS NOT OF PUBLIC OR GREAT GENERAL INTEREST**

The issue decided by the Ninth District is a purely local issue regarding service of process by commercial carriers and is relevant to only one Ohio court: the Summit County Court of Common Pleas. The issue properly identified and decided by the Ninth District was confined to the confluent effect of a Summit County Court of Common Pleas local order allowing service by commercial carrier as applied to the Ohio Civil Rule changes, and the chronology of the case at bar. The case *sub judice* is factually distinguishable from every case *not* filed in the Summit County Court of Common Pleas before July 1, 2012, wherein service of process by commercial carrier under Miscellaneous Order No. 325 became effective on a defendant on July 1, 2012 falling within one year after a plaintiff's complaint was filed. Ohio case law is well established and the Ninth District has harmonized the case at bar with the existing precedent.

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...." Thereafter, the Summit County Court of Common Pleas clerks began using Federal

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<sup>6</sup> The Ninth District's decision was based on Plaintiffs/Appellants serving Defendants/Appellants within one year of commencing the complaint pursuant to Civ.R.3. See *Ninth District's Decision*; see *supra* at Page 3.

Express as the default method of service instead of Certified Mail. The Ohio Civil Rule change allowing commercial carrier service was authorized by this Court in 2012 and became effective on July 1, 2012. *See Civ.R. 86 (II)*. Ohio Civil Rule 86 (II) “govern[s] all proceedings in actions brought after [the rule changes] take effect and also all further proceedings in actions then pending” unless it is not feasible or if applying the amendment prospectively would work injustice. *Id.* A civil action is commenced once service is obtained within one year after filing a complaint with the court. *See Civ. R. 3(A)*. The Ohio Supreme Court has held that “[p]rocedural 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).

The Plaintiffs’/Appellees’ complaint was filed on October 27, 2011 and served upon and accepted by all Defendants/Appellants by December 15, 2011 via Federal Express. Plaintiffs/Appellees had until October 27, 2012 to perfect service upon Defendants/Appellants. When Civil Rule 86(II) became effective on July 1, 2012, the case at bar had not come to trial nor was there a final adjudication or appeal. Since the case at bar was pending and commenced on July 1, 2012, the Federal Express notice of Plaintiffs’/Appellees’ complaint, delivered and accepted by all Defendants/Appellants became proper and effective. The Summit County Court of Common Pleas thus established jurisdiction over the Defendants/Appellants as of July 1, 2012.

The aforementioned case law and the Ninth District’s holding clearly and unequivocally demonstrates how procedural rule changes apply retroactively under particularized circumstances. Certainly a disgruntled party may appeal over this issue in the future, but there is

no “guesswork” left for the Summit County Court of Common Pleas.<sup>7</sup> The precedent is clear and settled: any of the trial courts within the Ninth District can apply and uphold the precedent of the Ninth District and this state in a “uniform fashion.”<sup>8</sup> There also remains no district court “split” to resolve, and instead, the Ninth District’s decision in the case at bar aligns with this Court’s case law and the Eighth District’s holding in *Pullar*. 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); see *Pullar v. Upjohn Health Care Servs.*, 21 Ohio App.3d 288, N.E.2d 486 (8<sup>th</sup> Dist.1984) (Civil Rule of Procedure change was retroactively applied to a pending case). The precedent and Ohio Civil Rules ultimately categorize each remaining case as pending, commenced, dismissed, or otherwise. The status of the remaining case will determine how retroactive procedural rule changes should be applied.

Presiding Judge Celebrezze, along with Judges Vukovich and Donofrio, aptly applied this Court’s holdings, Ohio Civil Rule 3(A) and Ohio Civil Rule 86(II) changes to properly decipher the dispute at bar. The Ninth District’s decision also aligns with the Eighth District Court of Appeals’ precedent leaving no district “split” on this issue throughout the entire State of Ohio. Defendants’/Appellants’ suggestion that binding judges within the Ninth District with “a decision made by extra-territorial judges sitting by assignment” renders litigation more costly or that it would result in more appeals costs is without basis. See generally *See Ohio Family Practice Motion for Reconsideration*. Defendants/Appellants have offered this Court no substantive rationale upon which the matter *sub judice* is of public or great interest.

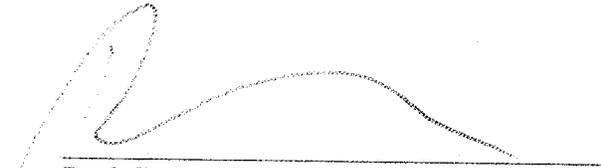
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<sup>7</sup> Defendants/Appellants argue that “guesswork” remains in view of the Ninth District’s decision. See *Ohio Family Practice Motion for Reconsideration*.

<sup>8</sup> Defendants/Appellants argue that the general interest of jurisprudence requires further review of this matter so that the law is administered in a “uniform fashion.” See *Ohio Family Practice Motion for Reconsideration*.

## CONCLUSION

As Defendants/Appellants present no new facts and circumstances warranting this Court's further review, and in view of the aforementioned reasons and those previously set forth in Plaintiffs'/Appellees' September 30, 2014 Memorandum Opposing Jurisdiction, Plaintiffs/Appellees ask this Honorable Court to deny Defendants/Appellants Motion for Reconsideration. Jurisdictional review should once again be denied.



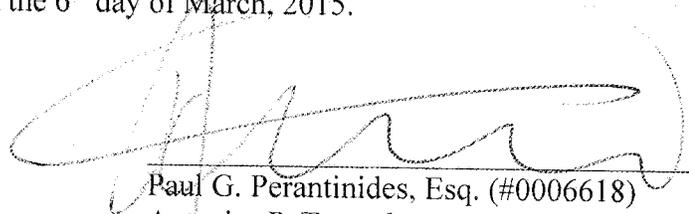
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Paul G. Perantinides, Esq. (#0006618)  
Antonios P. Tsarouhas, Esq. (#0064110)  
Attorneys for Plaintiffs/Appellees

APT/MJD

## CERTIFICATE OF SERVICE

I hereby certify that a copy of the foregoing Motion to Strike and Opposition to Motion for Reconsideration was sent to Appellants' counsel, Stacy Delgros, Esq., 127 Public Square, Suite 3510 Cleveland, OH 44114, Douglas G. Leak, Esq., 1375 E. Ninth St. 9<sup>th</sup> Floor, Cleveland, OH 44114, 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 email on the 6<sup>th</sup> day of March, 2015.



Paul G. Perantinides, Esq. (#0006618)  
Antonios P. Tsarouhas, Esq. (#0064110)  
Attorneys for Plaintiffs/Appellees

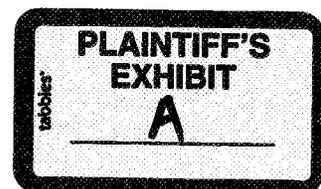
APT/MJD

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.**



## Mark J. Dvorak

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**From:** Tony Tsarouhas  
**Sent:** Friday, March 06, 2015 1:36 PM  
**To:** sgriffin@wr-law.com  
**Cc:** Kara M. Hershberger; Mark J. Dvorak  
**Subject:** Hubiak

Steve,

Just to let you know, your office did not serve us with your Motion for Reconsideration. If it were not for Mark Groedel's Joinder, we would have never known you had filed this pleading with the Supreme Court of Ohio.

Thank you.

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