[Cite as *Gliozzo v. Univ. Urologists of Cleveland, Inc.*, 2006-Ohio-1726.]

COURT OF APPEALS OF OHIO, EIGHTH DISTRICT

COUNTY OF CUYAHOGA

NO. 86371

FRANK GLIOZZO,	:	
Plaintiff-Appellant	:	JOURNAL ENTRY
vs.	:	AND
UNIVERSITY UROLOGISTS OF CLEVELAND, INC., et al.,	:	OPINION
Defendants-Appellees	:	
	:	
DATE OF ANNOUNCEMENT OF DECISION		April 6, 2006
	:	
	:	
CHARACTER OF PROCEEDING	:	Civil appeal from Common Pleas Court
	:	Case No. CV-514796
JUDGMENT	:	REVERSED
DATE OF JOURNALIZATION	:	

APPEARANCES:

For Plaintiff-Appellant:

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For Defendants-Appellees:

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ANTHONY O. CALABRESE, JR., J.:

{¶ 1} Frank Gliozzo ("Gliozzo") appeals the trial court's decision granting the motion to dismiss filed by University Urologists of Cleveland, Inc. and Martin Resnick, M.D., (collectively referred to as "appellees"). For the following reasons, we reverse the decision of the trial court.

{¶ 2} On November 14, 2003, Gliozzo filed a medical malpractice action against appellees. Gliozzo attempted unsuccessfully to serve the complaint via certified mail. The docket reflected the failure of the certified mail, and the Cuyahoga County clerk's office mailed a copy of this failure to Gliozzo's attorney. Gliozzo's attorney failed to make any further attempt to serve appellees.

{¶ 3} Although not served with the complaint, appellees obtained leave to plead and filed an answer asserting various affirmative defenses, including that the claims were barred by the statute of limitations and insufficient service of process.

{¶ 4} In April 2005, nine days prior to trial, appellees moved to dismiss the action, claiming that Gliozzo had failed to commence the action within the applicable statute of limitations.[1] Although recognizing that the motion might have merit, the court denied the motion as untimely because the dispositive motion deadline had

[1] It is undisputed that the one-year statute of limitations would have expired on November 28, 2003.

passed. On the day of trial, appellees orally moved for leave to renew their motion to dismiss. After hearing arguments from both sides, the trial court granted appellees' motion and dismissed the case with prejudice for failure to commence the action within the applicable statute of limitations.

{¶ 5} Gliozzo appeals this decision, raising the three assignments of error contained in the appendix to this opinion.

{¶ 6} In his first assignment of error, Gliozzo argues that the trial court committed reversible error in granting appellees' motion to dismiss. He claims that appellees voluntarily submitted themselves to the court's jurisdiction by fully litigating this matter. We agree.

{¶ 7} A court must obtain personal jurisdiction over a defendant to consider and decide a case. *Coke v. Mayo* (Feb. 4, 1999), Franklin App. No. 98AP-550, citing *Maryhew v. Yova* (1984), 11 Ohio St.3d 154, 156. A court obtains personal jurisdiction over the defendant by one of three ways: 1) by service of process; 2) by the defendant voluntarily appearing and submitting to the court's jurisdiction; or 3) by the defendant involuntarily submitting to the court's jurisdiction by waiving affirmative defenses. *Maryhew*, supra at 156. "The latter may more accurately be referred to as a waiver of certain affirmative defenses." Id.

{¶ 8} Service of process is the necessary prerequisite to the commencement of a civil action. *Gaul v. Crow* (Sept. 22, 1999),

Cuyahoga App. Nos. 74600, 74608-74612, citing *Lash v. Miller* (1977), 50 Ohio St.2d 63. Pursuant to Civ.R. 3(A), an action is commenced by filing a complaint with the court, if service is obtained on a defendant within one year. See, also, R.C. 2305.17. However, an action may be dismissed when service of process has not been obtained after the passage of more than one year. *Maryhew*, supra at 157, citing *Lash*, supra.

{¶ 9} In the present case, Gliozzo admits the failure to perfect service upon appellees. However, Gliozzo argues that by participating in the litigation of this case almost to trial, appellees have submitted themselves to the jurisdiction of the trial court and waived their right to proper service. We agree with Gliozzo's argument.

{¶ 10} The Ohio Supreme Court has held that judgment may be rendered against a defendant who is not properly served with process where the record shows he "has voluntarily submitted himself to the court's jurisdiction or committed other acts which constitute a waiver of the jurisdictional defense." *Maryhew,* supra; see, also, *Garnett v. Garnett*, Cuyahoga App. No. 50857, 1986 Ohio App. LEXIS 7778. While the record reflects appellees timely filed the affirmative defense of insufficiency of process, the record also shows appellees contacted Gliozzo's counsel and requested a leave to plead, filed an answer, attended a case management conference, conducted discovery, exchanged expert reports, attended

pretrials, filed a dispositive motion and filed motions in limine. A review of the docket demonstrates that appellees vigorously defended this case *on the merits*, up until the eve of trial.

{¶ 11} We agree with this court's decision and rationale applied in *Garnett* and find that even though appellees raised the affirmative defense of insufficiency of process, the latter acts of appellees show that they "voluntarily submitted themselves to the court's jurisdiction and waived [their] objection to defective service." *Garnett*, supra.

{¶ 12} Appellees rely heavily on this court's more recent decision of *Holloway v. Gen. Hydraulic & Machine, Inc.,* Cuyahoga App. No. 82294, 2003-Ohio-3965. However, after reviewing the legal authority upon which the *Holloway* court based its decision, we are inclined to reassess our previous position. The purpose of the civil rules is to provide notice to a defendant of any pending legal action and all allegations involved in that action. Here, not only were appellees fully aware of the medical malpractice lawsuit filed by Gliozzo and the allegations contained therein, appellees vigorously participated in the litigation of this action. It was only on the eve of trial, long after dispositive motions had been filed, that appellees moved to dismiss for insufficiency of process.

{¶ 13} Accordingly, we find that in the instant case, appellees voluntarily submitted themselves to the jurisdiction of the court

and waived any objection to defective service.

{¶ 14} Gliozzo's first assignment of error is sustained.

{¶ 15} Our analysis of Gliozzo's first assignment of error renders his second and third assignments of error moot.

{¶ 16} Judgment reversed. This matter is remanded for action consistent with this opinion.

It is ordered that the appellant recover from appellees costs herein taxed.

It is ordered that a special mandate issue out of this court directing the Cuyahoga County Court of Common Pleas to carry this judgment into execution.

A certified copy of this entry shall constitute the mandate pursuant to Rule 27 of the Rules of Appellate Procedure.

ANTHONY O. CALABRESE, JR.
JUDGE

MARY EILEEN KILBANE, J., CONCURS;

COLLEEN CONWAY COONEY, P.J., DISSENTS.
(SEE SEPARATE DISSENTING OPINION ATTACHED.)

N.B. This entry is an announcement of the court's decision. See App.R. 22(B), 22(D) and 26(A); Loc. App.R. 22. This decision will be journalized and will become the judgment and order of the court pursuant to App.R. 22(E), unless a motion for reconsideration with supporting brief, per App.R. 26(A) is filed within ten (10) days of the announcement of the court's decision. The time period for review by the Supreme Court of Ohio shall begin to run upon the journalization of this court's announcement of decision by the clerk per App.R. 22(E). See, also, S.Ct.Prac.R. II, Section 2(A)(1).

Appendix

Assignments of Error:

"I. The trial court committed reversible error when it failed to find that the plaintiff's action was commenced when the defendants voluntarily submitted themselves to the court's jurisdiction by fully litigating this matter.

II. The trial court committed reversible error when it granted the defendants' motion to dismiss.

III. The trial court committed reversible error when it

abused its discretion by granting both the defendants' motion for reconsideration and motion to dismiss on the day of trial."

COURT OF APPEALS OF OHIO EIGHTH DISTRICT

COUNTY OF CUYAHOGA

NO. 86371

FRANK GLIOZZO	:	
	:	
Plaintiff-Appellant	:	D I S S E N T I N G
	:	
vs.	:	O P I N I O N
	:	
UNIVERSITY UROLOGISTS OF CLEVELAND, INC., ET AL.	:	
	:	
Defendants-Appellees	:	

DATE: April 6, 2006

COLLEEN CONWAY COONEY, P.J., DISSENTING:

{¶ 17} I respectfully dissent from the majority opinion which "reassesses [this court's] previous position" in *Holloway v. Gen. Hydraulic*, Cuyahoga App. No. 82294, 2003-Ohio-3965, appeal denied, 100 Ohio St.3d 1487, 2003-Ohio-5992.

{¶ 18} The legal authority on which we relied in *Holloway* was the Ohio Supreme Court's decision in *First Bank of Marietta v. Cline* (1984), 12 Ohio St.3d 317. Holloway argued, just as Gliozzo

does, that by participating in the litigation, the defendant waived his affirmative defense of lack of service of process. We followed the *First Bank of Marietta* case, which held that a defendant who asserts the defense of failure of service of process in his answer has not waived it even though he actually proceeds so far as to wait until the day of trial before moving for dismissal.

{¶ 19} A long line of cases also follows *First Bank of Marietta*. See *Bell v. Midwestern Educational Serv., Inc.* (1993), 89 Ohio App.3d 193, 203-204, 624 N.E.2d 196 ("the appellees properly raised the issue of sufficiency of service as an affirmative defense in their first responsive pleading and they did not waive it by * * * going to trial on the merits"); *Blount v. Schindler Elevator Corporation*, Franklin App. No. 02AP-688, 2003-Ohio-2053 (defendant never voluntarily submitted to the court's jurisdiction because the assertion of the affirmative defense for failure of service of process continues the valid defense, even though a defendant participates in pretrial litigation); *Wise v. Qualified Emergency Specialists, Inc.* (Dec. 17, 1999), Hamilton App. No. C-980802 (a party, by participating in a case, does not waive in personam jurisdiction once the defense of lack of proper service of process has been raised); *Coke v. Mayo* (Feb. 4, 1999), Franklin App. No. 98AP-550 ("A defendant who raises an affirmative defense of insufficiency of service of process before actively participating in the case continues to have an adequate defense relating to

service of process").

{¶ 20} The majority relies on *Maryhew v. Yova* (1984), 11 Ohio St.3d 154. However, I agree with the Tenth District Court of Appeals which easily distinguished *Maryhew*, stating:

> "In *Maryhew*, the Supreme Court held that personal jurisdiction may be acquired 'either by service of process upon the defendant, the voluntary appearance and submission of the defendant or his legal representative, or by certain acts of the defendant or his legal representative which constitute an involuntary submission to the jurisdiction of the court.' Id. at 156. However, because the defendant in *Maryhew* did not file any responsive pleading, the Supreme Court did not address the determinative issue here, i.e., whether a defendant voluntarily submits to a trial court's jurisdiction by participating in litigation, even though the defendant asserts the defense of insufficiency of process in its first responsive pleading. Therefore, the holding in *Maryhew* does not alter our conclusion that the Schindler appellees did not voluntarily submit to the trial court's jurisdiction." *Blount*, supra at _28.

{¶ 21} In the instant case, appellees asserted the affirmative defense of insufficient service of process in their answer. Although they participated in the case, this affirmative defense was never waived. "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." *Blount*, supra at ¶ 27, quoting *Coke*, supra. Therefore, appellees did not voluntarily submit themselves to the court's jurisdiction or involuntarily waive any affirmative defenses by participating in the case. Accordingly, I would affirm the trial court's dismissal.