

IN THE MUNICIPAL COURT OF FINDLAY, OHIO

TOM G. LYON,

1981 FEB -9 AM 9:19

Plaintiff

CASE NO. 81-CV-G-10

vs.

JUNE WYMER,

MEMORANDUM OPINION

Defendant

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This cause came on for trial on the 30th day of January, 1981, upon the Complaint of Plaintiff and the oral defenses of Defendant. At the close of the trial and arguments the case was continued until the 2nd day of February, 1981, for further consideration by the Court of the legal issues and for the opportunity for counsel to present further oral or written arguments on the legal issues herein.

The Court, upon consideration of all the testimony, evidence, and arguments of law in this action finds that personal service was attempted upon Defendant, but that the service of process was by Plaintiff herein, who is forbidden by the Rules of Civil Procedure, as a party to the action, to make service of process. The Court finds that at the outset of the appearance in Court on January 30, 1981, that several oral defenses were presented by Defendant's attorney, to wit: insufficiency of process, insufficiency of service of process, and failure to state a claim upon which relief can be granted. The Court concludes that service in this case was defective, but finds the issue presented for decision at this time is whether Defendant by her appearance and the actions of her and her attorney waived the issue of insufficiency of service of process.

The Court finds that although Defendant attempted to avoid service in this case, that service by a party as occurred herein does not overcome the defect in service. The Court finds that Defendant has filed no responsive pleadings herein, and notes that one of the defenses raised orally at the outset of the hearing of this matter was failure to state a claim upon which

relief can be granted. The Court <sup>1001</sup> is of the opinion that such a defense goes to the merits of the case and not merely to jurisdictional issues. Under the old procedure of the courts of Ohio joinder of the issue of failure to state a claim upon which relief can be granted with the issue of insufficiency of service of process in effect served as a waiver of defective service. Under the Ohio Rules of Civil Procedure, Rule 12(B), every defense shall be asserted in the responsive pleading if one is required, except that certain enumerated defenses may at the option of the pleader be made by motion. The Rule further states "A motion making any of these defenses shall be made before a pleading if the further pleading is permitted." The Rule goes on to say: "No defense or objection is waived by being joined with one or more other defenses or objections in a responsive pleading or motion."

The Court, therefore, finds that there has been insufficiency of service of process in this cause and that Defendant has not waived her defense of insufficiency of service of process.

It is, therefore, ORDERED, ADJUDGED, and DECREED as follows:

1. Service of summons herein is hereby quashed for insufficiency of service of process.
2. This matter is continued until such time as proper service of process is made upon Defendant and this matter is duly set for trial.
3. Exceptions saved to Plaintiff.
4. A Journal Entry shall be prepared and submitted by Attorney Foley subject to approval of Attorney Kentris.

JOHN T. PATTERSON, JUDGE

Approvals on attached page.

BYCH V. RYMER. MEMORANDUM OPINION. PAGE THREE.

APPROVED BY:

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George L. Kentris  
Attorney for Plaintiff

ORIGINAL

SIGNED  
J. PATRICK FOLEY III

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J. Patrick Foley III  
Attorney for Defendant