IN THE MARION MUNICIPAL COURT FOR MARION COUNTY, OHIO

JOHN E. ANDERSON, :

PLAINTIFF, : CASE NO. 99 CVG 00424

vs

FAITH CHAMPER, : JUDGMENT ENTRY

DEFENDANT. :

On April 30, 1999, this cause came on to be heard for trial. The Plaintiff was present, and the Defendant, Faith Champer, was present and was represented by Attorney Mitchell A. Libster. Thereupon, testimony was heard and evidence taken.

For the reasons stated in the accompanying Memorandum of Opinion, it is the Judgment and Order of the Court that the Plaintiff is entitled to judgment for restitution of the premises at 126 Canby Court, Marion, Ohio. It is the further Order of the Court that the set-out date in this matter shall be May 17, 1999.

Court costs are to be paid by the Defendant.

William R. Finnegan
JUDGE WILLIAM R. FINNEGAN

cc: Plaintiff
Mitchell A. Libster, Attorney for Defendant

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JOHN E. ANDERSON, :

PLAINTIFF, : CASE NO. 99 CVG 00424

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FAITH CHAMPER, MEMORANDUM OF OPINION

DEFENDANT. :

On April 30, 1999, this cause came on for trial to the Court. The Plaintiff was present, and the Defendant was present and was represented by Attorney Mitchell A. Libster. Thereupon, testimony was heard and evidence taken.

The evidence revealed that on September 1, 1998, the Plaintiff and the Defendant entered into an oral rental agreement wherein the Defendant rented the property located at 126 Canby Court, Marion, Ohio, at a rental rate of $250.00 per month, due the 1st day of each month. The evidence further revealed that the Defendant has been delinquent on rental payments since February 1, 1999, and that service of the 3-day notice was made on April 12, 1999. The evidence further revealed that the Defendant is still in the property.

The Defendant at trial maintained that the 3-day eviction notice served upon her was not proper, in that the required statutory language of Ohio Revised Code Section 1923.04(A) is not printed in a conspicuous manner. The Defendant further defends by maintaining that the service of process made in this case, of

posting the Summons at the premises, in conjunction with ordinary mail, certificate of mailing service from the Court, pursuant to new Ohio Revised Code Section 1923.06(E)(3) and (C), is unconstitutional, in that it does not comply with the service of summons requirements of Ohio Civil Rules 4 through 4.6.

Turning first to the issue of whether the new version of Ohio Revised Code Sections 1923.06(C), (E)(3) and (G)(2) are constitutional, the Court makes the following observations.

Effective March 30, 1999, Ohio Revised Code Section 1923.06 was amended. Among the changes to said Section was a new way of providing service of summons in actions in Forcible Entry and Detainer. R.C. 1923.06(C) provides that the Clerk of the Court in which the eviction complaint is filed shall mail summons by ordinary mail, along with a copy of the complaint, document, or other process to be served to the defendant at the address set forth in the caption of the summons and to any address set forth in any written instructions furnished to the Clerk. The mailing is to be evidenced by a certificate of mailing which the Clerk shall complete and file. R.C. 1923.06(D) lists what persons will be allowed to serve the summons. R.C. 1923.06(E) provides that the person serving process in a forcible entry and detainer action shall effect service by either locating the person to be served at the premises and tendering a copy of the process and accompanying documents to that person, or by leaving a copy of the summons, complaint, document or process with a person of suitable age and discretion found at the premises if the person to be served cannot

be found at the time the person making service attempts to serve the summons. R.C. 1923.06(E)(3) goes on to provide that service can also be accomplished if neither of the preceding methods are successful, by posting a copy in a conspicuous place on the subject premises.

The new procedure of issuing and serving process in a Forcible Entry and Detainer action is different from the provisions relating to service of summons in the Ohio Rules of Civil Procedure, Civil Rules 4 through 4.6. The issue this Court must determine is whether the new service of summons provisions of Ohio Revised Code Section 1923.06 are constitutional.

In considering this issue, the Court notes that Article IV, Section 5(B) of the Constitution of Ohio, provides that the Supreme Court shall prescribe rules governing practice and procedure in all courts of the state, which rules shall not abridge, enlarge, or modify any substantive right. Said provision goes on to provide that all laws in conflict with such rules shall be of no further force or effect after such rules have taken effect. If the Ohio Supreme Court has spoken to a matter of procedure, the Civil Rules promulgated would control over conflicting statutes. State, ex rel. Silcott v. Spahr, 50 Ohio St.3d 110 (1990); Thomas v. Holiday Inn of Lima, 62 Ohio Misc.2d 487 (Marion Muni. Ct. 1992).

Rule 1(A) of the Ohio Rules of Civil Procedure provides that the Civil Rules prescribe the procedure to be followed in all courts of this State in the exercise of civil jurisdiction at law or in equity, with the exceptions stated in Civil Rule 1(C). Civil

Rule 1(C)(3) provides that the Rules of Civil Procedure, to the extent that they would by their nature be clearly inapplicable, shall not apply to procedure in forcible entry and detainer; however, Civil Rule 1(C) also provides that where any statute provides for procedure by a general or specific reference to the statutes governing procedure in civil actions, such procedure shall be in accordance with the Civil Rules.

Former Revised Code Section 1923.06(A), which was in effect prior to March 30, 1999, specifically provided that summons in forcible entry and detainer was to be issued, in the form specified, and be served and returned as in the Rules of Civil Procedure. As a result, the issue never arose of whether the summons provisions of the Civil Rules were by their nature clearly inapplicable to forcible entry and detainer actions.

This Court will proceed to make a determination as to whether the provisions relating to service of summons by certified mail, as provided by Civil Rule 4.1(A), is clearly inapplicable to actions in forcible entry and detainer.

In considering this issue, the Court must first consider the nature of the forcible entry and detainer action.

Forcible entry and detainer is a summary proceeding in which any judge of a county court may make inquiry into disputes between landlords and tenants, and, where appropriate, order restitution of the premises to the landlord. Given its summary nature, the drafters of the Rules of Civil Procedure were careful to avoid encrusting this special remedy with time consuming procedure

tending to destroy its efficacy. The underlying purpose behind a forcible entry and detainer action is to provide a summary, extraordinary and speedy method for the recovery of the possession of real estate in the cases especially enumerated by statute. State, ex rel. GMS Management Co. v. Callahan, 45 Ohio St.3d 51 (1989); Housing Authority v. Jackson, 67 Ohio St.2d 129 (1981). The Civil Rules will be inapplicable if the application would frustrate the purpose of the forcible entry and detainer proceeding. State, ex rel. GMS Management Co. v. Callahan, supra.

The State, ex rel. GMS Management Co. v. Callahan case held that Civil Rule 52, relating to the preparation of Findings of Fact and Conclusions of Law, is not applicable to forcible entry and detainer actions. The Housing Authority v. Jackson decision found that the provisions relating to Civil Rule 53(E) concerning the 14 day objections period to recommendations by referees, and the provisions of Civil Rule 54(B) concerning final appealable orders, are by their nature clearly inapplicable to a forcible entry and detainer proceeding.

The Defendant relies upon the recent decision of Talley v. Warner, Unreported Cleveland Municipal Court, Housing Division, Case No. 99-CVG-7215 (April 20, 1999), wherein the Court held that Civil Rule 4.1(A) does not frustrate the summary nature of actions in forcible entry and detainer, and is, therefore, applicable to actions in forcible entry and detainer. In making this conclusion, the Talley Court noted that certified mail service is the preferred method of service under the Civil Rules, and that under the

regulations of the United States Postal Service, the certified mail is to be held no fewer than 3 days nor more than 15 days, unless the sender specifies fewer days. The Talley Court went on to find that since a clerk of court is free to specify a period of delivery of as little as three days during which the post office is to hold the mail for delivery, there is only an incremental delay in proceedings if the certified mail is returned as unclaimed or undeliverable.

This Court has considered the reasoning in the Talley decision, and respectfully disagrees with the conclusion found in Talley. This Court notes that Ohio Civil Rule 4.1(A) is quite detailed as to the duties of a clerk in issuing summons by certified or express mail. The Court notes that the only specific instructions for the clerk to send to the post office in issuing summons, is that the certified or express mail is to be returned receipt requested, along with instructions to the delivering postal employee to show to whom delivered, date of delivery, and address where delivered. No provision for the amount of time in which the post office is to hold the certified or express mail is provided under Civil Rule 4.1(A).

This Court is also aware, from processing thousands of civil cases each year, that the post office tends to hold certified mail for time periods closer to the 15 days spoken of in the mail regulations, as opposed to the 3 days minimum provided for under the postal regulations. Given the summary and special nature of forcible entry and detainer actions, this Court comes to the

conclusion that the provisions relating to summons by certified mail are clearly inapplicable to actions in forcible entry and detainer.

This Court notes, since it is held that the provisions for certified mail service under Civil Rule 4.1(A) are clearly inapplicable to actions in forcible entry and detainer, it necessarily follows that the provisions of Civil Rule 4.6, relating to sending of summons by ordinary mail service, when certified or express mail is returned "refused" or "unclaimed", are also clearly inapplicable. The Court notes that the Talley Court found that the portion of said Rule allowing ordinary mail service only after the certified or express mail is returned refused or unclaimed, does frustrate the summary nature of actions in forcible entry and detainer. However, rather than deferring to the new statutory provisions in Ohio Revised Code Section 1923.06, the Talley Court proceeded to create a new procedure for ordinary mail service of summons, not provided for in either the Rules of Civil Procedure or the Ohio Revised Code. Although this Court is in agreement with the Talley Court that the provisions relating to ordinary mail service found in Civil Rule 4.6 frustrate the summary nature of eviction proceedings, this Court disagrees that a local trial court has the authority to create its own rules of civil procedure concerning service of summons as a response.

As this Court finds that the provisions for summons by certified mail under Civil Rule 4.1(A) and Civil Rule 4.6(C) and (D) are by their nature clearly inapplicable to forcible entry and

detainer actions, this Court now turns to consider whether the challenged provisions of Ohio Revised Code Section 1923.06 are constitutional in providing the defendant with due process.

In considering this issue, the Court is aware that the fundamental rule has been set forth in the case of Mullane v. Central Hanover Bank and Trust Co., 339 U.S. 306 (1950), wherein the United States Supreme Court recognized that an elementary and fundamental requirement of due process in any proceeding which is to be accorded finality is notice reasonably calculated, under all the circumstances, to apprise interested parties of the pendency of the action and afford them an opportunity to present their objections.

This Court must decide whether the new statutory method, of allowing service of summons by posting at the residence, if personal or residence service is unsuccessful, combined with the requirement that the clerk of court mail summons as well by ordinary mail, certificate of mailing, complies with the due process requirements of the Constitution.

In considering this issue, the Court is aware that the United States Supreme Court, in the case of Greene v. Lindsey, 456 U.S. 444 (1982), held that service of process by posting summons on the door of a residential apartment, by itself, did not comply with the requirements of the Due Process Clause. However, the majority opinion in Greene strongly indicated that where the subject matter of the action also happens to be the mailing address of the defendant, and where personal service is ineffectual, notice by

mail may reasonably be relied upon to provide interested persons with actual notice of judicial proceedings. Indeed, in Footnote 9 of the majority opinion in Greene, it is stated that even conceding that process served by mail is far from the ideal means of providing the notice the Due Process Clause of the Fourteenth Amendment requires, we have no hesitation in concluding that posted service accompanied by mail service, is constitutionally preferable to posted service alone. See also Footnote 2 of the dissenting opinion of Justice O'Connor, in Greene.

The Court also notes, in considering this issue, that notice by mail is widely recognized as an efficient and inexpensive means of communication to inform a party of a proceeding which may adversely affect his liberty or property interests. Crist v. Battle Run Fire District, 115 Ohio App.3d 191 (Marion Cty. 1996). The Court also notes that the Supreme Court of Ohio, in the case of In Re: Foreclosure of Liens for Delinquent Taxes, 62 Ohio St.3d 333 (1980), held that notification by ordinary mail would comply with the requirements of due process.

This Court has also considered the statements in the Talley case wherein the Court in Talley notes that a similar provision to the present service of summons provisions now found in R.C. 1923.06, was considered, and rejected, by the Rules Advisory Committee of the Ohio Supreme Court in 1995. The Talley Court speculated that the reason for rejection of the proposal was that the proposed change did not provide for verification of receipt or lack of reliability. The speculation of the Talley Court is

incorrect.

The undersigned Judge was a member of the Rules Advisory Committee when this matter was considered by the Rules Advisory Committee in 1995 and 1996. Although some members of the Rules Advisory Committee, indeed, did have some reservations as to the adequacy of the proposed method of service of summons, which is now found in R.C. 1923.06, the actual reason the Rules Advisory Committee did not take action on the proposed changes, was the conclusion that the problem complained about by the proponents of the change, that more than one-third of all evictions filed were having to be continued, because of failure to complete service of summons, appeared to be a purely local problem at the Franklin County Municipal Court, and not a state-wide problem. As a result, the Rules Advisory Committee concluded that amendment of the Civil Rules was not necessary to correct what was basically a problem in one trial court. See Minutes of the Rules Advisory Committee, March 1, 1996, Item 7A, attached to this Memorandum. Of course, the Ohio Legislature was free to reach its own conclusions as to the scope of the perceived problem and fashion an appropriate response, and has done so.

To summarize, the Court finds that the provisions of Ohio Revised Code Section 1923.06(C), (E)(3) and (G)(2) are constitutional, and are not preempted by the Rules relating to summons under Civil Rule 4.1(A) and 4.6(C) and (D).

Turning to the other argument of the Defendant for dismissal, that relating to the language contained in the 3-day eviction

notice that the required language of Ohio Revised Code Section 1923.04(A) is not conspicuous, the Court notes that in Black's Law Dictionary, Fifth Edition (1979), under "Conspicuous term or clause", that "a term or clause is conspicuous when it is so written that a reasonable person against whom it is to operate ought to have noticed it."

Applying this standard to the Notice to Leave Premises served upon the Defendant, the Court notes, that although said document is obviously a photocopy of a photocopy, the required statutory language is not so faded as to render the required language unreadable. Further, the Court finds from the facts that the required statutory language is set forth separately from the rest of the language from the document, enclosed in a separate box, and is typed in all capital letters, that a reasonable person should note the required language. The Court therefore finds that the requirement of conspicuousness has been met in this matter.

The Court finds that the Plaintiff is entitled to recover possession of the premises at 126 Canby Court, Marion, Ohio.

William R. Finnegan
JUDGE WILLIAM R. FINNEGAN

cc: Plaintiff
Mitchell A. Libster, Attorney for Defendant

7. Civil Rules Subcommittee Report.

A. Civ. R. 4.1, special service in F. E. and D. cases. Merz reported that the municipal judges' association said if service in these cases is a problem, it is a problem unique to *Columbus* and is not statewide. The Subcommittee reported this to the amendment sponsor, the Ohio Apartment Association, and is waiting to hear back from them.

B. Civ. R. 68, Offer of Judgment. Merz reported that the ABA has adopted a suggestion to change the federal rule in the same direction as the proposed amendment to the Ohio rule, also to include attorney fees.

C. Civ. R. 75(G). This had been tabled from the last meeting. The Subcommittee's recommendation to adopt their proposed amendment is still on the floor. Walinski reiterated his objection that the proposed amendment is substantive and should not be in the rule. Ray suggested that an amendment to App. R. 27 may be more appropriate. Merz suggested that the matter be referred to the Appellate Rules Subcommittee for determination of whether the appellate rules is the proper place for the change, which was agreed to by consensus.

7. Juvenile Rules Subcommittee. Bartlett reported that the Subcommittee Chair had been in contact with him this morning and that because the chair would not be able to arrive until after noon, Bartlett advised him not to attend. Bartlett reported for the chair that the subcommittee is working on proposed amendments to Juv. R. 28-30.

8. Appellate Rules Subcommittee.

A. App. R. 8(C). A handout was distributed, with a new proposed amendment at the bottom. Jacobs moved to delete the first sentence, but there was no second. There was discussion as to whether the amendment more properly belonged in App.R. 26, and several other comments. Fain suggested that the proposed amendment be remanded to the Subcommittee for further consideration on jurisdictional questions. Upon motion of Merz seconded by Walinski, the proposed amendment was referred back to the Subcommittee.