In the
Supreme Court of Ohio

JENNIFER ACKMAN, Personal Representative and Administrator of the Estate of Janet M. Sollman, deceased	:	Case No. 2023-0975
Appellant,	:	On Appeal from the Hamilton County Court of Appeals,
v.	:	First Appellate District
MERCY HEALTH WEST HOSPITAL, LLC, et al.	:	
Appellees.	:	

MERIT BRIEF OF *AMICUS CURIAE* OHIO ASSOCIATION FOR JUSTICE IN SUPPORT OF APPELLANT JENNIFER ACKMAN, PERSONAL REPRESENTATIVE AND ADMINISTRATOR OF THE ESTATE OF JANET M. SOLLMANN, DECEASED

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STATEMENT OF INTEREST

The Ohio Association for Justice ("OAJ") is a statewide association of over 1,500 lawyers whose mission is to protect and promote Ohioans' right to a fair and impartial civil justice system, including their constitutional right to trial by jury, through advocacy, education and training.

INTRODUCTION AND SUMMARY OF ARGUMENT

The Ohio Civil Rules of Procedure are to be "construed and applied to effect just results by eliminating delay, unnecessary expense and all other impediments to the expeditious administration of justice." Civ.R. 1(B). This Court's decision in *Gliozzo v. Univ. Urologists of Cleveland*, 114 Ohio St.3d 141, 2007-Ohio-3762, stands this purpose on its head. Civ.R. 12(B) has been used to delay justiciable issues, increase expense, waste judicial resources and decide issues on technicalities instead of their merits. It encourages defendants to lie in wait to raise a service defense while actively participating in litigation in order to run out the statute of limitations and have the case dismissed. This litigation gamesmanship is both unjust and contrary to the purpose of the civil rules. This Court must reverse *Gliozzo* and adopt a workable rule for all parties.

This case illustrates the procedural gamesmanship *Gliozzo* permits. The defendant, despite knowing he had not been properly served, litigated the case on its merits for over two years before raising his service defense by motion. The approach adopted in *Gliozzo* encourages this behavior; it allows a defendant to raise an affirmative defense in an answer under Civ.R. 12(B)(2)-(5) and then raise it by motion as late as trial.

This situation all too often prejudices the plaintiffs in an action where a defendant asserts a technical defense by answer, participates in the litigation just long enough to run out the

service clock in Civ.R. 3(A) and the statute of limitations, and then springs its trap on the plaintiff. The plaintiff is then left without recourse to rectify the service error and cannot escape the bar of the statute of limitations.

Civ.R. 12 is not designed to permit this type of delay in presenting specific defenses. The rule specifically states that any of its enumerated defenses, including failure of service of process, shall be made before pleading if a further pleading is permitted. In doing so, the rule recognizes that early presentation of known defenses must be made by motion within a reasonable timeframe.

Further, though the rule permits preservation of service defenses, its purpose runs afoul of Civ.R. 1(B) when permitted to be used as a delay tactic to assert the defense at a more advantageous and strategic time. In order to effect just results, reduce delay, and decrease unnecessary expense, this Court must follow the federal courts and hold that active participation in a lawsuit forfeits the service defenses contained in Civ.R. 12(B)(4) and (5).

STATEMENT OF FACTS AND THE CASE

OAJ adopts the facts presented by Ms. Ackman. OAJ emphasizes that the defendants, utilizing *Gliozzo*, knowingly waited two years, while actively participating in the litigation, before presenting their service defense to have the case dismissed. And, as the underlying courts have pointed out, this behavior was specifically condoned by the holding in *Gliozzo.*

ARGUMENT IN SUPPORT OF PROPOSITION OF LAW

OAJ's Proposition of Law:

> *Civ.R. 12(B) defenses must be raised by motion within a reasonable timeframe, and a party waives its 12(B)(4) and (5) defenses through sufficient participation in the litigation.*

A. CIVIL RULE 12 FRAMEWORK AND ITS CURRENT APPLICATION UNDER *GLIOZZO*.

Ohio Rule of Civil Procedure 12(B) requires the prompt assertion of defenses. *Hoover v. Sumlin*, 12 Ohio St.3d 1, 4 (1984). Civ.R. 12(B) states:

> Every defense, in law or fact, to a claim for relief in any pleading, whether a claim, counterclaim, cross-claim, or third-party claim, shall be asserted in the responsive pleading thereto if one is required, except that the following defenses may at the option of the pleader be made by motion:
>
> (1) Lack of jurisdiction over the subject matter;
>
> (2) Lack of jurisdiction over the person;
>
> (3) Improper venue;
>
> (4) Insufficiency of process;
>
> (5) Insufficiency of service of process;
>
> (6) Failure to state a claim upon which relief can be granted;
>
> (7) Failure to join a party under Rule 19 or Rule 19.1.
>
> A motion making any of these defenses shall be made before pleading if a further pleading is permitted. No defense or objection is waived by being joined with one or more other defenses or objections in a responsive pleading or motion. If a pleading sets forth a claim for relief to which the adverse party is not required to serve a responsive pleading, he may assert at the trial any defense in law or fact to that claim for relief. When a motion to dismiss for failure to state a claim upon which relief can be granted presents matters outside the pleading and such matters are not excluded by the court, the motion shall be treated as a motion for summary judgment and disposed of as provided in Rule 56. Provided however, that the court shall consider only such matters outside the pleadings as are specifically enumerated in Rule 56. All parties shall be given reasonable opportunity to present all materials made pertinent to such a motion by Rule 56.

Civ.R. 12(B). In addition to the specific Civ.R. 12(B) defenses, Civ.R. 12(G) sets forth how and when the enumerated 12(B) defenses must be raised by motion. It states:

> A party who makes a motion under this rule must join with it the other motions herein provided for and then available to him. If a party makes a motion under this rule and does not include therein all defenses and objections then available to him which this rule permits to be raised by motion, he shall not thereafter assert

> by motion or responsive pleading, any of the defenses or objections so omitted, except as provided in subdivision (H) of this rule.

With respect to the Civ.R. 12(B)(2)-(5) defenses specifically, Civ.R. 12(H) sets an outer limit on how and when those defenses are waived. *See Marquest Medical Prods., Inc. v. Emde Corp.,* 496 F.Supp. 1242, 1245 n. 1 (D.Colo.1980). It provides:

> (1) A defense of lack of jurisdiction over the person, improper venue, insufficiency of process, or insufficiency of service of process is waived (a) if omitted from a motion in the circumstances described in subdivision (G), or (b) if it is neither made by motion under this rule nor included in a responsive pleading or an amendment thereof permitted by Rule 15(A) to be made as a matter of course.

Civ.R. 12(H)(1).

The present Civ.R. 12(H)(1) took effect in 1983. The previous rule was amended to "distinguish between waiver of certain Civ.R. 12 motion defenses and waiver of pleading defenses, particularly affirmative defenses, which are raised in the answer and are governed by Civ.R. 8 and Civ.R. 15." Editor's Note, Civ.R. 12, Page's Ohio Revised Code Annotated (Supp.1991) 22.

Following the adoption of the amended Civ.R. 12(H), this Court has reviewed several cases involving 12(H)'s waiver provisions under circumstances like this case.

In *Maryhew v. Yova*, the Court was asked to determine whether the defendant, by appearing in the litigation and obtaining two orders for leave to move or plead voluntarily waived service of process. 11 Ohio St.3d 154, 157 (1984). The defendant appeared in the action and made two requests for move or plead, which were granted. *Id.* at 155. The Court found that the requests for leave to move or plead were not motions made under Civ.R. 12(B) for the purposes of Civ.R. 12(G) and (H). *Id.* at 158. The Court held that the action was not commenced

because service had not been perfected within one year and there was no waiver of service, and the statute of limitation now barred the action. *Id.* at 159.

In *Gliozzo v. Univ. Urologists of Cleveland, Inc.*, this Court was asked to determine whether the defendant's active participation in litigation constitutes a waiver of the insufficiency of process defense under Civ.R. 12(H). 114 Ohio St.3d 141, 2007-Ohio-3762, ¶ 11. The *Gliozzo* Court held that the enumerated defenses of Civ.R. 12(B), if raised in a responsive pleading, were only waived as provided in Civ.R. 12(H). *Id.* According to the Court's holding, defendants "are free to seek dismissal of the case for insufficiency of service, even though they had also mounted a vigorous defense upon the merits." *Id.* at ¶ 12.

1. The Procedural Trap Created by *Gliozzo*.

Since *Gliozzo* was decided, Civ.R. 12 has been employed unapologetically by defendants as a trap for plaintiffs. It permits the defendant to raise a Civ.R. 12(B) defense in an answer and then wait for the most advantageous time to raise it by motion to dismiss the case on its merits. The *Gliozzo* approach frustrates the Civil Rules' purpose and design.

The problem created by *Gliozzo* is at the confluence of several procedural factors. First, *Gliozzo* permits a defendant to raise a defense under Civ.R. 12(B)(2)-(5) in an answer and preserve in perpetuity. *Gliozzo*, 114 Ohio St.3d at ¶ 10; *First Bank of Marietta v. Cline*, 12 Ohio St.3d 317, 466 N.E.2d 567 (1984). Second, pursuant to Civ.R. 3(A), a plaintiff has one year to perfect service on the defendant. Third, if service is not perfected within one year, the plaintiff cannot correct the service error, and the case was never commenced for purposes of the savings provisions of R.C. § 2305.19. *Moore v. Mt. Carmel Health Sys.*, 162 Ohio St.3d 106, 2020-Ohio-4113. Thus, if the statute of limitations expires while the case is pending, and the defendant raises the service defense after one year of participation of the litigation, the plaintiff is without

any recourse to resolve the service issue, and its case is barred by the statute of limitations. *Id.* at ¶ 34.

The current status of the law post-*Gliozzo* and *Moore* gives "*carte blanche* to keen defense lawyers to play a jurisprudential game of cat and mouse." *Maryhew v. Yova*, 11 Ohio St.3d at 162 (Brown, J., dissenting). As the concurrence in the court below noted, this approach allows "a party to sit back and wait for the clock to run out, all the while engaging in active litigation. *Ackman v. Mercy Health West Hosp., LLC*, 2023-Ohio-2075, ¶ 27 (1st Dist.) (Bergeron, P.J., concurring).

There are numerous examples of defendants engaging in this jurisprudential game of cat and mouse since *Gliozzo*. *See e.g.*, *Case v. Clark Insulation*, 2018-Ohio-4611, 125 N.E.3d 203 (8th Dist.); *Leotta v. Great Lakes Pain Management Ctr.*, 2020-Ohio-4995, 161 N.E.3d 91 (8th Dist.); *Beck v. Lally*, 8th Dist., Cuyahoga Nos. 109374 and 109429, 2020-Ohio-4305; *Suiter v. Karimiam*, 9th Dist. Summit No. 27496, 2015-Ohio-3330; *Garber v. Menendez*, Ashland C.P. No. 16-CI-033 (March 22, 2017). In each instance, the defendant used the *Gliozzo* application to evade liability by waiting for the service clock to expire, while actively participating in the case.

2. The *Gliozzo* Interpretation of Civ.R. 12(H) Frustrates Civ.R. 1.

The Civil Rules of Procedure are to be "construed and applied to effect just results by eliminating delay, unnecessary expense and all other impediments to the expeditious administration of justice." Civ.R. 1(B). This Court has held that "[o]ne of the purposes of the Civil Rules is to effect the resolution of cases upon their merits, not on pleading deficiencies." *Hoover v. Sumlin,* 12 Ohio St.3d 1, 5 (1984) (citing *Peterson v. Teodosio*, 34 Ohio St. 2d 161, 175 (1973)). In effect, *Gliozzo* stands Civ.R 1(B) on its head by violating all the principles it

sought to avoid. *See Ackman*, 2023-Ohio-2075, at ¶ 26. *Gliozzo* makes our "civil justice system . . . too slow, too expensive, and too reliant on technicalities." *Id.* at ¶ 26.

The Ohio approach to Civ.R. 12 permits a defendant to raise a 12(B) defense in answer and preserve it in perpetuity. This approach encourages the defendant to wait to raise the defense at the most opportune time, i.e. after the claim is barred. And it does not matter the amount of time or resources expended in furtherance of the litigation while the defendant sat waiting to spring its trap.

Civ.R. 12(B) should be interpreted in a manner that is consistent with Civ.R. 1(B) by employing the procedure for timely asserting pre-answer Rule 12 motions as well as permitting waiver or forfeiture of the service defenses when a defendant actively participates in litigation. This requires this Court to re-examine and overturn its decision in *Gliozzo*.

B. CIVIL RULE 12(B) FAVORS PRESENTMENT OF ENUMERATED DEFENSES BY MOTION WITHIN A REASONABLE TIMEFRAME.

Civ.R. 12(B) enumerates seven specific defenses that may be made by motion. Included in those defenses are:

(1) Lack of jurisdiction over the subject matter;

(2) Lack of jurisdiction over the person;

(3) Improper venue;

(4) Insufficiency of process;

(5) Insufficiency of service of process;

(6) Failure to state a claim upon which relief can be granted;

(7) Failure to join a party under Rule 19 or Rule 19.1.

The rule specifically provides that "A motion making any of these defenses shall be made before pleading if a further pleading is permitted." When an answer is permitted, this requires a motion to be made pre-answer. *See* 5B Wright & Miller, *Federal Practice and Procedure* § 1391 (April 2023 Update).

The general policy behind Civ.R. 12(B) motion is supported by Civ.R. 12(H)(1), which requires all motions under the rule to be consolidated into one motion for all defenses then available to him. *See* Civ.R. 12(G). The Tenth District Court, including then-Judges Moyer and McCormac, agreed: "In accordance with [Civ.R. 12(B) and (G)], it is essential that a party asserting improper venue must make such assertion at the earliest possible moment." *Nicholson v. Landis*, 27 Ohio App. 3d 107, 109 (10th Dist.1985).

With respect to service, the defendant is in a unique position to know when they have not been properly served. For example, in this case, the trial docket reflects the complaint was filed on February 21, 2020, and Dr. Ahmad filed his answer on March 13, 2020. (R. 13.) If service has any purpose, it is to notify the adverse party of the lawsuit. *See Gliozzo*, 114 Ohio St.3d at ¶ 20 (Pfeiffer, J., dissenting). It is obvious that Dr. Ahmad received actual notice of the lawsuit, otherwise he could not have defended himself by filing an answer three weeks after the complaint was filed. *Id.* Perfected service would not have provided Dr. Ahmad with anything he did not already have. *Id.* And by participating in the litigation for the next two years, Dr. Ahmad effectively communicated to the Appellants that they had notice of the lawsuit and were defending themselves on the merits. *Id.*

Nevertheless, Dr. Ahmad knew that he was not properly served. He asserted the failure of service as a defense in his Answer. *See* R. 13, Affirmative Defense ¶ 9; see also Civ.R. 11. Under the framework of Civ.R. 12(B), Dr. Ahmad was obligated to do more than simply raise the

service defense by asserting in his answer and then wait until an advantageous time to raise it by motion.

Civ.R. 12(B) requires a defendant with an available defense to file a motion to assert his defense before filing a further pleading, i.e. an answer. The language of 12(B) has no meaning if it does not mean what it says: "A motion making any of these defenses [12(B)(2)-(5)] **shall be made before pleading** if a further pleading is permitted." (emphasis added). This provision of the rule required Dr. Ahmad to raise the issue by motion if he was aware of it. Or, if the defense was not yet available, he must raise once it becomes available.

Federal courts agree with this approach. *Datskow v. Teledyne, Inc., Continental Products Division,* 899 F.2d 1298, 1303 (2d Cir.1990) ("A delay in challenging personal jurisdiction by motion to dismiss has resulted in waiver, even where, as here, the defense was asserted in a timely answer."); *Marcial Ucin, SA v. SS GALICIA*, 723 F. 2d 994, 997 (1st Cir.1983) ("The objective of Rule 12 is to eliminate unnecessary delay at the pleading stage by requiring the presentation of an omnibus pre-answer motion in which defendant advances every available Rule 12 defense. 5 Wright and Miller, Federal Practice and Procedure, § 1384, at 837."). The Sixth Circuit in *King v. Taylor* held that a defendant who believes he has been improperly served need not raise the defense by motion immediately but cannot wait long past the 120 days for service to raise it.[1] 694 F.3d 650, 661 (6th Cir.2012).

Failing to enforce this provision of Civ.R. 12(B) advances a policy of delay and gamesmanship. If the defendant is aware it has a meritorious defense under one of the enumerated defenses of Civ.R. 12(B), they are obliged to raise it by motion within a reasonable timeframe before actively participating in the litigation. *See King*, 694 F.3d at 661. If they are

[1] The federal rules now allow 90 days for service. Fed.R.Civ.P. 4(m).

permitted to preserve it in an answer despite being aware of it, only to raise it at a more advantageous time, is an application of the rule that frustrates its purpose.

C. A PARTY WAIVES ITS CIVIL RULE 12(B)(4) AND (5) DEFENSES THROUGH SUFFICIENT PARTICIPATION IN THE LITIGATION.

In *Gliozzo*, this Court declined to hold that a defendant's participation in a lawsuit was a waiver of the service defenses in Civ.R. 12(B). The Court instead found that a party can only waive Civ.R. 12(B)(4)-(5) defenses as stated in Civ.R. 12(H).

The federal courts come to a completely different resolution of the issue. Several circuit courts have held that the defense listed in Fed.R.Civ.P. 12(h) may be waiver or forfeited by a party's participation in the litigation. *See e.g., King,* 694 F.3d at 661; *Hamilton v. Atlas Turner*, 197 F.3d 58 (2d Cir.1999).

1. Federal Rule of Civil Procedure 12(H) and Forfeiture by Participation.

As this Court has noted, Ohio Civ.R. 12 is comparable to Fed.R.Civ.P. 12. *Maryhew v. Yova,* 11 Ohio St.3d at 58. Fed.R.Civ.P. 12 is nearly identical to its Ohio counterpart. With respect to waiver, the Federal Rules of Civil Procedure provide:

> (h) Waiving and Preserving Certain Defenses.
> (1) *When Some Are Waived.* A party waives any defense listed in Rule 12(b)(2)–(5) by:
> (A) omitting it from a motion in the circumstances described in Rule 12(g)(2); or
> (B) failing to either:
> (i) make it by motion under this rule; or
> (ii) include it in a responsive pleading or in an amendment allowed by Rule 15(a)(1) as a matter of course.

While Ohio Civ.R. 12(H) provides:

> (1) A defense of lack of jurisdiction over the person, improper venue, insufficiency of process, or insufficiency of service of process is waived (a) if omitted from a motion in the circumstances described in subdivision (G), or (b) if it is neither made by motion under this rule nor included in a responsive pleading or an amendment thereof permitted by Rule 15(A) to be made as a matter of course.

Despite their similarities, specifically with respect to waiver of 12(B)(2)-(5) defenses, the federal courts hold that Fed.R.Civ.P. 12(h) is subject to forfeiture when the defendant actively participates in the litigation. And further, Fed.R.Civ.P. 12(h)(1) specifies the minimum steps that a party must take in order to preserve a defense." *Peterson v. Highland Music, Inc.*, 140 F.3d 1313, 1318 (9th Cir.1998).

In *King v. Taylor*, the Sixth Circuit Court of Appeals, examining the Fed.R.Civ.P. 12, came to the opposite conclusion of the Court in *Gliozzo*. In *King*, the Sixth Circuit decided that a defendant's extensive participation in the litigation forfeited[2] his service defense under Fed.R.Civ.P. 12(b)(5), despite preserving the defense in his answer. 694 F.3d at 658. The court held: "Asserting a Rule 12(b) defense in an answer 'do[es] not preserve the defense in perpetuity.' *Burton v. N. Dutchess Hosp.*, 106 F.R.D. 477, 481 (S.D.N.Y.1985). A defendant is 'required at some point to raise the issue by motion for the court's determination.' *Id.* Waiting too long to do so can forfeit the defense." *Id.*

The *King* court considered Rule 12(h) waiver and decided that Fed.R.Civ.P 12(h) "sets only the outer limits of waiver; **it does not preclude waiver by implication**." *Id.* (quoting *Marquest Medical Prods., Inc. v. Emde Corp.*, 496 F.Supp. 1242, 1245 n. 1 (D.Colo.1980) (emphasis added)); *see also Yeldell v. Tutt*, 913 F.2d 533, 539 (8th Cir.1990). "Even where a defendant properly preserves a Rule 12(b) defense by including it in an answer, he may forfeit the right to seek a ruling on the defense at a later juncture through his conduct during the litigation." *Id.* (citing *Hamilton v. Atlas Turner, Inc.*, 197 F.3d 58, 60 (2d Cir.1999); *see*

[2] According to the federal courts, "[t]he term 'waiver' is best reserved for a litigant's intentional relinquishment of a known right. Where a litigant's action or inaction is deemed to incur the consequence of loss of a right, or, as here, a defense, the term 'forfeiture' is more appropriate. *See United States v. Olano*, 507 U.S. 725, 733, 113 S.Ct. 1770, 123 L.Ed.2d 508 (1993).

also Creech v. Roberts, 908 F.2d 75, 84 (6th Cir.1990) (Guy, J., dissenting)); *Continental Bank, N.A. v. Meyer*, 10 F.3d 1293, 1296-7 (7th Cir.1993) (finding waiver of personal jurisdiction by defendant's conduct, though waiver under 12(h) did not occur); *Yeldell*, 913 F.2d at 539 ("While the Tutts literally complied with Rule 12(h) by including the jurisdictional issue in their answer, they did not comply with the spirit of the rule, which is 'to expedite and simplify proceedings in the Federal Courts.'"); *Alger v. Hayes*, 452 F.2d 841 (8th Cir.1972) (the defendant waived his defense of lack of personal jurisdiction because his conduct did "not reflect a continuing objection to the power of the court to act over the defendant's person." *Id.* at 844. "We think this plays 'fast and loose' with the power of the federal court and we disavow tolerance of such a procedure." *Id.* at 845).

The Sixth Circuit pointed to several factors that a trial court should consider when assessing whether a defendant's engagement in the case constitutes a forfeiture of a service defense. The threshold issue is whether a defendant's conduct prior to raising the defense gave the plaintiff "a reasonable expectation" that the defendant will defend the suit on the merits or whether the defendant has caused the court to "go to some effort that would be wasted if personal jurisdiction is later found lacking." *Id.* at 659 (citing *Gerber v. Riordan*, 649 F.3d 514, 519 (6th Cir.2011) (quoting *Mobile Anesthesiologists Chi., LLC v. Anesthesia Assocs. of Hous. Metroplex, P.A.*, 623 F.3d 440, 443 (7th Cir.2010)). In determining whether a defendant has forfeited its defense, the court should consider all the relevant circumstances. *Hamilton*, 197 F.3d at 61. Since service of process is simply how a defendant receives notice of an action and is formally brought within a court's jurisdiction, whereas personal jurisdiction concerns the fairness of requiring a defendant to appear and defend in a forum, it is easier to find forfeiture of a service defense. *See id.*, 197 F.3d at 60; *Datskow.*, 899 F.2d at 1303.

The defendant in *King* asserted failure of service in his answer, and then was completely silent about the defense for over a year before raising it via summary judgment. *King*, 694 F.3d at 660. During that period of over a year, the defendant: 1) met with plaintiff's counsel and filed a joint discovery report; 2) voluntarily participated in full discovery on the merits, including responding to written discovery, giving his deposition, attending depositions, and retaining expert witness; 3) moved to amend the case schedule; 4) moved to extend discovery; and 5) attended status conferences. *Id.*

Under these circumstances, the Sixth Circuit determined that the defendant's conduct indisputably gave plaintiffs a "reasonable expectation that the defendant would defend the suit on the merits." *See id.* (citing *Gerber*, 649 F.3d at 519). In addition, the defendant's decision to wait until the summary judgment stage to seek a ruling on his service defense caused the district court to go to at least "some effort that would be wasted if [proper service of process] is later found lacking." *Id.*

A critical factor the Sixth Circuit considered in determining whether the defendant forfeited his service defense was based on the deliberativeness of her conduct for gamesmanship purposes. *Id.* at 661. The court took a very disapproving view of this conduct:

> At oral argument, Taylor's counsel admitted that for "tactical reasons" she did not bring a motion to dismiss at an earlier stage in the litigation. Counsel intentionally waited until after the statute of limitations had run before filing her motion. In assessing whether Taylor forfeited his defective-service defense through his active and extensive participation in the litigation, the deliberativeness of his conduct, for gamesmanship purposes, weighs against Taylor.

Id.

Based on all these factors, the Sixth Circuit found that the defendant had forfeited his ability to raise the service defense by his participation in the litigation. *Id.* at 661.

This approach strikes a balance between the defendant's ability to properly raise and enforce a service defense, while also mandating that they do so timely. A defendant cannot lie-in-wait for the most advantageous time to assert its defense all the while participating in the litigation. A Rule 12 defense must be raised by motion within a reasonable timeframe or risk forfeiture.[3] The *King* court held that failure to raise the defense well after the time for service, while actively participating in the case, resulted in a forfeiture of the defense. *Id.*

The same should hold true in Ohio.

2. Forfeiture Correctly Questions Why the 12(B) Defenses were Not Raised Within an Appropriate Timeframe.

Rather than question the defendant's conduct, the *Gliozzo* approach instead put the onus back on the plaintiff to ensure service was proper. *Gliozzo*, 114 Ohio St.3d at ¶ 16. However, this approach creates some practical issues that could be avoided by adopting the federal model.

First, the defenses contained in Civ.R. 12(H) are waived if not asserted by motion prior to an answer or in an answer. For that reason, nearly every answer filed by a defendant in Ohio asserts the defenses of improper venue, insufficiency of process, insufficiency of service of process, and lack of jurisdiction over the person, to avoid an inadvertent waiver of these defenses. *See e.g.* R. 13, Affirmative Defenses. In fact, answers typically contain all defenses listed in Civ.R. 8 and 12. *See id.* Whether these defenses are meritorious is subject to further discovery.

Second, discovery does not always yield the discovery of the service error. If, for example, a defendant does not file an answer immediately, there may not be sufficient time to correct the service error before the expiration of one year per Civ.R. 3(A). *See Maryhew*, 11

[3] The federal rules allow 90 days for service. Fed.R.Civ.P. 4(m). Ohio's corresponding rule allows six months for service. Civ.R. 4(E).

Ohio St.3d at 157. Or, as in this case, the answer lists twenty-three affirmative defenses, including all the defenses in Civ.R. 8 and Civ.R. 12. (R. 13.) Pressing forward on these issues can be time-consuming and fraught with discovery disputes about the timing or legitimacy of these defenses.

Third, when a defendant actively participates in a case, it creates a reasonable expectation that they have actual knowledge of the allegations against them. The constitutionality of a notice mechanism is dependent upon the likelihood of its ultimate success in notifying an interested party of a pending action. *In re Foreclosure of Liens for Delinquent Taxes*, 62 Ohio St.2d 333, 336 (1980). The U.S. Supreme Court held that a method for providing notice must be "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." *Mullane* v. *Central Hanover Bank & Trust Co.*, 339 U. S. 306, 314 (1950).

When a party files an answer within the time provided in Civ.R. 12, and then mounts a vigorous defense on the merits, they effectively communicate that they have been notified of the allegations against them. As in this case, the defendant undoubtedly had actual notice of the allegations in the complaint. Yet, the defendant was able to raise a failure of service in his answer and then wait two years to raise it by motion. If the defendant is aware of a service error, they have the burden to establish that defense and should be required to do so within a reasonable timeframe. *Todd Development Co. Inc. v. Morgan*, 116 Ohio St.3d 461, 465, 2008-Ohio-87, 880 N.E.2d 88.

In contrast to *Gliozzo*, the federal courts' approach preserves the defendant's ability to raise a service defense while also eliminating their ability to use Civ.R. 12 for gamesmanship and delay purposes. Allowing forfeiture of a 12(B) defense, if not raised in an appropriate

timeframe, will reduce the gamesmanship, judicial waste, needless expense that *Gliozzo* encourages. The spirit of the rules supports eliminating this type of behavior. Civ.R. 1(B). The federal approach cures the issues encouraged by *Gliozzo*, by questioning why the defense was not raised earlier in the litigation. Further, it addresses the procedural catch-22 of a defendant invoking the court's jurisdiction for years, mounting a defense on the merits of the case, only to later argue they were never properly given notice of the allegations against them.

D. *GLIOZZO* MUST BE OVERTURNED AND THIS COURT SHOULD ADOPT THE FORFEITURE THROUGH PARTICIPATION APPROACH TO CIV.R. 12(H).

The doctrine of stare decisis generally compels a court to recognize and follow an established legal decision in subsequent cases in which the same question of law is at issue. *New Riegel Local School Dist. Bd. of Edn. v. Buehrer Group Architecture & Eng., Inc.*, 157 Ohio St.3d 164, 2019-Ohio-2851, 133 N.E.3d 482, ¶ 18, citing *Clark v. Snapper Power Equip., Inc.*, 21 Ohio St.3d 58, 60, 488 N.E.2d 138 (1986). In *Westfield Ins. Co. v. Galatis*, the Court set forth a test to consider the prudence of overruling a prior decision. 100 Ohio St.3d 216, 2003-Ohio-5849, 797 N.E.2d 1256, ¶ 43. The test directed the Court to overrule its prior decisions when (1) the decisions were wrongly decided or circumstances no longer justify continued adherence to them, (2) the decisions defy practical workability, and (3) abandoning the precedent would not create an undue hardship for those who have relied upon it. *Id.* at ¶ 48.

But not all cases require satisfaction of the *Galatis* test to overrule prior decisions. *State v. Henderson*, 161 Ohio St.3d 285, 2020-Ohio-4784, 162 N.E.3d 776, ¶ 29. The *Galatis* test applies to cases involving substantive law. *Id.* "In cases in which we overrule a prior decision regarding procedural rules, evidentiary rules or constitutional questions though, we have declared the *Galatis* analysis unnecessary." *Id.* (citing *State v. Silverman*, 121 Ohio St.3d 581,

2009-Ohio-1576, 906 N.E.2d 753, ¶ 33 (the *Galatis* test does not apply in deciding whether to overrule precedent interpreting procedural and evidentiary rules, where there is little reliance interest)). In cases involving procedural rules, "stare decisis has relatively little vigor" because the procedural rules do "not serve as a guide to lawful behavior. *See United States v. Gaudin*, 515 U.S. 506, 521, 115 S.Ct. 2310, 132 L.Ed.2d 444 (1995); *Fong Foo v. Shaughnessy*, 243 F.2d 715, 719 (2d Cir.1955).

The *Gliozzo* rationale unquestionably applies to facts of this case. However, the time has come to revisit the Court's decision in *Gliozzo* because of the many reasons set forth above. Simply, the *Gliozzo* approach to Civ.R. 12 promotes legal gamesmanship, reduces judicial economy, and embraces a system that favors cases be determined on procedural technicalities instead of their merits. *See Barkdale v. Van's Auto Sales*, 38 Ohio St.3d 127, 128, 527 N.E.2d 284 (1988).

Gliozzo is unquestionably a procedural decision. *See also Hamilton*, 197 F.3d at 61 ("we observe that whether forfeiture has occurred is a matter of federal procedural law.") The decision does not serve as a guide to lawful behavior, and there is no reliance interest in the in its procedural rule, except to advance the game. Therefore, stare decisis has little vigor in this application, and this Court must revisit *Gliozzo* to address the issues it has created. *See Ackman*, 2023-Ohio-2075, at ¶ 26.

As the concurrence in the court below points out, the time has come to formulate a workable standard for all parties under Civ.R. 12. *Id.* The federal model of Rule 12 blends the ability of a defendant to raise a legitimate defense under 12(H), while promoting the spirit of the civil rules. This Court should follow the federal court and adopt their model of forfeiture based

on conduct when a defendant waits to raise a service defense after extensive participation in the case.

CONCLUSION

For all the foregoing reasons, this Court should revisit and overrule its decision in *Gliozzo*. The Court should reverse the decision of the First District Court of Appeals.

Respectfully submitted,

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CERTIFICATE OF SERVICE

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