THE SUPREME COURT OF OHIO

CASE NOS. 2023-0975

On Appeal from the First Appellate District
Hamilton County, Ohio

Court of Appeals Case No. C-220507

JENNIFER ACKMAN, Personal Representative and Administrator
of the Estate of Janet M. Sollman, deceased,
Plaintiff-Appellant

v.

MERCY HEALTH WEST HOSPITAL LLC, et al.
Defendant-Appellees

MERIT BRIEF OF *AMICUS CURIAE* OHIO ASSOCIATION OF CIVIL TRIAL ATTORNEYS IN SUPPORT OF APPELLEES

Thomas N. Spyker, Esq. (0098075)
Reminger Co., L.P.A.
200 Civic Center Drive, Suite 800
Columbus, Ohio 43215
Telephone: (614) 232-2631
Facsimile: (614) 232-2410
tspyker@reminger.com
Counsel for Amicus Curiae Ohio Association of Civil Trial Attorneys

Frank J. Schiavone (0032161)
F. Joseph Schiavone Co., LPA
2 South Third Street, Suite 300
Hamilton, Ohio 45011-2866
fjslaw@gmail.com
Counsel for Appellant

Anne Marie Sferra (0030855)
Karin M. Long (0101480)
Bricker Graydon LLP
100 South Third Street
Columbus, Ohio 43215
asferra@brickergraydon.com
kmlong@brickergraydon.com
Counsel for Appellees, Muhammad Riaz Ahmad, M.D. &

Joseph Cesta (0088254)
1000 E. Main St.
P.O. Box 36
Lebanon, Ohio 45036
joe@herdmanlaw.com
Counsel for Appellant

Colleen M. Hegge (0038506)

Hospitalist Medicine Physicians of Ohio, P.C.

Joshua F. DeBra (0083267)
Calderhead, Lockemeyer 86 Peschke Law
6281 Tri-Ridge Boulevard, Suite 210
Loveland, Ohio 45140
Jdebra@clp-law.com
Counsel for Appellees, Muhammad Riaz Ahmad, M.D. & Hospitalist Medicine Physicians of Ohio, P.C.

Jessica Pratt (0087210)
Rendigs, Fry, Kiely 85 Dennis, LLP
600 Vine Street, Suite 2650
Cincinnati, Ohio 45202
jpratt@rendigs.com
Counsel for Mercy Health-West Hospital

11581 Big Bone Road
Union, Kentucky 41091
chegge@fuse.net
Counsel for Appellant

Medicare
7500 Security Blvd.
Baltimore, MD 21244

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INTRODUCTION AND STATEMENT OF INTEREST OF AMICI CURIAE

The Ohio Association of Civil Trial Attorneys ("OACTA") is a statewide organization with an array of members including attorneys, corporate executives, and claims professionals dedicated to the defense of tort litigation and civil disputes throughout Ohio. For over fifty years, OACTA has provided a forum where professionals work together to improve the administration of justice in Ohio. OACTA has a strong interest in fairness, predictability, stability, and consistency in Ohio's civil justice system.

This case is about more than this Court's 2007 decision in *Gliozzo*. This case is about whether a century's worth of fair and consistent precedent can be overturned on a preference. Since 1915, the jurisprudence surrounding service and service-related defenses has been stable leading to predictable results. Appellant and Amicus Curiae, the Ohio Association for Justice ("OAJ"), want to abandon a century's worth of predictable and consistent jurisprudence because, as they argue it, the outcome is unjust and that defendants are using *Gliozzo* to set sophisticated legal traps. Supposedly defendants across the state are depriving plaintiffs of justice by asserting and litigating the same types of service defenses this Court first reviewed and found proper d*uring the First World War.*

In practice, there are no such traps. There is no injustice. There are straightforward and long settled rules surrounding service and service-related defenses. And, critically, there is nothing unfair about those rules as they cut both ways. Indeed, the last time this Court addressed *Gliozzo* (a mere two and a half years ago) it did so by applying *it against a defendant*, finding she had waived affirmative defenses by failing to preserve them as prescribed by *Gliozzo*. *See Lundeen v. Turner*, 164 Ohio St. 3d 159, 2021-Ohio-1533.

At bottom, there is nothing new here. This case presents nearly identically to *Gliozzo*. Appellant simply does not like that the rules were enforced and would prefer if Ohio adopted the federal court approach. But this Court has repeatedly rejected any notion that enforcing the rules is somehow tantamount to a reversable injustice. And a reversal of this magnitude must be predicated on something more than preference. For these reasons, and those to follow, OACTA urges the Court to maintain its century long fair and consistent position on this issue.

STATEMENT OF THE CASE

OACTA defers to and adopts the Statement of the Case contained in the Merit Brief of Appellees Muhammad Riaz Ahmad, M.D. & Hospitalist Medicine Physicians of Ohio, P.C.

STATEMENT OF FACTS

OACTA defers to and adopts the Statement of Facts contained in the Merit Brief of Appellees Muhammad Riaz Ahmad, M.D. & Hospitalist Medicine Physicians of Ohio, P.C.

ARGUMENT IN OPPOSITION TO APPELLANT'S PROPOSITION OF LAW

Appellant's first and only proposition of law is that a "party waives its Civil Rule 12(b)(4) and (5) service defenses through sufficient participation in litigation." (*See* Appellant's Brief at p. 5). This proposition directly conflicts with this Court's decision *Gliozzo v. Univ. Urologists of Clevland*, which held:

> When the affirmative defense of insufficiency of service of process is properly raised and properly preserved, a party's active participation in the litigation of a case does not constitute waiver of that defense.

114 Ohio St.3d 141, 2007-Ohio-3762, 870 N.E.2d 714, ¶ 18.

Gliozzo's holding is deeply rooted in Ohio's common law and the jurisprudence in this area has been fair and consistent, leading to predictable results. *Gliozzo* should be reaffirmed. And as *Gliozzo* noted, if these rules are to change, it should be done openly through the collaborative rule making process prescribed by this Court—not through litigation.

I. Since 1915 this Court has consistently held that active participation in litigation does not negate a plaintiff's duty to serve; nor does it waive a defendant's service-related defenses.

Appellant necessarily concedes that under the current law, the Trial Court correctly granted summary judgment and the First District Court of Appeals correctly affirmed that decision. (Appellant Brief at p. 8). Unhappy with the state of the law, and the outcome it produced here, Appellant specifically petitioned this Court to revisit its decision in *Gliozzo*. (*Id.*). In a surface level analysis, Appellant and Amicus Curiae the Ohio Association of Justice ("OAJ") describe *Gliozzo* as an unfair interpretation of Ohio's Civil Rules, detrimental to plaintiffs pursuing justice across the state.

The reality is not nearly as exciting. *Gliozzo* is just one case in a long line of stable jurisprudence, deeply rooted in Ohio's common law. *Gliozzo* and the century's worth of jurisprudence supporting it, has resulted in a process that is fair, predictable, and leads to consistent results. As such, it is perhaps instructive to begin with a brief history discussing how this Court arrived at its conclusion in *Gliozzo*.

A. *Gliozzo* is the product of over one hundred years of consistent jurisprudence surrounding service of process defenses rooted in the common law of Ohio.

In 1915, more than a half-century before the civil rules would be enacted, this Court held that as a matter of common law, service-related defenses are not waived through active participation in a lawsuit:

> ***We cannot agree with the holding that it was the duty of [a defendant] to advise the court or the opposite party before judgment of the defective service***, and that, having failed to do so, his omission constituted a waiver of the original defective service. [Defendant] was not brought into court by a summons and no one had authority to enter his appearance or act for him. ***He had knowledge of the proceedings in court, it is true, but we do not see upon what theory the duty devolved upon him to advise the court or the parties to the proceeding of the defective service.***

Haley v. Hanna, 93 Ohio St. 49, 52, 112 N.E. 149 (1915) (emphasis added).

Fifty-five years later, in 1970, Ohio enacted its first set of civil procedure rules. Yet in doing so, this Court was clear. The common law surrounding service and a defendant's service-related defenses remained unchanged. *Maryhew v. Yova*, 11 Ohio St.3d 154, 157, 464 N.E.2d 538 (1984) citing *Haley, supra*. ("Inaction upon the part of a defendant who is not served with process, even though he might be aware of the filing of the action, does not dispense with the necessity of service. The Civil Rules do not change this common law of Ohio.").

In 1983, the current version of Civil Rule 12 took effect. *See* Amendment to Rule 12, effective 7/1/1983. The new version of Rule 12 expressly stated how service-related defenses could be waived:

> (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) (emphasis added).

In 1984, shortly after enactment, this Court accepted its first waiver case under the new version of the Rule. *Maryhew,* 11 Ohio St.3d 154, 158. In addition to reaffirming the common law duty of effecting proper service, *Maryhew* rejected the notion that a litigant's procurement of two extensions of time to move or plead waived service-related defenses. *Id*. About a month after *Maryhew*, this Court decided there was no waiver of service defenses where a party raised the defense in its answer, and then moved for a dismissal based on insufficient service during trial. *See First Bank of Marietta v. Cline*, 12 Ohio St.3d 317, 318, 466 N.E.2d 567 (1984).

In 2007, this Court accepted discretionary review of a 2-1 decision by the Eighth District Court of Appeals finding that a litigant waived service defenses through active participation in the litigation. *Gliozzo* at ¶ 5. In reversing the Eighth District, this Court examined its prior precedent on service defense waiver, and the express wording of Civil Rule 12(H)(1). Notably, this Court found that both of those sources – the common law and Civil Rules – compelled the same result, a finding that properly preserved service-related defenses are not waived through participation in litigation. *Id*. at ¶ 18.

But in so holding, this Court memorialized long-standing responsibilities for both plaintiffs and defendants. On one hand, a plaintiff is responsible for perfecting service. *Id*. at ¶ 18. On the other hand, where a plaintiff fails to perfect service, a defendant must assert that defense in their

first responsive pleading or they submit to the court's jurisdiction and waive any further complaint of defect. *Id*.

B. Cases decided after *Gliozzo* further demonstrate that the rule is fair, predictable, and consistently applied to all litigants.

Less than three years ago, in a per curiam decision, this Court reaffirmed *Gliozzo's* holding. *See Lundeen v. Turnner*, 164 Ohio St.3d 159, 2021-Ohio-1533 at ¶ 19-21. And *Lundeen* is instructive that *Gliozzo* cuts both ways—it is not the defendant friendly precedent Appellant makes it out to be. Indeed, in *Lundeen,* this Court applied *Gliozzo* against a defendant, finding that she had waived service-related defenses as outlined and provided for in *Gliozzo* when she "voluntarily submitted to the jurisdiction of the common pleas court in the foreclosure action by filing a Civ.R. 12(B) motion to dismiss without asserting insufficiency of service or lack of personal jurisdiction as defenses." *Id*. at ¶ 20.

II. *Gliozzo* does not create the procedural traps (or the dire landscape) Appellant and OAJ describe.

Appellant certainly describes a bleak landscape fraught with "shrewd defense attorney[s]" setting traps armed with a gamesmanship advantage allowed by *Gliozzo*. (Appellant Brief at p. 10). Meanwhile, Amicus Curiae OAJ describes an insurmountable "cat and mouse" game to which plaintiffs statewide seemingly have no recourse. (OAJ Brief at p. 6).

But traps, by their nature, are usually disguised. There is no disguise – much less the level of subterfuge suggested here – in a century old process that is reflected openly on a public docket:

04/13/2020	NOTICE TO FRANK J SCHIAVONE AS TO UNDELIVERED SERVICE ON MUHAMMAD RIAZ AHMAD MD SERVICE TYPE: CERTIFIED MAIL SERVICE REASON CODE: VACANT [CERTIFIED MAIL NBR.: 7194 5168 6310 0914 5758]

(*See* R. 16).[1] Here, as in *Gliozzo*, nothing was hidden. ***Legally***, nothing was hidden. At the time service failed here, the law in Ohio – that a Plaintiff must perfect service on a defendant regardless of participation – had been established for about one-hundred and fifteen years. *Haley*, 93 Ohio St. 49, 112 N.E. 149 (1915). ***Factually***, nothing was hidden. Notice went to Appellant's counsel that service failed. (R. 16). That notice was then reflected on the public docket.

Here, as in *Gliozzo*, Appellant took no further action. Here, as in *Gliozzo*, Appellant blames the process as unjust. Here, as in Gliozzo, a century of fair and predictable jurisprudence cautions against giving into Appellant's process complaints:

> Regardless of how appellants' behavior is characterized, the Ohio Rules of Civil Procedure govern the conduct of all parties equally, and ***we cannot disregard [the] rules to assist a party who has failed to abide by them***. The rules clearly declare that an action is commenced when service is perfected. Civ.R. 3(A). Furthermore, we have held, ***Inaction upon the part of a defendant who is not served with process, even though he might be aware of the filing of the action, does not dispense with the necessity of service***. The obligation is upon plaintiffs to perfect service of process; defendants have no duty to assist them in fulfilling this obligation.

Gliozzo at ¶ 16 (internal quotations and citations omitted) (emphasis added).

III. The Court should adhere to stare decisis and reaffirm its holding in *Gliozzo*.

As the Court knows, stare decisis is the doctrine of adherence to precedent, and it "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." *State v. Henderson*, 161 Ohio St.3d 285, 2020-Ohio-4784, 162 N.E.3d 776, ¶ 28. (internal citations omitted). Adhering to precedent – especially such long standing precedent – is the norm. Doing so creates stability and predictability. *See Westfield Ins. Co. v. Galatis*, 100 Ohio St.3d 216, 2003-Ohio-5849, 797 N.E.2d 1256, ¶ 43.

[1] Image obtained from the Trial Court's public docket: https://www.courtclerk.org/data/case_summary.php?sec=history&casenumber=A+2000845&submit.x=19&submit.y=14 (last accessed 2/20/2024).

Since at least 1915, the law surrounding the waiver of services related defenses has been fair, predictable, and leads to consistent results. *Haley*, 93 Ohio St. 49, 112 N.E. 149. In short, so long as service-related defenses are preserved in the first responsive pleading, no amount of active participation serves as a waiver. *See Haley, supra, Maryhew, supra; Cline, supra; Gliozzo, supra*. The precedent here is both long and well settled, supported by a long line of decisions from this Court. It should not be reversed lightly. Nor should it be reversed simply because Appellant argues the approach in federal court is better. *See Alleyne v. United States*, 570 U.S. 99, 118 (2018) (Sotomayor, J., concurring) (it would be illegitimate to overrule a precedent simply because the Court's current membership disagrees with it.).

A. This Court should utilize the *Galatis* test and reaffirm its holding in *Gliozzo*.

In *Galatis*, this Court adopted a three-part test, under which precedent may be overruled only if: for when precedent may be overruled:

> (1) the decision was wrongly decided at that time, or changes in circumstances no longer justify continued adherence to the decision, (2) the decision defies practical workability, and (3) abandoning the precedent would not create an undue hardship for those who have relied upon it.

Galatis, 2003-Ohio-5849, at paragraph one of the syllabus. But as this Court has noted, its use of the *Galatis* test has not been consistent. *Henderson* at ¶ 29 (collecting cases); *see also*, *Henderson* at ¶ 84 (also collecting cases) (Kennedy, J., concurring). [2]

[2]OACTA respectfully disagrees with Appellant's characterization of the concurrence in Henderson, asserting that "Chief Justice Kennedy stated clearly in her Henderson concurrence: 'the Galatis test [does] not apply in deciding whether to overrule precedent interpreting procedural and evidentiary rules.'" (Appellant Brief at p. 9 quoting *Henderson* at ¶ 84). Appellant omits key words from the quoted passage. On full review, the Henderson concurrence was recounting the Court's recent history of deploying *Galatis* in various situations and recounted: "***We held*** the Galatis test [does] not apply in deciding whether to overrule precedent interpreting procedural and evidentiary rules." (omitted words emphasized). The *Henderson* concurrence then goes on to make its point, that Galatis should not be used in the criminal context. In short, OACTA reads the passage as recounting a recent history of decisions, not the declarative statement on the application of *Galatis* to all procedural/evidentiary issues.

Here, Appellant devotes a substantial portion of its Brief to argue that the Court should completely abandon *Galatis* in its analysis of *Gliozzo*. (*See* Appellant Brief at pp. 8-10). This makes sense as a reversal of *Gliozzo* quickly fails under the *Galatis* factors. But OACTA respectfully suggests *Galatis* is appropriate here.

To begin, Appellant incorrectly suggests that this Court has made a wholesale rejection of *Galatis* in all cases involving procedural rules. (Appellant Brief at p. 9). Not true. This Court has held that "the *Galatis* test does not apply in deciding whether to overrule precedent interpreting procedural and evidentiary rules, ***where there is little reliance interest***." *Henderson* at ¶ 29 citing *Silverman* at ¶ 33 (emphasis added). In *Silverman*, this Court analyzed the nuance of admissible hearsay, a truly procedural matter where there was no reliance interest. *See State v. Silverman*, 121 Ohio St.3d 581, 2009-Ohio-1576, 906 N.E.2d 427, ¶ 34. In setting aside, the *Galatis* factors in *Silverman*, this Court did so because the evidentiary rule at issue did not affect the opposing party's conduct in the matter. *Silverman* at ¶ 33. This Court has utilized Galatis, or at least a portion of it, to analyze matters deemed procedural. *See Henderson*, 161 Ohio St. 3d 285, 2020-Ohio-4784.

Here, the Court should deploy the *Galatis* test in analyzing *Gliozzo* for three reasons. *First*, as outlined above, although *Gliozzo* interprets Civil Rule 12(H), the underlying principle – that service defenses are not waived through participation in the litigation – is a concept deeply rooted in Ohio's common law dating back over a century. *See Haley, supra*.

Second, unlike truly procedural rules, there is a is a substantial reliance interest here. Indeed, Appellee Dr. Ahmad – and surely others throughout the state – have relied on the one-hundred-year-old precedent. Indeed, Appellant acknowledges that overturning *Gliozzo* strips Appellee, and others of a defense. (*See* Appellant Brief at p. 14). OAJ also acknowledges this point. (OAJ Brief at p. 11, fn 2).

Third, this Court has already suggested *Galatis* is the appropriate test to utilize, should the Court revisit its jurisprudence on the waiver of service-related defenses. *See Gliozzo* at ¶ 14 (declining to revisit *Maryhew* and *Cline* because appellant did not show how they meet the standard for reversal set forth in *Galatis*).

a. First Galatis Factor: Gliozzo was correctly decided and there have been no circumstantial changes warranting reversal.

As fully discussed above, *Gliozzo* is the result of more than a century of consistent jurisprudence surrounding process service and related defenses. Neither Appellant nor OAJ offer any serious argument that this Court decided *Gliozzo* incorrectly. Rather, *Gliozzo* is rooted in Ohio's long-standing jurisprudence on the issue and the text of Civil Rule 12(H):

> Both Civ.R. 12 and our decision in *Cline* support the conclusion that when the affirmative defense of insufficiency of service of process is properly raised and properly preserved, a party's active participation in litigation of a case does not constitute waiver of that defense. Civ.R. 12(H)(1) does not include a party's participation in the case as a method of waiver. In our interpretation of the rule in *Cline*, we determined that a properly asserted and preserved defense may be raised even after trial has begun. Nothing in the facts here causes us to reconsider that conclusion.

Gliozzo at ¶ 11.

b. Second Galatis Factor: Gliozzo is practical and workable while the alternative is anything but.

Gliozzo establishes a bright line rule providing clear cut responsibilities for both plaintiffs and defendants. If either party runs afoul of the simple rule contained therein, there are consequences. A plaintiff may be subject to a service-related defense in a dispositive motion, as happened here, and in *Gliozzo*. While a defendant who does not properly preserve such defenses as prescribed, waives them, as in *Lundeen*.

In contrast, Appellants suggest abandoning *Gliozzo* for a standard mirroring the practice in some Federal Courts, which allow for a waiver of service-related defenses through participation

in the litigation. Far from a practical solution, federal courts have described the waiver determination "more art than science." *See Boulger v. Woods*, 917 F.3d 471, 477 (6th Cir. 2019). This artful standard employed in federal court has led to a wave of litigation over what constitutes waiver—a case-by-case determination in frequent need of appellate review. So while Appellant may prefer the federal approach, it cannot be said to be more practical than the bright lines drawn by the over 100 years of jurisprudence underpinning Ohio's current approach.

c. Third Galatis Factor: Abandoning Gliozzo would create undue hardship for those who have relied upon it.

While vilified for following and enforcing the Rules, Dr. Ahmad, and others like him, who have preserved and relied upon a service-related defense, are surely prejudiced by a reversal of *Gliozzo*. To strip Dr. Ahmad and others of this defense, a defense rooted in Ohio law for over a century, will create hardship—and surely Appellant will target this hardship, mock it, and dismiss it in comparison to Appellant's inability to have her matter decided on the merits. But at this stage, there is no place for such dialogue. Or, as *Gliozzo* observed:

> The obligation is upon plaintiffs to perfect service of process; ***defendants have no duty to assist them in fulfilling this obligation.***
>
> Whether appellants' conduct constituted gamesmanship or good litigation strategy, they followed the rules. ***If such behavior should not be permitted in the future, the proper avenue for redress would be to seek to change those rules.***

Gliozzo at ¶ 17. Dr. Ahmad followed the rules unequivocally upheld in *Gliozzo*. And the *Gliozzo* court stated to all that come after it, the reliance of service-related defenses is appropriate behavior until such time as the rules are changed through the rule making process.

B. Even if the Court declines to use the *Galatis* test it should reaffirm *Gliozzo.*

Appellant argues at length that the Court should consider this a procedural issue and thus, abandon the *Galatis* factors. (*See* Appellant Brief at p. 10). Yet, Appellant fails to offer *any* alternative standard for review, instead suggesting that free of *Galatis*, the Court should simply throw out more than a century of jurisprudence and pick their rule because they think it is better. (*Id*).

But even without the *Galatis* factors, stare decisis cannot be so easily dismissed. *It should not be so easily dismissed*. A century's worth of this Court's jurisprudence should not be overturned haphazardly simply because Appellants like federal practices better than state ones. Before *Galatis*, this Court held that it should depart from the doctrine of stare decisis only where the "necessity and propriety of doing so has been established" and that any departure "demands special justification." *Wampler v. Higgins* (2001), 93 Ohio St.3d 111, 120.

Appellant fails to offer necessity or propriety and falls well short of showing any special justification. Instead, Appellant and OAJ argue at length about preference of one process over another. A century's worth of fair and predictable jurisprudence should not be set aside for a preferred process.

IV. Any changes to the Civil Rules should be done through the rule-making process established by this Court.

Overruling *Gliozzo* – and the century of precedent behind it – is more than a change in the interpretation of a Civil Rule, it is tantamount to a significant amendment to those rules. This Court already has a process for amending the Civil Rules. And moreover, this Court has already prescribed that the rule making process is the proper form to address the change Appellant seeks. *See Gliozzo* at ¶ 17.

This Court established the Commission on Rules of Practice & Procedure for this precise purpose. (*See* https://www.supremecourt.ohio.gov/courts/advisory/commissions/commission-on-the-rules-of-practice-procedure/) (last accessed 2/20/2024). Each year, the Commission reviews and recommends amendments to procedural rules, including the Rules of Civil Procedure. *Id*. The proposed amendments are then published for public comment. *Id*. The process then requires this Court to submit proposed amendments to the General Assembly. *Id*.

In short, this process is inclusive and sets firm timeframes for notice of changes, and the effective date of any such change. *Id*. If there is to be a change in the century old standard for the waiver of service-related defense, that change should come through this rule making process.

V. If the Court reverses its holding in *Gliozzo*, it should do so prospectively.

To begin, if this rule change came about via the rule making process, as outlined above, there would be substantial notice and the change would become effective prospectively. *See generally*, Civ.R. 86. But should the Court be persuaded to reverse its holding in *Gliozzo*, bringing about this change judicially, OACTA urges the Court to apply any such change prospectively.

"[A]n Ohio court has discretion to apply its decision only prospectively after weighing the following considerations: (1) whether the decision establishes a new principle of law that was not foreshadowed in prior decisions; (2) whether retroactive application of the decision promotes or retards the purpose behind the rule defined in the decision; and (3) whether retroactive application of the decision causes an inequitable result." *State ex rel. Walmart, Inc. v. Hixson,* 170 Ohio St.3d 338, 2022-Ohio-4187, 212 N.E.3d 900, ¶ 14. These factors all cut in favor of a prospective application.

First, as outlined above, the law surrounding this issue has been consistent with *Gliozzo* since at least 1915. See Hanley, supra. Further, less than three years ago this Court, in a per curiam opinion, reiterated and enforced the holding in *Gliozzo*. *See Lundeen, supr*a. As such, the first

factor cuts in favor of prospective application since nothing in this Court's prior decisions foreshadowed this change in the law. *See Hixson*, 2022-Ohio-4187 ¶ 14.

Second, a retroactive application would not further the purpose of reversing *Gliozzo* outside the microcosm of this matter. Ostensibly, the goal here would be to streamline the service process, bringing it more in line with federal case law. That process is equally achieved through either the rule making process, or a prospective judicial decision reversing *Gliozzo*. Accordingly, this factor cuts in favor of a prospective application. *See Hixson*, 2022-Ohio-4187 ¶ 14.

Third, a retroactive application would surely cause inequitable results. As fully outlined above, Dr. Ahmad relied on a century's worth of consistent jurisprudence from this Court. A retroactive deprivation of that defense, a defense which has been repeatedly upheld by this Court, is inequitable on its face.

CONCLUSION

For over one hundred years, the jurisprudence surrounding service-related defenses has been fair, consistent, and leads to predictable results. OACTA respectfully urges this Court to remain consistent in this area of law, reaffirm *Gliozzo*, and deny Appellant's proposition of law.

Respectfully submitted,

/s/ Thomas N. Spyker
Thomas N. Spyker, Esq. (0098075)
Reminger Co., L.P.A.
200 Civic Center Drive, Suite 800
Columbus, Ohio 43215
Telephone: (614) 232-2631
Facsimile: (614) 232-2410
tspyker@reminger.com
Counsel for Amicus Curiae Ohio Association of Civil Trial Attorneys

CERTIFICATE OF SERVICE

On 2/20/2024, a true and accurate copy of the foregoing was served on all parties of record via the Court's E-filing system and by email.

Respectfully Submitted,

/s/ Thomas N. Spyker
Thomas N. Spyker (0098075)