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I. EXPLANATION OF WHY THIS CASE IS NOT A CASE OF PUBLIC OR GREAT GENERAL INTEREST

This case is routine. Appellant is attempting to circumvent the merits of his Complaint by claiming that Appellee's Answer, filed prior to the perfection of service, was ineffective and, as such, should lead to a default judgment for Appellant. It is thoroughly settled that a defendant may file a responsive pleading prior to the perfection of service on a complaint. Moreover, it is also well settled that cases should be decided on their merits rather than procedural rules. As such, the instant case does not present any question of such constitutional substance nor of such great public interest as would warrant further review by this Court.

Defendants routinely file responsive pleadings or other motions prior to service of a complaint being perfected. This Court has reviewed several cases in which a defendant participated in a lawsuit prior to the perfection of service. In those cases, this Court found not only that this practice is acceptable, but also that a voluntary appearance and active participation in a case by a defendant does not waive any affirmative defenses, including insufficiency of service, so long as the defendant includes the affirmative defenses in a responsive pleading. *Maryhew v. Yova* (1984), 11 Ohio St.3d 154, 156-157, 464 N.E.2d 538; *Gliozzo v. Univ. Urologists of Cleveland, Inc.* (2007), 114 Ohio St.3d 141, 2007 Ohio 3762, 870 N.E.2d 714.

Appellant fails to cite any case—because there is none—supporting his position that a responsive pleading to a complaint is only properly filed in the twenty-eight days following service of process. Appellant relies exclusively on Civ. R. 12(A)(1) which states that a “defendant shall serve his answer within twenty-eight days after service of the summons and complaint upon him.” Defendants do not dispute that once a party has been served with a complaint, the party has twenty-eight days in which to file an answer or other responsive pleading, however, nowhere in the Civil Rules is there a prohibition on filing an answer prior to

service. Civ. R. 12 represents a **maximum time** within which a defendant may respond to a complaint, not the sole **exclusive time** upon which a defendant must file a responsive pleading.

Finally, this case is not of great public concern because Appellant has not identified any plausible prejudice that results when an answer is filed prior to the perfection of service on a complaint. Appellant argues that if a defendant can file an answer to a complaint prior to service then there may inevitably be situations where a defendant files a “peremptory answer to an anticipated complaint.” (See Appellant’s Memorandum In Support of Jurisdiction, p. 6). Considering that no civil action can be commenced without a complaint, Appellant’s argument lacks any merit. See Civ. R. 3. In fact, there is no prejudice to a plaintiff when a defendant files an answer prior to service of a complaint since, the earlier an answer is filed, the faster the case can proceed on its merits and the more time a plaintiff has to develop strategy in response to any asserted defenses. In this case, however, Appellant wants to disqualify the Appellee’s Answer so that he does not have to litigate the merits of his Complaint, but can win by default judgment. Notwithstanding the fact that Appellee’s Answer was properly filed, it is well settled that default judgments are not favored under Ohio jurisprudence. As such, Appellant presents no compelling reason for this Court to expend its scarce judicial resources to review his case. It is respectfully submitted that jurisdiction should be declined.

II. STATEMENT OF THE CASE AND FACTS

On February 4, 2008, Appellant, acting *pro se*, filed a complaint against Appellee Richland County Child Support Enforcement Agency. Before service of process was even complete, Appellee, by and through its attorneys, diligently filed an Answer to Appellant’s Complaint on March 13, 2008. Despite Appellee’s Answer, Appellant filed a Motion for Default Judgment on March 17, 2008. The trial court overruled Appellant’s motion on March 26, 2008.

On April 18, 2008, Appellant filed a Motion for Relief from Judgment regarding the Court's denial of his Motion for Default Judgment. Appellee responded to this motion on April 25, 2008 and, once again, on June 24, 2008, the trial court overruled Appellant's motion. In addition to the aforementioned motions, Appellant also filed a motion to personally hold counsel for Appellee in contempt of court for responding to his Complaint before service was complete. The trial court overruled Appellant's Motion for Contempt on May 21, 2008.

On July 14, 2008, Appellee filed its Motion for Summary Judgment to which Appellant replied on August 11, 2008. On August 19, 2008, the trial court, Judge Henson presiding, granted Appellee's Motion for Summary Judgment. Appellant appealed the decision of the trial court to the Fifth District Court of Appeals. On February 10, 2009, the Fifth District affirmed the trial court's decision granting summary judgment to Appellee. The Court ruled in pertinent part that Appellee, "timely filed an answer in response to Appellant's complaint." Further, the Court found that there was "no requirement [that] the answer must be filed after service of process is perfected." Appellant has not appealed any other part of the Fifth District's opinion.

III. ARGUMENT

Response to First Proposition of Law:

A Defendant May Properly File An Answer To A Complaint Prior To Service Of The Complaint Being Perfected.

The decision of the court of appeals affirming the trial court's denial of Appellant's Motion for Default Judgment was proper because Appellee answered Appellant's complaint timely, and there is no prohibition on filing an answer to a complaint prior to service being perfected.

Appellant argues that the Civil Rules allow an answer to be filed only after service of process is complete. In other words, Appellant believes that a defendant must wait for service of

process to begin defending the case. Appellant is wrong. Although an answer or other responsive pleading is not required until service of process is complete, this Court has held that a defendant may voluntarily appear even before the completion of service. See *Maryhew v. Yova* (1984), 11 Ohio St.3d 154, 156, 464 N.E.2d 538. Before the rules of civil procedure, the filing of a responsive pleading prior to service would have the effect of waiving any jurisdictional or service related defenses to a complaint. *Id.* at 156, 464 N.E.2d 538. The *Maryhew* Court ruled that even if a defendant voluntarily appeared prior to service, the defendant did not waive any jurisdictional defenses as long as those defenses were asserted by motion or responsive pleading. *Id.* at 157, 464 N.E.2d 538. More important, however, was the Court's implicit acceptance that a defendant could file a motion or responsive pleading prior to service of the complaint.

Subsequent cases have continued to recognize that defendants may file responsive pleadings prior to service. In *Bell v. Midwestern Educational Svcs., Inc.* (1993), 89 Ohio App.3d 193, 624 N.E.2d 196, the defendants' attorney answered the complaint on behalf of all defendants, but asserted a defense of insufficiency of service for three of the defendants. *Id.* at 195, 624 N.E.2d 196. The trial court dismissed the three defendants because they had never been properly served. *Id.* at 195, 624 N.E.2d 196. The court of appeals affirmed the dismissal. Thus, *Bell* is another example of a case where an answer was filed prior to service being perfected. More recently, in *Glozzo v. Univ. Urologists of Cleveland, Inc.*, 114 Ohio St.3d 141, 2007-Ohio-3762, 870 N.E.2d 714, this Court addressed the effect of active participation in a case prior to service being perfected. In *Glozzo*, the plaintiff had filed a medical malpractice action. *Id.* at ¶ 1. Service was attempted by certified mail, but failed. No further attempts at service were made. *Id.* at ¶ 2. Even though service was not complete, the defendants filed an answer to the complaint which included the defense of insufficiency of process. *Id.* at ¶ 3. Over a year later

and ten days prior to trial, defendants filed a motion to dismiss because service was never perfected. *Id.* at ¶ 4. Ultimately, the trial court found that service was insufficient and dismissed the complaint. *Id.* at ¶ 4. The Eighth District reversed finding that defendants' active participation in the case operated to waive the defense of insufficient service. *Id.* at ¶ 5. This Court reversed and held that when the affirmative defense of insufficiency of process is properly raised, a party's active participation in the litigation of a case does not constitute waiver of that defense. *Id.* at ¶ 18. Based on *Glozzo*, it is clear that a defendant may participate in a case, which includes the filing of an answer, prior to service being complete. Indeed, if as Plaintiff contends, a defendant must wait to be served before answering a complaint, there would be no need for an affirmative defense of insufficiency of process. Moreover, Appellee is not aware of any case which holds that a defendant cannot answer a complaint prior to service and Appellant does not suggest that any such cases exist. Therefore, based on the decisions cited above, it is well settled that nothing prohibits a defendant from filing an answer prior to service being completed.

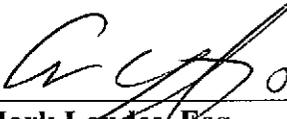
Finally, Appellant is not entitled to the relief that he is requesting. Appellant believes--mistakenly--that since Appellee's filed their Answer too early, Appellee's Answer is ineffective, and Appellant should be granted a default judgment. It is thoroughly settled that cases should be decided on their merits: "The primary objective and function of our courts is to adjudicate cases on the merits by applying substantive law whenever possible, and not to adjudicate cases with finality upon a strained construction of procedural law yielding unjust results." *Svoboda v. Brunswick* (1983), 6 Ohio St. 3d 348, 351, 453 N.E. 2d 648, 651. In this case, Appellant lost his case on the merits (which he does not appeal) and now seeks to salvage his claim through

procedural means. Such an attempt is exactly the type of procedure over substance that this Court refrains from advocating.

IV. CONCLUSION

Appellant plows no new ground in this appeal. This Court has analyzed several cases in which a defendant has answered or otherwise participated in a case prior to service being perfected and found no procedural or constitutional issue. Further, Appellant's position that he should be entitled to a default judgment based upon an answer that was filed too quickly is untenable and not supported by any case law. As such, there are no issues of such great public interest or constitutional substance that would warrant further review by the court. It is respectfully submitted that jurisdiction should be declined.

Respectfully submitted,

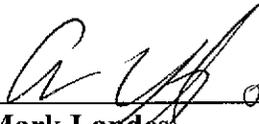


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PROOF OF SERVICE

The undersigned hereby certifies that a true and accurate copy of the foregoing was served via regular U.S. Mail, postage prepaid, this 22nd day of April, 2009 upon the following:

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