**IN THE SUPREME COURT OF OHIO**

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| JOHN A. LaNEVE et al. | ) | Case Nos.2007-1199, 2007-1372, 2007-1373 |
| | ) | |
| Appellees | ) | |
| | ) | |
| v. | ) | |
| | ) | |
| ATLAS RECYCLING, INC. et al. | ) | On Appeal from the Trumbull County |
| | ) | Court of Appeals, Eleventh Appellate |
| Appellants | ) | District, Case No. 2006-T-0032 |

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# REPLY BRIEF OF APPELLANT CONTAINERPORT GROUP, INC.

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FILED
FEB 05 2008
CLERK OF COURT
SUPREME COURT OF OHIO

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## ARGUMENT

**I. WHETHER AN AMENDED COMPLAINT THAT IDENTIFIES A PREVIOUSLY UNKNOWN JOHN DOE DEFENDANT RELATES BACK TO THE DATE OF THE FILING OF THE ORIGINAL COMPLAINT IS A MATTER GOVERNED *IN THE FIRST INSTANCE* BY CIV.R. 15(*D*)**

Appellees ignore Civ.R. 15(D), instead attempting to recast ContainerPort's First Proposition of Law as one involving Civ.R. 15(C). Their reason for doing so is obvious: They failed to comply with Civ.R. 15(D).

Civ.R. 15(C) and (D) provide:

> **(C) Relation back of amendments.**
>
> Whenever the claim or defense asserted in the amended pleading arose out of the conduct, transaction, or occurrence set forth or attempted to be set forth in the original pleading, the amendment relates back to the date of the original pleading. ***An amendment changing the party against whom a claim is asserted*** relates back if the foregoing provision is satisfied and, within the period provided by law for commencing the action against him, the party to be brought in by amendment (1) has received such notice of the institution of the action that he will not be prejudiced in maintaining his defense on the merits, and (2) knew or should have known that, but for a mistake concerning the identity of the proper party, the action would have been brought against him. [emphasis added]
>
> * * *
>
> **(D) Amendments where name of party unknown.**
>
> ***When the plaintiff does not know the name of a defendant***, that defendant may be designated in a pleading or proceeding by any name and description. When the name is discovered, the pleading or proceeding must be amended accordingly. The plaintiff, in such case, must aver in the complaint the fact that he could not discover the name. The summons must contain the words "name unknown," and a copy thereof must be served personally upon the defendant. [emphasis added]

The language highlighted in Civ.R. 15(C) above – the language upon which Appellees rely – applies to amendments "changing" the party against whom a claim is asserted. As this Court explained in *Kraly v. Vannewkirk* (1994), 69 Ohio St.3d 627, 632, 635 N.E.2d 323: "The plain language of the rule relates to the substitution of a proper party for one previously ***misidentified*** in the original complaint."

However, as this Court made clear in *Amerine v. Haughton Elevator Co.* (1989), 42 Ohio St.3d 57, 59, 537 N.E.2d 208, an amendment substituting a party's real name for a previously identified John Doe is ***not*** an amendment "changing" the party against whom a claim is asserted. *Accord Alcala v. Autullo*, 6th Dist. Nos. S-06-035, S-06-041, 2007-Ohio-5309 at ¶24, 2007 WL 2874362 (substituting party for defendant previously identified by fictitious name is not "changing" party against whom claim is asserted pursuant to second sentence of Civ.R. 15(C)); *Bykova v. Szucs*, 8th Dist. No. 87629, 2006-Ohio-6424 at ¶4, 2006 WL 3517958 (naming real party originally named as fictitious John Doe is not "changing" party against whom claim is asserted pursuant to second sentence of Civ.R. 15(C)).

Consequently, ***if*** Appellees' Amended Complaint relates back to the date of the filing of their original Complaint – which it does not – it does so under the ***first*** sentence of Civ.R. 15(C).

The law is clear that in a case involving a John Doe defendant, the relation-back provisions of Civ.R. 15(C) apply ***only*** if the requirements of Civ.R. 15(D) are met. As *Amerine* stated: "***[I]f*** the specific requirements of Civ.R. 15(D) are met, Civ.R. 15(C) ***then*** must be considered[.]" *Id.*, 42 Ohio St.3d at 58. *Accord Spencer v. Magic Twanger Restaurant* (April 1, 1998), 7th Dist. No. 96-CA-12, 1998 WL 158858 at *5 ("Civ.R. 15(D)'s requirements ***must*** . . . be met before relation back under Civ.R. 15(C) applies."); *Lawson v. Holmes, Inc.* (12th Dist.), 166 Ohio App.3d 857, 2006-

Ohio-2511, 853 N.E.2d 712, at ¶19 ("[T]he privilege of the relation-back rule, in cases in which a previously unknown defendant is identified by way of an amended complaint, depends upon ***strict*** compliance with Civ.R. 15(D).").

Appellees herein failed to comply with Civ.R. 15(D) in ***any*** respect, let alone strictly. Having failed to comply with Civ.R. 15(D), Appellees may ***not*** invoke the relation-back provisions of Civ.R. 15(C). Unable to relate their Amended Complaint back to the date of the filing of their Complaint, Appellees' claim against ContainerPort was filed outside the statute of limitations and is time-barred.

## II. APPELLEES FAILED TO MEET THE SPECIFIC REQUIREMENTS OF CIV.R. 15(D)

### A. Appellees Failed to Aver "in their Complaint" that They "Could Not"Discover the Names of the John Doe Defendants

Civ.R. 15(D) requires that a plaintiff "aver in the complaint the fact that he ***could not*** discover the name" of the defendant. Appellees did not so aver. Rather, Appellees averred that they "***ha[d] not*** yet discovered the names and/or addresses for the remaining Defendants, John-Doe Numbers #1-#5[.]" That Appellees "***had not***" discovered the names of the John Doe Defendants does not satisfy the Civ.R. 15(D) requirement that such names "***could not***" be discovered. Civ.R. 15(D) requires due diligence on the part of a plaintiff – the same due diligence that is required of a plaintiff who seeks to take advantage of the Savings Statute. Having failed to aver in their Complaint that they "***could not***" discover the true names of the John Doe Defendants, Appellees failed to satisfy the first prong of Civ.R. 15(D).

Moreover, Appellees failed to make the requisite averment "in their Complaint." Appellees' averment, that they "ha[d] not yet discovered the names and/or addresses for the remaining Defendants, John-Doe Numbers #1-#5[,]" appeared in the ***Instructions for Service*** that accompanied

their Complaint. Civ.R. 15(D) expressly requires that the averment that a plaintiff "could not" discover the names of John Doe defendants appear "***in the Complaint***."

In *Clint v. R.M.I. Co.* (December 13, 1990), 8th Dist. Nos. 57187, 57258, 1990 WL 204348 at *3 (Corrigan, J., dissenting), *jurisdictional motion overruled* (1991), 60 Ohio St.3d 708, 573 N.E.2d 671, the Eighth Appellate District did conclude that the words "Name and Address Unknown," which were included in the caption of a complaint, satisfied the Civ.R. 15(D) requirement that a plaintiff "aver in the complaint the fact that he could not discover the name" of the defendant.[1] However, in *Gates v. Precision Post* (September 14, 1994), No. 9-94-21, 1994 WL 514045, the Third Appellate District reached a different result. Concluding that *Clint* had improperly failed to follow the strict construction of Civ.R. 15(D) mandated by *Amerine*, the Court of Appeals in *Gates* held that a statement in a complaint that the names and addresses of John Doe defendants

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[1]Judge Corrigan disagreed, as his dissenting opinion reflects:

> . . . Precedent from the Supreme Court of Ohio and this court require strict application of Civ.R. 15(D).
>
> In the instant action the plaintiff failed to comply with the technical requirements of the rule. Under Civ.R. 15(D), in order to designate an unknown defendant with a fictitious name, a plaintiff must: (1) aver in the complaint that the plaintiff could not discover the name; (2) include in the summons the words "name unknown"; and (3) personally serve the summons on the defendant.
>
> The plaintiff's third amended complaint fails to contain an averment that she was unable to discover the defendants' names. Thus, the plaintiff failed to satisfy the first requirement. The plaintiff's failure to fully comply with Civ.R. 15(D) precludes the application of that rule to toll the statute of limitations. . . .

*Id.*, 1990 WL 204348 at *5.

were "***currently unknown***," was ***insufficient*** to meet the requirement of Civ.R. 15(D) that a plaintiff "aver in the complaint the fact that he ***could not*** discover the name." *Id.*, 1994 WL 514045 at *1-3.

Moreover, even ***if*** *Clint* saves Appellees from their failure to comply with the first requirement of Civ.R. 15(D) – which, pursuant to *Amerine*, it does not – *Clint* does ***not*** save Appellees from their failure to comply with the other requirements of the Rule. As the Tenth Appellate District explained in *West v. Otis Elevator Co.* (10th Dist. 1997), 118 Ohio App.3d 763, 766-767, 694 N.E.2d 93:

> Although plaintiffs rely on *Clint v. R.M.I. Co.* (Dec. 13, 1990), Cuyahoga App. No. 57187, unreported, 1990 WL 204348, *Clint* would not resolve ***all*** of the deficiencies in plaintiffs' compliance with Civ.R. 15(D). In *Clint*, the caption of the complaint indicated that the names and addresses of the John Doe defendants were unknown. *Clint* held that this complied with the provision of Civ.R. 15(D) requiring that the complaint state that the plaintiff could not discover the name of the John Doe defendants. Plaintiffs' deficiencies here ***go beyond the failure to so aver***, and include the same deficiency the Supreme Court ruled on in Amerine. Being bound by the precedent set forth in *Amerine*, we are compelled to find that plaintiffs failed to meet the requirements of Civ.R. 15(D). [emphasis added]

As in *West*, Appellees' deficiencies herein "go beyond the failure to . . . aver [an inability to discover the names of the John Doe Defendants]," and include other deficiencies that this Court addressed in *Amerine*. Appellees failed to comply with the requirement of Civ.R. 15(D) that they "aver in the complaint the fact that [they] could not discover the name [of the John Doe Defendants]." As such, Appellees may not invoke the relation-back provisions of Civ.R. 15(C).

### B. Appellees Failed to Include the Words "Name Unknown" in the Summons that Accompanied their Complaint

Appellees do not deny that they failed to include the words "Name Unknown" in the Summons that accompanied their Complaint. Rather, Appellees contend, "the words [Name

Unknown] are not required, insofar as Civ.R. 15(D) is in direct conflict with Civ.R. 4(B)." (Merit Brief of Appellees at p. 15). The contention lacks merit.

Civ.R. 4(B) provides:

> **Summons; form; copy of complaint.**
>
> The summons shall be signed by the clerk, contain the name and address of the court and the names and addresses of the parties, be directed to the defendant, state the name and address of the plaintiff's attorney, if any, otherwise the plaintiff's address, and the times within which these rules or any statutory provision require the defendant to appear and defend, and shall notify him that in case of his failure to do so, judgment by default will be rendered against him for the relief demanded in the complaint. ***Where there are multiple plaintiffs or multiple defendants, or both, the summons may contain, in lieu of the names and addresses of all parties, the name of the first party on each side*** and ***the name and address of the party to be served.*** [emphasis added]

Pursuant to Civ.R. 4(B), a summons accompanying a complaint that identifies multiple plaintiffs and defendants may, in lieu of the names and addresses of ***all*** the parties, contain "the name of the first party on each side" ***and*** "the name and address of the party to be served." The Summons accompanying Appellees' Complaint did contain the name of the first party on each side. However, it did ***not*** include the name and address of the party to be served – ContainerPort.

Civ.R. 15(D) requires that a summons accompanying a complaint naming a John Doe defendant contain the words "Name Unknown." The Civ.R. 15(D) "Name Unknown" requirement satisfies the Civ.R. 4(B) "name . . . of the party to be served" requirement ***in the John Doe context.*** Thus, and contrary to Appellees' urging, Civ.R. 15(D) and Civ.R. 4(B) do not conflict. Rather, they complement one another. Appellees were required to include in the Summons accompanying their Complaint the name ("Name Unknown") and address ("Address Unknown") of ContainerPort. They

did not. Having failed to comply with this requirement of Civ.R. 15(D), Appellees may not invoke the relation-back provisions of Civ.R. 15(C).

Appellees cite *Loescher v. Plastipak Packaging, Inc.* (3rd Dist.), 152 Ohio App.3d 479, 2003-Ohio-1850, 788 N.E.2d 681, contending that a ***complaint*** that contains the words "Name Unknown" satisfies the Civ.R. 15(D) requirement that the ***summons*** accompanying the complaint contain such words. Appellees' reliance on *Loescher* is suspect. First and foremost, *Loescher* ignored the plain language of Civ.R. 15(D) that "the ***summons*** must contain the words 'name unknown.'" Secondly, *Loescher* presented a factual scenario distinct from the present case. In *Loescher*, the plaintiff properly averred in her Complaint that "***despite [her] attempts to discover [the identity of the John Doe defendants]***" she was unable to do so. Moreover, in *Loescher*, the plaintiff properly effected ***personal*** service on the subsequently identified John Doe defendant. Thus, even ***if*** *Loescher* saves Appellees from their failure to comply with the Civ.R. 15(D) requirement that "the summons contain the words 'name unknown'" – which, pursuant to *Amerine*, it does not – *Loescher* does ***not*** save Appellees from their failure to effect personal service upon ContainerPort.

**C. Appellees Failed to Personally Serve ContainerPort**

Appellees do not deny that they failed to personally serve ContainerPort. What Appellees contend is that the Civ.R. 15(D) requirement of personal service conflicts with Civ.R. 4.3 and R.C. 1703.191. The contention lacks merit.

Civ.R. 4.3 governs service of process on non-resident defendants. R.C. 1703.191 concerns service of process on foreign corporations that are required to be licensed under the Revised Code, but that transact business in Ohio without being so licensed. ***Neither*** Civ.R. 4.3, ***nor*** R.C. 1703.191, apply to Appellant herein. ContainerPort is an ***Ohio*** corporation that is ***licensed to transact business***

***in Ohio***. *See* Amended Complaint at ¶13 ("Defendant, ContainerPort Group, Inc. . . . is incorporated and licensed to conduct business in the State of Ohio[.]"). Accordingly, Appellees' argument, as it relates to ContainerPort, is misdirected.

Moreover, Appellees' argument lacks merit even beyond its application to ContainerPort. Civ.R. 4.3 provides, in pertinent part:

> **(A) When service permitted.**
>
> Service of process may be made outside of this state, as provided in this rule, in any action in this state, upon a person who, at the time of service of process, is a nonresident of this state or is a resident of this state who is absent from this state. "Person" includes . . . a corporation[.] . . .
>
> **(B) Methods of service.**
>
> **(1) Service by certified or express mail.**
>
> Evidenced by a return receipt signed by any person, service of any process shall be by certified or express mail ***unless otherwise permitted by these rules***. . . . [emphasis added]
>
> * * *
>
> **(2) Personal service.**
>
> When ordered by the court, a "person" as defined in division (A) of this rule ***may*** be personally served with a copy of the process and complaint or other document to be served. . . . [emphasis added]

Civ.R. 4.3 does not ***prohibit*** personal service. It merely requires that a plaintiff obtain a court order to accomplish same. Thus, Civ.R. 15(D), which requires personal service upon a subsequently identified John Doe defendant, does ***not*** conflict with Civ.R. 4.3. Indeed, that Civ.R. 4.3 and Civ.R. 15(D) can be read in pari materia is evidenced by the decision in *Loescher v. Plastipak Packaging, Inc.* (3rd Dist.), 152 Ohio App.3d 479, 2003-Ohio-1850, 788 N.E.2d 681, at ¶2, wherein the plaintiff,

pursuant to "a motion for appointment of a process-server ***pursuant to Civ.R. 4.3(B)(2)***[,]" effected personal service upon a foreign corporation that previously had been identified as a John Doe defendant. Like the plaintiff in *Loescher*, Appellees herein could have, ***but did not***, request personal service on Appellants.

Similarly, R.C. 1703.191 does not conflict with Civ.R. 15(D). The statute provides:

> **Service of process on secretary of state; unlicensed corporations**
>
> Any foreign corporation required to be licensed under sections 1703.01 to 1703.31 of the Revised Code, which transacts business in this state without being so licensed, ***shall be conclusively presumed to have designated the secretary of state as its agent for the service of process in any action against such corporation*** . . . Pursuant to such service, suit may be brought in Franklin county, or in any county in which such corporation did any act or transacted any business. Such service shall be made upon the secretary of state by leaving with him, or with an assistant secretary of state, duplicate copies of such process, together with an affidavit of the plaintiff or one of the plaintiff's attorney, showing the last known address of such corporation, and a fee of five dollars which shall be included as taxable costs in case of judicial proceedings. Upon receipt of such process, affidavit, and fee the secretary of state shall forthwith give notice to the corporation at the address specified in the affidavit and forward to such address by certified mail, with a request for return receipt, a copy of such process.
>
> The secretary of state shall retain a copy of such process in his files, keep a record of any such process served upon him, and record therein the time of such service and his action thereafter with respect thereto.
>
> ***This section does not affect any right to serve process upon a foreign corporation in any other manner permitted by law***. [emphasis added]

Thus, the Secretary of State acts as the agent for service of process upon foreign corporations that are required to be licensed under the Revised Code and that transact business in Ohio without being so licensed. R.C. 1703.191 merely permits service of process, ***whatever form it takes***, to be made upon the Secretary of State. Thus, if a foreign corporation doing business in Ohio fails to

obtain licensure to transact business in Ohio, the personal service requirements of Civ.R. 15(D) must be made upon the Secretary of State. Civ.R. 15(D), which is in pari materia with Civ.R. 4.3, mandates personal service on a subsequently identified John Doe and does ***not*** conflict with R.C. 1703.191.

Finally, Appellees rely upon *Thacker v. Sells* (December 31, 1990), 10th Dist No. 90AP-669, 1990 WL 250512, for the proposition that Civ.R. 15(D) permits certified mail service upon a subsequently identified John Doe defendant. *Thacker*, citing ***no*** precedent and in ***direct*** contradiction to *Amerine*, which had been decided nearly two years earlier, opined that "after the name [of a John Doe defendant] is discovered and the pleading is amended to reflect that name, service may be provided by certified mail to the name and address of the person who is no longer a John Doe defendant, just as any other defendant may be served." *Id.*, 1990 WL 250512 at *3. *Thacker* reasoned that "the last sentence of Civ.R. 15(D) is the service that must be used to obtain jurisdiction over the John Doe defendant prior to discovery of the name." *Id.* *Thacker*'s interpretation of Civ.R. 15(D) – that it permits certified mail service upon a John Doe once the John Doe is identified, but that it requires personal service upon a John Doe before the John Doe is identified – finds no support in either the language of the Rule or the case law interpreting the Rule. Indeed, in *Amerine*, ***a case wherein a John Doe defendant's name had been discovered***, this Court declared: "Civ.R. 15(D) specifically requires that the summons *must* be served personally upon the defendant. In this case, service was performed [upon the ***identified*** John Doe defendant] by certified mail which is clearly ***not*** in accordance with the requirement of Civ.R. 15(D)." *Id.*, 42 Ohio St.3d at 58 (emphasis in italics in original; other emphasis added). *Thacker* is an anomaly that finds no support in the law.

Appellees failed to comply with the personal service requirement of Civ.R. 15(D). As such, they may not invoke the relation-back provisions of Civ.R. 15(C).

## III. APPELLEES FAILED TO COMMENCE THEIR ACTION AGAINST CONTAINERPORT UNDER CIV.R. 3(A)

Appellees posit that they had an additional year from the date their ***Amended Complaint*** was filed to effect service upon ContainerPort. Civ.R. 3(A) directs otherwise. The Rule provides:

> A civil action is commenced by filing a ***complaint*** with the court, if service is obtained within one year from ***such filing*** upon a named defendant, or upon an incorrectly named defendant whose name is later corrected pursuant to Civ.R. 15(C), ***or upon a defendant identified by a fictitious name whose name is later corrected pursuant to Civ.R. 15(D)***. [emphasis added]

As *Amerine* explained: "Civ.R. 3(A) . . . specifically states that the use of a fictitious name with subsequent correction, by amendment, of the real name of a defendant under Civ.R. 15(D) relates back to the filing of the original complaint and that service must be obtained within one year of the filing of the ***original complaint***." *Id.*, 42 Ohio St.3d at 59. In the present case, Appellees did not obtain valid service upon ContainerPort within one year of the filing of their Complaint. ***Certified mail*** service was effected. ***Personal*** service was required. Consequently, Appellees' action against ContainerPort was not commenced under Civ.R. 3(A) and was properly dismissed.

Appellees cite *Goolsby v. Anderson Concrete Corp.* (1991), 61 Ohio St.3d 549, 575 N.E.2d 801, *Bank One v. O'Brien* (December 31, 1991), 10th Dist Nos. 91AP-166, 91AP-441, 1991 WL 281429, and *Meek v. Nova Steel Processing, Inc.* (2nd Dist. 1997), 124 Ohio App.3d 367, 706 N.E.2d 374, contending they had an additional year from the date the ***Amended Complaint*** was filed within which to serve ContainerPort. The cited cases are of no assistance to Appellees.

First and foremost, in *Goolsby*, *Bank One*, and *Meek*, amended complaints were filed ***before*** expiration of the statute of limitations, such that the statute of limitations was not a bar to the subsequent refiling of the amended complaints. In the present case, Appellees' Amended Complaint was filed ***outside*** the statute of limitations.

Secondly, neither *Goolsby*, nor *Bank One* or *Meek* considered Civ.R. 3(A) in conjunction with Civ.R. 15(D). In the present matter, Civ.R. 15(D) is the crux of the case.

Finally, even ***if*** Appellees had an additional year from the date their Amended Complaint was filed to properly serve ContainerPort – which they did not – Appellees undertook ***no*** efforts to effect such personal service. On July 1, 2005, ContainerPort filed an Answer to the Amended Complaint, wherein it asserted the affirmative defenses of the statute of limitations and failure of and/or improper service. On August 23, 2005, ContainerPort filed a Motion to Dismiss grounded upon these same affirmative defenses.[2] The trial court did not grant ContainerPort's Motion to Dismiss until February 7, 2006. During this seven-month period of time, Appellees could have, but not did, attempt personal service upon ContainerPort. Indeed, on similar facts, the Eighth Appellate District in *Austin v. Standard Building* (December 4, 1997), 8th Dist. No. 71840, 1997 WL 754593, held that a trial court properly dismissed an action based upon the statute of limitations when a plaintiff failed to attempt personal service under Civ.R. 15(D). As *Austin* explained:

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[2]Having properly raised such affirmative defenses, Appellees' suggestion that Appellants somehow waived them is mistaken. *See* Merit Brief of Appellees at p. 19. Appellants' defenses are properly before the Court. *See Gliozzo v. University Urologists of Cleveland, Inc.*, 114 Ohio St.3d 141, 2007-Ohio-3762, 870 N.E.2d 714, at ¶13 ("The only way in which a party can voluntarily submit to a court's jurisdiction . . . is by failing to raise the defense of insufficiency of service of process in a responsive pleading or by filing certain motions before any pleading.").

> [For] a period of three and one-half months, [the plaintiff] had an opportunity to review [Civ.R. 15(D)], correct her error [of service by certified mail], and properly follow the requirement of Civ.R. 15(D) to personally serve the summons on [the defendant]. Had [the plaintiff] done so, the requirements of Civ.R. 15(D) would have been met, the amended complaint would have related back to the date of filing pursuant to Civ.R. 3(A), and the statute of limitations would not be a bar to the action against [the defendant].

*Id.*, 1997 WL 754593 at *5. Likewise in the present case, Appellees had an opportunity to correct their error of service by certified mail. Appellees cannot be heard to complain when they failed to take advantage of that opportunity. Once again, Appellees' lack of due diligence renders their arguments unpersuasive.

## IV. APPELLEES DID NOT "ATTEMPT TO COMMENCE" THEIR ACTION AGAINST CONTAINERPORT SO AS TO INVOKE R.C. 2305.19(A)

Plainly, Appellees did not "commence" their action against ContainerPort. The question presented is whether Appellees "attempted to commence" it sufficiently to invoke R.C. 2305.19(A).

The statute provides:

> In any action that is commenced or ***attempted to be commenced***, if in due time a judgment for the plaintiff is reversed or if the plaintiff fails otherwise than upon the merits, the plaintiff . . . may commence a new action within one year after the date of the reversal of the judgment or the plaintiff's failure otherwise than upon the merits or within the original applicable statute of limitations, whichever occurs later. . . . [emphasis added]

Appellees cite a host of cases that allegedly support their argument that they properly invoked R.C. 2305.19(A). *See DiCello v. Palmer* (February 12, 1980), 10th Dist. No. 79AP-402, 1980 WL 353265; *Whitt v. Hayes*, 4th Dist. No. 02CA2856, 2003-Ohio-2337, 2003 WL 21040281; *Schneider v. Steinbrunner* (November 8, 1995), 2nd Dist. No. 15257, 1995 WL 737480, *appeal not allowed* (1996), 75 Ohio St.3d 1451, 663 N.E.2d 332; *Shanahorn v. Sparks* (June 29, 2000), 10th Dist. No. 99AP-1340, 2000 WL 861261; and *Husarcik v. Levy* (November 10, 1999), 8th Dist. No. 75114,

1999 WL 1024135, *appeal not allowed* (2000), 88 Ohio St.3d 1482, 727 N.E.2d 132. However, ***none*** of the cited cases involved John Doe defendants, and ***none*** of the cited cases considered R.C. 2305.19(A) in conjunction with Civ.R. 15(D). Indeed, *Whitt* and *Schneider* actually support the position of ContainerPort.

In *Whitt*, the Fourth Appellate District defined "attempt to commence" as "making a ***proper*** demand for service within a year of filing a complaint." *Id.*, 2003-Ohio-2337 at ¶13. Appellees herein did not make a "proper" demand for service. ***Certified mail*** service was requested. ***Personal*** service was required.

In *Schneider*, the Second Appellate District held that "the attempted commencement provision of R.C. 2305.19 requires only that a Plaintiff has taken action to effect service on a defendant within the applicable limitations period ***according to one of the methods provided in the Civil Rules***." *Id.*, 1995 WL 737480 at *4. Appellees herein did not effect service according to the method required by Civ.R. 15(D). ***Certified mail*** service was requested. ***Personal*** service was required.

Moreover, Appellees wholly ignore the case law that ***is*** applicable herein – the case law that addresses R.C. 2305.19(A) ***in conjunction with*** Civ.R. 15(D). That case law, which emanates from three of Ohio's appellate districts, holds that a plaintiff's failure to serve a formerly fictitious, subsequently identified defendant as required by Civ.R. 15(D) is ***not*** an "attempt to commence" sufficient to invoke R.C. 2305.19(A). *See Mustric v. Penn Traffic Corp.* (September 7, 2000), 10th Dist. No. 00AP-277, 2000 WL 1264526 at *5 ("We believe that an attempt to commence as set forth in R.C. 2305.19 must be pursuant to a method of service that is proper under the Civil Rules."); *Permanent Gen. Cos. Ins. Co. v. Corrigan* (May 24, 2001), 8th Dist. No. 78290, 2001 WL 563072

at *3 ("Because of [the] utilization of an improper method of service the appellants were not entitled to benefit from the provisions of the savings statute allowing a case to be re-filed within one year of a voluntary dismissal as there was a failure to properly attempt to commence the action."); *Kramer v. Installations Unlimited, Inc.* (5th Dist.), 147 Ohio App.3d 350, 2002-Ohio-1844, 770 N.E.2d 632, at ¶27 ("Only when the 'attempt to commence' is made according to the Rules of Civil Procedure may a plaintiff avail himself or herself of the savings statute.").

In addition to *Mustric*, *Permanent General*, and *Kramer*, this Court's decision in *Thomas v. Freeman* (1997), 79 Ohio St.3d 221, 1997-Ohio-395, 680 N.E.2d 997, is instructive in interpreting the phrase "attempt to commence." In *Thomas*, the Court found that a plaintiff had "attempted to commence" an action when he had made ***repeated*** efforts to serve the named defendants ***by a method of service permitted by the Civil Rules***. The plaintiff was ultimately unable to effectuate service, and his claims were dismissed for lack of prosecution. The Court held that the plaintiffs' claims were saved by R.C. 2305.19(A), and that the plaintiff therefore had one year from the date of dismissal to re-file his claim. While *Thomas* did not entirely define the scope of what is "attempted commencement," its language suggests that only a ***good faith*** attempt at serving a defendant satisfies the "attempted commencement" requirement of R.C. 2305.19(A). Moreover, the United States Court of Appeals for the Sixth Circuit held as much in *Coleman v. Department of Rehabilitation & Corrections* (6th Cir. (Ohio) August 28, 2002), No. 01-3169, 46 Fed.Appx. 765, in concluding that a plaintiff's attempt to serve John Doe defendants by certified mail did ***not*** constitute an "attempt to commence" for purposes of R.C. 2305.19(A):

> *Mustric*, it seems, extends Thomas' logic to invoke a type of ***fault*** requirement. That is, after *Mustric*, a plaintiff can not invoke the Savings Statute if the reason the action was dismissed was the plaintiff's failure to follow the correct procedures. Contrary to the district court's opinion, *Mustric* does not stand for the proposition that the Ohio Savings Statute prevents a plaintiff from using a John Doe moniker in an action preserved by the Savings Clause. *Mustric*'s proposition is much simpler than that – ***if the dismissal is due to the plaintiff's own errors, then the plaintiff's action will not be saved.***
>
> *Mustric*, as an unpublished decision of the Ohio Court of Appeals, is not decisive if we believe the Ohio Supreme Court would have ruled otherwise. Where the state's highest court has not decided the issue before us, we may "not disregard a decision of the state appellate court on point, unless [we are] convinced by other persuasive data that the highest court of the state would decide otherwise." . . . While neither *Thomas* nor *Mustric* is completely on point, each provides insight into this issue. *Mustric* is persuasive for its view that a plaintiff whose case is dismissed due to his own neglect cannot later take advantage of the Savings Statute. This is especially helpful as a logical extension of *Thomas*, wherein the Ohio Supreme Court held the Savings Statute can be invoked by a plaintiff who followed the ***proper*** statutory service procedures, even if the service nonetheless failed. ***If this issue were presented, we believe the Ohio Supreme Court would follow Mustric and adopt the perfectly logical rule that a plaintiff cannot benefit from the Savings Statute where the dismissal was due to the plaintiff's own neglect.*** . . . [emphasis added] [citations omitted]

*Id.*, 46 Fed.Appx. at 770.

ContainerPort asks this Court to adopt the "perfectly logical rule" that a plaintiff cannot benefit from the one-year extension of time provided by R.C. 2305.19(A) if his case was dismissed due to his own neglect. Adopting such a rule would be consistent with the policy expressed in *Gliozzo v. University Urologists of Cleveland*, 114 Ohio St.3d 141, 2007-Ohio-3762, 870 N.E.2d 714, at ¶16, that the Civil Rules cannot be disregarded to "assist a party who has failed to abide by them." Contrary to Appellees' urging, this is not a case where "***one*** misstep . . . [has proved]

decisive of the outcome." (Merit Brief of Appellees at p. 24). Appellees herein missed ***every*** step. As such, they should not be permitted to benefit from the Savings Statute.

## V. APPELLEES' ACTION AGAINST CONTAINERPORT DID NOT "FAIL OTHERWISE THAN UPON THE MERITS"

Even ***if*** Appellees "attempted to commence" their action against ContainerPort – which they did not – they ***still*** failed to satisfy the requirement of R.C. 2305.19(A) that an action be disposed of "otherwise than upon the merits." For the same reason that *Goolsby* is limited to cases where a "refiling" occurs ***prior*** to expiration of the statute of limitation, the filing of the Amended Complaint herein ***could not*** have been a voluntary dismissal because it was filed outside the statute of limitations. *See LaBarbera v. Batsch* (1967), 10 Ohio St.2d 106, 227 N.E.2d 55, Syllabus (dismissal of action for failure to file within statute of limitations is ***dismissal on merits***); *Kraus v. Maurer*, 8th Dist. No. 83182, 2004-Ohio-748 at ¶34, 2004 WL 308112 (failure to commence within statutory period is ***dismissal with prejudice***).

## CONCLUSION

ContainerPort respectfully requests that the judgment of the Court of Appeals be reversed, and that the judgment of the trial court be reinstated. ContainerPort further requests that this Court answer the certified conflict question in the negative.

Respectfully submitted,

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## CERTIFICATE OF SERVICE

I certify that a copy of the foregoing Reply Brief of Appellant ContainerPort Group, Inc. was sent by ordinary U.S. mail this 4th day of February 2008 to: Julia R. Brouhard, Esq. and Robert T. Coniam, Esq., Ray, Robinson, Carle & Davies P.L.L., 1717 E. Ninth Street, Suite 1650, Cleveland, Ohio 44114-2878, Attorneys for Appellant China Shipping (North America) Holding Co., Ltd.; and Robert F. Burkey, Esq., 200 Chestnut Ave. NE, Warren, Ohio 44483, Attorney for Appellees John A. LaNeve and Melissa LaNeve.

Thomas W. Wright
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**ContainerPort Group, Inc.**

## § 1703.191

**Statutes & Session Law**

**TITLE [17] XVII CORPORATIONS -- PARTNERSHIPS**

**CHAPTER 1703: FOREIGN CORPORATIONS**

**1703.191 Service of process on secretary of state in action against unlicensed foreign corporation.**

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**1703.191 Service of process on secretary of state in action against unlicensed foreign corporation.**

Any foreign corporation required to be licensed under sections 1703.01 to 1703.31 of the Revised Code, which transacts business in this state without being so licensed, shall be conclusively presumed to have designated the secretary of state as its agent for the service of process in any action against such corporation arising out of acts or omissions of such corporation within this state, including, without limitation, any action to recover the statutory forfeiture for failure to be so licensed. Pursuant to such service, suit may be brought in Franklin county, or in any county in which such corporation did any act or transacted any business. Such service shall be made upon the secretary of state by leaving with him, or with an assistant secretary of state, duplicate copies of such process, together with an affidavit of the plaintiff or one of the plaintiff's attorneys, showing the last known address of such corporation, and a fee of five dollars which shall be included as taxable costs in case of judicial proceedings. Upon receipt of such process, affidavit, and fee the secretary of state shall forthwith give notice to the corporation at the address specified in the affidavit and forward to such address by certified mail, with a request for return receipt, a copy of such process.

The secretary of state shall retain a copy of such process in his files, keep a record of any such process served upon him, and record therein the time of such service and his action thereafter with respect thereto.

This section does not affect any right to serve process upon a foreign corporation in any other manner permitted by law.

Effective Date: 10-20-1978

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**RULE 4.3**

**Ohio Court Rules**

**RULES OF CIVIL PROCEDURE**

**TITLE II. COMMENCEMENT OF ACTION AND VENUE; SERVICE OF PROCESS; SERVICE AND FILING OF PLEADINGS AND OTHER PAPERS SUBSEQUENT TO THE ORIGINAL COMPLAINT; TIME**

**RULE 4.3 Process: Out-of-State Service**

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## RULE 4.3 Process: Out-of-State Service

### (A) When service permitted.

Service of process may be made outside of this state, as provided in this rule, in any action in this state, upon a person who, at the time of service of process, is a nonresident of this state or is a resident of this state who is absent from this state. "Person" includes an individual, an individual's executor, administrator, or other personal representative, or a corporation, partnership, association, or any other legal or commercial entity, who, acting directly or by an agent, has caused an event to occur out of which the claim that is the subject of the complaint arose, from the person's:

(1) Transacting any business in this state;

(2) Contracting to supply services or goods in this state;

(3) Causing tortious injury by an act or omission in this state, including, but not limited to, actions arising out of the ownership, operation, or use of a motor vehicle or aircraft in this state;

(4) Causing tortious injury in this state by an act or omission outside this state if the person regularly does or solicits business, engages in any other persistent course of conduct, or derives substantial revenue from goods used or consumed or services rendered in this state;

(5) Causing injury in this state to any person by breach of warranty expressly or impliedly made in the sale of goods outside this state when the person to be served might reasonably have expected the person who was injured to use, consume, or be affected by the goods in this state, provided that the person to be served also regularly does or solicits business, engages in any other persistent course of conduct, or derives substantial revenue from goods used or consumed or services rendered in this state;

(6) Having an interest in, using, or possessing real property in this state;

(7) Contracting to insure any person, property, or risk located within this state at the time of contracting;

(8) Living in the marital relationship within this state notwithstanding subsequent departure from this state, as to all obligations arising for spousal support, custody, child support, or property settlement, if the other party to the marital relationship continues to reside in this state;

(9) Causing tortious injury in this state to any person by an act outside this state committed with the purpose of injuring persons, when the person to be served might reasonably have expected that some person would be injured by the act in this state;

(10) Causing tortious injury to any person by a criminal act, any element of which takes place in this state, that the person to be served commits or in the commission of which the person to be served is

guilty of complicity.

**(B) Methods of service.**

*(1) Service by certified or express mail.*

Evidenced by return receipt signed by any person, service of any process shall be by certified or express mail unless otherwise permitted by these rules. The clerk shall place a copy of the process and complaint or other document to be served in an envelope. The clerk shall address the envelope to the person to be served at the address set forth in the caption or at the address set forth in written instructions furnished to the clerk with instructions to forward. The clerk shall affix adequate postage and place the sealed envelope in the United States mail as certified or express mail return receipt requested with instructions to the delivering postal employee to show to whom delivered, date of delivery, and address where delivered.

The clerk shall forthwith enter the fact of mailing on the appearance docket and make a similar entry when the return receipt is received. If the envelope is returned with an endorsement showing failure of delivery, the clerk shall forthwith notify, by mail, the attorney of record or, if there is no attorney of record, the party at whose instance process was issued and enter the fact of notification on the appearance docket. The clerk shall file the return receipt or returned envelope in the records of the action. If the envelope is returned with an endorsement showing failure of delivery, service is complete when the attorney or serving party, after notification by the clerk, files with the clerk an affidavit setting forth facts indicating the reasonable diligence utilized to ascertain the whereabouts of the party to be served.

All postage shall be charged to costs. If the parties to be served by certified or express mail are numerous and the clerk determines there is insufficient security for costs, the clerk may require the party requesting service to advance an amount estimated by the clerk to be sufficient to pay the postage.

*(2) Personal service.*

When ordered by the court, a "person" as defined in division (A) of this rule may be personally served with a copy of the process and complaint or other document to be served. Service under this division may be made by any person not less than eighteen years of age who is not a party and who has been designated by order of the court. On request, the clerk shall deliver the summons to the plaintiff for transmission to the person who will make the service.

Proof of service may be made as prescribed by Civ. R. 4.1 (B) or by order of the court.

[Effective: July 1, 1970; amended effective July 1, 1971; July 1, 1980; July 1, 1988; July 1, 1991; July 1, 1997.]

Staff Note (July 1, 1997 Amendment)

RULE 4.3 Process: Out-of-state service

Prior to the 1997 amendment, service of process under this rule was permitted only by certified mail. It appears that service of process by express mail, i.e. as that sort of mail is delivered by the United States Postal Service, can always be obtained return receipt requested, and thus could accomplish the purpose of notification equally well as certified mail. Therefore, the amendment provides for this

additional option for service.

Other amendments to this rule are nonsubstantive grammatical or stylistic changes.

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