IN THE SUPREME COURT OF OHIO

WASHINGTON MUTUAL BANK, FKA WASHINGTON MUTUAL BANK, FA, Appellee, v. JACK K. BEATLEY, *et al.*, Appellants.	}	Supreme Court Case No. 2008-1056 On Appeal from the Franklin County Court of Appeals, Tenth Appellate District Court of Appeals Case No. 06AP-1189

S.Ct.Prac.R. VI, Section 2

APPELLANT'S MERIT BRIEF

KEVIN E. HUMPHREYS* (0069168)
* *Counsel of Record*
545 East Town Street
Columbus, OH 43215
(614) 241-5550, Ext. 240
(614) 241-5551 fax
lawyer@columbus.rr.com

Counsel for Appellants
Jack K. Beatley and
64 W. Northwood Avenue, LLC

THOMAS R. WINTERS (0018055)
First Assistant Attorney General of Ohio

MICHAEL L. STOKES* (0064792)
* *Counsel of Record*
KELLY A. BORCHERS (0081254)
Assistant Attorneys General
30 East Broad Street, 17th Floor
Columbus, OH 43215
(614) 728-4527
(614) 466-5087 fax
mstokes@ag.state.oh.us

Counsel for *Amicus Curiae*
Ohio Attorney General in support of
Appellants Jack K. Beatley, et al.

GREGORY J. O'BRIEN* (0053441)
* *Counsel of Record*
Taft Stettinius & Hollister LLP
200 Public Square, Suite 3500
Cleveland, OH 44114
(216) 241-2838
(216) 241-3707 fax
gobrien@taftlaw.com

- and -

JOHN P. WOLFSMITH (Illinois: 6256879)
MATTHEW R. DEVINE (Illinois: 6282744)
Jenner & Block, LLP
330 N. Wabash Avenue
Chicago, IL 60611
(312) 222-9350
(312) 840-7515 fax
jwolfsmith@jenner.com
mdevine@jenner.com

Counsel for Appellee Washington Mutual
Bank, fka, Washington Mutual Bank, FA

FILED
NOV 03 2009
CLERK OF COURT
SUPREME COURT OF OHIO

APPELLANTS' MERIT BRIEF

TABLE OF CONTENTS

TABLE OF AUTHORITIES ---------- v

STATEMENT OF FACTS ---------- 1

ARGUMENT ---------- 5

I. **CERTIFIED QUESTION**:
WHEN A TRIAL COURT DISMISSES A PLAINTIFF'S ACTION FOR LACK OF CAPACITY TO MAINTAIN AN ACTION, DOES R.C. 1703.29 PREVENT THE PLAINTIFF FROM APPEALING THAT DECISION? ---------- 5

II. **PROPOSITION OF LAW NO. 1**:
R.C. 1703.29(A) IS A REMEDIAL ENACTMENT OF THE GENERAL ASSEMBLY WHICH PROHIBITS AN UNLICENSED FOREIGN CORPORATION'S RIGHT OF ACTION WITHIN THE COURTS OF THE STATE OF OHIO. ---------- 5

A. R.C. 1703.29(A) deprives the unregistered foreign corporation of legal capacity to sue. ---------- 6

B. R.C. 1703.29(A) affects the "right of action" is distinguishable from a "cause of action." ---------- 7

C. The General Assembly is vested with authority to enact remedial legislation which prescribes remedies including the method of enforcement of rights or obtaining redress. ---------- 8

III. **PROPOSITION OF LAW NO. 2**:
THE PROHIBITION SET FORTH IN R.C. 1703.29(A) APPLIES TO THE MAINTENANCE OF ANY ACTION IN ANY COURT OF THIS STATE, INCLUDING, THE CONTINUED MAINTENANCE OF SUCH ACTION BY WAY OF APPEAL. ---------- 9

A. Chapter 1703 - Ohio's Foreign Corporation Act serves a vital state interest – the protection of the due process rights of Ohio's Citizenry by requiring licensing/registration with the Ohio Secretary of State to effectuate service of process upon foreign corporations. ---------- 9

B. The United States Supreme Court approved the Ohio General Assembly's legislative actions undertaken to secure the registration of foreign corporations. ----------12

C. R.C. 1703.29(A) operates as a rational restriction upon a foreign corporation which has failed to register with the Ohio Secretary of State and subject itself to the jurisdiction of Ohio's courts. ----------16

D. Jurisdictions across the United States have enacted similar laws that unregistered foreign corporations lack capacity to maintain actions in the court's of those respective states.----------18

E. An unregistered foreign corporation's continuation of an action, by way of appeal, is also prohibited by R.C. 1703.29(A). ----------21

1. There is no constitutional or inherent right to appeal in Ohio.----------21

2. The right of appeal to the court of appeals is a product of statutory law, as enacted by the General Assembly.----------23

3. The General Assembly may prohibit by legislative enactment the appeal of a final order, judgment, or decree of court to the courts of appeals in Ohio. ----------24

F. Where an appellant lacks capacity to maintain an action, a court of appeals is without jurisdiction to hear the appeal. ----------25

G. At least one other jurisdiction has held that a foreign corporation which is barred by statute from maintaining an action is without authority to continue its action further by appeal.----------26

H. This Court's holding in Buckeye Foods v. Cuyahoga County Bd. of Revision (1997), 78 Ohio St.3d 459, 1997-Ohio-199, 678 N.E.2d 917, supports the Appellants' argument that an unregistered foreign corporation may not maintain an appeal. ----------26

CONCLUSION AND ANSWER TO CERTIFIED QUESTION ----------28

APPENDIX TABLE OF CONTENTS

Case Decisions and Entries:

Notice of certified conflict, in *Washington Mutual Bank v. Beatley, et al.*, Case No. 08-1056, filed May 30, 2008 ..... Appdx. 1

April 8, 2008 Judgment Entry from the Tenth District Court of Appeals in *Washington Mutual Bank v. Beatley,* Franklin App. No. 06AP-1189, from which the appeal is taken ..... Appdx. 21

April 8, 2008 Opinion of the Appeals Court - *Washington Mutual Bank v. Beatley,* Franklin App. No. 06AP-1189, 2008-Ohio-1679 ..... Appdx. 22

April 8, 2008 Judgment Entry from the Tenth District Court of Appeals in *Washington Mutual Bank v. Beatley,* Franklin App. No. 06AP-1189 ..... Appdx. 30

October 4, 2006 Trial Court Decision and Entry Granting Defendants Jack K. Beatley and 64 W. Northood Avenue, LLC's Motion to Dismiss the Plaintiff's Complaint Filed September 1, 2006 ..... Appdx. 31

Constitutional Provision:

Section 3, Article IV, Ohio Constitution ..... Appdx. 36

Statutes:

R.C. 1329.01 ..... Appdx. 38

R.C. 1703.29 ..... Appdx. 39

R.C. 2505.03 ..... Appdx. 41

TABLE OF AUTHORITIES:

Cases

A. & W. Artesian Well Co. Toranbene (1965), 124 Vt. 413, 207 A.2d 140 ..... 20, 21

Alabama Western R. Co. v. Talley-Bates Const. Co. (Ala. 1909), 50 So. 341 18

American Railway Express Co. v. Kentucky (1927), 273 U.S. 269, 47 S.Ct. 353, 71 L.Ed. 639 15

American Restaurant & Lunch Co. v. Glander (1946), 147 Ohio St. 147, 33 O.O. 38, 70 N.E.2d 93 23

B. & O. R. Co. v. Harris (1870), 79 U.S. 65, 12 Wall 65 ..... 12, 14, 15

Barbier v. Connolly, (1884), 113 U.S. 27, 5 S.Ct. 357, 28 L.Ed. 923 17

Bauer v. Grinstead (1943), 142 Ohio St. 56, 26 O.O. 252, 50 N.E.2d 334 22

Beamish v. Noon (1915), 76 Or. 415, 149 P. 522 19

Bradford v. Indiana Harbor Belt R. Co. (C.A. 7, 1927), 16 F.2d 836 18

Buckeye Foods v. Cuyahoga County Bd. of Revision (1997), 78 Ohio St.3d 459, 1997-Ohio-199, 678 N.E.2d 917 ..... 6, 26, 27, 28, 29

Cincinnati Gas & Elec. Co. v. Pope (1978), 54 Ohio St.2d 12, 8 O.O.3d 7, 374 N.E.2d 406 ..... 24, 25

Cincinnati Polyclinic v. Balch (1915), 92 Ohio St. 415, 111 N.E. 159 22

City of Middletown v. City Commission of Middletown (1941), 138 Ohio St. 596, 21 O.O. 481, 37 N.E.2d 609 22

Colegrove v. Handler (1986), 34 Ohio App.3d 142, 517 N.E.2d 979 16

Collins v. Millen (1897), 57 Ohio St. 289, 39 W.L.B. 67, 48 N.E. 1097 21

Columbia River Door Co. v. Todd (1918), 90 Or. 147, 175 P. 443 19

Connecticut Mut. Life Ins. Co. v. Spratley (1899), 172 U.S. 602, 19 S.Ct. 308 ..... 13, 15

Cooke v. Kinney (1981), 65 Ohio St.2d 7, 417 N.E.2d 106 22

Craftsman Type, Inc. v. Lindley (1983), 6 Ohio St.3d 82, 6 O.B.R. 122, 451 N.E.2d 768 24

Delaware River Quarry & Construction Co. v. Bethlehem & N. Pass. Ry. Co. (Pa. 1902), 204 Pa. 22, 53 A. 533 20

DeWeese v. Zaino (2003), 100 Ohio St.3d 324, 2003-Ohio-6502, 800 N.E.2d 5 24

Dot Systems, Inc. v. Adams Robinson Ent., Inc. (1990), 67 Ohio App.3d 475, 587 N.E.2d 844 16

Douglas v. Kentucky (1897), 168 U. S. 488, 18 Sup. Ct. 199 14

Fielder v. Ohio Edison Co. (1952), 158 Ohio St. 375, 109 N.E.2d 855 ..... 7, 8, 9

Fitch v. Braddock (1923), 93 Okl. 78, 219 P. 703 19

Frate v. Al-Sol, Inc. (1999), 131 Ohio App.3d 283, 722 N.E.2d 185 ..... 6, 7

Friendly Village Community Assn., Inc. v. Silva & Hill Constr., Co. (1973), 31 Cal. App.3d 220, 107 Cap. Rptr. 123 6

Gallafent v. Tucker (Idaho 1929), 281 P. 375 19

Gibbes v. Zimmerman (1933), 290 U.S. 326, 54 S.Ct. 140 10

Gibraltar Const. & Engineering, Inc. v. State Nat. Bank of Bethesda (1972), 265 Md. 530, 290 A.2d 789 26

GMS Mgt. Co. v. Axe (1982), 5 Ohio Misc.2d 1, 5 OBR 53, 449 N.E.2d 43 27

Goodsill v. Brig St. Louis (1847), 16 Ohio 178 8

Groel v. United Electric Co. (1905), 69 N.J. Eq. 397, 60 A. 822 12

Hale v. City Cab, Carriage & Transfer Co. (1912), 66 Wash. 459, 119 P. 837 19

Hastings Industrial Co. v. Moran (1906), 143 Mich. 679, 107 N. W. 706 20

Hayes v. Missouri (1887), 120 U.S. 68, 7 S.Ct. 350, 30 L.Ed. 578 17

Heegaard v. Dakota L. & T. Co. (1893), 3 S. D. 569, 54 N. W. 656 19

Helms v. Pacific Mill & Timber Co. (1922), 57 Cal. App. 442, 207 P. 708 19

Home Owners' Loan Corp. v. Sherwin (1938), 59 Ohio App. 567, 18 N.E.2d 992 16

Hooper v. California (1895), 155 U.S. 648, 15 Sup. Ct. 207 14

In re Cutler-Owens Intern. Ltd., (Bankr.Ct.S.D.N.Y. 1985), 55 B.R. 291 19

In re Davis' Estate (1958), 107 Ohio App. 52, 156 N.E.2d 321 25

In re Mahoning Valley Sanitary Dist. (1954), 161 Ohio St. 259, 53 O.O. 140, 119 N.E.2d 61 ..... 22, 24

In re Metz v. Victims of Crime Division (Aug. 23, 1979), Franklin App. No. 79-AP-446, unreported, 1979 WL 209273 24

In re Trader (1974), 272 Md. 364, 325 A.2d 416 ..... 16, 17

Kilbreath v. Rudy (1968), 16 Ohio St.2d 70, 45 O.O.2d 370, 242 N.E.2d 658 9

Klien v. Bendix-Westinghous Co. (1968), 13 Ohio St.2d 85, 234 N.E.2d 587 25

Kraft v. Hoppe (1922), 152 Minn. 143, 188 N.W. 162 18

Lafayette Ins. Co. v. French (1855), 59 U.S. 404 ..... 12, 13

Lenart v. Lindley (1980), 61 Ohio St.2d 110, 15 O.O.3d 152, 399 N.E.2d 1222 23

Liberty Nat. Ins. Holding Co. v. Charter Co. (C.A.Ala. 1984), 734 F.2d 545 6

Lindblom v. Board of Tax Appeals (1949), 151 Ohio St. 250, 39 Ohio Op. 66, 85 N.E.2d 376 21

M. S. Cohn Gravel Co. v. Terry (1928), 135 Okl. 275, 275 P. 1048 20

MBA Realty v. Little G, Inc. (1996), 116 Ohio App.3d 334, 688 N.E.2d 39 7

Mitchell v. Great Works Milling & Mfg. Co. (C.C. Me., 1843), 17 Fed.Cas. 496 16

Moody v. Morris-Roberts Co. (1923), 38 Idaho 414, 226 P. 278 19

Mutual Reserve Fund Life Ass'n v. Phelps (1903), 190 U.S. 147, 23 S.Ct. 707 10

National Fertilizer Co. v. Fall River etc., Bank (1907), 196 Mass. 458, 82 N. E. 671, 14 L. R. A. (N. S.) 561, 13 Ann. Cas. 510 20

Neuchatel Asphalt Co. v. New York (1898), 155 N. Y. 373, 49 N. E. 1043 20

Neyens v. Worthington (1908), 150 Mich. 580, 114 N. W. 404, 18 L. R. A. (N. S.) 142 20

Parker v. Bowron (1953), 40 Cal.2d 344, 254 P.2d 6 6

Pennoyer v. Neff (1877), 95 U.S. 714, 24 L.Ed. 565 ..... 10, 11

People v. Conti (1926), 127 Misc. 244, 216 N.Y.S. 442 ..... 17, 18

Peter & Burghard Stone Co. v. Carper (Ind.App. 1930), 172 N.E. 319 20

Peters v. Harman (1904), 17 Ohio C.D. 88 21

Petitioners v. Board of Twinsburg Tp. Trustees (1965), 4 Ohio App.2d 171, 211 N.E.2d 880 25

Phillips v. Goldtree (1887), 74 Cal. 151, 15 P. 451 19

Proctor v. Kardassilaris (2007), 115 Ohio St.3d 71, 2007-Ohio-4838, 873 N.E.2d 872 23

Protective Finance Corporation v. Glass (N.J.Supp. 1924), 2 N.J. Misc. 818, 100 N.J.L. 85, 125 A. 879 19

Quality Internatl. Ents., Inc. v. IFCO Sys. N. Am., Inc., Summit App. No. 23131, 2006-Ohio-5883 ..... 5, 25, 26, 28, 29

Queen City Valves, Inc. v. Peck (1954), 161 Ohio St. 579, 53 O.O. 430, 120 N.E.2d 310 ..... 23, 27

Reilly v. Hatheway (1912), 46 Mont. 1, 125 P. 417 19

Smith v. Stubbs (1901), 16 Colo. App. 130, 63 P. 955 19

St. Clair v. Cox (1882), 106 U.S. 350, 1 S.Ct. 354, 27 L.Ed. 222 ..... 10, 12

State ex rel. Downs v. Panioto (2006), 107 Ohio St.3d 347, 2006-Ohio-8, 839 N.E.2d 911 23

State ex rel. Holdridge v. Indus. Comm. (1967), 11 Ohio St.2d 175, 228 N.E.2d 621 9

State ex rel. Kilbane v. Indus. Comm. (2001), 91 Ohio St.3d 258, 2001-Ohio-34, 744 N.E.2d 708 8

State ex rel. Sinay v. Sodders (1997), 80 Ohio St.3d 224, 1997-Ohio-344, 685 N.E.2d 754 6

State ex rel. Wright v. Ohio Adult Parole Auth. (1996), 75 Ohio St.3d 82, 661 N.E.2d 728 23

State ex. rel. Jones v. Suster (1998), 84 Ohio St.3d 70, 1998-Ohio-275, 701 N.E.2d 1002, 1008 6

State of Missouri v. Lewis (1879), 101 U.S. 22 17

State of Washington ex rel. Bond & Goodwin & Tucker v. Superior Court of State of Washington for Spokane County (1933), 289 U.S. 361, 53 S.Ct. 624 15

State v. Hughes (1975), 41 Ohio St.2d 208, 70 O.O.2d 395, 324 N.E.2d 731 23

State v. Superior Court (1920), 111 Wash. 205, 190 P. 234 19

Swift v. Little (1907), 28 R. I. 108, 65 A. 615 20

Temple v. Riverland Co. (Tex. Civ. App. 1921), 228 S. W. 605 20

Thomas v. Columbus (1987), 39 Ohio App.3d 53, 528 N.E.2d 1274 27

Thompson v. Building, etc., Ass'n (1905), 57 W. Va. 551, 50 S. E. 756 20

Thompson v. Street Bldg. Assn. (1896), 78 Ohio C.D. 68, 13 Ohio C.C. 250 21

Turnbull v. Michigan Cent. R. Co. (1914), 183 Mich. 213, 150 N. W. 132 19

Van Camp v. McCulley (1913), 89 Ohio St. 1, 104 N.E. 1004 ..... 7, 8, 9

Van Fossen v. Babcock & Wilcox Co. (1988), 36 Ohio St.3d 100, 522 N.E.2d 489 9

Vermont Farm etc., Co. v. Hall (1916), 80 Or. 308, 156 P. 1073 20

Vickers v. Buck's Stove & Range Co. (1905), 70 Kan. 584, 79 P. 160 19

Walsh v. J. R. Thomas' Sons (1915), 91 Ohio St. 210, 110 N. E. 454 19

Ward Land, etc., Co. v. Mapes (1905), 147 Cal. 747, 82 P. 426 19

Washington Mutual Bank v. Beatley, Franklin App. No. 06AP-1189, 2008-Ohio-1679 ..... 7, 25, 28

Weil v. Taxicabs of Cincinnati (1942), 139 Ohio St. 198, 39 N.E.2d 148 9

Western Electrical Co. v. Pickett (1911), 51 Colo. 415, 118 P. 988, 38 L. R. A. (N. S.) 702, Ann. Cas. 1913A 1322 19

Whalen Const. & Equipment Co. (Mo.App. 1979), 578 S.W.2d 69 19

Williams v. City of Akron (1978), 54 Ohio St.2d 136, 374 N.E.2d 1378 22

Woods v. Interstate Realty Co. (1949), 337 U.S. 535, 69 S.Ct. 1235, 93 L.Ed. 1524 ..... 18, 28

Woolfort v. Dixie (1905), 77 Ark. 203, 91 S. W. 306, 113 Am. St. Rep. 139, 7 Ann. Cas. 217 19

Statutes

R.C. 1329.01 26

R.C. 1329.10(A) 27

R.C. 1329.10(B) 4, 26, 27

R.C. 1703.01 6

R.C. 1703.29 ..... 4, 5, 7, 16, 25, 29

R.C. 1703.29(A) 4, 5, 6, 7, 8, 9, 16, 18, 21, 25, 26, 27, 28

R.C. 1703.31 6

R.C. 1777.02 26

R.C. 2505.03 ..... 23, 24

R.C. 2505.03(A) 23

R.C. 2743.20 24

Constitutional Provisions

Fourteenth Amendment to the United States Constitution 10

Section 28, Article II, Ohio Constitution 8

Section 3(B)(2), Article IV, Ohio Constitution 22, 24, 28

Section 3(B), Article IV, Ohio Constitution 22, 25

The 1968 Modern Courts Amendment to Article IV of the Ohio Constitution 22

Other Authorities

4 American Jurisprudence 2d (2008), *Database,* Appellate Review, Section 75 25

59 American Jurisprudence 2d (2008), *Database*, Parties, Section 31 6

STATEMENT OF FACTS

On July 14, 2006, Washington Mutual Bank fka Washington Mutual Bank, FA ("Washington Mutual") filed its Complaint in the Franklin County Court of Common Pleas against Jack K. Beatley, 64 W. Northwood Avenue LLC, John Doe and Don Breckenridge. (Trial Ct. Rec. 8) Jack K. Beatley and 64 W. Northwood Avenue, LLC are related in interest and collectively referred to as ("Beatley"). Washington Mutual's Complaint alleged that Jack K. Beatley was in default of the mortgage loan at issue in the underlying matter[1], yet no proof to support Washington Mutual's allegations were attached to the Complaint. (*Id.*) Washington Mutual did not present any evidence to support its allegations of default because Beatley was not in default on his mortgage, Washington Mutual failed to properly apply Beatley's cleared checks for the mortgage loan account and had improperly commenced the foreclosure action, despite its lack of capacity to sue in Ohio's courts.

In its Complaint, Washington Mutual did not identify the type of person or entity it is. (Trial Ct. Rec. 8) On August 18, 2006, Washington Mutual moved to substitute party-plaintiff to include various cryptic abbreviations continuing to identify itself as Washington Mutual Bank, all the while failing to identify itself as the real party in interest to commence an action for default on this mortgage note. (Trial Ct. Rec. 39) Substitution of the party-plaintiff was granted. (Trial Ct. Rec. 43) Washington Mutual never made any further amendments to the body of the Complaint to explain the type of person or entity it is.

[1] Mr. Beatley executed a promissory note in favor of Home Savings of America, FA, on April 20, 1990, for $187,000.00. (T.D. 8). The note was secured by a mortgage dated April 25, 1990 on the property located at 64 West Northwood Avenue, Columbus, Ohio 43201.

After confirming that neither Washington Mutual Bank nor Washington Mutual Bank, FA were registered to do business in the State of Ohio with the office of the Ohio Secretary of State, Beatley moved to dismiss the Complaint on September 1, 2006. (Trial Ct. Rec. 60). Beatley attached certified documents from the Ohio Secretary of State's Office in support of his motion to dismiss the complaint. (App. Rec. 169; Appdx. 23-24, ¶4) [2] Those official records stated that the Secretary of State has no records of an Ohio corporation, foreign corporation, Ohio limited liability corporation, foreign limited liability corporation, Ohio limited partnership, foreign limited partnership, Ohio limited liability partnership, foreign limited liability partnership, trade name registration, or report of use of fictitious name, either active or inactive known as Washington Mutual Bank or Washington Mutual Bank, FA. *Id.* Based upon these official and certified records the trial court determined that Washington Mutual Bank and Washington Mutual Bank, FA were fictitious names that had not been registered with the Secretary of State's Office. (App. Rec. 169; Appdx. 24, ¶5) Given the absence of registration with the Ohio Secretary of State the trial court determined that the action could not be maintained. *Id.* On October 4, 2006, the trial court issued its decision granting Beatley's Motion to Dismiss. (Trial Ct. Rec. 67; Appdx. 31) This decision and entry was filed on October 26, 2006. *Id.*

The trial court docket reflects that Washington Mutual filed an out-of-rule "Reply Memorandum" in opposition to Beatley's Motion to Dismiss. (Trial Ct. Rec. 64) As referenced by the trial court's opinion, it did not have nor did it consider Washington Mutual's untimely Memorandum in opposition. (Trial Ct. Rec. 67) The trial court noted in its decision and entry: "The Court finds that Plaintiff was afforded more than the fourteen (14) days required by rule to

[2] Citations herein to items included within the Apellant's Appendix, attached hereto, are

respond to the motion, as more than thirty (30) days have elapsed since filing, and no response or memorandum contra has been filed." (Trial Ct. Rec. 64; Appdx. 34-35)

Washington Mutual filed its Notice of Appeal of the trial court's decision on November 24, 2006 assigning error to the trial court's dismissal of the underlying action. (Trial Ct. Rec. 75); and (Docketing Statement filed in the appeals court on November 24, 2006, App. Rec. 8) Thereafter, the appeals court granted Washington Mutual leave to file a Civ. R. 60(B) motion with the trial court. (App. Rec. 26) However, Washington Mutual failed to file its Civ. R. 60(B) motion prior to expiration of the time allowed by the appeals court. Thereafter, Beatley moved to dismiss the appeal for Washington Mutual's failure to file its appellant's brief with the appeals court. (App. Rec. 42) In response to the motion to dismiss the appeal, Washington Mutual filed a Civ.R. 60(B) motion with the trial court. (Trial Ct. Rec. 82) The trial court ordered that Washington Mutual's 60(B) motion be stricken as it was filed outside the time for consideration which had been ordered by the appeals court. (Trial Ct. Rec. 86)

The appeals court denied Beatley's motion to dismiss the appeal for Washington Mutual's failure to file its brief. (App. Rec. 91) The trial court again certified the record below which included Washington Mutual's untimely filed Civ.R. 60(B) Motion. (App. Rec. 103) The trial court's record is clear that it did not consider Washington Mutual's Civ.R. 60(B) Motion, rather it was stricken from the record. Accordingly, Washington Mutual's Civ.R. 60(B) Motion and the evidence attached thereto, is not properly before this Court. Since Washington Mutual's appeal to the appeals court related solely to the trial court's decision to grant Beatley's Motion to Dismiss the Complaint, only the trial court record which was certified to the appeals court in 2006 should be considered by this Court as the record properly before the appeals court.

---

designated by "(Appdx._)".

On September 11, 2007, Beatley filed a Motion to Dismiss the Appeal as a consequence of Washington Mutual's lack of capacity to commence or maintain the appeal pursuant to R.C. 1329.10(B) and R.C. 1703.29(A); arising from Washington Mutual's failure to register and/or nominate a statutory agent for service of process within the State of Ohio. (App. Rec. 94) Beatley included in the motion to dismiss an affidavit from the Ohio Secretary of State's Office. (App. Rec. 94, Exhibit A attached thereto) The affidavit demonstrated that Washington Mutual, Inc., an entity which was not a domestic entity within the State of Ohio, does business across the United States under the tradename Washington Mutual Bank. (App. Rec. 94, Exhibit A attached thereto, at ¶3, therein) The affidavit demonstrated that the names Washington Mutual Bank and Washington Mutual Bank, FA remained as unregistered names with the Ohio Secretary of State. (App. Rec. 94, Exhibit A attached thereto, at ¶6, therein). On September 27, 2007, the appeals court issued a journal entry which stated that the motion to dismiss the appeal would be considered at the time the appeals court addressed the merits of the appeal. (App. Rec. 100; Appdx. 31)

After oral argument, the appeals court rendered an opinion which denied Beatley's motion to dismiss the appeal. (App. Rec. 169; Appdx. 24-25, ¶7). The opinion of the appeals court was further journalized by judgment entry which denied Beatley's motion to dismiss the appeal. (App. Rec. 170; Appdx. 21) With regard to Beatley's motion to dismiss the appeal pursuant to R.C. 1703.29, the court of appeals determined that Washington Mutual, an unregistered foreign corporation, as a party to the trial court action had standing to pursue the appeal. (App. Rec. 169; Appdx. 24-25, ¶7). The appeals court opinion did not distinguish Washington Mutual's standing to appeal, versus its lack of legal capacity to maintain or continue its action via the appeal.

Beatley moved the appeals court to certify a conflict upon the following issue: "Whether an unregistered foreign corporation has standing (legal capacity) to commence or maintain an appeal in an appellate court of this state?" (App. Rec. 171) The appeals court agreed that its reasoning set forth in the denial of Beatley's motion to dismiss the appeal conflicted with the Ninth District's decision in *Quality Internatl. Ents., Inc. v. IFCO Sys. N. Am., Inc.*, Summit App. No. 23131, 2006-Ohio-5883. (App. Rec. 177; Appdx. 8) The appeals court certified the following question of law: "When a trial court dismisses a plaintiff's action for lack of capacity to maintain an action, does R.C. 1703.29 prevent the plaintiff from appealing that decision?" (App. Rec. 177; Appdx. 10) (App. Rec. 179; Appdx. 6) This Court accepted the certified conflict on August 6, 2008.

ARGUMENT

I. CERTIFIED QUESTION:

WHEN A TRIAL COURT DISMISSES A PLAINTIFF'S ACTION FOR LACK OF CAPACITY TO MAINTAIN AN ACTION, DOES R.C. 1703.29 PREVENT THE PLAINTIFF FROM APPEALING THAT DECISION?

II. PROPOSITION OF LAW NO. 1:

R.C. 1703.29(A) IS A REMEDIAL ENACTMENT OF THE GENERAL ASSEMBLY WHICH PROHIBITS AN UNLICENSED FOREIGN CORPORATION'S RIGHT OF ACTION WITHIN THE COURTS OF THE STATE OF OHIO.

The central issue within this appeal arises pursuant to the General Assembly's enactment of R.C. 1703.29(A) which states:

> (A) The failure of any corporation to obtain a license under sections 1703.01 to 1703.31, inclusive, of the Revised Code, does not affect the validity of any contract with such corporation, but **no foreign corporation which should have obtained such license shall maintain any action in any court until it has obtained such license**. Before any such corporation shall maintain such action on any cause of action arising at the time when it was not licensed to transact business in this state, it shall pay to the secretary of state a forfeiture of two

hundred fifty dollars and file in his office the papers required by divisions (B) or (C) of this section, whichever is applicable.

R.C. 1703.29(A)(emphasis added)(Appdx. 39). The General Assembly's prohibition set forth with R.C. 1703.29(A), conditions the "right of action" of a foreign corporation to maintain any action in a court upon its compliance with the licensing provisions set forth in sections 1703.01 to 1703.31, inclusive of the Revised Code.

A. R.C. 1703.29(A) deprives the unregistered foreign corporation of legal capacity to sue.

R.C. 1703.29(A) limits the legal capacity of a foreign corporation to maintain an action in court. "Capacity to sue is the right to come to court, while standing to sue is the right to relief in court." See, *Friendly Village Community Assn., Inc. v. Silva & Hill Constr., Co.* (1973), 31 Cal. App.3d 220, 224, 107 Cap. Rptr. 123 (citing *Parker v. Bowron* (1953), 40 Cal.2d 344, 254 P.2d 6, 351); see generally, 59 American Jurisprudence 2d (2008), *Database,* Parties, Section 31. This Court has held that a lack of standing denotes the prosecution of an action by one who is not the real party in interest. See *State ex. rel. Jones v. Suster* (1998), 84 Ohio St.3d 70, 77, 1998-Ohio-275, 701 N.E.2d 1002, 1008. The real party in interest is the person who is directly benefited or injured by the outcome of the case. *State ex rel. Sinay v. Sodders* (1997), 80 Ohio St.3d 224, 226, 1997-Ohio-344, 685 N.E.2d 754, 757.

Courts often recognize that standing is related to and likely to be confused with the concept of capacity to sue. See, *Liberty Nat. Ins. Holding Co. v. Charter Co.* (C.A.Ala. 1984) 734 F.2d 545, 554. Within Ohio, the Eighth District Court of Appeals, in *Frate v. Al-Sol, Inc.* (1999), 131 Ohio App.3d 283, 722 N.E.2d 185, acknowledged that when a statute prevents a party from maintaining an action in court, that statute deprives the person of capacity to sue. *Frate,* 131 Ohio App.3d at 288, 722 N.E.2d at 188 (citing *Buckeye Foods v. Bd. of Revision*

(1997), 78 Ohio St.3d 459, 461, 678 N.E.2d 917, 918-919; *Ebner v. Caudill* (1994), 93 Ohio App.3d 785, 786-787, 639 N.E.2d 1231, 1232-1233). The Eighth District Court Appeals recognized that in its opinion of *MBA Realty v. Little G, Inc.* (1996), 116 Ohio App.3d 334, 337-338, 688 N.E.2d 39, 41-42, it had incorrectly described such statutory prohibition as a denial of "standing," rather than a denial of "capacity to sue." [3] *Frate,* 131 Ohio App.3d at 288, 722 N.E.2d at 188.

The foregoing authorities demonstrate that a party who may in fact be the real party in interest, with all requisite standing and interest in the subject matter of the action, who is otherwise deprived of the right to come into court to maintain an action is properly characterized as lacking "capacity to sue." Therefore, this Court must conclude that the prohibition against the maintenance of an action in R.C. 1703.29(A) deprives a foreign corporation of capacity to sue, irrespective of whether or not that corporation may be the real party in interest with standing.

B. R.C. 1703.29(A) affects the "right of action" is distinguishable from a "cause of action."

When interpreting the legal effect of R.C. 1703.29(A), due care should be given to distinguish a "right of action" from a "cause of action." This Court has previously stated that "plaintiff's capacity to sue [] relates to the right of action as contradistinguished from the cause of action." *Van Camp v. McCulley* (1913), 89 Ohio St. 1, 7, 104 N.E. 1004, 1006. In *Fielder v. Ohio Edison Co.* (1952), 158 Ohio St. 375, 109 N.E.2d 855, this Court explained that a "right of action is a remedial right affording redress" while a "cause of action is the operative facts which

[3] Appellants submit in the case sub judice, the appeals court fell victim to the same legal error in its opinion and denial of Beatley's motion to dismiss the appeal. The appeals court did not properly construe R.C. 1703.29, under the applicable principle of lack of capacity to maintain an action/"capacity to sue," instead it considered solely whether or not Washington Mutual was the real party in interest and possessed standing with regard to the subject matter of the cause of action. See, *Washington Mutual Bank v. Beatley,* Franklin App. No. 06AP-1189, 2008-Ohio-1679, at ¶7.

give rise to such right of action." *Fielder*, 158 Ohio St. at 382, 109 N.E.2d at 859 (reversed by statute on other grounds). In its opinion this Court opined:

> **A right of action is a remedial right affording redress for the infringement of a legal right belonging to some definite person, whereas a cause of action is the operative facts which give rise to such right of action.** When a legal right is infringed, there accrues, ipso facto, to the injured party **a right to pursue the appropriate legal remedy** against the wrongdoer. **This remedial right is called a right of action.** The plaintiff must show a right in himself, recognized by law, and a wrongful invasion thereof; and since both rights and delicts are operative facts, he must show as to himself such fact or group of facts as will invest a consequent remedial right and must show as to the adversary party such culpatory act or acts as will disclose the latter's infringement of the specific legal right so asserted. It must follow that only he who is invested with the legal right, which is the subject matter of any particular cause of action, can be affected by the latter. In other words, a party is affected by a particular cause of action only when he is invested to some degree with the right which is the subject matter of such cause of action.

Fielder, 158 Ohio St. at 382-383, 109 N.E.2d at 859. So too in *Van Camp,* this Court stated that the "right of action is remedial." *Van Camp,* 89 Ohio St. at 7, 104 N.E. at 1006. Therefore, it cannot be said that R.C. 1703.29(A) alters an underlying cause of action, rather it expressly conditions the remedial "right of action" that a foreign corporation may attempt to use to pursue legal remedies in any court.

C. The General Assembly is vested with authority to enact remedial legislation which prescribes remedies including the method of enforcement of rights or obtaining redress.

Ohio's General Assembly has long been recognized as possessing plenary power to establish, change or abolish remedies. See, *Goodsill v. Brig St. Louis* (1847), 16 Ohio 178, 180; see also, *State ex rel. Kilbane v. Indus. Comm.* (2001), 91 Ohio St.3d 258, 2001-Ohio-34, 744 N.E.2d 708. Although the General Assembly's power to enact laws is subject to Section 28, Article II, of the Ohio Constitution, this Court has held that this constitutional provision does not impair the General Assembly's power to enact remedial laws. See, *Van Fossen v. Babcock &*

Wilcox Co. (1988), 36 Ohio St.3d 100, 107, 522 N.E.2d 489 (superseded by statute on other grounds); *Kilbreath v. Rudy* (1968), 16 Ohio St.2d 70, 45 O.O.2d 370, 242 N.E.2d 658. "Substantive law is that which creates duties, rights and obligations, while procedural or remedial law prescribes the methods of enforcement of rights or obtaining redress." *Kilbreath,* 16 Ohio St.2d at 72, 242 N.E.2d at 660 (citing *State ex rel. Holdridge v. Indus. Comm.* (1967), 11 Ohio St.2d 175, 228 N.E.2d 621). "Remedies have to do with the methods and procedure by which rights are recognized, protected and enforced, not with the rights themselves." *Weil v. Taxicabs of Cincinnati* (1942), 139 Ohio St. 198, 205, 39 N.E.2d 148, 151. As demonstrated in the preceding section, the prohibition contained with R.C. 1703.29(A), restricts a foreign corporation's "capacity to sue" which affects the remedial "right of action." See, *Fielder, surpa.; Van Camp, supra.* Therefore, R.C. 1703.29(A) clearly falls within the definition of a remedial law, the enactment of which the General Assembly holds plenary power.

The forgoing legal principles taken together support the first proposition of law that R.C. 1703.29(A) is a remedial enactment of the General Assembly which prohibits an unlicensed foreign corporation's right of action within the courts of the State of Ohio.

III. PROPOSITION OF LAW NO. 2:

THE PROHIBITION SET FORTH IN R.C. 1703.29(A) APPLIES TO THE MAINTENANCE OF ANY ACTION IN ANY COURT OF THIS STATE, INCLUDING THE CONTINUED MAINTENANCE OF SUCH ACTION BY WAY OF APPEAL.

A. Chapter 1703 - Ohio's Foreign Corporation Act serves a vital state interest – the protection of the due process rights of Ohio's Citizenry by requiring licensing/registration with the Ohio Secretary of State to effectuate service of process upon foreign corporations.

It is beneficial for this Court to reflect upon the purpose served by the registration/licensing[4] requirements of R.C. Chapter 1703. The fundamental purpose under R.C. Chapter 1703, is to provide for the designation of a person for service of process within the State of Ohio, as to a foreign corporation doing business in Ohio. The United States Supreme Court has long supported the purpose behind such enactments by the legislatures and general assemblies of the states. In *Mutual Reserve Fund Life Ass'n v. Phelps* (1903), 190 U.S. 147, 23 S.Ct. 707, the United States Supreme Court embraced these statutes:

> This and other kindred statutes enacted in various states indicate the purpose of the state that foreign corporations engaging in business within its limits shall submit to controversies growing out of that business to its courts, and not compel a citizen having such a controversy to seek the state in which the corporation has its home for the purpose of enforcing his claims.

Mutual Reserve Fund Life Ass'n, 190 U.S. at 158, 23 S.Ct. at 708.

The need for such statutes is to support and uphold the constitutional right of Due Process provided for in the Fourteenth Amendment to the Constitution of the United States. What the citizen "is guaranteed by the Fourteenth Amendment is the preservation of his substantial right to redress by some effective procedure." *Gibbes v. Zimmerman* (1933), 290 U.S. 326, 332, 54 S.Ct. 140, 142 (citations omitted).

The need for some sort of personal jurisdiction of an out of state defendant to achieve redress and judgment has been clear since the seminal holding of *Pennoyer v. Neff* (1877), 95 U.S. 714, 24 L.Ed. 565. The nuance of personal jurisdiction of corporations was explained by the United States Supreme Court in *St. Clair v. Cox* (1882), 106 U.S. 350, 1 S.Ct. 354, 27 L.Ed. 222, where the United States Supreme Court opined:

---

[4] Since the developed case law throughout the United States refers to registration with a secretary of state as opposed to licensure, Appellant has elected to refer to the licensing requirements in Chapter 1703 and 1703.29(A) as registration requirements for consistency and clarity of argument.

The doctrine of that case [*Pennoyer v. Neff*, supra,] applies, in all its force, to personal judgments of state courts against foreign corporations. The courts rendering them must have acquired jurisdiction over the party by personal service or voluntary appearance, whether the party be a corporation or a natural person. There is only this difference: A corporation, being an artificial being, can act only through agents, and only through them can be reached, and process must, therefore, be served upon them. In the state where a corporation is formed it is not difficult to ascertain who are authorized to represent and act for it. Its charter or the statutes of the state will indicate in whose hands the control and management of its affairs are placed. Directors are readily found, as also the officers appointed by them to manage its business. But the moment the boundary of the state is passed difficulties arise; it is not so easy to determine who represent the corporation there and under what circumstances service on them will bind it. Formerly it was held that a foreign corporation could not be sued in an action for the recovery of a personal demand outside of the state by which it was chartered. The principle that a corporation must dwell in the place of its creation, and cannot, as said by Chief Justice TANEY, migrate to another sovereignty, coupled with the doctrine that an officer of the corporation does not carry his functions with him when he leaves his state, prevented the maintenance of personal actions against it. There was no mode of compelling its appearance in the foreign jurisdiction. Legal proceedings there against it were, therefore, necessarily confined to the disposition of such property belonging to it as could be there found; and to authorize them legislation was necessary.

* * *

This doctrine of the exemption of a corporation from suit in a state other than that of its creation, was the cause of much inconvenience and often of manifest injustice. The great increase in the number of corporations of late years, and the immense extent of their business, only made this inconvenience and injustice more frequent and marked. Corporations now enter into all the industries of the country. The business of banking, mining, manufacturing, transportation, and insurance is almost entirely carried on by them, and a large portion of the wealth of the country is in their hands. Incorporated under the laws of one state, they carry on the most extensive operations in other states. To meet and obviate this inconvenience and injustice, the legislatures of several states interposed and provided for service of process on officers and agents of foreign corporations doing business therein. While the theoretical and legal view, that the domicile of a corporation is only in the state where it is created, was admitted, it was perceived that when a foreign corporation sent its officers and agents into other states, and opened offices and carried on its business there, it was, in effect, as much represented by them there as in the state of its creation. As it was protected by the laws of those states, allowed to carry on its business within their borders and to sue in their courts, it seemed only right that it should be held responsible in those courts to obligations and liabilities there incurred.

St. Clair, 106 U.S. at 353-355, 1 S.Ct. 357-359. In *Groel v. United Electric Co.* (1905), 69 N.J. Eq. 397, 60 A. 822 the New Jersey Supreme Court explained generally as to the rights to be protected though enactment of the foreign corporation service of process laws.

> Foreign corporations, before the enactment of this legislation, could, as we have seen, come within the state of New Jersey, and, unless service had been made upon some actual representative thereof while the corporation was actually doing business in the state, they were free to withdraw from the state, and cause citizens who had transacted business with them here to pursue them to their home jurisdictions, at great inconvenience and expense; the result being, as was said in *B. & O. R. Co. v. Harris*, supra [12 Wall. 65], to give foreign corporations, 'to a large extent, immunity from all legal responsibility.'

Groel, 69 N.J. Eq. at 414, 60 A. at 828. These statutes provide a method to obtain service of process for enforcement of the jurisdiction that the state has over the foreign corporation, by virtue of its business or interests acted upon within the state. *Id.,* 69 N.J. at 412-413, 60 A. at 828. There was no per se creation of jurisdiction, rather a method to enforce what already existed. *Id.*

B. <u>The United States Supreme Court approved the Ohio General Assembly's legislative actions undertaken to secure the registration of foreign corporations.</u>

Perhaps the most cited United States Supreme Court case on these points of constitutional law, involved none other than a foreign corporation law enacted by Ohio's General Assembly. In *Lafayette Ins. Co. v. French* (1855), 59 U.S. 404, the Court explained:

> It cannot be deemed unreasonable that the State of Ohio should endeavor to secure to its citizens a remedy, in their domestic forum, upon this important class of contracts made and to be performed within that State, and fully subject to its laws; nor that proper means should be used to compel foreign corporations, transacting this business of insurance within the State, for their benefit and profit, to answer there for the breach of their contracts of insurance there made and to be performed.
>
> Nor do we think the means adopted to effect this object are open to the objection, that it is an attempt improperly to extend the jurisdiction of the State beyond its own limits to a person in another State. Process can be served on a corporation only by making service thereof on some one or more of its agents. The law may,

> and ordinarily does, designate the agent or officer, on whom process is to be served. For the purpose of receiving such service, and being bound by it, the corporation is identified with such agent or officer. The corporate power to receive and act on such service, so far as to make it known to the corporation, is thus vested in such officer or agent. Now, when this corporation sent its agent into Ohio, with authority to make contracts of insurance there, the corporation must be taken to assent to the condition upon which alone such business could be there transacted by them; that condition being, that an agent, to make contracts, should also be the agent of the corporation to receive service of process in suits on such contracts; and, in legal contemplation, the appointment of such an agent clothed him with power to receive notice, for and on behalf of the corporation, as effectually as if he were designated in the charter as the officer on whom process was to be served; or, as if he had received from the president and directors a power of attorney to that effect. The process was served within the limits and jurisdiction of Ohio, upon a person qualified by law to represent the corporation there in respect to such service; and notice to him was notice to the corporation which he there represented, and for whom he was empowered to take notice.
>
> We consider this foreign corporation, entering into contracts made and to be performed in Ohio, was under an obligation to attend, by its duly authorized attorney, on the courts of that State, in suits founded on such contracts, whereof notice should be given by due process of law, served on the agent of the corporation resident in Ohio, and qualified by the law of Ohio and the presumed assent of the corporation to receive and act on such notice; that this obligation is well founded in policy and morals, and not inconsistent with an principle of public law; and that when so sued on such contracts in Ohio, the corporation was personally amenable to that jurisdiction; and we hold such a judgment, recovered after such notice, to be as valid as if the corporation had had its habitat within the State; that is, entitled to the same faith and credit in Indiana as in Ohio, under the constitution and laws of the United States.

Lafayette Ins. Co., 59 U.S. 404. After *Layfette*, the legislatures and general assemblies of the States began enacting foreign corporation laws that went so far as to provide service upon the secretary of state, of the respective sovereign state, in the event the foreign corporation's domestic agent was no longer available within the state. The United States Supreme Court also passed upon these provisions with full constitutional approval. One such case was *Connecticut Mut. Life Ins. Co. v. Spratley* (1899), 172 U.S. 602, 19 S.Ct. 308, in support of its decision the Court stated:

A vast mass of business is now done throughout the country by corporations which are chartered by states other than those in which they are transacting part of their business, and justice requires that some fair and reasonable means should exist for bringing such corporations within the jurisdiction of the courts of the state where the business was done out of which the dispute arises.

It was well said in *Railroad Co. v. Harris*, 12 Wall. 65, at page 83, by Mr. Justice Swayne, in speaking for the court, in regard to service on an agent, that 'when this suit was commenced, if the theory maintained by counsel for the plaintiff in error be correct, however large or small the cause of action, and whether it were a proper one for legal or equitable cognizance, there could be no legal redress short of the seat of the company in another state. In many instances the cost of the remedy would have largely exceeded the value of its fruits. In suits local in their character, both at law and in equity, there could be no relief. The result would be, to a large extent, immunity from all legal responsibility.' The court, in view of these facts, was of opinion that congress intended no such result.
* * *
Upon the question relative to the alleged creation of a contract between the state and the company, by the appointment of the secretary of state as it agent, under the act of 1875, to receive process for it, we have no doubt.
The act of 1875 stated the terms upon compliance with which a foreign corporation should be permitted to do business within the state of Tennessee.
* * *
When, therefore, in 1887, the legislature passed another act, and therein provided for the service of process, no contract between the state and the corporation was violated thereby, or any of its obligations in any wise impaired, for the reason that no contract had ever existed. Instead of a contract, it was a mere license given by the state to a foreign corporation to do business within its limits upon complying with the rules and regulations provided for by law. That law the state was entirely competent to change at any time by a subsequent statute, without being amenable to the charge that such subsequent statute impaired the obligation of a contract between the state and the foreign corporation doing business within its borders under the former act.

Statutes of this kind reflect and execute the general policy of the state upon matters of public interest, and each subsequent legislature has equal power to legislate upon the same subject. The legislature has power at any time to repeal or modify the act granting such permission, making proper provision, when necessary, in regard to the rights of property of the company already acquired and protecting such rights from any illegal interference or injury. *Douglas v. Kentucky*, 168 U. S. 488, 18 Sup. Ct. 199. The cases showing the right of a state to grant or refuse permission to a foreign corporation of this kind to do business within its limits are collected in *Hooper v. California*, 155 U.S. 648, at page 652, 15 Sup. Ct. 207.
* * *

> As these statutes involve public interests, legislation regarding them are necessarily public laws. . .

Connecticut Mut. Life Ins. Co., 172 U.S. at 619-621, 19 S.Ct. at 315. This continued right of service of process through the secretary of state, as a de facto agent for a foreign corporation was deemed a necessary right under the law. The holdings of the United Supreme Court treat this right as a lawful and constitutional right of the people. See *State of Washington ex rel. Bond & Goodwin & Tucker v. Superior Court of State of Washington for Spokane County* (1933), 289 U.S. 361, 364, 53 S.Ct. 624, 626. ("The provision that the liability thus to be served should continue after withdrawal from the state afforded lawful and constitutional protection of persons who had there transacted business with the [foreign corporation].")(citing *American Railway Express Co. v. Kentucky* (1927), 273 U.S. 269, 274, 47 S.Ct. 353, 71 L.Ed. 639).

Based upon the foregoing authority there can be no doubt that R.C. Chapter 1703 serves a fundamental and revered constitutional purpose – to enable to citizens of the State of Ohio to obtain and/or invoke their right of redress through the state courts. For over a century the highest Court in the land has condoned the States' statutory methods to effectuate service of process upon foreign corporations. In the case *sub judice*, Washington Mutual has held itself above the law, with total disregard to the constitutional purposes served by R.C. Chapter 1703. The State of Ohio has a great interest in crafting the procedure which ultimately serves to protect the state and federal constitutional rights of its citizenry, through service of process upon designated agents.

The significance of the necessity of the states' respective foreign corporation registration requirements was recognized by the United States Supreme Court that in their absence, for the foreign corporation, the "'result would be, to a large extent, immunity from all legal responsibility.'" See *B. & O. R. Co. v. Harris, supra*, 12 Wall at 83.

C. R.C. 1703.29(A) operates as a rational restriction upon a foreign corporation which has failed to register with the Ohio Secretary of State and subject itself to the jurisdiction of Ohio's courts.

The State of Ohio has fashioned a balanced remedy, applicable to foreign corporations that fail to comply with Chapter 1703's registration requirements which lead to the appointment of an agent for service of process in Ohio. As a penalty for failing to comply with the registration requirements of Chapter 1703, R.C. 1703.29 divests the unregistered foreign corporation of legal capacity to maintain an action in any court in Ohio. See R.C. 1703.29(A); *Dot Systems, Inc. v. Adams Robinson Ent., Inc.* (1990), 67 Ohio App.3d 475, 480, 587 N.E.2d 844, 847 (citing *Colegrove v. Handler* (1986), 34 Ohio App.3d 142, 145, 517 N.E.2d 979, 982-983). 'The states, in providing their own jurisdictional tribunals, have a right to limit, control, and restrict their judicial functions, and jurisdiction according to their own mere pleasure.' *Home Owners' Loan Corp. v. Sherwin* (1938), 59 Ohio App. 567, 570, 18 N.E.2d 992, 993[5] (quoting *Mitchell v. Great Works Milling & Mfg. Co.* (C.C. Me., 1843), 17 Fed.Cas. 496, 499.

The Maryland Supreme Court opinion of *In re Trader* (1974), 272 Md. 364, 325 A.2d 416 quoted and referenced the United States Supreme Court decisions which recognized the state's sovereign authority to control their internal courts, to wit:

> The Supreme Court held that it was 'the right of every State to establish such courts as it sees fit, and to prescribe their several jurisdictions as to territorial extent, subject-matter and amount, and the finality and effect of their decisions'; that the equal protection clause was not violated 'by any diversity in the jurisdiction of the several courts as to subject-matter, amount or finality of decision, if all persons within the territorial limits of their respective jurisdictions have an equal right, in like cases and under like circumstances, to resort to them

[5] So as to avoid any confusion, *Home Owner's Loan Corp.*, ruled that in 1938, a federal savings and loan was not included in Ohio's definition of "foreign corporation;" thus a federal savings and loan might institute a foreclosure action, even in the absence of compliance with R.C. Chapter 1703. However, effective May 21, 1997, the foreign corporation definition now includes a federal savings and loan. Thus, under present day law, applying the holding in *Home Owner's Loan Corp.*, an unregistered federal savings and loan is precluded from maintaining an action in any court of this state.

> for redress'; that '(a)s respects the administration of justice, it may establish one system of courts for cities and another for rural districts; one system for one portion of its territory and another system for another portion'; and '(c) onvenience, if not necessity, often requires this to be done, and it would seriously interfere with the power of a State to regulate its internal affairs to deny to it this right'; that each State is permitted to prescribe 'its own modes of judicial proceeding (and) . . . (i)f diversities of laws and judicial proceedings may exist in the several States without violating the equality clause in the 14th Amendment, there is no solid reason why there may not be such diversities in different parts of the same State.' [State of Missouri v. Lewis (1879),] 101 U.S. [22,] at 30-31. See also *Barbier v. Connolly*, 113 U.S. 27, 5 S.Ct. 357, 28 L.Ed. 923 (1884): *Hayes v. Missouri*, 120 U.S. 68, 7 S.Ct. 350, 30 L.Ed. 578 (1887).

In re Trader, 272 Md. 398-399, 325 A.2d 416. In *People v. Conti* (1926), 127 Misc. 244, 216 N.Y.S. 442, the court set forth four significant reasons which permit states to govern justice within their state courts without regard to federal interference:

> The states, in providing their own judicial tribunals, have a right to limit, control, and restrict their judicial functions, and jurisdiction, according to their own mere pleasure. They may refuse to allow suits to be brought there 'arising under the laws of the United States' for many just reasons: First, that Congress are bound to provide such tribunals for themselves; secondly, that state courts are not subject to the legislation of Congress as to their jurisdiction; thirdly, that it may most materially interfere with the convenience of their own courts, and the rights of their own citizens, and be attended with great expense to the state, as well as great delays in the administration of justice, to allow their courts to be crowded with suits, arising under the laws of the United States; and, fourthly, as in the present case, that it would involve the state courts in almost endless examinations and discussions of the principles and bearings of the [federal] law, confessedly a system novel in our jurisprudence, intricate in its details, and involving questions exceedingly complicated and difficult in its practical operation. Suppose, upon considerations of this sort, any state Legislature should prohibit its own courts from taking cognizance of any causes arising under the [federal] act, no one could doubt that it was a perfectly constitutional exercise of authority, and not justly to be complained of, as a want of comity or of justice. A due regard of a state to its own rights, and its duties to its own citizens, might require such a course, in order to prevent oppressive delays, and obstructions in the actual administration of home justice, and, at all events, might justify it in preferring such claims to those, belonging appropriately to the national jurisdiction.

Conti, 127 Misc. at 248, 216 N.Y.S. at 446. These decisions support Ohio's right to establish remedial laws which restrict an unregistered foreign corporation from maintaining an action in the any court of this state.

D. Jurisdictions across the United States have enacted similar laws that unregistered foreign corporations lack capacity to maintain actions in the court's of those respective states.

In this section, Appellants advise this Court of many reported case citations which demonstrate that most states across the United States have enacted their own laws that also prohibit unregistered foreign corporations from maintaining actions within their respective state courts. The citations provided herein are not intended to be exhaustive as to the treatment in every state, but are representative of the holdings of many states which share a similar legislative enactment compared to R.C. 1703.29(A).

The courts of Alabama, have held that a foreign corporation is bound under its laws to register with its secretary of state prior to conducting any business in Alabama, and the legislative purpose is not served when the foreign corporation waits to register by virtue of its interest in obtaining access to Alabama's courts. See *Alabama Western R. Co. v. Talley-Bates Const. Co.* (Ala. 1909), 50 So. 341, 344-345. The law in the State of Illinois has been recognized to preclude unregistered foreign corporations from maintaining an action in Illinois state courts. See, *Bradford v. Indiana Harbor Belt R. Co.* (C.A. 7, 1927), 16 F.2d 836, 837. The State of Minnesota bars relief through its courts to unregistered foreign corporations. See, *Kraft v. Hoppe* (1922), 152 Minn. 143, 145, 188 N.W. 162, 163. The State of Mississippi's enactment was recognized as precluding unregistered foreign corporations from bringing any action or suit in the courts of Mississippi. See, *Woods v. Interstate Realty Co.* (1949), 337 U.S. 535, 536, 69 S.Ct. 1235, 1236, 93 L.Ed. 1524. The State of Missouri is also recognized as having a similar

prohibition. See, *Whalen Const. & Equipment Co.* (Mo.App. 1979), 578 S.W.2d 69, 70-71. New Jersey's prohibition was acknowledged in *Protective Finance Corporation v. Glass* (N.J.Supp. 1924), 2 N.J. Misc. 818, 819, 100 N.J.L. 85, 86, 125 A. 879. The United States Bankruptcy Court for the Southern District of New York stated that New York's law which prohibits unregistered foreign corporations doing business in New York from maintaining an action in New York was a standard "door-closing" statute which deprives the foreign corporation of legal capacity to sue. *In re Cutler-Owens Intern. Ltd.,* (Bankr.Ct.S.D.N.Y. 1985), 55 B.R. 291, 294.

In its consideration of the defense related to an unregistered foreign corporation's lack of capacity to sue in Idaho, the Supreme Court of Idaho made reference to the following parallel citations in other states that related to the lack of capacity to sue in other states:

> *Phillips v. Goldtree*, 74 Cal. 151, 13 P. 313, 15 P. 451; *Helms v. Pacific Mill & Timber Co.*, 57 Cal. App. 442, 207 P. 708; 20 Cal. Jur. p. 776; 21 Cal. Jur. pp. 99, 100; 19 Cal. Jur. p. 524; *Fitch v. Braddock*, 93 Okl. 78, 219 P. 703; *Reilly v. Hatheway*, 46 Mont. 1, 125 P. 417; *Heegaard v. Dakota L. & T. Co.*, 3 S. D. 569, 54 N. W. 656; *Smith v. Stubbs*, 16 Colo. App. 130, 63 P. 955; *Turnbull v. Michigan Cent. R. Co.*, 183 Mich. 213, 150 N. W. 132; *Walsh v. J. R. Thomas' Sons*, 91 Ohio St. 210, 110 N. E. 454; *State v. Superior Court*, 111 Wash. 205, 190 P. 234; *Hale v. City Cab, Carriage & Transfer Co.*, 66 Wash. 459, 119 P. 837; *Beamish v. Noon*, 76 Or. 415, 149 P. 522; *Benson v. Johnson*, 85 Or. 677, 165 P. 1001, 167 P. 1014; *Columbia River Door Co. v. Todd*, 90 Or. 147, 175 P. 443.

Gallafent v. Tucker (Idaho 1929), 281 P. 375, 377. In a similar review of jurisdictions on this topic the Appellate Court of Indiana, as part of an *in Banc* review stated:

> For decisions from other jurisdictions dealing with statutes somewhat like the statute of this state, we call attention to the following: *Ward Land, etc., Co. v. Mapes* (1905) 147 Cal. 747, 82 P. 426; *Western Electrical Co. v. Pickett* (1911) 51 Colo. 415, 118 P. 988, 38 L. R. A. (N. S.) 702, Ann. Cas. 1913A 1322; *Moody v. Morris-Roberts Co.* (1923) 38 Idaho 414, 226 P. 278; *Woolfort v. Dixie* (1905) 77 Ark. 203, 91 S. W. 306, 113 Am. St. Rep. 139, 7 Ann. Cas. 217; *Vickers v. Buck's Stove & Range Co.*, 70 Kan. 584, 79 P. 160; *National Fertilizer Co. v. Fall River etc., Bank* (1907) 196 Mass. 458, 82 N. E. 671, 14 L. R. A. (N. S.) 561, 13

> Ann. Cas. 510; *Hastings Industrial Co. v. Moran* (1906) 143 Mich. 679, 107 N. W. 706; *Neyens v. Worthington* (1908) 150 Mich. 580, 114 N. W. 404, 18 L. R. A. (N. S.) 142; *Neuchatel Asphalt Co. v. New York* (1898) 155 N. Y. 373, 49 N. E. 1043; *M. S. Cohn Gravel Co. v. Terry* (1928) 135 Okl. 275, 275 P. 1048; *Vermont Farm etc., Co. v. Hall* (1916), 80 Or. 308, 156 P. 1073; *Swift v. Little* (1907) 28 R. I. 108, 65 A. 615; *Temple v. Riverland Co.* (Tex. Civ. App. 1921) 228 S. W. 605; *Thompson v. Building, etc., Ass'n* (1905) 57 W. Va. 551, 50 S. E. 756.

Peter & Burghard Stone Co. v. Carper (Ind.App. 1930), 172 N.E. 319, 324. The Pennsylvania Supreme Court plainly stated the object underlying its state's registration act for foreign corporations and "door-closing" provisions when it wrote:

> The purpose of the act is to bring foreign corporations doing business in this state within the reach of legal process. This purpose is not accomplished by a registration of the corporation at the pleasure of its officers, or when it may be to their interest to appeal to our courts. The act is for the protection of those with whom it does business, or to whom it may incur liability by its wrongful acts, and nothing short of a registration, before the contract that it seeks to enforce is made, can give it a right of action. Any other construction of the act would violate its plain words, and wholly defeat its object, by affording protection to the corporation, and denying it to the public.

Delaware River Quarry & Construction Co. v. Bethlehem & N. Pass. Ry. Co. (Pa. 1902), 204 Pa. 22, 25-26, 53 A. 533. The Supreme Court of Vermont in *A. & W. Artesian Well Co. Toranbene* (1965), 124 Vt. 413, 207 A.2d 140 opined that the effect of its door-closing statute was not a product of the state court defendant's action but rather the failure of the foreign corporation to what it was legally required to do. The court explained:

> Harsh as this bar to enforcement of its contract rights by a foreign corporation may seem to be, it can only arise by reason of such corporation's own volition. If such foreign corporation chooses to do business in this state without affording the protection to both the State, as well as to those with whom it contracts, as it is required to do by the statute, by the same choice it has foregone the enforcement of its contractual rights in the Vermont court.
>
> It cannot be said that the purpose of these statutes is to unjustly enrich one with whom the foreign corporation has contracted. Such person is given no right to bar suit against him. It is only the corporation itself, through its failure or refusal to

> accept the statutory requirements that can bring into effect the bar against its enforcement in court of its contractual rights.

Id., 124 Vt. At 416, 207 A.2d at 142.

The foregoing citations demonstrate that the vast majority of jurisdictions across the United States maintain door-closing statutes which operate against unregistered foreign corporations doing business within those jurisdictions. The legal effect of these provisions is widely viewed as depriving the unregistered foreign corporation of legal capacity to sue, and/or the "right of action," within the respective state court systems. This Court should also acknowledge and hold in this case that foreign corporations that fail to comply with Chapter 1703 are barred from maintaining an action in the courts of Ohio pursuant to R.C. 1703.29(A).

E. <u>An unregistered foreign corporation's continuation of an action, by way of appeal, is also prohibited by R.C. 1703.29(A).</u>

Under Ohio law an appeal has long been recognized as the continuation of an action. See, *Peters v. Harman* (1904), 17 Ohio C.D. 88, (citing *Thompson v. Street Bldg. Assn.* (1896), 78 Ohio C.D. 68, 13 Ohio C.C. 250).

1. <u>There is no constitutional or inherent right to appeal in Ohio.</u>

A right of appeal is not an inherent or natural right. *Collins v. Millen* (1897), 57 Ohio St. 289, 291, 39 W.L.B. 67, 48 N.E. 1097. In recognizing that there is no right of appeal from a judgment of a court in Ohio except as conferred by law this Court stated:

> 'The right of appeal is not an inherent or inalienable right, but must be conferred by authority upon the person who would enjoy it. 2 American Jurisprudence, 847, § 6. It is unknown to the common law. 4 Corpus Juris Secundum, Appeal and Error, p. 81, § 18. **<u>The Constitution of Ohio prescribes the jurisdiction of certain courts, but is silent as to who may prosecute an appeal. It is therefore necessary to turn to the statutory law of the state.</u>**'

Lindblom v. Board of Tax Appeals (1949), 151 Ohio St. 250, 254, 39 Ohio Op. 66, 85 N.E.2d 376, 377-378 (quoting *City of Middletown v. City Commission of Middletown* (1941), 138 Ohio

St. 596, 603, 21 O.O. 481, 37 N.E.2d 609, 613) (emphasis added); see also *In re Mahoning Valley Sanitary Dist.* (1954), 161 Ohio St. 259, 266-267, 53 O.O. 140, 119 N.E.2d 61, 65-66. This Court explained in *Cincinnati Polyclinic v. Balch* (1915), 92 Ohio St. 415, 111 N.E. 159, that while the General Assembly could not alter the jurisdiction of the courts of appeals, the General Assembly had the power to enact legislation that provided for the method for exercising the jurisdiction of the appellate courts in Ohio. *Id.*, 92 Ohio St. at 417, 111 N.E. at 160; see also, *Bauer v. Grinstead* (1943), 142 Ohio St. 56, 57, 26 O.O. 252, 50 N.E.2d 334. In effect, the legislature has retained the legislative power to bestow or withhold the substantive "right of appeal." A litigant who wishes to undertake appeal in an action must therefore comply with the applicable provisions of law to benefit from that right. *Cooke v. Kinney* (1981), 65 Ohio St.2d 7, 8, 417 N.E.2d 106, 108.

The 1968 Modern Courts Amendment to Article IV of the Ohio Constitution, set forth the present jurisdiction of the courts of appeals. See, Section 3(B), Article IV of the Ohio Constitution (Appdx. 36). Section 3(B)(2), Article IV of the Ohio Constitution states:

> Courts of appeals shall have such jurisdiction **as may be provided by law** to review and affirm, modify, or reverse judgments or final orders of the courts of record inferior to the court of appeals within the district, except that courts of appeals shall not have jurisdiction to review on direct appeal a judgment that imposes a sentence of death. Courts of appeals shall have such appellate jurisdiction as may be provided by law to review and affirm, modify, or reverse final orders or actions of administrative officers or agencies.

Section 3(B)(2), Article IV, Ohio Constitution (emphasis added)(Appdx. 36). A brief history of amendments of 1912, 1944, 1959, and 1968 which led up to the current version of Section 3(B)(2), Article IV of the Ohio Constitution are described in this Court's decision in *Williams v. City of Akron* (1978), 54 Ohio St.2d 136, 141-142, 374 N.E.2d 1378, 1381-82. Those amendments to the Ohio Constitution do not alter the prior holdings of this Court which provide

a litigant with the substantive "right" to institute an appeal which remains subject to statutory law as established by the Ohio General Assembly. See, *State v. Hughes* (1975), 41 Ohio St.2d 208, 70 O.O.2d 395, 324 N.E.2d 731, (the "right" of appeal is a matter of substantive law beyond the scope of the rules of court procedure which came into existence as a result of the 1968 Modern Courts Amendment to the Ohio Constitution). In *Proctor v. Kardassilaris* (2007), 115 Ohio St.3d 71, 2007-Ohio-4838, 873 N.E.2d 872, this Court also held that a right to sue or be sued is also a matter of substantive law, which cannot be abridged, enlarged, or modified by the Ohio's rules of court. *Id.,* 115 Ohio St.3d at 75, 2007-Ohio-4838, 873 N.E.2d at 877, at ¶18.

2. <u>The right of appeal to the court of appeals is a product of statutory law, as enacted by the General Assembly.</u>

R.C. 2505.03 states in pertinent part:

> Every final order, judgment, or decree of a court and, when provided by law, the final order of any administrative officer, agency, board, department, tribunal, commission, or other instrumentality may be reviewed on appeal by a court of common pleas, a court of appeals, or the supreme court, whichever has jurisdiction.

R.C. 2505.03(A), (Appdx. 41). This provision of law generally provides the basis upon which the right of the continuation of action by way of appeal may be invoked. See generally, *State ex rel. Downs v. Panioto* (2006), 107 Ohio St.3d 347, 2006-Ohio-8, 839 N.E.2d 911, at ¶17 (citing *State ex rel. Wright v. Ohio Adult Parole Auth.* (1996), 75 Ohio St.3d 82, 84, 661 N.E.2d 728); see also, *State v. Hughes, supra.* Similarly, this Court has held:

> It is axiomatic that when a right to appeal is conferred by legislative enactment, the statute's prescriptions must all be strictly complied with in order to invoke the jurisdiction of the appropriate appellate tribunal. *Lenart v. Lindley* (1980), 61 Ohio St.2d 110, 399 N.E.2d 1222 [15 O.O.3d 152]; *Queen City Valves v. Peck* (1954), 161 Ohio St. 579, 120 N.E.2d 310 [53 O.O. 430]; *American Restaurant & Lunch Co. v. Glander* (1946), 147 Ohio St. 147, 70 N.E.2d 93 [33 O.O. 38].

Craftsman Type, Inc. v. Lindley (1983), 6 Ohio St.3d 82, 85, 6 O.B.R. 122, 451 N.E.2d 768, 771; see also, *DeWeese v. Zaino* (2003), 100 Ohio St.3d 324, 2003-Ohio-6502, 800 N.E.2d 5, at ¶19. Beyond the express Constitutional language of "as may be provided by law" which is contained with Section 3(B)(2), Article IV of the Ohio Constitution, the General Assembly's influence over the "right" of appeal is further apparent when one considers that it is the General Assembly that defines as a matter of law what constitutes a final order. See *Cincinnati Gas & Elec. Co. v. Pope* (1978), 54 Ohio St.2d 12, 16, 8 O.O.3d 7, 374 N.E.2d 406, 409. Accordingly, the "right" to invoke appellate jurisdiction remains subject to law as enacted by the General Assembly.

3. <u>The General Assembly may prohibit by legislative enactment the appeal of a final order, judgment, or decree of court to the courts of appeals in Ohio.</u>

The qualification of "as may be provide by law" that is set forth in Section 3(B)(2), Article IV of the Ohio Constitution reserves in the General Assembly the power to withhold or abrogate a "right" of appeal to the courts of appeals. See, Section 3(B)(2), Article IV, Ohio Constitution (Appdx. 36); see also, *In re Mahoning Valley Sanitary Dist., supra.*, paragraph five of the syllabus ([a] prohibition of an appeal as provided by statute comes within the term, 'otherwise provided by law,' in Section 12223-3, General Code, Section 2505.03, Revised Code.) Recognizing its limited jurisdiction, the Tenth District Court of Appeals found that it had no jurisdiction to review a judgment of the Court of Claims which addresses a decision of the Court of Claims' commissioners. *In re Metz v. Victims of Crime Division* (Aug. 23, 1979), Franklin App. No. 79-AP-446, unreported, 1979 WL 209273, at *1. The Tenth District held that R.C. 2743.20 provided that the Court of Claims' judgment at issue constituted a final determination which was not subject to appeal. *Id.*

This Court in *Cincinnati Gas & Elec. Co. v. Pope, supra.*, applied Section 3(B)(2), Article IV of the Ohio Constitution together with R.C. 2505.03, and concluded "that all final

orders are not ipso facto appealable orders." *Id.*, 54 Ohio St.2d at 16, 374 N.E.2d at 409. The conclusion of the Court was supported by the prior holding in *Klien v. Bendix-Westinghous Co.* (1968), 13 Ohio St.2d 85, 234 N.E.2d 587, which had determined that the "unless otherwise provided by law" language in R.C. 2505.03 allowed the legislature to make exception from appellate review. *Id.*, 54 Ohio St.2d at 16-17, 374 N.E.2d at 409. The precedent of this Court demonstrates that the Ohio Constitution reserves the right in the General Assembly to limit appellate review, as may be provided by law. Appellants submit to this Court that R.C. 1703.29(A) is a legislative enactment which prohibits an unregistered foreign corporation from maintaining an action in Ohio's courts of appeals.

F. Where an appellant lacks capacity to maintain an action, a court of appeals is without jurisdiction to hear the appeal.

The Ohio Constitution demonstrates that the courts of appeals are courts of limited jurisdiction. See, Section 3(B), Article IV, Ohio Constitution (Appdx. 36). In light of these limits, if an appellate court lacks authority to hear or otherwise conduct its review, it arises as a result of a lack of jurisdiction. It is also widely accepted that an appellate court has the responsibility to determine whether it has jurisdiction. See, 4 American Jurisprudence 2d (2008), *Database*, Appellate Review, Section 75. At least two courts of appeals in Ohio have held that if no party entitled to appeal is before the appellate court, the appellate court is without jurisdiction to hear the appeal. See, *Petitioners v. Board of Twinsburg Tp. Trustees* (1965), 4 Ohio App.2d 171, 176, 211 N.E.2d 880, 884; and *In re Davis' Estate* (1958), 107 Ohio App. 52, 57, 156 N.E.2d 321, 325.

In *Quality Internatl. Ents., Inc. v. IFCO Sys. N. Am., Inc.*, Summit App. No. 23131, 2006-Ohio-5883, (the case determined to be in conflict with the *Washington Mutual Bank v. Beatley* decision at issue in the case *sub judice*), the appellate court held that R.C. 1703.29 deprived the

appellant of a right to maintain the appeal. See, *Quality Internatl. Ents., Inc.,* 2006-Ohio-5883, at ¶¶10-12. Since, R.C. 1703.29(A) deprives an unlicensed foreign corporation from maintaining an action in any court in Ohio, R.C. 1703.29(A) by operation prohibits appellate jurisdiction in any appeal undertaken by an unlicensed foreign corporation to an Ohio court of appeals.

G. At least one other jurisdiction has held that a foreign corporation which is barred by statute from maintaining an action is without authority to continue its action further by appeal.

With regard to the issue before this Court – as to whether or not, a foreign corporation which is prohibited by a state statute from maintaining an action in any court of the state is thereby precluded from maintaining an appeal, the highest court in Maryland has addressed this issue. The Court of Appeals of Maryland held that a foreign corporation which is not permitted to maintain an action in any court in Maryland has "no authority to maintain its counterclaim further by appeal to this Court." *Gibraltar Const. & Engineering, Inc. v. State Nat. Bank of Bethesda* (1972), 265 Md. 530, 536, 290 A.2d 789, 793. The holding in *Gibraltar,* demonstrates that this Court should hold that a foreign corporation which is not in compliance with Chapter 1703 of the Revised Code is prohibited from maintaining an appeal to the Ohio courts of appeals.

H. This Court's holding in *Buckeye Foods v. Cuyahoga County Bd. of Revision* (1997), 78 Ohio St.3d 459, 1997-Ohio-199, 678 N.E.2d 917, supports the Appellants' argument that an unregistered foreign corporation may not maintain an appeal.

In *Buckeye Foods v. Cuyahoga County Bd. of Revision* (1997), 78 Ohio St.3d 459, 1997-Ohio-199, 678 N.E.2d 917, , this Court interpreted R.C. 1329.10(B), which states:

> **No person doing business under a trade name or fictitious name shall commence or maintain an action in the trade name or fictitious name in any court in this state** or on account of any contracts made or transactions had in the trade name or fictitious name until it has first complied with section 1329.01 of the Revised Code and, if the person is a partnership, it has complied with section 1777.02 of the Revised Code, but upon compliance, such an action may be commenced or maintained on any contracts and transactions entered into prior to compliance.

R.C. 1329.10(B), (emphasis added)(Appdx. 38). The door-closing language contained within R.C. 1329.10(B) which states "no person * * * shall * * * maintain an action * * * in any court," tracks the statutory language of R.C. 1703.29(A) that "no foreign corporation * * * shall maintain any action in any court." See R.C. 1329.10(A), (Appdx. 38); and R.C. 1703.29(A), (Appdx. 39). When construing the statutory language of R.C. 1329.10(B), this Court followed its prior line of decisions which held that neither an action **nor appeal** was permitted as a result of the statutory prohibition. This Court stated in pertinent part:

> A person places himself in a precarious position when he operates under a fictitious name. A person doing business under an unregistered, fictitious name lacks the legal capacity to sue. *GMS Mgt. Co. v. Axe* (1982), 5 Ohio Misc.2d 1, 8, 5 OBR 53, 61, 449 N.E.2d 43, 51; *Thomas v. Columbus* (1987), 39 Ohio App.3d 53, 55-56, 528 N.E.2d 1274, 1277.
>
> In *Queen City Valves, Inc. v. Peck* (1954), 161 Ohio St. 579, 583-584, 53 O.O. 430, 432-433, 120 N.E.2d 310, 313, we said:
>
> "**This court has no disposition to be hypertechnical and to deny the right of appeal on captious grounds but it cannot ignore statutory language which demands that certain conditions be met to confer jurisdiction upon an appellate tribunal.**"
>
> * * *
>
> we require a complainant to be an entity that has legal capacity. . . . Since Buckeye Foods is fictitious, it cannot file a complaint . . . Accordingly, since Buckeye Foods is a fictitious name that has no capacity to litigate these complaints, it is not the party affected by these complaints. We, thus, affirm the BTA's dismissal of the complaints.

Buckeye Foods, 78 Ohio St.3d at 461-462, 678 N.E.2d 917, (emphasis added). The rule of law as pronounced by this Court in *Buckeye Foods* is wholly consistent with, and supported by the arguments asserted heretofore, in this Merit Brief.

CONCLUSION AND ANSWER TO THE CERTIFIED QUESTION

Although the Appellants cited *Buckeye Foods* and *Quality Internatl. Ents., Inc.* and argued that Washington Mutual lacked legal capacity to maintain the appeal in their appellate brief and motion to dismiss below, in its April 8, 2008, Opinion, the appeals court did not mention either *Buckeye Foods* or *Quality Internatl. Ents., Inc.* or refer to the legal principal of lack of capacity when it concluded that the motion to dismiss the appeal would be denied. See, *Washington Mutual*, 2008-Ohio-1679, at ¶7. As noted earlier in this Merit Brief, the appeals court failed to draw a requisite distinction between standing and capacity to sue. See footnote 3, at p. 7, above.

The law cited in support of each of the foregoing propositions of law demonstrates that the General Assembly has the constitutional right pursuant to Section 3(B)(2), Article IV of the Ohio Constitution to enact laws that may invoke and/or withhold the right of action, or a continued action by way of appeal. Chapter 1703 of the Revised Code serves a vital and fundamental due process purpose. It provides the avenue for legal process to be effectuated upon foreign corporations doing business in Ohio with Ohio's citizenry. R.C. 1703.29(A) is not a peculiar or suspect piece of legislation, many parallel enactments appear throughout the United States. Its function is balanced. Where a foreign corporation fails to subject itself to the jurisdiction of Ohio's courts through registration with the Ohio Secretary of State, then that foreign corporation is denied the legal capacity to maintain any action in any court in Ohio. In the *Woods* decision, *supra.*, the United States Supreme Court recognized that these door-closing statutes are legitimate and constitutionally sound.

This Court also has before it the holding in *Buckeye Foods* which supports the conclusion that the prohibition against the maintenance of an action, also operates as a bar to a continuation of the action by way of appeal. The holding of *Quality Internatl. Ents., Inc.* is well reasoned and consistent with the rationale of *Buckeye Foods,* including the vast body case law cited above. For the reasons stated above, appellant submits that the Court should answer the certified question, as follows:

> "When a trial court dismisses a plaintiff's action for lack of capacity to maintain an action, does R.C. 1703.29 prevent the plaintiff from appealing that decision?" Yes.

Further, the Appellants respectfully request that this Court **ADOPT** the two propositions of law submitted by the Appellant in support of the answer to the certified question; answer the certified question in the affirmative; and **REVERSE** the Tenth District Court of Appeals' April 8, 2008, Opinion and judgment, with further instructions to the appeals court enter a judgment dismissing the appeal, or for any further proceedings consistent with this Court's ruling.

Respectfully submitted,

Kevin E. Humphreys (0069168)
545 East Town Street
Columbus, Ohio 43215
Telephone: (614) 241-5550
Facsimile: (614) 241-5551
Counsel for Appellants Jack K. Beatley, Esq. and
64 W. Northwood Avenue, LLC

CERTIFICATE OF SERVICE

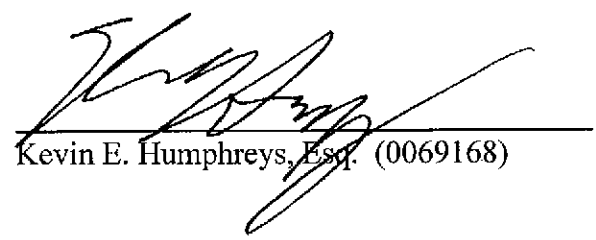
The undersigned hereby certifies that a copy of the foregoing Appellants' Merit Brief together with its Appendix was deposited with the U.S. Postal Service for delivery via prepaid first class mail upon all parties entitled to service as identified below this 3rd day of November, 2008:

Thomas R. Winters – First Assistant Attorney General of Ohio
Michael Stokes, Esq.
Kelly Borchers, Esq.
Assistant Attorneys General
30 East Broad Street, 17th Floor
Columbus, OH 43215
Counsel for Amicus Curiae
Ohio Attorney General

Gregory J. O'Brien, Esq.
Taft Stettinius & Hollister LLP
200 Public Square, Suite 3500
Cleveland, OH 44114

- and -

John P. Wolfsmith, Esq.
Matthew R. Devine, Esq.
Jenner & Block, LLP
330 N. Wabash Ave.
Chicago, Illinois 60611
Counsel for Appellee Washington Mutual Bank, fka
Washington Mutual Bank, FA



Kevin E. Humphreys, Esq. (0069168)

APPELLANTS' MERIT BRIEF APPENDIX

TABLE OF CONTENTS

Case Decisions and Entries:

Notice of certified conflict, in *Washington Mutual Bank v. Beatley, et al.*, Case No. 08-1056, filed May 30, 2008 ..... Appdx. 1

April 8, 2008 Judgment Entry from the Tenth District Court of Appeals in *Washington Mutual Bank v. Beatley,* Franklin App. No. 06AP-1189, from which the appeal is taken ..... Appdx. 21

April 8, 2008 Opinion of the Appeals Court - *Washington Mutual Bank v. Beatley,* Franklin App. No. 06AP-1189, 2008-Ohio-1679 ..... Appdx. 22

April 8, 2008 Judgment Entry from the Tenth District Court of Appeals in *Washington Mutual Bank v. Beatley,* Franklin App. No. 06AP-1189 ..... Appdx. 30

October 4, 2006 Trial Court Decision and Entry Granting Defendants Jack K. Beatley and 64 W. Northood Avenue, LLC's Motion to Dismiss the Plaintiff's Complaint Filed September 1, 2006 ..... Appdx. 31

Constitutional Provision:

Section 3, Article IV, Ohio Constitution ..... Appdx. 36

Statutes:

R.C. 1329.01 ..... Appdx. 38

R.C. 1703.29 ..... Appdx. 39

R.C. 2505.03 ..... Appdx. 41

IN THE SUPREME COURT OF OHIO

WASHINGTON MUTUAL BANK, FKA
WASHINGTON MUTUAL BANK, FA,,
Appellee,

v.

JACK K. BEATLEY, *et al.*,
Appellants.

08-1056

On Appeal from the
Franklin County Court of Appeals,
Tenth Appellate District

Court of Appeals
Case No. 06AP-1189

NOTICE OF CERTIFIED CONFLICT

KEVIN E. HUMPHREYS* (0069168)
* *Counsel of Record*
545 East Town Street
Columbus, OH 43215
(614) 241-5550, Ext. 240
(614) 241-5551 fax
lawyer@columbus.rr.com

Counsel for Appellants
Jack K. Beatley and
64 W. Northwood Avenue, LLC

THOMAS R. WINTERS (0018055)
First Assistant Attorney General of Ohio

MICHAEL L. STOKES* (0064792)
* *Counsel of Record*
KELLY A. BORCHERS (0081254)
Assistant Attorneys General
30 East Broad Street, 17th Floor
Columbus, OH 43215
(614) 728-4527
(614) 466-5087 fax
mstokes@ag.state.oh.us

Counsel for *Amicus Curiae*
Ohio Attorney General in support of
Appellants Jack K. Beatley, et al.

GREGORY J. O'BRIEN* (0053441)
* *Counsel of Record*
Taft Stettinius & Hollister LLP
200 Public Square, Suite 3500
Cleveland, OH 44114
(216) 241-2838
(216) 241-3707 fax
gobrien@taftlaw.com

- and -

JOHN P. WOLFSMITH (Illinois: 6256879)
MATTHEW R. DEVINE (Illinois: 6282744)
Jenner & Block, LLP
330 N. Wabash Avenue
Chicago, IL 60611
(312) 222-9350
(312) 840-7515 fax
jwolfsmith@jenner.com
mdevine@jenner.com

Counsel for Appellee Washington Mutual
Bank, fka, Washington Mutual Bank, FA

FILED
MAY 30 2008
CLERK OF COURT
SUPREME COURT OF OHIO

NOTICE OF CERTIFIED CONFLICT

Appellants Jack K. Beatley and 64 W. Northwood Avenue, LLC, hereby give notice to the Supreme Court of Ohio that on May 20, 2008, the Franklin County Court of Appeals, Tenth Appellate District, certified a conflict on a rule of law between its merit decision in *Washington Mut. Bank v. Beatley,* Franklin App. No. 06AP-1189, 2008-Ohio-1679, and the Ninth District Court of Appeals' decision in *Quality Internatl. Ents., Inc. v. IFCO Sys. N. Am., Inc.,* Summit App. No. 23131, 2006-Ohio-5883.

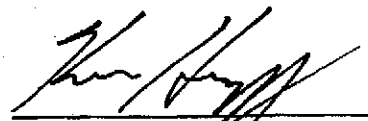
The May 20, 2008, Tenth District Court of Appeals' *Journal Entry* granting Appellants' motion to certify a conflict is attached hereto as Exhibit A. The May 20, 2008, Tenth District Court of Appeals' *Memorandum Decision* granting Appellants' motion to certify a conflict is attached hereto as Exhibit B.

Copies of the conflicting decisions of the Tenth District Court of Appeals' decision in *Washington Mut. Bank v. Beatley,* Franklin App. No. 06AP-1189, 2008-Ohio-1679, and the Ninth District Court of Appeals' decision in *Quality Internatl. Ents., Inc. v. IFCO Sys. N. Am., Inc.,* Summit App. No. 23131, 2006-Ohio-5883, are attached hereto as Exhibit C, and Exhibit D respectively.

The legal issue certified by the Tenth District Court is as follows:

> When a trial court dismisses a plaintiff's action for lack of capacity to maintain an action, does R.C. 1703.29 prevent the plaintiff from appealing that decision?

Respectfully submitted,



Kevin E. Humphreys (0069168)
545 East Town St.
Columbus, OH 43215
614-241-5550 Ext. 240
614-241-5551 Fax
lawyer@columbus.rr.com
Counsel of record for Appellants
Jack K. Beatley and
64 W. Northwood Avenue, LLC

CERTIFICATE OF SERVICE

The undersigned hereby certifies that a copy of the foregoing Notice of Certified Conflict of Appellants Jack K. Beatley and 64 W. Northwood Avenue, LLC was deposited with the U.S. Postal Service for delivery via prepaid first class mail upon all parties entitled to service as identified below this 30th day of May, 2008:

Thomas R. Winters – First Assistant Attorney General of Ohio
Michael Stokes, Esq.
Kelly Borchers, Esq.
Assistant Attorneys General
30 East Broad Street, 17th Floor
Columbus, OH 43215
Counsel for Amicus Curiae
Ohio Attorney General

Gregory J. O'Brien, Esq.
Taft Stettinius & Hollister LLP
200 Public Square, Suite 3500
Cleveland, OH 44114

- and -

John P. Wolfsmith, Esq.
Matthew R. Devine, Esq.
Jenner & Block, LLP
330 N. Wabash Ave.
Chicago, Illinois 60611
Counsel for Appellee Washington Mutual Bank, fka
Washington Mutual Bank, FA

Kevin E. Humphreys, Esq. (0069168)

EXHIBIT A

FOLLOWS THIS PAGE

20522 - X19

FILED
COURT OF APPEALS
FRANKLIN CO. OHIO
2008 MAY 20 PM 3:26
CLERK OF COURTS

IN THE COURT OF APPEALS OF OHIO

TENTH APPELLATE DISTRICT

Washington Mutual Bank, fka, Washington Mutual Bank, FA,	:	
Plaintiff-Appellant,	:	No. 06AP-1189 (C P C No 06CVE07-9066)
v.	:	(REGULAR CALENDAR)
Jack K Beatley et al.,	:	
Defendants-Appellees.	:	

JOURNAL ENTRY

For the reasons stated in the memorandum decision of this court rendered herein on May 20, 2008, it is the order of this court that the motion to certify is granted. However, we do not agree with how appellees have framed the question to be certified. Instead of the question proposed by appellees, we certify the following question:

> When a trial court dismisses a plaintiff's action for lack of capacity to maintain an action, does R.C. 1703.29 prevent the plaintiff from appealing that decision?

In conclusion, because our decision in the case at bar conflicts with the Ninth District Court of Appeals' decision in *Quality Internatl. Ents., Inc. v IFCO Sys. N. Am., Inc.*, Summit App. No. 23131, 2006-Ohio-51, on a rule of law, we grant appellees' motion.

KLATT, J., BROWN & FRENCH, JJ

By: William A. Klatt
Judge William A. Klatt

EXHIBIT B

FOLLOWS THIS PAGE

FILED
COURT OF APPEALS
FRANKLIN CO. OHIO
2008 MAY 20 PM 1:53
CLERK OF COURTS

IN THE COURT OF APPEALS OF OHIO

TENTH APPELLATE DISTRICT

Washington Mutual Bank, fka, Washington Mutual Bank, FA,	:	
Plaintiff-Appellant,	:	No. 06AP-1189 (C.P.C. No. 06CVE07-9066)
v.	:	(REGULAR CALENDAR)
Jack K. Beatley et al.,	:	
Defendants-Appellees.	:	

MEMORANDUM DECISION

Rendered on May 20, 2008

Roetzel & Andress, LPA, *Thomas L. Rosenberg*, *Jessica L. Davis*; and *Kevin E. Humphreys*, for appellee Jack K. Beatley.

Marc Dann, Attorney General, *Michael L. Stokes* and *Kelly A. Borchers*, for *Amicus Curiae*.

Taft, Stettinius & Hollister LLP, *Gregory J. O'Brien*; *Jenner & Block LLP*, *John P. Wolfsmith*, *Matthew R. Devine*; *Lerner, Sampson & Rothfuss*, and *Pamela S. Petas*, for appellant.

ON MOTION TO CERTIFY CONFLICT

KLATT, J.

{¶1} Defendants-appellees, Jack K. Beatley and 64 W. Northwood Avenue, LLC, have filed a motion to certify a conflict pursuant to App.R. 25(A) and Section 3(B)(4) of the Ohio Constitution. Plaintiff-appellant, Washington Mutual Bank, fka Washington

Mututal Bank, FA, has filed a memorandum in opposition to appellees' motion. For the following reasons, we grant appellees' motion.

{¶2} Section 3(B)(4), Article IV of the Ohio Constitution, gives the courts of appeals of this state the power to certify the record in a case to the Supreme Court of Ohio "whenever * * * a judgment upon which they have agreed is in conflict with a judgment pronounced upon the same question by any other court of appeals." Certification can be granted only where the judgments conflict upon the same question. *Johnson v. Indus. Comm.* (1939), 61 Ohio App. 535, 537. Before certifying a case to the Supreme Court of Ohio, an appellate court must satisfy three conditions: (1) the court must find that the asserted conflict is "upon the same question;" (2) the alleged conflict must be on a rule of law—not facts; (3) in its journal entry or opinion, the court must clearly set forth the rule of law that it contends is in conflict with the judgment on the same question by another district court of appeals. *Whitelock v. Gilbane Bldg. Co.* (1993), 66 Ohio St.3d 594, 596. Such conflicts must be over questions that are still material to both judgments as to be dispositive of the cases. *Lyons v. Lyons* (Oct. 4, 1983), Franklin App. No. 82AP-949.

{¶3} Appellees contend that our decision in the case at bar is in conflict with the judgment of the Ninth District Court of Appeals in *Quality Internatl. Ents., Inc. v. IFCO Sys. N. Am., Inc.*, Summit App. No. 23131, 2006-Ohio-51 ("Quality International"). We agree.

{¶4} In *Quality International*, the Ninth District Court of Appeals dismissed an appeal on the grounds that the appellant lacked capacity to appeal because it had not complied with statutory licensing requirements for foreign corporations doing business in

Ohio. Id. at ¶12; R.C. 1703.29. In essence, the Ninth District Court of Appeals denied the appellant the right to appeal the trial court's determination that the appellant lacked the capacity to bring an action. In the case at bar, we denied appellees' motion to dismiss appellant's appeal despite appellees' assertion that R.C. 1703.29 prevented appellant from maintaining the appeal. Therefore, we permitted appellant to appeal the trial court's determination that the appellant lacked the capacity to bring an action. *Washington Mut. Bank v. Beatley*, Franklin App. No. 06AP-1189, 2008-Ohio-1679, at ¶7. Therefore, our decision in the present case is in conflict with *Quality International* on a rule of law.

{¶5} However, we do not agree with how appellees have framed the question to be certified. Instead of the question proposed by appellees, we certify the following question:

> When a trial court dismisses a plaintiff's action for lack of capacity to maintain an action, does R.C. 1703.29 prevent the plaintiff from appealing that decision?

{¶6} In conclusion, because our decision in the case at bar conflicts with the Ninth District Court of Appeals' decision in *Quality International* on a rule of law, we grant appellees' motion.

Motion granted.

BROWN and FRENCH, JJ., concur.

EXHIBIT C

FOLLOWS THIS PAGE

C
Washington Mut. Bank v. Beatley
Ohio App. 10 Dist.,2008.

CHECK OHIO SUPREME COURT RULES FOR REPORTING OF OPINIONS AND WEIGHT OF LEGAL AUTHORITY.

Court of Appeals of Ohio,Tenth District, Franklin County.
WASHINGTON MUTUAL BANK, fka, Washington Mutual Bank, FA, Plaintiff-Appellant,
v.
Jack K. BEATLEY et al., Defendants-Appellees.
No. 06AP-1189.

Decided April 8, 2008.

Appeal from the Franklin County Court of Common Pleas.

Roetzel & Andress, LPA, Thomas L. Rosenberg, Jessica L. Davis; and Kevin E. Humphreys, for appellee Jack K. Beatley.
Marc Dann, Attorney General, Michael L. Stokes and Kelly A. Borchers, for Amicus Curiae.
Taft, Stettinius & Hollister LLP, Gregory J. O'Brien; Jenner & Block LLP, John P. Wolfsmith, Matthew R. Devine; Lerner, Sampson & Rothfuss, and Pamela S. Petas, for appellant.
KLATT, J.
*1 {¶ 1} Plaintiff-appellant, Washington Mutual Bank, fka Washington Mutual Bank FA, appeals from a judgment of the Franklin County Court of Common Pleas that Northwood Avenue, LLC (collectively referred to as appellees). For the following reasons, we reverse that judgment and remand the matter for further proceedings.

{¶ 2} On July 14, 2006, appellant filed a complaint for foreclosure in the Franklin County Court of Common Pleas against appellees. In the complaint, appellant alleged that it was the holder of a note and a mortgage securing such note and that the appellees had defaulted on payment of the note. Appellant requested judgment in the amount of the balance due on the note as well as foreclosure of the mortgage and sale of the property located at 64 W. Northwood Avenue in Columbus, Ohio.

{¶ 3} In lieu of an answer, appellees filed a motion to dismiss appellant's complaint pursuant to Civ.R. 12(B)(1) and 12(B)(6). Appellees argued that appellant's name, "Washington Mutual Bank, fka Washington Mutual Bank FA," was an unregistered, fictitious name as defined in R.C. 1329.01. Appellees claimed that appellant's failure to register its fictitious name deprived it of standing to commence the present action because R.C. 1329.10(B) prohibits any person doing business under a fictitious name from commencing an action in Ohio courts in the fictitious name without first registering its fictitious name. Equating the lack of standing with a lack of jurisdiction, appellees argued that the trial court lacked subject matter jurisdiction over the case. Appellees further claimed that appellant failed to state a claim upon which relief could be granted because the trial court did not have jurisdiction over the case and, therefore, could not grant appellant any relief.

{¶ 4} The trial court granted appellees' motion to dismiss the complaint. In its decision, the trial court held that a motion to dismiss for lack of standing is permissible under Civ.R. 12(B)(1). The trial court went on to consider

© 2008 Thomson/West. No Claim to Orig. U.S. Govt. Works.

evidence beyond the allegations of the complaint to determine whether appellant had standing to commence this action. Specifically, appellees submitted an affidavit from one of its attorneys with its motion to dismiss. Attached to the affidavit were certified documents from the Ohio Secretary of State's Office. The documents state that the Secretary of State has no records of any Ohio corporation, foreign corporation, Ohio limited liability corporation, foreign limited liability corporation, Ohio limited partnership, foreign limited partnership, Ohio limited liability partnership, foreign limited liability partnership, trade name registration, or report of use of fictitious name, either active or inactive, known as Washington Mutual Bank or Washington Mutual Bank FA.

{¶ 5} Based on these documents, the trial court determined that Washington Mutual Bank and Washington Mutual Bank FA were fictitious names that had not been registered with the Secretary of State's office. Given appellant's failure to register its fictitious names, the trial court determined that appellant could not maintain this action. Although the exact basis of its decision is somewhat unclear, the trial court mentioned appellant's lack of standing as well as its lack of capacity to sue in dismissing appellant's complaint under Civ.R. 12(B)(1). The trial court also determined that because appellant lacked standing or capacity to sue, appellant failed to state a claim upon which relief could be granted. Accordingly, the trial court dismissed appellant's complaint based on both Civ.R. 12(B)(1) and 12(B)(6).

*2 {¶ 6} Appellant appeals and assigns the following error:

> The trial court erred as a matter of law in granting defendants-appellees' Motion to Dismiss plaintiff-appellant's Complaint.

{¶ 7} Appellees have filed a motion to dismiss this appeal, arguing that appellant may not maintain this appeal because it is an unregistered foreign corporation. We disagree. In order to have standing to appeal, a party must be able to demonstrate a present interest in the subject matter of the litigation which has been prejudiced by the judgment appealed from. *McCarthy v. Lippitt,* Monroe App. No. 04-MO-1, 2004-Ohio5367, at ¶ 59;*GMAC Mtge. Co. v. Lewis,* Franklin App. No. 05AP-284, 2005-Ohio-5165, at ¶ 6;*Deutsche Bank Trust Co. v. Barksdale Williams,* Cuyahoga App. No. 88252, 2007-Ohio-1838, at ¶ 12. Appellant was a party in the trial court and it has a present interest in the subject matter of this litigation. Appellant's interest in the subject matter of the litigation was prejudiced by the trial court's dismissal of its complaint for foreclosure. Therefore, appellant has standing to pursue this appeal. Appellees' motion to dismiss is denied.

{¶ 8} Appellant appeals from the trial court's dismissal of its complaint. We first address the propriety of that dismissal pursuant to Civ.R. 12(B)(1). This rule permits dismissal where the trial court lacks jurisdiction over the subject matter of the litigation. The standard of review for a dismissal pursuant to Civ.R. 12(B)(1) is whether any cause of action cognizable by the forum has been raised in the complaint. *Milhoan v. Eastern Loc. School Dist. Bd. of Edn.,* 157 Ohio App.3d 716, 2004-Ohio-3243, at ¶ 10;*State ex rel. Bush v. Spurlock* (1989), 42 Ohio St.3d 77, 80.We review an appeal of a dismissal for lack of subject matter jurisdiction under Civ.R. 12(B)(1)de novo. *Moore v. Franklin Cty. Children Servs.,* Franklin App. No. 06AP-951, 2007-Ohio-4128, at ¶ 15;*Newell v. TRW, Inc.* (2001), 145 Ohio App.3d 198, 200.

{¶ 9} A trial court is not confined to the allegations of the complaint when determining its subject matter jurisdiction under Civ.R. 12(B)(1), and it may consider pertinent material without converting the motion into one for summary judgment. *Southgate Dev. Corp. v. Columbia Gas Transmission Corp.* (1976), 48 Ohio St.2d 211, paragraph one of the syllabus; *Moore.*

{¶ 10} The trial court's dismissal pursuant to Civ.R. 12(B)(1) appears to be based on appellant's lack of standing

© 2008 Thomson/West. No Claim to Orig. U.S. Govt. Works.

or lack of capacity to sue. However, neither standing nor capacity to sue challenges the subject matter jurisdiction of a court in this context. *State ex rel. Tubbs Jones v. Suster* (1998), 84 Ohio St .3d 70, 77 ("Lack of standing challenges the capacity of a party to bring an action, not the subject matter jurisdiction of the court."); *Country Club Townhouses-North Condominium Unit Owners Assn. v. Slates* (Jan. 24, 1996), Summit App. No. 17299 ("Capacity to sue or be sued does not equate with the jurisdiction of a court to adjudicate a matter; it is concerned merely with a party's right to appear in a court in the first instance."); see, also, *Benefit Mtg. Consultants, Inc. v. Gencorp, Inc.* (May 22, 1996), Summit App. No. 17488 ("Capacity to sue is not jurisdictional."). These issues are properly raised by a Civ.R. 12(B)(6) motion to dismiss for failure to state a claim upon which relief can be granted. See *Woods v. Oak Hill Community Med. Ctr., Inc.* (1999), 134 Ohio App .3d 261, 267 (noting that dismissal for lack of standing is a dismissal pursuant to Civ.R. 12[B][6]); *Bourke v. Carnahan,* Franklin App. No. 05AP-194, 2005-Ohio-5422, at ¶ 10 ("Elements of standing are an indispensable part of a plaintiff's case."); *Kiraly v. Francis A. Bonanno, Inc.* (Oct. 29, 1997), Summit App. No. 18250 (affirming Civ.R. 12[B][6] dismissal of complaint for plaintiff's lack of capacity to sue).

*3 {¶ 11} Because standing and capacity to sue do not challenge the subject matter jurisdiction of a court, the trial court erred when it dismissed appellant's complaint on these grounds pursuant to Civ.R. 12(B)(1). Dismissal pursuant to this rule focuses on a court's subject matter jurisdiction over the claims raised in the complaint, not the standing or capacity of the plaintiff to bring those claims. Cf. *Moore,* quoting *Vedder v. Warrensville Hts.,* Cuyahoga App. No. 81005, 2002-Ohio-5567, at ¶ 15 ("The issue of subject-matter jurisdiction involves 'a court's power to hear and decide a case on the merits and does not relate to the rights of the parties' ".). Our review of the record reveals no support for the proposition that the trial court lacked subject matter jurisdiction over this foreclosure action.

{¶ 12} The trial court also dismissed appellant's complaint for failure to state a claim upon which relief can be granted pursuant to Civ.R. 12(B)(6)."A motion to dismiss for failure to state a claim upon which relief can be granted is procedural and tests the sufficiency of the complaint."*State ex rel. Hanson v. Guernsey Cty. Bd. of Commrs.* (1992), 65 Ohio St.3d 545, 548.In order for a trial court to grant a motion to dismiss for failure to state a claim upon which relief may be granted, it must appear beyond doubt from the complaint that the plaintiff can prove no set of facts entitling him to recovery. *Id., O'Brien v. Univ. Community Tenants Union* (1975), 42 Ohio St.2d 242, syllabus. This court reviews a trial court's disposition of a motion to dismiss for failure to state a claim under Civ.R. 12(B)(6)de novo.*Stewart v. Fifth Third Bank of Columbus* (Jan. 25, 2001), Franklin App. No. 00AP-258.

{¶ 13} In contrast to the resolution of a Civ.R. 12(B)(1) motion, a trial court may consider only the statements and facts contained in the pleadings and may not consider or rely on evidence outside the complaint when resolving a Civ.R. 12(B)(6) motion to dismiss. *Estate of Sherman v. Millhon* (1995), 104 Ohio App.3d 614, 617;*New 52 Project, Inc. v. Proctor,* Franklin App. No. 07AP-487, 2008-Ohio-465, at ¶ 3 (court must limit its consideration to the four corners of the complaint when deciding a Civ.R. 12[B][6] motion to dismiss).

{¶ 14} In this case, the trial court relied on matters outside appellant's complaint to resolve appellees' motion to dismiss. The court relied on documents from the Secretary of State's office attached to an affidavit filed in support of appellees' motion to dismiss. Appellees argue that the trial court considered these documents solely for purposes of the Civ.R. 12(B)(1) analysis. We disagree. The trial court expressly considered these documents in its standing/capacity analysis. That analysis was also the basis of its decision to grant appellees' motion to dismiss pursuant to Civ.R. 12(B)(6).

© 2008 Thomson/West. No Claim to Orig. U.S. Govt. Works.

{¶ 15} When a Civ.R. 12(B)(6) motion to dismiss presents matters outside the pleadings, the trial court may either exclude the extraneous matter from its consideration or treat the motion as one for summary judgment and dispose of it pursuant to Civ.R. 56. *Powell v. Vorys, Sater, Seymour & Pease* (1998), 131 Ohio App.3d 681, 684.A trial court may not, however, sua sponte convert a Civ.R. 12(B)(6) motion to dismiss into a motion for summary judgment and dispose of it without giving notice to the parties of its intent to do so. *Id.;State ex rel. Baran v. Fuerst* (1990), 55 Ohio St.3d 94, 97.Failure to notify the parties that the court is converting a Civ.R. 12(B)(6) motion to dismiss into one for summary judgment is, itself, reversible error. *Charles v. Conrad,* Franklin App. No. 05AP410, 2005-Ohio-6106, at ¶ 30.

*4 {¶ 16} The trial court effectively converted appellees' Civ .R. 12(B)(6) motion to dismiss into a motion for summary judgment by considering the documents appellees submitted with its motion. However, the court did not notify the parties of its intent to convert the motion to dismiss into a summary judgment motion. This failure is reversible error. *Id.;Chahda v. Youseff,* Cuyahoga App. No. 82505, 2004-Ohio-635, at ¶ 12;*Wickliffe Country Place v. Kovacs* (2001), 146 Ohio App.3d 293, 297-298;*Stewart.*

{¶ 17} The trial court erred when it dismissed appellant's complaint pursuant to both Civ.R. 12(B)(1) and 12(B)(6). Given this disposition, we need not address appellant's preemption arguments. Accordingly, appellant's assignment of error is sustained and the judgment of the Franklin County Court of Common Pleas is reversed. The matter is remanded for further proceedings consistent with law and this opinion

Appellees' motion to dismiss denied; judgment reversed and cause remanded.

BROWN and FRENCH, JJ., concur.
Ohio App. 10 Dist.,2008.
Washington Mut. Bank v. Beatley
Slip Copy, 2008 WL 928424 (Ohio App. 10 Dist.), 2008 -Ohio- 1679

END OF DOCUMENT

© 2008 Thomson/West. No Claim to Orig. U.S. Govt. Works.

EXHIBIT D

FOLLOWS THIS PAGE

H
Quality Internatl. Ents., Inc. v. IFCO Sys. N. Am., Inc.
Ohio App. 9 Dist.,2006.

CHECK OHIO SUPREME COURT RULES FOR REPORTING OF OPINIONS AND WEIGHT OF LEGAL AUTHORITY.

Court of Appeals of Ohio,Ninth District, Summit County.
QUALITY INTERNATIONAL ENTERPRISES, INC., Appellant
v.
IFCO SYSTEMS NORTH AMERICA, INC., Appellee.
No. 23131.

Decided Nov. 8, 2006.

Appeal from Judgment Entered in the Court of Common Pleas, County of Summit, Ohio, Case No. CV-2005-07-4110.

Steven W. Mastrantonio, Attorney at Law, for Appellant.
Stephen W. Funk and Paul W. Lombardi, Attorneys at Law, for Appellee.

DECISION AND JOURNAL ENTRY

***1** This cause was heard upon the record in the trial court and the following disposition is made:
SLABY, Presiding Judge.
{¶ 1} Appellant Quality International Enterprises ("QIE") appeals the decision of the Summit County Court of Common Pleas in which the court dismissed QIE's action against Appellee IFCO Systems North America, Inc. ("IFCO"). We dismiss QIE's appeal on the grounds that it did not have the capacity to bring the appeal.

{¶ 2} QIE is a Delaware corporation that does business in both Ohio and Texas, and that has its principal place of business in Akron. It specializes in distributing wooden pallets and boxes. In 2003, QIE began doing business with IFCO Systems North America (IFCO), which produces pallets and boxes through one of its subsidiaries, Integral Pallet Holdings Operations (IPHO), located in Texas. IPHO sold pallets to Dell Computers (Dell) using QIE as an intermediary. QIE coordinated payment for the pallets. While QIE's main office was in Ohio, it was maintaining a small office near Dell's headquarters in Austin, Texas.

{¶ 3} In 2005, problems began to develop between QIE and IFCO. The end result was that QIE did not forward Dell's payments on IFCO's invoices. No one disputes that invoices remained unpaid, though there is a dispute as to how much money was involved and whether Dell had raised quality control concerns regarding IFCO's products. IFCO's subsidiary IPHO brought suit against QIE in Harris County, Texas, on July 15, 2005. On July 20, 2005, QIE filed suit against IFCO in Summit County, Ohio, on claims of breach of contract and interference with business relationships. On August 1, 2005, QIE was registered as a trade name with the Ohio Secretary of State, and the named agent was "Brasbob Enterprises, Inc."

{¶ 4} IFCO did not file an answer to QIE's complaint, and instead filed a motion to dismiss on October 11,

© 2008 Thomson/West. No Claim to Orig. U.S. Govt. Works.

2005, on the grounds of forum non conveniens. IFCO argued that Texas was a more appropriate forum for two reasons: first, there was already litigation pending in Texas regarding these two parties, and second, all of the events giving rise to the Summit County litigation had taken place in Texas. QIE filed a timely response to IFCO's motion to dismiss on November 14, 2005. On December, 2005, IFCO filed a motion for leave to supplement its motion to dismiss, and informed the Summit County trial court that the Texas court had issued a default judgment after QIE's failure to respond to IFCO's complaint. QIE did not respond to this supplement, nor did it request leave to respond. Finally, on January 25, 2005, IFCO filed notice of newly discovered facts and a second motion for leave to supplement its original motion to dismiss. In this filing, IFCO informed the court that, on January 3, 2006, shortly before the trial court had held a hearing on IFCO's motion to dismiss, QIE had terminated its trade name with the Secretary of State, and no longer had the capacity to maintain the suit because it was not licensed or registered in the State of Ohio. See R.C. 1329.10 and R.C. 1703.29. QIE had never informed the trial court of its termination of the trade name. On January 31, 2006, the trial court found that there was no registered Ohio entity operating under the name of QIE, and granted IFCO's motion to dismiss on the grounds that QIE lacked the legal capacity to maintain the suit, and on the grounds of forum non conveniens.

*2 {¶ 5} QIE filed the instant appeal on March 2, 2006. On March 24, 2006, IFCO filed a motion to dismiss QIE's appeal on the ground that QIE lacked capacity to bring the appeal. IFCO argued that QIE did not seek licensure with the State of Ohio until after it had filed the notice of appeal. Therefore, IFCO argued, QIE could not maintain an appeal under RC 1703.29 because it was an unlicensed foreign corporation. This court denied IFCO's motion, stating that the motion was related to the merits of the appeal, which we would need to consider.

{¶ 6} In its appeal, QIE raised the following four assignments of error:

FIRST ASSIGNMENT OF ERROR

"The trial court erred as a matter of law by depriving QIE of the opportunity to respond to IFCO's Supplemental Motion to Dismiss per the requirements of Civ.R. 6 and Summit County Local Rule 7.14(A)."

SECOND ASSIGNMENT OF ERROR

"The trial court erred when it relied upon R.C. 1329.10 to dismiss QIE's claims against IFCO."

THIRD ASSIGNMENT OF ERROR

"The trial court erred by allowing IFCO to contest QIE's capacity to bring the Ohio action based upon QIE's filing status after [IFCO] had waived its defense pursuant to Ohio Civ.R. 9(A) and 12(H)."

FOURTH ASSIGNMENT OF ERROR

"The trial court abused its discretion in holding that Texas was the more convenient forum."

{¶ 7} QIE argues that the trial court prematurely decided the motion to dismiss based on new information contained in IFCO's supplemental motion, without giving QIE the opportunity to respond to the new information. It also argues that the trial court applied the wrong law to the motion to dismiss, that it permitted IFCO to raise issues it had waived, and that its decision to dismiss on the grounds of forum non conveniens was an abuse of dis-

© 2008 Thomson/West. No Claim to Orig. U.S. Govt. Works.

cretion. We do not reach the merits of QIE's assignments of error because we find that QIE lacked capacity to bring this appeal. We therefore dismiss the appeal.

{¶ 8} QIE filed its notice of appeal on March 2, 2006. At that time QIE was not registered in any way with the Ohio Secretary of State. R.C. 1703.03 provides, in pertinent part, as follows: "No foreign corporation not excepted from sections 1703.01 to 1703.31 of the Revised Code, shall transact business in this state unless it holds an unexpired and uncanceled license to do so issued by the secretary of state."R.C. 1703.29(A) continues:

"The failure of any corporation to obtain a license under sections 1703.01 to 1703.31, inclusive, of the Revised Code, does not affect the validity of any contract with such corporation, but *no foreign corporation which should have obtained such license shall maintain any action in any court until it has obtained such license.*"(Emphasis added.)

At the time that QIE filed its appeal, it had not complied with the licensing requirement, and therefore could not maintain an appeal to this court.

{¶ 9} QIE cites *P.K. Springfield, Inc. v. Hogan* (1993), 86 Ohio App.3d 764, 621 N.E.2d 1253, in support of its contention that maintaining an action is separate from initiating an action, and that a corporation may initiate an action and then remedy the lack of licensure in order to maintain that action. However, the facts of *Hogan* do not bear out QIE's argument. In *Hogan,* the defendant raised cross-claims in its answer but was not a registered corporation licensed to do business under R.C. 1703.29(A). The appellate court found that the filing of a cross-claim constitutes "maintaining an action," which the statute clearly prohibits to an unlicensed foreign corporation. *Id.,* at 769.It held that "R.C. 1703.29(A) require[s] [the defendant] to obtain a license in order to maintain its cross-claim."*Id;* see, also, *Monaco v. Ted Terranova Sales Inc.* (Aug. 28, 1984), 10th Dist. Nos. 83AP-351, 83AP-352, 83AP-526 (Corporation whose license was cancelled after events giving rise to cause of action transpired did not have capacity to sue unless licensed at time action was filed.) Therefore, the cross-claimant in *Hogan* was not permitted to maintain its action due to its lack of licensure.

*3 {¶ 10} QIE's argument with respect to capacity to raise this appeal also creates practical problems. Immediately upon filing an action, a party is maintaining that action. QIE's interpretation creates a distinction without a difference, and is untenable. If a corporation has not received the proper licensure prior to filing an appeal, it lacks the capacity to bring the appeal. The statutory requirement that a corporation register or become licensed in the State of Ohio encourages corporations to complete filing and registration before they can enjoy the full use of the court systems. It would defeat this purpose to allow corporations to ignore the filing requirements until after they have filed an appeal.

{¶ 11} QIE attempts to argue in its brief that IFCO has waived the capacity argument on appeal because it did not raise QIE's lack of licensure at the trial level. We draw a distinction between licensure and registration. "Licensure" refers to a foreign corporation's obtaining a license to operate in the State of Ohio, pursuant to RC 1703.03 and RC 1703.29. "Registration" refers to a corporation's filing its trade name or trademark with the Ohio Secretary of State pursuant to RC 1329.01. Whether IFCO drew the trial court's attention to QIE's lack of licensure at the time the original action was brought does not affect QIE's status at the time this appeal was filed, and IFCO cannot be said to have waived the issue. We cannot reach issues of waiver below when the party attempting to claim that there was waiver does not have any capacity to access the court system at the time its appeal is filed in this court. We therefore hold that R.C. 1703.29 requires that, to be considered competent to maintain an appeal, a foreign corporation must be licensed in Ohio at the time it commences that appeal.

© 2008 Thomson/West. No Claim to Orig. U.S. Govt. Works.

{¶ 12} QIE's appeal is dismissed on the grounds that it lacked the capacity to appeal due to its failure to comply with the licensing requirements for foreign corporations doing business in Ohio.

Appeal dismissed.

Immediately upon the filing hereof, this document shall constitute the journal entry of judgment, and it shall be file stamped by the Clerk of the Court of Appeals at which time the period for review shall begin to run. App.R. 22(E). The Clerk of the Court of Appeals is instructed to mail a notice of entry of this judgment to the parties and to make a notation of the mailing in the docket, pursuant to App.R. 30.

Costs taxed to Appellant.

CARR, J. and MOORE, J., concur.
Ohio App. 9 Dist.,2006.
Quality Internatl. Ents., Inc. v. IFCO Sys. N. Am., Inc.
Slip Copy, 2006 WL 3208589 (Ohio App. 9 Dist.), 2006 -Ohio- 5883

END OF DOCUMENT

© 2008 Thomson/West. No Claim to Orig. U.S. Govt. Works.

IN THE COURT OF APPEALS OF OHIO

TENTH APPELLATE DISTRICT

Washington Mutual Bank, fka, Washington Mutual Bank, FA,	:	
	:	
Plaintiff-Appellant,	:	No. 06AP-1189 (C.P.C. No. 06CVE07-9066)
v.	:	(REGULAR CALENDAR)
Jack K. Beatley et al.,	:	
Defendants-Appellees.	:	

JUDGMENT ENTRY

For the reasons stated in the opinion of this court rendered herein on April 8, 2008, appellees' motion to dismiss is denied; appellant's assignment of error is sustained, and it is the judgment and order of this court that the judgment of the Franklin County Court of Common Pleas is reversed, and this cause is remanded to that court for further proceedings in accordance with law consistent with said opinion. Costs assessed against appellees.

KLATT, J., BROWN & FRENCH, JJ.

By William A. Klatt
Judge William A. Klatt

FILED
COURT OF APPEALS
2008 APR -8 PM 3:34
CLERK OF COURTS

IN THE COURT OF APPEALS OF OHIO

TENTH APPELLATE DISTRICT

Washington Mutual Bank, fka, Washington Mutual Bank, FA,	:	
Plaintiff-Appellant,	:	No. 06AP-1189 (C.P.C. No. 06CVE07-9066)
v.	:	(REGULAR CALENDAR)
Jack K. Beatley et al.,	:	
Defendants-Appellees.	:	

FILED
COURT OF APPEALS
FRANKLIN CO. OHIO
2008 APR -8 PM 12:51
CLERK OF COURTS

O P I N I O N

Rendered on April 8, 2008

Roetzel & Andress, LPA, *Thomas L. Rosenberg*, *Jessica L. Davis*; and *Kevin E. Humphreys*, for appellee Jack K. Beatley.

Marc Dann, Attorney General, *Michael L. Stokes* and *Kelly A. Borchers*, for *Amicus Curiae*.

Taft, Stettinius & Hollister LLP, *Gregory J. O'Brien*; *Jenner & Block LLP*, *John P. Wolfsmith*, *Matthew R. Devine*; *Lerner, Sampson & Rothfuss*, and *Pamela S. Petas*, for appellant.

APPEAL from the Franklin County Court of Common Pleas

KLATT, J.

{¶1} Plaintiff-appellant, Washington Mutual Bank, fka Washington Mutual Bank FA, appeals from a judgment of the Franklin County Court of Common Pleas that dismissed its complaint against defendants-appellees, Jack K. Beatley and 64 W.

Northwood Avenue, LLC (collectively referred to as appellees). For the following reasons, we reverse that judgment and remand the matter for further proceedings.

{¶2} On July 14, 2006, appellant filed a complaint for foreclosure in the Franklin County Court of Common Pleas against appellees. In the complaint, appellant alleged that it was the holder of a note and a mortgage securing such note and that the appellees had defaulted on payment of the note. Appellant requested judgment in the amount of the balance due on the note as well as foreclosure of the mortgage and sale of the property located at 64 W. Northwood Avenue in Columbus, Ohio.

{¶3} In lieu of an answer, appellees filed a motion to dismiss appellant's complaint pursuant to Civ.R. 12(B)(1) and 12(B)(6). Appellees argued that appellant's name, "Washington Mutual Bank, fka Washington Mutual Bank FA," was an unregistered, fictitious name as defined in R.C. 1329.01. Appellees claimed that appellant's failure to register its fictitious name deprived it of standing to commence the present action because R.C. 1329.10(B) prohibits any person doing business under a fictitious name from commencing an action in Ohio courts in the fictitious name without first registering its fictitious name. Equating the lack of standing with a lack of jurisdiction, appellees argued that the trial court lacked subject matter jurisdiction over the case. Appellees further claimed that appellant failed to state a claim upon which relief could be granted because the trial court did not have jurisdiction over the case and, therefore, could not grant appellant any relief.

{¶4} The trial court granted appellees' motion to dismiss the complaint. In its decision, the trial court held that a motion to dismiss for lack of standing is permissible under Civ.R. 12(B)(1). The trial court went on to consider evidence beyond the

allegations of the complaint to determine whether appellant had standing to commence this action. Specifically, appellees submitted an affidavit from one of its attorneys with its motion to dismiss. Attached to the affidavit were certified documents from the Ohio Secretary of State's Office. The documents state that the Secretary of State has no records of any Ohio corporation, foreign corporation, Ohio limited liability corporation, foreign limited liability corporation, Ohio limited partnership, foreign limited partnership, Ohio limited liability partnership, foreign limited liability partnership, trade name registration, or report of use of fictitious name, either active or inactive, known as Washington Mutual Bank or Washington Mutual Bank FA.

{¶5} Based on these documents, the trial court determined that Washington Mutual Bank and Washington Mutual Bank FA were fictitious names that had not been registered with the Secretary of State's office. Given appellant's failure to register its fictitious names, the trial court determined that appellant could not maintain this action. Although the exact basis of its decision is somewhat unclear, the trial court mentioned appellant's lack of standing as well as its lack of capacity to sue in dismissing appellant's complaint under Civ.R. 12(B)(1). The trial court also determined that because appellant lacked standing or capacity to sue, appellant failed to state a claim upon which relief could be granted. Accordingly, the trial court dismissed appellant's complaint based on both Civ.R. 12(B)(1) and 12(B)(6).

{¶6} Appellant appeals and assigns the following error:

> The trial court erred as a matter of law in granting defendants-appellees' Motion to Dismiss plaintiff-appellant's Complaint.

{¶7} Appellees have filed a motion to dismiss this appeal, arguing that appellant may not maintain this appeal because it is an unregistered foreign corporation. We

disagree. In order to have standing to appeal, a party must be able to demonstrate a present interest in the subject matter of the litigation which has been prejudiced by the judgment appealed from. *McCarthy v. Lippitt*, Monroe App. No. 04-MO-1, 2004-Ohio-5367, at ¶59; *GMAC Mtge. Co. v. Lewis*, Franklin App. No. 05AP-284, 2005-Ohio-5165, at ¶6; *Deutsche Bank Trust Co. v. Barksdale Williams*, Cuyahoga App. No. 88252, 2007-Ohio-1838, at ¶12. Appellant was a party in the trial court and it has a present interest in the subject matter of this litigation. Appellant's interest in the subject matter of the litigation was prejudiced by the trial court's dismissal of its complaint for foreclosure. Therefore, appellant has standing to pursue this appeal. Appellees' motion to dismiss is denied.

{¶8} Appellant appeals from the trial court's dismissal of its complaint. We first address the propriety of that dismissal pursuant to Civ.R. 12(B)(1). This rule permits dismissal where the trial court lacks jurisdiction over the subject matter of the litigation. The standard of review for a dismissal pursuant to Civ.R. 12(B)(1) is whether any cause of action cognizable by the forum has been raised in the complaint. *Milhoan v. Eastern Loc. School Dist. Bd. of Edn.*, 157 Ohio App.3d 716, 2004-Ohio-3243, at ¶10; *State ex rel. Bush v. Spurlock* (1989), 42 Ohio St.3d 77, 80. We review an appeal of a dismissal for lack of subject matter jurisdiction under Civ.R. 12(B)(1) de novo. *Moore v. Franklin Cty. Children Servs.*, Franklin App. No. 06AP-951, 2007-Ohio-4128, at ¶15; *Newell v. TRW, Inc.* (2001), 145 Ohio App.3d 198, 200.

{¶9} A trial court is not confined to the allegations of the complaint when determining its subject matter jurisdiction under Civ.R. 12(B)(1), and it may consider pertinent material without converting the motion into one for summary judgment.

Southgate Dev. Corp. v. Columbia Gas Transmission Corp. (1976), 48 Ohio St.2d 211, paragraph one of the syllabus; *Moore*.

{¶10} The trial court's dismissal pursuant to Civ.R. 12(B)(1) appears to be based on appellant's lack of standing or lack of capacity to sue. However, neither standing nor capacity to sue challenges the subject matter jurisdiction of a court in this context. *State ex rel. Tubbs Jones v. Suster* (1998), 84 Ohio St.3d 70, 77 ("Lack of standing challenges the capacity of a party to bring an action, not the subject matter jurisdiction of the court."); *Country Club Townhouses-North Condominium Unit Owners Assn. v. Slates* (Jan. 24, 1996), Summit App. No. 17299 ("Capacity to sue or be sued does not equate with the jurisdiction of a court to adjudicate a matter; it is concerned merely with a party's right to appear in a court in the first instance."); see, also, *Benefit Mtg. Consultants, Inc. v. Gencorp, Inc.* (May 22, 1996), Summit App. No. 17488 ("Capacity to sue is not jurisdictional."). These issues are properly raised by a Civ.R. 12(B)(6) motion to dismiss for failure to state a claim upon which relief can be granted. See *Woods v. Oak Hill Community Med. Ctr., Inc.* (1999), 134 Ohio App.3d 261, 267 (noting that dismissal for lack of standing is a dismissal pursuant to Civ.R. 12[B][6]); *Bourke v. Carnahan*, Franklin App. No. 05AP-194, 2005-Ohio-5422, at ¶10 ("Elements of standing are an indispensable part of a plaintiff's case."); *Kiraly v. Francis A. Bonanno, Inc.* (Oct. 29, 1997), Summit App. No. 18250 (affirming Civ.R. 12[B][6] dismissal of complaint for plaintiff's lack of capacity to sue).

{¶11} Because standing and capacity to sue do not challenge the subject matter jurisdiction of a court, the trial court erred when it dismissed appellant's complaint on these grounds pursuant to Civ.R. 12(B)(1). Dismissal pursuant to this rule focuses on a

court's subject matter jurisdiction over the claims raised in the complaint, not the standing or capacity of the plaintiff to bring those claims. Cf. *Moore*, quoting *Vedder v. Warrensville Hts.*, Cuyahoga App. No. 81005, 2002-Ohio-5567, at ¶15 ("The issue of subject-matter jurisdiction involves 'a court's power to hear and decide a case on the merits and does not relate to the rights of the parties' ".). Our review of the record reveals no support for the proposition that the trial court lacked subject matter jurisdiction over this foreclosure action.

{¶12} The trial court also dismissed appellant's complaint for failure to state a claim upon which relief can be granted pursuant to Civ.R. 12(B)(6). "A motion to dismiss for failure to state a claim upon which relief can be granted is procedural and tests the sufficiency of the complaint." *State ex rel. Hanson v. Guernsey Cty. Bd. of Commrs.* (1992), 65 Ohio St.3d 545, 548. In order for a trial court to grant a motion to dismiss for failure to state a claim upon which relief may be granted, it must appear beyond doubt from the complaint that the plaintiff can prove no set of facts entitling him to recovery. Id., *O'Brien v. Univ. Community Tenants Union* (1975), 42 Ohio St.2d 242, syllabus. This court reviews a trial court's disposition of a motion to dismiss for failure to state a claim under Civ.R. 12(B)(6) de novo. *Stewart v. Fifth Third Bank of Columbus* (Jan. 25, 2001), Franklin App. No. 00AP-258.

{¶13} In contrast to the resolution of a Civ.R. 12(B)(1) motion, a trial court may consider only the statements and facts contained in the pleadings and may not consider or rely on evidence outside the complaint when resolving a Civ.R. 12(B)(6) motion to dismiss. *Estate of Sherman v. Millhon* (1995), 104 Ohio App.3d 614, 617; *New 52 Project, Inc. v. Proctor*, Franklin App. No. 07AP-487, 2008-Ohio-465, at ¶3 (court must

limit its consideration to the four corners of the complaint when deciding a Civ.R. 12[B][6] motion to dismiss).

{¶14} In this case, the trial court relied on matters outside appellant's complaint to resolve appellees' motion to dismiss. The court relied on documents from the Secretary of State's office attached to an affidavit filed in support of appellees' motion to dismiss. Appellees argue that the trial court considered these documents solely for purposes of the Civ.R. 12(B)(1) analysis. We disagree. The trial court expressly considered these documents in its standing/capacity analysis. That analysis was also the basis of its decision to grant appellees' motion to dismiss pursuant to Civ.R. 12(B)(6).

{¶15} When a Civ.R. 12(B)(6) motion to dismiss presents matters outside the pleadings, the trial court may either exclude the extraneous matter from its consideration or treat the motion as one for summary judgment and dispose of it pursuant to Civ.R. 56. *Powell v. Vorys, Sater, Seymour & Pease* (1998), 131 Ohio App.3d 681, 684. A trial court may not, however, sua sponte convert a Civ.R. 12(B)(6) motion to dismiss into a motion for summary judgment and dispose of it without giving notice to the parties of its intent to do so. Id.; *State ex rel. Baran v. Fuerst* (1990), 55 Ohio St.3d 94, 97. Failure to notify the parties that the court is converting a Civ.R. 12(B)(6) motion to dismiss into one for summary judgment is, itself, reversible error. *Charles v. Conrad*, Franklin App. No. 05AP-410, 2005-Ohio-6106, at ¶30.

{¶16} The trial court effectively converted appellees' Civ.R. 12(B)(6) motion to dismiss into a motion for summary judgment by considering the documents appellees submitted with its motion. However, the court did not notify the parties of its intent to convert the motion to dismiss into a summary judgment motion. This failure is reversible

error. Id.; *Chahda v. Youseff*, Cuyahoga App. No. 82505, 2004-Ohio-635, at ¶12; *Wickliffe Country Place v. Kovacs* (2001), 146 Ohio App.3d 293, 297-298; *Stewart.*

{¶17} The trial court erred when it dismissed appellant's complaint pursuant to both Civ.R. 12(B)(1) and 12(B)(6). Given this disposition, we need not address appellant's preemption arguments. Accordingly, appellant's assignment of error is sustained and the judgment of the Franklin County Court of Common Pleas is reversed. The matter is remanded for further proceedings consistent with law and this opinion

Appellees' motion to dismiss denied;
judgment reversed and cause remanded.

BROWN and FRENCH, JJ., concur.

IN THE COURT OF APPEALS OF OHIO

TENTH APPELLATE DISTRICT

FILED
COURT OF APPEALS
FRANKLIN CO. OHIO
2007 SEP 27 PM 2:37
CLERK OF COURTS

Washington Mutual Bank, f/k/a Washington Mutual Bank, FA,	:	
Plaintiff-Appellant,	:	
v.	:	No. 06AP-1189
Jack K. Beatley et al.,	:	(REGULAR CALENDAR)
Defendants-Appellees.	:	

JOURNAL ENTRY

Appellees' September 11, 2007 motion to dismiss this appeal shall be considered at such time as the court addresses the merits of this appeal.

JUDGE

JUDGE

cc: Deputy Court Administrator

IN THE COURT OF COMMON PLEAS, FRANKLIN COUNTY, OHIO
GENERAL DIVISION

WASHINGTON MUTUAL BANK, f/k/a WASHINTON MUTUAL BANK, FA	:	**Case No.:**	**06CVE-07-9066**
Plaintiff,	:		
v.	:	**Judge:**	**Guy L. Reece, II**
JACK K. BEATLEY, et al.,	:		
Defendants.	:		

TERMINATION NO. 8
BY 10-4-06

DECISION AND ENTRY
GRANTING DEFENDANTS JACK K. BEATLEY AND 64 W. NORTHWOOD AVENUE, LLC'S MOTION TO DISMISS THE PLAINTIFF'S COMPLAINT FILED SEPTEMBER 1, 2006

FILED COMMON PLEAS COURT 2006 OCT 26 AM 8:16 CLERK OF COURTS

RENDERED THIS 4th DAY OF OCTOBER 2006.

REECE, J.

This matter is presently before the Court on Defendants Jack K. Beatley and 64 W. Northwood Avenue, LLC's Motion to Dismiss the Plaintiff's Complaint, filed September 1, 2006. After review and consideration, this Court finds the Defendants' motion well-taken, and it is hereby GRANTED.

Plaintiff Washington Mutual Bank, fka Washington Mutual Bank, FA filed the instant action in foreclosure on July 14, 2006. Therein the Washington Mutual Bank asserted a claim for enforcement of a certain note in the amount of One Hundred Eighty-Seven Thousand Dollars, dated April 20, 1990, between Jack K. Beatley as borrower, and Home Savings of America, F.A., lender (hereinafter "Note"). In addition, Plaintiff's complaint sought foreclosure of a certain mortgage dated April 20, 1997, given by Jack K. Beatley in favor of Home Savings of America, F.A., upon the real property situated at 64 West Northwood Avenue, in the City of Columbus, Ohio, said mortgage is recorded in

the Office of the Franklin County Recorder at Vol 15090, Page E17 (hereinafter "Mortgage").

After the filing of the Complaint, Plaintiff filed a motion to Substitute Party Plaintiff on August 18, 2006. On August 22, 2006, this Court granted the Plaintiff's motion which was filed on August 18, 2006. The Court notes that the motion filed by the Plaintiff substituted the Washington Mutual Bank for the Washington Mutual Bank as the party plaintiff. There was no real change in the party plaintiff rather the motion merely added surplusage including a successor in interest, and "sbmt" and "siit" descriptors to the Plaintiff's name. Given that the motion now before the Court was filed as to the Plaintiff Washington Mutual Bank the Court finds that the motion was properly directed against the named Plaintiff in this action, the Washington Mutual Bank, formerly known as the Washington Mutual Bank, FA.

Defendants Jack K. Beatley and 64 Northwood Avenue, LLC, ("Movants"), moved this Court to dismiss Plaintiff's Complaint pursuant to Civ.R. 12(B)(1) and 12(B)(6). Movants argue that Washington Mutual Bank is a fictitious name and that Plaintiff lacks standing to bring the action and has failed to state a claim. A motion to dismiss for lack of standing is sanctioned under Civ.R. 12(B)(1). Kovacs v. Aetna Life Ins. Co. (April 21, 1994), Cuyahoga App. No. 65295, unreported, 1994 Ohio App. LEXIS 1699, *6, citing McHenry v. Indus. Comm. (1990), 68 Ohio App.3d 56, 62. The standard to apply to a motion to dismiss under Civ.R. 12(B)(1) is whether the plaintiff has alleged any cause of action which the court has authority to decide. Id. In determining whether the plaintiff has alleged a cause of action sufficient to withstand a Civ.R. 12(B)(1) motion to dismiss, the trial court is not confined to the allegations of the

complaint but may consider material pertinent to its inquiry without converting the motion dismiss into one for summary judgment. Southgate Dev. Corp. v. Columbia Gas Transmission Corp. (1976), 48 Ohio St.2d 11, paragraph one of the syllabus.

Under Ohio law, an action may be prosecuted only in the name of the real party in interest. State ex rel. Dallman v. Court of Common Pleas (1973), 35 Ohio St.2d 176; Civ.R. 17(A). A real party in interest is "one who has a real interest in the subject matter of the litigation, and not merely an interest in the action itself, i.e. one who is directly benefited or injured by the outcome of the case." Shealy v. Campbell (1985), 20 Ohio St.3d 23. Movants argue that the instant action has not been brought by a real party in interest. Specifically, Defendant argues that Washington Mutual Bank is a fictitious name, under which an action may not be commenced or maintained.

In support of their motion to dismiss, Movants present evidence that neither "Washington Mutual Bank" nor "Washington Mutual Bank, FA" are registered with the Ohio Secretary of State as an Ohio or foreign corporation, Ohio or foreign limited liability company, Ohio or foreign limited liability partnership, trade name or fictitious name. (Humphreys's Aff. ¶¶ 6-7, Ex. A). Plaintiff's Complaint and/or Amended Complaint contains no averment to define what type of legal entity "Washington Mutual Bank" and/or Washington Mutual Bank, FA" are, and the evidence attached to Movant's motion demonstrates that "Washington Mutual Bank" and "Washington Mutual Bank, FA" are not an Ohio corporation, foreign corporation, Ohio limited liability company, foreign limited liability company, Ohio limited partnership, foreign limited liability partnership, trade name, or fictitious name. R.C. 1329.01(A)(2) defines a fictitious name as "a name used in business or trade that is fictitious and that the user has not registered

or is not entitled to register as a trade name." Thus it appears that "Washington Mutual Bank" and "Washington Mutual Bank, FA" are fictitious names.

A person doing business under an unregistered fictitious name lacks legal capacity to sue. Buckeye Foods v. Cuyahoga County Bd. of Revision (1997), 78 Ohio St.3d 459, 461. R.C. 1329.01(D) provides, in pertinent part, that "any person who does business under a fictitious name and who has not registered and does not wish to register the fictitious name as a trade name or who cannot do so because the name is not available for registration shall report the use of the fictitious name to the secretary of state, on a form prescribed by the secretary of state." The Secretary of State has no record of use of "Washington Mutual Bank" or "Washington Mutual Bank, FA." R.C. 1329.01 provides that "[n]o person doing business under a fictitious name shall commence or maintain an action in the . . . fictitious name in any court in this state . . . until it has first complaint with section 1329.01 of the Revised Code." Failure to register or report use of the fictitious name "Washington Mutual Bank" and/or "Washington Mutual Bank, FA" constitutes noncompliance with R.C. 1329.01(D). Therefore, because Plaintiff failed to register or report its use of the name "Washington Mutual Bank" or "Washington Mutual Bank, FA" with the Ohio Secretary of State, it may not maintain an action in such fictitious name(s).

Based upon the foregoing analysis this Court finds that the Plaintiff has failed to state claim upon which relief can be granted, in either count, so presented before this Court. Upon review, this Court finds Defendant's motion to dismiss pursuant to Civ.R. 12(B)(1) and 12(B)(6) is well taken, and it is hereby **GRANTED**. The Court finds that Plaintiff was afforded more than the fourteen (14) days required by rule to respond to the

motion, as more than thirty (30) days have elapsed since filing, and no response or memorandum contra has been filed.

It is hereby **ORDERED, ADJUDGED and DECREED** that the Plaintiff's Complaint and Amended Complaint asserting claims upon the note and for foreclosure is hereby dismissed; and no exception is made by this Court as permitted by Civ.R. 41(B)(3).

It is further **ORDERED, ADJUDGED and DECREED** that the grounds for the dismissal are based upon Civ.R. 12(B)(1) and Civ.R. 12(B)(6).

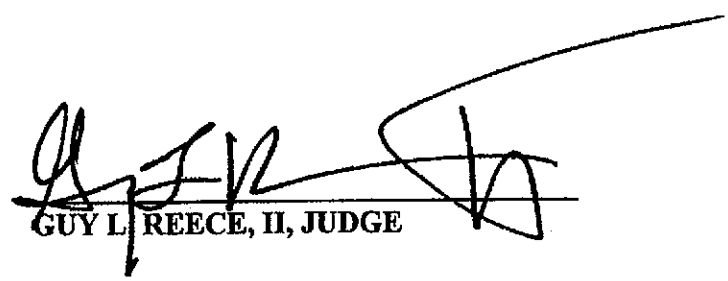
It is further **ORDERED, ADJUDGED and DECREED** that the Plaintiff has failed to prosecute the claims it may have had upon the Note and Mortgage at issue in this case as provided for under the laws of the State of Ohio.

It is further **ORDERED, ADJUDGED and DECREED** that costs of the action are taxed against the Plaintiff.

It is further **ORDERED, ADJUDGED and DECREED** that the filing of this final entry constitutes entry of judgment in this matter pursuant to Civ.R. 58, and said judgment is a final appealable order for purposes of App.R. 4.

It is further **ORDERED, ADJUDGED and DECREED** that this action is terminated from this Court's docket and the Clerk of this Court shall serve upon all parties not in default for failure to appear notice of this judgment and the date of entry of this final entry upon the journal. The Clerk shall notate service of the same upon the docket.

IT IS SO ORDERED.



GUY L. REECE, II, JUDGE

C

Baldwin's Ohio Revised Code Annotated Currentness
Constitution of the State of Ohio (Refs & Annos)
Article IV. Judicial (Refs & Annos)

➡ O Const IV Sec. 3 Organization and jurisdiction of courts of appeals

(A) The state shall be divided by law into compact appellate districts in each of which there shall be a court of appeals consisting of three judges. Laws may be passed increasing the number of judges in any district wherein the volume of business may require such additional judge or judges. In districts having additional judges, three judges shall participate in the hearing and disposition of each case. The court shall hold sessions in each county of the district as the necessity arises. The county commissioners of each county shall provide a proper and convenient place for the court of appeals to hold court.

(B) (1) The courts of appeals shall have original jurisdiction in the following:

(a) Quo warranto;

(b) Mandamus;

(c) Habeas corpus;

(d) Prohibition;

(e) Procedendo;

(f) In any cause on review as may be necessary to its complete determination.

(2) Courts of appeals shall have such jurisdiction as may be provided by law to review and affirm, modify, or reverse judgments or final orders of the courts of record inferior to the court of appeals within the district, except that courts of appeals shall not have jurisdiction to review on direct appeal a judgment that imposes a sentence of death. Courts of appeals shall have such appellate jurisdiction as may be provided by law to review and affirm, modify, or reverse final orders or actions of administrative officers or agencies.

(3) A majority of the judges hearing the cause shall be necessary to render a judgment. Judgments of the courts of appeals are final except as provided in section 2 (B) (2) of this article. No judgment resulting from a trial by jury shall be reversed on the weight of the evidence except by the concurrence of all three judges hearing the

© 2008 Thomson Reuters/West. No Claim to Orig. US Gov. Works.

cause.

(4) Whenever the judges of a court of appeals find that a judgment upon which they have agreed is in conflict with a judgment pronounced upon the same question by any other court of appeals of the state, the judges shall certify the record of the case to the supreme court for review and final determination.

(C) Laws may be passed providing for the reporting of cases in the courts of appeals.

CREDIT(S)

(1994 HJR 15, am. eff. 1-1-95; 132 v HJR 42, adopted eff. 5-7-68)

Current through 2008 File 129 of the 127th GA (2007-2008), apv. by 10/28/08, and filed with the Secretary of State by 10/28/08.

Copr. (c) 2008 Thomson Reuters/West

END OF DOCUMENT

© 2008 Thomson Reuters/West. No Claim to Orig. US Gov. Works.

C

Baldwin's Ohio Revised Code Annotated Currentness
Title XIII. Commercial Transactions (Refs & Annos)
Chapter 1329. Labels and Marks (Refs & Annos)
Registered Trade Names

➡ 1329.10 Injunction against violation; effect of noncompliance on civil actions

(A) The attorney general, upon the request of the secretary of state, shall bring an action for an injunction against any person who violates section 1329.01 or 1329.07 of the Revised Code, and who, after proper notification by the secretary of state, refuses or fails to comply with such section.

(B) No person doing business under a trade name or fictitious name shall commence or maintain an action in the trade name or fictitious name in any court in this state or on account of any contracts made or transactions had in the trade name or fictitious name until it has first complied with section 1329.01 of the Revised Code and, if the person is a partnership, it has complied with section 1777.02 of the Revised Code, but upon compliance, such an action may be commenced or maintained on any contracts and transactions entered into prior to compliance.

(C) An action may be commenced or maintained against the user of a trade name or fictitious name whether or not the name has been registered or reported in compliance with section 1329.01 of the Revised Code.

CREDIT(S)

(1978 H 297, eff. 10-20-78; 1977 H 296; 127 v 222)

Current through 2008 File 129 of the 127th GA (2007-2008), apv. by 10/28/08, and filed with the Secretary of State by 10/28/08.

Copr. (c) 2008 Thomson Reuters/West

END OF DOCUMENT

C

Baldwin's Ohio Revised Code Annotated Currentness
Title XVII. Corporations--Partnerships
Chapter 1703. Foreign Corporations (Refs & Annos)
Miscellaneous Provisions

→ 1703.29 Unlicensed foreign corporation contracts not affected; corporation cannot maintain an action

(A) The failure of any corporation to obtain a license under sections 1703.01 to 1703.31, inclusive, of the Revised Code, does not affect the validity of any contract with such corporation, but no foreign corporation which should have obtained such license shall maintain any action in any court until it has obtained such license. Before any such corporation shall maintain such action on any cause of action arising at the time when it was not licensed to transact business in this state, it shall pay to the secretary of state a forfeiture of two hundred fifty dollars and file in his office the papers required by divisions (B) or (C) of this section, whichever is applicable.

(B) If such corporation has not been previously licensed to do business in this state or if its license has been surrendered it shall file as required by division (A) of this section:

(1) Its application for a license certificate, together with the filing fee, with such information as the secretary of state requires as to the time it began to transact business in this state and as to the number of its issued shares represented in this state, and with the license fees on its shares represented in this state plus a forfeiture of fifteen per cent thereon.

(2) A certificate from the tax commissioner that the corporation has paid all franchise taxes which it should have paid had it qualified to do business in this state at the time it began to do so, plus any penalties assessable on said taxes on account of failure to pay them within the time prescribed by law, or a certificate of the commissioner that the corporation has furnished security satisfactory to the commissioner for the payment of all such franchise taxes and penalties.

(C) If such corporation has been previously licensed to transact business in this state and its license has expired or has been canceled by the secretary of state upon order of the commissioner, or for failure to designate an agent for service of process, it shall file with the secretary of state its application for reinstatement, as provided by law, together with the proper reinstatement fee plus a forfeiture of fifteen per cent thereon.

Upon the filing of such application and payment of such fees and penalties or forfeitures, the secretary of state shall issue to such corporation a license certificate.

CREDIT(S)

© 2008 Thomson Reuters/West. No Claim to Orig. US Gov. Works.

(1953 H 1, eff. 10-1-53; GC 8625-25)

Current through 2008 File 129 of the 127th GA (2007-2008), apv. by 10/28/08, and filed with the Secretary of State by 10/28/08.

Copr. (c) 2008 Thomson Reuters/West

END OF DOCUMENT

© 2008 Thomson Reuters/West. No Claim to Orig. US Gov. Works.

C

Baldwin's Ohio Revised Code Annotated Currentness
Title XXV. Courts--Appellate
Chapter 2505. Procedure on Appeal (Refs & Annos)
Final Order

➡ 2505.03 Final order may be appealed; determination of which procedural rules will govern appeal

(A) Every final order, judgment, or decree of a court and, when provided by law, the final order of any administrative officer, agency, board, department, tribunal, commission, or other instrumentality may be reviewed on appeal by a court of common pleas, a court of appeals, or the supreme court, whichever has jurisdiction.

(B) Unless, in the case of an administrative-related appeal, Chapter 119. or other sections of the Revised Code apply, such an appeal is governed by this chapter and, to the extent this chapter does not contain a relevant provision, the Rules of Appellate Procedure. When an administrative-related appeal is so governed, if it is necessary in applying the Rules of Appellate Procedure to such an appeal, the administrative officer, agency, board, department, tribunal, commission, or other instrumentality shall be treated as if it were a trial court whose final order, judgment, or decree is the subject of an appeal to a court of appeals or as if it were a clerk of such a trial court.

(C) An appeal of a final order, judgment, or decree of a court shall be governed by the Rules of Appellate Procedure or by the Rules of Practice of the Supreme Court, whichever are applicable, and, to the extent not in conflict with those rules, this chapter.

CREDIT(S)

(1986 H 412, eff. 3-17-87; 1986 H 158; 129 v 582; 1953 H 1; GC 12223-3)

Current through 2008 File 129 of the 127th GA (2007-2008), apv. by 10/28/08, and filed with the Secretary of State by 10/28/08.

Copr. (c) 2008 Thomson Reuters/West

END OF DOCUMENT