COURT OF COMMON PLEAS
CLERMONT COUNTY, OHIO

BUCCIERE FINANCIAL, INC. dba EASTERN HILLS EDUCATIONAL BUILDING	**:**	**CASE NO. 2011 CVC 00821**
Plaintiff	**:**	**Judge McBride**
vs.	**:**	
VALERIE CLARK	**:**	**DECISION/ENTRY**
Defendant	**:**	

R.L. Kent Bucciere, attorney for the plaintiff Bucciere Financial, Inc. dba Eastern Hills Educational Building, 8682 Calumet Way, Cincinnati, Ohio 45249.

McCaslin, Imbus & McCaslin, William M. Cussen, attorney for the defendant Valerie Clark, 632 Vine Street, Suite 900, Cincinnati, Ohio 45202.

This cause is before the court for consideration of two motions- a motion for summary judgment and a motion to enforce settlement- filed by the defendant Valerie Clark.

The court scheduled and held a hearing on the motions on April 16, 2012. At the conclusion of that hearing, the court took the issues raised by the motions under advisement.

Upon consideration of the motions, the record of the proceeding, the evidence presented for the court's consideration, the oral and written arguments of counsel, and the applicable law, the court now renders this written decision.

FACTS OF THE CASE AND PROCEDURAL BACKGROUND

On May 13, 2011, the plaintiff Bucciere Financial, Inc. dba Eastern Hills Educational Building (hereinafter "Bucciere Financial") filed the present action against a John Doe defendant requesting injunctive relief and alleging that, on July 13, 2010, this unknown defendant posted an allegedly defamatory statement about the plaintiff on internet websites under the internet username "honestgramma." No request for service was made and no summons was issued as to the original complaint at that time.

An amended complaint was filed on August 12, 2011 which named Valerie Clark as the defendant. The plaintiff filed a praecipe for service with the amended complaint directing the Clerk of Courts to serve Valerie Clark with copies of the original and amended complaints via certified mail service. The resulting summons does not contain the words "name unknown." Certified mail service was obtained upon Valerie Clark on August 16, 2011.

On December 23, 2011, Clark filed a motion for summary judgment arguing that the amended complaint naming her as the defendant was filed outside the applicable statute of limitations and that the plaintiff's claim was time-barred. The plaintiff filed a response to the motion on January 9, 2012 and the motion for summary judgment was set for hearing before this court on February 17, 2012. This hearing was not held due to

the fact that the court was made aware that the case was settled and, consequently, the hearing on the motion for summary judgment was vacated and the case was set for a hearing on entry. The court was later informed of a dispute regarding the status of the settlement and ultimately the case was again set for oral argument on the defendant's motion for summary judgment as well as the defendant's motion to enforce a settlement agreement.

According to the affidavit filed by defense counsel William M. Cussen, on or about February 10, 2012, counsel for the plaintiff stated to Cussen that if the defendant would take down the internet post which is the subject of this litigation then the plaintiff would dismiss the lawsuit.[1] Thereafter, on or about February 14, 2012, Cussen informed counsel for the plaintiff that the defendant agreed and was taking down the post.[2] The defendant did, in fact, remove the post at issue.[3] Cussen goes on to aver that on or about February 24, 2012, the plaintiff submitted a settlement agreement which included a new term requiring the unsuccessful party in any action relating to the settlement agreement to pay reasonable attorney fees and costs to the prevailing party.[4] The defendant refused to sign the agreement due to the inclusion of this attorney fees clause.[5]

In contrast, counsel for the plaintiff, R.L. Kent Bucciere, states in his affidavit that a preliminary settlement negotiation telephone conference was held on February 10, 2012, during which Bucciere told defense counsel that if the allegedly defamatory post was removed and the defendant agreed to sign the plaintiff's customary settlement

[1] Affidavit of William M. Cussen at ¶ 1.
[2] Id. at ¶ 2 and Exhibit A.
[3] Id. at ¶ 4.
[4] Id. at ¶ 5.
[5] Id. at ¶ 6.

agreement, the plaintiff would agree to dismiss the case at the defendant's cost, to which defense counsel replied "I believe my client would agree to that."[6] Bucciere states that at no time did defense counsel agree to settle the case at bar.[7] Bucciere goes on to aver that, in that same February 10th discussion, he informed defense counsel that he would draft a settlement agreement in the next few days and transmit it to him, to which defense counsel responded that he looked forward to receiving it.[8] The proposed settlement agreement was forwarded to defense counsel and, on March 5th, defense counsel called Bucciere and requested a modification of the terms of the settlement agreement and asked the plaintiff's counsel to forward a copy of the agreement by email so that he could make the proposed changes and the plaintiff's counsel did so.[9] Bucciere states in his affidavit that "[a]t no time did settlement of this matter occur."[10]

Emails between counsel on March 5, 2012, indicate that, after the proposed changes were inserted by defense counsel, the plaintiff's counsel responded with further proposed changes, namely the attorney fees clause discussed above.[11] Defense counsel then responded that he would discuss the matter with his client and let the plaintiff's counsel know if she would agree to such language.[12] The following day, defense counsel informed the plaintiff's counsel that his client would not sign the agreement with the attorney fees language but would sign the agreement if that clause

[6] Affidavit of R.L. Kent Bucciere at ¶¶ 3-6.
[7] Id. at ¶ 7.
[8] Id. at ¶¶ 8-9.
[9] Id. at ¶¶ 11-13.
[10] Id. at ¶ 14.
[11] Plaintiff's Response to Defendant's Motion to Enforce Settlement Agreement, Exhibit F.
[12] Id. at Exhibit H.

was removed.[13] On March 8, 2012, defense counsel sent an email to the plaintiff's counsel stating "[a]re we going to be able to settle this pursuant to my March 6, 2012 e-mail or shall we notify the court that we were unable to complete the settlement and that the court should rule on the pending motion for summary judgment?"[14]

LEGAL ANALYSIS

I. MOTION TO ENFORCE SETTLEMENT AGREEMENT

"Where the trial judge is advised that the parties have agreed to the settlement but the court is not advised of the terms of the agreement, then the settlement agreement can be enforced only if the parties are found to have entered into a binding contract."[15] " 'A valid settlement agreement is a binding contract between the parties which requires a meeting of the minds as well as an offer and acceptance.' "[16] "Therefore, there must be a mutual agreement and the terms of the agreement must be reasonably certain and clear."[17] "An oral settlement agreement may be enforceable if there is sufficient particularity to form a binding contract."[18] "The settlement agreement may be enforced either through filing an independent action for breach of contract, or by

[13] Id. at Exhibit I.
[14] Id. at Exhibit K.
[15] *Natl. Court Reporters, Inc. v. Krohn & Moss, Ltd.* (Feb. 17, 2011), 8th Dist. No. 95075. 2011-Ohio-731, ¶ 9, citing *Bolen v. Young* (1982), 8 Ohio App.3d 36, 38, 455 N.E.2d 1316 (Ohio App. 10th Dist., 1982).
[16] Id. at ¶ 10, quoting, *Rulli v. Fan Co.* (1997), 79 Ohio St.3d 374, 376, 683 N.E.2d 337, 1997-Ohio-380.
[17] Id., citing *Rulli*.
[18] Id. at ¶ 12, citing *Kostelnik v. Helper,* 96 Ohio St.3d 1, 770 N.E.2d 58, 2002–Ohio–2985.

filing a motion to enforce the settlement in the same action pursuant to Civ.R. 15(E), which provides for the filing of supplemental pleadings."[19]

" '[I]t is well established that courts will give effect to the manifest intent of the parties where there is clear evidence demonstrating that the parties did not intend to be bound by the terms of an agreement until formalized in a written document and signed by both."[20] As set forth above, in the case at bar, the plaintiff's counsel avers that the settlement between the parties was contingent upon the defendant agreeing to sign the plaintiff's customary settlement agreement. Thereafter, as demonstrated by the emails between the parties, the defendant requested a modification to the terms of the plaintiff's customary settlement agreement and the parties began to negotiate the terms of said agreement.

The settlement agreement in the case at bar was not simply that the defendant would take down the internet posting at issue in return for dismissal of the complaint. Instead, the agreement was also contingent upon the defendant executing the plaintiff's customary written settlement agreement. The parties negotiated the terms of that agreement but were unsuccessful in reaching an agreement. As a result, there is not an enforceable settlement agreement between the parties.

As a result, the motion to enforce the settlement agreement is not well-taken and shall be denied.

[19] Id., citing *Davis v. Jackson*, 159 Ohio App.3d 346, 823 N.E.2d 941, 2004-Ohio-6735 (Ohio App. 9th Dist., 2004).
[20] *Apple v. Hyundai Motor America* (March 12, 2010), 2nd Dist. No. 23218, 2010-Ohio-949, ¶ 8.

II. MOTION FOR SUMMARY JUDGMENT

(A) WHAT IS THE STANDARD FOR REVIEW ON A MOTION FOR SUMMARY JUDGMENT?

The court must grant summary judgment, as requested by a moving party, if "(1) no genuine issue of material fact remains to be litigated; (2) the moving party is entitled to judgment as a matter of law; and (3) the evidence demonstrates that reasonable minds can come to but one conclusion, and that conclusion is adverse to the party opposing the motion."[21]

The court must view all of the evidence, and the reasonable inferences to be drawn therefrom, in a light most favorable to the non-moving party.[22] Furthermore, the court must not lose sight of the fact that all evidence must be construed in favor of the nonmoving party, including all inferences which can be drawn from the underlying facts contained in affidavits, depositions, etc.[23]

Determination of the materiality of facts is discussed in *Anderson v. Liberty-Lobby Inc.* (1986), 477 U.S. 242, 248, 106 S.Ct. 2505, 2510, 91 L.Ed.2d 202, 211:

> "As to materiality, the substantive law will identify which facts are material. Only disputes over facts that might affect the outcome of the suit under the governing law will properly preclude the entry of summary judgment."[24]

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[21] Civ. R. 56(C); *Temple v. Wean United, Inc.* (1977), 50 Ohio St.2d 317, 327, 364 N.E.2d 267; *Davis v. Loopco Indus., Inc.* (1993), 66 Ohio St.3d 64, 65-66, 609 N.E.2d 144.

[22] *Engel v. Corrigan* (1983), 12 Ohio App.3d 34, 35, 465 N.E.2d 932; *Viock v. Stowe-Woodward Co.* (1983), 13 Ohio App.3d 7, 12-13, 467 N.E.2d 1378; *Welco Indus. Inc. v. Applied Cas.* (1993), 67 Ohio St.3d 344, 356, 617 N.E.2d 1129; *Willis v. Frank Hoover Supply* (1986), 26 Ohio St.3d 186, 188, 497 N.E.2d 1118; *Williams v. First United Church of Christ* (1974), 37 Ohio St.2d 150, 152, 309 N.E.2d 924.

[23] *Hannah v. Dayton Power & Light Co.* (1998), 82 Ohio St.3d 482, 485, 696 N.E.2d 1044, citing *Turner v. Turner* (1993), 67 Ohio St.3d 337, 341, 617 N.E.2d 1123.

[24] *Anderson v. Liberty-Lobby Inc.* (1986), 477 U.S. 242, 248, 106 S.Ct. 2505, 2510, 91 L.Ed.2d 202, 211.

Whether a genuine issue exists meanwhile is answered by the following inquiry: Does the evidence present "a sufficient disagreement to require submission to a jury" or is it "so one-sided that the party must prevail as a matter of law[?]"[25] "The inquiry performed is the threshold inquiry of determining whether there is the need for a trial–whether, in other words, there are any genuine factual issues that can properly be resolved only by a finder of fact because they may reasonably be resolved in favor of either party."[26]

The burden is on the moving party to show that no genuine issue exists as to any material fact, and that the moving party is entitled to judgment as a matter of law.[27] This burden requires the moving party to "specifically delineate the basis upon which summary judgment is sought in order to allow the opposing party a meaningful opportunity to respond."[28]

A party seeking summary judgment, on the ground that the nonmoving party cannot prove its case, bears the initial burden of informing the trial court of the basis for the motion, and identifying those portions of the record which demonstrate the absence of a genuine issue of material fact on the essential element(s) of the nonmoving party's claims.[29] The moving party cannot discharge its initial burden under Civ.R. 56 simply by making a conclusory assertion that the nonmoving party has no evidence to prove its

[25] Id. at 251-52, 106, S.Ct. at 2512, 91 L.Ed.2d at 214.
[26] Id. at 250, 106 S.Ct. at 2511, 91 L.Ed.2d at 213.
[27] *AAAA Enterprises, Inc. v. River Place Community Urban Redevelopment Corp.* (1990), 50 Ohio St.3fd 157, 161, 553 N.E.2d 597; *Harless v. Willis Day Warehousing Co.* (1978), 54 Ohio St.2d 64, 66, 375 N.E.2d 46.
[28] *Mitseff v. Wheeler* (1988), 38 Ohio St.3d 112, 526 N.E.2d 798, syllabus.
[29] *Dresher v. Burt* (1996), 75 Ohio St.3d 280, 293, 662 N.E.2d 264; *Vahila v. Hall* (1997), 77 Ohio St.3d 421, 429, 674 N.E.2d 1164.

case.[30] Rather, the moving party must be able to specifically point to some evidence of the type listed in Civ.R. 56(C) which affirmatively demonstrates that the nonmoving party has no evidence to support the nonmoving party's claims.[31]

If the moving party fails to satisfy its initial burden, the motion for summary judgment must be denied.[32] However, if the moving party satisfies this burden, then the nonmoving party has a "reciprocal burden" to set forth specific facts, beyond the allegations and denials in his pleadings, demonstrating that a "triable issue of fact" remains in the case.[33] The duty of a party resisting a motion for summary judgment is more than that of resisting the allegations in the motion.[34] Instead, this burden requires the nonmoving party to "produce evidence on any issue for which that (the nonmoving) party bears the burden of production at trial."[35]

The nonmovant must present documentary evidence of specific facts showing that there is a genuine issue for trial and may not rely on the pleadings or unsupported allegations.[36] Opposing affidavits, as well as supporting affidavits, must be based on personal knowledge, must set forth facts as would be admissible into evidence, and must show affirmatively that the affiant is competent to testify on the matters stated therein.[37]

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[30] Id.
[31] Id.
[32] Id.
[33] Id.
[34] *Baughn v. Reynoldsburg* (1992), 78 Ohio App.3d 561, 563, 605 N.E.2d 478.
[35] *Wing v. Anchor Media Ltd. Of Texas* (1991), 59 Ohio St.3d 108, 570 N.E.2d 1095, paragraph three of the syllabus; *Welco Indus., Inc. v. Applied Companies* (1993), 67 Ohio St.3d 344, 346, 617 N.E.2d 1129; *Gockel v. Ebel* (1994), 98 Ohio App.3d 281, 292, 648 N.E.2d 539.
[36] *Shaw v. J. Pollock & Co.* (1992), 82 Ohio App.3d 656, 659, 612 N.E.2d 1295.
[37] Civ.R.56(E); *Carlton v. Davisson* (1995), 104 Ohio App.3d 636, 646, 662 N.E.2d 1112; *Smith v. A-Best Products Co.* (Feb. 20, 1996), 4th Dist. No 94 CA 2309, unreported.

"Personal knowledge" is defined as "knowledge of the truth in regard to a particular fact or allegation, which is original and does not depend on information or hearsay."[38]

Accordingly, affidavits which merely set forth legal conclusions or opinions without stating supporting facts are insufficient to meet the requirements of Civ.R.56(E), which sets forth the types of evidence which may be considered in support of or in opposition to a summary judgment motion.[39]

Under Civ.R.56(C), the only evidence which may be considered when ruling on a motion for summary judgment are "pleadings, depositions, answers to interrogatories, written admissions, affidavits, transcripts of evidence, and written stipulations of fact, if any, timely filed in the action." These evidentiary restrictions exist with respect to materials which are submitted both in support of and in opposition to a motion for summary judgment.

Where the copy of a document falls outside the rule, the correct method for introducing such items is to incorporate them by reference into a properly framed affidavit.[40] Thus, Civil Rule 56(E) also states that "[s]worn or certified copies of all papers or parts thereof referred to in an affidavit shall be attached thereto or served therewith."

Because summary judgment is a procedural device designed to terminate litigation where there is nothing to try, it must be awarded with caution, and doubts must

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[38] *Carlton v. Davisson*, 104 Ohio App.3d at 646, 662 N.E.2d at 1119; *Brannon v. Rinzler* (1991), 77 Ohio App.3d 749, 756, 603 N.E.2d 1049.
[39] *Stamper v. Middletown Hosp. Assn.* (1989), 65 Ohio App.3d 65, 69, 582 N.E.2d 1040.
[40] *Martin v. Central Ohio Transit Auth.* (1990), 70 Ohio App.3d 83, 89, 590 N.E.2d 411; *Biskupich v. Westbay Manor Nursing Home* (1986), 33 Ohio App.3d 220, 222, 515 N.E.2d 632.

be resolved in favor of the nonmoving party.[41] Summary judgment is not appropriate where the facts are subject to reasonable dispute when viewed in a light favorable to the nonmoving party.[42]

However, the summary judgment procedure is appropriate where a nonmoving party fails to respond with evidence supporting his claim(s). While a summary judgment must be awarded with caution, and while a court in reviewing a summary judgment motion may not substitute its own judgment for the trier of fact in weighing the value of evidence, a claim to survive a summary judgment motion must be more than merely colorable.[43]

In deciding a summary judgment motion, the court may, even if summary judgment is not appropriate upon the whole case, or for all the relief demanded, and a trial is necessary, grant a partial summary judgment, such that a trial will remain necessary as to the remaining controverted facts.[44]

(B) ANALYSIS

The defendant's sole argument in her motion for summary judgment is that the statute of limitations has run on the plaintiff's claim and therefore the claim is now barred.

The court notes for the record that additional legal arguments were raised in the defendant's reply brief; however, as noted in the summary judgment standard set forth

[41] *Davis v. Loopco Indus., Inc.*, 66 Ohio St.3d at 66, 609 N.E.2d at 145.
[42] *Mers v. Dispatch Printing Co.* (1985), 19 Ohio St.3d 100, 105-06, 483 N.E.2d 150.
[43] *Wing v. Anchor Media Ltd. Of Texas*, 59 Ohio St.3d at 111, 570 N.E.2d at 1099.
[44] Civ.R.56(D); *Holeski v. Lawrence* (1993), 85 Ohio App.3d 824, 834, 621 N.E.2d 802.

above, the moving party must identify the basis of the motion in the motion itself so as to give notice to the non-moving party and provide that non-moving party with a sufficient and fair opportunity to respond to the legal arguments raised by the motion. Counsel for the plaintiff objected at the hearing of this matter to any arguments beyond the statute of limitations issue and this court agrees that those issues cannot be raised after the motion has been filed and, as such, the court will not consider any of those additional legal arguments.

Therefore, the only argument before the court for consideration on the motion for summary judgment is that the plaintiff's claim is time-barred by the expiration of the statute of limitations.

The defendant's defamation action is governed by R.C. 2305.11(A), which dictates that "[a]n action for libel * * * shall be commenced within one year after the cause of action accrued." The cause of action in the present case accrued when the subject alleged defamatory internet posting was made, which was on July 13, 2010. Therefore, the statute of limitations to file the claim at bar would expire on July 13, 2011.

The plaintiff filed its original complaint in the case at bar on May 13, 2011, which was prior to the expiration of the one-year statute of limitations. That original complaint names a "John Doe" defendant "Name and Address Unknown" and states that the plaintiff was unable to discover the identity and location of that "John Doe" defendant prior to filing the complaint.[45] No summons was issued upon the complaint at that time and the only description of the unknown defendant is that he or she posted under the moniker "honestgramma."

[45] Original Complaint, filed May 13, 2011, ¶ 3.

On August 12, 2011, the plaintiff filed an amended complaint naming Valerie Clark as the defendant. A praecipe for service was filed with the clerk of courts requesting that the original complaint and the amended complaint be served upon Valerie Clark via certified mail. Clark was served by certified mail on August 16, 2011.

In her answer, Clark sets forth several affirmative defenses including "[t]hat the plaintiff's claims are barred by the applicable statute of limitations."[46] The defendant filed the present motion for summary judgment on December 23, 2011 but, due to the notification of settlement, the motion was not heard by this court until April 2012.

It is undisputed that the amended complaint, filed on August 12, 2011, was filed outside the one-year statute of limitations. However, the plaintiff argues that, pursuant to Civ.R. 3(A) and 15(D), its amended complaint relates back to the filing of the original complaint and, therefore, the claim is not time-barred.

Pursuant to Civ.R. 3(A) "[a] civil action is commenced by filing a complaint with the court, if service is obtained within one year from such filing upon a named defendant, or upon an incorrectly named defendant whose name is later corrected pursuant to Civ.R. 15(C), or upon a defendant identified by a fictitious name whose name is later corrected pursuant to Civ.R. 15(D)."

If the proper defendant in a case is unknown, a plaintiff "may nevertheless file a complaint and then amend it when the name of the unknown party is discovered."[47] Civ.R. 15(D) states specifically as follows:

> "When the plaintiff does not know the name of a defendant, that defendant may be designated in a pleading or proceeding by any name and description. When the name is discovered, the pleading or proceeding must be amended

[46] Answer at ¶ 22.
[47] *LaNeve v. Atlas Recycling, Inc.* (2008), 119 Ohio St.3d 324, 894 N.E.2d 25, ¶ 9.

> accordingly. The plaintiff, in such case, must aver in the complaint the fact that he could not discover the name. The summons must contain the words "name unknown," and a copy thereof must be served personally upon the defendant."

"When a plaintiff files an amended complaint pursuant to Civ.R. 15(D) and the applicable statutory time limit has expired, the determination of whether service has been properly effected on the formerly fictitious, now identified, defendant requires Civ.R. 15(D) to be read in conjunction with Civ.R. 15(C) and 3 (A)."[48] The Ohio Supreme Court requires strict compliance with the dictates of Civ.R. 15(D), some of which are that the summons contain the words "name unknown" and that the summons be personally served upon the formerly fictitious, now identified, defendant.[49] That court has held that "[s]ervice on the formerly fictitious, now identified, defendant by certified mail is 'clearly not in accordance with the requirement of Civ.R. 15(D).' "[50]

The Ohio Supreme Court has also stated that "[a]ssuming that a plaintiff meets the specific requirements of Civ.R. 15(D), the relation-back provisions of Civ.R. 15(C) are then considered."[51] Therefore, a court is to consider the requirements of Civ.R. 15(C) only when the plaintiff has first met all the dictates of Civ.R. 15(D). "The relation back concept provides that "[i]f plaintiff files his complaint, and if the applicable statute of limitations runs, and if plaintiff amends his complaint[,] * * * the amendment relates back to the time of the original filing of the action."[52] An amendment relates back to the

[48] Id., citing *Amerine v. Haughton Elevator Co.* (1989), 42 Ohio St.3d 57, 537 N.E.2d 208, syllabus.
[49] Id. at ¶ 10.
[50] Id., quoting *Amerine*, supra, 42 Ohio St.3d at 58.
[51] Id. at ¶ 11, citing *Amerine* at 58.
[52] Id.

date of the original complaint if the parties are not changed and the substitution of a real name for a fictitious name is not changing a party.[53]

"The rule pertaining to the commencement of a civil action specifically permits an amendment made pursuant to Civ.R. 15(D) to relate back to the filing of an original complaint, provided service is obtained within one year of the filing of the original complaint."[54] "Moreover, so long as the original complaint was filed prior to the expiration of the statutory time limit, 'service does not have to be made on the formerly fictitious, now identified, defendant within the statute of limitations.'"[55]

In *LaNeve v. Atlas Recycling, Inc.* (2008), 119 Ohio St.3d 324, 894 N.E.2d 25, ¶ 9, the Ohio Supreme Court examined a fact-pattern similar to that of the case at bar. In *LaNeve*, the plaintiff filed against several "John Doe" defendants within the statute of limitations and, within the one year for obtaining service under Civ.R. 3(A), the plaintiff amended his complaint to identify the defendants.[56] The amended complaint was filed outside the statute of limitations, so the plaintiff attempted to invoke the relation-back principles in order to maintain his action against those defendants.[57]

The *LaNeve* court noted that "[c]ontrary to the express requirements of the rule, the summons for [the plaintiff's] complaint or amended complaint, however, did not include the words 'name unknown' with respect to any of the defendants, and it was served by certified mail."[58] Therefore, the court found that the plaintiff failed to meet the specific requirements of Civ.R. 15(D) and, consequently, could not claim the benefit of

[53] Id.
[54] Id. at ¶ 12, citing Civ.R. 3(A) and *Amerine* at 59.
[55] Id., quoting *Amerine* at 59.
[56] Id. at ¶ 14.
[57] Id.
[58] Id. at ¶ 15.

the relation back of the amended complaint as provided by Civ.R. 3(A).[59] As a result, the plaintiff's action was determined to be outside the applicable statute of limitations.[60]

The court further found that the application of the saving statute, as codified in R.C. 2305.19(A), was inappropriate because the plaintiff failed to "attempt to commence the action." The court reasoned that "[a]n attempt to commence an action as contemplated by R.C. 2305.19, however, must be pursuant to a method of service that is proper under the Civil Rules. Certified mail is an improper method of service under Civ.R. 15(D), which specifies that personal service is the only method by which a fictitious, now identified, defendant may be served."[61] Due to the fact that the plaintiff used certified mail to obtain service and never obtained or attempted personal service on the defendants, the plaintiff failed to properly attempt to commence the action and the savings statute was inapplicable.[62]

Recognizing its somewhat harsh result, the Ohio Supreme Court noted that "the spirit of the Civil Rules is to resolve cases upon their merits and not on pleading deficiencies."[63] However, it noted that "the issue presented in this case is one of a failure to perfect service, which ultimately affects whether a court has personal jurisdiction over a defendant. The obligation to perfect service of process is placed only on the plaintiff, and the lack of jurisdiction arising from want of, or defects in, process or in the service thereof is ground for reversal."[64] "Similarly, it is an established principle that actual knowledge of a lawsuit's filing and lack of prejudice resulting from the use of

[59] Id.
[60] Id.
[61] Id. at ¶ 17.
[62] Id. at ¶ 18.
[63] Id. at ¶ 21.
[64] Id. at ¶ 22.

a legally insufficient method of service do not excuse a plaintiff's failure to comply with the Civil Rules."[65] The court found that "[i]n this regard, the Civil Rules are not just a technicality, and we may not ignore the plain language of a rule in order to assist a party who has failed to comply with a rule's specific requirements."[66]

Subsequent to the *LeNeve* decision, the Twelfth District Court of Appeals held that " * * * if the name of the defendant is unknown, a plaintiff has the initial statute of limitations period, plus one year, to identify and properly serve a defendant."[67] To the extent that this holding arose from ambiguity in the *LeNeve* decision, this court finds that any such ambiguity was resolved by the Ohio Supreme Court itself when it further examined the issues surrounding Civ.R. 15(D) compliance in the recent case of *Erwin v. Bryan* (2010), 125 Ohio St.3d 519, 929 N.E.2d 1019. The syllabus of that case states as follows:

> "1. Pursuant to Civ.R. 15(D), a complaint against a party whose name is unknown must describe the defendant and a summons containing the words 'name unknown' must be personally served on the defendant.
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> 2. Civ.R. 15(D) does not authorize a claimant to designate defendants using fictitious names as placeholders in a complaint filed within the statute-of-limitations period and then identify, name, and personally serve those defendants after the limitations period has elapsed."[68]

In its decision, the *Erwin* court noted that "* * * a plaintiff may use Civ.R. 15(D) to file a complaint designating a defendant by any name and designation when the plaintiff does not know the name of that defendant, provided that the plaintiff avers in the

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[65] Id.
[66] Id. at ¶ 23, citing, *Gliozzo v. Univ. Urologists of Cleveland, Inc.*, 114 Ohio St.3d 141, 870 N.E.2d 714, 2007-Ohio-3762, ¶ 16.
[67] *Baker v. Meijer Stores Ltd. Partnership* (Sept. 8, 2009), 12th Dist. No. CA2008-11-136, 2009-Ohio-4681, ¶ 42.
[68] *Erwin*, supra, at paragraph one and two of the syllabus.

complaint that the name could not be discovered, the summons contains the words 'name unknown,' and that summons is personally served on the defendant. Although the plaintiff may designate a defendant whose name is unknown by 'any name and description,' the complaint must nonetheless sufficiently identify that party to facilitate obtaining personal service on that defendant upon the filing of the complaint."[69]

While the court in *Erwin* determined that the plaintiff actually did know the name of the defendant when she filed the complaint, it also held that, even if she had not known the defendant's name at the time of filing the original complaint, "the original complaint did not provide a description that sufficiently identified either so that personal service could be obtained upon the filing of the complaint, as the rule directs[,]" and, therefore, the plaintiff "did not identify an individual or entity that could be personally served with the summons as contemplated by Civ.R. 15(D), nor did she attempt personal service on the fictitiously named defendants using descriptions provided in her complaint."[70] As a result, the court held that, because the plaintiff failed to comply with the requirements of Civ.R. 15(D), the amended complaint did not relate back to the timely filed original complaint and the plaintiff failed to commence her action prior to the expiration of the statute of limitations.[71]

At least one court, when discussing the *Erwin* decision, has stated that the *Erwin* court expressly found that "service on the fictitiously named defendant, using the original complaint and a summons containing the words 'name unknown,' must be completed prior to the expiration of the applicable statute of limitations."[72]

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[69] Id. at ¶ 31.
[70] Id. at ¶ 34.
[71] Id. at ¶ 35.
[72] *Anetomang v. OKI Sys., Ltd.* (March 1, 2012), 10th Dist. No. 10AP-1182, 2012-Ohio-822, ¶ 18.

However, whether this court agrees with that interpretation of the *Erwin* decision or would still find that Civ.R. 3(A) gives the plaintiff one year from the filing of the original complaint to obtain service, even if that date falls outside the statute of limitations, neither scenario was met in the case at bar.

The plaintiff did not request the issuance of any summons with its original complaint and the only description of the unidentified defendant in the complaint was that his or her Yahoo name was "honestgramma." Assuming this was a sufficient description under the circumstances, when the plaintiff did file a praecipe for service, it requested only service via certified mail and did not request that the summons contain the phrase "name unknown." Therefore, a summons containing the words "name unknown" was never personally served upon the defendant.

If this court were to find that the plaintiff had one year from the filing of the original complaint to comply with the requirements of Civ.R. 15(D) and obtain service, or even attempt to obtain proper service, that time expired on May 13, 2012, while this case was under advisement. It is unfortunate that the parties' failed attempt at settlement delayed consideration of this matter by the court until several months after the filing of the motion for summary judgment; however, the plaintiff has been on notice of the defendant's statute of limitations argument since the answer was filed in September 2011, and this argument was further articulated in the motion for summary judgment filed in December of that same year.

While no waiver argument was made or raised, the court would note for the record that, though the defendant's answer does not set forth an affirmative defense of insufficiency of process, it does set forth an affirmative defense stating the plaintiff's

claim was barred by the applicable statute of limitations. Therefore, the court finds that the issues and defense discussed in the present decision were not waived by the defendant.

Pursuant to the analysis set forth in the *LaNeve* case, due to the fact that the plaintiff never obtained or attempted personal service upon the defendant, as required by Civ.R. 15(D), the saving statute is inapplicable.

Therefore, because the plaintiff failed to comply with the requirements of Civ.R. 15(D) as set forth and discussed above, the plaintiff's amended complaint, filed outside the applicable statute of limitations, does not relate back to the timely filed original complaint and the plaintiff failed to commence its action prior to the expiration of the statute of limitations.

Based on the above analysis, the defendant's motion for summary judgment is well-taken and shall be granted.

CONCLUSION

The defendant's motion to enforce settlement agreement is not well-taken and is hereby denied.

The defendant's motion for summary judgment is well-taken and is hereby granted.

IT IS SO ORDERED.

DATED:_____ _____
Judge Jerry R. McBride

CERTIFICATE OF SERVICE

The undersigned certifies that copies of the within Decision/Entry were sent via Facsimile/E-Mail/Regular U.S. Mail this 1st day of June 2012 to all counsel of record and unrepresented parties.

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