

IN THE SUPREME COURT OF OHIO

JOHN A. LaNEVE, et al.,)	Supreme Court Case No. 2007-1199
)	
Appellees)	
)	
v.)	
)	
ATLAS RECYCLING, INC.)	
)	
Defendant)	On Appeal from the Trumbull County
)	Court of Appeals, Eleventh Appellate
v.)	District
)	
CHINA SHIPPING (NORTH AMERICA))	
HOLDING CO., LTD., et al.,)	Court of Appeals Case No. 2006-T-0032
)	
Appellants)	

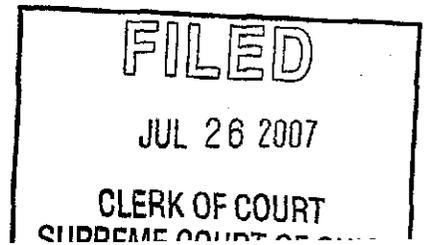
**MEMORANDUM IN SUPPORT OF JURISDICTION
OF APPELLANT CONTAINERPORT GROUP, INC.**

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EXPLANATION OF WHY THIS CASE IS A CASE OF PUBLIC
AND GREAT GENERAL INTEREST

These case presents two critical issues facing civil litigants: (1) Whether a plaintiff who files an amended complaint identifying a previously named John Doe defendant must comply with the requirements of Civ.R. 15(D) in order to invoke the relation-back provisions of Civ.R. 15(C) and avoid the statute of limitations as a bar; and (2) Whether R.C. 2305.19, Ohio's savings statute, may be invoked by a plaintiff who fails to comply with the requirements of Civ.R. 15(D).

Concerning the first issue, the Court of Appeals wholly ignored the requirements of Civ.R. 15(D), deeming them "technical service requirements," and in doing so, disregarded established precedent. Concerning the second issue, the Court of Appeals permitted two plaintiffs to avail themselves of the savings statute, notwithstanding their blatant failure to properly serve two John Doe defendants pursuant to Civ.R. 15(D).

If the decision of the Court of Appeals is permitted to stand, confusion and uncertainty will result. Resolution of the issues here presented is important to the public, who expect and deserve fair and equitable treatment from the courts of Ohio, and is of great general interest to litigants, who have an expectation that the Ohio Rules of Civil Procedure and the Ohio Revised Code will be followed and applied fairly.

Most telling, though, is the recent Judgment Entry of the Court of Appeals granting in part and denying in part the Motion to Certify a Conflict filed by Appellants ContainerPort Group, Inc. ("ContainerPort") and China Shipping (North America) Holding Co., Ltd. ("China Shipping").¹

¹In accordance with S.Ct.R.Prac. IV, Section 1, ContainerPort will be filing a Notice of Certified Conflict relative to such Judgment Entry.

In that portion of its Judgment Entry *denying* certification, the Court of Appeals states:

. . . [T]he cases relied upon by [ContainerPort and China Shipping] in support of their first issue all agree that plaintiffs, in serving John Doe defendants, must comply with the requirements of Civ.R. 15(D): *they simply do not agree on what those requirements are*. In *LaNeve*, we affirmed the proposition that the requirements of Civ.R. 15(D) must be met in order to obtain jurisdiction of a John Doe defendant. . . . *We noted, however, the murkiness of the rule's application*. . . [emphasis added]

(Appx. 18). Since certification has been denied on this first issue, the within discretionary appeal is all the more critical. ContainerPort submits that it is of public and great general interest that the stated “murkiness” of Civ.R. 15(D) be addressed by this Court.

In that portion of its Judgment Entry *granting* certification, the Court of Appeals further states:

The gist of our holding in *LaNeve* was that the savings statute applied to permit plaintiffs one further year to obtain service on [ContainerPort and China Shipping] – in compliance with Civ.R. 15(D). . . . This clearly conflicts with the decisions of the courts in *Kramer*, *Permanent COS Ins. Co.*, and *Mustric*, all of which held that failure to comply with the requirements of Civ.R. 15(D), initially, meant that no attempt had been made to commence an action, rendering the savings statute inapplicable. . . . Consequently, we certify the following question to the Supreme Court of Ohio:

“Does the Ohio savings statute, R.C. 2305.19(A), apply to an action where plaintiff fails to comply strictly with the requirements of Civ.R. 15(D) in serving the original complaint?”

(Appx. 19). The Court of Appeals readily admits that its holding respecting this second issue is in conflict with decisions from other Ohio appellate districts. To this end, ContainerPort submits that it is of public and great general interest that the law of Ohio be uniformly applied throughout each of Ohio’s appellate districts.

The issues here presented have implications far beyond the parties to this dispute. Accordingly, ContainerPort respectfully requests that this Court accept jurisdiction and reverse the judgment of the Court of Appeals in accordance with the Propositions of Law that follow.

STATEMENT OF THE CASE AND FACTS

On May 28, 2002, Appellee John LaNeve (“LaNeve”) was allegedly injured during the course and scope of his employment with Atlas Recycling, Inc. (“Atlas”) when he opened a container box and allegedly was exposed to hazardous chemicals.

On May 28, 2004, the day the statute of limitations expired, LaNeve and his wife filed a Complaint in the Trumbull County Court of Common Pleas, naming Atlas as a Defendant and stating claims for employer intentional tort, negligence, and loss of consortium. The Complaint also named five John Does as Defendants, alleging they were the manufacturer/owner and/or distributor and/or lessor/lessee of the container box. The Complaint did *not* allege that the LaNeves could not discover the names of the John Doe Defendants.

On May 6, 2005, the LaNeves filed an Amended Complaint adding ContainerPort and China Shipping as Defendants. The Amended Complaint did *not* allege that ContainerPort and China Shipping were the entities identified in the Complaint as the John Doe Defendants.

The LaNeves instructed the Clerk of Court to issue service of summons, along with a copy of the Amended Complaint, upon ContainerPort by way of *certified mail*. On or about May 26, 2005, a certified mail receipt was returned. The Summons accompanying the Amended Complaint did *not* include the words “name unknown.”

On August 23, 2005, ContainerPort filed a Motion to Dismiss the Amended Complaint for failure to state a claim under Civ.R. 12(B)(6). ContainerPort argued that it had not been

properly served under Civ.R. 15(D) and Civ.R. 3(A), and that as such, the relation-back provisions of Civ.R. 15(C) did not apply, and the LaNeves' claims were barred by the statute of limitations.

On January 5, 2006, the trial court held a hearing on ContainerPort's Motion to Dismiss and on a similar Motion to Dismiss filed by China Shipping. On February 7, 2006, the trial court entered an Order dismissing with prejudice the LaNeves' claims against ContainerPort and China Shipping. On March 2, 2006, the trial court entered a *Nunc Pro Tunc* Order directing that "there is no just reason for delay."

The LaNeves appealed the trial court's judgment. By way of Opinion and Judgment Entry entered on June 11, 2007, the Eleventh Appellate District reversed the judgment of the trial court and remanded for further proceedings. The Court of Appeals held that the LaNeves were not required to comply with the "technical service requirements" of Civ.R. 15(D) because ContainerPort and China Shipping received adequate notice of the pendency of the lawsuit. (Appx. 7). The Court of Appeals further held that R.C. 2305.19, Ohio's savings statute, afforded the LaNeves an additional year to perfect service because the LaNeves "attempted to commence" their suit against the John Doe Defendants and that such suit "failed otherwise than upon the merits." (Appx. 6).

It is the position of ContainerPort that the Court of Appeals erred in its holdings.

ARGUMENT IN SUPPORT OF PROPOSITIONS OF LAW

Proposition of Law No. I: A party who files an amended pleading pursuant to Civ.R. 15(D) must (1) aver in his original pleading that the plaintiff could not discover the name of the unknown defendant; (2) include the words “name unknown” in the summons accompanying the amended pleading; and (3) personally serve the summons and amended pleading on the newly-identified defendant in order to invoke the relation-back provisions of Civ.R. 15(C) and avoid the statute of limitations as a bar.

Civ.R.15(D) governs the amendments of pleadings where the name of a party is unknown. The Rule provides:

(D) Amendments where name of party unknown.

When the plaintiff does not know the name of a defendant, that defendant may be designated in a pleading or proceeding by any name and description. When the name is discovered, the pleading or proceeding must be amended accordingly. The plaintiff, in such case, must aver in the complaint the fact that he could not discover the name. The summons must contain the words “name unknown,” and a copy thereof must be served personally upon the defendant.

ContainerPort posits that in a case involving a previously unknown but subsequently identified defendant, a plaintiff must (1) aver in his original pleading that the plaintiff could not discover the name of the unknown defendant; (2) include the words “name unknown” in the summons accompanying the amended pleading that identifies the previously unknown defendant; and (3) personally serve the summons and amended pleading on the subsequently identified defendant.² A failure on any one of these elements precludes a plaintiff from invoking the

²That personal service is required under Civ.R. 15(D) is beyond dispute. However, there is some question as to whether the *original* complaint and summons or the *amended* complaint and summons require personal service. Compare *Easter v. Complete Gen. Constr. Co.*, 10th Dist. No. 06AP-763, 2007-Ohio-1297, 2007 WL 853337 (original complaint and summons must be personally served) with *Miller v. Amer. Family Ins. Co.*, 6th Dist. No. OT-02-011, 2002-Ohio-7309, 2002 WL 31888219 (amended complaint and summons must be personally served).

relation-back provisions of Civ.R. 15(C), which provides:

(C) Relation back of amendments.

Whenever the claim or defense asserted in the amended pleading arose out of the conduct, transaction, or occurrence set forth or attempted to be set forth in the original pleading, the amendment relates back to the date of the original pleading. An amendment changing the party against whom a claim is asserted relates back if the foregoing provision is satisfied and, within the period provided by law for commencing the action against him, the party to be brought in by amendment (1) has received such notice of the institution of the action that he will not be prejudiced in maintaining his defense on the merits, and (2) knew or should have known that, but for a mistake concerning the identity of the proper party, the action would have been brought against him.

In *Amerine v. Haughton Elevator Co.* (1989), 42 Ohio St.3d 57, 537 N.E.2d 208, this Court held that a plaintiff's failure to satisfy the elements of Civ.R. 15(D) precluded her from invoking the relation-back provisions of Civ.R. 15(C) in an attempt to avoid the statute of limitations as a bar to her claim. As *Amerine* explained:

The issue presented is whether Civ.R. 15(D), read in conjunction with Civ.R. 15(C) and 3(A), allows appellants' complaint . . . to relate back to the time of the filing of the original complaint[.]

* * *

Civ.R. 15(D) specifically requires that the summons *must* be served personally upon the defendant. In this case, service was performed by way of certified mail which is clearly not in accordance with the requirement of Civ.R. 15(D). Civ.R. 15(D) also requires that the summons must contain the words "name unknown." Appellants also failed to meet this specific requirement of the rule. [emphasis in original]

Accordingly, due to appellants' failure to meet the specific requirements of Civ.R. 15(D), the judgment of the court of appeals [affirming entry of summary judgment in favor of defendant] is affirmed.

Id., 42 Ohio St.3d at 58. The Court continued:

Since Civ.R. 3(A) has been amended, it is appropriate for us to interpret and explain the amended rule as it relates to Civ.R. 15(C) and (D). In an appropriate case, *if the specific requirements of Civ.R. 15(D) are met*, Civ.R. 15(C) *then* must be considered. . . .
[footnote omitted/emphasis added]

* * *

Under Civ.R. 15(C), an amendment relates back to the date of the original pleading if the parties are not changed. As an example, in the case at bar, the amendment substituted the party's real name for the fictitious John Doe number two. The party was not changed. The party was the same. Thus, the amendment of the pleading relates back to the date of the original pleading.

As amended, Civ.R. 3(A) states:

Commencement. 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 Rule 15(C), or *upon a defendant identified by a fictitious name whose name is later corrected pursuant to Rule 15(D)*. [emphasis in original]

Civ.R. 3(A) now specifically states that the use of a fictitious name with subsequent correction, by amendment, of the real name of a defendant under Civ.R. 15(D) relates back to the filing of the original complaint and that service must be obtained within one year of the filing of the original complaint[.] . . .

Accordingly, in determining if a previously unknown, now known, defendant has been properly served so as to avoid the time bar of an applicable statute of limitations, Civ.R. 15(D) must be read in conjunction with Civ.R. 15(C) and 3(A).

Based upon *Amerine* and a host of appellate decisions following it, the LaNeves failed to satisfy the elements of Civ.R. 15(D), such that they were precluded them from invoking the relation-back provisions of Civ.R. 15(C), rendering their claims barred by the statute of

limitations. See *Plumb v. River City Erectors, Inc.* (10th Dist. 2000), 136 Ohio App.3d 684, 687, 737 N.E.2d 610 (failure to include words “*name unknown*” in summons failed to satisfy requirements of Civ.R. 15(D) such that complaint did not relate back); *Mears v. Mihalega* (December 19, 1997), 11th Dist. No. 97-T-0040, 1997 WL 801291 at *1 (affirming entry of summary judgment in favor of defendant when summons did not contain words “*name unknown*”); *Gaston v. City of Toledo* (6th Dist. 1995), 106 Ohio App.3d 66, 79, 665 N.E.2d 264 (Civ.R. 15(D) requires summons be served *personally* upon defendant); *Hodges v. Gates Mills Towers Apt. Co.* (September 28, 2000), 8th Dist. No. 77278, 2000 WL 1429421 at *3 (“Appellants failed to satisfy the *personal* service requirement of Civ.R. 15(D) within one year of amending their complaint and, therefore, the trial court properly granted summary judgment in favor of [the defendant].”); *McConville v. Jackson Comfort Systems, Inc.* (9th 1994), 95 Ohio App.3d 297, 304, 642 N.E.2d 416 (since plaintiff served defendant by certified mail rather than *personally*, action was not properly commenced within statute of limitations); *Burya v. Lake Metroparks Bd. of Park Commissioners*, 11th Dist. No. 2005-L-015, 2006-Ohio-5192 at ¶39, 2006 WL 2798294 (“Supreme Court authority indicates . . . that service of the original complaint and summons should be made on the former John Doe defendant, and that Civ.R. 15(D) explicitly requires these to be by *personal* service.”); See *Gates v. Precision Post* (September 14, 1994), 3rd Dist. No. 9-94-21, 1994 WL 514045 at *2-3 (affirming entry of summary judgment in favor of defendants for failure to allege in original and amended complaints *inability to discover names of defendants*); *Lawson v. Holmes, Int’l, Inc.* (12th Dist.), 166 Ohio App.3d 857, 2006-Ohio-2511 at ¶21, 853 N.E.2d 712 (“Strict compliance with Civ.R. 15(D) requires that the necessary averment [that the *plaintiff could not discover the name of the unknown defendant*]

be made in the original complaint[.]”.

The Court of Appeals refused to follow *Amerine* and its progeny, deeming Civ.R. 15(D) a mere “technical service [rule].” (Appx. 7). The Court of Appeals opted instead to rely upon *Goolsby v. Anderson Concrete Corp.* (1991), 61 Ohio St.3d 549, 575 N.E.2d 801, Syllabus, wherein this Court held: “When service has not been obtained within one year of filing a complaint, and the subsequent refiling of an identical complaint within rule would provide an additional year within which to obtain service and commence an action under Civ.R. 3(A), an instruction to the clerk to attempt service on the complaint will be equivalent to a refiling of the complaint.” The Court of Appeals erred in its disregard of Civ.R. 15(D), and it erred in its reliance upon *Goolsby*.³

Believing the Court of Appeals’ decision on this issue conflicted with decisions from other Ohio appellate districts construing Civ.R. 15(D), ContainerPort and China Shipping filed a Motion to Certify a Conflict.⁴ In denying such certification, the Court of Appeals reasoned:

... [T]he cases relied on by [ContainerPort and China Shipping]
... all agree that plaintiffs, in serving John Doe defendants, must

³*Goolsby* is readily distinguishable from the present case in two significant respects: (1) it did *not* involve John Doe defendants, and (2) it was premised upon a factual situation where the amended complaint was filed and the instruction for service was made *prior to expiration of the statute of limitations*.

⁴The Motion sought certification of two issues: (1) Does service by certified mail on a “John Doe” defendant, more than one year after the original complaint was filed, meet the requirements of Civ.R. 15(D) and the controlling Ohio Supreme Court case of *Amerine v. Haughton Elevator Co.* (1989), 42 Ohio St.3d 577? and (2) Does the Ohio savings statute, R.C. 2305.19(A), apply to “save” this case where plaintiff did not attempt to commence the lawsuit by proper service pursuant to Civ.R. 15(D)? The Court of Appeals denied certification on the first issue and granted certification on an amended version of the second issue: Does the Ohio savings statute, R.C. 2305.19(A), apply to an action where plaintiff fails to comply strictly with the requirements of Civ.R. 15(D) in serving the original complaint?

comply with the requirements of Civ.R. 15(D): *they simply do not agree on what those requirements are*. In [our Opinion and Judgment], we affirmed the proposition that the requirements of Civ.R. 15(D) must be met in order to obtain jurisdiction of a John Doe defendant. . . . We noted, however, *the murkiness of the rule's application*. . . . Strictly speaking, the only point on which we disagreed with the cases cited by [ContainerPort and China Shipping] was our assumption, sub silentio, that [the LaNeves'] failure to aver in the body of the complaint that they could not discover the names of the defendants was not fatal. This conflicts with *Gates* and *Lawson* – but is not the issue [ContainerPort and China Shipping] ask us to certify. [emphasis added]

(Appx. 18-19). By way of its discretionary appeal, ContainerPort asks this Court to accept jurisdiction in order to clarify “the murkiness of [Civ.R. 15(D)’s] application” and in order to clarify, for the benefit of all Ohio courts, counsel and litigants, that a party who files an amended pleading pursuant to Civ.R. 15(D) must (1) aver in his original pleading that the plaintiff could not discover the name of the unknown defendant; (2) include the words “name unknown” in the summons accompanying the amended pleading; and (3) personally serve the summons and amended pleading on the newly-identified defendant in order to invoke the relation-back provisions of Civ.R. 15(C) and avoid the statute of limitations as a bar.

Proposition of Law No. II: An action is not “attempted to be commenced” for purposes of R.C. 2305.19(A), nor does an action “fail otherwise than upon the merits” for purposes of R.C. 2305.19(A), when a plaintiff fails to request and obtain personal service upon a previously identified John Doe in accordance with Civ.R. 15(D).

R.C. 2305.19(A) provides:

In any action that is commenced or attempted to be commenced, if in due time a judgment for the plaintiff is reversed or if the plaintiff fails otherwise than upon the merits, the plaintiff or, if the plaintiff dies and the cause of action survives, the plaintiff’s representative may commence a new action within one year after the date of the reversal of the judgment or the plaintiff’s failure otherwise than upon the merits or within the period of the original applicable statute of limitations, whichever occurs later. This division applies to any claim asserted in any pleading by a defendant.

The Court of Appeals held that the phrase “attempted to be commenced” as used in R.C. 2305.19(A) means “[a] failure to comply with technical service rules – such as that in Civ.R. 15(D).” (Appx. 6-7). The Court of Appeals further held that a failure to request and obtain personal service upon a previously identified John Doe in accordance with Civ.R. 15(D) constitutes a “failure otherwise than upon the merits,” thus invoking the provisions of R.C. 2305.19(A). (Appx. 6). In so holding, the Court of Appeals reasoned that “[s]ervice of process is a practical thing, not an abstraction for the delectation of legal scholars,” and that the “technical service requirements” of Civ.R. 15(D) should not be permitted to “trump all other considerations.” (Appx. 7). ContainerPort submits that the Court of Appeals’ holdings are contrary to established precedent, and that the Court of Appeals’ reasoning is at odds with the spirit of Ohio law.

At least three of Ohio’s appellate districts have held that R.C. 2305.19(A) does *not* apply where a plaintiff attempts to commence an action against a John Doe defendant by certified mail

rather than personal service. See *Mustric v. Penn Traffic Corp.* (September 7, 2000), 10th Dist. No. 00AP-277, 2000 WL 1264526; *Permanent Gen. Cos. Ins. Co. v. Corrigan* (May 24, 2001), 8th Dist. No. 78290, 2001 WL 563072; *Kramer v. Installations Unlimited, Inc.* (5th Dist.), 147 Ohio App.3d 350, 2002-Ohio-1844, 770 N.E.2d 632. As the Tenth Appellate District explained in *Mustric*:

We believe that an attempt to commence as set forth in R.C. 2305.19 must be pursuant to a method of service that is proper under the Civil Rules. Here, appellant's method of attempting to commence the action was pursuant to certified mail service, an improper method under Civ.R. 15(D). Not only did appellant not actually serve [the defendant] by personal service, appellant did not even attempt to serve [the defendant] by personal service. Personal service is the only method by which a now named John Doe defendant may be served. Hence, appellant did not properly attempt to commence the action against [the defendant].

Because appellant did not properly attempt to commence the action against [the defendant], the savings statute is inapplicable. Therefore, appellant failed to bring the present action against [the defendant] within the applicable statute of limitations, and summary judgment in favor of [the defendant] was appropriate. . . . [emphasis added]

Id., 2000 WL 1264526 at *5. As the Eighth Appellate District explained in *Permanent General*:

. . . [T]he appellants failed to properly serve the appellee via personal service as required under Civ.R. 15(D), after ascertaining his identity. In this case, as in *Mustric*, service was performed by way of certified mail which is clearly not in accordance with the requirement of Civ.R. 15(D). ***Because of this utilization of an improper method of service the appellants were not entitled to benefit from the provisions of the savings statute allowing a case to be re-filed within one year of a voluntary dismissal as there was a failure to properly attempt to commence the action.*** Accordingly, the trial court correctly determined that the re-filed complaint was time-barred by the statute of limitations. [emphasis added]

Id., 2001 WL 563072 at *3. As the Fifth Appellate District explained in *Kramer*:

We agree with the trial court's conclusion that the saving statute is not available to protect appellant's claim from the two-year statute of limitations. Although, arguably, appellant did "attempt to commence" the lawsuit within the two-year statute of limitations by serving appellant via certified mail, the attempt was improper under Civ.R. 15(D).

The cases reviewed by this court support the conclusion that the attempt must be made according to the Rules of Civil Procedure. ***Only when the "attempt to commence" is made according to the Rules of Civil Procedure may a plaintiff avail himself or herself of the savings statute.*** Further, we have found no case law that has permitted a plaintiff to use the savings statute where service failed due to a failure to use the proper method of service under the Rules of Civil Procedure. The cases we have reviewed that permitted the use of the savings statute used the proper method of service as required by the Rules of Civil Procedure, but service was not perfected for whatever reason. [emphasis added]

Id., 147 Ohio App.3d at 356.

Finally, that the reasoning of the Court of Appeals is at odds with the spirit of Ohio law is best illustrated by the dissent authored by Justice Grendell in the Court of Appeals' Opinion:

The majority opinion cavalierly disregards any consideration of Civ.R. 15(D) as a "technical service rule." Rather than being "an abstraction for the delectation of legal scholars," the failure of a party to properly amend pleadings, in this case by failing to obtain personal jurisdiction over two John Doe defendants, is not the sort of defect that the "spirit of the Civil Rules" allows us to ignore. *Cf. Patterson v. V & M Auto Body* (1992), 63 Ohio St.3d 573, 577 (holdings based on the "spirit of the Civil Rules" do not "stand for the proposition . . . that where defects appear [in the amendment of pleadings] they may be ignored").

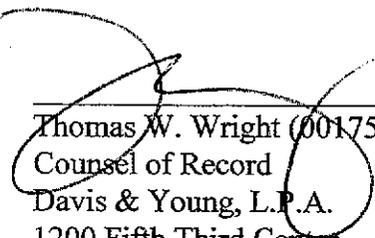
(Appx. 13).

The Court of Appeals erred in holding that R.C. 2305.19(A) applies *without* regard to the Rules of Civil Procedure applicable to John Doe Defendants.

CONCLUSION

For the reasons discussed above, this case involves matters of public and great general interest. ContainerPort respectfully requests that this Court accept jurisdiction so that the important issues presented can be reviewed on the merits.

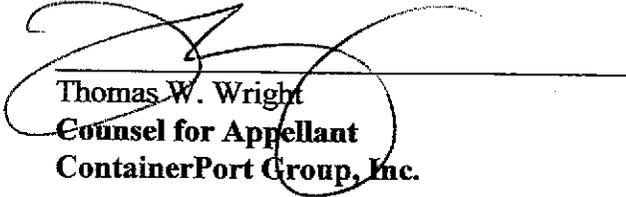
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CERTIFICATE OF SERVICE

I certify that a copy of this Memorandum in Support of Jurisdiction of Appellant ContainerPort Group, Inc. was sent by ordinary U.S. mail this 25th day of July 2007, to Julia R. Brouhard, Esq. and Robert T. Coniam, Esq., Ray, Robinson, Carle & Davies PLL, 1717 E. Ninth Street, Suite 1650, Cleveland, Ohio 44114, Counsel for Appellant China Shipping (North America) Holding Co., Ltd.; and Robert F. Burkey, Esq., 200 Chestnut Ave. NE, Warren, Ohio 44483, Counsel for Appellees John LaNeve and Melissa LaNeve.



Thomas W. Wright
Counsel for Appellant
ContainerPort Group, Inc.

FILED
COURT OF APPEALS

JUN 11 2007

TRUMBULL COUNTY, OH
KAREN INFANTE ALLEN, CLERK

THE COURT OF APPEALS
ELEVENTH APPELLATE DISTRICT

TRUMBULL COUNTY, OHIO

JOHN A. LaNEVE, et al., : **OPINION**
 :
Plaintiffs-Appellants, :
 : **CASE NO. 2006-T-0032**
- vs - :
 :
ATLAS RECYCLING, INC., :
 :
Defendant, :
 :
CHINA SHIPPING (NORTH AMERICA) :
HOLDING CO., LTD., et al., :
 :
Defendants-Appellees.

Civil Appeal from the Court of Common Pleas, Case No. 04 CV 1266.

Judgment: Reversed and remanded.

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COLLEEN MARY O'TOOLE, J.

{¶1} John and Melissa LaNeve appeal from the judgment of the Trumbull County Court of Common Pleas, dismissing their action against China Shipping (North America) Holding Co., Ltd. and ContainerPort Group, Inc. pursuant to Civ.R. 12(B)(6). We reverse and remand.

{¶2} Mr. LaNeve alleges that he suffered injuries at his place of employment, Atlas Recycling, Inc., May 28, 2002. May 28, 2004, he and Mrs. LaNeve filed the underlying action for intentional tort, negligence, and loss of consortium against Atlas, and various "John Doe" defendants. May 6, 2005, the LaNeves filed an amended complaint, replacing two of the John Doe defendants with China Shipping and ContainerPort, and instructing the clerk to issue summons by certified mail. The docket indicates that certified mail containers were prepared on or about May 19, 2005, and summons issued May 23, 2005. The certified mail receipt from ContainerPort indicates service of the summons and amended complaint was made May 26, 2005; that from China Shipping shows service was made June 2, 2005.

{¶3} July 1, 2005, ContainerPort answered the amended complaint, asserting the defenses of failure of and/or improper service, and the statute of limitations. July 28, 2005, China Shipping filed a motion to dismiss the amended complaint for failure to state a claim, pursuant to Civ.R. 12(B)(6). China Shipping asserted that it had not been personally served with the amended complaint and summons, as required with former John Doe defendants pursuant to Civ.R. 15(D), within the year required by Civ.R. 3(A). Consequently, it argued the amended complaint was time-barred, as it did not relate

back to the filing of the original complaint, which occurred the day the statute of limitations for the LaNeves' claims ran on May 28, 2004.

{¶4} August 23, 2005, ContainerPort moved to dismiss the amended complaint on substantially the same basis as had China Shipping. The LaNeves opposed December 19, 2005; and, China Shipping filed a reply brief December 29, 2005. The trial court held an evidentiary hearing January 5, 2006. February 7, 2006, the trial court dismissed the claims against China Shipping and ContainerPort, with prejudice, as time-barred. March 2, 2006, the trial court filed a nunc pro tunc entry, finding there was "no just reason for delay."

{¶5} March 7, 2006, the LaNeves timely noticed this appeal, assigning three errors:

{¶6} "[1.] The trial court erred in ruling that appellants' claims against appellees were time barred by the two year statute of limitations because Civil Rule 15(D) conflicts with other law, and thus, is invalid, unenforceable and does not apply to this case.

{¶7} "[2.] The trial court erred in ruling that appellants' claims against appellees were time barred by the two year statute of limitations because appellants' amended complaint relates back to the original complaint, which was timely filed.

{¶8} "[3.] The trial court erred in ruling that appellants' claims against appellees were time barred by the two year statute of limitations when the clerk of courts unreasonably delayed preparing and issuing summons."

{¶9} We deal with the assignments *en masse*.

{¶10} The basis for the motions to dismiss filed by defendants in this case is the conjunction between Civ.R. 3(A), 15(C), and 15(D), with the two year statute of

limitations for personal injury. China Shipping and ContainerPort argued in the trial court, and continue to argue, as follows:

{¶11} Civ.R. 15(D) demands personal service of the summons and complaint and/or amended complaint be made on a former John Doe defendant when its name is discovered.¹ It requires that the original complaint be served on such a defendant. It requires certain “magic language” be included in the complaint and/or amended complaint and one or more of the summons. The LaNeves never served the original complaint on China Shipping or ContainerPort at all; they served the amended complaint by certified mail. Thus, service was improper under Civ.R. 15(D), and the amended complaint does not relate back under Civ.R. 15(C).

{¶12} Civ.R. 3(A) provides that a civil action is commenced by filing a complaint with the court, if service is achieved within a year of the filing. The original complaint in this case was filed May 28, 2004, the last day of the applicable limitations period. Since proper service was not achieved under Civ.R. 15(D) on either China Shipping or ContainerPort within a year of May 28, 2004, this action did not commence within the limitations period, and is time-barred.

1. We do not quibble with the point that personal service is required under the rule. We would note, for benefit of parties and counsel, that there is some question as to whether the original complaint and summons, or the amended complaint and summons, are the matters requiring personal service under Civ.R. 15(D). See, e.g., *Burya v. Lake Metroparks Bd. of Park Comms.*, 11th Dist. No. 2005-L-015, 2006-Ohio 5192, at ¶¶38-39 (original complaint and summons, not amended complaint and summons, must be personally served under Civ.R. 15(D)). See, also, *Easter v. Complete Gen. Constr. Co.*, 10th Dist. No. 06AP-763, 2007-Ohio-1297, at ¶¶24-29. But, see, *Miller v. Am. Family Ins. Co.*, 6th Dist. No. OT-02-011, 2002-Ohio-7309, at ¶¶37 (amended complaint and summons to be personally served). It seems prudent counsel should request personal service of both the original and amended complaints and summons, and otherwise comply strictly with the provisions of Civ.R. 15(D) as regards to any pleading served on a John Doe or former John Doe defendant.

{¶13} The flaw in this argument results from failure to account for the interaction of Civ.R. 3(A) and the savings statute, R.C. 2305.19. In *Goolsby v. Anderson Concrete Corp.* (1991), 61 Ohio St.3d 549, at the syllabus, the Supreme Court of Ohio held:

{¶14} “[w]hen service has not been obtained within one year of filing a complaint, and the subsequent refiling of an identical complaint within rule would provide an additional year within which to obtain service and commence an action under Civ.R. 3(A), an instruction to the clerk to attempt service on the complaint will be equivalent to a refiling of the complaint.”

{¶15} This rule applies, even though the statute of limitations expires during the one-year period for service obtained by the “refiling.” Cf. *Goolsby*, at 550.

{¶16} In *Fetterolf v. Hoffman-LaRoche, Inc.* (1995), 104 Ohio App.3d 272, 279, we extended the rule in *Goolsby* to situations where a would-be plaintiff files an amended complaint, with demand for service, within the limitations period.

{¶17} In *Nationwide Mut. Ins. Co. v. Galman*, 7th Dist. No. 03 MA 202, 2004-Ohio-7206, the court held that a second amended complaint, filed *outside* the two year statute of limitations for personal injury, was valid, since it benefitted from operation of the savings statute due to filing of the first amended complaint *within* the limitations period. *Id.* at ¶28.

{¶18} In the instant case, the LaNeves filed their original complaint, including various John Doe defendants, May 28, 2004 – the final day allowed by the two-year statute of limitations, R.C. 2305.10. This was an attempt to commence their actions against China Shipping and ContainerPort, within the limitations period, as required to preserve the savings statute. R.C. 2305.19(A). They filed their amended complaint,

with instructions for service, May 6, 2005, within the one year period allowed for service by Civ.R. 3(A). Pursuant to the authority of *Fetterolf* at 279, this was the equivalent of a voluntary dismissal and refiling: i.e., a failure "otherwise than upon the merits," bringing the savings statute into operation. Cf. *Galman* at ¶¶24-35. Thus, the LaNeves had one year from May 6, 2005 to perfect service upon China Shipping and ContainerPort, pursuant to R.C. 2305.19(A).

{¶19} We are aware that other appellate courts have held a plaintiff may not benefit from the savings statute when its attempt to commence an action is not fully compliant with the Civil Rules. Thus, in *Kramer v. Installations Unlimited, Inc.* (2002), 147 Ohio App.3d 350, 355-356, the Fifth District ruled that a plaintiff had not attempted to commence an action against a John Doe defendant, within the meaning of the savings statute, when that plaintiff did not attempt personal service as required by Civ.R. 15(D). The *Kramer* court relied, in part, on a similar ruling by the Eighth District in *Permanent Gen. COS Ins. Co. v. Corrigan* (May 24, 2001), 8th Dist. No. 78290, 2001 Ohio App. LEXIS 2317. In this case, of course, the LaNeves did not demand personal service on China Shipping or ContainerPort of either the original complaint and summons, or amended complaint and summons, when the latter was filed. Pursuant to the authority of *Kramer* and *Permanent Gen. COS Ins. Co.*, this failure to demand proper service under Civ.R. 15(D) would be fatal to the LaNeves' actions.

{¶20} We respectfully believe those courts construing the phrase, "attempted to be commenced," as used in the savings statute, R.C. 2305.19(A), to mean "would have commenced except for some failure by the clerk, the process server, or the postal system," are reading too much into this simple phrase. It means what it says: the

savings statute preserves, for a year, any action which a would-be plaintiff has tried to commence, without success, due to the circumstances listed in the statute. A failure to comply with technical service rules – such as that in Civ.R. 15(D) – is exactly the sort of attempt to commence an action to which the savings statute is directed.

{¶21} It should be recalled that service of process exists for two reasons: (1) so a defendant knows an action is pending, and may properly defend itself; and, (2) to give the court in which the action is filed personal jurisdiction. Service of process is a practical thing, not an abstraction for the delectation of legal scholars, and the courts of Ohio should construe the civil rules regulating it in a practical light. See, e.g., Civ.R. 1(B). This case is illustrative. Both China Shipping and ContainerPort received actual notice of the pendency of the LaNeves' claims, within a period appropriate under the statute of limitations, Civ.R. 3(A), and the savings statute, *unless* the technical service requirements of Civ.R. 15(D) are allowed to trump all other considerations. This runs contrary to the spirit and intent of the Civil Rules.

{¶22} The judgment of the Trumbull County Court of Common Pleas is reversed and the matter is hereby remanded for further proceedings consistent with this opinion.

WILLIAM M. O'NEILL, J., concurs,

DIANE V. GRENDALL, J., dissents with a Dissenting Opinion.

DIANE V. GRENDALL, J., dissents with a Dissenting Opinion.

{¶23} I respectfully dissent.

{¶24} The following points are undisputed.

{¶25} John LeNeve's alleged injuries occurred on May 28, 2002. The original complaint was filed on May 28, 2004, against Atlas Recycling, Inc. and various John Doe defendants. On May 28, 2004, the statute of limitations on LaNeve's personal injury claims expired. R.C. 2305.10.

{¶26} On May 6, 2005, LaNeve filed an amended complaint replacing two of the John Doe defendants with China Shipping (North America) Holding Co., Ltd. and ContainerPort Group, Inc. On May 26, 2005, ContainerPort was served with a copy of the amended complaint by certified mail. On June 2, 2005, China Shipping was likewise served with the amended complaint by certified mail.

{¶27} Since the statute of limitations on LaNeve's claims had run by the time China Shipping and ContainerPort were added as defendants, it is necessary that the amended complaint "relate back" to the date of the filing of the original complaint.

{¶28} Ohio Civil Rule 3(A), governing the commencement of a civil suit, provides: "A civil action is commenced by filing a complaint with the court, if service is obtained within one year from such filing upon a named defendant, or upon an incorrectly named defendant whose name is later corrected pursuant to Civ. R. 15(C), or upon a defendant identified by a fictitious name whose name is later corrected pursuant to Civ. R. 15(D)."

{¶29} Under Civil Rule 3(A), "[a] plaintiff could therefore," as LaNeve has done herein, "file a complaint on the last day of the limitations period and have a full year beyond that date within which to obtain service." *Goolsby v. Anderson Concrete Corp.* (1991), 61 Ohio St.3d 549, 550.

{¶30} The time within which to perfect service of a complaint may be extended even further. “When service has not been obtained within one year of filing a complaint, and the subsequent refiling of an identical complaint within the rule would provide an additional year within which to obtain service and commence an action under Civ.R. 3(A), an instruction to the clerk to attempt service on the complaint will be equivalent to a refiling of the complaint.” *Id.* at syllabus.

{¶31} The majority’s decision depends upon construing LaNeve’s May 6, 2005 amended complaint as a subsequent dismissal and refiling of the original complaint. Thus, the majority concludes LaNeve had an additional year from May 6, 2005 within which to perfect service upon China Shipping and ContainerPort.

{¶32} However, construing LaNeve’s amended complaint as a refiled original complaint is not permissible under Ohio law.

{¶33} “In determining if a previously unknown, now known, defendant has been properly served so as to avoid the time of an applicable statute of limitations, Civ.R. 15(D) must be read in conjunction with Civ.R. 15(C) and 3(A).” *Amerine v. Haughton Elevator Co.* (1989), 42 Ohio St.3d 57, at syllabus.

{¶34} Civ.R. 15(D) provides: “*Amendments where name of party unknown.* -- When the plaintiff does not know the name of a defendant, that defendant may be designated in a pleading or proceeding by any name and description. When the name is discovered, the pleading or proceeding must be amended accordingly. The plaintiff, in such case, must aver in the complaint the fact that he could not discover the name. The summons must contain the words ‘name unknown,’ and a copy thereof must be served personally upon the defendant.”

{¶35} Thus, “Civ.R. 15(D) specifically requires that the summons *must* be served personally upon the defendant.” *Amerine*, 42 Ohio St.3d at 58 (emphasis sic). This court has acknowledged the necessity of personal service of the original complaint on a John Doe defendant in order to have the amended complaint relate back. “Supreme Court authority indicates *** that service of the original complaint and summons should be made on the former John Doe defendant, and that Civ.R. 15(D) explicitly requires these to be by personal service.” *Burya v. Lake Metroparks Bd. of Park Commrs.*, 11th Dist. No. 2005-L-015, 2006-Ohio-5192, at ¶39.²

{¶36} The facts in *Burya* are directly on point and ought to control the outcome in the present case. In *Burya*, the alleged injuries occurred on October 13, 2001. *Id.* at ¶2. The plaintiffs filed a complaint on October 8, 2003, including John Doe defendants. *Id.* at ¶4. On July 6, 2004, plaintiffs moved to file an amended complaint identifying one of the John Doe defendants. The amended complaint and summons were served upon the John Doe defendant by certified mail. *Id.* at ¶9. Thereafter, the former John Doe defendant moved and was granted summary judgment on the ground that plaintiffs failed to serve him personally as required by Civ.R. 15(D). *Id.* at ¶11. This court agreed and affirmed the decision of the lower court. *Id.* at ¶40 (“it was proper for the trial court to grant him summary judgment on the basis of the statute of limitations, once the one year period provided for service under Civ.R. 3(A) ran in October, 2004”).

{¶37} Our decision in *Burya* is consistent with the decisions of other Ohio appellate districts. See *Easter v. Complete Gen. Constr. Co.*, 10th Dist. No. 06AP-763,

2. *Burya v. Lake Metroparks Bd. of Park Commrs.*, 11th Dist. No. 2005-L-015, 2006-Ohio-5192, at ¶39, discretionary appeal allowed, 112 Ohio St.3d 1441, 2007-Ohio-152 (on political subdivision immunity issue), certification granted, 112 Ohio St.3d 1438, 2007-Ohio-152 (on political subdivision immunity issue).

2007-Ohio-1297, at ¶27 (“in order for an amended complaint to relate back to the original complaint vis a vis a defendant originally identified by a fictitious name, the plaintiff is required to personally serve the newly identified John Doe defendant with a copy of the original summons and complaint within one year of the filing of the original complaint”); *Kramer v. Installations Unlimited, Inc.*, 147 Ohio App.3d 350, 355, 2002-Ohio-1844 (“Civ.R. 15(D) specifically required appellant to personally serve [a John Doe defendant] and service by certified mail is not a permitted form of service for a formerly fictitious now identified defendant”); *Permanent Gen. Cos Ins. Co. v. Corrigan* (May 24, 2001), 8th Dist. No. 78290, 2001 Ohio App. LEXIS 2317, at *4 (“the personal service requirement of Civ.R. 15(D) is mandatory”); *McConville v. Jackson Comfort Sys., Inc.* (1994), 95 Ohio App.3d 297, 304 (requirements of Civ.R. 15(D) and 3(A) were not met where “[s]ervice of the amended complaint was accomplished by way of certified mail” and the “amended complaint was filed beyond the expiration date of the statute of limitations”); *Gaston v. Toledo* (1995), 106 Ohio App.3d 66, 79 (“[i]t is only when a plaintiff meets the personal service requirement under Civ.R. 15(D), that such plaintiff can benefit by the one-year of additional time to perfect service under Civ.R. 3(A)”).

{¶38} Rather than follow *Burya* and the other authorities, the majority relies upon the case of *Goolsby*, 61 Ohio St.3d 549, for the proposition that, “[w]hen service has not been obtained within one year of filing a complaint, and the subsequent refiling of an identical complaint within rule would provide an additional year within which to obtain service and commence an action under Civ.R 3(A), an instruction to the clerk to attempt service on the complaint will be equivalent to a refiling of the complaint.” *Id.* at syllabus.

{¶39} *Goolsby* is easily distinguished. First, none of the defendants in *Goolsby* were John Doe defendants. Thus, the Supreme Court did not consider Civ.R. 3(A) “in conjunction with” Civ.R. 15(D) as it had in *Amerine*. Cf. *Amerine*, 42 Ohio St.3d 57, at syllabus.

{¶40} Second, the holding in *Goolsby* is premised on the factual situation where the amended complaint/instruction to the clerk to attempt service was made **prior to the expiration of the statute of limitations**. As the Supreme Court stated, “in the case at bar, the original complaint was filed, it was not dismissed, and a demand for service was made -- **all prior to the expiration of the limitations period**.” 61 Ohio St.3d at 551. It was “[u]nder these circumstances” that the plaintiff’s attempt at service was construed as a dismissal and refiling. *Id.* (emphasis added). Cf. *Pewitt v. Roberts*, 8th Dist. No. 85334, 2005-Ohio-4298, at ¶15 (“appellant’s request for service on appellees in this case was not made until after the two year limitations period expired, while the request for service by the plaintiff in *Goolsby* was made within the original statute of limitations”); *Fetterolf v. Hoffman-LaRoche, Inc.* (1995), 104 Ohio App.3d 272, 279 (holding that, under *Goolsby*, appellant’s claim for loss of consortium was barred since service of the amended complaint occurred after the statute of limitations had run on this claim).

{¶41} Similarly, the majority’s recourse to the saving statute, R.C. 2305.19(A), is unavailing. As with its reliance on *Goolsby*, the majority fails to apply the saving statute in conjunction with the Civil Rules applicable to John Doe defendants. The majority’s application of the saving statute is also contrary to precedent. See *Mustric v. Penn Traffic Corp.* (Sept. 7, 2000), 10th Dist. No. 00AP-277, 2000 Ohio App. LEXIS 4032, at

*13-*14 (holding that R.C. 2305.19(A) did not apply where the plaintiff attempted to commence the action against John Doe defendants by certified mail, "an improper method under Civ.R. 15(D)").

{¶42} In sum, the outcome of the present case is determined, under *Amerine, Burya*, and Civ.R. 15(D), by the fact that LaNeve attempted to serve China Shipping and ContainerPort by certified mail, rather than personal service.

{¶43} The majority opinion cavalierly disregards any consideration of Civ.R. 15(D) as a "technical service rule." Rather than being "an abstraction for the delectation of legal scholars," the failure of a party to properly amend pleadings, in this case by failing to obtain personal jurisdiction over two John Doe defendants, is not the sort of defect that the "spirit of the Civil Rules" allows us to ignore. Cf. *Patterson v. V & M Auto Body* (1992), 63 Ohio St.3d 573, 577 (holdings based on the "spirit of the Civil Rules" do not "stand for the proposition *** that where defects appear [in the amendment of pleadings] they may be ignored").

{¶44} The decision of the lower court should be affirmed.

STATE OF OHIO)
)SS.
COUNTY OF TRUMBULL)

IN THE COURT OF APPEALS
ELEVENTH DISTRICT

JOHN A. LaNEVE, et al.,

Plaintiffs-Appellants,

- vs -

ATLAS RECYCLING, INC.,

Defendant,

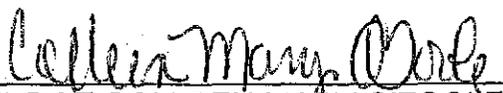
CHINA SHIPPING (NORTH AMERICA)
HOLDING CO., LTD., et al.,

Defendants-Appellees.

JUDGMENT ENTRY

CASE NO. 2006-T-0032

For the reasons stated in the opinion of this court, it is the judgment and order of this court that the judgment of the Trumbull County Court of Common Pleas is reversed and the matter is hereby remanded for further proceedings consistent with this opinion.


JUDGE COLLEEN MARY O'TOOLE

WILLIAM M. O'NEILL, J., concurs,

DIANE V. GRENDALL, J., dissents with Dissenting Opinion.

FILED
COURT OF APPEALS

JUN 11 2007

TRUMBULL COUNTY, OH
KAREN INFANTE ALLEN, CLERK

STATE OF OHIO)
)SS.
COUNTY OF TRUMBULL)

IN THE COURT OF APPEALS
ELEVENTH DISTRICT

JOHN A. LaNEVE, et al.,
Plaintiffs-Appellants,

- vs -

ATLAS RECYCLING, INC.,

Defendant,

CHINA SHIPPING (NORTH AMERICA)
HOLDING CO., LTD., et al.,

Defendants-Appellees.

JUDGMENT ENTRY

CASE NO. 2006-T-0032

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TRUMBULL COUNTY, OH
KAREN INFANTE ALLEN, CLERK

This matter is before the court on the joint motion of appellees, China Shipping (North America) Holding Co., Inc., and ContainerPort Group, Inc., to certify conflicts to the Supreme Court of Ohio, pursuant to Section 3(B)(4), Article IV of the Ohio Constitution, S.Ct.Prac.R. IV, and App.R. 25. Appellees believe the judgment of this court in *LaNeve v. Atlas Recycling, Inc.*, 11th Dist. No. 2006-T-0032, 2007-Ohio-2856, conflicts on two issues with those of other courts of appeals. Appellants have filed an opposition.

In *LaNeve*, appellants John A. and Melissa LaNeve brought an action against various entities, including certain John Doe defendants, for injuries allegedly suffered by Mr. LaNeve at his place of employment. *Id.* at ¶2. The action was filed on the last day of the two-year limitations period, May 28, 2004. Cf. *Id.* May 6, 2005, the LaNeves filed an amended complaint, replacing two of

the John Doe defendants with appellees. Service of the amended complaint and summons, via certified mail, was made on ContainerPort May 26, 2005; on China Shipping, June 2, 2005. *Id.*

Both China Shipping and ContainerPort eventually moved to dismiss, citing various alleged failures by the LaNeves to comply with the requirements of Civ.R. 15(D), governing service of process on John Doe defendants, including failure to aver in the body of the complaint that the defendants' names could not be discovered, and (especially) lack of personal service. *LaNeve* at ¶¶3-4. After briefing and an evidentiary hearing, the trial court granted the motions to dismiss. *Id.* at ¶4. By a decision filed June 8, 2007, we reversed and remanded, deeming that the savings statute, R.C. 2305.19(A), allowed the LaNeves one year from the filing of the amended complaint on May 6, 2005, to comply with the requirements of Civ.R. 15(D). *Id.* at ¶¶18.

The first issue on which appellees allege a conflict is stated as follows: "Does service by certified mail on a 'John Doe' defendant, more than one year after the original complaint was filed, meet the requirements of Civ.R. 15(D) and the controlling Ohio Supreme Court case of *Amerine v. Haughton Elevator Co.* (1989), 42 Ohio St.3d 57?" Appellees contend our decision in *LaNeve* conflicts on this point with the decisions of the Third, Fifth, Sixth, Eighth, Ninth, Tenth and Twelfth Appellate Districts in the following cases: *Gates v. Precision Post* (Sept. 14, 1994), 3d Dist. No. 9-94-21, 1994 Ohio App. LEXIS 4148; *Kramer v. Installations Unlimited, Inc.* (2002), 147 Ohio App.3d 350 (Fifth District); *Whitman v. Chas. F. Mann Painting Co.*, 6th Dist. No. L-04-1114, 2005-Ohio-245; *Hodges*

v. Gates Mills Towers Apt. Co. (Sep. 28, 2000), 8th Dist. No. 77278, 2000 Ohio App. LEXIS 4477; *McConville v. Jackson Comfort Systems, Inc.* (1994), 95 Ohio App.3d 297 (Ninth District); *Easter v. Complete Gen. Constr. Co.*, 10th Dist. No. 06AP-763, 2007-Ohio-1297; *Plumb v. River City Erectors, Inc.* (2000), 136 Ohio App.3d 684 (Tenth District); *W. v. Otis Elevator Co.* (1997), 118 Ohio App.3d 763 (Tenth District); and *Lawson v. Holmes, Inc.*, 166 Ohio App.3d 857, 2006-Ohio-2511.

The second issue on which appellees allege a conflict exists is stated as follows: "Does the Ohio savings statute, R.C. 2305.19(A), apply to 'save' this case where plaintiff did not attempt to commence the lawsuit by proper service pursuant to Civ.R. 15(D)?" Appellees contend our decision in *LaNeve* conflicts on this point with decisions of the Fifth, Eighth, and Tenth Appellate Districts in the following cases: *Kramer, supra*, (Fifth District); *Permanent Gen. COS Ins. Co. v. Corrigan* (May 24, 2001), 8th Dist. No. 78290, 2001 Ohio App. LEXIS 2317; and *Mustric v. Penn Traffic Corp.* (Sept. 7, 2000), 10th Dist. No. 00AP-277, 2000 Ohio App. LEXIS 4032.

Three conditions must be met for an appellate court to certify a question to the Supreme Court of Ohio. *Whitelock v. Gilbane Bldg. Co.* (1993), 66 Ohio St.3d 594, 596.

"First, the certifying court must find that its judgment is in conflict with the judgment of a court of appeals of another district and the asserted conflict *must* be 'upon the same question.' Second, the alleged conflict must be on a rule of law – not facts. Third, the journal entry or opinion of the certifying court must

clearly set forth that rule of law which the certifying court contends is in conflict with the judgment on the same question by other district courts of appeals.” (Emphasis sic.)

We respectfully believe application of the foregoing principles to the issues presented by appellees dictates we deny certification of their first issue. The various cases cited in support of it all concern various failures by plaintiffs to comply with the requirements of Civ.R. 15(D). Thus, in *Gates* and *Lawson*, the Third and Twelfth Districts affirmed grants of summary judgment to former John Doe defendants when plaintiffs failed to aver in the body of the complaints that the names of these defendants could not be discovered. *Gates* at 9; *Lawson* at ¶21. In *McConville* and *Easter*, the Ninth and Tenth Appellate Districts held that the original complaint and summons must be personally served on former John Doe defendants. *McConville* at 304; *Easter* at ¶¶27-29. In *Hodges*, the Eighth Appellate District found that Civ.R. 15(D) requires personal service of the amended complaint and summons on John Doe defendants. *Hodges* at 7.

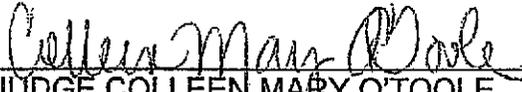
In sum, the cases relied on by appellees in support of their first issue all agree that plaintiffs, in serving John Doe defendants, must comply with the requirements of Civ.R. 15(D); they simply do not agree on what those requirements are. In *LaNeve*, we affirmed the proposition that the requirements of Civ.R. 15(D) must be met in order to obtain jurisdiction of a John Doe defendant. Cf. *LaNeve* at ¶11, fn.1. We noted, however, the murkiness of the rule's application. *Id.* Strictly speaking, the only point on which we disagreed with the cases cited by appellees was our assumption, *sub silentio*, that the

LaNeves' failure to aver in the body of the complaint that they could not discover the names of the defendants was not fatal. This conflicts with *Gates* and *Lawson* – but is not the issue appellees ask us to certify.

The gist of our holding in *LaNeve* was that the savings statute applied to permit plaintiffs one further year to obtain service on China Shipping and ContainerPort – in compliance with Civ.R. 15(D). Cf. *Id.* at ¶¶13-18. This clearly conflicts with the decisions of the courts in *Kramer*, *Permanent COS Ins. Co.*, and *Mustric*, all of which held that failure to comply with the requirements of Civ.R. 15(D), initially, meant that no attempt had been made to commence an action, rendering the savings statute inapplicable. *Kramer* at 356; *Permanent COS Ins. Co.* at 7-9; *Mustric* at 13-14. Consequently, we certify the following question to the Supreme Court of Ohio:

“Does the Ohio savings statute, R.C. 2305.19(A), apply to an action where plaintiff fails to comply strictly with the requirements of Civ.R. 15(D) in serving the original complaint?”

Appellees' motion to certify is denied in part and granted in part.



JUDGE COLLEEN MARY O'TOOLE

WILLIAM M. O'NEILL, J., concurs,

DIANE V. GRENDALL, J., concurs in part, dissents in part, with a Concurring/
Dissenting Opinion.

DIANE V. GRENDALL, J., concurs in part, dissents in part, with a Concurring/
Dissenting Opinion.

I concur in the decision to certify a conflict on the second issue presented, although the qualifying adverb "strictly" has been unnecessarily added to the proposed question. In the present case, appellees did not "strictly," "substantially," or even "minimally" comply with Civ.R. 15(D).

As to the first question, I respectfully dissent and would certify a conflict with the case set forth below.

In *LaNeve*, the majority of this court held that compliance with the provisions of Civ.R. 15(D) was not necessary in order to preserve a cause of action against John Doe defendants. 2007-Ohio-2856, at ¶21 ("*unless* the technical service requirements of Civ.R.15(D) are allowed to trump all other considerations," appellees have commenced their action in accordance with Civ.R. 3(A)) (emphasis sic); *id.* at ¶20 (the "failure to comply with technical service rules -- such as that in Civ.R. 15(D) -- is exactly the sort of attempt to commence an action to which the savings statute is directed"); *id.* at ¶19 ("[p]ursuant to the authority of *Kramer* and *Permanent Gen. COS Ins. Co.*, [appellees'] failure to demand proper service under Civ.R. 15(D) would be fatal to [their] actions").

Civil Rule 15(D) provides that, when amending a complaint to identify John Doe defendants, "[t]he summons must contain the words 'name unknown,' and a copy thereof must be served personally upon the defendant." In the present case, appellants complied with neither requirement.

In *Kramer v. Installations Unlimited, Inc.*, 147 Ohio App.3d 350, 2002-Ohio-1844, the Fifth District held that a complaint was time-barred where

plaintiffs served John Doe defendants by certified mail, rather than personally as required by Civ.R. 15(D). *Id.* at 355.

In *Whitman v. Chas. F. Mann Painting Co.*, 6th Dist. No. L-04-1114, 2005-Ohio-245, the Sixth District held that an amended complaint did not relate back where service of the complaint was by certified mail and the summons did not contain the words "name unknown." *Id.* at ¶8.

In *Hodges v. Gates Mills Towers Apt. Co.* (Sept. 28, 2000), 8th Dist. No. 77278, 2000 Ohio App. LEXIS 4477, the Eighth District held that an action against John Doe defendants was timed-barred where service of the complaint was by certified mail, rather than personal service. *Id.* at *7.

In *McConville v. Jackson Comfort Systems, Inc.* (1994), 95 Ohio App.3d 297, the Ninth District held that service of an amended complaint on John Doe defendants by certified mail, rather than by personal service, did not relate back to the filing of the original complaint. *Id.* at 304.

In *Plumb v. River City Erectors, Inc.* (2000), 136 Ohio App.3d 684, the Tenth District held that an amended complaint did not relate back to the filing of the original complaint where the summons did not contain the words "name unknown" and service was by certified mail. *Id.* at 687.

The result in each of these cases would be different under our holding in *LaNeve*. Contrary to the majority's position, this is precisely the issue appellees seek to have certified to the Supreme Court: "Does service by certified mail on a 'John Doe' defendant, more than one year after the original complaint was filed,

meet the requirements of Civ.R. 15(D) and the controlling Ohio Supreme Court case of *Amerine v. Haughton Elevator Co.* (1989), 42 Ohio St.3d 577"

Accordingly, appellees' first proposed question also should be certified as a conflict.