

IN THE SUPREME COURT OF OHIO

JOHN A. LANEVE, et al.	:	Supreme Court Case No. 07-1199
	:	
Appellees,	:	
	:	
v.	:	
	:	
ATLAS RECYCLING, INC.	:	
	:	
Defendant	:	On Appeal from the Trumbull
	:	County Court of Appeals
v.	:	Eleventh Appellate District
	:	
CHINA SHIPPING (NORTH AMERICA)	:	Court of Appeals
HOLDING CO., LTD., et al.	:	Case No. 2006-T-0032
	:	
Appellants	:	

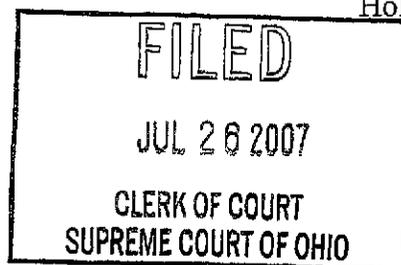
MEMORANDUM IN SUPPORT OF JURISDICTION OF APPELLANT CHINA SHIPPING (NORTH AMERICA) HOLDING CO. LTD.

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**EXPLANATION OF WHY THIS CASE IS A CASE OF
PUBLIC OR GREAT GENERAL INTEREST**

This case presents two critical issues regarding the interpretation of an Ohio statute, portions of the Ohio Rules of Civil Procedure, and a prior decision of this Court. The first issue is whether appellant, a John Doe defendant, was properly served pursuant to Civ. R. 3(A), and 15(D) as interpreted in *Amerine v. Haughton Elevator Co.*, (1989), 42 Ohio St. 3d 57, 537 N.E.2d 208. The second issue is whether the Ohio savings statute, R.C. 2305.19(A), relieves appellees of their burden to properly serve a John Doe defendant. The resolution of these two issues is important to this Court, to attorneys, judges and litigants in Ohio, and to the general public, who expects and deserves fair and equitable treatment from the courts of Ohio.

Appellant is a John Doe defendant who was not personally served within one year from the date the original complaint was filed. Appellees did not state in their original complaint that they could not discover the name of Appellant and did not include the words “name unknown” on the summons. Each of these required actions is specifically set forth in Civ.R. 3(A) and 15(D), and this Court held in *Amerine* that the requirements are mandatory. Nevertheless, the court of appeals ignored this Court’s precedent and reversed the trial court’s dismissal of appellees’ claims on the basis that the requirements for service on a John Doe defendant were merely “technical service requirement[s]” and that, in any event, appellees’ claims were saved by the savings statute.

The doctrine of *stare decisis*, that is following precedent set by this Court, is important to provide continuity and predictability in the legal system. “We adhere to *stare decisis* as a means of thwarting the arbitrary administration of justice as well as providing a clear rule of law by which the citizenry can organize their affairs.” *Westfield Ins. Co. v. Galatis*, 100 Ohio St.3d 216, 226, 2003 Ohio 5849, at P43. “[W]e cannot ignore binding precedent from the

Ohio Supreme Court. Being bound by the precedent set forth in *Amerine*, we are compelled to find that appellants failed to meet the requirements of Civ.R. 15(D).” *Plumb v. River City Erectors, Inc.* (2000), 136 Ohio App.3d 684, 688, 737 N.E.2d 610, 613.

The court of appeals apparently did not believe it was bound by *Amerine*, which was cited in appellant’s briefs and argument, even though appellant was served by certified mail, not personally as required by Civ.R. 15(D), just like the defendant in *Amerine*. Both the legislature and this Court have a reasonable expectation that their laws, rules and holdings will be followed by all courts in the state. *Amerine*’s holding is clear and should have been applied to uphold the trial court’s dismissal. Instead the court below was arbitrary in its administration of justice.

The court of appeals’ attempt to excuse appellees from following the rules by characterizing their amended complaint as a dismissal and subsequent refiling allegedly permitted by the savings statute is another tortured effort wholly unsupported by any relevant case law. In fact, courts of appeal that have considered the argument have held that the savings statute does not save a case against a John Doe defendant unless it was properly commenced or plaintiff attempted to commence the suit by proper service under Civ.R. 3(A) and 15(D). Here appellees did nothing that was proper, but the court of appeals arbitrarily determined that appellees’ failure did not matter. (The court of appeals has certified a conflict between its opinion and the opinions of other circuits on this issue, which will be the subject of a separate filing by appellant.)

The court below also failed to follow the doctrine of *in pari materia* when applying the savings statute without regard to the service requirements of Civ.R. 3(A) and 15(D). “In Ohio and elsewhere the generally accepted rule is that statutes relating to the

same matter or subject, although passed at different times and making no reference to each other, are *in pari materia* and should be read together to ascertain and effectuate if possible the legislative intent.” *State, ex rel. Pratt v. Weygandt* (1956), 164 Ohio St. 463, 466, 132 N.E.2d 191, 194, See also *Thomas v. Freeman*, (1997) 79 Ohio St.3d 221, 225, 680 N.E. 2d 997 (*in pari materia* applied to harmonize Civ.R. 41(B) and 4(E)). The savings statute and the John Doe service rules may be harmonized by requiring a plaintiff to serve or at least attempt to serve the John Doe defendant as required by the rules in order to benefit from the savings statute. The court below did not harmonize the rules with the statute. Again, an arbitrary administration of justice.

The effect of the decision of the court below is to arbitrarily extend the applicable statute of limitations, but statutes of limitations reflect the intent of the legislature and public policy that complaints must be filed within a certain period of time. If a court believes a particular time limit should be extended, it is up to the legislature, not the court, to change it.

If allowed to stand, the decision of the court below will cause significant uncertainty and confusion among the courts and attorneys of Ohio. Up until this decision, courts around the state have consistently applied the savings statute, the Rules of Civil Procedure and *Amerine*. Now, the court below has said that judges and litigants may abandon adherence to the rules and decisions of this Court. Attorneys and judges will no longer know how to apply the John Doe service requirements. Undoubtedly some attorneys will use this decision to excuse their failure to follow the rules, and some courts may agree, to the detriment of defendants whose attorneys follow the rules. A double standard will develop depending upon the location of the

lawsuit, not on the applicable law and rules. This is a clear example of the arbitrary administration of justice that the rules and this Court have sought to avoid.

The general public has a reasonable expectation that the laws of Ohio and the Rules of Civil Procedure will be applied fairly and equally to all litigants wherever they happen to be sued. The decision of the court below erodes that expectation and lends support to those who contend that all lawyers are up to no good and that courts render decisions that are not fair. The public confidence in the judicial system is undermined if a court can ignore the intent of the legislature and of this Court by rendering a decision without regard to that intent and contrary to all legal authority. If all courts could make decisions based upon their own view of what the law should be, not on what the law is, then there would be a general breakdown of the judicial system. A system that allows courts to make their own rules on a case-by-case basis cannot render fair and equal justice to all citizens

This Court must grant jurisdiction to hear this case to promote fair and equal justice for the citizens of Ohio, to enforce its prior decisions, and to ensure that statutes and the Rules of Civil Procedure are applied equitably, fairly and consistently throughout the courts of Ohio.

STATEMENT OF THE CASE AND FACTS

Appellee John LaNeve alleges he was injured on May 28, 2002, while in the course and scope of his employment by defendant Atlas Recycling Inc. (not a party to this appeal), when he opened a shipping container box and allegedly was exposed to certain hazardous chemicals. LaNeve and his wife filed suit against Atlas Recycling Inc. on May 28, 2004, the day the statute of limitations expired, alleging causes of action for intentional tort, negligence and loss of consortium. Appellees also named five John Doe defendants, alleging

that they were the manufacturer/owner and/or distributor and/or lessor/lessee of the container.

Appellees failed to allege that they could not discover the names of the John Doe defendants.

On May 6, 2005, Appellees filed an Amended Complaint adding appellants China Shipping and ContainerPort as defendants. The Amended Complaint does not allege that either China Shipping or ContainerPort were the defendants previously identified as John Does in the original complaint. Appellees instructed the clerk to issue a summons and serve it along with a copy of the Amended Complaint upon China Shipping “c/o Norton Lines, 1855 W. 52nd Street, Cleveland, Ohio 44102-3337” via certified mail. On June 2, 2005, more than one year after the original complaint was filed, a certified mail receipt was signed by “Keith Goodrum” at that address.

Appellant filed a motion to dismiss the amended complaint for failure to state a claim under Civ.R. 12(B)(6) on July 28, 2005, arguing that the claims against it were barred by the two-year statute of limitations contained in R.C. 2305.10 because appellees failed to follow any of the requirements of Civ. R. 15(D) and (3)(A) for serving the amended complaint on John Doe China Shipping. Those rules required that they serve the John Do defendant personally, that the personal service must be made within one year after the original complaint was filed, that the original complaint must state that they could not discover the names of the John Doe defendants, and that the summons must contain the words “name unknown” when referring to the John Doe defendants. Appellees’ total failure to follow the required procedures meant that their claims against China Shipping did not relate back to the date the original complaint was filed under Civ.R. 15(C) and were time barred by R.C. 2305.10 because they were not filed within two years of the date of John LaNeve’s alleged injury.

The trial court held a hearing on appellant's motion to dismiss, and on a similar motion filed by appellant ContainerPort, on January 5, 2006, and granted the motions of both appellants. The court entered an order dismissing appellees' claims against both appellants on February 7, 2006. On motion of appellees, the court entered an order *nunc pro tunc* on March 2, 2006, stating there was no just reason for delay.

Appellees appealed the trial court's judgment. By judgment entry and opinion entered on June 11, 2007, the court of appeals granted the appeal, reversing the judgment of the Trumbull County Court of Common Pleas and remanding the matter for further proceedings. Appx. 1-2. In a 2-1 decision, the court of appeals determined that 1) appellees did not have to comply with the "technical service requirements" of the Ohio Rules of Civil Procedure because appellants received adequate notice of the pendency of the lawsuit by certified mail; and 2) that the Ohio savings statute, R.C. 2305.19(A), applied to give appellees an additional year from the date they filed their amended complaint identifying the John Doe defendants to serve those defendants because they "attempted to commence" their lawsuit against the John Doe defendants. Appx. 8. Appellant filed its Second Notice of Appeal on July 3, 2007, along with a Motion to Stay Judgment of Court of Appeals, which was granted on July 19, 2007.

The court of appeals erred in holding that appellees could ignore the requirements of Civ.R. 3(A), Civ.R. 15(D), and controlling Supreme Court precedent for serving John Doe defendant China Shipping. The court of appeals also erred in holding that the savings statute applied without regard to the Rules of Civil Procedure applicable to John Doe defendants.

ARGUMENT IN SUPPORT OF PROPOSITIONS OF LAW

Proposition of Law No. I: Claims brought against a subsequently identified John Doe defendant under Civ.R. 15(D) in an amended complaint are time barred under Civ.R. 15(C) and properly dismissed under Civ.R. 12(B)(6) when the original complaint does not aver that

plaintiff could not discover the name of the John Doe defendant, when the summons does not include the words “name unknown”, when the original and amended pleadings are not personally served on the subsequently identified John Doe defendant, and when personal service is not completed within one year from the date the original complaint was filed pursuant to Civ.R. 3(A).

There is no dispute regarding the facts of this case. Appellees did not aver in their original complaint that they could not discover the name of this appellant, the summons did not include the words “name unknown”, the pleadings were not served personally on appellant and service was not made within one year from the date the original complaint was filed.

This Court has already set the path a plaintiff must follow to ensure that an amendment to identify a previously unknown John Doe defendant will relate back to the date the original complaint was filed. “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).” *Amerine v. Haughton Elevator Co.* (1989), 42 Ohio St. 3d 57, 537 N.E.2d 208, at syllabus.

Ohio Rule of Civil Procedure 15(D) specifically delineates the procedure to follow with a John Doe defendant:

(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.

The next step is to examine 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.

When an amended complaint substitutes the real name of a party for the fictitious John Doe designated in the original complaint, the party is not changed. The party remains the same, with its proper name. *Amerine* at 59.

Ohio Rule of Civil Procedure 3(A) provides:

(A) 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 Civ.R. 15(C), or upon a defendant identified by a fictitious name whose name is later corrected pursuant to Civ.R. 15(D). Emphasis added.

Applying Civ.R. 15(D), 15(C) and 3(A) to the facts of this case, as required by *Amerine*, it is clear that appellees' amended complaint does not relate back to their original complaint and is, therefore, time barred. The trial court properly applied the applicable Civil Rules and case law and dismissed appellees' claims against appellant.

The court of appeals, in reversing the trial court, inexplicably failed to even mention *Amerine*, (which appellant relied upon in its brief and in oral argument and which Judge Grendell relied upon in her dissent, Appx. 14) let alone attempt to distinguish it from the facts of this case. The *Amerine* Court affirmed summary judgment granted to a former John Doe defendant that was not personally served, even though service was made by certified mail within one year from the date the original complaint was filed. In addition, the plaintiff there failed to meet the specific requirement of including the words "name unknown" on the summons.

The only factual distinction between this case and *Amerine* is that there the John Doe defendant was served by certified mail within one year after the original complaint was filed and here appellee made another critical mistake by serving appellant by certified mail more than one year after the original complaint was filed. In both cases the plaintiffs failed to make

personal service. Nevertheless, the court of appeals here ignored *Amerine*. Instead, it relied upon *Goolsby v. Anderson Concrete Corp.* (1991), 61 Ohio St.3d 549, 575 N.E.2d 801 at the syllabus:

“[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.” Emphasis added.

Applying *Goolsby*, the court of appeals determined that appellees’ filing of the amended complaint with instructions to the clerk to serve it via certified mail was the equivalent of dismissing and refiling, giving appellees an additional year in which to serve the amended complaint. Appx. 6-8.

Goolsby is easily distinguished from the case at hand. There were no John Doe defendants in that case, so this Court did not need to consider the conjunction between the various Civil Rules. Specifically, *Goolsby* did not involve questions of personal service within one year after the original complaint was filed or of the wording required in the complaint and summons, which were the important issues in *Amerine* and in this case.

As pointed out by Judge Grendell in her dissent, not only did the court of appeals ignore *Amerine*, it ignored its own prior decisions directly on point. Appx. 10. Two cases are of particular interest. In *Burya v. Lake Metroparks Bd. of Park Commrs.*, 11th Dist. No. 2005-L-015, 2006 Ohio 5192, (reversed on unrelated issue, 114 Ohio St.3d 35, 2007 Ohio 2712) in an opinion written by the same judge who wrote the opinion being appealed here, the court held that Civ.R. 15(D) as interpreted by *Amerine* “explicitly requires” personal service of the original complaint and summons on the former John Doe defendant unless waived by defendant. 2006 Ohio 5192, at P39. The court below failed to explicitly require personal service here.

In *Mears v. Mihalega* (December 19, 1997), 11th Dist. No. 97-T-0040, 1997 Ohio App.LEXIS 5739, the court noted that “the Supreme Court of Ohio has adopted a strict interpretation of this mandate” [that Civ.R. 15(D) requires the words “name unknown” on the summons]. 1997 Ohio App.LEXIS 5739 at *3, citing *Amerine*. The opinion, joined by the same judge who joined the majority opinion here, affirmed summary judgment for the John Doe defendant where the summons did not include the required terminology and where “plaintiff did not effectuate personal service within one year of the filing of the original complaint”. *Id.* at *7. Again, the court below did not discuss or distinguish *Mears*.

The court of appeals did not cite even one case on point that supports its decision. In fact, the opinions of numerous courts of appeal from other districts conflict with the opinion being appealed here. Those cases include *Gates v. Precision Post* (September 14, 1994), 3rd Dist. No. 9-94-21, 1994 Ohio App. LEXIS 4148, (summary judgment affirmed where plaintiff did not serve John Doe defendant in compliance with the requirements of Civ.R. 15(D); *Kramer v. Installations Unlimited, Inc.*, 147 Ohio App.3d 350, 2002-Ohio-1844, 5th Dist., (dismissal affirmed where service made by certified mail instead of in person); *Whitman v. Chas. F. Mann Painting Co.*, 6th Dist. No. L-04-1114, 2005-Ohio-245, (summary judgment affirmed where amended complaint was not served personally and summons did not contain words “name unknown”); *Hodges v. Gates Mills Towers Apt. Co.*, (September 28, 2000), 8th Dist., No. 77278, 2000 Ohio App. LEXIS 4477 (summary judgment affirmed where plaintiff failed to satisfy personal service requirement of Civ.R. 15(D); *McConville v. Jackson Comfort Systems, Inc.* (1994), 95 Ohio App.3d 297, 9th Dist. (summary judgment affirmed where complaint was not personally served); *Easter v. Complete Gen. Constr. Co.* (2007), 10th Dist. No. 06AP-763, 2007-Ohio-1297, (plaintiff must personally serve former John Doe defendant within one year of the

filing of the original complaint); *West v. Otis Elevator Co.* (1997), 118 Ohio App.3d 763, 10th Dist., (summary judgment for defendant affirmed where personal service occurred more than one year after the date the original complaint was filed); *Plumb v. River City Erectors, Inc.*, (2000), 136 Ohio App.3d 684, 10th Dist., (dismissal affirmed where plaintiffs failed to include the words “name unknown” on the summons and failed to serve the summons personally, even though they did serve the amended complaint personally); and *Lawson v. Holmes, Inc.*, 166 Ohio App.3d 857, 2006-Ohio-2511, 12th Dist., (summary judgment affirmed where plaintiff failed to comply with all requirements of Civ.R. 15(D) as required by *Amerine*). Appellants filed a Joint Motion to Certify a Conflict on this issue, which was denied, again by a 2-1 majority, due to “the murkiness of the rule’s [15(D)] application”. Appx. 18. (The court did certify a conflict on the savings statute issue discussed below.)

The opinion of the court below that requirements of Civ.R. 15(D) are merely “technical service requirements”, Appx. 8, is wholly unsupported and flies in the face of this Court’s holding in *Amerine*. Appellees completely failed to follow the mandates of Civ.R. 3(A) and 15(D). The trial court’s dismissal was proper and should be reinstated. Appellant urges this Court to grant jurisdiction over this discretionary appeal to clarify the “murkiness” in the application of these rules.

Proposition of Law No. II. The savings statute, R.C. 2305.19(A), must be read in conjunction with Civ.R. 3(A), 15(C) and 15(D) and does not save an otherwise untimely claim against a John Doe defendant where plaintiff’s attempt to commence its action is not fully compliant with those Civil Rules.

The court below concluded that when appellees filed, but did not serve, their amended complaint within the one-year period allowed by Civ.R. 3(A) for service after the original complaint was filed, it was the equivalent of a voluntary dismissal and refile, which

then triggered the savings statute, R.C. 2305.19(A),¹ and gave plaintiffs an additional year from the date they amended their complaint to serve appellant. Appx. 6-8.

The court below relied again on *Goolsby*, supra. In *Goolsby* the complaint was filed well before the statute of limitations expired, but the plaintiff instructed the clerk to withhold service. Two days before the end of the limitations period, plaintiff instructed the clerk to attempt service. *Goolsby*, 61 Ohio St.3d at 551. The complaint was served within one year thereafter, but plaintiff voluntarily dismissed the complaint and subsequently refiled, drawing a motion to dismiss from defendant. This Court determined that had plaintiff dismissed the first complaint and refiled a second complaint on the date she requested service of the first complaint, which was before the statute of limitations expired, she would have had a year to serve it under Civ.R. 3(A). Under those specific circumstances, this Court held that plaintiff's attempt at service before the statute of limitations expired was equivalent to a dismissal and refiling. *Id.* Those circumstances do not exist here because appellees filed their amended complaint after the original statute of limitations expired.

The court below also cites *Fetterolf v. Hoffmann-LaRoche, Inc.* (1995), 104 Ohio App.3d 272, 661 N.E.2d 811: "In *Fetterolf* . . . 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". Appx. 6. The distinction between *Fetterolf* and this case, ignored by the court below, lies right in the quotation – Fetterolf filed the amended complaint within the limitations period.

¹ 2305.19(A) provides in part: "In any action that is commenced or attempted to be commenced, if in due time, . . . the plaintiff fails otherwise than upon the merits, the plaintiff . . . may commence a new action within one year after . . . the plaintiff's failure otherwise than upon the merits."

Fetterolf actually supports appellant's position. It involved various claims against various defendants including wrongful death, survival action and loss of consortium, each with a different statute of limitations. Although some of the claims were saved by the *Goolsby* reasoning, the court held that the loss of consortium claim was not saved because the "refiling date" occurred after the statute of limitations expired for that claim. *Fetterolf*, at 279-280. That is exactly the situation in this case – the "refiling date" was 11 ½ months after the statute of limitations expired on appellees' claims.

The court below has impermissibly expanded R.C. 2305.19(A) in holding that appellees' filing of their amended complaint constituted an attempt to commence their lawsuit, giving them an additional year to serve appellants.

[T]he 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. Appx. 7-8.

Once again, the court failed to cite even one case directly on point where the attempt to commence occurred after the statute of limitations expired.² In fact, the court acknowledged that it was aware of cases from other districts holding that "[A] plaintiff may not benefit from the savings statute when its attempt to commence an action is not fully compliant with the Civil Rules". Appx. 6. Instead of following those decisions, the court devised a wholly

² The court does cite *Nationwide Mut. Ins. Co. v. Galman*, 7th Dist. No. 03 MA 202, 2004 Ohio 7206 which appears to hold that an amended complaint naming a John Doe defendant may be filed after the statute of limitations expires. A closer analysis of that case, however, shows that the court considered the statute of limitations to be tolled because the John Doe defendant actively concealed herself from the plaintiffs. *Id.* at P37. Appellant here did not conceal itself. Appellees had its name and address within one month after they filed their original complaint.

new interpretation of the savings statute. The court of appeals has certified the following conflict between its holding and the holdings of other circuits:

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?"³ Appx. 19.

Appellant will timely file a notice of this certification with this Court.

The substance of the conflict between the circuits is that courts in the Fifth, Eighth and Tenth Districts have held that the savings statute does not save a case against a John Doe defendant unless the attempt to commence the suit was proper under the Civil Rules. See *Kramer v. Installations Unlimited, Inc.* (2002), 147 OhioApp.3d 350, 2002-Ohio-1844, 5th Dist., (savings statute does not apply where plaintiff served former John Doe defendant by certified mail instead of by personal service as required by Civ.R. 15(D)); *Permanent General Cos Ins. Co v Corrigan* (May 24, 2001), 8th Dist. No. 78290, 2001 Ohio App. LEXIS 2317, (summary judgment affirmed where plaintiff did not attempt to personally serve former John Doe defendant pursuant to Civ.R. 15(D) and, therefore, was not entitled to benefit from the provisions of the savings statute); and *Mustric v. Penn Traffic Corp.* (September 7, 2000), 10th Dist. No. 00AP-2772000 Ohio App. LEXIS 4032, (savings statute does not apply where plaintiff did not personally serve or attempt to personally serve the former John Doe defendant pursuant to Civ.R. 15(D)).

The court below stated that:

[s]ervice 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 . . .the technical service requirements of Civ.R. 15(D) should not be allowed to trump all other considerations, to justify its holding that

³ The court changed the issue requested by appellants, which was: "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' claims were saved by the savings statute without regard to Civ.R. 15(D). Appx. 8. In response, Judge Grendell wrote:

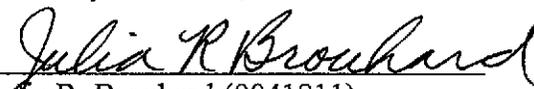
The majority opinion cavalierly disregards any consideration of Civ.R. 15(D) as a "technical service rule." Rather than being "an abstraction for the delectation of legal scholars," the failure of a party to properly amend pleadings, in this case by failing to obtain personal jurisdiction over two John 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. 14.

Appellees did absolutely nothing to comply with the rules regarding how to properly name and serve a John Doe defendant. They should not be rewarded for their failure by having "another bite at the apple" via the savings statute. The court of appeals erred in applying the savings statute without regard to the Civil Rules where appellees were not fully compliant with those rules. Its decision must be reversed and the decision of the Trumbull County Court of Common Pleas should be reinstated.

CONCLUSION

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

Respectfully submitted,

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CERTIFICATE OF SERVICE

I certify that a copy of this Memorandum in Support of Jurisdiction of Appellant China Shipping (North America) Holding Co., Ltd. was sent by ordinary U.S. mail this 25th day of July, 2007, to Thomas W. Wright, Esq. and William Jack Meola, Esq., Davis & Young, 1200 Fifth Third Center, 600 Superior Avenue, East, Cleveland, Ohio 44114-2654, Counsel for Appellant ContainerPort Group, Inc. and Robert F. Burkey, Esq., 200 Chestnut Ave. NE, Warren, Ohio 44483, Counsel for John LaNeve and Melissa LaNeve.



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(North America) Holding Ltd.

IN THE SUPREME COURT OF OHIO

JOHN A. LANEVE, et al.

Appellees,

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ATLAS RECYCLING, INC.

Defendant

v.

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

Appellants

Supreme Court Case No. 07-1199

On Appeal from the Trumbull
County Court of Appeals
Eleventh Appellate District

Court of Appeals
Case No. 2006-T-0032

**APPENDIX TO MEMORANDUM IN SUPPORT OF JURISDICTION OF
APPELLANT, CHINA SHIPPING (NORTH AMERICA) HOLDING CO. LTD.**

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,

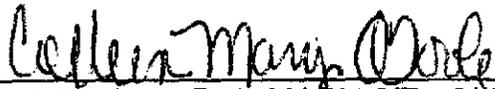
CHINA SHIPPING (NORTH AMERICA)
HOLDING CO., LTD., et al.,

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

APPX. 1

JUN 11 2007

TRUMBULL COUNTY, OH
KAREN INFANTE ALLEN, CLERK

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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, :
- vs - : CASE NO. 2006-T-0032
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.

Robert F. Burkey, Burkey, Burkey & Scher Co., L.P.A., 200 Chestnut Avenue, N.E., Warren, OH 44483-5805 (For Plaintiffs-Appellants).

Julia R. Brouhard and Robert T. Coniam, 1717 East Ninth Street, #1650, Cleveland, OH 44114 (For Defendants-Appellees, China Shipping (North America) Holding Co., LTD.)

Thomas W. Wright, William J. Meola and Kristi L. Haude, Davis & Young, L.P.A., 1000 Sky Bank Building, 108 Main Avenue, S.W., Warren, OH 44481 (For Defendants-Appellees, Containerport Group, Inc.).

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." *Goalsby 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.

JUL 11 2007

STATE OF OHIO)
)SS.
COUNTY OF TRUMBULL)

IN THE COURT OF APPEALS
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JOHN A. LaNEVE, et al.,

Plaintiffs-Appellants,

- vs -

ATLAS RECYCLING, INC.,

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Defendants-Appellees.

JUDGMENT ENTRY

CASE NO. 2006-T-0032

FILED
COURT OF APPEALS
JUN 29 2007
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.

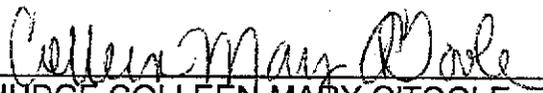
In sum, the cases relied on by appellees in support of their first issue all agree that plaintiffs, in serving John Doe defendants, must comply with the requirements of Civ.R. 15(D): they simply do not agree on what those requirements are. In *LaNeve*, we affirmed the proposition that the requirements 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.

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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 Eight 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 57?"

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