

IN THE SUPREME COURT OF OHIO

JOHN A. LaNEVE, et al.,)
)
 Appellees)
)
 v.)
)
 ATLAS RECYCLING, INC.)
)
 Defendant)
)
 v.)
)
 CHINA SHIPPING (NORTH AMERICA))
 HOLDING CO., LTD., et al.,)
)
 Appellants)

Supreme Court Case No.:

07-1373

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

Court of Appeals Case No. 2006-T-0032

NOTICE OF CERTIFIED CONFLICT OF
APPELLANT CONTAINERPORT GROUP, INC.

FILED
JUL 27 2007
CLERK OF COURT
SUPREME COURT OF OHIO

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**NOTICE OF CERTIFIED CONFLICT OF
APPELLANT CONTAINERPORT GROUP, INC.**

Pursuant to S.Ct.Prac.R. IV, Sections 1 and 4, Appellant ContainerPort Group, Inc.

("ContainerPort") hereby gives notice that on June 29, 2007, the Court of Appeals for Trumbull County, Eleventh Appellate District, in Case No. 2006-T-0032, issued a Judgment Entry certifying a conflict among Ohio courts of appeal on the following question:

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?

In its Judgment Entry, the Court of Appeals determined that its June 11, 2007 merit Opinion and Judgment Entry is in conflict with the following opinions from the Fifth, Eighth, and Tenth Appellate Districts:

- *Kramer v. Installations Unlimited, Inc.* (5th Dist.), 147 Ohio App.3d 350, 2002-Ohio-1844, 770 N.E.2d 632
- *Permanent Gen. Cos. Ins. Co. v. Corrigan* (May 24, 2001), 8th Dist. No. 78290, 2001 WL 563072
- *Mustric v. Penn Traffic Corp.* (September 7, 2000), 10th Dist. No. 00AP-277, 2000 WL 1264526

It bears noting that the question certified by the Court of Appeals differs from the question it was asked to certify. The question the Court of Appeals was asked to certify is the following:

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)?

It bears further noting that in its Judgment Entry granting certification, the Court of Appeals denied certification on the following question:

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?

A discretionary appeal is presently pending before this Court in Case No. 07-1119, wherein ContainerPort has proposed the following Propositions of Law that relate to both the certified and non-certified questions here in issue:

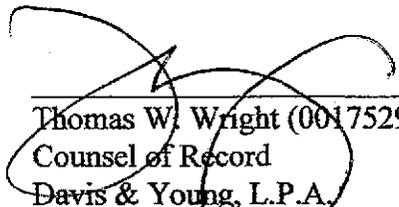
Proposition of Law No. I: A party who files an amended pleading pursuant to Civ.R. 15(D) must (1) aver in his original pleading that the plaintiff could not discover the name of the unknown defendant; (2) include the words “name unknown” in the summons accompanying the amended pleading; and (3) personally 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.

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).

Finally, and in accordance with S.Ct.Prac.R. IV, Section 1, ContainerPort attaches hereto:

(1) a copy of the June 11, 2007 merit Opinion (Appx. 1-13) and Judgment Entry (Appx. 14) of the Court of Appeals; (2) a copy of the June 29, 2007 Judgment Entry of the Court of Appeals certifying a conflict (Appx. 15-22); and (3) copies of the conflicting opinions in *Kramer v. Installations Unlimited, Inc.* (5th Dist.), 147 Ohio App.3d 350, 2002-Ohio-1844, 770 N.E.2d 632 (Appx. 23-29); *Permanent Gen. Cos. Ins. Co. v. Corrigan* (May 24, 2001), 8th Dist. No. 78290, 2001 WL 563072 (Appx. 30-33); and *Mustric v. Penn Traffic Corp.* (September 7, 2000), 10th Dist. No. 00AP-277, 2000 WL 1264526 (Appx. 34-39).

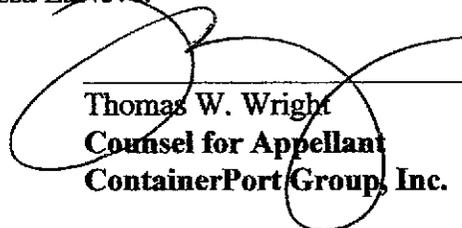
Respectfully submitted,



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ContainerPort Group, Inc.

CERTIFICATE OF SERVICE

I certify that a copy of this Notice of Certified Conflict of Appellant ContainerPort Group, Inc. was sent by ordinary U.S. mail this 21st 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.

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 Commrs.*, 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.

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

Appx. 14

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

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.

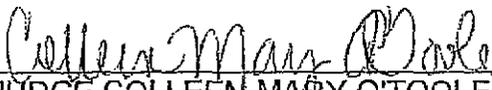
In sum, the cases relied on by appellees in support of their first issue all agree that plaintiffs, in serving John Doe defendants, must comply with the requirements of Civ.R. 15(D): they simply do not agree on what those requirements are. In *LaNeve*, we affirmed the proposition that the requirements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

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 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.

147 Ohio App.3d 350, 770 N.E.2d 632, 2002 -Ohio- 1844

Court of Appeals of Ohio,
Fifth District, Licking County.
KRAMER, Appellant,

v.

INSTALLATIONS UNLIMITED, INC., et al., Appellees.

No. 01 CA 73.

Decided Apr. 12, 2002.

Personal injury action was brought against corporation. The Court of Common Pleas, Licking County, dismissed action, and plaintiff appealed. The Court of Appeals, Wise, J., held that: (1) plaintiff failed to properly serve corporation personally, and (2) amended complaint was not protected against statute of limitations by savings statute.

Affirmed.

West Headnotes

[1] [KeyCite Notes](#)

↔ [30 Appeal and Error](#)

↔ [30XVI Review](#)

↔ [30XVI\(F\) Trial De Novo](#)

↔ [30k892 Trial De Novo](#)

↔ [30k893 Cases Triable in Appellate Court](#)

↔ [30k893\(1\) k. In General. Most Cited Cases](#)

The standard of review on a motion to dismiss for failure to state a claim upon which relief can be granted is de novo. Rules Civ.Proc., Rule 12(B)(6).

[2] [KeyCite Notes](#)

↔ [307A Pretrial Procedure](#)

↔ [307AIII Dismissal](#)

↔ [307AIII\(B\) Involuntary Dismissal](#)

↔ [307AIII\(B\)4 Pleading, Defects In, in General](#)

↔ [307Ak622 k. Insufficiency in General. Most Cited Cases](#)

A motion to dismiss for failure to state a claim upon which relief can be granted is procedural and tests the sufficiency of the complaint; therefore, a trial court will determine only whether the allegations contained in the complaint are legally sufficient to state a claim. Rules Civ.Proc., Rule 12(B)(6).

[3] [KeyCite Notes](#)

↔ [30 Appeal and Error](#)

↔ [30XVI Review](#)

↔ [30XVI\(F\) Trial De Novo](#)

↔ [30k892 Trial De Novo](#)

↔ [30k895 Scope of Inquiry](#)

↔ [30k895\(2\) k. Effect of Findings Below. Most Cited Cases](#)

Under a de novo analysis of the grant of a motion to dismiss for failure to state a claim, an appellate court must accept all factual allegations of the complaint as true, and all reasonable inferences must be drawn in favor of the nonmoving party.

[4]  KeyCite Notes

↳ 313 Process

↳ 313II Service

↳ 313II(A) Personal Service in General

↳ 313k56 Persons to Be Served

↳ 313k57 k. In General. Most Cited Cases

Rule governing amendment of complaints to name previously unnamed defendants specifically requires that the summons be personally served upon the defendant. Rules Civ.Proc., Rule 15(D).

[5]  KeyCite Notes

↳ 241 Limitation of Actions

↳ 241II Computation of Period of Limitation

↳ 241II(H) Commencement of Proceeding; Relation Back

↳ 241k117 Proceedings Constituting Commencement of Action

↳ 241k119 Issuance and Service of Process

↳ 241k119(3) k. Service of Process. Most Cited Cases

↳ 241 Limitation of Actions KeyCite Notes 

↳ 241II Computation of Period of Limitation

↳ 241II(H) Commencement of Proceeding; Relation Back

↳ 241k121 Defects as to Parties

↳ 241k121(2) k. Amendment of Defects. Most Cited Cases

The use of a fictitious defendant's name, with subsequent correction by amendment of the real name, relates back to the filing of the original complaint, and service must be obtained within one year of the filing of the original complaint. Rules Civ.Proc., Rule 15(D).

[6]  KeyCite Notes

↳ 241 Limitation of Actions

↳ 241II Computation of Period of Limitation

↳ 241II(H) Commencement of Proceeding; Relation Back

↳ 241k117 Proceedings Constituting Commencement of Action

↳ 241k119 Issuance and Service of Process

↳ 241k119(3) k. Service of Process. Most Cited Cases

Under one-year rule, service does not have to be made within the statute of limitations on a former John Doe defendant, now named, as long as the original complaint has been filed before the expiration of the statute of limitations. Rules Civ.Proc., Rule 3(A).

[7]  KeyCite Notes

- ☞ 241 Limitation of Actions
 - ☞ 241II Computation of Period of Limitation
 - ☞ 241II(H) Commencement of Proceeding; Relation Back
 - ☞ 241k117 Proceedings Constituting Commencement of Action
 - ☞ 241k119 Issuance and Service of Process
 - ☞ 241k119(3) k. Service of Process. Most Cited Cases



- ☞ 241 Limitation of Actions KeyCite Notes
 - ☞ 241II Computation of Period of Limitation
 - ☞ 241II(H) Commencement of Proceeding; Relation Back
 - ☞ 241k121 Defects as to Parties
 - ☞ 241k121(2) k. Amendment of Defects. Most Cited Cases

Personal injury plaintiff's amended complaint, identifying a former John Doe defendant, did not relate back to original pleading, and was thus time-barred, where defendant was not served in person, but by certified mail.



[8] KeyCite Notes

- ☞ 241 Limitation of Actions
 - ☞ 241II Computation of Period of Limitation
 - ☞ 241II(H) Commencement of Proceeding; Relation Back
 - ☞ 241k130 New Action After Dismissal or Nonsuit or Failure of Former Action
 - ☞ 241k130(5) k. Dismissal or Nonsuit in General. Most Cited Cases

Defendant's amended complaint against corporation in personal injury action, which identified a former John Doe defendant, was not protected from two-year statute of limitations by savings statute, where plaintiff did not properly attempt to commence the action by personally serving corporation, but served by certified mail. R.C. § 2305.19; Rules Civ.Proc., Rules 3(A), 15(D).

****633 *352** Stephen R. McCann, Zanesville, for appellant.
Isaac, Brant, Ledman & Teetor, LLP, Terri B. Gregori and John E. Vincent, Columbus, for appellees.

WISE, Judge.

{¶ 1} Appellant Stephan McCann appeals the decision of the Licking County Court of Common Pleas that granted appellee Installations Unlimited, Inc.'s motion to dismiss. The following facts give rise to this appeal.

{¶ 2} Appellant McCann sustained personal injuries from a fall on March 6, 1998. Appellant filed his original complaint on March 2, 2000, which named three defendants and ten John Doe defendants. During discovery, appellant learned that Installations Unlimited may be a party responsible for the injuries he sustained. Therefore, on December 5, 2000, appellant filed an amended complaint that included Installations Unlimited as a defendant but did not substitute Installations Unlimited for one of the John Doe defendants. The amended complaint also included the ten John Doe defendants identified in the original complaint.

{¶ 3} Appellant served Installations Unlimited with the summons and amended complaint by certified mail. Appellant concedes that personal service of the summons and amended complaint upon Installations Unlimited was not attempted and did not occur. Installations Unlimited filed an answer to the amended complaint on January 2, 2001. In its answer, Installations Unlimited asserted the statute of limitations and failure of process and/or failure of service as affirmative defenses.

{¶ 4} On March 8, 2001, Installations Unlimited filed a motion for summary ****634** judgment, arguing that appellant failed to obtain personal service as required under the Rules of Civil Procedure. On the same date, appellant voluntarily dismissed the original action without prejudice and refiled the present case. Installations Unlimited was served with this complaint via ordinary U.S. Mail on April 17, 2001. On May 15, 2001, Installations Unlimited filed a motion to dismiss on the basis that appellant's claims were barred by the statute of limitations due ***353** to appellant's failure to personally serve it with a copy of the summons and complaint. The trial court granted Installations Unlimited's motion to dismiss on July 2, 2001.

{¶ 5} Appellant timely filed a notice of appeal and sets forth the following assignment of error for our consideration:

{¶ 6} "I. The trial court erred in granting defendant-appellee's motion to dismiss."

I

{¶ 7} Appellant sets forth two arguments in support of his sole assignment of error. First, appellant maintains that R.C. 2305.19, the saving statute, should be liberally construed to allow him to have his trial on the merits. Second, appellant contends that the trial court's focus on Civ.R. 3(A) and Civ.R. 15(D) is too narrow and does not recognize the interrelationship of the saving statute and the Rules of Civil Procedure. We disagree with both arguments.

[1]  [2]  [3]  {¶ 8} Installations Unlimited filed its motion to dismiss pursuant to Civ.R. 12(B)(6). Our standard of review on a Civ.R. 12(B)(6) motion to dismiss is de novo. Greeley v. Miami Valley Maintenance Contrs., Inc. (1990), 49 Ohio St.3d 228, 229, 551 N.E.2d 981. A motion to dismiss for failure to state a claim upon which relief can be granted is procedural and tests the sufficiency of the complaint. State ex rel. Hanson v. Guernsey Cty. Bd. of Commrs. (1992), 65 Ohio St.3d 545, 548, 605 N.E.2d 378. Therefore, the court will determine only whether the allegations contained in the complaint are legally sufficient to state a claim. *Id.* Under a de novo analysis, we must accept all factual allegations of the complaint as true and all reasonable inferences must be drawn in favor of the nonmoving party. Byrd v. Faber (1991), 57 Ohio St.3d 56, 60, 565 N.E.2d 584. It is based upon this standard that we review appellant's sole assignment of error.

{¶ 9} In addressing the issues raised by appellant in his assignment of error, we first refer to the Ohio Supreme Court's decision in Amerine v. Haughton Elevator Co. (1989), 42 Ohio St.3d 57, 537 N.E.2d 208, syllabus, wherein the court held:

{¶ 10} "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)."

{¶ 11} Civ.R. 15(D) addresses amendments to a complaint where the name of a party is unknown and provides as follows:

{¶ 12} "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 ***354** 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 the copy thereof must be served personally upon the defendant."

{¶ 13} The *Amerine* decision also refers to Civ.R. 3(A), which provides:

****635** {¶ 14} "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)."

[4]  [5]  [6]  {¶ 15} Thus, Civ.R. 15(D) specifically requires that the summons be personally served upon the defendant. Amerine at 58, 537 N.E.2d 208. Further, 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 service must be obtained within one year of the filing of the original complaint. Id. at 59, 537 N.E.2d 208. Also under Civ.R. 3(A), service does not have to be made on the formerly fictitious, now identified defendant, within the statute of limitations as long as the original complaint has been filed before the expiration of the statute of limitations. Id.

[7]  {¶ 16} In applying the above rules and case law from various districts to the facts of the case sub judice, the trial court concluded that appellant's claim was time-barred because he failed to comply with the Rules of Civil Procedure for substituting and properly serving a John Doe defendant. Judgment Entry, July 2, 2001, at 2. The trial court relied upon the case of Plumb v. River City Erectors, Inc. (2000), 136 Ohio App.3d 684, 737 N.E.2d 610, to support its conclusion that appellant's amended complaint did not relate back to the filing date of the original complaint due to appellant's failure to comply with Civ.R. 15(D).

{¶ 17} The Plumb case addressed the issue of whether service of an amended complaint via certified mail upon a previously unknown, but later identified, defendant was sufficient to withstand the statute of limitations. In Plumb, the plaintiff was injured on September 21, 1995, and filed suit naming several defendants and a fictitious "XYZ" Corporation on August 25, 1997. Id. at 686, 737 N.E.2d 610. Plaintiff filed an amended complaint substituting the defendant River City for the fictitious "XYZ Corporation" on August 6, 1998. Id. River City was served the summons and amended complaint by certified mail on August 24, 1998. Id. In addition, a special process server was appointed and personally served a copy of the amended complaint upon River City. Id. *355 However, the process server did not personally serve River City with a copy of the summons. Id.

{¶ 18} River City filed a motion to dismiss the amended complaint and argued that it did not relate back to the date of the original complaint because River City was not personally served a copy of the summons. Id. The trial court granted River City's motion to dismiss. Id. The Tenth District Court of Appeals affirmed the trial court's holding that although River City was personally served with a copy of the amended complaint, the court of appeals noted that Civ.R. 15(D) requires that a copy of the summons be personally served upon the newly identified defendant. Id. at 687, 737 N.E.2d 610. Because River City was not personally served a copy of the summons, plaintiff's amended complaint did not relate back to the filing date of the original complaint and was therefore time-barred. Id. at 687-688, 737 N.E.2d 610.

{¶ 19} In applying the analysis of the Plumb case to the facts of this case, we conclude, as did the trial court, that appellant's complaint is time-barred because appellant did not properly serve Installations Unlimited with a copy of the summons and amended complaint. Civ.R. 15(D) specifically **636 required appellant to personally serve Installations Unlimited, and service by certified mail is not a permitted form of service for a formerly fictitious, now identified, defendant. Therefore, appellant's complaint is time-barred under the applicable statute of limitations.

{¶ 20} In response, appellant refers to R.C. 2305.19, the saving statute, which provides:

{¶ 21} "In an action 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, and the time limited for the commencement of such action at the date of reversal or failure has expired, the plaintiff, * * * may commence a new action within one year after such date. * * *

[8]  {¶ 22} Appellant maintains that he "attempted to commence" this lawsuit by serving

Installations Unlimited via certified mail. Thereafter, appellant voluntarily dismissed the lawsuit, which constitutes a failure otherwise than upon the merits within the meaning of the saving statute, and refiled the complaint. In response to this argument, the trial court concluded in its judgment entry that appellant's claim was not protected by the saving statute because appellant failed to properly "attempt to commence" the action by personally serving Installations Unlimited with a copy of the summons and amended complaint. Judgment Entry, July 2, 2001, at 6.

{¶ 23} In reaching this conclusion, the trial court relied upon the case of ***356** *Permanent Gen. Cos. Ins. Co. v. Corrigan* (May 24, 2001), Cuyahoga App. No. 78290, 2001 WL 563072. In *Permanent Gen.*, the Eighth District Court of Appeals held:

{¶ 24} "[W]hen a plaintiff is permitted to amend his or her complaint to specifically name a former John Doe defendant, such defendant must be personally served pursuant to Civ.R. 15(D). Here, appellant did not do so. Rather, appellant served Ingle Barr by certified mail. The question becomes, did appellant attempt to serve Ingle Barr such that the savings statute is applicable. We find that appellant did not.

{¶ 25} "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 Ingle Barr by personal service, appellant did not even attempt Ingle Barr 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 Ingle Barr. Because appellant did not properly attempt to commence the action against Ingle Barr, the savings statute is inapplicable. Therefore, appellant failed to bring the present action against Ingle Barr within the applicable statute of limitations, and summary judgment in favor of Ingle Barr was appropriate. * * * *Id.* at 2-3, quoting *Mustric v. Penn Traffic Corp.* (Sept. 7, 2000), Franklin App. No. 00AP-277, 2000 WL 1264526.

{¶ 26} 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).

{¶ 27} 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 ****637** "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 saving 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.

{¶ 28} Accordingly, we conclude that the trial court properly granted Installations Unlimited's motion to dismiss.

{¶ 29} Appellant's sole assignment of error is overruled.

***357** {¶ 30} For the foregoing reasons, the judgment of the Court of Common Pleas, Licking County, Ohio, is hereby affirmed.

Judgment affirmed.

GWIN, P.J., and FARMER, J., concur.

Ohio App. 5 Dist., 2002.
Kramer v. Installations Unlimited, Inc.
147 Ohio App.3d 350, 770 N.E.2d 632, 2002 -Ohio- 1844

END OF DOCUMENT

Not Reported in N.E.2d, 2001 WL 563072 (Ohio App. 8 Dist.)

Only the Westlaw citation is currently available.

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

Court of Appeals of Ohio, Eighth District, Cuyahoga County.
PERMANENT GENERAL COS INSURANCE CO., et al., Plaintiffs-Appellants,
v.
Ed CORRIGAN, Defendant-Appellee.
No. 78290.
May 24, 2001.

Daran P. Kiefer, Esq., Ted M. Traut, Esq., Kreiner & Peters Co., L.P.A., Cleveland, OH, for plaintiffs-Appellants.

James E. Behrens, Esq., Michael S. Schroeder, Esq., Behrens, Gioffre & Schroeder, L.P.A., Cleveland, OH, for defendant-appellee.

JOURNAL ENTRY AND OPINION.

CORRIGAN.

*1 Plaintiffs-appellants Allstate Insurance Company, Christine Brown and Christopher Brown (hereinafter appellants) appeal from the trial court's grant of summary judgment in favor of defendant-appellee Ed Corrigan. Because we find that the appellants singular assignment of error is without merit, we affirm the ruling of the trial court.

On February 26, 1998, appellants filed Case No. 349743 in the Cuyahoga County Court of Common Pleas seeking reimbursement for expenses paid and other damages arising out of an automobile accident on March 9, 1996. The lawsuit named as defendants Mary Corrigan and a John Doe as defendants. On September 24, 1998 the appellants attempted to amend the complaint by substituting appellee Ed Corrigan for John Doe. Appellants attempted service on Corrigan via certified mail at the time that the complaint was amended. On December 22, 1998, the complaint was voluntarily dismissed by the appellants. The action was then re-filed by the appellants within one year of the voluntary dismissal on December 2, 1999 as Case No. 397639.

On April 12, 2000, the appellee filed a motion for summary judgment. The basis for the motion was that the appellants had failed to attempt commencement of service during the pendency of the initial action making them unable to avail themselves to the savings statute and thus were time barred by the statute of limitations from maintaining the action as the second complaint was filed well over two years from the time of the accident. The appellee's motion for summary judgment was granted by the trial court on June 21, 2000. The appellants timely filed the within appeal July 12, 2000. The appellants present one assignment of error for this court's review as follows:

I. THE TRIAL COURT ERRED IN GRANTING DEFENDANT'S MOTION FOR SUMMARY JUDGMENT BASED ON THE STATUTE OF LIMITATIONS BECAUSE OHIO'S SAVINGS STATUTE, REVISED CODE S2305.19, APPLIES TO ACTIONS THAT HAVE BEEN COMMENCED OR ATTEMPTED TO BE COMMENCED.

Civ.R. 56 provides that summary judgment may be granted only after the trial court determines: 1) no genuine issues as to any material fact remain to be litigated; 2) the moving party is entitled to judgment as a matter of law; and 3) it appears from the evidence that reasonable minds can come but to one conclusion and viewing such evidence most strongly in favor of the party against whom the motion for summary judgment is made, that conclusion is adverse to that party. *Norris v. Ohio Std. Oil Co.* (1982), 70 Ohio App.2d 1, 433 N.E.2d 620; *Temple v. Wean United, Inc.* (1977), 50 Ohio St.2d 317, 364 N.E.2d 267.

It is well established that the party seeking summary judgment bears the burden of demonstrating that no issues of material fact exist for trial. Celotex Corp. v. Catrett (1987), 477 U.S. 317, 330, 106 S.Ct. 2548, 91 L.Ed.2d 265; Mitseff v. Wheeler (1988), 38 Ohio St.3d 112, 115, 526 N.E.2d 798. Doubts must be resolved in favor of the nonmoving party. Murphy v. Reynoldsburg (1992), 65 Ohio St.3d 356, 604 N.E.2d 138.

*2 This court reviews the lower court's granting of summary judgment de novo. Brown v. Scioto Bd. of Commrs. (1993), 87 Ohio App.3d 704, 622 N.E.2d 1153.

The appellee maintains that the appellants did not properly attempt to commence the initial action against him because they failed to comply with Civ.R. 15(D) which requires that when a pleading is amended to substitute a party whose identity was previously unknown, service of such pleading must be made personally and may not be made via certified mail.

Civ.R. 15(D) states:

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

This court has previously held that the personal service requirement of Civ.R. 15(D) is mandatory:

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). (Emphasis sic.) Hodges v. Gates Mills Tower Apt. Co. (September 28, 2000), Cuyahoga App. No. 77278, unreported, citing Amerline v. Haughton Elevator Co. (1989), 42 Ohio St.3d 57, 58, 537 N.E.2d 208.

The Hodges court went on to hold that as appellants failed to satisfy the personal service requirement of Civ.R. 15(D) within one year of amending their complaint * * * the trial court properly granted summary judgment * * *.

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 added.)

In Austin v. Standard Bldg. (Dec. 4, 1997), Cuyahoga App. No. 71840, unreported, this court held that in order for an amendment of a complaint naming a fictitious defendant to relate back to the initial filing date under Civ.R. 15(D), a copy of the complaint must be served personally upon the defendant upon learning his true identity.

[I]f a plaintiff timely files an action naming an unknown "John Doe" defendant containing the words "name unknown," then, even though a statute of limitations has intervened, plaintiff may serve the John Doe defendant upon discovering who he is within one year after commencing the action by personally serving a copy of the summons upon him. Civ.R. 15(D). The amended complaint then relates back to the initial filing date of the complaint. Civ.R. 3(A).

* * *

*3 Consequently, where, as here, appellant has failed to follow the requirements of Civ.R. 15(D), she is unable to claim the benefit of the relation back of the amended complaint as provided by Civ.R. 3(A). *Amerline supra*; see, also, *Gaston v. City of Toledo* (1995), 106 Ohio App.3d 66, 79, 665 N.E.2d 264; *McConville v. Jackson Comfort Systems, Inc.* (1994), 95 Ohio App.3d 297, 642 N.E.2d 416. Therefore, we find that Civ.R. 15(D) governs the matter before us and appellant's failure to follow the requirements of that rule preclude her from gaining the benefit of the relation back of her amended complaint to the date of filing as permitted by Civ.R. 3(A). The trial court properly granted summary judgment to appellee on the basis of *Amerline, supra*. (Emphasis added.)

In *Mustric v. Penn Traffic Corp.* (Sept. 7, 2000), Franklin App. No. 00AP-277, unreported, the Tenth Appellate District addressed the identical issue as is presented to this court in the within appeal, and determined that a plaintiff who fails to attempt personal service when amending a pleading to reflect a now known defendant as required by Civ.R. 15(D) has not properly attempted to commence an action, making the savings statute inapplicable:

* * * As indicated above, when a plaintiff is permitted to amend his or her complaint to specifically name a former John Doe defendant, such defendant must be personally served pursuant to Civ.R. 15(D). Here, appellant did not do so. Rather, appellant served Ingle Barr by certified mail. The question becomes, did appellant attempt to serve Ingle Barr such that the savings statute is applicable. We find that appellant did not.

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 Ingle Barr by personal service, appellant did not even attempt to serve Ingle Barr 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 Ingle Barr. Because appellant did not properly attempt to commence the action against Ingle Barr, the savings statute is inapplicable. Therefore, appellant failed to bring the present action against Ingle Barr within the applicable statute of limitations, and summary judgment in favor of Ingle Barr was appropriate. To this extent, appellant's first assignment of error is overruled. (Emphasis added.)

Similarly, in this case the 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.

*4 Judgment affirmed.

It is ordered that appellee recover of appellants his costs herein taxed.

The court finds there were reasonable grounds for this appeal. It is ordered that a special mandate issue out of this court directing the Common Pleas Court to carry this judgment into execution.

A certified copy of this entry shall constitute the mandate pursuant to Rule 27 of the Rules of Appellate Procedure.

KILBANE, J., and O'DONNELL, J., concur.

N.B. This entry is an announcement of the court's decision. See App.R. 22(B), 22(D) and 26(A); Loc.App.R. 27. This decision will be journalized and will become the judgment and order of the court

pursuant to App.R.22(E) unless a motion for reconsideration with supporting brief, per App.R. 26(A), is filed within ten (10) days of the announcement of the court's decision. The time period for review by the Supreme Court of Ohio shall begin to run upon the journalization of this court's announcement of decision by the clerk per App.R. 22(E). See, also, S.Ct.Prac.R. II, Section 2(A)(1).

Ohio App. 8 Dist.,2001.

Permanent General Cos Ins. Co. v. Corrigan

Not Reported in N.E.2d, 2001 WL 563072 (Ohio App. 8 Dist.)

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Not Reported in N.E.2d, 2000 WL 1264526 (Ohio App. 10 Dist.)

Only the Westlaw citation is currently available.

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

Court of Appeals of Ohio, Tenth District, Franklin County.
Thomas Mustric, Plaintiff-Appellant,
v.
PENN TRAFFIC CORPORATION et al., Defendants-Appellees.
No. 00AP-277.
Sept. 7, 2000.

Appeal from the Franklin County Court of Common Pleas.

Thomas Owen Mustric, pro se.

Reminger & Reminger Co., L.P.A., and Lee W. Westfall, for appellee Nationwide Mutual Insurance Company.

George A. Lyons, for appellee Penn Traffic Company.

McNamara and McNamara, for Lisa Weekley Coulter, for appellee Ingle Barr, Inc.

OPINION

TYACK

*1 On February 26, 1999, Thomas Owen Mustric filed a complaint in the Franklin County Court of Common Pleas against Penn Traffic Company dba Big Bear Stores ("Big Bear"), "Nationwide Reality Investors Inc." ("Nationwide") ^{FN1} and Ingle Barr, Inc. ("Ingle Barr"). Mr. Mustric noted that this was a re-filed complaint. Mr. Mustric averred that he had tripped and fallen over a negligently designed area used for the return of shopping carts. The incident occurred in a parking lot outside of a Big Bear grocery store located in Thurber Shopping Center. Nationwide was the owner of the shopping center, and Big Bear leased a portion of such shopping center. Ingle Barr constructed the cart corrals at issue.

FN1. In its answer, Nationwide noted that Mr. Mustric had incorrectly listed its name in the complaint's caption and that the correct name was Nationwide Mutual Insurance Company.

On September 21, 1999, a modified case schedule was filed indicating the following deadlines:

Supplemental disclosure of witnesses	October 15, 1999
Dispositive motions	December 15, 1999
Discovery cut-off	January 15, 2000

On September 30, 1999, Big Bear and Nationwide filed a joint motion for summary judgment, asserting summary judgment in their favor was warranted as the undisputed evidence established that Mr. Mustric was aware of the existence of the cart corrals and took precaution to avoid them; therefore, Big Bear and Nationwide could not be held liable for Mr. Mustric's injuries.

On October 15, 1999, Mr. Mustric filed a motion for leave to file a late response to Big Bear and Nationwide's motion for summary judgment. Big Bear and Nationwide had no objection to this motion, and the trial court subsequently granted Mr. Mustric an extension until November 15, 1999 to respond to the motion for summary judgment.

On October 21, 1999, Ingle Barr filed its motion for summary judgment. Ingle Barr asserted, in part, that summary judgment in its favor was appropriate on statute of limitations grounds.

On December 22, 1999, the trial court filed an entry indicating Mr. Mustric had until January 17, 2000 to respond to Big Bear/Nationwide's and Ingle Barr's motions for summary judgment. On January 18, 2000, Mr. Mustric filed a motion for an extension to respond. On January 24, 2000, the trial court filed a decision and entry denying Mr. Mustric's motion for an extension.

On January 27, 2000, Mr. Mustric filed memoranda contra Big Bear/Nationwide's and Ingle Barr's motions for summary judgment. Attached was the affidavit of Alan J. Kundtz, appellant's purported expert witness. On this same date, Mr. Mustric also filed a motion for reconsideration of his January 18, 2000 motion for an extension. Big Bear, Nationwide and Ingle Barr moved to strike Mr. Mustric's memoranda contra on the grounds they were untimely. In addition, Big Bear, Nationwide and Ingle Barr contended Mr. Kundtz's affidavit should be stricken as Mr. Mustric failed to disclose this expert pursuant to the scheduling order.

On January 31, 2000, the trial court rendered a decision. Again, the trial court denied Mr. Mustric's motion(s) for an extension and denied Mr. Mustric leave to file late memoranda contra the motions for summary judgment. The trial court also granted Big Bear/Nationwide's and Ingle Barr's motions for summary judgment. A judgment entry was journalized on February 14, 2000.

*2 Mr. Mustric (hereinafter "appellant") has appealed to this court, assigning the following errors for our consideration:

I. The only issue on appeal is whether the lower trial court abused its discretion when it granted full summary judgment rather than partial summary judgment when on appeal its review did not strike appellee's [*sic*] summary judgment when the judge did not impose an additional requirement on the appellees to meet the requirements set forth in Civil Rule 56.

II. Because the procedures used by the lower trial court bias its decision to lower its case load rather than to follow law in the interest of justice as unconstitutional as 1) to require an expert witness to be disposed not required in Civil Rule 56; 2) to strike the plaintiff-appellant's expert witness and deposition exhibits, the bases for the case; and, 3) to not grant time for equity in law are lower trial court's controlling bias as required by Civil Rule 1 for equity in justice based on all available evidence, rather than merely adoption the lower trial court's judge's evaluation of its administrative record on plaintiff's disparate treatment claims as a hostile environment for justice. [*Sic.*]

We address appellant's second assignment of error first. The issues presented in appellant's second assignment of error are procedural in nature. Specifically, appellant contends the trial court erred in not granting him a further extension in which to file memoranda contra the motions for summary judgment filed by Big Bear, Nationwide and Ingle Barr (hereinafter collectively referred to as "appellees"). In addition, appellant asserts the trial court erred in striking his memoranda contra and the attached affidavit of his expert.

As indicated above, Big Bear and Nationwide's motion for summary judgment was filed on September 30, 1999. Pursuant to Loc.R. 21.01 of the Franklin County Court of Common Pleas, General Division, appellant's memorandum contra was due October 14, 1999. Appellant did not file a memorandum contra. Instead, one day later on October 15, 1999, appellant filed a motion for leave to file a late memorandum contra. The trial court granted appellant an extension until November 15, 1999. However, appellant did not file a memorandum contra by this date.

In the meantime, Ingle Barr had filed its motion for summary judgment on October 21, 1999. Hence, appellant's memorandum contra this motion for summary judgment was due November 4, 1999. Appellant did not timely respond to Ingle Barr's motion for summary judgment either.

On December 22, 1999, the trial court granted appellant an extension, giving him until January 17, 2000 to respond to both motions for summary judgment. By January 17, 2000, appellant had not

filed any memoranda contra. On January 18, 2000, appellant again requested an extension, and the trial court denied this on January 24, 2000. Despite this ruling, appellant filed memoranda contra appellees' motions for summary judgment on January 27, 2000. Attached to these memoranda was the affidavit of appellant's expert, Mr. Kundtz. Appellant requested that such memoranda be deemed filed instanter.

*3 On January 31, 2000, the trial court denied appellant a further extension and denied appellant's request that his memoranda contra be filed instanter. The trial court struck appellant's untimely memoranda and indicated they would not be considered. For the reasons that follow, we find the trial court did not err in making the above rulings.

In the January 18, 2000 motion for an extension, it appears appellant requested ten more days in which to file memoranda contra on the grounds he had been involved with a visiting diplomat January 16 through January 18, 2000. We first note that appellant did not set forth such facts in an affidavit; rather, such explanation was merely set forth in the body of appellant's motion. Second, appellant was aware on December 22, 1999 that he had until January 17, 2000 to file his memoranda contra the motions for summary judgment. Appellant had already been granted a previous extension. In addition, appellant's stated reasons for the request for an extension did not fall under Civ.R. 56(F). Appellant did not, for example, indicate he needed an extension in order to obtain affidavits or other discovery. Notwithstanding this, the trial court would not have abused its discretion in concluding appellant's stated reason for an extension was insufficient.

For all the reasons indicated above, the trial court did not abuse its discretion in denying appellant's motion for a further extension. Therefore, appellant's January 27, 2000 memoranda contra and the exhibits attached thereto were untimely, and the trial court did not err in striking them.

Accordingly, appellant's second assignment of error is overruled.

We now turn to appellant's first assignment of error. Appellant contends the trial court erred in granting summary judgment to appellees. Summary judgment is appropriate when, construing the evidence most strongly in favor of the nonmoving party, (1) there is no genuine issue of material fact; (2) the moving party is entitled to judgment as a matter of law; and (3) reasonable minds can come to but one conclusion, that conclusion being adverse to the nonmoving party. Zivich v. Mentor Soccer Club, Inc. (1998), 82 Ohio St.3d 367, 369-370, citing Horton v. Harwick Chem. Corp. (1995), 73 Ohio St.3d 679, paragraph three of the syllabus. Our review of the appropriateness of summary judgment is *de novo*. See Smiddy v. The Wedding Party, Inc. (1987), 30 Ohio St.3d 35.

We first address the summary judgment granted to Ingle Barr. In its motion for summary judgment, Ingle Barr asserted, in part, that summary judgment in its favor was warranted as the claim against it was time-barred. Specifically, Ingle Barr contended the savings statute, R.C. 2305.09, did not apply.

As indicated above, the complaint herein was a re-filed complaint. The incident at issue occurred on April 20, 1995. The original complaint was filed on April 21, 1997 (a Monday)-the last day the cause of action could have been filed under the applicable statute of limitations. Appellant voluntarily dismissed the original complaint on June 10, 1998 and re-filed it on February 26, 1999.

*4 In the original action, the trial court had rendered a decision granting Ingle Barr's motion for summary judgment on the grounds appellant failed to personally serve Ingle Barr pursuant to Civ.R. 15(D).^{FN2} In the original case, appellant had named a John Doe defendant. Appellant was later permitted to identify such John Doe as Ingle Barr. Civ.R. 15(D) states that when a plaintiff amends the pleading to reflect the now known defendant, a copy of the summons must be served personally upon the now named defendant. In its June 10, 1998 decision in the original action, the trial court stated that appellant's failure to personally serve Ingle Barr resulted in a failure to commence the action, as Ingle Barr had not been properly served within one year of the filing of the complaint. Appellant voluntarily dismissed the original action before final judgment had been entered on this decision.

FN2. Instead, appellant served Ingle Barr by certified mail in October 1997.

The issue we must decide is whether the savings statute applies and permits appellant to re-file his complaint herein. R.C. 2305.19 states:

In an action commenced, or attempted to be commenced, * * * if the plaintiff fails otherwise than upon the merits, and the time limited for the commencement of such action at the date of * * * failure has expired, the plaintiff * * * may commence a new action within one year after such date. * * *

In Amerine v. Haughton Elevator Co. (1989), 42 Ohio St.3d 57, the Supreme Court of Ohio dealt with the issue of whether an amended complaint related back to the original complaint pursuant to Civ.R. 15(C). The plaintiff in such case filed a complaint against two unnamed defendants and later amended the complaint to name one of the John Doe defendants. *Id.* The plaintiff served such named defendant by certified mail. *Id.* at 57-58. Subsequently, the trial court granted such defendant's motion for summary judgment which had asserted the action was time-barred. *Id.* at 58.

The Supreme Court affirmed the granting of summary judgment, noting that Civ.R. 15(D)'s language is mandatory and specifically requires, in part, that the summons be served personally upon the now named defendant. *Id.* Certified mail service clearly was not in accord with Civ.R. 15(D). *Id.* While the amended complaint related back to the original complaint, the action had not been commenced against the defendant because proper service had not been obtained within one year of the original complaint.

Amerine establishes that Civ.R. 15(D)'s requirement of personal service is mandatory. As indicated above, appellant did not personally serve Ingle Barr after it had been specifically named in the action. Hence, the trial court in the original action properly determined that the action had not been commenced against Ingle Barr. However, this is not the exact issue before this court. Our determination rests upon R.C. 2305.19 which allows a re-filed action not only when the original action had been commenced but, alternatively, when the plaintiff merely has attempted to commence the action.

*5 In Shanahorn v. Sparks (June 29, 2000), Franklin App. No. 99AP-1340, unreported, this court recognized that a case does not have to have been actually commenced in order to utilize the savings statute. We determined that the savings statute applied if the plaintiff merely attempted to commence the original action within the applicable statute of limitations. *Id.* at 8-9.

In Shanahorn, the plaintiff's original attempt at service failed, and service was not obtained within one year of the original complaint. The plaintiff subsequently voluntarily dismissed the original complaint and re-filed the complaint. In the re-filed action, the defendant asserted the savings statute was inapplicable because the original action had never been commenced. The plaintiff asserted the savings statute applied because she had attempted service (the original certified mail service that had failed). This court agreed with the plaintiff, noting that R.C. 2305.19 includes not only commencement but an attempt to commence. We indicated that an "attempt to commence" required only that the plaintiff take action to effect service on the defendant. *Id.* The plaintiff in Shanahorn had so attempted by requesting certified mail service at the time the complaint was filed. *Id.* at 10.

The case at bar presents a slightly different fact pattern, as it involves a former John Doe defendant. As indicated above, when a plaintiff is permitted to amend his or her complaint to specifically name a former John Doe defendant, such defendant must be personally served pursuant to Civ.R. 15(D). Here, appellant did not do so. Rather, appellant served Ingle Barr by certified mail. The question becomes, did appellant attempt to serve Ingle Barr such that the savings statute is applicable. We find that appellant did not.

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 Ingle Barr by personal service, appellant did not even attempt to serve Ingle Barr 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 Ingle Barr.

Because appellant did not properly attempt to commence the action against Ingle Barr, the savings statute is inapplicable. Therefore, appellant failed to bring the present action against Ingle Barr within the applicable statute of limitations, and summary judgment in favor of Ingle Barr was appropriate. To this extent, appellant's first assignment of error is overruled.

We now turn to the summary judgment granted to Big Bear and Nationwide. Big Bear and Nationwide's motion for summary judgment went to the merits of the negligence claim against them. Big Bear and Nationwide assert the trial court did not err in granting them summary judgment because the undisputed evidence was that the cart corral was open, obvious and known to appellant and, therefore, there was no duty to protect appellant from any alleged danger. In addition, Big Bear and Nationwide contend there was no evidence of negligent design or that an alleged negligent design proximately caused appellant's injuries.

*6 We first note that a shopkeeper owes a business invitee a duty of ordinary care in maintaining the premises in a reasonably safe condition so that its customers are not unnecessarily and unreasonably exposed to danger. *Paschal v. Rite Aid Pharmacy, Inc.*, (1985), 18 Ohio St.3d 203. However, a shopkeeper is not an insurer of the customer's safety. *Id.* A shopkeeper is under no duty to protect a business invitee from dangers which are known to such invitee or are so obvious and apparent to such invitee that he or she may reasonably be expected to discover them and protect himself or herself against them. *Id.* at 203-204, citing *Sidle v. Humphrey* (1968), 13 Ohio St.2d 45, paragraph one of the syllabus.

In support of their position, Big Bear and Nationwide cite to appellant's deposition testimony. However, appellant's deposition was never filed in the present action and, therefore, it is not part of the record. We also note that Big Bear and Nationwide did not attach portions of the relevant deposition testimony to their memoranda in support of their motion for summary judgment.

As a general matter, a deposition transcript must be filed with the court or otherwise authenticated before it can be given the force and effect of legally acceptable evidence. *Putka v. Parma* (1993), 90 Ohio App.3d 647, 649. However, while mere portions of a deposition attached to summary judgment motions are not properly before the trial court, a court may nonetheless consider such if no objection is raised. *Rinehart v. W. Local School Dist. Bd. of Edn.*, (1993), 87 Ohio App.3d 214, 218-219, fn. 2. In the case at bar, there is no deposition before us, either in whole or in part. We note that appellant did attach a photocopy of his entire deposition to his January 27, 2000 memorandum contra. However, as indicated above, this was stricken as being untimely.

Hence, appellant's deposition is not before this court, and we will not consider such testimony in making our decision herein. Big Bear and Nationwide did attach a photocopy of appellant's answers to interrogatories. This photocopy is unauthenticated and normally would not be considered proper evidence. See *Green v. B.F. Goodrich Co.* (1993), 85 Ohio App.3d 223, 228. However, appellant made no objection and, therefore, this court will consider the interrogatories in making our determination. See *Rinehart, supra*; *Boydston v. Norfolk S. Corp.* (1991), 73 Ohio App.3d 727, 731, fn. 2, motion to certify overruled in (1991), 62 Ohio St.3d 1472.

According to appellant's answers to interrogatories, the following occurred with regard to the incident at issue. Appellant left the Big Bear store carrying two bags of groceries. Appellant proceeded to go across the parking lot. Appellant spotted his car. Appellant "cut close to a truck to miss the cement cart corrals." Appellant tripped over the cart corral and landed on a cable spike protruding two to four inches out of a cement corral. As a result of his fall, appellant suffered, in part, a bruise to his chest and injuries to his neck, back, chest, extremities and entire body.

*7 We note first that there is no evidence Nationwide was responsible in any way for the existence

and/or condition of the cart corrals. The only evidence is that Big Bear designed the corrals and specified the materials used in them. See affidavit of Jeff Poole. Hence, there is no evidence that could lead a reasonable person to conclude that Nationwide in any way had possession or control over the premises upon which the alleged negligent act(s) occurred. See, generally, Wireman v. Keneco Distributors, Inc. (1996), 75 Ohio St.3d 103, 108 (it is a fundamental tenet of premises tort law that in order to have a duty to keep premises safe for others, one must be in possession and control of the premises). As there is no evidence Nationwide had possession and control over the premises at issue, summary judgment in favor of Nationwide was appropriate.

Turning to Big Bear, we conclude summary judgment in its favor was appropriate as the evidence indicates appellant was aware of the existence of the corrals. Indeed, appellant stated in his answers to the interrogatories that he, in essence, tried to avoid such corrals. However, he did not miss such corrals and, instead, tripped over them anyway. As stated above, a business owner is not an insurer of an invitee's safety, and there is no duty to protect such invitee from known dangers. See Paschal, supra.

We note that issues of comparative negligence are never reached if the court determines that a landowner owes no duty. See Anderson v. Ruoff (1995), 100 Ohio App.3d 601, 604. In the case at bar, we have determined that Big Bear, as the entity in possession of and control over the premises at issue, owed appellant no duty as appellant was aware of and, indeed, tried to protect himself from, the cart corrals. Having determined Big Bear owed no duty to warn of or otherwise protect appellant from any alleged danger involving the cart corrals, Big Bear is not liable to appellant for his injuries. Therefore, summary judgment in favor of Big Bear was appropriate.

In summary, summary judgment in favor of all appellees was appropriate. Accordingly, appellant's first assignment of error is overruled.

Having overruled each of appellant's assignments of error, the judgment of the Franklin County Court of Common Pleas is affirmed.

Judgment affirmed.

KENNEDY and PETREE, JJ., concur.

Ohio App. 10 Dist., 2000.

Mustric v. Penn Traffic Corp.

Not Reported in N.E.2d, 2000 WL 1264526 (Ohio App. 10 Dist.)

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