

IN THE SUPREME COURT OF OHIO

JOHN A. LANEVE, et al.) Case Nos. 2007-1199, 2007-1372, 2007-1373
)
Appellees)
)
v.)
)
ATLAS RECYCLING, INC., et al.) On Appeal from the Trumbull County Court
) of Appeals, Eleventh Appellate District,
Appellants) Case No. 2006-T-0032

MERIT BRIEF OF APPELLANT CHINA SHIPPING
(NORTH AMERICA) HOLDING CO., LTD

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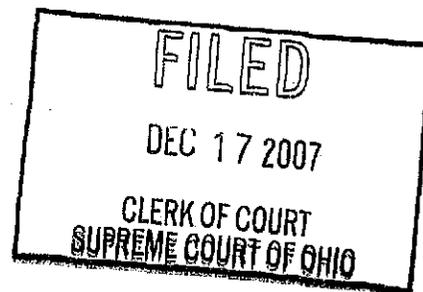


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STATEMENT OF FACTS

This case involves a personal injury plaintiff's attempt, and failure, to properly name and serve "John Doe" defendants in accordance with the Ohio Rules of Civil Procedure. Appellee John A. LaNeve alleges he was injured on May 28, 2002, by exposure to certain chemicals while opening a container box at his place of employment with Atlas Recycling, Inc. ("Atlas"). (Supp. 006) Atlas is not a party to this appeal.

LaNeve and his wife (collectively "LaNeve") filed suit against Atlas and five "John Doe" defendants on May 28, 2004, the day the two-year personal injury statute of limitations expired, alleging causes of action for intentional tort, negligence and loss of consortium. LaNeve alleged that the John Does were the manufacturer/owner (John Doe #1); and/or distributor (John Doe #2); and/or lessor/lessee of the container box (John Doe #3); and/or persons "who may have some interest or responsibility concerning the subject container box" (John Does #4-#5). (Supp. 008) The complaint did not allege that LaNeve could not discover the names of the John Does. The summons did not include the words "name unknown" in reference to the John Doe defendants. (Supp. 012)

Almost one year later, on May 6, 2005, LaNeve filed an Amended Complaint adding appellants China Shipping (North America) Holding Co. Ltd. ("China Shipping") and ContainerPort Group, Inc. ("ContainerPort") as defendants. (Supp. 015) The Amended Complaint alleges that China Shipping was the "supplier/owner" of the container box and that ContainerPort was "also a supplier of the subject container box," but does not allege that either China Shipping or ContainerPort is one of the John Doe defendants listed in the complaint. (Supp. 018)¹

¹ It should be noted that LaNeve filed a pleading entitled "Amendment to Complaint Pursuant to Civ.R. 15(D)" at the same time he filed the Amended Complaint. (Supp. 013) That pleading states that "John Doe #1-

LaNeve included "Instructions for Service" as part of the Amended Complaint, specifically instructing the clerk of courts to issue a summons and serve it along with a copy of the Amended Complaint "by **CERTIFIED MAIL**" upon China Shipping "c/o Norton Lines, 1855 W. 52nd Street, Cleveland, Ohio." (Supp. 021) On June 2, 2005, more than one year after the original complaint was filed and more than three years after plaintiff's alleged injury, a certified mail receipt showing delivery at that address was signed by "Keith Goodrum", as evidenced by an entry dated "06/06/05" in the Trial Court Docket.² (Supp. 002) No personal service was made on China Shipping at that time or since.

China Shipping filed a Rule 12(B)(6) motion to dismiss on July 28, 2005, on the basis that the personal injury lawsuit was time barred by R.C. 2305.10(A) because LaNeve did not properly name and serve China Shipping as a John Doe defendant pursuant to Civ.R. 15(C) and (D) and 3(A).³ Appellant ContainerPort filed a similar motion. Both motions were granted and the trial court entered a dismissal order on February 7, 2006. (Appx. 26) On motion of LaNeve, the court entered an order *nunc pro tunc* on March 2, 2006, stating that there was no just reason for delay. (Appx. 27)

LaNeve timely appealed the dismissal. The Eleventh District Court of Appeals reversed the judgment of the trial court by a two-to-one majority in an opinion and judgment entered on June 11, 2007. (Appx. 4, 18) The majority downplayed the personal service requirement and held that (1) LaNeve did not have to comply with the "technical service requirements" of the Ohio Rules of Civil Procedure because appellants received adequate notice

Manufacturer/Owner" is China Shipping and that "John-Doe #4" is ContainerPort. (Supp. 013) That pleading was not served with the Amended Complaint, and the identity of China Shipping in the Amendment to Complaint Pursuant to Civ.R. 15(D) is different from the Amended Complaint where plaintiff alleged China Shipping was the "supplier/owner." (Supp. 018)

² Although not pertinent to this appeal, China Shipping denies that Keith Goodrum was the proper person to serve on its behalf.

³ Copies of all statutes and Rules are contained in Appendix at Appx. 73-75.

of the pendency of the lawsuit by certified mail; and that (2) the Ohio savings statute, R.C. 2305.19(A) applied to give LaNeve an additional year from the date the amended complaint was filed to serve the John Doe defendants because LaNeve “attempted to commence” the lawsuit. The dissent would have affirmed on the basis of this Court’s controlling decision, *Amerine v. Haughton Elevator Co.* (1989) 42 Ohio St.3d 57, 537 N.E.2d 208. (Appx. 13, ¶42, 44) (Grendell, J., dissenting).

China Shipping filed its Second Notice of Appeal on July 3, 2007, (Appx. 1) and its Memorandum in Support of Jurisdiction on July 27, 2007. Appellant ContainerPort also filed its Notice of Appeal on July 3, 2007. On October 3, 2007, this Court granted jurisdiction to hear the case and allowed the appeal.

Appellants China Shipping and ContainerPort filed a Joint Motion to Certify a Conflict with the Court of Appeals on June 20, 2007, contending that both holdings of the court of appeals conflicted with holdings of other district courts of appeal. By Judgment Entry filed on June 29, 2007, the court of appeals granted the motion to certify a conflict as to the applicability of the savings statute and denied it as to the failure to properly serve the John Doe defendants. (Appx. 18) The dissent would have granted the motion on both issues. (Appx. 25) (Grendell, J., concurring in part and dissenting in part). On October 3, 2007, this Court determined that a conflict exists.

ARGUMENT

Proposition of Law No. 1:

Claims brought against a subsequently identified John Doe defendant under Civ.R. 15(D) in an amended complaint are time barred under Civ.R. 15(C) and properly dismissed under Civ.R. 12(B)(6) when the original complaint does not aver that plaintiff could not discover the name of the John Doe defendant, when the summons does not include the words “name unknown”, when the original and amended

pleadings are not personally served on the subsequently identified John Doe defendant, and when personal service is not completed within one year from the date the original complaint was filed pursuant to Civ.R. 3(A).

This Court has held that “In determining if a previously unknown, now known defendant has been properly served so as to avoid the time bar of an applicable statute of limitations, Civ.R. 15(D) must be read in conjunction with Civ.R. 15(C) and 3(A).” *Amerine* at paragraph two of the syllabus. This Court affirmed the appellate court’s affirmation of the summary judgment granted to the newly-identified John Doe defendant because that defendant was not personally served, even though service by certified mail was completed within one year after the original complaint was filed, and because the summons did not contain the words “name unknown.” *Id.* at 58-59. Despite this Court’s clear mandate, and citation of *Amerine* by both appellants here and in the dissenting opinion (Appx.7), the court below completely ignored *Amerine*, without any explanation as to why it does not control here.

Amerine teaches that the applicable Civil Rules are considered in the reverse order. Rule 15(D) discusses the proper method to name an unknown defendant in the original complaint and then amend when plaintiff discovers the defendant’s name. The Rule provides:

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

The next step is to examine Civ. R. 15(C) to determine whether the amended complaint relates back to the date the original complaint was filed. This is most important where the amendment properly naming the previously unknown defendant is filed after the applicable

statute of limitations expires, as was the situation confronting LaNeve. Civ.R. 15(C) provides in relevant part:

(C) Relation back of amendments. Whenever the claim or defense asserted in the amended pleading arose out of the conduct, transaction, or occurrence set forth or attempted to be set forth in the original pleading, the amendment relates back to the date of the original pleading.

Under the first sentence of Rule 15(C), the amendment relates back to the date of the original pleading if the parties are not changed. Where an amendment substitutes the party's real name for the fictitious "John Doe" listed in the original complaint, the party has not changed. It is the same party, now using its real name. *Amerine* at 59.

The third step of the analysis is found in Civ.R. 3(A) that provides:

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

Under *Amerine*, the three rules read in conjunction with each other required that LaNeve take four steps: (1) state in the original complaint that the names of the John Doe defendants could not be discovered, (2) request that the summons contain the words "name unknown", (3) amend his complaint when he discovered the names of the John Does, and (4) personally serve China Shipping within one year from May 28, 2004, the date the original complaint was filed. LaNeve failed on three of the four requirements. He did not state in his original complaint that he could not discover the name of the defendant. The summons did not contain the words "name unknown". LaNeve did amend his complaint on May 6, 2005, 22 days before his one year for service under Civ.R. 3(A) expired, but he failed to request that personal service be made on or before May 28, 2005. Instead, LaNeve requested service by certified mail,

which was not accomplished until June 2, 2005, more than one year after his original complaint was filed on May 28, 2004. LaNeve's service thus was untimely under Civ.R. 3(A) and by a method not permitted under Civ.R. 15(D).

There is no meaningful distinction between this case and *Amerine*. In both cases, the plaintiff failed to personally serve the now-known John Doe defendant and failed to ensure that the summons contained the words "name unknown". *Amerine* at 58. In fact, appellant's case is stronger than appellee's case was in *Amerine* because LaNeve also failed to serve appellant within one year from the date the original complaint was filed, as required by Civ.R. 3(A). The trial court below properly followed *Amerine* and granted China Shipping's Motion to Dismiss because LaNeve's cause of action was barred by the two year statute of limitations.

The *Amerine* mandate that plaintiffs must strictly comply with the requirements of Civ.R.15 (D), 15(C) and 3(A) in order to avoid the time bar of the applicable statute of limitations has been consistently followed by courts of appeal from various districts that have considered it. Those cases include, among others, *Easter v. Complete Gen. Constr. Co.*, 10th Dist. No. 06AP-763, 2007-Ohio-1297, (plaintiff must personally serve original complaint and summons on former John Doe defendant within one year of the filing of the original complaint); *Lawson v. Holmes, Inc.*, 12th Dist., 166 Ohio App.3d 857, 2006-Ohio-2511, 853 N.E.2d 712, (summary judgment affirmed where plaintiff failed to state in original complaint that he could not discover the names of the John Doe defendants); *Whitman v. Chas. F. Mann Painting Co.*, 6th Dist. No. L-04-1114, 2005-Ohio-245, (summary judgment affirmed where amended complaint was served by certified mail instead of personally within one year of the filing of the original complaint); *Kramer v. Installations Unlimited, Inc.*, 5th Dist., 147 Ohio App.3d 350, 2002-Ohio-1844, 770 N.E.2d 632 (dismissal affirmed where service of summons and amended

complaint made by certified mail instead of in person); *Plumb v. River City Erectors, Inc.*, (10th Dist. 2000), 136 Ohio App.3d 684, 737 N.E.2d 610, (dismissal affirmed where plaintiffs failed to include the words “name unknown” on the summons and failed to serve the summons personally, even though they did serve the amended complaint personally); *Hodges v. Gates Mills Towers Apt. Co.*, (September 28, 2000), 8th Dist., No. 77278, 2000 Ohio App. LEXIS 4477 (summary judgment affirmed where plaintiff failed to satisfy personal service requirement of Civ.R. 15(D)); *West v. Otis Elevator Co.* (10th Dist. 1997), 118 Ohio App.3d 763, 694 N.E.3d 93, (summary judgment for defendant affirmed where plaintiffs failed to state in the complaint that they could not discover the names of the John Doe defendants, failed to include the words “name unknown” in the summons, and failed to personally serve the summons, even though they did have the original and amended complaints personally served); *Gates v. Precision Post* (September 14, 1994), 3rd Dist. No. 9-94-21, 1994 Ohio App. LEXIS 4148, *aff’d on other grounds*, 74 Ohio St.3d 439, 1996-Ohio-183, 659 N.E.2d 1241, (summary judgment affirmed where plaintiff did not aver in the complaint his inability to discover the names of the defendants); and *McConville v. Jackson Comfort Sys., Inc.* (9th Dist. 1994), 95 Ohio App.3d 297, 642 N.E.2d 1058, (summary judgment affirmed where complaint was not personally served).⁴

Appellants here filed a Joint Motion to Certify a Conflict with other district courts of appeal on *Amerine’s* applicability, which was denied by a 2-1 majority due to the alleged “murkiness of the rule’s [15(D)] application”. (Appx. 21, Pg 4) (The court did certify a conflict on the savings statute issue discussed below.) The dissent noted that the results in the allegedly

⁴ There is some confusion regarding exactly which document(s) must be served personally. *Amerine* said that the summons must be served personally. Subsequent courts have also required service of the original complaint and/or amended complaint. (See text above.) The court below noted: “We do not quibble with the point that personal service is required under the rule. * * * It seems prudent counsel should request 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. (Appx. 7, ¶11, fn 1)

“murky” cases would be different under the LaNeve holding and that was “precisely” the issue the appellees sought to have certified as conflicting with the holdings of other district courts of appeal. The issue requested was: “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?” (Appx. 21, Pg 7-8) (Grendell, J., concurring in part and dissenting in part).

The court of appeals below even ignored its own prior decisions directly on point. Two are of particular interest. In *Burya v. Lake Metroparks Bd. of Park Commrs.*, 11th Dist. No. 2005-L-015, 2006 Ohio 5192, *rev'd on other grounds*, 114 Ohio St.3d 35, 2007 Ohio 2712, 867 N.E.2d 829, in an opinion written by the same judge who wrote the opinion being appealed here, the court unanimously held (as to that issue) that Civ.R. 15(D) as interpreted by *Amerine* “explicitly requires” personal service of the original complaint and summons on the former John Doe defendant unless waived by defendant. Similarly, in *Mears v. Mihalega* (December 19, 1997), 11th Dist. No. 97-T-0040, 1997 Ohio App.LEXIS 5739, *appeal not allowed* (1998) 81 Ohio St.3d 1496, 691 N.E.2d 1058, the court noted that “the Supreme Court of Ohio has adopted a strict interpretation of this mandate” [that Civ.R. 15(D) requires the words “name unknown” on the summons]. 1997 Ohio App.LEXIS 5739 at *3, citing *Amerine*. The *Mears* unanimous opinion, joined by the same judge who joined the majority opinion below, affirmed summary judgment for the John Doe defendant where the summons did not include the required words and where “plaintiff did not effectuate personal service within one year of the filing of the original complaint”. *Id.* at *7. The court below failed to discuss or distinguish *Burya* or *Mears*.

Other cases from the Eleventh District where the court felt bound by *Amerine* and the Rules of Civil Procedure include *Batchelder v. Young*, 11th Dist. No. 2005-T-0150, 2006-

Ohio-6097 (jurisdiction declined and appeal dismissed, 113 Ohio St.3d 1444, 2007-Ohio-1266) (*Amerine* and its progeny require strict compliance with Civ.R. 15(D) in order to receive the benefits of the “relation back” provision of Civ.R. 15(C)); *Smith v. L.J. Lewis Enterprises, Inc.*, 11th Dist. No. 2000-T-0052, 2001-Ohio-4291, appeal not allowed (2002) 94 Ohio St.3d 1452, 762 N.E.2d 370, (in opinion written by the judge who joined in the decision in LaNeve, the court affirmed the dismissal of appellant’s claims against two John Doe defendants in accordance with Civ.R. 15(D) because the complaint was never personally served on the John Doe defendants); and *Stewart v. North Coast Center*, 11th Dist. No. 2005-A-0042, 2006-Ohio-2392, (in an opinion with which the author of the LaNeve opinion concurred, the court affirmed summary judgment granted to defendants on the basis that they were immune from suit under R.C. 2305.51, but noted in dicta that the claim against the “Jane Doe” defendant was time barred in any event because she was served with the amended complaint and a summons, which failed to contain the words “name unknown,” by certified mail, rather than personal service as required by *Amerine* and *Mears*, so that the amended complaint did not relate back to the original filing date under Civ.R. 15(C)).

Instead of addressing and distinguishing *Amerine* and its own prior cases (none of which resorted to the savings statute to help the plaintiff), the court below relied on *Goolsby v. Anderson Concrete Corp.* (1991), 61 Ohio St.3d 549, 575 N.E.2d 801, *Fetterolf v. Hoffmann-LaRoche, Inc.* (11th Dist.1995), 104 Ohio App.3d 272, 661 N.E.2d 811, and *Nationwide Mutual Ins. Co. v. Galman*, 7th Dist., 2004-Ohio-7206. *Goolsby* and *Fetterolf* did not involve John Doe defendants and did not require this Court or the Eleventh District Court to consider Civ.R. 15(D) personal service on a John Doe defendant in relation to Civ.R. 3(A). *Nationwide* did involve one John Doe defendant but the Seventh District Court of Appeals did not base its holding as to that

John Doe defendant on the proper method of service under Civ.R. 15(D). Instead, *Nationwide* held that the John Doe defendant concealed her identity so she could avoid being sued, which resulted in a tolling of the statute of limitations under R.C. 2305.15(A) until her identity was disclosed, making the filing and personal service of an amended complaint on her timely even though it appeared to be time barred. *Id.* at ¶36-41.⁵ There is no claim here that China Shipping concealed itself in order to avoid the lawsuit.

The court below excuses LaNeve for all of his procedural failures by proclaiming that “[s]ervice of process is a practical thing, not an abstraction for the delectation of legal scholars and the courts of Ohio should construe the civil rules regulating it in a practical light.” (Appx. 10, ¶21.) The “technical service requirements” [and presumably this Court’s holding in *Amerine*] should not be “allowed to trump all other considerations” because this would “run[s] contrary to the spirit and intent of the Civil Rules.” *Id.* The dissent points out, however, that the “spirit of the rules” does not permit a court to completely ignore all defects in pleadings. (Appx. 13, ¶43) (Grendell, J., dissenting). As this Court recently stated in a case involving plaintiff’s failure to ensure that defendant was properly served under Civ.R. 3(A): “[T]he Ohio Rules of Civil Procedure govern the conduct of all parties equally, and we cannot disregard [the] rules to assist a party who has failed to abide by them. * * * The obligation is upon plaintiffs to perfect service of process.” (Internal quotes and citations deleted.) *Glozzo v. University Urologists of Cleveland, Inc.* 114 Ohio St.3d 141, 1007-Ohio-3762, ¶16, 870 N.E.2d 714.

The effect of the majority’s ruling was to extend the two-year statute of limitations for LaNeve. Statutes of limitation provide a definite point in time by which a person may sue another party in order to promote finality for all parties and to prevent claims from being made long after the cause of action accrues. “Neither legislative intent nor public policy

⁵ A more thorough explanation of these three cases is included in the discussion of Proposition of Law No. 2.

supports * * * an extension of the statute of limitations. R.C. 2305.10 and the other statutes of limitation mandate that complaints be filed within specific periods of time. That mandatory language [shall be brought within two years] (see *Dennison v. Dennison* (1956), 165 Ohio St. 146, 149, 134 N.E.2d 574) and those specific time limits reflect the clearly expressed intent of the General Assembly that the time for filing a complaint not be arbitrarily extended.” *Whitman*, 2005-Ohio-245 at ¶9.

An amended complaint identifying a John Doe defendant filed after the statute of limitations expired will “relate back” to the original date of filing under Civ.R. 15(C), thus making it timely, only if the specific requirements of Civ.R. 15(D) are followed. “In failing to comply with the specific requirements of Civ.R. 15(D), a plaintiff fails to initiate the cause of action with regard to those fictitiously identified defendants and therefore may not employ the “relation back” privilege of Civ.R. 15(C) when an amended complaint falls outside the statute of limitations.” *Lawson*, at 2006-Ohio-2511 ¶20, following *Amerine*. “In looking to * * * *Amerine*, and the application of that mandate * * * it is clear that the specific requirements of Civ.R. 15(D) are threshold requirements for the proper commencement of a cause of action against a fictitiously named defendant, and not mere ‘technicalities.’” *Lawson* at ¶26.

Amerine and Civ.R. 15(D), 15(C) and 3(A) require a plaintiff to 1) aver in the complaint that he could not discover the name of the John Doe defendant, 2) request that the summons contain the words “name unknown”, 3) amend his complaint within one year after the original complaint was filed, and 4) obtain personal service on the newly identified John Doe defendant within one year after the original complaint was filed. If all of those actions are taken, then the cause of action is properly commenced against the John Doe defendant under Civ.R. 3(A). LaNeve 1) did not aver in the original complaint that he could not discover the names of

the John Doe defendants, 2) the summons did not say “name unknown”, 3) there was no service of any pleading or document within one year after the original complaint was filed, and 4) there was no personal service of any pleading at any time. As a result, LaNeve’s amended complaint did not relate back to the date he filed his original complaint under Civ.R. 15(C) and his claims against China Shipping were barred by the statute of limitations.

By ignoring the mandate of *Amerine* and the Rules, the court below has arbitrarily extended the statute of limitations for LaNeve, even though he did not properly commence the lawsuit against China Shipping. This Court should reaffirm the procedures required by the Rules of Civil Procedure and *Amerine* and reverse the arbitrary decision of the court below.

Proposition of Law No. 2:

The savings statute, R.C. 2305.19(A), must be read in conjunction with Civ.R. 3(A), 15(C) and 15(D) and does not save an otherwise untimely claim against a John Doe defendant where plaintiff’s attempt to commence its action is not fully compliant with those Civil Rules.

The court below concluded, sua sponte, that when LaNeve filed his amended complaint within the one-year period allowed by Civ.R. 3(A) for service after the original complaint was filed, such filing was the equivalent of a voluntary dismissal and refiling permitted by the savings statute, R.C. 2305.19(A)⁶. (Appx. 28) To reach this conclusion the court below erroneously relied on both *Goolsby* and *Fetterolf*. As a result, the court said, LaNeve had an additional year from the date the amended complaint was filed within which to serve China Shipping. Since the amended complaint was served by certified mail less than thirty days after it was filed, LaNeve’s claims against China Shipping were “saved”. (Appx. 7, ¶21) The court below failed to cite even one case involving both the savings statute and John Doe

⁶ LaNeve did not make this argument to either the trial court or the court of appeals and no party briefed the issue.

defendants that supports its conclusion. Neither *Goolsby* nor *Fetterolf* involved John Doe defendants and neither required the courts to consider the operation of Civ.R. 15(D) and Civ.R. 3(A) in conjunction with the savings statute. Unlike LaNeve, both *Goolsby* and *Fetterolf* measured Civ.R. 3(A)'s one-year service requirement from a date before their respective statutes of limitation expired.

In *Goolsby*, the plaintiff filed her lawsuit seventeen months before the two year statute of limitations expired. Her attorney instructed the clerk to refrain from attempting service until two days before the limitations period expired. Service was completed six days later, but more than one year after the original complaint was filed, in apparent violation of the one-year service limit in Civ.R. 3(A). *Goolsby* at 550. In the unusual circumstances presented, plaintiff could have dismissed her complaint on the day she requested service and refiled an identical new complaint before the two year statute of limitations expired. If she had done so, Civ.R. 3(A) would allow one year within which to serve the new complaint that was filed just before the limitations period expired.

This Court determined that because *Goolsby* could have filed a new complaint within the limitations period at the time she requested service of her first complaint, the request for service was equivalent to dismissing and refileing the complaint. "When service has not been obtained within one year of filing a complaint, and the subsequent refileing 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 refileing of the complaint." (Emphasis added.) *Id.* at syllabus.⁷

⁷ *Goolsby* subsequently dismissed her first lawsuit, which the Court ultimately determined was timely, and refiled pursuant to the savings statute. The defendant contended the first lawsuit had not been properly commenced so the savings statute was inapplicable. *Fetterolf* at 279.

Unlike *Goolsby*, LaNeve's filing of the amended complaint and request for service did not occur until May 6, 2005, more than eleven months after his limitations period had expired. (Supp. 002) On the day he filed the amended complaint, he could not have dismissed his complaint and refiled within rule; i.e. before the statute of limitations expired on May 28, 2004. The rationale for *Goolsby*, that there was still time left under the statute of limitations for plaintiff to dismiss and refile her lawsuit, does not apply here, where LaNeve had run out of time to refile his lawsuit against China Shipping long before he filed his amended complaint.

The court below states that in *Fetterolf* it "extended the rule in *Goolsby* to situations where a would-be plaintiff files an amended complaint, with demand for service, within the limitations period." (Emphasis added.) (Appx. 8, ¶16) The key is "within the limitations period." *Fetterolf* involved a rather complicated calculation of the proper limitation dates for claims brought on behalf of a minor for negligence, loss of consortium, products liability, medical malpractice and, after the minor died, for wrongful death. After carefully reviewing all possible limitation dates and the tolling of limitations as to the minor's claims while he was alive, the court found that the earliest possible limitation period ended on November 13, 1993. The amended complaint was filed and a request for service was made on May 14, 1993, within the limitation period.⁸ *Fetterolf* at 280-281. Following *Goolsby*, the court determined that plaintiff's instruction to the clerk to serve the amended complaint was equivalent to a refile of the complaint within rule, which gave him until May 14, 1994, to perfect service. *Id.* at 279-280.

Fetterolf actually prohibits the action that the court below advocates here. One of the claims in *Fetterolf* was for loss of consortium. In holding that the various claims were

⁸ The original complaint was filed on May 15, 1992, but defendants were never served with that complaint so the original action never commenced under Civ.R. 3(A). *Id.* at 275.

“refiled” on May 14, 1993, the court noted that the claim for loss of consortium, which had a shorter limitations period, was properly dismissed because it was time barred on the date of “refiling.” “Consequently, Goolsby is distinguishable because appellant could not have dismissed his loss of consortium claim in the original complaint and refiled the same claim in his amended complaint prior to the expiration of the statutory period.” *Id.* at 280. Likewise, the filing of LaNeve’s amended complaint cannot be considered a “refiling” because LaNeve’s claims against China Shipping were time barred on the date the amended complaint was filed. See also *Pewitt v. Roberts*, 8th Dist. No. 85334, 2005-Ohio-4298, ¶15, 2005 Ohio App. LEXIS 3914, (plaintiff’s instructions to the clerk to serve the defendants was equivalent to a refiling under *Goolsby*, but the refiled complaint was untimely under *Fetterolf*.)

The court below also cited *Nationwide v. Galman* as supporting its contention that LaNeve’s amended complaint was sufficient to extend the service date for an additional year, stating: “[T]he court held that a second amended complaint, filed *outside* the two year statute of limitations for personal injury, was valid, since it benefited from operation of the savings statute due to filing of the first amended complaint *within* the limitations period. (Emphasis sic.) *Id.* at ¶28.” (Appx. 8, ¶17) *Nationwide* does not help LaNeve.

Nationwide filed a timely complaint, and shortly thereafter timely amended its complaint, on behalf of one of its insureds against the owner and the operator of the car that collided with the insured’s car. *Nationwide* at ¶4-5. Both of the defendants actively tried to conceal their identity and the owner originally denied that he owned the vehicle. Ten days before the statute of limitation expired, the owner admitted at deposition that he did own the car and he revealed the name and address of the driver. *Id.* at ¶9. The trial court allowed Nationwide to file a second amended complaint adding the name of the newly discovered John Doe

defendant after the statute of limitations expired, but later granted summary judgment to both defendants on the grounds that the claims were time barred. *Id.* ¶17. The Court of Appeals for the Seventh Appellate District held that because Nationwide attempted to commence its action by filing the first amended complaint and requesting service before the statute of limitations expired, it would be “allowed to use the saving statute to support maintenance of their second amended complaint filed after the statute of limitations.” *Nationwide* at ¶33-35.⁹ LaNeve did not file his amended complaint and request service on China Shipping before the two-year statute of limitations expired, so he cannot take advantage of the holding in *Nationwide*.

The court below determined that LaNeve “attempted to commence” his lawsuit so that he was able to take advantage of the savings statute. “A failure to comply with technical service rules – such as that in Civ.R. 15(D) – is exactly the sort of attempt to commence an action to which the savings statute is directed.” (Appx.10, ¶20)¹⁰ While there are a number of cases that discuss what is required for a plaintiff to “attempt to commence” a lawsuit, there are very few that consider the requirements for a plaintiff to “attempt to commence” an action against a John Doe defendant such as appellant here.

In *Mustric v. Penn Traffic Corp.* (September 7, 2000), 10th Dist. No. 00AP-277, 2000 Ohio App. LEXIS 4032, the court held that “[b]ecause appellant did not properly attempt to commence the action against Ingle Barr [the John Doe defendant] the savings statute is inapplicable. *Id.* at *13-14. When plaintiff amended his original complaint to identify Barr as

⁹ Although the court’s holding was based on its analysis of the savings statute, it also noted that the trial court should not have granted summary judgment to the owner of the vehicle on whether his actions constituted concealment of his identity, that the original complaint had been properly served and was not superseded if the amended complaint had not been served as defendant claimed, and that plaintiff had properly served the amended complaint on the Secretary of State pursuant to R.C. 2703.20, involving service where the operator or owner of a motor vehicle conceals his whereabouts. *Id.* at ¶41-44.

¹⁰ That is a curious statement in light of the court also stating: “We do not quibble with the point that personal service is required under the rule.” (Appx. 7, ¶11, fn 1) If personal service is required under the rule, how can the court justify its holding that service by certified mail was adequate?

the defendant, he served Barr by certified mail instead of personally as required by Civ.R. 15(D). In granting Barr's motion for summary judgment, the trial court determined that plaintiff's failure to serve Barr personally within one year of the filing of the original complaint resulted in a failure to properly commence the action. The plaintiff then voluntarily dismissed the action before judgment could be entered and subsequently refiled, claiming the benefit of the savings statute. *Id.* at *9-10.

The Court of Appeals for the Tenth District first reviewed the requirements for service on a John Doe defendant, relying on *Amerine*. "*Amerine* establishes that Civ.R. 15(D)'s requirement of personal service is mandatory." *Id.* at *11. The court then considered whether plaintiff had attempted to commence the action, even though the action was not actually commenced. It had previously held that the savings statute would apply where the plaintiff had attempted to commence the original action within the applicable statute of limitations by requesting certified mail service at the time the complaint was timely filed. *Id.* at *13, citing *Shanahorn v. Sparks* (June 29, 2000), 10th Dist. No. 99AP-1340, 2000 Ohio App. LEXIS 2859 at *9-10, *12. *Shanahorn* did not, however, involve service on a John Doe defendant. Considering the requirement of personal service on a John Doe defendant, the court stated: "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." *Mustric* at *13. Service on Barr by certified mail instead of personal service was not proper, and plaintiff made no attempt to serve Barr personally. As a result, plaintiff did not properly attempt to commence the action against him, and the savings statute did not apply. *Id.* at *13-14.

The Court of Appeals for the Eighth District agreed with *Mustric* in *Permanent General Cos. Ins. Co. v. Corrigan* (May 24, 2001), 8th Dist. No. 78290, 2001 WL 563072. The

facts of *Permanent General* are similar to those in *Mustric*. Plaintiffs amended their original complaint to identify Corrigan as the John Doe listed in the original complaint. They served Corrigan within one year from the date the original complaint was filed, but by certified mail, not personally. The complaint was then dismissed and refiled within one year of the dismissal. The trial court's grant of summary judgment to Corrigan was affirmed on the basis that plaintiffs were not entitled to benefit from the savings statute because they used an improper method of service of the original complaint. *Id.* at *3.

The Court of Appeals for the Fifth Appellate District relied on the two preceding cases and *Amerine* in *Kramer v. Installations Unlimited, Inc.*, 2002-Ohio-1844, 147 OhioApp.3d 350, 770 N.E.2d 632. The facts of *Kramer* are similar to those above. Kramer served the newly-discovered John Doe defendant by certified mail and made no attempt to serve it personally. Installations Unlimited filed a motion for summary judgment. Plaintiff voluntarily dismissed on the same date and refiled, claiming the benefit of the savings statute. *Id.* at ¶13. The court looked to *Amerine* to determine the requirements for service on a John Doe defendant, and noted the specific requirement that personal service be made on such defendant. It agreed with *Mustric* and *Permanent General* that an attempt to commence under R.C. 2305.19 must be made pursuant to a method of service that is proper under the Civil Rules. *Id.* at ¶21-23. Plaintiff's attempt to commence the suit by certified mail service was improper under Civ.R. 15(D). The court further noted that "we have found no case law that has permitted a plaintiff to use the savings statute where service failed due to a failure to use the proper method of service under the Rules of Civil Procedure." *Id.* at ¶23.

The United States Court of Appeals for the Sixth Circuit considered the applicability of the Ohio savings statute to causes of action against John Doe defendants in a

prisoner's case brought pursuant to 42 U.S.C. §1983.¹¹ In *Coleman v. Dept. of Rehabilitation and Corrections*, (6th Cir. (Ohio) August 28, 2002) No. 01-3169, 46 Fed.Appx. 765, *; 2002 U.S. App. LEXIS 18016, **, the court affirmed the dismissal of Coleman's claims against various John Doe defendants, among others, because they were barred by the applicable statute of limitations. Coleman filed his suit on time but then took no action for over one year to discover the identity of the John Does, during which time the statute of limitations expired. *Id.* at *770-771, ** 12-15. Since Coleman did not actually commence his action against the John Doe defendants pursuant to Civ.R. 3(A), the court next considered whether he attempted to commence it. *Id.* at *769, **8-9.

The Sixth Circuit first looked at this Court's decision in *Thomas v. Freeman* (1997), 79 Ohio St.3d 221, 680 N.E.2d 997, holding that plaintiff there attempted to commence an action by making repeated efforts to serve the named defendants. "While *Thomas* did not entirely define the scope of what is attempted commencement, its language suggests a good faith attempt at serving a defendant satisfies the "attempted commencement" requirements of the Savings Statute." *Coleman* at *769, **9-10. The plaintiff in *Thomas* actually filed her initial complaint and demanded service before the two-year statute of limitations expired. *Thomas*, 79 Ohio St.3d at 227.

Thomas did not involve a John Doe defendant, so the Sixth Circuit then considered *Mustric*, "the only other relevant Ohio case." *Coleman* at *769, **10. The court noted that Civ.R. 15(D) required personal service and that *Mustric*'s failure to follow the rules of service had prevented him from benefiting from the savings statute. *Id.* at *770, **10-11.

¹¹ In a § 1983 action, the federal court must apply the statute of limitations of the relevant state, including its procedural rules affecting the statute of limitations and relevant decisions of the Ohio Supreme Court. *Id.* at *769, **7-8.

“Mustric’s proposition is * * * that if the dismissal is due to the plaintiff’s own errors, then the plaintiff’s action will not be saved.” Id.

The Sixth Circuit Court of Appeals acknowledged that as an unpublished decision, *Mustric* is not decisive if the Sixth Circuit believed that the Ohio Supreme Court would have ruled otherwise. However, that court believed that this Court would follow *Mustric* and “adopt the perfectly logical rule that a plaintiff cannot benefit from the Savings Statute where the dismissal was due to the plaintiff’s own neglect.” Id. at *770, **12.

The holdings in *Mustric*, *Permanent General*, *Kramer* and *Coleman* allow this Court’s ruling in *Amerine* applying the Rules of Civil Procedure to be harmonized with the savings statute and logically follow this Court’s holding in *Thomas*. An “attempt to commence” a cause of action against a John Doe defendant requires some action required by Civ.R. 15(D) and Civ.R. 3(A), including at least using the proper language in the original complaint and summons and attempting to personally serve the John Doe defendant within the applicable time period. LaNeve took none of those steps and the dismissal of his claims against China Shipping was a result of his own failure to do so. LaNeve should not be rewarded for his inaction by allowing him to take advantage of the savings statute.

Certified 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?

Upon motion of the appellants, the court below acknowledged that its holding regarding the applicability of the savings statute to circumstances such as those in this case conflicts with the holdings of other district courts of appeal and posed the Certified Question

above. Specifically, the lower court's opinion conflicts with *Mustric*, *Permanent General* and *Kramer* cited in support of appellant's Proposition of Law No. 2.

It should be noted that the question certified by the court of appeals is not the issue suggested in the Joint Motion to Certify a Conflict. The issue stated there was "Does the Ohio savings statute, R.C. 2305.19(A) apply to "save" this case where plaintiff did not attempt to commence the lawsuit by proper service pursuant to Civ.R. 15(D)?" The question certified is much narrower because it refers only to service of the original complaint and not to the other requirements of Civ.R. 15(D).

The conflict certified by the court of appeals is discussed in Proposition of Law No. 2. The court below determined that LaNeve did not have to strictly follow the service requirements of the Rules of Civil Procedure in order for the amended complaint, filed after the statute of limitations expired, to be effective under the savings statute. (Appx. 28) The Fifth, Eighth, and Tenth District courts of appeal, and the federal court in *Coleman*, all determined that the better analysis would be to determine first whether the plaintiff had properly attempted to commence his action against the John Doe defendant pursuant to *Amerine* and the applicable Rules of Civil Procedure within the applicable time limit. If the plaintiff did not attempt to properly serve the John Doe defendant, then the plaintiff could not take advantage of the savings statute.

The court below acknowledged the holdings in *Kramer* and *Permanent General*, but believes that 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." (Emphasis sic. Internal quotation marks omitted.) (Appx. 9, ¶20) Those cases do not construe

“attempted to commence” as requiring some failure by the clerk, process server or postal system. They simply require plaintiff to take some positive action to have his complaint filed and served in the manner provided under the Rules. Simply filing a complaint on time is not enough.

The approach employed by the court below allows LaNeve to circumvent the Rules applicable to John Doe defendants without any justification, even though it also says that “prudent counsel” should “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.” (Emphasis added.) (Appx. 7, ¶11, fn 1) The court’s two different positions are inconsistent. If the court’s decision is affirmed, how is a future court or a litigant to know which rules and holdings may be ignored? A system that allows such deviation is not a fair and equitable system. Rather, it is a system that encourages forum shopping to find the court most willing to ignore precedent. The court below cavalierly says that Civ.R. 15(D) is merely a “technical service rule” and that “[s]ervice of process is a practical thing * * * and the courts of Ohio should construe the civil rules regulating it in a practical light.” (Appx. 10, ¶21) What does that mean? Without reference to the Civil Rules and precedent, there is no way to predict its meaning with any confidence. The form of service permissible in Warren, Ohio, must be the same form of service permissible in Columbus. How can the litigation process be fair to all litigants, if the rules can change without warning?

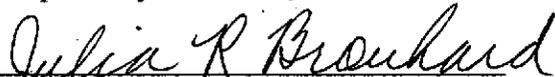
The advantage of the rule set forth by the Fifth, Eighth and Tenth District courts lies in its simplicity and ease of application. Did the plaintiff at least attempt to follow the rules of service required by Civ.R. 15(D), 3(A) and *Amerine*? If he did, then he can take advantage of the savings statute. If he did not, then he is not entitled to the privilege of using the savings statute to save his claim.

CONCLUSION

The decision below is fundamentally unfair to all litigants because it fails to strictly apply the Ohio Rules of Civil Procedure regarding naming and serving John Doe defendants, as required by this Court in *Amerine*. It is totally unsupported by any case law and, in fact, conflicts with its own prior holdings and with the holdings of numerous other district courts of appeal. If allowed to stand, the decision will result in disparate application of this Court's holdings and the Rules of Civil Procedure among the various districts in the state and promote forum shopping. This Court should affirm its decision in *Amerine* by continuing to require strict compliance with the Rules of Civil Procedure regarding John Doe defendants.

The judgment of the court of appeals should be reversed, the decision of the trial court should be reinstated, and the certified question should be answered in the negative.

Respectfully submitted,


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COUNSEL FOR APPELLANT
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HOLDING CO. LTD.

CERTIFICATE OF SERVICE

I certify that a copy of this Merit Brief was sent by ordinary U.S. mail to counsel of record for appellees, Robert F. Burkey, 200 Chestnut Ave. NE, Warren, Ohio 44483, and by hand delivery to counsel for appellant ContainerPort, Thomas W. Wright and Jack Meola, Davis & Young, 1200 Fifth Third Center, 600 Superior Avenue, East, Cleveland, Ohio 44114 on December 14, 2007.


Julia R. Brouhard, Counsel of Record for
Appellant China Shipping (North America)
Holding Co. Ltd.

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.:

07-1199

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

Court of Appeals Case No. 2006-T-0032

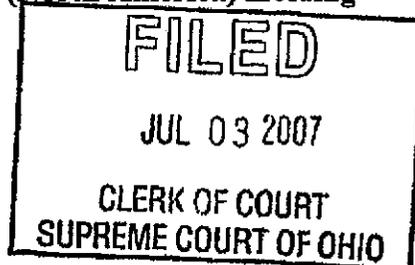
SECOND NOTICE OF APPEAL OF APPELLANT CHINA SHIPPING
(NORTH AMERICA) HOLDING CO., LTD.

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**SECOND NOTICE OF APPEAL OF APPELLANT CHINA SHIPPING
(NORTH AMERICA) HOLDING CO., LTD.**

Appellant China Shipping (North America) Holding Co., Ltd. hereby gives notice of appeal to the Supreme Court of Ohio from the judgment of the Trumbull County Court of Appeals, Eleventh Appellate District, entered in Court of Appeals Case No. 2006-T-0032 on June 11, 2007.

This case presents a question of public and great general interest.

Respectfully submitted,

By Julia R. Brouhard
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CERTIFICATE OF SERVICE

I certify that a copy of this Second Notice of Appeal of Appellant China Shipping (North America) Holding Co., Ltd. was sent by ordinary U.S. mail this 2 day of July 2007, to Thomas W. Wright, Esq. and William Jack Meola, Esq., Davis & Young, 1200 Fifth Third Center, 600 Superior Avenue, East, Cleveland, Ohio 44114-2654, Counsel for Appellant ContainerPort Group, Inc. and Robert F. Burkey, Esq., 200 Chestnut Ave. NE, Warren, Ohio 44483, Counsel for Appellees John LaNeve and Melissa LaNeve.

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(North America) Holding Co., Ltd.

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, :
- vs - : CASE NO. 2006-T-0032
ATLAS RECYCLING, INC., :
Defendant, :
CHINA SHIPPING (NORTH AMERICA) :
HOLDING CO., LTD., et al., :
Defendants-Appellees. :

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

Judgment: Reversed and remanded.

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COLLEEN MARY O'TOOLE, J.

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

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

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

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

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

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

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

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

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

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

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

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

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

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

1. We do not quibble with the point that personal service is required under the rule. We would note, for benefit of parties and counsel, that there is some question as to whether the original complaint and summons, or the amended complaint and summons, are the matters requiring personal service under Civ.R. 15(D). See, e.g., *Burya v. Lake Metroparks Bd. of Park 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 refile 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 refile 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 refile 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,

JUDGMENT ENTRY

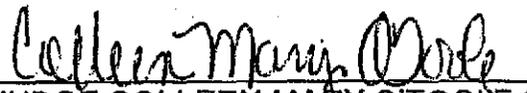
- vs -

CASE NO. 2006-T-0032

ATLAS RECYCLING, INC.,
Defendant,

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

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


JUDGE COLLEEN MARY O'TOOLE

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

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

FILED
COURT OF APPEALS

JUN 11 2007

TRUMBULL COUNTY, OH
KAREN INFANTE ALLEN, CLERK

STATE OF OHIO)
)SS.
COUNTY OF TRUMBULL)

IN THE COURT OF APPEALS
ELEVENTH DISTRICT

JOHN A. LaNEVE, et al.,

Plaintiffs-Appellants,

- vs -

ATLAS RECYCLING, INC.,

Defendant,

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

Defendants-Appellees.

JUDGMENT ENTRY

CASE NO. 2006-T-0032

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.

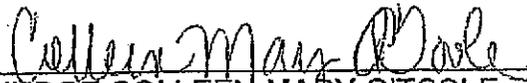
In sum, the cases relied on by appellees in support of their first issue all agree that plaintiffs, in serving John Doe defendants, must comply with the requirements of Civ.R. 15(D): they simply do not agree on what those requirements are. In *LaNeve*, we affirmed the proposition that the requirements 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. Houghton Elevator Co.* (1989), 42 Ohio St.3d 577"

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

IN THE COURT OF COMMON PLEAS
TRUMBULL COUNTY, OHIO

FILED
CLERK
COURT

JOHN A. LaNEVE, et al.,

Plaintiffs,

v.

ATLAS RECYCLING, INC., et al.,

Defendants.

CASE NO. 04-CV-1266

2006 FEB -7 A 8:54

JUDGE W. WYATT MCKAY

ORDER OF DISMISSAL WITH PREJUDICE
OF PLAINTIFFS' CLAIMS AGAINST
DEFENDANTS CHINA SHIPPING (NORTH
AMERICA) HOLDING CO., LTD., AND
CONTAINER PORT GROUP, INC.

The Court, having considered defendants' China Shipping (North America) Holding Co., Ltd. and Container Port Group, Inc.'s motions to dismiss plaintiffs' claims against them pursuant to Rule 12(B)(6) on the basis that plaintiffs' claims are time barred, and further having heard oral argument of counsel for plaintiffs and defendants, and being of the opinion that defendants' motions to dismiss are well taken and should be granted, it is therefore

ORDERED ADJUDGED AND DECREED that all of plaintiffs' claims brought against defendants China Shipping (North America) Holding Co., Ltd. and Container Port Group, Inc. are hereby dismissed with prejudice, at plaintiffs' costs. Plaintiffs' claims against defendant Atlas Recycling, Inc. shall remain pending upon the docket of this Court.

Signed this 7th day of February, 2006.

JUDGE W. WYATT MCKAY

Approved:

Julia R. Brouhard (0041811)

Robert T. Coniam (0034623)

Attorneys for Defendant

China Shipping (North America) Holdings, Ltd.

Thomas Wright / signed per telephone consent

Thomas Wright (0017529)

William Jack Meola (0022122)

Attorney for Defendant

Container Port Group, Inc.

IN THE COURT OF COMMON PLEAS
TRUMBULL COUNTY, OHIO

JOHN A. LaNEVE, et al.

Plaintiffs

vs.

ATLAS RECYCLING, INC., et al.

Defendants

CASE NO. 2004 CV 1266

JUDGE W. WYATT MCKAY

NUNC PRO TUNC

ORDER OF DISMISSAL OF PLAINTIFFS'
CLAIMS AGAINST DEFENDANTS
CHINA SHIPPING (NORTH AMERICA)
HOLDING CO., LTD., AND CONTAINER
PORT GROUP, INC.

The Court, having heretofore dismissed Plaintiffs' claims against Defendants, China Shipping (North America) Holding Co., Ltd. and Container Port Group, Inc., on February 7, 2006, it is ordered that there is no just reason for delay.

Signed 2nd day of March, 2006.

W. Wyatt McKay

JUDGE W. WYATT MCKAY

Approved:

Robert F. Burkey

Robert F. Burkey, Esq. (0015249)
Attorney for Plaintiffs

No Position per telephone 03/01/06
Julie R. Brouhard, Esq. (0041811)
Robert T. Coniam, Esq. (0034623)
Attorneys for Defendant
China Shipping (North America) Holding Co., Ltd.

No Response
William Jack Meola, Esq. (0022122)
Thomas Wright, Esq. (0017529)
Attorney for Defendant
Container Port Group, Inc.

TO THE CLERK OF COURTS: YOU ARE ORDERED TO SERVE
COPIES OF THIS JUDGMENT ON ALL COUNSEL OF RECORD
OR UPON THE PARTIES WHO ARE UNREPRESENTED FORTH-
WITH BY ORDINARY MAIL

W. Wyatt McKay

JUDGE

TRUMBULL COUNTY
CLERK OF COURTS

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Copies:
R Burkey R Coniam
C Richards T Wright
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IN THE SUPREME COURT OF OHIO

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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. 07-1199

07-1372

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
CHINA SHIPPING (NORTH AMERICA) HOLDING CO., LTD.**

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FILED
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SUPREME COURT OF OHIO

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Counsel for Appellees
John LaNeve and Melissa LaNeve

**NOTICE OF CERTIFIED CONFLICT OF APPELLANT
CHINA SHIPPING (NORTH AMERICA) HOLDING CO., INC.**

Pursuant to Ohio Supreme Court Rule IV, Sections 1 and 4, Appellant China Shipping (North America) Holding Co., Inc., "China Shipping" hereby gives notice to the Ohio Supreme Court that on June 29, 2007, the Trumbull County Court of Appeals, Eleventh Appellate District, certified to this Court a conflict between its June 11, 2007, merit Opinion and Judgment Entry and the opinions of other Ohio courts of appeals on the following question of law:

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?

A copy of the court of appeals' Judgment Entry and Opinion entered on June 11, 2007, is included in the Appendix at Appx. 1-14, and a copy of the Judgment Entry entered on June 29, 2007, is included in the Appendix at Appx. 15-22.

In its Judgment Entry of June 29, 2007, the court of appeals certified that its June 11, 2007, decision is in conflict with decisions of the Fifth, Eighth and Tenth Appellate Districts in the following cases, each of which is included in the Appendix:

Kramer v. Installations Unlimited, Inc. (5th Dist.), 147 Ohio App.3d 350
2002-Ohio-1844, 770 N.E.2d 632 – Appx. 23-27

Permanent Gen. Cos Ins. Co. v. Corrigan (May 24, 2001), 8th Dist. No.
78290, 2001 Ohio App. LEXIS 2317 – Appx. 28-32

Mustric v. Penn Traffic Corp. (September 7, 2000), 10th Dist. No. 00AP-
277, 2000 Ohio App. LEXIS 4032 – Appx. 33-39

It should be noted that the question the appeals court was asked to certify differs from the question certified by the court. Appellant's proposed question was:

Does the Ohio savings statute, R.C. 2305.19(A), apply to “save” this case where plaintiff did not attempt to commence the lawsuit by proper service pursuant to Civ.R. 15(D)?

It should be further noted that the court of appeals refused to certify a conflict 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 the Court in Case No. 07-1119, wherein appellant has proposed the following Propositions of Law that relate to the certified and non-certified questions at issue herein:

Proposition of Law No. I: Claims brought against a subsequently identified John Doe defendant under Civ.R. 15(D) in an amended complaint are time barred under Civ.R. 15(C) and properly dismissed under Civ.R. 12(B)(6) when the original complaint does not aver that plaintiff could not discover the name of the John Doe defendant, when the summons does not include the words “name unknown”, when the original and amended pleadings are not personally served on the subsequently identified John Doe defendant, and when personal service is not completed within one year from the date the original complaint was filed pursuant to Civ.R. 3(A).

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

Appellant respectfully requests that this Court find that a conflict exists between the circuits and that it also accept appellant's discretionary appeal in order to fully consider and determine all issues raised in this case.

Respectfully submitted,

By Julia R Brouhard

Julia R. Brouhard (0041811)

Lead Counsel

Robert T. Coniam (0034623)

Ray, Robinson, Carle & Davies P.L.L.

1717 E. Ninth Street, Ste. 1650

Cleveland, OH 44114-2878

Counsel for Appellant China Shipping

(North America) Holding Co., Ltd.

CERTIFICATE OF SERVICE

I hereby certify that a true and correct copy of this Notice of Certified Conflict of Appellant China Shipping (North America) Holding Co., Ltd. was sent by ordinary U.S. mail on this 26th day of July 2007 to Thomas W. Wright, Esq. and William Jack Meola, Esq., Davis & Young, 1200 Fifth Third Center, 600 Superior Avenue, East, Cleveland, Ohio 44114-2654, Counsel for Appellant ContainerPort Group, Inc. and to Robert F. Burkey, Esq., 200 Chestnut Ave. NE, Warren, Ohio 44483, Counsel for Appellees John LaNeve and Melissa LaNeve.

Julia R Brouhard

Julia R. Brouhard

Counsel for Appellant China Shipping

(North America) Holding Co., Ltd.

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.

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

Court of Appeals
Case No. 2006-T-0032

**APPENDIX TO NOTICE OF CERTIFIED CONFLICT OF APPELLANT
CHINA SHIPPING (NORTH AMERICA) HOLDING CO., LTD.**

STATE OF OHIO)
)SS.
COUNTY OF TRUMBULL)

IN THE COURT OF APPEALS
ELEVENTH DISTRICT

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

- vs -

ATLAS RECYCLING, INC.,
Defendant,

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

JUDGMENT ENTRY

CASE NO. 2006-T-0032

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


JUDGE COLLEEN MARY O'TOOLE

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

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

FILED
COURT OF APPEALS

JUN 11 2007

APPX. 1

APPV 2A

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." *Goolsby v. Anderson Concrete Corp.* (1991), 61 Ohio St.3d 549, 550.

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

JUL 11 2007

STATE OF OHIO)
)SS.
COUNTY OF TRUMBULL)

IN THE COURT OF APPEALS
ELEVENTH DISTRICT

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

JUDGMENT ENTRY

-- vs -

CASE NO. 2006-T-0032

ATLAS RECYCLING, INC.,
Defendant,

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

Defendants-Appellees.

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.

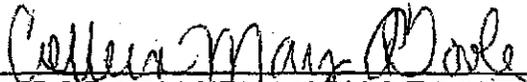
In sum, the cases relied on by appellees in support of their first issue all agree that plaintiffs, in serving John Doe defendants, must comply with the requirements of Civ.R. 15(D): they simply do not agree on what those requirements are. In *LaNeve*, we affirmed the proposition that the requirements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

LEXSEE 147 OHIO APP 3D 350

CHARLES KRAMER, Plaintiff-Appellant -vs- INSTALLATIONS UNLIMITED, INC., et al., Defendants-Appellees

Case No. 01 CA 73

COURT OF APPEALS OF OHIO, FIFTH APPELLATE DISTRICT, LICKING COUNTY

147 Ohio App. 3d 350; 2002 Ohio 1844; 770 N.E.2d 632; 2002 Ohio App. LEXIS 1851

April 12, 2002, Date of Judgment Entry

PRIOR HISTORY: [***1] CHARACTER OF PROCEEDING: Civil Appeal from the Court of Common Pleas, Case No. 01 CV 197.

DISPOSITION: Trial court's judgment was affirmed.

COUNSEL: For Plaintiff-Appellant: STEPHEN R. McCANN, Zanesville, Ohio.

For Defendants-Appellees: TERRI B. GREGORI, JOHN E. VINCENT, ISAAC, BRANT, LEDMAN & TEETOR, LLP, Columbus, Ohio.

JUDGES: Hon. W. Scott Gwin, P. J., Hon. Sheila G. Farmer, J., Hon. John W. Wise, J. Wise, J., Gwin, P. J., and Farmer, J., concur.

OPINION BY: John W. Wise

OPINION

[*352]

[**633] *Wise, J.*

Appellant Stephan McCann appeals the decision of the Licking County Court of Common Pleas that granted Appellee Installations Unlimited, Inc.'s ("Installation Unlimited") motion to dismiss. The following facts give rise to this appeal.

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 Installations Unlimited may be a party responsible for the injuries he sustained. Therefore, on December 5, 2000, appellant filed an amended complaint which included Installations Unlimited as a defendant, but did not substitute Installations Unlimited for one of the John Doe defendants. [***2] The amended complaint also included the ten John Doe defendants identified in the original complaint.

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.

On March 8, 2001, Installations Unlimited filed a motion for summary judgment [*634] arguing 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 re-filed 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 [***3] and complaint. The trial court granted Installations Unlimited's motion to dismiss on July 2, 2001.

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

I. THE TRIAL COURT ERRED IN GRANTING DEFENDANT-APPELLEE'S MOTION TO DISMISS.

I

Appellant sets forth two arguments in support of his sole assignment of error. First, appellant maintains *R.C. 2305.19*, the savings statute, should be liberally construed to allow him to have his trial on the merits. Second, appellant contends 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 savings statute and the Rules of Civil Procedure. We disagree with both arguments.

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 dis-

miss for failure to state a claim upon which relief can be granted is procedural and tests the sufficiency of the complaint. [***4] *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 only determine 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.

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:

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)*.

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

When the plaintiff does not know [***5] 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.

The *Amerine* decision also refers to *Civ.R. 3(A)*, which provides, in pertinent part:

[**635] 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)*.

Thus, *Civ.R. 15(D)* specifically requires that the summons be personally served upon the defendant. *Amerine at 58*. 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 [***6] year of the filing of the original complaint. *Id. at 59*. 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.*

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)*.

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 [***7] *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*. 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.*

River City filed a motion to dismiss the amended complaint and argued 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 *Civ.R. 15(D)* requires a copy of the summons be personally served upon the newly identified [***8] defendant. *Id. at 687*. 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. 136 Ohio App. 3d at 687-688.

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.

In response, appellant refers to *R.C. 2305.19*, the savings statute, which provides, in pertinent part:

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 [***9] the date of reversal or failure has expired, the plaintiff, * * * may commence a new action within one year after such date. * * *

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 savings statute, and re-filed the complaint. In response to this argument, the trial court concluded in its judgment entry that appellant's claim was not protected by the savings 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.

In reaching this conclusion, the trial court relied upon the case of *Permanent Gen. COS Ins. Co. v. Corrigan* (May 24, 2001), 2001 Ohio App. LEXIS 2317, Cuyahoga App. No. [*356] 78290, unreported. In *Permanent Gen.*, the Eighth District Court of Appeals held:

* * * 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)*. [***10] 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 certi-

fied 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. * * * 2001 Ohio App. LEXIS 2317, *7, quoting *Mustric v. Penn Traffic Corp.* (Sept. 7, 2000), 2000 Ohio App. LEXIS 4032, Franklin App. No. 00AP-277, unreported.

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

The cases reviewed by this court support the conclusion that the attempt must be made according to the Rules of Civil Procedure. Only when the [**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 savings statute where service failed due to a failure to use the proper method of service under the Rules of Civil Procedure. The cases we have reviewed that permitted the use of the savings statute used the proper method of service as required by the Rules of Civil Procedure, but service was not perfected for whatever reason.

Accordingly, we conclude the trial court properly granted Installations Unlimited's [***12] motion to dismiss.

147 Ohio App. 3d 350, *; 2002 Ohio 1844;
770 N.E.2d 632, **; 2002 Ohio App. LEXIS 1851, ***

Appellant's sole assignment of error is over-ruled.

[*357] For the foregoing reasons, the judgment of the Court of Common Pleas, Licking County, Ohio, is hereby affirmed.

By: Wise, J.

Gwin, P. J., and

Farmer, J., concur.

JUDGMENT ENTRY

For the reasons stated in our accompanying Memorandum-Opinion, the judgment of the Court of Common Pleas of Licking County, Ohio, is affirmed.

Costs to appellant.

LEXSEE 2001 OHIO APP. LEXIS 2317

PERMANENT GENERAL COS INSURANCE CO., ET AL., Plaintiffs-Appellants vs. ED CORRIGAN, Defendant-Appellee

NO. 78290

COURT OF APPEALS OF OHIO, EIGHTH APPELLATE DISTRICT, CUYAHOGA COUNTY*2001 Ohio App. LEXIS 2317***May 24, 2001, Date of Announcement of Decision**

PRIOR HISTORY: [*1] CHARACTER OF PROCEEDING: Civil appeal from Common Pleas Court. Case No. 397639.

DISPOSITION: AFFIRMED.

COUNSEL: For plaintiffs-appellants: Daran P. Kiefer, Esq., Ted M. Traut, Esq., KREINER & PETERS CO., L.P.A., Cleveland, Ohio.

For defendant-appellee: James E. Behrens, Esq., Michael S. Schroeder, Esq., BEHRENS, GIOFFRE & SCHROEDER CO., L.P.A., Cleveland, Ohio.

JUDGES: MICHAEL J. CORRIGAN, PRESIDING JUDGE. ANNE L. KILBANE, J., and TERRENCE O'DONNELL, J., CONCUR.

OPINION BY: MICHAEL J. CORRIGAN

OPINION

JOURNAL ENTRY and OPINION

MICHAEL J. CORRIGAN, P.J.:

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 [*2] 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 [*3] 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 St. 2d 1, 433 N.E.2d 615; *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, 91 L. Ed. 2d 265, 106 S. Ct. 2548; *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. [*4]

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 [*5] 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 Towers Apt. Co.*, 2000 Ohio App. LEXIS 4477 (September 28, 2000), Cuyahoga App. No. 77278, unreported, citing *Amerine 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.*, 1997 Ohio App. LEXIS 5421 (Dec. 4, 1997), Cuyahoga App. No. 71840, unreported, this court held that in order for an amendment of a complaint naming a fictitious [*6] 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.

If 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)*.

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 [*7] 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.*, 2000 Ohio App. LEXIS 4032 (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 ap-

peal, 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* [*8] 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 [*9] 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.

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*.

MICHAEL J. CORRIGAN

PRESIDING JUDGE

ANNE L. KILBANE, J., and

TERRENCE 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.* [*10] 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)*.

LEXSEE 2000 OHIO APP. LEXIS 4032

Thomas Mustric, Plaintiff-Appellant, v. Penn Traffic Corporation et al., Defendants-Appellees.

No. 00AP-277

COURT OF APPEALS OF OHIO, TENTH APPELLATE DISTRICT, FRANKLIN COUNTY

2000 Ohio App. LEXIS 4032

September 7, 2000, Rendered

PRIOR HISTORY: [*1] APPEAL from the Franklin County Court of Common Pleas.

DISPOSITION: Affirmed.

COUNSEL: 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.

JUDGES: TYACK, J., KENNEDY and PETREE, JJ., concur.

OPINION BY: TYACK

OPINION

(REGULAR CALENDAR)

TYACK, J.

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") 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.

1 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.

[*2] 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 [*3]. 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 [*4] and Ingle Barr's motions for summary judgment. A judgment entry was journalized on February 14, 2000.

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 [*5] 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 mo-

tions 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, [*6] 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.

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 [*7] 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 [*8] 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 non-

moving party. *Zivich v. Mentor Soccer Club, Inc.* (1998), 82 Ohio St. 3d 367, 369-370, 696 N.E.2d 201, citing *Horton v. Harwick Chem. Corp.* (1995), 73 Ohio St. 3d 679, 653 N.E.2d 1196, 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, 506 N.E.2d 212.

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. [*9] Specifically, Ingle Barr contended the savings statute, R.C. 2305.19, 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.

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)*.² 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 [*10] 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.

2 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, 537 N.E.2d 208, 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 [*11] 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, [*12] 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.

In *Shanahorn v. Sparks*, 2000 Ohio App. LEXIS 2859 (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. 2000 Ohio App. LEXIS 2859 at *9-10.

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 [*13] 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. 2000 Ohio App. LEXIS 2859 at *12.

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, [*14] 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, [*15] Big Bear and Nationwide contend there was no evidence of negligent design or that an alleged negligent design proximately caused appellant's injuries.

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, 480 N.E.2d 474. 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, 233 N.E.2d 589, 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 [*16] 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, 630 N.E.2d 380. 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, 621 N.E.2d 1365. 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 [*17] and normally would not be considered proper evidence. See *Green v. B.F. Goodrich Co.* (1993), 85 Ohio App. 3d 223, 228, 619 N.E.2d 497. 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, 598 N.E.2d 171, motion to certify overruled in (1991), 62 Ohio St. 3d 1472, 580 N.E.2d 1101.

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.

We note first that there is no evidence Nationwide was responsible in any way for the existence and/or condition of the [*18] 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, 661 N.E.2d 744 (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 [*19] 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, 654 N.E.2d 449. In the case at bar, we have de-

termined 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 [*20] PETREE, JJ., concur.

42 U.S.C.A. § 1983

Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any State or Territory or the District of Columbia, subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress, except that in any action brought against a judicial officer for an act or omission taken in such officer's judicial capacity, injunctive relief shall not be granted unless a declaratory decree was violated or declaratory relief was unavailable. For the purposes of this section, any Act of Congress applicable exclusively to the District of Columbia shall be considered to be a statute of the District of Columbia.

Ohio Revised Code § 2305.10 - Bodily injury or injury to personal property.

(A) Except as provided in division (C) or (E) of this section, an action based on a product liability claim and an action for bodily injury or injuring personal property shall be brought within two years after the cause of action accrues. Except as provided in divisions (B)(1), (2), (3), (4), and (5) of this section, a cause of action accrues under this division when the injury or loss to person or property occurs.

Ohio Revised Code § 2305.15 Tolling during defendant's absence, concealment or imprisonment.

(A) When a cause of action accrues against a person, if the person is out of the state, has absconded, or conceals self, the period of limitation for the commencement of the action as provided in sections 2305.04 to 2305.14, 1302.98, and 1304.35 of the Revised Code does not begin to run until the person comes into the state or while the person is so absconded or concealed. After the cause of action accrues if the person departs from the state, absconds, or conceals self, the time of the person's absence or concealment shall not be computed as any part of a period within which the action must be brought.

Ohio Revised Code § 2305.19 - Saving in case of reversal.

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

Ohio Civil Rule 3. Commencement of Action; Venue

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

Ohio Civil Rule 12. Defenses and Objections--When and How Presented--by Pleading or Motion--Motion for Judgment on the Pleadings

(B) How presented. Every defense, in law or fact, to a claim for relief in any pleading, whether a claim, counterclaim, cross-claim, or third-party claim, shall be asserted in the responsive pleading thereto if one is required, except that the following defenses may at the option of the pleader be made by motion: (1) lack of jurisdiction over the subject matter, (2) lack of jurisdiction over the person, (3) improper venue, (4) insufficiency of process, (5) insufficiency of service of process, (6) failure to state a claim upon which relief can be granted, (7) failure to join a party under Rule 19 or Rule 19.1. A motion making any of these defenses shall be made before pleading if a further pleading is permitted. No defense or objection is waived by being joined with one or more other defenses or objections in a responsive pleading or motion. If a pleading sets forth a claim for relief to which the adverse party is not required to serve a responsive pleading, he may assert at the trial any defense in law or fact to that claim for relief. When a motion to dismiss for failure to state a claim upon which relief can be granted presents matters outside the pleading and such matters are not excluded by the court, the motion shall be treated as a motion for summary judgment and disposed of as provided in Rule 56. Provided however, that the court shall consider only such matters outside the pleadings as are specifically enumerated in Rule 56. All parties shall be given reasonable opportunity to present all materials made pertinent to such a motion by Rule 56.

Ohio Civil Rule 15. Amended and Supplemental Pleadings

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

The delivery or mailing of process to this state, a municipal corporation or other governmental agency, or the responsible officer of any of the foregoing, subject to service of process under Rule 4 through Rule 4.6, satisfies the requirements of clauses (1) and (2) of the preceding paragraph if the above entities or officers thereof would have been proper defendants upon the original pleading. Such entities or officers thereof or both may be brought into the action as defendants.

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