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
Appellants	)	District, Case No. 2006-T-0032

MERIT BRIEF OF APPELLANT CONTAINERPORT GROUP, INC.

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TABLE OF CONTENTS

Page

TABLE OF AUTHORITIES iv

STATEMENT OF FACTS 1

ARGUMENT 5

Proposition of Law No. I:

A party who files an amended pleading pursuant to Civ.R. 15(D) must (1) aver in his original pleading that the plaintiff could not discover the name of the unknown defendant; (2) include the words "name unknown" in the summons accompanying the amended pleading; and (3) personally serve the summons and amended pleading on the newly-identified defendant in order to invoke the relation-back provisions of Civ.R. 15(C) and avoid the statute of limitations as a bar 5

1. A Plaintiff Must Aver in His Original Pleading that He Could Not Discover the Name of the Unknown Defendant 6

2. A Plaintiff Must Include the Words "Name Unknown" in the Summons 7

3. A Plaintiff Must Personally Serve the Defendant When He Is Identified 9

4. A Plaintiff's Failure to Satisfy Any of the Elements of Civ.R. 15(D) Precludes Him From Invoking the Relation-Back Provisions of Civ.R. 15(C) 11

Proposition of Law No. II:

An action is not "attempted to be commenced" for purposes of R.C. 2305.19(A), nor does an action "fail otherwise than upon the merits" for purposes of R.C. 2305.19(A), when a plaintiff fails to request and obtain personal service upon a previously identified John Doe in accordance with Civ.R. 15(D) 13

1. In Order to "Commence" an Action Against a John Doe Defendant under Civ.R. 3(A), a Plaintiff Must Obtain Service Upon the John Doe Defendant Within One Year of the Filing of the Complaint 13

2. The *Goolsby* Exception to the Civ.R. 3(A) Requirement that a Defendant Be Served Within One Year of the Filing of a Complaint Does Not Apply When a Refiling Occurs Outside the Statute of Limitations 14

3. R.C. 2305.19(A) Only Applies to Actions that Are "Commenced or Attempted to Be Commenced" and that "Fail Otherwise Upon the Merits" 16

Certified Conflict Issue:

Does the Ohio savings statute, R.C. 2305.19(A), apply to an action where plaintiff fails to comply strictly with the requirements of Civ.R. 15(D) in serving the original complaint? 19

CONCLUSION 24

CERTIFICATE OF SERVICE 25

APPENDIX

Appx. Page

Notice of Appeal of Appellant ContainerPort Group, Inc.
(July 9, 2007) A1

Notice of Certified Conflict of Appellant ContainerPort Group, Inc.
(July 27, 2007) A4

Judgment Entry of Trumbull County Court of Appeals Granting in Part and Denying in Part Motion to Certify Conflict
(June 29, 2007) A48

Judgment Entry of Trumbull County Court of Appeals Reversing Judgment of Trumbull County Court of Common Pleas and Remanding
(June 11, 2007) A56

Opinion of Trumbull County Court of Appeals
(June 11, 2007) A57

Nunc Pro Tunc Judgment Entry of Trumbull County Court of Common Pleas Dismissing Plaintiffs' Claims against Defendants China Shipping (North America) Holding Co., Ltd. and ContainerPort Group, Inc.
(March 2, 2006) A70

Judgment Entry of Trumbull County Court of Common Pleas Dismissing with Prejudice Plaintiffs' Claims against Defendants China Shipping (North America) Holding Co., Ltd. and ContainerPort Group, Inc.
(February 7, 2006) A71

R.C. 2305.10 . . . . . A72

R.C. 2305.19 . . . . . A75

Civ.R. 3 . . . . . A76

Civ.R. 4 . . . . . A80

Civ.R. 15 . . . . . A81

TABLE OF AUTHORITIES

Page

CASES

Amerine v. Haughton Elevator Co.
(1989), 42 Ohio St.3d 57, 537 N.E.2d 208 . . . . . 6, 7, 8, 9, 10, 12, 13, 14

Burya v. Lake Metroparks Bd. of Park Comm'rs
11th Dist. No. 2005-L-015, 2006-Ohio-5192, 2006 WL 2798294,
rev'd on other grounds, 114 Ohio St.3d 35, 2007-Ohio-2712, 867 N.E.2d 829 10

Coleman v. Department of Rehabilitation & Corrections
(6th Cir. (Ohio) August 28, 2002), N0. 01-3169, 46 Fed.Appx. 765 22-23

Collins v. State of Ohio, Dep't of Natural Resources
(January 6, 1983), 10th Dist. No. 82AP-370, 1983 WL 3311 7

Easter v. Complete Gen. Constr. Co.
10th Dist. No. 06AP-763, 2007-Ohio-1297, 2007 WL 853337 10

Fetterolf v. Hoffman-LaRoche, Inc.
(11th Dist. 1995), 104 Ohio App.3d 272, 661 N.E.2d 811 15

Gaston v. City of Toledo
(6th Dist. 1995), 106 Ohio App.3d 66, 665 N.E.2d 264 . . . . . 9, 10

Gates v. Precision Post
(September 14, 1994), 3rd Dist. No. 9-94-21, 1994 WL 514045,
aff'd on other grounds,74 Ohio St.3d 439, 1996-Ohio-183, 659 N.E.2d 1241 6

Gliozzo v. University Urologists of Cleveland
114 Ohio St.3d 141, 2007-Ohio-3762, 870 N.E.2d 714 . . . . . 17, 18, 23

Goolsby v. Anderson Concrete Corp.
(1991), 61 Ohio St.3d 549, 575 N.E.2d 801 . . . . . 13, 14, 15

Hodges v. Gates Mills Towers Apt. Co.
(September 28, 2000), 8th Dist. No. 77278, 2000 WL 1429421 10

Kramer v. Installations Unlimited, Inc.
(5th Dist.), 147 Ohio App.3d 350, 2002-Ohio-1844, 770 N.E.2d 632 . . . . . 17, 21

Kraus v. Maurer
8th Dist. No. 83182, 2004-Ohio-748, 2004 WL 308112 19

LaBarbera v. Batsch
(1967), 10 Ohio St.2d 106, 227 N.E.2d 55 . . . . . 19, 23

Lawson v. Holmes, Inc.
(12th Dist.), 166 Ohio App.3d 857, 2006-Ohio-2511, 853 N.E.2d 712 . . . . . 6, 12, 23

Loescher v. Plastipak Packaging, Inc.
(3rd Dist.), 152 Ohio App.3d 479, 2003-Ohio-1850, 788 N.E.2d 681 8-9

McConville v. Jackson Comfort Sys., Inc.
(9th Dist. 1994), 95 Ohio App.3d 297, 642 N.E.2d 416 10

Mears v. Mihalega
(December 19, 1997), 11th Dist. No. 97-T-0040, 1997 WL 801291
appeal not allowed (1998), 81 Ohio St.3d 1497, 691 N.E.2d 1058 8

Miller v. American Family Ins. Co.,
6th Dist. No. OT-02-011, 2002-Ohio-7309, 2002 WL 31888219 . . . . . 8, 9, 10

Mitulski v. USS/Kobe Steel Co.
(May 26, 1999), 9th Dist. Nos. 98CA007085, 98CA007105, 1999 WL 334789,
appeal not allowed (1999), 87 Ohio St.3d 1405, 716 N.E.2d 1168 8

Moh v. Anderson
(December 12, 1996), 10th Dist. No. 96APE06-724, 1996 WL 715471 14-15

Mustric v. Penn Traffic Corp.
(September 7, 2000), 10th Dist. No. 00AP-277, 2000 WL 1264526 . . . . . 17, 20

Permanent Gen. Cos. Ins. Co. v. Corrigan
(May 24, 2001), 8th Dist. No. 78290, 2001 WL 563072 . . . . . 17, 20, 21

Pewitt v. Roberts
8th Dist. No. 85334, 2005-Ohio-4298, 2005 WL 1994447 15

Plumb v. River City Erectors, Inc.
(10th Dist. 2000), 136 Ohio App.3d 684, 737 N.E.2d 610 . . . . . 8, 10

Sorrell v. Estate of Datko
(7th Dist.), 147 Ohio App.3d 319, 2001-Ohio-3460, 770 N.E.2d 608 23

Spencer v. Magic Twanger Restaurant
(April 1, 1998), 7th Dist. No. 96-CA-12, 1998 WL 158858 9-10

Thomas v. Freeman (1997)
79 Ohio St.3d 221, 680 N.E.3d 997 . . . . . 21, 22

Wells v. Michael
10th Dist. No. 05AP-1353, 2006-Ohio-5871, 2006 WL 3199281 23

West v. Otis Elevator Co.
(10th Dist. 1997), 118 Ohio App.3d 763, 694 N.E.2d 93 6

Whitman v. Chas. F. Mann Painting Co.
6th Dist. No. L-04-1114, 2005-Ohio-245, 2005 WL 126652 . . . . . 9, 10, 23-24

STATUTES

R.C. 2305.10(A) 11

R.C. 2305.19 . . . . . 16, 21, 22

R.C. 2305.19(A) 13, 16, 17, 19, 20, 22, 23, 24

RULES

Civ.R. 3(A) 13, 14, 16

Civ.R. 4(E) 24

Civ.R. 15(C) 5, 11-12

Civ.R. 15(D) 5, 6, 7, 9, 11, 12, 13, 17, 18, 19, 20, 23, 24

STATEMENT OF FACTS

On May 28, 2002, Appellee John A. LaNeve ("LaNeve") was allegedly injured when, during the course and scope of his employment with Atlas Recycling, Inc. ("Atlas"), he opened a container box and was exposed to hazardous chemicals. (Complaint ¶4; Supplement ("Supp.") 006).

On May 28, 2004, the day the statute of limitations expired, LaNeve and his wife filed a Complaint in the Trumbull County Court of Common Pleas naming Atlas as a Defendant and stating claims for employer intentional tort, negligence, and loss of consortium.[1] (Supp. 005-010). The Complaint also named five John Does as Defendants: John Doe No. 1 ("Manufacturer/Owner of the subject container box"); John Doe No. 2 ("Distributor"); John Doe No. 3 ("Lessor/Lessee, an entity having control, dominion or ownership of the subject container box"); and John Doe Nos. 4 and 5 ("[W]ho may have some interest or responsibility concerning the subject container box"). (Complaint ¶12; Supp. 008). The Complaint did ***not*** aver that the LaNeves could not discover the names of the John Doe Defendants. Moreover, the Summons accompanying the Complaint did ***not*** contain the words "name unknown." (Supp. 012).

On May 6, 2005, the LaNeves filed an Amended Complaint adding China Shipping (North America) Holding Co., Ltd. ("China Shipping") and ContainerPort Group, Inc. ("ContainerPort") as Defendants. (Supp. 015-021). The Amended Complaint did ***not*** aver that China Shipping and ContainerPort were being substituted for one or more of the previously designated John Doe Defendants.

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[1]Atlas is not a party to this appeal.

An "Instructions for Service" addendum accompanying the Amended Complaint directed the Clerk of Court as follows:

> Please issue service of summons along with a copy of the Amended Complaint upon Defendants, CHINA SHIPPING (NORTH AMERICA) HOLDING CO., LTD. c/o Norton Lines, 1855 W. 52nd Street, Cleveland, Ohio 44102-3337 and CONTAINERPORT GROUP, INC., 1340 Deopt [sic] Street, Cleveland, Ohio 44116 by ***CERTIFIED MAIL*** and make the same returnable in accordance with the law. [emphasis in original]

(Supp. 021). The Summons accompanying the Amended Complaint did ***not*** contain the words "name unknown." (Supp. 022).

Certified mail service was effected upon ContainerPort on May 26, 2005 (Trial Court Docket ("T.D." No. 15; Supp. 002), and certified mail service was effected upon China Shipping on June 2, 2005 (T.D. No. 17; Supp. 002).

On July 1, 2005, ContainerPort filed an Answer to the Amended Complaint, asserting, inter alia, the affirmative defenses of failure to state a claim upon which relief may be granted, the statute of limitations, and failure of and/or improper service. (T.D. No. 21; Supp. 002). On July 28, 2005, China Shipping filed a Motion to Dismiss the Amended Complaint for failure to state a claim under Civ.R. 12(B)(6). (T.D. No. 25; Supp. 003). China Shipping argued that it had not been properly served under Civ.R. 15(D) and Civ.R. 3(A), that the relation-back provisions of Civ.R. 15(C) did not apply, and that the LaNeves' claims were therefore barred by the statute of limitations. On August 23, 2005, ContainerPort filed a Motion to Dismiss asserting similar arguments. (T.D. No. 29; Supp. 003).

On February 7, 2006, the trial court entered an Order granting ContainerPort's and China Shipping's Motions to Dismiss and dismissing with prejudice the LaNeves' claims against

ContainerPort and China Shipping. (Appendix "Appx." A71). On March 2, 2006, due to pending Cross-Claims, the trial court entered a Nunc Pro Tunc Order directing that "there is no just reason for delay." (Appx. A70).

On March 7, 2006, the LaNeves filed a Notice of Appeal of the trial court's judgment. (T.D. No. 42; Supp. 004). On June 11, 2007, by way of Opinion (Appx. A57-A69) and Judgment Entry (Appx. A56), the Court of Appeals, Eleventh Appellate District, Trumbull County, reversed the judgment of the trial court and remanded for further proceedings. The Court of Appeals opined:

> 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). . . . [T]his was the equivalent of a voluntary dismissal and refiling: i.e., a failure "otherwise than upon the merits," bringing the savings statute into operation. . . . 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).
>
> 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.

> 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 the 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. [emphasis in original]

(Appx. A61-A63).

On June 20, 2007, ContainerPort and China Shipping filed a Joint Motion to Certify a Conflict. By way of Judgment Entry entered on June 29, 2007 (Appx. A48-A55), the Court of Appeals granted the Motion in part,[2] certifying the following question to this Court:

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

(Appx. A52).

On July 3, 2007, ContainerPort filed a Notice of Appeal (2007-1199)(Appx. A1-A3), and on July 27, 2007, ContainerPort filed a Notice of Certified Conflict (2007-1373)(Appx. A4-A47). The Court accepted both appeals.[3]

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[2]ContainerPort and China Shipping also asked the Court of Appeals to certify a second 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?" The Court of Appeals declined certification of this second issue. (Appx. A48-A55).

[3]On July 3, 2007, China Shipping filed a Second Notice of Appeal (2007-1199), and on July 27, 2007, China Shipping filed a Notice of Certified Conflict (2007-1372). Both appeals were accepted and have been consolidated with the appeals of ContainerPort.

ARGUMENT

PROPOSITION OF LAW NO. I

> A party who files an amended pleading pursuant to Civ.R. 15(D) must (1) aver in his original pleading that the plaintiff could not discover the name of the unknown defendant; (2) include the words "name unknown" in the summons accompanying the amended pleading; and (3) personally serve the summons and amended pleading on the newly-identified defendant in order to invoke the relation-back provisions of Civ.R. 15(C) and avoid the statute of limitations as a bar.[4]

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

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

ContainerPort posits that in a case involving an unknown defendant, a plaintiff must (1) aver in his original pleading that he could not discover the name of the defendant; (2) include the words "name unknown" in the summons; and (3) personally serve the defendant when he is identified.

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[4]If permitted, ContainerPort would amend its First Proposition of Law as follows:

> A party who files an amended pleading pursuant to Civ.R. 15(D) must (1) aver in his original pleading that the plaintiff could not discover the name of the unknown defendant; (2) include the words "name unknown" in the summons accompanying the ***original*** pleading; and (3) personally serve the ***summons accompanying the original pleading <u>and</u> the summons accompanying the amended pleading*** on the newly-identified defendant in order to invoke the relation-back provisions of Civ.R. 15(C) and avoid the statute of limitations as a bar. [emphasis reflecting suggested amendment]

1. A Plaintiff Must Aver in His Original Pleading that He Could Not Discover the Name of the Unknown Defendant

In *Amerine v. Haughton Elevator Co.* (1989), 42 Ohio St.3d 57, 58, 537 N.E.2d 208, this Court recognized that Civ.R. 15(D) contains "specific requirements" that must be followed. One such requirement is that "[w]hen the plaintiff does not know the name of a defendant . . . [t]he plaintiff . . . ***must*** aver in the complaint the fact that he could not discover the name." Civ.R. 15(D)[emphasis added].

Following *Amerine*, Ohio's courts of appeal have strictly enforced this requirement of the Rule. *See, e.g.*, *Gates v. Precision Post* (September 14, 1994), 3rd Dist. No. 9-94-21, 1994 WL 514045 at *1-3, *aff'd on other grounds*, 74 Ohio St.3d 439, 1996-Ohio-183, 659 N.E.2d 1241 (affirming entry of summary judgment in favor of defendants for plaintiff's ***failure to allege in complaint that he was unable to discover names of defendants***); *West v. Otis Elevator Co.* (10th Dist. 1997), 118 Ohio App.3d 763, 766, 694 N.E.2d 93 (plaintiffs' ***failure to include within body of complaint that they could not discover names of John Doe defendants*** failed to meet requirements of Civ.R. 15(D)); *Lawson v. Holmes, Inc.* (12th Dist.), 166 Ohio App.3d 857, 2006-Ohio-2511, 853 N.E.2d 712, at ¶21 ("***[S]trict*** compliance with Civ.R. 15(D) requires that the necessary averment [***that the plaintiff could not discover the name of the unknown defendant***] be made in the original complaint[.]").

Appellees herein did ***not*** aver in their Complaint that they could not discover the names of the John Does Defendants identified therein. Rather, Appellees merely averred:

> 12. Defendants, John-Doe No. #1 – Manufacture[r]/Owner of the subject container box and/or John-Doe No. #2 – Distributor and/or John-Doe No. #3 – Lessor/Lessee, an entity having control, dominion, or ownership of the subject box and/or John-Doe Numbers #4 and No.

> #5, who may have some interest or responsibility concerning the subject container box, (hereinafter referred to collectively as "JOHN-DOE"), were the manufacture[r]/owner and/or distributor and/or lessor/lessee and/or parties of interest of and for the subject container box which contained hazardous chemicals that directly caused Plaintiff, John A. LaNeve's injuries.

(Supp. 008). The requirement that a plaintiff aver in his complaint that he could not discover the name of a defendant is not a mere technical requirement. Rather, it serves an important purpose: To discourage the filing of complaints by complacent plaintiffs who undertake ***no*** affirmative acts, but rather name unidentified defendants in the hope that within a year they ***might*** discover a missing party to designate.[5] Requiring a plaintiff to aver in his complaint that he ***could not*** discover the name of a defendant encourages due diligence.

In the present case, lacking an averment that the true names of the John Doe Defendants could not be discovered, Appellees failed to satisfy the first prong of the Civ.R. 15(D) requirements.

2. A Plaintiff Must Include the Words "Name Unknown" in the Summons

Civ.R. 15(D) provides: "When the plaintiff does not know the name of a defendant . . . the summons must contain the words 'name unknown[.]'" In *Amerine*, this Court concluded that a plaintiff's failure to include the words "name unknown" in a summons failed to meet the "specific requirements" of Civ.R. 15(D). *Id.*, 42 Ohio St.3d at 58.

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[5]Indeed, there is authority to suggest that the use of Civ.R. 15(D) is limited to the situation where the defendant and his whereabouts are known, but not his name (***not*** the situation where the identity of a defendant is wholly unknown). *See Collins v. State of Ohio, Dep't of Natural Resources* (January 6, 1983), 10th Dist. No. 82AP-370, 1983 WL 3311 at *4-5 (quoting McCormac, *Ohio Civil Rules Practice* 199, §9.06 (1970)("[Civ.R. 15(D)] should be used only in an emergency situation where the ***name*** of the defendant cannot be discovered before the action must be commenced to toll the statute of limitations. In that case actual service which must be personal must be made on the defendant within one year. Before judgment can be taken, it is necessary to discover the name and amend the pleadings accordingly.").

Following *Amerine*, Ohio's courts of appeal have strictly enforced this requirement of the Rule. *See, e.g.*, *Miller v. American Family Ins. Co.*, 6th Dist. No. OT-02-011, 2002-Ohio-7309 at ¶37, 2002 WL 31888219 (since ***summons on amended complaint did not contain words "name unknown"*** requirements of Civ.R. 15(D) were not met); *Mitulski v. USS/Kobe Steel Co.* (May 26, 1999), 9th Dist. Nos. 98CA007085, 98CA007105, 1999 WL 334789 at *2-3, *appeal not allowed* (1999), 87 Ohio St.3d 1405, 716 N.E.2d 1168 (plaintiff's ***failure to include words "name unknown"*** in summons that accompanied amended complaint failed to adhere to requirements of Civ.R. 15(D)); *Plumb v. River City Erectors, Inc.* (10th Dist. 2000), 136 Ohio App.3d 684, 686-688, 737 N.E.2d 610 (***failure to include words "name unknown"*** in summons that accompanied amended complaint failed to satisfy requirements of Civ.R. 15(D)).

Admittedly, there is confusion among the appellate courts as to whether the words "name unknown" must appear in the summons accompanying the ***original*** complaint, the summons accompanying the ***amended*** complaint, or ***both***. *Amerine* concluded that "***the*** summons must contain the words 'name unknown,'" but it did not specify ***which*** summons. *Id.*, 42 Ohio St.3d at 58 [emphasis added].

The courts of appeal in *Miller*, *supra*, *Mitulski*, *supra*, and *Plumb*, *supra* applied the "name unknown" requirement to summonses accompanying ***amended*** complaints. However, other courts of appeal have applied the requirement to summonses accompanying ***original*** complaints. *See, e.g.*, *Mears v. Mihalega* (December 19, 1997), 11th Dist. No. 97-T-0040, 1997 WL 801291 at *2, *appeal not allowed* (1998), 81 Ohio St.3d 1497, 691 N.E.2d 1058 (plaintiff failed to include words "name unknown" in summons accompanying ***original*** complaint); *Loescher v. Plastipak Packaging, Inc.* (3rd Dist.), 152 Ohio App.3d 479, 2003-Ohio-1850, 788 N.E.2d 681, at ¶18 (Civ.R. 15(D) requires

service of ***original*** summons though recognizing that "[t]he rule is not clear as to whether the original summons or the amended summons must contain the required language.").

Regardless of how this Court decides the issue, the Civ.R. 15(D) requirement that "the summons must contain the words 'name unknown'" was ***not*** met in the present case. ***Neither*** the summons accompanying Appellees' Complaint, ***nor*** the summons accompanying Appellees' Amended Complaint, contained the words "name unknown." Consequently, Appellees failed to comply with the second prong of the Civ.R. 15(D) requirements.

3. A Plaintiff Must Personally Serve the Defendant When He Is Identified

Civ.R. 15(D) requires that "[t]he summons . . . must be served personally upon the defendant." In *Amerine*, this Court declared that certified mail service "is clearly ***not*** in accordance with the requirement of Civ.R. 15(D)." *Id.*, 42 Ohio St.3d at 58 [emphasis added].

Following *Amerine*, Ohio's courts of appeal have strictly enforced this requirement of the Rule. *See, e.g.*, *Gaston v. City of Toledo* (6th Dist. 1995), 106 Ohio App.3d 66, 79, 665 N.E.2d 264 ("Only when a plaintiff meets the ***personal*** service requirement under Civ.R. 15(D) can he benefit from the one-year of additional time to perfect service under Civ.R. 3(A)."); *Miller v. American Family Ins. Co.*, 6th Dist. No. OT-02-011, 2002-Ohio-7309 at ¶37, 2002 WL 31888219 (plaintiff who served amended complaint by ***certified mail*** did ***not*** comply with requirements of Civ.R. 15(D)); *Whitman v. Chas. F. Mann Painting Co.*, 6th Dist. No. L-04-1114, 2005-Ohio-245 at ¶8, 2005 WL 126652 (***certified mail*** service of amended complaint ***not*** compliant with Civ.R. 15(D)); *Spencer v. Magic Twanger Restaurant* (April 1, 1998), 7th Dist. No. 96-CA-12, 1998 WL 158858 at *5-6 (service of amended complaint by ***regular mail failed*** to meet Civ.R. 15(D) personal service

requirement); *Hodges v. Gates Mills Towers Apt. Co.* (September 28, 2000), 8th Dist. No. 77278, 2000 WL 1429421 at *3 (plaintiffs' failure to serve amended complaint ***personally*** rendered summary judgment in favor of defendant proper); *Plumb v. River City Erectors, Inc.* (10th Dist. 2000), 136 Ohio App.3d 684, 687, 737 N.E.2d 610 ("***Certified mail*** service does ***not*** fulfill the express language of Civ.R. 15(D).").

Again, there is confusion among the appellate courts as to whether the summons accompanying the ***original*** complaint, the summons accompanying the ***amended*** complaint, or ***both*** must be served personally. *Amerine* concluded that "***the*** summons must be served personally," but it did not specify ***which*** summons. *Id.*, 42 Ohio St.3d at 58 [emphasis added].

The courts of appeal in *Gaston, supra, Miller, supra, Whitman, supra, Spencer, supra, Hodges, supra*, and *Plumb, supra* applied the personal service requirement to summonses accompanying ***amended*** complaints. However, other courts of appeal have applied the personal service requirement to summonses accompanying ***original*** complaints. *See, e.g., McConville v. Jackson Comfort Sys., Inc.* (9th Dist. 1994), 95 Ohio App.3d 297, 304, 642 N.E.2d 416 ("Civ.R. 15(D) specifically requires that the summons [of the ***original*** complaint] must be served personally upon the defendant."); *Easter v. Complete Gen. Constr. Co.*, 10th Dist. No. 06AP-763, 2007-Ohio-1297 at ¶26, 2007 WL 853337 ("[I]n 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."); *Burya v. Lake Metroparks Bd. of Park Comm'rs*, 11th Dist. No. 2005-L-015, 2006-Ohio-5192 at ¶38, 2006 WL 2798294, *rev'd on other grounds*, 114 Ohio St.3d 35, 2007-Ohio-2712, 867 N.E.2d 829 ("Civ.R. 15(D) mandates

personal service of the ***original*** complaint and summons on a John Doe defendant – not the amended complaint and summons.").

At least one court – the Court of Appeals below – has suggested that "prudent counsel should request personal service of ***both*** the original and amended complaints and summons[es][.]" (Appx. A60 (n.1)).

Regardless of how this Court decides the issue, the Civ.R. 15(D) requirement that "[t]he summons . . . must be served personally upon the defendant" was ***not*** met in the present case. ***Neither*** the summons accompanying the original Complaint, ***nor*** the summons accompanying the Amended Complaint, was served personally upon ContainerPort. Rather, service was accomplished by certified mail. Consequently, Appellees failed to comply with the third prong of the Civ.R. 15(D) requirements.

4. A Plaintiff's Failure to Satisfy Any of the Elements of Civ.R. 15(D) Precludes Him From Invoking the Relation-Back Provisions of Civ.R. 15(C)

Appellee's alleged injury occurred on May 28, 2002. Appellees' filed their Complaint on May 28, 2004 – the day the statute of limitations expired.[6] They filed their Amended Complaint on May 6, 2005 – nearly a year ***after*** the statute of limitations expired. Thus, in order for the Amended Complaint to have been timely filed, it must relate back to the date the Complaint was filed.

Civ.R. 15(C) governs the relation-back of amendments. The Rule provides, in pertinent part:

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[6]R.C. 2305.10(A) provides a two-year statute of limitation for an action for bodily injury.

(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. . . .

The law on this point is clear: The relation–back provisions of Civ.R. 15(C) apply ***only*** if the requirements of Civ.R. 15(D) are met. As *Amerine* stated: "***[I]f*** the specific requirements of Civ.R. 15(D) are met, Civ.R. 15(C) ***then*** must be considered[.]" *Id.*, 42 Ohio St.3d at 58 [emphasis added]. *Accord Spencer v. Magic Twanger Restaurant* (April 1, 1998), 7th Dist. No. 96-CA-12, 1998 WL 158858 at *5 ("Civ.R. 15(D)'s requirements ***must*** . . . be met before relation back under Civ.R. 15(C) applies."); *Lawson v. Holmes, Inc.* (12th Dist.), 166 Ohio App.3d 857, 2006-Ohio-2511, 853 N.E.2d 712, at ¶19 ("***[T]he privilege of the relation-back rule***, in cases in which a previously unknown defendant is identified by way of an amended complaint, ***depends upon strict compliance with Civ.R. 15(D)***.").

As heretofore demonstrated, Appellees wholly failed to comply with the requirements of Civ.R. 15(D). As such, they are not permitted to invoke the relation-back provisions of Civ.R. 15(C). Unable to relate their Amended Complaint back to the date of the filing of their Complaint, Appellees' claims against ContainerPort and China Shipping were filed outside of the statute of limitations and are time-barred.

PROPOSITION OF LAW NO. II

An action is not "attempted to be commenced" for purposes of R.C. 2305.19(A), nor does an action "fail otherwise than upon the merits" for purposes of R.C. 2305.19(A), when a plaintiff fails to request and obtain personal service upon a previously identified John Doe in accordance with Civ.R. 15(D).[7]

1. In Order to "Commence" an Action Against a John Doe Defendant under Civ.R. 3(A), a Plaintiff Must Obtain Service Upon the John Doe Defendant Within One Year of the Filing of the Complaint.

Even ***if*** Appellees had complied with the requirements of Civ.R. 15(D)(***which they did not***), such that they were permitted to invoke the relation-back provisions of Civ.R. 15(C)(***which they were not***), Appellees ***still*** failed to commence their action pursuant to Civ.R. 3(A).

Civ.R. 3(A) 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 defendant identified by a fictitious name whose name is later corrected pursuant to Civ.R. 15(D).

In *Amerine*, this Court held that "[i]n 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)." *Id.*, 42 Ohio St.3d at Syllabus. As *Amerine* explained:

> Civ.R. 3(A) . . . specifically states that the use of a fictitious name with subsequent correction, by amendment, of the real name of a defendant under

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[7]If permitted, ContainerPort would amend its Second Proposition of Law as follows:

In a civil action involving a John Doe defendant, an action is not "commenced" under Civ.R. 3(A), nor is it "commenced or attempted to be commenced" under R.C. 2305.19(A), when a plaintiff fails to satisfy any one of the requirements of Civ.R. 15(D), and the action does not "fail otherwise than upon the merits" when a *Goolsby v. Anderson Concrete Corp.* (1991), 61 Ohio St.3d 549, "refiling" occurs outside the statute of limitations.

> Civ.R. 15(D) relates back to the filing of the original complaint and that ***service must be obtained within one year of the filing of the original complaint.*** [emphasis added]

Id., 42 Ohio St.3d at 59.

In the present case, service was ***not*** obtained upon ContainerPort within one year of the filing of Appellees' Complaint. Certified mail service was effected; personal service was required. Consequently, the action against ContainerPort was never commenced under Civ.R. 3(A) and was properly dismissed.

2. The *Goolsby* Exception to the Civ.R. 3(A) Requirement that a Defendant Be Served Within One Year of the Filing of a Complaint Does Not Apply When a Refiling Occurs Outside the Statute of Limitations.

Notwithstanding that Civ.R. 3(A), as applied in *Amerine*, dictated that Appellees' Amended Complaint was never commenced, the Court of Appeals invoked *Goolsby v. Anderson Concrete Corp.* (1991), 61 Ohio St.3d 549, 575 N.E.2d 801, to effect a different result. In *Goolsby*, this Court held:

> When service has not been obtained within one year of filing a complaint, and the subsequent refiling of an identical complaint within rule would provide an additional year within which to obtain service and commence an action under Civ.R. 3(A), an instruction to the clerk to attempt service on the complaint will be equivalent to a refiling of the complaint.

Id., 61 Ohio St.3d at Syllabus.

Thus, *Goolsby* carved out a narrow exception to the Civ.R. 3(A) requirement that a defendant be served within one year of the filing of a complaint. The rationale for the exception was aptly articulated by the Tenth Appellate District in *Moh v. Anderson* (December 12, 1996), 10th Dist. No. 96APE06-724, 1996 WL 715471 at *2:

> . . . The rationale underlying the *Goolsby* case was that nothing was gained by forcing a plaintiff to dismiss one lawsuit and file another lawsuit ***which could be filed within the pertinent statute of limitations***. Instead, the Supreme Court of Ohio held that the time allocated for service of process could be extended to the time permitted for the original filing of the complaint ***if the lawsuit was filed more than one year before expiration of the statute of limitations***. . . . [emphasis added]

Plainly, *Goolsby* does not assist Appellees herein. *Goolsby* turned on the fact that the plaintiff could have gained an extra year for perfecting service merely by filing a notice of dismissal and refiling the action. That is, ***the statute of limitations would not have been a bar to the refiling of a subsequent complaint***. In the present case, the statute of limitations ***was*** a bar to the filing of the Amended Complaint. That is, the statute of limitations had run at the time Appellees filed their Amended Complaint.

In sum, *Goolsby* stands for the proposition that if a plaintiff could have dismissed and refiled to save his case, then instructions to serve the complaint ***may*** be construed as the equivalent of a refiling in order to avoid impediments to the expeditious administration of justice. In the present case, even ***if*** under *Goolsby* Appellees' instructions to the clerk to serve ContainerPort constituted the equivalent of the refiling of a complaint, such refiling (the Amended Complaint) was ***still*** untimely because it was filed outside the statute of limitations. *See Fetterolf v. Hoffman-LaRoche, Inc.* (11th Dist. 1995), 104 Ohio App.3d 272, 279-280, 661 N.E.2d 811 (limiting application of *Goolsby* to cases where "refiling" date occurs ***prior*** to expiration of statute of limitation); *Pewitt v. Roberts*, 8th Dist. No. 85334, 2005-Ohio-4298, 2005 WL 1994447, at ¶¶15-16 ("Even if we accept that the action was 'commenced' [under *Goolsby*] . . . it was not ***timely*** commenced within two years from the date her cause of action arose[.]").

Consequently, even ***if*** under *Goolsby* Appellees' action was "commenced" for purposes of Civ.R. 3(A), it was not ***timely*** commenced.

3. R.C. 2305.19 Only Applies to Actions that Are "Commenced or Attempted to Be Commenced" and that "Fail Otherwise Upon the Merits."

In yet a further attempt to effect the result it desired, the Court of Appeals, ***sua sponte***, invoked R.C. 2305.19(A). The Court of Appeals opined: "[Appellees' filing of their Amended Complaint] was the equivalent of a voluntary dismissal and refiling: i.e., a failure 'otherwise than upon the merits,' bringing the savings statute [R.C. 2305.19] into operation." (Appx. A62).

R.C. 2305.19(A) provides:

> In any action that is commenced or ***attempted to be commenced***, if in due time a judgment for the plaintiff is reversed or if the plaintiff ***fails otherwise than upon the merits***, the plaintiff . . . 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 original applicable statute of limitations, whichever occurs later. . . . [emphasis added]

In order for R.C. 2305.19(A) to apply, two things are required: (1) an action "commenced or attempted to be commenced"; and (2) an action disposed of "otherwise than upon the merits." Neither requirement was met in the present case.

With regard to the first requirement, the Court of Appeals held that an action is "attempted to be commenced" when "a would-be plaintiff has tried to commence, without success[.]" (Appx. A63). As the Court of Appeals reasoned:

> . . . 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.
>
> 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. [emphasis in original]

(Appx. A63). The Court of Appeals erred in both its holding and its reasoning.

First and foremost, other Ohio appellate courts considering the issue have held that a plaintiff's failure to serve a formerly fictitious, later identified defendant as required by Civ.R. 15(D) is ***not*** an "attempt to commence" sufficient to invoke R.C. 2305.19(A). *See Mustric v. Penn Traffic Corp.* (September 7, 2000), 10th Dist. No. 00AP-277, 2000 WL 1264526 at *5 ("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."); *Permanent Gen. Cos. Ins. Co. v. Corrigan* (May 24, 2001), 8th Dist. No. 78290, 2001 WL 563072 at *3 ("Because of [the] 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."); *Kramer v. Installations Unlimited, Inc.* (5th Dist.), 147 Ohio App.3d 350, 2002-Ohio-1844, 770 N.E.2d 632, ¶27 ("Only when the "attempt to commence" is made according to the Rules of Civil Procedure may a plaintiff avail himself or herself of the savings statute.").

Secondly, this Court has expressly declared that the Rules of Civil Procedure are ***not*** to be disregarded "to assist a party who has failed to abide by them." *Gliozzo v. University Urologists of Cleveland*, 114 Ohio St.3d 141, 2007-Ohio-3762, 870 N.E.2d 714, ¶16. In *Gliozzo*, the Court held

that "[w]hen the affirmative defense of insufficiency of service of process is properly raised and properly preserved, a party's active participation in the litigation of a case does not constitute waiver of that defense." *Id.* at ¶18. As the Court explained:

> [Plaintiff] also argues that allowing a party to file a motion to dismiss based upon insufficient service after that party has defended on the merits encourages legal gamesmanship and prevents the efficient administration of justice. [Plaintiff] points out that although [Defendants] were aware of the deficient service, they did not move to dismiss the case on that basis until after the time to perfect service had expired, denying him the opportunity to remedy the error. He also contends that because the primary objective of the rules relating to service of process is to provide notice, a strict application of the rules in this case simply elevates form over function.
>
> Regardless of how [Defendants]' behavior is characterized, the 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***." *Bell v. Midwestern Educational Servs., Inc.* (1993), 89 Ohio App.3d 193, 204, 624 N.E.2d 196. The rules clearly declare that an action is commenced when service is perfected. Civ.R. 3(A). Furthermore, we have held, "Inaction upon the part of a defendant who is not served with process, even though he might be aware of the filing of the action, does not dispense with the necessity of service." *Maryhew* [*v. Yova*], 11 Ohio St.3d [154], 157, 11 OBR 471, 464 N.E.2d 538. ***The obligation is upon plaintiffs to perfect service of process***; defendants have no duty to assist them in fulfilling this obligation. *Id.*, 11 OBR 471, 464 N.E.2d 538.
>
> Whether [Defendants]' conduct constituted gamesmanship or good litigation strategy, ***they followed the rules***. If such behavior should not be permitted in the future, the proper avenue for redress would be to seek to change those rules. [emphasis added]

Id. at ¶¶15-17. The same reasoning applies in the present case. Civ.R. 15(D) cannot be disregarded simply because Appellees failed to follow it. Indeed, and contrary to the opinion of the Court of Appeals, the "technical service requirements" of Civ.R. 15(D) ***are*** mandatory and ***may*** "trump" other considerations.

The second element of R.C. 2305.19(A) requires that an action be disposed of "otherwise than upon the merits." The Court of Appeals held that Appellees' filing of their Amended Complaint, with accompanying instructions for service, "was ***the equivalent of a voluntary dismissal*** and refiling: i.e., a failure 'otherwise than upon the merits[.]'" (Appx. A62). However (and for the same reason that *Goolsby* is limited to cases where a "refiling" occurs ***prior*** to expiration of the statute of limitation), the filing of the Amended Complaint herein ***could not*** have been a voluntary dismissal because it was filed outside the statute of limitations. *See LaBarbera v. Batsch* (1967), 10 Ohio St.2d 106, 227 N.E.2d 55, Syllabus (dismissal of action for failure to file within statute of limitations is ***dismissal on merits***); *Kraus v. Maurer*, 8th Dist. No. 83182, 2004-Ohio-748 at ¶34, 2004 WL 308112 (failure to commence within statutory period is ***dismissal with prejudice***).

In sum, because Appellees did not "commence or attempt to commence" their action against ContainerPort, and because Appellees' action against ContainerPort did not "fail otherwise than upon the merits," R.C. 2305.19(A) does not apply.

CERTIFIED CONFLICT ISSUE

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

The Court of Appeals held that an action is "attempted to be commenced" when "a would-be plaintiff has tried to commence, without success[.]" (Appx. A63). The Court of Appeals reasoned that "[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. A63). As indicated heretofore, such ruling is contrary to the weight of Ohio appellate authority on the issue. At least three appellate courts have held that a plaintiff's failure to serve a formerly fictitious, later

identified defendant as required by Civ.R. 15(D) is ***not*** an "attempt to commence" sufficient to invoke R.C. 2305.19(A).

In *Mustric v. Penn Traffic Corp.* (September 7, 2000), 10th Dist. No. 00AP-277, 2000 WL 1264526, the Tenth Appellate District held that a plaintiff's failure to serve a formerly fictitious, later identified defendant by personal service, as required by Civ.R. 15(D), was not an "attempt to commence" sufficient to invoke the savings statute. As *Mustric* explained:

> . . . [W]hen a plaintiff is permitted to amend his or her complaint to specifically name a former John Doe defendant, such defendant must be personally served pursuant to Civ.R. 15(D). Here, appellant did not do so. Rather, appellant served [the formerly fictitious, later identified defendant] by certified mail. The question becomes, did appellant attempt to serve [the defendant] such that the savings statute is applicable. We find that appellant did not.
>
> We believe that an attempt to commence as set forth in R.C. 2305.19 must be pursuant to a method of service that is proper under the Civil Rules. Here, appellant's method of attempting to commence the action was pursuant to certified mail service, an improper method under Civ.R. 15(D). Not only did appellant not actually serve [the defendant] by personal service, appellant did not even attempt to serve [the defendant] by personal service. Personal service is the only method by which a now named John Doe defendant may be served. Hence, appellant did not properly attempt to commence the action against [the defendant].
>
> Because appellant did not properly attempt to commence the action against [the defendant], the savings statute is inapplicable. Therefore, appellant failed to bring the present action against [the defendant] within the applicable statute of limitations, and summary judgment in favor of [the defendant] was appropriate. . . .

Id., 2000 WL 1264526 at *5.

In *Permanent Gen. Cos. Ins. Co. v. Corrigan* (May 24, 2001), 8th Dist. No. 78290, 2001 WL 563072, the Eighth Appellate District held similarly:

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

Id., 2001 WL 563072 at *3.

In *Kramer v. Installations Unlimited, Inc.* (5th Dist.), 147 Ohio App.3d 350, 2002-Ohio-1844, 770 N.E.2d 632, the Fifth Appellate District followed suit:

> The cases reviewed by this court support the conclusion that the attempt must be made according to the Rules of Civil Procedure. Only when the "attempt to commence" is made according to the Rules of Civil Procedure may a plaintiff avail himself or herself of the savings statute. Further, we have found no case law that has permitted a plaintiff to use the saving statute where service has 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.

Id., 2002-Ohio-1884 at ¶27.

Although not dispositive of the issue, the decision of this Court in *Thomas v. Freeman* (1997), 79 Ohio St.3d 221, 680 N.E.2d 997, is likewise instructive. In *Thomas*, the Court found that a plaintiff had "attempted to commence" an action when he made repeated efforts to serve the named defendants. The plaintiff was ultimately unable to effectuate service, and his claims were dismissed for lack of prosecution. The Court held that the plaintiffs' claims were saved by R.C. 2305.19, and that the plaintiff therefore had one year from the date of dismissal to re-file his claim. While *Thomas* did not entirely define the scope of what is "attempted commencement," its language suggests that

only a ***good faith*** attempt at serving a defendant satisfies the "attempted commencement" requirement of R.C. 2305.19(A). Indeed, the United States Court of Appeals for the Sixth Circuit held as much in *Coleman v. Department of Rehabilitation & Corrections* (6th Cir. (Ohio) August 28, 2002), N0. 01-3169, 46 Fed.Appx. 765, in concluding that a plaintiff's attempt to serve John Doe defendants by certified mail did ***not*** constitute an "attempt to commence" for purposes of R.C. 2305.19:

> *Mustric*, it seems, extends Thomas' logic to invoke a type of ***fault*** requirement. That is, after *Mustric*, a plaintiff can not invoke the Savings Statute if the reason the action was dismissed was the plaintiff's failure to follow the correct procedures. Contrary to the district court's opinion, *Mustric* does not stand for the proposition that the Ohio Savings Statute prevents a plaintiff from using a John Doe moniker in an action preserved by the Savings Clause. *Mustric*'s proposition is much simpler than that – ***if the dismissal is due to the plaintiff's own errors, then the plaintiff's action will not be saved.***
>
> *Mustric*, as an unpublished decision of the Ohio Court of Appeals, is not decisive if we believe the Ohio Supreme Court would have ruled otherwise. Where the state's highest court has not decided the issue before us, we may "not disregard a decision of the state appellate court on point, unless [we are] convinced by other persuasive data that the highest court of the state would decide otherwise." . . . While neither *Thomas* nor *Mustric* is completely on point, each provides insight into this issue. *Mustric* is persuasive for its view that a plaintiff whose case is dismissed due to his own neglect cannot later take advantage of the Savings Statute. This is especially helpful as a logical extension of *Thomas*, wherein the Ohio Supreme Court held the Savings Statute can be invoked by a plaintiff who followed the ***proper*** statutory service procedures, even if the service nonetheless failed. ***If this issue were presented, we believe the Ohio Supreme 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.*** . . . [emphasis added] [citations omitted]

Id., 46 Fed.Appx. at 770.[8]

This case presents the Court with an opportunity to adopt the "perfectly logical rule" that a plaintiff cannot benefit from the one-year extension of time provided by R.C. 2305.19(A) if the dismissal of the plaintiff's case was due to his own neglect. Adopting such a rule would be consistent with the policy expressed in *Gliozzo* (that the Civil Rules cannot be disregarded to assist a party who has failed to abide by them) and the stated policy that underlies the enactment of statutes of limitation in Ohio:

> Statutes of limitation are . . . designed to ensure an end to litigation and to establish a state of stability and repose. . . . Although it was said many years ago in Ohio . . . and elsewhere . . . that the statute of limitations was a disfavored defense, the modern and better view is that it is as favored as any other defense, since it is based on an important legislative policy. . . .
>
> Although it has been said many times that the savings statute . . . is a remedial statute and to be liberally construed . . . the court is reluctant to infer that this principle is of more importance than the policies mentioned without completely clear evidence of legislative intent. [citations omitted]

LaBarbera v. Batsch (1967), 10 Ohio St.2d 106, 114, 227 N.E.2d 55. *Accord Lawson v. Holmes, Inc.* (12th Dist.), 166 Ohio App.3d 857, 2005-Ohio-2511, 853 N.E.2d 712, ¶25 (citing *Whitman v. Chas. F. Mann Painting Co.*, 6th Dist. No. L-04-1114, 2005-Ohio-245 at ¶11, 2005 WL 126652)("Neither legislative intent nor public policy supports an extension of the statute of limitations. R.C. 2305.10 and the other applicable statutes of limitation mandate that complaints be

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[8]It bears noting that the "fault" analysis employed by *Coleman* has been utilized by Ohio appellate courts, albeit in contexts unrelated to Civ.R. 15(D). *See Sorrell v. Estate of Datko* (7th Dist.), 147 Ohio App.3d 319, 2001-Ohio-3460, 770 N.E.2d 608, ¶24 (plaintiffs' demand of service upon non-entity demonstrated "lack of . . . ***diligence***" required by savings statute such that plaintiff did not "attempt to commence" action for purpose of savings statute); *Wells v. Michael*, 10th Dist. No. 05AP-1353, 2006-Ohio-5871 at ¶14, 2006 WL 3199281 (attempting service upon party that does not exist is ***not*** "attempt to commence" for purposes of savings statute).

filed within specific periods of time. That mandatory language 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.").

In the present case, the record contains ***no*** evidence of an attempt by Appellees to discover the identity of ContainerPort. Indeed, at the time Appellees filed their Amended Complaint, the case was already ripe for dismissal under Civ.R. 4(E).[9] Appellees' lack of effort, combined with their lack of diligence, furthers ***no*** policy interest and militates ***against*** a finding that R.C. 2305.19(A) operates to extend the statute of limitations in the present case.

R.C. 2305.19(A) does ***not*** apply when a plaintiff fails to comply strictly with the requirements of Civ.R. 15(D).

CONCLUSION

Based upon the foregoing, ContainerPort respectfully requests that the judgment of the Court of Appeals be reversed, and that the judgment of the trial court be reinstated.

ContainerPort further requests that this Court answer the certified conflict question in the negative.

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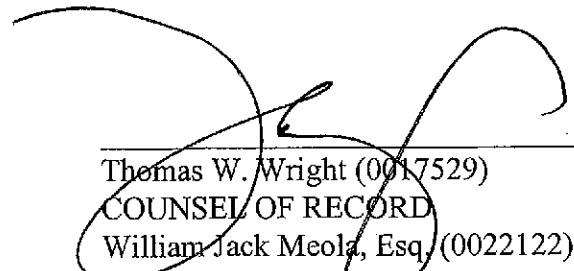
[9]Civ.R. 4(E) provides that "[i]f a service of the summons and complaint is not made upon a defendant within six months after the filing of the complaint and the party on whose behalf such service was required cannot show good cause why such service was not made within that period, the action shall be dismissed as to that defendant without prejudice upon the court's own initiative with notice to such party or upon motion." The Complaint was filed on May 28, 2004. Thus, and as to the John Doe Defendants, the case was ripe for dismissal on November 28, 2004. The Amended Complaint was not filed until May 6, 2005.

Respectfully submitted,



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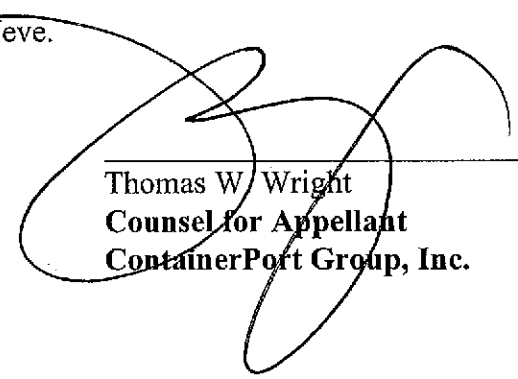
CERTIFICATE OF SERVICE

I certify that a copy of the foregoing Merit Brief of Appellant ContainerPort Group, Inc. was sent by ordinary U.S. mail this 19th day of December 2007 to: Julia R. Brouhard, Esq. and Robert T. Coniam, Esq., Ray, Robinson, Carle & Davies P.L.L., 1717 E. Ninth Street, Suite 1650, Cleveland, Ohio 44114-2878, Attorneys for Appellant China Shipping (North America) Holding Co., Ltd.; and Robert F. Burkey, Esq., 200 Chestnut Ave. NE, Warren, Ohio 44483, Attorney for Appellees John A. LaNeve and Melissa LaNeve.



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

IN THE SUPREME COURT OF OHIO

JOHN A. LaNEVE, et al.,	)	Supreme Court Case No.:
	)	
Appellees	)	07-1199
	)	
v.	)	
	)	
ATLAS RECYCLING, INC.	)	
	)	
Defendant	)	On Appeal from the Trumbull County
	)	Court of Appeals, Eleventh Appellate
v.	)	District
	)	
CHINA SHIPPING (NORTH AMERICA)	)	
HOLDING CO., LTD., et al.,	)	Court of Appeals Case No. 2006-T-0037
	)	
Appellants	)	

FILED
JUL 03 2007
CLERK OF COURT
SUPREME COURT OF OHIO

NOTICE OF APPEAL OF APPELLANT CONTAINERPORT GROUP, INC.

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Counsel for Appellees
John LaNeve and Melissa LeNeve

NOTICE OF APPEAL OF APPELLANT CONTAINERPORT GROUP, INC.

Appellant ContainerPort Group, Inc. 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,

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Counsel for Appellant
ContainerPort Group, Inc.

CERTIFICATE OF SERVICE

I certify that a copy of this Notice of Appeal of Appellant ContainerPort Group, Inc. was sent by ordinary U.S. mail this 24 day of July 2007, to Julia R. Brouhard, Esq. and Robert T. Coniam, Esq., Ray, Robinson, Carle & Davies PLL, 1717 E. Ninth Street, Suite 1650, Cleveland, Ohio 44114, Counsel for Appellant China Shipping (North America) Holding Co., Ltd.; and Robert F. Burkey, Esq., 200 Chestnut Ave. NE, Warren, Ohio 44483, Counsel for Appellees John LaNeve and Melissa LaNeve.

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

IN THE SUPREME COURT OF OHIO

JOHN A. LaNEVE, et al.,	)	Supreme Court Case No.:
	)	
Appellees	)	**07-1373**
	)	
v.	)	
	)	
ATLAS RECYCLING, INC.	)	
	)	
Defendant	)	On Appeal from the Trumbull County
	)	Court of Appeals, Eleventh Appellate
v.	)	District
	)	
CHINA SHIPPING (NORTH AMERICA)	)	
HOLDING CO., LTD., et al.,	)	Court of Appeals Case No. 2006-T-0032
	)	
Appellants	)	

FILED
JUL 27 2007
CLERK OF COURT
SUPREME COURT OF OHIO

NOTICE OF CERTIFIED CONFLICT OF APPELLANT CONTAINERPORT GROUP, INC.

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NOTICE OF CERTIFIED CONFLICT OF APPELLANT CONTAINERPORT GROUP, INC.

Pursuant to S.Ct.Prac.R. IV, Sections 1 and 4, Appellant ContainerPort Group, Inc. ("ContainerPort") hereby gives notice that on June 29, 2007, the Court of Appeals for Trumbull County, Eleventh Appellate District, in Case No. 2006-T-0032, issued a Judgment Entry certifying a conflict among Ohio courts of appeal on the following question:

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

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

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

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

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

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

Does service by certified mail on a "John Doe" defendant, more than one year after the original complaint was filed, meet the requirements of Civ.R. 15(D) and the controlling Ohio Supreme Court case of *Amerine v. Haughton Elevator Co.* (1989), 42 Ohio St.3d 57?

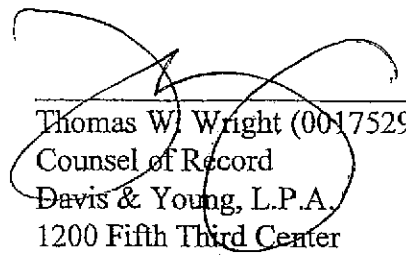
A discretionary appeal is presently pending before this Court in Case No. 07-1119, wherein ContainerPort has proposed the following Propositions of Law that relate to both the certified and non-certified questions here in issue:

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

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

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

Respectfully submitted,



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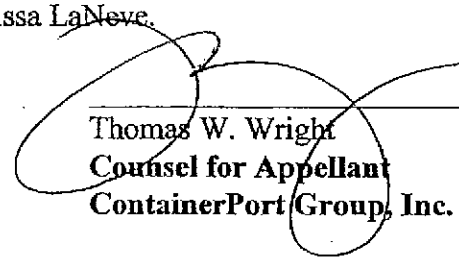
Counsel for Appellant
ContainerPort Group, Inc.

CERTIFICATE OF SERVICE

I certify that a copy of this Notice of Certified Conflict of Appellant ContainerPort Group, Inc. was sent by ordinary U.S. mail this 26th day of July 2007, to Julia R. Brouhard, Esq. and Robert T. Coniam, Esq., Ray, Robinson, Carle & Davies PLL, 1717 E. Ninth Street, Suite 1650, Cleveland, Ohio 44114, Counsel for Appellant China Shipping (North America) Holding Co., Ltd.; and Robert F. Burkey, Esq., 200 Chestnut Ave. NE, Warren, Ohio 44483, Counsel for Appellees John LaNeve and Melissa LaNeve.



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

FILED
COURT OF APPEALS
JUN 11 2007
TRUMBULL COUNTY, OH
KAREN INFANTE ALLEN, CLERK

THE COURT OF APPEALS

ELEVENTH APPELLATE DISTRICT

TRUMBULL COUNTY, OHIO

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

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

Judgment: Reversed and remanded.

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

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

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

COLLEEN MARY O'TOOLE, J.

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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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. GRENDELL, J., dissents with a Dissenting Opinion.

DIANE V. GRENDELL, 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 refilling 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,

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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"); *Fetterrolf 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 statue is also contrary to precedent. See *Mustric v. Penn Traffic Corp.* (Sept. 7, 2000), 10th Dist. No. 00AP-277, 2000 Ohio App. LEXIS 4032, at

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

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

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

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

STATE OF OHIO)
)SS.
COUNTY OF TRUMBULL)

IN THE COURT OF APPEALS

ELEVENTH DISTRICT

JOHN A. LaNEVE, et al.,

Plaintiffs-Appellants,

- vs -

ATLAS RECYCLING, INC.,

Defendant,

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

Defendants-Appellees.

JUDGMENT ENTRY

CASE NO. 2006-T-0032

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

JUDGE COLLEEN MARY O'TOOLE

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

DIANE V. GRENDELL, 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 -

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Defendant,

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

Defendants-Appellees.

JUDGMENT ENTRY

CASE NO. 2006-T-0032

FILED
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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 apellees 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. GRENDELL, J., concurs in part, dissents in part, with a Concurring/ Dissenting Opinion.

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

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

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

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

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

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

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

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

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

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

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

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

meet the requirements of Civ.R. 15(D) and the controlling Ohio Supreme Court case of *Amerine v. Haughton Elevator Co.* (1989), 42 Ohio St.3d 57?"

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

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

Court of Appeals of Ohio,
Fifth District, Licking County.
KRAMER, Appellant,
v.
INSTALLATIONS UNLIMITED, INC., et al., Appellees.
No. 01 CA 73.
Decided Apr. 12, 2002.

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

West Headnotes

[1] KeyCite Notes

30 Appeal and Error
30XVI Review
30XVI(F) Trial De Novo
30k892 Trial De Novo
30k893 Cases Triable in Appellate Court
30k893(1) k. In General. Most Cited Cases

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

[2] KeyCite Notes

307A Pretrial Procedure
307AIII Dismissal
307AIII(B) Involuntary Dismissal
307AIII(B)4 Pleading, Defects In, in General
307Ak622 k. Insufficiency in General. Most Cited Cases

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

[3] KeyCite Notes

30 Appeal and Error
30XVI Review
30XVI(F) Trial De Novo
30k892 Trial De Novo
30k895 Scope of Inquiry
30k895(2) k. Effect of Findings Below. Most Cited Cases

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

[4] KeyCite Notes

313 Process
313II Service
313II(A) Personal Service in General
313k56 Persons to Be Served
313k57 k. In General. Most Cited Cases

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

[5] KeyCite Notes

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

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

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

[6] KeyCite Notes

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

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

[7] KeyCite Notes

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

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

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

[8] KeyCite Notes

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

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

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

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

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

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

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

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

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

I

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

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

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

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

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

{¶ 12} "When the plaintiff does not know the name of a defendant, that defendant may be designated in a pleading or proceeding by any name and *354 description. When the name is discovered, the pleading or proceeding must be amended accordingly. The plaintiff, in such case, must aver in the complaint the fact that he could not discover the name. The summons must contain the words 'name unknown,' and the copy thereof must be served personally upon the defendant."

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

**635 {¶ 14} "A civil action is commenced by filing a complaint with the court, if service is obtained within one year from such filing upon a named defendant, or upon an incorrectly named defendant whose name is later corrected pursuant to Civ.R. 15(C), or upon a defendant identified by a fictitious

name whose name is later corrected pursuant to Civ.R. 15(D)."

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

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

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

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

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

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

{¶ 21} "In an action commenced, or attempted to be commenced, if in due time a judgment for the plaintiff is reversed, or if the plaintiff falls otherwise than upon the merits, and the time limited for the commencement of such action at the date of reversal or failure has expired, the plaintiff, * * * may commence a new action within one year after such date. * * *"

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

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

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

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

{¶ 25} "We believe that an attempt to commence as set forth in R.C. 2305.19 must be pursuant to a method of service that is proper under the Civil Rules. Here, appellant's method of attempting to commence the action was pursuant to certified mail service, an improper method under Civ.R. 15(D). Not only did appellant not actually serve Ingle Barr by personal service, appellant did not even attempt Ingle Barr by personal service. Personal service is the only method by which a now named John Doe defendant may be served. Hence, appellant did not properly attempt to commence the action against Ingle Barr. Because appellant did not properly attempt to commence the action against Ingle Barr, the savings statute is inapplicable. Therefore, appellant failed to bring the present action against Ingle Barr within the applicable statute of limitations, and summary judgment in favor of Ingle Barr was appropriate. * * *" *Id.* at 2-3, quoting *Mustric v. Penn Traffic Corp.* (Sept. 7, 2000), Franklin App. No. 00AP-277, 2000 WL 1264526.

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

{¶ 27} The cases reviewed by this court support the conclusion that the attempt must be made according to the Rules of Civil Procedure. Only when the ****637** "attempt to commence" is made according to the Rules of Civil Procedure may a plaintiff avail himself or herself of the savings statute. Further, we have found no case law that has permitted a plaintiff to use the saving statute where service failed due to a failure to use the proper method of service under the Rules of Civil Procedure. The cases we have reviewed that permitted the use of the savings statute used the proper method of service as required by the Rules of Civil Procedure, but service was not perfected for whatever reason.

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

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

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

Judgment affirmed.

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

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

END OF DOCUMENT

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

Only the Westlaw citation is currently available.

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

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

Daran P. Kiefer, Esq., Ted M. Traut, Esq., Kreiner & Peters Co., L.P.A., Cleveland, OH, for plaintiffs-Appellants.
James E. Behrens, Esq., Michael S. Schroeder, Esq., Behrens, Gioffre & Schroeder, L.P.A., Cleveland, OH, for defendant-appellee.

JOURNAL ENTRY AND OPINION.

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

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

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

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

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

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

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

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

Civ.R. 15(D) states:

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

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

Civ.R. 15(D) specifically requires that the summons must be served personally upon the defendant. In this case, service was performed by way of certified mail which is clearly not in accordance with the requirement of Civ.R. 15(D). (Emphasis sic.) *Hodges v. Gates Mills Tower Apt. Co.* (September 28, 2000), Cuyahoga App. No. 77278, unreported, citing *Amerline v. Haughton Elevator Co.* (1989), 42 Ohio St.3d 57, 58, 537 N.E.2d 208.

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

Civ.R. 3(A) states:

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

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

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

* * *

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

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

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

We believe that an attempt to commence as set forth in R.C. 2305.19 must be pursuant to a method of service that is proper under the Civil Rules. Here, appellant's method of attempting to commence the action was pursuant to certified mail service, an improper method under Civ.R. 15(D). Not only did appellant not actually serve Ingle Barr by personal service, appellant did not even attempt to serve Ingle Barr by personal service. Personal service is the only method by which a now named John Doe defendant may be served. Hence, appellant did not properly attempt to commence the action against Ingle Barr. Because appellant did not properly attempt to commence the action against Ingle Barr, the savings statute is inapplicable. Therefore, appellant failed to bring the present action against Ingle Barr within the applicable statute of limitations, and summary judgment in favor of Ingle Barr was appropriate. To this extent, appellant's first assignment of error is overruled. (Emphasis added.)

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

*4 Judgment affirmed.

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

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

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

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

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

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

Ohio App. 8 Dist.,2001.
Permanent General Cos Ins. Co. v. Corrigan
Not Reported in N.E.2d, 2001 WL 563072 (Ohio App. 8 Dist.)

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

Only the Westlaw citation is currently available.

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

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

Appeal from the Franklin County Court of Common Pleas.
Thomas Owen Mustric, pro se.
Reminger & Reminger Co., L.P.A., and Lee W. Westfall, for appellee Nationwide Mutual Insurance Company.
George A. Lyons, for appellee Penn Traffic Company.
McNamara and McNamara, for Lisa Weekley Coulter, for appellee Ingle Barr, Inc.

OPINION

TYACK

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

We believe that an attempt to commence as set forth in R.C. 2305.19 must be pursuant to a method of service that is proper under the Civil Rules. Here, appellant's method of attempting to commence the action was pursuant to certified mail service, an improper method under Civ.R. 15(D). Not only

did appellant not actually serve Ingle Barr by personal service, appellant did not even attempt to serve Ingle Barr by personal service. Personal service is the only method by which a now named John Doe defendant may be served. Hence, appellant did not properly attempt to commence the action against Ingle Barr.

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

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

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

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

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

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

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

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

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

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

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

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

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

Judgment affirmed.

KENNEDY and PETREE, JJ., concur.

Ohio App. 10 Dist.,2000.
Mustric v. Penn Traffic Corp.
Not Reported in N.E.2d, 2000 WL 1264526 (Ohio App. 10 Dist.)

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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 apellees 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. GRENDELL, J., concurs in part, dissents in part, with a Concurring/ Dissenting Opinion.

DIANE V. GRENDELL, 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.

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.

Colleen Mary O'Toole

JUDGE COLLEEN MARY O'TOOLE

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

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

FILED
COURT OF APPEALS
JUN 11 2007
TRUMBULL COUNTY, OH
KAREN INFANTE ALLEN, CLERK

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THE COURT OF APPEALS

ELEVENTH APPELLATE DISTRICT

TRUMBULL COUNTY, OHIO

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

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

Judgment: Reversed and remanded.

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

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

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

COLLEEN MARY O'TOOLE, J.

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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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. GRENDELL, J., dissents with a Dissenting Opinion.

DIANE V. GRENDELL, 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 refilling 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,

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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"); *Fetterrolf 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 statue 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.

X-9410

IN THE COURT OF COMMON PLEAS
TRUMBULL COUNTY, OHIO

JOHN A. LaNEVE, et al.	CASE NO. 2004 CV 1266
Plaintiffs	JUDGE W. WYATT MCKAY
vs.	*NUNC PRO TUNC* ORDER OF DISMISSAL OF PLAINTIFFS' CLAIMS AGAINST DEFENDANTS CHINA SHIPPING (NORTH AMERICA) HOLDING CO., LTD., AND CONTAINER PORT GROUP, INC.
ATLAS RECYCLING, INC., et al.	
Defendants	

****

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.

JUDGE W. WYATT MCKAY

Approved:

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 FORTHWITH BY ORDINARY MAIL

JUDGE

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7516

IN THE COURT OF COMMON PLEAS
TRUMBULL COUNTY, OHIO

JOHN A. LaNEVE, et al.,	)	CASE NO. 04-CV-1266 2006 FEB -7 A 8:53
	)	
Plaintiffs,	)	JUDGE W. WYATT MCKAY
	)	
v.	)	**ORDER OF DISMISSAL WITH PREJUDICE OF PLAINTIFFS' CLAIMS AGAINST DEFENDANTS CHINA SHIPPING (NORTH AMERICA) HOLDING CO., LTD., AND CONTAINER PORT GROUP, INC.**
	)	
ATLAS RECYCLING, INC., et al.,	)	
	)	
Defendants.	)	

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.

W. Wyatt McKay

JUDGE W. WYATT MCKAY

Approved:

Julia R. Brouhard

Julia R. Brouhard (0041811)
Robert T. Coniam (0034623)
Attorneys for Defendant
China Shipping (North America) Holdings, Ltd.

Thomas Wright / JB signed per telephone consent 2/3/06

Thomas Wright (0017529)
William Jack Meola (0022122)
Attorney for Defendant
Container Port Group, Inc.

§ 2305.10

Statutes & Session Law

TITLE [23] XXIII COURTS -- COMMON PLEAS

CHAPTER 2305: JURISDICTION; LIMITATION OF ACTIONS

2305.10 Bodily injury or injury to personal property.

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.

(B)(1) For purposes of division (A) of this section, a cause of action for bodily injury that is not described in division (B)(2), (3), (4), or (5) of this section and that is caused by exposure to hazardous or toxic chemicals, ethical drugs, or ethical medical devices accrues upon the date on which the plaintiff is informed by competent medical authority that the plaintiff has an injury that is related to the exposure, or upon the date on which by the exercise of reasonable diligence the plaintiff should have known that the plaintiff has an injury that is related to the exposure, whichever date occurs first.

(2) For purposes of division (A) of this section, a cause of action for bodily injury caused by exposure to chromium in any of its chemical forms accrues upon the date on which the plaintiff is informed by competent medical authority that the plaintiff has an injury that is related to the exposure, or upon the date on which by the exercise of reasonable diligence the plaintiff should have known that the plaintiff has an injury that is related to the exposure, whichever date occurs first.

(3) For purposes of division (A) of this section, a cause of action for bodily injury incurred by a veteran through exposure to chemical defoliants or herbicides or other causative agents, including agent orange, accrues upon the date on which the plaintiff is informed by competent medical authority that the plaintiff has an injury that is related to the exposure, or upon the date on which by the exercise of reasonable diligence the plaintiff should have known that the plaintiff has an injury that is related to the exposure, whichever date occurs first.

(4) For purposes of division (A) of this section, a cause of action for bodily injury caused by exposure to diethylstilbestrol or other nonsteroidal synthetic estrogens, including exposure before birth, accrues upon the date on which the plaintiff is informed by competent medical authority that the plaintiff has an injury that is related to the exposure, or upon the date on which by the exercise of reasonable diligence the plaintiff should have known that the plaintiff has an injury that is related to the exposure, whichever date occurs first.

(5) For purposes of division (A) of this section, a cause of action for bodily injury caused by exposure to asbestos accrues upon the date on which the plaintiff is informed by competent medical authority that the plaintiff has an injury that is related to the exposure, or upon the date on which by the exercise of reasonable diligence the plaintiff should have known that the plaintiff has an injury that is related to the exposure, whichever date occurs first.

(C)(1) Except as otherwise provided in divisions (C)(2), (3), (4), (5), (6), and (7) of this section or in section 2305.19 of the Revised Code, no cause of action based on a product liability claim shall accrue against the manufacturer or supplier of a product later than ten years from the date that the product was

delivered to its first purchaser or first lessee who was not engaged in a business in which the product was used as a component in the production, construction, creation, assembly, or rebuilding of another product.

(2) Division (C)(1) of this section does not apply if the manufacturer or supplier of a product engaged in fraud in regard to information about the product and the fraud contributed to the harm that is alleged in a product liability claim involving that product.

(3) Division (C)(1) of this section does not bar an action based on a product liability claim against a manufacturer or supplier of a product who made an express, written warranty as to the safety of the product that was for a period longer than ten years and that, at the time of the accrual of the cause of action, has not expired in accordance with the terms of that warranty.

(4) If the cause of action relative to a product liability claim accrues during the ten-year period described in division (C)(1) of this section but less than two years prior to the expiration of that period, an action based on the product liability claim may be commenced within two years after the cause of action accrues.

(5) If a cause of action relative to a product liability claim accrues during the ten-year period described in division (C)(1) of this section and the claimant cannot commence an action during that period due to a disability described in section 2305.16 of the Revised Code, an action based on the product liability claim may be commenced within two years after the disability is removed.

(6) Division (C)(1) of this section does not bar an action for bodily injury caused by exposure to asbestos if the cause of action that is the basis of the action accrues upon the date on which the plaintiff is informed by competent medical authority that the plaintiff has an injury that is related to the exposure, or upon the date on which by the exercise of reasonable diligence the plaintiff should have known that the plaintiff has an injury that is related to the exposure, whichever date occurs first.

(7)(a) Division (C)(1) of this section does not bar an action based on a product liability claim against a manufacturer or supplier of a product if all of the following apply:

(i) The action is for bodily injury.

(ii) The product involved is a substance or device described in division (B)(1), (2), (3), or (4) of this section.

(iii) The bodily injury results from exposure to the product during the ten-year period described in division (C)(1) of this section.

(b) If division (C)(7)(a) of this section applies regarding an action, the cause of action accrues upon the date on which the claimant is informed by competent medical authority that the bodily injury was related to the exposure to the product, or upon the date on which by the exercise of reasonable diligence the claimant should have known that the bodily injury was related to the exposure to the product, whichever date occurs first. The action based on the product liability claim shall be commenced within two years after the cause of action accrues and shall not be commenced more than two years after the cause of action accrues.

(D) This section does not create a new cause of action or substantive legal right against any person involving a product liability claim.

(E) An action brought by a victim of childhood sexual abuse asserting any claim resulting from childhood sexual abuse, as defined in section 2305.111 of the Revised Code, shall be brought as provided in division (C) of that section.

(F) As used in this section:

(1) "Agent orange," "causative agent," and "veteran" have the same meanings as in section 5903.21 of the Revised Code.

(2) "Ethical drug," "ethical medical device," "manufacturer," "product," "product liability claim," and "supplier" have the same meanings as in section 2307.71 of the Revised Code.

(3) "Harm" means injury, death, or loss to person or property.

(G) This section shall be considered to be purely remedial in operation and shall be applied in a remedial manner in any civil action commenced on or after April 7, 2005, in which this section is relevant, regardless of when the cause of action accrued and notwithstanding any other section of the Revised Code or prior rule of law of this state, but shall not be construed to apply to any civil action pending prior to April 7, 2005.

Effective Date: 07-06-2001; 04-07-2005; 08-03-2006

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§ 2305.19

Statutes & Session Law

TITLE [23] XXIII COURTS -- COMMON PLEAS

CHAPTER 2305: JURISDICTION; LIMITATION OF ACTIONS

2305.19 Saving in case of reversal.

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.

(B) If the defendant in an action described in division (A) of this section is a foreign or domestic corporation, and whether its charter prescribes the manner or place of service of process on the defendant, and if it passes into the hands of a receiver before the expiration of the one year period or the period of the original applicable statute of limitations, whichever is applicable, as described in that division, then service to be made within one year following the original service or attempt to begin the action may be made upon that receiver or the receiver's cashier, treasurer, secretary, clerk, or managing agent, or if none of these officers can be found, by a copy left at the office or the usual place of business of any of those agents or officers of the receiver with the person having charge of the office or place of business. If that corporation is a railroad company, summons may be served on any regular ticket or freight agent of the receiver, and if there is no regular ticket or freight agent of the receiver, then upon any conductor of the receiver, in any county in the state in which the railroad is located. The summons shall be returned as if served on that defendant corporation.

Effective Date: 03-02-2004

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RULE 3

Ohio Court Rules

RULES OF CIVIL PROCEDURE

TITLE II. COMMENCEMENT OF ACTION AND VENUE; SERVICE OF PROCESS; SERVICE AND FILING OF PLEADINGS AND OTHER PAPERS SUBSEQUENT TO THE ORIGINAL COMPLAINT; TIME

RULE 3 Commencement of Action; Venue

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).

(B) Venue: where proper.

Any action may be venued, commenced, and decided in any court in any county. When applied to county and municipal courts, "county," as used in this rule, shall be construed, where appropriate, as the territorial limits of those courts. Proper venue lies in any one or more of the following counties:

(1) The county in which the defendant resides;

(2) The county in which the defendant has his or her principal place of business;

(3) A county in which the defendant conducted activity that gave rise to the claim for relief;

(4) A county in which a public officer maintains his or her principal office if suit is brought against the officer in the officer's official capacity;

(5) A county in which the property, or any part of the property, is situated if the subject of the action is real property or tangible personal property;

(6) The county in which all or part of the claim for relief arose; or, if the claim for relief arose upon a river, other watercourse, or a road, that is the boundary of the state, or of two or more counties, in any county bordering on the river, watercourse, or road, and opposite to the place where the claim for relief arose;

(7) In actions described in Civ.R. 4.3, in the county where plaintiff resides;

(8) In an action against an executor, administrator, guardian, or trustee, in the county in which the executor, administrator, guardian, or trustee was appointed;

(9) In actions for divorce, annulment, or legal separation, in the county in which the plaintiff is and has been a resident for at least ninety days immediately preceding the filing of the complaint;

(10) In actions for a civil protection order, in the county in which the petitioner currently or temporarily resides;

(11) In tort actions involving asbestos claims, silicosis claims, or mixed dust disease claims, only in the county in which all of the exposed plaintiffs reside, a county where all of the exposed plaintiffs were exposed to asbestos, silica, or mixed dust, or the county in which the defendant has his or her principal place of business.

(12) If there is no available forum in divisions (B)(1) to (B)(10) of this rule, in the county in which plaintiff resides, has his or her principal place of business, or regularly and systematically conducts business activity;

(13) If there is no available forum in divisions (B)(1) to (B)(11) of this rule:

(a) In a county in which defendant has property or debts owing to the defendant subject to attachment or garnishment;

(b) In a county in which defendant has appointed an agent to receive service of process or in which an agent has been appointed by operation of law.

(C) Change of venue.

(1) When an action has been commenced in a county other than stated to be proper in division (B) of this rule, upon timely assertion of the defense of improper venue as provided in Civ.R. 12, the court shall transfer the action to a county stated to be proper in division (B) of this rule.

(2) When an action is transferred to a county which is proper, the court may assess costs, including reasonable attorney fees, to the time of transfer against the party who commenced the action in a county other than stated to be proper in division (B) of this rule.

(3) Before entering a default judgment in an action in which the defendant has not appeared, the court, if it finds that the action has been commenced in a county other than stated to be proper in division (B) of this rule, may transfer the action to a county that is proper. The clerk of the court to which the action is transferred shall notify the defendant of the transfer, stating in the notice that the defendant shall have twenty-eight days from the receipt of the notice to answer in the transferred action.

(4) Upon motion of any party or upon its own motion the court may transfer any action to an adjoining county within this state when it appears that a fair and impartial trial cannot be had in the county in which the suit is pending.

(D) Venue: no proper forum in Ohio.

When a court, upon motion of any party or upon its own motion, determines: (1) that the county in which the action is brought is not a proper forum; (2) that there is no other proper forum for trial within this state; and (3) that there exists a proper forum for trial in another jurisdiction outside this state, the court shall stay the action upon condition that all defendants consent to the jurisdiction, waive venue, and agree that the date of commencement of the action in Ohio shall be the date of commencement for the application of the statute of limitations to the action in that forum in another jurisdiction which the court deems to be the proper forum. If all defendants agree to the conditions, the court shall not dismiss the action, but the action shall be stayed until the court receives notice by affidavit that plaintiff has recommenced the action in the out-of-state forum within sixty days after the effective date of the order staying the original action. If the plaintiff fails to recommence the action in the out-of-state forum within the sixty day period, the court shall dismiss the action without prejudice. If all defendants do not agree

to or comply with the conditions, the court shall hear the action.

If the court determines that a proper forum does not exist in another jurisdiction, it shall hear the action.

(E) Venue: multiple defendants and multiple claims for relief.

In any action, brought by one or more plaintiffs against one or more defendants involving one or more claims for relief, the forum shall be deemed a proper forum, and venue in the forum shall be proper, if the venue is proper as to any one party other than a nominal party, or as to any one claim for relief.

Neither the dismissal of any claim nor of any party except an indispensable party shall affect the jurisdiction of the court over the remaining parties.

(F) Venue: notice of pending litigation; transfer of judgments.

(1) When an action affecting the title to or possession of real property or tangible personal property is commenced in a county other than the county in which all of the real property or tangible personal property is situated, the plaintiff shall cause a certified copy of the complaint to be filed with the clerk of the court of common pleas in each county or additional county in which the real property or tangible personal property affected by the action is situated. If the plaintiff fails to file a certified copy of the complaint, third persons will not be charged with notice of the pendency of the action.

To the extent authorized by the laws of the United States, division (F)(1) of this rule also applies to actions, other than proceedings in bankruptcy, affecting title to or possession of real property in this state commenced in a United States District Court whenever the real property is situated wholly or partly in a county other than the county in which the permanent records of the court are kept.

(2) After final judgment, or upon dismissal of the action, the clerk of the court that issued the judgment shall transmit a certified copy of the judgment or dismissal to the clerk of the court of common pleas in each county or additional county in which real or tangible personal property affected by the action is situated.

(3) When the clerk has transmitted a certified copy of the judgment to another county in accordance with division (F)(2) of this rule, and the judgment is later appealed, vacated, or modified, the appellant or the party at whose instance the judgment was vacated or modified must cause a certified copy of the notice of appeal or order of vacation or modification to be filed with the clerk of the court of common pleas of each county or additional county in which the real property or tangible personal property is situated. Unless a certified copy of the notice of appeal or order of vacation or modification is so filed, third persons will not be charged with notice of the appeal, vacation, or modification.

(4) The clerk of the court receiving a certified copy filed or transmitted in accordance with the provisions of division (F) of this rule shall number, index, docket, and file it in the records of the receiving court. The clerk shall index the first certified copy received in connection with a particular action in the indices to the records of actions commenced in the clerk's own court, but may number, docket, and file it in either the regular records of the court or in a separate set of records. When the clerk subsequently receives a certified copy in connection with that same action, the clerk need not index it, but shall docket and file it in the same set of records under the same case number previously assigned to the action.

(5) When an action affecting title to registered land is commenced in a county other than the county in which all of such land is situated, any certified copy required or permitted by this division (F) of this rule shall be filed with or transmitted to the county recorder, rather than the clerk of the court of common pleas, of each county or additional county in which the land is situated.

(G) Venue: collateral attack; appeal.

The provisions of this rule relate to venue and are not jurisdictional. No order, judgment, or decree shall be void or subject to collateral attack solely on the ground that there was improper venue; however, nothing here shall affect the right to appeal an error of court concerning venue.

(H) Definitions.

As used in division (B)(11) of this rule:

(1) "Asbestos claim" has the same meaning as in section 2307.91 of the Revised Code;

(2) "Silicosis claim" and "mixed dust disease claim" have the same meaning as in section 2307.84 of the Revised Code;

(3) In reference to an asbestos claim, "tort action" has the same meaning as in section 2307.91 of the Revised Code;

(4) In reference to a silicosis claim or a mixed dust disease claim, "tort action" has the same meaning as in section 2307.84 of the Revised Code.

[Effective: July 1, 1970; amended effective July 1, 1971; July 1, 1986; July 1, 1991; July 1, 1998; July 1, 2005.]

RULE 4

Ohio Court Rules

RULES OF CIVIL PROCEDURE

TITLE II. COMMENCEMENT OF ACTION AND VENUE; SERVICE OF PROCESS; SERVICE AND FILING OF PLEADINGS AND OTHER PAPERS SUBSEQUENT TO THE ORIGINAL COMPLAINT; TIME

RULE 4 Process: Summons

RULE 4. Process: Summons

(A) Summons: issuance.

Upon the filing of the complaint the clerk shall forthwith issue a summons for service upon each defendant listed in the caption. Upon request of the plaintiff separate or additional summons shall issue at any time against any defendant.

(B) Summons: form; copy of complaint.

The summons shall be signed by the clerk, contain the name and address of the court and the names and addresses of the parties, be directed to the defendant, state the name and address of the plaintiff's attorney, if any, otherwise the plaintiff's address, and the times within which these rules or any statutory provision require the defendant to appear and defend, and shall notify him that in case of his failure to do so, judgment by default will be rendered against him for the relief demanded in the complaint. Where there are multiple plaintiffs or multiple defendants, or both, the summons may contain, in lieu of the names and addresses of all parties, the name of the first party on each side and the name and address of the party to be served.

A copy of the complaint shall be attached to each summons. The plaintiff shall furnish the clerk with sufficient copies.

(C) Summons: plaintiff and defendant defined.

For the purpose of issuance and service of summons "plaintiff" shall include any party seeking the issuance and service of summons, and "defendant" shall include any party upon whom service of summons is sought.

(D) Waiver of service of summons.

Service of summons may be waived in writing by any person entitled thereto under Rule 4.2 who is at least eighteen years of age and not under disability.

(E) Summons: time limit for service.

If a service of the summons and complaint is not made upon a defendant within six months after the filing of the complaint and the party on whose behalf such service was required cannot show good cause why such service was not made within that period, the action shall be dismissed as to that defendant without prejudice upon the court's own initiative with notice to such party or upon motion. This division shall not apply to out-of-state service pursuant to Rule 4.3 or to service in a foreign country pursuant to Rule 4.5.

[Effective: July 1, 1970; amended effective July 1, 1971; July 1, 1973; July 1, 1975; July 1, 1984.]

RULE 15

Ohio Court Rules

RULES OF CIVIL PROCEDURE

TITLE III. PLEADINGS AND MOTIONS

RULE 15 Amended and Supplemental Pleadings

RULE 15. Amended and Supplemental Pleadings

(A) Amendments.

A party may amend his pleading once as a matter of course at any time before a responsive pleading is served or, if the pleading is one to which no responsive pleading is permitted and the action has not been placed upon the trial calendar, he may so amend it at any time within twenty-eight days after it is served. Otherwise a party may amend his pleading only by leave of court or by written consent of the adverse party. Leave of court shall be freely given when justice so requires. A party shall plead in response to an amended pleading within the time remaining for response to the original pleading or within fourteen days after service of the amended pleading, whichever period may be the longer, unless the court otherwise orders.

(B) Amendments to conform to the evidence.

When issues not raised by the pleadings are tried by express or implied consent of the parties, they shall be treated in all respects as if they had been raised in the pleadings. Such amendment of the pleadings as may be necessary to cause them to conform to the evidence and to raise these issues may be made upon motion of any party at any time, even after judgment. Failure to amend as provided herein does not affect the result of the trial of these issues. If evidence is objected to at the trial on the ground that it is not within the issues made by the pleadings, the court may allow the pleadings to be amended and shall do so freely when the presentation of the merits of the action will be subserved thereby and the objecting party fails to satisfy the court that the admission of such evidence would prejudice him in maintaining his action or defense upon the merits. The court may grant a continuance to enable the objecting party to meet such evidence.

(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.

(E) Supplemental pleadings.

Upon motion of a party the court may, upon reasonable notice and upon such terms as are just, permit him to serve a supplemental pleading setting forth transactions or occurrences or events which have happened since the date of the pleading sought to be supplemented. Permission may be granted even though the original pleading is defective in its statement of a claim for relief or defense. If the court deems it advisable that the adverse party plead to the supplemental pleading, it shall so order, specifying the time therefor.

[Effective: July 1, 1970.]