

IN THE SUPREME COURT OF OHIO

JOHN A. LaNEVE, et al.

Plaintiff-Appellee

vs.

ATLAS RECYCLING, INC., et al.

Defendant-Appellant

Case No. 2007-1199 (consolidated with Case No. 2007-1372 and 2007-1373)

On Appeal from the Trumbull County Court of Appeals, Eleventh Appellate District, Case No. 2006-T-0032

MERIT BRIEF OF APPELLEES

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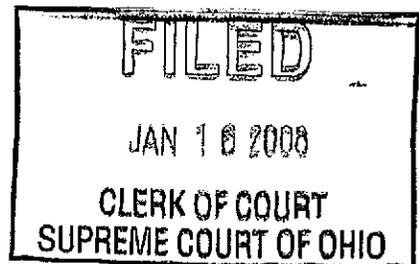


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STATEMENT OF FACTS

Atlas is engaged in the business of buying, selling, trading and recycling various metals. (T.d. 14; Supplement ("Supp") 016).

In May of 2002, Appellant, John LaNeve, worked for Atlas as a nonferrous operator. (T.d. 14; Supp. 016).

On or about May 28, 2002, Appellant, John LaNeve, was instructed by Atlas to load a container box with scrap metal to be shipped to a buyer. Upon opening the container box, Appellant, John LaNeve, was exposed to certain unknown hazardous chemicals, and as a result of same, suffered serious injuries to his eyes, nose, throat and lungs. (T.d. 14; Supp. 016).

The subject container box was owned by China Shipping, an overseas company. (Supp. 018). At the time of Appellant, John LaNeve's, incident, China Shipping, was incorporated under the laws of the State of Delaware but was transacting business in the State of Ohio without a license or registration in Ohio. (T.d. 36; Supp. 032-033).

China Shipping delivered the subject container box to Container Port, which was a container yard located in Cleveland, Ohio. (T.d. 14; Supp. 018). Atlas picked up the subject container box from Container Port. (T.d. 14; Supp. 018).

Before Atlas received the subject container box, the same had been cleaned and/or fumigated with unknown hazardous chemical material, which directly caused the injuries of Appellant, John LaNeve.

On May 28, 2004, Appellees, John LaNeve and his wife, filed a complaint in the Trumbull County Court of Common Pleas, under Case No. 2004 CV 1266 alleging intentional tort, negligence, and loss of consortium. (T.d. 1; Supp. 005-010).

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Appellees identified as defendants in their original complaint the following:

- (1) Atlas Recycling, Inc.
- (2) John Doe, Unknown Company No. 1-Manufacturer/Owner, address unknown
- (3) John Doe, Unknown Company No. 2-Distributor, address unknown
- (4) John Doe, Unknown No. 3-Lessor/Lessee, address unknown
- (5) John Doe, Unknown No. 4, address unknown
- (6) John Doe, Unknown No. 5, address unknown. (T.d. 1; Supp. 005).

Appellees provided the following instructions for service to the Clerk of Courts for the Trumbull County Court of Common Pleas in their original complaint:

“Please issue service of summons along with a copy of the Complaint upon DEFENDANT named herein at the address captioned above by CERTIFIED MAIL and make the same returnable in accordance with law. Please note that Plaintiffs have not yet discovered the names and/or addresses for the remaining Defendants, John-Doe Numbers #1-#5 and will provide the same within the statutory time limits provided by our Ohio Civil Rules of Procedure.” (T.d. 1; Supp. 011).

On August 20, 2004, Atlas timely filed an answer to Appellees’ complaint and a cross claim for indemnity from John-Doe Defendants. (T.d. 8; Supp. 001).

On May 6, 2005, Appellees filed an “Amendment to Complaint Pursuant to Civ.R. 15(D)” which informed the trial court that the *unknown* names and addresses of the Defendants described as John-Doe defendants #1 and #4 in Appellees’ original complaint had been discovered to be Appellants, China Shipping (North America) Holding Co., Ltd. (“China Shipping”) and Container Port Group, Inc. (“Container Port”), and as result, Appellees had cause to amend their complaint. (T.d. 13; Supp. 013).

Accordingly, on the same day, Appellees filed an amended complaint substituting China Shipping and Container Port for unknown John-Doe defendants #1 and #4. (T.d. 14; Supp. 015).

Appellees provided the following instructions for service to the Clerk of Courts in their amended complaint:

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“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 Container Port Group, Inc., 1340 Depot Street, Cleveland, Ohio 44116 by certified mail and make the same returnable in accordance with the law.” (T.d. 14; Supp. 021).

Two weeks later on May 19, 2005, the Clerk of Courts prepared the summons for services of Appellees’ amended complaint upon China Shipping and Container Port. (T.d. 35, 36; Supp. 025). On May 23, 2005, summons was issued by the Clerk of Courts to China Shipping and Container Port.

On May 24, 2005 at 1:34 p.m. an attempt at delivery of the summons was made upon China Shipping which failed for reasons unknown to Appellees. (T.d. 36, Ex. B).

On May 25, 2005 at 10:29 a.m., service of the summons was made upon Container Port. (Supp. 024).

On June 2, 2005 at 3:07 p.m., service of the summons was made upon China Shipping. (Supp. 031).

On July 1, 2005, Container Port filed an answer to Appellees’ Amended Complaint. (T.d. 20; Supp. 002).

Subsequently, Appellants filed answers to Atlas’ Cross-Claims and Cross-Claims for indemnity from Atlas. (T.d. 21, 22; 27; Supp. 002-003).

On July 28, 2005, China Shipping filed a Motion to Dismiss Appellees’ Amended Complaint. (T.d. 25, 26; Supp. 003). On August 23, 2005, Container Port filed its Motion to Dismiss Appellees’ Amended Complaint. (T.d. 29; Supp. 003).

Both of the above Motions to Dismiss filed by Appellants were based on the grounds that Appellees’ claims were time barred by the two year statute of limitations and Appellees failed to follow the requirements of Civ.R. 15(D), 15(C) and 3(A).

On January 5, 2006, a hearing was held on Appellants' motions to dismiss. Upon conclusion of that hearing, the trial court decided to grant Appellants' motions to dismiss, but held that decision in abeyance because of the cross-claims filed by and against Appellants and Atlas.

In an attempt to avoid multiple appeals, repetitive litigation, and save time, the trial court suggested to Appellants to wait until discovery had been conducted, and upon completion of the same, file dispositive motions or attempt settlement with Atlas. Ultimately, Appellants decided to have the trial court enter its ruling on their motions to dismiss rather than to move forward with discovery and/or settlement with Atlas.

Thus, on February 7, 2006, the trial court entered its ruling dismissing the claims against China Shipping and Container Port. (T.d. 40; Supp. 004).

Subsequently, on March 7, 2006, Appellees filed a Notice of Appeal of the trial court's judgment. (T.d. 42; Supp. 004). On June 11, 2007, the Eleventh District Court of Appeals reversed the judgment of the trial court and remanded for further proceedings, by way of Opinion (Appx. 4) and Judgment Entry (Appx. 3). In its Opinion, the Court of Appeals held:

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 CivR. 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).

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On June 20, 2007, ContainerPort and China Shipping filed a Joint Motion to Certify a Conflict, which was granted in part, by the Court of Appeals on June 29, 2007, certifying the following conflict:

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. 17).

On July 3, 2007, ContainerPort and China Shipping filed a Notice of Appeal, and on July 27, 2007, both ContainerPort and China Shipping filed a Notice of Certified Conflict, both of which were accepted by this Court and have been consolidated.

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ARGUMENT

Response to Proposition of Law No. I:

An amendment will relate back to an original pleading after the three requirements of Civ.R. 15(C) are met. (1) the amended complaint must arise from the same events supporting the original complaint. (2) the party sought to be substituted by the amendment must receive notice of the action within the period provided by law so that the party is able to maintain a defense. (3) the new party, within the period provided by law for commencing the action, must have or should have known that, but for a mistake concerning the proper party's identity, the action would have been brought against the new party.

Civ.R. 15(C) sets forth three requirements which must be met before an amendment relates back to the original pleading. First, the amended complaint must arise from the same events supporting the original complaint. Second, the party sought to be substituted by the amendment must receive notice of the action within the period provided by law so that the party is able to maintain a defense. Third, the new party, within the period provided by law for commencing the action, must have or should have known that, but for a mistake concerning the proper party's identity, the action would have been brought against the new party. *Cecil vs. Cottrill* (1990), 67 Ohio St.3d 367.

In this case, Appellees' injuries arose on or about May 28, 2002. Appellees' original complaint was filed on May 28, 2004, and thus, Appellees' original complaint was filed within the applicable two year statute of limitations prescribed by R.C. 2305.10(A). (T.d. 1).

Appellees identified as defendants in their original complaint as follows:

- (1) Atlas Recycling, Inc.
- (2) John Doe, Unknown Company No. 1-Manufacturer/Owner, address unknown
- (3) John Doe, Unknown Company No. 2-Distributor, address unknown
- (4) John Doe, Unknown No. 3-Lessor/Lessee, address unknown
- (5) John Doe, Unknown No. 4, address unknown
- (6) John Doe, Unknown No. 5, address unknown. (T.d. 1; Supp. 005).

Appellees did *not know the names or addresses* of the John Doe defendants 1 through 5 and stated the same clearly in the caption of their original complaint.

In addition, Appellees stated in their instructions for service to the Clerk of Courts in their original complaint the fact that Appellees were not able to discover the names and addresses for John Doe defendants #1-#5. (T.d. 1; Supp. 011).

When the names and addresses of the John Doe defendants were discovered, Appellees accordingly amended their complaint.

Appellees filed their amended complaint on May 6, 2005 to substitute John Doe defendants #1 and #4 described in Appellees' original complaint for China Shipping and Container Port based upon the *same exact facts* as stated in Appellees' original complaint. (T.d. 1, 13, 14; Supp. 005, 013; 015).

Appellees' met the first requirement set forth under Civ.R. 15(C).

In addition, the Supreme Court of Ohio held in the case of *Kraly vs. Vannewkirk* (1994), 69 Ohio St.3d 627 that "Civ.R. 15(C) may be employed to *substitute* a party named in the amended pleading for a party named in the original pleading to permit the amended pleading to relate back to the date of the original pleading, provided the requirements of the rule are otherwise satisfied." (Emphasis added).

Unknown John Doe defendant #1 was described in Appellees' original complaint as the *owner* of the subject container box and John Doe defendant #4 was described as an unknown party who may have some interest or *responsibility* concerning the subject container box. (T.d. 1; Supp. 008).

China Shipping was the owner of the subject container box and delivered the same to Container Port who in turn delivered the same to Atlas. (T.d. 14; Supp. 018). Unknown John

Doe defendant #1 and China Shipping are the same party; unknown John Doe defendant #4 and Container Port are the same the party.

Appellees did not try to add and/or join China Shipping and Container Port as new party-defendants to this action. Rather, Appellees substituted China Shipping for unknown John Doe defendant #1 and Container Port for unknown John Doe defendant #4.

Since the name of the correct defendants (China Shipping and Container Port) were merely *substituted* for the name of the unknown John Doe defendants #1 and #4, Appellees' amended complaint relates back to the original complaint.

Since the original complaint was filed within two years of the date of injury, Appellees' claims are not barred by the statute of limitations.

Moreover, Container Port and China Shipping received timely notice of the Appellees' suit prior to the expiration of the one year provided for in Civ.R. 3(A).

The language "within the period provided by law for commencing an action" as used in Civ.R. 15(C), includes the time for service allowed under Civ.R. 3(A). *Supra. Cecil.*

Civ.R. 3(A) as amended, provides that "a civil action is commenced by filing a complaint with the court, if service is obtained within one year from such filing...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)."

Accordingly, an amended complaint will relate back to the filing of the original complaint even if the plaintiff perfects service of the original complaint after the statute of limitations has expired as long as the substituted party received timely notice of the suit prior to the expiration of the one year provided for in Civ.R. 3(A). *Cross vs. Biviano*, 11th Dist. No.

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2000-T-0123, 2001 Ohio 3936, 2001 Ohio 4313 citing *Megginson vs. Song*, 4th Dist. No. 95 CA 2337, 1995 Ohio App. LEXIS 5680.

According to the Second District Court in the case of *Meek vs. Nova Steel Processing, Inc.*, Civ.R. 3(A) provides for an additional year to perfect service upon the filing of an amended complaint. *Meek vs. Nova Steel Processing, Inc.*(19970, 124 Ohio App.3d 367.

The Second District Court, in support of its decision, applied the ruling of the Supreme Court of Ohio in the case of *Goolsby vs. Anderson Concrete Corp.* (1991), 61 Ohio St.3d 549 and the ruling of the Tenth District Court in the case of *Bank One, Columbus, NA vs. O'Brien*, 10th Dist. No. 91AP-166 and 91AP-441, 1991 Ohio App. LEXIS 6391 which held that the filing of an amended complaint is also equivalent to refiling the complaint and the same provides for an additional year within which to make service under Civ.R. 3(A).

In this case, Appellees filed instructions with the Clerk of Courts for service along with their amended complaint on May 6, 2005. (T.d. 14; Supp. 021). Appellees filed their amended complaint and instructions for service within one year of the filing of their original complaint.

For some unknown reason, the Clerk of Courts did not prepare the summons until two weeks later, on May 19, 2005, and did not issue summons until May 23, 2005. (Supp. 025-028).

Service of summons was made upon Container Port on May 25, 2005 at 10:29 a.m. (Supp. 028).

An attempt at delivery was made on May 24, 2005 at 1:34 p.m. upon China Shipping which failed for reasons unknown to Appellees. Service was ultimately made upon China Shipping on June 2, 2005 at 3:07 p.m. (Supp. 028).

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The Clerk of Courts unreasonably delayed the issuance of summons upon China Shipping and Container Port for approximately three weeks.

“A cause of action will not be barred by failure to obtain service within the prescribed time when such failure is caused by unreasonable delay attributable to the clerk of courts.” *Scott vs. Orlando* (1981), 2 Ohio App.3d 333.

Appellees served China Shipping and Container Port well within one year of the time when the amended complaint was filed, and with respect to Container Port, within one year from the date of filing Appellees’ original action. Accordingly, Appellees’ claims are not time-barred.

Moreover, Civ.R. 4 governs summons. Specifically, Civ.R. 4(B) states as follows:

Where there are multiple plaintiffs or multiple defendants, or both, the summons may contain, in lieu of the names and addresses of all the 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.

In this case, in accordance with Civ.R. 4(B), the summons served upon China Shipping and Container Port contained the name and address of the first plaintiff, the name and address of the first defendant and the name and address of the party to be served. In addition, a copy of the amended complaint, which contained the names of all the parties, was attached to the summons. Accordingly, summons complied with the requirements of Civ.R. 4(B).

To the extent that the summons did not contain the words “name unknown” as purportedly required by Civ.R. 15(D), Appellees assert that those words are not required, insofar as Civ.R. 15(D) is in direct conflict with Civ.R. 4(B), as Civ. R. 15(D) states:

When the plaintiff does not know the name of the 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.

Moreover, Appellees' original complaint and summons did identify the John Doe defendants as unknown companies, addresses unknown, which constitutes substantial compliance with Civ.R. 15(D), if it applies at all in this case. *See Loescher vs. Plastipak Packaging, Inc.* (2003), 152 Ohio App.3d 479 (Third District Court held that the injured party complied with Civ.R. 15(D) because the original complaint contained the words "name unknown" which was incorporated into the original summons); *Clint vs. R.M.I. Co.*, 8th Dist. No. 57187, 57258, 1990 Ohio App. LEXIS 5480 (Eighth District Court held that the administratrix satisfied the technical requirements of Civ.R. 15(D) by including in the caption of the original complaint a statement that the names and addresses of some defendants were unknown and by including counsel's signature on the complaint.)

Civ.R. 15(D) is also in direct conflict with Civ.R. 4.3 governing service of process on non-resident defendants.

Civ.R. 4.3(A) authorizes Appellees to obtain service of process "upon a person who, at the time of service of process, is a non-resident of this state." The rule defines "person" to include a corporation which "has caused an event to occur out of which the claim that is the subject of the complaint arose, from the persons...(3) causing tortious injury by an act or omission in this state." Civ.R. 4.3(A)(3).

At all times material to this case, China Shipping was not a resident of the State of Ohio. China Shipping was incorporated under the laws of the State of Delaware. (Supp. 033). Furthermore, as alleged in Appellees' amended complaint, China Shipping caused tortious injury to Appellees in Ohio. Accordingly, China Shipping is subject to service of process in accordance with Civ.R. 4.3.

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Pursuant to Civ.R. 4.3(B), governing methods of service, “service of process shall be certified or express mail unless otherwise permitted by these rules.” Civ.R. 4.3(B)(1). (Emphasis added). Personal Service is only authorized on a non-resident defendant under Civ.R. 4.3 “when ordered by the court.” Civ.R. 4.3(b)(2). (Emphasis added).

The trial court in this case has not issued any order requiring personal service upon China Shipping. Moreover, Appellees should not be required to obtain personal service on China Shipping in another state when China Shipping chose to conceal itself by engaging in business in the State of Ohio without the statutorily required license.

It is noteworthy that Civ.R. 15(D) is a rule of convenience. (See history to Civ.R. 15(D) at n.4 (1970) stating that “Rule 15(D) is a rule of convenience.”) There is nothing convenient about requiring Appellees to obtain personal service upon a non-resident defendant, e.g. China Shipping, when it is not operating in compliance with Ohio statutes requiring it to be licensed in the State of Ohio.

Civ.R. 15(D) is also in direct conflict with R.C. 1703.191, Service of Process on Secretary of State; Unlicensed Corporations. Pursuant to R.C. 1703.191:

Any foreign corporation required to be licensed under Section 1703.01 to 1703.31 of the Revised Code, which transacts business in this state without being so licensed, shall be conclusively presumed to have designated the Secretary of State as its agent for the service of process in any action against such corporation arising out of the acts or omissions of such corporation within this state...Such service shall be made upon the Secretary of State by leaving with him, or with an Assistant Secretary of State, duplicate copies of such process, together with an affidavit of the plaintiff or one of the plaintiff’s attorneys, showing that the last known address of such corporation, and the fee of five dollars which shall be included as taxable costs in a case of judicial proceedings. Upon receipt of such process, affidavit, and fee the Secretary of State shall forthwith give notice to the corporation at the address specified in the affidavit and forward to such address by certified mail with a request for return receipt, a copy of such process.

China Shipping is a foreign (Delaware) corporation required to be licensed pursuant to R.C. 1703.03 which states as follows:

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“No foreign corporation not excepted from § 1703.01 to 1703.31, inclusive, of the Revised Code, shall transact business in this state unless it holds an unexpired and uncanceled license to do so issued by the Secretary of State.”

The exceptions to the licensing requirement are set forth in R.C. 1703.02, which states that corporations engaged in the State of Ohio solely in interstate commerce are not required to obtain a license. A foreign corporation that rents or owns property in Ohio, employs Ohio residents and solicits business in Ohio does not engage “solely in interstate commerce so as to be exempt from” the licensing provisions. *Didactics Corp. vs. Welch Scientific Co.* (Dist. Ct. Ohio 1968), 291 F.Supp. 890.

China Shipping owns, leases or operates a warehouse in Cleveland, Ohio, which is located at 1855 West 52nd Street, the address at which China Shipping received the summons, as acknowledged in its motion to dismiss. (T.d. 14, 36-Windle Affidavit, Ex. B and 26).

China Shipping is not exempt from the licensing requirement set forth above. Nonetheless, China Shipping is not licensed in the State of Ohio as required by R.C. 1703.03. Therefore, China Shipping arguably could have been served pursuant to R.C. 1703.191.

However, R.C. 1703.191 mandates a method of service, e.g. by leaving a copy of the summons with the Secretary of State, contrary to the method of service mandated by Civ.R. 15(D), e.g. personal service.

Assuming arguendo that Civ.R. 15(D) does apply to this case, the trial court erred in dismissing Appellees’ claims prematurely. Civ.R. 3(A) provides for an additional year to perfect service upon the filing of an amended complaint. *Supra. Meek.* Accordingly, Appellees should have been permitted to perfect service by personal service on China Shipping and Container Port at any time up to May 6, 2006.

Furthermore, in *Thacker vs. Sells*, 1990 Ohio App. LEXIS 5913, the Tenth District Court stated that “after the name is discovered and the pleading is amended to reflect that

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name, service may be provided by certified mail to the name and address of the person who is no longer a John Doe defendant, just as any other defendant may be served.”

In addition, both Container Port and China Shipping subjected themselves to the jurisdiction of the trial court by participating in the litigation by filing either an answer to Appellees’ amended complaint and/or an answer to the cross-claim filed by Atlas and/or a cross-claim against Atlas. (T.d. 20, 21, 22, 27; Supp. 002-003).

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Response to Proposition of Law No. II

The savings statute, R.C. 2305.19(A), must contemplate an action timely commenced; failure of a plaintiff in the action otherwise than upon the merits; expiration of the time limit for commencing the action at the date of such failure; and the right of the plaintiff to commence a new action within one year of such failure.

According to the Fourth District in *Whitt vs. Hayes*, 2003 Ohio 2337, and also followed by this Court in *Thomas vs. Freeman*, 79 Ohio St.3d 221, 227, 1997 Ohio 395, 680 N.E.2d 997, “the former version of R.C. 2305.17 provided that an attempt to commence an action is equivalent to its commencement. Thus, under former R.C. 2305.17, plaintiffs were required to file a complaint and perfect service within a year of filing the complaint before they could take advantage of the savings statute of R.C. 2305.19.”

“However, the current version of R.C. 2305.17 does not provide a definition for ‘attempt to commence.’ Thus, plaintiffs may utilize the savings statute within one year of the dismissal of the complaint so long as the statute of limitations has expired, the plaintiff filed an original complaint with a proper demand for service on the defendant, and the complaint was dismissed ‘otherwise than upon the merits.’” *Whitt. Id.*

Similarly, “it would appear that the good faith filing of a complaint followed by service within one year from such filing, which service is later determined to be ineffective, would constitute an attempt to commence the action within the meaning of R.C. 2305.19.” *DiCello vs. Palmer*, 1980 Ohio App. LEXIS 12309.

In the instant action, Appellee was injured on May 28, 2002. Pursuant to R.C. 2305.10, “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.”

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Accordingly, Appellees filed their action on May 28, 2004, within the prescribed statute of limitations, and thus, is considered timely commenced.

The fact that service upon the defendants was not obtained prior to the expiration of the statute of limitations is irrelevant because the Tenth Appellate District in *Shanahorn vs. Sparks*, 2000 Ohio App. LEXIS 2859 and the Second Appellate District in *Schneider vs. Steinbrunner*, 1995 Ohio App. LEXIS 5449 (Nov. 8, 1995), held that "a plaintiff is permitted to utilize the savings statute even though the plaintiff does not obtain service on the original complaint. The mere fact that a plaintiff demands service prior to the expiration of the statute of limitations is sufficient."

Similarly, this Court held in *Goolsby v. Anderson Concrete Corp.*, 61 Ohio St. 3d 549, "A plaintiff could therefore file a complaint on the last day of the limitations period and have a full year beyond that date within which to obtain service."

In *Goolsby*, the plaintiff filed her first complaint on February 6, 1986, and instructed the clerk not to attempt service of the summons and complaint until July 17, 1987, just two days prior to the limitation of the statutory period for bringing the action. Service was subsequently obtained six days later. Plaintiff then voluntarily dismissed the case and later refiled her complaint pursuant to the saving statute, R.C. 2305.19. The trial court dismissed the plaintiff's second action, as it stated that the original complaint had not been "commenced" pursuant to Civ.R. 3(A) and that the saving statute was inapplicable. This Court disagreed and held that the plaintiff's instruction to the clerk was the equivalent of a refile of her complaint.

The facts of the current action are quite similar to that of *Goolsby*, in that, Appellees filed their original complaint with instructions for service on May 28, 2004, the last day of the statutory limitations period. Subsequent to the expiration of the two year limitation, Appellees

filed an amended complaint, arising from the same events supporting the original complaint, and requested service for the same. The trial court later dismissed Appellees' amended complaint stating that it was filed outside of the limitations period.

In comparing *Goolsby* to the case at bar, Appellees' instruction to the clerk with the filing of the amended complaint was the equivalent of a refile of their complaint, which would have entitled them to an additional year to obtain service on Appellants, i.e., May 6, 2006. Service was ultimately effectuated on Appellant, ContainerPort, on May 26, 2005, and on Appellant, China Shipping, on June 2, 2005, within the applicable amount of time as prescribed by the Ohio savings statute in this matter.

Additionally, in conjunction with the Eleventh District in this action, the filing of the amended complaint on May 6, 2005, was "the equivalent of a voluntary dismissal and refile: i.e., a failure 'otherwise than upon the merits,' bringing the savings statute into operation." (Appx. 9). Citing *Fetterolf vs. Hoffman-LaRoche, Inc.* (1995), 104 Ohio App.3d 272, 279 and *Nationwide Mut. Ins. Co. vs. Galman*, 7th Dist. No. 03 MA 202, 2004-Ohio-7206, 24-35.

Thus, in light of the foregoing, Appellees action was timely commenced, it failed otherwise than upon the merits, the time limit for commencing the action at the date of such failure had expired, and Appellees reserved the right to an additional year for which to perfect service under R.C. 2305.19.

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 Ohio savings statute or more specifically, R.C. 2305.19(A) provides as follows:

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

The language of R.C. 2305.19 is quite clear and unambiguous in that "parties seeking refuge under RC § 2305.19, the savings statute, must meet **two** requirements. The first of these is either the commencement or the attempted commencement of the action before the expiration of the statutory limitations period for such actions. The second is a failure otherwise than upon the merits." (Emphasis added). *Branscom vs. Birtcher*, 55 Ohio App. 3d 242, 563 N.E.2d 731 (1988). Consequently, there is no requirement anywhere within the statute based on Civ.R. 15(D). As stated, there are only **two** requirements for those seeking to benefit from the savings statute, not two plus some additional undisclosed prerequisites that one must discover before reaping the benefits of the statute.

If Civ.R. 15(D) has somehow been incorporated into the savings statute over time, although not explicitly identified anywhere within statute, as mentioned throughout, the original complaint was in accordance with Civ.R. 15(D), in that Appellees did *not know the names or addresses* of the John Doe defendants 1 through 5 and stated the same clearly in the caption of their original complaint by identifying them as "Unknown Company" and "Address Unknown." "The spirit of the Civil Rules is the resolution of cases upon their merits, not upon pleading deficiencies." *Husarik vs. Levy*, 1999 Ohio App. LEXIS 5303;

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citing *Peterson vs. Teodosio* (1973), 34 Ohio St. 2d 161, 175, 297 N.E.2d 113. If Appellees' claims are not going to be heard on their merits simply because they identified the John Doe defendants as "Unknown Company" and "Address Unknown" instead of "Name Unknown," that is entirely against the spirit of the Civil Rules. Regardless of the exact wording contained in the caption of the complaint, it is quite obvious that the John Doe defendants were unknown to plaintiff and were expressed as such.

In addition, Appellees stated in their instructions for service to the Clerk of Courts in their original complaint the fact that Appellees were not able to discover the names and addresses for John Doe defendants #1-#5, also in accordance with Civ.R. 15(D). Even though the language was not spot on, the point was still clearly conveyed. (T.d. 1; Supp. 011).

"Decisions on the merits should not be avoided on the basis of mere technicalities; pleading is not a game of skill in which one misstep by counsel may be decisive to the outcome. Rather, the purpose of pleading is to facilitate a proper decision on the merits." *Shirley Lothes vs. John Doe-1*, 1984 Ohio App. LEXIS 10747 (Ohio Ct. App. 1984)

"R.C. 2305.19 is remedial in nature and is to be given a liberal construction." *Husarik, supra*; citing *LaBarbera vs. Batsch* (1966), 5 Ohio App. 2d 151, 158, 214 N.E.2d 443.

Also, R.C. 2305.19 applies to save a plaintiff's action, otherwise barred by the statute of limitations, "when the original suit and the new action are substantially the same." *Children's Hosp. v. Dept. of Public Welfare* (1982), 69 Ohio St. 2d 523, 525, 433 N.E.2d 187. As a matter of policy, R.C. 2305.19 should be "liberally construed in order that controversies * * * be decided upon important substantive questions rather than upon technicalities of procedure." *Kinney v. Ohio Dept. Admin. Serv.* (1986), 30 Ohio App. 3d 123, 126, 507 N.E.2d 402, citing *Greulich v. Monnin* (1943), 142 Ohio St. 113, 116, 50 N.E.2d 310.

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In the case of *Shanahorn vs. Sparks*, 2000 Ohio App. LEXIS 2859, the Tenth District held that "an attempt to commence within the meaning of R.C. 2305.19 requires only that a plaintiff has taken action to effect service on a defendant within the applicable statute of limitations. Because the plaintiff had requested service by certified mail on the day she filed her original complaint, the plaintiff attempted commencement of the action and, therefore, could refile such complaint pursuant to the savings statute." (Emphasis added) Citing *Schneider vs. Steinbrunner*, 1995 Ohio App. LEXIS 5449 (Nov. 8, 1995) at 11.

Similarly, in *Husarik vs. Levy*, 1999 Ohio App. LEXIS 5303, Appellant filed a complaint for personal injuries and subsequently filed a request with the clerk of courts for service of the same and summons by certified mail. After a series of events, his complaint was ultimately dismissed, and Appellant asserted that his action was preserved pursuant to R.C. 2305.19. The Eighth District agreed with Appellant, stating, that "Appellant properly utilized the savings statute to refile his complaint notwithstanding his failure to perfect service of the original complaint."

Moreover, in *Thomas v. Freeman*, 79 Ohio St. 3d 221, 680 N.E.2d 997 (Ohio 1997), the Ohio Supreme Court found plaintiff had "attempted to commence" an action where he made repeated efforts to serve the named defendants via regular mail at the defendants' last known address. The plaintiff was ultimately unable to effectuate service, and his claims were dismissed for lack of prosecution and failure to obtain service. The Ohio Court held the plaintiff's claims were saved by R.C. 2305.19 and the plaintiff, therefore, had one year from the date of dismissal to re-file his claim. (Emphasis Added).

Although *Thomas* did not exclusively define the extent of what is attempted commencement, its language suggests a good faith attempt at serving a defendant satisfies the "attempted commencement" requirements of the Savings Statute.

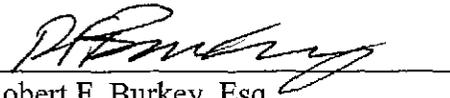
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CONCLUSION

Based upon the foregoing, Appellee respectfully requests that the judgment of the Court of Appeals be affirmed, and that this case be remanded for further proceedings. Furthermore, Appellee requests that this Court answer the certified conflict question in the positive.

Respectfully submitted,



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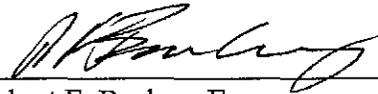
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CERTIFICATE OF SERVICE

This is to certify that a true and correct copy of the foregoing has been sent via ordinary US Mail on this 14th day of January, 2008 to the following:

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1717 E. Ninth Street, Ste. 1650
Cleveland, Ohio 44114-2878

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IN THE COURT OF COMMON PLEAS
TRUMBULL COUNTY, OHIO

CLERK OF COURT
TRUMBULL COUNTY, OHIO

JOHN A. LaNEVE, et al.,)

CASE NO. 04-CV-1266

2006 FEB -7 A 8:54

Plaintiffs,)

JUDGE W. WYATT MCKAY

v.)

ORDER OF DISMISSAL WITH PREJUDICE
OF PLAINTIFFS' CLAIMS AGAINST

ATLAS RECYCLING, INC., et al.,)

DEFENDANTS CHINA SHIPPING (NORTH
AMERICA) HOLDING CO., LTD., AND

Defendants.)

CONTAINER PORT GROUP, INC.

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

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

Signed this 7th day of February, 2006.

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 / signed per
Thomas Wright (0017529) *telephone consent*
William Jack Meola (0022122) *2/3/06*
Attorney for Defendant
Container Port Group, Inc.

IN THE COURT OF COMMON PLEAS
TRUMBULL COUNTY, OHIO

JOHN A. LaNEVE, et al.

Plaintiffs

vs.

ATLAS RECYCLING, INC., et al.

Defendants

CASE NO. 2004 CV 1266

JUDGE W. WYATT MCKAY

NUNC PRO TUNC

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

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

Signed 2nd day of March, 2006.

W. Wyatt McKay

JUDGE W. WYATT MCKAY

Approved:

R. F. Burkey

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

No Position per telephone 03/01/06
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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
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W. Wyatt McKay

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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,

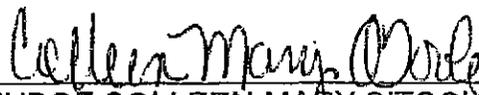
CHINA SHIPPING (NORTH AMERICA)
HOLDING CO., LTD., et al.,

Defendants-Appellees.

JUDGMENT ENTRY

CASE NO. 2006-T-0032

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



JUDGE COLLEEN MARY O'TOOLE

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

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

FILED
COURT OF APPEALS

JUN 11 2007

TRUMBULL COUNTY, OH
KAREN INFANTE ALLEN, CLERK

Appx. 3

FILED
COURT OF APPEALS

JUN 11 2007

TRUMBULL COUNTY, OH
KAREN INFANTE ALLEN, CLERK

THE COURT OF APPEALS
ELEVENTH APPELLATE DISTRICT
TRUMBULL COUNTY, OHIO

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

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

Judgment: Reversed and remanded.

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

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

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

COLLEEN MARY O'TOOLE, J.

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

{¶23} I respectfully dissent.

{¶24} The following points are undisputed.

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

STATE OF OHIO)
)SS.
COUNTY OF TRUMBULL)

IN THE COURT OF APPEALS
ELEVENTH DISTRICT

JOHN A. LaNEVE, et al.,

Plaintiffs-Appellants,

- vs -

ATLAS RECYCLING, INC.,

Defendant,

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

Defendants-Appellees.

JUDGMENT ENTRY

CASE NO. 2006-T-0032

FILED
COURT OF APPEALS
JUN 29 2007
TRUMBULL COUNTY, OH
KAREN INFANTE ALLEN, CLERK

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

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

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

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

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

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

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

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

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

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

(Emphasis sic.)

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

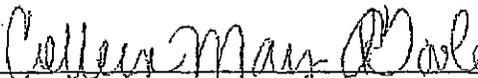
In sum, the cases relied on by appellees in support of their first issue all agree that plaintiffs, in serving John Doe defendants, must comply with the requirements of Civ.R. 15(D): they simply do not agree on what those requirements are. In *LaNeve*, we affirmed the proposition that the requirements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

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

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

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

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



JUDGE COLLEEN MARY O'TOOLE

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

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

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

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

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

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

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

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

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

In *Whitman v. Chas. F. Mann Painting Co.*, 6th Dist. No. L-04-1114, 2005-Ohio-245, the Sixth District held that an amended complaint did not relate back where service of the complaint was by certified mail and the summons did not contain the words "name unknown." *Id.* at ¶18.

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.

JRB
KCS

2005

IN THE SUPREME COURT OF OHIO

JOHN A. LANEVE, et al.

Appellees,

v.

ATLAS RECYCLING, INC.

Defendant

v.

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

Appellants

Supreme Court Case No. 07-1199

07-1372

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

Court of Appeals
Case No. 2006-T-0032

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

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

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

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

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

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

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

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

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

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

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

It should be further noted that the court of appeals refused to certify a conflict on the following question:

Does service by certified mail on a “John Doe” defendant, more than one year after the original complaint was filed, meet the requirements of Civ.R. 15(D) and the controlling Ohio Supreme Court case of *Amerine v. Haughton Elevator Co.* (1989), 42 Ohio St.3d 577?

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

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

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

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

Respectfully submitted,

By Julia R Brouhard

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CERTIFICATE OF SERVICE

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

Julia R Brouhard

Julia R. Brouhard

Counsel for Appellant China Shipping

(North America) Holding Co., Ltd.

TITLE 23. COURTS -- COMMON PLEAS
CHAPTER 2305. JURISDICTION; LIMITATION OF ACTIONS
COMMENCEMENT OF ACTION

Go to the Ohio Code Archive Directory

ORC Ann. 2305.19 (2007)

§ 2305.19. Saving in case of reversal or failure otherwise than upon merits.

(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.

TITLE 17. CORPORATIONS -- PARTNERSHIPS
CORPORATIONS
CHAPTER 1703. FOREIGN CORPORATIONS

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ORC Ann. 1703.02 (2007)

§ 1703.02. Corporations excepted

Sections 1703.01 to 1703.31 of the Revised Code do not apply to corporations engaged in this state solely in interstate commerce, including the installation, demonstration, or repair of machinery or equipment sold by them in interstate commerce, by engineers, or by employees especially experienced as to such machinery or equipment, as part thereof; to credit unions, title guarantee and trust companies, bond investment companies, and insurance companies; or to public utility companies engaged in this state in interstate commerce.

TITLE 17. CORPORATIONS -- PARTNERSHIPS
CORPORATIONS
CHAPTER 1703. FOREIGN CORPORATIONS

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ORC Ann. 1703.03 (2007)

§ 1703.03. License required

No foreign corporation not excepted from sections 1703.01 to 1703.31 of the Revised Code, shall transact business in this state unless it holds an unexpired and uncanceled license to do so issued by the secretary of state. To procure such a license, a foreign corporation shall file an application, pay a filing fee, and comply with all other requirements of law respecting the maintenance of the license as provided in those sections.

TITLE 17. CORPORATIONS -- PARTNERSHIPS
CORPORATIONS
CHAPTER 1703. FOREIGN CORPORATIONS

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ORC Ann. 1703.191 (2007)

§ 1703.191. Service of process on secretary of state in action against unlicensed foreign corporation

Any foreign corporation required to be licensed under sections 1703.01 to 1703.31 of the Revised Code, which transacts business in this state without being so licensed, shall be conclusively presumed to have designated the secretary of state as its agent for the service of process in any action against such corporation arising out of acts or omissions of such corporation within this state, including, without limitation, any action to recover the statutory forfeiture for failure to be so licensed. Pursuant to such service, suit may be brought in Franklin county, or in any county in which such corporation did any act or transacted any business. Such service shall be made upon the secretary of state by leaving with him, or with an assistant secretary of state, duplicate copies of such process, together with an affidavit of the plaintiff or one of the plaintiff's attorneys, showing the last known address of such corporation, and a fee of five dollars which shall be included as taxable costs in case of judicial proceedings. Upon receipt of such process, affidavit, and fee the secretary of state shall forthwith give notice to the corporation at the address specified in the affidavit and forward to such address by certified mail, with a request for return receipt, a copy of such process.

The secretary of state shall retain a copy of such process in his files, keep a record of any such process served upon him, and record therein the time of such service and his action thereafter with respect thereto.

This section does not affect any right to serve process upon a foreign corporation in any other manner permitted by law.

Ohio Rules Of Civil Procedure
Title I Scope Of Rules - One Form Of Action

Ohio Civ. R. 1 (2007)

Rule 1. Scope of rules: applicability; construction; exceptions

(A) Applicability.

These rules prescribe the procedure to be followed in all courts of this state in the exercise of civil jurisdiction at law or in equity, with the exceptions stated in subdivision (C) of this rule.

(B) Construction.

These rules shall be construed and applied to effect just results by eliminating delay, unnecessary expense and all other impediments to the expeditious administration of justice.

(C) Exceptions.

These rules, to the extent that they would by their nature be clearly inapplicable, shall not apply to procedure (1) upon appeal to review any judgment, order or ruling, (2) in the appropriation of property, (3) in forcible entry and detainer, (4) in small claims matters under Chapter 1925, Revised Code, (5) in uniform reciprocal support actions, (6) in the commitment of the mentally ill, (7) in all other special statutory proceedings; provided, that where any statute provides for procedure by a general or specific reference to the statutes governing procedure in civil actions such procedure shall be in accordance with these rules.

Ohio 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

Ohio Civ. R. 3 (2007)

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

recommended 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) 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.

Ohio 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

Ohio Civ. R. 4 (2007)

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.

Ohio 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

Ohio Civ. R. 4.3 (2007)

Rule 4.3. Process: out-of-state service

(A) When service permitted.

Service of process may be made outside of this state, as provided in this rule, in any action in this state, upon a person who, at the time of service of process, is a nonresident of this state or is a resident of this state who is absent from this state. "Person" includes an individual, an individual's executor, administrator, or other personal representative, or a corporation, partnership, association, or any other legal or commercial entity, who, acting directly or by an agent, has caused an event to occur out of which the claim that is the subject of the complaint arose, from the person's:

- (1)** Transacting any business in this state;
- (2)** Contracting to supply services or goods in this state;
- (3)** Causing tortious injury by an act or omission in this state, including, but not limited to, actions arising out of the ownership, operation, or use of a motor vehicle or aircraft in this state;
- (4)** Causing tortious injury in this state by an act or omission outside this state if the person regularly does or solicits business, engages in any other persistent course of conduct, or derives substantial revenue from goods used or consumed or services rendered in this state;
- (5)** Causing injury in this state to any person by breach of warranty expressly or impliedly made in the sale of goods outside this state when the person to be served might reasonably have expected the person who was injured to use, consume, or be affected by the goods in this state, provided that the person to be served also regularly does or solicits business, engages in any other persistent course of conduct, or derives substantial revenue from goods used or consumed or services rendered in this state;
- (6)** Having an interest in, using, or possessing real property in this state;
- (7)** Contracting to insure any person, property, or risk located within this state at the time of contracting;
- (8)** Living in the marital relationship within this state notwithstanding subsequent departure from this state, as to all obligations arising for spousal support, custody, child support, or property settlement, if the other party to the marital relationship continues to reside in this state;
- (9)** Causing tortious injury in this state to any person by an act outside this state committed with the purpose of injuring persons, when the person to be served might reasonably have expected that some person would be injured by the act in this

state;

(10) Causing tortious injury to any person by a criminal act, any element of which takes place in this state, that the person to be served commits or in the commission of which the person to be served is guilty of complicity.

(B) Methods of service.

(1) Service by certified or express mail. Evidenced by return receipt signed by any person, service of any process shall be by certified or express mail unless otherwise permitted by these rules. The clerk shall place a copy of the process and complaint or other document to be served in an envelope. The clerk shall address the envelope to the person to be served at the address set forth in the caption or at the address set forth in written instructions furnished to the clerk with instructions to forward. The clerk shall affix adequate postage and place the sealed envelope in the United States mail as certified or express mail return receipt requested with instructions to the delivering postal employee to show to whom delivered, date of delivery, and address where delivered.

The clerk shall forthwith enter the fact of mailing on the appearance docket and make a similar entry when the return receipt is received. If the envelope is returned with an endorsement showing failure of delivery, the clerk shall forthwith notify, by mail, the attorney of record or, if there is no attorney of record, the party at whose instance process was issued and enter the fact of notification on the appearance docket. The clerk shall file the return receipt or returned envelope in the records of the action. If the envelope is returned with an endorsement showing failure of delivery, service is complete when the attorney or serving party, after notification by the clerk, files with the clerk an affidavit setting forth facts indicating the reasonable diligence utilized to ascertain the whereabouts of the party to be served.

All postage shall be charged to costs. If the parties to be served by certified or express mail are numerous and the clerk determines there is insufficient security for costs, the clerk may require the party requesting service to advance an amount estimated by the clerk to be sufficient to pay the postage.

(2) Personal service. When ordered by a court, a "person" as defined in division (A) of this rule may be personally served with a copy of the process and complaint or other document to be served. Service under this division may be made by any person not less than eighteen years of age who is not a party and who has been designated by order of the court. On request, the clerk shall deliver the summons to the plaintiff for transmission to the person who will make service.

Proof of service may be made as prescribed by Civ. R. 4.1(B) or by order of the court.

Ohio Rules Of Civil Procedure
Title III Pleadings And Motions

Ohio Civ. R. 15 (2007)

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 therefore.