

IN THE SUPREME COURT OF OHIO

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

**REPLY OF CHINA SHIPPING (NORTH AMERICA) HOLDING CO., LTD
TO APPELLEES' MERIT BRIEF**

Julia R. Brouhard, Esq. (0041811)
COUNSEL OF RECORD
Robert T. Coniam (0034623)
RAY, ROBINSON, CARLE & DAVIES
1717 E. Ninth Street, Suite 1650
Cleveland, Ohio 44114-2878
Telephone: (216) 861-4533
Facsimile: (216) 861-4568
jbrouhard@rayrobcle.com
rconiam@rayrobcle.com

**Counsel for Appellant
China Shipping (North America)
Holding Co., Ltd.**

Robert F. Burkey, Esq. (0015249)
200 Chestnut Ave. N.E.
Warren, Ohio 44483
Telephone: (330) 393-3200
Fascimile: (330) 393-6436
rb@title-company.net

**Counsel for Appellees
John LaNeve and Melissa LaNeve**

Thomas W. Wright, Esq. (0017529)
COUNSEL OF RECORD
William Jack Meola (0022122)
DAVIS & YOUNG
1200 Fifth Third Center
600 Superior Avenue, East
Cleveland, Ohio 44114-2654
Telephone: (216) 348-1700
Facsimile: (216) 621-0602
twright@davisyoung.com
jmeola@dywarren.com

**Counsel for Appellant
ContainerPort Group, Inc.**

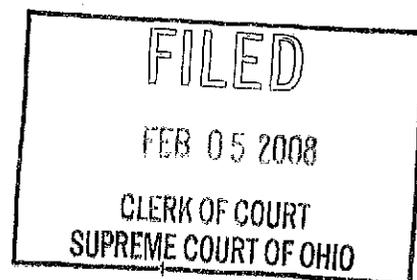


TABLE OF CONTENTS

	<u>Page</u>
TABLE OF AUTHORITIES	iii
I. STATEMENT OF FACTS	1
II. PROPOSITION OF LAW NO. 1	2
A. LaNeve Ignores This Court’s Dispositive Case Law	2
B. LaNeve Had One Year To Perfect Service From The Date The Original Complaint Was Filed, Not From The Date The Amended Complaint Was Filed	3
C. LaNeve Did Not Substantially Comply With Civ.R. 15(D).....	4
D. Civ.R. 15(D) Does Not Conflict With Any Other Civil Rule Or Statute.....	6
E. The Clerk of Courts Did Nothing Wrong	8
III. PROPOSITION OF LAW NO. 2.....	10
A. LaNeve Ignores Relevant Case Law.....	10
B. <i>Goalsby</i> Does Not Apply	12
IV. CERTIFIED QUESTION.....	14
V. CONCLUSION.....	15
CERTIFICATE OF SERVICE	16

TABLE OF AUTHORITIES

Page

CASES

Amerine v. Haughton Elevator Co.
(1989), 42 Ohio St.3d 57, 537 N.E.2d 2082, 10-11, 14-15

Austin v. Miami Valley Hosp. (2nd Dist. 1984), 19 Ohio App.3d 231,
232, 483 N.E.2d 11856

Bank One, Columbus, NA v. O'Brien, 11th Dist. No. 91AP-166,
91AP-441, 1991 Ohio App. LEXIS 63903

Cecil v. Cottrill (1993), 67 Ohio St.3d 367, 618 N.E.2d 1332

Clint v. R.M.I. Co. (December 13, 1990), 8th Dist. No. 57187, 57258,
1990 Ohio App. LEXIS 5480, jurisdictional motion overruled 60 Ohio
St.3d 708 (1991), 573 N.E.2d 671 (Table)4

Coleman v. Department of Rehabilitation & Corrections
(6th Cir. (Ohio) August 28, 2002), NO. 01-3169, 46 Fed.Appx. 765, *770;
2002 U.S. App. LEXIS 18016, **1211

Elam v. McAlpin's Co. (November 8, 2001), Hamilton County
Common Pleas No. A0103121, 2001 WL 3565594711

Fetterolf v. Hoffman-LaRoche, Inc.
(11th Dist. 1995), 104 Ohio App.3d 272, 661 N.E.2d 811 12-13

Gliozzo v. University Urologists of Cleveland, Inc.
114 Ohio St.3d 141, 2007-Ohio-3762, ¶16, 870 N.E.2d 71410, 15

Goolsby v. Anderson Concrete Corp.
(1991), 61 Ohio St.3d 549, 575 N.E.2d 801 3, 12-13

Kramer v. Installations Unlimited, Inc.
(5th Dist.), 147 Ohio App.3d 350, 2002-Ohio-1844, 770 N.E.2d 63210, 15

Loescher v. Plastipak Packaging, Inc., 3rd Dist., 152 Ohio App.3d
479, 2003-Ohio-1850, 788 N.E.2d 681.....4, 7

<i>Meek v. Nova Steel Processing, Inc.</i> (1997), 124 Ohio App.3d 367, 706 N.E.2d 374	3
<i>Mustric v. Penn Traffic Corp.</i> (September 7, 2000), 10 th Dist. No. 00AP-277, 2000 WL 1264526	10-11, 15
<i>Permanent Gen. Cos. Ins. Co. v. Corrigan</i> (May 24, 2001), 8 th Dist. No. 78290, 2001 WL 563072.....	10, 15
<i>Scott v. Orlando</i> (6 th Dist. 1981), 2 Ohio App.3d 333, 442 N.E.2d 96.....	8-9
<i>Schneider v. Steinbrunner</i> (November 8, 1995), 2 nd Dist. No. 15257, 1995 WL 737480	14
<i>Shanahorn v. Sparks</i> (June 29, 2000), 10 th Dist. No. 99AP-1340, 2000 Ohio App. LEXIS 2859	14
<i>State ex rel. Pratt v. Weygandt</i> (1956), 164 Ohio St. 463, 466, 132 N.E.2d 191, 194	6-7
<i>Thacker v. Sells</i> (December 31, 1990), 10 th Dist. No. 90AP-669, 1990 WL 250512, <i>Thacker v. Franklin County, Ohio</i> (June 21, 1994), 10 th Dist. No.94APE01-10, appeal dismissed sua sponte, no substantial constitutional question and discretionary appeals, if applicable, not allowed, 70 Ohio St.3d 1446, 640 N.E.2d 527 (Table)	5-6
<i>West v. Otis Elevator Co.</i> (10 th Dist. 1997), 118 Ohio App.3d 763, 694 N.E.2d 93	6
<i>Whitman v. Chas. F. Mann Painting Co.</i> 6 th Dist. No. L-04-1114, 2005-Ohio-245, 2005 WL 126652.....	15
<i>Whitt v. Hayes</i> , 4 th Dist., 2003-Ohio-2337.....	14
STATUTES	
R.C. 1703.191	8
R.C. 2305.19(A).....	10, 12

RULES

Civ.R. 3(A).....3, 5, 10-12, 14-15

Civ.R. 4.1(A), (B) 7-8, 10

Civ.R. 4.3(B)(2) 6-8

Civ. R. 4.6(E)..... 9-10

Civ.R. 15(C)..... 10-11, 15

Civ.R. 15(D).....3-8, 10-11, 13-15

Civ.R. 41(A)(1).....5

REPLY OF CHINA SHIPPING (NORTH AMERICA) HOLDING CO., LTD
TO APPELLEES' MERIT BRIEF

I. STATEMENT OF FACTS

Appellant China Shipping (North America) Holding Co., Ltd. (hereinafter "China Shipping") does not agree with all of the facts stated in the Merit Brief of Appellees John A. LaNeve and his wife (hereinafter collectively "LaNeve" or Appellees), but for purposes of this appeal, very few facts are necessary, and LaNeve does not dispute those facts.

John LaNeve alleges he was injured on May 28, 2002. LaNeve filed suit on May 28, 2004, against Atlas Recycling, Inc., his employer, and five John Doe defendants. (Supp. 006, 008)¹ The Complaint did not allege that he could not discover the names of the John Doe defendants and the summons did not include the words "name unknown" in reference to those defendants. (Supp. 008, 012)

LaNeve filed an Amended Complaint on May 6, 2005, adding China Shipping as a defendant, without stating that it was one of the John Doe defendants named in the original Complaint. (Supp. 018) LaNeve instructed the clerk to serve the Amended Complaint by certified mail at an address in Cleveland, Ohio, and the certified mail was received at that address on June 2, 2005. (Supp. 002)

LaNeve never instructed the clerk to make personal service on China Shipping. No personal service was made on China Shipping at any time.

¹ All references herein to Supplement and Appendix refer to those documents attached to China Shipping's Merit Brief.

endants. In the case at bar, LaNeve did not seek to add China Shipping in place of another party who was misidentified. Instead, he sought to provide the proper name of the defendant whose name was previously unknown. “Unknown John Doe defendant #1 and China Shipping are the same party.” (LaNeve Brief, Pg 12-13) Where an amendment substitutes the party’s real name for the fictitious “John Doe” listed in the original complaint, the party has not changed. It is the same party, now identified by its real name. *Amerine* at 59.

Amerine clearly controls the outcome of this case, but LaNeve and the court below ignored it without explanation. The arbitrary decision of the court below is a radical departure from long established precedent of this Court and from its own prior decisions. The court’s opinion, if not overturned, will result in unequal treatment of all citizens of Ohio based solely on where they choose to file suit. The doctrine of stare decisis exists to stop the arbitrary and unfair administration of justice in Ohio and must be applied in this case.

PROPOSITION OF LAW NO. I

A. LaNeve Ignores This Court’s Dispositive Case Law

Throughout this case, LaNeve has never acknowledged the existence of this court’s controlling decision in *Amerine v. Haughton Elevator Co.* (1989), 42 Ohio St.3d 57, 537 Ohio Op.2d 208, let alone tried to distinguish it. Likewise, LaNeve has failed to distinguish the numerous John Doe cases that follow *Amerine* relied upon by China Shipping or by Appellant AmerPort Group, Inc. LaNeve never explains why he did not have to follow *Amerine*.

LaNeve relies instead on generally irrelevant cases that discuss the proper method to add or substitute a new party citing, for instance, *Cecil v. Cottrill* (1993), 67 Ohio St.3d 367, 67 Ohio St.3d 133. *Cecil* involved adding the correct party when plaintiff initially named that

B. LaNeve Had One Year To Perfect Service From The Date The Original Complaint Was Filed, Not From The Date The Amended Complaint Was Filed

LaNeve contends that he had one additional year from the date the amended complaint was filed within which to serve China Shipping pursuant to Civ.R. 3(A), citing *Meek v. Nova Steel Processing, Inc.* (1997), 124 Ohio App.3d 367, 706 N.E.2d 374, *Goolsby v. Anderson Concrete Corp.* (1991), 61 Ohio St.3d 549, 575 N.E.2d 801 and *Bank One, Columbus, NA v. O'Brien*, 11th Dist. No. 91AP-166, 91AP-441, 1991 Ohio App. LEXIS 6390. (LaNeve Brief, Pg 14) As a result, he argues, the trial court erred in dismissing the claims prematurely and LaNeve should have been permitted to perfect service by personal service on China Shipping at any time up to May 6, 2006, one year after the amended complaint was filed. (LaNeve Brief, Pg 18)² LaNeve never presented this argument to the trial court.

None of the cited cases help LaNeve. First, none involved John Doe defendants, so application of Civ.R. 15(D) was not an issue. Second, while the cases may say that a plaintiff has one year from the date the amended complaint is filed to obtain service under Civ.R. 3(A), in each of those cases the amended complaint was filed before the statute of limitations expired. Thus, as in any other case, when an amended complaint is filed before the statute of limitations expires, the plaintiff has one year within which to serve it in the manner required by the Civil Rules. None of those cases say that a plaintiff has one year to serve an amended complaint on a John Doe defendant when the amended complaint is filed after the statute of limitations has expired. LaNeve cites no case so holding.

² Nothing prevented LaNeve from serving China Shipping personally between the time China Shipping filed its Motion to Dismiss and the time the court ruled on that motion, but he did not do so, negating the effectiveness of this argument.

C. LaNeve Did Not Substantially Comply With Civ.R. 15(D)

LaNeve claims “substantial compliance” with Civ.R.15(D) “if it applies at all in this case.” (LaNeve Brief, Pg 16) Of course Civ.R.15(D) applies – LaNeve named John Doe defendants – 15(D) deals with John Doe defendants. How could it not apply? LaNeve gives no explanation for this curious statement. In any event, the cases cited, *Loescher v. Plastipak Packaging, Inc.*, 3rd Dist., 152 Ohio App.3d 479, 2003-Ohio-1850, 788 N.E.2d 681, and *Clint v. R.M.I. Co.* (December 13, 1990), 8th Dist. No. 57187, 57258, 1990 Ohio App. LEXIS 5480, jurisdictional motion overruled 60 Ohio St.3d 708 (1991), 573 N.E.2d 671 (Table), stand only for the proposition that those courts held the placement of the words “name unknown” required by Civ.R. 15(D) may vary. *Loescher* determined that listing only one of several defendants on the summons and the failure to have the words “name unknown” on the original summons were excused because the original complaint stated that the names and addresses of the John Doe defendants were unknown “despite Plaintiff’s attempts to discover their names and addresses.” *Loescher* at ¶8-11. *Clint* held that placement of the words “name and address unknown” in the caption of the complaint satisfied the requirement of Civ.R. 15(D) that such averment be made “in the complaint.” *Clint* included the words “name and address unknown” in the summons. *Clint* at *7-*12. Neither decision has been followed by any other court.

Of more importance here, and overlooked by LaNeve, is the fact that in both *Loescher* and *Clint* the plaintiff obtained personal service on the John Doe defendant within one year from the date the complaint listing the unknown John Doe defendant was filed.³ LaNeve never obtained personal service on China Shipping.

³ In *Clint* the claim against a John Doe defendant was made in the third amended complaint, which was filed before the applicable statute of limitations expired. *Clint* at *4.

LaNeve does cite one unreported, anomalous case in which the court determined that attempted certified mail service on the newly discovered John Doe defendant satisfied the requirements of Civ.R. 15(D). *Thacker v. Sells* (December 31, 1990), 10th Dist. No. 90AP-669, 1990 WL 250512, (hereinafter *Sells I*), summary judgment granted after remand on other grounds affirmed, *Thacker v. Franklin County, Ohio* (June 21, 1994), 10th Dist. No.94APE01-10, appeal dismissed sua sponte, no substantial constitutional question and discretionary appeals, if applicable, not allowed, 70 Ohio St.3d 1446, 640 N.E.2d 527 (Table). Thacker originally filed suit on December 5, 1988, for the alleged wrongful death of her son in the Franklin County Juvenile Detention Center, naming various defendants plus three John Doe defendants. Answers were filed for the defendants actually named. On December 1, 1989, plaintiff amended her complaint to properly name the John Doe defendants including Roseanne Sells, Superintendent of the Center. Plaintiff requested certified mail service on each defendant, but then dismissed the complaint pursuant to Civ.R. 41(A)(1) on December 5, 1989, "one day before one year had elapsed after filing the initial complaint, and apparently before certified mail service had actually been made upon the three newly identified defendants..." *Sells I* at *1. Plaintiff then filed a new complaint on February 8, 1990, against all of the same defendants, including Sells, who was served by certified mail. *Sells I* at *1.

Sells' motion to dismiss for lapse of the statute of limitations was granted, but the court of appeals reversed. It first held, without citation to any other case, that Civ.R. 15(D) did not require personal service on a John Doe defendant once the correct name is discovered because that defendant is no longer unknown and, therefore, certified mail service may be made just as on any other defendant. *Id.* at *3. Next the court held that plaintiff had "attempted to commence" her action within the one year provided by Civ.R.3(A) by requesting certified mail

service but that the service “period was interrupted by the voluntary dismissal of the action before it could be determined that effective service was not made within the one-year period” [after the original complaint was filed]. (Emphasis added.) Id. at *4.

Sells I is directly contrary to *Amerine*, which it never mentions. *Sells I* has never been cited, much less followed by any other court. Subsequent cases from the Tenth District followed *Amerine* in requiring personal service, including *West v. Otis Elevator Co.* (10th Dist. 1997), 118 Ohio App.3d 763, 694 N.E.2d 93. The author of the *West* opinion was the same judge who concurred in *Sells I*. *West* failed to personally serve the summons, failed to include the words “name unknown” in the summons, and failed to state in the complaint that it could not discover the names of the John Doe defendants. Id. at 766-767. Even if *Sells I* is correct, and China Shipping contends it is not, it still requires service, whether personal or by certified mail, within one year after the original complaint is filed. LaNeve did not serve China Shipping within one year after the original complaint was filed.

LaNeve did not substantially comply with Civ.R. 15(D). He did not state in the complaint that he could not discover the names of the John Doe defendants, he did not include the words “name unknown” on either summons, he did not serve China Shipping personally, and he did not serve China Shipping within one year from the date the original complaint was filed.

D. Civ.R. 15(D) Does Not Conflict With Any Other Civil Rule Or Statute

LaNeve also contends that Civ.R. 15(D) should not be enforced because it allegedly conflicts with Civ.R. 4.3, which governs service of process on non-resident defendants. (LaNeve Brief, Pg 16-17) LaNeve cites no cases in support of this contention, and goes to great lengths to create a conflict where none exists.

When considering statutes or rules that seem to conflict, courts routinely apply the doctrine of *in pari materia*. The doctrine favors consistent construction as opposed to inconsistent construction. *Austin v. Miami Valley Hosp.* (2nd Dist. 1984), 19 Ohio App.3d 231, 232, 483 N.E.2d 1185. See also, *State ex rel. Pratt v. Weygandt* (1956), 164 Ohio St. 463, 132 N.E.2d 191, (“In Ohio and elsewhere the generally accepted rule is that statutes relating to the same subject or matter, although passed at different times and making no reference to each other, are *in pari materia* and should be read together to ascertain and effectuate if possible the legislative intent.”) *Id.* at 466.

LaNeve’s reliance on Civ.R. 4.3 is completely misplaced. That Rule refers to service of process outside of the state. LaNeve, however, did not serve or attempt to serve China Shipping outside of the state. Instead, LaNeve requested service on China Shipping by having the court clerk mail the Summons and Amended Complaint to an address in Cleveland. LaNeve can hardly complain now that Civ.R. 4.3 conflicts with Civ.R. 15(D) when he never used that Rule to attempt service out of state.

Civ.R. 4.1 applies to the process LaNeve actually employed. Civ.R. 4.1 permits service by certified or express mail (See § (A)) or permits personal service “when the plaintiff files a written request with the clerk for personal service.” (See § (B)). Thus, LaNeve could have complied with Rule 15(D) requiring personal service because personal service is permitted under Civ.R. 4.1(B) without first obtaining court approval.

Even if LaNeve had attempted service out of state under Civ.R. 4.3, that Rule provides that a plaintiff may request a court order for personal service of the summons and complaint. See Civ.R. 4.3(B)(2). “Service under this division may be made by any person not less than 18 years of age who is not a party and who was designated by order of the court. On

request, the clerk shall deliver the summons and complaint to the plaintiff for transmission to the person who will make service.” See *Loescher v. Plastipak Packaging, Inc.*, 2003-Ohio-1850 at ¶2 (plaintiff filed motion for appointment of process-server pursuant to Civ.R. 4.3 and summons was personally served on defendant). LaNeve does not explain why he did not request an order for personal service. Clearly, Civ.R. 15(D) does not conflict with Civ.R. 4.3 or with Civ.R. 4.1 because both rules permit personal service, which Civ.R. 15(D) requires.

LaNeve also contends, again without any case or statutory support, that Civ.R. 15(D) is in direct conflict with R.C. 1703.191 governing service of process on the Secretary of State for unlicensed corporations. (LaNeve Brief, Pg 17-18.) He claims that service on the Secretary of State conflicts with the service mandated by Civ.R. 15(D), “e.g. personal service.” (LaNeve Brief, Pg 18) (Curiously LaNeve now seems to admit that Civ.R. 15(D) does require personal service.) Significantly, LaNeve never attempted to serve China Shipping through the Secretary of State. Assuming for purposes of this argument only that China Shipping was required to obtain a license but failed to do so, then LaNeve actually failed to properly serve China Shipping as an unlicensed corporation in the State of Ohio. Under that scenario, LaNeve should have personally served the Secretary of State on behalf of defendant China Shipping. Personal service on the Secretary of State pursuant to Civ.R. 4.1(B) would have been in accordance with the statute cited by LaNeve and in accordance with Rule 15(D). Thus, the Rule does not conflict with the Statute.

E. The Clerk of Courts Did Nothing Wrong

Last, LaNeve contends the court clerk “unreasonably delayed the issuance of summons upon China Shipping for approximately three weeks,” citing *Scott v. Orlando* (6th Dist. 1981), 2 Ohio App.3d 333, 442 N.E.2d 96. The argument seems to be that had the clerk issued

and mailed the summons sooner, it would have been delivered via certified mail to China Shipping prior to May 28, 2005. (LaNeve Brief , Pg 14-15) Even if service by certified mail was proper, which China Shipping denies, there is nothing in the record to indicate that LaNeve instructed the clerk to issue the summons quickly because the Amended Complaint needed to be served no later than May 28, 2005.

The facts in *Scott* are completely different from the facts herein. There, plaintiff filed suit long before the statute of limitations expired, but asked the court clerk to withhold service of the complaint. Some ten months later, Scott filed a praecipe requesting that service be made. The clerk's office, following its own unwritten rule, forwarded the case file to the court for review and Scott was subsequently asked for a written explanation of the delay. Scott filed the written explanation and "regularly thereafter inquired of the clerk and the court" as to the status. Despite counsel's efforts and repeated assurances from the clerk, service was not accomplished until more than one year after the complaint had been filed. The case was dismissed for failure to serve the complaint timely. *Id.* at 333-334. The Sixth Appellate District Court reversed the trial court's dismissal, disapproving the unwritten rule regarding cases in which delay of service had occurred, stating: "We find no authority which reposes discretion as to issuance of summons in the clerk of court or in the trial court." *Id.* at 334. Under those unique circumstances, Scott's case was not time barred.

In the case at bar, the clerk issued and mailed the summons on May 19, 2005, within two weeks (not three as alleged by LaNeve) after the amended complaint was filed. (Supp. 002) There is no showing that the clerk took affirmative action, as in *Scott*, to "unreasonably delay" issuance and service of the summons. The clerk was not instructed to

issue the summons more quickly. Once the certified mail was sent, the clerk had no further control over the delivery of the mail.

It is the duty of the party filing the lawsuit or its attorney to ensure proper service of process. Civ.R. 4.6(E) provides: “The attorney of record or the serving party shall be responsible for determining if service has been made and shall timely file written instructions with the clerk regarding completion of service notwithstanding the provisions in Civ.R. 4.1 through 4.6 which instruct a clerk to notify the attorney of record or the serving party of failure of service of process.” (Emphasis added.) See also *Glozzo v. University Urologists of Cleveland, Inc.*, 114 Ohio St.3d 141, 2007-Ohio-3762, ¶16, 870 N.E.2d 714 (obligation is upon plaintiffs to perfect service of process). LaNeve did nothing to ensure that the clerk issued and served the summons within the required one-year period. LaNeve cannot now blame his inaction on the clerk.

III. PROPOSITION OF LAW NO. 2

A. LaNeve Ignores Relevant Case Law

Both appellants herein cited and relied upon three Ohio cases to support their contention that the Ohio Savings Statute, R.C. 2305.19(A) does not “save” LaNeve’s lawsuit because he did not properly commence or “attempt to commence” it under the requirements of Civ.R.15(D), 15(C) and 3(A). Those cases include *Mustric v. Penn Traffic Corp.* (September 7, 2000), 10th Dist. No. 00AP-277, 2000 WL 1264526; *Permanent General Cos. Ins. Co. v. Corrigan* (May 24, 2001), 8th Dist. No. 78290, 2001 WL 563072; and *Kramer v. Installations Unlimited, Inc.*, (5th Dist.), 147 OhioApp.3d 350, 2002-Ohio-1844, 770 N.E.2d 632. Each of those cases involved a John Doe defendant that was not personally served as required by Civ.R. 15(D). Each of those courts determined that an “attempt to commence” under the Savings

Statute must be made pursuant to the method of service required by the applicable Civil Rule. Because Civ.R. 15(D) as interpreted by *Amerine* requires personal service on a John Doe defendant, among other things, the plaintiffs in each of the three cited cases failed to attempt to commence their lawsuit and their claims were not saved.

Appellants also cited a case from the United States Court of Appeals for the Sixth Circuit, which includes Ohio, in which that court considered *Mustric* and decided that this Supreme Court would follow it and “adopt the perfectly logical rule that a plaintiff cannot benefit from the Savings Statute where the dismissal was due to the plaintiff’s own neglect.” *Coleman v. Dept. of Rehabilitation and Corrections*, (6th Cir. (Ohio) August 28, 2002) No. 01-3169, 46 Fed.Appx. 765, *770; 2002 U.S. App. LEXIS 18016, **12.

China Shipping has discovered one other case that considers the Savings Statute in conjunction with Civ.R. 15(D), 15(C), 3(A) and *Amerine*. *Elam v. McAlpin’s Co.* (November 8, 2001), Hamilton County Common Pleas No. A0103121, 2001 WL 35655947, no subsequent history, held that the Savings Statute did not apply to a refiled complaint involving a Jane Doe defendant when that defendant was not properly served within one year after the original complaint was filed because plaintiff did not aver in the original complaint that she could not discover the name of the defendant and did not include the words “name unknown” on the summons, as required by *Amerine* and the Civil Rules. *Id.* at *3. “The plaintiff having failed to comply with the applicable rules, she cannot here avoid the bar that the statute of limitations presents with respect to her claim against defendant Millar.” *Id.*

Instead of analyzing the four cases cited by appellants and attempting to distinguish them, LaNeve cites cases that do not involve John Doe defendants and that are, as a result, distinguishable from this case. Furthermore, LaNeve does not cite even one case, other

than his own, that considers the Savings Statute in connection with service on a John Doe defendant and finds in his favor.

B. *Goolsby* Does Not Apply

LaNeve contends that all he had to do was file his complaint on time and then request service at some point during the one year allowed by Civ.R. 3(A), even if he did not request the proper method of service. Then he could “effectively dismiss” under *Goolsby* and his amended complaint would amount to a refile under R.C. 2305.19. LaNeve’s continued reliance on *Goolsby* is wrong because he misstates that holding, as did the court below. As pointed out in China Shipping’s Merit Brief at Pg 12-14, *Goolsby* filed her original complaint long before the statute of limitations expired, but she did not request service until two days before the statute expired and it was not served until after the statute expired. *Goolsby* at 550. At the time she requested service, the statute had not expired. She could have filed an identical new complaint on that date, it would have been timely, and she would have had one year to serve it under Civ.R. 3(A). Rather than penalizing plaintiff for not taking the extra steps of dismissing and refiling, this Court treated the request for service made before the statute expired as the equivalent of dismissing and refiling.

Goolsby does not stand for the proposition that every request for service is equivalent to a dismissal and refiling. The request for service, or the actual filing of an amended complaint, must be made before the statute of limitations expires. LaNeve claims that *Fetterolf v. Hoffmann-LaRoche, Inc.* (11th Dist. 1995), 104 Ohio App.3d 272, 661 N.E.2d 811, also supports his position, but it does not. In *Fetterolf*, several claims asserted in an amended complaint were timely filed, but a claim for loss of consortium had a different limitations period and was time barred and properly dismissed because it was filed after its statute of limitations

expired. “Consequently, *Goolsby* is distinguishable because appellant could not have dismissed his loss of consortium claim in the original complaint and refiled the same claim in his amended complaint prior to the expiration of the statutory period.” *Id.* at 280.

LaNeve claims “[t]he facts of the current action are quite similar to that of *Goolsby*.” (LaNeve Brief, Pg 21-22) That is not true. LaNeve’s request for service occurred more than eleven months after his statute of limitations expired. *Goolsby*’s request for service occurred before the statute of limitations expired. LaNeve could not have dismissed his complaint and filed a new complaint against China Shipping on the day he requested service because such a complaint would have been time barred. *Goolsby* could have filed a timely new complaint on the day the request for service was made. The facts of the two cases are in direct opposition to each other. *Goolsby* properly commenced or attempted to commence her lawsuit, so she could subsequently take advantage of the Savings Statute after she dismissed her first lawsuit and then refiled. LaNeve did not properly commence or attempt to commence his lawsuit against China Shipping, so he cannot take advantage of the Savings Statute.

LaNeve never commenced his lawsuit against China Shipping because he did not serve it within one year from the date he filed his original complaint. LaNeve never properly attempted to commence his lawsuit because he did not follow the steps required by Civ.R. 15(D) for service on a John Doe defendant. LaNeve’s claims against China Shipping failed on the merits because they were time barred. As a result, he cannot take advantage of the Savings Statute which requires failure other than on the merits, to revive his lawsuit against China Shipping.

IV. CERTIFIED QUESTION

Once again, LaNeve fails to discuss the conflict between the opinion of the court below and the opinions of the courts in three other districts cited in Appellants' briefs. He never explains why those cases are not the better reasoned cases. He never cites any case other than his own in which a court considered the question and then decided in his favor.

The cases that LaNeve does cite by and large discuss the definition of "attempt to commence" as used in the Savings Statute. The cases cited make reference to the fact that the plaintiffs filed the original complaint and made a proper demand for service before the statute of limitations expired. See for instance *Whitt v. Hayes*, 4th Dist., 2003-Ohio-2337 (plaintiff filed complaint with a demand for service on time); *Shanahorn v. Sparks* (June 29, 2000), 10th Dist. No. 99AP-1340, 2000 Ohio App. LEXIS 2859 (both appellant's original complaint and request for service of summons were submitted prior to expiration of statute of limitations); *Schneider v. Steinbrunner* (November 8, 1995), 2nd Dist. No. 15257, 1995 WL 737480 (plaintiff requested service of process when she timely filed complaint). Here, LaNeve did not request service on China Shipping before the statute of limitations expired.

LaNeve and the Court of Appeals both allege his case should be saved because decisions should be made on the merits, not on mere technicalities. (LaNeve Brief, Pg 24) The court below gives no reason why its opinion should prevail over the well-reasoned opinions of its sister district courts other than it sought to save LaNeve from a "technical service rule" despite his failure to comply with Civ.R. 15(D), 3(A) and *Amerine*. (Appx. 10, ¶21) The result of the court's unjustified resort to the Savings Statute was that the court allowed LaNeve to avoid the bar of the statute of limitations. The court totally failed to consider the countervailing argument that statutes of limitation are passed for a reason and are not to be extended on a whim. "Neither

legislative intent nor public policy supports * * * an extension of the statute of limitations * * * [that] mandate that complaints be filed within specific periods of time. That mandatory language * * * and those specific time limits reflect the clearly expressed intent of the General Assembly that the time for filing a complaint not be arbitrarily extended.” *Whitman v. Chas. F. Mann Painting Co.* 6th Dist. No. L-04-1114, 2005-Ohio-245, 2005 WL 126652, *¶11. (Internal citation omitted.) The arbitrary actions of the court of appeals allowed LaNeve to ignore the requirements of the Rules of Civil Procedure. The Ohio Rules of Civil Procedure may not be disregarded to assist a party who has failed to abide by them. *Glozzo* at ¶16.

This Court accepted the certified question presumably in order to resolve the conflict between the courts of the various districts and to give guidance to attorneys in Ohio about when the Savings Statute may be utilized in connection with a John Doe case. The opinions of the Tenth District in *Mustric*, the Eighth District in *Permanent General* and the Fifth District in *Kramer* consider various aspects of the issue, including this Court’s opinion in *Amerine*, and conclude that a plaintiff should not be able to reap the benefit of the extension of the statute of limitations as provided by the Savings Statute, Civ.R. 3(A), Civ.R. 15(C) and Civ.R. 15(D), when that plaintiff did not at least, attempt to properly serve the John Doe defendant in accordance with the Civil Rules. This Court should adopt the “perfectly logical rule” of the Tenth, Eighth and Fifth District Courts that a plaintiff may not benefit from the Savings Statute if he failed to follow the mandates of the Civil Rules.

V. CONCLUSION

Appellant China Shipping urges this Court to reverse the opinion of the court of appeals, reinstate the decision of the trial court, and answer the certified question in the negative.

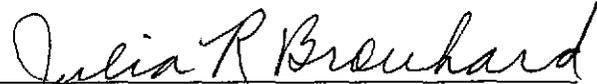
Respectfully submitted,



Julia R. Brouhard, Counsel of Record
Robert T. Coniam
COUNSEL FOR APPELLANT CHINA SHIPPING
(NORTH AMERICA) HOLDING CO., LTD.

CERTIFICATE OF SERVICE

I certify that a copy of this Reply of China Shipping (North America) Holding Co., Ltd. to Appellees' Merit Brief was sent by ordinary U.S. mail this 4th day of February 2008, to Thomas W. Wright, Esq. and William Jack Meola, Esq., Davis & Young, 1200 Fifth Third Center, 600 Superior Avenue, East, Cleveland, Ohio 44114-2654, Counsel for Appellant ContainerPort Group, Inc. and Robert F. Burkey, Esq., 200 Chestnut Ave. NE, Warren, Ohio 44483, Counsel for John LaNeve and Melissa LaNeve.



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