DAVID P. HAUS,	:	IN THE COURT OF COMMON PLEAS OF
	:	LYCOMING COUNTY, PENNSYLVANIA
Plaintiff	:	
	:	
vs.	:	NO. 99-00,087
	:	
MONA CHANG, M.D., CORNERSTONE FAMILY HEALTH, PC and DIVINE PROVIDENCE HOSPITAL,	:	
	:	
Defendant	:	PRELIMINARY OBJECTIONS

OPINION AND ORDER

This Opinion and Order is entered following an evidentiary hearing April 22, 1999, concerning the Preliminary Objections filed by Defendants[1] Mona Chang, M.D., Cornerstone Family Health, P.C. and Divine Providence Hospital in opposition to Plaintiff David P. Haus's Second Amended Complaint (as stipulated; *see* Order of Court dated March 30, 1999). We are asked to consider whether improper service of the Complaint necessitates the claim be stricken.2 We are also called upon to determine whether certain portions of the Complaint should be stricken or repled for lack of specificity.

This case concerns alleged medical malpractice by the above captioned Defendants January 27-28,

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[1] Defendant Divine Providence Hospital is represented by David R. Bahl, Esquire; Defendants Mona Chang, M.D. and Cornerstone Family Health, P.C., are represented by C. Edward S. Mitchell, Esq. and Darryl R. Wishard, Esq. Preliminary Objections were filed on behalf of all Defendants by their respective counsel. The individual Defendants are referred to collectively as "Defendants" throughout this Opinion.

[2] Defendants further argue the improper service failed to toll the statute of limitations and the claim is thus barred. Generally, statute of limitations defenses are raised in New Matter, rather than by Preliminary Objections. Pa.R.C.P. Nos. 1028, 1030, 42 Pa.C.S.A.; ***Ferrari v. Antonacci***, 689 A.2d 320 (Pa.Super. 1997), *allocatur denied*. As indicated at hearing, the Court recognizes, however, that the practical effect of striking the Complaint for improper service is that the claim would in fact be time-barred. Accordingly, we indicated it would be considered as part of the Preliminary Objections (*see* Order of Court dated March 30, 1999). Accordingly, Plaintiff's Preliminary Objections to Defendants' Preliminary Objections, filed April 19, 1999, which raise this issue are deemed moot.

1997. Plaintiff's initial Complaint was filed January 21, 1999, and served shortly thereafter (within 30 days) upon Defendants by a constable. However, Pa.R.C.P. No. 400(a), 42 Pa.C.S. requires service be made by a sheriff. Defendants argue the original service must be stricken. Plaintiff responds original service should not be stricken as Plaintiff made a good faith effort to serve the Complaint and no prejudice to Defendants resulted from the error.

At hearing, Plaintiff's counsel presented testimony that the law firm used the constable for service only because it's secretary had been instructed to do so by several offices, including the Prothonotary, Court Administrator and Sheriff of Lycoming County. Plaintiff also elicited testimony from the Office Manager of the constables' office as well as the constable himself. The Office Manager testified to the effect that the constables get phone calls to serve complaints. The constable stated he serves complaints referred by the Sheriff's office. Further, Plaintiff established the Complaints were actually served upon Defendants January 29, 1999, albeit by a constable.

The defense called personnel from the three Lycoming County offices indicated. All testified they did not recall instructing the secretary to serve the Complaint through the constables and/or that they would not have done so. This included a stipulation by Counsel that, if called to testify, four employees of the Sheriff's office who are responsible for answering phones, if called to testify, would testify they did not recall ever receiving a telephone call from the secretary, never instructed anyone to rely upon a constable for service of a complaint, never directed anyone to the constables' office and none of the four could say they would have been the one to receive the call from the secretary in January of 1998.

Plaintiff points out that the constable's phone number was not in the local Philadelphia directory and it is unlikely the secretary obtained the number from a source other than the Lycoming County offices with which she spoke. The secretary, Barbara A. Cantwell, testified it was her practice to call a county prior to filing a complaint to determine the appropriate way to serve it. She stated she never heard of a constable before, nor of a constable making service of a complaint.

This Court cannot accept Plaintiffs' contention they were instructed by any appropriate authority that local practice in Lycoming County directs a constable, rather than a sheriff, is to serve a complaint. No credible evidence was presented to establish this is a matter of local practice. This contention has no basis in state nor local rules.

We are unconvinced the constable and the Office Manager actually understood the nature of the various papers they testified the constables routinely served, or could distinguish between a District Justice complaint and a Court of Common Pleas complaint. The constable testified there was no distinction in his mind. When he served the Complaint at issue upon one of the Defendants, he told the person receiving it that it was a hearing notice. She looked at the document and informed the constable it was a complaint, not a hearing notice. Further, the Office Manager testified they never received Complaints from the Sheriff's office for service. This Court finds the constable's office does not serve Court of Common Pleas civil complaints.

Conversely, we find credible the testimony given by the various employees of Lycoming County that the established practice in this county is complaints go to the Sheriff's department for service, or

where attorneys tell the Prothonotary's office to direct them. Neither the Prothonotary's, Sheriff's or Court Administrator's offices would direct anyone to the constables for service of a complaint.

We resolve the resulting inconsistency created by Ms. Cantwell's testimony by determining she either did not correctly understand what was said to her, or did not adequately communicate the nature of her inquiry. At the same time, we also find the constable's office did not understand either what Ms. Cantwell was asking them to serve, and/or the limitations upon their authority. Even accepting Ms. Cantwell acquired the constables' telephone number from someone in Lycoming County, this does not prove she was also instructed to send the Complaint to the constables for service. Moreover, the failure to perfect service in accordance with the rules of civil procedure is the ultimate responsibility of Plaintiff's attorney. "It is the plaintiff's burden to demonstrate that his [or her] efforts were reasonable." ***Shackelford v. Chester County Hospital***, 690 A.2d 732 (Pa.Super. 1997).

Defendants argue good faith requires compliance with the Pennsylvania Rules of Civil Procedure and local practice. ***Lamp v. Heyman***, 366 A.2d 882 (Pa. 1976); ***Feher by Feher v. Altman***, 515 A.2d 317 (Pa.Super. 1986); ***Williams v. Septa***, 585 A.2d 583 (Pa.Cmwlth 1991). "A plaintiff has not made a good faith effort when he fails to take those steps necessary to afford proper notice of the suit to the defendant." ***Feher*** at 319.

In ***Lamp***, our Supreme Court addressed whether the filing of a praecipe for writ of summons to commence an action within the time allowed by the relevant statute of limitations tolled the running of the statute if service of the writ was not effectuated until after the statute had run. The Court said

a writ of summons would remain effective to commence an action only if the plaintiff then refrains from a course of conduct which "serves to stall in its tracks the legal machinery he has just set in motion. *Id.* at 889.

One of the most damaging cases to Plaintiff's position is ***Rosenberg v. Nicholson***, 597 A.2d 145 (Pa.Super. 1991), wherein the Superior Court held a plaintiff's inadvertent service of defendant at an incorrect address lacked reasonableness and good faith and therefore were ineffective and did not toll the statute of limitations. "[C]onduct that is unintentional that works to delay the defendant's notice of the action may constitute a lack of good faith on the part of the plaintiff." *Id.* at 148. A further blow is dealt by ***Ferrara v. Hoover***, 636 A.2d 1151 (Pa.Super. 1994), which quotes the ***Rosenberg*** case: "[I]t is not necessary the plaintiff's conduct be such that it constitutes some bad faith or overt attempt to delay before the rule of ***Lamp*** will apply. Simple neglect and mistake to fulfill the responsibility to see that requirements for service are carried out may be sufficient to bring the rule in ***Lamp*** to bear." ***Ferrara*** at 1152.

In the most recent appellate pronouncement presented to the Court concerning this issue, ***Moses v. T.N.T. Red Star Express***, 725 A.2d 792 (1999), the Pennsylvania Superior Court reviewed the progeny of ***Lamp***, noting it has been interpreted to mean the filing of a praecipe for a writ of summons will only toll the statute if, during the life of the writ, the plaintiff makes a good faith attempt to effectuate service. "What constitutes 'good faith' effort to serve legal process is a matter to be assessed on a case by case basis." *Id.* at 796.

Under the facts before this Court, we must conclude that the cases relied upon by

Defendants are factually distinguishable and thus not sufficiently supportive of their position to rule in their favor. In ***Williams***, there wasn't even an argument plaintiff attempted to comply with local practice, or took any affirmative action to insure the writ was served in accordance with the Rules of Civil Procedure. In ***Feher***, "plaintiffs'-appellants' counsel had the burden of proving that he took some affirmative action calculated to provide notice of the suit to the defendant, yet he did not present the court with *any* evidence that he had made the requisite good faith effort." *Id.* at 320 (emphasis in original). Here, Plaintiff has argued vigorously with respect to their attempts both to comply with local practice and make a good faith effort to effectuate service.

With respect to ***Rosenberg***, the Superior Court found the statute of limitations was not tolled for want of a good faith effort to effectuate service despite no prejudice to the defendant plaintiff's repeated attempts. In so doing, the Court distinguished the facts before it with the case of ***Leidich v. Franklin***, 575 A.2d 914 (1990), a case which is the most factually similar to the instant case and therefore controlling.

In ***Leidich***, after filing of a praecipe for the issuance of a writ of summons with the Prothonotary, a copy of the writ was served upon the defendants by first class mail. Proper service of the writ upon defendants by the sheriff was not effectuated until after the statute of limitations had run. The Court noted previous appellate decisions wherein the courts had opined that although rules relating to service of process are important (stating notice is a constitutional touchstone for the power of the courts to act), not every aspect of service is equally critical so that any defect in the process is necessarily "mortal." *Id.* at 919.

Because the defect in service had not affected any substantial rights of the defendants and there was no allegation of prejudice by defendants in the manner in which they received notice of the lawsuit, the Court found the defective service nevertheless tolled the statute of limitations. The Court stated:

> More importantly, consistent with ***Lamp's*** teachings, we cannot in good conscience equate the plaintiff's attorney's actions with a 'course of conduct which serve[d] to stall' the machinery of justice. For example, once the writ was mailed to the defendants, communication with and the submission of documents to their liability carrier began. Even the initial stages of discovery (notice of deposing the defendants) were underway before being discontinued at the behest of the defendants' counsel.
>
> Thus, we do not view the plaintiff's actions as a 'course of conduct' to be condemned under the guise of ***Lamp*** (an 'issue & hold' case). Yet, we caution that, in reversing the order of the court below, we in no way wish to signal to the bench and bar our approval of a circumvention of the Pennsylvania Rules of Civil Procedure and local practice. We are merely holding that, under the particular facts here, ***Lamp's*** 'good faith' effort to notify the defendants was established in tandem with the absence of a 'course of conduct' attributable to the plaintiff evidencing a stalling of the machinery of justice.

Leidich at 919-920. Similarly, Defendants in this case complain of no prejudice suffered as a result of service by the constable instead of the sheriff. Defendants had actual notice of the Complaint within thirty days of its filing and discovery began. There is nothing in the record to indicate Plaintiff's actions constituted a course of conduct which served to "stall the machinery of justice." Rather, applying the principles of ***Moses v. T.N.T. Red Star Express***, *supra* and ***Leidich v. Franklin***, *supra*, this Court is satisfied that because the effort of Plaintiff's counsel's office (through Ms. Cantwell) did in fact result in Defendants' receipt of the original Complaint within the statute of limitations period, the defect in service does not

warrant dismissal of the Complaint.

Accordingly, we find the service of the Complaint was defective and Plaintiff bears the responsibility for the defective service. However, under the facts of the case, the statute of limitations was tolled by the original service.[3] Thus, while the objection requesting the original service be stricken will be sustained, the request to dismiss the action as barred by the applicable two year statute of limitations is denied.

We now turn to consider Defendants' remaining Preliminary Objections, concerning whether Plaintiff's Second Amended Complaint, filed March 25, 1999, contains allegations which should be stricken or repled for lack of specificity. In light of our March 30, 1999, Order, the objections raised by Defendants in this regard to Plaintiff's earlier Complaints are to be considered as they apply to Plaintiff's Second Amended Complaint. For the reasons set forth in Defendants Objections and briefs, we agree the language "including but not limited to" must be stricken from the Second Amended Complaint. We further agree that Paragraphs 17(f), (g), (h) and (i) and Paragraphs 18(f), (h) and (j) are insufficiently specific and shall be repled.

[3] The Preliminary Objections filed by Attorney Mitchell included a request that Plaintiff's Amended Complaint be stricken for lack of verification. However, as indicated, the parties agreed the Preliminary Objections would be considered as related to Plaintiff's second Amended Complaint; at argument, Attorney Mitchell indicated he would accept the verification filed by counsel for Plaintiff.

ORDER

AND NOW, this 30th day of June, 1999, it is HEREBY ORDERED as follows:

1. Defendants Preliminary Objections with respect to improper service of the original Complaint are **SUSTAINED**.

2. For the reasons set forth in the foregoing Opinion, the improper service did not fail to toll the statute of limitations; accordingly, Defendants' request to dismiss the action is **DENIED**.

3. Defendants' Preliminary Objections with respect to lack of specificity in the Second Amended Complaint are **SUSTAINED**. The language "including but not limited to" shall be stricken from the Complaint. Paragraphs 17(f), (g), (h) and (i) and 18(f), (h) and (j) shall be repled.

4. Plaintiff shall file a Third Amended Complaint within twenty (20) days of the filing of this Order.

BY THE COURT,

William S. Kieser, Judge

cc: Court Administrator
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David R. Bahl, Esquire
C. Edward S. Mitchell, Esquire
Darryl R. Wishard, Esquire
Judges
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