JACOB KRAYNAK and FAITH KRAYNAK, his wife, Plaintiffs vs. SUSQUEHANNA HEALTH SYSTEM, THE WILLIAMSPORT HOSPITAL & MEDICAL CENTER/EMERGENCY DEPARTMENT, and BARRY SPECTOR, M.D., Defendants	: : : : : : : : : : : :	IN THE COURT OF COMMON PLEAS OF LYCOMING COUNTY, PENNSYLVANIA NO. 99-01,882 MOTION FOR SUMMARY JUDGMENT

DATE*: *November 17, 2000

OPINION and ORDER

The matters presently before the Court are the summary judgement motions filed by Defendants Susquehanna Health Systems, The Williamsport Hospital and Medical Center on August 31, 2000, and by Defendant Barry Spector, M.D., on September 1, 2000. Defendant's summary judgment motions seek dismissal of the Plaintiff's claim as having been asserted beyond the applicable Statute of Limitations since the Writ of Summons which initiated the action was not timely served upon them.

Facts

The material facts in this case are uncontested and are supported by the attachments to the summary judgment motions and Plaintiffs' responses, as well as the uncontested pleadings.[1] The facts reveal that on November 30, 1997, Dr. Spector saw Plaintiff

[1] Plaintiff has filed responses to both summary judgments on September 28, 2000. All parties filed briefs as follows: Defendant Susquehanna Health System, September 1, 2000; Dr. Spector, September 1, 2000; Plaintiffs, October 23, 2000. In addition, Defendant Susquehanna Health System has filed an affidavit of Christie Fisher, an employee of the Lycoming County sheriff's office in support of summary judgment motion through a praecipe filed September 26, 2000. Argument was held on October 30, 2000.

Jacob J. Kraynak at The Williamsport Hospital. Mr. Kraynak's symptoms included hyperventilating, coughing, involuntary muscle spasms, and dizziness. Complaint par. 11. While in the emergency room, Mr. Kraynak developed slurred speech, inability to swallow, double vision, and numbness on the left side of his face and body. Complaint par. 12. Mr. Kraynak was initially diagnosed as suffering from an anxiety attack. It was subsequently determined that Mr. Kraynak actually suffered a severe stroke. Complaint pars. 19, 35.

Based on these events, Plaintiff Faith Kraynak suspected that there was something "wrong" with the way her husband had been treated on November 30, 1997. Faith Kraynak Deposition, page 87. Consequently, the Plaintiffs sought legal counsel. The Plaintiffs consulted with several different attorneys who were experienced in medical malpractice cases with the goal of pursuing a medical malpractice claim against the Defendants. Faith Kraynak Deposition, pages 89-98. Despite their diligent and exhaustive efforts, every attorney approached by the Plaintiffs declined to take the case. Notwithstanding their lack of success in obtaining counsel, the Plaintiffs were aware that their claim was subject to a two-year Statute of Limitations.[2] The Plaintiffs also knew that they had to commence an action prior to November 30, 1999 or their time would expire. Though he declined to represent the Kraynaks, Attorney Jeff Dohrmann of Williamsport did give the Plaintiffs a "blank" Praecipe for Writ of Summons form. Faith Kraynak Deposition, page 98.

[2] The Plaintiffs became aware of the Statute of Limitations through the course of their numerous consultations.

On November 29, 1999, Plaintiffs went to the Office of the Prothonotary of Lycoming County, filled out and filed the Praecipe for Writ of Summons, and paid a $55 filing fee. Faith Kraynak Deposition, page 30.

Mrs. Kraynak testified that she paid the $55 fee and was told by a Prothonotary employee that this "would take care of the filing." Mrs. Kraynak then asked the employee several times whether or not paying the $55 would keep our statute of limitations or would preserve these rights and was answered yes. Faith Kraynak Deposition, page 31. Plaintiffs were informed that in order to effect a service of process upon Defendants; they must pay an additional $75 fee to the Lycoming County sheriff. Faith Kraynak Deposition, page 40. The Plaintiffs claimed that they did not have enough money to pay the $75 fee. Faith Kraynak Deposition, page 32. Plaintiffs understood that the Sheriff would not serve the Writ of Summons until the Sheriff's Office received the $75 fee.

On November 29, 1997, Plaintiffs went to the Office of the Prothonotary of Lycoming County, filled out and filed the Praecipe for Writ of Summons, paying a $55 filing fee. (Faith Kraynak Deposition, page 29.) Plaintiffs were told at that time that in order to obtain service of process upon Defendants, the Lycoming County sheriff must serve the Writ and that an advance of $75 must be paid to the sheriff. (Faith Kraynak Deposition, p. 40.) Mrs. Kraynak, when asked for $75 for the sheriff to serve the Writ, informed the employee that "they did not have the money to pay that," then Mrs. Kraynak asked if they didn't have the $75 fee whether the action would be nullified or whether their action would be blanked out and was told, no; upon further asking what would happen if the form goes up to the sheriff's office and there is no check and the employee said don't worry about it, everything will be okay. (Faith

Kraynak Deposition, page 33.) Mrs. Kraynak was also told about reissuing the Writ every thirty days, to keep track of the dates and when thirty days comes up to come back in and pay a $5 filing fee to reissue the Writ.

According to her deposition (page 35), Mrs. Kraynak was still confused about the procedure:

> So I, at that point – I did ask her a few times on this, because it was kind of unclear. I just wanted to make sure that if I didn't have the check – I was really worried I didn't have the check or the case for that $75 – this would still be filed, yet it wouldn't be thrown out or anything else. <u>It would be held</u>. That the date and the time and everything would be- this would be valid yet, the filing would be valid (emphasis added).

After her initial visit to the Prothonotary, Mrs. Kraynak called the Sheriff's Office before December 29, 1997 to see if they had gotten the Writ and to ensure that "everything was okay". Faith Kraynak Deposition, page 40. Mrs. Kraynak told the Sheriff's Office that she still did not have the $75 fee. A sheriff's office employee asked her if they were coming in to refile or reissue and she replied "Yes." As demonstrated by her testimony (Faith Kraynak Deposition, pages 40-42), there was still some confusion on the Plaintiff's part concerning the procedure.

> And they mentioned something, are you coming in to refile or re- they said refile or reissue. I'm not quite sure what words they used. And I said yes, I am. And I said – they asked me if I was aware of the date, the time factor of 30 days. And they said, well , we don't deliver anything without a check or without a payment, the $75. And that's when I asked again, there's no way I can deliver it, is there? And she said no. She said you can't.
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> And at that point, I had told them that I was coming in to do the reissuing. And they said that's fine.
>
> In other words, to them, they relayed to me, to them, if it's like if they don't have the payment, I'm not going to be in trouble.

> And I was afraid that they would have the paperwork up there and they would wonder well, where is – what's going on here.
>
> So they more or less seemed okay with the idea that I was coming in to reissue and that's more or less what –
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> Q. Did you understand from the phone call with the sheriff's office that they would not be serving that writ of summons
> that they had in their possession at that point?
>
> A. I understood that they couldn't until they had a check in their hand, or payment – cash or check.
>
> Q. And you hadn't made that payment yet?
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> A. I couldn't make the payment. And I was quite candid with them on the phone. I said financially, I said, I would if I could. And that's why I'm asking if I can deliver it, if I could take it to them myself. And I got the same kind of, like, oh no, you can't do that.

Based upon her understanding of the procedure, Mrs. Kraynak reissued the Writ of Summons on December 29, 1997 and January 28, 2000. On February 22, 2000, the firm of Mathers and Dincher paid the $75 fee to the sheriff for process of service. On February 28, 2000, 87 days after the initial filing, the Writ was again reissued and the same day the sheriff served it upon the Defendants. Mathers and Dincher entered an appearance for Plaintiffs on March 1, 2000.[3]

Discussion

The issue presented for determination is whether or not the Plaintiffs' failure to pay in advance the sheriff's fee required to serve a writ of summons, where good faith reasons exist for not paying the fee, constitutes an exception to the rule that a Writ of Summons must be timely served to toll the statute of limitations. This Court, based upon what we believe to be controlling case law precedent, finds the failure to effect service in a timely manner has caused

[3] Plaintiffs filed a complaint on March 27, 2000. Susquehanna filed an Answer on April 14, 2000, and Dr. Spector filed an answer on May 12, 2000. Both Answers raised the Statute of Limitations as a defense as a New Matter alleging a factual basis substantially conforming to the foregoing facts.

the Writ of Summons to be ineffective to toll the statute of limitations and therefore the Defendants' Motion for Summary Judgment must be granted.

Though the facts in this case may be somewhat involved, the answer is relatively straightforward. The Pennsylvania Rules of Civil Procedure are designed to toll the Statute of Limitations only after the opposing party is aware of the pending litigation. The prevailing belief is that the law requires finality. A related concern is preventing a party from gaining an unfair advantage by allowing them to secretly sustain a lawsuit long after the potential defendant believes the permitted time period has elapsed. Nevertheless the law does recognize the ever-present possibility of human error and because of this there are certain exceptions to the rule that will toll the Statute of Limitations when service is defective. The exceptions include untimely service of process.

The seminal case concerning this issue is ***Lamp v. Heyman***, 366 A.2d 882 (Pa. 1976). ***Lamp*** holds that a Writ of Summons shall remain effective to commence an action only if the plaintiff refrains from a course of conduct which "serves to stall in its tracks the legal machinery he has just set in motion" by the filing. ***Id.*** at 889. ***Lamp*** has been interpreted to mean that the filing of a Writ will only toll the Statute of Limitations if during the life of the Writ plaintiff makes a "good faith effort" to effectuate service. ***Moses v T.N.T. Red Star Express***, 725 A.2d 792, 796 (Pa.Super. 1999). What constitutes such a good faith effort has to be assessed on a case by case basis. ***Ibid.*** There is no mechanical approach to determine whether or not a plaintiff has made a good faith effort, but it is clear that the burden is upon the plaintiffs to demonstrate that their efforts were reasonable. ***Green v. Vinglas***, 635 A.2d 1070, 1073 (Pa.Super. 1993). Moreover, even if the plaintiffs have not engaged in some bad faith

conduct in order to delay service, the rule of ***Lamp*** may still apply; simple neglect and mistake may be sufficient to make the rule applicable. ***Ferrar v. Hoover***, 636 A.2d 1151, 1152 (Pa.Super. 1994). The concept of good faith received further elaboration in the case of ***Leidich v. Franklin***, 575 A.2d 914 (Pa.Super. 1990). In ***Leidich***, the Superior Court found plaintiff had made a good faith effort to effectuate service of a writ by delivering it to the defendants by first class mail. We applied ***Leidich*** in ***Haus v. Chang***, *et al*., No. 99-00,087, Opinion filed June 30, 1999, where we found that plaintiff's mistaken service of complaint by a constable, rather than the sheriff, while defective, was sufficient to constitute a good faith effort which tolled the statute of limitations.

Plaintiffs acknowledge all of these cases seem to indicate that they acted improperly, but assert they did so in good faith as they did not fully understand the law, had been assured they had acted properly to preserve their claims and instead of wanting to avoid notifying the Defendants they did not serve the Writ simply because they could not then afford the cost, but did so within three months of the time the original Writ was filed. Therefore, Plaintiffs argue they should be held to have effectively tolled the statute of limitations. However, a closer examination of ***Lamp*** and its progeny reveal that this is not so. In ***Lamp***, the initial concern was with the intentional actions of the plaintiffs in withholding the Writ. Nevertheless, the cases since ***Lamp*** have further restricted the definition of good faith with the result that many types of conduct that appear to be mistaken or inadvertent, still do not constitute good faith. In ***Green***, *supra,* at 1073, the plaintiff unwittingly failed to pay the sheriff's office fee. In its reasoning, the Court explained that did not meet the requirements of good faith.

> Were we to look only at the ***Lamp*** decision itself, it would appear that Green has not engaged in the evils that ***Lamp*** was seeking to prevent when she unwittingly failed to pre-pay the sheriff's office for deputized service. This was obviously an unintended delay. Clearly, the effect of ***Lamp*** should not be to punish those who make a good faith effort to comply with the local rules. When we look at the cases decided subsequent to ***Lamp***, however, it appears as though Green has not met her burden of proving that she made a good faith effort to comply with local practice.

In ***Green***, *supra* 1073-74, the Court noted ***Feher v. Altman***, 515 A.2d 317 (Pa.Super 1986) and commented:

> Thus although appellant's counsel did not actively attempt to thwart service of the writ, he also did not take any affirmative action to see that the writ was served and to put the defendant on notice that an action had been filed against him. In failing to prepay the sheriff or give the sheriff instructions for service of the original writ, appellant's counsel failed to comply with local practice and thereby failed to demonstrate an affirmative good faith effort to provide notice to the defendant.

In ***Ferrara v. Hoover***, *supra*, the Court reaffirmed earlier decisions which stated that good faith means compliance with the Pennsylvania Rules of Procedure.[4] When viewed *in toto*, the cases seem to stand for the proposition that the Court will excuse improper service (provided the defendant actually received the formal complaint) as acting in good faith, and consequently toll the Statute of Limitations, but will not do so if the defendant never received notice.

Viewed against this backdrop, this case can now be decided. It should be noted that the Plaintiffs did not act maliciously. Quite the contrary, they diligently searched for

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[4] ***Ferrara*** also rejected contentions by the plaintiff that the mistake was due to failure of the Prothonotary or sheriff's office to appropriately see that service is carried out or appropriate advice given. ***Ferrara*** clearly disapproves blaming such officials for the responsibility of making effective service. Finally, ***Ferrara*** notes that an argument of lack of prejudice to the defendant's substantial rights cannot excuse timely service.

representation, they filed the appropriate writ, and they renewed the writ on three separate occasions. These actions suggest a desire to meet the necessary requirements of the law. Furthermore, the Defendants concede that the delay may not have prejudiced them in any substantial way. Nevertheless, none of these actions meet the standard of good faith, as this Court understands it. The constraints imposed by prior decisions compel this Court to reluctantly dismiss the Plaintiff's cause of action at this time rather than to have their claims decided on the merits.

Accordingly, the following Order will be entered:

O R D E R

Based upon the foregoing Opinion, Defendants' Motions for Summary Judgement filed August 31, 2000, and September 1, 2000 are GRANTED. Plaintiffs' Complaint is hereby dismissed.

BY THE COURT:

William S. Kieser, Judge

cc: Court Administrator
Raymond E. Ginn, Esquire
Ginn & Vickery, P.C.; 23 East Avenue; P.O. 34 Wellsboro, PA 16901
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