

**THE FIRST JUDICIAL DISTRICT OF PENNSYLVANIA, PHILADELPHIA COUNTY  
IN THE COURT OF COMMON PLEAS**

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<b>ROBIN POULSON, Administratrix of the Estate: Of MADELINE N. LUCAS, Deceased Appellant/Plaintiff ,</b>	:	<b>CIVIL TRIAL DIVISION</b>
	:	
<b>v.</b>	:	<b>FEBRUARY TERM, 2006 No. 1935</b>
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<b>ALBERT EINSTEIN HEALTHCARE, AND GERMANTOWN COMMUNITY HEALTH SERVICES t/a WILLOW TERRACE : NURSING HOME AND ALBERT EINSTEIN : MEDICAL CENTER AND ALBERT EINSTEIN: MEDICAL CENTER, t/a WILLOW TERRACE : NURSING HOME AND CHESTNUT HILL : HOSPITAL AND MOSS REHABILITATION : HOSPITAL AND WILLOW TERRACE : NURSING HOME AND WILLOWCREST : NURSING HOME</b>	:	<b>Superior Court Docket No. 507 EDA 2008</b>
	:	
<b>Appellees/Defendants.</b>	:	

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**OPINION**

**PROCEDURAL HISTORY**

Plaintiff, Robin Poulson, Administratrix of the Estate of Madeline Lucas (hereinafter plaintiff) appeals from the entry of judgment dated January 3, 2008. Specifically, plaintiff seeks review of this Court's Order November 30, 2006, which granted Defendant Chestnut Hill Hospital's preliminary objections for failure to effectuate service of process.

## FACTUAL BACKGROUND

On or about January 23, 2004, plaintiff entered Albert Einstein Medical Center (AEMC)<sup>1</sup> for treatment of an infection near her kidney dialysis port. (1<sup>st</sup> Amended Complaint, ¶14). After undergoing care at AEMC, plaintiff was discharged on or about February 2, 2004 to the Willow Terrace Nursing Home (Willow Terrace), a facility which plaintiff believed to be owned and operated by AEMC, or alternatively, Albert Einstein Health Care Network. (Id., ¶15). Plaintiff remained a patient at Willow Terrace until on or about February 21, 2004, when she was discharged from the facility to her residence. (Id., ¶16). It is alleged by plaintiff that at the time of her discharge from Willow Terrace on February 21, 2004, she had a pressure ulcer which was not detectable to her or her family. Plaintiff states that the pressure ulcer had developed while she was a patient at Willow Terrace. (Id., ¶20). According to plaintiff, the pressure ulcer persisted and advanced from the aforesaid time period and thereafter, resulted in a need for hospitalization at Chestnut Hill on February 28, 2004. On or about February 28, 2004 the plaintiff entered Chestnut Hill Hospital (Chestnut Hill) as an in-patient, where she remained until her discharge to her residence on May 4, 2004. (Id., ¶18). On or about May 22, 2004, plaintiff was admitted as an in-patient at AEMC, where she remained a patient until her death on June 1, 2004. (Id., ¶19).

Plaintiff commenced this action by filing a Writ of Summons on February 21, 2006. A Complaint was subsequently filed on May 4, 2006 and plaintiff amended her Complaint on December 20, 2006. Plaintiff's Amended Complaint alleges that defendants Albert Einstein Healthcare Network, Albert Einstein Medical Center,

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<sup>1</sup> It is alleged by plaintiff that AEMC trades as (t/a) Willowcrest Nursing Home, and as Willow Terrace Nursing Home.

Willowcrest Nursing Home, and Willow Terrace Nursing Home were negligent in the diagnosis, care and treatment of her while a patient at their facility resulting in the formation of pressure ulcers, generalized sepsis and/or infection which resulted in her death. (1<sup>st</sup> Amended Complaint, pgs. 5-10). Plaintiff alleged similar counts of negligence against defendant Moss Rehabilitation and Chestnut Hill Hospital. (Id. pgs. 11-15).

On September 13, 2006 a judgment of non pros was entered in favor of defendants Albert Einstein Healthcare Network and Germantown Community Health Services t/a Willow Terrace Nursing Home for plaintiff 's failure to file certificates of merit within the time required by Pa.R.C.P. 1042.3. (See Docket). On September 25, 2006, Chestnut Hill filed their preliminary objections to plaintiff's First Amended Complaint, stating *inter alia* that plaintiff had not effectuated proper service of process of the Writ of Summons. On October 25, 2006, plaintiff responded to the preliminary objections and filed their Affidavit of Service stating that the writ was served on Chestnut Hill on March 20, 2006. (Certification of Service of Writ of Summons Upon Defendant, Chestnut Hill Hospital). Despite plaintiff's contentions, the Certification was filed after the applicable statute of limitations had expired. By Order dated November 30, 2006, this Court granted Chestnut Hill's preliminary objections based on plaintiff's failure to effectuate proper service of the Writ of Summons.

On December 6, 2007 the Honorable Sandra Mazer Moss granted Summary Judgment in favor of Albert Einstein Medical Center, Albert Einstein Medical Center, t/a Willowcrest Nursing Home, Albert Einstein Medical Center t/a Willow Terrace Nursing Home, Moss Rehabilitation Hospital, Willow Terrace Nursing Home and Willowcrest

Nursing Home thereby disposing of all parties and all claims to this action. (See Docket). On January 3, 2008, plaintiff filed her praecipe to enter judgment in favor of defendants and against plaintiff thereby perfecting their right to appeal the Order of November 30, 2006. On January 7, 2008, plaintiff filed her Notice of Appeal from the judgment of January 3, 2008 and issued her statement of matters accordingly.

The sole issue to be addressed on appeal is whether this Court committed an abuse of discretion or error of law in granting Chestnut Hill's preliminary objections for plaintiff's failure to properly execute service of process.

### **LEGAL ANALYSIS**

In determining whether a trial court properly sustained preliminary objections, the appellate court must examine the averments in the complaint, together with the documents and exhibits attached thereto, in order to evaluate the sufficiency of the facts averred. *Clemleddy Constr., Inc. v. Yorston*, 2002 PA Super 342, 810 A.2d 693, 696 (Pa. Super. 2002). The basis of the inquiry is to determine the legal sufficiency of the complaint and whether the pleading would permit recovery if ultimately proven. *Id.* The appellate court will reverse the trial court's decision regarding preliminary objections only where there has been an error of law or abuse of discretion. *Id.*

Plaintiff erroneously argues that, although the certificate of service was not filed within the time stated in the Pennsylvania Rules of Civil Procedure 401 and the applicable statute of limitations, service was made upon Chestnut Hill within designated time under the rules and therefore cured any defect.

Pa.R.C.P. 1007 provides that an action may be commenced by filing a praecipe for writ of summons or a complaint.

According to Pa.R.C.P. 401:

(a) Original process shall be served within the Commonwealth within *thirty days* after the issuance of the writ or the filing of the complaint.

(b)(1) If service within the Commonwealth is not made within the time prescribed by subdivision (a) of this rule or outside the Commonwealth within the time prescribed by Rule 404, the prothonotary upon praecipe and upon presentation of the original process, shall continue its validity by reissuing the writ or reinstating the complaint, by writing thereon "reissued" in the case of a writ or "reinstated" in the case of a complaint.

(2) A writ may be reissued or a complaint reinstated at any time and any number of times. A new party defendant may be named in a reissued writ or a reinstated complaint.

(4) A reissued, reinstated or substituted writ or complaint shall be served within the applicable time prescribed by subdivision (a) of this rule or by Rule 404 after reissuance, reinstatement or substitution. (emphasis added).

Courts strictly enforce the rules regarding service of process, especially in instances where the action was instituted by way of writ of summons in an effort to toll the statute of limitations. Our Pennsylvania Supreme Court has stated:

Service of process is a mechanism by which a court obtains jurisdiction of a defendant, and therefore, the rules concerning service of process must be strictly followed ... Without valid service, a court lacks personal jurisdiction of a defendant and is powerless to enter judgment against him or her .... Thus, improper service is not merely a procedural defect that can be ignored when a defendant subsequently learns of an action against him or her.

*Witherspoon v. City of Philadelphia*, 768 A.2d 1079, 564 Pa. 388 (2001) (quoting *Cintas Corp. v. Lee's Cleaning Services, Inc.*, 549 Pa. 84, 700 A.2d 915, 917-918. The courts of this Commonwealth have consistently refused to extend the statute of limitations in instances where a writ of summons is not properly served within the statute of

limitations, noting “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 set in motion.” *Witherspoon*, 768 A.2d at 1082 (quoting *Lamp v. Heyman*, 469 Pa. 465, 366 A.2d 882, 889 (1976)). Once a Writ of Summons is filed in an effort to toll the statute of limitations, a Plaintiff is required to make a good faith effort at properly serving the defendant within thirty days after the Writ of Summons has been filed. *Lamp*, 366 A.2d at 889.

In *Englert v. Fazio Mech. Servs.*, 2007 PA Super 233, 932 A.2d 122, 124-125 (2007). our Superior Court further explained *Lamp* and its successor cases:

It is well settled in this Commonwealth pursuant to *Lamp v. Heyman*, 469 Pa. 465, 366 A.2d 882 (1976), and *Farinacci v. Beaver County Industrial Development Authority*, 510 Pa. 589, 511 A.2d 757 (1986), that service of original process completes the progression of events by which an action is commenced. Once an action is commenced by writ of summons or complaint the statute of limitations is tolled only if the plaintiff then makes a good faith effort to effectuate service. *Moses v. T.N.T. Red Star Express*, 1999 PA Super 31, 725 A.2d 792 (Pa. Super. 1999), *appeal denied*, 559 Pa. 692, 739 A.2d 1058 (1999). ‘What constitutes a ‘good faith’ effort to serve legal process is a matter to be assessed on a case by case basis.’ *Id.* at 796; *Devine v. Hutt*, 2004 PA Super 460, 863 A.2d 1160, 1168 (Pa. Super. 2004)(citations omitted). ‘[W]here noncompliance with *Lamp* is alleged, the court must determine in its sound discretion whether a good-faith effort to effectuate notice was made.’ *Farinacci*, at 594, 511A.2dat759.

In making such a determination, we have explained:  
It is not necessary [that] the plaintiff 's conduct be such that it constitutes some bad faith act 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. Thus, conduct 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 . Devine, supra at 1168 (quoting Rosenberg v. Nicholson, 408 Pa. Super. 502, 597 A.2d 145, 148 (Pa. Super. 1991), appeal denied, 530 Pa. 633, 606 A.2d 903 (1992)). '[A]lthough there is no mechanical approach to be applied in determining what constitutes a good faith effort, it is the plaintiff 's burden to demonstrate that his efforts were reasonable.'* *Bigansky v. Thomas Jeffers on University Hospital*, 442 Pa. Super. 69, 658 A.2d 423, 433 (Pa. Super. 1995), *appeal denied*, 542 Pa. 655, 1668 A.2d 1119 (1995). (emphasis added).

The Superior Court has held that determining whether a plaintiff acted in good faith lies within the sound discretion of the trial court. *McCreesh v. City of Philadelphia*, 585 Pa. 211; 888 A.2d 664, 672 (2005).

In the present case, Plaintiff has failed to properly effectuate service of original process and has violated the statute of limitations for its claim against Chestnut Hill. After issuing the writ of summons on February 21, 2006, no further attempts at service were made. Instead of reinstating service of original process within thirty (30) days after issuance of the writ of summons, as required by law, Plaintiff filed her Complaint on May 4, 2006, seventy two (72) days after the writ of summons was issued.

After receiving notice that service was not effectuated by way of Chestnut Hill's preliminary objections, plaintiff attempted to remediate the problem by filing a Certification of Service of the Writ of Summons on Chestnut Hill (hereinafter Certification) the same day that the preliminary objections were filed and approximately six (6) months after the writ was issued. This conduct amounts to lack of good faith by plaintiff by not reissuing the writ in a timely manner. Plaintiff does not provide any excuse for this unreasonable delay.

The fact that plaintiff had filed her Complaint seventy two (72) days after filing the Writ of Summons does not negate her failure to comply with Pa.R.C.P. 401 in failing to reissue the writ within thirty (30) days from the date it was initially issued. Plaintiff does not dispute the fact that the Certification was not filed with the Court, nor does she offer an excuse for the delay in filing the Certification, which would meet her burden to demonstrate that her efforts to obtain service were reasonable. See *Bigansky*, supra. Plaintiff's unexplained conduct in violating the Pennsylvania Rules of Civil Procedure regarding service of process amount to a lack of good faith.

In addition to plaintiff's improper service of the writ within the applicable statute of limitations, the Certification was also invalid because it did not specify the name of the individual personally served and it was not filed with the prothonotary in a timely manner as is required under Pa.R.C.P. 405.

Pa.R.C.P 405, states in pertinent part:

(a) When service of original process has been made the sheriff or other person making service shall make a return of service forthwith. If service has not been made and the writ has not been reissued or the complaint reinstated, a return of no service shall be made upon the expiration of the period allowed for service.

(b) A return of service shall set forth the date, time, place and manner of service, *the identity of the person served* and any other facts necessary for the court to determine whether proper service has been made.

(d) *A return of service by a person other than the sheriff shall be by affidavit.* If a person other than the sheriff makes a return of no service, the affidavit shall set forth with particularity the efforts made to effect service.

(e) *The return of service or of no service shall be filed with the prothonotary.* (emphasis added).

Plaintiff's Certification that was subsequently filed states in pertinent part, "...I served a true and correct copy of the Writ [sic] Summons in the above captioned matter upon the Defendant, Chestnut Hill Hospital, by handing a true copy of said writ to an adult individual in charge of the business premises of the Defendant at the front information desk at 8835 Germantown Avenue, Philadelphia, PA 19118." (Certification of Service of Writ of Summons Upon Defendant, Chestnut Hill Hospital). The Certification does not identify the name of the individual served in accordance with Pa.R.C.P. 405(d). The Certification was also not filed until approximately six (6) months after the writ was issued without either reissuing the writ or citing a reason for the excessive delay. Without identifying the individual served and timely filing the Certification with the prothonotary, the requirements of Rule 405 have not been met and service is not valid.

Lastly, Plaintiff attempts to argue that Chestnut Hill engaged in "affirmative activity" in the case and therefore has waived the right to assert that proper service was not made. (Plaintiff's Motion for Reconsideration, ¶18). In support of her contention, Plaintiff cites the case of *Ball v. Burke*, 621 A.2d 156, 423 Pa. Super. 358 (1993). The "affirmative activity" that plaintiff mentions in *Ball* refers to the statement "Once a party takes action on the merits of a case, he waives his right to object to defective service of process case." *Id.* at 362. However, unlike in *Ball*, Chestnut Hill properly preserved the issue of improper service of process by filing their preliminary objections before proceeding with the merits of the case. Therefore there is no affirmative action by Chestnut Hill, which would waive their right to contest the service of process.

## **CONCLUSION**

Based on the foregoing analysis, this Court respectfully requests that the Order of November 30, 2006, which granted defendant Chestnut Hill's preliminary objections should be affirmed by the court above.

**BY THE COURT:**

3-18-2008  
Date

ALLAN L. TERESHKO, J.