Witherspoon Update

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There have been three Pennsylvania Superior Court decisions that have recently addressed the issue of proper service of a writ of summons or a complaint which challenge the Pennsylvania Supreme Court's lead opinion in Witherspoon v. City of Philadelphia, 564 Pa. 388, 768 A.2d 1079. The three cases are Parr v. Roman, 2003 PA Super. 149, 822 A.2d 78, Ramsay v. Pierre, 2003 PA Super. 148, 822 A. 2d 85, and Sheets v. Liberty Homes, Inc., and Lewis Homes, Inc., 2003 PA Super. 183, 823 A.2d. 1016. The Pennsylvania Superior Court stated in all three opinions that to impose a heightened standard, which requires process to be "immediately and continuously reissued until service is made," was unnecessary. Rather, the Pennsylvania Superior Court found that the long-standing requirement of a good faith effort to effectuate service is the proper standard to govern the issue. Parr v. Roman, 203 PA Super. 149, ¶ 3, 822 A.2d at 80.

The Pennsylvania Superior Court in Parr decided to use the standard that a plaintiff must make a "good faith effort to effectuate service" instead of adopting the heightened standard of "immediate and continual reissue" that was implemented by the lead opinion in Witherspoon. In Parr the plaintiffs ("Parrs") filed a summons one day before expiration of the statute limitations on a personal injury action which was a result of an automobile collision with the defendant, Ms. Roman. Parr v. Roman, 2003 PA Super. 149, ¶ 2, 822 A.2d at 79. Service of process was attempted several times without success; the writ lapsed and was renewed twice before service was made five months after the initial writ was secured. Parr v. Roman, 2003 PA Super. 149, ¶ 2, 822 A.2d at 79. The trial court entered judgment on the pleadings in favor of the defendant because the plaintiffs failed to immediately and continually reissue the writ until service was made as is required by Witherspoon. Parr v. Roman, 2003 PA Super. 149, ¶ 2, 822 A.2d at 79.

Upon review, the Pennsylvania Superior Court decided not to follow the "immediate and continual reissue" language from Witherspoon because the heightened standard proposed by the lead opinion is merely dicta. Parr v. Roman, 2003 PA Super. 149 ¶ 2, 822 A.2d at 79. The court in Parr upon careful examination of the lead opinion in Witherspoon found that only two Justices supported the heightened standard while five Justices found the change of standard from a "good faith effort" to "immediate and continual reissue" was unnecessary. Parr v. Roman, 2003 PA Super. 149, ¶ 9, 822 A.2d at 80. The court in Parr stated that "in reality, Witherspoon only stands for the principle that in some circumstances, it is so clear that a plaintiff did not exercise good faith to see that the writ was served that there is no need to hold a hearing, and judgment on the pleadings is appropriate." Parr v. Roman, 2003 PA Super. 149 ¶ 10, 822 A.2d at 81. The court in Parr stated that a good faith effort would encompass such activities as inquires of postal authorities, inquires of relatives, employers, neighbors, examination of phone books, motor vehicle records, etc., but ultimately it is decided on a case-by-case basis. Parr v. Roman, 2003 PA Super. 149, ¶¶ 17, 9, 822 A.2d at 81, 80.

The court in Parr found that the trial court had made an error by entering judgment on the pleadings without giving the Parrs the opportunity to show that they attempted in good faith to serve process on Roman. The court in Parr reasoned that the trial court prevented the Parrs from establishing a factual basis from which the court could exercise its discretion because it improperly relied on the dicta in Witherspoon. Parr v. Roman, 2003 PA Super. 149, ¶ 16, 822 A.2d at 81. Therefore, the court in Parr held that the trial court should have held a hearing to determine whether the Parrs were acting in good faith in their attempts to serve process or whether they were seeking to "stall in its tracks the legal machinery they have just set in motion." Parr v. Roman, 2003 Pa. Super. 149, ¶ 15, 822 A.2d at 81 (citing Lamp v. Heyman, 469

Pa. 465, 366 A.2d 882, 889). The day after the Superior Court filed its decision in Parr it filed another decision, Ramsay v. Pierre, 2003 PA Super. 148, 822 A.2d 85, which reiterated that Pennsylvania law only requires a plaintiff to make a "good faith effort to effectuate service" in order to toll the statute of limitations.

On January 4, 2000, three days prior to the expiration of the statute of limitations, the appellee in Ramsay commenced an action for property damage by filing a complaint in the Philadelphia Municipal Court. Ramsay v. Pierre, 2002 PA Super. 148 ¶ 5, 822 A.2d at 87. Service of process was attempted without success at the appellant's last known address in Philadelphia. Ramsay v. Pierre, 2003 PA Super. 148, ¶ 5, 822 A.2d at 88. The action was dismissed due to no service. Ramsay v. Pierre, 2003 PA Super. 148 ¶ 5, 822 A.2d at 88. The appellee then contacted the post master who informed the appellee of the appellant's new address in Upper Darby, Pennsylvania. Ramsay v. Pierre, 2003 PA Super. 148, ¶ 5, 822 A.2d at 88. Service of process was attempted by a constable at the Upper Darby address, but this too was unsuccessful. The action was again dismissed for no service. Ramsay v. Pierre, 2003 PA Super. 148, ¶ 5, 822 A.2d at 88. Upon two unsuccessful attempts to serve the appellant, the appellee applied for alternate service in accordance with local rules of procedure. Ramsey v. Pierre, 2003 PA Super. 148 ¶ 6, 822 A.2d at 88. Finally nine months after the filing of the complaint service was effectuated via certified mail, return receipt requested, on October 5, 2002. Ramsay v. Pierre, 2003 PA Super. 148, ¶ 6, 822 A.2d at 88.

The court in Ramsay states that Pennsylvania has adopted a requirement that a plaintiff make a good faith attempt to serve process in a timely manner where the action is commenced before the statute of limitations has run, but service does not occur until after the statute of limitations has expired. Ramsay v. Pierre, 2003 PA Super. 148, ¶ 16, 822 A.2d at 90. The

Superior court also stated, as it did in Parr, that what constitutes a good faith effort is evaluated on a case-by-case basis. Ramsay v. Pierre, 2003 PA Super. 148 ¶ 16, 822 A.2d at 90. The court further stated that no single factor is dispositive, but one consideration is whether the plaintiff, in this case the appellee, complied with the applicable local rules of procedure. Ramsay v. Pierre, 2003 PA Super. 148 ¶ 17, 822 A.2d at 90. The court in Ramsay found that according to the record the appellee took affirmative action to effect service in accordance with the applicable rules of procedure. Ramsay v. Pierre, 2003 PA Super. 148 ¶ 17, 822 A.2d at 91.

Also, the court stated that an additional factor to be considered is timeliness of service. Ramsay v. Pierre, 2003 PA Super. 148 ¶ 18, 822 A.2d at 91. However, the court is Ramsay disagrees with the appellant's determination of timeliness. The court found that the appellant erroneously relied on the "immediately and continually reissue" standard of Witherspoon to make his argument that service was untimely. Ramsay v. Pierre, 2003 PA Super. 148, ¶ 19, 822 A.2d at 91. The court in Ramsay stated that as a "plurality decision, Witherspoon lacks precedential value." Ramsay v. Pierre, 2003 PA Super. 148 ¶ 19, 822 A.2d at 91. At best Witherspoon can be used only as an example of a plaintiff's lack of good faith in service of process, and it can not be used to create a heightened requirement for plaintiffs. Therefore, the court in Ramsay held that the nine month period to effectuate service was not unreasonable because the appellee made a good faith effort to effect service during that period of time and made no attempts to thwart the progress of the lawsuit or stall the legal machinery that he set in motion. Ramsay v. Pierre, 2003 PA Super. 148 ¶ 21, 822 A.2d at 91, 92.

The Superior Court briefly addressed the issue again in its opinion in Sheets v. Liberty Homes, Inc., and Lewis Homes, Inc., 2003 PA Super. 183, 823 A.2d 1016. The facts of Sheets can be distinguished slightly from that of Parr and Ramsay because the writ of summons in

Sheets was filed before the statute limitations had run and was served upon the defendants within 30 days of being filed. Sheets v. Liberty Homes, Inc., and Lewis Homes, Inc., 2003 PA Super. 183, ¶ 2, 823 A.2d at 1017. However, the question of tolling the statute of limitations came into questions in Sheets because the defendants argued that by filing a complaint it erases the tolling of the statute of limitation set in place by the filing and serving of a writ of summons. 2003 PA Super. 183, ¶ 3, 823 A.2d at 1018. The court in Sheets stated that "the tolling date for the statute of limitations occurs when there is proper, prompt service of a timely filed writ of summons" and "the subsequent complaint does not erase this tolling of the statute of limitations." 2003 PA Super. 183, ¶ 5, 823 A.2d at 1018. The court further stated that "the only time a subsequent complaint will replace a writ of summons is when the writ of summons was never properly served or is a nullity for some other reason." 2003 PA Super. 183, ¶ 5, 823 A.2d at 1018.

The court in Sheets further addressed the issue of tolling the statute of limitations by discrediting the standard set forth in Witherspoon and reaffirming the law originally set forth in Lamp v. Heyman, 366 A.2d 882 (Pa. 1976). 2003 PA Super. 183, ¶ 6, 823 A.2d at 1018. The court in Sheets stated that the "immediately and continually reissuing of the writ until service is made" standard developed in Witherspoon was not the controlling law when determining if the statute of limitations has been tolled. 2003 PA Super. 183, ¶ 6, 823 A.2d at 1018. The court reaffirmed that the correct and controlling precedent for tolling the statute of limitations was set forth in Lamp, and that it called only for a "good faith effort to find and serve the Defendant." 2003 PA Super. 183, ¶ 6, 823 A.2d at 1019. The court further stated, as the Lamp court did, that a "writ of summons shall 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." 2003 PA Super. 183, ¶ 6, 823 A.2d at 1019. However, the court's discussion

of Witherspoon and Lamp was dicta and did not apply to the case because the writ was filed before the statute of limitations expired and was served within 30 days. 2003 PA Super. 183, ¶ 7, 823, A.2d at 1019. This discussion does provide an insightful analysis of why the "good faith effort" from Lamp, Parr, and Ramsay is the controlling law in Pennsylvania.

A Plaintiff must make a "good faith effort to effectuate service" after the writ has been filed in order to toll the statute of limitations. The only value that the plurality decision from Witherspoon has it that it demonstrates what does not qualify as a good faith effort under the standard set forth in Lamp. An attorney has the duty to make sure that the writ is properly and promptly served after being filed, but that does not necessarily mean the writ must be continually renewed until served. It is the duty of the attorney to make the appropriate effort to find and serve the defendant. If an attempt at service fails, an attorney must make a good faith effort to find the needed information to serve the defendant within the allotted time period. Yet, ultimately the decision of what actions constitute a good faith effort is determined on a case-by-case basis by the court.