

**[J-156-2004]**  
**IN THE SUPREME COURT OF PENNSYLVANIA**  
**EASTERN DISTRICT**

**CAPPY, C.J., CASTILLE, NIGRO, NEWMAN, SAYLOR, EAKIN, BAER, JJ.**

CHARLES F. MCCREESH,	:	No. 31 EAP 2004
	:	
Appellant	:	Appeal from the Order of the
	:	Commonwealth Court entered on
	:	December 31, 2003 at No. 709 CD 2003,
v.	:	which reversed the Order of the Court of
	:	Common Pleas of Philadelphia dated
	:	January 2, 2003 at August Term 2002, No.
CITY OF PHILADELPHIA,	:	1387
	:	
Appellee	:	ARGUED: October 18, 2004

**DISSENTING OPINION**

**MR. JUSTICE EAKIN**

**DECIDED: December 28, 2005**

The majority has developed a new rule holding a trial court may only dismiss a case where there is ineffective service in two distinct situations: (1) where the plaintiff's actions evidence an intent to stall the judicial machinery, or (2) where the plaintiff's failure to comply with the Rules of Civil Procedure has actually prejudiced the defendant. Majority Slip Op., at 16-17. The majority goes so far as to suggest that without prejudice, actual notice itself, much less proper service, may be unnecessary. As this result fundamentally fails to comport with the Pennsylvania Rules of Civil Procedure and controlling case law, I offer my dissent.

The Pennsylvania Rules of Civil Procedure expressly provide the sheriff or a competent adult shall serve original process in Philadelphia. Pa.R.C.P. 400.1(a). This Rule was adopted in 1990 by this Court, as the sole means of making service there. It

is the only means of proper service under this Rule, a directive sufficiently clear and simple. Nevertheless, proper service was not made here until November, nearly three months after the statute of limitations expired. Plaintiff did not comply with this basic, straight-forward, and fundamentally important Rule of service, and is to be excused in the name of “flexibility.”

Notice of an action is not the same as service of process; these are distinct and important notions, and our Rule refers only to the latter, and rightfully so. There are good reasons for requiring strictly proper service, and today’s rule abandons them in favor of an amorphous concept of “no harm, no foul.” This has its place in basketball, but not in service of legal process.

I also disagree with the majority’s application of Lamp v. Heyman, 366 A.2d 882 (Pa. 1976), as interpreted in Farinacci v. Beaver County Industrial Development Authority, 511 A.2d 757 (Pa. 1986). In Lamp, the plaintiff’s attorney filed a praecipe for a writ of summons within the applicable statute of limitations period, but instructed the prothonotary to refrain from delivering the writ to the sheriff for service. After the statute of limitations expired, the plaintiff’s attorney had the writ reissued and served. The Rules at the time allowed such abuses, and this Court commented it had become a “relatively common practice” for lawyers to file a praecipe, then deliberately forgo timely service, opting instead to have the writ reissued and served after the statute of limitations expired. Lamp, at 886. We therefore established constraints on permissible conduct to “avoid the situation in which a plaintiff can bring an action, but, by not making a good-faith effort to notify a defendant, retain exclusive control over it for a period in excess of that permitted by the statute of limitations.” Id., at 889. To that end, this Court held:

[I]n actions initiated subsequent to the date of this decision, 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 ....

Id.<sup>1</sup> We further emphasized in order to prohibit manipulation of the Rules of service, a “plaintiff should comply with local practice as to the delivery of the writ to the sheriff for service.” Id. Thus, we explained that “[i]f under local practice it is the prothonotary who both prepares the writ and delivers it to the sheriff, the plaintiff shall have done all that is required of him when he files the praecipe for the writ.” Id. (emphasis added). On the other hand, we indicated that if local practice dictates a plaintiff must deliver the writ to the sheriff for service, the plaintiff shall do so promptly. Id.

In Farinacci, this Court revisited Lamp and expanded on this good faith requirement. See Farinacci, at 759 (“Lamp requires of plaintiffs a good-faith effort to effectuate notice of commencement of the action.”). In Farinacci, the plaintiffs filed a praecipe for a writ of summons February 2, 1982, one day before the statute of limitations expired. The prothonotary issued the writ the next day, and although counsel intended to serve the writ immediately, he misplaced the file. When counsel found the file a week later, he “forgot to take the necessary steps to effectuate service of the writ.” Id. at 758. On March 11, 1982, counsel had the writ reissued and served it within two weeks. The defendants filed preliminary objections, arguing the filing of the praecipe

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<sup>1</sup> The Court sought a compromise between absolute adherence to the 30-day service requirement and the once common practice of allowing attorneys to delay or prevent service of the writ.

had “not toll[ed] the statute of limitations where plaintiffs failed to instruct and pay the sheriff for service in accordance with local practice.” Id. The trial court agreed and dismissed the action; the Superior Court affirmed.

This Court also affirmed, concluding the trial court had not abused its discretion in finding the plaintiffs failed to satisfy Lamp’s requirement of a good-faith effort to effectuate service. Under Lamp, “plaintiffs must comply with local practice to ensure, insofar as they are able, prompt service of process,”<sup>2</sup> and according to the trial court, the plaintiffs had not met this requirement, as local practice demanded they provide the sheriff with instructions and payment for service, and the plaintiffs’ counsel neglected to do so for approximately one month. Id. This Court emphasized it was within the trial court’s “sound discretion” to determine whether a good-faith effort to effectuate service was made. Id. As the evidence demonstrated not only that the “first eight or nine days of delay [was] attributable to counsel’s simply misplacing the file,” but also the “remaining four weeks’ delay was attributable only to counsel’s faulty memory.” Id., at 759-60, the Court concluded:

[A]s plaintiffs have failed to provide an explanation for counsel’s inadvertence which could substantiate a finding that plaintiffs made a good-faith effort to effectuate service of the writ, we are constrained to hold that the order of the [trial court] granting defendants’ preliminary

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<sup>2</sup> Accord Nagy v. Upper Yoder Township, 652 A.2d 428, 430 (Pa. Cmwlth. 1994) (holding simple neglect or mistake could support finding of failure to comply with Lamp’s good faith requirement); Williams v. Southeastern Pennsylvania Transportation Authority, 585 A.2d 583, 585 (Pa. Cmwlth. 1991) (“Lamp requires a plaintiff to comply with local practice regarding delivery of the writ to the sheriff for service.”); Fehrer by Fehrer v. Altman, 515 A.2d 317, 319 (Pa. Super. 1986) (“At a minimum, the good-faith requirement in [Lamp] mandates compliance with the Pennsylvania Rules of Civil Procedure, and, importantly, local practice.”).

objections and dismissing plaintiffs' action was not an abuse of discretion, and was therefore proper.

Id., at 760.

Lamp and Farinacci, decisions from this Court, control this case. The holding of the intermediate appellate court in Leidich v. Franklin, 575 A.2d 914 (Pa. Super. 1990) does not, nor does it express a better rule. Farinacci clarified that, in order to satisfy Lamp's good faith standard, a plaintiff must comply with local Rules of service. Considering both Lamp and Farinacci, along with the evidence of record in this case, I would conclude the Commonwealth Court did not err in determining McCreesh, like the plaintiffs in Farinacci, did not engage in a good-faith effort to effectuate service in accordance with the Rules of Civil Procedure, and, as a result, McCreesh's filing of the praecipe did not toll the statute of limitations.

Indeed, like the plaintiffs in Farinacci, McCreesh did not promptly comply with local practice and Rules of service. Instead of following the clear mandate of our Rule, McCreesh sent the writ to the City Law Department by certified mail, which is not a valid method of service. Pa.R.C.P. 400.1(a). This Court found it significant in Farinacci that the plaintiffs waited approximately five weeks to undertake proper service, yet McCreesh delayed service even longer, waiting three months before getting the writ reissued and serving the City properly. And while Farinacci states an explanation, beyond thoughtlessness, for counsel's failure to comply with the Rules could "substantiate a finding that plaintiffs made a good-faith effort to effectuate service of the writ," Farinacci, at 760, here, no such explanation has been provided. In fact,

McCreesh has never offered any explanation for the failure to serve the City in accordance with our Rules.<sup>3</sup> See, e.g., Williams, at 585 (although plaintiff may not have actively attempted to thwart service, there was no good-faith effort because “neither did he take affirmative action to insure that the writ was served in accordance with the Rules of Civil Procedure.”).

The Commonwealth Court also noted the trial court’s finding (that McCreesh made a good-faith effort to serve the writ) was based on its mistaken conclusion that McCreesh properly served the writ by certified mail; in fact, such service was not proper. Accordingly, the Commonwealth Court considered whether other factors supported a finding of good faith and, if so, whether this would support the ruling that filing the writ tolled the statute of limitations. The Court concluded McCreesh’s actions, or rather his inaction, did not constitute a good-faith effort to promptly serve the City, as Lamp and its progeny require. This case is essentially indistinguishable from Farinacci;

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<sup>3</sup> Both Lamp and Farinacci make clear that a court should not find a plaintiff acted without good faith if fault for improper service lies with someone other than the plaintiff or his agents, e.g., if the sheriff does not follow through with service after the plaintiff has done all that is necessary.

If under local practice it is the prothonotary who both prepares the writ and delivers it to the sheriff, the plaintiff shall have done all that is required of him when he files the praecipe for the writ; the commencement of the action shall not be affected by the failure of the writ to reach the sheriff’s office where the plaintiff is not responsible for that failure.

Lamp, at 889; See Farinacci, at 759-60 (delay attributable only to plaintiff or his agents does not support finding of good faith). However, McCreesh and his counsel did not do all required of them to secure proper service of the writ when they merely put the writ in the mail to a city office; thus, this caveat is of no assistance to McCreesh.

consequently, the Commonwealth Court did not err in finding McCreesh did not act with the good faith required by our case law.

The majority states:

We conclude that the rigid compliance requirement of the Teamann line of cases is incompatible with the plain language of Rule 401, the spirit of Lamp, and the admonition of Rule 126 to construe liberally the rules of procedure so long as the deviation does not affect the substantial rights of the parties.

Majority Slip Op., at 16. I see no “plain language” in Rule 401 that trumps Lamp or Farinacci. Indeed, the plainest language relevant to cases filed in the First Judicial District is not Rule 401; it is Rule 400.1. The “spirit” of Lamp is that of making proper service so as to keep the case moving; the spirit of Lamp is expressly defeated by ignoring the Rule of service and sitting by for months. And Rule 126 does not say the Rules are to be merely construed liberally—it says they are to be liberally construed in order “to secure the just, speedy and inexpensive” determination of the action. Pa.R.C.P. 126. A “just, speedy and inexpensive” determination is advanced by adherence to the Rule, not by notions of flexibility which excuse compliance with basic Rules of service promulgated by the Supreme Court. This is not “liberal construction”; it is liberal ignoring of the Rule to allow a result. A “just, speedy and inexpensive” result follows adherence to the clear, uncomplicated Rule of service.

The majority relies on Leidich v. Franklin, 575 A.2d 914 (Pa. Super. 1990), for the proposition that actual notice suffices to establish good faith under Lamp. Even if Leidich could supersede case law from this Court, it does not actually stand for such a broad proposition, and is factually distinguishable from the instant case. In Leidich, the

plaintiff sent original process to the defendants by first class mail, which is not permitted under Pa.R.C.P. 400; service was not properly made until after the expiration of the statute of limitations. Shortly afterward, however, the plaintiff (1) began communicating with and submitting documents to the defendants' liability carrier, (2) served deposition notices for the depositions of the defendants, and (3) began settlement discussions with the defendants' carrier. See Leidich, at 919-20. Because these proceedings were well underway prior to the expiration of the statute of limitations, the Superior Court stated: "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." Id., at 919 (quoting Lamp, at 889). The court therefore held Lamp's good faith requirement was satisfied. Id., at 920 ("[U]nder 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."). However, the court limited its holding to a situation where, as here, "the defect in service ha[d] not affected any substantial rights of the defendants," and there was no "allegation that the defendants were prejudiced by the manner in which they received notice of the lawsuit." Id., at 919-20.

Leidich was serving papers and in settlement discussions before the statute of limitations ran. McCreesh did not initiate any actions to advance his lawsuit until three months after the statute of limitations expired. Thus, I must disagree with the majority's statement that Leidich supports the proposition that actual notice alone is sufficient to constitute good faith; Leidich only suggests a court may consider actual notice along with other factors in ascertaining whether a plaintiff has acted in good faith. While

Leidich indicates actual notice and prejudice to a defendant can play a part in a good faith analysis under Lamp,<sup>4</sup> we need not write a new rule to accomplish this.

Under Farinacci, we should be constrained to find it was not reversible error for the Commonwealth Court to conclude the mere filing of the praecipe before the expiration of the statute of limitations did not toll the statute, because the plaintiff did not “comply with local practice to ensure, insofar as [he was] able, prompt service of process.” Farinacci, at 759. Furthermore, McCreesh provides no explanation—aside from unfamiliarity with the Rules of Civil Procedure—that would substantiate a finding that he did, in fact, make a good-faith effort to effectuate service. See Fulco, 686 A.2d at 1333 n.5 (“Farinacci effectively requires that mere unexplained neglect prevents the finding of a good-faith effort.”). His inaction long after the statute ran is conclusive support for the Commonwealth Court’s conclusion.

I would hold the Commonwealth Court did not err in finding McCreesh failed to act in good faith as required by Lamp and Farinacci. Lamp does not excuse inertia simply because there is no intent to stall the process—it requires the moving party to move, and failure to do so properly and promptly has consequences even for the unintentionally inert. Lamp looks to the moving party’s actions, and does not excuse

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<sup>4</sup> In support of this premise, Leidich and Fulco v. Shaffer, 686 A.2d 1330 (Pa. Super. 1996), rely on the dissenting opinion in Farinacci, which specifically criticized the majority for failing to consider actual notice and prejudice. See Leidich, at 918, 919 (citing former Justice Zappala’s dissent in Farinacci); Fulco, 686 A.2d at 1333; see also Farinacci, at 760 (Zappala, J., dissenting) (majority should not have affirmed trial court’s decision when record revealed defendants “were made aware of the [plaintiff’s] claim within one year prior to the commencement of ... legal proceedings,” and trial court’s good faith analysis was “noticeably void of any finding of prejudice suffered by any of the [defendants]”). A dissenting opinion from this Court is not binding legal authority.

inaction simply because there is no affirmative showing of prejudice to the non-moving party. Thus, I would affirm the decision that the statute of limitations barred McCreesh's claim.

Mr. Justice Nigro joins this dissenting opinion.