IN THE COMMONWEALTH COURT OF PENNSYLVANIA

James D. Schneller, Heirs and Beneficiaries of Marjorie Schneller, James D. Schneller, trustee ad litem & Estate of Marjorie Schneller, James D. Schneller, trustee ad litem	:	
v.	:	No. 111 C.D. 2008
	:	Submitted: May 30, 2008
Fox Subacute at Clara Burke, their owners, and employees, including Debbie McCoy, James Foulke, Joseph Murray, Nurse McKinney R.N., & Jane Doe 1, Jane Doe 2, and Jane Doe 3, Gary Drizin, M.D., Marjorie Zitomer, Richard Schneller, T. Sergeant Pepper, Esq., & Pennsylvania Department of Health, Division of Nursing Care Facilities-Norristown Field Office, and its employees Inspector Gary Layman and Supervisor Judith Folan	:	
Appeal of: James D. Schneller	:	

OPINION NOT REPORTED

MEMORANDUM OPINION
PER CURIAM FILED: August 25, 2008

James D. Schneller ("Schneller"), *pro se*, appeals from a June 8, 2007 order of the Montgomery County Common Pleas Court sustaining preliminary objections filed by Defendants Gary Drizin, M.D., the Pennsylvania Department of Health, Division of Nursing Care Facilities, Inspector Gary Layman and his supervisor Judith Folan, as well as Joseph Murray and James Foulke (Appellees). This matter arises out of Schneller's wrongful death and survival action against Appellees and against Fox Subacute at Clara Burke, Debbie McCoy, Marjorie Zitomer, Richard Schneller and T. Sergeant Pepper, Esq.

Schneller alleged in his complaint that his mother, Marjorie Schneller, died on March 31, 2002 as a result of negligent care in a nursing home operated by Fox Subacute at Clara Burke. Two years later, on March 31, 2004, Schneller filed his complaint against the various named defendants, including siblings (Marjorie Zitomer and Richard Schneller), and he brought counts in negligence, fraud and conspiracy related to his mother's death. Schneller alleged that the Department's Division of Nursing Care Facilities, Layman and Folan (together, "Department") failed to properly investigate Schneller's complaints that the nursing home failed to provide adequate care for his mother. The earliest that Schneller served any of the defendants with his complaint was May 24, 2004.

Fox Subacute, McCoy, Zitomer, Richard Schneller and Pepper timely filed preliminary objections asserting that Schneller lacked the capacity to sue and failed to serve his complaint within the two-year statute of limitations period. 42 Pa. C.S. §5524. The Department filed preliminary objections on the basis of sovereign immunity. On September 16, 2004, the trial court held an administrative conference at which the parties discussed whether preliminary objections asserting Schneller's lack of capacity to sue and improper service would be deemed raised by all defendants. *Schneller v. Fox Subacute at Clara Burke* (Montg. Com. Pl., No. 04-06046, filed November 9, 2005), slip. op. at 3. On June 10, 2005, the trial court sustained preliminary objections regarding Schneller's capacity to bring survival counts as he had not been appointed administrator of the estate. On September 1, 2005, the trial court struck remaining counts "sustaining Defendants' preliminary objection based on improper service." *Id*. at 4. On September 13, 2005, Schneller served Foulke and Murray for the first time, and they filed preliminary objections.

Schneller appealed the September 1, 2005 order to the Superior Court. He disputed the finding of an agreement that the preliminary objections asserting improper service would be deemed to have been raised by all defendants. The trial court conceded that a reading of the transcript did not give clear indication that the issue of improper service was raised by all defendants. Nonetheless, the trial court held that "Defendants have not waived any objections on the basis of improper service." *Id*. at 13. The Superior Court affirmed the trial court's order sustaining preliminary objections for untimely service as to Fox Subacute, McCoy, Zitomer, Richard Schneller and Pepper, and it determined that the only remaining counts related to non-survival counts against the Department and Dr. Drizin. *Schneller v. Fox Subacute at Clara Burke*, (Pa. Super, No. 2721 EDA 2005, filed June 27, 2006). Schneller thereafter filed two certificates of merit in the trial court on June 30, 2006, submitting amended versions on July 18, 2006, and Dr. Drizin filed his first set of preliminary objections on September 7, citing lack of service within the limitations period. The trial court sustained the outstanding preliminary objections on June 8, 2007.[1]

Schneller appealed the trial court's June 8, 2007 order to the Superior Court, which transferred the case to this Court. As a preliminary matter, the Court points out that Pa. R.A.P. 903(a) generally mandates that in order for a party to appeal a matter from a lower court to an appellate court, the party seeking to appeal must file the requisite notice within 30 days after entry of the order from which the appeal is to be taken. Because Schneller failed to comply, the Court

[1]Accepting well-pleaded facts of the non-moving party as true, the Court must determine whether the moving party is entitled to prevail as a matter of law, and its review is plenary. *Stackhouse v. Commonwealth, Pennsylvania State Police*, 892 A.2d 54 (Pa. Cmwlth. 2006).

declines review of the "prior matters" listed by Schneller as issues 7 through 9 although the Court will address issue 6, which Schneller listed as a "prior matter," inasmuch as his position on this issue (lack of jurisdiction due to improper service) is the foundation for much of his argument as to why he should prevail on matters properly before the Court.[2]

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[2]Schneller lists a total of nine issues for review:

> 1) Has the trial court erred and erred in discretion by ending the case despite Plaintiffs filing of a request to transfer causes of action from the federal complaint dismissed for lack of jurisdiction pursuant to 42 Pa. C.S. §5103?
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> 2) Has the trial court erred and abused discretion in deciding that the Commonwealth Defendants are not health-related personnel as required for waiver of sovereign immunity, and in determining that said defendants did not act outside of the scope of their employment?
>
> 3) Has the trial court erred and abused discretion in sustaining preliminary objections for lack of jurisdiction due to improper service, where later-served parties had constructive notice of the Complaint, in which the corporation of which they are officers had participated at length, and Plaintiffs had stated reasons of economy in light of the County's grant of forma pauperis, and, contrary to prior determinations of impropriety, the original service on the remaining defendants was proper?
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> 4) Has the trial court erred and erred in discretion in sustaining new preliminary objections for improper service filed by a defendant who was found in the preceding appeal to have failed to raise said preliminary objections?
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> 5) Plaintiffs request review of of [sic] orders declared moot which are in reality directly related to appeal[.]
>
> 6) Has the trial court erred in sustaining preliminary objections for lack of jurisdiction due to improper service, where the circumstances do not breach the threshold established by the Lamp v. Heyman case law?

Footnotes continued on the next page ….

Visiting the issue, the Superior Court determined that Schneller failed to make a good faith effort to serve his complaint as required pursuant to *Lamp v. Heyman*, 469 Pa. 465, 366 A.2d 883 (1976). Schneller argued before the Superior Court, as here, that he was unable to serve the defendants because of his poor health, impoverishment and the burden of having four other cases pending at that time. The court noted Pa. R.C.P. No. 401(a), mandating that original process must be served within thirty days after the filing of a complaint, and *Lamp*, requiring plaintiffs to make a good faith effort to do so. The court further noted that in *McCreesh v. City of Philadelphia*, 585 Pa. 211, 888 A.2d 664 (2005), the Supreme Court adopted a more flexible approach but that according to *Miller v. Klink*, 871 A.2d 331 (Pa. Cmwlth. 2005), even under *McCreesh* Schneller bore the burden of establishing a good faith effort to timely serve process.

An action to recover damages for injury based on negligent tortious conduct is subject to a two-year statute of limitations under 42 Pa. C.S. §5524.

> 7) Has the trial court shown bias and prejudgment of the case in not adjudicating plaintiff's requests for compelling of the answers to interrogatories and compelling of the production of the facility records, despite the relevance of them to preliminary objections?
>
> 8) Shall the order which sustains objections of lack of capacity to sue be amended, where it strikes Count 14 – Negligent and Intentional Infliction of Emotional Distress on behalf of plaintiff, for himself?
>
> 9) Has the trial court erred in sustaining the preliminary objection due to lack of capacity to sue where plaintiff litigates diligently towards permission for leave to sue, and the executrix blatantly attempts to forestall the survival action because she is a defendant therein?

The Superior Court acknowledged that the filing of a complaint to commence an action is sufficient to toll the statute of limitations if the plaintiff makes a good faith effort to serve the complaint in compliance with applicable rules. Schneller filed his complaint on March 31, 2004 but failed to serve any of the defendants until May 2004. The Superior Court concluded: "Schneller has not put forth a good faith effort to serve the Defendants with the complaint and therefore has not tolled the statute of limitations." *Schneller* (No. 2721 EDA 2005), slip. op. at 13.

Schneller now urges this Court to disregard the Superior Court's decision claiming that it is clearly erroneous. Schneller raises the same factors that he raised on his first appeal, primarily his poor health and impoverishment. Yet once again Schneller fails to provide case law to support his position that those factors he cited for lack of timely service demonstrate his good faith. For example, *Sweet v. Ayres*, 419 A.2d 749 (Pa. Super. 1980), involved interference by a third person, where a plaintiff's father requested that the sheriff hold a writ without the knowledge of plaintiff or his counsel, which is nothing like the present case. Also, *Carter v. Amick*, 371 A.2d 961 (Pa. Super. 1977), does not concern service of process at all but rather inactivity after a case was properly commenced due to illness of an attorney. Schneller appears to admit that he could have timely pursued service, stating that his "good faith effort involved pursuing existing or newly created proceedings in other Counties," Brief of Appellant, p. 47, and that where litigation was intertwined he pursued matters "stepwise, and in a logical order…." *Id.* at 51. This Court agrees with Superior Court's analysis on this issue.

Dr. Drizin

The trial court sustained Dr. Drizin's preliminary objections based on the Superior Court's determination that Schneller failed to timely serve all of the

defendants. He argues, however, that the trial court violated Pa. R.A.P. 1701 by deciding Dr. Drizin's preliminary objections during the pendency of Schneller's motion for reconsideration to the Superior Court, his petition for allowance of appeal to the Pennsylvania Supreme Court and his petition for writ of certiorari to the United States Supreme Court, all of which were denied.

As a general rule, Pa. R.A.P. 1701(a) provides that after an appeal is taken the trial court may proceed no further in the matter. However, subsection (c) of the rule provides that the prohibition in Rule 1701(a) is limited to the matters that are in dispute, such that where only a particular claim or issue adjudged in the matter is involved in an appeal the rule operates to prevent the trial court from proceeding further with respect to that particular claim or issue. Dr. Drizin's yet-to-be-filed preliminary objections were not at issue in Schneller's prior appeal and subsequent petitions. Moreover, Dr. Drizin filed his preliminary objections in response to the certificates of merit, which Schneller filed during the pendency of his appeals. Evidently, Schneller did not object to the trial court's addressing the preliminary objections, and issues not raised in the trial court are waived and may not be raised on appeal. Pa. R.A.P. No. 302(a).

Schneller takes issue with the fact that the trial court accepted Dr. Drizin's preliminary objections given that his objections were not timely filed. The preliminary objections at issue are the first set of preliminary objections actually filed by Dr. Drizin. While Dr. Drizin attempted to join preliminary objections by the other defendants, Schneller opposed the effort and prevailed, thereby necessitating Dr. Drizin's subsequent filing. Also, under Pa. R.C.P. No. 1042.4, he had no obligation to file preliminary objections until Schneller filed his certificates of merit. Although Dr. Drizin's preliminary objections were untimely

filed by 31 days, the trial court acted within its discretion to deem the objections timely pursuant to Pa. R.C.P. No. 126 due to lateness and perceived deficiencies in Schneller's certificates of merit. Schneller fails to explain how he was prejudiced as the trial court acted reasonably in view of the procedural morass before it and Schneller's actions along with Dr. Drizin's effort to streamline matters.

Murray and Foulke

Schneller argues that the trial court improperly sustained preliminary objections filed by Murray and Foulke for lack of jurisdiction due to improper service. Schneller asserts that these "later-served parties" had constructive notice of the complaint because their corporation participated at length in the litigation. However, Schneller's argument is premised on his incorrect assumption that the original service on Fox Subacute was proper. As discussed above, Schneller did not make timely service. Even if Murray and Foulke had constructive notice, and assuming for the sake of argument that it would be sufficient to show personal jurisdiction over them, Schneller has failed to show that constructive notice was given within the applicable limitations period. The fact that Schneller failed to timely serve the corporation is fatal to his argument.

The Department

Schneller argues that sovereign immunity was waived with respect to the Department. In Section 8522 of the Judicial Code, 42 Pa. C.S. §8522, the legislature waived sovereign immunity as a bar to suit against Commonwealth parties for damages arising out of a negligent act where damages would otherwise be recoverable under the law. Under the medical-professional liability exception, 42 Pa. C.S. §8522(b) and subsection (2), "the defense of sovereign immunity shall not be raised to claims for damages caused by … [a]cts of health care employees of

Commonwealth agency medical facilities or institutions or by a Commonwealth party who is a doctor, dentist, nurse or related health care personnel." Schneller posits that Department employees are "related health care personnel" and that its Division of Nursing Care Facilities is a Commonwealth agency medical facility or institution for purposes of Section 8522(b)(2). Without citing to any authority, Schneller contends that the Nursing Care Division and its employees are related health care personnel in view of their power to make decisions pertinent to medical care and that the Department is not entitled to immunity where its inspectors have authority equal to that of a doctor as to the health of nursing home patients.

Schneller further argues that the Division of Nursing Care is a medical facility or institution because its purpose is solely and directly related to nursing homes, which are medically complex. In support, Schneller refers to the statutory construction principles *noscitur a sociis* (that a word is known by the company it keeps) and *ejusdem generis* (that when a general term follows a specific term, the general term should be understood as a reference to subjects akin to the specific term). Schneller fails to identify any decision-making authority that would render an inspector akin to a medical professional or to explain how the Department's employees might have created some special relationship giving rise to the duties of a medical professional. He submits that his allegations are sufficient to show that employees acted outside the scope of their employment in committing, *inter alia*, acts of homicide and reckless disregard.

Citing 1 Pa. C.S. §2310, and 42 Pa. C.S. §§102, 8501 and 8521, the trial court held that the Department, as a Commonwealth agency, and Layman and Folan, as employees of the Commonwealth agency, are Commonwealth parties entitled to sovereign immunity. The trial court correctly indicated that exceptions

to sovereign immunity are to be strictly construed to uphold legislative intent and to insulate the Commonwealth from tort liability. *Frazier v. Pennsylvania Commonwealth State Police*, 845 A.2d 253 (Pa. Cmwlth. 2004). The trial court found that the Department is not a medical facility or institution, and Schneller's complaint contains no facts to show that Department employees are related health care personnel. The complaint stated only that Schneller lodged a formal complaint, which Layman investigated and Nolan responded to by letter to Schneller. The trial court reasoned that these allegations were insufficient to state a cause of action falling within the medical professional exception to sovereign immunity: all of the actions complained of were undertaken by Layman and Folan within the scope of their duties. The Court agrees with the trial court on this issue.

The term medical facility or institution would ordinarily encompass such facilities and institutions as hospitals, clinics, doctor's offices and the like, *i.e.*, institutions and facilities that provide medical services such as diagnosis and treatment of illness, surgical procedures and rehabilitation. Here, the Department is not alleged to have engaged in the provision of medical services. Thus it cannot be classified as a medical facility or institution. *Steinberg v. Commonwealth, Department of Public Welfare*, 405 A.2d 1135 (Pa. Cmwlth. 1979). Moreover, the Department's employees are not alleged to have undertaken any tasks that would amount to the provision of medical services or a medical practice, and, as a result, they may not be classified as related health care personnel. As the Department contends, Schneller charges the Department along with Layman and Folan with failure to investigate Schneller's complaint to his satisfaction, but this activity is not subject to a waiver of sovereign immunity. *See Kline v. Pennsylvania Mines*

Corp., 547 A.2d 1276, 1278 (Pa. Cmwlth. 1988) (holding no waiver for negligent policies and activities of "negligent inspection and regulatory enforcement").[3]

In discussing why this Court should end this frivolous litigation and prevent Schneller's further abuse of the judicial process, Fox Subacute points out that Schneller has filed 20 lawsuits and 58 appeals to date arising out of his claims related to his mother's death. Fox Subacute states that Schneller has sued hospitals, doctors, nurses, nursing homes, drug companies, attorneys and law firms, banks, funeral homes, the Montgomery County Prothonotary and his brother and sister. *See* Fox Subacute Supplemental Reproduced Record. There is no question that this litigation has to come to an end, but the termination of this case is not due to the multiplicity of lawsuits filed by Schneller. Rather, the Court brings this litigation to an end because the moving parties are entitled to prevail as a matter of law. The Court affirms the order of the trial court.

[3]Schneller challenges the trial court's refusal to entertain his motion to add federal causes of action. According to Schneller, he filed a similar complaint that was dismissed by the U. S. District Court, Eastern District of Pennsylvania, for lack of jurisdiction. He asserts that the trial court should have granted his motion to add the dismissed federal claims to the instant action pursuant to 42 Pa. C.S. §5103(b). In general, "such *transfer may be effected by filing a certified transcript* of the final judgment of the United States court and the related pleadings in a court or magisterial district of this Commonwealth…." 42 Pa. C.S. §5103(b)(2) (emphasis added). Schneller failed to file a certified transcript with the trial court as required under 42 Pa. C.S. §5103(b)(2), and it therefore was under no obligation to entertain Schneller's motion to transfer.

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PER CURIAM

O R D E R

AND NOW, this 25th day of August, 2008, the Court affirms the order of the Montgomery County Common Pleas Court sustaining the preliminary objections of Defendants Gary Drizin, M.D., the Pennsylvania Department of Health, Division of Nursing Care Facilities, Inspector Gary Layman and Supervisor Judith Folan, as well as Joseph Murray and James Foulke.