

JOAN P. SAVOY,	:	IN THE COURT OF COMMON PLEAS OF
	:	LYCOMING COUNTY, PENNSYLVANIA
Plaintiff	:	
	:	
vs.	:	NO. 02-00,219
	:	
JUSTIN M. BRUNGARD,	:	CIVIL ACTION - LAW
	:	
Defendant	:	PRELIMINARY OBJECTIONS

ORDER

AND NOW, this ____ day of December 2002, the Court DENIES Defendant’s Preliminary Objections on the basis of the Statute of Limitations.

Although the Court believes this issue is a close and significant one, the Court finds the case of *Leidich v. Franklin*, 394, Pa. Super. 302, 575 A.2d 914 (1990) bodes toward denial of the objections. *Liedich*, like this case, concerns a personal injury action where the plaintiff’s attorney attempted to toll the Statute of Limitations by filing a praecipe for issuance of a writ of summons with the Prothonotary. Although payment for issuance of the writ was made, there was a notation on the back of the writ, which said, “writ to attorney.” A copy of the writ was served upon defendant by First Class Mail. The original writ was served on an agent of the defendant’s insurance company, but was not properly served on the defendant. After engaging in settlement negotiations with the defendant’s insurance carrier, the plaintiff was confronted with a request to dismiss the case based on a violation of the Statute of Limitations, because the writ of summons was not properly served on the defendant as required by the Pennsylvania Rules of Civil Procedure. The lower court granted the defendant’s preliminary objections and dismissed the case. The Superior Court reversed. Although noting the importance of the rules relating to service of process and acknowledging that service of the writ on the defendant by

mail was not in strict conformity with the rules, the Superior Court found that sustaining the preliminary objections and dismissing the plaintiff's case was an unjust sanction since the defect in service had not affected any substantial rights of the defendant.

In the case at bar, Plaintiff's attorney sent a copy of the writ to Defendant by mail and he does not dispute receiving it the next day. This case is similar to the *Leidich* case in that, although the writ of summons was not properly served on Defendant in strict conformity with the rules, Defendant received a copy of the writ within thirty days of its issuance.

What complicates this case is the holding of the more recent Pennsylvania Supreme Court pronouncement in *Witherspoon v. City of Philadelphia*, 564 Pa. 388, 768 A.2d 1079 (2001) which Defendant argues modifies or limits the Superior Court's holding in *Leidich*. The court, however, notes that the Pennsylvania Supreme Court in *Witherspoon* does not mention the *Leidich* decision. As a lower court, this court is obligated to read the *Leidich* precedent as being compatible with the *Witherspoon* decision if such can reasonably be accomplished and to follow both.

In *Witherspoon*, a Philadelphia plaintiff hired a process server to serve a writ of summons on the City of Philadelphia. The summons was issued in September 1996 a few days before the statute of limitations expired. The process server was not successful in serving the writ because no authorized agent was present to accept the service. The attorney for the plaintiff failed to reissue the writ or make additional attempts to have the writ served due to a mistaken belief that service had already been made. In May 1997, plaintiff's counsel filed a complaint, which was served on the City of Philadelphia within thirty days of its issuance.

In upholding dismissal of the complaint for violation of the statute of limitations, the *Witherspoon* court noted that it is inherently unfair, as well as contrary to the purposes of the statute of limitations, to permit the limitation period to be tolled without the defendant being apprised that he might continue to be subject to liability. 564 Pa. at 396, 768 A.2d at 1083.¹ The *Witherspoon* court then stated, “Given the importance of service of original process in completing the progression of events by which an action is commenced, we deem it necessary that where that progression ‘straddles the line of the limitation period’ the process must be served within the time allowed by the Rules of Civil Procedure, or if service cannot be made, process must be immediately and continually reissued until service is made.” *Id.* at 397-8, 768 A.2d at 1084. The Supreme Court thus found that the lower court did not abuse its discretion in granting the City’s preliminary objection, which raised the statute of limitations.

Unlike the *Leidich* case and our own case, it does not appear that the defendant in *Witherspoon* received actual notice of the lawsuit by receiving a copy of the writ of summons within the statute of limitations period. On a fairness or equitable level it is difficult to dismiss an action and deprive a litigant of their fundamental right of presenting their case in a court of law when the defendant timely receives the writ of summons from the postman instead of the sheriff. Further, it appears in this case that the writ was also timely sent to Defendant’s insurance company, and settlement discussions soon ensued between the parties. Obviously, there has been no stalling of the legal machinery of this case as discovery is

¹ The City of Philadelphia had been served with a six-month notice of intention to file suit against a government unit required by 42 Pa. C.S. §5522, but was not served with the writ of summons.

ongoing and the case has progressed along the same timeframe as would have existed if the writ of summons had been served in accordance with the Rules of Civil Procedure.²

Since Defendant and Defendant's insurance carrier received a copy of the writ of summons within days of the filing of the original writ of summons, this court cannot say clearly that the *Witherspoon* opinion applies to this case and that the *Leidich* opinion should have no effect. Therefore, the court denied the preliminary objections, because Defendant's right to relief was not clear and free from doubt.³ See also, *Moses v. Red Star*, 725 A.2d 792 (Pa.Super. 1999), where the Pennsylvania Superior Court specifically discussed the *Leidich* case and noted in *Leidich* that the plaintiff's good-faith attempt at service on defendant through mailing of the summons immediately after filing of the praecipe for writ, coupled with defendant's conduct of discovery after receipt of the writ, compelled the result reached in the *Leidich* case.

Defendant shall answer Plaintiff's Complaint within thirty days. In the alternative, because of the difficulty and closeness of the issue presented, the Court would consider a request by Defendant for certification of the issue to the Pennsylvania Superior Court. Any such request for certification must be made within thirty days of docketing of this Order.

BY THE COURT,

Kenneth D. Brown, Judge

² Plaintiff filed her complaint on May 20, 2002. See also, Plaintiff's New Matter in their Preliminary Objections to Defendant's Preliminary Objections filed June 10, 2002.

³The court also notes the parties have not argued or briefed the issue of whether defendant has waived any objection to improper service by engaging in discovery.