

deteriorating health.¹

The state action was removed to this court on August 23, 2000 on the ground that defendant Moreno was an employee of Greater Philadelphia Health Action, Inc. (“GPHA”), a federally funded health center. (00-CA-4300). Because the Secretary of the Health and Human Services (“HHS”) deemed GPHA to be an HHS grantee and its employees to be employees of the Public Health Service, a federal agency, there was federal jurisdiction of this action pursuant to the Federal Tort Claims Act (“FTCA”), 28 U.S.C. § 2679 *et seq.* On October 20, 2000, the Honorable Eduardo C. Robreno of this court substituted the United States for Moreno and dismissed plaintiff’s claims against the United States without prejudice as a result of plaintiff’s failure to exhaust her administrative remedies. On February 2, 2001, the action against remaining parties was remanded to state court.

On February 26, 2002, Markowitz filed an answer and cross-claim against Moreno in the state court survival action, and as a result, on March 14, 2002, plaintiff’s survival action was once again removed to the United States District Court for the Eastern District of Pennsylvania because of Moreno’s presence in the lawsuit. (02-CA-1307).²

Presently before the court are Markowitz’s motion for summary judgment (Doc. 4), his second motion for summary judgment (Doc. 21) and PGC and Bongiorno’s motion for summary

¹ Because plaintiff has raised only state law claims against the defendants whose motion for summary judgment are considered here, Pennsylvania law applies.

² On October 24, 2001, plaintiff instigated an action in federal court against the United States pursuant to the FTCA, alleging the negligence of Moreno in treating defendant. (01-CA-5392). By an order dated April 11, 2002, 01-CA-5392 was consolidated with this action.

judgment.^{3 4} (Doc. 7).

FACTUAL BACKGROUND

As necessary on a motion for summary judgment, the facts that follow are viewed and all reasonable inferences are drawn in favor of Vicki Miller (“Miller”) as the non-moving party.

Matsushita Elec. Indus. Co. v. Zenith Radio Corp., 475 U.S. 574, 587 (1986).

Decedent was born on April 1, 1933 with severe mental retardation. During his life, decedent only attained the mental age of four years. In 1988, decedent was placed in a Community Living Arrangement through Jewish Educational and Vocational Services (“JEVS”). While residing at the JEVS home, Phil Markowitz M.D. (“Markowitz”), provided psychiatric treatment and prescribed psychiatric medications to decedent.

In October 1995, decedent was admitted to Frankford Hospital (“Frankford”) with possible acute rhabdomyolysis, a serious disease characterized by muscle breakdown. While hospitalized at Franklin, decedent was treated by Dr. Benjamin Franklin (“Franklin”). Franklin

³ Plaintiff has brought Count I against PGC, Count II against Bongiorno, and Count IV against Markowitz. As such, PGC and Bongiorno’s motion is for summary judgment on Counts I and II of plaintiff’s complaint and Markowitz’s motion is for summary judgment on Count IV of plaintiff’s complaint.

⁴ Plaintiff argues that Bongiorno and PGC waived their right to file a motion for summary judgment since they did not make such a motion by March 4, 2002, the state court scheduling order deadline for summary judgment motions. Doc. 13 at 8 - 9. This argument is without merit. Once this action was removed to federal court on March 14, 2002, a preliminary pre-trial conference was held and new case management deadlines were established. The deadline for filing summary judgment motions is September 11, 2002. Bongiorno and PGC’s motion for summary judgment was filed on April 12, 2002, well-before the prescribed deadline. Plaintiff has not cited any authority to support her contention that Bongiorno and PGC waived their right to bring a motion for summary judgment in federal court simply because they did not bring a timely motion under the state court scheduling order.

repeatedly advised decedent's sister, Vicki Miller ("Miller"), that decedent's condition was caused by an adverse reaction to the medication that he had been prescribed at the JEVS home.

Decedent remained at Frankford until November 27, 1995, at which time he was transferred to Philadelphia Geriatric Center ("PGC"), where Charles Bongiorno M.D. ("Bongiorno") was decedent's attending physician. While at PGC, decedent's condition deteriorated. Decedent developed multiple bed sores and also had a continuous fever, the cause of which was never diagnosed.

On September 9, 1997, decedent was transferred from PGC to Temple University Hospital ("Temple") after his condition became unstable. He died on September 24, 1997, with the cause of death listed as sepsis, a severe illness caused by infection of the bloodstream.

STANDARD OF REVIEW

Either party to a lawsuit may file a motion for summary judgment, and it will be granted "if the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law." Fed. R. Civ. P. 56(c). "Facts that could alter the outcome are "material", and disputes are "genuine" if evidence exists from which a rational person could conclude that the position of the person with the burden of proof on the disputed issue is correct." *Ideal Dairy Farms, Inc. v. John Lebatt, LTD.*, 90 F.3d 737, 743 (3d Cir. 1996) (citation omitted). When a court evaluates a motion for summary judgment, "[t]he evidence of the non-movant is to be believed." *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242,

255 (1986). Additionally, “all justifiable inferences are to be drawn in [the non-movant’s] favor.” *Id.* Under Pennsylvania law, “summary judgment based on the statute of limitations will be proper where a plaintiff fails to plead facts sufficient to toll the statute, or admits facts sufficient to concede the statute of limitations defense, or where the plaintiff fails in his response to show that a genuine issue of material fact exists or finally, where plaintiff’s evidence is inherently unreliable.” *Holmes v. Lado*, 602 A.2d 1389 (Pa. Super. 1992).

DISCUSSION

The parties do not dispute that a two year statute of limitations period is applicable to this survival action. 42 Pa.C.S. § 5523(2). However, the parties do dispute the date upon which the two year statute of limitations for plaintiff’s survival action began to run. In their motions for summary judgment, defendants argue that because decedent’s injury was discovered or discoverable before his death, the statute of limitations began to run before decedent died and this survival action is untimely. Plaintiff counters that the limitations period was tolled until decedent’s death, on September 24, 1997, thereby making this case timely when filed less than two years later, on September 21, 1999.

The statute of limitations begins to run as soon as the right to institute and maintain a suit arises. *Pocono Int’l Raceway, Inc. v. Pocono Produce, Inc.*, 468 A.2d 468, 471 (Pa. 1983). Generally, this period commences for a personal injury case when the alleged negligent act occurred. *Bigansky v. Thomas Jefferson Univ. Hosp.*, 658 A.2d 423, 427 (Pa. Super. Ct. 1995). However, the discovery rule acts as an exception to this general rule under Pennsylvania law when a plaintiff, despite the exercise of due diligence, is unable to know the existence of the

injury and its cause. *Bohus v. Beloff*, 950 F.2d 919, 924 (3d Cir. 1991). In such cases, the discovery rule provides that the statute of limitations does not begin to run until the injured party “knows, or reasonably should know, (1) that he has been injured, and (2) that his injury has been caused by another party’s conduct.” *Id.* (quoting *Cathcart v. Keene Indus. Insulation*, 471 A.2d 493 (Pa. Super. Ct. 1984)). In other words, until one discovers, or through reasonable diligence should have discovered his injury and that it was caused by his physician, the running of the statute of limitations with respect to a medical malpractice action will be delayed until the time of discovery, or the time when discovery becomes reasonably possible. *Citsay v. Reich*, 551 A.2d 1096, 1098 - 99 (Pa. Super. Ct. 1988).

A survival action is one in which a personal representative brings suit to enforce a cause of action that accrued to a deceased individual. *Harvey v. Hassinger*, 461 A.2d 814, 816 (Pa. Super. Ct. 1983). Recovery in a survival action is not based upon a new cause of action that accrued to the plaintiff, but rather, upon a cause of action which was possessed by the decedent at the time of his death. *McClinton v. White*, 427 A.2d 218, 221 (Pa. 1981). Thus, the latest the statute of limitations on a survival action may be commenced is the date of decedent’s death. *Pastierik v. Duquesne Light Co.*, 526 A.2d 323, 326 (Pa. 1986). However, the statute of limitations will begin to run prior to death with respect to injuries that the decedent should reasonably have discovered while alive.⁵*Id.*

⁵ Contrary to defendants’ assertion, it is not true that the discovery rule does not apply to survival actions. Although the Pennsylvania Supreme Court has held that the discovery rule cannot extend the date when the limitations period begins to run in survival actions beyond the date of death, *Anthony v. Koppers Co., Inc.*, 436 A.2d 181 (Pa. 1981), the court has recognized that the discovery rule will allow the limitations period to commence before death when the decedent discovered his injury while alive. *Pastierik*, 526 A.2d at 327.

The discovery rule is an objective test. Whether an individual knew or should reasonably have known of an actionable injury is measured by the reasonable person standard. *A. McD. v. Rosen*, 621 A.2d 128, 130 (Pa. 1993). Thus, although it is unclear what decedent was specifically told about his injury and it is clear that someone suffering from mental retardation to the extent that he was would be unable to comprehend whatever he was told about his injury and its cause, decedent's actual knowledge is simply not the relevant focus in determining when this cause of action accrued. The proper focus is on when a reasonable individual would have discovered his injury and that it was caused by another party's conduct.

Plaintiff's individual knowledge here is particularly pertinent because her knowledge of decedent's injury is instructive of when a reasonable individual would have known of his injury and that it was caused by another party's conduct to commence the running of the statute of limitations. As decedent's sister, and only living relative, she closely monitored decedent's health and his treatment program. She visited decedent numerous times weekly and she spoke regularly to his doctors about his condition. Doc. 7, Ex. B at 59 - 62, 78, 79, 83. Although Miller may not have been decedent's legal guardian⁶, she accepted responsibility for decedent on his admission agreement with PGC and she gave permission for PGC to perform a skin biopsy on decedent's right leg. Doc. 13, Ex. I, J. These actions indicate Miller's close ties to decedent and her involvement in his health care. Miller was clearly receiving information on decedent's behalf and interacting with decedent's doctors on his behalf. Thus, the time which Miller became aware that an adverse reaction to medication was the cause of decedent's deteriorating condition is

⁶ Plaintiff alleges that decedent's guardian was the Commonwealth of Pennsylvania. Doc. 12 at 7. Plaintiff also alleges that the Commonwealth "was not responsible for monitoring [decedent's] care." *Id.* There is no record evidence to substantiate these allegations.

extremely instructive of when the medical negligence action against defendants accrued.

Plaintiff's knowledge of decedent's injuries is instructive of when a reasonable individual would have discovered this actionable injury.

I. Discovery of Injury Caused by Markowitz

Markowitz was decedent's treating psychiatrist while he resided at the JEVS home from 1988 until October 4, 1995. During this time, Markowitz prescribed numerous medications to decedent, which plaintiff now claims interacted in such a way to cause decedent a fatal injury. As a result, plaintiff alleges that Markowitz was negligent in his care of decedent while at the JEVS home.

Plaintiff's deposition testimony clearly establishes that while decedent was hospitalized at Frankford his injury from the medications was discovered. Plaintiff testified that at the time decedent was admitted to Frankford on October 5, 1995, and repeatedly thereafter, she was told by Franklin that decedent was having an adverse reaction to the psychiatric medications that had been prescribed to him while he resided at the JEVS home. Doc. 4, Ex. D at 60, 66 - 68. On December 17, 1995, plaintiff wrote a letter to Bongiorno, decedent's treating physician at PGC, explaining that decedent's condition was "brought about by an adverse reaction to drugs that were prescribed for him while at the JEVS home." Doc. 4, Ex. E. Additionally, from plaintiff's testimony, it is clear that she knew that Markowitz was decedent's psychiatrist at the JEVS home and that she knew, or at least should have known, that Markowitz was responsible for prescribing the psychiatric medications which were causing decedent's adverse reaction. Doc. 4, Ex. C at 39 - 40, 63; Ex. D at 51.

This uncontradicted record evidence clearly establishes that as early as October 5, 1995, or at least by December 17, 1995, a reasonable person would have known of his injury and that it was caused by Markowitz's actions in prescribing "bad medication." Thus, in the fall of 1995, a cause of action against Markowitz accrued and the statute of limitations began to run. As such, the statute of limitations for a negligence claim against Markowitz expired in the fall of 1997, well before the date upon which plaintiff commenced this action.

II. Statute of Limitations Was Not Tolloed

Plaintiff offers four reasons as to why the statute of limitations on her claim against Markowitz did not begin to run until the date of decedent's death. First, plaintiff argues that the extent of decedent's injury was not discovered until after his death because plaintiff was not told that the drugs prescribed to decedent could interact in a fatal manner, nor was she ever informed that decedent had tested high for toxicity. Second, plaintiff claims that because the decedent was mentally retarded he did not and could not have discovered that his injury was caused by an adverse reaction to his medications. Third, plaintiff contends that the statute of limitations was tolled until the date of death because defendants concealed information from her that prevented her from knowing of this cause of action at an earlier time. Finally, plaintiff maintains that there are extraordinary circumstances here that explain decedent's failure to bring this cause of action before his death, and that as a result, equity requires that the statute of limitations be tolled until the date of death. These four arguments are without merit, and I will reject them each in turn.

A. Knowledge of an Actionable Injury

It is well-settled under Pennsylvania law that a plaintiff need not know the precise medical cause of an injury in order to begin the running of the statute of limitations. *Bigansky*, 658 A.2d at 430. All that must be known, or reasonably known, to commence the statute of limitations period is that an injury occurred as a result of conduct of another. *Id.* Lack of knowledge, mistake or misunderstanding does not toll the running of the statute of limitations. *Pocono Int'l Raceway, Inc. v. Pocono Produce Inc.*, 468 A.2d 468, 471 (Pa. 1983).

The uncontradicted record evidence is that decedent suffered an adverse reaction to the “bad medications” he had been prescribed by Markowitz and that this injury was known by plaintiff by the fall of 1995. The fact that in the fall of 1995 a reasonable person may not have known that his exact injury was a toxic reaction to medication is irrelevant. For purposes of determining the date upon which the statute of limitations commenced, a reasonable person’s knowledge that he suffered an adverse reaction to medications is enough to establish knowledge of an injury caused by another. Thus, the statute of limitations began to run on plaintiff’s claim against Markowitz in the fall of 1995. It simply does not matter under Pennsylvania law when plaintiff became aware of the exact extent or medical cause of decedent’s injury.

B. Mental Retardation Does Not Toll The Statute Of Limitations

Section 5533 of the Pennsylvania Judicial Code provides that “insanity or imprisonment does not extend the time . . . for the commencement of a matter.” 42 Pa.C.S. § 5533. Plaintiff argues that although this section prohibits tolling the statute of limitations for the insane, it is not entirely clear that it prohibits tolling of claims brought by mentally retarded persons, as insanity

is not defined in the statute.⁷ Pennsylvania courts interpreting section 5533, however, have found that this section precludes tolling the statute of limitations for insanity or mental incapacity of any kind. See, e.g., *A. McD. v. Rosen*, 621 A.2d 128, 130 (Pa. Super. Ct. 1993). Additionally, in applying section 5533, the Third Circuit has specifically found that “mental retardation is not a basis for preserving [a] claim under Pennsylvania’s tolling statute.” *Lake v. Arnold*, 232 F.3d 360, 366-67 (3d. Cir. 2000). Thus, as the Third Circuit has stated, “[n]either the state statutory tolling provisions, which do not authorize tolling for mental incompetency, nor the state discovery rule, which applies an objective standard for determining when an individual should discover a latent injury, afford [plaintiff] any relief from the conclusion that her state claims are time-barred.”⁸ *Id.* at 368.

⁷ Plaintiff also raises an Equal Protection argument as to why tolling should be allowed for claims of mentally retarded individuals. She argues that because mentally retarded individuals often have the mental age of young children, and the statute of limitations is tolled for minors, the statute of limitations must similarly be tolled for those with mental retardation. Otherwise, she argues that two similarly situated classes – the mentally retarded and minors – will be treated differently without a compelling government interest to support such differential treatment. However, as recognized by the court in *Truesdale v. Albert Einstein Medical Center*, 767 A.2d 1060 (Pa. Super. Ct. 2001), there is a compelling government interest for tolling the statute of limitations for minors but not for mentally retarded individuals. The court accurately explained that “[u]nlike a minor plaintiff, who will achieve majority within a certain, measurable period of time, a person prevented by psychological debility from prosecuting her case can neither guarantee nor predict her return to health.” 767 A.2d at 1065. Tolling claims of mentally retarded individuals “unfairly prejudices defendants by holding them hostage indefinitely to a claim that the plaintiff may never be able to prove or even . . . to prosecute.” *Id.* Indisputably, this result contravenes the purpose underlying the statute of limitations.

⁸ Plaintiff also argues that because decedent was mentally retarded he did not and could not know of his injury or that it was caused by the actions of defendants. She maintains that because this survival action is based on the cause of action that accrued to decedent, it is his knowledge of injury that is important when deciding whether the statute of limitations period commenced at a time before his death. This argument misunderstands the application of the discovery rule. In determining whether an individual knew or should reasonably have known of an actionable injury, the objective reasonable person standard is taken into account not the

C. Decedent's Injuries Were Not Concealed From Plaintiff

When a defendant intentionally misinforms or actively conceals information that prevents a plaintiff from commencing an action to enforce his rights, the statute of limitations will be tolled. *Kingston Coal Co. v. Felton Mining Co., Inc.*, 690 A.2d 284, 291 (Pa. Super. Ct. 1997). However, in order for fraudulent concealment to toll the statute of limitations, the defendant must have committed some affirmative act of concealment upon which the plaintiff justifiably relied. *Id.* The plaintiff has the burden of providing active concealment by clear and convincing evidence. *Hubert v. Greenwald*, 743 A.2d 977, 981 (Pa. Super. Ct. 1999).

Plaintiff claims that Markowitz concealed information regarding the dangerous nature of the drugs prescribed to decedent and the positive results of his toxicity test. As a result, plaintiff argues that the statute of limitations was tolled until decedent's death. However, plaintiff has neither alleged facts nor provided evidence that Markowitz engaged in affirmative acts of concealment or deception with regard to decedent's illness. She has not alleged that Markowitz knew, but nevertheless actively concealed from her, that decedent was suffering a toxic and severe reaction to his medications. In fact, the testimony does not indicate that decedent's adverse reaction to his medication was known by anyone while decedent was under Markowitz's care. Because plaintiff has not carried her burden of submitting evidence of Markowitz's active concealment of information that prevented her from bringing this suit earlier, I find that the statute of limitations may not be tolled on this basis.

D. There Is No Basis For An Equitable Tolling

subjective standard of what the decedent himself knew or should have known. *See supra.*

A federal court may equitably toll a statute of limitations with reference to federal claims in three situations: “(1) where the defendant has actively misled the plaintiff respecting the plaintiff’s cause of action; (2) where the plaintiff in some extraordinary way has been prevented from asserting his or her rights; or (3) where the plaintiff has timely asserted his or her rights mistakenly in the wrong forum.” *Oshiver v. Levin, Fishbein, Sedran & Berman*, 38 F.3d 1380, 1387 (3d. Cir. 1994). Plaintiff alleges that the first and second situations are applicable to the instant action. In particular, she claims that Markowitz actively misled her as to the severity of decedent’s injury and she proposes two extraordinary circumstances that she believes warrant equitable relief: (1) that decedent’s mental retardation prevented him from exerting his legal rights, and (2) that plaintiff was not decedent’s legal guardian and therefore she could not bring suit on decedent’s behalf prior to his death.

Third circuit precedent provides a federal court may only equitably toll a state statute of limitations when a plaintiff is effectively barred from asserting a right created by *federal law*. *Lake v. Arnold*, 232 F.3d 360 (3d Cir. 2000); *Eubanks v. Clarke*, 434 F. Supp. 1022 (E.D.Pa. 1977). Principles of comity and federalism require a federal court to apply Pennsylvania tolling law to Pennsylvania state law claims. *Id.* Because plaintiff has only brought state law claims against Markowitz, this is not a case where the court may equitably toll the statute of limitations based on the principles set forth in *Oshiver* and *Lake*.⁹

Plaintiff misunderstands the import of *Lake v. Arnold*, the case she cites to support the proposition that a federal court may equitably toll the statute of limitations when a plaintiff is

⁹ Although plaintiff claims that equitable tolling principles have been applied to state law claims, the cases plaintiff cites for this principle are inapposite.

mentally retarded. In *Lake*, the plaintiff, a mentally retarded woman, asserted both state and federal claims against defendants for permanently sterilizing her without her consent. The Third Circuit held that principles of comity and federalism required the court to apply Pennsylvania law, which does not toll the statute of limitations for mental retardation, to plaintiff's state law claims. 232 F.3d at 368. But, the Third Circuit noted that "federal courts may toll the statute of limitations for *federal laws* where the plaintiff 'in some extraordinary way has been prevented from asserting his or her rights.'" *Id.* at 370 (emphasis added). Because plaintiff was a member of a protected class and her guardians did not adequately protect her rights, as they were the ones who had her sterilized, the *Lake* court found extraordinary circumstances, which made it appropriate to toll the statute of limitations on plaintiff's federal claims. *Id.* at 372. However, *Lake* does not authorize the court to toll the statute of limitations because of decedent's mental retardation in the instant action, where only state law claims have been raised. The court must apply Pennsylvania tolling law to plaintiff's state law claims.

Even assuming, arguendo, that a federal court may equitably toll the statute of limitations for state law claims, the circumstances here do not warrant such action. As explained above, there is no evidence that the defendant actively misled plaintiff as to this cause of action. *See supra* part III.C. There also are no extraordinary circumstances here to the extent necessary to toll the statute of limitations. Pennsylvania courts and the Third Circuit interpreting Pennsylvania law have clearly found that mental retardation is not a reason to toll the statute of limitations, and I am bound by that determination. In addition, the fact that plaintiff was not decedent's legal guardian at the time of his injury is irrelevant to the date upon which the statute of limitations for this survival action accrued. Because survival actions are based upon rights of action which were

possessed by decedent at the time of his death, the relevant date for beginning to run the statute of limitations on a survival action is not when a plaintiff acquired the legal right to bring an action, but rather when a reasonable person knew, or should have known of, the injury and that it was caused by another party's conduct.

Plaintiff claims that decedent's legal guardian was the Commonwealth of Pennsylvania and that the JEVS home and PGC monitored decedent's healthcare. Doc. 12 at 13; Doc. 13 at 6,13. Because the JEVS home and PGC employed those who allegedly provided negligent healthcare to decedent, plaintiff contends that they had no motivation to bring a medical negligence suit on behalf of decedent. As such, plaintiff contends that this is a case like *Lake* where the guardian system failed in such a way to make equitable tolling appropriate. However, the JEVS home and PGC were not decedent's guardian. Moreover, unlike *Lake*, this suit was not necessarily lost during decedent's lifetime. After decedent died on September 24, 1997, plaintiff could have been immediately appointed administratrix of decedent's estate and acquire the legal right to bring this survival action. At that time the statute of limitations for the cause of action against Markowitz had not yet expired. It was approximately three months short of two years from the date when the injury caused by Markowitz was reasonably discovered. Given that at the time of decedent's death plaintiff knew of decedent's injury and that it was caused by the actions of Markowitz, there is no reason that she could not have brought this suit immediately upon being appointed administratrix. It is partially because plaintiff inexplicably waited almost two years after decedent's death to commence this action that it is time-barred. The principles of equitable tolling simply do not apply to cases of "garden variety" neglect where the plaintiff failed to exercise a reasonable amount of diligence in pursuing a claim.

III. Discovery of Injury Caused by PGC and Dr. Bongiorno

Bongiorno was decedent's treating physician while he resided at PGC, from November 27, 1995 until September 9, 1997. Plaintiff alleges that while at PGC, decedent's condition rapidly deteriorated and that the negligence of Bongiorno and PGC precipitated this decline in decedent's health.

Plaintiff's testimony indicates that during decedent's residence at PGC she was aware that decedent's health was rapidly deteriorating and that she felt that Bongiorno's treatment of decedent's condition was inadequate. Although she had requested that decedent be given physical therapy, he never received therapy of any kind. Doc. 7, Ex. B at 73, 74. She also testified that decedent developed fevers in his first weeks at PGC, and that Bongiorno was unable to determine the cause of these fevers. Id. at 78, 79. Her testimony establishes that for purposes of this motion Bongiorno failed to discover the cause of the fevers even after plaintiff alerted Bongiorno that decedent may have had an adverse reaction to his psychiatric medications. Doc. 7, Ex. E. Plaintiff further testified that decedent developed bed sores while at PGC and that nothing was done to prevent these sores or to make decedent stronger. Doc. 7, Ex. B at 77, 81 - 83. Because of decedent's poor condition, a "couple of months" before September 1997, plaintiff discussed with Bongiorno her wish to have decedent transferred to Temple University Hospital ("Temple") before it was "too late." Id. at 84 - 85. In addition, while decedent was at PGC, plaintiff went to a lawyer to discuss decedent's poor health. Id. at 71. However, it was not until after decedent's death that the cause of decedent's deteriorating health was made known. Plaintiff's expert has opined that the cause of decedent's worsening health at PGC was

Bongiorno's failure to diagnose and treat decedent's toxic side effects from his previous psychiatric medications. Doc. 7, Ex. D.

The record evidence establishes that a reasonable person would have known while residing at PGC that his health was deteriorating, as evidenced by his bed sores and fevers, but it does not establish that a reasonable person would have known that his deteriorating health was caused by Bongiorno's failure to treat the toxic side effects of his previous psychiatric medications. By the time decedent was admitted to PGC, the medications had been stopped but apparently their damage had been done. A reasonable person certainly might not know that the damage from his medications, which had been completely stopped by the time he was admitted to PGC, continued and that he required treatment for the residual toxic reaction. Thus, because it is not clear that prior to decedent's death, a reasonable person would know that decedent's injury, his deteriorating health, was caused by the conduct of another, Bongiorno's failure to diagnose and treat decedent's toxic condition, I find that it is at least a jury question as to whether plaintiff's negligence claims against Bongirono and PGC for the failure to diagnose and treat the toxic side effects of decedent's previous psychiatric medications accrued prior to September 24, 1997, the date of decedent's death.

IV. Tolling Effect of Filing a Praeceptum for Writ of Summons

Under Pennsylvania statutory law, "a matter is commenced for purposes of [the statute of limitations] when a document embodying the matter is filed in an office authorized . . . to receive such document." 42 P.S. § 5503(a). In other words, the statute provides that the mere filing of a praecipe for writ of summons or a complaint tolls the statute of limitations. The Pennsylvania

Supreme Court, however, has limited the effect of this toll by creating the “equivalent period” doctrine, which allows a party upon filing a praecipe for a writ of summons, to keep an action “alive” for a period of time equivalent to the applicable statute of limitations, but not beyond this period. *Zarlinsky v. Laudenslager*, 167 A.2d 317, 319 - 20 (Pa. 1961). In *Lamp v. Heyman*, 366 A.2d 882, 889 (Pa. 1976), the Pennsylvania Supreme Court further limited the effect of this toll, finding that a praecipe for a writ of summons commences an action for purposes of the statute of limitations “only if the plaintiff refrains from a course of conduct which serves to stall in its tracks the legal machinery he has just set in motion.” *Lamp* has subsequently been interpreted as requiring plaintiffs to make a good faith effort to effectuate service once the writ of summons is issued by the Prothonotary. See *Patterson v. American Bosch Corp.*, 914 F.2d 384, 391 (3rd Cir. 1990) (*Lamp* does not dictate “an additional affirmative duty to pursue service of process if the initial good faith service attempt is unsuccessful); *Farinacci v. Beaver County Indus. Dev. Auth.*, 511 A.2d 757, 759 (Pa. 1986).

PGC and Bongiorno rely on the Pennsylvania Supreme Court’s decision in *Witherspoon v. City of Philadelphia*, 768 A.2d 1079 (Pa. 2001), to support their argument that the statute of limitations was not tolled by plaintiff’s filing of a praecipe for writ of summons. In *Witherspoon*, the lead opinion found that in order for a writ of summons to toll the applicable period of limitations, “the process must be immediately and continually reissued until service is made.” 768 A.2d 1079, 1084. Thus, PGC and Bongiorno argue that because the writ was not immediately reissued here, and they were not served before the initial writ expired, *Witherspoon* dictates that plaintiff’s action was untimely when the writ was eventually reissued on October 27,

1999, more than two years after decedent's death.¹⁰

The portion of the lead opinion in *Witherspoon* to which the defendants refer, however, was only supported by two justices, a minority of the seven justice *Witherspoon* court. Of the other five justices, two justices dissented from the lead opinion entirely, and three justices concurred in the result only “based upon the plaintiff’s failure to effectuate service upon [defendant] for a period of nine months” and not because a toll of the statute of limitations had been nullified when the writ of summons was not immediately reissued after its initial expiration. *Id.* Thus, what the majority of justices in *Witherspoon* agreed upon was that the plaintiff did not act in good faith to serve defendant in a timely fashion, and as a result, the filing of a praecipe for a writ of summons did not toll the limitations period for commencing the action. *Witherspoon*, therefore, does not announce a new procedural rule as Bongiorno and PGC contend. Instead, it merely reaffirms the requirement imposed on plaintiffs by Pennsylvania law to act in good faith to effect service upon defendants. *Id.* Thus, contrary to PGC and Bongiorno’s contention, *Witherspoon* does not provide the court with authority to find that the tolling effect of the praecipe on the statute of limitations, which was timely filed on September 21, 1999, was nullified because plaintiff did not immediately renew the writ of summons when it expired after 30 days.

Plaintiff has not provided the court with any evidence as to her good faith efforts to effectuate service on PGC and Bongiorno. Moreover, the state docket is unclear as to whether

¹⁰ Plaintiff filed a praecipe for issuance of writ of summons on September 21, 1999, but she did not serve Bongiorno or PGC before this praecipe expired 30 days later. Instead, on October 27, 1999, plaintiff reissued the writ, and Bongiorno was served on November 18, 1999. After a second reissuance of the writ on December 2, 1999, PGC was served on December 16, 1999.

any attempts were made to serve PGC and Bongiorno before the expiration of the initial writ. Therefore, I find it necessary to hold a hearing to determine whether a good faith effort was made by plaintiff to serve PGC and Bongiorno after the praecipe for writ of summons was filed and to clarify the meaning of the state docket entries.¹¹

CONCLUSION

The statute of limitations began to run on plaintiff's survival action at the time when a reasonable person knew or should have known of decedent's injury and that it was caused by another party's conduct. For plaintiff's claim against Markowitz this time occurred sometime between October and December 1995,¹² when decedent was hospitalized at Frankford. Plaintiff does not dispute that during his stay at Frankford, decedent's injury and its cause, namely

¹¹ Bongiorno and PGC also argue that they are entitled to summary judgment because plaintiff has failed to prove their medical negligence as a matter of law. They argue that plaintiff did not provide an expert report establishing that Bongiorno's treatment of decedent while he resided at PGC deviated from the standard of care attributable to physicians under the circumstances, as is required to establish a prima facie case of medical negligence when the events and circumstances of a malpractice action are beyond the knowledge of an average lay person. *See Montgomery v. South Philadelphia Med. Group*, 656 A.2d 1385, 1390 (Pa. Super. Ct. 1995). I do not agree. Plaintiff has provided the court with an expert report from Dr. Wolfram Rieger, which, when viewed in a light most favorable to plaintiff, establishes that PGC and Bongiorno's actions fell below the applicable standard of care. Specifically, Dr. Rieger opined that PGC and Bongiorno failed to recognize decedent's "clear signs of permanent and life-threatening" toxicity, and that as a result there was "no consistent treatment to minimize the effects of that toxicity." Further, Dr. Rieger opined that "whatever chance Mr. Miller had [to recover] was denied to him by the care he received from his physicians." Doc. 13, Ex. D. Because plaintiff has provided an expert opinion that Bongiorno's care of decedent while at PGC was below the applicable standard of care, PGC and Bongiorno are not entitled to summary judgment as a matter of law.

¹² Because the statute of limitations has expired regardless of whether the decedent's injury was known in October or December, it is unnecessary for the court to determine the exact date that decedent's injury was discovered.

Markowitz's negligence, were discovered. Instead, plaintiff argues that the statute of limitations must be tolled as a matter of law. Because tolling under Pennsylvania law has not occurred here and there is no genuine issue as to the facts that demonstrate the discovery of decedent's injury in the fall of 1995, I find that the cause of action against Markowitz accrued and the statute of limitations began to run at that time. As such, the limitations period for bringing this claim expired in the fall of 1997. Accordingly, plaintiff's present claim against Markowitz is untimely, and I will grant Markowitz's motion for summary judgment.¹³

For plaintiff's negligence claim against Bongiorno and PGC, however, it is at least a jury question as to whether a reasonable person could be expected to have known prior to the date of decedent's death that his deteriorating health was caused by the failure of Bongiorno and PGC to diagnose and treat decedent for an existing toxicity. As a result, the limitations period for plaintiff's claims against Bongiorno and PGC may not have begun to run until September 24,

¹³ In the event that the court found that the statute of limitations did not begin to run until the date of decedent's death, Markowitz argues that the statute of limitations for bringing a claim against him has nevertheless expired. Markowitz argues that the under *Witherspoon v. City of Philadelphia*, 768 A.2d 1079 (Pa. 2001), the tolling effect of the praecipe for issuance of writ of summons on the statute of limitations was nullified when plaintiff did not serve, or reissue, the original writ within 30 days of its issuance. However, because the court has found that the statute of limitations for plaintiff's claim against Markowitz commenced well-before the date of decedent's death, the court need not consider this argument.

The court also need not consider the argument presented by Markowitz in his second motion for summary judgment. In this second motion, Markowitz contends that plaintiff failed to make a good faith attempt to serve him with a writ of summons and/or complaint within the period prescribed by Pa. R. Civ. P. 401(a), rendering her action against Markowitz untimely and invalid. Because the court will grant Markowitz's first motion for summary judgment, the court will not consider the merits of this argument. However, I note that there appears to be a genuine issue of material fact as to whether plaintiff made a good faith and timely attempt to serve Markowitz, and as a result, this issue would not be appropriate for resolution on summary judgment without further inquiry.

1997, the date of decedent's death and the praecipe filed by plaintiff was timely.¹⁴ However, because there is no evidence as to the efforts plaintiff made to serve Bongiorno and PGC after she filed a praecipe for writ of summons on September 21, 1997, I will order a hearing to determine whether plaintiff acted in good faith in attempting to serve Bongiorno and PGC in a timely fashion and to clarify the meaning of the state docket entries with regard to service.

An appropriate order follows.

¹⁴ I note, however, that a reasonable person would have known that while residing at PGC decedent suffered bedsores which became infected, and that such infections were caused by the inadequate healthcare provided to decedent by Bongiorno. Thus, any negligence claim against Bongiorno and PGC based on decedent's bedsores accrued on or before September 9, 1997, the date upon which decedent was transferred from PGC to Temple, and was untimely when plaintiff filed her praecipe on September 21, 1997.

**IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF PENNSYLVANIA**

| | | |
|-------------------------------------|---|----------------|
| VICKI MILLER, ADMINISTRATRIX OF THE | : | |
| ESTATE OF HENRY S. MILLER | : | |
| | : | |
| Plaintiff | : | |
| | : | NO. 02-CA-1307 |
| | : | |
| v. | : | |
| | : | |
| PHILADELPHIA GERIATRIC CENTER, | : | |
| CHARLES BONGIORNO, M.D., | : | |
| UNITED STATES OF AMERICA, and | : | |
| PHIL MARKOWITZ, M.D. | : | |
| | : | |
| Defendants. | | |

ORDER

And now this _____ day of July, 2002, upon consideration of the motion of defendant, Phil Markowitz, for summary judgment (Doc. 4) and the responsive documents; it is hereby ORDERED that Markowitz’s motion for summary judgment is GRANTED and judgment is entered in favor of Markowitz and against plaintiff as to Count IV of plaintiff’s complaint.

It is further ORDERED that the second summary judgment motion of defendant Phil Markowitz (Doc. 21) is DENIED as moot.

Upon consideration of the motion of defendants, Charles Bongiorno and Philadelphia Geriatric Center, for summary judgment (Doc. 7) and the responsive documents; it is hereby ORDERED that a hearing shall be held to determine whether plaintiff made good faith efforts to effectuate service on Bongiorno and PGC and to clarify the entries of the state court docket with regard to service at 2:00 p.m. on August 23, 2002 in Courtroom 14B.

William H. Yohn, Jr., Judge