RENDERED: MAY 23, 2008; 2:00 P.M.
NOT TO BE PUBLISHED

Commonwealth of Kentucky

Court of Appeals

NO. 2006-CA-002149-MR

CATHY DOUGLAS; JOHN DOUGLAS;
AND JUSTIN DOUGLAS — APPELLANTS

APPEAL FROM FAYETTE CIRCUIT COURT
v. HONORABLE PAMELA R. GOODWINE, JUDGE
ACTION NO. 06-CI-00519

UNIVERSITY OF KENTUCKY HOSPITAL;
DALIA ELKHAIRI, M.D.; MIRIAM MARCUM,
M.D.; PAUL DEPRIEST, M.D.; UNKNOWN
MAKER OF THE NOVASURE DEVICE; UNKNOWN
NURSE; AND WALLER DALTON, M.D. — APPELLEES

OPINION
AFFIRMING

** ** ** ** **

BEFORE: CAPERTON, LAMBERT, AND THOMPSON, JUDGES.

CAPERTON, JUDGE: This appeal stems from a medical malpractice case[1] filed pro se[2] on February 3, 2006, by Cathy, John and Justin Douglas (hereinafter Douglas) against the University of Kentucky Hospital, various physicians at the University of Kentucky Chandler Medical Center including Dr. Dalia Elkhairi, Dr. Miriam Marcum, Dr. Paul DePriest, Dr. Waller Dalton, and "Unknown Nurse" (hereinafter U.K. Physicians), as well as against the Unknown Maker of the Novasure Device, Unknown Gynecologic (sic) Unit, and Dr. Charles Dietrich, a physician of the United States Armed Forces.[3]

The sole issue on appeal is whether the trial court properly dismissed Douglas' claims against the U.K. Physicians without prejudice on the basis of insufficient service of process under CR 12.02(e) and CR 4.04[4]. After careful review of the record, we affirm the Order of Dismissal issued by the Hon. Pamela Goodwine, Judge, Fayette Circuit Court.

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[1] In filing her Complaint, Douglas claims that two medical procedures which Cathy Douglas underwent at The University of Kentucky Medical Center in February of 2004 were performed negligently, resulting in injury.

[2] On May 8, 2007, Appellants filed a Motion for Appointment of Counsel. That Motion was denied on June 1, 2007, by the Chief Judge of the Court of Appeals on grounds that there is no statutory authority for appointment of counsel in a civil appeal.

[3] Because Dr. Dietrich was initially joined as a party to this claim, the case was removed to federal court pursuant to 28 U.S.C. §2679. Dr. Dietrich filed a motion to substitute, and the United States was substituted as a party for Dr. Dietrich. A Motion to Dismiss was filed on behalf of the U.S. which was sustained, and this case was remanded back to the Fayette Circuit Court for further proceedings.

[4] The case against the University of Kentucky was dismissed on grounds of sovereign immunity via an Order of September 8, 2006. Although the University of Kentucky is listed as a party on this appeal, the September 12, 2006 Order of the Trial Court dismissing the claims against the University has not been appealed.

Douglas initially filed a complaint with the Fayette Circuit Court Clerk on February 7, 2006. At that time, Douglas attempted service on the U.K. Physicians via certified mail through the office of the circuit clerk, as set forth in Kentucky Rule of Civil Procedure 4.01(a). That statute provides:

> 1) Upon the filing of the complaint (or other initiating document) the clerk shall forthwith issue the required summons and, at the direction of the initiating party, either: (a) Place a copy of the summons and complaint (or other initiating document) to be served in an envelope, address the envelope to the person to be served at the address set forth in the caption or at the address set forth in written instructions furnished by the initiating party, affix adequate postage, and place the sealed envelope in the United States mail as registered mail or certified mail return receipt requested with instructions to the delivering postal employee to deliver to the addressee only and show the address where delivered and the date of delivery. The clerk shall forthwith enter the facts of mailing on the docket and make a similar entry when the return receipt is received by him or her. If the envelope is returned with an endorsement showing failure of delivery, the clerk shall enter that fact on the docket. The clerk shall file the return receipt or returned envelope in the record. Service by registered mail or certified mail is complete only upon delivery of the envelope. The return receipt shall be proof of the time, place and manner of service. To the extent that the United States postal regulations permit authorized representatives of local, state, or federal governmental offices to accept and sign for "addressee only" mail, signature by such authorized representative shall constitute service on the and be recoverable as costs(emphasis added).

In this instance, the certified mail was delivered to the University's Obstetrics and Gynecology Department, but was not delivered directly to the U.K. Physicians named as defendants. Upon arrival at the Department, the mailing was

signed for by one Matthew Lally (Lally), whom the Department states is a temporary employee, engaged in minor clerical and staff duties.

The University asserts that Lally was never appointed or designated by the U.K. Physicians to accept service of process on their behalf. In support of their position, the University of Kentucky (U.K.) filed the May 2, 2006, affidavit of John Allen, Department Administrator for the University of Kentucky Department of Obstetrics and Gynecology. In that Affidavit, Allen states that neither he nor any other U.K. official or faculty member appointed or otherwise delegated to Mr. Lally the authority to accept service of process for any of the defendants in this matter.

On May 2, 2006, the U.K. Physicians, by special appearance, moved to dismiss the claims against them pursuant to CR 12.02 and CR 4.04, on the basis of insufficient service of process. After conducting a hearing on the motion, on September 26, 2006, the trial court entered an Order dismissing Douglas' claims against the U.K. Physicians for insufficiency of service of process, without prejudice. Douglas now appeals the dismissal of her claim against the U.K. Physicians to this Court.

The U.K. Physicians cite *R.F. Burton Tower Co. v. Dowell Div. of Dow Chemical Co.*, 471 S.W.2d 708 (Ky. 1971), for the proposition that Kentucky has long followed a strict rule of "in-hand service of process." In so arguing, the U.K. Physicians cite to CR 4.04(2), which provides in pertinent part that "(s)ervice shall be made upon an individual within this Commonwealth … by delivering a

copy of the summons and of the complaint (or other initiating document) to him personally …". That rule further provides that if a defendant refuses personal service, it is appropriate to deliver the summons and complaint to "an agent authorized by appointment or by law to receive service of process" for the defendant.

We believe the U.K. Physicians are correct in citing *Burton* insofar as personal service is still the preferred method of service, primarily because it offers the most assurance that the intended defendant received the summons and complaint. However, Kentucky statutory law is clear that personal delivery is not the only method by which service of process may be effected.

Clearly, CR 4.01(a) provides an alternative method of service via certified mail in lieu of personal delivery to the defendant, and if the intended party receives and accepts the service by certified mail, it is equivalent to receipt through personal service. Thus, in the instant matter, the issue is not whether service via certified mail is proper in general, but whether it was effective in this case. It is undisputed that Douglas attempted service through CR 4.01(a) when the complaint was mailed. Regardless of Plaintiff's efforts at service pursuant to the Rule of Civil Procedure, the Plaintiff ultimately bears the burden of proving the service was proper if challenged, as here, or suffer the consequences of lack of service. A court finding of lack of service may merely mean service must be re-issued and an individual or entity be properly served or, alternately, may be so harsh as to forever bar a plaintiff from his day in court. Regardless, the necessity for service of

process is axiomatic and deeply rooted in constitutional law; to be before a court, a person or entity must be properly served.

If a party challenges the validity of service of process, the plaintiff bears the burden of proving compliance with the governing rules for process. *Griffith v. St. Walberg Monastery*, 427 S.W.2d 802 (Ky. 1968). However, there is always a presumption that a communication that was properly stamped, addressed and deposited in the mail was received by addressee. Once the fact of address, stamp and deposit is proven, the burden shifts to the addressee to prove that he never received the letter. *Haven Point Enterprises, Inc. v. United Kentucky Bank, Inc.*, 690 S.W.2d 393 (Ky. 1985).

In the instant case, the trial court found that the U.K. Physicians had met their burden of proving they had never personally received the summons and complaint as required by statute. Douglas does not dispute that the certified mail was received and signed for by Lally, nor does Douglas effectively dispute the Physician's assertion that Lally was not designated by any of the U.K. Physicians to accept service of process on their behalf.

We do believe that there is nothing in the record to dispute that Douglas made a good faith attempt to serve the U.K. Physicians. Unfortunately, neither CR 4 nor the case law provides a good faith exception to proper service under the civil rules. The law is clear that a summons is delivered to a person only when placed within his reach and he accepts it. *Fleishman v. Goodman*, 67 S.W.2d 691 (1934). As noted in CR 4.01(a), "Service by registered mail or certified mail

is complete only upon delivery of the envelope." In this instance, a cursory examination of the record and examination of the return receipt would have revealed that the summons and complaint were not signed for by the physicians for whom they were intended. At the very least, Lally's name on the return receipt should have led one to inquire as to whether or not he was an authorized agent of the addressee. We believe that this failure forms a proper basis for the trial court's order of dismissal.

We also find the case of *Mitchell v. Money*, 602 S.W.2d 687 (Ky. App. 1980), to be illustrative of the issue at hand. In that case, this court held that service of process through certified mail was not sufficient to bind a decedent's estate when a copy of the summons and complaint was sent to the decedent's address and was signed for by his wife. The court reasoned that Money, the decedent, never became a party to the action because the trial court failed to obtain jurisdiction over him or his estate. Similarly, although the certified mail was delivered to the correct place of business of the defendants sub judice, it was nevertheless an incomplete delivery as the mail reached neither the intended addressee nor an authorized agent of same.

In the appeal to this court, Douglas argues that the trial court's dismissal of the U.K. Physicians was premature. In response, we would note that Douglas first made attempts to serve the U.K. Physicians in February 2006. The 12.02(e) motion to dismiss was not filed until May 12, 2006, and the motion was not actually ruled upon until September 26, 2006.

Douglas asserts that after receiving the motion to dismiss based on failure to serve the U.K. Physicians pursuant to CR 4.04, that attempts were made to serve summons pursuant to CR 4.05(a) and/or 4.05(e). After a careful review of the appellate record, we do not find evidence that such attempts were made. Further, case law is clear that a diligent search for the individual intended to be constructively served must be established before constructive service of this nature is properly effected. *W.G.H. v. Cabinet for Human* Resources, 708 S.W.2d 109 (Ky. App. 1986). As we find no such evidence in the record of either a diligent search for the individuals or attempts to serve them pursuant to CR 4.05, we will assume that the facts support the ruling of the trial court.

Upon review, we are confined to a determination of whether the pleadings supported the judgment. *Porter v. Harper*, 477 S.W.2d 778, (Ky. 1972). In the case sub judice, as to the alleged attempt at service through CR 4.05, we believe the pleadings supported the judgment. Pursuant to CR 76.12(4)(c)(v), it is clear that each argument asserted by the parties shall have ample supportive references to the record, to include: citations of authority pertinent to each issue of law, a statement with reference to the record, which indicates such argument was properly preserved for review and, if so, in what manner. Our past decisions make clear that when an appellant fails to comply with CR 76.12(4)(c)(v), a reviewing court need only undertake an overall review of the record for manifest injustice. *Commonwealth v. Benham*, 816 S.W.2d 186 (Ky. 1991). In the case sub judice, we find no manifest injustice.

Douglas also sites to CR 4.04(9) in support of the argument that because the certified mail reached the place of business of the U.K. Physicians that it was sufficient to constitute personal service. That portion of the civil rules reads:

> Service may be made upon a nonresident individual who transacts business through an office or agency in this state, or a resident individual who transacts business through an office or agency in any action growing out of or connected with the business of such office or agency, *by serving the person in charge thereof*.

Douglas has not established that the "person in charge thereof" was Lally, and it is clear from the record that Lally is the individual who received and signed for the documents at issue in this matter. Thus, Douglas' argument fails.

Finally, Douglas, as a pro se claimant, invokes the precedent set forth by the United States Supreme Court in *Haines v. Kerner*, 404 U.S. 519 (1972), and *Baag v. MacDougall*, 454 U.S. 364 (1982), that allegations of a pro se complaint are to be construed liberally, and held to less stringent standards than formal pleadings drafted by lawyers. While this Court certainly recognizes and appreciates the principle set forth in those decisions, we do not find that precedent to be directly on point in the instant matter. In the matter currently under review, the issue is not the allegations or the substance of the complaint itself, but rather both the manner in which service was attempted and whether or not that service was sufficient to meet the requirements set forth by the civil rules.

In light of the foregoing, we find that the trial court did not abuse its discretion in dismissing this action for insufficiency of service of process. The

absence of proper service of process renders a court without jurisdiction to enter a judgment against the non-responding party. Accordingly, the judgment of the Hon. Pamela Goodwine, Fayette Circuit Court, is affirmed.

LAMBERT, JUDGE, CONCURS.

THOMPSON, JUDGE, CONCURS AND FILES SEPARATE OPINION.

THOMPSON, JUDGE, CONCURRING: I concur that the trial court did not abuse its discretion when it dismissed this action for insufficiency of service of process. I write only to comment on the absurdity of this case being before this Court.

The trial court dismissed the case without prejudice, thus Douglas could easily have re-filed his complaint and proper service of process accomplished. As this Court has observed, there is nothing in the record to dispute that Douglas made a good faith effort and had a bona fide intent to have the process served. Under our Civil Rules, the statute of limitations was tolled when the complaint was filed and summons issued in good faith. *See Louisville & N.R. Co. v. Little,* 264 Ky. 579, 95 S.W.2d 253, 255 (1936).

Instead, Douglas appealed the order of dismissal and now will presumably again file his complaint and obtain service on the defendants. It cannot be said that anything has been gained by either party as a result of the needless appeal of the order of dismissal. I point out the futility of this appeal only to suggest that future litigants who fail in the proper service of a defendant, and

when a complaint is dismissed without prejudice, strive to first obtain proper service on the defendants before expending the time and expense to pursue an appeal.

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