[Cite as *Deaton v. Brookover*, 2004-Ohio-4630.]

COURT OF APPEALS OF OHIO, EIGHTH DISTRICT

COUNTY OF CUYAHOGA

NO. 83416

SHARON DEATON	:	
	:	
Plaintiff-Appellant	:	
	:	JOURNAL ENTRY
	:	
vs.	:	and
	:	
	:	OPINION
CHRISTOPHER G. BROOKOVER	:	
	:	
Defendant-Appellee	:	

DATE OF ANNOUNCEMENT
OF DECISION: September 2, 2004

CHARACTER OF PROCEEDING: Civil appeal from
Common Pleas Court
Case No. CV-472175

JUDGMENT: REVERSED AND REMANDED

DATE OF JOURNALIZATION: _____

APPEARANCES:

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ANTHONY O. CALABRESE, JR., J.:

{¶1} Plaintiff-appellant Sharon Deaton ("Deaton") appeals from the dismissal of her case by the Cuyahoga County Court of Common Pleas. For the reasons stated below, we reverse and remand.

{¶2} On June 5, 2000, Deaton was working as a pizza delivery person when defendant-appellee Christopher Brookover ("Brookover") allegedly struck her with his vehicle, causing injury. On June 3, 2002, Deaton filed suit, and service was attempted via certified mail. On June 27, 2002, the certified mail receipt was returned "unclaimed." Deaton requested service via ordinary mail on July 25, 2002. Brookover filed his answer on July 30, 2002.

{¶3} On February 28, 2003, a second request for ordinary mail service was requested. On March 31, 2003, the regular mail was returned "addressee unknown." On May 19, 2003, Deaton made a third attempt at regular mail service. The clerk of courts, however, sent service via certified mail. On June 5, 2003, Brookover was served.

{¶4} On June 24, 2003, Brookover filed a motion to dismiss for failure to state a claim upon which relief could be granted.[1] On August 8, 2003, the court granted said motion.

{¶5} It is from this granting of Brookover's motion to dismiss that Deaton appeals and advances three assignments of error for our review.

I.

[1]The motion was based on Deaton's failure to commence an action under Civ.R. 3(A).

{¶6} In her first assignment of error, Deaton argues that "the court erred in dismissing [her] case for failure to state a claim with prejudice where appellant had perfected ordinary mail service within Civil Rule 3(A), pursuant to Civil Rule 4.6(D)." We agree.

{¶7} Pursuant to Civ.R. 4.6(D), if certified mail is returned "unclaimed," a party may request service via ordinary mail. "The mailing shall be evidenced by a certificate of mailing which shall be completed and filed by the clerk. Answer day shall be twenty-eight days after the date of mailing as evidenced by the certificate of mailing. The clerk shall endorse this answer date upon the summons which is sent by ordinary mail. Service shall be deemed complete when the fact of mailing is entered of record, provided that the ordinary mail envelope is not returned by the postal authorities with an endorsement showing failure of delivery." Id.

{¶8} Proper service is presumed in cases where the civil rules on service are followed. *Brodart Co. v. Frontier Roofing & Supply Co.* (Apr. 29, 1993), Cuyahoga App. Nos. 62376, 62933, and 63225. This presumption, however, is rebuttable by sufficient evidence. Id. A party's unchallenged affidavit is sufficient to overcome the presumption of service. *Carter v. Miles* (Feb. 3, 2000), Cuyahoga App. No. 76590. This sworn statement places the burden on the serving party to make a further evidentiary showing that the party being served had received the entries. *Ondrejcak v. Jelly Rolls* (Sept. 3, 1998), Cuyahoga App. No. 73997.

{¶9} Additionally, "due process requires that service be accomplished in a manner reasonably calculated, under all the circumstances, to apprise interested parties of the pendency of the action, and to give them an opportunity to appear. A determination of

whether notice was reasonably calculated to reach the interested party requires a case-by-case examination of the particular facts." *C & W Inv. Co. v. Midwest Vending, Inc.*, Franklin County App. No. 03AP-40, 2003-Ohio-4688. The trial court's determination of whether service by ordinary mail was completed will not be disturbed absent an abuse of discretion.[2] *Ramirez v. Shagawat*, Cuyahoga App. No. 83259, 2004-Ohio-1001.

{¶10} In the case sub judice, service by certified mail was returned "unclaimed" on June 27, 2002. On July 25, 2002, Deaton requested ordinary mail service, and the clerk of courts generated service on July 29, 2002. The envelope was not returned showing failure of delivery. At this point, there was a presumption of good service.

{¶11} Brookover argues that "appellant['s] counsel's actual knowledge and affirmative conduct demonstrate that appellee was not properly served on July 29, 2002." He argues Deaton's subsequent requests upon the court for ordinary mail service on February 28, 2003 and May 19, 2003 show that she knew service was not perfected. Also, Deaton stated that "in each instance the defendant was not found."[3] Brookover finds this to be sufficient evidence to overcome the presumption of good service where the civil rules are followed. We disagree.

{¶12} First, having obtained service through her first attempt at service by ordinary mail, Deaton's subsequent attempts were unnecessary and are not, by themselves, indicia of a lack of good service. Second, there is no affidavit provided stating Brookover never received service. Third, unlike cases where judgment is entered upon an

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[2]An abuse of discretion connotes more than a mere error of law or judgment; rather, it implies that a court's attitude was unreasonable, arbitrary, or unconscionable. *News-Herald v. Bahr*, Lake Co. App. No. 2002-L-176, 2003-Ohio-6223.

[3]Deaton's brief in opposition to Brookover's motion to dismiss.

unsuspecting defendant due to lack of service,[4] Brookover filed his answer two days after ordinary mail was generated, thus suggesting he was reasonably apprised of Deaton's case against him.

{¶13} Under the facts sub judice, Brookover has failed to provide sufficient evidence contra the presumption of good service, and we find the trial court abused its discretion by dismissing Deaton's case. Deaton's first assignment of error is well-taken and sustained.

II.

{¶14} Because appellant's first assignment of error has been sustained, we need not address her second assignment of error. App.R. 12(A)(1)(c).

Judgment reversed and remanded.

This cause is reversed and remanded to the lower court for further proceedings consistent with this opinion.

It is, therefore, considered that said appellant recover of said appellee her costs herein.

It is ordered that a special mandate be sent to the Cuyahoga County Court of Common Pleas to carry this judgment into execution.

A certified copy of this entry shall constitute the mandate pursuant to Rule 27 of the Rules of Appellate Procedure.

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ANTHONY O. CALABRESE, JR.
JUDGE

[4]See, generally, *Plain Dealer Publishing Co. v. Percaiz*, Cuyahoga App. No. 82205, 2003-Ohio-4347.

FRANK D. CELEBREZZE, JR., P.J., and

TIMOTHY E. McMONAGLE, J., CONCUR.

N.B. This entry is an announcement of the court's decision. See App.R. 22(B), 22(D) and 26(A); Loc.App.R. 22. This decision will be journalized and will become the judgment and order of the court pursuant to App.R. 22(E) unless a motion for reconsideration with supporting brief, per App.R. 26(A), is filed within ten (10) days of the announcement of the court's decision. The time period for review by the Supreme Court of Ohio shall begin to run upon the journalization of this court's announcement of decision by the clerk per App.R. 22(E). See, also, S.Ct.Prac.R. II, Section 2(A)(1).