**UNPUBLISHED**

**IN THE UNITED STATES DISTRICT COURT**
**FOR THE WESTERN DISTRICT OF VIRGINIA**
**BIG STONE GAP DIVISION**

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| **THOMAS TRACY, ET AL.,** | ) | |
| | ) | |
| Plaintiffs, | ) | Case No. 2:02CV00057 |
| | ) | |
| **v.** | ) | **OPINION** |
| | ) | |
| **RON ANGELONE, ET AL.,** | ) | By: James P. Jones |
| | ) | United States District Judge |
| Defendants. | ) | |

*Thomas Tracy and Alice Tracy, Pro Se; Pamela A. Sargent, Senior Assistant Attorney General of Virginia, Richmond, Virginia, for Defendants.*

David Tracy, an inmate at Wallens Ridge State Prison in Big Stone Gap, Virginia, committed suicide on April 6, 2000. Tracy's parents, Thomas and Alice Tracy, appearing pro se and acting on behalf of David Tracy's estate, filed this action on April 5, 2002, under 42 U.S.C.A. § 1983 (West Supp. 2002). The Complaint alleges that the defendants—Virginia Department of Corrections officials and employees—are liable for the death of David Tracy.[1] On August 7, 2002, the action

[1] David was one of about 500 Connecticut prisoners transferred to Wallens Ridge, a newly-built "supermax" prison facility, under a contract between the Virginia and Connecticut state governments in order to relieve prison crowding in Connecticut. The transfer was controversial in Connecticut, particularly after the death of David and another Connecticut inmate at Wallens Ridge. *See Young v. New Haven Advocate*, 315 F.3d 256, 259 (4th Cir. 2002) (regarding Virginia prison warden's libel suit against Connecticut newspapers). David Tracy's estate filed suit in federal court in Connecticut against Connecticut prison officials over David's death at Wallens Ridge and the action was settled

was dismissed without prejudice because of lack of service. *See* Fed. R. Civ. P. 4(m). On motion of the plaintiffs, it was reinstated on September 6, 2002, and the plaintiffs were granted an extension of forty-five days "to file proof of service of the summons and complaint on the defendants in the manner provided by law." *Tracy v. Angelone*, No. 2:02CV00057, 2002 WL 31002841, at *3 (W.D. Va. Sept. 5, 2002).

On October 18, 2002, the plaintiffs filed proofs of service as to certain of the defendants.[2] These defendants thereafter filed a Motion to Dismiss and Supplemental Motion to Dismiss, contending, inter alia, that the proofs of service showed that proper service of process had not been accomplished. The plaintiffs were granted an opportunity to respond and the motions are now ripe for decision.[3]

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for $750,000 about the time the present suit was filed. *See Gulash v. Armstrong*, No. 3:01CV362(PCD) (D. Conn. May 6, 2002); Laurence Hammack, *Connecticut Settles Lawsuits in Supermax Deaths*, Roanoke Times & World News, Mar. 15, 2002, at A1.

[2] The defendants for whom proofs of service were filed are Janeway, Harris, Necessary, Young, Lefevers, and Gilley. No proofs of service were filed as to defendants Angelone, Aslinger, Mullins, or Parlier.

[3] A response on behalf of the plaintiffs was submitted by James L. Sullivan, a Connecticut attorney not admitted to practice before this court. A rule of this court requires any pleading to be signed by a member of the bar of this court and that an attorney not admitted to practice in Virginia may appear only in association with a member of the bar of this court. *See* W.D. Va. R. 4, 5. By order of January 7, 2003, the plaintiffs were allowed thirty days to resubmit the response in compliance with the local rule. That time has expired and the response has not been resubmitted. In any event, even if the plaintiffs' response was considered, it would make no difference in the disposition of the case.

Pursuant to Federal Rule of Civil Procedure 4(e), absent a waiver, service of process must be made either "by delivering a copy of the summons and of the complaint to the individual personally or by leaving copies thereof at the individual's dwelling house or usual place of abode . . . or by delivering a copy [thereof] to an agent authorized by appointment or by law to receive service of process." Alternatively, service may be made upon an individual in accord with the laws of the state in which the district court is located. *See id.* Virginia law requires that service of process be made by delivery of process personally, by delivery of process to a family member over the age of sixteen at the person's abode, or by posting the process on the door of the person's abode and then certifying to the court that a copy of such process was also mailed to the person's abode. *See* Va. Code Ann. § 8.01-296 (Michie 2000).

According to the proofs of service filed, the summonses for defendants Janeway, Harris, Necessary, and Young were served on "Sgt. Jeffery Head, Correctional Officer." As to defendants Lefevers and Gilley, service was made on "Teresa Hawkins, Human Resources Specialist." In all cases, it was recited that service was made "to person age 16 or older at place of business authorized to accept service. . . . "

While the service provisions of Rule 4 ought to be construed liberally where, as here, notice of the lawsuit was actually received, *see Karlsson v. Rabinowitz,* 318 F.2d 666, 668 (4th Cir. 1963), the court cannot ignore the plain requirements of the rule. It is clear that service in this case was not made personally on the defendants or constructively on someone at their abode or dwelling. Although the proofs of service recite that the persons served were authorized to accept service, the defendants deny it and the plaintiffs have offered no proof of any such authorization. Proof of authority cannot be based solely on the acceptance of process, *see MW Ag, Inc. v. N. H. Ins. Co.*, 107 F.3d 644, 647 (8th Cir. 1997), or on the agent's claim of authority, *see Whisman v. Robbins*, 712 F. Supp. 632, 636 (S.D. Ohio 1988). When challenged, the plaintiffs have the burden of proving that service was proper. *See Aetna Bus. Credit, Inc. v. Universal Decor & Interior Design, Inc.*, 635 F.2d 434, 435 (5th Cir. 1981). They have not met that burden in this case.

Because the plaintiffs have not complied with the court's order of September 6, 2002, it is appropriate to dismiss the case for failure to obtain proper service on any of the defendants. The plaintiffs were given an adequate opportunity to obtain proper

service and there is no indication that even with another extension such service would be obtained.[4]

A separate order consistent with this Opinion will be entered.

DATED: April 7, 2003

_____
United States District Judge

[4] As noted in my previous opinion in this case, I recognize that dismissal here will likely result in the loss of the cause of action because the suit was filed one day before the expiration of the statute of limitations. *See Tracy v. Angelone*, 2002 WL 31002841, at *2. Nevertheless, there is limit to indulgence. This law suit has been pending for over a year without proper service of process on the defendants. As pointed out by the defendants, while the Complaint was signed by Mr. and Mrs. Tracy, it appears to have been "ghost written" by a lawyer and it is obvious that the Tracys have had legal representation regarding David's death in view of the lawsuit in Connecticut. Perhaps the large settlement in Connecticut has caused the plaintiffs' nonchalant attitude toward the prosecution of this case. In any event, the defendants are also entitled to due process of law.