IN THE COURT OF APPEALS OF IOWA

No. 1-367 / 00-1461
Filed August 15, 2001

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CLERK SUPREME COURT

JAMES MOYER,
Plaintiff-Appellee,

vs.

STACY JOHNSON and CHRISTOPHER JOHNSON,
Defendants-Appellants.

Appeal from the Iowa District Court for Polk County, Richard G. Blane, II, Judge.

Defendants appeal from the district court's interlocutory order overruling their motion to dismiss plaintiff's personal injury action. **AFFIRMED.**

Kerrie M. Plummer and Jay J. Chung of Saggio & Harlan, L.L.P., West Des Moines, for appellants.

David S. Wiggins of Wiggins & Anderson, P.C., West Des Moines, for appellee.

Considered by Huitink, P.J., and Miller and Hecht, JJ.

HUITINK, P.J.

Stacy and Christopher Johnson appeal from a district court order denying their motion to dismiss. We affirm.

I. Background Facts and Proceedings.

The Johnsons and James Moyer were involved in an automobile accident on February 2, 1998. On February 1, 2000, Moyer filed a lawsuit alleging negligence on the part of the Johnsons. Although Moyer attempted timely service of process via the Dallas County Sheriff, the sheriff was unable to locate the Johnsons and service was not effectuated. Moyer's only notice of the sheriff's failure to serve the defendants was an invoice requiring payment of a mileage fee, but showing date of service to be 00/00/00 and a service fee of $0.00. On May 10, 2000, the court discovered that service had not been effectuated and ordered Moyer to properly serve the Johnsons by June 9, 2000. Moyer perfected service on May 23, 2000.

The Johnsons subsequently filed a motion to dismiss, alleging service was untimely pursuant to Iowa Rule of Civil Procedure 49(f). The district court denied this motion, finding good cause for the plaintiff's failure of service. The Johnsons thereafter filed an application for interlocutory appeal, which was granted by our supreme court.

On appeal, the Johnsons allege that the district court erred in denying their motion to dismiss. They argue that the district court erred in finding good cause for delay in service of the original notice.

II. Standard of Review.

Our review of a district court's ruling on a motion to dismiss is for correction of errors at law. Iowa R. App. P. 4; *Henry v. Shober*, 566 N.W.2d 190, 191 (Iowa 1997). The district court's findings of fact are binding on appeal unless not supported by substantial evidence. *McCormick v. Meyer*, 582 N.W.2d 141, 144 (Iowa 1998). We are not bound by the district court's application of legal principles or its conclusions of law. *Id.*

III. The Merits.

Iowa Rule of Civil Procedure 49(f), as recently amended, provides as follows:

> (f) If service of the original notice is not made upon the defendant, respondent, or other party to be served within 90 days after filing the petition, the court, upon motion or its own initiative after notice to the party filing the petition, shall dismiss the action without prejudice as to that defendant, respondent, or other party to be served or direct an alternate time or manner of service. If the party filing the papers shows good cause for the failure of service, the court shall extend the time for service for an appropriate period.

Our supreme court has provided the following guidelines for assessing good cause:

> "[t]he plaintiff must have taken some affirmative action to effectuate service of process upon the defendant or have been prohibited, through no fault of his [or her] own, from taking such an affirmative action. Inadvertence, neglect, misunderstanding, ignorance of the rule or its burden, or half-hearted attempts at service have generally been waived as insufficient to show good cause. Moreover, intentional nonservice in order to delay the development of a civil action or to allow time for additional information to be gathered prior to 'activating' the lawsuit has been held to fall short of . . . good cause . . . ."

Carroll v. Martir, 610 N.W.2d 850, 858 (Iowa 2000) (quoting *Henry*, 566 N.W.2d at 192-93). A lengthy delay in service is also indicative of a plaintiff who has filed

a petition "not to seriously institute litigation, but rather to 'ice' the statute of limitations for a later determination on whether to proceed with suit." *Alvarez v. Meadow Lane Mall Ltd. P'ship*, 560 N.W.2d 588, 591 (Iowa 1997).

In finding that good cause existed for the delay, the district court noted:

> First and foremost, Plaintiff took "some affirmative action to effectuate service of process" on Defendants. On February 2, 2000, Plaintiff's attorney [David Wiggins] sent the Dallas County Sheriff Directions of Service along with two Original Notices for service on Defendants. At some point between February 10, 2000 and March 1, 2000, Wiggins received a Bill for Civil Papers Served on Defendants. According to Wiggins, the normal practice is that if service is not made, the papers are returned to the Plaintiff's attorney. Thus, because the Dallas County Sheriff did not return the papers to him, or even note on the Bill that service was not made, he assumed service was properly effectuated. Thus, the facts clearly establish that Plaintiff took some action to serve Defendants.
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> Further, along this same line of analysis, the fact that Plaintiff took some affirmative action to effectuate service demonstrates that he was not attempting to "'ice' the statute of limitations for a later determination on whether to proceed with suit." Finally, once this Court brought the fact that Defendants had not been served to Plaintiff's attention, service was promptly effectuated. Once again, this Court believes this fact establishes that Plaintiff had every intention of complying with the service requirements.
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> This is not a case where Plaintiff affirmatively determined to forego service of process for purposes of settlement negotiations or other trial tactics. Rather, this is a case where miscommunication between the Dallas County Sheriff and Plaintiff's attorney caused the delay. This Court believes attorney Wiggins honestly believed service of process was effectuated. Therefore, this Court finds that there existed "good cause" for the delay of service and as a result, Defendants' Motion to Dismiss must be denied.

(Citations omitted.)

The factual basis for the district court's good cause determination finds abundant support in the record. We, like the district court, believe counsel's efforts to timely initiate service and his genuine misunderstanding concerning completion of service distinguish this case from others involving abusive delays

in effectuating service of process. The district court's decision is accordingly affirmed in its entirety.

AFFIRMED.