IN THE COURT OF APPEALS OF IOWA

No. 3-522 / 12-2003
Filed July 24, 2013

SCOTT FELDHACKER and RACHELLE BARNES,
Plaintiffs-Appellees,

vs.

TRAVIS LEE WEST,
Defendant-Appellant,

and

AMERICAN FAMILY MUTUAL INSURANCE, A Corporation,
Defendant.

Appeal from the Iowa District Court for Union County, David L. Christensen, Judge.

Travis West appeals the denial of his motion to dismiss for failure to serve process. **AFFIRMED.**

Stanley Jay Thompson of Davis Brown Law Firm, Des Moines, for appellant.

Marc Allen Humphrey of Humphrey Law Firm, P.C., Des Moines, and Tara Lynn Hofbauer of Hudson, Mallaney, Shindler & Anderson, P.C., West Des Moines, for appellees.

Courtney J. Vernon, West Des Moines, for American Family Mutual Insurance.

Considered by Eisenhauer, C.J., and Potterfield and Tabor, JJ.

TABOR, J.

Travis West appeals the district court's denial of his motion to dismiss for failure to serve process. He contends good cause did not exist under Iowa Rule of Civil Procedure 1.302(5) to grant plaintiffs' motion to extend the ninety-day period. He also argues because plaintiffs failed to serve him with their motion to extend, they should not have received additional time to serve their petition.

Because a combination of circumstances justify the district court's extension of the service deadline, we affirm. The plaintiffs were engaged in ongoing settlement negotiations, faced continuing medical treatment, and experienced difficulty obtaining medical records. They also took affirmative steps to effectuate service through the sheriff's office. We agree with the district court's finding of good cause for additional time to serve West with the petition. The good cause finding is not impacted by plaintiffs' failure to serve West with the extension request.

I. Background Facts and Proceedings

On July 5, 2012, Scott Feldhacker and Rachelle Barnes[1] filed a petition at law and jury demand against Travis West and American Family Mutual Insurance. The petition alleges on July 8, 2010, West negligently crashed his Dodge Ram pickup truck into the Ford Escort driven by Feldhacker and in which Barnes was a passenger. The petition includes claims against American Family—the plaintiffs' underinsured motorist coverage provider.

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[1] We will refer to Feldhacker and Barnes collectively as the plaintiffs.

Aware of the ninety-day deadline to serve process on defendants, plaintiffs' counsel explored potential settlement with West's insurance carrier, Buckeye State Mutual Insurance Company. On September 28, 2012, while still awaiting complete medical records and without yet reaching settlement, counsel sent process to the Adams County Sheriff to be served on defendants.

On October 3, 2012—the final day for timely service—plaintiffs faxed a motion to the court requesting additional time to serve the petition on West. The motion explained American Family had received process that day, but despite several attempts by the sheriff's office, West had not been successfully served. Included with the motion was a proposed order granting the extension. Plaintiffs' counsel did not provide West with either document.

Two days later West filed a motion to dismiss based on plaintiffs' failure to serve process within ninety days of filing their petition. Later that day the court signed the proposed order granting the plaintiffs a thirty-day extension to serve West.[2] Service occurred two days after the court's grant.

On November 2, 2012, the court held a hearing on West's motion to dismiss. The court overruled the motion later that day, reasoning West was served process before the extended deadline.

West filed an application for interlocutory appeal with our supreme court, contesting the district court's denial of his motion to dismiss. The supreme court granted West's application and transferred the case to our court.

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[2] The court deemed the motion to extend as filed when it was faxed to the court.

II. Scope and Standard of Review

We review a district court's ruling on a motion to dismiss for correction of legal error. *Rucker v. Taylor*, 828 N.W.2d 595, 598 (Iowa 2013). While case pleadings ordinarily form the outer boundaries of material to be evaluated in a motion to dismiss, when the motion is based on failure to provide timely service, a court may consider facts outside the pleadings. *Id.* at 598–99. So long as the district court's findings of fact are supported by substantial evidence, they are binding on appeal. *Id.* at 599 (differentiating district court's fact-findings from legal conclusions or application of legal principles, which are not binding on review).

III. Error Preservation

On appeal, West argues the district court erred in granting additional time to serve him because (1) the record does not support its good cause finding, and (2) West was not served plaintiffs' motion to extend. The plaintiffs contend West failed to preserve error on either argument. They assert West should have filed a motion under Iowa Rule of Civil Procedure 1.904[3] either after the court granted the extension or overruled West's motion to dismiss. The plaintiffs additionally

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[3] Rule 1.904(2) reads:

> On motion joined with or filed within the time allowed for a motion for new trial, the findings and conclusions may be enlarged or amended and the judgment or decree modified accordingly or a different judgment or decree substituted. But a party, on appeal, may challenge the sufficiency of the evidence to sustain any finding without having objected to it by such motion or otherwise. Resistances to such motions and replies may be filed and supporting briefs may be served as provided in rules 1.431(4) and 1.431(5).

assert because West did not argue in the district court that their motion to extend was improperly served, the issue is not preserved for appeal.

According to West, he sufficiently preserved error on both issues, based on the court's two separate rulings and his trial briefs. West believes his arguments in his motion-to-dismiss brief served the function of a rule 1.904(2) motion for both challenges, and because the court's ruling indicates it considered the issues, even if the analysis is incomplete or sparse, error was preserved.

Error preservation rules exist to provide district courts an opportunity to avoid or correct errors and to provide a record for appellate courts. *Veatch v. Bartels Lutheran Home*, 804 N.W.2d 530, 533 (Iowa Ct. App. 2011). A party ordinarily must raise an issue and the district court must rule on that issue to ensure preservation for appellate review. *Duck Creek Tire Serv., Inc. v. Goodyear Corners, L.C.*, 796 N.W.2d 886, 892 (Iowa 2011). Even if a party properly raises an issue, if the district court fails to rule on it, the party must file a motion requesting a ruling on the issue to preserve error. *Kramer v. Bd. of Adjustment for Sioux County*, 795 N.W.2d 86, 93 (Iowa Ct. App. 2010).

In plaintiffs' motion to extend, they list circumstances they contend constitute good cause to extend the filing deadline:

- They were in "consistent contact" with West's insurance carrier, Buckeye State Mutual Insurance Company, and its adjuster, Deb Wobig, for purposes of out-of-court settlement.
- They were both injured in the collision and continued to receive medical treatment.
- Because one of Feldhacker's physicians recently had his medical license suspended, they were having difficulties gaining medical records to use for settlement purposes.
- Barnes had since been diagnosed with a blood clot, and the medical records would be important to discuss settlement.

- With five days left to serve, they sent the original notice and petition to the Adams County Sheriff's Office and maintained daily contact with the office to stay apprised of the status.

The court's order granting additional time included a conclusory good cause finding: "the Court having reviewed the Motion and being fully advised in the premises does hereby find that the Motion should be granted for good cause shown."

In West's motion to dismiss, filed the same day as the court's order granting the extension, he contends no good cause exists for the failed service since plaintiffs had not taken affirmative action to effectuate service and had not been prohibited from doing so through no fault of their own. The plaintiffs resisted the motion, reiterating the same background facts and reasoning advanced in their motion to extend. They also "respectfully suggest[ed] that good cause ha[d] been shown for the extension of time for service, as requested." West's reply to their resistance included an in-depth good cause analysis.

The record does not include a transcript of the November 2, 2012 hearing on West's motion to dismiss. The court's subsequent handwritten order reads in full:

> Contested hearing held on Travis Lee West's motion to dismiss. An Order Granting Extension of Time to Serve Defendant West granted plaintiffs until November 3, 2012 to serve West. Service was [A]ccomplished prior to the deadline. West's motion to dismiss is overruled. So Ordered.

In recently rejecting an argument that a rule 1.904(2) motion was required to preserve error, our supreme court explained: "If the court's ruling indicates that

the court *considered* the issue and necessarily ruled on it, even if the court's reasoning is 'incomplete or sparse,' the issue has been preserved." *Lamasters v. State*, 821 N.W.2d 856, 564 (Iowa 2012). Even more recently, the court found error was preserved in a motion to dismiss when a district court incorporated the motion into its order:

> When the district court enters an order incorporating the reasons made in the motion to dismiss as grounds for dismissal, we take the order at face value. We assume that the district court read the motion to dismiss, understood the arguments that were made, and relied upon them in reaching a ruling. Any suggestion that the district court would be surprised under these circumstances amounts to an attack on the diligence of the district court that we refuse to entertain.

Cooksey v. Cargill Meat Solutions Corp., 831 N.W.2d 94, 97 (Iowa 2013).

Here the court expressly found good cause existed based on the plaintiffs' motion to extend, which they again referenced in resisting West's motion to dismiss. Both parties extensively briefed the issue of good cause between the court's October 5 finding that good cause existed and its November 2 denial of West's motion to dismiss. We believe the November 2 ruling implicitly affirmed the court's earlier good cause finding. *See State v. Paredes*, 775 N.W.2d 554, 561 (Iowa 2009) ("[w]here a question is obvious and ruled upon by the district court, the issue is adequately preserved.").

Because both rulings centered on the rule 1.302(5) good cause issue, we believe plaintiffs' motion to extend and West's motion to dismiss present two sides to the same coin for error preservation purposes. After the court's good cause finding, West revisited the issue through his motion to dismiss, which was ruled on by the district court.

Although rule 1.904(2) is one means for preserving error, it is not an exclusive avenue:

> "The preservation of error doctrine does not require the request for a ruling to be made under rule 1.904(2). There is no procedural rule solely dedicated to the preservation of error doctrine, and a party may use any means to request the court to make a ruling on an issue. Furthermore, we treat a motion by its contents, not its caption."

Lamasters, 821 N.W.2d at 863 (quoting *Meier v. Senecaut*, 641 N.W.2d 532, 539 (Iowa 2002)) (alterations omitted).

Under these circumstances, West did not waive his claims by failing to file a 1.904(2) motion. *See Lee v. State*, 815 N.W.2d 731, 739 (Iowa 2012) ("We will not exalt form over substance when the objectives of our error preservation rules have been met."); *Griffin Pipe Prods. Co. v. Bd. of Revenue*, 789 N.W.2d 769, 772 (Iowa 2010) ("Our issue preservation rules are not designed to be hypertechnical."). For the same reason, West preserved error on his argument that he was not served with plaintiffs' motion to extend. After the court granted plaintiffs' ex parte motion, West addressed the plaintiffs' failure to serve him with their extension motion in his motion-to-dismiss brief. Opposing counsel could respond to the argument and the district court had opportunity to address any error in its November 2 order. *See State v. Milner*, 571 N.W.2d 7, 12 (Iowa 1998).

IV. Merits

A. Did Good Cause Exist to Extend the Ninety-Day Deadline?

West asserts plaintiffs' excuses for delayed service—settlement negotiations and gathering additional medical records—do not constitute good

cause to extend the deadline. West likens their justifications to those considered in *Antolik v. McMahon*, 744 N.W.2d 82, 84 (Iowa 2007), in which our supreme court held settlement negotiations did not constitute good cause for failure to timely effect service.

The plaintiffs distance the present facts from *Antolik*, noting the plaintiffs in that case cited settlement negotiations as their sole basis of delay, whereas here the extension was necessitated by ongoing negotiations, difficulty in obtaining medical records, and repeated attempts to serve West within the ninety-day cutoff.

Rule 1.302(5) provides both the ninety-day filing period and the manner in which it may be extended:

> If service of the original notice is not made upon the defendant . . . 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 . . . 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.

To satisfy this good cause standard, a plaintiff must have made some affirmative act to effectuate service on the defendant, or was prohibited, through no fault of the plaintiff, from making an affirmative act. *Meier*, 641 N.W.2d at 542 (discussing mechanics of rule 1.302(5) and explaining difference between rule and its predecessor).

> "[G]ood cause is likely (but not always) to be found when the plaintiff's failure to complete service in timely fashion is a result of the conduct of a third person, typically the process server, the defendant has evaded service of the process or engaged in misleading conduct, the plaintiff has acted diligently in trying to effect service or there are understandable mitigating circumstances."

Wilson v. Ribbens, 678 N.W.2d 417, 421 (Iowa 2004) (quoting 4B Charles A. Wright & Arthur R. Miller, *Federal Practice & Procedure* § 1137, at 342 (3d ed. 2002)).

Neglect, inadvertence, ignorance, or misunderstanding of the rule or its burden, or half-hearted service attempts, generally do not constitute good cause. *Meier*, 641 N.W.2d at 542. Neither does intentional non-service for the purpose of delaying the action's development or to allow plaintiffs time to gather additional information before "activating" the law suit satisfy the good cause requirement. *Id.*

We first examine the present facts in light of the *Antolik* holding. In *Antolik,* the ground urged for extension was ongoing settlement negotiations that, if successful, would have made the litigation unnecessary. 744 N.W.2d at 84. The supreme court relied on the historic principle that "'[s]ettlement negotiations, even if done in good faith, do not constitute . . . good cause for delaying service.'" *Id.* at 85 (quoting *Henry v. Shober*, 566 N.W.2d 190, 193 (Iowa 1997)).

Our supreme court recently revisited this principle in *Rucker*, 828 N.W.2d at 600–03, holding although settlement negotiations have not historically constituted good cause for delaying service, instances exist in which dismissal on this basis would be inequitable. The court explained the good cause standard "considers all the surrounding circumstances, including circumstances that would make it inequitable for a defendant to successfully move to dismiss." *Rucker*, 828 N.W.2d at 601.

Rucker erased any bright line previously indicating settlement negotiations can never constitute good cause for a delay in service. *Id.* at 603 (emphasizing "good cause requires an examination of all of the surrounding facts to determine if they reveal 'understandable mitigating circumstances'"); c*ompare Henry v. Shober*, 566 N.W.2d 190, 192–93 (Iowa 1997) (holding where insurance representative only continued to negotiate a settlement and did nothing to suggest to plaintiff service was unnecessary, dismissal was not inequitable) *with Wilson*, 678 N.W.2d at 422 (holding dismissal would be inequitable where parties allegedly entered into agreement, memorialized in letters, to delay service for out-of-court negotiations and exchanging medical records); *see also Antolik*, 744 N.W.2d at 85 (affirming dismissal of plaintiff's request to extend based on settlement negotiations).[4]

We agree with plaintiffs that this situation is not controlled by *Antolik*, and the totality of circumstances support the district court's finding of good cause. Unlike the above cases, here the plaintiffs tried to serve process within ninety days. *See Rucker*, 828 N.W.2d 597–98 (service first attempted outside ninety-day window); *Antolik*, 744 N.W.2d at 84 (same); *Wilson*, 678 N.W.2d at 419 (service first attempted nearly ten months after suit filed); *Henry*, 566 N.W.2d at 191 (directed service 156 days after petition was filed). Plaintiffs' counsel maintained frequent contact with insurance adjuster Wobig, trying to resolve the dispute. Realizing settlement was becoming less likely within the ninety-day

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[4] The *Rucker* court did not discuss *Antolik*.

period, plaintiffs—through the sheriff's office—repeatedly attempted service in the remaining five days.

West contends the plaintiffs' unsuccessful efforts to serve him in the final five days do not justify extending their deadline. He compares his case to *Crall v. Davis*, 714 N.W.2d 616 (Iowa 2006), in which the first attempt at service occurred fifty days after the petition was filed and contends the eighty-five-day wait by Feldhacker and Barnes defeated good cause. But a key component to *Crall's* rationale was that the plaintiffs there offered "no explanation" for their delay. *See* 714 N.W.2d at 621 (citing precedent in which the lack of explanation contributed to no-good-cause findings).

By contrast, Feldhacker and Barnes cited several reasons for waiting until the eighty-fifth day before trying to effectuate service: ongoing settlement negotiations, continued medical treatment, and difficulty obtaining medical records. These surrounding circumstances, in conjunction with their multiple pre-deadline attempts to serve West, constitute good cause for an extension of time. Our conclusion is bolstered by the preference of Iowa courts to hear a case on the merits rather than dismiss on a procedural technicality. *See Rucker*, 828 N.W.2d at 603 ("Because the substantive rights of a plaintiff can be at stake through the application of a statute of limitations, it is important that the good-cause standard under rule 1.302(5) not be applied too narrowly.").

B. Should Plaintiffs' Failure to Serve Their Motion to Extend on West Justify its Denial?

West contends the court improperly granted the motion to extend because plaintiffs failed to serve him with their motion, despite knowing his home address. West cites no Iowa case in which a plaintiff's failure to serve a defendant with a motion to extend was an independent ground for denying the extension. But West draws our attention back to *Antolik*, where the district court entered an order extending time for service without notice to the defendant. *See* 744 N.W.2d at 84.

Again, we are not persuaded by *Antolik*. The supreme court found the lack of notice of the extension was less important than the insufficiency of the grounds urged for good cause. *See id*. The plaintiffs acknowledge they did not serve West with the motion, but note they did send a copy to the insurance company by facsimile. They argue because they had not yet been able to serve West with the petition, requiring service of the motion to extend time to serve the petition would be illogical.

We agree it makes little sense to deny the plaintiffs' extension request based on their failure to serve the defendant with the motion when the reason for moving to extend was their inability to provide service of the petition. Moreover, West cannot show he was prejudiced. Despite not being served with the plaintiffs' extension request, West had the opportunity to rebut their good cause argument in urging the court to grant his motion to dismiss. Accordingly, we do

not believe plaintiffs' failure to serve West with their motion is cause for reversing the district court.

AFFIRMED.