IN THE COURT OF APPEALS OF IOWA

No. 1-945 / 11-0838
Filed February 1, 2012

LARRY WHITE and MICHELLE WHITE,
Plaintiffs-Appellees,

vs.

IMT INSURANCE COMPANY d/b/a THE IMT GROUP d/b/a WADENA INSURANCE, and NATIONWIDE INSURANCE COMPANY OF AMERICA d/b/a NATIONWIDE MUTUAL INSURANCE COMPANY d/b/a NATIONWIDE INSURANCE d/b/a ALLIED INSURANCE d/b/a NATIONWIDE AGRIBUSINESS d/b/a TITAN INSURANCE d/b/a VICTORIA INSURANCE,
Defendants-Appellants.

Appeal from the Iowa District Court for Black Hawk County, Stephen C. Clarke (motion for additional time) and James C. Bauch (motions to dismiss), Judges.

Defendants appeal the district court order denying their pre-answer motions to dismiss. **AFFIRMED IN PART AND REVERSED IN PART.**

Brian L. Yung of Klass Law Firm, L.L.P., Sioux City, for appellant IMT Insurance Company.

Brian R. Kohlwes of Law Office of Scott J. Idleman, Des Moines, for appellant Nationwide Insurance Company.

Tyler J. Johnston and Bryan S. Witherwax of Witherwax Law, P.C., West Des Moines, for appellees.

Heard by Eisenhauer, P.J., Danilson, J., and Sackett, S.J.*

*Senior judge assigned by order pursuant to Iowa Code section 602.9206 (2011).

EISENHAUER, P.J.

Nationwide Insurance Company of America and IMT Insurance Company were granted interlocutory appeal to challenge the district court order denying their separate pre-answer motions to dismiss. They argue the court erred in finding plaintiffs Larry and Michelle White had "good cause" for failure to serve the original notice within ninety days as required by Iowa Rule of Civil Procedure 1.302(5). We affirm in part (Nationwide) and reverse in part (IMT).

I. Background Facts and Proceedings.

A November 16, 2008 motor vehicle accident led to the Whites' November 16, 2010 petition seeking underinsured motorist benefits from Nationwide and IMT. The Whites are insured by IMT, and at the time of the accident, they were operating a vehicle insured by Nationwide. The petition notes the Whites "are in the process of settling with the tortfeasor driver with the consent of their insurance company." The tortfeasor was insured by Guide One Insurance.

On January 24, 2011, an e-mail exchange occurred between Kathy Boyd, Nationwide liability claims associate, and Bryan Witherwax, the Whites' attorney. Boyd informed Witherwax the November 16, 2008 claim "has been reassigned to me," and she requested "a copy of the complaint along with copies of up to date specials, medical reports and related information. Please also provide the prior records for Mr. White that were supplied to Guide One Insurance." Witherwax responded and asked Boyd what she needed "in advance of all this information to agree to the settlement" currently negotiated with the tortfeasor. Boyd replied:

"A copy of the suit filing and written request from you. At this time are you looking for permission to settle only?"

The next day, January 25, Boyd e-mailed Witherwax: "In follow up to our conversation yesterday, Nationwide Insurance grants permission to settle the bodily injury claim of Larry White with Guide One Insurance for their policy limit . . . ."

On January 26, Mike Herold, IMT assistant regional claims manager, e-mailed Witherwax:

> We understand [Guide One] (insurer for the tortfeasor) has offered to pay their policy limit . . . and that you have requested our permission to settle. As we previously discussed, IMT Insurance Company does not believe that our permission is necessary in light of our policy language regarding U.I.M. coverage. We believe that permission needs to come from [Nationwide]. That being said, from our standpoint we don't have a problem if you choose to settle with [Guide One] and we agree we will not argue prejudice as it pertains to U.I.M. coverage.

A few hours later, Witherwax replied to Herold and asked whether IMT is "waiving any lien that you have for medpay?" A few minutes later, Herold replied: (1) Larry White's policy contains a $5000 medical payments coverage limit; (2) no medical bills have been submitted; (2) "[i]t is our understanding [Nationwide] has paid out $2000.00 in Medical Pay Coverage"; (3) if you have medical bills "you would like for us to consider under the Medical Pay Coverage please forward those for our review"; and (4) in the event medical bills are submitted, the IMT policy includes the enclosed subrogation language.

On February 8, 2011, IMT's Herold wrote to Witherwax regarding the November 2008 accident:

> This is a follow-up to our phone conversation today regarding the medical pay subrogation claim of Michelle White.
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> To date we have made medical payments on Michelle White's behalf of $790.33. Enclosed is a copy of our supporting documentation. As discussed we are agreeable to accepting 2/3 of our medical pay subrogation claim of $790.33 or $526.83.

On February 15, the Whites filed a request with the court for additional time to obtain service. February 15 is ninety-one days after the Whites' lawsuit was filed. *See* Iowa Code § 4.4(34) (2009). Also on February 15, the Iowa Department of Insurance accepted service of the Whites' lawsuit on behalf of defendants IMT and Nationwide.

On February 17, Witherwax e-mailed Nationwide's Boyd and asked if she had "time to talk about this claim tomorrow (Friday)?" At 6:31 a.m. on Friday, February 18, Boyd replied:

> I will not have time today to discuss this claim . . . . Regarding completing service I have spoken with our legal department who advised we will not require service on the company. If agreeable with you we will attempt to resolve and we acknowledge suit has been filed.

On February 21, the court granted the Whites' request for additional time and allowed service until May 17, 2011. On February 25, Nationwide filed a pre-answer motion to dismiss arguing the Whites failed to complete service or file a motion requesting additional time for service within ninety days.

On March 2, 2011, Witherwax e-mailed Nationwide's Boyd asking: "Do you have everything you need now? Just let me know?" Boyd replied: "This file has been reassigned . . . ."

On March 7, the Whites resisted Nationwide's motion to dismiss stating they took affirmative action to effectuate service of process: "sent the documents

to be served to the Commissioner of Insurance for the State of Iowa before the ninety (90) days had expired" and "took the affirmative steps of requesting additional time to serve" from the district court. The Whites noted the February 15 service was "substantially before" the court-ordered May 17 extension of service date. Finally, the Whites alleged Nationwide "was also well aware of the suit before the ninety (90) day deadline had elapsed":

> As part of the process of approving settlement with the primary insurance carrier regarding the accident that took place on November 16, 2008, Kathy Boyd, a representative for [Nationwide], requested to see a copy of the petition filed in this case. The [Whites' attorneys] forwarded a copy of the filed petition to [Nationwide's] representative. The representative for [Nationwide] acknowledged receipt of the same and approved the settlement of the underlying claim with the primary insurance carrier.

Also on March 7, IMT filed a pre-answer motion to dismiss arguing untimely service and adopting the legal arguments of codefendant Nationwide. The Whites resisted. After hearing, in May 2011, the district court denied the motions to dismiss. In June, Nationwide and IMT filed applications for interlocutory appeal, which were granted by the Iowa Supreme Court.

II. Scope of Review.

We review a district court ruling on a motion to dismiss for failure to serve in a timely manner for correction of errors at law. *Falada v. Trinity Indus., Inc.*, 642 N.W.2d 247, 249 (Iowa 2002). While motions to dismiss are generally limited to the pleadings, an exception exists "when the court is considering a motion to dismiss for delay of service." *Crall v. Davis*, 714 N.W.2d 616, 619

(Iowa 2006). In those circumstances, courts consider matters outside the pleadings.[1] *Carroll v. Martir*, 610 N.W.2d 850, 856 (Iowa 2000).

The district court's findings of fact "are binding on appeal unless they are not supported by substantial evidence." *Id*. at 857. Evidence is substantial if "a reasonable mind would accept it as adequate to reach a conclusion." *Business Consulting Servs., Inc. v. Wicks*, 703 N.W.2d 427, 429 (Iowa 2005). "We are not, however, bound by the district court's legal conclusions or applications thereof." *Wilson v. Ribbens*, 678 N.W.2d 417, 418 (Iowa 2004).

III. Merits.

Iowa Rule of Civil Procedure 1.302(5) governs service of process:

> 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 . . . or direct an alternate time or manner of service. If the party filing the papers [plaintiff] shows good cause for the failure of service, the court shall extend the time for service for an appropriate period.

The official comments to the rules provide: "Ninety days was chosen in order that service would be perfected prior to the issuance of scheduling orders by most courts." The Iowa Supreme Court has explained:

> [The] rule contemplates that the court take action once service has not been accomplished within ninety days from the time the petition is filed. The type of action directed by the rule is to dismiss the action without prejudice, impose alternative directions for service, or grant extension of time to complete service for an appropriate period of time. Extension of time requires a showing of good cause.
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> . . . .
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> By allowing the court to dismiss a petition after ninety days, the rule now establishes the standard for presumptive abuse.

[1] Accordingly, Nationwide's argument the district court erred in considering documentation outside the pleadings is without merit.

> Thus, courts must now simply decide if the plaintiff has shown justification for the delay.
>
> We apply the good cause standard to determine justification for delay.

Meier v. Senecaut, 641 N.W.2d 532, 541-42 (Iowa 2002). Good cause requires the plaintiff to have taken some affirmative action to effectuate service of process. *Id*. at 542. Good cause is generally found when the plaintiff has acted diligently and service is delayed as "a result of the conduct of a third person, typically the process server," *or* the defendant has evaded service or engaged in misleading conduct, *or* "there are understandable mitigating circumstances." *Wilson*, 678 N.W.2d at 421.

"The present rule clearly requires a court to grant an extension to the ninety-day requirement on a showing of good cause." *Id*. While "good faith settlement negotiations, standing alone, do not constitute good cause for delays in service," agreements delaying service "in pending litigation in the hope of settlement . . . may constitute 'good cause'" under our rules of civil procedure. *Id. at* 422.

The district court ruled:

> The plaintiffs resist . . . contending that the insurance companies were aware of the action because the plaintiffs couldn't settle the underlying case without the insurance companies' permission and approval. The defendant did approve the settlement with the underlying claim. The plaintiffs' position is supported by the communications contained in Group Exhibit A [e-mails and letters detailed above] that was received by the Court. In addition, the plaintiffs had sent the required paperwork to the commissioner of insurance for the state of Iowa before February 15, 2011, which would have been within ninety days of the filing of the original notice and petition.
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> . . . The question for the Court is whether there is good cause for failure to serve the defendant within the ninety days. The Court finds that the plaintiffs did take some affirmative action to

> effectuate service pursuant to the insurance commissioner of the state of Iowa. They also took steps to obtain additional time for service by filing the appropriate motion with the Iowa district court, albeit one day late. The Court finds this case to be similar to that of *Falada v. Trinity Industries, Inc.*, 642 N.W.2d 247 (Iowa 2002). In that case the plaintiffs waited until the 89th day to effectuate service and did so on the wrong company. When they learned of their mistake, they obtained service fifteen days later on the right party.
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> In the present case the plaintiffs had forwarded a copy of the filed petition to the defendant's representative during the ninety days, and the plaintiffs sent the required paperwork to the insurance commissioner before the expiration of the ninety days. In addition, there was only a one-day delay before service of notice, and the Court finds good cause exists for the short delay beyond ninety days.

IMT first argues the district court "erred in treating the two insurance carriers as one party for purposes of the motion." IMT asserts "[w]hile there may have been evidence of e-mail communications between the White's attorney and Nationwide about a UIM lawsuit, there was no such documentation concerning IMT."

While we agree the district court's ruling could have been clearer in this regard, the communications/exhibits show Nationwide was the defendant approving the settlement of the underlying claim while IMT was the defendant who responded in January 2011 that its approval was not necessary. IMT specifically mentioned its UIM policy language in asserting its prior approval was not necessary. Therefore, both defendants were aware of the Whites' potential claim. However, we agree with IMT that the communications between it and the Whites do not show IMT was aware it had been sued. Neither do the communications show IMT had entered into any agreement to delay, waive, or accept service.

We turn now to IMT's claim the court erred in finding good cause for the delay of service on it. "Good cause" requires the plaintiffs to "have taken some affirmative action to effectuate service of process upon the defendant." *Crall*, 714 N.W.2d at 620. We consider the length of delay in service. *See Turnbull v. Horan*, 522 N.W.2d 860, 861 (Iowa Ct. App. 1994). Additionally, we consider whether plaintiffs applied to the court for an extension of time for service as an affirmative action supporting a finding of good cause. *See Crall*, 714 N.W.2d at 621-22. "Inadvertence, neglect, misunderstanding, ignorance of the rule or its burden, or half-hearted attempts at service have generally been [deemed] insufficient to show good cause." *Id*. at 620 (quoting *Senecaut*, 641 N.W.2d at 542).

Here, the one-day delay in service is short, unlike the lengthy and unacceptable delays in *Senecaut*, 641 N.W.2d at 542 (finding service ninety days after learning correct identity where two Senecauts in area) and *Palmer v. Hofman*, 745 N.W.2d 745, 747 (Iowa Ct. App. 2008) (finding service 184-days after ninety-day deadline due to paralegal's inaction). Additionally, the Whites did seek an extension of time. However, the combination of these two factors is insufficient when our review of the record discloses no evidence supporting the district court's finding the Whites "had sent the required paperwork to the commissioner of insurance for the state of Iowa before February 15, 2011." Further, during oral argument the Whites' attorney acknowledged there are no affidavits or documents in the record establishing the date on which the petition was sent/delivered to the insurance commissioner for service. On this record, the Whites have failed to meet the *Crall* "some affirmative action" test. *See Crall*,

714 N.W.2d at 620. Accordingly, we reverse the district court decision as to IMT and remand for an ordering dismissing IMT.

Next, we consider Nationwide's claim the court erred in failing to grant its pre-answer motion to dismiss. Nationwide argues any waiver of service of process it made in Boyd's e-mail sent on February 18, 2011, four days *after* the service deadline, was invalid because it "is impossible for [it] to waive a deadline that has already passed." Nationwide cites no authority for this argument. A party's failure in a brief to cite authority in support of an issue may be deemed waiver of that issue. *Baker v. City of Iowa City*, 750 N.W.2d 93, 103 (Iowa 2008). It is undisputed Boyd's e-mail to the Whites' attorney informed him she had checked with the legal department and Nationwide "will not require service on the company. If agreeable with you we will attempt to resolve and we acknowledge suit has been filed." Accordingly, we find no error in the district court's denial of Nationwide's pre-answer motion to dismiss. Costs on appeal are taxed one-half to the Whites and one-half to Nationwide.

AFFIRMED IN PART AND REVERSED IN PART.