IN THE COURT OF APPEALS OF IOWA

No. 8-767 / 07-1961
Filed October 29, 2008

MARTIN THRASH, Individually, and as the Administrator of the Estate of Keli D. Duval, And on behalf of the Children of Keli D. Duval; Joshua E. Duval, Adult, and Victoria N. Thrash, Minor, and Mathew M. Thrash, minor,
Plaintiffs-Appellees,

vs.

ABBE CENTER FOR COMMUNITY MENTAL HEALTH, INC., and RICHARD LARSEN, M.D., and SINDA H. EGGERMAN, PH.D.,
Defendants-Appellants.

Appeal from the Iowa District Court for Linn County, Thomas L. Koehler, Judge.

Defendants appeal the district court's denial of their motions to dismiss asserting plaintiffs failed to meet Iowa's ninety-day service requirement. **REVERSED AND REMANDED**.

Richard A. Stefani and Raymond R. Stefani, II of Gray, Stefani & Mitvalsky, P.L.C., Cedar Rapids, for appellant Richard Larsen, M.D.

James M. Peters and Jason M. Steffens of Simmons Perrine PLC, Cedar Rapids, for appellants Abbe Center for Community Mental Health, Inc. and Sinda H. Eggerman.

Martin Diaz, Iowa City, for appellee.

Considered by Huitink, P.J., and Vogel and Eisenhauer, JJ.

EISENHAUER, J.

The facts are undisputed. On June 6, 2007, plaintiff Martin Thrash individually, as executor, and on behalf of his minor children, filed a petition against three defendants. He did not have an attorney. Under Iowa Rule of Civil Procedure 1.302(5), plaintiffs had ninety days to serve the defendants with original notice or the court "shall dismiss the action without prejudice" or direct alternate service. Plaintiffs acknowledge the rule required service by September 4, 2007. The rule also allows the court to extend the time for service if the plaintiffs show "good cause for the failure of service." *See* Iowa R. Civ. P. 1.302(5).

On September 6, 2007, plaintiffs filed a request for more time to effect service. This request was never granted.[1] On September 7, 2007, defendants were served with the petition, but not with the required original notice. *See* Iowa R. Civ. P. 1.302(3) ("[O]riginal notice shall be served with a copy of the petition."). Also in September 2007, defendants filed motions to dismiss due to plaintiffs' deficient service. In October 2007, all defendants were properly served.

Plaintiff Martin Thrash filed an affidavit resisting defendants' motions to dismiss stating: (1) he misunderstood and thought he had three months to investigate before service was required; (2) he did not want to serve the

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[1] On September 20, 2007, the court ruled plaintiffs' request for additional time for service was moot because "all defendants appear to have been served"; however, at that time the defendants' motions to dismiss had not been placed in the court file. On October 8, 2007, the court's September 20th order was vacated and the court ruled the motions to dismiss "should be considered on their merits."

defendants "if the case was not worth pursuing"; (3) his investigation was delayed when his father's estate required out of state travel and when he had trouble contacting the medical records personnel; and (4) he was unaware of the original notice requirement.

On October 31, 2007, the court denied defendants' motions to dismiss and ruled Thrash's affidavit "establishes good cause for the delay in effectuating service." In January 2008, defendants' application for interlocutory appeal was granted by the Iowa Supreme Court.

"We review a motion to dismiss for failure to effect timely service of process for the correction of errors at law." *Wilson v. Ribbens*, 678 N.W.2d 417, 418 (Iowa 2004). When, as here, there is no service within ninety days and no order extending time for service, the only issue is whether the plaintiffs have "shown justification for the delay." *See Crall v. Davis*, 714 N.W.2d 616, 620 (Iowa 2006). "The standard we employ in determining such justification is 'good cause.'" *Id*. The Iowa Supreme Court has instructed good cause means:

> The plaintiff must have taken some affirmative action to effectuate service of process upon the defendant. . . . Inadvertence, neglect, misunderstanding, ignorance of the rule or its burden . . . [are] insufficient to show good cause. Moreover, intentional nonservice in order to . . . allow time for additional information to be gathered prior to "activating" the lawsuit . . . fall[s] short of . . . good cause.

Henry v. Shober, 566 N.W.2d 190, 192-93 (Iowa 1997). Additionally, 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. *Wilson*, 678

N.W.2d at 421. However, we cannot "ignore a clear statutory requirement to achieve what appears to be the best result in a particular case." *Id*. at 420.

Because the reasons for delay of service detailed in Thrash's affidavit do not constitute good cause under the statute, we reverse. Thrash's affidavit contains no allegations of evasion or misleading conduct by defendants. *See id.* at 421. Thrash took no affirmative action to serve the defendants within the ninety-day requirement and did not request an extension of time until after the deadline had passed. Therefore, Thrash has not acted diligently. *See id.* Thrash's misunderstanding and/or ignorance of the service requirements does not constitute good cause. *See Henry*, 566 N.W.2d at 192-93. Thrash's intentional delay of service while investigating whether to "activate" the lawsuit does not constitute good cause. *See id*.

Plaintiffs argue they should have greater leniency in missing the service deadline because Thrash was acting without counsel and because defendants were not prejudiced. We disagree. Unrepresented litigants are held to the same standards as other litigants. *Johnson v. Nickerson*, 542 N.W.2d 506, 513 (Iowa 1996). Iowa's good cause standard does not mention prejudice. *See Wilson*, 678 N.W.2d at 421.

Plaintiffs request we adopt a new standard for analyzing untimely service cases. However, this issue was not raised and decided in the district court; therefore, we will not address it for the first time on appeal. *Meier v. Senecaut*, 641 N.W.2d 532, 537 (Iowa 2002).

Finally, plaintiffs seek affirmative relief regarding Matthew Thrash's claim. This issue was resolved on September 2, 2008, when the Iowa Supreme Court overruled plaintiffs' motion to dismiss defendants' appeal.

We conclude the district court erred as a matter of law in failing to grant defendants' motions to dismiss. Accordingly, we reverse the district court and remand for an order dismissing the petition.

REVERSED AND REMANDED.