

IN THE SUPREME COURT OF IOWA

**SUPREME COURT NO. 23-2035
Polk County No. LACL154718**

RHONDA C. LUCAS,

Plaintiff-Appellee,

vs.

**PETER J. WARHOL
Defendant-Appellant,**

And

**PROGRESSIVE DIRECT INSURANCE COMPANY
Defendant.**

APPELLEE RHONDA LUCAS' BRIEF

Jeff Carter
Zachary C. Priebe
Jeff Carter Law Offices, P.C.
300 Walnut Street, Suite 260
Des Moines, Iowa 50309
Tel: (515) 557-1961
Fax: (515) 557-1962
jeff@jeffcarterlaw.com
zpriebe@jeffcarterlaw.com
ATTORNEYS FOR PLAINTIFF – APPELLEE

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STATEMENT OF ISSUES PRESENTED FOR REVIEW

ISSUE I: WAS THE DISTRICT COURT CORRECT IN CONCLUDING THAT THE DEFENDANT EVADED SERVICE AND IN GRANTING THE PLAINTIFF ADDITIONAL TIME TO SERVE THE DEFENDANT?

ISSUE II: DID THE DISTRICT COURT RIGHTLY DETERMINE THAT THE DEFENDANT COULD BE SERVED THROUGH HIS ATTORNEY UNDER THE IOWA RULES OF CIVIL PROCEDURE?

ROUTING STATEMENT

This case should be transferred to the Iowa Court of Appeals because it is a case that presents the “application of existing legal principles.” Iowa R. App. P. 6.903 (2)(d) and Iowa R. App. P. 6.1101 (3)(a).

NATURE OF THE CASE

This interlocutory appeal asks the court to sanction a nonresident driver’s evasion of personal service where the district court has determined that the record reflects the nonresident driver’s evaded service. Rhonda Lucas requests that this court affirm the prior rulings of the district court, lift the current stay, and remand this case to the capable hands of the district court.

STATEMENT OF THE FACTS

On January 12, 2021, Peter Warhol operated his vehicle on the interstate in Polk County. (D0001, Petition at Law and Jury Demand, at p. 2 (1/11/23). Peter Warhol, a Minnesota resident, drove his vehicle without a license, but with an open container of alcohol. (D0001, Petition at Law and Jury Demand, at p. 2 (1/11/23).

Mr. Warhol's vehicle collided with a vehicle operated by the Plaintiff Rhonda Lucas. (D0001, Petition at Law and Jury Demand, at p. 2 (1/11/23). The collision occurred with such force that Ms. Lucas's vehicle ended up in the ditch. (D0001, Petition at Law and Jury Demand, at p. 2 (1/11/23). Mr. Warhol is later cited for leaving the scene of the accident. (D0001, Petition at Law and Jury Demand, at p. 2 (1/11/23).

Plaintiff Rhonda Lucas files her petition at law and jury demand on January 11, 2023, alleging that Defendant Warhol negligently operated his motor vehicle. D0001, Petition at Law and Jury Demand (1/11/23). On March 23, 2023 Lucas files a motion to extend the service deadline (D0005, Plaintiff's Motion to Extend Time to Effectuate Service, (3/23/23), and the next day the district court granted Ms. Lucas additional time (sixty days) – until June 12, 2023 – in which to serve the Defendant Warhol. (D0006, Order Granting Plaintiff's Motion to Extend Time to Effectuate Service, (3/24/23).

In her motion for extension, Rhonda Lucas outlines her attempts at service of Defendant Warhol. (D0005, Plaintiff's Motion to Extend Time to Effectuate

Service (3/23/23). Her attempts at service include utilizing the sheriff's office in the county of the last known address of the Defendant, hiring a private investigator, and beginning the process of serving a non-resident motorist through the Iowa Department of Transportation (D0005, Plaintiff's Motion to Extend Time to Effectuate Service (3/23/23)).

Afterwards, Rhonda Lucas attempts service of the Defendant via Iowa Code Section 321.501. (D0008, Certification of Service (4/21/23); (D0009, Certification of Service, Exhibit 1 (4/21/23); D0010, Certification of Service, Exhibit 2 (4/21/23); D0011, Certification of Service, Exhibit 3 (4/21/23); D0012, Certification of Service, Exhibit 4 (4/21/23). Ms. Lucas receives notice through a private investigator that Defendant Warhol is residing at an address in Eden Prairie, Minnesota. (D0008, Certification of Service (4/21/23); (D0009, Certification of Service, Exhibit 1 (4/21/23); D0010, Certification of Service, Exhibit 2 (4/21/23); D0011, Certification of Service, Exhibit 3 (4/21/23); D0012, Certification of Service, Exhibit 4 (4/21/23).

While attempting service of an out-of-state driver through Iowa Code Section 321.501, Rhonda Lucas's attorney corresponded with claims specialist for Defendant Warhol's motor vehicle liability insurer – Progressive. The correspondence between Lucas's attorney and the claims representative occurred on April 6, 2023. (D0028, Plaintiff's Resistance to Defendant Warhol's Motion to

Reconsider or Enlarge, Attachment 1, (10/16/23). The claims representative does not mention the housing circumstances of the Defendant in this correspondence. (D0028, Plaintiff's Resistance to Defendant Warhol's Motion to Reconsider or Enlarge, Attachment 1, (10/16/23). Instead, the claims representative critiques the manner in which the Plaintiff is attempting to serve the Defendant. (D0028, Plaintiff's Resistance to Defendant Warhol's Motion to Reconsider or Enlarge, Attachment 1, (10/16/23).

On April 21, 2023, the Rhonda Lucas files her certification of service under Iowa Code §321.501. (D0008, Certification of Service (4/21/23); (D0009, Certification of Service, Exhibit 1 (4/21/23); D0010, Certification of Service, Exhibit 2 (4/21/23); D0011, Certification of Service, Exhibit 3 (4/21/23); D0012, Certification of Service, Exhibit 4 (4/21/23). On June 19, 2023, the Defendant has an attorney appear on his behalf and file a motion to dismiss claiming lack of service under Iowa Rule of Civil Procedure 1.302 and Iowa Code §321.501. (D0013, Defendant's Pre-Answer Motion to Dismiss (6/19/23); (D0014, Appearance on Behalf of Defendant Peter J. Warhol (6/19/23).

In Defendant's motion, Mr. Warhol's attorney asserts that he learned of Mr. Warhol's housing status on April 4, 2023. (D0014, Defendant's Pre-Answer Motion to Dismiss, at p. 3 (6/19/23). This motion was accompanied by e-mail correspondence from the attorney for the Defendant to the attorney for the Plaintiff

claiming that service “could not have occurred” due to Mr. Warhol’s housing status. (D0021, Plaintiff’s Resistance to Defendant Warhol’s Motion to Strike and Response to Defendant’s Reply, Third Attachment (7/14/23)).

After a hearing on the Warhol motion to dismiss, the district court entered an order concluding that the Defendant evaded service. (D0022, Order (1) Denying Pre-Answer Motion to Dismiss Petition for Lack of Service, (2) Denying Motion to Strike Notice of Intent to File Default Application, (3) Extending Service Deadline, (9/23/23). In addition, the district court outlined the attempts made to serve the Defendant. (D0022, Order (1) Denying Pre-Answer Motion to Dismiss Petition For Lack of Service, (2) Denying Motion to Strike Notice of Intent to File Default Application, (3) Extending Service Deadline, (9/23/23). The district court granted Rhonda Lucas additional time to serve the Defendant, until December 22, 2023. (D0022, Order (1) Denying Pre-Answer Motion to Dismiss Petition For Lack of Service, (2) Denying Motion to Strike Notice of Intent to File Default Application, (3) Extending Service Deadline, at p. 6 (9/23/23)).

In October, Warhol filed a motion to enlarge the district court ruling, and a hearing was held in November on that motion. The district court denied that motion. (D0032, Order Denying Motion to Reconsider or Enlarge Order Denying Motion to Dismiss, Motion to Strike, and Extension of Service Deadline (11/12/23)).

Next, Rhonda Lucas filed a motion for alternative service under Iowa Rule of Civil Procedure 1.305(14). (D0034, Plaintiff’s Motion for Alternative Service Under Rule 1.305(14), (11/21/23). The district court granted Plaintiff’s motion, finding only a “metaphysical possibility” that the Plaintiff might ever personally serve the Defendant. (D0034, Order Granting Plaintiff’s Motion for Alternative Service Under Rule 1.305(14) (11/29/23). From that order, the Defendant filed his application for interlocutory appeal and to stay the proceeding, and that request was granted by the Iowa Supreme Court.

However, the Plaintiff later learned that Mr. Warhol had a warrant for his arrest in Minnesota throughout the course of 2023, and that he also had a pending court appearance in Minnesota. As a result, Plaintiff filed a motion resisting the order to stay the district court proceedings, but this court ultimately granted the application for interlocutory review and then halted the district court proceedings on January 5, 2023.

Yet prior to that order, the Defendant was personally served with notice of this cause of action on January 3, 2023. Rhonda Lucas moved to dismiss this interlocutory appeal on that basis, but that motion was denied by this court.

ARGUMENT

- I. The District Court correctly determined that the Defendant Peter Warhol is actively evading service, and rightly granted the Plaintiff Rhonda Lucas an extension of time in which to serve the Defendant.**

STANDARD OF REVIEW

“We review a district court's ruling on a motion to dismiss for the correction of errors at law.” *Shumate v. Drake Univ.*, 846 N.W.2d 503, 507 (Iowa 2014) (quoting *Mueller v. Wellmark, Inc.*, 818 N.W.2d 244, 253 (Iowa 2012)).

When reviewing a motion to dismiss, courts are to accept the facts alleged in the petition as true. *McGill v. Fish*, 790 N.W.2d 113, 116 (Iowa 2010).

The initial question before this Court is did good cause exist for the district court to grant the Plaintiff more time in which to personally serve the Defendant. Under Iowa Rule of Civil Procedure 1.302(5), if the Plaintiff can establish good cause for a lack of service, then the “...court shall extend the time for service for an appropriate period.” Iowa R. Civ. P. 1.302(5). “[G]ood cause is likely (but not always) to be found when the plaintiff's failure to complete service in a 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)).

Following the established legal proposition that facts alleged in the petition are to be considered true, the district court was able to find that the Defendant Peter Warhol began evading service immediately following the collision that injured Rhonda Lucas as he is immediately cited for leaving the scene of an accident (among other citations).

Yet this isn't the only evidence of the Defendant evading service. The correspondence from Progressive to Plaintiff's counsel suggests how service be effectuated on the Defendant, when the representative from Progressive knew fully well that that method would be insufficient given the Defendant's housing circumstances. The e-mail from the attorney for the Defendant to Plaintiff's attorneys also suggested that service is impossible on this Defendant.

Additionally, the district court pointed out in its September 23, 2023 order that the "Defendant Warhol retained Iowa counsel, who entered an appearance, filed dispositive motions, and appeared on Defendant Warhol's behalf at oral argument." (D0022, Other Order, at p. 5 (9/23/23)). The Court continues:

Defendant Warhol easily could have established a post office box number as his "residence" where he could receive mail. He appears to be off the grid on purpose. If the court found otherwise, every nonresident defendant involved in a motor vehicle accident in Iowa could stop, hold, decline or ignore altogether all mail and then claim homelessness. Service on nonresidents under such circumstances would be an impossibility. It also seems unlikely that Progressive failed to communicate notice of this matter to Defendant Warhol—their insured. (D0022, Other Order, at p. 5 (9/23/23)).

This Court has been reluctant to apply the good cause standard under Iowa Rule of Civil Procedure 1.302(5) too narrowly as the substantive rights are at stake. *Rucker v. Taylor*, 828 N.W.2d 595, 603 (Iowa 2013).

It would be unfair to the Plaintiff to allow the representative from the insurance company to actively mislead Plaintiff's attorneys in attempting service, when the insurance company representative knew fully well that service on this Defendant was impossible. Here, the record reflects diligent attempts at service by the Plaintiff as outlined in the prior district court orders. The insurance company representative could have easily informed Plaintiff's attorneys of the impossibility of service, but the insurance company chose the path of misdirection in sending the Plaintiff on a wild goose chase.

Yet the story does not end here, as the Plaintiff later discovered that the Defendant had a warrant for his arrest in Minnesota during the course of this proceeding. It was also learned that the Defendant had a court appearance where he was ultimately served. Unfortunately for Ms. Lucas, the stay order prohibited any further action from the district court even though the Defendant was personally served at this proceeding.

This is yet more evidence of Warhol's evasion of service, and another reason that the prior action of the district court should be affirmed.

Finally, it is clear under their facts that Plaintiff acted diligently in trying to effect service or there are understandable mitigating circumstances that support the Trial Court's ruling in this case. This is exactly what is anticipated in Rule 1.302(5).

II. The District Court prudently ordered that the Defendant Peter Warhol should be served through counsel pursuant to Iowa Rule of Civil Procedure 1.305(14).

STANDARD OF REVIEW

“We review a district court's ruling on a motion to dismiss for the correction of errors at law.” *Shumate v. Drake Univ.*, 846 N.W.2d 503, 507 (Iowa 2014) (quoting *Mueller v. Wellmark, Inc.*, 818 N.W.2d 244, 253 (Iowa 2012)).

When reviewing a motion to dismiss, courts are to accept the facts alleged in the petition as true. *McGill v. Fish*, 790 N.W.2d 113, 116 (Iowa 2010).

First, the Plaintiff questions whether this issue has been preserved for appellate review. “It is a fundamental doctrine of appellate review that issues must ordinarily be both raised and decided by the district court before we will decide them on appeal.” *Meier v. Senecaut*, 641 N.W.2d 532, 537 (Iowa 2002). The district court did not have the opportunity to rule on the issues raised in the Defendant's November 30, 2023 resistance.

Nevertheless, under Iowa Rule of Civil Procedure 1.305(14) states; “If service cannot be made by any of the methods provided by this rule, any defendant

may be served as provided by court order, consistent with due process of law.”

Iowa R. Civ. P. 1.304(14). This Court has held that the “essentials of due process are satisfied if the notice is one which is reasonably calculated to come to the Defendant’s attention and give him an opportunity to defend the actions if desired to do so.” *Hron v. Ryan*, 164 N.W. 2d 815, 819 (Iowa 1969). Also, this Court has previously found that even in a contempt action where incarceration is a possible result, where a party is shown to consistently evade process, it is permissible to serve notice upon an attorney. *M.A. v. Iowa District Court for Polk County*, 517 N.W. 2d 205, 208 (Iowa 1994).

In this matter, the Defendant is claiming the lack of the ability to defend himself in this proceeding, but this is nonsensical considering that the Defendant has had an attorney filing motions and bringing an interlocutory appeal on his behalf for the last year.

Nevertheless, the district court saw in these facts only the “metaphysical” possibility that Rhonda Lucas would be able to ever serve the Defendant. (D0034, Other Order, at p. 1 (11/29/23)). But under the facts before the district court, service by way of the Defendant’s attorney is completely reasonable when faced with the Defendant’s continuing evasion of service.

Next, Defendant Warhol suggests in his brief the actions of Progressive in this matter are nothing more than Progressive following through with their

contractual obligation to their insured. Plaintiff submits that she is a third-party beneficiary to that contract if that is the case. When an insurance contract extends coverage to someone who is not the policyholder, this additional insured becomes a third-party beneficiary of the contract. *Osmic v. Nationwide Agribusiness Ins. Co.*, 841 N.W.2d 853, 859–61 (Iowa 2014). As third-party beneficiary, Rhonda Lucas has no qualms with service through the attorneys appearing in this case.

Making matters more vexatious, the Plaintiff has discovered more evidence of the Defendant Warhol's continued evasion of service. In her resistance to the motion and order to stay the district court proceedings filed with this Court on December 15, 2023, the Plaintiff submits a proposed district court pleading outlining the continued evasion, and the Plaintiff learned that the Defendant has over the course of the previous year been subject to an active arrest warrant and may have been residing with his mother at a property where service is challenging.

For these reasons, the Plaintiff contends that service through counsel under Iowa Rule of Civil Procedure 1.305(14) is appropriate.

CONCLUSION

Defendant Peter Warhol invites this Court to condone his continuing evasion of personal service in this matter. Rhonda Lucas respectfully requests that this Court decline that invitation, affirm all prior orders of the district court, and remand this

CERTIFICATE OF COMPLIANCE

This brief complies with the type-volume limitation of Iowa R. App. P. 6.903(1)(g)(1) because this brief contains 2,649 words, excluding the parts of the brief exempted by Iowa R. App. P. 6.903(1)(g)(9).

This brief complies with the typeface requirements of Iowa R. App. P. 6.903(1)(e) and the type-style requirements of Iowa R. App. P. 6.903(1)(f) because this brief has been prepared in a proportionally spaced typeface using Times New Roman 14 point font.

/S/ Zachary Priebe

CERTIFICATE OF SERVICE

We, Jeff Carter, Zachary Priebe, and Angela Bohnenkamp, members of the Bar of Iowa, hereby certify that on the 24th day of June, 2024, we electronically filed the foregoing with the Clerk of Court using the Iowa Electronic Document Management System which will send a notice of electronic filing to the following Counsel of Record. Per Rule 16.317(1)(a), this constitutes service of the document(s) for purposes of the Iowa Court Rules.

/S/ Zachary Priebe

CERTIFICATE OF FILING

We hereby certify that on the 24th day of June, 2024, we electronically filed the foregoing with the Clerk of Court using the Iowa Electronic Document Management System which will send a notice of electronic filing to the following Counsel of Record. Per Rule 16.317(1)(a) this constitutes service of the document(s) for purposes of the Iowa Court Rules.

/S/ Zachary Priebe