

IN THE SUPREME COURT OF IOWA

APPEAL NO. 23-2035

RHONDA LUCAS,

Plaintiff-Appellee,

v.

PETER WARHOL,

Defendant-Appellant.

**INTERLOCUTORY APPEAL FROM THE IOWA DISTRICT COURT
IN AND FOR POLK COUNTY
HONORABLE JEANIE VAUDT
Polk County No. LACL154718**

BRIEF OF APPELLANT

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Other Authorities:

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STATEMENT OF ISSUES PRESENTED FOR REVIEW

- I. WHETHER THE DISTRICT COURT ERRED WHEN FINDING ALLEGED EVASIVE AND MISLEADING BEHAVIOR, BASED ON THE FACT OF HOMELESSNESS ALONE, CONSTITUTED GOOD CAUSE FOR A SECOND EXTENSION OF TIME FOR SERVICE, AND THUS DENIED WARHOL'S MOTION TO DISMISS AND MOTION TO STRIKE

- II. WHETHER THE DISTRICT COURT ERRED WHEN PREMATURELY GRANTING THE MOTION FOR ALTERNATE SERVICE, AFTER THE MOVING PARTY HAD MADE NO ADDITIONAL ATTEMPTS AT PERSONAL SERVICE, AND CITING AS SUPPORT ALLEGED EVASIVE AND MISLEADING BEHAVIOR OF A HOMELESS DEFENDANT

ROUTING STATEMENT

The Iowa Supreme Court should retain this matter. This case presents a substantial issue of first impression; namely, proper service of process upon a homeless defendant. Iowa R. App. P. 6.1101(2)(c). Additionally, this case presents fundamental and urgent issues of broad public importance. Iowa R. App. P. 6.1101(2)(d). In the calendar year of 2023, Iowa's district courts received over 660,000 cases, and Iowa had over 2,600 individuals experiencing homelessness.¹ Retention of this matter would suitably address a novel issue affecting the due process rights of a significant population of Iowans. It would also provide final guidance to litigants and practitioners regarding proper procedure when encountering this issue.

NATURE OF THE CASE

This matter is an interlocutory appeal of two district court orders in a personal injury action. First, the appellant challenges the November 12, 2023, ruling denying his Motion to Reconsider or Enlarge the ruling of September 23, 2023. (D0032, Order Denying Motion to Reconsider, 11/12/23). The September 23, 2023, ruling: (1) denied his pre-answer Motion to Dismiss for lack of proper

¹Iowa Courts Annual Report 2023, State Court Case Statistics, p. 21 https://www.iowacourts.gov/static/media/cms/Annual_Report_2023__F323582E925F5.pdf; The U.S. Dept. of Housing and Urban Development, The 2023 Annual Homelessness Assessment Report (AHAR to Congress) Part 1: Point-In-Time Estimates of Homelessness, App. p. 103, December 2023 (huduser.gov).

and timely service, (2) denied his Motion to Strike a notice of intent to file default, and (3) granted a second extension of time to effectuate personal service upon him. (See D0022, Order Denying MTD, 9/23/23).

The second order challenged on appeal is the November 29, 2023, Order granting Plaintiff's Motion for Alternate Service, which specifically granted the ability to serve defense counsel for Warhol as an alternative method of service.² The district court proceedings are stayed by this Court pending interlocutory appeal. (D0041, Supreme Court Order, 1/5/24).

STATEMENT OF FACTS

Rhonda Lucas and Peter Warhol were involved in a motor vehicle accident on January 12, 2021. The Plaintiff-Appellee ("Lucas") filed her personal injury Petition at Law on January 11, 2023, alleging a negligence claim against Warhol, and an underinsured motorist claim against Progressive Country Mutual Insurance Company.³ (D0003, Petition at Law, 1/11/23). The initial 90-day service deadline

² The November 29, 2023 order granted Plaintiff's motion for alternate service prior to expiration of the ten day period for Warhol to resist. Within the time window to resist, Warhol filed a Resistance to the Motion for Alternate Service, with a Motion to Reconsider the same. (D0035, Resistance/Motion, 11/30/23). The district court had taken no action prior to Warhol's application for interlocutory appeal.

³ Lucas's Petition mistakenly named "Progressive Direct Insurance Company" as the UM/UIM carrier. Counsel appeared on behalf of the correct carrier, Progressive Country Mutual Insurance Company and clarified the misnomer. (See D0024, Appearance, 10/2/23). The claims against Progressive Country Mutual are not relevant to this appeal.

was April 11, 2023. Prior to that date, on March 23, 2023, Lucas moved for an extension of time to effectuate service upon Warhol. (D0005, Motion to Extend Time, 3/23/23). Therein, Lucas stated that the Carver County, Minnesota Sheriff’s office attempted personal service upon Warhol at the address listed on the accident report and advised counsel that Warhol no longer lived there. *Id.* ¶ 3–4. However, no affidavit or certificate was filed reflecting the same. It is unknown on what date(s) personal service was attempted at the accident report address. Lucas also asserted in her motion for extension that she had served the Iowa Department of Transportation (DOT)—to attempt service upon Warhol as a non-resident motorist—but had yet to receive a certificate of filing. *Id.* ¶ 6. *See* Iowa Code § 321.501 (2022).

On March 24, 2023, the district court granted Lucas’s motion for extension, ordering that service upon Warhol be effectuated within 60 days thereafter, up to and including June 12, 2023. (D0005, Order Granting Additional Time, 3/34/23). Counsel for Lucas filed a “Certification of Service” alleging that Lucas had achieved service upon Warhol via section 321.501. (D0008, Certification of Service, 4/21/23). The exhibits filed contemporaneously therewith consisted of an

Iowa DOT certificate of filing, certified mailing to two addresses, and USPS tracking of the same. (D0010–D0012, Exhibits, 4/21/23).⁴

One of the two addresses was the address from the police report—6670 Mohawk Drive, Chanhassen, MN—which Lucas had already represented to the court was known to be an invalid service address for Warhol because Warhol did not live there. In the certification, counsel for Lucas asserted that “certified mail was completed at the Eden Prairie address and the return receipt was returned to this office.” (D0008, Certification of Service ¶ 5, 4/21/23). In fact, tracking reveals that both mailings were returned to the office of Plaintiff’s Counsel, *unsigned*. Regardless, the mailings were not *restricted* certified mail as required by the statute. *See* Iowa Code § 321.501(2).

On June 19, 2023—one week after the extended deadline for service expired—a pre-answer Motion to Dismiss was filed on behalf of Warhol. (D0013, Motion to Dismiss, 6/19/23). The Motion to Dismiss represented that Warhol was homeless and had nowhere to receive mail. *Id.* ¶ 9. Defense counsel identified therein at least three separate defects that thwarted compliance with section 321.501. In addition to the defects, counsel asserted that there could be no

⁴ Upon review of the docket, the April 21, 2023, exhibits were filed as “proposed” and therefore may not be easily accessible to all via the docket. Should the court have difficulty viewing or accessing the exhibits, the appellant is willing to assist with providing accessible copies for the record.

“delivery” as required for section 321.501, since Warhol could not receive mail at the two addresses attempted.

In resistance to the Motion to Dismiss, Lucas argued that service was proper under Iowa Code section 321.501. (D0016, Resistance, 6/29/23). It was undisputed that Lucas had not achieved service upon Warhol via other methods (i.e., personal), and that no additional extensions had been requested.

After the Motion to Dismiss was filed, Plaintiff’s counsel filed another “Certification of Service” with attachments. (D0017, Certificate, 6/29/23). This certification was also in pursuit of service via section 321.501, but with separate, subsequent mailings in May 2023. The subsequent mailings were via restricted certified mail but again were mailed to addresses Lucas knew were invalid: the address on the police report where it was confirmed he no longer lived, and the address for which the prior mailing was returned undeliverable. The subsequent set of certified mailings were again returned unsigned and undelivered. (D0017, Attachment, 6/29/23).

In Resistance to the Motion to Dismiss, Lucas argued that merely placing the document in the mail was sufficient to satisfy section 321.501, even if it was not delivered to the recipient. (D0016, Resistance to MTD, 6/29/23). Warhol submitted controlling case law to the contrary.

While the Motion to Dismiss was pending, Lucas filed a Notice of Intent to file application for default judgment against Warhol. (D0018, Notice of Intent, 7/3/23). Warhol moved to strike the Notice of Intent, again setting forth the pending issues of service. (D0019, Motion to Strike, 7/5/23).

In her Resistance to the Motion to Strike, Lucas proposed three alternatives to consider in the event the court did not find service proper under section 321.501: (1) treat Warhol's homelessness as a "refusal" of the certified mailing, (2) substitute Warhol's insurance carrier for Warhol, or (3) grant Plaintiff yet another extension of time and order either defense counsel or the insurance carrier to provide Warhol's contact information. (D0021, Resistance to Motion to Strike, 7/14/23). Attached to her Resistance to the Motion to Strike, Lucas submitted—for the first time—a signed proof of personal service attempts on Warhol. (D0021, Attachment 1, 7/14/23). Interestingly, the attempted address in the "Certificate of Unserved Process" attached to the Resistance was not the address listed on the accident report. To date, Lucas has not filed a sworn certificate or affidavit evidencing the Sheriff's alleged involvement via initial attempts at personal service at the accident report address.

The district court set a hearing to address both the Motion to Dismiss and the Motion to Strike. (D0020, Order Setting Hearing, 7/12/23). At the Hearing, the parties appeared before the Judge and the undisputed factual record was

discussed.⁵ That is, Lucas had not served Warhol personally but instead had opted to attempt service via the non-resident motorist statute (Iowa Code section 321.501, et seq.). Lucas had attempted this unsuccessfully in March/April 2023, and then showed evidence that such had been attempted again in May 2023. But the records submitted in support of service per 321.501 revealed Lucas was notified that Warhol did not reside at the second address that service was attempted at via personal service and/or certified mail per 321.501. There was also discussion surrounding the fact that Warhol was homeless and did not have an address to receive mail. For the first time, whether Warhol had attempted to evade service or engaged in misleading conduct was mentioned; no additional facts were presented other than those outlined above. At the request of the judge, the parties submitted Proposed Orders following the Hearing, outlining the facts discussed and legal arguments posited by each party.⁶

The district court entered an Order on September 23, 2023, denying Warhol’s Motion to Dismiss and Motion to Strike, and “extending the deadline for Lucas to *personally* serve Defendant Warhol.” (D0022, Other Order, 9/23/23) (emphasis added). In the Order, the district court found that the initial mailings

⁵ The July 25, 2023, Hearing was not recorded or transcribed.

⁶ The Proposed Orders are not appearing on the docket via counsel’s view. The Appellant is willing to assist in providing accessible copies to the court should the Court wish to include them in the record and not have access.

were insufficient for purposes of service under section 321.501, as they were not sent via restricted certified mail as the statute requires. *Id.* p. 2. Next, the court addressed Warhol’s argument that service under Chapter 321 could not be achieved because he did not have a mailing address and therefore could not accept or refuse to accept a restricted certified mailing as required under existing law. *Id.* p. 4–5. The court acknowledged that Warhol was homeless, and that no caselaw addresses service of process upon a homeless defendant. However, it stated that Warhol “refuse[d] to establish a point of contact for receiving mail.” *Id.* p. 4. The order further states:

Under this record the court finds Defendant Warhol has engaged in misleading activity and is actively evading service. 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 mail and then claim homelessness.

Id.

The court also suggested that the appearance and/or participation of counsel was evidence of Warhol’s knowledge of the suit. Ultimately, the court issued another extension of time for Lucas to attempt personal service upon Warhol—this time an additional 90 days, up to and including December 22, 2023:

Rule 1.302(5) permits an extension of time to perfect service upon a defendant who has evaded service or has engaged in misleading conduct. As noted above, under this record the court finds Defendant Warhol’s conduct meets both categories. In an abundance of caution,

the court ultimately finds that Lucas should be granted additional time to attempt **personal** service on Defendant Warhol given Defendant Warhol's elusive actions to date.

(D0022, Other Order p. 6–7, 9/23/23) (emphasis added).

Warhol timely filed a Motion to Reconsider or Enlarge the September 23, 2023, Order denying the Motion to Dismiss and Motion to Strike and granting a service extension. (D0025, Motion to Reconsider, 10/6/23). Specifically, Warhol sought reconsideration or enlargement of the findings that Warhol had “evaded service” and/or “engaged in misleading conduct” – specifically raising an issue with the factual finding of the court that he was “off the grid on purpose.” *Id.* ¶ 4. Warhol asserted there was no evidence in the record to support that his homelessness was intentional or that he otherwise exhibited evasive behavior, as required by existing case law. Since the alleged evasive and misleading conduct findings were noted to constitute “good cause” for failure to serve and for granting an extension for service, Warhol likewise sought reconsideration of the extension of time and his Motion to Dismiss.

In Resistance to the Motion to Reconsider, Lucas asserted that Warhol's insurance carrier was assisting Warhol in evading service. (D0028, Resistance to Reconsider, 11/16/23). Warhol contested any attempts to impute the carrier or counsel's actions to him as it pertains to legal notice. (D0029, Reply to Resistance, 11/12/23).

The court set a hearing for the Motion to Reconsider or Enlarge. (D0027, Order Setting Hearing, 10/11/23). At the Hearing, counsel for Warhol distinguished caselaw detailing evasion of service and/or misleading conduct. (D0043, Transcript at p. 6, 2/29/24). However, the court only engaged in conversation regarding whether a mailbox was established or available. *Id.* at 7–8, 14–16. Counsel for Warhol clarified that “if the Court is going to find that failing to establish a mailbox is evasion of service or misleading conduct . . .” then he was requesting reconsideration of that finding based on existing case law—or lack thereof. *Id.* at 18:6.

Counsel for Lucas requested their efforts be considered sufficient to provide notice, and that the court enter an order accordingly. Counsel for Lucas also argued that the appearance of defense counsel established notice to Warhol and suggested his insurance carrier was “encouraging this outrageous, reprehensible conduct.” *Id.* at 12:1. Counsel for Progressive Mutual Insurance Company—the UM/UIM carrier—disputed Plaintiff’s assertion that Warhol’s liability carrier and Lucas’s UIM carrier were one and the same and also disputed any alleged ill motives of the insurance carriers. *Id.* at 19.

Counsel for Lucas broached the subject of alternative service at the November 8, 2023, Hearing. Warhol’s counsel contended the topic was outside the

scope of the hearing concerning the Motion to Reconsider, and requested written motion practice, should the court decide to entertain the new request.

On November 12, 2023, the district court entered an Order Denying the Motion to Reconsider or Enlarge the ruling on the Motion to Dismiss, Motion to Strike, or extension of service deadline. (D0032, Other Order, 11/12/23). The court did not provide additional analysis or reasoning, but concluded, “the Motion is not supported by good cause.” *Id.* Alternative service was not addressed. However, the court rejected Lucas’s argument that service was perfected at that juncture. It reiterated that per the September 23, 2023, Order, Plaintiff had up to and including December 22, 2023, to personally serve Defendant Warhol. At that point in time, Lucas and her counsel still had nearly six weeks to pursue personal service upon Warhol.

However, Lucas made zero additional effort to personally serve Warhol or even locate him. Rather—nine days later—Lucas moved for alternate service under Iowa Rule of Civil Procedure 1.304(14). (D0033, Motion for Alternate Service, 11/21/23). Specifically, Lucas requested the alternative service method be, “Defendant’s attorney officially receiving a copy of the Petition.” *Id.* ¶ 13. The district court granted Plaintiff’s motion—prior to the ten-day allotment for resistance to a motion—and found:

Defendant Warhol continues to evade service of process. He does so with full knowledge that a personal injury lawsuit has been filed in the

Iowa District Court for Polk County, naming him as a Defendant. Although he claims homelessness, he has hired counsel who has entered an appearance in this matter on his behalf . . . Warhol to date has spent considerable time, effort and presumably money attempting to evade service and thus potential liability for his alleged actions underpinning this lawsuit . . . under these circumstances, service under Rule 1.305(14) of suit papers upon Defendant Warhol's counsel is proper.

(D0034, Order Granting Alternate Service, 11/29/23).

Within ten days of the Motion for Alternate Service being filed, Warhol filed a Resistance to the same. (D0035, Resistance to Alternate Service, 11/30/23). On December 5, 2023, a process server presented to the law office of defense counsel and personally served counsel with the Original Notice, Petition, Jury Demand, and Order granting alternate service. (D0036, Return, 12/6/23). Counsel accepted service with noted objection to the same being valid and proper – incorporating all arguments and legal authority set forth in the – at the time – pending Resistance / Motion to Reconsider Alternative Service.

The district court did not address the arguments or law set forth in Warhol's timely Resistance to Alternate Service. The Application for Interlocutory Appeal and Motion for Stay of District Court Proceedings followed. The Supreme Court accepted the Interlocutory Appeal and granted to the Motion to Stay.⁷

⁷ After the Application for Interlocutory Appeal was accepted and the Motion to Stay Granted, Lucas attempted to personally serve Warhol as outlined in the Motion to Dismiss Appeal that was filed (*See Appellee's MTD*, 1/23/24). Interestingly, Lucas alleged personal service had been accomplished at that time –

ARGUMENT

I. THE DISTRICT COURT ERRED BY DENYING THE MOTION TO RECONSIDER OR ENLARGE THE SEPTEMBER 23, 2023, RULINGS THAT DENIED WARHOL'S MOTION TO DISMISS, DENIED WARHOL'S MOTION TO STRIKE, AND GRANTED LUCAS ADDITIONAL TIME TO SERVE WARHOL, BECAUSE EACH RULING RELYIED UPON ALLEGED EVASION OR MISLEADING CONDUCT OF WARHOL, WHICH LACKED SUBSTNATIAL EVIDENCE.

This Court reviews a district court's decision on a motion to dismiss for correction of errors at law. *Sioux Pharm, Inc. v. Summit Nutritionals Int'l Inc.*, 859 N.W.2d 182, 188 (Iowa 2015) (citing *Shams v. Hassan*, 829 N.W.2d 848 (Iowa 2013)). Under the applicable standard of review, the court is not bound by the district court's conclusions of law, nor its application of legal principles. *Shams*, 829 N.W.2d at 853. The court is not bound by the factual findings below unless they are supported by substantial evidence. *Crall v. Davis*, 714 N.W.2d 616, 619 (Iowa 2006).

Matters of service are jurisdictional. *See* Iowa R. Civ. P. 1.305 cmt. (stating the rule's "provisions are also jurisdictional"). The court "shall dismiss the action" if service upon a party is not completed within ninety days of filing the Petition.

in January 2024. Supporting documentation suggests that Lucas retained a private investigator in November 2023 to locate Warhol. Of course, the Motion to Dismiss the Appeal was denied as these attempts at personal service are moot given all service deadlines had expired and the district court proceedings had been stayed. Lucas did not submit or show that any similar or like actions or efforts had been made prior to the submissions to the district court in November/December 2024 and then to this Court in January 2024.

Iowa R. Civ. P. 1.302(5). The exception to dismissal is if a plaintiff can show good cause for their failure to serve and obtains an extension by the court. *Id.* Lucas initially obtained an extension—although the motion was unsupported by an affidavit or return of service. Thereafter, Lucas’s only efforts were in pursuit of service via the non-resident motorist statute by mailing to addresses that were known by Lucas to be invalid. Such attempts were confirmed to be unsuccessful and legally insufficient.

Notwithstanding the lack of proper service, the lack of good cause, and the mandate of dismissal within the rules of procedure, the district court found that good cause existed because of Warhol allegedly “evading service” or engaging in “misleading conduct.” This finding was prefaced solely upon the fact of Warhol’s homelessness and lack of a mailing address. Specifically, the court determined that Warhol “refuse[d] to establish a point of contact for receiving mail,” was “off the grid on purpose,” exhibiting “elusive behaviors” and merely “claim[ing] homelessness.” (D0022, Other Order, 9/23/23). However, there was and remains no factual support in the record for any of the preceding findings. In fact, the record is devoid of any conduct of Warhol whatsoever. These factual findings were based on speculation and assumptions about motives of Warhol, none of which were supported by facts in the record.

No good cause existed under the record. Therefore, the district court erred in granting Lucas another extension of time to serve Warhol and erred in denying Warhol's Motion to Dismiss. Accordingly, the district court decision should be reversed, and the matter should be remanded with instruction to dismiss the claims against Warhol for lack of personal jurisdiction.

a. Service Was Not Proper Under Iowa Code Section 321.501 as the Mailings Were to Invalid Addresses, and There Was No Actual Receipt Nor Refusal of the Mailings.

The statutory requirements for service upon a non-resident motorist were not met. Additionally, it is undisputed that personal service was not achieved. Thus, Warhol had no actual legal notice of the suit sufficient for personal jurisdiction.

Half-hearted efforts to effectuate service—without more—are not legally sufficient. Although Lucas's counsel urged that service was achieved by way of sufficient efforts, the district court correctly rejected this in its November 12, 2023, Order, stating: "Plaintiff's urging during oral argument that the court should consider service perfected because of Plaintiff's service efforts to date is likewise denied." (D0032, Order, 11/12/23). When the order was issued, "Plaintiff's service efforts to date" included personal service attempts at two addresses that were both confirmed to be invalid, followed by mailings to the very same addresses. Not only were the addresses used known by Lucas to be invalid, but the mailings themselves

also contained defects. All four mailing attempts were returned to counsel unsigned and undelivered—and thus legally insufficient.

Lucas initially attempted personal service at the address listed on the accident report: 6670 Mohawk Drive, Chanhassen, Minnesota. Although no affidavit or return of service was filed, Lucas’s counsel alleged that “the Carver County Sheriff has sent this office notice that the Defendant no longer lived at this address.” (D0005, Motion to Extend Time ¶ 4, 3/23/23). A second address, in Eden Prairie, Minnesota, was attempted where the apartment manager advised that Warhol no longer lived there. (D0021, Certificate of Unserved Process, 7/13/23). Thereafter, Lucas took no further effort to attempt personal service upon Warhol and instead elected to pursue service under Iowa’s non-resident motorist statute.

Iowa Code Chapter 321 governs motor vehicles and laws of the road.

Section 321.501 provides:

The plaintiff in any action against a nonresident shall cause the original notice of suit to be served by doing all of the following:

1. By filing a copy of the original notice of suit with the director, together with a fee of two dollars.
2. By mailing to the defendant, and to each of the defendants if there are more than one, within ten days after said filing with the director, by restricted certified mail addressed to the defendant at the defendant's last known residence or place of abode, a notification of the filing with the director.

Iowa Code § 321.501 (2022).

Counsel for Lucas filed a “Certification of Service” alleging that the Iowa DOT provided a Certificate of Service that was then mailed via certified mail at two locations, addressed to Warhol. (*See* D008–D0012, 4/21/23). *See also* Iowa Code § 321.505. However, the mailings were not “by restricted certified mail” as the statute requires. Iowa Code § 321.501(2). Additionally, the two addresses were the prior residences of Warhol, which Lucas had previously learned he no longer resided at. In effect, Lucas knew prior to sending the mailings that they would not reach Warhol or provide notice as intended.

The extended deadline for service expired on June 12, 2023. Given the above defects, counsel for Warhol filed a Pre-Answer Motion to Dismiss, alleging numerous procedural defects. (D0013, Motion to Dismiss, 6/19/23). *After* the Motion to Dismiss was filed, Lucas submitted a second “Certification of Service” reflecting another set of mailings in pursuit of service via section 321.501. (D00017, Certification, 6/29/23). The subsequent mailings were via restricted certified mail but continued to be sent to the same—knowingly invalid—addresses.

“[W]hen notice is sent to a wrong address where the defendant does not live, the notice is invalid.” *L.F. Noll Inc. v. Eviglo*, 816 N.W.2d 391, 394 (Iowa 2012) (*citing Barrett v. Bryant*, 290 N.W.2d 917, 921 (Iowa 1980)). This is true even when a different individual signs for the recipient at the wrong address and forwards the notice to the defendant. *See, e.g., Bentley v. Allen-Sherman-Hoff*

Pump Co., 203 N.W.2d 312, 314 (Iowa 1972). It is undisputed that in this case, both addresses used by Lucas were invalid because Warhol did not live there, and thus neither could be sufficient under section 321.501.

In addition to the form and addresses, each of the four mailings were legally insufficient because there was no evidence that they were either delivered to, or refused by, the recipient.

The case of *Emery Transportation Company v. Baker* is conclusive. 119 N.W.2d 272 (Iowa 1963). The issue of first impression in *Emery* was whether a restricted certified mailing under section 321.501 that was “unclaimed” satisfied the statutory requirement of notice. It did not. This Court was clear in *Emery* that “the statutory procedure must be *strictly* followed.” *Id.* at 276 (emphasis in original). *See also L.F. Noll Inc.*, 816 N.W.2d at 393–94 (“we strictly construe statutes providing extraordinary methods of securing jurisdiction over nonresidents.”).

Simply placing documents in the mail is insufficient under section 321.501:

Clearly, then, the act of timely *mailing* a notification, properly addressed, by restricted registered mail, does not end plaintiff’s obligation. A receipt showing it had been delivered is required by section 321.505, and with the possible exception of refusal by addressee to accept delivery of the same, plaintiff must show actual delivery of the notice, usually by return receipt. When the return shows otherwise, as it did here, there remains an obligation upon plaintiff to seek other means of notification, i.e. service on defendants personally under section 321.504.

Emery, at 277 (emphasis in original); *see also* Iowa Code §§ 321.504 – 321.505 (2021).

The Court clarified that the exception of refusal to accept delivery requires “due proof” that the recipient refused to receive and sign for the envelope, “with a showing he had an opportunity to do so.” *Id.* The exception was not applicable in *Emery*. The defendants were not present to accept the mailing, so the carrier left a notice at the address for the defendant to call the post office; after ten days of being unclaimed, the mailing was returned to the sender. *Id.* at 275. The plaintiff received the returned mail with the note, “not in town.” *Id.* at 276. Failure of the defendant to call the post office and/or present to sign the return receipt was not sufficient notice, nor was it considered a refusal. *Id.* A contrary result may be reached where the defendant acknowledges receiving notice that the carrier attempted delivery to them. *See, e.g., Barrett*, 290 N.W.2d at 922.

When a restricted certified mailing is undelivered or unclaimed, the burden remains with the plaintiff to pursue an alternate method of service. The *Emery* court held:

[W]e interpret the statute as requiring one attempting to obtain service on a nonresident to show actual or offered delivery of the notification to the person named, or he must obtain another method of service, i.e., personal service in the other state (section 321.504), if the court is to obtain personal jurisdiction of the person of the defendant.

Id. at 277.

There was no actual delivery to Warhol as all mailing receipts were returned to counsel for Lucas, unsigned and undelivered. Nor was there an offered delivery to Warhol, or an opportunity for Warhol to refuse delivery, as he was not present at the locations to refuse to receive or sign the mailing, nor to receive notice that the carrier had attempted delivery. There is nothing in the record suggesting mailings were presented to Warhol, who then refused to accept. Lucas has not met her burden to show “due proof” that Warhol had the opportunity to receive her restricted certified mailings and refused to do so. As in *Emery* and *L.F. Noll*, the mailings were legally insufficient to provide notice under section 321.501.

After receiving the unsigned return receipts, the burden of effectuating service remained upon Lucas. Thereafter, Lucas did not promptly pursue an alternate method of service, nor did Lucas request another extension of time by the court. *Compare, e.g., Wolfs v. Challacombe*, 218 N.W.2d 564, 570 (Iowa 1974) (after receiving the unsigned receipt, plaintiff “promptly . . . made strenuous effort to locate” the defendant and serve via section 321.504). The record is devoid of any evidence that Lucas made effort to even locate Warhol.

Ultimately, the district court found that Lucas had not achieved service via section 321.501. (*See* D0032, Order, 11/12/23) (denying Plaintiff’s request that the court consider service perfected). Such was the correct holding under the law;

however, the court erred by not taking the appropriate action in the case consistent with that finding – dismissal.

b. Without Timely Service, the Court Had a Duty to Dismiss the Claims Against Warhol.

With no proof of service or requests for relief upon expiration of the deadline, the court should have granted Warhol’s Motion to Dismiss.

Under the Rules of Civil Procedure, the plaintiff is responsible for serving copies of the original notice and petition within 90 days of filing their petition. Iowa R. Civ. P. 1.305(2). The plaintiff is also responsible for showing good cause for their failure to serve, should they need to request an extension of time beyond the 90-day service period. Iowa R. Civ. P. 1.305(5). If service is not made upon a defendant within the time prescribed, “the court, upon motion or its own initiative after notice of to the party filing the petition, shall dismiss the action without prejudice as to that defendant.” *Id.* (emphasis added); *see also Crall*, 7146 N.W.2d at 620 (“If there was no such good cause, the rule requires the court to dismiss the action without prejudice.”) As a general matter of interpretation, the word “shall” imposes a mandatory duty. *In re Marriage of Thatcher*, 864 N.W.2d 533, 539 (Iowa 2015).

Amended Rule 1.305(5)—formerly 49(f)—contains a simplified procedure for courts to follow when confronted with a motion to dismiss where there is a

delay in service, after 90 days or beyond any extension. *Meier v. Senecaut*, 641 N.W.2d 532, 541 (Iowa 2002).

[Rule 1.305(5)] simplifies the procedure for courts to follow when confronted with a motion to dismiss for delay in service of process filed by a defendant who has been served more than ninety days after the petition was filed or beyond any extension. Under the prior rule, a two-step analysis was employed. If there had been a delay in service, the court was first required to decide if the delay was presumptively abusive. If abusive delay was established, the court was then required to decide if the delay was justified. Under our new rule, it is no longer necessary for the court to engage in the first step of the analysis when service has not been made within ninety days and no extension was granted. By allowing the court to dismiss a petition after ninety days, the rule now establishes the standard for presumptive abuse. Thus, courts must now simply decide if the plaintiff has shown justification for the delay.

Id. at 541–42.

Additionally, the enacting committee of our service rules directed: “The courts cannot relax these rules, because they have no jurisdiction to exercise any discretion, or do any act, until they acquire it in the manner here specified.” Iowa R. Civ. P. 1.305, 1943 official cmt. Having no service achieved within ninety days, nor within the extended period up to June 12, 2023, Lucas’s delay was “presumptively abusive.” *Crall*, 714 N.W.2d at 620 (*citing Meier*, 641 N.W.2d at 542). Thus, when Lucas did not achieve service upon Warhol by the deadline prescribed, and upon Motion by Warhol, the district court had a mandatory duty to dismiss the action as to Warhol. Failure to dismiss was an error at law.

c. There is No Evidence in the Record to Support Findings That Warhol was “Evading Service” or Engaged in “Misleading Conduct,” Nor that his Homelessness was Intentional or “On Purpose.”

Rather than dismissing the action, the district court found that good cause existed for Lucas’s failure to serve, and in turn granted yet another extension of time for Lucas to pursue personal service. However, the court’s findings as to good cause were not grounded in the factual record and thus not supported by substantial evidence. In addition, the factual record contained no facts to suggest Warhol had evaded service or was engaged in misleading conduct. Therefore, not only was the “good cause” finding not supported by substantial evidence – it was also an erroneous legal finding.

The only information in the record regarding Warhol was that he was homeless; had nowhere to receive mail; and that he no longer resided at the two subject addresses. Yet, the court concluded that Warhol “refused to establish a way to receive mail”—inferring some sort of intent by Warhol as to his homelessness. (D0022, Order Denying MTD p. 5, 6/23/23). The court cited no factual or legal support for this conclusion. There was also no support cited for the conclusion that “Defendant Warhol easily could have established a post office box number as his ‘residence’ where he could receive mail.” *Id.* The mere fact of not having a location to receive mail does not imply that the same was a result of a refusal to establish one. Additionally, Warhol had no affirmative duty to establish a post

office box or leave a forwarding address—to aid others in serving him or otherwise. It is not Warhol’s duty to assist Plaintiff in serving him. *See, e.g., Mokhtarian v. GTE Midwest Inc.*, 578 N.W.2d 666, 669 (Iowa 1998) (“The plaintiff cannot rely on the opposing party to inform him or her that service was not sufficient under the rules of civil procedure . . .”). Again, the finding that Warhol “refused” to establish a post office box inferred there was some level of intent by Warhol as to his ability to receive mail. There was no factual support under the record to infer intent of Warhol.

The court reasoned that if it did not so hold, then any nonresident involved in a motor vehicle accident “could stop, hold, decline or ignore altogether mail and then claim homelessness.” *Id.* As an initial matter, Warhol was not “claiming” homelessness; he was homeless. There is nothing in the record to suggest that Warhol lied about this fact. Defense counsel notified the court and opposing counsel of this fact given the consequences it would have upon the service attempts per Iowa Code section 321.501 under applicable law. *See generally Emery*, 119 N.W.2d 272. This rationale also fails to account for Iowa caselaw holding that proof a defendant declined or ignored certified mailing attempts could equate to a refusal under section 321.501. *See, e.g., Barrett*, 290 N.W.2d at 922.

The district court cited the case of *Wilson v. Ribbens* for the proposition that “good cause” under Rule 1.305(5) could arise when a defendant has evaded service

of process or engaged in misleading conduct. (D0022 at 3, Order Denying MTD, 6/23/23) (*citing* 678 N.W.2d 417 (Iowa 2004)). The district court held that “Defendant Warhol’s conduct meets both categories.” This would require the district court to find conduct in the record to support both that Warhol was evading service, and that Warhol engaged in misleading conduct. However, the record is entirely devoid of *any* “conduct” of Warhol as it pertains to attempts by Lucas to serve the lawsuit paperwork. This is consistent with the lack of any citations to testimony, documents, affidavits, or otherwise, in the September 22, 2023, Order and the November 29, 2023, Order. Accordingly, the court’s alleged good cause was prefaced upon inferences, speculation, and conjecture, not factual findings.

Again, the court only had before it the mere fact of Warhol’s homelessness. The district court stating Warhol was “off the grid on purpose” implies that his state of homelessness was intentional.

The record also evidences a lack of diligence by Lucas. The district court stated that as of September 23, 2023, Warhol was “actively evading service.” However, “active” evasion implies there were “active” service attempts to evade. Lucas was not actively attempting to serve Warhol—and had not taken any steps to do so since May 2023, which was the second attempt to serve Warhol pursuant to the non-resident motorist statute and, as outlined above, included sending mailings to addresses that Lucas previously knew Warhol was not residing at. The record

reflects that the last attempt at personal service was May 11, 2023, and the last attempt at service per section 321.501 was on May 30, 2023. This means there was one additional personal service attempt during the first extended service period (60-day extension that expired June 12, 2023), and zero personal service attempts during the second extended service period (expired December 22, 2023). The only other service attempts were via mail to addresses Plaintiff knew were invalid – coupled with arguments to the court that service was already perfected.

In *Steiner v. Moyer*, even where there was direct evidence that the defendant was evading service in the initial 90-day service period, the court found that summary judgment was appropriate because of Plaintiff’s unexplainable delay or lapse in action. No. 21-0948, 2022 WL 1234141 at *2 (Iowa Ct. App., April 27, 2021) (citing *Crall*, 714 N.W.2d at 621). The *Steiner* court stated, “we cannot find Moyer evaded service during the extended period following those attempts when *no* efforts were made to serve Moyer.” *Id.* Thus, not only is there no factual support for evasion or misleading conduct, but there can be no “active” evasion of service where there is no “active” service attempts or even active attempts to locate the defendant.

Although the *Wilson* court outlined possibilities where “good cause is likely (but not always) to be found,” the specific issue in *Wilson* was whether a written agreement with an insurance adjuster gave rise to good cause for failure to serve.

Wilson, 678 N.W.2d at 418. Caselaw reviewing the specific issues of evasion or misleading conduct are distinguishable from the case at hand.

Warhol was not “evasive” or “misleading” as a matter of law. This Court described evasive behavior in *Iowa Supreme Ct. Attorney Disciplinary Board v. Dennis Bjorklund*, 725 N.W.2d 1 (Iowa 2006). Therein, the disciplinary board had attempted to serve three documents/notices upon Defendant Bjorklund. *Id.* at 11. With the first document, when a process server saw Bjorklund arrive to his home and approached him, Bjorklund denied his own identity and misidentified himself as “Jake.” *Id.* The process server then obtained a photograph of Bjorklund and made a second attempt at his office; again, Bjorklund denied his identity. *Id.* With the second complaint, the process server staked out at Bjorklund’s home, and when Bjorklund exited his home and recognized the process server’s vehicle, he retreated inside. *Id.* The process server again took the second document to Bjorklund’s office. When Bjorklund exited the building and the process server stepped toward him with papers, Bjorklund broke into a run. Even with the process server in pursuit and losing a shoe, Bjorklund continued to run. *Id.* With the third set of documents in tow, a process server had attempted service on five separate occasions, followed by five separate attempts by the sheriff’s office. *Id.* at 12. On some occasions, Bjorklund’s employees assisted in his elusive efforts. *Id.*

In *Hoffman v. Carlock*, the Clinton County, Iowa, Sheriff attempted service upon Carlock but advised, “He is living in Minnesota.” No. 08-1883, 2009 WL 3050876 at *2 (Iowa Ct. App., Sep. 17, 2009). Subsequently, the plaintiff retained a process server, as well as three separate sheriff offices, who made more than thirteen attempts to serve Defendant Carlock at his employer, and two attempts at personal addresses. *Id.* The court granted an extension of time and service by publication. *Id.* at 1. Carlock moved to quash notice by publication and subsequently applied for interlocutory appeal. In both pleadings he asserted he was a resident of Clinton County, Iowa, for more than 90 days after the petition was filed, and thus the plaintiff should have personally served him in Iowa. *Id.* at 3. However, Carlock presented a contradictory argument in his appellate brief, stating that by the time the petition was filed he had sold his residence in Iowa and relocated to Minnesota where he found employment. Based on this record, the Court stated, “Carlock’s whereabouts were uncertain perhaps purposely so.” *Id.*

In contrast, a defendant moving residences between an accident and the filing of a petition does not constitute evasion. *Dennis v. Christianson*, 482 N.W.2d 448, 452 (Iowa 1992). The court rejected an evasion/good cause argument where a process server made two attempts at a location and was advised by an unknown individual that the defendant did not live there, but on the second attempt left a card and the defendant called. *Carter v. Benjamin*, No. 11-0989, 2012 WL

3026555 (Iowa Ct. App., July 25, 2012). It is also not “misleading conduct” to wait for expiration of the service window to pursue a motion to dismiss for lack of service. *Estate of Barnett v. Wimer*, No. 07-1309, 2008 WL 2200242 (Iowa Ct. App., May 29, 2008) (rejecting a misleading argument, stating: “Defendants had no legal obligation to alert Plaintiff as to any [service] deficiencies . . . In fact, they may have been remiss in their duties as attorneys for Defendants to do other than what they did...”).

The record reflects no evidence of Warhol running, hiding, retreating, misrepresenting his identity or residence, or lying to process servers, law enforcement, or the court. Accordingly, the record lacks substantial evidence to support the district court’s findings that Warhol was evading service and engaged in misleading conduct. Rather than granting additional time, the district court should have granted Warhol’s Motion to Dismiss and Motion to Strike. The finding of evading or misleading conduct is not supported by any evidence and a finding as to the same based on this record fails as a matter of law per the litany of cases outlined above regarding evasion or misleading conduct.

The record is also devoid of other good cause to deny dismissal. “Good cause” as it relates to service has been outlined by this Court as follows:

The 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.

Wilson, 678 N.W.2d at 421 (citing *Henry v. Schober*, 566 N.W.2d 190, (Iowa 1997)).

Additionally, failure to move for an extension of time may be seen as lack of good cause for delay in service. *Crall*, 714 N.W.2d at 621. Lucas failed to move for a second extension of time prior to September 12, 2023. Lucas's mailing to knowingly invalid addresses, followed by an argument that the act of mailing alone and/or "effort" is sufficient legal notice, could be regarded as "ignorance of the rule or its burden, or half-hearted attempts at service." *Wilson*, 678 N.W.2d at 421.

Service attempts that have no legal significance cannot be used as a justification for delay in service. *Mokhtarian*, 578 N.W.2d at 669. Therefore, the mailing attempts by Lucas cannot be used as justification here.

In *Crall v. Davis*, although the court found plaintiff had taken affirmative steps to serve the defendant, the affirmative steps did not constitute good cause. 714 N.W.2d at 621. There was a delay before plaintiff made any service attempts—for which plaintiff could not explain—and the attempts that were made had no legal significance. *Id.* The amounted to a lack of diligence—and therefore lack of good cause. The same can be said here. Although Lucas alleges attempts to personally serve Warhol at the address listed on the accident report, no affidavit has been filed reflecting the same. Thus, it is unclear when Lucas retained the

sheriff's office, or on which date(s) service was first attempted. We only know that Lucas alleges attempts were made at some point prior to her Motion for Extension, which was filed on March 23, 2023—71 days after the Petition was filed.

Consequently, the district court's rulings lacked good cause support—via evasion, misleading, or otherwise. Extending the service deadline without good cause to excuse Lucas's failure to serve Warhol was an error at law.

d. Legal Representation Does Not Equate to Legal Notice

It was error for the district court to suggest that the involvement of legal counsel was evidence of Warhol's knowledge of the litigation, or sufficient to form legal notice of same. When denying the Motion to Dismiss, the district court stated:

The court further finds Defendant Warhol's argument that he has no prior notice of this proceeding lacks credibility. If Defendant Warhol was unaware of the instant lawsuit, he has no reason as a nonresident to contact and retain an Iowa lawyer. Yet, Defendant Warhol retained Iowa counsel, who entered an appearance, filed dispositive motion, and appeared on Defendant Warhol's behalf at oral argument. (D0022, Order, p. 5, 9/23/23).

Once more, awareness of the lawsuit was an assumption without factual support. The district court cited no evidence to suggest that Warhol personally arranged representation. The above finding is a misrepresentation of an insurer's duty to defend its insured. *See First Newton Nat'l Bank v. General Cas. Co.*, 426 N.W.2d 618, 629 (Iowa 1988) (explaining generally the duty to defend).

This finding and reasoning is in error for several reasons. First, the court refers to “notice of this proceeding” as mere knowledge of the existence of a lawsuit. This is not the notice contemplated under the Iowa Rules of Civil Procedure, Iowa statute, or existing caselaw. “The central elements of due process are notice and an opportunity to defend.” *Silva v. Emp. Appeal Bd.*, 547 N.W.2d 232, 234–35 (Iowa 1969). Notice in the legal sense of due process is more than a general awareness. “Notice of the possibility of a lawsuit is not sufficient; the party being sued must be served with an original notice as required by our rules of civil procedure.” *Henry v. Shober*, 566 N.W.2d 190, 192 (Iowa 1997) (emphasis added). *See also Mokhtarian*, 578 N.W.2d at 669 (“it is irrelevant whether GTE knew a lawsuit had been filed because Iowa Rule of Civil Procedure 49 still requires service of an original notice and petition upon the defendant.”). Iowa law is clear that “notice to the defendant” means service of the original notice—including specified contents—along with a copy the petition. Iowa R. Civ. P. 1.302.

Secondly, the appearance of counsel has no bearing on the personal jurisdiction of Warhol and in no way excuses Plaintiff’s duty under the law. The district court’s theory begs the question: how could a defendant ever successfully challenge personal jurisdiction or notice?

Iowa has abolished the special appearance, and parties can raise sufficiency of notice via a pre-answer motion to dismiss—as did Warhol. *Antolik v. McMahon*,

744 N.W.2d 82, 83 (Iowa 2007); Iowa R. Civ. P. 1.421(1). Having counsel appear in the case and participate in litigation on Warhol's behalf is not synonymous with actual notice to Warhol. This is especially true given all litigation involving Warhol thus far has concerned the sufficiency of service, and he has maintained his position that the court lacks personal jurisdiction based on lack of legal notice of the lawsuit.

Lucas inserted Warhol's insurance carrier's involvement into the record. At minimum, the knowledge or involvement of Warhol's liability insurance carrier and appearance of counsel on Warhol's behalf reflects Warhol's insurance carrier's contractual obligation to furnish representation to and protect the insured, and counsel's ethical obligation to provide competent and diligent representation to a client. The insurance carrier's knowledge does not impute to Warhol. Active defense under that relationship has no bearing on evasion of service or misleading conduct, and it was an error of law for the district court to consider the same in its legal analysis.

The district court furthermore stated: "It is also unlikely that Progressive failed to communicate notice of this matter to defendant Warhol—their insured." The party to be served with notice in this matter is the named defendant—Peter Warhol—not his insurance carrier. As is true with Warhol, Progressive has no duty

to assist Plaintiff in achieving service. Such was solely Lucas’s burden. *Emery*, at 277.

Lucas did not meet her burden to effectuate service upon Warhol—either personally or via other methods—prior to the deadline(s). Lucas likewise failed to meet her burden to show good cause for failure of service. Accordingly, upon Motion for Reconsideration, the district court should have granted dismissal of Warhol.

II. THE DISTRICT COURT ERRED BY GRANTING THE MOTION FOR ALTERNATE SERVICE

The second order challenged on appeal—the November 29, 2023, Order Granting Alternative Service—relied upon the same findings of evading service and imputed “knowledge”:

Defendant Warhol continues to evade service of process. He does so with full knowledge that a personal injury lawsuit has been filed in the Iowa District Court for Polk County, naming him as a Defendant. Although he claims homelessness, he has hired counsel who has entered an appearance in this matter on his behalf.

(D0034, Order p. 1, 11/29/23).

Appellant maintains the arguments above that the record lacks evidence of evading service or misleading conduct – and certainly any sort of evidence that suggests from November 12, 2023, to November 29, 2023, Warhol “continue[d] to evade service of process” – and that involvement of counsel has no bearing on the legal analysis. Warhol maintains that he should have been dismissed before this

stage of litigation. However, even if, *arguendo*, this Court were to find good cause and uphold the second extension of the service deadline, it was error for the district court to grant Lucas's request for an alternative method of service – that being personal service on his attorney of record.

As an initial matter, the district court's ruling on the Motion for Alternate Service was premature and deprived Warhol of the opportunity of consideration. The Motion for Alternative Service was filed on November 21, 2023. Under Iowa's procedural rules for motion practice, parties opposing a motion can file a resistance within ten days after a copy of the motion is served. Iowa R. Civ. P. 1.431(4). Accordingly, Warhol's deadline for resisting Lucas's Motion for Alternative Service was December 1, 2023. The district court granted the Motion on November 29, 2023. The Motion did not indicate whether the counsel for Warhol was consulted, and the Order likewise did not mention whether any party was in resistance. This is especially important as counsel for Warhol had already notified the court that Warhol would resist a request for leave to pursue alternative methods of service at the hearing on November 8, 2023, and specifically requested the opportunity to present written authority as to the same.

The November 8, 2023, Hearing was set to address Warhol's Motion to Reconsider or Enlarge. However, upon opportunity to present oral argument, counsel for Lucas requested the court order service be perfected, or in the

alternative, that Lucas be granted the ability to serve counsel. In response, counsel stated: “Moving for alternative service at this stage, one, is a new motion, so I would ask for an opportunity to address that via motion practice.” (D0043, Transcript, 14:7, 2/29/24). The district court erred by prematurely granting alternative service, especially after being put on notice that Warhol wished to present a resistance.

The merits of the Alternative Service ruling are likewise improper for a multitude of reasons. First, the Order granting alternative service relied upon the same flawed reasoning of evasion and misleading conduct addressed above. Warhol could not “continue” to evade service with knowledge when such evasion and notice were never properly established to begin with. Interestingly, no additional facts were presented to the court between the two rulings—including no service attempts or conduct of Warhol. Thus, the evasion and misleading rationale continues to be improper.

Secondly, Lucas’s Motion for Alternative Service should have been rendered moot. It is noted throughout the September 23, 2023, and November 12, 2023, orders that Lucas must **personally** serve Warhol on or before December 22, 2023. (*See* D0022, Order pp. 1, 5, 6, 9/23/23). The orders also found that Lucas’s service efforts were insufficient. Yet, Lucas moved for alternative service just nine days later, without proof or allegation of any additional attempts at serving or

locating Warhol. At the point of filing her Motion for Alternative Service, Lucas still had over one month of time left on her extended deadline. In other words, Lucas was once again requesting judicial relief from a statutory duty—after already receiving a requested *and* a sua sponte extension—without showing any additional effort at satisfying that duty. Like the court in *Steiner*, the district court should have considered Lucas’s inaction during the extended period. *See* No. 21-0948, 2022 WL 1234141 at *2 (Iowa Ct. App., April 27, 2021).

Finally, Lucas did not meet the statutory requirements for alternative service to be had, as she did not make a proper showing that service could not be achieved by traditional methods. Rule 1.305(14) provides: “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. 1.305(14) (emphasis added). In other words, subsection 14 has two requirements: (1) “Prior to ordering service under this rule, the district court must find service could not have been made under any method provided in Rule 1.305,” and (2) “the alternative method of service must also comply with due process.” *Ackelson v. Manley Toys, Inc.*, No. 14-0469, 2019 WL 4935560 at *4 (Iowa Ct. App., Aug. 19, 2015) (internal citations omitted). Lucas has not met either requirement.

In the Motion for Alternative Service, Lucas requested the court order that service via email to Warhol’s attorney be legally sufficient. In support she cited

M.A. v. Iowa District Court for Polk County, 517 N.W.2d 205 (Iowa 1994). The case is distinguishable because it concerned service of an application to find a mother in contempt after she “did virtually everything possible to obstruct” the court’s order. *Id.* at 208. The mother appeared in person with counsel at the hearing and was again served with the contempt application personally at the courthouse. *Id.* The portion of the *M.A.* opinion cited by Lucas is *obiter dictum*.

Regarding the mother, the court stated:

She does not challenge the manner of service of notice or contest the court’s jurisdiction over her. She complains only that she was not given adequate time to prepare for the hearing. This issue was not raised in the district court, and it was therefore waived. In any event, her argument is without merit. She had actual and timely notice of the contempt application well in advance of the hearing through service of notice on her attorney.” *Id.* at 208.

The *M.A.* court cited *Beauchamp v. Iowa District Court in and for Cass County*, for the proposition that a “court could prescribe notice on attorney if defendant shown to consistently evade process.” *M.A.*, 517 N.W.2d at 208; *Beauchamp*, 328 N.W.2d 527 (Iowa 1983). Jeffrey, the party to be served in *Beauchamp*, was likewise an alleged contemnor. *See Beauchamp*, 328 N.W.2d 527 at 528. By definition, such parties had already shown disobedience—unlike Warhol. The district court allowed service of Jeffrey by simply mailing a copy to his attorney, and this was reversed by the Supreme Court on appeal. The *Beauchamp* court held:

Laura contends that the court's order in the present contempt was authorized pursuant to rule 56.1(n) because Jeffrey was evading service. The problem with this contention is that its predicate was not established. The burden was on Laura to show service could not be made on Jeffrey in the manner provided in Rule 56 . . . We have no occasion to determine whether the method of service ordered by the court was consistent with due process.

Id. See also Lutz v. Darbyshire, 297 N.W.2d 349 (Iowa 1980) (finding the court did not have jurisdiction over a party when notice was mailed to the attorney pursuant to court order) (overruled on other grounds).

Lucas maintained the burden to show service *cannot* be made under Rule 1.305. She failed to make a sufficient showing and thus the November 29, 2023, Order was an error at law.

CONCLUSION

The court has not acquired personal jurisdiction over Defendant Warhol, as service of process had not been timely or properly achieved. The district court's findings that Warhol evaded service and engaged in misleading activity were not supported by substantial evidence. Therefore, it was an error of law for the district court to find good cause existed. Without good cause, the district court should have granted Warhol's Motion to Dismiss for lack of service, granted Warhol's Motion to Strike the Notice of Intent.

REQUEST FOR ORAL SUBMISSION

Appellant respectfully request that this matter be set for oral argument before the Court.

CERTIFICATE OF COSTS

Petitioners certify that no costs were incurred in printing or duplicating paper copies of briefs.

CERTIFICATE OF COMPLIANCE

This brief complies with the typeface requirements and type-volume limitation of Iowa R. App. P. 6.903(1)(i) because this brief has been prepared in a proportionally spaced typeface using Times New Roman in 14 and contains 9,882 words, excluding the parts of the brief exempted by Iowa R. App. P. 6.903(1)(i)(1).

Jordan Reed

Signature

5/24/24

Date

CERTIFICATE OF SERVICE

I, Jordan R. Reed, member of the Bar of Iowa, hereby certify that on May 24, 2024, I or a person acting on my behalf served the above Petitioners’/Appellants’ Final Brief and Request for Oral Argument to the Respondent/Appellee’s attorney of record, via EDMS in full compliance with Rules of Appellate Procedure and Rules of Civil Procedure.

Jordan Reed

CERTIFICATE OF FILING

I, Jordan R. Reed hereby certify that I, or a person acting in my direction, did file the attached Petitioners’/Appellants’ Final Brief and Request for Oral Argument upon the Clerk of the Iowa Supreme Court via EDMS on this 24th day of May, 2024.

Jordan Reed
