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

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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

REPLY ARGUMENT

I. Continued Attempts to Improperly Insert Evidence Outside the Scope of this Appeal Should be Rejected.

The appellate record is comprised of documents and exhibits "*filed in the district court case from which the appeal is taken*," and transcripts from the district court. Iowa R. App. P. 6.801 (emphasis added). This is fundamental to the doctrine of appellate review, i.e., that the appellate court review and correct decisions of district courts based only upon the record available to it at that time it rendered the decision.

Lucas has attempted to present evidence to this court that was not presented to the district court or considered by the district court in reaching the conclusions subject to Warhol's appeals. These attempts were present in Lucas's Resistance to the Application for Interlocutory Appeal (which was not convincing to this court), in her Motion to Dismiss the Interlocutory Appeal (which was denied by this court), and now in her factual and argument sections of her brief. Lucas admits via briefing that the information set forth was discovered "during the pendency of *this* matter." (Appellee Brief p. 13, emphasis added). Remarkably, Lucas argues that this information discovered *subsequent to* the Orders subject to the appeal constitute further support for evasion of service and therefore supports the previously issued orders. In addition, the post-interlocutory appeal exhibits/evidence/information was previously presented before the Court with Lucas's Motion to Dismiss Appeal,

which was ultimately denied. (*See* 1/23/24 Motion to Dismiss; 4/4/24 Order Denying Motion to Dismiss).

Warhol requests that these improper attempts be stricken from the record and not considered by this Court.[1] If the additional information set forth by Lucas has any value, it is further evidence that attempts or investigation as to service of Warhol should not have been put on hold in May 2023 as there was more Lucas could have done in this case—but failed to do until apparently late November 2023, after Orders had been entered that found Warhol had evaded service or engaged in misleading conduct based on the record before the district court comprising of the actions and attempts at service from date of filing through time of first hearing (D0022, Order Denying Pre-Answer MTD, Granting Extension, 9/23/23).

II. Lucas Failed to Meet Her Burden to Show Proper Service or Good Cause to Excuse Lack of Service.

Lucas does not dispute that attempts at service under Iowa Code section 321.501 in this case were insufficient as a matter of law. *See* Iowa Code § 321.501 (2022). Additionally, she does not appear to dispute the fact that service was not achieved during either the initial 90-day service period or the extended service period. Lucas fails to address or provide any authority on these issues.

[1] Warhol also made this request in his Reply to Plaintiff's Resistance to Interlocutory Appeal, and his Resistance to the Plaintiff's Motion to Dismiss the Appeal. Of course, Plaintiff's Motion to Dismiss the Appeal was denied.

Attempts at service that have no legal significance cannot be used as justification for delay in service or failure to serve. *Crall v. Davis*, 714 N.W.2d 616, 621 (Iowa 2006) (citing *Mokhtarian v. GTE Midwest Inc*., 578 N.W.2d 666, 668 (Iowa 1998). Accordingly, Lucas cannot use the attempts at mailing per section 321.501 to constitute sufficient "effort" or "diligence" for purposes of establishing good cause. Even so, the alleged service attempts were far from "diligent." *See Diligent*, BLACK'S LAW DICTIONARY, (12th Ed. 2024) ("Careful, attentive, and hard working; persistent in doing something"). For example, Lucas knew, based on affidavits obtained on her behalf, that both mailings to the addresses attempted for Warhol were not going to reach him and thus they could not have provided legal notice. *See* Iowa Code § 321.501; *Emery Transp. Co. v. Baker*, 119 N.W.2d 272 (Iowa 1963) (finding actual delivery evidenced by a return receipt signed by the defendant is required). Ignorance of the rule and half-hearted attempts are insufficient to establish good cause. *Wilson v. Ribbens,* 678 N.W.2d 417, 421 (Iowa 2004).

Once Lucas learned that Warhol no longer lived at the two addresses attempted, there were no further efforts toward achieving personal service. The record reflects that the last attempt at personal service was May 11, 2023. After Warhol's counsel notified Plaintiff's counsel that Warhol had nowhere to receive mail and he was not authorized to accept service on Warhol's behalf in June 2023

(after the extension of time to serve had elapsed), rather than continue personal service attempts or promptly request another extension, Lucas argued in response to the Motion to Dismiss that past efforts were sufficient and/or that the court should order counsel or the insurance carrier to accept service. This not only misstates the standard under our service rules but demonstrates a lack of diligence or good cause.

Iowa courts have consistently found that efforts above those demonstrated in this case were not sufficient to meet the plaintiff's burden of proof. *See, e.g., Meier v. Senecaut,* 641 N.W.2d 532, 542 (Iowa 2002) (once confusion over the identity of the defendant was resolved, plaintiff only attempted to serve the defendant at his residence during workday hours); *Carter v. Benjamin*, No. 11-0989, 2012 WL 3026555 (Iowa Ct. App., July 25, 2012) (personal service attempts at a residence, followed by leaving a card in the mailbox with instructions to call and pick up the complaint, during which time the plaintiff was corresponding with the insurer); *Crall*, 714 N.W.2d at 618–621 (making three attempts after an unexplained delay, speaking with the defendant via phone, failure to request additional time, and attempts to substitute serve via the defendant's daughter or attorney); *Watters v. Lidtke*, 2008 WL 6505214 (Iowa Dist. Ct., March 14, 2008) (plaintiff knew the defendant moved to Illinois, called directory assistance, and sent the petition to two Illinois sheriffs); *Anthony v. 60th Street III, LC,* 2018 WL 11212037 (Iowa Dist. Ct.,

June 5, 2018) (asking defense counsel if service can be accepted, followed by service outside the 90-day period was insufficient).

The court in *Wolfs v. Challacombe*, ruled that a plaintiff whose mailing of notice via section 321.501 was not received by a nonresident defendant—under the *Emery* analysis—must continue to pursue the means of notice under section 321.504, i.e., personal service. 218 N.W.2d 564, 570 (Iowa 1974); *see also* Iowa Code § 321.504 (2021). The plaintiff in *Wolfs* "promptly pursued" other means of service upon receiving the unclaimed mailings and made "strenuous effort to locate defendants." *Id.* at 570. The same cannot be said under this record.

Although it is Lucas who carries the burden, she attempts to divert the blame for failure of service to Warhol's insurance carrier and Warhol's attorney. Specifically, it is asserted that Warhol's insurance carrier "knew fully well" that service would be insufficient and was therefore misleading. Warhol's insurance carrier is not a party to this lawsuit, and cannot be a party to this lawsuit (per Iowa's direct-action statute). Iowa Code section 516.1-.3; *Roach v. Ravenstein's Estate*, 326 F. Supp. 830 (S.D. Iowa 1971). Notwithstanding, there is no support for the assertion that Warhol's insurance carrier was misleading in this action. It is Lucas who inserted Warhol's insurance carrier's involvement into the record, and unnecessarily so.

Specifically, Lucas relies on an email exchange between a Progressive representative and her counsel. Although the email correspondence has no significance in excusing Lucas's actions or inaction, a closer look is telling. In the correspondence, the representative: (correctly) identified legal errors in the method of alleged service; requested additional documentation showing the notification had been *delivered* to Warhol as required by law; notified counsel she did not think service had been perfected but pointed out the extended deadline had not lapsed; and offered to further review and discuss the subject. (D0028, Attachment to Resistance, 10/16/23).

As is true with Warhol and his defense counsel, the representative had no duty to assist Plaintiff in achieving service or otherwise notify Plaintiff of any deficiencies. *See Mokhtarian,* 578 N.W.2d at 669 ("The plaintiff cannot rely on the opposing party to inform him or her that service was not sufficient under the rules of civil procedure . . ."); *Emery*, 119 N.W.2d at 277. Additionally, this correspondence further confirms that Plaintiff was aware of the deficiencies prior to her deadline expiring, and prior to the Motion to Dismiss—which relied in part on the same grounds.

Even if the above correspondence could be considered misleading, it does not impute to Warhol to the detriment of his due process rights. Both the district court and Lucas cite *Wilson v. Ribbens* for the proposition that evasion or misleading

conduct may constitute good cause under Rule 1.302(5). *See* 678 N.W.2d 417, 421 (Iowa 2004); Iowa R. Civ. Pro. 1.302(5). However, *Wilson* considered actual facts of evasion or misleading conduct, specifically when "the plaintiff's failure to complete service in timely fashion is a result of the conduct of a third person, typically the process server, ***the defendant*** *has evaded service of process or engaged in misleading conduct . . .*" *Wilson*, 678 N.W.2d at 421 (citing Wright & Miller, *Federal Practice & Procedure* § 1137 at 342 (2002)). The record is devoid of any evidence of evasion or misleading behavior of Warhol by which the district court could have relied.

Warhol contended at the district court and further contends now that the district court's analysis and findings were erroneous in light of well-established due process law, duties of insurance carriers to defend their insured(s), and the ethical obligations attorneys have to their clients. *See, e.g.,* William T. Barker, *The Tripartite Relationship*, 20 No. 17 Ins. Litig. Rep. 729 (1998); *Estate of Barnett v. Wimer*, No. 07-1309, 2008 WL 2200242 (Iowa Ct. App., May 29, 2008) (finding "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" had they not awaited the service deadline and then filed a motion to dismiss). Conclusions regarding evasive or misleading behavior of Warhol or any agents on his behalf are unsupported by the record and fail under existing law. The district

court's findings of fact do not support any conclusion as a matter of law that Warhol was evading service or engaged in misleading conduct. As such, the district court should have granted Warhol's Motion to Dismiss or otherwise ruled there was no good cause under the record.

III. The Issue of Alternate Service is Properly Before this Court and if Reached, the District Court Should be Reversed on That Issue.

As an initial matter, Warhol posits that this issue may not necessarily be reached by the Court should it find that his Motion to Dismiss should have been granted. However, should the Court consider the granting of Lucas's Motion for Alternative Service, it should reverse the same.

The issue concerning alternative methods of service, including personal service upon counsel for Warhol, was preserved for appellate review. The preservation of error rule requires a party seeking to appeal an issue "to call to the attention of the district court" a failure to decide an issue. *Meier*, 641 N.W.2d at 540. The district court *did* decide on Lucas's Motion for Alternative Service methods in its November 29, 2023, Order (D0034, Order, 11/29/23).

This ruling was an error at law because (1) the court entered the order prematurely without providing Warhol an opportunity to resist or be heard on the issue, and (2) the court continued to rely upon alleged evasion or misleading conduct that was unsupported in the record. Warhol certainly brought these issues to the attention of the district court in his timely pleading within ten days of Plaintiff's

motion (*See* D0035, Resistance, 11/30/23). Additionally, error is preserved by requesting the court reconsider, enlarge, or amend its ruling—which Warhol did in his November 30, 2023, pleading. *Tetzlaff v. Camp*, 715 N.W.2d 256, 258–59 (Iowa 2006); Iowa R. Civ. P. 1.904(3). The pleading was captioned: Defendant Warhol's Joint Resistance to Plaintiff's Motion for Alternate Service and Motion to Reconsider Alternative Service. Therein, Warhol titled a section for his Motion to Reconsider, and requested reconsideration in his prayer for relief.

Notwithstanding, Lucas asserts that the district court did not have an "opportunity" to rule on the issues in the resistance. However, nearly two weeks lapsed between Warhol's timely Resistance and Notice of Appeal. Most importantly, the court was aware that Warhol intended to resist any request for alternative service methods and present argument to the court regarding the issue yet ruled on the motion prior to Warhol's allotted time to do so.

A hearing was held on November 8, 2023, specifically to address Warhol's Motion to Reconsider or Enlarge the first Order that denied the motion to dismiss and granted another extension. During oral argument, counsel for Lucas requested the court deem Warhol has been served, or alternatively, that he be served through his attorney. (D0043, Transcript p. 11, 2/29/24). This was the first request or mention of leave for alternative service methods. As such, counsel for Warhol argued the topic was outside the scope of the November 8 hearing, and that if the court were to

consider such a request, Warhol would resist the same and request "an opportunity to address that via motion practice." *Id.* p. 14. As such, the issue was "call[ed] to the attention of the district court" at hearing, the motion was timely resisted, and Warhol also requested reconsideration; the district court's disregard of these efforts should not be a detriment to Warhol. *Meier*, 641 N.W.2d at 540; *Tetzlaff*, 715 N.W.2d at 258. Thus, the issue is preserved for this Court's review.

As to the merits, leave to pursue alternative service methods should not be granted unless the plaintiff shows that "service cannot be made by any of the methods provided" in the rules, and that the requested method complies with due process. Iowa R. Civ. P. 1.305 (14); *Ackelson v. Manley Toys, Inc.*, No. 14-0469, 2019 WL 4935560 at *4 (Iowa Ct. App., Aug. 19, 2015). As previously argued, Lucas has not met her burden to show, after diligent effort, that Warhol could not be served by traditional methods within the time allotted.

The district court and Lucas improperly equate knowledge of an insurance carrier and participation of legal counsel with notice of process under the law. This court has held that an insurance carrier's knowledge of a lawsuit is irrelevant to the analysis of service because the insurance carrier is not the defendant and, regardless of the carrier's knowledge, "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).

Participation of counsel for Warhol likewise does not excuse Plaintiff's burden. Lucas misses the irony in considering service upon an attorney proper legal notice because the attorney is appearing and "presenting a defense," when the crux of that attorney's participation and "defense" was to assert lack of legal notice in the first place. Any attempts to distract the court from the ultimate issue of Warhol's due process rights, or shift the burden of proof, should be declined.

Lucas—for the first time in this case—asserts that she was a third-party beneficiary to the insurance contract between Warhol and his insurance carrier. *See Estate of Gottschalk v. Pomeroy Dev. Corp.*, 893 N.W.2d 579, 586 (Iowa 2017) ("We do not consider issues for the first time on appeal."). In support of this, Lucas cites the case of *Osmic v. Nationwide Agribusiness Inc. Co.*, 841 N.W.2d 853, 859-61 (Iowa 2014). This case is inapplicable here for a number of reasons. First, the legal claim / issues are different. In *Osmic*, the underlying claim at issue was a first-party uninsured or underinsured motorist claim; there was an issue of whether a passenger but not a named insured in an insured auto was bound by the terms of the policy contract covering the insured auto (i.e., this was the third-party beneficiary issue); there was an issue of whether a two-year limitations period under the policy contract was enforceable; there was an issue of whether a first-party carrier had an affirmative duty to their insureds; and there was an issue of whether the first-party carrier had waived defenses under theory of estoppel. Second, the facts are different.

In *Osmic*, the plaintiff was a passenger in the vehicle that was covered by an auto policy contract; the plaintiff was not a named insured; the plaintiff sought UM/UIM benefits under that policy; and the plaintiff did not file within the two-year limitations period provided in the policy. For all these reasons, *Osmic* is distinguishable and is neither instructive or dispositive to the present case and issues before the Court.

Lastly, the assumption that Warhol must have known about the suit also fails. "It is the rule in this and most jurisdictions that knowledge on the part of the defendant will not supply the need for a valid, legal notice or summons, as required by rule or statute." *Harrington v. City of Keokuk*, 141 N.W.2d 633, 638 (Iowa 1966). In other words, "informal awareness of the lawsuit is immaterial" *Stockbauer v. Schake*, No. 2010 WL 3155218 at *2 (Iowa Ct. App., Aug. 11, 2010). Since Lucas failed to serve Warhol with legal notice as provided for in the Rules, the district court should have granted the Motion to Dismiss.

CONCLUSION

It was Lucas's burden to serve her Original Notice and Petition upon Warhol within the allotted ninety day period, or the initial extension. It was also her burden to show that good cause existed for failure to do so. In response to Warhol's motion to dismiss for lack of service, the district court found that Warhol evaded service or was engaged in misleading conduct and therefore good cause existed, despite no

record of misleading conduct or evasive conduct. The district court found – and now Lucas argues – that because Warhol was homeless at all times material, Warhol had knowledge of the proceedings, Warhol's insurance carrier had knowledge of the proceedings, Warhol's insurance carrier retained counsel to defend him, and Warhol's attorney, the undersigned, filed pre-answer dispositive motions on his behalf to protect his due process rights, equates to Warhol evading service or engaging in misleading conduct. As has been outlined ad nauseum in Warhol's submissions and arguments at the district court and before this Court, there was no factual nor legal basis to find that Warhol had evaded service or engaged in misleading conduct. Therefore, the district court's denial of Warhol's Motion to Dismiss, grant of additional time to serve, and then grant of alternative methods of service were in error.

Respectfully submitted,

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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 3,113 words, excluding the parts of the brief exempted by Iowa R. App. P. 6.903(1)(i)(1).

Jordan Reed
_____
Signature

7/12/24
_____
Date

CERTIFICATE OF SERVICE

I, Jordan R. Reed, member of the Bar of Iowa, hereby certify that on July 12, 2024, I or a person acting on my behalf served the above Petitioners'/Appellants' Reply Brief to the Clerk and the Respondent/Appellee's attorney of record, via EDMS in full compliance with Rules of Appellate Procedure and Rules of Civil Procedure.

Jordan Reed
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