

IN THE COURT OF APPEALS OF IOWA

No. 2-344 / 11-1791
Filed June 27, 2012

**TANYA CALDWELL, Administrator of
the ESTATE OF SCOTT MCCARTHY, and
TANYA CALDWELL and CALLEN
MCCARTHY,**
Plaintiffs-Appellants,

vs.

**HOLIDAY LAKE OWNERS'
ASSOCIATION, INC., and RICKY
RIZZIO,**
Defendants-Appellees.

Appeal from the Iowa District Court for Poweshiek County, James Q.
Blomgren, Judge.

The plaintiffs appeal from the district court order dismissing their claim for
failure to serve notice. **AFFIRMED.**

Pete Leehey and Anthony Olson of Pete Leehey Law Firm, P.C., Cedar
Rapids, for appellants.

Joseph A. Quinn and Mitchell R. Kunert of Nyemaster, Goode, West,
Hansell & O'Brien, P.C., Des Moines, for appellees.

Considered by Vogel, P.J., and Tabor and Bower, JJ.

BOWER, J.

The plaintiffs appeal from the district court order dismissing their claim against Ricky Rizzio for damages arising from an accident that caused the death of Scott McCarthy. They contend the district court erred in finding they lacked good cause for failing to serve Rizzio within ninety days of filing the original notice. Because the plaintiffs have failed to show good cause for the delay, we affirm.

I. Background Facts and Proceedings.

On August 15, 2009, Rizzio was involved in an accident that resulted in McCarthy's death. The plaintiffs, McCarthy's estate, and his parents filed a petition against Rizzio seeking damages for McCarthy's death on June 7, 2011. The plaintiffs' attorney mailed directions for service of the original notice to the Linn County Sherriff on June 13, 2011. The ninety-day deadline for service expired on September 4, 2011. On September 6, 2011, McCarthy's attorney received an invoice from the Linn County Sherriff dated August 30, 2011, which stated service had been unsuccessfully attempted on June 14, 2011, because the address provided was an empty lot.

On September 22, 2011, eighteen days after the deadline, Rizzio filed a motion to dismiss for failure to serve. The plaintiffs filed a resistance eleven days later on October 3, 2011, and moved the court for an additional ninety days to make service. On October 11, 2011, the district court dismissed the plaintiffs' claims. The plaintiffs' motion to reconsider was denied.

II. Scope and Standard of Review.

We review motions to dismiss for correction of errors at law. *Crall v. Davis*, 714 N.W.2d 616, 619 (Iowa 2006). Although motions to dismiss are generally limited to the pleadings, the court may consider other matters when ruling on a motion to dismiss for delay of service. *Id.* We are bound by the district court's findings of fact if supported by substantial evidence. *Id.* Substantial evidence is that which a reasonable mind would accept as adequate to reach a conclusion. *Id.*

III. Analysis.

Iowa Rule of Civil Procedure 1.302(5) states that if service of the original notice is not made upon a defendant within ninety days of the filing of the petition, the court shall, on its own or upon motion, dismiss the action without prejudice unless good cause for the failure of service can be shown. If good cause exists, the court shall extend the time for service for an appropriate period. Iowa R. Civ. P. 1.302(5). The rule establishes the standard for presumptive abuse and the court must simply decide if the plaintiff has shown justification for the delay. *Crall*, 714 N.W.2d at 620.

The district court impliedly found the plaintiffs failed to serve Rizzio within ninety days. Substantial evidence supports this finding. The question is whether there is substantial evidence to find the plaintiffs failed to show good cause for the failure.¹ *See id.*

¹ Our review is hampered by the fact that there was hearing on the motions and the district court's rulings contain no fact findings or conclusions of law. Although the court

Our supreme court has stated “good cause” means

[t]he 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. Moreover, intentional nonservice in order to delay the development of a civil action or to allow time for additional information to be gathered prior to “activating” the lawsuit has been held to fall short of [good cause].

Wilson v. Ribbens, 678 N.W.2d 417, 421 (Iowa 2004). “Good cause is likely (but not always) to be found 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” *Id.* The length of delay in service must be taken into account, as well as the explanation for the delay. *See Turnbull v. Horan*, 522 N.W.2d 860, 861 (Iowa Ct. App. 1994).

The record here fails to show good cause for the delay in service. Although the plaintiffs took affirmative steps to serve Rizzio by mailing the sheriff the original notice and directions for service only six days after the petition was filed, they failed to take any action to follow up. After the plaintiffs’ attorney received the notice from the sheriff’s office that it had been unable to effectuate service two days after the ninety-day deadline passed, they failed to promptly seek an extension of time. *See Meier v. Senecaut*, 641 N.W.2d 532, 542 (Iowa 2002) (noting rule 1.302(5) “requires service within ninety days and requires the plaintiff to take affirmative action to obtain an extension or directions from the

did not make an express finding regarding good cause, such finding is implicit in the court’s ruling. *See Duder v. Shanks*, 689 N.W.2d 214, 218-19 (Iowa 2004).

court if service cannot be accomplished”). In fact, the plaintiffs waited until September 28, 2011, after the motion to dismiss was filed, to hire a private investigator to locate Rizzio. A motion seeking an extension of time for service was not filed until October 3, 2011—nearly one month after the ninety-day deadline expired. The plaintiffs failed to show good cause for the delay. Accordingly, we affirm.

AFFIRMED.