

**IN THE COURT OF APPEALS OF IOWA**

No. 6-1068 / 06-0585  
Filed January 31, 2007

**ALAN D. ELSBERRY and KELLI R. ELSBERRY,**  
Plaintiffs-Appellants,

**vs.**

**MERLYN RAY TUCKER,**  
Defendant-Appellee.

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Appeal from the Iowa District Court for Boone County, David R. Danilson,  
Judge.

Plaintiffs-appellants appeal from an order denying their motion to extend the time to serve the defendant-appellee and sustaining defendant-appellee's motion to dismiss. **AFFIRMED.**

John J. Gajdel, Urbandale, for appellants.

Mark S. Brownlee of Kersten Brownlee Hendricks, L.L.P., Fort Dodge, for appellee.

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

**EISENHAUER, J.**

Allan and Kelli Elsberry (Elsberrys) appeal from an order denying their motion to extend the time to serve Merly Ray Tucker and sustaining Tucker's motion to dismiss for failure to timely serve process. We affirm.

Elsberrys filed a petition on July 1, 2005, seeking damages as a result of an alleged assault occurring on July 8, 2003. On July 25, 2005, Elsberrys delivered the original notice and petition to the Boone County Sheriff's office for service upon Tucker. The Boone County Sheriff informed Elsberrys that Tucker had moved to Greene County. The Sheriff also provided Elsberrys with Tucker's new address.

On November 21, 2005, the district court entered an order giving Elsberrys fifteen days to file either proof that service was completed within ninety days of filing the petition or a motion showing good cause for the failure to timely serve the original notice and petition.

On December 5, 2005, Elsberrys filed a motion for extension of time to complete service. The motion contained an affidavit by Elsberrys' counsel explaining how the Boone County Sheriff had provided him with Tucker's new address and that he had been "diligently attempting to verify the address in order to serve" Tucker.

Based solely upon the information contained in this affidavit, the court concluded there was good cause for the delay and granted additional time to complete service. Tucker was served two days later at the address provided by the Boone County Sheriff.

Tucker responded to the petition with a motion to dismiss. Tucker argued dismissal was proper because he had not been served within ninety days of the filing of the petition. See Iowa R. Civ. P. 1.302(5). Tucker also filed a motion to reconsider, praying the court rescind its December 5, 2005 order granting additional time to complete service. This motion contained an affidavit from Merlyn Tucker indicating he had lived at the Greene County address for nearly a year before Elsberry's attempted to serve him in Boone County. The affidavit also stated his name, address, and phone number were listed in the local phone book and his current phone number was obtainable through directory assistance. In addition, neither he nor his "stay-at-home" wife received any contact, notice, or communication from Elsberry's regarding service of process during the 159 days from the date the petition was filed and when Merlyn was eventually served.

Elsberry's resisted the motion to reconsider, but did not dispute any facts set forth in Tucker's affidavit. Elsberry's contended their one unsuccessful attempt at service qualified as sufficient "affirmative action" to justify the delay in service.

Relying on the facts set forth by both parties, the district court concluded there was not good cause to grant the extension to complete service. The court found Elsberry's had "dropped the ball" after the initial attempt at service. Despite the multiple avenues available to verify Tucker's new address, Elsberry's did not explain why there was no further attempt at service. The court rescinded its earlier order and dismissed the action for failure to complete service within ninety days of filing the petition.

Elsberrys appeal, arguing (1) the district court erred in determining there was not good cause for the delay, (2) the district court incorrectly reconsidered its own decision, and (3) Tucker was not prejudiced by any delay in service.

We review a motion to dismiss for failure to effect timely service of process for the correction of errors at law. *Brubaker v. Estate of DeLong*, 700 N.W.2d 323, 326 (Iowa 2005). The district court's findings of fact are binding upon us so long as they are supported by substantial evidence. *Carroll v. Martir*, 610 N.W.2d 850, 857 (Iowa 2000). "Evidence is substantial when a reasonable mind would accept it as adequate to reach a conclusion." *Bus. Consulting Servs., Inc. v. Wicks*, 703 N.W.2d 427, 429 (Iowa 2005).

Iowa Rule of Civil Procedure 1.302(5) "requires service within ninety days and requires the plaintiff to take affirmative action to obtain an extension or direction from the court if service cannot be accomplished." *Meier v. Senecaut*, 641 N.W.2d 532, 543 (Iowa 2002). If service has not been completed within the ninety-day period, the court is required to "dismiss the action without prejudice, impose alternative direction for service, or grant extension of time to complete service for an appropriate period of time." *Id.* at 541. "Extension of time requires a showing of good cause." *Id.* We have defined good cause to mean

[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.

*Id.* at 542 (citations omitted).

Despite the contention counsel had been "diligently" attempting to verify Tucker's new address in order to effectuate service, substantial evidence

supports the district court's conclusion there was not good cause for the delay. Elsberry's made only one attempt to serve Tucker at an old address. Even though the Boone County Sheriff provided a new address, Elsberry's took no further action until the court's November 21, 2005 order raised the specter of dismissal. Elsberry's gave no reason for the four month delay and provided no explanation as to what efforts were taken to verify the new address. The district court was correct to conclude there was not good cause for the delay in service. See, e.g., *id.* at 543 (holding there was no good cause for delay when plaintiff only attempted to serve defendant at his residence during the work-day and made no attempts to contact defendant by phone); *Dennis v. Christianson*, 482 N.W.2d 448, 451-52 (Iowa 1992) (citing failure to check local directories or directory assistance to facilitate service as a factor in good cause analysis).

Elsberry's argument that the district court incorrectly reconsidered its own decision "based on the same facts" is without merit. A district court has the power to correct its own perceived errors, "so long as the court has jurisdiction of the case and the parties involved." *McCormick v. Meyer*, 582 N.W.2d 141, 144 (Iowa 1998) (citations omitted). Until the district court has rendered a final order or decree, it has the power to correct any of the rulings, orders, or partial summary judgments it has entered. *Hayes v. Kerns*, 387 N.W.2d 302, 308 (Iowa 1986) (citations omitted). Tucker's affidavit in support of his motion to reconsider contained additional facts not available to the court when it originally found good cause for the delay. The Court properly considered those facts when reconsidering its original ruling.

We also reject Elsberry's claim that the district court erred because Tucker suffered no prejudice. Under a prior rule, a court was required to decide if a delay in service was presumptively abusive before it considered whether the delay was justified. *Meier*, 641 N.W.2d at 542. However, "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" because rule 1.302(5) now establishes the standard of "presumptive abuse." *Id.* When service has not been made within ninety days and no extension was granted, "courts must now simply decide if the plaintiff has show justification for the delay." *Id.* Because Tucker was not served within ninety days, the district court correctly presumed prejudice and proceeded to the good cause analysis.

We find no legal error requiring reversal in this case.

**AFFIRMED.**