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**TODD ALLEN OETKEN, Plaintiff-Appellee, vs. JULIUS SOSA GUERRERO and  
ROWENA JAMITO, Defendants-Appellants.**

**No. 8-718 / 07-2091**

**COURT OF APPEALS OF IOWA**

*2008 Iowa App. LEXIS 871*

**September 17, 2008, Filed**

**NOTICE:**

NO DECISION HAS BEEN MADE ON PUBLICATION OF THIS OPINION. THE OPINION IS SUBJECT TO MODIFICATION OR CORRECTION BY THE COURT AND IS NOT FINAL UNIL THE TIME FOR REHEARING OR FURTHER REVIEW HAS PASSED. AN UNPUBLISHED OPINION MAY BE CITED IN A BRIEF; HOWEVER, UNPUBLISHED OPINIONS SHALL NOT CONSTITUTE CONTROLLING LEGAL AUTHORITY.

**SUBSEQUENT HISTORY:** Reported at *Oetken v. Guerrero*, 758 N.W.2d 841, 2008 Iowa App. LEXIS 2015 (Iowa Ct. App., 2008)

**PRIOR HISTORY:** [\*1]

Appeal from the Iowa District Court for Des Moines County, Mary Ann Brown, Judge. Defendants appeal the district court's denial of their motion to dismiss due to plaintiff's failure to timely effectuate service.

**DISPOSITION:** REVERSED AND REMANDED.

**COUNSEL:** Mark King of Patterson Law Firm, L.L.P., Des Moines, for appellant.

Brett Beattie of Beattie Law Firm, P.C., Des Moines, for appellee.

**JUDGES:** Considered by Mahan, P.J., and Vaitheswaran and Doyle, JJ.

**OPINION BY:** VAITHESWARAN

**OPINION**

**VAITHESWARAN, J.**

A district court found good cause for a plaintiff's untimely service of process. On appeal, the defendants take issue with this determination. Finding merit to their arguments, we reverse and remand for dismissal of the action.

### ***I. Background Facts and Prior Proceedings***

On April 16, 2007, Todd Oetken sued Julius Sosa Guerrero and Rowena Jamito for injuries sustained in a car accident. Two days later, Oetken directed the Des Moines County Sheriff to serve Guerrero and Jamito at their address in West Burlington, Iowa. The sheriff filed a return of service stating the defendants had reportedly moved to California.

Approximately one month after the petition was filed, Oetken's attorney sent a letter to the defendants at a California address obtained [\*2] from their insurance provider. Included with the letter were the Original Notice, Petition, and two acceptance of service forms. The attorney asked the defendants to complete the acceptance forms and mail them back to him within fourteen days. He stated that if the defendants did not comply, he would have them served by the local sheriff. The defendants did not respond.

The ninety-day service requirement expired on July 14, 2007. *Iowa R. Civ. P. 1.302(5)*. One month after this expiration date, Oetken's attorney withdrew from the case and another attorney was substituted for him.

On September 10, 2007, almost five months after the petition was filed, a case coordinator notified the parties that the petition would be dismissed on the court's own motion twenty-five days from the date of the notice unless good cause was shown as to why service had not been completed. After receiving this notice, Oetken's new attorney moved for additional time to effectuate service. The defendants countered with a motion to dismiss for lack of timely service.<sup>1</sup> The district court denied the defendants' motion after determining that Oetken's (1) reliance on the case coordinator's notice and (2) retention of [\*3] substitute counsel amounted to good cause for the delay. In response to a motion for enlarged findings and conclusions, the court reaffirmed its earlier decision. The defendants filed an application for interlocutory appeal, which was granted.

<sup>1</sup> Service was ultimately made on September 24, 2007.

### ***II. Analysis***

Iowa Rule of Civil Procedure 1.302(5) provides:

If service of the original notice is not made upon the defendant, respondent, or other party to be served within 90 days after filing the petition, the court, upon motion or its own initiative after notice to the party filing the petition, shall dismiss the action without prejudice as to that defendant, respondent, or other party to be served or direct an alternate time or manner of service. If the party filing the papers shows good cause for the failure of service, the court shall extend the time for service for an appropriate period.

Abuse is presumed if service is not effectuated within the ninety-day period. *Meier v. Senecaut*, 641 N.W.2d 532, 542 (Iowa 2002). The only remaining question is whether "the plaintiff has shown justification for the delay." *Id.* A good cause standard is used to answer this question. Good cause requires "some [\*4] affirmative action to effectuate service of process upon the defendant" or something that prevents the plaintiff "through no fault of his [or her] own, from taking such an affirmative action." *Id.* (quoting *Carroll v. Martir*, 610 N.W.2d 850, 858 (Iowa 2000)).

The defendants maintain that neither the case coordinator's notice nor Oetken's substitution of counsel amounted to good cause for the delayed service, as the district court determined. Our review is on error, with the court's permitted fact findings binding on us if supported by substantial evidence. *Crall v. Davis*, 714 N.W.2d 616, 619 (Iowa 2006).

We begin with the case coordinator's notice. We agree with the defendants that the notice does not furnish good cause for the delay in service of process. It was issued after the ninety-day service period prescribed by *rule 1.302(5)* and was not issued pursuant to a motion for extension of time filed within the ninety-day period. *See Id.* at 621-22 (stating motion for extension of time for service "was not merely preferable, but required"); *Meier*, 641 N.W.2d at 543

("We emphasize [*rule 1.302(5)*] requires service within ninety days and requires the plaintiff to take affirmative action to obtain [\*5] an extension or directions from the court if service cannot be accomplished."). Notably, Oetken's original attorney advised the defendants that if they did not accept service within fourteen days of his letter to them, he would proceed to have the local sheriff serve them. After the expiration of the fourteen days, counsel had forty-five days to follow through with his promise. He neglected to do so. *See Meier, 641 N.W.2d at 542* ("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.") (quoting *Carroll, 610 N.W.2d at 858*).

We turn to the district court's reliance on Oetken's substitution of counsel. The application for substitution of counsel was filed well outside the ninety-day service period and, again, was not preceded by a timely motion for extension of the service deadline. Accordingly, this factor did not support a good cause determination.

We reverse and remand for entry of an order of dismissal without prejudice. *Iowa R. Civ. P. 1.302(5); Meier, 641 N.W.2d at 543*.

**REVERSED AND REMANDED.**