

IN THE COURT OF APPEALS OF IOWA

No. 5-136 / 94-0416

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JUN 27 1995
JAMES R. HAVERCAMP, JR.

DANIEL WILLIAM ROE,

Appellee,

vs.

SHIRLEY GARROW,

Appellant.

Appeal from the Iowa District Court for Scott County, David Sohr and James R. Haverkamp, Judges.

Defendant appeals a jury verdict in favor of plaintiff. **AFFIRMED.**

John C. Stevens of Lewis and Stevens, P.C., Muscatine, for appellant.

Patrick W. Driscoll of Stanley, Lande & Hunter, Davenport, for appellee.

Considered by Hayden, P.J., and Habhab and Cady, JJ.

HAYDEN, P.J.

Daniel Roe filed a petition against Shirley Garrow alleging he suffered extensive injuries and burns when a fire broke out at Garrow's home due to her negligence in using a faulty extension cord to operate an appliance.

The petition was filed on November 20, 1992, only hours before the tolling of the statute of limitations on Roe's claim. Garrow was not served with original notice and a copy of the petition until January 5, 1993, forty-six days after the petition was filed. Garrow filed a motion to dismiss the petition based on this delay in service.

A hearing was held on the motion. Roe's counsel stated he was unaware of Garrow's residence at the time the petition was filed. Roe's counsel testified his office searched telephone directories and city directories, attempted to reach Garrow's daughter, and randomly called people with the same last name until they discovered the right phone number and finally notified Garrow of the court action. Roe stated Garrow had not been prejudiced by the delay. Garrow claimed her address could have been obtained quickly and easily and Roe knew she had returned to her home after the fire damage was repaired.

The trial court denied the motion to dismiss, stating Roe made a reasonable effort to locate Garrow and service occurred within a reasonable time. Garrow's application for interlocutory appeal was denied.

Following a jury trial, Roe was found thirty-five percent at fault and Garrow sixty-five percent at fault. The trial court entered judgment in favor of Roe for \$35,204.26 with interest.

Garrow filed a motion for judgment notwithstanding the verdict claiming Roe's cause of action relied on, but Roe had failed to plead or prove, section 85.106 of the 1988 Uniform Fire Code which prohibits use of extension cords for nonportable appliances. Garrow's motion was denied.

Garrow appeals. She claims the trial court erred in denying her motions to dismiss and for judgment notwithstanding the verdict.

I. Motion to Dismiss.

Defendant contends the trial court should have granted her motion to dismiss because of delay in service. Our review is for correction of errors at law. Iowa R. App. P. 4, *Dennis v. Christianson*, 482 N.W.2d 448, 450 (Iowa 1992).

A plaintiff filing a petition is obligated to file written directions for service of the original notice with the petition. Iowa R. Civ. P. 49(a). The petition, original notice, and directions for service must then be promptly delivered for service on the defendant. Iowa R. Civ. P. 49(b). Although these rules do not specify when service must be made, there is clear authority providing for dismissal if there is abusive delay in completing service on the defendant. See *Bean v. Midwest Battery & Metal, Inc.*,

449 N.W.2d 353, 354-55 (Iowa 1989); *In re Steinberg*, 443 N.W.2d 711, 713-14 (Iowa 1989). In making this determination, the court considers the length of the delay and whether the delay was intentional. *Taylor v. Wiebold*, 390 N.W.2d 128, 129-30 (Iowa 1986); *Scieszinski v. City of Wilton*, 270 N.W.2d 450, 452 (Iowa 1978). When a delay is presumptively abusive, the plaintiff bears the burden of justification for the delay. *Bean*, 449 N.W.2d at 356.

Defendant was served forty-six days after the filing of the petition. Although these cases must be judged on their own unique set of facts, we note Iowa precedent has allowed similar delays. Compare *Steinberg*, 443 N.W.2d at 714 (thirty-seven day delay not abusive) and *Taylor*, 390 N.W.2d at 129-30 (seven-month delay not presumptively abusive) with *Christianson*, 482 N.W.2d at 451 (delay of two and one-half years held presumptively abusive) and *Bean*, 449 N.W.2d at 355 (eight-month delay presumptively abusive). Further, our supreme court has noted Iowa Rule of Civil Procedure 49 is based on Federal Rule of Civil Procedure 4. *Steinberg*, 443 N.W.2d at 713. The *Steinberg* court observed that under Rule 4 "service is considered 'prompt' if made within 120 days of the filing of the complaint." *Id.* at 714 (citing Fed. R. Civ. P. 4(j); *Thomsen v. United Parcel Serv. Inc., Local 710*, 792 F.2d 115, 118 (8th Cir. 1986)). In the instant case, service was made well within the 120 days allowed by the federal rule.

In addition to the length of the delay, we consider whether the delay was intentional. We have carefully reviewed the record and find no evidence the delay was intentional. We agree with the trial court "plaintiff made a reasonable, though not perfect, effort to locate defendant." We find plaintiff did not intentionally delay service, nor was the forty-six-day delay abusive. Under this record, the trial court correctly denied defendant's motion to dismiss.

II. Motion for Judgment Notwithstanding the Verdict.

Defendant argues the trial court erred in denying her motion for judgment notwithstanding the verdict. Our scope of review is for correction of errors at law. Iowa R. App. P. 4; *Hillrichs v. Avco Corp.*, 514 N.W.2d 94, 97 (Iowa 1994).

Defendant specifically complains plaintiff did not properly prove up a Davenport City Ordinance as required under Iowa Code section 622.62 (1993). Defendant in part complains the ordinance plaintiff introduced at trial was a "duplicating machine copy" which was not properly authenticated. Defendant made no such objection at trial and did not preserve this issue for review.

Even if defendant's full argument was preserved for review, the record demonstrates the ordinance was properly received into evidence. We further note the case was submitted to the jury on theories of general and specific negligence, and there is nothing in the verdict form or the judgment entry to indicate the jury reached its

verdict in reliance upon the ordinance. We therefore hold the trial court was correct in refusing to grant defendant's motion for judgment notwithstanding the verdict.

We affirm the trial court on all issues presented. Costs on appeal are taxed to defendant-appellant Garrow.

AFFIRMED.