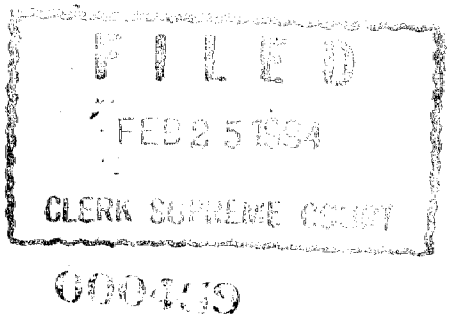
IN THE COURT OF APPEALS OF IOWA

No. 3-648 / 93-0363



CAROL STROUGH,
Plaintiff-Appellant,

vs.

DOUGLAS & LOMASON COMPANY and
PHILLIP UPDIKE d/b/a UPDIKE
ELECTRIC AND APPLIANCE,
Defendants-Appellees.

Appeal from the Iowa District Court for Montgomery County, Charles L. Smith, III, Judge.

Strough appeals from the district court's dismissal of her action against Updike and from the court's grant of summary judgment in favor of Douglas & Lomason. **AFFIRMED.**

Forrest E. Ebersold of Ebersold Law Office, Omaha, Nebraska, for appellant.

Patrick D. Smith and Dorothy L. Kelley of Jones, Hoffman, Huber, Kelley, Book & Cortese, Des Moines, for appellee Douglas & Lomason Company.

Suellen Overton and Robert Laubenthal of Smith, Peterson, Beckman & Willson, Council Bluffs, for appellee Phillip Updike d/b/a Updike Electric and Appliance.

Heard by Sackett, P.J., Habhab, J., and Peterson, S.J.*

*Senior judge from the 1st Judicial District serving on this court by order of the Iowa Supreme Court.

SACKETT, P.J.

Plaintiff-appellant Carol Strough appeals the trial court decision to grant a summary judgment in her action for injuries she claims she sustained in the parking lot of her employer. We affirm. Plaintiff was employed by defendant-appellee Douglas & Lomason. On October 21, 1990, she allegedly fell while working. Then on October 25, 1989,[1] she allegedly fell again while leaving work. Plaintiff said she fell in a hole on Douglas & Lomason's parking lot.

On October 16, 1991, the plaintiff filed with the Clerk of the Iowa District Court of Montgomery County, Iowa, a petition at law captioned "Carol Strough v. Unknown Corporations." The petition claimed plaintiff fell on October 21, 1989, and was injured because of the negligence of another. The petition was not accompanied by an original notice of suit. Plaintiff also served a subpoena on defendant Douglas & Lomason.

On October 25, 1991, plaintiff amended her petition to name Douglas & Lomason Company and Philip Updike as defendants. At this point it was her contentions defendant-appellee Philip Updike dug the hole. No original notice of suit accompanied the amended petition.

Nearly ten months later in July of 1992, plaintiff

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1. Plaintiff's petition places the accident on October 25, 1989; her appellate brief places the accident on October 25, 1990.

filed original notices with the clerk requesting they be served on defendants. Only then were defendants Douglas & Lomason and Updike served with original notices.

CLAIM AGAINST DEFENDANT UPDIKE

On July 30, 1992, defendant Updike filed a motion to dismiss alleging plaintiff failed to comply with Iowa Rule of Civil Procedure 49, and the delay of 262 days from the date of filing the amended petition naming Updike as a defendant was unreasonable. Updike also filed an affidavit stating since October 1991, he had been a resident of Montgomery County and he knew of no reason why personal service on him could not have been made.

Plaintiff resisted the motion alleging she needed the 262 days after filing her amended petition to investigate the claims. The trial court sustained Updike's motion. This appeal followed. Plaintiff contends the delay in serving Updike was not unreasonable or abusive.

Updike challenged the personal jurisdiction of the court. The burden, therefore, is on the plaintiff to sustain the requisite jurisdiction by showing an adequate and timely service and compliance with any applicable statute. Dennis v. Christianson, 482 N.W.2d 448, 450 (Iowa 1992); Cross v. Lightolier, 395 N.W.2d 844, 846 (Iowa 1986).

Iowa Rule of Civil Procedure 49 provides, in applicable part:

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> (a) Written directions for the service of the original notice and copy of petition shall be delivered to the clerk with the petition. There shall also be delivered to the clerk with the petition the original notice to be served and sufficient copies of both. The original notice shall . . . be directed to the defendant, . . .
>
> (b) Upon the filing of the petition the clerk shall forthwith deliver for service the original notice and copies, copies of the petition, and the directions for service to the sheriff, to a person specially appointed to serve it, or other appropriate person. . . .

Plaintiff's attorney intentionally did not give the clerk of court an original notice of suit to be served on Updike when the amended petition was filed. He stated in his resistance to defendant Updike's motion to dismiss that on October 21, 1992, he received a phone call from an attorney for Douglas & Lomason who told him she believed the work had possibly been done by Updike, but she could not provide any documentation at that point of the same and she left him with the impression she was not really sure of this information herself. He went on to state he amended the petition to add Douglas & Lomason and Updike but chose not to serve them until he could complete an investigation to determine if Updike was involved in the work in question.[1] He further stated he immediately contacted persons witnessing the fall but did not have sufficient evidence to believe Updike was involved until June 1992.

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1. Counsel is directed to Iowa Rule of Civil Procedure 80 that provides, in applicable part:

> (a) [C]ounsel's signature to every motion, pleading, or other paper shall be deemed a certificate . . . that to the best of Counsel's knowledge, information, and belief, formed after reasonable inquiry, it is well grounded in fact . . . (emphasis

Plaintiff contends the delay was not abusive and defendant was not prejudiced so she should prevail.

Plaintiff had the burden to justify the lengthy delay in service. Dennis, 482 N.W.2d at 451; Bean v. Midwest Battery & Metal, Inc., 449 N.W.2d 353, 356 (Iowa 1989).

During the 242 day period between filing and service, plaintiff (1) failed to comply with Rule of Civil Procedure 49 and (2) made no attempt to serve Updike even though the only evidence is at all times Updike was readily available for service in Montgomery County. The trial court was correct. We affirm on this issue.

CLAIM AGAINST DOUGLAS & LOMASON

Douglas & Lomason, after being served with an original notice of suit, answered alleging certain affirmative defenses, including exclusive remedy. An amendment to their answer raised the defense of the statute of limitations. Douglas & Lomason then filed a motion for summary judgment which was sustained.

Plaintiff while working for Douglas & Lomason was injured during the course of her employment on October 21, 1989. She strained her back and shoulders. On October 25, 1989, she sustained a second injury to her back and shoulders when she fell in the trench in the parking lot. Plaintiff sought medical care on October 27, 1989. She received disability and her medical expenses were paid by

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supplied).

her employer. Plaintiff hired an attorney and entered into an agreement for settlement where it was agreed plaintiff injured her neck, back, shoulders and upper and lower extremities that were compensable under the Workers' Compensation Act. Plaintiff received healing period benefits for her injuries and industrial disability. As of September 17, 1990, the parties agreed plaintiff had sustained a five percent permanent industrial disability to her body as a whole as the result of injury to her neck, back, shoulders, upper and lower extremities, and her healing period benefits ended November 29, 1989. It was stipulated the injuries occurred on or about October 21, 1989, and the medical records attached to and made a part of the agreement indicated the doctors diagnosed and treated her as having combined work-related injuries. The agency approved the agreement.

The trial court found it was without dispute that plaintiff was compensated for her injuries under the Workers' Compensation Act and was barred from pursuing this action against Douglas & Lomason. We agree. We need not address the other argument for affirmance urged by this defendant.

AFFIRMED.