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CLERK SUPREME COURT

394

IN THE COURT OF APPEALS OF IOWA

WARREN SANDQUIST and MARY JANE SANDQUIST,

Appellants,

vs.

GEORGE ABERNATHY,

Appellee.

Filed December 28, 1977

271
2-59313

Appeal from Buena Vista District Court - Richard W. Cooper, Judge.

Plaintiffs appeal trial court's refusal to reinstate their cause of action after a rule 215.1, Rules of Civil Procedure, dismissal for want of prosecution. - Reversed and remanded for reinstatement.

John A. Templer Jr. and Ralph E. Walker, of Thoma, Schoenthal, Davis, Hockenberg & Wine, of Des Moines, and Latimer and Mahlum, of St. Paul, Minnesota, for Appellants.

Tom George, of Cosson, Christianson, Hohnbaum & George, of Des Moines, and Don C. Day, of Minneapolis, Minnesota, for Appellee.

Heard by Allbee, C.J., and Donielson, Snell, Oxberger and Carter, JJ.

PER CURIAM

This case presents the question whether the plaintiffs Warren and Mary Jane Sandquist established reasonable cause under rule 215.1, Rules of Civil Procedure, to require the trial court to reinstate their case. The Sandquists' case was dismissed pursuant to rule 215.1 on January 2, 1976. Within that same month, they had filed for reinstatement. The denial of their application gave rise to this appeal. We reverse.

The trial court overruled the Sandquists' November 17, 1975 motion for a continuance on December 29, 1975. Their case was dismissed January 2, 1976, by the clerk's ministerial act under rule 215.1. Rather than proceed directly to the supreme court, the Sandquists, guided by rule 215.1, returned to the district court to seek reinstatement. When the trial court refused reinstatement the appeal was properly perfected.

The harshness of automatic dismissal under rule 215.1 was reduced by the legislature when it added the last paragraph of the rule, providing for reinstatement of cases under certain conditions. 1965 Iowa Acts, ch. 487, § 2. Under the rule as it now stands, the trial court has no discretion as to the original dismissal, but possesses the power to reinstate the cause under certain circumstances. Johnson v. Lindquist, 184 N.W.2d 681 (Iowa 1971). Clearly, then, an effective appeal could be taken only after the trial court has been given the opportunity to exercise its judgment. The Sandquists sought such an exercise. We hold the ultimate question of whether they have failed to prosecute their case with the requisite alacrity is now properly before this court.

In a rule 215.1 dismissal "it is beyond the power of the trial court to withhold reinstatement when the required showing has been made." Rath v. Sholty, 199 N.W.2d 333, 336 (Iowa 1972). The trial court's findings of fact in a reinstatement ruling are binding upon this court if supported by substantial evidence. But, "whether the facts and inferences found constitute 'inadvertence,' 'mistake,' or 'other reasonable cause' is not a factual but a legal question on review." Rath, supra.

In the fall of 1975 defendant George Abernathy was declining to settle.

Counsel for both parties with respective schedule conflicts were unable to stipulate to a trial date before the automatic dismissal date. Abernathy claimed non-receipt of the Sandquists' motion for continuance, notice of hearings on the motion, and non-receipt of the Sandquists' certificate of readiness for trial. The court files indicate such papers were on file. Further, it is without dispute that the congested judicial docket of the district foreclosed the Sandquists from any real hope of avoiding a rule 215.1 dismissal by prosecution of its case during November or December of 1975.

In ruling upon the reinstatement the trial court found the Sandquists had failed to certify readiness for trial during the September-October trial session when the case could have been assigned for jury trial. Rule 215.1, by its terms, requires that a case, following notice of automatic dismissal, be tried prior to the next January 1. The effect of the trial court's ruling was to require in the impasse created by counsels' schedule conflicts and the congested docket that the case be tried before the end of the third judicial session in October, 1975. This effectively telescoped the period following the rule 215.1 notice to an operative period of less than three months. This is manifestly counter to the mandates of rule 215.1. We cannot find upon this record any dilatory tactics or the inactivity which foreclosed the plaintiffs in Wharff v. Iowa Methodist Hospital, 219 N.W.2d 18, 23 (Iowa 1974) from a reinstatement. The court in **Wharff** specifically noted no motion for continuance was ever filed in that case. 219 N.W.2d at 21.

The Sandquists' case according to the trial court was "precariously handled" from its inception. We are not constrained by such an observation to infer as a matter of law that the Sandquists have failed to prosecute their case and thereby subjected themseves to dismissal. The fact is they were in court well before the January 1, 1976, dismissal date seeking to bring their case to trial. Rule 215.1 imposes the ultimate sanction of dismissal upon a case for want of prosecution. See Local Board of Health, Boone County v. Wood, 243 N.W.2d 862, 865 (Iowa 1976). It is not intended to dismiss a case in which the aggregate of counsels' efforts and the judicial docket realities results in a case untried before the automatic dismissal date.

The Sandquists established reasonable cause for reinstatement of the action and their application should have been granted.

Reversed and remanded for reinstatement of Sandquists' cause of action.

CARTER, J. dissents.

CARTER, J. (dissenting)

I dissent. This appeal has been taken from the trial court's order refusing to reinstate plaintiffs' case after it was dismissed pursuant to rule 215.1, Rules of Civil Procedure. The application for such relief was based upon the final paragraph of that rule which has both discretionary and mandatory provisions for the reinstatement of dismissed cases. I am unable to ascertain from the majority's opinion whether it is based upon the mandatory provisions for reinstatement or the discretionary provisions but, in either event, I believe the majority's conclusion is incorrect.

The mandatory provision of the reinstatement rule, in order to be operative, requires a showing that the dismissal was a result of "oversight, mistake or other reasonable cause." Clearly there has been no such showing in the present case nor could there be. The dismissal was the result of the trial court's denial of plaintiffs' motion to continue the case into the next calendar year for trial. This ruling was contained in a considered written opinion rendered after notice and full hearing. The clerk's dismissal of the case on January 2, 1976, was the inevitable result of that ruling. Under these circumstances it cannot be said that the dismissal was the result of "oversight" or "mistake." With respect to the words "other reasonable cause," as used in the reinstatement rule, I must conclude that such language means other reasonable grounds for failure to obtain the necessary continuance order. It should not be construed to encompass the situation where plaintiffs seek such an order and the court, after full hearing, refuses to grant it. I would therefore conclude that the mandatory portion of the reinstatement rule was not available to the plaintiffs in the instant case.

With respect to the trial court's discretion to reinstate a case under the last sentence of rule 215.1, there is nothing in the rule which gives any criteria for discretionary reinstatement in those instances which fail to qualify for mandatory reinstatement. The inference is that the discretion to reinstate is very broad. But, if such is the case, it naturally follows that there is an equally broad discretion to refuse to reinstate in instances which do not qualify for mandatory reinstatement. Whatever the extent of the trial court's discretion in passing upon applications for reinstatement, I do not believe that it is abused by failing to change the result of a previous ruling which the court believes to be correct. It is within the trial court's discretion to stand upon its convictions. Any error, in such instances, must be predicated upon the prior

ruling and not upon the refusal to change it.

The notice of appeal in the present case recites:

> The above named Plaintiffs, Warren Sandquist and Mary Jane Sandquist, hereby appeal to the Supreme Court of Iowa from the Ruling entered herein on the 3rd day of March, 1976, denying Plaintiffs' Application for Reinstatement of Their Cause of Action and all rulings and orders inhering therein.

If there was any error in failing to grant a continuance under rule 215.1, prior to the time the case was dismissed, this does not inhere in the trial court's order denying plaintiffs' application for reinstatement so as to be included in the appeal from that order. There was an intervening final judgment by reason of the clerk's dismissal order of January 2, 1976, in which the error, if any, in refusing to grant a continuance inhered. The clerk's entry of judgment is nonetheless final because it is a ministerial act. Such is the case with many judgments such as judgments entered on a jury's verdict. See, Moreno v. Vietor, 261 Iowa 806, 813, 156 N.W.2d 305 (1968). Nor is such judgment entry not final because it is possible that it may later be vacated or set aside and the cause reinstated. Such possibility exists as to nearly all final judgments as a result of the provisions for granting a new trial contained in rule 244, R.C.P. And, of course the court's ruling on the motion for continuance which brought about the clerk's dismissal order was not a ministerial act.

The issue presented is not when plaintiffs could have appealed but whether they have appealed from the order which is dispositive of the matters of which they now complain. I conclude that they have not appealed from that dispositive order in the manner required by law. Not only is this revealed by the provisions of their notice of appeal but also from the fact that their entire brief and argument on appeal concerns only the legal sufficiency of the trial court's ruling on the application for reinstatement. As carefully noted in the trial court's ruling, 17 of the 25 paragraphs of that application were disposed of in the court's prior ruling on the request for continuance. With respect to the instant appeal, this portion of the application is clearly subject to the rule that no appeal will lie from a decision on a motion to reconsider a previous ruling. City of Cedar Rapids v. Cox, 250 Iowa 457, 467, 93 N.W.2d 216 (1959); Stover v. Central Broadcasting Co., 247 Iowa 1325, 1331-32, 78 N.W.2d 1, 5 (1956). Moreover, that rule

seems to be equally applicable to the other eight paragraphs of the application to reinstate which are no more than additional factual gloss placed upon the grounds for continuance previously rejected by the trial court. Thus, these eight paragraphs really raise no new issues and like the rest of the application are essentially a request for reconsideration.

For the reasons previously discussed, I would not consider the merits of the issues presented in the motion for continuance on an appeal from the court's ruling on the application to reinstate. But because the majority of this court does decide this appeal based upon these issues I deem it proper to register my disapproval of the conclusions reached with respect to that aspect of the case as well. I find nothing at all improper about the trial court's order of December 29, 1975, overruling plaintiffs' motion for continuance. I am forced to conclude that the grounds of said motion represent no more than an apology which falls considerably short of "satisfactory reasons for want of prosecution."

I believe it ill-behooves this court to reverse a trial court for acting to enforce rules promulgated by our supreme court against litigants who have clearly violated the spirit of those rules. The majority opinion mistakenly equates the policy of rule 215.1, with policies involved in granting trial continuances generally. It concludes that because the docket precluded the case from being tried during the time remaining prior to dismissal this constitutes satisfactory grounds for continuance. This completely ignores the policy of rule 215.1 which demands a showing of "satisfactory reasons for want of prosecution." Plaintiffs did not file their certificate of readiness for trial (a prerequisite to trial assignment) until November 17, 1975, in an action filed on August 11, 1972. It is really not surprising that the trial docket would be unable to accommodate a request for assignment for trial of a major civil damage action within a period of 44 days.

There is always some time on the docket of any court when it becomes impossible to assign additional cases for trial during the remainder of the "try or dismiss" period provided by rule 215.1. If the majority's reasoning is followed, all a litigant, whose case is subject to that rule, need do, in order to avoid it, is to wait until

this time arrives and then request assignment. Under the policy of the rule, which requires satisfactory reasons for want of prosecution, I believe a trial judge can review the entire period the case has been on file and the diligence or lack thereof shown by plaintiffs throughout this period. If this is done in the present case, the facts militate strongly in favor of the trial court's refusal to spare this case from dismissal under rule 215.1.

While plaintiffs experienced some difficulty in identifying who was the driver of the car which injured them, they had a valid claim stated against the owner of the car from the time the trial court allowed an amendment to their petition on April 11, 1974. From this point forward there is no indication that thought was given by plaintiffs to adding additional parties to their lawsuit. There is no claim made that key witnesses were not available. Defendants sought permission to appeal the ruling allowing the amendment last referred to but this was denied by the supreme court on May 23, 1974. Plaintiffs have offered no satisfactory explanation or justification for the inaction which took place during the nearly 18 month period between this date and the time they filed their certificate of readiness on November 17, 1975. This appears to have been more than ample time to dispose of the litigation without running afoul of rule 215.1. The fact that plaintiffs may have contemplated actions in other jurisdictions is no excuse for failing to comply with the procedural rules of this jurisdiction.

Nor did plaintiffs make satisfactory explanation or justification for not acting promptly to seek assignment upon receipt of the clerk's notice in July of 1975. They state in their brief on appeal:

> The failure of plaintiffs' Iowa counsel to file a Certificate of Readiness in September could certainly be seen as due to "inadvertence" or excusable neglect since he had not anticipated any difficulty whatsoever in scheduling the trial in the remaining months of 1975. These factors alone constitute grounds for mandatory reinstatement of the case.

I do not believe such expectations concerning a result which counsel had taken no effort to achieve in the regular manner can excuse the rather substantial inactivity which was allowed to take place. This belief is strengthened by the fact that plaintiffs' motion for continuance indicates that they did not contact defendants' counsel about agreeing on a trial date until October of 1976. This is neglect but it is not excusable neglect.

This case is like no other decided case involving the application of rule 215.1,[1] but if the policy of that rule is to have any real meaning the trial court acted properly in deciding the issue which confronted it. The result may be harsh but it is a result which is dictated by the rule. Plaintiffs' explanation for the considerable delay involved was not sufficiently meritorious to compel the trial court to accept it. To save the case from the operation of the rule would have been the easy decision but the trial court made the hard decision and I believe the correct decision. Trial judges are not engaged in popularity contests and must on occasion make hard decisions.

Rule 215.1 is designed to be as nearly self-executing as possible in the absence of judicial intervention to remove a case from its operation. To the extent such intervention is undertaken without compelling reasons the policy of the rule is thereby frustrated. Decisions such as that of the majority in the instant case can only serve to undermine the resolution of trial courts to permit the rule to operate as it was intended. If the rule is too harsh it should be changed. But unless and until it is changed relief should not afforded simply because of an occasional harsh result. I would affirm the trial court.

[1] It appears that the only decided appeal which involves the refusal of a trial judge to remove a case from the operation of a dismissal order prior to the time it is actually dismissed is Crouch v. Randolph, 213 N.W.2d 673 (Iowa 1973). The facts of that case are so distinguishable as to render it inapposite to the present decision.