IN THE COURT OF APPEALS OF IOWA

EARL J. HENRY and PATRICIA HENRY,

Plaintiffs-Appellants,

vs.

WINNESHIEK COOPERATIVE ASSOCIATION; RONAN BROTHERS; JAMES F. RONAN, and JAMES RONAN, JR.,

Defendants-Appellees.

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Appeal from the Iowa District Court for Winneshiek County (21451), James L. Beeghly and John Bauercamper, Judges.

Plaintiffs appeal the dismissal of their petition contending the filing of the petition tolls the statute of limitations and the dismissal was improper because there was no showing the delay in service resulted from an intent to delay or thwart the litigation. **REVERSED AND REMANDED.**

Frank D. Elwood of Elwood & Elwood, North English, for plaintiffs-appellants.

Donald H. Gloe of Miller, Pearson, Gloe, Burns, Beatty & Cowie, Decorah, for appellees Ronan.

Calvin R. Anderson and Andrew F. Van Der Maaten of Anderson & Wilmarth, Decorah, for appellee Winneshiek Coop.

Considered by Oxberger, C.J., and Schlegel and Hayden, JJ.

HAYDEN, J.

Plaintiffs, Earl and Patricia Henry, filed their petition two days before the statute of limitations expired, but made no attempt to serve the petition upon the defendants until some six months later. The district court dismissed the petition on the ground of noncompliance with the statute of limitations. Plaintiffs appealed. We reverse and remand.

I.

Earl Henry suffered physical injuries while delivering and unloading hogs at a livestock sale barn. Henry and his wife filed this lawsuit against the sale barn operation, Winneshiek Cooperative Association, and against the purchasers of his hogs, Ronan brothers.

The Henrys' petition was filed two days before the expiration of the two-year statute of limitation period. However, original notice of the petition was not served on the defendants until almost six months later, after the expiration of the statute of limitation period. Defendant, Winneshiek Cooperative, filed a motion to dismiss, and defendants Ronan brothers filed a motion to adjudicate law points. Both these documents raise the contention plaintiffs had not complied with the two-year statute of limitations because their petition was neither served within that period nor served shortly after a timely filing. The district court agreed with defendants'

position and dismissed the petition for noncompliance with the statute of limitations. Plaintiffs appeal from this order.

II.

Plaintiffs argue the filing of the petition tolls the statute of limitations, without regard to the time of service. They also argue the dismissal was improper because there was no showing the delay in service resulted from an intent to delay or thwart the litigation.

Our scope of review is for correction of errors at law. Iowa R. App. P. 4. The trial court's findings of fact are binding upon us if supported by substantial evidence. Iowa R. App. P. 14(f)(1). We are not, however, bound by the trial court's determinations of law and are free to decide whether the trial court's findings were induced by legal error. Raymon v. Norwest Bank Marion, National Association, 414 N.W.2d 661, 663 (Iowa App. 1987).

III.

The Henrys initially contend Iowa Rule of Civil Procedure 48 clearly indicates the statute of limitations is tolled by the filing of a petition. Rule 48 provides: "A civil action is commenced by filing a petition with the court." Rule 55, has this language with respect to the statute of limitations:

> For the purpose of determining whether an action has been commenced within the time allowed by statutes for limitation of actions, whether the limitation inheres in the statutes creating the remedy or not, the filing of a petition shall be deemed a commencement of the action.

Despite the language of rule 55, the Iowa Supreme Court has held a statute of limitation could not be avoided by the filing of a petition if there was an intentional failure to serve the original notice. Taylor v. Wiebold, 390 N.W.2d 128, 129 (Iowa 1986).

In this case, the defendants were served some six months following the original filing of the petition and after the two-year statute of limitations had run. Because the original petition was filed prior to the statute of limitations deadline, the problem presented here is whether the failure of the plaintiffs to serve defendants was of the intentional nature our courts have found to be impermissible under the rules.

Both defendants rely on Scieszinski v. City of Wilton, 270 N.W.2d 450 (Iowa 1978), and Becker v. Star Auto, Inc., 376 N.W.2d 645 (Iowa App. 1985), to support the district court's decision.

In Scieszinski, the plaintiff deliberately defeated the prompt issuance and service of summons by filing his petition without the original notice, just shy of the running of the limitations period. The plaintiffs also procured an ex parte order sealing the petition. Approximately three months after the filing, the order sealing the petition was vacated, and service accomplished on the defendant. The court concluded a party may not "intentionally bury an action until a later date and then

escape the bar of an intervening limitations statute on the ground the petition itself was technically 'filed' before the limitation period expired." Scieszinski, 270 N.W.2d at 452.

The Becker case involved a five-year statute of limitations period. The plaintiff filed the petition two weeks before the running of the statute of limitations and, even though a registered agent was available on that date, process was not served until more than two and one-half years after the petition was filed. The plaintiff received a trial dismissal notice under Iowa Rule of Civil Procedure 215.1. The trial court, on a motion by the plaintiff, continued the case and removed it from the provisions of rule 215.1. Plaintiff promised the court to get the notice served. Service was not accomplished until nearly a year later. This court followed the Scieszinski case, holding a party may not "intentionally bury an action until a later date and then escape the bar of an intervening limitations statute on the ground the petition itself was technically filed before the limitations period expired." Becker, 376 N.W.2d at 647. However, in our opinion we took note of the severe time passage, stating: "The service involved here was not affected for more than seven years following the date of the accident, more than two and one-half years after the petition was filed, and over one year after the Beckers received a continuance based on their claim that

'service will shortly be made upon the Chrysler corporation.' " Id. at 648.

The plaintiffs, on the other hand, rely on the recent case of Taylor v. Wiebold, 390 N.W.2d 128 (Iowa 1986). Here, the injured party was a minor at the time of her injury. Under our laws the statute of limitations was to run a year after the plaintiff had reached her majority. Before the statute had run, the plaintiff filed a petition, together with the original notice, but did not include directions for service of the notice as provided in Iowa Rule of Civil Procedure 49(a). An original notice was not served on the defendant until some seven months later, and in the mean time, the statute of limitations had expired. In its decision, the supreme court determined the Scieszinski case was to be applied very narrowly and only in those cases where the plaintiffs' failure to comply with rule 49(b) was intentional. The court went on to determine there was no evidence of intentional delay on the part of the plaintiff and thus, Scieszinski was not controlling. Id., at 129-130.

The primary distinction between the cases upon which defendants rely and the instant case is the actions of the plaintiffs in the earlier cases were reasonably calculated to have a dilatory affect, resulting in a greater likelihood of prejudice to the defendants in their defense of the actions as well as a greater assault upon the

principle behind these provisions, which is to accommodate the speedy disposition of cases through our court system.

Here Henrys served defendants within six months of the filing with the court, unlike the plaintiffs in Becker, which waited nearly two and one-half years to serve the defendant. Unlike the plaintiff in Scieszinski, Henrys did not engage in actions motivated by an interest to prejudice defendants' case. In the case at bar, if anything, plaintiffs' actions displayed an understanding of judicial economy. With the statute of limitations winding down, the plaintiffs had to file an action, however still uncertain as to the role these defendants played, attempted further investigation before forcing conceivably uninvolved defendants into securing attorneys and spending unnecessary sums in litigation.

We note the Iowa Supreme Court, in considering this issue in the past, has not addressed the underlying purpose for intentional delay. However, we do not find evidence of the type of intentional delay which the Iowa supreme Court warned against in Taylor v. Wiebold. We therefore reverse and remand this case for reinstatement in the district court.

REVERSED AND REMANDED.