FILED
APR 27 1982
CLERK SUPREME COURT

IN THE COURT OF APPEALS OF IOWA

34

TAMARA K. DAVIS; and JEROMY THOMAS DAVIS and HEATHER RASMUSSEN, by their mother and next friend, TAMARA K. DAVIS,

Plaintiffs-Appellants,

vs.

PAUL C. HOFFEY, individually, and as Chief of Police of Cedar Falls, Black Hawk County, Iowa; LAWRENCE KRUGER, individually, and as Lieutenant and Shift Commander of Cedar Falls, Black Hawk County, Iowa Police Department; JAMES ERICKSON, individually, and as Patrolman of Cedar Falls, Black Hawk County, Iowa, Police Department; and STEPHEN HUNEMULLER, individually, and as Patrolman of Cedar Falls, Black Hawk County, Iowa, Police Department, and CITY OF CEDAR FALLS,

Defendants-Appellees.

Filed April 27, 1982

2-96
2-66670

Appeal from Black Hawk District Court - Peter Van Metre and Dennis D. Damsgaard, Judges.

Plaintiffs appeal the trial court's dismissal of their wrongful death action asserting: (1) that they should have been permitted to amend their wrongful death petition; (2) that the dismissal of the petition should have been set aside; and (3) that their "motion to set aside default" was the proper procedural vehicle to challenge the dismissal. APPEAL DISMISSED.

Larry J. O'Connor, Waterloo, for plaintiffs-appellants.

David R. Mason of Redfern, McKinley, Mason & Dieter, Cedar Falls, for defendants-appellees.

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

Plaintiffs initiated this wrongful death action by filing a petition at law on August 12, 1980, which was amended on August 15, 1980. On September 2, 1980, defendants filed a motion to dismiss plaintiffs' petition, as amended, for failure to state a claim upon which relief could be granted.

On October 27, 1980, a hearing was held on defendants' motion to dismiss and the trial court entered the following order which in pertinent part stated:

> It was conceded that on the present state of the record the Motion to Dismiss must be sustained. Mr. O'Connor orally asked leave to amend and it is now ordered as follows:
>
> 1. The Motion to Dismiss is submitted.
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> 2. The Motion for Leave To Amend shall be filed in writing forthwith and Defendants shall have to and including November 3, 1980, to respond in writing thereto. Plaintiffs shall then have until November 10, 1980, to respond in writing thereto and the matters will then be submitted to the Court without further hearing.

On November 7, 1980, the trial court dismissed plaintiffs' wrongful death petition on the grounds that no plaintiff was a representative of the decedent's estate, and on the further ground that plaintiffs had not timely complied with a previous court order permitting them to file a motion to amend their petition to show that one of the plaintiffs had become an executor.

On November 10, 1980, plaintiffs filed an application for leave to amend and on November 12, 1980, plaintiffs filed a motion to set aside default. Both of these motions were overruled on March 19, 1981. Plaintiffs then filed notice of appeal on April 16, 1981.

We find that the plaintiffs elected to stand on the record as made at the October 27, 1980, hearing when they failed to file their amended petition within the time period specified by the trial court. Iowa R. Civ. P. 86. Therefore, the trial court's order filed on November 7, 1980, sustaining defendant's motion to

dismiss was a final adjudication. Plaintiffs failed to file their appeal within thirty days of November 7, 1980, and their subsequent motions do not fall within the exceptions stated in Iowa R. App. P. 5 which would extend their time to appeal. We, therefore, dismiss their appeal filed on April 16, 1981, as untimely.

APPEAL DISMISSED.