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CLERK SUPREME COURT

IN THE COURT OF APPEALS OF IOWA

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TIMOTHY J. O'BRIEN and **JANET O'BRIEN**,

Plaintiffs-Appellants,

vs.

RATTVUM V. MULLAPUDI, JAMES E. SPODEN, and **THE FINDLEY HOSPITAL**,

Defendants-Appellees.

6-195
85-1186

Appeal from the Iowa District Court for Dubuque County (Law No. 44116) - R. J. Curnan, Judge.

Plaintiffs appeal the district court's refusal to reinstate their lawsuit after it was dismissed for want of prosecution under Iowa R. Civ. P. 215.1. **REVERSED.**

Gary S. Gill, Des Moines, for plaintiffs-appellants.

Mark A. Woollums and Ralph D. Sauer of Betty, Neuman & McMahon, Davenport, for defendant-appellee Mullapudi.

Charles E. Miller of Lane & Waterman, Davenport, for defendant-appellee Spoden.

David L. Hammer and Stephen C. Krumpe of O'Connor & Thomas, P.C., Dubuque, for defendant-appellee hospital.

Heard by Donielson, P.J., and Schlegel and Hayden, JJ.

SCHLEGEL, J.

The plaintiffs appeal the district court's refusal to reinstate their lawsuit after it was dismissed for want of prosecution under Iowa Rule of Civil Procedure 215.1. We reverse.

On April 1, 1983, the plaintiffs filed their petition against the defendants, two doctors and a hospital. Defendant Spoden answered on April 25, 1983, and served interrogatories on the plaintiffs on June 28, 1983. Defendant Spoden thereafter filed a motion to compel answers to those interrogatories on December 27, 1983, and the plaintiffs were ordered by the district court on January 4, 1984, to answer the interrogatories within fifteen days from the date of that order. Plaintiffs ultimately provided the answers on January 27, 1984. No further action was taken by plaintiffs, although a notice pursuant to Iowa Rule of Civil Procedure 215.1 was issued by the Dubuque County District Clerk on August 10, 1984.

On December 28, 1984, the plaintiffs' counsel mailed an application for continuance, but it was not received at the Clerk's office until January 2, 1985. The district court ruled that it had lost jurisdiction because the application was not timely filed before January 1, 1985, and therefore dismissed plaintiffs' case. On June 18, 1985, the plaintiffs filed an application to reinstate their dismissed lawsuit. As grounds for the reinstatement, the plaintiffs' application alleged that the dismissal resulted from oversight and mistake of plaintiffs' counsel in failing to file his application for a continuance prior to January 1, 1985.

The district court refused to reinstate the dismissed lawsuit. The district court stated that the plaintiffs were not entitled to reinstatement of the lawsuit even under a liberal interpretation of rule 215.1 because the plaintiffs had taken very little action to pursue their lawsuit.

On appeal, the plaintiffs contend that the district court was required to reinstate their lawsuit under the portion of the last paragraph of rule 215.1 providing that the court "shall" reinstate upon a showing that dismissal resulted from "oversight, mistake, or other reasonable cause." The plaintiffs contend that the trial court erred in denying their application for reinstatement because the court failed to comply with the mandatory provisions of rule 215.1. We agree.

Rule 215.1 provides two bases for a trial court to reinstate a dismissed case:

> 1. The trial court may [emphasis added], in its discretion reinstate the dismissed action;
>
> 2. The trial court shall [emphasis added] upon a showing that the dismissal was a result of oversight, mistake or other reasonable cause, reinstate the action.

The burden is on the movant to establish an adequate reason for reinstatement. Matter of Estate of Bearbrower, 376 N.W.2d 922, 923 (Iowa Ct. App. 1985). In the instant case, the attorney for the plaintiffs admitted that due to his mistake or oversight the action was dismissed. No evidence was presented that it was not the mistake or oversight of the plaintiff's lawyer that caused the dismissal. The trial court looked to the total history of the proceedings since the case's filing date as grounds for denying the reinstatement.

In Rath v. Sholty, 199 N.W.2d 333, 335 (Iowa 1972), our supreme court said that the legislature "plainly dictated a nondiscretionary result upon a showing of 'oversight, mistake, or other reasonable cause.' " The court emphasized that the word shall in Rule 215.1 is mandatory. Id. at 336. The court said, "[c]learly, it is beyond power of trial court to withhold reinstatement when the required showing has been made." Id. In Rath, the court found proof of oversight for two reasons. First, the attorney admitted, "Well, it just plain slipped my mind."

Secondly, the court looked to the reason that a continuance was not obtained due to an oversight by counsel. Id. at 337. The court found an understandable reason for the oversight. Counsel was relying on a judge's indication that the judge would let counsel know of the assignment. Id. at 327. In the case at hand, we have the undisputed admission that the attorney was guilty of oversight. We also have the regrettable but understandable fact that the application for a continuance mailed to the court on December 28 was not filed until January 2, presumably due to holiday delays. In Rath, our supreme court found under the above described circumstances, that as a matter of law, the trial court should have sustained the motion to reinstate. Id. at 336. The circumstances of the instant case similarly require that the motion to reinstate should have been sustained.

Wharff v. Iowa Methodist Hospital, 219 N.W.2d 18 (Iowa 1974), says that good faith to defend or continue the action be shown in addition to evidence of mistake or oversight. In Wharff, the court concluded that no mandatory or discretionary reinstatement was required. It is particularly relevant, however, that in Wharff there was no admission by the attorney that he had made a mistake. In fact, a new attorney made the application for the reinstatement. Id. at 21. Plaintiff stated in the application for reinstatement that the first attorney gave assurances the case was being properly pursued. Id. The court noted in Wharff that the record clearly showed that "no motion for continuance was ever filed." Therefore, there was no good faith attempt by counsel to avoid dismissal. Unlike the present case, in Wharff there was no attorney admission of mistake and no request for a continuance. These same two elements were present in Rath. If indeed good faith is required to show the existence of a mistake, both Rath and Wharff suggest that the application for a continuance can provide that element. When an attorney admits to the court that he has

made a mistake and there is evidence provided that the attorney's mistake was in good faith, such as the mailing of a motion for a continuance three days before the dismissal date, the granting of a reinstatement of the case is mandatory. Our courts have initiated a further search for diligence on the part of the attorney in cases where there was an absence of admission by the attorney of a mistake or oversight, see Wharff v. Iowa Methodist Hospital, 219 N.W.2d at 21, or in cases where there has been a good faith failure to file a motion for continuance. See Matter of Estate of Bearbower, 376 N.W.2d at 925.

The trial court had the admission of the attorney before it. The trial court had the December 28 application for a continuance before it. In these circumstances, it was an error of law not to grant the reinstatement. The court did not have the discretion to deny it. Rule 215.1 and our precedent, including Rath and Wharff, require mandatory reinstatement under the circumstances of the present case.

REVERSED.

Hayden, J., concurs; Donielson, P.J., dissents.

DONIELSON, P.J. (dissenting)

I respectfully, but vigorously dissent. The majority's decision completely violates the spirit and intent of rule 215.1. By holding that an attorney, who receives notice in August that his client's case will be dismissed if not tried by January 1, but who fails to take any action whatsoever until three days before the dismissal date and then offers the explanation that he failed to file a timely motion for continuance because he was busy, made a good faith effort to proceed with trial is simply incredulous. The majority apparently believes that any mistake or oversight is allowable so long as the attorney admits that he made a mistake. Such rationale is unequivocably contrary to the spirit and the letter of rule 215.1, and I believe today's holding will seriously increase the risk of mistakes being made and will only lead to greater confusion.

The obvious purpose of rule 215.1 is to ensure that cases which have appeared on the court docket for a lengthy period of time proceed expeditiously; otherwise, the court docket will be cleared of such "dead" cases. I also, however, believe that there is another purpose, though not codified in rule 215.1. Rule 215.1 also acts as a deterrent to those who are entrusted with defending those rights of individuals which they are employed to represent. It is beyond question that a lawyer must use proper care to safeguard the interests of his client and that he should not neglect a legal matter entrusted him. Iowa Code of Professional Responsibility EC 6-4. While I do not mean to suggest that counsel in the present case expressly or intentionally violated any rules of ethical consideration, such rules are important considerations when determining whether a mistake or oversight was reasonable within the intent of rule 215.1.

When considering the question of whether reinstatement of a cause of action is mandatory, two determinations must be made: (1) whether reinstatement is mandatory because there has been proof of oversight, mistake, or other

reasonable cause; and (2) if proof is insufficient, then whether reinstatement should be granted in the discretion of the court. Rath v. Sholty, 199 N.W.2d 333, 335 (Iowa 1972). The trial court's decision as to whether there is a sufficient showing of mistake or oversight is not a factual question, but a legal one on review. Wharff v. Iowa Methodist Hospital, 219 N.W.2d 18, 21 (Iowa 1974). Therefore, the findings of fact of the trial court are binding upon us if supported by substantial evidence. Iowa R. App. P. 14(f)(1). In reviewing the trial court's discretionary decision to grant or deny reinstatement, we will reverse only if there is an abuse of discretion. Rath, 199 N.W.2d at 336. Rule 215.1 has often been compared with rules 236 and 252, and as with those decisions interpreting rules 236 and 252, Iowa courts have generally favored a liberal approach to the interpretation of rule 215.1, allowing for trial on the merits. Bearbower, 376 N.W.2d at 923; Wharff, 219 N.W.2d at 21-22.

If the movant has proven that dismissal occurred due to oversight or mistake, then reinstatement is mandatory and not discretionary. Bearbower, 376 N.W.2d at 923; Wharff, 219 N.W.2d at 21; Rath, 199 N.W.2d at 336. Our courts have held, however, that ignoring a notice while showing nothing more than a mere excuse, plea, apology, or explanation is not sufficient to justify a reinstatement. Wharff, 219 N.W.2d at 22. Where the movant provides proof of accident or excusable neglect, coupled with a showing of a good faith intent to defend or continue the action, sufficient justification will exist to reinstate the dismissed cause of action. Id. "Oversight" has been defined as "something overlooked" or an "omission or error due to inadvertence." Id. at 23. "Inadvertence" has been defined as a "lack of care or attentiveness." Id. Oversight, while similar to excusable neglect, is not the same as gross neglect or willful procrastination. Id.

A number of Iowa courts have previously considered the question of whether the fact that the mistake or oversight was due to the fault of the attorney and not the client is a factor to be considered when ruling on a motion for reinstatement. In Wharff v. Iowa Methodist Hospital, 219 N.W.2d at 18 (Iowa 1974), the Iowa Supreme Court extensively reviewed this question in the context of a line of cases dealing with setting aside of a default. In Reilly v. Kinkhead, 181 Iowa 615, 165 N.W. 80 (1917), a default judgment was entered against the defendant when he failed to timely answer or appear. 181 Iowa 619-20, 165 N.W. at 80-81. Defendant, in his motion to set aside the default judgment, stated that the new member of the attorney's staff had improperly filed the pleadings. Id. at 618, 165 N.W. at 81. The Iowa Supreme Court, in holding that defendant's motion to set aside should have been granted, held that the mistake of the attorney, under the existing circumstances, was not negligence. Id. at 624, 165 N.W. at 82-83.

The Wharff court next considered the case of Newell v. Tweedy, 241 Iowa 90, 40 N.W.2d 20 (1949). In granting a motion to set aside default, the court in Newell, noting that the failure of the defendant to appear was due to an excusable breakdown and noting that the attorneys had shown a good faith effort to defend, held that the failure to appear by counsel should not prevent the defendants from having their day in court. 241 Iowa at 96, 40 N.W.2d at 24.

Upon a review of the above cases, the court in Wharff clarified the current viewpoint regarding the attorney-client error distinction:

> In general, the distinction between client error and attorney error is relevant in determining whether a default judgment should be overturned. It would not seem to be the sole factor, however; rather, it is part of the overall situation which might include prompt attention to the default, existence of a meritorious defense, appellate court's reliance on trial court's discretion and the policy of trial on the merits. Furthermore, there are limits on the extent to which the distinction will be car-

> ried . . . . The problem thus is not so much who made the cause for dismissal but the substance of the cause.

219 N.W.2d at 24. We must therefore look to the factor that the mistake was the fault of the attorney and not the client in determining whether reinstatement should have been granted.

In Wharff, the Iowa Supreme Court found that there was inadequate proof of excusable mistake or oversight. 219 N.W.2d at 25. The court in its discretion considered numerous factors which would indicate that reinstatement was in order, including the complex nature of the case and plaintiff's statement that the case could not be tried before January 1. Id. at 21-25. The court, however, found great significance in the fact that for nine months there was little activity by plaintiffs in prosecuting the case and that there was little effort to collect evidence. Id. at 23. The court, emphasizing this, concluded there was no proof of mistake or oversight. Id. at 25.

In Rath, the Iowa Supreme Court held that the attorney's failure to take action after receiving a notice that the case must be tried by January 1 was sufficient proof of excusable neglect. 199 N.W.2d at 337. The attorney in Rath had been diligently attempting to have his case assigned to trial and had relied on the district court judge to let him know when the case would be assigned. Id. at 335. The attorney, at the reinstatement hearing, testified that, "Well, it just plain slipped my mind. I was busy on other matters. I had been told by Judge Braginton at all times he would let me know and just slipped (up) on it." Id. at 336. The Rath court, while disapproving of attorneys relying on a promised event instead of independently ensuring that cases are assigned a trial date, found that under the circumstances the oversight was excusable. Id. at 337.

More recently, in Matter of Estate of Bearbower, 376 N.W.2d 922, 923 (Iowa Ct. App. 1985), plaintiffs requested a continuance on a hearing, which was granted. Plaintiffs were also granted leave to amend their petition. Id. A notice pursuant to rule 215.1 was timely sent to the parties, but no action was taken, and the case was dismissed for want of prosecution. Id. The court in Bearbower, upon a lengthy analysis of the Rath-Wharff line of cases, held that under the circumstances of that case the oversight was excusable. Id. at 925. In rendering its decision, the court in Bearbower noted that the mitigating factors in favor of reinstatement were the complex nature of the case, it could not be tried before January 1, and the attorney was otherwise diligent. Id. The court did note, however, that there was a period of seven months when no documents were filed by the plaintiffs. Id. The key factor in Bearbower, according to the court, was the fact that the parties had previously stipulated that the plaintiffs' attorney had been diligently pursuing the case. Id.

A recurring theme running throughout the cases discussed in our analysis is that when an attorney fails to file a timely motion for continuance and the case is dismissed pursuant to rule 215.1, the court will reinstate the case if there is a showing by the movant that the attorney had been diligently pursuing the case but simply overlooked the rule 215.1 deadline. The courts have also looked to the complex nature of the case and will look to whether discovery or other action has been taking place. Where, however, the record reveals that the case was dismissed solely because the attorney became busy and forgot, no justification will lie for reinstating the dismissed case.

Upon examining the circumstances of this case as a whole, I do not believe that plaintiffs' attorney's excuse that he was busy in other cases is sufficient proof of a good faith intent to prosecute the case. The record reveals that in the two years prior to dismissal, little if any discovery had been accomplished.

The interrogatories propounded to the plaintiffs on June 28, 1983, were not answered until January 27, 1984, after a court order. Following this date, no action whatsoever was taken until December 28, 1984, when plaintiffs' attorney filed the application for a continuance, only three days before the deadline for dismissal under rule 215.1. Plaintiffs' counsel's explanation as to why he failed to timely file his application is that he was busy with other cases. Simply arguing that he was busy with other cases, without more, is not sufficient to require us to order a mandatory reinstatement.

Nor do I believe the trial court abused its discretion in denying plaintiffs' motion to reinstate. Our review in those areas in which a trial court exercises its discretionary power under rule 215.1 is similar to that we employ in rulings under Iowa Rule of Civil Procedure 236. Wharff, 219 N.W.2d at 25. We will reverse only if there is a showing of an abuse of discretion. Rath, 199 N.W.2d at 336. Such abuse of discretion will be found only if the trial court's ruling is not supported by substantial evidence. Id. Thus, unless the trial court's use of its discretionary powers was exercised on grounds clearly untenable or unreasonable, we will not interfere with its ruling. Glenn v. Farmland Foods, Inc., 344 N.W.2d 240, 243 (Iowa 1984).

As noted earlier, the evidence before the trial court showed there had been a near total lack of activity from January 27, 1984, the day on which plaintiffs' answers to defendant's interrogatories were filed and December 28, 1984, the date on which plaintiffs filed their application for a continuance. No explanation other than the attorney's statement that he was busy with other cases was ever provided. Furthermore, I note that the motion for reinstatement was not filed within a short time after dismissal, but was filed over five months later. I therefore believe that there was no evidence before the trial court to substan-

tiate a showing of oversight, mistake, or other reasonable cause, and I cannot say that the district court abused its discretion in failing to reinstate this case.

This case was particularly difficult in light of the allegations set forth in plaintiffs' original petition. While we have repeatedly held that we prefer a full trial on the merits, I believe we must, however, confine such preference to expeditious trials under settled rules of civil procedure. To further promote our goal of expeditious trials on the merits, we must balance the tension between the goal of protecting each plaintiff's right to their day in court with the purpose and intent of rule 215.1 in preventing unnecessary delays. While rule 215.1 undoubtedly imposes hardship on those litigants whose suit is lost, we must draw the line between those cases where good faith efforts were made to prosecute or defend a case, but through justifiable mistake or oversight were dismissed, and those cases where lack of due diligence resulted in dismissal. To hold otherwise would render the basic impetus of rule 215.1 meaningless. I would therefore hold that the trial court was correct in denying plaintiffs' motion to reinstate.