IN THE COURT OF APPEALS OF IOWA

No. 0-795 / 99-2058
Filed April 27, 2001

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CLERK SUPREME COURT

ROBERT W. JOHNSON and ELOISE M. JOHNSON,
Plaintiffs-Appellants/Cross-Appellees,

vs.

NORTHWEST IOWA HOSPITAL CORPORATION, DES MOINES ANESTHESIOLOGIST, P.C., WILLIAM BERG, IOWA HEART, LUNG & VASCULAR SURGEONS, P.C., and JAMES R. SKINNER,
Defendants-Appellees/Cross-Appellants.

Appeal from the Iowa District Court for Polk County, Robert D. Wilson, Judge.

Plaintiffs appeal from a summary judgment entered against them on their personal injury and loss-of-consortium claims. Defendants cross-appeal, contending the court erred by reinstating the action following its dismissal pursuant to Iowa Rule of Civil Procedure 215.1. **CROSS-APPEAL REVERSED; APPEAL RENDERED MOOT.**

Curt Krull of Roehrick, Hulting, Krull & Blumberg, P.C., Des Moines, for appellants.

Tom Finley, Jack Hilmes, and Kerry A. Finley of Finley, Alt, Smith, Scharnberg, Craig, Hilmes & Gaffney, P.C., Des Moines, for appellees.

Heard by Streit, P.J., and Hecht and Vaitheswaran, JJ.

STREIT, P.J.

Mark Twain quipped, "Do not put off till tomorrow what can be put off till day-after-tomorrow just as well." Mark Twain, *More Maxims of Mark* (Merle Johnson ed., 1927), http://www.marktwain.about.com/arts/marktwain/library/texts/bl_moremaxims.htm (last visited March 2, 2001). Iowa Rule of Civil Procedure 215.1, thinking of the Twain in all of us, promotes the expeditious trial of cases. Pursuant to the rule, Robert and Eloise Johnson's case was dismissed for want of prosecution. We reverse the district court's order reinstating the case.

I. Background Facts & Proceedings.

Robert Johnson underwent surgery in June of 1995 at Iowa Lutheran Hospital to repair an abdominal aortic aneurysm. Shortly after the surgery, he discovered he had an injury comparable to a burn on his back. Robert and his wife filed a petition in June of 1997 alleging Robert sustained this injury during his surgery two years earlier. The Johnsons named Robert's treating doctors and their employers as the defendants responsible for his injury.

In July of 1998 the Polk County Clerk of Court sent a dismissal notice saying the Johnsons' case would be dismissed pursuant to Iowa Rule of Civil Procedure 215.1 on January 2, 1999, if not tried before that date. The Johnsons' case was not timely tried and, accordingly, was dismissed in January of 1999. Four months later the Johnsons filed an application seeking reinstatement of their case. The district court reinstated the case in May of 1999.

In October of 1999 the defendants filed a motion for summary judgment alleging the Johnsons could not establish their claims because their failure to

comply with section 668.11 of the Iowa Code precluded them from offering expert medical testimony.[1] The district court granted the defendants' motion for summary judgment.

Both parties appeal. The Johnsons claim summary judgment was inappropriate because, under the doctrine of res ipsa loquitur, they did not need expert testimony to establish their claims. On cross-appeal, the defendants claim the case should not have been reinstated after it was dismissed pursuant to rule 215.1. We address only the latter issue.

II. The Merits.

Rule 215.1 promotes the "expeditious trial of cases on the merits by clearing the docket of dead cases and assuring 'the timely and diligent prosecution of those cases that should be brought to a conclusion.'" *O'Brien v. Mullapudi*, 405 N.W.2d 815, 816 (Iowa 1987) (citing *Brown v. Iowa Dist. Court*, 272 N.W.2d 457, 458 (Iowa 1978)). If a case has been dismissed pursuant to the rule, it may be subject to mandatory reinstatement or discretionary reinstatement following timely application for reinstatement. Iowa R. Civ. P. 215.1; *O'Brien*, 405 N.W.2d at 816-17. Mandatory reinstatement is required "upon a showing that [the rule 215.1] dismissal was the result of oversight, mistake or other reasonable cause." Iowa R. Civ. P. 215.1.

The district court reluctantly concluded the dismissal of the Johnsons' case resulted from an "oversight mistake" and thus reinstatement was

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[1] Section 668.11 requires a "party in a professional liability case brought against a licensed professional . . . who intends to call an expert witness . . . [to] certify . . . the expert's name, qualifications and purposes for calling the expert" within a certain time period. Iowa Code § 668.11 (1997).

mandatory. In reaching this conclusion, the court accepted the Johnsons' argument their failure to prosecute their case was partially excused by the court administrator's failure to send notice of a scheduling conference to their attorney after they filed their petition in 1997. The court, citing *Holland Bros. Construction Co. v. Iowa Department of Transportation*, 434 N.W.2d 902, 904 (Iowa Ct. App. 1988), stated "current Iowa case law has [the] practical effect" of "encourag[ing] attorneys to rely on court administration to meet a party's obligation under Rule 215.1."[2]

We review the court's reinstatement of the Johnsons' case for a correction of errors at law. *Ray v. Merle Hay Mall, Inc.*, ___ N.W.2d ___ (Iowa Ct. App. 2000). "A prerequisite to either [mandatory or discretionary] reinstatement is a showing by plaintiffs of reasonable diligence in preparing and pursuing the case for trial." *O'Brien*, 405 N.W.2d at 817; *see also* Iowa R. Civ. P. 215.1 ("It is the declared policy that *in the exercise of reasonable diligence* every civil and special action, except under unusual circumstances, shall be brought to issue and tried within one year from the date it is filed and docketed and in most instances within a shorter time.") (emphasis added). Here, the court made the following finding:

> Most cases in the system are handled in a timely fashion; however, this is not one of them. Plaintiffs waited the full two years

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[2] *Holland*, a case in which this court held the plaintiff was entitled to mandatory reinstatement, contains the following language:

> The Iowa Supreme Court in *Gold Crown Properties v. Iowa District Court*, 375 N.W.2d 692, 696 (Iowa 1985), acknowledged modern court structure mandates we recognize the extent of judicial administrative duties currently carried out by court administrators. We believe the result of these administrators' expanded duties is attorneys now place much more reliance on administrative acts of these persons.

Holland, 434 N.W.2d at 904.

> to file their lawsuit. Plaintiffs delayed further in not timely serving defendants. *Plaintiffs made no effort to get the case scheduled for trial, not even during the five months after the Rule 215.1 notice went out.*

(Emphasis added.) This finding—for which there is ample support in the record—should have led to the denial of the Johnsons' application for reinstatement: The Johnsons did not respond to the defendants' January 1998 discovery requests; they did not follow-up on the clerk's July 1998 dismissal notice in any way other than by applying for reinstatement in April 1999; and they did not reply to defendants' December 1998 letter asking whether they intended to proceed with litigation. Simply put, the Johnsons did not do anything demonstrating reasonable diligence in preparing and pursuing their case for trial.

We recognize court administrators have broader duties than they once did. This fact, however, does not provide the Johnsons with a valid excuse for failing to diligently prepare and pursue their case for trial. *Holland* does not say otherwise. In that case, this court found the plaintiffs "had proven oversight mistake sufficient to merit mandatory reinstatement" given their reliance on certain acts of the court administrator. *Holland*, 434 N.W.2d at 904. However, we also found they had "at all times diligently attempted to move [their] action toward trial" and "[n]othing in [the] record indicate[d] the plaintiffs [had] been dilatory in any way." *Id.* In contrast, nothing was done to move this case to trial. There is no evidence that sending notice of a scheduling conference a few months after the filing of this case would have helped save the case from inaction. This is especially true considering the rule 215.1 notice of pending dismissal had no effect. Accordingly, we reverse on the defendants' cross-

appeal and dismiss the Johnsons' petition. Costs are taxed against the Johnsons.

CROSS-APPEAL REVERSED; APPEAL RENDERED MOOT.

Vaitheswaran, J., concurs; Hecht, J., dissents.

HECHT, J. (dissenting).

I respectfully dissent. Johnson claims to have suffered what he believes to be a burn injury on his upper back during a surgical procedure for a lumbar spine problem. The nature of the injury and the limited potential damage recovery in this case did not justify the expenditure by the Johnsons or their counsel of substantial litigation expenses for expert testimony. Plaintiffs' comparatively small potential recovery and defendants' correspondingly small exposure also limited the amount of time reasonable counsel could be expected to spend on the case. Both sides recognized this and, for an extended period of time, considered the possibility of settlement.

The realities of the practice of law within the specialty area of medical negligence make it extremely difficult for moderately injured plaintiffs to find experienced attorneys to represent them in meritorious low-budget cases. The standard of "reasonable diligence" should be applied in a manner that does not make access to the courthouse even more difficult for such litigants. We should leave room for the possibility that a reasonable plaintiff's counsel in a medical negligence claim might reasonably elect to simply file the action and proceed to trial without conducting formal discovery.[3] In short, under the circumstances of this case, I cannot join the majority's determination that, as a matter of law, plaintiffs failed to exercise reasonable diligence in preparing and pursuing this case for trial. The district court's finding the dismissal was the result of an oversight or mistake is supported by substantial evidence in the record.

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[3] This is especially true in a case where plaintiff relies upon the doctrine of res ipsa loquitur.

Accordingly, I would affirm the district court's reinstatement of the Johnsons' petition pursuant to Iowa Rule of Civil Procedure 215.1.

I would also reverse the summary judgment in favor of defendants. The summary judgment record presents a genuine issue of material fact as to whether Johnson sustained an upper back burn injury while in defendants' care for lumbar spine surgery. Although defendants deny the injury was sustained while under their exclusive control, a reasonable juror could find on this record (1) the injury to a healthy part of Johnson's body, which was not within the area of the operation, occurred while he was under defendants' exclusive control during the surgery, and (2) the injury would not have occurred if reasonable care had been exercised by defendants. *See Wick v. Henderson*, 485 N.W.2d 645, 648-50 (Iowa 1992). Plaintiffs' failure to designate an expert on liability was not dispositive here because they generated a genuine issue of material fact as to the foundation facts of *res ipsa loquitur*. *Id.* at 648. Accordingly, I would reverse the district court's grant of summary judgment and remand for trial.