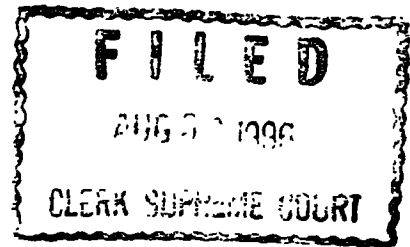


IN THE COURT OF APPEALS OF IOWA

No. 6-248 / 95-921



SHARON A. GILL and MATT W. GILL,

Plaintiffs-Appellants,

vs.

TONJA SCHULTE,

Defendant-Appellee.

Appeal from the Iowa District Court for Allamakee County, Margaret L.
Lingreen, Judge.

Plaintiffs appeal from the district court's dismissal of their personal injury action
against Tonja Schulte. **AFFIRMED.**

David W. Stamp of Ball, Kirk, Holm & Nardini, P.C., Waterloo, for appellants.

David L. Riley of Yagla, McCoy & Riley, Waterloo, for appellee.

Considered by Habhab, P.J., and Huitink and Streit, JJ.

STREIT, J.

Appellant appeals an order dismissing her petition for serving an original notice on defendant 147 days after filing her Petition.

Sharon Gill claims she was injured by an Allamakee county resident on August 3, 1992, in an automobile accident in Allamakee County. She filed a pro se petition in Delaware county¹ against Tonja Schulte on August 2, 1994, two days before the statute of limitations would expire. The petition was delivered to the clerk without the original notice and directions for service.

On November 15, 1994, Gill's attorney filed an appearance, motion for change of venue, and "recast petition at law." The motion was sustained and Gill filed a "recast petition at law" on December 22, 1994, in Allamakee County attaching the previous petition. The "recast" petition added Matt Gill as a Plaintiff. Schulte was served with an original notice, a copy of the original pro se petition, and the "recast petition" on December 27, 1994, 147 days after the pro se petition was filed.

Schulte filed a motion to dismiss, arguing the 147-day delay was presumptively abusive. An evidentiary hearing was held. The district court dismissed the Gills' petition.

¹

Delaware County has no other apparent connection with this case.

I. Rule 49(b) Service on Defendant

Our review is for errors at law. Iowa R. App. P. 4. A Plaintiff filing a petition is obligated to file written directions for service of the original notice with the petition. Iowa R. Civ. P. 49(a). The petition, original notice, and directions for service must then be promptly delivered for service on the defendant. Iowa R. Civ. P. 49(b). Although these rules do not specify when service must be made, there is a clear authority providing for dismissal if there is abusive delay in completing service on the defendant. *Bean v. Midwest Battery & Metal, Inc.*, 449 N.W.2d 353, 354-55 (Iowa 1989); *In re Steinberg*, 443 N.W.2d 711, 713-14 (Iowa 1989). In making this determination, the court considers the length of delay and whether the delay was intentional. *Taylor v. Wiebold*, 390 N.W.2d 128, 129-30 (Iowa 1978). When a delay is presumptively abusive, Plaintiff bears the burden of justification for the delay. *Bean*, 449 N.W.2d at 356. In this case, the trial court held service of the petition was untimely. The 147-day delay between filing of the pro se Petition and service upon the Defendant was presumptively abusive and Plaintiffs did not meet their burden of justification for delay. We agree.

In *Turnbull v. Horan*, a 126-day delay was found to be presumptively abusive. See *Turnbull v. Horan*, 522 N.W.2d 860, 861 (Iowa App. 1994). The delay in that case was lengthy enough to place the case in conflict with the Iowa Supreme Court's order²

² Iowa Supreme Court order of August 22, 1985, suggests that within 120 days of when a suit is on file a notice should go out to both parties from the court

concerning time standards for case processing. *Id.* We did not adopt a specific deadline within which service must be made on the defendant. Here, there was a 147-day delay between filing the pro se Petition and serving notice on Schulte. This delay is presumptively abusive and the burden shifts to the Gills to show justification for delay.

There may be cases in which lengthy delays may be justified. *Bean*, 449 N.W.2d at 356. The Gills claim ongoing negotiations between them and Schulte's insurance company concerning a settlement is sufficient justification for delay. They claim it was understood there would be no need for personal service of notice on Schulte until such time as the negotiations collapsed or concluded. Although not required, there is no evidence of a mutual agreement or waiver between the insurance company and Plaintiff. The reason cited by Plaintiffs is not sufficient justification for the delay. The district court is therefore affirmed.

II. Rule 179(b) and Rule 252

Gills filed a 179(b) motion and brought an action based under Iowa Rule of Civil Procedure 252 on the grounds of additional evidence and fraud allegations. An action based on rule 252 requires petition and notice under rule 253. *See Iowa R. Civ. Pro.* 252, 253. The procedure under rule 252 was not followed by Plaintiffs and no action under rule 252 exists. The allegations of fraud and additional evidence go

administrators, setting up a scheduling conference consistent with the Iowa Supreme Court guidelines on time standards for a case processing.

instead toward Plaintiffs' 179(b) motion as further points and argument against dismissal.

A. Additional Evidence

Plaintiffs urged the court to consider an affidavit from Plaintiffs' attorney and supporting exhibits upon their 179(b) motion. A court will not consider additional evidence under a 179(b) motion. *See Iowa R. Civ. Pro. 179(b)*. A 179(b) motion may not act as a revolving door for the parties to continually enter in evidence not submitted at the hearing because they did not think it was important. Plaintiffs chose to cite ongoing communications between Plaintiffs and Defendant's insurer as an excuse for the delay. The district court ruled no evidence was presented to indicate that Defendant's insurer and Plaintiff had mutually agreed to or waived Defendant's service. The Gills misunderstand this ruling to mean they now have to show an actual agreement between them and the insurance company for the delay. The district court was simply stating, however, had the Gills submitted an agreement to a delay in Defendant's service, this would go to prove their burden of sufficient justification for delay. Plaintiffs sought to admit as new evidence an affidavit by Plaintiff's attorney and supporting exhibits pertaining to communications between Plaintiff's counsel and the claims adjuster for Schulte's insurer. This evidence was correctly not considered by the court under the 179(b) motion.

B. Fraud and Irregularity

Plaintiffs contend the district court relied on a fraudulent affidavit submitted by Schulte's insurer in its ruling. The Gills had knowledge of the contents of the affidavit prior to the district court hearing and elected not to dispute those contents or seek a continuance of the hearing to respond because they did not believe the affidavit was relevant. Plaintiffs urge the judgment should be set aside because of irregularity or fraud practiced in obtaining the same and should be considered as proof of justification for delay. An allegation of fact known to be false and the establishment of such fact by testimony also known to be false, do not constitute fraud authorizing proceedings to set aside the Judgment. *Hedrick v. Smith & Reed*, 137 Iowa 625, 115 N.W. 226 (1908). The trial court correctly denied Plaintiff's 179(b) motion based on fraud.

AFFIRMED.