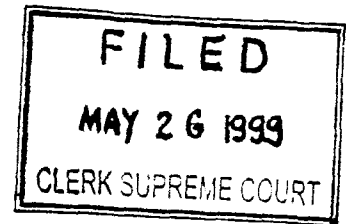


IN THE COURT OF APPEALS OF IOWA

No. 8-713 / 97-2347



GUENEVERE "SUE" REED Executor of the Estate of
Michelle Renee Vigus, Deceased; GUENEVERE "SUE" REED
and DENNIS S. REED, Guardians and Conservators of ZANE
NICHOL and GENNE VIGUS, Minors; and GUENEVERE "SUE"
REED and DENNIS S. REED, Wife and Husband, Individually,

Plaintiffs-Appellants,

vs.

FARMLAND INDUSTRIES INC., a Kansas Profit Corporation,
and MICHAEL I. JOHNSON,

Defendants-Appellees.

Appeal from the Iowa District Court for Greene County, Gary L. McMinimee,
Judge.

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

Steven H. Shindler and Andrew B. Howie of Smith, Schneider, Stiles, Hudson
Serangeli Mallaney & Shindler, P.C. Des Moines, for appellants.

Thomas J. Logan and Hugh J. Cain of Hopkins & Huebner, P.C., Des Moines,
for appellees.

Considered by Huitink, P.J., Mahan, J., and Hayden, S.J.* Sackett, C.J., takes
no part.

*Senior judge assigned by order pursuant to Iowa Code § 602.9206 (1997).

PER CURIAM

The plaintiffs appeal the district court's dismissal of their personal injury action against the defendants. We affirm the district court's dismissal because the six-month delay in service of the original notice to the defendants was presumptively abusive with no justification.

In July 1995, Guenevere (Sue) Reed was a passenger in a car driven by her daughter, Michelle Vigus; also in the automobile were Michelle's two children, Zane Nichols and Genne Vigus. An automobile driven by Michael Johnson crossed the center line and collided with the Vigus automobile. Michelle was killed, while Sue, Zane, and Genne were severely injured in the collision. At the time of the accident, Johnson was acting in the course of his employment for Farmland Industries (hereinafter "Farmland") and was driving a vehicle owned by Farmland.

On January 7, 1997, Sue and Dennis Reed (hereinafter collectively and singularly referred to as "Reed"), represented by their attorney, Stephan Rosman, met with Farmland's insurance carrier, Wausau, to mediate the claims arising from the accident. On February 25, 1997, G.E. Taylor, a Wausau claims representative, called Rosman regarding a possible settlement.

On April 14, 1997, Rosman filed a lawsuit on behalf of Reed against Farmland. Taylor attempted to contact Rosman twice in May 1997 to discuss settlement; however, Rosman did not return either of the calls. On June 23, 1997, Taylor called Rosman to discuss the settlement and informed Rosman that attorney Thomas Logan could accept service on behalf of Farmland. Rosman informed Taylor that he had

prepared a petition against Farmland. It is in dispute as to whether Taylor was aware at this time the petition was on file; also in dispute is whether Logan pressured Rosman to continue the negotiations before commencing litigation. For whatever reason, Farmland, through its registered agent, was not served until October 8, 1997; Michael Johnson never received notice of the petition. The service was approximately six months (178 days) after the filing of the petition.

On October 24, 1997, counsel representing Farmland and Johnson filed a motion to dismiss for failure to procure timely service on the defendants. A hearing was held on the motion in November 1997. In December 1997, the trial court ruled the motion should be sustained for failure to obtain timely service. Reed appeals.

Generally, we do not favor the filing or granting of motions to dismiss. *Cutler v. Klass, Whicher & Mishne*, 473 N.W.2d 178, 181 (Iowa 1991). We review the district court's ruling on a motion to dismiss for the correction of errors at law. *Alvarez v. Meadow Lane Mall Ltd. Partnership*, 560 N.W.2d 588, 590 (Iowa 1997). The district court's findings of fact are binding on appeal unless not supported by substantial evidence. *Dennis v. Christianson*, 482 N.W.2d 448, 450 (Iowa 1992). Since the rules of civil procedure at the time of this action did not specifically address when service of the original notice must be accomplished, we must examine whether the delay was abusive under then existing rules of civil procedure and case law.¹

¹ Our rule now provides:

If service of the original notice is not made upon the defendant, respondent, or other party to be served within 90 days after filing the petition, the court, upon motion or its own initiative after notice to the party filing the petition,

Reed contends the delay in service of the original notice was due to the actions of Farmland's insurance representative, Taylor. Reed claims Taylor insisted on delaying litigation in order to promote settlement negotiations and not to serve Farmland until there had been further negotiations. At all material times of this case, the Iowa Rules of Civil Procedure did not offer a specific time limit on serving notice. Without a specific time limit, the court established guidelines in determining whether delay in service of an original notice was abusive. The court must first determine if the delay was presumptively abusive. If the delay was presumptively abusive, the court must then determine if the plaintiff has carried the burden of proving the delay was justified. If it was not justified, the case must be dismissed. If the delay was justified, dismissal by reason of abusive delay is inappropriate. *Mokhtarian v. GTE Midwest Inc.*, 578 N.W.2d 666, 668 (Iowa 1998) (a seven-month delay was presumptively abusive); *Henry v. Shober*, 566 N.W.2d 190, 192-93 (Iowa 1997) (169-day delay in serving the defendant with original notice was presumptively abusive); *Alvarez*, 560 N.W.2d at 591 (Iowa 1997) (159-day delay in serving the defendant was presumptively abusive).

The first prong of the test we must address is whether Reed's delay of 178 days was presumptively abusive. Reed claims the delay in service was not presumptively

shall dismiss the action without prejudice as to that defendant, respondent, or other party to be served or direct an alternate time or manner of service. If the party filing the papers shows good cause for the failure of service, the court shall extend the time for service for an appropriate period.
Iowa R. Civ. P. 49(f) (effective January 24, 1998).

abusive since Reed was not at fault for the delay. Reed argues Taylor was the reason behind the delay in service. Reed alleges Taylor informed Rosman that further settlement attempts should be made before litigation. Rosman relied on the promise of ongoing negotiations in not serving Farmland; also, it was believed by Reed if service was attempted the settlement negotiations would cease. There is nothing in the record to support the threat of ending negotiations upon the filing of the petition.

At the time of this action there was no time requirement as to when an original notice must be served; however, in *Turnball v. Horan*, we accepted Federal Rule of Civil Procedure 4(j) as our persuasive guideline for determining a presumptively abusive delay. *Turnball v. Horan*, 522 N.W.2d 860, 871 (Iowa App. 1994). Federal Rule of Civil Procedure 4(j) provides that service is prompt if made within 120 days of filing a complaint. *Thomsen v. United Parcel Serv., Inc.*, 792 F.2d 115, 118 (8th Cir. 1986). In analyzing our rules 49(a) and (b), federal case law interpreting similar federal statutes constitutes persuasive authority although not conclusive authority. See *Mount Pleasant Community Sch. Dist. v. Public Employment Relations Bd.*, 343 N.W.2d 472 (Iowa 1984). Even if Reed's delay in service was not motivated by a last minute chance to "ice" the statute of limitations, we believe the delay was presumptively abusive. The persuasive federal authority, along with a long line of Iowa cases, support our belief that a delay beyond 120 days is presumptively abusive. See *Mokhtarian*, 578 N.W.2d at 668 (a seven-month delay was presumptively abusive); *Henry*, 566 N.W.2d at 192-93 (169-day delay in serving the defendant with

original notice was presumptively abusive); *Alvarez*, 560 N.W.2d at 59 (159-day delay in serving the defendant was presumptively abusive); *Turnball*, 522 N.W.2d at 861 (four-month delay was presumptively abusive).

The second prong of the test comes after we have determined the existence of a presumptively abusive delay. We must now determine if the plaintiff was justified in the delay. Adequate justification for delay in service is equated to good cause. Our definition of good cause requires:

[t]he plaintiff must have taken some affirmative action to effectuate service of process upon the defendant or have been prohibited, through no fault of his [or her] own, from taking such an affirmative action. Inadvertence, neglect, misunderstanding, ignorance of the rule or its burden, or half-hearted attempts at service have generally been waived as insufficient to show good cause.

Henry, 566 N.W.2d at 193; *McCormick v. Meyer*, 582 N.W.2d 141, 145 (Iowa 1998).

Reed relies on the argument that Taylor's stalling tactics influenced the decision to delay the service and, along with the threat of the negotiations ending, justified the delay of service. We do not accept this argument. Once again there is nothing in the record to support the argument that negotiations would end, and there is nothing in the request to continue negotiations which leads us to believe Reed was justified in delaying service. Once a petition is filed, the plaintiff bears the burden of ensuring the service of the original notice and petition on the defendant is both proper and timely. *Mokhtarian*, 578 N.W.2d at 669. We do not support the use of ongoing negotiations as a justification for a delay of service. As we found in *Henry*, settlement negotiations, even if done in good faith, do not constitute adequate

justification or good cause for delaying service. *Henry*, 566 N.W.2d at 193. Since the delay **was** not justified, the case was properly dismissed by the trial court.

Reed argues the holding of *Henry v. Shober* should be reversed. The supreme court concluded that fostering settlement negotiations does not justify delinquent service. *Id.* Reed contends insurance companies already have the upper hand in negotiation settlements and this ruling further hinders a plaintiff's case against an insurance company. Farmland contends there is no factual demonstration that insurance companies are in better positions and the determination of who has the upper hand is based on the perspective of the speaker. *Henry* is not a wildcard holding lacking precedent and supporting cases to follow. Instead, *Henry* is in the family of a long line of cases focused on ensuring the timely service of the original petition upon the defendant. We observe the supreme court has not wavered in its decisions following *Henry*, and if the case is to be overturned, the supreme court should be the court to do it.

The facts of this case support the trial court's decision to dismiss the case. There is no basis, other than a misplaced reliance on an unproven threat, to justify the delay. It is important that future plaintiffs are aware of the consequences of an untimely service; therefore, this case should be affirmed.

AFFIRMED.

No. 97-2347. [8-713] REED v. FARMLAND INDUSTRIES

Appeal from the Iowa District Court for Greene County, Gary L. McMinimee, Judge. **AFFIRMED.** Considered by Huitink, P.J., Mahan, J., and Hayden, S.J. Sackett, C.J., takes no part. Opinion by Hayden, S.J. (7 pages \$2.80)

In July 1995, Guenevere (Sue) Reed was a passenger in a car driven by her daughter, Michelle Vigus. Michelle's two children were also in the car. An automobile driven by Michael Johnson crossed the center line and collided with the Vigus automobile. Michelle was killed instantly and Sue and the children were severely injured. Michael Johnson was acting in the course of his employment for Farmland Industries at the time of the accident and driving an automobile owned by Farmland. In January 1997, Sue and her husband, represented by their attorney, Stephan Rosman, met with Farmland's insurance carrier, Wausau, to mediate claims arising from the accident.

No. 97-2347. [8-713] REED v. FARMLAND INDUSTRIES (continued)

In February 1997, G.E. Taylor, a Wausau claims representative called Rosman regarding a possible settlement. In April, Rosman filed a lawsuit on behalf of Reed against Farmland and Johnson. Farmland was not served notice of the original petition until October 1997, approximately six months (178 days) after the filing of the petition; Johnson was never served. Farmland and Johnson filed a motion to dismiss for failure to procure timely service. In December 1997, the trial court dismissed the petition. Reed appeals. **OPINION HOLDS: I.** At the time of this action the rules of civil procedure did not specifically address when service of the original notice must be accomplished. Without a specific time limit, we looked to see if the delay was presumptively abusive and if it was abusive, whether or not the delay was justified. We first looked to see if the delay of 178 days was presumptively abusive. Reed contends the delay was not presumptively abusive because Reed was not at fault for the delay. Reed argues Taylor urged Reed not to file a petition but rather to continue negotiations. Rosman relied on the promise of ongoing negotiations in not serving Farmland. We applied persuasive authority from the federal rules of civil procedure setting 120 days as the time limit. The persuasive authority together with a long line of Iowa cases supporting the 120 days provide the basis for our decision that Reed's delay of 178 days was presumptively abusive. **II.** The second prong of the test was to determine if the delay was justified. Adequate justification for delay is equated to good cause. Reed argues the delay was justified because of the stalling tactics used by Taylor along with the threat of negotiations ending if the petition was filed. There is nothing in the record to support the notion that negotiations would have ended if the petition was filed. We do not support the use of ongoing negotiations as a justification for a delay in service. Since the delay was abusive and not justified, the case was properly dismissed by the trial court. **III.** Reed contends the holding in *Henry v. Shober*, 566 N.W.2d 190, 192-93 (Iowa 1997), should be reversed. In *Henry*, the supreme court concluded that fostering settlement negotiations does not justify delinquent service. We observe the supreme court has not wavered in its decisions following *Henry* and we will not reverse *Henry*.