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DEC 27 1979
CLERK SUPREME COURT

IN THE COURT OF APPEALS OF IOWA

JUDITH KAY DOESCHER and LEON HENRY DOESCHER,

Plaintiffs-Appellants,

vs.

WILLIAM L. BUHROW, M.D.,

Defendant-Appellee.

Filed December 27, 1979

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2-63204

Appeal from Clinton District Court - Max R. Werling, Judge.

Plaintiffs appeal summary judgment for defendant in medical malpractice suit, which was granted because the statute of limitations had not been tolled by plaintiffs' allegedly defective filing. Reversed and Remanded.

Timothy S. White & J. Richard Johnson of White, Wenzel & Piersall, Cedar Rapids, for plaintiffs-appellants.

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

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

DONIELSON, J.

Plaintiffs appeal summary judgment for defendant in medical malpractice suit. For reversal, plaintiffs contend their instructions to the clerk of court to not serve the original notice immediately did not prevent their filing of the petition from tolling the statute of limitations. They also contend defendant's objections to any procedural defects in filing the petition or serving of notice were waived because they were not raised in a special appearance. We reverse the summary judgment and remand this action for further proceedings to allow plaintiffs to press their claims.

I.

Plaintiffs personally filed a petition, original notice, and directions for service with the clerk of court on July 28, 1978. The petition alleged defendant had negligently injured Judith Doescher during an operation on July 30, 1976, and asked for $50,000 for damages to Judith and $10,000 for Leon Doescher's damages arising from his wife's medical problems. The original notice provided to the clerk by the plaintiffs was not delivered to the sheriff for service until September 12, 1978; defendant was served on September 25, 1978.

On October 12, 1978, defendant filed a motion for summary judgment alleging plaintiffs had asked the clerk to delay service. The motion initially asked summary judgment be granted for failure to comply with Iowa R. Civ. P. 49; but an amendment to the motion, filed October 26, 1976, asserted plaintiffs' petition should be considered as filed as of the date of service, thus failing to toll the statute of limitations within the required time and barring the action. Plaintiffs resisted the motion by asserting the filing of a general appearance waived the objection to defects in service and filing the petition did toll the limitations period. The trial court initially overruled the motion for summary judgment since defendant was not prejudiced by the delayed service. Defendant filed a motion to reconsider that emphasized the statute of limitations argument. On February 8, 1979, the trial court filed a ruling on defendant's motion to reconsider that reversed its earlier ruling and granted defendant's motion for summary judgment. The ground for this ruling was plaintiffs' efforts to delay service, which the court viewed as preventing the filing of their petition from tolling the statute of limitations; since plaintiffs had discovered the injury on July 30, 1976, the statute of

limitations was not tolled in time, and the action was barred. From that judgment, plaintiffs bring this appeal.

II.

The controlling issue in this case is whether plaintiffs' action of instructing the court clerk "not to serve the petition immediately" was an intentional bypass of some of the steps for starting an action. If plaintiffs' action falls within such a category, then the holding of Scieszinski v. City of Wilton, 270 N.W.2d 450 (Iowa 1978), is controlling and summary judgment for defendant was correctly granted. A close analysis of Scieszinski, the Iowa Rules of Procedure, and the policies behind them leads us to conclude, however, plaintiffs' actions did not invalidate the filing of the petition with the clerk of court and the action was commenced within the limitation period.

In Scieszinski v. City of Wilton, 270 N.W.2d 450 (Iowa 1978), plaintiff filed a petition against the City of Wilton within the six-month limitations period of section 613A.5, The Code 1977. Scieszinski, 270 N.W.2d at 451. Simultaneously, however, plaintiff filed a motion and order ex parte requiring the clerk to seal the file, thus preventing service of process. Id. The order was vacated and defendant was served after the six-month period had passed. Id. at 452. The trial court held the action was barred by the statute of limitations. Id. On appeal, the supreme court held the limitations period was not tolled under the circumstances, although the petition was technically filed in a timely manner. Id. The supreme court viewed the allowing of plaintiff to "intentionally bury an action" as frustrating one basic purpose of the limitations statute--prompt notification to the defendant of the action. Id.

The differences between plaintiffs' delaying action here and that of the plaintiff in Scieszinski distinguishes these two cases sufficiently so that a different result is warranted. Here, plaintiffs instructed the clerk not to serve the papers immediately. Plaintiffs possessed no legal authority to make such an instruction. In contrast, the plaintiff in Scieszinski obtained an ex parte judicial order sealing the order, motion, and petition, Scieszinski, 270 N.W.2d at 451, which prevented the clerk from processing the documents for service. Here, the clerk clearly was without authority to delay the service of the papers. Iowa R. Civ. P. 49, requires the clerk after the filing of the petition to deliver immediately for service the original notice, petition, copies of these

documents, and directions for service to the sheriff or other appropriate person. If the clerk considered herself bound by plaintiffs' instructions, she should have refused to file the petition; once filed she was required to commence the service process.

An additional distinguishing characteristic between the two cases is here all the necessary papers and fees were delivered to the clerk on July 28, 1978; in Scieszinski the plaintiff had not filed the original notice. By this omission, plaintiff Scieszinski failed to comply with Iowa R. Civ. P. 49, preventing the clerk from processing the documents for service. Scieszinski's omission in conjunction with the court order was viewed by the supreme court as "intentionally [burying] the action," Scieszinski, 270 N.W.2d at 452, since he made the service process impossible to complete.

Here, plaintiffs intentionally made the service process possible and, in fact, required. They delivered all the necessary documents to the clerk and paid the required fees. Their instructions were of no binding effect on the clerk who was required to deliver for service to the appropriate person the copy of the petition, the original notice and copy, and the directions for service. Iowa R. Civ. P. 49(b). This case is closer to a "bungle by a clerk while processing papers [than an] intentional bypass by a plaintiff of some step for starting an action . . . ." Scieszinski, 270 N.W.2d at 452.

Further, one purpose of a limitations period is prompt notification to a defendant of a pending action. Id. In Scieszinski, this was impossible to achieve since the documents were sealed by court order. Id. Here, even though defendant did not receive legal notice immediately after filing, notice was published in the local newspaper. Plaintiffs were aware of this and defendant even testified he was questioned about the case soon after the notice was published. The notification purpose was partially achieved in this instance even though legal notice was not immediately served.

Plaintiff should not, therefore, be prejudiced by the clerk's failure to follow the proper procedure. One reason why Iowa R. Civ. P. 48 was changed in 1975 was to "avoid harsh results that have occurred in the past where suit has been filed but the limitations has not been tolled because proper service has not been had upon defendant." 1975 Advisory Committee, Proposed Amendments to the Iowa Rules of Civil Procedure and Official Comments; see Note, Procedural Changes Concerning Commencement of Civil Litigation: Adrift with Rudder and Compass in Iowa, 62 Iowa L. Rev. 192, 202 (1976).

Denying relief to plaintiff on their claim is too harsh a result when it was due more to clerical mistake than any intentional attempt to delay.

We hold this action was commenced on July 28, 1976, when plaintiffs filed all required documents with the clerk of court. Iowa R. Civ. P. 48. The filed documents would have allowed the clerk to commence the service process and plaintiffs' instructions to delay service were of no legal consequence. Iowa R. Civ. P. 49. With the filing of an action being deemed a commencement of an action, Iowa R. Civ. P. 55, we hold this action was commenced within the time allowed by the statute of limitations, § 614.1(9), The Code 1977 (two years).

The judgment of the trial court is reversed and this action is remanded to the trial court to allow plaintiffs the opportunity to press their claims.

REVERSED AND REMANDED.