

IN THE COURT OF APPEALS OF IOWA

No. 2-599--2-627 / 91-1944--92-0726

ANTONIO HENLEY,

Appellant,

vs.

IOWA CENTRAL COMMUNITY COLLEGE, DENNIS PILCHER,
CHARLES CURTIS, and KENT CURTIS,

Appellees.

ANTONIO HENLEY,

Appellee,

vs.

IOWA CENTRAL COMMUNITY COLLEGE, DENNIS PILCHER,
CHARLES CURTIS and KENT CURTIS,

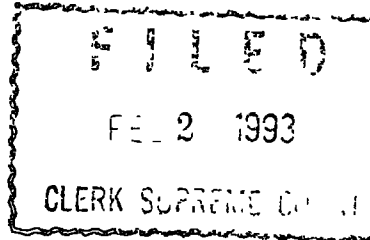
Appellants.

Appeal from the Iowa District Court for Webster County,
Newt Draheim and Mark S. Cady, Judges.

Plaintiff appeals the dismissal of his suit pursuant to
Iowa Rule of Civil Procedure 215.1. Defendants appeal the
vacation of the dismissal under Rule 252. **REVERSED** in No.
91-1944; **AFFIRMED** in No. 92-726; and **REMANDED**.

David S. Wiggins and Frederick B. Anderson of Wiggins &
Anderson, P.C., West Des Moines, for Henley.

Mark R. Crimmins and Herbert R. Bennett of Bennett,
Crimmins & Yung, Fort Dodge, for Iowa Central Community
College and Dennis Pilcher.



James L. Kramer and Thomas J. Bice of Johnson, Erb,
Gibb, Bice & Carlson, P.C., Fort Dodge, for Kent Curtis.

Heard by Donielson, P.J., and Sackett, J., and Perkins,
S.J.*

*Senior Judge from the 5th Judicial District serving on
this court by order of the Iowa Supreme Court.

PERKINS, S.J.

Plaintiff Antonio Henley was on the basketball team of Iowa Central Community College. On March 28, 1987, he was injured while he was a passenger in the team bus. He filed the present tort suit on March 28, 1989, against the college, the bus driver, and the driver and owner of the other vehicle involved in the accident. At the time Henley filed the suit he was a resident of Virginia and he hired attorney Joseph W. Kaestner of Richmond, Virginia, to represent him.

On August 28, 1989, the district court signed an order substituting attorney Jerry C. Estes of Fort Dodge for Kaestner as Henley's counsel. On May 24, 1990, Estes filed an application to withdraw as Henley's counsel. The court granted the application on July 2, 1990, and gave Henley twenty days to secure other counsel.

On July 20, 1990, the Webster County Clerk of Court sent notice to Kaestner and counsel for defendants that pursuant to Iowa Rule of Civil Procedure 215.1 the case was subject to dismissal if not tried prior to January 1, 1991. Kaestner did not advise subsequent counsel of this notice.

Also on July 20, 1990, Frederick B. Anderson of West Des Moines mailed to the clerk's office his appearance in the case as counsel for Henley. The clerk's office received the appearance on July 23, 1990. The clerk's office did not send a rule 215.1 notice to Anderson.

On October 10, 1990, the district court granted Henley's motion to amend the petition, but denied his request to extend discovery deadlines. The court noted the case was subject to automatic dismissal under rule 215.1 on January 1, 1991. The court ordered the Court Administrator to schedule the case for trial in the first trial session of 1991.

Henley's counsel contacted the court administrator and the case was set for trial on October 1, 1991. On September 11, 1991, the Clerk of Court noted the case as dismissed pursuant to rule 215.1.

Henley filed a motion to reinstate on September 23, 1991. The court found the case had been automatically dismissed on January 1, 1991. The court concluded that because the motion to reinstate was not filed within six months, as required by rule 215.1, the court had no jurisdiction to reinstate the case.

Henley filed a petition for relief pursuant to rule 252 on December 17, 1991. He also filed a notice of appeal on December 18, 1991 (No. 91-1944)

On March 20, 1992, the district court ruled on Henley's petition for relief pursuant to rule 252. The court determined that an appeal from a judgment does not deprive an appellant of the right to petition to vacate that judgment. The court concluded that the failure to give the rule 215.1 notice to attorney Anderson, under the

circumstances of the case, rendered the dismissal void. Having determined that relief pursuant to rule 252 should be granted, the court concluded it could only grant such relief if the supreme court remanded the case for that purpose. The court then directed Henley to file a motion for remand with the Iowa supreme court.

The supreme court granted Henley's motion for limited remand on April 17, 1992. On April 22, 1992, the district court ordered that Henley's petition for relief pursuant to rule 252 be granted. The court reinstated the case, stating that it would be dismissed if not tried before January 1, 1993.

Defendants then filed an application for permission to file an interlocutory appeal. On May 27, 1992, the supreme court granted the application. The court determined this appeal (No. 92-726) should be consolidated for submission with the pending appeal filed by Henley (No. 91-1944). We will thus address the two appeals together. We will address the second appeal, No. 92-726, first because we conclude our decision on this issue renders a discussion of the first appeal unnecessary.

A motion to vacate a judgment pursuant to rule 252 is triable at law. Hastings v. Espinosa, 340 N.W.2d 603, 607 (Iowa App. 1983). A trial court has wide discretion in making its ruling. Id.

We note that an appeal from a judgment does not deprive the appellant of his statutory right to petition for vacation of that judgment, if his procedure is timely. Shaw v. Addison, 236 Iowa 720, 726, 18 N.W.2d 796, 800 (1945); H & S Ltd. v. Andreola, 363 N.W.2d 592, 595 (Iowa App. 1984). Thus, the district court correctly determined it had jurisdiction to consider Henley's motion for relief pursuant to rule 252.

We therefore turn to the question of whether the district court abused its discretion in granting Henley's motion. We conclude the court did not abuse its discretion.

The formalities of rule 215.1 must be strictly observed as a prerequisite to dismissal of a case under the rule. Erickson v. Salama, 379 N.W.2d 904, 906 (Iowa 1986). The supreme court has stated:

Because the stakes are high, and the results harsh, the formalities prescribed to implement the rule 215.1 procedure must be strictly observed. [Citation]. If there is not substantial compliance, the rule is not invoked and there is no automatic dismissal that needs to be set aside.

Greene v. Tri-County Community School District, 315 N.W.2d 779, 782 (Iowa 1982).

We find the formalities of rule 215.1 were not strictly observed in the present case. In Erickson, the clerk's failure to mail notice to one of the counsel of record rendered the subsequent dismissal void. 379 N.W.2d at 907. In this case, notice was sent only to Kaestner and

counsel for defendants. We conclude this notice was not sufficient to invoke rule 215.1. The record showed Kaestner was no longer involved in the case and that Henley had been given twenty days from July 2, 1990, to obtain new counsel. The clerk sent its notice on July 20, 1990. The clerk could have sent notice to Henley personally or waited until the twenty-day period had expired before sending notice. Furthermore, the clerk could have sent notice to Anderson when he filed his appearance in the case. Under rule 215.1 the notice could have been sent any time previous to August 15, 1990.

Therefore, because rule 215.1 was not properly invoked, there was no automatic dismissal pursuant to that rule. We determine the case should have been reinstated. In appeal No. 91-1944, we reverse the district court's decision refusing to reinstate the case. In appeal No. 92-726, we affirm the district court decision to grant relief pursuant to rule 252. We remand the case to the district court for trial and order that trial be held on or before June 30, 1993. Costs of this appeal are assessed to the defendants.

REVERSED in No. 91-1944; AFFIRMED in No. 92-726; and REMANDED.