FILED
SEP 6 1984
CLERK SUPREME COURT

IN THE COURT OF APPEALS OF IOWA

Filed September 6, 1984

391

RICHARD E. UCHTORFF,

Plaintiff-Appellant,

vs.

DAVID DAHLIN, Clerk of the District Court of Iowa for Scott County,

Defendant-Appellee.

4-126
83-1435

Appeal from the Iowa District Court for Scott County—Max Werling, Judge.

Petitioner appeals from grant of summary judgment for defendant in an action against the Scott County District Court Clerk. REVERSED AND REMANDED.

John J. Carlin and Thomas Corsiglia of John J. Carlin, P.C., for plaintiff-appellant.

Thomas C. Fritzsche, Assistant Scott County Attorney, for defendant-appellee.

Heard by Oxberger, C.J., Donielson, and Schlegel, JJ.

OXBERGER, C.J.

Petitioner appeals from a ruling in favor of respondent in a motion for summary judgment regarding petitioner's action against the Scott County Clerk of Court for alleged negligence. We reverse and remand.

The facts in the case are not disputed. On July 7, 1982, a decree was granted dissolving the marriage of petitioner, Richard Uchtorff. He filed a motion to enlarge or expand findings of fact under Iowa Rule of Civil Procedure 179(b). The court ruled against the motion on October 8, 1982, but Uchtorff was not sent a copy of the ruling until January 19, 1983. By then it was too late to appeal the decision. Uchtorff appealed the ruling to the Iowa Supreme Court, which dismissed his untimely appeal on March 18, 1983. On March 28, Uchtorff sent notice to the clerk of Scott County district court of his intent to sue for alleged negligence of the clerk in failing to give timely notice of the court's decision. The petition was filed June 27, 1983.

Defendant, the respondent here, then moved for summary judgment, stating that petitioner had failed to comply with section 613A.5 of the Iowa Code which requires that if action is to be taken against a municipality, it must be notified of the action within 60 days of the alleged loss or injury, or the action must be commenced within six months of such loss or injury. Respondent claimed the date from which the notice or action should have been made was the last day on which a timely appeal could have been taken, or November 8, 1982. Petitioner said the date to be used was what he claims is the date of his injury, when the Iowa Supreme Court denied his appeal March 18, 1983. Petitioner also argued that if the court did not accept this as the date of injury, the discovery rule should apply and that the statute should run from when he discovered his injury, March 18, 1983.

Petitioner asks we reconsider the Iowa Supreme Court's ruling in Montgomery v. Polk County, 278 N.W.2d 911 (Iowa 1979) that the discovery rule does not apply in a section 613A action. Respondent countered that Montgomery was properly applied, but if the court accepted the notice as proper, the clerk's alleged negligence was not the cause of petitioner's injury. Respondent claimed that the sole proximate cause of petitioner's injury was his failure to move under Iowa Rule of Civil Procedure 252 and 253 to vacate or set aside the ruling. The trial court granted summary judgment, saying appeal should have been made from the earlier date and Montgomery prohibited use of the discovery rule.

In reviewing summary judgment, we are to decide if a genuine issue of material fact exists, and if there is none, to decide if the movant should prevail as a matter of law. Meylor v. Brown, 281 N.W.2d 639 (Iowa 1979). Since the facts are stipulated in this matter, we limit our review to determine if the applicable law shows the movant party should prevail.

I. Tolling of the Statute of Limitations Under Chapter 613A.

The key question to be decided regarding this issue is whether the beginning of the limitations period of chapter 613A is from the time of the last day the appeal could be taken, or the day of the supreme court decision.

Chapter 613A makes injury, and not the negligent act the triggering factor. The relevant provision indicates the notice or commencement of action must occur within the stated time from the date of "the alleged wrongful death, loss or injury" Iowa Code § 613A.5 (1983). There is little dispute that injury is the act relevant to the statute of limitations, and this is the general rule Iowa courts have followed. Wolfswinkel v. Gesink, 180 N.W.2d 452 (Iowa 1970); 51 Am. Jur. 2d, Limitations of Actions 135 (1972). Petitioner claims this injury occurred when the supreme court dismissed the appeal, but respondent argues in essence that the appeal was pointless, and that actual injury occurred on the first day appeal could

no longer be taken. Respondent notes Iowa Rule of Civil Procedure 82(f) does not extend appeal time when notice is not properly given to a party. Respondent makes the unique analogy that the Iowa Supreme Court decision is similar to a second opinion in a medical case, as indicated in Flynn v. Lucas County Memorial Hospital, 203 N.W.2d 613 (Iowa 1973). In that case the court determined that injury to the patient was discovered when the first opinion regarding the injury was made, and that the second opinion merely confirmed what the patient already knew. Id. at 616. Respondent argues that here, as in Flynn, the second opinion of the Iowa Supreme Court confirmed what the trial court had already decided; that the appeal was dead.

While the Iowa Supreme Court declined to do so, it appears that it was possible the court could have revived the appeal. The court recently amended the Iowa Rules of Appellate Procedure to reflect at rule 20(b) that the supreme court or a justice of the court may extend the time for filing a notice of appeal if the justice decides appeal was not made because of failure of the trial court clerk to notify the party of the entry of the final decision. This is the exact situation involved here. Although new rule 20(b) was not effective until July 1983, the court has indicated it may entertain arguments that an untimely appeal should be heard, if petitioner can show he was denied due process. Blanchard v. Brewer, 429 F.2d 89 (8th cir. 1970) cert. denied, 401 U.S. 1002, 91 S. Ct. 1224, 28 L. Ed. 2d 535 (1971); State v. Search Warrant, 234 N.W.2d 874 (Iowa 1975); Ford v. State of Iowa, 258 Iowa 137, 138 N.W.2d 116 (1965). By its passage of rule 20(b) the Iowa Supreme Court has indicated that it may accept an error of the clerk of court in failing to notify a party of a ruling as an excuse allowing an untimely appeal to be heard. Therefore, Uchtorff's appeal was not necessarily pointless and his injury did not occur until the court pronounced it dead on March 18, 1983. Since petitioner's notice to the clerk of Scott County district court came within 60 days of the injury, the notice was timely.

II. Proximate Cause of Petitioner's Injury

Respondent argued to the lower court in its motion for summary judgment that if it decided notice was properly given, it was petitioner's failure to use Iowa Rule of Civil Procedure 252 to vacate the judgment that resulted in his injury. The lower court did not reach this issue because of its decision that notice was not properly given. Matters presented to the lower court may, however, be considered by this court even if the trial court rejected the arguments. Geil v. Babb, 214 Iowa 263, 242 N.W. 34 (1932).

Iowa Rule of Civil Procedure 252 allows a motion to vacate a judgment when there has been a mistake on the part of the clerk of court. Petitioner claims the ruling on its 179(b) motion could not have been set aside on such grounds because the clerk's error occurred subsequently to the ruling, and did not result in an erroneous order. The clerk's error, petitioner claims, relates to the supreme court's decision rejecting the appeal, and says what he needed was a rule of civil procedure to set aside that decision. Respondent counters that petitioner should have proceeded under rule 252 within a year from the lower court ruling, that it was the only route for petitioner to take, and failure to do so was the sole proximate cause of petitioner's injury. If proceeding under the rule was petitioner's only proper route, petitioner was the sole cause of his own injury and such a defense has been recognized to bar recovery. Sponsler v. Clarke Electric Cooperative, Inc., 329 N.W.2d 663 (Iowa 1983).

The question for this court to decide is whether rule 252 was the exclusive proper avenue for petitioner to obtain relief. It is possible that rule 252 was the only proper route, that the rule could not have been used and rule 20(b) indicates appeal would be proper, or that the two rules are options for petitioner to chose from.

Petitioner's argument that he could not have used rule 252 to vacate the judgment must be rejected in light of Matter of Estate of Young, 273 N.W.2d 388

(Iowa 1978). In that situation, as in this one, the clerk of court had failed to notify the petitioner that a ruling had been made and the petitioner lost his appeal. Id. at 390. Instead of attempting to appeal, the petitioner used rule 252 to try to set aside the ruling. Id. The court denied a motion to dismiss the rule 252 action, saying it was proper as long as petitioner could show (1) grounds for setting aside the ruling and (2) attack the order on the merits. Id. at 391. He did so by showing the error of the clerk as grounds and by claiming the lower court did not have authority to take the action it did. Id. Here, petitioner Uchtorff could have alleged (1) the error of the clerk and (2) attacked the lower court order on whatever basis he might have used if he could have appealed. The case indicates a rule 252 action would have been proper.

It does not appear, however, that use of rule 252 was petitioner's only option, and an appeal using grounds now found at Iowa Rule of Appellate Procedure 20(b) was an alternative. In construing rules of civil procedure, principles similar to those used in connection with statutes apply. The rules are to be construed liberally to insure resolution of disputes on their merits. Smith v. Baule, 260 N.W.2d 850 (Iowa 1977). They should be harmonized if possible. Committee on Professional Ethics and Conduct of Iowa State Bar Ass'n v. Shaffer, 230 N.W. 1 (Iowa 1975). If rule 252 is to be read as the only manner in which a ruling may be attacked when appeal is lost because of error of the clerk, then rule 20(b) has no meaning. Instead, it appears to open another avenue to parties who have lost an appeal because of such mistakes. If we are to give effect to the new rule of appellate procedure, we must view it as an alternative to action under rule 252. Since failure to take action under rule 252 was not the sole proximate cause of petitioner's injury, and his notice to the county was properly made, we reverse the trial court's grant of summary judgment and remand for trial on the merits of the case.

REVERSED AND REMANDED.