FILED
FEB 23 1983
CLERK SUPREME COURT

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**IN THE COURT OF APPEALS OF IOWA**

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| **STATE OF IOWA, ex rel. GENEVIA NOEL LETTINGTON,** | ) | |
| Petitioner-Appellee, | ) | Filed February 23, 1983 |
| vs. | ) | |
| **LARRY DEAN KEPHART,** | ) | 2-403 / 68279 |
| Respondent-Appellant. | | |

Appeal from Mahaska District Court - Charles R. Bates, Judge.

The respondent appeals from the trial court judgment establishing his paternity of Genevia Lettington's child and ordering him to pay child support. AFFIRMED.

Frank M. Krohn, Prairie City, for respondent-appellant.

Thomas J. Miller, Attorney General, and Robert Huibregtse, Assistant Attorney General, for petitioner-appellee.

Heard en banc.

**OXBERGER, C.J.**

The respondent appeals from the trial court judgment establishing his paternity of Genevia Lettington's child and ordering him to pay child support. The respondent claims that the trial court erred in reinstating the case dismissed under Iowa R. Civ. P. 215.1 for failure to prosecute, and that the trial court erred in sustaining the petitioner's motion for summary judgment since there was allegedly an issue of fact as to whether the petitioner had sexual intercourse prior to meeting the respondent and in establishing respondent's support obligation since the trial court allegedly failed to notify the respondent of a hearing during which the child support obligation was ordered.

On June 5, 1978, the petitioner, Genevia Lettington, commenced an action, asserting that the respondent, Larry Kephart, was the father of her child and seeking to establish paternity and to secure child support payments. Kephart denied that he was the father of the child and asserted that he believed Lettington was pregnant before he met her. No Iowa Rule of Civil Procedure 215.1 notice was given by the clerk prior to August 15, 1979, although such a notice was given for the year 1980. On August 4, 1980, Kephart filed a motion to dismiss pursuant to rule 215.1. On August 27, 1980, the trial court overruled on the basis that the required notice under rule 215.1 was not sent. Kephart's interlocutory appeal of this ruling was rejected.

On September 26, 1980, Lettington filed a motion for summary judgment seeking an order providing that Kephart was the father of the child and under an obligation to support the child. Attached to the motion were supporting affidavits and interrogatories. On December 30, 1980, the trial court granted Lettington's application for a continuance ex parte. On January 8, 1980, Kephart filed a motion to dismiss under rule 215.1. On January 29, 1980, Lettington filed an application for reinstatement. On February 24, 1981, the trial court entered a

ruling on the motion to dismiss and a motion for reinstatement in which the trial court concluded that the case was dismissed in accordance with rule 215.1 on January 2, 1981, but that the application for reinstatement should be sustained. The court then reinstated the case.

On March 24, 1981, the trial court entered a ruling on the motion for summary judgment, noting that the supporting affidavits and a blood test supported Lettington's claims of paternity. The trial court also noted that Kephart admitted having intercourse with Lettington during January, 1977, and that Kephart did not file a resistance claiming any genuine issue of fact to try. The trial court found that Kephart was the father of the child and reserved the support obligation issue until a hearing on that issue. Kephart subsequently filed a notice of appeal from this order, but the supreme court refused to grant an interlocutory appeal.

On November 16, 1981, the issue on the support obligation was scheduled for a hearing. The hearing was continued until December 7, 1981, because there was some question as to whether Kephart had been served with the notice of the hearing although his attorney was present. Kephart did not appear personally on December 7, 1981, but his attorney did appear. Testimony was offered concerning the necessary support obligation and Kephart's earning capacity. The trial court, in an order filed on February 5, 1982, set Kephart's support obligation at $35 per week until the child reaches eighteen, dies or becomes self-supporting. Kephart appeals from this order.

**I. Reinstatement After Dismissal Under Rule 215.1.**

Kephart argues that the trial court lacked authority to reinstate the case more than six months after its automatic dismissal on January 1, 1980. We find, however, that because the requirements of rule 215.1 were not met, that rule did not become operative and the case was not dismissed under it.

The rule requires that prior to August 15 of each year, the clerk of the court shall give notice to counsel of record that the case will be subject to dismissal if not tried prior to January 1 of the next succeeding year. The clerk of the court failed to give such notice prior to August 15, 1979. "Because the stakes are high, and the results harsh, the formalities prescribed to implement the rule 215.1 procedure must be strictly observed." Greene v. Tri-County Community School District, 315 N.W.2d 779, 782 (Iowa 1982). In Greene, the court held that there was no automatic dismissal because the notice was served on, rather than before, August 15. Here, where there was no notice at all, it is obvious that rule 215.1 could not operate to cause dismissal of the case in January, 1980.

Kephart argues, however, that rule 215.1 was operative in January, 1981, because a "try or dismiss order" was filed in a timely manner in 1980. The trial court found that rule 215.1 did result in an automatic dismissal of the case in January, 1981, but that this was a result of what the court called a "procedural thicket created by the respondent's interlocutory appeal of an order overruling his motion to dismiss." With reference to cases dismissed under the operation of rule 215.1, the court has said:

> We accord considerable discretion to trial courts in reinstating stricken cases. [citation] We also recognize that reinstatement is mandatory upon a showing of oversight, mistake or other reasonable cause. [citation]

Werkmeister v. Kroneberger, 262 N.W.2d 295, 296 (Iowa 1978).

Under these circumstances, it was certainly within the trial court's discretion to reinstate the case, if indeed it was not mandatory that it do so.

**II. Summary Judgment.**

Kephart argues that he was denied due process by the court's grant of a motion for summary judgment.

In ruling on the motion for summary judgment, the court noted that Kephart had failed to file a resistance claiming any genuine issue of fact to try. The

purpose of Iowa Rule of Civil Procedure 237 is to avoid useless trials where no issue of ultimate fact exists. Gruener v. City of Cedar Falls, 189 N.W.2d 577, 580-81 (Iowa 1971). "Of course, a party may elect to stand on the record as made by his opponents but he must then succeed, if he succeeds at all, not on the strength of his own case, for he has made none, but on the weakness of his adversary's." McCarney v. Des Moines Register & Tribune Co., 239 N.W.2d 152, 154 (Iowa 1976). Iowa Rule of Civil Procedure 237(e) provides:

> When a motion for summary judgment is made and supported as provided in this rule, an adverse party may not rest upon the mere allegations or denials of his pleading, but his response, by affidavits or as otherwise provided in this rule, must set forth specific facts showing that there is a genuine issue for trial. If he does not so respond, summary judgment, if appropriate, shall be entered against him. (Emphasis supplied.)

The court concluded that "by his failure to suggest any facts controverting the ultimate facts supporting petitioner's motion for summary judgment, also acknowledges there is no genuine issue of fact upon which reasonable minds could differ." Iowa R. Civ. P. 237(g). The court found that there was more than a preponderance of evidence establishing Kephart's paternity of Lettington's child. Among other things, Kephart admitted having had intercourse with Lettington at the time of conception, sophisticated blood tests showed a statistical probability of 91.91% that Kephart was the father of the child, and soon after Lettington's discovery of her pregnancy, Kephart acknowledged fatherhood in a letter he wrote to her.

Under these circumstances, we find that the court did not err in granting summary judgment.

The court's judgment is therefore affirmed.

AFFIRMED.