

IN THE COURT OF APPEALS OF IOWA

No. 4-252 / 93-1183

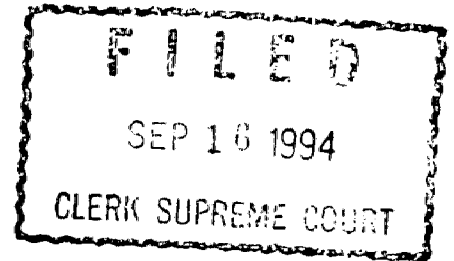
ROXANNE MICH, Administrator of the
Estate of Rex Earl Mich, and for
JESSICA MARIE MICH, A Minor, AMY
KATHERINE MICH, A Minor, ADAM JAMES
MICH, A Minor, and MATTHEW MONTGOMERY
MICH, A Minor, By Their Mother and
Next Best Friend, ROXANNE MICH, and
ROXANNE MICH, Individually,

Plaintiffs-Appellants,

vs.

HAWKEYE PAVING CORPORATION, An
Iowa Corporation,

Defendant-Appellee.



Appeal from the Iowa District Court for Mahaska County,
James B. Rielly, Judge.

The plaintiffs challenge the order granting summary
judgment in the defendant's favor. **AFFIRMED.**

Luis Herrera, Des Moines, for appellant.

Michael F. Lacey, Jr., and Ronald M. Rankin of
Patterson, Lorentzen, Duffield, Timmons, Irish, Becker &
Ordway, Des Moines, for appellee.

Considered by Hayden, P.J., and Habhab and Cady, JJ.

CADY, J.

Rex Mich died in an automobile accident when he was ejected from a pickup truck with an allegedly damaged driver's side door. Rex's employer, Hawkeye Paving Corporation (Hawkeye), had leased the truck from Roxanne Mich. Roxanne Mich, the administrator of the estate of Rex Mich, brought a negligence action against Hawkeye. Roxanne also brought suit on behalf of her minor children.¹ The district court granted Hawkeye's motion for summary judgment. In this appeal, Mich challenges the court's summary judgment order. We affirm the district court.

On October 29, 1992, Hawkeye filed a motion for summary judgment as to all liability issues. On March 11, 1993, Hawkeye served a request for admissions upon Mich. Mich failed to respond to the requests for admissions until May 24, 1993. On June 8, 1994, Hawkeye supplemented its statement of material facts in support of its summary judgment motion. This supplement argued that the requests for admissions should be deemed admitted pursuant to Iowa Rule of Civil Procedure 127 because Mich failed to respond to the requests within thirty days.

The motion for summary judgment proceeded to hearing before the court. This proceeding was not recorded. After the hearing, the court determined that because Mich failed

1. For simplicity, we will refer to the plaintiffs collectively as Mich.

to timely respond to Hawkeye's request for admissions they were deemed admitted. It also determined the admissions left no genuine issue of material fact and granted Hawkeye's motion for summary judgment. Mich appeals.

On appeal Mich argues: (1) she made an oral motion to enlarge time to respond to the requests for admissions during the summary judgment hearing and the court erred in failing to grant this motion; (2) if the requests for admissions are not deemed admitted, a genuine issue of material fact exists; and (3) assuming the requests for admissions are admitted, the affidavit accompanying the resistance to the summary judgment motion is sufficient to raise a genuine issue of material fact.

Hawkeye counters that Mich failed to preserve error and even if error was preserved, the district court did not abuse its discretion by excluding Mich's response to Hawkeye's request for admissions.

We review this case for correction of errors at law. Iowa R. App. P. 4.

I.

Hawkeye asserts Mich failed to preserve error on the issue of the district court's refusal to accept Mich's untimely response to Hawkeye's request for admissions. Mich replies that error was preserved when she made an oral motion to extend the time for filing a response under rule 127 at the summary judgment hearing.

Rule 127 allows the court to grant a party additional time to respond to requests for admissions. Iowa R. Civ. P. 127. The rule requires the party seeking this relief to make a motion. Id.

In the present case, there is no record of Mich's motion nor is there a corresponding court order. No record was made of the summary judgment hearing and Mich did not prepare a statement of the proceedings in accordance with Iowa Rule of Appellate Procedure 10. After careful review of the district court's order, we found no mention of the Mich's oral motion for an extension of time. Likewise, Mich did not ask the court to enlarge or amend its summary judgment order to include a specific ruling on her motion to extend time for filing. See Iowa R. Civ. P. 179(b).

The burden of demanding a ruling rests with the party desiring it. Blunt, Ellis, & Loewi, Inc. v. Igram, 319 N.W.2d 189, 195 (Iowa 1982). Error is not preserved when a motion is not ruled upon by the trial court and no timely request or demand for a ruling is made. Sullivan v. Chicago & Northwestern Transp., 326 N.W.2d 320, 325 (Iowa 1982). Thus, on the record before us, we find Mich failed to preserve error.

II.

Setting aside the preservation of error issue, we nevertheless conclude the district court should be affirmed.

Parties do not have a right to file a late response to a request for admissions. Allied Gas v. Federated Mut. Ins. Co., 332 N.W.2d 877, 879 (Iowa 1983) (citing State of North Dakota v. Newberger, 613 P.2d 1002, 1006 (Mont. 1980)). Whether or not to allow a party to file a late response rests within the discretion of the trial court. Id. In making its decision the court considers the two prong standard for amending and withdrawing a provision under Iowa Rule of Civil Procedure 128.² Thus, "the court may permit [an extension of time] when the presentation of the merits of the action will be subverted thereby and the party who obtained the admission fails to satisfy the court that granting an [extension of time] will prejudice him in maintaining his action or defense on the merits." Iowa R. Civ. P. 128. Applying this standard to Mich's motion to file a late response, we find the district court properly exercised its discretion in excluding Mich's untimely response to Hawkeye's request for admissions.

III.

Finally, Mich argues that even if Hawkeye's requests for admissions are admitted, the affidavit accompanying Mich's resistance to summary judgment raises a genuine issue of material fact. We do not agree. The admissions

2. Although plaintiffs characterized their motion as one for an extension of time to respond under rule 127, this court has previously acknowledged no distinction is drawn between the a motion to file an untimely response and a rule 128-motion to amend or withdraw an admission. Allied Gas, 332 N.W.2d at 879. Thus, consideration of the standard set out in rule 128 is appropriate.

which Mich is deemed to have made are dispositive of the negligence issue and eliminate all questions of fact. The admissions specifically state there was no problem with the truck, Hawkeye did not have a duty to ensure the truck was in safe working order, and Hawkeye did not and should not have known the truck was unsafe or the door would not close. Thus, we conclude the affidavit is insufficient to create a genuine issue of material fact. We affirm the district court's summary judgment order.

AFFIRMED.