IN THE COURT OF APPEALS OF IOWA

No. 4-302 / 93-1584

ALVERN C. WEED,

Appellant,

vs.

BRUCE A. SHAPPARD,

Appellee.

Appeal from the Iowa District Court for Scott County, James E. Kelly, Judge.

The plaintiff appeals the district court's ruling dismissing his tort action seeking personal injury and property damages from the defendant. **AFFIRMED.**

Arthur L. Buzzell, Davenport, for appellant.

Michael C. Walker of Goebel & Koury Law Offices, Davenport, for appellee.

Considered by Donielson, C.J., and Hayden and Huitink, JJ.

HAYDEN, J.

On June 10, 1991, the plaintiff, Alvern Weed, commenced a tort action seeking personal injury and property damages against the defendant arising out of an automobile collision between the parties occurring on June 11, 1989. The case was scheduled for trial on November 16, 1992. No demand for jury trial was ever filed by Weed. Weed voluntarily dismissed the case without prejudice on October 30, 1992. He claims he developed physical symptoms and was unable to obtain medical evidence linking the symptoms to the accident in time for the November 1992 trial. He did not request a continuance.

On March 17, 1993, Weed commenced a second action raising the same claim arising out of the June 1989 accident. Shappard filed a motion to dismiss asserting Weed was not allowed to refile the action under Iowa Code section 614.10 because Weed had been negligent in the first action by not asking for a continuance prior to dismissing the case.

On September 29, 1993, the trial court entered a ruling granting the motion to dismiss. The court determined Weed had a duty to "protect his claim by asking for a continuance due to the newly-discovered evidence and circumstances." The court concluded the failure to seek a continuance was negligence. The court also noted his failure to seek a jury trial in the first action constituted negligence. The court concluded the failure of

the first action was due to the plaintiff's negligence requiring dismissal of the case.

On October 21, 1993, Weed filed a notice of appeal. The scope of review is for corrections of errors at law. Iowa R. App. P. 4.

Weed dismissed his original action after the statute of limitations ran and filed the same lawsuit again five months later. To avoid the action being time-barred, appellant relies on Iowa Code section 614.10, which states:

> If, after the commencement of an action, the plaintiff, for any cause except negligence in its prosecution, fails therein, and a new one is brought within six months thereafter, the second shall, for the purposes herein contemplated, be held a continuation of the first.

Iowa Code § 614.10 (1993) (emphasis added).

For section 614.10 to apply, appellant must both plead and prove dismissal of the first action was not based on negligence. State v. Bi-States Constr. Co. Inc., 269 N.W.2d 455, 457 (Iowa 1978). There is a presumption of negligence in the prosecution of the first case when the second action is brought after the statute of limitations runs, Central Constr. Co. v. Klingensmith, 127 N.W.2d 654, 655 (Iowa 1964), and the burden is upon appellant to prove he was not negligent. Wilson v. Wright, 189 N.W.2d 531, 532 (Iowa 1971) (citation omitted).

Weed denies the cause of action failed due to any negligence on his part. Instead, appellant claims newly-discovered evidence and the decision to request a jury trial were the reasons for the failure of the cause of

action. We disagree.

Weed is not entitled to relief if he voluntarily dismisses his first cause of action without requesting a continuance. Pardey v. Town of Mechanicsville, 112 Iowa 68, 71, 83 N.W. 828, 829 (1900); Archer v. Chicago, B & Q Ry., 65 Iowa 611, 613, 22 N.W. 894, 895 (1885). If appellant discovered new evidence prior to trial, appellant should have requested a continuance rather than voluntarily dismissing his case without prejudice. Pardey, 112 Iowa at 71, 83 N.W. at 829. The trial court was correct in concluding Weed's failure to seek a continuance constituted negligence.

Furthermore, no jury demand was ever made. It is obvious Weed dismissed his own case to attempt to circumvent the rule jury demands must be filed within ten days. See Iowa R. Civ. P. 177(b). But for Weed's failure to request a jury trial, the first cause of action would not have failed. Negligence with regard to the prosecution of a case includes the failure to adequately protect one's own legal rights. See Central Constr. Co. v. Klingensmith, 127 N.W.2d 654, 657 (Iowa 1964). The trial court was also correct in concluding Weed's failure to seek a jury trial in the first action constituted negligence.

There was ample support for the trial court's finding appellant's cause of action failed because of negligence in its prosecution. No error appears. Judgment of the trial court is affirmed.

AFFIRMED.