**IN THE COURT OF APPEALS OF IOWA**

No. 0-110 / 99-0930
Filed May 10, 2000

**ESTATE OF DOROTHY KUHNS, and JEFF KUHNS and PEARL GUY, Legal Representatives of the Deceased and Executors of the Estate,**
Plaintiffs-Appellants,

vs.

**DALE MARCO,**
Defendant-Appellee.

FILED
MAY 10 2000
CLERK SUPREME COURT

Appeal from the Iowa District Court for Polk County, Richard G. Blane II, Judge.

Plaintiffs appeal from the district court order granting defendant's motion for summary judgment in their personal injury suit. **AFFIRMED.**

Jerry Crawford and Brad Schroeder of the Crawford Law Firm, Des Moines, for appellants.

Douglas A. Haag of Patterson, Lorentzen, Duffield, Timmons, Irish, Becker & Ordway, L.L.P., Des Moines, for appellee.

**Heard by Streit, P.J., and Zimmer and Hecht, JJ.**

HECHT, J.

Plaintiffs Jeffrey Kuhns and Pearl Guy, executors and legal representatives of the Estate of Dorothy Kuhns, appeal from the district court order granting defendant Marco's motion for summary judgment in their personal injury suit. They contend the court erred in granting summary judgment because (1) substitution of the real parties in interest pursuant to Iowa Rule of Civil Procedure 2 relates back to filing of the original petition despite rule 69(e); (2) rule 49(f) and the intent behind the rules require the amended petition to relate back to the filing of the original petition; (3) rule 69(e) should not be applied to cases amending plaintiffs' names; (4) the district court misapplied rule 69(e); and (5) the district court improperly dismissed their action. We affirm.

I. **Factual Background and Proceedings.** Dorothy Kuhns and Dale Marco ("Marco") were involved in a car accident on December 23, 1996. Mrs. Kuhns suffered some injuries as result of the accident. She died from unrelated causes on September 21, 1997. Her will named her children, Jeffrey Kuhns ("Kuhns") and Pearl Guy ("Guy"), executors of her estate. They filed the present action on December 22, 1998, the day before the statute of limitations expired, alleging negligence and intentional infliction of emotional distress theories against Marco. The Estate of Dorothy Kuhns was the only named plaintiff in the original petition. Plaintiffs served Marco with notice of the original petition on January 9, 1999.

On January 28, 1999, Marco filed a motion to dismiss for failure to name the real party in interest pursuant to Iowa Code sections 611.20 and 611.22.[1] On February 24, 1999, Kuhns and Guy filed a motion for leave to amend and substitute the petition to add their names as plaintiffs and as the legal representatives and executors of the Estate. The district court granted the motion to amend and denied the motion to dismiss.

On March 16, 1999, Marco filed a motion for summary judgment contending the amended and substituted petition did not relate back to the original filing date and therefore the cause of action was barred by the statute of limitations. The district court granted Marco's motion on May 14, 1999. The Estate, Kuhns, and Guy appeal.

**II. Standard of Review.** A claim, which is barred by the applicable statute of limitations, may be properly disposed of by summary judgment. *Stahl v. Preston Mut. Ins. Ass'n,* 517 N.W.2d 201, 202 (Iowa 1994). Our review of a grant or denial of summary judgment is for errors of law. Iowa R. App. P. 4; *Gabrilson v. Flynn,* 554 N.W.2d 267, 270 (Iowa 1996). We review summary judgment motions to determine the existence of any genuine issue of material fact and whether the law was correctly applied. *Hegg v. Hawkeye Tri-County REC,* 512 N.W.2d 558, 559 (Iowa 1994). The burden rests on the movant to establish the right to summary judgment. *Enochs v. City of Des Moines,* 314

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[1] Section 611.20 states, "All causes of action shall survive and may be brought notwithstanding the death of the person entitled or liable to the same." Iowa Code § 611.20 (1997). Section 611.22 states, in relevant part, "Any action contemplated in sections 611.20 and 611.21 may be brought . . . by or against the legal representatives or successors in interest of the deceased." Iowa Code § 611.22.

N.W.2d 378, 380 (Iowa 1982). We review the record in the light most favorable to the party opposing summary judgment. *Smith v. CRST Int'l, Inc.*, 553 N.W.2d 890, 893 (Iowa 1996); *Hill v. McCartney*, 590 N.W.2d 52, 55 (Iowa App. 1998).

**III. Error Preservation.** Plaintiffs argue Iowa Rule of Civil Procedure 2 mandates substitution of the real parties in interest and permits relation back of the amendment to the date they filed the original petition despite the requirements of rule 69(e). Marco contends plaintiffs did not preserve error with respect to their rule 2 argument. Issues must be presented to and passed upon by the trial court before they can be raised and decided on appeal. *Johnston Equip. Corp. v. Industrial Indemn.*, 489 N.W.2d 13, 16 (Iowa 1992) (citing *State Farm Mut. Ins. Co. v. Pflibsen*, 350 N.W.2d 202, 207 (Iowa 1984)). A rule 179(b) motion to enlarge or amend a ruling is necessary for preservation of error when the district court fails to resolve a matter properly submitted. Iowa R. Civ. P. 179(b); *Johnston Equip.*, 489 N.W.2d at 17.

While plaintiffs' attorney did raise the real party in interest issue at the hearing on Marco's motion for summary judgment, the district court did not address the issue in its ruling which concentrated on the rule 69(e) issue. Plaintiffs did not file a rule 179(b) motion seeking to obtain a ruling from the district court on whether rule 2 allowed their action to proceed notwithstanding the provisions of rule 69(e). We therefore conclude plaintiffs have failed to preserve error on their rule 2 argument. Failure to preserve error bars our review on appeal. *Nepstad Custom Homes Co. v. Krull*, 527 N.W.2d 402, 405 (Iowa App. 1994).

Plaintiffs argue Iowa Rule of Civil Procedure 69(e)[2] should not apply to cases such as theirs where they sought to amend the name of the plaintiff rather than the name of the defendant. Rule 69(e) provides, in relevant part:

> Whenever the claim or defense asserted in the amended pleading arose out of the conduct, transaction, or occurrence set forth or attempted to be set forth in the original pleading, the amendment relates back to the date of the original pleading. An amendment changing the party against whom a claim is asserted relates back if the foregoing provision is satisfied and, within the period provided by law for commencing the action against the party, the party to be brought in by amendment (1) has received such notice of the institution of the action that the party will not be prejudiced in maintaining a defense on the merits, and (2) knew or should have known that, but for a mistake concerning the identity of the proper party, the action would have been brought against the party.

Iowa R. Civ. P. 69(e). This rule applies to both amendments changing parties and amendments correcting the names of parties. *Porter v. Good Eavespouting,* 505 N.W.2d 178, 181 (Iowa 1993); *Grant v. Cedar Falls Oil Co.,* 480 N.W.2d 863, 866 (Iowa 1992). If all of the elements of the rule are met, the amendment will relate back to the date of the original pleading. *Butler v. Woodbury County,* 547 N.W.2d 17, 19 (Iowa App. 1996). While the clear language of this rule appears to apply only to defendants, our supreme court has held the rule also allows amendments that add plaintiffs. *M-Z Enters., Inc. v. Hawkeye-Security Ins. Co.,* 318 N.W.2d 408, 411 (Iowa 1982). We therefore determine the district court was correct in applying rule 69(e) to this case.

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[2] Formerly Iowa Rule of Civil Procedure 89 amended and redesignated as rule 69(e), effective January 24, 1998.

In cases involving amendments to add plaintiffs, the requirement that the named defendants received sufficient notice of the amended petition during the statute of limitations period applies. *Ezzone v. Riccardi,* 525 N.W.2d 388, 399-400 (Iowa 1994). Although it is unclear from the record the exact date Marco received notice of the amended petition, he did not receive notice of the original petition until January 9, 1999, seventeen days after the expiration of the statute of limitations. We logically assume he received notice of the amended petition some date after January 9, 1999, and after the statute of limitations period had run. In any event, Marco did not receive the required notice of the amended petition within the period provided by law for commencing the action against him and therefore, the amended petition cannot relate back to the original date of filing.

Plaintiffs argue, in the alternative, if rule 69(e) does apply, the recent amendment to rule 49(f) would permit their amended petition to relate back to the date of the original filing. Before the amendment, rule 49(f) did not provide for a specific time period in which to serve defendants with original notice, although case law required dismissal of an action if there was an "abusive delay" in completing service. *See Alvarez v. Meadow Lane Mall Ltd. Partnership,* 560 N.W.2d 588, 591 (Iowa 1997). Effective January 24, 1998, rule 49(f) imposes a ninety-day time limit after the date of filing within which to serve an original notice on defendants. *See* Iowa R. Civ. P. 49(f).

Because of this change, plaintiffs encourage us to adopt the standard used by the federal courts in Federal Rule of Civil Procedure 15(c) and extend

the time for serving notice of amendments to pleadings within the time limit for service of process delineated by the rules of civil procedure. Rule 15(c) provides, in relevant part:

> An amendment of a pleading relates back to the date of the original pleading when . . . (3) the amendment changes the party or the naming of the party against whom a claim is asserted if . . . within the period provided by Rule 4(m) for service of the summons and complaint, the party to be brought in by amendment (A) has received such notice of the institution of the action that the party will not be prejudiced in maintaining a defense on the merits . . . .

Fed. R. Civ. P. 15(c)(3)(A). Rule 4(m) allows plaintiffs 120 days to serve defendants with notice of the complaint. Fed. R. Civ. P. 4(m). This court has declined to follow the federal relation-back standard in the past. *See Butler,* 547 N.W.2d at 20. Plaintiffs argue the *Butler* court was looking for the direction provided by the amendment to rule 49(f) to conform the Iowa standard to the Federal standard. However, plaintiffs overlook an important distinction between our rule 69(e) and the Federal Rule 15(c). Rule 15(c) specifically mentions rule 4(m) and states notice must be served within the period for *service of the summons and complaint.* Rule 69(e) states notice must be given within the period provided by law for *commencing the action* against the party. Rule 69(e) clearly and unmistakably requires notice of the amendment to be received within the statute of limitations period if the proponent of the amendment wishes it to relate back to the date of the original filing. Even after the amendment of rule 49, rule 69(e) does not include language extending the limitations period to include the time allowed to accomplish service of process as in Federal Rule 15(c).

We cannot extend the relation-back principle within rule 69(e) in a manner that is not authorized by the clear language of the rule. "We must accept the governing rules as they exist when we decide cases and interpret rules, like we do statutes, in a sensible, workable, practical, and logical manner." *Butler,* 547 N.W.2d at 20 (citing *State v. Deierling,* 406 N.W.2d 793, 794 (Iowa 1987)). Although we subscribe to the notion symmetry between Federal and Iowa rules of civil procedure should be promoted, our task is not to create rules, but to interpret them. *Butler,* 547 N.W.2d at 20. Marco did not receive notice of the amended petition within the period provided by law for commencing the action; and the statute of limitations period expired. Therefore, the amended petition does not relate back to the date of the original filing under the existing rules. Accordingly, we affirm the judgment of the district court.

**V. Conclusion.** We have considered all remaining arguments presented by plaintiffs in this matter and consider them to be without merit. The judgment of the district court granting summary judgment in favor of defendant Marco is affirmed.

**AFFIRMED.**