

IN THE COURT OF APPEALS OF IOWA

No. 8-420 / 97-1912

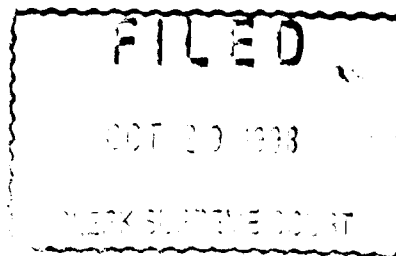
**STEVEN C. FISHEL AND
JENNIFER L. FISHEL,**

Plaintiffs-Appellants,

vs.

LEE JONG SEUNG,

Defendant-Appellee.



Appeal from the Iowa District Court for Linn County, Lynne Brady, Judge.

Plaintiffs appeal from a district court order dismissing their negligence suit against defendant for lack of personal jurisdiction. **AFFIRMED.**

Mark J. McCool, Cedar Rapids, and Ronald L. Ricklefs, Cedar Rapids, for appellants.

John D. Stonebraker of McDonald, Stonebraker & Cepican, P.C., Davenport, for appellee.

Heard by Sackett, P.J., and Huitink and Mahan, JJ.

MAHAN, J.

Steven and Jennifer Fishel appeal from a district court order dismissing the Fishels' negligence suit against Lee Jong Seung for lack of personal jurisdiction. The Fishels contend the district court erred by relying on disputed facts outside the pleadings, and by finding the Fishels could not prevail under any set of facts. We affirm.

On September 25, 1993, Jennifer Fishel and Lee Jong Seung were involved in a motor vehicle accident in Cedar Rapids. Seung attended the University of Iowa and lived in an Iowa City apartment. He had full coverage automobile insurance with American Family Insurance Group. On September 19, 1995, the Fishels filed this negligence suit against Seung, six days before the personal injury statute of limitations expired.

On March 25, 1996, the district court reviewed the case because it had been on file for six months. It was noted there had been no return of service and the district court concluded there was no personal jurisdiction over Seung. The case was continued on the court's own motion for sixty days, at which time either a case scheduling conference would be set if service had been completed or a dismissal would be considered.

On the sixtieth day, the Fishels applied for additional time within which to serve the defendant. The application stated the Fishels had two process servers attempt to serve Seung. The Fishels also asserted they had made "numerous

attempts” to locate Seung. The record does not show how many nor what types of attempts were made to either locate or serve Seung.

A ninety-day extension was granted on May 24, 1996. The Fishels hired Patrick McCool to serve process on Seung. McCool testified he attempted to serve Seung two or three times at the Iowa City apartment during “the late summer or early fall of 1996.” Upon learning Seung no longer lived at that address, McCool contacted the University of Iowa Registrar’s Office and the Iowa Alumni Association. Neither office had a listing for Seung. McCool further testified he “spent several days” looking for Seung during that time period.

On September 11, 1996, the Fishels applied for and received permission to serve Seung pursuant to Iowa Code section 321.498.¹ The application was granted and a copy of the original notice was filed with the Iowa Department of Transportation several weeks later on October 1, 1996. Although section 321.501 requires a plaintiff to send a defendant a notice of the filing at the defendant’s last known residence within ten days of filing, notification was not mailed to Seung until October 22, 1996.

Seung’s attorney, apparently hired by American Family on Seung’s behalf, filed a motion to dismiss in July 1997.² The attorney noted there were no affidavits of service, as required by section 321.505, in the court file at that time. These proofs

¹ This was almost one full year after suit was filed and several weeks after the expiration of the May 24, 1996 order.

² The parties agree Seung is still unaware of this lawsuit.

were filed in August 1997, approximately ten months after the substituted service was purportedly made.

The suit was dismissed in September 1997. The district court ruled the delay in service was presumptively abusive, the Fishels' excuses were insufficient justification, and the statute of limitations had expired.

I. STANDARD OF REVIEW. A district court ruling on a motion to dismiss is reviewed for the correction of errors at law. *Henry v. Shober*, 566 N.W.2d 190, 191 (Iowa 1997). Orders granting a motion to dismiss are generally disfavored. *Id.* However, a suit must be dismissed if the plaintiff's delay in service is unjustified and abusive. *Id.* at 192; *Alvarez v. Meadow Lane Mall*, 560 N.W.2d 588, 591 (Iowa 1997).

II. ABUSIVE DELAY IN SERVICE. A delay in service is presumptively abusive if the defendants are served more than 120 days after the plaintiffs filed their petitions.³ *Henry*, 566 N.W.2d at 193; *Alvarez*, 560 N.W.2d at 591; *Dennis v. Christianson*, 482 N.W.2d 448, 451 (Iowa 1992); *Bean v. Midwest Battery & Metal, Inc.*, 449 N.W.2d 353, 355 (Iowa 1989); *Turnbull v. Horan*, 522 N.W.2d 860, 861 (Iowa App. 1994). The Fishels' delay in service lasted approximately thirteen months or 398 days, assuming Seung was properly served in October 1996. Clearly this delay is presumptively abusive. *Id.*

³ Until recently, the Iowa Rules of Civil Procedure did not specify when service had to be made. The new rule, Iowa Rule of Civil Procedure 49(f), effective January 24, 1998, sets a ninety-day time period for service. The time period will be extended upon a showing of good cause for the failure of service.

The Fishels have the burden to prove their presumptively abusive delay was justified. *Henry*, 566 N.W.2d at 192; *Alvarez*, 560 N.W.2d at 591. The Fishels contend the delay is justified because: (1) Seung evaded service by moving from his last known address in Iowa City without leaving a forwarding address; (2) they have been unable to locate Seung through University of Iowa records; and (3) American Family has not accepted service. We disagree.

First, Seung's decision to move does not become evasion of process simply because the Fishels waited until the last minute to file suit; it is not unusual for college students to change residences. Had they filed earlier, the Fishels might have been able to serve Seung at his Iowa City address. *Dennis*, 482 N.W.2d at 452. Second, the single attempt to locate Seung through the University of Iowa records made by McCool eight or more months after the petition was filed is insufficient to show good cause. *Id.* at 451; *Henry*, 566 N.W.2d at 192-193 (neglect and half-hearted attempts at service are generally insufficient to show good cause). Finally, American Family's knowledge of the law suit does not relieve the Fishels of their duty to serve notice on Seung. Iowa R. Civ. P. 49; *Henry*, 566 N.W.2d at 192; *Alvarez*, 560 N.W.2d at 592 (notice to an insurer is not notice to its insured). The Fishels failed to establish good cause for the thirteen-month delay in service and the suit was properly dismissed. *Henry*, 566 N.W.2d at 192; *Alvarez*, 560 N.W.2d at 591.

III. STATUTE OF LIMITATIONS. Ordinarily, the filing of a petition would toll the statute of limitations. Iowa R. Civ. P. 55. However, an intentional *or*

unjustified, abusive delay does not toll the statute of limitations. *Henry*, 566 N.W.2d at 192. Since we have determined the Fishels' delay was unjustified and abusive, the statute of limitations was not tolled and expired on this claim on September 25, 1995.

For these reasons, we affirm the district court order dismissing this suit.

AFFIRMED.