IN THE COURT OF APPEALS OF IOWA

No. 0-649 / 90-415

BEVERLY GRANT and CONNIE CARSON,

Appellants,

vs.

CEDAR FALLS OIL CO., d/b/a FOOD 4 LESS,

Appellee.

FILED
AUG 27 1991
CLERK SUPREME COURT

Appeal from the Iowa District Court for Polk County, Joel D. Novak, Judge.

The plaintiffs appeal a district court ruling dismissing their lawsuit against Cedar Falls Oil Company. **REVERSED.**

Alfredo Parrish and Andrew J. Dunn of Parrish, Kruidenier & Exline, Des Moines, for appellants.

Kasey W. Kincaid of Walker, Giudicessi & Kincaid, Des Moines, for appellee.

Considered by Oxberger, C.J., and Donielson and Schlegel, JJ.

OXBERGER, C.J.

On September 5, 1989, the day on which the statute of limitations expired, Beverly Grant and Connie Carson filed a petition against Holiday Erickson Petroleum, Inc., d/b/a Food 4 Less. They sued for damages for personal injuries arising out of an incident that occurred on September 2, 1987.

On September 8, 1989, the defendant's counsel called the plaintiffs' counsel, and indicated that he would be representing Food 4 Less. Sometime after the phone conversation, plaintiffs' counsel realized that Holiday Erickson Petroleum, Inc., is not an existing entity. On November 6, 1989, the plaintiffs filed an amendment to their petition to name the correct defendant, Cedar Falls Oil Company, d/b/a Food 4 Less.

The defendant moved to dismiss the lawsuit. It alleged that the petition filed against it on November 6, 1989, was barred by the two-year statute of limitations. The plaintiffs argued that, under Iowa Rule of Civil Procedure 89, the amended petition relates back to the date of filing the original petition. The district court dismissed the case as barred by the statute of limitations. The court found that the amendment did not relate back because the defendant did not receive notification of the lawsuit before the statute of limitations had run.

The plaintiffs appeal. They note that they commenced their suit within the statute of limitations and then promptly served the defendant. They maintain that this procedure was proper. The plaintiffs also argue that the defendant should be estopped from moving to dismiss the suit because defense counsel failed to notify the plaintiffs of the misnomer.

Allowance of an amendment to a pleading is the rule and denial the exception, although an amendment is not permissible which will substantially change the issue. M-Z Enterprises v. Hawkeye-Security Insurance Company, 318 N.W.2d 408, 411 (Iowa 1982). Additionally, a trial court has considerable discretion as to whether an appropriate request for leave to amend should be granted or denied and we will reverse only where a clear abuse of discretion is shown. Id. The test is whether the defendants had fair notice of the action and whether the substitution of defendants will alter the claim to their prejudice. Id.

Iowa Rule of Civil Procedure 89 provides:

> 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 him, the party to be brought in by amendment (1) has received such notice of the institution of the action that he will not be prejudiced in maintaining his 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 him.

If the effect of the proposed amendment is merely to correct the name of a party already in court, clearly there is no prejudice in allowing the amendment, even though it relates back to the date of the original complaint. Schellhorn v. Williams, 244 Iowa 908, 913, 58 N.W.2d 361, 364 (1953). On the other hand, if the effect of the amendment is to substitute for the defendant a new party, such amendment amounts to a new and independent cause of action and cannot be permitted when the statute of limitations has run. Id. at 365.

Thus, in the case of Smith v. Baule, 260 N.W.2d 850, 851 (Iowa 1977), the plaintiffs sued Illinois Central Industries and Illinois Cental R.R. Co., instead of the proper defendant Illinois Central Gulf Railroad. The court held that because the proper defendant was not named until after statute of limitations had run, and case was properly dismissed. Id. at 854.

Also, in the case of Jacobson v. Union Story Trust & Savings Bank, 338 N.W.2d 161, 162 (Iowa 1983), the plaintiffs filed a suit against Paul Spies on the last day of the limitations period. They then found out Spies was dead and no estate had been opened. Id. After an estate was opened and Union Story Trust & Savings Bank was named executor, plaintiffs filed an amended petition naming the bank as defendant. Id. The court found that the

plaintiffs had failed to give notice to the bank, as the substituted defendant, within the two-year limitations period, as required by Rule 89. Id. at 164. Furthermore, plaintiffs presented no evidence that the bank knew or should have known of the lawsuit. Id.

On the other hand, in the case of Reynolds v. Nowotny, 189 N.W.2d 557, 558 (Iowa 1971), the plaintiff filed a petition against Donald R. Nowotny, and later amended it to name Donald P. Nowotny, Jr. The court held that because plaintiff did not change his theory of liability the case should not have been dismissed. Id. at 562.

In M-Z Enterprises, Inc. v. Hawkeye-Security Insurance Company, 318 N.W.2d 408, 410 (Iowa 1982), the petition named M.Z. Davis Crane Service, Inc. as plaintiff. This was not a real corporation, but was a trade name. Id. Later, after statute of limitations had run, M-Z Enterprises was named. Id. The court found that the defendant was not prejudiced and allowed the amended petition. Id. at 412.

In the present suit, Cedar Falls Oil Company knew of the suit as quickly as if it had been properly named the defendant in the original petition. Counsel for defendant telephoned the plaintiffs within three days after the suit was filed and stated that he was going to represent Food 4 Less. The amended petition did not change the cause of action. We do not believe defendant was prejudiced.

We find that under Iowa Rule of Civil Procedure 89 the amended petition should relate back to the date the original petition was filed. We reverse the decision of the district court which dismissed plaintiffs' suit as being barred by the statute of limitations.

REVERSED.