FILED
FEB 23 1983
CLERK SUPREME COURT

IN THE COURT OF APPEALS OF IOWA

DELBERT J. DRISCOLL,

Plaintiff-Appellant,

vs.

DR. DONOVAN F. WARD, DR. A. L. McDERMOTT and THE FINLEY HOSPITAL,

Defendants-Appellees.

Filed February 23, 1983

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2-499
2-68468

Appeal from Dubuque District Court - Thomas H. Nelson, Judge.

Plaintiff appeals the trial court's order refusing to reinstate plaintiff's malpractice action against the defendants after its dismissal pursuant to Iowa Rule of Civil Procedure 215.1. REVERSED.

Daniel J. Chapman of Chapman & Chapman, Bismarck, North Dakota; and Ernst & Cody, P.C., Dubuque, Iowa, for plaintiff-appellant.

Robert V. Waterman of Lane & Waterman, Davenport, Iowa; and Lawrence H. Fautsch of Fautsch, Fautsch, McCaw & Galliart, Dubuque, Iowa, for defendant-appellee Dr. Ward.

David L. Hammer of O'Connor, Thomas, Hammer, Bertsch & Norby, Dubuque, Iowa, for defendant-appellee Finley Hospital.

Greg A. Egbers of Betty, Neuman, McMahon, Hellstrom & Bittner, Davenport, Iowa, for defendant-appellee Dr. McDermott.

Considered en banc.

PER CURIAM

Plaintiff, Delbert Driscoll, appeals from the trial court's order refusing to reinstate his malpractice action against the defendants after its dismissal pursuant to Iowa Rule of Civil Procedure 215.1. Plaintiff asserts in the alternative that the court was required to reinstate the case under the mandatory provisions of rule 215.1 or that the trial court abused its discretion in refusing to reinstate the matter. We reverse.

Plaintiff's counsel, Daniel Chapman, is a resident of Bismarck, North Dakota and is licensed to practice law in that state. In this action in Iowa, plaintiff retained the services of the Scalise law firm located in Des Moines, Iowa, to serve as local counsel. On January 13, 1982, the Scalise firm withdrew as local counsel and Ernst & Cody, P.C., was substituted. Other procedural aspects of this case will be discussed in the pertinent portions of this opinion.

I. Scope of Review. Since this is an action at law, our review is on assigned error only. Iowa R. App. P. 4. In reviewing the mandatory reinstatement provisions of rule 215.1 the pertinent principles are:

> [T] rial court must initially determine whether the evidence adduced at the hearing constitutes a "showing" of oversight, mistake or other reasonable cause. This first involves a factual finding which we shall review not de novo, as in equity, but as in a law proceeding. It follows that trial court's findings of fact and inferences inherent therein are binding upon this court if supported by substantial evidence. Rule 344(f)(1), R.C.P. Whether the facts and inferences found constitute "inadvertence," "mistake" or "other reasonable cause" is not a factual but a legal question on review. 5 C.J.S. Appeal and Error § 1454, p. 591. We have held trial court's interpretation of its findings becomes a question of law which is not conclusive on appeal.

Rath v. Sholty, 199 N.W.2d 333, 336 (Iowa 1972). In reviewing the discretionary aspect of rule 215.1:

> Our review in those peripheral areas in which trial court's discretion is invoked under rule 215.1, R.C.P. will be that employed in reviewing rulings under rule 236, R.C.P. The exercise of a lower court's discretion is not reviewable; it

> is only the alleged abuse of that power which is reviewable on appeal. . . . [citing authority] Generally, abuse of discretion will be found only where there is no support for the decision in the hearing evidence.

Id. at 335-336.

II. Rule 215.1. Plaintiff complains that the trial court erred in failing to reinstate this action under the mandatory provision or in the alternative abused its discretion in not reinstating the matter. Rule 215.1 provides in part:

> The trial court may, in its discretion, and shall upon a showing that such dismissal was a result of oversight, mistake or other reasonable cause, reinstate the action or actions so dismissed. Application for such reinstatement, setting forth the grounds therefore, shall be filed within six months from the date of dismissal.

There is no dispute that plaintiff's application for reinstatement was within the requisite six months.

A. Mandatory Reinstatement. Plaintiff asserts that the matters adduced at the reinstatement hearing evidenced "mistake or other reasonable cause" under 215.1 thus requiring mandatory reinstatement. The trial court in its order overruling plaintiff's application for reinstatement bases its dismissal not only on rule 215.1 but also on Court Rule 116,[1] District Rule 17,[2] Iowa Code § 610.3 (1981),[3] and Iowa Rule of Civil Procedure 134.[4] A review of the history of this case is necessary to decide this issue.

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[1] The trial court found that plaintiff did not comply with Court Rule 116, however, the trial court itself did not supply the notice specifically required by Rule 116 to plaintiff to advise plaintiff of a potential dismissal.

[2] The trial court found that the case was "at issue" for the purposes of District Rule 17 on July 15, 1980, the date the last defendant filed an answer. No specific dismissal provision in local rule 17 is cited to this court.

[3] The trial court found a violation of section 610.3 and yet the Scalise firm was of record as local counsel for the purposes of section 610.3 until at least January 13, 1982, when the trial court permitted the withdrawal of local counsel.

[4] The trial court stated that it had examined the court file and found no answers to interrogatories required of plaintiff. Plaintiff claims that he mailed the answers to defendants, but omitted to file them with the court. Trial court did not inquire of the parties as to the correctness of this statement. On remand this issue may be considered by the court. However, we note that dismissal under rule 134 is a severe sanction and the court may consider other alternatives in a proceeding brought for sanctions.

This action was filed by the local counsel on June 26, 1980, to which the last defendant answered on July 15, 1980. During the remainder of 1980 and early 1981 the parties undertook discovery. On April 3, 1981, the plaintiff was ordered to answer interrogatories. On June 9, 1981, defendant McDermott served notice that a Dr. White would be deposed on July 27, 1981, and such deposition did occur on that date. On July 21, 1981 the clerk sent the 215.1 notice to the parties. After the deposition of Dr. White, the plaintiff inquired about settlement possibilities with defendants on July 28, 1981.

On October 6, 1981, plaintiff's counsel received correspondence from local counsel stating the firm's desire to withdraw as counsel and advised plaintiff's counsel of the following:

> One final note, this case is subject to Iowa Rule of Civil Procedure 215.1. In other words, this case is subject to dismisal on December 31, 1981, unless continued to a date certain in 1982. Basically all that is necessary is for you to check with the other attorneys involved in this case and ask them to stipulate to a continuance to a date certain in 1982. I have never had an occasion whereby Iowa lawyers have ever objected to continue a 215.1 case. Once you get the agreement out of all counsel, you should take a signed stipulation, plus an Order, to the local district judge for signature and filing.

On November 3, 1981, plaintiff received a response from defense counsel indicating a desire to settle the action against defendant McDermott for $5,000. The parties agree for various reasons that the offer was to be held open until at least December 12, 1981. On December 21, 1981, plaintiff decided not to accept the offer of settlement and mailed a proposed stipulation to defense counsel requesting an extension because this action would "extend the above-entitled matter beyond the first day of January, 1982." Counsels for the various defendants refused to agree to the stipulation and on December 28, 1981, plaintiff filed a motion for relief from the operation of rule 215.1. On December 30, 1981, the trial court ruled that no relief would be granted plaintiff since defendants' counsel refused to waive notice on the motion filed December 28. On January 4, 1982, the action was

dismissed under rule 215.1. Plaintiff moved to reinstate the action on February 19, 1982, under rule 215.1. Plaintiff's application was denied by the trial court on March 24, 1982.

"Reinstatement is mandatory and not discretionary for trial court if the dismissal is shown to be the result of 'oversight, mistake or other reasonable cause.' [citation omitted] The general policy in this jurisdiction has been to allow trial on the merits." Iowa Methodist Hospital, 219 N.W.2d 18, 21 (Iowa 1974). " '[Rule 215.1] giving the court power to set aside dismissals is remedial, intended to be liberally construed and applied to the end that meritorious trials may be had.' " Rath, 199 N.W.2d at 337 (quoting 27 C.J.S. Dismissal & Nonsuit § 78, p. 491).

In the present instance plaintiff alleges that it was his counsel's mistaken reliance upon the statement of local counsel, advising his counsel that in practice motions seeking relief from rule 215.1 are uncontested, that caused his counsel to wait until December 21, 1981, before seeking relief from rule 215.1. Plaintiff in fact requested relief from the court on December 28. Such a record does not support the trial court's conclusion that there was no credible evidence showing dismissal was the result of "oversight, mistake or other reasonable cause." We believe that plaintiff demonstrated that dismissal occurred due to "mistake or other reasonable cause" and as such trial court was without discretion to deny reinstatement. Accordingly, we reverse the trial court and remand for the reinstatement of plaintiff's action.

B. Discretionary Reinstatement. Since we have disposed of this matter under the mandatory reinstatement provision, we find it unnecessary to determine whether the trial court abused its discretion.

REVERSED AND REMANDED.