

FILED

IN THE COURT OF APPEALS OF IOWA OCT 21 1980

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CLERK SUPREME COURT

GEORGE J. HESS and MARY ESTHER HESS,)

Plaintiffs-Appellants,)

Filed October 21, 1980

vs.)

GREEN FIELD TRANSPORT, INC., and)

ROBERT C. McMAHON,)

0-288

Defendants-Appellees.)

63804

Appeal from Webster District Court - R. K. Richardson, Judge.

Plaintiffs appeal from trial court's denial of their motion to reinstate their action against defendants which was dismissed for want of prosecution under Iowa R. Civ. P.

215.1. REVERSED AND REMANDED.

David J. Lawler, Fort Dodge, Iowa, for plaintiffs-appellants.

John W. Galley, Fort Dodge, Iowa, for defendants-appellees.

Submitted to Oxberger, C.J., and Donielson, Snell, Carter and Johnson, JJ.

PER CURIAM

Plaintiffs appeal from trial court's denial of their motion to reinstate their action against defendants which was dismissed for want of prosecution under Iowa R. Civ. P. 215.1. They claim the notice of dismissal required by Rule 215.1 was untimely or, assuming valid notice, dismissal resulted from oversight, mistake or other reasonable cause. Because we find the notice of dismissal was untimely, we reverse and remand with directions to reinstate plaintiffs' action.

Plaintiffs filed a petition against defendants on October 7, 1976. On August 15, 1978, the clerk of court sent notice (pursuant to Rule 215.1) to the parties that the cause was subject to dismissal if not tried before January 1, 1979. No trial occurred and the cause was dismissed on January 2, 1979. Plaintiffs moved for reinstatement on April 13, 1979, alleging invalid notice of dismissal since it was not given "prior to" August 15, 1978 as required by rule 215.1. They also claimed reinstatement was required because plaintiffs retained new counsel who was not aware of the August 15 notice. The trial court denied the motion for reinstatement and this appeal followed.

Rule 215.1 provides in relevant part as follows:

All cases at law or in equity where the petition has been filed more than one year prior to July 15 of any year shall be for trial at any time prior to January 1 of the next succeeding year. The clerk shall prior to August 15 of each year give notice to counsel of record as provided in rule 82 of: (a) the docket number, (b) the names of parties, (c) counsel appearing, (d) date of filing petition, and the notice shall state that such case will be for trial and subject to dismissal if not tried prior to January 1 of the next succeeding year pursuant to this rule. (emphasis added)

The duty to give notice prior to August 15 is mandatory; the clerk's failure to do so is such a mistake, oversight or omission as to entitle plaintiff to reinstatement of his dismissed action. Rhiner v. Arends, 292 N.W.2d 399, 401 (Iowa 1980); Schmidt v. Abbott, 261 Iowa 886, 889-90, 156 N.W.2d 649, 651 (1968). Here the clerk gave notice on, not prior to, August 15; thus, the notice was untimely. Plaintiffs are therefore entitled to reinstatement and the trial court erred in holding to the contrary.

The judgment is reversed and remanded with directions to reinstate plaintiffs' action.

REVERSED AND REMANDED.