

IN THE SUPREME COURT OF IOWA

CASE NO. 19-0608

CHRISTY B. LOGAN,
Appellant,

v.

THE BON TON STORES, INC., and LIBERTY MUTUAL INSURANCE
CO.,
Appellees.

APPEAL FROM THE IOWA DISTRICT COURT
FOR JOHNSON COUNTY

HON. LARS ANDERSON

APPELLEES' FINAL BRIEF

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LIBERTY MUTUAL INSURANCE
CO.

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STATEMENT OF THE ISSUES

I. Faxing A Petition Does Not Satisfy The Service Requirements of 17A.19(2).

CASES

Brown v. John Deere Waterloo Tractor Works, 423 N.W.2d 193
(Iowa 1988)

Ortiz v. Loyd Roling Constr. and Grinnell Mut. Reinsurance, 928 N.W.2d
651 (Iowa 2019)

STATUTES AND RULES

Iowa Code Section 17A.19(2) (2017)

Iowa R. Civ. Pro. 1.442(2)

OTHER AUTHORITIES

Jonathan Coppersmith, Faxed: The Rise and Fall of the Fax Machine (2015)

ROUTING STATEMENT

This case involves application of existing principles of law and should be routed to the Iowa Court of Appeals. Iowa R. App. P. 6.1101(3)(a).

STATEMENT OF THE CASE

This appeal stems from the dismissal of a Petition for Judicial Review of an Iowa Workers' Compensation Commission ruling because Plaintiff failed to substantially comply with Iowa Code section 17A.19(2) requirements for service.

On January 3, 2019, Appellant Christy B. Logan ("Logan") filed a "Judicial Review: Motion to Appeal Commission Ruling" with the District Court. Logan sought review of a decision of the Iowa Workers' Compensation Commissioner denying Logan workers' compensation benefits. App. 78.

On January 3, 2019, Logan faxed a file-stamped copy of the Petition for Judicial Review to counsel for Appellees, The Bon Ton Stores and Liberty Mutual Insurance Co. ("Bon Ton"). App. 82.

On January 23, 2019, Bon Ton filed a Motion to Dismiss Petition for Judicial Review. Bon Ton argued Logan did not comply with the service requirements of Iowa Code section 17A.19(2), because Logan only faxed a copy of her Petition to counsel, rather than serving Bon Ton or counsel in the manner set forth in Iowa Code section 17A.19(2). Bon Ton argued the District Court lacked jurisdiction due to the lack of proper service and that the Court dismiss the Petition. App. 81-83.

On January 28, 2019, Logan filed a Motion to Extend Time for Notice of Service for Judicial Review. Logan asserted she substantially complied with Iowa Code section 17A.19(2). Logan argued Bon Ton’s counsel was aware of “all past and current actions in this matter” and she sought an extension of time to properly serve Bon Ton in order to give the District Court jurisdiction over the controversy. App. 84-85.

On February 19, 2019, Logan filed copies of U.S. Postal Service Certified Mail Receipts, to prove service of the Petition on Liberty Mutual Insurance Co. and counsel. The receipts show mailing on February 19, 2019. App. 90; App. 91.

On March 13, 2019, the District Court granted Bon Ton’s Motion to Dismiss for lack of service and denied Logan’s motion to extend time for service. App. 92-95.

Logan now appeals.

STATEMENT OF THE FACTS

On February 18, 2016, Logan filed a Petition with the Iowa Workers Compensation Commission alleging she suffered a work place injury at the Younkers in Iowa City on March 1, 2014.

On April 4, 2016, she filed Petitions alleging further injuries occurred on April 4, April 23, and October 18, 2014. Bon Ton was her employer on the dates of all alleged injuries. Bon Ton denied her complaints arose out of her employment but instead argued her complaints were an ongoing manifestation of a pre-existing condition. The matter went to hearing on June 21, 2018. App. 46.

On August 24, 2018, the Deputy Commissioner found that Logan failed to carry her burden to prove she sustained injuries arising out of and in the course of her employment on the March 1, April 4, and April 23, 2014, dates of alleged injury. App. 55.

The Deputy did determine that Logan sustained a work-related injury to her left knee on October 18, 2014, however the Deputy found that Logan failed to carry her burden that the October 18, 2014, injury caused any temporary or permanent disability. The Deputy found Bon Ton was only responsible for Logan's medical appointment with Dr. John Albright, M.D.,

performed on October 30, 2014. No other workers' compensation benefits were awarded. App. 55.

The Deputy's ruling was affirmed in its entirety by a final agency decision on December 5, 2018. App. 77.

On January 3, 2019, Logan filed what constituted a Petition for Judicial Review of the decision by the Iowa Workers' Compensation Commissioner under Iowa Code section 17A.19 and Iowa Code section 86.26. App. 78. On January 3, 2019, Logan faxed a file-stamped copy of the Petition for Judicial Review to counsel for Bon Ton. App. 82.

On January 23, 2019, Bon Ton filed a Motion to Dismiss Petition for Judicial Review. Bon Ton argued Logan did not comply with the service requirements of Iowa Code section 17A.19(2), because Logan faxed a copy of her Petition to counsel, rather than serving Bon Ton or counsel in the manner set forth in Iowa Code section 17A.19(2). App. 81-83. Bon Ton argued the District Court lacked jurisdiction due to the lack of proper service and therefore, the Court should dismiss the Petition. Id.

On January 28, 2019, Logan filed a Motion to Extend Time for Notice of Service for Judicial Review. Logan asserted she substantially complied with Iowa Code section 17A.19(2). Logan also argued Bon Ton's counsel

was aware of “all past and current actions in this matter” and she sought an extension of time to properly serve Bon Ton.

On February 15, 2019, Bon Ton replied to Logan’s Motion to Extend Time of Service. Bon Ton rested on its Motion to Dismiss. Bon Ton’s reply also stated Logan still had not served her Petition by that date. App. 86.

On February 19, 2019, Logan filed a Response to Bon Ton’s reply stating she asked the District Court for time to properly serve the Petition. That same day, Logan filed copies of U.S. Postal Service Certified Mail Receipts, purporting to show service of the Petition on Liberty and counsel on February 19, 2019. App. 91.

On March 13, 2019, the District Court granted Bon Ton’s Motion to Dismiss and denied Logan’s Motion to Extend Time for Service. App. 92-95.

Logan now appeals.

ARGUMENT

I. **FAXING A PETITION TO COUNSEL OF RECORD DOES NOT SATISFY THE SERVICE REQUIREMENTS OF IOWA CODE SECTION 17A.19(2).**

Scope and Standard of Review

The Court reviews this case to correct errors of law. *Ortiz v. Loyd Roling Constr. Co. and Grinnell Mut. Reinsurance*, 928 N.W.2d 651, 653 (Iowa 2019). Substantial, not literal compliance, is needed to comply with section 17A.19(2). *Brown v. John Deere Waterloo Tractor Works*, 423 N.W.2d 193, 194 (Iowa 1988).

A. **Logan Did Not Comply With The Statutory Language of Iowa Code Section 17A.19(2)**

Iowa Code section 17A.19(2) requires:

Within ten days after the filing of a petition for judicial review the petitioner shall serve by the means provided in the Iowa rules of civil procedure for the personal service of an original notice, or shall mail copies of the petition to all parties named in the petition and, if the petition involves review of agency action in a contested case, all parties of record in that case before the agency. Such personal service or mailing shall be jurisdictional. The delivery by personal service or mailing referred to in this subsection may be made upon the party's attorney of record in the proceeding before the agency. A mailing shall be addressed to the parties or their attorney of record at their last known mailing address. Proof of mailing shall be by affidavit.

Iowa Code § 17A.19(2) (2017).

The statute provides two options for service in a judicial review proceeding following a contested agency action: (1) service by means

provided in the Iowa Rules for Civil Procedure for personal service of an original notice; or (2) service by mailing copies of the petition to all parties named in the petition and all parties of record in the case before the agency. Either option can be completed on the party's attorney of record in the agency action.

Logan did not mail the Petition until February 19, 2019. Logan did not complete service within the 10 days as required by the statutory language of 17A.19(2) and, therefore, did not substantially comply with the requirements of 17A.19(2) as written.

B. Plaintiff Did Not Substantially Comply With The Statutory Service Requirements Following The Iowa Supreme Court's Ruling in *Ortiz* Because Faxing Is Not E-mail

Logan asserts she substantially complied with the service requirement by faxing the Judicial Review Petition to counsel the day it was filed with the District Court. She argues she carried out the intent of the statute by using a modern form of communication to comply with service. After the ruling by the District Court in this case, the Iowa Supreme Court issued its ruling in *Ortiz v. Loyd Roling Constr. Co. and Grinnell Mut. Reinsurance*, 928 N.W.2d 651, 653 (Iowa 2019).

In *Ortiz*, the Iowa Supreme Court discussed substantial compliance under 17A.19(2). *Ortiz*, 928 N.W.2d at 653-54. In *Ortiz*, the issue before the

Court was whether e-mailing a Petition for Judicial Review to counsel of record constituted substantial compliance with 17A.19(2). *Id.* The Supreme Court held e-mail between counsel properly constituted service under section 17A.19(2). *Id.* at 655.

The Court noted e-mail was not a common form of communication in 1977 when the statute was enacted or in 1981 when the statute was amended but e-mail constitutes the common form of communication today. *Id.* at 653.¹ Specifically, the Court said in interpreting the statute:

Our legislature used the word “mail” in 1975 and 1981 to describe current routine systematic methods of sending written communications. At the time, the current method was postal service. But this, however, should not preclude the word to apply to a means of communication that would later displace postal mail as the standard and most reliable means of routine, reliable communication.

Id. at 655.

Underlying the Court’s holding was that the interpretation of the statute:

promotes the objects of the statute to provide a reliable and convenient form of communication and is consistent with the common and expected manner that lawyers send and receive legal documents in Iowa today. Any other method of communication would be unexpected and jeopardize the purpose of the statute.

¹ The Court also noted that Iowa Rule of Civil Procedure 1.442(2) allows for service by e-mail. That same rule allows for service by fax. See Iowa R. Civ. Pro. 1.442(2) (“Service shall be made by ... transmitting by fax (facsimile) a copy to the attorney or to the party at the attorney’s or party’s last known address.”).

Id.

However, the Iowa Supreme Court acknowledged “the leeway permitted under the substantial-compliance doctrine would not normally include using a means of communication different than provided under the statute.” *Id.* at 654. But the Court noted that e-mail is now the common form of communication between attorneys and “replaced postal mail as the normal means to transmit legal documents among lawyers. This displacement draws emails into the circle of substantial compliance.” *Id.*

Fax is not e-mail. Unlike e-mail, fax has not replaced postal mail as the standard, most reliable, or normal means of communication. Instead, the fax machine has gone the way of the telegraph, Morse Code, or pager. It was e-mail that replaced the fax as the primary way of sending documents electronically. Today, the common way to send documents is to scan the documents and send it via e-mail to the recipient. It is not to send a fax.

While a fax is certainly a more recent development as a form of communication than a physical letter, it was not unheard of when the legislature passed 17A. The fax machine was invented in the 1840s. In the 1968 movie *Bullitt* starring Steve McQueen, McQueen’s character receives a fax of a passport while working in a police station. The 1970s, 1980s, and 1990s experienced a dramatic increase in the use of fax machines to send

documents. Yet, despite the growing prevalence of the fax machine, the legislature did not include it as a proper form of service to serve a judicial review petition. The legislature was certainly aware of the existence of fax machines in the 38 years since the section was amended in 1981 yet they never chose to amend the section to allow service by fax.

Today, faxing is not a current form of communication but instead an obsolete technology. *See* Jonathan Coppersmith, Faxed: The Rise and Fall of the Fax Machine 8 (2015) (“My procrastination has thus enabled me to report the obsolescence and decline of faxing.”).

Moreover, had the Supreme Court wanted to include faxes as substantially complying with 17A.19(2), the Court could have extended the forms of communication that satisfy substantial compliance beyond e-mail. Instead, the Court solely found that e-mail complied with the statute. In allowing e-mail, the Court stated “Any other method of communication would be unexpected and jeopardize the purpose of the statute.” *Ortiz*, 928 N.W.2d at 655. Fax is a different form of communication and is not the common method of communication in today’s society.

Fax does not substantially comply with the statute under the Iowa Supreme Court’s most recent interpretation of 17A.19(2). Therefore, Logan did not substantially comply with the service requirements 17A.19(2).

CONCLUSION

Since the neither the statutory language nor the Supreme Court's interpretation in *Ortiz* allows for the faxing of a judicial review petition to satisfy the service requirements under 17A.19(2), the district court should be affirmed and the case dismissed.

REQUEST FOR NON-ORAL SUBMISSION

The Appellees believe this case can be decided on the briefs without the assistance of oral argument. However, if oral argument is granted, the Appellees request the opportunity to be heard.

CERTIFICATE OF FILING AND SERVICE

I hereby certify that on October 22, 2019, I electronically filed the foregoing Appellees' Proof Brief with the Clerk of the Supreme Court by using the Iowa Electronic Document Management System (EDMS), which will send notice of electronic filing to the following:

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Per Rules 6.106(1) and 6.701, this constitutes service for purposes of the Iowa Court Rules.

/s/ Aaron W. Lindebak _____

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CERTIFICATE OF COMPLIANCE

This brief complies with the typeface requirement and type-volume limitation of Iowa Rs. App. P. 6.903(1)(d) and 6.903(1)(g)(1) because:

[x] this brief has been prepared in proportionally spaced typeface using Times New Roman 14 point and contains 2,173 words, excluding the parts of the brief exempted by Iowa R. App. P. 6.903(1)(g)(1).

/s/ Aaron W. Lindebak
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October 22, 2019
Date