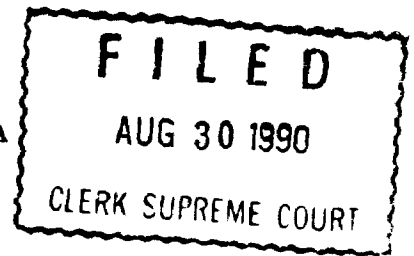


IN THE COURT OF APPEALS OF IOWA

No. 0-302 / 89-385



VINCENT RIESSELMAN, EDIE RIESSELMAN, and IRENE BAUMHOVER,

Appellants,

vs.

557

THOMAS H. TREINEN,

Appellee.

Appeal from the Iowa District Court for Ida County,
Richard J. Vipond, Judge.

The plaintiffs, acting pro se, appeal from the
dismissal of their suit as a sanction for refusing to obey
a court order. **AFFIRMED.**

Vincent Riesselman, Edie Riesselman, and
Irene Baumhover, appellants, pro se.

Colin McCullough, Sac City, for appellee.

Considered by Oxberger, C.J., and Donielson and
Schlegel, JJ. Habhab, J., takes no part.

DONIELSON, J.

Vincent and Edie Riesselman and Irene Baumhover, (plaintiffs), acting pro se, filed a petition against attorney Thomas Treinen. The petition appears to allege attorney malpractice against Treinen although the precise nature of the suit is unclear.

During the discovery stages of the suit, defendant Treinen served notice of depositions on the plaintiffs for October 19, 1988. Subpoenas were served on October 18, 1988. On October 19, 1988, plaintiffs appeared at the time and place stated in the notice of depositions, however, the depositions did not take place. Treinen's attorney attempted to take the depositions but plaintiffs would not be sworn, answer questions, or permit inspection of documents. Treinen moved to compel discovery and the court entered an order directing the plaintiffs to submit to a deposition proceeding. All plaintiffs were in the court on January 17, 1989, when the court issued its oral ruling requiring plaintiffs to appear for the taking of their depositions, to be sworn, to answer all appropriate questions, and to produce and allow inspection of requested documents. Depositions were scheduled to begin immediately following the court's ruling on the motion to compel. Soon after Treinen began his attempt to depose plaintiffs disputes arose and Ms. Baumhover eventually refused to answer any further questions. The parties requested and received a hearing before the trial court which resulted in

further instruction and clarification by the court. However, when the depositions resumed, plaintiffs continued to refuse to answer questions, interrupted the proceedings, and answered questions on behalf of the sworn witness.

The district court dismissed the plaintiffs' petition pursuant to Iowa Rule of Civil Procedure 134(b)(2)(C) as a sanction for their refusal to obey a court order regarding discovery.

The plaintiffs appeal from the dismissal of their petition. They argue the dismissal was an excessive sanction. On appeal plaintiffs have moved to disqualify the defendant's attorney due to an alleged conflict of interest. The motion to disqualify was ordered submitted with the appeal.

I. MOTION TO DISQUALIFY. Plaintiffs have moved to disqualify defendant's attorney. Plaintiffs claim they intend to call attorney for defendant, Colin McCullough, to testify about matters relating to their deceased father's conservatorship proceedings where McCullough's law firm was employed by the children. Plaintiffs contend DR 5-102(A) of the Iowa Code of Professional Responsibility requires that McCullough withdraw or that the court disqualify him. However, DR 5-102(A) determines when an attorney should withdraw in situations where the attorney may be called on behalf of a client. Plaintiffs are not the clients of attorney McCullough and, therefore, DR 5-102(A) is inapplicable here.

It may be plaintiffs' contention that McCullough should be disqualified as defendant's counsel because McCullough's law firm formerly represented plaintiffs in a related matter. Our supreme court recently addressed a disqualification motion by a litigant against a former lawyer now representing litigant's foe in Richers v. Marsh & McLennan Group Associates, No. 211/89-1164, slip op. (Iowa July 18, 1990). The supreme court noted an attorney should be disqualified from representing a party against a former client if the two representations bear a "substantial relationship" to each other. Id. at 7-8. The disqualification is based upon the attorney's duty to preserve client (both former and present) confidences and secrets and the importance of avoiding even the appearance of impropriety. Code of Professional Responsibility, Canons 4 and 9. It is the movant's burden to show the two representations are substantially related. Richers, slip op. at 8. Plaintiffs have not shown what, if any, relationship exists between McCullough's present representation of defendant Treinen and the McCullough firm's prior representation in the conservatorship proceedings. The plaintiffs have not met their burden in this case and the motion to disqualify attorney McCullough is denied.

II. DISMISSAL AS SANCTION.

Iowa rule of civil procedure 134 (b)(2)(C) expressly authorizes a court to dismiss an action as a sanction for failing to comply with the discovery order. See Annot., 32 A.L.R.4th 212 (1984).

We have long recognized that "[i]mposition of discovery sanctions by a trial court is discretionary and will not be reversed unless there has been an abuse of discretion." Suckow v. Boone State Bank & Trust Co., 314 N.W.2d 421, 425 (Iowa 1982); State ex rel. Parcel v. St. John, 308 N.W.2d 8, 10 (Iowa 1981; Eickelberg v. Deere & Co., 276 N.W.2d 422, 426 (Iowa 1979); Haumerson v. Ford Motor Co., 257 N.W.2d 7, 14 (Iowa 1977). Where, however, the trial court selects dismissal of the action as the appropriate discovery sanction, the range of discretion is narrowed. Smiley v. Twin City Beef Co., 236 N.W.2d 356, 360 (Iowa 1975). We have held that "[i]n order to justify dismissal of the action, a party's non-compliance must be due to willfulness, fault or bad faith." Suckow, 314 N.W.2d at 425, citing McQuillen v. City of Sioux City, 306 N.W.2d 789, 791 (Iowa 1981) (plaintiff's willful non-compliance with court order to submit to a medical examination justified sanction of dismissal).

We have divided our decisions involving discovery sanctions into two categories: (1) violation of a trial court discovery order, and (2) violation solely of a rule of civil procedure relating to discovery. See Suckow, 314 N.W.2d at 425-26. A comparison of the two classes of cases "makes it very clear that dismissal is a discovery sanction generally used when a party has violated a trial court's order." Id. at 426, citing Zimmerman v. Purex Corp., 256 Iowa 190, 194-95, 125 N.W.2d 822, 825 (1964) (sanction was improper in the absence of a court order setting a specific time limit to answer interrogatories).

Postma v. Sioux Center News, 393 N.W.2d 314, 318 (Iowa 1986).

Under the foregoing principles we conclude the trial court did not abuse its discretion in ordering the dismissal as a sanction for plaintiffs' refusal to obey a court order. Defendant Treinen moved to dismiss this suit as a sanction for plaintiffs' first refusal to cooperate in the taking of their depositions. The trial court refused to impose such a harsh sanction in the absence of a

violation of a court order. However, the trial court did issue an order requiring plaintiffs cooperation with discovery and plaintiffs continued to thwart defendant's attempts to obtain information. This failure to cooperate resulted in another hearing before the court and did not end there. Even after the court's clarification of its order, plaintiffs resisted defendant's attempts to obtain information concerning the basis of plaintiffs' action. The trial court specifically found plaintiffs' violation of the order was intentional and deliberate. We see no reason to question the trial court's finding. We conclude the dismissal of plaintiffs' action was well within the court's discretion.

Costs are assessed to appellants.

AFFIRMED.