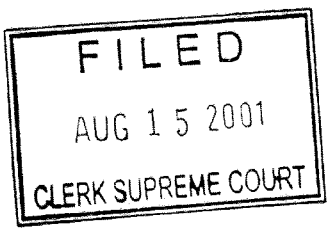
IN THE COURT OF APPEALS OF IOWA

No. 1-328 / 00-0177
Filed August 15, 2001



JOHN LARUE,
Appellant,

vs.

LARRY PORTIS, d/b/a PORTIS AUTO REPAIR,
Appellee.

Appeal from the Iowa District Court for Floyd County, John S. Mackey, Judge.

Plaintiff appeals the district court judgment entered in favor of defendant on plaintiff's negligent misrepresentation and fraudulent misrepresentation claims. **REVERSED AND REMANDED.**

Thomas P. Frerichs of Frerichs Law Office, P.C., Waterloo, for appellant.

Russell Schroeder, Jr. of Schroeder Law Office, Charles City, for appellee.

Considered by Sackett, C.J., and Vogel and Vaitheswaran, JJ.

VOGEL, J.

John Larue appeals the district court's imposition of a discovery sanction barring his presentation of witnesses and exhibits at trial. We reverse and remand.

Background Facts and Proceedings. On July 15, 1997, John Larue filed a petition alleging negligent and fraudulent misrepresentation by Larry Portis, d/b/a Portis Auto Repair [Portis]. Trial was set for August 12, 1998, but Portis moved for and was granted a continuance. The subsequent scheduling order set a new trial date of January 13, 1999, and a new discovery deadline of December 11, 1998.

On November 20, 1998, Portis served Larue with three interrogatories which requested information regarding all of Larue's witnesses, both expert and non-expert, and the exhibits he intended to offer at trial. Larue did not respond to these interrogatories or request additional time to respond from either Portis or the district court. In a similar vein, Portis did not make any effort to obtain answers from Larue or file a motion to compel compliance. Nine days prior to the second trial date, Larue requested and obtained a continuance. The final scheduling order set trial for September 22, 1999, and noted that discovery was complete. At no time prior to September 22 did Larue or Portis contact the district court or each other regarding the outstanding interrogatories.

Then, on the morning of trial, Portis made an oral motion in limine to bar Larue from introducing any witness testimony or exhibits, citing Larue's failure to respond to the outstanding interrogatories. Portis specifically requested the

sanction under Iowa Rule of Civil Procedure 134(b)(2)(B), contending that Larue's lack of response had prevented him from properly preparing for trial. Larue asserted he was not required to answer the interrogatories as they were untimely, having been served less than thirty days before the close of discovery. He admitted he did not request an extension of the deadline so that he could respond to the interrogatories, but noted Portis's failure to make a good-faith effort to obtain the discovery, or to file a motion to compel.

The district court granted Portis's motion, citing Iowa Rules of Civil Procedure 134(d)(2) and 134(b)(2)(B). When asked to expand on the factual basis for its ruling, the court verbally remarked:

> I think it's quite apparent from the record that plaintiffs failed – plaintiff failed to answer interrogatories propounded as required by the rules. Ten months have elapsed since the service upon the same. There was no extension, even given the scheduling orders, requested by the plaintiff. Under these circumstances and given the fact that discovery is no longer a hiding game under our rules, the court concludes that the only proper sanction is exclusion of all witnesses and testimony and exhibits on behalf of the plaintiff.

Larue decided not to proceed with the trial and left the courthouse.

Larue then contacted the Court Administrator's office to select a new trial date, which request was apparently denied. During a December 14, 1999, conference call, Portis requested that judgment be entered in his favor. The court noted that Larue could provide no authority to support his previous trial scheduling request and found that "[e]ven if trial were to be rescheduled, the court's prior order granting defendant's motion in limine would stand and plaintiff would be excluded from presenting any evidence in support of his case . . . ." It

then proceeded to enter judgment in Portis's favor. Larue appeals the judgment entry, specifically attacking the court's confirmation of its prior discovery ruling.

Scope of Review. We review the imposition of a discovery sanction for an abuse of discretion. *Troendle v. Hanson,* 570 N.W.2d 753, 755 (Iowa 1997). There must be substantial evidence in support of the factual findings which underlie the district court's exercise of discretion. *Id.* Abuse is found where that discretion was exercised on clearly untenable or unreasonable grounds. *Id.*

Imposition of Sanction. Portis correctly notes he was not required to seek a motion to compel before requesting that the district court impose sanctions on Larue. Iowa Rule of Civil Procedure 134 provides, in part:

> If a party . . . fails . . . [t]o serve answers or objections to interrogatories submitted under R.C.P. 126, after proper service of the interrogatories . . . the court in which the action is pending on motion may make such orders in regard to the failure as are just, and among others it may take any action authorized under paragraphs (A), (B), (C), and (E) of subdivision (b)(2) of this rule.

Iowa R. Civ. P. 134(d). Larue admits he never responded to the interrogatories, and one of the permitted sanctions is "prohibiting [the disobedient] party from introducing designated matters in evidence." Iowa R. Civ. P. 134(b)(2)(B). Although Larue claims the service of the interrogatories was untimely, nothing in the rules requires that service occur at least thirty-days prior to a discovery deadline. *See generally* Iowa R. Civ. P. 124, 126 and 134. They provide only that a party has thirty days in which to respond. Iowa R. Civ. P. 126.

The district court's ruling was nevertheless in error. Before a court may entertain a motion for sanctions under rule 134, there must be an allegation "that counsel for the moving party has made a good faith but unsuccessful attempt to

resolve the issues raised by the motion with opposing counsel without intervention of the court." Iowa R. Civ. P. 134(e). This requirement applies to any motion relating to discovery and is not limited to formal written motions or motions to compel. *Id.* It is undisputed that Portis's attorney made absolutely no effort to obtain discovery responses before making a motion in limine the morning of trial and, accordingly, the district court should not have considered Portis's request. Moreover, even if a good faith effort had been made, the sanction imposed was too harsh.

When the sanction is dismissal, the district court's range of discretion narrows, and the court's decision is justified only upon a finding of willfulness, fault, or bad faith. *Farley v. Ginther*, 450 N.W.2d 853, 856 (Iowa 1990). Here, although dismissal was not involved as a sanction, by precluding Larue from presenting evidence and witness testimony, the court's ruling worked as an effective dismissal of his claims. We therefore "consider the sanction imposed with that in mind." *Id.*

Larue's only justification for failing to answer the interrogatories is his contention that their late filing relieved him of the responsibility to respond. While this demonstrates ten months of deliberate inaction and sanctionable behavior, the court made no finding as to Larue's credibility or motivations, and there is not substantial, independent evidence in the record that would support a finding of willfulness or bad faith. Larue did not disregard a court order or even a good-faith request from opposing counsel, as neither were made.

Dismissal is a drastic sanction, typically limited to cases where there has been a violation of a court order. *Kendall/Hunt Pub. Co. v. Rowe*, 424 N.W.2d 235, 240 (Iowa 1988). Such a limitation "reflects the 'proper balance between the conflicting policies of the need to prevent delays and the sound public policy of deciding cases on their merits.'" *Id.* (quoting *Edgar v. Slaughter*, 548 F.2d 770, 772 (8th Cir.1977)). Clearly, imposing a lesser sanction and continuing the trial date would have caused further, and arguably unnecessary delay in a case that had been pending for over two years. However, some of the blame for such a delay must be ascribed to Portis. During the ten months the discovery was outstanding he had mechanisms available to assist in obtaining a response, yet chose to do nothing until the morning of trial. To prevent a plaintiff from presenting his case, where the defendant must bear some culpability for the potential delay, would be an abuse of discretion. However, as previously discussed, the district court should not have even reached the issue, absent compliance with rule 134(e). Therefore, we reverse the decision of the district court and remand for further proceedings.

REVERSED AND REMANDED.