

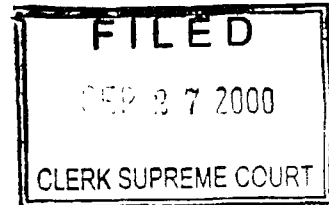
IN THE COURT OF APPEALS OF IOWA

No. 9-814 / 98-2292
Filed September 27, 2000

DAVID MICHAEL ZIMMER,
Plaintiff-Appellee/Cross-Appellant,

vs.

VERSA PRODUCTS, INC. and
G & L PRODUCTS, INC.,
Defendants-Appellants/Cross-Appellees.



Appeal from the Iowa District Court for Clinton County, Mark D. Cleve,
Judge.

Defendants appeal and plaintiff cross-appeals from the district court judgment entered on a jury verdict finding defendants eighty percent at fault on plaintiff's negligence and strict liability claims following plaintiff's fall from a ladder. **AFFIRMED.**

W. Don Brittin, Jr. of Nyemaster, Goode, Voigts, West, Hansell & O'Brien,
P.C., Des Moines, for appellants.

Craig A. Levien and Peter J. Thill of Betty, Neuman & McMahon, L.L.P.,
Davenport, for appellee.

Considered by Streit, P.J., and Mahan and Hecht, JJ.

HECHT, J.

Defendants Versa Products, Inc. and G & L Products, Inc. appeal a jury verdict which assessed eighty percent of fault to them in a tort suit brought as a result of a fall from a ladder. Plaintiff David Zimmer cross-appealed. We affirm.

In August 1995, Zimmer was using a Versa Ladder to set roof trusses when the ladder collapsed and Zimmer fell to the ground, sustaining injuries. The ladder was manufactured by G & L and sold by Versa. In June 1997, Zimmer filed suit against Versa and G & L under theories of strict liability and negligence.

In answers to interrogatories filed in September 1997, defendants stated they had not yet reached any decision regarding expert or trial witnesses. They stated the ladder was tested and inspected by Underwriter's Laboratory (UL) and conformed to the requirements of the American National Standards Institute, Inc. (ANSI). David Lambert, the chairman of Versa and president of G & L, was identified as a person giving answers to interrogatories.

The district court required defendants to designate their expert by July 1, 1998. On June 30, 1998, defendants designated John Hatfield as a potential expert witness. On August 28, 1998, less than thirty days before trial, which was set for September 21, 1998, the report of defendants' expert was given to plaintiff.

A few days before trial, both parties revealed the names of the witnesses and the exhibits they intended to present at trial. For the first time, plaintiff discovered defendants intended to call Lambert as a witness. Neither party informed the other of the proposed testimony of the witnesses.

Defendants filed a motion in limine seeking to limit testimony of plaintiff's expert, Joseph Leane, to matters contained in his report. Plaintiff also filed a motion in limine, which sought to exclude Hatfield from testifying because the substance of his testimony was not revealed within thirty days prior to trial. In a separate oral motion in limine, plaintiff sought to exclude Lambert from testifying because defendants had not revealed the substance of his proposed testimony.

After hearing arguments on these motions, the district court determined as a sanction under Iowa Rule of Civil Procedure 125, defendants' expert, Hatfield, should not be allowed to testify. As a sanction against plaintiff, the court determined Leane could not testify concerning a report made by plaintiff's first expert, John Johnson. The court also excluded testimony by Leane concerning alternative safe design because this information had not been included in his report.

At the trial, plaintiff presented the testimony of Zimmer, Zimmer's father, and two friends who were present at the time of the accident. Leane testified the ladder had a design defect. He stated the hinge was locked in place by a tapered cog. Leane gave the opinion the shape of the tapered cog allowed the cog to back out of the center of the hinge, to the point where the hinge unlocked and the ladder collapsed. He testified the hinges of the ladder showed damage.

Defendants presented only the testimony of Lambert, who was allowed to testify generally about Versa and G & L. The district court did not permit Lambert to testify on any other matters. Defendants made an offer of proof concerning the excluded testimony of Lambert and Hatfield.

The district court denied defendants' motion for a directed verdict and plaintiff's motion for further discovery sanctions against defendants. The jury assigned twenty percent of the fault to Zimmer and eighty percent to defendants. The jury found Zimmer's total damages were \$267,246.57. The district court denied defendants' motions for judgment notwithstanding the verdict and new trial. Defendants appealed and plaintiff cross-appealed.

I. Scope of Review.

Our scope of review in this tort action is for the correction of errors at law. Iowa R. App. P. 4.

II. Design Defect.

Defendants contend the district court should have granted its motion for directed verdict and judgment notwithstanding the verdict on the issue whether the hinge was defectively designed. The case was submitted to the jury on theories of negligence and strict liability. Under either of these theories, defendants claim plaintiff failed to present sufficient evidence to show the product was unreasonably dangerous.

In assessing a motion for judgment notwithstanding the verdict, this court's only inquiry is whether there was sufficient evidence to justify submitting the case to the jury. *Vogan v. Hayes Appraisal Assocs., Inc.*, 588 N.W.2d 420, 423 (Iowa 1999). If there is substantial evidence to support a plaintiff's claims, a motion for judgment notwithstanding the verdict should be denied. *Id.* Evidence is substantial when a reasonable mind would find the evidence presented adequate to reach the same findings. *Tredea v. Anesthesia & Analgesia, P.C.*, 584 N.W.2d 276, 280 (Iowa 1998). The court views the evidence in the light most favorable

to the party against whom the motion was made and takes into consideration every legitimate inference that may fairly and reasonably be made. *Rolling v. Daily*, 596 N.W.2d 72, 74 (Iowa 1999).

Products liability law broadly refers to the legal responsibility for injury resulting from the use of a product. *Lovick v. Wil-Rich*, 588 N.W.2d 688, 698 (Iowa 1999). It encompasses three separate and distinct theories of liability: negligence, strict liability, and breach of warranty.¹ *Id.* The underlying theories ordinarily concern improper design, inadequate warnings, or mistakes in manufacturing. *Id.* The present case was based on a theory of improper design.

In order to prove design negligence, it is necessary for plaintiff to show the product was unreasonably dangerous because of defendant's failure to use reasonable care in its design. *Ackerman v. American Cyanamid Co.*, 586 N.W.2d 208, 220 (Iowa 1998). To establish strict liability, it is necessary for plaintiff to show the design of the product was unreasonably dangerous. *Chown v. USM Corp.*, 297 N.W.2d 218, 220 (Iowa 1980). Thus, proof the product was unreasonably dangerous is an essential element under both theories. *Id.* "Unreasonably dangerous" refers to the consumer's reasonable expectations regarding the product's characteristics. *Wernimont v. International Harvester Corp.*, 309 N.W.2d 137, 140 (Iowa App. 1981).

Plaintiff's expert, Leane, testified the ladder was unreasonably dangerous because it had a propensity to suddenly collapse, which would be contrary to consumer expectations. Defendants claim, however, Leane's conclusion was

¹ The supreme court recently declined to merge negligence and strict liability in defective design cases. *Lovick v. Wil-Rich*, 588 N.W.2d 688, 699 (Iowa 1999).

wholly unsupported. It was within the province of the jury to decide what weight to give expert testimony. *Johnson v. Knoxville Community Sch. Dist.*, 570 N.W.2d 633, 640 (Iowa 1997). The jury, as the finder of fact, was free to accept or reject evidence on this or any other issue. *Blume v. Auer*, 576 N.W.2d 122, 125 (Iowa App. 1997). Leane's testimony provides substantial evidence the ladder was unreasonably dangerous. The district court properly denied defendants' motions for directed verdict and judgment notwithstanding the verdict.

III. Exclusion of Defendants' Expert.

Defendants claim the district court abused its discretion by prohibiting their expert, Hatfield, from testifying. Iowa Rule of Civil Procedure 125(c) requires a party to disclose the substance of an expert witnesses' testimony as soon as practicable, but in no event less than thirty days prior to the beginning of trial except on leave of court. Defendants admit they did not disclose the substance of Hatfield's testimony prior to thirty days before the trial, but assert the delay was due to plaintiff's failure to timely respond to discovery requests.

As in all evidentiary matters, the trial court has broad discretion in making a ruling on expert testimony under rule 125. *Millis v. Hute*, 587 N.W.2d 625, 627 (Iowa App. 1998). We interfere only if a clear abuse of discretion is shown. *Klein v. Chicago Cent. & Pac. R.R. Co.*, 596 N.W.2d 58, 60 (Iowa 1999). We will reverse only when the trial court's ruling rests on grounds or for reasons clearly untenable or unreasonable. *Morris-Rosdail v. Schechinger*, 576 N.W.2d 609, 611 (Iowa App. 1998).

The failure of a party to comply with a discovery order or discovery rules may result in the imposition of sanctions. *Golden Circle Air, Inc. v. Sperry*, 543 N.W.2d 629, 632 (Iowa App. 1995). It is not necessary a party's disobedience of discovery orders be willful in order to bring about sanctions. *Wernimont*, 309 N.W.2d at 143. Exclusion of evidence is the most severe sanction available under rule 125, and is justified only when prejudice would result. *Klein*, 596 N.W.2d at 61. Exclusion should not be imposed lightly; other sanctions are available such as continuation of the trial or limitation of testimony. *Id.*

We find the district court did not abuse its discretion by excluding Hatfield's testimony. Defendants failed to either disclose the substance of Hatfield's testimony or request an extension of time within thirty days prior to trial. Generally, we accord trial courts almost unfettered discretion in sorting through disputes under rule 125. See *Klein*, 596 N.W.2d at 62.

IV. Limitation of Lambert's Testimony.

Defendants contend the district court abused its discretion by limiting Lambert's testimony. Lambert was identified as a witness two days before trial. Plaintiff sought to exclude his testimony because defendants had not disclosed what he was going to testify about. Defendants assert plaintiff was aware of Lambert because he answered the interrogatories and obviously had knowledge about Versa and G & L. Defendants also assert plaintiff was aware the ladder was tested and inspected by UL and conformed to the requirements of ANSI, and Lambert should have been permitted to testify to these facts.

Defendants point out plaintiff also did not identify witnesses until shortly before trial. The district court determined defendants were not taken by surprise

because they had taken depositions of all the potential witnesses. However, the court found plaintiff was unaware of the substance of Lambert's testimony because he had not taken any depositions. For this reason, the court excluded most of Lambert's testimony, but did not exclude plaintiff's witnesses. Defendants claim they should not be penalized for plaintiff's failure to utilize available discovery techniques.

A party's failure to request depositions does not excuse another party's duty to supplement discovery responses. *See Hoekstra v. Farm Bureau Mut. Ins. Co.*, 382 N.W.2d 100, 109 (Iowa 1986). Therefore, plaintiff's failure to take any depositions does not excuse defendants from supplementing discovery responses to designate Lambert as a witness or to reveal the substance of his testimony.

As noted above, the trial court has broad discretion in making rulings on evidentiary matters. *Millis*, 587 N.W.2d at 627. We interfere only if a clear abuse of discretion is shown. *Klein*, 596 N.W.2d at 60.

We determine the district court did not abuse its discretion in restricting Lambert's testimony. Lambert was not timely disclosed as a witness defendants expected to call at trial. He was not identified in defendants' initial answers to interrogatories as a potential witness. The district court acted within its discretion to find defendants' supplementation of its answers two days before trial was not a timely disclosure defendants planned to call Lambert as a witness.

Furthermore, we determine defendants were not prejudiced by their inability to have Lambert testify concerning UL testing and ANSI standards. This evidence would be inadmissible in any event under our hearsay rules. Lambert

was not designated as an expert, and in fact, defense counsel specifically stated Lambert was not an expert. Defendants, however, wanted Lambert to testify about UL testing and ANSI standards because they were not permitted to present any expert testimony. The permissible scope of lay testimony is not expanded and hearsay rules are not vitiated to accommodate a litigant who presents no expert testimony. Accordingly, Lambert would not be able to provide admissible testimony about either safety testing by a third party or the ladder's compliance with ANSI standards.

V. Additional Discovery Sanctions.

In the cross-appeal, plaintiff claims the district court should have imposed additional discovery sanctions against defendants due to their failure to fully answer interrogatories. Plaintiff asked about any safety studies concerning the ladder. Defendants responded the ladder was tested and inspected by UL and conformed to ANSI standards. In defendants' offer of proof, Lambert testified the company had conducted three in-house cycle studies to test the ladder's safety. Plaintiff contends because defendants failed to supplement their answers to interrogatories to include information about these cycle tests, the court should have entered judgment against defendant as a matter of law.

Iowa Rule of Civil Procedure 134 allows the court to impose sanctions when it is determined a party has failed to obey an order to provide or permit discovery. *In re Marriage of Butterfield*, 500 N.W.2d 95, 98 (Iowa App. 1993). We apply an abuse of discretion standard in our review of sanction orders. *Board of Water Works Trustees v. City of Des Moines*, 469 N.W.2d 700, 703 (Iowa 1991).

Here, Lambert was not permitted to testify concerning the in-house cycle studies. We find this was a sufficient sanction for defendants' failure to include information about the cycle tests in their answers to interrogatories. The district court did not abuse its discretion in declining to impose a more severe sanction.

VI. Limitation of Testimony of Plaintiff's Expert.

Like the defendants, the plaintiff did not supplement his discovery responses regarding expert testimony. Defendant discovered during Leane's deposition, taken on September 1, 1998, that Leane intended to testify concerning the collapse of a similar Versa Ladder, which was the subject of a lawsuit in Illinois, and concerning an alternative safe design. The deposition was taken less than thirty days before trial. The district court excluded Leane's testimony on these issues. Plaintiff asserts the district court abused its discretion by excluding this evidence.

Plaintiff failed to supplement its discovery responses in a timely fashion to reveal Leane intended to testify about the Illinois incident or about an alternate safe design. Rule 125(c) requires a party to disclose the substance of an expert witness' testimony as soon as practicable, but in no event less than thirty days prior to the beginning of trial except on leave of court. The trial court has broad discretion in making rulings on expert testimony under rule 125. *Millis*, 587 N.W.2d at 627. The district court did not abuse its discretion in prohibiting Leane from testifying about the incident in Illinois or about alternate safe design, due to plaintiff's failure to supplement his discovery responses.

VII. Johnson's Report.

Plaintiff claims the district court abused its discretion by prohibiting Leane from **testifying** concerning the contents of a report by Johnson, plaintiff's first expert. Plaintiff states the findings of Johnson's report were admissible as evidence relied upon by Leane.

An expert may testify from three possible sources: (1) the firsthand observation by the witness; (2) from information obtained at trial through hypothetical questions or the testimony of other witnesses; and (3) the presentation of data to the expert outside of court and other than by his own perception. *Brunner v. Brown*, 480 N.W.2d 33, 34 (Iowa 1992). Iowa Rule of Evidence 703 allows experts to give opinions based on facts and data not admissible in evidence when such information is reasonably relied upon by experts in the particular field in forming opinions. *Id.*

Rule 703, however, does not automatically permit hearsay evidence to be admitted at trial simply because an expert is testifying. *C.S.I. Chem. Sales, Inc. v. Mapco Gas Prods., Inc.*, 557 N.W.2d 528, 531 (Iowa App. 1996). The evidence is only admissible to explain the basis for the expert opinion, not for the truth. *Id.* The rule does not permit an expert witness to testify other experts subscribe to or support his or her opinion. *Id.*

In the present case, plaintiff sought to introduce the contents of Johnson's report in an attempt to bolster Leane's opinion. Plaintiff did not propose to use the report to explain the basis for Leane's opinion, but to attempt to show the truth of Johnson's findings in the report. For this reason, the district court properly precluded Leane from testifying to the contents of the report.

We affirm the decision of the district court. ~~Costs of this~~ appeal are assessed ~~one-half~~ to each party.

AFFIRMED.