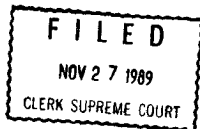


IN THE COURT OF APPEALS OF IOWA

No. 9-333 / 88-1340



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LOIS KAMMERMAN,

Appellant,

vs.

HARVEY CALDWELL and CITY OF CEDAR RAPIDS,

Appellees.

Appeal from the Iowa District Court for Linn County,
George Stigler, Judge.

Appellant appeals from a judgment entered upon a jury's
verdict awarding her damages for injuries she sustained as
a result of an automobile accident. **AFFIRMED.**

Charles C. Brown, Jr. of Tom Riley Law Firm, Cedar
Rapids, for the plaintiff-appellant.

David F. McGuire, Cedar Rapids City Attorney, and James
H. Flitz, Assistant Cedar Rapids City Attorney, for the
defendants-appellees.

Heard by Donielson, P.J., and Sackett and Habhab, JJ.

HABHAB, J.

Appellant Lois Kammerman has appealed from a judgment entered upon a jury's verdict awarding her damages for injuries she sustained as a result of an automobile accident. Appellant asserts the district court erred in refusing to permit her to designate an additional expert witness. She further contends the district court erred in refusing to allow her to call this expert as a rebuttal witness. We affirm.

On July 6, 1985, appellant's automobile was involved in a motor vehicle accident in Cedar Rapids. She asserted she suffered a back injury in the accident. On August 1, 1986, appellant brought this action against appellees. Pursuant to an agreement between the parties, the district court entered an order on December 22, 1986, which set deadlines for disclosure of experts and discovery. This order required appellant to disclose her expert witnesses by March 30, 1987. On March 2, 1987, appellant designated her expert witnesses.

Subsequently, on May 5, 1987, appellant was admitted to a Cedar Rapids hospital. There she was treated by Dr. John Koch. On July 1, 1987, appellant named Dr. Koch as an additional expert. Appellees then sought to exclude Dr. Koch on the basis that appellant's naming of him as an expert was untimely. On August 6, 1987, after a hearing on the matter, the district court overruled appellees' motion to exclude Dr. Koch.

At some point in the summer of 1987, appellant's counsel referred appellant to Dr. Walker in Waterloo.¹ On August 12, 1987, after examining appellant, Dr. Walker wrote to appellant's counsel informing him of his findings. Appellant's counsel, however, did not amend its interrogatories so as to inform appellees of Dr. Walker's existence. On January 29, 1988, trial-setting conference was held, and this case was set for trial on August 8, 1988. On March 30, 1988, Dr. Walker again wrote to appellant's counsel following appellant's final examination. In his August 8 letter, Dr. Walker again set forth his findings and recommendations.

It was not until April 11, 1988, that appellant sought to designate Dr. Walker as an additional witness. Hearing was held on appellant's motion on June 10, 1988, and the district court denied appellant's motion on July 18, 1988.

At trial, the appellant sought permission to call Dr. Walker as a rebuttal witness. The trial court denied this request. At the close of trial, the district court directed a verdict in appellant's favor on the issue of liability. The case was then submitted to the jury on the

1. We note the following excerpt taken from a letter dated August 12, 1987, from Dr. Walker to appellant's counsel, "Thanks for referring Mrs. Kammerman to me. I have not given her a return appointment but I would be very happy to see her and carry out any that she deems necessary."

sole issue of damages. The jury awarded her damages of \$8,214.95.

Our scope of review is on assigned error. Iowa R. App. P. 4. The district court has the inherent authority to enforce rules of discovery and may impose sanctions upon a party for failing to obey. Hoekstra v. Farm Bureau Mut. Ins. Co., 382 N.W.2d 100, 108 (Iowa 1986). A trial court's imposition of discovery sanctions is discretionary and will not be reversed absent an abuse of discretion on the part of the trial court. Krugman v. Palmer College, 422 N.W.2d 470, 473 (Iowa 1988); Sullivan v. Chicago & Northwestern Transp., 326 N.W.2d 320, 324 (Iowa 1982); Suckow v. Boone State Bank & Trust Co., 314 N.W.2d 421, 425 (Iowa 1982). As the Iowa Supreme Court has noted: "'We find an abuse of discretion when such discretion is exercised on grounds or for such reasons clearly untenable or to an extent clearly unreasonable.'" Hoekstra, 382 N.W.2d at 208 (quoting Hubby v. State, 331 N.W.2d 690, 697 (Iowa 1983)). As a result, the appellate courts of this state have been "slow to find an abuse of discretion." Sullivan, 326 N.W.2d at 324; see Hoekstra, 382 N.W.2d at 108.

Turning to the facts of this case, we find no abuse. Appellant first saw Dr. Walker in August of 1987, some five months after the deadline for designating experts had passed. Appellant took no steps to inform appellees of Dr. Walker's existence nor to designate him as an additional witness until April of 1988, a lapse of eight months. In

addition, appellant took no action for over two months following the setting of the trial date. As a result, by the time the district court heard arguments on appellant's motion concerning Dr. Walker, less than two months remained before trial. The district court's ruling on this motion comes less than three weeks before trial.² Under such circumstances, we are unable to find that the district court abused its discretion when it refused to permit Dr. Walker to testify.

Similarly, the trial court did not abuse its discretion in not permitting Dr. Walker to testify on rebuttal. As appellant points out, the general rule is that the trial court has broad discretion in determining what is proper rebuttal testimony and but for a showing of an abuse of discretion, the trial court's ruling will not be disturbed on appeal. Renze Hybrids, Inc. v. Shell Oil Co., 418 N.W.2d 634, 640 (Iowa 1988). With this precept of law in mind, we decline to disturb the trial court's ruling. In

2. We note the following excerpt from the district court ruling of July 18, 1988:

The file reflects that trial is scheduled for August of 1988. The deadline for designation of plaintiff's experts expired on March 30, 1987. The Court has considered the plaintiff's statement that Dr. Walker is not being called to testify as an expert. However, it appears clear to this Court that Dr. Walker is indeed being called to testify as an expert witness within the area of his expertise as an orthopedic surgeon. The deadlines for designation of experts has long since past and it is the determination of this Court that the Motion to Designate Additional Witness should be denied.

this regard, we further note the absence of testimony in the record that would make the rules of rebuttal applicable.

AFFIRMED.

Donielson, P.J., concurs; Sackett, J., dissents.

SACKETT, J. (dissenting)

I respectfully dissent. I cannot agree with the majority.

The bottom line in this case is: Does a reasonable basis exist to preclude a party from calling an expert witness to testify to medical conditions of the plaintiff that manifested themselves, or were diagnosed, during the pendency of litigation, when the adverse party was notified nearly four months¹ before trial that the medical witness would be called. Because I find no reasonable basis to exclude the testimony, and because I determine exclusion of the testimony precluded plaintiff from presenting the complete picture of the problems she alleged were the result of this accident, I would reverse and remand for a new trial.

It is well recognized additional evidence may manifest itself during the pendency of litigation. Our supreme court was recently asked to allow a claimant, who had discovered additional personal injuries more than two years after an accident, to avoid the two-year bar under Iowa Code section 614.1(2) (1987). The supreme court recognized that "additional time will be consumed in such matters as discovery and further pleading, and that the net effect is to allow a potential plaintiff a considerable length of time in which additional injuries may become apparent."

1. Three days short of four months.

LeBeau v. Dimig, No. 88-1191, slip op. at 8 (Iowa Oct. 18, 1989); see also Jones v. Trustees of Bethany College, 351 S.E.2d 183, 187 (W. Va. 1986).

I recognize we have seen implemented in the past several years a series of rules establishing scheduling orders, the purpose of which appears to be to make our court system more efficient so as to make more accessible a forum where litigants are assured an opportunity for fairness and justice. If these changes serve as an unreasonable basis to prevent a full presentation of reasonable facts, then we are losing focus of the reason for the existence of this state's courts. To me the purpose of requiring disclosure and providing for discovery is to define the controversy and provide the adverse party with timely notice of evidence so they have sufficient time to investigate the evidence and prepare for trial, so the matter can be fairly and completely litigated. See generally Haumersen v. Ford Motor Co., 257 N.W.2d 7, 14 (Iowa 1977).

I think issues of disclosure and discovery should be interpreted with this basic purpose in mind. We should not interpret rules for discovery and disclosure in a manner that will encourage their use as technical road blocks to a litigant's presentation of all relevant evidence. Four months was more than ample time for defendant to depose Dr. Walker, review his testimony, and be prepared to deal with

it at trial. Therefore, I find the defendant's attempt to resist the motion was an attempt to preclude the admission of the evidence, rather than a resistance based on defendant's need for adequate time to allow for trial preparation.

We should in no way encourage the imposition of sanctions where there is adequate time for trial preparation and the purpose of the objection is merely an attempt to exclude evidence. Rather, we must do all we possibly can to encourage the reasonable resolution of these matters by the attorneys and litigants outside the courtroom. The fact that we see few appeals involving discovery disputes is, as we said in In re Marriage of Williams, 421 N.W.2d 160, 166 (Iowa App. 1988),

[A] credit to the cooperation that generally exists among the Iowa bar in resolving discovery in accordance with the Iowa Code of Professional Responsibility EC 7-38 which provides:

A lawyer should be courteous to opposing counsel and should accede to reasonable requests regarding court proceedings, settings, continuances, waiver of procedural formalities, and similar matters which do not prejudice the rights of his client. He should follow local customs of courtesy or practice, unless he given timely notice to opposing counsel of his intention not to do so. A lawyer should be punctual in fulfilling all professional commitments.

We need to strongly encourage the bar in this state to maintain a climate where lawyers, though zealous advocates of their clients' rights, are fair and cooperative in assuring that discovery is properly utilized and reasonable

requests are not denied. The erosion of the climate can result in the denial of justice. This spirit of cooperation is necessary so our courts are not inundated by a series of unreasonable discovery disputes, which will take precious judicial time and are expensive and unfair to litigants.

I know these are generally issues on which we defer to the broad discretion of the trial court, see State ex rel. Shanahan v. Iowa District Court for Iowa County, 356 N.W.2d 523, 526 (Iowa 1984); H&S Ltd. v. Andreola, 363 N.W.2d 592, 595 (Iowa App. 1984); Wernimont v. International Harvester Corp., 309 N.W.2d 137, 143 (Iowa App. 1981), and I read the majority opinion as being based on a determination the trial court did not abuse its discretion. I do not interpret the opinion to encourage a lack of cooperation among the bar, because I know the judges in the majority subscribe to fairness, reasonableness, and cooperation among the bar. I have, however, concern their opinion may be otherwise interpreted.