

IN THE COURT OF APPEALS OF IOWA

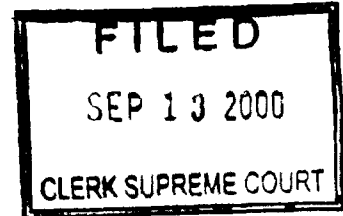
No. 0-266 / 99-1396
Filed September 13, 2000

JEWEL L. BOWLES and DAVID P. BOWLES,
Plaintiffs-Appellees,

vs.

**RENDY MAE BROWN, WILLIAM BELTRAN, and
ALLSTATE INSURANCE COMPANY,**
Defendants,

**KIMARY A. PHILLIPS d/b/a CLUB
THIRTY SOMETHING,**
Defendant-Appellant.



Appeal from the Iowa District Court for Black Hawk County, Todd Geer,
Judge.

Defendant Kimary Phillips d/b/a Club Thirty Something appeals from a
district court order granting plaintiffs' motion for default judgment and motion to
strike her answer. **AFFIRMED.**

Thomas B. Read and James L. Sines of Crawford, Sullivan, Read &
Roemerman, P.C., Cedar Rapids, for appellant.

Robert L. Rausch of the Rausch Law Firm, Waterloo, for appellees.

Considered by Mahan, P.J., and Vaitheswaran, J., and Peterson, S.J.*

*Senior Judge assigned by order pursuant to Iowa Code § 602.9206 (1999).

PETERSON, S.J.

Kimary A. Phillips d/b/a Club Thirty Something appeals from a district court order granting the plaintiffs' motion for default judgment and motion to strike her answer in this negligence/dram shop action. She contends the trial court erred in striking her answer and entering a default judgment in plaintiffs' favor when it failed to order the clerk of court to mail her a copy of the order granting plaintiffs' motion to compel and the clerk did not mail a copy of the order and the court abused its discretion in entering a default judgment against her. We affirm.

Background and Proceedings. On February 1, 1997, there was an accident in Waterloo, Iowa, between a motor vehicle driven by Jewel L. Bowles and a motor vehicle driven by Rendy Mae Brown. On March 27, 1998, a petition was filed alleging Rendy Mae Brown was negligent in the operation of her motor vehicle. It also alleged Kimary A. Phillips (Phillips) operated Club Thirty Something and her agents or employees sold and served liquor, beer, or both to Rendy Mae Brown to the point where she or her agents or employees knew or should have known Rendy Mae Brown would become intoxicated and/or she or her agents or employees knew or should have known Rendy Mae Brown was intoxicated.

This petition had been proceeded by a notice of intent to bring a lawsuit on behalf of Jewel Bowles which was served by certified mail on Club Thirty Something on July 12, 1997, and the Preferred National Insurance Company on July 17, 1997. The file contains receipts showing the service on the indicated

dates. The original notice, petition, and jury demand was served on Phillips in Waterloo, Iowa, on April 3, 1998.

On May 19, 1998, the attorney for Jewel Bowles wrote to the Preferred National Insurance Company. The letter advised them a lawsuit had been filed against their insured, Kimary A. Phillips, d/b/a Club Thirty Something on April 4, 1998, and to date no answer had been placed on file. A copy of the original notice, petition of law and jury demand was also forwarded to the insurance company at that time. On June 25, 1998, an answer was filed for Phillips.

On July 1, 1998, the plaintiffs filed a request for production of documents and submitted interrogatories to Phillips. On February 18, 1999, plaintiffs' attorney wrote to Phillips's attorney indicating they had not yet received responses to a discovery request which was served on July 1, 1998. The letter requested the responses and the documents requested be received by March 5, 1999.

On April 2, 1999, plaintiffs' counsel again wrote to Phillips's counsel indicating answers to the interrogatories and requests for production of documents had not been received. The letter further noted in the event the responses were not received by April 15, 1999, a motion to compel responses would be filed.

On April 19, 1999, the plaintiffs filed a motion to compel Phillips to produce the requested documents and answer the interrogatories. The motion was set for hearing on May 4, 1999, and directed that the clerk shall provide copies of the order setting the matter for hearing to all counsel of record.

On May 4, 1999, the parties appeared by their attorneys. The order ruling on the motion to compel indicates Phillips has not responded to communications from her attorney. He has hired an investigator to locate her and requested additional time. The order directed Phillips respond to all of plaintiffs' outstanding discovery requests on or before June 1, 1999, on pain of having her answer and defenses to the plaintiffs' claim stricken and a default entered against her. The order entered indicated the clerk of court shall provide copies of the order to counsel of record.

On June 21, 1999, the plaintiffs filed a motion for default judgment and a motion to strike the answer. That motion was set for hearing on July 9, 1999, and the order setting it for hearing provided the clerk shall provide copies of the order to all counsel of record.

On July 8, 1999, an appearance was filed on behalf of Phillips by new attorneys. On July 9, 1999, an order was entered granting the plaintiffs' motion for default judgment and motion to strike Phillips's answer and entered a default against her.

The matter came before the court for jury trial on July 20, 1999. On July 26, 1999, the jury rendered a verdict in favor of the plaintiffs in the sum of \$74,902.23. On July 29, 1999, an order was entered in favor of the plaintiff, Jewel L. Bowles, and against Kimary A. Phillips d/b/a Club Thirty Something in the sum of \$72,402.23.

Discussion. Discovery sanctions by a trial court are discretionary and will not be reversed unless there has been an abuse of discretion. *2049 Group Ltd.*

v. Galt Sand Co., 526 N.W.2d 876, 878 (Iowa App. 1994). An abuse of discretion exists only when the trial court exercises its discretion on grounds or the reasons clearly untenable or to an extent clearly unreasonable. *Rawlin v. LeMars Mut. Ins. Co.*, 357 N.W.2d 579, 583 (Iowa 1984).

The defendant initially contends the trial court did not have the authority to strike the defendant's answer and enter default judgment when the court did not order the clerk to mail to the defendant a copy of the order granting the motion to compel and that the clerk did not mail a copy of that order. Iowa Rule of Civil Procedure 134(a)(2) requires any order granting a motion to compel discovery shall include a statement that failure to comply with the order may result in the imposition of sanctions and Iowa Rule of Civil Procedure 134(a)(5) requires the order be mailed by the clerk to both the attorney and the client. The record in this case indicates this rule of civil procedure was not complied with.

The appellant court will only consider the theories and issues raised and ruled upon by the trial court. *Hagarty v. Dysart-Geneseo Community Sch. Dist.*, 282 N.W.2d 92, 96 (Iowa 1979). A theory for recovery for an issue not presented to the trial court is deemed waived. *In re Estate of Crabtree*, 550 N.W.2d 168, 171 (Iowa 1996). A review of the record in this matter reveals this issue was not presented to the trial court and accordingly we deem it was waived.

The defendant next contends the trial court erred when it struck the answer of the defendant and entered default judgment in favor of the plaintiff.

Because the sanction of dismissal or default judgment precludes a trial on the merits, the range of the trial court's sanctions is narrow. In order to justify the

sanction of default, a party's noncompliance must be the result of willfulness, fault, or bad faith. We have previously affirmed the entry of default judgment in cases where the dilatory party failed to provide discovery responses. *Aquadrill, Inc. v. Environmental Compliance Consulting Servs., Inc.*, 558 N.W.2d 391, 396 (Iowa 1997).

When no answer appeared subsequent to the service of the original notice and petition upon Phillips, counsel for the plaintiff wrote to the insurance company drawing this fact to their attention. About a month later, an answer was filed for Phillips.

Shortly thereafter plaintiffs' counsel filed requests for documents and interrogatories. Approximately seven months later, when there was no response to the discovery request, counsel for plaintiffs wrote to Phillips's attorney requesting responses by March 5, 1999. Approximately one month later, when there was no response to the request for discovery, plaintiffs' counsel again wrote to defendant's attorney. In the letter it was noted if the discovery was not completed by April 15, 1999, a motion to compel discovery would be filed.

On April 18, 1999, the motion to compel was filed and set for hearing on May 4, 1999. The order was sustained and the defendant was given until June 1, 1999, to respond to the discovery request. There was no response and on June 21, 1999, the motion for default was filed. The motion was set for hearing and shortly before the hearing substitute counsel appeared and responded to the discovery request, however, had not secured Phillips's signature to the interrogatories.

Phillips's initial counsel failed to provide discovery within the appropriate period of time as set out in the Iowa Rules of Civil Procedure. He further neglected to respond to two letters from plaintiffs' counsel requesting he respond to the discovery requests. He further failed to comply with the court order requiring him to respond to the discovery requests. It was his contention at the hearing he had been unable to locate Phillips. However, plaintiffs' counsel was able to secure service of the petition on her in Waterloo, Iowa, and substitute counsel had been able to find her before the hearing upon the motion for default. We find the actions of Phillips's initial attorney showed a willful disregard for the discovery requests filed by the plaintiffs, and he was clearly at fault in not responding to discovery requests in a timely manner. There was no indication to the court there would be a change of attorney for Phillips until the day before the hearing on the motion for default and no indication in the record the new attorneys had difficulty in obtaining information from Phillips's initial attorney. Accordingly we conclude the trial court did not abuse its discretion in entering default judgment in this matter.

In conclusion, we find the defendant, Phillips, failed to preserve error on the issue concerning the failure of the court to order the clerk to mail to the defendant a copy of the order granting the motion to compel and the fact the clerk did not mail a copy of that order to the defendant. We further find the trial court did not abuse its discretion by entering default judgment against the defendant, Kimary A. Phillips, d/b/a Club Thirty Something.

AFFIRMED.