**IN THE COURT OF APPEALS OF IOWA**

FILED
AUG 30 1996
CLERK SUPREME COURT

No 6-217 / 94-0652

**SASHA LYNN SMITH, By Her Guardian,**
**C. PATRICK SMITH,**

Plaintiff-Appellant,

**vs.**

**DONALD HUBANKS, Owner, and**
**DANIEL R. HUBANKS, Driver,**

Defendants-Appellees.

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Appeal from the Iowa District Court for Dubuque County, Alan Pearson, Judge.

Sasha Smith, by her guardian C. Patrick Smith, appeals from the dismissal of her personal injury suit against defendants as a sanction for repeated failure to comply with a discovery order. **AFFIRMED.**

C. Patrick Smith, Dubuque, pro se, appellant.

Bruce L. Gettman, Jr. and Kellyann M. Lekar of Clark, Butler, Walsh & Hamann, Waterloo, for appellees.

Heard by Sackett, C.J., and Habhab and Streit, JJ.

**STREIT, J.**

Sasha Lynn Smith, by her guardian C. Patrick Smith, appeals the district court order dismissing her personal injury claim against Donald and Daniel Hubanks. We affirm.

On September 10, 1992, Sasha Smith filed this action against Daniel Hubanks, as driver, and Donald Hubanks, as owner, for damages arising out of a 1990 automobile accident. Defendants served Smith with interrogatories and document requests on September 30, 1992, and Smith responded with partial and unverified responses in March 1993. Defendants moved to compel discovery in April 1993, contending Smith's responses were inadequate. In resistance, Smith's attorney advised the court that Smith was suffering from mental illness and depression, making it impossible for Smith and her attorney to communicate. Smith's attorney asked the court to provide an alternative means of providing discovery and on May 18, 1993, the district court entered an order continuing resolution of the motions. The court's order noted Smith had been hospitalized for mental illness.

In August 1993, the court entered an order allowing Smith, who was no longer hospitalized forty-five days to (1) submit signed answers to interrogatories; (2) provide a medical report justifying her failure to comply with discovery, or (3) have a guardian appointed to act on her behalf for purposes of the lawsuit. Smith's attorney asked for

additional time to comply and a hearing on the issue was scheduled for December 2, 1993

On November 23, 1993, Dr. Ashenafi Waktola of the University of Iowa Hospitals and Clinics informed the court that Smith was at that time hospitalized at the Mental Health Institute in Independence. The district court concluded this letter was not sufficiently specific to address whether Smith was capable of understanding and responding to questions asked of her about the suit. The court then ordered the Mental Health Institute to furnish more specific information regarding Smith's condition so it could properly assess Smith's case.

Following a March 1994 hearing, the district court dismissed Smith's case without prejudice, noting that no good cause had been shown for Smith's failure to comply with the August 1993 discovery order. Smith, who has since had a guardian appointed on limited remand, appeals.

Our review is for the correction of errors at law. Iowa R. App. P. 4. The imposition of discovery sanctions by a trial court is discretionary and will not be reversed unless we find an abuse of discretion. *Kendall/Hunt Pub. Co. v. Rowe*, 424 N W.2d 235, 246 (Iowa 1988). We will not find an abuse of discretion unless the district court exercised its discretion "on grounds or for reasons clearly untenable or to an extent clearly unreasonable." *State v. Blackwell*, 238 N.W.2d 131, 138 (Iowa 1976) (quoting *Weeks v. Burnor*, 326 A.2d 138, 140 (Vt. 1974)).

Dismissal is a discovery sanction generally used when a party has violated a trial court's order. *Suckow v. Boone State Bank & Trust Co.*, 314 N W.2d 421, 426 (Iowa 1982). "Implicit in the deterrent standard is a recognition of the problems of delays and excessive costs which plague our modern judicial system and the need to establish an orderly administration of justice." Mark S. Cady, *Curbing Litigation Abuse and Misuse: A Judicial Approach*, 36 DRAKE L. REV.483, 518 (1987) Dismissal is a drastic measure that should not be ordered absent willfulness, fault, or bad faith. *McQuillen v. City of Sioux City*, 306 N.W.2d 789, 791 (Iowa 1981). Such willfulness, fault, or bad faith need not be on the part of a party herself. *See Bindel v. Larrington*, 543 N.W.2d 912, 914 (Iowa App. 1995). Instead, an attorney's action or inaction may serve as a basis for dismissal of a client's case. *Id.* The fact that sanctions less drastic than dismissal are available to the trial court does not require us to find an abuse of discretion. *Id.*

Although upon initial consideration it may appear unduly harsh to "punish" a party for the acts or omissions of their attorney, upon further reflection it is clear that it is the only equitable solution.

> It is not that courts should be unsymapthetic to a blameless client, but any other position would be "inconsistent with the system of representative litigation." Failing to dismiss simply because of the blameless client would also have the adverse effect of shifting the fault of the lawyer to the other equally blameless opposing party. . . . If an orderly system is to be achieved, attorneys must understand that their conduct can result in a loss of a client's claim.

Cady, 36 DRAKE L. REV at 520 (quoting *Link v. Wabash R.R.*, 370 U S 626, 634, 82 S Ct. 1386, 1390, 8 L. Ed. 2d 734, 740 (1962)) (footnotes omitted). "We would, however, suggest that the court keep in mind the possibility, in future cases of inexusable neglect by counsel, of imposing substantial costs and attorney's fees payable by offending counsel personally to the opposing party, as an alternative to the drastic remedy of dismissal." *Schwarz v. United States*, 384 F 2d 833, 836 (2d Cir. 1967)

The district court's August 11, 1993 order allowed Smith forty-five days to (1) submit signed answers to interrogatories; (2) submit a medical report justifying her failure to answer interrogatories; or (3) have a guardian appointed to act in or on her behalf. Smith contends her good faith efforts to secure a medical report pursuant to this order provide a reasonable explanation for her failure to submit signed interrogatory answers or appoint a guardian. We disagree.

On November 23, 1993, Dr. Ashenafi Waktola of the University of Iowa Hospitals and Clinics submitted a letter to the district court regarding Smith's treatment. That letter provided in its entirety:

> We were requested by the parents of Sasha Smith to write a letter to the court regarding her situation. Sasha Smith is a 23-year-old single white female from Dubuque, IA, who was transferred to the University of Iowa Hospital and Clinics from Independence Mental Health Institute on November 1, 1993. She is currently hospitalized in the Neuropsychiatric Unit.

On December 7, the district court issued an order stating that Dr. Waktola's letter was not "sufficiently specific" to address the issue of Smith's competency to comply with defendants' discovery requests. The court accordingly ordered the Independence

Mental Health Institute to furnish more specific information to assist the court in assessing Smith's case.

Although a copy of the December 7 order was sent to Smith's attorney, Joseph J. Bitter, counsel did nothing to ensure the Mental Health Institute complied with the court's order, nor did he attempt to secure a more specific medical report from another source. Smith does not claim extenuating circumstances, mistake, or misinformation led to counsel's failure to act in this matter. Instead, we can only assume counsel was aware of the district court's order but simply did not produce the requested information. Such neglect on the part of Smith's attorney constitutes a willful violation of a district court order and provides a reasonable basis for dismissal of her claim. *See Bindel*, 543 N.W.2d at 914.

While we recognize Smith's mental condition may have precluded her from submitting signed answers to interrogatories, the district court allowed Smith the opportunity to properly explain her lack of compliance through medical documentation or appointment of a guardian. Smith did neither of these things and accordingly violated the district court's order. The district court, therefore, had the authority to dismiss Smith's lawsuit based on her willful failure to comply with the court's order. *See Sullivan v. Chicago & N.W. Transp. Co.*, 326 N.W.2d 320, 324 (Iowa 1982). While dismissal may have been a drastic measure, we cannot say it was an abuse of discretion. We affirm the district court's order dismissing Smith's claim.

**AFFIRMED.**

Habhab, J., concurs; Sackett, C.J., dissents.

**SACKETT, C.J.** (dissenting)

I dissent.

The majority has affirmed the dismissal of plaintiff Sasha Lynn Smith's personal injury case as a sanction for her failure to sign answers that were made to interrogatories.

An attorney filed the action in Smith's behalf. Smith suffered mental illness. When the answers were not signed, the court gave Smith time to either sign the answers, provide a medical report justifying her failure to comply with discovery, or have a guardian appointed to act in her behalf.

Smith's parents, her next-of-kin, were not ready to ask to be appointed as her guardians. Smith would not sign either the interrogatories or a release of medical information authorizing the release of her medical records. Smith clearly suffered mental illness and the file reflects various hospitalizations. Her father was appointed as her guardian after the case was dismissed, and he has pressed this appeal.

The first question the court needs to address is what responsibility we have to a person who appears to be operating under a mental disability before dismissing a case for a technical violation of discovery rules. It appeared Smith was not able to respond. The case should not have been dismissed without the court, on its own motion, appointing a guardian ad litem in her behalf. I would reverse the dismissal and remand to the district court.