IN THE COURT OF APPEALS OF IOWA

No. 1999-272 (9-502) / 98-1807
Filed October 27, 1999

FILED
OCT 2 7 1999
CLERK SUPREME COURT

FARM BUREAU MUTUAL INSURANCE COMPANY,
Appellant,

vs.

BRENT MICHAEL BRUNSSEN and TRACEY ANN BRUNSSEN,
Appellees.

Appeal from the Iowa District Court for Benton County, Larry J. Conmey, Judge.

Farm Bureau appeals a district court order granting the Brunssens' motion to compel. **AFFIRMED IN PART AND REVERSED IN PART.**

Paul S. Swinton of Morain, Burlingame & Pugh, P.L.C., West Des Moines, for appellant.

Thomas L. Fiegen of Fiegen Law Firm, P.C., Cedar Rapids, for appellees.

Heard by Streit, P.J., and Vogel and Vaitheswaran, JJ.

VOGEL, J.

Farm Bureau appeals a district court order granting the Brunssens' motion to compel. We affirm in part and reverse in part.

Background facts. On June 5, 1996, Brent Brunssen was driving eastbound on Highway 199 in Benton County, towing some garbage cans on a trailer attached to his Nissan Pathfinder. David Radeke was operating his motorcycle in the westbound lane of Highway 199 when one or more of Brunssen's garbage cans fell off the trailer. Radeke crashed his motorcycle and sustained injury. Radeke's insurer, Farm Bureau, investigated the accident and took statements from Brunssen, Radeke, and Benton County Sheriff, Ken Popenhagen.

On June 22, 1996, Radeke died of causes unrelated to the accident. Radeke's estate assigned its claims against Brunssen to Farm Bureau, which subsequently filed suit against the Brunssens. The Brunssens propounded a discovery request upon Farm Bureau, seeking all "tape recorded or typewritten statements of any witness or party relating to the claim that Plaintiff is asserting against Defendants." Farm Bureau provided the statement it had taken from Brent Brunssen, but objected to providing the statements from Radeke and Sheriff Popenhagen on various grounds. The Brunssens filed a motion to compel production of the remaining statements which was granted by the district court without hearing on October 8, 1998. Our supreme court granted Farm Bureau's application for an interlocutory appeal of that order.

Scope of review. As the district court has wide discretion in ruling upon the discoverable nature of requested information, we will not reverse unless there has been an abuse of that discretion. *See Schaffer v. Rogers*, 362 N.W.2d 552, 555 (Iowa 1985); *Ashmead v. Harris*, 336 N.W.2d 197, 199 (Iowa 1983); *Griffith v. Moss*, 554 N.W.2d 571, 573 (Iowa App. 1996). Discretion is abused when the district court's ruling rests upon grounds or reasons clearly untenable or unreasonable. *See Griffith*, 554 N.W.2d at 573. A ruling founded on an incorrect interpretation of a discovery rule can constitute an abuse of discretion. *See id.*; *see also Schaffer*, 362 N.W.2d at 555.

Discovery under I. R. Civ. P. 122. Farm Bureau contends the district court abused its discretion in granting the Brunssens' motion to compel.

Iowa Rule of Civil Procedure 122(a) provides that parties may obtain discovery regarding any matter, not privileged, which is relevant to the subject matter involved in the pending action. However, rule 122(c) provides that:

> a party may obtain discovery of documents and tangible things otherwise discoverable under subdivision "a" of this rule and prepared in anticipation of litigation or for trial by or for another party or by or for that other party's representative . . . *only upon a showing that the party seeking discovery has substantial need of the materials in the preparation of his case and that he is unable without undue hardship to obtain the substantial equivalent of the materials by other means.* In ordering discovery of such materials *when the required showing has been made,* the court shall protect against disclosure of the mental impressions, conclusions, opinions, or legal theories of an attorney or other representative of a party concerning the litigation.

Iowa R. Civ. P. 122(c) (emphasis added).

While the trial court did not specifically so find, both parties agree that the statements taken from Radeke and Sheriff Popenhagen were prepared in anticipation of litigation. *See Griffith*, 554 N.W.2d at 574 ("The work product privilege in Iowa Rule of Civil Procedure 122(c) extends to an automobile insurer's investigation of an accident between the insured and a third party."); *see also Ashmead*, 336 N.W.2d at 201. However, they disagree as to whether the Brunssens met their burden under rule 122(c) to justify discovery of the statements. Farm Bureau claims the trial court record was devoid of facts to support that the Brunssens had a substantial need of the statements and were unable to obtain the substantial equivalent by other means without undue hardship.

The entire record before the trial court consisted of: 1) the petition and original notice; 2) the answer; 3) the Brunssens' motion to compel; and 4) Farm Bureau's resistance. The Brunssens' motion to compel provided, in relevant part:

> 3. Plaintiff is suing Brunssens to recover amounts that it paid its insured, David Radeke. Radeke has since died of unrelated causes. Because Radeke is deceased, the statement in possession of Plaintiff is the only evidence of his observations of the events involved. The statement given by Radeke to Plaintiff, his insurance company, before his death, cannot be obtained by any other means, is clearly discoverable, and may be admissible at trial. . . .

We find the trial court did not abuse its discretion in granting the motion to compel as to Radeke's statement. The Brunssens' motion was sufficient to establish they had a substantial need for Radeke's statement and were unable to obtain the substantial equivalent by other means without undue hardship.

However, we find that the court abused its discretion in granting the motion as to Sheriff Popenhagen's statement. Although the Brunssens make many claims on appeal in support of their need for the sheriff's statement, none of these claims were made before the trial court and we will not consider them on appeal. *See Jones v. Madison County*, 492 N.W.2d 690, 693-94 (Iowa 1992) (stating that issues not properly raised or based on information not contained in the record will not be addressed on appeal). We note with disapproval that the appendix for this appeal was rife with documents which were not a part of the trial court record.

We conclude the district court's order should be affirmed as to David Radeke's statement and reversed as to Sheriff Popenhagen's statement. Costs of this appeal are assessed to Farm Bureau.

AFFIRMED IN PART AND REVERSED IN PART.