FILED
AUG 29 1985
CLERK SUPREME COURT

IN THE COURT OF APPEALS OF IOWA

SHERYL F. COUNTRYMAN,	)	
Plaintiff-Appellant,	)	Filed August 29, 1985
vs.	)	
LUCINDA McMAINS,	)	5-335 84-1494
Defendant-Appellee.	)	

Appeal from the Iowa District Court for Wapello County - Dan F. Morrison, Judge.

Plaintiff appeals from the trial court's denial of a motion for a continuance. **REVERSED.**

Arthur L. Buzzell of Newport & Buzzell, Davenport, for plaintiff-appellant.

Kenneth L. Keith and Lloyd E. Keith of Dull, Keith & Beaver, Ottumwa, for defendant-appellee.

Considered by Donielson, P.J., and Schlegel and Sackett, JJ.

Plaintiff appeals from the final judgment on her tort action. She asserts that the trial court abused its discretion in overruling her motion for continuance which was sought on the day of trial for the purpose of completing depositions. Plaintiff further asserts that the trial court abused its discretion in overruling her motion for new trial which alleged, in part, misconduct on the part of defendant and surprise from defense testimony. We reverse.

As a result of an accident between the parties, plaintiff filed a petition on April 29, 1981, which alleged that defendant was negligent and that defendant committed an assault and battery. Defendant's answer denied the allegation and asserted negligence on the part of plaintiff.

On November 9, 1981, plaintiff's attorney took the deposition of defendant. The deposition was not completed because of defendant's refusal to answer all questions. On December 14, 1981, the court ordered defendant to answer questions propounded by plaintiff's counsel.

The parties allegedly entered into a settlement agreement. Defendant's attorney sent settlement papers and a $2,000 draft to plaintiff's attorney. On May 18, 1982, plaintiff's attorney informed defendant's attorney that plaintiff was unwilling to complete the settlement.

On July 29, 1982, plaintiff's attorney sent a letter to defendant's attorney expressing his desire to finish the deposition. Defendant's attorney responded that he would not agree to any further depositions in the case. On August 16, and on September 16, 1982, plaintiff's attorney filed notices of taking depositions. Defendant's attorney filed corresponding motions for a protective order and objection to notice of deposition. The defendant's motion stated, in part, that defendant no longer lived within the State. The court then ruled that the deposition of defendant was to take place in Ottumwa on December 27, 1982.

Defendant's attorney filed an application to amend the answer to assert an affirmative defense. Defendant's attorney also filed a motion for continuance of trial and for order continuing court scheduled deposition. The court granted the application to amend and granted the continuance until further court order.

Plaintiff was represented by new counsel in February 1983. On April 10, 1984, defendant's attorney applied to withdraw as counsel. Defendant's attorney stated that defendant refused to return for court-ordered depositions or for trial. The court denied the application to withdraw.

Defendant appeared at trial. Plaintiff's attorney moved for a continuance at the commencement of proceedings on the basis that defendant had been unavailable for purposes of completing depositions and discovery testimony. Defendant's attorney resisted the motion and indicated that defendant could lose her out-of-state job if trial was set at a later date. The court overruled the motion for a continuance.

During trial, defendant testified that the cause of the collision between the parties was her defective accelerator. The court in its findings of fact, conclusions of law, and judgment entry, stated that plaintiff did not prove that defendant intentionally struck her vehicle. The court found that defendant was negligent and ordered her to pay $1,191.93 plus interest and court costs.

Plaintiff filed a timely motion for new trial. The motion asserted: pre-trial misconduct on the part of defendant; surprise from defense testimony which ordinary prudence could not have guarded against; newly-discovered material evidence from defendant's testimony which could not with reasonable diligence have been discovered and produced at trial; mistakes of fact by the court; she was entitled to judgment notwithstanding the verdict because defendant failed to plead material facts necessary to constitute her defense. The court overruled the motion for new trial.

Absent a clear abuse of discretion, trial courts have broad discretion in deciding whether to grant motions for continuances. Department of General Services v. R. M. Boggs Co., 336 N.W.2d 408, 410 (Iowa 1983); Madison Silos, Division of Martin Marietta Corp. v. Wassom, 215 N.W.2d 494, 499 (Iowa 1974). Abuse of discretion has been consistently defined as "an erroneous conclusion and judgment, one clearly against logic and effect of facts and circumstances before the court, or the reasonable, probable and actual deductions to be drawn therefrom." Glenn v. Farmland Foods, Inc., 344 N.W.2d 240, 243 (Iowa 1984); citing Boggs, 336 N.W.2d at 410; State v. Morrison, 323 N.W.2d 254, 256 (Iowa 1982); Best v. Yerkes, 247 Iowa 800, 816, 77 N.W.2d 23, 32 (1956). Despite the heavy burden plaintiff must carry, we conclude that the trial court abused its discretion in denying the motion for a continuance.

Plaintiff offers a compelling explanation as to the reasons a continuance should have been granted in this case. Plaintiff initially served interrogatories and scheduled a deposition of defendant. At the deposition, defendant refused to answer questions regarding her emotional state of mind prior to the accident. These questions were never answered before trial.

After the deposition, settlement negotiations ensued and defendant entered into a prolonged absence. While conflicting views were taken in the briefs as to which party should bear the responsibility for not finishing the deposition, plaintiff was diligent and appears to have made sufficient overtures to complete defendant's deposition. Defendant's attorney was not sure if defendant would be present at trial. Moreover, defense counsel in an application to withdraw stated as a reason for withdrawal that defendant "has refused to return for court-ordered depositions." To counsel's surprise, defendant was present at the trial and testified that a "sticky" accelerator caused her car to hit plaintiff's car. The record indicates that a repairman who worked on defendant's car after

the accident would have testified that the repairs to defendant's car did not involve problems relating to a "sticky" accelerator. Defendant's emotional state was essential to substantiate plaintiff's allegations that defendant intentionally hit plaintiff's car in an attempt to harm her former husband who was standing near plaintiff's car at the time of the accident.

Defendant asserts that plaintiff did not take complete advantage of discovery sanctions to compel defendant's testimony and for this reason the trial court properly denied the motion for a continuance. Notwithstanding defendant's suggestions to the contrary, we are persuaded that plaintiff did not use the full panoply of discovery sanctions due to the likelihood defendant's insurer would have been absolved of responsibility to pay a judgment if defendant defaulted. Plaintiff had a legitimate reason for not pursuing every conceivable discovery sanction to compel defendant's testimony. Given these circumstances, the motion for a continuance should not have been denied to penalize plaintiff for failing to act diligently in obtaining the desired testimony.

While the extent of defendant's uncooperativeness is disputed, we conclude that plaintiff was unable to adequately prepare for trial because of defendant's evasiveness in completing her deposition. Testimony regarding whether a "sticky" accelerator caused defendant's car to hit plaintiff's car was central to establishing defendant's state of mind before the accident. If defendant willfully caused the accident, such evidence could support the assault and battery theory and the punitive damages claim. Motions for continuances should not be granted frequently due to the needs of judicial economy; however, in this instance we feel the ends of justice required such a delay in the proceedings. For these reasons we reverse.

REVERSED.

Schlegel, J., concurs; Sackett, J., dissents.

SACKETT, J. (dissenting)

I fail to find the trial court abused its discretion in failing to grant plaintiff's motion for continuance. Iowa Rule of Civil Procedure 182(a) provides in part:

> Motion for continuance shall be filed without delay after the grounds therefor become known to the party or his counsel. . .

Iowa R. Civ. P. 182(a).

Plaintiff was aware since at least December of 1981 that defendant had refused to answer a question on deposition; namely, why had she been crying prior to the accident. The continuance on this ground was not sought until June 5, 1984.

Plaintiff filed a certificate of readiness for trial June 28, 1983, contending she would be ready for trial by August 1, 1983. Plaintiff filed a second certificate of readiness for trial in October of 1983 contending she would be ready for trial on March 1, 1984. The grounds upon which the June 5, 1984 continuance was sought were known to plaintiff at the time of the filing of both certificates.

In my determination I have also considered the following factors:

1. Plaintiff sought a continuance only when defendant appeared for trial. Plaintiff had intended to use the trial date to obtain a default judgment.
2. Iowa Rule of Civil Procedure 134 "Failure to Make Discovery; Consequences" was never utilized by the plaintiff either before or during trial. The majority has determined that plaintiff did not utilize discovery sanctions because of the likelihood that defendant's insurer would not pay the judgment if defendant defaulted. They have further determined that this was a legitimate reason for not pursuing discovery sanctions. They cite no authority to support their position nor can I find any. Even if a problem with insurance coverage would support plaintiff's failure to utilize discovery, I would find it totally unpersuasive because plaintiff intended to default defendant at the time set for trial. Only when defendant appeared and plaintiff could not seek a default did she seek a continuance.

3. On April 27, 1982, the parties agreed to settle. On April 30, 1982, defendant tendered a check and a release was made to plaintiff. On May 17, 1982, defendant inquired as to settlement status and was advised the settlement would not go through. Defendant sought to enforce the settlement which further delayed the proceedings.
4. Defendant's attorney offered to allow defendant to be deposed prior to the commencement of trial. Plaintiff did not accept the offer to depose.
5. The trial court determined plaintiff's newly discovered evidence would not have changed the verdict.

I do not by my dissent seek to condone the conduct of the defendant in seeking to avoid completing the deposition. However, the Iowa Rules of Procedure provide tools to enforce discovery. A party who had filed a certificate of readiness seeking a trial date should not be granted a continuance because she failed to utilize sanctions to obtain discovery prior to seeking a trial date.

I would affirm the trial court.