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CLERK SUPREME COURT

IN THE COURT OF APPEALS OF IOWA

SHAWN P. SMITH; C. PATRICK SMITH and DONNA SMITH, Husband and Wife,)	
Plaintiffs-Appellants,)	Filed December 17, 1987
vs.)	271
CHRISTOPHER JOHN SWEHLA, INTERSTATE POWER COMPANY, HARVEY SWEHLA and CITY OF DUBUQUE,)	7-204 86-973
Defendants-Appellees.)	

Appeal from the Iowa District Court for Dubuque County (No. 44545), T.H. Nelson, Senior Judge, and Roger F. Peterson, Judge.

Plaintiffs appeal both from order dismissing their suit as a sanction for failing to comply with discovery obligations and from order denying their motion for rehearing. **AFFIRMED.**

James H. Reynolds, Dubuque, for plaintiffs-appellants.

Michael J. Coyle of Fuerste, Carew, Coyle, Juergens & Sudmeier, Dubuque, for defendants-appellees Swehla.

David L. Hammer, Les V. Reddick, and David A. Tank of O'Connor & Thomas, Dubuque, for defendant-appellee Interstate Power Co.

Barry A. Lindahl, Dubuque, for defendant-appellee City of Dubuque.

Considered by Oxberger, C.J., and Schlegel and Sackett, JJ.

SCHLEGEL, J. 272

On February 21, 1984, appellants initiated the present action, seeking damages allegedly resulting from an automobile accident. This date was the final opportunity for filing before our statute of limitations would have barred the suit. See Iowa Code § 614.1(2) (1983). While this filing was allowable within our statutes, it serves to set the tone for the proceedings that followed. See Postma v. Sioux Center News, 393 N.W.2d 314, 316 (Iowa 1986). On June 4, 1986, several ignored discovery motions and court orders later, the district court dismissed appellants' action as a sanction for their intransigence. See Iowa R. Civ. P. 134(b)(2)(C). Appellants subsequently filed an "application for rehearing" which was denied. This appeal followed. Our review is limited to the correction of legal errors. Iowa R. App. P. 4.

I.

We first address appellants' claim that the district court erred in denying their "motion for rehearing." Recognizing that our rules make no provision for such a motion, appellants now seek to characterize their request as a motion for enlarged and amended findings and conclusions under rule of civil procedure 179(b). Although we look to the substance of a motion and not its title, Peoples Trust & Sav. Bank v. Baird, 346 N.W.2d 1, 2 (Iowa 1984), our law is clear that a rule 179(b) motion is an inappropriate vehicle for reopening the record for additional evidence. In the Matter of Appeal of Elliott, 319 N.W.2d 244, 247 (Iowa 1982). This is precisely what appellants sought to accomplish via their "motion for rehearing."

We believe appellants' motion is akin to what our cases have referred to as "motion[s] to reconsider or set aside a previous order . . . ." Recker v. Gustafson, 271 N.W.2d 738, 739 (Iowa 1978). Rulings upon such motions are not appealable. Id. Error, if any, is in the previous order. Bos Lines, Inc. v.

Phillips & Phillips, 226 N.W.2d 819, 821 (Iowa 1975). Accordingly, appellants' first contention presents us with no issue and we may proceed to an evaluation of their second claim: that the district court erred in dismissing their cause of action as a discovery sanction.

II.

The district court, on June 4, 1986, dismissed appellants' petition as to all defendants. We deal first with the dismissal as to defendants Christopher and Harvey Swehla. Iowa Rule of Civil Procedure 134(b)(2)(C) expressly authorizes a court to dismiss an action as a sanction for failing to comply with a court order pertaining to discovery. Traditionally, the imposition of discovery sanctions by a trial court has been recognized as discretionary and not subject to reversal absent an abuse of discretion. Postma, 393 N.W.2d at 318. Cases in which a trial court selects dismissal of an action as a discovery sanction, however, involve a somewhat narrower range of discretion. Id.; see Smiley v. Twin City Beef Co., 236 N.W.2d 356, 360 (Iowa 1975). Such sanction should not be imposed unless the noncompliance is due to willfulness, fault, or bad faith. McQuillen v. City of Sioux City, 306 N.W.2d 789, 791 (Iowa 1981). Our decision involving discovery sanctions have been divided into two categories: (1) violation of a trial court discovery order, and (2) violation solely of a rule of civil procedure relating to discovery. Postma, 393 N.W.2d at 318; see Suckow v. Boone State Bank and Trust Co., 314 N.W.2d 421, 425-26 (Iowa 1982). Dismissal of a cause of action is a discovery sanction generally used only when a party has committed the former type of violation. Postma, 393 N.W.2d at 318.

With respect to defendants Swehla, however, this distinction serves little purpose as appellants violated both discovery rules and court orders demanding compliance therewith. The record discloses that Swehla filed interrogatories on January 22, 1985, directed at appellants, along with a request for production.

Appellants' response to this request for production was, according to Swehla, incomplete and, accordingly, two motions to compel followed along with two additional requests for production. The interrogatories were never answered. A motion to compel resulted, followed by a court order. The order expressly required appellants to comply with Swehla's motion to compel or be subject to the sanctions provided for in rule 134. No such compliance was forthcoming. A motion to dismiss was filed and a hearing set. The discovery deadline passed. Consistent with past performance, appellants' counsel failed to appear for the hearing on Swehla's motion to dismiss. Aside from the partial response to Swehla's first request for production, appellants responded to none of the above-noted motions or orders. Appellants did not resist, in any fashion, Swehla's motion to dismiss. No explanation for these failures was ever attempted in the district court. Consistent with our case law in the area, we cannot say the district court abused its discretion in dismissing appellants' case as to Swehla. See McQuillen, 306 N.W.2d at 791; Bos Lines, 226 N.W.2d at 821; see also Hubby v. State, 331 N.W.2d 690, 695 (Iowa 1983) (appellate court will assume that district court found facts in accordance with its ruling).

III.

Appellants displayed similar intransigence in their dealings with defendant Interstate Power Company. Responses to discovery requests were spotty; a court order with respect thereto was ignored; appellants' counsel failed to appear at the deposition of appellants' expert witness, who informed appellee's counsel that he, the witness, had not been asked by appellants' counsel to deliver documents sought by the earlier discovery requests; appellant unilaterally cancelled a court-ordered psychological examination seven days before the discovery deadline without making further arrangements for the examination.

Given this record, the cases supply adequate support for the district court's choice of sanction. See McQuillen, 306 N.W.2d at 791-92; Bos Lines, 226 N.W.2d at 821. We are presented, however, with an additional problem. Interstate Power filed their motion to dismiss on May 27, 1986. Appellants filed no resistance to the motion, which was set for a June 11 hearing. Notwithstanding the order setting the motion for a June 11 hearing, the district court dismissed appellants' claim as to all defendants on June 4, 1986. Appellants claim this chronology reflects district court error. We disagree.

Our rules of civil procedure do not require a hearing prior to a district court's imposition of the sanction of dismissal. See Iowa R. Civ. P. 134(b). Neither, we think, is such a hearing required as a matter of constitutional due process. In Link v. Wabash Railroad Company, 370 U.S. 626, 8 L. Ed. 2d 734, 82 S. Ct. 1386, reh'g denied, 371 U.S. 873, 9 L. Ed. 2d 112, 83 S. Ct. 115 (1962), the United States Supreme Court, dealing with an analogous federal rule governing dismissal as sanction for failure to prosecute, to comply with rules of procedure, or to comply with court orders, said the following:

> Nor does the absence of notice as to the possibility of dismissal or the failure to hold an adversary hearing necessarily render such a dismissal void. It is true, of course, that "the fundamental requirement of due process is an opportunity to be heard upon such notice and proceedings as are adequate to safeguard the right for which the constitutional protection is invoked." ... But this does not mean that every order entered without notice and a preliminary adversary hearing offends due process. The adequacy of notice and hearing respecting proceedings that may affect a party's rights turns, to a considerable extent, on the knowledge which the circumstances show such party may be taken to have of the consequences of his own conduct. The circumstances here were such as to dispense with the necessity for advance notice and hearing.

370 U.S. at 632, 8 L. Ed. 2d at 739, 82 S. Ct. at 1389. (citations omitted).

In the present case, appellants had been placed on notice by two previous court orders which expressly bolstered their demand for compliance with threats of resort to rule 134 sanctions.

A similar issue was presented by Smiley v. Twin City Beef Co., 236 N.W.2d 356, 359 (Iowa 1975). In Smiley, appellant claimed that a district court's order which granted appellee judgment and struck appellant's counterclaim as a discovery sanction "was ex parte and improper." Our supreme court disagreed, noting both that "the [district] court could have entered judgment without any action by plaintiff," id., and that the appellant had been afforded notice by the district court's earlier discovery orders "and knew the implications of a continued failure to" comply with those orders. Id. The court accordingly rejected appellant's claim that rule 134 required notice and hearing prior to the imposition of sanctions. Id.

While we do not condone the district court's dismissal of the present action prior to the set hearing, we believe the fact that such a hearing was not requested by appellants and was granted by grace and not by right militates against a finding of reversible error. Appellants suggest the hearing would allow them the opportunity to "explain or mitigate their admittedly bad appearance in the matter of discovery." This understated summation of appellants' discovery performance fails to recognize that appellants ignored their opportunities and obligations to make such explanations at numerous stages prior to the challenged dismissal.

IV.

We note appellants have filed a separate appeal from a district court order which denied, for want of subject matter jurisdiction, appellants' motion to set aside a default. Appellants' motion was filed after the filing of their initial appeal.

We need not address the merits either of appellants' substantive claim or the district court's jurisdictional conclusions. Appellants fail to argue the

issue on appeal and have, accordingly, abandoned it. Hubby, 331 N.W.2d at 694; Iowa R. App. P. 14(a)(3).

The district court's order dismissing appellants' action is affirmed as against both appellees.

AFFIRMED.