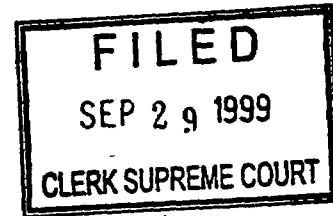


IN THE COURT OF APPEALS OF IOWA

No. 9-325 / 98-0809
Filed September 29, 1999



**MARVIN MITCHELL d/b/a CUSTOM
FARM SERVICE LAND COMPANY,**
Plaintiff-Appellant,

vs.

**PIONEER HI-BRED INTERNATIONAL,
INC., and BB & P FEED & GRAIN, INC.,**
Defendants-Appellees.

Appeal from the Iowa District Court for Polk County, Larry J. Eisenhauer,
Judge.

Plaintiff appeals from the district court's dismissal of his products liability
action for damages to his corn crop. Plaintiff alleges the court erred in dismissing his
action as a discovery sanction. **AFFIRMED.**

Peter C. Riley of the Tom Riley Law Firm, PLC, Cedar Rapids, for appellant.

Terri L. Combs and Melissa Shafter of Faegre & Benson LLP, Des Moines,
for appellees.

Heard by Sackett, C.J., and Huitink and Mahan, JJ.

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MAHAN, J.

Marvin Mitchell appeals from the district court's dismissal of his products liability action for damages to his corn crop. Mitchell contends the district court erred in dismissing his action as a discovery sanction. We affirm.

On January 13, 1997, Mitchell filed an agricultural products liability action against Pioneer Hi-Bred International and BB & P Feed and Grain (hereafter collectively referred to as "Pioneer"). It is undisputed this is the second action filed by Mitchell with respect to the same parties and causes of action.¹ Mitchell dismissed the prior 1996 action without prejudice after failing to comply with a district court order which had granted defendant's motion to compel discovery and which had ordered Mitchell to produce by a certain date. The current action was then filed within seven days of the dismissal of the first action. In the underlying action, as in the first, Mitchell contended his 1995 corn crop suffered about one million dollars in lower crop yields due to the crop disease known as "gray leaf spot." Mitchell contended Pioneer, when selling him the seed in question, orally guaranteed him the seed was immune to the disease. Mitchell contended he sold his entire 1995 grain crop through one grain elevator and the weigh records from that elevator established his alleged yield loss and damages. Mitchell further contended his alleged yield

¹ The two lawsuits were substantively the same with the exception of adding Mitchell's ex-wife as a named plaintiff and including an additional claim against BB & P Feed and Grain.

losses had already been "fully verified and investigated" because he had previously filed and collected on a federally-insured crop protection insurance claim.

Pioneer's theory of defense is the loss was fabricated. Pioneer sought to prove that in addition to the grain sold through the elevator Mitchell had stored portions of the 1995 crop which were not included in the elevator tickets and sold corn to his father and brother who ran a neighboring hog operation. Pioneer further contended Mitchell's receipt of insurance money did not represent a "verification" of his claimed yield losses since his receipt of the insurance money was the result of a lawsuit against the insurer. Pioneer also contended Mitchell had a history of both pressing questionable crop insurance claims and obtaining settlement payments through intimidation and litigation.

On February 10, 1997, Pioneer served discovery requests which included a request for Mitchell's business records. Pioneer filed a motion to compel and for sanctions on July 8, 1997, after repeated attempts over the previous months to obtain additional responses to Mitchell's deficient discovery responses made in February of 1997.

At the August hearing on the motion, Mitchell asserted he did not maintain any business records regarding his farming operation. He also took the position it was Pioneer's responsibility to obtain the records sought from third parties. The district court advised Mitchell it was his responsibility to gather responsive information from third parties if necessary. By order dated August 28, 1997, the hearing on the motion

to compel and for sanctions was continued based on an agreement Mitchell would supplement the discovery responses.

Pioneer continued efforts to obtain Mitchell's business records from third parties.² However, by October of 1997, Pioneer still was unable to obtain more than a few financial records and Mitchell had produced few documents, so Pioneer filed a renewed motion to compel and for sanctions. At the December hearing on the renewed motion, Mitchell continued to assert he did not maintain his own business records and they would need to be obtained from third parties. On December 18, 1997, the district court ordered Mitchell to produce business records for the years of 1993, 1994, and 1997, his tax returns for the years of 1993 and 1994, and specifically ordered records be produced reflecting the number of hogs and source of feed purchased for those hogs by Mitchell Brothers' Hog Operation for 1995. These records were to be produced no later than January 10, 1998.

Mitchell failed to comply with this order and Pioneer filed a second renewed motion to compel and for sanctions on January 13, 1998. While this motion was pending, Pioneer deposed Mitchell. Throughout the deposition, which was conducted over at least four days between January 21 and February 5, 1998, Mitchell failed to produce his 1997 business records, indicated he did not know where the records were, and had apparently made no effort to locate them. At Mitchell's deposition, eleven days after the production deadline had passed and over a month since the entry of the

² These discovery efforts included dealings with a St. Paul, Minnesota tax attorney which were, to say the least, highly unusual.

December discovery order, Mitchell's attorney admitted he and Mitchell had not even discussed issues related to the order to produce records regarding the hog operation.

On March 5, 1998, at the hearing on the second renewed motion, the district court inquired about Mitchell's failure to produce his 1997 business records by January 10th.³ Mitchell's attorney explained Mitchell usually gathers his business records from the previous year on March 1st. Mitchell's attorney was unable to explain why the records could not have been gathered at an earlier time and was unable to show Mitchell had made any efforts to gather the records by January 10th.

The district court noted it was at least the third time these same discovery issues were before the court. The district court found Mitchell is aware of how litigation is to be conducted and that, as of January 21, 1998, he had made no effort to obtain the 1997 business records. The district court then stated, in part, as follows:

There is also reference in the depositions to questions about efforts to obtain hog operation information. I find it interesting that the discussion in the deposition indicates -- and I think I will quote part of it. This is [Mitchell's attorney] speaking. "[] Mitchell and I have not even had a chance to discuss the issues relating to what the Judge said at the hearing and the Judge's Order and the various things that transpired." And we are talking January 21, and the Order was entered on December 18, 1997. And he goes on to say, "I would anticipate that we will discuss that matter during the lunch break today."

This alone, in my opinion, warrants dismissal of this lawsuit, and that's what I am going to do. I believe that there is a pattern in the case of [Mitchell] obfuscating in failing to comply with Court Orders, failing to comply with legitimate discovery requests without excuse and without a reason.

³ Mitchell also failed to produce other business records and information relating to the hog operation.

It seems to me that we are here a third time, and after twice demonstrating a complete disregard for what the Court directs, that the only appropriate resolution is dismissal.

The district court dismissed Mitchell's lawsuit. Mitchell appeals.

I. STANDARD OF REVIEW. A district court's order imposing discovery sanctions will not be disturbed unless the court abused its discretion. *Troendle v. Hanson*, 570 N.W.2d 753, 755 (Iowa 1997); see *Kendall/Hunt Publ'g Co. v. Rowe*, 424 N.W.2d 235, 240 (Iowa 1988). The range of that discretion narrows when the drastic sanctions of dismissal or default are imposed pursuant to Iowa Rule of Civil Procedure 134(b)(2)(C). *Aquadrill, Inc. v. Envtl. Compliance Consulting Servs., Inc.*, 558 N.W.2d 391, 395 (Iowa 1997); *Smiley v. Twin City Beef Co.*, 236 N.W.2d 356, 360 (Iowa 1975). An abuse of discretion consists of a ruling which rests upon clearly untenable or unreasonable grounds. *Troendle*, 570 N.W.2d at 755; see *Squealer Feeds v. Pickering*, 530 N.W.2d 678, 681 (Iowa 1995). We are less inclined to reverse a trial court's sanction when a violation of a previous order underpins that sanction. *Farley v. Ginther*, 450 N.W.2d 853, 856 (Iowa 1990).

We must also be satisfied that substantial evidence supports any factual findings necessary to the court's exercise of its discretion. *Troendle*, 570 N.W.2d at 755; see *State ex rel. Parcel v. St. John*, 308 N.W.2d 8, 10 (Iowa 1981).

II. DISMISSAL AS DISCOVERY SANCTION. In dismissing Mitchell's lawsuit, the district court acted pursuant to its authority under Iowa Rule of Civil

Procedure 134(b), which allows the court to impose sanctions on a party who fails to obey the court's order to provide or permit discovery. These sanctions may include dismissal of a disobedient plaintiff's action. Iowa R. Civ. P. 134(b)(2)(C).

In order to justify dismissal, a party's noncompliance with the court's discovery orders must be the result of willfulness, fault, or bad faith. *Troendle*, 570 N.W.2d at 755. See, e.g., *Kendall/Hunt*, 424 N.W.2d at 240; *Postma v. Sioux Center News*, 393 N.W.2d 314, 318 (Iowa 1986); *Smiley*, 236 N.W.2d at 360. This rule "reflects the 'proper balance between the conflicting policies'" of avoiding delays and deciding cases on their merits. *Troendle*, 570 N.W.2d at 755; *Kendall/Hunt*, 424 N.W.2d at 240 (quoting *Edgar v. Slaughter*, 548 F.2d 770, 772 (8th Cir. 1977)).

After review of the record, we are satisfied substantial evidence supports the district court's fact finding that Mitchell's noncompliance with the discovery orders was the result of willfulness, fault, or bad faith. Mitchell had prior litigation experience. These same discovery issues had been before the court three times. See, e.g., *Troendle*, 570 N.W.2d at 757 (failure to comply with three court orders). There is no evidence he could not have obtained the information for production by January 10th, nor is there any evidence Mitchell made any effort to collect the information by January 10th. See *Aquadrill*, 558 N.W.2d at 395-396 (finding defendant's noncompliance with court's discovery order was willful where defendant produced only some of the requested documents and showed no efforts were taken to obtain the remainder of the requested information). The district court discussed the obvious

violation of the December 18, 1997 discovery order. Mitchell had not produced the discovery by January 10, 1998, and had not made any effort to contact the court and seek an extension or other relief. More importantly, the district court based his dismissal on a "pattern" of obfuscation "in failing to comply with Court Orders, failing to reply to legitimate discovery requests without excuse and without a reason." The district court concluded there was a "complete disregard" of court directives and a dismissal of the lawsuit was appropriate. We agree. To reverse this case would minimize the importance of complying fully with court ordered discovery or, in the alternative, taking immediate steps in attempting to comply or seeking other relief. We conclude it was not an abuse of discretion to dismiss this cause of action as a discovery sanction for Mitchell's failure to produce or attempt to produce his 1997 business records.

For these reasons, we affirm the district court's dismissal of Mitchell's case as a discovery sanction.

AFFIRMED.