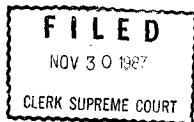


IN THE COURT OF APPEALS OF IOWA



BONNIE KRUGMAN,)

Plaintiff-Appellant,)

vs.)

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PALMER COLLEGE OF CHIROPRACTIC,))

WARREN RHODES, D.C. and)

PATRICK T. KEEFE, D.C.)

Ron Ashe, D.C.,)

Defendants-Appellees.)

7-201
86-896

Appeal from the Iowa District Court for Scott County (No. 66572),
Margaret S. Briles and Edward B. deSilva, Judges.

Plaintiff appeals from the orders of two judges contending they abused their discretion in failing to continue the case, in applying sanctions, in dismissing her case, and in denying her motion to vacate these orders. **REVERSED AND REMANDED.**

Paul R. O'Malley of O'Malley & O'Malley, Chicago, Illinois, and Alan Hartsock of Winstein, Kavinsky, Wallace & Doughty, Rock Island, Illinois, for plaintiff-appellant.

Robert D. Lambert of Carlin, Hellstrom & Bittner, Davenport, for defendants-appellees Palmer College, Warren Rhodes, and Patrick T. Keefe.

Heard by Donielson, P.J., and Schlegel and Hayden, JJ.

DONIELSON, P.J.

Plaintiff appeals from the orders of two judges, contending there was an abuse of discretion by the trial court in failing to continue the final pretrial, in failing to continue the trial, and in imposing sanctions by barring plaintiff's experts and dismissing plaintiff's petition, which was based on chiropractic negligence. We reverse and remand.

The plaintiff, Bonnie Krugman, sought chiropractic treatment from Warren Rhodes, a student resident. Krugman suffered a stroke soon afterwards. In 1982 she brought a suit against Palmer College of Chiropractic, Rhodes, Patrick T. Keefe, and Ron Ashe. Ashe was granted summary judgment and is not involved with this appeal. Krugman retained the services of Attorney Paul R. O'Malley of Chicago, Illinois, for the suit because of his expertise in handling cases of chiropractic negligence.

This case was placed on the strike list under Iowa Rule of Civil Procedure 215.1, but Krugman filed a trial certificate stating the case would be ready for trial on January 10, 1986; the case was then removed from the strike list. On January 28, 1986, the parties were ordered to list their expert witnesses. Krugman and defendants identified six expert witnesses, three for Krugman and three for defendants. The trial was set for April 28, 1986. O'Malley had another case which was set for April 14, 1986, and was expected to last for two weeks and perhaps longer. On April 8, 1986, Krugman asked for a continuance which was denied. Krugman asked the court to reconsider, which was also denied.

O'Malley's other trial took three weeks. On April 28, 1986, the day set for this trial, neither he nor Krugman was present. Local counsel was present but unprepared to try the case. The trial court ruled that Krugman's expert witnesses were precluded from offering expert opinion testimony because the

experts were not made available to defendants prior to trial for depositions. The court also ruled that Krugman's petition be dismissed. Krugman filed a motion to vacate the dismissal order and sanctions order, stating that circumstances had made it impossible for her chosen attorney to be in attendance at the trial. This motion was denied.

On appeal, Krugman contends that the trial court abused its discretion in failing to continue the final pretrial and the trial, and in imposing sanctions by barring her experts and dismissing the case. Krugman states that any discovery noncompliance was not due to willfulness, fault, or bad faith: Krugman's attorney could not be in two courtrooms at one time. Krugman argues that the sanction of dismissal should not be imposed when there is inability to comply with a court's order.

The defendants moved to dismiss Krugman's appeal for lack of jurisdiction on the ground that Krugman's notice of appeal was untimely. The supreme court found that Krugman's motion to vacate dismissal/sanctions order was in essence a motion pursuant to Iowa Rule of Civil Procedure 179(b), thus extending the time for filing notice of appeal. The defendants' motion to dismiss was denied. We thus retain jurisdiction of the matter.

Our scope of review is for the correction of errors at law. Iowa R. App. P. 4.

A scenario of the relevant events in the two conflicting cases may be summarized as follows:

<u>Krugman</u>	<u>Van Hootegem</u> (conflicting Illinois trial)	<u>Occurrence</u>
9/1/82		Petition filed
9/16/85		Plaintiff's certificate of readiness for trial on 1/10/86
10/22/85		Order removing case from strike list and order setting trial for 4/28/86

1/28/86	Order setting dates for closing of pleadings, completion of discovery, and listing of experts (a) Plaintiff's experts listed by 2/28/86, (b) Defendants' experts listed by 3/15/86, (c) Pleadings closed by 3/31/86, (d) Discovery completed by 4/14/86
1/30/86	Pretrial conference
2/86	Plaintiff disclosed 12 experts
2/10/86	Original trial date
2/28/86	Plaintiff identified 3 experts
3/14/86	Defendants identified 3 experts
3/21/86	Defendants' motion to compel supplemental answers to interrogatories (as to subject matter of plaintiff's 3 experts' testimony)
4/1/86	Order for Plaintiff to supplement interrogatories and make plaintiff's experts available for depositions
4/3/86	Motions heard
4/7/86	Plaintiff supplemented interrogatories
4/7/86	Deposition in Madison, Wisconsin
4/8/86	Plaintiff's application to continue final pretrial conference and trial
4/9/86	Pretrial conference
4/9/86	Order denying continuance, canceling settlement conference, and ordering settlement conference documents (exhibits list) by 4/21/86
4/10/86	Plaintiff's motion for reconsideration for continuance of trial and extension to complete discovery
4/11/86	Deposition in Chicago, Illinois

4/11 & 4/16/86	Defendants' motion for sanctions for plaintiff's failure to timely supplement interrogatories and make available 3 experts for depositions, and supplement thereto
4/14/86	Trial commenced
4/21/86	Order denying plaintiff's continuance and extension of discovery and continuing defendants' motion for sanctions until after depositions taken (at time of trial)
4/22, 4/25 & 4/28/86	Defendants' motions for sanctions for plaintiff's failure to file settlement conference documents and plaintiff's failure to make experts available for depositions
4/28/86	Plaintiff's interlocutory appeal filed
4/28/86	Trial date; order precluding plaintiff's 3 experts from testifying, and dismissing plaintiff's claim
5/1/86	Trial concluded
5/5/86	Mistrial declared
5/8/86	Plaintiff's motion to vacate dismissal and order of sanctions
5/27/86	Order denying motion to vacate
6/19/86	Notice of appeal

I. Motion to Continue. Krugman's first argument on appeal is that there was an abuse of discretion on the part of the trial court in failing to continue the final pretrial and trial. Trial courts have broad discretion in deciding whether to grant motions for continuance, absent a clear abuse of discretion we will not interfere. Department of General Services v. R. M. Boggs Co., Inc., 336 N W 2d 408, 410 (Iowa 1983). An abuse of discretion refers to "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." State v. Morrison, 323 N.W.2d 254, 256 (Iowa 1982). The fact that an attorney has a conflicting trial schedule does not give him an automatic right to a continuance. Dept. of General Services, 336 N.W.2d at 410. The trial court's action in denying a motion to continue must be unreasonable under the attendant circumstances in order to find an abuse of discretion. See State v. Cott, 283 N.W.2d 324, 329 (Iowa 1979).

In this case we conclude the trial court abused its discretion in denying Krugman's application to continue the pretrial conference and trial and in denying Krugman's application to reconsider continuance of the trial and extend the time to complete discovery.

We look to the case of Dept. of General Services, 336 N.W.2d at 408, for our guidance. That case is factually similar to the case at bar. In Dept. of General Services, the trial attorney was scheduled for two overlapping trials in the same courthouse. Trial counsel had no one else, other than an inexperienced young associate, to try the case. Counsel had previously consented to the trial date, believing the trial in conflict would be settled or completed the prior week. Ten days before trial, counsel realized the conflicting case would not be settled and, in addition, would take three weeks rather than the estimated one week. Trial court denied the motion for continuance. Interlocutory appeal was taken, proceedings were stayed, and the case settled. However, the supreme court considered the appeal as not being moot in order to provide authoritative adjudication for future guidance in cases involving similar issues. The court held that the trial court abused its discretion in denying the continuance and cited with approval Coburn v. Domanosky, 257 Pa. Super. 474, 480, 390 A.2d 1335, 1338 (1978), which stated:

[T]he most important factor [for granting the continuance is that] counsel did offer a reasonable explanation for his scheduling conflict, specifically, that he thought that he could handle both the civil

and criminal cases because the criminal case looked to be a short one, and because the civil case was far down on the list [of civil cases for that week].

In the present case (1) Attorney O'Malley indicated 20 days before trial that he desired a continuance due to the fact the conflicting case he was to try in another state would take three weeks, rather than his estimated two weeks, which would cause overlapping of the two cases; (2) Attorney O'Malley was the sole litigator in this matter, although local counsel was of record, and was hired by Krugman because of his professional malpractice expertise; (3) Attorney O'Malley was committed to the court in the conflicting case (a medical malpractice drug reaction trial), which was of just as significant a posture as the Krugman case wherein O'Malley's expertise was required; and (4) due to six new experts being identified by both Krugman and defendants on February 28 and March 15, 1986, respectively, it would be next to impossible to schedule all their depositions by the trial date of April 28, 1986, due to scheduling conflicts and the fact the experts were located across the country.

Trial court, Judge Briles, in her ruling denying Krugman's motion to continue stated that no good cause was shown for a continuance; that all fault and neglect in this case had been by the plaintiff; and that Attorney O'Malley's failure to supplement interrogatories was a "deliberate ploy to avoid the trial date." In Judge Briles' order on Krugman's motion to reconsider continuance of trial date, she noted that dates as outlined in the pretrial conference could be extended upon a showing of good cause; referred to the fact that defendants were of limited insurance coverage; that no excuse was shown why Krugman had not made her experts available for depositions; and that other attorneys were available for Krugman. She also continued defendants' motion for sanctions until all the depositions were taken when the experts arrived at Scott County for

the trial, at which time the court would then determine if defendants were prejudiced.

We are in disagreement with Judge Briles' ruling that "good cause" was not demonstrated to continue the case. This was Krugman's first and only request for a continuance; there is no doubt Attorney O'Malley's presence was imperatively required in two places at one time; that he advised the court at his earliest knowledge, 20 days before trial, of the need for a continuance; that Attorney O'Malley was chosen in each of the two conflicting trials because of his expertise; that due to his required presence in the conflicting trials, it was not possible for him to meet the discovery requests; and that Judge Briles' knowledge of defendants' limited insurance coverage was of no consequence to the merits of ruling on the motion for continuance. We reverse for abuse of discretion for the trial court's clearly untenable and unreasonable reasons for denying plaintiff's motion to continue. See Hubby v. State, 331 N.W.2d 690, 697 (Iowa 1983).

II. Sanctions. Krugman also argues there was an abuse of discretion on the part of the trial court, Judge deSilva, in imposing sanctions by precluding her experts from testifying at trial and dismissing her petition on April 28, 1986, the date set for trial. She also alleges the court abused its discretion in denying her motion to vacate the dismissal order and order of sanctions.

The basic rule of sanctions is that the imposition of sanctions by the trial court is discretionary and will not be reversed unless there has been an abuse of discretion. Sullivan v. Chicago and Northwestern Trans., 326 N.W.2d 320, 324 (Iowa 1982). However, where the sanction selected by the trial court is dismissal of the action, the range of discretion is narrowed. Suckow v. Boone State Bank and Trust Co., 314 N.W.2d 421, 425 (Iowa 1982); Smiley v. Twin City Beef Co., 236 N.W.2d 356, 360 (Iowa 1975). In order to justify dismissal

of the action, a party's noncompliance must be due to willfulness, fault, or bad faith. Fox v. Studebaker-Worthington, Inc., 516 F.2d 989, 993 (8th Cir. 1975); McQuillen v. City of Sioux City, 306 N.W.2d 789, 791 (Iowa 1981); Smiley, 236 N.W.2d at 360; Sukow, 314 N.W.2d at 425. Krugman contends that the basic error of the trial court, both Judge Briles and Judge deSilva, was that whatever noncompliance occurred in getting the discovery done and making preparations for trial, none was due to willfulness, fault, or bad faith.

Iowa Rule of Civil Procedure 134 dealing with sanctions is substantially the same as Federal Rule of Civil Procedure 37; it is clear that the use of sanctions pursuant to Rule 37 is limited by the due process clause of the fifth amendment. R. E. Morris Investments, Inc., et al. v. Lind, 304 N.W.2d 189, 191 (Iowa 1981) (trial court's striking jury trial demand as a sanction for failure to comply with a discovery order was an abuse of discretion). In addition, the United States Supreme Court has stated:

[T]here are constitutional limitations upon the power of courts, even in aid of their own valid processes, to dismiss an action without affording a party the opportunity for a hearing on the merits of his cause.

Societe Internationale v. Rogers, 357 U.S. 197, 209, 78 S. Ct. 1087, 1094, 2 L. Ed. 2d 1255, 1265 (1958).

The issue we are presented with in the present case involves exalting form over substance. Krugman's rights are damaged by dismissal of her case and denial of expert testimony. The harsh sanctions of dismissal we find to be disproportionate to Attorney O'Malley's failure to comply with the discovery orders. Less drastic alternatives were available. Krugman should not be punished when her counsel could not be at two trials at one time and asked for his first continuance of the case 20 days before trial was to commence and also moved for a continuance on discovery when he realized he could not complete the

deadlines. Local counsel did not have the expertise to try the case. The chart set out earlier in this opinion demonstrates the intertwining events of Attorney O'Malley's commitments to both trials. The severity of dismissal and the reasons for it need to be weighed against Krugman's right of due process of law. The attendant circumstances in this case weigh in favor of Krugman to proceed with her right to a trial on the merits of this case. We find Attorney O'Malley has not been willful, at fault, or acted in bad faith in his conduct with regard to discovery orders and procedural matters. We find he listed his experts on February 28, 1986, in compliance with the January 28, 1986, court order. Krugman was ordered to supplement interrogatories by April 4, 1986; the supplement was mailed on April 4, 1986 and on file April 7, 1986. He alerted the court at his earliest opportunity to the *extenuating circumstances of the situation* he was in.

With regard to the sanction of Judge deSilva excluding Krugman's three experts from testifying due to their unavailability for depositions by defendants, we note that Judge Briles in an earlier ruling allowed defendants to take the three depositions when the experts arrived for trial at Scott County, at which time the court would then decide if defendants had been prejudiced by being precluded from their testimony at an earlier date. Because of Judge Briles' previous ruling in this regard and because of our decision that this case is reinstated, we reverse the trial court's decision and permit the testimony of Krugman's three experts who were named on February 28, 1986.

We additionally hold that this opinion is to be construed in light of the particular circumstances of this case. Because of our ruling, we do not address Krugman's motion to vacate dismissal. We therefore reverse the trial court in accord with the foregoing decision and remand this case to be set for trial.

REVERSED AND REMANDED.