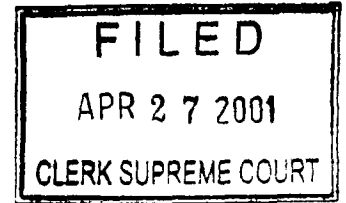


IN THE COURT OF APPEALS OF IOWA

No. 1-070 / 99-1914
Filed April 27, 2001



EZRA ADKISSON, by his mother and
next friend, **DEBORA ADKISSON**,
Appellant,

vs.

GIT-N-GO CONVENIENCE STORES, INC.,
Appellee.

Appeal from the Iowa District Court for Polk County, Linda R. Reade,
Judge.

Ezra Adkisson, by and through his mother and next friend, Debora Adkisson, appeals the district court's ruling granting Git-N-Go Convenience Stores, Inc.'s summary judgment motion and dismissing his claims of negligence, negligent entrustment, intentional infliction of emotional distress, and outrageous conduct. **AFFIRMED.**

Patricia K. Wengert of Tom Whitney Law Offices, Des Moines, for
appellant.

Mark W. Thomas of Grefe & Sidney, P.L.C., Des Moines, for appellee.

Heard by Sackett, P.J., and Vogel and Zimmer, JJ.

VOGEL, J.

Ezra Adkisson, by and through his mother and next friend, Debora Adkisson, appeals the district court's grant of the summary judgment motion filed by Git-N-Go Convenience Stores, Inc. (Git-N-Go) and the resulting dismissal of his claims for negligence, negligent entrustment, intentional infliction of emotional distress, and outrageous conduct. Adkisson contends that the district court abused its discretion in not accepting a late resistance to the summary judgment motion, that it erroneously ruled expert testimony was necessary to establish the casual connection between Git-N-Go's actions and his injuries and that, even if expert testimony was necessary, summary judgment was inappropriate as the record contained sufficient facts to send the issue of causation to the jury. We affirm the district court.

Background facts. On January 28, 1998, Ezra Adkisson, then fourteen years old, purchased a sexually-explicit magazine from a neighborhood convenience store owned and operated by Git-N-Go. Adkisson alleged he experienced psychological and mood changes as a result of viewing and reading the magazine. Prior to the purchase Adkisson had an extensive history of physical, psychological and other problems¹ stemming from horrific and sustained physical, psychological and sexual abuse perpetrated upon him by his natural father. The year immediately prior to the sale Adkisson received both

¹ An in-home casework therapist described Adkisson's history of "troubled behavior" as including "physical aggression, destruction of property, homicidal thoughts, running away, threats to [his] mother, school difficulties, suspected sexual abuse, sexual comments and behaviors, self-abusive behaviors, poor social skills and white power and Nazi ideation."

inpatient and outpatient treatment or counseling from at least six different programs before being admitted to the residential treatment program at Orchard Place in Des Moines. The magazine purchase occurred while he was on a scheduled home visit from Orchard Place.

Scope of Review. Summary judgment rulings are reviewed for correction of errors at law. Iowa R. App. P. 4; *General Car & Truck Leasing Sys., Inc. v. Lane & Waterman*, 557 N.W.2d 274, 276 (Iowa 1996). Where no genuine issue of material fact exists and the moving party is entitled to judgment as a matter of law, summary judgment is appropriate. Iowa R. Civ. P. 237(c); *City of West Branch v. Miller*, 546 N.W.2d 598, 600 (Iowa 1996). In making this determination, the court reviews the pleadings, depositions, answers to interrogatories, admissions on file, and affidavits, if any. *City of West Branch*, 546 N.W.2d at 600.

All facts are viewed in the light most favorable to the party opposing the motion for summary judgment. *Bearshield v. John Morrell & Co.*, 570 N.W.2d 915, 917 (Iowa 1997). However, a party resisting summary judgment may not simply rely upon the pleadings, but must "set forth specific facts showing that there is a genuine issue for trial. If the adverse party does not so respond, summary judgment, if appropriate, shall be entered." Iowa R. Civ. P. 237(e). Although summary judgment is improper where reasonable minds could differ on resolution of the matter before the court, *Dickerson v. Mertz*, 547 N.W.2d 208, 212 (Iowa 1996), no fact issue exists if the dispute is over legal consequences flowing from undisputed facts. *City of West Branch*, 546 N.W.2d at 600.

Rejection of Untimely Filing. Adkisson asserts the trial court abused its discretion when it found his resistance to the motion for summary judgment was not timely. Subsumed in this claim is Adkisson's plea for a second extension of time in which to respond to Git-N-Go's summary judgment request, which plea was orally made and denied at the summary judgment hearing. A district court has wide discretion when ruling on pretrial deadlines. *Gary v. Heritage Nat. Healthplan Services, Inc.*, 485 N.W.2d 851, 854 (Iowa Ct. App. 1992) (citing *Donovan v. State*, 445 N.W.2d 763, 766 (Iowa 1989)). Review of such a ruling is for errors at law, Iowa R. App. P. 4, and the district court's decision will be reversed only for an abuse of discretion. *Gary*, 485 N.W.2d at 854. Discretion is abused if a decision is based on clearly unreasonable or untenable grounds. See *Martin v. B.F. Goodrich Co.*, 602 N.W.2d 343, 345 (Iowa 1999).

Adkisson's current counsel, Patricia K. Wengert, first appeared on his behalf in February 1999, upon his former counsel's withdrawal from the practice of law. At that time the petition had been on file for over nine months, discovery had closed, and trial was set for May of that year. During a March 2, 1999, hearing on Git-N-Go's motion to dismiss for failure to comply with discovery, the district court granted Adkisson's request to continue the trial and directed compliance with outstanding discovery. In a uniform scheduling order signed by counsel, trial was continued to December 6, 1999, with Adkisson's expert disclosure deadline set for June 7, 1999, and discovery to close on October 6, 1999. No further requests were made to extend either deadline. Because of the

length of time the petition had been on file, the case was subject to an Iowa Rule of Civil Procedure 215.1 dismissal on January 2, 2000.

Adkisson timely disclosed five witnesses: two clinical social workers, a medical doctor, and two persons familiar with the impact of pornography. Git-N-Go propounded an interrogatory regarding expert witnesses to be called at trial. Adkisson provided a generalized response naming the medical doctor and stating that, in the event he called either clinical social worker, the interrogatory would be supplemented.² Git-N-Go then filed its summary judgment motion, and hearing was set for September 27, 1999. Adkisson filed a short, preliminary resistance and requested he be given until October 8, 1999, to fully respond.

The preliminary resistance contained neither a statement of disputed facts nor a memorandum of authorities. The district court gave Adkisson an opportunity to cure that defect when it continued the summary judgment hearing to October 15, 1999, and granted him until October 8 to respond to Git-N-Go's motion. Not only was the filing deadline the specific date requested by Adkisson, it also allowed Git-N-Go and the court sufficient time to review the resistance prior to hearing.

Adkisson failed to file a supplemental response by the deadline and no further extension request was made. A resistance was eventually filed and provided to opposing counsel late in the afternoon on October 14, the day prior to the hearing. It contained a two-sentence letter from the previously identified

² The interrogatory answer also reserved the right to call a social worker not designated by Adkisson. It did not address either of the pornography experts previously disclosed.

doctor, a supplemental response to Git-N-Go's expert witness interrogatory that named one of Adkisson's pornography-impact experts as a trial witness, and an affidavit from the newly-named witness. The record contains no specific explanation as to why the resistance was not filed in a timely manner, although in his brief Adkisson claims the late filing was the result of an oversight by his attorney. In addition, it appears Adkisson was experiencing discovery difficulties, and that these difficulties may have been the reason for the initial extension request.

During the summary judgment hearing Adkisson's counsel stated some discovery was still outstanding, including a copy of the magazine Adkisson purchased at the Git-N-Go store. She attributed the discovery difficulties to an inability to locate prior counsel, to "red tape" at the various counseling centers that had treated Adkisson and to her own health problems that pre-dated her appearance in the case. Asserting Adkisson's experts needed to review the magazine before he could file an adequate response to the summary judgment motion, she made a second request for additional time to supplement the resistance.

The district court found those reasons insufficient given the history of the proceedings and the potential prejudice to Git-N-Go:

THE COURT: [Y]ou [Ms. Wengert] came in this case . . . when [it] was in serious jeopardy of being dismissed for failure to comply with discovery. You assured us . . . that you were ready to go on this case [and] entered into a uniform scheduling order which delayed the trial until December the 6th of 1999. In it you agreed to a deadline of expert witnesses of June 7, 1999, so I'm curious as to why here in October you're for the first time telling us that you have a problem. I would assume that when you entered into this

scheduling order on March the 3rd that if there was a problem you would of let us know and not wait until very shortly before trial. . . . [Y]ou have declared experts. You have asked for no extension of that expert time, and the time to name experts and to disclose what they're going to say has passed months ago

MR. LYFORD: [On behalf of Git-N-Go] we do resist the extension. Discovery was closed on October 6th, and . . . I think Ms. Wengert has the idea she can just keep doing discovery in this case and somehow we're going to get what [Adkisson's] experts say. Our deadline has passed because we have never figured out what they're going to say. She never answered Interrogatories . . . , and we're kind of swimming in this case if this goes on anymore because I think she has had ample opportunity. . . . I was up last night to do a reply, and I've got something done, but it really isn't right. The deadlines don't seem to mean anything.

In denying the further extension request the court stated:

I cannot prejudice these defendants because of these last minute explanations as to why you haven't done your work. . . . I'm not going to grant additional time to respond to the motion for summary judgment for the reasons that the request was not received before the last expiration of the last deadline, and in this case I can't prejudice the defendants because the plaintiffs are not up to speed in the case.

The court then proceeded to hear argument on the merits of the summary judgment request, reserving ruling on the timeliness issue. In its written decision the court found the resistance was untimely and that summary judgment could be granted on that basis alone. The court then ruled on the merits of the motion in light of the late-filed resistance.

Even accepting the unsupported statement that the late filing was a mere oversight, the record demonstrates a reasonable basis for the district court's decision. Oversight or mistake on the part of counsel does not excuse failure to comply with an established deadline, particularly when the deadline was set at

Adkisson's request. Nor was it unreasonable for the court to view the filing as untimely in light of Adkisson's discovery problems. Adkisson had ample opportunity to bring these matters to the court's attention, and failed to do so until all deadlines had closed and trial was less than two months away. Moreover, by filing his resistance late in the afternoon the day prior to the hearing, Adkisson drastically circumscribed Git-N-Go's ability to craft a reply.

Adkisson also argues that, even if the record would support the district court's decision as a general matter, discretion was abused in this case because the ruling was made in regard to a summary judgment filing. Contrary to Adkisson's assertion, the nature of summary judgments does not curtail a district court's discretion to enforce compliance with established deadlines. Since the timeliness issue was within the district court's discretion, and as the exercise of that discretion was based on reasonable grounds, no abuse is shown.

Summary Judgment Motion. With the supplemental response removed from consideration, Adkisson failed to properly resist the summary judgment request. The lack of resistance does not lead to an automatic grant of summary judgment, however, as Git-N-Go's motion must still present a meritorious claim for dismissal of Adkisson's petition. See Iowa R. Civ. P. 237(c) and (e). A review of the record demonstrates that Git-N-Go's motion, memorandum of authorities and statement of undisputed facts establish Git-N-Go's right to judgment as a matter of law. This result does not change even if the untimely resistance is fully considered in the light most favorable to Adkisson.

Central to all of Adkisson's claims is his burden of proving he suffered harm, and that the harm is in some way connected to the actions of Git-N-Go. Here the claimed harm is emotional and psychological damage of a young person with a long and complex history of psychological and emotional problems. Accordingly, the jury must be able to differentiate between problems pre-dating the magazine purchase, and any aggravation of those problems or completely new difficulties demonstrably related to viewing and reading the magazine.

Both Adkisson and his mother gave deposition testimony that viewing the magazine aggravated Adkisson's pre-existing problems, increasing their occurrence and/or severity, and the incident was briefly addressed in therapy session notes. However, Adkisson presented no expert opinion that would establish a causal relationship between viewing the magazine and any increased level of emotional or psychological problems. Whether expert testimony is required to establish the casual link depends on the complexity of the issue presented. See *Schlader v. Interstate Power Co.*, 591 N.W.2d 10, 14 (Iowa 1999).

Generally speaking, expert testimony is not necessary, and a plaintiff can establish his burden without an expert opinion,

if all the primary facts can be accurately and intelligibly described to the jury, and if they, as men of common understanding, are as capable of comprehending the primary facts and of drawing correct conclusions from them as are witnesses possessed of special or peculiar training, experience, or observation in respect of the subject under investigation.

Id. (quoting *Salem v. United States Lines Co.*, 370 U.S. 31, 35, 82 S. Ct. 1119, 1122, 8 L. Ed. 2d 313, 317 (1962)). As established by *Schlader*, the key inquiry

is not the nature of the case, but the complexity of the facts before the jury.³ We agree with the trial court's determination that Adkisson's long and complicated history of acute psychological and emotional problems is of such complexity that the question of causation is beyond an average person's understanding. *Accord Roling v. Daily*, 596 N.W.2d 72, 75 (Iowa 1999) (noting that although a plaintiff did not need expert testimony to establish that he was physically injured as a result of a car accident, expert testimony should be required to establish he suffered emotional damage and that it resulted from the accident). Consequently, expert testimony is necessary to establish his claims.

At the time of the summary judgment hearing expert deadlines had passed and discovery had closed. According, Adkisson could rely upon only the five expert witnesses previously identified. The two experts designated for their knowledge of pornography and its impact had not examined Adkisson and neither could opine as to pornography's effect on Adkisson in particular, much less differentiate for the jury Adkisson's pre-existing conditions from any harm actually caused by the magazine purchased at Git-N-Go. Although the remaining three experts had examined Adkisson only one, Marcia R. Flugsrud-Breckenridge, M.D., Ph.D., provided any opinion as to the effect viewing the magazine had on Adkisson. Even if we were to ignore the fact that this opinion was provided not by affidavit, but by an unverified letter, its contents do not help Adkisson's cause.

³ For example, although expert testimony is typically required in medical malpractice cases, the facts of a particular incident may be of a nature and kind that the average person can pass rational judgment. See *Kennis v. Mercy Hosp. Medical Center*, 491 N.W.2d 161, 165 (Iowa 1992).

Dr. Flugsrud-Breckenridge opined:

I am of the opinion that there is not direct cause and effect that occurred from Ezra Adkisson's being exposed to the pornography. However, that does not mean that the pornography did not have an adverse effect on his psychological state.

Adkisson points to the latter portion of the statement and claims it is sufficient to raise a fact question on the issue of damages. While nominally supportive of Adkisson's position, this generalized statement is insufficient in the face of Dr. Flugsrud-Breckenridge's affirmative opinion that there is no causal connection between the pornography exposure and Adkisson's post-viewing psychological state. As Adkisson failed to produce any expert testimony on the issue of causation, the district court was correct in its grant of the summary judgment request.

Having considered all arguments advanced on appeal, we affirm.

AFFIRMED.

Zimmer, J., concurs; Sackett, P.J., concurs in part and dissents in part. '

SACKETT, C.J. (concurring in part and dissenting in part)

I concur in part and dissent in part.

The issue before us is whether the plaintiffs' suit against Git-N-Go Stores, Inc. should be dismissed on summary judgment without a trial. I would affirm in part and remand for trial.

Plaintiffs claim that Ezra, then fourteen years old and mentally fragile because of abuse he suffered earlier in this childhood, purchased a periodical titled *Gallery Magazine* from a Git-N-Go store. The Adkissons contend the magazine was obscene and in selling the magazine to the fourteen-year-old defendant violated Iowa Code section 728.2, which provides in applicable part:

Any person, other than the parent or guardian of the minor, who knowingly disseminates or exhibits obscene material to a minor, including the exhibition of obscene material so that it can be observed by a minor on or off the premises where it is displayed, is guilty of a public offense and shall upon conviction be guilty of a serious misdemeanor.

At this point in the proceedings defendant does not claim there is no evidence that Ezra purchased the magazine from its store. Nor have they claimed that the magazine does not meet the definition of obscene material in section 728.2. The magazine⁴ is described in the record as showing pictorial depictions of nude females including vulva, vaginal and anal regions; sexual activity between two women, between men and women, and between persons under the age of legal consent; bestiality; penetration of the vagina with foreign objects, and masturbation. The magazine also is claimed to have

⁴ . The actual magazine was in the hands of plaintiffs' original attorney at the time of the hearing on the motion for summary judgment and was not available to plaintiffs' current attorney.

advertisements for “phone sex,” pharmaceutical and medical supplies and other devices for increasing the size of the male sex organ and other sexually oriented objects and aids. It is clear *Gallery Magazine* comes under the legislature’s definition of obscene material in section 728.2.

To survive a motion for summary judgment the plaintiffs must not only show there is evidence that the defendant violated the statute, but also show as a result of the violation that they suffered damages. Defendant contends that because plaintiffs were unable to show they had the necessary evidence from which a finding of damages could be made, they have failed to meet their burden and the district court was correct in dismissing the claim on summary judgment. Plaintiffs challenge this finding.

The majority has affirmed the district court’s dismissal on two grounds: (1) plaintiff did not properly resist the motion for summary judgment, and (2) even if the resistance were considered, plaintiffs failed to show there was an issue of material fact as to whether plaintiffs were damaged.

Summary judgment is proper when there is no genuine issue of fact and the moving party is entitled to judgment as a matter of law. *Knapp v. Simmons*, 345 N.W.2d 118, 121 (Iowa 1984). Every legitimate inference that reasonably can be deduced from the evidence should be afforded the nonmoving party. *Id.* Summary judgment may be appropriate in an instance in which expert testimony is required to establish negligence or foundational facts, and expert testimony is unavailable, so no genuine issue of fact can be proved. *Schlader v. Interstate*

Power Co., 591 N.W.2d 10, 12 (Iowa 1999); *Welte v. Bello*, 482 N.W.2d 437, 440 (Iowa 1992).

The district court held that plaintiffs' resistance should not be considered because it was ordered to be filed by October 8, 1999, but in fact was not filed until October 14, 1999, the day before the scheduled hearing. I agree with the majority's affirming on this issue. The decision not to consider the resistance was a discretionary call by the district court. The district court could also have allowed the resistance to be considered. The major problem with delay in this case came not from plaintiffs' current counsel but from the attorney who had their case for one and one-half years, and then for reasons of failing health withdrew. Plaintiffs' current attorney was at substantial disadvantage because of an inability to get the file from the first attorney, and at the time of the hearing she did not yet have a copy of the particular magazine plaintiff was alleged to have purchased. I recognize the need for efficiency in a trial court and that the sins of counsel are imputed to the client. Yet under the facts of this case it would seem that it would have been reasonable to accept the resistance. The parties had agreed at that point to move the trial date forward. And while the majority reasons that the defendants would not have time to craft the proper resistance, I hardly see this as a major problem, as I am sure it would have been simple to have given defendant necessary time to respond and sanction plaintiff by awarding defendant attorney fees for the extra time spent as a result of the delays.

I disagree with the majority's conclusion that either with or without the resistance the district court correctly granted summary judgment because plaintiffs failed to show the necessary facts to support their claim for damages.

I recognize that the Iowa Supreme Court has required expert testimony in the past to establish emotional damages. *Roling v. Daily*, 596 N.W.2d 72, 75 (Iowa 1999). In that case an expert was required to provide the causal link between witnessing the carnage of an automobile accident and a subsequent personality and mood change in the witness.

This case is distinguishable, not because we do not require a causal link between witnessing the carnality of a *Gallery* magazine and a subsequent personality and mood change, but because the legislature has already provided us with that link. Under Iowa Code section 728.2 it is a crime to disseminate obscene literature to minors. There can be no other policy behind this statute but that the legislature presumes emotional damage to minors exposed to such material. An understanding of the effect of obscene material on the mind of a child would not require expert testimony. For purposes of summary judgment, then, the plaintiffs should be able to rely on the legislature's presumption of emotional damages to meet their burden in establishing their own case of emotional damages. Whether or not the young man in this case did indeed suffer further damages upon viewing *Gallery* is an issue for the jury. With respect to this issue of the majority opinion, I respectfully dissent.