IN THE COURT OF APPEALS OF IOWA

No. 2-1161 / 12-0696
Filed March 13, 2013

JON FARIS and REBECCA FARIS,
Individually and as Next Friend
to NATHAN FARIS,
Plaintiffs-Appellants,

vs.

CITY OF IOWA FALLS,
Defendant-Appellee.

FARM BUREAU MUTUAL INSURANCE
COMPANY,
Plaintiff,

vs.

SHERRI BALL,
Defendant.

Appeal from the Iowa District Court for Hardin County, Timothy J. Finn (sanction order), and Dale E. Ruigh (summary judgment), Judges.

Jon and Rebecca Faris challenge the district court order excluding expert witness testimony on their behalf as a sanction for alleged discovery violations. **REVERSED AND REMANDED.**

Steven Verne Lawyer of Law Firm of Steven V. Lawyer & Associates, P.L.C.,, West Des Moines, for appellants.

Beth E. Hansen of Swisher & Cohrt, P.L.C., Waterloo, for appellee.

Heard by Vaitheswaran, P.J., and Tabor and Mullins, JJ.

TABOR, J.

Jon and Rebecca Faris sued the City of Iowa Falls on behalf of their minor son, Nathan, who was profoundly injured as a result of being struck by a minivan while walking along a city street. The suit alleged the city was negligent in constructing and maintaining the street. The city repeatedly moved to compel discovery over the course of the three-and-one-half year litigation. In response to the city's motion for sanctions, the district court barred the plaintiffs from calling expert witnesses. Without expert testimony, the plaintiffs' case could not withstand the city's motion for summary judgment.

On appeal, the plaintiffs allege the court abused its discretion by excluding their expert witness testimony. Because the plaintiffs complied with the court's April 11, 2011 order by producing discovery responses for their designated expert witness, civil engineer Joseph Filippino, we find the sanction excluding that witness to be unreasonable. Accordingly, we reverse and remand for further proceedings.

I. Background Facts and Proceedings

At 6:20 p.m. on September 14, 2007, twelve-year-old Nathan Faris was walking with a friend along the north side of Pierce Street between Oak and Elizabeth Streets in Iowa Falls. The boys were headed east. Sherri Ball struck Nathan with her mini-van as she drove west. Ball said the glare of the setting sun prevented her from seeing Nathan.

On September 14, 2009, Nathan's parents, Jon and Rebecca Faris (the plaintiffs), filed an action against Ball, which they subsequently assigned to their

underinsured motorist carrier as the real party in interest. They also filed an action against Iowa Falls, alleging the city was negligent in the design, construction, and maintenance of the roadway. The city filed a cross-petition against Ball, alleging she proximately caused the accident and Nathan's injuries. The court consolidated the claims against Ball and the city into one action.

On November 24, 2009, the city propounded interrogatories and requests for production of documents upon the plaintiffs. The city sought, among other things, to discover information about the plaintiffs' expert witnesses.

On January 20, 2010, the city's attorney sent the plaintiffs' attorney a letter stating that to move the case forward for trial the city needed the discovery responses, "particularly those related to [Nathan]'s injuries and your expert witnesses." The letter asked for the responses to be provided by January 29, 2010. On March 10, 2010, the city's attorney sent another letter to the plaintiffs' counsel regarding their failure to provide the requested discovery. The city's letter stated that if the plaintiffs failed to provide full and complete answers by March 18, 2010, the city would file a motion to compel discovery. The plaintiffs failed to provide the requested discovery.

On March 18, 2010, the city filed its motion to compel. The district court entered an order granting the motion on March 23, 2010. The court ordered the plaintiffs to file answers or good-faith objections to the discovery requests by April 15, 2010. The court also ordered the plaintiffs to pay costs and $150 in attorney fees as a sanction.

The plaintiffs served the city with discovery responses on April 15, 2010 deadline. In response to interrogatories and requests for production of documents regarding expert witnesses, the plaintiffs responded that they would decide their experts at a later date and supplement the answer with the requested information.

A June 24, 2010 scheduling order set trial for April 19, 2011. The plaintiffs were to certify their expert witnesses no later than 210 days before trial—which was September 21, 2010. The city then had until 150 days before trial, November 20, 2010, to certify its expert witnesses. The plaintiffs served their designation of expert witnesses on the September 21, 2010 deadline. They identified eleven expert witnesses, including Nathan's medical care providers, accident reconstruction experts, a civil/highway engineer, and vocational specialists.

On September 28, 2010, the city's attorney wrote to plaintiffs' counsel asking the plaintiffs to supplement their discovery responses. The letter noted the plaintiffs had not yet provided the city with any reports from expert witnesses. The letter requested the substance of the experts' expected testimony and production of the materials used in preparing their reports. The letter emphasized these materials were needed by October 15, 2010, so the city could determine its own experts by the November 20 deadline. The letter noted that the city would seek enforcement from the court if the plaintiffs did not produce the materials by October 15, 2010.

The plaintiffs did not respond to the city's request for supplementation of their discovery responses. On November 10, 2010, the city filed a second motion to compel discovery, as well as a request to extend time to designate its experts. The court's November 18, 2010 order directed the plaintiffs to file any objections to the motion within ten days, or to produce the requested material within twenty days. The order warned the plaintiffs that failure to do so could lead to sanctions, including the possible dismissal of their action.

On November 30, 2010, the plaintiffs moved to continue the trial until fall 2011. The motion stated that Nathan underwent spinal fusion surgery on September 7, 2010, and his treating physicians were unable to provide an opinion regarding his long-term prognosis until sometime in February or March 2011. The plaintiffs did not object to the motion to compel, nor did they provide the requested discovery.

The city filed a motion for sanctions on December 10, 2010, for the plaintiffs' failure to comply with the November 18, 2010 order. The motion sought dismissal of the action or, in the alternative, asked the court to prohibit the plaintiffs from introducing any expert testimony. In their response to the motion, the plaintiffs alleged for the first time that due to a mailing error, they did not receive the court's November 18, 2010 order until after the ten-day period expired.

On January 7, 2011, the district court granted the continuance. A new scheduling order issued February 11, 2011, set trial for March 6, 2012. The

deadline for the plaintiffs to designate expert witnesses was reset for August 9, 2011.

The court held a hearing on the city's motion for sanctions on January 26, 2011. In its order filed April 11, 2011, the court addressed the plaintiffs' argument that their medical experts had not reached final opinions about damages because of the September 2010 surgery, stating: "Mr. and Mrs. Faris have never sought a protective order deferring their obligation to respond to all of the discovery requests. Absent such an order, they are required to respond to all of the discovery requests within the time limits established by the procedural rules or court order." The court also explained the fact that an expert's opinion was not final did not preclude discovery of the expert's current opinion and the basis for that opinion; "[s]uch is certainly the case here, where the accident giving rise to this litigation occurred 3 1/2 years ago and the lawsuit has been pending for approximately 1 1/2 years."

The court also pointed out the plaintiffs had yet to disclose the opinions of their liability experts, which did not depend on Nathan's medical condition. Because of this failure, the court ordered sanctions. While the court denied the city's request to dismiss the action or prohibit introduction of expert witness testimony, it did award the city $1000 in trial attorney fees. The court also ordered the plaintiffs to provide "full and complete answers" to the interrogatories and responses to the requests for production by May 5, 2011. The court's order cautioned that failure to comply "may result in the dismissal of this action."

On May 3, 2011, the plaintiffs' attorney sent a letter to the city's attorney conveying the plaintiffs' intent to provide their liability experts' current opinions in report form and the completed discovery responses on May 5. Plaintiffs' counsel stated their economist and medical providers were unable to provide opinions regarding prognosis at that time, and asked if the city's attorney considered the absence of those opinions to be a violation of the court's April 11 order. The city's attorney replied that the city believed the court order required plaintiffs to "file discovery responses with respect to all experts that you intend to call at trial regardless of whether their field is liability or damages."

On May 5, 2011, the plaintiffs filed their amended designation of expert witnesses. The plaintiffs designated only one expert, civil engineer Joseph Filippino, who was expected to provide an opinion concerning the city's liability. They also served the city with supplemental discovery responses on that date, including Filippino's report. In addition, the plaintiffs filed a motion for protective order, indicating they intended to designate additional expert witnesses before the August 9, 2011 deadline, in compliance with the trial scheduling order. They sought an order excusing them from producing additional designations or opinions until that time.

In response to the motion for protective order, on May 18, 2011, the city moved to dismiss, or in the alternative, to exclude expert testimony. The motion alleged the plaintiffs sought a protective order to circumvent the April 11, 2011 order. The city also alleged the plaintiffs failed to provide full and complete

answers to several interrogatories and one of the requests for production of documents regarding their expert witnesses.

The plaintiffs resisted the motion to dismiss on May 25, 2011, contending they were not seeking to circumvent court orders as asserted by the city. They argued that under the court's order of continuance, the new deadline for expert designations was August 9, 2011, and there was "nothing inappropriate or non-compliant" in amending their designation to exclude potential damage witnesses "with the open and acknowledged intent to supplement the designation on or before the new deadline—a deadline set exactly for that purpose." They rebutted the city's claim that their supplemental answers were incomplete, stating they supplemented three sets of interrogatories comprising over 107 questions and subparts, and three sets of request for production with over 3300 pages of documents.

The district court heard argument on the motions and entered an order on July 28, 2011. In that order, the court expressed its "inescapable conclusion" that the plaintiffs failed to comply with the rules of civil procedure and court orders, and were "engaged in a pattern of delay in providing Defendant City of Iowa Falls the identity of Plaintiffs' expert." The court denied the motion to dismiss but imposed the sanction of excluding plaintiffs' expert testimony from the trial. The court denied the plaintiffs' motion to reconsider.

On January 5, 2012, the city moved for summary judgment under Iowa Code sections 670.3 and .4 (2009). The court granted the motion on March 8, 2012. With regard to the plaintiffs' claim the city should have constructed a

sidewalk along Pierce Street, the court found the city enjoyed discretionary function immunity. But the court rejected the city's immunity argument in relation to the plaintiffs' claim the city failed to install a curb pursuant to its own street improvement program plans. Instead, the court found the plaintiffs could not as a matter of law carry their burden to prove the absence of the curb violated engineering or safety standards. The court noted although the plaintiffs submitted an engineering report regarding those standards, the July 28, 2011 sanction excluded their expert opinion. The court also determined that without an expert the plaintiffs could not establish the placement of large stones on the shoulder or failure to cut back vegetation breached engineering or safety standards.

The plaintiffs filed a notice of appeal on April 9, 2012.

II. Scope and Standards of Review

The district court has discretion to sanction a party for failing to comply with discovery rules or orders. *Whitley v. C.R. Pharmacy Serv., Inc.,* 816 N.W.2d 378, 388 (Iowa 2012). "While the sanction for the failure to supplement discovery can include exclusion of the evidence at trial, the trial court can also deny a request to exclude evidence." *Id.* (upholding decision to continue trial rather than exclude evidence). We will find an abuse of discretion if the district court acted "on grounds or for reasons clearly untenable or to an extent clearly unreasonable." *Id*. at 389.

Where the sanction is dismissal, the district court's discretion narrows. *Farley v. Ginther*, 450 N.W.2d 853, 856 (Iowa 1990). Because dismissal is an

extreme sanction, the district court must find willfulness, fault, or bad faith in the discovery violation. *Id*. We recognize the instant case did not involve direct dismissal as a sanction. But as in *Farley*, here dismissal ultimately occurred by means of summary judgment. *See id.* Accordingly, we consider the sanction imposed with that in mind. *See id*.

III. Analysis

The plaintiffs ask us to reverse the sanction ordered by the district court. The plaintiffs argue their supplemental discovery responses—including the designation of a liability expert—filed on May 5, 2011, complied with the deadline set by the court on April 11, 2011, as well as the trial scheduling order issued on February 7, 2011. The city defends the sanction, contending the plaintiffs violated rules of civil procedure and court-ordered discovery.

We start by noting the two separate analytical models for determining whether sanctions are appropriate in a discovery dispute: (1) cases where the party has violated a rule and (2) cases where the party has failed to comply with a court order. *See Farley*, 450 N.W.2d at 856. Appellate courts are less inclined to reverse a sanction in the second instance, where the district court is enforcing a previous court order. *Id*.

The district court's July 28, 2011 order concluded the plaintiffs failed to comply with both "the Iowa Rules of Civil Procedure and the orders of the Court." But the sanction order did not cite any specific rules. On appeal, the city cites Iowa Rule of Civil Procedure 1.508(1) governing the discovery of expert witness opinions and rule 1.517 allowing an opposing party to compel discovery and

listing possible discovery sanctions. The city also contends the plaintiffs violated court orders requiring them to provide discovery concerning their expert witnesses. We disagree that the plaintiffs' May 5, 2011 discovery responses violated an order of the court.

The exclusion of evidence is a sanction that should not be imposed lightly. *Klein v. Chicago Cent. & Pac. R.R. Co.*, 596 N.W.2d 58, 61 (Iowa 1999). Rule 1.508(3) requires a party to supplement expert witnesses discovery for the purpose of avoiding surprise to the opposing party and to allow the parties to formulate their positions on as much evidence as is available. *Id*. In this case, the city cannot claim surprise by the plaintiffs' designation of Filippino as an expert witness or insufficient time to formulate its position in response to receiving his engineering report. The plaintiffs complied with the April 11, 2011 order by producing the civil engineer's report by May 5, 2011. The most recent scheduling order set trial for March 6, 2012, and did not require plaintiffs to certify their experts until August 9, 2011.

In deciding if the sanction was an abuse of discretion, we review the district court's consideration of four factors: (1) the plaintiffs' reason for not providing the challenged evidence during discovery; (2) the importance of the evidence; (3) the time needed for the opposing party to prepare to meet the evidence; and (4) the propriety of granting a continuance. *See Lawson v. Kurtzhals*, 792 N.W.2d 251, 259 (Iowa 2010). The sanction order failed to focus on these factors. Most critically, the order overlooked the fact the plaintiffs *did* provide the report of their liability expert by the court's May 5 deadline. The

court abused its discretion by excluding the testimony of an expert for whom the plaintiffs provided timely discovery responses.

As for their damage experts, the plaintiffs explained the medical providers and economist could not offer final opinions yet because of Nathan's recent surgery. The district court did not mention that explanation in its July 28 sanction order. Neither did the court consider whether the city needed the preliminary views of the damage experts or whether the continuance already granted provided the city enough time to formulate its response to the plaintiffs' amended designation. The district court was premature in determining the testimony of any damage experts designated in the future should be barred. Moreover, as the plaintiffs point out, the testimony of treating physicians generally is not subject to the discovery procedures set out in rule 1.508. *See Morris-Rosdail v. Schelchinger*, 576 N.W.2d 609, 612 (Iowa Ct. App. 1998).

The district court ordered the harsh sanction excluding expert testimony without fully considering the *Lawson* factors. Accordingly, we find an abuse of discretion.

The city argues that even if we find the district court abused its discretion in sanctioning the plaintiffs by excluding all expert witness testimony, we can affirm because the plaintiffs have failed to show they were prejudiced. We disagree. The engineering report produced by the plaintiffs' liability expert engenders a fact issue on the question of causation. As the court noted in its summary judgment ruling, "Without expert testimony, Mr. and Mrs. Faris could not, as a matter of law, carry their burden of proving that the absence of a curb

violated the engineering or safety standards which existed in 2001." The court also found the exclusion of expert testimony was fatal to their claims that large rocks on the shoulder and encroaching vegetation played a role in the accident. Excluding their expert witness testimony precipitated the dismissal of the case.

Because the district court abused its discretion in sanctioning the plaintiffs and the plaintiffs were prejudiced by the sanction, we reverse the sanction ordered on July 28, 2011, and remand for further proceedings.

REVERSED AND REMANDED.