

IN THE COURT OF APPEALS OF IOWA

No. 9-026 / 08-0756

Filed April 22, 2009

**TED LEWISON, ALICE LEWISON, LISA
SCHENCK, GEORGE BARTLESON,
JOANN BARTLESON, SANDY HEIMER,
TOM HEIMER, SUZANNE J. JONES,
CHARLES L. JONES, KURT KNAPP and
KAREN KNAPP,**

Plaintiffs-Appellants,

vs.

**HOWARD R. GREEN COMPANY and CITY
OF FOREST CITY, IOWA,**

Defendants-Appellees.

Appeal from the Iowa District Court for Linn County, Douglas S. Russell,
Judge.

Plaintiffs appeal the district court order striking their surreply brief and
granting summary judgment to defendants. **REVERSED AND REMANDED.**

Edward M. Blando and Christopher L. Bruns of Elderkin & Pirnie, P.L.C.,
Cedar Rapids, for appellants.

Ivan T. Webber and James R. Wainwright of Ahlers & Cooney, P.C., Des
Moines, for appellee-City of Forest City.

Roger W. Stone, Webb L. Wassmer, and Jeffrey A. Stone of Simmons
Perrine P.L.C., Cedar Rapids, for appellee-Howard R. Green Company.

Heard by Vaitheswaran, P.J., and Eisenhauer and Doyle, JJ.

EISENHAUER, J.

Plaintiffs appeal the district court order striking their surreply brief and accompanying affidavit. Plaintiffs also appeal the court's grant of summary judgment to the defendants. Because we conclude the district court abused its discretion in granting the motions to strike, we reverse and remand for the trial court to reconsider the summary judgment motions based on the full record.

In July 2005, plaintiffs/homeowners filed suit alleging negligence and gross negligence against Howard R. Green Company and Forest City. The homeowners alleged Forest City reconfigured its sanitary sewer system in 1995 and then forced them to connect to the system. Green Company designed the sewer additions, which backed up numerous times causing damage.

After answering the petition, in January and February 2007, the defendants each filed two motions for summary judgment. These motions were denied in June 2007.

Approximately one month later, on July 25, 2007, Forest City filed its third motion for summary judgment. In support, Forest City cited the deposition of Ervin Mussman, plaintiffs' engineering expert. On July 31, 2007, plaintiffs filed a motion seeking additional time to resist. Plaintiffs noted discovery was ongoing and Forest City was expected to reply to Green Company's July 25 interrogatories by August 24, 2007.

Green Company's third motion for summary judgment was filed on August 2, 2007, and also cited to Mussman's deposition. Plaintiff's motion seeking additional time to resist again alleged Forest City's interrogatory answers could

be relevant to the summary judgment issues. Therefore, both defendants acquiesced in plaintiffs incorporating ongoing discovery in their summary judgment resistance. The court granted additional time for plaintiffs to resist.

Plaintiffs filed their resistance to Forest City's summary judgment motion on September 25, 2007, and included a September 24, 2007 affidavit by Mussman. Plaintiffs filed their resistance to Green Company's summary judgment motion on October 1, 2007, and included Mussman's September 24 affidavit as well as Mussman's second affidavit of October 1, 2007.

Green Company next sought and received court permission for two extensions of time to file a reply brief. Green Company stated it wanted to depose Mussman again, which occurred on January 21, 2008. Although Green Company's motions and the court's subsequent orders refer only to a reply brief, on January 31, 2008, Green Company filed an extensive supplemental statement of facts in support of summary judgment and attached: (1) Mussman's new January 21, 2008 deposition; (2) excerpts from Michael Miller's March 7, 2007 deposition; (3) the Iowa DNR Wastewater Construction Permit Application; (4) the Iowa DNR construction permit; (5) David Moermond's certification of a Green Company document; (6) a letter from Green Company to the Iowa DNR; (7) the Iowa DNR wastewater construction staff directory; (8) Jack Fink's resume; and (9) excerpts from Fink's November 6, 2007 deposition. Green Company also filed a reply brief.

In February, Green Company filed a supplement to this supplemental statement of facts and included excerpts from the second deposition of Elynn

Charlson, taken on January 17, 2008. Green Company stated Charlson's deposition "was not available at the time of its prior filing of its supplemental statement of facts."

On February 4, 2008, Forest City adopted Green Company's filings and filed its own supplemental brief supporting summary judgment. Ten days later, Forest City filed a supplemental statement of undisputed facts and attached portions of the second Mussman deposition (January 21, 2008).

On February 20, 2008, plaintiffs filed the document central to this appeal – a request to file a surreply. Plaintiffs alleged the recent replies of Green Company and Forest City "incorporate additional evidence and/or assert arguments not raised in the original summary judgment filings." Plaintiffs stated they had no opportunity to respond to "this new evidence/arguments" and the interests of justice would be served "if the plaintiffs were allowed to file a surreply addressing the new arguments/evidence." In the alternative, the plaintiffs asked the court to disregard the new arguments/evidence "because a party cannot raise new arguments in a summary judgment reply."

On February 26, the court allowed the surreply and ordered its contents "should be limited to arguments related to the issues set forth in the request."

On March 18, 2008, plaintiffs filed their surreply and attached Mussman's third affidavit along with deposition testimony of Moermond and Charlson. Plaintiffs explained the discovery timing—after Mussman's second deposition (January 21, 2008), witness Moermond was deposed in February 2008. Witness Charlson's second deposition (January 17, 2008) had not been available at the

time of Mussman's second deposition. After reviewing the newly-available deposition testimony, Mussman's third affidavit affirmed his previous affidavits and also stated his opinions. Green Company and Forest City moved to strike the surreply brief and third Mussman affidavit.

On April 7, 2008, the court granted the motions to strike, granted summary judgment, and dismissed the case. Plaintiffs appeal. Because we find resolution of the motion to strike issue dispositive, we do not address the summary judgment issues advanced on appeal.

In granting the motion to strike, the district court stated:

Iowa Rule of Civil Procedure 1.981(3) provides that "[i]f affidavits supporting the resistance are filed, they must be filed with the resistance." Iowa R. Civ. P. 1.981(3) (2008). In [the February 26] order, the court granted plaintiffs's request for leave to file their surreply, but specifically found that the content of the surreply should be limited to the issues set forth in the request. In their request, plaintiffs did not seek leave to file an additional affidavit from Mr. Mussman. Because plaintiffs filed a surreply that exceeded the scope of the February 26, 2008 order, and that included an affidavit that was not filed with the resistance to motions for summary judgment, the motions to strike plaintiffs' surreply should be granted

We review the district court's grant of motions to strike for abuse of discretion. *Thies v. James*, 184 N.W.2d 708, 710 (Iowa 1971). In the context of the facts of this case, as detailed above, we conclude the court abused its discretion in narrowly interpreting the order of another judge. See *id.* (stating a litigant's rights "should not be denied proper hearing by strict application of legal formalities"). We also hold rule 1.981(3) does not prohibit the filing of subsequent affidavits with a surreply. Rather, it only requires affidavits supporting any resistance to be filed simultaneously with the resistance. Here it

is implicit in the order granting surrepley that it included any additional statement of facts or affidavits.

Defendants did not just file reply briefs, but also filed extensive supplemental statements of facts including numerous depositions and exhibits. After the original supplemental facts, Green Company filed a supplement to its supplement and included Charlson's second deposition. These filings allowed evidence into the record to which the plaintiffs had never had an opportunity to respond and the court-authorized surrepley allowed plaintiffs to address this new evidence. Mussman's third affidavit responds to the second Charlson deposition, first utilized in Green Company's supplement to its supplement. The second Charlson deposition did not exist when the first and second Mussman affidavits were drafted.

The court abused its discretion in striking the surrepley and affidavit because, under these facts, its ruling allowed the defendants to supplement the evidence supporting their original summary judgment filings while prohibiting plaintiffs from responding in kind as allowed in the court order. We reverse and remand for the trial court to reconsider the summary judgment motions based on the full record.

REVERSED AND REMANDED.