IN THE COURT OF APPEALS OF IOWA

No. 1-085 / 10-0843
Filed April 27, 2011

MISTY M. WHITLEY,
Plaintiff-Appellant,

vs.

C.R. PHARMACY SERVICE, INC.,
d/b/a FIFTH AVENUE PHARMACY and
FIFTH AVENUE COMPOUNDING,
Defendants-Appellees.

Appeal from the Iowa District Court for Linn County, L. Vern Robinson, Judge.

The plaintiff appeals following a jury verdict for the defendants in her pharmacy malpractice lawsuit. **REVERSED AND REMANDED.**

R.E. Breckenridge of Breckenridge & Duker, P.C., Ottumwa, and Gregory K. Zeuthen and Lawrence Baron, Portland, Oregon, for appellant.

Christopher L. Bruns and Robert M. Hogg of Elderkin & Pirnie, P.L.C., Cedar Rapids, for appellees.

Heard by Sackett, C.J., and Doyle and Danilson, JJ.

DOYLE, J.

Misty Whitley sued C.R. Pharmacy Service, Inc.,[1] alleging it improperly prepared medication that caused serious injuries to both of her eyes. During the jury trial, C.R. Pharmacy used two exhibits that had not been disclosed to Whitley before the trial began. Whitley asked the trial court to exclude the evidence as a sanction for C.R. Pharmacy's failure to disclose. The court denied the request. Whitley claims this was in error and entitles her to a new trial. We agree.

I. Background Facts.

Misty Whitley was deployed to Iraq as a member of the Iowa Army National Guard in 2003. When she returned home the following year, Whitley enrolled in an accounting program at a community college. She wanted to become an officer in the armed forces and needed to earn a degree in order to do so. She also needed to improve her eyesight. According to military guidelines, Whitley's poor vision disqualified her from becoming an officer. She was informed that could change if she had LASIK surgery to improve her eyesight.

Dr. Lee Birchansky, an ophthalmologist at Fox Eye Laser & Cosmetic Institute, P.C., performed a procedure called Epi-LASIK on both Whitley's eyes on November 3, 2005. Her vision was corrected to 20/20. But by March 2006, she developed some corneal haze or scarring, an expected risk of the surgery, which caused her vision to decline.

[1] C.R. Pharmacy operated its business under the names Fifth Avenue Pharmacy and Fifth Avenue Compounding. For ease of reference, we will simply refer to the defendants as C.R. Pharmacy throughout this opinion.

Whitley returned to Dr. Birchansky, who recommended she undergo a second procedure called corneal scraping to remove the haze. A chemotherapeutic and potentially toxic medication called mitomycin is routinely used during such procedures. Dr. Birchansky's office ordered the mitomycin from C.R. Pharmacy, requesting it be prepared at a 0.02% concentration. The pharmacy's note documenting the order indicated it was to be delivered to Dr. Birchansky by Thursday, March 9, 2006, the day of Whitley's procedure.

On that day, pharmacist Jodie Smith began preparing the medication at around 9:20 a.m. She ran the prescription through the pharmacy's computer, printed a label, and gathered the supplies she needed to complete the order. She took everything to a sterile compounding facility across the street from the pharmacy. The medicine was compounded at 9:25 a.m.

C.R. Pharmacy's delivery person, Ray Bollman, clocked in at the pharmacy at 10:16 a.m. He typically began his shift by writing delivery tickets for the prescriptions that were to be delivered that day and recording them in his delivery log. The delivery tickets were written on white and pink carbon paper. Bollman would staple the white copies to the prescription bag, and the pink copies would be placed on a corkboard by Bollman's desk. At the end of the day, Bollman would take all the pink copies and place them in a basket by the pharmacy's cash register. The delivered prescriptions were run through the cash register the following day.

Once Bollman's delivery preparations were completed, he would usually stop for lunch and begin his deliveries in the afternoon. On March 9, he clocked out for lunch at 12:15 p.m. and clocked back in at 12:45 p.m. His delivery log for

the day showed a delivery to Fox Eye Clinic, its address, and a signature by "Karen M," the clinic's receptionist, with a line through it. Bollman sometimes indicated unsuccessful deliveries by putting a line through the address or signature.

Whitley's procedure began sometime after noon on March 9, 2006. Dr. Birchansky estimated it was probably finished by about 1:20 p.m. Whitley experienced a stinging sensation in both eyes when the mitomycin was applied. She saw Dr. Birchansky for a follow-up appointment a few days later. Her eyes were very irritated, and her vision was poor. She could see only shapes and general colors. She was also experiencing severe headaches. On April 7, Dr. Birchansky's office called Whitley and told her to go to the University of Iowa Hospitals and Clinics as soon as possible for an appointment with Dr. Young Kwon, an ophthalmologist specializing in glaucoma.

Dr. Kwon examined Whitley's eyes and observed severe inflammation in both. He performed emergency surgery that night. A physician who assisted Dr. Kwon with the surgery wrote Dr. Birchansky a letter on April 11, 2006, stating the degree of inflammation seen in Whitley's eyes suggested a wrong dilution of mitomycin was used during the March 9 procedure.

Upon receiving this letter, Dr. Birchansky looked in his clinic's refrigerator to see if the medication he had used on Whitley was still there. He found a bottle with a label from Fifth Avenue Compounding, a division of C.R. Pharmacy. The label, dated March 9, 2006, identified the medication as mitomycin 0.02% with a prescription number of Rx 0102193. Fox Eye Clinic and Dr. Birchansky were listed as the customers.

On April 14, 2006, Dr. Birchansky sent the medicine to the pharmacology department at the University of Iowa for testing. That testing revealed the medication did not contain any mitomycin. Further testing was recommended, which Dr. Birchansky decided against. The sample was destroyed by the pharmacology lab.

Whitley's vision continued to deteriorate. She underwent a corneal transplant in both eyes. The transplant in the left eye was not successful, leading to the removal of that eye.

II. Proceedings.

Whitley sued Dr. Birchansky and his clinic in November 2007. The petition was later amended to add C.R. Pharmacy as a defendant. A pretrial order was entered in August 2008, setting a trial date for September 2009. The order stated,

> Any party intending to offer an exhibit into evidence at the time of trial shall have such exhibit marked by proper designation prior to the commencement of the pretrial conference. At the time of the pretrial conference such exhibits or copies thereof shall be presented to opposing counsel for examination and classifying. The only exhibits exempted are those which will be used for impeachment purposes only or those exhibits which are too difficult to transport because of size or weight.

A separate order establishing deadlines stated discovery was to close on July 10, 2009, "unless extended by court order for good cause."

Whitley propounded interrogatories and a request for production of documents on the defendants. Dr. Birchansky was dismissed from the suit in January 2009, and the trial scheduled for September was continued until March 2010 on both parties' request. No order establishing new discovery deadlines

was entered, though the court had directed in its continuance order that "deadlines for discovery and pleadings be changed by order of the Court Administrator." Whitley amended her petition for a second time in September 2009 and propounded new interrogatories on C.R. Pharmacy two months later.

Interrogatory No. 7 asked, "Do you allege Plaintiff's damages were approximately [sic] caused by the acts of person[s] or entities **other than by** employees, personnel, agents or such entities acting on behalf of CR Pharmacy, Inc., Fifth Avenue Pharmacy, or Fifth Avenue Compounding?" C.R. Pharmacy responded, "Yes." Interrogatory No. 8 requested C.R. Pharmacy to specify the allegation and identify the witnesses and evidence supporting it. C.R. Pharmacy answered,

> Defendant objects to this Request as calling for attorney work product. Without waiving this objection Defendant states it contends Dr. Birchansky's office applied a substance other than the original MMC [mitomycin] prescription to Plaintiff's eyes and later substituted another substance for the original prescription before sending the bottle for testing.

C.R. Pharmacy later filed a supplemental objection to the interrogatories, asserting they were untimely, as discovery had closed in July 2009 and had not been extended by the court.

The final pretrial conference was held on February 12, 2010. The parties exchanged exhibits and filed pretrial statements. The final pretrial order stated, "Any exhibit not identified will not be admitted at trial unless this order is modified by the court, for good cause shown, by any party wishing to offer such exhibit." Among the exhibits identified by the defense was exhibit D—a copy of Bollman's delivery log from March 9, 2006, signed by "Karen M," Dr. Birchansky's

receptionist, and a pink delivery ticket with a computer receipt and a cash register receipt stapled to it. The computer receipt, dated March 9, 2006, listed the customer as Fox Eye Clinic and Dr. Birchansky, the medication as mitomycin 0.02%, the prescription number, Rx 0102193, and the price, $85.59. The cash register receipt was dated March 10, 2006, and showed a charge of $85.59.

The jury trial began on March 1, 2010. Up to that point, C.R. Pharmacy's defense, as shown in its answer to Whitley's Interrogatory No. 7, was that it had prepared and delivered the correct medication to Dr. Birchansky, but he mistakenly applied something else to Whitley's eyes. That defense changed sometime after the final pretrial conference when C.R. Pharmacy's manager, Robert Keane, discovered documents showing the mitomycin was picked up by Dr. Birchansky's office manager, Judy Hazzard, after Whitley's procedure was over.

Keane testified, over Whitley's objections, that in preparing for trial he came across the pharmacy's pickup log, marked by the defense as exhibit NN. One line of the log was dated "3-9" and listed the prescription number of the mitomycin prepared for the clinic, Rx 0102193. Next to the prescription number was a signature of a "J. Hazzard." Keane explained that when customers came into the pharmacy to pick up compounded prescriptions, they were required to sign the pharmacy's pickup log. He testified that after he discovered the pickup log, he found exhibit OO, which he described as a pickup receipt. The receipt was handwritten on white and pink carbon paper, with both copies still together. It was dated March 9, 2006, and made out to Fox Eye Clinic for Rx 0102193 with a price of $85.59. Attached to the handwritten receipt was a computer receipt

that was identical to the computer receipt in exhibit D. A cash register receipt was also attached. Unlike the cash register receipt in exhibit D, however, this receipt showed the prescription was run through the pharmacy's cash register on March 9, 2006, at 1339, or 1:39 p.m.

When asked about the discrepancies between exhibit D, showing the mitomycin was delivered to the clinic, and exhibits NN and OO, showing it was picked up after Whitley's procedure was over, Keane stated he

> came up with two possibilities. One, it was a refrigerated item. Ray [Bollman] wrote up the delivery ticket, went out to make his delivery, and left the medication in the refrigerator.
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> . . . .
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> . . . The other possibility would be that if somebody—which happens, somebody could call and say they're going to be picking it up. Somebody would go to the delivery tote and take that prescription out of that delivery tote.

Exhibits NN and OO were admitted into evidence during Keane's testimony. Whitley objected, outside the presence of the jury. She argued the exhibits should be excluded from evidence because they were not disclosed to her prior to trial. The trial court overruled her objection, but allowed her to depose Keane and two other witnesses during a recess. Whitley also tried to contact Hazzard, who had retired from Dr. Birchansky's office several years earlier, but was unsuccessful. And Bollman was not available to testify, as he suffered from an advanced case of Parkinson's disease at the time of the trial.

Exhibits NN and OO were the centerpieces of defense counsel's closing statement, during which counsel theorized that Dr. Birchansky operated on Whitley without the mitomycin prepared by C.R. Pharmacy. He posited that someone from Dr. Birchansky's office grabbed the wrong medication out of the

clinic's refrigerator. Dr. Birchansky used that medication on Whitley without realizing it was incorrect. After Whitley's surgery, Hazzard picked up the mitomycin from C.R. Pharmacy and placed it in the clinic's refrigerator. Defense counsel suspected that when Dr. Birchansky discovered the mitomycin in his refrigerator, the staff member that had given him the wrong medication took C.R. Pharmacy's label off the mitomycin and put it on a different substance to cover up the mistake that had been made. He argued that explained why testing showed the sample Dr. Birchansky sent to the lab was not mitomycin.

The jury returned a verdict finding C.R. Pharmacy was not at fault. Whitley filed a motion for new trial, alleging "the verdict in this matter was the direct result of the Defendants' failure to comply with the rules of discovery and engage[ment] in trial by ambush." C.R. Pharmacy resisted, arguing the documents were not discovered by Keane until after the final pretrial conference had already occurred. It asserted that it had no duty to supplement Whitley's untimely interrogatories and that the exhibits were used only for impeachment purposes, as allowed by the pretrial order.

The trial court sided with C.R. Pharmacy, ruling:

> I believed the exhibits were discovered by Pharmacist Robert Keane on February 16 or 17 immediately before trial, just as he and counsel indicated. Likewise, I believed counsel was acting in good faith and relying on discovery deadlines and prior defense objections to discovery. As a result, I ordered a recess during the trial to allow the Plaintiff additional discovery, and to present additional evidence if necessary. . . . I concluded that even though, in my opinion, it would have been professionally preferable for the Defendant to have phoned or e-mailed opposing counsel with the news of Mr. Keane's discovery, there was no technical breach of the rules. Further, I determined the evidence was valuable for the jury and important to the process of finding the truth.

Whitley appeals. She claims the court erred in denying her motion to exclude the evidence as a sanction for C.R. Pharmacy's failure to disclose the exhibits prior to trial. She also claims the court erred in allowing Keane's speculative testimony.

III. Discussion.

A. Error Preservation.

We begin by discussing C.R. Pharmacy's error preservation concerns. The pharmacy argues Whitley is confined on appeal to the ground she raised in her motion for new trial in challenging the court's decision to admit the undisclosed exhibits—unfair surprise under Iowa Rule of Civil Procedure 1.1004(3).[2] Whitley responds that she is not solely appealing from the court's denial of her motion for new trial. She asserts that she is instead complaining about the court's decision during trial to deny her request to exclude the evidence as a sanction for C.R. Pharmacy's non-disclosure.

To preserve error for appellate review, a party must alert the district court to the issue at a time when the court can take corrective action. *See Summy v. City of Des Moines*, 708 N.W.2d 333, 338 (Iowa 2006). From our examination of the record, we see Whitley objected to the exhibits twice, once during Dr. Birchansky's testimony and again before it was offered by the defense during Keane's testimony. Whitley argued exhibits NN and OO should be excluded because those documents were not disclosed prior to trial. The court considered

[2] This rule provides that an aggrieved party may have an adverse verdict "vacated and a new trial granted if any of the following causes materially affected movant's substantial rights: . . . . Accident or surprise which ordinary prudence could not have guarded against." Iowa R. Civ. P. 1.1004(3).

the objections and overruled them. We accordingly find error was adequately preserved on the arguments raised by Whitley on appeal. *See Milks v. Iowa Oto-Head & Neck Specialists, P.C.*, 519 N.W.2d 801, 805 (Iowa 1994) ("An objection to the admission of evidence must be made as soon as the grounds for the objection become apparent."); *see also* Iowa R. Evid. 5.103(*a*)(1); *In re Estate of Kahl*, 210 Iowa 903, 232 N.W. 133 (1930) (holding a "motion for a new trial is not necessary in order to present to this court such errors as are claimed . . . to have been made by the trial court in the rulings on the evidence" when the appeal is taken from the judgment). This brings us to the merits of Whitley's arguments.

B. Exhibits NN and OO.

It is well-settled that trial courts have inherent power to maintain and regulate cases proceeding to final disposition. *See Lawson v. Kurtzhals*, 792 N.W.2d 251, 258 (Iowa 2010). This power includes the authority to exclude evidence at trial for a failure to supplement discovery. *Id.* The imposition of discovery sanctions by a trial court is discretionary and will not be reversed absent an abuse of discretion. *Id.* In determining whether a sanction is appropriate, the trial court should consider several factors, including:

> "(1) the party's reasons for not providing the challenged evidence during discovery; (2) the importance of the evidence; (3) the time needed for the other side to prepare to meet the evidence; and (4) the propriety of granting a continuance."

Id. at 259 (citation omitted). "Noncompliance with discovery requirements is often not tolerated." *Id.* at 258.

Whitley argues C.R. Pharmacy had a duty to supplement its discovery responses upon finding the exhibits approximately two weeks before trial. She

additionally asserts disclosure was required by the pretrial orders entered by the court, which prohibited the parties from using any undisclosed exhibits at trial except for impeachment purposes. We agree.

Iowa Rule of Civil Procedure 1.503(4)(*a*)(3) requires a party who has responded to a request for discovery "to supplement or amend the response to include information thereafter acquired as follows . . . [a]ny matter that bears materially upon a claim or defense asserted by any party to the action." The purpose of this rule "is to avoid surprise and to permit the issues to become both defined and refined before trial. This allows litigants to prepare for the actual matters they will ultimately confront." *White v. Citizens Nat'l Bank*, 262 N.W.2d 812, 816 (Iowa 1978). Rule 1.503(4)(*a*)(3) does not impose a duty on the propounding party to request supplementation, as C.R. Pharmacy argues. Instead, the duty to supplement is upon the party answering the discovery request. *Lawson*, 792 N.W.2d at 259. "Implicit in this rule are sanctions for noncompliance such as exclusion of evidence, continuance or other actions that a trial court deems appropriate." *Miller v. Bonar*, 337 N.W.2d 523, 527 (Iowa 1983).

C.R. Pharmacy was additionally required to adhere to the pretrial orders, which directed the parties to exchange all exhibits they intended to use prior to the trial. *See Lawson*, 792 N.W.2d at 259. The final pretrial order specifically stated, "Any exhibit not identified will not be admitted at trial unless this order is modified by the court, for good cause shown, by any party wishing to offer such exhibit." Exclusion of evidence for failure to comply with pretrial orders is allowed by rule 1.602(5), which provides:

> If a party or party's attorney fails to obey a scheduling or pretrial order . . . the court, upon motion or the court's own initiative, may make such orders with regard thereto as are just, and among others any of the orders provided in rule 1.517(2)(*b*)(2)-(4).

Rule 1.517(2)(*b*)(2) states that if a party fails to comply with an order compelling discovery, the court may sanction the party by "prohibiting such party from introducing designated matters in evidence."

Our discovery rules "are to be liberally construed to effectuate the disclosure of relevant information to the parties." *Barks v. White*, 365 N.W.2d 640, 643 (Iowa Ct. App. 1985); *see also* Iowa R. Civ. P. 1.501(2) ("The rules providing for discovery . . . shall be liberally construed and shall be enforced to provide the parties with access to all relevant facts."). This furthers the purpose of discovery "'to enable preparation for trial, as well as to aid in development of proof'" and assures that "'judgments rest upon the real merits of causes and not upon the skill and maneuvering of counsel.'" *Barks*, 365 N.W.2d at 643 (citation omitted).

That purpose was certainly defeated here by C.R. Pharmacy's deliberate and unapologetic failure to disclose vital evidence to Whitley. Exhibits NN and OO were discovered two weeks before trial. At oral argument, defense counsel stated he strategically withheld the exhibits from Whitley's counsel in an attempt to secure an advantage for his client at trial. He argued there was no duty to disclose the evidence because (1) Whitley's interrogatories were untimely, and (2) the exhibits were used for impeachment purposes only, as allowed by the pretrial orders. We reject both of these excuses.

The original trial date was continued on both parties' request, and court administration neglected to enter an amended scheduling order setting new discovery deadlines as directed by the district court. The parties nevertheless continued to engage in discovery after the original deadline had passed. C.R. Pharmacy in fact answered the interrogatories, only later objecting to them as untimely. While C.R. Pharmacy may not have technically violated our discovery rules by not supplementing its responses, it certainly violated the spirit and purpose of the rules. *See* Iowa R. Civ. P. 1.501(2) (requiring discovery to be conducted in good faith); *Ragan v. Petersen*, 569 N.W.2d 390, 394 (Iowa Ct. App. 1997) (considering "the concepts of civility and professionalism, which have become increasingly important ingredients of modern-day advocacy").

Even were we to assume for the sake of argument that C.R. Pharmacy had no duty to supplement its discovery responses, the court's pretrial orders independently required disclosure of all exhibits before trial. *See Lawson*, 792 N.W.2d at 259. C.R. Pharmacy's argument that the exhibits were used for impeachment purposes only, as allowed by the pretrial orders, is without merit. Although the exhibits were used to impeach Dr. Birchansky's testimony, they were admitted into evidence during defense counsel's direct examination of Keane. We recognize C.R. Pharmacy did not discover the exhibits until after the final pretrial conference. But that does not excuse its decision to keep them hidden from plaintiff's counsel in the intervening two weeks before trial.

That decision put Whitley at a distinct disadvantage at trial, a disadvantage defense counsel admitted he deliberately cultivated. Advance warning about the exhibits would have given Whitley a better chance of

answering C.R. Pharmacy's new allegations than was afforded to her after the trial had already started. The depositions allowed by the court in the middle of trial did little to alleviate the prejudice occasioned by these surprise exhibits. As Whitley argues,

> The person who allegedly signed the pickup log had been retired for several years and could not be located in the heat of trial. The cash machines that generated the time stamp had not been checked for accuracy and could not have been done in the heat of trial. . . . While the court [did] give the Plaintiff the opportunity to depose defense witnesses, the Plaintiff clearly [did] not have time to take the steps to investigate these documents or determine what documents Dr. Birchansky's office may have to rebut such allegations.

In its ruling on Whitley's motion for new trial, the trial court stated it admitted exhibits NN and OO in an effort to aid the jury in "the process of finding the truth." However, we believe the exhibits raised more questions than they answered because of Whitley's inability to adequately respond to the evidence. The only testimony attempting to reconcile exhibit D, showing the medicine was delivered, with exhibits NN and OO, showing it was picked up, came from C.R. Pharmacy's manager, Robert Keane. Whitley objected to his testimony as speculative.[3]

It is clear defense counsel's adversarial and gamesmanship approach to discovery in this case frustrated the goal of the discovery process, which is to "'make a trial less a game of blindman's b[l]uff and more a fair contest with the

[3] Due to our conclusion that the trial court abused its discretion in admitting exhibits NN and OO, we need not and do not reach Whitley's second claim that the court erred in overruling her objection to Keane's testimony. However, we observe Keane admitted on cross-examination that he had no firsthand knowledge of how exhibits D, NN, and OO were generated. He also admitted he did not know for "absolute certainty" whether the mitomycin was delivered or picked up. He testified his explanation as to the discrepancies between the exhibits was based on his examination of the pharmacy's records and his knowledge of the pharmacy's usual practices.

basic issues and facts disclosed to the fullest practicable extent.'" *Comes v. Microsoft Corp.*, 775 N.W.2d 302, 311 (Iowa 2009) (citation omitted). Because of counsel's obstreperous tactics, the jury was confronted with conflicting exhibits bearing on the central issue in the case. "Standards of civility exist in the practice, not as a matter of convenience to the profession, but as a matter of fairness and simple justice." *Vlotho v. Hardin County*, 509 N.W.2d 350, 353 (Iowa 1993). Departures from these standards "are condemned because they severely distract from the quality of justice Iowa citizens have a right to expect when they come to court." *Id.*

Given C.R. Pharmacy's flimsy reasons for not disclosing the evidence before trial, the importance of the evidence, the limited time allowed for the other side to respond to the evidence, and the undesirable option of continuing the trial when it was already well under way, we conclude the district court abused its discretion in denying Whitley's request to exclude the evidence. *See Lawson*, 792 N.W.2d at 259. Though the choice among sanctions for a party's nondisclosure rests within the discretion of the trial court, *see Schwarzenbach v. Schwarzenbach*, 446 N.W.2d 475, 479 (Iowa Ct. App. 1989), we cannot countenance what occurred in this case. The decision of the district court is reversed, and this case is remanded for a new trial. *See Fox v. Stanley J. How & Assocs., Inc.*, 309 N.W.2d 520, 522 (Iowa Ct. App. 1981) ("Although trial courts have the power and discretion to impose sanctions, it is incumbent upon a reviewing court to scrutinize the exercise of that discretion and to confine the exercise to reasonable limits.").

REVERSED AND REMANDED.