IN THE COURT OF APPEALS OF IOWA

No. 1-1003 / 11-0877
Filed February 29, 2012

LEONARD JACK,
Plaintiff-Appellant,

vs.

P AND A FARMS LTD., d/b/a CROOKED CREEK SHOOTING PRESERVE,
Defendant-Appellee.

Appeal from the Iowa District Court for Washington County, Joel D. Yates, Judge.

Leonard Jack appeals a district court's order granting default judgment in favor of his former employer based on Jack's failure to personally appear for trial.

AFFIRMED.

James K. Weston II of Tom Riley Law Firm, Iowa City, for appellant.

Heather L. Carlson of McDonald, Woodward & Carlson, P.C., Davenport, for appellee.

Considered by Eisenhauer, C.J., Vogel, J., and Sackett, S.J.*

*Senior judge assigned by order pursuant to Iowa Code section 602.9206 (2011).

VOGEL, J.

On May 24, 2007, Leonard Jack filed a lawsuit against P and A Farms, Limited, doing business as Crooked Creek Shooting Preserve (Crooked Creek), under Iowa Code section 87.21 (2007), alleging (1) he was injured within the scope of his employment with Crooked Creek in December 2005, (2) Crooked Creek did not carry liability insurance, and (3) he incurred damages as a result of the injury.

During the pendency of this case, several motions to continue were filed. When the case was finally scheduled for a three-day jury trial to begin on May 3, 2011—almost four years after the initial filing—and a jury had been empanelled, Jack failed to personally appear. After a hearing on the record, the case was dismissed with prejudice. Jack then filed a Rule 1.904(2) motion to enlarge or amend the findings and conclusions. On June 2, 2011, the district court expanded its prior order, but again found Jack to be in default and dismissed the case. Jack appeals.

"A decision to grant or deny a motion for default judgment rests in the sound discretion of the trial court." *Wilson v. Liberty Mut. Group*, 666 N.W.2d 163, 165 (Iowa 2003). We review a district court's decision to grant or deny a motion for default judgment for an abuse of discretion. *See id.* (stating that with respect to a district court's decision to grant or deny a default judgment, "[r]eversal on appeal is warranted only when the court's discretion has been abused").

Jack raises one issue on appeal—that the trial court erred in dismissing the case simply because he was not present for trial. Iowa Rule of Civil Procedure 1.971(3) provides:

> A party shall be in default whenever the party does any of the following:
>
> . . . .
>
> (3) Fails to be present for trial.

Jack specifically contends that although he was not present at trial, he had made a prima facie case under Iowa Code section 87.21,[1] and should have been allowed to proceed to trial through counsel despite his failure to be present for trial. As Crooked Creek maintains, Jack could have established a prima facie case under section 87.21; without his presence, however, there was no manner by which Crooked Creek could cross-examine him. *See* Iowa Code § 624.1 ("All issues of fact in ordinary actions shall be tried upon oral evidence taken in open court, except that depositions may be used as provided by law."); *Avery v. Harms Implement Co.*, 270 N.W.2d 646, 650 (Iowa 1978) ("While the scope of cross-examination is discretionary, the right to do so is absolute. It is a right essential to a fair trial."). We agree with Crooked Creek that despite Jack's ability to establish a prima facie case under section 87.21, his absence precluded P and A from cross-examining him, which is essential to a fair trial. *Avery*, 270 N.W.2d at 650.

Jack also argues that dismissal was not the proper remedy, because there were "less drastic" remedies than dismissal available to the district court. Crooked Creek replies, stating that none of the cases cited by Jack, nor any rule

[1] The provision is quoted in relevant part in the partial dissent.

of law, addresses whether the presence of a non-appearing party's counsel is sufficient to avoid default. Under the plain language of Iowa Rule of Civil Procedure 1.971(3), a party "shall be in default" when it "fails to be present for trial." As the district court noted in its original ruling from May 3, 2011,

> [T]he Plaintiff failed to personally appear. Plaintiff's counsel made an oral motion to continue the trial to a later date. Defendant's counsel resisted the motion to continue and moved that the case be dismissed. The court notes that this case has been on file since 2007, that this trial date has been set for almost a year, and that the Plaintiff received notice of the trial date.

The district court's June 2, 2011 ruling on Jack's Rule 1.904(2) motion also noted, "The court finds that the attorney for Plaintiff failed to state any good cause for continuing the trial." *See In re Marriage of Hatzievgenakis*, 434 N.W.2d 914, 916 (Iowa Ct. App) (holding the district court's denial of a continuance was not an abuse of discretion where the party—who was employed as a ship captain and could jeopardize his employment by leaving the ship during his tour of service—failed to request a continuance until eleven days before a trial that had been scheduled for at least four months).

In light of the plain language of Rule 1.971(3), and in recognition of the discretion afforded the district court in granting or denying a motion for default judgment, we affirm the district court's order granting default judgment based on Jack's failure to personally appear at the scheduled May 3, 2011 trial.

AFFIRMED.

Eisenhauer, C.J., concurs; Sackett, S.J., concurs in part and dissents in part.

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

I concur in part and dissent in part.

Plaintiff Jack brought a tort action in May of 2007 seeking compensation for an injury he incurred while he was an employee of P and A Farms LTD. P and A did not carry worker's compensation liability insurance so the action was based on an employee's right to sue under Iowa Code section 87.21, a provision that provides, among other things, that a non-insured employer is presumed negligent.

The matter finally came on for trial in May of 2011. Plaintiff's counsel and counsel for the LTD appeared. Plaintiff's counsel requested a continuance on the basis that his client, who was traveling from Idaho, was stranded, and the attorney's attempts to contact him were unsuccessful. Defendant's counsel objected and the district court denied the motion indicating that the case had been pending for some time.[2] Defendant had also asked that the case be dismissed arguing, "Both sides, both parties in a lawsuit have an obligation to be present when a court date is set. Defendants are here ready to go. The plaintiff is not here." The district court denied the continuance and sustained defendant's motion for dismissal without further findings.

Plaintiff's counsel asked the court to consider the possibility to withdraw plaintiff's jury demand and submit the case to the court based: "[O]n the statute the lawsuit was brought under and the presumptions that are contained in that statute, as well as the admissions that are on file as a part of the court record." Plaintiff's attorney pointed out the presumption of negligence and causation

[2] It appears the both parties contributed to delays.

under Iowa Code section 87.21, and indicated there were a number of admissions made by defendant. He requested the opportunity to admit the plaintiff's deposition and contended that the plaintiff could prevail even without being present. The court without further findings said it stood on its original ruling and dismissed the case with prejudice.

I. Request for continuance. I agree with the majority that the district court did not abuse its discretion in denying the plaintiff's motion for continuance, and I too would affirm on this issue. Plaintiff's attorney appeared and requested a continuance. Plaintiff, who by this time lived in Idaho, and who had planned to be present, for a reason unclear was not personally present. The case had been pending for some time.

II. Dismissal. I disagree, however, with the majority's decision to affirm the district court's dismissal of the action and believe that plaintiff's attorney, who appeared on the plaintiff's behalf and made a request to try the case, should have been given the opportunity to do so. Granted, the plaintiff was not physically present in the courthouse, but the attorney who represented him was and requested the right to proceed with the case in his client's absence.

The majority contends the case should be affirmed relying on the fact the named plaintiff was not in the courtroom, basically the same basis on which the district court dismissed. In doing so, the majority cites and appears to be relying on Iowa Rule of Civil Procedure 1.971(3) which provides in applicable part:

> A party shall be in default whenever the party does any of the following:
> . . . .
> (3) Fails to be present for trial.

The majority, the district court, and the defendant have not cited an Iowa case that supports its position applying the rule above to a situation where a party is not physically present in a courthouse but their attorney—who is authorized to represent parties in an Iowa court—is personally appearing and representing the position of a party.[3] Nor has the defendant cited to an Iowa court supporting its position on this issue.[4] The absence of authority to support defendant's position indicates to me that historically the Iowa legal community has recognized the absence of a party who appears for trial represented by an attorney will not have the case dismissed (if a plaintiff) or risk being found in default (if a defendant).

Plaintiff preserved error on the dismissal issue. His attorney asked the court to consider the possibility to withdraw plaintiff's jury demand and submit the case to the court "based on the statute the lawsuit was brought under and the presumptions that are contained in that statute, as well as the admissions that are on file as a part of the court record." Plaintiff's attorney pointed out the presumption of negligence and causation under Iowa Code section 87.21 and indicated there were a number of admissions made, and requested the opportunity to admit the plaintiff's deposition and contended that the plaintiff could prevail even without being present.

---

[3] If the majority's position is correct, how does that position apply to an entity not a person, such as the LTD here. While the LTD is represented by counsel, and its officers, director, and other employees may be in the courthouse, the LTD is not physically there.

[4] I also have been unable to find a case. While defendant relies on a case from another jurisdiction, I do not find the case persuasive on the point.

The district court without further findings said it stood on its original ruling and dismissed the case with prejudice. I believe this was error and it was never the intent of the rule to provide for a dismissal if the attorney representing the party is present and willing to proceed as here, without the client.

Plaintiff further contends he made a prima facie case based on the statutory presumption and defendant's admissions,[5] and he should have been allowed to present this case.[6] Section 87.21 provides in relevant part that:

> Any employer . . . who has failed to [obtain workers' compensation liability insurance] . . . is liable to an employee for a personal injury in the course of and arising out of the employment, and the employee may enforce the liability by an action at law for damages, or may collect [workers' compensation benefits]. In actions by the employee for damages under this section, the following rules apply:
>
> 1. It shall be presumed:
>
> a. That the injury to the employee was the direct result and growing out of the negligence of the employer.
>
> b. That such negligence was the proximate cause of the injury.
>
> 2. The burden of proof shall rest upon the employer to rebut the presumption of negligence, and the employer shall not be permitted to plead or rely upon any defense of the common law, including the defenses of contributory negligence, assumption of risk and the fellow servant rule.
>
> 3. In an action at law for damages the parties have a right to trial by jury.

In *Stroup v. Reno*, 530 N.W.2d 441, 443 (Iowa 1995) the court said:

> It is also clear from the statute [87.21] that an uninsured employer, unlike an insured employer, may be obliged to defend a tort action in which the uninsured employer is not only at a substantial disadvantage concerning the statutory presumption of

[5] He also contends we should find for him on this record. I do not address this issue because I do not believe error was preserved and I believe even if the admissions make a prima facie case that the defendant has the right to attempt to rebut the presumption in the statute.

[6] He does not state how error was preserved on this issue but a liberal reading of the argument made to the district court indicates that the admissions provide a basis for him to prevail.

> negligence and proximate cause and the inability to assert defenses, but also is subject to unlimited damages. The petitioner's employer can only attempt to rebut its presumed negligence and proximate cause, and contest petitioner's claimed damages. Being in this almost defenseless situation and facing unlimited damages is the statutory penalty an employer must pay for not carrying insurance.

Plaintiff, after this action was filed, propounded and served on the defendant on January 25, 2008, fourteen requests for admissions,[7] to which there was not a timely response. Under Iowa Rule of Civil Procedure 1.510(2), if a party does not respond within thirty days to a request for admissions, the matter is deemed admitted.

However, on October 24, 2008, the defendant filed a motion admitting certain requests, but withdrawing its deemed admissions to other admissions and asked for additional time to answer other requests for admissions. On November 7, 2008, the district court ruled on the motion acknowledging that the defendant admitted certain requests, and found the defendant admitted other requests at the hearing. The court found that to require the defendant to be bound by other of the admissions, which resulted from the failure to respond to the request for admissions, would "if admitted, in essence, admit liability" for a portion of the plaintiff's damages. The court further found the defendant should have additional time to answer those requests and gave the defendant until November 18, 2008, to respond to those admissions.[8]

---

[7] If the admission were all admitted it would appear the plaintiff would have proved his case. It does not appear however that the plaintiff sought judgment based on the admissions not being timely answered.

[8] Plaintiff does not appear to challenge this order on appeal. Furthermore, I believe there is support for the district court's position on this issue. The district court's decision regarding late responses will not be disturbed on appeal unless there is an abuse of discretion. *Uthe v. Time-Out Family Amusement Ctrs.*, 475 N.W.2d 635, 637 (Iowa Ct.

The docket does not reflect that the defendant, after being granted until November 18, 2008, to respond to certain requests for admissions, ever did so. However, on November 16, the defendant amended its answer to the petition admitting the plaintiff was an employee from August 2005 to February 2006. It denied that the plaintiff was injured during the course of employment, stating that the plaintiff ignored safety rules when entering the duck cage where he was injured, and possibly was intoxicated when injured. It denied the plaintiff's injury was severe. It admitted it did not have workers' compensation insurance, but believed it could self-insure for same and noted it provided the plaintiff with needed medical attention for injuries he may have sustained. Defendant also alleged no compensable injuries exist.

I considered the defendant's claim that the case should have been dismissed because it could not cross-examine the plaintiff. Cross-examination is available to an adverse party after a witness for the other side has testified. The plaintiff will not testify so there would be no right of cross-examination. Furthermore, there is no showing that the defendant subpoenaed Jack as a witness. For these reasons, I reject this argument.

One cannot say, based on the record as it was at the time the case was dismissed, that plaintiff could not have made a prima facie case. After the district

---

App. 1991). In order to show an abuse of discretion, one generally must show the court exercised its discretion "on grounds or for reasons clearly untenable or to an extent clearly unreasonable." *State v. Blackwell*, 238 N.W.2d 131, 138 (Iowa 1976). The right to file late responses to a request for admissions rests in the court's discretion. *Double D Land & Cattle Co., Inc. v. Brown*, 541 N.W.2d 547, 549 (Iowa Ct. App. 1995). In making this determination, the district court is to consider (1) whether the presentation of the merits would be subserved by a late filing, and (2) whether the party who obtained or requested the admissions failed to satisfy the court that he would be prejudiced by a late filing. *See* Iowa R. Civ. P. 1.511; *Allied Gas & Chem. Co. v. Federated Mut. Ins. Co.*, 332 N.W.2d 877, 879 (Iowa 1983).

court gave the defendant the right to make a late response to the request for admissions, no response was made so the admissions could be deemed admitted and they support the plaintiff's position and would shift the burden to the defendant. Even if the amended answer to the petition is considered a response to the request for admissions, the amended answer acknowledges the lack of workers' compensation insurance; the fact that some injury was incurred; and it happened in the duck cage while the plaintiff was their employee. These facts standing alone appear to be sufficient to shift the burden to the defendant. Considering all factors, I would reverse the dismissal and remand to the district court to allow the plaintiff to present his evidence.