IN THE COURT OF APPEALS OF IOWA

No. 2-388 / 11-0991
Filed June 27, 2012

TERI LEE NIE and
ALLAN JOSEPH NIE,
Plaintiffs,

vs.

SARTORI MEMORIAL HOSPITAL, INC., COVENANT MEDICAL CENTER, INC., WHEATON FRANCISCAN HEALTHCARE-IOWA, INC., JOHN MATTHEW GLASCOCK, M.D., and MIDWEST INSTITUTE OF ADVANCED LAPAROSCOPIC SURGERY,
Defendants-Appellees,

JUDITH O'DONOHOE,
Appellant.

Certiorari to the Iowa District Court for Black Hawk County, Stephen C. Clarke, Judge.

An attorney challenges a district court order imposing sanctions against her for violating Iowa Rule of Civil Procedure 1.413(1). **WRIT ANNULLED.**

Judith O'Donohoe of Elwood, O'Donohoe, Braun, White, L.L.P., Charles City, pro se.

George Weilein of Gallagher, Langlas & Gallagher, P.C., Waterloo, for appellees.

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

DOYLE, J.

Judith O'Donohoe filed a notice of appeal from a district court order imposing sanctions against her for violating Iowa Rule of Civil Procedure 1.413(1) by requesting sanctions against opposing counsel. We treat O'Donohoe's challenge to the sanctions as a petition for writ of certiorari, grant the writ, and finding no merit to the challenge, annul the writ.

I. Background Facts and Prior Proceedings.

In late May 2010, Teri Nie contacted Judith O'Donohoe's office regarding a potential medical malpractice claim concerning a gastric bypass surgery performed by Dr. John Glascock. After reviewing some of the available medical records, O'Donohoe filed a medical negligence petition on behalf of Teri and her husband, Allan, on the last day before the statute of limitations ran on the claim—June 2, 2010. The last defendant was served on June 18.

The defendants promptly filed an answer on June 21, generally denying the allegations and raising several affirmative defenses. On the same date, they served the plaintiffs with several sets of interrogatories, as well as requests for production of documents and requests for admissions.

The plaintiffs responded to the requests for admissions on July 20. They admitted to having filed the case without first consulting an expert witness. And in response to requests regarding whether a "qualified medical expert has provided the opinion to Plaintiffs . . . that [the defendants] breached the standard of care," the plaintiffs stated they were "unable to answer this request as they are still awaiting input from medical expert and the medical expert will not be able to give a definitive opinion until depositions have been taken in the case." The

remaining discovery went unanswered. On August 31, counsel for the defendants sent O'Donohoe a letter asking that she provide responses to the discovery requests by September 16.

On September 3, the defendants filed a motion for summary judgment, arguing that because "Plaintiffs have no experts, Plaintiffs cannot, as a matter of law, establish a prima facie case. . . . Therefore, Defendants are entitled to summary judgment."

The plaintiffs filed their amended responses to the requests for admissions on September 17, stating they "have now received an opinion from a medical expert that the treatment provided to Teri Nie during the gastric bypass surgery fell below the standard of care." They did not, however, name or provide any further information about that expert. The plaintiffs requested additional time to resist the summary judgment motion. The defendants resisted. On September 23, the plaintiffs served their response to the defendants' resistance as follows:

> At the time of filing the Petition, the Plaintiffs had some but not all of their medical records. The undersigned had to thereafter obtain the remaining medical records in order to present them to a possible expert for review.
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> . . . The records, which totaled over 400 pages, were received and sent to the Plaintiff's expert on or about July 15, 2010.
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> . . . It was not until the first part of September, 2010 that the undersigned received a verbal opinion from the expert that he believed malpractice may have occurred during the treatment provided by the Defendants.
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> . . . Plaintiffs need additional time to resist the motion for summary judgment in order to obtain a written opinion from their expert so that they may produce it as part of the resistance.

After reviewing these filings, the district court entered an order granting the plaintiffs' request for additional time given the early stages of the litigation.[1]

On September 17, due to the plaintiffs' failure to respond to the interrogatories and requests for production of documents, the defendants filed a motion to dismiss, or in the alternative, a motion to compel discovery from plaintiffs. A hearing on the motion was held on October 20, following which the district court entered an order denying the dismissal request, granting the motion to compel, and ordering the plaintiffs to respond to all outstanding discovery within twenty days.

After that hearing, O'Donohoe advised the defendants' attorney that she "had an expert report coming." The defendants' attorney informed her that upon receipt of the report, he would most likely withdraw the summary judgment motion. O'Donohoe provided the expert's report to the defendants' attorney, along with responses to the defendants' discovery requests, on November 8. The expert's report was dated September 20.

Three days after responding to the defendants' discovery requests, the plaintiffs served a resistance to the summary judgment motion that included a request for sanctions under Iowa Rule of Civil Procedure 1.413(1) and Iowa Code section 619.19 (2009). The plaintiffs argued the defendants' September 3 summary judgment motion was "not well grounded in law or fact." Asserting they were not required to disclose expert witnesses until December 2010 under Iowa Code section 668.11, the plaintiffs contended their failure to answer an expert

[1] A trial scheduling order entered around the same time set the trial for July 17, 2012.

interrogatory by September 3, 2010, did not provide a foundation for granting summary judgment. Further, the plaintiffs argued the trial scheduling order set a May 2012 discovery deadline and they had until thirty days before the July trial date to supplement an expert witness interrogatory.[2]

The defendants filed a reply to the plaintiffs' resistance, asserting:

> When Plaintiffs ultimately filed their Resistance to Defendants' Motion for Summary Judgment on November 15, 2010, *all of it* was based upon information which Plaintiffs *were for the first time producing* more than two months *after* the filing of Defendants' Motion for Summary Judgment. Moreover, *all of* Plaintiffs' Resistance, with the possible exception of the Interrogatory answer by their retained expert, was based on information that Plaintiffs possessed but had not produced to Defendants *before* Defendants filed their Motion for Summary Judgment on September 3, 2010. . .
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> Yet, despite all of these arrearages, failures, and clandestine actions by Plaintiffs, which necessitated the filing of Defendants' Motion for Summary Judgment and Defendants' Motion to Dismiss/ First Motion to Compel, Plaintiffs' lawyer now has the audacity to request sanctions against *Defendants*. That Request is patently frivolous; and is itself sanctionable.

The district court agreed. Following a hearing on the summary judgment motion and requests for sanctions, the court found as follows:

> This Motion for Summary Judgment would have been dismissed by the defendants had not the plaintiffs' counsel sought sanctions. Plaintiffs' counsel's request for sanctions is truly frivolous based on the progress of this case and information that she had both before and after the filing for Motion for Summary Judgment, which she refused to disclose until some two-plus months after the filing of the Motion for Summary Judgment.
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> But for the unprofessional conduct of plaintiffs' counsel which caused the matter of this Motion for Summary Judgment to drag on, the Motion for Summary Judgment would have been

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[2] The trial scheduling order provided that all discovery be completed by May 1, 2012. It says nothing about supplementing discovery thirty days before trial. The order also required the plaintiffs to disclose expert witnesses at least 210 days before trial (December 20, 2011), unless an earlier designation was required by statute. *See e.g.*, Iowa Code § 668.11. Under section 668.11, the plaintiffs' expert designation was due by December 18, 2010.

> withdrawn, the hearing held on March 3, 2011, would not have been necessary and counsel and the court could have spent their time on more productive matters. The court therefore concludes that the conduct of Plaintiffs' counsel is sanctionable under Iowa Rule of Civil Procedure 1.413(1).

After reviewing an attorney fee affidavit from defense counsel, the court entered an order requiring O'Donohoe to pay $2000 in attorney fees to the defendants. The court also denied a barrage of post-ruling motions, responses, and replies filed by both parties.[3]

O'Donohoe filed a notice of appeal.

II. Scope and Standards of Review.

Preliminarily, we note the proper means to review a district court's order imposing sanctions is by writ of certiorari. *See Everly v. Knoxville Cmty. Sch. Dist.*, 774 N.W.2d 488, 492 (Iowa 2009). However, we treat the notice of appeal as a petition for writ of certiorari, Iowa R. App. P. 6.108; *Everly*, 774 N.W.2d at 492, and we grant the petition. We therefore review the assignment of error in a certiorari context. *Everly*, 774 N.W.2d at 492.

A district court's order imposing sanctions under Iowa Rule of Civil Procedure 1.413(1) is reviewed for an abuse of discretion. *Id.* Although our rule makes sanctions mandatory when a violation occurs, "whether a violation has occurred is a matter for the court to determine, and this involves matters of judgment and degree." *Mathias v. Glandon*, 448 N.W.2d 443, 446 (Iowa 1989). This determination "rests upon and is informed by the District Court's intimate

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[3] O'Donohoe began the flurry of filings by filing a motion to amend or enlarge pursuant to Iowa Rule of Civil Procedure 1.904(2). The defendants resisted. O'Donohoe then filed a response to the defendants' resistance and a reply to the attorney fee affidavit filed by opposing counsel. The defendants' attorney had the last word by filing a "Response to Plaintiffs' Reply" to the attorney fee affidavit.

familiarity with the case, parties, and counsel, a familiarity we cannot have. Such a determination deserves substantial deference from a reviewing court." *O'Connell v. Champion Int'l Corp.*, 812 F.2d 393, 395 (8th Cir. 1987). We will nevertheless correct erroneous applications of law. *Everly*, 774 N.W.2d at 492.

III. Discussion.

One of the primary goals of Iowa Rule of Civil Procedure 1.413(1) is to maintain a high degree of professionalism in the practice of law. *Barnhill v. Iowa Dist. Ct.*, 765 N.W.2d 267, 273 (Iowa 2009). The rule accordingly imposes an obligation on counsel "not to file any pleadings or motions for any 'improper purpose, such as to harass or cause unnecessary delay or needless increase in the cost of litigation.'" Mark S. Cady, *Curbing Litigation Abuse and Misuse: A Judicial Approach*, 36 Drake L. Rev. 483, 498 (1987) (quoting Iowa R. Civ. P. 1.413(1)). "Conduct necessary to constitute harassment under the 'improper purpose' clause is more than bothering or annoying the opposing party." *Id.* at 499. It may also include conduct that harasses the court. *Id.*

> The court is often the forgotten victim of a party's harassing conduct. The "improper purpose" clause seeks to eliminate tactics that divert attention from the relevant issues, waste time and serve to trivialize the adjudicatory process. A harassing claim deprives the court of desperately needed time to hear legitimate complaints and results in greater costs to the taxpayers.

Id. (footnotes omitted).

In *Gaiardo v. Ethyl Corp.*, 835 F.2d 479, 484 (3d. Cir. 1987), the Third Circuit noted its concern with a "noticeable increase in unjustified requests for sanctions." The court stated the federal rule (on which our rule 1.413(1) is based) "is being perverted when used as a tool for harassment rather than as an

instrument to prevent abuse." *Gaiardo*, 835 F.2d at 484; *see also Barnhill*, 765 N.W.2d at 273 (stating that because rule 1.413 is based on Federal Rule of Civil Procedure 11, "we look to federal decisions applying rule 11 for guidance").

> The use of Rule 11 as an additional tactic of intimidation and harassment has become part of the so-called "hardball" litigation techniques espoused by some firms and their clients. Those practitioners are cautioned that they invite retribution from courts which are far from enchanted with such abusive conduct. A court may impose sanctions on its own initiative when the Rule is invoked for an improper purpose.

Gaiardo, 835 F.2d at 485 (footnote omitted).

The district court characterized O'Donohoe's request for sanctions as "truly frivolous" based on "the progress of this case and information that she had both before and after the filing for Motion for Summary Judgment, which she refused to disclose until some two-plus months after the filing of the Motion for Summary Judgment." The court found sanctions were appropriate because O'Donohoe's conduct "caused the matter of this Motion for Summary Judgment to drag on," resulted in an unnecessary hearing, and precluded counsel and the court from devoting their time to more productive matters.

In arguing this was an abuse of discretion, O'Donohoe focuses on the merits of the defendants' summary judgment motion. She asserts

> the law did not support the assertion that failure to have an expert opinion in support of the case within 74 days of an answer and in light of the failure to make further factual inquiry, either of plaintiffs or plaintiffs' counsel, the motion was not filed upon reasonable inquiry as to the facts and with support of existing case law.

We conclude otherwise.

The defendants filed a motion for summary judgment on September 3, 2010, based on O'Donohoe's lack of naming an expert witness. *See Hill v.*

McCartney, 590 N.W.2d 52, 56 (Iowa Ct. App. 1998) ("Generally, when the ordinary care of a physician is an issue, only experts can testify and establish the standard of care and the skill required."). As noted by O'Donohoe, this was only seventy-four days after the defendants answered the petition. Her expert witness designation was not due for several more months. *See* Iowa Code § 668.11(1)(a) (requiring plaintiff to "certify to the court and all other parties the expert's name, qualifications and the purpose for calling the expert" within 180 days of defendant's answer).

Though the defendants sought summary judgment early on in this case, that does not mean the motion was frivolous when filed, as suggested by O'Donohoe, given her failure to timely respond to defendants' discovery requests. *See Gruener v. City of Cedar Falls*, 189 N.W.2d 577, 580 (Iowa 1971) ("To obviate the labor and expense of trial to expose those empty vessels, summary judgment procedure was conceived. By proper motion, a party can compel his adversary to come forth with specific facts which constitute competent evidence showing a prima facie claim or defense. Paper cases and defenses can thus be weeded out to make way for litigation which does have something to it.").

O'Donohoe glosses over the fact that more than two months before the summary judgment motion was filed, the defendants had propounded discovery requesting information about the plaintiffs' expert witnesses, if any. The discovery also sought information about any admissions Dr. Glascock, or other staff, may have made to the plaintiffs. The plaintiffs did not respond to these discovery requests, other than a generic answer to the defendants' requests for

admissions that "they are still awaiting input from medical expert and the medical expert will not be able to give a definitive opinion until depositions have been taken in the case." When the summary judgment motion was filed, the plaintiffs' discovery responses were forty-four days overdue. No expert had been named. No request for an extension of time to respond to discovery had been made. Under the circumstances, and with no information forthcoming from the plaintiffs, the defendants' attorney reasonably believed the plaintiffs did not possess an expert witness—an essential component of their medical malpractice claim.[4] *See Hill*, 590 N.W.2d at 56. The district court found counsel's assertion in this regard credible. *See Dull v. Iowa Dist. Ct.*, 465 N.W.2d 296, 297-98 (Iowa Ct. App. 1990) (deferring to district court's resolution of factual questions regarding whether a dismissal was filed with an improper purpose).

O'Donohoe contests this conclusion, arguing that if defense counsel

> *had done further investigation* he could have been aware that Plaintiffs' counsel had some medical records and according to Plaintiffs, the doctor admitted malpractice, having cut something which was not the subject of the operation. . . . It was also clear that defense counsel knew that an expert opinion was being solicited because of the July 20th response to request for admissions. Further . . . the expert opinion was supportive of the negligence claim. However, *no further investigation was done by defense counsel before filing the motion*.

(Emphasis added.) This argument is baffling, as defense counsel sought the information O'Donohoe claims he failed to investigate in the discovery requests

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[4] That the plaintiffs also pled a res ipsa loquitur claim does not automatically exempt the case from the expert-witness requirement, as O'Donohoe contends on appeal. *See Kennis v. Mercy Hosp. Med. Ctr.*, 491 N.W.2d 161, 167 (Iowa 1992) (rejecting plaintiff's claim that expert testimony was not required under his res ipsa loquitur claim where causation of the claimed injury was beyond the understanding of a lay person).

she ignored. And no expert opinion was provided to the defendants' attorney before the summary judgment motion was filed, despite his requests.

We also find no merit to O'Donohoe's argument that anything occurring after the summary judgment motion was filed on September 3 was irrelevant to the district court's analysis. To the contrary, the court was required to examine the state of facts at the time O'Donohoe filed the request for sanctions. *See Everly*, 774 N.W.2d at 493 ("In determining whether a pleading is sanctionable, we must look at the state of the facts at the time the party filed the pleading."). Moreover, the fallout from her filing is relevant to the appropriateness of the sanction.

The expert witness report O'Donohoe submitted with her November 15, 2010 resistance to the defendants' summary judgment motion was dated September 20. Yet, on September 23, O'Donohoe represented to the court that she needed additional time to respond to the motion in order "to obtain a written opinion from their expert so that they may produce it as part of the resistance." And after an October 20 hearing on the defendants' motion to compel, O'Donohoe told defense counsel that she "had an expert report coming." Counsel informed her that upon receipt of that report, he would most likely withdraw the summary judgment motion.

Indeed, after the report was finally provided to defense counsel on November 8, he offered to withdraw the summary judgment motion if O'Donohoe agreed to withdraw her request for sanctions. O'Donohoe refused to do so. Her actions, as detailed above, have resulted in a waste of judicial resources, including those expended on this appeal.

If we were standing in the shoes of the trial court we may have done something differently, but after considering all of O'Donohoe's arguments, whether specifically addressed or not, we find no abuse of discretion in the court's decision to sanction O'Donohoe for her misuse of rule 1.413. We accordingly annul the writ of certiorari.

WRIT ANNULLED.