

**IN THE COURT OF APPEALS OF IOWA**

No. 8-832 / 08-0132  
Filed January 22, 2009

**DAVID L. LORENSON and  
LOIS LORENSON,**  
Plaintiffs-Appellants,

**vs.**

**CRAIG C. AMENT,**  
Defendant-Appellee.

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Appeal from the Iowa District Court for Black Hawk County, Kellyann M. Lekar, Judge.

Plaintiffs appeal the district court's ruling granting defendant's motion for directed verdict. **AFFIRMED IN PART, REVERSED IN PART, AND REMANDED.**

Peter C. Riley of Tom Riley Law Firm, P.L.C., Cedar Rapids, for appellants.

Patrick M. Roby and Robert M. Hogg of Elderkin & Pirnie, P.L.C., Cedar Rapids, for appellee.

Heard by Eisenhauer, P.J., and Doyle, JJ, and Robinson, S.J.\*

\*Senior judge assigned by order pursuant to Iowa Code section 602.9206 (2007).

**ROBINSON, S.J.**

Plaintiffs, David and Lois Lorensen, filed suit against defendant, Craig Ament, claiming Ament committed legal malpractice when representing the Lorensens in the sale of their pizza and bar business. They alleged Ament was negligent by including ambiguous language in the purchase agreement and in failing to promptly provide the buyer a list of personal property to be included and excluded in the sale. During trial, the district court prohibited certain evidence about specific expenditures the Lorensens claimed were damages. It concluded the evidence should be excluded because the Lorensens failed to disclose this documentation prior to trial. At the close of the plaintiffs' evidence, the district court granted a motion for directed verdict in favor of Ament. It determined that the Lorensens failed to provide sufficient evidence to prove their damages were sustained as a result of Ament's negligence. The Lorensens appeal, claiming the district court erred in (1) prohibiting testimony about specific damages as a sanction for not providing the evidence during discovery or pursuant to a pretrial order, and (2) granting Ament's motion for directed verdict. We affirm in part, reverse in part, and remand.

**I. BACKGROUND.** The Lorensens had three corporations that owned a bar and pizza restaurant in Cedar Falls called the Stein – Pizza House. The corporations leased the premises to another company (not owned by the Lorensens) called Chirps, Inc., that operated the bar and pizza restaurant. Craig Ament often provided legal services to the Lorensens concerning their businesses. In early March 2001, Ament learned someone was interested in buying the Stein – Pizza

House and passed this information on to the Lorensens. The Lorensens indicated they were willing to sell the business for \$400,000. The parties then agreed that \$200,000 would be paid for the real property and \$200,000 would be paid for personal property and the business name. There was uncertainty about exactly what personal property would be included in the sale since Chirps had leased and operated the business for some time and some original personalty had been removed or replaced by Chirps. Because Chirps's lease was not due to expire until immediately before the closing, Ament included the following provision in the purchase agreement:

Seller conveying all personal property currently located on the premises, including the name – “The Stein – Pizza House,” by Bill of Sale at closing for an additional \$200,000.00. Any personal property not included in the sale must be disclosed and jointly agreed upon in writing.

The parties signed the purchase agreement on March 9 and closing was to take place on or before May 31, 2001. The buyer paid \$40,000 earnest money to be held in trust by Ament.

The buyer inspected the property on March 11 and videotaped the walk-through. The purpose of the walk-through was to determine what personal property was on the premises. Lorensen requested Chirps to prepare a list of property it owned that would not be included in the sale. Chirps never provided such list and began removing items from the business.<sup>1</sup> Chirps vacated the premises on May 31 and the Lorensens and the buyer inspected the property on

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<sup>1</sup> The Lorensens and Chirps disputed what property each owned. The issue was resolved through litigation whereby a judgment was entered against Chirps for \$37,000.

June 1. Since a substantial amount of equipment and property was no longer present, the buyers were unwilling to close or pay the \$400,000 purchase price.

To resolve what personal property should be included in the sale, the buyer compiled a list of items present during the original walk-through and faxed it to the Lorensens. The Lorensens then identified which items were present and which were missing. They faxed their notations to Ament on June 5. On June 12, the buyer's attorney sent Ament a letter stating the buyer was willing to close within twenty-four hours if the Lorensens would agree to reduce the price by \$81,942.73. The buyer estimated this was the value of the missing property. The next day Ament responded on behalf of the Lorensens explaining that they would not agree to a lower price and were prepared to return the earnest money if the issue was not resolved by June 15.

The buyer filed suit on June 15 seeking specific performance of the purchase agreement and an injunction to prevent the Lorensens from selling the business to anyone else. On June 22, the Lorensens faxed Ament another list of personal property identifying what items were currently at the business, and what items were apparently owned by Chirps. They expected Ament to forward the list on to the buyer promptly but by all accounts, the list was not forwarded until July 17.

Since there was no agreement on the personalty, and there was no word from the buyers, the Lorensens decided to reopen the Stein – Pizza House themselves. In early July, they began renovating the premises. The Lorensens believed they had to act promptly to avoid the risks of losing business due to the

imminent return of students to Cedar Falls and the possibility of the premises becoming uninsurable due to vacancy. The Lorensens did not consult with Ament prior to beginning the renovations. On July 17, Ament sent the buyer's attorney a letter indicating that the Lorensens wanted to countersue and were remodeling the building so it could be used and the Lorensens' damages would be mitigated. Included with the letter was the list of personal property the Lorensens had faxed Ament on June 22.<sup>2</sup> On July 23, the buyer's attorney responded noting this was the first time such list had been provided to the buyer but agreeing to pay the full price of \$400,000 for the business and personal property listed. The buyer wanted to close by July 25.

At this point the Lorensens were not willing to sell the property for \$400,000 because they had made substantial expenditures to improve the premises. They refused to close and the buyer filed suit seeking specific performance of the purchase agreement. On April 15, 2002, judgment in favor of the buyer was entered. Specific performance was ordered. The court did not award damages finding the buyer's claim for lost profits and the Lorensens' claim for the cost of improvements offset each other. The Lorensens were ordered to pay the buyer's attorney fees and court costs.

On June 19, 2006, the Lorensens commenced this action claiming Ament was negligent in handling the sale of the Stein – Pizza House and they suffered damages as a result. A jury trial commenced on December 18, 2007. Upon objection and outside the presence of the jury, the court limited testimony and

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<sup>2</sup> Ament did make minor phrase changes to the list prior to forwarding it to the buyer but it was substantively identical to the list the Lorensens sent Ament.

evidence as to the amounts the Lorensens spent to improve the property. The evidence was excluded as a discovery sanction since the Lorensens had not provided this information in response to interrogatories and had not provided the exhibits to Ament prior to trial. At the close of plaintiff's case, Ament moved for directed verdict on several grounds. The court granted the motion finding there was not substantial evidence of damages proximately caused by Ament's negligence. The Lorensens now appeal contending the court abused its discretion in excluding the evidence on damages and erroneously granted Ament's motion for directed verdict.

**II. STANDARD OF REVIEW.** We review a trial court's imposition of a discovery sanction for an abuse of discretion. *Kendall/Hunt Publ'g Co. v. Rowe*, 424 N.W.2d 235, 240 (Iowa 1988). Such abuse is present if the ruling rests on clearly untenable or unreasonable grounds. *Troendle v. Hanson*, 570 N.W.2d 753, 755 (Iowa 1997).

Rulings on a motion for directed verdict are reviewed for correction of errors at law. Iowa R. App. P. 6.4; *Yates v. Iowa West Racing Ass'n*, 721 N.W.2d 762, 768 (Iowa 2006). "In such cases, we review the evidence in the light most favorable to the nonmoving party to determine whether a fact question was generated." *Dettmann v. Kruckenburg*, 613 N.W.2d 238, 250-51 (Iowa 2000). However, "[e]ven if the facts are undisputed, if reasonable minds could draw different inferences from the evidence, the case should be submitted to the jury." *Fiala v. Rains*, 519 N.W.2d 386, 387 (Iowa 1994). If there is not substantial evidence to support each element of the plaintiff's claim, a directed

verdict in defendant's favor is appropriate. *Olson v. Nieman's, Ltd.*, 579 N.W.2d 299, 313 (Iowa 1998). But such motion should be denied if the plaintiff has presented substantial evidence to support each element of the claim. *Id.* "Evidence is substantial when a reasonable mind would accept it as adequate to reach a conclusion." *Hasselmann v. Hasselmann*, 596 N.W.2d 541, 545 (Iowa 1999) (quoting *Johnson v. Dodgen*, 451 N.W.2d 168, 171 (Iowa 1990)).

**III. EXCLUSION OF EVIDENCE OF DAMAGES.** "Discovery shall be conducted in good faith, and responses to discovery requests, however made, shall fairly address and meet the substance of the request." Iowa R. Civ. P. 1.501(2). A party who responds to a discovery request has a duty to supplement or amend the response to include later acquired information on "[a]ny matter that bears materially upon a claim or defense asserted by any party to the action." Iowa R. Civ. P. 1.503(4)(a)(3). A defendant is entitled to discover amounts claimed for separate elements of damages. *Gordon v. Noel*, 356 N.W.2d 559, 564 (Iowa 1984). "The purpose of the rule is to avoid surprise and to permit the issues to become both defined and refined before trial." *White v. Citizens Nat'l Bank of Boone*, 262 N.W.2d 812, 816 (Iowa 1978). A plaintiff's failure to supplement responses as to specific damages during discovery can effectively deny the defendant the opportunity to rebut the evidence on damages later presented at trial. *Id.*

Trial courts have discretion to sanction litigants who fail to obey discovery rules. *Barks v. White*, 365 N.W.2d 640, 644 (Iowa 1985). A trial court may exclude the newly presented evidence, continue the trial, or take other actions it

deems appropriate. *Miller v. Bonar*, 337 N.W.2d 523, 527 (Iowa 1983). “Generally, there is an abuse of discretion in imposing discovery sanctions only where there is a lack of substantial evidence to support the trial court’s ruling.” *Wagner v. Miller*, 555 N.W.2d 246, 249 (Iowa Ct. App. 1996).

Ament’s interrogatories asked the Lorensens to identify each element of damage they sought, the amount as to each element of damage, and the basis for each figure. The Lorensens’ answered, “[a]pproximately \$100,000 incurred in fixing up the business in anticipation that they would run it, which the court offset against the deficiency in the personal property.” Ament also requested they identify each exhibit they intended to offer and provide the exhibits prior to the close of discovery. The Lorensens advised that they would disclose exhibits pursuant to the pretrial court order. The pretrial order required the exhibits to be disclosed the Friday before trial. The Lorensens did not supplement their interrogatories or disclose the exhibits they intended to offer regarding specific damages. The district court determined the Lorensens knew damages would be disputed at trial and therefore their failure to disclose their evidence during discovery and to identify exhibits prior to trial, was a violation of the rule of good faith. As a sanction, the court prohibited admission of additional testimony or exhibits as to specific damages.

The Lorensens argue the court erred in excluding the evidence because their responses to discovery requests were in good faith. For support they assert their responses complied with the requirements of *Gordon v. Noel*, 356 N.W.2d 559, 564 (Iowa 1984). They also claim that specific documentation of damages



did not need to be disclosed because Ament never requested such documents. In *Gordon*, 356 N.W.2d at 564, the Supreme Court stated that a plaintiff can be compelled to disclose the amount of damages claimed. It appears the Lorensens did respond with an estimated amount of their claimed damages. However, the Lorensens did not provide the exhibits they planned to use as required by the pretrial order.

If a party or party's attorney fails to obey a . . . pretrial order, . . . or if a party or party's attorney fails to participate in good faith, 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).

Iowa R. Civ. P. 1.602(5). A court may issue “[a]n order refusing to allow the disobedient party to support . . . designated claims . . . or prohibiting such party from introducing designated matters in evidence.” Iowa R. Civ. P. 1.517(2)(b)(2). Plaintiffs’ assertion that they did not intend on offering the documentation of specific damages into evidence is disingenuous. It thwarts the purpose of discovery and pretrial orders.

Considering these applicable rules of discovery, we conclude the court was well within its discretion to prohibit evidence and testimony of the Lorensens’ specific claims of damages. Substantial evidence in the record supports its ruling. The trial commenced in December 2007 and the court noted the specific amounts of damages were known by the defendants in 2001 and 2002. It found that under ordinary circumstances the plaintiff would be allowed to testify as to damages but when a party knows, for some time, documentation exists to support the claim for damages and it is obviously relevant, withholding such

information is a violation of the duty to conduct discovery in good faith. We see no flaw in this reasoning. The court did not abuse its discretion in excluding the Lorensons' evidence on damages at trial.

**IV. DIRECTED VERDICT.** The trial court granted Ament's motion for directed verdict concluding the Lorensons failed to present substantial evidence of the damages caused by Ament's negligence. In our review we must determine whether the evidence, when viewed in a light most favorable to the Lorensons, was sufficient to generate a jury question on this issue. "A fundamental element of a malpractice action is proof of damages proximately caused by the negligence." *Whiteaker v. State*, 382 N.W.2d 112, 114 (Iowa 1986). The plaintiff must show the loss would not have occurred but for the attorney's negligence. *Ruden v. Jenk*, 543 N.W.2d 605, 611 (Iowa 1996). In a legal malpractice action, to prove damages, the plaintiffs must present evidence to support a finding that they would have obtained a superior result than the one actually received. *Shannon v. Hearity*, 487 N.W.2d 690, 692 (Iowa Ct. App. 1992). "The fact the evidence does not say precisely what the plaintiffs lost does not necessarily exculpate the defendant." *Id.* (citing *Burke v. Roberson*, 417 N.W.2d 209, 213 (Iowa 1987)). Estimated damages may be sufficient. *Id.*; *Burke*, 417 N.W.2d at 213. However, for there to be substantial evidence to generate a jury question, there must be a reasonable basis from which a damage amount can be inferred or approximated. *Shannon*, 487 N.W.2d at 693 (citations omitted).

The Lorensons claim that Ament was negligent by not drafting the contract to more clearly state that the Lorensons could not convey the items Chirps

owned, and by not promptly forwarding the buyer the June 22 list of items the Lorensens faxed Ament. They assert absent this negligence, they would have avoided the lawsuit with the buyer and would not have incurred expenses to renovate and reopen the business.

In accepting the facts in a light most favorable to the Lorensens, we find a jury question on the issue of damages proximately caused by Ament's conduct was generated. Plaintiffs' expert, attorney Todd Forsythe, opined that Ament had committed professional negligence in two respects. He testified that had Ament drafted the contract to include either a bill of sale with specific personal property listed or a disclaimer that Chirps's personal property would not be included in the sale, the subsequent disputes with the buyer could have been avoided. Also, Forsythe opined if Ament had forwarded the list of personal property from the Lorensens promptly after receiving it on June 22, the issue could have been settled before the Lorensens undertook their renovation efforts. Although defense expert, Robert Braun testified Ament's legal services were well within the standard of care, it is generally appropriate to allow the case to be submitted to the jury when a case is at all close. See *Reed v. Chrysler Corp.*, 494 N.W.2d 224, 229 (Iowa 1992) ("We again emphasize that much is wasted by granting directed verdicts in routine cases, or in cases that are at all close.").

The district court seemed to conclude proof of damages was lacking given its ruling to exclude evidence as a discovery sanction. We disagree and believe, even without the excluded testimony and exhibits as to certain damages, there was substantial evidence to support a finding of damage. "When the alleged

legal malpractice consists of a client's assertion that the defendant lawyer has mishandled a claim or lawsuit, proof of damages necessarily involves analysis of the value of that underlying cause of action." *Whiteaker*, 382 N.W.2d at 114. The court file documenting the Lorensens' litigation with the buyer was admitted as evidence. In that action, the value of the Lorensens' improvements to the property was at issue. This provided substantial evidence of the Lorensens' expenditures from which a jury could infer or approximate damages. Likewise, David Lorensen's testimony generally outlining the damages was received without objection. An estimation of damages could be deduced from that record. Finding the district court erred in granting Ament's motion for directed verdict, we reverse and remand for a new trial.

**V. CONCLUSION.** We affirm the district court's ruling excluding evidence that should have been disclosed to Ament prior to trial. The court did not abuse its discretion in issuing this sanction for the Lorensens' failure to conduct discovery in good faith. We reverse the district court's grant of Ament's motion for a directed verdict. There was substantial evidence presented to generate a fact question for the jury on whether the Lorensens suffered damages as a result of Ament's professional negligence. The court file detailing the buyer's suit against the Lorensens was admitted into evidence and provided substantial evidence of the Lorensens' alleged damages.

**AFFIRMED IN PART, REVERSED IN PART, AND REMANDED.**