

NO. A09-1993

State of Minnesota
In Court of Appeals

Torchwood Properties, LLC,
a Minnesota limited liability company, as successor in interest to Anthony Magnotta and
Lisa Magnotta, husband and wife.

Appellant,

v.

Judith McKinnon,

Respondent.

Respondent's Brief and Appendix

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The appendix to this brief is not available for online viewing as specified in the *Minnesota Rules of Public Access to the Records of the Judicial Branch*, Rule 8, Subd. 2(e)(2).

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STATEMENT OF FACTS

1. Appellant served written discovery requests on Respondent on or about October 3, 2008. (Respondent's Appendix at 14-19).
2. Appellant's interrogatories did not ask any questions relating to Respondent's meetings with city officials about her property. (Respondent's Brief at 14-19).
3. Appellant's Requests for Production of Documents did not specifically request any notes from meetings with city officials, only general requests to produce all party and non-party statements, communications about the property and relevant documents Respondent intended to introduce at trial. (Respondent's Brief at 14-19).
4. Respondent served written discovery responses to Appellant on or about November 11, 2008. (Appellant's Brief at 7).
5. Appellant never served Respondent with any supplemental discovery requests, nor did Appellant ever attempt to depose Respondent or any city officials. (Respondent's Appendix at 11).
6. During the direct examination of Respondent, she acknowledged that she had signed the document entitled "Authorization to Raze (Repair) Hazardous Building," (hereinafter "Authorization"), which had previously been admitted into evidence as Exhibit 9. (T.16).
7. While testifying about the circumstances leading up to her decision to sign the Authorization, Respondent alluded to some notes she had taken pertaining to

discussions with city officials which had not been provided to her attorney in response to Appellant's discovery requests. (T.17).

8. Counsel for Appellant requested a continuance in order to obtain further discovery. (Appellant's brief at 9-10).
9. The Court opined that the discovery sought by Counsel for Appellant were of uncertain relevance to the case (T.18, 21).
10. Respondent testified that it would be very difficult to find the notes because they were in her basement, which was full of boxes and a terrible mess, and the electricity had been turned off (T.20).
11. The Court noted that Respondent arrived in a wheel chair and appeared to be in an extremely fragile condition. (T.20, 28).
12. The Court determined that Respondent would not be able to obtain the notes by the following day and, even if the Court continued the matter for several months, as would be necessitated by the Court's docket, she might never find the notes. (T.28).
13. The Court eventually denied Counsel for Appellant's request for a continuance. (Appellant's Brief at 11).
14. Counsel for Appellant elected not to participate in the remainder of the trial. (T.36).
15. The Court ruled in Respondent's favor as to all of Appellant's claims. (Appellant's Brief at 11).

16. Appellant brought a motion for new trial which was denied. (Appellant's Brief at 22).

ARGUMENT

I. *The Court's Denial of Appellant's Request for a Continuance was within its Sound Discretion*

The district court has considerable discretion in scheduling matters and in furthering the interests of judicial administration and economy. *Rice Park Properties v. Robins, Kaplan, Miller & Ciresi*, 532 N.W.2d 556 (Minn.1995). A court's decision to grant or deny a continuance will not be reversed absent a clear abuse of discretion. *Dunshee v. Douglas*, 255 N.W.2d 42, 45 (Minn.1977). This court uses a two-part test when reviewing a district court's decision denying a requested continuance: (1) has the plaintiff been diligent in seeking or obtaining discovery; and (2) is plaintiff seeking further discovery in the good-faith belief that material facts will be discovered and not simply engaging in a discovery 'fishing expedition?' *Lewis v. St. Cloud State Univ.*, 693 N.W.2d 466, 473 (Minn. App. 2005), *review denied* (Minn. June 14, 2005). Additionally, while arguably of no persuasive authority, the Eighth Circuit has articulated five factors to be examined by trial courts when exercising discretion concerning continuances, which are as follows: 1) the nature of the case and whether the parties have been allowed adequate time for trial preparation; 2) the diligence of the moving party; 3) the conduct of the opposing party and whether a lack of cooperation has contributed to the need for continuance; 4) the effect of the continuance and whether delay will

seriously disadvantage either party; and 5) the asserted reasons for the continuance. *In re Hopper*, 228 B.R. 216, 218-219 (8th Cir. BAP 1999), quoting *United States v. Bernhardt*, 642 F.2d 251, 252 (8th Cir.1981).

Respondent testified that she had notes at home in a box buried in a basement which currently lacked electricity. Appellant requested a continuance in the middle of trial so that Respondent could produce said notes. The Court made it clear it would be amenable to a brief continuance, but determined, based on Respondent's testimony, that she would not be able to produce the notes by the end of the following business day. However, in the interests of judicial administration and economy, the Court determined that a longer delay (four months minimum), necessitated by the Court's docket, was not warranted under the circumstance, due to the determination that: 1) Respondent might never be able to produce the notes; and 2) the questionable relevance of the notes to the issues in the case.

Appellant's reliance on *In re Wolfe* for its argument that the Court erred in taking Respondent's health into consideration is completely misplaced. The Eighth Circuit in *In re Wolf* determined that it was not an abuse of discretion for the trial court to deny the debtor's third requested continuance of the bankruptcy proceedings despite debtor's serious medical condition – completely inapposite to the facts of this case. *In re Wolf*, 232 B.R. 741, 745 (8th Cir. 1990). Furthermore, the ruling in *In re Wolf* is persuasive authority at best, so the district court had no obligation to follow it. Appellant also incorrectly argues that there was no possible disadvantage to Respondent by granting the requested continuance. The Court's calendar dictated that the matter would likely have to

be continued into next year. The Court noted that Respondent appeared to be in a fragile condition. Respondent's health could have further worsened prior to the continued trial date, possibly precluding her from further participating in the trial. There would also clearly be additional expenses associated with a continued trial date – Respondent would incur additional witness fees as well as attorney's fees for the time commuting back and forth to Albert Lea from Minneapolis. Accordingly, the Court's decision to proceed with the trial was not an abuse of discretion.

II. *Appellant Was Not Materially Prejudiced*

District court has broad discretion in determining whether to grant new trial, and will be reversed only for clear abuse of discretion. *Molenaar v. United Cattle Co.*, 553 N.W.2d 424 (Minn. App.1996), *review denied*. Motions for new trial should be granted cautiously and sparingly and only in furtherance of substantial justice. *Leuba v. Bailey*, 88 N.W.2d 73 (Minn. 1957). Appellant has argued four separate grounds for a new trial under Rule 59, which are as follows:

- (a) Irregularity in the proceedings of the court, referee, jury, or prevailing party, or any order or abuse of discretion, whereby the moving party was deprived of a fair trial;
- (b) Misconduct of the jury or prevailing party;
- (c) Accident or surprise which could not have been prevented by ordinary prudence;
- (d) Material evidence newly discovered, which with reasonable diligence could not have been found and produced at the trial.

A new trial will be granted only where it is apparent that error complained of materially prejudiced party seeking new trial. *Hlubeck v. Beeler*, 9 N.W.2d 252, 254 (Minn. 1943). Pursuant to Minn. R. Civ. P. 61, the Court must disregard any error either in the admission or exclusion of evidence or defect in any ruling which does not affect the substantial rights of the parties. Minn. R. Civ. P. 61 (1989). Errors of law and irregularity in proceedings must be prejudicial in order for new trial to be granted. *Danielson v. Hanford*, 352 N.W.2d 758, 762 (Minn. App. 1984). Further, the moving party has the burden to prove that the documents are relevant to his or her claim. *Abbott v. Comm'r of Public Safety*, 760 N.W.2d 920, 925 (Minn. App. 2009).

The notes are not relevant to any contested issues in the case – Respondent admitted that she signed the Authorization stating that the City of Albert Lea had determined her property was a public hazard and allowed the city to either repair or raze it. Respondent did not plead coercion as an affirmative defense, not did Respondent testify that she was coerced into signing the document, only that she did not necessarily agree with all of it but that she felt she had no other choice. Regardless of what Respondent may have thought about the condition of her property or the need to raze it, there is no dispute that the city determined it was a public hazard and did in fact demolish it. Nothing contained in Respondent's notes could possibly relate to the issues of Appellant's damages and causation, which are exactly what the Court found Appellant failed to prove at trial. As such, even if Respondent had been able to locate the notes, it would not change the outcome of the trial. See *Lundin v. Stratmoen*, 85 N.W.2d 828, 832

(Minn. 1957) (even though party wrongfully deprived by his adversary of the identity and location of a witness need not, in seeking a new trial, show that he could not by reasonable diligence have discovered such witness before trial, he must nevertheless satisfy requirement that witness' testimony as to new evidence is reasonably likely to change the result). Furthermore, the only real "irregularity" in the proceedings was Appellant's Counsel's decision to not participate in the remainder of the trial. Appellant was given every opportunity to complete their case in chief and to cross-examine Respondent's witnesses, but elected not to. Appellant was certainly prejudiced by failing to participate in the remainder of the trial, but error procured by the moving party cannot be the basis for a new trial. *Isler v. Burman*, 232 N.W.2d 818, 822 (Minn. 1975).

III. Respondent Did Not Commit Misconduct

Respondent's failure to disclose notes to Appellant prior to trial did not amount to misconduct by a prevailing party. Appellant's claim that it specifically requested all notes is not supported by the record. None of the Appellant's document requests specifically request notes created by Respondent, let alone notes created in connection with meetings with city officials about her property. Request No. 4 is wholly inapplicable because Respondent did not intend to introduce said notes as evidence at trial, nor would said notes qualify as "correspondence" with another as described in Request No. 9. Simply put, Appellant's Requests for Production of Documents were too vague and/or overly broad to argue that Respondent did not provide acceptable responses. Furthermore, failure or refusal, in answer to written discovery requests, to provide

complete discovery responses, known either to litigant or her attorney, is not of itself a ground which automatically requires the granting of a new trial. *See Lundin*, 85 N.W.2d at 828.

IV. Appellant Did Not Exercise Reasonable Diligence

Appellant did not exercise diligence in obtaining the discovery at issue. As noted above, Appellant never specifically requested notes created by Respondent regarding her meetings with city officials about her property, or inquired about the substance of said meetings. Appellant had the opportunity to depose Respondent, at which time Appellant could have asked her the same questions which resulted in the revelation of the existence of some notes as were asked at trial, but elected not to. Similarly, Appellant could have deposed city officials about their meetings with Respondent about her property, but elected not to. Appellant could have easily discovered the existence of Respondent's notes and/or the information contained in said notes prior to trial, and therefore, the "surprise" at trial could have been prevented by ordinary prudence.

V. Appellant Bases Appeal on Facts Not In Evidence

Appellants bear the burden of providing an adequate record on appeal sufficient to show alleged errors. *Port Auth. of St. Paul v. Harstad*, 531 N.W.2d 496, 501 (Minn. App. 1995). Further, Minn. R. Civ. App. P. 110.02, holds that an appellant has the burden of providing transcripts of proceedings. Minn. R. Civ. App. P. 110.02, subd. 1 (2009). If the appellant fails to provide a full transcript sufficient to support review, the court can

reject appeal. *Noltimier v. Noltimier*, 157 N.W.2d 530, 531 (Minn. 1968). Finally, this Court has held that it may only hear an appeal with a partial transcript if the issues to be heard are those of law only, and not the issues heard at the lower court. *McDonald v. Stonebraker*, 255 N.W.2d 827, 830 (Minn. App. 1977).

Appellant has not provided the full record of the Respondent's testimony nor even the pages of the transcript which it references in its brief to the Court. The Appellant has failed to provide full transcripts which support review and the appellate record is therefore inadequate. The Respondent respectfully asks that the Court reject the appeal. *Noltimier*, 157 N.W.2d at 531.

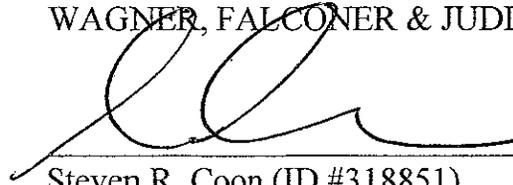
CONCLUSION

The district court's denial of Appellant's request for a continuance was within its sound discretion. The district court did not err in taking into account the Respondent's health, amongst several other factors, in determining the need for a continuance. Appellant was not materially prejudiced by the denial of the continuance because the sought after discovery was unlikely relevant to the contested issues at trial. Respondent's failure to disclose the notes during discovery did not amount to misconduct because Appellant's requests were too general. Finally, Appellant failed to exercise reasonable diligence in obtaining the notes by electing to not depose Respondent following written discovery. For the reasons set forth above, this Court should deny Appellant's appeal and award Respondent her costs and disbursements incurred in connection with this appeal.

Respectfully submitted,

WAGNER, FALCONER & JUDD, LTD.

Date: 12/30/09

A handwritten signature in black ink, appearing to be 'S. Coon', written over a horizontal line.

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