STATE OF MINNESOTA
IN COURT OF APPEALS
A13-2119

Daniel S. Carlson, et al.,
Appellants,

vs.

Michelle Figueroa,
Respondent,

Kelly Carlson,
Respondent.

Filed June 30, 2014
Reversed and remanded
Rodenberg, Judge

Dakota County District Court
File No. 19HA-CV-13-891

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Considered and decided by Johnson, Presiding Judge; Rodenberg, Judge; and Chutich, Judge.

U N P U B L I S H E D O P I N I O N

RODENBERG, Judge

Appellants Daniel S. Carlson and New Life Properties, LLC challenge the district court's grant of respondents' summary judgment motions and its simultaneous denial of appellants' request for a continuance to permit additional discovery. We reverse and remand.

FACTS

This case concerns fire damage to a commercial building owned by appellants that occurred on December 16, 2012. Respondent Michelle Figueroa leased office space in that building to operate a massage-therapy business. Respondent Kelly Carlson (unrelated to appellant Daniel Carlson) was an independent contractor with Figueroa's business. Appellants allege that the fire started in the laundry room of the office space leased by Figueroa. City of Apple Valley Fire Marshal Roy Kingsley and Deputy State Fire Marshal Bruce McLaughlin separately investigated the cause and origin of the fire. They viewed the premises shortly after the fire, and completed their investigations and reports by early January 2013. Both concluded that the cause and origin of the fire were "undetermined." In their depositions, both agreed that spontaneous combustion was a possible cause of the fire.

Appellants' property and casualty insurer, The Hartford, hired Unified Investigation & Sciences, Inc. (Unified), and its employee, Michael Ling, to investigate the cause and origin of the fire. The record indicates that Mr. Ling may be of the opinion that the fire was caused by spontaneous combustion of rags soiled with massage oils that

were improperly stored on top of a card table in the laundry room, but no formal opinion by Mr. Ling is contained in the record and he has not been deposed. The Hartford also hired an electrical engineering company, OnSite Engineering, to investigate the cause and origin of the fire. For reasons not disclosed by the record, The Hartford denied appellants' fire claim after these investigations. Appellants then started this action by serving respondents with a summons and complaint that was filed on March 1, 2013, claiming that the fire was caused by spontaneous combustion of soiled rags negligently stored by respondents. Appellants also sued The Hartford in federal court concerning its denial of coverage.

Respondent Figueroa filed an informational statement in this case on April 26, 2013, proposing the following scheduling deadlines: (1) discovery to be completed within ten months (by approximately February 2014), (2) a dispositive motion deadline of January 31, 2014, and (3) a trial date of April 7, 2014. She also suggested that appellants' expert(s) be disclosed by October 31, 2013. No other party filed an informational statement. On May 7, a scheduling order was issued setting forth the following deadlines for the litigation: (1) a discovery deadline of October 10, 2013, (2) a dispositive motion deadline of September 10, 2013, and (3) a trial date of December 9, 2013. The scheduling order did not identify a deadline for expert witness disclosures and stated that "all continuances are subject to the Minnesota Supreme Court Timing Objectives." No judge signed the scheduling order, and it appears to have been generated by court administration. No party moved to amend the order.

Respondents each served and filed summary judgment motions just days after Kingsley and McLaughlin were deposed. The motions argued that the complaint should be summarily dismissed due to appellants' failure to retain an expert witness concerning the cause and origin of the fire. The motions were set for hearing on September 11, 2013.

Appellants responded to these motions with a request for a continuance to permit additional discovery. *See* Minn. R. Civ. P. 56.06. Appellants' counsel submitted an affidavit in support of the request, explaining that, although subpoenas duces tecum had been served on both Unified and OnSite Engineering, Unified had not responded to the subpoena and OnSite Engineering had only "partially" responded on July 15, 2013. The affidavit also stated that "[appellants] are in the process of retaining Mr. Ling [of Unified] to serve as an expert witness," and that, because of the related insurance-coverage litigation between appellants and The Hartford, "conflict waivers, consents, releases and authorizations [had] delayed matters beyond [appellants'] control." The affidavit concluded: "[Appellants] reasonably believe in good faith that further discovery will enable them to meet their burden to overcome summary judgment, and establish a genuine issue of material fact exists as to the cause and origin of the fire at issue in this litigation." The affidavit did not explain why no other cause and origin expert had been consulted or retained. Several exhibits were attached to the affidavit, including the subpoenas that had been served on Unified and OnSite Engineering, a letter from The Hartford's lawyer evidencing OnSite Engineering's response to its subpoena, pages from Kingsley's deposition referencing Mr. Ling's opinion that the fire was caused by spontaneous combustion, and an email from Mr. Ling dated August 26, 2013 regarding

his willingness to serve as appellants' expert witness, pending approval from "senior management from The Hartford."

At the motion hearing, Figueroa's attorney explained that the motions were brought before the close of discovery because the district court's "scheduling order required that [the motions] be heard by no later than September 10." He explained that, when he called the court to obtain a motion date, court administration staff told him that "there is no way this court is going to change this trial date because the court needs to comply with the mandates of the Minnesota Supreme Court as far as handling of the civil calendar." And Figueroa's attorney concluded: "I don't think . . . this motion is premature because it is consistent with this court's scheduling order." Appellants' counsel then argued for a continuance. The district court stated: "The sad thing is, there probably are fact issues," and that "throw[ing] people out of court on summary judgment . . . tends to bother me." The district court granted respondents' motions for summary judgment. It held that appellants had not been diligent in pursuing discovery, that continuances are not allowed when a party is seeking expert opinion rather than facts, and that respondents were entitled to summary judgment because appellants failed to procure expert testimony on issues of cause and origin. This appeal followed.

D E C I S I O N

A party may move for summary judgment "at any time after the expiration of 20 days from the service of the summons." Minn. R. Civ. P. 56.01. But another party may respond to such a motion by requesting a continuance "to permit affidavits to be obtained or depositions to be taken or discovery to be had or [the court] may make such other

order as is just." Minn. R. Civ. P. 56.06. "A district court's decision to deny a motion for a continuance to conduct discovery is reviewed under an abuse-of-discretion standard." *Lewis v. St. Cloud State Univ.*, 693 N.W.2d 466, 473 (Minn. App. 2005), *review denied* (Minn. June 14, 2005).

We note that the scheduling order's inexplicably tight deadlines precipitated the timing of the motion for summary judgment and the corresponding request by appellants to continue that motion until discovery was complete, and we begin our analysis with that order. Respondent Figueroa was the only party to submit an informational statement. *See* Minn. R. Gen. Pract. 111.02 (2012) (stating that informational statement should be used to provide important scheduling information to the court).[1] Yet the scheduling order set deadlines that were much shorter than those suggested by Figueroa. *See* Minn. R. Gen. Pract. 111.03 (setting out mandatory and discretionary deadlines in scheduling orders). This scheduling order appears to have been generated by a court administrator, not by a judge, and it stated that "all continuances are subject to the Minnesota Supreme Court Timing Objectives."

We are unable to locate any "Minnesota Supreme Court Timing Objectives." This reference may be to Minnesota Judicial Council Policy 505.1, which is entitled "Timing Objectives for Case Dispositions." These objectives are aspirational, however, and are not binding on district courts in individual cases. We cannot find any authority for the

[1] The General Rules of Practice were amended by order and effective July 1, 2013 changing this practice. Now, parties may provide scheduling information in a "Civil Cover Sheet" submitted with their pleadings. *See* Minn. R. Gen. Pract. 104, 111.02 (2013).

notion that a civil action such as this one is *required* to be resolved according to such a short and rigid schedule.[2] We are troubled that the scheduling order was issued by a court administrator without apparent judicial involvement. The early involvement of a judge in scheduling matters will reduce the likelihood of a scheduling order like this one, which fails to reflect the issues in and needs of the particular case. It also seems unlikely that a judge in this circumstance would have set a dispositive motion deadline *before* the discovery cutoff. *Cf.* Fed. R. Civ. P. 56(b) (setting the presumptive deadline for dispositive motions for 30 days *after* the close of discovery). While we see no prohibition on court administration generating a scheduling order, we think that a district court should be hesitant to insist upon strict compliance with a scheduling order that is apparently untethered to any judicial assessment of scheduling issues.

As noted, the scheduling order here set deadlines vastly different and much tighter than those suggested by respondent Figueroa in her informational statement, the only one filed by any party. The parties had approximately three months from the filing of the scheduling order to serve and file dispositive motions in compliance with the 28-day notice requirement of Minn. R. Gen. Pract. 115.03. Concerning the discovery deadline that was inexplicably set one month *after* the dispositive motion deadline, respondents argue that "[n]othing in rule 16, rule 56, or any other rule prevents a district court from

[2] At oral argument, counsel suggested that Dakota County's recent implementation of a "rocket docket" (the "pilot expedited civil litigation track") may explain the tight scheduling in this case. However, the "rocket docket" pilot applies to cases filed after July 1, 2013. *Order Relating to Civil Justice Reform Task Force*, No. ADM10-8051 (Minn. May 8, 2013). This case was filed in March 2013 and is therefore not part of the pilot.

ruling on a summary judgment motion merely because it is heard before the discovery deadline." *See Molde v. CitiMortgage, Inc.*, 781 N.W.2d 36, 46 (Minn. App. 2010). While nothing *prevents* the district court from hearing summary judgment motions before the close of discovery, the scheduling order here, coupled with the district court's rigid insistence on compliance with that order, had the effect of *requiring* dispositive motions before the close of discovery.

Served with motions for summary judgment while discovery was ongoing, appellants appropriately requested a continuance pursuant to rule 56.06.[3] The rule provides that a district court "may order a continuance to permit affidavits to be obtained or depositions to be taken or discovery to be had or may make such other order as is just." Minn. R. Civ. P. 56.06. In deciding a motion for a continuance to permit additional discovery, a district court must consider the moving party's (1) diligence in seeking discovery and (2) good-faith belief that the party will discover material facts. *Rice v. Perl*, 320 N.W.2d 407, 412 (Minn. 1982).

"Continuances should be liberally granted under [r]ule 56.06, especially when the party seeking more time is doing so because of insufficient time to conduct discovery." *Bixler by Bixler v. J.C. Penney Co.*, 376 N.W.2d 209, 216 (Minn. 1985). But "the rule

[3] Appellants may have been less than perfectly diligent in their efforts over the summer months in securing the testimony of Mr. Ling and in serving an out-of-state subpoena. Appellants might also have taken steps to obtain relief from the unreasonable scheduling order before the dispositive motions were filed. But appellants were litigating both this case and the federal coverage case, and they contend that the interplay between the two cases complicated their efforts to secure Mr. Ling's expert opinions. Although the record does not contain a motion under rule 56.06, appellants clearly requested a continuance of the summary judgment motions, as the rule contemplates, and supported that request with an affidavit.

will not be applied to aid a party who has been lazy or dilatory." 10B Charles Alan Wright et al., *Federal Practice & Procedure* § 2741, at 429 (3d ed. 1998). "Sufficient time for discovery is considered especially important when the relevant facts are exclusively in the control of the opposing party . . . ." *Rice,* 320 N.W.2d at 412 (quotation omitted); *see also* Wright, *supra*, § 2741, at 419-22 (noting that whether the moving party is in exclusive control of the facts to be discovered should be considered in assessing diligence).

The district court appears to have concluded that appellants were not diligent for two reasons: (1) they chose to file suit shortly after the fire (and well before the expiration of the applicable statute of limitations) without first retaining an expert, and (2) the evidence appellants were seeking to discover was within their control because they own the building where the fire occurred.

The district court stated that "[appellants] can hardly complain now that they have not had enough time to obtain expert testimony when it was they who rushed this matter into court." Respondents contend that appellants knew expert testimony was going to be required, but their lack of diligence resulted in a failure to retain an expert before the summary judgment motions were filed. Appellants respond that this case "is not a professional negligence case that requires a plaintiff to procure an expert affidavit as a prerequisite to bringing an action."

Appellants sued respondents after The Hartford denied appellants' claim, but appellants did not request the abbreviated discovery schedule. And although as a practical matter expert testimony concerning the cause and origin of the fire here will

doubtless be important, appellants were not obligated to have a trial-ready expert's opinion in hand before commencing suit. Actions alleging professional negligence require an expert affidavit prior to suit. Minn. Stat. § 544.42, subds. 2, 3 (2012). The district court cited no authority, and we are aware of none, requiring a plaintiff to obtain expert opinion before filing a complaint in an ordinary negligence case. Issues concerning the cause and origin of the fire are questions of *fact*. Unlike professional negligence cases, where the standard of care is critically important, this typical negligence case presents factual questions about what caused a fire.

We are troubled, as was the district court, by appellants' failure to retain *any* expert by the hearing date. They could have retained another expert in light of their conflicts and ongoing litigation with The Hartford. However, the district court erred in requiring disclosure of an expert witness on issues of cause and origin before the dispositive motion deadline.

The district court also reasoned that, because appellants did not have expert support for the allegation that the fire was caused by respondents' negligence, they violated Minn. R. Civ. P. 11.02(c) by alleging in their complaint that the fire was caused by improper storage of massage oils, solvents, sheets, or rags. However, the record contains evidence that Mr. Ling told appellant Daniel Carlson of his opinion that the fire was caused by spontaneous combustion. Fire Marshals Kingsley and McLaughlin both testified that they could not exclude spontaneous combustion as a possible cause of the fire. Rule 11.02(c) provides that facts can be developed through "further investigation or discovery," and does not require that an expert be identified before a complaint is filed in

order to provide a factual basis for pleading causation in a negligence case. Minn. R. Civ. P. 11.02(c).

The district court also reasoned that, because the fire occurred in appellants' building, evidence regarding the cause and origin of the fire was within their control. Respondent Kelly Carlson argues that, "because appellants made the choice to completely remediate the building before securing an expert, they are caught in a bind of their own making." Appellants having controlled and remediated the building after the fire seems irrelevant in context. The issue is not one of spoliation. *See, e.g.*, *Willis v. Ind. Harbor S.S. Co.*, 790 N.W.2d 177, 184 (Minn. App. 2010) (noting that spoliation generally refers to destruction of evidence by a party to litigation), *review denied* (Minn. Dec. 22, 2010). Two fire marshals viewed the scene before any remediation. And The Hartford engaged OnSite Engineering to collect and preserve artifacts from the fire.[4] Because the lawsuit was dismissed before discovery was complete, the record does not reveal what artifacts have been preserved. On this record, appellants have established that another entity, OnSite Engineering, likely has artifacts from the fire that are relevant to the issues of cause and origin. And OnSite Engineering was retained by The Hartford, against which appellants are aligned in the federal court case.

[4] The subpoena directed at OnSite Engineering requested "a copy of all tangible evidence, sampling, or test results pertaining to the fire or the investigation of the fire." At the summary judgment motion hearing, appellants' counsel explained that he understood that OnSite Engineering had "artifacts including sheets taken from the card table which Mr. Ling has expressed opinion was the origin of the fire." The rule 56.06 affidavit could have better explained the existence and importance of these artifacts, but the record establishes that appellants were seeking these artifacts through discovery, that appellants did not possess the artifacts at the time of the summary judgment motion, and that material facts may be uncovered once those artifacts are discovered or produced.

At the time of and immediately after the fire, appellants justifiably relied on The Hartford, their property and casualty insurer, to investigate the cause and origin of the fire. But after the initial investigation, The Hartford denied coverage. At that point, all of the cause-and-origin evidence was controlled by The Hartford or its agents. Appellants do not control the evidence they seek to discover regarding the cause and origin of the fire, including the opinion testimony of Mr. Ling. *See Rice*, 320 N.W.2d at 412. With the benefit of hindsight, ways in which appellants could have conducted discovery more efficiently are obvious, but we are unable to conclude that the record supports the conclusion that appellants were dilatory in seeking discovery. *See id.*

We must also consider whether appellants had a good faith belief that additional discovery would provide more support for their claims. "[T]he court should be quite strict in refusing continuances where the party merely expresses a hope or a desire to engage in a fishing expedition either by discovery or at the time of trial." *Id.* (quotation omitted). Even if the moving party was diligent in seeking discovery, when further discovery will not reveal material facts, the district court may deny the continuance motion. *Id.*

The district court held that appellants did not have a good faith belief that material facts would be uncovered because they were seeking expert opinion, rather than facts. But as discussed, the cause and origin of the fire *is* a question of fact, albeit one on which appellants sought expert opinion. Appellants also argue that Mr. Ling has personal knowledge of facts and has an opinion on the cause and origin of the fire. The affidavit in support of appellants' rule 56.06 request sufficiently explains the discovery that still

needs to be conducted and why it was not completed by the time of the motion hearing. The district court itself observed that "there probably are fact issues." At the time of the dispositive motions, there were unresolved issues of fact, and discovery concerning those issues was ongoing *and expressly permitted by the scheduling order*.[5]

The district court also relied on the opinions of Kingsley and McLaughlin that the cause of the fire was "undetermined" when it granted respondents' summary judgment motions. Both conceded that spontaneous combustion was a possible cause of the fire. Their testimony is not evidence that spontaneous combustion did not cause the fire, or that some other specified condition was the cause of the fire. Their testimony fails to remove or resolve the disputed cause-and-origin issues. Rather, it highlights the unresolved and disputed issues of cause and origin.

We next consider whether the affidavit submitted in support of appellants' rule 56.06 request is sufficient. "A rule 56 affidavit must be specific about the evidence expected, the source of discovery necessary to obtain the evidence, and the reasons for the failure to complete discovery to date." *Alliance for Metro. Stability v. Metro. Council*, 671 N.W.2d 905, 919 (Minn. App. 2003). A district court does not abuse its discretion when it denies a continuance motion that is unsupported by affidavit or when the affidavit does not meet these requirements. *Molde*, 781 N.W.2d at 45-46.

Respondent Figueroa argues that the affidavit submitted in support of appellants' rule 56.06 request was deficient: "At best, appellants' affidavit generally discusses things

[5] We also observe that rule 56.06 does not limit continuances to situations when a party seeks to discover facts. The rule states that in ruling on such a motion, a district court "*may make such other order as is just."* Minn. R. Civ. P. 56.06 (emphasis added).

they had done, but in no paragraph do they explain why they could not complete those things." Respondent Figueroa also argues that appellants "provided no affidavit showing that the numerous cause and origin experts in the Twin Cities area, or elsewhere, lacked the expertise to opine on spontaneous combustion."

Appellants' rule 56.06 affidavit is not legally deficient. It indicates that appellants sought an expert opinion that they reasonably believed to be available. It states that appellants expected to obtain Mr. Ling's opinion, and had been unable to obtain it by the dispositive motion deadline due to the related coverage litigation and the need for consents and conflict waivers. This is sufficient under the rule. *See Alliance for Metro. Stability*, 671 N.W.2d at 919. We are sympathetic to respondent Figueroa's argument that appellants could have retained a different expert, but we are not persuaded that their failure to do so makes the affidavit deficient.

A scheduling order was issued that set unreasonably short deadlines, given the circumstances of this case. The district court's stated rationale for not continuing the summary judgment motions is not supported by the record or applicable law. The rule 56.06 affidavit was legally sufficient under applicable precedent. We therefore conclude that the district court exceeded its discretion in granting the motions for summary judgment before discovery was complete.

Reversed and remanded.