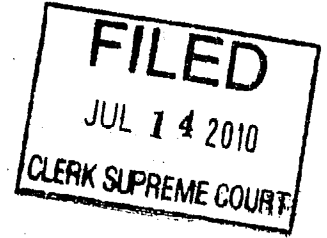
IN THE SUPREME COURT OF IOWA

No. 08–1087

Polk County No. LACL102016

O R D E R



JAN REIS and **DEAN STOWERS,**

Plaintiffs,

vs.

IOWA DISTRICT COURT FOR POLK COUNTY,

Defendant.

After the filing of our opinion in this appeal on May 7, 2010, a petition for rehearing was filed. With the approval of the entire court, the author of the opinion has amended the filed opinion by making additions and changes to pages 19–21.

With this amendment considered, the petition for rehearing is denied. A copy of the revised material is attached.

Dated this 14th day of July, 2010.

Marsha Ternus

Marsha K. Ternus, Chief Justice

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punishment: punitive punishment for acts which are completed contempts and imprisonment to coerce the performance of acts ordered by the court. *Id.* The fine authorized by section 665.4 is for the benefit of the state. *Id.*

Care Initiatives argues in response that the district court based its order of attorneys fees on Iowa Rules of Civil Procedure 1.517(2)(*b*)(5) and 1.602(5). Rule 1.517 pertains to discovery and lists sanctions available to a court in which an action is pending for "a party" who "fails to obey an order to provide or permit discovery." Iowa R. Civ. P. 1.517(2)(*b*). The rule provides that a court's order regarding such failure may include "an order treating as a contempt of court the failure to obey any orders," and an order requiring the "disobedient party or the attorney advising such party or both to pay the reasonable expenses, including attorney's fees, caused by the failure." Iowa R. Civ. P. 1.517(2)(*b*)(4)–(5). Rule 1.517(2)(*b*)(4)–(5) specifically provides that a court may enter any of the sanctions provided "in addition thereto" the other sanctions in the list. Rule 1.602 provides discretion for trial courts to hold pretrial conferences and enter pretrial orders. The rule also provides for the sanction of "reasonable expenses . . . including attorney's fees" if "a party or party's attorney fails to obey a scheduling or pretrial order." Iowa R. Civ. P. 1.602(5).

The district court specifically based its order of fees on its authority under rules 1.517(2)(*b*)(5) and 1.602(5). A protective order is an "order to provide or permit discovery" under rule 1.517(2)(*b*), which authorizes sanctions for failure to obey such orders. It is also a "pretrial order" under rule 1.602(5). Both rules allow sanctions to be levied against a party or a party's attorney. A party's attorney may be sanctioned, even if the attorney's client took no steps to violate the discovery rules, when it is the attorney's conduct which violated a court

order. *See Kendall/Hunt Publ'g Co. v. Rowe*, 424 N.W.2d 235, 242 (Iowa 1988) (noting rule 1.517—then rule 134—mirrors federal rule 37 and cases under rule 37 are persuasive authority); *Whitehead v. Gateway Chevrolet, Oldsmobile*, No. 03-C-5684, 2004 WL 1459478, at *1, 3 (N.D. Ill. June 29, 2004) (imposing sanction of attorneys' fees under Rule 37(b) on attorney who used confidential information from a previous case, in violation of a protective order, to file the complaint in the instant case); *Poliquin v. Garden Way, Inc.*, 154 F.R.D. 29, 31–32 (D. Me. 1994) (sanctioning attorney under rule 37(b), including the potential for reasonable attorneys' fees to be set at a later date, when attorney disclosed an affidavit protected by a protective order to co-counsel in a separate case).

The district court had authority to sanction Stowers as either a party or a party's attorney. The protective order, to which Stowers signed an undertaking to be bound, specifically lists Stowers as a party. It states, "Parties: Jan Reis and her spouse . . . ." Additionally, there was sufficient evidence supporting the district court's finding that Stowers acted as an attorney to Reis during the litigation. An attorney-client relationship exists when: " '(1) a person sought advice or assistance from an attorney, (2) the advice or assistance sought pertained to matters within the attorney's professional competence, and (3) the attorney expressly or impliedly agreed to give or actually gave the desired advice or assistance.' " *State v. Parker*, 747 N.W.2d 196, 203–04 (Iowa 2008) (quoting *Comm. on Prof'l Ethics & Conduct v. Wunschel*, 461 N.W.2d 840, 845 (Iowa 1990)). Although Reis denied during the contempt hearing that Stowers had acted as her attorney, she also admitted that she talked to him about legal matters and relied on him to help her interpret things. Newkirk, Reis's attorney during the pending litigation, testified that Fielder & Newkirk had taken the position that Stowers was acting as an

attorney for Ms. Reis. Additionally, Stowers sent emails to Fiedler & Newkirk on Reis's behalf demanding return of her files and case materials and citing case law. When Armentrout, Care Initiatives' attorney, sent a letter to Reis and Stowers demanding return of its documents, Stowers responded, noting that Armentrout's letter "poses a number of legal and ethical issues."

The district court did not err in determining an award of fees was within the remedies available. *See Falstaff Brewing Corp. v. Miller Brewing Co.*, 702 F.2d 770, 784 (9th Cir. 1983) (finding insufficient evidence for criminal contempt but ordering reasonable attorneys fees for violation of protective order under federal rule 37); *Kehm v. Procter & Gamble Mfg. Co.*, 580 F. Supp. 913, 915–16 (N.D. Iowa 1983) (ordering reasonable attorneys fees and costs under federal rule 37 for violation of protective order where attorney sold confidential documents after entry of judgment). Although the district court did not have authority to order fees as a sanction for contempt because of the limits imposed by section 665.4, the district court was allowed to impose fees pursuant to rules 1.517(2)(*b*)(5) and 1.602(5).

Although we affirm the availability of reasonable expenses and fees as sanctions, we limit portions of the district court's order based on our holding above. First, because we vacate the order of contempt as it applies to Reis, we also vacate the order that Reis be jointly responsible for costs and fees. Second, the award for fees may not extend to the unsuccessful efforts by Care Initiatives to hold individuals other than Stowers in contempt, including Reis, Fiedler, and Newkirk. Third, we vacate the order requiring Stowers to pay the attorneys' fees and expenses incurred by Fiedler & Newkirk in defending the contempt action brought against Fiedler and Newkirk. The decision to file a nonmeritorious contempt action against Fiedler and Newkirk was made

by Care Initiatives, and it is improper to require Stowers to pay the fees and expenses incurred by their firm. Fourth, consistent with our decision above, we limit the reasonable fees or expenses to Care Initiatives' efforts relating to enforcement of the protective order. The district court's jurisdiction did not extend to the settlement agreement, and, therefore, the award of fees may not extend to expenses relating to the settlement agreement.

We hold it was not an abuse of discretion for the district court to order that Stowers be responsible for the costs of storage of the documents secured by the court and the reasonable fees of Care Initiatives in their effort to hold Stowers in contempt under the protective order. The determination of the monetary amount of reasonable fees is within the district court's discretion. *See Kendall/Hunt*, 424 N.W.2d at 242. Sanctions under rule 1.517 (previously rule 134) should serve a three-fold purpose: (1) to insure that a party will not profit from its failure to comply with a court order, (2) to provide specific deterrence and seek compliance with the court's order, and (3) to provide general deterrence in the active case and in litigation generally. *Id.* We remand to the district court for implementation of the reasonable fee award within the limitations we have outlined above.

2. *Injunctive relief.* The district court ordered that the protective order continues to cover confidential information and documents gained through this litigation, and that any use of such information or documents is prohibited without further order of the court. Reis and Stowers argue the district court's order amounts to inappropriate injunctive relief. We disagree. As noted above, the district court retained authority to enforce the protective order. Courts have routinely held that this authority also includes the authority to modify or lift such orders. *See, e.g., United Nuclear*, 905 F.2d at 1427 ("As long as a protective order

remains in effect, the court that entered the order retains the power to modify it, even if the underlying suit has been dismissed."); *see also Pub. Citizen*, 858 F.2d at 783 ("In sum, although the court lacked power to impose new discovery-related obligations after dismissing the case on the merits, we find that, because the protective order was still in effect, the district court had the power to make postjudgment modifications to the protective order in light of changed circumstances."). As we held above, the protective order continued in effect and parties were required to move for modification before using or disclosing documents designated confidential in the underlying suit. The district court's order merely clarified the continuing effect of the protective order and was an appropriate remedy.

IV. Conclusion.

The district court had jurisdiction to enforce the protective order entered during discovery in this case but did not have jurisdiction to enforce a settlement agreement that was never entered by the court. The district court's determination that Stowers be held in contempt of court for violation of the protective order is supported by substantial evidence. The district court's determination that Reis be held in contempt of court for violation of the protective order is not supported by substantial evidence, and it was erroneous for the court to rely on the settlement agreement to hold Reis in contempt. We uphold the district court's authority to order fees, but limit the scope of the award. We remand this case to the district court for entry of an order and remedies consistent with this decision.

DECISION OF COURT OF APPEALS VACATED; WRIT SUSTAINED IN PART AND ANNULLED IN PART; AND CASE REMANDED.