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**STATE OF MINNESOTA
IN COURT OF APPEALS
A13-1413**

OSEMI, Inc.,
Appellant,

vs.

Red Wing Port Authority,
Respondent.

**Filed April 28, 2014
Affirmed
Halbrooks, Judge**

Goodhue County District Court
File No. 25-CV-11-3153

Patrick J. Lee-O'Halloran, Hammargren & Meyer, P.A., Bloomington, Minnesota (for appellant)

George C. Hoff, Justin L. Templin, Hoff, Barry & Kozar, P.A., Eden Prairie, Minnesota (for respondent)

Considered and decided by Schellhas, Presiding Judge; Halbrooks, Judge; and Harten, Judge.*

* Retired judge of the Minnesota Court of Appeals, serving by appointment pursuant to Minn. Const. art. VI, § 10.

UNPUBLISHED OPINION

HALBROOKS, Judge

On appeal from the district court's dismissal of various tort and quasi-contract claims arising from a real-estate-conveyance dispute, appellant argues that the district court abused its discretion by (1) dismissing with prejudice its claims as a sanction for noncompliance with discovery orders and (2) denying its motion for a vacated judgment or a new trial when appellant asserted errors of law and excusable neglect. We affirm.

FACTS

In 2007, appellant OSEMI, Inc., a manufacturer of semi-conductors, leased property in Red Wing owned by respondent Red Wing Port Authority (RWPA). The parties subsequently entered into a "Memorandum of Understanding" (MOU), contemplating the sale of the leased property to OSEMI. But negotiations for a purchase agreement broke down in early 2011. OSEMI was subsequently ordered to vacate the property following a breach of its lease agreement with RWPA. We upheld the eviction order on appeal. *See Red Wing Port Auth. v. Osemi, Inc.*, No. A11-1851, 2012 WL 1914128 (Minn. App. May 29, 2012), *review denied* (Minn. Aug. 21, 2012).

In December 2011, OSEMI filed a complaint against RWPA for specific performance under the MOU and for damages under theories of unjust enrichment, fraudulent inducement, tortious interference with business relations, and damage to business reputation.

The district court ordered discovery to be completed by August 16, 2012, and scheduled a jury trial for October 15, 2012. In July 2012, RWPA moved for partial

summary judgment on OSEMI's claim of specific performance under the MOU. On August 14, two days before the discovery deadline, OSEMI moved to extend the deadline. As of August 14, OSEMI had not disclosed any specific damages evidence. Following a hearing on the motions, the district court issued an order granting partial summary judgment to RWPA on the specific-performance claim, concluding that the parties' MOU was "merely an agreement to agree" and failed to confer any rights to OSEMI to purchase the property. The district court reserved OSEMI's motion to extend discovery and scheduled a status conference for October 10 to address the remaining procedural matters.

In the course of discovery, RWPA made multiple requests for disclosures relating to OSEMI's alleged damages. RWPA also deposed OSEMI's president, David Braddock, as plaintiff's corporate representative, in February 2012 and again in September 2012. At the second deposition, Braddock was asked whether he had done "any estimates at all of the money" believed to be lost as a result of RWPA's conduct. Braddock replied, "No." RWPA subsequently moved to exclude all damages evidence on the ground that OSEMI had "failed to provide any information with respect to its damages" despite RWPA's repeated requests and because, as a consequence, RWPA lacked the information necessary to defend against OSEMI's claims.

The district court heard RWPA's motion to exclude damages evidence at the October 10 status conference. RWPA noted that in the 11 months that had passed since the commencement of the litigation, OSEMI had produced no calculation of its damages. OSEMI initially argued that it had not failed to comply with any discovery request,

seeming to suggest that its disclosures were adequate. But after the district court insisted that RWPA was entitled to see evidence in support of its claimed damages, OSEMI promised that it would “try” to provide damages calculations and requested two weeks to do so. The district court granted OSEMI two additional months and imposed a “firm” discovery deadline of December 21, 2012. Trial was rescheduled for January 28, 2013.

RWPA scheduled Braddock for a third deposition to take place on December 21, the last day of the discovery period. Braddock failed to appear. After the close of business, OSEMI served on RWPA’s counsel an unsigned affidavit from Braddock with documents attached. Six days later, on December 27, OSEMI filed and served a signed affidavit from Braddock with several attachments. In these documents, OSEMI claimed nearly \$6 million in damages as a result of RWPA’s allegedly unlawful conduct. The content of some of the supporting documents was redacted. RWPA renewed its motion to exclude all evidence relating to claimed damages due to untimely disclosure.

The parties appeared for jury trial on January 28, 2013. Before trial commenced, the district court heard arguments on RWPA’s motion to exclude. The district court found that OSEMI had demonstrated a “pattern of failure to fully comply with court imposed deadlines” and intentionally and without justification failed to produce documentation relating to its alleged damages during discovery. The district court concluded that RWPA would be substantially prejudiced if the matter proceeded to trial due to the lack of any “meaningful opportunity . . . to defend itself against damages claimed by OSEMI.” The district court stated on the record that RWPA would have to “fly by the seat of its pants . . . and see some of these damage claims for the first time” at

trial due to OSEMI's noncompliance. The district court further indicated that, due to the extensive on-the-record discussion at the October 2012 status conference, OSEMI knew that compliance with the scheduling order was expected in this matter. The district court granted RWPA's motion to exclude and dismissed OSEMI's claims with prejudice.

OSEMI moved for a vacated judgment or new trial. The district court denied the motion, concluding that it had "imposed the proper sanction for an intentional and unjustified refusal to cooperate with discovery" and that OSEMI forfeited the right to a trial on the merits. This appeal follows.

DECISION

I.

A district court has authority to impose sanctions for a party's failure to comply with a discovery order, including dismissal of the claims of the disobedient party in whole or in part. Minn. R. Civ. P. 37.02(b)(3). Dismissal with prejudice is the most punitive sanction available and should be granted only under "exceptional circumstances." *Firoved v. Gen. Motors Corp.*, 277 Minn. 278, 283, 152 N.W.2d 364, 368 (1967). But a district court is justified in dismissing a claim when a party willfully fails to comply with a discovery order without justification or excuse. *Breza v. Schmitz*, 311 Minn. 236, 237, 248 N.W.2d 921, 922 (1976) (quotation omitted). "When a party has willfully and without justification or excuse refused to comply with discovery orders that party has forfeited the right to a trial of the case on the merits." *Frontier Ins. Co. v. Frontline Processing Corp.*, 788 N.W.2d 917, 922 (Minn. App. 2010), *review denied* (Minn. Dec. 14, 2010) (quotation omitted). The district court's discovery-related orders

will not be disturbed absent an abuse of discretion. *Shetka v. Kueppers, Kueppers, Von Feldt & Salmen*, 454 N.W.2d 916, 921 (Minn. 1990).

In determining whether a district court abused its discretion by imposing a discovery sanction, we typically consider whether (1) the district court set a specific date for compliance and warned of potential sanctions for noncompliance; (2) the noncompliance was willful or without justification, and an isolated incident or part of a pattern; and (3) the moving party demonstrated prejudice. *Frontier*, 788 N.W.2d at 923.

OSEMI argues that the law mandates that the district court issue an order compelling discovery and outlining potential discovery sanctions before it may exercise its discretion to dismiss a claim under rule 37.02. But none of the numerous cases that OSEMI cites stands for this proposition. Further fatal to its argument, the cases on which OSEMI relies are inapposite, *see Dennie v. Metro. Med. Ctr.*, 387 N.W.2d 401, 406 (Minn. 1986) (involved inadvertent failure to disclose identity of expert witness); *Cornfeldt v. Tongen*, 262 N.W.2d 684, 697 (Minn. 1977) (same); *Firoved*, 277 Minn. at 379-82, 152 N.W.2d at 366-68 (involved failure to prosecute when plaintiff's counsel died, first substitute counsel withdrew, representation of second substitute counsel was terminated, and third substitute counsel was retained only a few days before trial); *Chicago Greatwestern Office Condo. Ass'n v. Brooks*, 427 N.W.2d 728, 732 (Minn. App. 1988) (involved technical defects in disclosures of pro se defendant, of which defendant was unaware, and the district court's order contained no findings to support or explain its dismissal); *Jadwin v. City of Dayton*, 379 N.W.2d 194, 197 (Minn. App. 1985) (dismissal was ordered against non-disobedient party and district court made decision under agency

principles deemed inapplicable on review), or they are distinguishable, *see Beal v. Reinertson*, 298 Minn. 542, 544, 215 N.W.2d 57, 58 (1974) (no showing of prejudice); *Hoyland v. Kelly*, 379 N.W.2d 150, 153 (Minn. App. 1985), *review denied* (Minn. Feb. 19, 1986) (no evidence of willful noncompliance).

OSEMI also contends that the district court abused its discretion by dismissing its claims without first warning of the potential discovery sanctions following noncompliance. The existence of a clear warning by the district court that dismissal or a similar sanction would result if a party fails to comply with a discovery deadline is “a significant factor in determining on appeal whether such a sanction was appropriate.” *Frontier*, 788 N.W.2d at 923 (quotation omitted). But the existence of an explicit warning is not dispositive of that inquiry. *See id* at 923-24 (affirming dismissal as discovery sanction despite “lack of explicit warning” of potential sanctions where warning was deemed “implicit” in district court’s communications).

OSEMI received adequate notice of the need to disclose damages evidence by the close of discovery in order to preserve its claim for damages. The transcript of the October 2012 status conference contains a lengthy and detailed conversation concerning RWPA’s motion to exclude damages evidence due to OSEMI’s failure to supply RWPA with information concerning the nature, factual basis, and extent of OSEMI’s claimed damages. At the conference, the district court stated that “[RWPA] is entitled to know what [OSEMI’s] claims of damages are in advance of trial” and how OSEMI has calculated them. After initially contesting that RWPA was entitled to any additional documentation, OSEMI eventually stated that it would attempt to produce damages

evidence. Although OSEMI requested two additional weeks of discovery, the district court granted significantly more time, extending discovery by two months. A review of the record leaves no question that the district court extended discovery for the sole purpose of allowing OSEMI to produce damages evidence. And OSEMI was well informed of the necessity to produce damages evidence, including a calculation of damages, in order to proceed to trial on the merits of its claims.

We are not persuaded that OSEMI was caught unaware of the need to timely disclose a damages calculation or inadequately apprised of potential consequences of noncompliance with discovery. The district court put OSEMI on notice at the October 2012 status conference that its discovery responses were insufficient to proceed to trial on the merits of the claims and provided a “firm” extended discovery deadline to allow those disclosures. We conclude that the district court adequately advised OSEMI of the importance of complying with the district court’s orders.

Referring to Braddock’s unsigned affidavit, OSEMI argues that its noncompliance with discovery rules was merely an unintentional, isolated incident of filing approximately 20 minutes late. But the record disproves this assertion and provides ample support for the district court’s finding that OSEMI engaged in an intentional “pattern of failure to fully comply with court imposed deadlines.” OSEMI failed to produce damages evidence by the August 16 discovery deadline. Even after this deadline passed, OSEMI denied that it had failed to meet its discovery obligations. It was not until RWPA renewed its motion to exclude damages evidence and the district court insisted that RWPA was entitled to see a damages calculation that OSEMI agreed to produce

damages evidence, including a calculation of damages. Then, after having been given two additional months to produce that evidence, OSEMI not only failed to timely produce relevant documentation but also failed to produce its president for the December 21 deposition. In sum, the district court's conclusion that OSEMI's noncompliance was repeated and willful is supported by the record on appeal.

OSEMI further asserts that RWPA did not make a sufficient showing of prejudice to justify dismissal. "The primary factor to be considered in determining whether to grant a dismissal with or without prejudice is the prejudicial effect of the order upon the parties." *Firoved*, 277 Minn. at 283, 152 N.W.2d at 368; *see also Housing & Redevelopment Auth. v. Kotlar*, 352 N.W.2d 497, 500 (Minn. App. 1984) (holding no abuse of discretion in dismissal when party failed to produce discovery and prejudice was shown). The moving party seeking dismissal generally has "the burden of showing particular prejudice of such a character that some substantial right or advantage will be lost or endangered." *Frontier*, 788 N.W.2d at 925 (quotation omitted).

A year after it filed its complaint, OSEMI still had not produced a damages calculation. It was not until December 27, 2012, after discovery had closed, that OSEMI produced specific damages evidence. In those redacted documents, OSEMI asserted, for the first time in the course of litigation, nearly \$6 million in damages as a result of RWPA's conduct. Given that trial was scheduled to commence less than one month later, and because critical information was redacted from those documents, we agree with the district court that RWPA was deprived of a meaningful opportunity to defend itself

against the damages claimed by OSEMI. We conclude that RWPA met its burden to prove prejudice sufficient to warrant dismissal as a discovery sanction.

Because OSEMI refused to comply with discovery orders and forfeited the right to a trial of the case on the merits, the district court acted within its discretion by dismissing OSEMI's claims.

II.

OSEMI challenges the denial of its motion for a new trial under Minn. R. Civ. P. 59 or to vacate the judgment under Minn. R. Civ. P. 60.02. We review for an abuse of discretion both a district court's decision whether to grant a new trial under rule 59, *Bosshart v. Comm'r of Pub. Safety*, 427 N.W.2d 720, 722 (Minn. App. 1988), and whether to vacate a judgment under rule 60 of the Minnesota Rules of Civil Procedure, *Northland Temporaries, Inc. v. Turpin*, 744 N.W.2d 398, 402 (Minn. App. 2008), *review denied* (Minn. Apr. 29, 2008).

OSEMI argues that a new trial is warranted because the district court erroneously required that it prove damages with "absolute certainty" instead of reasonable certainty. A new trial may be granted when a decision is contrary to the law. Minn. R. Civ. P. 59.01(g). "Entitlement to a new trial on the grounds of improper evidentiary rulings rests upon the complaining party's ability to demonstrate prejudicial error." *Kroning v. State Farm Auto. Ins. Co.*, 567 N.W.2d 42, 46 (Minn. 1997). In the absence of an indication that the district court exercised its discretion arbitrarily, capriciously, or contrary to legal usage, we are bound by the result. *Id.*

The record lends no support to OSEMI's assertion that the district court required disclosure of "absolute certain" damages in advance of trial. To the contrary, the district court communicated that RWPA was entitled to see how OSEMI calculated its claimed damages so that it could defend against those claims at trial. The district court never suggested that the OSEMI's damages calculation must be absolutely certain.

OSEMI contends that it is entitled to relief from final judgment because its noncompliance with discovery orders was excusable. A party may be relieved from a final judgment for excusable neglect. Minn. R. Civ. P. 60.02(a). A party seeking to vacate a judgment on grounds of excusable neglect must show (1) a reasonable claim on the merits, (2) a reasonable excuse for failure or neglect to act, (3) due diligence after notice of entry of judgment, and (4) that no substantial prejudice will result to the opponent. *See Hinz v. Northland Milk & Ice Cream Co.*, 237 Minn. 28, 30, 53 N.W.2d 454, 456 (1952). Even when each *Hinz* factor is established, relief from judgment is "not absolute" and the decision to grant relief rests "largely within the [district] court's discretion." *Bentonize, Inc. v. Green*, 431 N.W.2d 579, 582 (Minn. App. 1988) (quotation omitted).

OSEMI suggests that we should excuse its noncompliance with the district court's discovery orders because it endured a series of problems during the course of litigation that were out of its control, such as its counsel's health problems and OSEMI's eviction and relocation. But the district court considered OSEMI's circumstances and adequately accommodated OSEMI by granting a lengthy extension of discovery. OSEMI has failed

to offer a reasonable explanation of its subsequent failure to timely disclose its damages evidence.

OSEMI also contends that we should excuse its noncompliance with the district court's discovery orders because that noncompliance was its only mistake and it otherwise "generally participated in the case." Contrary to OSEMI's implicit assertion, the failure to comply with discovery orders is a sufficient basis for dismissal with prejudice. *See* Minn. R. Civ. P. 37.02(b)(3); *Frontier*, 788 N.W.2d at 922.

OSEMI also argues that Braddock was not required under Minn. R. Civ. P. 30.04 to attend the third deposition because he had already been deposed for seven hours. But as the district court noted, and as demonstrated by the record, when breaks were deducted, the combined total time of the first two depositions was less than seven hours. More significantly, the district court noted that OSEMI's counsel had agreed to hold open Braddock's deposition because OSEMI "failed to properly prepare or produce documents related to damages that were requested as part of the Notice of Deposition."

OSEMI has failed to establish that its noncompliance with the district court's discovery orders was due to excusable neglect. Consequently, it was well within the district court's discretion to deny relief from its order and judgment dismissing OSEMI's claims.

Affirmed.