COURT OF APPEALS
DECISION
DATED AND FILED

October 27, 2005

Cornelia G. Clark
Clerk of Court of Appeals

Appeal No. 2004AP2973 **Cir. Ct. No. 2003CV2923**

STATE OF WISCONSIN **IN COURT OF APPEALS**
DISTRICT IV

ED CODY, JR.,

PLAINTIFF-RESPONDENT,

V.

MICHAEL WEYGANDT,

DEFENDANT-APPELLANT.

APPEAL from a judgment of the circuit court for Dane County: MICHAEL NOWAKOWSKI, Judge. *Affirmed*.

Before Lundsten, P.J., Dykman and Deininger, JJ.

¶1 PER CURIAM. Michael Weygandt appeals from a summary judgment requiring him to pay Ed Cody $68,351.76 on a Lemon Law claim. Weygandt argues that the court should have allowed him to withdraw certain admissions he made by default and that, even with those admissions, there were

still disputed material facts requiring trial. We conclude the trial court acted within its discretion when refusing to allow withdrawal of the admissions, and that Weygandt waived any argument that the admissions were not dispositive. Accordingly, we affirm.

BACKGROUND

¶2 Cody alleged that he had bought a custom-made Harley Davidson replica motorcycle from Weygandt which had several defects, including failed brakes, an inoperative speedometer, a dead battery, and a shock absorber that fell off while the vehicle was in operation. When attempts to repair the motorcycle were unsuccessful and Weygandt refused to refund his money, Cody filed suit. Prior to trial, Cody served Weygandt with a request for admissions asking him to acknowledge, among other things, that he was a manufacturer and had sold Cody a new motorcycle with a one-year express warranty; that Cody had returned the motorcycle for a number of repairs which had kept it out of operation for more than thirty days; and that Weygandt had failed to repair the motorcycle in conformity with the express warranty. After Weygandt failed to answer within thirty days, Cody filed a motion for summary judgment. In response to the summary judgment motion, Weygandt moved to withdraw his admissions. The trial court refused to permit withdrawal of the admissions and granted summary judgment based upon them.

DISCUSSION

¶3 When a party fails to respond to a request for admission within thirty days, the matter is deemed admitted under WIS. STAT. § 804.11(1)(b) (2003-04).[1] The court may permit withdrawal of an admission "when the presentation of the merits of the action will be subserved thereby and the party who obtained the admission fails to satisfy the court that withdrawal … will prejudice the party in maintaining the action or defense on the merits." WIS. STAT. § 804.11(2). We review the trial court's decision whether to allow withdrawal of an admission under the erroneous exercise of discretion standard, considering whether the court reasonably applied the proper legal standard to the facts of record. *See* ***Schmid v. Olsen***, 111 Wis. 2d 228, 237, 330 N.W.2d 547 (1983).

¶4 The record here plainly shows that the trial court considered Weygandt's motion to withdraw his admissions under the standard set forth in WIS. STAT. § 804.11(2). Specifically, the court was persuaded that Cody would be prejudiced by withdrawal of the admissions three days before the scheduled trial because he would then need to locate and obtain witnesses from California and Florida on issues which he had believed to be undisputed.

¶5 Weygandt contends that Cody was not prejudiced in that way because he had known from early in the litigation that there might be witnesses with relevant knowledge in other states. That argument is misplaced, however, because Cody had no reason to track down those witnesses after Weygandt had made his admissions. Cody would therefore have been significantly

[1] All references to the Wisconsin Statutes are to the 2003-04 version unless otherwise noted.

disadvantaged if issues on which he had not prepared suddenly became contested again three days before trial. In short, we are satisfied that the trial court's refusal to allow withdrawal of the admissions was a proper exercise of discretion.

¶6 Even given the admissions, Weygandt contends that there were still material facts in dispute requiring trial. In his trial court brief, however, the only basis Weygandt offered for opposing summary judgment was the withdrawal of his admissions, noting that "[t]he admissions go to the core of the merits of this case, which if not withdrawn, would be entirely dispositive." We therefore deem Weygandt to have waived any attempt to contest the basis for summary judgment based on the admissions. *See* ***Schwittay v. Sheboygan Falls Mut. Ins. Co.***, 2001 WI App 140, ¶16 n.3, 246 Wis. 2d 385, 630 N.W.2d 772 ("A party must raise an issue with sufficient prominence such that the trial court understands that it is called upon to make a ruling.").

By the Court.—Judgment affirmed.

This opinion will not be published. *See* WIS. STAT. RULE 809.23(1)(b)5.