

**COURT OF APPEALS
DECISION
DATED AND FILED**

January 23, 2007

A. John Voelker
Acting Clerk of Court of Appeals

NOTICE

This opinion is subject to further editing. If published, the official version will appear in the bound volume of the Official Reports.

A party may file with the Supreme Court a petition to review an adverse decision by the Court of Appeals. See WIS. STAT. § 808.10 and RULE 809.62.

Appeal No. 2006AP506

Cir. Ct. No. 2005CV32

STATE OF WISCONSIN

**IN COURT OF APPEALS
DISTRICT III**

HEYRMAN CONSTRUCTION CO., INC.,

PLAINTIFF-RESPONDENT,

V.

MIDWEST AMUSEMENT PARK, LLC,

DEFENDANT-APPELLANT,

**TERRY A. KRALOVETZ, WATER & WHEELS AMUSEMENT PARK, LLC,
WATER & WHEELS RACEWAY, INC., 22 SHAWANO, LLC AND AUTO
PREP CENTER OF SHAWANO, INC.,**

DEFENDANTS,

NORTHEAST ASPHALT, INC.,

INTERVENING-DEFENDANT.

APPEAL from a judgment of the circuit court for Shawano County:

THOMAS G. GROVER, Judge. *Affirmed.*

Before Cane, C.J., Hoover, P.J., and Peterson, J.

¶1 PER CURIAM. Midwest Amusement Park, LLC, appeals a judgment granting \$80,094.60 to Heyrman Construction Co., Inc., and denying Midwest's motion to withdraw its admissions. Midwest contends the trial court erroneously exercised its discretion by not granting Midwest's motion to withdraw its admissions. Midwest also contends the trial court erroneously exercised its discretion by granting Heyrman's motion for judgment on the basis of Midwest's failure to comply with discovery procedures, including Midwest's failure to appear at a noticed deposition and its failure to timely respond to Heyrman's request for admissions. We disagree and therefore affirm the trial court's judgment.

BACKGROUND

¶2 On February 2, 2005, Heyrman sued Midwest to obtain payment for improvements Heyrman made to Midwest's amusement park and racetrack facilities. On June 30, Northeast Asphalt, Inc., filed a motion to intervene which was later granted. In September, Northeast and Heyrman both served notices of deposition on Midwest. The notices were served by mail on Naomi Isaacson, Midwest's registered agent. This is the address Midwest provided to all of the parties. Nobody from Midwest appeared at the scheduled deposition.

¶3 On October 12 Heyrman served a request to admit.¹ After not receiving a response, Heyrman filed a motion for judgment against Midwest on November 17. At the January 13, 2006 hearing, Midwest filed a motion to

¹ When a party does not answer a request to admit, the matter is admitted. WIS. STAT. § 804.12(1)(a).

withdraw its admissions.² After an evidentiary hearing, the trial court denied the motion to withdraw the admissions and granted judgment to Heyrman.

STANDARD OF REVIEW

¶4 “The decision to allow relief from the effect of an admission is within the trial court’s discretion.” *Mucek v. Nationwide Commc’ns, Inc.*, 2002 WI App 60, ¶25, 252 Wis. 2d 426, 643 N.W.2d 98. The decision to impose a discovery sanction is also discretionary. See *Hudson Diesel, Inc. v. Kenall*, 194 Wis. 2d 531, 541, 535 N.W.2d 65 (Ct. App. 1995). We will uphold the trial court’s discretionary decision if it “examined the relevant facts, applied a proper standard of law, and, demonstrating a rational process, reached a conclusion that a reasonable judge could reach.” *Mucek*, 252 Wis. 2d 426, ¶25.

DISCUSSION

¶5 Midwest first argues Heyrman would not have been entitled to judgment had the court allowed the withdrawal of Midwest’s admissions. Midwest contends the court erroneously exercised its discretion by not considering the statutory factors regarding when to allow the withdrawal of admissions. WISCONSIN STAT. § 804.11(2) states “[t]he court may permit withdrawal or amendment 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 or amendment will prejudice the party in maintaining the action or defense on the merits.” However, the trial court is not obligated to consider the

² All references to the Wisconsin Statutes are to the 2003-04 version unless otherwise noted.

factors set forth in § 804.11(2). See *Mucek*, 252 Wis. 2d 426, ¶35 (“A trial court’s general authority to maintain the orderly and prompt processing of cases provides authority to deny withdrawal, apart from the two factors in Wis. Stat. § 804.11(2).”).

¶6 In this case, the court examined the relevant facts including Midwest’s failure to comply with the discovery statutes in regards to both Heyrman and Northeast. The court found that even if Midwest had not received the original request to admit sent in October, it certainly had notice of the request as a result of the motion Heyrman filed in November. Midwest made no attempt to respond to the request until the hearing in January. Therefore, we conclude the trial court did not erroneously exercise its discretion when it denied Midwest’s request to withdraw its admissions. See *Mucek*, 252 Wis. 2d 426, ¶25.

¶7 Midwest also argues the court erroneously exercised its discretion by granting judgment against Midwest as a sanction for discovery violations under WIS. STAT. § 804.12(4). In order to enter a judgment against a party for discovery violations the trial court must determine the “noncomplying party’s conduct is egregious or in bad faith and without a clear and justifiable excuse.” *Smith v. Golde*, 224 Wis. 2d 518, 526, 592 N.W.2d 287 (Ct. App. 1999) (quoting *Hudson Diesel*, 194 Wis. 2d at 542).

¶8 The court conducted a detailed analysis of Midwest’s conduct supporting the court’s egregiousness determination. First, the court noted Heyrman’s contention that it sent the requests to admit and the notice of deposition to the address provided by Midwest and Midwest did not respond. The court also found that subsequently, Midwest has responded to letters sent to the same address. After listening to all of the testimony the court concluded:

And it does appear to me that Midwest Amusement Park, LLC has basically simply ignored this action in—at least the legal procedures of this action. They have not complied with the Statute regarding discovery in at least two instances with regard to this particular plaintiff and also to other parties.

And their claim that they never got the notice is hard to believe ... I find they at least certainly had notice of the ... Request to Admit or Deny. They knew that this action was being taken since Mr. Herald filed this motion. And it is just today that we now have some response attempted by the defendant to answer the Request to Admit or Deny.

And all of this leads me to believe that this is an egregious breach of procedure. It does warrant the remedy requested by the plaintiff.

¶9 Midwest further argues the testimony of its president that she never received the requests or the notice of deposition provides a clear and justifiable excuse for the delay. However, the trial court heard this testimony and found it “hard to believe.” We give deference to the trial court to judge the credibility of the witnesses. *See* WIS. STAT. § 805.17(2). The trial court further found that Midwest did receive the request to admit in November when it received Heyrman’s motion and still did not attempt to respond until the court date in January. These facts do not show a “clear and justifiable excuse.” Therefore, the record shows the trial court exercised its discretion by examining the relevant facts and applying the proper legal standards. The analysis demonstrates a rational thought process and the court reached a conclusion that a reasonable judge could reach. *Mucek*, 252 Wis. 2d 426, ¶25.

¶10 Finally, Midwest argues the trial court erred by failing to consider other less severe sanctions. The trial court must determine whether less severe sanctions than judgment against a party are available to remedy discovery violations only in cases where the conduct was neither intentional nor in bad faith.

Hudson Diesel, 194 Wis. 2d at 545. The record demonstrates Midwest's conduct in this case was intentional and therefore the court was not required to consider other remedies.

By the Court.—Judgment affirmed.

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

