COURT OF APPEALS
DECISION
DATED AND FILED

June 11, 2008

David R. Schanker
Clerk of Court of Appeals

Appeal No. 2007AP1728 **Cir. Ct. No. 2007CV126**

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

ALAN DORDEL,

PLAINTIFF-RESPONDENT,

V.

ARLYN W. NOFFKE,

DEFENDANT-APPELLANT.

APPEAL from a judgment of the circuit court for Winnebago County: SCOTT C. WOLDT, Judge. *Reversed and cause remanded with directions.*

Before Brown, C.J., Anderson, P.J., and Snyder, J.

¶1 ANDERSON, P.J. In this case we reverse the circuit court's order denying Arlyn W. Noffke's motion for reconsideration seeking to withdraw his admissions and the vacation of summary judgment in favor of Alan Dordel. The

court had granted Dordel summary judgment based solely on Noffke's failure to respond to requests for admissions served thirty-two days after the summons and complaint were filed.[1] The record does not demonstrate that when the court considered the motion to relieve Noffke from his deemed admissions, it gave careful thought whether resolution of the merits of the action would be promoted by withdrawal of the admissions and whether Dordel would be prejudiced by the withdrawal of the admissions. Both considerations are required by law.

¶2 Dordel filed a summons and complaint on January 22, 2007, asserting that Noffke had breached a stipulation resolving earlier litigation over a joint project to construct and sell a house. Dordel sought damages including the balance of $5644 due P&J Kampo Electric, Inc., and $4401.54 he claims to have spent to repair or replace items damaged or taken by Noffke. Noffke, appearing pro se, filed an answer on February 16, 2007, denying all of Dordel's substantive claims.

¶3 Dordel served requests for admissions, containing twenty-three separate factual assertions, on Noffke by mail on February 23, 2007. The due date for Noffke's response was March 28, 2007. *See* WIS. STAT. §§ 804.11(1)(b) and 801.15(5)(a) (2005-06).[2] When Noffke failed to respond, Dordel filed a motion for summary judgment on April 11, 2007, alleging that because Noffke had not responded in a timely manner, all of the factual assertions were deemed admitted;

[1] In ***Bank of Two Rivers v. Zimmer***, 112 Wis. 2d 624, 630, 334 N.W.2d 230 (1983), the supreme court held, "summary judgment can be based upon a party's failure to respond to a request for admission."

[2] All references to the Wisconsin Statutes are to the 2005-06 version unless otherwise noted.

therefore, there were no genuine issues of material fact and he was entitled to judgment.

¶4 A hearing on the motion was conducted on May 4, 2007. Dordel appeared by counsel and Noffke appeared pro se. In response to a question from the court, Noffke admitted that he had not answered the request for admissions. The court went on to rule that pursuant to WIS. STAT. § 804.11(2), the factual assertions in the request for admissions were deemed admitted; therefore, there were no genuine issues of material fact and Dordel was entitled to summary judgment.

¶5 Several days later, Noffke hired an attorney who filed a motion for reconsideration on May 11, 2007, seeking to withdraw the deemed admissions and the vacation of the summary judgment in favor of Dordel. Accompanying the motion was a complete response to the requests for admissions; the affidavit of the owner of P&J Kampo Electric, Inc., averring that the balance due for electrical work was the sole responsibility of Dordel; and Noffke's affidavit denying that he had damaged or taken items.

¶6 The hearing on the motion for reconsideration was conducted on June 5, 2007, and the court denied the motion, explaining:

> I don't think they caught him on a technicality. What pushes it over the top for me is the fact that he had an attorney originally and then the lawsuit is filed and then he tries to go without an attorney; and I think that he was given every opportunity in the world to answer these things because the motion was filed, he was noticed on it, he could have done it, he was noticed of the hearing, he could have been here, he could have got an attorney, and he could have done these things, all before the hearing, and he chose not to do that; and in the interest of finality and the fact that there's absolutely no reason whatsoever why he did not answer, given every opportunity he had, I'm going to deny

> the motion to reconsider it and I'm going to sign the Judgment accordingly. I think there has been prejudice against the plaintiffs in this case and I just—
>
> ….
>
> Everything the plaintiffs have said. I think it's partly due to the attorney's fees, I think its partly due to delay, after the stipulation before with counsel, and the facts are that he didn't comply with the stipulation, and all these things put the plaintiff at a disadvantage in any lawsuit because he keeps on pushing it on. I think that delay is part of prejudice, and that's why I try to push these cases along, so there's not the prejudice to either party and we can get an ultimate resolution; and I think part of this is getting a resolution of this case and not continuing to reopen these matters, so I'm going to deny the request for reconsideration.

¶7 On appeal, Noffke asserts that the circuit court erroneously exercised its discretion when it denied his request to withdraw the admissions. Citing ***Mucek v. Nationwide Communications, Inc.***, 2002 WI App 60, ¶34, 252 Wis. 2d 426, 643 N.W.2d 98, he faults the court for not considering whether the merits of the action will be subserved by withdrawal and whether Dordel established that he would be prejudiced by the withdrawal of the admissions.

¶8 We rely heavily upon ***Mucek*** because it controls the result in this case. Our standard of review is summarized in that case:

> The decision to allow relief from the effect of an admission is within the trial court's discretion. We will uphold a trial court's discretionary act if the court examined the relevant facts, applied a proper standard of law, and, demonstrating a rational process, reached a conclusion that a reasonable judge could reach. At the same time, if a trial court fails to adequately set forth its reasoning, we may independently review the record to determine if it provides a basis for the court's exercise of discretion.

Id., ¶25 (citations omitted).

¶9 ***Mucek*** is notable for NCI's continuing, egregious conduct thwarting the plaintiff's attempts at discovery. ***Id.***, ¶27. Even before the plaintiff filed its first request for admissions, the court had sanctioned NCI for failing to comply with discovery demands by striking its answer, finding it one hundred percent liable for breach of contract and limiting trial to damages. ***Id.***, ¶10. NCI failed to respond to the first request for admissions and, by operation of statute, the factual assertions were deemed admitted. ***Id.***, ¶11. Counsel for NCI then filed a motion seeking either more time to respond to the request or to withdraw the admissions. ***Id.***, ¶12. The court denied the motion because the court considered the failure to reply to be a continuation of NCI's egregious conduct. ***Id.***, ¶13.

¶10 On the first day of trial, NCI finally responded to the first request for admissions and asked the court to reconsider its previous denial of the motion to withdraw the admissions. ***Id.***, ¶14. The trial court denied the request, relying on NCI's history of thwarting Mucek's attempts to get factual information through discovery. ***Id.***

¶11 We explained in ***Mucek*** that when a party fails to respond to a request for admissions, the factual assertions are deemed admitted.

> When a party fails to respond to a request for an admission within thirty days of service, or within a shorter or longer time period set by the court, the matter is admitted. WIS. STAT. § 804.11(1)(b). A matter admitted is conclusively established unless the court permits withdrawal. WIS. STAT. § 804.11(2). A court's authority to permit withdrawal is constrained by the following language found in § 804.11(2):
>
> > The 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.

Mucek, 252 Wis. 2d 426, ¶34.

¶12 We then pointed out that when considering whether to permit a party to withdraw admissions the court should look at two statutory conditions:

> Thus, the statute provides that a court "may" permit withdrawal or amendment only if "the merits of the action will be subserved" and if the party who benefits from the admission "fails to satisfy the court that withdrawal … will prejudice" the benefiting party.

Id.

¶13 In ***Mucek***, we made clear that the statute, WIS. STAT. § 804.11(2), is permissive and "the court 'may' permit withdrawal if both statutory conditions are met, but it is not required to do so." ***Mucek***, 252 Wis. 2d 426, ¶34. In addition to the two statutory conditions, we recognized that a court's "general authority to maintain the orderly and prompt processing of cases" provides additional authority to block withdrawal of admissions, ***id.***, ¶35; this is also a discretionary decision.

¶14 When the court has such a discretionary decision to make, it must explain the reasons for the result on the record:

> A discretionary determination, to be sustained, must demonstrably be made and based upon the facts appearing in the record and in reliance on the appropriate and applicable law. Additionally, and most importantly, a discretionary determination must be the product of a rational mental process by which the facts of record and law relied upon are stated and are considered together for the purpose of achieving a reasoned and reasonable determination…. It is not enough that the relevant factors upon which discretion could have been based may be found obscurely in the record. If the exercise of discretion is to be upheld, it must be demonstrated on the record that those factors were considered in making the discretionary determination.

Hartung v. Hartung, 102 Wis. 2d 58, 66, 306 N.W.2d 16 (1981).

¶15 An examination of the record in this case reveals that the circuit court failed to properly exercise its discretion. It first focused on Noffke's pro se status. "What pushes it over the top for me is the fact that he had an attorney originally and then the lawsuit is filed and then he tries to go without an attorney…." It is a general principal that pro se litigants "must satisfy all procedural requirements" and courts are not required to cut them any slack in complying with procedural rules. ***Waushara County v. Graf***, 166 Wis. 2d 442, 452, 480 N.W. 2d 16 (1992). However, the duty to treat pro se litigants no different than attorneys does not excuse the failure of a court in making a discretionary decision to consider the statutory conditions applicable to the question before it.

¶16 In this case, the court did not consider both statutory conditions. While the court did state that Dordel was prejudiced, it attributed that prejudice to Noffke's delays and his not complying with a stipulation that resolved previous litigation. It did not state how Dordel would be prejudiced if Noffke was permitted to withdraw his admissions. In ***Mucek***, we defined the prejudice that must be established to block the withdrawal of admissions:

> [T]he prejudice contemplated by this statute is not simply that a party would be worse off without the admissions.… Rather, the party benefiting from the admission must show prejudice in addition to the inherent consequence that the party will now have to prove something that would have been deemed conclusively established if the opposing party were held to its admissions.

Mucek, 252 Wis. 2d 426, ¶30 (citations omitted). The court did refer to its authority to regulate its calendar, but did not adequately explain how denying Noffke's motion to withdraw his admissions would help the orderly and prompt

processing of cases. The court failed to explain how "the merits of the action will be subserved" by denying Noffke's motion.

¶17 Because the court failed to make an adequate record we must "independently review the record to determine if it provides a basis for the court's exercise of discretion." *See* ***id.***, ¶25. We conclude that "the merits of the action will be subserved" by permitting withdrawal. In support of his motion, Noffke filed his own evidentiary affidavit in which he disputed all of Dordel's claims. He also filed the affidavit of the owner of P&J Kampo Electric, Inc., stating that Dordel, not Noffke, was liable for the amounts due and owing. From the record before us, it appears there are genuine issues of material fact and the law prefers to afford litigants a day in court and a trial on the issues. *See* ***Village of Fontana-On-Geneva Lake v. Hoag***, 57 Wis. 2d 209, 214, 203 N.W.2d 680 (1973) ("[S]ummary judgment is a drastic remedy which, if granted, deprives the parties of a trial.").

¶18 The only prejudice to Dordel is that he is now going to have to conduct discovery and prove the truth of his assertions. ***Mucek*** requires more. "[T]he prejudice contemplated by this statute is not simply that a party would be worse off without the admissions." ***Mucek***, 252 Wis. 2d 426, ¶30.

¶19 We cannot conclude that denying Noffke's motion to withdraw his admissions would promote the orderly and prompt processing of cases. Dordel served his requests for admissions only thirty-two days after filing this action. He was granted summary judgment ninety-two days after filing this action. Noffke moved timely after Dordel was granted summary judgment and filed a motion to withdraw his admissions within seven days. By the time the court denied Noffke's motion, only 147 days had elapsed after this action was commenced and neither

party had conducted any discovery.[3] We believe that permitting Noffke to withdraw his admissions will not impair the court's calendar or its authority to control the cases on that calendar.

¶20 We conclude that the circuit court erroneously exercised its discretion by failing to analyze on the record if withdrawal of the admission will promote the resolution of the merits of the action and, if Dordel, who benefits from the admissions, will be prejudiced by withdrawal. Our own independent review of the record obliges us to reverse because withdrawal of the admissions will permit resolution of genuine issues of material fact in a trial and withdrawal does not unduly prejudice Dordel.

By the Court.—Judgment reversed and cause remanded with directions.

Not recommended for publication in the official reports.

[3] In ***Mucek v. Nationwide Communications, Inc.***, 2002 WI App 60, ¶28, 252 Wis. 2d 426, 643 N.W.2d 98, we held that

> a trial court may consider a party's history of discovery abuse when deciding whether to permit withdrawal or amendment of admissions, both when determining prejudice under [WIS. STAT.] § 804.11(2) and when otherwise exercising the court's authority to control the orderly and prompt processing of a case.

There is no history of Noffke engaging in discovery abuse because no discovery was conducted.