STATE OF MINNESOTA
IN COURT OF APPEALS
A18-1747

Franz J. Metzger,
Appellant,

vs.

Thomas Stearns, et al.,
Respondents,

Affinity Plus Federal Credit Union, et al.,
Defendants,

Itasca County,
Respondent.

Filed July 1, 2019
Affirmed; motion denied
Bratvold, Judge

Itasca County District Court
File No. 31-CV-17-945

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Considered and decided by Ross, Presiding Judge; Larkin, Judge; and Bratvold, Judge.

U N P U B L I S H E D O P I N I O N

BRATVOLD, Judge

On appeal from summary judgment in a dispute over appellant's access to his real property, appellant raises one issue: whether the district court abused its discretion in deeming him to have admitted respondents' requests for admission based on his failure to respond until over 100 days after the requests were served. Indeed, appellant failed to respond to the requests until one week before the scheduled summary-judgment hearing. Because we conclude that the district court did not abuse its discretion, we affirm.

FACTS

In April 2017, appellant Franz J. Metzger sued respondents Thomas and Kathryn Stearns (the Stearnses) and Itasca County (the county)[1] seeking a declaration of his right to access his property near Bowstring Lake via a road (the road), which he described as 33 feet wide and extending from County Road 173 to the northern boundary of his property.[2] The road is located on the Stearnses' property; Metzger alleged that the county maintained the road until 1973 or 1974, when the county relocated County Road 173. Metzger also alleged that he obtained title to his property in 1987 and had used the road as the "sole access" until the Stearnses blocked use of the road in 2016. Metzger claimed that he had

[1] Collectively, we refer to the Stearnses and the county as respondents.

[2] Metzger also sued Affinity Plus Federal Credit Union, Woodland Bank, and Mortgage Electronic Registration Systems, Inc., but only the Stearnses and the county served answers to Metzger's complaint.

the right to use the road on one of three theories: by implied easement, by common-law dedication of a public road, or by prescriptive easement.

After Metzger and the Stearnses engaged in unsuccessful settlement negotiations, the Stearnses served an answer in September 2017, denying the easement claims and asserting two declaratory-judgment counterclaims. The first counterclaim asserted that if the road was once public, the county intentionally abandoned it at or near the time that County Road 173 was relocated. The second counterclaim asserted that the road is a private road, owned by the Stearnses, and any previous access easement was abandoned when County Road 173 was relocated and the land that Metzger later purchased became accessible directly from County Road 173. In October 2017, the county served an answer, denying the common-law dedication claim, counterclaiming that the county intentionally abandoned the road, and making allegations about the relocation of County Road 173 similar to those made by the Stearnses.

Metzger never filed an answer to the county's counterclaim. The district court issued a scheduling order, which required that discovery be completed by February 15, 2018.

On February 7, 2018, Metzger served an answer to the Stearnses' counterclaims, admitting that the county relocated County Road 173 in 1973 or 1974, denying that the county abandoned the road, denying that the road became a private road, and denying that he accessed his property directly from County Road 173.

Also on February 7, the Stearnses served Metzger with requests for admissions, interrogatories, and requests for document production. Although the method of service is not clear based on the appellate record, Metzger concedes he was served in his brief to this

court. A week later, the county electronically served Metzger with requests for admissions, interrogatories, and requests for document production, which the county also filed with the district court. Metzger, the Stearnses, and the county then jointly agreed to extend the discovery deadline to allow Metzger to respond to the discovery requests. The district court issued an updated scheduling order extending the discovery deadline until April 15, 2018, and setting the case for a court trial on August 20, 2018.

Metzger failed to respond to any of respondents' requests for admission, interrogatories, or requests for production by April 15.

On April 27, 2018, the Stearnses moved for summary judgment, arguing that because Metzger "without explanation" failed to respond to requests for admission, his failure meant "each of the requests being deemed admitted by operation" of Minn. R. Civ. P. 36.01, and, therefore, summary judgment was appropriate. On May 17, the county also moved for summary judgment, arguing that Metzger "never filed an answer to Itasca County's counterclaims, leaving him in default" and that he failed to respond to the county's requests for admission "in the time allowed, and they should be deemed admitted as a result." The county's attorney filed an affidavit, attaching the admission requests, and averring that Metzger had not responded. The county also submitted affidavit evidence, which averred that the road "in controversy is a grassed-over trail, not suitable for the general motoring public" and that the disputed road "was abandoned as a public road, at the time" County Road 173 was relocated. A hearing for the summary-judgment motions was scheduled for June 18, 2018.

More than three weeks after the county's motion was filed and one week before the scheduled summary-judgment hearing, Metzger served and filed responses to the respondents' discovery requests on June 11 and included responses to the requests for admission.

On June 13, Metzger submitted affidavits by his attorney and by Metzger, along with exhibits, in opposition to the summary-judgment motions. The next day, Metzger filed a memorandum of law in opposition to the summary-judgment motions, in which he stated he was no longer pursuing the implied-easement theory. Metzger's memorandum did not discuss respondents' argument that he had admitted their requests for admission by failing to respond, nor did it address the county's argument that he had defaulted on the counterclaim that the public road was abandoned.

On the day of the summary-judgment hearing, Metzger's counsel submitted a second affidavit, titled as an "affidavit of procedural history." Metzger's counsel averred that he "was remiss" in not filing an answer to the Stearnses' counterclaims until February 7, and attested that, on February 7, he had received two notifications from the electronic court filing system and that neither he nor his secretary opened the notice for the Stearnses' discovery requests. Metzger's counsel added that he "was not personally aware" of the discovery requests until the Stearnses filed their summary-judgment motion.[3] Metzger's counsel did not discuss his failure to respond to the county's counterclaim or the county's

[3] On February 19, 2017, the Stearnses' counsel sent Metzger's counsel an email reminding him of the outstanding discovery requests. Metzger's counsel, in a letter to the district court dated June 27, 2018, acknowledged receiving this email.

discovery requests, although he acknowledged being served with the county's discovery requests.

After a hearing on June 18, the district court granted the respondents' motions for summary judgment and dismissed Metzger's complaint with prejudice. The district court's written order described the relevant procedural history and found that Metzger "filed his [discovery] response to both Stearns and Itasca County on June 11, 2018—124 and 117 days after requests were served, respectively."

The district court then considered Minn. R. Civ. P. 36.01, which provides that requests for admissions are "admitted unless within 30 days after service of the request, . . . the party to whom the request is directed serves upon the party requesting the admission a written answer or objection." The district court also stated that Metzger "did not provide any explanation to the [district court] to show cause for his failure to respond," nor did he make "the requisite motion" under rule 6.02 to seek an extension of time to respond to the requests, "either orally or in writing." The district court concluded that "the matters included in the Requests for Admissions are deemed admitted both as to the [Stearnses'] requests and Itasca County's requests." Consequently, "[b]ased on the Request for Admissions being admitted . . . the [district court] finds there are no genuine issues of material fact at issue." Metzger appeals.

D E C I S I O N

I. Metzger's late responses to respondents' requests for admission

Metzger argues that the district court abused its discretion by deeming admitted the respondents' requests for admissions and in not considering his late responses.

Under the Minnesota Rules of Civil Procedure, a "party may serve upon any other party a written request for the admission, for purposes of the pending action only, of the truth of any matters . . . that relate to statements, opinions of fact, or the application of law to fact." Minn. R. Civ. P. 36.01. After a request for admission is made, "[t]he matter *is admitted unless within 30 days after service of the request,* or within such shorter or longer time as the court may allow" the party of whom the request is made denies the request for admission. Minn. R. Civ. P. 36.01 (emphasis added). Once a matter is admitted, whether by the party's affirmative admission or failure to respond, that matter "is conclusively established unless *the court on motion permits* withdrawal or amendment of the admission." Minn. R. Civ. P. 36.02 (emphasis added). The admission of a request makes it unnecessary to prove the matter at trial. *See Phelps v. Benson*, 90 N.W.2d 533, 548 (Minn. 1958).

A district court's decision under rule 36 is discretionary. *Dahle v. Aetna Cas. & Sur. Ins. Co.*, 352 N.W.2d 397, 402 (Minn. 1984). We review a district court's discovery decisions for abuse of discretion. *Erickson v. MacArthur*, 414 N.W.2d 406, 407 (Minn. 1987). We review a district court's summary-judgment decision de novo. *Melrose Gates, LLC v. Moua*, 875 N.W.2d 814, 819 (Minn. 2016).

In his brief to this court, Metzger cites Minn. R. Civ. P. 36.01 and contends that the "primary" issue is whether the district court "should have considered the belated answers to discovery in granting summary judgment." Metzger also asserts that there is "no apparent case law on point," but that *Dahle* is "the closest case."

In *Dahle*, appellant sought survivor's economic loss benefits for herself and her then-unborn child following the death of her husband and the child's father. 352 N.W.2d at 398-99. One of the issues on appeal was the district court's decision to allow appellant's untimely responses to requests for admission.[4] *Id.* at 401. Appellant responded to requests for admission about one month after the 30-day deadline. *Id.* The district court "held that appellant's responses, although untimely, were nevertheless sufficient" and that "[a]ppellant's tardiness, therefore, did not result in admissions." *Id.* The supreme court upheld the district court's decision not to deem the requests admitted. *Id*. The supreme court stated that "admission of such requests by fiat without prejudice to the opposing party is not favored" and that "allowing an extension in these circumstances is within the discretion of the trial court." *Id.*

While *Dahle* instructs that deeming requests admitted is "not favored," we conclude that Metzger's reliance on *Dahle* is misplaced for two reasons. First, *Dahle* upholds the district court's exercise of discretion. *Dahle* held that the district court did *not* abuse its discretion based on the absence of prejudice to the requesting party in allowing the untimely responses. *Id*. *Dahle* did not hold that a district court abuses its discretion by refusing to consider a party's untimely responses. *Id.* Indeed, rule 36.01 states that a request for admission "is admitted" unless a party timely responds by written answer or objection.

[4] Appellant lost on summary judgment in the district court based on a purely legal issue: whether a posthumous child is included in the no-fault act's definition of surviving dependent. *Id*. at 400. On appeal, the supreme court reversed on the legal issue, then considered the respondent's argument that the district court had erred on the discovery issue. *Id.* at 400-02.

Minn. R. Civ. P. 36.01. Here, Metzger concedes that he did not timely respond to the respondents' requests for admission. Thus, under rule 36.01, the district court correctly determined that Metzger's failure to respond to respondents' requests resulted in admissions to those requests.

Second, *Dahle* must be read in light of the effect of an admission under rule 36.02, which provides that "[a]ny matter admitted pursuant to this rule *is conclusively established unless the court on motion* permits withdrawal or amendment of the admission." Minn. R. Civ. P. 36.02 (emphasis added). Rule 36.02 goes on to provide that a district 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 that party in maintaining the action or defense on the merits." Minn. R. Civ. P. 36.02.

It appears that the appellant in *Dahle* asked the district court to withdraw the admissions and allow her untimely responses. 352 N.W.2d at 401. In contrast, Metzger did not ask the district court to allow him to withdraw or amend the admissions, nor did he ask the court to permit the late submission of his responses. Simply put, Metzger does not explain in his brief to this court how the district court abused its discretion in deeming the requests admitted when he did not request that the court do otherwise. [5]

[5] In his comments comparing his case to *Dahle*, Metzger appears to contend that he made a request for "expansion of time." We can find no such request in the record. We note that Metzger failed to order a transcript of the summary-judgment hearing and, consequently, we do not have a record of any oral requests made to the district court. It is the appellant's duty to order a transcript if needed on appeal. Minn. R. Civ. App. P. 110.02.

Metzger appears to contend on appeal that rule 36.01 operates differently when "the request goes to the ultimate issue." Metzger did not raise this issue in the district court and, generally, we do not consider issues for the first time on appeal. *Thiele v. Stich*, 425 N.W.2d 580, 582-83 (Minn. 1988). Even so, rule 36.01 does not support Metzger because it states that requests may "relate to statements, opinions of fact, or the application of law to fact." Minn. R. Civ. P. 36.01. It is true that *Dahle* described the disputed admission as "an ultimate issue," but it also stated that "requests for admission concerning opinions and conclusions are permissible." 352 N.W.2d at 402. *Dahle* went on to echo rule 36.01's requirement that a district court consider prejudice to the requesting party before allowing amendment or withdrawal of an admission. *Id.*

The district court's decision is consistent with *Dahle*. Stating that the appellant's response was "only" untimely, *Dahle* cautioned that courts should not allow litigants to "rely on technicalities to obtain the admission of a critical factual issue [and] subvert[] the information gathering purpose of the discovery rules." *Id.* But Metzger's response was more than untimely, it occurred after discovery had ended, shortly before the summary-judgment hearing, and about two months before the scheduled trial. While the district court did not consider allowing Metzger to withdraw or amend the admissions because Metzger did not make that request, the record likely would have supported a finding of prejudice to respondents.

We conclude that the district court did not abuse its discretion by deeming Metzger to have admitted respondents' requests for admissions under Minn. R. Civ. P. 36.01. Respondents properly served requests for admission upon Metzger on February 7 and 14.

The parties then agreed to extend the discovery schedule to allow Metzger time to respond to the requests, which is reflected in the district court's extension of the discovery schedule. Discovery closed under the extended schedule on April 15, yet Metzger failed to respond to the admission requests. Respondents then filed separate motions for summary judgment, which relied on rule 36.01, stated that they had received no response from Metzger, and argued that the requests were deemed admitted.

In his brief to this court, Metzger acknowledges that he was served with the respondents' requests for admission in February 2018, but failed to respond until June 11, more than 100 days after the requests were served and just one week before the summary-judgment hearing. Metzger did not provide any reason for his delay in response other than initially overlooking the Stearnses' requests for admission. Metzger also did not move the district court to accept the late responses or to permit him to withdraw or amend the admissions, as authorized by rule 36.02.[6]

In light of the procedural history, Metzger's extremely dilatory response to respondents' requests for admissions, and his failure to ask the district court to grant relief

[6] The district court stated that Metzger did not ask to extend the time to respond to respondents' requests under rule 6.02, which allows the court to grant an extension "upon motion made after the expiration of the specified period permit the act to be done where the failure to act was the result of excusable neglect." Minn. R. Civ. P. 6.02; *see also Lake Superior Ctr. Auth. v. Hammel, Green & Abrahamson, Inc.*, 715 N.W.2d 458, 471 (Minn. App. 2006) (holding that a district court's extension of time under rule 6.02 is discretionary), *review denied* (Minn. Aug. 23, 2016). The district court also stated that making such a motion is "the first step," and noted that a litigant must establish excusable neglect to actually obtain an extension. The district court's reasoning under rule 6.02 provides an alternative reason to affirm, but we need not reach the issue because we affirm under rule 36.

from the operation of rule 36, we conclude that the district court did not abuse its discretion by deeming admitted respondents' requests for admissions. Because Metzger's brief to this court only challenges the district court's decision not to consider his late responses, we affirm the district court's grant of summary judgment.[7]

II. Motion for sanctions

After this appeal was filed, the Stearnses served Metzger with a motion seeking sanctions for filing a frivolous appeal, in order to give Metzger the opportunity to withdraw. Metzger did not withdraw the appeal. The Stearnses filed their brief in this court and separately filed a motion for sanctions and attorney fees and costs incurred by responding to Metzger's appeal. Metzger did not respond to the motion or submit a reply brief on the merits to this court. Consideration of the motion for sanctions was deferred to the panel by order of this court.

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[7] Metzger does not argue in his brief to this court that the record establishes genuine issues of material fact. Even assuming the issue were before us, we would affirm after considering each of Metzger's claims. First, the district court granted summary judgment on Metzger's prescriptive-easement claims. By operation of rule 36.01, Metzger admitted that he had "not used the . . . road to enter [his] Property for any purpose for a period of 15 continuous years or more." A prescriptive easement is based upon "prior continuous use" and "require[s] a showing that the property has been used in an *actual*, open, *continuous*, exclusive, and hostile manner for 15 years." *Rogers v. Moore*, 603 N.W.2d 650, 656-57 (Minn. 1999) (emphasis added).

Second, the district court granted summary judgment on Metzger's claim of a public road by common-law dedication. By operation of rule 36.01, Metzger admitted that the county had not performed any maintenance on the road since the 1970s, had replaced the road with a relocated county road, and that the county was not "responsible for keeping the [road] open for use and travel by the general motoring public." When we compare these admissions to the five elements for abandonment of a public street by a municipality, we conclude that summary judgment was appropriate. *See Halverson v. Village of Deerwood*, 322 N.W.2d 761, 767 (Minn. 1982) (outlining the elements of public abandonment of a road).

Under Minn. Stat. § 549.211, attorneys certify, when submitting "a pleading, written motion, or other paper" that:

> (1) it is not being presented for any improper purpose, such as to harass or to cause unnecessary delay or needless increase in the cost of litigation;
> (2) the claims, defenses, and other legal contentions are warranted by existing law or by a nonfrivolous argument for the extension, modification, or reversal of existing law or the establishment of new law.

Minn. Stat. § 549.211, subd. 2(1)-(2) (2018). "If, after notice and a reasonable opportunity to respond, the court determines that subdivision 2 has been violated, the court may . . . impose an appropriate sanction upon the attorneys, law firms, or parties that have violated subdivision 2 or are responsible for the violation." Minn. Stat. § 549.211, subd. 3 (2018).

A party seeking sanctions must file a separate motion that describes the conduct warranting sanctions, and provides the responding party with a 21-day safe-harbor period to withdraw the challenged document, motion, or paper. Minn. Stat. § 549.211, subd. 4(a) (2018). A court may "if imposed on motion and warranted for effective deterrence, [enter] an order directing payment to the movant of some or all of the reasonable attorney fees and other expenses incurred as a direct result of the violation." Minn. Stat. § 549.211, subd. 5(a) (2018).

"The decision of whether to award attorneys' fees for frivolous claims rests within this court's broad discretion." *Leonard v. Nw. Airlines, Inc.*, 605 N.W.2d 425, 433 (Minn. App. 2000), *review denied* (Minn. Apr. 18, 2000). The Minnesota Supreme Court has cautioned that sanctionable conduct "should be construed somewhat narrowly—while

some sanctionable conduct might under these circumstances escape discipline, that is preferable to deterring legitimate or arguably legitimate claims." *Uselman v. Uselman*, 464 N.W.2d 130, 142 (Minn. 1990).[8]

The Stearnses claim that Metzger's appeal is "being made in bad faith; . . . and is intended to cause unnecessary delay and a needless increase in the cost of this litigation." The Stearnses further contend that Metzger's arguments on appeal are "frivolous" and "not warranted by existing law." We are not persuaded. In *Fed. Home Loan Mortg. Corp. v. Mitchell*, this court did not impose sanctions against appellants' attorney even though "this court has rejected the arguments raised by the [appellants'] attorney more than 20 times in unpublished and order opinions" and he "continue[d] to bring identical claims to this court." 862 N.W.2d 67, 73 n.2 (Minn. App. 2015), *review denied* (Minn. June 30, 2015). Instead, we noted that "[f]urther iterations of frivolous arguments rejected as meritless by this court may compel this court to consider the full extent of its sanctioning authority." *Id.*

In support of his position on appeal, Metzger's attorney cited one case and, in response to the sanctions motion, failed to respond. In light of our broad discretion and the supreme court's direction to narrowly construe what conduct should be sanctioned, we

[8] Although *Uselman* has been superseded by statute, its reasoning remains valid. *See Radloff v. First Am. Nat'l Bank of St. Cloud, N.A.*, 470 N.W.2d 154, 159 (Minn. App. 1991), *review denied* (Minn. July 24, 1991). In *Uselman*, the Minnesota Supreme Court applied section 549.21 as it existed prior to a 1986 amendment. *See id.* Appellate courts continue to generally rely on *Uselman* for its reasoning that was not affected by subsequent statutory changes. *See, e.g.*, *Collins v. Waconia Dodge, Inc.*, 793 N.W.2d 142, 145-46 (Minn. App. 2011); *Buscher v. Montag Dev., Inc.*, 770 N.W.2d 199, 211 (Minn. App. 2009); *Radloff*, 470 N.W.2d at 159.

conclude that Metzger's appeal is not frivolous and has not been presented for an improper purpose. We therefore decline to award sanctions against Metzger or his attorney.

Affirmed; motion denied.