COURT OF APPEALS
DECISION
DATED AND FILED

November 18, 1997

Marilyn L. Graves
Clerk, Court of Appeals
of Wisconsin

No. 96-2370

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

LAWANDA MCDOWELL, OLLIE MCDOWELL AND JOYCE MCDOWELL,

PLAINTIFFS,

V.

MILWAUKEE TRANSPORT SERVICES, INC.,

DEFENDANT-APPELLANT,

SHAMALETTA SMITH,

DEFENDANT-RESPONDENT.

APPEAL from a judgment of the circuit court for Milwaukee County: JACQUELINE SCHELLINGER, Judge. *Affirmed.*

Before Wedemeyer, P.J., Schudson and Curley, JJ.

PER CURIAM. Milwaukee Transport Services, Inc. (MTS) appeals from a judgment granting partial summary judgment to codefendant Shamaletta

Smith after MTS failed to respond to Smith's requests for admission within the thirty-day time limit prescribed by § 804.11(1)(b), STATS.[1] MTS raises three issues; we affirm.

Smith was the driver of an automobile involved in an accident with an MTS bus. On May 5, 1995, Smith's passengers filed suit against Smith and MTS. On December 22, 1995, Smith filed a cross-claim and, on February 19, 1996, served MTS with requests for admission, requesting MTS to admit:

> 1. That the damage to the vehicle owned by Shamaletta Smith as a result of the accident on August 8, 1994 was $3,209.60….
>
> 2. That the damage was caused by the negligence of the driver of the Milwaukee County Transit bus.
>
> 3. That defendant does not dispute that the accident of August 8, 1994 occurred as a result of the negligence of the Milwaukee County Transit driver.
>
> 4. That Shamaletta Smith was Zero (0) percent negligent on August 8, 1994 during the accident with the Milwaukee County Transit bus driver.

On April 12, 1996,[2] MTS responded, and included a letter to Smith's counsel stating, *inter alia*:

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[1] Section 804.11(1)(b), STATS., provides, in pertinent part:

> Each matter of which an admission is requested shall be separately set forth. The matter is admitted unless, within 30 days after service of the requests, or within such shorter or longer time as the court may allow, the party to whom the requests is directed serves upon the party requesting the admission a written answer or objection addressed to the matter, signed by the party or attorney, but, unless the court shortens the time, a defendant shall not be required to serve answers or objections before the expiration of 45 days after service of the summons and complaint upon the defendant ....

> Through inadvertence, unintentionally, I did not complete the response in 30 days, but have complied immediately as the matter was brought to my attention.
>
> I request that you allow the additional time. The case is still months away from trial.

Smith did not permit the additional time. Instead, on April 25, 1996, Smith moved for partial summary judgment against MTS. On June 17, 1996, pursuant to § 804.11(1)(b), STATS., the trial court deemed the matters within Smith's requests for admission admitted and then, based on those admissions, granted Smith's motion for partial summary judgment. On June 28, 1996, MTS moved to reopen the partial summary judgment on the grounds of excusable neglect, pursuant to § 806.07(1)(a), STATS., and failure to compel discovery, pursuant to § 804.12(2), STATS. On July 22, 1996, the trial court denied MTS's motion to reopen.

MTS first argues that the trial court erroneously exercised discretion by not extending the time for its response to Smith's requests for admission. Claiming that the scheduling order supersedes the statutory time limit set forth in § 804.11(1)(b), STATS., MTS contends that the trial court improperly denied its requests for an extension. We disagree.

Failure to respond to a party's requests to admit within the prescribed time period can be a costly error. *See* ***Bank of Two Rivers v. Zimmer,*** 112 Wis.2d 624, 334 N.W.2d 230 (1983); *see also* ***Schmid v. Olsen,*** 111 Wis.2d 228, 330 N.W.2d 547 (1983). Once the statutory time period has run, the requests to admit are deemed admitted. *See* § 804.11(1)(b), STATS. The decision to allow relief

[2] MTS's responses were postmarked April 12, 1996 – some fifty-three days after the February 19, 1996, service date. Although the parties give different accounts of the length of this time period, an exact determination is unnecessary for the resolution of this appeal.

from the effect of an admission is discretionary. *See* ***Schmid***, 111 Wis.2d at 237, 330 N.W.2d at 551. This court will not find an erroneous exercise of discretion if the trial court examined the relevant facts, applied a proper standard of law, and using a demonstrated rational process, reached a conclusion that a reasonable judge could reach. *See* ***Loy v. Bunderson***, 107 Wis.2d 400, 414-15, 320 N.W.2d 175, 184 (1982).

As one commentator has noted:

> Section 804.11 is self-executing. If the answering party fails to serve written answers or objections to the requests for admission within the time allowed by section 804.11 (*and he or she has not obtained an extension of time or a protective order from the court*), the requests are deemed admitted…. [And u]nless the court permits the deemed answers to be withdrawn, the matter admitted is conclusively established for all purposes, including summary judgment and trial.

Jeffrey S. Kinsler, *Requests for Admission in Wisconsin Procedure: Civil Litigation's Double-Edged Sword*, 78 MARQ. L. REV. 625, 655 (1995) (emphasis added) (footnotes omitted).

Nevertheless, MTS contends that the trial court should have exercised discretion by extending the time allotted for response to Smith's requests for admission. However, as the trial court emphasized:

> If 804.11 has no teeth, if people ignore a requests to admit or answer them late, I mean, one of the reasons for this is to get down to the issues in the case. And it actually is a duty of judicial economy to have requests for admission narrow the issues, and failure to answer them in a timely fashion without a request for an extension of time to answer, either from the attorney whose [sic] proposed them or from the court, sends the message that the court doesn't take seriously the discovery statutes.

In responding to counsels' arguments, the trial court added:

> Under 804.11, the court may, in fact, grant additional time for answers to be given, *but the court should be asked for that time*. As soon as a mistake has been known, to the party who made the error, there should be an effort made to try to secure the additional time from the party who proposed the requests for admission, and *if there can't be successful resolution, the court should be notified*.

(Emphasis added.) Thus, although the trial court noted that an extension might have been warranted had MTS applied for relief prior to the June 17 motion hearing on summary judgment, it concluded that an extension was not appropriate because MTS had failed to apprise the court of its mistake and its inability to resolve the problem with Smith's counsel.[3] Therefore, we conclude that the trial court properly exercised discretion by refusing to grant MTS relief.

MTS next argues that the trial court erred in granting partial summary judgment based on the requests. Again, we disagree. This court reviews summary judgment decisions *de novo*, applying the same standards employed by the circuit court. *See* ***Ervin v. City of Kenosha***, 159 Wis.2d 464, 479, 464 N.W.2d 654, 660 (1991). We must affirm summary judgment if "the pleadings, depositions, answers to interrogatories, *and requests on file*, together with the affidavits, ... show that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law." ***Bank of Two Rivers***, 112 Wis.2d at 631, 334 N.W.2d at 233-34 (emphasis added). A request for admission can seek an admission which would be dispositive of the entire case.

[3] MTS neither contacted the trial court to obtain additional response time in the period between Smith's motion filed on April 25, 1996, and the motion hearing of June 17, 1996, nor moved the court for withdrawal or amendment of its requests pursuant to § 804.11(2), STATS. Section 804.11(2), STATS., provides, in pertinent part: "(2) EFFECT OF ADMISSION. Any matter admitted under this section is conclusively established unless the court on motion permits withdrawal or amendment of the admission ...."

See ***id.*** Summary judgment can be based upon a party's failure to respond to a requests for admission. *See* ***id.*** at 630, 334 N.W.2d at 233.

MTS's failure to timely respond to Smith's requests for admission resulted in the admission of material facts favorable to Smith – admissions which conclusively established that Smith was entitled to partial summary judgment as a matter of law. Once this occurred, the trial court was authorized to grant summary judgment. *See* § 802.08, STATS.; *see also* ***Bank of Two Rivers***, 112 Wis.2d at 630, 334 N.W.2d at 233.

Finally, MTS argues that Local Rule 343 requires a party to file a motion to compel prior to moving for summary judgment on the basis of an opponent's failure to timely respond to its requests for admission. The trial court rejected this argument, stating:

> The Court finds that [this] rule [is] not applicable to a situation where we have requests to admit. This isn't a failure to provide discovery which is needed by the other side in order for it to conduct it's [sic] case. This is a completely different creature.

MTS has presented no authority that Local Rule 343 requires a motion to compel prior to moving for summary judgment with respect to admissions deemed admitted pursuant to § 804.11(1)(b), STATS. Accordingly, we affirm the partial summary judgment of the trial court.

By the Court.–Judgment affirmed.

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