

**COURT OF APPEALS
DECISION
DATED AND FILED**

December 29, 1998

Marilyn L. Graves
Clerk, Court of Appeals
of Wisconsin

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

No. 98-1289

STATE OF WISCONSIN

IN COURT OF APPEALS
DISTRICT III

**RONALD L. OHLMANN, WISCONSIN LABORERS' HEALTH
AND PENSION FUND, AND STATE OF WISCONSIN
DEPARTMENT OF JUSTICE-OFFICE OF CRIME VICTIM
SERVICES,**

PLAINTIFFS-RESPONDENTS,

V.

JAMES ROBLE,

DEFENDANT-APPELLANT.

APPEAL from a judgment and orders of the circuit court for Lincoln County: ROBERT O. WEISEL, Reserve Judge, and J. MICHAEL NOLAN, Judge. *Affirmed.*

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

PER CURIAM. James Roble appeals two court orders imposing sanctions for Roble's discovery violations and failure to respond to a request for

admissions: (1) striking Roble's answer; and (2) deeming admitted the claimed past medical expenses plaintiff incurred. Roble contends that the trial court erroneously exercised its discretion by striking his answer for failing to answer Ohlmann's interrogatories and request to produce. Roble further contends the trial court erroneously exercised its discretion when it deemed admitted claimed past medical expenses as a sanction for Roble's failure to respond to Ohlmann's request for admissions. Because we conclude that the trial court properly sanctioned Roble, we affirm the judgment.

Ron Ohlmann and James Roble were both employed on a construction project in Lincoln County. One of the equipment companies hosted a party at a local bar for all employees working on the project. The host company supplied free food and drink. Ohlmann and his fiance, Darlene Jaeger, attended as did Roble. Ohlmann contends that, late into the party while he was in the men's room urinating, Roble hit him three times in the face using brass knuckles in an unprovoked and intentional attack. Ohlmann contends he suffered serious injuries as a result of this attack, including a broken jaw in two places, several broken teeth, and cuts and bruises. Roble retained an attorney and filed an answer contending that Ohlmann's conduct provoked the fight and that Roble's blow was struck in self-defense.

Ohlmann served interrogatories and requests to produce upon Roble's counsel but Roble failed to respond despite his counsel's efforts. Roble's counsel eventually moved for and was granted permission to withdraw from representation, citing Roble's failure to respond. Ohlmann eventually brought a motion to compel answers to interrogatories and request for production. At a motion hearing, the trial court, Judge Weisel presiding, ordered Roble, who was then still represented by counsel, to respond within twenty days and imposed a

contingent sanction that failure to respond within this time would result in the trial court striking Roble's answer. Ultimately, Ohlmann brought a motion to strike Roble's answer and for default judgment. At a hearing on the motion to strike, Roble contended that his failure was the result of the amount of travel he is required to do during construction season making communication with his attorney difficult, his lack of sophistication in legal matters, and depression resulting from an unspecified traumatic event that occurred during this time. The trial court, Judge Nolan presiding, struck Roble's answer to Ohlmann's complaint. The effect of the court order precluded Roble from defending the action based on his affirmative defense that Ohlmann provoked the fight and Roble struck in self-defense.

Ohlmann subsequently served a request for admissions on Roble who was now appearing pro se. Roble failed to respond. Ohlmann brought a motion seeking to have the request for admissions deemed admitted based on Roble's failure to respond. At the motion hearing just before trial at which Roble failed to appear, the trial court granted the motion and deemed admitted the reasonable necessity for and amount of Ohlmann's claimed medical bills. Accordingly, the only issue remaining for trial was the amount of compensatory and punitive damages.

The jury verdict resulted in a judgment of \$50,000 in compensatory and punitive damages. Roble filed a post-verdict motion seeking a new trial on the grounds that the trial court erroneously exercised its discretion in striking Roble's answer and in deeming admitted the request for admissions. Because the post-verdict hearing was held after the notice of appeal was filed, this court ordered that the review of the orders on appeal would be limited to the information presented to the trial court at the time it made the decisions in question.

Roble contends that the trial court erroneously exercised its discretion by imposing sanctions based upon his failure to respond to discovery demands and his failure to respond to a request for admissions. A trial court's decision to impose sanctions for violation of discovery demands is submitted to the trial court's exercise of discretion and will be sustained if the trial court has examined the relevant facts, applied a proper standard of law, and, using a rational process in reaching a conclusion, reached a conclusion that a reasonable judge could reach. *Paytes v. Kost*, 167 Wis.2d 387, 393, 482 N.W.2d 130, 132 (Ct. App. 1992). Here, the trial court's striking of the answer operated to preclude Roble from defending the action based upon his affirmative defense and was the equivalent of granting judgment to the plaintiff as to liability. Striking an answer is appropriate only when the noncomplying party's conduct is either egregious or in bad faith and was without clear and justifiable excuse. *Hudson Diesel, Inc. v. Kenall*, 194 Wis.2d 531, 541-42, 535 N.W.2d 65, 69 (Ct. App. 1995). Therefore, this court reviews Roble's failure to respond to the interrogatories and request to produce to determine whether his conduct was either egregious or in bad faith and was without justifiable excuse. If the record contains a reasonable basis for such determination, the sanctions imposed will be sustained even though the trial court may not have specifically articulated the basis for its determination. *Paytes*, 167 Wis.2d at 394, 482 N.W.2d at 132. The trial court has discretion to deem information admitted based on Roble's failure to respond to demands to admit or deny. Section 804.11(1)(b), STATS.

In this case, Roble admits that he failed to respond to a reasonable discovery request for answers to interrogatories and a request to produce. Roble also admits he failed to respond to a court order. He therefore assumes the burden of establishing justification for his noncompliance. See *Carlson Heating v.*

Onchuck, 104 Wis.2d 175, 181, 311 N.W.2d 673, 676 (Ct. App. 1981). Roble contends that his failure to respond to discovery demands was the result of: (1) a traumatic event which recently occurred and left him depressed; (2) his lack of sophistication in legal matters; and (3) the frequent moves required by his employment which made communicating with his attorney difficult. None of these reasons are a sufficient explanation for Roble's failure to respond to proper discovery demands. Roble does not identify the nature of the traumatic incident that occurred to him nor does he explain how the depression resulting from this incident prevented him from complying with the discovery requests. Roble further fails to explain his difficulty in communicating with a lawyer that he retained and who presumably was available by phone or through the mail for the necessary purposes of preparing an appropriate response to the discovery demands. Neither his lack of sophistication, particularly at the time he was represented by counsel who fully explained the consequences of a failure to respond to Roble, nor his frequent moves are sufficient justification for his failure to comply with the discovery requirements imposed upon him by statute.

In sum, Roble did not respond to his own attorney's repeated attempts to secure responses to the interrogatories and request for production. He was accorded numerous opportunities to respond. A period of three months passed between the time the written interrogatories and request to produce were submitted and the hearing at which the court ordered Roble to respond within twenty days. Roble did not respond to the court's order. Another four months passed before the court finally ordered Roble's answer struck for noncompliance. Finally, Roble's explanations are insufficient justification for his failure to comply. Consequently, this court concludes that the record contains a reasonable basis for a determination that Roble's conduct was egregious and without

justifiable excuse. This court concludes the trial court properly imposed the sanction striking Roble's answer based upon his bad faith failure to respond to the discovery request.

Roble's protracted and continued failure to respond to a properly filed discovery demand and court order constitutes egregious conduct which was without justifiable excuse and the trial court's striking of Roble's answer was an appropriate sanction in response to such conduct. The trial court's deeming past medical expenses as admitted for Roble's failure to respond to a request for admission was a reasoned and appropriate sanction well within the court's discretion. The judgment is therefore affirmed.

By the Court.—Judgment and orders affirmed.

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

