COURT OF APPEALS
DECISION
DATED AND FILED

November 10, 2010

A. John Voelker
Acting Clerk of Court of Appeals

Appeal No. 2009AP2597 **Cir. Ct. No. 2007CV2962**

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

FLOYD LOPER,

PLAINTIFF-APPELLANT,

V.

DR. ASHOK KUMAR AND INJURED PATIENTS AND FAMILIES COMPENSATION FUND,

DEFENDANTS-RESPONDENTS.

APPEAL from an order of the circuit court for Waukesha County: KATHRYN W. FOSTER, Judge. *Affirmed*.

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

¶1 PER CURIAM. In this medical malpractice action, Floyd Loper appeals from an order denying his motion to withdraw admissions and granting

summary judgment to Ashok Kumar, M.D., and the Injured Patients and Families Compensation Fund ("the Fund"). Seeing no error, we affirm.

¶2 On August 18, 2004, Dr. Kumar performed a left femoropopliteal in situ saphenous vein bypass graft to surgically treat Loper's severe peripheral vascular disease. According to the complaint, Dr. Kumar—angry because Loper was taken outside in a wheelchair to have a cigarette—discharged Loper from the hospital the day after surgery without antibiotics or instructions, then failed to properly respond to Loper's repeated complaints of fever, foul wound drainage and escalating pain. Loper was rehospitalized in critical condition with a staphylococcus infection. After a second femoropopliteal bypass on August 31, Loper alleged that the pain continued, he was unable to walk and Dr. Kumar told him his choices were to live with it or undergo an amputation.

¶3 Loper sought a second opinion. On January 3, 2005, the second surgeon performed an ilioprofunda and below-the-knee femoropopliteal bypass with an artificial graft. While rehabilitating in a nursing home, he fell and fractured his hip. Loper alleged that Dr. Kumar's substandard care led to the infection, surgeries, pain and compromised mobility that followed.

¶4 Loper timely filed this lawsuit.[1] Then a pattern of delinquency set in. On August 23, 2007, Loper was served with Dr. Kumar's First Set of Written Interrogatories and Request for Production of Documents ("First Set of Discovery"). Despite Loper's repeated assurances that the responses were forthcoming, Loper did not provide them until September 10, 2008, nearly a full

[1] We use the parties' names but recognize that it is their attorneys who are responsible for the filings and responses.

year after they were due. *See* WIS. STAT. §§ 804.08(1)(b) and 804.09(2) (2007-08).[2]

¶5 On February 24, 2009, Loper was served with Dr. Kumar's Second Set of Discovery and First Set of Requests for Admissions. One admission requested was that Dr. Kumar "acted reasonably and within the appropriate standard of care in his treatment of the plaintiff." Loper did not respond. He later explained that he thought the Second Set of Discovery duplicated the First, and so overlooked the attached Requests for Admissions. Dr. Kumar moved for summary judgment on April 6. The Fund joined the motion.

¶6 On June 2, 2009, Loper filed with the court a twenty-page document entitled "Exhibit A." Unresponsive to the summary judgment motion, "Exhibit A" comprised in its entirety the cover letter for the September 10, 2008 responses to the First Set of Discovery; the responses; a multi-page, single-spaced summary of Loper's condition in his own words; a blank page; and the first page of the "Opinion of Richard B. Lewan, MD," Loper's retained expert.

¶7 The summary judgment motion hearing was held on June 22. That same day, Loper's counsel filed an affidavit dated June 2 that references the "Exhibit A" filed three weeks earlier. He averred that he did not answer Dr. Kumar's February 24 Second Set of Discovery and First Set of Requests for Admissions "in a timely manner"[3] because, contrary to Waukesha County Circuit

[2] All references to the Wisconsin Statutes are to the 2007-08 version unless otherwise noted.

[3] Loper includes in the appendix to his brief a document entitled "Motion to Allow for Filing of Answers to Request for Admissions." The motion is dated June 2, 2009 but bears no date stamp indicating it was filed in the circuit court. Further, it is not in the record on appeal or entered in the automated circuit court records (CCAP).

Court Rule: Civil 3.4, Dr. Kumar's counsel never notified him that Dr. Kumar expected a response, despite their numerous conversations about setting Dr. Kumar's and Dr. Lewan's depositions. He claimed he thus was "surprise[d]" when Dr. Kumar and the Fund "unilaterally cancelled" Dr. Lewan's scheduled deposition and moved for summary judgment.

¶8 Loper also claimed at the motion hearing to have prepared and faxed a brief and affidavit in response to the summary judgment motion. The court and opposing counsel denied receiving it. The court ordered Loper to serve the court and counsel with all pleadings and submissions addressing the motion, to pay defense counsels' associated costs by June 24, and, depending upon the outcome of the summary judgment motion, to produce Dr. Lewan for deposition by September 15. The court warned Loper that, the serious nature of the case notwithstanding, failure to meet those conditions would result in dismissal.

¶9 Loper did not pay the costs and while he served Dr. Kumar, he did not serve the Fund with his responsive pleadings as ordered. On July 10, Dr. Kumar moved to dismiss. Loper did not respond. The Fund joined Dr. Kumar's motion. On August 7, the court held a hearing on the defendants' motions to dismiss and for summary judgment. The court construed Loper's brief opposing summary judgment as a motion to withdraw admissions.

¶10 The court observed that the procedural history was "replete with delay [and] nonresponses" by Loper's counsel, "even the nonresponse to this motion to dismiss today." The court deemed the requests for admission admitted by Loper's failure to reply as required by WIS. STAT. § 804.11(1)(b), such that no disputed issues of fact existed for trial and that Loper's dilatory pattern and the "strong public preference [for] the orderly administration of justice" warranted

summary judgment in the defendants' favor. It also ruled that the grant of summary judgment rendered the motion to dismiss moot. Loper appeals.

¶11 The issues on appeal spring from Loper's undisputed failure to respond to Dr. Kumar's Requests for Admissions. A request can seek admissions to matters that are dispositive of the entire case. ***Bank of Two Rivers v. Zimmer***, 112 Wis. 2d 624, 630, 334 N.W.2d 230 (1983). The failure to reply is construed as an admission. *See* WIS. STAT. § 804.11(1)(b). "Any matter admitted under this section is conclusively established unless the court on motion permits withdrawal or amendment of the admission." Sec. 804.11(2). Loper's admission that Dr. Kumar "acted reasonably and within the appropriate standard of care" was dispositive of Loper's claim. Loper argues that the circuit court erred in not allowing him to withdraw the admission. We disagree.

¶12 Whether to permit withdrawal of an admission under WIS. STAT. § 804.11 lies within the circuit court's discretion. ***Luckett v. Bodner***, 2009 WI 68, ¶31, 318 Wis. 2d 423, 769 N.W.2d 504. We will uphold the order if the circuit court applies a proper standard of law, examines the relevant facts and, using a rational process, reaches a conclusion that a reasonable court could reach. Id. The court may permit withdrawal if both of two conditions are met: "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 … will prejudice the party in maintaining the action or defense on the merits." WIS. STAT. § 804.11(2); *see also* ***Luckett***, 318 Wis. 2d 423, ¶¶27, 30.

¶13 Even if both statutory conditions are met, a court is not required to permit withdrawal. *See* ***Mucek v. Nationwide Commc'ns, Inc.***, 2002 WI App 60, ¶34, 252 Wis. 2d 426, 643 N.W.2d 98. Apart from the two statutory factors, a

circuit court may deny withdrawal pursuant to its general authority to maintain the orderly and prompt processing of cases. ***Id.***, ¶35.

¶14 Here, the court sternly admonished Loper at the June 22 summary judgment motion hearing that he had "used up every ounce of discretion in [his] favor." Still, it put off deciding the motion so as to give him another chance while clearly cautioning him that failure to comply with its specific orders would result in dismissal. Loper continued his dilatory ways.

¶15 Loper posits that his failure to answer the request for admissions should be of no consequence because Dr. Lewan's "detailed 3-page report" specifically stated how Dr. Kumar's treatment fell below the standard of care. The full report is not part of the record. Loper filed only the first page, which simply gives Dr. Lewan's credentials in family and internal medicine and begins to summarize the case. It contains no expert opinions. We are limited to reviewing only matters that were of record in the trial court. *See* ***South Carolina Equip., Inc. v. Sheedy***, 120 Wis. 2d 119, 125, 353 N.W.2d 63 (Ct. App. 1984). Accordingly, we cannot consider the full report Loper first supplies in his appellate appendix. *See* ***id.*** at 125-26. We have no choice but to hold fast to that rule here because Loper was put on notice at the June 22 hearing that the court did not have Dr. Lewan's complete report yet still did not remedy that lack.

¶16 Given the court's authority to control the prompt and orderly administration of justice, we conclude that Loper's history of dilatory conduct and discovery abuses and the court's concern for judicial order made the decision not to allow him to withdraw his admission a proper exercise of discretion. *See* ***Mucek***, 252 Wis. 2d 426, ¶28.

¶17 We turn to the grant of summary judgment. We review de novo a circuit court's rulings on summary judgment and apply the governing standards just as the circuit court did. ***Green Spring Farms v. Kersten***, 136 Wis. 2d 304, 315-17, 401 N.W.2d 816 (1987). Summary judgment must be granted when there is no genuine issue of material fact and a party is entitled to judgment as a matter of law. WIS. STAT. § 802.08(2). It may be based upon a party's failure to respond to a request for admission, even where the substance of the admissions has been denied in the pleadings. *See* ***Bank of Two Rivers***, 112 Wis. 2d at 630-31. On a motion for summary judgment, the mandatory language of WIS. STAT. § 804.11(2) "can foreclose all pertinent issues of fact." ***Bank of Two Rivers***, 112 Wis. 2d at 630-31.

¶18 Loper would have been the party with the burden of proof at trial in connection with his claim. He therefore had the burden to show that there were genuine issues of material fact necessitating a trial. *See* ***Transportation Ins. Co., Inc. v. Hunzinger Constr. Co.***, 179 Wis. 2d 281, 290, 507 N.W.2d 136 (Ct. App. 1993). His failure to respond to the request for admissions constitutes a conclusively established admission that Dr. Kumar met the standard of care. Thus, no material facts remained in dispute as to negligence. Summary judgment was proper.

¶19 Pressing on, Loper tries two other tacks. He contends the court erred in granting summary judgment because Dr. Kumar did not comply with Waukesha County Circuit Court Rule: Civil 3.4 before filing the motion for summary judgment. This rule requires parties to consult with each other and attempt to work out their differences before filing motions to compel discovery or production of documents under WIS. STAT. ch. 804. It has nothing to do with summary

judgment. Waukesha County Circuit Court Rule: Civil 5.4, governing summary judgment, does not have a similar consultation/negotiation requirement.

¶20 He also asserts that summary judgment unfairly deprives him of his right to have his case litigated on its merits. That unfortunate result does not make the grant of summary judgment inappropriate.[4]

¶21 Finally, Loper's counsel has filed a false certification that the appendix meets the requirements in WIS. STAT. RULE 809.19(2)(a). The appendix does not include relevant circuit court record entries essential to our understanding of the issues, specifically the portion of the transcript containing the court's findings or opinion. *See* ***State v. Bons***, 2007 WI App 124, ¶23, 301 Wis. 2d 227, 731 N.W.2d 367. Counsel therefore is sanctioned $150 for providing a false appendix certification and a deficient appendix. *See* ***id.***, ¶25. Counsel shall pay $150 to the clerk of this court within thirty days of the release of this opinion.

By the Court.—Order affirmed.

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

[4] If Loper believes his rights have been adversely affected by his counsel's handling of this case, we cannot offer a remedy here but he could pursue one in a separate action. *See* ***Village of Big Bend v. Anderson***, 103 Wis. 2d 403, 406, 308 N.W.2d 887 (Ct. App. 1981).