COURT OF APPEALS
DECISION
DATED AND FILED

December 9, 2015

Diane M. Fremgen
Clerk of Court of Appeals

NOTICE

This opinion is subject to further editing. If published, the official version will appear in the bound volume of the Official Reports.

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

Appeal No. 2015AP551 **Cir. Ct. No. 2012CV406**

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

ESTATE OF JOYCE O. TRAXLER, BY ITS SPECIAL ADMINISTRATOR, GARTH E. SEILER,

PLAINTIFF-APPELLANT,

V.

THOMAS W. TRAXLER, JR. AND FARMERS & MERCHANTS BANK,

DEFENDANTS-RESPONDENTS,

JOHN B. SELSING AND LIBERTY INSURANCE UNDERWRITERS, INC.,

DEFENDANTS.

APPEAL from an order of the circuit court for Winnebago County: KAREN L. SEIFERT, Judge. *Affirmed*.

Before Neubauer, C.J., Reilly, P.J., and Gundrum, J.

¶1 PER CURIAM. This case involves a dispute over Joyce O. Traxler's post-will transfer of real estate to her son, Thomas W. Traxler, Jr. After Joyce's motion[1] to withdraw her admissions was denied, the court granted summary judgment in favor of Thomas and Farmers & Merchants Bank (collectively, Thomas) and granted Thomas statutory fees and costs. We affirm.

¶2 Joyce and her husband, Thomas, Sr., owned two plots of land, a total of about ten acres. Their home and pet shop and kennel business were on "Parcel One"; Thomas operated a plant nursery business on "Parcel Two." Soon after Thomas, Sr. died in October 2007, Joyce executed a will dividing her property among her nine children: five percent each to five of them, fifteen percent to one, and twenty percent each to the remaining three, Thomas, Garth, and Sherre.

¶3 In October 2008, Joyce went to the office of Thomas's lawyer, John Selsing. She executed an agreement and warranty deed by which she agreed that if Thomas paid off the $22,520.18 mortgage balance, he would get full title to Parcel Two, plus an easement across Parcel One and, upon her death, he would have the first option to purchase Parcel One. On March 31, 2009, Joyce signed a warranty deed transferring to Thomas full title to Parcel One as of that date.

¶4 It is undisputed that there was strife both between Joyce and her children and among the siblings. Concerns about the dysfunction appear throughout Joyce's medical records from various providers. Joyce's primary health care provider, Nurse Practioner Linda Schiesl, specifically noted that Joyce herself sometimes would pit Sherre, Garth, and Thomas against each other.

[1] Joyce's death postdated the hearing on the motion.

¶5 Joyce was adjudicated incompetent in March 2010. The land transfers to Thomas had fueled the family disharmony and in March 2012, Joyce, by her guardian, filed suit against him and Selsing. The complaint alleged civil theft of real property and conversion of real property against both Thomas and Selsing; rescission of contract, breach of contract, civil theft of personal property, conversion of personal property, and unjust enrichment against Thomas; and legal malpractice against Selsing. The complaint also sought a declaratory judgment that any claim by Thomas or Farmers & Merchants Bank, to which Thomas had granted the mortgages on the two parcels, of legal title or other interest in either parcel stemming from the transactions at issue be declared void. Motivating the lawsuit was Garth's and Sherre's notion that Thomas and Selsing colluded to exploit Joyce's increasingly precarious health, which included significant depression after Thomas, Sr.,'s death and early dementia.

¶6 Thomas served upon Joyce interrogatories and requests for admissions. The latter asked Joyce to admit that: Thomas made mortgage and tax payments per the October 2008 agreement and paid $5400 for her oral surgery and dentures; she instructed Selsing to prepare the documents necessary to transfer the real property; at least between October 2008 and March 2009, her intent was to transfer her real property to Thomas; Thomas and Selsing did not conspire to deprive her of her property; any documents Selsing prepared transferring property to Thomas were prepared at her direction; Thomas did not make material misrepresentations, exert undue influence, perpetrate a fraud, or place her under duress to cause her to transfer her property to him; and Thomas did not charge her any rent after the pet shop building became titled in his name.

¶7 Despite defense accommodations, Joyce failed to comply with the discovery requests, overrunning some deadlines by nearly a year. Thomas moved

to compel discovery and to admit as findings of fact the unanswered requests for admissions. *See* WIS. STAT. § 804.11(1)(b) (2013-14).[2] When Joyce still had not responded by the time of the hearing seven weeks later, the circuit court granted Thomas's motion and granted him costs of the motion.

¶8 Joyce moved to withdraw the default admissions. After extensive briefing and several hearings, the motion was denied. Joyce petitioned unsuccessfully for interlocutory review. Her counsel then asked the circuit court to reconsider its denial of the motion to withdraw the admissions, which counsel claimed were due to "an unusually high press of other business," including a large out-of-state arbitration case. The motion failed.

¶9 Armed with the admissions, Thomas moved for summary judgment. The court granted summary judgment on all of his claims.[3] Shortly thereafter, Joyce died. Her estate, substituted as plaintiff, now appeals.

¶10 The issues on appeal arise from Joyce's undisputed failure to respond to Thomas's requests for admissions. When a party serves a request for admissions, the matter is deemed admitted unless it is denied within thirty days. *See* WIS. STAT. § 804.11(1)(b).

¶11 "Any matter admitted under [WIS. STAT. § 804.11(2)] is conclusively established unless the court on motion permits withdrawal or amendment of the admission." ***Id.*** Whether to allow relief from the effect of an

[2] All references to the Wisconsin Statutes are to the 2013-14 version unless noted.

[3] The court denied summary judgment on the legal malpractice claim against Selsing. That claim is not part of this appeal.

admission is within the circuit court's discretion. ***Mucek v. Nationwide Commc'ns, Inc.***, 2002 WI App 60, ¶25, 252 Wis. 2d 426, 643 N.W.2d 98. The court may allow withdrawal if it (1) subserves the presentation of the merits of the action and (2) does not prejudice the party who obtained the admission. ***Luckett v. Bodner***, 2009 WI 68, ¶30, 318 Wis. 2d 423, 769 N.W.2d 504. Both factors must be satisfied. ***Id.*** We will uphold a discretionary decision 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." ***Mucek***, 252 Wis. 2d 426, ¶25.

¶12 Although the circuit court concluded that withdrawal "most likely" would have subserved the presentation of the merits of the action, it found that withdrawal would have prejudiced Thomas. It rebuffed counsel's explanation that the admissions were but a "technical error," calling the default instead a "refusal to follow the law" in the face of a more lucrative case. Observing that, despite defense courtesies, counsel persisted in failing to cooperate with discovery even after Thomas moved to have the admissions deemed accepted, the court properly invoked its "general authority to maintain the orderly and prompt processing of cases." *See* ***id.***, ¶28 (court may consider pattern of discovery abuse when exercising its general authority to maintain orderly and prompt processing of cases).

¶13 The estate argues that the denial of the motion for withdrawal was error because the admissions effectively amounted to a complete dismissal of Joyce's claims and constitute "ultimate facts" the trier of fact otherwise would have decided. Those are immaterial considerations. *See* ***Schmid v. Olsen***, 111 Wis. 2d 228, 236, 330 N.W.2d 547 (1983); *see also* ***Bank of Two Rivers v. Zimmer***, 112 Wis. 2d 624, 630-31, 334 N.W.2d 230 (WIS. STAT. § 804.11(1)(b)

applies to admissions dispositive of entire case). We have no hesitation affirming the court's exercise of discretion.

¶14 The circuit court then granted Thomas's request under WIS. STAT. § 804.12(1)(c)1.[4] to recoup his costs and fees incurred in bringing the motion to compel. Because the court already had signed the order granting the requested fees by the time Joyce objected, the estate argues that her due process rights were violated. It contends the court should have considered her objections to fees and costs that are "patently improper" and were "based on alleged noncompliance with a previously undisclosed 'five-day rule.'"

¶15 At the September 16 motion hearing on the motion to compel, the court observed that Joyce ignored at least three discovery deadlines since May 30, 2013, and still had not responded. In its September 25 written order, the court ordered Thomas to submit a statement of his costs and attorney fees. On September 26, Thomas's counsel served on Joyce an affidavit, albeit not signed or notarized, setting forth his and his associates' hours and hourly rates. He sought a total of $2633.75. Counsel served a properly endorsed one on October 1. Both cover letters invoked the "five-day rule."

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[4] WISCONSIN STAT. § 804.12(1)(c)1. provides:

> If the motion is granted, the court shall, after opportunity for hearing, require the party or deponent whose conduct necessitated the motion or the party or attorney advising such conduct or both of them to pay to the moving party the reasonable expenses incurred in obtaining the order, including attorney fees, unless the court finds that the opposition to the motion was substantially justified or that other circumstances make an award of expenses unjust.

¶16 The court signed the order on October 4; Joyce's counsel objected on October 9. He first explained that he was away for five days on the arbitration when the billing statements arrived at his office. He then objected to the costs on grounds that the motion to compel was wrongly granted and that Thomas sought an unreasonable sum for drafting a motion just "seven double-spaced pages" long. As before, the court was unmoved that counsel sought to use the arbitration case to justify inattention to a court matter in this case. The order stood.

¶17 Counsel's "press of other business" may have interfered with actually getting notice within five days but, even if there was error, the estate has shown no prejudice. *See* ***Jax v. Jax***, 73 Wis. 2d 572, 582, 243 N.W.2d 831 (1976) (error not prejudicial unless we conclude a different result probable). Once the court determined that counsel's conduct necessitated the motion to compel, it could order Joyce to pay the reasonable expenses incurred in advancing it. *See* WIS. STAT. § 804.12(1)(c)1. The estate has not established that the court erroneously exercised its discretion in imposing the discovery sanction. *See* ***Paytes v. Kost***, 167 Wis. 2d 387, 393, 482 N.W.2d 130 (Ct. App. 1992).

¶18 Finally, the estate contends the circuit court erred in granting Thomas's motion for summary judgment on Joyce's claims for civil theft of real property, conversion of real property, rescission of contract, and declaratory judgment. We review summary judgment de novo, using the same standards and methodology applied by the circuit court. *See* ***Capitol Indem. Corp. v. Reasbeck***, 166 Wis. 2d 332, 336, 479 N.W.2d 247 (Ct. App. 1991). As we have set forth the methodology for reviewing a summary judgment many times, *see* ***Green Springs Farm v. Kersten***, 136 Wis. 2d 304, 315-16, 401 N.W.2d 816 (1987), we need not repeat it here.

¶19 The estate's contention in regard to Joyce's conversion and civil-theft claims is disingenuous at best. Joyce herself expressly abandoned those claims in her response to Thomas's summary judgment motion, admitting that they cannot survive in light of the requests to admit.

¶20 The estate's rescission-of-contract argument also misses the mark. The estate contends Joyce was incompetent to make the October 2008 and March 2009 transfers. It points to the following evidence: Schiesl, the nurse practioner, testified that in July 2009 Joyce had a neurology consult for "memory problems" and that in August 2009 she noted that Joyce had "definite depression with some dementia"; a neuropsychologist's October 2009 report noted that Joyce "definitely looks as though she is experiencing an early dementia … of at least moderately severe proportions"; Joyce's adjudication of incompetence in 2010; and the estate's retained expert opined that in October 2008 Joyce "was likely afflicted by cognitive disabilities … to the point she was rendered unable to fully understand the implications of her financial transactions" and by March 2009, "due to the progressive nature of dementia," she "likely was not able to fully understand the nature of the financial and legal proceedings that she was involved in."

¶21 The law presumes every adult is competent until satisfactory proof to the contrary is presented. ***Hauer v. Union State Bank***, 192 Wis. 2d 576, 589, 532 N.W.2d 456 (Ct. App. 1995). The fact that Joyce had memory problems, developed dementia, and later was adjudicated incompetent "is only peripherally relevant." *See* ***Becker v. Zoschke***, 76 Wis. 2d 336, 345, 251 N.W.2d 431 (1977). The law recognizes that testators may have lucid intervals during which they possess sufficient testamentary capacity. ***Sorensen v. Ziemke***, 87 Wis. 2d 339, 345, 274 N.W.2d 694 (1979).

¶22 The estate's evidence does not establish that Joyce had no lucid intervals between October 2008 and March 2009. Just a month before the neuropsychologist's October 2009 "early dementia" notation, he described Joyce as "alert, oriented, and cooperative." Numerous other care notes in her medical record describe her as "alert and oriented" as late as 2011. The retained expert formed his opinion in 2012 purely from a record review without having met or examined Joyce at the relevant times. Schiesl confirmed at deposition that, cognitively speaking, a person with dementia still can have good and bad days.

¶23 Further, and more specific to Joyce's testamentary wishes, Schiesl's testimony and care notes reflect that whenever Thomas was mentioned, Joyce "perk[ed] up" and "was happy," and that it "seem[ed] like Joyce preferred Tom over the other siblings." Selsing testified that Joyce's serious heart condition in 2008 prompted her to direct him to draw up documents to ensure that, in the event of her death, Thomas would get Parcel Two, which he had improved from a former swamp and built his business there; that in 2009 she instructed him to draw up the Parcel One deed; that she always was "very clear as to what she wanted and why she wanted it"; that her directives were consistent with what he knew Thomas, Sr.'s wishes were; that his notes reflected that Joyce gave four reasons for transferring everything to Thomas[5]; and that he, Selsing, was "not at all" concerned about her competency. The estate has not produced satisfactory evidence that Joyce lacked competency at the time in question.

[5] "1. Tom is paying the mortgage off on the property, 2. Tom has been paying all of the legal bills, including my husband's estate, 3. Tom paid for my oral surgery and no one else would help, and, 4. Tom has taken care of me and has been wonderful."

¶24 The record and Joyce's admissions satisfy us that there exists no genuine issue of material fact. Summary judgment was properly granted.[6]

By the Court.—Order affirmed.

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

[6] The estate wisely has abandoned a challenge to the grant of summary judgment on the breach-of-contract claim, which arose because Thomas did not pay $1,241.11 of the $22,520.18 mortgage. As the circuit court observed, the discrepancy was not grounds for a breach because, by the time the deed was filed, continued payments had reduced the amount owing and it "makes no sense that [Thomas] should be obligated to pay more than was due just to make the deed valid." If there was a breach, it was immaterial, leaving the contract—if there was one—valid and binding. *See* ***Management Computer Servs., Inc. v. Hawkins, Ash, Baptie & Co.***, 206 Wis. 2d 158, 183, 557 N.W.2d 67 (1996).