COURT OF APPEALS
DECISION
DATED AND FILED

December 28, 2000

Cornelia G. Clark
Clerk, Court of Appeals
of Wisconsin

No. 00-1105

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

LINDA JOBE AND WALTER JOBE,

PLAINTIFFS-RESPONDENTS,

V.

A COMPLETE SPA & POOL SUPPLY CENTRE, INC., AND GREG GRISWOLD,

DEFENDANTS-APPELLANTS.

APPEAL from an order of the circuit court for Dane County: RICHARD J. CALLAWAY, Judge. *Affirmed.*

¶1 VERGERONT, J.[1] Linda and Walter Jobe filed this small claims action seeking a refund of their deposit of $1,000 for the purchase of a pool from A Complete Spa and Pool Supply Centre, Inc. (ACS). The court granted their

[1] This appeal is decided by one judge pursuant to WIS. STAT. § 752.31(2)(a).

motion for summary judgment and entered judgment in their favor for $1,000. ACS and Greg Griswold appeal, contending the trial court erred in: (1) striking their late responses to the Jobes' requests for admissions, (2) striking their response to the Jobes' reply brief in support of summary judgment and granting the Jobes' motion for summary judgment, and (3) dismissing their defamation counterclaim. For the reasons explained below, we affirm.

BACKGROUND

¶2 On April 2, 1999, the Jobes visited ACS to shop for an above-ground swimming pool. They made the $1,000 cash deposit on that date in order that the pool they were interested in purchasing would be held for them. The deposit was recorded on an invoice, a copy of which the Jobes received.

¶3 Approximately two weeks later, the Jobes contacted ACS and spoke to Griswold, telling him that they would not be purchasing the pool due to an unforeseen tax obligation. At this time, Griswold told the Jobes that it was ASC's company policy not to refund deposits, but the Jobes could receive a $1,000 in-store credit towards an equivalent future purchase. Griswold restated this offer in a subsequent letter, and stated that "the non-refundable security deposit" was being kept to cover the damages ACS had incurred as a result of the Jobes' breach of contract.

¶4 In a reply letter dated May 27, 1999, Linda Jobe expressed disagreement with the decision not to refund the $1,000 and related the Jobes' view of the circumstances of their visit to ASC on April 2, 1999, which she stated, had made "this transaction difficult from the beginning" and "emphasized [her] concern of how professional your company will be to work with in the future." She also stated that she called twice "to request a copy of the contract that we

signed with your company indicating your refund policy and have not received any copy from you, nor did we receive a copy the day we were there." Below her name at the end of the letter, the following was written:

> CC. Super Splash Pools [sic], @SPLASHSUPERPOOL.COM
> Better Business Bureau
> Office of Consumer Affairs

However, in affidavits filed with the court, Linda Jobe averred that she did not mail a copy of her letter to Splash SuperPools, LLC, and she did not mail a copy of the letter to the Better Business Bureau until approximately June 29, 1999, when she also mailed it a copy of Griswold's June 4, 1999 response to her letter. Linda Jobe also averred that she understands the Better Business Bureau and the Office of Consumer Affairs to be the same agency.[2]

¶5 With the dispute over the return of the $1,000 unresolved, the Jobes pro se filed a small claims action against ASC and Griswold seeking return of the $1,000. Griswold, acting as ACS's agent and on his own behalf, filed an answer; asserted affirmative defenses of breach of contract and quantum meruit; counterclaimed for defamation based on Linda Jobe's copying the May 27, 1999 letter to others; and, in addition to damages, asked for costs in defending a frivolous action.

¶6 After a trial at which the Jobes were represented by counsel and ACS and Griswold appeared pro se, the court commissioner ruled in the Jobes' favor. The defendants requested a trial de novo to a jury. At a pretrial conference

[2] In the Jobes' brief on appeal they explain that throughout the litigation they have erroneously referenced the Wisconsin Department of Agriculture, Trade and Consumer Protection's Consumer Affairs Division as the "Better Business Bureau."

on November 2, 1999, a jury trial was scheduled for January 14, 2000, with jury selection to take place on January 10, 2000.

¶7 On December 27, 1999, the Jobes filed two motions: a motion to strike the defendants' responses to the Jobes' request for admission and a motion for summary judgment. The Jobes had served a request for admission on the defendants on October 22, 1999, and the Jobes' counsel received the responses by facsimile transmission on December 3, 1999. Among the requests for admission were requests to admit that: the Jobes signed no contract or written document concerning the sale of the pool; ASC agreed to settle the matter by providing the Jobes with an in-store credit; ASC has no evidence Splash SuperPools, LLC even received a letter or copy of a letter to ASC from Linda Jobe; and various circumstances that might have resulted in damages had not occurred. The Jobes asked that all the requests be deemed admitted because of the untimely response.

¶8 In their brief supporting their motion for summary judgment, the Jobes asserted that, with the requests for admission deemed admitted, there were no facts in dispute and they were entitled to judgment as a matter of law on the following grounds: under WIS. STAT. § 402.201[3] there was no enforceable

[3] WISCONSIN STAT. § 402.201(1) provides:

> Formal requirements; statute of frauds. (1) Except as otherwise provided in this section a contract for the sale of goods for the price of $500 or more is not enforceable by way of action or defense unless there is some writing sufficient to indicate that a contract for sale has been made between the parties and signed by the party against whom enforcement is sought or by the party's authorized agent or broker. A writing is not insufficient because it omits or incorrectly states a term agreed upon but the contract is not enforceable under this subsection beyond the quantity of goods shown in such writing.

All references to the Wisconsin Statutes are to the 1997-98 version unless otherwise noted.

contract between ASC and the Jobes; even if a contract existed ACS had not been damaged by the breach; the Jobes and ACS had entered into an agreement to settle the matter for a $1,000 in-store credit; and there was no evidence that defendants were damaged by the Jobes' alleged defamatory action. An affidavit of Linda Jobe and an affidavit of counsel with exhibits attached accompanied the motion and the brief.

¶9 The defendants filed a response to the summary judgment motion on January 7, 2000, contending that they, rather than the Jobes, were entitled to summary judgment because the Jobes' claim was frivolous and brought in bad faith. They also argued that there were material issues of fact on their counterclaim that required a trial. Attached to their written argument were copies of the invoice, Griswold's April 21, 1999 letter to the Jobes, and his June 4, 1999 letter to Linda Jobe. The defendants did not address the Jobes' motion to strike the defendants' responses to the requests for admission.

¶10 Because of the birth of Griswold's child and the Jobes' motion for summary judgment, the court postponed jury selection and gave the Jobes fifteen days to reply to the defendants' response to their motion for summary judgment. After the Jobes filed their reply brief and a second affidavit of Linda Jobe in support of their motion for summary judgment, the defendants on January 31, 2000, filed a response to the Jobes' motion to strike their late responses to the requests for admission. The defendants asserted that Griswold had inadvertently failed to respond in time due to the press of business and the late response had not prejudiced the Jobes; they asked the court to consider their responses. That same day the Jobes by letter asked the court to strike this response to their motion because it was late, and also disputed that the defendants had shown they were entitled to have their late responses to the requests for admission considered.

¶11 On February 16, 2000, the defendants filed a single-spaced, fifty-six-page response to the Jobes' reply brief on their summary judgment motion, with thirty-three pages of attachments. One of the attachments was the Jobes' responses to requests for admission in which they admitted that on April 2, 1999, they agreed to purchase all of the items in invoice no. 54848 for the total price of $8,434.73 less the $1,000 deposit. The Jobes asked that this brief be stricken because a response to a reply is generally not permitted without leave of the court, their (the Jobes') reply brief had not raised any new arguments that needed to be addressed by the defendants, and the defendants' second brief far exceeded the limits of Dane County Local Court Rule 115.

¶12 At the hearing scheduled on the summary judgment motion, the court first struck defendants' response to the Jobes' reply brief on summary judgment because the defendants had not requested permission to respond to a reply brief and the form of the response was unacceptable under the rules of the circuit court. The court then struck the defendants' responses to the Jobes' requests for admission because the responses were late. The court granted the Jobes' motion for summary judgment because, it concluded, there was no dispute that the contract was over $500 and it was not in writing as required by WIS. STAT. § 402.201(1). The court entered judgment for the Jobes for $1,000. Finally, the court dismissed the defamation counterclaim because there was no evidence in the record to support that claim.

DISCUSSION

Requests for Admission

¶13 We first consider the defendants' contention that the trial court erred in striking their late responses to the Jobes' requests for admission.[4]

¶14 If a request for admission is not answered or objected to within thirty days after service, the matter is admitted. 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…. The 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 the party in maintaining the action or defense on the merits.

Section 804.11(2). The trial court's decision whether to allow relief is committed to the court's discretion. ***Schmid v. Olsen***, 111 Wis. 2d 228, 237, 330 N.W.2d 547 (1983).

¶15 We uphold a trial court's discretionary act if the 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." ***Loy v. Bunderson***, 107 Wis. 2d 400, 414-15, 320 N.W.2d 175 (1982). Even when a court does not articulate its reasoning, we may independently review the record to determine if it provides a basis for the trial court's exercise of its discretion. *See* ***State v. Pharr***, 115 Wis. 2d 334, 343, 340 N.W.2d 498 (1983). The court's failure

[4] There is no dispute the defendants did not respond to the requests for admission within thirty days of service.

to comment on evidence does not warrant our conclusion that it ignored it; we may assume the court considered the evidence before it. *See* ***Nelsen v. Nelsen***, 205 Wis. 2d 632, 640, 556 N.W.2d 784 (Ct. App. 1996).

¶16 We conclude the trial court properly exercised its discretion in striking the defendants' late responses. First, although the defendants were representing themselves, in their earlier requests for admission served on the Jobes, they set forth the substance of WIS. STAT. § 804.11(1)(b). The Jobes brought this to the court's attention by attaching these requests to their counsel's affidavit and by commenting on this in their brief. Also attached to counsel's affidavit were printouts from at least eight other cases in which Griswold represented himself. The court could therefore reasonably conclude that Griswold understood the importance of responding within thirty days and the significance of not responding.

¶17 Second, the explanation that a deadline has been inadvertently overlooked because of the press of business is not considered "excusable neglect" for failure to timely answer in other contexts. *See, e.g.,* ***Wagner v. Springaire Corp.***, 50 Wis. 2d 212, 218, 184 N.W.2d 88 (1971) (moving for relief from default judgment). Although such cases are not controlling under WIS. STAT. § 804.11, they do indicate that a court could reasonably decide that Griswold's explanation for the late answers is not one that compels relief.

¶18 Third, defendants have not shown that presentation of the merits will be served by relieving them of the effect of their admissions. They have presented no evidentiary materials in a form complying with WIS. STAT. § 802.08(3)[5] that

[5] WISCONSIN STAT. § 802.08(3) provides:

(continued)

show there are material facts in dispute that entitle them to a trial on the merits. This is true even when we consider the thirty-three pages of attachments to the brief the trial court struck.

¶19 Finally, the defendants did not move for relief when they discovered they filed their responses late. They also did not respond to the Jobes' motion to strike when they responded to the Jobes' brief on summary judgment, even though the Jobes' arguments in that brief were based on the deemed admissions. It was not until after the Jobes filed a reply brief on the summary judgment motion that the defendants offered an explanation for their late responses and asked the court to consider them. Relieving the defendants from the effect of their late responses at that time would have required the Jobes to re-brief their motion for summary judgment, beginning a new briefing schedule on that motion. Given all the circumstances, the court could reasonably conclude that it would not be fair to the

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> (3) SUPPORTING PAPERS. Supporting and opposing affidavits shall be made on personal knowledge and shall set forth such evidentiary facts as would be admissible in evidence. Copies of all papers or parts thereof referred to in an affidavit shall be attached thereto and served therewith, if not already of record. The court may permit affidavits to be supplemented or opposed by depositions, answers to interrogatories, or further affidavits. When a motion for summary judgment is made and supported as provided in this section, an adverse party may not rest upon the mere allegations or denials of the pleadings but the adverse party's response, by affidavits or as otherwise provided in this section, must set forth specific facts showing that there is a genuine issue for trial. If the adverse party does not so respond, summary judgment, if appropriate, shall be entered against such party.

Jobes or consistent with the efficient operation of the court's calendar to consider the defendants' late responses to the requests for admission.[6]

Summary Judgment on the Jobes' Claim

¶20 The defendants next contend that the court erred in granting summary judgment to the Jobes because the invoice and the Jobes' admission that they agreed to purchase everything on the invoice is sufficient to satisfy WIS. STAT. § 402.201(1).

¶21 When reviewing the grant of a motion for summary judgment, our review is de novo and we apply the same methodology as the trial court. *See* ***Green Springs Farms v. Kersten***, 136 Wis. 2d 304, 315, 401 N.W.2d 816 (1987). Summary judgment is proper if there are no genuine issues of material fact and the moving party is entitled to judgment as a matter of law. ***Id.*** Submissions supporting and opposing summary judgment must be in a form that meets the requirements of WIS. STAT. § 802.08(3). We do not reverse an order granting summary judgment simply because there is a factual dispute; the disputed facts must be material facts, that is, facts that would affect the resolution of the controversy. ***Clay v. Horton Mfg. Co.***, 172 Wis. 2d 349, 354, 493 N.W.2d 379 (Ct. App. 1992). A summary judgment may be based on a party's failure to respond to a request for admission. ***Bank of Two Rivers v. Zimmer***, 112 Wis. 2d 624, 630, 334 N.W.2d 230 (1984).

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[6] Although the court *may* grant relief under WIS. STAT. § 804.11(2) if that will serve presentation of the merits and if the opposing party does not show prejudice to its case on the merits, this does not mean that the court may not consider other relevant factors, nor does it mean that the court *must* grant relief if the opposing party does not show prejudice to its case on the merits.

¶22 The admission of the Jobes that the defendants refer to was submitted as an attachment to their February 16, 2000 brief which the court struck. However, we need not consider whether the court erroneously exercised its discretion in striking the brief and attachments, or the merits of the defendants' argument on compliance with WIS. STAT. § 402.201(1). Even if we consider the Jobes' admission, and even if we assume for purposes of argument that there was a contract between the Jobes and ASC that complied with § 402.201(1) and the Jobes repudiated it, the defendants have submitted no evidence of any damages.

¶23 The defendants' deemed admissions under WIS. STAT. § 804.11(1)(b) are that, since April 2, 1999, the damaged, former demonstration pool in which the Jobes had expressed an interest has: (1) never been repaired, (2) never been used as a demonstration pool, and (3) its availability has never been communicated to potential customers.[7] The attachments to the brief struck by the court contain no evidence regarding damages—no evidence of a resale of the pool, of incidental damages, of efforts to sell the pool, of circumstances that show such efforts would be unavailing, or of any other evidence that would show entitlement to damages under WIS. STAT. § 402.703 (Seller's Remedies in General) and the provisions referred to therein.

¶24 The fact of the Jobes' repudiation of the contract, in itself, does not entitle ASC to keep the deposit. There must be some evidence of damages before they may recover. *See* ***DeSombre v. Bickel***, 18 Wis. 2d 390, 399, 118 N.W.2d 868 (1963). Since the defendants submitted no evidence of damages, the trial

[7] In the defendants' late responses to these admissions, they admitted the first two propositions and denied the third because of insufficient information. Therefore, even if the late responses were considered, they would not affect our conclusion that there is no evidence of damages.

court properly granted summary judgment in the Jobes' favor for return of the deposit.

Defamation Counterclaim

¶25 The defendants contend the court erred in dismissing their counterclaim because there are factual disputes entitling them to a trial.

¶26 The elements of defamation are: (1) the statement is false; (2) the statement has been communicated to a third party through speech, writing, or conduct; (3) the communication is unprivileged; and (4) the communication tends to harm a person's reputation so that his or her reputation is lowered in the community or so that third persons are deterred from dealing or associating with him or her. ***Stoll v. Adriansen***, 122 Wis. 2d 503, 517, 363 N.W.2d 182 (Ct. App. 1984).

¶27 There is no evidence that the Jobes sent the May 27 letter to Splash SuperPools, LLC. Linda Jobe's affidavit avers she did not, and the defendants have submitted no evidence disputing that, even considering the attachments to the brief the court struck. The defendants argue that, when they responded to her letter, it was not unreasonable for them to send Splash SuperPools a copy of their own letter because of the "CC." on Linda Jobe's letter. This assertion does not constitute a proper submission under WIS. STAT. § 802.08(3), but, more importantly, even if true, it does not show that the Jobes communicated the contents of the May 27 letter to Splash SuperPools, LLC.

¶28 It is undisputed that Linda Jobe did sent a copy of her letter to the Better Business Bureau, along with Griswold's response. We conclude this communication falls within a conditional privilege. Certain communications are

conditionally privileged and therefore not actionable, even if the statement is otherwise defamatory, because the maker of the statement "is acting in furtherance of some interest of societal importance, which is entitled to protection even at the expense of uncompensated harm to the plaintiff." ***Zinda v. Louisiana-Pacific Corp.***, 149 Wis. 2d 913, 921-22, 440 N.W.2d 548 (1989). In ***Schier v. Denny***, 12 Wis. 2d 544, 550-51, 107 N.W.2d 611 (1961), the court concluded:

> After most careful consideration we have concluded that the public interest, of fostering the free filing of complaints with administrative agencies with respect to improper business or professional conduct without being subjected to reprisal in the form of damages exacted in a suit for malicious prosecution, outweighs the competing private interest of compensating a person whose business or profession has been injured by the malicious filing of unwarranted charges.

Schier, 12 Wis. 2d at 550-51.

¶29 We conclude the public interest recognized in ***Schier*** in the context of a malicious prosecution claim also applies in a claim for defamation, thus establishing a conditional privilege to file a complaint with an administrative agency with respect to allegedly improper business or professional practices.

¶30 It is true, as the defendants contend, that a conditional privilege may be forfeited if abused. ***Olson v. 3M***, 188 Wis. 2d 25, 38, 523 N.W.2d 578 (Ct. App. 1994). However, the burden is on the defendants to affirmatively prove abuse of the privilege; this means that, at the summary judgment stage, they have the burden of showing that a genuine and material factual dispute exists on abuse of privilege. ***Id.*** The defendants have submitted no material complying with WIS. STAT. § 802.08(3) that shows there is a genuine and material factual dispute on this issue.

¶31 Because the undisputed facts show that the only third party to whom the Jobes communicated the allegedly defamatory letter was a party to whom the Jobes had a conditional privilege to make the communication, and because there is no evidence the conditional privilege was abused, the Jobes were entitled to summary judgment dismissing the counterclaim.

By the Court.—Order affirmed.

This opinion will not be published. *See* WIS. STAT. § 809.23(1)(b)4.