COURT OF APPEALS
DECISION
DATED AND FILED

June 5, 2013

Diane M. Fremgen
Clerk of Court of Appeals

Appeal No. 2011AP2427 **Cir. Ct. No. 2009CV1683**

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

S.C. JOHNSON & SON, INC.,

PLAINTIFF-RESPONDENT,

V.

MICHAEL J. DEGUELLE,

DEFENDANT-APPELLANT.

APPEAL from a judgment of the circuit court for Racine County: GERALD P. PTACEK, Judge. *Affirmed.*

Before Brown, C.J., Reilly and Gundrum, JJ.

¶1 PER CURIAM. Michael J. DeGuelle appeals from a judgment entered in favor of S.C. Johnson & Son, Inc. (SCJ).[1] DeGuelle argues that the trial

[1] The Honorable Charles H. Constantine presided at trial, and the Honorable Gerald P. Ptacek entered the final written judgment.

court improperly limited discovery and granted summary judgment. He also contends that the trial court erred by denying his motion for judicial recusal and in determining the admissibility of evidence at the damages trial. We affirm.

¶2 DeGuelle was employed by SCJ as a state tax manager and had access to SCJ's confidential tax and financial records solely by virtue of his employment. DeGuelle signed an Agreement to Maintain Secrecy and Assign Inventions, in which he agreed to not disclose SCJ documents or use them for his own benefit and to return all SCJ documents and copies upon termination.

¶3 In 2007, after receiving a negative performance review, DeGuelle alleged to SCJ personnel that he had witnessed his supervisor engaging in tax improprieties. SCJ retained an outside law firm, Kirkland and Ellis (K&E), to independently investigate DeGuelle's claims. K&E was asked to review the documents DeGuelle provided, to interview DeGuelle for additional details, and to make an independent judgment whether there had been criminal or fraudulent activity by SCJ's tax department. K&E investigated each of the three areas DeGuelle brought to their attention: the destruction of certain documents; the handling of an IRS error; and the completion of a specific tax form. After completing its analysis, K&E reported that even assuming the truth of DeGuelle's factual allegations, SCJ's actions were neither criminal nor fraudulent.

¶4 DeGuelle then filed a whistleblower complaint with the U.S. Department of Labor (DOL) asserting that SCJ's negative performance reviews were in response to his allegations of fraud.[2] SCJ learned that DeGuelle had

[2] DeGuelle's DOL complaint, which relied on the Sarbanes-Oxley Act, was soon dismissed because the Act's regulations and standards do not apply to privately held companies.

attached to his DOL complaint confidential financial documents belonging to SCJ. SCJ again retained K&E to investigate the alleged improprieties in light of any new information and provided a detailed March 19, 2009 memo written by DeGuelle. K&E concluded that the additional facts only supported their original conclusion: "We found no evidence, or even indication, of any fraudulent or criminal conduct by SCJ's tax department." The IRS later reviewed the matter, found no illegal activity, and expressed satisfaction with the way SCJ handled the tax matters.

¶5 In addition to the confidential documents disclosed to the DOL, SCJ discovered that DeGuelle previously sent confidential documents to his personal home computer via email. Two SCJ employees met with DeGuelle and he unequivocally stated that he had never taken nor disclosed SCJ documents. DeGuelle also denied attaching any SCJ tax returns or records to his DOL complaint. On April 10, 2009, DeGuelle was terminated for taking and disclosing confidential documents and for lying to SCJ about these actions.

¶6 After his termination, DeGuelle refused to comply with SCJ's repeated demands to return company documents. SCJ filed an action in the Racine County Circuit Court to compel the return of documents, alleging claims for replevin, breach of contract, and conversion. After learning that DeGuelle made statements to the press that SCJ was committing "criminal fraud," SCJ amended its complaint to allege defamation.

¶7 DeGuelle retained counsel and filed counterclaims alleging breach of contract, wrongful termination, and defamation. DeGuelle's attorney returned to SCJ over 3000 pages of its private documents which were previously in DeGuelle's possession. The parties stipulated to two protective orders requiring

that confidential documents be filed under seal and creating a special category of documents deemed "Confidential-Attorney's Eyes Only."[3] DeGuelle's attorney eventually turned over additional SCJ documents from DeGuelle's possession. Soon thereafter, over DeGuelle's objection, his attorney was permitted to withdraw and DeGuelle proceeded pro se.

¶8 The discovery process was contentious and resulted in abundant paper filings and numerous hearings. During one such hearing, over SCJ's objection, the trial court reinstated the time for DeGuelle to name an expert witness. DeGuelle named Bruce Zagaris, an out-of-state tax law attorney, and identified a number of documents he wanted his expert to examine. SCJ expressed its intent to classify those documents as "attorney's eyes only." The trial court approved a procedure whereby SCJ would immediately send a number of sensitive, confidential documents directly to Zagaris for his review, create a list of the documents provided to Zagaris, and retain a local attorney to enable DeGuelle to more conveniently review the documents and consult with his expert in a private room. Deguelle never reviewed the documents and no expert report was ever filed.

¶9 The trial court scheduled a hearing on summary judgment for April 11, 2011, and SCJ filed a timely motion. In response, DeGuelle filed a letter opposing summary judgment "based upon the lack of receiving any instructions [from] the judge to respond to the motion for summary judgment and the objections raised herein[.]" DeGuelle's response did not contain any affidavits.

[3] Documents designated as "attorney's eyes only" could be reviewed but not possessed or copied by non-attorneys such as DeGuelle.

¶10 At the hearing, SCJ moved for summary judgment based on DeGuelle's failure to file a timely and proper response. The trial court determined that even overlooking the untimeliness of DeGuelle's response, it contained no affidavits and was insufficient under WIS. STAT. § 802.08(3) (2011-12)[4] to defeat summary judgment:

> Well, Mr. DeGuelle, you haven't responded to the affidavits. You haven't really provided - - to be honest, you haven't provided anything other than your own opinion, not sworn to, that they committed a crime. These other individuals you mention, you don't have affidavits. You don't have any sworn testimony from them. You don't have anything.

¶11 The trial court granted summary judgment in favor of SCJ and dismissed DeGuelle's counterclaims. The trial court found that SCJ was entitled to $50,000 in damages.

The trial court properly exercised its discretion when it ordered that certain sensitive financial documents would be sent directly to DeGuelle's expert and that DeGuelle could review the documents at a local attorney's office.

¶12 During the time DeGuelle was represented by counsel, the parties stipulated to a protective order allowing for certain documents to be designated "attorney's eyes only." This became an issue after DeGuelle named an expert and SCJ designated as "attorney's eyes only" the sensitive financial documents Zagaris would need to review in order to render an opinion.[5] After considering that the

[4] All references to the Wisconsin Statutes are to the 2011-12 version unless otherwise noted.

[5] There were about 333 pages of "attorney's eyes only" documents. During the course of the case, DeGuelle was directly provided approximately 5000 pages of discovery.

documents contained highly confidential financial material and that in the past, DeGuelle had not respected confidentiality,[6] the trial court approved SCJ's request to send the documents directly to Zagaris. DeGuelle argues that the court's discovery procedure denied him access to discovery and prevented him from proving his affirmative defenses and counterclaims. We disagree.

¶13 The trial court has broad discretion in fashioning discovery orders, including whether to limit discovery through a protective order. ***Paige K.B. v. Steven G.B.***, 226 Wis. 2d 210, 232, 594 N.W.2d 370 (1999). Where a movant shows good cause, WIS. STAT. § 804.01(3) permits the circuit court to make any order "to protect a party or person from annoyance, embarrassment, oppression, or undue burden or expense." ***Paige K.B.***., 226 Wis. 2d at 232. We review the trial court's decision for an erroneous exercise of discretion and will affirm as long as the trial court examined the relevant facts, applied the proper legal standard, and reached a reasonable conclusion. ***Id.*** at 232-33.

¶14 The trial court properly exercised its discretion when it tailored a protective order that considered the interests of both parties and was based on the specific facts of record. Its "good cause" finding was justified and the limited restrictions provided DeGuelle access to the documents through both his expert and his ability to privately review the papers and consult with the expert telephonically from the local attorney's office. The documents were primarily relevant to the issue of whether SCJ committed tax fraud, an issue only Zagaris was qualified to address. SCJ provided the documents immediately and directly to

[6] The trial court relied in part on DeGuelle's conceded and intractable opinion that a document was not confidential if he, himself, determined it constituted evidence of a crime.

Zagaris. DeGuelle was not denied access to the 333 pages of discovery labeled "attorney's eyes only." DeGuelle simply chose not to avail himself of the opportunity for inspection.

¶15 We reject DeGuelle's suggestion that the trial court's protective order prevented him from presenting a defense or proving his claims. Zagaris appeared telephonically and informed the court that though he had received the "attorney's eyes only" discovery, DeGuelle had instructed him not to open the envelope. Sensitive to DeGuelle's limited resources, the trial court listed the documents provided and ascertained Zagaris's opinion that the information would sufficiently enable him to render an initial opinion. When DeGuelle continued to protest, the trial court patiently told him to get started with the process and suggested that if Zagaris felt he needed more information or assistance from DeGuelle, the trial court would address the matter again. The trial court repeated this instruction multiple times: "Well, it's going to have to be [adequate] to start. We'll start with half a loaf, Mr. DeGuelle." The trial court's procedure was an appropriate exercise of its broad discretion and DeGuelle made no effort to avail himself of the resources in place. He cannot now complain that they were insufficient.

The trial court properly entered summary judgment in favor of SCJ and dismissed DeGuelle's counterclaims.

¶16 The court scheduled a summary judgment hearing for April 11, 2011,[7] and SCJ filed a timely motion. On April 1, 2011, SCJ sent a letter requesting summary judgment based on DeGuelle's failure to respond. On April 8, 2011, DeGuelle filed four documents: (1) a motion for change of venue; (2) a motion for judicial disqualification; (3) a letter notifying the court of further allegedly unlawful conduct by SCJ; and (4) a letter responding to SCJ's reply brief concerning judgment on the pleadings and to its April 1, 2011 letter. DeGuelle did not submit any affidavits in opposition to summary judgment. Rather, DeGuelle's response stated:

> I have not prepared a response to the [plaintiff's] frivolous motion for summary judgment based on instruction I received from the [trial court] during the hearing held on January 18, 2011 as well as during hearings held prior thereto. During the hearing, I specifically inquired of the judge what information he required from me when a motion for summary judgment was filed. I was informed during this hearing by the judge that when the date for summary judgment approached, he would provide me with instructions on the response that would be required from me.… I have merely followed the judges (sic) orders and waited for those instructions. As of the date hereof, I have not received any such instructions.

¶17 The letter went on to state that DeGuelle had reviewed SCJ's summary judgment motion and would provide his "remarks." He asserted that the supporting affidavits of SCJ's attorneys constituted inadmissible hearsay

[7] DeGuelle's claim that he first learned of the summary judgment hearing on March 24, 2011, is not supported by the record. The court scheduled the summary judgment hearing in open court on December 13, 2010. The hearing was later moved to April 15, 2011, allowing DeGuelle even more time to prepare.

warranting sanctions, and that their affidavits should not be credited given their "proven record of intentionally distorting fact and seeking to mislead this court into false conclusions." DeGuelle reiterated many of the complaints voiced in earlier pleadings and letters to the court, as well as on the record.

¶18 The trial court determined that DeGuelle's letter did not contain any counteraffidavits and failed to minimally comply with statutory requirements:

> In other words, there should be affidavits. There should be references to depositions. There should be exhibits. You have nothing. And your argument to me is: Well, that's simply a matter of technicality. That's something that the statutes require.

DeGuelle asked to be put on the stand to read the letter under oath. The trial court expressed its understanding that DeGuelle was involved a difficult case and explained that though it had "tried to bend over backwards to assist [DeGuelle]," it could not exceed certain limits:

> But I can't—I can't represent you. I can't give you legal advice. I can't ethically do any of that stuff. So when you say to me: I'm writing a letter, assume it's under oath, if the statute, which I'm bound to follow, says it's got to be an affidavit, that means it's got to be an affidavit.

¶19 DeGuelle attempted to blame the trial court for his deficient response, arguing that it should have provided him with additional instruction. DeGuelle referred to a hearing in December 2010[8] where after explaining in detail what a summary judgment motion would look like and how DeGuelle needed to

[8] Despite the contrary assertion in DeGuelle's April 8, 2011 letter, there is no discussion concerning the requirements for a summary judgment response anywhere in the January 18, 2011 transcript.

respond with counteraffidavits, it added: "Once it's filed, I will talk to you about it again." The trial court responded to DeGuelle's attempt to shift responsibility:

> Regardless of what I said in December or anything else, you have never inquired since then, you know: What do I need to do? And what happens is you submit to the Court submissions that are not in appropriate form. That are basically conclusions and stream of consciousness, to a certain extent, asserting what went on and there's nothing that directly contradicts the various affidavits that have been submitted in support of the various motions brought by S.C. Johnson regarding their motion for summary judgment.

Having concluded that DeGuelle's response was insufficient, the trial court examined SCJ's motion and attachments, determined that SCJ had established its claims,[9] and granted summary judgment.

¶20 DeGuelle argues that the trial court erroneously refused to consider his letter as a proper response under WIS. STAT. § 802.08. We review the trial court's procedural decisions for an erroneous exercise of discretion. *See* ***Gross v. Woodman's Food Mkt., Inc.***, 2002 WI App 295, ¶32, 259 Wis. 2d 181, 655 N.W.2d 718. Section 802.08 governs summary judgment proceedings and its provisions make abundantly clear that testimonial evidence must be submitted by affidavit. Subsection (3) provides:

> 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

[9] The trial court deferred its ruling on the conversion claim and set it for the same time as the damages trial. SCJ withdrew the claim and DeGuelle asked for a frivolousness finding. The trial court determined that the claim was not frivolous, but was voluntarily dismissed because there was an issue of fact that would have required further litigation. Contrary to DeGuelle's contention on appeal, SCJ's decision to withdraw the claim to avoid further litigation does not render the claim frivolous.

> 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.

¶21 DeGuelle has failed to demonstrate that the trial court's refusal to accept his response was improper. ***Swan Sales Corp. v. Jos. Schlitz Brewing Co.***, 126 Wis. 2d 16, 28, 374 N.W.2d 640 (Ct. App. 1985) (appellant has the burden of showing that the trial court erroneously exercised its discretion, and we will not reverse unless such error is clearly shown). His response contained no affidavits and was clearly deficient under the summary judgment statute. Though DeGuelle asserts that the trial court should have deferred to his pro se status, the right to self-representation is "[not] a license not to comply with relevant rules of procedural and substantive law." ***Waushara Cnty. v. Graf***, 166 Wis. 2d 442, 452, 480 N.W.2d 16 (1992) (citation omitted). A pro se litigant is bound by the same rules of procedure as a represented party, and the circuit court has no duty "to walk pro se litigants through the procedural requirements." ***Id***.

¶22 While DeGuelle could have attempted to provide an explanatory affidavit detailing the need for additional time,[10] he instead asked to be put under oath to testify and now blames the trial court for his deficient response. First, the trial court was not authorized to accept DeGuelle's offer to testify there and then.

[10] A party opposing summary judgment may file an affidavit establishing the reasons for the present lack of necessary affidavits. *See* WIS. STAT. § 802.08(4).

There is no authority permitting oral testimony in lieu of affidavits in the summary judgment context, and such a practice would impermissibly require the trial court to make credibility assessments. Second, we reject DeGuelle's attempt to blame his noncompliance on the trial court's December 13, 2010 "instructions." The trial court attempted to help DeGuelle by alerting him to the need for counteraffidavits, and, in fact, DeGuelle had previously filed affidavits in the case. DeGuelle did not ask for further instruction even after receiving the summary judgment motion and the April 1, 2011 warning letter. It was DeGuelle's responsibility to read the statutes or seek other assistance. The trial court properly exercised its discretion in declining to construe and consider DeGuelle's letter as a statutorily compliant response.

¶23 We further conclude that the trial court properly granted summary judgment on SCJ's claims. This court reviews summary judgment decisions de novo, applying the same methodology and legal standard employed by the circuit court. ***Frost v. Whitbeck***, 2001 WI App 289, ¶6, 249 Wis. 2d 206, 638 N.W.2d 325. We first examine the pleadings to determine whether the complaint states a claim and whether the answer joins an issue of fact or law. ***Id.*** If an issue has been joined, we examine the parties' affidavits and other submissions to determine whether the movant has made a prima facie case for judgment and, if so, whether the opposing party's affidavits establish a disputed material fact that would entitle the opposing party to trial. ***Id.***; *see also* WIS. STAT. § 802.08(2).

¶24 SCJ established that it was entitled to summary judgment on its replevin and breach of contract claims. DeGuelle's deposition testimony along with SCJ's undisputed affidavits established that DeGuelle had taken and retained SCJ documents after his termination and also after SCJ demanded their return.

¶25 SCJ is also entitled to summary judgment on its defamation claims. SCJ's motion, including the tax expert's affidavit, the K&E report, and the IRS findings, establish that SCJ did not engage in any tax fraud or crimes as DeGuelle publicly stated. The burden to prove criminal fraud was on DeGuelle, and he submitted no counteraffidavits. As stated by the trial court, DeGuelle's claims were unsubstantiated:

> Other than Mr. DeGuelle himself, there has never been any determination by any legal entity such as the IRS, such as an attorney general, such as a federal attorney, such as an accountant other than Mr. DeGuelle, who is not a CPA although I think he's taken some classes, that have reached the same conclusion that Mr. DeGuelle has reached and which he insists on telling the world.

¶26 Finally, we conclude that the trial court properly dismissed DeGuelle's counterclaims. As far as breach of contract, there was simply no employment contract capable of breaching. *See* ***Wolf v. F&M Banks***, 193 Wis. 2d 439, 450-54, 534 N.W.2d 877 (Ct. App. 1995) (no contract in company's code of ethics setting forth guidelines for employee conduct); ***Bantz v. Montgomery Estates, Inc.***, 163 Wis. 2d 973, 981, 473 N.W.2d 506 (Ct. App. 1991) (no contract in employer's formal conduct policy or handbook outlining general rules). SCJ's handbook explaining its mission and employee conduct expectations is not a contract. DeGuelle also failed to demonstrate a breach because SCJ's unrebutted affidavits establish that DeGuelle was fired for nonretaliatory reasons. Similarly, DeGuelle failed to establish his wrongful termination claim in the face of SCJ's affidavit testimony that he was fired for nonretaliatory reasons.

¶27 We have also examined each allegedly defamatory statement and conclude that none constitutes defamation. Each statement was either not made by

SCJ, was privileged, was not defamatory, or if defamatory, was true. The trial court properly dismissed DeGuelle's counterclaims.

The trial court properly denied DeGuelle's motion for judicial disqualification.

¶28 DeGuelle argues that the presiding judge should have disqualified himself pursuant to WIS. STAT. § 757.19(2)(g) because he "allowed a mockery to be made of the justice system by entertaining [SCJ's] frivolous lawsuit." DeGuelle asserts that the trial court was biased against him as demonstrated, for example, by its "willfully ignoring Wisconsin case law and denying the defendant the opportunity to depose the plaintiff's CEO, Fisk Johnson."

¶29 We disagree and conclude that the trial court properly denied DeGuelle's recusal motion under WIS. STAT. § 757.19(2). Section 757.19(2) establishes seven situations in which a judge must disqualify him or herself. While the first six are susceptible of objective determination, paragraph (g) requires disqualification "[w]hen a judge determines that, for any reason, he or she cannot, or it appears he or she cannot, act in an impartial manner" and involves the judge's subjective determination of his or her own impartiality. Sec. 757.19(2)(g); ***Sharpley v. Sharpley***, 2002 WI App 201, ¶¶15-16, 257 Wis. 2d 152, 653 N.W.2d 124. Paragraph (g) does not require disqualification in a situation where one other than the judge objectively believes there is an appearance of judicial impartiality. ***Sharpley***, 257 Wis. 2d 152, ¶16. Here, the judge determined that there was no basis for recusal under any provision in § 757.19(2), and therefore decided that he

could act impartially. We see nothing in the record to contradict the judge's determination that he could be objective.[11]

¶30 The record in this case demonstrates that the trial court bent over backwards to assist DeGuelle, for example, explaining that he would need an expert to prevail and extending the time to find and name an expert. The trial court monitored depositions on DeGuelle's behalf to ensure that SCJ would not take advantage of his pro se status. The trial court apprised DeGuelle of various legal options, such as the permissive appeal process and the need to preserve issues for review. The trial court agreed to review various documents in camera in order to facilitate discovery. The trial court gave DeGuelle substantial leeway due to his pro se status and financial limitations, and nothing in the record persuades us that the trial court was biased.

The trial court properly determined the scope of admissible evidence at the damages trial.

¶31 At the damages trial, the court awarded SCJ the full $50,000 requested, concluding that the evidence was "overwhelming" that SCJ's reputation was damaged by DeGuelle's false claims of tax fraud and criminal activity. DeGuelle argues that the trial court improperly admitted some or all of the testimony of Kelly Semrau and Gary Ackavickus. However, their testimony is not part of the appellate record. By orders entered March 29, 2012, and June 11, 2012, we denied DeGuelle's requests to supplement the record with transcripts of

[11] We reject DeGuelle's suggestion that because the judge later recused himself, he was impartial at the time of trial. If anything, the judge's subsequent recusal demonstrates an understanding of the court's continuing duty to remain impartial, and suggests that when that moment came, he immediately disqualified himself.

this testimony. Our decisions were based in part on DeGuelle's prior representations that he intended to proceed without these transcripts. Upon the filing of DeGuelle's first appellant's brief and appendix, which this court soon rejected, SCJ filed a motion to strike the brief and specifically pointed out the inappropriate inclusion of the nonrecord transcripts in the appendix. DeGuelle has again included these transcripts in his appendix and improperly cites to them in his appellant's brief. *See* ***Reznichek v. Grall***, 150 Wis. 2d 752, 754 n.1, 442 N.W.2d 545 (Ct. App. 1989) (the appendix may not be used to supplement the record).

¶32 We conclude that the trial court's damage determination was an appropriate exercise of discretion. Because the transcript is incomplete, we assume that any missing portions would support the circuit court's discretionary exercise in terms of admissibility, causation, and the amount of loss incurred. *See* ***Austin v. Ford Motor Co.***, 86 Wis. 2d 628, 641, 273 N.W.2d 233 (1979) (when transcripts are missing from the record, we assume that they support affirming the trial court's determinations).

By the Court.—Judgment affirmed.

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