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Commonwealth of Kentucky

Court of Appeals

NO. 2009-CA-001964-MR

WILLIAM C. ERIKSEN, P.S.C. APPELLANT

v. APPEAL FROM BARREN CIRCUIT COURT
HONORABLE PHIL PATTON, JUDGE
ACTION NO. 09-CI-00281

STEPHEN J. ISAACS APPELLEE

OPINION
AFFIRMING

** ** ** ** **

BEFORE: TAYLOR, CHIEF JUDGE; COMBS AND NICKELL, JUDGES.

NICKELL, JUDGE: William C. Eriksen, P.S.C. (Eriksen), has appealed from the Barren Circuit Court's September 22, 2009, entry of summary judgment in favor of Stephen J. Isaacs. After a careful review of the record, the briefs and the law, we affirm.

This case centers around obtaining copies of ten pages of medical bills. This seemingly miniscule task has developed into a dispute consuming substantial time and resources. In September 2008, Isaacs, an attorney, requested copies of medical records pertaining to the minor grandchild of one of his clients[1] from Eriksen, a chiropractor. A properly executed medical records release accompanied the request. Isaacs asserted that under KRS[2] 422.317, he was entitled to one free copy of the records.

On October 14, 2008, Eriksen acknowledged the request and insisted upon advance payment of a fee of $100.00 for copying the records. In addition, Eriksen indicated there would be a charge of $1.00 per page of record copied, which amount would be due upon receipt of the records. Isaacs countered the fee demand by sending a highlighted copy of the statute to Eriksen and indicating his intent to depose the treating medical provider to certify the records. Eriksen continued to demand payment of the copy fee before providing the records and insisted he would issue a bill for services rendered if a deposition were to be scheduled. Eriksen failed to inform Isaacs that a free copy of the requested records had previously been provided to the patient's mother.

When it became obvious no resolution could be had between the parties, Isaacs filed a complaint with the Kentucky Board of Chiropractic Examiners (Board). Eriksen vehemently contested the allegations in the

[1] The client was also the financial conservator for the minor child.

[2] Kentucky Revised Statutes.

complaint. An investigation was conducted and the Board ultimately dismissed the complaint in March 2009, finding that since a free copy of the records had apparently been provided to the child's mother, no violation had occurred.

Eriksen filed the instant suit against Isaacs alleging the filing of a complaint with the Board constituted an abuse of administrative process. He alleged he had sustained damages, costs and fees as a result of Isaacs' actions and demanded compensatory and punitive damages. Isaacs answered the complaint denying the allegations and asserting several defenses.

On July 10, 2009, Isaacs filed a notice of service of interrogatories, requests for production of documents, and requests for admission upon Eriksen. Rather than answering the discovery requests, Eriksen moved the court for leave to file a supplemental complaint. The supplemental complaint added new allegations of abuse of process stemming from Isaacs' discovery requests which Eriksen believed to be inappropriate and unrelated to the claims in issue. Isaacs filed a response in opposition to Eriksen's motion. On July 27, 2009, the trial court convened a hearing on the matter. Eriksen admitted some of the discovery requests had merit but opined the remaining requests were merely a "fishing expedition" for information related to an as-yet-unfiled counterclaim. Eriksen further admitted he had not sought a protective order or taken any other action in response to the discovery requests other than the proposed filing of the amended complaint. He affirmatively asserted that objections to the discovery would be forthcoming. Although the trial court stated it would take the matter under

submission, the record does not contain a ruling by the trial court on the motion to file the amended complaint.

On August 19, 2009, Isaacs filed a motion for summary judgment accompanied by a supporting memorandum of law. He argued that Eriksen had failed to respond to the requests for admission in the time allowed under CR[3] 36.01, and thus the requests were conclusively deemed admitted. Isaacs alleged that as a result of these automatic admissions, Eriksen had stated there was no evidence to support the underlying claim and no damages resulted from the allegedly wrongful conduct. The motion was noticed to be heard on August 31, 2009. However, due to a possible issue with Eriksen's receiving a copy of the motion for summary judgment, Isaacs re-noticed the hearing for September 14, 2009. Eriksen took no action in response to the motion prior to the scheduled hearing.

At the hearing, Eriksen delivered a response in opposition to the motion for summary judgment and a motion to withdraw or amend the automatic admissions accompanied by his responses and objections to the requests for admissions. Isaacs immediately moved to strike the pleading as being untimely. The court reserved ruling on Isaacs' motion to allow him time to file a written motion to strike and/or a response to Eriksen's tardy response and motion. Isaacs made a brief oral argument setting forth the basis of the summary judgment motion. Eriksen admitted the default in answering the discovery requests but

[3] Kentucky Rules of Civil Procedure.

urged the trial court to allow for the withdrawal or amendment of the automatic admissions brought about by the default.

Following the hearing, Isaacs filed a written motion to strike and a reply to Eriksen's response to the summary judgment motion on September 18, 2009. On September 22, 2009, the trial court entered a summary judgment in favor of Isaacs, finding Eriksen's failure to answer the requests for admissions constituted automatic admissions leaving no genuine issues of material fact to be determined and Isaacs was thus entitled to judgment as a matter of law. The trial court then dismissed Eriksen's complaint with prejudice. This appeal followed.

Before this Court, Eriksen contends the trial court erred in denying his motion to withdraw or amend the automatic admissions. In urging reversal of the ruling on his motion, Eriksen further argues the trial court's grant of summary judgment to Isaacs, based on those automatic admissions, is rendered infirm and should be vacated.

Initially, we note that in contravention of CR 76.12(4)(c)(iv) and (v), Eriksen does not cite to us within the record the factual basis supporting its legal argument. Eriksen's brief is also devoid of citation to the record supporting its summary of the factual evidence presented. Although noncompliance with CR 76.12 is not automatically fatal, we would be well within our discretion to strike Eriksen's brief for its omissions and flagrant noncompliance. *Elwell v. Stone*, 799 S.W.2d 46 (Ky. 1990).

Next, Eriksen contends the trial court erred in denying the motion to withdraw or amend the automatic admissions. We disagree.

> A proper request for admissions is often an effective tool in pretrial practice and procedure.[4] Once a party has been served with a request for admissions, that request cannot simply be ignored with impunity. Pursuant to CR 36.01, the failure of a party to respond to such a request means that the party admits the truth of the allegations asserted. *See, Commonwealth of Ky. Dep't. of Highways v. Compton,* Ky., 387 S.W.2d 314 (1964). Furthermore, any matter admitted under the rule is held to be *conclusively established* unless the trial court permits the withdrawal or amendment of the admissions. CR 36.02. Thus, an inattentive party served with a request for admissions may run the risk of having judgment entered against him based upon the failure to respond. *See, Lewis v. Kenady,* Ky., 894 S.W.2d 619 (1995). Pursuant to the rule, however, the trial court retains wide discretion to permit a party's response to a request for admissions to be filed outside the 30 or 45-day time limit delineated by the rule.

Harris v. Stewart, 981 S.W.2d 122, 124 (Ky. App. 1998) (emphasis and footnote in original).

Clearly, the decision to grant or deny a motion to amend or withdraw lies within the sound discretion of the trial court. Therefore, any such decision will

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[4] CR 36.01(2) provides in part as follows:

> Each matter of which an admission is requested shall be separately set forth. The matter is admitted unless, within 30 days after service of the request, or within such shorter or longer time as the court may allow, the party to whom the request is directed serves upon the party requesting the admission a written answer or objection addressed to the matter, signed by the party or by his attorney, but, unless the court shortens the time, a defendant shall not be required to serve answers or objections before the expiration of 45 days after service of the summons upon him.

be overturned only if the trial court abused that discretion; that is, only if the decision was "arbitrary, unreasonable, unfair, or unsupported by sound legal principles." *Commonwealth v. English*, 993 S.W.2d 941, 945 (Ky. 1999). However, after a careful review of the record, we are unable to find where the trial court ever ruled on Eriksen's motion, and Eriksen has not cited us to the location of such a ruling in the record. We are convinced none exists.

It is axiomatic that a trial court must "first be given the opportunity to rule on questions before they are available for appellate review." *Elwell*, 799 S.W.2d at 48 (quoting *Massie v. Persson*, 726 S.W.2d 448, 452 (Ky. App. 1987)). As this is a Court of review, in the absence of a ruling by the trial court, there is simply nothing for this Court to review. *Florman v. MEBCO Ltd. Partnership*, 207 S.W.3d 593 (Ky. App. 2006) (quoting *Lawrence v. Risen*, 598 S.W.2d 474, 476 (Ky. App. 1980)). No ruling appears in the record and Eriksen did not demand a decision on the motion. When a motion has been made, a movant must insist the trial court rule on the motion or it will be deemed waived. *Bell v. Commonwealth,* 473 S.W.2d 820, 821 (Ky. 1971); *see also Thompson v. Commonwealth,* 147 S.W.3d 22, 40 (Ky. 2004) ("Even when an objection or motion has been made, the burden continues to rest with the movant to insist that the trial court render a ruling; otherwise, the objection is waived."); *Perkins v. Commonwealth,* 237 S.W.3d 215, 223 (Ky. App. 2007) ("Our case law is well established that a failure to press a trial court for a ruling or an admonition on an objection or on a motion

for relief operates as a waiver of that issue for purposes of appellate review."). Because this issue was waived, it warrants no further discussion.

Finally, we must briefly address Eriksen's assertion that the trial court erroneously entered summary judgment in favor of Isaacs based on the automatic admissions. Eriksen makes only a bare allegation and cites no law supporting this position. Further, no argument is presented except an unsupported statement that the "granting of Isaacs' motion was unreasonable and unfair." Nevertheless, we perceive no error in the trial court's ruling. It was supported by substantial evidence and the record reflects there was no genuine issue of material fact to be determined. Thus, Isaacs was entitled to a judgment as a matter of law. CR 56.03; *Steelvest, Inc. v. Scansteel Serv. Ctr., Inc.,* 807 S.W.2d 476, 480 (Ky. 1991).

Therefore, for the foregoing reasons, the judgment of the Barren Circuit Court is affirmed.

COMBS, JUDGE, CONCURS.

TAYLOR, CHIEF JUDGE, CONCURS IN RESULT ONLY.

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