AFFIRMED; Opinion Filed June 4, 2020

In The
Court of Appeals
Fifth District of Texas at Dallas

No. 05-18-01411-CV

SIMEON COKER, Appellant
V.
COMMISSION FOR LAWYER DISCIPLINE, Appellee

On Appeal from the 191st Judicial District Court
Dallas County, Texas
Trial Court Cause No. DC-17-15478

MEMORANDUM OPINION

Before Justices Myers, Partida-Kipness, and Reichek
Opinion by Justice Myers

Simeon Coker appeals the judgment in favor of the Commission for Lawyer Discipline. The trial court granted the Commission's motion for summary judgment establishing that appellant had violated the Texas Disciplinary Rules of Professional Conduct. Subsequently, the court signed a judgment suspending Coker from the practice of law for thirty-six months. Coker brings two issues on appeal, contending the trial court erred by (1) denying his motion to withdraw deemed admissions, and (2) considering the deemed admissions in the motion for summary judgment. We affirm the trial court's judgment.

BACKGROUND

The Underlying Case

On August 2, 2013, A.G. was taking her grandchild, I.G., for a haircut. As A.G. drove down the highway, a tire blew out on her vehicle, and the vehicle hit the guardrail. I.G. was supposedly secured in his car seat, but he was ejected from the vehicle and died at the scene. The child's family hired Coker to represent them in a wrongful death lawsuit against the manufacturers of the vehicle, the tire, the car seat, and the guard rail.

Coker filed the lawsuit, but he failed to respond to the defendants' discovery requests. The trial court signed orders to compel Coker to respond to discovery, and when he failed to do so, the trial court granted the defendants' motions for sanctions. The court granted at least one defendant's motion to deem admissions due to Coker's failure to answer requests for admissions. The trial court granted the defendants' motions for summary judgment.

The record contains numerous instances of discovery abuse by Coker during the wrongful-death lawsuit. Beginning September 14, 2015, the tire manufacturer's attorney made repeated requests for Coker to ship the damaged tire to it for inspection and testing, but Coker did not immediately respond. In November 2015, Coker telephoned the attorney for the tire manufacturer and told one of the attorney's employees that the vehicle and tire were "gone" and would not be available in the future. The tire manufacturer moved for summary judgment

because of the disappearance of the tire. Coker did not file a response to the motion for summary judgment, and the trial court granted the motion for summary judgment.

The vehicle manufacturer served interrogatories and requests for disclosure and for production on Coker's clients. Coker did not timely respond. The vehicle manufacturer warned Coker that if he did not respond, the manufacturer would file a motion to compel, but Coker still did not respond or seek an extension for responding. When more than two months had passed since the discovery was due, the manufacturer filed a motion to compel. The trial court granted the motion to compel and ordered Coker to respond to the discovery requests within seven days. Coker did not file responses to the discovery requests. The manufacturer moved for sanctions. At the hearing on the motion for sanctions, Coker presented responses to the discovery. The trial court found that the responses were "grossly inadequate." The trial court granted the motion for sanctions, dismissed Coker's clients' claims against the vehicle manufacturer, and ordered Coker to pay the manufacturer $10,000 for the vehicle manufacturer's attorney's fees.

Coker also failed to respond to the car-seat manufacturer's discovery requests. The trial court entered an order granting the car-seat manufacturer's motion to compel. The trial court also handwrote on the order:

> The Court will entertain Defendant's further motion for sanctions based upon Plaintiff's past discovery abuse in this case, which is apparently undeterred by this Court's past sanctions. This Court will

> once again consider death penalty sanctions and further monetary sanctions against counsel individually for the same reason.

Shortly thereafter, the trial court deemed admitted the car-seat manufacturer's requests for admissions. Coker did not move to withdraw the deemed admissions, and the car-seat manufacturer moved for summary judgment. Coker filed a response to the motion for summary judgment, but the response did not address the deemed admissions. The trial court granted the motion for summary judgment.

The guardrail manufacturer also complained of Coker's failure to respond to discovery requests. That defendant filed a no-evidence and traditional motion for summary judgment that the trial court granted.

Coker filed a notice of appeal. The Fort Worth Court of Appeals dismissed the appeal for want of prosecution because Coker did not make payment arrangements for the clerk's record. *See F.G. v. Dorel Juvenile Group*, No. 02-16-00438-CV, 2017 WL 632915 (Tex. App.—Fort Worth Feb. 16, 2017, no pet.) (per curiam) (mem. op.).

The Disciplinary Case

In November 2017, the Commission for Lawyer Discipline filed this action against Coker requesting that he be disciplined for his inadequate representation of the clients in the underlying suit. The Commission alleged Coker violated Rules

1.01(b)(1),[1] 3.02,[2] and 3.04(d)[3] of the Texas Disciplinary Rules of Professional Conduct. *See* TEX. DISCIPLINARY RULES PROF'L CONDUCT R. 1.01(b)(1), 3.02, 3.04(d), *reprinted in* TEX. GOV'T CODE ANN., tit. 2, subtit. G, app. A (TEX. STATE BAR R. art. X, § 9). The Commission included requests for disclosure with its petition. On January 11, 2018,[4] the Commission served Coker with requests for production, requests for admission, and interrogatories.

Coker filed an answer to the Commission's petition. However, Coker did not respond timely to any of the Commission's discovery requests. He did not file any objections to the discovery requests or otherwise explain his failure to answer timely. Nor did he seek additional time to answer the discovery requests.

On March 8, the Commission filed a motion to compel asking the trial court to require Coker to respond to the Commission's requests for disclosure, requests for production of documents, and interrogatories. The Commission argued that Coker had waived his right to object to the discovery requests by not timely objecting. *See* TEX. R. CIV. P. 192.3(e) ("An objection that is not made within the

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[1] "In representing a client, a lawyer shall not: (1) neglect a legal matter entrusted to the lawyer . . . ." TEX. DISCIPLINARY RULES PROF'L CONDUCT R. 1.01(b)(1).

[2] "In the course of litigation, a lawyer shall not take a position that unreasonably increases the costs or other burdens of the case or that unreasonably delays resolution of the matter." *Id.* 3.02.

[3] "A lawyer shall not: . . . knowingly disobey, or advise the client to disobey, an obligation under the standing rules of or a ruling by a tribunal except for an open refusal based either on an assertion that no valid obligation exists or on the client's willingness to accept any sanctions arising from such disobedience." *Id.* 3.04(d).

[4] Unless otherwise noted, all dates are for the year 2018.

time required . . . is waived unless the court excuses the waiver for good cause shown."). On March 19, the trial court held a hearing on the motion to compel and ordered Coker to deliver "full and complete responses, without objections," to the Commission's interrogatories and requests for production and disclosure "to counsel for Petitioner on or before 5:00 p.m. CST, March 29, 2018, at the Office of the Chief Disciplinary Counsel." The motion to compel did not address the requests for admissions. On March 23, the Commission sent Coker an additional copy of the order.

Coker e-mailed his responses to the Commission on March 29 at 8:48 p.m., almost four hours late. The responses were not "full and complete" as the trial court had ordered. For example, Coker's response to all twenty-three of the Commission's requests for production was, "At this time, Respondent have [sic] no response to this request, but will supplement should document [sic] that is responsive to this discovery becomes [sic] available."[5] Coker's response to any interrogatory asking about his communications with the attorneys for the defendants in the underlying case was that he "had communications with counsels for [the defendant] on several occasions on various topics in relationship to the underlying case. However, as to the date, time location substance, Respondent

[5] Except for the word "Respondent," these responses were the exact response Coker gave in the untimely responses to requests for production by the vehicle manufacturer in the underlying case. The court in that case found the responses "grossly inadequate."

cannot recall. Respondent will supplement this response if and when other information that is responsive to this interrogatory becomes available." The court found these responses were "evasive and inadequate."

Coker also filed on March 29 his responses to the requests for admissions. Coker's response to thirty-six of the Commission's ninety-four requests for admissions was, "Respondent has no sufficient information to admit or deny this request for Admission."[6]

The Commission moved to have its requests for admissions deemed admitted because Coker's responses were not timely and they were evasive and incomplete. The Commission also moved for sanctions because of Coker's discovery abuse. Coker filed a response to the motion to deem admissions stating he answered the requests for admissions, so the motion to deem the requests admitted should be denied. Coker filed a response to the request for sanctions stating that sanctions should be denied. He asserted he did not violate the order compelling discovery by serving the Commission with his responses after 5:00 p.m. as required by the trial court's order because, under Rule of Civil Procedure

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[6] Coker provided this response to every question asking him to admit that an attachment was a true and correct copy of a document that he did not draft in the underlying litigation. He also provided this response to questions asking if he had filed a response to a defendant's motion to compel, if he had paid any amount of a sanctions order, and whether he had received certain documents.

Rule of Civil Procedure 198.2(b) provides, "Lack of information or knowledge is not a proper response unless the responding party states that a reasonable inquiry was made but that the information known or easily obtainable is insufficient to enable the responding party to admit or deny." TEX. R. CIV. P. 198.2(b). Coker did not include that language in his responses.

21(f)(5), a document electronically filed before midnight is timely.[7] *See* TEX. R. CIV. P. 21(f)(5). He also asserted that he complied with all the discovery requests. He stated that the Commission was in possession of one requested document. He stated he did not provide another document in his possession to the Commission because the document "belongs to respondent's clients, who have not waived attorney/client privilege."[8]

The trial court held a hearing and granted the motion for sanctions and the motion to deem admissions. The court's order disallowed Coker from further discovery, prohibited him from introducing evidence not already produced, and deemed admitted Coker's "untimely and seemingly inadequate and/or evasive responses to" the Commission's requests for admissions.

The Commission then filed a motion for partial summary judgment seeking an order that Coker had violated the Rules of Professional Conduct. The Commission relied on the deemed admissions as evidence in support of its motion for summary judgment. Coker filed a response to the motion for summary judgment asserting he did not violate the Rules of Professional Conduct. He also

[7] Rule 21(f) concerns electronic filing of documents, not serving opposing counsel with responses to discovery, and the midnight deadline does not apply when the trial court's order provides a specific time. *See* TEX. R. CIV. P. 21(f)(5) ("Unless a document must be filed by a certain time of day, a document is considered timely filed if it is electronically filed at any time before midnight . . . on the filing deadline."); *see also id.* 21a (methods of service).

[8] Rule 193.3 provides a procedure for withholding privileged material. The record does not show that Coker followed that procedure. *See* TEX. R. CIV. P. 193.3.

argued that the Commission was required to prove his mental state, such as lack of good faith, which he asserted involved fact issues that should not be resolved in summary judgment. Coker's response did not address the deemed admissions except to state, "The only evidence that has been provided by petitioner is a deemed admissions [sic] that has not met all the elements of Rule 1.01(b)(1)." After a hearing, the trial court granted the Commission's motion for summary judgment. Following another hearing, the court rendered the final judgment that Coker be suspended from the practice of law for thirty-six months.

Postjudgment, Coker filed a motion to strike the deemed admissions. He asserted that his failure to answer the requests for admissions timely was not intentional or the result of conscious indifference and that the Commission would not be unduly prejudiced by the withdrawal of the admissions. Coker attached his responses to the requests for admissions, but he presented no evidence showing his failure to respond timely was not intentional or the result of conscious indifference.

Coker also filed a motion for new trial. In the motion, Coker asserted he had newly discovered evidence consisting of affidavits from his clients in the underlying case. The clients stated they had gotten rid of the car and tire involved in the accident before they hired Coker. The clients also stated they did not want to pursue the case if it would have resulted in the grandmother being blamed for the child's death or give the police cause to reopen the case. They stated they did not blame Coker for the case being dismissed, and they believed Coker was

following their instructions of letting the case go if there was the possibility of the grandmother being blamed or getting into trouble.

The trial court denied the motion to strike the deemed admissions and the motion for new trial.

WITHDRAWAL OF DEEMED ADMISSIONS

In his first issue, Coker contends the trial court erred by denying his request to withdraw the deemed admissions.

Preservation of Error

Rule of Appellate Procedure 33.1 provides, to preserve error for appellate review, "the record must show that: (1) the complaint was made to the trial court by a *timely* request, objection, or motion . . . ." TEX. R. APP. P. 33.1(a)(1) (emphasis added). Coker contends he preserved error from the trial court's refusal to allow him to withdraw the deemed admissions because he moved for withdrawal of the deemed admissions after the final judgment and raised the issue in his motion for new trial.

Coker argues his postjudgment request for withdrawal of the deemed admissions was timely to preserve error for appellate review. In *Wheeler v. Green*, the supreme court stated there are equitable principles that permit a complaint about deemed admissions to be raised for the first time in a motion for new trial filed after a final summary judgment. *Wheeler v. Green*, 157 S.W.3d 439, 442 (Tex. 2005) (per curiam). In that case, the non-attorney pro se defendant had been

served with requests for admissions instructing her to serve the attorney-represented plaintiff with the responses "within thirty days after service of this request." *Id.* at 441. The defendant delivered the responses to the plaintiff twenty-seven days later after she actually received the requests, but because of the mailbox rule, it was thirty-five days after she was deemed to have received them. Six months later, the plaintiff moved for summary judgment based on deemed admissions and attached a copy of the requests for admissions to the motion for summary judgment. The plaintiff did not inform the court that the defendant had answered the requests for admissions. *Id.* The trial court granted the plaintiff's motion for summary judgment. The defendant then retained an attorney who filed a motion for new trial, attached the defendant's responses, and argued that the requests should not have been deemed admitted. *Id.* at 441–42. The supreme court concluded that the defendant, Sandra,

> did not waive these arguments by presenting them for the first time in her motion for new trial. We recently held in *Carpenter v. Cimarron Hydrocarbons Corp.* that the equitable principles allowing these arguments to be raised in a motion for new trial *do not apply if a party realizes its mistake before judgment and has other avenues of relief available.* But nothing in this record suggests that before summary judgment was granted, Sandra realized that her responses were late, that she needed to move to withdraw deemed admissions, or that she needed to file a response to the summary judgment raising either argument. Accordingly, we hold she was entitled to raise them in her motion for new trial.

Id. at 442 (emphasis added) (citations omitted) (citing *Carpenter v. Cimarron Hydrocarbon Corp.*, 98 S.W.3d 682, 686 (Tex. 2002)); *see also Marino v. King*, 355 S.W.3d 629, 630–34 (Tex. 2011) (per curiam) (similar facts and holdings).

There are many distinctions between *Wheeler* and this case. Coker is an attorney. He knew his responses were late on April 12 when the Commission moved to deem admissions. He knew the requests for admissions had been deemed admitted on May 29 when the trial court signed the order deeming the requests for admissions admitted. On June 20, the Commission moved for summary judgment on the basis of the deemed admissions. Coker filed his response to the motion for summary judgment on June 6, but he did not request withdrawal of the deemed admissions. The reporter's record from the summary judgment hearing on July 13 shows Coker did not request during the hearing that the deemed admissions be withdrawn. Nor does the record show Coker requested withdrawal of the deemed admissions between the June 20 partial summary judgment and the hearing on August 20 to determine the appropriate sanction for his violations of the Rules of Professional Conduct.

Coker should have realized his "mistake" of not timely responding to the requests for admissions and that he needed to move for withdrawal of the deemed admissions well before the partial summary judgment or the final judgment in this case. The equitable considerations that might permit a party to move postjudgment for withdrawal of deemed admissions are not present in this case. Coker's

postjudgment motion to strike deemed admissions was untimely and did not preserve his issue for appellate review.

Good Cause for Withdrawal of Deemed Admissions

Even if Coker had preserved for appellate review his motion to strike the deemed admissions, the record does not support overturning the trial court's denial of that motion.

"[T]rial courts have broad discretion to permit or deny withdrawal of deemed admissions, but they cannot do so arbitrarily, unreasonably, or without reference to guiding rules or principles." *Wheeler*, 157 S.W.3d at 443. Rule 198.3 provides that the trial court may allow a party to withdraw or amend an admission if:

> (a) the party shows good cause for the withdrawal or amendment; and
>
> (b) the court finds that the parties relying upon the responses and deemed admissions will not be unduly prejudiced and that the presentation of the merits of the action will be subserved by permitting the party to amend or withdraw the admission.

TEX. R. CIV. P. 198.3.

"Good cause is established by showing the failure involved was an accident or mistake, not intentional or the result of conscious indifference." *Wheeler*, 157 S.W.3d at 442. Coker argues on appeal that he had "good cause," and that his failure to answer the requests for admissions timely was the result of accident or mistake. Coker argues he "established good cause by raising meritorious defenses to [the Commission's] causes of action in the form of affidavits of the clients at

issue in this case." While those affidavits discuss that the clients were not unhappy with Coker's representation of them, they do not address why Coker failed to file timely responses to the requests for admissions in this case. Coker presented no evidence that his failure to answer the requests for admissions timely was due to accident or mistake. Nor did he present any evidence showing his failure to respond timely to the requests for admissions was not intentional or the result of conscious indifference. Finally, his motion to strike deemed admissions, motion for new trial, and brief on appeal do not explain what the good cause, accident, or mistake was that caused him to not answer the requests for admissions timely.

Coker also asserts he "had *promptly provided answers* to the requests for admissions." The record does not support this statement. The record shows Coker was served with the requests for admissions on January 11. His responses to the requests for admissions were due Monday, February 12. *See* TEX. R. CIV. P. 4 (weekend rule); *id.* 198.2(a) (discovery response due 30 days after service of request). He served the Commission with his responses to the requests for admissions on March 29, seventy-seven days after being served with the requests for admissions. His responses were forty-five days late. This was neither timely nor prompt. To the extent Coker may argue he was only three hours late in meeting the deadline of March 29 at 5:00 p.m. in the order compelling discovery responses, that order did not address the requests for admissions. Nor did it extend the time for Coker to respond to the requests for admissions. The record does not

show Coker had good cause for his failure to respond timely to the requests for admissions.

We conclude Coker has not shown the trial court abused its discretion by denying his postjudgment motion to strike deemed admissions. We overrule Coker's first issue.

SUMMARY JUDGMENT

In his second issue, Coker contends the trial court erred by granting the motion for summary judgment.

Coker argues that deemed admissions to merits-preclusive requests for admissions are not competent summary judgment evidence.

Requests for admissions should be used for addressing uncontroverted matters or evidentiary issues. *Wheeler*, 157 S.W.3d at 443. "They may also be used to elicit 'statements of opinion or of fact or of the application of law to fact.'" *Marino*, 355 S.W.3d at 632 (quoting TEX. R. CIV. P. 198.1). However, a request that a party admit or deny a purely legal issue is improper. *Maswoswe v. Nelson*, 327 S.W.3d 889, 897 (Tex. App.—Beaumont 2010, no pet.); *Cedyco v. Whitehead*, 253 S.W.3d 877, 880, 881 (Tex. App.—Beaumont 2008, pet. denied).

Coker does not specify which, if any, of the Commission's requests for admissions ask him to admit or deny a purely legal issue. However, we have reviewed the Commission's requests for admissions. None of the requests ask Coker to admit or deny that he violated a Rule of Professional Conduct or to admit

or deny whether he acted in good or bad faith. Instead, they ask him to admit or deny whether documents attached to the requests for admissions are true and correct copies of documents in the underlying case, to admit or deny whether he received the documents, and to admit or deny whether he took or failed to take specified actions. The requests may involve the application of law to fact, but that is permissible. *See* TEX. R. CIV. P. 198.1; *Marino,* 355 S.W.3d at 632. We conclude Coker has not shown the deemed admissions are not proper summary judgment evidence.

Coker also asserts that summary judgment based solely on deemed admissions is improper unless there is a showing of flagrant bad faith and callous disregard for the rules. *See Marino*, 355 S.W.3d at 633 (citing *Wheeler*, 157 S.W.3d at 443 (noting that "absent flagrant bad faith or callous disregard for the rules, due process bars merits-preclusive sanctions")). Coker's flagrant bad faith and callous disregard for the rules are established in the record. The Commission was seeking discipline against Coker because, in the underlying case, his clients' wrongful-death action was dismissed because he repeatedly failed to respond to the defendants' discovery requests, including requests for admissions, without excuse, explanation, or request for additional time. Coker's failure to respond caused the defendants to seek orders compelling Coker to respond to the discovery requests. Likewise, in this case, Coker was served with discovery requests, yet he did not timely respond to them, he did not request additional time, and his failure to

respond caused the Commission to file a motion to compel. His responses to the motions to compel provided no explanation, excuse, or good cause for his failure to respond timely. When he did finally respond, the trial court found his responses were inadequate and evasive.

We conclude the record establishes Coker's flagrant bad faith and callous disregard for the rules. Therefore, this case is one where summary judgment based on deemed admissions is proper. We overrule Coker's second issue.

CONCLUSION

We affirm the trial court's judgment.

/Lana Myers/
LANA MYERS
JUSTICE

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Court of Appeals
Fifth District of Texas at Dallas

JUDGMENT

SIMEON COKER, Appellant No. 05-18-01411-CV V. COMMISSION FOR LAWYER DISCIPLINE, Appellee	On Appeal from the 191st Judicial District Court, Dallas County, Texas Trial Court Cause No. DC-17-15478. Opinion delivered by Justice Myers. Justices Partida-Kipness and Reichek participating.

In accordance with this Court's opinion of this date, the judgment of the trial court is **AFFIRMED**.

It is **ORDERED** that appellee COMMISSION FOR LAWYER DISCIPLINE recover its costs of this appeal from appellant SIMEON COKER.

Judgment entered this 4th day of June, 2020.