STATE OF MICHIGAN

COURT OF APPEALS

BONNIE ROSENBURG, Personal Representative of the Estate of CYNTHIA ANN WEAVER,

Plaintiff-Appellee,

v

JACK CRONK,

Defendant-Appellant.

UNPUBLISHED
January 31, 1997

No. 185765
Grand Traverse Circuit Court
LC No. 93-11147-CZ

Before: Markman, P.J., and O'Connell and D. J. Kelly,* JJ.

PER CURIAM.

Defendant, a parole officer with the Michigan Department of Corrections, appeals as of right the judgment entered in favor of plaintiff in the amount of $258,793.75. Plaintiff brought this action alleging gross negligence by defendant after plaintiff's decedent was murdered by a parolee under defendant's supervision. After defendant failed to comply with the trial court's written scheduling order, the court granted plaintiff's motion for default against defendant, and a jury trial was thereafter held solely on the issue of damages. Defendant challenges both the trial court's decision to grant plaintiff's motion for default against him and its refusal to set aside the default. In light of the Supreme Court's recent decision in *White v Beasley*, 453 Mich 308; 552 NW2d 1 (1996), we reverse and remand.

Defendant first contends that the sanction of default was not available to the trial court, arguing that the court rules do not contemplate such a sanction for the types of violations of the trial court's scheduling order that he committed. Defendant failed to personally attend the final settlement conference, as ordered by the trial court. Default for such a failure is explicitly contemplated by MCR 2.401(G)(1). Therefore, the trial court's grant of a default against defendant was well within the parameters of the authority conferred on it. *Kornak v ACIA*, 211 Mich App 416, 420; 536 NW2d 553 (1995).

Defendant next contends that the trial court's refusal to set aside his default was improper because the court's decision was based on its mistaken belief that defendant could not proffer a

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* Circuit judge, sitting on the Court of Appeals by assignment.

meritorious defense to plaintiff's claims. The trial court concluded that defendant could not proffer a meritorious defense after determining that defendant could not avail himself of the "public duty" doctrine because a "special relationship" had arisen between defendant and plaintiff's decedent.[1] However, our Supreme Court recently addressed the "special relationship" exception for the first time, and articulated a much more restrictive test for the existence of a special relationship than this Court had previously applied. *White, supra*, pp 319-321. The *White* test requires a plaintiff to show, inter alia, that there was an "assumption by the [governmental agency], through promises or actions, of an affirmative duty to act on behalf of the party who was injured." *White, supra*, p 320 (adopting the test set forth in *Cuffy v City of New York*, 69 NY2d 255; 513 NYS2d 372; 505 NE2d 937 [1987]).[2] Because there is nothing in the present record to indicate that defendant assumed an affirmative duty to act on behalf of plaintiff's decedent, defendant may clearly claim that a meritorious defense potentially exists in this case. If so, defendant may thereby also successfully support his motion to set aside the default and the accompanying judgment. MCR 2.603(D)(1). We, therefore, reverse the judgment of the trial court, and the case is remanded for proceedings consistent with this opinion. The trial court may, in its discretion, award costs prior to setting aside the default judgment.

Reversed and remanded. We do not retain jurisdiction.

/s/ Stephen J. Markman
/s/ Peter D. O'Connell
/s/ Daniel J. Kelly

[1] The trial court did not have the benefit of the Supreme Court's decision in *White, supra*, as *White* was decided after the trial court's decision in this case.

[2] We note that the holding in *White* specifically applied only to police officers (with the Court explicitly refusing to decide whether the case should apply to other governmental employees). *White, supra*, 453 Mich 315 & n 3, 321. However, we nonetheless believe that the policy implications expressed in *White* are served by applying the test set forth therein to parole officers as well.