

STATE OF MICHIGAN
COURT OF APPEALS

DALE VANDERPLOEG, Assignee of
BUTTERWORTH HOSPITAL, SARAH SAENZ,
Assignee of BUTTERWORTH HOSPITAL, and
BUTTERWORTH HOSPITAL,

Plaintiffs-Appellees,

v

JAMES WILLIAM PARISIAN, M.D.,

Defendant-Appellant.

UNPUBLISHED
June 5, 1998

No. 196555
Kent Circuit Court
LC No. 94-002284 NH

Before: Gage, P.J., and Fitzgerald and Smolenski, JJ.

PER CURIAM.

Defendant appeals as of right the default judgment entered against him in this indemnification action. We affirm.

Plaintiffs Dale Vanderploeg and Sarah Saenz filed this action as the assignees of ninety-nine percent of plaintiff Butterworth Hospital's indemnification claim against defendant. The right of indemnification arose as a result of Butterworth Hospital's payment of \$450,000 in settlement of a medical malpractice/wrongful death action filed against it by Sarah Saenz as Personal Representative of the Estate of Maellen Vanderploeg. As part of the settlement, the hospital assented to payment of the agreed figure and to the assignment of ninety-nine percent of its claim against defendant for indemnification of the settlement amount. This agreement forms the basis of the present indemnification action, which was filed on June 13, 1994, and assigned to Kent Circuit Judge Robert Benson.

Judge Benson scheduled a settlement conference for January 25, 1996. The order scheduling the conference required the parties to attend. Defendant, who had moved his practice to Virginia, did not attend, although his attorney and a representative of his insurance carrier did attend. At the conference, plaintiffs indicated that they would not settle for less than the \$450,000 judgment. Defendant's insurance policy limit was \$200,000, and defendant apparently had only authorized a settlement up to policy limits. Hence, the case was assigned a trial date of November 5, 1996.

As part of Kent Circuit Court's "Settlement Week" program, the case was scheduled for a second settlement conference on March 12, 1996, by Chief Circuit Judge Dennis Kolenda. The notice ordered "clients and persons with authority to settle" to be present at the conference and stated that "failure to prepare for, attend, or meaningfully participate in this settlement conference may result in the imposition of sanctions." Despite this warning, defense counsel informed defendant that it was unnecessary for defendant to attend the conference. Defendant's attorney and a representative of his insurance carrier attended the conference. Plaintiffs continued to demand \$450,000, and defense counsel again had authority only to settle the claim for policy limits.

On March 26, 1996, plaintiffs filed a motion for default based on defendant's failure to attend the settlement conference. Judge Kolenda heard the plaintiffs' motion on April 26, 1996. On May 15, 1996, Judge Kolenda entered an order granting a default judgment for the sum certain judgment of \$450,000 plus interest and costs. Defendant's motions for reconsideration and to set aside the default judgment were denied.

Defendant first contends that the default judgment should be set aside because Judge Kolenda did not have authority to order a settlement conference and, therefore, did not have authority to enter a default judgment based on defendant's failure to attend the conference. However, defendant never alleged during any of the proceedings below that Judge Kolenda lacked authority to enter the order scheduling the conference or that Judge Kolenda lacked the authority to enforce the order with sanctions. Indeed, defendant failed to mention Judge Kolenda's alleged lack of authority to enter the scheduling order until filing this appeal.¹ Because defendant failed to raise an objection in the trial court, we decline to consider defendant's argument. See, e.g., *People v Montrose (After Remand)*, 201 Mich App 378, 379-380; 506 NW2d 565 (1993).²

Defendant also contends that Judge Kolenda abused his discretion in imposing the sanction of default because plaintiffs' complaint on its face shows that Butterworth Hospital was not free of active fault and thus failed to state a cause of action for indemnification. Defendant never raised any argument regarding the sufficiency of the pleadings at any of the hearings related to the default before Judge Kolenda.³ If defendant wished to set up a meritorious defense on the ground that Butterworth's active negligence appeared on the face of the complaint, he should have brought the defense clearly to the attention of Judge Kolenda either by stating such asserted defense in his motion for reconsideration or in his motion to set aside the default judgment or, minimally, by arguing it orally before Judge Kolenda. We decline to consider an argument not presented to the trial judge, particularly where defendant seeks review of the manner in which Judge Kolenda exercised his discretion.

Defendant next asserts that Judge Kolenda erred by entering the default judgment without requiring plaintiffs to first prove that defendant's negligence was the sole cause of the decedent's death. Defendant's assertion is misplaced. Plaintiffs alleged that defendant's negligence was the sole proximate cause of the decedent's death. A default amounts to an admission of the allegations contained in the complaint. *American Central Corp v Stevens Van Lines, Inc*, 103 Mich App 507; 303 NW2d 234 (1981). It is the very essence of a default that it relieves the plaintiff of the necessity of proving the allegations in the complaint. Defendant points to no authority, and our research has unveiled none, to support his argument that where there are disputed issues of fact, a plaintiff must offer proofs on those issues to establish liability before a default may be entered.

Next, defendant maintains that Judge Kolenda abused his discretion by entering the default judgment as a sanction for defendant's failure to attend the court-ordered settlement conference. A trial court's decision to grant a default for failure to appear at a scheduled settlement conference is reviewed for an abuse of discretion. *McGee v Macambo Lounge, Inc*, 158 Mich App 282, 285; 404 NW2d 242 (1987).

Pursuant to MCR 2.401(G)(1), "failure of a party or the party's attorney to attend a scheduled conference, as directed by the court, constitutes default to which MCR 2.603 is applicable or grounds for dismissal under MCR 2.504(B)." MCR 2.401(G)(2), however, mandates that the court excuse the failure of a party or the party's attorney to attend a conference, and enter an order other than one of default or dismissal, if the court finds that: (a) entry of an order of default or dismissal would cause manifest injustice, or (b) the failure to attend was not due to the culpable negligence of the party or the attorney. Here, defendant defied two court orders by failing to appear for two separate court-ordered settlement conferences. A plain reading of Judge Kolenda's written opinion demonstrates that he gave serious consideration to the two factors listed in MCR 2.401(G) that would mitigate against entry of a default judgment and found neither applicable. This Court has readily upheld a trial court's decision to impose the default sanction in those situations where a party has defied a court order to appear at a settlement conference. See, e.g., *McGee, supra*; *Reinhardt v Bennett*, 45 Mich App 18, 23; 205 NW2d 847 (1973) (the Court noted that it would not hesitate to affirm the lower court's action had it entered a default against the plaintiffs for failure of counsel to appear at a pretrial conference).

Last, defendant contends that Judge Kolenda abused his discretion by failing to set aside the default judgment. Whether a default judgment should be set aside is a decision within the sound discretion of the trial court. *Marposs Corp v Autocam Corp*, 183 Mich App 166, 170-171; 454 NW2d 194 (1990). Pursuant to MCR 2.603(D)(1), a "motion to set aside a default or default judgment, except when grounded on a lack of jurisdiction over the defendant, shall be granted only if good cause is shown and an affidavit of facts showing a meritorious defense is filed."

Good cause sufficient to warrant the setting aside of a default or default judgment includes (1) a substantial defect or irregularity in the proceedings upon which the default was based, (2) a reasonable excuse for failure to comply with the requirements that created the default, or (3) some other reason showing that manifest injustice would result if the default and the resulting judgment were allowed to stand. *Lindsley v Burke*, 189 Mich App 700, 702; 474 NW2d 158 (1991).

Defendant argues on appeal that the default judgment should be set aside due to procedural irregularities that occurred in the entry of the default judgment. Defendant failed to raise these alleged procedural deficiencies before the trial court as a basis for setting aside the default judgment. Nonetheless, we have reviewed defendant's arguments and find them unpersuasive. The only "substantial" defect alleged by defendant is plaintiffs' failure to give notice of the request for judgment at least seven days before entry of the judgment. MCR 2.603(B)(1)(b). The purpose of the notice requirement is to apprise the defaulting party of the possibility of entry of judgment so that he may have an opportunity to participate in any hearing necessary to ascertain the amount of damages or other form of remedy to be granted. *Dollar Rent-A-Car Systems v Nodel Construction*, 172 Mich App 738, 743; 432 NW2d 423 (1988). Here, defendant's attorney responded to plaintiffs' motion for default and presented arguments at the hearing on plaintiffs' motion for default. Because plaintiffs were seeking

damages in a sum certain based upon the settlement of the underlying malpractice action, no further proceedings were necessary to determine the amount of damages.

Defendant argued before Judge Kolenda that he was unaware that his failure to attend the court-ordered conference could result in a default judgment and that defense counsel's belief that this case would not settle and that defendant's attendance at the settlement conference would accomplish nothing constitutes a reasonable excuse for his failure to comply with the order requiring his attendance. Defendant's argument regarding his lack of knowledge of the sanction is without merit. Not only did the order scheduling the conference state that failure of a party to attend could result in sanctions, but also MCR 2.401(G)(1) authorizes such a sanction. Given the Supreme Court's authorization of the use of the sanctions of default and dismissal for failure of a party or his attorney to attend a conference aimed at meaningful settlement negotiations, excusing defendant's failure to attend under these circumstances as "reasonable" would render the settlement conference procedure a nullity. Consequently, we reject defendant's argument that he showed good cause to set aside the default.

Defendant also failed to file a sufficient affidavit of facts showing a meritorious defense. Defendant submitted only the affidavits of defense counsel and the representative of his insurance company, and failed to submit an affidavit of his own. Although the affidavits of his counsel conclude that "Dr. Parisian has a meritorious defense," the allegations that "defendant was not at fault," or that "defendant did not cause the alleged injuries," are simply conclusory and do not present the facts based on personal knowledge that are necessary to satisfy the requirements of MCR 2.401(D)(1). *Novi Construction, Inc v Triangle Excavating Co*, 102 Mich App 586; 302 NW2d 244 (1980). Hence, we conclude that Judge Kolenda did not abuse his discretion by failing to set aside the default judgment.

Affirmed.

/s/ Hilda R. Gage

/s/ E. Thomas Fitzgerald

/s/ Michael R. Smolenski

¹ We note that defendant brought several motions before Judge Kolenda rather than Judge Benson, which suggests that defendant recognized Judge Kolenda's authority to preside over matters involving settlement conferences.

² Defendant contends that this issue involves subject matter jurisdiction and therefore is not waived. We disagree. Subject matter jurisdiction involves the authority of a particular court to exercise judicial power over a class of cases, not the authority of a particular judge within that court to try a particular case.

³ Rather, defendant argued that plaintiff could not *prove* freedom from active fault.