STATE OF MICHIGAN

COURT OF APPEALS

MARK WAMP and CATHY WAMP, as next friends of JASON WAMP, a minor,

Plaintiffs-Appellees,

v

GARY GREENWELL,

Defendant-Appellant.

UNPUBLISHED
December 15, 1998

No. 204448
Washtenaw Circuit Court
LC No. 95-001879 NO

Before: Doctoroff, P.J., and Sawyer and Fitzgerald, JJ.

PER CURIAM.

Defendant appeals as of right a circuit court order denying his motions to set aside a default judgment, for new trial, and for judgment notwithstanding the verdict. We affirm.

Defendant's reliance on MCR 4.304(B)(1) as the rule underlying the entry of the default in this case is misplaced, because the case at bar did not involve a small claims action in district court. Because the default was based on the "failure to defend" standard in MCR 2.603(A) and, accordingly, defendant was not entitled to notice of the request for a default judgment, see MCR 2.603(B)(1)(d), we find that the dispositive issue in this case is whether defendant has shown that the trial court abused its discretion in denying his motion to set aside the default judgment pursuant to MCR 2.603(D). Neither the standards for a new trial motion under MCR 2.611, nor the standards for a judgment notwithstanding the verdict under MCR 2.610, govern this issue. However, we have considered defendant's arguments relative to his motions for judgment notwithstanding the verdict and new trial, to the extent that they were presented to the trial court, in determining whether the trial court's failure to set aside the default judgment constituted an abuse of discretion. *Cf. Ellsworth v Highland Lakes Development Associates*, 198 Mich App 55, 57-58; 498 NW2d 5 (1993) (the mislabeling of a motion does not preclude review where the lower court otherwise permits it). Thus, our review of the trial court's decision is governed by the following standards:

> The question whether a default or a default judgment should be set aside is within the sound discretion of the trial court and will not be reversed on appeal absent a clear abuse of that discretion. *Gavulic v Boyer*, 195 Mich App 20, 24; 489 NW2d

> 124 (1992). Except when grounded on lack of jurisdiction over the defendant, a motion to set aside a default or a default judgment generally may be granted only if good cause is shown and an affidavit of facts showing a meritorious defense is filed. MCR 2.603(D)(1); *Marposs Corp v Autocam Corp*, 183 Mich App. 166, 171; 454 NW2d 194 (1990). Good cause sufficient to warrant setting aside a default or a default judgment includes: (1) a substantial defect or irregularity in the proceeding on which the default was based, (2) a reasonable excuse for the failure to comply with requirements that created the default, or (3) some other reason showing that manifest injustice would result if the default or default judgment were allowed to stand. *Gavulic, supra* at 24-25. An attorney's negligence is attributable to the client and normally does not constitute grounds for setting aside a default judgment. *Pascoe v Sova*, 209 Mich App 297, 298-299; 530 NW2d 781 (1995). However, even if there is no reasonable excuse for the failure to comply with the requirements that created the default, "[t]he showing of a meritorious defense and factual issues for trial may, under certain circumstances, fulfill the good-cause requirement by way of constituting a reason evidencing that manifest injustice would result from permitting a default to stand." *Komejan v Suburban Softball, Inc*, 179 Mich App 41, 51; 445 NW2d 186 (1989). [*Park v American Casualty Ins Co*, 219 Mich App 62, 66-67; 555 NW2d 720 (1996).]

Here, defendant failed to show an irregularity in the proceeding upon which the default was granted with respect to the issue of liability, and no irregularity or other error was committed by the trial court in determining the amount of damages upon which the default was entered. Defendant also failed to show a reasonable excuse for not complying with the condition that created the default, namely, his failure to apply for a writ of habeas corpus so that he could appear, in propria persona, on the date scheduled for trial. Defendant's reliance on the standards in *People v Herrara (On Remand)*, 204 Mich App 333, 338-339; 514 NW2d 543 (1994), for scrutinizing sanctions against pro se prisoners is misplaced because this is not a case where access to the courts was sought by defendant to pursue a claim involving a constitutionally protected liberty interest against another party. The instant case involves plaintiffs' claims, as next friends of the minor child, based on tort law and the Civil Rights Act, MCL 37.2101 *et seq*.; MSA 3.548(101) *et seq*. Under these circumstances, we consider defendant's pro se prisoner status to be a relevant factor, but it is not a decisive factor in his favor. *Cf. Katko v Modic*, 85 Ohio App 3d 834; 621 NE2d 809 (1993).

In this regard, we are mindful of the fact that defendant's incarceration rendered him unable to personally travel to the courthouse to determine how his motions were processed. *Walker-Bey v Dep't of Corrections*, 222 Mich App 605, 611; 564 NW2d 171 (1997). Nevertheless, the lower court record does not contain a praecipe for the motions or otherwise support defendant's position that he properly scheduled a hearing for February 28, 1997. Further, defendant's pro se status did not excuse him from complying with procedural rules. *Cf. Walker-Bey, supra*. In any event, while defendant may have had a subjective expectation as to how his motions would be processed, he has not shown entitlement to further discovery or a trial adjournment. Giving due consideration to defendant's pro se status, we conclude that defendant failed to show a reasonable excuse for not applying for the writ of

habeas corpus so that he could appear at the scheduled trial. *Cf. Huggins v MIC General Ins Corp*, 228 Mich App 84, 87; 578 NW2d 326 (1998).

We are also unpersuaded that defendant has shown manifest injustice relative to either the issue of liability or the determination of damages so as to fulfill the "good cause" requirement. *Park, supra* at 67. When evaluating a trial court's decision on a motion under the abuse of discretion standard, "the result must be so palpably and grossly violative of fact and logic that it evidences not the exercise of will but perversity of will, not the exercise of judgment but defiance thereof, not the exercise of reasons but rather of passion or bias." *Fletcher v Fletcher*, 447 Mich 871, 879-880; 526 NW2d 889 (1994), quoting *Spalding v Spalding*, 355 Mich 382, 384-385; 94 NW2d 810 (1959). Under the circumstances of this case, we conclude that the trial court did not abuse its discretion in finding insufficient evidence of either good cause or a meritorious defense to set aside the default judgment. In reaching this conclusion, we reject defendant's claim that the trial court misapplied MCR 2.306(D)(4). The trial court's opinion plainly recognized that defendant would only be precluded from testifying on matters for which he exercised his privilege against self-incrimination if a trial were held.

Finally, we decline to consider defendant's claim that the trial court should have applied MCL 600.6305; MSA 27A.6305 and MCL 600.6306; MSA 27A.6306 in determining damages, because this claim was not raised in defendant's motion to set aside the default judgment or the motions for judgment notwithstanding the verdict or new trial. Absent unusual circumstances, issues not raised below may not be raised on appeal. *Peterman v Dep't of Natural Resources*, 446 Mich 177, 183; 521 NW2d 499 (1994). We similarly find that defendant has not shown that his constitutional claim that he was deprived of due process was presented to the trial court in the motions, but note, in passing, that the lower court record does not reflect a denial of due process. *In re Brock*, 442 Mich 101, 111-112; 499 NW2d 752 (1993).

Affirmed.

/s/ Martin M. Doctoroff
/s/ David H. Sawyer
/s/ E. Thomas Fitzgerald