STATE OF MICHIGAN

COURT OF APPEALS

KATHRYN SCHRAM, Next Friend of TOBY SCHRAM, a Protected Person,

Plaintiff-Appellee,

v

JEFFREY HELMBOLDT, JR.,

Defendant-Appellant.

UNPUBLISHED
July 6, 1999

No. 205707
Antrim Circuit Court
LC No. 96-006916 NI

Before: Griffin, P.J., and McDonald and White, JJ.

PER CURIAM.

Defendant appeals by right from a judgment entered in favor of plaintiff based on damages awarded by a jury after the trial court entered a default judgment in favor of plaintiff on the issue of liability. Defendant challenges the trial court's denial of his motion for summary disposition and the court's entry of the default judgment on liability as a sanction for defendant's conduct with regard to discovery. We affirm in part and reverse in part.

I

Plaintiff sued defendant for non-economic damages and excess wage loss under the no-fault automobile insurance act, MCL 500.3101 *et seq*.; MSA 24.13101 *et seq*., after her son, Toby Schram, suffered brain damage and other injuries as the result of an accident in which the snowmobile he was driving collided with defendant's parked automobile.

On the evening of January 8, 1996, defendant was traveling southbound on highway M-66 near Mancelona in his 1989 Ford Probe, heading from his home in East Jordan toward his sister's home in Mancelona, apparently because his sister was going to babysit for his young son while he worked from 10:00 p.m. to 6:00 a.m. Defendant may or may not have been driving the car, and another adult may or may not have been traveling with him.[1]

During the trip, the car suddenly stalled and would not restart. The driver steered the car to the side of the road, and all of the car's occupants walked to a nearby McDonald's restaurant, where one

of them telephoned defendant's sister, Jessica, for assistance. Jessica's boyfriend at the time, Troy, came to their aid and transported them to Jessica's house. Approximately one-half hour later, defendant, who had obtained the use of a substitute vehicle to get to work, returned to the stalled Probe. With the help of either his wife, Lynnette Helmboldt, or Troy, he pushed the car further to the side of the road. Defendant asserts that in the car's final resting place, its entire length was two to three feet to the right of the white fog line in the road. He indicated that the front bumper was touching a snow bank on the side of the road and that the gap between the rear bumper and the snow bank was only wide enough for him to pass through it sideways. Lynnette, who claimed to have returned to the car with defendant, corroborated defendant's deposition testimony regarding the final placement of the car. Both defendant and Lynnette admitted that they did not put any flashers, reflectors, flags, or other warning signs on the Probe. Troy, who defendant said had accompanied him to the car and had helped him push it further to the side of the road, was not deposed, did not testify at trial, and did not provide any affidavits in this case.

Sometime between 1:00 a.m. and 5:37 a.m. the next morning, Schram was driving a snowmobile southbound on the shoulder of M-66. Apparently, he did not see defendant's car until he was almost upon it and crashed into the rear of the Probe; the snowmobile ended up underneath the car. Jeffrey Wynkoop and Christopher Ash, at that time both deputies with the Antrim County Sheriff's Department, were dispatched to the accident scene, and both opined, based on the severity of the accident and the position of the vehicles, that Schram had been speeding. Schram was unable to confirm or contest this conclusion, since as a result of his injuries he was unable to remember the accident.[2]

On July 15, 1997, right before trial was to begin, plaintiff's attorney informed the court that he had recently learned of perjury committed by defendant and his wife. Apparently, defendant had disclosed to an unnamed third party that Lynnette had not been present during the events surrounding the Probe's breakdown and that she had been at work that evening. This contradicted testimony given by Lynnette during her deposition. Specifically, even though defendant, in his deposition, indicated that Troy had returned with him to the Probe and had helped to push it to the side, Lynnette, who listened to defendant's deposition and testified immediately afterward, said, "[a]nd it wasn't Troy who took him to work; it was me, and I was the one that helped him push the car." Lynnette further testified that she could not remember what shift she was working that evening, and that after she and defendant returned to the disabled car, she steered while defendant pushed the car further to the side of the road. Defendant had earlier testified that he steered while Troy pushed the car.

Defendant himself made reference to Lynnette being present on the evening in question when he said, "the whole family" walked to McDonald's after the car stalled. Although he did not directly state that Lynnette had been driving the car that evening, he did indicate that in general he did not drive the Probe because he was not listed on its insurance policy. Further, he answered "yes" to the following deposition question:

> In any event, you're driving along the road – I don't mean you're physically driving, but you're riding along the road and the car dies. You pulled off onto the shoulder – or Lynnette pulled off onto the shoulder?

Because of the discrepancy between Lynnette's work schedule and her deposition testimony, and because of an interrogatory answer implying that Lynnette was present that night,[3] plaintiff concluded that defendant and Lynnette had committed perjury, and she asked the court to enter a default judgment regarding liability as a sanction for the misconduct. In response, defendant argued, among other things, that a default judgment was unwarranted because the allegedly perjured testimony was immaterial to the case.

The court asked defendant and his wife to testify regarding the allegations of perjury, but defendant asserted his Fifth Amendment right against self-incrimination, and Lynnette, after being advised of her Fifth Amendment rights, indicated that she wanted to consult with an attorney. Plaintiff then called Sandra Summerville, the business manager of Summertree Residential Centers, Lynnette's employer at the time, to testify. Summerville brought with her Lynnette's employment records, including a time sheet that indicated that she had worked from 2:00 p.m. to 10:00 p.m. on January 8, 1996. Although Summerville could not testify with certainty that Lynnette's signature on the January 8 time sheet was authentic, no evidence to the contrary was presented. Moreover, Summerville indicated that all absentees were required to have an "absentee form" in their files, and no such form existed for Lynnette for January 8.

Subsequently, the court agreed that defendant's conduct in countenancing his wife's perjury and in making discovery responses that were misleading warranted the entry of a default judgment on the issue of liability, including the issue of comparative negligence and proximate cause. The court then granted a directed verdict for plaintiff on the issue whether Schram suffered a serious impairment of body function, a ruling that defendant does not contest. The court then proceeded with a jury trial on damages.

We review a trial court's decision to grant a default judgment because of discovery violations for an abuse of discretion. *Thorne v Bell*, 206 Mich App 625, 632-633; 522 NW2d 711 (1994).

The trial court abused its discretion in granting plaintiff a default judgment based on defendant's misconduct, since the misconduct was not severe and did not unduly prejudice plaintiff. The trial court's reasons for granting plaintiff's request for a default judgment were that (1) Lynnette had indeed been at work during the evening in question, since her employment time sheet showed this and no evidence to the contrary was presented; (2) it was thus evident that she lied during her deposition when she testified that she drove the car that evening and helped move it to the side of the road; (3) defendant answered an interrogatory falsely when he indicated that Lynnette was present that night; (4) even though the false interrogatory alone might not have been enough to warrant a default, defendant also lied in his deposition when he said that the "whole family" walked to McDonald's, since the whole family must include Lynnette; (5) even though he was present during his wife's deposition, defendant made no attempt to correct her false testimony, which was material in that it related to the final resting position of the Probe ; (6) although defendant's perjury in itself might not merit a sanction, defendant's countenance of his wife's perjury did; and (7) plaintiff's case preparation was prejudiced by the misconduct, and although an adjournment might fix the prejudice, an adjournment would "prejudice . . . everybody involved, not the least of which is the County of Antrim."

A trial court has discretion, under MCR 2.313(B)(2)(c), to grant a default judgment for failure to comply with discovery. Here, if defendant did indeed commit or countenance perjury in depositions, such misconduct could be deemed a failure to properly comply with discovery. In *Thorne v Bell*, 206 Mich App 625, 633; 522 NW2d 711 (1994), this Court stated that "[t]he sanction of a default judgment should be used only when there has been a flagrant and wanton refusal to facilitate discovery." In the instant case, although the evidence indicates that defendant's wife committed other misconduct, the only misconduct that could potentially be attributed to defendant were his allegedly improper interrogatory answer, his statement that the "whole family" walked to McDonald's, and his alleged countenance of his wife's perjury. The interrogatory answer should not be held against defendant, since it was signed only by his attorney and since it truthfully indicated what Lynnette's testimony was expected to be. It is likely that defendant's attorney interviewed Lynnette and prepared the interrogatory based on that interview; it cannot be assumed that defendant encouraged or would have agreed with her expected testimony.

By contrast, defendant's statement that "the whole family" walked to McDonald's should be held against him, since Lynnette was a member of his family and the statement therefore indicates that Lynnette was with him when the car stalled. However, even though reprehensible, this statement did not warrant a default judgment, since it did not prejudice plaintiff. *Thorne*, *supra*, 206 Mich App 633, indicates that prejudice to the opposing party should be considered when deciding whether a default judgment based on discovery violations should be granted. Who was present in the Probe at the time it stalled was of no consequence to plaintiff's claim; the information plaintiff required pertained to the *final resting position* of the Probe, after it had been pushed further off the road. As to this issue, although Lynette testified that she helped move the Probe, defendant testified that Troy had helped him. Given defendant's testimony, plaintiff cannot hold defendant solely responsible for her decision not to depose Troy.

The remaining behavior to consider, then, is defendant's alleged countenance of Lynnette's perjury. During his deposition, defendant testified that he returned to the Probe with Troy and that together they pushed the car to its final resting position. He gave no indication that Lynnette was present at that time. Subsequently, Lynnette testified that it was she who returned to the car with defendant and helped him move it. That defendant did not come forth and reassert his statement that he had been with Troy does not necessarily mean that he was willfully countenancing his wife's perjury. He may have been afraid of incriminating his wife or he may have been intimidated by the formal nature of the depositions. He may not even have realized that he was allowed to speak during someone else's deposition. For the trial court to have granted a default judgment on the basis of this speculative countenance constituted an abuse of discretion.

It is possible that the trial court's ruling was based not on a discovery violation but merely on the inherent nature of defendant's misconduct. Trial courts are permitted to grant default judgments for "flagrant misconduct" by parties to a case. *Cummings v Wayne Co*, 210 Mich App 249, 251-252; 533 NW2d 13 (1995). In *Cummings*, the defendant was granted a default judgment after the plaintiff threatened and vandalized potential defense witnesses. *Id.*, 251. In determining that the default was warranted, this Court emphasized the "gravity of [the] plaintiff's misconduct" and the prejudice to the

defendant, finding that the misconduct had "permanently deprived the court of the opportunity to hear the testimony of witnesses who would be able to testify openly and without fear." *Id*., 253. Here, as indicated earlier, the gravity of defendant's own conduct, as opposed to his wife's, was not severe. Moreover, the prejudice to plaintiff was slight, since defendant had testified that Troy was the person who helped him move the car.

Next, we reject defendant's claim that the trial court erred in denying defendant's motion for summary disposition. The court rejected defendant's argument that the Supreme Court's decision in *Wills v State Farm Ins Co*, 437 Mich 205, 208; 468 NW2d 511 (1991), required that plaintiff's negligence action be dismissed, and concluded that there were genuine issues of fact regarding whether defendant was negligent in parking his vehicle on the shoulder of the highway.

We review a trial court's grant or denial of summary disposition pursuant to MCR 2.116(C)(10), based on a finding that there is no genuine issue of material fact, de novo. *Pinckney Community Schools v Continental Casualty Co*, 213 Mich App 521, 525; 540 NW2d 748 (1995). Like the trial court, we look at the entire record and, viewing the evidence in favor of the nonmoving party, decide if there exists an issue about which reasonable minds might differ. *Id*.

Defendant argues that it was not reasonably foreseeable, as a matter of law, that a snowmobiler would be traveling along the shoulder of the road where defendant left his vehicle, since snowmobiles are prohibited by state law from traveling on the shoulders of state highways.[4] In *Wills, supra*, the plaintiff's decedent was driving a snowmobile on the shoulder of a state highway when he collided with an empty, unlit, parked automobile and was killed. The automobile was off the roadway, but it was facing oncoming traffic, so that vehicles approaching it faced the front of the car and could not see the reflectorized surfaces on the rear. *Id*. at 208, 214-215. The plaintiff sued her decedent's no-fault automobile insurance carrier, seeking survivors benefits. *Id*. at 208. No-fault benefits are payable for "accidental bodily injury arising out of the ownership, maintenance or use of a motor vehicle as a motor vehicle." Because snowmobile are not motor vehicles, the plaintiff was required to show that the parked vehicle was in use as a motor vehicle, a determination that is governed by MCL 500.3106; MSA 24.13106. The plaintiff relied on section 3106(1)(a), which allows recovery when the vehicle "was parked in such a way as to cause unreasonable risk of the bodily injury which occurred." *Id.* at 209. The plaintiff attempted to establish the unreasonableness of the parking by showing that the vehicle was parked in violation of the lighted-vehicle statute,[5] and by pointing to the inability of the snowmobile driver to see reflectors on the rear of the vehicle since the vehicle was facing the oncoming traffic. *Id*. at 214.

The Supreme Court held that where the facts are undisputed, the determination whether a motor vehicle is parked in such a way as to create an unreasonable risk of bodily injury within the meaning of section 3106(1)(a) is an issue of statutory construction to be determined by the court. In analyzing the specific case at bar, the Court concluded that because the snowmobile driver was not in the class of plaintiffs sought to be protected by the lighted-vehicle statute, (because the snowmobile driver was unlawfully on the shoulder), the statutory purpose doctrine was not fulfilled under the facts presented, and a violation of the statute, even if proved, would not establish that the motor vehicle was unreasonably parked for purposes of determining liability for no-fault benefits. In addressing the

plaintiff's claim that the parked vehicle presented an unreasonable risk because of the inability to see reflectorized surfaces, the Court stated

> that it is not unreasonable to park a vehicle without regard to the protection of persons who may not legally be on the shoulder where the vehicle is parked. . . .[*Id*. at 214-215.]

While the underlying facts in the instant case are similar to those in *Wills*, and the quoted language can be read as rejecting the instant plaintiff's claims as a matter of law, we conclude that the trial court correctly determined that *Wills* was decided and the quoted statement was made in the context of a first-party no-fault action involving the interpretation of a statutory provision. The lead opinion stated:

> Use of the phrase "unreasonable risk" in the parking exception appears, at first blush, to create a question of fact.[10] But where the facts are undisputed and the complainant is relying on a violation of a statute to establish that unreasonableness, it is a question of law for the court. . .
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> [10] While we recognize that "unreasonableness" in the general, negligence sense is a question for the jury, the statutory concept here, assuming undisputed facts, is a question of law in the first instance.
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Thus, we do not understand *Willis* to address the common-law negligence liability of a motorist, but only the statutory provision allowing the recovery of no-fault benefits where the parked vehicle was parked in such a way as to cause unreasonable risk of the bodily injury which occurred.

Affirmed in part, reversed in part and remanded for proceeding consistent with this opinion. No costs to either side. We do not retain jurisdiction.

/s/ Richard A. Griffin
/s/ Gary R. McDonald
/s/ Helene N. White

[1] The uncertainty regarding who accompanied plaintiff and who was driving the car relates to plaintiff's claim of misconduct and perjury and will be explained further *infra*.

[2] As a result of the collision, Schram suffered a broken thigh bone, a fractured jaw, a collapsed lung, and a severe brain injury. He had to relearn basic activities like standing and walking, he experienced

changes in his personality, and, according to one expert, he will permanently suffer from speech and memory impairments.

[3] The record does not contain a copy of the interrogatory in question. However, the trial court summarized it in its ruling:

> Now, the plaintiffs [sic] sent interrogatory requests with respect to I guess the standard interrogatories about each person who was listed to testify as a witness, what the substance of their testimony would be. And the defendant's response was that Lynnette Helmboldt, who is the wife of the defendant, that she was present when the vehicle became disabled. . . . It says that, this is defendant's answer, saying that she, Lynnette, who was not a party, would testify that she was present when the vehicle was disabled, and the vehicle was completely off the traveled portion of the road when it was left.

The trial court further indicated that defendant's attorney, but not defendant, had signed the interrogatory answers.

[4] MCL 324.82119; MSA 13A.82119 indicates that snowmobiles may operate on highway shoulders only to cross bridges or culverts.

[5] MCL 257.694; MSA 9.2394.