

STATE OF MICHIGAN
COURT OF APPEALS

KIM SAFFIAN,

Plaintiff-Appellee,

v

ROBERT R. SIMMONS, D.D.S.,

Defendant-Appellant.

FOR PUBLICATION

July 7, 2005

9:05 a.m.

No. 250645

Cheboygan Circuit Court

LC No. 01-006896-NH

Official Reported Version

Before: Zahra, P.J., and Neff and Cooper, JJ.

ZAHRA, J. (*concurring in part and dissenting in part*).

This case presents two distinct issues: (1) Whether a medical malpractice defendant is relieved of the duty to timely answer or otherwise respond to a complaint where the complaint was filed with a defective affidavit of merit and (2) whether the trial court properly reinstated a default that the court had previously set aside. I agree with the majority that defendant was required to answer or otherwise timely respond to the complaint, notwithstanding the defective affidavit of merit. Although the affidavit of merit was defective under MCL 600.2912d, defendant did not have the authority to unilaterally determine that the proffered affidavit of merit failed to comply with the requirements of MCL 600.2912d such that defendant was relieved of the duty to respond to the complaint. Had the Legislature intended to relieve a defendant of the obligation to answer or otherwise respond to a complaint filed with a defective affidavit, it would have specifically provided the defendant with such authority.

However, I disagree with the majority's conclusion that there are sufficient facts in the record to support the conclusion that defendant was properly defaulted. It is not clear from the trial court's findings whether the trial court concluded that defendant fabricated his claim that the failure to transmit the summons and complaint to his insurer was the product of excusable clerical error. I would vacate the default and remand for further factual findings on whether defendant had fabricated this claim. If the trial court concludes that defendant fabricated the facts supporting his motion to set aside the default, the default judgment should be reinstated and the trial court should impose monetary sanctions against defendant pursuant to MCR 2.114(E). If, however, the trial court concludes that defendant's claim of excusable clerical error was not fabricated, the trial court abused its discretion by reinstating the default. The ensuing default

judgment should be set aside, and the trial court should rule on defendant's motion for summary disposition.

I. A Medical Malpractice Defendant Cannot Unilaterally Determine That a Proffered Affidavit of Merit Fails to Comply With MCL 600.2912d

MCL 600.2912e provides, in part, that "[i]n an action alleging medical malpractice, within 21 days after the plaintiff has *filed an affidavit in compliance with section 2912d*, the defendant shall file an answer to the complaint." (Emphasis added.) MCR 2.108(A)(6), which addresses the time for answering a complaint in a medical malpractice lawsuit, provides in pertinent part that "[i]n an action alleging malpractice . . . the defendant must serve and file an answer within 21 days after being served with . . . *the affidavit . . . required by MCL 600.2912d.*"¹ (Emphasis added.) At issue in this case is whether a defendant is permitted to unilaterally determine whether an affidavit of merit fails to satisfy the requirements of MCL 600.2912d such that defendant need not answer the complaint.

The primary goal of judicial interpretation of statutes is to ascertain and give effect to the intent of the Legislature. *Neal v Wilkes*, 470 Mich 661, 665; 685 NW2d 648 (2004). The best measure of intent is the words used by the Legislature. *Lansing Mayor v Pub Service Comm*, 470 Mich 154, 164; 680 NW2d 840 (2004). "Where the language is unambiguous, 'we presume that the Legislature intended the meaning clearly expressed—no further judicial construction is required or permitted, and the statute must be enforced as written.'" *Pohutski v City of Allen Park*, 465 Mich 675, 683; 641 NW2d 219 (2002), quoting *DiBenedetto v West Shore Hosp*, 461 Mich 394, 402; 605 NW2d 300 (2000); see also *Nastal v Henderson & Assoc Investigations, Inc*, 471 Mich 712, 720; 691 NW2d 1 (2005). A provision of law is ambiguous when it irreconcilably conflicts with another provision or is equally susceptible to more than a single meaning. *Lansing Mayor, supra* at 166. "Where the language of a statute is of doubtful meaning, a court must look to the object of the statute in light of the harm it is designed to remedy, and strive to apply a reasonable construction that will best accomplish the Legislature's purpose." *Marquis v Hartford Accident & Indemnity (After Remand)*, 444 Mich 638, 644; 513 NW2d 799 (1994). Moreover, the Legislature is presumed to have knowledge of existing laws on the same subject and is presumed to have considered the effect of new laws on all existing laws. *Walen v Dep't of Corrections*, 443 Mich 240, 248; 505 NW2d 519 (1993). These same rules of construction apply to the interpretation of court rules. *In re KH*, 469 Mich 621, 628; 677 NW2d 800 (2004).

Applying these principles of statutory construction, I conclude, contrary to defendant's argument, that the use of the phrase "in compliance with MCL 600.2912d" in MCL 600.2912e

¹ MCR 2.108(A)(6) is antiquated in that it refers to the filing of security for costs required by MCL 600.2912d. The option to file security for costs was removed from MCL 600.2912d in 1993. 1993 PA 78. However, MCR 2.108(A)(6) was not amended to conform to the revised statute. See *White v Busuito*, 230 Mich App 71, 76 n 5; 583 NW2d 499 (1998).

and the phrase "required by MCL 600.2912d" in MCR 2.108(A)(6) do not authorize a defendant to unilaterally determine whether plaintiff's affidavit of merit satisfies the detailed requirements of MCL 600.2912d. Rather, these phrases merely identify the type of affidavit that, if filed with the complaint, brings about a defendant's obligation to answer or otherwise file a responsive pleading to the complaint. This is not to say that a plaintiff may pursue a medical malpractice action with a defective affidavit of merit. A defendant may challenge a statutorily defective affidavit by responsive pleading, motion, or assertion of an affirmative defense. A defendant may not, however, ignore a complaint, allow a default judgment to be taken, and later attack the judgment on the basis of a defective affidavit.

We must presume that the Legislature was aware of established court procedure at the time it enacted this legislation. It is exclusively the province of the courts to determine the sufficiency of pleadings, the admissibility of evidence, and the efficient administration of justice in the courts. Nothing in MCL 600.2912d suggests that the Legislature intended to take this function away from the trial court and place it in the hands of the defendant.

This interpretation of MCL 600.2912e and MCR 2.108(A)(6) is consistent with other provisions of the Revised Judicature Act that address medical malpractice actions. MCL 600.2912c(1) provides, in pertinent part:

In an action alleging medical malpractice, a party named as a defendant in the action may, *instead of answering or otherwise pleading*, file with the court an affidavit certifying that he or she was not involved, either directly or indirectly, in the occurrence alleged in the action. [Emphasis added.]

Thus, in limited situations, the Legislature expressly granted to medical malpractice defendants the unilateral authority to avoid answering or otherwise filing a responsive pleading to a medical malpractice complaint. Had the Legislature intended to allow medical malpractice defendants to unilaterally determine whether an affidavit of merit failed to comply with the provisions of MCL 600.2912d so as to relieve the defendant of the obligation to file an answer or other responsive pleading, it would have expressly granted such authority. The omission of a provision in one part of a statute that is included in another part should be construed as intentional. *Farrington v Total Petroleum, Inc*, 442 Mich 201, 210; 501 NW2d 76 (1993); *Polkton Twp v Pellegrom*, 265 Mich App 88, 103; 693 NW2d 170 (2005).

II. The Trial Court Improperly Reinstated the Default Against Defendant

Defendant moved to set aside the default on December 10, 2001. Under MCR 2.603(D)(1), "[a] motion to set aside a default . . . shall be granted only if good cause is shown and an affidavit of facts showing a meritorious defense is filed." The good cause and meritorious defense elements of a motion must be considered separately. *Zaiter v Riverfront Complex, Ltd*, 463 Mich 544, 553 n 9; 620 NW2d 646 (2001). In regard to the good cause requirement, defendant proffered an affidavit from his employee, Mona Wilson, in which she stated that she personally faxed to the insurance company the summons and complaint. She also stated that "my fax machine does not print a verification or confirmation unless there is a communication

problem and I did not receive any verification that the faxed transmittal had a communication problem and was not received by the ProNational Insurance Company." Further, Wilson affirmed that her "writing does appear on the top of the Summons as attached to my affidavit, . . . stating, 'faxed September 19th ProNational'" and that she made this notation immediately after she faxed the documents.

In regard to the affidavit of meritorious defense requirement, defendant proffered an affidavit identifying the factual basis of his defense. Defendant's affidavit, in general, averred that he did not breach the applicable standard of care and that the cause of plaintiff's injury stemmed from past chronic infections resulting from two previous root canals not performed by defendant.

The trial court granted defendant's motion to set aside the default. The trial court found the time frame in which defendant failed to answer was "relatively short," and that the "failed fax transmittal" was in part responsible for the delay and constituted a "reasonable excuse."

After defendant filed his motion for summary disposition based on plaintiff's defective affidavit of merit, plaintiff filed a motion requesting the trial court reconsider its order setting aside the default. Trial courts have discretion to reconsider previous rulings. MCR 2.119(F)(3) provides:

Generally, and without restricting the discretion of the court, a motion for rehearing or reconsideration which merely presents the same issues ruled on by the court, either expressly or by reasonable implication, will not be granted. The moving party must demonstrate a palpable error by which the court and the parties have been misled and show that a different disposition of the motion must result from correction of the error.

After conducting a hearing, the trial court issued a written opinion and order denying defendant's motion for summary disposition and granting plaintiff's motion to reinstate the default, finding that "two factors were not argued or made known to the Court at the time of the motion to set aside the default and the Court was therefore misled at the time of the initial ruling on this matter."

The trial court, in addressing the first factor, stated that

it appears from the discovery that has been conducted by way of phone records and the testimony of Defendant's office manager, Mona Wilson, that it is questionable whether a good faith effort to transmit the summons and complaint by fax as alleged at the original motion to set aside the default is accurate. The testimony of Mona Wilson is that she did make this attempt, however, the phone records do not establish that any long distance call was made or billed to her phone system on the date of the alleged fax. This evidence removes the possibility that a long distance call was misdialed and the information faxed to the wrong number. The phone records established that there was no long distance

call on the relevant date. It appears that a phone connection was not made on that date to a long distance number that would have allowed the machine to process the fax and these facts contradict the affidavit Mona Wilson.

The trial court stated that it found "questionable," whether there was "a good faith effort to transmit the summons and complaint by fax as alleged at the original motion to set aside the default" The trial court further noted that the absence of any long distance call on the date of the alleged fax, in short, contradicts the affidavit of Mona Wilson. The obvious implication of these findings, considered along with the conclusion that it was misled at the time of the initial ruling on this matter, is that defendant fabricated his claim that the failure to transmit the summons and complaint to his insurer was the product of excusable clerical error. This Court has held that a motion for reconsideration of setting aside a default is properly granted when evidence is presented that "seriously call[s] into question" the factual allegations contained in the affidavit supplied in support of the motion to set aside the default. *Michigan Bank-Midwest v D J Reynaert, Inc*, 165 Mich App 630, 646; 419 NW2d 439 (1988).

However, where there are allegations indicating that fraud has been committed on the court, it is generally an abuse of discretion for the court to decide the motion without first conducting an evidentiary hearing into the allegations. *Rapaport v Rapaport*, 185 Mich App 12, 16; 460 NW2d 588 (1990); *St Clair Commercial & Savings Bank v Macauley*, 66 Mich App 210, 214-215, 238 NW2d 806 (1975); but see *Michigan Bank-Midwest, supra* at 643 (no evidentiary hearing is required where a party alleged to have committed fraud is not entitled to relief on certain alternative grounds). Here, while there may be evidence suggesting that defendant fabricated his claim, the absence of a long distance phone record on the day the fax was attempted does not necessarily defeat defendant's assertion that the fax was not received because of clerical error. As mentioned, Wilson's affidavit explains that she "did not receive any verification that the faxed transmittal had a communication problem and was not received by the ProNational Insurance Company." The absence of a long distance phone record is not inconsistent with this assertion, and, indeed, may even explain how she "did not receive any verification that the faxed transmittal had a communication problem" That is, if there were never a phone connection, (for any number of reasons) there may not be any failed communication to verify, which is consistent with Wilson's averment that she believed that the fax was received. Thus, I conclude that the evidence is unclear in regard to whether defendant fabricated his claim that the failure to transmit the summons and complaint to his insurer was the product of excusable clerical error. Accordingly, I would vacate the order of default and remand for an evidentiary hearing on the matter.

The trial court also addressed a second basis for granting plaintiff's motion to reconsider setting aside the default. The trial court noted that defendant had argued in his brief in support of setting aside the default that Michigan favors meritorious litigation and that manifest injustice would result if defendant were not able to present proof to the trier of fact. The trial court held:

These arguments were made by the Defendant and relied upon by the Court in its assessment of its ruling in setting aside the default. What has unfolded subsequent to that ruling, however, is the Defendant's argument that the

summons and complaint must now be dismissed with prejudice because the Plaintiff's Affidavit of Merit was signed by an expert in the field of endodontics concerning this particular root canal which gives rise to this action rather than someone in the field of general dentistry.

Further, the trial court stated:

It is patently unfair to allow the Defendant to successfully assert in his request to set aside the default that all litigants, whenever possible, should have their day in court knowing that upon granting this relief, Defendant will then be entitled to summary disposition based on an affidavit being executed by a dentist specializing in endodontics rather than general dentistry.

I conclude that the trial court abused its discretion in reinstating the default on this ground. The court rule addressing the setting aside of a default has only two elements. The defaulted party must show good cause for not timely pursuing the defense and "an affidavit of facts showing a meritorious defense." MCR 2.603(D)(1). Nothing in the court rule precludes a once-defaulted party from pursuing a defense other than the defense pleaded in the affidavit of meritorious defense under MCR 2.603(D). The requirement of an affidavit of meritorious defense essentially prevents a defaulted party from merely denying the plaintiff's allegations in a conclusory manner. See *Miller v Rondeau*, 174 Mich App 483, 488; 436 NW2d 393 (1988). To the extent that the trial court reinstated the default merely because it did not approve of defendant pursuing a statute of limitations defense, the trial court erred.

III. Conclusion

Defendant lacked authority to ignore plaintiff's complaint, notwithstanding the defective affidavit of merit. I would vacate the default and the ensuing default judgment, and remand for an evidentiary hearing on the issue whether defendant's claim of clerical error to establish good cause for the failure to timely or otherwise respond to the complaint was fraudulent. To the extent the court concludes that defendant did not commit a fraud on the court, the trial court should rule on defendant's motion for summary disposition.²

/s/ Brian K. Zahra

² I express no opinion on the merit of defendant's motion for summary disposition based on the applicable statute of limitations.