

STATE OF MICHIGAN
COURT OF APPEALS

JESSICA ANN WASHINGTON, a Minor, by her
Father and Next Friend, RUDOLPH
WASHINGTON,

Plaintiff-Appellee,

v

THOMAS LEE PARKER,

Defendant-Appellant,

and

BOBBY JO LEWANDOWSKI,

Defendant.

UNPUBLISHED
August 18, 1998

No. 191333
St. Clair Circuit
LC No. 95-000097 NI

Before: McDonald, P.J., and O'Connell and Smolenski, JJ.

PER CURIAM.

Defendant Thomas Lee Parker appeals as of right from the circuit court's order denying defendant's motion to set aside the default and from a default judgment awarding plaintiff damages in the amount of \$750,000. We affirm the trial court's denial of the motion to set aside the default but reverse the default judgment.

Plaintiff filed this suit against defendant and Bobby Jo Lewandowski, alleging she sustained injuries in a car accident after defendant and Lewandowski negligently entrusted a vehicle to her. At the time of the accident, plaintiff was fifteen years old. Her complaint alleged defendant and Lewandowski allowed her to drive the vehicle although they were aware that she did not have a license to do so and that she lacked the skill and judgment necessary to operate the vehicle properly.

After the complaint was filed, defendant was incarcerated on criminal charges unrelated to this matter. Defendant's attorney in the criminal matter was Kenneth Lord. Lord accepted service of

process in this civil action on defendant's behalf. Lord arranged for an extension to answer the complaint and unsuccessfully attempted to turn the matter over to defendant's insurer. Defendant never answered plaintiff's complaint, and a default was eventually entered. Plaintiff later moved for entry of a default judgment.

Lord filed an appearance in this matter after the default was entered. He also filed a motion to set aside the default and a document entitled "Affidavit of Meritorious Defense," which was signed by defendant. The document was not notarized, but stated that defendant was incarcerated at the time of the accident, never owned the vehicle in question, and did not lend plaintiff the car or give her permission to drive it.

The trial court held a hearing on defendant's motion to set aside the default. Defendant, who remained incarcerated, was not present at the hearing. Lord argued defendant failed to answer the complaint because he was incarcerated and his insurer had refused to provide a defense. Lord repeated the grounds for a meritorious defense contained in the document defendant offered as an affidavit. Lord indicated he was not representing defendant any further after the day of the hearing, and claimed he had only represented defendant in the matter only to the extent that he had "attempted to protect [defendant's] rights in this matter." The court found defendant failed to present a meritorious defense and denied the motion to set aside the default.

Lord objected when it became apparent the trial court was going to proceed to hold a hearing on damages, indicating the court should arrange for defendant to be present to represent himself at the hearing. Plaintiff argued defendant did not have a right to present a defense since the default had been entered. Although the court recognized defendant was not present and stated that his absence was due to his incarceration, it proceeded to excuse Lord and took testimony from two witnesses. At the conclusion of the hearing, the trial court indicated it would enter a default judgment in the amount of \$750,000 plus interest. After the hearing, the default judgment was entered. This appeal followed.

Defendant argues the trial court abused its discretion in denying his motion to set aside the default. We disagree.

While the policy of this state generally favors the meritorious determination of issues, and, therefore, encourages the setting aside of defaults, whether a default should be set aside is within the sound discretion of the trial court and will not be reversed absent a clear abuse of discretion. *Gavulic v Boyer*, 195 Mich App 20, 24; 489 NW2d 124 (1992). A court may grant a motion to set aside a default only upon a showing of good cause and the filing of an affidavit of facts showing a meritorious defense. MCR 2.603(D)(1); *Gavulic, supra* at 24.

Good cause includes a substantial irregularity or defect in the proceedings, a reasonable excuse for failure to comply with the requirements that created the default, or some other reason showing that manifest injustice would result from allowing the default to stand. *Gavulic, supra* at 24-25. In this case, defendant argued he had good cause because he was incarcerated during the proceedings and because his insurer failed to provide a defense. We find this is not enough to establish good cause. Prisoners can and do engage in litigation, civil as well as criminal, despite their incarceration. This

Court's docket typically includes numerous cases in which parties who are incarcerated vigorously advance their interests. Moreover, the fact that the insurer would not provide a defense for defendant does not excuse his failure to answer the complaint. Lord accepted service of the complaint and should have responded to the complaint when the insurer refused to do so. A lawyer's negligence is attributable to the client, and does not normally constitute grounds for setting aside the default judgment. *Pascoe v Sova*, 209 Mich App 97-298; 530 NW2d 781 (1995). Although the trial court apparently did not base its decision on this ground, it reached the right result by denying defendant's motion to set aside the default and reversal is not necessary. *Phinney v Perlmutter*, 222 Mich App 513, 532; 564 NW2d 532 (1997).

Defendant also argues the trial court erred when, after entering the default, it allowed defendant's counsel to withdraw without notice to defendant and held a hearing on damages, at which neither defendant nor counsel were present. We agree. We review the trial court's actions for an abuse of discretion. *Pascoe, supra* at 301; *Bye v Ferguson*, 138 Mich App 196, 208; 360 NW2d 175 (1984).

While the question of a defaulting party's liability is settled by a default, the defaulting party has the right to participate where further proceedings are necessary to determine the amount of damages. *Wood v Detroit Automobile Inter-Ins Exchange*, 413 Mich 573, 578; 321 NW2d 653 (1982); *Dollar Rent-A-Car v Nodel*, 172 Mich App 738, 743; 432 NW2d 423 (1988).

In this case, defendant was denied his right to participate in the hearing because the trial court allowed counsel to withdraw after denying his motion to set aside the default, excused counsel from the proceedings, and then immediately held a hearing on damages. Although it appears from the record that counsel claimed he was not representing defendant, counsel accepted service of the complaint, filed an appearance, filed a motion to set aside the default, and appeared at the hearing on the motion to set aside the default. There is no indication in the record that defendant knew counsel would discontinue his representation of defendant if the motion to set aside the default was denied. See *Bye, supra* at 207; *Pascoe, supra* at 300. Accordingly, defendant was entitled to assume he would continue to be represented at the damages hearing. See *Bye, supra* at 207; *Pascoe, supra* at 300. Under these circumstances, the trial court abused its discretion by proceeding immediately to the damages hearing. Defendant should have been given notice of withdrawal and an opportunity to be present to defend himself or obtain new counsel. See *Bye, supra* at 207-208; *Pascoe, supra* at 300-301. Accordingly, we reverse the default judgment. A new hearing must be held on the issue of damages after defendant has been given proper notice at which defendant is allowed to participate.

Affirmed in part, reversed in part, and remanded for further proceedings consistent with this opinion. We do not retain jurisdiction.

/s/ Gary R. McDonald
/s/ Peter D. O'Connell
/s/ Michael J. Smolenski