STATE OF MICHIGAN

COURT OF APPEALS

MICHAEL ROBERT POLLOCK and SHANNON MARIE POLLOCK,

Plaintiffs-Appellees,

v

MICHELIN NORTH AMERICA, INC.,

Defendant-Appellant,

and

MICHELIN CLERMONT-FERRAND

Defendant.

UNPUBLISHED
April 4, 2000

No. 207969
Wayne Circuit Court
LC No. 94-434049 NP

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

PER CURIAM.

Defendant Michelin North America, Incorporated appeals as of right from a judgment for plaintiffs in the amount of $236,400 in this products liability action. We reverse and remand.

I

Plaintiff sustained injuries in 1993 while attempting to inflate or check the air pressure within a sixteen inch Michelin tire. Before inflating the tire, plaintiff had placed the sixteen inch tire on a 16.5 by 6.75 inch Budd Company wheel rim. Plaintiff alleged that the "tire and wheel/rim combination created what is known in the tire and wheel/rim industry as a 'mismatch' condition." The tire exploded, allegedly breaking plaintiff's nose, both his wrists, his right arm, hand and fingers, fracturing his ribs, damaging an eye and causing many other abrasions and lacerations.

Plaintiffs filed a complaint alleging negligence and breach of express and implied warranty counts against Michelin North America, Michelin Clermont-Ferrand, the Budd Company, Budd Acquisition Corporation, and Thyssen Steel Detroit Company d/b/a Thyssen Steel Group.[1] Over one year prior to

trial, Budd Acquisition Company and Thyssen Steel Detroit Co. d/b/a Thyssen Steel Group were dismissed pursuant to a stipulated order. On June 3, 1997, plaintiffs and the Budd company agreed to settle, with the Budd Company agreeing to pay plaintiffs $40,000. While the status of named defendant Michelin Clermont-Ferrand is unclear from the lower court record provided this Court, Michelin Clermont-Ferrand is not a party to the instant appeal.[2]

The trial began on June 3, 1997. The lower court docket sheets reveal that prior to trial settlement conferences had occurred on September 26, 1996 and April 11, 1997. On June 2, 1997, the day before trial, the parties spent approximately one hour and forty minutes in chambers discussing settlement. On returning to the courtroom, the trial court remarked, "We've had some negotiations about settlement and we're going to adjourn the case until tomorrow morning. I have told and ordered the attorneys from Michelin to have somebody from Michelin Tire here with the authority to settle the case."

The next morning, in response to the court's inquiry whether someone with authority to settle was now present, defense counsel presented Michelin North America (hereinafter "Michelin") senior technical advisor Robert Robinson. After Robinson was sworn, the court inquired of him as follows:

> *The Court*: All right. I understand that you don't want to pay any money on this case. Do you have the authority to settle the case?
>
> *Mr. Robinson*: I have complete authority in this case, your Honor.
>
> *The Court*: To settle the case also?
>
> *Mr. Robinson*: To settle the case or to try the case. Yes, your Honor.
>
> *The Court*: You do. All right. Okay . . . . Let me ask you this. Have you ever settled any cases before?
>
> *Mr. Robinson*: Yes, I have, your Honor.

The court, parties and representatives then again retired to chambers where for approximately forty minutes they discussed settlement. The discussions were unsuccessful, and trial was commenced.

On June 10, 1997, plaintiffs' counsel requested that the court permit him to cross examine Robinson regarding his authority to settle the case, explaining that he did not believe Robinson's earlier representations concerning his settlement authority. The trial court permitted plaintiffs' counsel to ask a few questions outside the jury's presence, leading to the following discussion:

> *Q*: Mr. Robinson, you have never settled a 16 inch tire 16.5 rim mismatch case, have you?
>
> *A*: No, I haven't.

* * *

Q: And you have to get authority from someone at the corporate offices to give you authority to settle most cases, don't you?

A: That is not correct.

Q: Your supervisor Mr. [Ourada] has testified, has he not, that he has the only authority in your Products Liability Department to settle cases?

A: To settle in terms of value, an amount.

* * *

Not in terms of determining whether to settle or whether not to settle.

Q: He has to make the final say on the amount and approve it?

A: That is correct.

Q: And you don't have any—

A: But as to whether to settle or not—if you'd let me finish my—finish my response. On whether to settle or not, it is my sole responsibility.

Q: And you don't have the authority to authorize money without Mr. [Ourada]'s permission—consent?

A: Since there is no intent on my—in my mind to settle, then there is no question of whether there is an amount to authorize.

* * *

Mr. [Ourada] is my boss, your Honor. I have already said that the decision on whether to settle or not settle the case is mine and mine alone. If I make a decision to settle, then the figure amount for settlement has to be agreed between a committee of my boss and myself.

Q: Which means he hasn't got the authority to authorize a dollar.

The Court: Is that correct?

A: I have the authority not to authorize a dollar.

The Court: But do you have the authority to authorize a dollar?

A: Not one dollar.

Plaintiffs' counsel moved for a contempt citation, then subsequently requested a default, which the court took under advisement.

On June 11, 1997, after plaintiffs had presented several witnesses over four days of trial, the parties presented the court with their arguments regarding the propriety of a default. The trial court granted one pursuant to the following reasoning:

> The Court is going to grant the motion. It is going to default the defendants. It's my view that in order to have a meaningful settlement conference, you have to have somebody with the authority to pay money if you're a defendant, and to accept money if you're a plaintiff. You cannot have a meaningful settlement conference if the posture is the person who is here does not have one dollar to settle a case, and that's what we were told under oath. I don't think—I think—there's no question in my mind a defendant does not have to settle a case, but there's also no question in my mind that in order for a meaningful settlement conference, a defendant does have to have somebody with money at the settlement conference. The Court ordered that. I don't think there's any question about that. And everybody knew what I had ordered. So, therefore, the Court is going to grant the motion.

Later during the day's proceedings, the court further discussed the basis for its ruling, quoting *Kiefer v Great Atlantic & Pacific Tea Co, Inc*, 80 Mich App 590, 594, n 3; 264 NW2d 71 (1978), which the court also quoted in its July 23, 1997 opinion:

> [A] special problem is presented when the defendant is a corporation. However, the party must be represented at these [settlement] conferences by someone with authority to settle the suit in the same manner as an individual party. In most instances, this will mean someone with discretion to make and accept offers not limited by predetermined amounts.

Because the court did not believe that Robinson possessed this authority, the court concluded that Michelin had failed to comply with MCR 2.401(F)(1) and defaulted Michelin with respect to the issue of its liability.

After a subsequent bench trial concerning plaintiffs' damages, the court awarded $276,000, then subtracted the Budd Company's $40,000 settlement, entering judgment against Michelin in the amount of $234,000. Michelin subsequently moved to set aside the default judgment and for a new trial, which the trial court denied.

II

Michelin contends that the trial court erred in entering the default judgment against it when it had complied with the court's directive to produce a representative possessing authority to settle the case. The trial court found that defendant violated MCR 2.401(F), which provides in relevant part as follows:

> *Presence of Parties at Conference*. In the case of a conference at which meaningful discussion of settlement is anticipated, the court may direct that persons with authority to settle the case, including the parties to the action, agents of parties, representatives of lienholders, or representatives of insurance carriers:
>
> (1) be present at the conference; or
>
> (2) be immediately available at the time of the conference. The court's order may specify whether the availability is to be in person or by telephone.

In the event that a party or a party's attorney disobeys a court order to attend a settlement conference, MCR 2.401(G) provides for a default or dismissal of that party's case:

> (1) Failure of a party or the party's attorney to attend a scheduled conference, as directed by the court, constitutes a default to which MCR 2.603 is applicable or grounds for dismissal under MCR 2.504(B).
>
> (2) The court shall 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.

Because MCR 2.401(F) and (G) give the court discretion to default a defendant for failure to participate in pretrial proceedings, we review for an abuse of that discretion. *Schell v Baker Furniture Co*, 232 Mich App 470, 474; 591 NW2d 349 (1998).

Michelin argues that it complied with MCR 2.401(F) when it produced Robinson, who had complete and exclusive authority to determine whether to settle or try the case. Plaintiff counters that MCR 2.401(F) demands the appearance of a representative with meaningful, unlimited settlement authority, and characterizes Robinson's authority as limited to only authority not to settle the case.

The trial court abused its discretion in entering a default against Michelin on the basis that Robinson lacked authority to offer specific amounts of money in settlement because the plain language of MCR 2.401(F) and (G) contemplates entry of a default only when a party or its attorney fails to *attend* a scheduled conference, and makes no provision for a default based on the party's or party's attorney's failure to make a settlement offer. *Henry v Prusak*, 229 Mich App 162, 170; 582 NW2d 193 (1998). No indication exists that Michelin or Robinson attempted to avoid attending any settlement conference. To the contrary, defense counsel and Robinson engaged in at least two separate attempts to settle the case before trial, and the record does not reveal that defense counsel or Robinson in bad faith simply refused to entertain any settlement of the case. Although the entry of default prevented

Michelin from presenting its case in chief, defense counsel filed with Michelin's motion to set aside the default his sixteen page affidavit of meritorious defense.

We find that defendant's production of Robinson satisfied MCR 2.401(F) and the trial court's order. The court rule's plain language contemplates only the facilitation of "meaningful" settlement discussions among "persons with authority to settle the case."[3] We note that the trial court did not explicitly require the presence of someone who could authorize the payment of a specific monetary amount. In response to the court's order, Michelin produced Robinson, who testified repeatedly and undisputedly that he alone could decide whether or not to entertain settlement of this particular case for any monetary sum. He explained that he spent seventy to eighty percent of his time working for Michelin defending its products in litigation, and explained that "this particular file is mine within the corporation," that it had always been his responsibility, and that he was fully familiar with it. Thus, Michelin's production of Robinson, who possessed complete authority to determine whether to settle or try the case, and who meaningfully participated in the settlement negotiations, properly responded to MCR 2.401(F) and the court's order.

To the extent that the trial court relied on *Kiefer*, *supra*, in ordering the default, its reliance was misplaced. Unlike *Kiefer*, this case did not involve a representative that made a deliberate effort to avoid settlement negotiations altogether. Additionally, while *Kiefer* involved a disagreement concerning an appropriate settlement amount, this case involved Michelin's determination, at Robinson's recommendation, that it did not wish to settle at all. With respect to the *Kiefer* Court's statement in footnote three, *supra*, this case is not one in which Michelin produced a representative who could not effectively negotiate because he lacked authority to act on Michelin's behalf and was simply instructed by another individual with authority to offer only a certain, specific sum. The fact that someone besides Robinson must concur in a specific settlement dollar amount is irrelevant in this case when Robinson, the individual possessing the sole authority to determine whether the instant case represents a candidate for settlement at any dollar amount, has apparently in good faith concluded that this is not such a case.[4]

We note briefly that under the circumstances of this case the trial court's entry of a default sanctioned Michelin for its failure to make a settlement offer.

> A court cannot "force" settlements upon parties. The practical effect of [the trial court]'s sanction of default against a party whose insurance carrier's representative refuses to make an offer to pay money is to force settlement. While we certainly encourage settlement negotiations as an essential and necessary tool for the resolution of disputes and docket control in congested courts, we cannot tolerate the routine practice of entering a default against a party for failure of the party's insurance carrier to make an offer of settlement. Such a practice deprives a party of due process, the right to assert a defense, and the right to have a jury determine any disputed issues of fact. [*Henry*, *supra* at 170-171.]

Although *Henry* involved a defendant defaulted for its nonparty insurance carrier's refusal to offer a settlement, we find that its reasoning applies to this case involving the party's own representative.[5]

Plaintiffs offer the dire prediction that a reversal of the trial court "will toll the death knoll for settlement cases in Michigan courts." Plaintiffs' rhetoric ignores the facts of this case, however, which show that pursuant to MCR 2.401(F) the trial court demanded the presence of a representative with authority, that Robinson had authority to determine whether to settle or try the case, and that Michelin and Robinson attended apparently meaningful settlement negotiations. These facts reflect that the court rules achieved their intended purpose to achieve meaningful settlement discussions.[6]

In light of our conclusion that the trial court abused its discretion in defaulting Michelin pursuant to MCR 2.401, we need not address Michelin's further constitutional arguments.

Reversed and remanded for further proceedings consistent with this opinion. We do not retain jurisdiction.

/s/ Hilda R. Gage
/s/ E. Thomas Fitzgerald
/s/ Jane E. Markey

[1] Shannon Pollock also alleged loss of consortium.

[2] After reviewing the record, we are unable to ascertain exactly what happened to Michelin Clermont-Ferrand. The record contains a translated affidavit of service indicating that the French corporation was served on April 12, 1995. While Michelin Clermont-Ferrand generally appeared on the parties' filings throughout the case, we did not locate the entry of an appearance by the corporation. At trial, the parties' attorneys disagreed whether Michelin Clermont-Ferrand was ever properly served.

[3] The trial court equated a "person[] with authority to settle" as someone with authority to pay specific amounts of money. The language of MCR 2.401(F) is devoid of any such specific requirements. While plaintiffs cite this Court's statement that "[t]he purpose behind MCR 2.401 is satisfied when the insurance company sends a representative who has unlimited authority and unfettered discretion to settle the case and who is able to participate in meaningful settlement negotiations," *Kornak v Auto Club Ins Ass'n*, 211 Mich App 416, 422; 536 NW2d 553 (1995), we note that the *Kornak* Court did not hold that meaningful settlement negotiations under MCR 2.401 can *only* occur in the presence of someone with totally unfettered settlement discretion.

[4] While plaintiffs contend that Robinson had no authority to settle as contemplated by the court rule because "[h]e was a courier of Defendant's fixed, predetermined prohibition against settlement of this case," plaintiffs' argument ignores Robinson's testimony regarding the scope of his authority. Furthermore, plaintiffs do not support their assertion that Robinson was programmed to adhere to a predetermined position of settlement rejection.

[5] Although court rule commentary does not represent authority binding on this Court, we note the following persuasive and relevant discussion of MCR 2.401(G):

> It has been reported that some Michigan trial courts have adopted a practice of entering defaults against defendants who appear at a settlement conference but offer little or nothing in settlement. The apparent theory is that offering nothing in settlement is

> not meaningful participation, and is therefore tantamount to refusing to attend the settlement conference. We believe that such a practice is not authorized by MCR 2.401(G), which permits entry of a default only for "[f]ailure of a party or the party's attorney to *attend* a scheduled conference." To add the additional requirement that the party make what the trial court considers a "meaningful" settlement offer, on pain of default or dismissal, would require an amendment to the rule, and would seriously intrude upon the parties' right to a "day in court." Once a party is in attendance, it is up to the opposing party, with or without the court's assistance, to persuade that party to change its settlement position based on the likely outcome of the trial. The same principle applies to all parties to the case. If either the plaintiff or the defendant elects not to settle, or holds out for what the court may deem an "unreasonable" settlement, it has every right to proceed to trial, weighing the risk of an unfavorable outcome against the possibility of complete vindication. [2 Dean & Longhofer, Michigan Court Rules Practice, p 478 (emphasis in original).]

[6] Plaintiffs also argue that a default was proper pursuant to MCR 2.506(A)(2) and (F). We will not address these provisions, however, because neither the parties nor the trial court previously addressed these provisions. *Fast Air, Inc v Knight*, 235 Mich App 541, 549; 599 NW2d 489 (1999).