STATE OF MICHIGAN

COURT OF APPEALS

ROBERT P. THOMAS,

Plaintiff-Appellant,

v

GEORGE JEROME & COMPANY, DENNIS J. CHEGASH, BROOKS WILLIAMSON & ASSOCIATES INCORPORATED, TOWN SQUARE ASSOCIATES LLC, SAL-MAR HOMES INCORPORATED, MCNAMEE PORTER & SEELEY INCORPORATED, CITY OF NEW BALTIMORE, ERIC WIEDERHOLD, ANN BILLOCK, DEPARTMENT OF ENVIRONMENTAL QUALITY, RICH POWERS, DAVID HAMILTON, and MICHAEL B. NURSE,

Defendants-Appellees.

UNPUBLISHED
May 21, 2002

No. 224259
Macomb Circuit Court
LC No. 99-002331-CE

Before: Cooper, P.J., and Cavanagh and Markey, JJ.

PER CURIAM.

Plaintiff appeals by right the trial court's order dismissing this case because plaintiff failed to post bonds required as security for costs. We affirm in part, reverse in part, and remand.

Plaintiff argues that the trial court abused its discretion when it set aside the defaults entered against eight of the defendants: Sal-Mar, Town Square, Chegash, City of New Baltimore, Wiederhold, Billock, Jerome & Company, and McNamee Porter & Seeley.[1] Plaintiff asserts that defendants did not present the trial court with good cause and an affidavit of a meritorious defense. We agree. The trial court abused its discretion in setting aside these defaults because it did not follow MCR 2.603(D), the court rule that sets forth the proper procedure for setting aside defaults. We reverse and remand on this issue. This Court reviews the trial court's decision on a

[1] We note that the default issue does not pertain to defendants Michigan Department of Environmental Quality (MDEQ), Hamilton, Powers, Nurse, and Brooks Williamson.

motion to set aside a default for an abuse of discretion. *Kowalski v Fiutowski*, 247 Mich App 156, 158; 635 NW2d 502 (2001).

MCR 2.603(D) states as follows:

> (1) A motion to set aside a default or a default judgment, except when grounded on lack of jurisdiction over the defendant, shall be granted only if good cause is shown and an affidavit of facts showing a meritorious defense is filed.
>
> (2) Except as provided in MCR 2.612, if personal service was made on the party against whom the default was taken, the default, and default judgment if one has been entered, may only be set aside if the motion is filed
>
> (a) before entry of judgment, or
>
> (b) if judgment has been entered, within 21 days after the default was entered.
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> (3) In addition, the court may set aside an entry of default and a judgment by default in accordance with MCR 2.612.
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> (4) An order setting aside the default must be conditioned on the party against whom the default was taken paying the taxable costs incurred by the other party in reliance on the default, except as prescribed in MCR 2.625(D). The order may also impose other conditions the court deems proper, including a reasonable attorney fee.

Generally, the law favors the determination of claims on the merits. *Alken-Ziegler, Inc v Waterbury Headers Corp*, 461 Mich 219, 229; 600 NW2d 638 (1999). However, "the policy of this state is generally against setting aside defaults and default judgments that have been properly entered." *Id.* As the court rule explains, a party must demonstrate good cause and file an affidavit of a meritorious defense. MCR 2.603(D)(1); *Alken-Ziegler, supra*. Good cause can be demonstrated by showing a "substantial irregularity or defect in the proceeding upon which the default is based" or "a reasonable excuse for failure to comply with the requirements that created the default." *Alken-Ziegler, supra* at 233. Our Supreme Court, however, has clarified that manifest injustice is not a third factor that can be used to satisfy the good cause requirement. *Id.* Instead, manifest injustice is the "result that would occur if a default were allowed to stand where a party has satisfied the 'meritorious defense' and 'good cause' requirements of the court rule." *Id.* Further, our Supreme Court explained that "the strength of the defense obviously will affect the 'good cause' showing that is necessary. In other words, if a party states a meritorious defense that would be absolute if proven, a lesser showing of 'good cause' will be required than if the defense were weaker, in order to prevent manifest injustice." *Id*. at 233-234.

In this case, defendants Town Square, Sal-Mar, George Jerome & Company, Chegash, City of New Baltimore, Wiederhold, Billock, and McNamee Porter & Seeley were in default on August 10, 1999 after they failed to answer plaintiff's first amended complaint. On August 23, 1999, defendants Town Square, Sal-Mar, George Jerome & Company, and Chegash moved to set

aside the default, and defendants City of New Baltimore, Billock, and Wiederhold joined in the motion by filing a "joinder and concurrence" on August 24, 1999.

We conclude that the trial court abused its discretion when it set aside the defaults entered against these defendants. First, at the hearing, it appears that defendants and the trial court agreed that the defaults were properly entered. Consequently, these defendants cannot demonstrate good cause by showing a substantial defect in the proceeding where the default was entered. Second, defendants also failed to demonstrate good cause by providing a reasonable excuse for their failure to comply. Defendants Town Square, Sal-Mar, George Jerome & Company, and Chegash argued that their attorney had traveled to Florida because of a family member's death and that this was good cause. However, the trial court properly rejected this argument once plaintiff pointed out that the answer was due several days before their attorney left. Further, defendants City of New Baltimore, Wiederhold, and Billock made no attempt to demonstrate good cause at all. Yet, the trial court still found good cause and set aside the default. This was an abuse of discretion. Moreover, although the trial court's sole basis for finding good cause was a pending motion, the trial court recognized that the pending motion was a motion for summary disposition filed by defendant Brooks Williamson, a defendant that had not been found in default. Thus, we do not agree with the trial court that the defaulted defendants could demonstrate good cause because they were waiting for the outcome of this motion. Third, defendants City of New Baltimore, Billock, and Wiederhold did not file an affidavit of a meritorious defense. The court rule plainly requires that such an affidavit be filed by the moving party before a default is set aside.[2] MCR 2.603(D). The court rule also requires that any order setting aside a default must be conditioned on the party against whom the default was taken paying the taxable costs of the party taking the default. MCR 2.603(D)(4). The trial court here also failed to follow this portion of the court rule. Therefore, the defaults entered against these defendants were improperly set aside. With respect to these defendants that moved to set aside the default, we reverse and remand so that the trial court can conduct a second hearing and appropriately apply the court rule.

We also conclude that the trial court abused its discretion when it set aside the default entered against defendant McNamee Porter & Seeley. Defendant McNamee Porter & Seeley did not move to set aside the default, did not appear at the hearing on the motion to set aside the defaults, and did not otherwise demonstrate good cause and a meritorious defense. Thus, because defendant McNamee Porter & Seeley failed to meet any of the requirements of the court rule, the trial court abused its discretion when it set aside the default. We reverse the trial court's order setting aside the default with respect to McNamee Porter & Seeley.

Plaintiff argues that the trial court abused its discretion when it relied on MCR 2.109(A) rather than MCL 324.1702 in ordering him to post a bond for security for costs. We disagree. This Court reviews the trial court's decision to impose a bond as security for costs for an abuse of discretion. *Farleigh v Amalgamated Transit Union, Local 251*, 199 Mich App 631, 633; 502 NW2d 371 (1993). Further, interpretation and application of a statute involves a question of law that this Court reviews de novo. *People v Webb*, 458 Mich 265, 274; 580 NW2d 884 (1998).

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[2] We note that defendants Town Square, Sal-Mar, Chegash, and Jerome & Company filed an affidavit of meritorious defense.

MCR 2.109(A) provides in pertinent part:

> On motion of a party against whom a claim has been asserted in a civil action, if it appears reasonable and proper, the court may order the opposing party to file with the court clerk a bond with surety as required by the court in an amount sufficient to cover all costs and other recoverable expenses that may be awarded by the trial court, or, if the claiming party appeals, by the trial and appellate courts. The court shall determine the amount in its discretion. MCR 3.604(E) and (F) govern objections to the surety.

MCL 324.1702 provides:

> If the court has reasonable grounds to doubt the solvency of the plaintiff or the plaintiff's ability to pay any cost or judgment that might be rendered against him or her in an action brought under this part, the court may order the plaintiff to post a surety bond or cash in an amount of not more than $500.00.

First, it is necessary to decide if the court rule and statute directly conflict. "To determine whether there is a real conflict between a statute and a court rule, both are read according to their plain meaning." *Staff v Johnson*, 242 Mich App 521, 530; 619 NW2d 57 (2000). We conclude that in respect to this particular fact situation, the statute and court rule directly conflict. MCL 324.1702 restricts the amount of a bond to $500 whereas MCR 2.109 places no restriction on the amount of the bond. Further, the statute and court rule both address the same situation, the requirement that plaintiff post a bond as security for costs. Contrary to defendants' argument, both MCR 2.109(A) and MCL 324.1702 concerned a plaintiff's ability to pay costs. MCR 2.109(A) allows a court to order plaintiff to post a bond for costs where it is "reasonable and proper."[3] MCL 324.1702 also allows a court to require a plaintiff to post a bond for costs when a court has "reasonable grounds" to question the plaintiff's ability to pay costs. Thus, the statute and court rule conflict.

Second, this Court must determine whether the statute or court rule governs in the instant case. We conclude that MCR 2.109(A) applies.

The authority to determine the rules of practice and procedure rests exclusively with our Supreme Court. *McDougall v Schanz*, 461 Mich 15, 26; 597 NW2d 148 (1999); *Staff*, *supra* at 531. Indeed, the Constitution gave our Supreme Court this exclusive power. See Const 1963, art 3, § 2; Const 1963, art 6, § 5; *McDougall*, *supra*. Therefore, the Legislature cannot interfere with our Supreme Court's powers in this arena. *McDougall*, *supra* at 27. Likewise, our Supreme Court does not have authority to "enact court rules that establish, abrogate, or modify the substantive law." *Id*. To determine whether the court rule or the statute governs in the instant case, this Court must determine whether the statute addresses a matter of practice and

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[3] We note that MCR 2.109(B)(1) also addresses a party's financial ability to furnish a security bond.

procedure or substantive law. *Staff, supra* at 530-531. "The task of determining the line between practice and procedure and substantive law is a difficult one that must be determined case by case." *Id.* at 531.

In this case, the trial court relied on MCR 1.104 and *Omne Financial, Inc v Shacks, Inc*, 226 Mich App 397, 404; 573 NW2d 641 (1997), aff'd 460 Mich 305; 596 NW2d 591 (1999), to conclude that the court rule prevailed over the statute. MCR 1.104 states that "[r]ules of practice set forth in any statute, if not in conflict with any of these rules, are effective until superseded by rules adopted by the Supreme Court." Moreover, in *Omne, supra* at 399, this Court considered whether contractual venue provisions are binding. In making this determination, this Court was required to consider a conflict between a court rule and a statute in matters of venue. *Id.* at 403-404. This Court stated as follows:

> We note that venue is not governed solely by statute. The parties' choice of venue and motions for change of venue are matters of practice and procedure, which are primarily treated by court rule. Where there is a conflict between a court rule and a statute, the court rule should prevail. [*Id*. at 404.]

The trial court in the present case relied on this language to conclude that the posting of a security bond was a matter of practice and procedure and ordered plaintiff to post a bond for $169,000.

Plaintiff, however, argues that to reach this decision, the trial court completely disregarded our Supreme Court's decision in *McDougall, supra* at 15. In *McDougall*, our Supreme Court addressed the issue of whether MCL 600.2169, a statute governing the admission of expert testimony, was unconstitutional because it conflicted with MRE 702 and infringed upon the Supreme Court's authority to promulgate rules regarding practice and procedure. *Id* at 18. Ultimately, our Supreme Court concluded that the statute was an enactment of substantive law and did not "impermissibly infringe this Court's constitutional rulemaking authority over 'practice and procedure.'" *Id.* at 37. Plaintiff apparently misreads *McDougall* and argues that it stands for the proposition that in <u>all</u> instances a statute takes precedence over a court rule. Unfortunately for plaintiff, the ruling of our Supreme Court was not as broad. Instead, our Supreme Court emphasized the need for a case-by-case analysis to determine whether the statute involves a matter of practice and procedure or substantive law to decide whether the statute or court rule governs. *Id*. at 36.

Apparently anticipating that this Court would reach that conclusion, plaintiff urges this Court to conclude that MCL 324.1702 concerns a matter of substantive law. However, we are inclined to agree with the trial court and conclude that posting a security bond concerns a matter of practice and procedure. In other words, the statutory provision does not regulate a substantive area of environmental law. Indeed, were it not for the $500 limit, the statutory provision would essentially mirror the court rule. In any event, we believe that requiring a party to post a security bond is a matter of practice and procedure related to court administration; therefore, the court rule applies. See generally *Staff, supra* at 531 (statutes of limitation are regarded as procedural and not substantive).

With respect to the trial court's order for bond for security for costs, we also reverse and remand because the trial court did not follow the applicable law when determining the bond. As

previously stated, MCR 2.109(A) states that a bond may be ordered if it is "reasonable and proper." However, MCR 2.109(B) provides that subrule A does not apply in the following circumstances:

> The court may allow a party to proceed without furnishing security for costs if the party's pleading states a legitimate claim and the party shows by affidavit that he or she is financially unable to furnish a security bond.

In *In re Surety Bond for Costs*, 226 Mich App 321, 331-332; 573 NW2d 300 (1997), this Court explained the criteria for requiring a plaintiff to post a bond as security:

> Security should not be required unless there is a substantial reason for doing so. A "substantial reason" for requiring security may exist where there is a "tenuous legal theory of liability," or where there is good reason to believe that a party's allegations are "groundless and unwarranted." If a party does not file a security bond as ordered, a court properly may dismiss that party's claims. [Internal citations omitted.]

In this case, the trial court ordered plaintiff to post a $169,000 bond as security for potential costs. Because the court did not follow the applicable law cited above when it ordered the bond, we remand the bond issue to the trial court for a hearing and the appropriate application of the law. We also note parenthetically that the bonds the court ordered are high amounts. We note further that with respect to defendant McNamee, the bond order is reversed because of the default appropriately entered against McNamee. With respect to the other seven defendants involved in the default issue, this issue may be moot if the trial court determines on remand that the defaults were appropriately entered. Regarding the five defendants that were not defaulted, Brooks Williamson, MDEQ, Powers, Hamilton, and Nurse, the bond order is reversed and remanded for a determination in accordance with the applicable law.

Plaintiff argues that his FOIA claims against defendants City of New Baltimore, Billock, and Wiederhold should be reinstated. Initially, we note that this issue will also be moot if the trial court determines on remand that the defaults were appropriately entered against these defendants. However, to provide guidance to the trial court in case it finds that the defaults should be set aside, we offer the following. We conclude that the trial court abused its discretion in dismissing plaintiff's FOIA claims because plaintiff had failed to post a security bond as to these three defendants. As previously stated, the trial court cannot order plaintiff to post a security bond unless it has a substantial reason. *In re Surety, supra* at 331-332. A substantial reason can be demonstrated if plaintiff relies on a tenuous theory of liability or if plaintiff's allegations are groundless. *Id*. In this case, the trial court ordered defendants City of New Baltimore, Wiederhold, and Billock to produce the information that plaintiff had requested. Therefore, plaintiff's FOIA claims are not groundless or based on a tenuous legal theory, and the plaintiff's FOIA claims should be reinstated. To the extent that plaintiff has alleged other theories of liability against these defendants that the trial court may determine upon remand to be tenuous or groundless, the trial court may order a bond as security for costs after it follows the applicable law regarding security bonds.

Plaintiff also argues that the trial court abused its discretion when it granted defendants' motions to add affirmative defenses rather than granting plaintiff's motion for summary

disposition. With respect to plaintiff's summary disposition motion, we disagree. This Court reviews a trial court's decision on a motion for summary disposition de novo. *Village of Dimondale v Grable*, 240 Mich App 553, 563; 618 NW2d 23 (2000).

In this case, plaintiff moved for summary disposition against all defendants under MCR 2.116(C)(9). However, the trial court only ruled on the motion for summary disposition brought against defendant Brooks Williamson because defendant withdrew the remaining motions after the trial court's decision on the first motion. Therefore, we only address the motion for summary disposition brought against defendant Brooks Williamson.

The trial court denied plaintiff's motion for summary disposition against defendant Brooks Williamson after reasoning that the motion was premature because discovery was incomplete and further factual development was necessary. The trial court, however, informed plaintiff that the motion was denied without prejudice, and plaintiff could move for summary disposition again once discovery was completed.

We agree with plaintiff that the trial court's reasons for denying the motion for summary disposition were incorrect. The court rule clearly states that only the pleadings may be considered when ruling on such a motion. MCR 2.116(G)(5). Therefore, the fact that discovery was incomplete is an inappropriate reason to deny summary disposition under this ground.

Nevertheless, we conclude that summary disposition was still properly denied. Plaintiff alleged causes of action against defendant Brooks Williamson under the natural resources and environmental protection act (NREPA). Defendant Brooks Williamson filed an answer to the first amended complaint and either categorically denied plaintiff's allegations or stated that it lacked sufficient knowledge to either admit or deny the allegations. Defendant Brooks Williamson also raised the following as affirmative defenses: plaintiff failed to state a claim upon which relief may be granted; plaintiff's claim for injunctive relief fails to establish a substantial material injury; plaintiff failed to exhaust administrative remedies; plaintiff lacks standing; plaintiff's claims are barred by laches, waiver, and unclean hands; and plaintiff's claims are barred by the statute of limitations. As our Supreme Court explained in *Nasser v Auto Club Ins Ass'n*, 435 Mich 33, 47-48; 457 NW2d 637 (1990), when material allegations contained in the complaint are categorically denied, summary disposition is improper.

> First, as explained above, merely denying liability is itself a valid defense. The fact that the defense ultimately might be unsuccessful in whole or in part does not render it invalid for purposes of MCR 2.116(C)(9), nor does the fact that it ultimately might be found not to create a genuine issue of material fact to be resolved at trial, thus entitling plaintiff to summary disposition under MCR 2.116(C)(10). [*Id*. at 48.]

Thus, we conclude that the denial of summary disposition was proper.

Next, plaintiff argues that the trial court abused its discretion when it granted defendants' motions to add affirmative defenses. Defendants' sought to add the affirmative defense recognized by the NREPA. MCL 324.1703. Plaintiff argues that defendants waived this statutory defense because it was not raised earlier. The trial court's decision to grant or deny a motion for leave to amend is reviewed for an abuse of discretion. *Frank W Lynch & Co v Flex*

Technologies, Inc, 463 Mich 578, 583; 624 NW2d 180 (2001). With respect to defendant McNamee, which was appropriately defaulted in this matter, the motion should not have been granted, and that portion of the order granting McNamee's motion to add affirmative defenses is reversed. With respect to the other seven defaulted defendants, this issue is moot. If the defaults were appropriately entered against these defendants, then the motion should not have been granted. If the defaults are set aside upon remand, then defendants will have an opportunity to file affirmative defenses in their answers to plaintiff's first amended complaint in accordance with the court rules. With respect to the five defendants that were not defaulted, Brooks Williamson, MDEQ, Nurse, Powers, and Hamilton, we conclude that the trial court did not abuse its discretion in allowing these defendants to add the affirmative defense contained in the NREPA.

In this case, defendants sought to add the affirmative defense contained in the NREPA. This affirmative defense states that "there is no feasible and prudent alternative to defendant's conduct and that his or her conduct is consistent with the promotion of the public health, safety, and welfare in light of the state's paramount concern for the protection of its natural resources from pollution, impairment, or destruction." MCL 324.1703(1). The trial court granted defendants' requests because there was no prejudice to plaintiff as plaintiff was aware of the statute. Thus, the trial court gave defendants seven days to file amended affirmative defenses.

We agree with the trial court's conclusion. There was no evidence of bad faith in defendants' delays in raising this affirmative defense. Furthermore, we agree with the trial court's conclusion that plaintiff would not be prejudiced if the trial court granted the requests for amendment. There is no evidence that plaintiff would be denied a fair trial. Discovery was incomplete, there was no impending trial date, and there was no evidence that defendants' delays in raising this defense resulted in the loss of valuable witnesses or evidence. Finally, plaintiff was not surprised by this affirmative defense because it is provided for by the NREPA, the act plaintiff relied on to state a cause of action against defendants. Thus, given that leave should be freely granted when justice requires, we conclude that the trial court did not abuse its discretion in allowing these nondefaulted defendants to add the affirmative defense.

Plaintiff argues that the trial judge abused his discretion when he refused to disqualify himself from hearing this case. Plaintiff further claims that this case should be reassigned to a different judge on remand. We disagree. This Court reviews the denial of a motion for disqualification for an abuse of discretion, *People v Bennett*, 241 Mich App 511, 513; 616 NW2d 703 (2000), while reviewing the application of the facts to the law de novo, *Cain v Dep't of Corrections*, 451 Mich 470, 503 n 38; 548 NW2d 210 (1996).

MCR 2.003(B) governs the disqualification of a trial judge and lists several grounds that disqualify a judge from hearing a case including that "[t]he judge is personally biased or prejudiced for or against a party or attorney." MCR 2.003(B)(1). The challenging party bears the burden of demonstrating that disqualification is warranted. *Michigan Ass'n of Police v City of Pontiac*, 177 Mich App 752, 757; 442 NW2d 773 (1989). In addition, the challenging party must overcome the presumption of impartiality. *Cain*, *supra* at 497.

After reviewing plaintiff's arguments and the record, we conclude that the trial court properly denied the motion for disqualification, and that it need not be assigned to a different judge upon remand. There is no evidence to substantiate plaintiff's claim that the trial court was

biased or prejudiced against plaintiff. Disqualification based on bias or prejudice cannot be established merely by repeated rulings against a litigant even if the rulings were erroneous. *Wayne Co Prosecutor v Parole Bd*, 210 Mich App 148, 155; 532 NW2d 899 (1995).

We affirm in part, reverse in part, and remand for further proceedings consistent with this opinion. We do not retain jurisdiction.

/s/ Jessica R. Cooper
/s/ Mark J. Cavanagh
/s/ Jane E. Markey