STATE OF MICHIGAN

COURT OF APPEALS

KENNETH HAYNES and SANDRA HAYNES,

Plaintiffs-Appellees,

v

GEORGE HANNAH,

Defendant-Appellant.

UNPUBLISHED
November 22, 2002

No. 230974
Genesee Circuit Court
LC No. 98-062970-NO

Before: Holbrook, Jr., P.J., and Gage and Meter, JJ.

PER CURIAM.

Defendant appeals as of right from an order granting plaintiffs a default judgment. We affirm.

On April 22, 1996, plaintiff Kenneth Haynes was visiting defendant on defendant's property when he brushed up against a power supply unit used for a radio amplifier and received a serious electrical shock. Haynes was taken to Hurley Medical Center, where he was hospitalized for third-degree burns. He remained in the hospital for three days and followed up with the burn clinic once a week for approximately six months.

On May 4, 1998, plaintiffs[1] filed a complaint in the circuit court alleging negligence against defendant with respect to the power supply unit. Trial was originally scheduled to commence on October 19, 1999, but trial was adjourned twice by plaintiffs' counsel, Barry LaKritz, and once by defense counsel, Timothy Ruwart. On April 27, 2000, the circuit court notified the parties of the new trial date: June 27, 2000. During that time, the case was also placed on a removal trial docket.[2]

On June 2, 2000, Ruwart sent a letter to Cindy Holbrook, the removal docket coordinator, requesting her to have the circuit court judge originally assigned to the case, Judge Neithercut, sign an order that the parties had stipulated to another adjournment of trial due to a conflict with

[1] Kenneth Haynes' wife, Sandra Haynes, claimed loss of consortium as a result of her husband's injuries.

[2] This is a docket designed to expedite the disposition of cases that mediate for less than $25,000 by trying them before judges – including district and visiting judges – other than the circuit judges to which they were originally assigned.

another trial Ruwart also had starting on June 27, 2000. Holbrook left a phone message for Ruwart on June 5 stating that the order would not be signed until it was known whether the other case scheduled for June 27 would actually go to trial.

On June 26, 2000, Ruwart appeared before district court judge Larry Stecco, who had since been assigned to this case, for a settlement conference and advised Judge Stecco that his other conflicting case would most likely not settle. Later that day, Ruwart received a phone call indicating that the instant case was set for trial at 8:30 a.m. on following day (June 27). Ruwart did not appear for trial because of the conflict with the other trial. Judge Stecco granted a default against defendant on the morning of June 27 and conducted a hearing on damages. He later signed a default judgment awarding a total of $255,322.67 to plaintiffs.

On July 18, 2000, defendant filed a motion to set aside the default and default judgment. A hearing took place on July 31, 2000, and Judge Stecco gave defendant three weeks to present information that there was no other Allstate Insurance attorney[3] that could have litigated on behalf of defendant on June 27, 2000. On August 30, 2000, when Ruwart came before Judge Stecco with various materials and schedules, Judge Stecco determined that there were other Allstate attorneys that could have represented defendant the day of trial. Judge Stecco ultimately denied the motion to set aside the default and default judgment, stating that "there should have been someone available" to litigate the case on behalf of Allstate.

On appeal, defendant first argues that Judge Stecco lacked the authority to enter a default or default judgment. We disagree.[4] Indeed, a trial court has the discretion to enter a default and default judgment for the failure to appear for a scheduled trial. See *Muscio v Muscio*, 62 Mich App 167, 169; 233 NW2d 224 (1975), MCR 2.603(B)(1)(d), and MCR 2.603(B)(3). Defendant alleges, however, that under the terms of the "Removal Trial Docket Notice" that he received, "the only judge with authority to deny the adjournment, and implicitly the only judge with authority to enter the default, was the assigned circuit court judge, Judge Neithercut." The "Removal Trial Docket Notice" stated:

> Adjournments – Adjournments are strongly discouraged. If an adjournment is absolutely necessary the request must be made through Cindy Holbrook . . . . Upon approval from the Circuit Judge to whom the [case] has been assigned an order must be filed in the Circuit Court Clerk's Office.

We fail to see how this notice affected Judge Stecco's authority to enter a default and default judgment. Although Ruwart made a request to adjourn through Holbrook, the proposed adjournment order was not signed. Thereafter, the case proceeded to Judge Stecco and he, as the judge presiding over the case at trial, had the authority to grant the default and default judgment. Defendant's argument is without merit.

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[3] Allstate Insurance Company was providing the defense on behalf of defendant.

[4] "The scope of a trial court's powers is a question of law. We review questions of law de novo." *Traxler v Ford Motor Co*, 227 Mich App 276, 280; 576 NW2d 398 (1998).

Next, defendant argues that Judge Stecco, even assuming he had the authority to grant a default, abused his discretion in doing so. See *Traxler v Ford Motor Co*, 227 Mich App 276, 286; 576 NW2d 398 (1998) (discovery sanctions are reviewed for an abuse of discretion). We disagree. Whether a default is an appropriate sanction differs with the circumstances of each case. *Kalamazoo Oil Co v Boerman*, 242 Mich App 75, 86; 618 NW2d 66 (2000). A default is warranted if the actions by a party are flagrant and wanton and not merely accidental or involuntary. *Id.* The trial court should carefully consider the factors surrounding each case and determine whether an entry of default is just and proper. *Id.*

In the instant case, the trial had been originally scheduled for October 19, 1999, but was delayed until June 27, 2000. Before the dismissal, the case had already been adjourned three times to accommodate the schedules of both Ruwart and LaKritz. Furthermore, Ruwart did not receive an order adjourning the present case and was notified in early June 2000, that the stipulation adjourning the present case would not be signed until further notice of whether the conflicting case was going to settle. Nevertheless, Ruwart waited until the day before trial to attempt to sort out the conflicting trial dates. Ruwart did not attempt to secure replacement counsel in the event that trial would take place on the scheduled date, thus jeopardizing his own client by simply assuming that the court would adjourn the trial date of June 27, 2000. Moreover, Ruwart did not file a motion for adjournment.

Judge Stecco explained that if the insurance company was going to make the economic decision not to settle cases, "then, at the very least, they need to have sufficient lawyers available to try them. They can't have a pile of cases placed on two lawyers." Judge Stecco further noted that the insurance company reasonably could have brought in a different lawyer to deal with the conflict.

Under the circumstances, we conclude that Judge Stecco did not abuse his discretion in granting a default. As noted in *Cook v Haynes*, 92 Mich App 288, 295; 284 NW2d 479 (1979), "[a] trial judge's concern for docket control may well be a legitimate justification for dismissal." Moreover, if the lower court record indicates that the trial court acted with logic and reason, rather than out of passion or bias, then the trial court's judgment should not be second-guessed on appeal. See generally *In re Kyung Won Kim*, 72 Mich App 85, 89-90; 249 NW2d 305 (1976). Ruwart's actions were not accidental or involuntary. Ruwart failed to appear for trial or to arrange for different counsel to appear, knowing that trial was to occur at a certain date and time. Thus, the court acted with logic and reason in granting the default, and we will not disturb its ruling. Ruwart knew of his conflict with the other pending trial weeks earlier and had ample opportunity to prepare another Allstate attorney for the trial in the instant case.

Next, defendant contends that the court should not have entered a default judgment in the amount of $255,322.67 because defendant preserved its right to a jury trial on damages. We disagree. This issue essentially involves a question of law; we review questions of law de novo. *Traxler, supra* at 280.

We acknowledge that in *Wood v Detroit Automobile Inter-Insurance Exchange*, 413 Mich 573, 583-584; 321 NW2d 653 (1982), the Supreme Court held that if a trial court holds a hearing to determine the appropriate amount of damages against a defaulting party, that party, if it properly invoked its right to a jury trial, is entitled to a jury trial on damages. See also *Zaiter v Riverfront Complex, Ltd*, 463 Mich 544, 555-556; 620 NW2d 646 (2001). However, these cases

involved situations in which a party was defaulted for something *other than* failing to appear for trial.[5] See *Zaiter, supra* at 546-547, and *Wood, supra* at 576-577. The situation in the instant case is fundamentally different. Indeed, MCR 2.603(B)(1), dealing with the notice required to be given to a defaulted party before a default judgment may be entered, specifically states that "[i]f the default is entered for failure to appear for a scheduled trial, notice under this subrule is not required." See MCR 2.603(B)(1)(d). Accordingly, defendant in the instant case was not even entitled to notice with regard to the impending default judgment.[6] It follows that he was not entitled to a jury trial with respect to the ultimate amount of damages contained in the default judgment. Moreover, defendant failed to appear at the date and time that a jury was waiting to make findings with respect to liability and damages. Again, it logically follows that by failing to appear, defendant waived his right to have a jury make these findings.

MCR 2.603(B)(3)(b)(ii) states that if a court must determine the amount of damages before entering a default judgment, it "may conduct hearings or order references it deems necessary and proper, and shall accord a right of trial by jury to the parties to the extent required by the constitution." In *Wood, supra* at 585, the Court noted that this "constitutional reference is but a circular reference to the court rules" because Const 1963, art 1, § 14, states that the right to a jury trial in civil cases shall be waived "unless demanded by one of the parties in the manner prescribed by law." Under this constitutional provision, it must be determined if a party has properly demanded a jury trial under the applicable laws and whether the demand remains in force. Here, although defendant initially demanded a jury trial, he waived his right to a jury trial with respect to liability by failing to appear for trial and having a default properly entered against him. In other words, defendant's initial demand for a jury trial with respect to liability failed to remain in force. We conclude that defendant *also* waived his right to a jury trial with respect to damages by failing to appear for trial, given the language of MCR 2.603(B)(1)(d) and given the nature of the default. His initial demand for a jury trial with respect to damages failed to remain in force.

We acknowledge that in *Marshall Lasser, PC v George*, 252 Mich App 104, 108; 651 NW2d 158 (2002), this Court stated that a party who fails to appear for trial waives his right to a jury trial with respect to liability but retains the right to a jury trial with respect to damages. However, this statement in *Marshall Lasser* clearly constituted obiter dictum because it was not necessary to the disposition of the case. *Luster v Five Star Carpet Installations, Inc*, 239 Mich App 719, 730 n 5; 609 NW2d 859 (2000). Indeed, the default in *Marshall Lasser* involved not

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[5] We note that in *Zaiter, supra* at 546-547, the defendant failed to provide discovery and was defaulted. The defendant then failed to appear for the default judgment hearing after it had been given proper notice. *Id.* at 547, 556. The Court held that the failure to provide discovery and the failure to appear for the default judgment hearing did not constitute a waiver of the defendant's right to a jury trial on damages. *Id.* at 556. The instant case is fundamentally different from *Zaiter* because defendant in this case did not appear at trial, i.e., at the date and time that *a jury was waiting to rule on both liability and damages.* Defendant waived his right to a jury trial on these issues by failing to appear at trial.

[6] We reject defendant's argument on appeal that he *was* entitled to notice of the impending default judgment. As discussed earlier, Ruwart failed to appear for trial, and MCR 2.603(B)(1)(d) therefore was applicable.

the failure to appear for trial but rather the failure to file an answer to the complaint. *Marshall Lasser, supra* at 105. Accordingly, because the statement at issue constituted obiter dictum, it is not binding upon this Court. *Cheron, Inc v Don Jones, Inc,* 244 Mich App 212, 216; 625 NW2d 93 (2000). We remain convinced that under the circumstances of this case, in which defendant failed to appear for trial, defendant effectively waived his right to a jury trial on the issue of damages. See *Marshall Lasser, supra* at 108 ("the waiver of a properly demanded jury trial can be inferred from the conduct of the parties under a 'totality of the circumstances' test'").

Defendant's last argument on appeal is that the trial court erred by denying defendant's motion to set aside the default and default judgment. We disagree. We review this issue for an abuse of discretion. *Gavulic v Boyer,* 195 Mich App 20, 24; NW2d (1992), overruled on other grounds by *Allied Electric Supply Co, Inc v Tenaglia,* 461 Mich 285 (1999). Moreover, "the policy of this state is generally against setting aside defaults and default judgments that have been properly entered." *Alken-Ziegler, Inc v Waterbury Headers Corp,* 461 Mich 219, 229; 600 NW2d 638 (1999).

"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." MCR 2.603(D)(1). In *Midwest Mental Health Clinic, PC v Blue Cross and Blue Shield of Michigan,* 119 Mich App 671, 675; 326 NW2d 599 (1982), this Court emphasized that the mere showing of a meritorious defense is not enough to set aside a default; good cause is also necessary. As noted in *Gavulic, supra* at 24-25:

> Good cause sufficient to warrant setting aside a default or default judgment includes (1) a substantial defect or irregularity in the proceeding upon which the default was based, (2) a reasonable excuse for the failure to comply with the requirements that created the default, or (3) some other reason showing that manifest injustice would result if the default and the resulting default judgment were allowed to stand."

Here, although defendant asserted a meritorious defense that could potentially have succeeded at trial, defendant failed to satisfy the good cause element necessary to set aside the default and default judgment. Indeed, as discussed above, both the default and the default judgment were properly entered. No substantial irregularity in the proceedings occurred, Ruwart had no reasonable excuse for his actions, and no manifest injustice is apparent. *Id.* Accordingly, the trial court did not abuse its discretion by failing to set aside the default and default judgment.

Affirmed.

/s/ Donald E. Holbrook, Jr.
/s/ Hilda R. Gage
/s/ Patrick M. Meter