STATE OF MICHIGAN

COURT OF APPEALS

LACY HARTER, and MIKE McCLELLAND, individually and in their capacity as co-personal representatives of the ESTATE OF KEGAN McCLELLAND,

Plaintiffs-Appellees,

v

GRAND AERIE FRATERNAL ORDER OF EAGLES,

Defendant-Appellant,

and

HOWELL AERIE #3607 FRATERNAL ORDER OF EAGLES,

Defendant-Appellee,

and

MICHIGAN STATE AERIE FRATERNAL ORDER OF EAGLES, INEZ D. BARTON TRUST, HARRIS SEPTIC CLEANING AND ALWAYS CLEAN PORTABLE TOILETS, INC., DALE HARRIS, D & J GRAVEL CO., INC., and AMERICAN CONCRETE PRODUCTS, INC.,

Defendants.

UNPUBLISHED
April 22, 2004

No. 244689
Livingston Circuit Court
LC No. 00-017892-NO

Before: Cooper, P.J., and O'Connell and Fort Hood, JJ.

PER CURIAM.

Defendant Grand Aerie appeals as of right the judgment of $8,362,483.80, jointly and severally with Howell Aerie #3607 (Local #3607). Defendant also appeals the trial court's entry of a default judgment under MCR 2.313(B)(2)(c) and the denial of its motion for summary disposition under MCR 2.116(C)(10). We affirm. This case arose from the tragic drowning of a

young child, Kegan McClelland, in a septic tank located on property used by the local Howell chapter of the Fraternal Order of Eagles for its social functions. A trustee from Local #3607 had replaced a concrete lid with a plastic lid, but neglected to fasten the lid down. At the time of the drowning, the septic tank was uncovered. McClelland and his mother, an auxiliary member of Local #3607, were attending a picnic hosted by the local chapter.

I. Default Judgment

Defendant contends that the trial court improperly ordered its default as a sanction for errors caused by its insurance carrier. Defendant claims that it had no control over the carrier. We disagree. We review a trial court's decision to enter a default judgment for abuse of discretion.[1]

Plaintiffs served interrogatories on defendant on February 15, 2001. Defendant promptly responded, but provided false information regarding its liability insurance coverage[2] and ignored plaintiffs' document request for policy declaration sheets. We note that, to date, defendant has *never* produced these documents. On March 14, 2001, plaintiff deposed Richard Downer, secretary of the State Order of Eagles. Plaintiffs requested insurance documents, which Mr. Downer failed to bring to the deposition. Although copies of the insurance policies were one block away in Mr. Downer's office, defense counsel[3] refused to allow Mr. Downer to retrieve the requested documents.[4] On May 7, 2001, defense counsel himself presented further false information regarding defendant's insurance coverage under the guise of correcting the earlier information. Defense counsel now asserted that defendant had coverage of one million dollars per incident.[5] Defense counsel changed its story again some time before July 9, 2001, and informed the mediation panel that defendant carried a two million dollar policy. As a result, plaintiffs' claim was evaluated at $2.3 million, reflecting the insurance coverage of defendant and Local #3607. On August 3, 2001, the trial court granted plaintiffs' motion to compel discovery. Defendant was ordered to completely answer interrogatories and produce certified copies of all declaration sheets for all insurance policies relating to the current incident. Defendant *never* complied with the court's order.

The parties subsequently received notice of the final pre-trial settlement conference and were ordered to appear with representatives with full settlement authority from all insurance carriers. Defendant revealed its six million dollars of excess insurance coverage for the first time at the November 2, 2001 conference. Defendant asserted that both policies were carried by Legion. However, defendant only appeared with an agent from an independent claims adjuster

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[1] *Sturak v Ozomaro*, 238 Mich App 549, 569; 606 NW2d 411 (1999).

[2] Defendant originally claimed coverage under Local #3607's policy with a $300,000 limit in a letter dated February 22, 2001.

[3] Defense counsel represented both defendant and the State Order.

[4] [Deposition of Richard Downer, pp 63-64, 101-102.]

[5] Defense counsel presented this information to plaintiff by letter dated May 7, 2001.

purporting to have settlement authority for defendant's primary policy. The trial court adjourned the settlement conference until the following Monday, November 5, 2001, the day the trial was scheduled to begin.

On November 5, 2001, a jury was impaneled in preparation for the trial. But defendant again appeared at the conference with an independent claim adjuster falsely purporting to have full settlement authority for both policies. When placed under oath, the adjuster admitted that she had not spoken to the insurance company, and so, could not have been given authority to settle the case. Defense counsel even claimed to have the power to waive the insurance carrier's defenses. Although, plaintiffs requested a default at that time, the trial court adjourned the conference until the following day, ordering defendant to provide declaration sheets for both policies and a certified letter from Legion granting the appearing agent full settlement authority by 5:00 p.m.

At 6:30 that evening, defendant finally revealed that its primary and excess insurance polices were not covered by the same carrier. Furthermore, Ohio Casualty, the actual excess policy carrier, had not been notified of the pending lawsuit. Instead of immediately entering a default, the trial court rescheduled the conference once more for November 7, 2001. Agents from both insurance carriers appeared for the first time. Ohio Casualty refused to waive its lack of notice defense and asserted that it would need to start negotiations anew. Legion refused to settle for more than $250,000.

As a result of defendant's failure to cooperate on any level the trail court finally entered defendant's default, striking defendant's answer, and ordering a trial on the issue damages. It was obvious from the record that the trial court was extremely patient and polite and repeatedly tried to obtain defendant's cooperation before resorting to this ultimate sanction. The trial judge stated that he had taken extreme measures to make himself available around the clock to confer with the parties in an attempt to quickly resolve the issue. The trial court further noted that defendant's false representations had frustrated the purpose of the settlement conference, which could have been concluded with "minimal effort in compliance with standard practices."[6] Defendant's complete failure to answer interrogatories and produce records regarding insurance coverage amounted to serious and prejudicial discovery violations. The mediation award was severely limited, the settlement offer was not conducted in good faith, and the jury had been forced to wait idly for two days. The matter was tried before a jury to determine an appropriate damages award. Defendant subsequently moved the trial court to set aside its order of default.[7] The trial court refused, again noting the frustration of case evaluation and the settlement conference due to defendant's uncooperative behavior and defendant's failure to comply with court orders.

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[6] See Transcript of November 7, 2001, p 51.

[7] Pursuant to MCR 2.603(D)(1), a trial court must set aside a default only upon a showing of good cause, which we find lacking in this case, and a meritorious defense. *Zaiter v Riverfront Complex, LTD*, 463 Mich 544, 551; 620 NW2d 646 (2001).

A trial court may strike pleadings and enter a default judgment against a party as sanctions for discovery violations.[8] Default is a severe sanction and should only be granted when the discovery violations constitute a "flagrant and wanton refusal to facilitate discovery and not when failure to comply with a discovery request is accidental or involuntary."[9] Before determining appropriate sanctions, the trial court should consider the following factors:

> (1) Whether the violation was wilful or accidental; (2) the party's history of refusing to comply with discovery requests (or refusal to disclose witnesses); (3) the prejudice to the [other party]; (4) actual notice to the [other party] of the witness and the length of time prior to trial that the [other party] received such actual notice; (5) whether there exists a history of [the party's] engaging in deliberate delay; (6) the degree of compliance by the [party] with other provisions of the court's order; (7) an attempt by the [party] to timely cure the defect, and (8) whether a lesser sanction would better serve the interests of justice.[10]

The record reflects that the trial court considered all of these factors and the available sanctions before making its determination.[11]

We note from oral arguments before this panel that defense counsel candidly admitted the conduct of the insurance companies was egregious, but never addressed trial defense counsel's own inappropriate conduct throughout the pretrial process.

We find that the trial court properly entered a default judgment against defendant for its flagrant and wanton discovery violations. The record reflects that the trial court carefully considered defendant's actions and only opted to default defendant as a last resort. Defendant repeatedly failed over a nine-month period to provide truthful and complete information regarding its liability insurance, even upon court order. Defendant's misinformation caused the case to be severely under-evaluated. At the brink of trial, and under threat of default, defendant continued its discovery antics. Plaintiffs were severely prejudiced by defendant's dilatory tactics as Ohio Casualty intended to reinstate negotiations and assert lack of notice as a defense. Defendant's motion to set-aside the default was properly denied.[12]

Defendant's contention that it cannot be sanctioned for the conduct of its insurance carrier is spurious. While case law does support defendant's contention that a trial court may not default a party for its insurance carrier's failure to appear at a settlement conference pursuant to

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[8] MCR 2.313(B)(2)(c).

[9] *Mink v Masters*, 204 Mich App 242, 244; 514 NW2d 235 (1994).

[10] *Bass v Combs*, 238 Mich App 16, 26-27; 604 NW2d 727 (1999), quoting *Dean v Tucker*, 182 Mich App 27, 32-33; 451 NW2d 571 (1990).

[11] *Id.* at 26.

[12] See MCR 2.603(D)(1); *Alken-Zeigler v Waterbury Headers Corp*, 461 Mich 219, 229; 600 NW2d 638 (1999).

MCR 2.401(F) through (G),[13] it is clear that defendant was defaulted for its own egregious behavior pursuant to MCR 2.313(B)(2)(c). In a case such as this, the attorney-client relationship is with the insured, not the insurance company. Therefore, the attorney's duty and loyalty is solely to the insured.[14] It is absurd to assert that defendant did not know to whom insurance premiums were sent and the amount of coverage obtained. Defendant continually failed to provide truthful information regarding its own insurance coverage, and therefore, certainly played a role in this farce upon the court. The blame for discovery violations was properly placed on defendant.[15]

II. Summary Disposition

Defendant also asserts that the trial court erred in denying its motion for summary disposition. However, we are precluded from reviewing this issue.

A default judgment settles the issue of liability and the defaulted party is precluded from relitigating that issue.[16] When the trial court entered a default against defendant, it lost standing to contest the factual allegations in plaintiffs'complaint, including defendant's vicarious or direct liability for McClelland's death.[17] Defendant argues that the trial court improperly denied its motion for summary disposition as national fraternal organizations are not vicariously or directly liable for the land-related torts of local chapters under Michigan law.[18] However, the issue of liability was settled against defendant in a properly entered default and defendant may not attempt to relitigate that issue by seeking reversal of the trial court's denial of its motion for summary disposition.

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[13] *Henry v Prusak*, 229 Mich App 162, 169-171; 582 NW2d 193 (1998), citing *McGee v Macombo Lounge, Inc*, 158 Mich App 282, 286-288; 404 NW2d 242 (1987).

[14] *Kirschner v Process Design Assocs, Inc*, 459 Mich 587, 598; 592 NW2d 707 (1999), quoting *Michigan Millers Mut Ins Co v Bronson Plating Co*, 197 Mich App 482, 492; 496 NW2d 373 (1992), overruled in part on other grounds *Wilkie v Auto-Owners Ins Co*, 469 Mich 41; 664 NW2d 776 (2003); *Atlanta Internat'l Ins Co v Bell*, 438 Mich 512, 516; 475 NW2d 294 (1992) (BRICKLEY, J) ("something less than a plenary attorney-client relationship exists between a defense counsel and an insurer"), 524 (BOYLE, J, concurring) ("The attorney-client relationship is with the insured only.").

[15] See *Kirschner*, *supra* at 597-598 (finding it improper to sanction the insurance company for misleading answers to interrogatories as the insured, as the client, was chargeable for those answers.

[16] *Wood v DAIIE*, 413 Mich 573, 578; 321 NW2d 653 (1982); *Kalamazoo Oil Co v Boerman*, 242 Mich App 75, 79; 618 NW2d 66 (2000).

[17] See *Ackron Co v Oakland Co*, 108 Mich App 767, 775; 310 NW2d 874 (1981).

[18] See *Colangelo v Tau Kappa Epsilon*, 205 Mich App 129, 134-136; 517 NW2d 289 (1994); *Kratze v Order of Oddfellows*, 190 Mich App 38, 44-45; 475 NW2d 405 (1991), aff'd in part, rev'd in part on other grounds 442 Mich 136 (1993).

III. High-Low Agreement

Before trial, the local chapter entered into a settlement agreement with plaintiffs to pay either $200,000 or $300,000 depending on the jury's verdict. We reject defendant's contention that it was prejudiced by the court's failure to reveal this agreement to the jury, as Local #3607's failure to present a defense increased defendant's appearance of culpability.

This issue has been definitively determined by our Supreme Court as follows:

> When there is no genuine dispute regarding either the existence of a release or a settlement between plaintiff and a codefendant or the amount to be deducted, the jury shall not be informed of the existence of a settlement or the amount paid, unless the parties stipulate otherwise. Following the jury verdict, upon motion of the defendant, the court shall make the necessary calculation and find the amount by which the jury verdict will be reduced.[19]

Defendant knew of the settlement agreement before trial, but did not seek its admission until the default had been entered. Defendant was not prejudiced by Local #3607's failure to present a defense as it had been defaulted on the issue of liability and could only present evidence regarding damages. Therefore, the trial court did not err in denying defendant's request to admit evidence of the settlement agreement. Defendant forfeited any claimed error regarding the apportionment of damages by failing to request an apportionment of fault pursuant to MCL 600.6304. Defendant also failed to request the trial court reduce the damages award by the amount of the settlement.

We also reject defendant's claim that the settlement agreement should limit its liability. Defendant asserts that the settlement agreement released Local #3607, and therefore, limits defendant's liability, as the local chapter's principal. Defendant's assertion would have merit if the only ground for relief was vicarious liability.[20] As defendant was also defaulted on the issue of direct liability, we find that the judgment against defendant was appropriate.

IV. *Porter* Poem

Defendant's final contention is that plaintiffs' counsel so tainted the jury by reciting a poem about organ donation to "eulogize" McClelland in closing argument that this Court must reverse the jury's verdict.[21] We disagree. We note that defendant failed to object on this ground

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[19] *Brewer v Payless Stations, Inc*, 412 Mich 673, 679; 316 NW2d 702 (1982).

[20] *Theophelis v Lansing General Hosp*, 430 Mich 473, 480-491; 424 NW2d 478 (1988) (opinion of Griffin, J); *Larkin v Otsego Memorial Hosp Ass'n*, 207 Mich App 391, 393; 525 NW2d 475 (1994).

[21] See *Porter v Northeast Guidance Ctr, Inc*, unpublished opinion per curiam of the Court of Appeals, issued October 5, 2001 (Docket No. 213190), slip op at 5-6, modified in part 467 Mich 900 (2002). In *Porter*, the same attorney read the same poem in a wrongful death case after presenting evidence that the decedent's organs had been donated. This Court reversed and remanded for a new trial on damages alone. *Id.* at 7. The Supreme Court, however, remanded for a new trial on the merits.

at trial and failed to show that the poem caused error requiring reversal for a new trial for damages. We find citation to *Porter v Northeast Guidance Ctr, Inc*, inapplicable in this case as defendant was defaulted on the issue of liability.

Affirmed.

/s/ Jessica R. Cooper
/s/ Karen M. Fort Hood