

STATE OF MICHIGAN
COURT OF APPEALS

ROBERT MATTIS,

Plaintiff-Appellant,

V

YOUSIF TOMA YOUSIF,

Defendant-Appellee.

UNPUBLISHED

September 19, 2006

No. 260339

Oakland Circuit Court

LC No. 2002-039593-NI

Before: Murray, P.J., and Smolenski and Servitto, JJ.

PER CURIAM.

Plaintiff appeals as of right from a judgment of no cause of action in favor of defendant, following a jury trial, in this automobile negligence action. Because the trial court properly denied plaintiff's motion for judgment notwithstanding the verdict, and did not abuse its discretion in denying plaintiff's request for a new trial or in granting defendant's motion to set aside the default judgment, we affirm.

This action arises out of a July 2000 automobile accident in which defendant's vehicle struck plaintiff's vehicle. Plaintiff was unable to personally serve defendant and obtained an order authorizing alternate service by posting a copy of the summons and complaint at defendant's last know address and by mailing copies of the summons and complaint to defendant by both first class and certified mail at his last known address. The certified mail was returned unclaimed. Defendant failed to respond or otherwise appear and plaintiff obtained a default judgment against defendant for \$50,000. Plaintiff thereafter contacted defendant's insurer and informed it of the default judgment. Shortly thereafter, defendant filed a motion to set aside the default judgment pursuant to MCR 2.603(D) and MCR 2.612(B). The trial court granted the motion and the matter proceeded to trial. A jury determined that defendant was negligent, but concluded that plaintiff was not injured in the automobile accident. A judgment was therefore entered in defendant's favor. The trial court denied plaintiff's posttrial motion for judgment notwithstanding the verdict (JNOV) or a new trial.

Plaintiff first argues that the trial court erred in denying his motion for JNOV or a new trial. According to plaintiff, there was overwhelming evidence that the 2000 automobile accident exacerbated his preexisting arthritic condition. See *Wilkinson v Lee*, 463 Mich 388, 395; 617 NW2d 305 (2000) ("Regardless of the preexisting condition, recovery is allowed if the trauma caused by the accident triggered symptoms from that condition.").

A trial court's decision on a motion for JNOV is reviewed de novo, considering the evidence and all reasonable inferences in a light most favorable to the nonmoving party. If reasonable jurors could have reached different conclusions, the jury verdict must stand. *Linsell v Applied Handling, Inc*, 266 Mich App 1, 11; 697 NW2d 913 (2005). This Court reviews the trial court's denial of a motion for a new trial for an abuse of discretion. *Campbell v Sullins*, 257 Mich App 179, 193; 667 NW2d 887 (2003). In deciding whether to grant or deny a motion for a new trial on the ground that the jury's verdict is against the great weight of the evidence, the trial court's function is to determine whether the overwhelming weight of the evidence favors the losing party. *Id.* This Court gives substantial deference to a trial court's determination that the verdict is not against the great weight of the evidence. *Id.* "This Court and the trial court should not substitute their judgment for that of the jury unless the record reveals that the evidence preponderates so heavily against the verdict that it would be a miscarriage of justice to allow the verdict to stand." *Id.*

In this case, although plaintiff presented evidence of an injury, viewed in a light most favorable to defendant, the evidence permitted the jury to conclude that plaintiff had a degenerative arthritic condition that was not aggravated by the accident. Evidence indicated that there was no observed or reported injury to plaintiff immediately after the accident. Additionally, x-rays and an MRI did not reveal any trauma-related injury, but did show degenerative changes. Plaintiff admitted in his deposition that he had back problems before the 2000 accident, and admitted that he was able to engage in various activities shortly after the accident. Also, defendant presented a videotape showing plaintiff engaged in various activities, which could have caused the jury to question the credibility of plaintiff's testimony regarding whether his preexisting arthritic condition was actually aggravated by the 2000 accident.

Because there was evidence supporting the jury's verdict and the evidence did not preponderate so heavily against the verdict that it would be a miscarriage of justice to allow the verdict to stand, the trial court properly denied plaintiff's motion for JNOV and did not abuse its discretion in denying his request for a new trial.

Plaintiff next argues that the trial court erred in setting aside the default judgment that was originally entered against defendant. We disagree. The decision whether to set aside a default judgment is entrusted to the discretion of the trial court. *Saffian v Simmons*, 267 Mich App 297, 307; 704 NW2d 722 (2005). Where there has been a valid exercise of discretion, appellate review is sharply limited. Unless there has been a clear abuse of discretion, the trial court's ruling will not be set aside. *Id.*

At the time defendant moved to set aside the default judgment, MCR 2.603(D) provided:

(D) Setting Aside Default.

(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.

(3) In addition, the court may set aside an entry of default and a judgment by default in accordance with MCR 2.612.

(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.

The purpose of an affidavit of meritorious defense is to inform the trial court whether the defaulted defendant has a meritorious defense to the action against it. *Cramer v Metropolitan Savings Ass'n*, 136 Mich App 387, 398; 357 NW2d 51 (1983). In this case, defendant's attorney submitted an affidavit in which he raised the defense that plaintiff would not be able to satisfy the no-fault threshold for recovery of noneconomic damages. Under the no-fault act, a plaintiff is entitled to noneconomic damages only if he suffered "death, serious impairment of body function, or permanent serious disfigurement." MCL 500.3135(1). While plaintiff argues that the affidavit was deficient because it merely contained Lewis's arguments, not particularized facts, we disagree.

The affidavit indicated that it was based on a review of plaintiff's available medical records and identified specific facts concerning plaintiff's medical condition and treatment in support of the no-fault threshold defense. For example, Lewis averred that plaintiff did not break any bones, did not require surgery or hospitalization, and reported that his neck "felt good" six weeks after the accident. Additionally, an MRI did not reveal any herniated discs, but did reveal degenerative disc disease. Further, plaintiff's physical therapy records documented "excellent progress" and indicated that plaintiff's physical therapy ended approximately two months after the accident. In sum, the affidavit contained sufficient facts to identify a meritorious defense to plaintiff's action for recovery of noneconomic damages.

The trial court could also have reasonably concluded that there was good cause to set aside the default judgment. Good cause includes a substantial defect or irregularity in the proceedings upon which the default was based or a reasonable excuse for failure to comply with the requirements that created the default. *ISB Sales Co v Dave's Cakes*, 258 Mich App 520, 531; 672 NW2d 181 (2003).

It is apparent from the trial court's comments at the hearing on defendant's motion to set aside the default judgment that the court was influenced by the circumstances surrounding plaintiff's efforts to serve defendant and plaintiff's subsequent attempt to pursue collection from defendant's insurance company. Plaintiff initially attempted to personally serve defendant at his last known address, but was informed that defendant was not home and had returned to Iraq. Plaintiff subsequently obtained an order authorizing alternate service by mail (first class and certified) and posting at defendant's last known address. The certified letter was returned unclaimed. After plaintiff obtained a default judgment, he contacted defendant's insurer for the

first time. Although we agree that plaintiff was not required to serve defendant's insurer, plaintiff subsequently attempted to satisfy the judgment through defendant's insurer without having made any effort to contact or notify the insurer before the judgment was obtained. Additionally, plaintiff obtained alternate service on defendant at an address at which, according to information received by plaintiff, defendant may no longer be residing, yet plaintiff made no attempt to contact or notify defendant through his known insurer. Under these circumstances, the trial court reasonably could have determined that there was good cause to justify setting aside the default judgment.

Thus, the trial court did not abuse its discretion in setting aside the default judgment under MCR 2.603(D)(1). Because the default judgment was properly set aside under MCR 2.603(D)(1), defendant was not required to proceed under MCR 2.612.

Affirmed.

/s/ Christopher M. Murray

/s/ Michael R. Smolenski

/s/ Deborah A. Servitto