

STATE OF MICHIGAN
COURT OF APPEALS

PAUL HUIZINGH,

Plaintiff-Appellant,

v

ALLSTATE INSURANCE COMPANY,

Defendant-Appellee.

UNPUBLISHED

April 29, 2003

No. 233698

Kent Circuit Court

LC No. 00-011254-NF

Before: Whitbeck, C.J., and Cavanagh and Bandstra, JJ.

PER CURIAM.

On June 18, 2001, this Court peremptorily reversed the trial court's decision to grant defendant's motion to set aside a default on the ground that defendant had not shown good cause under MCR 2.603(D)(1). Defendant sought leave to appeal and, on February 4, 2002, our Supreme Court remanded the matter back to this Court for "further explanation of its order of June 18, 2001, specifically stating the standards of review used and further explaining the Court's conclusion that the trial court erred in finding that defendant showed good cause." *Huizingh v Allstate Ins Co*, 639 NW2d 809 (2002). On reconsideration, this Court vacated our previous order peremptorily reversing the trial court, and granted plaintiff's interlocutory application for leave to appeal limited to the issues raised in the application. We, again, reverse the trial court's order setting aside the default entered against defendant and remand for reinstatement of the default.

On June 14, 2000, plaintiff was allegedly involved in a motor vehicle accident with an uninsured vehicle and sustained injuries. On November 9, 2001, plaintiff brought an action for first-party no-fault insurance benefits, under a policy issued by defendant to plaintiff's parents as a relative domiciled in their household, and for uninsured motorists benefits. Pursuant to MCL 500.456, on December 18, 2000, plaintiff effected service on defendant through the commissioner of insurance. On January 4, 2001, defendant filed an appearance. On January 19, 2001, a default was entered against defendant for failure to file an answer to plaintiff's complaint. On January 25, 2001, defendant filed an answer and affirmative defenses in response to plaintiff's complaint.

On February 14, 2001, defendant filed its motion to set aside default. Defendant argued that its answer to plaintiff's complaint was timely filed because defendant did not receive a copy of the complaint from the insurance commissioner until December 28, 2000; thus, the default was erroneously entered. Defendant further argued that plaintiff was not entitled to first-party

insurance benefits because he was driving an uninsured vehicle and was not a resident relative of a policyholder when he was allegedly struck by another uninsured vehicle.

Plaintiff responded to defendant's motion, arguing that defendant had failed to establish good cause because MCL 500.456 provided that the legal process that was served on the insurance commissioner "shall have the same effect as if [defendant was] personally served." Accordingly, defendant's negligence or mistake in failing to answer the complaint did not suffice to establish good cause under MCR 2.603(B)(1). Further, plaintiff argued, defendant's affidavit of meritorious defense was insufficient as merely setting forth conclusory statements unsupported by facts and was contrary to evidence submitted by plaintiff.

At oral argument on defendant's motion to set aside the default, defendant abandoned its argument that its answer was timely filed and conceded that it was filed nine days late. Defendant failed to offer any "good cause" for the delay but instead focused on its alleged "absolute defenses" to plaintiff's claim. Nevertheless, the trial court found that there was good cause and a meritorious defense sufficient to set aside the default entered against defendant. As discussed above, this appeal followed.

Plaintiff argues that the trial court erroneously set aside the default because defendant failed to meet the mandatory "good cause" requirement of MCR 2.603(D)(1). We agree. A trial court's decision on a motion to set aside a default is reviewed for a clear abuse of discretion. *Alken-Ziegler, Inc v Waterbury Headers Corp*, 461 Mich 219, 227; 600 NW2d 638 (1999). However, the trial court's interpretation and application of a court rule is reviewed de novo as a question of law. *Peters v Gunnell, Inc*, 253 Mich App 211, 225-226; 655 NW2d 582 (2002).

MCR 2.603(D)(1) provides:

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.

The court rule plainly mandates a showing of good cause as one of the requirements that must be met before a motion to set aside a default may be granted. The "good cause" requirement may be met by showing "(1) a procedural irregularity or defect, or (2) a reasonable excuse for failure to comply with the requirements that created the default . . ." *Alken-Ziegler, supra* at 233.

Here, defendant did not offer for the trial court's review any "good cause" for its failure "to plead or otherwise defend" against the action within the applicable time limits. See MCR 2.108, 2.603(A)(1). As defendant effectively conceded at oral argument, service on the insurance commissioner commenced the time provisions for filing a response to plaintiff's complaint. See MCL 500.456; MCR 2.108. Defendant cannot concede an issue in the trial court and then take an inconsistent position on appeal. See *Weiss v Hodge (After Remand)*, 223 Mich App 620, 636; 567 NW2d 468 (1997). In addition to defendant's failure to present a "good cause" explanation for the trial court's consideration, the trial court failed to articulate a basis for its finding that the "good cause" requirement was established. Therefore, the trial court's finding of "good cause" did not constitute a "valid exercise of discretion" because there was no "good cause" offered in which to exercise discretion. See *Alken-Ziegler, supra* at 227. Accordingly, this Court need not accord deference to that decision. We conclude that the trial court failed to

properly apply MCR 2.603(D)(1) to defendant's motion to set aside the default and, thus, we reverse the decision to set aside the default and remand for its reinstatement.

Reversed and remanded for reinstatement of the default. We do not retain jurisdiction.

/s/ Mark J. Cavanagh

/s/ Richard A. Bandstra