

**STATE OF MICHIGAN**  
**COURT OF APPEALS**

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GLENN PRATER,

Plaintiff-Appellee,

v

DR. YUCEL SEZGIN, M.D.,

Defendant-Appellant.

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UNPUBLISHED

April 21, 2005

No. 253059

Jackson Circuit Court

LC No. 01-004758-NH

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GLENN PRATER,

Plaintiff, Garnishee Plaintiff-  
Appellant,

v

YUCEL SEZGIN, M.D.,

Defendant,

and

PRONATIONAL INSURANCE COMPANY,

Garnishee Defendant-Appellee.

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No. 255768

Jackson Circuit Court

LC No. 01-004758-NH

Before: Murray, P.J., and Markey and O'Connell, JJ.

PER CURIAM.

Defendant appeals as of right from the trial court's order of default judgment following a trial solely on the issue of damages. Plaintiff appeals from the trial court's order granting garnishee-defendant insurance company's motion for summary disposition based on the insured defendant doctor's failure to cooperate with his defense, which was a requirement in the insurance contract. We affirm in all respects.

Plaintiff's claim arose from vertebrae-fusion surgery performed by defendant. Plaintiff's complaint alleged that the doctor negligently performed the fusion surgery, because the surgery was unnecessary (defendant spaced and fused vertebrae that were not causing any problems), and defendant carelessly and detrimentally left portions of two plate screws in the space between plaintiff's vertebrae. The surgery did not help plaintiff's problems with neck pain, and further fusion surgery of the next higher vertebra was necessary.

Plaintiff sued, but defendant's bankruptcy proceedings automatically stayed the action. To persuade the bankruptcy court to lift the stay, plaintiff promised to limit his damages to defendant's insurance coverage. The bankruptcy court lifted the stay, and the case proceeded in state circuit court.

In a motion hearing the Friday before trial, defendant's attorney notified the court and opposing counsel that he could not reach defendant and was unsure whether defendant would show up for trial. He explained that defendant would not return his phone calls or respond to his letters regarding the subpoena plaintiff served on defense counsel. The attorney remarked that defendant had a history of failing to appear in similar lawsuits, and being careful not to request an outright adjournment, he told the court that he was "looking for guidance" on how to proceed. The court had already indicated that the case had been drawn out for two years, and it had allowed defendant to substitute counsel on the grounds that no further delay would result. The trial court commented that jurors were scheduled to be there on Monday, and indicated it would enter a default against defendant if he failed to appear.

Defendant's attorney immediately argued against default, explaining that he could appear in defendant's stead and hinting that the deposition transcript could stand in the place of defendant's live testimony. The trial court explained that plaintiff had subpoenaed defendant, intending to call him as an adverse witness. The court also reiterated that the case was already two years old and confirmed that this behavior was typical of defendant. The court considered adjournment, but indicated that if it adjourned trial, defendant would show up as scheduled. Therefore, the trial court chose to proceed as though defendant would appear and left the threat of default lingering.

Defendant failed to appear for trial. Plaintiff immediately moved the court to enter default. Defendant's counsel stated that after Friday's hearing he had a telephone conversation with defendant, who was in Florida. According to defense counsel, defendant was preparing to go to Turkey to visit his brother who was undergoing heart surgery. Defendant's attorney indicated that he had discussed the issue of default with defendant, but defendant insisted that he must go. The trial court cited the fact that plaintiff intended to call defendant as an adverse witness and entered a default judgment against defendant. Defendant's attorney conceded that a default would be proper, but protested against the entry of a full default judgment. Nevertheless, the trial court entered the default judgment and limited the jury trial to damages.

The jury returned a verdict for \$651,000, which, after offsets, a partial remittitur, and other calculations and adjustments, resulted in a \$367,775.39 judgment entered on December 12, 2003. Six days later, plaintiff requested a writ for garnishment against defendant's insurance company, garnishee-defendant ProNational. The insurance company moved for summary disposition, claiming that the doctor breached his insurance contract by failing to appear for trial, so the company was not liable to pay his judgment. At the motion hearing, plaintiff argued that

the insurance company waived the issue because the attorney provided to defendant by the insurance company failed to move for an adjournment. The trial court found that defendant breached his contractual obligation to cooperate with his defense, so the insurance company was not obligated to pay the judgment against defendant doctor.

In No. 253059, defendant argues that the trial court abused its discretion when it entered default because it failed to explore lesser sanctions on the record. We disagree. In this case, defendant's proffered defense was a general denial that he failed to perform according to the standard of care. Therefore, the trial court had only two realistic options available to it. It could adjourn the trial and tax costs against defendant, or it could enter default against defendant. MCR 2.506(F). Striking pleadings or depriving defendant of any defense would have had substantially the same effect as an absolute default. MCR 2.506(F)(3-6). Both on the Friday before and the Monday of trial, the trial court properly recited its reasons for entering a default rather than granting an adjournment. The trial court's strongest reason was that defendant had no incentive ever to appear for trial, so adjournment would only further drag out a lagging case without any indication that the end result would be different. Therefore, the trial court adequately reviewed alternatives on the record, and it did not abuse its discretion when it determined that default was the appropriate remedy.

Defendant also argues that the trial court erred after it entered default by disallowing evidence and jury instructions regarding proximate cause. We disagree. Evidentiary issues are reviewed for abuse of discretion. *Campbell v Sullins*, 257 Mich App 179, 196; 667 NW2d 887 (2003). Legal errors in jury instructions, like legal errors generally, are reviewed de novo. *Kenkel v Stanley Works*, 256 Mich App 548; 665 NW2d 490 (2003).

Defendant specifically argues that the trial court limited his opportunity to present evidence that, while the surgery may not have been immediately necessary, due to plaintiff's condition, it was inevitable.<sup>1</sup> When a party defaults, all well pleaded facts are taken as true and opposition to those allegations is precluded. *Kalamazoo Oil Co v Boerman*, 242 Mich App 75, 78-79; 618 NW2d 66 (2000). Plaintiff alleged in his complaint that defendant's performance of the initial neck surgery was negligent, unnecessary, and harmful. While incomplete, these allegations were well pleaded, and defendant's default precluded him from presenting, arguing, or otherwise litigating these issues before the jury. *Id.* Nevertheless, defendant tried to present evidence that plaintiff's neck was in such a degenerating state that surgery was inevitable, and consequently, defendant should not pay damages that were a normal byproduct of the surgical procedure. While we acknowledge a theoretical distinction between a necessary and an inevitably necessary surgery, in reality, the circumstances of this case made defendant's offer of proof a contest over the necessity of the initial surgery, which was not permitted. First among those circumstances was the fact that defendant actually performed the surgery, removing disk cartilage, spacing the vertebrae, inserting a "fusing" bone fragment seed, and installing a plate.

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<sup>1</sup> We note that this was the only area where the trial court limited defendant's presentation of proximate cause evidence, and the jury was not persuaded by the other evidence presented.

Therefore, the evidence of any eventual necessity for the surgery was innocently but irretrievably lost.

Under these circumstances, defendant's evidence of inevitability was necessarily restricted to information of the degenerative state of plaintiff's cervical spine before the initial surgery. Any presentation of the poor state of plaintiff's spine would serve to controvert the accepted allegations that the surgery was unnecessary and would countermand the default. The purposes of the default would be undermined, because the evidence would require plaintiff to contest the condition of his spine as though no default had been entered. Therefore, the trial court did not abuse its discretion when it disallowed defendant's proof of the surgery's inevitability. *Id.* at 87-88.

Regarding defendant's proposed jury instruction, the entire instruction related to the issue of liability, which defendant's default had settled. Moreover, the allegations in the complaint, taken as true, provided for every contingency in the instruction, so the instruction was unnecessary, irrelevant, and confusing. Defendant argues that the instruction explained the impropriety of awarding damages without first finding proximate cause. Nevertheless, accepting the complaint's allegations as true forecloses the issue, because according to the complaint, defendant negligently performed an unnecessary operation, which proximately caused plaintiff damage. After default, the only remaining point of clarification on proximate cause was, "How much damage did defendant proximately cause?" Defendant had ample opportunity to discredit many of plaintiff's ailments and losses as unrelated to the surgery, but in light of the complaint's allegations and the default's punitive and prohibitive purpose, the trial court correctly prevented defendant from arguing that the surgery did not proximately cause plaintiff any damage. *Id.* at 78-79.

In No. 255768, plaintiff argues that the trial court erred when it granted the insurance company's, rather than his, motion for summary disposition. Plaintiff's summary disposition motion contended that the insurance company waived its non-cooperation defense when counsel the insurance company assigned to defendant failed to request an adjournment to obtain defendant's presence at trial. We disagree. We review de novo a trial court's decision to grant summary disposition. *Maiden v Rozwood*, 461 Mich 109, 118; 597 NW2d 817 (1999).

As an initial matter, we note that, at least in Michigan, courts clearly distinguish between an attorney assigned by an insurance company to defend an insured and the insurance company's attorney. *Kirschner v Process Design Assocs, Inc*, 459 Mich 587, 598-599; 592 NW2d 707 (1999). An insured's attorney owes the insured a paramount duty of loyalty and service, and we are generally disinclined to hold an insurance company responsible for actions taken by the attorney in execution of that service. *Id.* Nevertheless, plaintiff's argument fails because it is based entirely on the principle that defendant's attorney must move for an adjournment before the insurance company may claim non-cooperation. In this case, it is clear that the alternatives of adjourning the trial or proceeding without defendant were presented to the trial court, albeit tactfully and indirectly, and the trial court flatly rejected those alternatives. Before it even became a ripe issue, the trial court declared that defendant's failure to appear would result in default and explained why. Therefore, a motion for adjournment by defendant's counsel would have been futile, and the law does not condition the presentation of valid claims on the performance of senseless functions. *Modern Globe, Inc v Lake Drive Corp*, 340 Mich 663, 669; 66 NW2d 92 (1954).

Plaintiff presents a multifaceted argument that the trial court erred when it granted the insurance company's motion for summary disposition. First, plaintiff argues that the trial court failed to determine whether the insurance company suffered any actual prejudice, instead assuming that defendant's absence alone served to prejudice the insurance company. We disagree. While plaintiff emphasizes that the insurance company must demonstrate actual prejudice, he fails to acknowledge that insurance companies can demonstrate that the conduct of their insureds caused actual prejudice if they show that "they have been materially injured in their ability to contest the merits of the case . . . ." *Anderson v Kemper Ins Co*, 128 Mich App 249, 254; 340 NW2d 87 (1983).

Unlike many cases, defendant's failure to appear did not simply free defense counsel from the burden of cross-examining an unhelpful and undeniably liable client. See *Allen v Cheatum*, 351 Mich 585, 597; 88 NW2d 306 (1958). Rather, the defense had two experts lined up to testify at trial, and if their trial testimony substantially mirrored the testimony they provided in their depositions, defendant would have had a solidly constructed and plenary defense. The experts explained that plaintiff's pain stemmed in large part from a torn ligament readily apparent in the pre-operation images of plaintiff's spine, and it demanded the surgery defendant performed. They agreed that plaintiff's surgery was ultimately successful, because the vertebrae properly fused. While they equivocated somewhat about the damage caused by the misplaced screws, they agreed that the initial surgery was necessary and that defendant performed it in accordance with the standard of care. This was the entire defense and a good one, but it was rendered worthless by defendant's failure to appear and consequential default. Therefore, the trial court did not err when it determined that plaintiff failed to show any issue of material fact, and the insurance company demonstrated prejudicial impairment of its ability to contest the merits of plaintiff's malpractice claims. *Anderson, supra*.

Next, plaintiff argues that defendant's brother's sudden need for heart surgery was an unforeseeable intervening circumstance that excused defendant doctor's compliance with the contract's cooperation condition as impossible. We disagree. Plaintiff failed to contest any material fact regarding the reason the doctor left the country, so the issue was a matter of law for the trial court. MCR 2.116(C)(10). While an unforeseen event may render a party's strict performance impossible, and, therefore, excusable, the doctrine is not so flexible that it can be extended to excuse the performance of every obligation that creates a scheduling conflict with a higher priority, imposes a personal hardship, or otherwise renders performance inconvenient. *Bissell v L W Edison Co*, 9 Mich App 276, 284, 286; 156 NW2d 623 (1967). Rather, our reading of *Bissell* leads us to conclude that the doctrine is reserved for those cases where the very nature of the performance is unforeseeably and radically changed by some external event that renders strict compliance so extremely burdensome, expensive, inefficient, or implausible that requiring it borders on cruelty. The imminent heart surgery of defendant's brother did not markedly alter the essence of defendant's foreseeable obligation to attend and fully participate at trial. At the time of the contract's execution, defendant could reasonably foresee that an obligation to attend a trial might interfere with the potential emergence of conflicting, but ultimately ordinary, personal obligations. Therefore, the brother's surgery and defendant's consequential desire to visit his brother did not render defendant's compliance with the contract provision impossible, and the trial court did not err when it held accordingly.

Finally, plaintiff argues that granting the insurance company's motion was premature because discovery could have revealed a lack of diligence in obtaining defendant's presence at trial. We disagree. Plaintiff did not oppose the insurance company's evidence that defense counsel diligently attempted to procure defendant's presence for trial, and we will not excuse a party's failure to oppose facts raised and supported in an MCR 2.116(C)(10) motion on the grounds that more discovery might reveal a genuine factual issue. *Maiden, supra* at 121. Rather, plaintiff was at least required to make some independent showing that a legitimate dispute existed. *Michigan Nat'l Bank v Metro Institutional Food Service, Inc*, 198 Mich App 236, 241; 497 NW2d 225 (1993). Plaintiff failed to do so. On the morning of trial, counsel placed on the record the substance of his Friday telephone conversation with defendant. Counsel stated that he explained the probability of default and the negative consequences it would have on the defense, but defendant insisted that he must go to his brother. Due diligence does not require an attorney to hogtie reckless clients and present them like a package or use an electric goad to corral a reluctant witness into court. It is enough that counsel presented the consequences, encouraged compliance, and gave defendant sufficient notice that he could have arrived if he had exercised a little diligence of his own. Because plaintiff does not refute that defense counsel's actions, if bona fide, demonstrate due diligence, and because plaintiff fails to proffer any indication that the actions were not bona fide, the trial court correctly rejected plaintiff's claim that the motion for summary disposition was premature. *Id.*

Affirmed.

/s/ Christopher M. Murray

/s/ Jane E. Markey

/s/ Peter D. O'Connell