STATE OF MICHIGAN

COURT OF APPEALS

EMMANUEL FORD, JANICE MARSHALL, MARVIN BRANTLEY, LARRY REDFEARN and ARTHUR WARREN,

Plaintiffs-Appellees,

v

STANLEY WYRE,

Defendant-Appellant,

and

DETROIT PUBLIC SCHOOL DISTRICT and PERCY L. CASH,

Defendants.

UNPUBLISHED
August 18, 2000

No. 209140
Wayne Circuit Court
LC No. 96-639529-CK

Before: Talbot, P.J., and Neff and Saad, JJ.

SAAD, J. (dissenting).

I respectfully dissent. The entry of a default judgment was too harsh a sanction under the circumstances of this case. This Court stated in *Frankenmuth Mutual Ins Co v ACO, Inc*, 193 Mich App 389, 396-397; 484 NW2d 718 (1992):

> Default judgment is a possible sanction for discovery abuses.[1] MCR 2.313(B)(2)(c). It is, however, a drastic measure and should be used with caution. *Equico Lessors, Inc v*

[1] The majority indicates that the default judgment was entered as a sanction for defendant's persistent failure to respond to the litigation and abide by the court rules the trial court's instructions. However, it appears from the record that defendant was served with the summons and complaint (by substituted service) and did file an answer and counterclaim even though his answer was late. Moreover, at the hearing on plaintiffs' motion for default judgment, defense counsel represented to the court that his office would be filing a motion to set aside the default (entered as a result of the fact that defendant filed a late

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Original Buscemi's, Inc, 140 Mich App 532, 534; 364 NW2d 373 (1985). When the sanction of a default judgment is contemplated, the trial court should consider whether the failure to respond to discovery requests extends over a substantial period of time, whether there was a court order directing discovery that has not been complied with, the amount of time that has elapsed between the violation and the motion for default judgment, and whether wilfulness has been shown. *Id.*, pp 534-535. The court must also evaluate on the record other available options before concluding that a drastic sanction is warranted. *Hanks v SLB Management, Inc*, 188 Mich App 656, 658; 471 NW2d 621 (1991). The sanction of default judgment should be employed only when there has been a flagrant and wanton refusal to facilitate discovery, that is, the failure must be conscious or intentional, not accidental or involuntary. *Equico Lessors, Inc*, p 535. We review the trial court's decision to grant a default judgment for an abuse of discretion. *Id.*

Although it was not filed on a timely basis, as the majority states defendant nonethless apparently did file an answer and counterclaim. Therefore, defendant's only outstanding offense at the time the default judgment was entered was that he had not appeared for his first scheduled deposition. Hence, contrary to the majority's position, although the trial court did not specifically state its reasons for granting plaintiff's request for a default judgment, it appears that the default judgment was entered primarily as a discovery sanction. While the failure to appear at a deposition is a serious matter worthy of some type of sanction, default judgment was entirely inappropriate. The record does not disclose a history of recalcitrance or deliberate noncompliance with discovery orders, which typically precedes the imposition of such a harsh sanction. *Thorne v Bell*, 206 Mich App 625, 633-634; 522 NW2d 711 (1994). Defendant did not repeatedly refuse to appear for a deposition or frustrate other discovery efforts, he only missed the first scheduled deposition. *Frankenmuth, supra*, 193 Mich App 396-397. Additionally, there was no order directing defendant to appear for a deposition; hence, defendant's failure to appear at the deposition was not violative of a court order. In the absence of an order or some other compelling circumstance, this Court is disinclined to find the wilfulness required to enter a judgment by default for failure to comply with discovery. *Frankenmuth, supra*, 193 Mich App 399. In any event, it would be difficult to classify the failure to appear for one deposition as an intentional refusal to facilitate discovery which would warrant the entry of a default judgment.

Nor is this a case where the failure to respond to discovery requests extended over a substantial period of time. Nor is it a case in which the failure to provide discovery is in violation of a direct order of the trial court. Under these circumstances, the trial court should have chosen less drastic measures to compel discovery. See *MacArthur Patton v Farm Bureau Insurance*, 403 Mich 474, 477-478; 270 NW2d 101 (1978) (the trial court erred in granting dismissal of the plaintiff's complaint where the failure

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answer) contemporaneously with the hearing on plaintiffs' motion for a default judgment. Subsequently, during the damages portion of the hearing, the trial court acknowledged that he had received defendant's motion to set aside the default. In any event, defendant had already filed an answer and counterclaim. Therefore, he had previously remedied the situation that led to the initial default. Hence, defendant's only offense at the time the default judgment was entered was that he had not appeared for his first scheduled deposition.

to respond to discovery requests did not extend over a substantial period of time and the failure to provide discovery was not in violation of a direct order of the trial court).[2]

Moreover, the trial court did not evaluate on the record other available options before concluding that a drastic sanction was warranted. This was completely improper. See *Houston v Southwest Detroit Hospital*, 166 Mich App 623, 628-629; 420 NW2d 835 (1987). Alternative remedies, including the imposition of costs and the entry of an order requiring defendant to appear at a specified time for a deposition could have been utilized[3] which would have punished any disobedience or recalcitrance and would have better served the interests of justice under the circumstances of this case, especially because this case implicates a public sector defendant, the Detroit Public School District, and public funds.[4]

I also strongly disagree with the majority's conclusion that defendant waived his right to a jury trial on the issue of damages. As the majority correctly notes, defendant's right to a jury trial on the issue of damages was preserved, despite the entry of a default judgment against him. A default does not constitute a waiver of a jury trial in a civil case. *Mink v Masters*, 204 Mich App 242, 245-246; 514 NW2d (1994). Once a plaintiff files a demand for a jury, the defendant need do nothing further to preserve his right to a trial by jury and plaintiff may only waive a jury trial with defendant's consent. *Id.*, p 247.

Here, defendant was never given an opportunity for a jury trial. The trial judge never offered to convene a jury or assemble a panel to hear any evidence on the question of damages. Instead, the trial

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[2] This case is in sharp contrast with cases where the harsh sanction of default judgment was found to be proper. See, e.g., *Mink v Masters*, 204 Mich App 242, 244-245; 514 NW2d 235 (1994) (default judgment proper where the plaintiff had to file several motions to compel the defendants to supply certain financial records and where the trial court entered two orders requiring defendants to supply the documents and gave them a number of opportunities to comply with the discovery request before default judgment was entered); *Reno v Gale*, 165 Mich App 86, 91-92; 418 NW2d 434 (1987) (the trial court did not abuse its discretion in dismissing the defendant's counterclaims with prejudice where over an eight-month period the plaintiff repeatedly, but unsuccessfully, attempted to schedule the defendant's deposition and the defendant still failed to appear for the deposition even after being ordered to do so by the trial court); *Doan Construction v Stolaruk Corporation*, 131 Mich App 589; 345 NW2d 692 (1983) (the president of the defendant corporation *repeatedly* failed to appear for scheduled depositions and failed to comply with the trial court's order that he appear for the deposition on a date certain); *Krim v Osborne*, 20 Mich App 237, 241; 173 NW2d 737 (1969) (dismissal of a negligence action five years after it had accrued was not an abuse of discretion where the plaintiff had *repeatedly* failed to comply, or had delayed complying, with court discovery rules regarding the answering of interrogatories and the taking of depositions and where plaintiff gave no explanation for his *repeated* dilatory conduct).

[3] See MCR 2.313.

[4] At oral arguments, attorneys for both sides acknowledged that the Detroit School Board had agreed to fully indemnify defendant in this matter.

judge made it very clear that he, himself, intended to hold a "hearing" and "take testimony" on the issue of damages. The court had no power to conduct a hearing on damages. Under these circumstances, though defense counsel acted imprudently and thus exposed himself to the possibility of serious sanctions, it cannot be said that defendant, by leaving the courthouse prior to the hearing before a judge (not a jury), waived his right to a *jury trial* on damages. Defendant was never even given an opportunity for a jury trial, and this was made abundantly clear by the trial judge's announcement that he, not a jury, would determine the right to and amount of damages.

Even more troubling is the amount of damages awarded to plaintiffs based on only the most cursory and self-serving testimony. Although there is no question that defendant and his attorney voluntarily absented themselves from the ill-conceived "hearing" on damages, the evidence presented by plaintiffs to support the damages awarded by the trial court was vague and conclusory at best. For instance, Emmanuel Ford testified that he was out of work for two years, lost $80,000 in income, and suffered a "nervous breakdown" as a result of defendant's conduct. No documentary proof was supplied in support of these assertions. In spite of the speculative nature of Ford's damages and lack of proof indicating that he had sustained damages in the amount of $750,000, the trial court, without any explanation whatsoever, awarded Ford $750,000 in damages. The total damages awarded to plaintiffs was $1,745,000. With the addition of post-judgment interest, this amount may now be well over two million dollars.

Where, as here, extreme and premature sanctions are coupled with a huge damage award without the benefit of a jury or even of counsel to rebut unsubstantiated damage claims, this Court should correct this obvious miscarriage of justice.

/s/ Henry William Saad