

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

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STUART E. SMALL, individually and on behalf  
of SMALL & BERRIS, P.C., SMALL AND  
SMALL, P.C., and LAW OFFICES OF STUART  
E. SMALL AND ASSOCIATES, P.C.,

UNPUBLISHED  
June 15, 2001

Plaintiffs/Counter-Defendants-  
Appellees,

v

MARVIN L. BERRIS,

No. 212952  
Oakland Circuit Court  
LC No. 93-451089-CK

Defendant/Counter-Plaintiff -  
Appellant.

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Before: Hoekstra, P.J., and Cavanagh and Gage, JJ.

PER CURIAM.

Defendant appeals as of right the trial court's orders granting plaintiffs summary disposition as to liability regarding plaintiffs' complaint and, after a bench trial, awarding damages and attorney fees to plaintiffs, and granting plaintiffs summary disposition on defendant's counter-complaint. We reverse in part, affirm in part, and remand for further proceedings.

Defendant first argues that the trial court erred in granting plaintiffs summary disposition on the complaint. Specifically, defendant claims that he was denied procedural due process because he did not receive adequate notice that plaintiffs' motion encompassed more than a request to dismiss a portion of defendant's counterclaim, i.e., that it encompassed a request for summary disposition on the allegations in plaintiffs' complaint. Further, defendant claims that the trial court violated the Michigan Court Rules by granting summary disposition as a sanction for failure to appear at scheduled hearings. We agree that the trial court's grant of summary disposition in favor of plaintiffs on their complaint was improper and therefore reverse and remand.

In *Brenner v Kolk*, 226 Mich App 149, 155; 573 NW2d 65 (1997), this Court stated:

As an initial matter, we note that the trial court dismissed this case by granting defendants' motion for summary disposition. The trial court did not

specify the court rule under which it granted the motion, but it is clear from the transcript of the hearing that the court granted summary disposition as a sanction for plaintiff's failure to preserve evidence. We conclude that the trial court's method of dismissing this case was incorrect as a matter of law because MCR 2.116 is not a rule of sanction. Summary disposition is proper only when the pleadings show that a party is entitled to judgment as a matter of law or if the affidavits or other proofs show no genuine issue of material fact. See MCR 2.116(I)(1).

The *Brenner* Court determined that a Michigan trial court may sanction parties for the loss or destruction of evidence as an exercise of its inherent powers and remanded the case to the trial court to determine the admissibility of the challenged evidence, noting that the trial court may then entertain a motion for summary disposition. *Id.* at 159-165.

In the present case, the trial court did not specify the court rule under which it granted plaintiffs' motion and the record reveals that the trial court granted summary disposition as a sanction for defendant failing to respond to the motion. In fact, the trial court later referred to the action as a default. As in *Brenner, supra*, we conclude that the trial court's method of dismissing the present case was incorrect as a matter of law because it inappropriately used summary disposition under MCR 2.116 as a sanction. Further, plaintiffs' only motion for summary disposition and supporting brief requested that the trial court dismiss with prejudice the defendant's *counterclaim*, without specifically mentioning a request for summary disposition as to plaintiffs' complaint, nor was defendant present at the hearing to contest an oral motion for summary disposition on the complaint. See *Lawrence v Department of Corrections*, 81 Mich App 234, 237-238; 265 NW2d 104 (1978) (Where the incarcerated plaintiff did not receive notice of the Attorney General's motion for summary judgment until after the motion was granted, the plaintiff was denied due process because "[u]nderlying the claim made here is the principle that notice must be given sufficiently in advance of the scheduled proceeding to afford the party a reasonable opportunity to prepare and answer."). Under these circumstances, the procedural defects substantially impacted the course of the case and reversal and remand to the trial court for proceedings on the complaint is necessary.

Because of the procedural defects requiring remand to the trial court, we decline to address the merits of summary disposition on plaintiffs complaint, which the trial court did not address. See *Brenner, supra*. However, if plaintiff moves for summary disposition on the complaint after remand, obviously the trial court can address the issues raised on appeal at that time.<sup>1</sup>

With regard to defendant's counterclaim for which plaintiff actually filed a motion for summary disposition in the trial court, defendant also argues that the trial court erred in granting summary disposition in favor of plaintiffs. A review of the record compels us to find that the trial court's grant of summary disposition of the counterclaim also was granted as a sanction and

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<sup>1</sup> To that end, we note that it seems that the conversion statute, MCL 600.2919a; MSA 27A.2919(1), is inapplicable to the facts pleaded here.

without addressing the merits of defendant's motion. Accordingly, for the same reason that we reversed the grant of summary disposition on the complaint, we also reverse the grant of summary disposition on the counter-complaint and remand to the trial court. Again, we note that upon remand the trial court is free to address the merits of plaintiff's motion for summary disposition on the counterclaim.

Defendant further argues that the trial court abused its discretion in awarding plaintiffs \$2,500 in sanctions for defendant's failure to comply with discovery requests. Defendant does not contest that the trial court should have imposed sanctions; rather, defendant argues that the sanctions imposed by the trial court do not reflect reasonable compensation for the time expended by plaintiffs' attorney in obtaining the requested orders, for drafting the motions at issue, and for the time for the appearance. We disagree. The record amply supports the imposition of sanctions under MCR 2.313(B)(2), which allows reasonable expenses, including attorney fees, and "*such sanctions as are just.*" From the record before us, we are satisfied that the sanctions amount that the trial court awarded was reasonable in light of defendant's repeated failures to comply with plaintiffs' discovery requests.

Defendant also argues that the trial court erred in appointing a receiver over defendant's law practice and assessing him the fees. Defendant concedes that this issue is unpreserved, and we find no plain error affecting the outcome of the proceedings. *People v Carines*, 460 Mich 750, 763, 774; 597 NW2d 130 (1999). Regardless, by failing to cite any supporting legal authority for his position, defendant has abandoned this issue. *Prince v MacDonald*, 237 Mich App 186, 197; 602 NW2d 834 (1999); *Head v Phillips Camper Sales & Rental, Inc*, 234 Mich App 94, 116; 593 NW2d 595 (1999) ("This Court will not search for authority to sustain or reject a party's position.").

Because of our resolution of the previous issues, we need not address defendant's remaining arguments.

Reversed in part, affirmed in part, and remanded for further proceedings. We do not retain jurisdiction.

/s/ Joel P. Hoekstra  
/s/ Mark J. Cavanagh  
/s/ Hilda R. Gage