STATE OF MICHIGAN

COURT OF APPEALS

RAYMOND HAHKA, L. AURELLA HAHKA, and LINDA S. WEST, Plaintiffs-Appellees,	UNPUBLISHED December 20, 2007
v	No. 273041 Alger Circuit Court
JOHN MICHAEL HONGISTO, Defendant-Appellant.	LC No. 02-003928-CH

Before: Donofrio, P.J., and Sawyer and Cavanagh, JJ.

PER CURIAM.

Following entry of a default on the issue of liability and a bench trial on the issue of damages in this action for assault, battery, and denial of access to easements, the trial court issued a judgment ordering defendant to pay plaintiffs $60,000 in damages. Defendant appeals by leave granted. We reverse and remand for further proceedings consistent with this opinion.

Defendant first claims that the trial judge improperly allowed plaintiffs to revoke their jury demand without his consent. We agree. Under the plain language of MCR 2.508(D)(3), a demand for a jury trial may not be withdrawn unless both parties consent "in writing or on the record." See *Marshall Lasser, PC v George*, 252 Mich App 104, 106-107; 651 NW2d 158 (2002). Although implied conduct may constitute "consent on the record," defendant's absence from the pretrial conference and failure to have the resulting default on the liability issue overturned did not constitute implied consent. See *Mink v Masters*, 204 Mich App 242, 246; 514 NW2d 235 (1994) (concluding that a default judgment on the issue of liability does not waive a jury trial on damages in a civil case). Moreover, defendant's objection to the bench trial and his motion for a jury trial established his express opposition. Therefore, under MCR 2.508(D)(3) and *Mink*, defendant was entitled to a jury trial on damages.

Given this disposition, we need not address the errors that were alleged to have occurred at the bench trial. However, since they are likely to arise on remand, we will address them to the extent necessary to provide guidance for the new trial.

Defendant argues that the trial court erred in barring his opening statement. We agree that the court should have allowed defendant to make his statement, see *People v Stimage*, 202 Mich App 28, 32; 507 NW2d 778 (1993), but this error alone would not constitute error requiring reversal in light of the opportunity afforded defendant to argue his case during closing

argument, *People v Buck*, 197 Mich App 404, 413-414; 496 NW2d 321 (1992), rev'd on other grounds sub nom *People v Holcomb*, 444 Mich 853; 508 NW2d 502 (1993). However, on remand the court should be advised to follow strictly the procedure set forth in MCR 2.507(B).[1]

Next, defendant argues that several hearsay and relevance objections should have been sustained. Three of these objections related to threatening statements defendant had allegedly made to other people who in turn conveyed the statements to plaintiff West. The trial court allowed the statements, apparently because they were not offered to establish that defendant had made the threats, but to establish that they frightened West. We note that defendant's objections focused on the absence of the person who told West that they had heard these statements. The trial court addressed only the first layer of these hearsay statements—whether defendant's statements were admissible for the truth of the matter asserted, see MRE 801(c),—but not whether the statements by the individuals to West were admissible. Should the testimony and objections be repeated at trial on remand, the trial court's rulings on the hearsay nature of the questions shall address all the levels of hearsay involved. Further, if the trial court again concludes that the statements were admissible to prove that West was afraid of defendant, the trial court shall consider whether the evidence is relevant to damages if it cannot be established that defendant made the statements and was therefore the cause of the damages.

Finally, defendant objected on relevance grounds to testimony that defendant blocked a potential buyer in the driveway and yelled at him, effectively quashing any desire he had to purchase the property. This was relevant to damages claimed by plaintiffs stemming from their inability or delay in selling their houses due to defendant's actions.

We reverse and remand for further proceedings consistent with this opinion. We do not retain jurisdiction.

/s/ Pat M. Donofrio
/s/ David H. Sawyer
/s/ Mark J. Cavanagh

[1] MCR 2.507(A) states as follows:

> Before the introduction of evidence, the attorney for the party who is to commence the evidence must make a full and fair statement of that party's case and the facts the party intends to prove. Immediately thereafter or immediately before the introduction of evidence by the adverse party, the attorney for the adverse party must make a like statement. Opening statements may be waived with the consent of the court and the opposing attorney.