

STATE OF LOUISIANA

COURT OF APPEAL

FIRST CIRCUIT

NUMBER 2014 CW 1862

THOMAS GORMAN

VERSUS

LIEUTENANT AUSTIN MILLER, DEPUTY ANDREW, DEPUTY TOM FLOYD, AND DEPUTY ROBERT REDMOND

Rendered: JUN 03 2015

On Application for Supervisory Writs
from the Twentieth Judicial District Court
in and for the Parish of East Feliciana, Louisiana
Docket Number 41248

Honorable Robert Downing, Judge ad hoc presiding

Donna U. Grodner
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Counsel for Plaintiff/Relator,
Thomas Gorman

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Counsel for Defendants/Respondents,
Lieutenant Austin Miller, Deputy Tom
Floyd, and Deputy Robert Redmond

BEFORE: WHIPPLE, C.J., GUIDRY, PETTIGREW, McDONALD,
WELCH, HIGGINBOTHAM, CRAIN, THERIOT, HOLDRIDGE, AND
CHUTZ

*Pettigrew J. concurs and assigns Reasons
Guidry J. concurs and assigns Reasons.*

WAG

WAG by WAG

*AMM
gmh*

ADW

*MRT
by WAG
CH*

PER CURIAM.

Thomas Gorman, plaintiff and relator herein, filed suit against Lieutenant Austin Miller, Deputy Andrew Duncan, Deputy Tom Floyd, and Deputy Robert Redmond, alleging that while he was detained at the East Feliciana Parish jail, the defendants verbally and physically attacked him, causing serious injuries. Gorman sought damages under state and federal law, including 42 U.S.C. § 1983.

The defendants did not answer Gorman's suit. Thus, on Gorman's motion, which alleged personal service on the defendants, the trial court entered a preliminary default judgment. At the hearing to confirm the preliminary default judgment, Gorman offered proof of his demand through his own testimony, medical records, two affidavits, as well as photographs of his injuries. The trial court excluded the medical records and affidavits and determined that Gorman's testimony was not credible. Thereafter, concluding that Gorman had not met his burden of proof to confirm the preliminary default judgment, the trial court denied the confirmation of default and dismissed Gorman's suit, on its own motion, with prejudice.

Gorman subsequently appealed that ruling to this Court, challenging the trial court's exclusion of the medical records and affidavits, its refusal to confirm the preliminary default judgment for Gorman's failure to meet his burden of proof, and its dismissal of his suit with prejudice. Sitting *en banc*,¹ this Court reversed the trial court's ruling dismissing Gorman's suit, on its own motion,² with prejudice and remanded the matter "for further proceedings consistent with the views expressed" in the appeal opinion.

¹ Judges McClendon and Drake recused themselves from consideration of this matter.

² In finding that the trial court was unauthorized to *sua sponte* dismiss plaintiff's suit for failure to meet his burden of proof to confirm a preliminary default judgment, this Court overruled its prior decision in *State Through Dept. of Social Services v. R.H.*, 93-2312 (La. App. 1st Cir. 10/7/94), 644 So.2d 853 insofar as it found the court could supply the motion.

Following the issuance of the appeal opinion, Gorman filed an application for supervisory writs of review from the Louisiana Supreme Court, seeking an order that this Court conduct a *de novo* review. On March 21, 2014, the Supreme Court denied Gorman's writ application.

However, while Gorman's writ application was pending with the Supreme Court, defendants filed an answer to plaintiff's original and amended petitions for damages, asserting various defenses. After the Supreme Court denied writs and the matter was returned to the trial court, Gorman, in order to have the preliminary default confirmed, moved to set the matter for hearing. On August 27, 2014, the trial court denied Gorman's motion to set the confirmation for default for hearing and ruled that the suit would proceed to trial on the merits. Gorman now seeks supervisory review of that ruling, arguing that this Court's *en banc* opinion ordered a limited remand solely for the specific purpose of requiring that the trial court admit and not consider the evidence it had erroneously excluded.

The record reflects that the defendants filed an answer to Gorman's suit after the Supreme Court denied writs and returned the matter to the trial court. Louisiana Code of Civil Procedure article 1002 provides that a defendant may file an answer at any time prior to confirmation of a default judgment against him. A default judgment formally granted after an answer is filed constitutes an absolute nullity under La. C.C.P. art. 2002. *Martin v. Martin*, 95-2557 (La. App. 1 Cir. 9/27/96), 680 So.2d 759, *writ denied*, 96-2622 (La. 12/13/96), 692 So.2d 1065. As such, there is no basis for the trial court to render a judgment by default. Thus, the requested interpretation of this court's prior opinion regarding the scope of our remand is moot.

Accordingly, Thomas Gorman's writ application is denied.

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CRAIN, THERIOT, HOLDRIDGE, AND CHUTZ

 PETTIGREW, J., CONCURS, AND ASSIGNS REASONS.

Even though I dissented in part in the case of **Gorman v. Miller**, 12-0412 (La. App. 1st Cir. 11/13/13), 136 So.3d 834, writ denied, 13-2909 (La. 3/21/14), 135 So.3d 620, due to the peculiar procedural posture of this case at this time, I am constrained to concur in the denial of this writ.

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GUIDRY, J., concurs and assigns reasons.

 **GUIDRY, J., concurring.**

Constrained by the law, I will reluctantly concur in denying the writ in this matter. Predictably, by remanding this matter to the trial court, this court has given the defendants a second bite at the apple and an unfair advantage by allowing them “an opportunity to answer this suit and present evidence at this late juncture, especially since defendants repeatedly have failed to avail themselves at the proper time of numerous opportunities to answer the plaintiff’s claims and present opposing evidence.” Gorman v. Miller, 12-0412, p.7 (La. App. 1st Cir. 11/13/13), 136 So.3d 834, 847, writ denied, 13-2909 (La. 3/21/14), 135 So.3d 620. Despite the injustice that has resulted in this court’s previous improper remand, I, nonetheless, am legally constrained at this procedural juncture in this matter to reluctantly concur in the denial of the writ.