STATE OF MICHIGAN

COURT OF APPEALS

STEVEN B. MICHLIN and LASERLAND,

Plaintiffs-Appellants,

v

PATRICIA BLOVET,

Defendant-Appellee.

UNPUBLISHED
June 13, 2000

No. 210861
Oakland Circuit Court
LC No. 97-536699-NO

Before: Hood, P.J., and Gage and Whitbeck, JJ.

PER CURIAM.

Plaintiffs Steven B. Michlin and Laserland appeal as of right the default judgment against defendant Patricia Blovet in this defamation action, which denied them damages. We remand for further proceedings.

I. Basic Facts And Procedural History

Blovet reported to police that Michlin, her employer, had touched her in an inappropriate, sexual manner. The prosecutor charged Michlin with fourth-degree criminal sexual conduct and he pleaded nolo contendere to that charge. Blovet then filed a sexual harassment suit against Michlin. When the parties settled the sexual harassment suit, they entered into a consent judgment for $5,500 to be held in escrow pending the outcome of this defamation action against Blovet.

Plaintiffs, in this defamation action, claimed that Blovet fabricated her allegations regarding Michlin's sexual contact and sexual harassment. Plaintiffs specifically alleged that Blovet maliciously "communicated to third parties false statements that Plaintiff Michlin had, in essence, stalked Defendant, intimidated her, created a hostile environment, [and] engaged in a campaign of sexual harassment of her . . . ." Michlin claimed damages for mental distress, humiliation, degradation and interference with his family relationships. Laserland sought damages for business it allegedly lost.

After Blovet failed to answer plaintiffs' complaint, the trial court entered a default and denied the motion to set aside the default. Plaintiffs moved for a default judgment and, on January 21, 1998, the trial court held a hearing on that motion. Although Blovet was present at the hearing and, after a

fashion, participated in it, she was not represented by counsel.[1] Michlin testified[2] that Blovet's accusations caused him to suffer humiliation, degradation and emotional distress, and that the accusations also interfered with his family relationships.

According to Michlin, he spent over $50,000 defending the criminal and civil cases. Michlin presented copies of canceled checks, which he alleged represented costs expended since the cases began. He itemized the costs, placing them in the following categories: $1,800 in psychological counseling; $1,122 in unspecified fees for the criminal case; $476 in copying fees; $42,395 in attorney fees for his defense in the criminal and civil cases; and $1,200 "expenses for meetings in restaurants." Michlin claimed that he spent in excess of $100 for private investigation and expert evaluations of some of Blovet's evidence in the prior cases. Michlin also sought $100 a day for the 600 days he claimed that he was emotionally distressed because of Blovet's alleged lies. Laserland claimed that it suffered $200,000 in damages because, Michlin explained, Laserland's gross income decreased from $800,000 a year to about $600,000 a year after Blovet accused him of sexual improprieties. At the conclusion of the hearing, the trial court took the matter under advisement.

On February 24, 1998, the trial court entered a default judgment, which stated in pertinent part:

> Plaintiffs are entitled to damages in the amount of -$0- for the reason that Plaintiff, STEVEN B. MICHLIN, did not prove that he suffered any damages where he pled nolo contendere to Criminal Sexual Conduct charges in a related case where Defendant BLOVET was the complainant, and where he entered into a Consent Judgment for $5500 in a related case brought by Defendant BLOVET.

Plaintiffs now argue that the trial court erred in considering Michlin's plea and the settlement in the sexual harassment case when determining whether they were entitled to damages.

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[1] After the trial court heard Blovet's explanation of her inability to retain counsel, it ruled that the hearing would proceed:

> THE COURT: Yeah. Well, I think we are here today for a hearing on damages?
>
> MR. ROSE: Yes, your Honor.
>
> THE COURT: I think we are going to have to proceed.
>
> MR. ROSE: All right.
>
> THE COURT: [To Ms. Blovet] You are going to have to do later what you are going to have to do.
>
> You may participate, obviously, and if you have any questions you want to ask you may, so just have a seat and we'll continue.

[2] We note that this testimony was in response to a series of extraordinarily leading questions posed by plaintiffs' counsel. Because Blovet was not represented by counsel, there were no objections to these questions.

Before reaching the merits of this case, we make two observations about the materials we must consider in this appeal. First, we note the Blovet has not filed a brief on appeal and is apparently now unrepresented in this matter. Second, plaintiffs' brief on appeal does not conform to our rules in several important respects. The statement of facts is argumentative in the extreme and violates our requirement that all material facts, both favorable and unfavorable, be fairly stated without argument or bias. See MCR 7.212(C)(6). The brief also repeatedly and improperly refers to matters outside the lower court record while, at the same time, it fails to refer to the record when appropriate and necessary. See MCR 7.210(A)(1), 7.212(C)(6), and 7.212(C)(7).[3] As much as Michlin and his counsel may wish to relitigate matters decided in other cases, this appeal is not the place for such an attempt.

II. Standard Of Review

We review an award of damages under the clearly erroneous standard. *Triple E Produce Corp v Mastronardi Produce, Ltd*, 209 Mich App 165, 177; 530 NW2d 772 (1995).

III. The Effect Of A Default

The trial court's brief statement in the February 24, 1998 default judgment concerning damages is ambiguous. We are not certain from the wording in that brief statement whether the trial court was looking at the question of *liability* or the question of *damages*. The default judgment refers to Michlin's failure "to prove" damages and this statement is logically related to the evidence adduced at the January 21, 1998 hearing. The default judgment then refers the nolo contendere plea and sexual harassment suit settlement. The trial court may have considered the plea and the settlement as relevant to *liability* and not strictly to the *damages* issue. This interpretation is troubling because "a default settles the question of liability as to well-pleaded allegations and precludes the defaulting party from litigating that issue." *Wood v DAIIE*, 413 Mich 573, 578; 321 NW2d 653 (1982). The trial court's language leads to different interpretations of the default judgment.

One interpretation of the default judgment is that, rather than accepting plaintiffs' defamation claim as established, the trial court may have concluded that plaintiffs failed to establish that Blovet's publications were untruthful. In the absence of that proof, the trial court may have believed that it could not award plaintiffs any damages. However, the default had already settled whether Blovet was liable and, therefore, the only matter left for the trial court to decide was the amount of damages Blovet owed plaintiffs, if any. If this interpretation of the default judgment is correct, then the trial court clearly erred in its analysis, as *Wood*, *supra*, makes clear.

However, the trial court heard testimony from Michlin concerning damages. The trial court could have concluded from Michlin's testimony that plaintiffs had not actually incurred damages that were compensable at law. As a result, the trial court may have included the language referring to the

[3] Indeed, we note that plaintiffs' brief states, "We take the liberty and ask leave of the court to refer to factual developments in all of the related litigation as this was done by Judge Kuhn in his ruling in this case." This Court granted no such leave and, at oral argument, admonished plaintiffs' counsel to confine his argument to facts contained in the record.

nolo contendere plea and the sexual harassment suit settlement simply to recount the factual background to this case, without considering the plea and the settlement for the purpose of determining liability or relying on them to deny damages. The text of the default judgment does not inescapably suggest that the trial court was pondering Blovet's liability and attempting to determine whether her alleged defamatory statements were untrue in light of the plea and settlement. Rather, the trial court may have referred to the pleas and the settlement as matters of record and historical fact. If this reading of the default judgment is correct, then the trial court did not clearly err in its analysis.

IV. The Settlement Reference

Aside from the error the trial court may have committed by considering liability when entering the default judgment, the trial court may have also erred by considering the sexual harassment suit settlement as relevant to the damages issue. MRE 408 prohibits a party from introducing evidence of a settlement "to prove liability for or invalidity of the claim or its amount." Accordingly, the trial court clearly erred if it considered Michlin's decision to settle Blovet's sexual harassment suit as proof that he was liable in that case and, in turn, suffered no damages because he was the wrongdoer. However, if the trial court relied on Michlin's testimony, and not on the settlement, to determine that Michlin did not sustain damages, then it did not clearly err.

V. Nolo Contendere Plea Reference

The trial court's reference to the nolo contendere plea falls under a different analysis than its reference to the sexual harassment suit settlement. MRE 410 generally provides that, "in any civil or criminal proceeding," a plea of nolo contendere is *inadmissible* against the defendant who entered the plea. The relevant exception to this rule is that "to the extent that evidence of a guilty plea would be admissible, evidence of a plea of nolo contendere to a criminal charge *may be admitted in a civil proceeding to support a defense against a claim asserted by the person who entered the plea*." MRE 410(2) (emphasis supplied). This case fits squarely within the exception in MRE 410(2) because it is civil and the evidence was used to defend against a claim by the person who entered the plea, Michlin.[4] Furthermore, Michlin made that nolo contendere plea, and the costs associated with it, the primary subject of the hearing to determine damages. See *Sudul v City of Hamtramck*, 221 Mich App 455, 514; 562 NW2d 478 (1997). There is no logical way to separate the facts surrounding the plea from the damages Michlin claimed he suffered. Thus, if the trial court considered the facts surrounding the plea when calculating damages, it did not necessarily err.

However, if the trial court believed that a nolo contendere plea essentially estopped Michlin from seeking damages for conduct related to the criminal case in which he entered the plea, then the trial court clearly erred. In *Lichon v American Universal Ins Co*, 435 Mich 408, 417-422, 431-432; 459 NW2d 288 (1990), the Michigan Supreme Court explained at length that, aside from cases in which judicial estoppel apply, a nolo contendere plea cannot be used to prevent a party from litigating an issue

[4] We recognize that Laserland, Inc. is a corporate entity and distinct from Michlin. However, its claims, if cognizable, appear derivative of Michlin's claims.

merely because it may be factually related to the plea. At the heart of this rule is the purpose behind a nolo contendere plea: to assert to the court in the criminal proceeding that the defendant does not wish *to contest* the charges without admitting to their truth or claiming that they are false. *Id*. at 419-422. Thus no legal doctrine prevented Michlin from proving that he sustained damages from Blovet's statements. If the trial court believed that Michlin could not claim damages, then it clearly erred.

VI. Conclusion

We conclude that the language in the February 24, 1998 default judgment is ambiguous. On one hand, the default judgment referred to Michlin's failure "to prove" damages, but in the same sentence the trial court linked that failure to the nolo contendere pleas and the sexual harassment suit settlement. Thus, the trial court has left us with two alternatives: hypothesizing about its true reasoning in the default judgment or remanding for a clarification. Hypothesizing about the trial court's reasoning is untenable. See *Smith v Crime Victims Compensation Bd*, 130 Mich App 625, 628-629; 344 NW2d 23 (1983) ("An appellate court is not to supplement gaps in the record by second-guessing."). Therefore, we remand to the trial court so that it may clarify on the record why it did not award damages to plaintiffs. We express no opinion concerning what damages in this case might be, whether they may only be nominal, or whether they exist at all. We remind the trial court that the default conclusively established Blovet's *liability* and caution the trial court that it may not consider either Michlin's nolo contendere pleas or sexual harassment suit settlement to preclude an award of *damages*, if any exist.

Remanded for further proceedings consistent with this opinion. We retain jurisdiction.

/s/ Harold Hood
/s/ Hilda R. Gage
/s/ William C. Whitbeck