

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

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JACKSON & CHURCH COMPANY, LOUIS  
PERROT, and VERA PERROT,

UNPUBLISHED  
February 12, 2013

Plaintiffs/Counter-Defendants-  
Appellees,

v

PETER KAISER and BAY CITY SHOVELS,  
INC.,

No. 307633  
Arenac Circuit Court  
LC No. 10-011154-CK

Defendants/Counter-Plaintiffs-  
Appellants.

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Before: JANSEN, P.J., and WHITBECK and BORRELLO, JJ.

PER CURIAM.

Defendants Peter Kaiser and Bay City Shovels, Inc., (collectively Kaiser) appeal as of right the circuit court's order dismissing their counterclaim and granting a default judgment in favor of plaintiffs Jackson & Church Company and Louis and Vera Perrot (collectively Jackson & Church) as a discovery sanction for failing to comply with its discovery orders. We affirm in part, reverse in part, and remand.

I. FACTS

A. BACKGROUND FACTS

Bay City Shovels is a manufacturer whose business includes manufacturing parts for government contracts. When a government calls for companies to bid to produce a part, Bay City Shovels submits a bid. If the bid is accepted, Bay City Shovels manufactures the part when a government requests it. Several years may pass between when a government accepts a bid, and when it requires Bay City Shovels to produce the part.

On June 10, 2004, Jackson & Church agreed to sell Bay City Shovels to Peter Kaiser for \$470,000. Peter Kaiser signed a promissory note, in which he agreed to make payments to Jackson & Church Company. Peter Kaiser and Bay City Shovels signed separate personal guaranty agreements. At that time, government contracts were pending.

In February 2010, Jackson & Church sued Kaiser, alleging that they were in default of the promissory note and liable for the remaining \$385,343 balance. Kaiser counterclaimed that Jackson & Church used grossly underbid contracts to materially misrepresent the value of Bay City Shovels, in order to fraudulently induce Peter Kaiser to purchase it.

## B. DISCOVERY DISPUTES

In August 2010, Jackson & Church moved the trial court to compel Kaiser to answer interrogatories. The trial court heard the motion on September 14, 2010, and ordered Kaiser to answer the interrogatories within 14 days. Kaiser did so. The trial court ordered the parties to complete discovery by October 11, 2010.

On December 13, 2010, Jackson & Church moved the trial court to compel Kaiser to produce documents that Jackson & Church requested in October 2010. After a hearing on the motion, the trial court ordered Kaiser to produce the documents by February 1, 2011. Jackson & Church sent Kaiser a letter on February 9, 2011, stating that they still required “cost and summary sheets on the prior bids.”

On April 11, 2011, Jackson & Church moved the trial court to dismiss Kaiser’s counterclaims and enter a default judgment as discovery sanctions. Jackson & Church based the motion on Kaiser’s failure to comply with discovery requests, including the October 2010 request for documents related to the prior bids.

The trial court heard arguments on the motion on May 25, 2011. When the trial court indicated that it was confused about which documents Jackson & Church were requesting, Jackson & Church responded that they sought the cost sheets on the prior bids of fourteen prior government contracts. Jackson & Church clarified that Kaiser produced only the costs and billing records of current contracts, not past contracts. Jackson & Church alleged that, without the cost sheets for the past contracts, they could not defend against Kaiser’s counterclaims. Kaiser argued that a default judgment was not warranted because Kaiser complied with the request for background information on the bids, they communicated with Jackson & Church in an attempt to provide the specific documents requested, and they had been confused about which specific documents Jackson & Church meant.

Louis Perrot testified at the hearing that he prepared the allegedly fraudulent bids. He testified that he could not prove that the bids were not fraudulently low without the costs documentation for contracts that were comparable to the bids. Perrot testified that he had used the information from the prior, similar contracts that detailed the labor hours, materials, and outsourcing that the contract required in order to create the allegedly fraudulent bids he submitted from 2002 until 2004. In response to questioning, Perrot testified that he specifically required the “bid bills,” and the record indicates that he showed the court and the attorneys a “bid bill” to demonstrate what he meant. Perrot testified that he had kept the “bid bills” for the specific years that he needed in “the upstairs office,” in folders labeled according to the contract.

The trial court declined to sanction Kaiser, stating that it believed that Kaiser had been confused and that their failure to comply with the discovery request did not seem intentional.

The trial court ordered Kaiser to produce the “bid bills” for the specified contracts by July 25, 2011.

On August 12, 2011, Jackson & Church again moved the trial court for discovery sanctions because Kaiser failed to produce any documents. Kaiser responded that the deficiencies were not intentional and did not warrant dismissing their counterclaim, and asserted that a default on Jackson & Church’s claims would be too broad of a sanction.

At the hearing on September 14, 2011, Jackson & Church indicated that Kaiser did give them a substantial quantity of documents on September 12, 2011, but that those documents did not include the “bid bills.” Louis Perrot testified at the hearing that the documentation was deficient because the “bid bills” were missing or incomplete, and illustrated the deficiencies in five different projects. Perrot testified that it was “practically impossible” to recreate over half of the bids that Jackson & Church alleged were fraudulent, and that it would be “very hard” to recreate others.

The trial court found that Kaiser did not comply with its discovery order because they produced the documents on September 12, 2011, when it ordered them to produce the documents by July 25, 2011. It further found that Kaiser did not submit completed “bid bills,” and produced voluminous documents that were not related to the specified bids. The trial court orally ruled that it was “going to grant the motion and dismiss the counter claim at this time and enter a default as to liability on the [Perrots’] claim. So the only issue left is damages . . .” The trial court ordered that “a Default Judgment is hereby entered in favor of [Jackson & Church], and against [Kaiser], and the case shall proceed to a Trial on the issue of damages to [Jackson & Church] only and that the Counter Claim is hereby dismissed.” The trial court granted Jackson & Church’s motion to dismiss Kaiser’s counterclaim, and entered a default against Kaiser on Jackson & Church’s claim concerning the amount owed on the promissory note. It subsequently denied Kaiser’s motion for reconsideration.

## II. DISCOVERY SANCTIONS

### A. STANDARD OF REVIEW

This Court reviews for an abuse of discretion the trial court’s decision to impose discovery sanctions.<sup>1</sup> The trial court abuses its discretion if its outcome falls outside the range of reasonable and principled outcomes.<sup>2</sup>

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<sup>1</sup> *KBD & Assocs, Inc v Great Lakes Foam Technologies, Inc*, 295 Mich App 666, 677; 816 NW2d 464 (2012); see *MacArthur Patton Christian Assoc v Farm Bureau Ins Group*, 403 Mich 474, 475, 477; 270 NW2d 101 (1978).

<sup>2</sup> *Maldonado v Ford Motor Co*, 476 Mich 372, 388; 719 NW2d 809 (2006).

## B. LEGAL STANDARDS

MCR 2.313(B)(2) authorizes the trial court to sanction a party if it fails to obey the court's discovery orders:

If a party . . . fails to obey an order to provide or permit discovery . . . the court in which the action is pending may order such sanctions as are just, including . . . :

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(c) an order . . . dismissing the action or proceeding or a part of it, or rendering a judgment by default against the disobedient party.

Dismissal is generally appropriate only when the party intentionally refuses to comply with discovery, as opposed to an accidental failure.<sup>3</sup> Before imposing a harsh sanction, the trial court should “carefully consider the circumstances of the case to determine whether a drastic sanction such as dismissing a claim is appropriate.”<sup>4</sup> Factors that the trial court should consider include:

(1) whether the violation was wilful [sic] or accidental; (2) the party's history of refusing to comply with previous court orders; (3) the prejudice to the opposing party; (4) whether there exists a history of deliberate delay; (5) the degree of compliance with other parts of the court's orders; (6) attempts to cure the defect; and (7) whether a lesser sanction would better serve the interests of justice.<sup>5</sup>

## C. DISMISSAL OF KAISER'S COUNTERCLAIM

Kaiser contends that the trial court abused its discretion when it dismissed their counterclaim because they did not intentionally violate the trial court's discovery order and because the trial court did not consider a lesser sanction. We disagree.

The trial court initially ordered the parties to complete discovery by October 2010. Jackson & Church initially moved the trial court for a default on April 11, 2011. The trial court considered that Kaiser's delay might not be intentional at the first dismissal hearing, noting that it was confused about what exactly Jackson & Church were requesting. Jackson & Church stated the specific type and kind of information they sought in great detail at the hearing on May 25, 2011, showed the attorneys and court what a “bid bill” looked like, and even stated where the documents had been located when they sold Kaiser the business. Kaiser stated on the record that

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<sup>3</sup> *Hardrick v Auto Club Ins Ass'n*, 294 Mich App 651, 661; 819 NW2d 28 (2011).

<sup>4</sup> *Kalamazoo Oil Co v Boerman*, 242 Mich App 75, 86; 618 NW2d 66 (2000); see also *Vicencio v Ramirez*, 211 Mich App 501, 506-507; 536 NW2d 280 (1995).

<sup>5</sup> *Id.* at 507.

they understood what documents Jackson & Church were requesting. The trial court then gave Kaiser until July 25, 2011, to produce the documents. Thus, the trial court not only *considered* another option than dismissal, it *gave* Kaiser another option.

Kaiser produced approximately 1500 pages—or 25 pounds—of unrelated documents almost two months late, and just two days before the second default hearing. Perrot testified that these documents were not the “bid bills,” and were not useful. He testified that from the documents provided, it was “virtually impossible” to explain the majority of the bids, and was “very hard” to explain others. Jackson & Church were significantly prejudiced by Kaiser’s failure to produce the documents because without the “bid bills,” Jackson & Church could not recreate the calculations they used for the bids and could not effectively defend against Kaiser’s claims that they fraudulently underbid on the government contracts to intentionally misrepresent the state of the business to Kaiser.

We are not convinced that the trial court’s dismissal of Kaiser’s counterclaim was outside the range of principled outcomes under these circumstances. That Kaiser violated multiple discovery orders over a substantial period of time, after Jackson & Church went to great lengths to describe which documents they required, supports the trial court’s conclusion that the behavior was intentional. Kaiser’s failure to produce these documents prejudiced Jackson & Church because, without the “bid bills,” Jackson & Church could not recreate the calculations they used for the bids. We conclude that the trial court did not abuse its discretion when it determined that Kaiser did not comply with its orders and dismissed their counterclaim under these circumstances.

#### D. DEFAULT ON JACKSON & CHURCH’S CLAIM

Kaiser also argues that the trial court abused its discretion because the scope of its discovery sanction was too broad when it included a default on Jackson & Church’s primary claim without any reason to support that sanction. We agree.

Jackson & Church assert that Kaiser did not raise this issue before the trial court. An issue is preserved when it is raised before and decided by the trial court.<sup>6</sup> The record indicates that, in their brief in opposition to Jackson & Church’s motion for discovery sanctions as well as at the hearing, Kaiser argued that a default judgment on Jackson & Church’s main claim would be too broad. The record further reflects that Kaiser subsequently moved the trial court for reconsideration of its order on the grounds that it had not addressed the circumstances surrounding Jackson & Church’s claim before granting them a default on the claim. Because Kaiser raised this issue before the trial court, we conclude that this issue is preserved.

Despite some confusion in the briefs and at oral argument regarding whether the sanction the trial court entered was a default or essentially a grant of partial summary disposition, we conclude that the trial court did grant Jackson & Church a default judgment, and not a lesser sanction. The trial court’s written order stated that “a Default Judgment is hereby entered in

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<sup>6</sup> *City of Riverview v State*, 292 Mich App 516, 519; 808 NW2d 532 (2011).

favor of [Jackson & Church], and against [Kaiser].” The trial court speaks through its orders.<sup>7</sup> We note that Kaiser stated procedural defenses to the primary claim that were not related to the discovery issue, and may have affected Kaiser’s liability on the promissory note to some or all of the parties. “[A] default settles the question of liability as to well-pleaded allegations and precludes the defaulting party from litigating that issue.”<sup>8</sup> Thus, these are not issues that could have been resolved at the trial for damages.

Michigan courts generally favor the determination of issues on their merits unless the trial court properly entered a default judgment.<sup>9</sup> We reiterate that default is a harsh sanction, and the trial court should carefully consider the circumstances of the case before imposing it.<sup>10</sup> There is nothing in the trial court’s oral ruling, order entering the default, or order denying Kaiser’s motion for reconsideration from which this Court could conclude that the trial court considered the circumstances of Kaiser’s failure to respond to the document request as that failure related to Jackson & Church’s claim. The trial court should at least evaluate sanction options other than default record.<sup>11</sup> We conclude that the trial court abused its discretion because it does not appear to have considered whether Kaiser’s failure to produce the “bid bills” had any effect on Jackson & Church’s primary claims.

The considerations that led the trial court to conclude that dismissal of Kaiser’s counterclaim was warranted do not support its decision to grant Jackson & Church a default judgment on their claim. A discovery sanction should be “proportionate and just.”<sup>12</sup> Here, the discovery dispute concerned the “bid bills” that were at the heart of Kaiser’s counterclaim, not any documents that pertained to Jackson & Church’s claims. While the lack of historical bid documents clearly prejudiced Jackson & Church’s ability to defend against the counterclaim, Jackson & Church did not require these documents to pursue their original claims. There is no indication that Kaiser failed to produce any documents necessary to Jackson & Church’s pursuit of their claims. Nor is there any indication that the trial court considered any of these factors as they related to Jackson & Church’s claim. Finally, there is no indication that the trial court determined that Kaiser’s behavior was so flagrant and intentional that it should extend across the entire case.

We conclude that the trial court’s sanction does not, from this record, appear to be proportionate or carefully considered. We do not suggest that the trial court need consider the nature of the discovery request as it relates to every single possible claim and defense, but under the circumstances of this case—where Kaiser appears to have otherwise complied with

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<sup>7</sup> *Lown v JJ Eaton Place*, 235 Mich App 721, 726; 598 NW2d 633 (1999).

<sup>8</sup> See *Wood v Detroit Auto Inter-Ins Exch*, 413 Mich 573, 578; 321 NW2d 653 (1982).

<sup>9</sup> See *Alken-Ziegler, Inc v Waterbury Headers Corp*, 461 Mich 219, 229; 600 NW2d 638 (1999).

<sup>10</sup> *Kalamazoo Oil Co*, 242 Mich App at 86.

<sup>11</sup> *Vincencio*, 211 Mich App at 506-507.

<sup>12</sup> *Hardrick*, 294 Mich App at 662, quoting *Kalamazoo Oil Co*, 242 Mich App at 87.

discovery, except as it pertained to their counterclaim—the trial court’s entry of a default judgment on Jackson & Church’ claim without articulating some basis for doing so was an outcome falling outside the range of reasonable outcomes.

We affirm the trial court’s order of dismissal as it relates to Kaiser’s counterclaim. We reverse the part of the trial court’s order granting Jackson & Church a default judgment on their claim, and remand for determination of that claim on the merits. We do not retain jurisdiction.

/s/ Kathleen Jansen

/s/ William C. Whitbeck

/s/ Stephen L. Borrello