STATE OF MICHIGAN

COURT OF APPEALS

EASTERN OIL COMPANY, a Michigan Corporation, Plaintiff-Appellant, v MARY ERMATINGER, an individual and CADILLAC OIL COMPANY, a Michigan Corporation, Defendants-Appellees.	UNPUBLISHED August 25, 2009 No. 284286 Oakland Circuit Court LC No. 05-070411-CZ
EASTERN OIL COMPANY, a Michigan Corporation, Plaintiff-Appellee, v MARY ERMATINGER, an individual and CADILLAC OIL COMPANY, a Michigan Corporation, Defendants-Appellants.	No. 284442 Oakland Circuit Court LC No. 05-070411-CZ

Before: Fitzgerald, P.J., and Talbot and Shapiro, JJ.

PER CURIAM.

This contract and tort action arose when defendant Mary Ermatinger was terminated by plaintiff Eastern Oil Company (Eastern) and went to work for defendant Cadillac Oil Company (Cadillac). In Docket No. 284442, defendants appeal as of right from the trial court's entry of default judgments against them. In Docket No. 284286, plaintiff appeals as of right from the trial court's failure to hold defendants jointly and severally liable. We reverse, vacate the defaults, affirm the trial court's determination that the contract provision is enforceable, and remand to the trial court discovery and trial and for entry of an order imposing sanctions pursuant to MCR 2.603(D)(4).

I. Basic Facts and Procedural History

Both Eastern and Cadillac are in the business of selling industrial lubricating oils to machine tool shops. Eastern hired Ermatinger in 1987 as a sales representative. In 1996, she executed an Employee Confidential Information and Competition Limitation Agreement (the Agreement). Pursuant to the Agreement, Ermatinger was prohibited from calling on any of Eastern's customers for a period of six months following termination of her employment with Eastern and from using or disclosing any of Eastern's trade secret formulas. In the event of a violation of the Agreement, Eastern could elect to require Ermatinger to purchase the good will associated with any Eastern customer where "any disclosure or use of confidential information, or any contact, solicitation or dealing prohibited by this Agreement at any time results in, or in any way contributes to, the sale of any product or service by me, my new employer, or by any business entity in which I have a direct or indirect interest to" that customer.

While at Eastern, Ermatinger worked as its sale's representative for Quality Pipe Products, Inc. (Quality Pipe). In May 2004, Eastern had begun to develop a custom-blend metal cutting fluid for Quality Pipe, ultimately known as "Formcut 6504." Formcut 6504 was successfully developed by October 2004 and non-trial shipments of the product to Quality Pipe began by late March 2005. Ermatinger had been involved in the development of Formcut 6504 and was one of the authorized personnel able to access its formula on Eastern's computer system.

Eastern terminated Ermatinger on March 31, 2005. Cadillac hired her in June 2005 as a sales representative. Around July 2005, Quality Pipe ceased doing business with Eastern and began obtaining custom-blend metal cutting solution from Cadillac. Two months later, Eastern received anonymous telephone calls stating that Ermatinger had been violating the Agreement by soliciting sales from Eastern's clients and "had been in Quality Pipe selling products for Cadillac Oil Company for the past month."

Plaintiff filed suit against Ermatinger and Cadillac Oil seeking both injunctive relief and damages. After defendants each failed to timely appear, default against each was entered. While the subsequent motion for entry of default judgment was pending, defendants filed motions for to set aside the defaults. The trial court found, both on the initial motions and on motions for reconsideration that neither Ermatinger nor Cadillac Oil had set forth "good cause" for doing so.

II. Defaults

We begin our analysis with the proposition that "the law favors the determination of claims on their merits." *Alken-Zeigler, Inc v Waterbury Headers Corp*, 461 Mich 219, 227; 600 NW2d 638 (1999). As noted by Judge O'Connell in his concurrence in *Shawl v Spence Bros, Inc*, 280 Mich App 213, 241, 242; 760 NW2d 674 (2008) (O'Connell, J. concurring), "if a timely meritorious claim or defense is alleged and the conflict of the parties reasonably falls within the set of rules at issue, the law favors a lesser sanction than default or dismissal," and courts should not allow "the manner in which the procedural rules are implemented [to] be more important than the substance of the case." We agree that "[rules of practice and procedure] must be followed but they must also be thought of as guides and standards to the means of achieving justice, not the end of justice itself." *Higgins v Henry Ford Hosp*, 384 Mich 633, 637; 186 NW2d 337 (1971).

In this case, the trial court had good reason to be displeased with the actions of defendants in their failures to cooperate in plaintiff's attempts to accomplish service. However, we conclude that each defendant presented "good cause" for its failure to timely appear.[1]

As to Ermatinger, we conclude that she was never served under the court rules and so she has shown "a substantial defect or irregularity in the proceedings upon which the default was based." *Shawl, supra* at 221. It is uncontested that Ermatinger was not served pursuant to MCR 2.105(A) by personal delivery of the summons and complaint or by certified mail with filing of a signed receipt. Where ordinary service cannot be completed, the serving party may seek to serve by other means that are within the court's discretion. MCR 2.105(I). However, an order for substituted service may only be issued after a request made in a "verified motion" and "service of process may not be made under this subrule before entry of the court's order permitting it." MCR 2.105(I)(2) and (3). Here, no verified motion was filed and no order of the court allowing it was ever entered. Pursuant to MCR 2.602(A)(2), the date of entry of an order is the date that the order was signed. The trial court did not issue a written order allowing substituted service and so no order was ever entered. We do not disagree with the trial court's conclusion that Ermatinger was evading ordinary service and discuss this further below as it applies to MCR 2.603(D)(4). However, absent compliance by both the serving party and the trial court with MCR 2.105(I), we cannot find that she was served and so conclude that she has satisfied the good cause requirement.

As to Cadillac Oil, we conclude that the trial court erred in finding that Cadillac had been served and so agree that it has also demonstrated "good cause." Plaintiff alleged that service was made on Cadillac by personal delivery of the summons and complaint upon its resident agent and president, Roger Piceu. The court held an evidentiary hearing on this issue at which time Eastern Oil's process server testified. He refused to provide his actual name which, according to defendants' briefing, is Harvey Aidem, and instead gave the court only the name "O'Malley" which he described as his "street name" and "professional name." He testified that he personally served Piceu on November 11, 2005 on Cadillac's premises. The trial court concluded that the issue was one of credibility and that the process server's testimony was more credible that Piceu's since Piceu had been evading service. While Piceu's credibility is questionable, we conclude that the other evidence presented at the hearing and in the motion for reconsideration

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[1] Defendants' claim that the trial court had no jurisdiction over them is without merit. Both defendants appeared through a general appearance filed by their counsel. In doing so, defendants submitted to the court's jurisdiction. *Penny v ABA Pharmaceutical Co* (*On Remand*), 203 Mich App 178, 181; 511 NW2d 896 (1993) (a defendant "who enters a general appearance and contests a cause of action on the merits submits to the court's jurisdiction and waives service of process objections"). Although *Al-Shimmari v Detroit Med Ctr*, 477 Mich 280, 293; 731 NW2d 29 (2007) overruled *Penny*'s statement regarding service of process objections to the extent it conflicted with MCR 2.116(D)(1), it left intact the conclusion that failure to file a limited appearance subjected defendants to the jurisdiction of the trial court. See *id.* at 292, n 17 ("whether a party 'submits to the court's jurisdiction,' is irrelevant in determining whether a party has waived a (C)(3) objection" [citations omitted]). Accordingly, the trial court had jurisdiction over defendants.

demonstrates that Piceu was not in Michigan, but rather Florida on the alleged date of service. This evidence included: credit card receipts showing use of Piceu's personal credit card in Stuart, Florida on November 11; an affidavit from a Florida resident that Piceu was with her on both the morning and evening of November 11; an affidavit from Cadillac's general manager that a process server came to the company's premises on November 11 looking for Piceu and that he was advised that Piceu was not present and that, in fact, Piceu was not at the office that day but instead was out of town; and credit card receipts and sales invoices made out to Piceu from Florida for November 10 and 12. Moreover, we do not believe that the process server's testimony can be considered credible. First, as already noted, it is uncontested that he refused to give his name and signed the proof of service with a false name and the proof of service was not notarized. Second, at Cadillac's motion to strike the proof of service, plaintiff's counsel did not dispute that O'Malley's true name was Harvey M. Aidem or that Aidem had been convicted on two felony counts of larceny by conversion, MCL 750.362, and one count of obtaining money under false pretenses, MCL 750.218. Given the nature of these offenses, we cannot agree that "O'Malley" was a credible witness. We, therefore, find that the trial court clearly erred in concluding that Piceu had been served on November 11.

We also find that defendants did present meritorious defenses, although these were somewhat limited by the trial court's focus on the issue of service, rather than meritorious defense, when it denied the motions to set aside default. Indeed, the trial court directed the parties at the hearing not to discuss the meritorious defense issue. Cadillac provided an affidavit from Piceu that alleged that the restrictive covenant was not binding on Cadillac because it was not a party to the Agreement. It also alleged that it owed no duty to plaintiff. This affidavit provided a meritorious to plaintiff's claim for injunctive relief.

Cadillac also provided Tilotti's affidavit which stated:

> 6. As Vice President and General Manager, I interviewed Mary Ermatinger for employment at Cadillac. Ms. Ermatinger had contacted me, looking for a job. She explained that Eastern Oil Company ("Eastern") had fired her, and she needed employment.
>
> 7. During the course of the interview, I became aware of the existence of a non-competition covenant that existed between Eastern and Ms. Ermatinger. It was my understanding that, according to the covenant, Ms. Ermatinger was prohibited from soliciting Eastern's customers for a period of six months. Because Ms. Ermatinger was fired by Eastern, I did not know whether the covenant was still enforceable. Nevertheless, I advised Ms. Ermatinger that, if she were to be hired by Cadillac, she should not solicit Eastern's customers during the remaining term of the covenant.
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> * * *
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> 11. During the course of this litigation, I understand that Eastern has accused Ms. Ermatinger or Cadillac, or both, of misappropriating a secret formula used by Eastern. I categorically deny that this has occurred. To be clear, Ms. Ermatinger is involved in sales for Cadillac. She has nothing to do with chemistry or the make up of the oil compositions and formulas which Cadillac

> supplies to its customers. . . . No misappropriation by Ermatinger or Cadillac of any formulas or trade secrets of Eastern has ever taken place to the best of my knowledge and belief. Ms. Ermatinger was not consulted by our chemists about any formula or trade secret of Eastern.

These assertions, if proven, could provide a meritorious defense against plaintiff's misappropriation of trade secrets, tortious interference with a business relationship, conspiracy, and unjust enrichment claims. These two affidavits together provided a meritorious defense as to all of plaintiff's claims.

Ermatinger's affidavit of merit alleged that the preliminary injunction is moot because her restriction on calling on Eastern's customers only lasted six months and the six-month period had expired. This was clearly a meritorious defense as to the injunctive claim. While this does not foreclose the claim that she actually violated the Agreement causing economic damages to Eastern, her affidavit went on to deny that she violated the Agreement. Moreover, Tilotti's affidavit spoke to Ermatinger's defense by stating that she had never provided Cadillac with the formula for Formcut 6504 or any other material and that she was specifically directed not to contact Quality Pipe or solicit their business.

We are cognizant of the fact that the trial court found that both defendants were actively and intentionally evading service and we do not disagree with that conclusion. Thus, although we are directing that the defaults be set aside, we direct that on remand, the trial court, pursuant to MCR 2.603(D)(4), assess taxable costs against defendants, including reasonable fees for all attorney fees incurred by plaintiff as a result of the default, including this appeal, and for the costs incurred by plaintiff in its attempts to serve defendants.

III. Remaining Claims

In light of our decision to reverse the default judgments against both defendants and remand the case for discovery and trial, we need not consider plaintiff's appeal regarding the amount of damages. Our reversal similarly precludes the need to decide defendants' assertion that the formula in the non-compete clause was an unenforceable liquidated damages provision. However, because this issue will come up again on remand, and the trial court already decided the issue, to promote judicial efficiency, we will consider the merits.

The provision at issue provides:

> If any disclosure or use of confidential information, or any contact, solicitation or dealing prohibited by this Agreement at any time results in, or in any way contributes to, the sale of any product or service by me, by my new employer, or by any business entity in which I have a direct or indirect interest, to any customer(s) of EASTERN that I was prohibited from contacting; then EASTERN, in its sole discretion and in addition to any other remedy provided by law or in the Agreement, may elect to sell the goodwill associated with any such customer(s) to me or to any business entity in which I have an interest. In the case of such election by EASTERN, I agree, on behalf of myself and any business entity in which I have an interest, to purchase the goodwill of any such

customer(s) and to pay EASTERN therefore an amount to be determined as follows:

a. With regard to any customer(s) that has purchased goods or services from EASTERN for a period of time in excess of two years preceding the election, the purchase price shall be equal to the total of EASTERN'S gross sales to such customer(s) during the two calendar years immediately preceding the election;

b. With regard to any customer(s) who has not purchased goods or services from EASTERN for a period in excess of two years prior to the election, the purchase price shall be determined by multiplying the average monthly gross sales to such customer(s) for all months preceding the election, by a factor of twenty-four (24) months.

The sale of goodwill shall not be deemed effective until EASTERN has received the full purchase price. I agree that the goodwill of any customer is difficult to evaluate and that the formula set forth in this paragraph is a commercially reasonable means of determining value.

Although the non-compete clause had a duration of six months, there was no duration on the duty not to disclose confidential information. The trial court held that this provision was enforceable under the law because it was "neither unconscionable nor excessive, and appears to be reasonable." It further concluded that defendants failed to prove any authority that the Agreement was one of adhesion. We agree.

Our Supreme Court has upheld provisions such as this one, reasoning:

> An employee who possesses confidential information regarding a client is in a position to exploit that information for the purpose of obtaining the patronage of the client after leaving his employer's service. In view of the risks presented by an employee's knowledge of confidential customer information, and the perceived unfairness of allowing the employee to gain a competitive advantage by using it, an employer may protect himself from the unauthorized use of such confidential information by obtaining an agreement that, in the event the employee obtains the patronage of former clients, he will be obliged to pay the employer according to an agreed formula. [*Follmer, Rudzewicz & Co, PC v Kosco*, 420 Mich 394, 406-407; 362NW2d 676 (1984).]

To be enforceable, the agreement must be reasonable. *Id.* at 408.

As noted by Eastern, remarkably similar provisions to the one contained in the Agreement have been upheld as valid. In *Follmer*, with is sister case *Nolta-Quail-Sauer & Assoc v Roche*, our Supreme Court upheld the enforcement of two non-compete clauses that required the purchase of goodwill when violated. The *Follmer* agreement provided for a period of three years and a goodwill value of the billable time spent by the employer during the immediate 12 months preceding termination. *Id.* at 398, n 1. The *Nolta-Quail-Sauer* agreement provided for a time period of five years and a penalty of three times the first year's insurance sales

commissions. *Id.* In *Rehmann, Robson & Co v McMahan*, 187 Mich App 36; 446 NW2d 325 (1991), this Court upheld a provision requiring no contact or solicitation for a period of two years after termination, with a penalty of the employer's billings for the one-year period prior to termination. *Id.* at 41-42.

In this case, the limitation of six months is remarkably small compared to the multi-year limitations contained in these other enforceable provisions, making its duration reasonable. Although there is no time limit on the disclosure of confidential information, we do not believe that this renders the provision unenforceable, as that requirement is unrelated to Ermatinger's ability to seek or perform future employment. Additionally, the use of gross sales to determine the value is similar to the other agreements' use of billings. None of these provisions speak in terms of profit, let alone net profit, such that the use of gross sales does not seem unreasonable. Although two of the upheld agreements set the value based on one-year's previous billings, the *Nolta-Quail-Sauer* provision takes one year's worth of commissions and multiplies it by three. Nothing in the *Nolta-Quail-Sauer* provision takes into account whether there was any expectation that the customer would continue to do business with the company for three years. Thus, we are unpersuaded by defendants' argument that the provision in this case is unenforceable because it essentially provides for two year's worth of sales without any evidence that the customer would stay.

Finally, in *Rehmann, supra*, this Court held that "we find no reason why designating the amount paid as 'goodwill' in one instance and as a 'penalty' in the other makes any material difference." *Id.* at 47. Thus, defendants' continued characterization of the provision as a penalty rather than the purchase of goodwill has no impact on this claim. We agree with the trial court that the non-compete clause is reasonable and, therefore, enforceable.

IV. Conclusion

In both cases, we reverse, vacate the trial court's entry of default judgments against defendants, affirm the trial court's holding that the Agreement is enforceable, and remand to the trial court to order discovery, schedule trial, and enter an order pursuant to MCR 2.603(D)(4) assessing taxable costs against defendants, including reasonable fees for all attorney fees incurred by plaintiff as a result of the default, including this appeal, and for the costs incurred by plaintiff in its attempts to serve defendant.

/s/ E. Thomas Fitzgerald
/s/ Douglas B. Shapiro

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COURT OF APPEALS

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EASTERN OIL COMPANY, Plaintiff-Appellee, v MARY ERMATINGER and CADILLAC OIL COMPANY, Defendants-Appellants.	No. 284442 Oakland Circuit Court LC No. 05-070411-CZ

Before: Fitzgerald, P.J., and Talbot and Shapiro, JJ.

TALBOT, J. (*dissenting*).

I respectfully dissent from the majority opinion reversing the entry of default judgment by the trial court in this matter.

While, as cited by the majority, "the law favors the determination of claims on their merits," *Alken-Zeigler, Inc v Waterbury Headers Corp,* 461 Mich 219, 229; 600 NW2d 638 (1999), I would also note that it is not the policy of this state to set aside defaults or default judgments that have been properly entered. *Id.* at 229; see also *Shawl v Spence Bros, Inc,* 280 Mich App 213, 221; 760 NW2d 674 (2008). In this instance, based on a thorough review of the file and pleadings, I believe that sufficient notice was provided to defendants for the valid effectuation of process.

The majority concludes that defendant, Mary Ermatinger, was "never served" because neither personal delivery nor certified mailing with a return receipt occurred pursuant to MCR

2.105(A). The majority concurrently acknowledges that Ermatinger actively avoided service of process. Contrary to the majority's position, the failure to technically comply with MCR 2.105 does not render service of process ineffective. Notably, the rules applicable to service of process "are not intended to limit or expand the jurisdiction given the Michigan courts over a defendant." MCR 2.105(J)(1). As a result, strict compliance with the rules is not mandated. MCR 2.105(J)(3); *Alycekay Co v Hasko Constr Co, Inc*, 180 Mich App 502, 505-506; 448 NW2d 43 (1989). Rather, "[t]his Court has held that service-of-process rules are intended to satisfy the due process requirement that a defendant be informed of the pendency of an action by the best means available, by methods reasonably calculated to give a defendant actual notice of the proceeding and an opportunity to be heard and to present objections or defense." *Bunner v Blow-Rite Insulation Co*, 162 Mich App 669, 673-674; 413 NW2d 474 (1987).

Because the purpose underlying the rules governing service of process is to provide actual notice of a lawsuit and an opportunity to defend, MCR 2.105(I)(1), courts shall not dismiss an action based on improper service unless the service failed to inform the defendant of the existence of a claim within the time specified within the court rules. MCR 2.105(J)(3); *Holliday v Townley*, 189 Mich App 424, 425; 473 NW2d 733 (1991). Contrary to the majority's opinion, the focus is not on the method of process used to provide the notice but rather on whether the service used actually provided timely notice of the complaint to an authorized individual.

With respect to Ermatinger, a process service submitted an affidavit indicating seven separate attempts to serve Ermatinger at her personal residence. One of these attempts involved telephone communication between the process server and Ermatinger in an effort to schedule service, but Ermatinger refused to cooperate in identifying a time to accept service of process. Ultimately, the process server left the summons and complaint "on the door in an obvious place" at defendant's home on November 21, 2005.[1] I note that the motion to set aside default and Ermatinger's attached affidavit avers "I was [sic] never had knowledge of the Summons and Complaint served upon me until after a Default was entered." However, in addition to being nonsensical, as the affidavit both denies knowledge of the existence of a summons and complaint while simultaneously appearing to acknowledge service, the affidavit is disingenuous as Ermatinger does not deny or address receipt of the ex parte motion and order for a temporary injunction nor the averment of plaintiff's attorney that he contacted Ermatinger and informed her of the filing of the complaint and ex parte motion. As this Court observed in *Barclay v Crown Bldg and Dev Inc*, 241 Mich App 639, 646; 617 NW2d 373 (2000), citing with approval 1 Dean & Longhofer, Michigan Court Rules Practice, p 118:

> In determining what constitutes "delivery," the purpose of the service should always be kept in mind. There is little reason, for example, to require a process server to trick an evasive defendant into grasping the papers served. Informing

[1] It appears that the process server also posted the ex parte motion and order to show cause for issuance of a temporary injunction, and related pleadings, at Ermatinger's residence at the same date and time. The lower court file includes a proof of service indicating the notice of default was mailed to Ermatinger, at her home address, on December 27, 2005.

> the defendant of the nature of the papers, offering them to the defendant, and leaving them within the defendant's physical control ought to suffice to constitute "delivery." [Emphasis omitted.]

Further, the validity of Ermatinger's affidavit submitted in conjunction with defendants' motion to set aside entry of default is questionable. The copy contained in the lower court file fails to indicate that the statements contained in the document are based on personal knowledge. MCR 2.119(B)(1)(c); *Regents of the Univ of Michigan v State Farm Mut Ins Co,* 250 Mich App 719, 728; 650 NW2d 129 (2002).

Based on a thorough review of the record, I believe Ermatinger's assertion that she was not served and that the trial court, therefore, lacked personal jurisdiction cannot be supported. The documentation in the record clearly establishes that Ermatinger was extremely aware of the existence of a lawsuit, particularly given the fact that she actively sought to avoid service. Contrary to defendant's assertion, a trial court's refusal to set aside a default judgment should not be reversed based on a failure to strictly comply with the court rules governing service of process if the party in default was timely informed of the existence of the action. *Alycekay, supra* at 506.

Further, I must take strenuous issue with the majority's contention that the default entered against Cadillac Oil should be set aside based on *this* Court's determination that the process server was not credible. It is a well-known precept that it is not the role of this Court to make credibility determinations and that we will not second-guess a trial court's credibility determinations. *Stallworth v Stallworth*, 275 Mich App 282, 286; 738 NW2d 264 (2007). This is particularly true, given the very explicit determination of the trial court on the issue of credibility of Cadillac Oil's resident agent following a hearing:

> Honestly, there's been so much duplicity and chicanery with respect to service in this that I find that Mr. Pequie [sic] through his demeanor, attitude, and tone is not credible.

In addition, a review of relevant transcripts contained in the lower court file demonstrates that Cadillac Oil was also actively avoiding service. Plaintiff's attorney represented, as an officer of the court, that he had attempted to serve Cadillac Oil with pleadings through his runner, who was denied entry to the business. Initially, the process server was also denied access to the building and did not make successful contact with Cadillac Oil's resident agent at his home. Notably, plaintiff's attorney faxed a copy of the temporary restraining order to the business and indicated he received proof that the document was successfully transmitted. Reportedly, the process server did gain access to Cadillac Oil's place of business and believed he served the resident agent, who reportedly threw the papers down and denied service had been effectuated. In addition, on November 29, 2005, a different process server went to Cadillac Oil to serve a copy of the preliminary injunction. A copy of the document was left at the business despite the unwillingness of the receptionist, or any other employee present, to physically accept the documents. While I acknowledge the factual discrepancies or contradictions cited by the majority regarding service specifically on the identified resident agent, it remains within the purview of the trial court to make a credibility determination. As with Ermatinger, and given the active avoidance of service by Cadillac Oil, I believe sufficient documentary evidence exists that the pleadings were delivered and available to defendant in accordance with the intent of the rules governing service of process and placing them on notice of the action. Further, the affidavit of

Cadillac Oil's resident agent, Roger Piceu, submitted in conjunction with defendants' motion to set aside default, suffers from the same deficiencies noted with regard to Ermatinger's affidavit, restricting its validity and its legitimate consideration.

Defendants and the majority appear to confuse the basis for setting aside the defaults from defendants' arguments pertaining to the damages to be awarded. It is clear that Cadillac Oil and Ermatinger sought to set aside the defaults by challenging jurisdiction based on lack of service. Their sole reliance on this position is substantiated by even a cursory review of defendants' motion, which addressed only the purported inadequacy of service. This is further demonstrated by Piceu's affidavit submitted in conjunction with the motion to set aside the default, which states in relevant part:

> My underlying defenses to this cause of action is that I was never served, that I am free and entitled to contract and do business with any 3rd Party which I choose.

Even on reconsideration, defendants alleged only the inadequacy of service of process for setting aside the defaults. Consequently, the trial court correctly resolved defendants' arguments based on the content of their pleadings and denied the request to set aside the default on the basis of service, finding the service of process adequate to meet the intent of the court rules for the provision of notice and an opportunity to defend.

Unfortunately, both defendants and the majority muddy the waters by then attempting to suggest alternative bases involving "good cause" and the existence of "meritorious defenses" to set aside the defaults. However, "good cause" need not be demonstrated, pursuant to MCR 2.603(D)(1), which states:

> A motion to set aside a default or a default judgment, *except* when grounded on lack of jurisdiction over the defendant, shall be granted only if good cause is shown and an affidavit of facts showing a meritorious defense is filed. [Emphasis added.]

As such, I believe the majority, following the arguments put forth by defendants, is confusing the requirements and the bases under the various court rules for setting aside the defaults. Arguments pertaining to good cause and meritorious defenses were asserted, not for the setting aside of the defaults, but rather in conjunction with the ascertainment of damages by the trial court. Hence the analysis undertaken by the majority, by evaluating good cause and meritorious defenses, is misplaced with regard to the propriety of the trial court's denial to set aside the defaults.

Although I believe that the trial court's determination to deny defendants' motion to set aside the defaults was correct and precludes the necessity of further review of the other issues set forth, I feel compelled to address the trial court's award based on the majority's decision to remand and the other issues raised in this appeal. Clearly, plaintiff's pleadings do not contain a claim for breach of contract with regard to Cadillac Oil. The complaint only alleges the

existence of a conspiracy between defendants with regard to its claims of misappropriation of trade secrets and tortious interference with a business relationship.[2] As such, Cadillac Oil's contention that it cannot be held liable for a breach of contract is moot because the default does not encompass this claim with regard to this defendant and the final judgment entered by the trial court does not assign to Cadillac Oil damages pursuant to this claim. It is obvious that the award of damages by the trial court is very restricted. The damages in the default judgment awarded plaintiff against Ermatinger are based on the provisions in the non-competition agreement. The trial court assigned none of these damages to Cadillac Oil and, contrary to plaintiff's assertion of joint and several liability, there is no basis for such an assignment. With reference to the damages awarded to plaintiff against Cadillac Oil, they are minimal and represent only lost profits calculated for the finite period of time Ermatinger was employed by that defendant. Further, the trial court denied any continuing injunctive relief to plaintiff based on the natural expiration of the non-competition agreement. As such, I believe the trial court's resolution of this matter to be consistent with the proofs and pleadings put forth by the parties and equitable. Hence, I would affirm the trial court's award and judgment, because I believe remand is both in error and will result in the unnecessary and wasteful expenditure of judicial resources.

/s/ Michael J. Talbot

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[2] I believe the allegation of conspiracy is not supportable because a cause of action does not exist for civil conspiracy between a corporation and its agents acting in the scope of their employment. *Blair v Checker Cab Co*, 219 Mich App 667, 674; 558 NW2d 439 (1996). However, the claim is rendered irrelevant based on the trial court's ultimate decision and award of damages and the legal recognition that a "conspiracy standing alone without the commission of acts causing damage would not be actionable. The cause of action does not result from the conspiracy but from the acts done." *Terlecki v Stewart*, 278 Mich App 644, 653; 754 NW2d 899 (2008). As such, the default on the conspiracy claim is immaterial, as damages were neither awarded nor attributable to that claim.