STATE OF MICHIGAN

COURT OF APPEALS

SHERI L. FRAMALINO, Plaintiff-Appellee,	UNPUBLISHED October 16, 2012
v	No. 306468 Oceana Circuit Court
JAMES JENSEN, Defendant-Appellant.	LC No. 07-6234-NO

Before: FITZGERALD, P.J., and METER and BOONSTRA, JJ.

PER CURIAM.

Defendant appeals by delayed leave granted[1] from the trial court's entry of a default against defendant and subsequent entry of judgment in favor of plaintiff in the amount of $45,817.17. Because we find that the trial court abused its discretion by entering a default against defendant under the circumstances presented, and denied defendant his constitutional right to a jury trial on damages, we reverse and remand for further proceedings.

I. BASIC FACTS AND PROCEDURE

This personal injury action arises from an incident at The Village Pub in Pentwater, Michigan on August 13, 2005. Plaintiff was standing at the bar talking with friends. Plaintiff alleged that defendant was escorting an intoxicated man through the restaurant toward the door when both men fell onto plaintiff. Plaintiff was knocked to the ground and sustained a sprained ankle.

Plaintiff filed this action on March 22, 2007, naming defendant, The Village Pub, and the unidentified drunk patron as defendants. Defendant initially was represented by counsel, because the restaurant's insurer tendered a defense to both The Village Pub and defendant. Defense counsel filed an answer and jury demand on April 27, 2007, and on May 10, 2007, filed an amended answer, reliance upon jury demand, and affirmative defenses. Defendant was represented at a pre-trial conference in September of 2007 and appeared for a deposition in

[1] *Framalino v Jensen*, unpublished order of the Court of Appeals, entered April 23, 2012 (Docket No. 306468).

October of 2007. In December of 2007, the insurer determined that it had no duty to provide a defense for defendant, and defendant's counsel withdrew from representing defendant. Defendant apparently did not hire substitute counsel. Defendant did not appear for a status conference on April 28, 2008. The record indicates that trial court mailed to all parties a notice requiring them to appear for the status conference. According to defendant, the notice was sent to his address in Hart, Michigan, but at the relevant times in early 2008 defendant "resided in Colorado attending to his duties as a ski coach." Defendant later told the court that he might not have been in the country at that time, because he coaches ski racing and "spend[s] a lot of time overseas."

Plaintiff's counsel wrote a letter to the court following the April 28 status conference, requesting entry of an "Order of Default" against defendant.[2]

The letter stated in full:

> Enclosed please find an original and several copies of an Order of Default Against Defendant James Jenson [sic throughout] Only, for entry by the Court. I have also enclosed transcripts of several depositions to establish that in spite of the untruthful testimony of both James Jenson and Jeff Hodges, it is patently obvious (according to Andrea Blohm) that James Jenson WAS an agent of the pub and that in that capacity he participated in ejecting a drunken patron. It was during the performance of that duty that both he and the drunken patron fell on my client and caused her leg to be seriously injured.
>
> I have highlighted the portions of testimony which support this contention.
>
> The enclosed Order specifically addresses the agency relationship. Although Plaintiff's claim against the Village Pub has been settled for the premises liability claim, and the claim for the Dram Shop issue has been dismissed by this Court, it is Plaintiff's position that The Village Pub would still be liable for the actions of James Jenson during the scope of his agency relationship.
>
> I have also provided a self addressed stamped envelope for the Court's convenience.

The letter enclosed a proposed Order of Default and excerpts from deposition transcripts. Nothing in the record indicates that a motion accompanied this letter or that the letter was served on defendant. On May 13, 2008, the trial court entered the Order of Default against defendant. While the letter to the circuit court enclosing the proposed order addressed the merits of plaintiff's claim and the deposition testimony, the order itself was captioned, "Order of Default

[2] In early 2008, the trial court granted partial summary disposition to The Village Pub; subsequently, the parties stipulated to the dismissal of all claims against The Village Pub with prejudice and the trial court entered an order, based on the stipulation, dismissing it from the case on June 9, 2008.

Against Defendant James Jenson [sic], Only, for Non-Participation in Case Evaluation." The order reads in full as follows:

> The Court having been apprised that Defendant, James Jenson [sic] had failed to submit a Case Evaluation (ADR) Summary, and had failed to appear and participate in the ADR process which had been ordered by this Court, and the Court being advised that the Plaintiff and the Defendant, Village Resort (on the premises liability claim, alone) had submitted summaries and had appeared at the ADR hearing, and the Plaintiff and Defendant, Village Resort having accepted the Case Evaluation award and having resolved the claim between them on the claim for premises liability, alone, and the record having clearly demonstrated that at the time of the incident which gave rise to this suit that James Jenson [sic] was a "volunteer" security guard for the Village Pub and was acting within the course and scope of his agency relationship, and the Court being otherwise fully advised in the premises;
>
> IT IS HEREBY ORDERED AND ADJUDGED that a Default shall be entered against Defendant James Jenon [sic] and in favor of the Plaintiff.

The record indicates that defendant was served a copy of this order by mail to his Hart address on May 27, 2008. Also on that date, plaintiff submitted a proposed Order of Judgment against defendant James Jenson [sic] pursuant to the MCR 2.602 (B)(3), and served that proposed order on defendant at his Hart address.

On June 13, 2008, the trial court entered that Order of Judgment against defendant. As entered, the Order of Judgment reflected an uncompleted judgment amount, and read in full as follows:

> The court having been apprised that Plaintiff was struck from behind by Defendant James Jenson [sic throughout] and John Doe, the drunken patron who he was escorting out of The Village Pub, and her being knocked to the floor, was caused to suffer a severe and aggravating sprain to her right ankle and foot. The injury has caused her a great deal of pain which has impacted on her ability to perform her job as a hair stylist in a high-classed women's salon in Grosse Pointe, Michigan. The Defendant, James Jenson was defaulted for failing to comply with the Court's ordered ADR proceeding, and an Order was entered on May 13, 2008.
>
> IT IS HEREBY ORDERED AND ADJUDGED that a Judgment shall be entered against Defendant James Jenson and in favor of the Plaintiff in the amount of $_____, together with costs as follows:

Publication in Oceana County paper	$1,072.17
Publication in Aspen, Colorado paper	800.00
Filing Fee	150.00
Motion for alternate service	20.00
Case Evaluation	75.00
Total Costs	$2,117.17

> IT IF FURTHER ORDERED AND ADJUDGED that Plaintiff shall be entitled to interest on the Judgment at the statutory rate from the date of filing of the complaint until the judgment is satisfied in full.

Subsequently, on June 24, 2008, the trial court entered a second version of this Order of Judgment that (a) modified the language so as to add "and John Doe" in certain locations (and thereby to effect the entry of judgment also against "John Doe"); (b) inserted the damages amount of $35,000, which when combined with the previously ordered amount of costs rendered a "total judgment in the amount of $37,117.17"; and (c) added language to make the judgment a final order that closed the case. There is no indication in the record that this version of the Order of Judgment was ever served on defendant prior to its entry by the trial court, either under MCR 2.602(B)(3) or otherwise.

After plaintiff instituted garnishment proceedings, defendant retained counsel and moved to set aside the default and Default Judgment.[3] On July 18, 2011, the parties entered into a stipulated order to set aside the Default Judgment. A hearing was set for August 15, 2011 on defendant's motion to set aside the default and other matters.

At the hearing, the trial court denied defendant's motion to set aside the default, and overruled defendant's hearsay objection to certain deposition testimony. Defendant then asserted his right to a jury trial on the issue of damages:

> *Mr. Fox [Defendant's counsel]:* Thank you. If we are going to have a hearing on the damages pursuant to MCR 2.603, I would ask that the Court follow MCR 2.603(B)(2) – I'm sorry (B)(3)(b) which states that, "If, in order for the court to enter a default judgment or to carry it into effect, it is necessary to . . . determine the amount of damages . . . the court may conduct hearings or . . . order references it deems necessary and proper, and . . . ," then this is what I'm asking the Court to consider, ". . . and shall accord a right of trial by jury to the parties to the extent required by the constitution."
>
> As I mentioned earlier, Mr. Jensen, when he was represented, asked for a jury trial on all triable issues; that would include the issue of the amount of damages. A jury is entitled to establish those damages after hearing the parties who are at fault, the amount of the injuries and what other evidence might be relevant to the question of damages.

In response, plaintiff's counsel argued that it was too late for defendant to invoke his right to a jury trial, apparently believing, mistakenly, that no jury demand was ever made. The docket entries and the court file proved otherwise, and the trial court accepted that a jury had been requested by defendant. The court had the following exchange with defense counsel:

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[3] While the basis for the trial court's entry of the June 13, 2008 and June 24, 2008 versions of the Order of Judgment is unclear, the parties and the trial court subsequently referenced that order as a "Default Judgment."

The Court: I'm looking. Somebody paid for – somebody paid for a jury.

Mr. Fox: Your Honor, both Defendants requested a jury. The Village Pub or Village Resorts, Inc. which was the restaurant requested a jury through their attorney and Mr. Aardema [former counsel for defendant], when he filed his answer, relied upon the jury requested by the Village Resorts Defendant.

The Court: All right.

Mr. Fox: And in the reliance on that it stated that, if for some reason that request is deemed defective, he asserts the right to claim jury [sic] himself. Mr. Aardema or Oostema's withdrawal from the case does not constitute a waiver of the right to a jury trial that was claimed at the outset of this case; and the Court does not have discretion when it comes to matters that are required by the constitution. The Court rule is very clear that says, ". . . shall accord a right of trial by jury to the parties to the extent required by the constitution." This is a trier of fact that is the jury in this case; and I believe the Court is required to impanel a jury to hear this question.

The trial court denied defendant's request for a jury trial on damages, concluding that defendant's jury demand was "terminated" by the entry of the default:

The Court: I will accept your statement that your client was covered by the original demand for a jury trial; but that right ceased and was terminated at the time the default was entered; and given that circumstance it's within the Court's discretion and having found that there's no meritorious defense as a basis for refusing to set aside the default and finding no excusable neglect the Court would deny that and proceed to hear this case without a jury.

Mr. Fox: Do you want me to respond or is that –

The Court: That's the order of the Court.

Mr. Fox: All right.

Mr. Steinberg [plaintiff's counsel]: Thank you, Your Honor.

After hearing testimony from plaintiff and defendant, the trial court awarded plaintiff $45,817.17 in damages and costs. We granted defendant delayed leave to appeal.

II. ENTRY OF DEFAULT

Defendant first argues that the trial court erred in entering a default against defendant for failure to participate in case evaluation, and in refusing to set aside the default. We agree.

A default is generally entered against a party who has not appeared in an action or who has failed to plead or defend as required by the court rules. MCR 2.603(A). In a circuit court, a party may request that the clerk enter a default against such a party; after entry of the default, the

requesting party then sends notice to all other parties and the defaulting party. MCR 2.603(A)(1)(2). Here, it is not clear whether plaintiff's letter to the trial court was a request that the clerk enter such a default, or a request that the trial court do so, as the letter was addressed to the trial court clerk, but contained substantive legal arguments about the merits of plaintiff's claim in addition to the request for entry of a default.

The trial court apparently entered the default, at least in part, as a sanction for defendant's failure to participate in case evaluation. A trial court has the power to order a party to participate in discovery or risk the entry of a default. See *Wood v Detroit Automobile Inter-Ins Exch*, 413 Mich 573, 578; 321 NW2d 653 (1982). In *Wood*, the trial court ordered defendant to respond to interrogatories or risk an automatic default. *Id.* at 577. Our Supreme Court found that the entry of a default was a "reasonable action" in light of the defendant's refusal to comply with court orders. *Id.* at 580. Thus, the trial court in the instant case had the power to enter a default as a sanction against defendant, if defendant's behavior warranted such a response. See *Traxler v Ford Motor Co*, 227 Mich App 276, 286; 576 NW2d 398 (1998). However, as stated below, we conclude that such a response was not proportionate to defendant's actions.

A trial court's imposition of sanctions is reviewed for an abuse of discretion based on the facts and circumstances of the case. *Linsell v Applied Handling, Inc*, 266 Mich App 1, 21; 697 NW2d 913 (2005). We also review a trial court decision to set aside a default or default judgment for abuse of discretion. *Amco Builders & Developers, Inc v Team Ace Joint Venture*, 469 Mich 90, 94; 666 NW2d 623 (2003). An abuse of discretion occurs when the trial court's decision is outside the range of reasonable and principled outcomes. *Saffian v Simmons*, 477 Mich 8, 12; 727 NW2d 132 (2007).

Here, the order of default indicates that defendant "failed to submit a Case Evaluation (ADR) Summary, and had failed to appear and participate in the ADR process which had been ordered by this Court . . . ." The lower court record contains a pre-trial order that indicates that case evaluation would be scheduled during March of 2008. Additionally, the date "April 28, 2008" written in the blank provided for a settlement conference date; however, neither the "Yes" nor the "No" box is checked next to this item. The docket sheet contains the entry "ALTERNATIVE DISPUTE RESOLUTION ORDERED" for the date of the pretrial order. A notice to appear was sent to all parties to appear for a *status* conference on April 28, 2008. It is thus unclear from the record whether this was to be a settlement conference. No orders appear in the lower court record ordering defendant to submit a case evaluation summary or otherwise appear and participate in the ADR process.

As for defendant's failure to submit a case evaluation summary, we note that the record before this Court does not establish that a case evaluation summary was submitted by *any* party, although plaintiff contends that she submitted such a summary on February 6, 2008 and provided a copy to defendant (and the May 13, 2008 order states that the trial court had been "advised" that "the Plaintiff and the Defendant, Village Resort (on the premises liability clam, alone) had submitted summaries"). More importantly, penalties for failure to submit a case evaluation summary are specifically set forth in the court rule. MCR 2.403(I). A party that fails to timely file and serve a case evaluation summary and supporting documents is subject to a $150 dollar penalty to be paid at the time of the case evaluation hearing; that party additionally risks having the case evaluators render an award based on a one-sided presentation. MCR 2.403(I)(1). Trial

courts are not authorized to expand upon the sanctions available under this rule. See *Steward v Poole*, 196 Mich App 25, 29; 492 NW2d 475 (1992), rev'd on other grounds 443 Mich 863 (1993).

As for defendant's "failure to appear and participate in the ADR process which had been ordered" by the trial court,[4] we note that defendant failed to appear for the status or settlement conference on April 28, 2008, despite having been served with a notice to appear on January 9, 2008. MCR 2.410(A)(2) indicates that alternative dispute resolution includes "settlement conferences ordered under MCR 2.401" and "case evaluation under MCR 2.403." MCR 2.401 governs pretrial procedures and the scheduling of conferences. MCR 2.401(F) provides that the court may order the parties to appear at a conference for the purpose of discussing a settlement. MCR 2.401(G) also allows the trial court to enter a default when a party fails to appear for a conference at which the party was directed to appear. Thus, if the conference scheduled for April 28 was a "settlement conference" at which the trial court directed defendant to appear, the trial court possessed the authority to enter a default as a result of this failure.

It is somewhat ambiguous from the record before us as to whether the April 28, 2008 hearing was a "settlement conference." The hearing is referred to as a "miscellaneous hearing" and a "status conference" on the docket sheet and notice to appear. The pre-trial order contains an ambiguity as neither the "Yes" nor the "No" box is checked for a settlement conference on April 28, 2008. The only written order requiring defendant to attend the conference is the notice to appear itself. However, assuming that the April 28 conference was a settlement conference at which defendant was ordered to appear, we still conclude that the trial court abused its discretion by entering a default against defendant for his failure to appear.

"Default [as a sanction] is a drastic measure and should be used with caution." *Traxler*, 227 Mich App at 286. "Our legal system favors disposition of litigation on the merits." *Id.* This Court has articulated the factors that a trial court should consider before ordering a default judgment:

> Before imposing the sanction of a default judgment, a trial court should consider whether the failure to respond to discovery requests extends over a substantial period of time, whether an existing discovery order was violated, the amount of time that has elapsed between the violation and the motion for a default judgment, the prejudice to [the party requesting default], and whether wilfulness has been shown. The court should evaluate other options before concluding that a drastic sanction is warranted. [*Id.*, quoting *Thorne v Bell*, 206 Mich App 625, 632-633; 522 NW2d 711 (1994) (citations omitted).]

[4] It is unclear from the parties' briefs and the lower court record whether a hearing actually took place before the case evaluators. However, the record does not contain a written order requiring defendant's appearance at a case evaluation hearing. Even if the trial court had entered such an order, it would have exceeded its authority to do so, because such an order would be contrary to MCR 2.403(J)(1), which provides that a party has the right, but is not required, to attend a case evaluation hearing.

We find this language equally applicable to the entry of an order of default, since a default is conclusive on the issue of liability. *Wood,* 413 Mich at 578. Thus, a trial court should only employ the sanctions of default and default judgment when "there has been a flagrant and wanton refusal" to comply with orders of the court. *Traxler*, 227 Mich App at 286, quoting *Mink v Masters*, 204 Mich App 242, 244; 514 NW2d 235 (1994).

In *Traxler*, this Court found that the trial court had the power to order a default as a discovery sanction against the defendant when it found that defendant had "concealed very significant documents and information" and had "blatantly lied" in its answers to interrogatories. *Id.* at 279. Nonetheless, this Court remanded the case for the trial court to consider whether the conduct amounted to a "flagrant and wanton refusal to facilitate discovery" such that a default was warranted, and directed the court to consider whether a default was an appropriate sanction in light of the available alternatives. *Id.* at 288. In *Wood,* our Supreme Court upheld the trial court's entry of a default as a sanction against a defendant who had failed to comply with two court orders compelling discovery, the second of which explicitly threatened default as a consequence of refusal. 413 Mich at 577.

In the present case, we do not have a transcription of the record regarding the failure to appear at the scheduled conference. In denying defendant's motion to set aside the default, the trial court noted that defendant "didn't appear in opposition to the Motion to Withdraw back on 1/7 of '08. Well, also apparently he was certainly notified according to - - he failed to respond to even his lawyers relative to this matter of withdrawal." The trial court added that defendant "obviously knew of this case and the on-going and the fact that he neglected to do anything in his own defense." It is true that defendant did not file an opposition to the withdrawal of his attorney after the insurance carrier determined it was not required to pay for his defense. However, a party's failure to oppose a motion is different than a refusal to comply with orders of the court. It is also not clear how defendant "failed to respond to even his lawyers" regarding this withdrawal, but again, a party's failure to communicate with his own counsel (who is in the process of withdrawing) is qualitatively different than a party's refusal to follow orders of the court.

From the record before us, it appears that a default was entered against defendant following one failure to appear as directed. There is no indication on this record that the trial court explored other options less extreme than entry of a default. The notice to appear for the April 28 conference was mailed only two days after defendant's counsel withdrew from his representation, and, although it states that all parties must appear, it does not indicate that a party risks a default by not appearing. As stated above, defendant's failure to participate in case evaluation was not a legitimate basis for the trial court's sanction. The record does not permit us to determine if defendant's absence was willful or accidental. Defendant did not have a history of refusing to comply with orders of the court. Further, there is no evidence that any other party was prejudiced by defendant's absence. We conclude under these circumstances that, if defendant's conduct required a sanction, a lesser sanction would have better served the interests of justice. *Vicencio*, 211 Mich App at 507. We therefore set aside the trial court's order of default.

We also note that plaintiff's letter to the court was not presented as either a request for a clerk's entry of default under MCR 2.603(A)(1)(2), or as a motion for default or default

judgment, and was not served upon defendant, although it appears that it requests the entry of a default as a sanction against defendant for failure to participate in ADR, and additionally makes substantive legal arguments. The fact of this sort of *ex parte* communication is puzzling and troubling,[5] to say the least, as the letter sought dispositive relief, made legal arguments, and even included highlighted deposition testimony in support of its position (on which the trial court appears to have relied, in part, in entering its default order), yet did not comply with any of the court rules regarding motion practice in a civil case, see MCR 2.119, including that of service of motions on opposing parties. MCR 2.119(C); see also MCR 2.107(A)(1). These procedural defects, and others, provide us with additional grounds for setting aside the default.

III. DEFENDANT'S REQUEST FOR A JURY TRIAL

Because we set aside the trial court's order of default, the judgment entered by the trial court on September 12, 2011 also is vacated. Were we to conclude that the default was properly entered, we nonetheless would vacate the judgment, because the trial court erred in denying defendant's request for a jury trial on damages. This Court reviews de novo whether defendant had a right to a jury trial on the issue of damages. *In re MCI Telecom Corp Complaint*, 240 Mich App 292, 311; 612 NW2d 826 (2000).

This Court stated in *Mink*, 204 Mich App at 246, that "once one party has filed a jury demand, all other parties may rely on that jury demand and need not independently file their own demand for a jury trial." Although the right to a jury trial may be waived, a demand for a jury trial may not be withdrawn unless both parties consent "in writing or on the record." See *In re Nestorovski Estate*, 283 Mich App 177, 193; 769 NW2d 720 (2009); MCR 2.508(D)(3). MCR 2.509(A) provides that if a jury has been properly demanded, "trial of all issues so demanded must be by jury," unless "the parties agree otherwise by stipulation in writing or on the record," or the court determines that there is no right to a jury trial on an issue.

The entry of a default settles the issue of liability, but not damages. *Wood*, 413 Mich at 578 ("It is an established principle of Michigan law that a default settles the question of liability as to well-pleaded allegations and precludes the defaulting party from litigating the issue."). It is well settled that entry of a default or default judgment does not waive the defaulting party's right to a jury trial on damages. *Zaiter v Riverfront Complex, Ltd*, 463 Mich 544, 554; 620 NW2d 646 (2001); see also *Mink*, 204 Mich App at 246 (concluding that a default judgment on the issue of liability does not waive a jury trial on damages in a civil case). MCR 2.603(B)(3)(b) provides that if necessary to enter a default judgment, a court "may" conduct hearings as it deems necessary and "shall accord a right of trial by jury to the parties to the extent required by the

[5] To add to the puzzle, plaintiff's *letter* makes no reference to defendant's failure to participate in ADR, but only discusses the merits of plaintiff's claim and the alleged agency relationship. However, plaintiff's proposed *order* that the trial court signed indicates that the trial court was "apprised that Defendant, James Jenson had failed to submit a Case Evaluation (ADR) Summary, and had failed to appear and participate in the ADR process which had been ordered by this Court." It is thus unclear exactly when, or how, the trial court became "apprised" of defendant's conduct, other than by plaintiff's *ex parte* letter and the enclosed proposed order.

constitution." The use of the term "shall" denotes mandatory, not discretionary action. See *Gulley-Reaves v Baciewicz*, 260 Mich App 478, 485; 679 NW2d 98 (2004). In *Wood*, our Supreme Court held that if a trial court decides to hold a hearing to determine the appropriate amount of damages against a defaulting party, that party, if it properly invoked its right to a jury trial, is entitled to a jury trial on damages. *Wood*, 413 Mich at 583-584 ("We hold [ ] that a defaulting party who has properly invoked his right to jury trial retains that right *if* a hearing is held to determine the amount of recovery." *Wood*, 413 Mich at 583-584 (emphasis in original).

Here, the trial court found that defendant's right to a jury trial on the issue of damages, although preserved by the original jury demand, "ceased and was terminated at the time the default was entered." We conclude that this determination was in error. In *Zaiter*, 463 Mich at 554, an employment discrimination case, the defendants stated in their answer their reliance on the plaintiff's jury demand. Ultimately, the defendants were defaulted for failing to provide discovery. *Id.* at 548. When they failed to appear for a hearing on entry of a default judgment, the trial court entered judgment against defendants for $50,000.00. *Id*. The defendants unsuccessfully moved to set aside the default judgment. *Id*. at 550. Despite the defendants' failure to appear for the default judgment hearing and assert their right to a jury trial on damages, our Supreme Court unanimously held that the defendants did not waive their right to a jury trial; once the trial court decided to hold a hearing on damages, the defendants were entitled to have a jury determine damages. *Id*. at 556. Notably, the defendants' delay in raising the issue did not alter the Court's analysis in light of the constitutional importance of the right to trial by jury:

> As the Court of Appeals noted, [the defendant] did not raise this issue in its motion to set aside the default judgment. Rather, this question was first raised in [the defendant's] motion for reconsideration of the court's order denying the motion to set aside the default judgment. While that presentation may appear to be tardy, the constitutional nature of the right to trial by jury – a right never waived by [the defendant] – compels us to grant partial relief in the circumstances of this case. The principles elaborated in *Wood* are the basis of this result. [*Zaiter*, 463 Mich at 556.]

Here, defendant properly invoked his right to a jury trial, and did not waive that right. Although the entry of the default settled the issue of his liability (until set aside by this Court), defendant was entitled to a jury trial on the issue of damages. This error alone would require the vacation of the judgment against defendant.

IV. CONCLUSION

Although defendant's conduct in this litigation following the withdrawal of his attorney was less than ideal, his non-attendance at one scheduled conference did not merit the entry of a default against him, particularly under the circumstances in which it was requested. Further, the default that was entered was procedurally defective. The trial court therefore abused its discretion in entering the default and in denying defendant's request to set the default aside. Finally, even if we upheld the default against defendant, we would vacate the judgment entered against defendant on the ground that the trial court improperly denied defendant his right to a jury trial on damages.

We reverse the trial court's denial of defendant's motion to set aside the default, vacate the default and the judgment entered against defendant, and remand for further proceedings consistent with this opinion. We do not retain jurisdiction.

/s/ E. Thomas Fitzgerald
/s/ Patrick M. Meter
/s/ Mark T. Boonstra