DEFAULTS - HOW TO USE THEM TO YOUR ADVANTAGE

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I. DEFAULT AND DEFAULT JUDGMENT PROCEDURES

1. As soon as you are entitled to a default for failure to appear or defend, prepare an Affidavit in Support of Entry of Default, and a Default and Entry of Default. MCR 2.603(A)(1)

2. Send #1 to the court clerk and ask that the Entry be signed by the clerk, entered in the file and returned to your office. MCR 2.603(A)(1).

3. Once the Default has been entered, the defaulted party may not proceed until the default has been set aside. MCR 2.603(A)(3).

4. Before sending out notice of the entry of default, consider waiving a jury demand previously filed. MCR 2.508. (See, *infra*, Section III) Notice of entry of default must be served on defendant. MCR 2.603(A)(2).

5. Prepare and file a Motion for Default Judgment. Prepare and file an Affidavit in Support of Motion for Default Judgment, including a non-military affidavit under MCR 2.603(C).

6. If the defaulted party is a minor or an incompetent, a default judgment cannot be entered unless the person is represented by a conservator, a GAL or other representative. MCR 2.603(3)(a).

7. Obtain a hearing date and prepare a Notice of Hearing. If the claim is for a sum certain, and the defaulted party did not appear and isn't an infant or incompetent, no hearing is required. See, MCR 2.603(B)(2).

8. Serve the Default, together with the Motion for Entry of Default, the Affidavit in Support of Default and Notice of Hearing on all parties who have appeared, as well as to the defaulted party.[1] If the defaulted party has not appeared, the notice may either be served by personal service, by ordinary first-class mail at his or her last known address or the place of service of process, or as otherwise directed by the Court. MCR 2.603(A)(2). If the defaulted party has appeared, notice must be given under MCR 2.107.

9. File the Notice of Hearing and a Proof of Service of the items in #8. This must be completed more that 7 days before hearing. MCR 2.603(B)(1)(b).

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[1] A party seeking a default judgment must give notice of the request for the judgment to the defaulted party:

1. If the party has entered an appearance;
2. If the request for entry of a judgment seeks relief different in kind or amount than stated in the original pleadings; or
3. If the pleadings do not state a specific dollar amount.

10. In cases where a sum certain has not been demanded, the Court may conduct hearings to take into account and determine the amount of damages. MCR 2.603(B)(3)(b). The court shall "accord a right of trial by jury to the parties to the extent required by the constitution."

11. The court rule requires the court clerk to promptly mail notice of the entry of a default judgment. Practically speaking, the task is completed by the attorney mailing it to the defendant's last known address or the place of service and file a proof of mailing. MCR 2.603(B)(4).

II. MOTION TO SET ASIDE DEFAULT OR DEFAULT JUDGMENT

A. General Rule: Generally, a motion to set aside a default or a default judgment, except when granted on lack of jurisdiction, shall be granted only if 1) good cause is shown and 2) an affidavit of facts showing a meritorious defense is filed. MCR 2.603.[2] See MCR 2.603(D)(2) for time limitations.

- The policy of this state is generally against setting aside defaults and default judgments which have been properly entered. *Alken-Ziegler v. Waterbury Headers Corporation*, 461 Mich 219 (1999); *Barclay v. Crown Bldg. & Dev.*, 241 Mich App 639 (2000).

- The good cause and meritorious defense requirements of MCR 2.603(D)(1) must both be shown in order to prevail on a motion to set aside a default or default judgment. *Id.*

- Good cause is established by 1) a procedural irregularity or defect; or 2) a reasonable excuse for not complying with the requirements that created the default. *Id.*

- Manifest injustice is not a third form of good cause that excuses failure to comply with the court rules where there is a meritorious defense. Rather, it is the result that would occur if a default were allowed to stand where a party has satisfied the good cause and meritorious defense requirements. *Id.*

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[2] A court may also set aside in accordance with MCR 2.612. MCR 2.603(D)(3).

- While a lesser showing of good cause will suffice where the meritorious defense would be absolute if proven, good cause must still be shown in order to prevent manifest injustice. *Alken-Ziegler, supra; Barclay, supra*. See also, *Ferenz v. Muskegon County Road Commission*, COA No. 230945 (11/1/02); *Hilock v. Gear*, COA No. 233424 (8/20/02); *Francis v. Farm Bureau*, COA No. 237406 (5/29/03).

- Attached are two briefs in opposition to motions to set aside defaults.

- While MCR 2.603(D)(3) notes that a court may also set aside a default and a judgment by default in accordance with MCR 2.612, the "any other reason justifying relief" grounds of that court rule should not be read so as to obliterate the Court's analysis of the "good cause" and "meritorious defense" elements. *Alken-Ziegler, supra; Barclay, supra*.

B. Good Cause Cases

1. Neglect of defendant, insurer or attorney is not generally good cause

- A defendant's neglect in failing to respond to pleadings does not rise to the level of mistake or excusable neglect to establish good cause to set aside a default judgment. *VanPembrook v. Zero Manufacturing Company*, 146 Mich App 97 (1985). In *Van Pembrook,* although defendant was involved in two other cases with the plaintiffs (in different courts) it was not excusable neglect to fail to respond to pleadings filed in a new case.

- The neglect of the Secretary of State, which inadvertently misfiled a complaint properly served on its office and failed to respond, did not constitute reasonable excuse or good cause to set aside default. *Poling v. Secretary of State*, 142 Mich App 54 (1985).

- Neglect of defendant's attorney in failing to respond to a complaint is not good cause to set aside a default. *White v. Sadler*, 350 Mich 511 (1957); *Kuikstra v. Cheers Good Times Saloons, Inc.*, 187 Mich App 699 (1991); *Park v. American Casualty Insurance Company*, 219 Mich App 62 (1996); *Vollmer v. Fonstad*, COA No. 248439 (11/13/03); *Badalow v. Evenson*, 62 Mich App 750 (1975); *First Bank of Cadillac v. Benson*, 81 Mich App 550 (1978); *Okros v. Myslakowski,* 67 Mich App 397 (1976); *Yenglin v Mazur*, 121 Mich App 218 (1982).

- Scheduling error that results in defendant's failure to appear for hearing, resulting in default, is not good cause. *Deveroux v. Combs*, COA No. 233671 (10/29/02).

- Dram shop. Plaintiff obtained default judgment against AIP. Defendant then dismissed for failure to name and retain, and Plaintiff tried to set aside the default judgment. Attorney negligence is "normally not grounds to set aside a default." *Scargall v. Whitmore*, COA No. 231718 (8/6/02).

- Neglect of an insurance carrier in handling lawsuit papers is not good cause to set aside a default. *Asmus v. Barrett*, 30 Mich App 570 (1971).

- A party is responsible for the negligent actions or inactions of its agents. *Alken-Ziegler, supra*; *Levitt v. Kacy Manufacturing Co.*, 142 Mich App 603 (1985).

- *Allied Electric Supply Company v. Tenaglia*, COA No. 224189, states that a "minor error without cataclysmic consequence" by defense counsel might constitute a reasonable excuse and satisfy the "good cause" element. In this case, the plaintiff's counsel conceded that defense counsel did nothing wrong.

- *Allmender v. Southeastern Michigan Services*, COA No. 228372 (4/23/02), suggests that the existence of negligence in failing to respond does not preclude a finding of good cause, citing *Huggins v. MIC General Ins. Corp*., 228 Mich App 84 (1998). However, both *Huggins* and the decision in *Komejan v. Suburban Softball, Inc.*, 179 Mich App 41 (1989), on which *Huggins* was based, set aside defaults relying on the so-called third prong (manifest injustice) of the test to set aside a default that was eliminated by *Alken-Ziegler*, *supra*. Also, *Levitt v. Kacy Mfg. Co.*, 142 Mich App 603 (1985), where the insurer was in receivership and there were unusual problems, the court found "good cause" despite negligence, under the pre *Alken-Ziegler* standards.

- Failure to answer an amended complaint or file a notice indicating that the answer to the original complaint stood as the answer to the amended complaint is the basis for entry of a default. Good cause to set the default aside based on defense counsel's heavy work load was rejected in *City of Sterling Heights v. Bledsoe*, COA (2/03); see also, *Thomas v. George Jerome & Co., Inc*, COA (5/21/02), where the defaulted defendant did not file answer to an amended complaint and trial court was reversed for finding "good cause" because defaulted defendant was waiting for the outcome of a motion for summary disposition filed by a non-defaulted co-defendant.

- *Black v. Mabene*, COA No. 238482 (7/29/03). Defendant failed to respond to complaint because she was too busy seeing doctors in order to bolster her pending SSD claim. Decision implies the defendant was *in pro per*. At hearing to enter default judgment, court decided on its own motion to set aside the default based on a meritorious defense of defendant's mental condition. Court of Appeals reversed, noting that Plaintiff was not given notice of motion to set aside or

chance to prepare. The trial court's decision to find a meritorious defense did not warrant setting aside default, since defendant did not establish "good cause."

- *Toma v. Constable*, COA No. 252970 (8/11/05). Defendant claimed a reasonable excuse for failure to answer was that there was a power outage. The outage occurred at 4:00 on the date the answer was due, and defendant showed nothing to prove that, had the power not failed, they would have delivered the answer to the courthouse before it closed. COA ruled no good cause.

- *Prater v. Sezgin*, COA No. 253059 (4/21/05). Doc failed to appear for trial after being subpoenaed by plaintiff's counsel. Defense counsel for doc claimed he could appear in place of doc and dep could stand in place of testimony. Defendant doc claimed he had to visit his brother who was undergoing heart surgery in Turkey. The default stood.

- *Alladin Fireplace Center, LLC v. Eickenroth, et al*, COA No. 261769 (10/24/06). Good cause and meritorious defense elements must be considered separately. Where a moving party fails to establish good cause in the first instance, the court need not consider the alleged meritorious defense. In this case, default and answer were both filed on the 22nd day after service. The court found no explanation as to why defense counsel didn't take other action to confirm service. Citing *Alken-Ziegler*, court held that a party is responsible for any action or inaction by the party or the party's agent. Where a party's attorney fails to timely respond, that is not good cause to set aside a default.

- *FLF Company, Inc. v. Parry et al*, COA No. 264397 (10/24/06). Claims by a *pro se* defendant that he had depression and various "entanglements" were insufficient to establish good cause, particularly because he was able to make the *pro se* motion to set aside the default and appear to argue the motion. Manifest injustice is not a discrete event, but rather a factor to be considered with the good cause and meritorious defense requirements.

- *Saffian v. Simmons*, 477 Mich 8 (2007), where in med mal case an AOM is filed with the complaint, the defendant must answer or respond to the complaint and his unilateral belief that the AOM does not meet the requirements of MCL 600.2912d is not "good cause" for failing to respond to the complaint. Also, the claim of a technical or mechanical error in a fax machine may establish good cause BUT it is not an abuse of discretion for the trial court to refuse to set it aside absent evidence to support that mere assertion of a failure.

2. Miscommunication between attorney, insurer and/or client is not generally good cause

- Miscommunication or misunderstanding between the defendant and its attorney is not reasonable excuse for failing to respond to a complaint. *Pascoe v. Sova*, 209 Mich App 297 (1995) (although withdrawing without notice to client equals abandonment and grounds to set aside default judgment entered after withdrawal).

- *AMCO v. Team Ace Joint Venture*, 469 Mich 90 (2003). Default judgment entered after defendant failed to appear for court ordered deposition. Defendant claimed "good cause" because he was "abandoned" by his attorney. However, the court noted that it appeared to be "miscommunication" rather than "abandonment." The trial court quoted *White v. Sadler*, *supra*, "An attorney's negligence or mistake is distinguishable, as regard the right to reopen a default judgment, from his abandonment of the case, which may be in effect a fraud on his client," thereby implying that abandonment would be "good cause." See also, *True Worship Church of God v Anderson*, COA No. 253294 (4/21/05).

- *Bailey v. Jerrett*, COA No. 223888 (11/20/01), where a miscommunication between the defendant and its attorney did not establish good cause to set aside a default. In *Bailey*, even though the motion to set the default aside was filed within nine days of the default, the Court held that neither a miscommunication nor a misunderstanding between the defendant and its attorney was a reasonable excuse for failing to respond to the complaint filed nine months earlier.

3. Lack of notice to defendant of default is good cause

- Failure to give the required notice of an entry of a default and/or default judgment is considered good cause for setting them aside. *Bradley v. Fulgham*, 200 Mich App 156, 159-159 (1991); *National City Bank v. Hayden,* COA No. 234045 (1/28/03); *Ajdari v. Adjari*, COA No. 230426 (6/28/02); *Krzeminski v. Farmers Ins. Exch*., COA No. 247270 (9/30/04); *Dozier v. Tubby's Sub Shop*, COA No. 269944 (8/21/07). *Smith v. Trojan*, COA No. 252244 (4/12/05) held good cause existed because court entered a default judgment, for defendant's failure to appear at pre-trial, before entering and serving a default.

4. Absolute defense allow lesser showing of good cause

- *Francis v. Farm Bureau*, COA No. 237406 (5/29/03). Court held that where plaintiff sued for UIM coverage, but had not exhausted the underlying coverage (presumably because Farm Bureau, which has a one year statute to file UIM cases, did not authorize settlement), that Farm Bureau had an absolute defense, and therefore the negligence of defense counsel in failing to get the answer filed on time (3 days late) was "a lesser showing" but nevertheless good cause.

- *Golson v. Allstate Insurance*, COA No. 251302 (3/1/05). Allstate failed to answer, but claimed a cancellation of the policy was an absolute defense. Bad decision in that the court refers to the standards to set aside a default judgment in setting the parameters of "good cause" to supplement *Alken-Ziegler*.

- Where the defendant had a meritorious defense which, if true, was absolute, a default judgment entered based on a technically incorrect responsive pleading was properly set aside in *HTC Global v. Vasan,* COA No. 240644 (10/28/03). Similar result in *Delegrange Remodeling v Anthony*, COA No. 250022 (3/24/05).

5. Miscellaneous good cause cases/issues

- Where the parties had agreed to an extension to respond to the complaint, the trial court did not abuse its discretion in concluding that "good cause" existed. *Davisson v. Gale Industries,* COA No. 229077 (7/23/02). There is no indication whether the extension had expired.

- Service on Commissioner of Insurance/No fault case and UM case. Plaintiff effected service on insurer through the commissioner of insurance. Defendant filed an appearance in advance of the default, but failed to file an answer until 6 days after default entered. Court noted that service on the commissioner "shall have the same effects as if [defendant was] personally served." MCL 500.456. Court of Appeals held trial court erred in finding "good cause" and remanded for reinstatement of the default, relying on *Alken-Ziegler*. *Huizingh v. Allstate*, COA No. 233698 (4/29/03).

- Where defendant maintained several addresses and repeatedly represented that one was their address, they could not maintain that another address was proper place for service. "Defendants may not create a defect amounting to good cause by simply refusing to pick up documents served on them in accordance with the trial court's substituted service." *Lake Forest Estates Condominium v. Berryman*, COA No. 249570 (12/14/04) relying on *Barclay v. Crown Building and Development*, 241 Mich App 639 (2000).

- Documents properly addressed and placed in the mail are presumed to reach their destination. *Crawford v. Michigan*, 208 Mich App 117 (1994). This presumption may be rebutted by evidence, but whether it was is a question for the trier of fact. *Stacey v. Sankovick*, 19 Mich App 688 (1969). In *Lyons v. Coates*, COA No. 24266 (1/8/04), it was not abuse of discretion for trial court to deny motion to set aside where defense presented no evidence to support a denial of mail receipt. The mere denial of service is insufficient to rebut the presumption. There must be direct and positive testimony regarding non receipt. See, *Intercontinental Electronics v. American Keyboard Products,* COA No. 242455 (3/18/04).

However, a bad result in *Express Lawsuit Funding, LLC v. Short and Bank One ,* COA No. 244377 (2/24/04), where it was not abuse of discretion for court to find good cause that a writ of garnishment and default judgment had not been received by mail, based on the fact that the bank had earlier responded to another writ.

- Two day delay in filing answer did not affect plaintiff's substantial rights and justified good cause requirement where the defendant had a meritorious defense of no threshold injury. *Banwell v Burnstein*, COA No. 251128 (4/14/05).

- Where the court failed to properly docket the filing of an answer, and a default was subsequently entered, it was properly set aside. *Hertz, Schram & Saretsky v. Turner,* COA No. 239176 (1/20/04).

- Where trial court entered default based on failure to comply with discovery order, it was not "good cause" to set the default aside on the basis that the defendant had substantially complied with order. *Lupo v. Eastland*, COA No. 248440 (8/17/04).

- *Haque v. Wm. Beaumont Hospital*, COA No. 25865 (1/20/05). Med mal case. Where complaint was first filed in 1997, but procedural issues had delayed the answer's due date until March 2001 and a default was entered one month later, there was good cause to set the default aside since the defendant had filed an affidavit of meritorious defense under MCL 600.2912e in January 2001, thereby indicating an intent to defend the claim.

- Good cause to set aside a default judgment was not established with efforts to show that the plaintiffs had failed to submit sufficient documentary evidence to support the amount of damages claimed in *Cheer v. Alban Building Co.*, COA No. 275692 (3/04/08).

C. Meritorious Defense Cases

1. Where a party has not established the "good cause" element to set aside a default, there is no need for the trial court to address the question of whether there is a meritorious defense. *Zaiter v. Riverfront Complex, Ltd.*, 463 Mich 544 (2001).

2. The meritorious defense element to set aside a default must be considered separately from the good cause element. *Alken-Ziegler, supra; Zaiter, supra*.

3. The filing of an affidavit of meritorious defense is a condition precedent to setting aside a default. *Feieraband v. Manistee Circuit Judge*, 253 Mich 115, 116 (1931). *Hanson v. Temple*, COA No. 256922 (10/11/05).

   a. As noted in *Novi Construction v Triangle*, 102 Mich App 586 (1980), an affidavit of meritorious defense that merely states a conclusion and does not give a factual

basis for that conclusion is not an affidavit of facts under MCR 2.603(D)(1). *Novi*, at 590, citing *Hartman v Roberts-Walby Enterprises, Inc.*, 17 Mich App 724 (1969), lv den 383 Mich 774 (1970). In *Miller v Rondeau*, 174 Mich App 483 (1988), where the trial court held that the defendant had failed to provide a sufficient affidavit of meritorious defense, the Court of Appeal held that an affidavit must be more than the suggestion of "anticipated testimony."

> "[A]n affidavit filed in support of a motion must be made on personal knowledge, stating with particularity facts admissible as evidence establishing the grounds stated in the motion and showing affirmatively that the affiant, if sworn as a witness, can testify competently to the facts stated in the affidavit, MCR 2.119(B)(1).
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> The mere denial of a plaintiffs allegations, without the recitation of facts indicating the existence of a meritorious defense, is insufficient to cause this Court to revers a trial court's decision denying a motion to set aside a default." Miller, at 487-488.

b. *Hilock v. Gear*, COA No. 233424 (8/20/02). Defendant's affidavit was insufficient to establish meritorious defense (citing *Novi Construction, Ind. v. Triangle Excavating, Co.*, 102 Mich App 586 (1980), but affidavit of his insurance adjuster was sufficient (citing *Hunley v. Phillips*, 164 Mich App 517 (1987).

c. *Francis v. Farm Bureau*, COA No. 237406 (5/29/03). Defendant failed to file an affidavit of meritorious defense, but the Court of Appeals upheld the trial court order setting default aside because the defendant's motion set forth a meritorious defense as a matter of law.

d. *Haque v. Wm. Beaumont Hospital*, COA No. 25865 (1/20/05). Med mal case. The affidavit of meritorious defense in support of a motion to set aside default in a med mal case need not comply with the affidavit requirements in medical malpractice actions under MCL 600.2912e. The affidavit need only satisfy the requirement of MCR 2.603(D)(1).

III. RIGHT TO JURY FOR DEFAULT JUDGMENT HEARINGS

A. The Issue

If a default has been entered for failing to plead or otherwise defend, the party has no right to take any action until a default is set aside. MCR 2.603(A)(3). That would presumably include filing a demand for a jury trial or a reliance on a previously filed jury demand prior to a hearing on a Default Judgment. Accordingly, before filing a default or motion for default judgment, consider whether a previously filed demand for jury trial should be withdrawn or waived. Matters to consider in the decision process include: the judge assigned to the file; venue and the likely jury pool; the nature of the injuries and damages; the plaintiff's jury appeal; the defendant's jury appeal; and the likelihood that the court will allow comparative fault to be an issue at the damage hearing (see, Section IV, *infra*). Also consider the likelihood that the Court will allow the waiver of a jury trial in light of the unsettled law:

MCR 2.508. A demand for jury trial may not be withdrawn without the consent, expressed in writing or on the record, of the "parties or their attorneys." The issue i, 1) whether a plaintiff can withdraw a jury demand before the defendant appears; and, conversely, 2) whether a defendant can rely on a jury demand which is properly withdrawn before the default is entered or the defendant appears.

B. The Cases

1. In *Asmus v Barrett*, 30 Mich App 570 (1971), the court suggested that a defaulted party may not be heard on the trial of damages as a matter of right nor have any right to a trial by jury. The suggestion in *Asmus* is that the defendant either waives the right by failure to make a timely demand under MCR 2.508 or has forfeited his right to a contested trial by the act that created the default. However, the court in *Wood*, *infra*, noted this was not an accurate reflection of the law and was dictum in *Asmus*.

2. *Wood v. DAIIE*, 413 Mich 573 (1982) -- Plaintiff demanded jury; defendant demanded jury; defendant was defaulted for discovery abuse -- Under MCR 2.603(B)(3), a court shall accord a right of trial by jury to the parties to the extent required by the constitution at a hearing for damages. Because the defendant had filed a jury demand before the default was entered for discovery abuse, the Court in *Wood* ruled that the defendant was entitled to a jury trial at the hearing for damages.

   While the right to a jury trial in civil litigation is provided by the constitution, it is waived in all civil cases unless demanded by one of the parties "in the manner prescribed by law." (Constitution 1963, Article 1, Section 14). Under MCR 2.508, a party may demand a trial by jury by filing a demand, in writing, within the time periods set by the Court Rule. The question remaining after *Wood* is whether a defaulted party can demand a jury trial or file a reliance on a prior jury demand after the default has been entered. The *Wood* Court stated, "we need not decide in this case whether a defaulting party who has failed to properly invoke its right to a jury trial may do so on the issue of damages after a default has been entered." Accordingly, if a demand for jury trial is waived prior to entering the default, plaintiff would certainly have an argument, with some dictum support, that the defendant has no right to invoke its right to jury.

3. In *Mink v. Masters*, 204 Mich App 242 (1994) – Plaintiff demanded jury; defendants filed reliance on jury demand; default entered for discovery abuse – The court cited *Wood* as holding that a default does not constitute a waiver of jury trial where it is necessary for the trial court to hold a hearing on the issue of damages. The court held that a defendant has a right to jury trial if that right has been preserved even though the defendant has been subsequently defaulted. The court held that a reliance on jury demand was adequate to preserve defendant's right to jury trial. The court noted that MCR 2.508(D)(3) clearly requires that a withdrawal of a jury demand be with the consent of all parties or their attorneys, not just by the parties that filed a jury demand. "That is, 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." That would seem to support an argument that, even if a waiver of jury trial is filed before the defaulted party can rely on the demand, consent will be needed from all parties.

   In the *Mink* concurring opinion, Chief Judge Doctoroff felt the majority overstated *Wood* by suggesting that, once a party files a demand for a jury trial, the defendant need do nothing to preserve the jury trial further. He noted that the majority overlooked the important fact that, in *Wood*, the defendant had filed a jury demand not just a reliance before the default was entered. He also quoted the language in *Wood* stating that the court was not deciding whether a defaulting party, who failed to properly invoke its right to jury trial, would be entitled to do so on the issue of damages after a default had been entered.

4. *Chrysler v. Home Insurance Company*, 213 Mich App 610 (1995) – Plaintiff filed jury demand; the defendant did **not** file jury demand; default entered for discovery abuse – The *Chrysler* court felt compelled to follow the majority decision in *Mink* and gave the defendant a jury trial, although it disagreed with the *Mink* majority opinion for the reasons stated in Doctoroff's concurring opinion. "Were we not compelled to follow *Mink*, we would affirm and hold that defendant had waived its right to a jury trial by failing to file either a jury demand or a reliance." MCR 2.508(D).

5. *Zaiter v. Riverfront Complex, Ltd.*, 463 Mich 544 (2001) – Plaintiff filed jury demand; defendant filed reliance on jury demand; a default entered for discovery abuse. Relying on *Wood*, the Court held that the right to a trial by jury on damages must be provided to a defaulted defendant.

6. *Waatti & Sons Electric v. Shaya Construction Co.*, COA No. 224513 (2/5/02). Where the plaintiff demanded a jury trial in a garnishment proceeding, the demand for a jury trial could not be withdrawn without the written consent or expression of consent on the record of all the parties.

7. *Lasser v. George*, 252 Mich App 104 (2002) – Plaintiff demanded jury with complaint; jury demand never withdrawn; Defendant defaulted for failure to answer; unclear whether Defendant filed a reliance; parties conducted non-jury trial on damages and Plaintiff was dissatisfied with the result; Plaintiff appealed for jury trial – Plaintiff filed a general jury demand of all issues and the Court said the "Defendant was entitled to rely on plaintiff's jury demand." (citing *Mink v. Masters*, 204 Mich App 242 (1994). The Court continued: "Pursuant to MCR 2.603(B)(3)(b), defendant's default on the issue of liability did not extinguish either party's right to a jury trial on the issue of damages. Once the right to trial by jury was secured, plaintiff needed defendant's consent to waive or withdraw the right to have the jury hear and decide the issue of damages." (citing *Mink*, *supra*). In this case, the court held that parties had impliedly consented to waive jury on the record by conducting the lengthy damage proceeding by bench trial.

8. *Alexander v. Southeastern Tile,* COA No. 268565 (7/17/07). Once a court determines a hearing is needed to determine damages, it is obligated to afford the defendant a properly preserved right to jury trial. In this case, the plaintiff demanded a jury, which was not withdrawn and defendants were allowed to rely upon it. Court cited MCR 2.508(D)(3).

9. Federal decisions addressing the right to a jury trial at the damage hearing following a default include *Eisler v. Stritzler*, 535 F.2d 148 (1st Cir. 1976); *Henry v. Sneiders*, 490 F.2d 315 (9th Cir. 1974); and *Graham v. Malone Freight Lines, Inc*., 98-2074 (1st Cir. 1999). In *Graham*, where the offending defendants did not appear or defend, the court held that neither the Seventh Amendment nor the

Federal Rules of Civil Procedure require a jury trial to assess damages after the entry of a default. In *Henry,* the court held that, although the federal court rule preserves the right to a jury trial required by any statute of the United States at a damage hearing following a default, because the defendant and court could not find any statute of the United States requiring a jury trial there was no such right. These are interesting from the standpoint that the Federal Rules of Civil Procedure also require that a demand for a jury trial previously filed by a party be waived only with consent of the parties.

IV. COMPARATIVE FAULT AND OTHER DEFENSES AT THE HEARING ON DAMAGES

A. The Issue

Can a defaulted party assert comparative negligence, or other defenses, in the damage hearing on the entry of the default judgment?

B. Comparative Negligence Case

The key Michigan decision is *Kalamazoo Oil Company v. Boerman*, 242 Mich App 75 (2000). The Court makes several statements, including the following:

> "In Michigan, it is an established principle that a default settles the question of liability as to well pleaded allegations and precludes the defaulting party from litigating that issue. *Wood, supra*; *American Central Corporation v. Stevens Van Lines, Inc.*, 103 Mich App 507 (1981). In *Stevens*, the court ruled that the entry of a default is equivalent to an admission as to all well pleaded allegations. In other words, where a trial court has entered a default judgment against a defendant, the defendant's liability is admitted and the defendant is estopped from litigating issues of liability. However, a default judgment is not an admission regarding damages." *Boreman* at 79.

> "We note that a default may be granted for either the failure to plead or answer or as a sanction for improper conduct such as discovery abuses. These two circumstances under which a default may be entered are fundamentally different. Failing to plead or answer speaks an implied concession that the party is liable, or perhaps an indifference to the outcome to the litigation. In contrast, a default entered as a sanction is a means to penalize a party for failure to comply with the trial court's

directive, and as noted above, should be entered only in the most egregious circumstances. Because the circumstances under which a default may be entered are so fundamentally different, we believe that the answer to the question at issue here may be different for policy reasons, depending on which circumstances is presented. Here we limit our decision to only those instances where default is utilized as a sanction for discovery abuses. As in the present case, where entry of default is based on discovery abuses and the case proceeds to a trial on damages only, we believe that the decisive factor in the decision whether to admit evidence of comparative negligence is the extent of the sanction necessary, as decided by the sanctioning court. The sanctioning court is in a position to determine the appropriate sanction for the discovery abuse to serve the purposes of curbing the sanctioned behavior, restoring order to the proceeding, and chastising the abuser for the improper conduct. In other words, because discovery sanctions are to be proportionate and just, it would be imprudent to attempt to delineate a bright-line rule. Rather, we believe that where a defendant has been defaulted as a sanction for discovery abuses, it should be within the trial court's discretion either to allow or to prohibit the defaulted party from introducing evidence of a party's comparative negligence at the trial on damages." *Boerman* at 87.

- *Rogers v. J. B. Hunt Transport, Inc.*, 244 Mich App 600 (2001) rev'd and remanded, 466 Mich 645 (2003). The decision focuses on whether the admitted liability by virtue of a default of one defendant would be binding on the other defendant, whose liability was vicarious. The defaulted defendant was an employee of the non-defaulted defendant at the time of the accident, but not at the time of the default. The Court of Appeals held that the admitted liability of the defaulted defendant was binding on a vicariously liable employer. The Court of Appeals also affirmed the trial court's decision to let the vicariously liable employer raise comparative negligence at trial. The Supreme Court reversed the vicarious liability ruling and did not address the comparative fault issue. There is however dicta in the dissent suggesting that comparative fault can be argued at the damage phase, although this was a discovery abuse default.

In light of *Boerman*, the suggestion should be that there is no discretion on the part of the Court where the defaulted party failed to answer or respond in a timely manner, i.e. made an implied concession of liability and showed an indifference to the outcome to the litigation. In that circumstance, evidence of comparative negligence should not be allowed. However, to help ensure this result plaintiff's counsel should always affirmatively allege no comparative fault in the complaint.

C. Other Defenses at the Damage Hearing

- *Prater v. Sezgin*, COA No. 253059 (4/21/05) Doc defaulted but wanted to admit causation evidence on damage evaluation and argue that the surgery was inevitable. Plaintiff alleged in his complaint that defendant's performance of surgery was negligent and unnecessary, and since the allegations were pled the defendant could not argue otherwise. All well pled facts were taken as true.

- *Pitts v Perski*, 1999 WL 33435956, COA No. 210257 (1999), the court addressed whether a defaulted defendant could raise the issue of serious impairment. The panel, citing *Wood*, *supra*, ruled unanimously that the defendant cannot. Because defendant's default constituted an admission of all well-pleaded allegations, and resolved the issue of liability as to those allegations, a trial on the question of whether plaintiff suffered a serious impairment of body function was not necessary. The trial court's ruling on the motion in limine did not preclude defendant from participating fully in the trial on damages.

V. STANDARD OF REVIEW

- *Alken-Ziegler v. Waterbury Headers Corporation*, 461 Mich 219 (1999) at 227:

"The ruling on a motion to set aside a default or a default judgment is entrusted to the discretion of the trial court. *Park v. American Casualty Ins. Co.*, supra. Where there has been a valid exercise of discretion, appellate review is sharply limited. *Wendel v. Swanburg*, 384 Mich 468, 475; 185 N.W.2d 348 (1971). Unless there has been a clear abuse of discretion, a trial court's ruling will not be set aside. *Kellom v. City of Ecorse*, 329 Mich. 303; 45 N.W.2d 293 (1951); *Brookdale Cemetery Ass'n v. Lewis*, 342 Mich 14, 18; 69 N.W.2d 176 (1955); *Cramer v. Metropolitan Savings Ass'n (Amended Opinion)*, 136 Mich. App. 387, 398; 357 N.W.2d 51 (1984), and *Gavulic v. Boyer*, 195 Mich. App. 20, 24; 489 N.W.2d 124 (1992).

An abuse of discretion involves far more than a difference in judicial opinion. *Williams v. Hofley Mfg Co.*, 430 Mich 603, 619; 424 N.W.2d 278 (1988). It has been said that such abuse occurs only when the result is "'so palpably and grossly violative of fact and logic that it evidences not the exercise of will but perversity of will, not the exercise of judgment but defiance thereof, not the exercise of reason but rather of passion or bias.'" *Marrs v. Bd of Medicine*, 422 Mich 688; 375 N.W.2d 321 (1985), quoting *Spalding v. Spalding*, 355 Mich. 382, 384-385; 94 N.W.2d 810 (1959), and noting that, although the *Spalding* standard has been often discussed and frequently paraphrased, it has remained essentially intact."

- *AMCO v. Team Ace Joint Venture*, 469 Mich 90 (2003). Supreme Court reversed Court of Appeals decision to reverse the trial court, which had refused to set aside a default judgment for lack of "good cause." Supreme Court held that Court of Appeals had failed to accord the trial court ruling the deference it was due. Court quoted *Scripps v. Reilly*, 35 Mich 371 (1877): "It can never be intended that a trial judge has purposely gone astray in dealing with matters within the category of discretionary proceedings, and unless it turns out that he has not merely misstepped, but has departed widely and injuriously, an appellate court will not reexamine. It will not do it when there is no better reason than its own opinion that the course actually taken was not as wise or sensible or orderly as another would have been."

VI. MISCELLANEOUS ISSUES

1. Effect of default on non-defaulting co-defendant. The entry of a default against one defendant is not an admission of liability on the part of a non-defaulting co-defendant. *Allstate v. Hayes*, 442 Mich 56 (1993); *Klimmer v. Klimmer*, 66 Mich App 310 (1975). Even where the liability of a co-defendant is vicarious only, a default entered against a co-party does not preclude the non-defaulted defendant from contesting its vicarious liability. *Rogers v. J. B. Hunt Transport, Inc.*, 244 Mich App 600 (2001), *rev'd and remanded*, 466 Mich 645 (2003). In *Rogers*, the defaulted defendant was an employee of the non-defaulted defendant at the time of the accident, but not when the lawsuit was filed. *Rogers* will also apparently apply in cases involving owners liability under MCL 257.401, since liability under that statute is direct, not derivative. *Peters v. Department of State Highways*, 66 Mich App 560 (1976).

2. Dram shop. Plaintiff obtained default judgment against AIP. Defendant then dismissed for failure to name and retain, and Plaintiff tried to set aside the default judgment. *Scargall v. Whitmore*, COA No. 231718 (8/6/02).

3. Evidentiary hearing on damages. *Techsys, Inc. et al. v. Lifton et al.* COA No. 237517 (2/18/03). Where the plaintiff had submitted conclusory summaries of damage claims

and no evidence to support attorney fees, the Court of Appeals said the trial court abused its discretion in failing to set aside the damages part of a default judgment. It held a new hearing on damages, in which the defaulting party can participate, was required, citing *Midwest Mental Health v. BC/BS*, 119 Mich App 671 (1982).

4. Discovery by defaulted party on damage issue. Under MCR 2.603(A)(3), a defaulted party "may not proceed with the action," which would arguably preclude discovery even though MCR 2.603(B)(3) requires the trial court to accord a right to trial by jury to the extent required by the constitution.

5. Potential effect of default and/or default judgment on insurance coverage.

- *Coburn v. Fox*, 425 Mich 300 (1986). As to **auto** insurance coverage, if the default is a result of the failure of defendant to cooperate with insurer, the insurer may be able to avoid coverage, but only to the extent the coverage limits exceed the statutory minimum coverage required. However, in a non-auto case. . .

- *Remar v. Trumbley and Citizens Insurance Co.*, COA No. 242779 (6/3/03). Plaintiff took a $350,000.00 default judgment against defendant Trumbley after being bitten by a brown recluse spider at the Trumbley's motel, and then garnished Citizens, the defendant's insurance carrier. The insurer claimed that it had no knowledge of the litigation. Citizens denied coverage based on an exclusion in the policy for Trumbley failing to notify the insurer of the lawsuit. Trumbley claimed she called her agent and stated that, "I've been sued," and was told that someone would contact her. The court granted summary disposition to Citizens on the coverage issue. Although the court noted that "mere failure by an insured to notify its insurer of a lawsuit will not cut off the insurer's liability under the policy absent a showing of prejudice by the insurer." (citing, *Koski v. Allstate Ins. Co.*, 456 Mich 439 (1998)), the court held that Trumbley had complied with none of the policy requirements of notice and had prejudiced Citizens. Interestingly, the court held that it was a question of fact whether the independent agent was the agent of Trumbley or a dual agent for Trumbley and Citizens.