ORIGINAL

IN THE SUPREME COURT OF OHIO

UTTERBACK DENTAL GROUP, INC.	)	CASE NO.: 13-0328
	)	
Plaintiff-Appellee,	)	
	)	
vs.	)	
	)	*Appeal From The Fifth District Court of Appeals 2011 CA 2853*
JAMES A. LUCIDO	)	
	)	
Defendant-Appellant.	)	

UTTERBACK DENTAL GROUP, INC.'S BRIEF IN OPPOSITION TO MEMORANDUM IN SUPPORT OF JURISDICTION

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PRELIMINARY STATEMENT

One litigant's repeated failure to comply with court orders regarding discovery does not pose a substantial constitutional question or an issue of great public importance. Appellant is essentially asking this court to fix his own dilatory conduct. Appellant persisted in ignoring discovery requests and court orders, was warned on multiple occasions that default judgment was a possibility for his continued non-compliance, and nevertheless chose to disregard the court's warning. Appellant was not denied his due process rights. He had ample opportunity to defend his conduct, but was ultimately sanctioned for a flagrant abuse of the discovery process.

STATEMENT OF FACTS

The Utterback Dental Group, Inc. ("Utterback") issued discovery requests to Appellant on January 18, 2011 and April 29, 2011. (Motion for Sanctions, p.1). Appellant did not adequately and completely respond to the document requests. *Id.* Appellant did not object to the requests. *Id.* at p.2. Repeated attempts to resolve the dispute without aid of the court resulted in Appellant promising the records, but not producing them. *Id.*, pp.2-3. The issue was brought to the trial court's attention at the final pretrial. The trial court ordered Appellant to comply, specifying exactly what documents Appellant was required to produce. (August 22, 2011 Judgment Entry).

After Utterback received notice that Appellant would not produce the documents in accordance with the court order, Utterback moved for sanctions on August 25, 2011 (Motion for Sanctions). Appellant opposed the Motion for Sanctions the next day. (Defendant's Response to Plaintiff's Motion for Discovery Sanctions, August 26, 2011). The trial court set the matter for an evidentiary hearing on September 9, 2011. (September 8, 2011 Judgment Entry). Following the evidentiary hearing, the court granted Utterback's Motion for Sanctions on the record on

September 9, 2011, and subsequently memorialized its order on September 13, 2011. (Judgment Entry, September 13, 2011). The trial court ordered production of the records and ordered Appellant to pay the attorneys' fees incurred by Utterback on or before 4:00 p.m. on September 14, 2011, five days before trial. *Id.* The trial court specifically warned that "[s]hould defendant fail to comply with this order, the court will consider striking the defendant's answer." *Id.*

Appellant failed to produce most of the documents that were the subject of the court order, and Utterback moved to strike Appellant's Answer and Counterclaim and enter Default Judgment against Appellant on September 14, 2011. (Motion to Strike Answer And Counter-Claim, and for Entry of Default Judgment as to Liability, pp.2-3). As the trial was scheduled for Monday, September 19, 2011, the trial court set the motion for evidentiary hearing on Friday, September 16, 2011. (Judgment Entry, September 15, 2011). Appellant never objected to the timing of the hearing, either by motion or at the hearing. (*See* transcript of September 16, 2011 hearing).

At the hearing, the trial court found that Appellant had willfully failed to comply with discovery, and granted Appellee's Motion to Strike. *Id.* The trial court granted judgment by default in favor of Appellee and set a damages hearing which was referred to a magistrate. *Id.* On November 30, 2011, the trial court adopted the magistrate's findings, and entered judgment for Appellee in the amount of $473,000.

In short, Appellant was warned about his discovery abuses in two separate court orders, Appellant filed a brief attempting to defend his discovery conduct, and Appellant was afforded two evidentiary hearings to justify his failure to produce documents. Appellant had notice of the consequences of his discovery abuses, and the trial court more than protected his due process right of notice and an opportunity to be heard.

WHY THIS CASE DOES NOT PRESENT A SUBSTANTIAL CONSTITUTIONAL QUESTION OR AN ISSUE OF PUBLIC OR GREAT GENERAL INTEREST

I. Appellant Waived the Only Issue He Seeks to Raise in This Court.

As an initial matter, this court should not accept jurisdiction over this appeal because Appellant has waived the very legal argument he asks this court to address. Appellant's entire appeal is an attempt to fault the trial court for not giving him seven days notice prior to the evidentiary hearing relating to Utterback's request for default judgment. Appellant attended the hearing, and never objected to the timing of the hearing, or gave the trial court an opportunity to address Appellant's criticism. "Ordinarily, reviewing courts do not consider questions not presented to the court whose judgment is sought to be reversed." *State ex rel. Quarto Mining Co. v. Foreman*, 79 Ohio St.3d 78, 81, 1997-Ohio-71, 679 N.E.2d 706 (1997), quoting *Goldberg v. Indus. Comm.*, 131 Ohio St. 399, 404, 3 N.E.2d 364 (1936). According to this principle, this court has held: "[i]t is well settled that we will not consider issues not presented in the trial court." *Bennett v. Stanley*, 92 Ohio St.3d 35, 49, 2001-Ohio-128, 748 N.E.2d 41.

This court has previously dismissed cases when it became apparent that the appellant waived the issue on appeal. *See*, *State v. Urbin*, 100 Ohio St.3d 1207, 2003-Ohio-5549, 797 N.E.2d 985. In *State v. Urbin*, then Chief Justice Moyer noted that the majority of the court dismissed the appeal as improvidently allowed when "[f]ull merit briefing and oral argument have revealed that the appellant waived the primary legal proposition he now presents." *Id.* at ¶3 (Moyer, C.J., concurring); *see also State v. Brown*, 98 Ohio St.3d 121, 2002-Ohio-7040, 781 N.E.2d 159 (Cook, J., dissenting) ("Because Brown did not properly preserve for review the certified issue * * * this court should dismiss this cause as having been improvidently allowed.").

In this case, the court need not proceed to full merit briefing and oral argument before it is evident that Appellant has waived his right to claim error based upon insufficient notice of the

possibility of dismissal. Appellant was ordered to produce documents and was cautioned that "[s]hould defendant fail to comply with this order, the court will consider striking the defendant's answer." (Judgment Entry, September 13, 2011). Appellant failed to comply, and a hearing was set for September 16, 2011. Appellant and his counsel both attended the hearing, presented evidence, and never once objected to the timing of the hearing or claimed that Appellant did not have sufficient notice. (Transcript of September 13, 2011 hearing). Accordingly, Appellant has waived any argument that he received insufficient notice prior to the trial court's grant of default judgment for Appellant's discovery abuses, and this court should decline to hear Appellant's appeal.

II. Appellant Is Only Entitled to Notice and an Opportunity to be Heard Prior to the Trial Court Entering Default Judgment, Therefore, the Failure to Provide Seven Days' Notice Does Not Involve a Substantial Constitutional Question.

This court should reject Appellant's attempt to rely upon an inapplicable civil rule in order to manufacture a constitutional argument that would rescue him from his own discovery violations. Appellant claims that the trial court's failure to give him seven days written notice of the potential for default judgment violates his due process rights. Appellant is mistaken.

Citing the United States Supreme Court, this Court has held: "[a]n elementary and fundamental requirement of due process in any proceeding which is to be accorded finality is notice reasonably calculated, under all the circumstances, to apprise interested parties of the pendency of the action and afford them an opportunity to present their objections." *PHH Mortgage Corp. v. Pratter,* 133 Ohio St.3d 91, 2012-Ohio-3931, ¶9, 975 N.E.2d 1008, citing *Mullane v. Cent. Hanover Bank & Trust Co.*, 339 U.S. 306, 314, 70 S.Ct. 652, 94 L.Ed. 865 (1950). "[T]here can be no doubt that at a minimum [the due process clause] require[s] that

deprivation of life, liberty or property by adjudication be preceded by notice and opportunity for hearing appropriate to the nature of the case." *Id.*

This court has already held that the notice required prior to dismissing a plaintiff's case is simply notice and an opportunity to be heard: "counsel has notice of an impending dismissal with prejudice for failure to comply with a discovery order when counsel has been informed that dismissal is a possibility and has had a reasonable opportunity to defend against dismissal." *Quonset Hut, Inc. v. Ford Motor Co.*, 80 Ohio St.3d 46, 49, 684 N.E.2d 319 (1997). "The purpose of notice is to 'provide the party in default an opportunity to explain the default or to correct it, or to explain why the cause should not be dismissed with prejudice.'" *Id.* at 48, citing *Logsdon v. Nichols*, 72 Ohio St.3d 124, 128, 647 N.E.2d 1361 (1995).

Here, the trial court granted the similar sanction of default judgment. Ohio courts have reasoned that entering a dismissal with prejudice of a plaintiff's claim is "analogous" to entering default judgment against a defendant, and have applied the same test this Court has used for dismissals. *See Fester v. Price*, 11th Dist. No. 08AP-1020, 2009-Ohio-3482, and *Associated Business Invest. Corp.*, 2nd Dist. No. 19211, 2002-Ohio-6385, ¶23. Those courts have held that "the granting of default judgment requires the due process guarantee of prior notice," but not notice in compliance with Civ.R. 55(A). *Haddad v. English,* 145 Ohio App.3d 598, 763 N.E.2d 1199 (9th Dist. 2001); *see also, Fester v. Price,* 11th Dist. No. 08AP-1020, 2009-Ohio-3482.

Appellant's attempt to expand notice beyond what is constitutionally required does not raise a substantial constitutional question. Appellant received actual notice of the trial court's intention to enter default judgment against him if his discovery abuses continued. Appellant had an opportunity to defend his conduct in a written opposition to Utterback's request for sanctions and by presenting evidence at two separate hearings on the sanctions issue. Appellant had actual

notice and numerous opportunities to defend himself. Appellant's due process rights were protected and, therefore, this case does not raise a substantial constitutional question.

III. This Case Does Not Involve an Issue of Public or Great General Interest.

Fortunately for Ohio courts, the type of flagrant discovery abuse exhibited by Appellant is not a frequent occurrence. Entering default judgment for willful disregard of court orders compelling discovery is not common place. What is more, the unique factual circumstances of this case render it of little precedential value to Ohio courts and future litigants, even if this court were to accept this appeal.

First, Appellant has waived the argument that he did not receive sufficient notice by failing to assert that issue before the trial court. Second, Appellant's case is factually unique in that his violation of the trial court's order occurred less than seven days prior to trial. As such, it was impossible for the trial court to provide Appellant with seven days notice of the default judgment hearing. This fact alone makes Appellant's case distinguishable from the precedent on which he relies, and from cases that are likely to arise in the future. Finally, Appellant's argument that this case is of great public interest is primarily based upon Appellant's perception that "Ohio Appellate Districts have come to varying conclusions on this issue." (Memorandum in Support of Jurisdiction of Appellant James A. Lucido, p. 2.) Despite his contention, Appellant did not seek to certify a conflict in this matter. This court should not countenance Appellant's failure to follow the procedure for certifying a conflict by permitting him to circumvent that process, arguing that the alleged conflict somehow makes this case of great public interest.

Other litigants have argued that these precise issues should be reviewed by this court, and this court determined that Appellant's arguments were not worthy of discretionary review. For example, in *Haddad v. English*, 145 Ohio App.3d 598, 763 N.E.2d 1199 (9th Dist. 2001), the

appellants attempted to appeal the Ninth District Court of Appeal's decision affirming the trial court's granting of default judgment based upon their failure to appear at deposition. *Id.* at 604. The appellate court found that they were given adequate notice and affirmed the default judgment. The appellants attempted to appeal the issue to this court, but this court declined to accept jurisdiction over the appeal. *Haddad v. English*, 94 Ohio St.3d 1429, 761 N.E.2d 46 (2002). Not a single one of the cases cited by Appellant was decided after this court declined to accept jurisdiction over the *Haddad v. English* appeal.

ARGUMENT IN OPPOSITION TO APPELLANT'S PROPOSITION OF LAW

Appellant's Proposition of Law No. 1: The Constitutional guarantee of due process demands that notice consistent with the requirement of Ohio Civil Rule 55(A) be given before default judgment can be entered against a party as a discovery sanction.

The plain language of Civ.R. 55(A) demonstrates that it does not apply to Appellant's case. Civ.R. 55(A) applies only in instances where the party "has failed to plead or otherwise defend." Here, it is undisputed that Appellant filed an answer. Civ.R. 55(A) has no application to this case.

Instead, this Court has already held that the notice required prior to issuing serious discovery sanctions is simply notice and an opportunity to be heard: "the purpose of notice is to 'provide the party in default an opportunity to explain the default or to correct it, or to explain why the cause should not be dismissed with prejudice.'" *Quonset Hut, Inc. v. Ford Motor Co.*, 80 Ohio St.3d 46, 684 N.E.2d 319 (1997), citing *Logsdon v. Nichols*, 72 Ohio St.3d 124, 128, 647 N.E.2d 1361 (1995). This case concerns the sanction of granting default judgment for failure to comply with a court order permitting discovery under Civ.R. 37(B)(2)(c). Ohio courts have reasoned that entering a dismissal with prejudice of a plaintiff's claim is "analogous" to entering default judgment against a defendant. *See Fester v. Price*, 11th Dist. No. 08AP-1020,

2009-Ohio-3482. Because the two sanctions are analogous, "Ohio appellate courts have relied upon dismissal cases to determine whether appropriate notice occurred in default judgment cases." *Huntington Nat'l Bank v. Zeune,* 10th Dist. No. 08AP-1020, 2009-Ohio-3482. Those courts have held that "the granting of default judgment is an equally harsh remedy and requires the same due process guarantee of prior notice of dismissal." *Id.* Accordingly, those courts apply the *Quonset Hut* requirement of prior notice and an opportunity to defend.

Various Ohio courts of appeals have held that notice of the potential sanction of default judgment and an opportunity to respond is all that is required to satisfy due process; "Implied notice of the possibility of a default judgment is all that is needed to satisfy the due process guarantees." *Associated Business Invest. Corp.*, 2nd Dist. No. 19211, 2002-Ohio-6385, ¶23. "[T]he granting of default judgment requires the due process guarantee of prior notice," but not notice in compliance with Civ.R. 55(A). *Haddad v. English,* 145 Ohio App.3d 598, 763 N.E.2d 1199 (9th Dist. 2001); *see also, Fester v. Price,* 11th Dist. No. 08AP-1020, 2009-Ohio-3482.

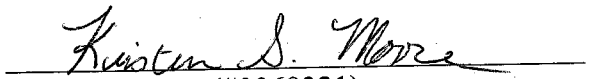
The type of notice that is necessary to satisfy due process is situation-dependent, it must be "appropriate to the proceeding." *PPH Mortg., supra,* 2012-Ohio-3931, at ¶9. There is good reason to permit seven days notice for default judgment in a failure to answer scenario. There, the time is needed to prepare a defense because the party is at the outset of litigation, does not have the benefit of discovery, and has likely not retained counsel prior to the notice of default. In contrast, when discovery sanctions are at issue, the parties have been involved in litigation for some time, have been given the opportunity to familiarize themselves with the issues, and have simply chosen not to appropriately engage in the discovery process. The stage of the proceeding in the latter scenario does not require as much notice to prepare.

This Court has previously recognized a litigants' due process right to notice of dismissal for discovery violations. That standard is applicable in the analogous situation of default judgment as well. Because this Court has conclusively established the standard applicable to this case, Appellant's attempts to expand notice beyond what is constitutionally required should be rejected.

CONCLUSION

This Court should decline to exercise jurisdiction over this appeal. The factual circumstances of this case are unique, and unlikely to produce any precedent that would have broad application to other parties. Importantly, Appellant asks this court to address an issue that Appellant himself has waived by not raising it in the trial court. Additionally, the unique facts here—namely that Appellant received actual notice of the court's intent to enter default, opposed sanctions in a brief, was afforded two separate evidentiary hearings, and committed his final violation less than seven days prior to trial—render this case so unique that this Court's decision could only benefit these two parties. Finally, the standard for notice required to satisfy due process rights prior to default judgment is established, and need not be further addressed by this court.

Respectfully submitted,



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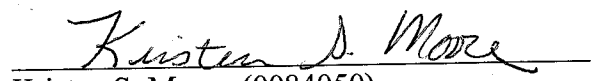
PROOF OF SERVICE

This will certify that a copy of the foregoing was served by regular U.S. Mail service upon Tracey A. Laslo, Esq., 325 East Main Street, Alliance, Ohio 44601on this 26th day of March 2013.



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