

IN THE COURT OF APPEALS OF OHIO
TENTH APPELLATE DISTRICT

The Huntington National Bank,	:	
Plaintiff-Appellee,	:	
v.	:	No. 08AP-1020 (C.P.C. No. 07CVH09-13121)
Rodney D. Zeune,	:	(REGULAR CALENDAR)
Defendant-Appellant.	:	

D E C I S I O N

Rendered on July 16, 2009

Weltman, Weinberg & Reis Co., L.P.A., and *Allen J. Reis*, for appellee.

James L. Dye, for appellant.

APPEAL from the Franklin County Court of Common Pleas

KLATT, J.

{¶1} Defendant-appellant, Rodney D. Zeune, appeals from a judgment of the Franklin County Court of Common Pleas granting a default judgment to plaintiff-appellee, The Huntington National Bank ("Huntington"). For the following reasons, we affirm.

{¶2} On September 28, 2007, Huntington filed suit against Zeune and eight corporate entities that Huntington alleged that Zeune either owned or controlled. Huntington asserted that one of these entities, Zeune Enterprises, LLC ("Zeune Enterprises"), tendered a \$50,000 check to another of Zeune's corporate entities,

American Petroleum, Inc. ("American Petroleum"). When American Petroleum cashed the check, Zeune Enterprises' account became overdrawn in the amount of \$47,122.42. According to Huntington, Zeune Enterprises failed to reimburse Huntington for the \$47,122.42, and Zeune began concealing Zeune Enterprises' assets to avoid making payment to Huntington. Based on these allegations, Huntington brought claims for conversion, unjust enrichment, and fraud against all nine defendants.

{¶3} Acting pro se, Zeune filed an answer on December 7, 2007. In contravention to Civ.R. 5(B) and (D), Zeune failed to attach a certificate of service to his answer. None of the other defendants answered the complaint.

{¶4} As none of the corporate entities filed an answer, Huntington moved for and received a default judgment against all eight entities. Zeune then filed a Civ.R. 60(B) motion seeking to vacate the default judgment, which the trial court denied. In the signature block of his Civ.R. 60(B) motion, Zeune listed an address different from the New Albany address contained in Zeune's answer and at which a process server had achieved service on Zeune. Recognizing that Zeune had changed his address from New Albany to Mount Vernon, the Franklin County Clerk of Courts ("clerk") included the new address in the record. However, Huntington apparently remained unaware of Zeune's new address because, as evidenced by the lack of a certificate of service, Zeune failed to serve Huntington with the Civ.R. 60(B) motion.

{¶5} On July 23, 2008, counsel for Huntington mailed a notice of deposition to Zeune at his New Albany address. The United States Postal Service returned the notice of deposition marked with a forwarding address for Zeune's Mount Vernon residence. Counsel for Huntington then mailed the notice of deposition to the Mount Vernon address.

{¶6} Zeune failed to appear at his scheduled deposition. Counsel for Huntington called the number for Zeune's cellular telephone and, when he did not respond, counsel called another telephone number he had for Zeune. Again, Zeune did not respond.

{¶7} In light of Zeune's failure to attend the deposition and subsequent non-responsiveness, counsel for Huntington moved for an order compelling discovery or, in the alternative, a default judgment. Zeune did not respond to that motion. While Huntington's motion was pending, the case came before the trial court for a previously-scheduled pre-trial conference. Zeune did not appear at the pre-trial conference.

{¶8} On October 1, 2008, the trial court issued a decision and entry granting Huntington a default judgment against Zeune. In relevant part, the trial court stated:

As no opposition to [Huntington's motion to compel discovery or, alternatively, for default judgment] was filed, and as Defendant Zeune failed to appear at the September 24 pre-trial conference, this Court can only find that Defendant Zeune's failure to appear at the properly noticed deposition was not substantially justified.

{¶9} The trial court issued a judgment entry rendering judgment in Huntington's favor and granting Huntington \$47,122.42 in damages on October 20, 2008. Zeune now appeals from that judgment, and he assigns the following errors:

[1.] THE TRIAL COURT MAY IMPOSE THE EXTREME SANCTION OF DEFAULT JUDGMENT UNDER CIVIL R. 37(D) ONLY UPON A FINDING OF BAD FAITH OR WILLFULNESS.

[2.] PRIOR TO ORDERING THE SANCTION OF DEFAULT JUDGMENT, THE TRIAL COURT MUST PROVIDE NOTICE OF ITS INTENTION TO DO SO.

[3.] THE TRIAL COURT ERRED TO THE DETRIMENT OF APPELLANT IN IMPOSING THE HARSHTEST POSSIBLE SANCTION, (DEFAULT) AS A RESULT OF APPELLANT'S FAILURE TO APPEAR AT A SINGLE DEPOSITION.

{¶10} Before we consider the merits of Zeune's assignments of error, we must address the jurisdictional argument that Huntington raises. Huntington argues that Zeune failed to file his appeal within the 30-day window provided by App.R. 4(A), and thus, this court lacks jurisdiction over Zeune's appeal. We disagree.

{¶11} Failure to comply with App.R. 4(A) is a jurisdictional defect and is fatal to any appeal. *In re H.F.*, 120 Ohio St.3d 499, 2008-Ohio-6810, ¶17; *Bond v. Village of Canal Winchester*, 10th Dist. No. 07AP-556, 2008-Ohio-945, ¶11. According to App.R. 4(A):

A party shall file the notice of appeal required by App.R. 3 within thirty days of the later of entry of the judgment or order appealed or, in a civil case, service of the notice of judgment and its entry if service is not made on the party within the three day period in Rule 58(B) of the Ohio Rules of Civil Procedure.

Thus, in civil cases, if service of the notice of judgment and its entry occurs within three days, then the appeal period begins on the date of the judgment. *State ex rel. Sautter v. Grey*, 117 Ohio St.3d 465, 2008-Ohio-1444, ¶16, citing *In re Anderson*, 92 Ohio St.3d 63, 67, 2001-Ohio-131. However, if the clerk fails to timely serve the parties, then App.R. 4(A) tolls the time period for filing a notice of appeal until the clerk accomplishes service. *Id.*

{¶12} In the case at bar, the clerk never served the parties with the October 20, 2008 judgment as required in Civ.R. 58(B). Consequently, we conclude that App.R. 4(A) indefinitely tolled the 30-day period for filing a notice of appeal, making Zeune's appeal timely.

{¶13} Huntington, however, argues that Zeune's appeal time began to run on October 6, 2008, the date on which the clerk served the parties with the October 1, 2008 decision and entry and noted the service on the docket. Based upon Huntington's calculations, it contends that Zeune filed his notice of appeal over one week after the 30-day period elapsed. We find Huntington's argument unavailing because it wrongly assumes that the October 1, 2008 decision and entry constituted a final, appealable order.

{¶14} R.C. 2505.03(A) limits the jurisdiction of appellate courts to the review of final, appealable orders, judgments, or decrees. *State ex rel. Bd. of State Teachers Retirement Sys. of Ohio v. Davis*, 113 Ohio St.3d 410, 2007-Ohio-2205, ¶44. " 'A judgment that leaves issues unresolved and contemplates that further action must be taken is not a final appealable order.' " *Id.*, quoting *State ex rel. Keith v. McMonagle*, 103 Ohio St.3d 430, 2004-Ohio-5580, ¶4. Thus, a judgment that grants a default judgment as to liability only and leaves the issue of damages undetermined is not a final, appealable order. *Chitwood v. Zurich Am. Ins. Co.*, 10th Dist. No. 04AP-173, 2004-Ohio-6718, ¶9; *Lindsey v. Rumpke* (Nov. 16, 2000), 10th Dist. No. 00AP-426.

{¶15} Here, the trial court granted Huntington a default judgment in its October 1, 2008 decision and entry, but it did not set a damage amount. As the October 1, 2008 decision and entry left the issue of damages unresolved, it was not a final, appealable order. Consequently, Zeune could not appeal the grant of the default judgment until after the trial court issued its October 20, 2008 judgment, which was a final, appealable order because it included a damages award. Zeune filed a timely appeal from that judgment, and thus, we have jurisdiction over his appeal.

{¶16} By Zeune's first assignment of error, he argues that the trial court erred in granting a default judgment without first finding that his failure to attend his deposition was the result of willfulness or bad faith. We disagree.

{¶17} A trial court has broad discretion when ruling upon a motion for sanctions under Civ.R. 37(D). *State ex rel. Citizens for Open, Responsive & Accountable Govt. v. Register*, 116 Ohio St.3d 88, 2007-Ohio-5542, ¶18. Absent an abuse of that discretion, an appellate court will not reverse the imposition of a discovery sanction. *Nakoff v. Fairview Gen. Hosp.*, 75 Ohio St.3d 254, 1996-Ohio-159, syllabus. "The term 'abuse of discretion' connotes more than an error of law or of judgment; it implies that the court's attitude is unreasonable, arbitrary or unconscionable." *Blakemore v. Blakemore* (1983), 5 Ohio St.3d 217, 219.

{¶18} Pursuant to Civ.R. 37(D), if a party fails to appear before the officer who is to take his deposition after the party is served with proper notice of the deposition, a trial court may "make such orders in regard to the failure as are just, and among others it may take any action authorized under subsections (a), (b), and (c) of subdivision (B)(2) of [Civ.R. 37]." Civ.R. 37(B)(2)(c) permits a trial court to "render[] a judgment by default against the disobedient party." Thus, Civ.R. 37(D) invests the trial court with the power to enter a default judgment against a party for failure to attend his or her deposition. However, because default judgment is such a harsh sanction, a trial court may only impose that sanction when a party's absence is due to willfulness or bad faith. *State ex rel. Dispatch Printing Co. v. Johnson*, 106 Ohio St.3d 160, 2005-Ohio-4384, ¶49, quoting *Toney v. Berkemer* (1983), 6 Ohio St.3d 455, syllabus; *Ohio Bar Liability Ins. Co. v. Silverman*, 10th Dist. No. 05AP-923, 2006-Ohio-3016, ¶15.

{¶19} Here, the trial court did not use the terms "willfulness" or "bad faith" when assessing Zeune's conduct; rather, it found that Zeune's absence from his deposition was "not substantially justified." A trial court, however, need not use any particular "magic words" when granting default judgment, as long as the record substantiates willful inaction or bad faith. *Silverman* at ¶15; *Malaco Constr., Inc. v. Jones* (Aug. 24, 1995), 10th Dist. No. 94AP-1466. Cf. *Tymachko v. Ohio Dept. of Mental Health*, 10th Dist. No. 04AP-1285, 2005-Ohio-3454, ¶14 (applying the same rule when reviewing whether the trial court properly dismissed a case for discovery violations); *LJEL, Inc. v. Overland Transp. Sys., Inc.* (Mar. 28, 1996), 10th Dist. No. 95AP-1250 (same). We, therefore, must examine the record for evidence of willfulness or bad faith.

{¶20} Our review of the record reveals that Zeune failed to appear at his deposition and, despite multiple opportunities, he never offered any explanation excusing his absence. Zeune did not respond to the telephone calls placed by Huntington's counsel on the day of the deposition, and he did not otherwise contact Huntington's counsel to explain his nonattendance or reschedule. Zeune also failed to file any response to Huntington's motion to compel discovery or grant a default judgment. Finally, Zeune did not attend the pre-trial conference, thus missing his last opportunity to justify his absence.

{¶21} Failure to comply with a discovery request coupled with a subsequent lack of explanation for that noncompliance indicates willfulness and bad faith. *Kentucky-Indiana Lumber v. Grayland Pelfrey/Remodeling Concepts*, 2d Dist. No. 2006 CA 100, 2007-Ohio-6137, ¶14; *Flatt v. Atwood Manor Nursing Ctr.*, 3d Dist. No. 3-06-26, 2007-Ohio-5387, ¶30; *Fester v. Price* (Dec. 26, 1997), 11th Dist. No. 96-G-2033; *Russo v.*

Goodyear Tire & Rubber Co. (1987), 36 Ohio App.3d 175, 178-79; *Bohl v. Vigh* (Jan. 30, 1995), 12th Dist. No. CA94-06-046; *Shiflett v. Filbrun* (Aug. 12, 1993), 10th Dist. No. 93AP-263. Applying that rule here, we conclude that Zeune's absence from his deposition and his utter failure to explain that absence demonstrates willfulness and bad faith. Accordingly, we conclude that the trial court did not abuse its discretion in entering a default judgment against Zeune, and we overrule his first assignment of error.

{¶22} By Zeune's second assignment of error, he argues that the trial court erred in entering a default judgment without first providing him notice of its intent to do so. Because Zeune received sufficient notice, we disagree.

{¶23} In *Ohio Furniture Co. v. Mindala* (1986), 22 Ohio St.3d 99, 101, the Supreme Court of Ohio held that a non-complying party must receive notice of the possibility of a dismissal before a trial court imposes it as a discovery sanction under Civ.R. 37(B)(2)(c). As later stated by that court, "[t]he 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 case should not be dismissed with prejudice." *Hillabrand v. Drypers Corp.*, 87 Ohio St.3d 517, 518, 2000-Ohio-468, quoting *Logsdon v. Nichols* (1995), 72 Ohio St.3d 124, 128. Dismissal and default judgment are two different and distinct discovery sanctions. Civ.R. 37(B)(2)(c) (permitting a trial court to "dismiss[] the action or proceeding or any part thereof, or render[] a judgment by default against the disobedient party") (emphasis added). However, "[t]he granting of default judgment is an equally harsh remedy and requires the same due process guarantee of prior notice as dismissal." *Malaco Constr.*, *supra*. See also *Dayton Modulars, Inc. v. Dayton View Community Dev. Corp.*, 2d Dist. No. 20894, 2005-Ohio-6257, ¶9, quoting *Haddad v. English* (2001), 145 Ohio App.3d

598, 603 (" '[T]he granting of a default judgment requires the due process guarantee of prior notice,' including those entered for failure to comply with discovery orders."); *Fester*, supra ("[T]he granting of a default judgment is an equally harsh remedy that requires the same due process guarantee of prior notice."); *Bank One, Columbus, NA v. O'Brien* (Dec. 31, 1991), 10th Dist. No. 91AP-165, disagreed with on other grounds by *Howard v. Catholic Social Servs. of Cuyahoga Cty., Inc.*, 70 Ohio St.3d 141, 147, 1994-Ohio-219 ("Although Civ.R. 41 is not specifically applicable to default judgments, some form of notice is certainly required.").

{¶24} Because the notice requirement originated in the dismissal context, Ohio appellate courts have relied upon dismissal cases to determine whether appropriate notice occurred in default judgment cases. *Associated Business Invest. Corp. v. CTI Communications Inc.*, 2d Dist. No. 19211, 2002-Ohio-6385, ¶23; *Haddad*, 604-05; *Fester*. In the dismissal context, a party receives sufficient notice once it is informed that dismissal is a possibility, and it has a reasonable opportunity to defend against dismissal. *Quonset Hut, Inc. v. Ford Motor Co.* (1997), 80 Ohio St.3d 46, 49. Therefore, if a party is served with a motion to dismiss and has an opportunity to file a responsive motion, then a trial court may grant a dismissal. *Id.* at 48-49; *Pearson v. Mansfield Correctional Inst.*, 10th Dist. No. 02AP-96, 2002-Ohio-5011, ¶19-23. Applying this rule in the default judgment context, the appellate court in *Fester* held that when the plaintiff moved for default judgment as a sanction for discovery violations and the defendants had the opportunity to respond but did not, the defendants had received the required notice.

{¶25} In the case at bar, Huntington moved to compel discovery or, alternatively, for a default judgment. Because Huntington specifically sought the sanction of default

judgment, Zeune was on notice that the trial court might enter such a sanction against him. Additionally, Zeune had the opportunity to respond to Huntington's motion, but he did not avail himself of that opportunity. Accordingly, we conclude that Zeune was on notice that the trial court could grant a default judgment against him as a discovery sanction, and thus, we overrule Zeune's second assignment of error.

{¶26} By Zeune's third assignment of error, he argues that the trial court should have imposed a less severe discovery sanction than default judgment. We disagree.

{¶27} A trial court has broad discretion in choosing the particular sanction to impose for a discovery violation, and an appellate court reviews the appropriateness of that decision only for an abuse of discretion. *Woodruff v. Barakat*, 10th Dist. No. 02AP-351, 2002-Ohio-5616, ¶15; *Settle v. Thurber Manor Apts.* (May 11, 1999), 10th Dist. No. 98AP-608; *Brunner & Brunner v. Abboud* (Feb. 27, 1996), 10th Dist. No. 95AP-933. In determining a suitable sanction, a trial court should consider: (1) the history of the case; (2) all the facts and circumstances surrounding the noncompliance; (3) what efforts, if any, the faulting party made to comply; (4) the ability or inability of the faulting party to comply; and (5) any other relevant factors. *Marion v. Brandes* (Aug. 1, 2000), 10th Dist. No. 99AP-1153, citing *Billman v. Hirth* (1996), 115 Ohio App.3d 615, 619. Taking into account the background of the noncompliance, the trial court must balance the severity of the violation against the degree of possible sanctions and select the sanction that is most appropriate. *Woodruff* at ¶16, quoting *Settle*.

{¶28} In the case at bar, the record reveals that Zeune engaged in a consistent pattern of inaction and noncompliance with the Civil Rules of Procedure and the Local Rules of the Franklin County Court of Common Pleas, General Division. Zeune failed to

attach a certificate of service to either his answer or his Civ.R. 60(B) motion—the only two documents he filed prior to the entry of default judgment. Thus, presumably, Zeune failed to serve those filings on opposing counsel. Zeune also failed to file either an initial or supplemental disclosure of witnesses. After his nonattendance at his deposition, Zeune failed to contact counsel for Huntington to explain his absence or reschedule his deposition. Zeune then failed to respond to Huntington's motion to compel discovery or grant a default judgment, and he did not attend the previously-scheduled pre-trial conference. Finally, Zeune offered the trial court no information that would excuse his failure to appear at his deposition.

{¶29} In light of Zeune's repeated inaction and noncompliance, we conclude that the trial court did not abuse its discretion in granting a default judgment against him for his failure to attend his deposition. Accordingly, we overrule Zeune's third assignment of error.

{¶30} For the foregoing reasons, we overrule Zeune's first, second, and third assignments of error, and we affirm the judgment of the Franklin County Court of Common Pleas.

Judgment affirmed.

TYACK, J., concurs.

CONNOR, J., concurs in part and dissents in part.

CONNOR, J. concurs in part and dissents in part.

{¶31} Although I concur with the majority's analysis of the jurisdictional issue, I am unable to join the majority's disposition of appellant's assignments of error. I therefore respectfully concur in part and dissent in part.

{¶32} I believe this case perfectly illustrates the maxim, "bad cases make bad law." In the cases cited by the majority, the trial courts undertook a consistent and active involvement in the underlying discovery disputes. *State ex rel. Citizens for Open, Responsive & Accountable Govt. v. Register*, 116 Ohio St.3d 88, 2007-Ohio-5542, ¶11; *Nakoff v. Fairview Gen. Hosp.*, 75 Ohio St.3d 254, 257; *Toney v. Berkemer* (1983), 6 Ohio St.3d 455, syllabus; *Ohio Bar Liab. Ins. Co. v. Silverman*, 10th Dist. No. 05AP-923, 2006-Ohio-3016, ¶6; *Malaco Const., Inc. v. Jones* (Aug. 24, 1995), 10th Dist. No. 94AP-1466; *Tymachko v. Ohio Dept. of Mental Health*, 10th Dist. No. 04AP-1285, 2005-Ohio-3454, ¶6; *LJEL, Inc. v. Overland Transp. Sys., Inc.* (Mar. 28, 1996), 10th Dist. No. 95AP-1250; *Kentucky-Indiana Lumber v. Grayland Pelfrey/Remodeling Concepts*, 2d Dist. No. 2006 CA 100, 2007-Ohio-6137, ¶4; *Flatt v. Atwood Manor Nursing Ctr.*, 3d Dist. No. 3-06-26, 2007-Ohio-5387, ¶3; *Fester v. Price* (Dec. 26, 1997), 11th Dist. No. 96-G-2033; *Russo v. Goodyear Tire & Rubber Co.* (1987), 36 Ohio App.3d 175, 176-77; *Bohl v. Vigh* (Jan. 30, 1995), 12th Dist. No. CA94-06-046; *Shiflett v. Filbrun* (Aug. 12, 1993), 10th Dist. No. 93AP-263; *Dayton Modulares, Inc. v. Dayton View Community Dev. Corp.*, 2d Dist. No. 20894, 2005-Ohio-6257, ¶1; *Haddad v. English* (2001), 145 Ohio App.3d 598, 601-02; *Bank One, Columbus, NA v. O'Brien* (Dec. 31, 1991), 10th Dist. No. 91AP-165; *Associated Business Invest. Corp. v. CTI Communications Inc.*, 2d Dist. No. CA 19211, 2002-Ohio-6385, ¶5-6; *Quonset Hut, Inc. v. Ford Motor Co.* (1997), 80 Ohio St.3d 46, 49.

{¶33} The trial courts in these cases provided discovery orders, provided warnings of sanctions for noncompliance, and/or conducted evidentiary hearings on the issues presented. In the instant matter, the trial court had no such involvement. Instead

it merely granted a default judgment because appellant failed to appear at a deposition, failed to respond to a discovery motion, and failed to attend a pre-trial conference.

{¶34} At multiple instances through its opinion, the majority seemingly scours the record and case law to find and explain potential support for the trial court's decision. However, I find the instant matter to be distinguishable from those cases cited by the majority.

{¶35} As for appellant's first and third assignments of error, it is well-settled that a trial court's discretion is not unfettered when imposing a discovery sanction. *Woodruff v. Barakat*, 10th Dist. No. 02AP-351, 2002-Ohio-5616, ¶16, citing *Settle v. Thurber Manor Apts.* (May 11, 1999), 10th Dist. No. 98AP-608; see also *Billman v. Hirth* (1996), 115 Ohio App.3d 615. When reviewing such decisions, an appellate court must determine whether the trial court "examined the right things and did not act arbitrarily." *Russo* at 179.

{¶36} When a discovery sanction prevents a resolution on the merits of a claim, the typical abuse of discretion standard is actually heightened. *Jones v. Hartranft* (1997), 78 Ohio St.3d 368, 371 (applying rule when reviewing whether the trial court properly dismissed a case with prejudice). Indeed, " '[j]udicial discretion must be carefully – and cautiously – exercised before [a reviewing court] will uphold an outright dismissal of a case on purely procedural grounds.' " *Quonset* at 48, quoting *DeHart v. Aetna Life Ins. Co.* (1982), 69 Ohio St.2d 189, 192.

{¶37} Generally, when imposing discovery sanctions, a " 'trial court must consider the posture of the case and what efforts, if any, preceded the noncompliance and then balance the severity of the violation against the degree of possible sanctions, selecting that sanction which is most appropriate.' " *Settle*, quoting *Russo* at 178.

{¶38} While the trial court in the instant matter did describe appellee's efforts preceding the noncompliance, the decision ultimately failed to articulate any other portion of the analysis. Instead, it merely provided:

As no opposition to [appellee's] motion was filed, and as [appellant] failed to appear at the September 24 pre-trial conference, this Court can only find that Defendant Zeune's failure to appear at the properly noticed deposition was not substantially justified.

Trial court's decision and entry, at 2. As a result, the trial court granted judgment by default. *Id.*

{¶39} Rather than balancing the violation against the range of sanctions, the trial court expressed its mistaken belief that it had no alternative but to grant a default judgment. Such was not the case. See Civ.R. 37. As a result, I believe the trial court's decision was arbitrary and constitutes an abuse of discretion. See *Russo* at 179. This is further supported by the "heightened" standard of review applicable to the default judgment rendered in this case. See *Jones* at 371. As a result, I believe the trial court committed reversible error.

{¶40} As additional support, the majority cites the correct rule of law requiring a determination of willfulness or bad faith before a default judgment may be granted as a discovery sanction. *Toney* at 458, citing *Societe Internationale v. Rogers* (1958), 357 U.S. 197, 212, 78 S.Ct. 1087. The majority then excuses the trial court's misstatement of law by indicating that a trial court need not include "magic words" like willfulness or bad faith. See *Silverman* at ¶15, citing *Malaco Constr.* See also *Toney* at syllabus. However, if such "magic words" are omitted, the record must nevertheless demonstrate willfulness or bad faith before a default judgment may be granted. *Id.*

{¶41} Based upon my 16 years of experience as a judge on the trial bench, I do not believe the record supports such a finding. According to the record, neither did the trial court. The trial court's misstatement of the law is quite telling: the trial court did not find that appellant's conduct amounted to willfulness or bad faith. As a result, I am unwilling to substitute my judgment for that of the trial court. Instead, I am merely willing to hold the trial court to its word. Therefore, the trial court committed reversible error in granting a default judgment.

{¶42} Again, in the cases cited by the majority, the trial courts were actively involved in the discovery disputes. Therefore, the circumstances are distinguishable.

{¶43} Further, I must express my concern about the practical implications of the majority's holding in this matter. The effect of the majority's holding is effectively that noncompliance with a discovery request and a subsequent lack of explanation could amount to willfulness and bad faith. Given the prevalence of discovery motions in most cases, the majority's holding may have dire consequences.

{¶44} My concern is heightened by the abuse of discretion standard typically applied to discovery decisions. *Toney* at 458, citing Civ.R. 37(A) and (B). When considering this standard of review, the majority's ruling may undermine the basic tenet that cases should be resolved upon the merits when possible. *Perotti v. Ferguson* (1983), 7 Ohio St.3d 1, 3. Additionally, I believe trial courts may struggle with the slippery slope that could result from the majority's opinion.

{¶45} Based upon the foregoing, I believe the trial court committed reversible error by granting a default judgment. I would therefore sustain appellant's first and third assignments of error and reverse the trial court's judgment on those grounds.

{¶46} As a result, there would be no need to analyze appellant's second assignment of error. However, I feel compelled to respectfully dissent from the majority's opinion in this regard as well.

{¶47} This portion of the majority's analysis regards the implied notice imputed by every discovery motion. According to the majority, discovery motions provide an opposing party with implied notice of the range of alternative sanctions sought therein. Under the circumstances of the instant appeal, I believe more is required.

{¶48} The majority cites three cases where courts have analyzed the notice requirements of default judgment cases. See *Fester*, *Haddad*, and *Associated Business*. These cases are all distinguishable from the instant matter.

{¶49} In *Fester*, the trial court was presented with an unopposed motion to compel discovery. *Id.* The trial court granted the motion and ordered the production of documents requested by the appellee. *Id.* Subsequently, the appellee filed a motion to show cause and for attorney fees. The appellants failed to respond, and the trial court conducted a hearing on the show cause motion. *Id.* After the hearing, the trial court granted the appellee's motion and "gave the parties fourteen days to suggest, or oppose, further sanctions." *Id.* Four days later, the appellee requested further sanctions, including a judgment by default under Civ.R. 37(B)(2)(c). The appellants failed to respond to this request for further sanctions. As a result, the trial court granted judgment. *Id.* Upon appeal, the Eleventh District Court of Appeals found no abuse of discretion and affirmed the trial court's judgment. *Id.*

{¶50} In *Haddad*, the trial court was presented with a series of discovery motions. *Id.* at 604. In the order granting these motions, the trial court expressly warned the

appellants of the potential sanction of a default judgment for any noncompliance. *Id.* When the appellants failed to comply, the trial court granted judgment. *Id.* at 605. Upon appeal, the Ninth District Court of Appeals found no abuse of discretion and affirmed the trial court's judgment. *Id.*

{¶51} In *Associated Business*, the trial court was presented with a discovery motion, which it granted. *Id.* at ¶4-5. The appellant failed to comply, which caused the trial court to issue a subsequent order. This subsequent order expressly warned of Civ.R. 37(B) sanctions. *Id.* at ¶5-6. It was then discovered that the appellant had transferred corporate assets from the appellant-defendant to a non-party. *Id.* at ¶8. As a result, the appellee filed a motion for default judgment on the basis that the liquidation of assets was undertaken to defeat the appellee's claims. *Id.* The trial court conducted a hearing on the motion and concluded that the appellant's failure to comply with discovery requests and orders substantially prejudiced the appellees. *Id.* at ¶9. Accordingly, the trial court granted judgment, which the Second District Court of Appeals affirmed. *Id.* at ¶13, 30.

{¶52} The discrepancies between these cases and the instant appeal are readily apparent. Importantly, the trial courts in these cases ordered discovery to be provided and expressly referenced sanctions for noncompliance. Additionally, the appellants in these cases all disobeyed the court's orders. Finally, two of the trial courts conducted evidentiary hearings on the issues.

{¶53} The majority cites *Quonset* as the precedent providing the authority to find implied notice. In *Quonset*, the Supreme Court of Ohio held:

[F]or purposes of Civ.R. 41(B)(1), 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. See *Logsdon [v. Nichols]* (1995), 72 Ohio St.3d 124], 129, 647 N.E.2d at 1365-1366 (Cook, J., concurring in part and dissenting in part) (the notice required by Civ.R. 41[B][1] need not be actual but may be implied when reasonable under the circumstances).

Id. at 50.

{¶54} Therefore, according to *Quonset*, the issue is whether notice may *reasonably* be implied under the circumstances of this case. Id. The circumstances of this case involve a pro se litigant who relocated during the pendency of this litigation. The record demonstrates that appellant did not receive a filing on at least one occasion. While this is attributable to appellant's failure to update his address, I believe the due process implications on the other side outweigh appellant's failure. Additionally, appellee's motion to compel sought appellant's attendance at his deposition and *alternatively* sought a default judgment. Under these circumstances, I would find that notice may not reasonably be implied in this case.

{¶55} Based upon the foregoing, I would sustain all or any of appellant's three assignments of error. Accordingly, I would reverse the trial court's granting of a default judgment.
