

STATE OF MICHIGAN
COURT OF APPEALS

JAMES L. SPYKERMAN and JACQUELINE R.
SPYKERMAN,

UNPUBLISHED
September 23, 2003

Plaintiffs-Appellees,

v

AMERICAN RESIDENTIAL, INC., d/b/a
AMERICAN RESIDENTIAL ROOFING, and
GEOFFREY V. KABASA,

No. 238247
Barry Circuit Court
LC No. 2000-000237-CK

Defendants-Appellants.

Before: Donofrio, P.J., and Fort Hood and Schuette, JJ.

PER CURIAM.

Defendants appeal as of right from a judgment in favor of plaintiffs. We affirm.

Defendants first allege that the trial court erred in granting entry of a default. We disagree. The trial court's decision to enter a default is reviewed for an abuse of discretion. *Barclay v Crown & Building Development, Inc*, 241 Mich App 639, 642; 617 NW2d 373 (2000). Although the law favors a determination of a claim based on the merits, the policy of this state is generally against setting aside defaults and default judgments that have been properly entered. *Alken-Ziegler, Inc v Waterbury Headers Corp*, 461 Mich 219, 229; 600 NW2d 638 (1999). "The Michigan Court Rules specifically authorize a default judgment as a sanction for certain discovery abuses. Such abuses include a failure to comply with a discovery order, MCR 2.313(B)(2)(c), failure to serve answers to interrogatories, MCR 2.313(D)(1)(b), and, under certain circumstances, failure to supplement responses to discovery requests, MCR 2.302(E)(2)." *Traxler v Ford Motor Co*, 227 Mich App 276, 280; 576 NW2d 398 (1998). The findings of a trial court are reviewed for clear error. *Id.* at 282. A finding is clearly erroneous when, although there is evidence to support it, the reviewing court is left with a definite and firm conviction that a mistake has been made. *Id.* When located for a deposition, the witness testified that defendants began to issue his paychecks in the names of other individuals to avoid a paper trail from which plaintiffs could ascertain his address. The witness also testified that he continued to work for defendants, while the individual defendant testified in deposition that his employment had ended months earlier. This information caused defendants' counsel to withdraw from the case, noting that he could not continue representation in a manner consistent with the Michigan Rules of Professional Conduct. Based on the evidence in the record below, we cannot conclude

that the trial court's factual findings were clearly erroneous, *Traxler, supra*, and the decision to enter a default was not an abuse of discretion. *Barclay, supra*.¹

Defendants next allege that the trial court erred in entering a judgment that provided for joint and several liability. Defendants did not object to the entry of the judgment on this basis below and may not now harbor error as an appellate parachute. *Marshall Lasser, PC v George*, 252 Mich App 104, 109; 651 NW2d 158 (2002). Defendants' contention that the failure to address joint and several liability was an oversight by all parties is not borne out by the record. Rather, defendants expressly raised the issue of joint liability with respect to the calculation of interest. It would be unfair to void the judgment, as requested by defendants, where defendants expressed satisfaction with the terms of the judgment and failed to request a division of liability by the jury in a special verdict form. *Id.*; see also MCR 2.514; *Dedes v Asch*, 233 Mich App 329, 334-335; 590 NW2d 605 (1998).

Lastly, defendants allege that the trial court erred in denying their motion for a directed verdict of the claim for exemplary damages by plaintiff Jacqueline Spykerman because she did not witness the damage by defendant Kabasa. Exemplary damage awards are properly considered in intentional tort claims if they compensate a plaintiff for humiliation, sense of outrage, and indignity resulting from injuries maliciously, willfully, and wantonly inflicted by a defendant. *B & B Investment v Gitler*, 229 Mich App 1, 9-10; 581 NW2d 17 (1998). The theory is that the reprehensible nature of the defendant's conduct intensifies the injury and justifies exemplary damages. *Id.* The trial court's denial of a motion for directed verdict is reviewed de novo. *Tobin v Providence Hospital*, 244 Mich App 626, 642; 624 NW2d 548 (2001). Courts review the motion by considering the evidence in the light most favorable to the nonmoving party, with all reasonable inferences in the nonmoving party's favor. *Id.* at 643. Applying this standard, we cannot conclude that the trial court erred in denying the motion for a directed verdict.

Affirmed.

/s/ Pat M. Donofrio
/s/ Karen M. Fort Hood
/s/ Bill Schuette

¹ Defendants also assert that they were entitled to an evidentiary hearing and that plaintiffs were aware of the witness' location as evidenced by the billing records in support of attorney fees. These claims were not raised, addressed, and decided by the trial court, and therefore, are not preserved for appellate review. *Miller v Inglis*, 223 Mich App 159, 168; 567 NW2d 253 (1997).