STATE OF MICHIGAN
IN THE SUPREME COURT
(ON APPEAL FROM THE MICHIGAN COURT OF APPEALS)

LACY HARTER and MIKE
McCLELLAND as Co-Personal Representatives
of the Estate of KEGAN McCLELLAND, Deceased,
and LACY HARTER, Individually, and
MIKE McCLELLAND, Individually,

Plaintiffs-Appellees,

Supreme Court Docket No. 126255
Court of Appeals
No. 244689

v

GRAND AERIE FRATERNAL ORDER OF EAGLES,
Defendant-Appellant,

Livingston Circuit Court
No. 00-017892-NO

and

HOWELL AERIE #3607 FRATERNAL ORDER OF EAGLES,

Defendant-Appellee,

and

MICHIGAN STATE AERIE FRATERNAL ORDER OF EAGLES,
HARRIS SPECTIC CLEANING AND ALWAYS CLEAN
PORTABLE TOILETS, INC., DALE HARRIS, Individually, and
AMERICAN CONCRETE PRODUCTS, INC., Individually,

Defendants, Not Participating.

VANDEVEER GARZIA P.C.

AMICUS CURIAE BRIEF OF THE MICHIGAN DEFENSE TRIAL COUNSEL

PROOF OF SERVICE

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STATEMENT OF INTEREST

Amicus Curiae, MICHIGAN DEFENSE TRIAL COUNSEL ("MDTC"), is a non-profit corporation whose purpose is to advance the views of civil defense attorneys and their clients.

The issues presented by the parties to this appeal affect all civil defense attorneys, particularly those who provide a defense pursuant to an insurance policy.

The brief in support of Defendant-Appellant's application for leave to appeal presents roughly six main arguments, including the claim that the trial court's decision to default the defendant as a sanction for a discovery violation was an abuse of discretion. It is this consideration that compelled MDTC to file its Motion for Leave to Participate as Amicus Curiae in Support of Defendant-Appellant's Application for Leave to Appeal.

Accordingly, MDTC's brief will focus on this issue of whether the trial court abused its discretion in defaulting the defendant for an inadvertent and isolated mistake during discovery which led the defendant to under-represent its insurance commitments, and where the trial court failed to first impose, let alone even consider, lesser sanctions that would be more just under the circumstances.

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STATEMENT OF APPELLATE JURISDICTION

On April 22, 2004, the Court of Appeals issued an unpublished per curiam opinion in this case. *Harter v Grand Aerie Fraternal Order of Eagles*, unpublished opinion per curiam of the Court of Appeals, docket no. 244689, released April 22, 2004. On June 1, 2004, Defendant-Appellant Grand Aerie filed an application for leave to appeal with this Court.

This amicus brief, filed on behalf of the Michigan Defense Trial Counsel, asks that this Court grant the application for leave to appeal that has been filed by Defendant-Appellant Grand Aerie.

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STATEMENT OF QUESTIONS PRESENTED

I. DID THE TRIAL COURT ABUSE ITS DISCRETION BY IMPOSING THE MOST SEVERE SANCTION FOR A DISCOVERY VIOLATION WHERE

A. THE VIOLATION WAS ACCIDENTAL,

B. THE VIOLATION WAS ISOLATED, AND

C. THE TRIAL COURT FAILED TO IMPOSE OR EVEN CONSIDER LESS DRASTIC SANCTIONS THAT WERE MORE APPROPRIATE?

Defendant-Appellant Answer:	Yes.
Plaintiffs-Appellees Answers:	No.
Amicus Curiae MDTC Answers:	Yes.

II. SHOULD THIS COURT GRANT LEAVE WHERE

A. THE COURT OF APPEALS FAILED TO UNDERTAKE ANY MEANINGFUL APPELLATE REVIEW OF THE TRIAL COURT'S DECISION TO DEFAULT THE DEFENDANT,

B. THIS ERROR INVOKES THE NECESSITY FOR THIS COURT TO EXERCISE ITS ERROR CORRECTING POWER, AND

C. THE COURT OF APPEALS DECISION WOULD STAND AS EVIDENCE THAT A TRIAL COURT'S EXERCISE OF DISCRETION WILL NOT BE SCRUTINIZED ON APPEAL NO MATTER HOW DISPROPORTIONATE THE SANCTION IS AS TO THE MISCONDUCT?

Defendant-Appellant Answer:	Yes.
Plaintiffs-Appellees Answers:	No.
Amicus Curiae MDTC Answers:	Yes.

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STATEMENT OF FACTS

Amicus curiae, MDTC, adopts the statement of facts and proceedings set forth in the brief of Defendant-Appellant Grand Aerie in support of its application for leave to appeal. Further facts necessary to highlight the arguments presented will be provided where necessary.

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ARGUMENT

I. THE SANCTION OF DEFAULT MUST BE USED CAUTIOUSLY

Standard of Review

Discovery sanctions are reviewed for an abuse of discretion. *Traxler v Ford Motor Co*, 227 Mich App 276, 286; 576 NW2d 398 (1998).

The Court Rules authorize a trial court to fashion an appropriate sanction when a litigant violates a discovery order. The sanctions of a default against a defendant (or dismissal of the complaint against a plaintiff) are the harshest and most severe of all sanctions available for the violation of a discovery order. MCR 2.313(B)(2) gives the trial court a wide range of sanctions it can impose depending on the severity of the misconduct. One such sanction is a default, but the court rule also authorizes the court to take less drastic measures.

In reviewing discovery sanctions, Michigan appellate courts have shaped numerous rules to ensure that the punishment meets the severity of the misconduct. To facilitate a meaningful review, the trial court is required to put its reasons on the record for picking one sanction over another.

When determining what sanction, if any, to impose on a party that has violated a discovery order, the trial court must first consider a list of at least 8 non-exhaustive factors.

> (1) whether the violation was willful or accidental, (2) the party's history of refusing to comply with discovery, (3) the prejudice to the other party, (4) could the other party have avoided the prejudice suffered, (5) was there a history of deliberate delay, (6) the degree of compliance with other provisions of the court's order, (7) whether the party attempted to promptly cure the defect, and (8) whether a lesser sanction would better serve the interests of justice. [*Dean v Tucker*, 182 Mich App 27, 32-33; 451 NW2d 571 (1990).]

Simply because a party is found to have violated a discovery order does not mean that concepts such as justice and due process are deemed irrelevant when fashioning an appropriate sanction for a discovery violation. "The court rule does not give the trial court unlimited discretion.

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Only those sanctions found to be just are permitted." *Houston v Southwest Det' Hosp'*, 166 Mich App 623, 631; 420 NW2d 835 (1987) (emphasis added).

Because justice is still a relevant consideration, even when dealing with a party that has violated a discovery order, the trial court must carefully consider all of the factors and circumstances involved in order to impose a sanction that meets the severity of the offense. This discretion to punish misconduct has its limits. "[W]hile rules of practice give discretion to the process of administering justice and must be followed, their application should not be a fetish to the extent that justice in a particular case is not done." *Dean, supra,* 182 Mich App 32.

A trial court must exercise restraint before jumping to the conclusion that a default or dismissal is justified because the ultimate sanctions are appropriate only in extreme cases of misconduct.

Case law has made clear that, although the imposition of a sanction for a discovery violation is a discretionary matter, a trial court must examine other available sanctions before imposing the ultimate sanction of default. Importantly, in order to provide for meaningful appellate review, the trial court must then also explain its reasons on the record for choosing a particular sanction over others.

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

Without a record reflecting the trial court's decision-making process, an appellate court has no way to review the trial court's choice of sanction. This process outlining the trial court's deliberations is absolutely necessary because "[a]n appellate court cannot review a decision for an

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abuse of discretion unless it knows how and why the discretionary decision was made." *Houston, supra,* 166 Mich App 631.

On appeal from the Livingston Circuit Court, the Court of Appeals failed to fulfill its duty to apply a meaningful level of scrutiny to the trial court's choice of sanction. Even under the deferential abuse of discretion standard, the Court of Appeals did not perform its crucial role of serving as a check on a trial court's discretion to punish a litigant.

Certainly, the trial court is in the best position to fashion a sanction given its familiarity with the parties, the facts, and the circumstances surrounding the discovery violation. But the Court of Appeals is absolutely vital for ensuring that a trial judge does not go too far in punishing a litigant.

Other cases from the Court of Appeals, when the ultimate sanction of default was deemed too severe, show a common theme. The lodestar factor in those cases where a default was ruled too harsh a sanction was the fact that the party guilty of a discovery violation committed the misconduct unwittingly. In fact, it is an abuse of discretion to default a party where the evidence of willfulness is ambiguous at best. *Daugherty v Michigan (After Remand)*, 163 Mich App 697, 702; 415 NW2d 279 (1987).

Because a default is the most extreme sanction available to a trial court armed with numerous punishment options, a default can be justified only when the misconduct was most extreme. Quite simply, the severity of the punishment must correspond to the severity of the misconduct.

A. Only Willful, Repeated Discovery Abuses Relating To Ultimate Issues Of Liability Are Sufficiently Severe To Warrant A Default

Even though discovery sanctions are reviewed under a discretionary standard on a case by case basis, certain trends are evident from a cursory review of appellate decisions.

On the one hand, there are cases where a default was entered due to a party's discovery abuses but the default was reversed on appeal under the abuse of discretion standard. In these

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cases, the Courts characterized the noncompliance with discovery orders as "negligent," "accidental," "involuntary" or an "inadvertent mistake."

On the other hand, there are cases where a party was defaulted for violating a discovery order and the default was affirmed on appeal. In these cases, the following phrases were used to describe the discovery violations: "protracted," "willful," "deliberate noncompliance," "history of recalcitrance," "absolutely no cooperation," "flagrant and wanton refusal to facilitate discovery," and "flagrant disobedience of the court's orders."

In this case, the defendant's misconduct was inadvertent, negligent at worst, and isolated. And the discovery that was not had bore absolutely no relationship to a single issue for trial. The discovery that was mistakenly not revealed was the existence of insurance, which may bear upon settlement negotiations, but had no relevance to the issue of the Grand Aerie's legal liability for the drowning.

Clearly, the fact that trial courts are given discretion when fashioning sanctions for a party's violation of a discovery order indicates that courts must decide each case according to its own peculiar facts. But a review of these cases reveals the following theme: in each case, except this one, where the sanction of dismissal was affirmed by the Court of Appeals, the offending party **willfully** engaged in the **repeated** practice of frustrating the discovery of evidence that touched upon issues of **liability**. When these factors were absent, the sanction of dismissal or default was reversed on the ground that it was too severe a sanction for the misconduct complained of.

This Court must grant leave because the failure to do so will arm litigants with an example to present trial courts as proof that their discretion is unlimited and to rest assured that a decision to default a party will not be reversed on appeal no matter how tenuous the theory of liability against the defaulted party and no matter the severity of the discovery misconduct because the abuse of discretion standard of review lacks teeth. This, in fact, was one argument made by plaintiffs' trial

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counsel. "If I did this, if Jeff [sic] Fieger did this and a Court entered a default after this abuse, not an appellate court in this state would overturn this." (11/6/01 Tr, p 12.)

While the defendant in this case was not angelic, it was not evil either. Justifying a trial court's decision to slap an $8 million plus judgment on a party who bears no responsibility for the loss for what amounts to an inadvertent mistake concerning a matter peripheral to liability is not just and does not comport with due process concepts.

It is necessary for this Court to grant the application for leave to appeal for two primary reasons. One, if the Court of Appeals' erroneous decision was due to a misunderstanding of the appropriate standard of review for deciding these cases, a clear pronouncement on the limits of a trial court's discretion is necessary. Two, and related to the first point, this Court must exercise its error correcting power to undo the most severe sanction for the inadvertent misconduct of a party who bears no legal responsibility in this case. Correcting the error committed in this case will go a long way in delineating the boundaries of a trial court's discretion.

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II. A DEFAULT IS THE MOST SERIOUS SANCTION; IT MUST THEREFORE BE USED ONLY TO PUNISH THE MOST SERIOUS DISCOVERY VIOLATIONS

The impropriety of the Court of Appeals' decision in this case becomes clear upon an examination of other cases where the Court addressed the propriety of a sanction imposed for violation of a discovery order. The present case stands alone among years of consistent case law. The sanction of default was reversed as too severe on numerous occasions even where the misconduct committed by the sanctioned party was much more egregious than that committed by the Grand Aerie.

A. A Default Is Appropriate Only After The Trial Court Determines That A Less Drastic Sanction Will Not Work

In *Houston, supra,* the trial court imposed the most severe sanction by dismissing the plaintiff's medical malpractice complaint due to the plaintiff's attorney's admitted negligence in

failing to comply with the court's discovery order. Throughout discovery, the parties had a difficult time conducting the depositions of the plaintiff's experts. Haggling over deposition dates continued for two and a half years after the initial complaint.

Ultimately, the defendant filed a motion seeking to compel the depositions. The plaintiff's primary attorney did not attend this hearing; instead, he sent a young associate to handle the motion. The trial court issued an order requiring the plaintiff's expert depositions to be completed within 75 days. *Houston, supra*, 166 Mich App 625-626.

The young associate who attended this hearing failed to alert plaintiff's primary attorney about the 75 day cut-off date for expert depositions. Unaware of the 75 day deadline, the plaintiff violated the court's discovery order. The trial court thereafter granted the defendant's motion to dismiss the case as a sanction for plaintiff's failure to permit discovery. *Houston, supra,* 166 Mich App 626-627.

No doubt, the conduct of the plaintiff's attorney was negligent. The 75 day order was clear and could have been easily followed but for the negligence of the plaintiff's attorney. But the Court of Appeals reversed finding that the trial court erred in imposing the severest of sanctions because the violation of the court order was not willful. The Court noted that dismissal is unwarranted when the violation is "accidental or involuntary." *Houston, supra,* 166 Mich App 628. A reversal was equally compelled by the fact that the trial court rushed to the grant of a dismissal before considering the range of less severe sanctions it could have imposed.

> With all of the above options open to the court, either singly or in combinations of more than one, we believe that it is proper to impose the drastic sanction of dismissal only after first having carefully evaluated all of the options on the record and concluding which option is just and proper within the context of the particular case. [*Houston, supra,* 166 Mich App 629-630.]

The fact that the trial court failed to consider lesser sanctions (such as striking the expert witness list, prohibiting the plaintiff from introducing particular evidence, staying proceedings until

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the order was obeyed, or ordering the plaintiff to pay costs and attorney fees the defendant incurred as a result of the failure to meet the deposition deadline) was evidence that the trial court abused its discretion.

Quite simply, when a trial court does not weigh and consider its options in light of the severity and extent of the misconduct in the case before it, the trial court does not actually exercise its discretion. "Discretion" is not a free choice, but a reasoned selection of one option over another where no particular course of action is mandated.

In the present case, the trial court did not elaborate, propose, or even mention any sanction other than a default. When a motion for default was put forward, the trial court did not consider any other option. Defense counsel suggested other less severe sanctions, but the trial court did not address them.

Nowhere in the transcripts does the trial court offer its reason for imposing the most severe sanction over some other lesser sanction that certainly would have been more appropriate in this case given the unintentional and isolated violation of a discovery order. After declaring that a discovery order had been violated, the trial court stated: "I'm not going to let this jury sit back twiddling their thumbs all day again all day today. I am entering, I'm striking the answer of the Grand Aerie. I'm entering their default." (11/7/01 Tr, p 52.) No other potential sanction was mentioned.

Clearly, before a default is appropriate, the trial court must, at a minimum, consider sanctions less than default. It is an abuse of discretion to fail to do so.

B. Due Process Requires A Substantiated Finding Of Willful Misconduct Before A Party Can Be Defaulted

In another case, the Court of Appeals reversed a default sanction on due process grounds because the trial court failed to adequately substantiate a finding that the misconduct was willful even though the guilty party engaged in numerous instances of misconduct during the discovery

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process. *Traxler, supra.* The default was reversed even though this discovery misconduct showed a purposeful design to withhold evidence directly related to the ultimate issue of liability. The plaintiffs in *Traxler* filed a products liability action against the defendants claiming that the design and manufacture of their car seats were defective. Thus, the plaintiffs' discovery requests focused on the car seat's design and manufacture process. Needless to say, this information was absolutely vital to the plaintiffs' case and was within the exclusive control of the defendants.

The defendants lodged groundless objections to nearly every interrogatory the plaintiffs submitted illustrating a plan to frustrate the plaintiffs' discovery attempts. The plaintiffs were forced to file numerous motions to compel the release of the requested and discoverable information. "Discovery took place over more than two years and was marked by Ford's numerous objections and by plaintiffs' repeated motions to compel." *Traxler, supra*, 227 Mich App 278. The trial court found that the defendants "had concealed very significant documents and information, and, worse, had blatantly lied about those documents . . . ." *Id.* at 279.

Despite a record replete with willful and deliberate attempts to frustrate the plaintiffs' discovery requests, the Court of Appeals reversed finding that a default was not justified even under those circumstances. The Court noted that "'the sanction of default judgment should be employed only when there has been a flagrant and wanton refusal to facilitate discovery and not when failure to comply with a discovery request is accidental or involuntary.'" *Traxler, supra,* 227 Mich App 286 (citation omitted).

The trial court failed to adequately justify its finding that the defendants willfully refused to comply with a discovery order. The defendants claimed that their conduct was not intentional. The fact that the trial court failed to substantiate its finding of willful misconduct necessitated the reversal of default on due process grounds. *Traxler, supra,* 227 Mich App 288.

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The trial court engaged in a lengthy analysis of what sanction to impose after giving full consideration to the relevant factors for making its decision. Yet, despite the severity and repetitive nature of the defendants' discovery abuses, the default sanction was nonetheless reversed.

This Court must grant leave in this case because neither the trial court nor the Court of Appeals substantiated a finding that the Grand Aerie chose to intentionally violate a discovery order. The trial court offered an explanation of what discovery orders were allegedly violated, but failed to determine whether these violations were willful. Defense counsel repeatedly noted that the failure to timely reveal the existence of excess insurance was inadvertent.

> [T]he key element that this Court has got to address is whether there's been any bad faith dealing on either my part or on the part of my clients.
> And I submit this record in this case is clear that there has not been one iota of any bad faith in terms of any willful violation of Court orders or bad faith conduct by my clients or anyone else involved in this case. [11/7/01 Tr, p 44.]

The trial court never addressed this argument before imposing a default, probably because it could not; there was absolutely no evidence of bad faith or an intentional desire to under-represent the Grand Aerie's insurance commitments.

In *Dean, supra,* the Court reversed the sanction which resulted in a dismissal of the plaintiff's legal malpractice case where the misconduct was an "inadvertent mistake." *Dean, supra,* 182 Mich App 34. The unintentional error was calendaring the wrong due date for the parties to file their witness lists. The trial court thereafter refused to allow the plaintiff to extend the witness list deadline and also disallowed plaintiff from presenting witnesses. Unable to substantiate her claim with testimony, the trial court dismissed the plaintiff's case.

The Court of Appeals reversed finding that "the sanction of barring the testimony of the expert witness, with the necessary result of summary disposition against plaintiff, was inappropriate in the context of this case." *Dean, supra,* 182 Mich App 35. The Court also found that dismissal was not warranted because the plaintiff's attorney attempted to correct the mistake as soon as it was

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discovered. Based on these two factors, the Court ruled that the imposition of costs and attorney fees incurred as a result of the failure to meet the discovery order would have been more appropriate given the severity of the offense.

In the present case, likewise, the failure to reveal the excess insurance policy was an inadvertent mistake and as soon as the mistake was realized, everything was done to correct the mistake.

In *Thorne, supra,* the Court reversed the trial court's dismissal of the plaintiff's claims for a discovery violation where the violation was not willful and where the violation was an isolated incident. The plaintiff failed to provide the defendants a witness list as required by the trial court's scheduling order. The Court ruled that this violation did not warrant a dismissal of their complaint. "The record does not disclose a history of recalcitrance or deliberate noncompliance with discovery orders . . . . there is no indication in the record that plaintiffs willfully disregarded the order." *Id.* at 633-634. Absent a protracted history of intentional discovery violations, the trial court was reversed because the ultimate sanction of dismissal was "inconsistent with the various discretionary discovery sanction options available to it." *Id.* at 635.

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C. Absent A Willful Violation Of A Discovery Order, The Sanction Of Default Is An Abuse Of Discretion

Willfulness is the key factor. *See Middleton v Margulis*, 162 Mich App 218, 223; 412 NW2d 268 (1987); *Edge v Ramos*, 160 Mich App 231, 234; 407 NW2d 625 (1987); *MacArthur v Farm Bur' Ins'*, 403 Mich 474, 477; 270 NW2d 101 (1978). In no case was a default or dismissal upheld where the misconduct was inadvertent. This is particularly true where the evidence that was not revealed, i.e., proof of excess insurance, was peripheral to the issues to be decided at trial.

Defense counsel raised this issue while the trial court was considering the plaintiffs' motion for default. The trial court was alerted to the fact that for a default to be appropriate, there must be a showing that the failure to follow the discovery was by design. The trial court, however, never

addressed this argument. No ruling was made concerning the willful or involuntary nature of the offense.

This string of case law illustrates a true level of consistency and concern for proportionality when doling out sanctions. Notwithstanding the discretionary nature of these decisions, the Court of Appeals has never hesitated from reversing a sanction that it deemed too harsh. Why the Court strayed from its desire for consistency in this case is unknown.

III. A Default Is Rightly Affirmed Only Where The Record Establishes Repeated, Intentional Violations Of A Discovery Order And No Subsequent Attempt To Remedy The Violation

The above cases, where the dismissal or default was reversed, must be compared to those instances where the entry of default was affirmed on appeal. In these cases where the ultimate sanction was affirmed, the guilty party engaged in a deliberate scheme to avoid complying with discovery orders. In each of these cases where a default was appropriate, the refusal to violate a court order was willful, repeated, and no attempt was made to correct any misleading information that may have been submitted to the trial court.

A. A Default Is Warranted Only When Less Drastic Measures Do Not Work

For example, in *Draggoo v Draggoo*, 223 Mich App 415; 566 NW2d 642 (1997), the Court of Appeals affirmed the entry of a default judgment of divorce against the defendant and the division of the marital estate. To justify this harsh sanction, though, the Court noted that the defendant engaged in a repeated pattern of intentional deceit to conceal his assets. First, the defendant failed to provide any of the financial information he was ordered to provide in order to allow the trial court to impose a just division of the marital estate. Due to his intentional failure to provide this information, the trial court sanctioned the defendant in the amount of $1,750.00.

When the monetary sanction was issued, the court ordered the defendant to provide this financial information within 30 days. T he defendant provided financial information, but the

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information he provided was false. He was thrown in jail for his second intentional violation of a discovery order.

The trial court then agreed to release the defendant from prison, and at the same time gave him another order to provide his financial information. This time, instead of providing his financial information, the defendant left for Florida having never provided this information. The trial court finally defaulted him based on this pattern of intentionally deceitful misconduct finding that "there had been absolutely no cooperation on the part of Mr. Draggoo." *Draggoo, supra,* 223 Mich App 419.

The Court of Appeals affirmed the default judgment because the defendant had been given numerous opportunities to comply with the discovery order. The trial court also imposed lesser sanctions in an attempt to compel compliance, but fining and then throwing the defendant in jail did not work. The trial court was thus left with no other sanction option to impose for defendant's "flagrant disobedience with the court's orders." *Draggoo, supra,* 223 Mich App 427. "The record in this case is replete with defendant's violations of the court's orders and clearly shows that the trial court tried less drastic measures to coerce defendant's compliance with the discovery requests, but to no avail. We find no abuse of discretion . . . ." *Id.* at 429.

In the present case, no such attempt to use lesser sanctions was made. Instead, the trial court went immediately for the most severe sanction which has resulted in a party bearing no legal responsibility for the accident being tagged with a judgment in excess of $8 million. Clearly, this sanction does not fit the severity of the offense, i.e., an inadvertent and isolated mistake that was corrected as soon as it was discovered.

In *D augherty, supra*, the Court affirmed the sanction of dismissal where the plaintiff refused to provide critical evidence, destroyed it, and then lied about destroying it. The plaintiff brought suit on behalf of his deceased brother who was injured in a diving accident. Prior to trial,

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and before he could be deposed, the decedent passed away. But the plaintiff, the decedent's brother, had 2 cassette recordings of the decedent's responses to interrogatories concerning the diving accident and the extent of his injuries. This was the only evidence that came directly from the deceased to substantiate the claim.

Shortly after the plaintiff's deposition where the existence of the cassette tapes was revealed, the defendant filed a motion to compel production of the tapes. After the trial court granted the motion to compel the plaintiff failed to comply with the order. The defendant then filed a motion for dismissal based on the plaintiff's failure to comply with discovery. On the day the motion for dismissal was set for hearing, the plaintiff's attorney claimed he was ill and sought a 30 day adjournment. At this point, the plaintiff had not provided the tapes, filed a written response to the motion, or explained where the tapes were. The defendant denied this request to adjourn and neither the plaintiff nor his attorney attended the hearing. The trial court granted the motion to dismiss. The plaintiff then asked for reconsideration claiming for the first time that the cassette tapes had been lost, one of which was allegedly lost in the mail when it was forwarded to the plaintiff's attorney. *Daugherty, supra,* 163 Mich App 700-701.

On appeal, the Court noted that the sanction of dismissal is rarely warranted and only in cases of egregious and willful misconduct, but that such a showing was made.

> The authority of a trial judge to take the drastic step of dismissal of a plaintiff's complaint is clear. However, our Supreme Court has stated that such a measure should be exercised cautiously. Dismissal is not favored where a relatively short period elapses between a party's failure to do something and the motion to dismiss and where there is an ambiguous showing of willfulness on the part of the noncomplying party. [*Daugherty, supra,* 163 Mich App 701-702.]

The dismissal was affirmed, though, because of the plaintiff's intentional violation of the discovery order and subsequent failures to correct the violation. If the tapes were lost, the plaintiff could have informed the trial court of this fact prior to the motion to compel and certainly before

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the motion to dismiss. The plaintiff could have informed the defendant and the trial court that the tapes were lost but raised this argument only after the dismissal was entered.

B. Dismissal Is A Proper Exercise Of Discretion Only Where The Discovery Violations Are Protracted

In *Bellok v Koths*, 163 Mich App 780; 415 NW2d 18 (1987), the dismissal was affirmed where a personal injury plaintiff deliberately failed to comply with numerous discovery orders that deprived the defendant of an opportunity to counter the plaintiff's allegations. The plaintiff refused to substantiate any of his claims through discovery by failing to answer interrogatories and thereafter refusing to authorize the release of his medical records. Without this information, the defendant was unable to defend the action. "Obstruction of discovery was not limited to a single instance, but rather plaintiff's lengthy, protracted delays and denials of discovery consumed the duration of this litigation. Defendants' attempts to discover information vital to a proper defense of their case were frustrated." *Id.* at 783.

C. None Of The Factors Justifying A Default Are Present In This Case

Thus, in each of these cases, the propriety of the default or dismissal as a sanction for a discovery violation generally hinged on three factors: (1) whether the misconduct was accidental or willful, (2) whether the misconduct was repetitive or an isolated incident, and (3) whether the discovery violation substantially prejudiced the other party. This latter issue was generally resolved by considering whether the information that was withheld prohibited the other side from substantiating its case or defending the action.

The trial court's decision to issue the most severe sanction based on an unintentional discovery violation that did not touch upon any liability issue to be determined through trial cannot be reconciled with the above line of cases. Rather, the harsh sanction of default should be used cautiously and only in extreme circumstances where the depravity and extent of the misconduct warrants such a severe sanction.

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But, instead, the trial court ignored the multiplicity of effective punishments it could have doled out and instead went right for the most extreme. The trial court failed to explain whether the misconduct was accidental or intentional, and the evidence shows clearly that it was the former. The trial judge then failed to consider any sanction short of default. These 2 omissions were present in those cases where the default or dismissal was reversed on appeal as an abuse of discretion.

IV. LEAVE MUST BE GRANTED TO ENSURE THAT THE COURT OF APPEALS APPLIES AN APPROPRIATE LEVEL OF SCRUTINY WHEN REVIEWING A TRIAL COURT'S DECISION TO ISSUE THE ULTIMATE DISCOVERY SANCTION

For some inexplicable reason, the Court of Appeals in this case refused to apply any level of scrutiny to the trial court's actions and instead, made blanket statements that do not comport with the facts of this case. Throughout its opinion, the Court of Appeals repeatedly states that the Grand Aerie provided "false information" regarding its insurance coverage and admonished defense counsel for revealing the existence of the insurance policy for the first time at the November 2, 2001 settlement conference. *Harter v Grand Aerie*, unpublished opinion per curiam of the Court of Appeals, docket no. 244689, released April 22, 2004, slip op, p 2. But the panel refused to address the fact that the presentation of false information was completely involuntary. Like the trial court, Judges Fort Hood and Cooper avoided addressing the ultimate issue in cases where a default was issued, i.e., whether the violation was willful.

The Court noted the requirement that for a default to be properly entered, the discovery violation must be flagrant and wanton, not merely accident or involuntary. Slip op, p 4. The Court even noted the 8 factors identified by the *Dean* Court that a trial court must consider when fashioning an appropriate sanction. *Id.* But then Court issues a naked statement that, "The record reflects that the trial court considered all of these factors and the available sanctions before making its determination." Slip op, p 4.

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Nowhere on the record, however, did the trial court address the 8 factors outlined in *Dean*. Nor did the trial court decide whether the presentment of incomplete information concerning the defendant's insurance coverage was deliberate.

Judges Fort Hood and Cooper then make the curious statement that the trial court "opted to default defendant as a last resort." Slip op, p 4. How can this be when the trial court failed to first impose a sanction less than default? Worse, how can this be when the trial court failed to even consider another sanction less than default?

In this case, the effect of the Court of Appeals' decision to affirm the trial court's entry of a default judgment is to allow the imposition of an $8 million judgment to be levied against a national charitable organization that, if left to their proofs, the plaintiffs could not establish any amount of liability.

This decision is unpublished, and without mandatory precedential effect, but certainly, this decision would be cited to reassure a trial court that its discretion will not be reversed.

Given that the plaintiffs' trial strategy would not be affected by the late announcement that the Grand Aerie had more insurance than originally thought, imposing an admission of liability on a party whose liability would be zero is not appropriate for the type of misconduct alleged. Clearly, some lesser sanction should have been imposed, perhaps costs and attorney fees caused by the inadvertent failure to disclose excess insurance coverage.

CONCLUSION

The application for leave to appeal filed by the Grand Aerie presents numerous significant legal issues in need of resolution by this State's highest court. Of particular concern is the issue raised by this amicus and by Judge O'Connell in dissent: the severity of the misconduct is nowhere near the severity of the sanction.

More troubling than the trial court's decision to default the Grand Aerie is the clear lack of

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scrutiny the Court of Appeals majority applied to the trial court's discretionary decision. Absent meaningful appellate review, a trial court is emboldened to impose clearly unwarranted discovery sanctions with knowledge that its discretion will not be overturned on appeal.

RELIEF REQUESTED

Amicus curiea MDTC requests that this Court grant the Grand Aerie's application for leave to appeal.

Respectfully submitted,

By:_____

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