MAR 2003
TERM

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

11

AMCO BUILDERS & DEVELOPERS, INC.,

Plaintiff-Appellant/Counter-Defendant,

v

TEAM ACE JOINT VENTURE,

S.C. NO. 120459

Defendant/Counter-Plaintiff/Cross-Defendant,

and

HARTFORD FIRE INSURANCE CO., C.A. NO: 221513

Defendant/Cross-Defendant, L.C. NO: 97 709362 CK

and

ACME DEMOLITION/INTERVALE JOINT VENTURE,

Defendant-Appellee,

and

LEROY LOVE d/b/a ACME DEMOLITION CO.,

Defendant/Counter-Plaintiff/Cross-Plaintiff,

and

INTERVALE EXCAVATING & DEMOLITION, INC.,

Defendant-Appellee/Cross-Defendant.

_____/

BRIEF ON APPEAL OF DEFENDANT-APPELLEE
INTERVALE EXCAVATING & DEMOLITION, INC.

ORAL ARGUMENT REQUESTED

CERTIFICATE OF SERVICE

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COUNTER-STATEMENT OF THE QUESTION PRESENTED

Amco's Statement of Question Presented, as set forth on page 2 of its Brief, does nothing to aid this Court in understanding the issue which Amco seeks to present. To read that Statement, one would be led to believe that a circuit court judge can never properly set aside a default which arises from the failure to comply with an agreed-upon order to produce someone for deposition. Of course, that is not the law. A circuit court judge is required to consider all the facts and circumstances surrounding that which gave rise to the default in order to determine whether it should be set aside. *See Houston v Southwest Detroit Hospital,* 166 Mich App 623; 420 NW2d 835 (1987), *lev denied* 431 Mich 852 (1988). Since there is more to the question of the propriety of a circuit court judge's setting aside or refusing to set aside a default and default judgment than merely non-compliance with a court order, Intervale Excavating and Demolition, Inc. provides the following as an accurate statement of the question presented.

> WHETHER THE COURT OF APPEALS PROPERLY DETERMINED THAT THE LOWER COURT HAD ABUSED ITS DISCRETION IN IMPOSING THE DRASTIC SANCTION OF DEFAULT AND THEN IN DENYING INTERVALE'S MOTION FOR RELIEF FROM DEFAULT AND FROM DEFAULT JUDGMENT WHICH HAD BEEN ENTERED AS A RESULT OF INTERVALE'S PRINCIPAL, CLARENCE CARSON'S, FAILURE TO APPEAR FOR HIS DEPOSITION, AFTER INTERVALE DEMONSTRATED THAT MR. CARSON HAD NEVER BEEN TOLD BY PRIOR COUNSEL AND WAS OTHERWISE UNAWARE, PRIOR TO APRIL 14, 1999, THAT HIS DEPOSITION HAD BEEN SOUGHT, THAT HIS DEPOSITION HAD BEEN ORDERED, THAT A DEFAULT HAD BEEN ENTERED AS A RESULT OF HIS

FAILURE TO APPEAR AT DEPOSITION AND THAT A DEFAULT JUDGMENT HAD FOLLOWED?

Intervale Excavating and Demolition, Inc., answers "yes."

Amco Builders and Developers, Inc., answers "no."

The Court of Appeals answered "yes."

COUNTER-STATEMENT OF FACTS

A. Procedural introduction.

This case involves the entry of a default, the entry of a default judgment and the denial of a motion for relief from default and for relief from default judgment. All of those things occurred by April 30, 199 . Contrary to the settled principles that appellate review is limited to the record presented in the trial court, *see Amorello v Monsanto Corp,* 186 Mich App 324; 463 NW2d 487 (1990), and that an enlargement of the record on appeal is not permitted, *Hawker v Northern Mich Hosp, Inc,* 164 Mich App 314; 416 NW2d 428 (1987), plaintiff's Brief is replete with information which had not been presented to the trial court (primarily because plaintiff recites facts which occurred after the appeal had been filed in the Court of Appeals). In footnote 2 on page 5 of its Brief, plaintiff advises this Court that while the appeal in this matter was pending before the Court of Appeals, Intervale sued Amco for breach of contract.[1] Since that fact was not presented to the circuit court, it cannot be considered by this Court. Even if it could, it is legally irrelevant to the question of whether the circuit court judge abused his discretion in refusing to set aside the default and the default judgment. In footnote 4 which appears

[1] Since the default judgment against Intervale was based only on Amco's tortious interference with contract claim, Tr, 03/18/99, pp 6-8, 10, citing the February, 1997 Complaint by Amco, Appellant's Appendix, pp 86a-88a, 90a, and was not based on the claim that Intervale breached the contract between Amco and Acme Demolition/Intervale Joint Venture, and since the facts essential to the tortious interference with contract claim are different from the facts relevant to the breach of contract claim, Intervale was entitled to sue Amco for breach of contract.

on page 9 of its Brief, Amco talks about a settlement between prior counsel's malpractice carrier and Intervale. That also cannot and should not be considered by this Court. The same is true with respect to footnote 7 which appears on page 15 of the Brief. The only facts upon which this Court may base its decision with respect to the issue of the propriety of the entry of the default and default judgment and the subsequent failure to set them aside are the facts which occurred before April 30, 1999 and which were presented to the circuit court. A recitation of those facts and circumstances follows.

B. Factual background.

In June, 1996, the City of Detroit Housing Commission awarded a contract to Team Ace Joint Venture for the demolition of twelve buildings at Herman Gardens. On September 17, 1996, Team Ace Joint Venture subcontracted with Amco Builders & Developers, Inc. (Amco) for demolition work. The amount of that contract was $595,236.00. Amco was to (1) remove 12 buildings and foundations (2) remove utilities and parking lots/sidewalks and (3) refill, compact and regrade and seed the project site.

On September 18, 1996, Amco in turn subcontracted with Acme Demolition/Intervale Joint Venture for demolition services at a contract price of $244,000.00. When Amco fell behind the contract timetable in removing the utilities and parking lots, Team Ace reached an agreement with Amco that the utilities and parking lots portion of the work would be valued at $160,000.00 and would be split between Amco and Acme/Intervale at $80,000.00 a piece.

Amco alleged that in November, 1996, Team Ace Joint Venture sought to circumvent Amco's contract by dealing directly with Clarence Carson, a principal of Intervale Excavating & Demolition, Inc. Team Ace, on the other hand, claimed that it faced serious problems with Amco concerning the timing and quality of the work for the project. Amco alleged that Team Ace Joint Venture was paid in full on its contract with the City of Detroit Housing Commission, and received in excess of $840,000.00. Amco alleged that even though Team Ace Joint Venture had been paid in full by the City of Detroit, Team Ace Joint Venture failed to pay Amco pursuant to the September 17, 1996 contract between them.

Subsequently in 1997, Amco sued Team Ace Joint Venture alleging breach of contract, breach of account stated, unjust enrichment and made a claim on a payment bond. Amco sued Acme Demolition/Intervale Joint Venture and its constituent entities, Leroy Love d/b/a Acme Demolition Company and Intervale Excavating and Demolition, Inc., alleging breach of contract and tortious interference with Amco's economic relationship with Team Ace Joint Venture. In its June 22, 1998, Mediation Statement, Amco sought an award of $700,000.00 against Team Ace Joint Venture, ". . . said sum representing the contract price of $595,236.00 plus interest, consequential damages and attorneys' fees . . ." Amco also requested an award of $100,000.00 against the

Acme/Intervale Joint Venture.[2]

C. Facts relevant to the default and default judgment.

In October, 1998, Amco and all parties, other than Acme Demolition/Intervale Joint Venture and Intervale Excavating & Demolition, Inc., reached a settlement of their respective claims and counter-claims following mediation and numerous settlement discussions. On November 23, 1998, during a status/settlement conference, the circuit court directed prior counsel for Acme Demolition/Intervale Joint Venture and Intervale Excavating & Demolition, Inc., to produce Clarence Carson for deposition within 30 days. Subsequently, Amco's counsel contacted prior counsel by letter seeking to obtain a date for Mr. Carson's deposition. Prior counsel failed to respond to Amco's request to obtain a date for the deposition of Mr. Carson. Subsequently, Amco filed a motion for default judgment against defendant Intervale Excavating & Demolition, Inc. and Acme/Intervale Joint Venture for failing to comply with the November 23, 1998 order. That motion was heard on January 15, 1999.

At that hearing, counsel for Amco argued that Amco was entitled to a default judgment solely because Mr. Carson had not been produced for deposition. (Tr, 1/15/99,

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[2] While MCR 2.403(J)(4) provides that statements in mediation summaries are not admissible in any court proceeding, that sub-rule does not apply here because Wayne County Circuit Court Judge John Murphy, himself, opened the door as to the topic of what transpired at mediation. (Tr, 3/12/99, pp 9-10; Appellant's Appendix, pp 78a-79a). Judge Murphy asked prior counsel for Intervale the amount of the mediation award against Intervale who told him that the award was $50,000.00. There was no objection from counsel for Amco. (*See also* Tr, 4/30/99, pp 13-14; Appellant's Appendix, pp 126a-127a).

p 3; Appellant's Appendix, p 56a). She reminded Judge Murphy that prior counsel ". . . did not participate in discovery in this case, did not produce Mr. Carson for deposition, did not appear. I don't believe he prepared the mediation summary in the case, did not participate in the drafting of the pretrial order . . ." (Tr, 1/15/99, p 5; Appellant's Appendix, p 58a). Prior counsel admitted that due to the illness of his son he had not participated in the case and had not been available to properly represent his client.[3] (Tr, 1/15/99, p 6; Appellant's Appendix, p 59a). For those reasons, he implored Judge Murphy to not grant the motion for default judgment. (Tr, 1/15/99, p 7; Appellant's Appendix, p 60a). Judge Murphy granted Amco's motion for a default, limited to liability, stating:

> "I recall going over this and discussing with you the medical problems that your family was having and that is why I went ahead and entered the order to allow for deposition of your client and apparently that has not taken place. I believe that default should enter at this time."

(Tr, 1/15/99, pp 8-9; Appellant's Appendix, pp 61a-62a).

From all that appears, Judge Murphy chose to impose the sanction of default on January 15, 1999 simply because he said that he would on November 23, 1998. To be sure, at the March 12, 1999 hearing on the motion to set aside the entry of default, Judge

---

[3] To be sure, while prior counsel represented that he could then produce Mr. Carson, it subsequently became clear that prior counsel had never informed Mr. Carson that his deposition had been sought and ordered. In fact, Mr. Carson did not know about any of this until after default judgment had been entered and current counsel came into the case. *See* the factual recitation in this regard, *infra.*

Murphy did state that he had considered other options short of default ". . . when we initially had argument when plaintiff moved for the entry." (Tr, 3/12/99, p 9; Appellant's Appendix, p 79a). There is nothing in the record, however, to show that he did. The implementing order granting default against defendant Intervale Excavating and Demolition, Inc., and Acme Demolition/Intervale Joint Venture was entered on January 27, 1999.

On February 12, 1999, prior counsel for Acme Demolition/Intervale Joint Venture and Intervale Excavating and Demolition, Inc. filed a motion to set aside default entry. That motion was heard on March 12, 1999. Prior counsel noted, first, that the default had been entered based solely on the failure to Mr. Carson to appear at deposition pursuant to court order. (Tr, 3/12/99, p 5; Appellant's Appendix, p 74a). He asserted that good cause and a meritorious defense existed.[4] Prior counsel reminded Judge Murphy of his personal situation, involving his son's illness that had gone on for the past year and a half. (Tr, 3/12/99, p 5; Appellant's Appendix, p 75a). He argued that the default should be set aside ". . . because it is too harsh a remedy against the client in this situation." (Tr, 3/12/99, p 5; Appellant's Appendix, p 75a). He told Judge Murphy that his client was not at fault. "This had only to do with me." (Tr, 3/12/99, p 6; Appellant's Appendix, p 76a). He argued that the delay in obtaining the deposition of Mr. Carson did not cause prejudice to the other parties. (Tr, 3/12/99, p 6; Appellant's Appendix, p 76a). Prior counsel argued

[4] Plaintiff did not challenge the existence of a meritorious defense in plaintiff's opposing brief. (Tr, 03/12/99, p 5; Appellant's Appendix, p 75a).

that other sanctions, less than default, should have been considered and imposed by the court. (Tr, 3/12/99, p 7; Appellant's Appendix, p 77a).

Without requiring any argument from Amco's counsel, Judge Murphy denied the motion stating:

> "With regard to the motion to set aside the default judgment [sic], the Court has reviewed the pleadings, and the Court believes that good cause has not been presented sufficient to set aside the default." (Tr, 3/12/99, p 9; Appellant's Appendix, p 79a).

Judge Murphy then set a hearing on the issue of damages for March 18, 1999. (Tr, 3/12/99, p 9; Appellant's Appendix, p 79a).

On March 18, 1999, the hearing on damages was held. Prior counsel for Acme Demolition/Intervale Joint Venture and Intervale Excavating and Demolition, Inc. did not even appear. Mr. Perkins, counsel for the other joint venturer, Leroy Love, d/b/a Acme Demolition Company, stated that there was some confusion as to whether prior counsel was representing both Acme Demolition/Intervale Joint Venture and Intervale Excavating and Demolition, Inc. He stated that prior counsel was representing only Intervale Excavating and Demolition, Inc., the defaulting entity. (Tr, 3/18/99, p 6; Appellant's Appendix, p 86a). (*See also* Tr, 4/30/99, p 3; Appellant's Appendix, p 116a). In order to clear the matter up, counsel for Amco stated that although the default had been entered against both Acme Demolition/Intervale Joint Venture and Intervale Excavating and Demolition, Inc., she was proceeding only against Intervale Excavating and Demolition, Inc. ". . . on the tortious interference claim that was in our complaint." (Tr, 3/18/99, pp 6-

7; Appellant's Appendix, pp 86a-87a). Then, in the absence of prior counsel for Intervale Excavating and Demolition, Inc., Amco put on its damages proof. (Tr, 3/18/99, pp 8-13; Appellant's Appendix, pp 88a-93a). The total sum sought against Intervale Excavating and Demolition, Inc. was $595,606.15. Judge Murphy granted a default judgment in that amount. (Tr, 3/18/99, p 12; Appellant's Appendix, p 92a). On the same date a default judgment in that amount, to be set off by the amount recovered from any settlement reached between the plaintiff and Team Ace Joint Venture, was entered.[5]

On April 22, 1999, current counsel for Intervale Excavating and Demolition, Inc. filed an appearance.[6] On April 23, 1999, current counsel for Intervale Excavating and

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[5] The March 18, 1999 Default Judgment is in the principal amount of $595,606.15, prior to application of the set-off between plaintiff and the other parties and prior to the application of statutory interest. The settlement amount received by the plaintiff was $300,000.00. Thus, the net principal amount owing by Intervale under the March 18, 1999 Default Judgment is $295,606.15. A Modified Default Judgment was entered on March 22, 1999. The modification consisted simply of typing the hand-written portions of the March 18, 1999 default judgment.

[6] That appearance was filed on behalf of both Intervale Excavating and Demolition, Inc. and Acme Demolition/Intervale Joint Venture because at that time current counsel was taking the file over from prior counsel and it was unclear as to exactly which entities prior counsel represented.

Demolition, Inc. filed a motion for relief from default and motion for relief from default judgment pursuant to MCR 2.612(C)(1)(f). In that motion, current counsel argued that the default and the default judgment should be set aside and a lesser sanction, if any, imposed because the failure to comply with the requirement that created the default, *i.e.* the failure of Clarence Carson to appear for his deposition, was attributable solely and singularly to the fact that Mr. Carson was completely unaware of the fact that his deposition had been requested, noticed and subsequently ordered. Mr. Carson first learned of the fact that his deposition had been ordered and the fact that the defaults and default judgment had been entered as a result of his failure to appear for deposition on April 14, 1999. (*See* the affidavit of Clarence Carson dated April 22, 1999, ¶ 6-9; Appellant's Appendix, pp 110a-113a). Before that date, Mr. Carson knew nothing about the facts and circumstances which led to the default and default judgment.

In addition, current counsel argued that prior counsel's inactions and omissions, which indisputably resulted from his care of his then terminally ill son,[7] should not be

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[7] Over the past 20 years, prior counsel, Alex J. Miller, cared for his son who suffered from the genetic-based neurological disease, Neurofibromatosis, Type 2. (Affidavit of Alex J. Miller, ¶ 2; Appellant's Appendix, pp 107a-109a). Over the two years preceding the entry of the default, Mr. Miller's son's physical condition had deteriorated without recovery. Affidavit of Alex J. Miller, ¶ 3. Beginning in May, 1998, as a result of the deterioration of his son's balance and walking ability and vision, Mr. Miller spent most nights at his son's apartment. Affidavit of Alex J. Miller, ¶ 3(f). His son became completely blind in June, 1998. Affidavit of Alex J. Miller, ¶ 3(g). In the fall of 1998, his son became wheelchair bound. Mr. Miller's son needed someone to be with him at all times. Affidavit of Alex J. Miller, ¶ 3(h). Mr. Miller's attempts to hire assistance for daily care of his son were unsuccessful. In the fall of 1998, the ability to care for his son physically changed and, at that point, two people were required to care for him and not just one. Affidavit of Alex J. Miller, ¶ 3(j). In February, 1999, Mr. Miller's son had a

(Continued on next page.)

imputed to Intervale Excavating and Demolition, Inc., whose president, Mr. Carson, never knew that his deposition had been ordered or that a default and default judgment had been entered as a result of his failure to appear at deposition. The hearing on Intervale's motion for relief from default and from default judgment was held on April 30, 1999. Current counsel argued that the default judgment against Intervale should be set aside because Mr. Carson didn't know, prior to April 14, 1999, that Amco was attempting to take his deposition, did not know that an order had been entered compelling his deposition and didn't know that a default had been entered against Intervale.

> "[t]he entire thrust of our motion is that my client knew nothing about what was going on here, and I have read enough of this file to knew that Mr. Miller never came to this Court and said, "Judge, I have never told Mr. Carson that his deposition is scheduled, judge I have never told Mr. Carson that there is a 30-day order, that in the case a default will be entered against you if you don't appear for deposition."
>
> Never told your Honor that – he never told Mr. Carson that in fact default was entered, never told Mr. Carson that a default judgment motion was scheduled, never told him that a default motion, a default judgment hearing had occurred. And according to Mr. Carson's affidavit, it was not until April 14, that he learned anything about what had happened to his case." (Tr, 4/30/99, p 11; Appellant's Appendix, p 124a).

(Continued from previous page.)
complete loss of leg coordination, loss of hand coordination and most sensation in his legs, arms and hands. He required two people to be with him at all times. Affidavit of Alex J. Miller, ¶ 3(k). As a result of caring for his seriously ill son during the time period relevant to the instant case, Fall, 1998 through Spring, 1999, Mr. Miller was able to practice law only on a part-time basis and only at the times he was able to obtain nursing assistance for his son. Affidavit of Alex J. Miller, ¶ 4. During the pendency of this appeal, Mr. Miller's son passed away.

Judge Murphy stated that he believed that prior counsel had told him that he had been in communication with his clients. (Tr, 4/30/99, p 15; Appellant's Appendix, p 128a). Current counsel made it clear that he didn't know if prior counsel had been "in communication" with Mr. Carson but even if he had, prior counsel had never told him that his deposition had been sought, that his deposition had been ordered, that a default had been entered as a result of the failure to appear at deposition and that subsequently a default judgment had been entered. (Tr, 4/30/99, pp 15-16; Appellant's Appendix, pp 128a-129a). Current counsel argued that while ". . . what was going on with his son . . ." was not a "legal excuse" for prior counsel's inactions and omissions, ". . . if there has ever been a more horrifying set of medical facts that impinge upon an attorney's ability to practice, I have never seen one." (Tr, 4/30/99, p 16; Appellant's Appendix, p 129a).

Current counsel argued that because this case involved an attorney who ". . . let his practice . . . suffer because his son is dying . . ." Judge Murphy should impose a lesser sanction. (Tr, 4/30/99, pp 19-20; Appellant's Appendix, pp 132a-133a). Significantly, current counsel advised Judge Murphy that Mr. Carson would make himself available for deposition. (Tr, 4/30/99, p 20; Appellant's Appendix, p 133a).

Notwithstanding the fact that he acknowledged that current counsel had made a good argument, Judge Murphy denied the motion stating:

> "I've considered those issues when I proceeded on with the last hearing. Mr. Miller did write a letter to the Court that indicated he was having continued problems with his son. And his problems with his son were not brought to the

> Court's attention just before the last hearing, they were apparently longstanding problems. And he had, as far as the Court, other problems. And the lawyers, the other lawyers in the case were aware of them as well.
>
> He told us about them, those in chambers. But nonetheless he continued on with representation of the defendants, he was here most of the time with regard to this case. And I bent over backwards in terms of the order that I entered, making sure that before he would approve such an order, he had the okay from his clients that they would be produced for deposition within the period of time.
>
> I didn't arbitrarily pick the time for the deposition, I said make sure now, call somebody, if you need to call somebody do that before I set this limit, before I set this limitation on here in terms of when these depositions are to be taken. And I was told by him that that was okay, he could live with the order and I entered it.
>
> So, with regard to your clients, I am not satisfied that this cause has been presented." (Tr, 4/30/99, pp 20-22; Appellant's Appendix, pp 133a-135a).

Current counsel made it clear that whatever prior counsel had told Judge Murphy about Mr. Carson being available was <u>untrue</u>. (Tr, 4/30/99, p 22; Appellant's Appendix, p 135a). Nonetheless, Judge Murphy concluded that rather than setting aside a net $295,000.00 default judgment in favor of Amco (which, even after settlement with the other parties, would have accepted $50,000.00 from Intervale), Intervale should be subjected to a by then plus $330,000.00 default judgment and should sue its prior lawyer all because Amco was unable to take one deposition.

D. Proceedings before the Court of Appeals.

On August 6, 1999, Intervale Excavating and Demolition, Inc. filed a claim of appeal in the Court of Appeals.[8]

The thrust of the appeal was that the reason for the default was a result of prior counsel's abandonment of his client as a result of preoccupation with the physical and psychological care of his extremely ill son during the period in question. The relevant aspect of that abandonment was the fact that Clarence Carson had never been told by prior counsel that (1) his deposition had been requested and ordered, (2) that a default had been entered as a consequence of his failure to appear at deposition and (3) that a default judgment had followed.

Following briefing and arguments, the Court of Appeals issued its decision on November 2, 2001. The Court of Appeals' majority reversed the circuit court's denial of the motion to set aside the default and default judgment "on the ground that the trial court abused its discretion in refusing to set aside the default judgment." Slip Opinion, p 3; Appellant's Appendix, p 38a. The majority, after reviewing the affidavits of Clarence Carson and Alex Miller, concluded that "Miller's lack of attention to this case exceeded neglect and constituted an abandonment of the representation." The majority concluded

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[8] Intervale Excavating and Demolition, Inc. had earlier, on May 7, 1999, filed a claim of appeal in the Court of Appeals. The first claim of appeal was eventually dismissed, on August 10, 1999, because until July 30, 1999 when the order for dismissal of the cross-claim of Leroy Love d/b/a ACME Demolition Company against Intervale Excavating and Demolition, Inc. was entered, no final order existed within the meaning of MCR 7.202(7)(a)(i).

that Miller's abandonment of the this case and his failure to apprise Carson that his deposition had been ordered and that a default and default judgment had been entered as a result of his failure to appear for deposition ". . . constitutes a reasonable excuse for defendants' failure to comply with the requirements that caused the default to enter." Slip Opinion, p 4; Appellant's Appendix, p 39a. Amco's application for leave to appeal followed on November 26, 2001. On October 30, 2002, this Court issued its Order granting leave to appeal.

ARGUMENT

THE COURT OF APPEALS PROPERLY DETERMINED THAT THE LOWER COURT HAD ABUSED ITS DISCRETION IN IMPOSING THE DRASTIC SANCTION OF DEFAULT AND THEN IN DENYING INTERVALE'S MOTION FOR RELIEF FROM DEFAULT AND FROM DEFAULT JUDGMENT WHICH HAD BEEN ENTERED AS A RESULT OF INTERVALE'S PRINCIPAL, CLARENCE CARSON'S, FAILURE TO APPEAR FOR HIS DEPOSITION, AFTER INTERVALE DEMONSTRATED THAT MR. CARSON HAD NEVER BEEN TOLD BY PRIOR COUNSEL AND WAS OTHERWISE UNAWARE, PRIOR TO APRIL 14, 1999, THAT HIS DEPOSITION HAD BEEN SOUGHT, THAT HIS DEPOSITION HAD BEEN ORDERED, THAT A DEFAULT HAD BEEN ENTERED AS A RESULT OF HIS FAILURE TO APPEAR AT DEPOSITION AND THAT A DEFAULT JUDGMENT HAD FOLLOWED.

A. Standard of review.

The standard to be used in evaluating the sanction of default is whether the trial judge abused his discretion. *Banaszewski v Coleman,* 131 Mich App 92, 94; 345 NW2d 647 (1983). Similarly, a trial court's decision regarding whether to set aside a default is reviewed under an abuse of discretion standard. *Alken-Ziegler, Inc v Waterbury Headers Corp,* 461 Mich 219; 600 NW2d 638 (1999).

B. Analysis.

Is discretion unbridled or are there restrictions on the exercise of discretionary authority vested in a judge? Can a judge, exercising his discretionary authority, do

anything he pleases or must that authority be exercised within the scope and parameters imposed by law? The answers are obvious. This Court said as much over 80 years ago.

The discretion lodged in a trial court is not a private, arbitrary, or personal, but, rather, a legal discretion to be exercised according to established and well-known principles of law. "Where anything is left to any person to be done according to his discretion, the law intends it must be done with sound discretion and according to law; and the Court of [appeals] hath a power to redress things that are otherwise done, notwithstanding that they are left to the discretion of those that do them." *People v Gage*, 188 Mich 635, 642; 155 NW 464, 467 (1915). This Court must not avoid its responsibility to remedy erroneous rulings by pretending that it has only the most egregious of errors. *People v Gleason,* 122 Mich App 482, 488, fn4; 333 NW2d 85 (1983) citing *People v Talley,* 410 Mich 378, 396-397; 301 NW2d 809 (1981) (Levin, J., concurring).

Here, defendant contends that Judge Murphy failed to exercise his discretion according to law. *People v Gage, supra.* The Court of Appeals had the power to and did properly remedy that abuse of discretion.

1. <u>Abuse of discretion in entering a default in the first place</u>.

When trial court sanctions are too harsh, they must be reversed. *See e.g., Traxler v Ford Motor Co,* 227 Mich App 276; 576 NW2d 398 (1998); *Houston v Southwest Detroit Hosp*, 166 Mich App 623, 629-630; 420 NW2d 835 (1987), *lv denied* 431 Mich 852 (1988). The imposition of sanctions, especially such a drastic one as default, should be

again noted the harshness of such a remedy and reversed a trial court's dismissal with prejudice. This Court stated:

> "Mindful of the fact that dismissal is a harsh remedy to be invoked cautiously, the trial court should evaluate the length, circumstances, and reasons for delay in light of the need for administrative efficiency and the policy favoring the decision of cases on their merits, considering among other factors: 1) the degree of the plaintiff's personal responsibility for the delay, 2) the amount of prejudice to the defendant caused by the delay, 3) whether there exists a lengthy history of deliberate delay, and 4) whether the imposition of lesser sanctions would not better serve the interests of justice. *Davis v Williams,* 588 F2d 69, 70 (CA 4 1978)."

397 NW2d at 794. *See also Bass v Combs,* 238 Mich App 16; 604 NW2d 727 (1999).

Dismissing an action or entering a default for failure to make discovery is a drastic sanction that may justifiably be imposed only where the refusal is "flagrant and wanton," *Device Trading Ltd v Viking Corp,* 105 Mich App 517; 307 NW2d 362 (1981); *Phillips Industries, Inc v Smith*, 90 Mich App 237, 246; 282 NW2d 788 (1979); *Kalamazoo Oil Co v Boerman,* 242 Mich App 75, 86; 618 NW2d 66 (2000). Such a harsh sanction should be used only "with caution" and "where the conduct has been inexcusable." *Equico Lessors, Inc v Original Buscemi's, Inc,* 140 Mich App 532, 535; 364 NW2d 373 (1985). *See also Carver v Ford Motor Co,* 108 Mich App 359; 310 NW2d 47 (1981); *Martin v Hess Cartage Co,* 36 Mich App 243; 193 NW2d 357 (1971); *Richards v O'Boyle,* 21 Mich App 607; 175 NW2d 874 (1970). Otherwise stated, the type of conduct which warrants the drastic remedy of default or dismissal must be conscious or

intentional, not accidental nor involuntary. *Jack's Factory Outlet v Pontiac State Bank*, 95 Mich App 174, 179; 290 NW2d 114 (1980).

A number of United States Court of Appeals have declared that default or dismissal with prejudice is a harsh sanction to be used only in "extreme cases," *Bishop v Cross*, 790 F2d 38 (CA 6 1986); *Dyotherm Corp v Turbo Machine Co*, 392 F2d 146, 148-149 (CA 3 1968); *Flaksa v Little River Marine Construction Co, Inc*, 389 F2d 885, 887 (CA 5 1968); *Independent Productions Corp v Loew's, Inc*, 283 F2d 730, 733 (CA 2 1960); *Durgin v Graham*, 372 F2d 130-131 (CA 5 1967), and have set aside dismissals not adequately supported. *Moore v St Louis Music Supply Co, Inc*, 539 F2d 1191 (CA 8 1976); *Peterson v Term Taxi, Inc*, 429 F2d 888 (CA 2 1970); *Reizakis v Loy*, 490 F2d 1132 (CA 4 1974); *Sykes v United States*, 290 F2d 555, 557 (CA 9 1961); *Davis v Operation Amigo, Inc*, 378 F2d 101, 103 (CA 10 1967) ("[a] dismissal with prejudice is a harsh sanction and should be resorted to only in extreme cases; the procedural history of each case must be examined in order to make such determination; the judge must be ever mindful that the policy of the law factors the learning of a litigant's claim upon the merits.") Dismissals or defaults for failure to provide discovery have frequently been set aside. *MacArthur Patton Christian Ass'n v Farm Bureau Ins Group, supra; Titus v Mercedez-Benz of North America*, 695 F2d 746 (CA 3 1982); *Rogers v Kroger Co*, 669 F2d 317 (CA 5 1982) ("such a sanction is reserved for the most egregious of cases"); *Donnelly v Johns-Manville Sales Corp*, 677 F2d 339 (CA 3 1982); *Jackson v Washington Monthly Co*, 569 F2d 119 (CA DC 1978) ("trial-court dismissal of a lawsuit never heard

on its merits is a drastic step, normally to be taken only after unfruitful resort to lesser sanctions).

A review of the cases where the dismissal or default sanctions were used discloses that such a sanction is granted only where the conduct can be characterized as inexcusable. *Humphrey v Adams,* 69 Mich App 577; 245 NW2d 167 (1976) (order of dismissal with prejudice was not an abuse of discretion where there were repeated warnings that continued noncompliance would result in dismissal); *Krim v Osborne,* 20 Mich App 237; 173 NW2d 737 (1969) (dismissal with prejudice was justified where there had been repeated dilatory conduct—case pending for more than two and one-half years; the majority of delay attributable to plaintiff's failure to comply with discovery).

Defendant contends that the lower Court, contrary to the admonition of this Court that the most drastic step of default should be exercised cautiously and then only after the imposition of other sanctions has not worked, *MacArthur Patton Christian Ass'n, supra; North v Department of Mental Health, supra*, imposed that drastic measure <u>without</u> sufficient justification. The use of the most drastic sanction of default was <u>not</u> justified by the "facts" which Judge Murphy thought existed[10] since there exists no basis for a determination that Mr. Carson's failure to appear for his deposition (and this was the <u>sole</u>

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[10] Prior to April 23, 1999, when current counsel filed the motion for relief from judgment and default judgment and submitted the affidavit of Mr. Carson which stated that he first became aware of the fact that his deposition had been sought, ordered, and a default entered as the result of his failure to appear, Judge Murphy believed that prior counsel had advised Mr. Carson that his deposition had been ordered (even though nowhere in the record did prior counsel say this – he simply said, generically, that he had "renewed communications" with his client).

basis for the entry of the default), even if he knew about it – and he didn't -- was "flagrant and wanton," "inexcusable," "conscious or intentional," "contumacious" or the result of repeated dilatory conduct.

The decision in *Houston v Southwest Detroit Hosp,* 166 Mich App 623; 420 NW2d 835 (1987) *lv denied* 431 Mich 852 (1988), supports this contention. There, plaintiff and defendant hospital entered into a stipulation for discovery-only depositions of plaintiff's designated expert witnesses. Plaintiff subsequently failed to provide her experts for deposition. The trial court then granted defendant's motion to dismiss for failure to permit discovery. On appeal, the Court of Appeals reversed, finding that the circuit court did not properly set forth on the record the reasons for the exercise of its discretion resulting in dismissal of plaintiff's action against defendant. *Id.* at 627. The Court reasoned that, with all of the various sanction options open to the trial court, either singly or in combinations of more than one, it was proper to impose the drastic sanction of dismissal <u>only</u> after first having carefully evaluated on the record all of the options and concluding which sanction option was just and proper within the context of the particular case. Of particular interest in this case, the court in *Houston* reasoned as follows:

> "We have indicated that we believe that the result in this case was arrived at through an analytical process that did not take into account on the record all of the options available short of dismissal and that the court did not come to a reasoned conclusion on the record as to which sanctions, including dismissal, would be the most appropriate under all of the circumstances. We hesitate to go through this process since it is our view that this is the trial court's function in the first instance. We are confident that the trial judge can and will properly exercise his discretion under the guidelines set forth in this opinion if the matter is remanded to him for

> reconsideration. We believe that this process is required to be accomplished on the record for two reasons:
>
> 1. The Court rule does not give the trial court unlimited discretion. Only those sanctions found to be just are permitted.
>
> 2. An appellate court cannot review a decision for abuse of discretion unless it knows how and why the discretionary decision was made."

Houston, supra, at 631. "The record should reflect that the trial court gave careful consideration to the factors involved and considered all of its options in determining what sanction was just and proper in the context of the case before it. *Dean v Tucker,* 182 Mich App 27, 32; 451 NW2d 571 (1990)." *Bass v Combs, supra,* 604 NW2d at p 733.

A review of the transcript of the January 15, 1999 hearing at which the default was entered shows that the lower court did not consider sanctions options short of default. That omission, in and of itself, warrants a reversal of the default (and the subsequent default judgment).[11] Furthermore, and in any event, defendant contends that once all available sanctions options are considered, it is clear that the ultimate sanction of default was not warranted. Since the goal of the imposition of a sanction is to serve the interests of justice, defendant contends that a lesser sanction as, for example, a monetary sanction that had to be paid by Intervale itself, and not by prior counsel, would have accomplished

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[11] In addition, the lower court failed to state the nature of the prejudice, if any, to Amco caused by the delay in taking the deposition of Mr. Carson. It must be remembered that as of November, 1998 when the order compelling the deposition was entered, Amco had reached a resolution with all other parties and all that remained was Amco's claim against Intervale.

the goal of securing Mr. Carson's deposition (if as Judge Murphy apparently mistakenly believed he, Mr. Carson, was the cause of his own failure to appear at deposition). The failure to even consider such an available, effective, lesser sanction demonstrates the abuse of discretion on the part of the lower court in entering the default in the first place. That abuse continued in refusing to set aside the default and default judgment after the lower court was apprised of the true facts.

2. The failure to grant relief from the default and default judgment after the true facts were presented by current counsel.

A party seeking to set aside a default or a default judgment must demonstrate good cause and must file an affidavit of meritorious defense.[12] *Alken-Ziegler, Inc v Waterbury Headers Corp, supra,* interpreting MCR 2.603(D)(1) and MCR 2.612(C)(1)(f) – the latter being the court rule relied upon by defendant-appellee in support of its motion for relief from default and default judgment dated April 23, 1999. A party may establish a "good cause" by showing a substantial procedural irregularity or defect or a reasonable excuse for failure to comply with the requirements that created the default. *Alken-Ziegler, Inc v Waterbury Headers Corp, supra.* In this case, there exists not only a reasonable but, rather, an absolute excuse for the failure to comply with the requirements which created the default. Mr. Carson knew nothing about his deposition until April 14, 1999, when he was advised by prior counsel that the plaintiff had attempted to take his deposition, that

[12] No challenge was ever raised by plaintiff to the sufficiency of the affidavit of meritorious defense submitted by Mr. Carson on February 3, 1999. The significance of that affidavit, as it relates to the default issue, is discussed *infra.*

an order compelling him to appear for a deposition had been entered, that a default had been entered against Intervale as a result of his failure to appear for his deposition and that a default judgment had been entered against Intervale. (Affidavit of Clarence Carson dated April 22, 1999; Appellant's Appendix, pp 110a-113a, ¶¶ 6-9). When a person doesn't know that he has an obligation to do something, his failure to do that something is certainly excusable. By no means can it be said to be willful since in order to be willful a failure need be conscious or intentional rather than accidental or involuntary. *Edge v Ramos,* 160 Mich App 231, 234; 407 NW2d 625 (1987).

Amco, and Judge Zahra in dissent, question the veracity of the Carson affidavit concerning his lack of knowledge that his deposition had been requested, noticed and subsequently ordered. They point out that Intervale's prior lawyer had indicated that he was in contact with his client. *See* also Tr, 4/30/99, at p 15; Appellant's Appendix, p 128a where Judge Murphy stated that he believed that prior counsel had told him that he had been in communication with his clients. All that need be said in reply to this point is that just because an attorney says that he had been "in communication" with or had "spoken to" a client does not mean that the attorney told him that his deposition had been ordered, that a default had been entered as a result of the failure to appear at deposition and that subsequently a default judgment had been entered. In short, a generic statement by prior counsel that he had been "in communication" with Mr. Carson does not begin to call into question the veracity of Mr. Carson's affidavit which states that prior to April 14, 1999, he knew nothing about the facts and circumstances which led to the entry of the default and default judgment. This conclusion is reinforced when one acknowledges that prior

counsel told Judge Murphy at the March 12, 1999 hearing that his client was not a fault and that: "This had only to do with me." Tr, 3/12/99, p 6; Appellant's Appendix, p 76a.

Furthermore, the fact that Mr. Carson signed an earlier affidavit on February 3, 1999 which prior counsel utilized in conjunction with the motion to set aside default entry does not provide any indication that Mr. Carson knew at that time that a default had been entered because of a failure to appear for a deposition.[13] Common sense instructs that any client which has been sued would think it routine, when asked by his lawyer, to sign an affidavit which sets forth his position and defenses. Most lay persons would think that setting forth one's defenses is merely part and parcel of normal litigation practice and, conversely is not something that is only done after a default had been entered against you.

Plaintiff should not be heard to argue that even though Mr. Carson's failure to appear for deposition is the result of not being advised of the obligation to do so by prior counsel, he must nonetheless bear the consequences of the failure to appear. That is because the exception to the general rule of attorney conduct input to client, and not the general rule itself, applies here. While a negligent failure to act by a lawyer is generally attributable to a client and does not normally constitute grounds for setting aside a default judgment, *Park v American Casualty Ins Co,* 219 Mich App 62; 555 NW2d 720 (1996),

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[13] The substance of the February 3, 1999 affidavit would give no lay person any indication that it was necessary at the consequence of the earlier entry of a default. It speaks only to the merits of the case. The only indication in the entire document that it relates to a default is the title itself.

where the alleged neglect constitutes an outright abandonment of the case by the attorney, the client is properly permitted to rely on that ground for vacating the default judgment. *White v Sadler*, 350 Mich 511, 523; 87 NW2d 192 (1957). While defendants contend that Mr. Miller's failure to notify Mr. Carson that his deposition had been ordered, under the unique facts and circumstances presented here (*see* the April 21, 1999 Affidavit of Alex J. Miller; Appellant's Appendix, pp 107a-109a) is excusable,[14] any neglect on his part, whether excusable or not, cannot be imputed to Mr. Carson and, thus, cannot support the default and default judgment. Simply put, imputation of the attorney's neglect to the client ceases at the point where abandonment of the client appears. Abandonment is what occurred here.

The courts have demonstrated a willingness to relieve innocent clients from the consequences of their attorneys' actions and inactions in certain circumstances by recognizing exceptions to the general rule that the conduct of the lawyer is attributable to his client. One exception to the principle that counsel's neglect is imputed to the client exists where the attorney abandoned his responsibilities, since an utter failure of representation in effect abolishes and obliterates the attorney-client relationship. *Seacall Development Ltd v Santa Monica Rent Control Board,* 73 Cal App 4th 201; 86 Cal Rptr 229 (1999); *Aldrich v San Fernando Valley Lumber Co,* 170 Cal App 3d 725; 216 Cal Rptr 300 (2nd Dist 1985). Annotation: Incompetence of Counsel as Ground for Relief

[14] When an attorney's neglect is the result of his preoccupation with the serious illness of a family member, the neglect may be deemed excusable. *In re Schulz,* 254 BR 149, 154 (6th Cir 2000).

from State Court Civil Judgment, 64 ALR 4th 323 (1988). For this reason, the client has no attorney from whom negligence can be imputed.

In *Aldrich, supra,* the attorney had done nothing further after filing an amended complaint and his client's case was dismissed for failure to respond to interrogatories. The Court held that relief was available to the client where (1) the client was free from negligence (2) the neglect of the party's attorney was of an extreme degree and (3) the attorney's conduct was sufficient to be treated as obliterating the existence of the attorney-client relationship (4) where the client acts with due diligence in moving for relief after discovering the attorney's neglect and (5) the other side was not prejudiced by the delay. An attorney's authority to bind his client does not permit him to impair or destroy his client's cause of action or defense. Where there is a total failure on the part of counsel on the part of counsel to represent the client, so that the attorney has virtually substituted himself out of the case, the client is effectively and unknowingly deprived of representation and conduct rising to this level is not imputed to the client. *Carroll v Abbott Laboratories, Inc,* 32 Cal 3d 892; 187 Cal Rptr 592; 654 P2d 775 (1982).

In *Day v Allaire,* 31 NJ Eq 303 (1879), the Court held that relief was appropriate where the defendant's attorney had failed to present significant evidence and then abandoned the case without the defendant's knowledge or consent. *See also Graham v Loris,* 272 S C 442; 248 SE2d 594 (1978) where the Court held that the exception to the general rule of imputed negligence obtains in the event of the attorney's abandonment or withdrawal from the case. There, the defendant's attorney had withdrawn from the case at a crucial stage without prior notice and then secreted himself beyond the reach of the

defendant's representatives without turning over the files in the case. The Court reasoned that an attorney who undertakes the conduct of an action impliedly agrees to carry it to its termination and is not at liberty to abandon it without reasonable cause and reasonable notice to the client. Under those circumstances, *i.e.,* a unilateral abandonment of the client by counsel, the gross dereliction of duty and its consequences are not to be visited on the client.

In *Eniss v Fourth Street Bldg Assoc,* 102 Iowa 520; 71 NW 426 (1897), the Court held that it was error to deny a defendant's motion for relief from judgment where the defendant alleged that he had not been presented at trial because his attorney had absconded without giving him any notice. In support of his request for relief from judgment, the defendant stated that his attorney had prepared and filed an answer, had agreed to appear and defend the action and had agreed to keep the defendant advised of all proceedings, including (like here) when the defendant's presence would be needed. The defendant relied on his attorney who absconded five days before trial, and, as a result, judgment was entered against defendant. The Court held that the defendant, in employing and relying on his attorney, had done what people had usually do, and all that was necessary, in order to make his defense. The absconding of the attorney, and the concomitant failure to notify the defendant of the trial, were events that the defendant had no reason to anticipate or to guard against. On those facts, the Court held that that the defendant was entitled to relief from the judgment against him.

The following cases also recognize and apply the principle that the client is entitled to relief from dismissal, if a plaintiff, or default, if a defendant, where the

attorney had abandoned the action and the client without notice to the client. *Ray v Arnette,* 32 Ky LR 562; 106 SW 828 (1908); *Campbell v Archer,* 55 SW2d 110 (Tenn 1977); *Barclays American Court v Howell,* 81 NC App 654; 345 SC 2d 228 (1986).

In this case, we have a total failure on the part of prior counsel to represent the client with specific regard to the conduct that led to the default – the failure to appear for deposition -- coupled with an absence of fault on the part of the client. The foregoing Michigan and out-of-state cases well support the conclusion that the abandonment of the client by the prior lawyer constitutes the requisite good cause to warrant setting aside a default.

Having established the requisite good cause and a meritorious defense, the default and default judgment were properly set aside by the Court of Appeals because ". . . manifest injustice is the result that would occur if a default were allowed to stand where a party had satisfied the "meritorious defense" and "good cause" requirements of the court rule." *Alken-Ziegler, Inc v Waterbury Headers Corp, supra.* Manifest injustice is surely present here. Amco's contract with Team Ace was worth approximately $595,000 and Amco would have had to have paid the Acme Demolition/Intervale Joint Venture $244,000.00 under its subcontract. Thus, if everything had gone right, Amco would have netted the difference, *i.e.,* approximately $349,000.00. Since Amco received $300,000.00 in settlement with the other parties (prior to the entry of the default and default judgment against Intervale), its true loss is approximately $49,000.00 (or $114,000.00 if one considers the non-record fact that Amco paid Acme – the other member of the joint venture -- $65,000.00 in settlement). This is consistent with the fact that on October 28,

1998, after a resolution was reached with the other parties in the amount of $300,000.00, Amco was still willing to settle with Intervale for $50,000.00.[15] To permit the default and default judgment to stand would result in a windfall to Amco all because it was unable to take a single deposition. Under these circumstances, the necessary and only conclusion is that Judge Murphy abused his discretion when, after being advised of the true facts relating to client abandonment by prior counsel and after being advised by current counsel that Mr. Carson would be promptly made available for deposition, he refused to grant the requested relief from the default and the default judgment.

Before leaving this argument, one last point needs to be made. Amco argues that it will be "severely prejudiced" if the November 2, 2001 decision of the Court of Appeals is permitted to stand because Amco will lose the benefit of its judgment. Appellant's Brief, p 15. That argument lacks merit because the effect of the Court of Appeals' decision to set aside the default and default judgment is simply to return this matter to the Wayne County Circuit Court for further proceedings. In effect, the status quo of litigation has simply been restored. The claim of Amco against Intervale Excavating and Demolition, Inc. has <u>not</u> been dismissed. Amco still has the right to pursue its claims against Intervale Excavating and Demolition, Inc. and, if it can prove them to a jury, recover a judgment.

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[15] Although MRE 408 states that offers to compromise are not admissible to prove liability for a claim or its amount, the rule further states that such evidence is admissible when offered for another purpose. It is offered here for the purpose of showing the manifest injustice that would exist by virtue of the default judgment.

So, the fact that a default judgment has been set aside cannot be said to "severely prejudice" Amco.

CONCLUSION

Based on the foregoing analyses and citations to authority, Intervale Excavating & Demolition, Inc., contends that the circuit court abused its discretion, first, in imposing the drastic sanction of default and compounded that abuse by refusing to grant the requested relief from the default and default judgment after being advised of the true facts relating to client abandonment by prior counsel. The Court of Appeals properly recognized as much and reversed the denial of the motion for relief from default and default judgment, set aside the default judgment and the default which preceded it and remanded this case to the Wayne County Circuit Court for trial. For these reasons, Intervale Excavating and Demolition, Inc. requests that this Court issue its decision affirming the November 2, 2001 decision of the Court of Appeals remanding the case to the circuit court for an on-the-merits determination of Amco's claim.

PLUNKETT & COONEY, P.C.

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DATED: February 5, 2003

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

AMCO BUILDERS & DEVELOPERS, INC.,

Plaintiff-Appellant/Counter-Defendant,

v

TEAM ACE JOINT VENTURE,

S.C. NO. 120459

Defendant/Counter-Plaintiff/Cross-Defendant,

and

HARTFORD FIRE INSURANCE CO.,

C.A. NO: 221513

Defendant/Cross-Defendant,

L.C. NO: 97 709362 CK

and

ACME DEMOLITION/INTERVALE JOINT VENTURE,

Defendant-Appellee,

and

LEROY LOVE d/b/a ACME DEMOLITION CO.,

Defendant/Counter-Plaintiff/Cross-Plaintiff,

and

INTERVALE EXCAVATING & DEMOLITION, INC.,

Defendant-Appellee/Cross-Defendant.

_____/

CERTIFICATE OF SERVICE

STATE OF MICHIGAN)
) ss.
COUNTY OF WAYNE)

Ernest R. Bazzana, being first duly sworn, deposes and says that he is a Partner with the firm of Plunkett & Cooney, P.C., and that on the 5th day of February, 2003, he caused to be served a copy of Defendant-Appellee's Brief on Appeal, Oral Argument Requested, and Certificate of Service upon the following:

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by enclosing same in a pre-addressed, pre-stamped envelope and depositing same in the United States Mail.

ERNEST R. BAZZANA

Subscribed and sworn to before
me this 5th day of February, 2003.

Laura A. Baird, Notary Public
St. Clair County, Michigan
Acting in Wayne County, Michigan
My Commission expires: 01/15/2004

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