[Cite as *Lyons v. Kindell*, 2015-Ohio-1709.]

IN THE COURT OF APPEALS
FIRST APPELLATE DISTRICT OF OHIO
HAMILTON COUNTY, OHIO

LAUNA LYONS, Individually and as parent and next friend to M.H., a minor,	:	APPEAL NO. C-140160 TRIAL NO. A-0901908
Plaintiff-Appellee,	:	*O P I N I O N.*
vs.	:	
THEOTIS KINDELL, JR., as executor of the estate of Willa Mae Kindell, deceased,	:	
and	:	
THEOTIS KINDELL, JR., as successor executor of the estate of Theotis Kindell, deceased,	:	
Defendants-Appellants.	:	

Civil Appeal From: Hamilton County Court of Common Pleas

Judgment Appealed From Is: Affirmed

Date of Judgment Entry on Appeal: May 6, 2015

Stephen R. Felson and *Michael B. Ganson*, for Plaintiff-Appellee,

William D. Bell, Sr., for Defendants-Appellants.

Please note: this case has been removed from the accelerated calendar.

CUNNINGHAM, Judge.

{¶1} First in 2005, and then in a refiling in 2009, a mother sued the owners of an apartment for her child's lead-poisoning injuries, allegedly sustained when she and her child lived in the apartment in 2002. One of the owners died in 2003, the other in 2006. The executor of the owners' estates appeals the trial court's judgment in favor of the mother, arguing that the court should not have entered a default judgment against him as a discovery sanction, that the claim against one owner's estate was time-barred, and that the damages award was against the weight of the evidence. We affirm.

I. Lyons' Refiled Complaint

{¶2} Launa Lyons instituted an action for negligence, breach of contract, and breach of implied warranty of habitability against Theotis Kindell, Jr., as executor of the estates of his deceased parents, Willa Mae and Theotis Kindell, Sr. Lyons alleged that she had rented an apartment owned by Kindell's parents from December 2001, until October 2002. She claimed that a September 2002 health inspection had revealed levels of lead-based paint that rendered the apartment uninhabitable for her and her minor children. She alleged that her minor son, M.H., had suffered permanent injuries as a result of lead poisoning from the apartment.

{¶3} Lyons' complaint, filed on February 25, 2009, indicated that it was the refiling of her initial complaint that had been filed in October 2005, and voluntarily dismissed in February 2008.

{¶4} In May 2009, after Kindell had failed to answer the complaint, Lyons moved for a default judgment. In June 2009, Kindell filed a motion to answer or to

otherwise plead out of time. In an accompanying affidavit, Kindell asserted that he had received the complaint at his Florida residence, and that he had mistakenly believed that the attorney for his parents' estates had also received the complaint. The trial court granted Kindell's motion.

A. Kindell's Motion to Dismiss

{¶5} On September 1, 2009, Kindell filed an answer, alleging several affirmative defenses, including that Lyons' claims were barred by the statutes of limitations. He also filed a motion to dismiss the complaint against his father's estate because, pursuant to R.C. 2117.06(B), such claims had to have been filed within one year of his father's death.

{¶6} On September 24, 2009, Lyons responded to Kindell's motion to dismiss. She claimed that M.H.'s status as a minor tolled the statutes of limitations for her claims on his behalf and, as a result, for her own claims. In the alternative, she argued, her claims were contingent claims and therefore not barred by R.C. 2117.06.

{¶7} Four months later, on January 28, 2010, Kindell filed a reply memorandum to Lyons' memorandum in opposition to his motion to dismiss the claims against his father's estate. He asked the court to either grant his motion to dismiss, or to convert his motion into one for summary judgment. He supported his reply with an affidavit of the attorney for his father's estate.

{¶8} On April 27, 2010, the trial court denied Kindell's motion to dismiss the claims against his father's estate.

{¶9} On September 22, 2010, the court issued a scheduling order, mandating that discovery be completed by April 8, 2011.

B. Lyons' Motion to Compel Discovery

{¶10} On April 8, 2011, Lyons filed a motion to compel Kindell to answer interrogatories, and a request for production of documents. Her attorney's accompanying affidavit stated that he had served the discovery requests on Kindell on September 22, 2010, and that, despite his extrajudicial attempts to resolve the matter, Kindell had failed to respond.

{¶11} On May 10, 2011, the trial court granted Lyons' motion to compel, and ordered Kindell to respond to the discovery requests by May 16, 2011. The court's entry contained the notation that "defense counsel agreed with the order and requested the same." The entry was signed by defense counsel.

{¶12} On May 18, 2011, Lyons filed a motion for sanctions against the defendants for failing to abide by the court's May 10 order, seeking a default judgment on liability. Lyons filed a notice that the motion would be heard on May 25, 2011.

{¶13} On May 24, 2011, Kindell filed a response to Lyons' motion for sanctions. He stated:

> The Defendant **agreed** with the order heretofore compelling discovery with the expectation that the Court would direct how the requested discovery should be answered since the Defendant executor, who has lived in Orlando, Florida since 1985, [h]as no personal knowledge of the information sought in the discovery. If he is to respond to the discovery with an answer to each questions stating that "[I] as the successor executor to the Estate of Theotis Kindell and the Executor to

> the Estate of Willa Mae Kindell, have no knowledge or basis for responding to the requested discovery, because I had no involvement with the real estate property in question," he can do so. The deceased Kindells were the one[s] who actively operated the real estate property at 858 Hutchins Avenue, Cincinnati, Ohio. Accordingly, the Defendant will provide information on the discovery that he possesses, but cannot under oath attest to any of the substantive information requested. It is not his fault that the original action was dismissed and the knowledgeable parties, Theotis Kindell and Willa Mae Kindell, died in the interim.

{¶14} On May 25, 2011, the trial court held a hearing on the motion for sanctions. The court took the matter under submission.

{¶15} On August 1, 2011, Kindell filed his affidavit in support of his response in opposition to Lyons' motion for sanctions. In his affidavit, Kindell stated that he had lived in Florida for more than 15 years and that he had had no involvement with any real estate owned by his parents during their lives, including the subject property. He stated that he had no personal information on the matter, and that he could find no documents, including the lease alleged by Lyons, for the subject property. Kindell averred that he knew of no insurance that covered the property. He stated that the property had been transferred to his brother in October 2006, and that his attempts to locate his brother had been unsuccessful.

{¶16} On August 4, 2011, the trial court conducted another hearing on the motion for sanctions. On August 10, 2011, the court granted the motion and entered a default judgment on the issue of liability in favor of Lyons.

{¶17} Kindell appealed that order to this court, but we dismissed the appeal in February 2012.

C. The Trial Court's Final Judgment

{¶18} In April 2012, the trial court issued a scheduling order, setting the matter for trial on August 9, 2012. No transcript of the trial was filed with this court. But on August 30, 2012, Kindell filed an "objection to court's sua sponte request for findings of fact and conclusions of law from the parties before any decision is rendered by the court."

{¶19} On January 18, 2013, the trial court issued its findings of fact and conclusions of law, and its damages award for $796,305.91. Lyons filed motions for prejudgment interest, litigation expenses, and court costs.

{¶20} On October 18, 2013, the court reissued its findings of fact and conclusions of law, and reduced the damages award to $646,305.91.

{¶21} On February 25, 2014, the court issued its final judgment, awarding $646,305.91, plus prejudgment interest and costs. Kindell appeals that judgment.

II. Default-Judgment Sanction for Violating Discovery Order

{¶22} In his first assignment of error, Kindell argues that the trial court abused its discretion by granting a default judgment to Lyons as a sanction for his failure to comply with its discovery order. Kindell contends that he had informed the

court early in the proceedings that he would have had difficulty complying with the discovery requests.

{¶23} Trial courts have discretion to impose sanctions for discovery violations. *See* Civ.R. 37; *Toney v. Berkemer*, 6 Ohio St.3d 455, 458, 453 N.E.2d 700 (1983). Under Civ.R. 37(D), if a party fails to serve answers or objections to interrogatories or to serve a written response to a request for inspection, the court "may make such orders in regard to the failure as are just, and among others it may take any action authorized under subsections (a), (b), and (c) of subdivision (B)(2) of this rule." Civ.R. 37(B)(2)(a), (b), and (c) allow orders establishing certain facts in accordance with the moving party's claim, preventing the noncompliant party from submitting evidence, striking pleadings, and rendering default judgment against the noncompliant party. *See State ex rel. Dispatch Printing Co. v. Johnson*, 106 Ohio St.3d 160, 2005-Ohio-4384, 833 N.E.2d 274, ¶ 48.

{¶24} Because a default judgment is such a harsh sanction, a trial court abuses its discretion by granting the sanction for a party's failure to respond to discovery requests if the record does not show willfulness or bad faith on the part of the responding party. *Toney* at syllabus; *Johnson* at ¶ 49. In granting a default judgment, the court need not use the words "willfulness" or "bad faith," as long as the record substantiates that the failure to respond was due to willful inaction or bad faith. *See Huntington Natl. Bank v. Zeune*, 10th Dist. Franklin No. 08AP-1020, 2009-Ohio-3482, ¶ 19, citing *Ohio Bar Liab. Ins. Co. v. Silverman*, 10th Dist. Franklin No. 05AP-923, 2006-Ohio-3016, ¶ 15. A trial court's imposition of a default judgment as a sanction will not be disturbed unless the sanction was an abuse of the court's discretion. *Toney* at 458, citing *Ward v. Hester*, 36 Ohio St.2d 38, 303

N.E.2d 861 (1973). In determining whether the imposition of that sanction was an abuse of discretion, an appellate court must not substitute its judgment for that of the trial court, but must consider the circumstances under which the sanction was imposed and determine whether the sanction was proportionate to the seriousness of the infraction. *See Russo v. Goodyear Tire & Rubber*, 36 Ohio App.3d 175, 179, 521 N.E.2d 1116 (9th Dist.1987).

{¶25} We have held that a trial court does not abuse its discretion by entering a default judgment against a defendant who fails to comply with its discovery orders. *See Short v. Ralston*, 1st Dist. Hamilton Nos. C-900549 and C-900623, 1992 Ohio App. LEXIS 15 (Jan. 8, 1992); *Newhall v. Goyette*, 1st Dist. Hamilton No. C-840486, 1985 Ohio App. LEXIS 6496 (Apr. 24, 1985) (defendant failed, without adequate explanation, to appear at his court-ordered deposition). Similarly, we have upheld the dismissal of a plaintiff's complaint as a sanction under Civ.R. 37(B) where the record demonstrated that the plaintiff's conduct in failing to respond to discovery was prompted by willfulness and bad faith. *See Five Star Fin. Corp. v. Merchants Bank & Trust Co.*, 1st Dist. Hamilton No. C-120814, 2013-Ohio-3097; *Evans v. Smith*, 75 Ohio App.3d 160, 598 N.E.2d 1287 (1st Dist.1991); *Clayton v. Camargo Cadillac*, 1st Dist. Hamilton No. C-880625, 1989 Ohio App. LEXIS 3492 (Sep. 13, 1989). *But see Dater v. Charles H. Dater Found.*, 1st Dist. Hamilton Nos. C-020675 and C-020784, 2003-Ohio-7148 (trial court abused its discretion by dismissing a plaintiff's action with prejudice for her failure to appear at her deposition where the plaintiff had produced an uncontroverted doctor's opinion stating that her medical condition precluded travel to the site of the deposition).

{¶26} In this case, the trial court's entry granting the default-judgment sanction summarized Lyons' efforts to obtain discovery. The court noted that the discovery requests and interrogatories had been served in September 2010, that Kindell had failed to respond by the April 2011 discovery cut-off date, and that Lyons had been forced to file a motion to compel. The motion was supported by an affidavit of Lyons' attorney who had made numerous extrajudicial efforts to obtain the information from Kindell. The court emphasized that despite its order that Kindell respond by May 24, 2011, Kindell had produced nothing until his August 1, 2011 affidavit, which simply reiterated his failed attempts to locate documentation.

{¶27} Under the circumstances, we cannot say that the trial court abused its discretion by entering a default judgment in favor of Lyons as a sanction under Civ.R. 37(B). Kindell's utter failure to respond to Lyons' discovery requests "cannot be construed as a good faith effort to comply." *See Russo*, 36 Ohio App.3d at 178, 521 N.E.2d 1116. Accordingly, we overrule the first assignment of error.

III. Kindell's Motion to Dismiss

{¶28} In his second assignment of error, Kindell argues that the trial court erred by overruling his motion to dismiss the claims against his father's estate as untimely under R.C. 2117.06(B).

{¶29} For a trial court to dismiss a complaint under Civ.R. 12(B)(6) for failure to state a claim upon which relief can be granted, it must appear beyond doubt that the plaintiff can prove no set of facts in support of the claim that would entitle the plaintiff to the relief sought. *O'Brien v. Univ. Community Tenants Union, Inc.*, 42 Ohio St.2d 242, 245, 327 N.E.2d 753 (1975). The allegations of the complaint must be taken as true, and those allegations and any reasonable inferences

drawn from them must be construed in the nonmoving party's favor. *Id* at 246. Appellate review of a trial court's decision on a Civ.R. 12(B)(6) motion is de novo. *Perrysburg Twp. v. Rossford*, 103 Ohio St.3d 79, 2004-Ohio-4362, 814 N.E.2d 44, ¶ 5.

{¶30} Generally, a statute-of-limitations affirmative defense is not properly raised in a Civ.R. 12(B)(6) motion because it typically requires reference to materials outside the complaint. *See Savoy v. Univ. of Akron*, 10th Dist. Franklin No. 11AP-183, 2012-Ohio-1962, ¶ 6. But a Civ.R. 12(B)(6) motion may be granted on statute-of-limitations grounds when the complaint on its face conclusively indicates that the action is time-barred. *Doe v. Archdiocese of Cincinnati*, 109 Ohio St.3d 491, 2006-Ohio-2625, 849 N.E.2d 268, ¶ 11; *Cramer v. Archdiocese of Cincinnati*, 158 Ohio App.3d 110, 2004-Ohio-3891, 814 N.E.2d 97, ¶ 8 (1st Dist.).

{¶31} In this case, Kindell's motion to dismiss was based upon the limitations period in R.C. 2117.06(B), which governs the presentment of a creditor's claims, including claims arising out of contract or tort, against an estate. *See In re Estate of Greer*, 197 Ohio App.3d 542, 2011-Ohio-6721, 968 N.E.2d 55, ¶ 7 (1st Dist.). A creditor must present a written claim in one of three ways: (1) to the executor or administrator; (2) to the executor or administrator and by filing a copy of the written claim with the probate court; or (3) by ordinary mail addressed to the decedent that is actually received by the executor or administrator within the time limit specified in R.C. 2117.06(B). R.C. 2117.06(A)(1). The purpose of the statute is to promote the prompt settlement of estates of decedents. *See Burwell v. Maynard*, 21 Ohio St.2d 108, 111, 255 N.E.2d 628 (1970); *In re Estate of Natherson*, 102 Ohio App. 475, 134 N.E.2d 852 (8th Dist.1956).

{¶32} At the time that Kindell's father died, former R.C. 2117.06(B) required all claims to be presented within one year of the decedent's death, whether or not the estate was released from administration or an executor or administrator was appointed within that one-year period. *See In re Estate of Goehring*, 7th Dist. Columbiana Nos. 05 CO 27 and 05 CO 35, 2007-Ohio-1133 ¶ 75. R.C. 2117.06(B) has since been amended and currently provides a six-month period after death to present claims against the estate. *See In re Estate of Mason*, 109 Ohio St.3d 532, 2006-Ohio-3256, 849 N.E.2d 998 ¶ 7. A claim that is not presented within the time period in R.C. 2117.06(B) is "forever barred as to all parties, including, but not limited to, devisees, legatees, and distributees." R.C. 2117.06(C).

{¶33} Lyons' complaint filed on February 25, 2009, stated that it was the refiling of an action that had been filed on October 27, 2005, and later dismissed. The complaint did not set forth the date of death for Kindell's father, so the question of whether the claims were time-barred by R.C. 2117.06(B) could not be resolved conclusively on the face of the complaint. At that point, the Civ.R. 12(B)(6) motion was properly denied.

{¶34} Even so, the date of the decedent's death was clear from both Kindell's motion to dismiss and from Lyons' response to that motion. Because the date of death was not in dispute, the trial court could glean from the face of the pleadings that more than 22 months had passed between the death of Kindell's father on December 31, 2003, and the filing of the initial complaint in this action on October 27, 2005.

{¶35} The better procedure would have been for Kindell to file a motion for summary judgment pursuant to Civ.R. 56, so that matters outside the pleadings

could properly have been considered by the trial court. Indeed, in his *reply* to Lyons' memorandum in opposition to the motion to dismiss, Kindell asked the court to convert his motion into one for summary judgment as provided by Civ.R. 12.

{¶36} With his reply, Kindell submitted an affidavit of the estate's attorney which averred that Theotis Kindell, Sr., had died on December 31, 2003, and that he had been the attorney for the estate since November 2005. He asserted that the estate had rejected Lyons' claims "filed on August 23, 2003 [sic] against his estate as untimely. (See a true and accurate certified copy of the rejection of claim against the Estate of Theotis Kindell incorporated by reference and attached hereto)." Attached to the affidavit was the decedent's death certificate and a rejection of the claim against the estate that had been filed in the probate court in November 2005. The rejection was not, as the affidavit had indicated, for a claim made by Lyons, but for a claim by another person.

{¶37} It is apparent from the record that the trial court did not treat Kindell's motion to dismiss as one for summary judgment. Even if it had, we would be compelled to conclude that summary judgment was properly denied because Kindell failed to demonstrate that no factual issue remained with respect to whether R.C. 2117.06(B) barred Lyons' claims against the estate. The evidentiary material submitted with the motion simply did not relate to the claims asserted in this case. We overrule the second assignment of error.

IV. The Damages Award

{¶38} In his third and final assignment of error, Kindell argues that the trial court erred when it sua sponte requested findings of fact and conclusions of law to include damages not presented by Lyons during her case in chief.

{¶39} First, Kindell contends that, after the trial on damages, the trial court did not announce its verdict before requesting that the parties submit proposed findings of fact and conclusions of law.

{¶40} Civ.R. 52 provides:

> When questions of fact are tried by the court without a jury, judgment may be general for the prevailing party unless one of the parties in writing requests otherwise before the entry of judgment pursuant to Civ.R. 58, or not later than seven days after the party filing the request has been given notice of the court's announcement of its decision, whichever is later, in which case, the court shall state in writing the conclusions of fact found separately from the conclusions of law.

{¶41} Regardless of the limits embodied in Civ.R. 52, a trial court retains inherent authority to request sua sponte that the parties submit proposed findings of fact and conclusions of law. *See Miller v. Miller*, 5th Dist. Coshocton No. 06 CA 3, 2006-Ohio-7019, ¶ 7; *Roediger Const., Inc. v. Wasylyk*, 8th Dist. Cuyahoga Nos. 70839 and 70844, 1997 Ohio App. LEXIS 1509 (Apr. 17, 1997). And Kindell has failed to demonstrate any prejudice resulting from the court's action in this case.

{¶42} Next, Kindell contends that the trial court's award of damages was not supported by any evidence in the record. However, we are unable to consider this argument because Kindell has not provided a transcript of the trial. As the appellant, Kindell had the burden to demonstrate error by reference to matters in the record. *See Knapp v. Edwards Laboratories*, 61 Ohio St.2d 197, 199, 400 N.E.2d 384 (1980); App.R. 9(B). When the alleged error is that the trial court's judgment was

unsupported by the evidence, the appellant must include in the record all portions of the transcript relevant to the contested issue. *Hartt v. Munobe*, 67 Ohio St.3d 3, 7, 615 N.E.2d 617 (1993); App.R. 9(B). Without a transcript of the trial in this case, we must presume the validity of the trial court's proceedings. *Knapp* at 199. Consequently, we overrule the third assignment of error and affirm the trial court's judgment.

Judgment affirmed.

FISCHER, J., concurs separately.
HENDON, P.J., dissents.

FISCHER, J., concurring separately.

{¶43} While I concur in the majority opinion, I write separately because of the unique and unusual procedural history in this case.

{¶44} As noted above, this case was originally filed in October 2005, and remained pending until it was dismissed in February 2008. After his mother's death in August 2006, the defendant became the executor for both estates. Therefore, well before the first action was dismissed, the defendant should have been investigating the case, looking for information, and preparing for the litigation.

{¶45} The complaint was refiled in February 2009, and was properly served upon the defendant in March 2009. Despite having been properly served, the defendant failed to answer or otherwise respond, so the plaintiff moved for a default judgment in May 2009. More than a month passed before the defendant filed a motion to answer or plead out of time. In his affidavit, the defendant acknowledged that he had received the summons and complaint as a Florida resident and that he had done nothing. Notably, this four-month timeframe was just the first of many

periods of inaction in this case, causing increased costs to all parties and delay in the court.

{¶46} The trial court, however, granted the defendant an opportunity to answer, and he did. The defendant also filed a motion to dismiss. Within less than a month, the plaintiff responded to the motion to dismiss. But it was not until approximately four months later, in January 2010, when the defendant filed a reply memorandum. This is the second example of months of inaction chosen by the defendant.

{¶47} The trial court denied the motion to dismiss in late April 2010, and issued a scheduling order on September 22, 2010, specifying that discovery must be completed by April 8, 2011.

{¶48} On the same day that the court issued the scheduling order, September 22, 2010, the plaintiff served discovery requests on the defendant. For more than six months, the defendant did not respond. He did nothing to move the case along. He did not serve responses or file a motion for an extension of time to respond. He did not oppose the discovery requests on the basis that the information sought was not reasonably calculated to lead to the discovery of admissible evidence. *See* Civ.R. 26.

{¶49} According to the record, the defendant did not send a letter or an email to opposing counsel to request additional time. But the plaintiff made numerous extrajudicial efforts to obtain the requested discovery. Yet there was what I would characterize as "total radio silence" from the defendant. So on April 8, 2011, the date that the court had, in September 2010, scheduled as the discovery deadline, the plaintiff was forced to file a motion to compel relating to the discovery requests.

{¶50} Notably, the defendant failed to respond to the plaintiff's motion to compel.

{¶51} On May 10, 2011, a month later, the trial court granted the motion to compel and ordered responses to the discovery requests by May 16, 2011. As noted in ¶ 11 of the majority opinion, the entry contained a notation that "defense counsel agreed with the order and requested the same." That entry was signed by counsel for the defendant.

{¶52} And yet, the defendant still served no discovery responses, and this was approximately eight months after the discovery requests had been served and a motion to compel on the subject granted. So on May 18, 2011, the plaintiff filed a motion for sanctions, including a request for a default judgment, significantly the second motion for default in this, the second case filed in this dispute. The motion was scheduled to be heard on May 25, 2011.

{¶53} On May 24, 2011, the defendant finally filed his response to the motion for sanctions, yet still filed no responses to the discovery requests. The defendant had agreed with the order compelling discovery, as noted in that entry, and the defendant had finally, for the first time, alerted the court that he, as the executor of the estates, had no knowledge or involvement. The record is devoid of any reason why the defendant simply did not file such a response to the discovery requests. The trial court took the matter under submission on May 25, 2011.

{¶54} Approximately four months after the plaintiff filed a motion for sanctions for disobedience of the order to compel, and ten months after the discovery request had been served without any response, on August 1, 2011, the defendant filed an affidavit in support of his response to the motion for sanctions. This was the first

evidence submitted by the defendant in the discovery dispute. On August 4, 2011, the trial court conducted yet another hearing and heard argument by the parties. And on August 10, 2011, the court granted the motion and entered a default judgment.

{¶55} The defendant immediately appealed, and we dismissed the appeal in February 2012, as not being from a final and appealable order.

{¶56} In April 2012, approximately 20 months after service of the discovery requests, the trial court issued a new scheduling order setting the matter for trial in August 2012, almost two years from the initial discovery requests. Again, by either of these two dates, no responses had been filed, including any responses that may have affected the trial on damages following the default judgment on liability. After the trial on damages and various posttrial motions, on February 25, 2014, the trial court issued its final judgment. As of that date, the defendant still had submitted no discovery responses.

{¶57} A trial court must have broad discretion when imposing sanctions for discovery violations. *Nakoff v. Fairview Gen. Hosp.*, 75 Ohio St.3d 254, 662 N.E.2d 1 (1996); *State ex rel. Citizens for Open, Responsive & Accountable Govt. v. Register*, 116 Ohio St.3d 88, 2007-Ohio-5542, 876 N.E.2d 913, ¶ 18; *Brokamp v. Mercy Hosp.*, 132 Ohio App.3d 850, 860, 726 N.E.2d 594 (1st Dist.1999). As cited above in ¶ 23 of the majority opinion, many different sanctions may be issued, including preventing the submission of evidence, the striking of pleadings, or the ultimate sanction, a default judgment. For a default judgment, a party needs to show either "willfulness" or "bad faith." Again, this court must find an abuse of discretion by the trial court to reverse its decision. As noted above in ¶ 25 of the majority opinion, we have

previously affirmed dismissals against defendants and plaintiffs in these circumstances.

{¶58} The standard of review for discovery sanctions was set forth in *Five Star Fin. Corp. v. Merchants Bank & Trust Co.*, 1st Dist. Hamilton No. C-120814, 2013-Ohio-3097, ¶ 10:

> We must determine whether the trial court carefully and cautiously exercised its discretion before we will uphold the dismissal of a case with prejudice on purely procedural grounds. *DeHart v. Aetna Life Ins.* Co., 69 Ohio St.2d 189, 192, 431 N.E.2d 644 (1982). The trial court's judgment will be affirmed where the conduct of the plaintiff was "so negligent, irresponsible, contumacious or dilatory as to outweigh the policy that disposition of litigation should be upon its merits." *Evans v. Smith*, 75 Ohio App.3d 160, 163, 598 N.E.2d 1287 (1st Dist.1991); *see Toney v. Berkemer*, 6 Ohio St.3d 455, 458, 6 Ohio B. 496, 453 N.E.2d 700 (1983). ***A trial court may look to the entire history of the case when making such a ruling.*** *Russo v. Goodyear Tire & Rubber Co.*, 36 Ohio App.3d 175, 178, 521 N.E.2d 1116 (9th Dist.1987).

(Emphasis added.)

{¶59} So the issue in this case is: based upon the *entire* history of the case, could a trial court reasonably reach a decision to enter a default judgment, rather than one of the other available sanctions? *See id.*; *see also* Civ.R. 37. And while I agree that, had I been the trial judge, I might have decided on some other, less final,

and less draconian sanction than the one chosen by this judge, based upon this case history, I cannot say that such a decision was "unreasonable, arbitrary or unconscionable." *See Blakemore v. Blakemore*, 5 Ohio St.3d 217, 219, 450 N.E.2d 1140 (1983); *Berk v. Matthews*, 53 Ohio St.3d 161, 169, 559 N.E.2d 1301 (1990) (a reviewing court may not substitute its judgment for that of the trial court absent an abuse of discretion). Even disregarding the first lawsuit, which had been dismissed more than two years after its initial filing, and then refiled, this case sat, and sat, and sat, with almost no activity over several years simply because the defendant refused to file responses to rather basic interrogatories and document requests.

{¶60} So that the reader can understand that these were neither difficult nor highly complicated requests for information during the discovery process, I have set forth examples of what the plaintiff in this case sought:

> [Interrogatory] 2. Please identify * * * any and all persons you expect to call as witness in this matter, and provide a brief synopsis of each person's testimony.
>
> * * *
>
> [Interrogatory] 4. Please identify * * * each and every exhibit you intend to introduce at trial.
>
> * * *
>
> [Request for Production] 1. Please produce a certified copy of the declarations page, the complete policy, including endorsements, and any reservation of rights letter or notice of any insurance in effect relative to the subject incident and the injuries and damages suffered by Plaintiffs as a result thereof.

* * *

> [Request for Production] 2. Please produce copies of any statements you have from Plaintiffs.

{¶61} Parties in civil discovery should not have to wait for months upon months to get some type of responses to basic discovery requests. In this case, the plaintiff, according to the only evidence in the record, made numerous extrajudicial attempts to get the information. And if there was no information to be "gotten," as averred in the eleventh-hour affidavit submitted by the defendant, why is the record devoid of responses simply stating as much, without the need for a motion to compel? Without the need for a motion for sanctions? And without the need for numerous discovery hearings and pleadings to be filed? Where is a letter or an email in the record showing that the defendant so informed the plaintiff before the plaintiff was forced to file its first motion? This record is simply empty of any such communication. Thus, one can only conclude from this record that the defendant willfully refused to participate in discovery until a motion for sanctions had been filed.

{¶62} The civil rules were instituted to make discovery more efficient, to eliminate surprise, and to lead to a fair and equitable trial, or to the resolution of a dispute when all the parties know the information only available to one side prior to discovery. *See, e.g., Huffman v. Hair Surgeon, Inc.*, 19 Ohio St.3d 83, 85, 482 N.E.2d 1248 (1985); *Brokamp*, 132 Ohio App.3d at 860, 726 N.E.2d 94; *see also* Civ.R. 1. The plaintiff should not have had to file a motion to compel on the last day for discovery. The defendant chose to do nothing, and effectively ignored the request

for discovery from September 22, 2010, through at least May 2011. When parties must make repeated motions and extrajudicial efforts to get information, ironically, and especially if the opposing party claims to have no such information, like in this case, why was all this judicial time and effort necessary? Parties cannot allow cases to just "sit there," and ignore discovery requests because that slows down the efficiency of our courts and our entire civil justice system, and creates increased costs for parties who invoke Ohio's system of justice. The six months between the service of the discovery requests and the end of the discovery deadline, and the ten or 11 months in which no response of any kind, judicial or extrajudicial, occurred, are the most glaring examples of this problem in the civil dockets.

{¶63} The circumstances in this case are extremely unfortunate. And while, as I noted above, had I been the trial judge, I may have chosen a different and less severe sanction on these facts, given the unnecessarily protracted procedural history of this case, I cannot say that the trial court abused its discretion in entering a default judgment. Obviously, such a sanction should be used sparingly. The goal, of course, is to reach cases on their merits. But when one party refuses to participate in the discovery process, the merits can never be reached. The willful ignoring of discovery requests undermines the entire system.

{¶64} What is most sad about the situation is that this type of ignoring of discovery for months upon months after responses should have been made, and responding only when a motion to compel or for sanctions is filed, is not an isolated situation, and occurs on an often enough basis to be both worrisome and bothersome. Such behavior is unfortunate for all involved, is harmful to the parties, costly to the courts, and hence the taxpayers, and brings disrepute to the finest civil

justice system in the world, the American court system. We as judges, lawyers, and those working with us, can and must do better to make our civil justice system work better for all.

{¶65} Maybe the court's decision below and this opinion will help reinvigorate all of us to do a better job at discovery, and help our system of civil justice work even better.

HENDON, P.J., dissenting.

{¶66} Although a trial court has broad discretion to sanction violations of its discovery orders, that discretion is not boundless. Where its exercise forever denies a party the review of a claim's merits, the abuse-of-discretion standard of review is heightened. *See Jones v. Hartranft*, 78 Ohio St.3d 368, 372, 678 N.E.2d 530 (1997).

{¶67} In this case, the record does not show either willfulness or bad faith on the part of Kindell sufficient to warrant such an extreme sanction. *See Toney v. Berkemer*, 6 Ohio St.3d 455, 453 N.E.2d 700 (1983). On the contrary, it demonstrates Kindell's continued, albeit clumsy, attempt to defend the case. From the outset, Kindell made clear that he intended to defend the refiled action "just as [his] parents had done" in the previously filed action. He pursued a motion to dismiss the action against his father's estate. Although he was a Florida resident, his local counsel appeared at multiple hearings before the trial court. Indeed, a notation on the court's entry granting the motion to compel stated, "Defense counsel agreed with the order and requested same."

{¶68} This was not a defendant who entirely failed to participate or who was trying to dodge his responsibility to comply with a discovery order. Instead, as his response to the motion for sanctions demonstrates, Kindell had expected, mistakenly

it seems, some direction from the trial court about how he should respond to the requested discovery. He made clear in that response that he would provide any information in his possession, but that he could not attest under oath to any "substantive information requested." His response also noted that the subject real estate had been transferred in 2006.

{¶69} Kindell's latest affidavit, filed at the eleventh hour but *before* the court ordered a default judgment, indicated his attempts to obtain information and documents for the property, including any lease agreement with Lyons, and his lack of knowledge of the existence of insurance coverage.

{¶70} Because the record demonstrates that Kindell's conduct in failing to appropriately respond to Lyons' discovery requests was neither willful nor in bad faith, I believe that the trial court abused its discretion in entering a default judgment against him. The trial court had far less drastic remedies available to it, and should have imposed one of those before resorting to the harshest sanction possible. In granting a default judgment on liability, the trial court denied Kindell the right to have the claims and defenses tried on their merits, and granted an utter windfall to Lyons. Therefore, I respectfully dissent.

Please note:

The court has recorded its own entry on the date of the release of this opinion.