

STATE OF MINNESOTA
COUNTY OF HENNEPIN

DISTRICT COURT
FOURTH JUDICIAL DISTRICT

Case Type: Personal Injury

Doe 114,

Court File No.: 27-CV-16-1712
Judge Frank J. Magill, Jr.

Plaintiff,

v.

**PLAINTIFF'S MEMORANDUM
OF LAW IN SUPPORT OF MOTIONS
FOR SANCTIONS AND DEFAULT
JUDGMENT**

Jason McLean,

Defendant.

INTRODUCTION

Plaintiff moves for sanctions against Defendant Jason Arthur McLean pursuant to Minn. R. Civ. P. 37 for failure to cooperate in discovery and for judgment by default pursuant to Minn. R. Civ. P. 55.01 for his failure to defend. Defendant McLean failed to comply with this Court's discovery order filed July 19, 2017, requiring him to appear for his deposition on August 22, 2017. Additionally, Defendant McLean has failed to respond to written discovery requests, including Requests for Admission concerning liability. Defendant McLean's failure to cooperate with discovery requests in good faith and non-appearance for his deposition, a blatant disregard of the Court's Order, warrants economic and non-economic sanctions. And, Defendant McLean's willful violation of Court rules, including a Court Order, contumacious conduct, and intentional delaying of the proceedings makes entry of default judgment appropriate. Thus, Plaintiff respectfully requests that the Court grant her motion for discovery sanctions and enter judgment by default against Defendant McLean.

FACTS

I. Procedural History

In 2015 and 2016, Plaintiff and four other individuals sued Defendant Jason McLean for his sexual abuse of them as minors while a Company Actor and employee of Children's Theatre Company.¹ After multiple failed attempts to depose Defendant McLean with proper service, Plaintiff moved for an order compelling him to appear for taking of his deposition and for expenses and attorneys' fees.^{2 3} Defendant McLean failed to respond or to appear for the hearing on July 17, 2017, on the motion. On July 19, this Court ordered Defendant McLean to appear for his deposition at the law office of Jeff Anderson & Associates located in Saint Paul, Minnesota, on August 22, 2017.

Plaintiff's counsel served Defendant McLean on July 17, 2017, with a Fifth Amended Notice of Video Deposition for August 22, 2017. (Ex. A to the Affidavit of Molly Burke) On July 19, 2017, Plaintiff's counsel provided him with a courtesy copy of the Court's order. (Ex. B to the Affidavit of Molly Burke) On July 25, 2017, Plaintiff served on Defendant McLean Requests for Production of Documents and Requests for Admission. (Exs. C, D, E to the Affidavit of Molly Burke) Plaintiff requested that Defendant McLean admit to engaging in sexual contact with her and four other Plaintiffs, who have brought related cases, when she and they were minors. (Ex. D)

¹ Plaintiff's counsel has filed identical Memoranda of Law in Support of Motions for Sanctions and Judgment by Default in four of the five related matters involving Defendant McLean: *Laura Adams v. Children's Theatre Company and Jason McLean*, 27-CV-15-20713; *Doe 76 v. Children's Theatre Company and Jason McLean*, 27-CV-15-21165; *Doe 116 v. Children's Theatre Company and Jason McLean*, 27-CV-16-144; and *Doe 114 v. Jason McLean*, 27-CV-16-1712. Plaintiffs' briefs filed in each matter are identical; the factual circumstances are the same, and each Plaintiff makes the same request of the Court. In the fifth related case, *Doe 496 v. Children's Theatre Company, John Clark Donahue, and Jason McLean*, 27-CV-17-13730, Plaintiff moves only for Judgment by Default.

² Plaintiff's counsel's numerous efforts over a period of many months to contact, locate, and serve McLean with Notices of Deposition and counsel's pertinent communications with Defendant McLean are set forth in Plaintiff's Memoranda of Law, affidavit, and exhibits in support of her Motion to Compel filed on June 26, 2017.

³ Four of the five plaintiffs, Laura Adams, Doe 76, Doe 116, and Doe 114, brought motions to compel.

A response was required by August 28, 2017. See Minn. R. Civ. P. 36.01 (providing time by which response is required to requests for admission).

On August 17, 2017, Plaintiff's counsel filed a Notice of Motion and Motion for Prejudgment Attachment, to be heard August 31, 2017. McLean provided no response to Plaintiff's briefing of the motion by the required deadline under the Minnesota Rules of Civil Procedure. Shortly before the hearing, the date was reset for October 11, 2017.

On August 22, 2017, Defendant McLean did not appear for his deposition. Plaintiff's counsel made a record of his nonappearance. (Ex. F to the Affidavit of Molly Burke) Additionally, Defendant McLean failed to respond to discovery requests and to Plaintiff's efforts to meet and confer concerning his non-responses. (Ex. G to the Affidavit of Molly Burke) Moreover, Defendant McLean neither answered nor objected to Plaintiff's Requests for Admission by the deadline of August 28, 2017. Thus, the matters requested are deemed admitted and conclusively established. Minn. R. Civ. P. 36.

II. Defendant McLean's Selling of Assets

On July 14, 2017, an article published by City Pages, reported that McLean sold his business, the Varsity Theater, for \$2.51 million. (Ex. H to the Affidavit of Molly Burke) A second article published by City Pages, on August 2, 2017, reported that McLean entered into an agreement to sell his business, the Loring Pasta Bar, and the building at 325 14th Avenue Southeast, Minneapolis, Minnesota, 55414, in which the business was located, to three longtime managers for an undisclosed amount of money. (Ex. I to the Affidavit of Molly Burke) According to 2016 Hennepin County Property Tax Information, McLean personally owned the building, and its estimated market value was \$1,505,000. (Ex. J to the Affidavit of Molly Burke)

III. Plaintiff's Harm Suffered

As a result of the sexual abuse Defendant McLean perpetrated against Plaintiff, which is deemed admitted and conclusively established—that McLean engaged in sexual contact with Plaintiff when she was a minor and under the age of 18 years old—Plaintiff has suffered and will continue to suffer damages as alleged in her Complaint. See Complaint. The Affidavit of Susan Phipps-Yonas, Ph.D., a psychologist licensed to practice in Minnesota, addresses the nature of Plaintiff's damages. See Affidavit of Susan Phipps-Yonas, Ph.D., dated September 26, 2017.

ARGUMENT

I. **Defendant McLean's Failure to Cooperate in Discovery and Non-Appearance at his Court-Ordered Deposition, a Blatant Disregard of this Court's Order, Warrants Economic and Non-Economic Sanctions**

Courts are authorized by Rule 37.02 of the Minnesota Rules of Civil Procedure to impose sanctions for failing to comply with a discovery order. The "choice of a sanction for a party's failure to comply with a discovery order is a matter within the trial court's discretion." Patton v. Newmar Corp., 520 N.W.2d 4, 7 (Minn. Ct. App. 1994) rev'd on other grounds 538 N.W.2d 116 (Minn. 1995); see also Bowman v. Bowman, 493 N.W.2d 141 (Minn. Ct. App. 1992). Trial judges have inherent power to impose sanctions for the nondisclosure of information. Id.

If a party "fails to obey an order to provide or permit discovery, including an order made pursuant to . . . 37.01, the court in which the action is pending may make such orders in regard to the failure as are just." Minn. R. Civ. P. 37.02(b). This includes "an order treating as a contempt of court the failure to obey any orders." Id. Additionally, orders available to the Court include an order that "designated facts shall be taken to be established for purposes of the action," "[a]n order refusing to allow the disobedient party to support or oppose designated claims or defenses," or "rendering an order by default." Id.

“Although a judgment by default runs contrary to the primary objective of the law to dispose of claims on their merits, courts must be provided broad discretion to enforce calendar rules and prevent unnecessary and inexcusable delays.” State by Humphrey v. Ri-Mel, Inc., 417 N.W.2d 102, 108 (Minn. Ct. App. 1987) “A party who willfully and without justification or excuse fails to comply with discovery orders with an intent to delay trial and continues to refuse to cooperate with the court forfeits the right to a trial on the merits.” Id. at 108–09 (citing Breza v. Schmitz, 311 Minn. 236, 237, 248 N.W.2d 921, 922 (1976)). The Minnesota Court of Appeals has affirmed a dismissal with prejudice when a party failed to produce documents or comply with an order compelling discovery. Housing and Redevelopment Authority v. Kotlar, 352 N.W.2d 497, 498 (Minn.Ct.App.1984).

Finally, Minn. R. Civ. P. 37.02(b) provides that in lieu of any of the orders possible under the rule, or in addition thereto, “the court shall require the party failing to obey the order or the attorney advising that party or both to pay the reasonable expenses, including attorney fees, caused by the failure, unless the court finds that the failure was substantially justified or that other circumstances make an award of expenses unjust.”

Defendant McLean has willfully and persistently repeatedly refused to participate in discovery, disregarded this Court’s Order, and caused unnecessary delays. After months of Defendant McLean’s evading conduct and counsel’s attempts to secure his deposition, Plaintiff was forced to seek an order to compel his deposition. This Court ordered him to appear for his deposition on August 22, 2017. Defendant McLean flagrantly disregarded the Order by failing to appear. Additionally, Defendant McLean has failed to respond to discovery requests, Plaintiff’s motions, efforts to meet and confer, and Requests for Admission.

Defendant McLean's conduct has been without justification or excuse. His refusal to cooperate with discovery and the Court's Order has further delayed discovery and prejudiced Plaintiff. While evading any participation in the judicial proceedings, Defendant McLean has simultaneously taken action to transfer assets, putting them beyond the reach of Plaintiff. Additionally, Plaintiff has incurred expenses, including attorneys' fees, as a result of Defendant McLean's repeated noncompliance. In the Court's order dated July 19, 2017, the Court stated that if Defendant McLean failed to appear for his deposition as ordered, the Court would require him to pay reasonable expenses incurred by the other parties, including attorney's fees, caused by his nonappearance.

In order to remedy the prejudice suffered by Plaintiff, Plaintiff requests the following sanctions:

- A. That Defendant McLean be ordered to pay reasonable expenses, including attorneys' fees, as set forth in the accompanying Affidavit of Molly Burke, caused by his nonappearance at his court-ordered deposition.
- B. That the Court order that the matters in Plaintiff's Requests for Admissions, that Defendant McLean engaged in sexual contact with Plaintiff and four other plaintiffs when she and they were minors, are established as a matter of law.
- C. That the Court issue an order refusing to allow Defendant McLean to support any of his asserted affirmative defenses.
- D. That the Court render judgment by default against Defendant McLean.

In sum, under these circumstances, sanctions against Defendant McLean are warranted.

II. Plaintiff is Entitled to Entry of Default Judgment Against Defendant McLean

A. Defendant McLean has Engaged in Willful Violations of Court rules, Contumacious Conduct, and Intentional Delays

Default judgment may be entered against a party who fails to “plead or otherwise defend” within the time allowed by the law “and when that fact is made to appear by affidavit.” Minn. R. Civ. P. 55.01. Minnesota courts have used federal caselaw to provide guidance concerning the meaning of “otherwise defend.” See Black v. Rimmer, 700 N.W.2d 521, 526 (Minn. Ct. App. 2005) (applying meaning of “otherwise defend” as interpreted by Federal caselaw); The Eighth Circuit Court of Appeals has stated that “[d]efault judgment for failure to defend is appropriate when the party’s conduct includes willful violations of court rules, contumacious conduct, or intentional delays.” Ackra Direct Mktg. Corp. v. Fingerhut Corp., 86 F.3d 852, 856 (8th Cir. 1996); Fafinski v. Johnson, No. A15-2041, 2016 WL 4263082, at *1-3 (Minn. Ct. App. Aug. 15, 2016), *review denied* (Oct. 26, 2016) (applying Eighth Circuit Court of Appeals’ meaning of “failure to defend”). (Ex. K to the Affidavit of Molly Burke) The decision whether to grant or deny a motion for a default judgment lies within the discretion of the district court. Black, 700 N.W.2d at 525.

In Ackra, similar to Defendant McLean, the defaulted parties were initially represented, but their counsel withdrew. 86 F.3d at 854–55. Subsequently, like Defendant McLean, the defaulted parties did not obtain substitute counsel or participate in the litigation. Id. at 855. The Eighth Circuit upheld the entry of default judgment and stated that no mitigating factor “excuse[d] their total failure to participate in the litigation after their counsel withdrew.” Id. at 856. In Fafinski, the defendant’s conduct included filing a late answer containing clerical and substantive errors and failing in several ways to follow the General Rules of Practice. 2016 WL 4263082, at *4. The Minnesota Court of Appeals determined that the conduct, which suggested “intentional delay and a disregard for procedural rules,” “demonstrates a failure to defend.” Id.

Here, Defendant McLean's conduct includes willful violations of court rules, contumacious conduct, and intentional delays. For months Defendant McLean refused to participate in the discovery process and repeatedly failed to appear for his deposition. Because of his evading conduct, Plaintiff was forced to seek an order to compel his deposition. Defendant McLean neither responded to Plaintiff's motion nor appeared at the hearing. And, after the Court granted Plaintiff's motion, Defendant McLean willfully disregarded the Court's Order by failing to appear. Additionally, Defendant McLean has failed to respond to discovery requests, efforts to meet and confer, and Requests for Admission. Significantly, his failure to respond to the Requests for Admission has resulted in the matter of his sexual abuse of Plaintiff when she was a minor as being admitted and conclusively established. Defendant McLean also failed to respond to Plaintiff's Motion for Prejudgment Attachment. Defendant McLean's actions demonstrate a failure to defend.

B. Plaintiff Has Demonstrated that as a Result of McLean's Sexual Abuse, She Has Suffered Damages

Because of Defendant McLean's failure to defend, Plaintiff is entitled to judgment by default in the amount of \$1 million dollars. Defendant McLean's sexual abuse of Plaintiff—that McLean engaged in sexual contact with Plaintiff when she was a minor and under the age of 18 years old—is deemed admitted and conclusively established. As a result of Defendant McLean's sexual abuse of Plaintiff, she has suffered and will continue to suffer damages. See Affidavit of Susan Phipps-Yonas, Ph.D. Recent verdicts reached in Minnesota cases involving child sex abuse include verdicts in the millions of dollars:

- a. **\$13.5 million** verdict in 2015 on behalf of a single survivor abused at a day care center (*J.K., a minor, by and through parent and natural guardian v. New Horizon Kids Quest, Inc.*, File No. 27-CV-12-9958, Minn. Dist. Ct., Hennepin County) (reversed) (Ex. L to the Affidavit of Molly Burke);

- b. **\$6 million** revised verdict in 2015 against the day care center (*J.K., a minor, by and through parent and natural guardian v. New Horizon Kids Quest, Inc.*, File No. 27-CV-12-9958, Minn. Dist. Ct., Hennepin County) (Ex. M to the Affidavit of Molly Burke);
- c. **\$8.1 million** verdict in 2015 on behalf of a single survivor abused by a priest working in the Diocese of Duluth (*Bill Weis v. Diocese of Duluth*, File No. 62-CV-14-871, Minn. Dist. Ct., Ramsey County) (Ex. N to the Affidavit of Molly Burke);
- d. **\$2.1 million** verdict in 2016 on behalf of two survivors who sued their perpetrator (*John Doe 101 and John Doe 102 vs. Matthew Feeney, Walden Entertainment*, File No. 27-CV-14-17039, Minn. Dist. Ct., Hennepin County) (Exs. O and P to the Affidavit of Molly Burke);
- e. **\$10.19 million** verdict in 2016 on behalf of a survivor who sued her perpetrator (*D.L.S. v. Jay Allen Schoep*, File No. 12-CV-15-746, Minn. Dist. Ct., Chippewa County) (Ex. Q to the Affidavit of Molly Burke);
- f. **\$4 million** verdict obtained in 2017 against the estate of a perpetrator (*WJA vs. Patricia C. Johnson, as the Personal Representative of the Estate of Terry M. Johnson, Deceased*, File No. 27-CV-16-5306, Minn. Dist. Ct., Hennepin County) (Ex. R to the Affidavit of Molly Burke).

In sum, because of Defendant McLean's willful violations of court rules, contumacious conduct, and intentional delays, he has failed to defend. Plaintiff has suffered and will continue to suffer damages because of Defendant McLean's sexual abuse of her as a minor, a fact which is deemed admitted and conclusively established. Thus, Plaintiff is entitled to entry of judgment by default against Defendant McLean in the amount of \$1 million dollars.

CONCLUSION

Based on the foregoing, Plaintiff respectfully requests that the Court impose the requested sanctions against Defendant McLean and enter judgment by default against him in the amount of \$1,000,000.00.

Dated: September 27, 2017.

JEFF ANDERSON & ASSOCIATES, P.A.

A handwritten signature in cursive script, appearing to read "Molly K. Burke", written over a horizontal line.

By: Jeffrey R. Anderson, #2057

Molly K. Burke, #0391477

366 Jackson Street, Suite 100

St. Paul, MN 55101

(651) 227-9990

jeff@andersonadvocates.com

molly@andersonadvocates.com

Attorneys for Plaintiff