THIRD DIVISION
Order Filed August 31, 2017
Supplemental Order Upon Denial of Rehearing November 15, 2017

No. 1-16-1359

IN THE
APPELLATE COURT OF ILLINOIS
FIRST JUDICIAL DISTRICT

In re MARRIAGE OF	)	Appeal from the
	)	Circuit Court of
KRYSTYNA S. ROMAN-KROCZEK,	)	Cook County.
	)	
Petitioner-Appellee,	)	
	)	
and	)	No. 12 D 5889
	)	
BOHDAN J. KROCZEK,	)	
	)	
Respondent-Appellant	)	
	)	
(Izabela Roman,	)	Honorable
	)	Patricia Marian Logue,
Intervening Respondent-Appellee).	)	Judge Presiding.

JUSTICE HOWSE delivered the judgment of the court.
Justices McBride and Ellis concurred in the judgment.

ORDER

¶ 1 *Held*: The circuit court of Cook County's order barring respondent in dissolution proceeding from presenting any evidence, claims, or defenses at trial as sanction for failure to appear at his own discovery deposition is reversed; the circuit court failed to use a less severe sanction to coerce compliance with discovery and warn defendant that his failure to appear at his deposition would result in escalation in severity of sanctions.

¶ 2 Petitioner, Krystyna S. Roman-Kroczek, married respondent, Bohdan J. Kroczek, in December 1985. In June 2012 Krystyna filed a petition for dissolution of marriage. In the dissolution proceedings Krystyna sought to recover from Bohdan money that her sister, Izabela Roman, loaned Krystyna to meet her living expenses. Izabela had also loaned the parties money to buy a home in Florida. In April 2014 petitioner filed a petition to join Izabela as a necessary third party. Izabela filed a combined response to the petition to join her as a necessary third party and her own petition to intervene. The trial court granted the petitions to join Izabela as a third-party respondent. Izabela also filed a complaint against Bohdan for breach of contract and for an equitable lien on marital property located in Florida.

¶ 3 After respondent failed to appear for his own deposition, the trial court entered an order barring respondent from presenting any evidence, claims, or defenses at trial. The matter proceeded to trial, after which the court entered judgment against respondent. Respondent appeals, arguing the trial court's sanction was an abuse of discretion because he did not violate a court order and its sanction was too severe under the circumstances.

¶ 4 For the following reasons, we reverse the trial court's order sanctioning defendant for noncompliance with discovery and remand for further proceedings not inconsistent with this order.

¶ 5 BACKGROUND

¶ 6 Respondent appeals from the judgment of dissolution entered by the circuit court on the grounds the court abused its discretion when it entered its discovery sanction against him and that the property distribution ordered by the court constituted an abuse of discretion. In light of our disposition, we confine our discussion of the proceedings below to those related to discovery and otherwise necessary for an understanding of our disposition. The parties married in 1985.

Petitioner, Krystyna Roman-Kroczek (Krystyna) filed her petition for dissolution of marriage against respondent, Bohdan J. Kroczek (Bohdan), on June 15, 2012. The parties engaged in discovery.

¶ 7 On May 29, 2013, Krystyna filed a motion to compel Bohdan to comply with a notice to produce and to answer interrogatories. The motion to compel stated Krystyna served Bohdan with the notice to produce and interrogatories on January 29, 2013. The motion alleged that on March 28, 2013, Bohdan "produced some, but not all, of the documents described in the Notice to Produce but did not answer any of the Interrogatories." Krystyna wrote to Bohdan describing the deficiencies and demanded compliance by April 23, 2013. According to the motion to compel, on April 16, 2013, Bohdan "produced additional, but not all of the, documents described in the Notice to Produce, and served unsworn and incomplete answers to the Interrogatories." On May 15, 2013, Krystyna's attorney wrote to Bohdan's attorney in accordance with Illinois Supreme Court Rule 201(k) (eff. July 30, 2014).[1] The May 29, 2013 motion to compel sought an order directing Bohdan to comply with all outstanding discovery requests, a finding that his failure to comply was without substantial cause or justification, and attorney fees and costs.

¶ 8 On September 17, 2013 Krystyna issued a subpoena for deposition for records and testimony to Bohdan Kroczek Surgical Ltd. (Bohdan Surgical) and Kasia Missok. Bohdan Surgical and Missok were commanded to mail the requested records to Krystyna's attorney on or before October 14, 2013. Missok was commanded to appear to give deposition testimony on

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[1] Rule 201(k) reads as follows: "Reasonable Attempt to Resolve Differences Required. The parties shall facilitate discovery under these rules and shall make reasonable attempts to resolve differences over discovery. Every motion with respect to discovery shall incorporate a statement that counsel responsible for trial of the case after personal consultation and reasonable attempts to resolve differences have been unable to reach an accord or that opposing counsel made himself or herself unavailable for personal consultation or was unreasonable in attempts to resolve differences."

October 22, 2013, and Bohdan Surgical was commanded to appear on October 23, 2013. On September 18, 2013, Krystyna issued a subpoena for deposition testimony to Karolina Kudyba. Kudyba was also commanded to appear to give deposition testimony on October 22, 2013.

¶ 9 On October 24, 2013, Krystyna filed petitions for a rule to show cause why Bohdan Surgical, Missok (now identified at Katarzyna Missok), and Kudyba should not be held in contempt for failing to produce documents on or before October 14, 2013, or to seek an extension of time to do so, and/or failing to send a representative to give testimony or to seek an extension of time to do so. The petitions all alleged on information and belief the failure to comply with the subpoena was willful and contumacious, sought an order directing compliance with the subpoena, asked the court to issue a rule *instanter*, and sought attorney fees.

¶ 10 Specifically, the petition against Bohdan Surgical alleged that on October 23, 2013, Krystyna's attorney asked one of Bohdan's attorneys whether a representative of Bohdan Surgical would appear to give testimony, and one of Bohdan's attorneys responded they would not appear to testify. The petition against Missok alleged Krystyna's attorney contacted Bohdan's attorneys by email on October 21, 2013 regarding Missok's appearance to give testimony and one of Bohdan's attorney's responded they thought Missok's deposition had been postponed. The petition against Kudyba alleged Kudyba did not appear because Krystyna's attorney called Kudyba on October 18, 2013 and Kudyba informed Krystyna's attorney she wanted to find an attorney to represent her at the deposition. The petition against Kudyba further alleged that at the time of filing no attorney for Kudyba had contacted Krystyna's attorney to reschedule the deposition.

¶ 11 On October 28, 2013, Krystyna filed a second motion to compel Bohdan to comply with the January 29, 2013 notice to produce and to answer interrogatories. The second motion to compel stated that the original motion to compel remained pending at the time of filing the

second motion to compel. The second motion to compel alleged that on or about June 25, 2013, after Krystyna filed the motion to compel on May 29, 2013 (original motion to compel), Bohdan "produced some additional documents responsive to the Notice to Produce." The second motion to compel alleged Rule 201(k) had been satisfied by an October 24, 2013 email correspondence from her attorney to Bohdan's attorney.[2] The second motion to compel further alleged, on information and belief, that Bohdan also caused persons associated with him, "namely, his secretary [(Kudyba)], his paramour [(Missok)] who has checking-signing authority for one of his business accounts, and a representative of his corporation not to appear pursuant to Subpoena for their depositions. As a result, Krystyna has filed Petitions for Rule to Show Cause regarding each such person's unexcused failure to appear for a deposition." The second motion to compel asked for a finding that Bohdan's failure to comply with outstanding discovery requests is without substantial cause or justification and sought an order that he comply within 7 days, and attorney fees and costs.

¶ 12 On October 31, 2013, the trial court entered orders finding Krystyna's petitions for rule to show cause showed a *prima facie* case of indirect civil contempt against Kudyba, Missok, and Bohdan Surgical. The court issued a rule to show cause and directed them to appear to show cause why they should not be held in contempt for failing to appear for deposition as ordered by the court.

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[2] The October 24, 2013 email reads, in its entirety, as follows:

"Gentlemen:

Please call me or let me know by close of business tomorrow, October 25, 2013, whether, and if so when Dr. Kroczek will produce the documents and information requested in my October 17, 2013 letter.

Also, as far as we can tell, Dr. Kroczek has not produced documents regarding credit card accounts listed on his Rule 13.3.1 Disclosure Statement, namely, a Citi credit card and a Bank of America credit card.

Please consider this a Rule 201(k) communication. Thank you."

¶ 13 On November 31, 2013, Bohdan filed a response to the second motion to compel. The response to the second motion to compel alleged, in part, that Bohdan produced all documents available to him and in his possession on June 19, 2013. The response also alleged that when the court continued the original motion to compel, the court refused to order Bohdan to produce documents such as personal and corporate tax returns because those documents were not yet produced to him, due to his obtaining of an extension to file his personal and corporate tax returns. The response to the second motion to compel further alleged that at a hearing on the original motion to compel the only issue brought to the court's attention was Bohdan's personal and corporate tax returns for 2012 "because all other documentation had been previously tendered to [Krystyna's] attorneys on via [*sic*] correspondence of June 19, 2013." The response also alleged that other information was disclosed in his Rule 13.3.1 Disclosure Statement and that he has objected to the production of documents that are equally accessible to Krystyna.

¶ 14 On December 18, 2013, the trial court entered an agreed order on the petition for rule to show cause against Kudyba. The agreed order stayed the effect of the court's order on the petition for rule to show cause against Kudyba "until such time as Karolina Kudyba fails to appear for a properly-scheduled deposition as provided" in the agreed order. The agreed order directed Kudyba to appear for a deposition that is scheduled by agreement between the parties' attorneys and Kudyba's attorney. The agreed order stated that if Kudyba appears at such a deposition or the "matter is resolved amicably without the necessity of taking Karolina Kudyba's deposition," the petition for rule to show cause against Kudyba would be voluntarily withdrawn. The same day the court entered a similar order with regard to Bohdan Surgical. The order on the rule to show cause issued against Bohdan Surgical stated the order on the rule is stayed until Bohdan Surgical "fails to appear for a deposition on a date agreed by the parties' counsel and the witness; but said agreement shall not be unreasonably withheld." Bohdan appeared for the

deposition as the representative of Bohdan Surgical. The court also continued the order on the rule to show cause entered against Missok for hearing until January 29, 2014.

¶ 15 On February 13, 2014, the trial court entered an agreed order for a representative of Bohdan Surgical to appear for a deposition on February 21, 2014 and for Bohdan Surgical to produce documents pursuant to the subpoena on or before February 20, 2014. The February 13, 2014 agreed order stated that Bohdan Surgical had withdrawn two prior deposition dates.

¶ 16 On March 13, 2014 the trial court ordered Bohdan "to arrange the appearance of Mrs. K. Missok at her deposition by subpoena, such date to be scheduled [(not necessarily completed)] before the hearing on April 2, 2014."

¶ 17 On March 18, 2014 Krystyna served Bohdan with a request to admit facts. An April 7, 2014, Bohdan filed his response to Krystyna's request to admit facts.

¶ 18 On April 16, 2014, Krystyna filed a petition for adjudication of indirect civil contempt asking the trial court to issue a rule against Bohdan to show cause why he should not be held in contempt for his willful and contemptuous violation of the court's March 13, 2014 order that he arrange the appearance of Missok at her deposition. The April 16, 2014 petition alleged that Bohdan did not provide dates for Missok's deposition on or before April 2, 2014 as ordered by the court despite the fact Bohdan's attorneys informed Krystyna's attorneys "dates would be provided that week," and as of April 16, 2014 Bohdan had not arranged Missok's appearance for her deposition. Krystyna's attorney allegedly sent two emails requesting that information with no response. The petition alleged that as of the date of filing Missok had not made herself available for deposition.

¶ 19 On April 25, 2014, Krystyna filed a notice of issuance of subpoena to Kasia Missok for the purpose of discovery.

¶ 20 On April 29, 2014 the trial court entered an agreed order stating Bohdan had provided the date of May 8, 2014 for Missok's deposition, and that Krystyna's petition for rule to show cause was continued for status to June 18, 2014.

¶ 21 On September 12, 2014 Krystyna filed a motion to compel Missok to appear for deposition. The September 12, 2014 motion to compel alleged Missok is Bohdan's paramour and alleged employee. The September 12, 2014 motion to compel alleged that Missok appeared for her deposition on June 24, 2014, but she "did not bring all documents requested on the rider. For example, she did not have available her personal credit card statements that were paid by Bohdan Kroczek Surgical." The motion alleged Missok agreed to produce these records subsequent to her deposition. The deposition lasted approximately two hours. Missok agreed to appear for additional questioning. Missok forwarded the additional records on July 3, 2014, but certain records were not tendered. "Most significantly, the credit card statements from Banana Republic Visa were only dated July through December 2012, while requests for records from 2011 forward were made." The motion to compel alleged that when Krystyna's attorney attempted to reschedule the deposition, Missok's attorney responded Missok would not be made available unless they were informed of the areas of inquiry.[3] The motion to compel stated:

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[3] A copy of the email from Missok's attorney to Krystyna's attorney asking that they be "informed *** of the areas of inquiry," dated September 4, 2014, is attached to the September 12, 2014 motion to compel. That email reads, in pertinent part, as follows:

> "My recollection is that the deposition of Ms. Missok took over two hours and so if we do produce Ms. Missok voluntarily, it will only be for the short time remaining up to a total of three hours.
>
> * * *
>
> We will need to be informed of the areas of inquiry before there can be any agreement to produce Ms. Missok voluntarily. A blanket statement of 'information obtained since her initial deposition' is not sufficient to secure my agreement to produce my client for an additional deposition.
>
> * * *

"Krystyna was previously forced to appear in court on a number of occasions to obtain the cooperation and appearance of Kasia at her deposition. The most recent refusal to appear, without certain demands being met, is yet another example of Kasia's evasive behavior, which on information and belief is at the behest of Bohdan." The motion asked for an order compelling Missok to appear for the remainder of her deposition, and asked for additional time beyond the three-hour time limit to depose Missok "[d]ue to the extensive volume of documents tendered after her initial deposition," and due to Missok's attorney's alleged improper objections at the initial deposition.

¶ 22 On September 18, 2014 the trial court entered an order continuing the motion to compel the deposition of Missok to October 22, 2014 for hearing and granted Missok's attorney leave to file a response. On October 1, 2014, Missok's attorney filed a motion for protective order and response to the motion to compel. Missok's motion and response admitted Missok did not have all of her Banana Republic charge card statements and attached a transmittal letter to Krystyna's attorney for "all the documents in [her] possession or control responsive to the [subpoena] which were not produced at her deposition." Missok's motion and response stated Missok "does not object to using the remaining time (approximately ½ hour) of the deposition if counsel for Krystyna seeks to question her on the subsequently produced documents." The motion and response also alleged the September 4 email seeking to resolve the matter and what questions are to be asked regarding the additional documents was ignored. Missok asked the court to deny Krystyna's September 12 motion to compel and for a protective order limiting the continued deposition to ½ hour on documents Missok produced subsequent to the June 24, 2014 deposition.

> Perhaps, if there are a few salient questions that can be submitted in written form, a deposition can be avoided altogether. It would certainly save a lot of money for everyone. Why not try to resolve the information request in that manner?"

¶ 23 On October 22, 2014 the trial court ordered Missok to appear for her continued deposition on a date agreed upon by the attorneys within 45 days of the order. The order limited the time for the continued deposition to one hour total, with half of the time restricted to questions regarding documents not produced at the original deposition and half with no restrictions on questioning.

¶ 24 On March 30, 2015, Krystyna filed a motion to set trial dates. That motion also requested the trial court order the parties to complete any remaining discovery within 60 days. On April 2, 2015 the trial court entered an order setting the matter for trial on October 7 and 8, 2015.

¶ 25 On August 6, 2015 Krystyna filed an amended notice of deposition of Bohdan to be held on August 21, 2015 (correcting the prior notice which listed a date of August 22, 2015). On September 14, 2015 Krystyna filed a notice of deposition of Bohdan to be held on September 25, 2015.

¶ 26 On September 25, 2015, counsel for all parties appeared in the trial court on Bohdan's motion to strike and dismiss intervenor-plaintiff Izabela Roman's (Izabela) third-party complaint. The court's order states that Bohdan's attorney advised the court "of [Bohdan's] direction to take no further action or participate in the proceedings, based on [Bohdan's] statement to his counsel that that he has been discharged." At the Friday, September 25, 2014, hearing Bohdan's attorney informed the court he received an email the night before from Bohdan instructing him to inform the court the attorney no longer represents Bohdan and to withdraw from the divorce case. Bohdan's attorney informed the court he had begun to notify counsel for the parties the previous Monday he may be terminated "based on communications I was receiving from [Bohdan.]" The attorney continued: "His deposition is scheduled for 1:30 this afternoon [at Krystyna's counsels' office.] No idea whether or not he intends to appear. I have

sent him a copy of what's been scheduled. [T]heir client's deposition is schedule for October 2nd. The case is set for trial October 6th and 7th [which Krystyna's attorney corrected to 7th and 8th.]" Bohdan's attorney also stated that he had "the updated discovery to make my discovery current" and that he had received Krystyna's updated discovery. The attorneys discussed the pending motion to dismiss Izabela's third-party complaint. Bohdan's attorney asked for the motion to be continued and recommended the court set a date for Bohdan to appear in person to inform the court he terminated his attorney and so that the court could explain to Bohdan what is involved with terminating his attorney. The court stated its willingness to set a date for the attorneys to return and for Bohdan to personally appear, at which time one of Krystyna's attorneys stated: "I could tell you that if [Bohdan] doesn't appear for his deposition today, you could expect to see us on a motion for default." The court set the matter for status on the ruling on the motion to strike and dismiss and ordered Bohdan to appear "in court in his own proper person" on September 30, 2015.

¶ 27 Bohdan did not appear for his deposition on September 25, 2015. On September 28, 2015, Krystyna filed a motion for discovery sanctions. Krystyna's September 28, 2015 motion alleged Bohdan willfully failed to appear at his own deposition scheduled for September 25, 2015, of which he had reasonable notice and which "was previously agreed upon by the parties, through counsel." The motion for discovery sanctions alleged Bohdan's attorney (who had appeared in court that morning and informed the court he had been discharged) appeared at the deposition but Bohdan did not. Krystyna's motion for discovery sanctions alleged Bohdan's deposition is necessary for purposes of discovery and trial preparation, and without Bohdan's deposition testimony she is prejudiced and unable to prepare defenses to Bohdan's claims at trial. The motion alleged the matter should not be delayed any further, as the "case is over three years old, and should come to a conclusion on the previously scheduled trial dates." Krystyna also

alleged Bohdan's actions "are willfully obstructionist, taken solely to cause further delay." The motion cites examples "of Bohdan's previous non-compliance and disregard" of the trial court's orders, including failing to make Missok available for deposition, which he was later ordered to do; failing to pay Krystyna's attorney fees, which remained due; and failing to pay temporary support. The motion argued the "appropriate sanction *** is to bar Bohdan from presenting any claims, defenses, or any other testimony at trial."

¶ 28 Izabela filed a separate motion for discovery sanctions against Bohdan. Izabela's motion alleged that after consultation among the counsel for all parties she filed a notice of deposition on Bohdan to take place at a previously noticed deposition of Bohdan by Krystyna. Izabela's motion for sanctions alleged that "following further consultation among counsel for all the parties *** the parties agreed to reschedule the depositions of Bohdan J. Kroczek to September 25, 2015." Then, on September 24, 2015, Bohdan's then attorney informed Izabela's attorney "of the possibility he was going to be discharged by his client before the deposition scheduled for the following day." On September 25, 2015 Bohdan's attorney informed counsel and the court he had been discharged by e-mail the previous evening. According to Izabela's motion for sanctions Bohdan "then failed to appear at his deposition without any advance notice to the other parties." Izabela's motion for sanctions asked the trial court to bar Bohdan from pursuing any dispositive motion regarding her amended third-party complaint and from presenting any evidence, claims, or defenses at the trial.

¶ 29 On September 30, 2015 Bohdan, the other parties, and counsel appeared in court for status on ruling on Bohdan's motion to strike and dismiss Izabela's third-party complaint and on Bohdan's attorney's motion to withdraw and both motions for discovery sanctions. Following that appearance the trial court entered an order that reads, in pertinent part, as follows:

> "Bohdan Kroczek being advised by the court that if he consents to the withdrawal of his attorney, trial will not be delayed, the court admonishing Bohdan Kroczek of this prior to his attorney withdrawing, Bohdan giving consent to this and electing to file a *pro se* appearance, the court also hearing both motions for discovery sanctions brought as a result of Bohdan's failure to appear for his deposition scheduled for 9/25/15, and being duly advised in the premises, it is hereby ordered
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> (1) [Bohdan's attorney] is granted leave to withdraw;
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> (2) Bohdan Kroczek is granted leave to file *pro se* appearance, *instanter*;
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> (3) Krystyna Roman's motion for discovery sanctions filed on 9/28/15 is granted. Bohdan is hereby barred from presenting any evidence, claims, or defenses at trial relating to Krystyna's petition for dissolution of marriage, and Bohdan's counter-petition, if any;
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> (4) Izabela Roman's motion for discovery sanctions is granted. Bohdan is hereby barred from presenting any evidence, claims, or defenses at trial relating to Izabela Roman's complaint."

¶ 30 The trial court also ordered that trial would start on October 7 and 8, 2015 as previously scheduled, and that there "shall be no continuances of trial dates."

¶ 31 Following trial the trial court ordered the parties to submit proposed written judgments within 21 days. The trial court entered judgment in favor of Krystyna and against Bohdan.

¶ 32 This appeal followed.

¶ 33 ANALYSIS

¶ 34 Bohdan argues the trial court erred in sanctioning him by prohibiting him from presenting any evidence, claims, or defenses at the trial because his failure to appear for his deposition was

not in violation of any rule or court order and the sanction was too severe under the circumstances. Krystyna responds barring Bohdan from presenting evidence was the only appropriate sanction based on the entirety of Bohdan's conduct throughout the litigation during which, she asserts, Bohdan "has demonstrated deliberate disregard for the Court and the legal system." Izabela further argued that the trial court's sanction was proper given "Bohdan's long-established pattern of discovery abuses and contumacious conduct."

¶ 35 Litigation is controlled by discovery rules promulgated by our supreme court. *Bruske v. Arnold*, 44 Ill. 2d 132, 135 (1969). "The purpose of discovery is the ascertainment of truth and the expedition of the disposition of litigation. [Citation.]" *Bee Chemical Co. v. Service Coatings, Inc.*, 116 Ill. App. 2d 217, 223 (1969). Our supreme court's discovery rules "are designed to insure that the outcome of litigation shall depend on its merits in the light of all available facts rather than on the craftiness of the parties or guile of counsel." *Coutrakon v. Distenfield*, 21 Ill. App. 2d 146, 153 (1959). Discovery sanctions "are in and of the policy which is an integral part of our present judicial system—that of affording the fullest opportunity for exploration of an opponent's case prior to trial." *Id.* "The trial of a case shall not be delayed to permit discovery unless due diligence is shown." Ill. Sup. Ct. R. 201 (eff. July 1, 2014). "A sanction should be tailored to promote discovery, not punish a dilatory party. [Citation.] To the maximum extent that is practicable, sanctions should be customized to address the nature and extent of the harm while prescribing a cure to the specific offense." *Locasto v. City of Chicago*, 2014 IL App (1st) 113576, ¶ 27. "Generally, a sanction will not be reversed absent an abuse of discretion. [Citation.]" *Id.* ¶ 26.

¶ 36 In *Locasto*, the plaintiff issued discovery requests to the defendants in March 2011. Thereafter the trial court ordered the parties to complete oral discovery by June 21 and set a case management conference for June 22. *Id.* ¶ 11. The plaintiff filed a motion to compel and, one

day before the case management conference, requested depositions of the defendants. *Id.* ¶ 13. At the case management conference the trial court granted the plaintiff's motion to compel and entered an order of default "against all defendants for repeated discovery violations." (Internal quotation marks omitted.) *Id.* ¶ 14. The individual defendants had answered interrogatories the day before but the answers were incomplete, and the court gave them one week to complete written discovery. *Id.* By August, the defendants' answers to interrogatories were still not complete. *Id.* ¶ 15. The plaintiff also issued a second request for depositions. *Id.* The trial court continued the default. *Id.* In September the plaintiff "moved to transfer the case for default prove-up, alleging defendants had been defaulted three or more times for continued discovery violations and had yet to fully answer the interrogatories." *Id.* ¶ 16. The defendants completed their responses to the interrogatories; nonetheless, "the trial judge found all defendants remained in default for continued discovery violations" and ordered one of the defendants and a non-defendant employee of the defendant city to be deposed within 30 days of it order. *Id.* The trial court continued the matter for status of discovery; and, in the interim, the plaintiff issued a second request to depose the non-defendant employee and a third request to depose one of the defendants. *Id.* "On October 21, the court again found defendants in default for continued discovery violations and transferred the case for prove-up." *Id.* ¶ 17.

¶ 37 The defendants moved to vacate the default, claiming they had complied with all discovery requests, including the depositions, except for the non-defendant employee's deposition. *Id.* The defendants claimed the plaintiff chose "not to proceed on any of the dates she has been made available, and [the plaintiff's] attorney never responded to e-mails and a letter offering to present [the employee] on several dates in September and October." (Internal quotation marks omitted.) *Id.* ¶ 17. The trial court conducted a prove-up hearing and awarded the plaintiff damages. *Id.* ¶ 19. The defendants filed a postjudgment motion to vacate the default

judgment. *Id.* ¶ 20. The trial court continued the defendants' postjudgment motion and ordered the parties to schedule the employee's deposition. *Id.*

¶ 38 On appeal, the defendants argued "the trial court erred by holding them in default as a discovery sanction without first exploring and applying a less onerous sanction." *Id.* ¶ 24. The *Locasto* court began by noting that:

> "Illinois Supreme Court Rule 219 (eff. July 1, 2002) addresses the consequences of a party's refusing or failing to comply with rules or court orders regarding discovery. Rule 219 affords a trial judge broad discretion in fashioning a sanction appropriate under the specific circumstances. *** In determining whether the trial court abused its discretion, a reviewing court looks to the same factors that the trial court considers in deciding on a constructive sanction: (1) surprise to the adverse party; (2) the prejudicial effect of the proffered evidence; (3) the nature of evidence being sought; (4) diligence of the adverse party in seeking discovery; (5) timeliness of the adverse party's objection to the testimony or evidence; and (6) the good faith of the party offering the evidence. [Citation.] Of these factors, no single factor controls and each situation presents a unique factual scenario that bears on the propriety of a particular sanction. [Citation.]" *Locasto*, 2014 IL App (1st) 113576, ¶ 26.

The *Locasto* court wrote that, when a party is failing to satisfy its obligations to facilitate discovery, one way for trial judges to "push compliance is to describe the sanction that may be imposed for noncompliance in a court order, and then follow through with the sanction should the conduct so warrant. Thereafter, an even more intrusive sanction should be imposed for continued noncompliance." *Id.* ¶ 27. The defendants in *Locasto* argued "the trial court abused

its discretion by holding them in default before less drastic sanctions had been attempted and determined to be ineffective." *Id.* ¶ 29. This court agreed. *Id.* ¶ 41.

¶ 39 The *Locasto* court noted that the "defendants slowly responded to Locasto's discovery requests but did not exhibit blatant disregard for the court's authority. *** [A]lthough [the] defendants did not act expeditiously in responding to the trial court's case management order, they did not ignore it either." *Id.* ¶ 38. The act of noncompliance the plaintiff cited as support for the trial court's default order was the failure to complete the non-defendant employee's deposition. *Id.* ¶ 39. The *Locasto* court found that although the employee did not appear on the dates the plaintiff requested, the record showed there were other dates on which the employee could be deposed, therefore, the plaintiff shared fault for the inability to take the deposition. *Id.* More significant to the *Locasto* court was the plaintiff's response to the defendants' delays in completing discovery and complying with the trial court's discovery orders. *Id.* ¶ 40. The plaintiff filed a motion for default with his first motion to compel filed shortly after the deadline for completing oral discovery. *Id.* ¶¶ 12, 40. "One week later *** the trial court entered a default order 'against all defendants for repeated discovery violations' and gave defendants one week to furnish all written discovery. The court then entered continuing default orders on August 11 and September 16, and finally on October 21, 2011, before transferring the case for prove-up." *Id.* ¶ 40. This court held that "[w]hile the trial court acted appropriately and responsibly in setting deadlines, Locasto went for the jugular, default, in the first instance rather than seek sanctions in proportion to the gravity of the violations. In seeking the sanction of default, Locasto went too far. The trial court should have considered and invoked a less onerous sanction." *Id.* ¶ 41. Further, "before the July 22 order [of default], the trial court never warned defendants that their failure to comply could result in the sanction of 'last resort,' the sanction that should be reserved until 'after all the court's other enforcement powers have failed to

advance the litigation.' [Citation.]" *Id.* ¶ 42. This court held that the trial court in *Locasto* did not employ increasingly harsh sanctions and did not warn that failing to comply with its orders would result in increasingly harsh sanctions then follow through on those warnings before entering a default judgment. *Id.* ¶ 45. "In the absence of any consideration of intermediate sanctions and an advance warning that continued dilatory responses could result in a default, ***the judgment of default [was] unwarranted." *Id.* ¶ 46.

¶ 40 This court has called the series of orders in *Koppel v. Michael*, 374 Ill. App. 3d 998 (2007), "[a] proper application of progressive discovery sanctions." *Locasto*, 2014 IL App (1st) 113576, ¶ 43 (citing *Koppel*, 374 Ill. App. 3d 998). In *Koppel*, the defendants had failed to respond to the plaintiff's request for production of documents and interrogatories despite three orders by the trial court before the court barred the defendants from calling any witnesses at trial. *Koppel*, 374 Ill. App. 3d at 1000-01. In response to the plaintiff's first motion for sanctions, the trial court in *Koppel* first ordered the defendants to respond to the discovery requests by a date certain; when they failed to do so the court ordered them to respond and to pay attorney fees; and when the defendants failed again to comply, the court imposed a monetary sanction in addition to attorney fees. *Id.* After the trial court ordered the defendants to respond by a date certain, with each subsequent order, the trial court in *Koppel* advised the defendants "that the nature of the sanctions imposed will become more severe as their non-compliance persists." *Id.* at 1000-01. The trial court in *Koppel* ultimately entered a default judgment against the defendants for their "continuing noncompliance with this court's discovery orders" (*id.* at 1001) and this court affirmed (*id.* at 1007).

¶ 41 We do not find a progressive application of discovery sanctions present in this case. Considering the factors the trial court is to use in fashioning an appropriate sanction, we agree that sanctioning Bohdan for his failure to appear at his deposition was appropriate; we do not

agree that the "nuclear option" to bar Bohdan from presenting any evidence, claims, or defenses was warranted. Specifically lacking is the additional requirement that the trial court consider that "the purpose of a sanction is not merely to punish the dilatory party, but to effectuate the goals of discovery. [Citation] A just order is one that is commensurate with the seriousness of the violation [citation], and ensures both the accomplishment of discovery and a trial on the merits [citation]." (Internal quotation marks omitted.) *Adams v. Bath and Body Works, Inc.*, 358 Ill. App. 3d 387, 395 (2005).

¶ 42 In this case, Krystyna filed motions to compel regarding her request to produce documents and interrogatories on May 29, 2013 and October 28, 2013. Before the May 29 motion to compel, Bohdan had produced some documents and after being contacted by Krystyna's attorney produced additional documents; and he provided what Krystyna characterized as incomplete answers to interrogatories. When Krystyna filed the second motion to compel on October 28, the first motion to compel remained pending and, in the interim, Bohdan produced additional documents. After failing to appear for their depositions, Krystyna filed petitions for rule to show cause against Bohdan Surgical, Kudyba, and Missok. The delay in deposing Kudyba was so that she could obtain counsel. The trial court entered an order directing the parties to agree to a date for the deposition of Bohdan Surgical and Bohdan appeared for the deposition as its representative. The court ordered Bohdan to produce Missok for deposition. Krystyna filed a second petition for adjudication of indirect civil contempt regarding Missok's deposition. Bohdan then provided a date for her deposition. Krystyna subsequently filed a motion to compel regarding Missok's deposition after Missok had appeared for her disposition but failed to produce all of the documents Krystyna requested. In response, Missok's attorney produced the missing documents but did not agree to voluntarily give Krystyna additional time to depose Missok. The trial court resolved the dispute and ordered

Missok to complete her deposition on the documents she did not bring the first time and gave Krystyna an additional ½ hour to depose Missok on other documents. Similar to the defendants in *Locasto*, despite some disputes over discovery and admittedly causing some delay, Bohdan did not exhibit blatant disregard for the court's authority. We note that, also like the order of default in *Locasto*, the trial court's order barring Bohdan from presenting any evidence, claims, or defenses does not indicate that "the trial court found [Bohdan's] actions show a deliberate, contumacious or unwarranted disregard of the court's authority. [Citation.]" (Internal quotation marks omitted.) *Locasto*, 2014 IL App (1st) 113576, ¶ 42. Significantly, respondent was never admonished that a failure to comply with discovery could result in him being barred from presenting evidence, claims or defenses.

¶ 43 The only discovery matter that remained unfulfilled when the trial court barred Bohdan from presenting any evidence or defenses was Bohdan's deposition. Although the trial date was near when he failed to appear, the trial court had been informed that Krystyna's deposition had also not been taken and was scheduled for two days after the court entered the sanction and five days before the trial date. The trial court's order did not order Bohdan to pay Krystyna and Izabela's attorney fees, impose a monetary penalty, or most importantly, order Bohdan to appear for a deposition at a date agreed upon by Krystyna and Izabela before trial with a warning that failure to comply would result in the more onerous sanction of barring the presentation of evidence or defenses. See *id.* ¶45 (citing *Koppel*, 374 Ill. App. 3d 998).

¶ 44 Izabela argues Bohdan did receive a "lesser sanction" because, although he was prevented from presenting evidence or defenses, he was allowed "to make an opening statement, cross-examine witnesses, make a closing statement, and submit a proposed judgment," which she argues was "fair" in light of his conduct. Illinois Supreme Court Rule 219(c) provides a

nonexhaustive list of remedies the trial court may impose for failure to comply with discovery orders, including:

> "(i) That further proceedings be stayed until the order or rule is complied with;
>
> (ii) That the offending party be debarred from filing any other pleading relating to any issue to which the refusal or failure relates;
>
> (iii) That the offending party be debarred from maintaining any particular claim, counterclaim, third-party complaint, or defense relating to that issue;
>
> (iv) That a witness be barred from testifying concerning that issue;
>
> (v) That, as to claims or defenses asserted in any pleading to which that issue is material, a judgment by default be entered against the offending party or that the offending party's action be dismissed with or without prejudice;
>
> (vi) That any portion of the offending party's pleadings relating to that issue be stricken and, if thereby made appropriate, judgment be entered as to that issue." Ill. Sup. Ct. R. 219(c) (eff. July 1, 2014).

Initially we note the trial court did not bar Bohdan from presenting a "particular" claim or defense, or bar the testimony of "a witness" or the presentation of any specific evidence; instead, the trial court barred Bohdan from presenting "*any* evidence, claims, or defenses at trial relating to Krystyna's petition for dissolution of marriage" or "Izabela Roman's complaint." (Emphasis added.) Thus, although the trial court has broad discretion to enter any "such orders as are just," the trial court's order in this case exceeded the scope of the recommended orders for violating discovery orders set out in Rule 219. Ill. Sup. Ct. R. 219(c) (eff. July 1, 2014).

¶ 45 We acknowledge that the trial court in this case did not enter "the most onerous of all sanctions" against Bohdan. "The most onerous of all sanctions is a judgment by default on 'claims or defenses asserted in any pleading to which that issue is material' or dismissal of the

offending party's action, with or without prejudice. Ill. S. Ct. R. 219(c)(v) (eff. July 1, 2002)." *Locasto*, 2014 IL App (1st) 113576, ¶ 28. Barring the use of documents or witnesses is, generally, a "lesser sanction" than dismissal or default. *Id.* ¶ 36. Bohdan argues the sanction in this case was "was tantamount to a default judgment, as it resulted in only the admission of evidence that supported the positions of Krystyna and Izabela." The *Locasto* court held that:

> "before deploying a Rule 219(c)(v) sanction [(dismissal or default)], the trial court should already have considered the six factors listed above and concluded that sanctions against the noncomplying party are warranted. Then, the court should weigh four additional factors in deciding whether the time has come to impose default or dismissal: (1) the degree of the party's personal responsibility for the noncompliance, (2) the level of cooperation and compliance with previous discovery and sanction orders, (3) whether less coercive measures remain available or, based on the record, would be futile; and (4) whether the recalcitrant party had been warned, orally or in writing, about the possibility of entry of an order of default or dismissal." *Locasto*, 2014 IL App (1st) 113576, ¶ 35.

¶ 46 "[E]ach situation presents a unique factual scenario that bears on the propriety of a particular sanction. [Citation.]" *Locasto*, 2014 IL App (1st) 113576, ¶ 26. Although this case does not involve a sanction under Rule 219(c)(v), we find that under the facts and circumstances of this case the *Locasto* court's rationale applies. *Id.* ¶ 35. The barring of all evidence can be functionally equivalent to a default or dismissal. See *State Farm Fire & Casualty Co. v. Frigidaire, a Division of General Motors Corp.*, 146 F.R.D. 160, 163 (N.D. Ill. 1992); *American Family Insurance Co. v. Village Pontiac-GMC, Inc.*, 223 Ill. App. 3d 624, 629 (1992) ("After all evidence of the condition of the car is barred, no evidence remains upon which the trial court could find product liability or negligence."). This is not a situation where the result of an order

barring evidence is that the plaintiff cannot make out a *prima facie* case. *Cf. Frigidaire, a Division of General Motors Corp.*; *Village Pontiac-GMC, Inc.*; nonetheless, this case involved significant factual disputes about which Bohdan was prevented from presenting evidence. Krystyna called Bohdan as an adverse witness. From our review of the record, on multiple occasions Bohdan attempted to provide additional information on subjects including, for example, Krystyna's ability to work, his alleged decline in income, and the amount of dissipation of marital assets. The dissolution judgment finds "[Krystyna] is no longer able to perform the functions she was able to prior to ceasing work in 2004;" "there was no credible evidence to support the conclusion that Bohdan's income and earning capacity changed from prior to the divorce to the present time;" and "[t]he total amount dissipated by Bohdan *** is $671,643.73." The trial court's sanction had the effect of ending important aspects of the litigation without a full adjudication on the merits. *Locasto*, 2014 IL App (1st) 113576, ¶ 35. Although the trial court did not enter a default judgment, under the circumstances the trial court should have considered whether less coercive measures were available and whether less drastic sanctions would be futile. *Locasto*, 2014 IL App (1st) 113576, ¶ 35.

¶ 47 In support of her argument the sanction in this case was proper, Izabela relies on *In re Marriage of Vancura*, 356 Ill. App. 3d 200 (2005), in which the court upheld a sanction striking the respondent's answer and barring him from presenting evidence in the division of property trial. *In re Marriage of Vancura*, 356 Ill. App. 3d at 202-03. In *Vancura*, the respondent failed to respond to the petitioner's initial discovery requests prompting the petitioner to file a motion to compel. *Id.* at 202. The trial court granted the motion to compel and ordered the respondent to respond to the discovery requests by a date certain. *Id.* The respondent failed to respond by the date ordered and the petitioner moved for sanctions. *Id.* Thereafter the respondent provided answers that the petitioner claimed were deficient. *Id.* Following a hearing the trial court

ordered the respondent to comply with discovery by a new date "or risk having his evidence barred at trial." *Id.* The record did not contain a transcript of that hearing. *Id.* The petitioner received no further discovery and filed an amended motion for sanctions. *Id.* The trial court heard the amended motion for sanctions, after which the trial court sanctioned the respondent by striking his answer and barring him from presenting evidence. *Id.* Again, the record did not contain a transcript of the hearing in which the trial court struck the respondent's answer and barred him from presenting evidence. *Id.* On appeal the court found that "[t]he record here includes the trial court's sanctions order and its previous order compelling respondent to comply with discovery by November 30, but the record does not include a transcript of the hearing at which sanctions were discussed. We resolve all doubts due to incompleteness of the record against the appellant. *Foutch v. O'Bryant*, 99 Ill. 2d 389, 392 (1984). As such, we find no abuse of discretion in the trial court's imposition of sanctions." *Id.* at 203.

¶ 48 In this case, Izabela argues that if "[i]t was appropriate to strike the answer and proceed as if it were a default case in *Marriage of Vancura*[,] [c]ertainly, the lesser sanction of preventing Bohdan from presenting defenses or evidence, but permitting him to make an opening statement, cross[-]examine witnesses, make a closing statement, and submit a proposed judgment, all after multiple contempt proceedings and motions to compel, is more than fair." Additionally, both Izabela and Krystyna argue that because Bohdan failed to include in the record a bystander's report of the hearing on September 25, at which they state, in support of the sanction, that Bohdan's previous noncompliance with discovery was discussed, or of the hearing on September 30 when the trial court imposed the sanction, the order imposing sanctions should be affirmed

under *Foutch*[4]. We disagree; and, moreover, we find *Vancura* supports our judgment the trial court abused its discretion in sanctioning Bohdan. As Izabela concedes, a transcript of the proceedings on September 25 is attached to Bohdan's posttrial motion. "The pleadings in a case have always been considered as a part of the record, [citations] and *** the Civil Practice Act *** declares that an exhibit attached to and made a part of the complaint is to be treated as a part of the pleading." *Scott v. Freeport Motor Casualty Co. of Freeport*, 392 Ill. 332, 339 (1945). Neither Krystyna nor Izabela disputes the accuracy of the transcript of the September 25 hearing. Although no transcript of the proceedings on September 30, when the court actually imposed the sanction, is included in the record, no report of those proceedings is necessary to this court's disposition. We have found that the trial court failed to utilize a progressive application of discovery sanctions to coerce compliance with discovery and ensure a trial on the merits or to warn Bohdan that failure to comply would result in increasingly severe sanctions. Krystyna and Izabela have failed to cite any case in which this court upheld a discovery sanction barring all evidence without prior warning to the dilatory party. In *Vancura*, despite the absence of transcripts of the previous hearings, the trial court's orders demonstrated the trial court's use of progressive sanctions before barring the respondent's evidence, and a prior order from the trial court warned the respondent that noncompliance with discovery would result in his evidence

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[4] "[A]n appellant has the burden to present a sufficiently complete record of the proceedings at trial to support a claim of error, and in the absence of such a record on appeal, it will be presumed that the order entered by the trial court was in conformity with law and had a sufficient factual basis. Any doubts which may arise from the incompleteness of the record will be resolved against the appellant. [Citations.] As there is no transcript of the hearing on the motion to vacate here, there is no basis for holding that the trial court abused discretion in denying the motion." *Foutch v. O'Bryant*, 99 Ill. 2d 389, 391-92 (1984). The *Foutch* court also held that where the trial court's order states the court heard the evidence and was fully advised in the premises, "unless there is a contrary indication in the order or in the record, it is presumed that the court heard adequate evidence to support the decision that was rendered." *Id.* at 394.

being barred. The trial court's order barring Bohdan's evidence after failing to appear at his deposition and the transcript of the September 25 hearing demonstrate the court did not use progressive sanctions or give any such warning to Bohdan. Assuming, *arguendo*, the trial court considered the previous discovery disputes in fashioning its order, less coercive sanctions that could effectuate the goals of discovery were available and Bohdan should have been warned of the potential consequences. Thus, we find *Vancura* actually supports Bohdan's position in this appeal.

¶ 49 We hold that the record before us is sufficient to find, under the facts and circumstances of this case, the trial court abused its discretion by barring Bohdan from presenting any claims, defenses, or evidence because the sanction was a severe penalty which the trial court should not have imposed prior to attempting to use less onerous sanctions to "effectuate the goals of discovery" and ensure "a trial on the merits." *Adams*, 358 Ill. App. 3d at 395. The trial court also abused its discretion in imposing such a harsh sanction prior to giving any advance warning that failure to comply with less onerous sanctions, which should have been designed "to promote discovery, not punish" Bohdan, would result in a more severe sanction, including the one actually imposed. See *Locasto*, 2014 IL App (1st) 113576, ¶ 45.

¶ 50 Krystyna and Izabela argue Bohdan forfeited his right to argue the trial court erroneously excluded his evidence because he failed to make an offer of proof. "[A] party claiming he has not been given the opportunity to prove his case must provide a reviewing court with an adequate offer of proof of what the excluded evidence would have been. [Citation.] In the absence of an offer of proof, the issue of whether evidence was improperly excluded will be deemed waived. [Citation.]" *Chicago Park District v. Richardson*, 220 Ill. App. 3d 696, 701-02 (1991). The Illinois Rules of Evidence also provide that: "Error may not be predicated upon a ruling which admits or excludes evidence unless a substantial right of the party is affected, and *** [i]n case

the ruling is one excluding evidence, the substance of the evidence was made known to the court by offer or was apparent from the context within which questions were asked." Ill. R. Evid. 103(a)(2) (eff. Jan. 1, 2011). We reject this argument.

¶ 51 As Bohdan argues on appeal, we are not here dealing with a ruling on the admissibility of a particular piece of evidence; rather, the issue before us is whether the trial court properly sanctioned Bohdan by prohibiting him from presenting any claims, defenses, or evidence. Even if we were to assume Rule 103 applied in this context, an adequate offer of proof would have required Bohdan to effectively present his entire case. "A formal offer of proof is made whereby counsel 'offers the proposed evidence or testimony by placing a witness on the stand, outside the jury's presence, and asking him questions to elicit with particularity what the witness would testify to if permitted to do so.' [Citation.]" *Cundiff v. Patel*, 2012 IL App (4th) 120031, ¶ 20. We believe this is too great a burden to impose on a party to preserve their right to appeal a trial court's discovery sanction excluding all of a party's evidence. "In lieu of a formal offer of proof, counsel may request permission from the trial court to make representations regarding the proffered testimony. As a matter of the court's discretion, the court may allow such an 'informal' offer of proof." *People v. Pelo*, 404 Ill. App. 3d 839, 875 (2010). Based on the trial court's sanction we do not believe such an extensive informal offer of proof would have been allowed. Moreover, we believe the trial court clearly understood the nature and character of the evidence Bohdan would offer were he not precluded from doing so. "An offer of proof is, in fact, normally mandatory in order to preserve for review the question of whether a motion *in limine* was properly granted. That requirement may be relaxed where it is apparent that the trial court clearly understood the nature and character of the evidence sought to be introduced." *In re Leona W.*, 228 Ill. 2d 439, 461 n5 (2008). It is not necessary that the trial court be aware of precisely what the testimony will be, only that the court knows its "nature and character;" thus,

no offer of proof is required when the trial court clearly understood that a witness would testify as to the medical standard of care. *Dillon v. Evanston Hospital*, 199 Ill. 2d 483, 495 (2002)). Finally, "the waiver rule may be relaxed if the trial court was given the opportunity to consider and correct any error made at trial, since the rule of waiver states an admonition to the parties, not a limitation upon the jurisdiction of the reviewing court." *Nave v. Rainbo Tire Service, Inc.*, 123 Ill. App. 3d 585, 590 (1984). Here, the error was made before trial in prohibiting Bohdan from presenting any evidence, which the trial court had the opportunity to correct at trial. Further, we find that relaxing the waiver rule is necessary in this case to achieve a just result. *O'Malley v. Village of Palos Park*, 346 Ill. App. 3d 567, 576 (2004) (waiver rule may be overridden where the need for a just result exists).

¶ 52 We reverse the trial court's September 30, 2015 order barring Bohdan from presenting any evidence, claims, or defenses at trial, reverse the trial court's dissolution judgment, and remand for further proceedings and a new trial. On remand, the trial court may fashion an appropriate sanction for Bohdan's noncompliance with the subpoena to appear for deposition consistent with this order.

¶ 53 Finally, Izabela filed a motion to dismiss Bohdan's appeal of the dissolution judgment on the grounds Bohdan may not appeal the trial court's dissolution judgment (1) while accepting the benefits of that judgment or (2) while demonstrating contempt for the court. We ordered that motion taken with the case for consideration with our disposition of the appeal. In light of our holding, Izabela's motion to dismiss the appeal is denied as moot.

¶ 54 CONCLUSION

¶ 55 For the foregoing reasons, the circuit court of Cook County is reversed and the cause remanded for further proceedings not inconsistent with this order.

¶ 56 Reversed and remanded.

¶ 57 SUPPLEMENTAL ORDER UPON DENIAL OF REHEARING

¶ 58 Izabela filed a petition for rehearing of this court's order denying as moot her motion to dismiss Bohdan's appeal. In its dissolution judgment, the trial court awarded the parties' Florida residence to Izabela "as and for full accordance of the debt owed to her by the parties, which includes the debt taken to purchase the Florida property *** and the debt associated with Krystyna's living expenses." The dissolution judgment further stated "Izabela Roman shall be solely liable for any and all costs and expenses associated with said property upon its transfer." After being found in contempt for failing to comply with the court's order to sign a deed conveying the Florida property to Izabela, Bohdan signed the deed transferring the property. In her motion to dismiss the appeal Izabela argued Bohdan "pursued and accepted a payoff of his mortgage debt" and filed motions seeking additional money from Izabela for costs associated with the Florida property, constituting a release of errors such that Bohdan is now prohibited from appealing the judgment. Izabela argues this "court cannot reinstate the Nationstar mortgage;" therefore, the motion to dismiss is not moot.

¶ 59 "In Illinois, the effect of a reversal is to abrogate the decree and leave the cause as it stood prior to the entry of the decree [citation], restoring the parties to their original positions." *Williamsburg Village Owners' Ass'n, Inc. v. Lauder Associates*, 200 Ill. App. 3d 474, 483 (1990). We cannot say whether, following proceedings on remand, the judgment awarding the Florida residence to Izabela will remain the same; or, consequently, whether payment of the mortgage and expenses after the transfer of the Florida residence is a "benefit" to Bohdan which he is not entitled to have. On remand, the trial court can consider Izabela's payment of the mortgage on the Florida property when it makes a division of the marital property. Any payments Izabela has made on the mortgage or expenses, which are not required by the trial

court's judgment following remand, can be addressed through a monetary award or through the division of marital property.

¶ 60 Izabela's motion to dismiss the appeal also argued that after the trial court entered the dissolution judgment Bohdan engaged in contumacious conduct which "deprives him of the right to demand consideration from the very judicial system he holds in contempt." Izabela argues her motion to dismiss the appeal is not moot because the motion "is based on Bohdan's actions after Judge Logue's ruling, actions that are unrelated to the discovery sanctions at the heart of the appeal." (Emphasis omitted.) Some of Bohdan's allegedly contumacious conduct was related to his refusal to sign documents to transfer the Florida property. Additionally, Izabela asserted Bohdan was found in contempt for (1) failing to pay maintenance, (2) failing to pay attorney fees in connection with the proceedings regarding the maintenance, (3) failing to pay Krystyna's prospective attorney fees to defend this appeal, and (4) again for failing to pay maintenance.

¶ 61 We note the record shows Bohdan has purged himself of contempt of court by eventually complying with the trial court's orders. Bohdan has tendered a deed conveying his interest in the Florida property to Izabela and he has paid the sums he was ordered to pay. On remand the trial court can address Bohdan's conduct with respect to its orders in an appropriate sanction, if further sanctions are warranted in light of the fact he has purged himself of contempt.

¶ 62 Our judgment in this case has "rendered it impossible for [this] court to grant effectual relief" to Izabela on her claim Bohdan should be prohibited from appealing the trial court's judgment. See *In re Andrea F.*, 208 Ill. 2d 148, 156 (2003) (stating test for mootness). The trial court's judgment has been done away with. *Lauder Associates,* 200 Ill. App. 3d at 483. Accordingly, Izabela's motion to dismiss is moot.