

STATE OF MICHIGAN
IN THE SUPREME COURT
(On Appeal From The Court of Appeals)

LATIF Z. ORAM, a/k/a RANDY Z.
ORAM, et al.,

Plaintiff/Counter-Defendant/Appellant

v

JOHN ORAM and GARY ORAM,
Jointly and Severally,

Defendants/Counter-Plaintiffs/Appellees

and

JOHN ORAM and GARY ORAM, et al.,

Counter-Plaintiffs and
Third-Party Plaintiffs/Appellees

v

INTERNATIONAL OUTDOOR, INC., et al.

Third-Party Defendants/Appellees.

**DEFENDANT, JOHN ORAM'S, SUPPLEMENTAL BRIEF IN OPPOSITION TO
PLAINTIFF'S APPLICATION FOR LEAVE TO APPEAL**

34670
JE/PLAE'S Supplement

Supreme Court No. 134670
COA Docket No. 267077

Lower Case No. 02-039499-CK
Hon. Wendy L. Potts

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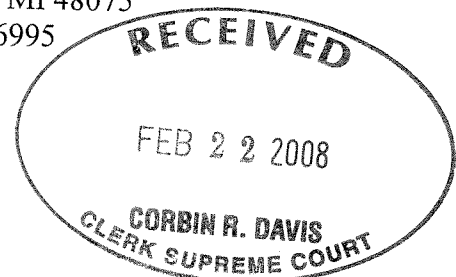


TABLE OF CONTENTS

INDEX OF AUTHORITIESiii

STATEMENT OF THE QUESTIONS PRESENTEDiv

STATEMENT OF FACTS 1

ARGUMENTS 3

 I. THE TRIAL COURT DID NOT ABUSE ITS DISCRETION IN
 DISMISSING PLAINTIFF’S CASE WITH PREJUDICE WHERE
 COUNSEL VIOLATED A COURT ORDER AND WAS NOT
 PREPARED TO TRY THE CASE ON ITS ASSIGNED DATE. 3

 A. Standard of Review..... 3

 B. The Trial Court Has The Inherent Authority To Impose The
 Sanction Of Dismissal. 4

 C. The Record Supports The Trial Court’s Decision To Dismiss
 Plaintiff’s Case..... 7

 D. The Trial Court Did Not Violate MCR 2.503(F) When It
 Dismissed Plaintiff’s Case 10

 E. The Trial Court Properly Dismissed Plaintiff’s Case Where
 Counsel Violated The November 15, 2005 Order 11

 II. THE TRIAL COURT DID NOT ERR IN AWARDING CASE
 EVALUATION SANCTIONS PURSUANT TO MCR 2.403(O). 14

 A. Standard of Review..... 14

 B. Discussion..... 14

RELIEF REQUESTED 17

INDEX OF AUTHORITIES

Cases

<i>Banta v Serban</i> , 370 Mich 367; 121 NW2d 865 (1963).....	4
<i>Broadway Coney Island, Inc v Commercial Union Ins Co</i> , 217 Mich App 109; 550 NW2d 838 (1996).....	15
<i>Brenner v Kolk</i> , 226 Mich App 149; 573 NW2d 65 (1999).....	7
<i>Campbell v Sullins</i> , 257 Mich App 179, 197, 667 N.W.2d 887 (2003).....	14
<i>Grievance Administrator v Underwood</i> , 462 Mich 188, 193-194, 612 NW2d 116 (2000).....	14
<i>Herrera v Levine</i> , 176 Mich App 350; 439 NW2d 378 (1989).....	6
<i>Houston v Southwest Det Hosp</i> , 166 Mich App 623, 631; 420 NW2d 835 (1983).....	7
<i>Maldonado v Ford Motor Company</i> , 476 Mich 372; 719 NW2d 809 (2006).....	3, 4, 9
<i>Muscio v Muscio</i> , 62 Mich App 167; 233 NW2d 224 (1975).....	5
<i>North v Dep't of Mental Health</i> , 427 Mich 659; 397 NW2d 793 (1986).....	4, 7, 8
<i>Vicencio v Ramirez</i> , 211 Mich App 501; 536 NW2d 280 (1995).....	7
<i>Williams v Kroger Food Co</i> , 46 Mich App 514; 208 NW2d 549 (1973).....	6
<i>Zdravkovich v Siegart</i> , 151 Md App 295; 824 A2d 1051 (2003).....	6

Statutes, Court Rules and Other Authorities

MCR 2.109	16
MCR 2.403(O).....	14
MCR 2.503(F).....	10
MCR 3.902	16

STATEMENT OF THE QUESTIONS PRESENTED

I. WHETHER THE TRIAL COURT ABUSED ITS DISCRETION IN DISMISSING PLAINTIFF'S CASE WITH PREJUDICE WHERE PLAINTIFF'S COUNSEL VIOLATED A COURT ORDER AND WAS NOT PREPARED TO TRY THE CASE ON THE ASSIGNED TRIAL DATE?

Court of Appeals answered:	NO
Trial court answered:	NO
Plaintiff-Appellant answers:	YES
Defendant-Appellee John Oram answers:	NO

II. WHETHER THE TRIAL COURT ERRED IN AWARDING CASE EVALUATION SANCTIONS PURSUANT TO MCR 2.403(O)?

Court of Appeals answered:	NO
Trial court answered:	NO
Plaintiff-Appellant answers:	YES
Defendant-Appellee John Oram answers:	NO

STATEMENT OF FACTS

On March 27, 2002, plaintiff, Latif (Randy) Oram, filed suit against his brothers, John and Gary Oram, to enforce a settlement agreement the brothers had signed. (See Complaint in lower court file) On August 10, 2005, plaintiff's attorney, Barry Steinway, withdrew as plaintiff's counsel. On August 24, 2005, James Shaw entered an appearance as plaintiff's counsel.

The case was set for trial on November 14, 2005, before visiting judge the Honorable Charles W. Simon, Jr. On September 27, 2005, the trial court issued instructions for trial. The instructions informed the parties the case was set for trial on November 14, 2005. The instructions further stated, "This is a firm trial date and no adjournments will be granted." The parties were instructed to submit proposed jury instructions, a verdict form and a short concise theory of the case to the Court by November 7, 2005. (See September 27, 2005 letter in the lower court file)

Plaintiff filed a Motion for Adjournment of Trial Date, and asked for at least a six month extension. Mr. Shaw requested the adjournment asserting he needed additional time to prepare for trial. Additionally, it was asserted Mr. Shaw could not try the case on the scheduled date because of conflict with trial in another matter in Wayne County. (See Motion for Adjournment of Trial Date in lower court file)

Following a hearing on plaintiff's Motion and on Plaintiff's Motion to Amend his Complaint, the trial court entered an order dated October 6, 2005, which states, in pertinent part:

1. The Plaintiff's Motion for Leave to File First Amended Complaint and Motion for Adjournment of Trial Date are denied because the granting of the Motions would result in significant, undue prejudice to the other parties since this case is more than 3 ½ years old and is scheduled for trial next month and one of the defense attorneys will no longer be practicing law after this year. [See Order dated October 6, 2005, in lower court file.]

On November 14, 2005, the date set for trial, the Court held a final settlement conference to try to resolve this case without the necessity of trial. The case did not settle. On November 15, 2005, defendants and their attorneys appeared for trial. Mr. Shaw did not appear for trial. The court was informed Mr. Shaw was in Huron Valley Hospital. Joseph Bird, a contract attorney for Mr. Shaw, who informed the court of Mr. Shaw's illness, was instructed to go to the hospital and report on the circumstances. Judge Simon had discussed the situation with the Chief Judge and was informed Mr. Shaw had been in Federal Court the previous day. (See Trial Transcript dated 11/15/05) Mr. Byrd provided the court with a handwritten note from Dr. Lee, stating Mr. Shaw was undergoing medical tests and should not work for at least one week. (See Dr. Lee's note in lower court file) The court adjourned jury selection and issued an order, which stated as follows:

The parties in this case having been ordered to appear on Tuesday, November 15, 2005 at 8:30 a.m. and all counsel having appeared except Plaintiff's counsel, and the Court being advised that Plaintiff's counsel sought medical treatment on November 15, 2005 and is incapacitated as a result of a medical problem, it is hereby ordered that the parties and their counsel appear for trial on Thursday, November 17, 2005 at 8:30 a.m.

It is further ordered that if Plaintiff's counsel fails to appear on Thursday, November 17, 2005 at 8:30 a.m. as a result of claimed incapacity, Plaintiff's counsel shall present his physician to testify regarding his incapacity on November 17, 2005 at 8:30 a.m. That physician may be examined by the parties and the Court as to James Shaw's purported incapacity as stated in the attached letter of Kevin Lee, M.D.

If Plaintiff's purported incapacity is not supported by testimony of his physician and Plaintiff is unwilling to proceed to trial, this matter will be dismissed, with prejudice. [See November 15, 2005, Order in lower court file]

On November 17, 2005, Mr. Shaw appeared in court, but informed the court he was not prepared for trial. (See Transcript dated 11/17/05 in lower court file) Mr. Shaw acknowledged he received a copy of the trial court's November 15, 2005, order. Mr. Shaw informed the Court,

however, that his physician was not present in the court for examination regarding counsel's incapacity. The court reminded Mr. Shaw that pursuant to the November 15, 2005, order, he was to present his physician to support a claim of incapacity. Judge Simon found Mr. Shaw was obviously not prepared to begin trial as ordered and did not follow his order to present his physician for examination. Therefore, he dismissed the case. (See November 17, 2005 Order in lower court record)

ARGUMENTS

I. THE TRIAL COURT DID NOT ABUSE ITS DISCRETION IN DISMISSING PLAINTIFF'S CASE WITH PREJUDICE WHERE COUNSEL VIOLATED A COURT ORDER AND WAS NOT PREPARED TO TRY THE CASE ON ITS ASSIGNED DATE.

A. Standard of Review.

An appellate court reviews a trial court's decision to dismiss an action under the abuse of discretion standard. *Maldonado v Ford Motor Company*, 476 Mich 372; 719 NW2d 809 (2006).

In *Maldonado*, this court explained what constitutes an abuse of discretion:

In *People v Babcock*, 469 Mich 247, 269; 666 NW2d 231 (2003), this Court noted that an abuse of discretion standard must be one that is more deferential than review de novo, but less deferential than the standard set forth in *Spalding v Spalding*, 355 Mich 382; 94 NW2d 810 (1959). This Court stated that "an abuse of discretion standard acknowledges that there will be circumstances in which there will be no single correct outcome; rather, there will be more than one reasonable and principled outcome." *Babcock, supra* at 269. The *Babcock* Court further noted that "[w]hen the trial court selects one of these principled outcomes, the trial court has not abused its discretion and, thus, it is proper for the reviewing court to defer to the trial court's judgment." *Id.* While *Babcock* dealt with a criminal sentencing issue, we prefer the articulation of the abuse of discretion standard in *Babcock* to the *Spalding* test and, thus, adopt it as the default abuse of discretion standard. [*Maldonado, supra*, at 372.]

B. The Trial Court Has The Inherent Authority To Impose The Sanction Of Dismissal.

This court has long held that a trial court has the inherent power to control the movement of cases on its docket by imposing a variety of sanctions, including dismissal. See e.g., *Banta v Serban*, 370 Mich 367; 121 NW2d 854 (1963); Most recently, in *Maldonado, supra* at 376, this court reaffirmed the trial court's inherent power to enforce its orders:

We reiterate that trial courts possess the inherent authority to sanction litigants and their counsel, including the power to dismiss an action. *Banta v Serban*, 370 Mich 367, 368; 121 NW2d 854 (1963); *Persichini v Beaumont Hosp*, 238 Mich App 626, 639-640; 607 NW2d 100 (1999); *Prince v MacDonald*, 237 Mich App 186, 189; 602 NW2d 834 (1999). This power is not governed so much by rule or statute, but by the control necessarily vested in courts to manage their own affairs so as to achieve the orderly and expeditious disposition of cases. See *Chambers v NASCO, Inc*, 501 US 32, 43; 111 S Ct 2123; 115 LEd2d 27 (1991).

We further acknowledge that our trial courts also have express authority to direct and control the proceedings before them. MCL 600.611 provides that "[c]ircuit courts have jurisdiction and power to make any order proper to fully effectuate the circuit courts' jurisdiction and judgments."

Defendant does not dispute that our legal system is committed to a policy favoring litigation on the merits and therefore, dismissal with prejudice is appropriate only in limited situations. *North v Dep't of Mental Health*, 427 Mich 659; 397 NW2d 793 (1986). As observed by the court in *North*, however, there is a countervailing policy that a trial court must have the power to dismiss a case as a sanction where a case is delayed:

[The] most severe in the spectrum of sanctions provided by statute or rule must be available to the district court in appropriate cases, not merely to penalize those whose conduct may be deemed to warrant such a sanction, but to deter those who might be tempted to such conduct in the absence of such a deterrent. [*North, supra* at 662, quoting *Nat'l Hockey League v Metropolitan Nat' Hockey Club, Inc*, 427 US 639, 643; 96 S Ct 2778; 49 L Ed 2d 747 (1976).]

The sanction of dismissal has been upheld where a party or counsel fails to appear ready for trial on the assigned date. For example, in *Banta, supra*, the plaintiff filed suit for negligence. The case was called for trial in March of 1961. Neither the plaintiff, nor the

plaintiff's counsel appeared on the date set for trial and the trial court dismissed the matter with prejudice. The trial court subsequently denied the plaintiff's Motion to reinstate the case.

At the hearing on the plaintiff's motion for reinstatement, the trial court stated when it was discovered that the plaintiff and his attorney were not present was the case was called, the court called to ascertain why counsel was not in court for trial. The court was told counsel was believed to have been in Lansing and not in Genesee County where the trial was to take place.

In *Banta*, the court recognized a trial court has the inherent power to control the movement of cases on its docket by a variety of sanctions, including dismissal, discontinuance, or involuntary nonsuit, even when requests for continuance are timely made and denied. The court stated, "It necessarily follows that a trial court has power to dismiss an action upon unexcused absence of plaintiff and his counsel when the case is called for trial." *Id.* at 368. The court affirmed the trial court's order dismissing the suit despite an affidavit from counsel where the affidavit did not contain an offer of proof to excuse or explain the absence. The court concluded:

Very few cases have been presented to this Court for review of dismissals for failure of plaintiffs to respond to trial calls, and perhaps the infrequency of such appeals would justify our conclusion that such dismissals rarely occur. That they should rarely occur is obvious, but it is equally obvious to us that trial judges must be empowered to invoke such drastic sanction if judicial control of trial dockets is to be retained. When continuances are timely sought, normally they should be granted, but only upon showing of meritorious cause. When parties fail to appear for trial, after due notice to counsel, as was in fact given in this case, trial judges should order dismissal, enter default judgment or grant other appropriate relief subject, of course, to subsequent vacation in the event such absence is proved unavoidable or otherwise excusable and justice so requires. There being a complete failure of such showing in the case at bar, we cannot say the trial judge abused his discretion by failing to set aside his order of dismissal. [*Id.* at 369-370, footnotes omitted.]

Similarly, in *Muscio v Muscio*, 62 Mich App 167; 233 NW2d 224 (1975), the plaintiff instituted an action for divorce and a trial date was scheduled for March 25, 1974. A final

settlement conference was held on that date in the morning, but did not result in a settlement. The parties were told trial would start at 1:30 that afternoon. At 1:30 the defendant and defense counsel appeared but neither the plaintiff nor the plaintiff's counsel appeared, asserting someone in the judge's office informed them the case had been adjourned until further notice. Defense counsel did not verify this information with the judge or with defense counsel. When they did not appear for trial, the judge entered a default judgment.

The Court of Appeals found the trial court did not abuse its discretion in entering the default judgment. Nothing in the record suggested it was reasonable for defense counsel to assume trial would be postponed until further notice. See also, *Maldonado, supra*; *Herrera v Levine*, 176 Mich App 350; 439 NW2d 378 (1989); *Williams v Kroger Food Co*, 46 Mich App 514; 208 NW2d 549 (1973).

At least one other jurisdiction has recently addressed the issue under what circumstances a trial court may dismiss a cause of action for failure to appear at trial due to illness. In *Zdravkovich v Siegart*, 151 Md App 295; 824 A2d 1051 (2003), the issue before the Maryland Court of Appeals was whether the trial court had abused its discretion in dismissing a case where the plaintiff, who was an attorney, failed to appear for trial. He had previously asked the trial court for a postponement of the trial date, which the trial court denied. On the day the matter was scheduled for trial, the plaintiff filed a motion for reconsideration of the trial court's order denying the request for a postponement. Attached to the motion was a letter from the plaintiff's doctor, which stated plaintiff was undergoing treatment for depression and could not at the time go forward with the trial. The physician recommended the matter be postponed for at least one month.

The plaintiff did not appear for the hearing on the motion for reconsideration. The Maryland Court of Appeals affirmed the trial court's order dismissing the plaintiff's case. It noted that while the plaintiff presented a letter from his doctor, he failed to present an affidavit or statement under oath supporting his request. Additionally, nothing in the note suggested the plaintiff would be available for trial within a reasonable time. The appellate court further noted trial judges have the discretion to dismiss a case for failure to appear at trial. Moreover, trial courts have the power to manage their dockets and prevent cases from remaining unresolved indefinitely.

The Maryland Court of Appeals found the trial had been scheduled for six months before the trial date and the matter had been on the trial court's docket for over a year at the time of trial. Additionally, the plaintiff knew the trial court had denied his request for a postponement and that he was expected to appear for trial. Therefore, the consequences of his failure to appear for trial should have been readily apparent to him.

C. The Record Supports The Trial Court's Decision To Dismiss Plaintiff's Case.

Plaintiff asserts the trial court, before issuing an order of dismissal as a sanction, must conduct on the record a careful evaluation of all available options, citing *Brenner v Kolk*, 226 Mich App 149; 573 NW2d 65 (1999); *Vincencio v Ramirez*, 211 Mich App 500; 536 NW2d 280 (1995); *Houston v Southwest Det Hosp*, 166 Mich App 623, 631; 420 NW2d 835 (1983). However, nowhere in the court rules is there an express requirement that a trial court undertake a record examination of all the factors cited in those appellate cases before dismissing an action. In *North, supra*, a case involving a no-progress dismissal, the Court attempted to balance the competing policy considerations, stating that before a case is dismissed, a trial court should

consider: (1) the degree of the plaintiff's personal responsibility for the delay; (2) the amount of prejudice to the defendant; (3) whether there exists a lengthy history of deliberate delay; and (4) whether the imposition of lesser sanctions would not better serve the interests of justice. *North, supra* at 662. The Court found, however, there is such a vast array of factual circumstances that could come before trial courts, a blanket rule governing the trial court's exercise of its discretion would be unworkable. *Id.* at 661. Moreover, it did not require the trial court to conduct an evaluation of these factors on the record.

Here, contrary to the plaintiff's argument, the record supports Judge Simon's decision to dismiss plaintiff's case. When the trial court issued its November 15, 2005 order, it was aware of certain information. First, this case had been on the docket for an extended period of time; it had been on the docket for over three years on the date of trial. Second, counsel for defendant, John Oram, was planning on retiring at the end of 2005. Therefore, unless the trial took place and was concluded before the end of 2005, defendant would suffer substantial prejudice because he would have to retain new counsel. No doubt, the case would be delayed for a substantial period of time and it would cost defendant a considerable amount of money to pay a new attorney to catch up on what had occurred over the past three years and to prepare for trial. Third, plaintiff's counsel had already tried to have the case adjourned, but that request had been denied by the trial court. The court set a firm trial date. Fourth, trial counsel had been able to attend a hearing in federal court on November 14, 2005, the day trial was supposed to commence. Fifth, even though the trial court instructed the parties to submit proposed jury instructions, a verdict form and a short concise theory of the case to the Court by November 7, 2005, plaintiff's counsel failed to file the requested documents. (See trial court docket entries) Sixth, as the Court of Appeals found in reviewing the lower court file, plaintiff had shown a

pattern of failing to comply with court orders, “most markedly by refusing to cooperate with the receiver and by continuing to seek vexing and increasingly cumulative discovery.”

Given that background, the trial court wanted evidence defense counsel was truly ill to the extent he could not represent plaintiff at trial before he would allow an adjournment. The court adjourned the matter for two days and gave plaintiff’s counsel two options: (1) he could appear ready for trial on November 17, 2005; or (2) if he continued to assert he was too ill to participate in the trial, he was required to have his physician in court so that it could be substantiated that he was too ill to participate in the trial. The trial court acted reasonably, given the unique background of this case.

When plaintiff’s counsel admitted on November 17, 2005 that he was not able to proceed with trial and utterly failed to support his claim of incapacity, the trial court properly exercised its discretion and dismissed the case with prejudice. See *Banta, supra*. Counsel had been warned about the repercussions if he failed to appear for trial or substantiate his incapacity claim in the manner required by the trial court. (See the Court’s November 15, 2005, Order)

It is irrelevant that the trial court could have imposed sanctions short of dismissal. In responding to Justice Cavanaugh’s dissent in *Maldonado, supra*, the Court stated:

Justice Cavanaugh suggests that the trial court had “numerous other options” available to it as sanctions apart from dismissal. *Post* at 419. Even if we agreed with this assertion, it is irrelevant in determining whether the sanction actually chosen-dismissal in this case-was within the range of “reasonable and principled outcome[s].” *Babcock, supra* at 269. In light of the repeated violation of the court’s instruction not to publicize the excluded conviction, we cannot say that Judge Giovan’s conclusion that nothing short of dismissal would deter plaintiff’s and her counsel’s repeated misconduct was incorrect. As such, even if we were to assume that there were other sanctions available-which we do not necessarily believe to be the case-the sanction of dismissal was clearly within the range of reasonableness under the circumstances. [*Maldonado, supra*. at 395-396, fn 24.]

The Court of Appeals correctly concluded Judge Simon's decision to dismiss the plaintiff's case was within the "reasonable and principled outcomes." Plaintiff suggests this Court could have simply adjourned the matter for one week. However, according to Dr. Lee's purported note, he recommended that counsel remain off work for **at least** one week. Therefore, even if the trial court took the note at face value, there was no guarantee plaintiff's counsel would have been ready for trial the following week. Moreover, there is no evidence plaintiff was prepared to proceed with the trial in propria persona or with the assistance of Mr. Bird. As previously stated, plaintiff's counsel had not even followed the court's directive of filing proposed jury instructions, a verdict form and a short concise theory of the case. Moreover, at no time did plaintiff indicate he could have and would have proceeded to trial without his attorney. Therefore, Judge Simon did not clearly abuse his discretion when he exercised his inherent authority and dismissed this case with prejudice.

D. The Trial Court Did Not Violate MCR 2.503(F) When It Dismissed Plaintiff's Case.

Contrary to plaintiff's argument in its application for leave to appeal, the trial court did not violate MCR 2.503(F). That rule provides:

(F) Death or Change of Status of Attorney. If the court finds that an attorney

(1) has died or is physically or mentally unable to continue to act as an attorney for a party,

(2) has been disbarred,

(3) has been suspended,

(4) has been placed on inactive status, or

(5) has resigned from active membership in the bar,

the court shall adjourn a proceeding in which the attorney was acting for a party. The party is entitled to 28 days' notice that he or she must obtain a substitute attorney or advise the court in writing that the party intends to appear on his or her own behalf. See MCR 9.119.

In this case, the trial court gave plaintiff's counsel an opportunity to establish that he was truly unable to continue to act as an attorney for plaintiff. The trial court wanted counsel's physician to appear in court to testify under oath and subject to cross-examination about counsel's condition.

Plaintiff states in his application that the trial court violated MCR 2.503(F) because it made a finding counsel was incapacitated yet did not grant an adjournment. That simply is not true. While counsel informed the court he was physically incapable of continuing to represent plaintiff, the case was dismissed because plaintiff's counsel failed to substantiate that claim. (See the trial court's order of November 17, 2005) Therefore, because the court rule only requires an adjournment where a judge **makes a finding** counsel could no longer represent the plaintiff and no such finding was made in this case, the trial court did not violate MCR 2.503(F).

E. The Trial Court Properly Dismissed Plaintiff's Case Where Counsel Violated The November 15, 2005 Order.

Additionally, the case was dismissed because plaintiff's counsel violated the terms of the court's November 15, 2005 order. The trial court ordered the parties and counsel to appear for trial on November 17, 2005. In the alternative, the order states that if counsel fails to appear – meaning fails to appear for trial as stated in the preceding paragraph - counsel was required to present his physician to testify regarding the alleged incapacity.

On November 17, 2005, plaintiff's counsel was physically present in court, but stated he could not try the case because of a medical problem. Therefore, plaintiff's counsel did not

“appear for trial” as required by the November 15, 2005 Order. Moreover, plaintiff’s counsel did not present his physician to testify regarding the alleged medical condition as required by the November 15, 2005 Order. It is irrelevant Dr. Lee was available by telephone. The November 15, 2005 Order explicitly required plaintiff’s counsel’s physician to be in court and the Court of Appeals correctly found that the court speaks through its written orders.

Plaintiff asserts it is customary for attorneys and witnesses to interface with courts through their clerks. Further, plaintiff argues it would be ill advised for anyone to ignore what a clerk says. While defendant does not dispute attorneys discuss matters of procedure with clerks on a regular basis, it is not customary for a clerk to give advice or information that directly contradicts a written order of the trial court. Additionally, where a clerk gives guidance on a matter of procedure that directly contradicts a written order of the court, it is nothing short of foolish for a witness or party not to confirm the issue in writing.

In this case, Judge Simon wanted plaintiff’s counsel’s physician to appear in court where he could be examined under oath and subject to cross-examination. Judge Simon was properly skeptical that plaintiff’s counsel was in fact too ill to participate in the trial. Plaintiff’s counsel previously asked for an adjournment of the trial date, but the motion was denied. Moreover, plaintiff’s counsel was able to handle a court matter on November 14, 2005, the day of the scheduled trial in the instant case. The only substantiation of counsel’s illness was a note allegedly written by Dr. Lee indicating counsel was undergoing an evaluation at Huron Valley Hospital. No medical records were submitted for the court’s consideration.

Plaintiff discusses in his Application that it was an inconvenience for Dr. Lee to appear in Court on November 17, 2005. The trial court’s order, however, does not require plaintiff’s counsel to present Dr. Lee for examination. Rather, the order clearly states plaintiff’s counsel

was required to present “his physician” to testify. Therefore, if it was a hardship on Dr. Lee to come to court on November 17, 2005, plaintiff’s counsel had the opportunity to present any of his physicians with knowledge of his recent illness to substantiate counsel’s purported incapacity.

In sum, the Court of Appeals correctly concluded the relevant question is not whether they, as sitting trial judges, would have dismissed plaintiff’s claims. Instead, the question is whether the trial court abused its discretion. The Court of Appeals properly gave broad deference to the trial court. The court properly found that this case had been on the docket way too long. Additionally, its review of the record indicated plaintiff was trying to intentionally stall the proceedings so that he could gain certain advantages in driving up fees and interest. Moreover, it found plaintiff had shown a pattern of failing to comply with court orders, had refused on several occasions to cooperate with the receiver and sought “vexing and increasingly cumulative discovery.” The Court correctly found that any sanction less than dismissal would have merely prolonged this nonmoving case and allowed litigation costs to mount. Finally, plaintiff was given a second chance as the case was not dismissed on November 15, 2005, but only after plaintiff violated the court’s subsequent order by failing to proceed with trial on November 17, 2005.

Under *Maldonado*, where the trial court selects one of several principled outcomes, the trial court cannot be said to have abused its discretion. Here, the Court of Appeals correctly found the trial court’s decision to dismiss this case was one of the principled outcomes. Therefore, it correctly affirmed the trial court’s dismissal of this case with prejudice.

II. THE TRIAL COURT DID NOT ERR IN AWARDING CASE EVALUATION SANCTIONS UNDER MCR 2.403(O).

A. Standard of Review.

A trial court's decision whether to grant case evaluation sanctions under MCR 2.403(O) presents a question of law, which is reviewed de novo. *Campbell v Sullins*, 257 Mich App 179, 197, 667 NW2d 887 (2003).

B. Discussion.

This issue involves the interpretation of MCR 2.403(O). This Court has previously articulated how court rules are to be interpreted. *Grievance Administrator v Underwood*, 462 Mich 188, 193-194, 612 NW2d 116 (2000). According to this Court:

When called on to construe a court rule, this Court applies the legal principles that govern the construction and application of statutes. *McAuley v General Motors Corp*, 457 Mich 513, 518; 578 NW2d 282 (1998). Accordingly, we begin with the plain language of the court rule. When that language is unambiguous, we must enforce the meaning expressed, without further judicial construction or interpretation. See *Tryc v Michigan Veterans' Facility*, 451 Mich 129, 135; 545 NW2d 642 (1996). Similarly, common words must be understood to have their everyday, plain meaning. See MCL § 8.3a; MSA 2.212(1); see also *Perez v Keeler Brass Co*, 461 Mich 602, 609; 608 NW2d 45 (2000). [*Grievance Administrator, supra*, at 193-194.]

In this case, the applicable court rule provides, in pertinent part, as follows:

(O) Rejecting Party's Liability for Costs.

- (1) If a party has rejected an evaluation and the action proceeds to verdict, that party must pay the opposing party's actual costs unless the verdict is more favorable to the rejecting party than the case evaluation. However, if the opposing party has also rejected the evaluation, a party is entitled to costs only if the verdict is more favorable to that party than the case evaluation.
- (2) For the purpose of this rule "verdict" includes,
 - (a) a jury verdict,
 - (b) a judgment by the court after a nonjury trial,

- (c) a judgment entered as a result of a ruling on a motion after rejection of the case evaluation.

Defendant does not dispute that subsection (2)(a) and (2)(b) are inapplicable in this case. Instead, it is defendant's position that what occurred in the trial court falls under subsection (2)(c). The order of dismissal in this case falls within the definition of "verdict" under MCR 2.403(O)(2)(c). As stated in *Broadway Coney Island, Inc v Commercial Union Insurance Companies (Amended Opinion)*, 217 Mich App 109, 114; 550 NW2d 838 (1996):

The order of dismissal with prejudice falls within the definition of "verdict" under MCR 2.403(O)(2)(c). The order had the same effect as a judgment of no cause of action in favor of the insurance agents and, therefore, is to be treated as one. To find otherwise would be contrary to the purpose behind MCR 2.403, which is to encourage settlement and deter protracted litigation by placing the burden of litigation costs upon the party that required that the case proceed toward trial by rejecting the mediator's evaluation.

Moreover, according to Black's Law Dictionary, the term "judgment" under the federal rules is synonymous with the word "decree." The dictionary further states that the term "decision" and "judgment" are commonly used interchangeable. Black Law Dictionary, Fifth Edition, p 755.¹

In this case, on November 17, 2005, the trial court dismissed plaintiff's action, finding plaintiff violated the court's prior order and was not prepared to proceed with trial. The trial court's order constituted a "judgment" under MCR 2.403(O)(2)(c). Subsequently, Plaintiff brought a Motion to Set Aside the Order of Dismissal. (See lower court file) The trial court denied plaintiff's motion. Plaintiff's Motion to Set Aside the Order of Dismissal is a motion that would satisfy the requirements of MCR 2.403(O)(2)(C). The court rule does not say which party

¹ Because the term is not defined by the court rule, this court may consult a lay dictionary to determine its common, ordinary meaning. *Stanton v Battle Creek*, 466 Mich 611, 617; 647 NW2d 508 (2002).

has to file the applicable motion. It merely states that if a motion is filed and a judgment is entered as a result, case evaluation sanctions are available.

Moreover, the court rule does not even say it has to be a motion filed by a party for the provision to apply. Here, the judge's decision to dismiss the case on November 17, 2005, was done sua sponte, without a motion filed by defendants. Sua sponte is defined by Black Law Dictionary as "of his or its own will or motion." Blacks Law Dictionary, Fifth Edition, p 1277. Therefore, in this case, the judge's action to dismiss the case on November 17, 2005, was through his own motion, which satisfies the literal terms of the court rule.

If a motion from a party only was required, the court rule would have been drafted in a different manner. For example, MCR 3.922, which concerns pretrial procedures in delinquency and child protection proceedings, states as follows:

On **motion of a party**, the court may permit discovery of any other materials and evidence, including untimely requested materials and evidence that would have been discoverable of right under subrule (A)(1) if timely requested. Absent manifest injustice, no motion for discovery will be granted unless the moving party has requested and has not been provided the materials or evidence sought through an order of discovery. (emphasis added)

Likewise, MCR 2.109, which governs security for costs, speaks in terms of motion of a party:

(A) Motion. On **motion of a party** against whom a claim has been asserted in a civil action, if it appears reasonable and proper, the court may order the opposing party to file with the court clerk a bond with surety as required by the court in an amount sufficient to cover all costs and other recoverable expenses that may be awarded by the trial court, or, if the claiming party appeals, by the trial and appellate courts. The court shall determine the amount in its discretion. MCR 3.604(E) and (F) govern objections to the surety. (emphasis added)


The court rule at issue in this case, MCR 2.403(O)(2)(c) does not limit the requisite motion to motions filed by parties. Had that been the intent, the words chosen could have been similar to those in the rules mentioned above. Therefore, the court's sua sponte dismissal on

November 17, 2005, was the equivalent of a "motion" for purposes of MCR 2.403(O)(2)(c) and the case evaluation sanctions were properly awarded.

RELIEF REQUESTED

Defendant, John Oram, Respectfully requests that this Honorable Court deny Plaintiff's Application for Leave to Appeal. In the alternative, defendant requests that this Court affirm Court of Appeals Opinion.

Respectfully submitted,


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