# STATE OF MICHIGAN

# COURT OF APPEALS

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

Plaintiff/Counter-Defendant/Counter-Plaintiff-Appellant,

and

O. B. PROPERTIES LIMITED PARTNERSHIP,

Plaintiff/Counter-Defendant/Counter-Plaintiff/Third-Party Defendant,

and

O. B. PROPERTIES and JAM SOUND SPECIALIST, INC.,

Plaintiffs/Counter-Defendants/Counter-Plaintiffs/Third-Party Plaintiffs,

v

JOHN ORAM and GARY ORAM,

Defendants/Counter-Plaintiffs/Counter-Defendants-Appellees,

and

INTERNATIONAL OUTDOOR, INC., VISION PROPERTIES, INC., DISCOUNT PAGING COMPANY, INC., and FUTURE VISION PROPERTIES, LLC,

Third-Party Defendants,

UNPUBLISHED
May 22, 2007

No. 267077
Oakland Circuit Court
LC No. 2002-039499-CK

and

ARMAND VELARDO, S. HADDAD, and
BRADLEY LAMBERT,

Intervening Plaintiffs,

and

HARRY CENDROWSKI,

Intervening Plaintiff-Appellee.

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Before: Cavanagh, P.J., and Jansen and Borrello, JJ.

PER CURIAM.

Plaintiff Latif "Randy" Oram (plaintiff) appeals by right the trial court order dismissing his claims with prejudice for failing to proceed with trial at the prescheduled time. Plaintiff also appeals several other trial court rulings that were issued during the pendency of this matter. We affirm in part, reverse in part, and remand for partial refund of plaintiff's $479,000 payment consistent with this opinion.

I

Defendants John Oram and Gary Oram (defendants) are plaintiff's brothers. In addition to being brothers, plaintiff and defendants were also business partners, and jointly owned several businesses in the United States and Canada. Among the parties' several joint business ventures were O.B. Properties Limited Partnership, O.B. Properties, and JAM Sound Specialist, Inc. Plaintiff and both defendants each owned a $^1/_3$ interest in these businesses.

In February 1999, defendants sued plaintiff in Oakland Circuit Case No. 1999-012291-CK. Plaintiff responded by asserting counterclaims and third-party claims based on events that occurred between 1993 and 1999. Defendants voluntarily agreed to dismiss their claims against plaintiff, but plaintiff did not agree to dismiss his counter-claims and third-party claims. Eventually, plaintiff's claims in Case No. 1999-012291-CK were dismissed on summary disposition as time-barred.

Plaintiff appealed the trial court's grant of summary disposition in Case No. 1999-012291-CK to this Court, but defendants agreed to settle with plaintiff before the appeal was decided. The parties executed a settlement agreement, which provided in pertinent part:

AGREEMENT

John Oram, individually, hereafter referred to as "John," Latif Oram, individually, hereafter referred to as "Randy" and Gary Oram, individually, hereafter referred to as "Gary" are willing to settle their differences and dismiss all pending and future litigation by agreeing to the following conditions:

Randy to remain as a $^1/_3$ partner in all entities in the United States and Canada.

Bob-Lo Island to agree to pay Randy a "make up" payment of $1,650,000. The make up payment will consist of certain properties (value to be agreed upon) to be transferred to Randy as a down payment. The balance of the monies to be secured by the four (4) real estate properties in the U.S. identified as Hayes, Telegraph, Warren and Gratiot.

All joint assets including Bob-Lo are to be audited and all financials brought up to date. A public accounting firm will be retained, if necessary.

Upon review of the financials, adjustments will be made to each shareholder[']s capital accounts as reflected by the books.

The three (3) brothers will conduct all of their business enterprises in a corporate fashion with an organizational chart, specific duties, just compensation and performance standards. A Board of Directors may be implemented, if necessary.

All three (3) brothers to declare all of the personal assets to determine if any assets are part of the assets of the brothers['] joint entities.

Each brother may continue to pursue his own personal business ventures, present or future, so long as there is no conflict to any of the joint ventures.

All taxes due as a result of prior or future sales of joint assets are to be borne by the joint business entities including any taxes due on the make-up payment.

Attorney fees paid in the past by Randy are accounted for in the "make up" payment. All unpaid fees of all parties in the past, present and future to be paid by the joint ventures.

Randy's attorney fees are only to Armand Velardo, which will be negotiated.

All disputes will be settled by binding arbitration.

Shortly after executing the settlement agreement, the parties executed a separate addendum to the agreement, which they entitled an "Acknowledgment." This acknowledgement[1] provided in relevant part:

ACKNOWLEDGMENT

> The undersigned do hereby acknowledge and agree that in reliance upon assurances given by the undersigned to Latif Z. Oram [on] this date, that the following actions will be taken:
>
> 1. The Agreement . . . signed by John Oram and Latif Z. Oram on July 31, 2001 and by Gary Oram on August 3, 2001 ("Agreement") shall be diligently pursued to a formal conclusion.
>
> 2. The make up payment as referred to in the aforesaid Agreement will be pursued immediately by giving Latif Z. Oram that authority to collateralize a loan on behalf of OB Properties, utilizing the Warren, Gratiot, Hayes and Telegraph locations to obtain funds available . . . to be paid over to Latif Z. Oram as a partial make up payment as referred to in the aforesaid Agreement. The balance of the make up payment will be paid over to Latif Z. Oram when refinancing of Boblo Island is obtained, or . . . otherwise through distributions agreed to by the undersigned, as a priority to Latif Z. Oram.
>
> 3. Latif Z. Oram will be given priority in the payment of the balance of the make up payment from the O.B. Properties (U.S.) transactions before disbursements will be made to John Oram or Gary Oram.
>
> 4. In reliance upon these assurances and those contained in the aforesaid Agreement, Latif Z. Oram agrees to sign a Stipulation to Dismiss his pending appeal of the Oakland County Circuit Court matter presently pending between the parties.
>
> 5. The parties acknowledge that the one-third ownership in each of the undersigned includes 1078385 Ontario Ltd. and OB Properties Canada, and all entities that are listed in the Oakland County Circuit Court lawsuit, the appeal of which is being dismissed.
>
> 6. But for these representations and assurances, Latif Z. Oram would not have dismissed the pending appeal of the aforesaid lawsuit.

[1] The acknowledgment, as contained in the lower court record and provided by the parties on appeal, included certain handwritten alterations. However, the parties do not dispute the accuracy or authenticity of these handwritten alterations.

Plaintiff filed the present action in March 2002, alleging that defendants had breached the terms of the settlement agreement and acknowledgment in the following ways:

> Failing to fairly and accurately disclose the affairs of the Oram Businesses to Randy Oram.
>
> Failing to fairly and accurately disclose loan transactions, including loans from Standard Federal bank, Fidelity Bank, Comerica Bank, Huntington Bank and New Century Bank, and [by failing to disclose] where the monies obtained from such loans were disbursed or utilized.
>
> Failing to diligently, honestly and carefully administer the affairs of the Oram Businesses, independent of each Defendant's individual personal interest, including, but not limited to, self-dealing and utilizing business assets to collateralize personal loans to the detriment of the Oram Businesses and Randy Oram.
>
> Improperly utilizing Defendants' majority control over the Oram Businesses for personal gain at the expense of the Oram Businesses and Randy Oram's best interest.
>
> Causing Randy Oram as a one-third ($^1/_3$) partner to involuntarily incur tax liability and loan obligations on which transactio0ns Randy Oram received little or no distribution, and which were entered into without his knowledge or consent.
>
> Defendants have improperly disbursed monies from the Oram Businesses for personal and family use while depleting Randy Oram's proper distributions.
>
> Defendants have entered upon a course of conduct of taking the receipts from the rental incomes of the Oram Businesses and transferring the same to Defendant JAM Sound Specialist, Inc., a non-operating entity since November 4, 2001, which thereafter disbursed funds out to Defendants, leaving the Oram Businesses without sufficient funds to pay Mortgage payments on a timely basis and without funds to pay Randy Oram the "make up" payment of $1,650,000, plus interest.
>
> Defendants have, upon information and belief, transferred real estate from OB Properties to Oram Joint Venture, a Michigan copartnership, owned equally by the Oram Brothers, in order to utilize Defendant John Oram's signature on loan transactions, to facilitate self-dealing.
>
> Defendants have, upon information and belief, utilized improper year-end adjustments to reduce their disbursement amounts in an attempt to hide wrongful distributions made to Defendants from the Oram Businesses.

In April 2002, defendants moved for summary disposition, arguing that this action was barred by the parties' contractual agreement to submit any future claims arising under the agreements to binding arbitration. The trial court ultimately denied defendants' motion,

however, ruling that Michigan law allowed plaintiff to unilaterally revoke the common-law agreement to arbitrate.

The trial court directed the parties to cooperate in jointly naming an independent person to evaluate the financial ability of O.B. Properties to finance and pay a mortgage to cover "all or a portion of the 'make up payment' of $1,650,000" by using the jointly owned "Gratiot, Hayes, Telegraph, and Warren properties" as collateral.

In August 2002, defendants countersued, filing counterclaims against plaintiff and third-party claims against Future Vision Properties, LLC, International Outdoor, Inc., Discount Paging Company, and Vision Properties of Michigan, Inc. Defendants asserted that plaintiff had surreptitiously established Future Vision Properties, LLC, International Outdoor, Inc., Discount Paging Company, and Vision Properties of Michigan, Inc. with jointly-owned assets, and that each brother therefore owned a $^1/_3$ interest in each of these businesses. According to defendants, plaintiff had failed to acknowledge their $^2/_3$ ownership in these entities. Defendants contended that plaintiff was violating the settlement agreement by operating and maintaining these additional business entities without their consent. Defendants also alleged that plaintiff had stolen certain books and financial records from the partnership. Among other things, defendants sought an accounting and a declaration that each brother owned a $^1/_3$ interest in Future Vision Properties, LLC, International Outdoor, Inc., Discount Paging Company, and Vision Properties of Michigan, Inc.

The trial court entered a stipulated order appointing Harry Cendrowski, CPA, for the purpose of conducting an audit of the Oram businesses. Thereafter, the trial court appointed Cendrowski as receiver for O.B. Properties Limited Partnership, O.B. Properties, JAM Sound Specialist, Inc., Oram Ventures, and Oram Joint Venture. The receiver was granted broad authority over the property and assets of all of these businesses.

In November 2003, defendants filed a motion seeking an order directing the receiver "to find and secure partnership assets now in Latif Oram's control." Defendants argued that between 1995 and 2000, plaintiff had taken substantial assets from O.B. Properties Limited Partnership for his own personal use in several different ways. Defendants argued that plaintiff had commingled these partnership assets with his own private property, and filed an additional motion "for an order prohibiting plaintiff Latif Oram from . . . interfering with the receivership."

The trial court entered an order requiring the parties to make "full and complete asset disclosures to the receiver." The court directed that the disclosures be "detailed and specific," with a "full identification and description of each asset, the value ascribed and [a] detailed methodology of the valuation process." The court also ordered the parties to disclose any asset "in which each party and/or their spouse have any ownership directly or indirectly."

In February 2004, plaintiff moved for summary disposition of defendants' counter-claims and third-party claims. Among other things, plaintiff argued that only the business entities *specifically named* in the settlement agreement were jointly owned, and that he was therefore entitled to own his own businesses separate from his brothers. He maintained that he had been perfectly free to set up Future Vision Properties, LLC, International Outdoor, Inc., Discount Paging Company, and Vision Properties of Michigan, Inc. as his own separate companies, without the consent of defendants.

Defendant John Oram then moved for summary disposition of plaintiff's claims. He asserted that there were "conditions precedent" under the settlement agreement that plaintiff was required to fulfill before becoming eligible to collect the $1,650,000 "make up" payment. Included among these "conditions precedent," John Oram stated (1) that all brothers, including plaintiff, were required to submit "statements regarding their personal assets," and (2) that plaintiff was required to obtain a loan on behalf of O.B. Properties Limited Partnership with which to pay the "make up" payment. John Oram argued that because plaintiff had not satisfied these conditions, he never became eligible to enforce the agreement.

In June 2004, the trial court entered an order extending the appointment of Cendrowski as receiver in this matter "until further order of this Court." The court's order also directed the receiver to sell and liquidate O.B. Properties Limited Partnership, O.B. Properties, JAM Sound Specialist, Inc., Oram Ventures, and Oram Joint Venture. The order established a process for selling these businesses, by which the receiver would first offer them for sale to the individual Oram brothers at private auction. If none of the Oram brothers bid and closed on any of the entities, the receiver was directed to then offer the businesses for sale at public auction.

In October 2004, the trial court denied defendants' motion for summary disposition and granted plaintiff's and third-party defendants' motion for summary disposition. The court ruled that defendants were barred from claiming any ownership interest in third-party defendants Future Vision Properties, LLC, International Outdoor, Inc., Discount Paging Company, and Vision Properties of Michigan, Inc. Defendants then again moved for summary disposition, arguing that they had no personal liability to pay plaintiff the "make up" payment envisioned by the settlement agreement.

Plaintiff bid on two of the partnership's properties, located at 16980 West Warren Avenue and 13300 Woodrow Wilson in Detroit. The receiver accepted plaintiff's bids for these parcels and entered into contracts with plaintiff for sale of the properties. Plaintiff paid the receiver $479,000 for the two parcels.

In December 2004, the receiver notified the trial court that he had sold most of the Oram properties and would be proceeding to sell the remaining properties. The receiver sought the court's permission to proceed with the scheduled closings, to satisfy or otherwise attempt to discharge all outstanding liens and encumbrances, and to pay the necessary closing costs. The trial court granted the receiver's requests.

Plaintiff then filed a motion seeking to compel the receiver to comply with the terms of the June 2004 order. Among other things, plaintiff asserted that despite his bids and contracts for sale with the receiver, no closings had yet taken place on the West Warren and Woodrow Wilson properties. Plaintiff asserted that the receiver had agreed to seek discharges of the outstanding Standard Federal Bank and Comerica Bank mortgages on the two properties prior to the closing date. Nonetheless, he argued that the receiver had not done so and was unreasonably delaying the closings.

The receiver responded that no closings could occur until the two outstanding mortgages were discharged. The receiver asserted that because the Comerica mortgage loan had been a personal loan to defendant John Oram, he believed he would be able to have the Comerica encumbrance set aside. Concerning the Standard Federal mortgage, the receiver asserted that

Standard Federal Bank would release the encumbrance if plaintiff would drop his outstanding claims against Standard Federal in a separate, ongoing lawsuit. But the receiver suggested that plaintiff was not cooperating in seeking a discharge of the mortgage.

The trial court ordered the receiver to refund plaintiff his $479,000 payment on the two properties. The court also ordered the receiver to resell the properties and not to allow plaintiff to bid at the resale. Plaintiff reminded the court that he had a contract with the receiver to purchase the two properties. The court responded that it was therefore going to "dissolve [the contract], set it aside" unless plaintiff closed on the Woodrow Wilson and West Warren properties, subject to the outstanding mortgages, by April 26, 2005. The court agreed with the receiver that plaintiff was not cooperating in seeking a discharge of the Standard Federal mortgage. The court believed that plaintiff was "playing games" and interfering with the receivership.

Plaintiff responded that the receiver had offered to clear the mortgages and encumbrances from the two properties prior to closing, and that this offer had induced him to bid on the parcels. Plaintiff argued that the court's new order, providing that he could only proceed to close on the properties "subject to all Mortgages and encumbrances," had unilaterally modified his purchase contracts. Plaintiff argued that "[b]ut for the Receiver's written agreement to settle all liens and encumbrances and clear title to the properties prior to sale, [plaintiff] would never have contractually bound himself to purchase the properties."

Plaintiff did not close on the West Warren and Woodrow Wilson properties by April 26, 2005. The receiver subsequently resold these two properties. However, the receiver did not refund plaintiff's $479,000 payment.

Plaintiff thus moved for an order compelling the receiver to refund his $479,000 payment on the West Warren and Woodrow Wilson properties. The receiver responded that he had not yet refunded the $479,000 because plaintiff had subsequently taken an assignment of the Standard Federal Bank mortgage. The receiver asserted that the mortgage therefore continued to encumber the West Warren property, and suggested that plaintiff had taken the assignment from Standard Federal in a further attempt to "extract an unfair benefit" and to interfere with the receivership. The receiver recognized that plaintiff had accepted the assignment in exchange for dropping his unrelated claims against Standard Federal in a separate, pending lawsuit. However, the receiver argued that plaintiff could now foreclose on the Standard Federal mortgage, and that he would thereby obtain "double payment" for the West Warren property in the event his $479,000 was refunded. The receiver argued that in such a case, plaintiff would have "double dip[ped]" by taking both the property and his payment. The receiver sought the court's permission to retain plaintiff's $479,000 deposit in full.

At oral argument, the trial court became noticeably upset with plaintiff and stated that plaintiff had been attempting to defraud the receiver. The trial court ordered the receiver to immediately deed the West Warren property over to plaintiff, subject to all outstanding liens and encumbrances, but to retain plaintiff's $479,000 payment.

The trial court entered an order requiring all parties to appear for jury selection and trial on November 15, 2005, at 8:30 a.m. Of note, the trial date in this case had already been delayed or adjourned by stipulation or on motion of one of the parties more than ten times.

On the morning of November 15, 2005, plaintiff's attorney, James Shaw, failed to appear for jury selection. Shaw's assistant, attorney Joseph Bird, informed the trial court that Shaw was hospitalized with a purported medical condition. The court instructed Bird to go to the hospital and find out what was wrong with Shaw. Bird obtained a note, allegedly from Shaw's neurosurgeon Dr. Kevin Lee, concerning Shaw's condition. That note stated:

> From: Kevin Lee, M.D.
>
> James Shaw is undergoing an evaluation at Huron Valley Hospital regarding an abnormal artery in the neck. The workup will require further testing and possible admission. He should remain off work until at least next week.

When Bird returned to the courthouse, he hand-delivered the note to the trial judge's law clerk. The trial court then issued an order rescheduling jury selection and trial for November 17, 2005:

> The parties in this case having been ordered to appear for trial 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 a 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 the testimony of his physician, and Plaintiff is unwilling to proceed to trial, this matter will be dismissed, with prejudice.

According to plaintiff, Shaw had undergone a lumbar puncture and several other medical tests on November 15, 2005, and an angiogram had been scheduled for November 17, 2005. Shaw nevertheless decided to forgo the angiogram and to appear in court on November 17, 2005.

Shaw appeared before the trial court on the morning of November 17, 2005. However, Shaw informed the court that he was not ready to proceed with jury selection and trial. He stated that he did not have his physician present with him in court. He then accused the court of violating his medical privacy by inquiring into his medical condition. Shaw informed the court that he was under the influence of strong pain medication. Shaw asked that Bird be allowed to represent plaintiff in his place.

The trial court responded that Bird was "not counsel of record in this case." Shaw reiterated that he was "not in any physical or mental condition to be able to properly [conduct trial] given the fact that I am under the medication that I am under." He again asked for permission to allow Bird to address the court, but the court responded, "No, he will not address

the Court . . . until he files an appearance in this case, he cannot address the Court." The court told Shaw, "Based on your statements here . . . you are indeed . . . not ready to proceed to trial, you have no tie or suit and you indicate an unwillingness to proceed to trial, according to the order of November 15, 2005, the case is dismissed with prejudice." The court noted, "[T]he physician was ordered to be here at 8:30. It is now 20 minutes of 9:00." The court issued an order dismissing this matter with prejudice.

Plaintiff moved for reconsideration of the order of dismissal, arguing that the November 15 order had required the presence of Dr. Lee only if "Plaintiff's counsel fails to appear." Plaintiff asserted that Shaw had not violated the terms of the order because Shaw had actually "appeared" in court, albeit unready to proceed with trial. Moreover, plaintiff argued that the November 15 order envisioned dismissal only if plaintiff was "unwilling to proceed to trial" on November 17, 2005. Plaintiff contended that he had been ready to proceed *in propria persona* on the morning of November 17, 2005, but that the court had not allowed him to assert the right to represent himself.

In support of his motion for reconsideration, plaintiff presented the deposition of Dr. Kevin Lee.[2] Lee stated that he had called the judge's law clerk on November 15 or 16, and that he had told the clerk that it would be difficult for him to be present at the courthouse. Lee testified that the clerk "immediately let me know that there was no subpoena requiring my attendance in court." Lee then testified,

> I asked [the clerk] how we should proceed, and he said that he would talk to Judge Simon. He told me that he would call me the next morning [November 17] at 8:30. I recall that he even gave me that time, 8:30, a very specific time. I then gave him my beeper number, I gave him my office phone number and told him that he should feel free to page me at 8:30 with further instructions on what to do next. It would be difficult for me to be in court, but of course, if required, I would have attended.
>
> * * *
>
> It was his suggestion that we do nothing further until he called me the next morning at 8:30. That was his recommendation, not mine.

However, Lee testified that the law clerk did not call on November 17 at 8:30 a.m. as promised, and that he never heard from the law clerk again. The trial court denied plaintiff's motion for reconsideration without oral argument and without comment.

Defendants John and Gary Oram then separately moved for case evaluation sanctions. They noted that case evaluation had been completed in March 2005, that plaintiff had rejected the proposed case evaluation award, and that the case had now been dismissed. They asserted

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[2] It is unclear whether this deposition was taken in conformity with the rules and whether the other parties to this case were properly notified that the deposition would be conducted.

that the trial court's dismissal of the case with prejudice constituted a "verdict" for purposes of MCR 2.403(O), and that an award of case evaluation sanctions against plaintiff was therefore appropriate. The trial court granted defendants' motions for case evaluation sanctions.

Even after plaintiff filed his claim of appeal with this Court he continued to file numerous motions in the trial court. Of particular note, plaintiff filed a motion seeking to compel payment by the receiver on the Standard Federal mortgage note. Defendant Gary Oram then filed a motion requesting that the trial court pay all proper outstanding attorney fees and costs, and enter an order closing the case. In July 2006, the trial court entered an order providing that there would be no further disbursements from the receivership to the parties or to their attorneys "until all appeals are concluded."

II

As an initial matter, we note that plaintiff's brief on appeal does not conform to MCR 7.212(C)(6). Plaintiff's statement of facts does not contain "[a]ll material facts, both favorable and unfavorable," and is not stated "without argument or bias." Plaintiff conveniently omits unfavorable facts from brief. Also, plaintiff uses the statement of facts as an extension of his argument section, mentioning several minor arguments in his statement of facts that are not included in the statement of the questions involved. See MCR 7.212(C)(5). Finally, many of the alleged facts provided in plaintiff's brief lack any citations to the lower court record. MCR 7.212(C)(6). "Appeals to the Court of Appeals are heard on the original record," MCR 7.210, and "[a] party may not expand the record on appeal, as this Court is limited to the record established by the trial court," *Trail Clinic, PC v Bloch*, 114 Mich App 700, 713; 319 NW2d 638 (1982). Nevertheless, although we may dismiss an appeal for failure to comply with the applicable court rules, MCR 7.216(A)(10), we will address the merits of plaintiff's claims.

III

Plaintiff first argues that the trial court abused its discretion by dismissing this case with prejudice when he and his attorney failed to proceed with trial at the prescheduled time. We disagree.

We review a trial court's decision to dismiss an action for an abuse of discretion. *Vicencio v Ramirez*, 211 Mich App 501, 506; 536 NW2d 280 (1995). "'[A]n 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.'" *Maldonado v Ford Motor Co*, 476 Mich 372, 388; 719 NW2d 809 (2006) (citation omitted). "'[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.* (citation omitted).

We begin by noting that it is improper for the trial court to dismiss an action if the parties have not received adequate notice of trial. *Vicencio, supra* at 504-505. Here, the parties received more than adequate notice prior to trial, and indeed the date set for trial had been postponed or adjourned by stipulation of the parties themselves at least ten times.

"A court, in its discretion, may dismiss a case with prejudice or enter a default judgment when a party or counsel fails to appear at a duly scheduled trial." *Id*. at 506; *Zerillo v Dyksterhouse*, 191 Mich App 228, 230; 477 NW2d 117 (1991). Our Supreme Court has long recognized that a trial court has the inherent power "to dismiss an action upon the unexcused absence of plaintiff and his counsel when the case is called for trial." *Banta v Serban*, 370 Mich 367, 368; 121 NW2d 854 (1963); see also *Maldonado*, *supra* at 376. This inherent 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." *Id*.

We recognize that "[d]ismissal is a drastic step that should be taken cautiously," and that the trial court should generally "carefully evaluate all available options on the record and conclude that the sanction of dismissal is just and proper" before dismissing a case. *Vicencio*, *supra* at 506. Among the relevant factors to be considered are: (1) whether the violation was willful or accidental; (2) the party's history of refusing to comply with previous court orders; (3) the prejudice to the opposing party; (4) whether there exists a history of deliberate delay; (5) the degree of compliance with other parts of the court's orders; (6) attempts to cure the defect; and (7) whether a lesser sanction would better serve the interests of justice. *Id*. at 507, citing *Dean v Tucker*, 182 Mich App 27, 32-33; 451 NW2d 571 (1990).

We acknowledge that the trial court did not specifically examine each of these factors on the record. Nevertheless, in light of the unique facts of this case, we cannot conclude that the court abused its discretion in failing to do so. At the time of dismissal, there already existed a substantial history of deliberate delay. As noted, the parties had sought to adjourn the trial date numerous times, and it appears after a thorough review of the record that plaintiff was attempting to intentionally stall the proceedings so that he could gain certain advantages by driving up fees and interest. Moreover, plaintiff had already 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. Indeed, trial had been adjourned so many times that it seemed the parties no longer wanted to continue with this action. They had effectively fallen into a holding pattern, and little was accomplished in terms of actual litigation for months at a time. Any sanction less than dismissal would not have been useful, merely prolonging the sluggish evolution of this case and allowing the costs of litigation to mount. Finally, we cannot omit mention of the fact that the trial court gave plaintiff a second chance in this matter. The order of dismissal was not issued when plaintiff's counsel first failed to appear on November 15, 2005, but only after plaintiff violated the trial court's second order by failing to proceed with trial on November 17, 2005.

The relevant question is not whether we, sitting as trial judges, would have dismissed plaintiff's claims. *Williams v Kroger Food Co*, 46 Mich App 514, 517; 208 NW2d 549 (1973). Rather, we are limited to the narrow question whether the trial court abused its discretion. We remain cognizant of the broad deference that we must afford the trial court under this standard. *Maldonado*, *supra* at 388.

Plaintiff contends that he did not actually violate the trial court's order because the trial court instructed him in open court that the case would be dismissed only if he—i.e. Randy Oram—failed to appear for trial. Plaintiff claims that contrary to the language of the order, the court did not even mention the presence or absence of his attorney when it instructed him from the bench. We are not persuaded by this argument. It is well settled that a trial court "speaks

through its orders, and the jurisdiction of this Court is confined to judgments and orders." *Law Offices of Lawrence J Stockler, PC v Rose*, 174 Mich App 14, 54; 436 NW2d 70 (1989). Moreover, this Court acts only on written judgments and decrees, not on oral statements or opinions from the bench. See *Tiedman v Tiedman*, 400 Mich 571, 576; 255 NW2d 632 (1977). A trial court's statements and opinions do not become effective until reduced to writing and signed. *Id*.

Similarly, plaintiff asserts that the trial judge's law clerk told Dr. Lee over the telephone that he did not have to be in court, and that Lee therefore had no way of knowing that the judge expected his presence on the morning November 17, 2005. Again, we are unpersuaded. The trial court spoke only through its written order, and not through the law clerk's telephone conversation with Lee. *Id*.

Plaintiff also asserts that he did not technically violate the trial court order because the order required the presence of Dr. Lee only if "counsel fails to appear." Because Shaw was physically present in court on the morning of November 17, 2005, plaintiff asserts that Shaw sufficiently "appeared," albeit unready to proceed with trial. Plaintiff is impermissibly parsing words. The obvious import of the trial court order was that plaintiff and his counsel were required to appear in court for the purpose of proceeding with trial. In fact, the order specifically provided, "[I]t is hereby ordered that the parties and their counsel *appear for trial* on Thursday, November 17, 2005" (emphasis added). Counsel's mere appearance, in a state unready and unprepared for trial, was not sufficient to comply with the letter or spirit of the trial court's order.

Finally, plaintiff contends that the trial court order envisioned dismissal only if plaintiff was "unwilling to proceed to trial." Plaintiff suggests that he was ready to proceed *in propria persona* on the morning of November 17, 2005, that he attempted to assert the right to self-representation, but that the trial court did not allow him to speak. This assertion is wholly without merit. We have extensively reviewed the transcript of the November 17 proceedings. At no time during those proceedings did plaintiff attempt to assert the right to continue *in propria persona* or otherwise advise the court that he was ready to proceed with trial.

On the specific facts of this case, we cannot say that the trial court surpassed the range of principled outcomes in dismissing plaintiff's claims. *Maldonado*, *supra* at 388. We perceive no abuse of discretion.[3]

IV

[3] Plaintiff contends that the trial court was obliged under MCR 2.503(F)(1) to grant a 28-day adjournment in light of Shaw's purported medical condition. However, this rule requires an adjournment only if the court first "*finds* that an attorney . . . has died or is physically or mentally unable to continue to act as an attorney for the party." MCR 2.503(F)(1) (emphasis added). Here, the court was not able to make any findings concerning whether Shaw was unable to proceed because Shaw's physician did not appear as ordered and Shaw was personally unwilling to cooperate with the court's inquiries into his medical condition.

Plaintiff next argues that the trial court erred by awarding attorney fees and other professional fees during the pendency of this case "contrary to the express language of the settlement agreement." We disagree.

Contrary to plaintiff's assertion, the settlement agreement allowed attorney fees for the Oram brothers' attorneys in the present and future, and did not only allow for "ordinary attorney fees after the settlement payment was made." It also allowed the brothers' attorney fees to be paid out of the jointly owned assets, which became the receivership assets upon appointment of the receiver. The settlement agreement provided in pertinent part:

> Attorney fees paid in the past by Randy are accounted for in the "make up" payment. All unpaid fees of all parties in the past, present and future to be paid by the joint ventures.
>
> Randy's attorney fees are only to Armand Velardo, which will be negotiated.

Beyond stating that the attorney fees were not payable under the terms of the settlement agreement, plaintiff provides no additional argument on this issue. An appellant may not merely announce his position and leave it to this Court to discover and rationalize the basis for his claims, nor may he give issues cursory treatment with little or no citation of supporting authority. *Peterson Novelties, Inc v Berkley*, 259 Mich App 1, 14; 672 NW2d 351 (2003). We are not persuaded by plaintiff's argument that attorney fees were improperly paid in this matter.

In addition to arguing that the settlement agreement did not authorize payment of fees for the brothers' individual attorneys, plaintiff also argues that the receiver and the receiver's counsel charged duplicative fees and that their billing was not sufficiently detailed. We review for an abuse of discretion the trial court's award of fees to a receiver. *Band v Livonia Assoc,* 176 Mich App 95, 110-111; 439 NW2d 285 (1989).

"Receivers have a right to compensation for their services and expenses." *Id*. at 111, citing *Fisk v Fisk*, 333 Mich 513, 518; 53 NW2d 356 (1952). A receiver may also employ legal counsel when the need for legal representation arises. *Band, supra* at 110.

Plaintiff asserts that the fees paid to the receiver and receiver's counsel were duplicative. It is true that

> [w]here the receiver himself is a lawyer, he should not employ other counsel except in an extraordinary case, as where unusual complications arise. 75 CJS, Receivers, § 161. It is the plain duty of such receiver-attorney to render legal services to the estate himself and save the estate a duplication of attorney fees. 66 Am Jur 2d, Receivers, § 294. [*Id*.]

However, Harry Cendrowski, the receiver appointed in this case, is an accountant and not a lawyer. Therefore, the fees paid to his own accounting firm were *ipso facto* not for legal services, and in a complicated matter such as the present case, we cannot say that the retention of counsel by the non-lawyer receiver was unnecessary. The fees paid to the receiver's firm and

those paid to Carson Fischer were not duplicative because the receiver rendered services of a different type than those rendered by his counsel.

Plaintiff also asserts that the billing statements submitted by the receiver and by Carson Fischer were not sufficiently detailed. "The amount of compensation to be awarded to the receiver is within the trial court's discretion." *Band*, *supra* at 111. It is true that the billing statements submitted by Carson Fischer were not greatly detailed, with many of the billed legal services referred to merely as "litigation support" and the like. However we cannot say that the fees were inappropriate in light of plaintiff's actions and the overall complexity of this case. Although plaintiff is the party who initially sought the receiver's appointment, as this case progressed plaintiff filed numerous motions against the receiver, many of which necessitated a legal response. See *Cohen v Cohen*, 125 Mich App 206, 215; 335 NW2d 661 (1983) (receiver's legal fees were necessary because receiver was required to respond to the plaintiff's legal maneuvering). Moreover, a review of the record shows that the trial court did not immediately grant each request for fees, but carefully considered the billing statements from the receiver and Carson Fischer to determine whether the requested fees were warranted. The court even held evidentiary hearings at times to assess the necessity of certain fees sought in this case. We find sufficient evidence on the record to sustain the trial court's award of fees to the receiver and the receiver's counsel, *Union Trust Co v Marsh*, 255 Mich 362, 364-365; 238 NW 321 (1931), and we cannot conclude that the trial court abused its discretion in awarding these fees in the particular amounts requested, *Band*, *supra* at 111.

V

Next, plaintiff argues that he was not required to obtain leave of the court before suing the receiver in this matter. Alternatively, he argues that the trial court abused its discretion in denying his motion for leave to sue the receiver. We disagree.

"In Michigan, leave of court must be obtained before bringing a lawsuit against a court-appointed receiver." *In re Motion for Leave to Sue Receiver of Venus Plaza Shopping Ctr*, 228 Mich App 357, 359; 579 NW2d 99 (1998). The grant or denial of leave to sue a receiver is reviewed for an abuse of discretion. *Id*.

In order for a party to sue a receiver, the receiver must have acted with "an element of bad faith" during the receivership. *Id.* at 361. When there has been no bad faith by the receiver, the trial court does not abuse its discretion in denying to motion for leave to sue. *Id*. at 362. Here, contrary to plaintiff's assertions, there was no evidence of bad faith by the receiver.

It appears that plaintiff's request to sue the receiver was motivated more by a disagreement with the receiver's good-faith decisions than by any honest belief that the receiver had actually engaged in wrongful conduct. It is true that the receiver filed a motion for a protective order against plaintiff, but this occurred only after plaintiff's numerous and frivolous attempts to obtain duplicative discovery from the receiver. Moreover, contrary to plaintiff's assertions, there was no indication that the receiver engaged in any sort of "tortuous conduct" in this case, and as the trial court acknowledged, the receiver's report and audit were as complete as possible under the circumstances. Finally, it was clear that plaintiff's motion for leave to sue the receiver was at least partially motivated by animus.

Plaintiff was not entitled to sue the receiver except by leave of the trial court. *Id*. at 359. The trial did not abuse its discretion in denying plaintiff's motion for leave to sue the receiver. *Id*. at 361-362.

VI

Plaintiff also argues that the trial court abused its discretion by "refusing to extend discovery after the appearance of new counsel." Again, we disagree. We review a trial court's decision to limit discovery for an abuse of discretion. *Messenger v Ingham Co Prosecutor*, 232 Mich App 633, 646; 591 NW2d 393 (1998).

Plaintiff asserts that the "restricted discovery schedule combined with the modest discovery that had been done towards trial preparation denied [plaintiff] the ability to engage in a fair trial." This is quite simply a distortion of the truth. By the time plaintiff's new counsel arrived on the scene, discovery had been open for more than three years. Further, the trial court granted a reasonable stay of all proceedings at that time to enable plaintiff's new counsel to familiarize himself with the facts of this case.

A trial court acts fully within its discretion by limiting discovery when it has become excessive or abusive. *Chastain v Gen Motors Corp*, 254 Mich App 576, 593; 657 NW2d 804 (2002); *In re Hammond Estate*, 215 Mich App 379, 387; 547 NW2d 36 (1996). A trial court may also limit discovery to relevant issues. *Muci v State Farm Mut Auto Ins Co*, 267 Mich App 431, 443; 705 NW2d 151 (2005). Finally, a court may limit vexatious or uncooperative behavior during the course of discovery. See *Minor v Michigan Education Ass'n*, 127 Mich App 196, 203 n 3; 338 NW2d 913 (1983).

Plaintiff has presented no evidence that his new counsel did not have access to all of the discovery conducted during the first three years of this case. Discovery had already been extended many times, either by stipulation or on motion of one or more of the parties. Moreover, after plaintiff's new attorney was retained, he had an additional two months before trial to complete any last-minute discovery that was needed. Even after the discovery cut-off date in this case, plaintiff continued to request discovery, frequently without providing a sufficient basis for assessing whether it was necessary or relevant. We conclude that the trial court did not abuse its discretion in refusing to further extend discovery on the eve of trial when discovery had already been open for more than three years. *Messenger*, *supra* at 646.

VII

Plaintiff also argues on appeal that the trial court erred by ruling that the individual defendants were not personally liable to pay the "make up" payment envisioned by the settlement agreement. We disagree. The proper interpretation of a contract is a question of law that we review de novo. *Wilkie v Auto-Owners Ins Co*, 469 Mich 41, 47; 664 NW2d 776 (2003).

The trial court ruled that the settlement agreement did not bind defendants John and Gary Oram personally to cover the "make up" payment to plaintiff, but rather that the agreement only reflected a hope that "the Bob-Lo Island project would generate sufficient revenue to assist with the payment of the make up payment." The court acknowledged that while the settlement agreement did not evidence an intent for the Bob-Lo Island project to provide the sole source of

"make up" monies, there was no indication in the agreement that the parties intended John Oram or Gary Oram to be individually liable for any of the "make up" amount.

A settlement agreement is a contract. In interpreting a contract, this Court's obligation is to determine the intent of the parties. *Quality Products & Concepts Co v Nagel Precision, Inc*, 469 Mich 362, 375; 666 NW2d 251 (2003). We must examine the language of the contract and accord the words their ordinary and plain meanings, if such meanings are apparent. *Wilkie*, *supra* at 47. When the contractual language is unambiguous, we interpret and enforce the contract as written. *Quality Products*, *supra* at 375. "[A]n unambiguous contractual provision is reflective of the parties' intent as a matter of law." *Id.*

The settlement agreement provided in pertinent part:

> Bob-Lo Island to agree to pay Randy a "make up" payment of $1,650,000. The make up payment will consist of certain properties (value to be agreed upon) to be transferred to Randy as a down payment. The balance of the monies to be secured by the four (4) real estate properties in the U.S. identified as Hayes, Telegraph, Warren and Gratiot.

In turn, the acknowledgment to the settlement agreement provided:

> The make up payment as referred to in the aforesaid Agreement will be pursued immediately by giving Latif Z. Oram that authority to collateralize a loan on behalf of OB Properties, utilizing the Warren, Gratiot, Hayes and Telegraph locations to obtain funds available . . . to be paid over to Latif Z. Oram as a partial make up payment as referred to in the aforesaid Agreement. The balance of the make up payment will be paid over to Latif Z. Oram when refinancing of Boblo Island is obtained, or . . . otherwise through distributions agreed to by the undersigned, as a priority to Latif Z. Oram.

Thus, while the agreements provided that a portion of the "make up" payment might be paid "through distributions agreed to by the undersigned," the agreements in no place indicated that any portion of the payment would be paid *by* the undersigned in their personal capacities. Instead, all relevant provisions regarding the "make up" payment evidenced a clear intent that the money due and owing to plaintiff would come from the various real properties owned jointly by the Oram brothers and their businesses. The settlement agreement and acknowledgment plainly demonstrated the parties' intent to take all $1,650,000 from jointly owned assets rather than from any individual partner. The trial court did not err in ruling that the individual defendants were not personally liable to pay any part of the "make up" payment amount.

VIII

Plaintiff next argues that the trial court erred by awarding case evaluation sanctions to defendants John Oram and Gary Oram because the order of dismissal with prejudice did not constitute a "verdict" for purposes of MCR 2.403(O). Again, we disagree. "A trial court's decision whether to grant case evaluation sanctions under MCR 2.403(O) presents a question of law, which this Court reviews de novo." *Campbell v Sullins*, 257 Mich App 179, 197; 667 NW2d 887 (2003).

The purpose of MCR 2.403(O) is to "encourage settlement and deter protracted litigation." *Haliw v Sterling Heights*, 257 Mich App 689, 704; 669 NW2d 563 (2003), rev'd on other grounds 471 Mich 700 (2005). MCR 2.403(O)(1) provides:

> 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.

The term "verdict" includes "a judgment entered as a result of a ruling on a motion after rejection of the case evaluation." MCR 2.403(O)(2)(c). We acknowledge that the dismissal of plaintiff's claims in this action was not the result of a ruling on a motion. However, an "order of dismissal with prejudice falls within the definition of 'verdict' under MCR 2.403(O)(2)(c)." *Broadway Coney Island, Inc v Commercial Union Ins Co*, 217 Mich App 109, 114; 550 NW2d 838 (1996). This is because an order of dismissal with prejudice has the same practical effect as a verdict of no cause of action, and should therefore by treated as such. *Id*.

Because the dismissal of plaintiff's claims in this case constituted a "verdict" within the meaning of MCR 2.403(O)(2), *Broadway Coney Island*, *supra* at 114, case evaluation sanctions were properly granted.[4]

IX

Finally, plaintiff argues that the trial court erred in finding that he had defrauded the receiver and in allowing the receiver to retain his $479,000 payment on the West Warren and Woodrow Wilson properties. Plaintiff contends that the trial court should have enforced his contracts to purchase the two properties. We agree, but find that a portion of the error in this regard was subsequently cured.

The trial court decided to undo the contracts between plaintiff and the receiver for the purchase of the West Warren and Woodrow Wilson properties. This cancellation of the purchase contracts was tantamount to a rescission. The objective of rescission is to return the parties to their status quo. *Wall v Zynda*, 283 Mich 260, 264; 278 NW 66 (1938); *Lash v Allstate Ins Co*, 210 Mich App 98, 102; 532 NW2d 869 (1995). Rescission necessarily involves an element of restitution because it is based on the idea that the parties should be restored to their pre-contract positions. *Id*. Therefore, the court correctly ordered the receiver to refund plaintiff's $479,000 payment on the two parcels.

Later, however, the court decided to allow the receiver to retain the $479,000 on the ground that plaintiff was purportedly attempting to defraud the receiver by failing to disclose his

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[4] Plaintiff argues that *Broadway Coney Island*, *supra* was incorrectly decided. However, that case has not been reversed, and we are therefore bound to follow it as precedent. MCR 7.215(C)(2).

interest in the Standard Federal mortgage. However, we detect no showing of actionable fraud by plaintiff in this case. Plaintiff acquired the mortgage assignment from Standard Federal Bank because he agreed to dismiss his meritorious claims against Standard Federal in a completely separate lawsuit. There was no evidence that plaintiff had planned or schemed to obtain the mortgage assignment as a way of making the West Warren property less marketable or to otherwise interfere with the receivership. On the contrary, plaintiff's acquisition of the mortgage assignment was entirely innocent, and the fact that he happened to acquire a mortgage lien on the very parcel for which he had already bid can hardly be described as fraud. It was erroneous for the trial court to reverse its earlier decision and to allow the receiver to keep plaintiff's $479,000 payment. Plaintiff would ordinarily be entitled to a complete refund of his $479,000.

We find, however, that this error was partially cured by the trial court's subsequent transfer of the West Warren property to plaintiff. After deciding to allow the receiver to keep the $479,000 payment, the court ordered the receiver to deed the West Warren property to plaintiff, subject to the outstanding mortgage.[5] Accordingly, plaintiff acquired title to the West Warren property, and the trial court's earlier error was extinguished—at least in part.

When the West Warren property was conveyed to plaintiff, plaintiff was no longer entitled to a refund of the payment that he had made *for the West Warren parcel*. However, the $479,000 was initially paid for both the West Warren property and the Woodrow Wilson property. It is not clear from the record what fraction of the $479,000 was paid for each respective parcel. But because the Woodrow Wilson property was never conveyed to plaintiff, he was still entitled to a refund of that fraction of the $479,000 paid for the Woodrow Wilson parcel.

We remand for a calculation of the specific percentage of the $479,000 that was paid for the Woodrow Wilson property, and direct the trial court to refund that percentage of the $479,000 to plaintiff. The trial court shall consider whether plaintiff is entitled to equitable interest on this partial reimbursement from the date of plaintiff's demand for refund until the date of refund itself. See *Olson v Olson*, 273 Mich App 347, 349; 729 NW2d 908 (2007); and *Thomas v Thomas*, 176 Mich App 90, 92-93; 439 NW2d 270 (1989); see also *Vowels v Arthur Murray Studios*, 12 Mich App 359, 363-364; 163 NW2d 35 (1968).

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[5] In general, "'when the holder of a real estate mortgage becomes the owner of the fee, the former estate is merged in the latter.'" *Clark v Fed Land Bank of St Paul*, 167 Mich App 439, 444; 423 NW2d 220 (1987), quoting *Titus v Cavalier*, 276 Mich 117, 120-121; 267 NW 799 (1936). However there is an exception to this rule. If the person in whom the fee and mortgage are united desires to keep the mortgage alive, the law will not imply a merger of estates. *Clark*, *supra* at 444; see also *Titus*, *supra* at 121. We need not decide in this case whether plaintiff's interest in the mortgage merged with the underlying estate when plaintiff acquired the West Warren property.

X

We note that plaintiff has purported to raise certain other minor arguments in his brief on appeal. We decline to address these matters, which were not included in plaintiff's statement of the questions presented. MCR 7.212(C)(5); *Caldwell v Chapman*, 240 Mich App 124, 132; 610 NW2d 264 (2000).

Affirmed in part, reversed in part, and remanded for partial refund of plaintiff's $479,000 payment consistent with this opinion. We do not retain jurisdiction.

/s/ Mark J. Cavanagh
/s/ Kathleen Jansen
/s/ Stephen L. Borrello