

STATE OF MICHIGAN  
COURT OF APPEALS

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PAUL H. GILLETT,

Plaintiff/Appellant-Cross Appellee,

v

MICHIGAN FARM BUREAU, PAT  
BLANCHETT, and TOM WISEMAN,

Defendant/Appellees-Cross  
Appellants.

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UNPUBLISHED  
December 22, 2009

No. 286076  
Eaton Circuit Court  
LC No. 07-001044-CD

Before: Meter, P.J., and Murphy, C.J., and Zahra, J.

MURPHY, C.J. (*dissenting*).

I respectfully dissent. Although I agree with the majority's conclusion that the trial court did not abuse its discretion in concluding that plaintiff's deletion of discoverable electronic material was not in good faith, I find that the trial court did not properly consider the availability of less drastic sanctions as required under Michigan law. For this reason, I would hold that the trial court abused its discretion by imposing the sanction of dismissal.

"Dismissal is a drastic step that should be taken cautiously." *Brenner v Kolk*, 226 Mich App 149, 163; 573 NW2d 65 (1997). For this reason, this Court stated in *Brenner* that before a trial court may impose such a sanction, it "is required to carefully evaluate all available options on the record." *Id.*

When imposing the sanction of dismissal in this case, the trial court stated as follows: "I've carefully considered all my options." The court said nothing more. It neither stated on the record what other options it had nor why the sanction of dismissal was the most appropriate option. Therefore, by failing to "carefully evaluate all [its] available options on the record," the trial court abused its discretion by imposing the sanction of dismissal. *Id.*; see also *Vicencio v Jaime Ramirez, MD, PC*, 211 Mich App 501, 506-507; 536 NW2d 280 (1995) ("Here, because the trial court did not evaluate other available options on the record, it abused its discretion in dismissing the case.").

The majority acknowledges that the trial court did not expressly consider alternative sanctions on the record. However, the majority concludes that the trial court's failure to do so was of little consequence because the record indicates that the trial court relied heavily on *Leon v IDX Systems Corp*, 464 F3d 951, 958 (CA 9, 2006), in concluding that dismissal was warranted.

Although *Leon* is factually analogous to this case, it is different in one significant respect—the trial court in *Leon* acted in accordance with the law of its jurisdiction before imposing a sanction of dismissal. The same cannot be said here.

In *Leon*, the Ninth Circuit also required the trial court to consider alternative sanctions. See *Leon*, 464 F3d at 958. Specifically, it stated that a trial court “must contemplate ‘less severe alternatives’ than outright dismissal.” *Id.*, citing *United States ex rel Wiltec Guam, Inc v Kahaluu Constr Co*, 857 F2d 600, 604 (CA 9, 1988). Moreover, the Ninth Circuit considered whether the trial court “explicitly discussed the feasibility of less drastic sanctions and explained why such alternate sanctions would be inappropriate.” *Id.* at 960. Although the Ninth Circuit imposed a sanction of dismissal, it did so after determining that the trial court satisfied this requirement. See *id.* at 960–61.

Thus, not only did the trial court in this case fail to properly consider less drastic sanctions on the record as required by Michigan law, but it also failed to do so in accordance with *Leon*—the case it relied upon for its decision. Consequently, whether the trial court dismissed this case because that is what happened in *Leon* or because it concluded that dismissal was the most appropriate sanction in light of all its available options is an open question. Contrary to the majority’s opinion, I do not believe that the former can serve as a sufficient basis for a sanction of dismissal in this case. Although a factual comparison of this case to *Leon* may serve as a basis for the trial court to conclude that plaintiff’s conduct was egregious and prejudicial to defendants, the facts and circumstances of *Leon* do not indicate why dismissal was the most appropriate sanction in the circumstances of this case. That is why the law of both Michigan and the Ninth Circuit require trial courts to reach this drastic conclusion only after they carefully consider all available options on the record.

Therefore, I would remand this case to the trial court so that it may determine an appropriate sanction after considering all its available options on the record.

/s/ William B. Murphy