STATE OF MICHIGAN

COURT OF APPEALS

TOMIKO LEWIS,

Plaintiff-Appellant,

and

ORCHARD LABORATORIES CORP and WOOK KIM M.D., PC, doing business as FARMBROOK INTERVENTIONAL PAIN AND EMG,

Intervening Plaintiffs,

v

OHIO SECURITY INSURANCE COMPANY, ANDREW FUGGS, S & G CUSTOM COLLISION, and BRITTANY LEWIS,

Defendants,

and

ALI ZAGHIR and BETTER DEAL SALES,

Defendants-Appellees.

UNPUBLISHED
January 28, 2021

No. 353173
Wayne Circuit Court
LC No. 18-001910-NF

Before: FORT HOOD, P.J., and CAVANAGH and TUKEL, JJ.

Tukel, J. (*Dissenting*).

I agree that the dismissal of plaintiff's case cannot stand on this record, and I agree that the case must be remanded to the trial court for further proceedings. I reach those conclusions because the trial court, without conducting an on-the-record review of possible lesser sanctions, dismissed the case based on plaintiff's failure to appear, or at least to timely appear, as ordered for trial. See *Vicencio v Ramirez*, 211 Mich App 501, 506-07; 536 NW2d 280 (1995). However, I do not join the majority's opinion because I believe that it could be read as undercutting a trial court's authority to enforce its deadlines and schedules. I also disagree with the majority's weighing, in

the first instance, of the *Vicencio* factors instead of leaving that task to the trial court. Consequently, I would not reverse the trial court's order but would vacate it, and afford the trial court the opportunity to find the facts and weigh the *Vicencio* factors.

Our Supreme Court, on numerous occasions, has "affirm[ed] the authority of trial courts to impose sanctions appropriate to contain and prevent abuses so as to ensure the orderly operation of justice. We reiterate that trial courts possess the inherent authority to sanction litigants and their counsel, including the power to dismiss an action." *Maldonado v Ford Motor Co*, 476 Mich 372, 375-376; 719 NW2d 809 (2006). That authority also is codified in our Constitution, see *id*. at 390 (noting that Const 1963, art 6, § 1 "vests the judicial power of the state exclusively in one court of justice," and that § 5 "confers upon this Court the power to make rules to govern the practice and procedure within the courts."). "Where the Michigan Constitution authorizes us to make rules to govern court proceedings, the authority to enforce those rules inescapably follows." *Maldonado*, 476 Mich at 375. Courts also possess statutory authority to enforce the rules, see *id*. at 391 (noting that "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' "); and the court rules also provide such authority, *id*. at 391(first alteration in original) (noting that "MCR 2.504(B)(1) provides that "[i]f the plaintiff fails to comply with [the court] rules or a court order, a defendant may move for dismissal of an action or a claim against that defendant' "), although a court's power to sanction a violation of an order "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*. at 376. While all of those authorities are tempered by the requirement that a court consider lesser sanctions, and apply one of those if it is sufficient to remedy the non-compliance, see *Vicencio v Ramirez*, 211 Mich App 501, 506-507; 536 NW2d 280 (1995), "[a] trial court's dismissal of a case for failure to comply with the court's orders" is reviewed only "for an abuse of discretion." *Maldonado* 476 Mich at 388.

As noted by the majority, the trial court never engaged in the analysis which *Vicencio* requires. Thus, on remand, the trial court at a minimum ought to be given the opportunity to make findings of fact and apply the *Vicencio* factors in the first instance; if it were to find that dismissal is inappropriate, the trial court also ought to be afforded the discretion, if it wishes to exercise it, to determine whether some lesser sanction is appropriate. See *Glenn v TPI Petroleum, Inc*, 305 Mich App 698, 703; 854 NW2d 509 (2014) ("The power of the lower court on remand is to take such action as law and justice may require so long as it is not inconsistent with the judgment of the appellate court.").[1]

The record establishes that plaintiff was told that she was to appear at 8:30 a.m. on the morning of trial; when she notified the trial court, through her attorney, that she would be late due

[1] Of course, neither the trial court nor an opposing party would be required, at this late date, to continue to pursue a sanction against plaintiff, even a sanction seeking something less than dismissal, for conduct which took place years ago. I simply note that, based on the present record, such a course of action should not be precluded as a matter of law; and *Vicencio* requires a court to consider the full range of available options as a sanction.

to what she reported was severe pain, the trial court apparently may have been willing to let things go, telling her to appear at 9:30. However, at 9:32, plaintiff's counsel informed the trial court that plaintiff was still at least 20-25 minutes away, and shortly thereafter the trial court dismissed the case. The majority states that the trial court admitted at a later hearing that it had told plaintiff to appear at 10:00, and that plaintiff did arrive "at some time around then." I cannot join that statement, for two reasons. I will assume that the majority is correct that the trial court, upon being told of plaintiff's late arrival, told her to appear by 10:00, although the record appears unclear in that regard and there has been no factfinding by the trial court as to that point.[2] But in any event, the "at some time around then" language could be understood as meaning that a party or lawyer need not comply with an actual deadline, so long as it came close to complying, a proposition which I believe to be incorrect.

Vicencio does not limit the authority of trial courts to impose a sanction for non-compliance generally; it prohibits trial courts from dismissing a case for non-compliance if another sanction short of dismissal, such as a monetary fine or paying an opposing parties attorneys' fees for the period of time wasted, would suffice to remedy the wrong. Moreover, the majority's statement that "There is no evidence that giving plaintiff additional time to arrive at trial or that rescheduling the trial would have prejudiced defendants in anyway [sic]" undercuts its own rationale; the trial court did not make specific findings or conduct an evidentiary hearing, so of course there is "no evidence" to support any conclusions or findings. And even in purporting to apply the *Vicencio* factors in the first instance, the majority does not actually do so. As the majority opinion states, "The *Vicencio* Court noted that 'a trial court is required to carefully evaluate all available options on the record and conclude that the sanction is just and proper,' " and "[t]he *Vicencio* Court then explicitly an [sic] unequivocally held that, 'because the trial court did not evaluate other available options on the record, it abused its discretion in dismissing the case.' " The majority engages in no analysis or discussion of any option besides the impropriety of dismissal, let alone "all available options."

For that reason, I would merely vacate the trial court's order of dismissal and allow it on remand to find all the relevant facts, and to afford the parties the opportunity of producing evidence bearing on the *Vicencio* factors. And I note in that regard that the list of factors in *Vicencio* "should not be considered exhaustive." *Vicencio*, 211 Mich App at 507.

Moreover, as a factual matter, it is impossible to know from the present record when exactly plaintiff did arrive and how much inconvenience her late arrival wrought. The trial court did not simply announce to plaintiff out of a clear blue sky that she was to arrive at 9:30 or 10:00; it did so only after learning that she would not be on time for the scheduled 8:30 start. I think it at least equally plausible that after having its schedule unilaterally altered by plaintiff, the trial court

[2] As discussed later in this opinion, I take issue with the majority deciding facts in the first instance. That includes both historical facts, such as what time plaintiff actually arrived; and legal conclusions based on historical facts, such as whether defendant suffered any prejudice. As to the time of plaintiff's arrival, the majority simply declares that it is irrelevant to its analysis whether plaintiff arrived at 9:30, 10:00, or, as regards 10:00, "some time around then."

set a time to mitigate that inconvenience, so that it, opposing counsel, defendant's representative, prospective jurors, possibly witnesses, and anyone else who needed to be present for the proceedings was not simply required to sit in the courtroom and wait for plaintiff to arrive. Indeed, the trial court noted, at the hearing on plaintiff's motion to reinstate her case, that it had a jury panel waiting the entire time, and it apparently received calls from the jury clerk regarding the inconvenience to the prospective jurors. That actual wasting of jurors' time, and likely that of others, involved approximately a wasted hour and half for many persons, including of course the trial judge. None of that can be fully discerned without factual findings by the trial court, and possibly an evidentiary hearing.[3] Of course, plaintiff may not have been physically able to appear on time; thus, one of the *Vicencio* factors is whether or not the violation "was wilful or accidental," see *id*. at 507, and a determination of whether it was wilful or accidental does not appear in the record, nor does a determination of whether a lesser sanction would have better served the interests of justice, *id*. All of that ought to be for the trial court to consider in the first instance, based on the facts as it finds them. See, e.g., *In re Martin*, 200 Mich App 703, 717; 504 NW2d 917 (1993) (alteration in original) ("It is not the function of an appellate court to decide disputed questions of fact in the first instance and then choose between affirmance or reversal by testing its factual conclusion against that which the trial court *might* have . . . reached."); MCR 2.613(C) (providing that "Findings of fact by the trial court may not be set aside unless clearly erroneous. In the application of this principle, regard shall be given to the special opportunity of the trial court to judge the credibility of the witnesses who appeared before it.").[4] That rule flows from our role as an error-correcting court, see, e.g., *Jawad A Shah, MD, PC v State Farm Mut Auto Ins Co*, 324 Mich App 182, 210; 920 NW2d 148 (2018) (describing this Court as an "error-correcting court"), and the proper manner of correcting an error here would be to have the trial court consider the question under the proper standard.

[3] The majority states that it "cannot fathom" why an evidentiary hearing would be necessary. That is the point. The majority is surmising what it believes to be the facts, but none of us can be certain we know all of them based on this record. That is why we review factual *findings*, rather than make assumptions on incomplete records. See MCR 2.613(C).

[4] It also is unclear to me why the majority cites a large number of unpublished cases. As a general rule, "[u]npublished opinions should not be cited for propositions of law for which there is published authority." MCR 7.215(C)(1). However, the *Vicencio* rule is well-established, and as the majority notes in footnote 5 of its opinion, by its own terms applies to dismissal of cases for violation of court rules or court orders, the issue presented here. In addition, *Vicencio* has been applied many times in published opinions involving dismissal of a case due to non-compliance with a court rule or court order. See, e.g., *Woods v SLB Prop Mgt, LLC*, 277 Mich App 622, 630; 750 NW2d 228 (2008); *Bloemendaal v Town & Country Sports Ctr, Inc*, 255 Mich App 207, 214; 659 NW2d 684, 688 (2002); *Heugel v Heugel*, 237 Mich App 471, 483; 603 NW2d 121 (1999). The majority gives no reason for its extensive citation of unpublished opinions, other than to note generally that such cases may be cited if persuasive; however, the majority never states anything about the cited cases which renders them persuasive. Given the clarity of existing law, including the existence of published cases, the extensive reliance on unpublished cases does not appear consonant with MCR 7.215.

For these reasons, while I agree with the majority that the order of dismissal cannot stand on the present record, I respectfully dissent from the reversal of the trial court's order. Instead, I would merely vacate that order and remand the case to the trial court for further proceedings.

/s/ Jonathan Tukel