[Cite as *Fulmer v. W. Licking Joint Fire Dist.*, 2014-Ohio-5843.]

COURT OF APPEALS
LICKING COUNTY, OHIO
FIFTH APPELLATE DISTRICT

		JUDGES:
DAVID FULMER	:	Hon. William B. Hoffman, P.J.
	:	Hon. W. Scott Gwin, J.
Appellant	:	Hon. Sheila G. Farmer, J.
	:	
-vs-	:	
	:	Case No. 14-CA-58
WEST LICKING JOINT FIRE DISTRICT	:	
	:	
	:	O P I N I O N
Appellee		

CHARACTER OF PROCEEDING: Civil appeal from the Licking County Court of Common Pleas, Case No. 2012CV01495

JUDGMENT: Reversed and Remanded

DATE OF JUDGMENT ENTRY: December 12, 2014

APPEARANCES:

For Appellant	For Appellee
DAVID COMSTOCK, JR.	DOUGLAS HOLTHUS
100 Federal Plaza East, Ste 926	300 East Broad Street, Ste. 350
Youngstown, OH 44503	Columbus, OH 43215

Gwin, J.

{¶1} Appellant appeals the May 27, 2014 judgment entry of the Licking County Court of Common Pleas precluding him from presenting any evidence regarding his claimed damages, which resulted in a dismissal of appellant's claim.

Facts & Procedural History

{¶2} Appellant David Fulmer ("Fulmer") was hired by appellee West Licking Joint Fire District ("District") to serve as its fire chief in 2009. On May 30, 2012, the West Licking Joint Fire District Board of Trustees ("Board") suspended appellant from his position. In October of 2012, the Board conducted an administrative evidentiary hearing relative to charges against appellant of misuse of funds and misconduct. The Board terminated appellant's employment in November of 2012. Appellant appealed this decision to the Licking County Court of Common Pleas and the trial court vacated the Board's decision terminating appellant. The District appealed to this Court from the trial court's entry and, in *Fulmer v. West Licking Joint Fire District*, 5th Dist. Licking No. 13-CA-36, 2014-Ohio-82, we affirmed the decision of the trial court and found the trial court did not abuse its discretion in vacating the decision to terminate appellant's employment.

{¶3} On February 19, 2014, the District filed a motion and request for evidentiary hearing to determine the amount of back pay or other relief for Fulmer. After a status conference, the trial court issued a judgment entry on March 14, 2014, setting an evidentiary damages hearing on May 23, 2014. The trial court noted that the parties stated they would need time to prepare evidence for discovery purposes to present to

the court to determine damages due for Fulmer's lost wages and benefits. In its judgment entry, the trial court stated as follows:

> Plaintiff shall provide discovery concerning health-related figures and health and benefit coverage received and paid for during those 15 months as well as other earned income and evidence necessary for the Court to determine damages. Plaintiff shall conclude that discovery on or before April 15, 2014. Defendant shall further prepare such documentation as may is [sic] necessary to present to the Court sufficient for it to determine the amount of damages that show Defendant's entitlement to pay-in benefits for the 15 month period and that shall be concluded on before May 15, 2013.

{¶4} On May 14, 2014, the District filed a motion for dismissal or motion for contempt pursuant to Civil Rule 37(B) for Fulmer's failure to comply with the March 14th order regarding discovery. Fulmer's attorney filed a memorandum in opposition on May 15, 2014, indicating he did start the discovery process in April and he was confused about the trial court's reference to plaintiff and defendant when the parties in the administrative appeal were designated as appellant and appellee. Further, that much of the documentation required for wages, sick time, and benefits was in the possession of the District, not Fulmer. Fulmer and his attorney also requested a continuance of the damages hearing if the trial court determined appellee would be prejudiced by the late submission of the discovery. Fulmer provided appellee with the discovery, in the form of a six-inch binder of information, on the same day as his response to the motion to dismiss was filed, which was approximately one week prior to the evidentiary hearing.

{¶5} At the evidentiary hearing and after oral argument by the parties, the trial court found that Fulmer could not introduce any evidence as to his damages or testify as to his damages. Thus, since Fulmer was unable to present any evidence in support of his damages, the trial court dismissed his claim for damages. In a May 27, 2014 judgment entry, the trial court stated that, on the basis of the length of time the case has been pending and the court's perceived willful failure of Fulmer to follow the explicit terms of the judgment entry, pursuant to Civil Rule 37(B), the evidence which was to be produced would not be admitted. Further, that "as a result of [Fulmer] having no evidence to present to demonstrate a claim for damages," the trial court dismissed appellant's claim for damages.

{¶6} Appellant appeals the May 27, 2014 judgment entry of the Licking County Court of Common Pleas and assigns the following as error:

{¶7} "I. THE TRIAL COURT ABUSED ITS DISCRETION BY ORDERING THE DISMISSAL OF THIS ACTION AS A DISCOVERY SANCTION RATHER THAN IMPOSING A LESS SEVERE PENALTY, COMMENSURATE WITH THE ALLEGED DISCOVERY FAILURE."

{¶8} Appellant argues the trial court abused its discretion in dismissing the case. We agree.

{¶9} Two Ohio Rules of Civil Procedure authorize the dismissal of claims for the failure to comply with a court order. Civil Rule 37(B)(2)(c) allows for dismissal after a violation of an order to compel discovery and Civil Rule 41(B)(1) permits a trial court to dismiss an action where a plaintiff fails to comply with any court order, whether related to discovery or not. An appellate court's review of a dismissal under Civil Rule

37(B)(2)(c) and 41(B)(1) is within the sound discretion of the trial court. *Quonset Hut, Inc. v. Ford Motor Co.*, 80 Ohio St.3d 46, 684 N.E.2d 319 (1997). However, that discretion must be cautiously exercised. *Id.*

{¶10} Although reviewing courts employ an ordinary abuse of discretion standard of review for dismissals with prejudice, that standard is actually heightened when reviewing decisions that forever deny a plaintiff a review of a claim's merits. *Id.* Due process also requires that notice be given to a party who is in jeopardy of having his claim dismissed one last chance to comply with the order or to explain the default. Civil Rule 41(B)(1); *Sazima v. Chalko*, 86 Ohio St.3d 151, 1999-Ohio-92, 712 N.E.2d 729. This notice requirement applies to all dismissal with prejudice, including those entered pursuant to Civil Rule 37(B) for failure to comply with discovery orders. *Ohio Furniture Co. v. Mindala*, 22 Ohio St.3d 99, 488 N.E.2d 881 (1986). The purpose of the notice is to provide the party in default with an opportunity to explain the default or correct it. *Logdson v. Nichols*, 72 Ohio St.3d 124, 1995-Ohio-225, 647 N.E.2d 1361.

{¶11} In considering dismissals under Civil Rule 41(B)(1), a trial court may properly take into account the entire history of the litigation, however, "[t]he extremely harsh sanction of dismissal should be reserved for cases when * * * conduct falls substantially below what is reasonable under the circumstances evidencing a complete disregard for the judicial system or the rights of the opposing party." *Id.* at 158, quoting *Moore v. Emmanuel Family Training Ctr., Inc.*, 18 Ohio St.3d 64, 479 N.E.2d 879 (1985).

{¶12} In other words, dismissal is reserved for those cases in which "the conduct of a party is so negligent, irresponsible, contumacious, or dilatory as to provide

substantial grounds for a dismissal with prejudice for failure to prosecute or obey a court order." *Id.* citing *Quonset Hut, Inc. v. Ford Motor Co.*, 80 Ohio St.3d 46, 684 N.E.2d 319 (1997). Further, among the factors to be considered by the trial judge in determining whether dismissal under Civil Rule 37 or 41 is appropriate is the tenant that "disposition of cases on their merits is favored in the law." *Quonset Hut v. Ford Motor Co.*, 80 Ohio St.3d 46, 684 N.E.2d 319 (1997).

{¶13} In this case, the effect of the trial court's denial of appellant's presentation of evidence on damages was tantamount to a dismissal because once appellant was unable to present any evidence or testimony on the issue of damages, the claim for damages resulted in the granting of the motion to dismiss. *Truckly v. Hand,* 5th Dist. Licking No. 96 CA 00057, 96 CA 00081, 1996 WL 570875 (Sept. 12, 1996). Further, the trial court never gave actual or express notice to appellant's counsel that the case would be dismissed with prejudice for failure to timely comply with the order of March 14, 2014. However, pursuant to *Quonset Hut*, we must find that appellee's May 14, 2014 motion to dismiss was sufficient to put appellant's counsel on notice that the case could be dismissed. 80 Ohio St.3d 46, 684 N.E.2d 319 (1997). Thus, appellant's counsel received notice at the time he became aware that appellee had filed his motion requesting the trial court dismiss appellant's claim for damages. This fact, however, does not determine the issue presented in this case.

{¶14} We find the instant case to be analogous to the Ohio Supreme Court case of *Sazima v. Chalko*, 86 Ohio St.3d 151, 1999-Ohio-92, 712 N.E.2d 729. In *Sazima*, the Ohio Supreme Court found the trial court abused its discretion in dismissing the matter for failure to comply because the plaintiff had complied within a few days of the actual

notice of the order. 86 Ohio St.3d 151, 1999-Ohio-92, 712 N.E.2d 729. The Supreme Court noted that, pursuant to its previous decision in *Quonset Hut*, "the very purpose of notice is to provide a party with an opportunity to explain its default and/or correct it" and the notice provided by Civil Rule 41(B) gives a plaintiff one last chance to obey the court order. *Id.* In *Sazima*, the plaintiff complied with the outstanding order three days prior to the trial court's order of dismissal and the Supreme Court reasoned that "if a trial court was permitted to dismiss an action for plaintiff's failure to comply with an outstanding order after notice to the plaintiff's counsel resulted in compliance, the entire purpose of providing notice in the first place would be defeated." *Id.* Thus, "once plaintiff's counsel has responded to the notice given pursuant to Civil Rule 41(B)(1) by complying with the order, the trial court may not thereafter dismiss the action on the basis of noncompliance." *Id.*

{¶15} In this case, appellant sent the outstanding discovery to appellee's counsel on May 14, 2014 and indicated in his May 15, 2014 response to the motion to dismiss that he sent the discovery to appellee's counsel. Counsel for appellee received the discovery approximately one week prior to the oral hearing on damages. Counsel for appellant took action to comply with the discovery order immediately after receiving notice of the potential dismissal, which was approximately ten days prior to the trial court's dismissal at the May 23rd hearing and the May 27th written judgment entry dismissing the case. Further, in this case, as in *Sazina*, the record does not support the conclusion that appellant or his counsel repeatedly ignored orders of the court with little or no justification presented.

{¶16} It is a "basic tenant of Ohio jurisprudence that cases should be decided on their merits." *Perotti v. Ferguson*, 7 Ohio St.3d 1, 454 N.E.2d 951 (1983). We find a dismissal with prejudice was not warranted in this case. While appellant's counsel was late in providing the discovery at issue he took action immediately after receiving the notice given pursuant to Civil Rule 41(B)(1). The discovery was received by appellee's counsel one week prior to the hearing on damages. This instance of noncompliance is not so flagrant that it rises to the level of extreme circumstances which would justify a dismissal with prejudice without first resorting to the imposition of lesser sanctions. Accordingly, we hold that the trial court abused its discretion in excluding the evidence and testimony regarding damages and dismissing appellant's claims with prejudice. Appellant's assignment of error is sustained.

{¶17} The May 27, 2014 judgment entry of the Licking County Court of Common Pleas is reversed and we remand the matter to the trial court for further proceedings in accordance with the law and this opinion.

By Gwin, J.,

Hoffman, P.J., and

Farmer, J., concur