[Cite as *Renner, Otto, Boisselle & Sklar, L.L.P. v. Estate of Siegel*, 2015-Ohio-1839.]

Court of Appeals of Ohio

EIGHTH APPELLATE DISTRICT
COUNTY OF CUYAHOGA

JOURNAL ENTRY AND OPINION
No. 101861

RENNER, OTTO, BOISSELLE & SKLAR, L.L.P.

PLAINTIFF-APPELLANT

vs.

THE ESTATE OF MICHAEL SIEGEL

DEFENDANT-APPELLEE

JUDGMENT:
REVERSED AND REMANDED

Civil Appeal from the
Cuyahoga County Court of Common Pleas
Case No. CV-07-620856

BEFORE: Celebrezze, A.J., McCormack, J., and Blackmon, J.

RELEASED AND JOURNALIZED: May 14, 2015

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FRANK D. CELEBREZZE, JR., A.J.:

{¶1} Appellant, Renner, Otto, Boisselle & Sklar, L.L.P. ("Renner"), appeals the dismissal of its suit against appellee, the estate of Michael Siegel, for legal fees. Renner argues that the court erred in granting the estate partial summary judgment and in denying its motion for reconsideration given the intervening decision of a federal appellate court in related litigation. After a thorough review of the record and law, we reverse and remand.

I. Factual and Procedural History

{¶2} In the early 1930s, Jerome Siegel and Joseph Shuster created the iconic comic book character Superman. The pair sold their interest in the intellectual property, including other characters that populated the Superman universe, to D.C. Comics for $130 in 1938. Joanne Siegel, Jerome's widow, and his daughter, Laura Siegel Larson, used Section 304(c) of the Copyright Act of 1976[1] to renegotiate the rights to Superman, Superboy, and other intellectual property in 1997. Michael Siegel, Jerome's son from a previous marriage, and Laura's half-brother, did not participate in the litigation that resulted.

{¶3} The litigation taking place in California had a great impact on the current litigation. The following facts were determined by the federal district court in *Siegel v. Warner Bros. Entertainment, Inc.*, 542 F.Supp.2d 1098 (C.D. Cal.2008):

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[1] 17 U.S.C. 304(c).

On April 3, 1997, the two heirs served seven separate notices of termination under section 304(c) of the 1976 Act, purporting to terminate several of Siegel's potential grant(s) in the Superman copyright to [D.C. Comics and Warner Brothers Entertainment, Inc.,] including the March 1, 1938, assignment; the May 19, 1948, stipulation; and the December 23, 1975, agreement.

* * *

Not long after the termination notices' effective date passed, the Siegel heirs retained new counsel and the parties re-entered into settlement discussions to resolve their respective claims to the Superman copyright. * * *

At some point the broad outline of a global settlement concerning the copyright to the Superman material, as well as to other works Siegel either authored or contributed material to Detective Comics (notably, Superboy and The Spectre properties), was reached. Specifically, on October 19, 2001, counsel for Joanne Siegel and Laura Siegel Larson sent a six-page letter to Warner Bros.' General Counsel confirming and summarizing the substance of the settlement. The letter concluded that "if there is any aspect of the above that is somehow misstated, please let me know by [October 22, 2001] at 2:00, as I will be out of the office — and likely difficult to reach — for the following four weeks." (Decl. Marc Toberoff, Ex. BB).

A week later, on October 26, 2001, Warner Bros.' General Counsel John Shulman responded with a letter, stating that he had "reviewed" the summary set forth in the October 19 letter, and then "enclose[d] * * * a more fulsome outline of what we believe the deal we've agreed to is"; the outline was five pages long. (Decl. Marc Toberoff, Ex. CC). The letter concluded that Warner Bros. was "working on the draft agreement" so as to "have this super-matter transaction in document form." (Decl. Marc Toberoff, Ex. CC).

A few months later, on February 1, 2002, outside counsel for Warner Bros. provided a copy of the promised draft agreement (spanning fifty-six pages), with the proviso that, "[a]s our clients have not seen this latest version of the agreement, I must reserve their right to comment." (Decl. Marc Toberoff, Ex. DD). Mention was also made in the draft agreement for the need of certain "Stand Alone Assignments" that had as yet not been finalized, something which Warner's outside counsel promised would be forthcoming. (Decl. Marc Toberoff, Ex. DD).

Three months later, on May 9, 2002, Joanne Siegel wrote a letter to Time Warner's Chief Operating Officer Richard Parsons, recounting that she and her daughter had "made painful concessions and reluctantly accepted John Shulman's last [settlement] proposal [in October, 2001]," but upon reading the proposed draft agreement learned that they had been "stabbed in the back," as it "contained new, outrageous demands that were not in the [October, 2001] proposal," such as "condition[ing] recei[pt of] financial compensation for our rights on demands which were not in the proposal we accepted." (Decl. Michael Bergman, Ex. Z). The letter concluded that "[a]fter four years we have no deal and this contract makes an agreement impossible." (Decl. Michael Bergman, Ex. Z).

Time Warner's CEO quickly responded with a letter of his own on May 21, 2002, expressing shock and dismay as "each of the major points covered in the draft agreement * * * accurately represented the agreement previously reached" by the parties. (Decl. Michael Bergman, Ex. AA). The letter continued by acknowledging that, as with all lengthy negotiations, Time Warner "expected" that the submission of the draft agreement would result in further "comments and questions on the draft" by Siegel family' representatives that "would need to [be] resolve[d]." (Decl. Michael Bergman, Ex. AA). The letter concluded by reaffirming Time Warner's continued interest "that this agreement can be closed based upon the earlier discussions with [the Siegel family's] lawyers." (Decl. Michael Bergman, Ex. AA).

Not long thereafter, the Siegel heirs' lawyers submitted for the family's review and approval a re-draft of the February 4, 2002, agreement the lawyers had crafted. (Decl. Marc Toberoff, Ex. AA). The Siegel heirs, on September 21, 2002, rejected the redraft and fired their attorneys. (Decl. Marc Toberoff, Ex. AA). That same day Joanne Siegel and Laura Siegel Larson sent a letter to DC Comics Click for Enhanced Coverage Linking Searches' General Counsel Paul Levitz notifying the company that they were "stopp[ing] and end[ing] negotiations with DC Comics, Click for

> Enhanced Coverage Linking Searches Inc., its parent company AOL Time Warner and all of its representatives and associates concerning" their rights to, among other things, Superman. (Decl. Michael Bergman, Ex. DD).

Id. at 1114-1116.

{¶4} Joanne and Laura then initiated an action in federal district court on October 8, 2004, seeking to enforce the termination notices sent in 1997. Relevant to this appeal, the district court found that no valid settlement agreement existed between the parties. *Id*. at 1139.

{¶5} Under the statutory scheme, Michael would gain a passive 25-percent interest in copyrighted works after termination. Therefore, to protect his interest in the negotiations,[2] Michael retained Renner. On December 26, 1997, Michael signed a contingency fee agreement entitling Renner to 33 percent of all proceeds derived from Michael's present and future interests in any copyrighted work related to Superman. Renner asserts that it expended considerable time and resources in protecting Michael's interests during the negotiations that took place.

{¶6} On January 17, 2006, Michael died. He had no will and any interest he had in the rights to Superman passed to his half-sister, Laura. On April 3, 2006, Michael's estate fired Renner. Renner filed suit against Michael's estate in the common pleas court on April 6, 2007, seeking to enforce the contingency fee agreement. It sought 33 percent of whatever funds would be received by the estate for the rights that were the

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[2] Renner did not participate in the federal litigation.

subject of the litigation in California. Renner also sought to be reimbursed for expenses and additional fees it was entitled to under the fee agreement with Michael. The estate answered and later filed a motion for partial summary judgment on March 5, 2009. There, the estate argued that Renner was not entitled to enforce the agreement, but may be entitled to recovery based on quantum meruit.[3]

{¶7} The trial court granted the estate's motion for partial summary judgment on September 17, 2010. The court found that prior to Michael's death, the contingency that the fee agreement was based on did not occur. Therefore, Renner was entitled only to recover based on quantum meruit. The trial court set the remaining issues for trial.

{¶8} On May 6, 2011, Renner filed a motion to continue the trial date indicating that settlement negotiations were ongoing. On December 27, 2011, the trial court dismissed the case with prejudice, stating, "[u]pon advice of counsel case is hereby settled and dismissed with prejudice subject to a more definite journal entry to follow." No agreement or further journal entry was ever filed with the court.

{¶9} On April 17, 2014, Renner filed a motion for reconsideration seeking to vacate the earlier dismissal with prejudice and decision on summary judgment. A development in the federal litigation had prompted Renner to revisit the earlier rulings. On January 10, 2013, the Ninth Circuit Court of Appeals reversed the district court's

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[3] "'Quantum meruit' means literally 'as much as deserved.'" *Reid, Johnson, Downes, Andrachik & Webster v. Lansberry*, 68 Ohio St.3d 570, 573, 629 N.E.2d 431 (1994), quoting *Black's Law Dictionary* 1243 (6th Ed.1990).

grant of summary judgment in favor of Laura.[4] *Larson v. Warner Bros. Entertainment*, 504 Fed. Appx. 586 (9th Cir.2013). The Ninth Circuit found that the 2001 agreement contained all the essential terms for a contract under California law and was binding. *Id.* at 588.

{¶10} After significant briefing, on August 1, 2014, the trial court issued an order stating,

> [t]his case is settled and dismissed. Counsel for the parties have not complied with the court's prior order, dated 12/27/2011. Counsel failed to submit a more definite journal entry at any time thereafter. This failure results in the dismissal of all claims, sua sponte, with costs to be assigned by the court. This case is therefore dismissed with prejudice.
>
> Plaintiff Renner Otto Boisselle & Sklar LLP's motion to reconsider non-final judgment, filed 4/17/2014, is denied.

{¶11} Renner then filed a timely notice of appeal from this decision raising three errors for review:

> I. The trial court erred to the prejudice of [Renner] by granting partial summary judgment on the issue of quantum meruit, in favor of [Michael's estate] when genuine issues of material fact exist whereby reasonable minds could conclude that [Renner] had fully performed under the terms of the fee agreement.
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> II. The trial court erred to the prejudice of [Renner] by granting partial summary judgment on the issue of quantum meruit, in favor of [Michael's estate] when full performance under the fee agreement would entitle [Renner] to collection of the full contingency provided under the fee agreement.

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[4] Joanne had passed away by this time and Laura inherited her entire interest. The litigation was continued by Laura, and Joanne's estate.

III. The trial court committed an abuse of discretion when it denied [Renner's] motion to reconsider because it failed to recognize the 9th Circuit Court of Appeals decision as binding.

II. Law and Analysis

A. Final, Appealable Order

{¶12} An issue requires analysis before proceeding to Renner's assigned errors. This court may only review final, appealable orders. R.C. 2505.03(A). In determining whether a judgment is final and appealable, appellate courts engage in a two-step analysis. The first step requires this court to determine whether the order is final in the sense defined by R.C. 2505.02. If so, then it must be determined whether the requirements of Civ.R. 54(B) are met and the order is postured as final with respect to a judgment upon multiple claims or involving multiple parties.

{¶13} R.C. 2505.02(B) defines a final order as one that affects a substantial right in an action and that in effect determines the action and prevents a judgment, or an order made in a special proceeding that affects a substantial right. R.C. 2505.02(B)(1) and (2). *See Whipps v. Ryan*, 10th Dist. Franklin Nos. 10AP-167 and 10AP-168, 2011-Ohio-3300, ¶ 6.

{¶14} Michael's estate argues that Renner's time for appeal of the summary judgment decision has passed and that it should have appealed from the entry granting partial summary judgment or the entry indicating a settlement was reached and the case was dismissed if it wished to raise the issues it did in the motion for reconsideration. However, neither of these orders was final and appealable. The grant of summary

judgment that leaves issues outstanding is not final and appealable. *Garber v. STS Concrete Co., L.L.C.*, 8th Dist. Cuyahoga No. 99139, 2013-Ohio-2700, ¶ 6. Here, the grant of summary judgment determined that Renner was not entitled to enforce the agreement, but may recover based on quantum meruit. The court then set for trial the issue of damages. This is not a final order capable of appeal.

{¶15} Michael's estate argues that the only thing left was a mechanical calculation of damages. However, "[e]ven orders determining liability without damages are not final appealable orders because those orders do not determine the action or prevent a judgment." *B & M Realty, Inc. v. Ferchill*, 8th Dist. Cuyahoga No. 101255, 2014-Ohio-4843, ¶ 5, citing *Dalliance Real Estate v. Covert*, 11th Dist. Geauga No. 2012-G-3090, 2013-Ohio-538, ¶ 5, citing R.C. 2505.02. The damages calculation required evidence of expenditures, work done by attorneys, and a reasonable hourly rate for such work. This is not the kind of mechanical calculation that would allow an appellate court to exercise jurisdiction over an appeal in such a procedural posture.

{¶16} Michael's estate also argues the December 27, 2011 order indicating the case had settled and dismissed was a final, appealable order. However, this entry is not final. It calls for a more definite journal entry to follow. This court has previously stated such an entry is not final and appealable as it requires further action by the parties. *Colbert v. Realty X Corp.*, 8th Dist. Cuyahoga No. 86151, 2005-Ohio-6726, ¶ 3-5. There, the trial court issued an order stating, "'[m]otion to enforce settlement agreement is granted. Parties are ordered to finalize terms and dates of payment within 30 days of

this order or face show cause hearing for failure to comply. Final. Costs of defendant [sic]. This court retains jurisdiction over all post-judgment motions.'" *Id*. at ¶ 3.

{¶17} The *Colbert* court held,

> [d]espite the court's use of the term "final," it is evident that the court did not intend for this judgment entry to finally dispose this case. The order anticipates further action by the parties to "finalize terms and dates of payment." Moreover, the order does not dispose of any claim by any party. Accordingly, it is not final and appealable.

Id. at ¶ 5, citing, *e.g.*, *State ex rel. Keith v. McMonagle*, 103 Ohio St.3d 430, 2004-Ohio-5580, 816 N.E.2d 597, ¶ 4. While the court's 2011 journal entry does indicate the case is dismissed with prejudice, and would presumably dispose of the claims in the case, it clearly mandates the parties file with the court an entry of dismissal documenting the settlement. Therefore, it is not final and appealable.

{¶18} The Ohio Supreme Court has recently found that dismissals conditioned on some future event are generally not permitted by any civil rule in Ohio. *Infinite Sec. Solutions, L.L.C. v. Karam Props. II*, Slip Opinion No. 2015-Ohio-1101, ¶ 22. It has rejected the conditional/unconditional dismissal dichotomy that has arisen in Ohio case law regarding continuing jurisdiction to enforce a settlement agreement. *Id*. at ¶ 34. But the court held that a trial court may retain jurisdiction over a dismissed case to enforce a settlement agreement where the agreement is incorporated into its journal entry of dismissal or the entry specifically reserves that right to the trial court. *Id*.

{¶19} However, *Karam Props*. does not directly address the issue in the present case. This is not a case about whether a court retains jurisdiction to enforce a settlement

agreement, but whether the court retains jurisdiction to allow parties to file further entries as directed by the court when the dismissal includes that language. The entry in *Karam Props*. indicated that the parties reserved the right to file a more definite entry. Specifically, the entry stated, "'[p]arties having represented to the court that their differences have been resolved, this case is dismissed without prejudice, with the parties reserving the right to file an entry of dismissal within thirty (30) days of this order.'" *Id*. at ¶ 9. The court found this entry was final and did not reserve unto the trial court jurisdiction to enforce the settlement agreement. The court stated, "the trial court did not expressly retain jurisdiction to enforce the underlying settlement agreement or to conduct any further proceedings in relation to the case. *Nor did the court purport to condition its dismissal on the parties' filing of a later entry*." (Emphasis added.) *Id.* at ¶ 32. The court disavowed the notion of a conditional dismissal but also held that a court has inherent jurisdiction to enforce its judgments. *Id.* at ¶ 34.

{¶20} The *Karam Props*. court is unclear on whether the present case represents a dismissal where the court has an inherent right to enforce its judgments and retains jurisdiction to accept the later entry filed by the parties referenced in the dismissal. Without a clear statement about the effect of the dismissal in this case, this court is loath to rule that such entries deprive the court of jurisdiction to take further action including actually allowing the parties to file the entries referenced in the dismissals. Such entries clearly reserve the jurisdiction to accept future entries. This also means the 2011 dismissal premised on the filing of a more definite entry is not a final, appealable order.

{¶21} Based on the above holdings, Renner correctly argues that these issues were not ripe for appeal prior to the 2014 dismissal of its case. Once that final order was issued, the interlocutory orders that Renner now challenges merged into the final order and are capable of review on appeal. *See* App.R. 4(A)(2) and 4(B)(5).

B. Reconsideration of Summary Judgment

{¶22} In Renner's first assigned error it argues that the court erred in ruling that it was limited to recovery based on quantum meruit. Renner also argues in its third assignment of error that the court failed to give the Ninth Circuit Court's decision in *Larson*, 504 Fed. Appx. 586 (9th Cir.2013), its full weight. Renner argues that, according to the holding of the Ninth Circuit Court of Appeals in 2013, the contingency occurred and Michael's rights vested in 2001.

{¶23} Renner raises the issue in terms of the denial of a motion for reconsideration that is reviewed for an abuse of discretion, but as the decision on partial summary judgment merged into the final order in this case, this court reviews that decision de novo. *Grafton v. Ohio Edison Co.*, 77 Ohio St.3d 102, 105, 671 N.E.2d 241 (1996). Pursuant to Civ.R. 56(C), summary judgment is appropriate when (1) there is no genuine issue of material fact; (2) the moving party is entitled to judgment as a matter of law; and (3) reasonable minds can come to but one conclusion and that conclusion is adverse to the nonmoving party, said party being entitled to have the evidence construed most strongly in his favor. *Horton v. Harwick Chem. Corp.*, 73 Ohio St.3d 679, 653 N.E.2d 1196 (1995), paragraph three of the syllabus. The party moving for summary judgment bears

the burden of showing that there is no genuine issue of material fact and that it is entitled to judgment as a matter of law. *Dresher v. Burt*, 75 Ohio St.3d 280, 662 N.E.2d 264 (1996).

{¶24} Regarding an attorney's right to recover fees under a contingency agreement, the Ohio Supreme Court has set forth the following:

> In *Fox & Associates Co., L.P.A. v. Purdon* (1989), 44 Ohio St.3d 69, 541 N.E.2d 448, syllabus, this court held: "When an attorney is discharged by a client with or without just cause, and whether the contract between the attorney and client is express or implied, the attorney is entitled to recover the reasonable value of services rendered the client prior to discharge on the basis of quantum meruit. (*Scheinesohn v. Lemonek* [1911], 84 Ohio St. 424, 95 N.E. 913, and *Roberts v. Montgomery* [1926], 115 Ohio St. 502, 154 N.E. 740, overruled.)" Thus, pursuant to *Fox*, even if an attorney is discharged without cause, and even if a contingent fee agreement is in effect at the time of the discharge, the discharged attorney recovers on the basis of quantum meruit, and not pursuant to the terms of the agreement.

Reid, Johnson, Downes, Andrachik & Webster v. Lansberry, 68 Ohio St.3d 570, 573, 629 N.E.2d 431 (1994).

{¶25} The *Reid* court went on to hold,

> we join those jurisdictions which have held that when an attorney representing a client pursuant to a contingent-fee agreement is discharged, the attorney's cause of action for a fee recovery on the basis of quantum meruit arises upon the successful occurrence of the contingency. Under this approach, in most situations the discharged attorney is not compensated if the client recovers nothing.
>
> The California Supreme Court, in *Fracasse* [*v. Brent*], 6 Cal.3d [784] at 792, 100 Cal.Rptr. [385] at 390, 494 P.2d [9] at 14, gave two reasons for adopting this holding. First, the amount involved and the result obtained, two significant considerations in deciding whether an attorney fee is reasonable, cannot be determined until the contingency occurs. Second, a client of limited means, for whom the contingent fee agreement is the only real hope of recovering an award, would be improperly burdened by an absolute obligation to pay his or her former

> attorney if no award is ever won. "Since the attorney agreed initially to take his chances on recovering any fee whatever, we believe that the fact that the success of the litigation is no longer under his control is insufficient to justify imposing a new and more onerous burden on the client." *Id*. See, also, *Rosenberg [v. Levin]*, 409 So.2d [1016] at 1022 [(Fla.1982)] (deferring the discharged attorney's cause of action supports the goal of preserving client's freedom to discharge; any resulting harm to attorney is minimized because the attorney fee under original contingent agreement depended on contingency's occurrence). We believe that the considerations behind this rule are consistent with the policies espoused in *Fox*. Because the contingency occurred in this case (appellant ultimately recovered approximately $ 94,000), appellee may recover in quantum meruit, pursuant to *Fox*."

Id. at 575-576.

{¶26} Further, the Twelfth District has cited the *Fracasse* case approvingly for the proposition that "'the attorney's action for reasonable compensation accrues only when the contingency stated in the original agreement has occurred — i.e., the client has had a recovery by settlement or judgment. It follows that the attorney will be denied compensation in the event such recovery is not obtained.'" (Citations omitted.) *Doellman v. Midfirst Credit Union, Inc.*, 12th Dist. Warren No. CA2006-06-074, 2007-Ohio-5902, ¶ 23, citing *Fracasse* at 792.

{¶27} Renner was terminated before Michael had obtained any recovery. This is analogous to a client who retains an attorney on a contingency basis to prosecute a claim. The attorney works on the matter through trial and is successful, but the matter is appealed. The client then terminates the attorney and retains new counsel to prosecute the appeal. It is clear from the above case law that the client has the right to do so.

The case law also makes clear that the attorney that represented the client during the trial court proceedings may recover for their services, but only based on quantum meruit.

{¶28} In this case, Michael never recovered any amount of money by the time of his death in 2006. It was only after the 2013 decision that it was determined a contract was formed in 2001. Also, any amount to be recovered by Siegel's estate remains a mystery because it is still the subject of ongoing litigation in California. The rights of the parties have still not been conclusively determined in the California litigation. Regardless of the Ninth Circuit Court of Appeals decision or when a contract was formed for the rights to Superman, Renner is only entitled to recover based on quantum meruit, and only after a recovery is received. Renner's services were terminated prior to any recovery or even a determination of the amount of recovery. Therefore, the trial court did not err in granting partial summary judgment in favor of Siegel's estate.

C. Dismissal with Prejudice

{¶29} The court determined that Renner had not complied with an order of the court for close to three years, and therefore, dismissed the case pursuant to its authority under Civ.R. 41. The propriety of this decision must be addressed.

{¶30} Civ.R. 41(B)(1) gives the court power to terminate litigation where a party fails to obey an order of the court. It provides, "[w]here the plaintiff fails to prosecute, or comply with these rules or any court order, the court upon motion of a defendant or on its own motion may, after notice to the plaintiff's counsel, dismiss an action or claim." Civ.R. 41(B)(3) indicates that dismissal under the above section constitutes a judgment on

the merits unless otherwise indicated. Here, the court clearly stated the dismissal was with prejudice.

{¶31} "The power to dismiss for lack of prosecution is within the sound discretion of the trial court, and appellate review is confined solely to whether the trial court abused that discretion. Therefore, the trial court's dismissal with prejudice will not be reversed unless it constitutes an abuse of discretion." (Citations omitted.) *Pembaur v. Leis*, 1 Ohio St.3d 89, 91, 437 N.E.2d 1199 (1982). When this standard of review is applied to such a harsh result as the termination of a party's case with prejudice, it can lead to significant injustice. So the rule and reviewing courts have required notice to delinquent parties that such a result could occur where an order of the court is not followed. *See, e.g., Levy v. Morrissey*, 25 Ohio St.3d 367, 496 N.E.2d 923 (1986); Civ.R. 41(B)(1).

{¶32} In the present case, the only evidence of notice to Renner is the prior order indicating the case was settled and dismissed with prejudice upon the filing of a more definite entry. This does not constitute notice under Civ.R. 41. It does not alert, at any time in the past, that Renner would be wholly deprived of recovery even after the parties tentatively reached agreement. The court could have issued notice for the parties to comply with the court's previous order or the case would be dismissed. Indeed, Loc.R. 18.0 allows a court to dismiss a case, except one awaiting trial assignment, that has "been on the docket for six months without any proceedings taken" after giving the parties notice. The court could still do so on remand, but the failure to give notice previously means the trial court abused its discretion in dismissing the case with prejudice. While a

court is certainly justified in dismissing a case where the parties have not complied with an order for this period of time, notice is still required:

> [P]ursuant to the plain language of Civ.R. 41(B)(1), a condition precedent to dismissal of an action for failure to prosecute is notice to the plaintiff or plaintiff's counsel of the court's intention to dismiss. Notice is an absolute prerequisite for dismissal for failure to prosecute. *Perotti v. Ferguson* (1983), 7 Ohio St.3d 1, 2-3, 7 OBR 256, 257, 454 N.E.2d 951, 952; *Drescher v. Summers* (1986), 30 Ohio App.3d 271, 272, 30 OBR 469, 470, 507 N.E.2d 1170, 1171. The Ohio Supreme Court has consistently held that it is an abuse of discretion to dismiss an action for failure to prosecute where no notice is given to the plaintiff or to plaintiff's counsel that the case would be dismissed. *See, e.g., Levy v. Morrissey* (1986), 25 Ohio St.3d 367, 368, 25 OBR 416, 417, 496 N.E.2d 923, 925; *Svoboda v. Brunswick* (1983), 6 Ohio St.3d 348, 350, 6 OBR 403, 405, 453 N.E.2d 648, 650. The purpose of this notice requirement is to afford the plaintiff the opportunity to "explain or correct [any] nonappearance" or to show why the case should not be dismissed. *See, also, Ford Motor Credit Co. v. Potts* (1986), 28 Ohio App.3d 93, 95, 28 OBR 136, 137, 502 N.E.2d 255, 257; *Metcalf v. Ohio State Univ. Hosp.* (1981), 2 Ohio App.3d 166, 167, 2 OBR 182, 183, 441 N.E.2d 299, 301. It also "reflects a basic tenet of Ohio

jurisprudence that cases should be decided on their merits." *Perotti*, supra, 7 Ohio St.3d at 3, 7 OBR at 257, 454 N.E.2d at 952.

Cook v. Transamerica Ins. Servs., 70 Ohio App.3d 327, 330, 590 N.E.2d 1382 (12th Dist.1990). Therefore, the trial court erred in sua sponte dismissing the case with prejudice without notice.

III. Conclusion

{¶33} The trial court abused its discretion in dismissing this case with prejudice without providing notice. Therefore, the case must be remanded to the trial court. The trial court may take the same action as it previously did, but only after notice is given and the dilatory party has a chance to cure its deficiency.

{¶34} Judgment reversed and remanded.

This cause is reversed and remanded to the lower court for further proceedings consistent with this opinion.

It is ordered that appellant recover of said appellee costs herein taxed.

The court finds there were reasonable grounds for this appeal.

It is ordered that a special mandate issue out of this court directing the common pleas court to carry this judgment into execution.

A certified copy of this entry shall constitute the mandate pursuant to Rule 27 of the Rules of Appellate Procedure.

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FRANK D. CELEBREZZE, JR., ADMINISTRATIVE JUDGE

TIM McCORMACK, J., and
PATRICIA ANN BLACKMON, J., CONCUR