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UNPUBLISHED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.

PER CURIAM.

In this third-party no-fault action, plaintiff appeals by right the trial court's order dismissing with prejudice her case against defendants-appellees, Ali Zaghir and Better Deal Sales,[1] as well as

[1] Plaintiff's claims against all other defendants, as well as the claims of intervening plaintiffs, were dismissed prior to the action that led to this appeal. Accordingly, use of "defendants" throughout is in reference only to Zaghir and Better Deal Sales.

the trial court's subsequent order denying plaintiff's request to reinstate the case. On appeal, plaintiff contends that the trial court erred when it dismissed her case on the basis of plaintiff's failure to timely appear at trial without first considering other available sanctions on the record. We agree and reverse.

I. FACTUAL BACKGROUND

On April 26, 2016, plaintiff was injured in an automobile accident. Plaintiff later made first-party claims against her no-fault provider, and third-party claims against the driver of the vehicle in which she was injured, his employer, the owner of the vehicle in which she was injured, as well as defendants Zaghir and Better Deal Sales, who were, respectively, the drive and owner of the other vehicle involved in the collision. Following discovery, every defendant other than defendants Zaghir and Better Deal Sales was dismissed from the case by stipulation. A jury trial was scheduled on plaintiff's claims against those remaining defendants for February 4, 2020.

Plaintiff was instructed to appear at trial by 8:30 a.m., but failed to do so. The trial court apparently indicated that plaintiff would have until 10:00 a.m. to arrive before it took action against her. At approximately 9:32 a.m., after having learned that, despite being en route to the courthouse, plaintiff was unlikely to arrive on time, defendants moved for dismissal.[2] The trial court granted the motion and dismissed plaintiff's claims with prejudice. Thereafter, plaintiff moved to reinstate her case on the basis that the trial court failed to consider lesser available remedies on the record before it dismissed her case. The trial court denied the motion, and this appeal followed.

II. ANALYSIS

Plaintiff contends that, prior to the trial court dismissing her case with prejudice, Michigan caselaw required the court to evaluate lesser available sanctions to determine whether they might have been more appropriate under the circumstances. We agree.

"A trial court's decision to dismiss an action is reviewed for an abuse of discretion." *Donkers v Kovach*, 277 Mich App 366, 368; 745 NW2d 154 (2007). We also review for an abuse of discretion a trial court's decision on a motion to reinstate an action. *Wickings v Arctic Enterprises, Inc*, 244 Mich App 125, 138; 624 NW2d 197 (2000). An abuse of discretion occurs when the trial court's decision falls outside the range of reasonable and principled outcomes. *Casey v Auto Owners Ins Co*, 273 Mich App 388, 404; 729 NW2d 277. "A trial court necessarily abuses its discretion when it makes an error of law." *Ronnisch Constr Group, Inc v Lofts on the Nine, LLC*, 499 Mich 544, 552; 886 NW2d 113 (2016).

Plaintiff primarily relies on *Dean v Tucker*, 182 Mich App 27; 451 NW2d 571 (1990), and *Vicencio v Ramirez*, 211 Mich App 501; 536 NW2d 280 (1995). In *Dean*, the plaintiff failed to

[2] The dissent suggests that the record is unclear as to whether the trial court gave plaintiff until 10:00 a.m. to arrive at the courthouse, and that the trial court may have given plaintiff until 9:30 a.m. Even were that the case, that ½ hour does not alter our analysis with respect to whether the trial court followed the appropriate procedure in this case, nor our application of that procedure to the circumstances.

file a witness list in a timely manner, the trial court denied a motion by the plaintiff to extend her time to file the same, and the trial court subsequently granted summary disposition to the defendant on the basis that the plaintiff was barred from presenting necessary witnesses. *Dean*, 182 Mich App at 29. This Court noted:

> While it is within the trial court's authority to bar an expert witness or dismiss an action as a sanction for the failure to timely file a witness list, the fact that such action is discretionary rather than mandatory necessitates a consideration of the circumstances of each case to determine if such a drastic sanction is appropriate. The corollary to this is that the mere fact that a witness list was not timely filed does not, in and of itself, justify the imposition of such a sanction. Rather, the record should reflect that the trial court gave careful consideration to the factors involved and considered all of its options in determining what sanction was just and proper in the context of the case before it. *Houston v Southwest Detroit Hosp*, 166 Mich App 623, 629-630; 420 NW2d 835 (1987). That is, while rules of practice give direction to the process of administering justice and must be followed, their application should not be a fetish to the extent that justice in a particular case is not done. *Higgins v Henry Ford Hosp*, 384 Mich 633, 637; 186 NW2d 337 (1971); *Houston*, 166 Mich App at 630. [*Dean*, 182 Mich App at 32.]

This Court further held that trial courts should consider the following factors in determining the appropriateness of a sanction for discovery violations:

> (1) whether the violation was wilful or accidental, (2) the party's history of refusing to comply with discovery requests (or refusal to disclose witnesses), (3) the prejudice to the defendant, (4) actual notice to the defendant of the witness and the length of time prior to trial that the defendant received such actual notice, (5) whether there exists a history of plaintiff engaging in deliberate delay, (6) the degree of compliance by the plaintiff with other provisions of the court's order, (7) any attempt by the plaintiff to timely cure the defect, and (8) whether a lesser sanction would better serve the interests of justice. [*Id*. at 32-33.]

Ultimately, this Court concluded that the dismissal in *Dean* on the basis of a discovery violation was not warranted under the circumstances. *Id*. at 35.

Defendants aptly point out that *Dean* specifically involved a discovery violation, and this case does not. This case involves the trial court's dismissal of an action on the basis of plaintiff's failure to timely appear at trial. Plaintiff suggests that *Vicencio* resolves the distinction by extending the *Dean* factors to cases beyond discovery violations. That is, plaintiff contends that *Vicencio* requires that the *Dean* factors must be considered by trial courts prior to dismissing a case for reasons in addition to and other than discovery violations, including for a failure to appear at trial.

Indeed, in *Vicencio*, the trial court dismissed the plaintiff's case for her failure to appear at trial, and this Court reversed. *Vicencio*, 211 Mich App at 503. Notably different in that case, however, was that at a final settlement conference at which the parties could not agree, "[t]he trial court stated that the case would proceed immediately to trial," and only then did it dismiss the case

on the basis that the plaintiff was not present. *Id*. Sensibly, the plaintiff's primary argument on appeal was that this constituted a due-process violation because the plaintiff had not been afforded notice of the trial date. *Id*. We agreed. *Id*. at 504. However, and importantly for this case, we further noted:

> Even if plaintiff had received adequate notice of the date of trial, a dismissal here was inappropriate. 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. MCR 2.504(B)(1); *Zerillo v Dyksterhouse*, 191 Mich App 228, 230; 470 NW2d 117 (1991) . . . .
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> Dismissal is a drastic step that should be taken cautiously. *Barlow v John Crane-Houdaille, Inc*, 191 Mich App 244, 251; 477 NW2d 133 (1991). Before imposing such a sanction, the trial court is required to carefully evaluate all available options on the record and conclude that the sanction of dismissal is just and proper. *Hanks v SLB Management, Inc*, 188 Mich App 656, 658; 471 NW2d 621 (1991). Here, because the trial court did not evaluate other available options on the record, it abused its discretion in dismissing the case. *Id*.; *Houston*[,] 166 Mich App [at] 631.
>
> Moreover, under these facts, dismissal was inappropriate. Our legal system favors disposition of litigation on the merits. *North v Dep't of Mental Health*, 427 Mich 659, 662; 397 NW2d 793 (1986). This Court has summarized some of the factors that a court should consider before imposing the sanction of dismissal: (1) whether the violation was wilful 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 defects; and (7) whether a lesser sanction would better serve the interests of justice. *Dean*[,] 182 Mich App [at] 32-33. This list should not be considered exhaustive. *Id*. at 33. [*Vicencio*, 211 Mich App at 506-507.]

Defendants contend that *Vicencio* does not apply because it involved a due-process violation, but they fail to address whatsoever the subsequent language in that case applying the factors from *Dean* to cases in which a plaintiff fails to appear at trial.

Although defendants failed to cite to the case, we uncovered one unpublished case wherein this Court considered the relevant language from *Vicencio* nonbinding dicta. In *Stricker v Stricker*, unpublished per curiam opinion of the Court of Appeals, issued January 16, 2020 (Docket No. 349626), pp 1-2,[3] this Court was tasked with determining whether a trial court had plainly erred when it granted a default judgment against the defendant on the basis of his failure to appear at a settlement conference, and his subsequent failure to appear at a motion hearing for entry of a

[3] Unpublished opinions are not binding on this Court, but may be considered for their persuasive value. MCR 7.215(C)(1).

default judgment against him.[4] Although the defendant failed to preserve the argument, he sought to argue, among other things, that the trial court had abused its discretion by granting the default judgment without considering lesser available remedies. *Id*. at 4. We first noted the specific remedies available to the trial court and outlined in the Michigan Court Rules for failure to attend a scheduled settlement conference as well as entry of default judgments. *Id*. With specific regard to whether *Vicencio* applied to the facts of the case, we noted: "[T]he part of *Vicencio* applying th[e *Dean*] factors was dicta because this Court primarily held that dismissal was inappropriate because the plaintiff did not receive adequate notice of the trial date." *Id*. at 5. We further noted "*Vicencio* did not hold that the trial court erred in not addressing those factors; rather, it held that consideration of those factors showed that a dismissal was not warranted." *Id*.

First, we disagree that "*Vicencio* did not hold that that the trial court erred in not addressing" the relevant factors. 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." *Vicencio*, 211 Mich App at 506. The *Vicencio* Court then explicitly an unequivocally held that, "because the trial court did not evaluate other available options on the record, it abused its discretion in dismissing the case." *Id*. at 506-507. Thus, the very reason that the *Vicencio* Court went on to analyze the relevant factors from *Dean* was because the trial court in that case should have done so. There would otherwise be little to no logic in the *Vicencio* Court electing to analyze the same.

Second, we are less confident than the *Stricker* Court that the portion of *Vicencio* applying the factors constitutes nonbinding dicta. "Obiter dictum," or what we generally refer to as "dicta," is "[a] judicial comment made while delivering a judicial opinion, but one that is unnecessary to the decision in the case and therefore not precedential." *Black's Law Dictionary* (11th ed). See also *Dessart v Burak*, 252 Mich App 490, 496; 652 NW2d 669 (2002) ("It is a well settled rule that obiter dicta lacks the force of an adjudication and is not binding under the principle of stare decisis.") (quotation marks and citation omitted). Contrarily, we have before distinguished "judicial dictum" as generally having somewhat different value. "Judicial dictum" is "[a]n opinion by a court on a question that is directly involved, briefed, and argued by counsel, and even passed on by the court, but that is not essential to the decision and therefore not binding even if it may later be accorded some weight." *Black's Law Dictionary* (11th ed). We have noted that judicial dictum can be used "to guide the judiciary on particular areas of law, and to signal future development of the law," and that, on occasion, "[s]uch judicial dicta is arguably as binding as the precise holding of [a] case." *Herteg v Somerset Collection GP, Inc*, unpublished per curiam opinion of the Court of Appeals, issued September 20, 2002 (Docket No. 227936), p 4.

While perhaps there is room to argue that the relevant analysis contained in *Vicencio* is judicial dictum, we are more inclined to conclude from the clear language of that case that

[4] *Stricker* is immediately distinguishable from this case because it involved not only a failure to appear at a settlement conference, but a subsequent failure to appear on a motion for entry of a default judgment that was filed on the basis of the initial failure to appear. *Stricker*, unpub op at 1-2, 4.

Vicencio's discussion and application of *Dean* was integral to its ultimate holding. *Vicencio*, 211 Mich App at 506-507. We would put forth that there is a difference between a court summarizing an issue in dicta, and a Court intentionally outlining two, alternative grounds on which an issue may be disposed. As noted, the *Vicencio* Court held with significant clarity that, "because the trial court did not evaluate other available options on the record, it abused its discretion in dismissing the case." *Id*. This was not merely nonessential commentary; it was part of the Court's holding. And, simply because the trial court addressed that fact *and* addressed the fact that the dismissal constituted a due-process violation does not render either statement of law any less binding.[5] That is, under *Vicencio*, the trial court's actions in that case constituted a due-process violation in light of the plaintiff's lack of notice *and* an abuse of discretion because the court failed to consider alternative remedies to dismissal. See *id*. at 504-508. Neither issue was dependent on the other, and both were dispositive. Notably, there is no shortage of Michigan cases reflecting the same conclusion.

In *Swain v Morse*, ___ Mich App at ___, ___; ___ NW2d ___ (2020) (Docket No. 346850); slip op at 7, we applied the *Vicencio* factors to a case involving dismissal of a claim for intentionally false testimony at trial. Although not the same as dismissal for failure to appear, it was also a case not involving a discovery violation, and we broadly noted that the *Vicencio* factors must be considered "[b]efore dismissing a case" for misconduct. See *id*. at 6-7. And, apart from *Stricker*, which involved plain-error review and entry of a default judgment under somewhat dissimilar circumstances, the vast majority of our unpublished caselaw since *Vicencio* has applied that case where the circumstances are similar to those at hand. See *In re Conservatorship of Lee*, unpublished per curiam opinion of the Court of Appeals, issued August 20, 2020 (Docket No. 349206), p 4 (noting that *Vicencio* requires a trial court to assess certain factors on the record prior to dismissing a case as a sanction for a party's failure to appear at trial); *Stanow v Beaumont Ctr for Pain Med (On Reconsideration)*, unpublished per curiam opinion of the Court of Appeals, issued March 17, 2020 (Docket Nos. 346641 and 347275), pp 2-3 (holding that dismissal of a case on the basis of a failure to appear at a show-cause hearing without consideration of the *Vicencio* factors constituted an abuse of discretion); *Corrales v Dunn*, unpublished per curiam opinion of the Court of Appeals, issued May 30, 2019 (Docket No. 343586), pp 3-4 (concluding that the trial court abused its discretion by dismissing a claim on the basis of a plaintiff's failure to appear at court-ordered mediation without first considering lesser available sanctions); *Romanhuck v Ford Motor Co*, unpublished per curiam opinion of the Court of Appeals, issued February 4, 2016 (Docket No. 324088), pp 4-5 (holding that that the trial court abused its discretion by failing to consider the *Vicencio* factors when it dismissed the plaintiff's case for failure to appear at the scheduled trial); *Fisher v Ann Arbor*, unpublished per curiam opinion of the Court of Appeals,

[5] Moreover, we note that this issue was likely the reason for *Vicencio*'s publication. While the due-process issue does not appear to have created a close question of law whatsoever, application of the *Dean* factors to cases not involving discovery violations might have been. See MCR 7.215(B). To that end, it should be noted that the *Vicencio* Court clearly and explicitly provided future courts with a version of the *Dean* factors that would not be limited to discovery violations. See *Vicencio*, 211 Mich App at 507. The Court was not required to do so.

issued January 30, 2014 (Docket No. 313634), pp 2-3 (noting that trial courts should consider the *Vicencio* factors prior to dismissing a case on the basis of a party's failure to appear).

With all of the above in mind, we conclude that the *Vicencio* factors should have been applied by the trial court, and that the trial court abused its discretion in failing to apply them both in its initial dismissal of plaintiff's claim and its subsequent affirmation of the same on the basis of her motion to reinstate her case.[6] And, we further conclude that, applying the *Vicencio* factors, dismissal with prejudice of plaintiff's case was a harsh penalty indeed.

While defendants point out that plaintiff's untimely appearance at trial was inexcusable, the record evidence simply does not establish that it was willful rather than accidental. Moreover, there was no history below of plaintiff having failed or refused to comply with court orders, having failed to appear at other times, or having caused deliberate delay. There is no evidence that giving plaintiff additional time to arrive at trial or that rescheduling the trial would have prejudiced defendants in anyway,[7] and there was evidence that plaintiff attempted to cure the defect in that, at the very least, she *did* arrive at trial, albeit approximately one to two hours late.[8] Finally, we agree with plaintiff that lesser sanctions might have been appropriate under the circumstances. Forgetting that monetary sanctions might have been an option, the trial court also could have elected to dismiss plaintiff's case without prejudice before handing down the harsh ruling that it did. See *Ellout v Detroit Med Ctr*, 285 Mich App 695, 698-699; 777 NW2d 199 (2009) (noting that dismissal is a harsh remedy, but that dismissal with prejudice is "the harshest remedy possible") (quotation marks and citation omitted).

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[6] We note defendants' unpreserved argument that plaintiff's motion was not properly filed. Be that as it may, that fact does not change our conclusion that the trial court initially erred in its dismissal of the case in the first place, nor the fact that the trial court denied plaintiff's motion on the merits and not because of any technical defect.

[7] The dissent argues that this conclusion is somehow problematic because no evidentiary hearing as to the *Vincencio* factors was ever held. To rephrase our statement as to the specific issue of prejudice: the evidence *plainly* establishes that defendants and their counsel arrived at trial prepared to defend their case. On the basis of that fact alone, we cannot fathom why an evidentiary hearing would be necessary to determine whether a 2-hour postponement or any other remedy other than dismissal with prejudice would have actually prejudiced defendants in such a meaningful way that dismissal with prejudice was either necessary or justified. And, as an aside, we note that, had the trial court followed the proper procedure in this case, it likely would have applied the *Vincencio* factors on the basis of the record before it—at trial—without ever conducting an additional evidentiary hearing. That is, there is more than enough of a record before us to indicate, without the need for a separate evidentiary hearing, that dismissal with prejudice was not an appropriate remedy at the time that it was imposed by the trial court.

[8] As indicated above, the trial court admitted at the hearing on plaintiff's motion to reinstate her case that it had given plaintiff until 10:00 a.m. to arrive at trial, and there appears to be no dispute that plaintiff arrived sometime around then. Notwithstanding, the trial court elected to dismiss plaintiff's claim with prejudice at approximately 9:32 a.m. after it learned that plaintiff was en route to the courthouse and would *likely* not arrive by 10:00 a.m.

Defendants refer to a number of Michigan cases that are not entirely helpful—and in some cases contradictory—to their argument. First, In *Williams v Kroger Food Co*, 46 Mich App 514, 517; 208 NW2d 549 (1973), this Court affirmed the dismissal of the plaintiff's case with prejudice when she failed to attend trial on the basis of her dissatisfaction with her counsel. We specifically noted that, although we would not have dismissed the plaintiff's case were we standing in the trial court's shoes, we could not determine that the trial court abused its discretion. *Id*. First, *Williams* was decided on the basis of the trial court's conclusion that the plaintiff intentionally refused to attend trial without a valid excuse, which interestingly, involves a consideration of the first factor from *Vicencio. Id*.; see also *Vicencio*, 211 Mich App at 507 (noting that prior to dismissal for failure to appear, trial courts should consider "whether the violation was wilful or accidental"). Second, and apart from being nonbinding on this Court pursuant to MCR 7.215(J)(1), *Williams* was decided long before both *Dean* and *Vicencio*, which form the basis of our plaintiff's argument. Accordingly, we see little value in defendants' citation to *Williams.*

Next, In *Rowser v State*, unpublished per curiam opinion of the Court of Appeals, issued February 23, 2001 (Docket No. 217326), pp 1-2, we affirmed the dismissal of a plaintiff's case on the basis of his failure to appear at a scheduled settlement conference. However, there was nothing to suggest that the plaintiff was challenging whether the trial court failed to apply *Vicencio* in this Court's brief opinion. *Id*. In that same vein, nothing from the opinion suggests that *Vicencio* was inapplicable. The opinion stands for very little other than the fact that, in that case, the plaintiff failed to establish that the trial court abused its discretion when it dismissed her case for failure to appear. What factors the trial court did or did not consider in electing to dismiss the case, or whether the court considered other available sanctions, simply cannot be gleaned from the face of the opinion.

In *Wolf v Clafton*, unpublished per curiam opinion of the Court of Appeals, issued September 28, 1999 (Docket No. 210299), p 1, we affirmed the dismissal of a plaintiff's case for refusing to appear at trial. Again, defendants fail to elucidate their argument with respect to *Wolf,* as there appears to have been no allegation in that case that the lower court failed to apply *Vicencio*. In fact, our two-paragraph opinion specifically referenced *Vicencio* as an authority. *Id*. Thus, to the extent that *Wolf* appears to have been about the trial court's improper balancing of the factors under *Vicencio,* the case only hinders defendants' argument that *Vicencio* is distinguishable and inapplicable whatsoever.

In *Owens v Chrysler Corp*, unpublished per curiam opinion of the Court of Appeals, issued April 27, 1999 (Docket No. 205210), p 8, we again affirmed the dismissal of a plaintiff's claim on the basis of her failure to appear. However, in *Owens*, our affirmation was made on the basis of the "incredible" and singular argument by the plaintiff that she did not have notice of her trial date when the evidence clearly established that fact to be untrue because the plaintiff had specifically requested an adjournment of the exact date. *Id*. at 7-8. Most importantly, and again, defendants seem to ignore that there was no argument in *Owens* that the trial court failed to consider the *Vicencio* factors, and that this Court explicitly referenced *Vicencio* as an authority in that case. *Id.* at 6, 8.

Finally, in *Godbout v Prospect Hills Ltd Partnership*, unpublished per curiam opinion of the Court of Appeals, issued September 12, 1997 (Docket No. 194721), p 1, we again affirmed the dismissal of a plaintiff's case for failure to appear at a scheduled trial. Although we noted that

"the record [was] devoid of any circumstances that would excuse plaintiff's failure to appear," once again, nothing in *Godbout* stands for the proposition that the trial court did not apply the *Vicencio* factors. *Id*. The case merely stands for the proposition that the trial court did not abuse its discretion when it concluded that the plaintiff had no excuse for his failure to appear, which very well may have been a conclusion drawn *as a result* of applying the *Vicencio* factors.

With defendants having failed to provide any law or meritorious analysis to suggest that the *Vicencio* factors were properly overlooked in this case, or that the trial court needed not explore other available remedies prior to dismissing plaintiff's case, and with all but one distinguishable case questioning the precedential effect of *Vicencio* since its release, we conclude that the trial court abused its discretion by failing to consider alternate remedies to dismissal under the facts of this case. Moreover, while plaintiff's tardiness certainly may have been sanctionable, there is nothing to suggest that dismissal with prejudice, at that juncture, was warranted.

Reversed and remanded for further proceedings consistent with this opinion. We do not retain jurisdiction.

/s/ Karen M. Fort Hood
/s/ Mark J. Cavanagh

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UNPUBLISHED
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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