STATE OF MICHIGAN

COURT OF APPEALS

KRISTOPHER WHITAKER,

Plaintiff-Appellant,

v

FARM BUREAU INSURANCE COMPANY,

Defendant-Appellee.

UNPUBLISHED
May 23, 2024

No. 363932
Wayne Circuit Court
LC No. 20-014096-NI

Before: BORRELLO, P.J., and SWARTZLE and YOUNG, JJ.

SWARTZLE, J. *(dissenting).*

I respectfully dissent for two reasons. First, in response to Farm Bureau's oral motion to dismiss, plaintiff's counsel did not argue that a lesser sanction would be appropriate. By failing to raise the issue of a lesser sanction, plaintiff has waived any claim on appeal with respect to such a sanction under this Court's "raise or waive" jurisprudence in ordinary civil cases like this one. See *Walters v Nadell*, 481 Mich 377, 387-388; 751 NW2d 431 (2008); *Napier v Jacobs*, 429 Mich 222, 227-229; 414 NW2d 862 (1987).

Second, I believe that recent panels of this Court have taken a too-rigid, reflexive approach when reviewing sanctions imposed by our trial courts. Rather than focus on whether a trial court has made a thoughtful, reasoned decision based on a record sufficient for appellate review, our caselaw appears to require that trial courts perform an explicit box-checking exercise based on factors set forth in *Vicencio v Ramirez*, 211 Mich App 501, 507; 536 NW2d 280 (1995). To be clear, I do not take issue with my panel colleagues who are faithfully following recent caselaw; I simply disagree with that caselaw.

Rather than require a formulaic, box-checking exercise by our trial courts, I prefer the approach taken by our Court in *Charlevoix Golf & Country Club, LLC v Troszak*, unpublished per curiam opinion of the Court of Appeals, issued January 24, 2012 (Docket No. 300892), where that panel explained:

> We do not believe that the court in *Vicencio* established a formulaic approach that must be strictly adhered to before a trial court may impose the sanctions of default judgment or dismissal. Rather, in light of the severity of the

> sanction, the court explained that the trial court must make a sufficient record to justify its decision to impose the sanction; the trial court must evaluate its options and must conclude that dismissal was "just and proper" under the totality of the circumstances. Because there are no specific procedures that the trial court must follow in every case, if it is clear that the trial court understood the gravity of the sanction and imposed it only after considering the circumstances giving rise to the sanction, then the trial court has complied with the requirement that it evaluate all available options on the record and conclude that the sanction of dismissal is just and proper. [*Id.* at 6 (cleaned up).]

As recounted in the majority opinion, the trial court in this case considered—in detail and on the record—the circumstances giving rise to the dismissal. A jury had been empaneled for what was supposed to be a one-day trial, and the trial court had already accommodated plaintiff's request that testimony begin on a second day because (1) plaintiff wanted to call a witness for whom plaintiff had just sought (and succeeded) in having precluded from testifying, and (2) plaintiff himself decided that he did not want to testify on the first day. Now, with plaintiff and his wife being no-shows on the second day (or, at best, possibly arriving at the courthouse near the end of the trial day), the trial court was realistically looking at a *third* day to call back the jury. All of these circumstances and more were well-known to and considered by the trial court. As for the gravity of the sanction, the trial court likewise made a clear, appropriate record on this issue, which the majority recounts and need not be repeated in this separate opinion. Thus, as I read the record, the trial court made a thoughtful, reasoned decision based on a record sufficient for appellate review, and this is all that this Court should require of a trial court under *Vicencio*.

Accordingly, I would not reach the question of lesser options because plaintiff failed to preserve this for appellate review, but, assuming the question was properly preserved, I would hold that the trial court sufficiently evaluated the available options and correctly concluded that the sanction of dismissal was just and proper. For these reasons, I respectfully dissent.

/s/ Brock A. Swartzle