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UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF MICHIGAN
SOUTHERN DIVISION

— — —

JOSHUA VanLAAN,
Plaintiff,

v.

MACOMB COUNTY, et al.,
Defendants.

Case No. 23-10146
Hon. Judith E. Levy

_____ /

MOTIONS FOR SANCTIONS

BEFORE THE HONORABLE JUDITH E. LEVY
United States District Judge
Federal Building
200 E. Liberty Street
Ann Arbor, MI 48104
Thursday, May 23, 2024

APPEARANCES:

For the Plaintiff: BRIAN T. DAILEY
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(313) 640-1111
(Counsel appeared telephonically)

To obtain a copy of this official transcript, contact:
Robert L. Smith, Official Court Reporter
(313) 234-2612 • robert_smith@mied.uscourts.gov

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APPEARANCES: (Continued)

For the Defendants: JOHN A. SCHAPKA
MACOMB COUNTY CORPORATION COUNSEL
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TIMOTHY S. FERRAND
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Appearing on behalf of Defendant
Donn Fresard

1 Ann Arbor, Michigan
2 Thursday, May 23, 2024
3 at about 10:30 a.m.

4 — — —
5 (Court and Defense Counsel present; Plaintiff
6 Counsel appeared telephonically; Plaintiff not
7 present.)

8 THE CASE MANAGER: All rise.

9 The United States District Court for the Eastern
10 District of Michigan is now in session, the Honorable
11 Judith Levy, United States District Judge, presiding.

12 You may be seated.

13 Calling Case No. 23-10146, Joshua VanLaan v. Macomb
14 County, et al.

15 THE COURT: Okay. Good morning. May I have
16 appearances, please, starting with whoever is at counsel
17 table.

18 MR. FERRAND: Judge, I'm Timothy Ferrand. I
19 represent Peter J. Lucido, the county prosecutor.

20 THE COURT: Okay.

21 MR. PERRIN: Your Honor, I'm John Perrin, and I
22 represent Donn Fresard.

23 THE COURT: Fresard. Okay.

24 MR. SCHAPKA: John Schapka here, representing
25 Defendant Macomb County.

1 THE COURT: Great. Okay. Well, thank you very
2 much.

3 And, Mr. Dailey --

4 MR. DAILEY: Yes, Your Honor.

5 THE COURT: -- would you like to make an
6 appearance?

7 MR. DAILEY: I will make an appearance. I do want
8 to mention to the Court, first of all, I apologize for having
9 to appear this way. I misread my calendar and I thought it
10 was going to be by Zoom or phone, so this is not the way I
11 normally do, but I apologize. I thank you for your courtesy
12 and your grace. I also apologize to Counsel.

13 The other thing is, is that I today am filing a
14 motion to withdraw as counsel for the plaintiff. So
15 I -- because of the breakdown of my relationship with my
16 client, I'm not really able to argue this motion.

17 THE COURT: Well, here's the other reason you're
18 not able to argue the reason -- or the motions. First is
19 that you did not file a response to the motions, and it's my
20 practice that if somebody doesn't file a response, and they
21 also don't appear in court, of course, but I understand you
22 misread the Court's notice, which I'm looking at, and it
23 begins with in-person hearing, notice of in-person hearing
24 was as far back as March 4th of 2024, and then we had an
25 amended notice of in-person hearing on March 18th of 2024.

1 So the word, "in-person," is in all caps, twice, on the
2 docket. So the fact that you did not observe that would be
3 another reason that arguing the motion would be limited, but
4 I still would allow you to answer my questions, if I had any.

5 But at this point, you have not yet filed your
6 motion to withdraw, so I may have some questions for you.

7 You are counsel of record. If there was a motion to
8 withdraw, it could have been filed before today's hearing.

9 So what I'd like to do is proceed with the hearing.
10 This is the date and time set for a hearing on
11 Defendant Peter Lucido's motion for sanction,
12 Defendant Macomb County's motion for sanctions, and Defendant
13 Donn Fresard's motion for sanctions.

14 And I have had an opportunity to read the briefs,
15 to read some of the extraordinary exchanges at the
16 depositions. And I have one question, I guess, that I'd like
17 to start with, Mr. Ferrand, just because you are sitting
18 right there.

19 Has the outstanding discovery been produced?

20 MR. FERRAND: No, Judge.

21 THE COURT: If you want to remain seated that would
22 be great, because then you can speak into the microphone --

23 MR. FERRAND: All right. Thank you, Judge.

24 THE COURT: -- and you can be heard through the
25 headphones for my court reporter.

1 And I'm just so happy that Mr. Smith has joined us
2 here in Ann Arbor, so welcome.

3 MR. FERRAND: So, Judge, those interrogatories and
4 requests for production of documents were served
5 June 26th, 2023. There was an exchange of discovery with
6 Deb Gordon's office, who was the attorney, at the time, for
7 plaintiff.

8 THE COURT: Correct.

9 MR. FERRAND: They answered the interrogatories,
10 but the answers were incomplete and evasive. I would also
11 indicate, at that time, we responded to discovery.
12 Ms. Gordon received that discovery which included thousands
13 of pages of records that we garnered from the computer
14 system, which demonstrated that Mr. VanLaan had lied
15 throughout these proceedings and had lied as it relates to
16 the reasons for his termination. Ms. Gordon withdrew at that
17 time.

18 Mr. Dailey, on November 6th, 2023, filed his
19 appearance, and then his client failed to appear for two
20 depositions, January 5 and January 12, 2024. Like today,
21 calling on the day of the hearing or the day before the
22 hearing saying, oh, we didn't realize it was scheduled for
23 today; or, oh, we can't appear tomorrow for the deposition.
24 And then we filed a motion, Judge. You entertained a
25 discovery conference --

1 THE COURT: Yes.

2 MR. FERRAND: -- January 16, 2024, and at that
3 conference, ordered plaintiff definitively to answer
4 interrogatories 1, 4, 5 and 7, request to
5 produce 9, 10, 12, 13, 14, 32, 33, 34 and 35.

6 THE COURT: And I had 1, 5 and 8, as well, that I
7 ordered.

8 MR. FERRAND: That is right, Judge, I missed one.

9 THE COURT: Okay.

10 MR. FERRAND: And plaintiff did not respond, at any
11 time, to those.

12 We did schedule his deposition duces tecum. We
13 asked him to produce those records, along with others, for
14 the deposition. As you read in that deposition transcript,
15 he appeared at the first day of deposition, back in February,
16 and said I didn't understand that I had to bring duces tecum
17 requests to the deposition. I will have them to you in a
18 week, and then he never produced the records.

19 THE COURT: And I think the record should also
20 reflect that plaintiff, himself, is a lawyer. It's a legal
21 position that he was being -- he's litigating over,
22 and he's still practicing as a lawyer. And he indicates in
23 the deposition that he sort of knows what a duces tecum
24 subpoena is, but isn't totally sure, but he seems to actually
25 know what it is, and he didn't bring the documents with him.

1 And you are informing me you still don't have them.

2 MR. FERRAND: Right. And even though he said I
3 don't understand what a duces tecum request is, he said I
4 will have them to you in a week. Months went by, again,
5 after that deposition, with no response.

6 And, Judge, no response to anything. No response
7 to this motion. No response to anything that was requested.
8 Just failed to prosecute the case, at all, after Ms. Gordon
9 left this litigation.

10 THE COURT: One thing I want to add to your
11 recitation is that there was the first day of the deposition
12 on February 9th, 2024, where on the transcript he says:

13 Question is asked, "And do you understand what a
14 duces tecum deposition notice is?"

15 Answer: "I think, for the most part."

16 Question: "It's a requirement that the deponent
17 bring documentation with him to the deposition. Do you
18 understand that?"

19 Answer: "Sure."

20 Question: "Okay. And can you tell us, on the
21 record, why you didn't bring those documents?"

22 Then he start dissembling here, from what I can
23 tell, and just says, "I'm required to produce copies."

24 Well, did he have copies?

25 MR. FERRAND: No, Judge.

1 THE COURT: No.

2 "It doesn't say I have to bring them with me."

3 Which that is what it says.

4 And the -- then he says, "And the majority of these
5 items have already been produced."

6 So to this day, there are -- none of those
7 documents have been produced.

8 The other thing is, as I understand, that at the
9 February 9th deposition, not all of the defendants were able
10 to question the plaintiff, and, therefore, there was to be a
11 March 5th continuation. And on March 4th of 2024, Mr. Dailey
12 informed the defendants that either he was sick or his client
13 was sick. He didn't know which. And that he would -- that
14 because of either of them being sick, neither would show up
15 on March 5th. And so then we have these motions, of course.
16 And --

17 MR. FERRAND: So as it relates to that, Judge, the
18 dep was begun on the ninth.

19 THE COURT: February 9th.

20 MR. FERRAND: And was not completed. I was not
21 even complete. And we had discussed that with the Court at
22 that earlier conference.

23 THE COURT: Right.

24 MR. FERRAND: And you indicated, look, this is an
25 employment deposition, there's multiple theories of

1 liability, I am likely to allow you more than seven hours.

2 If it becomes an issue, let me know.

3 And at the conclusion of that deposition, everybody
4 agreed we are nowhere near done. We all agreed -- we got out
5 our calendars at that deposition. We all agreed to
6 reschedule it for March 5th, 2024. That's the day they were
7 to appear. And, I mean, Judge, that's not -- that's a month
8 later. We moved this out a month to make sure both of their
9 calendars would allow them to appear.

10 And on the day before, again, that deposition, I
11 got an e-mail from Mr. Dailey saying, "I am ill and cannot
12 attend." And then in the afternoon I got an e-mail from him
13 saying, "My client advises he is ill and cannot attend."

14 THE COURT: Right.

15 MR. FERRAND: And then, of course, on the day of
16 the deposition, we find out that Mr. VanLaan is in the 41-A
17 District Court arguing a criminal preliminary examination.
18 And, Judge, I don't mean he's ill and he showed up. I mean,
19 he's there and he's on the record for two hours, arguing an
20 examination. He was not too ill to appear for his
21 deposition.

22 THE COURT: No, he wasn't.

23 MR. FERRAND: This is more fodder. This is more an
24 intent --

25 THE COURT: Yeah.

1 MR. FERRAND: -- to create injury to the defendant
2 through the continuation of attorney fees and costs.

3 THE COURT: I would agree. And so Federal Rule of
4 Civil Procedure 37(b)(2)(A) authorizes the Court to order
5 sanctions, including dismissal of the case, for failure to
6 comply with the court order to provide or permit discovery.
7 There was absolutely a court order here.

8 And there are four factors that I must consider in
9 determining whether dismissal is appropriate as a sanction
10 for failure to comply. And here, there's failure to
11 cooperate, whatsoever, in any prosecution of their own case,
12 meaning providing discovery, sitting for depositions,
13 furthering the case. There's also the specific orders that I
14 required of responding to -- we've already listed them, the
15 discovery requests being interrogatories 1, 4, 5 and 7,
16 requests to produce 1, 5, 8, 9, 10, 12, 13, 14, 32, 33, 34.
17 And that -- those -- just that, alone, would warrant the
18 sanctions, but it turns out that there's been much more than
19 that, which is failure to produce documents at the
20 deposition, and failure to show, and complete dishonesty by
21 either plaintiff or his counsel or both. It seems that both
22 are involved.

23 So I'm required to look at whether the party's
24 failure, and here there are multiple failures, is due to
25 willfulness, bad faith or fault.

1 And I want to add, in terms of my consideration, I
2 look at whether even this motion was responded to with an
3 explanation, or with anything at all, and there was no
4 response, whatsoever, from the plaintiff and his lawyer.

5 Second factor, whether the adversary, and here
6 we've got three, were prejudiced by the dismissed party's
7 conduct, whether the dismissed party was warned that failure
8 to cooperate could lead to dismissal, and whether less
9 drastic sanctions were imposed or considered before dismissal
10 was ordered.

11 That's the Sixth Circuit in 2019 in
12 *Mager -- M-A-G-E-R -- v. Wisconsin Central Limited*.

13 So looking at the first factor, whether the party's
14 failure is due to willfulness, bad faith or fault, I find,
15 today, that it's certainly due to all three of those are met
16 here. The conduct is willful.

17 Looking only at the e-mail communication that
18 Mr. Dailey said in the morning of March 4th, 2014 that he was
19 sick, by the afternoon, it was his client, he had forgotten
20 that he had said he was sick. It turns out he claimed his
21 client was sick. When now we have in a supplemental filing
22 and represented here by an officer of the court, that the
23 client was spending two hours or more arguing in court on
24 behalf of his own client.

25 And so we know from the Sixth Circuit case

1 *Mulbah* -- M-U-L-B-A-H -- v. *Detroit Board of Education*,
2 Sixth Circuit, in 2001, that the first factor of bad faith,
3 willfulness and fault is satisfied where the party's conduct
4 displays either an intent to thwart judicial proceedings or a
5 reckless disregard for the effect of her conduct on those
6 proceedings. And in this case, it is his conduct.

7 And this -- I don't know, honestly, whether
8 plaintiff and his counsel are trying to thwart the
9 proceedings or they have reckless disregard, but they have
10 one or the other or both, by not -- not even simply today not
11 reading the docket, that goes to Counsel's conduct. And I
12 would never punish a party for counsel's misconduct or
13 failure to follow the rules, alone, but here it goes to both.

14 And here's where one of my favorite words comes up,
15 in *Morgan v. St. Frances Hospital*, that's a Sixth Circuit
16 November 2021, and the word is "contumacious."

17 This factor requires -- this is what the court
18 said, "a clear record of delay or contumacious conduct."
19 That exists throughout this case, at least since the onset of
20 representation by Mr. Dailey.

21 And contumacious is defined as perverse in
22 resisting authority and stubbornly disobedient. That's what
23 we have in this deposition is stubbornly disobedient.

24 Mr. VanLaan certainly knows what a *duces tecum*
25 deposition is, but if he didn't, it says -- it says on the

1 deposition notice and subpoena it says, "The deponent is
2 required to produce copies of all documents, records,
3 writings and recordings of every kind and nature, including
4 all communications via cellphone, landline, et cetera,
5 regarding the following:" And then that's listed.

6 And his answer at the deposition says, "I don't
7 think it says I have to bring them today." And he was
8 informed it has a date and time. And so he just goes
9 on -- plaintiff goes on engaging in a perverse resistance to
10 authority, and he is certainly stubbornly disobedient.

11 So -- and in the Sixth Circuit, in order to
12 actually dismiss a case based on this kind of contumacious
13 conduct, courts are required that there be bad behavior from
14 the party and not just counsel. We have both here. But
15 we're reminded in *Carpenter v. City of Flint*, Sixth Circuit,
16 in 2013, that "Dismissal is usually inappropriate where the
17 neglect is solely the fault of the attorney. And here it's
18 not solely the fault of the attorney, by any means.

19 And so we had these original requests served a year
20 ago -- 11 months ago, June 28th of 2023. I think counsel
21 tried to work with Mr. VanLaan, and his lawyer, during that
22 time, got no cooperation, no progress, and were ordered by
23 this Court to provide that information and still did not do
24 so.

25 We also have all of the -- I don't know even know

1 | what to call it -- all of the ridiculousness about the
2 | March 5th continuation of the deposition.

3 | So this is certainly plaintiff's misconduct and
4 | contumacious conduct. There's bad faith. The last-minute
5 | cancellations that were going on continuously in this case,
6 | but specifically the March 5th, I find especially troubling.
7 | And also that there was some kind of dishonesty going on
8 | there, that displays bad faith.

9 | So once the Court finds that that first factor is
10 | met, because of contumacious conduct, the three other factors
11 | are less important. That's set forth in a Sixth Circuit case
12 | in 2016, it's a very long case number. It's a revocable
13 | trust versus another irrevocable trust, so I won't go through
14 | all of that, but that's what the case stands for.

15 | So -- but just out of an abundance of caution and
16 | concern about the case, I will go on to the other factors.

17 | Whether the defendants are prejudiced by the
18 | discovery violations. This factor is overwhelmingly met.
19 | The defendants have spent time, money and effort in pursuit
20 | of cooperation from the plaintiff, which he was legally
21 | obligated to provide, and failed to do so. And
22 | Defendant Lucido hasn't finished taking plaintiff's
23 | deposition. The other two defendants have not even started.
24 | There is a dispositive motion cutoff that's coming up. And
25 | it's just absolutely unacceptable that, for a year, those

1 discovery requests have been outstanding and have not been
2 met.

3 So factor three is whether the plaintiff was
4 warned. I certainly warned plaintiff's counsel, Mr. Dailey,
5 who's on the telephone, because he didn't read the docket
6 that sanctions may be imposed if the deposition is not taken
7 on the scheduled date. And so sanctions were definitely on
8 the table.

9 And there is a case -- the *Mager* case that I
10 mentioned earlier states, "When a plaintiff has not been
11 given notice that dismissal is contemplated, a District Court
12 should impose a penalty short of dismissal unless the
13 derelict party has engaged in bad faith or contumacious
14 conduct."

15 I warned that sanctions were on the table, and,
16 certainly, there is contumacious conduct.

17 So then, is a less drastic sanction available?
18 I've tried that. I ordered him to cooperate. He didn't do
19 it. Not only did he not cooperate, he lied. And the
20 depositions that I looked through are just -- that's not the
21 way people should be litigating cases. The kind of skirting
22 the answer and arguing with counsel, it's -- it's a bad
23 example of what the practice of law is about.

24 And I have a tendency to repeat myself, but one of
25 the things that I often tell lawyers is one of the reasons

1 why I believe in the Federal Rules of Evidence -- and when
2 somebody wants me to swear, I always say on the Federal Rules
3 of Evidence is what I want to swear on, not the Bible,
4 because I believe in the them. And I think that they level
5 the playing field between the least powerful plaintiff and
6 the most powerful corporations in the United States, or
7 globally. Everyone has to follow the rules, and that allows
8 a case to be litigated, regardless of the financial status or
9 social status or any other status that a party has.

10 And here, the plaintiff and his counsel just will
11 not follow the rules, and that cannot be rewarded.

12 So there really, from my perspective, is no less
13 drastic sanction, at this point, than dismissing the case.
14 And the question for me is whether the case should be
15 dismissed with or without prejudice. And from my perspective
16 I believe it should be dismissed with prejudice, because
17 there is just no lesser sanction that makes sense here.

18 If, apparently, Mr. Dailey plans to file a motion
19 to withdraw, he would be the second lawyer to leave this case
20 on behalf of plaintiff. Perhaps he would refile and pursue
21 it pro se, but I do not see, if he has not provided, in the
22 last year, the interrogatory and document request responses
23 when he admitted in his February deposition that he
24 understood he had to do that, there's just no reason to
25 believe that refiling this case would produce a different

1 outcome. He could be in this courtroom today, and is he not
2 here.

3 So I think that the Sixth Circuit in *Lovingood*,
4 which is kind of misspelled to me, but L-O-V-I-N-G-O-O-D, I
5 feel like it should have another G, loving good, but it is
6 *Lovingood* -- I guess that's what it is -- v. *Monroe County*,
7 they remind District Courts that it would be an abuse of
8 discretion to dismiss a plaintiff's claim with prejudice
9 unless there's been adequate notice.

10 There was adequate notice of this hearing. It was
11 noticed twice on the docket; once saying we would have an
12 in-person hearing, another time saying that hearing date was
13 adjourned for today. It was, undoubtedly, probably my
14 schedule that had to change, but in any event, plaintiff knew
15 about this case, his counsel knew -- about this hearing, his
16 counsel knew about the hearing. They chose not to come.
17 They could be here making an argument that it should be
18 dismissed without prejudice, so that the plaintiff can
19 refile, and they failed to make an appearance here.

20 Mr. Dailey, is there anything you want to say on
21 the with prejudice or without prejudice?

22 MR. DAILEY: No, Judge, but there is a comment I
23 would like to make in response to something that was said
24 earlier, when you're prepared to have me do that.

25 THE COURT: Okay. Now would be the time.

1 MR. DAILEY: Okay. I was not trying to suggest to
2 the Court that I misread the notices of the hearing as
3 in-person. I misread the calendaring on my own firm calendar
4 that -- that's what I was referring to, and so --

5 THE COURT: I heard you, but you're
6 obligated -- the docket is the record of the case, and so if
7 you put something in February that was supposed to be in
8 March, well, that's your responsibility. And you can always
9 double check the docket to find out when and where a hearing
10 is, and you didn't do that.

11 MR. DAILEY: Well, Judge, I did do that, but I
12 didn't do that until today. And the thing is that I don't
13 want to suggest that I'm not taking responsibility. I
14 certainly am. I know it's my responsibility. I have been
15 practicing law for 37 years, and I have done so successfully.

16 And I'm not suggesting to this Court or to counsel
17 that anybody is to blame for my misreading anything at all,
18 other than me. I take responsibility. The buck stops here.

19 But having said that, Judge, one of the things I
20 wanted to mention to you --

21 THE COURT: Okay.

22 MR. DAILEY: -- I was in the emergency room on
23 March 5th. I was there all day. I had issues related to
24 cardiac, and I had issues related to upper respiratory. I
25 had the same thing in the previous year, and I was told not

1 to return to work until April, I believe it was the 8th.

2 THE COURT: Mr. Dailey --

3 MR. DAILEY: So I --

4 THE COURT: -- I just have to ask you to stop. I'm
5 sorry that you've been ill. I'm very sorry that you've been
6 ill. The time and place to put forth that argument was in
7 response to three -- no less than three motions for
8 sanctions. Okay?

9 MR. DAILEY: I understand, Judge.

10 THE COURT: Not to show up remotely from out of
11 state or wherever you are, having failed to look at the
12 docket until the moments before the hearing. The message I
13 got was within an hour of the hearing. And so this is not
14 the time to say that you were in the hospital. I'm sorry you
15 were in the hospital. But that would be what you file in
16 response to a written -- three written motions for sanctions
17 that point out this unusual situation where, in the morning,
18 from the hospital apparently, you e-mail counsel, and then in
19 the afternoon, apparently, also from the hospital, you e-mail
20 counsel that it was, indeed, your client who was sick and not
21 you.

22 And so -- and let me just ask, Mr. Ferrand, did you
23 get communication that Mr. Dailey was in the hospital?

24 MR. FERRAND: No, Judge. We got -- we got the curt
25 e-mail I talked about earlier --

1 THE COURT: Right.

2 MR. DAILEY: -- that said, I am ill, I cannot
3 attend; followed by the second e-mail saying that my client
4 advises he is ill and cannot attend.

5 THE COURT: Okay.

6 MR. FERRAND: That's what we received.

7 THE COURT: All right.

8 MR. DAILEY: Your Honor --

9 THE COURT: So -- yeah, so this is not the time to
10 make an argument that you could have made if you had been
11 acting in good faith in this case and not engaging in
12 contumacious conduct.

13 MR. DAILEY: Your Honor, I'm not trying to -- I'm
14 not trying to argue with you. I'm just trying to set the
15 record straight.

16 I was not in the hospital on the 4th of March; I
17 was trying to avoid going to the hospital. It was the very
18 next day that I went to the hospital.

19 THE COURT: Oh --

20 MR. DAILEY: So I just want that to be clear on the
21 record. I never told Mr. Ferrand I was in the hospital on
22 the 4th -- March 4th, because I wasn't.

23 THE COURT: No.

24 MR. DAILEY: I just thought that I might be,
25 because I was getting ill on March 4th.

1 THE COURT: Okay.

2 MR. DAILEY: If I sent an e-mail saying that
3 Mr. VanLaan told me he was ill, then you can take to the bank
4 that that's what he told me.

5 THE COURT: Well, we can't take that to the bank.
6 Remember why we can't take that to the bank?

7 MR. DAILEY: I understand --

8 THE COURT: Because he was in court, in a different
9 court, representing a client, undoubtedly billing for his
10 services there. He was not too sick to have a two-hour
11 evidentiary hearing in a different court. So I'm not going
12 to the bank on that. I'd like --

13 MR. DAILEY: That's not my suggestion. My
14 suggestion is --

15 THE COURT: Oh --

16 MR. DAILEY: -- that if he told me that he was ill,
17 then clearly he told me he was ill. Whether or not he was
18 honest with me or not --

19 THE COURT: You know what --

20 MR. DAILEY: -- I don't know. If I sent an e-mail
21 saying that's what he said to me, that's what he said to me.

22 THE COURT: Okay.

23 MR. DAILEY: That's all.

24 THE COURT: Thank you for sharing that with us.
25 But what I understand is that Mr. Dailey is not

1 objecting to the dismissal with prejudice at this point. He
2 is defending his own conduct in the case, but not that
3 of -- and not even -- only with respect to one communication
4 about who was sick on March 4th of 2014 (sic).

5 MR. DAILEY: Judge, I'm not --

6 THE COURT: No, Mr. Dailey, you have no more
7 authority to speak here. You have taken steps that have led
8 to you not being here.

9 So it's my determination that in light of
10 everything that I've heard today from counsel, in the written
11 materials from all three defendants, and from the argument
12 provided by Mr. Daily today, that the case should be
13 dismissed with prejudice. It is that rare situation where
14 the process is being abused, and it's my responsibility to
15 bring that to a close.

16 So my only remaining question is whether any of the
17 defendants are seeking reasonable attorney fees for your work
18 on the motion for sanctions?

19 MR. SCHAPKA: Your Honor, if I may, I will speak to
20 that.

21 THE COURT: Mr. Schapka.

22 MR. SCHAPKA: Both Mr. Ferrand and Mr. Perrin were
23 retained by the County as conflict counsel for the two
24 individuals, so all the costs are of the County. We have
25 been paying them at their billable rates. My value to the

1 County, I'm fixed overhead, sometimes that's a amorphus
2 number.

3 THE COURT: You can remain seated and speak into
4 the microphone.

5 MR. SCHAPKA: Sometimes my value is a little bit
6 amorphus, because I'm salaried and inhouse and the County
7 would be paying me no matter what I'm doing. But Mr. Ferrand
8 and Mr. Perrin's costs, billed and already paid, are real
9 money. And I would at least ask the Court to impose
10 sanctions to the value of their costs that the County has
11 paid and will pay through, probably close of business today
12 or tomorrow, as they clean up their file.

13 THE COURT: And are you suggesting that that be a
14 sanction on Mr. VanLaan, Mr. Dailey, or both?

15 MR. SCHAPKA: Well, historically it has always been
16 the client who pays sanctions. In this case, I would ask for
17 both.

18 THE COURT: In order for me to do that, I would
19 need to have an accounting. I can't just say, so ordered,
20 let's say, you know, \$50,000. I can't make up numbers.

21 MR. SCHAPKA: I'm not asking the Court to do that.
22 I would submit a bill of costs.

23 THE COURT: I guess what I would ask you to do is
24 submit a motion for attorney fees as a sanction, that sets
25 forth who should be paid, the law that supports who should

1 pay the sanction as between the plaintiff and his lawyer, and
2 along with the costs that -- or the fees and costs that have
3 been associated with the motion for sanctions.

4 MR. SCHAPKA: Yes, Your Honor, will do.

5 THE COURT: Okay. Is there -- okay. So the other
6 thing is, this moots the motion for extension of the
7 dispositive motion deadline. There will be no dispositive
8 motion needed.

9 And, Mr. Dailey, you can certainly respond to the
10 motion for attorney fees, but you must do it on a timely
11 basis or it would be stricken and you won't be given a second
12 chance.

13 MR. DAILEY: I understand, and I will do that. But
14 I'm going to also file a motion to withdraw from representing
15 Mr. VanLaan, because now we are in sort of in a conflicting
16 position, I think, so I'm going to go ahead and file that.

17 THE COURT: You think what? Something file that.

18 MR. DAILEY: I am going to file my motion to
19 withdraw from representing Mr. VanLaan because it appears I'm
20 going to have to be representing myself.

21 THE COURT: I don't think you have to represent
22 yourself. You just have to respond to the motion for
23 attorney fees -- the sanction of attorney fees. And
24 Mr. Schapka just represented that, traditionally, that is
25 paid by the client and not attorney, but he thinks there may

1 be reason to split that. So why don't you wait and see what
2 the motion says?

3 MR. DAILEY: Okay.

4 THE COURT: Mr. Schapka, how much time do you need
5 to file your motion?

6 MR. FERRAND: Twenty-one days, Your Honor.

7 MR. SCHAPKA: Twenty-one days, Your Honor.

8 THE COURT: Can you just -- I'd just like to get
9 this wrapped up. Can you do it --

10 MR. SCHAPKA: Fourteen days.

11 THE COURT: --in fourteen days? Let's do 14 days.
12 Okay.

13 All right. So you will follow the local rules,
14 Mr. Dailey, for -- it's a non-dispositive motion for your
15 response, and if the County wants to reply, they can. And
16 then we'll either have a hearing or I will decide it on the
17 briefs; you'll find out on the docket about that.

18 MR. DAILEY: Understood, Your Honor.

19 THE COURT: Okay. Great.

20 MR. DAILEY: Again, thank you so much for allowing
21 me to appear by phone, and I really apologize for not being
22 there in person.

23 THE COURT: All right. Thank you. Anything
24 further?

25 MR. DAILEY: Not from plaintiff.

1 THE COURT: Okay. So what -- I don't intend to
2 expend any more time on a written reasoned opinion. I will
3 have a brief order that says for the reasons set forth on the
4 record, the case is dismissed with prejudice, and that there
5 will be further briefing regarding the sanction of attorney
6 fees for having to file that motion. Okay.

7 MR. DAILEY: Very good.

8 THE COURT: Thank you, all.

9 MR. DAILEY: Thank you, Judge. Have a good day.

10 THE COURT: You too.

11 MR. DAILEY: Bye.

12 THE COURT: Are you there, Mr. Dailey? Maybe he
13 hung up.

14 THE LAW CLERK: I'll try to end it.

15 THE COURT: Maybe it's over and we don't even know.

16 (Proceedings concluded at 11:22 a.m.)

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C E R T I F I C A T I O N

I, Robert L. Smith, Official Court Reporter of the United States District Court, Eastern District of Michigan, appointed pursuant to the provisions of Title 28, United States Code, Section 753, do hereby certify that the foregoing pages comprise a full, true and correct transcript taken in the matter of JOSHUA VanLAAN vs. MACOMB COUNTY, et al., Case No. 23-10146, on Thursday, May 23, 2024.

s/Robert L. Smith
Robert L. Smith, RPR, CSR 5098
Federal Official Court Reporter
United States District Court
Eastern District of Michigan

Date: 05/29/2024
Detroit, Michigan