

# IN THE SUPREME COURT OF TEXAS

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No. 98-0623

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MARTIN M. VILLARREAL, PETITIONER

v.

SAN ANTONIO TRUCK & EQUIPMENT AND ROBERT GONZALEZ, RESPONDENTS

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ON PETITION FOR REVIEW FROM THE  
COURT OF APPEALS FOR THE FOURTH DISTRICT OF TEXAS

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**Argued on April 7, 1999**

JUSTICE ENOCH, joined by JUSTICE BAKER, dissenting.

I share the sentiment that, I think, motivates the Court to reach its result — frustration at the Bexar County District Clerk's apparent refusal to change a badly worded dismissal notice, even after the court of appeals has expended significant judicial resources in several reported decisions to answer parties' questions about the notice's wording.<sup>1</sup> But frustration should not decide cases. The issue here is whether the notice is sufficient to warn litigants that the trial court might, under its inherent power, dismiss a case for want of prosecution. While the notice is not a model of clarity or good writing, it is sufficient. I dissent.

The Court's reasoning is flawed in several respects. First, in construing the dismissal notice, the Court focuses its attention on only two sentences: "You are requested to be present and make your announcement. If no announcement is made, this cause will be dismissed for want of prosecution." But the Court ignores the last line of the notice: "You are reminded that this is not a

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<sup>1</sup> See *Goff v. Branch*, 821 S.W.2d 732 (Tex. App.—San Antonio 1991, writ denied); *Ozuna v. Southwest Bio-Clinical Laboratories*, 766 S.W.2d 900 (Tex. App.—San Antonio 1989, writ denied).

docket for the re-setting of cases, but for their dismissal.”

Second, only looking at the two sentences it cites, the Court then assumes that a "plain reading" of this language "informs parties only of a possible Rule 165a(1) dismissal."<sup>2</sup> But what is a Rule 165a(1) dismissal? It is a dismissal based on a party's failure to appear for a hearing.<sup>3</sup> Thus under the Court's "plain reading," the dismissal notice, apparently, would only tell a party: If you come to this dismissal hearing, you won't get dismissed for not coming to this dismissal hearing. This "plain reading" is nonsense — the whole point of the dismissal docket, as any lawyer who practices in Bexar County knows,<sup>4</sup> is to allow Bexar County District Courts to dismiss cases of parties who are not diligently pursuing their claims.

Third, the Court contradicts its own "plain reading" — for the Court says "a reasonable litigant would understand [from the dismissal notice] that *only an announcement of ready for trial* would justify removal from the dismissal docket."<sup>5</sup> The Court in one breath reads a single warning — that a party's case will be dismissed only if he fails to appear for the dismissal hearing. But in the next, the Court concludes that this warning necessarily also warns the party that he must announce "ready for trial."

The Court professes to be compelled to this contradiction in order to avoid the "absurd conclusion" that follows from its "literal interpretation" of the two sentences.<sup>6</sup> Its interpretation is

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<sup>2</sup> \_\_\_ S.W.2d at \_\_\_.

<sup>3</sup> See TEX. R. CIV. P. 165a(1).

<sup>4</sup> See Bexar County Local Rule 3.26, RULES OF PRACTICE, PROCEDURE AND ADMINISTRATION IN THE DISTRICT COURTS OF BEXAR COUNTY, TEXAS (April 1991) (providing for show cause hearings on dismissal docket when cases are not diligently prosecuted); *State v. Rotello*, 671 S.W.2d 507, 508 (Tex. 1984) ("We conclude that the Rotellos are charged with notice of the trial court's intention to dismiss this cause at the April 1982 dismissal docket by their attorney's knowledge of the local rule.").

<sup>5</sup> \_\_\_ S.W.2d at \_\_\_ (emphasis added).

<sup>6</sup> *Id.* at \_\_\_.

that these two sentences promise that the case won't be dismissed if the party appears and makes an announcement — *any* announcement. But the Court follows false logic. The sentences don't say what the Court fears. The sentences literally promise *only* that the case *will* be dismissed if *no* announcement is made. It's a simple statement. There is nothing absurd about it. And significantly, these sentences do not promise the opposite — that if one merely announces, his case will not be dismissed.

A "literal interpretation" of the entire notice, including the final line, reveals that the notice warns that the trial court will exercise its inherent power to control its docket. As mentioned, the last line of the notice states: "You are reminded that this is not a docket for the re-setting of cases, but for their dismissal." Villarreal had notice that merely showing up and asking to be set for trial would not be enough — he was coming to a hearing where the trial court would decide whether to dismiss his case for want of prosecution, and he had notice that the way to avoid dismissal was not just to show up, but to show up *and convince* the trial court not to exercise its inherent power to dismiss the case.

And if those three lines weren't enough, the notice also expressly stated that the trial court placed Villarreal's claim on the dismissal docket on its own motion. As the court of appeals correctly noted, this additionally indicated that the trial court was invoking its inherent power to, after a hearing, dismiss Villarreal's claim.<sup>7</sup>

Finally, we don't have a record of the dismissal hearing. So how can we determine whether the trial court abused its discretion? The answer is simple — we can't. Therefore we presume the trial court didn't.<sup>8</sup> The Court, however, tries to gloss over the lack of a record by latching onto San

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<sup>7</sup> 974 S.W.2d at 278 (citation omitted).

<sup>8</sup> See *Simon v. York Crane & Rigging Co.*, 739 S.W.2d 793, 795 (Tex. 1987); *Ozuna*, 766 S.W.2d at 901.

Antonio Truck's concession that Villarreal appeared at the hearing and announced ready for trial.<sup>9</sup> But those facts are beside the point. San Antonio Truck conceded Villarreal's appearance and announcement precisely because, while it was true, it did not matter. To get to the Court's conclusion, it has to decide that the trial court, as a matter of law, had to believe Villarreal when he said he was ready. But the trial court didn't have to. Why should it — after all, Villarreal had done nothing for two years before the trial court put the case on the dismissal docket. Furthermore, without a record, we don't know what Villarreal's excuse, if he even gave one, was. The court of appeals stated it succinctly: "A belated trial setting or eager announcement of readiness to proceed to trial does not conclusively establish diligence."<sup>10</sup>

Out of frustration, the Court undertakes a strained effort to read the notice to warn only of a potential Rule 165a(1) dismissal. And then it rewrites the notice to require a "ready for trial" announcement in order to avoid absurdity. But it then denies to the trial court the fundamental discretion to disbelieve the announcement, even if the record shows the party's actions belying his words. The Court errs. The dismissal notice in this case adequately informed Villarreal that the trial court was invoking its inherent power to dismiss his claim for want of prosecution. I dissent.

A final thought — if I were the Bexar County District Clerk, I'd rewrite the notice to include the phrase, "The trial court is invoking its inherent power to dismiss this case for want of prosecution." It would be more clear and, it appears, nothing less will do.

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Craig T. Enoch  
Justice

Opinion delivered: May 27, 1999

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<sup>9</sup> \_\_\_ S.W.2d at \_\_\_.

<sup>10</sup> 974 S.W.2d at 278.