[Cite as *Arndt v. P & M Ltd.*, 2011-Ohio-649.]

IN THE COURT OF APPEALS

ELEVENTH APPELLATE DISTRICT

PORTAGE COUNTY, OHIO

CHRIS ARNDT, INDIVIDUALLY AND ON BEHALF OF ALL OTHERS SIMILARLY SITUATED, et al.,	:	**O P I N I O N**
	:	**CASE NO. 2009-P-0088**
Plaintiffs-Appellants,	:	
- vs -	:	
P & M LTD., et al.,	:	
Defendants-Appellees.	:	

Civil Appeal from the Portage County Court of Common Pleas, Case No. 2002 CV 0695.

Judgment: Affirmed.

George W. Cochran and *Edward J. Smith*, Smith, Greenberg & Leightty, P.L.L.C., 2321 Lime Kiln Lane, Ste. C, Louisville, KY 40222 (For Plaintiffs-Appellants).

John T. Murphy, Colleen R. Del Balso, and *Richard C.O. Rezie*, Gallagher, Sharp, Fulton & Norman, Sixth Floor, Bulkley Building, 1501 Euclid Avenue, Cleveland, OH 44115 (For Defendants-Appellees).

DIANE V. GRENDELL, J.

{¶1} Plaintiffs-appellants appeal several decisions of the Portage County Court of Common Pleas, culminating in the dismissal of their class action upon its merits. For the following reasons, we affirm the decision of the court below.

{¶2} Defendants-appellees P&M Ltd. (dba P&M Estates), Modern Management Solutions, LCC, Raymond Vehovec, and KMV V, Ltd. (collectively “P&M Estates”), are

alleged to be involved in the operation of P&M Estates, a mobile or manufactured home park located in Garrettsville, Ohio. Plaintiffs-appellants (or "class representatives") have been residents of P&M Estates.[1]

{¶3} On June 18, 2002, a Class Action Complaint (Other Tort) was filed against P&M Estates "on behalf of all natural persons who have resided in P&M Estates *** since January 1, 1992," in the Portage County Court of Common Pleas. The class representatives alleged that P&M Estates violated certain provisions of Ohio R.C. 3733.10, setting forth the obligations of manufactured home park operators. P&M Estates' alleged liability was based on the recurrent flooding of Eagle Creek, a tributary of Mahoning Creek which bisects the park.

{¶4} On September 24, 2003, the trial court entered an Order Granting Plaintiffs' Motion to Bifurcate with respect to the issue of compensatory damages: "Should the jury determine liability against Defendants, this Court will appoint a qualified arbitrator to conduct individual hearings brought by class members claiming to have suffered compensatory damages as a proximate result of Defendants' liability."

{¶5} On January 12, 2004, the trial court entered an Order and Journal Entry, certifying a class "for purposes of injunctive relief," consisting "of the present residents of P&M Estates." The court declined to certify a class "for claims of loss of use of the common areas and loss of enjoyment of homes caused by the floodwaters" and "for claims of property damage caused by the floodwaters."

{¶6} Both parties appealed the January 12, 2004 Order and Journal Entry.

1. As identified in the Third Amended Class Action Complaint (Other Tort), filed October 5, 2006, the class representatives were Chris Arndt, Doug and Denise Bly, James and Patricia Manges, Jason and Darlene DeBolt, William Mzik, and Earlene Waggoner.

{¶7} On August 26, 2005, this court issued its decision in *Arndt v. P&M Ltd.*, 163 Ohio App.3d 179, 2005-Ohio-4481, affirming in part and reversing in part the lower court's certification Order. This court affirmed the Order with respect to the certification of a class for injunctive relief and the denial of certification of a class for property damage. This court reversed the Order with respect to the denial of certification of a class for loss of use/loss of enjoyment damages and remanded "with instructions for the trial court to certify the loss-of-use/loss-of-enjoyment subclass." Id. at ¶37.

{¶8} On March 5, 2007, a Plaintiffs' Motion to Bifurcate Certain Trial Proceedings was filed. Inter alia, the class representatives moved the trial court to bifurcate the class action "into three separate proceedings in the following order: (a) trial on class liability; (b) trial on injunctive relief remedy; and (c) trial on 'loss of use' damages."

{¶9} On March 6, 2007, a Plaintiffs' Motion to Serve Voluntary Class Notice to Absentee Members regarding Certification of 'Loss of Use' Damages Sub-class was filed. In it, the class representatives moved the trial court for an Order "directing class notice to absentee members regarding certification of the 'loss of use' damages sub-class." The representatives asserted that, although they did not believe that Ohio Civ.R. 23(C)(2)[2] required them to give notice to absentee class members for "loss of use" damages, they were "willing to provide voluntary class notice."

2. Ohio Civ.R. 23(C)(2) provides: "In any class action maintained under subdivision (B)(3), the court shall direct to the members of the class the best notice practicable under the circumstances, including individual notice to all members who can be identified through reasonable effort." Subdivision (B)(3) provides that an action may be maintained as a class action where, "questions of law or fact common to the members of the class predominate over any questions affecting only individual members, and that a class action is superior to other available methods for the fair and efficient adjudication of the controversy."

{¶10} On April 13, 2007, the trial court entered an Order and Journal Entry, granting summary judgment in favor of P&M Estates. The class representatives appealed.

{¶11} On May 9, 2008, this court issued its decision in *Arndt v. P&M Ltd.*, 11th Dist. Nos. 2007-P-0038 and 2007-P-0039, 2008-Ohio-2316, reversing the decision of the lower court.[3]

{¶12} On May 29, 2009, a Magistrate Order was issued, setting the matter for trial on November 2, 2009.

{¶13} On June 3, 2009, a Plaintiffs' Recommendations on Bifurcation of Issues was filed. In it, the class representatives made recommendations that the issues of liability, injunctive relief, and "loss of use" damages be decided by the jury at different "phases" of the trial.

{¶14} On August 17, 2009, an Order to Serve Notice of Class Certification for "Loss of Use" Damages Sub-class on Absentee Class Members was issued in response to the class representatives' Motion to Serve Voluntary Class Notice. The Order provided that written notice of the class action be given to "all park residents from January 1, 1992 to the present." The written notice contained the following statement: "If you want to remain a member of the class, you should NOT file the 'Exclusion Request' and are not required to do anything at this time. By remaining a class member, any claims against Defendants for 'loss of use/enjoyment' damages will be determined by this case and cannot be presented by you in any other lawsuit." The

3. Summary judgment was affirmed with respect to one defendant, Carol Foster. 2008-Ohio-2316, at ¶93.

class representatives were to mail the written notices within 28 days of the court's Order.

{¶15} On October 1, 2009, a Plaintiffs' Motion *in Limine* on Aggregate Class Damages was filed, wherein the class representatives moved the trial court "for an Order affirming the admissibility of evidence supporting aggregate 'loss of use' class damages for distribution through sub-class apportionment rather than individual proof of claims by absentee class members."

{¶16} On November 2, 2009, an Order of the Court was issued, denying Plaintiffs' Motion *in Limine* on Aggregate Class Damages. The trial, scheduled to begin on this day, was continued for reasons unrelated to the issues raised in this appeal, and rescheduled for December 7, 2009.

{¶17} On November 12, 2009, a Plaintiffs' Proposal to Implement Court Ruling on Class Damages was filed. The class representatives claimed that, as a result of the trial court's denial of their Motion *in Limine* on Aggregate Class Damages, they were "expected to present evidence on loss of use/enjoyment damages on behalf of all class members." In other words, "a literal interpretation" of the court's ruling required the "jurors to hear testimony from 1,000 absentee members on their exposure to flooding." The representatives argued that, not only did the court's ruling render the trial unmanageable as a practical matter, it compromised the interests of the absentee class members. The representatives based this claim on the fact that the notice sent to the absentee class members did not advise them that they would have to present evidence of loss of use/enjoyment in order to share in the class recovery. To remedy the situation, the representatives proposed having the jury hear evidence of P&M Estates'

liability and testimony from the class representatives as to "their loss of use/enjoyment," and then establish "standard measures" for determining loss of use/enjoyment damages. After the trial proper, absentee class members would be notified that they were to submit their claims to a "special master," who would conduct hearings using the standard measures to determine individual damage awards.

{¶18} On November 23, 2009, an Order of the Court was issued, denying the Proposal to Implement Court Ruling on Class Damages. The trial court found "Plaintiffs' efforts to strictly interpret prior rulings of this Court are misguided," and "[t]here is no need for bifurcation nor for piecemeal jury determinations." The court ordered trial to begin as scheduled and the class representatives to present "the entirety of their case-in-chief."

{¶19} On November 24, 2009, a Plaintiffs' Motion to Continue Trial or to File Notice of Voluntary Dismissal under Rule 41(A) was filed. As class fiduciaries, i.e. to protect the interests of absentee class members, the class representatives requested "a reasonable time to retain an expert on class damages or to amend class notice to solicit individual testimony at trial."

{¶20} On December 1, 2009, an Order of the Court was issued, denying the Plaintiffs' Motion to Continue Trial or to File Notice of Voluntary Dismissal as "not well taken as untimely filed."

{¶21} On December 2, 2009, an Order of the Court was issued, sua sponte, advising the class representatives "that trial shall begin as scheduled [on December 7, 2009]; that failure of plaintiffs to appear and prosecute their claims shall operate as a

jury waiver pursuant to Civ.R. 39(A) and subject plaintiffs to dismissal and/or judgment in favor of defendants at plaintiffs' costs pursuant to Civ.R. 41(B)(1) and/or (2)."

{¶22} On December 3, 2009, the class representatives filed a Notice of Appeal from the November 23 and December 1 Orders, assigned Appeal No. 2009-P-0080. [4]

{¶23} On the same date, class representative Jason DeBolt filed an original action in this court, assigned Case No. 2009-P-0081, for Writs of Prohibition and Mandamus, seeking to have the trial court judge enjoined from proceeding in this matter.[5]

{¶24} On December 7, 2009, a Motion to Quash Subpoenas was filed by the class representatives, seeking an Order that all subpoenas requiring their attendance at trial be quashed on the grounds that the trial court is "without subject matter jurisdiction to proceed with trial."

{¶25} On the same date, Robert Wilcox, a plaintiff in related litigation against P&M Estates, filed a Motion to Intervene as a matter of right pursuant to Civ.R. 24(A). Wilcox asserted that his purpose in intervening was "to preserve class integrity," in light of the fact that "all class representatives are planning to file notice of their voluntary dismissal without prejudice prior to commencement of trial on December 7, 2009."

{¶26} On the same date, a Notice of Voluntary Dismissal without Prejudice pursuant to Rule 41(A)(1)(a) was filed by the class representatives.

{¶27} On December 8, 2009, the trial court issued a Judgment Entry, stating that the matter had come on for jury trial, on December 7, 2009, and that counsel for the

4. On January 15, 2010, this court dismissed the appeal for lack of a final order. *Arndt v. P&M Ltd.*, 11th Dist. No. 2009-P-0080, 2010-Ohio-113.
5. On November 1, 2010, this court dismissed the action on the respondent's motion. *State ex rel. DeBolt v. Inderlied*, 11th Dist. No. 2009-P-0081, 2010-Ohio-5306.

class representatives advised the court "that plaintiffs would not prosecute their class action claim." P&M Estates then moved the court to dismiss the action with prejudice for failure to prosecute, pursuant to Civ.R. 41(B)(1). The court found it had jurisdiction to proceed with trial despite the arguments raised by the class representatives, the filing of a Notice of Appeal, and the Complaint for extraordinary writs. The court found the attempted voluntary dismissal of the action by the representatives was "not effective to circumvent Civ.R. 23(E)," which provides that "[a] class action shall not be dismissed or compromised without the approval of the court, and notice of the proposed dismissal or compromise *** given to all members of the class in such manner as the court directs." Accordingly, the court ordered that Wilcox' Motion to Intervene be denied, the representatives' Motion to Quash, "though moot," be granted, and the class action be dismissed upon the merits pursuant to Civ.R. 41(B)(1) and (3).

{¶28} On December 10, 2009, the trial court issued an amended Judgment Entry Nunc pro Tunc.

{¶29} On December 21, 2009, the class representatives filed a Notice of Appeal. On appeal, the following assignments of error are raised:

{¶30} "[1.] The trial court committed prejudicial error against Plaintiffs-Appellants by systematically ignoring the law of the case establishing a 'loss of use' sub-class under Rule 23(B)(2)."

{¶31} "[2.] The trial court committed prejudicial error against Plaintiffs-Appellants by proceeding to trial without having jurisdiction."

{¶32} "[3.] The trial court committed prejudicial error against Plaintiffs-Appellants by disregarding their notice of voluntary dismissal without prejudice."

{¶33} "[4.] The trial court committed prejudicial error against Plaintiffs-Appellants by denying a class member's motion to intervene that would have preserved class members' rights."

{¶34} "[5.] The trial court committed prejudicial error against Plaintiffs-Appellants by granting Defendants-Appellees' motion for involuntary dismissal with prejudice."

{¶35} Under the first assignment of error, the class representatives argue that the Orders denying their Motions to aggregate or bifurcate damages essentially de-certified the sub-class for loss of use/enjoyment damages, thereby violating the law of the case doctrine. Under this assignment, the representatives further argue the trial court erred by denying their Motions to provide notice to absentee class members of the need to testify, continue trial, and voluntarily dismiss their action. Given our disposition of the representatives' second assignment of error (regarding jurisdiction), third assignment of error (regarding voluntary dismissal), and fifth assignment of error (regarding involuntary dismissal), we decline to address the issues raised in this assignment of error as moot.

{¶36} As explained in a prior decision of this court, the Motions at issue in the first assignment of error are interlocutory orders. *Arndt*, 2010-Ohio-113. Under the merger doctrine, interlocutory orders "are merged into the final judgment," and, "[t]hus, an appeal from the final judgment includes all interlocutory orders merged with it." *Grover v. Bartsch*, 170 Ohio App.3d 188, 2006-Ohio-6115, at ¶9; *Crowley v. Warren*, 11th Dist. No. 2002-T-0177, 2003-Ohio-5692, at ¶19.

{¶37} Several courts have recognized an exception to the merger rule, providing "that interlocutory rulings do not merge into a judgment of dismissal for failure to prosecute, and are therefore unappealable." *John's Insulation, Inc. v. L. Addison & Assoc., Inc.* (C.A.1, 1998), 156 F.3d 101, 105 (and the cases cited therein). "The cases adopting this exception to the merger rule appear to use it merely as a convenient vehicle to effectuate the unremarkable principle that a party who fails or refuses to proceed with its remaining claims should not be allowed to thereby accomplish immediate review of an otherwise unappealable, interlocutory order." *AdvantEdge Business Group, L.L.C. v. Mestmaker & Assoc., Inc.* (C.A.10, 2009), 552 F.3d 1233, 1237. This exception to the merger doctrine is best applied as a "prudential rule," whereby an appellate court may decline to review interlocutory orders preceding a dismissal for failure to prosecute to vindicate the policies against manipulation of court processes and piecemeal litigation, or may decide to review such orders where it is just and sensible to do so. Id. at 1237-1238.

{¶38} In the present case, consideration of these interlocutory orders is rendered moot by our affirmance of the involuntary dismissal of the class representatives' action. In other words, any potential merit in the representatives' arguments under this first assignment of error will not affect the ultimate disposition of this case. Cf. *Culver v. Warren* (1948), 84 Ohio App. 373, 393 (defining as moot "a judgment upon some matter which, when rendered, for any reason, cannot have any practical legal effect upon a then existing controversy") (citation omitted). Accordingly, the arguments raised herein need not be considered. App.R. 12(A)(1)(c); cf. *Vaccariello v. Smith & Nephew Richards, Inc.*, 94 Ohio St.3d 380, 386, 2002-Ohio-892 (Cook, J., concurring in

judgment only) (discussing the confusion caused by a court of appeals finding error in an interlocutory decision while affirming the ultimate judgment rendered).

{¶39} The first assignment of error is without merit.

{¶40} In the second assignment of error, the class representatives argue the trial court was without jurisdiction to proceed with trial, and, thus, without jurisdiction to dismiss the case. The representatives claim the court was without jurisdiction to proceed by virtue of its disregarding the existence of a sub-class for loss of use/enjoyment damages, which violated the law of the case.

{¶41} The representatives cite no authority for the proposition that purported violations of the law of the case deprive a trial court of its jurisdiction to act. Rather, most courts hold that "the doctrine of the law of the case is prudential and not jurisdictional." *Bowles v. Russell* (C.A.6, 2005), 432 F.3d 668, 677; *Castro v. United States* (2003), 540 U.S. 375, 384 (the law of the case doctrine "simply 'expresses' common judicial 'practice'; it does not 'limit' the courts' power"). For this reason alone, we reject the representatives' argument.

{¶42} We further note that this court rejected the class representatives' arguments in the original action seeking a writ or prohibition/mandamus against the trial court judge from proceeding. *State ex rel. DeBolt v. Inderlied*, 11th Dist. No. 2009-P-0081, 2010-Ohio-5306. In that decision, we held that the court's interlocutory rulings "did not conflict with any previous legal conclusion of this court," and that the trial judge "did not exceed the scope of his jurisdiction in rendering the rulings." Id. at ¶22. We further acknowledged that, "even if it is assumed, for the sake of *** analysis, that the disputed rulings were legally incorrect, such subsequent errors would be procedural in

nature, and would only constitute a viable reason for reversing the rulings on appeal." Id. at ¶23.

{¶43} The second assignment of error is without merit.

{¶44} The third and fourth assignments of error may be considered jointly. The class representatives argue the trial court was deprived of jurisdiction to proceed with trial once they filed their Notice of Voluntary Dismissal without Prejudice pursuant to Rule 41(A)(1)(a), on December 7, 2009. On appeal, the representatives maintain that this Notice purportedly dismissed "their claims only," thereby circumventing the requirement of Civ.R. 23(E), which provides "[a] class action shall not be dismissed *** without the approval of the court, and notice *** given to all members of the class." Another result of the representatives' attempted dismissal of "their claims only" was that the class action itself remained viable. At the minimum, the court was without jurisdiction to extinguish the rights of absentee class members without notice of the need for new class representation. Finally, the representatives argue that the court abused its discretion by denying Wilcox' Motion to Intervene, filed concurrently with the Notice of Dismissal, which would have preserved "class integrity" by installing a representative plaintiff. We disagree.

{¶45} With respect to Civ.R. 41(A), the staff notes remark that "voluntary dismissal without a court order is *** limited," in that a "plaintiff may not seek dismissal of a claim without an order of the court in a class suit (Rule 23)." The notes explain that in a class action, the "plaintiff stands in a representative capacity," and "plaintiff's voluntary dismissal without a court order may prejudice the rights of the persons whom he represents."

{¶46} The existence of suitable class representatives is essential to the maintenance of a suit as a class action. Civ.R. 23; *Schmidt v. Avco Corp.* (1984), 15 Ohio St.3d 310, 313; cf. *E. Texas Motor Freight Sys., Inc. v. Rodriguez* (1977), 431 U.S. 395, 403-404 ("classwide liability" was inappropriate in the absence of suitable named plaintiffs); *Hill v. W. Elec. Co., Inc.* (C.A.4, 1982), 672 F.2d 381, 388 ("[t]he defect of inadequate representation in a class action concededly has, in general, both merits and non-merits implications"). The dismissal of all class representatives, then, necessarily has the potential to compromise continued viability of a class action. Thus, the class representatives' attempted voluntary dismissal falls under the requirement of Civ.R. 23(E) and was not self-effectuating. Cf. *Larry James Oldsmobile-Pontiac-GMC Truck Co., Inc. v. Gen. Motors Corp.* (1997), 175 F.R.D. 234, 236 (where the sole named plaintiff in a class action sought to dismiss its personal claims, the "proper course [wa]s to require court approval," pursuant to Fed.R.Civ.P. 23(e)); *Rittmaster v. PaineWebber Group, Inc.* (C.A.2, 1998), 147 F.3d 132, 139 ("reading Rules 41(a)(1) and 23(e) together demonstrates that *** an individual claim that is part of a certified class action cannot be dismissed without court approval"). Since the dismissal was not self-effectuating, the trial court possessed the jurisdiction to proceed with trial.

{¶47} We also reject the class representatives' argument that the trial court's decision to proceed with trial constituted an abuse of the court's discretion.

{¶48} By virtue of Civ.R. 23, trial courts possess "wide discretion in applying various procedural devices used to manage a class action." *Martin v. Grange Mut. Ins. Co.*, 11th Dist. No. 2004-G-2558, 2004-Ohio-6950, at ¶49. "The basic effect of Rule 23 is to provide the trial judge with considerable flexibility and discretion in handling

purported class actions. The rule provides him with detailed guidelines to assist him in this task." Staff notes to Civ.R. 23(D).

{¶49} In the conduct of actions to which this rule applies, the court may make appropriate orders: (1) determining the course of proceedings or prescribing measure[s] to prevent undue repetition or complication in the presentation of evidence or argument; (2) requiring, for the protection of the members of the class or otherwise for the fair conduct of the action, that notice be given in such manner as the court may direct to some or all of the members of any step in the action, or of the proposed extent of the judgment, or of the opportunity of members to signify whether they consider the representation fair and adequate, to intervene and present claims or defenses, or otherwise to come into the action; (3) imposing conditions on the representative parties or on intervenors; (4) requiring that the pleadings be amended to eliminate therefrom allegations as to representation of absent persons, and that the action proceed accordingly; (5) dealing with similar procedural matters. Civ.R. 23(D).

{¶50} In the present case, the trial court established November 24, 2009, as the last day which class members could "opt out" of the action.[6] The class representatives' attempted voluntary dismissal of their claims on December 7, 2009, violated the court's Order establishing a deadline "to opt out of the class." Thus, court approval was required before the representatives could dismiss their individual claims. *Rittmaster*, 147 F.3d at 135 ("a class member seeking permission to opt out late must first demonstrate 'excusable neglect' for his or her failure to comply with a fixed deadline"; interpreting Fed.Civ.R.P. 6(b)(2), analogous to Ohio Civ.R. 6(B)(2)).

{¶51} The class representatives acknowledge that the purpose of their attempt to substitute Wilcox as the sole class representative was "to eliminate the risk of involuntary dismissal" as a result of their failure to prosecute. Management of a class action is within the court's discretion. It was a valid exercise of the court's discretion to

6. According to the class notice mailed by the class representatives on September 4, 2009, the "request for Exclusion must be postmarked before either **45 days** from the postmark of this notice or **45 days** after **OCTOBER 10, 2009,** whichever is later."

refuse them to withdraw and/or allow Wilcox to intervene solely for the purpose of circumventing its Order that trial should proceed on December 7, 2009.

{¶52} The third and fourth assignments of error are without merit.

{¶53} In the fifth and final assignment of error, the class representatives claim the trial court abused its discretion by dismissing all class claims with prejudice for "failure to prosecute."

{¶54} Ohio's Civil Rules expressly provide for the dismissal of an action with prejudice for failure to prosecute. "Where 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)(1). "A dismissal under division (B) of this rule *** operates as an adjudication upon the merits unless the court, in its order for dismissal, otherwise specifies." Civ.R. 41(B)(3).

{¶55} "The decision to dismiss a case pursuant to Civ.R. 41(B)(1) is within the sound discretion of the trial court." *Quonset Hut, Inc. v. Ford Motor Co.* (1997), 80 Ohio St.3d 46, 47. That discretion must be cautiously exercised when dismissing a case on purely procedural grounds. *DeHart v. Aetna Life Ins. Co.* (1982), 69 Ohio St.2d 189, 192; *Jones v. Hartranft*, 78 Ohio St.3d 368, 372, 1997-Ohio-203, (the "standard is actually heightened when reviewing decisions that forever deny a plaintiff a review of a claim's merits"). "The law favors deciding cases on their merits unless the conduct of a party is so negligent, irresponsible, contumacious or dilatory as to provide substantial grounds for a dismissal with prejudice for a failure to prosecute or obey a court order." *Schreiner v. Karson* (1977), 52 Ohio App.2d 219, 223. In such cases, a reviewing court

"will not hesitate to affirm the dismissal of an action." *Quonset*, 80 Ohio St.3d at 48; *Taylor v. Leader Transp. Sys., Inc.*, 11th Dist. No. 2003-L-115, 2004-Ohio-6330, at ¶46 ("a dismissal of an action *** is generally supportable upon a finding of willfulness, bad faith, or fault on the part of the disobedient party").

{¶56} In the present case, the trial court provided the class representatives notice, in its December 2, 2009 Order, that the class claims were subject to dismissal if they did not proceed with trial on December 7, 2009. As a result of the class representatives' failure to comply with this Order, the court dismissed the class action with prejudice for failure to prosecute, pursuant to Civ.R. 41(B)(1) and (3).

{¶57} The class representatives assert that their failure to proceed with trial as ordered was the result of an "ethical crisis" induced by the trial court's pre-trial orders. The representatives assert that they were prepared to commence trial on November 2, 2009, but that the trial court's "11th hour rulings" rendered it impossible to do so. Specifically, the court's denial of the Motion *in Limine* on Aggregate Class Damages forced the representatives to have 1,000 absentee class members present evidence of loss-of-use/enjoyment damages at trial. Not only was this a practical impossibility, but the class notice ordered by the court did not advise absentee class members of the possibility that they would have to testify at trial. Thereafter, the representatives sought a continuance in order "to retain an expert on class damages or to amend class notice to solicit individual testimony at trial." The court denied this motion as well. These rulings had the effect of "systematic[ally] dismantling" the loss-of-use/enjoyment subclass, mandated by this court in a prior appeal.

{¶58} The dilemma created by the trial court's November 2009 rulings is described by the class representatives as follows: "By virtue of the court's refusal to send corrected notice, the lines of demarcation on absentee rights were clearly drawn. Any class member who failed to testify at trial would forfeit his right to share in class recovery. Consequently, going forward on December 7, 2009 would require the representative plaintiffs to put their own interests ahead of the class. It also meant class counsel was favoring a few clients over the many. Under the circumstances, both Plaintiffs' and class counsel had a clear ethical duty to take the stand they did [by refusing to proceed with trial]. In fact, to do otherwise would have violated their obligation to vigorously prosecute class claims." We disagree.

{¶59} It has been held that an attorney does not "necessarily avoid the consequences of a refusal to obey a direct order of a trial court simply because his understanding of his personal or professional duties may differ from that of the court." *In re Sherlock* (1987), 37 Ohio App.3d 204, 212, quoting *State v. Gasen* (1976), 48 Ohio App.2d 191, 195 fn. Moreover, "[a]n officer of the court must always be held to disobey such instructions at his peril, and must understand that his justification for doing so will be subjected to the closest scrutiny and will be sustained only where it may be fairly concluded that no other course was reasonably available to him." Id.; *Voltz v. Manor Care Nursing Home*, 11th Dist. No. 98-L-103, 1999 Ohio App. LEXIS 1435, at *16-*17 (appellant's "willful" failure to attend a mandatory arbitration hearing as ordered by the court constituted a "failure to prosecute" justifying involuntary dismissal, despite the appellant's belief that such hearing was "prejudicial, non-dispositive, and beyond the power of the trial court").

{¶60} We find no compelling reason to justify the class representatives' failure to proceed with trial on December 7, 2009. The representatives' claim that the denial of their Motion *in Limine* on Aggregate Class Damages compelled them to present testimony from all absentee class members is not tenable. This Motion sought an "Order affirming the admissibility of evidence supporting aggregate 'loss of use' class damages *** rather than individual proof of claims by absentee class members." The Motion did not contain a proffer of the evidence to be admitted, but, rather, argument that such evidence should be admissible. The trial court's denial of the Motion did not prevent the representatives from introducing such evidence; it was merely a refusal to issue a preliminary ruling on its admissibility. As a practical matter, the court's November 2, 2009 Order had no effect on the representatives' ability to present their case. In this respect, the court advised the representatives that their "efforts to strictly interpret prior rulings [denying the Motion *in Limine*] are misguided." The claim that absentee class members would have to testify at trial or lose their right of recovery is a non sequitur given the circumstances in this case.

{¶61} Although motions in limine are widely used in Ohio courts, they are "frequently misused and misunderstood." *State v. Grubb* (1986), 28 Ohio St.3d 199, 200 (citation omitted). "A 'motion *in limine*' is defined as '[a] pretrial motion requesting [the] court to prohibit opposing counsel from referring to or offering evidence on matters so highly prejudicial to [the] moving party that curative instructions cannot prevent [a] predispositional effect on [the] jury.'" *State v. French* (1995), 72 Ohio St.3d 446, 449, citing Black's Law Dictionary (6 Ed.1990) 1013. "A ruling on a motion *in limine* reflects the court's anticipated treatment of an evidentiary issue at trial and, as such, is a

tentative, interlocutory, precautionary ruling." Id. at 450; *Grubb*, 28 Ohio St.3d at 201-202. Accordingly, "[*t*]*he sustaining of a motion in limine*," or, in the present case, its denial, "*does not determine the admissibility of the evidence to which it is directed*." *Grubb*, 28 Ohio St.3d at 201 (emphasis sic) (citation omitted). Equally significant is the fact that a ruling on a motion in limine does not preserve an issue for appeal. "*An appellate court need not review the propriety of such an order unless the claimed error is preserved by an objection, proffer, or ruling on the record when the issue is actually reached and the context is developed at trial*." Id. at 203 (emphasis sic) (citation omitted).

{¶62} By refusing to proceed with trial, then, the class representatives precluded the possibility of this court considering the issue raised in their Motion *in Limine*.

{¶63} Likewise, the class representatives' refusal to proceed with trial was not justified by the trial court's refusal to amend class notice or grant a continuance to obtain an expert on damages. The purpose of class notice is not to advise absentee class members as to whether their testimony will or will not be required at trial; rather, the purpose is to advise absentee members that they will be bound by any judgment rendered, that they have the option of excluding themselves from the class, and that they may enter an appearance through counsel. Civ.R. 23(C)(2). With respect to the continuance, the representatives repeatedly claim they were prepared to proceed with trial as of November 2, 2009. As explained above, the trial court's November rulings did not impose any restriction on the representatives' ability to present their case. Assuming arguendo, the court abused its discretion by denying the continuance, this ruling could have been reviewed on appeal.

{¶64} Accordingly, the trial court's pre-trial rulings did not create an ethical dilemma as to justify the class representatives' refusal to abide by the court's express order to proceed with trial. The representatives were duly advised that their refusal to do so could result in the dismissal of their case. Given the representatives' willful refusal to proceed with trial, the court's decision to grant P&M Estates' motion to dismiss was not an abuse of discretion.

{¶65} The fifth assignment of error is without merit.

{¶66} For the foregoing reasons, the Judgment of the Portage County Court of Common Pleas, dismissing the present action upon its merits, is affirmed. Costs to be taxed against appellants.

TIMOTHY P. CANNON, P.J.,

MARY JANE TRAPP, J.,

concur.