*1996 Ohio App. LEXIS 3815, **

DARLENE DIALS, Plaintiff-Appellant -vs- KAREN L. POWERS, Defendant-Appellee

Case No. 95CAE11080

COURT OF APPEALS OF OHIO, FIFTH APPELLATE DISTRICT, DELAWARE COUNTY

1996 Ohio App. LEXIS 3815

July 2, 1996, DATE OF JUDGMENT ENTRY

NOTICE: [*1] THE LEXIS PAGINATION OF THIS DOCUMENT IS SUBJECT TO CHANGE PENDING RELEASE OF THE FINAL PUBLISHED VERSION.

PRIOR HISTORY: CHARACTER OF PROCEEDING: Civil appeal from the Court of Common Pleas. Case No. 95CVC06214.

DISPOSITION: JUDGMENT: Reversed and remanded

CASE SUMMARY

PROCEDURAL POSTURE: Appellant vehicle passenger sought review of an order of the Court of Common Pleas of Delaware County (Ohio), which granted appellee motorist's motion under Ohio R. Civ. P. 60(B) for relief from a default judgment entered against her on the issue of liability stemming from a collision in which the motorist was cited for violating Ohio Rev. Code Ann. § 4511.21.

OVERVIEW: In reversing the judgment of the trial court, the court agreed with the passenger's contention that the trial court erred in failing to hold an evidentiary hearing on the motorist's motion for relief from judgment under Ohio R. Civ. P. 60(B). To merit relief from judgment, the passenger was required to demonstrate that she had a meritorious defense if relief was granted, and that she was entitled to relief under one of the grounds specified in Rule 60(B). The motorist's affidavit alleged excusable neglect in that negotiations were ongoing with her husband's insurance company and that she believed that she did not need to take any action. The motorist's affidavit also alleged a meritorious defense on the issue of damages in that she had talked to the driver of the vehicle the motorist had struck as well as the passenger, and both informed her that they were not hurt. The court concluded that the motorist had submitted factual material of affidavit quality with her motion demonstrating grounds which, if true, would constitute a defense to the action. Therefore, pursuant to controlling case authority, the trial court was required to assign the matter for an evidentiary hearing.

OUTCOME: The court reversed the judgment of the trial court and remanded the case to the trial court.

CORE TERMS: insurance carrier, notify, negotiations, assignment of error, excusable neglect, default judgment, passenger, averred, evidentiary hearing, proffered, lawsuit, ongoing, notifying, promptly, meritorious defense, personal injury claim,

property damage claim, insurance agent, abused, notified, carrier, marital, contra, truck, entitled to relief, dispositive, violating, collision, distance, collided

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Civil Procedure > Judgments > Relief From Judgment > Excusable Neglect & Mistakes > General Overview

HN1 To merit relief from judgment, a party seeking relief must demonstrate: (1) she has a meritorious defense if relief is granted; (2) she is entitled to relief under one of the grounds specified in Ohio R. Civ. P. 60(B)(1)-(5); and (3) the motion is made within a reasonable time. Ohio R. Civ. P. 60(B)(1) allows a trial court to grant relief from judgment for mistake, inadvertence, surprise or excusable neglect. More Like This Headnote

Civil Procedure > Judgments > Relief From Judgment > Excusable Neglect & Mistakes > General Overview

HN2 Where a motion for relief from judgment and supporting evidence contains sufficient allegations of operative facts that would support a meritorious defense to the judgment, the court must assign the matter for evidentiary hearing. More Like This Headnote

COUNSEL: APPEARANCES:

For Plaintiff-Appellant: J. Boyd Binning, 592 South Third Street, Columbus, OH 43215. **Paul Croushore,** 601 South High Street, Columbus, OH 43215.

For Defendant-Appellee: John C. Nemeth, Michael J. Collins, 21 East Frankfort Street, Columbus, OH 43206.

JUDGES: Hon. William B. Hoffman, P.J., Hon. Sheila G. Farmer, J., Hon. W. Don Reader, J. Reader, J. concurs. Hoffman, P.J. dissents.

OPINIONBY: Sheila G. Farmer

OPINION: OPINION

Farmer, J.

On July 25, 1993, appellee, Karen L. Powers, was operating a vehicle which collided with a vehicle in which appellant, Darlene Dials, was a passenger. Appellee was cited with violating R.C. 4511.21, assured clear distance ahead.

On June 26, 1995, appellant filed a complaint against appellee for damages she incurred from the accident. Appellee failed to file an answer.

On August 3, 1995, appellant filed a motion for default judgment. By judgment entry dated August 18, 1995, **[*2]** the trial court granted said motion on the issue of liability only. A damages hearing was held on September 11, 1995. By judgment

entry dated September 14, 1995, the trial court granted judgment to appellant and against appellee in the amount of $ 36,607.98 plus interest and court costs.

On October 6, 1995, appellee filed a motion for relief from judgment. On October 11, 1995, the trial court scheduled a non-oral hearing for October 30, 1995. Appellant filed a contra motion on October 13, 1995. By judgment entry dated October 27, 1995, the trial court granted appellee's motion.

Appellant filed a notice of appeal and this matter is now before this court for consideration. Assignments of error are as follows:

I

THE TRIAL COURT ABUSED ITS DISCRETION IN VACATING THE DAMAGES JUDGMENT WHERE THE DEFENDANT-APPELLANT FAILED TO ALLEGE ANY MERITORIOUS DEFENSE.

II

THE TRIAL COURT ABUSED ITS DISCRETION IN VACATING THE DAMAGES JUDGMENT WHERE THE ALLEGED EXCUSABLE NEGLECT WAS NOT DEMONSTRATED BY THE FACTS.

III

THE TRIAL COURT ERRED IN FAILING TO HOLD AN EVIDENTIARY HEARING AND ASSUMING THAT THE DEFENDANT HAD ALLEGED SUFFICIENT BASIS FOR VACATING THE DAMAGES JUDGMENT.

III

We shall address **[*3]** Assignment of Error III first because we find it to be dispositive of the appeal. Appellant claims the trial court erred in failing to hold an evidentiary hearing on the Civ.R. 60(B) motion. We agree.

HN1 To merit relief from judgment, appellee must demonstrate 1) she has a meritorious defense if relief is granted; 2) she is entitled to relief under one of the grounds specified in Civ.R. 60(B)(1) through (5); and 3) the motion is made within a reasonable time. GTE Automatic Electric v. ARC Industries (1976), 47 Ohio St. 2d 146, 351 N.E.2d 113, paragraph two of the syllabus. Under the second prong of *GTE Automatic* and as applicable to the case *sub judice* is Civ.R. 60(B)(1) which allows a trial court to grant relief from judgment for "mistake, inadvertence, surprise or **excusable neglect**." (Emphasis added.)

On October 20, 1995, appellee filed her own affidavit in support of her motion for relief from judgment. In particular, appellee's affidavit alleges excusable neglect at paragraph eight:

8. Due to the ongoing negotiations of which I was aware, as well as the settling of the property damage claim, I believed that the matter was being appropriately handled by my husband's **[*4]** insurance company, and therefore I did not need to take any action.

Appellees' affidavit at paragraph three further alleges a la *GTE Automatic* a meritorious defense on the issue of damages:

3. I did talk to the driver and passenger of the truck towing the boat, and both informed me that they were not hurt.

Appellant's Contra Motion included a February 14, 1995 letter from appellee's insurance carrier acknowledging the claim. See, Plainiff's Exhibit 3 attached to Plaintiff's October 13, 1995 contra motion. This acknowledgment was eight months prior to the filing of the lawsuit.

We find appellee submitted factual material of affidavit quality with her motion which demonstrates grounds which, if true, would constitute a defense to the action. See, *Adomeit v. Baltimore* (1974), 39 Ohio App. 2d 97, 316 N.E.2d 469; *East Ohio Gas v. Walker* (1978), 59 Ohio App. 2d 216, 394 N.E.2d 348. HN2 "Where the motion and supporting evidence contains sufficient allegations of operative facts which would support a meritorious defense to the judgment, the court must assign the matter for evidentiary hearing." *Cogswell v. Cardio Clinic of Stark County* (October 21, 1991), 1991 Ohio App. LEXIS **[*5]** 5481, Stark App. No. CA 8553, unreported, citing *Banc Ohio National Bank v. Schiesswohl* (1988), 51 Ohio App. 3d 130, 554 N.E.2d 1362.

Therefore, we conclude the matter should have been set for an evidentiary hearing.

Assignment of Error III is granted.

I, II

In light of our disposition of appellant's third assignment of error, we find the arguments raised herein to be moot.

The judgment of the Court of Common Pleas of Delaware County, Ohio is hereby reversed and remanded.

By Farmer, J.

Reader, J. concurs.

Hoffman, P.J. dissents.

JUDGES

JUDGMENT ENTRY

For the reasons stated in the Memorandum-Opinion on file, the judgment of the Court of Common Pleas of Delaware County, Ohio is reversed and remanded to said court for further proceedings consistent with this opinion.

DISSENTBY: HOFFMAN

DISSENT: *HOFFMAN, P.J., DISSENTING*

I respectfully dissent from the majority opinion. I would sustain appellant's second assignment of error which I find to be dispositive of this appeal and not require a

remand for an evidentiary hearing. To explain my reasons for doing so, I offer the following Statement of the Facts and Case as supplemental to that found in the majority **[*6]** opinion.

STATEMENT OF THE FACTS AND CASE

On or about July 25, 1993, appellee was operating a vehicle which collided with a boat being towed by a truck in which appellant was a passenger. The appellee was cited with violating R.C. 4511.21, assured clear distance ahead. Appellant claimed in her complaint to have suffered personal injuries and to have incurred medical expenses as a result of the collision. Appellant averred in her complaint that appellee negligently caused the collision.

Shortly after the accident, appellee reported the accident to her husband's insurance company who insured the vehicle she was operating. The insurer settled appellant's property damage claim through negotiations with appellant's counsel. Negotiations regarding appellant's personal injury claim were ongoing from August, 1993, until February, 1995. Appellee was aware her husband's insurance carrier was handling the matter on her behalf. Negotiations eventually broke off without settlement as to appellant's personal injury claim.

In May of 1995, appellee separated from her husband and moved out of the family home. Appellant filed her complaint against appellee on June 26, 1995. Service was obtained **[*7]** on appellee on or about June 30, 1995.

The appellee claims she did not notify the insurance carrier of the filing of the lawsuit against her because she did not want to discuss the matter with her estranged husband or with the insurance agent for the insurance carrier because the insurance agent was also her husband's brother.

Appellee reconciled with her husband in September, 1995. Appellee then brought to her husband's attention the fact a complaint had been served upon her. The appellee's husband then referred the matter to the insurance carrier. However, a default judgment had already been rendered against the appellee in the interim on August 18, 1995, on the issue of liability.

The trial court conducted a hearing on damages on September 11, 1995, after which it awarded judgment to appellant in the amount of $ 36,607.98 plus interest and court costs. (See judgment entry filed September 14, 1995.) The appellee was notified of this damage hearing by regular mail on August 10, 1995, but failed to appear. The hearing notice specifically informed appellee that default judgment had been already rendered and the hearing was to determine the damages to be awarded to the appellant. **[*8]**

Appellee filed her motion for relief from judgment on October 6, 1995. Attached thereto was an affidavit of appellee wherein she averred that after the incident, the passenger of the truck (appellant) informed her (appellee) that she was not hurt. Appellee further averred that due to her separation from her husband, she did not want to talk to him about the complaint, nor their insurance agent because he was her brother-in-law. Appellee further averred because of the ongoing negotiations between the insurance carrier and appellant of which she (appellee) was aware, [including the settlement of appellant's property damage claim], appellee "believed that the matter was being appropriately handled by her husband's insurance

company and therefore I did not need to take any action." (Powers Aff. No. 8.)

The trial court scheduled a non-oral hearing on appellee's motion for relief from judgment for October 30, 1995. Appellant filed a memorandum contra on October 13, 1995. On October 27, 1995, the trial court granted appellee's motion for relief from judgment.

LEGAL ANALYSIS

In Colley v. Bazell (1980), 64 Ohio St. 2d 243, 416 N.E.2d 605, the Ohio Supreme Court stated that **[*9]** the inquiry into whether neglect is excusable or inexcusable:

...must of necessity take into consideration all the surrounding facts and circumstances. Among such circumstances is whether the defendant promptly notified his carrier of the litigation. A second circumstance is the lapse of time between the last day for the filing of a timely answer and the granting of the default judgment. A third circumstance is the amount of the judgment granted. A fourth, but not decisive circumstance, is the experience and understanding of the defendant with respect to litigation matters.

Id. at 249.

There is a significant difference between promptly notifying the insurance carrier of the incident and promptly notifying the insurance carrier of the litigation. The fact that the appellee notified her husband's carrier of the incident and was aware of the fact that the property damage was settled and negotiations ongoing as to appellant's personal injury claim, does not justify or excuse her failure to notify the insurance carrier of the filing of formal litigation. Not only did appellant fail to notify the carrier of the filing of the complaint, she failed to notify the insurance carrier of **[*10]** the damage hearing after receiving notice that a default judgment had been entered. "Neglect of an individual to seek legal assistance after being served with court papers is not excusable." *Associated Estates Corp. v. Fellows* (1983), 11 Ohio App. 3d 112, 116, 463 N.E.2d 417. An allegation that a defendant "was under the impression that the insurance company which represents the owner of the property was defending not only the owner but also their interest...is not a sufficient factual basis to demonstrate the movant is entitled to relief under Civ.R. 60(B)(1). *Adomeit v. Baltimore* (1974), 39 Ohio App. 2d 97, 106, 316 N.E.2d 469.

Likewise, I find appellee's attempt to excuse her failure to notify the insurance carrier of the lawsuit because of her marital discord unpersuasive. Initially, I observe that such excuse is inherently inconsistent with her other proffered excuse for not notifying the insurance carrier; i.e., that she believed the matter was already being taken care of by the insurance carrier. To the contrary, this proffered excuse concerning her marital turmoil recognizes the need to notify the insurance carrier but seeks to excuse her failure to do so because **[*11]** of the emotional distress it would cause her. Appellee's recognition of the need to notify the insurance carrier is further evidenced by her communication of the filing of the lawsuit shortly after reconciliation with her husband.

Despite the logical inconsistency between the two proffered excuses noted above, there is no evidence the appellee's emotional distress caused by her marital problems rendered her incompetent to understand her legal obligations. As such, it cannot constitute a valid excuse for failing to notify the insurance carrier or

otherwise responding to the complaint. *Fouts v. Weiss-Carson* (1991), 77 Ohio App. 3d 563, 602 N.E.2d 1231. Defendants have "...an affirmative duty to take some action after being served with the complaint...or risk having a judgment taken against them." *Adomeit, supra*, at 106.

Neither of appellee's proffered reasons for failing to respond to the complaint, when considered singularly or together, are legally sufficient to constitute excusable neglect. I believe the trial court abused its discretion in finding excusable neglect on the part of appellee for her failure to answer appellant's complaint. Accordingly, I would sustain appellant's **[*12]** second assignment of error.

JUDGE WILLIAM B. HOFFMAN