[Cite as *Long v. Ferrell*, 2018-Ohio-155.]

COURT OF APPEALS
STARK COUNTY, OHIO
FIFTH APPELLATE DISTRICT

ASHLEY LONG, Individually and as the mother of MA-LEIGHA HARRIS, A minor	:	JUDGES: Hon. John W. Wise, P.J. Hon. Craig R. Baldwin, J. Hon. Earle E. Wise, Jr., J.
Plaintiff-Appellees	:	
-vs-	:	
SAVANNAH FERRELL	:	Case No. 2017CA00066
Defendant-Appellant	:	O P I N I O N

CHARACTER OF PROCEEDING: Appeal from the Court of Common Pleas, Case No. 2016CV01520

JUDGMENT: Affirmed

DATE OF JUDGMENT: January 9, 2018

APPEARANCES:

For Plaintiff-Appellees

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Wise, Earle, J.

{¶ 1} Defendant-Appellant, Savannah Ferrell (Ferrell) appeals the March 21, 2017 judgment of the Stark County Court of Common Pleas denying her Civ.R. 60(B) Motion to Vacate Default Judgment. Plaintiff-Appellee is Ashley Long (Long), individually, and as mother of Ma-Leigha Harris.

FACTS AND PROCEDURAL HISTORY

{¶ 2} On February 28, 2016, Long and her two children, Michael and 18-month old Ma-Leigha were at Ferrell's home. Ferrell asked Long to come over because she was upset over needing to take two of her four children to the hospital due to allegations of sexual abuse perpetrated by their father. Kayla Pellerin was present to watch Ferrell's remaining two children while Ferrell went to the hospital. Before Ferrell left, Long went to the store, leaving Michael and Ma-Leigha at Ferrell's home.

{¶ 3} As Ferrell got ready to leave, she observed the children playing in the front yard, the street, and behind her vehicle. She therefore went inside and asked Pellerin to gather the children and take them inside. Ferrell then saw the children run toward the back yard.

{¶ 4} Ferrell got into her truck to leave for the hospital. She briefly spoke with Pellerin, who was standing beside Ferrell's truck. As Ferrell backed her truck out of the driveway, she hit Ma-Leigha. Ma-Leigha sustained serious injuries.

{¶ 5} Ferrell initially lied about what happened by saying Ma-Leigha fell in the woods. But when questioned by police several hours after the accident, she admitted hitting Ma-Leigha with her truck.

{¶ 6} On July 1, 2016, Long filed a personal injury complaint on behalf of Ma-Leigha for the injuries she sustained, and on behalf of herself for the emotional distress she suffered due to Ma-Leigha's injuries. Ferrell was served with the complaint on August 10, 2016. On September 30, 2016, after Ferrell failed to answer the complaint, Long filed a motion for default judgment.

{¶ 7} On December 2, 2016, the trial court held a hearing on the matter. Long appeared at the hearing represented by counsel. Ferrell, although insured by Founders Insurance, appeared pro se. The trial court heard testimony from both Long and Ferrell. For her part, Ferrell admitted she struck Ma-Leigha while backing out of her driveway, causing the child's injuries. Ferrell was not sure who was responsible for watching Ma-Leigha while Long was at the store. Based on Ferrell's admissions, on December 5, 2016, the trial court issued a judgment entry granting Long's motion for default judgment, and awarding a total of $200,000 in financial and compensatory damages.

{¶ 8} On January 25, 2017, Ferrell, now represented by counsel, filed a Civ.R. 60(B) motion to vacate. For cause, Ferrell claimed she had a meritorious defense to the claims against her -- contributory and third party negligence on the part of Long and Pellerin -- and that the judgment was the result of excusable neglect, specifically, her lack of knowledge and understanding of her obligations under the law. On February 7, 2017, Long filed a memorandum in opposition. Ferrell replied on February 17, 2017.

{¶ 9} On March 21, 2017, the trial court denied the motion without a hearing. In its judgment entry, the trial court found that because Ferrell admitted she hit Ma-Leigha, knew she had hit her and proceeded to cover up that fact for several hours, Ferrell had failed to demonstrate she had a meritorious claim or defense. The trial court further found

no excusable neglect, nor lack of knowledge of the legal system. The court noted Ferrell had attempted to obtain counsel through the Office of Legal Aid, and the Public Defender's Office. The court further noted counsel for Long had contacted Ferrell as well as Ferrell's automobile liability provider before filing suit in an attempt to settle without success. Finally, the court found Ferrell failed to argue at the default/damages hearing that she had attempted to obtain counsel or did not understand the legal system.

{¶ 10} Ferrell now brings this appeal, raising the following four assignments of error

I

{¶ 11} "THE TRIAL COURT'S REFUSAL TO VACATE AND SET ASIDE THE DEFAULT JUDGMENT AGAINST DEFENDANT-APPELLANT SAVANNAH FERRELL FOR A LACK OF A MERITORIOUS DEFENSE CONSTITUTES AN ABUSE OF DISCRETION."

II

{¶ 12} "THE TRIAL COURT'S REFUSAL TO VACATE AND SET ASIDE THE DEFAULT JUDGMENT AGAINST DEFENDANT-APPELLANT SAVANNAH FERRELL FOR EXCUSABLE NEGLECT CONSTITUTES AN ABUSE OF DISCRETION."

III

{¶ 13} "THE TRIAL COURT'S REFUSAL TO VACATE AND SET ASIDE THE DEFAULT JUDGMENT AGAINST DEFENDANT-APPELLANT SAVANNAH FERRELL FOR OTHER REASONS JUSTIFYING RELIEF CONSTITUTES AN ABUSE OF DISCRETION."

IV

{¶ 14} "THE TRIAL COURT'S FAILURE TO HOLD AN EVIDENTIARY HEARING ON DEFENDANT'S MOTION TO VACATE BEFORE RULING ON THE MOTION CONSTITUTES AN ABUSE OF DISCRETION.

{¶ 15} Because Ferrell's assignments of error involve related concepts, we address them together.

{¶ 16} First, we review the trial court's decision on a motion for relief from judgment for an abuse of discretion. State ex rel. Russo v. Deters (1997), 80 Ohio St.3d 152, 153, 684 N.E.2d 1237 (1997). Ferrell must demonstrate, therefore, not merely an error of law or judgment, but that the trial court's attitude was unreasonable, arbitrary or unconscionable. Blakemore v. Blakemore, 5 Ohio St.3d 217, 219, 450 N.E.2d 1150 (1983).

{¶ 17} Next, the standard for when an evidentiary hearing on a Civ.R. 60(B) motion is necessary is set forth in *Cogswell v. Cardio Clinic of Stark County, Inc.*, 5th Dist. Stark No. CA-8553, 1991 WL 242070 (Oct. 21, 1991). In *Cogswell*, this court held under Civ.R. 60(B), a hearing is not required unless there exist issues supported by evidentiary quality affidavits. A trial court must hold an evidentiary hearing when the motion and supporting evidence contain sufficient allegations of operative facts, which would support a meritorious defense to the judgment. *Cogswell; BancOhio National Bank v. Schiesswohl*, 51 Ohio App.3d 130, 554 N.E.2d 1362 (9th Dist.1988).

{¶ 18} Third, in order to prevail on a motion for relief from judgment, the movant must demonstrate: 1) the party has a meritorious defense or claim to present if the relief is granted; 2) the party is entitled to relief under one of the grounds stated in Civ.R.

60(B)(1) through (5); and 3) the motion is made within a reasonable time. *GTE Automatic Elec., Inc. v. ARC Industries, Inc.*, 47 Ohio St.2d 146, 150, 351 N.E.2d 113 (1976). A movant must satisfy all of the *GTE* requirements, and the motion should be denied if any requirement is not met. *Strack v. Pelton*, 70 Ohio St.3d 172, 174, 637 N.E.2d. 914 (1994).

{¶ 19} Civ. R. 60(B) provides:

> (B) Mistakes; Inadvertence; Excusable Neglect; Newly Discovered Evidence; Fraud; Etc. On motion and upon such terms as are just, the court may relieve a party or his legal representative from a final judgment, order or proceeding for the following reasons: (1) mistake, inadvertence, surprise or excusable neglect; (2) newly discovered evidence which by due diligence could not have been discovered in time to move for a new trial under Rule 59(B); (3) fraud (whether heretofore denominated intrinsic or extrinsic), misrepresentation or other misconduct of an adverse party; (4) the judgment has been satisfied, released or discharged, or a prior judgment upon which it is based has been reversed or otherwise vacated, or it is no longer equitable that the judgment should have prospective application; or (5) any other reason justifying relief from the judgment. The motion shall be made within a reasonable time, and for reasons (1), (2) and (3) not more than one year after the judgment, order or proceeding was entered or taken. A motion under this subdivision (B) does not affect the finality of a judgment or suspend its operation.

{¶ 20} "Where timely relief is sought from a default judgment and the movant has a meritorious defense, doubt, if any, should be resolved in favor of the motion to set aside the judgment so that cases may be decided on their merits." *GTE Automatic Electric v. ARC Industries*, 47 Ohio St.2d 146, 351, N.E.2d 113 (1976) at paragraph three of the syllabus.

{¶ 21} Turning to the instant matter, Ferrell argues the trial court abused its discretion when it failed to find pursuant to her Civ.R. 60(B) arguments that: 1) she had established a meritorious defense; 2) she established excusable neglect and other just cause for relief, and 3) when the trial court failed to hold an evidentiary hearing on her motion.

{¶ 22} Ferrell must satisfy all three prongs of the *GTE* test. There is no dispute between the parties as to the third prong. Ferrell timely filed her Civ.R. 60(B) motion as it was filed less than a month after the trial court issued its judgment.

{¶ 23} Next, as to Ferrell's meritorious defense claim, a defense is meritorious if it is not a sham and when, if true, it states a defense in part or in whole to the cause of action set forth. *Brenner v. Shore*, 34 Ohio App.2d 209, 215, 297 N.E.2d 550 (1973). It was not necessary for Ferrell to establish that her defense would ultimately be successful. *Morgan Adhesives Co. v. Sonicor Instrument Corp*., 107 Ohio App.3d 327, 334, 668 N.E.2d 959 (1995).

{¶ 24} Ferrell advanced defenses in her sworn affidavit of contributory negligence on the part of Long, and third-party negligence on the part of Pellerin. Contributory negligence and third-party negligence are reasonable defenses. Because it is irrelevant

whether the defenses would be successful, we find the defenses meritorious under the first prong of the *GTE* test. Therefore, Ferrell should have been afforded a hearing.

{¶ 25} The remaining issue however, is whether Ferrell demonstrated a valid ground for relief under the provisions of Civ.R. 60(B).

{¶ 26} Ferrell first argues excusable neglect pursuant to Civ.R. 60(B)(1).

{¶ 27} The Supreme Court of Ohio has defined "excusable neglect" in the negative, stating "that the inaction of a defendant is not 'excusable neglect' if it can be labeled as a 'complete disregard for the judicial system.' " *Kay v. Marc Glassman, Inc*., 76 Ohio St.3d 18, 20, 665 N.E.2d 1102 (1996), quoting *GTE Automatic Elec., Inc*. at 153, 351 N.E.2d 113. The inquiry into whether a moving party's inaction constitutes excusable neglect must take into consideration all the individual facts and circumstances in each case. *Colley v. Bazell*, 64 Ohio St.2d 243, 249, 416 N.E.2d 605 (1980).

{¶ 28} Ferrell argues her failure to file an answer to Long's complaint is due to her inexperience with the legal system. It is well established, however, that pro se litigants are held to the same standards as litigants represented by counsel and are presumed to have knowledge of the law and legal proceedings. *State ex rel. Fuller v. Mengel*, 100 Ohio St.3d 352, 2003-Ohio-6448, 800 N.E.2d 25, ¶ 10.

{¶ 29} Moreover, we have previously found that an appellant's legal inexperience does not equate to excusable neglect. Failure to plead and/or seek legal advice after admittedly receiving complaint is not excusable neglect under Civ.R. 60(B)(1). *Shankle v. Egner*, 5th Dist. Nos. 2011CA00121, 2011CA00143, 2012-Ohio-2027 ¶ 65, *Roe v. Nicholas*, 5th Dist. Guernsey App. No. 00CA32, 2001 WL 474254 (Apr. 26, 2001). Ferrell

does not dispute her receipt of the complaint. We therefore decline to find excusable neglect.

{¶ 30} Finally, Ferrell argues she is entitled to relief pursuant to Civ.R. 60(B)(5).

{¶ 31} The Ohio Supreme Court has held that grounds for invoking Civ.R. 60(B)(5) should be substantial and further that "Civ.R. 60(B)(5) is intended as a catch-all provision reflecting the inherent power of a court to relieve a person from the unjust operation of a judgment, but it is not to be used as a substitute for any of the other more specific provisions of Civ.R. 60(B). *Caruso-Cirese, Inc. v. Lohman*, 5 Ohio St.3d. 64, 448 N.E.2d 1365 (1983) paragraphs one and two of the syllabus.

{¶ 32} Under this portion of her argument, Ferrell reiterates the arguments she advanced for excusable neglect. But as noted above, Civ.R. 60(B)5 may not be used as a substitute for more specific provisions of the rule. We have found above that Ferrell's inaction does not constitute excusable neglect, and decline to find a different result under Civ.R. 60(B)(5).

{¶ 33} While we find Ferrell did advance meritorious defenses and the trial court should have therefore held a hearing, because Ferrell is unable to satisfy all three prongs of the *GTE* test, we find no abuse of discretion in the denial of Ferrell's motion and affirm the judgment of the trial court.

By Wise, Earle, J.

Wise, John, P.J. and

Baldwin, J. concur.

EEW/rw