[Cite as *Dispatch Printing Co. v. Recovery Ltd. Partnership*, 2015-Ohio-1368.]

IN THE COURT OF APPEALS OF OHIO

TENTH APPELLATE DISTRICT

The Dispatch Printing Company et al.,	:	
Plaintiffs-Appellees,	:	
v.	:	No. 14AP-640 (C.P.C. No. 05CV-4220)
Recovery Limited Partnership et al.,	:	(ACCELERATED CALENDAR)
Defendants-Appellees,	:	
(Robert M. Hoffman,	:	
Appellant).	:	
The Dispatch Printing Company et al.,	:	
Plaintiffs-Appellees,	:	
v.	:	No. 14AP-641 (C.P.C. No. 05CV-11795)
Gilman D. Kirk et al.,	:	(ACCELERATED CALENDAR)
Defendants-Appellees,	:	
(Robert M. Hoffman,	:	
Appellant).	:	
Michael H. Williamson et al.,	:	
Plaintiffs-Appellees,	:	
v.	:	No. 14AP-642 (C.P.C. No. 06CV-4469)
Recovery Limited Partnership et al.,	:	(ACCELERATED CALENDAR)
Defendants-Appellees,	:	
(Robert M. Hoffman,	:	
Appellant).	:	

D E C I S I O N

Rendered on April 7, 2015

Anspach Meeks Ellenberger LLP, and *James S. Savage*, for appellees.

Golden & Meizlish Co., L.P.A., *Keith E. Golden* and *Adam H. Karl*, for appellant.

APPEALS from the Franklin County Court of Common Pleas

TYACK, J.

{¶ 1} Robert M. Hoffman is appealing from the Franklin County Court of Common Pleas' order which vacated the entry granting Hoffman's motion for leave to file a proof of claim instanter and which denied his motion for leave to file a proof of claim instanter. For the following reasons, we reverse the trial court's decision denying leave to file a proof of claim instanter.

{¶ 2} Hoffman presents one assignment of error:

> THE TRIAL COURT ERRED AND ABUSED ITS DISCRETION WHEN IT DENIED ROBERT M. HOFFMAN'S MOTION FOR LEAVE TO FILE PROOF OF CLAIM *INSTANTER*.

{¶ 3} Hoffman filed a "Motion for Leave to File Proof of Claim Instanter" on June 27, 2014. The trial court initially granted this motion but then later denied it and vacated its earlier entry. The trial court reasoned that Hoffman failed to submit a claim by the claim bar date of January 7, 2014 and was unable to demonstrate excusable neglect for failing to do so. Hoffman timely appealed this decision.

{¶ 4} This case involves the golden hoard of a sunken treasure ship. During a hurricane in 1857, the *SS Central America* sank off the coast of South Carolina carrying hundreds of passengers and several tons of gold. *Columbus-America Discovery Group v. Atlantic Mut. Ins. Co.*, 974 F.2d 450 (4th Cir.1992). The sinking of the *SS Central America* is one of the worst disasters in American maritime history and further exasperated the economic state of this nation after the Panic of 1857 as the ship was

carrying treasures to New York on the last leg of a journey from the gold fields of California. *Id.*

{¶ 5} Recovery Limited Partnership ("RLP") was formed in 1985 as an entity to help finance an expedition for the discovery and subsequent recovery of gold on the *SS Central America*. After the wreck's discovery in 1987, gold and other artifacts were recovered over the next four years. The U.S. District Court for the Eastern District of Virginia in a maritime action, established ownership of the wreck and its contents, ruling that Columbus-America Discovery Group, as an agent of RLP, owned 92.5 percent of the wreck and its contents.

{¶ 6} Columbus Exploration, LLC was formed to address the concerns of some of the investors in RLP. The Franklin County Court of Common Pleas placed RLP and Columbus Exploration into receivership. The receiver compiled a list of the receivership assets including the rights of RLP as salvor in possession of the *SS Central America*. The receiver also retained experts, identified claimants, moved to publish notification to unknown claimants, and set a claim bar date. The receiver identified 86 possible claimants who were all sent letters. After publications in the *Columbus Dispatch* and the Southeastern edition of the *Wall Street Journal* on November 20 and 27, 2013, a claim-bar date of December 20, 2013 was established by the trial court. The date was eventually extended a few weeks to January 7, 2014.

{¶ 7} Hoffman claimed he became aware of the receiver's actions after the claim bar date had passed. Hoffman eventually moved to file a proof of claim instanter. Hoffman claims that as payment for legal services he provided to RLP in the 1980's, he is entitled to "receive an interest of 1.5% of the net recovery in consideration for both past and future business consulting services and for previous legal work performed in connection with the expedition." (July 7, 1985 Letter from Hoffman to Thomas Thompson.) Hoffman offers, among other proof, a letter between himself and Thomas Thompson who was at the center of the gold recovery effort.

{¶ 8} The Supreme Court of Ohio has held that R.C. 2735.04 enables a trial court to exercise its discretion to limit or expand a receiver's powers. *State ex rel. Celebrezze v. Gibbs,* 60 Ohio St.3d 69 (1991); *Wells Fargo Bank, N.A. v. Odita,* 10th Dist. No. 13AP-663, 2014-Ohio-2540, ¶ 15. "Absent a showing that the trial court has abused that

discretion, a reviewing court will not disturb the trial court's judgment." *Id.* "The term 'abuse of discretion' connotes more than an error of law or judgment; it implies that the court's attitude is unreasonable, arbitrary or unconscionable." *Blakemore v. Blakemore*, 5 Ohio St.3d 217, 219 (1983). An abuse of discretion implies a decision that is arbitrary or capricious, one that is without a reasonable basis or clearly wrong. *Pembaur v. Leis*, 1 Ohio St.3d 89 (1982); *In re Ghali*, 83 Ohio App.3d 460 (10th Dist.1992).

{¶ 9} Hoffman argues that the receiver failed to provide reasonable opportunity for unknown creditors to present and prove their claims. Hoffman claims excusable neglect, because the notice in the newspapers was insufficient and highly unlikely to provide notice to unknown claimants.

{¶ 10} The general duties of a receiver include: giving notice to all known creditors of the receiver's appointment, affording "reasonable opportunity for creditors to present and prove their claims, and, if deemed appropriate by the receiver or the court, publish in a newspaper of general circulation within the County a deadline or bar date for submitting claims." Loc.R. 66.05 of the Court of Common Pleas of Franklin County. The duties also include determining the validity and priority of creditor's claims. The trial court found that the published notice had sufficient content and was published in a manner very reasonably calculated to inform the alleged creditors. The trial court reasoned that Hoffman's failure to view the notice was not excusable neglect. We examine whether the trial court abused its discretion in this determination.

{¶ 11} "[T]he concept of 'excusable neglect' must be construed in keeping with the proposition that Civ.R. 60(B)(1) is a remedial rule to be liberally construed, while bearing in mind that Civ.R. 60(B) constitutes an attempt to 'strike a proper balance between the conflicting principles that litigation must be brought to an end and justice should be done.' " *Colley v. Bazell*, 64 Ohio St.2d 243, 248 (1980). In determining whether excusable or inexcusable neglect has occurred, a court " 'must of necessity take into consideration all the surrounding facts and circumstances.' " *Griffey v. Rajan*, 33 Ohio St.3d 75 (1987), quoting *Colley* at 249; *Porter, Wright, Morris & Arthur, LLP v. Frutta Del Mondo, Ltd.*, 10th Dist. No. 08AP-69, 2008-Ohio-3567. "Excusable neglect" is defined in the negative and inaction of the party 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 (1996), quoting *GTE Automatic Elec., Inc. v. ARC Industries, Inc.*, 47 Ohio St.2d 146 (1976). Attorney's conduct falling "substantially below what is reasonable under the circumstances," constitutes inexcusable neglect. *GTE Automatic Elec.* at 152. Although a movant is not required to support its motion with evidentiary materials, the movant must do more than make bare allegation that he or she is entitled to relief. *Kay*, supra.

{¶ 12} The Ohio Fourth Appellate District has summarized a number of cases showing what factors and circumstances do and do not constitute excusable neglect. *Vanest v. Pillsbury Co.*, 124 Ohio App.3d 525 (4th Dist.1997). Though the case is nearly two decades old, the general principals and case examples given remain true.

{¶ 13} First, most cases finding excusable neglect also have found special circumstances that justify the neglect: *Kay* (attorney did not file answer timely due to office reorganization); *Colley* (by properly post-marked letter, attorney referred matter to insurance carrier notifying carrier that action was required within 28 days; the letter was lost in mail); *Perry v. Gen. Motors Corp.*, 113 Ohio App.3d 318 (10th Dist.1996) (a corporate employee sent the complaint to wrong department, thus preventing proper corporate official from responding to complaint prior to entry of default judgment); *McGee v. C&S Lounge*, 108 Ohio App.3d 656 (10th Dist.1996) (confusion created between insurance carrier and defendant resulted in default judgment rendered against defendant); *Bluffs of Wildwood Homeowners' Assn., Inc. v. Dinkel*, 96 Ohio App.3d 278 (12th Dist.1994) (personal and family illness may constitute excusable neglect); *Hopkins v. Quality Chevrolet, Inc.*, 79 Ohio App.3d 578 (4th Dist.1992) (failure to deliver complaint and summons to proper corporate authority may constitute excusable neglect); *Mid-America Acceptance Co. v. Lightle*, 63 Ohio App.3d 590 (10th Dist.1989) (attorney, who was in the process of changing secretaries, had received notice of trial date, but the staff failed to note the date on the calendar); *Gen. Motors Acceptance Corp. v. Deskins*, 16 Ohio App.3d 132 (8th Dist.1984) (plaintiff's reliance upon defense counsel's statement to "forget it" (the complaint) constitutes excusable neglect); *Brenner v. Shore*, 34 Ohio App. 2d 209, 211 (10th Dist.1973) (severe emotional strain resulting in hospitalization for "complete physical and mental collapse"). *Vanest* at fn. 9.

{¶ 14} Second, other cases that declined to find excusable neglect, despite the presence of special or unusual circumstances, generally suggest that if the party or the attorney could have controlled or guarded against the happening of the special or unusual circumstance, the neglect is not excusable: *Caruso-Ciresi, Inc. v. Lohman*, 5 Ohio St.3d 64 (1983) (an unexplained failure to answer is not excusable neglect); *Griffey* (physician informed insurance carrier of lawsuit but the insurance carrier never called back and the physician did not follow up in 51 days until default judgment); *D.G.M., Inc. v. Cremeans Concrete & Supply Co., Inc.*, 111 Ohio App.3d 134 (4th Dist.1996) (congressional candidate who admittedly received notice of suit but was preoccupied with election failed to respond to complaint); *Morgan Adhesives Co. v. Sonicor Instrument Corp.*, 107 Ohio App.3d 327 (9th Dist.1995) (although corporation claimed that it had not received proper notice of lawsuit, corporation was aware of pending lawsuit); *Internatl. Lottery, Inc. v. Kerouac*, 102 Ohio App.3d 660 (1st Dist.1995) (out-of-state attorney received notice of trial or default and failed to appear; not entitled to preferential treatment concerning procedural rules and time limits); *Katko v. Modic*, 85 Ohio App.3d 834 (11th Dist.1993) (ignorance of law not excusable neglect); *Whitt v. Bennett*, 82 Ohio App.3d 792 (2d Dist.1992) (attorney failed to attend dismissal hearing after receiving proper notice); *Brown v. Akron Beacon Journal Publishing Co.*, 81 Ohio App.3d 135 (9th Dist.1991), (out-of-state attorney's failure to file opposition to summary judgment within time prescribed by local rules not excusable neglect); *Fouts v. Weiss-Carson*, 77 Ohio App.3d 563 (11th Dist.1991) (allegations of emotional distress due to pending divorce and of seeking psychiatric assistance not excusable neglect in absence of "operative facts"); *Manson v. Gurney*, 62 Ohio App.3d 290 (9th Dist.1989) (failure to respond to complaint due to "layperson" status insufficient to rise to level of excusable neglect). *Vanest* at fn. 10.

{¶ 15} Third, excusable neglect may exist when a party has neither knowledge nor actual notice of the lawsuit. *See Moore v. Emmanuel Family Training Ctr.*, 18 Ohio St.3d 64 (1985) (the attorney did not receive notice of and did not have actual knowledge of discovery order; the error was between court and counsel); *Doddridge v. Fitzpatrick*, 53 Ohio St.2d 9 (1978) (the party had neither actual notice nor actual knowledge of pending litigation); *Miami Sys., Corp. v. Dry Cleaning Computer Sys., Inc.*, 90 Ohio App.3d 181

(1st Dist.1993) (there was a lack of notice of default judgment motion); *Weaver v. Colwell Fin*. Corp., 73 Ohio App.3d 139 (8th Dist.1992) (trial court's failed to deliver proper notice of trial date). *Vanest* at fn. 11.

{¶ 16} Finally, the demands of being a busy lawyer or of being preoccupied with other litigation generally do not constitute excusable neglect. *Lepkowski v. U.S. Dept. of Treasury*, 804 F.2d 1310 (C.A.D.C.1986) (only explanation offered is that he is a busy lawyer); *Solaroll Shade and Shutter Corp., Inc. v. Bio-Energy Sys., Inc.*, 803 F.2d 1130 (11th Cir.1986) (attorney's negligent failure to respond to a motion does not constitute excusable neglect, even if that attorney is preoccupied with other litigation). *Vanest* at fn. 12.

{¶ 17} We examine the surrounding factors and circumstances of this case, keeping in mind that we must find a proper balance between the principles that litigation must be brought to an end and justice should be done. We note that this is a very large and complicated case, made more so by Thomas Thompson's complete disregard for the American judicial process. This complexity, coupled with the extreme age of the case, creates a special set of circumstances that could indicate excusable neglect. The fact that the receiver found 86 possible claimants makes it more, not less likely, that there were claimants that were not initially identified by the receiver and that litigation would be more likely to continue. Moreover, in our digital age, it is questionable whether providing legal notices in printed media remains an adequate form of notice. *See* Reiders, *Old Principles, New Technologies, and the Future of Notice in Newspapers*, 38 Hofstra L.Rev. 1009, 1010-11 (2010) (observing that, as "[t]he American newspaper industry is dying," providing the public with "[c]onstructive notice via the Internet may be constitutionally superior to notice published in newsprint"). Additionally, the American public has become much more particular as to where it receives its news. Social media, whether in blogs, Facebook or Twitter, has pushed aside the more traditional news sources like the mainstream local and national print newspapers. We do not find that Hoffman's inactions in not filing a claim before the claim bar date when there is no evidence that he had any actual knowledge of such a deadline, constitute a complete disregard for the judicial system. *See Kay*; *GTE Automatic Elec.* We also note the general tenet of Ohio jurisprudence that cases should be decided on their merits whenever

possible. *Perotti v. Ferguson*, 7 Ohio St.3d 1, 3 (1983); *Peterson v. Teodosio*, 34 Ohio St.2d 161, 175 (1973).

{¶ 18} For these reasons, we find that Hoffman's failure to file a proof of claim before the claim bar date was "excusable neglect" when considering the special circumstance of this case. His behavior does not rise to a level of inexcusable neglect. More specifically, Hoffman's conduct, considering all of the facts and circumstances, cannot be characterized as conduct which exhibited a complete disregard for the judicial system and the rights of other parties. *Giffey*, supra; *see Mid-America Acceptance Co.* at 608. We therefore find the trial court erred in denying Hoffman's motion to file a proof of claim instanter.

{¶ 19} Hoffman's assignment of error is sustained and the trial court's decision is reversed to allow Hoffman leave to file proof of claim instanter.

Judgment reversed and remanded
for further proceedings.

HORTON, J., concurs.
LUPER SCHUSTER, J., dissents.

LUPER SCHUSTER, J., dissenting.

{¶ 20} Because I believe the trial court acted within its discretion in denying Hoffman's motion for leave to file instanter, I respectfully dissent.

{¶ 21} "A trial court's ruling on a Civ.R. 6(B) motion will not be disturbed absent an abuse of discretion." *Hillman v. Edwards*, 10th Dist. No. 10AP-58, 2010-Ohio-3524, ¶ 10, citing *Davis v. Immediate Med. Servs., Inc.*, 80 Ohio St.3d 10, 14 (1997). An abuse of discretion connotes more than an error of law or judgment; it implies that the attitude of the trial court was "unreasonable, arbitrary or unconscionable." *Blakemore v. Blakemore*, 5 Ohio St.3d 217, 219 (1983). To determine whether an untimely answer is due to excusable neglect, a court must consider all of the surrounding circumstances. *Hillman* at ¶ 10, citing *Davis* at 14. Neglect is inexcusable if a party's conduct falls substantially below what is reasonable under the circumstances. *Id.*, citing *Scarefactory, Inc. v. D & B Imports, Ltd.*, 10th Dist. No. 01AP-607 (Jan. 3, 2002). Further, neglect is

inexcusable when it reflects a complete disregard for the judicial system. *Id*., citing *Accu-Check Instrument Serv., Inc. v. Sunbelt Business Advisors of Cent. Ohio*, 10th Dist. No. 09AP-505, 2009-Ohio-6849, ¶ 14. Additionally, there is no excusable neglect if the party or his attorney could have guarded against or controlled the event that led to the untimely answer. *Id*., citing *Scarefactory, Inc.*

{¶ 22} As the majority explains, Hoffman claims excusable neglect on the basis that the notice in the newspaper was insufficient and highly unlikely to provide notice to unknown claimants. Though a determination of excusable neglect requires consideration of all the surrounding facts and circumstances, "[e]xcusable neglect is not present if the party seeking relief could have prevented the circumstances from occurring." *Stuller v. Price*, 10th Dist. No. 02AP-29, 2003-Ohio-583, ¶ 52.

{¶ 23} Here, Hoffman could have prevented the circumstances from occurring. He based his claim on a letter dated July 7, 1985, and Hoffman knew no later than November 11, 1999 that Thomas Thompson had recovered substantial gold from the *SS Central America*. Nonetheless, Hoffman never made a claim against the entities now in receivership either between 1985 to 1999 or between 1999 to June 27, 2014. Hoffman does not explain his failure to pursue any action during these timeframes.

{¶ 24} The majority notes we live in a digital age, which makes it all the more difficult to believe that even if Hoffman did not see the newspaper notices, he somehow remained completely unaware of Thompson absconding or of the various legal actions surrounding the recovery of the gold from the *SS Central America*. Moreover, there is no indication in the record as to how Hoffman suddenly became aware of the litigation in June 2014. The motion for leave to file instanter only states "Mr. Hoffman was completely unaware of the December 20, 2013 'Claim Bar Date' and only recently became aware of the procedures for filing a Proof of Claims." *See Scarefactory, Inc.* (noting the appellants provided no evidence, through affidavit or otherwise, in their motion to support their claim of excusable neglect under Civ.R. 6(B) and concluding that, absent such evidentiary support, the trial court did not abuse its discretion in denying appellants' motion).

{¶ 25} Additionally, the majority notes Loc.R. 66.05 of the Franklin County Court of Common Pleas specifically contemplates notice by publication "in a newspaper of

general circulation within the County." The receiver published notice, as approved by the trial court, in both the Southwestern edition of *The Wall Street Journal* and *The Columbus Dispatch*. At oral argument, Hoffman's counsel stated that Hoffman lived in Columbus at the time of notice. The majority nonetheless seems to suggest the notice here was insufficient. However, because the notice by publication complied with both the applicable local rule and the general due process requirement that notice be "reasonably calculated, under all the circumstances to apprise interested parties of the pendency of the action and afford them an opportunity to present their objections," I would conclude that the notice here was sufficient. *See Mullane v. Cent. Hanover Bank & Trust Co.*, 339 U.S. 306, 314 (1950).

{¶ 26} The trial court considered all of the surrounding facts and circumstances, including Hoffman's claim of excusable neglect, and rejected Hoffman's motion for leave to file, finding the lack of knowledge of the proceedings is attributable to Hoffman rather than to any fault of the receiver. I would find that the trial court did not abuse its discretion in denying Hoffman's motion for leave to file instanter. Accordingly, I would overrule Hoffman's sole assignment of error.