

**IN THE COURT OF APPEALS OF OHIO  
SECOND APPELLATE DISTRICT  
MONTGOMERY COUNTY**

CARLA TERLAU, et al.	:	
	:	
Plaintiffs-Appellants	:	C.A. CASE NO. 26791
	:	
v.	:	T.C. NO. 13CV935
	:	
N and D RESTAURANTS, INC., et al.	:	(Civil Appeal from
	:	Common Pleas Court)
Defendants-Appellees	:	
	:	

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**OPINION**

Rendered on the 30th day of June, 2016.

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and

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FROELICH, J.

{¶ 1} Carla and Douglas Terlau appeal from a judgment of the Montgomery County Court of Common Pleas, which denied their Civ.R. 60(B) motion for relief from a 2014 summary judgment in favor of N&D Restaurants, Inc., owner of the Olive Garden restaurant in Vandalia, Ohio, and Michael C. Cosculluela, who provided lawn care and landscaping for Olive Garden.

### **I. Facts and Procedural History**

{¶ 2} In March 2011, Carla Terlau sustained an injury to her knee when she stepped into a hole in a grassy berm in the parking area of the Olive Garden restaurant in Vandalia. In February 2013, the Terlaus filed a complaint for personal injuries against N&D and Cosculluela. Cosculluela filed an answer and N&D filed an answer and cross-claim (against Cosculluela). The Terlaus did not respond to the defendants' discovery requests until November 6, 2013, after motions to compel had been filed and a show cause order issued. Cosculluela and N&D filed motions for summary judgment in November and December 2013, respectively; the Terlaus again did not respond. On January 24, 2014, the trial court entered summary judgment in favor of N&D and Cosculluela.

{¶ 3} On January 19, 2015, almost one year from the trial court's judgment, the Terlaus filed a motion for relief from judgment pursuant to Civ.R. 60(B). The defendants opposed the motion. On July 10, 2015, the trial court overruled the motion without a hearing; the trial court found that the motion for relief from judgment was not filed within

a reasonable time and did not demonstrate excusable neglect.

{¶ 4} On August 4, 2015, the Terlaus filed a Motion for Reconsideration of their Civ.R. 60(B) motion; their attorney also requested that the motion be filed under seal due to its inclusion of information “of a personal and sensitive nature” related to counsel’s health. The trial court granted the request that the motion be filed under seal, ordering that it be accessible by the judge, court staff, and attorneys, but not be made available to the public remotely or by direct access. The trial court did not rule on the motion for reconsideration.

## **II. Motion for Relief from Judgment**

{¶ 5} The Terlaus appeal from the trial court’s denial of their motion for relief from judgment. They raise two assignments of error, which we will address together.

**The trial court erred when it denied Plaintiffs-Appellants’ Motion for Relief From Judgment.**

**The trial court erred when it denied Plaintiffs-Appellants’ Motion for Relief From Judgment without holding a hearing as requested by Plaintiffs-Appellants.**

{¶ 6} The Terlaus argue that a hearing should have been held and that their motion for relief from judgment should have been granted, because the motion was timely, excusable neglect was shown, and “justice would be served.”

{¶ 7} Civ.R. 60(B) permits trial courts to relieve parties from a final judgment for the following reasons: (1) “mistake, inadvertence, surprise or excusable neglect;” (2) newly discovered evidence; (3) fraud, misrepresentation or other misconduct of an adverse party; (4) the judgment has been satisfied, released or discharged; or (5) any

other reason justifying relief from the judgment. The Terlaus' motion relied on Civ.R. 60(B)(1), specifically "excusable neglect."

{¶ 8} The phrase "excusable neglect" in Civ.R. 60(B)(1) "is an elusive concept which has been difficult to define and to apply." *Kay v. Marc Glassman, Inc.*, 76 Ohio St.3d 18, 20, 665 N.E.2d 1102 (1996). The Supreme Court of Ohio has defined it "in the negative and ha[s] stated that the inaction of a defendant is not 'excusable neglect' if it can be labeled as a 'complete disregard for the judicial system.'" *Id.* A determination of whether neglect is excusable necessarily must involve consideration of all the surrounding facts and circumstances. *Griffey v. Rajan*, 33 Ohio St.3d 75, 79, 514 N.E.2d 1122 (1987), quoting *Colley v. Bazell*, 64 Ohio St.2d 243, 249, 416 N.E.2d 605 (1980).

{¶ 9} To prevail on a motion brought under Civ.R. 60(B), the movant must demonstrate that (1) the party has a meritorious defense or claim to present if relief is granted, (2) the party is entitled to relief under one of the grounds stated in Civ.R. 60(B), and (3) the motion is made within a reasonable time and, for reasons under Civ.R. 60(B)(1)-(3), not more than one year after judgment. *GTE Automatic Elec., Inc. v. ARC Industries, Inc.*, 47 Ohio St.2d 146, 351 N.E.2d 113 (1976), paragraph two of the syllabus. All of these requirements must be satisfied, and the motion should be denied if any one of the requirements is not met. *Strack v. Pelton*, 70 Ohio St.3d 172, 174, 637 N.E.2d 914 (1994); *Cincinnati Ins. Co. v. Schaub*, 2d Dist. Montgomery No. 22419, 2008-Ohio-4729, ¶ 15.

{¶ 10} A motion filed within one year must nevertheless also be filed "within a reasonable time." In other words, a trial court may find that a motion is not filed within a reasonable time, notwithstanding that it was filed within one year, if the court concludes

that the time taken to file the motion was not reasonable under the circumstances. *Tankersley v. Scales*, 2d Dist. Montgomery No. 26299, 2014-Ohio-4964, ¶ 16, citing *Doyle v. Doyle*, 2d Dist. Greene No. 97 CA 143, 1998 WL 698360, \* 3 (Oct. 9, 1998) and *Morris v. Grubb*, 2d Dist. Montgomery No. 15177, 1996 WL 132202, \* 4 (March 8, 1996), *appeal not allowed*, 76 Ohio St.3d 1478, 669 N.E.2d 860 (1996).

{¶ 11} Motions for relief from judgment under Civ.R. 60(B) are addressed to the sound discretion of the trial court, and the court's ruling will not be disturbed on appeal absent a showing of abuse of discretion. *Griffey*, 33 Ohio St.3d 75, 77, 514 N.E.2d 1122; *National City Mtge. Co. v. Johnson & Assoc. Financial Services, Inc.*, 2d Dist. Montgomery No. 21164, 2006-Ohio-2364, ¶ 11. To constitute an abuse of discretion, the trial court's decision must be unreasonable, arbitrary, or unconscionable. *Blakemore v. Blakemore*, 5 Ohio St.3d 217, 219, 450 N.E.2d 1140 (1983).

{¶ 12} In support of their argument that there had been excusable neglect, the Terlaus' motion for relief from judgment stated that 1) their attorney had "face[d] financial difficulties due to the severe contraction of Dayton's economy," 2) the attorney had faced "a health issue" (the details of which counsel offered to disclose "in chambers, at a hearing on the motion or by affidavit under such terms as the court may direct"), and 3) the attorney had traveled to visit his children around the time that the responses to the summary judgment motions were due. With respect to the timeliness of the motion, the Terlaus simply asserted that the motion was timely because, given the 11-month period during which discovery was conducted in the case, the defendants would not be prejudiced. (The motion does not address the fact that the Terlaus did not respond timely with discovery during much of the period that the case was pending, nor does it

more fully explain how any discovery that had been completed was relevant to the timeliness of the motion for relief from judgment.)

{¶ 13} The trial court found that, although the Terlaus had brought their motion for relief from judgment within one year, it was not filed “within a reasonable time.” The court noted that there had been “numerous timeliness issues [with the Terlaus’ filings] over the life of the case” and that the Terlaus’ attorney had not requested extensions or taken other “precautions” when health issues or other problems arose. The court also noted that counsel had provided no explanation for “waiting until days before the expiration of the Civ.R. 60(B) one-year deadline” to file the motion for relief from judgment. Based on these factors, the court concluded that the motion was “untimely.”

{¶ 14} With respect to excusable neglect, the Terlaus’ motion for relief from judgment stated that the Terlaus’ attorney “faced both financial problems and a health issue” at the time of the events related to the defendants’ motions for summary judgment, which “limited [his] ability to fully and vigorously represent his clients,” and that these issues continued “up to the present.” The motion also stated that counsel’s out-of-state travel to visit his children in December 2013 led to his “neglect” in failing “to properly docket the summary judgment deadline and file responsive pleadings.”<sup>1</sup>

{¶ 15} The trial court stated that it was “unable to find that the Plaintiff’s [the Terlaus’] counsel acted excusably,” primarily because of his “lack of communication” with

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<sup>1</sup> The motion for relief from judgment stated that counsel had been visiting his children out of state “from January 19, 2013 through December 28, 2013.” Thus, the court commented in its judgment that this traveling schedule “would have made practicing in Ohio slightly more difficult.” Counsel clarified in his motion for reconsideration that he was actually out of town for only ten days, in December 2013. In any event, the length of counsel’s travels was not dispositive of the motion.

the Court about his financial difficulties, his “treatment” (health issues), and his travel schedule. The court noted that, if it had been “more aware” of these issues, it might have “permitted additional time at important junctures, notwithstanding the extravagant amount of time the Court had already provided Plaintiffs.” The court further observed that, in addition to the failure to communicate with the court about his personal problems, counsel for the Terlaus had failed to adequately and timely produce discovery and to respond to the defendants’ motions for summary judgment. The court concluded that “none of Plaintiffs[’] actions” were the result of excusable neglect.

**{¶ 16}** Because the motion for relief from judgment was lacking in specificity, the nature of counsel’s “health issue” was not apparent to the court, including whether it was a physical illness or injury or mental or emotional illness, or the manner and/or extent to which it affected counsel’s ability to work. Moreover, counsel’s “health issue” was not the only basis cited for his failure to respond to the motion for summary judgment or to file the Civ.R. 60(B) motion more promptly; he also asserted that travel plans and the city’s economic woes contributed to the “difficulty of the situation.” A typographical error in the motion also created the impression that counsel had been out-of-state for most of the year preceding the motions for summary judgment.

**{¶ 17}** We recognize that counsel offered to provide additional information about the health issue “as the court may direct,” and the trial court could have provided such direction if it had chosen to do so. But we are very reluctant to hold that a court is *required* to request additional information from a party about a vaguely-described “issue” or problem before ruling on a motion for relief from judgment.

**{¶ 18}** It is unclear why counsel did not ask to file information about his “health

issue” under seal in support of the motion, as he did prior to filing the motion for reconsideration of the denial of the Civ.R. 60(B) motion.<sup>2</sup> In that filing, Plaintiffs’ counsel provided more information about the nature of his health issues, asserted that adverse rulings in this case had caused his health to further deteriorate, and provided some information about the treatment in which he was involved. Counsel also provided an affidavit from a social worker based in New York who served as his “life coach and advisor” during the relevant period; this affidavit described with some specificity the effect of the condition on counsel.

**{¶ 19}** Based on the information provided in counsel’s sealed motion for reconsideration, we are sympathetic to his situation and its potential to adversely affect his work. Nonetheless, our duty is to determine if the trial court erred given the information that was before the court when it ruled. Based on the record before us, we cannot find that the trial court abused its discretion in failing to request more information from the Terlaus and their attorney or in failing to conclude, when it ruled on the motion for relief from judgment based on the information before it, that counsel’s unspecified “health issue” constituted “excusable neglect.”

**{¶ 20}** Under the circumstances presented and with the information before it, the trial court did not abuse its discretion in concluding that the Terlaus’ motion for relief from

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<sup>2</sup> We note that the Ohio Rules of Civil Procedure do not provide for a motion for reconsideration of a final order in the trial court, and a decision denying a motion for relief from judgment is a final appealable order. Thus, a trial court may not “reconsider” a final order, as the Terlaus urged it to do. See also *Vlcek v. Chodkowski*, 2015-Ohio-1943, 34 N.E.3d 446, ¶ 111 (2d Dist.), citing *Green Tree Servicing, L.L.C. v. Kramer*, 193 Ohio App.3d 140, 2011-Ohio-1408, 951 N.E.2d 146, ¶ 34 (2d Dist.); *Wells Fargo Bank, N.A. v. Scott*, 2d Dist. Montgomery No. 26552, 2015-Ohio-3269, ¶ 8, citing *Pitts v. Ohio Dept. of Transp.*, 67 Ohio St.2d 378, 379, 423 N.E.2d 1105 (1981), fn. 1.



judgment was not filed within a reasonable time and that it did not demonstrate excusable neglect. Because the Terlaus did not establish two of the threshold requirements for Civ.R. 60(B) relief (timeliness and excusable neglect), the trial court was not required to hold a hearing on the motion.

{¶ 21} The assignments of error are overruled.

### **III. Conclusion**

{¶ 22} The judgment of the trial court will be affirmed.

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FAIN, J. and WELBAUM, J., concur.

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