[Cite as *Fitz v. Continental Ins. Co.*, 2003-Ohio-1815.]

COURT OF APPEALS
MUSKINGUM COUNTY, OHIO
FIFTH APPELLATE DISTRICT

NANCY FITZ, INDIVIDUALLY AND AS ADMINISTRATOR OF THE ESTATE OF PATRICK FITZ	:	JUDGES:
	:	Hon. William B. Hoffman, P.J.
	:	Hon. Sheila G. farmer, J.
	:	Hon. John F. Boggins, Jr.
Plaintiff-Appellee	:	
	:	
-vs-	:	Case No. CT2002-0023
	:	
CONTINENTAL INSURANCE COMPANY, ET AL.	:	O P I N I O N
Defendants-Appellants		

CHARACTER OF PROCEEDING:	Appeal from the Court of Common Pleas, Case No. CC2002-0113
JUDGMENT:	April 1, 2003
DATE OF JUDGMENT ENTRY:	

APPEARANCES:

For Plaintiff-Appellee	For Defendant-Appellant
JAMES W. TANSBOTTOM STEPHEN R. MCCANN 11 North Fourth Street P.O. Box 340 Zanesville, OH 43702-0340	STEVEN G. JANIK ANDREW J. DORMAN 9200 South Hills Blvd., #300 Cleveland, OH 44147-3521

[Cite as *Fitz v. Continental Ins. Co.*, 2003-Ohio-1815.]
Farmer, J.

{¶1} On February 25, 1991, Patrick Fitz was fatally injured in a motor vehicle accident. At the time of the accident, Mr. Fitz and his wife, appellee, Nancy Fitz, were covered under several insurance policies including a general liability policy issued to their former employer by appellant, National Union Fire Insurance Company of Pittsburgh, PA.

{¶2} On January 30, 2002, appellee, individually and as administrator of her husband's estate, filed a declaratory judgment action seeking underinsured motorist coverage under appellant's policy. Appellant received the complaint on February 5, 2002. The complaint was forwarded to the wrong claims office and as a result, the complaint went unanswered.

{¶3} On March 21, 2002, appellee filed for default judgment. By judgment entry filed March 26, 2002, the trial court granted said motion.

{¶4} On April 12, 2002, appellant filed a motion to vacate the default judgment pursuant to Civ.R. 60(B). A hearing was held on June 24, 2002. By judgment entry filed July 17, 2002, the trial court denied said motion.

{¶5} Appellant filed an appeal and this matter is now before this court for consideration. Assignments of error are as follows:

I

{¶6} "THE TRIAL COURT ABUSED ITS DISCRETION BY HOLDING NATIONAL UNION TO A HIGHER STANDARD FOR ESTABLISHING 'EXCUSABLE NEGLECT' THAN MANDATED BY THE SUPREME COURT OF OHIO."

II

{¶7} "A DEFAULT JUDGMENT IS NOT APPROPRIATE IN A DECLARATORY JUDGMENT."

III

{¶8} “THE TRIAL COURT ABUSED ITS DISCRETION WHEN IT CONSIDERED UNRELATED AND DEFECTIVE DEFAULT JUDGMENTS IN UPHOLDING THIS DEFAULT JUDGMENT.”

I, III

{¶9} Appellant claims the trial court erred in denying its motion to vacate default judgment pursuant to Civ.R. 60(B) as a valid defense to the default judgment and excusable neglect were established. We agree.

{¶10} A motion for relief from judgment under Civ.R. 60(B) lies in the trial court's sound discretion. *Griffey v. Rajan* (1987), 33 Ohio St.3d 75. In order to find an abuse of that discretion, we must determine the trial court's decision was unreasonable, arbitrary or unconscionable and not merely an error of law or judgment. *Blakemore v. Blakemore* (1983), 5 Ohio St.3d 217. Appellant based its Civ.R. 60(B) motion on "mistake, inadvertence, surprise or excusable neglect." Civ.R. 60(B)(1). In *GTE Automatic Electric Inc. v. ARC Industries, Inc.* (1976), 47 Ohio St .2d 146, paragraph two of the syllabus, the Supreme Court of Ohio held the following:

{¶11} “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)(1) through (5); and (3) the motion is made within a reasonable time, and, where the grounds of relief are Civ.R. 60(B)(1), (2) or (3), not more than one year after the judgment, order or proceeding was entered or taken.”

{¶12} Appellee claims she is entitled to underinsured motorist coverage under appellant's general liability policy pursuant to *Scott-Pontzer v. Liberty Mutual Fire Insurance Co.,* 85 Ohio St.3d 660, 1999-Ohio-292, and its progeny. Incorporated in the declaratory judgment complaint is an allegation that appellant has denied coverage. Within appellant's Civ.R. 60(B) motion is the claim that because the subject policy is not a motor vehicle policy, it does not fall within the requirements of R.C. 3937.18. Also, said policy is a self-insured policy and therefore excused from said statute.

{¶13} On its face, this court, having experienced the various twists and turns to *Scott Pontzer* cases, finds appellant may have "a meritorious defense or claim to present if relief is granted." See, *Cox v. State Farm Fire and Casualty Co.,* Licking App. No. 2001CA00117, 2002-Ohio-3076, *Dalton, et al. v. The Travelers Insurance Company,* Stark App. Nos. 2001CA00380, 2001CA00393, 2001CA00407 and 2001CA00409, 2002-Ohio-7369. We find the first prong of *GTE Automatic* to be satisfied.

{¶14} Appellant freely admits it made a mistake and directed the summons and complaint to the Blue Bell, Pennsylvania office as opposed to the Chicago, Illinois office within three days of receipt. The mail return shows the complaint was received on February 5, 2002. The notice to the wrong office was sent on February 8, 2002 and received on February 11, 2002. See, Exhibit A. By the time the error was found, the twenty-eight day time period to answer had lapsed. T. at 7.

{¶15} In *Colley v. Bazell* (1980), 64 Ohio St.2d 243, we are cautioned by the Supreme Court of Ohio that excusable neglect depends on the facts and circumstances of each case. In this regard, the trial court's reliance on other defaults against appellant is misplaced. The record does not substantiate that the same error occurred in the other

cases. In fact, at oral argument, it was not disputed that the other cases were based upon attorney error and not client error.

{¶16} In *Colley* at 248, the Supreme Court of Ohio set the tone for trial courts in dealing with Civ.R. 60(B) motions as follows:

{¶17} "In our view, the 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.' 11 Wright & Miller, Federal Practice & Procedure 140, Section 2851, quoted in *Doddridge v. Fitzpatrick* (1978), 53 Ohio St.2d 9, 12."

{¶18} A denial of a Civ.R. 60(B) motion serves justice when there has been an intentional disregard for the legal process and a lack of good faith by the neglectful party. Neither has occurred in this case. Appellant acted in a timely fashion to address the complaint, but the notice was misdirected and a timely filing was forestalled.

{¶19} Under the facts of this case, we fail to find an intentional act or a showing of bad faith. Further, although we need not get into the particulars of the declaratory judgment action, there can hardly be any showing of prejudice to appellee because she acknowledged the disputed coverage in the complaint. There is also no showing of prejudice to the trial court. This case involves multiple parties with numerous policies all in dispute under the theory of *Scott-Pontzer*. The trial court will have to review the coverages and the implications thereto. None of the other litigants are prejudiced because the default was filed two months after the initiation of the action.

{¶20} Upon review, we find the trial court erred in denying appellant's motion to vacate default judgment pursuant to Civ.R. 60(B).

{¶21} Assignment of Error I is granted.

II

{¶22} Assignment of Error II is moot given our ruling supra, however, it does pose an interesting question.

{¶23} Declaratory relief is statutory and requests the trial court to make a determination on the law and coverage. We note the motion for default and the default judgment do not make any specific allegations on the law and policies but aver a bare request for judgment and the granting of default. We are unable to find any Ohio case on point, but note the default judgment granted really did not resolve the issues presented in the case.

{¶24} The judgment of the Court of Common Pleas of Muskingum County, Ohio is hereby reversed and remanded.

By Farmer, J. and Boggins, J. concur

Hoffman, P.J. dissents.

SGF/jp 0314

Hoffman, P.J., dissenting

{¶25} I respectfully dissent from the majority opinion which I interpret as holding appellant's motion to vacate the default judgment against it is to be granted.

{¶26} I would agree the trial court's denial of appellant's motion to vacate should be reversed and remanded because of the trial court's misplaced reliance on other cases involving default judgments against appellant.[1] As noted by the majority, the trial court failed to factually distinguish the other case involving National Union wherein the proffered excusable neglect involved attorney error as opposed to neglect by the defendant itself as is presented in the case sub judice.

{¶27} Furthermore, appellee's response in opposition to appellant's motion to vacate included reference to two other cases wherein answers had not been timely filed by defendants averred to be "sister/brother" insurance companies of appellant. (See Affidavit of James W. Ransbottom, Plaintiff's Exhibit J at 3-4). Although averred, appellee offers no additional evidence to support the alleged relationship. The affidavit fails to establish how the affiant had first hand knowledge of the relationships. As appellant points out in its brief,

[1]The majority offers no critique of the trial court's application of *Perry v. General Motors* (1996), 113 Ohio App.3d 318, and its findings with respect thereto, which case was used by the trial court to support its denial of appellant's motion.

these other two cases involved different legal entities. Absent further evidence to establish their relationship, the trial court's reliance on those two cases was inappropriate.

{¶28} I believe the proper disposition of appellant's appeal would be to vacate the trial court's decision and remand the case with instructions to redetermine appellant's motion to vacate in light of our finding of improper reliance on those other cases.

{¶29} *Colley v. Bazell* (1980), 64 Ohio St.2d 243, is not a mandate to grant all defendant's motion to vacate. While the Ohio Supreme Court clearly announced therein its direction to liberally construe Civ. R. 60(B)(1), it stopped short of declaring the failure to do so would constitute an abuse of discretion. By finding the trial court erred in denying appellant's motion, I believe the majority prematurely preempts the trial court from exercising its discretion. As such, I must respectfully dissent.

JUDGE WILLIAM B. HOFFMAN