[Cite as *Vanderpool v. Kroger Co.*, 2008-Ohio-5492.]

COURT OF APPEALS
DELAWARE COUNTY, OHIO
FIFTH APPELLATE DISTRICT

KAREN VANDERPOOL

Plaintiff-Appellant

-vs-

KROGER COMPANY

Defendant-Appellee

JUDGES:
Hon. William B. Hoffman, P.J.
Hon. W. Scott Gwin, J.
Hon. John W. Wise, J.

Case No. 08 CAH 02 0002

O P I N I O N

CHARACTER OF PROCEEDING: Appeal from the Delaware County Court of Common Pleas, Case No. 06-CVD-10-1041

JUDGMENT: Reversed and Remanded

DATE OF JUDGMENT ENTRY: October 23, 2008

APPEARANCES:

For Plaintiff-Appellant

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Hoffman, P.J.

{¶1} Plaintiff-appellant Karen Vanderpool appeals the January 8, 2008 Judgment Entry of the Delaware County Court of Common Pleas denying her motion for relief from judgment in favor of Defendant-appellee Kroger Company.

STATEMENT OF THE FACTS AND CASE

{¶2} On June 5, 2006, Appellant filed an application for benefits with the Bureau of Workers' Compensation alleging she sustained an injury at work on May 24, 2006. On June 17, 2006, a District Hearing Officer for the Industrial Commission allowed the claim for "left wrist sprain/strain; DeQuervain's tendonitis of the left hand." Appellee appealed the decision to a Staff Hearing Officer on June 19, 2006. On September 11, 2006, the Staff Hearing Officer affirmed the District Hearing Officer's decision allowing the claim. On September 29, 2006, Appellee filed an appeal with the Industrial Commission. On October 3, 2006, the appeal was refused.

{¶3} On October 26, 2006, Appellee filed a notice of appeal in the Delaware County Court of Common Pleas. On December 26, 2006, Appellant filed her complaint with the trial court. On January 19, 2007, Appellee filed an answer and served Appellant with its first set of interrogatories and request for production of documents.

{¶4} On February 10, 2007, Appellant timely answered, signed, and had notarized, her responses to Appellee's interrogatories and request for production of documents. Appellant's attorney misplaced the responses, and the discovery was not provided to Appellee.

{¶5} On March 27, 2007, Appellee filed a motion to compel discovery. On April 19, 2007, the trial court granted the motion, ordering Appellant to respond to the

propounded discovery by May 2, 2007. On May 21, 2007, Appellee filed a motion for sanctions. Via Judgment Entry of June 15, 2007, the trial court granted the motion, dismissing the cause of action.

{¶6} On October 2, 2007, Appellant filed a motion for relief from judgment, pursuant to Civil Rule 60(B). Via Judgment Entry of January 8, 2008, the trial court denied the motion for relief from judgment.

{¶7} Appellant now appeals, assigning as error:

{¶8} "I. THE TRIAL COURT ABUSED ITS DISCRETION IN DENYING PLAINTIFF/APPELLANT'S MOTION FOR RELIEF FROM JUDGMENT."

{¶9} Ohio Civil Rule 60(B) reads:

{¶10} "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.

{¶11} "The procedure for obtaining any relief from a judgment shall be by motion as prescribed in these rules."

{¶12} In *GTE Automatic Electric Company v. ARC Industries* (1976), 47 Ohio St.2d 146, 351 N.E.2d 113, the Supreme Court held to prevail on a motion brought pursuant to Civ. R. 60(B), the movant must demonstrate: (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 where the grounds for 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.

{¶13} The concept of excusable neglect must be construed in keeping with the proposition that Civ. R. 60(B) is a remedial rule to be liberally construed, constituting an attempt to strike a proper balance between the conflicting principles that litigation must be brought to an end and justice should be done. *Moore v. Emanuel Family Training Center* (1985), 18 Ohio St.3d 64, 68, 479 N.E.2d 879.

{¶14} Upon review of the record, Appellant's counsel submitted an affidavit stating Appellant's discovery responses were misplaced due to an assistant's extensive absence from work, and the assistant is no longer employed with the office. The responses to the discovery indicate Appellant timely completed the same, and they were notarized on February 10, 2007.

{¶15} Under the unique facts and circumstances of this case, we find the ultimate sanction of dismissal unwarranted in this instance. We are reluctant to find an abuse of discretion, particularly where, as here, Appellee made repeated attempts to obtain the discovery responses prior to involvement of the court. However, Appellant

did herself timely respond to the discovery, and Appellant's counsel offered an explanation for neglect on his part. Though we recognize the neglect of a party's counsel is normally attributed to the party, we find a less severe sanction would be appropriate under these circumstances. Outright dismissal is an overly harsh penalty.

{¶16} Accordingly, the January 8, 2008 Judgment Entry of the Delaware County Court of Common Pleas is reversed, and the matter remanded to the trial court for further proceedings in accordance with the law and this opinion.

By: Hoffman, P.J.

Gwin, J. concurs separately,

Wise, J. dissents

s/ William B. Hoffman
HON. WILLIAM B. HOFFMAN

s/ W. Scott Gwin
HON. W. SCOTT GWIN

_____
HON. JOHN W. WISE

Gwin, J. concurring

{¶17} I write separately to note the within case is exactly like the case of *Kay v. MARK GLASSMAN Inc.*, 76 Ohio St. 3d 18, 1996-Ohio-430, 665 N.E.2d 1102. In *Kay*, counsel prepared an answer and discovery requests, signed them and the cover letters, and gave them with the case file to his secretary for mailing. Unfortunately, his secretary, in addition to her regular duties, was helping sort out the law firm's bookkeeping system following the retirement of the firm's bookkeeper. She mistakenly placed the pleadings and case file in a file drawer and did not mail the answer or the discovery requests.

{¶18} The Supreme Court noted Civ. R. 60(B) is a remedial rule to be liberally construed to serve the ends of justice, *Kay* at 20, citing *Colley v. Bazell* (1980), 64 Ohio St. 2d 243, 249. The court found the inaction of a defendant is not "excusable neglect" if it can be labeled as a "complete disregard for the judicial system" *Kay* at 20, citing *GTE*, supra. The Supreme Court found no complete disregard of the judicial system in *Kay*, and held the trial court should have granted relief from judgment as a matter of law. The case at bar is indistinguishable from *Kay*.

{¶19} As for the "meritorious defense", appellant prevailed at all stages of the administrative process, and the ends of justice are not served by dismissing her claim on procedural grounds rather than deciding it on the merits. I agree with the majority dismissal was far too severe a sanction for conduct the Supreme Court has found to be excusable as a matter of law.

s/ W. Scott Gwin
HON. W. SCOTT GWIN

Wise, J., dissenting

{¶20} I respectfully dissent from the majority decision. I first particularly observe that this case does not essentially involve the handling of legal paperwork within a business or other entity outside of the daily practice of law, in which case the failure to respond to such documents might be viewed more leniently.

{¶21} In *Smith v. Manor Care of Canton, Inc*., Stark App.Nos. 2005-CA-00100, 2005-CA-00160, 2005-CA-00162, 2005-CA-00174, 2006-Ohio-1182, we recited *Browning v. Health Enterprises of America, Inc.* (June 26, 1987), Crawford App. No. 3-86-1, for the proposition that "excusable neglect requires a finding of unique or extraordinary circumstances as opposed to a mere palpable mistake by counsel." Id. at ¶ 47. In *Smith*, we declined to find an abuse of discretion in the trial court's finding that "the departure of an associate from the firm and consequent mistaken belief a response had been filed does not constitute a unique or extraordinary circumstance." Id. at ¶ 47, 48. In the case sub judice, appellant's counsel averred that appellant's discovery responses were "misplaced" due to the absence of an office assistant. Majority Opinion at ¶ 14. Even if such a mistake by a law firm could be recognized as excusable neglect in light of *Smith*, we have before us the additional fact that neither appellant nor appellant's counsel took action in response to appellee's further motion to compel discovery and subsequent motion for sanctions. Generally, the greater the degree of willfulness of a movant, the less likely his or her conduct will be characterized as excusable neglect. See *Mid-America Acceptance Co. v. Lightle* (1989), 63 Ohio App.3d 590, 607. Accordingly, upon appellate review, I am unable to find the trial court abused its

discretion in denying the 60(B) motion based on appellant's counsel's thrice-occurring discovery failures.

{¶22} I would therefore affirm.

s/ John W. Wise
JUDGE JOHN W. WISE

IN THE COURT OF APPEALS FOR DELAWARE COUNTY, OHIO
FIFTH APPELLATE DISTRICT

KAREN VANDERPOOL	:	
	:	
Plaintiff-Appellant	:	
	:	
-vs-	:	JUDGMENT ENTRY
	:	
KROGER COMPANY	:	
	:	
Defendant-Appellee	:	Case No. 08 CAH 02 0002

For the reasons stated in our accompanying Memorandum-Opinion, the judgment of the Delaware County Court of Common Pleas is reversed, and the matter remanded to the trial court for further proceedings in accordance with the law and our Opinion. Costs to be divided.

s/ William B. Hoffman
HON. WILLIAM B. HOFFMAN

s/ W. Scott Gwin
HON. W. SCOTT GWIN

HON. JOHN W. WISE