[Cite as *Doe v. Canton Regency*, 2010-Ohio-5976.]

COURT OF APPEALS
STARK COUNTY, OHIO
FIFTH APPELLATE DISTRICT

JILL DOE, EXECUTRIX FOR THE ESTATE OF JANE DOE

Plaintiff-Appellee

-vs-

CANTON REGENCY, et al.

Defendants-Appellants

JUDGES:
Hon. W. Scott Gwin, P. J.
Hon. Sheila G. Farmer, J.
Hon. John W. Wise, J.

Case No. 2010 CA 00048

O P I N I O N

CHARACTER OF PROCEEDING:	Civil Appeal from the Court of Common Pleas, Case No. 2009 CV 02757
JUDGMENT:	Affirmed
DATE OF JUDGMENT ENTRY:	December 6, 2010

APPEARANCES:

For Plaintiff-Appellee	For Defendants-Appellants
LEE E. PLAKAS MEGAN J. FRANTZ TZANGAS, PLAKAS, MANNOS, & RAIES 220 Market Avenue South 8th Floor Canton, Ohio 44702	TERRANCE P. GRAVENS DENNIS M. PILAWA RAWLIN GRAVENS 55 Public Square Suite 850 Cleveland, Ohio 44113

Wise, J.

{¶1} Appellant Eugene Dietz appeals from the February 9, 2010, decision of the Stark County Common Pleas Court wherein the trial court awarded Appellee Jane Doe $214,952.50 in compensatory damages and $100,000.00 in punitive damages stating.

STATEMENT OF THE FACTS AND CASE

{¶2} On July 15, 2009, “Jane Doe” filed her Complaint against Canton Regency, etc. and Appellant Eugene Dietz. The claims against Appellant were assault and battery and punitive damages.

{¶3} On July 21, 2009, service was perfected on Appellant. The proof of service reflects that the Complaint was served at Appellant's residential address in Malvern, Ohio.

{¶4} On Sept. 11, 2009, “Jane Doe” moved for default judgment based on Appellant’s failure to file an answer. In Jane Doe's Motion for Default Judgment, Jane Doe waived her right to a jury trial for the default damages hearing only.

{¶5} On September 22, 2009, the trial court granted Jane Doe's motion for default judgment, stating that the order was a final appealable order. In the same order, the trial court ordered a bench trial on damages and set the trial for November 4, 2009.

{¶6} On Sept. 23, 2009, Jane Doe filed Motion for Leave to File First Amended Complaint to include New Life Church as a defendant.

{¶7} On September 25, 2009, the trial court granted Jane Doe's Motion for Leave to File First Amended Complaint.

{¶8} On September 28, 2009, Jane Doe filed her First Amended Complaint. Appellant was not served a copy of the First Amended Complaint.

{¶9} On October 1, 2009, service of the First Amended Complaint was perfected against Defendant New Life Church. (Proof of Service docketed Oct. 5, 2009).

{¶10} On November 12, 2009, the trial court rescheduled the damages hearing for December 9, 2009.

{¶11} On December 8, 2009, Attorneys Terrance P. Gravens and Dennis Pilawa, both with Rawlin Gravens Co., L.P.A., filed an Entry of Appearance of Counsel for Appellant.

{¶12} On December 9, 2009, Attorney Pilawa appeared at the damages hearing and requested the Court to continue the damages hearing.

{¶13} On the record, Attorney Pilawa stated that he was retained by Nationwide Insurance, who was the insurer for both Appellant and Defendant New Life Church.

{¶14} Jane Doe did not contest the issuance of a short continuance and the damages hearing on the default judgment was rescheduled for December 22, 2009.

{¶15} Addressed on the record was the fact that Appellant's house was for sale and that Jane Doe was concerned about the transfer of such asset. (T. at 15-16, Dec. 9, 2009 hearing)

{¶16} On Dec. 18, 2009, Appellant filed a Motion for Relief from Judgment and a Motion, Pursuant to Civ.R. (6)(B) for Leave to File Answer Outside Time Prescribed in Civ.R. 12(A)(1), on the Grounds of Excusable Neglect, Instanter, an Answer to Plaintiff's First Amended Complaint, Instanter, and a Motion to Continue Damages Hearing.

{¶17} In his Motion for Relief from Judgment, Appellant asserted that his failure to timely respond to the lawsuit was because criminal charges were filed against him January 12, 2009, regarding the assault of Jane Doe. These charges were dismissed on May 12, 2009. (Aff. of Eugene Dietz, Dec. 17, 2009)

{¶18} On December 22, 2009, Appellant filed a Request for Oral Hearing regarding his Motion to Vacate Judgment and Motion for Leave to File Answer.

{¶19} At the beginning of the scheduled damages hearing, the trial court denied Appellant's Motion to Continue Damages Hearing.

{¶20} The damages hearing went forward during which Attorney Pilawa participated,including objecting throughout the hearing.

{¶21} The damages hearing went forward on Jane Doe's original Complaint, not First Amended Complaint. (See Transcript of Damages Hearing, Dec. 22, 2009, Vol. 1, p. 14.)

{¶22} Witnesses at the damages hearing included Detective Collins,who testified as to Appellant’s confession and his two prior charges for sexual imposition out of Cuyahoga County. (T. at 19).

{¶23} The damages hearing was concluded on December 22, 2009 with the court taking the matter under advisement.

{¶24} On January 11, 2010, Jane Doe passed away.

{¶25} On January 15, 2010, Appellant Eugene Dietz filed a Notice of Suggestion of Death of Plaintiff Jane Doe and Motion for Substitution of Party Plaintiff Due to Death of Plaintiff Jane Doe.

{¶26} On January 21, 2010, Plaintiff filed Notice of Suggestion of Death of Plaintiff Jane Doe.

{¶27} On January 29, 2010, the trial court denied Appellant's Motion for Relief from Judgment, Motion for Leave to Answer and Request for Oral Hearing and Granted Jane Doe's Motion to Strike Eugene Dietz's Answer, stating that Appellant's asserted reasons for his neglect in responding to Jane Doe's Complaint did not rise to the level of excusable neglect. The trial court further found that no hearing was necessary because Appellant's Affidavit did "not contain sufficient allegations of operative facts demonstrating excusable neglect in failing to respond to the plaintiff's complaint."

{¶28} On February 2, 2010, Appellee filed under seal a Motion for Substitution of Plaintiff asking that the Executrix for the Estate of Jane Doe, Jill Doe be substituted as Plaintiff.

{¶29} On February 5, 2010, filed under seal, the trial court granted Appellee's Motion for Substitution of Plaintiff.

{¶30} On February 9, 2010, the trial court awarded Appellee $214,952.50 in compensatory damages and $100,000.00 in punitive damages stating:

{¶31} “It is therefore hereby ORDERED, ADJUDGED, AND DECREED that Plaintiff be granted judgment in the amount of $314,952.50 plus costs and legal interest from December 22, 2009.

{¶32} “There is no just cause for delay and this Final Judgment Entry is immediately appealable.”

{¶33} With respect to the death of Jane Doe, the trial court stated:

{¶34} "Based upon the aforementioned case law,this Court finds that considering evidence or facts that were not adduced during the damages hearing and that occurred after the damage hearing was concluded is inappropriate."

{¶35} Appellant now appeals, raising the following assignments of error for review:

ASSIGNMENTS OF ERROR

{¶36} "I. THE TRIAL COURT ERRED IN GRANTING DEFAULT JUDGMENT IN THE FIRST INSTANCE.

{¶37} "II. THE TRIAL COURT ERRED IN DENYING THE CIVIL RULE 6(B) MOTION FOR LEAVE TO FILE ANSWER AND IN STRIKING THE ANSWER FILED.

{¶38} "III. THE TRIAL COURT ERRED IN DENYING THE CIVIL RULE 60(B) MOTION FOR RELIEF FROM JUDGMENT.

{¶39} "IV. THE TRIAL COURT ERRED IN DENYING THE REQUEST FOR HEARING ON THE CIVIL RULE 6(B) AND 60(B) MOTIONS.

{¶40} "V. THE TRIAL COURT ERRED IN THE PROCEEDINGS AS TO THE HEARING ON DAMAGES.

{¶41} "VI. THE TRIAL COURT ERRED IN ITS ORDER AWARDING DAMAGES.

{¶42} "VII. THE TRIAL COURT ERRED IN ITS ORDER AND AWARD OF DAMAGES TO THE PLAINTIFF-APPELLEE, JANE DOE.

{¶43} "VIII. THE TRIAL COURT ERRED IN THAT ITS APPLICATION OF THE OHIO RULES OF CIVIL PROCEDURE AS TO THE DEFENDANT-APPELLANT VIOLATED THE "DUE PROCESS" PROVISIONS OF THE CONSTITUTIONS OF THE STATE OF OHIO AND THE UNITED STATES OF AMERICA."

I.

{¶44} In Appellant's first assignment of error, Appellant contends that the trial court erred in granting default judgment in this matter. We disagree.

{¶45} The trial court granted default judgment pursuant to Civ.R. 55(A). This rule provides, in pertinent part:

{¶46} "When a party against whom a judgment for affirmative relief is sought has failed to plead or otherwise defend as provided by these rules, the party entitled to a judgment by default shall apply in writing or orally to the court therefore; but no judgment by default shall be entered against a minor or an incompetent person unless represented in the action by a guardian or other such representative who has appeared therein. If the party against whom judgment by default is sought has appeared in the action, he (or, if appearing by representative, his representative) shall be served with written notice of the application for judgment at least seven days prior to the hearing on such application. * * * "

{¶47} Civ.R. 55(A) provides that default judgment may be awarded when a defendant fails to make an appearance by filing an answer or otherwise defending an action. *Davis v. Immediate Med. Serv., Inc.* (1997), 80 Ohio St.3d 10, 14, 684 N.E.2d 292, citing Civ.R. 55(A). However, it is a basic tenet of Ohio jurisprudence that cases should be decided on their merits.

{¶48} We review a trial court's decision concerning a default judgment under an abuse of discretion standard. *Huffer v. Cicero* (1995), 107 Ohio App.3d 65, 74, 667 N.E.2d 1031. In order to find an abuse of 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, 219, 450 N.E.2d 1140.

{¶49} Upon review we find that the record shows that Appellant's answer was due on August 18, 2009, and that Appellee did not move for default until September 11, 2009. The trial court did not rule on the motion for default judgment until September 22, 2009. Appellant did not answer the complaint, file a motion for extension to file an answer, or otherwise appear in the case.

{¶50} Upon the record, we find no abuse of discretion in the trial court granting Appellees' motion for default judgment.

{¶51} Appellant's first assignment of error is overruled.

II., III.

{¶52} In Appellant's second and third assignments of error, Appellant contends that the trial court erred in denying his Civ.R. 6(B) and motion for leave to file an answer and Civ.R. 60(B) motion to set aside the default judgment. We disagree.

{¶53} Pursuant to Civ.R. 6(B)(2), the trial court has the discretion to permit the filing of a late answer if the motioning party demonstrates excusable neglect. *Miller v. Lint* (1980), 62 Ohio St.2d 209, 214, 404 N.E.2d 752. Civ. R. 6 governs extensions of time and provides, in pertinent part:

{¶54} "(B) Time: extension

{¶55} " When by these rules or by a notice given thereunder or by order of court an act is required or allowed to be done at or within a specified time, the court for cause shown may at any time in its discretion (1) with or without motion or notice order the period enlarged if request therefor is made before the expiration of the period originally

prescribed or as extended by a previous order, or (2) upon motion made after the expiration of the specified period permit the act to be done where the failure to act was the result of excusable neglect; but it may not extend the time for taking any action under Rule 50(B), Rule 59(B), Rule 59(D), and Rule 60(B), except to the extent and under the conditions stated in them."

{¶56} A trial court's decision on whether a party's neglect was excusable shall not be reversed absent an abuse of discretion. *Marion Prod. Credit Assn. v. Cochran* (1988), 40 Ohio St.3d 265, 271, 533 N.E.2d 325. In determining whether neglect is excusable, the court takes all of the surrounding facts and circumstances into consideration. *Griffey v. Rajan* (1987), 33 Ohio St.3d 75, 514 N.E.2d 1122. In determining whether neglect is excusable or inexcusable, this Court must take into consideration all the surrounding facts and circumstances, and must be mindful of the admonition that cases should be decided on their merits, where possible, rather than procedural grounds. *Marion,* supra at 271, 533 N.E.2d 325. "Although excusable neglect cannot be defined in the abstract, the test for excusable neglect under Civ.R. 6(B)(2) is less stringent than that applied under Civ.R. 60(B)." *State ex rel. Lindenschmidt v. Butler Cty. Bd. of Commrs.,* 72 Ohio St.3d 464, 466, 1995-Ohio-49, 650 N.E.2d 1343.

{¶57} In the case sub judice, because the trial court had granted default judgment, the appropriate filing was not a Civ.R. 6(B) motion as a final judgment had already been entered and allowing the filing of an answer at that time would not have relieved Appellant from said judgment. The proper filing was therefore a Civ.R. 60(B) motion for relief from judgment.

{¶58} Civ.R. 60 Relief from Judgment or Order, provides:

{¶59} " ***

{¶60} "(B) Mistakes; inadvertence; excusable neglect; newly discovered evidence; fraud; etc.

{¶61} "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.

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

{¶63} To prevail on a motion to vacate a judgment pursuant to Civ. R. 60(B), the movant must demonstrate that: (1) the party has a meritorious defense 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. *GTE Automatic Electric Company, Inc. v. ARC Industries, Inc.* (1976), 47 Ohio St.2d 146, 351 N.E.2d 113, paragraph two of the syllabus.

{¶64} Where timely relief is sought from a default judgment, and the movant has a meritorious defense, doubt should be resolved in favor of the motion to set aside the judgment so that cases may be decided on their merits. *GTE Automatic, supra.* at paragraph three of the syllabus. Our standard of review of a court's decision as to whether to grant a Civ.R. 60(B) motion is abuse of discretion. *GTE* at 148, 351 N.E.2d 113.

{¶65} Upon review of the entire record in this matter, we find the trial court did not abuse its discretion in overruling Appellant's Civ.R. 60(B) Motion. Appellant has failed to establish surprise, inadvertence, or excusable neglect. Appellant admitted that he received notice of the lawsuit. He signed the proof of service. His arguments that he did not know how to respond to the Complaint, that he couldn't afford an attorney and that his involvement in criminal proceeding two months prior do not constitute excusable neglect. (See *Cripe v. Mayberry*, Fifth Dist. App. 03COA066, 2004-Ohio-3435; *Bergmeyer v. DeLong*, Fifth Dist. App. 2005CA0007, 2005-Ohio-5400).

{¶66} Appellant's third assignment of error is overruled.

IV.

{¶67} In Appellant's fourth assignment of error, Appellant contends that the trial court erred in denying his request for hearing on his Civ.R. 6(B) and Civ.R. 60(B) motions. We disagree.

{¶68} 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.* (October 21,

1991), Stark App. No. CA-8553. 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* (1988), 51 Ohio App.3d 130, 554 N.E.2d 1362.

{¶69} In this case, the trial court denied Appellant's motion for relief from judgment and request for hearing finding that none of Appellant's alleged reasons for failing to timely file an answer in this matter could support a meritorious defense to the judgment. Likewise, there was no reason to hold a hearing on Appellant's Civ.R. 6(B) motion once the trial court denied the Civ.R. 60(B) motion.

{¶70} Based on our disposition of Appellant's previous assignments of error, we find that the trial court did not err in not conducting an evidentiary hearing on Appellant's motions.

{¶71} Appellant's fourth assignment of error is overruled

V., VI., VII

{¶72} In his fifth, sixth and seventh assignments of error, Appellant contends that the trial court erred in conducting the damages hearing and in its order and award of damages. We disagree.

{¶73} Initially, we note that the grant or denial of a continuance is a matter entrusted to the broad, sound discretion of the trial court. *Polaris Ventures IV, Ltd. v. Silverman,* Delaware App.No. 2005 CAE 11 0080, 2006-Ohio-4138, ¶ 14, citing *State v. Unger* (1981), 67 Ohio St.2d 65, 423 N.E.2d 1078.

{¶74} We nonetheless recognize that "[b]oth the Fourteenth Amendment to the United States Constitution and Section 16, Article I of the Ohio Constitution guarantee due process of law, and thus guarantee 'a reasonable opportunity to be heard after a reasonable notice of such hearing.' " *Ohio Valley Radiology Associates, Inc. v. Ohio Valley Hosp. Ass'n.* (1986), 28 Ohio St.3d 118, 125, 502 N.E.2d 599 (additional citations omitted).

{¶75} The damages hearing in this matter was initially scheduled for December 9, 2009, but was rescheduled to December 22, 2009, a date which Appellant's counsel stated that he was available. We therefore find that Appellant's counsel had sufficient notice and adequate time to prepare for such hearing and that the trial court did not abuse its discretion in denying the motion or continuance.

{¶76} Appellant further argues that it was error for the trial court to include in its award of damages an award for future damages because Appellee died prior to the docketing of the trial court's judgment entry.

{¶77} However, we find that at the time of the damages hearing and the presentation of evidence, Appellee Jane Doe was still alive and therefore the trial court's consideration of such evidence as to future damages and life expectancy was proper.

{¶78} Further, Appellant argues that damages were awarded to the wrong party due to Appellee's death. However, upon review of the judgment entry, we find that the trial court ruled:

{¶79} "It is therefore hereby ORDERED, ADJUDGED AND DECREED that Plaintiff be granted judgment in the amount of $314,952.50 plus costs and legal interest from December 22, 2009."

{¶80} At the time of the filing, due to a substitution of plaintiff granted on February 5, 2010, the Plaintiff was Jill Doe, Executrix of the Estate of Jane Doe. We therefore find that the trial court named the proper party.

{¶81} As to Appellant's argument regarding the amended complaints, we find that pursuant to Civ.R. 5(A), Appellee was not required to serve Appellant because he was a party in default and the Amended Complaints did not assert new or additional claims for relief.

{¶82} Appellant's fifth, sixth and seventh assignments of error are overruled

VIII.

{¶83} In his eighth and final assignment of error, Appellant argues that the trial court's application of the Civil Rules of Procedure violated his due process rights. We disagree.

{¶84} Appellant does not present any additional arguments in support of this assignment of error, arguing instead that each of the previous assignments of error constitute a basis for reversal.

{¶85} Based on our disposition of the previous assignments of error, we find this assignment of error not well-taken and overrule same.

{¶86} Appellant's eighth assignment of error is overruled

{¶87} For the foregoing reasons, the judgment of the Court of Common Pleas of Stark County, Ohio, is affirmed.

By: Wise, J.

Gwin, P. J., and

Farmer, J., concur.

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JUDGES

JWW/d 1118

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

JILL DOE, EXECUTRIX FOR THE ESTATE OF JANE DOE	:	
Plaintiff-Appellee	:	
-vs-	:	JUDGMENT ENTRY
CANTON REGENCY, et al.	:	
Defendants-Appellants	:	Case No. 2010 CA 00048

For the reasons stated in our accompanying Memorandum-Opinion, the judgment of the Court of Common Pleas of Stark County, Ohio, is affirmed.

Costs assessed to Appellant.

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JUDGES