[Cite as *H.F. v. Erie-Huron-Ottawa Educational Serv. Ctr.*, 2014-Ohio-547.]

IN THE COURT OF APPEALS OF OHIO
SIXTH APPELLATE DISTRICT
HURON COUNTY

H.F., et al.	Court of Appeals No. H-13-003
Appellants	Trial Court No. CVC 20080788
v.	
Erie-Huron-Ottawa Educational Service Center, et al.	**DECISION AND JUDGMENT**
Appellees	Decided: February 14, 2014

* * * * *

Jason D. Winter and Holly Marie Wilson, for appellants.

Michael Loughman, Matthew A. Dooley, Ashleigh B. Elcesser and John D. Latchney, for appellees.

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PIETRYKOWSKI, J.

{¶ 1} Plaintiffs-appellants, H.F. and J.F. individually, and on behalf of their minor son, Je.F.[1], appeal the March 8, 2013 judgment of the Huron County Court of Common

[1] Though appellants' brief refers to Je.F. as the sole appellant we note that the notice of appeal lists mother, H.F., and the praecipe and docketing statements refer to "plaintiffs"

Pleas denying their Civ.R. 60(B) motion for relief from judgment. Because we find that the trial court did not abuse its discretion, we affirm.

{¶ 2} This action commenced on July 28, 2008, with the filing of a complaint against appellees Erie-Huron-Ottawa Educational Service Center (now known as North Point Educational Service Center) and teacher Marsha Kowalski. The complaint alleged negligent and intentional acts of abuse against Je.F. who was a student in a special needs classroom from 2003-2004. In September 2008, appellants' counsel unexpectedly died. According to appellants they waited a "significant time" to hear from the estate's attorney. Appellants were informed that the attorney would not aid them in their case and that the $2,500 retainer would not be refunded. According to appellants, they could not afford to pay another retainer and could not find an attorney to take the case without one.

{¶ 3} On January 15, 2009, appellees filed a motion to dismiss for failure to prosecute. The motion averred that the initial case was filed in 2006, but was voluntarily dismissed without prejudice. In the present, refiled action appellants were notified of a January 12, 2009 status conference which they failed to attend.

{¶ 4} On February 6, 2009, the trial court filed an order requiring that appellants "communicate their desire to prosecute the case to the Court by and through the appearance of counsel or otherwise" by March 5, 2009. It is undisputed that appellants never contacted the court. The matter was dismissed, with prejudice, on March 6, 2009.

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or "appellants." Thus, we will refer to appellants, plural, as was the case in the trial court.

{¶ 5} On February 19, 2013, appellants filed a motion to reinstate the dismissal as being without prejudice. Appellants argued that relief under Civ.R. 60(B)(1) was warranted because the "failure to prosecute their case [was] wholly attributed to the sudden and tragic death of their attorney and their inability to afford to obtain new counsel upon such notice." Appellants further stressed that public policy favors adjudications on the merits rather than technical outcomes.

{¶ 6} In opposition, appellees argued that relief under Civ.R. 60(B)(1) was time-barred. Further, appellees asserted that appellants could not rely on the catch-all provision under Civ.R. 60(B)(5) because they argued that their grounds for relief was "excusable neglect." Appellees further argued that appellants' motion did not establish grounds for relief because lack of counsel and ignorance of the legal system does not establish excusable neglect. Appellees contended that appellants did more than neglect the matter, they willfully ignored the order to notify the court if they intended to pursue the action.

{¶ 7} On March 8, 2013, the trial court denied the motion. In its judgment entry, the trial court explained that relief under Civ.R. 60(B)(1) was time-barred. Further, relief under Civ.R. 60(B)(5) was not warranted because the claim clearly fell within the confines of Civ.R. 60(B)(1). Finally, the court concluded that even considering the merits of the motion, appellants failed to show why, after nearly four years following the dismissal, they were entitled to relief. This appeal followed.

{¶ 8} Appellants raise the following assignment of error:

> The trial court erred in denying plaintiff-appellant's motion to reinstate dismissal without prejudice pursuant to Civ.R. 60(B) as appellant properly demonstrated [Je.F.]'s entitlement to relief under Civ.R. 60(B)(5).

{¶ 9} At the outset we note that review of "[a] motion for relief from judgment under Civ.R. 60(B) is addressed to the sound discretion of the trial court, and that court's ruling will not be disturbed on appeal absent a showing of abuse of discretion." *Griffey v. Rajan*, 33 Ohio St.3d 75, 77, 514 N.E.2d 1122 (1987). An abuse of discretion implies that the court's attitude is unreasonable, unconscionable or arbitrary. *Blakemore v. Blakemore*, 5 Ohio St.3d 217, 219, 450 N.E.2d 1140 (1983).

{¶ 10} Civ.R. 60(B) sets forth the following grounds for relief from judgment:

> (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.

{¶ 11} In order to obtain relief from judgment pursuant to Civ.R. 60(B), a 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. *GTE Automatic Elec., Inc. v. ARC Indus., Inc.*, 47 Ohio St.2d 146, 351 N.E.2d 113 (1976), paragraph two of the syllabus.

{¶ 12} These requirements must be shown by "operative facts" presented in evidentiary material accompanying the request for relief. *East Ohio Gas Co. v. Walker*, 59 Ohio App.2d 216, 220, 394 N.E.2d 348 (8th Dist.1978). Relief pursuant to Civ.R. 60(B) will be denied if the movant fails to adequately demonstrate any one of the requirements set forth in *GTE, supra*. *Argo Plastic Prods. Co. v. Cleveland*, 15 Ohio St.3d 389, 391, 474 N.E.2d 328 (1984).

{¶ 13} On appeal, unlike in the trial court, appellants now argue that Civ.R. 60(B)(1) is "wholly inapplicable" to the facts of the case and that "extraordinary circumstances" warrant relief under Civ.R. 60(B)(5). Appellants assert that in the trial court they requested relief under both Civ.R. 60(B)(1) and (5).

{¶ 14} Clearly, under Civ.R. 60(B)(1), the motion was not filed within one year after judgment and was untimely. As to Civ.R. 60(B)(5), appellants argue that the

extraordinary circumstances warranting relief include the fact that Je.F. is an incapacitated minor who was not represented by counsel on the date of the dismissal. Appellants attempt to separate Je.F.'s claims; they contend that the parents' failure to prosecute cannot be imputed to him.

{¶ 15} As to timeliness, appellants again use the fact that Je.F. was an incapacitated minor and the statute of limitations as to him has yet to run to demonstrate that the motion for relief from judgment was brought within a "reasonable time." Appellants support their argument with a guardianship case where the child, 12 years after settlement for injuries he sustained from a car accident, was permitted to vacate the settlement order. *In re Guardianship of Matyaszek*, 159 Ohio App.3d 424, 2004-Ohio-7167, 824 N.E.2d 132 (9th Dist.) In *Matyaszek*, in 1987, when appellant was two years old, he and his father were involved in an automobile accident. *Id.* at ¶ 3. Appellant's father began negotiating with appellee Ford Motor Company and signed a statement wherein he indicated that although his son had been injured he seemed "ok" now. *Id.* at ¶ 6. The settlement agreement which provided $10,000 for appellant was approved by the probate court and filed in a judgment entry.

{¶ 16} In 2000, after a guardian was appointed, minor appellant moved, pursuant to Civ.R. 60(B)(5), to vacate the judgment entry. Appellant argued that the settlement was procured through a fraud upon the court and that his due process rights were violated because he was not represented by counsel. *Id.* at ¶ 26. Granting the motion to vacate the magistrate found that the court was misled by appellant's parents and the attorneys as

to appellant's medical condition and the details of additional payments made to the parents and that a fraud was perpetrated on the court. *Id.* at ¶ 28. The decision was reversed by the probate judge who found that the 12-year delay was not reasonable as a matter of law. *Id.* at ¶ 32.

{¶ 17} On appeal, the court first noted that courts must give greater flexibility to the time requirements in cases involving minors. *Id.* at ¶ 58. The court then addressed the law applicable to settlements involving minors which specifically requires that the settlement was negotiated by a party acting in good faith. *Id.* at ¶ 79. The court then concluded that the father's mishandling of appellant's settlement money, the failure to provide appellant's doctor's note to the magistrate which detailed the seriousness of his condition, and the fact that appellant was not given "meaningful" representation, i.e. his father was not representing his interests, required that the settlement and dismissal judgment be vacated. *Id.* at ¶ 88-106.

{¶ 18} Unlike *Matyaszek*, there was no evidence presented in this case to demonstrate that Je.F.'s interests differed from his parents. Further, there is no evidence of fraud being perpetrated on the court. Also, there are critical factual differences between the cases including the fact that in *Matyaszek* appellant was represented by a guardian and the matter involved the application of settlement law. Other than espousing general public policy arguments, appellants have pointed to no specific facts which would rise to the level of "extraordinary circumstances" to warrant relief under Civ.R.

60(B)(5). Further, the compelling factors in *Matyaszek* are not present to convince this court that the motion was brought within a reasonable time.

{¶ 19} Accordingly, we find that the trial court did not abuse its discretion when it granted appellees' motion to dismiss. Appellants' assignment of error is not well-taken and denied.

{¶ 20} On consideration whereof, we find that substantial justice was done the parties complaining and the judgment of the Huron County Court of Common Pleas is affirmed. Pursuant to App.R. 24, costs of this appeal are assessed to appellants.

Judgment affirmed.

A certified copy of this entry shall constitute the mandate pursuant to App.R. 27. *See also* 6th Dist.Loc.App.R. 4.

Mark L. Pietrykowski, J. _____
JUDGE

Thomas J. Osowik, J. _____
JUDGE

Stephen A. Yarbrough, P.J. _____
CONCUR.
JUDGE

This decision is subject to further editing by the Supreme Court of Ohio's Reporter of Decisions. Parties interested in viewing the final reported version are advised to visit the Ohio Supreme Court's web site at: http://www.sconet.state.oh.us/rod/newpdf/?source=6.