

[Cite as *Torres v. Wood*, 2009-Ohio-5566.]

# Court of Appeals of Ohio

EIGHTH APPELLATE DISTRICT  
COUNTY OF CUYAHOGA

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JOURNAL ENTRY AND OPINION  
**No. 92666**

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**ODALYS TORRES, ET AL.**

PLAINTIFFS-APPELLANTS

vs.

**AUDREY J. WOOD**

DEFENDANT-APPELLEE

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**JUDGMENT:  
REVERSED AND REMANDED**

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Civil Appeal from the  
Cuyahoga County Court of Common Pleas  
Case No. CV-629138

**BEFORE:** Stewart, J., Cooney, A.J., and Gallagher, J.

**RELEASED:** October 22, 2009

**JOURNALIZED:**

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N.B. This entry is an announcement of the court's decision. See App.R. 22(B) and 26(A); Loc.App.R. 22. This decision will be journalized and will become the judgment and order of the court pursuant to App.R. 22(C) unless a motion for reconsideration with supporting brief, per App.R. 26(A), is filed within ten (10) days of the announcement of the court's decision. The time period for review by the Supreme Court of Ohio shall begin to run upon the journalization of this court's announcement of decision by the clerk per App.R. 22(C). See, also, S.Ct. Prac.R. II, Section 2(A)(1).

MELODY J. STEWART, J.:

{¶ 1} This case came to be heard upon the accelerated calendar pursuant to App.R. 11.1 and Loc.R. 11.1, the record from the Cuyahoga County Court of Common Pleas, and the briefs of counsel. Plaintiff-appellant, Odalys Torres, appeals from the judgment of the Cuyahoga County Court of Common Pleas dismissing her case with prejudice due to her counsel's failure to timely appear for trial. Finding merit to the appeal, we reverse the judgment of the trial court.

{¶ 2} Appellant filed a personal injury action against her landlord, defendant-appellee, Audrey Wood, to recover damages for injuries sustained in a fall on a patch of ice on the side of the rental property. The record reflects that four trial dates were set in this case. The first date, April 15, 2008, was reset because the court was involved in another trial at that time. The second date, July 23, 2008, was reset due to counsel for appellant's license to practice law being suspended for a continuing legal education (CLE) violation. The third date, November 5, 2008, was reset because the trial court was involved in a criminal trial. The final trial date was set for December 3, 2008 at 10:00 a.m., with both sides receiving written notice of the date and time. On the afternoon of December 2, 2008, the trial court notified each side by telephone that it was involved in another trial that week and therefore the case was to be assigned to a visiting judge and trial would begin at 9:00 a.m.

{¶ 3} It appears from the record that the case was called at 9:30 a.m. and appellant's counsel was not present. The trial court then dismissed the case with

prejudice. According to the court, appellant and counsel appeared at 10:10 a.m. According to appellant and her counsel, appellant arrived at the courtroom at 9:20 a.m. and her counsel arrived at 9:35 a.m. Citing traffic and elevator lines as reasons for his delay, counsel asked the court to reschedule the trial date. The court refused.

{¶ 4} Appellant immediately filed a motion asking the court to reschedule the trial or to set a hearing date to allow appellant an opportunity to be heard before the case was dismissed. The court denied the motion, and on December 10, 2008, issued a written entry dismissing the case with prejudice for failure to appear at trial.

{¶ 5} Appellant has timely appealed, raising the following assignments of error:

{¶ 6} “I. The trial court abused its discretion in dismissing plaintiff’s case with prejudice due to plaintiff and her counsel’s failure to appear at the hearing scheduled one hour before the scheduled trial start time.”

{¶ 7} “II. The trial court abused its discretion by ignoring and refusing to even consider plaintiff’s motion for relief from judgment.”

{¶ 8} The power to dismiss a case for lack of prosecution is within the sound discretion of the trial court. *Pembaur v. Leis* (1982), 1 Ohio St.3d 89. Civ.R. 41(B)(1) provides: “Where the plaintiff fails to prosecute, or comply with these rules or any court order, the court upon motion of a defendant or on its own motion may, after notice to the plaintiff’s counsel, dismiss an action or claim.”

Prior to ordering a dismissal on the merits under Civ.R. 41(B)(1), the trial court must give notice to plaintiff's counsel. *Ohio Furniture Co. v. Mindala* (1986), 22 Ohio St.3d 99; *Levy v. Morrissey* (1986), 25 Ohio St.3d 367. Notice need not be actual, however, and will be implied when reasonable under the circumstances. *Schreiner v. Karson* (1977), 52 Ohio App.2d 219; *Heard v. Sharp* (Jun. 16, 1988), Cuyahoga App. No. 53977.

{¶ 9} Dismissal with prejudice for want of prosecution acts as an adjudication on the merits. Civ.R. 41(B)(3). It is a harsh remedy that should be granted "only when an attorney's conduct falls substantially below what is reasonable and displays contempt for the judicial system or the rights of the opposing party." *Indus. Risk Insurers v. Lorenz Equip. Co.* (1994), 69 Ohio St.3d 576, 581, citing *Moore v. Emmanuel Family Training Ctr., Inc.* (1985), 18 Ohio St.3d 64, 70.

{¶ 10} "The law favors deciding cases on their merits unless the conduct of a party is so negligent, irresponsible, contumacious or dilatory as to provide substantial grounds for dismissal with prejudice for a failure to prosecute or obey a court order." *Schreiner*, 52 Ohio App.2d at 222.

{¶ 11} Based upon the record before us, it does not appear that appellant acted in such a manner as to warrant the sanction imposed. The trial court's entry dismissing the case cites two reasons for dismissal: the rescheduling of the July trial date to accommodate counsel's license suspension, and appellant's late arrival for trial on December 3, 2008. However, the court's docket also shows

that appellant filed her trial brief, proposed jury instructions, and the transcript of her expert witness's trial deposition in April 2008 in preparation for the first trial date. Additionally, on November 13, 2008, appellant filed supplemental proposed jury instructions in preparation for the December 3, 2008 trial date. Appellant's counsel corrected the CLE violation and had his license reinstated. He followed the court's instruction to file a notice of appearance in the case. Except for arriving late for trial, which appellant's counsel admits he did, it does not appear from the record that appellant failed to prosecute the case.

{¶ 12} There is nothing in the record to indicate that appellant was put on notice that a failure to arrive at 9:00 a.m. would result in dismissal with prejudice.

Furthermore, less severe sanctions were available. The court could have considered dismissal without prejudice or ordered appellant to pay certain costs and/or attorney fees, if warranted. *Willis v. RCA Corp.* (1983), 12 Ohio App.3d 1; *King v. Reed* (Oct. 18, 1990), Cuyahoga App. No. 57529. After consideration of the entire record, and considering the last minute change in trial time, we find the trial court abused its discretion in dismissing plaintiff's action with prejudice.

{¶ 13} For the foregoing reasons, we sustain appellant's first assignment of error. Because we find that the dismissal itself was improper, we do not reach the issue of the denial of the motion for relief from judgment raised in the second assignment of error.

{¶ 14} This cause is reversed and remanded for proceedings consistent with this opinion.

It is ordered that the appellant bear all costs herein taxed.

The court finds there were reasonable grounds for this appeal.

It is ordered that a special mandate be sent to the Cuyahoga County Court of Common Pleas to carry this judgment into execution.

A certified copy of this entry shall constitute the mandate pursuant to Rule 27 of the Rules of Appellate Procedure.

MELODY J. STEWART, JUDGE

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COLLEEN CONWAY COONEY, A.J., and  
SEAN C. GALLAGHER, J., CONCUR