[Cite as *In re S.S., A.S., & J.S.*, 2004-Ohio-5371.]

STATE OF OHIO	)	IN THE COURT OF APPEALS
	)ss:	NINTH JUDICIAL DISTRICT
COUNTY OF WAYNE	)	

IN RE: S.S., A.S. and J.S.	C.A. No. 04CA0032
	APPEAL FROM JUDGMENT ENTERED IN THE COURT OF COMMON PLEAS COUNTY OF WAYNE, OHIO CASE Nos. 01-0799 01-0800 01-0801

DECISION AND JOURNAL ENTRY

Dated: October 6, 2004

This cause was heard upon the record in the trial court. Each error assigned has been reviewed and the following disposition is made:

SLABY, Judge.

{¶1} Appellant, Audria Strong, appeals from the judgment of the Wayne County Court of Common Pleas, Juvenile Division, terminating her parental rights to her minor children, S.S., A.S., and J.S., and placing them in the permanent custody of the Wayne County Children Services Board ("CSB"). We reverse.

{¶2} Appellant and Steven Strong are the parents of S.S., born January 30, 1999, A.S., born June 19, 2000, and J.S., born August 6, 2001. The children were removed from the home pursuant to Juv.R. 6 on August 9, 2001. On August

24, 2001, they were adjudicated to be neglected. Following a dispositional hearing, the three children were placed in the temporary custody of CSB.

{¶3} On July 2, 2002, CSB filed a motion for permanent custody and the matter proceeded to hearing. On December 30, 2002, the juvenile court found that it was not in the best interest of the children to be placed in the permanent custody of CSB and denied the motion for permanent custody.

{¶4} In its judgment entry the juvenile court found that "the children do have an attachment to each other and their parents" and that "the parents do have suitable housing and are able to provide for the needs of the children. It will be a struggle for both parents to achieve success, but there has not been a showing that it is unlikely." The court found that permanent custody was not the only way to achieve a legally secure placement for these children. In addition, the court stated:

> "The fact that housing was lost in the spring of 2002 is outweighed by the best interests of the children to return to their parents. The environment of the family home appears safe and secure at this time. The [parents] are in counseling still, visit their children regularly, have a home and jobs, have completed parenting and are involved with budgeting, and understand the needs of the children for continued therapy. In short, the [parents] have complied with all of the case plan. Granted, they have not had the resounding success that might be wished, but their lack of success must be so evident as to convince the Court that the children will be in danger if returned. The evidence before the Court does not rise to that level."

Therefore, the court ordered CSB to prepare a case plan providing for the return of the children to the parent's home.

{¶5} On January 13, 2003, CSB filed a "Motion for New Trial," pursuant to Civ.R. 59(A)(8). In its motion, CSB relied on "new evidence, which has occurred since the hearing on the Motion for Permanent Custody[.]" CSB claimed that such evidence could not with reasonable diligence have been discovered and produced at trial. Attached to CSB's motion was the affidavit of Brooke Hider, a CSB caseworker. In her affidavit, Hider asserted facts stemming from events occurring after the permanent custody trial – events largely related to financial difficulties and one incident in which a child was injured.

{¶6} The parents opposed the motion, contending that evidence of matters that occurred after the final hearing will not support a motion for new trial.

{¶7} On February 18, 2003, the trial judge granted the motion for a new trial. Shortly thereafter, he recused himself because of a conflict of interest with witnesses expected to be called in the rehearing, and a visiting judge was assigned to the case.

{¶8} The matter was heard on November 12 and November 13, 2003. On April 9, 2004, the visiting judge terminated the parental rights of the parents and granted permanent custody of the children to CSB. Mother appealed; father did not. Appellant-mother assigns three errors for review. We address the third assignment of error first because it is dispositive.

ASSIGNMENT OF ERROR I

> "The juvenile court's decision to award permanent custody to [CSB] was against the manifest weights [sic] of the evidence."

ASSIGNMENT OF ERROR II

> "The juvenile court erred by awarding permanent custody to [CSB] without the children being in the temporary custody of the agency for at least twelve of the previous twenty-two months."

ASSIGNMENT OF ERROR III

> "The juvenile court erred when, after denying [CSB's] motion for permanent custody, it granted the agency's motion for a new trial based upon newly discovered evidence."

{¶9} In her third assignment of error, Appellant asserts the trial court erred when it granted CSB's motion for a new trial. We agree.

{¶10} CSB moved for a new trial on the basis of newly discovered evidence. The evidence it cited as being "newly discovered" admittedly related to events occurring after the hearing on the motion for permanent custody. CSB alleged that these events entitled them to a new trial because the evidence could not with reasonable diligence have been discovered and produced at trial.

{¶11} Civ.R. 59(A)(8) permits a new trial on the ground of newly discovered evidence where such evidence is material for the party applying, and where it could not with reasonable diligence have been discovered and produced at trial. Id. Case law has established that before a new trial may be granted on the basis of newly discovered evidence, the evidence (1) must be such as will probably change the result if a new trial is granted, (2) must have been discovered since the trial, (3) must be such as could not in the exercise of due diligence have been discovered before the trial, (4) must be material to the issues, (5) must not be

merely cumulative to former evidence, and (6) must not merely impeach or contradict the former evidence. *Sheen v. Kubiac* (1936), 131 Ohio St. 52, paragraph three of the syllabus. See, also, *In re West*, 4th Dist. No. 03CA20, 2003-Ohio-6299, at ¶23, (applying the *Sheen* standard for determining a motion for a new trial based upon newly discovered evidence in a permanent custody case).

{¶12} A motion for a new trial is addressed to the trial court's sound discretion and may not be disturbed on appeal absent an abuse of discretion. *Taylor v. Ross* (1948), 150 Ohio St. 448, paragraph two of the syllabus. An abuse of discretion implies that a court's ruling is unreasonable, arbitrary, or unconscionable; it is more than a mere error of law or judgment. *Blakemore v. Blakemore* (1983), 5 Ohio St.3d 217, 219.

{¶13} In general, newly discovered evidence has been interpreted to mean facts in existence at the time of trial of which the aggrieved party was excusably ignorant. *Schwenk v. Schwenk* (1982), 2 Ohio App.3d 250, 253. Therefore, matters occurring subsequent to the trial are not considered newly discovered evidence upon which to justify the granting of a new trial. Id. at 252. See, also, *Columbus & Southern Ohio Elec. Co. v. Pub. Util. Comm.* (1984) 10 Ohio St.3d 12, 13-14 (newly discovered evidence does not include evidence of matters occurring after trial); *Hutt v. Young* (1934), 47 Ohio App. 390, 393 (matters happening after trial cannot be considered to be newly discovered evidence);

Bachtel v. Bachtel, 7th Dist. No. 03 MA 75, 2004-Ohio-2807, at ¶46 (newly discovered evidence cannot be evidence that did not exist prior to trial); *Zimmerman v. Zimmerman* (June 18, 1990), 12th Dist. No. CA89-08-069 (facts not in existence at the time of trial are not newly discovered evidence).

{¶14} This principle is well grounded in the basic concept of finality of judgments. "To permit parties to bring up issues and facts that occurred after the trial would only serve to leave judgments unsettled and open to challenge at any time." *Hails v. Hails* (Sept. 30, 1993), 11th Dist. No. 92-L-182. There must be a reasonable end to litigation. Id. "To allow otherwise would mean the potential perpetual continuation of all trials in derogation of the notion of finality." Fink, Greenbaum, & Wilson, Guide to the Ohio Civil Rules of Procedure (2003) §59:14.

{¶15} This Court has previously addressed a question analogous to that presented by the case at bar. In *In re Lynch* (Aug. 21, 1985), 9th Dist. No. 11995, we considered an appeal from an order terminating parental rights brought on behalf of a parent. The father, in that case, sought a new trial based upon facts occurring after the permanent custody hearing. This Court denied the appeal, stating that "post hearing acts cannot be used as 'newly discovered evidence'" and, furthermore, that they were not relevant to the question then before the court, i.e. whether the father had theretofore met the requirements of the reunification plan. Id. at 4. See, also, *Bachtel* at ¶46 (new conditions cannot change the result

of a past trial and are not material to the issues at trial); *Zimmerman, supra* (events occurring after trial are not relevant to the question before the court).

{¶16} In support of its position, CSB cites two cases dealing with spousal support. See *Marksbury v. Marksbury* (1988), 46 Ohio App.3d 17 and *Knox v. Knox* (1986), 26 Ohio App.3d 17. In those cases, new trials were granted based on events occurring after trial, but before the final divorce decree was entered. We do not find these cases regarding the modification of spousal support to be persuasive in the context of the permanent custody case before us.

{¶17} Furthermore, in both *Marksbury* and *Knox*, there was a lengthy delay – eight and fourteen months, respectively – between the time when the hearing took place and final judgment was entered. In addition, the support awards were found to be otherwise non-modifiable. *Marksbury*, 46 Ohio App.3d at 19; *Knox*, 26 Ohio App.3d at 19-20. Thus, whatever the merits of *Marksbury* and *Knox*, the courts in those cases considered that there was an unavailability of other options available to the parties, and that a manifest injustice would occur if the motions for new trial were not granted. *Marksbury,* 46 Ohio App.3d at 19; *Knox*, 26 Ohio App.3d at 19-20. That is not the situation in the present matter.

{¶18} Here, CSB had other options available to it. It could have appealed from the decision of the trial court denying the motion for permanent custody, or it could have filed a new motion for permanent custody. Indeed, the second option may continue to be available to CSB. We have been presented with no

justification that would support a departure from the general principle that newly discovered evidence in support of a motion for a new trial must have been in existence at the time of trial, and the aggrieved party must have been excusably ignorant thereof.

{¶19} We conclude that evidence of events occurring after the hearing on the motion for permanent custody is not proper "newly discovered evidence" because those facts were not in existence at the time of trial. Moreover, those events had no relevance to the question of whether parental rights should have been terminated as of the time of the first trial. Accordingly, we conclude that the trial court erred in granting the motion for a new trial.

{¶20} Appellant's third assignment of error is sustained. Appellant's first and second assignments of error are rendered moot. The judgment of the trial court is reversed and the cause is remanded for further proceedings consistent with this opinion.

Judgment reversed,
and cause remanded.

The Court finds that there were reasonable grounds for this appeal.

We order that a special mandate issue out of this Court, directing the Court of Common Pleas, County of Wayne, State of Ohio, to carry this judgment into

execution. A certified copy of this journal entry shall constitute the mandate, pursuant to App.R. 27.

Immediately upon the filing hereof, this document shall constitute the journal entry of judgment, and it shall be file stamped by the Clerk of the Court of Appeals at which time the period for review shall begin to run. App.R. 22(E). The Clerk of the Court of Appeals is instructed to mail a notice of entry of this judgment to the parties and to make a notation of the mailing in the docket, pursuant to App.R. 30.

Costs taxed to Appellee.

Exceptions.

LYNN C. SLABY
FOR THE COURT

WHITMORE, P.J.
BATCHELDER, J.
CONCUR

APPEARANCES:

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