WWR #20663001

Supreme Court No. 2019-0423

IN THE SUPREME COURT OF OHIO

RAE-ANN GENEVA, INC.,	)	
	)	
Plaintiff-Appellee,	)	On Appeal from the Ashtabula County Court of Appeals, Eleventh Appellate District
	)	
vs.	)	
	)	Court of Appeals Case No. 2017-A-0067
ROBERT BLAKESLEE,	)	
	)	
Defendant-Appellant.	)	
	)	

MEMORANDUM IN OPPOSITION TO JURISDICTION OF APPELLEE, RAE-ANN GENEVA, INC.

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I. THIS CASE HAS NO PUBLIC OR GREAT GENERAL INTEREST AND DOES NOT PRESENT A SUBSTANTIAL CONSTITUTIONAL QUESTION

Appellant Robert Blakeslee ("Blakeslee") has presented no basis for the Ohio Supreme Court to accept jurisdiction. This case does not involve any constitutional question, or matter of public or great general interest. Rather, it involves the straight forward application of the Ohio Rules of Civil Procedure to a consent Judgment Entry Appellant agreed to through counsel. The Supreme Court should thus decline to hear further appeal.

This appeal arises from the granting of Plaintiff Rae-Ann Geneva, Inc.'s ("Rae-Ann") Motion for Summary Judgment, which Blakeslee's counsel took two extensions of time to oppose, yet failed to file any Brief in Opposition. The judgment was not appealed. After the time to appeal expired, Appellant filed his first Civil Rule 60 Motion for Relief From Judgment and Supplemental Brief. While that Motion was pending, the Parties agreed to vacate the judgment for 90 days to allow Blakeslee to seek additional Medicaid benefits, with the agreement that the judgment would be reinstated in 90 days. Some seven months later, the Trial Court reinstated the agreed judgment. Again, Blakeslee filed no appeal.

After the period to appeal expired, Appellant's third attorney filed a second Rule 60 Motion for Relief From Judgment arguing that "new" evidence, in the form of Medicaid records Blakeslee knew existed while summary judgment was pending and referred to in his first Rule 60 Motion, supported vacating the judgment again. After briefing and an evidentiary hearing, the Trial Court denied the Motion. Blakeslee then appealed the denial of his Rule 60 Motion to the Eleventh District Court of Appeals, which affirmed the Trial Court's decision on February 18, 2019. Appellant has now appealed that decision to this Honorable Supreme Court.

As will be demonstrated herein, the Court of Appeals properly determined that Blakeslee failed to meet his burden to demonstrate he was entitled to relief from judgment under the instant

procedural and factual scenario. The straight forward application of the Ohio Civil Rules by the Trial Court, does not raise any substantial constitutional question, or issue of great public or general importance. The Supreme Court should thus decline to hear further appeal.

II. STATEMENT OF THE CASE AND FACTS

After suffering a debilitating stroke, Blakeslee was transferred from a hospital to Rae-Ann's Skilled Nursing Facility, where he was a patient between April 25, 2014, and August 1, 2014. Due to his condition, Appellant's mother Margaret Blakeslee executed the subject Admission Agreement on April 29, 2014. As Rae-Ann was informed that Blakeslee had no medical insurance or Medicaid coverage, the Admission Agreement assured personal payment would be made to Rae-Ann for all services provided. As Blakeslee had no Medicaid coverage, his mother and father each agreed to pay for it with private money from Blakeslee's resources which included certain real estate, and that his assets would be liquidated to make payment if necessary. Rae-Ann relied upon this assurance of personal payment in agreeing to provide him with the high level of therapy services requested. During his stay with Rae-Ann, an initial Medicaid application was submitted but then withdrawn at the instruction of Blakeslee, by his father/Power of Attorney, who continuously represented to Rae-Ann that all charges would be paid with private funds.

Because Blakeslee owned certain assets, he was initially denied Medicaid benefits, and while a patient at Rae-Ann, there was no coverage. After being discharged, and while the instant case was pending with the Trial Court, Blakeslee continued to seek Medicaid coverage. A year after the services were provided, Medicaid approved Blakeslee for Modified Adjusted Gross Income (MAGI) Medicaid coverage on or about May 15, 2015.

Because there was no issue of fact that Rae-Ann was not fully compensated for the services it provided to Blakeslee, Appellant filed a Motion for Summary Judgment. Blakeslee, who

was represented by counsel throughout these proceedings, failed to file any opposition to Rae-Ann's Motion for Summary Judgment, despite taking several extensions to do so. Accordingly, because there was no genuine issue of material fact, and Rae-Ann was entitled to judgment as a matter of law, the Trial Court granted the unopposed Motion for Summary Judgment against Blakeslee on December 30, 2015. Blakeslee did not appeal this decision.

Blakeslee then filed his first Rule 60 Motion seeking to vacate the judgment, which Rae-Ann opposed on or about February 16, 2016. To allow Blakeslee the opportunity to seek further Medicaid coverage during the pendency of the Motion to Vacate, the parties executed an Agreed Notice To Vacate Judgment for 90 days, with an attached consent Judgment Entry against Blakeslee, signed by the Court and counsel, to be entered at the expiration of the 90 day period. After several extensions of this period, the Trial Court denied the Motion to Vacate, and re-entered the agreed judgment against Blakeslee on October 18, 2016. Again, no direct appeal was taken from this of judgment.

After the period to file a Notice of Appeal expired, Blakeslee, through his third attorney, filed a *second* Rule 60 Motion without any Affidavit or other admissible evidence, raising the same argument made in his first Motion for Relief From Judgment; that he was entitled to relief from the Agreed Judgment based on "newly discovered evidence," in the form of Appellant's own Medicaid records from 2015, which could have been presented a year earlier while the Motion for Summary Judgment was still pending. Rae-Ann opposed the motion, because a Rule 60 Motion on this basis had already been denied, Blakeslee was not entitled to relief due to newly discoverd evidence or any other basis set forth in Civ.R. 60(B)(1) – (5), and the evidence in the record failed to demonstrate Blakeslee had a meritorious defense to raise if relief was granted.

After an evidentiary hearing, the Trial Court denied the second Motion for Relief From Judgment on August 16, 2017.

Blakeslee appealed the denial of his second Rule 60 Motion to the Eleventh District Court of Appeals. After oral argument, the Court of Appeals affirmed the Trial Court's failure to grant relief, because a motion for relief from judgment cannot be used as a substitute for a timely appeal," the arguments raised in his Rule 60 Motion were raised in his first Motion for Relief From Judgment, and there was no newly discovered evidence or fraud.

III. ARGUMENT

Counter-Proposition of Law No. 1

A Civil Rule 60 Motion for Relief From Judgment Cannot Be Used As A Substitute for Appeal.

In *Pilkington N. Am., Inc. v. Toledo Edison Co.,* 2015-Ohio-4797, the Ohio Supreme Court held:

> [P34] **It is axiomatic that Civ.R. 60(B) cannot be used as a substitute for appeal** *Bank of Am., N.A. v. Kuchta*, 141 Ohio St.3d 75, 2014-Ohio-4275, 21 N.E.3d 1040, ¶ 16, citing *Harris v. Anderson*, 109 Ohio St.3d 101, 2006-Ohio-1934, 846 N.E.2d 43, ¶ 8-9. Like the other industrial companies that appealed the commission's February 19, 2009 order, Pilkington had the statutory right to file an application for rehearing and, if that application was unsuccessful, an appeal to this court. *See*R.C. 4903.10 and 4903.13. **Pilkington chose not to pursue those rights, however. Civ.R. 60(B) "does not exist to allow a party to obtain relief from his or her own choice to forgo an appeal from an adverse decision.**" *Kuchta* at ¶ 15, citing *Ackermann v. United States*, 340 U.S. 193, 198, 71 S.Ct. 209, 95 L.Ed. 207 (1950). **The doctrine of res judicata applies to a Civ.R. 60(B) motion filed as a substitute for appeal.** *Kuchta* at ¶ 16…
>
> **[P35] Pilkington did not appeal the commission's adverse judgment. Therefore, that judgment is final, and res judicata precludes the use of Civ.R. 60(B) to obtain relief from that final judgment**. (Emphasis added).

The Eleventh District Court of Appeals has similarly held that a Rule 60 motion cannot be used to raise the same issues which could have been the subject of a timely appeal:

> [P26] Appellants argue the trial court erred in denying their motion for relief from judgment because the court, in denying their motions to continue the trial (based on Eugene and Alice's health issues) and in addressing Mark's lateness for trial (due to his alleged illness), deprived them of an opportunity to prove their inability-to-pay defense. However, these alleged errors occurred before final judgment and could have been raised on appeal. Thus, appellants' first assignment of error merely challenges the correctness of the court's decision on the merits and could have been raised in *Deer Lake II*. As a result, appellants cannot rely on Civ.R. 60(B) as a substitute for an appeal of the trial court's judgment based on these issues.

State ex rel. Dewine v. Deer Lake Mobile Park, Inc., 2017-Ohio-1509 (11th Dist.); *Mamula v. Mamula*, 2006-Ohio-4176; Gursky v. Gursky, 2003-Ohio-5697 (11th Dist.).

Here, Blakeslee had several opportunities to appeal. He could have appealed the Trial Court's December 30, 2015 Order granting judgment against him, but did not, instead filing a Motion to Vacate. He could have appealed the October 18, 2016 reinstated consent judgment, but again failed to do so. After the time to appeal this judgment passed, he filed yet another Motion for Relief From Judgment, the denial of which gave rise to his appeal to the Eleventh District Court of Appeals. The very same "newly discovered" evidence raised in Blakeslee's Rule 60 Motion was hardly new, and could have been submitted in opposition to Rae-Ann's Motion for Summary Judgment, or in Appellant' s first Motion to Vacate.

Having failed to timely appeal the agreed judgment against him, Appellant was precluded from using a second motion for relief from judgment as a substitute for an appeal. Moreover, as set forth below, Blakeslee failed to come forward with sufficient evidence on every essential element to demonstrate entitlement to relief under Rule 60. The straight forward application of Ohio's procedural rules and case law interpreting them, does not give rise to any constitutional question or matter of great public importance. His second Rule 60 motion was thus "precluded by the doctrine of res judicata and/or the proposition that a Motion for Relief From Judgment cannot be used as a substitute for a timely appeal." Appellate Judgment Entry, pg. 5.

Counter-Proposition of Law No. 2

APPELLANT FAILED TO DEMONSTRATE HE WAS ENTITLED TO RELIEF FROM JUDGMENT UNDER CIVIL RULE 60.

After repeatedly foregoing his right to appeal, Blakeslee instead chose to attack the Trial Court's ruling by way of a second Rule 60 Motion for Relief From Judgment. However, Appellant's Rule 60 Motion failed to demonstrate entitlement to relief under this rule, and was properly denied.

In *Bell v. Bell*, 2017-Ohio-7956, the Eleventh District Court of Appeals held:

> [P49] To prevail on a motion brought under Civ.R. 60(B), the moving party must demonstrate that: (1) he has a meritorious defense or claim to present if relief is granted; (2) he 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 was entered. *GTE Automatic Electric v. ARC Industries*, 47 Ohio St.2d 146, 150-151, 351 N.E.2d 113 (1976). "Failure to satisfy any one of the three prongs of the GTE Automatic decision is fatal to a motion for relief from judgment." *Len-Ran, Inc. v. Erie Ins. Group*, 11th Dist. Portage No. 2006-P-0025, 2007-Ohio-4763, ¶20.
>
> [P51] "A motion filed pursuant to 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 an abuse of discretion." *Hiener v. Moretti*, 11th Dist. Ashtabula No. 2009-A-0001, 2009-Ohio-5060, ¶18…

Id. at ¶ 49-53. An abuse of discretion implies that the trial court's attitude was "unreasonable, arbitrary or unconscionable." *Blakemore v. Blakemore*, 5 Ohio St.3d 217, 219 (1983), quoting *State v. Adams* (1980), 62 Ohio St.2d 151, 157. Here, Appellant failed to establish any ground for relief under Civ.R. 60 (B)(1)-(5), or that he possessed a meritorious defense to present if relief were granted.

Appellant's Motion for Relief From Judgment was premised upon purported newly discovered evidence in the form of Blakeslee's own Medicaid bills and records from June of 2015. It is well-settled that "newly discovered" evidence under Civ.R. 60(B)(2), must be evi-

dence which could not have been discovered prior to trial through the exercise of due diligence. The Medicaid records Appellant claims were newly discovered, were in-fact generated years before they were obtained by Blakeslee's third attorney for use in a second Motion for Relief From Judgment. As the Trial Court noted, these documents existed while Rae-Ann's Motion for Summary Judgment was pending, and at the time Blakeslee's first Rule 60 Motion was filed. Thus, they clearly could have been obtained through discovery and submitted to the court long before Appellant's second Motion for Relief From Judgment. The failure of prior counsel to use due diligence to obtain and submit available evidence does not make the evidence "newly discovered," or provide any basis for relief from judgment. Newly *obtained* evidence due to the failure of counsel to conduct discovery during the pendency of an action, does not equal newly *discovered* evidence.

"Evidence that could have been discovered prior to trial by the exercise of due diligence does not qualify as newly discovered evidence. *Healey v. Goodyear Tire & Rubber Co.*, 9th Dist. Summit No. 25888, 2012-Ohio-2170, ¶16." *Bell, supra., at ¶ 53;* see also, *Karnofel v. Nye*, 2017-Ohio-7027 (11th Dist.). Appellant could have subpoenaed and submitted his own Medicaid records from June 24, 2015 prior to judgment, but his counsel failed to do so. That Appellant's third attorney only obtained them shortly before filing Blakeslee's second Motion for Relief From Judgment, does not transform them into newly discovery evidence under Civ.R. 60.

Moreover, "newly discovered evidence" was "only meant to apply to evidence in existence at the time of the trial, but the moving party was excusably unaware." *State ex rel. Dewine v. Deer Lake Mobile Park, Inc.*, 2017-Ohio-1509 (11th Dist.), citing *Gaul v. Gaul*, 2012-Ohio-4005, ¶ 21 (11th Dist.). The parties were well aware that after Blakeslee's Medicaid appeal was allowed in 2015, Rae-Ann submitted bills to Medicaid and received certain payments thereafter

which were credited to Appellant. The parties debated the Medicaid bill submissions and payments throughout these proceedings prior to judgment. Thus, Appellant was certainly aware of the records regarding same, yet failed to obtain them. Accordingly, there was no newly discovered evidence entitling Appellant to relief from judgment under Civ.R. 60(B)(2).

Appellant also alleged he was entitled to relief from judgment on the basis of fraud, but failed to allege, let alone submit evidence to support, the essential elements of fraud. In *Hasch v. Hasch*, 2009-Ohio-6377, the Eleventh Appellate District Court of Appeals held:

> **[P42] In determining the existence of fraud of an adverse party for purposes of Civ.R. 60(B), the movant must prove the elements of fraud**. *Cefaratti v. Cefaratti*, 11th Dist. No. 2004-L-091, 2005 Ohio 6895, at P28. In an action for fraud, the plaintiff must prove *each of the following elements*: (a) a representation, which (b) is material to the transaction at hand, (c) made falsely, with knowledge of its falsity, (d) with the intent of misleading another into relying upon it, (e) justifiable reliance upon the representation, and (f) a resulting injury proximately caused by the reliance. *Cohen v. Lamko, Inc*. (1984), 10 Ohio St.3d 167, 169, 10 Ohio B. 500, 462 N.E.2d 407. (Emphasis added.)

The Ohio Supreme Court further explained in *Bank of Am., N.A. v. Kuchta*, 141 Ohio St. 3d 75, 77-79, 2014-Ohio-4275:

> [P13] We agree with the widely held view, expressed by the Tenth District in *Botts*, that the **fraud**, **misrepresentation, or other misconduct contemplated by Civ.R. 60(B)(3**) **refers to deceit or other unconscionable conduct committed by a party to obtain a judgment and does not refer to conduct that would have been a defense to or claim in the case itself.** *Botts* at ¶ 15. (Emphasis added).

Moreover, “Pursuant to Civ.R. 60(B)(3), "[t]he term fraud denotes surprise, trick, cunning dissembling, and other unfair ways that are used to cheat another." *Cefaratti v. Cefaratti*, 11th Dist. Lake No. 2004-L-091, 2005-Ohio-6895, ¶28”. *State ex rel. Thomas v. Disanto*, 2017-Ohio-7292 (Eleventh Dist. Court of Appeals).

Appellant's Motion For Relief From Judgment failed to allege the essential elements of fraud, or offer any evidence in support thereof. Blakeslee did not identify any false, material representation made to him by Rae-Ann, with the intent of misleading, which he relied upon to his detriment, or injury related thereto. The failure to present evidentiary quality materials to support a claim for fraud under Civ.R.60(B)(3) warrants denial of the motion. *See, Residential Funding Co., LLC v. Thome*, 2012-Ohio-2552, ¶34.

Appellant's purported fraud also does not pertain to any conduct by Rae-Ann used to obtain a judgment; rather, only to conduct which Blakeslee alleges constitute a defense to Rae-Ann's claim. That Blakeslee was not granted any Medicaid coverage until June of 2015, affirms that Rae-Ann made no material misrepresentation to Appellant while he was being treated in 2014, which he relied on to his detriment. Finally, having sought relief from judgment due to the specific grounds of newly discovered evidence [60(B)(2)], and fraud [60(B)(3)], Appellant was precluded from obtaining relief under the catch-all provision of 60(B)(5). *Caruso-Ciresi, Inc., v. Lohman, 5 Ohio St. 3d 64, 66; Bell v. Bell,* 2017-Ohio-7956, ¶ 57 (11th Dist.).

IV. CONCLUSION

Based on the foregoing, it is manifest that there is no substantial constitutional question in this action that needs to be vindicated, and the issues here are not of great public or general interest. Rather, the subject judgment arises from the proper application of the Ohio Rules of Civil and Appellate procedure by the courts below. Therefore, Rae-Ann respectfully requests that the Supreme Court decline to accept this case for review.

Respectfully submitted,

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