

IN THE COURT OF APPEALS OF OHIO
FOURTH APPELLATE DISTRICT
HOCKING COUNTY

KIM A. ELLIOTT,	:	
	:	
Plaintiff-Appellant,	:	Case No. 08CA13/08AP13
	:	
vs.	:	
	:	
SMEAD MANUFACTURING CO.,	:	<u>DECISION AND JUDGMENT</u>
et al.,	:	<u>ENTRY</u>
	:	
Defendants-Appellees.	:	File-stamped date: 7-27-09

APPEARANCES:

Michael J. Muldoon, Columbus, Ohio, for Appellant.

John C. Barno, Barno Law, LLC, Columbus, Ohio, for Appellee, Smead Manufacturing Co., and Nancy H. Rogers¹, Ohio Attorney General, and Elise Porter, Assistant Attorney General, Columbus, Ohio, for Appellee, Administrator, Bureau of Workers' Compensation.

Kline, P.J.:

{¶1} Kim A. Elliott (hereinafter “Elliott”) appeals the decision of the Hocking County Court of Common Pleas, which denied her Civ.R. 60(B) motion for relief from judgment. On appeal, Elliott contends that the trial court (1) erred in denying her counsel the rightful attorney’s fee and (2) did not properly apply R.C. 4123.512(F). However, because Elliott used a Civ.R. 60(B) motion as a substitute for a direct appeal, we reject her arguments and dismiss this appeal.

I.

{¶2} Elliott was an employee of Smead Manufacturing Co. (hereinafter “Smead”). On October 18, 2005, Elliott filed the first of two complaints in the

¹ Nancy H. Rogers was the Ohio Attorney General at the time the Notice of Appeal was filed. Richard Cordray is the current Ohio Attorney General.

Hocking County Court of Common Pleas. In this complaint, Elliott claimed to have been involved in an accident in the course of her employment on or about March 18, 2002. This accident allegedly caused an injury to Elliott's right shoulder and arm. Elliott alleged that her workers' compensation claim was recognized for "sprain shoulder/arm right shoulder." Also in her first complaint, Elliott alleged that a District Hearing Officer denied Elliott's subsequent administrative motion seeking recognition of "cervical muscle strain" as an additional condition. Elliott further alleged the following: (1) that she appealed the denial to a Staff Hearing Officer, who vacated the denial and approved "cervical muscle strain" as an additional condition; (2) that Smead appealed the decision to the Industrial Commission, which refused the appeal and affirmed the allowance of "cervical muscle strain"; and, finally, (3) that Smead had appealed the decision of the Industrial Commission to the Hocking County Court of Common Pleas.

{¶3} Subsequently, on February 8, 2007, Elliott filed a second complaint in the Hocking County Court of Common Pleas. In her second complaint, Elliott claimed that she filed an administrative motion for recognition of "arthritis of right shoulder" as an additional condition of the March 18, 2002 accident. Elliott further alleged the following: (1) that a District Hearing Officer denied "arthritis of right shoulder" as an additional condition; (2) that a Staff Hearing Officer affirmed the District Hearing Officer's denial of the additional condition; (3) that Elliott appealed to the Industrial Commission, which refused her appeal without a

hearing; and, finally, (4) that Elliott filed a Notice of Appeal with the Hocking County Court of Common Pleas.

{¶4} On February 23, 2007, Elliott filed motions requesting that the trial court consolidate her two cases. Despite Smead's objections, the trial court granted these motions. The matter proceeded to a jury trial on February 11, 2008. The jury returned a verdict finding that Elliott was entitled to participate in the benefits of the Ohio Workers' Compensation Act for the condition of "cervical muscle strain," but that Elliott was not entitled to participate for the condition of "arthritis right shoulder." As a result, the trial court issued a judgment entry on February 27, 2008, which, in relevant part, states as follows: "The Court further enters judgment finding that Plaintiff is entitled to 50 percent of her deposition costs, and 50 percent of her statutory attorney's fee as outlined in R.C. 4123.512² since this case was a consolidated case of two separate actions under [R.C.] 4123.512. The Court finds that the split of these costs to Plaintiff is reasonable since it was Plaintiff's Motion to consolidate the two separate cases (05 CIV 414 and & [sic] CIV 056) to preserve costs for the parties. Therefore, it is appropriate and within its discretion to allocate on [sic] 50 percent of the deposition costs and statutory attorney fees to be paid to Plaintiff by the Defendant, Smead Manufacturing."

{¶5} Subsequently, on March 24, 2008, Elliott filed a motion for relief from judgment pursuant to Civ.R. 60(B). In that motion, Elliott argued that the trial

² The trial court did not specify whether it was applying the current version of R.C. 4123.512, which caps an attorney's fee at \$4200.00, or whether it was applying the former version of R.C. 4123.512, which caps an attorney's fee at \$2500.00.

court's decision to limit her attorney's fee and deposition costs to fifty percent of the statutory amount was contrary to the language of R.C. 4123.512(F). Smead opposed Elliott's Civ.R. 60(B) motion, and the trial court denied the motion on July 9, 2008. Elliott now appeals the trial court's denial of her Civ.R 60(B) motion and asserts the following assignment of error (which she incorrectly calls "PROPOSITION OF LAW NO. 1"): "THE TRIAL JUDGE ERRORED [SIC] IN DENYING THE PLAINTIFF'S COUSNEL [SIC] HIS RIGHTFUL ATTORNE [SIC] FEE UNDER THE STATUE [SIC] AND ALSO FAILED TO APPLY OHIO REVISED CODE §4123.512(F)."

II.

{¶6} In her sole assignment of error, Elliott contends that the trial court (1) erred in denying her counsel the rightful attorney's fee and (2) did not properly apply R.C. 4123.512(F).

{¶7} In an appeal from a Civ.R. 60(B) determination, a reviewing court must determine whether the trial court abused its discretion. *State ex rel. Richard v. Seidner* (1996), 76 Ohio St.3d 149, 151, citing *Rose Chevrolet, Inc. v. Adams* (1988), 36 Ohio St.3d 17, 20. An abuse of discretion connotes conduct that is unreasonable, arbitrary, or unconscionable. *State ex rel. Richard* at 151, citing *State ex rel. Edwards v. Toledo City School Dist. Bd. Of Edn.* (1995), 72 Ohio St.3d 106, 107.

{¶8} Civ.R. 60(B) provides: "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.”

{¶9} In order to prevail on a motion for relief from judgment pursuant to Civ.R. 60(B), the movant must demonstrate: (1) a meritorious claim or defense; (2) entitlement to relief under one of the grounds stated in Civ.R. 60(B)(1) through (5); and (3) timeliness of the motion. *Rose Chevrolet* at 20, citing *GTE Automatic Elec. v. ARC Industries* (1976), 57 Ohio St.3d 146, paragraph two of the syllabus; see, also, *Buckeye Fed. S. & L. Assn. v. Guirlinger* (1991), 62 Ohio St.3d 312, 314. If any one of these three requirements is not met, then the motion should be overruled. *Rose Chevrolet* at 20, citing *Svoboda v. Brunswick* (1983), 6 Ohio St.3d 348, 351; *Hopkins v. Quality Chevrolet, Inc.* (1992), 79 Ohio App.3d 578, 581.

{¶10} Initially, we must note the manner in which Elliott frames her argument on appeal. Although Elliott appeals from the trial court’s denial of her Civ.R. 60(B) motion, her lone assignment of error challenges the trial court’s

determination on the merits. Furthermore, in her brief, Elliott does not discuss the standards for prevailing under Civ.R. 60(B). Instead, she merely argues that the trial court erred in assessing the attorney's fee and in denying deposition costs under R.C. 4123.512(F). R.C. 4123.512(F) provides: "The cost of any legal proceedings authorized by this section, including an attorney's fee to the claimant's attorney to be fixed by the trial judge, based upon the effort expended, in the event the claimant's right to participate or to continue to participate in the fund is established upon the final determination of an appeal, shall be taxed against the employer or the commission if the commission or the administrator rather than the employer contested the right of the claimant to participate in the fund. The attorney's fee shall not exceed forty-two hundred dollars." (Or, according to the former version of the statute, twenty-five hundred dollars.)

{¶11} Because of the trial court's alleged errors in applying R.C. 4123.512(F), Elliott "request[s] relief from the Judgment Entry entered by the Court on February 26, 2008."³ Brief of Plaintiff-Appellant, Kim Elliott at 8. This judgment entry, however, is not the entry that denies the Appellant's Civ.R. 60(B) motion. Instead, the February 27, 2008 entry resolves the merits of the case, including the issues of the attorney's fee and deposition costs. The trial court denied Elliott's Civ.R. 60(B) motion in a July 9, 2008 entry.

{¶12} The manner in which Elliott frames her argument is especially relevant because we find that Elliott used a Civ.R. 60(B) motion as a substitute for a direct appeal. "[W]here the remedy of appeal is available to a party, and where the

³ Elliott misstates the date of the trial court's Judgment Entry. The correct date is February 27, 2008.

issues raised in a motion for relief from judgment are those which could properly have been raised on appeal, a motion for relief from judgment will be denied.” *Newell v. White*, Pickaway App. No. 05CA27, 2006-Ohio-637, at ¶14, quoting *Burroughs Real Estate Co. v. Zennie R. Heath* (Mar. 20, 1980), Cuyahoga App. No. 40476, unreported. “In order to bring [herself] within the limited area of Civ.R. 60(B), [Elliott] must establish the existence of extraordinary circumstances which rendered [her] unable to appeal[.] * * * [A] party should not be permitted to circumvent the appeals process through application of Civ.R. 60(B), *since it is the function of the appellate court to correct legal errors committed by the trial court.*” *Newell* at ¶14, quoting *Taylor v. Taylor* (Mar. 27, 1987), Lawrence App. No 1801, unreported (emphasis sic). See, also, *Plotkin v. Pacific Tel. & Tel. Co.* (C.A.9, 1982), 688 F.2d 1291; 7 Moore Federal Practice (1985), Paragraph 60.18(8).

{¶13} In short, Civ.R. 60(B) was intended to provide relief from a final judgment in specific, enumerated situations and cannot be used as a substitute for a direct, timely appeal. See *Doe v. Trumbull County Children Services Board* (1986), 28 Ohio St.3d 128, paragraph two of the syllabus; *Newell* at ¶15. “If a party raises the same question in a Civ.R. 60(B) motion as that [sic] he could have raised on a direct appeal, he could get an indirect extension of time for appeal by appealing the denial of the Civ.R. 60(B) motion.” *Newell* at ¶15, citing *Parke-Chapley Construction Company v. Cherrington* (C.A.7, 1989), 865 F.2d 907, 915. Thus, “[w]hen a Civ.R. 60(B) motion is used as a substitute for a timely appeal, and when the denial of that motion is subsequently appealed, the proper response is the dismissal of the appeal.” *Garrett v. Gortz*, Cuyahoga App. No.

90625, 2008-Ohio-4369, at ¶14, citing *State ex rel. Richard v. Cuyahoga Cty. Comms.*, 89 Ohio St.3d 205, 2000-Ohio-135.

{¶14} Here, Elliott did not directly appeal the trial court's final judgment. On a direct appeal, Elliott could have raised the same issues that she raised in her Civ.R. 60(B) motion, i.e., whether the trial court (1) erred in denying her counsel the rightful attorney's fee and (2) properly applied R.C. 4123.512(F). Therefore, pursuant to *Doe* and *Newell*, Elliott improperly used a Civ.R. 60(B) motion as a substitute for a direct appeal.

{¶15} Accordingly, we reject all of Elliott's arguments and dismiss her appeal.

APPEAL DISMISSED.

JUDGMENT ENTRY

It is ordered that the APPEAL BE DISMISSED and appellant pay the costs herein taxed.

The Court finds there were reasonable grounds for this appeal.

It is ordered that a special mandate issue out of this Court directing the Hocking 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. Exceptions.

Abele, J.: Concurs in Judgment and Opinion.
McFarland, J.: Dissents.

For the Court

BY: _____
Roger L. Kline, Presiding Judge

NOTICE TO COUNSEL

Pursuant to Local Rule No. 14, this document constitutes a final judgment entry and the time period for further appeal commences from the date of filing with the clerk.