

COURT OF APPEALS
DELAWARE COUNTY, OHIO
FIFTH APPELLATE DISTRICT

JULIE PETERMAN	:	JUDGES:
	:	
	:	Hon. Sheila G. Farmer, P.J.
Plaintiff-Appellant	:	Hon. John W. Wise, J.
	:	Hon. Patricia A. Delaney, J.
-vs-	:	
	:	Case No. 09 CAE 04 0045
DEAN STEWART, et al.	:	
	:	
	:	
Defendants-Appellees	:	<u>OPINION</u>

CHARACTER OF PROCEEDING: Appeal from the Delaware County Court of
Common Pleas Case No. 02-CV-C-08-449

JUDGMENT: AFFIRMED

DATE OF JUDGMENT ENTRY: December 2, 2009

APPEARANCES:

For Plaintiff-Appellant:

PHILIP L. PROCTOR
P.O. Box 4803
Newark, OH 43058

For Defendants-Appellees:

FRED J. BEERY
125 N. High St.
Hillsboro, OH 45133

Delaney, J.

{¶1} Appellant Philip L. Proctor appeals the March 31, 2009 and May 7, 2009 judgment entries of the Delaware County Court of Common Pleas, denying Appellant's motion for relief from judgment and finding that the judgment had not been satisfied. Defendants-Appellants are the Estate of Josephine Shively and Dean Stewart, Executor of the Estate.

STATEMENT OF THE FACTS AND THE CASE

{¶2} This case originated with the Probate Court in 1998 as a dispute between the Executor and beneficiary, Julie Peterman over the Estate of Josephine Shively. During the litigation of that matter, the Executor through his counsel filed certain personal documents belonging to Peterman as discovery. Peterman objected to the filing of her personal documents and moved to strike them. The documents remained in the Probate Court record and gave rise to the present case.

{¶3} Peterman filed a complaint in the Delaware County Court of Common Pleas on August 15, 2002. In her complaint against the Executor, she alleged invasion of privacy, invasion of privacy – publication of private facts, invasion of privacy – unwarranted publicity, intentional infliction of emotional distress, and injunctive relief. Peterman was represented by Appellant, Attorney Philip Proctor.

{¶4} Peterman filed an amended complaint on September 6, 2002, naming the Estate of Josephine Shively as an additional defendant. Peterman filed a second amended complaint on July 7, 2003 to add the tort of abuse of process.

{¶5} On October 24, 2003, Proctor filed a motion to withdraw as counsel alleging that he would be participating as a witness in the action. The trial court granted

the motion and ordered Proctor not to prepare or file any further pleadings on behalf of Peterman. Peterman subsequently represented herself in the action.

{¶6} On November 13, 2003, Peterman filed a motion for voluntary dismissal of the action. The trial court granted the dismissal on November 19, 2003.

{¶7} Within thirty days after the dismissal of the action, the Executor and the Estate filed motions for award of attorney's fees and costs, pursuant to R.C. 2323.51 and Civ.R. 11. The trial court held a hearing on the motions on November 10, 2005. By judgment entry filed on November 22, 2005, subsequent to the filing of post-hearing supplemental documents by the parties and a status conference on the matter, the trial court entered its decision wherein it found that the actions by Peterman and Proctor were clearly frivolous. Based upon the evidence in the record, the trial court found the claims asserted in the complaint, amended complaint, and second amended complaint were without merit. The trial court granted the Executor's and the Estate's motions for attorney's fees; it awarded the Executor \$1,780.00 and the Estate \$30,215.90 in attorney's fees to be assessed against Peterman and Proctor equally.

{¶8} Proctor and Peterman appealed the November 22, 2005 judgment to this Court. We affirmed the judgment of the trial court in *Julie Peterman v. Dean Stewart, Estate of Josephine Shively*, Delaware App. No. 05-CAE-12-0082, 2006-Ohio-4671 ("*Peterman I*").

{¶9} On October 17, 2006, Peterman and Proctor appealed this Court's decision to the Ohio Supreme Court. The Ohio Supreme Court declined jurisdiction and dismissed the appeals of Peterman and Proctor on January 24, 2007 and February 7,

2007. The Court further denied the subsequently filed motions for reconsideration on March 28, 2007.

{¶10} On May 10, 2007, Proctor filed a Civ.R. 60(B) Motion to Vacate Judgment as to Attorney and Motion for Relief from Judgment from the original judgment for legal fees with the Delaware County Court of Common Pleas. The motion was assigned to a different judge, based on whom Proctor filed a Motion to Recuse the assigned judge from the case. By separate judgment entries dated October 9, 2007, the trial court denied Proctor's motion to recuse and Civ.R. 60(B) motion.

{¶11} Proctor filed an appeal of the trial court's decisions with this Court. In our decision in *Julie Peterman v. Dean Stewart, et al.*, Delaware App. No. 07 CAE 10 0054, 2008-Ohio-2164 ("*Peterman II*") issued May 7, 2008, we affirmed the judgment of the trial court. We found that Proctor improperly utilized a Civ.R. 60(B) motion as a substitute for a timely appeal and that his claims were further barred by the doctrine *res judicata*.

{¶12} Proctor filed appealed the decision to the Ohio Supreme Court on July 22, 2008. The Ohio Supreme Court declined jurisdiction and dismissed the appeal on October 1, 2008. The Court further denied Proctor's motion for reconsideration on December 3, 2008.

{¶13} On February 13, 2009, Proctor filed a Motion for Relief from Judgment with the Delaware County Court of Common Pleas. In his motion, he asked for relief from the judgment entered on November 22, 2005 awarding attorney's fees in favor of the Executor and the Estate and relief from the October 9, 2007 judgment entry denying his first motion for relief from judgment. Proctor brought his Civ.R. 60(B) motion based

on the Ohio Supreme Court case, *Hageman v. Southwest Gen. Health Ctr.*, 119 Ohio St.3d 185, 2008-Ohio-3343, which was decided on July 9, 2008. Proctor asserted that the *Hageman* case presented a meritorious defense to him that was not previously addressed by the trial court.

{¶14} Simultaneously, Proctor filed a Motion to Determine Whether the Judgment (If Owed) Has Been Paid, for Relief from Judgment, to Determine the Amount Due or the Amount Overpaid, for Credit from Plaintiff's Share of the Estate, and Motion to Determine the Meaning of the Prior Judgment.

{¶15} On March 31, 2009, the trial court issued its judgment entry in which it stated that it reviewed *Hageman*, found it to be distinguishable from Peterman's case, and did not provide a basis for vacating the November 22, 2005 judgment.

{¶16} As to Proctor's second motion, the trial court denied the motion in part and deferred ruling in part. Proctor first argued that the November 22, 2005 judgment had been satisfied, but the trial court could not make such a determination based on the evidence presented. The trial court ordered the Executor and the Estate to provide an accounting to determine what amount, if any, was still owed on the judgment. Proctor next argued that interest on the judgment should be disallowed. The trial court found that it had previously rejected this argument in a prior judgment entry of which Proctor never appealed or filed a timely motion for relief.

{¶17} In Proctor's third argument, he stated that the trial court previously ordered the Executor of the Estate to turn over any and all funds to be paid to Peterman from the Estate. The trial court further ordered that the amount should be applied to the judgment rendered against Peterman. Proctor argued in his motion that the balance of

the Estate remained undistributed and held in an interest-bearing account. Proctor requested the trial court order that Peterman's share of the interest be applied to the judgment or paid directly to Proctor. The trial court denied the judgment because the trial court already ordered that Peterman's share of the Estate be distributed to her, therefore Peterman would not be entitled to a share of interest earned on the remaining undistributed estate.

{¶18} Proctor's final argument requested clarification of the trial court's November 22, 2005 judgment entry in which the trial court ordered the judgment "shall be assessed against Julie Peterman and her former attorney Philip Proctor equally." The trial court denied the request, finding that in a December 7, 2007 judgment entry, the trial court determined that Peterman and Proctor were jointly and severally liable on the judgment.

{¶19} On May 7, 2009, the trial court issued its final ruling finding that based on the accounting provided by the Executor and the Estate, the judgment had not been satisfied.

{¶20} Proctor now appeals the March 31, 2009 and May 7, 2009 judgments, bringing this case before this Court for the third time.

ASSIGNMENTS OF ERROR

{¶21} Proctor raises five Assignments of Error:

{¶22} "I. IN THE JUDGMENT ENTRIES FILED ON MARCH 31, 2009 AND MAY 7, 2009, THE TRIAL COURT FAILED TO RECOGNIZE THE NEW LAW OF THE *HAGEMAN* CASE AND COURT RULE 44-47 THAT MAKE BOTH A PARTY AND THE

PARTY'S ATTORNEY LIABLE FOR 'UNAUTHORIZED DISCLOSURE' OR FILING OF PRIVATE PAPERS WITHOUT THE CONSENT OF THE OPPOSING PARTY.

{¶23} "II. REGARDING THE JUDGMENT ENTRIES FILED ON MARCH 31, 2009 AND MAY 7, 2009, APPELLANT ATTORNEY PROCTOR COULD FILE HIS OWN SUIT FOR SUBROGATION AND DAMAGES UNDER *HAGEMAN* AS AGAINST THE ATTORNEYS FOR THEIR TORTIOUS CONDUCT REGARDING THE UNAUTHORIZED DISCLOSURE OF PRIVATE DOCUMENTS.

{¶24} "III. REGARDING THE JUDGMENT ENTRIES FILED ON MARCH 31, 2009 AND MAY 7, 2009, AWARDS OF ATTORNEY'S FEES DO NOT CARRY INTEREST AND INTEREST AND OTHER FEES CANNOT BE ADDED OVER A YEAR AFTER THE JUDGMENT WHERE THERE WAS NO NOTICE, HEARING, AND IT WAS NOT ORIGINALLY ORDERED BY THE COURT.

{¶25} "IV. REGARDING THE JUDGMENT ENTRIES FILED ON MARCH 31, 2009 AND MAY 7, 2009, IF THE JUDGMENT IS NOT TO BE REVERSED COMPLETELY, THEN FURTHER APPLICATION SHOULD BE TERMINATED UNDER THE PROSPECTIVE APPLICATION RULE OF 60(B)(4).

{¶26} "V. REGARDING THE JUDGMENT ENTRIES FILED ON MARCH 31, 2009 AND MAY 7, 2009, THE COMMON PLEAS COURT DOES NOT HAVE SUBJECT MATTER OR PERSONAL JURISDICTION TO CUT OFF CLIENT PETERMAN'S SHARE OF HER INHERITENCE [SIC] ESPECIALLY WHERE SUCH AN ORDER CONTRADICTS ORDERS FROM THE PROBATE COURT."

I., II.

{¶27} We will address Proctor's first and second Assignments of Error together because they are interrelated. In Proctor's first Assignment of Error, he argues the trial court abused its discretion in denying Proctor's motion for relief from the November 22, 2005 judgment. We disagree.

{¶28} A motion for relief from judgment under Civ.R. 60(B) lies within the trial court's sound discretion. *Griffey v. Rajan* (1987), 33 Ohio St.3d 75, 514 N.E.2d 1122. In order to find abuse of discretion, we must determine the trial court's decision was unreasonable, arbitrary or unconscionable. *Blakemore v. Blakemore* (1983), 5 Ohio St.3d 217, 219, 450 N.E.2d 1140.

{¶29} Civ.R. 60(B) states in pertinent part,

{¶30} On motion and upon such terms as are just, the court may relieve a party*
* * from a final judgment, order or proceedings 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 to taken. * *

* ."

{¶31} A party seeking relief from judgment pursuant to Civ.R. 60(B) must show: “(1) a meritorious defense or claim to present if relief is granted; (2) entitlement to relief under one of the grounds set forth in Civ.R. 60(B)(1)-(5); and (3) the motion must be timely filed.” *GTE Automatic Electric, Inc. v. ARC Industries, Inc.* (1976), 47 Ohio St.2d 146, 351 N.E.2d 113, paragraph two of the syllabus. A failure to establish any one of these three requirements will cause the motion to be overruled. *Rose Chevrolet, Inc. v. Adams* (1988), 36 Ohio St.3d 17, 20, 520 N.E.2d 564; *Argo Plastic Prod. Co. v. Cleveland* (1984), 15 Ohio St.3d 389, 391, 474 N.E.2d 328.

{¶32} Proctor argues that the case of *Hageman v. Southwest Gen. Health Ctr.*, 119 Ohio St.3d 185, 2008-Ohio-3343, presents a meritorious defense to the November 22, 2005 judgment entry that Peterman’s claims against the Estate and the Executor were frivolous. In presenting a meritorious defense under Civ.R. 60(B), a movant’s burden is only to allege a meritorious defense, not to prove that he will prevail on that defense. *Rose Chevrolet, Inc. v. Adams* (1988), 36 Ohio St.3d 17, 520 N.E.2d 564.

{¶33} In her complaint, Peterman brought various claims of invasion of privacy against the Executor and the Estate for their filing of Peterman’s personal documents in the Probate Court action. Proctor argues that *Hageman*, decided July 9, 2008, provides a basis for her claims. In *Hageman*, the Ohio Supreme Court held that, “an attorney may be liable to an opposing party for the unauthorized disclosure of that party’s medical information that was obtained through litigation.” 2008-Ohio-3343, syllabus.

{¶34} We agree with the trial court that *Hageman* does not provide a basis for vacating the November 22, 2005 judgment.

{¶35} First, this Court has reviewed Peterman's personal documents filed in the Probate Court case that were made part of the record in the present case. Upon our review, we find the records do not contain any medical information regarding Peterman. We further decline to extend the holding of *Hageman* to include all personal information, rather than just medical information, as argued by Proctor.

{¶36} Second, we do not find that *Hageman* presents this Court with an intervening decision that requires us to make an exception to the law-of-the-case doctrine. In *Hopkins v. Dyer*, 104 Ohio St.3d 461, 820 N.E.2d 329, 2004-Ohio-6769, the Ohio Supreme Court discussed the law-of-the-case doctrine and stated as follows:

{¶37} "The law of the case is a longstanding doctrine in Ohio jurisprudence. '[T]he doctrine provides that the decision of a reviewing court in a case remains the law of that case on the legal questions involved for all subsequent proceedings in the case at both the trial and reviewing levels.' *Nolan v. Nolan*, 11 Ohio St.3d at 3, 11 OBR 1, 462 N.E.2d 410. The doctrine is necessary to ensure consistency of results in a case, to avoid endless litigation by settling the issues, and to preserve the structure of superior and inferior courts as designed by the Ohio Constitution. *State ex rel. Potain v. Mathews* (1979), 59 Ohio St.2d 29, 32, 13 O.O.3d 17, 391 N.E.2d 343. It is considered a rule of practice, not a binding rule of substantive law. *Hubbard ex rel. Creed v. Sauline* (1996), 74 Ohio St.3d 402, 404, 659 N.E.2d 781." *Hopkins* at ¶ 15.

{¶38} The Court also explained, in *Hopkins*, that it has previously recognized an exception to the doctrine of the law of the case in *Jones v. Harmon* (1930), 122 Ohio St. 420, 172 N.E. 151, wherein it held that an inferior court must take notice of an intervening decision, by a superior court, that is inconsistent with the law of the case.

Id. at ¶ 16, 172 N.E. 151. Thus, the Court held in *Hopkins* that the decision in *Westfield Ins. Co. v. Galatis*, 100 Ohio St.3d 216, 2003-Ohio-5849, 797 N.E.2d 1256, constituted extraordinary circumstances that created an exception to the law-of-the-case doctrine because *Galatis* constituted an intervening decision by a superior court that was inconsistent with the law of the case. Id. at ¶ 18, 797 N.E.2d 1256.

{¶39} Third, we also affirm the decision of the trial court because it is well-settled that Civ.R. 60(B) “is not available as a substitute for a timely appeal * * * nor can the rule be used to circumvent or extend the time requirements for an appeal.” *Blasco v. Mislik* (1982), 69 Ohio St.2d 684, 686.

{¶40} We find the trial court did not abuse its discretion in determining that Proctor could not establish a meritorious defense with the application of *Hageman*. Because Proctor failed to meet one of the required elements, his motion must fail. Accordingly, Proctor’s first and second Assignments of Error are overruled.

III.

{¶41} Proctor argues in his third Assignment of Error that the trial court impermissibly modified the November 22, 2005 judgment entry by assigning penalties, fees and interest. Upon our review of the March 31, 2009 and May 7, 2009 judgment entries, we can find no such modification as alleged by Proctor.

{¶42} It further appeared from the trial court’s judgment entries that Proctor previously raised these arguments to the trial court and the trial court disposed of the issues by judgment entries filed in 2007. Specifically, the trial court stated that it determined that the November 22, 2005 judgment entry held “that Plaintiff Peterman and Attorney Proctor were jointly and severally liable on the judgment” by entry on

December 3, 2007. Proctor did not appeal the entries nor did he file motions for relief from judgment.

{¶43} We find Proctor's third Assignment of Error to be untimely and overrule the same.

IV.

{¶44} Proctor argues in his fourth Assignment of Error that under Civ.R. 60(B)(4), the November 22, 2005 judgment should not have prospective application due to the change in the law based upon *Hageman*. We disagree.

{¶45} Civ.R. 60(B)(4) states, "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."

{¶46} As stated above, we find that *Hageman* has no application to the facts of this case. Civ.R. 60(B)(4), therefore, cannot be utilized in the present case to argue that the judgment is no longer equitable.

{¶47} Proctor's fourth Assignment of Error is overruled.

V.

{¶48} Proctor argues in his fifth Assignment of Error that the trial court does not have personal or subject matter jurisdiction over the distribution of Peterman's share of the Estate as beneficiary. As stated above, in his motions for relief, Proctor argued that Peterman was still owed interest on her share of the Estate and that interest should be applied to the outstanding judgment. The trial court denied the motion because the Estate and the Executor were previously ordered to disburse Peterman's share of the

Estate and the trial court determined that there could not be any remaining balance on which interest accrued. Proctor states the judgments issued by the trial court on March 31, 2009 and May 7, 2009 impermissibly cut off Peterman from her remaining share of the Estate because the trial court was without jurisdiction to make such a finding.

{¶49} As a first matter, Proctor is making arguments regarding Peterman's share of the Estate. Peterman is not a party to this appeal, nor did she file a separate appeal. Proctor withdrew as counsel for Peterman on October 24, 2003.

{¶50} Second, we find it was Proctor who initially invoked the jurisdiction of the trial court with his request for credit on the judgment from Peterman's share of the Estate. In Proctor's motion for relief from judgment, Proctor requested the trial court to order the Executor and the Estate to calculate Peterman's share of accumulated interest and release those funds to be applied her share to the judgment in this matter. Proctor seemed to believe the trial court had personal and subject matter jurisdiction to order the Executor and the Estate to distribute any remaining interest to Peterman. Upon a negative ruling from the trial court, the trial court was apparently stripped of its jurisdiction to consider such a request.

{¶51} Proctor's fifth Assignment of Error is overruled.

{¶52} The judgment of the Delaware County Court of Common Pleas is affirmed.

By: Delaney, J.

Farmer, P.J. and

Wise, J. concur.

HON. PATRICIA A. DELANEY

HON. SHEILA G. FARMER

HON. JOHN W. WISE

PAD:kgb

IN THE COURT OF APPEALS FOR DELAWARE COUNTY, OHIO
FIFTH APPELLATE DISTRICT

JULIE PETERMAN	:	
	:	
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Plaintiff-Appellant	:	
	:	
-vs-	:	JUDGMENT ENTRY
	:	
DEAN STEWART, et al.	:	
	:	
	:	Case No. 09 CAE 04 0045
Defendants-Appellees	:	

For the reasons stated in our accompanying Memorandum-Opinion on file, the judgment of the Delaware County Court of Common Pleas is affirmed. Costs assessed to Appellant.

HON. PATRICIA A. DELANEY

HON. SHEILA G. FARMER

HON. JOHN W. WISE