[Cite as *Wallace Equine Servs., L.L.C. v. J. Arnold Property Mgt. Group, L.L.C.*, 2023-Ohio-2426.]

IN THE COURT OF APPEALS OF OHIO

SEVENTH APPELLATE DISTRICT
MAHONING COUNTY

WALLACE EQUINE SERVICES, LLC,

Plaintiff-Appellant,

v.

THE J. ARNOLD PROPERTY MANAGEMENT GROUP, LLC,

Defendant-Appellee.

OPINION AND JUDGMENT ENTRY
Case No. 22 MA 0035

Application for Reconsideration and for En Banc Consideration

BEFORE:
David A. D'Apolito, Cheryl L. Waite, Mark A. Hanni, Judges.

JUDGMENT:
Denied.

Atty. Jason M. Rebraca, Johnson & Johnson Law Firm, 12 West Main Street, Canfield, Ohio 44406, for Plaintiff-Appellant and

Atty. Matthew C. Giannini, 1040 South Commons Place, Suite 200, Youngstown, Ohio 44514, for Defendant-Appellee.

Dated: July 13, 2023

PER CURIAM.

{¶1} Appellant, Wallace Equine Services, LLC ("Wallace"), has timely filed a joint application for en banc consideration and a request that this court reconsider our decision in *Wallace Equine Services, LLC v. The J. Arnold Property Management Group, LLC*, 7th Dist. Mahoning No. 22 MA 0035, 2023-Ohio-1498 (Waite, J., dissenting), in which we affirmed the March 21, 2022 judgment of the Mahoning County Court of Common Pleas granting Appellee's, The J. Arnold Property Management Group, LLC ("Arnold"), motion to vacate default judgment.[1]

> App.R. 26, which provides for the filing of an application for reconsideration in this court, includes no guidelines to be used in the determination of whether a decision is to be reconsidered and changed. *Matthews v. Matthews*, 5 Ohio App.3d 140, 143, 450 N.E.2d 278 (10th Dist.1981). The test generally applied is whether the motion for reconsideration calls to the attention of the court an obvious error in its decision or raises an issue for our consideration that was either not at all or was not fully considered by us when it should have been. *Id.* An application for reconsideration is not designed for use in instances where a party simply disagrees with the conclusions reached and the logic used by an appellate court. *State v. Owens*, 112 Ohio App.3d 334, 336, 678 N.E.2d 956 (11th Dist.1996). Rather, App.R. 26 provides a mechanism by which a party may prevent miscarriages of justice that could arise when an appellate court makes an obvious error or renders an unsupportable decision under the law. *Id.*

D.G. v. M.G.G., 7th Dist. Mahoning No. 17 MA 0165, 2019-Ohio-1190, ¶ 2.

> App.R. 26(A)(2) governs application for en banc consideration. Pursuant to the rule, if a court of appeals determines that two or more of its decisions are in conflict, it may order that an appeal or other proceeding be considered en banc. App.R. 26(A)(2)(a). Intra-district conflicts can arise when different panels of judges hear the same issue, but reach different results. *Gentile v.*

[1] Arnold filed a response. Wallace filed a reply.

> *Turkoly*, 7th Dist. No. 16 MA 0071, 2017-Ohio-2958, ¶ 2, citing *McFadden v. Cleveland State Univ*., 120 Ohio St.3d 54, 2008-Ohio-4914, 896 N.E.2d 672, ¶ 15. "Consideration en banc is not favored and will not be ordered unless necessary to secure or maintain uniformity of decisions within the district on an issue that is dispositive in the case in which the application is filed." App.R. 26(A)(2)(a). The burden is on the party requesting en banc consideration to "explain how the panel's decision conflicts with a prior panel's decision on a dispositive issue and why consideration by the court en banc is necessary." App.R. 26(A)(2)(b).

Pfalzgraf v. Miley, 7th Dist. Monroe Nos. 16 MO 0005 and 16 MO 0006, 2018-Ohio-3595, *2.

{¶2} In its joint application, Wallace disagrees with this court's analysis and requests that we reconsider our decision affirming the trial court's judgment granting Arnold's motion to vacate default judgment. Specifically, Wallace asserts this court improperly considered materials outside the record and alleges we erred in affirming the lower court without considering Arnold's failure to support its grounds for relief under Civ.R. 60(B)(1)-(5). (5/9/2023 Application for Reconsideration and for En Banc Consideration, p. 3-6). Wallace additionally asserts this matter should be considered en banc because it namely conflicts with *Palmer v. Palmer*, 7th Dist. Belmont No. 12 BE 12, 2013-Ohio-2875; *Trotter v. Trotter*, 7th Dist. Columbiana No. 21 CO 0001, 2021-Ohio-4634; and *In re M.L.S.,* 7th Dist. Harrison No. 21 HA 0010, 2022-Ohio-2195.

{¶3} In *Wallace*, this court stated in detail:

> In its sole assignment of error, Wallace asserts the trial court erred in vacating the default judgment entry. Wallace contends the court abused its discretion for the reasons that Arnold's motion to vacate did not cite to grounds for relief under Civ.R. 60 and it did not allege a meritorious defense to the complaint. (7/1/2022 Appellant's Brief, p. 8).
>
> Appellate courts review a trial court's decision to grant or deny a motion to vacate default judgment for an abuse of discretion. *Taylor v. Grace*

Services, Inc., 7th Dist. Columbiana No. 91-C-21, 1992 WL 37806, *2 (Feb. 26, 1992). Abuse of discretion implies the trial court's decision is unreasonable, arbitrary, or unconscionable. *Blakemore v. Blakemore*, 5 Ohio St.3d 217, 219 (1983).

In support of its position that the trial court did not abuse its discretion in granting its motion to vacate, Arnold sets forth the following procedural explanation:

"Once the Complaint for monetary damages was, in fact, filed with the Mahoning County Common Pleas Court by the Plaintiff/Appellant (Wallace), the Defendant/Appellee (Arnold) filed a Leave to File an Answer and Counterclaim electronically. For whatever reason, when the clerk processed the document, it only processed the Motion for Leave and the Judgment Entry and did not file the Answer and Counterclaim unbeknownst to Defendant/Appellee's (Arnold's) counsel. A copy of the Answer and Counterclaim as well as the Motion and Entry were forwarded to Plaintiff/Appellant's (Wallace's) counsel. Plaintiff/Appellant (Wallace) then filed a Motion for Default Judgment which was granted at that time. Once the Defendant/Appellee (Arnold) became aware of what had occurred the Defendant/Appellee (Arnold) then filed a Motion to Vacate and (an) Answer and Counterclaim once again. The court granted it based upon the fact that the matter should be resolved based upon the facts of the case and not a hypertechnicality." (7/28/2022 Appellee's Brief, p. 5-6).

This court agrees with Arnold's position and the trial court's decision. "Fairness and justice are best served when a court disposes of a case on the merits." *DeHart v. Aetna Life Ins. Co.*, 69 Ohio St.2d 189, 193 (1982). The main objective of justice is that cases should be decided on their merits rather than upon procedural niceties and technicalities. *Id.* at 192-193; *Perotti v. Ferguson*, 7 Ohio St.3d 1, 3-4 (1983).

> This case was not left outstanding for a lengthy time nor did it cause undue hardship or prejudice to Wallace. Rather, the record reveals this matter transpired within a relatively short timeframe, as outlined by the dates addressed above. In addition, contrary to Wallace's position, we determine that by filing an answer and counterclaim, Arnold presented a meritorious defense. *See generally Cantrell v. Trabbic*, 6th Dist. Fulton No. F-81-7, 1981 WL 5419, *1 (Oct. 16, 1981); *Starr v. White*, 1st Dist. Hamilton No. C-840821, 1985 WL 11461, *1 (Sept. 4, 1985); *Magicable, Inc. v. Lynn Telecommunications, Inc.,* 11th Dist. Portage No. 1603, 1986 WL 4225, *2 (Apr. 4, 1986).
>
> This court stresses that actions should be examined on a case-by-case basis. We emphasize that our decision to affirm here is limited to the particular facts and procedure in this case. *See, e.g., Covarrubias v. Lowe's Home Improvement, L.L.C.,* 8th Dist. Cuyahoga No. 109819, 2021-Ohio-1658, ¶ 33. Upon consideration, the trial court did not abuse its discretion in granting Arnold's motion to vacate as fundamental fairness requires that this case be decided on its merits. *DeHart, supra,* at 192-193; *Perotti, supra,* at 3-4.

Wallace, 2023-Ohio-1498, ¶ 9-14.

{¶4} Thus, this court stressed the following: "actions should be examined on a case-by-case basis"; "our decision to affirm here is limited to the particular facts and procedure in this case"; and "the trial court did not abuse its discretion in granting Arnold's motion to vacate as fundamental fairness requires that this case be decided on its merits." *Id.* at ¶ 14. Implicit in our decision is the fact that the *GTE* test would not be necessary as that test applies in situations where a final decision has been made. *See GTE Automatic Elec., Inc. v. ARC Industries, Inc.*, 47 Ohio St.2d 146, 351 N.E.2d 113 (1976). In contrast, we found that "fundamental fairness requires that this case be decided on its merits." *Wallace* at ¶ 14.

{¶5} In any event, Arnold's February 7, 2022 electronic filing of its motion to file instanter, requesting the trial court to allow it to file an answer and counterclaim instanter,

reveal that Arnold had a meritorious defense or claim to present if relief were granted. Thus, Arnold filed its answer and counterclaim contemporaneously with the motion to file instanter, but for reasons unknown to Arnold, the clerk failed to process the answer and counterclaim at that time. The filing of the motion to file instanter demonstrates there was a meritorious defense. As stated by this court, "This case was not left outstanding for a lengthy time nor did it cause undue hardship or prejudice to Wallace. Rather, the record reveals this matter transpired within a relatively short timeframe[.]" *Id.* at ¶ 13.

{¶6} Upon consideration of the App.R. 26(A)(1) application filed in the present matter, it is apparent that Wallace has not demonstrated any obvious errors or raised any issues that were not adequately addressed in our previous opinion. This court is not persuaded that we erred as a matter of law.

{¶7} An application for reconsideration is not designed to be used in situations wherein a party simply disagrees with the logic employed or the conclusions reached by an appellate court. *Owens, supra,* at 336. App.R. 26(A)(1) is meant to provide a mechanism by which a party may prevent a miscarriage of justice that could arise when an appellate court makes an obvious error or renders a decision that is not supported by the law. *Id*. Wallace has made no such demonstration.

{¶8} Furthermore, in arguing for en banc consideration, Wallace cites to the following decisions from this district, namely: *Palmer*, 2013-Ohio-2875; *Trotter*, 2021-Ohio-4634; and *In re M.L.S.*, 2022-Ohio-2195. Wallace's reliance on these cases, however, is misplaced.

{¶9} In *Palmer*, the appellant appealed the trial court's adoption of a magistrate's decision but never filed (or attempted to file) a transcript. *Palmer* is inapplicable to the facts in the case at bar.

{¶10} Wallace also cites to *Trotter* and *In re M.L.S.* for the general proposition that appellate review is limited to evidence that existed at the time the trial court rendered its judgment. In the case sub judice, even if this court referred to Arnold filing its answer and counterclaim after Wallace's notice of appeal, Arnold gave notice of a meritorious defense with its motion to file the answer and counterclaim instanter, electronically filed on February 7, 2022. As stated, the inference is that the trial court in the instant case

construed the motion to file the answer and counterclaim instanter as evidence that Arnold had a meritorious defense to present.

{¶11} "The purpose of en banc proceedings is to resolve conflicts of law that arise within a district." *Gentile, supra,* at ¶ 4; App.R. 26(A)(2)(a). Our holding in this appeal is not in conflict with *Palmer, Trotter,* or *In re M.L.S.* and Wallace has failed to identify a dispositive issue. *See Pfalzgraf, supra,* at *2. Therefore, there is no basis for en banc consideration. *Gentile* at ¶ 4.

{¶12} For the foregoing reasons, Wallace's joint application for reconsideration and for en banc consideration is hereby denied.

JUDGE DAVID A. D'APOLITO, Concurs

JUDGE CHERYL L. WAITE, Concurs for other reasons, writing separately

JUDGE MARK A. HANNI, Concurs

Waite, J., concurring for other reasons.

{¶13} While I agree with the majority that the motion for reconsideration and for en banc consideration should be denied, here, I write separately because I cannot agree with the reasoning used by the majority.

{¶14} As to the application for reconsideration, for the same reasons as laid out in detail within my dissent of the direct appeal I must disagree with the majority's reasoning. Additionally, in addressing the request for reconsideration the majority posits new reasons in support of their original decision that are not founded in law. As to the request for consideration en banc, Appellant has misconstrued the majority's reasoning, and has conflated it into an actual conflict where none exists.

{¶15} In its denial of the motion for reconsideration, the majority addresses the fact that it did consider and reject application of the *GTE* test in this case. See *GTE Automatic Elec., Inc. v. ARC Industries, Inc.*, 47 Ohio St.2d 146, 351 N.E.2d 113 (1976). In the first paragraph of the opinion addressing the assignment of error, the majority restates the heart of Appellant's argument: that the *GTE* test was not met. Then, the majority ruled against Appellant. In so doing, the majority appears to address two of the three prongs of the requisite test, and relies heavily on one: timeliness. In my dissent, I clearly disagreed with the majority's approach. However, the motion for reconsideration, while clearly citing to the disagreement between the majority and the dissent, fails to raise an issue that was not considered or completely considered. In fact, it highlights that the issue was considered, and rejected, by the majority. While the majority's decision to simply set aside the relevant law in this matter may serve as a basis for further appeal, it does not comprise the basis for reconsideration in this case. Hence, I would deny the request for reconsideration, albeit on different grounds.

{¶16} I also cannot agree with the majority when, in their support of the original opinion, they posit additional reasoning. In its determination on the issue of reconsideration, the majority states that mere "*** filing of the motion to file instanter demonstrates there was a meritorious defense." This is not the law in Ohio and no presumption is raised simply by requesting to file an answer to a complaint. While the majority inexplicably contends that in the motion to file its answer instanter Appellee "gave notice of a meritorious defense," it is highly speculative, at best, to interpret Appellee's request in this manner. Again, this speculation in no way conforms to the requirements of *GTE* and its progeny, and is not supported by any statute or caselaw. It also raises a more fundamental problem, as it was offered to explain the majority's earlier apparent reliance on the answer and counterclaim not actually filed by Appellee until after the motion to vacate was granted by the trial court,

{¶17} In *Palmer, supra,* this Court held that a reviewing court cannot consider a matter on appeal that was not before the trial court at the time it made its ruling. As noted in my earlier dissent, "[t]he trial court docket notes that Appellee filed an answer and counterclaim on March 22, 2022, but as that was after the motion to vacate was already granted, this answer and counterclaim is not part of this record and is not properly before

us on appeal." *Wallace Equine Services, LLC v. J. Arnold Property Mgt. Group, LLC,* 7th Dist. Mahoning No. 22 MA 0035, 2023-Ohio-1498, (Waite, J., dissenting) ¶ 29. The majority contends that the facts in *Palmer* are inapplicable here. The legal principle contained in *Palmer*, however, is very relevant to the long-settled law that an appellate court cannot consider evidence that was not before the trial court. It is in dismissing the identical proposition of law contained in *In Re MLS, supra*, that the majority posits there was an inference raised that Appellee had a meritorious defense to the underlying suit merely by requesting to file an answer instanter. Again, I note that this is not the law in Ohio. This inaccurate statement of the law also prevents me from agreeing with the majority's reasoning in the request for reconsideration.

{¶18} It is important to be clear about the trial court's parameters in this matter. Trial courts have wide discretion when ruling on most pre-judgment motions. This includes the discretion, in many cases, to make presumptions regarding the evidence before the court. Once a final, appealable judgment is rendered, however, a trial court's ability to exercise its discretion is severely limited. The trial court had entered such a judgment in this case when it granted default. A party opposing default is also very limited when seeking redress: it may appeal, or may file a Rule 60(B) motion. If it files a request to vacate, that party must strictly comply with 60(B) and, hence, with *GTE* and its progeny. It must, in order to prevail, comply with all three prongs of the *GTE* test.

{¶19} In this case, there is no disagreement Appellee timely filed its motion, and so met the first prong. This is the prong on which the majority relies in its opinion. I repeat my earlier statement that if the trial court accepted the attorney's excuse for failing to file an answer and counterclaim, despite the lack of evidence such as an affidavit, the trial court's discretion in this post-judgment motion may extend so far as to affirm that credibility determination. Hence, the second prong of the *GTE* test may also be met: excusable neglect. However, the record is completely silent as to any meritorious defense. Because this is a post-judgment matter and the requirements of *GTE* are just that, no speculation or presumption is allowed to substitute for an averment by the necessary party. While Appellee's motion to file instanter may mean it had a meritorious defense, it may also mean Appellee had only a frivolous one, or none at all. Neither the trial court nor this Court was free to presume, and to do so was clearly erroneous.

{¶20} As to the request for rehearing en banc, the majority correctly notes that it is disfavored. Further, the requirement by rule is that the applicant must cite not only to the paragraph of the opinion at issue, but also to the paragraph(s) of the cases that allegedly conflict. Appellant in this case conflates the majority's (unsupported) contention (that the trial court apparently inferred Appellee had a meritorious defense to the underlying suit simply because Appellee filed a request to file an answer instanter) with a conflict. Appellant believes this inference or presumption conflates to the majority utilizing and relying on information contained in the actual answer that was, by all accounts, filed after the trial court ruled on this issue. Again, the majority does not directly rely on anything discussed in Appellee's tardy answer and counterclaim. It was not before the trial court in ruling on the motion to vacate and is not properly before us on appeal. The strictures in *Palmer* are still good law, and the majority does not challenge these, despite its cavalier treatment of the case. Instead, the majority, both in its opinion and more forcefully here, contend that both they and the trial court were free to fill in the missing prong of the *GTE* test with some presumption caused simply by Appellee's request to file an answer. While I respectfully contend this is erroneous and unsupported in law, it does not rise to the level of a direct conflict in any of our earlier cases.

{¶21} For all of these reasons, I agree with the denial of the motion for reconsideration and for rehearing en banc, although for totally different reasons.

NOTICE TO COUNSEL

This document constitutes a final judgment entry.