[Cite as *Pinchak v. Prudhomme*, 2010-Ohio-3879.]

Court of Appeals of Ohio

EIGHTH APPELLATE DISTRICT
COUNTY OF CUYAHOGA

JOURNAL ENTRY AND OPINION
No. 94053

DANIEL PINCHAK

PLAINTIFF-APPELLANT

vs.

VINCENT G. PRUDHOMME

DEFENDANT-APPELLEE

JUDGMENT:
AFFIRMED

Civil Appeal from the
Cuyahoga County Court of Common Pleas
Case No. CV-675327

BEFORE: Blackmon, P.J., Boyle, J., and Cooney, J.

RELEASED AND JOURNALIZED: August 19, 2010

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PATRICIA ANN BLACKMON, P.J.:

{¶ 1} Appellant Daniel Pinchak appeals the trial court's decision permitting appellee Vincent G. Prudhomme to file an untimely answer and assigns the following errors for our review:

> **"I. The trial court abused its discretion in permitting appellee to file an untimely answer, only after appellant had filed a motion for default, where appellee failed to demonstrate excusable neglect or even offer any explanation why he failed to timely file an answer."**

"II. The trial court erred on ruling on the day of trial that the defendant, would [sic] had failed to appear and provided no explanation for his failure, was not required to appear for trial and trial would proceed in his absence."

"III. The trial court erred in barring appellant's counsel from referring to evidence proving damages during closing argument."

{¶ 2} Having reviewed the record and pertinent law, we affirm the trial court's decision. The apposite facts follow.

{¶ 3} On November 4, 2008, Pinchak filed a personal injury complaint against Prudhomme. The complaint alleged that on October 26, 2007, Pinchak was a passenger in an automobile owned by him, but operated by Prudhomme, who lost control of the vehicle that struck a utility pole and guardrails, and eventually stopped against a tree. Pinchak specifically alleged that Prudhomme negligently failed to apply the brakes, traveled at an unreasonable speed, and failed to control the vehicle. Pinchak further alleged that as a result of Prudhomme's negligence, he sustained personal injuries.

{¶ 4} On January 2, 2009, Pinchak filed a motion for default judgment and the trial court scheduled the default hearing for February 26, 2009. On February 2, 2009, Prudhomme filed a motion for leave to file an answer instanter and filed an answer to Pinchak's complaint. In addition, Prudhomme also filed a motion to cancel the default hearing and to convert it to a case management conference.

{¶ 5} On February 18, 2009, the trial court granted Prudhomme's motion for leave to file his answer instanter and converted the default hearing to a case management conference. Thereafter, the case proceeded to trial, which commenced on September 8, 2009. On September 9, 2009, the jury found in Prudhomme's favor, finding that he was not negligent in causing the accident.

Motion for Leave to File Answer Instanter

{¶ 6} In the first assigned error, Pinchak argues the trial court erred in granting Prudhomme's motion for leave to file answer instanter.

{¶ 7} It is well recognized that a court may permit the filing of an untimely answer where there is sufficient evidence of excusable neglect on the record. *Albright v. Cincinnati Equitable Ins.*, 3rd Dist. No. 3-04-01, 2004-Ohio-4010, citing *State ex rel. Lindenschmidt v. Butler Cty. Bd. of Commrs.* (1995), 72 Ohio St.3d 464, 465, 650 N.E.2d 1343. See, also, *Evans v. Chapman* (1986), 28 Ohio St.3d 132, 135, 502 N.E.2d 1012; *Miller v. Lint* (1980), 62 Ohio St.2d 209, 214, 404 N.E.2d 752. The determination of whether neglect is excusable or inexcusable must take into consideration all the surrounding facts and circumstances, and courts must be mindful of the admonition that cases should be decided on their merits, where possible, rather than on procedural grounds. *Marion Prod. Credit Assn. v. Cochran* (1988), 40 Ohio St.3d 265, 271, 533 N.E.2d 325. Further, a trial court's Civ.R.

6(B)(2) determination is left to the sound discretion of the trial court and will not be disturbed on appeal absent a showing of an abuse of discretion. *Evans*, 28 Ohio St.3d at 135, 502 N.E.2d 1012; *Miller*, 62 Ohio St.2d at 213-214, 404 N.E.2d 752.

{¶ 8} The term "abuse of discretion" connotes more than an error of law or judgment; it implies that the court's attitude is unreasonable, arbitrary, or unconscionable. *Rock v. Cabral* (1993), 67 Ohio St.3d 108, 112, 616 N.E.2d 218, citing *Blakemore v. Blakemore* (1983), 5 Ohio St.3d 217, 219, 450 N.E.2d 1140. Consequently, where a defendant, after failing to file a timely answer, files a Civ.R. 7(B)(1) motion setting forth grounds of excusable neglect pursuant to Civ.R. 6(B), the court may permit the defendant to file an answer out of rule, thereby permitting the case to proceed on its merits. *Evans*, 28 Ohio St.3d at 135, 502 N.E.2d 1012; *Miller*, 62 Ohio St.2d at 214, 404 N.E.2d 752.

{¶ 9} In the present case, Prudhomme complied with the procedural requirements set forth in the Civ.R. 7(B)(1). Thus, the granting of Prudhomme's leave to file an answer must be upheld on appeal absent a showing that the trial court abused its discretion. In Prudhomme's motion for leave to file its answer instanter and motion to cancel default hearing and convert it to a case management conference, Prudhomme cited excusable mistake and inadvertence on his part, indicated that his attorney was

recently retained, and that no harm will be caused to plaintiff, given that a case management conference has never been held.

{¶ 10} While we do not condone Prudhomme's failure to retain legal counsel in a timely manner, we cannot say that in this case the trial court abused its discretion. First, when a party answers out of rule but before a default is entered, if the answer is good in form and substance, a default should not be entered. *Miami Sys. Corp. v. Dry Cleaning Computer Sys. Inc.* (1993), 90 Ohio App.3d 181, 186, 628 N.E.2d 122; *Mendise v. Plain Dealer Publishing Co.* (1990), 69 Ohio App.3d 721, 724, 591 N.E.2d 789; *Suki v. Blume* (1983), 9 Ohio App.3d 289, 290, 459 N.E.2d 1311. Further, given that cases should be decided on their merits whenever possible, we cannot say that the trial court, in this case, erred in granting the motion for leave to file an answer to the complaint.

{¶ 11} Here, at the time the trial court granted Prudhomme's motion for leave, Prudhomme had properly filed his motion for leave and Pinchak's motion for default judgment had not been granted. Since the trial court had not yet entered default judgment in Pinchak's favor at the time of its ruling on Prudhomme's motion for leave, we cannot say that the trial court, in this case, abused its discretion in allowing Prudhomme leave to file an answer. Accordingly, we overrule the first assigned error.

Defendant's Absence at Trial

{¶ 12} In the second assigned error, Pinchak argues the trial court erred when it proceeded with the trial despite Prudhomme's absence on the first day of trial. Pinchak contends the trial court should have proceeded with the trial ex parte.

{¶ 13} Initially, we note there is no requirement in a civil case that the party to that action personally be in the courtroom during trial. *Pierson v. Johnson* (Sept. 14, 1995), Cuyahoga App. No. 68238, citing *Williams v. Bolding* (1982), 6 Ohio App.3d 48, 49, 452 N.E.2d 1346.

{¶ 14} In the instant case, despite Prudhomme's absence on the first day of trial, he was represented by counsel when the case was called for trial and for its duration. The record indicates that Prudhomme appeared for the remainder of the trial. Further, the record indicates that the trial court did not issue a subpoena for the appearance of defendant, Prudhomme, which would be a prerequisite to requiring his presence at the trial. Id.

{¶ 15} Nonetheless, in support of his contention that the trial court should have proceeded ex parte due to Prudhomme's absence on the first day of trial, Pinchak cites *Barbato v. Miller* (May 18, 2000), Cuyahoga App. No. 76536. However, we find Pinchak's reliance to be misplaced.

{¶ 16} In *Barbato*, unlike the instant case, plaintiff's attorney had issued a subpoena to compel defendant's presence at trial. However, due to defendant's failing health, defense counsel filed a motion to quash the

subpoena, which the trial court denied, and ordered the defendant to appear for trial. When defendant failed to appear, the trial court found her in contempt and entered a monetary judgment against her as a sanction.

{¶ 17} On appeal, we reversed the trial court's decision and remanded for a trial on the merits, because we found, as we do here, that defendant's attorney was present and prepared for trial. Id. Consequently, Pinchak's reliance on *Barbato* is misplaced.

{¶ 18} Based on the foregoing, we find no abuse of discretion in the trial court's decision to proceed with trial when Prudhomme was absent on the first day of trial, but whose attorney was present and prepared to represent him at trial. Accordingly, we overrule the second assigned error.

Admission of Evidence

{¶ 19} In the third assigned error, Pinchak argues the trial court erred in precluding his attorney from referring to an alleged soft tissue fracture during closing argument.

{¶ 20} Initially, we note parties are generally afforded wide latitude in closing arguments. *State v. Irwin*, 184 Ohio App.3d 764, 2009-Ohio-5271, 922 N.E.2d 981. However, the admission of evidence generally lies within the trial court's broad discretion. A reviewing court should not disturb evidentiary rulings absent an abuse of discretion that has materially prejudiced a party. *Merkl v. Seibert*, 1st Dist. Nos. C-080973 and C-081033,

2009 -Ohio- 5473, citing *Beard v. Meridia Huron Hosp.*, 106 Ohio St.3d 237, 2005-Ohio-4787, 834 N.E.2d 323, ¶20.

{¶ 21} In the instant case, in limiting plaintiff's scope of closing argument, the trial court stated in pertinent part as follows:

> **"* * * I'm not going to allow plaintiff to argue as part of its damage claim a fractured vertebrae because the record does not conclusively establish that diagnosis. We have no medical expert to testify as to the inconsistencies in the record and it is therefore not within the knowledge of a lay person to consider that."**

{¶ 22} We have previously held that the causal connection between soft tissue injuries incurred in motor vehicle accidents and alleged subsequent physical disability is not so apparent as to be a matter of common knowledge, where the alleged injuries involved strains to the neck and back area. *Wood v. Estate of Batta*, Cuyahoga App. No. 90430, 2008-Ohio-1400, citing *Langford v. Dean* (Sept. 30, 1999), Cuyahoga App. No. 74854. See, also, *Hodge v. King* (July 16, 1998), Cuyahoga App. No. 72823; *Davis v. D & T Limousine Serv., Inc.* (June 16, 1994), Cuyahoga App. No. 65683; *Dolly v. Daugherty* (Nov. 15, 1979), Cuyahoga App. No. 40021. Thus, without an expert witness to testify about the alleged soft tissue injury, the trial court properly ruled that Pinchak's counsel was precluded from making any reference to the alleged injury.

{¶ 23} However, despite this limitation, Pinchak was not prejudiced. The record indicates that during closing argument, plaintiff's counsel

indicated that Pinchak had incurred $30,374 in medical bills, and had also hurt his shoulders, knee, and back during the accident. Most importantly, given that the jury found no negligence, Pinchak would not have been able to recover from Prudhomme. Thus, even if Pinchak's counsel was allowed to refer to the alleged soft tissue injury, it would not have changed the outcome of the jury's verdict.

{¶ 24} We conclude that the trial court did not abuse its discretion in precluding any reference to the alleged soft tissue injury. Accordingly, we overrule the third assigned error.

Judgment affirmed.

It is ordered that appellee recover from appellant his costs herein taxed.

The court finds there were reasonable grounds for this appeal.

It is ordered that a special mandate be sent to said court 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.

PATRICIA ANN BLACKMON, PRESIDING JUDGE

MARY J. BOYLE, J., and
COLLEEN CONWAY COONEY, J., CONCUR