

[Cite as *Youngblood v. Kindred Healthcare*, 2010-Ohio-4358.]

# Court of Appeals of Ohio

EIGHTH APPELLATE DISTRICT  
COUNTY OF CUYAHOGA

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JOURNAL ENTRY AND OPINION  
**No. 94442**

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**ROBERT V. YOUNGBLOOD**

PLAINTIFF-APPELLANT

vs.

**KINDRED HEALTHCARE, ETC., ET AL.**

DEFENDANTS-APPELLEES

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**JUDGMENT:**  
**REVERSED AND REMANDED**

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Civil Appeal from the  
Cuyahoga County Court of Common Pleas  
Case No. CV-698874

**BEFORE:** Gallagher, A.J., Kilbane, J., and Jones, J.

**RELEASED AND JOURNALIZED:** September 16, 2010

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SEAN C. GALLAGHER, A.J.:

{¶ 1} This cause came to be heard upon the accelerated calendar pursuant to App.R. 11.1 and Loc.R. 11.1, the trial court records, and briefs of counsel.

{¶ 2} Appellant, Robert V. Youngblood, appeals the decision of the Cuyahoga County Court of Common Pleas that dismissed his workers'

compensation complaint with prejudice and the trial court's subsequent denial of his motion for relief from judgment. For the reasons stated herein, we reverse the decision of the trial court and remand the matter for further proceedings.

{¶ 3} Youngblood is employed by appellee, Kindred Healthcare Operating, Inc. ("Kindred"). He filed a workers' compensation claim that was allowed by the Industrial Commission of Ohio for the back conditions of lumbosacral sprain, L4-L5 disc herniation, L5-S1 disc herniation, and lumbosacral radiculopathy. Kindred filed a notice of appeal in the Cuyahoga County Court of Common Pleas on July 16, 2009.

{¶ 4} On August 20, 2009, Youngblood filed his complaint against Kindred and the Bureau of Workers' Compensation. After Kindred filed an answer instanter, the trial court called the case for a case management conference ("CMC") on October 27, 2009. Because Youngblood failed to appear, the trial court issued an order resetting the matter for November 20, 2009 and indicated that the "failure to appear may result in sanctions including the possibility of entry of dismissal."

{¶ 5} Youngblood failed to appear at the CMC on November 20, 2009. In accordance with its earlier entry, the trial court dismissed the case and found that "Plaintiff is not entitled to participate in the Workers' Compensation fund for the conditions of Disc Herniation at L4-L5 and L5-S1."

{¶ 6} On the same date that the trial court issued the order of dismissal, Youngblood filed a motion for relief from judgment. Counsel for Youngblood asserted that at the time the notice for the November 20, 2009 CMC was issued, he had just replaced his assistant and she failed to include the CMC on counsel's calendar. He also argued that the Industrial Commission of Ohio had allowed the claim and that the case was only at the answer stage of proceedings. The trial court denied the motion, and this appeal followed.

{¶ 7} Youngblood raises two assignments of error for our review. His assignments of error provide as follows:

{¶ 8} “[I.] The lower court abused its discretion dismissing the matter with prejudice after plaintiff's counsel failed to appear at the case management conference.”

{¶ 9} “[II.] The lower court abused its discretion in denying the plaintiff's motion for relief from judgment.”

{¶ 10} Youngblood argues that the trial court abused its discretion in dismissing the action with prejudice and in denying his motion for relief from judgment. We find merit to both arguments.

{¶ 11} The decision to dismiss a case pursuant to Civ.R. 41(B)(1) is within the sound discretion of the trial court. *Quonset Hut, Inc. v. Ford Motor Co.* (1997), 80 Ohio St.3d 46, 47, 684 N.E.2d 319. Before a trial court

may dismiss an action for nonappearance at a pretrial conference, notice of the intended dismissal must be given to plaintiff's counsel pursuant to Civ.R. 41(B)(1). *Perotti v. Ferguson* (1983), 7 Ohio St.3d 1, 2-3, 454 N.E.2d 951.

{¶ 12} Pursuant to Civ.R. 41(B)(3), there is a presumption that an adjudication under Civ.R. 41(B) will operate as an adjudication upon the merits unless the trial court specifies otherwise in its order of dismissal. However, courts must be mindful that disposition of cases on their merits is favored in the law and judicial discretion must be carefully and cautiously exercised before an outright dismissal of a case on purely procedural grounds will be upheld. *Quonset Hut*, 80 Ohio St.3d at 48.

{¶ 13} “[F]or purposes of Civ.R. 41(B)(1), counsel has notice of an impending dismissal with prejudice \* \* \* when counsel has been informed that dismissal is a possibility and has had a reasonable opportunity to defend against dismissal.” *Id.* at 49. The purpose of such notice is to allow a party to explain the circumstances causing his or her nonappearance and why the case should not be dismissed with prejudice. *Logsdon v. Nichols*, 72 Ohio St.3d 124, 128, 1995-Ohio-225, 647 N.E.2d 1361.

{¶ 14} In this case, the trial court's notice informed counsel that dismissal was a possibility, but the notice did not specify that the dismissal

would be “with prejudice.”<sup>1</sup> We recognize that a dismissal with prejudice is an extremely harsh sanction and should be “reserved for those cases in which the conduct of a party is so negligent, irresponsible, contumacious or dilatory as to provide substantial grounds for a dismissal with prejudice for a failure to prosecute or obey a court order. Absent such extreme circumstances, a court should first consider lesser sanctions before dismissing a case with prejudice.” (Internal citations and quotations omitted.) *Autovest, L.L.C. v. Swanson*, Cuyahoga App. No. 88803, 2007-Ohio-3921, ¶ 25.

{¶ 15} Although we acknowledge that default of counsel frustrates the legitimate interest of the court in administering its docket, a trial court has lesser sanctions available, including among others, reprimand, payment of reasonable attorney fees to opposing counsel for wasted time, or contempt. We also recognize that this court has found similar inadvertance in failing to attend a pretrial to be insufficient to justify a dismissal with prejudice. See *id.*; *Rucker v. Cvelbar Body & Paint Co.* (Dec. 7, 1995), Cuyahoga App. No. 68573; *Willis v. RCA Corp.* (1983), 12 Ohio App.3d 1, 465 N.E.2d 924. Because there was an absence of egregious conduct herein, we find that the trial court abused its discretion in dismissing the case with prejudice.

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<sup>1</sup> We recognize that this court previously upheld a dismissal with prejudice upon a notice that a case would be “dismissed.” See *Shoreway Circle v. Gerald Skoch Co., L.P.A.* (1994), 92 Ohio App.3d 823, 830, 637 N.E.2d 355.

{¶ 16} Youngblood also filed a motion for relief from judgment on the same date as the trial court's dismissal of the action. To prevail on a motion brought under Civ.R. 60(B), the movant must demonstrate the following: (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. *GTE Automatic Elec., Inc. v. ARC Industries, Inc.* (1976), 47 Ohio St.2d 146, 150-151, 351 N.E.2d 113. Civ.R. 60(B)(1) states that on motion and upon such terms as are just, a court may relieve a party or its legal representative from a final judgment, order, or proceeding for "mistake, inadvertence, surprise or excusable neglect." Civ.R. 60(B)(1). A trial court's ruling on such a motion is reviewed for an abuse of discretion. *GTE Automatic*, 47 Ohio St.2d at 148.

{¶ 17} In moving for relief from judgment, Youngblood's counsel asserted that his newly retained assistant inadvertently failed to place the CMC on his calendar. Also, as discussed above, the record does not demonstrate that plaintiff deliberately disregarded the trial court's scheduling order or otherwise show that a dismissal with prejudice was warranted. It was apparent that Youngblood had a meritorious claim in that the Industrial Commission of Ohio had allowed his workers' compensation claim. Additionally, the motion was timely filed.

{¶ 18} Upon the circumstances of this case, we find that the trial court abused its discretion by denying Youngblood's motion for relief from judgment.

{¶ 19} For the foregoing reasons, we sustain the assignments of error, reverse the decision of the trial court, and remand the matter for further proceedings.

Judgment reversed, case remanded.

It is ordered that appellant recover from appellees 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.

SEAN C. GALLAGHER, ADMINISTRATIVE JUDGE

MARY EILEEN KILBANE, J., and  
LARRY A. JONES, J., CONCUR