

[Cite as *Alam v. Gallogly*, 2010-Ohio-5766.]

# Court of Appeals of Ohio

EIGHTH APPELLATE DISTRICT  
COUNTY OF CUYAHOGA

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JOURNAL ENTRY AND OPINION  
**No. 93993**

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**SAAMIA ALAM**

PLAINTIFF-APPELLANT

VS.

**NICHOLAS E. GALLOGLY**

DEFENDANT-APPELLEE

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**JUDGMENT:  
AFFIRMED**

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Civil Appeal from the  
Cuyahoga County Common Pleas Court  
Case No. CV-659361

**BEFORE:** Boyle, P.J., Celebrezze, J., and Cooney, J.

**RELEASED AND JOURNALIZED:** November 24, 2010

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MARY J. BOYLE, P.J.:

{¶ 1} Plaintiff-appellant, Saamia Alam, appeals from a judgment dismissing her personal injury case against defendant-appellee, Nicholas Gallogly, for failure to prosecute. Finding no merit to her appeal, we affirm.

Procedural History and Factual Background

{¶ 2} Alam and Gallogly were involved in a motor vehicle accident on January 8, 2005. Alam originally filed suit against Gallogly on January 8, 2007, but voluntarily dismissed it on May 18, 2007, pursuant to Civ.R. 41(A).

{¶ 3} On May 13, 2008, she refiled her case against Gallogly. After the trial court held a case management conference on September 4, 2008, it ordered that Alam submit her expert medical report by January 2, 2009, and

further ordered that Gallogly submit his by March 2, 2009. The trial court also set the final pretrial for April 2, 2009 and the trial for May 7, 2009.

{¶ 4} On March 31, 2009, Gallogly moved the court to preclude Alam from presenting any medical evidence at trial because she never submitted her expert report.

{¶ 5} On April 2, 2009, Alam's counsel moved to withdraw from the case. The court held a hearing on the motion on April 29, 2009, after which it granted the motion. The trial court then granted Alam's oral motion to continue the trial date, but only to August 27, 2009. The court further cautioned Alam and any counsel that "she may retain" that it would not continue the trial date again.

{¶ 6} The trial court held a final pretrial on August 25, 2009, where it made clear that the trial would still take place on August 27, 2009. On August 26, Alam moved the court for "one last continuance." She informed the judge that she needed more time because she had a death in her family and had some medical issues. She also told the judge that she had talked to three doctors who had all agreed to provide expert medical testimony, but that they needed more time "to go through medical records." She requested 90 more days to gather her medical evidence.

{¶ 7} On August 27, 2009, the trial court denied Alam's motion for continuance and dismissed her case pursuant to Civ.R. 41(B)(1) for failure to

prosecute. It is from this judgment that Alam appeals, raising one assignment of error for our review:

{¶ 8} “The trial court erred by overruling appellant’s motion for continuance and by dismissing the case with prejudice for failure to prosecute.”

Failure to Prosecute

{¶ 9} Civ.R. 41(B)(1) provides that when a “plaintiff fails to prosecute, or comply with these rules or any court order, the court upon motion of a defendant or on its own motion may, after notice to the plaintiff’s counsel, dismiss an action or claim.”

{¶ 10} The decision to dismiss an action pursuant to Civ.R. 41(B)(1) lies within the discretion of the trial court. *Jones v. Hartranft*, 78 Ohio St.3d 368, 371, 1997-Ohio-203, 678 N.E.2d 530. Appellate review of a dismissal under Civ.R. 41(B)(1) is limited to determining whether the trial court abused its discretion. *Id.* The term “abuse of discretion” implies that the court’s attitude is unreasonable, arbitrary, or unconscionable. *Blakemore v. Blakemore* (1983), 5 Ohio St.3d 217, 219, 450 N.E.2d 1140.

{¶ 11} On the day of the scheduled trial, Alam informed the trial court that she was not ready for trial. She again informed the court that she needed more time “for the doctors to go through all the medical records to make a detailed medical report.” She told the court that she had brought a letter with her from a new doctor that she had seen in late June 2009 that said, “it is

possible that her current symptom of her left knee [may be] the result of the motor vehicle accident, '05.”

{¶ 12} The trial court stated:

{¶ 13} “This lawsuit was filed on May 13, 2008, which was almost a year and a half ago. On April 29, we had a hearing where your lawyer withdrew, for the reason that you were not — this is as I recall, the reason, you were not assisting him in procuring medical reports. \*\*\* You cannot show up on the day of trial with some medical information that the other side has never seen and hope to get it into evidence at trial.”

{¶ 14} The trial court then asked Alam what she had done between the end of April, when her counsel withdrew, and the day of trial to prepare. Alam informed the court that she had recently been diagnosed with “bipolar two disorder.” She further stated that she had talked to a lawyer who she thought was going to help her, but then he developed medical problems. She further informed the court that she had talked to several other doctors, but that she needed more time to gather information.

{¶ 15} The trial court then said, “[a]s of April 29, you were on notice that the trial date will not be continued again. And I haven’t heard, this morning, evidence that some meaningful attempt has been made to marshal your evidence and prepare for trial.

{¶ 16} “I certainly have an obligation to be fair to you, and I certainly have to discharge that obligation.

{¶ 17} “I have to be fair to the defendant. He was in a car accident four-and-a-half years ago. And he hasn’t been able to put this behind him, one way or another.”

{¶ 18} The trial court recessed the hearing to give Alam an opportunity to settle the case with Gallogly. But the two parties could not agree to settlement terms.

{¶ 19} The trial court then denied Alam’s motion to continue, but permitted her to call the new doctor as a witness, even though she had not submitted an expert report or told Gallogly’s counsel about this new doctor. But Alam said that she had not asked the doctor to come to court that day. The trial court then asked her if she was prepared to go to trial without the doctor. Rather than answer the question, the court permitted Alam to read a letter from a different doctor, explaining why Alam was not prepared to go to trial. This doctor explained that Alam had mental health issues that were preventing her from adequately preparing her case. The trial court judge asked her if that was due to her 2005 car accident, and she replied no. The trial court then dismissed the case for lack of prosecution.

{¶ 20} Alam maintains that the trial court failed to give her proper notice that it would dismiss the action and that it abused its discretion in dismissing the

case because it did not consider less drastic alternatives, such as grant her request for continuance. Alam relies on this court's decision, *Wallace v. Euclid Meridia Hosp.*, 8th Dist. No. 82436, 2003-Ohio-5813, in support of her argument.

{¶ 21} In *Wallace*, this court reversed a trial court's dismissal of a case for lack of prosecution. Id. at ¶6. We explained that:

{¶ 22} "A Civ.R. 41(B) dismissal is an extremely harsh sanction that should 'be granted *only when an attorney's conduct falls substantially below what is reasonable and displays contempt for the judicial system* or the rights of the opposing party.' *Industrial Risk Insurers v. Lorenz Equip. Co.* (1994), 69 Ohio St.3d 576, 581, 635 N.E.2d 14. Emphasis added. \*\*\*

{¶ 23} "Lesser sanctions than dismissal with prejudice available to a court when a party fails to appear at a hearing include: (1) a reprimand by the court; (2) a finding of contempt; (3) an order prohibiting the party or attorney from appearing in that court without different counsel in the future; and (4) a dismissal without prejudice. *Willis v. RCA Corp.* (1983), 12 Ohio App.3d 1, 465 N.E.2d 924, paragraph two of the syllabus." *Wallace* at ¶4-5.

{¶ 24} We find the facts in *Wallace* are distinguishable from the present case. The plaintiff in *Wallace* had filed her case for the first time against Euclid Meridia Hospital in February 2002. The trial court dismissed it in October of that same year. We reversed the dismissal because there was nothing in the

record to suggest that the plaintiff was “intentionally dilatory or irresponsible in maintaining her claim.” *Id.* at ¶6. We noted that although the plaintiff was “slow to respond and may not have acted in the most efficient manner possible, the trial court did have less severe choices available.” *Id.* We found the trial court’s dismissal to be “too drastic a remedy,” given the “specific facts of this particular case.” *Id.*

{¶ 25} But under the facts of the present case, we conclude that the trial court did not abuse its discretion in dismissing it for lack of prosecution. The trial court stated that Alam’s first trial counsel had withdrawn from the case because Alam did not cooperate with him in procuring medical records. The trial court had already continued the trial date one time to give Alam more time to obtain new counsel and submit her expert medical report — for an injury that was allegedly caused by an accident occurring over four years prior. The trial court further gave Alam notice that it would not continue the trial a second time. And although Alam was not “intentionally dilatory” in maintaining her claim, the record indicates that she was irresponsible in doing so. See *Wallace*, *supra*. Thus, under these facts, we cannot say the trial court abused its discretion.

{¶ 26} Alam’s sole assignment of error is overruled.

Judgment affirmed.

It is ordered that appellee recover from appellant 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.

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MARY J. BOYLE, PRESIDING JUDGE

FRANK D. CELEBREZZE, JR., J., and  
COLLEEN CONWAY COONEY, J., CONCUR