[Cite as *Vipperman v. Bartley*, 2004-Ohio-3369.]

COURT OF APPEALS
RICHLAND COUNTY, OHIO
FIFTH APPELLATE DISTRICT

BRYAN S. VIPPERMAN, et al.

Plaintiffs-Appellees

-vs-

THOMAS L. BARTLEY, et al.

Defendants-Appellants

JUDGES:
Hon. W. Scott Gwin, P. J.
Hon. John W. Wise, J.
Hon. Julie A. Edwards, J.

Case No. 03 CA 58

<u>O P I N I O N</u>

CHARACTER OF PROCEEDING:	Civil Appeal from the Court of Common Pleas, Case No. 01 CV 693D
JUDGMENT:	Affirmed
DATE OF JUDGMENT ENTRY:	June 28, 2004

APPEARANCES:

For Plaintiff-Appellees

CASSANDRA J. MAYER
79 South Main Street
Mansfield, Ohio 44902

For Defendant-Appellants

LAURA M. FAUST
ROETZEL & ANDRESS
222 South Main Street
Akron, Ohio 44308

Wise, J.

{¶1} Appellant Liberty Mutual Insurance Company ("Liberty Mutual") appeals the decision of the Richland County Court of Common Pleas that denied its motion for relief from judgment pursuant to Civ.R. 60(B). The following facts give rise to this appeal.

{¶2} On August 9, 1999, Appellees Bryan and Sherry Vipperman were injured when Thomas Bartley collided with appellees' motorcycle. Appellees suffered serious injuries as a result of the collision. On March 9, 2000, appellees settled with Bartley's insurer, State Farm, for the policy limit of $200,000. Bartley also paid appellees $10,000 in addition to the money they received from State Farm.

{¶3} At the time of the accident, Sherry Vipperman was employed at J.C. Penney. Following the settlement with Bartley, counsel for appellees contacted J.C. Penney to determine whether coverage was available pursuant to the Ohio Supreme Court's decision in *Scott-Pontzer v. Liberty Mut. Fire Ins. Co.*, 85 Ohio St.3d 660, 1999-Ohio-292. Although appellees' counsel made several requests, J.C. Penney did not provide appellees with a copy of the insurance policy in effect on the date of the accident.

{¶4} Thereafter, on March 6, 2001, Judy Krogman, Senior Technical Claims Specialist with Liberty Mutual, contacted appellees' counsel and requested that counsel

send her various documents. Appellees' counsel complied with Ms. Krogman's request. Ms. Krogman contacted appellees' counsel again, on May 31, 2001, and requested additional information. On July 2, 2001, Ms. Krogman sent a letter to appellees' counsel denying UIM coverage on the basis that appellees destroyed the subrogation rights of Liberty Mutual when it settled with Bartley.

{¶5} As a result of Liberty Mutual's denial of coverage, on August 8, 2001, appellees filed a complaint, for declaratory judgment, against Bartley and Liberty Mutual. The complaint was served by certified mail on August 15, 2001. A person by the name of Steve Laros signed for the certified mail, at the post office, and delivered it to Liberty Mutual's Allentown Office. Mr. Laros is an independent contractor, hired by Liberty Mutual, to pick up its mail, at the post office, and deliver it to the Allentown Office each morning.

{¶6} Upon receipt of the complaint, Liberty Mutual sent a letter, to the Richland County Clerk of Courts, requesting additional information. Enclosed with this letter was the original summons, complaint, demand for production of documents and the scheduling conference notice. The Richland County Clerk's Office received the unsigned and undated letter, from Liberty Mutual, on August 20, 2001.

{¶7} The trial court conducted the scheduling conference on November 14, 2001. Counsel for Liberty Mutual did not appear for this conference. Liberty Mutual also did not file an answer or produce the requested policy. On March 14, 2002, appellees filed their motion for default judgment against Liberty Mutual. On February

25, 2002, appellees' counsel received a letter, from Liberty Mutual, requesting additional information. Enclosed with the letter was a copy of the motion for default judgment.[1]

{¶8} Subsequently, the trial court scheduled a hearing, on the motion for default judgment and the issue of damages, for March 14, 2002. On March 6, 2002, the trial court received a letter, from Liberty Mutual, requesting additional information regarding the notice of hearing on the motion for default judgment and damages hearing. Liberty Mutual failed to appear for the default judgment and damages hearing. At this hearing, the magistrate granted default judgment, against Liberty Mutual, in the amount of $1,970,000.

{¶9} On June 24, 2002, the trial court mailed a copy of the magistrate's decision to Liberty Mutual. Upon receipt of the magistrate's decision, Liberty Mutual sent another letter, to the trial court, requesting additional information. Included in the letter was a copy of the magistrate's decision. On June 27, 2002, the magistrate issued an amended decision noting the judgment was against Liberty Mutual and not Bartley. Appellees voluntarily dismissed Bartley, without prejudice, on July 1, 2002. A copy of the dismissal entry was sent to Liberty Mutual. Again, Liberty Mutual sent a letter, to the trial court, requesting additional information. The letter also had enclosed a copy of the amended magistrate's decision.

{¶10} A judgment entry on the magistrate's decision was filed on October 22, 2002. The trial court adopted the magistrate's decision on October 29, 2002. In a letter dated December 29, 2002, appellees' counsel contacted Liberty Mutual regarding the

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[1] Appellees allege at page 22 of their brief that the motion for default judgment was not time stamped until the day of the hearing because the court failed to file it when it was presented for filing.

default judgment and damages award. On January 29, 2003, Liberty Mutual filed a motion to vacate the default judgment pursuant to Civ.R. 60(B). The trial court conducted a hearing on Liberty Mutual's motion on May 2, 2003. The trial court overruled Liberty Mutual's motion on May 13, 2002.

{¶11} Liberty Mutual timely filed a notice of appeal and sets forth the following assignments of error for our consideration:

{¶12} "I. THE TRIAL COURT ERRED BY DENYING LIBERTY MUTUAL'S CIV.R. 60(B) MOTION FOR RELIEF FROM JUDGMENT.

{¶13} "II. THE DEFAULT JUDGMENT ENTRY AGAINST LIBERTY MUTUAL IS VOID FOR FAILURE TO COMPLY WITH CIV.R. 55(A).

{¶14} "III. THE DEFAULT JUDGMENT AGAINST LIBERTY MUTUAL VIOLATED DUE PROCESS.

{¶15} "IV. THE TRIAL COURT ERRED BY STATING IN ITS DECISION ON THE MOTION TO VACATE THAT IT PREVIOUSLY GRANTED JUDGMENT IN THE AMOUNT OF $1,970,000 AGAINST LIBERTY MUTUAL.

{¶16} "V. THE TRIAL COURT LACKED SUBJECT MATTER JUDGMENT (SIC) TO GRANT JUDGMENT AGAINST LIBERTY MUTUAL.

{¶17} "VI. THIS COURT LACKS JURISDICTION TO HEAR THIS APPEAL BECAUSE THE MAY 13, 2003 ENTRY WAS NOT A FINAL APPEALABLE ORDER."

I

{¶18} In its First Assignment of Error, Liberty Mutual contends the trial court erred when it denied its motion for relief from judgment pursuant to Civ.R. 60(B). We disagree.

{¶19} A motion for relief from judgment, under Civ.R. 60(B), lies within the discretion of the trial court. *Griffey v. Rajan* (1987), 33 Ohio St.3d 75, 77. In order to find an abuse of discretion, we must determine the trial court's decision was unreasonable, arbitrary or unconscionable and not merely an error of law or judgment. *Blakemore v. Blakemore* (1983), 5 Ohio St.3d 217, 219. Liberty Mutual based its motion on excusable neglect pursuant to Civ.R. 60(B)(1). The Ohio Supreme Court has defined the term "excusable neglect" in the negative and has stated that the inaction of a defendant is not excusable neglect if it can be labeled as a complete disregard for the judicial system. *Kay v. Marc Glassman, Inc.* (1996), 76 Ohio St.3d 18, 20, 1996-Ohio-430, citing *GTE Automatic Elec., Inc. v. ARC Industries, Inc.* (1976), 47 Ohio St.2d 146, 153.

{¶20} In the *GTE* case, at paragraph two of the syllabus, the Ohio Supreme Court held:

{¶21} "To prevail on a motion brought under Civ.R. 60(B), the movant must demonstrate that: (1) the party has a meritorious defense or claim to present if relief is granted; (2) the party is entitled to relief under one of the grounds stated in Civ.R. 60(B)(1) through (5); and (3) the motion is made within a reasonable time, and, where the grounds of relief are Civ.R. 60(B)(1), (2) or (3), not more than one year after the judgment, order or proceeding was entered or taken."

{¶22} In *Colley v. Bazell* (1980), 64 Ohio St.2d 243, 248, the Ohio Supreme Court discussed relief from judgment under Civ.R. 60(B)(1). The Court stated:

{¶23} "In our view, the concept of 'excusable neglect' must be construed in keeping with the proposition that Civ.R. 60(B)(1) is a remedial rule to be liberally

construed, while bearing in mind that Civ.R. 60(B) constitutes an attempt to 'strike a proper balance between the conflicting principles that litigation must be brought to an end and justice should be done.' " 11 Wright & Miller, Federal Practice & Procedure 140, Section 2851, quoted in *Doddridge v. Fitzpatrick* (1978), 53 Ohio St.2d 9, 12, 371 N.E.2d 214."

{¶24} Liberty Mutual sets forth several arguments in support of its First Assignment of Error. First, it maintains a default judgment was improper, in appellees' declaratory judgment action, because the issues raised, in the complaint, do not resolve the dispute between appellees and Liberty Mutual. Liberty Mutual refers to this court's comment, in *Fitz v. Continental Ins. Co.*, Muskingum App. No. CT2002-0023, 2003-Ohio-1815, wherein, we stated:

{¶25} "Declaratory relief is statutory and requests the trial court to make a determination on the law and coverage. We note the motion for default and the default judgment do not make any specific allegations on the law and policies but aver a bare request for judgment and the granting of default. We are unable to find any Ohio cases on point, but note the default judgment granted really did not resolve the issues presented in this case." Id. at ¶ 23.

{¶26} We find the *Fitz* decision unpersuasive in the matter currently before the court because in their motion for default judgment, appellees specifically alleged they are insureds under a policy Liberty Mutual issued to Appellee Sherry Vipperman's employer, J.C. Penney. Further, in the judgment entry granting default judgment, the trial court specifically referred to the *Scott-Pontzer* and *Ezawa*[2] decisions and

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[2] *Ezawa v. Yasuda Fire & Marine*, 86 Ohio St.3d 557, 1999-Ohio-124.

determined that appellees are insureds under the policy Liberty Mutual issued to J.C. Penney.

{¶27} Thus, unlike in *Fitz*, the motion for default judgment and judgment entry granting default judgment did not merely aver a bare request for judgment and the granting of judgment. Instead, the motion and judgment entry made specific allegations on the law and policy at issue.

{¶28} Liberty Mutual next maintains the trial court only had subject matter jurisdiction to determine that appellees are insureds under the J.C. Penney policy because this was the only averment contained in the complaint. Liberty Mutual also argues the complaint contains no allegations about what type of insurance is offered by the policy or that appellees are entitled to damages. We disagree with this argument based upon our review of the complaint.

{¶29} The complaint filed by appellees on August 8, 2001, alleges that Appellee Sherry Vipperman is entitled to coverage, under the policy Liberty Mutual issued to her employer, J.C. Penny, pursuant to the *Scott-Pontzer* decision. See paragraph eight of the complaint. Further, the complaint alleges that Appellee Bryan Vipperman is entitled to coverage, under the policy Liberty Mutual issued to his spouse's employer, J.C. Penney, pursuant to the *Ezawa* decision. See paragraph nine of the decision.

{¶30} We would also note that in the prayer for relief, appellees request UM/UIM coverage under Liberty Mutual's policy and specifically request compensation for the damages they sustained in the accident. Clearly, the trial court had subject matter jurisdiction to address the issues of coverage, including type of coverage and damages, as these allegations are contained in appellees' complaint.

{¶31} Liberty Mutual also contends it was not required to answer the complaint because it did not contain any factual allegations. Thus, Liberty Mutual concludes that its failure to file an answer did not result in any admissions because there were no factual allegations contained in the complaint. Liberty Mutual cites no case law, nor have we found any, that supports the conclusion that it was not required to file an answer.

{¶32} Further, Civ.R. 8(D) provides that, "[a]verments in a pleading to which a responsive pleading is required, other than those as to the amount of damage, are admitted when not denied in the responsive pleading. Thus, a failure to file an answer does not only deem factual averments as admitted, but applies to all averments contained in a pleading. Accordingly, by failing to timely answer appellees' complaint, Liberty Mutual admitted the averments contained in the complaint whether they be factual or legal.

{¶33} Finally, Liberty Mutual sets forth several arguments in support of its contention that the trial court abused its discretion when it denied its motion for relief from judgment. First, the service of the complaint at Liberty Mutual's Allentown Office contributed to its failure to timely file an answer because the Allentown Office only handles subrogation claims and was not familiar with receiving complaints via certified mail from Ohio. Second, a runner mistakenly signed for the certified mail and placed it in with the regular mail. Third, the staff at the Allentown Office thought the complaint was a pleading without a cover letter relating to a subrogation case.

{¶34} Although it appears several factors contributed to Liberty Mutual's failure to timely answer appellees' complaint, we do not find Liberty Mutual has established

excusable neglect thereby entitling them to relief from judgment. We reach this conclusion based upon the following facts. Liberty Mutual is a sophisticated worldwide insurance company and as part of its business, is involved in legal proceedings. Liberty Mutual's Allentown Office deals with subrogation claims from both the United States and Canada. The employee at Liberty Mutual designated to sort the mail actually received all of the documents sent to it by appellees' counsel and the trial court. However, upon receipt of these documents, the employee returned the documents with a letter requesting more information.

{¶35} In addition to returning the summons, complaint and scheduling order, to the trial court with a request for more information, Liberty Mutual also returned the motion for default judgment, notice of default damages hearing, magistrate's decision on default damages and the judgment entry dismissing Mr. Bartley. Also, appellees did not rush to judgment in this matter. Instead, they waited over six months to file their motion for default judgment. Based upon this disregard for the judicial proceedings, we conclude the trial court did not abuse its discretion when it denied Liberty Mutual's motion for relief from judgment.

{¶36} Liberty Mutual's First Assignment of Error is overruled.

II

{¶37} In its Second Assignment of Error, Liberty Mutual maintains the default judgment entry is void for failure to comply with Civ.R. 55(A). We disagree.

{¶38} Civ.R. 55(A) provides, in pertinent part:

{¶39} "* * * If the party against whom judgment by default is sought has appeared in the action he * * * shall be served with written notice of the application for judgment at least seven days prior to the hearing on such application."

{¶40} Liberty Mutual argues it made an appearance in this matter, on at least two occasions, prior to the trial court granting appellees' motion for default judgment. Thus, Liberty Mutual contends it was entitled to a seven-day notice prior to the trial court conducting the default judgment hearing.

{¶41} Although the appearance was not made by filing an answer or notice of appearance, Liberty Mutual claims it made an appearance by sending a letter to the Clerk of Courts requesting more information. Liberty Mutual also claims it made an appearance, by telephone and letter, when Judy Krogman denied appellees' insurance claim, which made it obvious that Liberty Mutual intended to contest the issue of coverage.

{¶42} Liberty Mutual also argues it did not receive the required seven-day notice because the motion for default was filed on March 14, 2002, at 9:41 a.m. and the judgment entry granting default judgment was filed on March 14, 2002, at 9:42 a.m. The record in this matter indicates the trial court prepared a notice of hearing on the motion for default judgment on February 20, 2002. This notice was sent to Liberty Mutual on February 22, 2002. Liberty Mutual received this notice and returned it to the trial court. The trial court received the returned notice of hearing on March 6, 2002. Clearly, Liberty Mutual received notice of the hearing in accordance with Civ.R. 55(A), even though the motion for default judgment was not filed until the day set for the hearing.

{¶43} Liberty Mutual's Second Assignment of Error is overruled.

III

{¶44} In its Third Assignment of Error, Liberty Mutual contends the default judgment violated due process because the $1,970,000 default judgment amounted to a forfeiture. We disagree.

{¶45} In support of this assignment of error, Liberty Mutual cites the Ohio Supreme Court's decision in *Colley v. Brazell,* supra, at fn. 5, citing *Tozer v. Charles A. Krause Milling Co.* (C.A. 3, 1951), 189 F.2d 242, 245, which states that "* * * [m]atters involving large sums should not be determined by default judgment if it can reasonably be avoided." Thus, Liberty Mutual concludes that because this matter involved a large sum of money, the case should be decided on its merits. Although courts generally prefer to decide cases on their merits, the Ohio Rules of Civil Procedure permit the granting of a default judgment where a party fails to timely file an answer, no matter the sum of money involved.

{¶46} Therefore, we decline to accept the view that a default judgment, in a case involving a large sum of money, amounts to a forfeiture in violation of due process.

{¶47} Liberty Mutual's Third Assignment of Error is overruled.

IV

{¶48} Liberty Mutual maintains, in its Fourth Assignment of Error, that the trial court erred by stating, in its decision on the motion to vacate, that it previously granted judgment in the amount of $1,970,000. We disagree.

{¶49} This assignment of error challenges the judgment entry of the trial court filed on May 13, 2003, which states, "On October 22, 2002, this Court entered a

$1,970,000 default judgment against Defendant Liberty Mutual Insurance Company based on the Magistrate's June 22, 2002 Decision after Default Damage Hearing." Liberty Mutual claims the judgment entry of October 22, 2002, does not reflect that the trial court entered a $1,970,000 judgment against it. Rather, the October 22, 2002 judgment entry merely adopts a magistrate's decision that states the following regarding damages:

{¶50} "1. Judgment should be rendered in favor of plaintiff Bryan Vipperman for his medical bills, loss of enjoyment of life, pain, and suffering in the total sum of Six Hundred Thousand Dollars ($600,000.00).

{¶51} "2. Judgment should be rendered in favor of Sherry Vipperman for her medical bills, loss of enjoyment of life, suffering, and lost wages in the amount of One Million Three Hundred Seventy Thousand Dollars ($1,370,000.00).

{¶52} "3. Those judgments should be entered against defendant Liberty Mutual Insurance Co. up to the amount of the underinsured motorist coverage it provided to the J.C. Penney Co. at the time of the collision." Amended Magistrate's Decision, June 27, 2002, at 11-12.

{¶53} Based upon the above language, Liberty Mutual argues that since the judgment was up to the amount of the underinsured motorists coverage it provided to J.C. Penny at the time of the collision, there never was a determination as to the amount of the judgment against it. Liberty Mutual made this same argument in a motion for modification of amount of supersedeas bond. We stated, in the judgment entry denying Liberty Mutual's motion, that "[o]ur preliminary review of this matter indicates that the trial court entered judgment on October 22, 2002, adopting the Magistrate's

decision rendering judgment against appellant Liberty Mutual Insurance Company in the amount of $1,970,000." Judgment Entry, Sept. 23, 2003.

{¶54} Upon further review of the record in this matter, we agree with our prior conclusion. The magistrate entered judgment in this matter, in the amount of $1,970,000, which represents $600,000 awarded to Appellee Bryan Vipperman and $1,370,000 awarded to Appellee Sherry Vipperman.

{¶55} Liberty Mutual's Fourth Assignment of Error is overruled.

V

{¶56} In its Fifth Assignment of Error, Liberty Mutual maintains appellees' complaint does not include a short and plain statement indicating entitlement to UIM coverage or the amount of coverage and therefore, the trial court did not have subject matter jurisdiction to issue the judgment. We disagree.

{¶57} In their complaint, appellees claim an entitlement to UIM coverage based upon the *Scott-Pontzer* and *Ezawa* cases. Further, the record establishes that appellees were unable to allege a specific amount of UIM coverage because Liberty Mutual failed to provide them with a copy of the policy at issue despite numerous requests by appellees' counsel. The trial court specifically found, in the judgment entry denying Liberty Mutual's motion for relief from judgment, that "* * * despite the plaintiffs providing the many documents requested by Ms. Krogman, she denied their claim without the courtesy of sending them the policy they had repeatedly requested." Judgment Entry, May 13, 2002, at 9.

{¶58} Therefore, appellees were unable to determine the amount of coverage because of Liberty Mutual's refusal to cooperate by providing a copy of the insurance

policy. Further, by failing to timely answer the complaint, Liberty Mutual has waived this argument.

{¶59} Liberty Mutual's Fifth Assignment of Error is overruled.

VI

{¶60} Liberty Mutual contends, in its Sixth Assignment of Error, that we lack jurisdiction to hear this appeal because the May 13, 2003 judgment entry is not a final appealable order. We disagree.

{¶61} Liberty Mutual claims the May 13, 2003 judgment entry, denying its motion for relief from judgment, is not a final appealable order because it is based upon the October 22, 2002 judgment entry which is not final in that it fails to specify the nature of the relief granted. The judgment entry denying the motion for relief from judgment was filed by the trial court in response to Liberty Mutual's motion seeking relief from judgment.

{¶62} Although Liberty Mutual's request for relief is made in response to the October 22, 2002 judgment entry, the judgment entry filed by the trial court on May 13, 2003, is in response to Liberty Mutual's motion requesting relief from judgment. The May 13, 2003 judgment entry does not relate back to the trial court's October 22, 2002 judgment entry. Accordingly, the judgment entry is a final appealable order and therefore, properly before this court.

{¶63} Liberty Mutual's Sixth Assignment of Error is overruled.

{¶64} For the foregoing reasons, the judgment of the Court of Common Pleas, Richland County, Ohio, is hereby affirmed.

By: Wise, J.

Gwin, P. J., concurs.

Edwards, J., dissents.

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JUDGES

JWW/d 521

Edwards, J., dissenting

{¶65} In *Bettis v. National Union Fire Insurance Company of Pittsburgh, PA.*, 2004 WL 909674, this Court held that when the insurance contract was not attached to the complaint, the allegations in a complaint for declaratory judgment were insufficient to support the finding of coverage and were insufficient to resolve the action via a motion for default. I still agree with that holding. Whether I would still agree with that holding in a situation where the plaintiff was not a party to a contract and was unable to obtain the contract from one of the parties to a contract, I do not need to answer in the case sub judice. The plaintiff did not demonstrate he was unable to obtain the contract. While it may be true that a simple request to the insurance company was unsuccessful in obtaining the contract, the plaintiff still had another option available. He could have and should have sought a production of the document under Civ.R. 34(D) prior to the filing of the declaratory judgment action.

{¶66} Therefore, I respectfully disagree with the majority and would sustain appellant's first assignment of error, thereby reversing the trial court.

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JUDGE

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

BRYAN S. VIPPERMAN, et al.	:	
Plaintiffs-Appellees	:	
-vs-	:	JUDGMENT ENTRY
THOMAS L. BARTLEY, et al.	:	
Defendants-Appellants	:	Case No. 03 CA 58

For the reasons stated in our accompanying Memorandum-Opinion, the judgment of the Court of Common Pleas of Richland County, Ohio, is affirmed.

Costs assessed to Appellant Liberty Mutual.

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JUDGES