

[Cite as *Wallace v. Euclid Meridia Hosp.*, 2003-Ohio-5813.]

COURT OF APPEALS OF OHIO, EIGHTH DISTRICT

COUNTY OF CUYAHOGA

NO. 82436

PAULA WALLACE	:	
	:	
Plaintiff-Appellant	:	JOURNAL ENTRY
	:	
vs.	:	and
	:	
	:	OPINION
EUCLID MERIDIA HOSPITAL,	:	
et al.	:	
	:	
Defendants-Appellees	:	

DATE OF ANNOUNCEMENT
OF DECISION: October 30, 2003

CHARACTER OF PROCEEDING: Civil appeal from
Common Pleas Court
Case No. CV-461950

JUDGMENT: REVERSED AND REMANDED

DATE OF JOURNALIZATION:

APPEARANCES:

For Plaintiff-Appellant: OSCAR TRIVERS
Hardiman, Buchanan, Howland
& Trivers
1025 Huntington Building
925 Euclid Avenue
Cleveland, Ohio 44115-1405

For Defendants-Appellees: SUSAN M. SEACRIST

(Euclid Meridia Hospital)

JOSEPH W. BORCHELT
Reminger & Reminger Co., LPA
1400 Midland Building
101 Prospect Avenue, West
Cleveland, Ohio 44115-1093

(Appearances Continued)

D. CHERYL ATWELL
Reminger & Reminger Co., LPA
200 Courtyard Square
80 S. Summit Street
Akron, Ohio 44308

(Dr. Charles Bailin)

BRIAN D. SULLIVAN
Reminger & Reminger Co., LPA
1400 Midland Building
101 Prospect Avenue, West
Cleveland, Ohio 44115-1093

(Margaritta Bruce, M.D.)

MARGARITTA BRUCE
c/o Euclid Meridia Hospital
18901 Lake Shore Boulevard
Cleveland, Ohio 44132

ANTHONY O. CALABRESE, JR., J.:

{¶1} Plaintiff-appellant Paula Wallace ("appellant") appeals from the decision of the trial court granting defendant Euclid Meridia Hospital's ("Meridia") motion to dismiss and defendant Dr. Charles Bailin's ("Dr. Bailin") motion to dismiss. Appellant further appeals from the trial court's denial of the motion to reinstate and/or relief from judgment. Having reviewed the arguments of the parties and the pertinent law, we reverse and remand.

I

{¶2} On February 4, 2002, plaintiff-appellant filed her medical malpractice claim against defendants Meridia, Dr. Bailin,

and Dr. Margaritta D. Bruce ("Dr. Bruce"). On July 23, 2002, appellant voluntarily dismissed Dr. Bruce. On September 11, 2002, Meridia filed a motion to dismiss for failure to prosecute and, on September 13, 2002, Dr. Bailin filed his motion to dismiss for failure to prosecute. Dr. Bailin's motion to dismiss was later treated by the court as a motion to compel.¹ On October 11, 2002, Meridia filed a second motion to dismiss, this time titled as "Defendant Euclid Meridia Hospital's Renewed Motion to Dismiss for Want of Prosecution." Appellee Dr. Bailin also filed a second motion to dismiss on October 18, 2002. Meridia and Dr. Bailin's motions to dismiss were granted on October 29, 2002. On January 7, 2003, the trial court denied appellant's motion to reinstate and/or relief from judgment. Appellant is now appealing the trial court's decision.

II

{¶3} Appellant's first assignment of error states: "The lower court erred in granting plaintiff's [sic] motion to dismiss for want of prosecution."

{¶4} 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.*"

¹See trial court docket journal entry of September 18, 2002, treating the motion to dismiss as a motion to compel.

Industrial Risk Insurers v. Lorenz Equip. Co. (1994), 69 Ohio St.3d 576, 581. Emphasis added. An abuse of discretion will be found if the lower court's ruling evidences an unreasonable, arbitrary or unconscionable attitude. *Rock v. Cabral* (1993), 67 Ohio St.3d 108, 112; *Blakemore v. Blakemore* (1983), 5 Ohio St.3d 217, 219.

{¶5} 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, paragraph two of the syllabus.

{¶6} Nothing in the record suggests that appellant was intentionally dilatory or irresponsible in maintaining her claim. In addition, appellant made an appearance at the status hearing and did respond to appellees' discovery requests at the time she received notice of the court's ruling on appellees' motion to dismiss for want of prosecution. Although the appellant was indeed slow to respond and may not have acted in the most efficient manner possible, the trial court did have less severe choices available. Given the specific facts of this particular case, we find that the trial court's dismissal is too drastic a remedy. Appellant's first assignment of error is granted.

{¶7} Appellant's second assignment of error states: "The lower court erred in denying plaintiff's motion to reinstate and fo [sic] relief from judgment."

{¶8} In order to prevail on a motion for relief from judgment pursuant to Civ.R. 60(B), the movant must demonstrate: (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. *Rose Chevrolet, Inc. v. Adams* (1988), 36 Ohio St.3d 17. *GTE Automatic Electric v. ARC Industries* (1976), 47 Ohio St.2d 146, paragraph two of the syllabus.

{¶9} As previously stated in appellant's first assignment of error, appellant was initially unaware of the proceedings; however, appellant did comply when she became aware of the motion. Furthermore, in this particular situation, appellant's attorney had an unusually difficult time contacting his client and was, therefore, unable to proceed in the timely manner he desired. The specific facts in this particular situation constitute a meritorious claim and defense. Accordingly, we grant appellant's second assignment of error and reverse and remand the case to the trial court.

This cause is reversed and remanded to the lower court for further proceedings consistent with this opinion.

It is, therefore, considered that said appellant recover of said appellees costs herein.

It is ordered that a special mandate be sent to the Cuyahoga County Court of Common Pleas 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.

ANTHONY O. CALABRESE, JR.
JUDGE

PATRICIA A. BLACKMON, P.J. and

FRANK D. CELEBREZZE, JR., J. CONCUR.

N.B. This entry is an announcement of the court's decision. See App.R. 22(B), 22(D) and 26(A); Loc.App.R. 22. This decision will be journalized and will become the judgment and order of the court pursuant to App.R. 22(E) unless a motion for reconsideration with supporting brief, per App.R. 26(A), is filed within ten (10) days of the announcement of the court's decision. The time period for review by the Supreme Court of Ohio shall begin to run upon the journalization of this court's announcement of decision by the clerk per App.R. 22(E). See, also, S.Ct.Prac.R. II, Section 2(A)(1).