

**THE COURT OF APPEALS
ELEVENTH APPELLATE DISTRICT
ASHTABULA COUNTY, OHIO**

KATHERINE M. TIMEONI,	:	OPINION
Plaintiff-Appellee,	:	
- vs -	:	CASE NO. 2006-A-0077
CHERYL CIANCIBELLI, et al.,	:	
Defendants-Appellees,	:	
TOM HANNAN, et al.,	:	
Defendants-Appellants.	:	

Civil Appeal from the Court of Common Pleas, Case No. 05 CV 975.

Judgment: Affirmed.

Jesse M. Schmidt, 55 Public Square, #1414, Cleveland, OH 44113-1900 (For Plaintiff-Appellee).

Lisa M. Spano, McNamara, Hanrahan, Callender & Loxterman, 8440 Station Street, Mentor, OH 44060 (For Defendants-Appellees, Cheryl Ciancibelli and Spinning Wheels Farm, Inc.).

Michael J. O'Shea, O'Shea & Associates Co., L.P.A., 55 Public Square, #1600, Cleveland, OH 44113 (For Defendants-Appellants, Tom and Carol Hannan).

MARY JANE TRAPP, J.

{¶1} Appellants appeal the judgment entry of the Ashtabula County Court of Common Pleas, which denied appellants' motion for a continuance and compelled them to proceed to trial unrepresented. For the reasons that follow, we affirm.

{¶2} Statement of Facts and Procedural History

{¶3} On September 27, 2005, appellee, Katherine M. Timeoni, filed a complaint against appellees, Cheryl Ciancibelli and Spinning Wheel Farms, Inc., alleging claims of breach of contract, quantum meruit, bailment, conversion, punitive damages, and replevin.

{¶4} On January 17, 2006, a pretrial conference was scheduled for April 24, 2006. On March 1, 2006, appellee Timeoni was given leave to file a second amended complaint, which added new defendants, appellants, Carol and Tom Hannan. On March 21, 2006, appellants' counsel, Michael O'Shea, filed a motion for a more definite statement.

{¶5} On April 24, 2006, the pretrial conference was held, and counsel for appellee Timeoni and appellee Ciancibelli, appeared. Apparently, appellants' counsel did not appear at the pretrial conference presumably because the notice of same was issued prior to the filing and service of the Second Amended Complaint. At the pretrial, the court scheduled the jury trial for October 4, 2006 at 8:30 a.m.

{¶6} On April 27, 2006, the court issued a judgment entry, which scheduled mediation for May 30, 2006. On April 28, 2006, the court issued a judgment entry, which, inter alia, overruled appellants' motion for a more definite statement. The judgment entry also set deadlines for submission of expert witness reports, motions for summary judgment, submissions of trial exhibits, and scheduled the trial for October 4, 2006.

{¶7} On May 19, 2006, appellants filed their answer and cross-claims. On May 25, 2006, appellants' attorney filed a motion to continue the May 30, 2006 mediation

citing two conflicting hearings scheduled for the same day; one in the Cuyahoga County Court of Common Pleas, Domestic Relations Division, at 1:30 p.m.; and the other a federal sentencing hearing scheduled for 3:00 p.m.

{¶8} After an unsuccessful mediation, the case remained on the docket as an anticipated jury trial until the parties finally agreed to try the case to the judge. A written stipulation to that effect was not filed with the court until October 2, 2006. On that same day, two days before trial, the court phoned counsel to advise that the court had to delay the start of the trial from October 4, 2006 to October 5, 2006, due to an ongoing criminal trial.

{¶9} On October 3, 2006, both appellee Timeoni and appellee Ciancibelli complied with the trial order, and filed and exchanged witness and exhibit lists. Appellant did not comply with this trial order and instead filed a motion for a continuance by facsimile, which was denied by the court on October 4, 2006. On the evening of October 4, 2006, counsel for appellant sent a letter to the court via facsimile, advising the court that he would “***work to timely complete” his matters in the Rocky River Municipal Court and “***then immediately get in [his] car to drive to [the] courtroom for this case.”

{¶10} On October 5, 2006, the case proceeded to a one-day bench trial, where appellants presented their case without their counsel present. Counsel for appellants never appeared in court on the day of trial. In fact, counsel contacted his clients by phone twice, once at 12:30 p.m. and again at 1:30 p.m. and also spoke with counsel for the co-defendant at the time of the second call, and decided to turn his car around and not appear in court.

{¶11} Judgment was entered against appellants on the counts of the Second Amended Complaint directed against them.

{¶12} Appellants now timely raise the following assignment of error:

{¶13} “The trial court violated Ohio law by overruling the motion to continue and [sic] compelling the Appellants to proceed unrepresented.”

{¶14} Appellants did not appeal the underlying judgment entered against them.

{¶15} **Standard of Review**

{¶16} “It is well-established in Ohio that the decision to grant or deny a continuance *** rests within the sound discretion of the trial court and will not be reversed on appeal absent an abuse of that discretion.” *DeFranco v. DeFranco* (2001), 11th Dist. No. 2000-L-147, 2001-Ohio-4338, at 4, citing *Burton v. Burton* (1999), 132 Ohio App.3d 473, 475; *In re Kriest* (Aug.6, 1999), Trumbull App. No. 98-T-0093, 1999 Ohio App. LEXIS 3605, at 7; *McGraw v. Convenient Food Mart* (June 18, 1999), Lake App. No. 97-L-271, 1999 Ohio App. LEXIS 2818, at 14. “An abuse of discretion connotes more than a mere error of law or judgment; rather it implies that the trial court’s attitude was unreasonable, arbitrary, or capricious.” *Id.* at 5, citing *Blakemore v. Blakemore* (1983), 5 Ohio St.3d 217, 219.

{¶17} “In determining whether the trial court abused its discretion in granting or denying the motion for a continuance, the reviewing court must balance the interests of judicial economy and justice against any potential prejudice to the defendant.” *Id.* at 5, citing *Griffin v. Lamberjack* (1994), 95 Ohio App.3d 257, 264.

{¶18} The Supreme Court of Ohio in *State v. Unger* (1981), 67 Ohio St. 2d 65, 67-68, specifically outlined some of the objective factors that a reviewing court should

consider: “*** the length of the delay requested; whether other continuances have been requested and received; the inconvenience to litigants, witnesses, opposing counsel and the court; whether the requested delay is for legitimate reasons or whether it is dilatory, purposeful, or contrived; whether the defendant contributed to the circumstance which gives rise to the request for a continuance; and other relevant factors, depending on the unique facts of each case.” See, also, *DeFranco* at 5-6, citing *In re Dietrich* (Dec. 12, 1997), Geauga App. No. 96-G-2020, 1997 Ohio App. LEXIS 5561, at 5.

{¶19} Motion for a Continuance

{¶20} In their sole assignment of error, appellants appeal the judgment of the trial court, which denied their motion for a continuance and compelled appellants to proceed to trial unrepresented. We reject appellants’ argument and affirm the trial court’s denial of the motion for a continuance.

{¶21} The general rule, pursuant to Sup.R. 41(B)(1) is that “when two or more cases are assigned the same trial date in different Ohio trial courts, the case that was first set for trial shall have priority and shall be tried on the assigned date. Continuances should be granted in the other cases unless a motion for continuance is filed less than thirty days prior to trial.” *Wheaton Industries, Inc. v. Fashion Two Twenty, Inc.* (1993), 11th Dist. No. 90-P-2185, 1993 Ohio App. LEXIS 4066, at 7.

{¶22} Specifically, appellants argue that the court abused its discretion by not granting appellants’ motion for a continuance, which was filed two days before trial. Appellants contend that this denial was unreasonable in light of the fact that the court, on October 2, 2006, delayed the start of the trial by one day due to an ongoing criminal jury trial.

{¶23} We reject this argument. Appellants' argument is unpersuasive since their counsel should have known a conflict would arise well before the required thirty day time period for a motion for continuance mandated by Sup.R. 41(B) and the fourteen day time period mandated by the local Ashtabula County Common Pleas Court rules. As a prosecutor, appellants' counsel surely was aware of his scheduled Rocky River Municipal Court docket thirty days before the scheduled trial date, and until the plaintiff-appellee in this case agreed to waive a jury trial on October 2, 2006, appellants' counsel was on notice that the instant case was scheduled for a jury trial, which in the normal course in common pleas court would take, at a minimum, two days.

{¶24} Sup.R. 41(B)(1) provides, in pertinent part: "The court should not consider any motion for a continuance due to a conflict of trial assignment dates unless a copy of the conflicting assignment is attached to the motion and the motion is filed not less than thirty days prior to trial."

{¶25} In *Wheaton*, we reviewed the exception to this general rule: "The duty to move for a continuance of a case set for trial on the same date as an attorney has another trial already scheduled is not abrogated by the possibility that the earlier set case will be settled or otherwise disposed of prior to trial. If the attorney chooses to delay a motion for continuance because of an expectation that the scheduling conflict will be resolved, it is done at the risk that no continuance will be granted in the later-set case. A trial court may exercise its discretion in deciding whether a motion for a continuance was timely made, and if it holds that the motion was not timely, it may proceed to adjudication of the case ex parte. ***" *Id.* at 7, citing *Alex N. Sill Co. v. Fazio* (1981), 2 Ohio App.3d 65, 68.

{¶26} It must also be noted that appellants' counsel failed to supply the trial court with any evidence that the Rocky River Municipal Court cases were set for trial by that court before the instant case was scheduled for trial by the court below on April 28, 2006, as required by Sup.R. 41(B)(1). In addition, counsel had previously waited until two business days before the scheduled mediation in this case to request a continuance because of schedule conflicts.

{¶27} From the outset, all the parties demanded a jury trial. Thus, thirty days before trial, appellants' counsel knew that a jury trial was scheduled for October 4, 2006. Attorneys who try cases can never expect that jury trial in common pleas court will take only one day. At the same time, as a prosecutor, appellants' counsel should also have known that he would have a full schedule of criminal hearings in the Rocky River Municipal Court on October 5, 2006. At this point, there were direct conflicts in his schedule. His belief or hope that this case would proceed to a bench trial on October 4 that would allow him to keep his docket in municipal court on October 5 was a false hope. Appellants' counsel chose not to file a motion to continue the trial in this case until the eleventh hour and instead took the risk that the parties would agree to a bench trial that would only take one day. Appellants' counsel rolled the dice and lost. Unfortunately, this gamble forced his clients to proceed unrepresented as appellants' counsel was not prepared with substitute counsel for either of his cases in municipal court or before the common pleas court.

{¶28} Thus, it is clear in the case sub judice that appellants' counsel knew that he had a potential conflict. He assumed the trial would only take one day because he anticipated that before the case proceeded to trial, the parties would stipulate to a

bench trial. This stipulation did not occur until October 2, 2006, two days before trial. The other parties had complied with the trial court order and were prepared to proceed to trial.

{¶29} While he may have had a legitimate reason to believe that the conflict would disappear based upon his expectations, his decision to not timely file a motion for continuance, when he knew a conflict was present, was done at his own risk and unfortunately, that of his clients.

{¶30} Reviewing the relevant factors and the evidence before us, we find no abuse of discretion in the trial court's denial of appellants' motion for a continuance.

{¶31} We find appellants' assignment of error to be without merit.

{¶32} Appellants' assignment of error is overruled.

{¶33} The judgment of the Ashtabula County Court of Common Pleas is affirmed.

DIANE V. GRENDELL, J., concurs,

WILLIAM M. O'NEILL, J., dissents with Dissenting Opinion.

WILLIAM M. O'NEILL, J., dissenting.

{¶34} I respectfully dissent from the majority, since I find that the trial court abused its discretion by changing the trial date just two days before trial and, then, subsequently denying appellants' motion for a continuance. The trial court's arbitrary actions forced appellants to proceed unrepresented, which prevented presumably innocent and injured parties from having their day in court.

{¶35} There is nothing in the record to suggest that appellants' motion for a continuance was due to a dilatory, purposeful, or contrived reason. Nor did appellants' counsel contribute to the circumstances that gave rise to the request. In fact, the record reveals that appellants' counsel complied with the Ohio Rules of Superintendence. In particular, Sup.R. 41, in relevant part, states:

{¶36} "When a continuance is requested for the reasons that counsel is scheduled to appear in another case assigned for trial on the same date in the same or another trial court of this state, *the case which was first set for trial shall have priority and shall be tried on the date assigned. Criminal cases assigned for trial have priority over civil cases assigned for trial.*" (Emphasis added).

{¶37} Thus, where the court moves a scheduled trial two days prior to trial, and counsel has shown good cause for delay, it is unreasonable to proceed and compel appellants to go through a trial without representation.

{¶38} In denying appellants' motion for a continuance, the court reasoned that the parties should have been prepared for trial the following day since the parties knew that the trial was expected to last two days. The inherent flaw with this logic is twofold. First, the record is clear that the parties had entered into a stipulation waiving the jury demand in this matter. It is wholly credible that counsel for all parties were under the impression this simple matter could be concluded on the first day of the bench trial. This is not an aggravated murder prosecution.

{¶39} Secondly, it is clear that counsel for appellants was not privy to any "understanding" this would be a two-day session. The probable length of the trial was discussed in the pretrial meeting with Appellee Timeoni's counsel and Appellees

Ciancibelli and Spinning Wheel Farm's counsel. However, appellants' counsel was absent from this pretrial apparently because appellants, as third party defendants, had not filed their answer at the time of the pretrial. Thus, appellants' counsel was not privy to this conversation regarding the expected length of the trial.

{¶40} Even Appellee Ciancibelli's counsel advised the court of this fact and did not object to the motion for a continuance, stating, "[y]our honor *** at the time of the pre-trial, Mr. O'Shea, they hadn't filed their answer yet. He wasn't here. I don't think he knew, to be honest it was a two day trial. It doesn't say anywhere in your Judgment Entry it was a two day trial."

{¶41} More importantly, the trial court's actions prejudiced appellants. Forcing appellants to proceed unrepresented over their objections and without the expertise of their counsel does not serve the interests of justice. Appellants clearly voiced their objections to proceed without representation, to no avail.

{¶42} Although the court attempted to give them the choice of proceeding, the court shirked its own responsibility for its actions and, essentially, shifted the blame to appellants' counsel when it stated:

{¶43} "So I'm not trying to put you in the position where you're representing yourself but, in fact, maybe Mr. O'Shea has put you in that position because you may present your side of the story. I want to give you every opportunity to do that but it's up to you to decide what you want to do at this point since he's not here. That's all."

{¶44} As demonstrated in the record, appellants lacked the expertise necessary to adequately represent themselves. Thus, in reality, the court, by asking appellants to

proceed pro se on the morning of trial, left them with virtually no choice at all; either proceed pro se or not be heard at all. These actions clearly prejudiced appellants.

{¶45} Fundamentally, the outcome of the case might well have been different for appellants had they been represented by counsel. The court has already found the actions of appellees to be wrongful. Appellants may well be entitled to punitive damages and attorney fees for the deceptive acts of Spinning Wheel Farm and Ciancibelli. Due to Appellee Ciancibelli's deceptive acts, appellants have to return a horse their daughter has been riding for a year and that they believed they purchased under a lawful sale. This situation is not only wrong, it is outrageous. If appellants were successful in being awarded attorney fees and punitive damages, the difficult and emotional search for a new animal companion would at least be monetarily compensated. In short, justice would be served in this sordid affair. I would remand for retrial so that appellants could have the case fairly heard on its merits.