

**IN THE COURT OF APPEALS
ELEVENTH APPELLATE DISTRICT
LAKE COUNTY, OHIO**

IN THE MATTER OF: D.S.R. : **O P I N I O N**
: **CASE NOS. 2011-L-119**
: **and 2011-L-130**

Civil Appeals from the Lake County Court of Common Pleas, Juvenile Division, Case No. 2010CV02009

Judgment: Affirmed.

Joseph Triscaro, DeMarco & Triscaro, Ltd., 30505 Bainbridge Road, Suite 225, Solon, OH 44139 (For Appellee).

John V. Heutsche, John V. Heutsche Co., L.P.A., Hoyt Block Building, Suite 220, 700 West St. Clair Avenue, Cleveland, OH 44113-1274 (For Appellant).

THOMAS R. WRIGHT, J.

{¶1} Appellant, Kimberly Corrales (“Mother”), appeals from judgments of the Lake County Court of Common Pleas, Juvenile Division, overruling her objections and adopting a magistrate’s decision, as well as denying her motions for relief from judgment.

{¶2} Mother met appellee, Carlos Enrique Rivera, Jr. (“Father”), in 2007 during an internship program in Florida. They quickly became involved in a romantic

relationship. After the internship, Father returned to his home state of Texas and Mother returned to Ohio. The couple continued a long distance relationship. In early 2008, Mother moved to Texas, resided with Father, and became pregnant. Later that year, the couple had a child, D.S.R. (“minor child”). A few months after she was born, Mother took the minor child to visit her family in Ohio. However, Mother and the minor child never returned to Texas.

{¶3} On November 15, 2010, Father filed a complaint for custody and visitation. The following month, Mother filed an answer and counterclaim. On April 25, 2011, a hearing was held before a magistrate. In her May 19, 2011 decision, the magistrate recommended Mother as the legal custodian and that Father should have visitation.

{¶4} On June 1, 2011, Mother filed preliminary objections to the magistrate’s decision, indicating that she “reserves the right to supplement [her] objections upon receipt and filing of the transcript of proceedings.” Also on that same date, Mother filed a praecipe to the court reporter to prepare the transcript in support of her preliminary objections to the magistrate’s decision. One week later, Father filed a response.

{¶5} In the meantime, Mother never filed the transcript nor did she request an extension of time. Two months later, on August 4, 2011, the juvenile court overruled Mother’s preliminary objections after an independent review, since she failed to file the transcript within 30 days after filing objections and failed to request an extension pursuant to Juv.R. 40 and Civ.R. 53.

{¶6} On August 5, 2011, the court adopted the magistrate’s decision in full. One week later, on August 12, 2011, Mother filed the transcript, in addition to a motion for relief from the court’s August 4, 2011 judgment, denying her objections to the

magistrate's decision, and a supplemental brief in support of her objections. Four days later, Father filed a brief in opposition and a motion to strike Mother's supplemental brief.

{¶7} On August 22, 2011, Mother filed an additional motion for relief from the court's August 5, 2011 judgment, adopting the magistrate's decision in full. Two days later, Father filed a brief in opposition.

{¶8} On September 6, 2011, the court denied Mother's motions for relief from judgment and granted Father's motion to strike Mother's supplemental brief supporting her objections to the magistrate's decision.

{¶9} Mother filed timely appeals, Case Nos. 2011-L-119 and 2011-L-130. This court, sua sponte, consolidated her appeals for purposes of briefing, oral argument, and disposition. Mother asserts the following assignments of error for our review:

{¶10} "[1.] The trial court erred in failing to conduct an independent review of Corrales' objections as required by Rule 54(D)(4)(D) of the Ohio Rules of Civil Procedure.

{¶11} "[2.] The trial court erred in failing to grant the motion for relief from judgment and conduct an independent review of Corrales' objections as required by Rule 54(d)(4)(d) of the Ohio Rules of Civil Procedure.

{¶12} "[3.] The trial court erred in striking from the record Corrales' supplemental brief supporting objections to magistrate's decision of May 19, 2011."

{¶13} In her first assignment of error, Mother argues the court erred in failing to conduct an independent review of her objections to the magistrate's decision, pursuant to Civ.R. 54(D)(4)(d).

{¶14} The provisions of Civ.R. 53(D) are analogous to those of Juv.R. 40(D). Thus, the same principles applied to Civ.R. 53(D) are applicable to Juv.R. 40(D). Because this matter was before the juvenile court, Juv.R. 40 governs the issue assigned as error. *In re B.D.*, 11th Dist. Nos. 2009-L-003 and 2009-L-007, 2009-Ohio-2299, ¶74. Juv.R. 40(D)(4)(d), which mirrors the language of Civ.R. 53(D)(4)(d), states, in part:

{¶15} “[i]n ruling on objections [to a magistrate’s decision], the court shall undertake an independent review as to the objected matters to ascertain that the magistrate has properly determined the factual issues and appropriately applied the law.”

{¶16} In addition, Juv.R. 40(D)(3)(b)(iii) states, in part: “[a]n objection to a factual finding, * * * shall be supported by a transcript of all the evidence submitted to the magistrate relevant to that finding or an affidavit of that evidence if a transcript is not available. * * * The objecting party shall file the transcript or affidavit with the court within thirty days after filing objections unless the court extends the time in writing for preparation of the transcript or other good cause.”

{¶17} When an objecting party fails to timely file a transcript or affidavit with their objections, a trial court can adopt the magistrate’s findings without further consideration, and the objecting party cannot challenge the merits of the factual findings on appeal. *Wade v. Wade*, 113 Ohio App.3d 414, 421 (11th Dist.1996). If the record contains a transcript of the evidentiary hearing before a magistrate, but if that transcript was not filed until after the objections were ruled upon, it was not before the trial court and cannot be considered on appeal. *Id.*

{¶18} As stated, Mother filed her “preliminary” objections to the magistrate’s decision and a praecipe to the court reporter to prepare the transcript on June 1, 2011. Mother had 30 days from June 1, 2011 to file the transcript or an affidavit if the transcript was not available. Juv.R. 40(D)(3)(b)(iii). Mother did not file the transcript on or before July 1, 2011, and she did not request leave for additional time. Two months after Mother’s objections were filed, the court, after conducting an independent review, overruled them on August 4, 2011. The next day, the court adopted the magistrate’s decision in full.

{¶19} On August 12, 2011, Mother untimely filed the transcript, in addition to a motion for relief from judgment denying her objections to the magistrate’s decision, and a supplemental brief in support of her objections. In support of Mother’s claim that she had requested more time, she attached to her August 12, 2011 60(B) motion a copy of a letter, which purports to be from her court reporter requesting an additional 30 days to prepare the transcript. However, this letter was not dated and never filed with the court. The letter indicates that a copy was mailed to Mother on July 21, 2011, after the time limit for filing the transcript had already passed.

{¶20} Based upon Mother’s failure to comply with Juv.R. 40(D)(3)(b)(iii), we determine the court correctly overruled her objections and properly adopted the magistrate’s decision in full. The court was required to accept the magistrate’s findings of fact as true and permitted to examine only the legal conclusions based on those facts since the transcript was untimely filed. *Wade, supra*, at 421. The magistrate’s decision set forth extensive findings of fact and conclusions of law. There is no evidence in the record that shows the court failed to conduct an independent review.

{¶21} Mother's first assignment of error is without merit.

{¶22} In her second assignment of error, Mother contends the trial court erred in failing to grant her 60(B) motions and conduct an independent review of her objections after she filed the transcript, explaining why it was untimely. She stresses that her objections raised issues of fact by the magistrate but that the court ignored them on the basis of an untimely filing of the transcript.

{¶23} "Under Ohio law, it is well-settled that relief from a prior final judgment can only be granted when the moving party has shown that [it] is entitled to relief under one of the five possible grounds stated in Civ.R. 60(B), that [it] has a meritorious claim or defense, and that the motion was filed in a timely manner. See, e.g., *Fouts v. Weiss-Carson* (1991), 77 Ohio App.3d 563, 565 * * *. It is equally well-settled that the disposition of a 60(B) motion lies within the sound discretion of the trial court; accordingly, the ruling on such a motion will not be reversed on appeal unless an abuse of that discretion can be shown. *Meslat v. Amster-Kirtz Co.*, 5th Dist. Nos. 2007 CA 00189 & 2007 CA 00190, 2008-Ohio-4058, at ¶26, quoting *Griffey v. Rajan* (1987), 33 Ohio St.3d 75, 77 * * *. Under a 60(B) analysis, an abuse of discretion occurs when the trial court exhibits an attitude that is unreasonable, arbitrary or unconscionable. *Cannell v. Robert L. Bates Co.* (Mar. 8, 2001), 10th Dist. Nos. 00AP-915, 00AP-916, & 00AP-917, 2001 Ohio App. LEXIS 835, at *4." *Natl. City Bank v. Graham*, 11th Dist. No. 2010-L-047, 2011-Ohio-2584, ¶15. (Parallel citations omitted.)

{¶24} Thus, "[i]n order to be entitled to relief under Civ.R. 60(B), the moving party must be able to satisfy all three prongs of the governing standard." *Id.* at ¶21, citing *Fouts*. In our case, Mother's August 12 and 22, 2011 motions for relief from

judgment were made “within a reasonable time” and clearly within one year of the court’s August 4 and 5, 2011 judgments pursuant to Civ.R. 60(B). (There is no dispute that Mother’s motions were filed in a timely manner.) Thus, Mother satisfied one of the three prongs required by Civ.R. 60(B). However, Mother failed to satisfy the other two prongs because she did not establish that she was entitled to relief under one of the grounds stated in Civ.R. 60(B)(1)-(5), and that she had a meritorious defense.

{¶25} Mother alleges that she set forth sufficient operative facts to warrant a finding of “excusable neglect” under Civ.R. 60(B)(1), which states, in part:

{¶26} “On motion and upon such terms as are just, the court may relieve a party or his legal representative from a final judgment, order or proceeding for the following reasons: (1) mistake, inadvertence, surprise or excusable neglect[.]”

{¶27} “What constitutes ‘excusable neglect’ depends on the facts and circumstances of each case.” *Katko v. Modic*, 85 Ohio App.3d 834, 837 (11th Dist.1993). “‘The term ‘excusable neglect’ is an elusive concept and has not been sufficiently defined.’ *Kay v. Marc Glassman, Inc.*, (1996), 76 Ohio St.3d 18, 20 * * *. Consequently, there is no clear and established standard as to what constitutes “excusable neglect” and therefore it is a determination left to the discretion of the trial court. *Lewis v. Auto. Techs.*, 2d Dist. No. 19423, 2003-Ohio-1263, ¶10. The Ohio Supreme Court, however, has “defined ‘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*, 76 Ohio St.3d at 20, * * *.” *Seven Seventeen Credit Union, Inc. v. Dickey*, 11th Dist. No. 2008-T-0107, 2009-Ohio-2946,

¶20, quoting *Technical Servs. Co. v. Trinitech Internatl., Inc.*, 9th Dist. No. 21648, 2004-Ohio-965, ¶18.

{¶28} As stated, Mother never requested an extension of time to file the transcript, and the August 12, 2011 filing of the transcript was untimely. “The case law is clear that when a movant is unable to procure a transcript within the required time, it is incumbent upon the party to seek an extension of time.” *Sheldon v. Billings*, 11th Dist. No. 2011-L-079, 2012-Ohio-528, ¶29, citing *Ludlow v. Ludlow*, 11th Dist. No. 2006-G-2686, 2006-Ohio-6864, ¶25; *Purdy v. Purdy*, 12th Dist. No. CA2002-11-089, 2003-Ohio-7214, ¶12.

{¶29} In support of Mother’s claim that she had requested more time, she attached to her August 12, 2011 60(B) motion a copy of her court reporter’s letter requesting an additional 30 days to prepare the transcript because they had to schedule a mutually feasible time with the court. However, this letter was not dated and never filed with the court. Again, the letter indicates that a copy was mailed to Mother on July 21, 2011, after the time limit for filing the transcript had already passed.

{¶30} Mother failed to demonstrate sufficient operative facts to warrant a finding of excusable neglect. Therefore, the court did not err in concluding that Mother was not entitled to relief under Civ.R. 60(B)(1). Mother also failed to demonstrate “any other reason justifying relief” under Civ.R. 60(B)(5).

{¶31} Mother further contends that she had a meritorious defense. Though the burden was on Mother to allege operative facts that would constitute a meritorious defense if found to be true, Mother failed to provide sufficient facts to demonstrate a meritorious defense. Mother as the moving party, was required to establish operative

facts and present them “in a form that meets evidentiary standards such as affidavits, depositions, transcripts of evidence, written stipulations or other evidence given under oath.” *French v. Gruber*, 11th Dist. No. 2005-A-0015, 2006-Ohio-1167, ¶25, quoting *Countrywide Home Loans v. Barclay*, 10th Dist. No. 04AP-171, 2004-Ohio-6359, ¶9.

{¶32} Mother takes issue with the court’s granting visitation with the minor child to Father. She makes reference in her appellate brief to facts contained in the transcript. However, as stated, when an objecting party fails to timely file a transcript or affidavit with their objections, a trial court can adopt the magistrate’s findings without further consideration, and the objecting party cannot challenge the merits of the factual findings on appeal. *Wade, supra*, at 421. Because the record contains a transcript of the evidentiary hearing before the magistrate but since that transcript was not filed until after the objections were ruled upon, it was not before the trial court and cannot be considered on appeal. *Id.* Mother fails to establish a meritorious defense. We fail to see that the court acted in an arbitrary or capricious manner.

{¶33} Thus, we conclude the court did not err in denying Mother’s 60(B) motions after the transcript was filed because she did not establish that her failure to defend the case was the result of excusable neglect, or “any other reason justifying relief,” and she did not show a meritorious defense.

{¶34} Mother’s second assignment of error is without merit.

{¶35} In her third assignment of error, Mother alleges the court erred in striking from the record her supplemental brief supporting objections to the magistrate’s decision. She maintains her brief was not a “pleading” and should not have been stricken from the record.

{¶36} A trial court's decision relating to a motion to strike is reviewed under an abuse of discretion standard. *Johnsonite, Inc. v. Welch*, 11th Dist. No. 2011-G-3012, 2011-Ohio-6858, ¶21, citing *State ex rel. Mora v. Wilkinson*, 105 Ohio St.3d 272, 2005-Ohio-1509, ¶10. An abuse of discretion is the trial court's "failure to exercise sound, reasonable, and legal decision-making." *Hammonds v. Eggett*, 11th Dist. No. 2010-G-2980, 2011-Ohio-6510, ¶16, quoting *State v. Beechler*, 2d Dist. No. 09-CA-54, 2010-Ohio-1900, ¶62, quoting Black's Law Dictionary (8 Ed.Rev.2004) 11.

{¶37} Juv.R. 40(D)(3)(b)(iii) states, in part: "[i]f a party files timely objections prior to the date on which a transcript is prepared, the party may seek leave of court to supplement the objections."

{¶38} As stated, Mother failed to timely file the transcript. Also, Mother failed to seek leave of court to supplement her objections pursuant to Juv.R. 40(D)(3)(b)(iii). Mother claims that Civ.R. 12(F) only provides authority to strike pleadings, and that her supplemental brief supporting her objections to the magistrate's decision was not a "pleading" under Civ.R. 7(A), and thus, should not have been stricken from the record. However, a court does not abuse its discretion in striking objections to a magistrate's decision when the objections are untimely filed. *Whiteside v. Madison Corr. Inst.*, 10th Dist. No. 04AP-401, 2005-Ohio-1844, ¶6; *Dunlavy v. Twinsburg City School Dist. Bd. of Edn.*, 9th Dist. No. 22682, 2005-Ohio-6320, ¶8. Thus, the court did not abuse its discretion in striking Mother's supplemental brief supporting her objections. *Id.*

{¶39} Mother's third assignment of error is without merit.

{¶40} For the foregoing reasons, Mother's assignments of error are not well-taken. The judgment of the Lake County Court of Common Pleas, Juvenile Division, is affirmed.

TIMOTHY P. CANNON, P.J.,

MARY JANE TRAPP, J.,

concur.