[Cite as *Johnson v. Johnson*, 2016-Ohio-7861.]

COURT OF APPEALS
STARK COUNTY, OHIO
FIFTH APPELLATE DISTRICT

FRANK D. JOHNSON Plaintiff-Appellee -vs- KELLY A. JOHNSON Defendant-Appellant	JUDGES: Hon. Sheila G. Farmer, P.J. Hon. William B. Hoffman, J. Hon. Craig R. Baldwin, J. Case No. 2016CA00060 O P I N I O N

CHARACTER OF PROCEEDING:	Appeal from the Stark County Common Pleas Court, Family Court Division, Case No. 2014-DR-00932
JUDGMENT:	Affirmed
DATE OF JUDGMENT ENTRY:	November 7, 2016

APPEARANCES:

For Plaintiff-Appellee	For Defendant-Appellant
TIMOTHY P. ASSAF 12 East Exchange Street, Fifth Floor Akron, Ohio 44308	JEFFREY V. HAWKINS Slater & Zurz, LLP One Cascade Plaza, Suite 2210 Akron, Ohio 44308-1135

Hoffman, J.

{¶1} Defendant-appellant Kelly A. Johnson ("Wife") appeals the February 24, 2016 Judgment Entry entered by the Stark County Court of Common Pleas, Family Court Division, which denied her Motion to Vacate Judgment Entry pursuant to Civ. R. 60(B)(1) and (3). Plaintiff-appellee is Frank D. Johnson ("Husband").

STATEMENT OF THE FACTS AND CASE

{¶2} Husband and Wife were married on July 22, 2003. Two children were born as issue of the marriage. On September 3, 2014, Husband filed a complaint for divorce. Wife filed a timely answer and counterclaim. The trial court scheduled the trial for February 25, 2015.

{¶3} On February 24, 2015, Husband filed a Motion for Sanctions, requesting the trial court sanction Wife for failing to comply with the trial court's February 18, 2015 Order, which required her to provide answers to Husband's interrogatories and provide documents in response to Husband's Request for Production of Documents.

{¶4} Neither Wife nor her counsel appeared for trial on February 25, 2015. The trial court had received a message from Wife's counsel indicating he had mechanical problems with his automobile the previous evening and was unable to secure transportation to court. Wife's counsel requested Husband's attorney contact him, which did occur. Despite Wife and her attorney's lack of appearance, the trial court directed Husband to proceed with the trial as Wife did not file a request for continuance and had not established excusable neglect.

{¶5} The trial court issued its Final Entry Decree of Divorce on March 9, 2015. On March 20, 2015, Wife filed a Motion for New Trial pursuant to Civil Rule 59, which she supported with the affidavit of her counsel. In her motion, Wife alleged trial counsel was unable to appear for trial due to car trouble and counsel had informed her not to appear for trial for such reason, and the reason for their failure to appear constituted irregularity in the proceeding and/or accident or surprise. The trial court denied Wife's motion via Judgment Entry filed March 30, 2015. Wife filed a request for findings of fact and conclusions of law, which the trial court denied via Judgment Entry filed April 13, 2015.

{¶6} Wife filed a timely Notice of Appeal of the trial court's April 13, 2015 Judgment Entry. This Court affirmed the trial court's denial of Wife's motion for new trial, finding "the trial court did not abuse its discretion in denying appellant's motion because there was no irregularity or accident or surprise." *Johnson v. Johnson*, 5th Dist. Stark No. 2015CA00076, 2015 -Ohio- 4748, at para. 18.

{¶7} On January 13, 2016, Wife filed a motion to vacate the judgment entry of divorce pursuant to Civ. R. 60(B)(1) and (3). The trial court conducted a hearing on the motion on February 22, 2016. Wife did not present testimony or evidence in support of her motion at the hearing despite being provided with the opportunity to do so. Accordingly, the trial court considered the parties' pleadings and arguments. Via Judgment Entry filed February 24, 2016, the trial court overruled Wife's motion, finding, "The facts related to [Wife's] Motion for Relief are identical to the facts presented previously in [Wife's] Motion for New Trial." The trial court further found, "the Court does not find that it was influenced to the [Wife's] detriment by the testimony of [Husband] as alleged."

{¶8} It is from this judgment entry Wife appeals, raising as her sole assignment of error:

{¶9} "I. THE TRIAL COURT ERRED AND ABUSED ITS DISCRETION WHEN THE COURT OVERRULED DEFENDANT/APPELLANT'S MOTION TO VACATE JUDGMENT ENTRY PURSUANT TO CIVIL RULE 60(B)(1) AND (3).

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{¶10} Civ. R. 60(B) provides:

> 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; * * * (3) fraud (whether heretofore denominated intrinsic or extrinsic), misrepresentation or other misconduct of an adverse party; * * * The motion shall be made within a reasonable time, and for reasons (1), (2) and (3) not more than one year after the judgment, order or proceeding was entered or taken. A motion under this subdivision (B) does not affect the finality of a judgment or suspend its operation.

{¶11} In *GTE Automatic Electric v. ARC Industries* (1976), 47 Ohio St.2d 146, 150–151, 351 N.E.2d 113, the Ohio Supreme Court set forth the factors necessary to recover under Civ.R. 60(B). "[T]he movant must demonstrate: (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." Where any one of the foregoing requirements is not satisfied, Civ.R. 60(B) relief is improper. *State ex rel. Richard v. Seidner,* 76 Ohio St.3d 149, 151, 1996–Ohio–54, 666 N.E.2d 1134. "A motion for relief from judgment under Civ. R. 60(B) is addressed to the sound discretion of the trial court, and that court's ruling will not be disturbed on appeal absent a showing of abuse of discretion." *Griffey v. Rajan* (1987), 33 Ohio St.3d 75, 77, 514 N.E.2d 1122. In addition, a Civ. R. 60(B) motion cannot be used as a substitute for an appeal. *State ex rel. Bragg v. Seidner* (2001), 92 Ohio St.3d 87, 87, 748 N.E.2d 532.

{¶12} In support of her Civ.R. 60(B) motion, Wife submitted the affidavit of her attorney, Jeffrey Hawkins, which is identical to the affidavit Wife submitted in support of her motion for new trial. In his affidavit, Attorney Hawkins averred he was aware of the final hearing scheduled for February 25, 2015, but explained, on the night prior to trial, he "had serious car malfunctions, i.e. a tire rod went out on my front right tire". Affidavit of Jeffrey V. Hawkins at para. 3- 4. He attempted to secure a rental car, however, a rental car was not available until the afternoon of February 25, 2015. *Id.* at para. 5. On February 25, 2015, Attorney Hawkins immediately contacted the trial court and informed the Bailiff of his inability to appear at trial. *Id.* at para. 5. Attorney Hawkins also contacted Husband's counsel. *Id.* Husband's counsel stated he would arrange a conference call with the trial court to reschedule the hearing. *Id.* The trial court went forward with the hearing without so notifying Attorney Hawkins. *Id.*

{¶13} In addition, Wife offered her own affidavit. Wife averred Attorney Hawkins contacted her on the morning of trial and advised her he was having automobile troubles

and would be unable to attend the trial. Affidavit of Kelly A. Johnson at para. 2. Wife continued, "At the same time, I was in Akron, Ohio tending to my Father who was gravely ill at the time. I later transported my father to the hospital, where he died one (1) week later. If I had known that the Court was going to proceed on February 25, 2015 without either myself nor [sic] my attorney present, I would have contacted the Court and indicated that I too was unable to attend the hearing due to a family emergency." *Id.*

{¶14} The law of the case "doctrine provides that the decision of a reviewing court in a case remains the law of that case on the legal questions involved for all subsequent proceedings in the case at both the trial and reviewing levels." *Nolan v. Nolan* (1984), 11 Ohio St.3d 1, 3. "This is necessary 'to ensure consistency of results in a case, to avoid endless litigation by settling the issues, and to preserve the structure of superior and inferior courts as designed by the Ohio Constitution." *Id.* The doctrine prevents lower courts from "disregard[ing] the mandate of a superior court in a prior appeal in the same case." *Nolan* at syllabus. Likewise, it prohibits litigants from "mak[ing] new arguments to the trial court on remand that were raised or could have been raised on the first appeal." *Neiswinter v. Nationwide Mut. Fire Ins. Co.,* 9th Dist. Summit No. 23648, 2008–Ohio–37, at ¶ 10.

{¶15} Wife continues to raise arguments specific to the denial of her motion for new trial. This Court has already addressed Wife's arguments in her first appeal. As such, our decision affirming the trial court's denial of her motion for new trial is law of the case, and Wife's arguments are barred by res judicata. *See, Washington Mut. Bank v. Wallace,* 12th Dist. Warren Nos. CA2014–02–024 and CA2014–02–031, 2014–Ohio–5317, ¶ 20 ("the decision of a reviewing court in a case remains the law of the case on

the legal questions involved for all subsequent proceedings in the case at both the trial and reviewing levels"); and *Eagle's View Professional Park Condominium Unit Owners Assn., Inc. v. EVPP, L.L.C.,* 12th Dist. Butler No. CA2014–06–134, 2015–Ohio–1929, ¶ 19 ("res judicata precludes a party from both relitigating issues already decided by a court of competent jurisdiction or raising matters that should have been brought by the party in a prior action involving the same parties").

{¶16} The judgment of the Stark County Court of Common Pleas, Family Court Division, is affirmed.

By: Hoffman, J.

Farmer, P.J. and

Baldwin, J. concur