[Cite as *Brown v. Bowers*, 2008-Ohio-4114.]

IN THE COURT OF APPEALS
FIRST APPELLATE DISTRICT OF OHIO
HAMILTON COUNTY, OHIO

LUEKIUCIUS BROWN	:	APPEAL NO. C-070797 TRIAL NO. A-0506331
and	:	*D E C I S I O N.*
SYLVESTER BROWN,	:	
Plaintiffs-Appellants,	:	
vs.	:	
WALTER T. BOWERS, II, M.D.,	:	
Defendant-Appellee.	:	

Civil Appeal From: Hamilton County Court of Common Pleas

Judgment Appealed From Is: Affirmed

Date of Judgment Entry on Appeal: August 15, 2008

Marlene Penny Manes, for Plaintiffs-Appellants,

Triona, Calderhead & Lockemeyer, LLC, *Joel L. Peschke*, and *David C. Calderhead*, for Defendant-Appellee.

Please note: This case has been removed from the accelerated calendar.

SYLVIA SIEVE HENDON, Judge.

{¶1} Plaintiffs-appellants, Luekiucius and Sylvester Brown, appeal the judgment of the trial court dismissing with prejudice their medical-malpractice action against defendant-appellee, Walter T. Bowers, II, M.D.

{¶2} In three assignments of error, the Browns now argue that the trial court erred by (1) failing to grant summary judgment in their favor, (2) denying their motion for a continuance, and (3) dismissing their case for want of prosecution. We begin with the Browns' second and third assignments of error because they are interrelated and are dispositive of the appeal.

Denial of a Continuance

{¶3} The Browns had initially filed their malpractice action against Bowers in January 2003, but they had voluntarily dismissed it in August 2004. A year later, they filed the malpractice action underlying this appeal.

{¶4} The trial court scheduled a jury trial for September 12, 2006. While no continuance entry was recorded, it is apparent from the record that the trial was rescheduled for October 15, 2007.

{¶5} On October 9, 2007, six days before the new trial date, the Browns filed a motion for a continuance. The Browns asserted that they had had "a death in their family, out of state, which necessitate[d] them being away during the time this case [was] now set." The defense objected to the continuance.

{¶6} The trial court denied the continuance the following day. In doing so, the court noted that the case had been pending for a "considerable period of time," and that it had been once dismissed and refiled.

{¶7} Then, on Thursday, October 11, four days before the trial was to begin, the Browns filed a motion to reconsider the denial of their continuance motion. But they provided no more detail for the court in support of their request than they had done for the initial motion for a continuance. The Browns simply asserted that it would have been "an undue hardship to require [them] to return [from Mississippi] for trial beginning next week."

{¶8} On the afternoon of the 11th, the trial court held an emergency hearing on the Browns' motion for reconsideration. The Browns were not present at the hearing, but their counsel and defense counsel were present.

{¶9} At the hearing, the Browns' attorney presented no evidence in support of the motion for reconsideration. Counsel informed the court that she had called the Browns on the evening of Monday, October 8, to confirm a meeting with them. At that time, the Browns had informed counsel that they would not be returning for a week. According to counsel, the Browns had left town before the court had ruled on their initial motion.

{¶10} The Browns' counsel stated that her expert witness was not available for trial the following week. And despite the trial court's denial of the motion for a continuance on Wednesday, October 10, the Browns' counsel acknowledged that she had cancelled a trial deposition of her expert scheduled on the 10th.

{¶11} The court overruled the motion for reconsideration. The court reasoned that the case had been pending for more than two years, that the trial was to begin a week after the relative's death, and that the Browns would simply need to return a day or two earlier than they had anticipated.

{¶12} On appeal, the Browns contend that the court abused its discretion in denying the continuance.

{¶13} It is well established that a trial court has supervisory control over its own docket.[1] So the court is vested with broad discretion in determining whether to grant or deny a motion for a continuance.[2] A reviewing court will not reverse a trial court's ruling on such a motion unless the court abused its discretion.[3]

{¶14} In evaluating a motion for a continuance, a trial court may consider factors such as the length of the delay requested, the reason for the delay, prior continuances, inconvenience, and whether the movant has contributed to the delay.[4] The potential for prejudice to a party must be balanced against the court's right to manage its docket and the public's interest in judicial economy.[5]

{¶15} Ohio courts recognize that a party has a right "to a reasonable opportunity to be present at trial and a right to a continuance for that purpose."[6] But a party does not have a right to unreasonably delay a trial.[7] To justify a continuance, the party's absence must be unavoidable and not voluntary.[8]

{¶16} Our review of the record convinces us that the trial court did not abuse its discretion in denying the Browns' motion to continue the trial. Their initial action had been pending for more than a year and a half before they had voluntarily dismissed it. The Browns had then waited 363 days to refile it.

{¶17} By the time the trial court considered the Browns' continuance motion, the refiled case had been pending for more than two years.

{¶18} In its efforts to accommodate the Browns, the trial court conducted an emergency hearing on their motion. The court was given no evidence, by way of

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[1] See *State ex rel. Buck v. McCabe* (1942), 140 Ohio St. 535, 537, 45 N.E.2d 763.
[2] See *State v. Unger* (1981), 67 Ohio St.2d 65, 423 N.E.2d 1078, syllabus; see, also, *Buck*, supra, at 537.
[3] See *Buck*, supra, at 537-538.
[4] See *State v. Ahmed*, 103 Ohio St.3d 27, 2004-Ohio-4190, 813 N.E.2d 637, ¶44.
[5] See *Unger*, supra, at 67.
[6] *Hartt v. Munobe*, 67 Ohio St.3d 3, 9, 1993-Ohio-177, 615 N.E.2d 617.
[7] Id.
[8] Id.

affidavit or obituary or otherwise, to determine exactly when the funeral was to occur or why the Browns could not return to begin the trial a week after being notified of their relative's death. As a result, the trial court was not presented with sufficient evidence to determine whether the Browns' absence the following week was unavoidable or in good faith. Because the court's decision was in no way arbitrary, unreasonable, or unconscionable, we hold that the trial court did not abuse its discretion in denying a continuance.[9] We overrule the second assignment of error.

The Dismissal

{¶19} In their third assignment of error, the Browns contend that the trial court erred by dismissing their case with prejudice for failure to prosecute.

{¶20} On the morning of Monday, October 15, 2007, the trial was to begin before a visiting judge. The Browns were not present, but their attorney, the defendant, and defense counsel were present. The defense was prepared to proceed to trial.

{¶21} Prior to trial, the visiting judge engaged in a lengthy discussion about the case with counsel for both sides. The judge noted that he had told the Browns' attorney that the trial would proceed that morning or that the case would be dismissed. The judge stated that jury selection could begin if the Browns would return within the next two days.

{¶22} The Browns' attorney indicated that she had her expert witness's earlier deposition, and that she "believed very strongly that based upon the [defendant's] own admissions, that [the Browns] would overcome the situation of getting or not getting [the case] to the jury." "The real issue," counsel asserted, "is that my clients cannot be here today. * * * I just don't feel comfortable going forward."

[9] See *Blakemore v. Blakemore* (1983), 5 Ohio St.3d 217, 219, 450 N.E.2d 1140.

{¶23} In dismissing the case for want of prosecution, the visiting judge's entry stated, "With the undersigned's assignment in this matter being only to preside at the trial of this case, he then advised those present that he did not have the authority to grant a continuance, and gave plaintiffs' counsel two options: (1) to proceed with jury selection; or (2) face immediate dismissal for want of or failure to prosecute. Plaintiffs' counsel advised that she was still unwilling to proceed without her clients present."

{¶24} Although the visiting judge incorrectly assumed that he did not have the authority to continue the case for trial, it is evident that his decision to dismiss the case simply reflected his refusal to continue the trial to another date. Regardless of the visiting judge's assumptions about his authority to continue the case, the fact remained that the assigned judge had ruled not once, but twice, on the same motion within the previous week, and that the Browns, in trying to get a third bite at the apple, had presented no new grounds to the visiting judge in support of their motion.

{¶25} Just as with our review of a denial of a motion for a continuance, we review the dismissal of a case for lack of prosecution under an abuse-of-discretion standard.[10] Even though courts use an abuse-of-discretion standard of review for dismissals with prejudice, "that standard is actually heightened when reviewing decisions that forever deny a plaintiff a review of a claim's merits."[11]

{¶26} Before a court can dismiss a case for failure to prosecute under Civ.R. 41(B)(1), the court must give notice of the intended dismissal to the plaintiff's attorney. For purposes of Civ.R. 41(B)(1), counsel has notice of an impending dismissal with prejudice "when counsel has been informed that dismissal is a possibility and has had a reasonable opportunity to defend against dismissal."[12]

[10] See *Pembaur v. Leis* (1982), 1 Ohio St.3d 89, 437 N.E.2d 1199.
[11] *Jones v. Hartranft*, 78 Ohio St.3d 368, 372, 1997-Ohio-203, 678 N.E.2d 530.
[12] *Quonset Hut, Inc. v. Ford Motor Co.* (1997), 80 Ohio St.3d 46, 49, 684 N.E.2d 319.

{¶27} The purpose of the notice requirement is "to afford plaintiff's counsel an opportunity to either comply with the court order, which is the basis of the impending dismissal, or to respond to the motion to dismiss."[13] "This principle is particularly applicable when neither the plaintiff nor his counsel is present to explain the failure to prosecute."[14]

{¶28} But this rationale fails where the plaintiff's counsel appears at the scheduled trial and is unwilling or unable to proceed.[15] There would be no purpose in requiring notice of an intended dismissal to allow the plaintiff or his counsel the opportunity to explain the failure to appear for trial when plaintiff's counsel is actually present for trial and has the opportunity to explain the plaintiff's failure to prosecute.[16]

{¶29} The record demonstrates that the Browns' counsel had ample notice that her clients' case would be dismissed with prejudice if she failed to proceed. She was also given sufficient opportunity to secure the presence of her clients to avoid dismissal. And while the sanction for the Browns' failure to proceed to trial was arguably harsh, it was certainly reasonable under the circumstances. Accordingly, we overrule the third assignment of error.

{¶30} Our disposition of the second and third assignments of error renders the first assignment of error moot. Therefore, we affirm the judgment of the trial court.

Judgment affirmed.

SUNDERMANN, P.J., concurs.

PAINTER, J., dissents.

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[13] *Carr v. Green* (1992), 78 Ohio App.3d 487, 490, 605 N.E.2d 431.
[14] *Asres v. Dalton*, 10th Dist. No. 05AP-632, 2006-Ohio-507, ¶16.
[15] *Metcalf v. Ohio State Univ. Hosps.* (1981), 2 Ohio App.3d 166, 167, 441 N.E.2d 299.
[16] *Asres*, at ¶18.

PAINTER, J., dissenting.

{¶31} The Browns' trial was set for September 2006. They had already paid for airfare for an expert and were prepared to proceed. But on the day that the trial was to start, the trial court sua sponte removed the case from that day's docket, apparently because the trial judge attended a funeral (of a former judge of this court). Though the cancellation was understandable, the Browns were greatly inconvenienced by the trial court's sua sponte continuance because they had to pay a cancellation fee to the expert, as well as wasted airfare.

{¶32} But a little over a year later, the trial court (a different judge) refused to grant a continuance so that the Browns could attend the funeral of a close family member and dismissed their case with prejudice. Ironic.

Failure to Exercise Discretion is an Abuse of Discretion

{¶33} We are reviewing the visiting judge's entry, which in part stated, "With the undersigned's assignment in this matter being only to preside at the trial of this case, he then advised those present that *he did not have the authority* to grant a continuance * * *." (emphasis added)

{¶34} "[T]he failure to exercise discretion in the mistaken belief it does not exist almost always amounts to reversible error."[17] After the first judge abrogated the first trial, another judge took his place. That judge refused to grant a continuance, but then referred the case to a third (visiting) judge for trial. The visiting judge believed that he could not grant the Browns' motion for a continuance and had no choice but to dismiss with prejudice. But the visiting judge did have the authority to handle this case

[17] *State v. Zukowski*, 10th Dist. No. 06AP-46, 2006-Ohio-5299, at ¶9. See, also, *Oakbrook Realty Corp. v. Blout* (1988), 48 Ohio App.3d 69, 71, 548 N.E.2d 305.

differently. And because the trial court failed to exercise discretion because of that mistaken belief, it committed reversible error.

Continuance Motion

{¶35} The majority points out the factors a trial court should consider before granting or denying a motion for a continuance. In this case, if the visiting judge had considered the factors, it would have been reasonable for him to either grant or deny the motion. The Browns were only asking to delay for a day or two. The reason for the delay was a funeral in Mississippi for a close family member that had taken place the Saturday before the Monday start of the trial. (At oral argument, Bowers' counsel asserted that the Browns should have flown back instead of driving. This statement fails to consider that not everyone has the means to travel by air on short notice—imagine the cost.) The only other continuance was a year earlier, when the trial court sua sponte continued the case because the trial judge wished to attend a funeral.

{¶36} The visiting judge had the discretion to either grant or deny the motion, but he mistakenly believed he had no discretion. This itself was an abuse of discretion that requires reversal. And the judge would not have dismissed if he thought he had discretion—as proved by the next section.

Dismissal with Prejudice was an Error of Law

{¶37} The trial court dismissed the Browns' case with prejudice. At a hearing, the trial court stated, "*I regret that I must dismiss the case* at this time, and it will be dismissed *with prejudice since you have previously had a 41(A).*" (emphasis added)

{¶38} This was an error of law—the double-dismissal rule applies only when a plaintiff twice dismisses under Civ.R. 41(A)(1).

{¶39} Based upon this error alone, we must reverse. The judge believed that the dismissal was *required* to be with prejudice, so he exercised no discretion whatsoever. (I do not fault the trial judge for this belief. Only with the benefit of research did I learn this nuance.)

{¶40} Perhaps the majority thinks that, if the judge would have had discretion, he would have dismissed with prejudice. But we do not know that—we know the opposite—"I regret that I must" is about as clear as it gets. By that statement alone we know that the judge would have dismissed *without* prejudice had he realized that he had the discretion to do otherwise. But he believed that the law mandated dismissal with prejudice. This was an error of law, and as such cannot be reviewed under an abuse standard.

{¶41} In *Olynyk v. Scoles*,[18] the plaintiff's case was dismissed once under Civ.R. 41(A)(2)—by order of the court rather than by a notice of dismissal under Civ.R. 41(A)(1). Shortly before trial was to begin, the plaintiff filed a notice of dismissal under Civ.R. 41(A)(1). The trial court held that the dismissal was with prejudice because it was the second time that the plaintiff had dismissed the case. But the Ohio Supreme Court determined that "[b]ecause only a Civ.R. 41(A)(1)(a) dismissal is totally within a plaintiff's control, the double-dismissal rule targets only that type of dismissal."[19] Regardless of what the entry said in this case, the law was otherwise—that alone is the answer to this case. Should we ignore the law here?

{¶42} The Ohio Supreme Court has made it clear that the double-dismissal rule only applies to dismissals under Civ.R. 41(A). Thus the trial court had the discretion to dismiss without prejudice. And because the trial court failed to exercise discretion because of its mistaken belief, we should reverse.

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[18] 114 Ohio St.3d 56, 2007-Ohio-2878, 868 N.E.2d 254.
[19] Id. at ¶26.

Third Reason Majority is Wrong

{¶43} Further, even if the trial court had used the correct law, the Browns' conduct did not merit dismissal with prejudice.

{¶44} The trial court dismissed the case for "lack of prosecution," which is reviewed on an abuse-of-discretion basis.[20] But the standard of review for the dismissal with prejudice is heightened because the dismissal would forever deny the Browns a judgment on the merits of their case.[21]

{¶45} The trial court may only dismiss a case with prejudice if the party's conduct is "so negligent, irresponsible, contumacious or dilatory as to provide substantial grounds for a dismissal with prejudice for a failure to prosecute or obey a court order."[22] Further, the conduct must "fall substantially below what is reasonable under the circumstances evidencing a complete disregard for the judicial system or the rights of the opposing party."[23]

{¶46} The Browns' and their attorney's behavior did not come anywhere near completely disregarding the judicial process or Bowers' rights. They simply asked for a brief continuance so that they could attend the funeral of Mrs. Brown's aunt, who had helped to raise her. Was this unreasonable? If so, then the first judge's decision to attend the funeral of an unrelated person was equally so. But obviously neither decision was unreasonable.

{¶47} Part of the justification that the trial court—before the case was assigned to the visiting judge—used to refuse to continue the case was that it had been pending for years. But the Browns had been set to move forward an entire year earlier when the trial court had sua sponte continued the case. The length of time that the case had been

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[20] *Jones v. Hartranft*, 78 Ohio St.3d 368, 371, 1997-Ohio-203, 678 N.E.2d 530.
[21] Id. at 372.
[22] *Tokles & Son, Inc. v. Midwestern Indemnity Co.* (1992), 65 Ohio St.3d 621, 632, 605 N.E.2d 936.
[23] *Moore v. Emmanuel Family Training Ctr., Inc.* (1985), 18 Ohio St.3d 64, 70, 479 N.E.2d 879.

pending was not solely due to the Browns. The trial court itself contributed to the delay. The trial court erred by failing to consider options other than dismissal with prejudice.

We Should Allow the Browns their Day in Court

{¶48} Cases should proceed on their merits, not be dismissed in error. The trial court used the wrong law thrice: (1) holding that there was no discretion to continue, (2) applying the double-dismissal rule, and (3) dismissing with prejudice. All three were error, and any one requires reversal.

{¶49} The majority's holding is the "type of result that causes laymen to scratch their heads and roll their eyes in bewilderment."[24] From it, I dissent.

Please Note:

The court has recorded its own entry this date.

[24] *Roberts v. Krupka* (1989), 13 Kan. App.2d 691, 779 P.2d 447.