[Cite as *Shannon v. Shannon*, 2001-Ohio-2588.]

IN THE COURT OF APPEALS OF OHIO
FOURTH APPELLATE DISTRICT
LAWRENCE COUNTY

Edna Mae Shannon,	:	
	:	
Plaintiff-Appellant,	:	
	:	Case No. 00CA46
vs.	:	
	:	DECISION AND JUDGMENT ENTRY
Larry Howard Shannon,	:	
	:	
Defendant-Appellee.	:	Released: 9/26/01

APPEARANCES

Phillip J. Heald, Ironton, Ohio, for appellant.

Mark K. McCown, Ironton, Ohio, for appellee.

Kline, J.:

Larry Howard Shannon appeals from the Lawrence County Common Pleas Court's denial of his Civ.R. 60(B) motion for relief from judgment. Mr. Shannon asserts that the trial court erred in denying his motion. Because Mr. Shannon did not demonstrate mistake, inadvertence, surprise, or excusable neglect in his failure to answer the divorce complaint filed by Edna Mae Shannon, we disagree. Accordingly, we overrule Mr. Shannon's assignment of error and affirm the judgment of the trial court.

I.

Mrs. Shannon filed a complaint for divorce in the trial court on January 7, 1999. Shortly thereafter, Mr. and Mrs. Shannon reconciled, and the court dismissed the complaint by agreed entry on April 15, 1999.

On November 16, 1999, Mrs. Shannon filed a second complaint for divorce in the trial court. Mrs. Shannon attempted to serve Mr. Shannon by certified mail. However, after several attempts the envelope was returned "unclaimed." Therefore, Mrs. Shannon attempted to achieve personal service upon Mr. Shannon. After approximately six months, the process server managed to achieve personal service upon Mr. Shannon on June 8, 2000. In addition to the complaint, the process server served a temporary support order and an order of injunction upon Mr. Shannon. The order of injunction enjoined Mr. Shannon from contacting Mrs. Shannon and from withdrawing or destroying any of the parties' joint assets or property.

Mr. Shannon did not answer the complaint, and later moved without notifying the court of his new mailing address. The court sent a notice of hearing on the complaint to his last known address. The court held a hearing on the complaint on

August 2, 2000, at which Mrs. Shannon and another witness testified. Mr. Shannon did not appear at the hearing.

The court entered the final divorce decree on September 12, 2000. On October 12, 2000, Mr. Shannon filed a motion for leave to file an answer, and later filed a motion for relief from judgment pursuant to Civ.R. 60(B).[1] The trial court held a hearing on the motion at which the court heard the arguments of counsel but the parties presented no evidence. The court filed an entry finding that there was no mistake, inadvertence or excusable neglect on the part of Mr. Shannon that would cause the court to grant his motion for relief.

Mr. Shannon appealed, asserting the following assignment of error:

> THE TRIAL COURT ABUSED IT'S *(sic)* DISCRETION AND THEREFORE COMMITTED REVERSIBLE ERROR BY NOT GRANTING APPELLANT'S CIV.R. 60(B)(1) MOTION, WHERE THERE WAS SUFFICIENT BASIS TO GRANT SAID MOTION.

II.

A trial court's ruling on a motion to vacate a judgment pursuant to Civ.R. 60(B) is within the court's sound discretion and will not be overturned absent a showing of an abuse of that discretion. *Griffey v. Rajan* (1987), 33 Ohio St.3d 75, 77. An abuse of discretion signifies more than an error of law or

[1] Mr. Shannon originally characterized his motion as a Civ.R. 60(B)(3) motion for relief from judgment based upon misrepresentation or fraud, but argued at his hearing for relief pursuant to Civ.R. 60(B)(1). On appeal, Mr. Shannon specifically confines his assignment of error to Civ.R. 60(B)(1).

judgment; it implies an attitude that is unreasonable, arbitrary or unconscionable. *State ex rel. Hillyer v. Tuscarawas Cty. Bd. of Commrs.* (1994), 70 Ohio St.3d 94, 97; *State ex rel. McMaster v. School Employees Retirement Sys.* (1994), 69 Ohio St.3d 130; *Steiner v. Custer* (1940), 137 Ohio St. 448, paragraph two of the syllabus. "When applying the abuse of discretion standard, a reviewing court is not free to merely substitute its judgment for that of the trial court." *In re Jane Doe 1* (1991), 57 Ohio St.3d 135, 137-138.

Civ.R. 60(B) provides in pertinent part:

> 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; * * *
>
> 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.

Thus, in order to obtain relief under Civ.R. 60(B)(1) from a final judgment, a party must show: (1) that it has a meritorious defense or claim to present if relief is granted; (2) that it is entitled to relief under one of the grounds stated in Civ.R. 60(B)(1), *i.e.*, "mistake, inadvertence, surprise or excusable neglect;" and (3) that it made its motion for relief from judgment within a reasonable time but no longer than one year from the time of the judgment. *GTE Automatic Electric, Inc. v.*

ARC Industries, Inc. (1976), 47 Ohio St.2d 146, paragraph two of the syllabus. The movant must set forth the grounds for a Civ.R. 60(B)(1) motion in the form of evidentiary materials, not mere allegations. *East Ohio Gas Co. v. Walker* (1978), 59 Ohio App.2d 216, 220. The trial court must overrule the motion if any one of these three requirements is not met. *Rose Chevrolet, Inc. v. Adams* (1988), 36 Ohio St.3d 17, 20; *Argo Plastic Products v. Cleveland* (1984), 15 Ohio St.3d 389, 391.

There is no bright line test for determining whether a party's reasons for failing to enter an appearance constitute mistake, inadvertence or excusable neglect. *D.M.G., Inc. v. Cremeans Concrete & Supply Co.* (1996), 111 Ohio App.3d 134, 138; *Hopkins v. Quality Chevrolet, Inc.* (1992), 70 Ohio App.3d 578, 582. In making the determination, we must bear in mind that Civ.R. 60(B) is a remedial rule that must be liberally construed. *Griffey*, 33 Ohio St.3d at 79. The rule attempts to strike a balance between the conflicting principles that litigation must be brought to a conclusion and justice should be done. *Id.* When there is any question whether or not a default judgment should be set aside, any doubt should be resolved in favor of the movant. *GTE Automatic Electric,* 47 Ohio St.2d at paragraph three of the syllabus. "However, there is a limit to the reach of these principles. A 'complete disregard of the judicial system' should not, for instance, be tolerated under

the guise of 'excusable neglect.'" *D.M.G., Inc.* at 138, citing *Griffey* at 79.

The determination of whether excusable or inexcusable neglect occurred "must of necessity take into consideration all the surrounding facts and circumstances." *Colley v. Bazell* (1980), 64 Ohio St. 2d 243, 249, fn. 4. If it is evident from all the facts and circumstances that the acts of the party seeking relief exhibited a disregard for the judicial system and the rights of the other party, then the trial court should find that the mistakes were inexcusable. *D.M.G., Inc.* at 138; see, also, *Colley* at 248; *GTE* at 153. Generally, a failure to plead or respond after admittedly receiving a copy of a complaint is not "excusable neglect." *Katko v. Modic* (1993), 85 Ohio App.3d 834, 838. Likewise, a person's failure to seek legal assistance after being served with court documents is not excusable. *Associated Estates Corp. v. Fellows* (1983), 11 Ohio App.3d 112, 116. Even illness does not justify a business owner ignoring legal documents received in the mail and failing to delegate a competent agent to handle business matters in his absence. See *Andrew Bihl Sons, Inc. v. Trembly* (1990), 67 Ohio App. 3d 664, 667.

In this case, Mr. Shannon argues mistake or excusable neglect as the ground for relief under Civ.R. 60(B)(1). Specifically, Mr. Shannon asserts that he ignored the complaint

served upon him because he did not understand it and believed that it related to the divorce action that was dismissed in April 1999. Mr. Shannon did not submit any evidentiary materials to support his allegations. In particular, we note that the record does not contain any evidentiary support for Mr. Shannon's allegation that he has "reading difficulties" that prevented him from understanding the complaint. However, the trial court considered, and the parties agree upon, the fact that Mrs. Shannon filed a complaint for divorce in January 1999 and dismissed it in April 1999.

The record reflects that Mrs. Shannon filed her second complaint for divorce in November 1999, over six months after the dismissal of her first complaint. Additionally, the record contains a certified mail receipt indicating that delivery of the complaint was attempted several times before it was returned "unclaimed" on December 8, 1999. The record also reflects that Mrs. Shannon successfully obtained personal service upon Mr. Shannon on June 8, 2000. Finally, the record reflects that at the time Mr. Shannon was served with the second complaint for divorce, he was also served with a temporary support order and with a restraining order that prohibited him from contacting Mrs. Shannon or disposing of marital assets.

Mr. Shannon asserts mistake or excusable neglect because the two complaints were filed in the same court during the same

year. However, the time frame suggests that Mr. Shannon's assertion is disingenuous: Mr. Shannon was served with the second complaint fourteen months after the first complaint was dismissed. Also, Mr. Shannon understood that the final divorce decree he received in the mail was important enough that he needed to seek counsel, yet claims that he did not understand the second complaint, served by personal service, well enough to even prompt him to bother seeking assistance in interpreting it. Finally, Mr. Shannon received support and restraining orders along with the second complaint, and these should have brought his attention to the fact that Mrs. Shannon had instituted a new action.

In examining the facts and circumstances surrounding Mr. Shannon's failure to answer, we cannot say that the trial court abused its discretion in concluding that Mr. Shannon did not demonstrate mistake or excusable neglect. Because the trial court did not err in determining that Mr. Shannon did not demonstrate that he is entitled to relief based upon mistake, inadvertence, surprise or excusable neglect, we need not examine whether Mr. Shannon had a meritorious defense to present had relief from judgment been granted. We find that the trial court did not abuse its discretion in denying Mr. Shannon's motion for relief from judgment.

Accordingly, we overrule Mr. Shannon's sole assignment of error and affirm the judgment of the trial court.

JUDGMENT AFFIRMED.

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JUDGMENT ENTRY

It is ordered that the JUDGMENT BE AFFIRMED and that Appellee recover of Appellant costs herein taxed.

The Court finds there were reasonable grounds for this appeal.

It is ordered that a special mandate issue out of this Court directing the Lawrence County Common Pleas Court to carry this judgment into execution.

Any stay previously granted by this Court is hereby terminated as of the date of this entry.

A certified copy of this entry shall constitute the mandate pursuant to Rule 27 of the Rules of Appellate Procedure. Exceptions.

Abele, P. J. and Evans, J. Concur in Judgment & Opinion.

For the Court

BY: _____
Roger L. Kline, Judge

NOTICE TO COUNSEL

Pursuant to Local Rule No. 14, this document constitutes a final judgment entry and the time period for further appeal commences from the date of filing with the clerk.