**[Cite as *Nicole C. v. Larry S., II*, 2004-Ohio-5244.]**

IN THE COURT OF APPEALS OF OHIO
SIXTH APPELLATE DISTRICT
LUCAS COUNTY

Nicole C.

Appellee

and

Lucas County Child
Support Enforcement Agency

Appellee

v.

Larry S., II

Appellant

Court of Appeals No. L-04-1080

Trial Court No. 91008746

**DECISION AND JUDGMENT ENTRY**

Decided: September 30, 2004

* * * * *

Susan K. Lehman-Sentle, for appellee Lucas County Child Support Enforcement Agency.

Dennis P. Strong, for appellant.

* * * * *

KNEPPER, J.

**{¶ 1}** This is an accelerated appeal from a judgment of the Lucas County Court of Common Pleas, Juvenile Division, in which the trial court denied a motion to vacate an earlier judgment in favor of appellee, the Lucas County Child Support Enforcement

Agency ("LCCSEA"), in a parentage case. The motion to vacate was filed by appellant, Larry S., II, who sets forth the following two assignments of error on appeal:

**{¶ 2}** "I. The trial court erred in granting appellee's 60(B) motion for relief from judgment in violation of appellant's due process rights.

**{¶ 3}** "II. The trial court erred in denying appellant's motion to set aside its order of December 26, 2003, as the trial court abused its discretion and had no personal jurisdiction over appellant."

**{¶ 4}** Nicole C. and Larry S., II are the parents of Larry S., III, born on March 1, 1991. On June 13, 1991, Nicole C. filed a complaint in parentage against Larry S., II. LCCSEA intervened in that action to obtain reimbursement for "past necessaries" provided to Larry S., III by the state of Ohio.

**{¶ 5}** On September 24, 1991, the trial court found that Larry S., II was the father of Larry S., III., and ordered him to pay child support in the amount of $86.67 per month. In addition, the judgment entry contained the following provision:

**{¶ 6}** "Lump Sum Judgment awarded in favor of Department of Human Services and against Obligor is waived for past support and $29,527.07 for birthing expenses through August 25, 1991."

**{¶ 7}** On January 28, 1997, Larry S., II filed a motion to "set aside" the trial court's September 24, 1991 judgment entry, in which he stated that judgment entry contains "clerical mistakes in the calculation of birthing expenses," and the above-quoted

paragraph is "vague and unclear." On February 28, 1997, the trial court denied Larry S., II's motion.

**{¶ 8}** On August 21, 2002, Larry S., II filed a motion to change custody in the trial court, in which he stated that the parties agreed it was in Larry S., III's best interest for the child to live with his father, since Nicole C. had moved to Indiana. On September 17, 2002, Nicole C. opposed a change of custody; however, the court-appointed guardian-ad-litem filed a report in which he stated that Larry S., II was better able to provide a stable home for the parties' minor child.

**{¶ 9}** On January 13, 2003, the trial court filed a judgment entry, in which it awarded custody of Larry S., III to his father. In addition, the trial court stated in this judgment entry that the parties agreed "that the [father's] obligation for birthing expenses and extraordinary medial expenses of the minor child is reduced by Twenty-Five Thousand ($25,000.00) Dollars, and that the arrearage due and owing on the obligation to the State of Ohio be paid by the [father] at the rate of Five ($5.00) Dollars per week. * * *" The trial court also reduced Larry S. II's obligation to LCCSEA by $3 for every $1 he paid of the guardian-ad-litem's fees.

**{¶ 10}** On January 16, 2003, Nicole C. filed an objection to the January 13 judgment entry and a motion for reconsideration, in which she stated that:

**{¶ 11}** "the judgment entry as worded would give [Larry S., II] a credit for $25,000.00 toward back child support in addition to the amount of credit he has already received per CSEA records. Though [Nicole C.] does not dispute that [Larry S., II]

should receive the $25,000 reduction for birthing and health care expenses that was negotiated a long time ago and believed by all parties to have been credited, but possibly not reflected by court order, it would unquestionably be an injustice for [Larry S., II] to receive $50,000 total credit toward a bill that was only in the neighborhood of $30,000 in the first place."

**{¶ 12}** On May 28, 2003, the trial court awarded a lump-sum judgment to the guardian-ad-litem in the amount of $1,052, to be paid by Larry S., II. The trial court further stated that Larry S., II "shall receive credit of two dollars toward his child support arrearage to [Nicole C.] for every one dollar paid toward the Guardian ad Litem's fee pursuant to this order."

**{¶ 13}** On October 14, 2003, LCCSEA filed a motion for relief from judgment pursuant to Civ.R. 60(B), in which it asked the trial court to vacate both the January 13, 2003 and the May 28, 2003 orders to the extent that they waive any arrearages that may be owing to the state of Ohio, and to re-instate the arrearages owed as set forth "by Judgment Entry filed September 24, 1991 * * *" and any other arrearages thereafter assigned to the Ohio Department of Job and Family Services * * *." The motion did not set forth the amount of the arrearages owed. The record contains no evidence that either Larry S., II or Nicole C. received notice that the motion was filed.

**{¶ 14}** On December 26, 2003, the trial court, without holding an evidentiary hearing, filed a judgment entry in which it granted LCCSEA's Civ.R. 60(B) motion. The trial court ordered the re-instatement of "the arrearage owed to the State of Ohio as

previously Ordered by Judgment Entry filed September 24, 1991" and any subsequent assignments of support to the Ohio Department of Job and Family Services, less any payments made on the arrears by Larry S., II.

**{¶ 15}** A motion to vacate the December 26, 2003 judgment was filed by Larry S., II on February 5, 2004, in which he asserted that the trial court did not have jurisdiction to consider LCCSEA's Civ.R. 60(B) motion because Larry S., II was never given notice that the motion was filed. In addition, Larry S., II asked the trial court to order LCCSEA to correct its records to conform to the terms of the September 24, 1991 judgment entry. On February 23, 2004, the trial court summarily denied Larry S., II's motion and affirmed its earlier ruling. A notice of appeal was filed in this court on March 23, 2004.

**{¶ 16}** Larry S., II asserts in his first assignment of error that his right to due process was violated because he was not afforded a hearing on his motion to vacate, without which he was unable to demonstrate that the trial court erred by granting LCCSEA's Civ.R. 60(B) motion. Similarly, in his second assignment of error, Larry S., II asserts that the trial court did not have jurisdiction to consider LCCSEA's Civ.R. 60(B) motion, because service of process was defective. Because these two assignments of error are interrelated, they will be considered together.

**{¶ 17}** We note initially that "[a] motion to vacate judgment is the equivalent of a motion for relief from judgment under Civ.R. 60(B)." *Dawson v. Udleson* (1987), 37 Ohio App.3d 141, 143, at n.1. The decision to grant or deny a Civ.R. 60(B) motion is within the sound discretion of the trial court, and will not be disturbed on appeal absent a

clear abuse of that discretion. *Adomeit v. Baltimore* (1974), 39 Ohio App.2d 97, 103. The term "abuse of discretion" connotes more than a mere error of law or judgment, instead requiring a finding that the trial court's decision was unreasonable, arbitrary, or unconscionable. *Blakemore v. Blakemore* (1983), 5 Ohio St.3d 217, 219.

**{¶ 18}** The Supreme Court of Ohio has held that, "[i]f the movant files a motion for relief from judgment and it contains allegations of operative facts which would warrant relief under Civil Rule 60(B), the trial court should grant a hearing to take evidence and verify these facts before it rules on the motion." *Coulson v. Coulson* (1983), 5 Ohio St.3d 12, 16, citing *Adomeit v. Baltimore*, supra, at 105. Conversely, "the trial court abuses its discretion in denying a hearing where grounds for relief from judgment are sufficiently alleged and are supported with evidence which would warrant relief from judgment." *Kay v. Mark Glassman, Inc.* (1996), 76 Ohio St.3d 18, 19, citing *Adomeit v. Baltimore*, supra, at 103.

**{¶ 19}** The grounds for relief set forth in Civ.R. 60(B)(1) - (5) are:

**{¶ 20}** "(1) mistake, inadvertence, surprise or excusable neglect; (2) newly discovered evidence which by due diligence could not have been discovered in time to move for a new trial under Rule 59(B); (3) fraud * * *, misrepresentation or other misconduct of an adverse party; (4) the judgment has been satisfied, released or discharged * * *; or (5) any other reason justifying relief from the judgment * * *."

**{¶ 21}** The failure of a party to receive actual notice has been found sufficient to satisfy the catch-all provision of Civ.R. 60(B)(5). *Riley v. Cleveland Television*

*Network*, 8th Dist. No. 83752, 2004-Ohio-3299, ¶12. See, also, *Rice v. Bethel Assoc., Inc.* (1987), 35 Ohio App.3d 133 (A trial court has no authority to vacate its own prior judgment, whether upon motion or sua sponte, "[u]nless notice and an opportunity to be heard are given to opposing parties * * *." Id., at the syllabus).

**{¶ 22}** It is undisputed that Larry S., II never received notice that LCCSEA had filed a Civ.R. 60(B) motion for relief from the trial court's January 13, 2003 judgment. It is further undisputed that no hearing was held on either LCCSEA's 60(B) motion, or Larry S., II's motion to vacate, which was timely filed less than two months after the trial court's judgment was issued.

**{¶ 23}** LCCSEA asserts on appeal that the lack of notice as to its Civ.R. 60(B) motion and failure to hold a hearing on Larry S., II's motion to vacate are irrelevant in this case. In support thereof, LCCSEA argues that Larry S., II and Nicole C. did not have the authority to waive arrearages that were owed to the state of Ohio.

**{¶ 24}** As to the parties' authority to waive arrearages, LCCSEA's argument is well-taken. See *Campbell v. Campbell* (1993), 87 Ohio App.3d 48, 50; *Mizell v. Mizell*, 7th Dist. No. 00 JE 30, 2001-Ohio-3409. However, in addition to raising the issue of notice, Larry S., II's motion to vacate also questioned the actual amount of the arrearages owed and the effect, if any, of the "waiver" that was set forth in the trial court's September 24, 1991 judgment entry. Those issues could have, and should have, been resolved by the trial court at a hearing. *Riley*, supra; *Rice*, supra.

**{¶ 25}** This court has reviewed the entire record of proceedings that was before the trial court and, upon consideration thereof and the law, finds that the trial court abused its discretion by: 1) granting LCCSEA's Civ.R. 60(B) motion without affording Larry S., II actual notice and an opportunity for a hearing; and 2) denying Larry S., II's motion to vacate the December 26, 2003 judgment entry without holding a hearing. Larry S., II's two assignments of error are well-taken.

**{¶ 26}** The judgment of the Lucas County Court of Common Pleas is hereby reversed, and the case is remanded to the trial court for further proceedings consistent with this decision and judgment entry. Pursuant to App.R. 24, costs of these proceedings are assessed to appellee, LCCSEA.

JUDGMENT REVERSED.

A certified copy of this entry shall constitute the mandate pursuant to App.R. 27. See, also, 6th Dist.Loc.App.R. 4, amended 1/1/98.

Peter M. Handwork, P.J. _____
JUDGE

Richard W. Knepper, J. _____
JUDGE

Arlene Singer, J. _____
CONCUR.
JUDGE