

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

Sheryl A. Stiriz

Court of Appeals No. L-05-1390

Appellant

Trial Court No. CI-2003-3274

v.

Matthew J. Nissen

**DECISION AND JUDGMENT ENTRY**

Appellee

Decided: August 4, 2006

\* \* \* \* \*

Frank Reynolds for appellant.

Todd M. Zimmerman and J. Mark Trimble, for appellee.

\* \* \* \* \*

PIETRYKOWSKI, J.

{¶1} This is an appeal of a Civ.R. 41(D) motion granted by the Lucas County Court of Common Pleas following plaintiff-appellant Sheryl Stiriz's voluntary dismissal under Civ.R. 41(A)(1)(a).

{¶2} The pertinent facts of the case are as follows. On May 30, 2003, appellant filed a complaint against defendant-appellee, Matthew Nissen, alleging negligence in connection with a 2001 automobile accident. Appellee filed his answer on June 25, 2003. The trial date was set for November 11, 2004; however, the date was altered on three

separate occasions with September 28, 2005, ultimately set as the trial date. On September 27, 2005, at 4:31 p.m., appellant filed a Civ.R. 41(A)(1)(a) motion for voluntary dismissal. As this was appellant's first voluntary dismissal, her case was dismissed without prejudice.

{¶3} On September 30, 2005, appellee filed a motion for costs under Civ.R. 41(D), should the matter be re-filed. Appellee filed for costs due to his difficulty in getting time off from his active duty in the Air Force, and the travel costs incurred by his drive from his duty assignment in Montana to Ohio.

{¶4} On November 9, 2005, the trial judge granted the motion, and ordered that "[the] Plaintiff shall pay costs of One Thousand Dollars (\$1000.00) to Defendant for travel expenses incurred" as a condition of refileing the case. This appeal followed.

{¶5} Appellant raises the following assignment of error:

{¶6} "I. The court committed reversible error when, following appellant's voluntary dismissal of the case under Ohio R. Civ. P. 41(A)(1), and without appellant's having refiled the case, it purported to award costs pursuant to Ohio R. Civ. P. 41(D) and to impose conditions upon appellant's refileing of the action."

{¶7} The sole issue in this appeal is whether the trial court retained the jurisdiction to assign costs under Civ.R. 41(D) after a plaintiff voluntarily dismissed her action pursuant to Civ.R. 41(A)(1)(a).

{¶8} The standard of review that applies in this case is abuse of discretion. A trial court will not be found to have abused its discretion unless the decision involves

more than an error of judgment or law and can be characterized as unreasonable, arbitrary, or unconscionable. *Blakemore v. Blakemore* (1983), 5 Ohio St.3d 217, 219. The term abuse of discretion has been defined as "a view or action that no conscientious judge, acting intelligently, could have honestly taken." (Citation omitted.) *State ex rel Shafer v. Ohio Turnpike Comm.* (1953), 159 Ohio St. 581, 590-591. When applying the abuse of discretion standard of review, an appellate court must not substitute its judgment for that of the trial court. *In re Jane Doe I* (1991), 57 Ohio St.3d 135, 137-138.

{¶9} Civ.R. 41(A)(1)(a) states that "a plaintiff, without order of court, may dismiss all claims asserted by that plaintiff against a defendant by \* \* \* filing a notice of dismissal at any time before the commencement of trial \* \* \*.

{¶10} Civ.R. 41(D) provides that "[i]f a plaintiff who has once dismissed a claim in any court commences an action based upon or including the same claim against the same defendant, the court may make such order for the payment of costs of the claim previously dismissed as it may deem proper and may stay the proceedings in the action until the plaintiff has complied with the order."

{¶11} Interpreting the above-quoted rules the Ohio Supreme Court, in *Sturm v. Sturm* (1992), 63 Ohio St.3d 671, 676, held that "once the \* \* \* action was voluntarily dismissed under Civ.R. 41(A)(1)(a), the [court] lost jurisdiction over the matter and could not award costs under Civ.R. 41(D)." The Ohio Supreme Court further noted that a different interpretation "would have the anomalous result of allowing two courts to award

costs: both the original court through an 'inherent power' theory, and the court in which the action is refiled, under the authority of Civ.R. 41(D)." Id.

{¶12} In this case, appellant filed her motion to dismiss prior to the commencement of the trial. Despite the circumstances surrounding the dismissal including the proximity to the trial, the distance traveled by appellee, and the efforts involved in procuring military leave, appellant's Civ.R. 41(A)(1)(a) motion was filed as required by the rule. Accordingly, we must find that the trial court abused its discretion when it granted appellee's Civ.R. 41(D) motion. Appellant's assignment of error is well-taken.

{¶13} On consideration whereof, we find that the judgment of the Lucas County Court of Common Pleas is reversed and the November 9, 2005 order is vacated. Appellee is ordered to pay the costs of this appeal pursuant to App.R. 24. Judgment for the clerk's expense incurred in preparation of the record, fees allowed by law, and the fee for filing the appeal is awarded to Lucas County.

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.

Mark L. Pietrykowski, J. \_\_\_\_\_

\_\_\_\_\_  
JUDGE

Arlene Singer, P.J. \_\_\_\_\_  
CONCUR.

\_\_\_\_\_  
JUDGE

William J. Skow, J. \_\_\_\_\_

CONCURS AND WRITES SEPARATELY.

JUDGE

SKOW, J.

{¶14} I agree with the judgment reached in this case, to-wit that the trial court was divested of jurisdiction by appellant's Civ.R. 41(A)(1)(a) dismissal. I would add, however, that the trial court had a strong motivation to assess costs. Appellant's counsel filed the dismissal motion at the eleventh hour prior to trial; he assured appellee's counsel a short time before trial that the case would proceed as scheduled; and he was certainly aware of the red tape involved with securing military leave, not to mention the considerable time and expense attendant to a round trip by automobile of some 3,200 miles. These matters may resurface if the case is ever refiled, which is clearly for another day. In the context of this case to date, they were merely borderline unprofessional, or worse.

<p>This decision is subject to further editing by the Supreme Court of Ohio's Reporter of Decisions. Parties interested in viewing the final reported version are advised to visit the Ohio Supreme Court's web site at: <a href="http://www.sconet.state.oh.us/rod/newpdf/?source=6">http://www.sconet.state.oh.us/rod/newpdf/?source=6</a>.</p>
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