The State ex rel. Hawk et al., Appellants, v. McCracken, Judge, Appellee.

[Cite as State ex rel. Hawk v. McCracken (1992), Ohio St.3d .]

Mandamus to compel court to vacate three and one-half year old entry -- Writ denied when court has no clear legal duty to perform the requested act.

(No. 91-2277 -- Submitted October 13, 1992 -- Decided December 11, 1992.)

Appeal from the Court of Appeals for Clinton County, No. CA90-04-005.

On January 27, 1983, plaintiff, Jo Ann Hawk, on behalf of her minor child, filed an amended malpractice action against certain doctors and hospitals. Defendants moved for summary judgment based upon the statute of limitations, R.C. 2305.11(B). The trial court journalized its ruling of July 12, 1984, granting summary judgment, on August 17, 1984. On August 15, 1985, plaintiff moved to "amend [the] judgment order." Judge Paul E. Riley of the Court of Common Pleas of Clinton County overruled the motion on January 26, 1987. On September 18, 1990, more than three and one-half years later, plaintiff filed a notice of appeal from the August 17, 1984 decision in the court of appeals. On April 29, 1991, the appeal was dismissed. Subsequently, we overruled a motion to certify the record in case No. 91-1298. See 62 Ohio St.3d 1425, 577 N.E.2d 1107.

Relators, Jo Ann Hawk et al., filed a mandamus complaint on April 6, 1990; respondent William B. McCracken, Judge Riley's successor, answered on June 19, 1990; and the parties stipulated the evidence and filed briefs. The requested relief was to compel respondent to vacate the August 17, 1984 entry, to refile it, and to provide notice of the same so that a timely appeal could be perfected, or, alternatively, to reinstate the amended complaint.

The court of appeals denied the writ and noted: "A final judgment had been issued below, and no direct appeal or post-judgment motions * * * were pursued." The court also said: "The issuance of a writ of mandamus would involve an

improper control of the trial court's judicial discretion * * * [and] there is no clear legal duty * * * to perform the requested act and relators are not entitled to the requested relief."

The cause is now before this court upon an appeal as of right.

Joseph P. Burke, for appellants.

Thomas E. Jenks and Scott G. Oxley, for appellee.

Per Curiam. For the following reasons, we affirm the judgment of the court of appeals.

Relators asserted in their complaint in mandamus below, and again on appeal, that following the trial court's July 12, 1984 grant of summary judgment in the underlying case, defendant Clinton Memorial Hospital's attorney, on July 20, 1984, mailed a "draft entry" journalizing the ruling to plaintiff's attorney; that on August 15, 1984, defendant's attorney presented the proposed entry, signed only by himself, to the trial court; that this entry was journalized on August 17, 1984; that the court did not specifically notify the attorneys of record of the journalization; that plaintiff's attorney first learned of the journalization more than thirty days thereafter; that on August 15, 1985, plaintiff's attorney filed a "[m]otion * * * to [a]mend [the] [j]udgment [o]rder, * * * so as to have it refiled so as to allow [plaintiff] to perfect an appeal"; and that the trial court knew plaintiff's name and address but failed to make any effort to notify her of the adverse judgment so that she could file an appeal.

Moreover, relators contend that the four-year statute of limitations relied upon by the trial court in dismissing the malpractice action, R.C. 2305.11(B), was declared unconstitutional in Mominee v. Scherbarth (1986), 28 Ohio St.3d 270, 28 OBR 346, 503 N.E. 2d 717, when that statute was applied against a minor. Relators further contend that on August 13, 1986, this court in Moldovan v. Cuyahoga Cty. Welfare Dept. (1986), 25 Ohio St.3d 293, 25 OBR 343, 496 N.E. 2d 466, held the failure to give a party reasonable notice of a judgment when the name and address of that party are known was "a denial of the right to legal redress of injuries created by Section 16, Article I of the Ohio Constitution," id. at 296, 28 OBR at 345-346, 496 N.E.2d at 468, and constitutes a denial of the party's right to perfect an appeal.

Respondent's position is summarized by his statement: "Appellant's plain and adequate remedy in this case was to file a Rule 60(B) motion and, if overruled, to file an appeal therefrom. No such motion was ever filed. No such appeal was filed." Respondent also points out that at the time of the trial court's ruling on the motion for summary judgment, July 12, 1984, the Ohio Rules of Civil Procedure did not require specific notification of the filing of judgment entries to the parties, other than the notice which occurs when the entry is actually journalized and docketed with the clerk of courts. See Town & Country Drive-In Shopping Centers, Inc. v. Abraham (1975), 46 Ohio App.2d 626, 75 O.O.2d 416, 348 N.E.2d 741.

We agree with respondent. Plaintiff in the underlying malpractice action did not file a timely notice of appeal from

the judgment of August 17, 1984, or the judgment of January 26, 1987. Nor did plaintiff ever file a Civ. R. 60(B) motion for relief from judgment. Instead, she followed a pattern of inappropriate, untimely responses. On July 20, 1984, she received the proposed entry resulting from the July 12, 1984 trial court ruling. On August 15, 1984, defendant's attorney forwarded his signed copy of the proposed entry to the trial court, which journalized it on August 17, 1984. More than thirty days later, plaintiff's attorney learned that the entry had been journalized, but took no action until August 15, 1985. At that time, instead of filing a Civ.R. 60(B) motion, he "invented" a motion to amend the judgment entry. Moreover, plaintiff waited more than three and one-half years after the trial court overruled her motion to amend to file a notice of appeal from the August 17, 1984 decision. This appeal was ultimately dismissed.

Accordingly, respondent had no duty to amend the 1984 judgment in 1990, when relators filed their mandamus action. The judgment of the court of appeals denying the writ is affirmed.

Judgment affirmed.

Moyer, C.J., Sweeney, Holmes, Douglas, Wright, H. Brown and Resnick, JJ., concur.