

IN THE COURT OF APPEALS
TWELFTH APPELLATE DISTRICT OF OHIO
BUTLER COUNTY

GEICO INDEMNITY COMPANY,	:	
Plaintiff-Appellant,	:	CASE NO. CA2010-11-315
- vs -	:	<u>OPINION</u>
	:	5/31/2011
AJWAD ALAUSUD,	:	
Defendant-Appellee.	:	

CIVIL APPEAL FROM FAIRFIELD MUNICIPAL COURT
Case No. 2009 CVE 0448

Kreiner & Peters Co., L.P.A., Todd W. Smith, 6047 Frantz Road, Suite 203, Dublin, Ohio 43017, for plaintiff-appellant

Fred S. Miller, Baden & Jones Bldg., 246 High Street, Hamilton, Ohio 45011, for defendant-appellee

RINGLAND, J.

{¶1} Plaintiff-appellant, Geico Indemnity Company, appeals from the Fairfield Municipal Court's decision granting relief from judgment entered against defendant-appellee, Ajwad Alausud. For the reasons outlined below, we affirm.

{¶2} On April 13, 2009, Geico filed a complaint against Alausud that alleged he negligently caused an automobile accident with its insured while traveling on State Route 4, Fairfield, Butler County, Ohio. Once mediation between the parties failed to result in a settlement, the trial court scheduled the matter for trial to be held on Monday,

January 4, 2010.

{¶3} On Thursday, December 31, 2009, a family emergency prompted Geico's trial counsel to file a motion for a continuance. That same day, the trial court granted Geico's motion to continue and rescheduled the matter for trial on March 1, 2010. The trial court, however, did not send notice of the continuance to Alausud until Wednesday, January 6, 2010, two days after the previously scheduled trial date. The record reveals that Alausud, acting pro se, appeared at the courthouse for trial on January 4, 2010.

{¶4} On March 1, 2010, after holding a bench trial, the trial court granted judgment to Geico in the amount of \$8,083.88 plus interest. Alausud, although he received notice of the trial date, failed to appear for the March 1 trial.

{¶5} On March 12, 2010, Alausud filed a letter with the trial court entitled "[t]o whom it may concern." In the letter, Alausud apologized for missing the March 1 trial, but explained that he "didn't miss the court willingly it was out of my hand because my son had surgery on February-12-2010 * * *." Alausud further explained that the surgery made it "very hard for [his son]," who was only four years old, and that "this situation kept [him] worried and distracted" to the point where he "completely forgot about the hearing date." In concluding, Alausud asked the trial court to "[p]lease give [him] the chance to practice [his] rights and defend [himself] in this case."

{¶6} On March 23, 2010, the trial court, construing Alausud's March 12 letter as a notice of appeal, transferred the matter to this court. However, in an entry dated July 23, 2010, this court determined that Alausud's letter was "in the nature of a Civ.R. 60(B) motion that should have been considered by the trial court." This court then then dismissed the matter.

{¶7} On October 12, 2010, the trial court held a hearing on Alausud's request for relief from judgment. Following the hearing, the trial court set aside the judgment

against Alausud and scheduled the matter for a damages hearing. Geico subsequently appealed from the trial court's decision setting aside the judgment, raising two assignments of error for review.

{¶8} Assignment of Error No. 1:

{¶9} "THE TRIAL COURT ABUSED ITS DISCRETION AND/OR ERRED IN GRANTING DEFENDANT/APPELLEE'S MOTION TO SET ASIDE THE JUDGMENT BECAUSE THE COURT CONSIDERED A DOCUMENT THAT WAS NOT SERVED UPON PLAINTIFF/APPELLANT PER CIVIL RULES 5(A), (B), & (D)."

{¶10} In his first assignment of error, Geico argues that the trial court erred by granting Alausud's 60(B) motion for relief from judgment "because the trial court reviewed and/or considered a document that was not served upon [them]." However, while it may be true that Alausud failed to adhere to the requirements of Civ.R. 5, Geico readily admits that it "found out about the letter when it was served with the notice of appeal in March, 2010." In turn, because Geico received the letter by virtue of the trial court's notice, a document which it admittedly received over six months before the hearing on the motion took place, Geico cannot now claim any resulting prejudice therefrom. See *Gilson v. Thomas*, Cuyahoga App. No. 86150, 2005-Ohio-6725, ¶14; *Fontanella v. Ambrosio*, Trumbull App. No. 2001-T-0033, 2002-Ohio-3144, ¶26; *Grenga v. Smith*, Trumbull App. No. 2001-T-0040, 2002-Ohio-1179, 2002 WL 409022, at *7; see, also, *Corporate Interior Sys., Inc. v. Lewis*, Butler App. No. CA2004-10-269, 2005-Ohio-6685, ¶20. Therefore, because Alausud's failure to adhere to the requirements of Civ.R. 5 was harmless, Geico's first assignment of error is overruled.

{¶11} Assignment of Error No. 2:

{¶12} "THE TRIAL COURT ABUSED ITS DISCRETION AND/OR ERRED IN GRANTING DEFENDANT/APPELLEE'S MOTION TO SET ASIDE JUDGMENT

BECAUSE DEFENDANT/APPELLEE FAILED TO DEMONSTRATE EXCUSABLE NEGLIGENCE."

{¶13} In its second assignment of error, Geico argues that the trial court abused its discretion by granting Alausud relief from judgment. We disagree.

{¶14} A trial court's decision to grant a Civ.R. 60(B) motion for relief from judgment will not be reversed on appeal absent an abuse of discretion. *Fitzwater v. Woodruff*, Preble App. No. CA2006-01-001, 2006-Ohio-7040, ¶9. An abuse of discretion is more than an error of law or judgment; it implies that the trial court acted unreasonably, arbitrarily, or unconscionably. *Argo Constr. Co., Inc. v. Kroger Ltd. Partnership I*, Clinton App. No. CA2008-09-036, 2009-Ohio-2811, ¶32; *Blakemore v. Blakemore* (1983), 5 Ohio St.3d 217, 219.

{¶15} To prevail on a Civ.R. 60(B) motion for relief from judgment, the movant must demonstrate: (1) a meritorious claim or defense; (2) entitlement to relief under one of the grounds stated in Civ.R. 60(B)(1) through (5); and (3) the motion is made within a reasonable time, and, where the grounds of relief are Civ.R. 60(B)(1), (2) or (3), not more than one year after the judgment, order or proceeding was entered or taken. *Aurora Loan Servs. v. Brown*, Warren App. Nos. CA2010-01-010, CA2010-05-041, 2010-Ohio-5426, ¶35, citing *GTE Automatic Electric v. ARC Industries* (1976), 47 Ohio St.2d 146, 150-151. A movant must meet all three requirements to succeed on its motion. *Strack v. Pelton*, 70 Ohio St .3d 172, 174, 1994-Ohio-107.

{¶16} In its appeal, Geico does not argue that Alausud failed to present a meritorious claim or defense, nor does it argue that his motion was not made within a reasonable time. Instead, Geico merely argues that the trial court abused its discretion by granting Alausud relief from judgment where he "failed to satisfy the standard of excusable neglect." However, Geico failed to provide this court with the transcript of the

October 12, 2010 motion hearing. As a result, we have no choice but to presume the regularity of the trial court's proceedings. See *Huebner v. Scott* (Nov. 23, 1992), Madison App. No. CA92-06-014, at 7-8; see, also, *Kuhlman Corp. v. Journeyman Professionals, Inc.*, Lucas App. No. L-04-1283, 2005-Ohio-2684, ¶4; *Preferred Capital Inc. v. Rock N Horse, Inc.*, Summit App. No. 21703, 2004-Ohio-2122, ¶¶13-14; *Qureshi v. Geppetto's Pizza & Ribs Franchise* (June 21, 2001), Cuyahoga App. No. 78672, 2001 WL 741495, at *3. Therefore, based on the record before this court, we find no abuse of discretion in the trial court's decision granting Alausud relief from judgment. Accordingly, Geico's second assignment of error is overruled.

{¶17} Judgment affirmed.

HENDRICKSON, P.J., and PIPER, J., concur.