

[Cite as *Smith v. Lima Memorial Hosp.*, 1999-Ohio-784.]

**COURT OF APPEALS
THIRD APPELLATE DISTRICT
ALLEN COUNTY**

ELSIE M. SMITH

PLAINTIFF-APPELLEE

CASE NO. 1-98-73

v.

LIMA MEMORIAL HOSPITAL

OPINION

DEFENDANT-APPELLANT

CHARACTER OF PROCEEDINGS: Civil appeal from Common Pleas Court

JUDGMENT: Judgment affirmed

DATE OF JUDGMENT ENTRY: May 27, 1999

ATTORNEYS:

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HADLEY, J.

{¶1} This is an appeal from a judgment entry of the Common Pleas Court of Allen County dated March 21, 1997, denying the motion of Appellant Lima Memorial Hospital ("LMH") for relief from judgment pursuant to Civ. R. 60(B), and from the jury verdict journalized September 30, 1998, awarding \$75,000 to Appellee Elsie Smith for medical expenses, pain and suffering and wages lost as a result of a fall while she was a patient at the hospital.

{¶2} The hospital asserts the following two assignments of error:

{¶3} The trial court abused its discretion in denying LMH's Civ R. 60(B) motion for relief from judgment on the grounds that the affidavits submitted in support of this motion were insufficient to establish excusable neglect.

{¶4} The trial court erred in denying LMH's motion for directed verdict as to Smith's claim of loss of profits.

{¶5} The hospital, for its first assignment of error, seeks a finding that the trial court abused its discretion in failing to grant relief from the January 31, 1997 default judgment granted against the hospital alleging that the hospital excusably failed to file a timely answer to the complaint due to the neglect of an employee. The employee failed to process the appellee's complaint in accordance with counsel's prescribed procedure and protocol.

{¶6} An abuse of discretion is more than an error of law or judgment. It implies that the court's attitude is unreasonable, arbitrary or unconscionable. *Masters v. Masters* (1994), 69 Ohio St.3d 83, 85.

{¶7} Civ R. 60(B) provides that a court may relieve a party from judgment for excusable neglect on a motion timely filed. To prevail on such a motion, the movant

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must show, in addition to one of the grounds stated in the rule, that there is a meritorious defense or claim to present if the relief is granted. *GTE Automatic Electric v. ARC Industries* (1976), 47 Ohio St.2d 146.

{¶8} The trial court found that the motion was timely filed and that the hospital had a possible valid defense to present but also found that the neglect was not excusable and showed a disregard for the judicial system. Upon reviewing the affidavits submitted in conjunction with the motion for relief from judgment, we agree with the trial court.

{¶9} The affidavit of Chris Cosaro, assistant to Kevin Webb, Vice President of Risk Management for the hospital, points out that she was instructed to forward the complaint immediately to the hospital's liability carrier with a copy to hospital counsel Michael J. Malone. She received the appellee's complaint on December 26, 1996, but through oversight, placed it in a file and failed to forward it as instructed. On February 7, 1997, she realized her error when she received a copy of the judgment entry of default and she notified counsel immediately of the situation.

{¶10} The affidavit of counsel Malone indicates that as early as June 1996, it was brought to his attention that assistant Cosaro was not forwarding complaints in a timely fashion. In spite of this early warning, Webb and Malone continued the same procedure. They saw fit to make special personal efforts on separate occasions in December 1996, and January 1997, to inspire Cosaro to follow the procedure and protocol. Malone also followed up with a letter to Cosaro in January 1997 - all to no apparent avail.

{¶11} The affidavits of Malone and Webb both state that as a result of this neglect, the hospital "has taken immediate steps" to insure that, in the future, the hospital forwards all complaints to the insurer and counsel.

{¶12} As the trial court points out, the hospital, with its Risk Management Department and Risk Counsel, is not a novice to litigation. If it was apparent in June, 1996, that there was a problem and the problem continued into December prompting Webb and Malone to counsel with Cosaro, the question becomes why the hospital did not take the "immediate steps" prior to this incident to insure that the complaints were properly forwarded. Having failed to do so, it is evident that the conduct of the hospital is not excusable and combined with those whose conduct is imputable to it, it exhibited a disregard for the judicial system and the rights of appellee. *Griffey v. Rajan* (1987), 33 Ohio St.3d 75.

{¶13} Thus, the trial court did not abuse its discretion in not granting the motion for relief and the first assignment of error is overruled.

{¶14} In the second assignment of error, Appellant claims that appellee's evidence regarding lost wages was speculative, at best, and that the appellant's motion for directed verdict thus should have been granted. Appellee states that there is sufficient evidence on which to find profits based upon the testimony of Elsie Smith and other witnesses.

{¶15} In actions for damages for personal injury, one of the elements of damage is the impaired earning power of the injured party and the loss of personal earnings suffered during such time as the injured party was either wholly or partially incapacitated.

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The correct rule for compensating the injured party who has an established business is to ascertain how much less valuable the business was by reason of the interruption and to allow that amount as damages. Proof with certainty or mathematical exactness is not required, nor need the proof be clear and indubitable, but the damages cannot be left to mere conjecture. 25A Corpus Juris Secundum (1966) 70-72, Damages, Section 162.

Therefore, the best proof available under the facts should be required. *LoSchiavo v. Northern Ohio Traction & Light Co.* (1922), 106 Ohio St. 61; *Gibbons v. Baltimore & O. R. Co.* (1952), 92 Ohio App. 87.

{¶16} In this case, Elsie Smith, age 87, is a shoe cobbler. Her life expectancy is 2.84 years. T.p.302. She testified that she draws social security based upon her late husband's earnings but that she made her living from her cobbler business. In a "real good year", like 1990-1, she made about \$4,000 per year. She believes that 1995 is the last year that she filed an income tax return. She does not recall what she made that year but her best estimate is that in 1995 she made \$2500-\$3000. She did not produce any tax returns and doesn't know if she has them anymore.

{¶17} Appellant comments in its brief that Smith does not have any documentation of her earnings. However, since she broke her hip in March 1995, she can't do her regular cobbler business. She now just does small jobs like sewing handles on pocket books for friends. For this work she does not maintain exacting records and she often does not charge or she makes just a few dollars which would not warrant her filing a tax return. (T.pp. 143, 147, 149, 190, 191). Therefore, the best available evidence

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of her earnings is her memory. This evidence was not mere conjecture and was not contradicted.

{¶18} Based upon the foregoing, the jury had some evidence to consider in determining lost earnings and apparently found it to be credible. The trial court thus did not err as a matter of law in denying the motion for the directed verdict on this issue.

{¶19} The second assignment of error is also overruled and the judgment of the trial court is affirmed.

Judgment affirmed.

WALTERS, J., concurs.

BRYANT, P.J., dissents.

BRYANT, P.J., dissenting.

{¶20} I dissent from the majority opinion for the following reasons. In this case, Smith received a default judgment.

{¶21} To prevail on a motion brought under Civ.R. 60(B), the movant must demonstrate that: (1) the party has a meritorious defense or claim to present if relief is granted; (2) the party is entitled 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 for 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.

{¶22} *GTE Automatic v. ARC Industries* (1976), 47 Ohio St.2d 146, 351 N.E.2d 113. Here, the trial court found that LMH presented a colorable defense to the complaint and that the motion for relief was timely filed. Thus, the only issue for review is whether LMH's neglect was excusable.

{¶23} “Fairness and justice are best served when a court disposes of a case on the merits.” *DeHart v. Aetna Life Ins. Co.* (1982), 69 Ohio St.2d 189, 193, 431 N.E.2d 644, 647. “Where timely relief is sought from a default judgment and the movant has a meritorious defense, doubt, if any, should be resolved in favor of the motion to set aside the judgment so that cases may be decided on their merits.” *Id.* at syllabus. “The concept of ‘excusable neglect’ must be construed in keeping with the proposition that Civ.R. 60(B)(1) is a remedial rule to be liberally construed. . . .” *Colley v. Bazell* (1980), 64 Ohio St.2d 243, 248, 416 N.E.2d 605, 610.

{¶24} The term “excusable neglect” is an elusive concept which has been difficult to define and to apply. Nevertheless, we have previously defined “excusable neglect” in the negative and have stated that the inaction of a defendant is not “excusable neglect” if it can be labeled as a “complete disregard for the judicial system.” * * * Although a movant is not required to support its motion with evidentiary materials, the movant must do more than make bare allegations that he or she is entitled to relief. * * * Thus, in order to convince the court that it is in the best interests of justice to set aside the judgment or to grant a hearing, the movant may decide to submit evidentiary materials in support of its motion.

{¶25} This is exactly what appellant did in this case. Rather than blankly assert that it was entitled to relief, appellant put forth evidence to substantiate its motion. Appellant’s counsel attached three separate affidavits * * * to attest to the fact that he had timely prepared an answer but that his secretary had inadvertently placed the pleadings back into the file drawer rather than mail them to the court for filing and to opposing counsel. * * * Appellant’s counsel did precisely what the rules require of him—through the submission of affidavits and accompanying exhibits, appellant alleged sufficient operative facts tending to show “excusable neglect.” Since appellant supported its motion with operative facts warranting relief, the trial court should have granted appellant’s motion for relief from judgment and abused its discretion in failing to do so.

{¶26} *Kay v. Marc Glassman, Inc.* (1996), 76 Ohio St.3d 18, 20-21, 665 N.E.2d 1102, 1104, (citations omitted).

{¶27} In this case, LMH submitted affidavits setting forth LMH's procedures for forwarding complaints to counsel. The affidavits also stated that a secretary had failed to follow the procedures and did not forward the complaint. The secretary admitted to this failure in her affidavit. Finally, the affidavits indicated the steps taken to correct the problem and assure that a similar mistake does not occur in the future. The failure of an employee to follow set procedures and forward a complaint to the proper party has been found to be excusable neglect. See *Perry v. Gen. Motors Corp.* (1996), 113 Ohio App.3d 318, 680 N.E.2d 1069, *Hopkins v. Quality Chevrolet, Inc.* (1992), 79 Ohio App.3d 578, 607 N.E.2d 914, *Sycamore Messenger, Inc. v. Cattle Barons* (1986), 31 Ohio App.3d 196, 509 N.E.2d 977, and *Kinter v. Giannaris* (Mar. 25, 1994), Geauga App. No. 93-G-1781. The evidence before the trial court indicates that the secretary previously had delayed sending complaints to counsel. However, there is no evidence in the record to indicate that any prior default judgments against LMH exist. Based upon the rapid response to the default judgment, the evidence proffered to substantiate its claim of excusable neglect, and the steps taken to prohibit the problem from repeating itself in the future, the trial court erred in finding a "complete disregard of the judicial system." Therefore, I would sustain the first assignment of error.

{¶28} The second assignment of error alleges that the trial court should have granted LMH's motion for a directed verdict on the issue of lost profits. LMH claims that the lost profits were too speculative to permit recovery.

{¶29} The general rule for the recovery of compensatory damages is that injury and the resulting damage must be shown with certainty and not be left to conjecture and speculation. It is uncertainty as to the *existence* of damages, not uncertainty as to the amount, which precludes recovery.

{¶30} *Pietz v. Toledo Trust Co.* (1989), 63 Ohio App.3d 17, 22, 577 N.E.2d 1118, 1123 (citations omitted).

{¶31} This court has addressed the issue of proof required to receive lost profits previously.

{¶32} Proof of lost profits must be reasonably certain and may not be speculative. Where conclusory evidence of lost profits is presented, without supporting information explaining how the profits were calculated, there is insufficient evidence of such lost profits.

{¶33} * *

{¶34} More is required of the plaintiff than merely his assertion (either directly or through an expert witness) that he would have made a particular amount in profits. Unless the figure is substantiated by calculations based on facts available or in evidence, the courts will properly reject it as speculative and uncertain.

{¶35} *Endersby v. Schneppe* (1991), 73 Ohio App.3d 212, 216-17, 596 N.E.2d 1081, 1084. Here, the only evidence of the lost profits was Smith's testimony that she might have earned between \$2,500 and \$3,000 per year in profits. There was no documentary evidence admitted to verify this information. Without more than Smith's assertion as to the amounts of profits, regardless of how minimal, they are speculative and the court should have rejected it. The second assignment of error should be sustained. For these reasons, I would reverse the judgment of the trial court.

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