



Redfield v. Mt. Sinai Medical Center

1992 | Cited 0 times | Ohio Court of Appeals | March 5, 1992

JOURNAL ENTRY AND OPINION

JUDGMENT: AFFIRMED.

The consolidated appeals sub judice arise from two related actions with lengthy procedural histories. These cases have twice been dismissed by the Eighth District Court of Appeals for failure to grant this Court jurisdiction in compliance with Civ. R. 54(B). On November 19, 1991 this Court granted defendants' motion to reinstate these appeals after the trial court on November 6, 1991 clarified its prior orders to dispose of all the parties and all the claims in the two cases consolidated in the trial court.

The appeals involve two related cases filed after the death of Yvonne Redfield ("decedent"); death occurred in the late stages of pregnancy at the Mt. Sinai Medical Center ("Mt. Sinai"). The same five defendants, viz., Mt. Sinai and Doctors Miller, a hematologist, Kiwi, Utian and Goldfarb, all obstetricians/gynecologists, were named in each case.

Case No. CV-137534 was filed by Bernard Redfield individually and in the alleged capacity as administrator of decedent's estate on October 8, 1987. Plaintiffs maintain this is a medical malpractice action (the "Medical Malpractice Case"). The appeal from this case has been designated Court of Appeals Case Number 59292.

Case No. CV-148302 was subsequently filed on April 18, 1988, exactly two years after decedent's death, by Bernard Redfield individually and in the alleged capacity as administrator of decedent's estate, with Malcolm Redfield, decedent's son, and Norman Jackson, Sr., decedent's father, as additional plaintiffs. Plaintiffs maintain this is a wrongful death action (the "Wrongful Death Case"). The appeal from this case has been designated Court of Appeals Case Number 59275.

The Wrongful Death Case was not originally assigned to the same judge as the prior Medical Malpractice Case based on representations by plaintiffs' counsel in the designation and certification sheets filed with the Wrongful Death complaint that the action was not "related" to the prior Medical Malpractice Case pending against the same five defendants.

The five defendants failed to file timely answers in the Wrongful Death Case because they had received, and subsequently answered, an amended complaint in the Medical Malpractice Case containing essentially verbatim substantive allegations four days earlier.



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After plaintiffs made a motion for default judgment in the Wrongful Death Case, all five defendants sought leave to file and subsequently filed answers denying liability in the Wrongful Death Case. Defendants, thereafter, filed a joint motion to dismiss or strike the Wrongful Death complaint and for sanctions against plaintiffs' counsel, Robert O. Garnett, under Civ. R. 11.

At a hearing conducted by the trial court on this motion in the Wrongful Death Case, the trial court granted all five defendants leave to answer the Wrongful Death complaint, denied plaintiffs' motion for default judgment on the Wrongful Death complaint, imposed \$1,200 in attorneys fees as sanctions against plaintiffs' counsel, and ordered the Wrongful Death Case transferred and consolidated with the prior Medical Malpractice Case.

The docket sheets in each case indicate the actions were subsequently consolidated in the trial court. Plaintiffs filed motions for partial summary judgment in the trial court in both cases and each defendant filed cross-motions for summary judgment in both cases. Drs. Kiwi, Utian and Goldfarb also filed joint motions to dismiss the complaint against them in each case.

The trial court granted all five defendants' motions for summary judgment in the Wrongful Death Case in an order journalized January 16, 1990.¹ The trial court granted the motions to dismiss filed by Drs. Kiwi, Utian and Goldfarb in the consolidated Medical Malpractice Case in an order journalized the next day.²

This Eighth District Court of Appeals subsequently dismissed plaintiffs' appeal for lack of a final appealable order by written opinion dated October 31, 1991 since the Medical Malpractice Case was still pending against Mt. Sinai and Dr. Miller. Prior to the journalization of this decision in Court of Appeals Case Numbers 59275 and 59292, the trial court clarified its prior order granting "all defendant's motions for summary judgment" in the Wrongful Death Case and also granted summary judgment for all defendants in the consolidated Medical Malpractice Case, thereby rectifying the Civ. R. 54(B) issue and granting jurisdiction to this Court of Appeals.

This Court of Appeals then granted defendants' motion for reconsideration and reinstated the appeals on the premature notices of appeal and briefs previously filed raising seven assignments of error. App. R. 4(A). The Court shall address plaintiffs' fourth assignment of error first.

I.

Plaintiff's fourth assignment of error challenges the validity of various orders entered prior to the transfer and consolidation of the two actions as follows:

THE TRIAL JUDGE SHOULD HAVE TRANSFERRED THE CASE FOR CONSOLIDATION, AS SOON AS IT WAS DETERMINED THERE WAS A PENDING RELATED CASE.



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Plaintiffs' fourth assignment of error is without merit.

Plaintiffs argue the trial judge originally assigned the Wrongful Death Case improperly entered various orders prior to transferring the case to another judge for consolidation with the Medical Malpractice Case. Plaintiffs contend C.P. Sup. R. 4 mandates the trial judge transfer the case without ruling on defendant's pending motions upon finding the Wrongful Death Case was "related" to the prior Medical Malpractice Case.

C.P. Sup. R. 4 governs the assignment of actions to a trial judge after filing and provides in pertinent part as follows:

For the purpose of these rules, the individual assignment system is that system whereby, upon the filing in, or transfer to, a division of the court of a civil case, or upon arraignment in a criminal case, a case is immediately assigned by lot to a judge thereof, who thus becomes primarily responsible for the determination of every issue and proceeding in the case until its termination. Under such system, all preliminary matters, including requests for continuances, must be submitted for disposition to the judge to whom the case has been assigned, or if the assigned judge is unavailable, to the administrative judge. (Emphasis added.)

C.P. Loc. R. 15 likewise provides in pertinent part as follows:

(B) It shall be the duty of the assigned judge to handle all court activity, including motions, emergency matters, case management conferences, pretrials, trials, and any post trial matters associated with the cases assigned to the docket.

Plaintiffs' argument the judge originally assigned to a case is required to make all decisions arising in the case until the termination of the case would prevent the substitution of judges or the transfer of any case contrary to substantial authority. Moreover, neither rule mandates the originally assigned judge resolve a motion to transfer the case prior to motions for leave to file an answer or for sanctions pending at the same time. We note that plaintiffs raised no objection in the trial court to this issue and in addition Civ. R. 16 recognizes substantial discretion in the assigned judge over the scheduling and disposition of various pretrial matters in a case.

We find no abuse of discretion where the assigned judge conducts a hearing in a properly assigned case and elects to satisfy the docket in the case prior to transferring the case to another judge after finding it is related to another pending action. Plaintiffs' argument to the contrary is nothing more than a belated effort to obtain more favorable rulings on the motions and would require substantial duplication of judicial resources in practice and impair the timely and orderly resolution of related pending cases.

Accordingly, plaintiffs' fourth assignment of error is overruled.



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II.

Plaintiffs' first, second and third assignments of error relate to the trial court's failure to grant a default judgment in the Wrongful Death Case as follows:

I. WHERE A JUDGE MAKES A RULING BUT FAILS TO JOURNALIZE IT, SUCH RULING IS A NULLITY.

II. WHERE A PARTY FAILS TO PLEAD OR OTHERWISE DEFEND AS REQUIRED, THE OTHER PARTY IS ENTITLED TO A JUDGMENT BY DEFAULT.

III. DUE PROCESS IS NOT SERVED WHERE A JUDGE IGNORES THE PROVISION THAT EXCUSABLE NEGLIGENCE MUST (sic) BE BOTH RAISED BY MOTION AND DEMONSTRATED.

Plaintiffs' first, second and third assignments of error are without merit.

Plaintiffs contend the trial court improperly denied plaintiffs' motion for default judgment in the Wrongful Death Case since defendants did not sufficiently demonstrate excusable neglect to file their belated answers. Plaintiffs likewise complain the trial court did not properly journalize its rulings after conducting a hearing on the motions.

Defendants filed answers, motions for leave to file answers instant, motions to quash, motions to strike or dismiss the complaint and for sanctions together with briefs in opposition to plaintiffs' motion for default judgment. Defendants explained they failed to file timely answers in the Wrongful Death Case since they filed answers to an amended complaint with identical substantive allegations in the Medical Malpractice Case four days prior to the commencement of the Wrongful Death Case.

Defendants argued they erroneously concluded the Wrongful Death Case was the Medical Malpractice Case to which they had already filed an answer and pointed out that plaintiffs' did not serve copies of the Wrongful Death complaint to defendants' counsel although plaintiffs knew the same counsel defended them in the Medical Malpractice Case.

The record demonstrates the trial court denied plaintiffs' motion for default judgment after conducting a hearing by the following order journalized August 2, 1988:

Hearing originally set for August 4, 1988 at 8:30 a.m. on plaintiffs' motion for default judgment is hereby cancelled, vacated and held for naught.

The trial court likewise granted by written journal entry defendants' Mt. Sinai and Dr. Miller's motions to quash and for leave to file their answers instant the same day. Although the hearing transcript indicates the trial court granted Drs. Kiwi, Utian and Goldfarb leave to file their answers



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instantly, the record does not contain a similar written journal entry for these three doctors. However, the record reflects the intention of the trial court to authorize such action on behalf of Drs. Kiwi, Utian and Goldfarb. After these doctors filed their answers instantly plaintiffs filed no motion objecting to this procedure or raising this issue in the trial court, therefore, the objection is waived. *American Vineyard Co. v. Wine Group* (1984), 20 Ohio App. 3d 366, 369 ("An issue which is not raised in the trial court is not proper on appeal").

Civ. R. 55 governs default judgments and provides in pertinent part as follows:

(A) Entry of Judgment. When a party against whom a judgment for affirmative relief is sought has failed to plead or otherwise defend as provided by these rules, the party entitled to a judgment by default shall apply in writing or orally to the court therefor; but no judgment by default shall be entered against a minor or an incompetent person unless represented in the action by a guardian or other such representative who has appeared therein. If the party against whom judgment by default is sought has appeared in the action, he (or, appearing by representative, his representative) shall be served with written notice of the application for judgment at least seven days prior to the hearing on such application. If, in order to enable the court to enter judgment or to carry it into effect, it is necessary to take an account or to determine the amount of damages or to establish the truth of any averment by evidence or to make an investigation of any other matter, the court may conduct such hearings or order such references as it deems necessary and proper and shall when applicable accord a right of trial by jury to the parties.

Civ. R. 6 authorizes the extension of the answer date beyond the twenty-eight day deadline set forth in Civ. R. 12(A) and provides in pertinent part as follows:

(B) Time: Extension. When by these rules or by a notice given thereunder or by order of court an act is required or allowed to be done at or within a specified time, the court for cause shown may at any time in its discretion *** (2) upon motion made after the expiration of the specified period permit the act to be done where the failure to act was the result of excusable neglect; but it may not extend the time for taking any action under Rule 50(B), Rule 59(B), Rule 59(D), and Rule 60(B), except to the extent and under the conditions stated in them.

This Court has held the decision of a trial court to permit the filing of a belated answer and to deny a default judgment will not be reversed absent an abuse of discretion. *State, ex rel. Owens v. East Cleveland Municipal Court* (May 3, 1990), Cuyahoga App. No. 58466 unreported; *Fritts v. Entenmann's, Inc., et al.* (Oct. 27, 1988), Cuyahoga App. No. 54373, unreported; *Ritondaro v. Croasmun* (Nov. 3, 1983), Cuyahoga App. No. 46682, unreported (wrongful death action).

Plaintiffs have failed to demonstrate the trial court abused its discretion. The trial court conducted a hearing on defendants' motions to dismiss or strike the Wrongful Death complaint and for sanctions after defendants filed motions to file answers instantly. Although defendants Mt. Sinai and Dr.



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Miller did not specifically allege "excusable neglect" in failing to file timely answers, all defendants presented similar evidence at the hearing. Plaintiffs failed to object to the introduction of this evidence by Mt. Sinai and Dr. Miller at the trial court hearing and, therefore, waived any objection by failing to raise it in the trial court and are precluded from raising such objection for the first time on appeal. *American Vineyard Co. v. Wine Group*, supra.

Plaintiffs' claims that the trial court denied them due process was also waived by failing to raise the argument in the trial court. *State v. Awan* (1986), 22 Ohio St. 3d 120. We note even if plaintiffs had properly raised and preserved this claim, the trial court hearing complied with the requirements of due process. *Fritts v. Entenmann's, Inc.*, supra at 6 (failure to conduct hearing does not violate due process when defendants' motion presents sufficient evidence of excusable neglect); *Jenkins v. Clark* (1982), 7 Ohio App. 3d 93, 95.

Accordingly, plaintiffs' first, second and third assignments of error are overruled.

III.

Plaintiffs' fifth assignment of error challenges the propriety of sanctions imposed on their counsel as follows:

SANCTIONS RULE 11 MAY NOT BE IMPOSED WHERE THERE IS NO SHOWING THAT A CASE WAS IMPEDED IN ITS PROGRESS THROUGH THE COURT, OR WHERE THERE WAS ACTION CONTRARY TO A RULE OF COURT.

Plaintiffs' fifth assignment of error is without merit.

Plaintiffs contend the trial court improperly granted sanctions against their counsel, Robert O. Garnett, pursuant to Civ. R. 11 because plaintiffs properly filed two separate actions. See, *Sexton v. Packing Co.* (1974), 37 Ohio St. 2d 58. Defendants argue the trial court properly granted sanctions based on counsel's filing false and misleading case designation forms and an affidavit to conceal the filing of two identical cases against defendants based on the same events. Defendants cite the trial court's reasoning for granting the sanctions, illustrated by the following transcript excerpt:

In the instant case the Court finds that Robert O. Garnett wilfully signed the designation form accompanied by his complaint with the idea in mind to get a default judgment for four million dollars, which almost actually occurred, and misleading the Court into believing there was [sic] no other companion cases and that there have been no return of any answers or otherwise.

This Court lacks jurisdiction to consider the parties' respective arguments since plaintiffs' counsel failed to file a notice of appeal in his own name and plaintiffs have no standing to raise this issue for their counsel. *Parks v. Chessie System Railroad* (Sep. 9, 1991), Cuyahoga App. No. 59894, unreported.



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Accordingly, plaintiffs' fifth assignment of error is overruled.

IV.

Plaintiffs' sixth assignment of error challenges the granting of summary judgment against plaintiffs as follows:

WHETHER THERE EXISTED MATERIAL ISSUES OF FACT, AT THE TIME THE TRIAL COURT GRANTED APPELLEES MOTIONS FOR SUMMARY JUDGMENT.

Plaintiffs' sixth assignment of error is without merit.

Defendants filed their respective motions for summary judgment against plaintiffs based on affidavits from various doctors testifying defendants conformed to the applicable standards of care in their treatment of decedent. No claim was raised concerning decedent's unborn fetus. Plaintiffs filed a brief in opposition supported by reports from their medical expert Albin G. Goldstein, M.D., a rheumatologist. No affidavits or other sworn testimony was submitted along with plaintiffs' brief in opposition to defendants' motions for summary judgment.

Dr. Goldstein's first report stated no opinion concerning the cause of decedent's death and deferred criticism of any defendants. A supplemental report identified several "possible" breaches of proper medical standards and stated it was "quite possible that because of the breach of standards that the patient suffered from the effects of lupus and died in April of 1986." Neither of Dr. Goldstein's reports were made under oath or supported by affidavit in accordance with Civ R 56(C) and 56(E). *Rodger v. McDonald's Restaurants of Ohio, Inc.* (1982), 8 Ohio App. 3d 256.

Plaintiffs failed to meet their burden of demonstrating any genuine issue of material fact concerning defendants' alleged malpractice by expert testimony. *Hawkins v. St. Luke's Hospital, et al.* (June 13, 1991), Cuyahoga App. No. 60944, unreported; *Drawl v. Steffee* (June 13, 1991), Cuyahoga App. No. 58682, unreported. Neither of the Goldstein reports state with sufficient probability that decedent's death was the direct and proximate result of any of defendant's negligence. *D'Amico v. Hawwa* (Mar. 9, 1989), Cuyahoga App. Nos. 55053 and 55177, unreported; *Luci v. Martin* (June 8, 1989), Cuyahoga App. No. 55485, unreported. Therefore, plaintiffs' rebuttal material failed to comply with the requisite standard set forth in the caselaw as required by Civ. R. 56(C) and 56(E). *Rodger v. McDonald's Restaurants of Ohio, Inc.*, supra. Plaintiffs failed to produce expert medical testimony that decedent's death was more likely than not caused by defendants' negligence and statements of possibilities are insufficient to present a prima facie case of medical malpractice thereby failing to raise a genuine issue of material fact when construed most strongly in plaintiffs' favor. *D'Amico v. Hawwa*, supra; *Luci v. Martin*, supra.

Accordingly, defendants were entitled to summary judgment as a matter of law and plaintiffs' sixth



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assignment of error is overruled.

V.

Plaintiffs' seventh assignment of error follows:

WHETHER IT IS APPROPRIATE FOR A TRIAL JUDGE TO DISMISS AN ACTION WITH PREJUDICE, WITHOUT GIVING A REASON THEREFOR.

Plaintiffs' seventh assignment of error is without merit.

Plaintiffs argue the trial court improperly dismissed the Medical Malpractice Case against defendants Kiwi, Utian and Goldfarb. However, as noted above, the trial court subsequently clarified its prior order granting "all defendants' motions for summary judgment" to include these claims on November 6, 1991. Consequently, error, if any, in dismissing the Medical Malpractice Case against these defendants was harmless since the trial court properly granted summary judgment at a later date on all these claims.

Accordingly, plaintiffs' seventh assignment of error is overruled.

Judgment affirmed.

It is ordered that appellee(s) recover of appellant(s) costs herein taxed.

The Court finds there were reasonable grounds for this appeal.

It is ordered that a special mandate issue out of this Court directing the Common Pleas Court to carry this judgment into execution.

A certified copy of this entry shall constitute the mandate pursuant to Rule 27 of the Rules of Appellate Procedure.

FRANCIS E. SWEENEY, P.J., and PATTON, J., CONCUR

JUDGE BLANCHE KRUPANSKY

1. The order in the Wrongful Death Case reads, in pertinent part, as follows: "Case No. 148302. Redfield v. Mt. Sinai. All defendants mtns. for summary judgment granted. Final" (Emphasis in original.)

2. The order in the Medical Malpractice Case reads, in pertinent part, as follows: "Case No. 137534. Bernard Redfield, et al. v. Mt. Sinai Medical Center. Motion of Defendants Kiwi, Utian and Goldfarb to Dismiss Complaint is granted."

