

**IN THE COURT OF APPEALS  
ELEVENTH APPELLATE DISTRICT  
LAKE COUNTY, OHIO**

CARLA SHELDON,	:	<b>O P I N I O N</b>
Plaintiff-Appellant,	:	
- vs -	:	<b>CASE NO. 2011-L-079</b>
JULIE BILLINGS,	:	
Defendant-Appellee.	:	

Civil Appeal from the Lake County Court of Common Pleas, Juvenile Division, Case No. 2010 AB 1188.

Judgment: Affirmed.

*Jay F. Crook*, Shryock, Crook & Associates, LLP, 30601 Euclid Avenue, Wickliffe, OH 44092 (For Plaintiff-Appellant).

*Cory R. Hinton*, Rand, Gurley & Hanahan, LLC, 8570 Mentor Avenue, Mentor, OH 44094 (For Defendant-Appellee).

*Brett J. Plassard*, 1875 West Jackson Street, Painesville, OH 44077 (Guardian ad litem).

DIANE V. GRENDELL, J.

{¶1} Plaintiff-appellant, Carla Sheldon, appeals the Judgment Entry of the Lake County Court of Common Pleas, Juvenile Division, denying her Motion for Reconsideration and Supplemental Motion to Vacate Judgment under Civil Rule 60(B). The merits of the underlying case were tried before a magistrate. Sheldon filed objections to the Magistrate Decision, but did not file a hearing transcript in support thereof. After the juvenile court adopted the Magistrate Decision, Sheldon moved to

have judgment vacated, asserting that the failure to file a transcript was the result of inadvertence and financial hardship. The issue to be determined by this court is whether a trial court abuses its discretion in denying a motion to vacate, where the movant claims that the failure to file a transcript in support of objections to a magistrate's decision is due to inadvertence and financial hardship. For the following reasons, we affirm the decision of the court below.

{¶2} On July 12, 2010, Sheldon filed a Complaint for Abuse, Dependency and Legal Custody against Julie Billings in the Lake County Juvenile Court. Sheldon alleged that she is the paternal grandmother of P.S. (d.o.b. 8/23/05) and D.S. (d.o.b. 4/14/04), and that Billings is the mother of the minor children. Sheldon further alleged that the minor children were dependent and abused, based on Billings' misuse of their medication and inappropriate sexual contact with them. Sheldon asked the court to grant her legal custody of the minor children.

{¶3} On August 25, 2010, an Amended Complaint was filed.

{¶4} On September 27, November 2, and November 9, 2010, the matter was tried before a juvenile court magistrate.

{¶5} On December 15, 2010, a Magistrate Decision was issued, recommending "[t]hat the complaint be dismissed as it has not been proven by clear and convincing evidence."

{¶6} On December 20, 2010, Sheldon filed Objections to Magistrate's Decision, raising eleven objections regarding the magistrate's consideration of the evidence presented at trial. The Objections further stated: "Plaintiff has requested the preparation of a transcript of the proceedings be prepared. As such, Plaintiff requests that she be

permitted to amend so as to modify these objections or present additional objections upon review of the transcript.”

{¶7} On January 27, 2011, the juvenile court issued a Judgment Entry, overruling Sheldon’s objections. The court noted “that Juvenile Rule 40 / Civil Rule 53 requires that [a] transcript be filed within thirty (30) days after filing objections unless the Court extends the time in writing for preparation of the transcript or other good cause.” The court found “that the thirty (30) days within which to file the transcript has expired, a transcript has not been filed and no extension to file the transcript has been requested.”

{¶8} On the same day, in a separate Judgment Entry, the juvenile court adopted the Magistrate Decision and dismissed the Complaint.

{¶9} On February 22, 2011, Sheldon filed a Motion for Reconsideration, on the grounds that, “while the transcript was requested at the time of filing [the objections], Plaintiff required additional time to produce the estimated transcript cost of \$2,400.00, [d]ue in full before work could begin.”

{¶10} On March 16, 2011, Sheldon filed a transcript of the trial proceedings in the juvenile court.

{¶11} On May 11, 2011, Sheldon filed a Waiver of Oral Argument and Supplemental Motion to Vacate Judgment under Civil Rule 60(B). In this motion, Sheldon clarified the bases for vacating the January 27, 2011 Judgment Entry as her “inability to procure the required funds to pay for the transcript as requested until February 17, 2011,” and “attorney error, as counsel for Plaintiff failed to inform the court of the need for payment in full and to request an extension of time to file the transcript.”

Additionally, Sheldon argued that, since the minor children were in Billings' custody, the potential of unfair prejudice to her as a result of the delay was "de minim[i]s."<sup>1</sup>

{¶12} On May 19, 2011, the juvenile court issued a Judgment Entry, denying Sheldon's Motion for Reconsideration and Supplemental Motion to Vacate.

{¶13} On June 20, 2011, Sheldon filed her Notice of Appeal. On appeal, Sheldon raises the following assignment of error:

{¶14} "[1.] The trial court committed prejudicial error and abused its discretion in denying Plaintiff-Appellant's Motion for Reconsideration and Supplemental Motion to Vacate Judgment Under Rule 60(B) regarding the judgment entry of January 27, 2011."

{¶15} Civil Rule 60(B) provides as follows:

{¶16} On motion and upon such terms as are just, the court may relieve a party or his legal representative from a final judgment, order or proceeding for the following reasons: (1) mistake, inadvertence, surprise or excusable neglect; (2) newly discovered evidence which by due diligence could not have been discovered in time to move for a new trial under Rule 59(B); (3) fraud (whether heretofore denominated intrinsic or extrinsic), misrepresentation or other misconduct of an adverse party; (4) the judgment has been satisfied, released or discharged, or a prior judgment upon which it is based has been reversed or otherwise vacated, or it is no longer equitable that the judgment should have prospective application; or (5) any other reason justifying relief from the judgment. The motion shall be made within a reasonable time, and for reasons (1), (2) and (3) not more than one year after the judgment, order or proceeding was entered or taken.

{¶17} "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

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1. Sheldon, who lives in Bluffton, Ohio, filed her Complaint while the minor children, who reside in Texas, were in her custody for summer visitation. Sheldon did not return the children to Billings at the end of her

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.” *GTE Automatic Elec., Inc. v. ARC*, 47 Ohio St.2d 146, 351 N.E.2d 113 (1976), paragraph two of the syllabus.

{¶18} The decision to grant or deny a Civ.R. 60(B) motion is entrusted to the sound discretion of the trial court. *In re Whitman*, 81 Ohio St.3d 239, 242, 690 N.E.2d 535 (1998), citing *Griffey v. Rajan*, 33 Ohio St.3d 75, 77, 514 N.E.2d 1122 (1987).

{¶19} The existence of a meritorious defense and a timely-filed request for relief do not, by themselves, warrant the granting of relief. Rather, “the movant must demonstrate that he is entitled to relief under one of the grounds stated in Civ.[R.] 60(B)(1) through (5).” *GTE* at 151. Our analysis will focus on whether Sheldon satisfied one of the grounds set forth in Civ.R. 60(B)(1) through (5).

{¶20} Sheldon argues that the failure to timely file a transcript of the proceedings before the magistrate constitutes “excusable neglect,” under Civ.R. 60(B)(1) (“mistake, inadvertence, surprise or excusable neglect”). The following was contained in an affidavit, sworn to by Sheldon’s trial counsel and attached to her Motion for Reconsideration:

{¶21} Susan Goodell required a payment of two thousand four hundred dollars in advance of commencement of work due to the large size of the transcript and expected labor costs. Affiant informed his client of this, and was told that funds would be procured, but that they would need to be removed from a 401(K) account.

{¶22} \* \* Affiant spoke several times in between the filing of the objection and the expiration of the time to file the transcript, at which time he was told the funds had been requested and would be made available upon receipt.

{¶23} \* \* Affiant receive[d] the funds via wire transfer on February 17, 2011. Payment was made to Susan Goodell on February 18, 2011, at

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visitation, in July 2010. In March 2011, Billings obtained a Writ of Habeas Corpus for the return of the children from the Juvenile Division of the Hancock County Court of Common Pleas, Case No. 21140065.

which time Affiant was provided a letter stating that March 15, 2011 would be the expected completion date.

{¶24} \* \* [T]he failure to file a request for extension of time in which to file the transcript was due to an oversight of Affiant, and the delay in filing the motion for reconsideration of the January 27, 2011 Judgment Entry was based upon the need to ensure payment for the transcript could be made and a completion date could be provided to the Court.

{¶25} “[T]he 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, while bearing in mind that Civ. R. 60(B) constitutes an attempt to ‘strike a proper balance between the conflicting principles that litigation must be brought to an end and justice should be done.’” *Colley v. Bazell*, 64 Ohio St.2d 243, 248, 416 N.E.2d 605 (1980), citing 11 Wright & Miller, *Federal Practice & Procedure*, Section 2851, at 140, quoted in *Doddridge v. Fitzpatrick*, 53 Ohio St.2d 9, 12, 371 N.E.2d 214 (1978). “Where the movant alleges inadvertence and excusable neglect as grounds for relief from judgment under Civ.R. 60(B)(1), but does not set forth any operative facts to assist the trial court in determining whether such grounds exist, the court does not abuse its discretion in denying the motion for relief from judgment.” *Rose Chevrolet, Inc. v. Adams*, 36 Ohio St.3d 17, 520 N.E.2d 564 (1988), syllabus. “A mere allegation that the movant’s failure to file a timely answer was due to ‘excusable neglect and inadvertence,’ without any elucidation, cannot be expected to warrant relief.” *Id.* at 21.

{¶26} In the present case, Sheldon has failed to support the bare assertion that the failure to request an extension of time “was due to an oversight” with sufficient operative facts to render the juvenile court’s judgment an abuse of its discretion. This has been the consistent conclusion of this court when presented with similar fact patterns. *Qualchoice, Inc. v. Brennan*, 11th Dist. No. 2008-L-143, 2009-Ohio-2533, ¶ 14 (“[i]n the absence of any operative facts explaining this failure [to file an answer],

such neglect is not excusable”); *Sutton v. Kim*, 11th Dist. No. 2004-T-0061, 2005-Ohio-5866, ¶ 15 (“[t]he failure to file a response to a motion for summary judgment, standing alone, does not amount to excusable neglect”); *Gregory v. Abdul-Aal*, 11th Dist. No. 2002-T-0176, 2004-Ohio-1703, ¶ 23 (the movant’s claims that “she was entitled to relief due to the unavailability of various discovery materials,” and “that she neglected to request an extension of time to oppose the motions for summary judgment because of ‘ongoing discovery and discussions with defense counsel’” do not demonstrate excusable neglect).

{¶27} The cases cited by Sheldon in support of her argument are factually distinguishable. In *McFredericks, Inc. v. Strouse*, 5th Dist. No. 09COA014, 2009-Ohio-6253, the court of appeals stated that “[e]xcusable neglect implies unusual or special circumstances.” The court found that the circumstances alleged in the movant’s affidavit, such as a prolonged absence from the jurisdiction and failure to receive mail due to domestic issues, satisfied this requirement. *Id.* at ¶ 24. In the present case, in contrast, Sheldon has provided no explanation for the failure to request an extension of time beyond mere “oversight.” *Compare Griffey*, 33 Ohio St.3d at 79, 514 N.E.2d 1122 (the claim that the failure to respond was due to a “breakdown in routine channels of communication \* \* \* is more an admission of neglect than an excuse for it”).

{¶28} Sheldon also cites *Kaur v. Bharmota*, 10th Dist. No. 05AP-1333, 2006-Ohio-5782, in which the court of appeals reversed a decision to adopt a magistrate’s decision where objections were not timely filed. *Kaur*, however, is wholly inapposite in that the appellant therein filed a timely motion, pursuant to Civ.R. 6(B), for an extension of time to file objections. *Id.* at ¶ 10. Thus, the appellant in *Kaur* was directly appealing the trial court’s judgment and did not have to seek relief through a Civ.R. 60(B) motion.

{¶29} Moreover, Shledon’s claim that she was unable to obtain the funds to pay for the transcript within the thirty-day period does not constitute excusable neglect. The case law is clear that when a movant is unable to procure a transcript within the required time, it is incumbent upon the party to seek an extension of time. *Ludlow v. Ludlow*, 11th Dist. No. 2006-G-2686, 2006-Ohio-6864, ¶ 25 (it was not an abuse of discretion to deny a motion for relief from judgment where the movant “fail[ed] to file the transcripts or a request for an extension of time to do so even following the trial court’s initial decision to adopt the magistrate’s ruling”); *Purdy v. Purdy*, 12th Dist. No. CA2002-11-089, 2003-Ohio-7214, ¶ 12 (it was not an abuse of discretion to deny a motion for relief from judgment where the movant “did not provide the court with a transcript within the 30-day period,” and did not file “[a] motion for extension of time to file a transcript \* \* \* until \* \* \* more than 60 days after [the movant] filed objections to the magistrate’s decision and after the domestic court had overruled the objections”).

{¶30} Finally we note that Civ.R. 53(D)(3)(b)(iii) provides that objections to a magistrate’s factual findings may be supported by “an affidavit of that evidence if a transcript is not available.” It has been held that, where a transcript is unavailable due to a party’s indigency, an affidavit of the evidence may be used in lieu of a transcript. *Gill v. Grafton Corr. Inst.*, 10th Dist. No. 09AP-1019, 2010-Ohio-2977, ¶ 13.

{¶31} Sheldon also claims that she is entitled to relief from judgment under Civ.R. 60(B)(5) (“any other reason justifying relief from the judgment”), described as a “catch-all provision reflecting the inherent power of a court to relieve a person from the unjust operation of a judgment.” *Caruso-Ciresi, Inc. v. Lohman*, 5 Ohio St.3d 64, 448 N.E.2d 1365 (1983), paragraph one of the syllabus.

{¶32} Sheldon argues that “the equities” of the present case favor the granting of her Motion, in that the minor children have been returned to Billings’ custody, the person whom they accused in open court of sexual molestation. We disagree.

{¶33} While acknowledging the severity of the accusations made against Billings, the record before this court demonstrates that these accusations have been thoroughly investigated and litigated. The magistrate noted that Sheldon had previously “reported to several children protective services agencies and the Mentor Police Department that [Billings] had sexually abused the boys.” The matter was investigated by Detective Colleen Petro of the Mentor Police Department, who ultimately “closed the case for lack of evidence” and testified in the current proceedings. Additionally, there was evidence that children services in Texas, where Billings and the children reside, has been involved with the family and “no disclosures of sexual abuse were ever made.”

{¶34} Moreover, the magistrate made extensive findings of fact in the present case. Sheldon’s objections did not challenge any of the specific factual findings made by the magistrate, but rather focused on the weight given to particular evidence, the conclusions as to whether certain testimony was credible, the competency of certain witnesses, and the admissibility of certain evidence. Accordingly, there was a strong factual basis on which the trial court could, and did, conduct its independent review of the matter before adopting the Magistrate Decision.

{¶35} Contrary to Sheldon’s position, this is not a case where the only equity favoring the denial of her Motion is finality. There are also issues of fairness to Billings and due process of law, whereby Sheldon should be bound by the same rules of procedure that apply to other litigants. As the Ohio Supreme Court has observed: “However hurried a court may be in its efforts to reach the merits of a controversy, the

integrity of procedural rules is dependent upon consistent enforcement because the only fair and reasonable alternative thereto is complete abandonment.” *Miller v. Lint*, 62 Ohio St.2d 209, 215, 404 N.E.2d 752 (1980).

{¶36} The sole assignment of error is without merit.

{¶37} For the foregoing reasons, the judgment of the Lake County Court of Common Pleas, Juvenile Division, denying Sheldon’s Motion for Reconsideration and Supplemental Motion to Vacate Judgment, is affirmed. Costs to be taxed against appellant.

CYNTHIA WESTCOTT RICE, J.,

MARY JANE TRAPP, J.,

concur.