

**IN THE COURT OF APPEALS
FIRST APPELLATE DISTRICT OF OHIO
HAMILTON COUNTY, OHIO**

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| JEANNE KINGREY, Individually and as Administrator of the Estate of William E. Kingrey, | : | APPEAL NO. C-140308 TRIAL NO. A-1107153 |
| Plaintiff-Appellant, | : | |
| vs. | : | <i>OPINION.</i> |
| DUKE ENERGY CORP., | : | |
| Defendant-Appellee, | : | |
| and | : | |
| CSX TRANSPORTATION, INC., | : | |
| and | : | |
| DAVID L. ROBINSON, | : | |
| Defendants. | : | |

Civil Appeal From: Hamilton County Court of Common Pleas

Judgment Appealed From Is: Affirmed

Date of Judgment Entry on Appeal: February 11, 2015

Provost Umphrey Law Firm, LLP, Joe Fisher, II, Pomerantz & Corsby Co. LPA and David I. Pomerantz, for Plaintiff-Appellant,

Reminger Co., LPA, and Patrick Kasson, for Defendant-Appellee.

Please note: this case has been removed from the accelerated calendar.

FISCHER, Judge.

{¶1} Plaintiff-appellant Jennifer Kingrey appeals the decision of the trial court denying her motion for relief from a judgment entered in favor of defendant-appellee Duke Energy Corp. (“Duke”). The trial court entered summary judgment in favor of Duke after Duke filed a motion for summary judgment as to all of plaintiff’s claims against it, and plaintiff failed to respond to that motion. Because plaintiff did not show that her failure to respond to Duke’s motion was the result of excusable neglect, we determine that the trial court did not abuse its discretion in denying plaintiff’s Civ.R. 60(B) motion. We, therefore, affirm the judgment of the trial court.

{¶2} Plaintiff filed this wrongful-death action in her capacity as the administrator of the estate of her late husband, William Kingrey, and in her individual capacity, after a train operated by defendant CSX Transportation, Inc., (“CSX”) struck and killed William. At the time of his death, William had been working for Asplundh Tree Expert Company, a subcontractor of Duke, and William had been walking along active train tracks to access a job site when he had been hit. Plaintiff filed suit against Duke, CSX, and defendant David Robinson. Two attorneys represented plaintiff in her suit: (1) a local counsel admitted to practice in Ohio, and (2) a Texas lawyer admitted pro hac vice. Both attorneys’ signatures appear on the amended complaint filed with the trial court.

{¶3} Plaintiff voluntarily dismissed her claims against CSX and Robinson, leaving only her claims against Duke. On December 13, 2013, Duke filed a motion for summary judgment asserting, in general, that it could not be liable in negligence for William’s death because William had been an employee of Duke’s subcontractor, and a general contractor such as Duke could only be liable for the injury of a

subcontractor's employee if the general contractor actively participated in the activity that led to the employee's injury. Duke's counsel attached a certificate of service to the summary-judgment motion indicating that Duke's counsel served the motion on both of plaintiff's attorneys by email at their separate email addresses on December 13.

{¶4} Under the local rules of the trial court, plaintiff had ten days within which to file a memorandum in opposition. *See* Loc.R. 14(B) of the Hamilton County Court of Common Pleas. Plaintiff, however, failed to file a response, and on January 8, 2014, the trial court entered summary judgment in favor of Duke on plaintiff's complaint.

{¶5} On February 6, 2014, plaintiff filed a Civ.R. 60(B) motion requesting relief from the trial court's judgment. In support of her motion, plaintiff relied on the affidavit of her Texas attorney, who admitted that he had received Duke's motion by email. The Texas attorney averred that his administrative assistant had opened the email, but "through an intra-office mistake," the filing had not been brought to his attention. Plaintiff asserted in her motion that her Ohio lawyer never received service; however, plaintiff did not offer any facts or evidence to support this assertion.

{¶6} Duke filed a memorandum in opposition to plaintiff's Civ.R. 60(B) motion, and attached a copy of the December 13 email sent from Duke's counsel to plaintiff's counsels, which contained the summary-judgment motion. Duke also attached an affidavit from its attorney's information-technology director, who averred that "[w]hen an e-mail is sent to multiple addressees, the fact that at least one addressee received the e-mail, combined with verification that the Sent Item in

the sent items folder lists all of the recipients, is conclusive proof that the e-mail was sent out from the sender's e-mail account at that particular date and time.”

{¶7} The trial court denied plaintiff's Civ.R. 60(B) motion, finding that plaintiff had not shown mistake, inadvertence, surprise, or excusable neglect under Civ.R. 60(B)(1). This appeal ensued.

{¶8} In a single assignment of error, plaintiff appeals the trial court's denial of her Civ.R. 60(B) motion.

{¶9} A party moving for relief from judgment under Civ.R. 60(B) must demonstrate that (1) it has a meritorious claim or defense to present if relief is granted, (2) it is entitled to relief under one of the grounds stated in Civ.R. 60(B), and (3) the motion is timely. *GTE Automatic Elec., Inc. v. ARC Industries, Inc.*, 47 Ohio St.2d 146, 351 N.E.2d 113 (1976), paragraph two of the syllabus. The movant must submit materials showing the existence of “ ‘operative facts’ and not mere general allegations.” *Poulos v. State Auto. Mut. Ins. Co.*, 1st Dist. Hamilton No. C-020226, 2003-Ohio-2899, ¶ 10, citing *Miami Sys. Corp. v. Dry Cleaning Computer Sys., Inc.*, 90 Ohio App.3d 181, 628 N.E.2d 122 (1st Dist.1993); *Kay v. Marc Glassman, Inc.*, 76 Ohio St.3d 18, 20, 665 N.E.2d 1102 (1996) (the movant must assert more than bare allegations to succeed under Civ.R. 60(B)). An appellate court reviews a trial court's decision on a Civ.R. 60(B) motion for an abuse of discretion. *Griffey v. Rajan*, 33 Ohio St.3d 75, 514 N.E.2d 1122 (1987).

{¶10} Plaintiff argues on appeal that her attorneys' failure to file a response to Duke's summary-judgment motion amounted to “excusable neglect” under Civ.R. 60(B)(1). As a general rule, neglect on the part of a party's attorney will be imputed to the party for purposes of Civ.R. 60(B)(1). *GTE Automatic Elec.* at 153. “Excusable

neglect” has no precise definition and has been described as “an elusive concept which has been difficult to define and to apply.” *Marc Glassman, Inc.* at 20. Where an attorney’s conduct amounts to a “complete disregard for the judicial system,” excusable neglect has not been shown. *Id.*

{¶11} In determining whether a party’s neglect is excusable, the Supreme Court has stated that an inquiring court must consider “all the surrounding facts and circumstances” presented to the court in a Civ.R. 60(B) motion. *Colley v. Bazell*, 64 Ohio St.2d 243, 249, 416 N.E.2d 605 (1980). Furthermore, although courts should decide matters on the merits and not on procedural grounds, Civ.R. 60(B)(1) cannot “serve as an emasculation of the pleading rules and time limits.” *Griffey* at 79.

{¶12} Plaintiff argues that the failure to respond to Duke’s summary-judgment motion after failing to discover one email does not amount to a “complete disregard for the judicial system.” *See GTE Automatic Elec.* at 153. But, plaintiff’s argument erroneously assumes that both of her attorneys failed to discover the service email. Plaintiff makes a general allegation in her Civ.R. 60(B) motion stating that her local counsel never received the email; however, a bare allegation cannot support a Civ.R. 60(B) motion. *See Poulos* at ¶ 10. Furthermore, the bare assertion that local counsel never received the email from Duke’s counsel fails to rebut the record evidence indicating that local counsel received proper service of the motion by email from Duke’s counsel on December 13, 2013. *See Civ.R. 5(B)(2)(f)* (service of pleading and other documents subsequent to the original complaint may be made by emailing a document to the attorney of record); *see also Cincinnati Ins. Co. v. Emge*, 124 Ohio App.3d 61, 63, 705 N.E.2d 408 (1st Dist.1997) (where a party follows the

civil rules for service, “courts presume that service is proper unless the defendant rebuts the presumption with sufficient evidence”).

{¶13} Therefore, where plaintiff has failed to set forth any operative facts showing why her Ohio attorney did not respond to Duke’s summary-judgment motion on her behalf, plaintiff has failed to show that her neglect constituted grounds for relief under Civ.R. 60(B)(1), and we cannot say that the trial court abused its discretion in denying plaintiff’s Civ.R. 60(B) motion. We overrule plaintiff’s assignment of error, and we affirm the judgment of the trial court.

Judgment affirmed.

HENDON, P.J., and CUNNINGHAM, J., concur.

Please note:

The court has recorded its own entry on the date of the release of this opinion.