

IN THE SUPREME COURT OF OHIO

Shirley J. Garmon, * Ohio Supreme Court No.: 07-0367
Appellant, * ON APPEAL FROM THE LUCAS COUNTY
COURT OF APPEALS SIXTH
vs. * APPELLATE DISTRICT
CASE NO.: L-06-1173
*
Anna M. Mills, et al., *
Appellees. *

**MEMORANDUM IN OPPOSITION TO JURISDICTION
OF DEFENDANT-APPELLEE STACIE KEATON GOODWIN**

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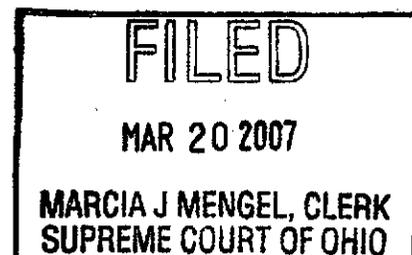


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THIS APPEAL PRESENTS NO SUBSTANTIAL CONSTITUTIONAL QUESTION. THE CASE IS NOT ONE OF PUBLIC OR GREAT GENERAL INTEREST. DISCRETIONARY APPEAL SHOULD BE DENIED.

This appeal does not present the proper vehicle to consider any of the issues of law asserted by Plaintiff-Appellant Gorman in her propositions of law. Each proposition of law asserted by Plaintiff-Appellant as a basis for her appeal to this Court addresses claimed errors of the Court of Common Pleas. None of the propositions of law assert any error by the Court of Appeals in its Decision and Judgment Entry of January 11, 2007.

In the Notice of Appeal filed by Plaintiff-Appellant she seeks discretionary review of the Decision and Judgment Entry of January 11, 2007 of the Sixth District Court of Appeals. That order denied reconsideration of the dismissal of her appeal in this case on November 27, 2007 due to failure of the Plaintiff-Appellant to comply with "several rules of appellate procedure." Decision and Judgment Entry of November 27, 2006, Sixth District Court of Appeals, p.4 The ruling by the Court of Appeals was not based upon a review of the underlying decisions of the trial court. Rather, it was based upon entirely independent appellate procedural grounds.

Under such circumstances the Memorandum in Support of Jurisdiction filed by Plaintiff-Appellant asserts no basis to reverse the decision of the Court of Appeals that is the subject of this appeal. For that reason alone Defendant-Appellee requests the Court to deny discretionary review of the decision of the Court of Appeals.

Even if there were a basis to consider the propositions of law asserted by Plaintiff-Appellant, the appeal should be denied. The trial court's judgment in favor of Defendant-Appellee Stacie Keaton Goodwin was issued pursuant to a verdict in her favor rendered in a jury trial. The sole claimed error with respect to the trial court's judgment in favor of Defendant-Appellee Goodwin is contained in proposition of law number 2. Plaintiff-Appellant claims that the trial court abused its discretion in denying a motion to continue the sixth trial date in a personal injury action that had

been pending in one form or another for over five years.

Consideration of such an issue presents no constitutional issues. It presents no issue of great public or great general interest. The trial court properly applied the step by step analysis for consideration of motions for continuances as outlined by the Supreme Court in the *State v. Unger* (1981), 67 Ohio St.2d 65. The required analysis for consideration of motions to continue trial dates is well settled in Ohio and does not require the consideration of this appeal.

The March 2006 trial date was the sixth assigned trial date in the case. The case had been pending in one form or another over five years. Plaintiff-Appellant, over the objection of Defendant-Appellee Goodwin, had been granted continuances as to the October 2005 and January 2006 assigned trial dates. The reasons asserted by Plaintiff-Appellant for a continuance of the March 2006 trial date concerned the claimed need for additional medical depositions. The trial court properly held that "...plaintiff was or should have been aware the need to depose and should have been able to depose these witnesses within the four months from October 2005 to March 6, 2006." Opinion and Judgment Entry of May 1, 2005 (Lucas County Common Pleas Ct.). The trial court was within its discretion under *State v. Unger* analysis to deny Plaintiff-Appellant her third straight request for a continuance.

Defendant-Appellee respectfully submits that the Supreme Court should deny consideration of this appeal.

RESPONSE OF DEFENDANT-APPELLEE STACIE KEATON GOODWIN TO PLAINTIFF-APPELLANT'S PROPOSITIONS OF LAW.

This appeal involves claims against three separate defendants on three independent claims. A brief summary of the case may assist the court in addressing propositions of law raised in the memorandum in support of jurisdiction.

The action against Defendant-Appellee Stacie Keaton Goodwin is a claim for personal injuries claimed to be caused by a motor vehicle collision on January 18, 1999. The case proceeded to jury trial on March 7, 2006. The jury returned a defense verdict in favor of Defendant-Appellee Stacie Keaton Goodwin. The judgment in favor of Goodwin became final on May 1, 2006. An appeal to the Sixth District Court of Appeals was dismissed by order of November 27, 2006 due to numerous failures to comply with the requirements of the Ohio Rules of Appellate Procedure and local appellate rules of the Sixth District Court of Appeals. (These failures are outlined in response to proposition of law No. 2.) A motion to reconsider the dismissal of the appeal was overruled by order of January 11, 2007. The appeal to this court is from the January 11, 2007, order denying reconsideration and reinstatement of the appeal.

The action against Defendant-Appellee Anna Mills was also an action for personal injuries arising out of a motor vehicle accident. The claim against Mills, however, arose out of a different motor vehicle accident. The Mills collision occurred on November 28, 1998. Mills was dismissed without prejudice by the trial court in an order of June 15, 2005. The dismissal was under Rule 41(B)(1) of the Ohio Rules of Civil Procedure for failure to prosecute.

Plaintiff-Appellant Shirley Garmon also asserted a claim against Defendant-Appellee State Farm Insurance Company ("State Farm"). The Plaintiff-Appellant alleged that State Farm improperly secured the execution of a release of all claims by her that released her personal injury claims against Defendant-Appellee Stacie Keaton Goodwin. Defendant-Appellee Stacie Keaton Goodwin, however, withdrew any claimed defenses based upon the release prior to trial. The action against Stacie Keaton Goodwin proceeded to trial on a bifurcated basis against Goodwin alone. Goodwin asserted no defense based upon the release at trial and made no comment to the jury with respect to the release.

RESPONSE TO PROPOSITION OF LAW NO.1

Proposition of Law No. 1 concerns alleged statements by State Farm to Plaintiff-Appellant to secure the execution of a release of all claims. The proposition of law does not relate to any claim against Defendant-Appellee Stacie Keaton Goodwin. Goodwin did not assert any defense at trial based upon the claimed release. Plaintiff-Appellant has never asserted that Stacie Keaton Goodwin played any role in securing execution of the release. As such, Proposition of Law No. 1 does not relate to any claim against Defendant-Appellee Stacie Keaton Goodwin.

RESPONSE TO PROPOSITION OF LAW NO. 2

THE ISSUE OF WHETHER OR NOT THE TRIAL COURT COMMITTED ERROR IN OVERRULING THE MOTION TO CONTINUE THE MARCH 6, 2006 TRIAL DATE IS NOT PROPERLY BEFORE THIS COURT. THIS APPEAL IS FROM A DENIAL OF A MOTION TO RECONSIDER DISMISSAL OF AN APPEAL BASED UPON FAILURE TO COMPLY WITH THE REQUIREMENTS OF THE OHIO RULES OF APPELLATE PROCEDURE AND THE LOCAL RULES OF THE SIXTH APPELLATE DISTRICT. WHETHER OR NOT THE TRIAL COURT SHOULD HAVE GRANTED A SIXTH CONTINUANCE OF THE TRIAL DATE IN A CASE PENDING IN ONE FORM OR ANOTHER FOR OVER FIVE YEARS IS NOT IN ISSUE ON THIS APPEAL.

The record on appeal was originally due on July 10, 2006. After the time for filing the record expired, Plaintiff-Appellant Gorman sought an extension, out of rule and in the wrong court, to extend the time to file the record in order to secure a trial transcript. Even after an extension was granted no trial transcript was ever filed with the court of appeals on the appeal.

On October 25, 2006, Defendant-Appellee Stacie Keaton Goodwin filed a motion to dismiss Garmon's appeal. The motion to dismiss was based upon the fact that the appeal involved an appeal from a verdict pursuant to a jury trial and that plaintiff had failed to file a transcript of trial proceedings within the time requirements under Rule 10(A) of the Ohio Rules of Appellate Procedure and, accordingly, had failed to meet her requirements under Rule 11© of the Ohio Rules of Appellate Procedure for the appeal. The Sixth District Court of Appeals sustained the motion to dismiss the appeal in a decision and judgment entry filed on November 27, 2006.

In its decision, the Court of Appeals recognized that the Plaintiff-Appellant had failed to comply with several rules of appellate procedure and, further, had not even filed a response to the motion to dismiss the appeal or show cause for a nearly four-month delay in filing a trial transcript:

In this appeal, appellant has not complied with several appellate rules of procedure: 1) appellant filed his motion for extension of time to file the record in the trial court on July 10, 2006, seven days after the date that the record was due to be filed in violation of 6th Dist.Co.App.R.2; 2) appellant obtained an extension in excess of the 30 days permitted by local rule and did nothing to correct the trial court error; 3) appellant did not file a transcript of proceedings or request a second extension of time on or before the October 31 date, even assuming that the date was valid; 4) appellant delayed the court's ruling on the motions to dismiss for several weeks by seeking a lengthy extension, then not filing the response, and 5) on November 6, appellant filed for an extension of time, out of rule, to file the transcript of proceedings on the grounds the "this Counsel on November 1, 2006, is sending the Court Reporter Wingate a bank check for \$1,000.00 for a deposit" so the court reporter will soon begin to prepare the transcript of proceedings.

Finding that appellant has not complied with the appellate rules of procedure and the 6th District Local Appellate Rules, has not filed a response to the motion to dismiss, and has not shown good cause for his nearly four month delay in filing the remaining part of the record, appellees' motions to dismiss appellant's appeal are found well-taken and granted. Accordingly, this appeal is dismissed.

Decision and judgment entry of the Sixth District Court of Appeals of November 27, 2006 at p.p. 4-5.

The Plaintiff-Appellant did not appeal the Decision and Judgment Entry of November 27, 2006 that dismissed her appeal.¹ She filed a motion to reinstate the appeal (which the Court of Appeals treated as a motion to reconsider under Rule 26 of the Ohio Rules of Appellate Procedure). The Court of Appeals overruled the motion to reconsider by order of January 11, 2007. It is the

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Rule II, Section 2(A)(1)(a) of the Rules of Practice of the Supreme Court of Ohio requires that an appeal from a court of appeals be instituted by the filing of a notice of appeal and memorandum in support of Jurisdiction within 45 days of the entry of judgment being appealed. Under Rule II, Section 2(A)(1)(b) the time period for filing of the notice of appeal and memorandum in support of jurisdiction is "mandatory" and the "failure to file within this time period shall divest the Supreme Court of jurisdiction to hear the appeal." Any notice of appeal and memorandum in support of jurisdiction to appeal the November 27, 2006 decision was required to be filed on or before Friday, January 12, 2007. Time to appeal the November 27, 2006 judgment has expired.

denial of the motion to reconsider on which jurisdiction for this appeal is sought.

In its opinion, the Court of Appeals recognized the limited review on motions to reconsider under Rule 26 of the Ohio Rules of Appellate Procedure. It cited *Matthews v. Matthews* (Franklin County 1981), 5 Ohio App.3d 140 in outlining the accepted standard for Rule 26 motions to reconsider:

As stated in *Matthews v. Matthews* (1981), 5 Ohio App.3d 140, paragraph two of the syllabus:

“The test generally applied upon the filing of a motion for reconsideration in the court of appeals is whether the motion calls to the attention of the court an obvious error in its decision or raises an issue for consideration that was either not considered at all or was not fully considered by the court when it should have been. (App R. 26, construed.)”

Decision and judgment entry of the 6th District Court of Appeals of January 11, 2007 p. 2.

The decision of the Sixth District Court of Appeals is in accord with a series of appellate decisions that have approved and followed the *Matthews v. Matthews* analysis of Rule 26 (A) motions to reconsider. Eg. *Guy v. Steubenville* (Jefferson County Court App. 2001), 2001 Ohio-3511; *State v. Owens* (Lake County 1996), 112 Ohio App.3d 334, *appeal denied*, 77 Ohio St.3d 1487.

The Sixth District Court of Appeals in this case applied the *Matthews v. Matthews* standard to the motion to reconsider and ruled that the Plaintiff-Appellant had failed to identify any “obvious error” in the motion to reconsider and failed to raise any issue that had not been “thoroughly considered” by the Court of Appeals in its ruling:

Upon due consideration of appellant’s motion to reinstate her appeal, this court finds that appellant has failed to call to our attention any “obvious error” in our decision, or raise any issues that have not been thoroughly considered by this court in the original decision. Accordingly, we find appellant’s motion to reinstate not well-taken and denied. Appellant’s motions for leave to file her brief are rendered moot.

Decision and judgment entry of the 6th District Court of Appeals of January 11, 2007 at p. 2.

The Notice of Appeal filed by Plaintiff-Appellant with the Supreme Court seeks an appeal with respect to the order of January 11, 2007 denying the motion to reconsider. Rule 26(A) of the Ohio Rules of Appellate Procedure allows for motions to reconsider. The rule expressly provides, however, that such motions do not extend the time for filing an appeal to the Supreme Court on the order for which reconsideration is sought: "The filing of an application for reconsideration shall not extend the time for filing a notice of appeal in the Supreme Court." Rule 26(A) of the Ohio Rules of Appellate Procedure. Time to appeal the November 27, 2006 judgment expired on January 12, 2007. See fn. 1.

Defendant-Appellee respectfully submits that there is no jurisdictional basis for the court to consider Plaintiff-Appellant's arguments on appeal. Proposition of Law No. 2 (the only proposition that pertains to Defendant-Appellee Stacie Keaton Goodwin) does not relate to any legal issue considered or argued to the Court of Appeals with respect to the motion to reconsider dismissal of the appeal. The Plaintiff-Appellant has not asserted any error relating to denial of the motion to reconsider dismissal of the appeal or for that matter any claimed error in the original order dismissing the appeal.

Under such circumstances the Memorandum in Support of Jurisdiction filed by Plaintiff-Appellant asserts no basis to reverse the decision of the Court of Appeals that is the subject of this appeal. In her jurisdictional memorandum Plaintiff-Appellee has not even addressed the requirements of the Ohio Rules of Appellate Procedure and whether the Court of Appeals properly ruled that she had violated numerous rules of appellate procedure, failed to properly show cause for the delay of transmission of the record, or otherwise met her duties in perfecting her appeal to the Court of Appeals.

THE TRIAL COURT PROPERLY OVERRULED A REQUEST FOR A SIXTH CONTINUANCE OF THE TRIAL DATE WHERE THE CLAIMED NEED FOR THE CONTINUANCE WAS TO PERMIT PLAINTIFF TO PROCEED WITH THE DEPOSITIONS OF TWO ADDITIONAL MEDICAL WITNESSES WHERE THE PLAINTIFF WAS OR SHOULD HAVE BEEN AWARE OF THE NEED TO DEPOSE THE WITNESSES AND SHOULD HAVE BEEN ABLE TO DEPOSE THEM WITHIN THE FOUR MONTHS BETWEEN THE PRIOR TRIAL DATE OF OCTOBER 2005 AND THE SIXTH SCHEDULED TRIAL DATE OF MARCH 6, 2006.

Even were the Court to determine there is a jurisdictional basis to consider proposition of law No. 2, there was no error in overruling the motion to continue the March 6, 2006 trial date. The case had been pending in one form or another for over five years. The claim is for personal injuries arising out of a January 18, 1999, motor vehicle collision. Plaintiff-Appellant originally filed suit against Defendant-Appellee Stacie Keaton Goodwin on November 19, 2000 in the case entitled *Shirley J. Garmon v. Anna M. Mills and Stacie Keaton*, Case No. CI2000-5080 (Lucas County C.P. Ct.). On September 4, 2002, Plaintiff-Appellant dismissed the original action with right to refile suit. Plaintiff-Appellant waited 364 days, or until September 3, 2003, to refile suit and commence this action. The March 6, 2006 trial date was the sixth trial date in the case. Previously, the trial court had granted Plaintiff-Appellant a continuance of the October 31, 2005 trial date over the objection of the Defendant-Appellee Goodwin. The January, 2006 trial date was also vacated and rescheduled to March 6, 2006 at Plaintiff-Appellant's request over the objection of Defendant-Appellee Stacie Keaton Goodwin.

The trial court overruled the motion to continue the March 6, 2006 trial date. Plaintiff-Appellant asserted that the continuance was necessary to secure additional medical depositions for trial. These were the depositions of a chiropractor that had been located in October 2005 but never scheduled and the deposition of Dr. Phillip Horowitz, M.D. The purpose of the deposition of Dr. Horowitz was to permit Plaintiff-Appellant to rebut testimony by her own primary care physician made in a trial deposition taken by Plaintiff-Appellant on October 24, 2005.

The Defendant-Appellee Goodwin objected to a sixth continuance of the trial date. At that point the case had been pending in one form or another for over five (5) years. The Plaintiff-Appellant had months to schedule the depositions before the March trial date and failed to do so. The trial court overruled the motion for a continuance and ordered the case to proceed to trial. Trial commenced on March 7, 2006. The jury returned a verdict for the defendant on March 8, 2006.

Defendant-Appellee Stacie Keaton Goodwin respectfully submits that the trial court properly exercised its discretion in denying the continuance. The court applied the step by step analysis promulgated in *State v. Unger* (1981), 67 Ohio St.2d 65 and *NIAM Investigations, Inc. v. Gilbert* (1999) 64 Ohio App.3d 125, 127 in overruling the motion:

In this case, the plaintiff argues that the Court erred in not continuing the March 6, 2006 trial date as requested by the plaintiff so she could depose two medical witnesses. The Court noted on March 6 that trial in this case had been re-scheduled on five previous dates (October 18, 2004, March 21, August 2, 2005 October 31, 2005 and January 30, 2006), and defense counsel had opposed the last two re-schedulings. The Court also noted then, and notes now, that the plaintiff had already deposed medical witnesses before the October 31, 2005 trial date. The Court finds that the plaintiff was or should have been aware the need to depose and should have been able to depose these witnesses within the four months from October 2005 to March 6, 2006. Accordingly, the Court finds this argument not well-taken. Decision and Judgment Entry of May 1, 2006 (denying motion for a new trial) at p. 3.

Judge Doneghy did not abuse his discretion in refusing the continuance. There had been other continuances by plaintiff, the case had been pending in one form or other for over 5 years, the reasons for the request were clearly avoidable and known well in advance of trial by the Plaintiff-Appellant.

RESPONSE TO PROPOSITION OF LAW NO. 3

Proposition of Law No. 3 relates solely to the claim against Defendant-Appellee Anna Mills and whether the trial court committed error in dismissing Plaintiff-Appellant's personal injury action against Mills on June 15, 2005 without prejudice for want of prosecution. The outcome on this issue has no bearing on the claim against Defendant-Appellee Stacie Keaton Garmon.

CONCLUSION

Defendant-Appellee Stacie Keaton Goodwin respectfully requests the Supreme Court to deny this appeal. Although the appeal seeks reversal of the Decision and Judgment Entry of the Sixth District Court of Appeals of January 11, 2007, Plaintiff-Appellant has asserted no error by the Court of Appeals with respect to its decision. The court of appeals decision rested on entirely procedural grounds that have not been addressed in the Memorandum in Support of Jurisdiction or in any proposition of law advanced by Plaintiff-Appellant. Accordingly this appeal does not present a basis for consideration of any legal issues advanced by Plaintiff-Appellant in this Court.

This case does not present constitutional issues or any issue of public or great general interest. The Court of Common Pleas and the Court of Appeals correctly applied longstanding law in rendering their decisions. Defendant-Appellee Stacie Keaton Goodwin request the Supreme Court to deny this appeal.

Respectfully submitted,

MANAHAN, PIETRYKOWSKI, DELANEY & WASIELEWSKI

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CERTIFICATE OF SERVICE

I hereby certify that a copy of the foregoing memorandum in opposition to jurisdiction of defendant-appellee Stacie Keaton Goodwin was sent this ____ day of March, 2007 to:

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