IN THE SUPREME COURT OF OHIO

STATE OF OHIO, EX REL. LUEKIUCIUS BROWN 1225 Westminster Drive Cincinnati, Ohio 45229	:	CASE NO. 09-0410
and	:	Original Action in Mandamus and/or Procedendo with Supporting Affidavit of Counsel
STATE OF OHIO, EX REL. SYLVESTER BROWN 1225 Westminster Drive Cincinnati, Ohio 45229	:	
Relators,	:	
v.	:	
FIRST DISTRICT COURT OF APPEALS HAMILTON COUNTY, OHIO 230 E. Ninth Street, 12th Fl. Cincinnati, Ohio 45202	:	
Respondent.	:	

COMPLAINT FOR A WRIT OF MANDAMUS/PROCEDENDO

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LUEKIUCIUS BROWN AND
SYLVESTER BROWN

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SUPREME COURT OF OHIO

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COMPLAINT FOR A WRIT OF MANDAMUS/PROCEDENDO

Relators, Luekiucius Brown and her husband, Sylvester Brown, petition this Court to issue a writ of mandamus and/or procedendo requiring the First District Court of Appeals, Hamilton County, Ohio, to reinstate their case, No. C070797. Additionally, relators are seeking an order requiring the First District Court of Appeals to rule on the assignment of error and issues presented as to the denial of relators' motion for partial summary judgment in Hamilton County Common Pleas Court, Case No. A0506331, which has yet to be ruled upon the merits in any appellate review, as is required. *Comer v. Risko,*

106 Ohio St.3d 185, at 186 ¶8, 2005-Ohio- 4559. Relators state that they have exhausted their ordinary appeal remedies warranting their seeking these extraordinary writ(s). The failure to grant these writs will effectively deny their constitutional and due process rights to adequate and fair appellate review guaranteed by the Ohio and Federal Constitutions, and by case law which mandates *de novo* appellate review of summary judgment decisions of trial courts. The Browns have been denied this review with no adequate remedy at law by this court by its denial of its jurisdiction in the normal appellate process (Case No. 2008-1905), and the appeals court's failure to rule on issues involving partial summary judgment, first on the basis that such an appeal was premature, and then later denying review on the basis that those issues were moot, have effectively denied the relators' of their appellate review rights.

Moreover, the trial court used an erroneous basis to dismiss relators' case with prejudice, and erroneously also mistook his authority. These actions, recognized by the appeals court, required that court to overturn the dismissal of relators' case. *State v. Zukowski*, 10th Dist. No. 06AP-46, 2006-Ohio-5299, at ¶9; also see *Oakbrook Realty Corp. v. Blout* (1988), 48 Ohio App.3d 69, 71, 548 N.E.2d 305, Civ. R. 41(A)(1)(a), *Olymk v. Scoles*, 114 Ohio St.3d 56, 2007-Ohio-2878, 868 N.E.2d 254. Because of the appeals court's failure to do so, and the Ohio Supreme Court's denial to accept this case on ordinary jurisdictional grounds, the relators are seeking extraordinary remedy. By the Ohio Supreme Court's interpretation as to the application of the double-dismissal rule in *Olymk v. Scoles, id.*, the relators' are claiming, through this complaint, that there case should be reinstated, and

should never have been dismissed..

Relators' complaint and request for these extraordinary and original writs by this Court are supported by the dissenting judge, when, in commenting on their appeal in the underlying case, wrote:

> "Cases should proceed on their merits, not be dismissed in error. The trial court used the wrong law thrice: (1) holding that there was no discretion to continue, (2) applying the double-dismissal rule, and (3) dismissing with prejudice. All three were error, and any one requires reversal.
>
> The majority's holding is the 'type of result that causes laymen to scratch their heads and roll their eyes in bewilderment.'"[1]

In further support of their complaint, relators' set forth the following facts:

JURISDICTION

1. This action is brought pursuant to R.C. §2731. This Court has jurisdiction pursuant to Article IV, §2(B)(1)(b) and (e), and Article I, §16 of the Ohio Constitution, and is being filed pursuant to Rule X of the Rules of Practice of the Ohio Supreme Court. This complaint also raises issues involving the authority and assignment of visiting judges, Article IV, §06(C) of the Ohio Constitution, and Supreme Court of Ohio, Guidelines for Assignment of Judges, §IV, ¶12(A), and dismissals pursuant to Civ. R. 41.

PARTIES

2. The parties in this case are the relators, who hereinafter will be referred to as "the Browns," and the respondent, the First District Court of Appeals, Hamilton County, Ohio, hereinafter referred to as "appeals court", and was the appellate court which had

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[1]citing *Roberts v. Krupka* (1989), 13 Kan. App.2d 691, 779 P.2d 447, as found in Exhibit 1, dissenting opinion in Case No. C070797 at ¶48 and ¶49.

jurisdiction over the appeal process from decisions rendered in the Browns case in the Hamilton County Common Pleas Court.

FACTS

3. The Browns filed a civil action against Mrs. Brown's obstetrician/ gynecologist, Dr. Walter T. Bowers, II, in 2003 (Hamilton County Common Pleas Court, Case No. A0300490). They voluntarily dismissed this case without prejudice pursuant to Civ. R. 41(A)(1)(a).

4. Their case was timely re-filed, and actively pursued.

5. Following discovery, the Browns filed a motion for partial summary judgment as to liability, which was supported by their affidavits, deposition/admission testimony of Dr. Bowers, a lengthy and detailed affidavit of the Browns' expert, and other evidentiary material, as well as memoranda citing the law supporting their motion.

6. Dr. Bowers, in response, filed only a brief, conclusionary affidavit of an individual who he purported was his expert. This individual did not address the totality of the criticisms rendered by the Browns' expert, nor did he contest, or even respond to, the allegations supported by the sworn testimony of the Browns, and Dr. Bowers.

7. The Browns' motion for partial summary judgment was denied, and an appeal was taken to the appeals court in Case No. C060853. The appeals court refused review on the basis that there was not a final appealable order. See Exhibit 2.

8. The case was returned to the common pleas court with a trial date of September 12, 2006.

9. When the parties appeared on the morning of September 12, 2006, prepared for trial, the assigned judge *sua sponte* announced that the case was not going to go forward as scheduled, and was being removed from that day's trial docket, as he was finishing a criminal trial, and would be attending the funeral of a local appellate court judge scheduled for the morning of the next day. No other judges were available.

10. The Browns incurred the expense of a cancellation fee for their out-of-state expert, and his plane ticket.

11. The new trial date was set for October 15, 2007, over a year away, and would be presided over by a newly-appointed common pleas judge.

12. The original assigned judge had moved to the Court of Appeals.

13. With no pre-trial conference scheduled, and the trial date approaching, the Browns' counsel called the clerk of the newly-assigned judge and inquired as to its status.

14. As a result of this phone call, a pre-trial conference took place on October 3, 2007.

15. At this in-chambers meeting, this judge indicated he would probably not be presiding over this case, and would most likely send it to the visiting judge ("VJ") coordinator for assignment to a VJ.

16. The parties related to him the history of the case (as stated in paragraph 9, above), and why it did not go forward a year earlier.

17. The Browns' counsel pushed to have their, and opposing counsel's, pending motions in limine ruled on; some of which had been pending for over a year and before the

original trial date. The judge declined to do so claiming they should be determined by whomever would be presiding over the trial.

18. The Browns' counsel contacted the office of the VJ coordinator and inquired, since the three possible visiting judges who might be available were from the local area, as to whether these motions could be considered by one of them prior to the trial. She was informed that this was not possible, as a specific VJ would not be assigned until the morning of trial, if needed.

19. The following Monday evening, October 8, 2007, the Browns' counsel was informed by them that there was a death of a close family member. It was requiring them to drive to Mississippi to attend the funeral, which was to take place the weekend before the Monday morning their trial was to begin. Being in their 70's and not able to drive straight through, they were concerned that they could not be back in time. This information was conveyed promptly to opposing counsel, and to the judge.

20. A motion for a delay in the start of the trial was filed. Without a hearing, their motion was denied.

21. The Browns' counsel filed a motion for reconsideration and for oral argument. Oral argument took place on Thursday, October 11, 2007. The motion was denied. The judge indicated that this case had to be tried within two years of filing, and failed to take into consideration that the case had been delayed by the previous trial judge, *sua sponte*, a year earlier, and which now resulted in their case falling into this judge's now declared "two-year deadline".

22. With no final appealable order from these denials, the Browns' counsel appeared as ordered to the office of the VJ coordinator on October 15, 2007, which was the morning the trial was to commence. The Browns' counsel explained to her the circumstances, and that she was appearing without her clients as they had not yet returned from the family funeral in Mississippi. The coordinator said the case was now assigned to a VJ that morning for trial. The identity of the VJ was not determined until then.

23. Browns' counsel explained her clients' situation to the VJ. He stated that he did not have the authority to grant a delay. He informed Browns' counsel that he saw only two options: (1) start jury selection immediately without the Browns present, or (2) he would have to dismiss the case for want of prosecution. (See VJ entry, Exhibit 3).

24. Browns' counsel stated she felt uncomfortable proceeding with jury selection without being able to adequately confer with her clients. The VJ said he, regrettably, then had no choice but to not only dismiss the case for want of prosecution, but that he was required to do so <u>with prejudice</u> as appellants had previously, voluntarily dismissed their case under Civ. R. 41(A)(1)(a) (see Exhibit 3).

25. He also stated that the entry dismissing the case had to be of record by the end of the week as his current assignment to Hamilton County ended at that time, implying that he was assigned to the county for a specified time and not necessarily to a specific case.

26. An appeal was taken to the First District Court of Appeals (Case No. C070797). Issues involving the earlier denial of partial summary judgment were included.

In a 2 to 1 decision, the dismissal was affirmed (see Exhibit 1), with the majority choosing not to address the issues as to the earlier denial of summary judgment finding that assignment of error moot by the affirmation of the dismissal.

27. The Browns filed an application for reconsideration asking the appellate court to rule on those issues, and referenced this Court's recent decision in *Todd Dev. Co., Inc. v. Morgan*, 116 Ohio St.3d 461, 2008-Ohio-87. However, by the same 2 to 1 vote, the appeals court denied that application for reconsideration.

28. An appeal was taken to this Court (Case No. 2008-1905). In a 6 to 1 decision, jurisdiction was denied. Thus, the Browns seek extraordinary relief for the reasons set forth below.

FIRST CLAIM FOR RELIEF

29. Relators incorporate all of the allegations contained in the above paragraphs as if fully re-stated herein.

30. The Browns were entitled to have the issues raised in regard to the appropriateness of the denial of their motion for partial summary judgment fully reviewed, which has not occurred. Originally, the appeals court said such a review was premature, and not ripe for review, and then when the issues were ripe for review, the appeals court chose to ignore their responsibility of *de novo* review (*Comer v. Risko, supra.*) by determining those issues to be moot on the basis that it affirmed, in a 2-1 decision, the dismissal with prejudice in the trial court.

31. The Browns contend that determination as to the appropriateness of the

denial of their motion for partial summary judgment by the appeals court could have substantially altered the case, could have narrowed the issues for trial, and/or changed settlement potentials.

32. Depending on a ruling by the appeals court in regard to the Browns' motion for partial summary judgment, the rest of the procedural posture, including the dismissal for want of prosecution with prejudice, might not have occurred.

SECOND CLAIM FOR RELIEF

33. Relators incorporate all of the allegations contained in the above paragraphs as if fully re-stated herein.

34. The Browns contend that their case should be re-instated, as it was dismissed in the Common Pleas Court, with affirmation in a 2 to 1 decision by the appeals court, for want of prosecution with prejudice when there was no finding, as required, that the Browns had, in any way, delayed the course of their litigation except for their failure to appear on the day of trial because they were attending a family funeral in Mississippi, about which they had informed the trial court, and had timely filed motions for changing the date for the beginning of the trial to accommodate the fact that they would be out of state for this funeral.

35. The trial court record did not demonstrate that the Browns, or their counsel, had failed to appear at any other time, nor that they failed to cooperate with opposing counsel or the court, nor that they failed to participate in discovery, nor had, in any other way, failed to prosecute or move their case forward. In fact, the Browns contend, quite to

the contrary, and state that they had participated in discovery, voluntarily sat for their discovery depositions, had their counsel take the deposition of Dr. Bowers, had incurred the expense and obtained the opinion of an expert, presented him for Dr. Bowers' counsel to take his discovery deposition, had filed motions including one for partial summary judgment, had filed an interlocutory appeal, had filed jury instructions, had appeared and were ready to commence their trial, a year earlier, at the time and on the date that the case was originally set for trial, and incurred the expense of the expert to appear, and his plane ticket, only to have the case, *sua sponte*, removed from the trial docket due to a death of a member of another branch of the judiciary, and whose funeral would be occurring during the course of the trial.

36. It is the Browns' contention that they have been denied their right to trial by jury as their actions did not rise to any level which would warrant a dismissal <u>for want of prosecution</u>, and certainly did not warrant such a dismissal with prejudice as set forth in *Jones v. Hartranft*, 78 Ohio St.3d 368, 371, 1997-Ohio-203, 678 N.E.2d 530, *Tokles & Son, Inc. v. Midwestern Indemnity Co.* (1992), 65 Ohio St.3d 621, 632, 605 N.E.2d 936.

<u>THIRD CLAIM FOR RELIEF</u>

37. Relators incorporate all of the allegations contained in the above paragraphs as if fully re-stated herein.

38. The Browns contend that the appeals court, in their 2 to 1 decision, erroneously affirmed the trial court's finding that because the Browns had previously voluntarily dismissed their case without prejudice, that a dismissal by the court for want

of prosecution required that dismissal had to be with prejudice. This mistaken interpretation of Civ. R. 41 have denied the Browns their constitutionally-protected rights.

39. The Browns contend that they are entitled to have their case reinstated by order of the Ohio Supreme Court. Civ. R. 41 and *Olymk v. Scoles, supra.*

FOURTH CLAIM FOR RELIEF

40. Relators incorporate all of the allegations contained in the above paragraphs as if fully re-stated herein.

41. The failure of the Browns to appear at the time their case was scheduled for trial (the second scheduled date as the first one was vacated a year earlier on the morning it was scheduled to begin through no fault of the Browns) because of a family funeral hundreds of miles away, when the trial court, and opposing counsel, had been timely advised of their predicament 6 days earlier, did not warrant their case being dismissed for want of prosecution with prejudice. This form of dismissal that morning, by a visiting judge, who had just been assigned that morning, did not constitute reasonable notice, particularly since the Browns were hundreds of miles away at that time. *Moore v. Emmanuel Family Training Ctr., Inc.* (1985), 18 Ohio St.3d 64, 70, 479 N.E.2d 879; *Dater v. Dater Foundation*, 2003-Ohio-7148, ¶¶ 44, 45; *McGee v. Lynch*, 2007-Ohio-3954, ¶22; *Tonti v. Hayes*, 2006-Ohio-2229, ¶20 ; *Schreiner v. Karson* (1977), 52 Ohio App.2d 219, 369 N.E.2d 800; *Williams v. Thamann*, 2007-Ohio-4320, ¶4.

42. Thus, the Browns seek reinstatement of their case.

FIFTH CLAIM FOR RELIEF

43. Relators incorporate all of the allegations contained in the above paragraphs as if fully re-stated herein.

44. With a finding by the appeals court that the visiting judge "incorrectly assumed that he did not have the authority to continue the case," the appeals court should have remanded the case back to the lower court. A mistake by a trial judge as to his authority is generally grounds for reversal. *State v. Zukowski, supra., Oakbrook Realty Corp. v. Blout, supra.* Reversal should have been ordered by the appeals court. As it was not, the Browns, in this complaint, are asking the Ohio Supreme Court to not only reinstate their case, but also to reverse the lower courts in their favor.

SIXTH CLAIM FOR RELIEF

45. Relators incorporate all of the allegations contained in the above paragraphs as if fully re-stated herein.

46. The Browns' counsel's reluctance to proceed with jury selection without their presence, did not justify a visiting judge's immediate dismissal of their case with prejudice for want of prosecution. Reinstatement and remand is required when a trial judge is mistaken as to his interpretation of the law and/or as to this authority. *State v. Zukowski, id., Oakbrook Realty Corp. v. Blout, id.*

PRAYER

47. The Browns, as relators, request this Court to grant the following relief by mandamus and/or procedendo and/or by any other act under its authority:

(A) Order the First District Court of Appeals, Hamilton County, Ohio, to rule on the appropriateness of the denial of the Browns' motion for partial summary judgment;

(B) Order the First District Court of Appeals, Hamilton County, Ohio, to re-instate the case and remand to the trial court for trial setting.

(C) Costs of this action.

(D) And any other relief that the Court may determine to be just and reasonable.

Respectfully submitted,

By:

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COUNSEL FOR RELATORS, LUEKIUCIUS BROWN AND SYLVESTER BROWN

IN THE SUPREME COURT OF OHIO

STATE OF OHIO, EX REL. LUEKIUCIUS BROWN 1225 Westminster Drive Cincinnati, Ohio 45229	:	CASE NO.
and	:	Original Action in Mandamus and/or Procedendo
STATE OF OHIO, EX REL. SYLVESTER BROWN 1225 Westminster Drive Cincinnati, Ohio 45229	:	
Relators,	:	
v.	:	
FIRST DISTRICT COURT OF APPEALS HAMILTON COUNTY, OHIO 230 E. Ninth Street, 12th Fl. Cincinnati, Ohio 45202	:	
Respondent.	:	

AFFIDAVIT OF ATTORNEY, MARLENE PENNY MANES,
IN SUPPORT OF RELATORS' COMPLAINT

COUNTY OF HAMILTON {
}
STATE OF OHIO }

Marlene Penny Manes, being first duly sworn and cautioned, states as follows, based upon personal belief and knowledge:

1. I am a licensed attorney in the State of Ohio and have been at all times relevant herein.

2. I have represented the Relators throughout the course of their litigation which originated in the Hamilton County Common Pleas Court against Walter T. Bowers, II, M.D.

3. I have prepared their Complaint for Mandamus and/or Procendo for which this Affidavit is offered in support. The exhibits which I have attached hereto are true and accurate copies of documents which they purport to be filed in the Hamilton County Common Pleas Court, the First District of Appeals, Hamilton County, Ohio, and the Ohio Supreme Court.

4. All of the facts which are contained in the Complaint are true and accurate to the best of my knowledge.

MARLENE PENNY MANES

Sworn to before me and subscribed in my presence this 26 day of February, 2009.

NOTARY PUBLIC

Charles H. Bartlett, JR., Attorney at Law
NOTARY PUBLIC - STATE OF OHIO
My Commission has no expiration date. Section 147.03 O.R.C.

IN THE SUPREME COURT OF OHIO

STATE OF OHIO, EX REL. LUEKIUCIUS BROWN 1225 Westminster Drive Cincinnati, Ohio 45229	:	CASE NO.
and	:	Original Action in Mandamus and/or Procedendo with Supporting Affidavit of Counsel
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Respondent.	:	

EXHIBITS IN SUPPORT OF RELATORS' COMPLAINT

Exhibit 1	Judgment Entry and Decision of the First District Court of Appeals, Hamilton County, Ohio entered August 15, 2008
Exhibit 2	Entry Granting Motion to Dismiss Appeal of the First District Court of Appeals, Hamilton County, Ohio entered November 1, 2006
Exhibit 3	Entry of Dismissal with Prejudice for Want of Prosecution entered October 19, 2007 in the Hamilton County Court of Common Pleas

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

LUEKIUCIUS BROWN	:	APPEAL NO. C-070797 TRIAL NO. A-0506331
and	:	*DECISION.*
SYLVESTER BROWN,	:	
Plaintiffs-Appellants,	:	
vs.	:	PRESENTED TO THE CLERK OF COURTS FOR FILING
WALTER T. BOWERS, II, M.D.,	:	AUG 15 2008
Defendant-Appellee.	:	COURT OF APPEALS

Civil Appeal From: Hamilton County Court of Common Pleas

Judgment Appealed From Is: Affirmed

Date of Judgment Entry on Appeal: August 15, 2008

Marlene Penny Manes, for Plaintiffs-Appellants,

Triona, Calderhead & Lockemeyer, LLC, Joel L. Peschke, and *David C. Calderhead*, for Defendant-Appellee.

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

EXHIBIT 1

SYLVIA SIEVE HENDON, Judge.

{¶1} Plaintiffs-appellants, Luekiucius and Sylvester Brown, appeal the judgment of the trial court dismissing with prejudice their medical-malpractice action against defendant-appellee, Walter T. Bowers, II, M.D.

{¶2} In three assignments of error, the Browns now argue that the trial court erred by (1) failing to grant summary judgment in their favor, (2) denying their motion for a continuance, and (3) dismissing their case for want of prosecution. We begin with the Browns' second and third assignments of error because they are interrelated and are dispositive of the appeal.

Denial of a Continuance

{¶3} The Browns had initially filed their malpractice action against Bowers in January 2003, but they had voluntarily dismissed it in August 2004. A year later, they filed the malpractice action underlying this appeal.

{¶4} The trial court scheduled a jury trial for September 12, 2006. While no continuance entry was recorded, it is apparent from the record that the trial was rescheduled for October 15, 2007.

{¶5} On October 9, 2007, six days before the new trial date, the Browns filed a motion for a continuance. The Browns asserted that they had had "a death in their family, out of state, which necessitate[d] them being away during the time this case [was] now set." The defense objected to the continuance.

{¶6} The trial court denied the continuance the following day. In doing so, the court noted that the case had been pending for a "considerable period of time," and that it had been once dismissed and refiled.

{¶7} Then, on Thursday, October 11, four days before the trial was to begin, the Browns filed a motion to reconsider the denial of their continuance motion. But they provided no more detail for the court in support of their request than they had done for the initial motion for a continuance. The Browns simply asserted that it would have been "an undue hardship to require [them] to return [from Mississippi] for trial beginning next week."

{¶8} On the afternoon of the 11th, the trial court held an emergency hearing on the Browns' motion for reconsideration. The Browns were not present at the hearing, but their counsel and defense counsel were present.

{¶9} At the hearing, the Browns' attorney presented no evidence in support of the motion for reconsideration. Counsel informed the court that she had called the Browns on the evening of Monday, October 8, to confirm a meeting with them. At that time, the Browns had informed counsel that they would not be returning for a week. According to counsel, the Browns had left town before the court had ruled on their initial motion.

{¶10} The Browns' counsel stated that her expert witness was not available for trial the following week. And despite the trial court's denial of the motion for a continuance on Wednesday, October 10, the Browns' counsel acknowledged that she had cancelled a trial deposition of her expert scheduled on the 10th.

{¶11} The court overruled the motion for reconsideration. The court reasoned that the case had been pending for more than two years, that the trial was to begin a week after the relative's death, and that the Browns would simply need to return a day or two earlier than they had anticipated.

{¶12} On appeal, the Browns contend that the court abused its discretion in denying the continuance.

{¶13} It is well established that a trial court has supervisory control over its own docket.[1] So the court is vested with broad discretion in determining whether to grant or deny a motion for a continuance.[2] A reviewing court will not reverse a trial court's ruling on such a motion unless the court abused its discretion.[3]

{¶14} In evaluating a motion for a continuance, a trial court may consider factors such as the length of the delay requested, the reason for the delay, prior continuances, inconvenience, and whether the movant has contributed to the delay.[4] The potential for prejudice to a party must be balanced against the court's right to manage its docket and the public's interest in judicial economy.[5]

{¶15} Ohio courts recognize that a party has a right "to a reasonable opportunity to be present at trial and a right to a continuance for that purpose."[6] But a party does not have a right to unreasonably delay a trial.[7] To justify a continuance, the party's absence must be unavoidable and not voluntary.[8]

{¶16} Our review of the record convinces us that the trial court did not abuse its discretion in denying the Browns' motion to continue the trial. Their initial action had been pending for more than a year and a half before they had voluntarily dismissed it. The Browns had then waited 363 days to refile it.

{¶17} By the time the trial court considered the Browns' continuance motion, the refiled case had been pending for more than two years.

{¶18} In its efforts to accommodate the Browns, the trial court conducted an emergency hearing on their motion. The court was given no evidence, by way of

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[1] See *State ex rel. Buck v. McCabe* (1942), 140 Ohio St. 535, 537, 45 N.E.2d 763.
[2] See *State v. Unger* (1981), 67 Ohio St.2d 65, 423 N.E.2d 1078, syllabus; see, also, *Buck*, supra, at 537.
[3] See *Buck*, supra, at 537-538.
[4] See *State v. Ahmed*, 103 Ohio St.3d 27, 2004-Ohio-4190, 813 N.E.2d 637, ¶44.
[5] See *Unger*, supra, at 67.
[6] *Hartt v. Munobe*, 67 Ohio St.3d 3, 9, 1993-Ohio-177, 615 N.E.2d 617.
[7] Id.
[8] Id.

affidavit or obituary or otherwise, to determine exactly when the funeral was to occur or why the Browns could not return to begin the trial a week after being notified of their relative's death. As a result, the trial court was not presented with sufficient evidence to determine whether the Browns' absence the following week was unavoidable or in good faith. Because the court's decision was in no way arbitrary, unreasonable, or unconscionable, we hold that the trial court did not abuse its discretion in denying a continuance.[9] We overrule the second assignment of error.

The Dismissal

{¶19} In their third assignment of error, the Browns contend that the trial court erred by dismissing their case with prejudice for failure to prosecute.

{¶20} On the morning of Monday, October 15, 2007, the trial was to begin before a visiting judge. The Browns were not present, but their attorney, the defendant, and defense counsel were present. The defense was prepared to proceed to trial.

{¶21} Prior to trial, the visiting judge engaged in a lengthy discussion about the case with counsel for both sides. The judge noted that he had told the Browns' attorney that the trial would proceed that morning or that the case would be dismissed. The judge stated that jury selection could begin if the Browns would return within the next two days.

{¶22} The Browns' attorney indicated that she had her expert witness's earlier deposition, and that she "believed very strongly that based upon the [defendant's] own admissions, that [the Browns] would overcome the situation of getting or not getting [the case] to the jury." "The real issue," counsel asserted, "is that my clients cannot be here today. * * * I just don't feel comfortable going forward."

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[9] See *Blakemore v. Blakemore* (1983), 5 Ohio St.3d 217, 219, 450 N.E.2d 1140.

{¶23} In dismissing the case for want of prosecution, the visiting judge's entry stated, "With the undersigned's assignment in this matter being only to preside at the trial of this case, he then advised those present that he did not have the authority to grant a continuance, and gave plaintiffs' counsel two options: (1) to proceed with jury selection; or (2) face immediate dismissal for want of or failure to prosecute. Plaintiffs' counsel advised that she was still unwilling to proceed without her clients present."

{¶24} Although the visiting judge incorrectly assumed that he did not have the authority to continue the case for trial, it is evident that his decision to dismiss the case simply reflected his refusal to continue the trial to another date. Regardless of the visiting judge's assumptions about his authority to continue the case, the fact remained that the assigned judge had ruled not once, but twice, on the same motion within the previous week, and that the Browns, in trying to get a third bite at the apple, had presented no new grounds to the visiting judge in support of their motion.

{¶25} Just as with our review of a denial of a motion for a continuance, we review the dismissal of a case for lack of prosecution under an abuse-of-discretion standard.[10] Even though courts use an abuse-of-discretion standard of review for dismissals with prejudice, "that standard is actually heightened when reviewing decisions that forever deny a plaintiff a review of a claim's merits."[11]

{¶26} Before a court can dismiss a case for failure to prosecute under Civ.R. 41(B)(1), the court must give notice of the intended dismissal to the plaintiff's attorney. For purposes of Civ.R. 41(B)(1), counsel has notice of an impending dismissal with prejudice "when counsel has been informed that dismissal is a possibility and has had a reasonable opportunity to defend against dismissal."[12]

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[10] See *Pembaur v. Leis* (1982), 1 Ohio St.3d 89, 437 N.E.2d 1199.
[11] *Jones v. Hartranft*, 78 Ohio St.3d 368, 372, 1997-Ohio-203, 678 N.E.2d 530.
[12] *Quonset Hut, Inc. v. Ford Motor Co.* (1997), 80 Ohio St.3d 46, 49, 684 N.E.2d 319.

{¶27} The purpose of the notice requirement is "to afford plaintiff's counsel an opportunity to either comply with the court order, which is the basis of the impending dismissal, or to respond to the motion to dismiss."[13] "This principle is particularly applicable when neither the plaintiff nor his counsel is present to explain the failure to prosecute."[14]

{¶28} But this rationale fails where the plaintiff's counsel appears at the scheduled trial and is unwilling or unable to proceed.[15] There would be no purpose in requiring notice of an intended dismissal to allow the plaintiff or his counsel the opportunity to explain the failure to appear for trial when plaintiff's counsel is actually present for trial and has the opportunity to explain the plaintiff's failure to prosecute.[16]

{¶29} The record demonstrates that the Browns' counsel had ample notice that her clients' case would be dismissed with prejudice if she failed to proceed. She was also given sufficient opportunity to secure the presence of her clients to avoid dismissal. And while the sanction for the Browns' failure to proceed to trial was arguably harsh, it was certainly reasonable under the circumstances. Accordingly, we overrule the third assignment of error.

{¶30} Our disposition of the second and third assignments of error renders the first assignment of error moot. Therefore, we affirm the judgment of the trial court.

Judgment affirmed.

SUNDERMANN, P.J., concurs.

PAINTER, J., dissents.

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[13] *Carr v. Green* (1992), 78 Ohio App.3d 487, 490, 605 N.E.2d 431.
[14] *Asres v. Dalton*, 10th Dist. No. 05AP-632, 2006-Ohio-507, ¶16.
[15] *Metcalf v. Ohio State Univ. Hosps.* (1981), 2 Ohio App.3d 166, 167, 441 N.E.2d 299.
[16] *Asres*, at ¶18.

PAINTER, J., dissenting.

{¶31} The Browns' trial was set for September 2006. They had already paid for airfare for an expert and were prepared to proceed. But on the day that the trial was to start, the trial court sua sponte removed the case from that day's docket, apparently because the trial judge attended a funeral (of a former judge of this court). Though the cancellation was understandable, the Browns were greatly inconvenienced by the trial court's sua sponte continuance because they had to pay a cancellation fee to the expert, as well as wasted airfare.

{¶32} But a little over a year later, the trial court (a different judge) refused to grant a continuance so that the Browns could attend the funeral of a close family member and dismissed their case with prejudice. Ironic.

Failure to Exercise Discretion is an Abuse of Discretion

{¶33} We are reviewing the visiting judge's entry, which in part stated, "With the undersigned's assignment in this matter being only to preside at the trial of this case, he then advised those present that *he did not have the authority* to grant a continuance * * *." (emphasis added)

{¶34} "[T]he failure to exercise discretion in the mistaken belief it does not exist almost always amounts to reversible error."[17] After the first judge abrogated the first trial, another judge took his place. That judge refused to grant a continuance, but then referred the case to a third (visiting) judge for trial. The visiting judge believed that he could not grant the Browns' motion for a continuance and had no choice but to dismiss with prejudice. But the visiting judge did have the authority to handle this case

[17] *State v. Zukowski*, 10th Dist. No. 06AP-46, 2006-Ohio-5299, at ¶9. See, also, *Oakbrook Realty Corp. v. Blout* (1988), 48 Ohio App.3d 69, 71, 548 N.E.2d 305.

differently. And because the trial court failed to exercise discretion because of that mistaken belief, it committed reversible error.

Continuance Motion

{¶35} The majority points out the factors a trial court should consider before granting or denying a motion for a continuance. In this case, if the visiting judge had considered the factors, it would have been reasonable for him to either grant or deny the motion. The Browns were only asking to delay for a day or two. The reason for the delay was a funeral in Mississippi for a close family member that had taken place the Saturday before the Monday start of the trial. (At oral argument, Bowers' counsel asserted that the Browns should have flown back instead of driving. This statement fails to consider that not everyone has the means to travel by air on short notice—imagine the cost.) The only other continuance was a year earlier, when the trial court sua sponte continued the case because the trial judge wished to attend a funeral.

{¶36} The visiting judge had the discretion to either grant or deny the motion, but he mistakenly believed he had no discretion. This itself was an abuse of discretion that requires reversal. And the judge would not have dismissed if he thought he had discretion—as proved by the next section.

Dismissal with Prejudice was an Error of Law

{¶37} The trial court dismissed the Browns' case with prejudice. At a hearing, the trial court stated, "*I regret that I must dismiss the case* at this time, and it will be dismissed *with prejudice since you have previously had a 41(A).*" (emphasis added).

{¶38} This was an error of law—the double-dismissal rule applies only when a plaintiff twice dismisses under Civ.R. 41(A)(1).

{¶39} Based upon this error alone, we must reverse. The judge believed that the dismissal was *required* to be with prejudice, so he exercised no discretion whatsoever. (I do not fault the trial judge for this belief. Only with the benefit of research did I learn this nuance.)

{¶40} Perhaps the majority thinks that, if the judge would have had discretion, he would have dismissed with prejudice. But we do not know that—we know the opposite—"I regret that I must" is about as clear as it gets. By that statement alone we know that the judge would have dismissed *without* prejudice had he realized that he had the discretion to do otherwise. But he believed that the law mandated dismissal with prejudice. This was an error of law, and as such cannot be reviewed under an abuse standard.

{¶41} In *Olynyk v. Scolès*,[18] the plaintiff's case was dismissed once under Civ.R. 41(A)(2)—by order of the court rather than by a notice of dismissal under Civ.R. 41(A)(1). Shortly before trial was to begin, the plaintiff filed a notice of dismissal under Civ.R. 41(A)(1). The trial court held that the dismissal was with prejudice because it was the second time that the plaintiff had dismissed the case. But the Ohio Supreme Court determined that "[b]ecause only a Civ.R. 41(A)(1)(a) dismissal is totally within a plaintiff's control, the double-dismissal rule targets only that type of dismissal."[19] Regardless of what the entry said in this case, the law was otherwise—that alone is the answer to this case. Should we ignore the law here?

{¶42} The Ohio Supreme Court has made it clear that the double-dismissal rule only applies to dismissals under Civ.R. 41(A). Thus the trial court had the discretion to dismiss without prejudice. And because the trial court failed to exercise discretion because of its mistaken belief, we should reverse.

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[18] 114 Ohio St.3d 56, 2007-Ohio-2878, 868 N.E.2d 254.
[19] Id. at ¶26.

Third Reason Majority is Wrong

{¶43} Further, even if the trial court had used the correct law, the Browns' conduct did not merit dismissal with prejudice.

{¶44} The trial court dismissed the case for "lack of prosecution," which is reviewed on an abuse-of-discretion basis.[20] But the standard of review for the dismissal with prejudice is heightened because the dismissal would forever deny the Browns a judgment on the merits of their case.[21]

{¶45} The trial court may only dismiss a case with prejudice if the party's conduct is "so negligent, irresponsible, contumacious or dilatory as to provide substantial grounds for a dismissal with prejudice for a failure to prosecute or obey a court order."[22] Further, the conduct must "fall substantially below what is reasonable under the circumstances evidencing a complete disregard for the judicial system or the rights of the opposing party."[23]

{¶46} The Browns' and their attorney's behavior did not come anywhere near completely disregarding the judicial process or Bowers' rights. They simply asked for a brief continuance so that they could attend the funeral of Mrs. Brown's aunt, who had helped to raise her. Was this unreasonable? If so, then the first judge's decision to attend the funeral of an unrelated person was equally so. But obviously neither decision was unreasonable.

{¶47} Part of the justification that the trial court—before the case was assigned to the visiting judge—used to refuse to continue the case was that it had been pending for years. But the Browns had been set to move forward an entire year earlier when the trial court had sua sponte continued the case. The length of time that the case had been

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[20] *Jones v. Hartranft*, 78 Ohio St.3d 368, 371, 1997-Ohio-203, 678 N.E.2d 530.
[21] Id. at 372.
[22] *Tokles & Son, Inc. v. Midwestern Indemnity Co.* (1992), 65 Ohio St.3d 621, 632, 605 N.E.2d 936.
[23] *Moore v. Emmanuel Family Training Ctr., Inc.* (1985), 18 Ohio St.3d 64, 70, 479 N.E.2d 879.

ENTERED
NOV 0 1 2006

IN THE COURT OF APPEALS

FIRST APPELLATE DISTRICT OF OHIO

HAMILTON COUNTY, OHIO

D70670996

LUEKIUCIUS BROWN

and

SYLVESTER BROWN,

Appellants,

vs.

WALTER T. BOWERS, II, M.D.

Appellee.

APPEAL NO. C-060853
TRIAL NO. A-0506331

ENTRY GRANTING MOTION
TO DISMISS APPEAL

This cause came on to be considered upon the motion of the appellee filed herein to dismiss the appeal, and upon the response thereto.

The Court finds that the motion to dismiss is well taken and is granted. This case is hereby dismissed. See *Wisintainer v. Elcen Power Strut Co.* (1993), 67 Ohio St.3d 352, 617 N.E.2d 1136.

It is further ordered that a certified copy of this judgment shall constitute the mandate to the trial court pursuant to Rule 27, Ohio Rules of Appellate Procedure.

To The Clerk:

Enter upon the Journal of the Court on NOV - 1 2006 **per order of the Court.**

By: _____ **(Copy sent to counsel)**
Presiding Judge

dis-ss4.doc

EXHIBIT 2

ENTERED
OCT 19 2007

COURT OF COMMON PLEAS
HAMILTON COUNTY, OHIO

LUEKIUCIUS BROWN, et. al.	:	CASE NO. A0506331
Plaintiffs	:	(Judge Alex Triantafilou, assigned judge) (Judge Robert Gorman, visiting judge)
v.	:	
WALTER T. BOWERS, II, M.D.	:	**ENTRY OF DISMISSAL WITH PREJUDICE FOR WANT OF PROSECUTION**
Defendant	:	

On October 15, 2007, the attorneys for the parties appeared in the office of the visiting judge coordinator as directed by the assigned Hamilton County Common Pleas Court Judge when he denied plaintiffs' motion for a change in trial date (entry of October 10, 2007), and plaintiffs' motion for reconsideration (entry of October 11, 2007) over plaintiffs' objections. At that time, the case was assigned to the undersigned visiting judge by the coordinator.

Plaintiffs' counsel advised the undersigned that the plaintiffs had driven to Mississippi to attend a family funeral, had not yet returned and that it was a hardship for them to do so as ordered. Defense counsel had been previously apprised of the situation, and that plaintiffs' counsel would not proceed without her clients being present. However, the defendant was present and available to go forward.

With the undersigned's assignment in this matter being only to preside at the trial of this case, he then advised those present that he did not have the authority to grant a continuance, and gave plaintiffs' counsel two options: (1) to proceed with jury selection; or (2) face immediate dismissal for want of or failure to prosecute. Plaintiffs' counsel advised that she was still unwilling to proceed without her clients present.

D75539831

EXHIBIT 3

Wherefore, the undersigned dismisses this case WITH PREJUDICE over plaintiffs' objections, pursuant to Civil Rule 41(B)(1) for failure to prosecute.

IT IS SO ORDERED.

Judge Robert Gorman, Visiting Judge
Court of Common Pleas
Hamilton County, Ohio

Have seen:

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