[Cite as *Qualchoice, Inc. v. Brennan,* 2009-Ohio-2533.]

THE COURT OF APPEALS

ELEVENTH APPELLATE DISTRICT

LAKE COUNTY, OHIO

QUALCHOICE, INC.,	:	**O P I N I O N**
Plaintiff-Appellee,	:	**CASE NO. 2008-L-143**
- vs -	:	
MARY JANE BRENNAN,	:	
Defendant-Appellant.	:	

Civil Appeal from the Lake County Court of Common Pleas, Case No. 08 CV 001594.

Judgment: Affirmed.

Shaun D. Byroads, James M. Peters, and Todd W. Smith, Kreiner & Peters Co., L.P.A., 6047 Frantz Road, #203, Dublin, OH 43017 (For Plaintiff-Appellee).

Joshua R. Angelotta, Williams, Moliterno & Scully Co., L.P.A., 2241 Pinnacle Parkway, Twinsburg, OH 44087 (For Defendant-Appellant).

DIANE V. GRENDELL, J.

{¶1} Defendant-appellant, Mary Jane Brennan, appeals the August 22, 2008 Judgment Entry of the Lake County Court of Common Pleas, denying her Motion for Relief from Judgment Pursuant to Civ.R. 60(B). For the following reasons, we affirm the decision of the court below.

{¶2} On May 14, 2008, plaintiff-appellant, Qualchoice, Inc., filed a Complaint against Brennan. The Complaint alleged that on May 18, 2006, Rachel Burnette was

injured as the result of Brennan's negligent operation of a motor vehicle in Madison, Ohio. As a proximate of Brennan's negligence, Burnette incurred medical bills in the amount of $2,108.25, which Qualchoice paid pursuant to a policy of insurance with Burnette. Qualchoice, as insurer, assignee, and subrogee of Burnette, sought judgment against Brennan for $2,108.25.

{¶3} On May 17, 2008, Brennan was served with a copy of the Complaint by certified mail.

{¶4} On June 27, 2008, Qualchoice filed a Motion for Default Judgment on the grounds that Brennan had "failed to plead or otherwise defend as required by the Civil Rules." Attached to the motion was a System Claim Report identifying payments made on Burnette's behalf by date of service, claim number, and provider's name, and an affidavit affirming service of summons of the complaint and that Brennan "is not a minor, incompetent, or in the military."

{¶5} On July 2, 2008, the trial court granted Qualchoice's Motion and entered Judgment in its favor in the amount of $2,108.25.

{¶6} On July 31, 2008, Brennan filed a Defendant's Motion for Relief from Judgment Pursuant to Ohio Civ.R. 60(B). Brennan also moved the court for a hearing on damages.

{¶7} On August 22, 2008, the trial court denied Brennan's Motion. With respect to the Motion for Relief from Judgment, the court found "Defendant fails to explain any unusual or special circumstances justifying her neglect in failing to answer the Complaint in this case." With respect to the request for a hearing on damages, the court held "that a hearing is not required in this case because an Affidavit relative to

Plaintiff's damages was filed, and no damages for pain and suffering were awarded as this was a subrogation claim."

{¶8} On September 19, 2008, Brennan filed her Notice of Appeal. She raises the following assignments of error:

{¶9} "[1.] The trial court abused its discretion when it denied appellant's Motion for Relief from Default Judgment pursuant to Ohio Civ.R. 60(B) since appellant had meritorious defenses to assert and her failure to answer appellee's Complaint was [the] result of excusable neglect."

{¶10} "[2.] Appellant was entitled to a hearing on damages despite the granting of default judgment."

{¶11} The Ohio Supreme Court set forth the standard for granting a Civ.R. 60(B) motion as follows: "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 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 Industries, Inc.* (1976), 47 Ohio St.2d 146, paragraph two of the syllabus. The Supreme Court has made clear that the movant must meet all three criteria to be entitled to relief. A timely motion may not be granted solely because the movant has a meritorious defense. "The movant must demonstrate that he is entitled to relief under one of the grounds stated in Civ.[R.] 60(B)(1) through (5)." Id. at 151. While Civ.R. 60(B) is a remedial rule and, therefore, to be construed liberally, the trial court must

bear in mind that the rule attempts 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* (1980), 64 Ohio St.2d 243, 248, citing 11 Wright & Miller, Federal Practice & Procedure 140, Section 2851, quoted in *Doddridge v. Fitzpatrick* (1978), 53 Ohio St.2d 9, 12.

{¶12} 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, 1998-Ohio-466, citing *Griffey v. Rajan* (1987), 33 Ohio St.3d 75, 77.

{¶13} "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* (1988), 36 Ohio St.3d 17, at syllabus.

{¶14} Brennan asserts "[i]t is the position of appellant that failure to file an answer to plaintiff's Complaint in a timely manner constitutes 'excusable neglect.'" We disagree. The failure to file a Answer to Qualchoice's Complaint constitutes neglect. In the absence of any operative facts explaining this failure, such neglect is not excusable.

{¶15} Brennan did not set forth any explanation as to why an Answer was not filed. In the Motion for Relief, she cited a couple of cases for the proposition that "miscommunication *** in defense counsel's office" constitutes excusable neglect. See *Scruggs v. Value City Furniture*, 11th Dist. No. 90-G-2259, 2000 Ohio App. LEXIS 6104, at *6-*7. Brennan offered no explanation, however, as to any of the actual circumstances of her case.

{¶16} Given this record, we have no choice but to affirm. "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." *Adams*, 36 Ohio St.3d at 21. In *Scruggs*, this court noted that "an unique set of circumstances combined to contribute to the failure of appellees to file a timely answer" and, therefore, relief was warranted. 2000 Ohio App. LEXIS 6104, at *6. In the present case, the trial court was not provided with any information that would have allowed it to make a similar conclusion.

{¶17} The first assignment of error is without merit.

{¶18} In the second assignment of error, Brennan claims the trial court erred by not holding a hearing on damages, inasmuch as "pain and suffering, if any, legitimacy of medical bills claimed and property damage are unliquidated damages."

{¶19} "If, in order to enable the court to enter [default] judgment or to carry it into effect, it is necessary to take an account or to determine the amount of damages or to establish the truth of any averment by evidence or to make an investigation of any other matter, the court may conduct such hearings or order such references as it deems necessary and proper and shall when applicable accord a right of trial by jury to the parties." Civ.R. 55(A).

{¶20} The decision to hold a hearing on damages when granting a default judgment is discretionary with the trial court. *Mid-Am. Acceptance Co. v. Reedy*, 11th Dist. No. 89-L-14-072, 1990 Ohio App. LEXIS 2712, at *6.

{¶21} "Proof of damages is not required before a default judgment can be granted in an action filed upon a liquidated damage claim based upon an account." Id.

at *6-*7, citing *Buckeye Supply Co. v. Northeast Drilling Co.* (1985), 24 Ohio App.3d 134, at paragraph one of the syllabus. "However, when the judgment is not liquidated, or only partially liquidated, it is reversible error for the trial court to enter a default judgment without holding a hearing on the damages issue." Id. at *7, citing *Maintenance Unlimited, Inc. v. Salemi* (1984), 18 Ohio App.3d 29, 32. See *Dallas v. Ferneau* (1874), 25 Ohio St. 635, at syllabus ("[w]here judgment is rendered on default, in an action on an account, without proof of the plaintiff's claim, there is no error for which the judgment will be reversed, the requiring of such proof, on failure to answer, being a matter within the discretion of the court").

{¶22} We disagree with Brennan that Qualchoice's claim is for unliquidated damages. Contrary to Brennan's position, Qualchoice seeks no compensation for underlying pain and suffering or property damage, only for medical expenses paid on behalf of its insured. Moreover, the legitimacy of these expenses is not in issue by virtue of Brennan's failure to Answer the Complaint. See Civ.R. 8(D) ("[a]verments in a pleading to which a responsive pleading is required, other than those as to the amount of damage, are admitted when not denied in the responsive pleading").

{¶23} As to the amount of the medical expenses, Qualchoice submitted proof in the form of an affidavit and claim report. "A liquidated claim is one that can be determined with exactness from the agreement between the parties or by arithmetical process or by the application of definite rules of law." *L.S. Industries v. Coe*, 9th Dist. No. 22603, 2005-Ohio-6736, at ¶22, quoting *Huo Chin Yin v. Amino Prods. Co.* (1943), 141 Ohio St. 21, 29; *Faulkner v. Integrated Servs. Network, Inc.*, 8th Dist. Nos. 81877 and 83083, 2003-Ohio-6474, at ¶27 (the same). Accordingly, "it is within the discretion

of the trial judge to require proof before entering a judgment by default, *** where the claim is based upon a written instrument, a contract where a specific amount is due, or an account." *Farmers & Merchants State & Sav. Bank v. Raymond G. Barr Ent., Inc.* (1982), 6 Ohio App.3d 43, 44 (citation omitted); *Buckeye Supply*, 24 Ohio App.3d at 136 ("[p]roof of damages is required before a default judgment may be granted in an action founded upon negligence; however, no such proof is necessary to support a liquidated damage claim based upon an account") (citation omitted).

{¶24} Qualchoice's claim was based on an account of monies paid to medical providers on behalf of its insured. We find no abuse of discretion in the failure to conduct a hearing on damages. *Professional Serv. Industries, Inc. v. Asphalt Specialists, Inc.*, 11th Dist. No. 91-T-4633, 1992 Ohio App. LEXIS 5046, at *6 (default judgment entered in an action on an account without hearing); *E.K. Concrete, Inc. v. Ross*, 11th Dist. No. 2794, 1980 Ohio App. LEXIS 13173, at *4 (the same).

{¶25} The second assignment of error is without merit.

{¶26} For the foregoing reasons, the judgment of the Lake County Court of Common Pleas, denying Brennan's Motion for Relief from Judgment Pursuant to Civ.R. 60(B), is affirmed. Costs to be taxed against appellant.

TIMOTHY P. CANNON, J., concurs,

COLLEEN MARY O'TOOLE, J., dissents with a Dissenting Opinion.

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COLLEEN MARY O'TOOLE, J., dissents with a Dissenting Opinion.

{¶27} I do not think that QualChoice proved its damages, as a matter of law. Hence, I would find that default judgment was improvidently granted, and reverse and remand for further proceedings.

{¶28} This court was recently faced with a similar case, *QualChoice, Inc. v. Nationwide Ins. Co.*, 11th Dist. No. 2007-L-172, 2008-Ohio-6979. QualChoice allegedly paid the medical bills of its insured, attendant upon an automobile accident, then filed its subrogation claim against the insured automobile liability carrier, Nationwide, seeking payment under the med pay provisions of the insured automobile policy. Id. at ¶2-3. QualChoice eventually moved for summary judgment, which the trial court granted. Id. at ¶4. On appeal, Nationwide asserted that QualChoice had failed to prove its damages. We foud merit in this assignment of error, holding as follows:

{¶29} "As support for its damage claim, QualChoice submitted the affidavit of Yvonne Harris, one of its subrogation analysts. Attached to the affidavit is a single page document, ***, denominated a 'System Claim Report,' and dated August 16, 2007. This report contains information regarding services provided to [the insured] from January 4, 2005, through January 6, 2005. There are seven entries for these dates. Each entry contains the following information: (1) date of service; (2) the claim number; (3) the patient's name; (4) the total bill for the service; (5) the amount actually paid by QualChoice; (6) the 'ICD9 Code'; and (7) the name of the service provider.

{¶30} "'Proof of the amount paid or the amount of the bill rendered and of *the nature of the services performed* constitutes prima facie evidence of the necessity and reasonableness of the charges for medical and hospital services. (***)' *Wagner v.*

McDaniels (1984), 9 Ohio St.3d 184, ***, at paragraph one of the syllabus. (Emphasis added.) In this case, the 'System Claim Report' submitted by QualChoice is simply insufficient, under *Wagner* and Civ.R. 56, to support QualChoice's claim, since it does not provide, except, perhaps, under the 'ICD9 Code,' any description of the medical services rendered [the insured] following her accident." *QualChoice,* supra, at ¶22-23.

{¶31} Similarly in this case, QualChoice relied solely on its System Claim Report to prove damages. Even in default proceedings, I believe this document is insufficient pursuant to *Wagner*. Some elemental description of the services rendered is required to make a prima facie case.

{¶32} I respectfully dissent.