



*Delaney, J.*

{¶1} Defendants-Appellants Lafayette Point Nursing and Rehabilitation Center and Provider Services Holdings, LLC appeal the April 30, 2015 judgment entry of the Coshocton County Court of Common Pleas.

### **FACTS AND PROCEDURAL HISTORY**

{¶2} On April 22, 2013, Plaintiff-Appellee Cindy Shingler filed a complaint in the Cuyahoga County Court of Common Pleas against Defendant-Appellants Lafayette Point Nursing and Rehabilitation Center, Provider Services Holdings, LLC, and Michael Provenza (hereinafter “Lafayette Point”) for wrongful/retaliatory discharge. Lafayette Point filed a motion to transfer venue to the Coshocton County Court of Common Pleas and to dismiss Provider Services and Provenza pursuant to Civ.R. 12(B)(6). On July 8, 2013, the Cuyahoga County Court of Common Pleas granted Lafayette Point’s motion to transfer venue to the Coshocton County Court of Common Pleas. Lafayette Point’s motion to dismiss Provider Services and Provenza pursuant to Civ.R. 12(B)(6) remained pending at the time the case was transferred to Coshocton County.

{¶3} After the matter was transferred to the Coshocton County Court of Common Pleas, Lafayette Point renewed its motion to dismiss Shingler’s complaint against Provider Services and Provenza pursuant to Civ.R. 12(B)(6). On September 13, 2013, the trial court denied the motion for Civ.R. 12(B)(6) against Provider Services. The trial court ordered Shingler to amend her complaint by November 1, 2013 to add factual allegations against Provenza or the case would be dismissed as to Provenza. The trial court further gave Shingler until November 1, 2013 to file an amended complaint containing a copy of the Separation Agreement referenced in her complaint.

The trial court sua sponte found Shingler's failure to attach a copy of the Separation Agreement to her complaint was in violation of Civ.R. 10(D)(1). Shingler was served with the judgment entry by ordinary mail on September 16, 2013.

{¶4} Shingler voluntarily dismissed Provenza from the action on September 23, 2013.

{¶5} On November 7, 2013, Lafayette Point filed a motion to dismiss Shingler's complaint for her failure to amend her complaint by November 1, 2013. On the same day as Lafayette Point's motion was filed, the trial court dismissed the case with prejudice for failure to file the amended complaint. Shingler filed a motion for reconsideration and leave to file an amended complaint *instanter* on November 14, 2013. Shingler argued in her motion that her complaint was not based on a violation of the terms of the Separation Agreement mentioned in her complaint. Lafayette Point filed a memorandum in opposition on November 22, 2013. Shingler filed an appeal of the November 7, 2013 judgment entry on December 9, 2013.

{¶6} The trial court issued a judgment entry on December 9, 2013, granting Shingler's motion for reconsideration and leave to file an amended complaint. The trial court vacated the November 7, 2013 judgment entry and accepted Shingler's complaint as filed. Subsequently, Shingler dismissed her appeal with this court.

{¶7} On February 14, 2014, Shingler filed a motion for relief from judgment pursuant to Civ.R. 60(B)(1) and (5). Shingler argued the November 7, 2013 judgment entry should be vacated due to her counsel's excusable neglect. Attached to the motion was the affidavit of Shingler's attorney stating she inadvertently overlooked the portion

of the September 13, 2013 entry requiring the Separation Agreement be submitted with an amended pleading by November 1, 2013.

{¶8} The trial court issued a judgment entry on February 24, 2014, granting Shingler's motion to for relief from judgment. The trial court found the motion for relief from judgment was filed within a reasonable time and alleged a potentially viable claim for relief. Further, it found the failure of Shingler's counsel to comply with the September 13th order was attributable to excusable neglect and no undue prejudice would be suffered by any party if the motion were granted. The trial court thus vacated its November 7th order, accepted Shingler's amended complaint as filed, and returned the case to the active docket.

{¶9} Lafayette Point appealed the February 24, 2014 judgment entry to this court. It argued the trial court erred when it granted Shingler's motion for relief from judgment without giving Lafayette Point an opportunity to respond to the motion. In *Shingler v. Lafayette Point Nursing & Rehab. Ctr.*, 5th Dist. Coshocton No. 2014CA0006, 2014-Ohio-5026, we sustained Lafayette's Assignment of Error. We vacated the February 24, 2014 judgment entry and remanded the matter to the trial court for further proceedings.

{¶10} Lafayette Point filed a response to the motion for relief from judgment. The trial court held a hearing on the motion on April 13, 2015. On April 30, 2015, the trial court issued its judgment entry granting Shingler's motion for relief from judgment.

{¶11} It is from this judgment Lafayette Point now appeals.

#### **ASSIGNMENTS OF ERROR**

{¶12} Lafayette Point raises two Assignments of Error:

{¶13} “I. THE TRIAL COURT ERRED AND/OR ABUSED ITS DISCRETION IN GRANTING RELIEF UNDER CIV.R. 60(B)(5) WHERE PLAINTIFF DISMISSED HER APPEAL AND CLAIMED HER FAILURE TO ABIDE BY THE AMENDMENT RULING WAS DUE TO NEGLIGENCE/INADVERTENCE.

{¶14} “II. THE TRIAL COURT ERRED AND/OR ABUSED ITS DISCRETION IN GRANTING RELIEF UNDER CIV.R. 60(B)(1) WHERE PLAINTIFF HAS NOT DEMONSTRATED ANYTHING MORE THAN MERE, UNEXCUSED NEGLIGENCE AS GROUNDS FOR FAILING TO ABIDE BY THE TRIAL COURT’S AMENDMENT RULING.”

### **ANALYSIS**

{¶15} Lafayette Point argues in its two Assignments of Error that the trial court abused its discretion when it granted Shingler’s motion for relief from judgment. We disagree.

#### **A. Standard of Review**

{¶16} The decision whether to grant a motion for relief from judgment under Civ.R. 60(B) lies within the trial court’s sound discretion. *Griffey v. Rajan*, 33 Ohio St.3d 75, 514 N.E.2d 1122 (1987). In order to find abuse of discretion, we must determine the trial court’s decision was unreasonable, arbitrary, or unconscionable. *Blakemore v. Blakemore*, 5 Ohio St.3d 217, 219, 450 N.E.2d 1140 (1983).

{¶17} A party seeking relief from judgment pursuant to Civ.R. .R. 60(B) must show: “(1) a meritorious defense or claim to present if relief is granted; (2) entitlement to relief under one of the grounds set forth in Civ.R. 60(B)(1)-(5); and (3) the motion must be timely filed.” *GTE Automatic Electric, Inc. v. ARC Industries, Inc.*, 47 Ohio St.2d 146,

351 N.E.2d 113 (1976), paragraph two of the syllabus. A failure to establish any one of the three requirements will cause the motion to be overruled. *Rose Chevrolet, Inc. v. Adams*, 36 Ohio St.3d 17, 20, 520 N.E.2d 564 (1988); *Argo Plastic Prod. Co. v. Cleveland*, 15 Ohio St.3d 389, 391, 474 N.E.2d 328 (1984).

{¶18} Shingler brought her motion for relief from judgment pursuant to Civ.R. 60(B)(1) and (5).

### **B. Excusable Neglect**

{¶19} Shingler argued her failure to amend her complaint by November 1, 2013 was excusable neglect. Civ.R. 60(B)(1) states as to excusable neglect:

On motion and upon such terms as are just, the court may relieve a party\*

\* \* from a final judgment, order or proceedings for the following reasons:

(1) mistake, inadvertence, surprise or excusable neglect; \* \* \*. 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 to taken.

{¶20} The Ohio Supreme Court has yet to develop a definitive definition of excusable neglect. However, it has described it in the negative stating, “the inaction of a defendant is not ‘excusable neglect’ if it can be labeled as a ‘complete disregard for the judicial system.’ “ *Kay v. Marc Glassman, Inc.*, 76 Ohio St.3d 18, 20, 665 N.E.2d 1102 (1996), quoting *GTE Automatic Elec., Inc.*, 47 Ohio St.2d at 153, 351 N.E.2d 113.

{¶21} The determination of whether neglect is excusable or inexcusable must take into consideration all the surrounding facts and circumstances, and courts must be

mindful that cases should be decided on their merits, where possible, rather than procedural grounds. *Griffey v. Rajan*, 33 Ohio St.3d 75, 79-81, 514 N.E.2d 1122 (1987).

{¶22} Shingler's counsel stated in her affidavit that when she reviewed the September 13, 2013 order, she interpreted the order to state that Shingler needed to amend the complaint or dismiss Provenza as a party. Shingler chose to dismiss Provenza as a party. Shingler's counsel averred that she inadvertently overlooked the trial court's second order, which required Shingler to amend her complaint to attach the Separation Agreement. The trial court stated in its April 30, 2015 judgment entry that it reviewed the evidence presented and found that counsel's failure to amend the complaint before November 1, 2013 was excusable neglect. The trial court found by example of Shingler's case filings, counsel was actively working on the case and the failure to amend the complaint with the Separation Agreement was an inadvertent oversight.

{¶23} Based on the record before us, we cannot find the trial court abused its discretion when it found excusable neglect on behalf of Shingler. We cannot say that counsel's failure to amend the complaint demonstrated a complete disregard for the judicial system.

### **C. Any Other Reason**

{¶24} Shingler also argued in her motion that she was entitled to relief from judgment pursuant to Civ.R. 60(B)(5). Civ.R. 60(B)(5) allows the trial court to relieve a party from a final judgment for "any other reason justifying relief from the judgment." Civ.R. 60(B)(5) operates as a catch-all provision and "reflects 'the inherent power of a court to relieve a person from the unjust operation of a judgment.'" *Maggiore v.*

*Barensfeld*, 5th Dist. Stark No.2011CA00180, 2012–Ohio–2909, ¶ 35 citing *Dutton v. Potroos*, 5th Dist. Stark No.2010CA00318, 2011–Ohio–3646, at ¶ 49. It is reserved for “extraordinary and unusual case [s],” *Myers v. Myers*, 9th Dist. Summit No. 22393, 2005–Ohio–3800, at ¶ 14, and “is not a substitute for the enumerated grounds for relief from judgment [.]” *Id.*

{¶25} Based on our decision to affirm the trial court’s finding of excusable neglect, it is unnecessary to reach the issue of Civ.R. 60(B)(5).

#### **D. Meritorious Defense**

{¶26} Shingler also argued she had a meritorious claim to present if the dismissal was vacated. Lafayette Point does not raise this issue in its appeal. Upon review of the procedural history, we note that while it may not be considered to be a “meritorious defense” pursuant to Civ.R. 60(B), the trial court’s dismissal of Shingler’s complaint for failure to comply with Civ.R. 10(D)(1) was procedurally incorrect.

{¶27} Lafayette Point originally moved the trial court to dismiss Provider Services and Provenza pursuant to Civ.R. 12(B)(6). Lafayette Point only raised Civ.R. 12(B)(6) in support of its argument. The trial court denied the Civ.R. 12(B)(6) motion as to Provider Services and ordered Shingler to amend her pleading as to Provenza or dismiss him as a party. The trial court then sua sponte held Shingler was in violation of Civ.R. 10(D)(1) for her failure to attach a copy of the Separation Agreement to the complaint. The trial court ordered Shingler to amend her complaint by attaching the Separation Agreement or the trial court would dismiss the complaint. On November 7, 2013, the trial court dismissed her complaint because Shingler failed to amend her complaint by attaching a copy of the Separation Agreement.



{¶28} Civ.R. 10(D)(1) states that when a claim or defense is based on an account or other written instrument, a party must attach a copy of the account or written instrument to the pleading. Failure to comply with Civ.R. 10(D), however, does not require dismissal of the complaint. *Sylvester Summers, Jr. Co., L.P.A. v. E. Cleveland*, 8th Dist. Cuyahoga No. 98227, 2013-Ohio-1339, ¶ 31 *appeal not allowed*, 136 Ohio St.3d 1491, 2013-Ohio-4140, 994 N.E.2d 463, ¶ 31 (2013). “Courts have repeatedly held that when a plaintiff fails to attach a copy of a written instrument to his complaint, the proper method to challenge such failure is by filing a Civ.R. 12(E) motion for a more definite statement.” *Id.* quoting *Castle Hill Holdings, L.L.C. v. Al Hut, Inc.*, 8th Dist. No. 86442, 2006–Ohio–1353, ¶ 26. It is the defendant’s burden to move for a more definite statement under Civ.R. 12(E). *Wells Fargo Bank, N.A. v. Horn*, 142 Ohio St.3d 416, 421, 2015-Ohio-1484, 31 N.E.3d 637, 643, ¶ 16 (2015) citing *Fletcher v. Univ. Hosps. of Cleveland*, 120 Ohio St.3d 167, 2008-Ohio-5379, 897 N.E.2d 147, ¶ 11. A defendant who fails to file a Civ.R. 12(E) motion before filing his answer has been held to have waived his right to assert Civ.R. 10(D) as a basis for dismissing the plaintiff's complaint. *Sylvester Summers, Jr. Co., L.P.A.* at ¶ 31 citing *Glenwood Homes, Ltd. v. State Auto Mut. Ins. Co.*, 8th Dist. No. 72856, 1998 WL 685493 (Oct. 1, 1998).

{¶29} The record in this case shows that Lafayette Point never moved for a more definite statement pursuant to Civ.R. 12(E). Lafayette Point only moved the trial court to dismiss Provider Services and Provenza pursuant to Civ.R. 12(B)(6).

#### **E. Reasonable Time**

{¶30} The parties do not dispute that Shingler’s motion for relief from judgment was filed with the trial court within a reasonable time.

**F. No Abuse of Discretion**

{¶31} Based on the foregoing, we find no abuse of discretion by the trial court to grant Shingler's motion for relief from judgment.

{¶32} Lafayette Point's two Assignments of Error are overruled.

**{¶33} CONCLUSION**

{¶34} The judgment of the Coshocton County Court of Common Pleas is affirmed.

By: Delaney, J.,

Hoffman, P.J. and

Baldwin, J., concur.