

COURT OF APPEALS  
RICHLAND COUNTY, OHIO  
FIFTH APPELLATE DISTRICT

WOMEN'S CARE, INC.	:	JUDGES:
	:	Hon. William B. Hoffman, P.J.
Plaintiff	:	Hon. Julie A. Edwards, J.
-vs-	:	Hon. John F. Boggins, J.
	:	
TRACYE BELCHER, et al.	:	Case No. 2004-CA-0047
	:	
Defendants/Third Party	:	
Plaintiffs-Appellants	:	<u>OPINION</u>
-vs-	:	
	:	
SWAN HOSE, a Tekni-Plex Company	:	
	:	
Third Party Defendant-	:	
Appellee	:	

CHARACTER OF PROCEEDING: Civil Appeal from Richland County  
Common Pleas Court, Case No. 2003-  
CVH-2350

JUDGMENT: Affirmed

DATE OF JUDGMENT ENTRY: FEBRUARY 9, 2005

APPEARANCES:

For Third Party Plaintiffs-Appellants  
Tracye Belcher and Kenneth Belcher

For Third Party Defendant-Appellee  
Swan Hose, a Tekni-Plex Company

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*Boggins, J*

{¶1} Third Party Plaintiffs-Appellants Tracye and Kenneth Belcher appeal the September 22, 2003 decision of the trial court denying Appellants' motion for default judgment, the October 3, 2003, decision of the trial court granting Third-Party Defendant-Appellee's Motion for Leave to File Answer Instantly and the April 19, 2004, decision of the trial court granting summary judgment in favor of Third Party Defendant-Appellee Swan Hose, a Tekni-Plex Company.

### **STATEMENT OF THE FACTS AND CASE**

{¶2} In July 2003, this lawsuit was initiated by Women's Care, Inc. against Tracye and Kenneth Belcher ("Belchers") on an account for medical services provided to Tracye Belcher in May, 1999, in the alleged sum of \$1,402.49.

{¶3} On July 31, 2003, the Belchers filed an Answer to said Complaint and a Third Party Complaint against Swan Hose, a Tekni-Plex Company ("Tekni-Plex"). The Third Party Complaint sought damages in an amount in excess of \$15,000.00 for allegedly failing to pay a \$995.00 medical bill incurred by the Belchers under the terms of an employee health insurance plan. Kenneth Belcher is an employee of Tekni-Plex, an industrial plant in Bucyrus, Ohio, which manufactures rubber hose.

{¶4} On September 5, 2003, The Belchers mailed a Motion for Default Judgment to the Clerk of Courts but failed to pay the \$10.00 filing fee until September 18, 2003, upon receipt of which the Motion was filed.

{¶5} The motion for default judgment was not served on Tekni-Plex.

{¶6} On September 22, 2003, a status conference was held in this matter with an appearance being made by Tekni-Plex.

{¶7} On September 30, 2003, Appellee Tekni-Plex filed a Motion for Leave to File its Answer Instanter.

{¶8} On October 3, 2003, the trial court granted the Motion for Leave to File Answer Instanter.

{¶9} On March 10, 2004, Appellee Tekni-Plex filed a Motion for Summary Judgment.

{¶10} Appellants filed a Response to Appellee's Motion for Summary Judgment.

{¶11} By Entry dated April 19, 2004, the trial court granted Appellee Tekni-Plex's Motion for Summary Judgment.

{¶12} Appellants now appeal, assigning the following errors for review:

#### **ASSIGNMENTS OF ERROR**

{¶13} "I. THE COURT ERRED IN DENYING THE MOTION FOR DEFAULT JUDGMENT ON THE BASIS THE MOTION DID NOT COMPLY WITH LOCAL RULES.

{¶14} "II. THE COURT ERRED IN GRANTING THIRD PARTY PLAINTIFF [SIC] LEAVE TO PLEAD AFTER IT WAS IN DEFAULT FOR AN ANSWER ON THE BASIS OF 'EXCUSABLE NEGLECT' WHICH WAS NEITHER SHOWN OR SUPPORTED.

{¶15} "III. THE COURT ERRED IN GRANTING SUMMARY JUDGMENT TO THE THIRD PARTY DEFENDANT ON THE BASIS THAT IT WAS NOT A PROPER PARTY."

I., II.

{¶16} In Appellants' first and second assignment of error they argue that the trial court erred in denying their Motion for Default Judgment and granting Appellees leave to file an answer out of rule. We disagree.

{¶17} In the instant case, Appellee Tekni-Plex was served with the Summons and Complaint on August 6, 2003. Six days later, on August 12<sup>th</sup>, the Court issued a Notice of Assignment scheduling a status conference for September 22, 2003.

{¶18} Appellee Tekni-Plex failed to timely file its answer and on September 18, 2003, Appellants filed a motion for default judgment.

{¶19} On September 22, 2003, the day of the status conference, the trial court denied Appellants' motion for default judgment, finding that Appellants had failed to serve a courtesy copy of the motion on Appellee as required by the local rules. A few days later, the trial court granted Appellees motion for leave to file answer instanter pursuant to Civ. R. 6(B).

{¶20} A trial court is granted discretion in permitting a party to file a pleading outside of the time guidelines set forth in the rules. Civ. R. 6 governs extensions of time and provides, in pertinent part:

{¶21} (B)Time: extension

{¶22} "When by these rules or by a notice given thereunder or by order of court an act is required or allowed to be done at or within a specified time, the court for cause shown may at any time in its discretion

{¶23} "(1) ...

{¶24} "(2) upon motion made after the expiration of the specified period permit the act to be done where the failure to act was the result of excusable neglect."

{¶25} \*\*\*

{¶26} Civ.R. 13(A) and Civ.R. 12(A)(1) expressly required Tekni-Plex to answer or otherwise plead within twenty-eight days after service of the summons and complaint

upon him. It is undisputed that Tekni-Plex failed to timely file his answer or responsive pleading within the time allowed.

{¶27} Default judgment may be awarded when a defendant fails to make an appearance by filing an answer or otherwise defending an action. Civ.R. 55(A).

{¶28} However, as stated above, Civ.R. 6(B)(2) allows for an extension of time to file a late pleading within the trial court's discretion "upon motion made after the expiration of the specified period \* \* \* where the failure to act was the result of excusable neglect."

{¶29} A Civ.R. 6(B) determination lies in the trial court's sound discretion. *State ex. rel. Lindenschmidt v. Butler Cty. Bd. of Commrs.* (1995), 72 Ohio St.3d 464. The Supreme Court has repeatedly defined the term abuse of discretion as implying the court's attitude is unreasonable, arbitrary, or unconscionable. See *Blakemore v. Blakemore* (1983), 5 Ohio St.3d 217, 450 N.E.2d 1140. When applying an abuse of discretion standard, this Court may not substitute its judgment for that of the trial court. *S. Ohio Coal Co. v. Kidney* (1995), 100 Ohio App.3d 661, 667.

{¶30} In addition, the spirit and purpose of the civil rules is to guarantee the efficient and equal administration of justice. Justice will not tolerate a blanket disregard of the rules. We find that neither the spirit nor purpose of the civil rules was disregarded by appellee herein. We are guided in this determination by the fundamental tenet of judicial review in Ohio that courts should decide cases on their merits. *DeHart v. Aetna Life Ins. Co.* (1982), 69 Ohio St.2d 189; *In re Estate of Reeck* (1986), 21 Ohio St.3d 126.

{¶31} In *Colley v. Bazell* (1980), 64 Ohio St.2d 243, the Supreme Court of Ohio cautions that excusable neglect depends on the facts and circumstances of each case.

{¶32} It was within the trial court's discretion to grant Tekni-Plex's motion for leave to plead and to overrule appellants' motion for default judgment upon a showing of excusable neglect. In determining whether neglect is excusable or inexcusable, all the surrounding facts and circumstances must be taken into consideration. Neglect under Civ.R. 6(B)(2) has been described as conduct that falls substantially below what is reasonable under the circumstances.

{¶33} In its motion for leave and memorandum in support, Tekni-Plex claims that Paul Higgins, the Human Resources manager for Tekni-Plex, was the person upon whom service was named in the summons and complaint. When Mr. Higgins received the court's notice of assignment six days after being served with the complaint, he mistakenly believed that the date contained in this assignment, which was printed on bright golden-rod colored paper with the date of the status conference printed in bold italicized font, larger than the rest of the text, was the cut-off date for Tekni-Plex to answer, appear or otherwise defend.

{¶34} The trial court found the explanations contained in Tekni-Plex's motion and memorandum in support to be tantamount to excusable neglect. We find such a conclusion not to be an abuse of discretion. Upon review of same, we find that appellee set forth sufficient facts to demonstrate excusable neglect for its failure to file an answer. We therefore find the trial court did not err in granting Appellee Tekni-Plex leave to file an answer, and in denying appellants' motion for default judgment against Tekni-Plex.

{¶35} Appellants' first and second assignments of error are denied.

III.

{¶36} In their third assignment of error, Appellants argue that the trial court erred in finding that Appellee was not a proper party. We disagree.

{¶37} "Summary Judgment Standard"

{¶38} Summary judgment proceedings present the appellate court with the unique opportunity of reviewing the evidence in the same manner as the trial court. *Smiddy v. The Wedding Party, Inc.* (1987), 30 Ohio St.3d 35, 36. Civil Rule 56(C) provides, in pertinent part:

{¶39} "Summary judgment shall be rendered forthwith if the pleadings, depositions, answers to interrogatories, written admissions, affidavits, transcripts of evidence in the pending case, and written stipulations of fact, if any, timely filed in the action, show that there is no genuine issue as to any material fact and that the moving party is entitled to judgment as a matter of law. \* \* \* A summary judgment shall not be rendered unless it appears from such evidence or stipulation and only therefrom, that reasonable minds can come to but one conclusion and that conclusion is adverse to the party against whom the motion for summary judgment is made, such party being entitled to have the evidence or stipulation construed most strongly in his favor."

{¶40} Pursuant to the above rule, a trial court may not enter a summary judgment if it appears a material fact is genuinely disputed. The party moving for summary judgment bears the initial burden of informing the trial court of the basis for its motion and identifying those portions of the record that demonstrate the absence of a genuine issue of material fact. The moving party may not make a conclusory assertion

that the non-moving party has no evidence to prove its case. The moving party must specifically point to some evidence which demonstrates the non-moving party cannot support its claim. If the moving party satisfies this requirement, the burden shifts to the non-moving party to set forth specific facts demonstrating there is a genuine issue of material fact for trial. *Vahila v. Hall*, 77 Ohio St.3d 421, 429, 1997-Ohio-259, citing *Dresher v. Burt*, 75 Ohio St.3d 280, 1996-Ohio-107.

{¶41} It is based upon this standard that we review appellant's assignments of error.

{¶42} Appellee moved for summary judgment on two bases: (1) that Tekni-Plex was not the proper party to this action; and (2) that Appellants' claims were pre-empted by ERISA.

{¶43} Upon review of the record, we find that at the time the medical bills were incurred by Appellants in May, 1999, Kenneth Belcher worked for Mark IV, Industries, Inc., which was later purchased by Tekni-Plex, Inc. on October 16, 2001. During the time he was employed by Mark IV Industries, Inc., Kenneth Belcher was a participant in the Mark IV Industries, Inc. and Subsidiaries Group Welfare Benefit Program. We find no evidence in the record that Tekni-Plex was in any way connected to this health plan at the time these medical services were provided, or that Tekni-Plex is the a legal successor or a successor administrator to such plan.

{¶44} Based on the foregoing, the trial court granted summary judgment in favor of Tekni-Plex.

{¶45} We therefore find Appellee Tekni-Plex was entitled to judgment as a matter of law, and the trial court did not err when it granted Appellee's motion for summary judgment.

{¶46} Appellants' third assignment of error is overruled.

{¶47} The judgment of the Richland County Court of Common Pleas is affirmed.

By: Boggins, J.

Hoffman, P.J. and

Edwards, J. concur

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JUDGES

IN THE COURT OF APPEALS  
FOR RICHLAND COUNTY, OHIO  
FIFTH APPELLATE DISTRICT

WOMEN'S CARE, INC., et al.	:	
	:	
Plaintiffs-Appellants	:	
	:	
-vs-	:	JUDGMENT ENTRY
	:	
TRACYE BELCHER, et al.	:	
	:	
Defendants/Third Party	:	CASE NO. 2004-CA-0047
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	:	
-vs-	:	
	:	
SWAN HOSE, a Tekni-Plex Company	:	
	:	
Third Party Defendant-	:	
Appellee	:	

For the reasons stated in our accompanying Memorandum-Opinion on file, the judgment of the Court of Common Pleas of Richland County, Ohio, is affirmed. Costs assessed to Appellant.

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JUDGES