

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

CHARLENE HAMPTON,	:	APPEAL NO. C-090179
Plaintiff-Appellee,	:	TRIAL NO. 08CV-22451
vs.	:	<i>JUDGMENT ENTRY.</i>
KYM WATLEY, ¹	:	
Defendant-Appellant.	:	

We consider this appeal on the accelerated calendar, and this judgment entry is not an opinion of the court.²

Plaintiff-appellee Charlene Hampton sued defendant-appellant Kym Watley for damages after Watley had bit Hampton in an altercation. The case proceeded to a trial before a magistrate in small claims court with both parties unrepresented. The magistrate found in favor of Hampton for \$3000. Thereafter, Watley requested findings of fact and conclusions of law.

Watley moved to a new residence on November 1, 2008, before the magistrate issued the amended decision with the findings of fact and conclusions of law. Watley did not notify the court of her new address, and the amended decision was sent to the parties at their addresses of record on December 12, 2008.

Neither party filed objections. Two weeks later, the trial court adopted the magistrate's amended decision and entered judgment in favor of Hampton.

¹ In the trial court, the defendant was designated as "Kymberly Whatley."

² See S.Ct.R.Rep.Op. 3(A), App.R. 11.1(E), and Loc.R. 12.

In January 2009, Watley moved to set aside the judgment. The trial court denied the motion in February 2009. Watley filed her notice of appeal in March 2009.

In her sole assignment of error, Watley contends that the trial court erred by entering judgment in favor of Hampton for \$3000. According to Watley, the factual findings adopted by the trial court were erroneous.

We are unable to review the merits of the assigned error because Watley has failed to timely appeal from the original judgment in favor of Hampton. “A Civ.R. 60(B) motion for relief from judgment cannot be used as a substitute for a timely appeal or as a means to extend the time for perfecting an appeal from the original judgment.”³

But Watley has timely appealed the trial court’s order denying her Civ.R. 60(B) motion for relief from judgment. In the interests of justice, we recast her assignment of error as a challenge to this order.

To prevail on a Civ.R. 60(B) motion, the moving party 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.⁴ To meet this burden of proof, the movant must set forth operative facts and cannot rely on bare allegations that she is entitled to relief.⁵ We review the trial court’s denial of a Civ.R. 60(B) motion under an abuse-of-discretion standard.⁶

Watley moved to vacate under Civ.R. 60 (B)(5), the catchall provision, alleging that she had missed the deadline for filing an objection because she had never received the

³ *Key v. Mitchell*, 81 Ohio St.3d 89, 90-91, 1998-Ohio-643, 689 N.E.2d 548.

⁴ *GTE Automatic Elec., Inc. v. ARC Industries, Inc.* (1976), 47 Ohio St.2d 146, 351 N.E.2d 113, paragraph two of the syllabus.

⁵ *Kay v. Marc Glassman, Inc.*, 76 Ohio St.3d 18, 20, 1996-Ohio-430, 665 N.E.2d 1102.

⁶ *Id.* at 19.

magistrate's amended decision sent to her former residence. Watley further alleged that she had requested that the post office forward her mail.

But Watley did not notify the trial court of her change of address, even though she had ample time to do so, and despite knowing that the magistrate's amended decision was forthcoming. And nothing in the record demonstrates that the amended decision sent to Watley's address of record was returned as "undelivered." Further, Watley did not request an evidentiary hearing, and she failed to support her motion with an affidavit or other relevant evidentiary materials to convince the court that it was in the best interests of justice to set aside the judgment.

Likewise, Watley's claim of a meritorious defense was supported only by her bare allegation that the magistrate had erred in determining the facts of the underlying claim. Although Watley's motion was filed within the time allowed to take advantage of the "excusable neglect" provision of Civ.R. 60(B)(1), under these facts, we cannot say that the trial court abused its discretion in denying her motion for relief from judgment.⁷

Accordingly, we overrule the assignment of error and affirm the trial court's judgment.

Further, a certified copy of this judgment entry shall be sent to the trial court under App.R. 27. Costs shall be taxed under App.R. 24.

CUNNINGHAM, P.J., DINKELACKER and MALLORY, JJ.

To the Clerk:

Enter upon the Journal of the Court on March 10, 2010

per order of the Court _____.

Presiding Judge

⁷ See *Zashin, Rich, Sutula & Monastra Co., L.P.A. v. Offenber* (1993), 90 Ohio App.3d 436, 629 N.E.2d 1057; *Tidwell v. Quagliari*, 2nd Dist. No. 06-CA-0036, 2007-Ohio-569.