

IN THE COURT OF APPEALS OF OHIO
TENTH APPELLATE DISTRICT

Jane Doe, :
 :
 Plaintiff-Appellee, :
 :
 v. : No. 15AP-2568
 :
 John Jones, : (REGULAR CALENDAR)
 :
 Defendant-Appellant. :

APPELLANT'S BRIEF

Respectfully submitted:

/s/ Jane J. Doe

Appellant Jane J. Doe, pro se
123 Litigation Lane
Any Town, Ohio 12345
555-555-5555
emailaddress@email.com

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ASSIGNMENTS OF ERROR

FIRST ASSIGNMENT OF ERROR: The trial court erred and abused its discretion in dismissing appellant's action.

ISSUES PRESENTED

1. In granting an oral motion to dismiss without prior notice, the trial court erred as a matter of law and abused its discretion.

STATEMENT OF THE CASE AND THE FACTS

After a nearly 20-year marriage, appellant filed a complaint for divorce on September 4, 2013. Appellee filed an answer and counterclaim. After discovery issues arose, a magistrate ordered appellant to comply with appellee's discovery requests and sanctioned appellant \$500.00

Trial on the filed complaint began on November 6, 2014. At the commencement of trial, the trial court inquired about the parties' exchange of information. After realizing necessary information had not been exchanged, the trial court instructed the parties to present the necessary information on the following day.

Appellant presented a case in chief. Prior to cross-examination, appellee argued that appellant failed to present adequate evidence and requested that the case be dismissed for failure to prosecute. The trial court agreed and the matter was dismissed without prejudice pursuant to Civ.R. 41(B)(1). Appellant timely appealed.

ARGUMENT

First Assignment of Error: THE TRIAL COURT ERRED AND ABUSED ITS DISCRETION IN DISMISSING APPELLANT'S ACTION.

A decision to dismiss for failure to prosecute is relegated to the sound discretion of the trial court and will not be reversed absent an abuse of discretion. *Quonset Hut, Inc. Ford Motor Co.*, 684 N.E.2d 319 (1997); *Jones v. Hartrantf*, 678 N.E.2d 530 (1997); *Pembaur v. Leis*, 437 N.E.2d 1199 (1982). The trial court dismissed appellant's case pursuant to Civ.R. 41(B)(1). Said provision expressly requires that notice be provided to a plaintiff before a trial can dismiss an action. However, the record does not indicate that the trial court provided any notice to appellant of its intent to dismiss this case.

Appellant was prepared for trial and went forward with trial on the scheduled date. Opening statements were made and appellant was sworn in as a witness. At the end of the second day of testimony and prior to cross-examining appellant, appellee made an oral motion to dismiss the case for failure to prosecute. The trial court granted the motion. Because no notice of the trial court's intent to dismiss this case

was provided to appellant, the trial court clearly abused its discretion in dismissing this case pursuant to Civ.R. 41(B)(1).

Accordingly, the trial court erred in dismissing appellant's case and the judgment of the trial court should be reversed.

CONCLUSION

The trial court erred and abused its discretion when it dismissed appellant's case pursuant to Civ.R. 41(B)(1). Therefore, appellant respectfully requests that this court reverse the judgment of the trial court and remand this matter to the trial court with instructions to hear this matter on its merits.

Respectfully submitted:

/S/ Jane J. Doe

Appellant Jane J. Doe, pro se

123 Litigation Lane

Any Town, Ohio 12345

555-555-5555

emailaddress@email.com

CERTIFICATE OF SERVICE

The undersigned hereby certifies that a true copy of Appellant's Brief was served by regular mail upon appellee, John Jones, at 123 South Fifth Street, Any Town, Ohio 12345, this 22 day of January, 2017.

/S/ Jane J. Doe
Appellant Jane J. Doe, pro se