Ohio Rulings Are Cautionary Tales For Attorneys In Crisis

By **L. Bradfield Hughes** (August 14, 2023)

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The COVID-19 pandemic introduced at least some flexibility into the traditionally rigid legal workplace.

For those working in downtown offices, the traffic on the daily commute was certainly better. Remote work options allowed counsel to take depositions from the comfort of their home offices. Hearings and even oral arguments could be conducted via Zoom, Teams or other videoconferencing applications.

The pandemic and related stay-at-home orders certainly required some unprecedented understanding and adaptability from participants in the legal system, be they lawyers, judges, clients or court staff.

Two recent decisions by Ohio appellate courts, however — one from the Ohio Supreme Court and another from the Ohio Court of Appeals, Second Appellate District — are sobering reminders that attorneys still practice in a field that at times demands in-person court appearances and strict adherence to procedural schedules, even when attorneys are faced with wrenching personal circumstances due to their own health emergencies or those of a close family member. And Ohio courts are hardly unique in this regard.

This article examines the two Ohio decisions mentioned above: (1) a recent Ohio Supreme Court decision issued on a Sunday denying an expedited writ to continue a trial when counsel needed bed rest for a pregnancy; and (2) a decision from Ohio's Second Appellate District where trial counsel saw his client's case dismissed with prejudice after counsel failed to appear in the courtroom because he was addressing his sister's emergent health crisis.

We conclude by briefly reviewing other precedent from beyond the Buckeye State, reminding counsel that personal emergencies will not always suffice to alter court deadlines or excuse procedural missteps.

An Emergency Stay Motion Denied

On May 3, a criminal defense attorney and her client filed an action in the Ohio Supreme Court, seeking a writ of mandamus compelling the trial judge in Ohio ex rel. Panzeca v. Highland County Court of Common Pleas, a criminal case, to continue trial for 12 weeks so that counsel could begin doctor-recommended bed rest associated with her pregnancy and deliver her twin babies.[1]

Two days later, on Friday, May 5, the relators filed an emergency motion to stay the trial that was set to begin the following Monday.

The Ohio Supreme Court ordered the state to respond to the motion for stay the very next day — on Saturday, May 6 — so that a ruling could be made before the trial was set to commence.

Such an expedited briefing schedule is unusual in the Ohio Supreme Court, and more typically seen in the context of adoption or election-related cases.

In her complaint, defense counsel noted, among other things, that she had received pregnancy-related continuances in three other criminal cases, there would be no speedy trial issue for her client with the requested 12-week delay, the defendant wanted her to remain as his counsel, and her male colleague at her law firm would not be able to represent the defendant in the same way that she could.

Before defense counsel filed the mandamus complaint, the trial judge had previously denied her request for a continuance. And in his motion to dismiss the writ action, the judge made a number of arguments, including:

- The real object of the writ action was a prohibitory injunction, making mandamus inappropriate;
- Defense counsel and her client had an adequate remedy at law via a pending appeal;
- "[T]his is a ploy of trial strategy" and the "prudent and professionally responsible thing to do would be to seek one of the many female attorneys practicing law in Ohio to step in to litigate this manner"; and
- Ohio law guaranteed the victims the right to have the trial conducted expeditiously.

Four days after the complaint was filed, on May 7, a Sunday — an unusual day for the court to issue decisions — the Ohio Supreme Court denied the emergency motion to stay the trial by a vote of 5-2.[2]

The five justices in the majority did not issue any written opinion, but Justice Jennifer Brunner dissented, with an opinion joined by Justice Michael Donnelly. Justice Brunner opined that:

- The case presented significant Sixth Amendment issues regarding the right to counsel of one's choice;
- The trial judge had effectively removed the defendant's chosen counsel;
- The replacement counsel was apparently hard of hearing; and
- The requested continuance was reasonable and should have been granted in the interests of justice.

The Ohio Supreme Court's decision denying the stay got some national attention, with Above the Law publishing an article titled "Pregnant? Don't Plan On Practicing Before Ohio's Supreme Court Any Time Soon."[3]

The upshot? Ohio lawyers should not assume that doctor-recommended bed rest for a complicated pregnancy will necessarily result in the continuance of a previously scheduled trial, or that the Ohio Supreme Court will come to the rescue in a writ action.

Ohio lawyers may also want to consider whether listing more than one counsel for a client could potentially result in a "next lawyer up" mentality when lead counsel can no longer appear, but the judge is eager to bring the matter to trial.

Practitioners may want to demonstrate bench strength with their notices of appearance including more than one lawyer, but in doing so they also may risk the court assuming that one lawyer on the list is as good as the next one when it comes to starting trials on time.

Appeals Court Affirms a Trial Dismissal

Another recent decision from the Montgomery County Court of Appeals also illustrates how courts will not always be sympathetic to emergent health concerns, unless counsel formally request continuances and provide sufficient information about the emergency.[4]

Saunders v. Greater Dayton Regional Transit Authority involved a terminated bus driver's discrimination and retaliation lawsuit against the bus company.

Although the trial court initially granted summary judgment in favor of the bus company, the court of appeals reversed that decision in part and remanded the sex discrimination claim for trial.

A jury trial was set for August 2022, and the pretrial order noted that the plaintiff's failure to appear at pretrial or trial would result in a Rule 41 dismissal and potentially sanctions.

The week before the trial, however, the sister of plaintiff's counsel was admitted to the hospital, which required counsel to reschedule his meeting with the bailiff to test courtroom technology.

At this time, no continuance was requested, and counsel assured the bailiff that his sister's hospitalization would not affect the trial schedule.

On the second day of trial, however, counsel received a text saying that his sister was being moved to the intensive care unit.

The court allowed him to play a video of witness testimony, but said that he would not stop the trial. Counsel nevertheless left the courtroom, and the judge noted that he and the plaintiff "have chosen to leave the courtroom without the court's permission."

When the trial was set to resume after a scheduled day off, counsel emailed the bailiff and opposing counsel at midnight to alert them that he would not be returning to court that week due to his sister's status at the hospital.

At 8:30 that morning, the bailiff emailed counsel to alert him that everyone except him and his client were at the courthouse ready to proceed, and that if they did not come to the

courtroom, the case would be dismissed with prejudice.

At 9:12 a.m., the trial court dismissed the case with prejudice for failure to prosecute, noting that there had been no request for continuance nor sufficient information provided to the court to allow the court to determine if a continuance was appropriate, and that the plaintiff and her counsel appeared to have abandoned the proceedings.

On appeal, the Second District unanimously affirmed, noting that the standard of review was limited to an abuse of discretion.

The court of appeals also noted that the plaintiff and her counsel had received multiple warnings that failure to appear could result in dismissal.

The panel acknowledged that counsel had "real-life, important events" occurring and that the "impact of the loss of a sibling cannot be overestimated."

But the court said that there were also "real-life, important events going on in the courthouse" on those days, and counsel failed to provide sufficient information in any formal request for continuance that the trial court could consider when determining whether to dismiss the case.

Calling the situation "tragic and unfortunate," the court of appeals regretted counsel's failure to formally request a continuance either before trial began or before counsel left the courtroom on the second day of trial.

An important lesson from Saunders to Ohio attorneys is that if a health crisis — your own, or that of a close family member — impairs the ability to proceed with a scheduled trial, it is critical to formally request a continuance at the earliest practicable opportunity, and to provide sufficient detail to the court for an informed ruling on the request.

Doing so may not solve the problem at the trial court, but it may at least give a sympathetic court of appeals the information in the record that it would need to reverse a dismissal for an abuse of discretion.

Failing to make such a request can result — as it did in Saunders — in a dismissal with prejudice that has little to no chance of being reversed on appeal.

Buckeye State Not an Outlier

I am a native Ohioan, and I am not seeking to paint Ohio's courts as unreasonable outliers when it comes to how they address counsel's personal emergencies.

Precedent from elsewhere certainly includes decisions requiring strict adherence to procedural deadlines, in spite of personal emergencies that counsel unexpectedly may be facing.

In the U.S. District Court for the District of Nevada, for example, U.S. Magistrate Judge Peggy Leen concluded in a 2008 ruling in Tobin v. Granite Gaming Group II LLC that plaintiff's counsel's

> recent personal matters, regarding her mother's health, are simply not credible excuses for her continued failures to follow this Court's Orders and attend hearings in this matter [as] Plaintiff's counsel has failed to provide this Court with any

information or documentation to substantiate her contentions regarding her mother's health.[5]

A judge in the U.S. District Court for the Northern District of California remarked in Mitchell v. Fox in 2017 that "[d]eficient performance is deficient performance, regardless of whether counsel's misstep results from, e.g., an understandable personal emergency or plain old ineptitude."[6]

And, in Gross v. Gross, the Superior Court of California, Sacramento County, in 2018 imposed more than $4,000 in sanctions against a defense attorney who failed to appear for a scheduling conference, despite counsel's representation that this failure was due to a personal emergency that arose that same morning.[7]

These cases and the more recent decisions from Ohio serve as cautionary tales for counsel facing exigent circumstances.

Prompt communication and documentation of the issue are critical to mitigate risk and protect clients from adverse outcomes that may arise when their counsel face unfortunate and unexpected personal crises.

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[1] State ex rel. Panzeca v. Highland Cty. Court of Common Pleas, Gen. Div., Ohio Supreme Court Case No. 2023-0582 (docket available at: https://www.supremecourt.ohio.gov/Clerk/ecms/#/caseinfo/2023/0582 (last accessed July 25, 2023)).

[2] Id., 05/07/2023 Case Announcements, 2023-Ohio-1520.

[3] Chris Williams, Pregnant? Don't Plan On Practicing Before Ohio's Supreme Court Any Time Soon, Above the Law (May 9, 2023), available at: https://abovethelaw.com/2023/05/pregnant-dont-plan-on-practicing-before-ohios-supreme-court-any-time-soon/ (last accessed July 25, 2023).

[4] Saunders v. Greater Dayton Regional Transit Authority, 2023-Ohio-1514 (Ohio Ct. App. May 5, 2023), available at: https://www.supremecourt.ohio.gov/rod/docs/pdf/2/2023/2023-Ohio-1514.pdf (last accessed July 25, 2023).

[5] Tobin v. Granite Gaming Group II, LLC, No. 2:07-cv-00577, 2008 U.S. Dist. LEXIS 118251, *14 (D. Nev. Feb. 29, 2008).

[6] Mitchell v. Fox, No. 16-cv-03885-EMC, 2017 U.S. Dist. LEXIS 26445, *14 (N.D. Cal. Feb. 24, 2017).

[7] Gross v. Gross, No. 30-2017-00963638-CU-PO-CJC, 2018 Cal. Super. LEXIS 36868 (Cal. Sup. Ct. Nov. 2, 2018).