

**87-LW-4447 (10th)**

Elizabeth A. HANBY et al., Plaintiffs-Appellants,

v.

The Honorable Richard METCALF, Defendant-Appellee.

No. 87AP-710.  
10th District Court of Appeals of Ohio, Franklin County.  
Decided on December 29, 1987.

Appeal from the Franklin County Common Pleas Court.

Elizabeth A. Hanby, pro se.

Lane, Alton & Horst, John M. Alton and Mary E. McWilliams, for appellee.

DECISION

YOUNG, Judge.

Appellant, Elizabeth Hanby, appeals from a decision of the Franklin County Common Pleas Court sustaining appellee, the Honorable Richard Metcalf's, motion to dismiss. Appellant had filed a motion for default judgment against Judge Metcalf which virtually was an action for damages as a result of a discretionary act performed by appellee in his official capacity as Judge of the Probate Division of the Franklin County Common Pleas Court. The trial court found that appellant had failed to sufficiently establish a claim or right to relief as required by Civ.R. 55(D). Furthermore, the trial court found that the doctrine of judicial immunity applied to the matter of which appellant now complains.

Appellant, in her brief, does not assert separate assignments of error. However, the substance of appellant's brief sets forth the following:

- I. The trial court erred in dismissing appellant's complaints.
- II. The trial court erred in denying appellant a default judgment.

Appellant asserts that appellee's answer was not timely filed. Civ.R. 12(A)(1) states:

"The defendant shall serve his answer within twenty-eight days after service of the summons and complaint upon him \* \* \* "

The record indicates that on March 30, 1987 appellant requested personal service upon the Honorable Richard Metcalf. Personal service was effectuated on March 31, 1987. Appellee's answer was filed with the court on May 1, 1987. Civ.R. 6(E) provides:

"Whenever a party has the right or is required to do some act or take some proceedings within a prescribed period after the service of a notice or other paper upon him and the notice or paper is served upon him by mail, three days shall be added to the prescribed period. \* \* \* "

Accordingly, the trial court correctly held that appellee's answer was filed in a timely manner.

In light of this court's finding that appellee's answer was timely filed, the trial court properly denied appellant's request for a default judgment.

Appellant next asserts that appellee is liable for actions he performed while administering the estate of Rutherford

Hawley, appellant's ex-husband. However, the record reflects that appellant did not appeal this decision at the time when it was made. Appellant cannot circumvent appellate procedure by now filing a complaint out of rule. See App.R. 4 (A). Therefore, appellant has waived her right to attack the decision made by appellee of which she now complains. Furthermore, the trial court properly dismissed appellant's allegations on the basis that her complaint failed to state a claim upon which relief could be granted. See Civ.R. 55(D). Since appellee's actions were performed in his judicial capacity the doctrine of judicial immunity protects his honest and independent administration of justice. See Voll v. Steele (1943), 141 Ohio St. 293. Accordingly, the trial court properly dismissed appellant's complaint.

Based on the foregoing, all the assignments of error addressed to this court by appellant are not well-taken and are overruled. The judgment of the Franklin County Common Pleas Court is affirmed.

Judgment affirmed.

REILLY and COOK, JJ., concur.

COOK, J., of the Eleventh Appellate District, sitting by assignment in the Tenth Appellate District.