

## MEMORANDUM DECISION

Pursuant to Ind. Appellate Rule 65(D), this Memorandum Decision shall not be regarded as precedent or cited before any court except for the purpose of establishing the defense of res judicata, collateral estoppel, or the law of the case.



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## IN THE COURT OF APPEALS OF INDIANA

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Pfaff Concrete, LLC,  
*Appellant-Defendant,*

v.

Tyler Thompson and Stacy  
Thompson,  
*Appellees-Plaintiffs.*

October 26, 2021

Court of Appeals Case No.  
21A-PL-1042

Appeal from the Monroe Circuit  
Court

The Honorable Geoffrey J. Bradley,  
Judge

Trial Court Cause No.  
53C01-2008-PL-1400

**Baker, Senior Judge.**

### Statement of the Case

- [1] Tyler Thompson and Stacy Thompson sued Pfaff Concrete, LLC, and other defendants. Pfaff did not file a response to the Thompsons' complaint within the required time, and the trial court granted default judgment against Pfaff and

in favor of the Thompsons. Pfaff now appeals from the trial court’s denial of its motion to correct error and alternative motion for relief from default judgment. We affirm.

## Issue

- [2] Pfaff raises three issues, one of which is dispositive: whether the trial court abused its discretion in denying Pfaff’s motion to correct error and motion for relief from judgment.

## Facts and Procedural History

- [3] The Thompsons contracted with Levi Smoot and Backyard Dreams to construct a swimming pool and patio at their home in Bloomington. Backyard hired Pfaff to pour concrete as part of the project. The Thompsons subsequently noticed substantial cracks in the concrete and paid to have it removed and replaced.
- [4] On August 6, 2020, the Thompsons sued Smoot and Backyard Dreams, claiming breach of contract and (in the alternative) negligence. Smoot and Backyard filed an answer.
- [5] On December 21, 2020, the Thompsons filed a First Amended Complaint for Damages, adding Pfaff as a defendant. They alleged that Pfaff was negligent.
- [6] The Thompsons mailed the First Amended Complaint to Pfaff via certified mail, directing the document to the attention of Pfaff’s “Highest Ranking Officer.” Appellant’s App. Vol. 2, p. 27. A person signed the certified mail

receipt on January 15, 2021, but the signer's name is illegible, and the person is not identified in the record. Meanwhile, Smoot and Backyard filed an answer to the First Amended Complaint on January 5, 2021. Pfaff did not file an answer.

[7] On January 19, 2021, The Thompsons filed a Second Amended Complaint for Damages, adding a claim of home improvement fraud against Smoot and Backyard Dreams. Smoot and Backyard filed an answer on February 5, 2021. Pfaff once again failed to file an answer.

[8] On February 25, 2021, the Thompsons filed a motion for default judgment against Pfaff. On March 3, 2021, an attorney for Pfaff filed an appearance and a motion for a thirty-day enlargement of time to respond to the Thompsons' complaint. In the motion, Pfaff stated the following:

- 1) That counsel herein has just been retained to represent the interest of the Defendant herein.
- 2) That counsel herein needs additional time in order to review said cause of action in order to file an answer.
- 3) That as a matter of law and equity, the Defendant's request for enlargement of time should be granted.

*Id.* at 10.

[9] The Thompsons objected to Pfaff's motion. On March 11, 2021, the trial court denied Pfaff's motion for an extension of time, granted the Thompsons' request for default judgment, and entered judgment in favor of the Thompsons and

against Pfaff “on all claims as contained in the Second Amended Complaint for Damages.” *Id.* at 23.

[10] Next, Pfaff filed a motion to correct error, which included an alternative motion for relief from judgment. The Thompsons filed a statement in opposition. The trial court denied Pfaff’s motion, and this appeal followed.

## Discussion and Decision

[11] Pfaff asks the Court to reverse the trial court’s entry of default judgment. As a result, we address his claims in relation to its motion for relief from judgment. That type of motion is governed by Indiana Trial Rule 60, which provides, in relevant part: “On motion and upon such terms as are just the court may relieve a party or his legal representative from a judgment, including a judgment by default, for the following reasons: . . . mistake, surprise, or excusable neglect; . . .” *Id.* A party seeking relief from a default judgment on grounds of mistake, surprise, or excusable neglect must also “allege a meritorious claim or defense.” *Id.*

[12] When addressing a motion to set aside a default judgment, the trial court must balance the need for an efficient judicial system with the judicial preference for deciding disputes on the merits. *Kmart Corp. v. Englebright*, 719 N.E.2d 1249, 1253 (Ind. Ct. App. 1999), *trans. denied*. Any determination of excusable neglect, surprise, or mistake must turn upon the unique factual background of each case. *Id.*

[13] We review the denial of Pfaff's motion for an abuse of discretion. *Id.* An abuse of discretion occurs if the trial court's decision was against the logic and effect of the facts and circumstances before the court or if the court misapplied the law. *Walker v. Kelley*, 819 N.E.2d 832, 836 (Ind. Ct. App. 2004). We will not reweigh the evidence or substitute our judgment for that of the trial court. *Kmart Corp.*, 719 N.E.2d at 1253.

[14] On the subject of excusable neglect, we are guided by the Indiana Supreme Court's decision in *Huntington National Bank v. Car-X Assoc. Corp.*, 39 N.E.3d 652 (Ind. 2015). In that case, Car-X, a junior creditor, sued Huntington National Bank, a senior creditor, to resolve their interests in their mutual debtor's property. Car-X served the complaint and summons on Huntington by certified mail, and Huntington received service the next day. Due to staffing shortages, Huntington did not refer the complaint to counsel until six days after Huntington's deadline for an answer had expired.

[15] Car-X moved for and obtained a default judgment against Huntington. Huntington moved for relief from the default judgment, arguing that its staffing challenges amounted to excusable neglect. The trial court denied Huntington's motion, and the Indiana Supreme Court affirmed the trial court's judgment. The Court determined that excusable neglect could include "a legitimate breakdown in communication through no fault of the defaulted party," *id.* at 657, but Huntington's inattentiveness to the complaint based on its employee's disregard of the mail did not meet that criteria.

[16] The facts in Pfaff’s case also fail to demonstrate excusable neglect. In its motion for relief from default judgment, Pfaff failed to provide any explanation at all as to why it failed to timely file a response to the First Amended Complaint, such as internal communication issues. Further, although Pfaff stated that the signature on the proof of service document was illegible, Pfaff failed to claim that the signer was not a Pfaff employee. As the movant, Pfaff bore the burden of proving sufficient grounds for relief from the default judgment, *Kmart Corp.*, 719 N.E.2d at 1253, but it failed to carry its burden.

[17] Pfaff argued to the trial court that the Thompsons’ service of the First Amended Complaint was defective because Pfaff’s chief executive officer, Mike Pfaff, did not sign the receipt. We disagree. Indiana Trial Rule 4.6 says that an organization may be served by directing the complaint to an “executive officer.” The Thompsons directed the complaint to the attention of the “highest ranking officer,” which is sufficient to comply with the Rule’s service requirements. *See Nw. Nat. Ins. Co. v. Mapps*, 717 N.E.2d 947, 954 (Ind. Ct. App. 1999) (service on corporation deemed sufficient; plaintiff had directed complaint to the “highest available officer,” without insisting on the officer’s signature on proof of service card). And Pfaff never argued to the trial court that its chief executive officer was unaware of the lawsuit during the time period for a response. *Cf. Swiggett Lumber Constr. Co., Inc. v. Quandt*, 806 N.E.2d 334, 336 (Ind. Ct. App. 2004) (reversing denial of motion to set aside default judgment; defendant company demonstrated that its president was not informed of the lawsuit).

[18] Further, service of a complaint on an organization, similar to service on an individual, may be completed by sending a copy of the complaint via certified mail to a “place of business.” Ind. Trial Rule 4(A)(1). Pfaff failed to claim in its motion for relief of judgment that the address to which the Thompsons sent the complaint was not its place of business. As a result, Pfaff’s complaints about alleged defects in service must fail, and Pfaff failed to demonstrate excusable neglect.

[19] Although our analysis could end there, we also address whether Pfaff demonstrated a meritorious defense. As the *Kmart Corp.* Court stated:

A meritorious defense is one showing that, if the case was retried on the merits, a different result would be reached. The movant need not prove absolutely the existence of a meritorious defense. However, the movant must show enough admissible evidence to make a prima facie showing of a meritorious defense indicating to the trial court the judgment would change and that the defaulted party would suffer an injustice if the judgment was allowed to stand. Some admissible evidence must be presented to the trial court showing that the defaulted party would suffer an injustice if the judgment is allowed to stand.

719 N.E.2d at 1258 (citations omitted).

[20] The Thompsons alleged in their First Amended Complaint that Pfaff negligently installed the concrete for their patio and pool. Pfaff did not address the negligence claim in its motion to correct error and motion for relief from judgment, much less set forth a prima facie showing of a meritorious defense. On appeal, Pfaff argues for the first time that it has a meritorious defense: Backyard, not Pfaff, may be responsible for the Thompsons’ damages. Pfaff has

waived this claim by failing to first present it to the trial court. *See Dorothy Edwards Realtors, Inc. v. McAdams*, 525 N.E.2d 1248, 1253 (Ind. Ct. App. 1988) (claim waived on appeal for failure to raise it at trial or in motion to correct error). For these reasons, Pfaff has failed to set forth a meritorious defense, and the trial court did not abuse its discretion in denying Pfaff's motion.<sup>1</sup>

## Conclusion

[21] For the reasons stated above, we affirm the judgment of the trial court.

[22] Affirmed.

Riley, J., and Altice, J., concur.

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<sup>1</sup> Pfaff further argues that the trial court abused its discretion in allowing the Thompsons to twice amend their complaint without first obtaining the court's approval or permission from a defendant, but we need not address that argument in light of Pfaff's failure to establish excusable neglect or a meritorious defense.