

MEMORANDUM DECISION

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ATTORNEYS FOR APPELLANT

David F. McNamar
McNamar & Associates, P.C.
Westfield, Indiana

Guy O. Kornblum
Guy O. Kornblum, A Professional Law
Corporation
San Francisco, California

ATTORNEYS FOR APPELLEES

John R. Maley
Barnes & Thornburg LLP
Indianapolis, Indiana

Offer Korin
Brooke Smith
Katz Korin Cunningham, PC
Indianapolis, Indiana

IN THE COURT OF APPEALS OF INDIANA

Vicky Melville Carvajal,
Appellant-Plaintiff,

v.

International Medical Group,
Inc. and Sirius International
Insurance Corporation,
Appellees-Defendants,

August 11, 2021

Court of Appeals Case No.
20A-MI-2321

Appeal from the Marion Superior
Court

The Honorable Heather A. Welch,
Judge

Trial Court Cause No.
49D01-1909-MI-37003

Robb, Judge.

Case Summary and Issues

- [1] After Vicky Carvajal was denied coverage under a surplus lines insurance policy underwritten by Sirius International Insurance Corporation (“Sirius”) and distributed and administered by International Medical Group, Inc. (“IMG”), she sued Sirius and IMG (collectively, “Insurers”) for breach of contract, declaratory judgment, and breach of the duty of good faith and fair dealing. Both sides filed motions for summary judgment. On August 17, 2020, the trial court denied Carvajal’s motion for partial summary judgment and granted in part and denied in part the Insurers’ motion for summary judgment.
- [2] Carvajal filed a motion to reconsider the summary judgment order which the trial court denied on November 2, 2020. On November 16, Carvajal filed a motion to certify the November 2 order. Over the Insurers’ objection, the trial court found that “under Ind. App. Rule 14(B)[,] good cause exists to permit a belated appeal” and certified the November 2 order. Appendix of Appellant, Volume 3 at 169. We accepted jurisdiction, also over the Insurers’ objection.
- [3] Carvajal raises several issues for our review, all related to the trial court’s summary judgment order. *See* Brief of Appellant at 17 (“This appeal arises from the trial court’s grant of partial summary judgment entry favoring Sirius/IMG.”). But we find the following issue raised by the Insurers to be dispositive: whether Carvajal’s interlocutory appeal is forfeited because the motion seeking certification was untimely and the certification order failed to state a basis for allowing a belated interlocutory appeal. Concluding that

Carvajal's right to appeal has been forfeited by untimely filing and improper certification, we dismiss and remand for further proceedings.

Facts and Procedural History

[4] Carvajal and her family, citizens of Ecuador, moved to Florida in September 2018. Carvajal has a visa and is a lawful resident of Florida. Shortly after arriving in Florida, Carvajal applied for, purchased, and was issued a medical insurance policy from Insurers. Several months later, Carvajal was diagnosed with lymphoma and applied for coverage of expenses associated with her diagnosis under her policy. IMG, as the administrator of the policy acting on behalf of Sirius, denied Carvajal's claims upon determining her lymphoma constituted a pre-existing condition for which coverage could be excluded under the policy. Carvajal appealed that determination, which was submitted for independent peer medical review and ultimately upheld. Carvajal then initiated this lawsuit against the Insurers in September 2019.

[5] The Insurers moved for summary judgment on all claims; Carvajal moved for partial summary judgment as to the Insurers' liability for payment of her expenses. The trial court held a hearing and on August 17, 2020, issued an order denying Carvajal's motion for partial summary judgment and granting in part and denying in part the Insurers' motion. Specifically, the trial court granted the Insurers' motion for summary judgment as to the declaratory judgment count; granted summary judgment to IMG on the breach of contract and breach of the duty of good faith and fair dealing counts; and denied

summary judgment to Sirius on those same two counts. Because the order did not dispose of all claims as to all parties – the two counts against Sirius remained pending – this was an interlocutory order.

[6] On August 27, 2020, Carvajal filed a pleading she styled as a “Response to Court’s Summary Judgment Order and Motion to Correct Errors/Reconsider.” App. of Appellant, Vol. 3 at 73. The Insurers responded, and on October 9, 2020, the trial court issued an order. Noting that motions to correct error only apply to final judgments and that the August 17 summary judgment order was not final because “[t]here remain counts against Sirius where liability must be determined,” the trial court treated the motion “only as a motion to reconsider.” *Id.* at 124. The trial court reevaluated its prior summary judgment order in light of Carvajal’s objections, found its initial ruling to be correct, and denied the motion to reconsider. After receiving the trial court’s order, the Insurers filed a motion to correct a clerical mistake or clarify the order. On November 2, the trial court issued an amended order but did not change its ultimate ruling.

[7] Carvajal then filed a motion to certify the trial court’s November 2 order for interlocutory appeal, noting that the order “is the Court’s response to [her] reconsideration request [of] the original Order of August 17, 2020.” *Id.* at 150. Carvajal argued certification was appropriate because the case involves a substantial question of law and she will suffer greater expense if the summary judgment order is erroneous and the case proceeds to trial against Sirius only. The Insurers objected, contending the motion to certify was untimely because

“it attempts to seek . . . interlocutory review of the [August 17, 2020] Summary Judgment Order past the . . . deadline to review that Order.” *Id.* at 157. On December 9, 2020, the trial court certified its November 2, 2020 order for interlocutory appeal, finding that “good cause exists to permit a belated appeal[.]” *Id.* at 169. The trial court did not state what specifically constituted good cause in this case, however.

[8] Carvajal’s motion for this court to accept her case for interlocutory appeal stated that the “orders being appealed here concern the trial court’s interlocutory rulings of August 17, 2020 . . . and the trial court’s further written order of denial of reconsideration of that order [on] November 2, 2020.” *Id.* at 170. Again, the Insurers objected because Carvajal had “failed to seek interlocutory review of the trial court’s [August 17, 2020] Summary Judgment Order [and] failed to obtain an adequate order certifying interlocutory review” because the trial court did not state a basis for finding good cause for a belated appeal of the summary judgment order. *App. of Appellant, Vol. 4 at 3.* We accepted jurisdiction of the appeal on January 15, 2021.

Discussion and Decision

I. Timeliness

[9] Although the failure to initiate a timely interlocutory appeal does not deprive this court of jurisdiction, it does result in forfeiture of the right to appeal absent extraordinarily compelling reasons. *State v. L.B.F.*, 132 N.E.3d 480, 486 (Ind. Ct. App. 2019), *trans. denied*; *see also* Ind. Appellate Rule 9(A)(5). Indiana

Appellate Rule 14(B) describes the procedure for appealing an interlocutory order that is not appealable by right:

An appeal may be taken from other interlocutory orders if the trial court certifies its order and the Court of Appeals accepts jurisdiction over the appeal.

(1) Certification by the Trial Court. The trial court, in its discretion, upon motion by a party, may certify an interlocutory order to allow an immediate appeal.

(a) Time for Filing Motion. A motion requesting certification of an interlocutory order must be filed in the trial court within thirty (30) days after the date the interlocutory order is noted in the Chronological Case Summary unless the trial court, for good cause, permits a belated motion. If the trial court grants a belated motion and certifies the appeal, the court shall make a finding that the certification is based on a showing of good cause, *and shall set forth the basis for that finding.*

(Emphasis added.)

[10] The Chronological Case Summary reflects the trial court issued its summary judgment order on August 17, 2020. A motion seeking to certify that order for interlocutory appeal should have been filed within thirty days of that date – September 16. *See* App.R. 14(B)(a). Carvajal, however, instead filed a “response” to the court’s order and a “motion to correct errors/reconsider.” As the trial court pointed out in its order on this motion, a motion to correct errors is only applicable to a final judgment. *See* App. of Appellant, Vol. 3 at 124; *see*

also Ind. Trial Rule 59(C) (“The motion to correct error, if any, shall be filed not later than thirty (30) days *after the entry of a final judgment*[.]”) (emphasis added). And because the trial court’s order did not dispose of all claims as to all parties, it was not a final judgment. *See* App.R. 2(H)(1). Therefore, Carvajal’s motion was appropriately treated as a motion to reconsider. *See Snyder v. Snyder*, 62 N.E.3d 455, 458 (Ind. Ct. App. 2016) (noting that “motions to correct error are proper only after the entry of final judgment; any such motion filed prior to the entry of final judgment must be viewed as a motion to reconsider”).

[11] Motions to reconsider, however, do “not delay the trial or any proceedings in the case, or extend the time for any further required or permitted action, motion, or proceedings under these rules.” T.R. 53.4(A); *see Citizens Indus. Grp. v. Heartland Gas Pipeline, LLC*, 856 N.E.2d 734, 737 (Ind. Ct. App. 2006) (stating “a motion to reconsider does not toll the time period within which an appellant must file a notice of appeal”), *trans. denied*.¹ Thus, Carvajal’s motion to reconsider did not toll the thirty-day deadline for seeking to certify the summary judgment order for interlocutory appeal and the November 16 motion to certify was untimely as to the summary judgment order.

[12] As to the order on the motion to reconsider, motions to reconsider are deemed denied if they are not ruled on within five days. T.R. 53.4(B). Carvajal’s

¹ We have often cautioned against this practice for the very reasons explained herein: because a motion to reconsider does not extend any deadlines, “filing a motion to reconsider following the entry of an appealable interlocutory order is an act fraught with danger[.]” *Snyder*, 62 N.E.3d at 459 (quotation and citation omitted).

motion to reconsider was filed on August 27, and pursuant to Trial Rule 53.4(B), was deemed denied as of September 3, 2020.² To appeal this denial, Carvajal was required to file her motion to certify within thirty days of September 3. Again, as to the order on the motion to reconsider, the November 16 motion to certify was untimely.³

[13] *Kroger Ltd. P’ship I v. Lomax*, 141 N.E.3d 46, is a case that is factually similar to this one. There, the trial court entered orders on December 13, 2018 and January 23, 2019, permitting the plaintiff to file belated responses to Kroger’s request for admissions. *Id.* at 48. Kroger filed a motion to reconsider those orders on February 15, 2019, which the trial court denied by order dated March 12. On March 26, Kroger filed a motion to certify the denial of the motion to reconsider.⁴ The trial court certified the order and this court accepted jurisdiction. On appeal, we considered *sua sponte* the timeliness of Kroger’s appeal as to the motion to reconsider. We noted that because Kroger’s motion

² Trial Rule 6(A) says that “[w]hen the period of time allowed is less than seven [7] days, intermediate Saturdays, Sundays, legal holidays, and days on which the office is closed shall be excluded from the computations.”

³ The trial court has the inherent power to reconsider any previous ruling while the action remains pending before the court, *Stephens v. Irvin*, 730 N.E.2d 1271, 1277 (Ind. Ct. App. 2000), *trans. denied*, so a deemed denial does not deprive the trial court of the power to rule on a motion to reconsider after the five days has passed, *Kroger Ltd. P’ship I v. Lomax*, 141 N.E.3d 46, 50 n.6 (Ind. Ct. App. 2020). It *does*, however, trigger the timeline for seeking an interlocutory appeal. *See Lomax*, 141 N.E.3d at 50.

⁴ The trial court had also denied Kroger’s motion for summary judgment on March 12 and Kroger also sought and was granted certification of that order.

to reconsider asked the trial court to overrule its previous rulings in the December 12 and January 23 orders,

the motion to certify the [motion to reconsider] Order was, in essence, a request to certify the December 13 Order and the January 23 Order. If Kroger wished to certify *those* orders for interlocutory appeal, it should have done so within thirty days[.] . . . Having failed to do so, Kroger could not extend the time to seek interlocutory appeal of those orders by filing a motion to reconsider.

Id. at 50. Moreover, the motion to reconsider the February order had been deemed denied by operation of Trial Rule 54.3(B) after five days, and the motion to certify was filed more than thirty days after the deemed denial and was therefore also untimely as to that order. *Id.* Accordingly, we held that Kroger failed to timely request certification of the discovery orders and declined to consider the parties' arguments as to those issues. *Id.*

[14] Similarly here, Carvajal's appeal raises issues related to the summary judgment order. Yet Carvajal neither filed a motion to certify the summary judgment order directly within thirty days of August 17, nor filed a motion to certify the denial of her motion to reconsider the summary judgment order within thirty days of its deemed denial. Therefore, Carvajal failed to timely request certification of the trial court's order she now seeks to appeal.

II. Belated Appeal

[15] Appellate Rule 14(B) does contain a provision allowing for a belated appeal, however. The trial court may, for good cause, permit a belated motion to

certify a discretionary interlocutory order for appeal. App. R. 14(B)(1)(a). We review a trial court's finding of good cause for an abuse of discretion. *State v. Foy*, 862 N.E.2d 1219, 1224 (Ind. Ct. App. 2007), *trans. denied*. An abuse of discretion occurs when the trial court's decision to certify is clearly against the logic and effect of the facts and circumstances before the trial court or the reasonable and probable deductions to be drawn therefrom. *L.B.F.*, 132 N.E.3d at 484.

[16] Carvajal did not argue in her motion to certify that good cause existed for the trial court to grant her belated motion. She did state that the case involved a substantial question of law and that she could suffer substantial expense if the case were not decided on interlocutory appeal. And in her response to the Insurers' objection to certification, she reiterated that the fact this is "an important case" shows that "definitive rulings [should be made] by the Indiana appellate courts before proceeding further." App. of Appellant, Vol. 3 at 166. But these reasons are simply grounds for granting a discretionary interlocutory appeal, not a showing of good cause for allowing a *belated* interlocutory appeal. See App. R. 14(B)(1)(c); see also *Cooper's Hawk Indianapolis, LLC v. Ray*, 162 N.E.3d 1097, 1098 (Ind. 2021) (per curiam) (stating the grounds for granting a discretionary interlocutory appeal do not constitute extraordinarily compelling circumstances restoring the right to a forfeited appeal). Carvajal did not offer any explanation for the delay in filing the motion to certify other than wishing "to give a judge another opportunity to change its opinion" before seeking appellate review, App. of Appellant, Vol. 3 at 165, which indicates a conscious

decision to proceed in a manner inconsistent with the trial and appellate rules governing the interlocutory appeal procedure. *Cf. Foy*, 862 N.E.2d at 1224 (holding the trial court did not abuse its discretion in finding good cause to allow a belated interlocutory appeal because the failure to file a timely motion to certify was due to a mistake in calculation and not “a disregarding of the time limit involved”).

[17] The trial court nevertheless found that good cause existed to certify the order. But the rule also requires that if the trial court makes a finding that certification is based on a showing of good cause, the trial court *must set forth the basis for that finding*, and here, the trial court failed to do so. We are not bound by a trial court’s determination on the issue of certification, *Foy*, 862 N.E.2d at 1224, and without a stated basis for finding good cause from the trial court, we must conclude the trial court failed to properly certify its order and therefore abused its discretion in granting Carvajal the opportunity to belatedly pursue her interlocutory appeal. *See Durall v. Weinberger*, 4 N.E.3d 207, 209 (Ind. Ct. App. 2014) (dismissing an interlocutory appeal in part because it was improperly certified in that the trial court did not state that there was good cause for belated certification *or* set forth the basis for such certification).

[18] The issues Carvajal raises in this appeal will remain available to her after the trial court enters final judgment in this case, and we find no extraordinarily compelling reasons to restore her forfeited right to seek interlocutory appeal of the trial court’s summary judgment order. Therefore, we deny the motion to

accept jurisdiction and dismiss this appeal without prejudice, remanding to the trial court for further proceedings.⁵

Conclusion

[19] Carvajal did not file a timely motion to certify the summary judgment order and the trial court did not properly certify the order for belated interlocutory appeal. Accordingly, we deny Carvajal’s motion to accept jurisdiction of this appeal and remand to the trial court for further proceedings.

[20] Dismissed and remanded.

Bailey, J., and May, J., concur.

⁵ We acknowledge that this court previously granted Carvajal’s petition to accept jurisdiction. Although we are reluctant to overrule decisions by the motions panel such as accepting jurisdiction of the interlocutory appeal in this case, a writing panel has the “inherent authority to reconsider any [motions panel] decision while an appeal remains pending[.]” *Haggerty v. Anonymous Party 1*, 998 N.E.2d 286, 293 (Ind. Ct. App. 2013).