MEMORANDUM DECISION

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IN THE COURT OF APPEALS OF INDIANA

Samantha Neese, Neese Trucking, LLC, Hoosier Bucking Bulls, LLC, and E&S Tri-Axle, LLC,

Appellants-Defendants,

v.

VoMac Truck Sales & Service,

Appellee-Plaintiff.

December 21, 2021

Court of Appeals Case No. 21A-CC-721

Appeal from the Owen Circuit Court

The Honorable Kelsey B. Hanlon, Judge

Trial Court Cause No. 60C02-1909-CC-433

Tavitas, Judge.

Case Summary

[1] Samantha Neese ("Samantha"), Neese Trucking, LLC ("Neese Trucking"), Hoosier Bucking Bulls, LLC ("Hoosier Bucking Bulls"), and E&S Tri-Axle, LLC ("E&S") (collectively, "Neese") appeal the trial court's denial of their motion for relief from judgment regarding a default judgment granted to VoMac Truck Sales & Service, Inc. ("VoMac"). Neese argues that the trial court erred by considering certain affidavits and that it was entitled to relief under Indiana Trial Rule 60(B)(1) and Trial Rule 60(B)(8). Concluding that Neese has failed to establish error regarding the affidavits and that Neese failed to show an abuse of discretion regarding the denial of its motion for relief from judgment, we affirm in part. We reverse in part and remand, however, for the trial court to correct the default judgment order, which doubles the proper judgment against Samantha.

Issue

[2] Neese raises one issue, which we restate as whether the trial court properly denied Neese's motion for relief from judgment.

Facts

[3] Neese's vehicle was damaged in an accident, and VoMac performed the repairs. Samantha, who is a member of Neese Trucking, Hoosier Bucking Bulls, and E&S, wrote a check to VoMac in the amount of $10,000.00 on behalf of Neese Trucking; she wrote another check to VoMac in the amount of $10,000.00 on behalf of E&S; and she wrote a third check to VoMac in the amount of

$7,528.00 on behalf of Hoosier Bucking Bulls. All three checks were returned for insufficient funds.

[4] On September 26, 2019, VoMac filed a complaint against Neese seeking $27,528.00 in damages and treble damages pursuant to Indiana Code Section 34-24-3-1.[1] After receiving the complaint, Samantha contacted VoMac's

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[1] Indiana Code Section 34-24-3-1 provides:

> If a person has an unpaid claim on a liability that is covered by IC 24-4.6-5 or suffers a pecuniary loss as a result of a violation of IC 35-43, IC 35-42-3-3, IC 35-42-3-4, IC 35-45-9, or IC 35-46-10, the person may bring a civil action against the person who caused the loss for the following:
>
> (1) An amount not to exceed three (3) times:
>
> (A) the actual damages of the person suffering the loss, in the case of a liability that is not covered by IC 24-4.6-5; or
>
> (B) the total pump price of the motor fuel received, in the case of a liability that is covered by IC 24-4.6-5.
>
> (2) The costs of the action.
>
> (3) A reasonable attorney's fee.
>
> (4) Actual travel expenses that are not otherwise reimbursed under subdivisions (1) through (3) and are incurred by the person suffering loss to:
>
> (A) have the person suffering loss or an employee or agent of that person file papers and attend court proceedings related to the recovery of a judgment under this chapter; or
>
> (B) provide witnesses to testify in court proceedings related to the recovery of a judgment under this chapter.
>
> (5) A reasonable amount to compensate the person suffering loss for time used to:
>
> (A) file papers and attend court proceedings related to the recovery of a judgment under this chapter; or
>
> (B) travel to and from activities described in clause (A).
>
> (6) Actual direct and indirect expenses incurred by the person suffering loss to compensate employees and agents for time used to:
>
> (A) file papers and attend court proceedings related to the recovery of a judgment under this chapter; or
>
> (B) travel to and from activities described in clause (A).
>
> (7) All other reasonable costs of collection.

attorney, and they had settlement discussions. In emails on October 1, 2019, Samantha acknowledged that an answer was needed within twenty days, and VoMac's attorney noted: "You are correct, an answer to the complaint must be filed within 20 days." Email Exhibit p. 6.[2] According to Samantha, she was aware that she had to answer the complaint within twenty days but thought contacting VoMac's attorney was sufficient. Ultimately, Neese paid $15,000.00 to VoMac, but settlement negotiations stalled. In a November 13, 2019 email, VoMac's counsel told Samantha, "The time has expired for you to file a response to the complaint. If you are not going to agree to the terms we proposed, we will have to go forward with litigation." *Id.* at 53.

[5] VoMac filed a motion for default judgment on January 13, 2020, which the trial court granted on January 16, 2020. The trial court ordered, in part, the following: (1) judgment against Samantha in the amount of $81,970.93; (2) judgment against Neese Trucking and Samantha, jointly and severally, in the amount of $30,493.15; (3) judgment against E&S and Samantha, jointly and severally, in the amount of $30,493.15; and (4) judgment against Hoosier Bucking Balls and Samantha, jointly and severally, in the amount of $22,955.24. Samantha emailed VoMac's counsel on February 9, 2020, and

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At the time the checks were written, Indiana Code Section 35-43-5-5(a) provided: "A person who knowingly or intentionally issues or delivers a check, a draft, or an order on a credit institution for the payment of or to acquire money or other property, knowing that it will not be paid or honored by the credit institution upon presentment in the usual course of business, commits check deception . . . ." (repealed effective July 1, 2021).

[2] Neese failed to provide this exhibit in its Appellant's Appendix.

stated: "I will do everything and get the money owed and paid and [a]gain I'm sorry. Yes I do appreciate them working with me. I have done wrong and I will make it right[.] I'm sorry." *Id.* VoMac then went forward with proceedings supplemental.

[6] Neese filed a motion for relief from judgment on July 1, 2020. Neese argued that it was entitled to relief pursuant to Trial Rule 60(B)(1) and Trial Rule 60(B)(8). Neese alleged that, after the complaint was filed, Samantha had contact with VoMac's attorney; Neese made payments to VoMac in the amount of $15,000.00; and VoMac's counsel did not advise it would be seeking default judgment. VoMac filed a response and affidavits of Tom Hughes and Jon Bragalone.[3] At a hearing on the matter, Samantha testified, and VoMac asked the trial court to consider the affidavits it previously submitted. Neese objected, and the trial court took the matter under advisement. After the hearing, the trial court overruled Neese's objection to consideration of VoMac's affidavits and denied Neese's motion for relief from judgment on March 24, 2021.

Analysis

[7] Neese challenges the trial court's denial of its motion for relief from judgment, which is governed by Indiana Trial Rule 60(B). We first note that VoMac did not file an appellee's brief. "[W]here, as here, the appellees do not submit a brief on appeal, the appellate court need not develop an argument for the

[3] Neese failed to provide the response and affidavits in its Appellant's Appendix.

appellees but instead will 'reverse the trial court's judgment if the appellant's brief presents a case of prima facie error.'" *Salyer v. Washington Regular Baptist Church Cemetery*, 141 N.E.3d 384, 386 (Ind. 2020) (quoting *Front Row Motors, LLC v. Jones*, 5 N.E.3d 753, 758 (Ind. 2014)). "Prima facie error in this context means 'at first sight, on first appearance, or on the face of it.'" *Id*. This less stringent standard of review relieves us of the burden of controverting arguments advanced in favor of reversal where that burden properly rests with the appellee. *See, e.g., Jenkins v. Jenkins*, 17 N.E.3d 350, 352 (Ind. Ct. App. 2014). We are obligated, however, to correctly apply the law to the facts in the record in order to determine whether reversal is required. *Id.*

[8] We review a trial court's denial of a motion for relief from judgment pursuant to Trial Rule 60(B) under an abuse of discretion standard. *Berg v. Berg*, 170 N.E.3d 224, 227 (Ind. 2021). Further, a "decision whether to set aside a default judgment is entitled to deference and is reviewed for abuse of discretion." *Fields v. Safway Grp. Holdings, LLC*, 118 N.E.3d 804, 809 (Ind. Ct. App. 2019), *trans. denied*. An abuse of discretion occurs where the trial court's judgment is clearly against the logic and effect of the facts and circumstances before it or where the trial court errs on a matter of law. *Berg*, 170 N.E.3d at 227. "Any doubt about the propriety of a default judgment should be resolved in favor of the defaulted party." *Fields*, 118 N.E.3d at 809. "Indiana law strongly prefers disposition of cases on their merits." *Id.*

[9] Neese argues that it was entitled to relief from the default judgment under both Trial Rule 60(B)(1) and Trial Rule 60(B)(8). Trial Rule 60(B) 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:
>
> (1) mistake, surprise, or excusable neglect;
>
> * * * * *
>
> (8) any reason justifying relief from the operation of the judgment, other than those reasons set forth in sub-paragraphs (1), (2), (3), and (4).

[10] Trial Rule 60(B) also requires such a motion to be filed "within a reasonable time for reasons (5), (6), (7), and (8), and not more than one year after the judgment, order or proceeding was entered or taken for reasons (1), (2), (3), and (4)." Moreover, "[a] movant filing a motion for reasons (1), (2), (3), (4), and (8) must allege a meritorious claim or defense." T.R. 60(B). The burden is on the movant to establish grounds for Trial Rule 60(B) relief. *In re Paternity of P.S.S.*, 934 N.E.2d 737, 740 (Ind. 2010).

A. Affidavits

[11] Neese first argues that the trial court erred by considering two affidavits filed by VoMac in response to the motion for relief from judgment. In general, appellate courts review decisions to admit evidence for abuse of discretion.

Matter of K.R., 154 N.E.3d 818, 820 (Ind. 2020). "An abuse of discretion occurs when the decision is clearly against the logic and effect of the facts and circumstances and the error affects a party's substantial rights." *Id.*

[12] On appeal, Neese argues that the trial court erred by considering affidavits by Philip Morelli and Tom Hughes.[4] The Morelli affidavit, however, was filed in support of VoMac's *motion for default judgment*, not VoMac's *response to Neese's motion for relief from judgment*. The Morelli affidavit was not at issue here; rather, at the hearing on the motion for relief from judgment, VoMac asked the trial court to consider the affidavits of Tom Hughes and Jon Bragalone, which were filed in response to Neese's motion for relief from judgment. Accordingly, Neese's argument related to the Morelli affidavit is waived. *See* Ind. Appellate Rule 46(A)(8)(a) (requiring cogent arguments); *Reed v. Bethel*, 2 N.E.3d 98, 107 (Ind. Ct. App. 2014) ("[A] party may not object on one ground at trial and seek reversal on appeal using a different ground."). Further, Neese makes no argument related to the admission of the Bragalone affidavit. Accordingly, we do not address the admission of the Bragalone affidavit.

[13] As for the Hughes affidavit, Neese merely argues that it should have been "afforded an opportunity to cross examine the deponents on the assertions made in the affidavits" and the affidavit contained "inadmissible evidence."

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[4] We note that Neese did not provide VoMac's response to the motion for relief from judgment or the affidavits at issue in the Appellant's Appendix. We remind Neese that Indiana Appellate Rule 50(A)(2)(f) requires the appendix to contain "pleadings and other documents from the Clerk's Record in chronological order that are necessary for resolution of the issues raised on appeal."

Appellant's Br. pp. 19-20. Neese, however, cites no authority for its arguments and does not identify the allegedly inadmissible evidence. Accordingly, Neese has waived the contention for failure to make a cogent argument. *See* Ind. Appellate Rule 46(A)(8)(a) (requiring cogent argument and citation to relevant authority).

B. Trial Rule 60(B)(1)—Excusable Neglect

[14] Neese next argues that it was entitled to relief from the default judgment under Trial Rule 60(B)(1)'s excusable neglect provision. "[A] Trial Rule 60(B)(1) motion does not attack the substantive, legal merits of a judgment, but rather addresses the procedural, equitable grounds justifying the relief from the finality of a judgment." *Huntington Nat. Bank v. Car-X Assoc. Corp.*, 39 N.E.3d 652, 655 (Ind. 2015). "[T]here is no general rule as to what constitutes excusable neglect under Trial Rule 60(B)(1)." *Id.* Rather, "[e]ach case must be determined on its particular facts." *Id.* In *Huntington Nat. Bank*, our Supreme Court quoted the following language with approval: "Excusable neglect . . . is just that: excusable neglect, not just neglect. It is something that can be explained by an unusual, rare, or unforeseen circumstance, for instance." *Id.* at 656 (quoting *Huntington Nat. Bank v. Car-X Assoc. Corp.*, 22 N.E.3d 687, 694 (Ind. Ct. App. 2014) (Barnes, J., dissenting), *trans. granted*). "The judicial system simply cannot allow its processes to be stymied by simple inattention." *Id.* (quoting *Smith v. Johnston*, 711 N.E.2d 1259, 1262 (Ind. 1999)).

[15] The following facts have been held to constitute excusable neglect, mistake, or surprise:

> (a) absence of a party's attorney through no fault of party; (b) an agreement made with opposite party, or his attorney; (c) conduct of other persons causing party to be misled or deceived; (d) unavoidable delay in traveling; (e) faulty process, whereby party fails to receive actual notice; (f) fraud, whereby party is prevented from appearing and making a defense; (g) ignorance of the defendant; (h) insanity or infancy; (i) married women deceived or misled by conduct of husbands; (j) sickness of a party, or illness of member of a family.

Li v. NextGear Cap., Inc., 136 N.E.3d 313, 319 (Ind. Ct. App. 2019).

[16] Neese argues that Samantha engaged in "significant settlement negotiations" with VoMac's counsel prior to the entry of default judgment; Samantha was unfamiliar with the procedures for such litigation; Samantha believed that the negotiations were equivalent to an answer to the complaint; and "VoMac's conduct led Samantha to believe that the parties were going to ultimately work out acceptable payment terms on the original invoiced amount." Appellant's Br. p. 15.

[17] Neese relies in part upon *Li*, 136 N.E.3d 313. In *Li*, NextGear filed a complaint against Li, Tam, and a dealership, in which Li and Tam were partners. The dealership's attorney, Rahimzadeh, began negotiating with NextGear, and Rahimzadeh said he was also negotiating on Li's behalf and that his representation "should . . . include [Li]." *Li*, 136 N.E.3d at 316. Li repeatedly called Tam to ask about the status of the litigation. NextGear then dismissed the dealership from the litigation and filed a motion for default judgment against Li and Tam, which the trial court granted. Li and Tam filed a motion

to set aside the default judgment. The trial court granted the motion as to Tam because he was not properly served with the complaint and summons. As to Li, the trial court found no excusable neglect and denied Li's motion.

[18] On appeal, we concluded that excusable neglect existed and held:

> Under these circumstances, there was a clear breakdown in communication between Li and Rahimzadeh, where Li believed that Rahimzadeh was representing his interests in the lawsuit with NextGear, and such breakdown in communication resulted in Li not hiring his own attorney to respond to the complaint. There was no evidence of foot dragging by Li as he testified that he immediately contacted Tam and Rahimzadeh after he received the complaint, and, thereafter, he contacted Tam every two weeks to inquire about the status of the NextGear litigation and Rahimzadeh's negotiations with NextGear. . . . Li was merely a layperson, and there was no evidence that he was savvy or sophisticated in the procedures of loan default litigation. . . . Li understandably, albeit mistakenly, believed that all was being taken care of and nothing more was required of him. We conclude that the neglect by Li in failing to file an answer to NextGear's complaint was excusable.

Id. at 321. We also concluded that Li presented a prima facie showing of a meritorious defense, and accordingly, we reversed the trial court's denial of Li's motion for relief from the default judgment.

[19] The trial court found no excusable neglect here and noted: "This is not a case involving a breakdown in communication between Neese and her insurance company or counsel which resulted in the entry of the judgment." Appellant's App. Vol. II p. 19. The trial court found that "Neese acknowledged receipt of

the Complaint, knew that an answer was due within 20 days, ultimately knew that the answer was overdue, and knew that VoMac was going to proceed with litigation, yet took no action for more than two months." *Id.* at 20.

[20] We agree with the trial court's analysis here. After receiving the complaint, Samantha began negotiations with VoMac's counsel regarding payment of the debt. Emails reveal that Samantha was aware that an answer must be filed within twenty days. Although Samantha made payments of $15,000.00, she was unable to reach an agreement regarding payment of the remaining debt. In November 2019, VoMac's counsel informed Samantha: "The time has expired for you to file a response to the complaint. If you are not going to agree to the terms we proposed, we will have to go forward with litigation." Emails p. 53. VoMac then filed a motion for default judgment in January 2020, which the trial court granted. Samantha did not email VoMac's counsel again until February 2020 and did not file a motion for relief from the judgment until July 2020. VoMac's counsel submitted an affidavit, which provided: "I never told Samantha Neese that she did not need to answer Plaintiff's Complaint." Affidavit of Jon Bragalone, filed July 13, 2020, ¶ 7. As the trial court noted, there was no breakdown in communication here. Samantha was fully aware of the complaint, the need for an answer, and the fact that VoMac would be proceeding with the litigation. Under these circumstances, we cannot say that

the trial court abused its discretion when it found no excusable neglect.[5] Accordingly, Neese was not entitled to relief under Trial Rule 60(B)(1).

C. Trial Rule 60(B)(8)—Exceptional Circumstances

[21] Next, Neese argues that it was entitled to relief under Trial Rule 60(B)(8), which allows relief for "any reason justifying relief from the operation of the judgment, other than those reasons set forth in sub-paragraphs (1), (2), (3), and (4)." In order to be granted relief pursuant to Indiana Trial Rule 60(B)(8), the moving party "must demonstrate some *extraordinary or exceptional circumstances* justifying equitable relief." *Ameristar Casino E. Chicago, LLC v. Ferrantelli*, 120 N.E.3d 1021, 1026 (Ind. Ct. App. 2019) (emphasis added), *trans. denied*.

> Exceptional circumstances include "equitable considerations" such as (1) whether the movant has a substantial interest in the matter at issue; (2) whether the movant had an "excusable reason" for its untimely response; (3) whether the movant took "quick action to set aside the default judgment" once the complaint was discovered; (4) whether the movant will suffer significant loss if the default judgment is not set aside; and (5)

[5] Because the trial court did not abuse its discretion when it found no excusable neglect, we need not address whether Neese had a meritorious defense. We note, however, that the trial court here entered judgment without holding a damages hearing and awarded treble damages. "A criminal conviction under the underlying statute is not required to recover in civil action under Indiana Code Section 34-24-3-1." *Heartland Res., Inc. v. Bedel*, 903 N.E.2d 1004, 1008 (Ind. Ct. App. 2009). In a default judgment action, however, "where the action is for a sum certain and liquidated, the final judgment can be entered and no hearing on damages [is] necessary." *Fitzpatrick v. Kenneth J. Allen & Assocs., P.C.*, 913 N.E.2d 255, 269 (Ind. Ct. App. 2009). We encourage trial courts to carefully consider whether such treble damages are "sum certain and liquidated." *Id.* Regardless, however, we need not address the meritorious defense arguments under these circumstances.

> whether the non-movant will suffer only minimal prejudice if the case is reinstated.

Innovative Therapy Sols., Inc. v. Greenhill Manor Mgmt., LLC, 135 N.E.3d 662, 668-69 (Ind. Ct. App. 2019). "[T]he burden is on the movant to demonstrate that relief is both necessary and just." *Huntington Nat. Bank*, 39 N.E.3d at 658. "As with subsection (B)(1), the decision whether to grant or deny a party's motion is left to the trial court's equitable discretion and highly fact specific." *Id.*

[22] On appeal, Neese relies in part upon our Supreme Court's decision in *Huntington Nat. Bank*. There, a bank did not respond to a complaint in a timely manner because the "employee who typically received service of process for the bank was away on maternity leave" and her supervisor failed to "refer the service to counsel" until six days after the deadline to respond. *Huntington Nat. Bank*, 39 N.E.3d at 654. After a default judgment was entered, the Bank sought relief from the judgment pursuant to Trial Rule 60(B). Although our Supreme Court found no excusable neglect under Trial Rule 60(B)(1), the Court remanded for the trial court to consider the following under Trial Rule 60(B)(8):

> (1) [the Bank's] substantial interest in the real estate through its mortgage; (2) its "excusable reason" for untimely responding; (3) its quick action to set aside the default judgment once the complaint and summons were discovered; (4) its significant loss if the default judgment is not set aside; and (5) the minimal prejudice to Car-X should the case be reinstated.

Id. at 658. The Court remanded for the "trial court to reevaluate Huntington's motion upon consideration of these and all relevant circumstances—especially Huntington's meritorious defense to the underlying suit, the substantial amount of money involved, and the lack of prejudice to Car-X." *Id.* at 658-59 (footnote omitted).

[23] The Court cautioned that:

> [T]he important and even essential policies necessitating the use of default judgments—maintaining an orderly and efficient judicial system, facilitating the speedy determination of justice, and enforcing compliance with procedural rules—should not come at the expense of professionalism, civility, and common courtesy. *Standard Lumber Co. of St. John, Inc. v. Josevski*, 706 N.E.2d 1092, 1095 (Ind. Ct. App. 1999). "An extreme remedy," a default judgment "is not a trap to be set by counsel to catch unsuspecting litigants" and should not be used as a "gotcha" devise when an email or even a phone call to the opposing party inquiring about the receipt of service would prevent a windfall recovery and enable fulfillment of our strong preference to resolve cases on their merits. *Smith* [*v. Johnston*, 711 N.E.2d 1259, 1264 (Ind. 1999)]; *Coslett* [*v. Weddle Bros. Const. Co., Inc.*, 798 N.E.2d 859, 861 (Ind. 2003)].

Id. at 659.

[24] The trial court here found that Neese failed to meet its burden of demonstrating "that relief is both necessary and just." Appellant's App. Vol. II p. 21. The trial court noted that:

> [T]here is no dispute that Neese was well aware of service, knew that an answer must be filed within 20 days, knew that no answer

> was filed in a timely manner, and knew that VoMac intended to proceed with the litigation, yet took no action for two months before the Motion for Default Judgment action was filed, and took no action for almost six months to set aside the default judgment.

Id.

[25] We conclude that the circumstances here are much different than the circumstances in *Huntington Nat. Bank*. There was no "gotcha" trap here. Neese was aware of the complaint, was aware of the time deadlines to file an answer, and was warned by VoMac's counsel that VoMac would have to proceed with litigation if the parties could not reach a settlement. Two months later, VoMac filed its motion for default judgment. Neese did not even file its motion for relief from judgment until five and one-half months after default judgment was granted. Under these circumstances, we cannot say Neese established "*extraordinary or exceptional circumstances* justifying equitable relief."[6] *Ameristar Casino E. Chicago*, 120 N.E.3d at 1026. The trial court did not abuse its discretion when it denied Neese's motion for relief from judgment under Trial Rule 60(B)(8).

[26] Although the trial court did not abuse its discretion by denying Neese's motion for relief from judgment, we sua sponte note that the default judgment order

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[6] Because Neese did not establish extraordinary or exceptional circumstances justifying equitable relief, we need not address whether Neese established a meritorious defense or whether it filed its motion for relief from judgment within a reasonable time.

enters judgment against Samantha in the amount of $81,970.93, and then also enters judgment against each LLC and Samantha jointly and severally. Accordingly, the trial court entered a double judgment against Samantha. On this issue, we reverse the trial court and remand for correction of the default judgment order.

Conclusion

[27] The trial court did not abuse its discretion by denying Neese's motion for relief from judgment. We note, however, that the default judgment order contains an error that improperly doubles the judgment against Samantha. Accordingly, we reverse in part and remand for the trial court to correct the judgment against Samantha. We affirm in part, reverse in part, and remand.

[28] Affirmed in part, reversed in part, and remanded.

Bradford, J., and Crone, J., concur.