MEMORANDUM DECISION

IN THE
Court of Appeals of Indiana

David Wagner,
Appellant-Defendant

v.

David Fife,
Appellee-Plaintiff

June 24, 2024

Court of Appeals Case No.
23A-PL-3124

Appeal from the LaGrange Superior Court

The Honorable Lisa M. Bowen-Slaven, Judge

Trial Court Cause No.
44D01-2211-PL-19

Memorandum Decision by Judge Vaidik
Judges Weissmann and Foley concur.

Vaidik, Judge.

Case Summary

[1] David Wagner appeals the trial court's denial of his Indiana Trial Rule 60(B) motion to set aside default judgment. We affirm.

Facts and Procedural History

[2] Wagner and David Fife were longtime friends. In November 2021, Wagner was buying a semi-truck and trailer from a third party, and Fife agreed to finance them for him. Wagner and Fife reached an oral agreement over the telephone, and nothing was reduced to writing. According to the oral agreement, Wagner had to make monthly payments to Fife.

[3] A year later, on November 1, 2022, Fife, represented by counsel, filed a complaint against Wagner for breach of contract, theft and/or conversion, and unjust enrichment. On November 14, Wagner was served with the complaint and a summons. The summons provided:

> You have been sued in the said County by the person named Plaintiff above.
>
> The nature of the suit and Plaintiff's demand against you are stated in the complaint, a copy of which is attached to this document.
>
> **You must respond to the petition in writing, personally or by attorney, within twenty-three (23) days after you receive this**

summons, or judgment by default may be entered against you for the relief the Plaintiff has demanded.

Appellee's App. Vol. II p. 2 (emphasis added). Wagner's response was due by December 7.

[4] The same day he received the complaint and summons, Wagner called Fife's attorney's office "requesting to speak to somebody, requesting to have their proof of documentation of contracts, a freight agreement, any equipment agreement[.]" Tr. Vol. I p. 8. Wagner, however, didn't get to speak to anyone. Wagner called two more times, around November 28 and December 12, but "nobody [was] available" to talk to him then either. *Id.* The third call was made about a week after Wagner's response was due.

[5] On February 7, 2023, almost three months after Wagner was served with the complaint and summons, he hadn't filed a response, so Fife moved for default judgment. He asked the trial court to enter judgment against Wagner for $50,950.14 plus interest, court costs, and attorney's fees. The motion was served on Wagner, but he didn't file a response. On February 24, the trial court entered default judgment against Wagner and issued the order to him.

[6] Two months later, on April 26, Wagner, represented by counsel, moved to set aside the default judgment under Indiana Trial Rule 60(B)(1) based on excusable neglect. Wagner alleged that he had called Fife's attorney's office to ask for a copy of the contract but had never heard back. The trial court held a hearing at which Wagner testified and the attorneys made oral arguments.

[7] The trial court denied Wagner's motion to set aside. The court noted that it didn't "fault[]" Wagner for contacting Fife's attorney's office because that was "within his right." *Id.* at 17. However, the court found that the summons was "very clear" that if Wagner didn't respond to the lawsuit within twenty-three days, default judgment could be entered against him. *Id.*

[8] Wagner now appeals.

Discussion and Decision

[9] Wagner appeals the trial court's denial of his motion to set aside the default judgment. When, as here, an evidentiary hearing is held, a trial court's ruling on such a motion is entitled to "substantial deference" and will be reversed only for an abuse of discretion. *Huntington Nat'l Bank v. Car-X Assocs. Corp.*, 39 N.E.3d 652, 655 (Ind. 2015).

[10] "Indiana law strongly prefers disposition of cases on their merits." *Coslett v. Weddle Brothers Constr. Co.*, 798 N.E.2d 859, 861 (Ind. 2003), *reh'g denied.* Therefore, a trial court considering a motion to set aside a default judgment "must balance the need for an efficient judicial system with the judicial preference for deciding disputes on the merits." *Baker v. Paschen*, 188 N.E.3d 486, 491 (Ind. Ct. App. 2022), *reh'g denied*, *trans. denied.*

[11] Wagner moved to set aside the default judgment under Trial Rule 60(B)(1), which provides that a judgment may be set aside based on a party's "mistake, surprise, or excusable neglect" if the motion is filed within one year of the

judgment and the moving party alleges "a meritorious claim or defense." Wagner argues that he proved excusable neglect.[1] "Because there is no general rule as to what constitutes excusable neglect under Trial Rule 60(B)(1), each case must be determined on its particular facts." *Huntington Nat'l Bank*, 39 N.E.3d at 655 (cleaned up).

[12] The trial court did not abuse its discretion in denying Wagner's motion to set aside the default judgment. It is undisputed that Wagner was served with the complaint and summons on November 14, 2022. The summons specifically advised Wagner that if he didn't respond to the complaint within twenty-three days (by December 7), default judgment could be entered against him. Wagner, however, didn't respond to the complaint. Fife didn't immediately seek a default judgment, instead waiting until February 7, 2023, to do so. The trial court entered a default judgment against Wagner on February 24. Even after a default judgment was entered against and issued to Wagner, he waited two months before he moved to set aside the default judgment.

[13] Wagner claims that the fact he called Fife's attorney's office three times and was told no one was available to talk to him "created a reasonable impression that his calls would be returned and would cause a reasonable person to take no further actions in the case while waiting for the return call." Appellant's Reply Br. p. 4. While it may have been reasonable for Wagner to wait a few days after

[1] Wagner also argues that he has a meritorious defense. In light of our conclusion that Wagner failed to prove excusable neglect, we need not address this argument.

first calling Fife's attorney's office, once several days passed with no return call, it was no longer reasonable for Wagner to ignore the approaching deadline. Although Wagner could continue calling Fife's attorney's office, the reasonable assumption at that point was that Fife's attorney was not calling him back and that he needed to respond personally or by an attorney before the deadline. Wagner failed to prove excusable neglect.

[14] Wagner relies on several cases. In the first case, *Smith v. Johnston*, 711 N.E.2d 1259 (Ind. 1999), a patient filed a proposed complaint with the Indiana Department of Insurance against a doctor. The doctor's counsel worked closely with the patient's counsel during the medical-review-panel process. After getting a favorable panel opinion, the patient filed suit against the doctor in trial court. The summons was served on a nurse at the doctor's office, but because the office manager wasn't there at the time, the usual procedure wasn't followed. As a result, the summons was placed on the doctor's desk (where he didn't read it for quite some time) rather than being sent to counsel. Because the doctor's counsel didn't know about the suit, no appearance was filed on behalf of the doctor. Without notifying the doctor's counsel about the suit, the patient's counsel moved for a default judgment.

[15] Our Supreme Court held that, although neither the Indiana Rules of Professional Conduct nor the Indiana Trial Rules explicitly require attorneys to notify opposing counsel of a suit, "the administration of justice requires that parties and their **known lawyers** be given notice of a lawsuit prior to seeking a default judgment." *Id.* at 1264 (emphasis added). And because the patient's

counsel knew the doctor was represented by counsel and didn't notify them of the pending lawsuit, the patient's counsel committed misconduct and the default judgment was set aside under Trial Rule 60(B)(3) (fraud, misrepresentation, or other misconduct of an adverse party).

[16] *Smith* does not apply here for two reasons. First, *Smith* analyzed whether the patient's counsel committed misconduct under Trial Rule 60(B)(3). The issue here, however, is excusable neglect by Wagner under Trial Rule 60(B)(1). Second, this Court has made clear that the duty laid out in *Smith* applies only when the attorney has clear knowledge that the opposing party is being represented. *See Allstate Ins. Co. v. Love*, 944 N.E.2d 47, 52 (Ind. Ct. App. 2011) (concluding that because plaintiff "had no clear knowledge" defendant was represented, there was "no duty to provide notice to [defendant's attorney] before seeking a default judgment"). Here, it is undisputed that Wagner was unrepresented when Fife filed suit and sought default judgment.[2]

[17] Wagner also cites *On the Level Fence & Deck, Inc. v. Indiana Bell Telephone Co.*, 217 N.E.3d 599 (Ind. Ct. App. 2023), *trans. denied*. There, AT&T sued On the Level, a fence and deck company, for damaging underground utility lines.

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[2] Wagner also cites a Pennsylvania case, *Duckson v. Wee Wheelers, Inc.*, where the superior court reversed the trial court's denial of the defendant's petition to open a default judgment because it found that an insurance company's delay in processing a complaint timely provided by its insured (the defendant) constituted "reasonable justification for delay." 620 A.2d 1206, 1209 (Pa. Super. Ct. 1993). Although the superior court also discussed the plaintiff's counsel's "resistance to cooperate" with the defendant's counsel, that was not the primary basis for its holding. *Id.* at 1212. *Duckson* is thus distinguishable.

Before the lawsuit was filed, AT&T had been communicating directly with On the Level's insurer. On the Level did not respond to the lawsuit, and a default judgment was obtained. On the Level moved to set aside the default judgment under Trial Rule 60(B)(1), arguing that it mistakenly believed its insurer knew about and was handling the lawsuit. The trial court denied the motion to set aside, and this Court reversed:

> Under the circumstances, we agree with On the Level that its failure to contact its insurer after being served with the complaint amounts to excusable neglect. To be sure, On the Level should have contacted its insurer out of an abundance of caution. But by all indications, On the Level, a fence and deck company, is not a sophisticated party with significant litigation experience. . . . Therefore, it was reasonable for On the Level to believe that AT&T would continue communicating directly with On the Level's insurer after filing suit and that the insurer had things under control.

Id. at 602.

[18] *On the Level* does not apply here either. There, we found it was reasonable for On the Level to believe that AT&T would continue communicating directly with its insurer and that its insurer had things under control. Here, however, it wasn't reasonable for Wagner to believe that the opposing party's attorney would help him. Wagner never had any contact with Fife's attorney and therefore had no basis to expect that the attorney would take care of him. The trial court did not abuse its discretion in denying Wagner's motion to set aside the default judgment.

[19] Affirmed.

Weissmann, J., and Foley, J., concur.

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