MEMORANDUM DECISION

ATTORNEY FOR APPELLANT

Paul B. Overhauser
Overhauser Law Offices, LLC
Greenfield, Indiana

ATTORNEYS FOR APPELLEES

Richard A. Rocap
Ryan L. Garner
Rocap Law Firm LLC
Carmel, Indiana

IN THE COURT OF APPEALS OF INDIANA

Christy Kenworthy,
Appellant/Defendant/Counterclaimant,

v.

Lyons Insurance & Real Estate, Inc., and Michael E. Lyons
Appellees/Plaintiffs/Counter-Defendants.

March 14, 2023

Court of Appeals Case No. 22A-CC-1375

Appeal from the Wayne Superior Court

The Honorable Bob A. Witham, Special Judge

Trial Court Cause No. 89D01-1411-CC-766

Memorandum Decision by Judge Bradford
Judges Pyle and Foley concur.

Bradford, Judge.

Case Summary

[1] In 2014, Lyons Insurance & Real Estate, Inc., and its president, Michael Lyons, (collectively, "Lyons") sued Christy Kenworthy for allegedly withholding money from them from a Wayne County Insurance Service ("WCIS") distribution check. Kenworthy filed a series of counterclaims. In August of 2016, the trial court granted summary judgment against Kenworthy on some counterclaims ("the Decided Counterclaims") but left the others undecided ("the Remaining Counterclaims"). Five years later, Kenworthy moved to dismiss the Remaining Counterclaims so that she could appeal the summary judgment ruling on the Decided Counterclaims. When Kenworthy attempted to appeal the judgment entered on the Decided Counterclaims, however, we interpreted the trial court's order dismissing her Remaining Counterclaims ("the Dismissal Order") as having dismissed all of her counterclaims and dismissed her appeal on mootness grounds ("Appeal One"). Kenworthy filed a motion for relief from judgment asking the trial court to vacate the Dismissal Order and enter a new order that dismissed only the Remaining Counterclaims, but the trial court denied her motion. Kenworthy appeals that denial, arguing that the trial court abused its discretion in denying her motion and, to the extent the trial court mistakenly dismissed the Decided Counterclaims, that the mistake should be corrected pursuant to Indiana Trial Rule 60. We affirm.

Facts and Procedural History

[2] In 2014, Lyons sued Kenworthy, claiming that Kenworthy had withheld WCIS distributions and that she had worked for WCIS during the time that she had been paid to provide services for Lyons. *Kenworthy v. Lyons Ins. & Real Est., Inc*., 185 N.E.3d 405, 407 (Ind. Ct. App. 2022). In her answer, Kenworthy asserted various counterclaims, including claims for defamation, unjust enrichment, conversion, fraud, malicious prosecution, abuse of process, engaging in frivolous litigation, and intentional infliction of emotional distress. *Id*. Eventually, both parties moved for summary judgment. The trial court denied summary judgment on Lyons' claims; however, it granted partial summary judgment in favor of Lyons on the Decided Counterclaims, which included Kenworthy's defamation claim as to certain persons, her intentional-infliction-of-emotional-distress claim, her abuse-of-process claim, and her malicious-prosecution claim. *Id*. at 408. The Remaining Counterclaims were left undecided.

[3] On April 6, 2021, after some unsuccessful attempts at mediation, the parties filed a stipulation of dismissal with prejudice as to Lyons' claims only. *Id.* at 409. Kenworthy also filed a motion for voluntary dismissal under Trial Rule 41(A)(2) in which she asked the trial court to dismiss the Remaining Counterclaims without prejudice. *Id*. After a hearing on Kenworthy's motion to dismiss, the trial court granted Kenworthy's motion to dismiss the Remaining Counterclaims without prejudice. *Id*. Believing that the partial grant of summary judgment on the Decided Counterclaims had then become final, Kenworthy attempted Appeal One. *Id*.

[4] In Appeal One, we concluded "that the trial court's grant of Kenworthy's motion for voluntary dismissal rendered her remaining appellate claims moot" and thus "dismiss[ed] the portion of her appeal relating to her dismissed counterclaims." *Id*. at 412. On April 4, 2022, Kenworthy moved for relief from judgment in the trial court and two days later petitioned us for rehearing on Appeal One. The trial court issued its order denying Kenworthy's motion for relief from judgment on May 23, 2022. Three days later, we denied Kenworthy's petition for rehearing.

Discussion and Decision

[5] Kenworthy contends that the trial court abused its discretion by denying her motion for relief from judgment, in which she argued that the Dismissal Order had been based on a clear error. Specifically, Kenworthy alleges that the trial court *sua sponte* dismissed the Decided Counterclaims as part of her Trial Rule 41(A)(2) voluntary dismissal of the Remaining Counterclaims and seeks relief under Trial Rule 60(B)(1) and 60(A). For its part, Lyons argues that the law of the case doctrine should preclude any review of the Dismissal Order, and in the alternative, that the trial court did not abuse its discretion in denying Kenworthy's motion for relief.

I. Law of the Case

[6] As an initial matter, Lyons argues that this appeal should be dismissed in accordance with the law of the case doctrine because we determined that the

case was moot in Appeal One. The law of the case doctrine states that "an appellate court's determination of a legal issue is binding both on the trial court on remand and the appellate court on a subsequent appeal, given the same case with substantially the same facts." *Ind. Farm Gas Prod. v. So. Ind. Gas & Elec. Co.*, 662 N.E.2d 977, 981 (Ind. Ct. App. 1996), *trans. denied*. The doctrine simply expresses the judicial preference generally to refuse to reopen issues that have been "litigated and decided." *Id*. Here, however, we are dealing with a different issue. In Appeal One, Kenworthy attempted to appeal, among other things, the summary judgment entry on the Decided Counterclaims. In this appeal, we are considering a new issue: whether Kenworthy is entitled to relief from judgment on the Dismissal Order. Consequently, the law of the case doctrine does not bar us from considering this appeal on the merits.

II. Trial Rule 60(B)(1): Mistake

[7] First, Kenworthy argues that the trial court abused its discretion in denying her motion for relief from judgment under Trial Rule 60(B) because that denial was "based on a clear error of law" and was a "mistake." Appellant's Br. pp. 13, 16. Trial Rule 60(B)(1) provides:

> **(B) Mistake--Excusable Neglect--Newly Discovered Evidence--Fraud, etc.** 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[.]

(Emphasis in original).

[8] Generally, "[w]e review the grant or denial of a Trial Rule 60(B) motion for relief from judgment under an abuse of discretion standard." *Munster Cmty. Hosp. v. Bernacke*, 874 N.E.2d 611, 613 (Ind. Ct. App. 2007). "An abuse of discretion occurs when the trial court's decision is against the logic and effect of the facts and circumstances before it." *Ind. Univ. Med. Ctr. v. Logan,* 728 N.E.2d 855, 859 (Ind. 2000). In deciding a motion for relief from judgment, the "trial court must balance the need for an efficient judicial system with the judicial preference for deciding disputes on the merits." *Id*. Trial Rule 60(B) "is meant to afford relief from circumstances which could not have been discovered during the period a motion to correct error could have been filed." *Bello v. Bello*, 102 N.E.3d 891, 894 (Ind. Ct. App. 2018). Accordingly, any "issue which was raised by or could have been raised by timely motion to correct errors and timely direct appeal may not be the subject of a motion for relief from judgment." *Cullison v. Medley*, 619 N.E.2d 937, 945 (Ind. Ct. App. 1993).

[9] Further, a "motion for relief from judgment pursuant to Trial Rule 60(B) may not be used as a substitute for a direct appeal." *Z.S. v. J.F.*, 918 N.E.2d 636, 640 (Ind. Ct. App. 2009) (citing *Goldsmith v. Jones*, 761 N.E.2d 471, 474 (Ind. Ct. App. 2002). Instead, Trial Rule 60(B) "affords relief in extraordinary circumstances which are not the result of any fault or negligence on the part of the movant." *Goldsmith*, 761 N.E.2d at 474. A trial court's discretion in considering a Rule 60(B) motion is "necessarily broad." *Fitzgerald v. Cummings*, 792 N.E.2d 611, 614 (Ind. Ct. App. 2003). "[W]e will not reweigh the evidence

or substitute our judgment for that of the trial court." *Kmart Corp. v. Englebright*, 719 N.E.2d 1249, 1253 (Ind. Ct. App. 1999) (citing *Pro. Laminate Corp. v. Educ. Sys. Corp. of Ind.*, 651 N.E.2d 1186, 1188 (Ind. Ct. App. 1996), *trans. denied*), *trans. denied*. The movant bears the burden of showing that relief is both necessary and just. *Z.S.*, 918 N.E.2d at 639.

[10] Specifically, Kenworthy argues that the trial court's denial of her motion for relief from judgment was based on a "clear error of law" because "the trial court lacked the power to dismiss Kenworthy's *Decided Counterclaims*[.]" Appellant's Br. p. 15 (emphasis in original). We disagree. Notably, Trial Rule 60(B)(1) does not contemplate relief for mistakes of law because "[a]s long ago as 1883 it has been the law in Indiana that mere mistakes of law do not authorize the vacation of a judgment." *Moe v. Koe*, 165 Ind. App. 98, 102, 330 N.E.2d 761, 764 (1975). While there are no fixed standards for what constitutes "mistake, surprise, or excusable neglect" under Trial Rule 60(B)(1), *Fitzgerald*, 792 N.E.2d at 615, Indiana courts have found the following facts to fit those terms:

> (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.

Englebright, 719 N.E.2d at 1254. Because Kenworthy's claim is not analogous to any of the above situations, we cannot say that the trial court abused its discretion in denying Kenworthy's motion under Trial Rule 60(B)(1) merely because the trial court's order was based on an alleged error of law.

[11] Moreover, Trial Rule 60(B)(1) affords Kenworthy no relief because the alleged mistake in the Dismissal Order would have been known when the order was issued on April 6, 2021. *Kenworthy*, 185 N.E.3d at 409. Therefore, the alleged mistake was an issue that "could have been raised by timely motion to correct errors and timely direct appeal" and thus "may not be the subject of a motion for relief from judgment." *Cullison*, 619 N.E.2d at 945; *see also Bello*, 102 N.E.3d at 894. Kenworthy neither moved to correct error for the trial court's alleged mistake in the Dismissal Order nor raised this argument in Appeal One. Because Kenworthy's argument could have been raised on a motion to correct error or on direct appeal, we cannot say that the trial court abused its discretion in denying Kenworthy's motion for relief from judgment under Trial Rule 60(B).

[12] Furthermore, even if Kenworthy could establish that the trial court had made a mistake in its Dismissal Order, she would also have to pose a meritorious defense. *See* Trial Rule 60(B). This element "requires a showing that vacating the judgment will not be an empty exercise." *Outback Steakhouse of Fla., Inc. v. Markley*, 856 N.E.2d 65, 73 (Ind. 2006) (internal quotation omitted). Specifically, the movant needs to "present evidence that, *if credited*, demonstrates that a different result would be reached if the case were retried on

the merits and that it is unjust to allow the judgment to stand." *Id*. at 73–74 (citing *Smith v. Johnston*, 711 N.E.2d 1259, 1265 (Ind. 1999)) (emphasis in original). "[I]t is well within the trial court's discretion to determine whether […] the nature of evidence presented in support of a motion to set aside judgment indeed satisfies the meritorious defense requirement of a prima facie showing." *Shane v. Home Depot USA, Inc.*, 869 N.E.2d 1232, 1238 (Ind. Ct. App. 2007).

[13] Kenworthy asserts that her motion for relief from judgment alleged a meritorious claim by arguing that, unless her motion was granted, she would "be precluded from appealing the adverse summary judgment ruling on her **Decided Counterclaims**." Appellant's App. Vol. II p. 66 (emphasis in original). In making her argument in her motion for relief from judgment, Kenworthy attached a copy of her appellant's brief in Appeal One claiming that it "demonstrate[s] the merit of her" claims. Appellant's Br. p. 16. Here, however, the trial court "reviewed [Kenworthy's] motion, as well as the response in opposition filed by Lyons[,]" and determined that her motion should be denied. Appellant's App. Vol. II p. 39. Given the trial court's broad discretion, and the fact that we rejected a similar argument by Kenworthy regarding the trial court's alleged mistake on petition for rehearing in Appeal One, we cannot say that the trial court's decision was "against the facts and circumstances before it." *Logan*, 728 N.E.2d at 859; *see also Munster Cmty. Hosp.*, 874 N.E.2d at 614 (concluding that an assertion that a movant's "complaint

alleges his meritorious claim[,]" without more, "is insufficient to warrant reversal under Trial Rule 60(B)").

III. Trial Rule 60(A): Clerical Mistake

[14] Kenworthy also argues in her appellant's brief that "the failure to include the word 'remaining' before the word 'counterclaims' in the operative language of the [Dismissal Order] was a 'mistake'" that "could also be corrected pursuant to" Trial Rule 60(A). Appellant's Br. p. 16. In her reply brief, however, Kenworthy makes a contradictory argument. In rebutting Lyons's arguments, Kenworthy contends that "the failure to include the word 'Remaining' before the word 'Counterclaims' in the [Dismissal Order] was not a clerical error – it was in the body of the *Order*, so it was a *court* error, not a *clerical* error." Appellant's Reply Br. pp. 6–7 (emphases in original). She claims that this alleged mistake "was an error of 'substance'" and "a T.R. 60(A) motion is not to be used for the purpose of correcting errors of substance." *Rissler v. Lynch*, 744 N.E.2d 1030, 1033 (Ind. Ct. App. 2001). As a result of her contradictory arguments, the Trial Rule 60(A) argument is waived. *See Edwards v. Wyllie*, 246 Ind. 261, 265, 203 N.E.2d 200, 202–03 (1964) (concluding that an appellant may waive an issue raised in her initial brief by contradicting her original argument in her reply brief).

[15] The judgment of the trial court is affirmed.

Pyle, J., and Foley, J., concur.