MEMORANDUM DECISION

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IN THE COURT OF APPEALS OF INDIANA

Thomas Behling, Sr.,
Appellant-Petitioner,

v.

Joyce Behling,
Appellee-Respondent.

September 18, 2023

Court of Appeals Case No. 23A-DC-282

Appeal from the Morgan Circuit Court

The Honorable Matthew G. Hanson, Judge

Trial Court Cause No. 55C01-1812-DC-2352

Memorandum Decision by Judge Brown
Judge Felix concurs.
Judge Crone dissents with a separate published opinion.

Brown, Judge.

[1] Thomas Behling, Sr., ("Husband") appeals the trial court's orders denying his October 25, 2022 motion and his January 1, 2023 motion. We affirm.

Facts and Procedural History

[2] On December 12, 2019, Joyce Behling ("Wife") filed a Verified Petition for Dissolution of Marriage which alleged that the parties were married in 1996 and had one child, T.B. On September 6, 2022, the trial court entered a Final Agreement and Final Order of the Court which stated the parties appeared with counsel and "herein sign their oral agreement recited in open Court" and ordered in part that Wife receive "$110,000 of the money in the Edward Jones Account," "[t]he remaining funds in the Edward Jones Account (approximately $614,000) will go to Husband," and "Husband agrees to pay $10,000 in college expenses for the benefit of [T.B.] from the money in the Edward Jones Account." Appellant's Appendix Volume II at 19.

[3] On October 25, 2022, Husband's counsel filed a "Motion for Nunc Pro Tunc and Attorney's Conference" which alleged that the September 6, 2022 order contained no discussion about a division of retirement accounts at Edward Jones, and that when Husband came to counsel's office to sign quitclaim deeds he was adamant that there may be money held by Wife at Edward Jones "separate and distinct from an interest-bearing account that was opened jointly by the parties for funds to be deposited from the sale of marital property during the pendency of the divorce." *Id.* at 22. The motion asserted that Wife had stated there were no retirement accounts in an answer to Interrogatory 10 and Interrogatory 11, she did not adequately disclose her assets to Husband, counsel

discovered five pages of documents submitted in discovery that "seemed to indicate the existence of 6 separate accounts with Edward Jones" which were discovered in "720 pages of loose leaf discovery that were unorganized and provided in 2 separate PDF files that in no way related back to any particular discovery request," and "these retirement accounts were not included in the marriage settlement, and therefore the Parties must either agree or the Court must make an equitable distribution of these retirement accounts." *Id.* at 23 (some capitalization omitted). Husband attached the Interrogatories as Exhibit A and six pages of statements for Edward Jones accounts as Exhibit B.

[4] On December 12, 2022, the court held a hearing. Husband's counsel argued:

> I just wanted to make clear is that my . . . reliance was on a sworn statement by [Wife] in the interrogatories. In which, she is asked are there retirement accounts? Answer no. Not, see attached. Not, maybe. No. Under oath. So, if I had it . . . I mean it seems to me that [Wife's counsel] is saying you cannot rely on interrogatories. There were six pages within 800 pages of documents. These documents were not responded to see rfp number 1 number 2 number 3. So, did I, yes I missed six pages in . . . 800 and . . . she is correct in hundreds of pages of documents. My client, like I said, we were trying to wrap this up, started to ask me questions, and became adversarial. And, I'm going look there's not any retirement accounts. See . . . the answer to the interrogatories. When I went to . . . the mediations, I relied upon her answers based in the interrogatory. I . . . think it is difficult for [Wife's Counsel] to say that this is not a fraud. When the question is asked, which is the which is the [sic] basis upon which to set aside a marriage settlement agreement. Or but I'm I'm [sic] not necessarily arguing fraud here. Although, I think it is when you respond no in an interrogatory and clearly there is.

Transcript Volume II at 143-144.

[5] On December 14, 2022, the court entered an order denying Husband's motion. The court's order stated that "it [was] clear that [Husband] had the discovery prior to coming to an agreement on the divorce," "it [was] clear that [Wife] did not hide these documents and more so that even a basic search of these documents, as was done to even create this argument, would have produced this information prior to the divorce decree being finished," and "the court [would] not find there was a purposeful hiding or any malfeasance on the part of [Wife] and therefore will deny the request to reopen this case as requested by" Husband. Appellant's Appendix Volume II at 42.

[6] On January 1, 2023, Husband filed a "Motion to Reconsider and Request for Hearing" which requested that the court "reconsider its ruling issued on December 14, 2022," and "order a hearing in which sworn testimony and evidence" could be presented. *Id.* at 44-45 (some capitalization omitted). The court denied Husband's motion.

Discussion

[7] Husband phrases the two issues in his brief as "[w]hether it was error for the court to refuse to grant a hearing on [his] trial rule 60(b) [] motion because fraud was properly alleged" and "[w]hether [his] failure to notice the documentation for Edward Jones accounts at issue before the agreement was reached constitutes excusable neglect pursuant to Trial Rule 60(b)(1)." Appellant's Brief at 4. He argues that his claim of fraud was sufficiently pled,

the trial court erred by not granting a hearing on his motion, and his counsel's failure to notice the documentation for the Edward Jones accounts before the agreement was reached constituted excusable neglect in light of Wife's answers to the interrogatories. Wife argues in part that Husband's counsel "admitted that he was provided nearly 800 pages of documents that he never reviewed until 4 months *after* the final hearing, and more than 3 years after he first received those documents." Appellee's Brief at 6.

[8] Initially, we note that Husband's October 25, 2022 "Motion for Nunc Pro Tunc and Attorneys' Conference" did not cite Ind. Trial Rule 60(B) and did not specifically use the terms "fraud" or "excusable neglect."[1] Appellant's Appendix Volume II at 22 (capitalization omitted). Husband's January 11, 2023 motion also did not cite Ind. Trial Rule 60(B) or use the terms "fraud" or "excusable neglect." Even assuming that Husband's October 25, 2022 motion constituted a motion for relief from judgment, we cannot say reversal is warranted.

[9] Relief from judgment under Trial Rule 60 is an equitable remedy within the trial court's discretion. *In re Adoption of C.B.M.*, 992 N.E.2d 687, 691 (Ind.

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[1] To the extent Husband's motion was titled "Motion for Nunc Pro Tunc and Attorneys' Conference," we note that "[a] nunc pro tunc entry is defined in law as 'an entry made now of something which was actually previously done, to have effect as of the former date.'" *Cotton v. State*, 658 N.E.2d 898, 900 (Ind. 1995) (quoting *Perkins v. Haywood*, 132 Ind. 95, 101, 31 N.E. 670, 672 (1892)). Such an entry may be used to either record an act or event not recorded in the court's order book or to change or supplement an entry already recorded in the order book. *Id.* Its purpose is to supply an omission in the record of action really had, but omitted through inadvertence or mistake. *Id.*

2013). Accordingly, we generally review a trial court's Rule 60 ruling only for abuse of discretion. *Id.* "But when 'the trial court rules on a paper record without conducting an evidentiary hearing,' . . . we are 'in as good a position as the trial court . . . to determine the force and effect of the evidence.'" *Id.* (quoting *GKN Co. v. Magness*, 744 N.E.2d 397, 401 (Ind. 2001) (quoting *Farner v. Farner*, 480 N.E.2d 251, 257 (Ind. Ct. App. 1985))). Under those circumstances, our review is de novo. *Id.*

[10] Ind. Trial Rule 60(B) provides in 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:
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> (1) mistake, surprise, or excusable neglect;
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> * * * * *
>
> (3) fraud (whether heretofore denominated intrinsic or extrinsic), misrepresentation, or other misconduct of an adverse party;
>
> (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).
>
> The motion shall 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). A movant filing a motion for reasons (1), (2), (3), (4), and (8) must allege a meritorious claim or defense.

[11] Ind. Trial Rule 60(D) provides: "In passing upon a motion allowed by subdivision (B) of this rule the court shall hear any pertinent evidence, allow

new parties to be served with summons, allow discovery, grant relief as provided under Rule 59 or otherwise as permitted by subdivision (B) of this rule."

[12] To the extent Husband argues that the court erred by not granting a hearing, we note that his October 25, 2022 "Motion for Nunc Pro Tunc and Attorney's Conference" merely requested "an attorneys conference on this *Motion For Nunc Pro Tunc* and for all just and proper relief in the premises." Appellant's Appendix Volume II at 22-23 (some capitalization omitted). While Husband's January 1, 2023 "Motion to Reconsider and Request for Hearing" requested that the court "order a hearing in which sworn testimony and evidence" could be presented, Husband does not specify what testimony and evidence he would have presented. *Id.* at 44-45 (some capitalization omitted). Further, the Interrogatories and multiple statements from Edward Jones were attached to Husband's October 25, 2022 motion and thus before the trial court. Under these circumstances, reversal is not warranted. *See Thompson v. Thompson*, 811 N.E.2d 888, 904 (Ind. Ct. App. 2004) (noting that Trial Rule 60(D) generally requires trial courts to hold a hearing on any pertinent evidence before granting Trial Rule 60(B) relief, but that when there is no pertinent evidence to be heard, a hearing is unnecessary) (citing *Pub. Serv. Comm'n v. Schaller*, 157 Ind. App. 125, 130, 299 N.E.2d 625, 628 (1973) (noting that the language of Rule 60(D) is mandatory but only for the presentation of "pertinent evidence")), *reh'g denied*, *trans. denied*.

[13] As for Husband's argument that his failure to notice the documentation for Edward Jones accounts before the agreement was reached constituted excusable neglect pursuant to Ind. Trial Rule 60(B)(1), we note that a motion under Rule 60(B)(1) 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. *KWD Industrias SA DE CV v. IPM LLC*, 129 N.E.3d 276, 281 (Ind. Ct. App. 2019). There is no general rule as to what constitutes excusable neglect. *Id.* Each case must be determined on its particular facts. *Id.* 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.

Id. (quoting *Kmart v. Englebright*, 719 N.E.2d 1249, 1254 (Ind. Ct. App. 1999) (citing *Cont'l Assurance Co. v. Sickels*, 145 Ind. App. 671, 675, 252 N.E.2d 439, 441 (1969), *reh'g denied*), *trans. denied*).

[14] Although there are exceptions, generally, the negligence of an attorney is attributable to the client for Trial Rule 60(B) purposes, and attorney negligence will not support a finding of excusable neglect. *Thompson*, 811 N.E.2d at 903-

904 (citing *Morequity Inc. v. Keybank*, 773 N.E.2d 308, 314 (Ind. Ct. App. 2002) (citing *Moe v. Koe*, 165 Ind. App. 98, 104-105, 330 N.E.2d 761, 765 (1975), *trans. denied*), *trans. denied*; *In re the Marriage of Ford*, 470 N.E.2d 357, 361 (Ind. Ct. App. 1984) ("We believe the only equitable result as between wife and the husband is for [wife] to suffer the consequences of any errors of judgment made by the attorney she hired."), *reh'g denied*, *trans. denied*; *Vanjani v. Fed. Land Bank of Louisville*, 451 N.E.2d 667, 671 (Ind. Ct. App. 1983) (noting that numerous cases hold that the negligence of an attorney does not amount to excusable neglect as a matter of law); *Rose v. Rose*, 181 Ind. App. 98, 100-101, 390 N.E.2d 1056, 1058 (1979) (the general rule with regard to the negligence of the attorney being attributable to the client is tempered by Trial Rule 60(B)'s rule that the facts and circumstances of the particular case are controlling)).

[15] Husband's October 25, 2022 motion attached the Interrogatories referenced above, which were dated June 5, 2019, as Exhibit A. Interrogatory 10 asked:

> Please identify by name, address, telephone number, identification number, and type of fund or account, all accounts, all pension funds, retirement funds, IRA accounts, annuity funds, profit-sharing plans, 401(k)s, ESOPs, SEPs, Keoghs, and all similar plans, funds, or accounts in which you had/have an interest as of the Date of Marriage on * and as of the Date of Final Separation and state whether each plan, fund, or account was/is vested as of the Date of Marriage and as of the date of Final Separation. In your answer please identify the date each plan, fund, or account vested, as well as:
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> (a) The value of your interest in each plan, fund, or account as of the Date of Marriage and your method of valuation;

(b) The value of your interest in each plan, fund or account as of the Date of Final Separation and your method of valuation;

(c) The amount that you now receive from each plan, fund or account upon demand;

(d) The amount that you may receive from each plan, fund, or account upon termination of your employment;

(e) The retirement age contemplated by each plan, fund, or account;

(f) The benefits available to you at retirement age in monthly installments and/or lump-sum payment;

(h)[2] Whether each plan, fund, or account is contributory or non-contributory;

(i) The date and amount of any loan taken against said funds, the amount, the scheduled payment and the balance of said loan;

(j) Whether you have surviving spouse benefit available through the plan; and

(k) Whether you executed documents through your employer regarding the surviving spouse benefit.

Appellant's Appendix Volume II at 27. Wife answered: "None." *Id.* at 28.

[16] Interrogatory 11 asked:

> Please identify (a) by name of financial institution, investment company, or other entity; address; telephone number; account number, type of account; how the account is titled; balance or value on the Date of Final Separation; and present balance or

[2] Interrogatory 10 does not include a subparagraph (g).

> value, all bank, stock, fund, investment, or similar accounts that you now maintain or own, or have maintained or owned since January 1, 2016 at, separately or together with another person or entity.

Id. Wife answered: "None." *Id.* The motion also attached Edward Jones account statements as Exhibit B including a statement for the "Portfolio for [Wife] & [T.B.]" for the period of December 1 to 31, 2018, which listed six accounts totaling $215,683.04.[3] *Id.* at 36.

[17] As pointed out by Wife, Interrogatory 24 asked her to

> produce all agreements, documents, explanations of benefits, evaluations, and any other papers relating to any pension or profit-sharing plan, ESOP, 401(k), SEP, IRA, Keogh, or other retirement plan in which you have an interest, including any loans thereon, whether or not presently vested, as of the Date of Marriage and as of the Date of physical separation.

Id. at 31. Wife answered: "Attached." *Id.* Wife also answered "Attached" to Interrogatory 25 which asked: "Please produce all canceled checks, account statements, and check registers (or account records) since January 1, 2016, for all accounts in which you have or had an interest, including but not limited to,

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[3] The six accounts included: (1) "Joint Tenants With Right of Survivorship" with Wife and T.B. as account holders; (2) "Custodian Account" with Wife as account holder; (3) "529 College Savings Plan" with Wife as account holder; (4) "Single Account Advisory Solutions Fund Model" with Wife as account holder; (5) "Roth Individual Retirement Account Guided Solutions Fund Account" with Wife as account holder; and (6) "Individual Retirement Account Guided Solutions Fund Account" with Wife as account holder. Appellant's Appendix Volume II at 36.

checking, savings, money market, CDs, CMAs, brokerage, credit union, stock, and all other similar accounts." *Id.*

[18] Husband acknowledges that he was provided the Edward Jones account statements, which were attached to his October 25, 2022 motion, during discovery. The trial court's September 6, 2022 order to which Husband agreed referred to "the Edward Jones Account." *Id.* at 19. Further, while Wife answered "None" with respect to two interrogatories asking about retirement accounts, she also answered "Attached" as to Interrogatory 24, which asked about such accounts, and answered "Attached" to Interrogatory 25, which asked about accounts generally. *Id.* at 28, 31. We also note that Husband's October 25, 2022 motion indicated that Husband was aware of the Edward Jones accounts. Under these circumstances, we cannot say that the trial court abused its discretion in denying Husband's motions.

[19] For the foregoing reasons, we affirm the trial court.

[20] Affirmed.

Felix, J., concurs.

Crone, J., dissents with a separate published opinion.

Crone, Judge, dissenting.

[21] In holding that Husband is not entitled to equitable relief,[4] the majority is apparently untroubled that both Wife and her attorney fraudulently stated in two interrogatory responses, under penalty of perjury, that Wife had no interest in any accounts as of the date of final separation. The majority also seems unconcerned that Wife's attorney violated her duty under Indiana Trial Rule 26(E)(2)(a) to seasonably amend those responses, which were incorrect when made, as well as her corresponding duty of candor toward the tribunal, which resulted in a fraud upon the court. *See* Ind. R. Prof. Conduct 3.3(a)(3) (providing that if lawyer or client "has offered material evidence and the lawyer comes to know of its falsity, the lawyer shall take reasonable remedial measures, including, if necessary, disclosure to the tribunal"). To be sure, Husband's attorney was less than diligent in reviewing the 720-page document dump from Wife's attorney. But, given the fraudulent interrogatory responses, he would not have been on the lookout for evidence regarding Wife's accounts, which constituted a sizable portion of the marital estate.

[22] Indiana Trial Rule 60(B) provides that a court may relieve a party from a judgment "upon such terms as are just[,]" and justice in this case requires a remand to divide and allocate the more than $215,000 in Wife's accounts, which would have been done the first time around if Wife's attorney had

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[4] Treating Husband's "Motion for Nunc Pro Tunc and Attorney's Conference" as anything other than a Trial Rule 60(B) motion for relief from judgment improperly elevates form over substance.

fulfilled her duty to apprise the trial court of their existence.[5] *See Elkhart Cnty. Dep't of Pub. Welfare v. Kehr*, 124 Ind. App. 325, 333, 112 N.E.2d 451, 454 (1953) (stating that a court's "primary purpose … is to render justice"). To do otherwise rewards Wife for her fraudulent responses to Husband's interrogatories.

[5] The parties' final agreement does not contain a general setoff provision in Wife's favor, so the accounts could not be said to have been divided and allocated by implication.