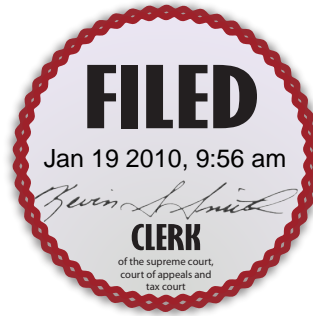


Pursuant to Ind.Appellate Rule 65(D), this Memorandum Decision shall not be regarded as precedent or cited before any court except for the purpose of establishing the defense of res judicata, collateral estoppel, or the law of the case.



ATTORNEY FOR APPELLANT:

ATTORNEYS FOR APPELLEE:

WILLIAM J. STEVENS
Lakeside, Michigan

DANIEL A. GIOIA
CHAD J. MELCHI
Burke Costanza & Cuppy LLP
Merrillville, Indiana

**IN THE
COURT OF APPEALS OF INDIANA**

RICHARD A. SWOBODA,
Appellant-Defendant,

vs.

RICHARD STALBRINK,
Appellee-Plaintiff.

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No. 46A05-0906-CV-359

APPEAL FROM THE LAPORTE SUPERIOR COURT
The Honorable David L. Chidester, Judge
Cause No. 46D01-0709-CT-175

January 19, 2010

MEMORANDUM DECISION - NOT FOR PUBLICATION

MAY, Judge

Richard A. Swoboda sued Richard Stalbrink for malpractice.¹ The trial court granted summary judgment for Stalbrink after a hearing at which Swoboda was not present. Swoboda claimed he had not received notice of the hearing, and asked the trial court to set aside the summary judgment and hold a new hearing. The trial court denied Swoboda's motion. Concluding Swoboda is entitled to a new hearing, we reverse and remand.

FACTS AND PROCEDURAL HISTORY

In 1996, Dunes Estate Planning began managing Swoboda's investment portfolio. Dunes was owned and operated by Swoboda's friend, Donna Pavlos. On September 9, 2005, Swoboda wrote Pavlos a letter questioning some of her actions. One of Swoboda's concerns was a management fee Pavlos had instituted on top of trade commissions. On September 29, 2005, Swoboda learned Pavlos was not licensed to act as a financial planner and therefore was not permitted to charge a management fee.

Swoboda negotiated an agreement whereby Pavlos would pay back the management fees with interest and secure the debt with a mortgage on her home. Swoboda asked Stalbrink, a lawyer who was already representing Swoboda on other matters, to prepare a written agreement and the necessary mortgage documents. On October 4, 2005, Richard and Patsy Swoboda and Donna and John Pavlos signed the agreement and mortgage Stalbrink had prepared. The agreement provided, in relevant part:

¹ A separate Order dated January 19, 2010 denies Swoboda's Motion for Oral Argument.

WHEREAS, the Pavlos had portrayed themselves as licensed “Financial Planners/Advisors”, during the time period from April 2000 through June 30, 2005; and

* * * * *

WHEREAS, Swoboda and Pavlos desire to settle all matters pertaining to the Pavlos and the Pavlos as Dunes Estate Planning’s mismanagement, mis-representation and wrongful assessment of management fees to Swoboda for the time period from April of 2000 to June 30, 2005, as well as to settle all disputes by and between them.

NOW, THEREFORE, in consideration of the covenants and promises made herein, the parties hereby agree as follows:

1. Pavlos shall execute a mortgage and note pledging their home . . . as security for repayment to Swoboda the amount of \$36,260.07 which equals \$31,537.00 plus interest of four percent (4%) during the time period from 4-1-00 through 1-01-06. . . . This amount represents the management fees wrongfully collected for the time period mentioned herein plus interest.

* * * * *

4. . . . Each party agrees that this agreement shall be confidential in nature and the terms hereof shall not be disclosed to any third party provided that the Pavlos comply and the amounts herein are paid in full on or before September 30, 2006. Should the amounts not be paid in full . . . or should Swoboda find that there is fraud or other misrepresentations which have taken place in the management of his investments with the Pavlos, he shall first notify them and then, subsequent to the notification, he shall be free and able to disclose the terms hereof and the actions of Pavlos without threat of recourse or damage.

(Appellant’s App. at 224-26.)²

After further investigation, Swoboda discovered further instances of mismanagement by Pavlos. For example, Pavlos had placed a substantial amount of Swoboda’s money into annuities without his authorization or signature. The annuities had a low rate of return and had large surrender penalties. Swoboda informed the Pavloses of his discoveries and negotiated a new agreement with them. Stalbrink

² The agreement has been reproduced as originally written. It appears that the agreement uses “Pavlos” as both singular and plural. John’s involvement in Dunes Estate Planning, if any, is not clear from the record before us.

prepared a new agreement and mortgage, which the Swobodas and Pavloses signed on January 6, 2006. The new agreement contained much of the same language as the original agreement. However, in the new agreement, the Pavloses promised to pay \$181,387.00 plus annual interest of 7.25%.

The Pavloses did not honor the agreement. Swoboda retained attorney Jennifer Evans to file suit against the Pavloses. The Pavloses argued Swoboda had settled all his claims against them in the first agreement, and the second agreement was therefore unenforceable. Swoboda settled his lawsuit against the Pavloses for \$18,000.

Swoboda then hired his current counsel, William Stevens, to file a malpractice claim against Stalbrink. Stevens filed an appearance and a complaint on September 21, 2007, in the LaPorte Superior Court. At that time, Stalbrink was a magistrate in the LaPorte Circuit Court; therefore, the judge assigned to the case recused himself, and Judge Chidester was appointed special judge.³ On October 9, 2008, the trial court ordered: “The Parties are given 120 days to conduct further d[i]scovery and 180 days for the filing of any motions. After 220 days, the Court, sua sponte, will set this matter for jury trial and conduct Final Pretrial Conference.” (*Id.* at 2.)

On April 2, 2009, Stalbrink moved for summary judgment.⁴ On April 22, 2009, the trial court granted the motion. On April 24, 2009, Swoboda moved to have the summary judgment order vacated, and his motion was granted without opposition from Stalbrink. The court’s order indicated Swoboda had until May 4, 2009, to respond to

³ Stalbrink is currently a judge in LaPorte Superior Court.

⁴ The chronological case summary does not reflect that the motion was filed, and the copy of the motion for summary judgment in the appendix is not file-stamped. However, both parties agree Stalbrink filed the motion on April 2, 2009.

Stalbrink's motion for summary judgment and that upon timely filing, a hearing would be scheduled in Michigan City.

On May 1, 2009, Swoboda filed a memorandum of law in opposition to Stalbrink's motion for summary judgment, a designation of evidence, and a cross-motion for partial summary judgment. That same day, the court scheduled a hearing for June 1, 2009, in Valparaiso. On May 21, 2009, Stalbrink filed a motion to strike Swoboda's motion for partial summary judgment because it was filed outside the deadline the court set for filing motions.

On June 1, neither Swoboda nor his attorney was present for the hearing. Counsel for Stalbrink, Daniel Gioia, was present. At the beginning of the hearing, the trial court and Gioia had the following conversation:

THE COURT: Well for the record we are here in 46D01-0709-CT-175, Richard Swoboda versus Richard Stalbrink. The Plaintiff and Plaintiff's attorney fails [sic] to appear for hearing set for 1:00 p.m.. [sic] in Valparaiso. It being now twenty minutes until 2:00 p.m., Attorney Gioia is here representing the Defendant, Richard Stalbrink and we're here today on a hearing on Motion for Summary Judgment. The Plaintiff had moved for partial Summary Judgment and the Defendant had moved for Summary Judgment, the Court had at one point issued an Order believing that the Plaintiff – the Court made an error on the deadlines and previously issued an Order for Summary Judgment. . . . [W]e are here today for a hearing on the post briefing, I guess. I'm worried though Attorney Gioia that Attorney Stevens, if you did not get notice that the matter had been moved to Valparaiso from Michigan City, I am wondering if he did.

ATTORNEY GIOIA: Well Your Honor, I had a chance to look at or to peruse the screen in Michigan City, apparently when he filed his reply that's when they reset the Motion for hearing in Valparaiso and that would have gone back to him, it never came to me but that's because I didn't get file stamped copies.

THE COURT: . . . We show it faxed to you on 5-5-09 but he does not have a fax number so we sent it to him in the mail and then

also called him up to coordinate the dates too I believe.

* * * * *

ATTORNEY GIOIA: He wasn't in LaPorte I can attest to that cause I was.

THE COURT: Yea, okay, he wasn't there and we called his office. The Court Reporter called finding out where he was and he's in Rochester Indiana, in Fulton County so I don't think he ever intended on attending this myself.

(Tr. at 4-5.) The court then heard Gioia's argument on behalf of Stalbrink. At the conclusion of the hearing, the trial court granted Stalbrink's motion for summary judgment. The court found Swoboda's cross-motion was untimely filed and denied it.

On June 2, 2009, Stevens, on behalf of Swoboda, filed a "Motion to Set Hearing on Plaintiff's Motion for Partial Summary Judgment; Set Hearing on Defendant's Motion to Strike; Set Hearing on Defendant's Motion for Summary Judgment and to Vacate any Order Entered as a Result of the Ex Parte Hearing of June 1, 2009." (Appellant's App. at 102.)⁵ Therein, Stevens claimed he received no notice of the hearing and was unaware of the hearing until he returned from Rochester around 5:00 p.m. on June 1.

The trial court denied the motion the same day it was filed. The order states, in relevant part:

The procedural history of this case shows a difficult process in obtaining notice to both counsel, either by relocation or having several law offices outside the State of Indiana. Plaintiff's counsel has never supplied the Court with a fax number, email address or other method of communication with Counsel. . . .

The Porter Superior Court 4 Staff has assured the Court that Counsel for Plaintiff was specifically advised by fax and first class letter that the hearing was set for June 1st and that it would be held in Valparaiso, not Michigan City. The Staff advised that they were working with numerous fax numbers for separate law offices for Plaintiff's Counsel. There is no

⁵ Again, the CCS does not show this motion was filed, and the copy included in the appendix is not file-stamped. However, both parties agree that the motion was filed.

requirement under Indiana Trial Rules or Local Rule that a Court Staff personally telephone an attorney or his secretary to remind them of a hearing. Plaintiff's Counsel simply missed the hearing and now blames the Court for such.

(Id. at 6-7.)

On June 5, 2009, Stevens filed an affidavit.⁶ Stevens averred that, when he filed his memorandum of law, designation of evidence, and motion for partial summary judgment, he enclosed a chronological case summary ("CCS") entry form, which had blanks for the court to fill in the date and time of the hearing on the motions. He also included two stamped envelopes, one addressed to himself and one addressed to Gioia, so that the court could mail them notice of the hearing. Stevens stated that on June 4, 2009, he received an envelope post-marked June 2, which included copies of various filings and the unused envelope addressed to Gioia. The envelope Stevens addressed to himself was post-marked June 2 and contained copies of the court's orders from June 1 and June 2. Stevens again alleged he had received no notice of the hearing until after it had been held. He stated that when he filed his motion for a new hearing on June 2, court staff told him notice of the June 1 hearing had not been mailed.

On June 11, 2009, Stalbrink filed a response, in which he stated he received notice of the hearing by fax. On June 25, 2009, Swoboda filed a notice of appeal.

DISCUSSION AND DECISION

Swoboda raises three issues, but we find the following dispositive: whether the trial court abused its discretion by denying his motion for a new hearing. Stalbrink

⁶ The CCS also does not show this affidavit was filed, and the copy in the appendix is not file-stamped. Again, both parties agreed that it was filed.

asserts, and we agree, that Swoboda's motion should be viewed as a motion to correct error, pursuant to Ind. Trial Rule 59. We review a court's ruling on a motion to correct error for abuse of discretion. *Knowledge A-Z, Inc. v. Sentry Ins.*, 891 N.E.2d 581, 584 (Ind. Ct. App. 2008), *trans. denied*. "An abuse of discretion occurs when the decision is against the logic and effect of the facts and circumstances before the court, and inferences that may be drawn therefrom." *Id.*

The trial court's order states Swoboda was notified of the hearing by fax and by mail. However, this finding contradicts the court's assertion that Swoboda never "supplied the Court with a fax number, email address or other method of communication." (Appellant's App. at 6.) On the contrary, Stevens' appearance provides a mailing address, phone number, fax number, and e-mail address. Although it appears his phone and fax numbers may have changed, and this may have caused some confusion, there appears to be no reason why notice could not have been mailed. In fact, Stevens supplied the court with a self-addressed and stamped envelope, which the court used to send him the June 1 and June 2 orders. The court also returned the envelope intended for Gioia unused, and the transcript of the hearing reflects Gioia did not receive notice the hearing was to be held in Valparaiso.

As evidence Swoboda had notice, Stalbrink points to a CCS entry form that appears to have been prepared by Stevens. The form recites that Stevens had filed a memorandum of law, a designation of evidence, and a motion for partial summary judgment. Stevens left blanks for the court to fill in the time and date of the hearing. The blanks were filled out with "June 1, 2009" and "1:00 PM." (*See* Appellant's App. at 98.)

The location of Porter Superior Court IV was crossed out, and LaPorte Superior Court I was written in. Then that was crossed out and “Porter Co.” was written. (*Id.*) The form bears Stevens’ signature, mailing address, and phone number, along with Gioia’s address and phone number. Handwritten notations dated May 5, 2009 and initialed “fcm,” added a new phone number for Stevens and a fax number for Gioia. (*Id.*) At the bottom of the form, the following options appear:

This CCS Entry Form shall be:

- Placed in the case file
- Discarded after entry on the CCS
- Mailed to all counsel by: ___ Counsel ___ Clerk ___ Court
- There is no attached order; or

The attached Order shall be placed in the RJO: ___ Yes ___ No.

(*Id.*) None of these options were marked. Nothing on this document indicates Stevens was in fact notified of the date, time, and location of the hearing.⁷

In sum, the only evidence Swoboda received notice of the hearing was the court’s own inquiries with its staff, to which Swoboda had no opportunity to respond. There is no documentation in the record that Stevens was served with notice, and the CCS makes no mention of Stevens being served. *See Anderson v. Horizon Homes, Inc.*, 644 N.E.2d 1281, 1287 (Ind. Ct. App. 1995) (a court speaks only through its official records and the CCS is an official record of the trial court), *trans. denied*. As noted above, the CCS contains several inaccuracies, which raise substantial doubt that Swoboda was served with notice. Therefore, we conclude the trial court abused its discretion by denying Swoboda’s motion. *See Chandler v. Dillon ex rel. Estate of Bennett*, 754 N.E.2d 1002,

⁷ The appendix also includes the copy of this document that was faxed to Gioia. (*See* Appellant’s App. at 134-35.) It has a cover sheet dated May 5, 2009 and the form states the hearing would be held in Michigan City.

1006 (Ind. Ct. App. 2001) (in reversing summary judgment when the non-moving party was given one day's notice of the hearing, we stated, "A party is denied due process when he is denied the opportunity to argue his case to the trial court after that court has determined it would hear argument."). The summary judgment for Stalbrink is reversed, and the case is remanded for a new hearing on the motion.

Reversed and remanded.

CRONE, J., and BROWN, J., concur.