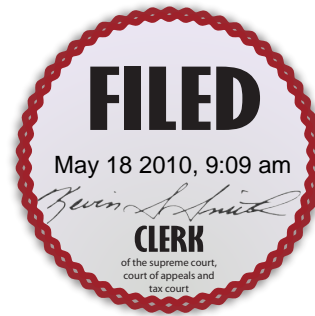


Pursuant to Ind.Appellate Rule 65(D), this Memorandum Decision shall not be regarded as precedent or cited before any court except for the purpose of establishing the defense of res judicata, collateral estoppel, or the law of the case.



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**IN THE
COURT OF APPEALS OF INDIANA**

TRINITY MEDICAL SOLUTIONS, INC.
and MATT CARNS,

Appellants-Defendants,

vs.

AMERICAN BACK SOLUTIONS, INC.,

Appellee-Plaintiff.

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No. 49A05-0908-CV-470

APPEAL FROM THE MARION SUPERIOR COURT
The Honorable S.K. Reid, Judge
Cause No. 49D14-0608-PL-35908

May 18, 2010

MEMORANDUM DECISION - NOT FOR PUBLICATION

NAJAM, Judge

STATEMENT OF THE CASE

Trinity Medical Solutions, Inc. (“Trinity”), a Colorado corporation, and Matt Carns, a Colorado resident, appeal the trial court’s grant of summary judgment for American Back Solutions, Inc. (“ABS”), an Indiana corporation. Trinity and Carns raise three issues for our review, which we restate as follows:

1. Whether the trial court abused its discretion when it revoked a prior order granting Trinity and Carns an extended period of time to respond to ABS’s Motion for Summary Judgment.
2. Whether the court abused its discretion when it denied Trinity and Carns’s motion to set aside summary judgment due to mistake, surprise, or excusable neglect.
3. Whether a genuine issue of material fact precludes the entry of summary judgment against Carns.

We affirm in part and reverse and remand in part.

FACTS AND PROCEDURAL HISTORY

On August 30, 2006, ABS filed its complaint against Trinity, Carns, and Sandra Madden Carns (“Sandra”)¹ (collectively, “the Defendants”) seeking damages for alleged breaches of a Sales Agreement and a Modified Sales Agreement (collectively, “the Agreements”). The Agreements were entered into “between Trinity Medical Solutions, Inc. and American Back Solutions, Inc.” and were executed by Ronald Sheppard, CEO of ABS, and Carns, the President of Trinity. Appellants’ App. at 15-17. The Agreements were attached to ABS’s complaint. On September 27, counsel for the Defendants entered an appearance and filed their answer and affirmative defenses. On August 1, 2007, counsel for the Defendants filed a counterclaim against ABS.

¹ The record indicates that, sometime after ABS filed its complaint, Sandra changed her name to Sandra Gildig.

On May 29, 2008, ABS served the Defendants, by their counsel, with a Request for Admissions. On June 27, counsel for the Defendants filed a motion for an enlargement of time to respond to the Request for Admissions. The trial court granted the Defendants' request and ordered the Defendants to respond by July 28, 2008. On July 30, without having filed a response, counsel for the Defendants filed a motion to withdraw her appearance, which the trial court granted on August 14.

Among other things, the Requests for Admissions sought the following admissions from Trinity:

Request Number 9: Admit that Trinity signed a modification of the Sales Agreement ("Modified Sales Agreement"), dated on or about June 3, 2005, so as to add and include an additional product, a "Private Label" decompression table.

Request Number 10: Admit that Trinity understood that the Modified Sales Agreement was an extension of the Sales Agreement, and that all terms of the Sales Agreement were still valid unless specifically modified by the modification.

Request Number 11: Admit that Trinity[] sold used Tables to third parties through the [I]nternet.

Request Number 12: Admit that by selling used Tables[] Trinity violated the terms of the Sales Agreement.

Request Number 13: Admit that Trinity's sale of used Tables instead of new Tables caused ABS to lose substantial profits from lost sales.

Request Number 14: Admit that ABS has been damaged due to Trinity's breach of the Non-Competition Clause.

Request Number 15: Admit that[,] due to Trinity's breach of the Sales Agreement, the Defendants owe ABS the sum of \$25,000.00 as liquidated damages.

Request Number 16: Admit that Trinity[] interfered with ABS's business relationship with ABS's clients, both existing and potential, by selling used Tables upon and through the [I]nternet and through private sales.

Request Number 17: Admit that Trinity sold used Tables and SPINA tables on [eB]ay.

Request Number 18: Admit that Trinity offered warranties for used Tables and SPINA tables sold to third parties.

Request Number 19: Admit that Trinity's[] breach of the Sales Agreement and the Modified Sales Agreement resulted in lost sales and revenue, attorney fees, and additional damages to ABS.

Id. at 100-03 (space for answers omitted). In addition, the Request for Admissions sought the following from Carns:

Request Number 5: Admit that the first year of the Sales Agreement ended in August, 2005.

* * *

Request Number 8: Admit that Carns signed a modification of the Sales Agreement . . . dated on or about June 3, 2005, . . . so as to add and include an additional product, a "Private Label" decompression table, to the Agreement.

Request Number 9: Admit that Carns understood that the Modified Sales Agreement was an extension of the Sales Agreement, and that all terms of the Sales Agreement were still valid unless specifically modified.

Request Number 10: Admit that Carns sold used Tables to third parties during the term of the Sales Agreement.

Request Number 11: Admit that Carns[,] during the term of the Sales Agreement[] and the Modified Sales Agreement[,] sold decompression tables manufactured by companies.

Request Number 12: Admit that selling used Tables violated the terms of the Sales Agreement and the Modified Sales Agreement.

Request Number 13: Admit that selling used Tables instead of new Tables caused ABS to lose substantial profits from lost sales.

Request Number 14: Admit that ABS has been damaged due to Carns'[s] breach of the Non-Competition Clause.

Request Number 15: Admit that Carns failed to sell the required minimum number of Tables during the first year of the Sales Agreement.

Request Number 16: Admit that the breach of the Sales Agreement entitled ABS to the sum of \$25,000.00.

Request Number 17: Admit that Carns interfered with ABS's business relationship with ABS's clients, both existing and potential, by selling used Tables upon and through the [I]nternet and th[r]ough private sales.

Request Number 18: Admit that Carns sold used Tables and SPINA tables on [eB]ay and other methods.

Request Number 19: Admit that Carns offered warranties for used Tables and SPINA tables sold to third parties.

Request Number 20: Admit that Carns'[s] breach of the Sales Agreement and the Modified Sales Agreement resulted in lost sales, lost revenue, attorney fees, and additional damages to ABS.

Id. at 109-11, 119 (space for answers omitted).

On September 10, about a month after the trial court granted the Defendants' attorney's motion to withdraw, ABS filed its motion for summary judgment. In support of its motion, ABS included the unanswered Request for Admissions as deemed admitted in full pursuant to Indiana Trial Rule 36(A). Shortly thereafter, Sandra obtained new counsel, who filed an appearance on Sandra's behalf only on September 23 along with a motion for an enlargement of time for Sandra to respond to ABS's allegations. ABS filed a motion in opposition to Sandra's request. Though aware of the pending motions, Trinity and Carns did not obtain new counsel and did not join Sandra's motion for an enlargement of time.

On October 3, the trial court entered an order granting ABS's motion in opposition to Sandra's request ("the October 3 Order"). However, the order stated that "the Court shall refrain from ruling on [Sandra's] Motion for Enlargement of Time . . . until the completion of [Sandra's] deposition." Id. at 35. And handwritten at the end of the October 3 Order was the following: "Defts' response to [ABS's] Motion for Summary Judgment enlarged to 45 days after completion of [Sandra's] deposition."² Id.

On November 18, ABS filed a Motion for Ruling on the Motion for Summary Judgment as to Trinity and Carns Only ("the Motion for Ruling"). That motion stated:

3. [Sandra's September 23 Motion for Enlargement of Time was filed] solely by Sandra [and] asserted that she was unaware of the pending Complaint until she received a copy of the Motion for Summary Judgment.

* * *

7. [The October 3 Order], in part, enlarges the time in which all Defendants—Trinity, Carns and Sandra—are required to file any response to the Motion for Summary Judgment until 45 days after Sandra's deposition.

8. Pursuant to Ind. [Trial Rule] 5(B)(2), Trinity and Carns received sufficient and complete service of the Motion for Summary Judgment. . . .

9. A ruling on the Motion for Summary Judgment is appropriate as Carns and Trinity have failed to respond . . . within the mandatory time allowed. . . .

10. To date, only Sandra has asserted lack of notice of the Complaint and the ongoing proceedings in this matter. Neither Trinity nor Carns ha[s] filed any pleading or paper claiming lack of notice. The Motion for Summary Judgment sent to all Defendants at Trinity's place of business has not been returned to counsel for [ABS]. In short, Trinity and Carns, with knowledge of its filing, chose not to respond to the Motion for Summary Judgment.

² Sandra was deposed on April 27, 2009.

Id. at 38-39.

Exactly fourteen days later, on December 2, 2008, the trial court granted ABS's Motion for Ruling but did not simultaneously enter an order on ABS's Motion for Summary Judgment. Thereafter, on December 8, Trinity and Carns filed their Response to the Motion for Ruling. The Response was signed by Carns, "Individually and as President of Trinity." Id. at 46. In the Response, Trinity and Carns acknowledged that they had received ABS's Motion for Summary Judgment in mid-September, but contended that they did not file a response because of the trial court's intervening October 3 Order granting them 45 days after Sandra's deposition to respond. Along with the Response, Trinity and Carns filed a Motion for Leave to Submit Responses and Objections to ABS's Request for Admissions (collectively, "the December 8 Requests"). Trinity and Carns asked that, "should the Court be inclined to revoke the extension that it previously granted to Trinity and Carns, they respectfully submit that it should at least allow them a period of 33 days from the date of the revocation order in which to respond" to ABS's Motion for Summary Judgment. Id. at 46. On December 15, the court struck Trinity and Carns's December 8 Requests, stating that "a corporation may not appear or file pleadings without counsel because to do so is the unauthorized practice of law" ("the December 15 Order"). Id. at 48.

On January 9, 2009, Carns faxed a letter to the trial court. Carns stated that he was "attempting to find counsel in Indiana . . . and anticipate[d] that [his and] Trinity's pleadings will be re-filed shortly." Appellee's App. at 185. Carns also noted that his December 8 Requests, at least as they applied to him individually, should not have been

stricken as the unauthorized practice of law. Carns then asked the court to “clarify that the referenced pleadings have been stricken only as they relate to [Trinity], not as they relate to me personally Alternatively, please advise me if I need to re-file the pleadings in my name alone.” Id. The court did not respond to Carns’s letter.

On January 29, the trial court entered summary judgment for ABS against Trinity and Carns only (“the January 29 Order”). ABS’s awarded damages exceeded \$800,000. On March 2, Trinity and Carns, by counsel, filed a Motion to Correct Error and a Motion to Withdraw Admissions Deemed Admitted. After granting ABS an enlargement of time in which to respond to those motions, the trial court held a hearing on Trinity and Carns’s motions on June 30.

Thereafter, on July 30 the court entered an amended order denying Trinity and Carns’s motions and affirming the January 29 Order (“the Final Order”). In its order, the court found the following facts, among others:

16. [Trinity and Carns’s] Response to [the] Motion for Ruling was drafted by Carns and Trinity’s counsel in Colorado.

* * *

18. Carns sent a letter dated January 9, 2009 The Letter was drafted by Carns and Trinity’s counsel in Colorado.

* * *

20. Trinity and Carns received actual notice of ABS[’s] Motion for Summary Judgment.

21. Trinity and Carns had knowledge of the pending Request[] for Admission[s].

22. Between September 10, 2008[,] and January 29, 2009, Carns and Trinity consulted with counsel in Colorado regarding ABS'[s] Motion for Summary Judgment[] and other pending motions and proceedings.

Appellants' App. at 154. The court then entered the following conclusions:

6. Trinity and Carns were not entitled to the enlargement of time set forth in the [October 3 Order] as they did not file a written request or make an oral motion to the Court for enlargement of time to respond to ABS'[s] Motion for Summary Judgment.

7. Under the facts and circumstances, the handwritten statement in the [October 3 Order] . . . does not grant an enlargement of time to Trinity and Carns to respond to ABS'[s] Motion for Summary Judgment.

8. The [December 2] Order Granting [ABS's] Motion for Ruling . . . did not amend or alter the time for Trinity and Carns to respond to ABS'[s] Motion for Summary Judgment.

9. Despite notice of the Motion for Summary Judgment, Trinity and Carns allowed thirty (30) days to lapse without filing any response, affidavits or request[s] for enlargement of time

10. Trinity and Carns were properly served with ABS'[s] Motion for Summary Judgment.

11. The [December 2] Order Granting Ruling . . . provided notice to Trinity and Carns that the Court would rule on the Motion for Summary Judgment.

12. The Court has no discretion to permit Trinity and Carns to file any response, affidavit or request for enlargement of time to ABS'[s] Motion for Summary Judgment if the 30 days in which to do so under [Ind. Trial Rule] 56(C) has expired.

13. In ruling on ABS'[s] Motion for Summary Judgment, the Court may consider the designated pleadings, depositions, answers to interrogatories, admission[s] and any affidavits tendered in support of the Motion for Summary Judgment.

14. The Court properly entered summary judgment in favor of ABS and against Trinity and Carns as the designated evidence did not raise a genuine issue of material fact and the law was with ABS.

15. The Court properly struck Trinity's [December 8] Response to Motion for Ruling, signed by Carns, to the extent that it applies to Trinity as a corporation [as Trinity] must be represented by counsel.

16. The Court properly struck the Response to Motion for Ruling as it applied to both Trinity and Carns as it was filed after the expiration of 15 days allotted under [local trial rule] LR49-TR5 Rule 203(B).

17. The Order Granting Summary Judgment was not entered due to mistake, surprise or excusable neglect

18. Trinity and Carns had notice of the pending Motion for Summary Judgment, were aware of the deadlines imposed by the Court and acknowledged the pending proceedings in filings and communications with the Court.

19. Trinity and Carns cannot claim mistake, surprise or excusable neglect in the entry of summary judgment . . . when they were consulting with counsel in Colorado regarding the pending Motion for Summary Judgment and other pending proceedings[and] took affirmative action demonstrating their knowledge of the Court proceedings.

20. Trinity and Carns'[s March 2] Motion to Withdraw [the Admissions] should be denied as they have failed to demonstrate that the withdrawal or amendment of the admissions . . . will subserve the presentation of the merits and that prejudice in maintaining the action or defense will not result to ABS [from] obtaining the admission[s].

21. Trinity and Carns'[s] presentation of the merits is not subserved when the admissions go to the core issues in dispute.

22. ABS would be prejudiced by granting [Trinity and Carns's motions] due to the expense and financial burden incurred in defending the Motion for Summary Judgment.

Id. at 154-57 (citations omitted). This appeal ensued.³

³ After the entry of the Final Order but before Trinity and Carns filed their notice of appeal, ABS and Sandra stipulated to Sandra's dismissal from the cause of action. Therefore, the Final Order is a final, appealable order.

DISCUSSION AND DECISION

Standard of Review

Trinity and Carns appeal from the Final Order on their March 2 Motion to Correct Error and to Withdraw the Admissions. That motion was filed pursuant to Indiana Trial Rules 59 and 60(B)(1). “We review a denial of a . . . Trial Rule 59 motion to correct error or a Rule 60(B) motion for relief from judgment for abuse of discretion.” Speedway SuperAmerica, LLC v. Holmes, 885 N.E.2d 1265, 1270 (Ind. 2008). An abuse of discretion occurs if the trial court’s decision is against the logic and effect of the facts and circumstances before it, or the reasonable inferences drawn therefrom. Lighty v. Lighty, 879 N.E.2d 637, 640 (Ind. Ct. App. 2008). We also consider the standards of review for the underlying rulings, which are stated as applicable below. See id.

Issue One: The December 2 Order

Trinity and Carns first assert that the trial court abused its discretion when it entered its December 2 Order revoking the extension of time the court had granted them in its October 3 Order. Therefore, they continue, the January 29 Order on summary judgment was untimely because the court had not provided them with an opportunity to respond to ABS’s Motion for Summary Judgment. We cannot agree.

As detailed above, the October 3 Order granted Trinity and Carns 45 days after Sandra’s deposition to respond to ABS’s September 10 Motion for Summary Judgment. Then, on November 18, ABS filed the Motion for Ruling, in which ABS sought to have the court’s timeline vacated as it applied to Trinity and Carns. On December 2, the court agreed with ABS and vacated its timeline, giving notice that it would rule on the pending

Motion for Summary Judgment as that motion applied to Trinity and Carns. However, the trial court did not actually rule on the Motion for Summary Judgment until January 29, fifty-eight days after it granted the Motion for Ruling.

Trinity and Carns contend that ABS's Motion for Ruling was "ambiguously titled 'Motion for Ruling on Plaintiff's Pending Motion for Summary Judgment as to Trinity Medical Solutions, Inc. and Matt Carns, Only.'" Appellants' Br. at 9 (citation omitted). Because the Motion for Ruling was ambiguous, they continue, Trinity and Carns were not capable of knowing that ABS's Motion for Ruling sought to vacate the October 3 Order's timeline with respect to Trinity and Carns. Likewise, Trinity and Carns assert that the court's December 2 Order granting the Motion for Ruling "fails to clearly indicate that . . . the Court was amending its previous Order and actually shortening the time in which Trinity and Carns had to respond to ABS'[s] Motion for Summary Judgment." Id. Neither did the court's December 2 Order establish a new time period for Trinity and Carns to respond.

Trinity and Carns's arguments are not persuasive. There was nothing ambiguous about ABS's Motion for Ruling or the December 2 Order granting that motion. And the Indiana Trial Rules provided a clear timeframe for Trinity and Carns to have filed their response to ABS's Motion for Summary Judgment. Indiana Trial Rule 56(C) states that a party "shall have thirty (30) days after service of the motion to serve a response" If Trinity and Carns were concerned that they had less than thirty days from the entry of the December 2 Order to file their response, they should have asked the court for an enlargement of time.

Trinity and Carns were not parties to Sandra's request for an enlargement of time in which to respond to ABS's Motion for Summary Judgment. As such, the trial court did not abuse its discretion in entering the December 2 Order amending the October 3 Order to reflect that fact. Neither was the January 29 Order on summary judgment untimely. The January 29 Order was fifty-eight days after the court notified Trinity and Carns that it would rule on ABS's Motion for Summary Judgment. Thus, Trinity and Carns had ample opportunity to file a response to the Motion for Summary Judgment.

Issue Two: Trial Rule 60(B)(1)

Next, Trinity and Carns contend that the trial court abused its discretion when it denied their March 2 Motion to Set Aside the Judgment pursuant to Indiana Trial Rule 60(B)(1). Trial Rule 60(B)(1) allows a trial court to set aside a prior judgment upon a showing by the movant of "mistake, surprise, or excusable neglect." In addition, the movant for relief from judgment must show a meritorious defense. Heartland Res., Inc. v. Bedel, 903 N.E.2d 1004, 1007 (Ind. Ct. App. 2009). "A meritorious defense is one that would lead to a different result if the case were tried on the merits." Id. We review the trial court's ruling on a 60(B)(1) motion for relief from judgment for an abuse of discretion. See id.

The entirety of Trinity and Carns's assertion of "mistake, surprise, or excusable neglect" is that they were unrepresented by counsel between August 14, 2008, and March 2, 2009. During that time, the admissions were deemed admitted, ABS filed its Motion for Summary Judgment and Motion for Ruling, and the trial court entered Summary Judgment for ABS. But Trinity and Carns do not address the trial court's finding, in the

Final Order, that Trinity and Carns did consult with counsel during that time period. Trinity and Carns also acknowledge that Indiana courts hold pro se litigants “to the same standard as licensed lawyers.” Novatny v. Novatny, 872 N.E.2d 673, 677 n.3 (Ind. Ct. App. 2007). We see no reason to deviate from that well established rule here. As such, the trial court did not abuse its discretion when it determined that its January 29 Order was not entered on the basis of mistake, surprise, or excusable neglect.

Issue Three: Entry of Summary Judgment Against Carns

Finally, Trinity and Carns challenge the merits of the trial court’s January 29 Order on summary judgment. Our standard of review for summary judgment appeals is well established:

When reviewing a grant of summary judgment, our standard of review is the same as that of the trial court. Considering only those facts that the parties designated to the trial court, we must determine whether there is a “genuine issue as to any material fact” and whether “the moving party is entitled to a judgment a matter of law.” In answering these questions, the reviewing court construes all factual inferences in the non-moving party’s favor and resolves all doubts as to the existence of a material issue against the moving party. The moving party bears the burden of making a prima facie showing that there are no genuine issues of material fact and that the movant is entitled to judgment as a matter of law; and once the movant satisfies the burden, the burden then shifts to the non-moving party to designate and produce evidence of facts showing the existence of a genuine issue of material fact.

Dreaded, Inc. v. St. Paul Guardian Ins. Co., 904 N.E.2d 1267, 1269-70 (Ind. 2009) (citations omitted). The party appealing from a summary judgment decision has the burden of persuading this court that the grant or denial of summary judgment was erroneous. Knoebel v. Clark County Superior Court No. 1, 901 N.E.2d 529, 531-32 (Ind. Ct. App. 2009).

In its Final Order, the trial court concluded that it had “properly entered summary judgment in favor of ABS and against Trinity and Carns as the designated evidence did not raise a genuine issue of material fact and the law was with ABS.” Appellants’ App. at 156. But Trinity and Carns contend that ABS failed to designate sufficient evidence to demonstrate the nonexistence of a genuine issue of material fact on the question of whether Carns was a party to the Agreements. Notably, Trinity and Carns’s argument on this issue is expressly limited to Carns and does not apply to Trinity. See Appellants’ Br. at 11. As for Carns, he argues that ABS did not present any evidence that he was a party to the Agreements that were alleged to have been breached. We agree. As Carns correctly identifies, “[t]he title of the Agreement, the first line of the Agreement, and the signature page of the Agreement all confirm that the Agreement is between Trinity and ABS, only.” Id. (citation omitted).

In response, ABS states that it designated the Agreements and the admissions to the trial court and, at that point, the burden shifted to Trinity and Carns to designate evidence demonstrating that Carns was not a party to the Agreements. But ABS does not identify what language in the Agreements implicated Carns as a party to those Agreements. Neither does ABS specifically identify which, if any, of Carns’s admissions explicitly identify him as a party to the Agreements. Indeed, Trinity and Carns’s admissions, when viewed as a whole, support the inference that Trinity breached the Agreements through the actions of Carns as its agent, rather than Carns individually having been a party to and having breached the Agreements.⁴

⁴ Carns also asserts that summary judgment was improper because the trial court considered evidence improperly before it, namely, his admissions (Trinity does not raise a similar argument). See

Thus, ABS's designated evidence failed to demonstrate that there was no genuine issue of material fact on the question of Carns's liability under the Agreements. As such, the burden never shifted to Carns to designate evidence to the contrary. See Dreaded, Inc., 904 N.E.2d at 1269-70. Accordingly, the trial court erred when it granted summary judgment to ABS on its claim against Carns in his individual capacity. Likewise, the court abused its discretion when it denied Trinity and Carns's motion to correct error on that issue. We reverse and remand on the question of Carns's alleged breach of the Agreements.

Conclusion

In sum, the trial court did not abuse its discretion when it entered its December 2 Order amending its October 3 Order's timeline. Neither did the trial court abuse its discretion when it refused to set aside its January 29 Order on summary judgment pursuant to Indiana Trial Rule 60(B)(1). However, ABS's designated evidence in support of its Motion for Summary Judgment did not demonstrate a prima facie case for summary judgment on the question of Carns's personal liability under the Agreements. Hence, on that issue alone, we reverse and remand for further proceedings.

Affirmed in part and reversed and remanded in part.

VAIDIK, J., and BROWN, J., concur.

Appellants' Br. at 6-7. But, given our holding that summary judgment was improper even with the admissions, we need not also consider whether the court abused its discretion in denying Carns's request to withdraw those admissions. And insofar as Carns is concerned that the admissions "presuppose that [he] personally was a party" to the Agreements, as stated above that is not the case. See id. at 6.