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:

DAVID A. ROSENTHAL
Lafayette, Indiana

ATTORNEYS FOR APPELLEE:

ALAN K.MILLS, Esq.
MARK R. OWENS, Esq.
ETHEL H. BADAWI, Esq.
Barnes & Thornburg, LLP
Indianapolis, Indiana

FILED
Jul 22 2010, 9:30 am
CLERK
of the supreme court, court of appeals and tax court

IN THE COURT OF APPEALS OF INDIANA

BRUCE GUNSTRA,

Appellant,

vs.

SALIN BANK and TRUST COMPANY,

Appellee.

No. 49A02-0912-CV-1274

APPEAL FROM THE MARION SUPERIOR COURT
The Honorable David J. Dreyer, Judge
Cause No. 49D10-0812-MF-54677

July 22, 2010

MEMORANDUM DECISION - NOT FOR PUBLICATION

DARDEN, Judge

STATEMENT OF THE CASE

Bruce Gunstra brings this interlocutory appeal of the trial court's order granting the motion of Salin Bank and Trust Company ("Bank") for pre-judgment garnishment of any distributions to Gunstra by two limited liability companies ("LLCs") of which he is a member.

We affirm.

ISSUE

Whether the order of pre-judgment garnishment must be reversed because Bank failed to make a necessary evidentiary showing of cause.

FACTS

Bank is the holder of a note, mortgage, and other loan documents evidencing various loans by Bank to Bruce Gunstra Buildings, Inc. ("BGB") and to G and L Development Co., Inc. ("G&L"). Gunstra signed a guaranty for each of the loans, personally and unconditionally guaranteeing their payment.[1] On December 3, 2008, Bank filed a complaint for breach of contract and guaranty, replevin, foreclosure and appointment of a receiver against, *inter alia*, BGB, G&L, and Gunstra, individually; Bank alleged that all amounts due and owing had not been paid.

---

[1] The Appendix filed by Gunstra is not consecutively paginated as required by Indiana Appellate Rule 51(C). The Appendix filed by Bank is paginated in compliance with the Rule; therefore, all references herein are to Bank's Appendix.

Gunstra was "President of Gunstra Builders Inc. and G&L" and was "the sole shareholder of Bruce Gunstra Builders Inc. and related entities," according to affidavits filed by Gunstra in the garnishment proceedings. (App. 598, 603).

On March 5, 2009, Bank filed its motion for a pre-judgment garnishment order, with an affidavit in support. Bank sought prejudgment garnishment of any distributions to be paid to Gunstra as a member of River Market Development, LLC ("River Market") and to G&L as a member of River Valley, L.L.C. ("River Valley").[2] Bank also petitioned the trial court to set an amount for the bond it would post, as provided by the garnishment statute.

On April 9, 2009, Gunstra filed a response to Bank's motion for a pre-judgment garnishment order. The response asserted "that the conditions to invoke prejudgment attachment [did] not exist," and that the garnishment statute was inapplicable. (App. 597). Gunstra's affidavit admitted that he was a member of River Market and would receive a distribution upon its sale of property.

On April 27, 2009, Gunstra (and BGB and G&L) filed an answer to the complaint. As to the allegations that he breached his guarantees, Gunstra admitted that he "executed and delivered to" Bank the four guarantees specified in the complaint with respect to the loans. (App. 65, 593). Gunstra further admitted the complaint's allegations that

> as president of both BGB and G&L, [he] directly benefited from the financial accommodations accorded to BGB and G&L by [Bank] under the Loan Agreements and was personally aware of, and knowledgeable about, all such financial accommodations given to BGB and G&L pursuant to the Loan Agreements.

[2] The affidavit in support of Bank's motion, by Bank's chief credit officer, stated his belief that Gunstra was a member of River Market; that G&L was a member of River Valley; and that distributions would be made to Gunstra and G&L by the LLCs as a result of property sales by the respective LLCs.

(App. 66, 593). However, Gunstra denied the complaint's allegations "as to the amount alleged" to be due on the loans. (App. 593).

A hearing on Bank's motion was held on August 24, 2009, and Gunstra was given until September 4, 2009 to respond to Bank's motion for a pre-judgment garnishment order. On September 4th, the response was filed. It stated that Gunstra was "a member of River Market LLC and River Valley LLC,"[3] and that the LLCs "own[ed] real estate." (App. 618).

On October 28, 2009, the trial court found Bank's action was "a claim for money founded on contract," citing "T.R. 64(B)(3)," and that the record "sufficiently show[ed]" indebtedness so as "to allow pre-judgment garnishment under I.C. 34-25-3-2(a)(2)." (App. 645). Accordingly, the trial court ordered pre-judgment garnishment against Gunstra and G&L regarding River Valley.[4] As subsequently amended on November 25, 2009, the appealed order provides for pre-judgment garnishment of "any current or future distributions and/or amounts paid to" Gunstra and G&L by either River Market or River Valley.[5] (App. 33).

---

[3] Gunstra's appellate brief also admits that he "is a member of" both River Market and River Valley. Gunstra's Br. at 3.

[4] Also on October 28th, the trial court set an amount for pre-judgment garnishment bond. On November 24, 2009, Bank posted bond in that amount with the trial court.

[5] The order as to G&L is not challenged in the appeal.

DECISION

Gunstra asserts that there are no issues of fact, "the issue is only at law." Gunstra's Br. at 2. He argues that a "garnishment of assets" requires "a showing of bad faith or intent akin to those facts for attachment pursuant to IC 34-25-2-1 and TR 64(B)(1)." *Id.* He "concedes" that Bank's "claim is for a money judgment based on a guaranty" but contends that Trial Rule "64(B)(1) requires some cause to provide for garnishment." Reply at 2.

Generally, interlocutory orders are reviewed for an abuse of discretion. *Hilliard v. Jacobs*, 916 N.E.2d 689 (Ind. Ct. App. 2009) (citing *In re Paternity of Duran*, 900 N.E.2d 454, 462 (Ind. Ct. App. 2009)), *trans. denied*. When the issue on appeal is a pure question of law, however, the matter is reviewed de novo. *Id.*

When interpreting trial rules, we apply the rules of statutory construction. *Daugherty v. Robinson Farms, Inc.*, 858 N.E.2d 192, 197 (Ind. Ct. App. 2006), *trans. denied*. When we interpret a statute, we attempt to determine and give effect to the legislature's intent when we examine the language it used in the statute. *Porter Dev., LLC v. First Nat. Bank of Valparaiso*, 866 N.E.2d 775, 778 (Ind. 2007); *see also Daugherty*, 858 N.E.2d at 197 (construe to "ascertain and give effect to the intent underlying the rule"). Where the statute is unambiguous, we read its words and phrases in their "plain, ordinary, and usual senses." *Id.* Further, it is just as important to recognize what a statute does not say as it is to recognize what it does say. *Herron v.*

State, 729 N.E.2d 1008, 1010 (Ind. 2000). We may not read into a statute that which is not the expressed intent of the legislature. *Id.*

We begin with Indiana Trial Rule 64(B), which provides as follows:

> Attachment or attachment and garnishment shall be allowed in the following cases in addition to those where such remedies prior to judgment are now permitted by law:
>
> * * *
>
> (3) Attachment or attachment and garnishment shall be allowed in favor of the plaintiff suing upon a claim for money, whether founded on contract, tort, equity or any other theory and whether it is liquidated, contingent or unliquidated; or upon a claim to determine the rights in the property or obligation attached or garnished.

Gunstra concedes that Bank's action against him is "for money" and "founded on a guaranty" by him. Gunstra's Br. at 2. "A guaranty is a contract to assume liability for the debts of another upon default." *Pollas v. Hardware Wholesalers, Inc.*, 663 N.E.2d 1188, 1189 (Ind. Ct. App. 1996). Thus, Trial Rule 64(B) applies, and it authorizes the remedy granted by the trial court.

In Title 34, Indiana law provides in Article 34 for the "special proceedings" of "attachment and garnishment." Chapter 1 of Article 34 provides general provisions with regard to both attachment and garnishment. Attachment is the subject of Chapter 2, *see* Ind. Code § 34.25.2.1 *et seq.*; and garnishment is the subject of Chapter 3. *See* I.C. § 34-25-3-1 *et seq*.

It is true, as Gunstra notes, that both Trial Rule 64 and the statutes specify certain prerequisites for obtaining an order of <u>attachment</u> against the property of a defendant. The trial rule states that it

> shall be a cause for attachment that the defendant or one of several defendants is a foreign corporation, a nonresident of this state, or a person whose residence and whereabouts are unknown and cannot be determined after reasonable investigation before the commencement of the action.

T.R. 64(B)(1). The statute states that the plaintiff

> may attach property when the action is for the recovery of money and the defendant:
> (1) is, or one (1) of several defendants is, a foreign corporation or a nonresident of Indiana;
> (2) is, or one (1) of several defendants is, secretly leaving or has left Indiana with intent to defraud:
> (A) the defendant's creditors;
> (B) the state;
> (C) a municipal corporation;
> (D) a school corporation . . . ;
> (3) is concealed so that a summons cannot be served upon the defendant;
> (4) is removing or about to remove the defendant's property subject to execution, or a material part of the property, outside Indiana, not leaving enough behind to satisfy the plaintiff's claim;
> (5) has sold, conveyed or otherwise disposed of the defendant's property subject to execution, or permitted the property to be sold with the fraudulent intent to cheat, hinder, or delay:
> (A) the defendant's creditors;
> (B) the state;
> (C) a municipal corporation;
> (D) a political subdivision; or
> (E) a school corporation . . . ; or
> (6) is about to sell convey, or otherwise dispose of the defendant's property subject to execution with the fraudulent intent to cheat, hinder, or delay:
> (A) the defendant's creditors;
> (B) the state;
> (C) a municipal corporation;
> (D) a political subdivision; or
> (E) a school corporation . . . .

I.C. § 34-25-2-1(b).

The order appealed, however, is an order of garnishment, which is what Bank's motion sought. As already noted, Trial Rule 64(B)(1) states that it "shall be a cause for attachment" if certain evidence is shown; however, Trial Rule 64(B)(3) provides that "garnishment **shall** be allowed in favor of the plaintiff suing upon a claim for money, ..." (emphasis added). When interpreting trial rules, we construe the word "shall" as mandatory. *Daugherty*, 858 N.E.2d at 197.

Similarly, although the previously quoted attachment statute required that certain evidence be shown in order to obtain an attachment order, the garnishment statute includes no such requirement of an evidentiary showing. Rather, the garnishment statute simply provides as follows:

> In all personal actions arising upon contract, . . . if at the time the action is commenced or at any time afterwards, whether a writ of attachment has been issued or not, the plaintiff, or a person representing the plaintiff, shall file with the clerk an affidavit that the plaintiff has good reason to believe, and does believe, that the person named in the affidavit:
> (1) has property of the defendant in the person's possession or under the person's control;
> (2) is indebted to the defendant;
> (3) has control or agency of any property, money, credits, or effects of the defendant; or
> (4) has control of the defendant's share or interest in the stock of any association or corporation.

I.C. § 35-25-3-2(a).[6] Bank submitted an affidavit that complies with this statutory requirement. The affidavit indicated that River Market would possibly make

---

[6] In addition, the plaintiff must file with the trial court "a written undertaking" that the plaintiff will prosecute the proceedings in garnishment and pay the defendant all damages sustained if the proceedings are wrongful and oppressive. I.C. § 35-25-3-2(b). Here, Bank filed such a statement of undertaking, *see* app. 581, and a bond.

distributions to member Gunstra. An affidavit by Gunstra confirmed that he was a member of River Market and would receive a distribution upon its sale of property.

Gunstra cites to *Squibb v. State*, 860 N.E.2d 904 (Ind. Ct. App. 2007), noting that the defendants therein were "removing or about to remove [their] property from Indiana which fact supported prejudgment attachment and garnishment." Gunstra's Br. at 3. *Squibb*'s analysis of the circumstances that "must be present" in order to "to attach a defendant's property" is inapposite here. 860 N.E.2d at 913 (emphasis added). Nevertheless, *Squibb* included an order of garnishment as well as attachment. Mrs. Squibb, the appellant, argued "that the trial court was not authorized to order garnishment" because the statute provided for garnishment "in all actions arising upon contract," and the action against her did "not arise upon contract." *Id.* at 915 (quoting I.C. § 35-24-3-1). We noted that "[r]egardless of the merits of this argument, Indiana Trial Rule 64(B)(3) authorizes garnishment 'in favor of the plaintiff suing upon a claim for money, whether founded on contract, tort, equity, or any other theory,'" and held that the trial court "was authorized in ordering prejudgment garnishment." *Id.* Thus, *Squibb* does not mandate our reversal of the order appealed.

Gunstra also cites to *Bowyer Excavating, Inc. v. Indiana Dep't of Envtl. Mgmt.*, 671 N.E.2d 180 (Ind. Ct. App. 1996). However, he does not develop an argument that explains why he believes *Bowyer* mandates reversal of the garnishment order he appeals. Moreover, he appears to concede that *Bowyer* did not deal with "the validity of a pre-

judgment garnishment order." Grunstra's Br. at 3. Accordingly, Gunstra has not persuaded us that based on *Bowyer*, the trial court's order must be reversed.

Gunstra's argument that "[p]re-[j]udgment [g]arnishment is only allowed if cause exists" must fail. Gunstra's Br. at 4. The law does not require that there be a showing of Gunstra's bad faith or devious action or malevolent intent in order for the trial court to grant Bank's motion for pre-judgment garnishment. Gunstra's argument would require that we read into the trial rules and the garnishment statute that which they do not say, and this we cannot do. *See Herron*, 729 N.E.2d at 1010.

Affirmed.

BAKER, C.J., and CRONE, J., concur