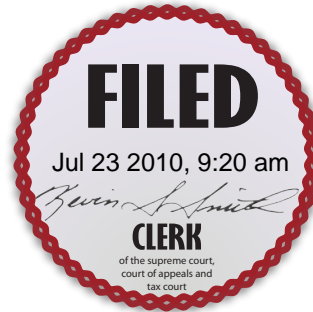


Pursuant to Ind.Appellate Rule 65(D), this Memorandum Decision shall not be regarded as precedent or cited before any court except for the purpose of establishing the defense of res judicata, collateral estoppel, or the law of the case.



ATTORNEYS FOR APPELLANT:

NATHANIEL LEE
JOHN M. LOWERY
Lee, Cossell, Kuehn & Love, LLP
Indianapolis, Indiana

ATTORNEYS FOR APPELLEE:

PETER H. POGUE
KORI L. McOMBER
Schultz & Pogue, LLP
Indianapolis, Indiana

**IN THE
COURT OF APPEALS OF INDIANA**

| | | |
|--------------------|---|-----------------------|
| KYLA PHILLIPS, |) | |
| |) | |
| Appellant, |) | |
| |) | |
| vs. |) | No. 36A01-1003-CT-142 |
| |) | |
| HOOK-SUPERX, INC., |) | |
| |) | |
| Appellee. |) | |

APPEAL FROM THE JACKSON CIRCUIT COURT
The Honorable William E. Vance, Judge
Cause No. 36C01-0412-CT-34

July 23, 2010

MEMORANDUM DECISION - NOT FOR PUBLICATION

BAILEY, Judge

Case Summary

Kyla Phillips appeals the trial court's denial of her motion for relief from judgment. We affirm.

Issue

Phillips raises two issues, which we consolidate and restate as whether the trial court abused its discretion in denying her motion for relief from judgment.

Facts and Procedural History

In February 2003, Phillips allegedly slipped and fell in the premises of Hook-SupeRx, Inc. ("Hook-SupeRx"). In December 2004, she sued the company for her damages. Hook-SupeRx propounded two sets of discovery requests; the first in February 2005 and the second, four years later, on February 11, 2009. When Phillips failed to respond to the second set of discovery documents, Hook-SupeRx filed a motion to compel on April 14, 2009. Still without a response from Phillips, Hook-SupeRx moved on May 18, 2009 to dismiss her complaint.

The trial court granted the defendant's motion to dismiss on June 1, 2009 and sent its order to Phillips' proper address by first class mail and by certified mail, with return receipt requested. The Chronological Case Summary contains the following entry for June 30, 2009: "Certified mail receipt returned showing no service on Kyla Phillips. (UNCLAIMED)." Appellant Appendix at 8. The parties dispute when Phillips first received notice of Hook-SupeRx's motion to dismiss. Nonetheless, Phillips acknowledges on appeal that she received a copy of the motion on June 9.

Five months later, on November 12, 2009, Phillips filed a “Verified Motion to Reinstate this Action.” Appellant App. at 13. After hearing oral argument and taking the matter under advisement, the trial court denied Phillips’ motion.

Phillips now appeals.

Discussion and Decision

Phillips argues that the trial court abused its discretion in denying her motion for relief from judgment. A party may move for relief from a judgment or order:

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.

Ind. Trial Rule 60(B)(1). In considering the motion, the trial court must balance the alleged injustice suffered by the party moving for relief against the interests of the prevailing party and society in general in the finality of litigation. Wilhelm v. Madison Village, MHC, LLC 864 N.E.2d 379, 382 (Ind. Ct. App. 2007), trans. denied. We will reverse the trial court’s decision only for an abuse of discretion. Id.

Here, the trial court sent its order, on June 1, 2009, both by first class mail and by certified mail, with return receipt requested, to what Phillips acknowledges was the proper address. On appeal, Phillips makes no effort to rebut the defendant’s argument regarding Indiana Trial Rule 60(B)(1) and fails to explain how her five-month delay in moving for relief from judgment resulted from mistake, surprise, or excusable neglect. Furthermore, the Indiana Supreme Court has stated that the failure to read one’s mail does not create a

circumstance of excusable neglect. Smith v. Johnston, 711 N.E.2d 1259, 1262 (Ind. 1999).

Thus, Phillips cannot benefit from the fact that the trial court's order of dismissal was returned as unclaimed, especially where it also sent its order by first class mail to the proper address.

Conclusion

The trial court did not abuse its discretion in denying Phillips' motion for relief from judgment.

Affirmed.

MAY, J., and BARNES, J., concur.