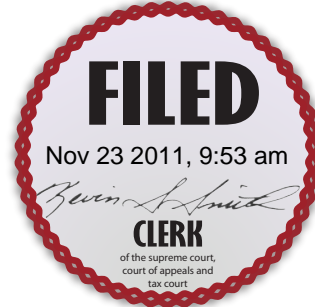


Pursuant to Ind. Appellate Rule 65(D), this Memorandum Decision shall not be regarded as precedent or cited before any court except for the purpose of establishing the defense of res judicata, collateral estoppel, or the law of the case.



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**IN THE
COURT OF APPEALS OF INDIANA**

ROBERT and HEATHER TAYLOR,)
)
Appellants-Plaintiffs,)
)
vs.)
)
CHARLES B. CALDWELL,)
)
Appellee-Defendant.)

No. 03A04-1105-CT-254

APPEAL FROM THE BARTHOLOMEW CIRCUIT COURT
The Honorable Stephen R. Heimann, Judge
Cause No. 03C01-0810-CT-2521

November 23, 2011

MEMORANDUM DECISION - NOT FOR PUBLICATION

KIRSCH, Judge

Robert Taylor (“Robert”) and Heather Taylor (“Heather”) (together, the “Taylors”) appeal the trial court’s judgment following entry of default in connection with their negligence action against Charles B. Caldwell (“Caldwell”). On appeal, the Taylors raise the following restated issue: whether the trial court erred in denying damages for Heather’s alleged permanent injuries.

We affirm.

FACTS AND PROCEDURAL HISTORY

On October 31, 2006, Heather was walking across U.S. Highway 50 in Bartholomew County, Indiana, when she was struck by a vehicle driven by Caldwell.¹ Caldwell had run a red light and, it was later determined, was operating his vehicle on a suspended license and while intoxicated. Caldwell was arrested and charged with various offenses in connection with the accident.²

On October 29, 2008, the Taylors filed a complaint against Caldwell alleging that his negligence had resulted in injuries to Heather and loss of consortium for Robert. The complaint alleged in part, “One or more of the Defendant’s actions set in motion a chain of circumstances that lead to the Plaintiffs suffering damages which include, but are not limited

¹ The “Order on Plaintiffs’ Motion for Default and Request for Judgment Pursuant to Indiana Rule of Civil Procedure 55” contains no findings of fact. As such, we use the facts set forth by the Taylors in their complaint. *See Appellants’ App.* at 8-14.

² The record before us does not contain the charges filed against Caldwell in connection with this accident. However, in their negligence complaint, the Taylors allege that Caldwell was arrested for: (1) operating a vehicle while intoxicated; (2) operating a vehicle while intoxicated resulting in serious bodily injury; and (3) criminal recklessness with a vehicle resulting in serious bodily injury. *Appellants’ App.* at 9.

to, personal injuries, physical pain and suffering, permanency, medical expenses, lost wages, and other pecuniary damages related to the Plaintiffs' personal property." *Appellants' App.* at 10, 12.

After Caldwell failed to answer the Taylors' complaint with a responsive pleading, the trial court granted their motion for default and ordered a bench trial to determine the Taylors' damages. Caldwell did not appear at the April 21, 2011 hearing on damages. During that hearing, the Taylors testified to the injuries Heather had sustained to her head and leg. They also testified to Heather's pain and suffering, health care expenses, lost wages, and loss of enjoyment of life. Finally, the Taylors testified that, five years after the accident, Heather continued to experience memory loss and loss of motion in her leg. The Taylors requested damages for Heather in the amount of \$1,500,000.00 and damages for Robert in the amount of \$250,000.00. The trial court concluded that there was insufficient evidence regarding the permanency of Heather's injuries and that "the sums requested [were] significantly inflated from what fact finders traditionally find as appropriate damages for facts similar to those presented." *Appellants' App.* at 6. The trial court granted damages to Heather in the amount of \$90,000.00 and to Robert in the amount of \$10,000.00. The Taylors now appeal. Additional facts will be added as necessary.

DISCUSSION AND DECISION

We first note that Caldwell has failed to file a brief. When the appellee fails to submit a brief, we need not undertake the appellee's burden of responding to arguments that are advanced for reversal by the appellant. *Buhring v. Tavoletti*, 905 N.E.2d 1059, 1064 (Ind. Ct.

App. 2009). Rather, we may reverse the trial court if the appellant makes a prima facie case of error. *Id.*

The Taylors appeal from a negative judgment on the issue of damages. A judgment entered against a party who bore the burden of proof at trial is a negative judgment. *Garling v. Ind. Dep't of Natural Res.*, 766 N.E.2d 409, 411 (Ind. Ct. App. 2002), *trans. denied*. On appeal, we will not reverse a negative judgment unless it is contrary to law. *Mominee v. King*, 629 N.E.2d 1280, 1282 (Ind. Ct. App. 1994). To determine whether a judgment is contrary to law, we consider the evidence in the light most favorable to the appellee, together with all the reasonable inferences to be drawn therefrom. *J.W. v. Hendricks County Office of Family & Children*, 697 N.E.2d 480, 482 (Ind. Ct. App. 1998). The judgment will be reversed only if the evidence leads to but one conclusion and the trial court reached the opposite conclusion. *Mominee*, 629 N.E.2d at 1282.

In their complaint, the Taylors alleged that Caldwell's negligent actions caused "personal injuries, physical pain and suffering, *permanency*, medical expenses, lost wages, and other pecuniary damages related to Plaintiffs' personal property." *Appellants' App.* at 10 (emphasis added). Noting that a default judgment amounts to a confession of the allegations contained in the complaint, the Taylors contend that Caldwell's default resulted in an admission that the damages Heather incurred were permanent. Ind. Trial Rule 55; *See Core Funding Grp., LLC v. Young*, 792 N.E.2d 547, 550 (Ind. Ct. App. 2003) (default judgment amounts to confession of complaint). As such, the Taylors contend that the permanency of the injury was established by default, and therefore, the trial court's determination that there could be no damages for permanent damages was contrary to law.

Our court was faced with a similar question in *Progressive Insurance Co. v. Harger*, 777 N.E.2d 91 (Ind. Ct. App. 2002). Harger insured his personal vehicle with Progressive Insurance Company (“Progressive”) and often drove the vehicle to deliver pizza. 777 N.E.2d at 92. During one of his deliveries, Harger was involved in a car accident, and Progressive paid \$49,000.00 to settle claims arising from the accident. Thereafter, Progressive sued Harger for the \$49,000.00, under the theory of unjust enrichment, contending that his “behavior and usage of the insured vehicle *excluded him from liability coverage* pursuant to the terms of the policy.” *Id.* (emphasis added). Harger failed to respond to the complaint, and Progressive filed a motion for default judgment under Indiana Trial Rule 55. *Id.* at 93. The trial court set the matter for hearing and required Progressive to present a factual basis to establish liability and evidence pertaining to damages. Following the hearing, the trial court issued the following order:

The Court having taken [Progressive’s] Motion for Default Judgment under advisement, the Court now finds that although [Harger] has failed to appear or otherwise defend this law suit and has hereby defaulted, nevertheless [*Harger*] was covered under the terms of the insurance contract between [Progressive] and [Harger].

Id. (emphasis added).

Progressive appealed, arguing that under Indiana Trial Rules 8(D) and 55, the allegations of the complaint are deemed admitted when a defendant defaults, and “the trial court is not permitted to make ‘a finding as a matter of law contrary to the allegations in the Complaint.’” *Id.* at 94 (citation omitted). Citing to Trial Rule 55, our court noted that, “[w]here a defendant fails to answer a complaint, even though there is a technical default, the nondefaulting party is not entitled to a judgment by default as a matter of law.” *Id.* at 95

(citing *Green v. Karol*, 168 Ind. App. 467, 473, 344 N.E.2d 106, 110 (Ind. Ct. App. 1976)). “Rather, Ind[iana] Trial Rule 55(B) specifically permitted the trial court to conduct a hearing ‘to establish the truth of any averment by evidence or to make an investigation of any other matter.’” *Id.* at 96. Thus, the trial court was within its discretion to order Progressive to “present a factual basis to establish liability.” *Id.* “Furthermore, the trial court was within its discretion to make findings contrary to the allegations of Progressive’s complaint.” *Id.*

Similarly, here, Caldwell defaulted after failing to appear and failing to file an answer to the Taylors’ complaint. The Taylors alleged that they suffered “personal injuries, physical pain and suffering, *permanency*, medical expenses, lost wages, and other pecuniary damages related to Plaintiffs’ personal property.” *Appellants’ App.* at 10 (emphasis added). For these injuries, the Taylors requested damages in the amount of \$1,500,000.00 for Heather and \$250,000.00 for Robert. The Taylors, however, were not automatically entitled to default judgment on all the allegations contained in their complaint. *Harger*, 777 N.E.2d at 94.

During the hearing on damages, the Taylors introduced evidence of Heather’s injuries, medical expenses in the amount of \$11,463.53, lost wages in the amount of \$1,317.76, and life expectancy. *Pls.’ Exs.* 1-5. Heather’s total out-of-pocket expenses, as noted in her exhibits, totaled \$12,781.29. The trial court was not bound by the Taylors’ averment that Heather’s injuries were permanent. As such, we find the trial court’s aggregate damage award in the amount of \$100,000.00 was not contrary to law.

Affirmed.

BAKER, J., and BROWN, J., concur.