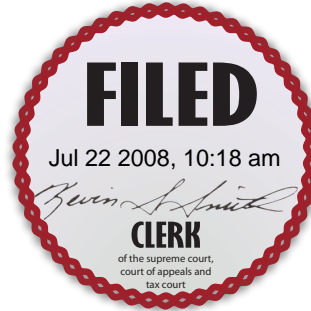


**Pursuant to Ind.Appellate Rule 65(D), this Memorandum Decision shall not be regarded as precedent or cited before any court except for the purpose of establishing the defense of res judicata, collateral estoppel, or the law of the case.**



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**IN THE  
COURT OF APPEALS OF INDIANA**

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SJON MARTIN, )

Appellant-Plaintiff )

vs. )

No. 49A02-0712-CV-1058 )

BANFIELD PET HOSPITAL OF CASTLETON, )  
DR. JIM DECHAND AND BANFIELD PET )  
HOSPITAL, )

Appellees-Defendants. )

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APPEAL FROM THE MARION SUPERIOR COURT  
The Honorable Gary L. Miller, Judge  
Cause No. 49D05-0606-CT-26376

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**July 22, 2008**

**MEMORANDUM DECISION - NOT FOR PUBLICATION**

**BARNES, Judge**

## **Case Summary**

Sjon Martin appeals the trial court's denial of his motion to correct error. We affirm.

### **Issue**

Martin raises one issue on appeal, which we restate as whether the trial court abused its discretion when it denied Martin's motion to correct error.

### **Facts**

Dr. Jim Dechand, a veterinarian, owns and practices at the Banfield Animal Hospital in Indianapolis. He performed surgery on Martin's dog, Ollie, on May 22, 2006. On May 29, 2006, Martin suspected that Ollie was in severe pain and took her to another veterinary practice. Another veterinarian determined that Ollie was in critical condition and euthanized the dog.

On June 28, 2006, Martin filed a complaint alleging negligence of Dr. Dechand and also named Banfield Animal Hospital as a defendant. The defendants filed a motion for summary judgment on June 18, 2007. On July 26, 2007, Martin filed a belated motion for enlargement of time to respond to the summary judgment motion. The trial court denied this motion on August 20, 2007. That same day, Martin filed an affidavit of veterinarian Byron B. Emswiller, Jr., with the court. In the affidavit, Dr. Emswiller opined that Dr. Dechand violated the standard of care and caused Ollie's death. The defendants moved to strike the affidavit from the record, contending that it was an inappropriate and untimely attempt to designate evidence in response to the summary judgment motion. The trial court struck the affidavit on October 1, 2007, and granted

summary judgment in favor of the defendants on October 9, 2007. Martin filed a motion to correct error on November 8, 2007. The trial court denied the motion to correct error on November 15, 2007. This appeal followed.<sup>1</sup>

### **Analysis**

“We review a trial court’s denial of a motion to correct error for an abuse of discretion.” Lighty v. Lighty, 879 N.E.2d 637, 640 (Ind. Ct. App. 2008). An abuse of discretion occurs when the trial court’s decision is against the logic and effect of the facts and circumstances, or reasonable inferences drawn from those facts. Id. We also must consider the standard of review applicable to the underlying decision. Martin contends the trial court improperly struck the affidavit of Dr. Emswiller from the record. We review a trial court’s decision to admit or exclude summary judgment evidence for an abuse of discretion. Starks Mechanical, Inc. v. New Albany-Floyd County Consol. Sch. Corp., 854 N.E.2d 936, 939 (Ind. Ct. App. 2006).

The stricken affidavit was not filed until August 20, 2007. Martin’s deadline to respond to the defendants’ summary judgment had already passed on July 23, 2007. Martin’s motion for an extension of time, which was untimely filed, was denied on August 20, 2007, as well. The trial court can extend the summary judgment time limits “upon a motion made within the applicable time limit.” Ind. Trial Rule 56(I); see also Starks, 854 N.E.2d at 940 (explaining that even though plaintiff was only one day late

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<sup>1</sup> In their statement of the case, appellees make reference to information gleaned during a mediation session. We remind counsel that Indiana’s Alternative Dispute Resolution Rules and Rules of Evidence provide that mediation is closed and considered confidential and privileged. See Ind. Alternative Dispute Resolution Rule 2.11; Ind. Evidence Rule 408.

filing his response the trial court had no discretion to allow the plaintiff to proceed because he did not move for an extension within the appropriate time). The filing of Dr. Emswiller's affidavit seems to be a belated attempt to designate evidence to avoid summary judgment and the trial court did not abuse its discretion in excluding this evidence.

Martin contends that the affidavit constitutes "newly discovered evidence" and is admissible on a motion to correct error. See Ind. T.R. 59(A)(1). Indiana Trial Rule 59 requires a motion to correct error to be filed when a party seeks to address "newly discovered material evidence, including alleged juror misconduct, capable of production within thirty (30) days of final judgment which, with reasonable diligence, could not have been discovered and produced at trial . . . ." Martin has not presented any argument or evidence that he could not have discovered or obtained this affidavit before the deadline for filing a response to summary judgment. Instead, he indicates that he was having trouble securing an affidavit from another veterinarian up until the deadline. Despite the troubles with securing an adequate affidavit, Martin neglected to file a timely request for an extension of the time limit or seek another expert affidavit within that time. Although Martin continues to classify the Emswiller affidavit as newly discovered evidence, we conclude it is more appropriately deemed untimely. Nothing in the record leads us to conclude it could not have been discovered within the appropriate time limits. The trial court properly struck the affidavit and did not abuse its discretion by denying Martin's motion to correct error.

## **Conclusion**

The trial court did not abuse its discretion by denying Martin's motion to correct error. We affirm.

Affirmed.

MAY, J., and MATHIAS, J., concur.