

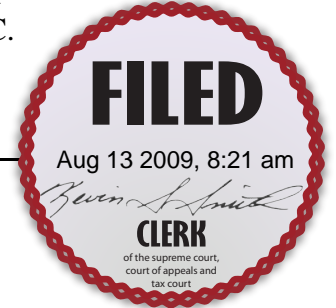
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**IN THE
COURT OF APPEALS OF INDIANA**

NIGHTINGALE HOME HEALTHCARE, INC.,)

Appellant-Plaintiff,)

vs.)

SUZIE OLIVA,)

Appellee-Defendant.)

No. 29A02-0902-CV-117

APPEAL FROM THE HAMILTON SUPERIOR COURT
The Honorable Daniel J. Pflieger, Judge
Cause No. 29D02-0608-PL-800

August 13, 2009

MEMORANDUM DECISION - NOT FOR PUBLICATION

VAIDIK, Judge

Case Summary

Nightingale Home Healthcare, Inc. (“Nightingale”) appeals from the trial court’s grant of summary judgment in favor of its former employee, Suzie Oliva. Specifically, Nightingale argues that the trial court erred by refusing to consider its summary judgment materials, and that if the court had done so, it would have found a genuine issue of material fact which precluded summary judgment. Because Nightingale filed its summary judgment materials after the time for a response had expired without previously making a motion to the trial court for a continuance before time expired, the trial court correctly refused to consider the belated materials. Because summary judgment was properly granted, we affirm.

Facts and Procedural History¹

Since 2003, Oliva has been a self-employed private duty caregiver, providing companion care services to the elderly and infirm. Appellant’s App. p. 89. These services include procuring and preparing meals, running errands, and visiting with her clients. As is common in the industry, Oliva also works for various other entities to supplement her income. *Id.* Beginning in August 2005, Oliva worked for Nightingale, a company providing home health care services, as an Intake Coordinator. In this capacity, among other things, Oliva received telephone calls from hospital discharge planners, physicians, patients, patient family members, marketers, and other people seeking Nightingale’s services and would either refer the callers to Nightingale’s scheduling

¹ These facts are taken from Oliva’s designated evidentiary materials, which, as discussed further below, were the only materials before the court when it granted summary judgment.

department or schedule the start of care herself. *Id.* Oliva did not perform home health care services for Nightingale during her employment. *Id.* at 90.

Danielle Crisp was also employed by Nightingale as an Intake Coordinator. In February 2006, Crisp provided Oliva with the name and phone number of Evaline Rhodehamel and asked Oliva to call Evaline, who was seeking home health care services for her husband, Harley Rhodehamel. *Id.* Evaline was seeking a home health care aide to help perform gastric tube feedings for Harley. *Id.* at 86. Nightingale's policy was that only a registered nurse could perform gastric tube feedings, and Nightingale charged a higher fee for nursing services than for home health care aide services. *Id.* As a result, Evaline told Crisp that the nursing rates were too expensive and decided that she would not hire Nightingale to perform these services. *Id.* Without being asked for a referral, Crisp suggested Oliva. Because Evaline was seeking the help of a home health care aide for gastric tube feedings and Nightingale could not satisfy Evaline's request, Oliva determined to her own satisfaction that she could take this case without conflicting with her duties at or competing with Nightingale. *Id.* at 90. Oliva called Evaline shortly thereafter. She did not undercut Nightingale's rates to solicit Evaline as a client. *Id.* at 92.

Oliva called Evaline and began providing home health care for Harley on February 9, 2006, until he died on August 15, 2006. *Id.* at 91. In March 2006, Oliva recommended to Evaline that she hire Nightingale for Harley's physical and occupational therapy. *Id.* Oliva herself, in her role as an Intake Coordinator for Nightingale, called Evaline from Nightingale to initiate the services, which Harley received for several

months. *Id.* Oliva asked Ava Burden and Takeda Blackwell, both fellow Nightingale employees, to help work at the Rhodehamels' home during their spare time. *Id.* at 91-92. She did not ask either woman to leave her employment or otherwise forego their duties to Nightingale. In July 2006, Oliva was suspended from Nightingale after being reprimanded for failing to follow the company's procedural policy of faxing referral information to the appropriate Clinical Coordinators. *Id.* at 92. She was terminated by Nightingale on July 26, 2006. After being terminated, Oliva asked Deanna Malone, another former Nightingale employee, to work with her on another case. *Id.*

On August 18, 2006, Nightingale filed suit against Oliva, alleging that she breached her fiduciary duty by diverting Evaline, a prospective Nightingale client, to her own service, actively and directly competing with Nightingale for both customers and employees, undercutting Nightingale's rates, and working in her own best interests and against her employer's interests.² *Id.* at 34-40. Oliva denied these allegations. After the parties conducted discovery, on September 5, 2008, Oliva filed a motion for summary judgment along with a brief in support and designation of evidentiary materials. Because Oliva served these documents by mail, the deadline for a response was October 8, 2008. Nevertheless, on October 16, 2008, Nightingale filed a motion for enlargement of time to respond to Oliva's motion for summary judgment, asking for a new deadline of October 17, the next day. But on October 16, the trial court granted summary judgment in favor of Oliva and awarded her attorney fees under Indiana's General Recovery Rule. *Id.* at 4-10.

² The complaint does not allege a breach of any noncompetition agreement.

On October 17, although summary judgment was granted the previous day, Nightingale filed its response to Oliva's motion for summary judgment, arguing that summary judgment was improper because of remaining genuine issues of material fact. That same day, Nightingale also filed a brief in opposition to Oliva's motion for summary judgment and a designation of evidence in support of its motion in opposition to summary judgment. Also that day, despite having already granted summary judgment, the trial court granted Nightingale's motion for enlargement of time to respond to Oliva's motion for summary judgment, imposing a new deadline of November 17, 2008.

The grant of both summary judgment and the enlargement of time led to confusion. On October 23, Oliva filed a motion to reconsider the trial court's order granting an enlargement of time. Oliva attached to this motion an exhibit consisting of email correspondence between Oliva's counsel and Nightingale's counsel. In the emails, dated October 13, 2008, counsel debate whether, in a conversation that took place on October 8, Oliva's counsel agreed to an enlargement of time for Nightingale to October 15 or October 17. *Id.* at 120-22. On October 23, Oliva also filed a request seeking reasonable attorney fees. On November 6, in the event that the trial court decided to consider Nightingale's belated summary judgment filings, Oliva filed an objection and motion to strike in regard to parts of the evidentiary materials filed by Nightingale. On November 17, 2008, Nightingale filed a motion to reconsider or, in the alternative, correct error in regard to the entry of summary judgment. On January 20, 2009, Nightingale filed an affidavit in support of its motion to reconsider or correct error. The affidavit consists of the testimony of Bikram Bhullar, an employee of Nightingale. *Id.* at

130-31. Bhullar alleged that Nightingale's counsel asked him on October 15 to mail Nightingale's response to Oliva's motion for summary judgment, its brief in opposition, and its designation of evidence. *Id.* at 131. Bhullar alleged that he mailed the documents that same day. *Id.* at 132. On January 23, Oliva filed an objection to Nightingale's motion to reconsider or correct error. Nightingale responded to that objection one week later. Because the trial court never issued a ruling on the motion to correct error, it was deemed denied. Nor did the trial court issue a ruling on any of the other motions before the court after the order granting an enlargement of time. Nightingale now appeals.

Discussion and Decision

On appeal, Nightingale argues that the trial court erred by entering summary judgment in Oliva's favor without considering its filings in opposition. If the trial court had considered these filings, Nightingale argues, it would have found genuine issues of material fact as to whether Oliva had breached her duty of loyalty to Nightingale, rendering summary judgment inappropriate.

Specifically, Nightingale argues that it timely filed both its motion for enlargement of time and its summary judgment materials because Oliva's counsel had agreed to an enlargement of time. In the event we find the documents untimely, Nightingale argues that the trial court had discretion to accept the belated documents. Nightingale also argues that, had the trial court considered its summary judgment materials, it would have determined that there are genuine issues of material fact which preclude summary judgment.

The law of summary judgment is well established. The purpose of summary judgment under Indiana Trial Rule 56 is to terminate litigation about which there can be no factual dispute and which may be determined as a matter of law. *Bushong v. Williamson*, 790 N.E.2d 467, 474 (Ind. 2003). On appeal, our standard of review is the same as that of the trial court: summary judgment is appropriate only where the evidence shows there is no genuine issue of material fact and the moving party is entitled to judgment as a matter of law. *Williams v. Riverside Cmty. Corr. Corp.*, 846 N.E.2d 738, 743 (Ind. Ct. App. 2006), *trans. denied*. We construe all facts and reasonable inferences drawn from those facts in favor of the non-moving party. *Id.* On appeal, the trial court's order granting or denying a motion for summary judgment is cloaked with a presumption of validity. *Sizemore v. Erie Ins. Exch.*, 789 N.E.2d 1037, 1038 (Ind. Ct. App. 2003). A party appealing from an order granting summary judgment has the burden of persuading the appellate tribunal that the decision was erroneous. *Id.* at 1038-39. However, where the facts are undisputed and the issue presented is a pure question of law, we review the matter *de novo*. *Crum v. City of Terre Haute ex rel. Dep't of Redev.*, 812 N.E.2d 164, 166 (Ind. Ct. App. 2004). The trial court entered an order containing findings of fact. This, however, does not change the nature of our review on summary judgment. In the summary judgment context, the entry of specific facts and conclusions aids our review by providing us with a statement of reasons for the trial court's decision, but it has no other effect. *Spears v. Blackwell*, 666 N.E.2d 974, 976 (Ind. Ct. App. 1996), *reh'g denied, trans. denied*.

We now consider whether Nightingale's summary judgment materials were timely filed. "Trial Rule 56(C) provides that a party opposing a motion for summary judgment has thirty days to serve a response or any other opposing affidavits." *HomEq Servicing Corp. v. Baker*, 883 N.E.2d 95, 98 (Ind. 2008).³ Additionally, Trial Rule 6(E) provides: "Whenever a party has the right or is required to do some act or take some proceedings within a prescribed period after the service of a notice or other paper upon him and the notice or paper is served upon him by mail, three [3] days shall be added to the prescribed period." Here, Oliva's counsel served Nightingale with her motion for summary judgment by mail on September 5, 2008, resulting in a deadline of October 8, 2008, for Nightingale's response. However, Nightingale did not respond until October 16, when it filed its motion for enlargement of time and October 17, when it filed its response to Oliva's motion for summary judgment, brief in opposition to Oliva's motion for summary judgment, and designation of evidence in support of its motion in opposition to summary judgment. Thus, Nightingale's response was untimely.

As for Nightingale's argument that the trial court has discretion to consider its belated summary judgment response, in 2008 our Supreme Court acknowledged that previous case law had been "somewhat inconsistent regarding the authority of a trial judge to consider affidavits filed after the thirty-day deadline in Rule 56(C)." *HomEq Servicing*, 883 N.E.2d at 98. After comparing cases from our Court requiring the adverse party to either file opposing materials or seek an extension of time within thirty days and

³ This case was handed down in March 2008, which is before the summary judgment proceedings in the case at hand began.

cases⁴ holding that a trial court has discretion to consider a summary judgment response after the deadline had passed, the Court stated:

Any residual uncertainty was resolved in 2005 when we cited *Desai* [*v. Croy*, 805 N.E.2d 844 (Ind. Ct. App. 2004), *trans. denied*] with approval and declared:

When a nonmoving party fails to respond to a motion for summary judgment within 30 days by either filing a response, requesting a continuance under Trial Rule 56(I),⁵ or filing an affidavit under Trial Rule 56(F), the trial court cannot consider summary judgment filings of that party subsequent to the 30-day period.

HomEq Servicing, 883 N.E.2d at 98-99 (quoting *Borsuk v. Town of St. John*, 820 N.E.2d 118, 124 n.5 (Ind. 2005)). Although this may seem harsh, the *Desai* court concluded that the rule precluding late filing was a bright line rule, and our Supreme Court cited this case with approval. *Id.*

The existence of any agreement between counsel for an enlargement of time does not alter the time limit established by this bright line rule. The nonmoving party must choose between filing a response, requesting a continuance under Trial Rule 56(I), or filing an affidavit under Trial Rule 56(F). Further, Trial Rule 56(I) provides, “For cause found, the Court may alter any time limit set forth in this rule *upon motion made within*

⁴ One of the cases Nightingale proffers to support its argument that the trial court has discretion to consider a belated summary judgment response, *Farm Credit Servs. of Mid-Am., FCLA v. Tucker*, 792 N.E.2d 565, 569 (Ind. Ct. App. 2003), is included in this list. Appellant’s Br. p. 13.

⁵ Trial Rule 56(I) was amended effective January 1, 2005. The previous version of Trial Rule 56(I) stated, “The Court, for cause found, may alter any time limit set forth in this rule.” *Logan v. Royer*, 848 N.E.2d 1157, 1160 (Ind. Ct. App. 2006). The rule currently reads, “For cause found, the Court may alter any time limit set forth in this rule upon motion made within the applicable time limit.”

the applicable time limit.” (Emphasis added.) An agreement between counsel⁶ to enlarge the time limit, though made within the applicable time limit but not filed with the court, is not the same as a motion made to the trial court within the applicable time limit seeking an extension of time. And because the trial court lacked discretion to grant an extension based upon a motion made after the time for a response had expired, its order granting a motion for enlargement of time was a nullity. As a result, the trial court did not err in refusing to consider Nightingale’s summary judgment materials, and we will not consider them on appeal.

Nor can we say that the trial court erred by granting summary judgment based on Oliva’s designated materials.⁷ The evidence shows that Oliva made arrangements with other employees to work on a case after work hours at Nightingale for a woman who had decided, before speaking to Oliva, that she would not hire Nightingale for help with her husband’s gastric tube feedings. Oliva successfully referred the Rhodehamels to Nightingale for physical and occupation therapies for Harley. The designated materials show that Oliva did not compete with Nightingale for either customers or employees, fail to use her best efforts for Nightingale, or otherwise violate her duty of loyalty to Nightingale as an employee. *See Kopka, Landau & Pinkus v. Hansen*, 874 N.E.2d 1065, 1070 (Ind. Ct. App. 2007) (“Prior to his termination, an employee must refrain from

⁶ In light of our conclusion, we need not address the conflict between counsel regarding whether the agreement was for an enlargement of time up to October 15 or October 17.

⁷ Trial Rule 56(C) provides, in part, “Summary judgment shall not be granted as of course because the opposing party fails to offer opposing affidavits or evidence, but the court shall make its determination from the evidentiary material designated to the court.” Nightingale does not argue on appeal that the evidence designated by Oliva presents a material question of fact or law precluding summary judgment.

actively and directly competing with his employer for customers and employees and must continue to exert his best efforts on behalf of his employer.”) (quoting *Potts v. Review Bd. of Ind. Emp. Sec. Div.*, 475 N.E.2d 708, 712 (Ind. Ct. App. 1985), *reh’g denied, trans. denied*). We affirm the trial court’s grant of summary judgment in Oliva’s favor.⁸

Affirmed.

NAJAM, J., and FRIEDLANDER, J., concur.

⁸ Nightingale makes no argument in its Appellant’s Brief that, were we to affirm the grant of summary judgment, the award of attorney fees to Oliva was nevertheless an abuse of discretion. Thus, we will not address this question on appeal. See *Monroe Guar. Ins. Co. v. Magwerks Corp.*, 829 N.E.2d 968, 977 (Ind. 2005) (“The law is well settled that grounds for error may only be framed in an appellant’s initial brief . . .”).