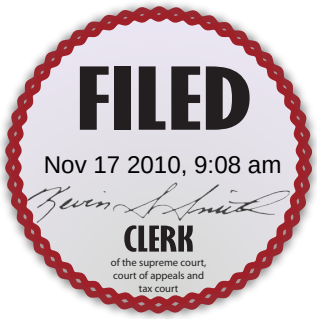

ATTORNEY FOR APPELLANTS:

STEPHEN H. DOWNS
Tiede Metz & Downs, P.C.
Wabash, Indiana

ATTORNEY FOR APPELLEE:

KRISTINA L. LYNN
Lynn and Stein, P.C.
Wabash, Indiana

IN THE
COURT OF APPEALS OF INDIANA

ROBERT BURCH and JOANN BURCH, Appellants-Defendants, vs. VERN PENNER, Appellee-Plaintiff.	))))))))))	No. 85A04-1003-PL-169

APPEAL FROM THE WABASH SUPERIOR COURT
The Honorable Christopher M. Goff, Judge
Cause No. 85D01-0802-PL-56

November 17, 2010

MEMORANDUM DECISION - NOT FOR PUBLICATION

VAIDIK, Judge

Case Summary

This is a contract dispute involving an alleged discovery violation. The defendants claim that the plaintiff failed to supplement or amend his deposition testimony and that he materially contradicted that testimony at trial. A jury found in favor of the plaintiff, and the defendants sought relief from judgment on account of misconduct. Assuming for purposes of argument that the plaintiff committed a discovery violation amounting to fraud, negligent misrepresentation, or misconduct, we conclude that the defendants have failed to show they were prejudiced as a result thereof. We affirm the trial court's judgment and its order denying relief.

Facts and Procedural History

Beginning in the early 1990s, farmer Vern Penner rented acreage from landowners Robert and Joann Burch pursuant to a verbal crop share lease agreement. Penner would farm the Burches' land and pay one half of each harvest as rent. The parties would split farming expenses equally. Penner did not keep track of how many crops he produced each year on the Burches' farm.

In 2003 or 2004, the Burches allegedly failed to contribute adequate seed, so Penner decided he would farm the rented land in two halves. He planted the Burches' seed supply on one half and his own seed on the other. The yields from the Burches' half were lower than the yields on his own, and Penner delivered only the crops produced on the Burches' half as rent. Penner continued to do this through 2007.

At some point the parties became involved in a contractual dispute pertaining to crop years 2006 and 2007, and Penner filed a complaint against the Burches seeking

compensation for labor and unpaid expenses. The Burches counterclaimed seeking unpaid rent. The Burches believed that, in light of the average crop yields in their county, Penner was shortchanging them on the harvests.

Penner was deposed before trial, and he indicated at his deposition that he tendered half of each harvest as rent to the Burches. When asked by defense counsel if he could compute his crop yields at the Burch farm, Penner said he did not know how much he produced each year. He stated, however, that Robert Burch kept records of the crops he received and that the total yields could be calculated just by multiplying the Burches' shares by two:

Q. Do you have production records?
A. No.
Q. I mean is there some - you have no, we have no way of knowing what your, -
A. No. I just -
Q. - what you produced over the years?
A. - did it currently each year; just divide it in half each year.
Q. But we should be able to go to the elevators and find out how much?
A. Well, he [Robert Burch] should have those receipts, yes.
Q. He should have those receipts, and we should be able to extrapolate that information -
A. Uh-huh, uh-huh.
Q. - by doubling it essentially, -
A. Uh-huh.

* * * * *

Q. And did there come a time at the end of the year that you would report to Bob [Burch] what the yield was and, and how-?
A. No. He just got his receipts from the elevator.
Q. During the first five (5) years, was there a time when you would report that to him?
A. No, I don't think so.
Q. How was he to know what the yield was?
A. By the receipts he had.
Q. So you would take half, supposedly you would take half?

A. Uh-huh.
Q. I'm sure you're representing that you took half of the grain that was produced to the elevators?
A. Right.
Q. But there's no way to verify whether it was half or more than half or less than half, is there, other than just-?
A. Well, I just had four equally-sized wagons, and I'd fill four and take two of his to here and take two of mine to where I would do with them.
Q. And that's how you measured it?
A. Uh-huh.
Q. Okay. And this went on from 1996 through -
A. Uh-huh.
Q. - 2007?
A. Uh-huh. Correct.

Appellant's App. p. 30-36. Penner did not amend or supplement his deposition testimony at any time before trial.

Then on the first day of trial, Penner testified on direct examination that since 2004 he had been dividing the Burches' land in half and giving them only the crops produced on their designated side. "I went ahead and I divided the fields. . . . I divided them in half[.] . . . I would plant [Robert Burch's] seed on his half, my seed on my half. . . . [W]hen I combined his half I took that to the elevator. When I combined my half I took it and put [it] in my bin." Tr. p. 22. The Burches did not object, ask that Penner's testimony be stricken, request a continuance, or otherwise alert the trial court that Penner's trial testimony contradicted his deposition testimony.

On cross-examination, the Burches questioned Penner about the half-and-half land division and his failure to disclose it at his deposition:

Q: [Y]ou remember giving me a deposition back in November of '08?
A: Yes.
Q: And a deposition is where I, you came down to my office . . . and I got to ask questions, uh, about this. And I've, I've heard a number

of things for the first time today that we, I thought we talked about at your deposition but they're different. Can you recall some of those things?

A: No.

Q: You can't. The splitting of the fields. We never talked about that. . . . [W]hen I asked you about the procedure for taking beans or corn . . . to the elevator, you told me you would take . . . one wagon for Burch and one for you. You never told me about the splitting of the fields.

A: Well, that didn't happen until 2003. We did that up til then, you know.

Q: What[?]

A: We didn't talk about the difference.

Q: The deposition was in '08.

A: Okay.

Q: November of '08.

A: Yeah. But you asked me how we, uh, divided it and that's how we did it up til '03.

Q: So, I didn't ask you. You thought I was asking you about before '03?

A: Right.

Q: What made you think that?

A: Because that was the normal way we had done it up til then.

Q: Okay. So, starting in '04, then you started splitting the fields.

A: Right.

Q: But you didn't ask me, you didn't tell me about that?

A: I would say you didn't ask.

Q: Okay. Silly me. I should, I should have asked. I'm sorry. . . .

Id. at 109-10. The Burches neither lodged an objection nor requested a continuance thereafter.

Penner was re-called to testify on the third day of trial, and the Burches cross-examined him on the land division once more. Penner also stated that he did not have records of his crop production, but he speculated that the yields on his side of the farm were greater than those on the Burches' side in 2007. Again, the Burches did not object or request a continuance.

The Burches introduced several "damage computation" exhibits which they had prepared before trial. The exhibits showed the unpaid rent amounts that the Burches believed they were owed based on the average crop yields in their county. The amounts were determined by subtracting the monetary value of the crops that the Burches actually received from the value of the crops they would have received given an average county yield. The Burches' exhibits were admitted and submitted to the jury.

The jury awarded Penner $4340 on his claims for unpaid labor and expenses. The jury awarded the Burches nothing on their counterclaim for unpaid rent.

The Burches next filed a post-trial motion for relief from judgment. They alleged that Penner contradicted his deposition at trial and that his failure to supplement or amend his deposition testimony constituted a discovery violation prejudicing their case. They claimed that, had they known Penner would testify that he began dividing the farm and paying them smaller shares of the harvests, they

> would have known to investigate further the yields on "plaintiff's half" of the farm; would have known to investigate further plaintiff's input costs and harvesting methods; would have shown in more detail our input costs; would have produced evidence on the quantity and quality of seed purchased by us for planting by plaintiff; would have been able to effectively cross-examine plaintiff on his change of testimony, his rationale for supposedly splitting the fields, and his methods of harvesting a "split" farm on which corn was grown exclusively on the east side and beans were grown exclusively on the west side; and would have argued the case much differently.

Appellant's App. p. 41. The Burches also submitted an affidavit of their expert witness, who stated in pertinent part:

> 7. Had I known that plaintiff was going to testify at trial that the crops paid defendants for rent were less than one-half of the gross yields produced on the farm, and that such was the result of plaintiff claiming that

he was physically splitting the farm for planting and harvesting purposes, ostensibly under the rationale that defendants were not providing him with adequate seed, I would have assisted defendants in preparing for, and undermining, that testimony, and/or would have testified as follows:

7.1 In my experience, no tenant farmer has ever paid rent by physically splitting a farm and planting one-half with his seed and the other half with his landlord's seed, and such a scenario is totally implausible.

7.2 I would have assisted in preparing additional discovery, in preparing defendants' case in chief and rebuttal case, and cross-examination of plaintiff, designed to elicit the following:

7.2.1. how plaintiff delineated the farm between he and the defendants.

7.2.2. how plaintiff addressed fertility spread on his half as opposed to "defendants' half." The soil tests, which I referred to when testifying at trial, show the farm had uniform, and adequate, fertility levels across the entire farm which would indicate the farm was not being physically divided for planting purposes.

7.2.3. documentation, such as seed bills, supporting defendants' claims that they paid for adequate seed for planting.

7.2.4. documentation which plaintiff alleges supports his claim that he was paying for seed for only for his half of the farm.

7.2.5. documentation showing the parties' respective obligations regarding the purchase and application of herbicide and fertilizer.

7.2.6. Farm Service Agency records, signed by plaintiff, show that plaintiff and defendants each received a 50% share of the crop in 2006 and 2007; these records would have been used to refute plaintiff's testimony that the fields were being split and that he was receiving more than one-half of the crops he was producing on defendants' farm.

Id. at 44-45. The trial court denied the Burches' motion. The Burches now appeal.

Discussion and Decision

The Burches claim that Penner violated the discovery rules by failing to amend or supplement his deposition testimony, that their case was prejudiced as a result, and that the trial court therefore erred by denying their motion for relief from judgment.

Indiana Trial Rule 60(B) provides: "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: . . . (3) fraud (whether heretofore denominated intrinsic or extrinsic), misrepresentation, or other misconduct of an adverse party . . . ." Rule 60(B)(3) creates a limited exception to the general rule of finality of judgments, enabling a court to grant relief from an otherwise final judgment due to fraud, misrepresentation, or misconduct of an adverse party. *Nature's Link, Inc. v. Przybyla*, 885 N.E.2d 709, 715 (Ind. Ct. App. 2008). "Misconduct" under Rule 60(B)(3) includes both negligent and intentional violations of Indiana's discovery rules. *Outback Steakhouse of Florida, Inc. v. Markley*, 856 N.E.2d 65, 73 (Ind. 2006).

The burden is on the movant to establish grounds for Trial Rule 60(B) relief. *In re Paternity of P.S.S.*, 934 N.E.2d 737, 740 (Ind. 2010). A Rule 60(B) motion is addressed to the equitable discretion of the trial court, and the grant or denial of the motion will be disturbed only when that discretion has been abused. *Id.* at 740-41. An abuse of discretion will be found only when the trial court's action is clearly erroneous, that is, against the logic and effect of the facts before it and the inferences which may be drawn therefrom. *Id.* at 741.

To obtain relief under Rule 60(B)(3) due to a discovery violation, the movant must show that (1) the opponent's violation amounted to either fraud, negligent misrepresentation, or misconduct; (2) the fraud, misrepresentation, or misconduct prejudiced the movant by preventing it from fully and fairly presenting its case at trial; and (3) the movant has made a prima facie showing of a meritorious claim or defense. Ind. Trial Rule 60(B)(3); *Markley*, 856 N.E.2d at 74.

Even if we assume without deciding that Penner committed a discovery violation amounting to fraud, negligent misrepresentation, or misconduct, the Burches nonetheless fail to establish they were prevented from fully and fairly presenting their case as a result thereof. The Burches' apparent theory at trial was that (a) Penner was required to pay one half of each harvest produced on the rented farmland, (b) the crop payments that the Burches received were low in light of average county yields, so (c) Penner must have been giving them less than half of each harvest. The Burches' case was predicated on average—not actual—crop yields, and they sought damages accordingly. Penner revealed on the stand that he split the farm beginning in 2003 or 2004 and that he reaped greater yields on his own half than on the Burches'. The Burches now allege that had they been aware Penner would so testify, they would have investigated Penner's story, produced evidence on the quality and quantity of their seed, and "argued the case much differently." But the Burches furnish no cogent explanation as to how Penner's revelation compromised their existing trial strategy or how prior knowledge of Penner's land-splitting would have altered their approach to the case. In fact, the Burches claim they would have tried to disprove Penner's trial testimony had they had anticipated it—

meaning they would have otherwise stuck with their average-crop-yield theory. Their expert would have testified that Penner's land-splitting was "totally implausible" and would have introduced evidence "to refute plaintiff's testimony that the fields were being split and that he was receiving more than one-half of the crops he was producing on defendants' farm." The Burches fail to illuminate how this would have strengthened their position. And in any event, if Penner's trial testimony was at all inconsistent with his deposition and the Burches wanted to discredit him, the Burches were free to introduce into evidence Penner's prior inconsistent statements—both for impeachment purposes and for their substantive truth. *See* Ind. Evidence Rule 613; Ind. Evidence Rule 801(d)(1)(A). The Burches had multiple opportunities to do so at trial. Now the Burches want yet another chance to contest Penner's land-division while presumably offering the same, unavailing average-crop-yield theory that they presented to the jury. We believe this is an insufficient basis to find that Penner's alleged misconduct deprived the Burches the opportunity to fully and fairly present their claim. We therefore conclude that the Burches have failed to establish prejudice from Penner's alleged discovery violation. *Cf. Markley*, 856 N.E.2d at 80-81 (finding prejudice where surprise testimony derailed movant's case presentation, and but for discovery violation, movant's handling of the litigation would have been entirely different).

For the foregoing reasons, we cannot say the trial court abused its discretion in denying the Burches' motion for relief from judgment.

Affirmed.

MAY, J., and ROBB, J., concur.