

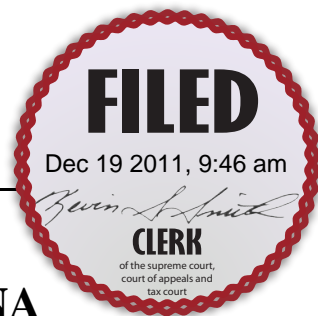
**Pursuant to Ind.Appellate Rule 65(D), this Memorandum Decision shall not be regarded as precedent or cited before any court except for the purpose of establishing the defense of res judicata, collateral estoppel, or the law of the case.**

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**IN THE  
COURT OF APPEALS OF INDIANA**

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CITY OF MUNCIE, INDIANA, )

Appellant, )

vs. )

STANLEY BENFORD, )

Appellee. )

No. 18A02-1011-MI-1281

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APPEAL FROM THE DELAWARE CIRCUIT COURT  
The Honorable John M. Feick, Judge  
Cause No. 18C04-0910-MI-59

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**December 19, 2011**

**MEMORANDUM DECISION - NOT FOR PUBLICATION**

**BROWN, Judge**

The City of Muncie, Indiana (the “City”), appeals the trial court’s order dated November 22, 2010 awarding damages to Stanley Benford. The City raises two issues, which we revise and restate as whether the court erred in entering the November 22, 2010 order. We reverse.

The relevant facts follow. On November 28, 2007, the State and the Muncie Police Department filed a Complaint for Forfeiture and Reimbursement of Law Enforcement Costs against Benford seeking forfeiture of a 1999 Cadillac Escalade following Benford’s November 26, 2007 arrest for conspiracy to commit arson and insurance fraud.<sup>1</sup> On January 8, 2008, the State and the Muncie Police Department filed a Verified Motion for Default and the court entered default judgment and ordered that the personal property be forfeited by Benford and become the property of the Muncie Police Department.

On October 28, 2009, Benford filed a Petition to Set Aside Judgment in which he asserted that on November 28, 2007, he was an inmate in the Delaware County Jail, that he never received service of process, and that he was not aware that the forfeiture action was pending. On December 18, 2009, the City sold the vehicle through an online auction for \$9,050.99.<sup>2</sup> On June 2, 2010, the court held a hearing on Benford’s petition<sup>3</sup> and the

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<sup>1</sup> The caption of the complaint states: “STATE OF INDIANA and the MUNCIE POLICE DEPARTMENT VS. STANLEY BENFORD.” Appellant’s Appendix at 111. The complaint was filed under cause number 18C04-0711-MC-19 (“Cause No. 19”).

<sup>2</sup> The Muncie Police Department, under separate cause number 18C04-0910-MI-59 (“Cause No. 59”), had filed a petition, which the court granted, requesting authorization for the Muncie Police Department to sell several previously-forfeited vehicles, which included Benford’s Cadillac under Cause No. 19.

State filed a response to Benford's petition which argued that Benford did receive service of process and that Benford did not timely file his Petition to Set Aside Judgment pursuant to Ind. Trial Rule 60(B).<sup>4</sup> On June 8, 2010, the court ordered the default judgment set aside and scheduled a bench trial for August 2, 2010.

On August 2, 2010, the parties appeared before the court and indicated that they agreed to the return of the vehicle to Benford, and the court asked the State's counsel to prepare a motion to dismiss with a proposed order and Benford's counsel to prepare a proposed order for the return of the vehicle.<sup>5</sup> On August 3, 2010, the court ordered the State to return the vehicle to Benford within three days. On August 9, 2010, Benford filed an Affidavit Alleging Contempt stating that the State had failed to return the vehicle and requested attorney fees.

On August 12, 2010, the State filed a motion "to dismiss this action with prejudice" in Count No. 19. Appellant's Appendix at 134. On August 13, 2010, the trial court granted the State's motion and entered an order of dismissal which provided: "IT IS THEREFORE ORDERED that this matter be dismissed with prejudice." Id. at 136.

On August 31, 2010, the court scheduled a hearing "concerning the return of [Benford's] property." Appellant's Appendix at 6. On September 13, 2010, the court held a hearing at which counsel for Benford and counsel for the City appeared.

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<sup>3</sup> At the hearing, counsel for the State indicated that the court had "signed off on the order to sell the vehicle online October 23, 2009." Transcript at 9. This statement is a reference to the court's order authorizing the sale of the vehicle using an internet auction site under Cause No. 59.

<sup>4</sup> The caption of the response identified only the State as the Plaintiff.

<sup>5</sup> The record indicates that this hearing was held under both Cause No. 19 and Cause No. 59. An entry in the CCS under Cause No. 59 on August 2, 2010, provides: "Due to the pending dismissal in [Cause No. 19], no further hearings in this case will be needed." Appellee's Appendix at 1.

Benford's counsel called Officer Rodney Frasier as a witness. Frasier testified that prior to the sale the vehicle was titled in the name of the City, that the vehicle was sold via an online auction in 2009, that the sale price was \$9,050.99, that the City collected \$8,328.45 after the online service collected its rate, and that the money was transferred to the City's account in February 2010. Benford testified that the value of the vehicle at the time it was taken was around \$12,000 and that he had new tires and rims which had cost him close to \$2,400. Benford's counsel stated that the parties were in court on Benford's "contempt citation" and that "[o]bviously they can't return the vehicle," and he requested "that the Court require the City of Muncie to compensate [his] client as is necessary to make him whole." Transcript at 34. Counsel for the City noted that it was in a difficult situation, that the City's "office was not involved up until this point," that "[i]t was the State of Indiana," and that it "need[ed] time to figure out where to do [sic] from here." Id. at 34-35. Benford's counsel noted that the City "was listed as a party originally" and the court stated that "to keep the case clear" the City should enter an appearance and file a motion to intervene. Id. at 36.

On September 22, 2010, Benford filed a Verified Motion for a Finding of Contempt, Damages and Attorney Fees requesting the court to enter a finding of contempt against the City and order the City, in lieu of the return of the vehicle, to pay Benford the sum of \$14,512.22, plus thirty dollars per day from August 3, 2010 for the loss of use of the vehicle, and reasonable attorney fees. On September 23, 2010, the City filed a motion to intervene and request for a hearing on Benford's motion. On November

4, 2010, following a hearing, the court found that the City “is now added as an intervenor” and scheduled a hearing for November 17, 2010. Appellant’s Appendix at 8.<sup>6</sup>

On November 17, 2010, the court held a hearing. At the start of the hearing, the City asked the court to reconsider its previous ruling on the motion to set aside default judgment, which the court denied. Benford’s counsel stated that the parties appeared “on a show cause hearing” and that the issue was “why they have not returned [Benford’s] vehicle as they were ordered to do,” and the City’s counsel stated that he “thought [the parties] were here to figure out the value of the vehicle and damages and move forward.” Id. at 55. The City introduced Plaintiff’s Exhibit 1, which indicated that the vehicle was sold by the “City of Muncie / Muncie Police Dept.” for \$9,050.99 on December 18, 2009. Plaintiff’s Exhibit 1.

On November 22, 2010, the court issued an order which found that the value of the property at the time of the court’s order to return it to Benford was \$14,000 and that the previous order to return Benford’s property was still in effect, ordered the City to pay Benford the sum of \$14,000, and denied Benford’s requests for compensation for the unlawful detention of the vehicle and attorney fees.<sup>7</sup>

The issue is whether the court erred in entering its order dated November 22, 2010. The City argues that “the trial court never had the authority to conduct any proceedings or enter any order following its August 13, 2010 dismissal of this action.”

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<sup>6</sup> Also, under Cause No. 59, on November 12, 2010, Benford filed a motion to set aside judgment entered October 29, 2009, to award attorney fees, and to dismiss cause of action. CCS for Cause No. 59 indicates that the matter would be heard at the hearing set for November 17, 2010.

<sup>7</sup> The court also ordered that Cause No. 59 be set aside and that cause of action dismissed.

Appellant's Brief at 5. The City appears to argue that Benford did not initiate a new action to enforce the order for the return of the vehicle or move to set aside the dismissal pursuant to Ind. Trial Rule 41. The City also argues that it is unclear whether it was ever truly considered a party to the case and that the evidence does not support the damage award.

Benford argues that the court's order setting aside the default judgment against him was proper. Specifically, Benford argues that the City "has waived its objections to the Court's continuing jurisdiction and the Court's authority to order it to pay \$14,000.00 in lieu of the return of Benford's vehicle." Appellee's Brief at 12. Benford further asserts that the City has been unjustly enriched by securing possession of his property. Benford also argues that he is entitled to appellate attorney fees.

On August 13, 2010, the trial court entered an order of dismissal which provided that "this matter be dismissed with prejudice." Appellant's Appendix at 136. This court has stated that "the law is clear that a motion under [Ind. Trial] Rule 60(B) is required to have a dismissal with prejudice set aside." E & S Mems, L.L.C. v. Eagen, 795 N.E.2d 508, 510 (Ind. Ct. App. 2003). Specifically, "[i]t is generally recognized that dismissal with prejudice is a dismissal on the merits." Id. (citing Midway Ford Truck Ctr., Inc. v. Gilmore, 415 N.E.2d 134, 136 (Ind. Ct. App. 1981)). In addition, Ind. Trial Rule 41(F) provides in relevant part: "A dismissal with prejudice may be set aside by the court for the grounds and in accordance with the provisions of Rule 60(B)." Id. Indeed, "this court has held that a dismissal with prejudice may be set aside *only* in accordance with the provisions of T.R. 60(B)." Id. (citing Midway, 415 N.E.2d at 137 (citing Hooker v.

Terre Haute Gas Corp., 162 Ind. App. 43, 317 N.E.2d 878 (1974)) (emphasis added)). It is also settled that Indiana Trial Rule 60(B) applies to orders, as well as judgments. Midway, 415 N.E.2d at 137 (citation omitted).

We also observe that in its August 13, 2010 order of dismissal the trial court did not expressly retain the authority to enforce its August 3, 2010 order or any other previous order. See E & S Mems, 795 N.E.2d at 511 (finding that the trial court did not retain the authority to enforce a previous agreement after it issued a final order dismissing the matter with prejudice). Further, while Indiana Code § 33-23-2-4 provides that “courts retain power and control over their judgments for ninety (90) days after rendering the judgments,” this court has determined that the statute “does not relieve the trial court of its obligation to abide by the Indiana Rules of Trial Procedure.” See id. (citing Davidson v. Am. Laundry Mach. Div., 431 N.E.2d 546, 550 (Ind. Ct. App. 1982) (stating that “although by statute the court possessed broad powers during term time to modify, set aside, or vacate its judgments, a trial judge could not by a wave of his gavel ‘inhibit finality of judicial proceedings and effectively emasculate’ our trial and appellate rules”) (quoting Wadkins v. Thornton, 151 Ind. App. 380, 279 N.E.2d 849, 851 (1972))). Again, the Indiana Trial Rules clearly provide that “[a] dismissal with prejudice may be set aside by the court for the grounds and in accordance with the provisions of Rule 60(B).” Ind. Trial Rule 41(F).

In this case, the record reveals that, following the August 13, 2010 dismissal with prejudice, Benford did not avail himself of Ind. Trial Rules 41(F) or 60(B) to reinstate the case or file a separate lawsuit to enforce the August 3, 2010 order that the City return his

vehicle. Because the trial court dismissed the action with prejudice, and Benford neither filed a new action nor followed Ind. Trial Rule 41(F) to have the dismissal set aside, the trial court did not have the authority to enter its November 22, 2010 order. See E & S Mems, 795 N.E.2d at 511 (holding that “because the trial court dismissed the action with prejudice, and Eagen neither filed a new action nor followed Trial Rule 41(F) to have the dismissal set aside” the trial court did not have the authority to consider Eagen’s motion to enforce the parties’ settlement agreement).

Based upon the record, we conclude that the trial court did not have the authority to enter the November 22, 2010 order. Accordingly, we reverse the court’s order.<sup>8</sup> We decline to award Benford appellate attorney fees.

Reversed.

FRIEDLANDER, J., and BAILEY, J., concur.

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<sup>8</sup> This opinion is limited to whether the trial court had the authority to enter the November 22, 2010 order, and we express no opinion concerning whether Benford would be entitled to relief under Ind. Trial Rule 60(B). We note that the trial court conducted a hearing at which it heard evidence related to the amount of damages. The parties and the trial court may now address this issue in the context either of a new action or an Ind. Trial Rule 60(B) motion for relief from judgment. See E & S Mems, 795 N.E.2d at 511 n.4 (noting that the trial court conducted a hearing on the merits, issued findings and conclusions, and entered a judgment, and that “[t]he parties and the court may now address this issue in the context either of a new action or a Trial Rule 60(B) motion for relief from judgment.”).