MEMORANDUM DECISION

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IN THE
COURT OF APPEALS OF INDIANA

Tammy Kossifos,
Appellant-Plaintiff,

v.

Pete Mamounas Incorporated d/b/a Sunset of Portage, PEK, Inc., George Mamounas, Kathy Mamounas, and Ray Kupiec
Appellee-Defendants.

October 26, 2021

Court of Appeals Case No. 21A-CT-722

Appeal from the Porter Superior Court

The Honorable Jeffrey W. Clymer, Judge

Trial Court Cause No. 64D02-1980-CT-7602

Tavitas, Judge.

Case Summary

[1] After a barroom incident during which Tammy Kossifos became injured, she filed a personal injury action against Pete Mamounas Incorporated d/b/a

Sunset of Portage, PEK, Inc., George Mamounas, Kathy Mamounas, and Ray Kupiec ("the Appellees"). PEK Inc. ("PEK"), owner of the bar, subsequently filed a motion for summary judgment with respect to two counts: Count I, alleges dram shop liability on the part of PEK; and Count II alleges a breach of duty to protect Kossifos from harm. Kossifos failed to file a response to the motion for summary judgment until fifty-two days later. PEK responded in turn by moving to strike Kossifos's designated evidence on the ground that it was not filed within thirty days of the motion for summary judgment. Kossifos's counsel indicated that the failure to file a timely response was excusable neglect under Trial Rule 60(B). The trial court disagreed, struck Kossifos's designated evidence, and, relying only on the evidence designated by PEK, granted the motion for summary judgment. Kossifos appeals the trial court's grant of the motion to strike. Because the trial court faithfully applied a bright-line rule when it struck Kossifos's designated evidence, we affirm.

Issue[1]

[2] The lone issue in the case is whether the trial court erred in striking Kossifos's untimely response to PEK's motion for summary judgment.[2]

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[1] Kossifos's brief is deficient pursuant to Indiana Appellate Rule 46(A)(4), which requires a "Statement of Issues." But the section similarly labelled in Kossifos's brief does not describe any issues. It merely sets forth a shorter version of the procedural history found in the statement of the case.

[2] In Kossifos's reply brief, she appears to suggest that she is appealing the grant of the motion for summary judgment in addition to the grant of the motion to strike her response to the motion for summary judgment. While the two issues are plainly distinct as a legal matter, Kossifos seems to conflate them. We agree with PEK's reading of Kossifos's opening brief and find that the only issue properly before us is whether the trial

Facts

[3] On August 8, 2019, Kossifos filed a complaint by counsel, Michael Deppe ("Attorney Deppe"), in the Porter Superior Court regarding an incident at Sunset of Portage ("the bar") on April 16, 2018. Kossifos claims that the bar negligently served another patron, Ray Kupiec, and that Kupiec subsequently physically attacked Kossifos and broke her arm. The trial court then entered an order clarifying that PEK was the successor company to Pete Mamounas, Incorporated, and, therefore, should be substituted as the defendant party. The trial court also ruled, in an order dated September 28, 2019, that George Mamounas and Kathy Mamounas should be dismissed as parties to the suit.

[4] PEK filed its answer on October 18, 2019. On January 11, 2021, PEK filed a motion for summary judgment as to Count I of the complaint, which alleged dram shop liability attributable to PEK, and Count II, which alleged that PEK breached a duty to protect Kossifos from Kupiec. PEK designated: (1) the complaint; (2) the answer; (3) a transcript of Kossifos's deposition; (4) an affidavit from Kupiec; and (5) an affidavit of an employee who was working at the bar on April 16, 2018.

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court erred in granting PEK's motion to strike Kossifos's response to the motion for summary judgment. To the extent that Kossifos argues otherwise, she has waived the issue for failure to make a cogent argument or cite any authority legitimately supporting such an argument. *See* Ind. Appellate Rule 46(A)(8); *Loomis v. Ameritech Corp.*, 764 N.E.2d 658, 668 (Ind. Ct. App. 2002) (holding that the failure to present a cogent argument waives the issue for appellate review), *trans. denied*.

[5] Kossifos did not file a response to the motion for summary judgment until March 4, 2021, wherein she designated only her own affidavit. The next day, on March 5, 2021, PEK filed a motion to strike Kossifos's response to the motion for summary judgment and argued that the response was filed fifty-two days after the initial deadline—outside the thirty-day limit prescribed by Trial Rule 56. The trial court held a hearing on both the motion to strike Kossifos's response to the motion for summary judgment and the motion for summary judgment itself on April 6, 2021.

[6] With respect to the motion to strike Kossifos's untimely response to the motion for summary judgment, Attorney Deppe argued at the hearing as follows:

> Your Honor, during that time . . . first of all, I was the first to get COVID and I nearly died, and I think that opposing counsel is aware of that. I've told him in regards to 19 days, I had a stroke, a heart attack, pneumonia, and COVID. Apparently, I [ ] gave COVID to people in my office because after that my office staff . . . back when this was filed, Crystal Prazino [ ] who works for me and does this stuff moderating the email, she was out with COVID. Anna Cornahole [ ] was on quarantine because of COVID.
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> Your Honor, I would call the Court's attention to Trial Rule 60(B). And in Trial Rule 60(B), it talks specifically about excusable neglect. I don't know anything that can be more excused than my staff being gone because of this pandemic. We're in unusual times. And I would merely call the court's record [sic] that since practicing since 2000, this is the first time

> this has ever happened to me, and, of course, it's the first time I've had COVID or everybody in my office is gone too.

Tr. Vol. II pp. 3-4.[3]

[7] The trial court examined the Indiana Supreme Court orders which stayed filing deadlines during the height of the pandemic. In its April 7, 2021 order, the trial court found that the Indiana Supreme Court's stay of filing deadlines expired in August 2020. PEK filed its motion for summary judgment on January 11, 2021. Thus, the trial court reasoned, Kossifos was required to file its response to the summary judgment motion or request an extension of time within thirty days. Kossifos's first response, however, was not filed until March 4, 2021, fifty-two days after the initial filing. Kossifos did not seek any extension of time prior to filing her first response. The trial court found that, based upon *Desai v. Croy*, 805 N.E.2d 844 (Ind. Ct. App. 2004), *trans. denied*, the thirty-day deadline provided in Trial Rule 56 is a bright-line rule and granted PEK's motion to strike Kossifos's response to the motion for summary judgment. The trial court further granted PEK's motion for summary judgment on Count I and Count II of Kossifos's complaint.[4] Kossifos now appeals.

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[3] Critically, Attorney Deppe did not disclose any kind of a timeframe during which he and his office staff were suffering these ailments; additionally Rule 60(B) pertains to relief from judgments already entered and the record does not reflect that Kossifos ever filed a Rule 60(B) motion, even after the trial court entered the order granting summary judgment.

[4] The trial court actually issued two orders in quick succession. On April 6, 2021, the trial court granted the motion for summary judgment with respect to Count II and took Count I, as well as the motion to strike Kossifos's response to the motion for summary judgment, under advisement. The next day, the trial court

Analysis

[8] Ordinarily, we review a trial court's decision on a motion to strike for an abuse of discretion. *See, e.g., Allstate Ins. Co. v. Hatfield,* 28 N.E.3d 247, 248 (Ind. Ct. App. 2015) (citing *Halterman v. Adams Cty. Bd. of Com'rs,* 991 N.E.2d 987, 990 (Ind. Ct. App. 2013)). With respect to a non-movant's untimely response to a motion for summary judgment, however, our case law has evolved to divest a trial court of discretion entirely.

[9] Trial Rule 56 governs summary judgments. Trial Rule 56(C) provides that "[a]n adverse party shall have thirty (30) days after service of the motion to serve a response and any opposing affidavits." In *Desai v. Croy*, we found as follows:

> In sum . . . we hold that where a nonmoving party fails to respond within thirty days by either (1) filing affidavits showing issues of material fact, (2) filing his own affidavit under Rule 56(F) indicating why the facts necessary to justify his opposition are unavailable, or (3) requesting an extension of time in which to file his response under 56(I), the trial court lacks discretion to permit that party to thereafter file a response. In other words, a trial court may exercise discretion and alter time limits under 56(I) only if the nonmoving party has responded or sought an extension within thirty days from the date the moving party filed for summary judgment. Here, because it is undisputed that Croy did not file any motions or affidavits within thirty days, the trial

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granted the motion for summary judgment with respect to Count I and granted the motion to strike Kossifos's response to the motion for summary judgment.

> court erred when it allowed Croy to file affidavits opposing Dr. Desai's motion.

805 N.E.2d 844, 850 (Ind. Ct. App. 2004). One year later, our Supreme Court adopted this thinking. *Borsuk v. Town of St. John*, 820 N.E.2d 118, 124 n.5 (Ind. 2005). Our Supreme Court subsequently held that, with respect to this corner of our Trial Rule 56 jurisprudence, "[a]ny residual uncertainty was resolved in 2005 when we cited *Desai* with approval . . . ." *HomEq Servicing Corp. v. Baker*, 883 N.E.2d 95, 98 (Ind. 2008).

[10] Finally, our Supreme Court explained as follows:

> In essence, *HomEq* reaffirmed the bright-line rule first declared in *Desai* which precludes the late filing of responses in opposition to a motion for summary judgment. *See, e.g., Starks Mech. Inc. v. New Albany-Floyd Cnty. Consol. Sch. Corp.*, 854 N.E.2d 936, 940 (Ind. Ct. App. 2006) (noting the "bright-line rule" and declaring, "even though [the non-movant] was merely one day late [in serving his response to a summary judgment motion], *Desai* stands for the proposition that the trial court had no discretion to allow [the non-movant] to file its response and designated evidence").
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> Now firmly entrenched as an article of faith in Indiana law, this bright-line rule provides clarity and certainty to an area of the law that for too long lacked both.

Mitchell v. 10th & The Bypass, LLC, 3 N.E.3d 967, 972-73 (Ind. 2014). This reading of binding Indiana precedent leaves us with no doubt that the trial court was without authority to allow Kossifos to file a response to PEK's motion for

summary judgment fifty-two days after the motion for summary judgment was filed. We conclude that the trial court correctly granted PEK's motion to strike Kossifos's response to the motion for summary judgment.

[11] Kossifos argues that this binding bright-line rule acts as an unfair barrier, depriving her of access to the courts, which Kossifos considers a denial of constitutional proportions. To the contrary, Kossifos had access to the courts. She filed litigation that lasted several years, two counts of which were only dismissed because she failed to comply with the trial rules. This is not a matter of access denied, but of access squandered.

Conclusion

[12] The trial court did not err by complying with Trial Rule 56(C) and the bright-line rule that a response to a motion for summary judgment must be filed within thirty days of the date the motion was filed. We affirm.

[13] Affirmed.

Mathias, J., and Weissmann, J., concur.