MEMORANDUM DECISION

ATTORNEY FOR APPELLANT

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ATTORNEYS FOR APPELLEES

Mark J. Schocke
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Highland, Indiana

IN THE COURT OF APPEALS OF INDIANA

Keep It Moving, LLC,

Appellant-Defendant,

v.

Connie Dawson, individually and as parent and natural Guardian of Landen Dawson, Minor Child,

Appellees-Plaintiffs.

September 27, 2021

Court of Appeals Case No. 21A-CT-913

Appeal from the Lake Superior Court

The Honorable Bruce D. Parent, Judge

Trial Court Cause No. 45D11-1807-CT-309

Altice, Judge.

Case Summary

[1] Keep It Moving, LLC (Keep It Moving) appeals the denial of its motion to set aside a default judgment with respect to a negligence action brought against it by Connie Dawson (Dawson), individually and as parent to her minor child, Landen Dawson.[1] Keep It Moving claims that it was entitled to relief because of excusable neglect, miscommunication, or exceptional circumstances under Ind. Trial Rule 60(B), and it established a meritorious defense. In the alternative, Keep It Moving argues that the trial court erred in not applying a set-off to the damage award for the amount that Dawson received in settlement proceeds from other defendants in the action.

[2] We affirm.

Facts and Procedural History

[3] Sometime during the afternoon of June 18, 2018, Dawson and Landen were sitting on the front porch of their Lowell, Indiana residence. Kourtney Maatman, who lived next door, was chatting in her yard with her friend, Nicole Graves. At some point, Graves got into her car and began to back out of Maatman's driveway. Graves's vehicle struck Maatman's unleashed pit bull. Dawson, a veterinary technician, witnessed the incident, approached the scene, and began rendering first aid to the dog. The dog bit Dawson's left middle

[1] For ease of reference, we identify the plaintiffs as "Dawson" throughout the opinion.

finger, severing it. A portion of her finger was amputated during surgery, and she subsequently underwent physical therapy for her injury.

[4] On June 27, 2018, Dawson filed a complaint against Maatman and her relatives,[2] alleging that they were responsible for her injuries because they allowed the pitbull—with known vicious propensities—to roam without adequate supervision. Dawson sought damages for her injuries, including medical expenses, and negligent infliction of emotional distress to Landen. Dawson subsequently amended her complaint and added Graves as a party defendant, alleging that Graves was operating her vehicle as an employee of Keep It Moving at the time of the incident.

[5] Dawson settled with the Maatmans in July 2019 for approximately $170,000, and they were dismissed from the suit. The case remained pending against Graves, and Dawson subsequently filed a second amended complaint on December 20, 2019, adding Keep It Moving as a party defendant. Dawson alleged that Keep It Moving was liable for Graves's negligent acts under the doctrine of respondeat superior.

[6] On January 2, 2020, Keep It Moving was served with the second amended complaint. Thereafter, on January 21, 2020, Keep It Moving's registered agent and president, Kimberly Price, sent a letter to the trial court that the clerk

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[2] The Dawsons also named Kraig and Karen Maatman as party defendants, alleging that they were the pit bull's owners.

marked as filed, denying Keep It Moving's liability in the June 18, 2018 incident. More particularly, the letter stated:

Cause No: 45011 1807 CT-309

> IN REGARD TO
> COMPLIANT (sic):
>
> IN NO WAY SHAPE OR FORM WAS KEEP IT MOVING INVOLCED (sic) IN ANYTHING THAT HAS TO DO WITH THIS MATTER. AS IT STATES IN THE PAPERWORK RECEIVED NICOLE GRAVES WAS AN INVITEE AT THE RESIDENCE LOCATED AT 9815 W 219 AVE IN LOWELL IN. **KEEP IT MOVING IS NOT RESPONSABE (sic) FOR ANY INCIDENT THAT OCCURRED**[.] THE NEGLAGENCE (sic) WAS ON THE PLAINTIFFS. KEEP IT MOVING DID NOT PUT HER HAND NEAR THE DOG[']S MOUTH. FROM WHAT I UNDERSTAND SHE WAS NOT A VETATNARIAN (sic) NOR DID ANYONE ASK HER TO ASSIST. HER ACTIONS CAUSED HER INJURY. THIS WAS SELF INFLICTED. TO TRY AND SUE KEEP IT MOVING BECAUSE ALL HER OTHER OPTIONS HAVE DENIED HER CLAIM IS OUT OF LINE . THE DOG WAS NOT OWNED BY HER (sic) SHE IS NOT LICENSED TO BE OF ANY MEDICAL ASSISTANCE. SHE HAD TO RUN TO THE SITUATION AND PUT HERSELF IN THAT POSITION. THE DOG WAS CHASING THE CAR IT WAS NOT JUST HIT. **THERE WAS NO NEGLIGENT ACTION ON NICOLE GRAVES** (sic) **OR KEEP IT MOVINGS** (sic) **PART.** HER INJURIES WHERE (sic) SUSTAINED FROM NEGLAGENCE (sic) ON HER PART. Keep it moving (sic) scope of work does not intel (sic) going to a friend's private residence. . . . **Keep it Moving denies any negligence or wrong doing in this matter.**
>
> Keep it Moving

946 Old Farm Rd

Dyer IN 46311

1/14/20

s/Kimberly Price

Appellant's Appendix Vol. II at 81. (emphasis added).

[7] On January 22, 2020, Dawson's attorney sent a letter to "Kimberly Price, Keep It Moving," stating that "you have been named as a defendant in the above matter," and pointed out that Price "had been served with a copy of this lawsuit on January 2, 2020." *Id.* at 83. The letter further stated that "I would suggest that you contact your insurance company and provide them with the necessary information relating to this claim." *Id.* Dawson's attorney indicated that he would file a motion for default judgment if Price did not retain an attorney "and an appearance is not entered within the next ten days." *Id.*

[8] Although Price received the letter, she did not respond. And as no appearance in the cause had been entered, Dawson filed a motion for default judgment on February 5, 2020. The trial court summarily denied the motion and accepted Price's letter as an answer to the complaint. The trial court denied a second motion for default judgment that Dawson filed on June 24, 2020, for the same reason.

[9] On July 23, 2020, Dawson filed a motion to strike Price's letter, asserting that the trial court improperly considered it as an answer to the complaint because Indiana law precludes a corporation from representing itself. Dawson contended that because Keep It Moving was required to retain legal counsel and it did not, all allegations in Dawson's complaint should be deemed admitted. The trial court scheduled a hearing for September 22, 2004 on the motion to strike and "defaulting defendant Keep It Moving." *Id.* at 117. Price/Keep It Moving failed to appear for the hearing, and the trial court granted Dawson's motion for a default judgment two days later.

[10] On January 26, 2021, Keep It Moving entered an appearance through its legal counsel and moved to set aside the default judgment. Keep It Moving alleged, among other things, that

> Price . . . [a]s a layman, . . . did not realize that Indiana law required her business, Keep it Moving, to be represented by counsel. As such, Price's mistake falls within subsection one (1) of T.R. 60(B). Further, Price was unaware of the September 22, 2020 hearing and so she did not appear for that hearing. This too, was an honest mistake which qualifies for relief under either subsection one (1) or eight (8). Finally, Keep It Moving has a meritorious defense. Plaintiff's claim of liability against Keep It Moving relies upon an assertion that Graves was negligent and was acting within the course and scope of employment with Keep It Moving. Keep it Moving, through its president and owner, Kim Price, denies that Graves was an employee in the course and scope of employment with Keep It Moving at the time of the incident that is the subject of the second amended complaint. Where there is no such employment, there is no respondeat superior. Keep It Moving also denies that it, or

> Graves, was negligent. As such, Keep It Moving meets the meritorious defense requirement of the rule.

Id. at 129.

The trial court denied Keep It Moving's motion to set aside the default judgment on February 11, 2021.[3] The trial court's order provided in part that

> 2. Trial Rule 60(b) provides, in pertinent part, that the Court may relieve a party from an entry of a final order for mistake, surprise, or excusable neglect. *Munster Community Hospital v. Bernacke*, 874 N.E.2d 611, 613 (Ind. Ct. App. 2007).
>
> 3. This Court held six hearings, none of which were attended by the MOVING PARTY. Counsel for the PLAINTIFF alleged that he 'received telephone calls' from the owner and president of the MOVING PARTY wherein he instructed her to 'contact her insurance carrier or her attorney to respond to the Complaint and further alleged that his firm sent correspondence to the MOVING PARTY on five occasions, with that same general message.
>
> . . .
>
> 6. The MOVING DEFENDANT invoked the magic words by alleging that this case possessed a meritorious claim. But, as the PLAINTIFF correctly argued, the MOVING DEFENDANT made only allegations and failed to back up those claims with the necessary proofs. The MOVING DEFENDANT failed to carry

[3] Neither party requested a hearing on the motion.

> its burden of demonstrating a prima facie showing of a meritorious claim.
>
> 7. This Court found that it was not excusable neglect, but the willful conduct of the owner and president of the MOVING DEFENDANT that kept her from appearing or responding to this litigation.

[11] Thereafter, the trial court held a damages hearing on March 3, 2021, at which time both Dawson and Keep It Moving appeared by counsel. The trial court awarded Dawson $80,000 against Keep It Moving and Graves and entered the following order:

> 9. DAWSON sued the owners of the dog and obtained a recovery for these same injuries of 'around $170,000.00.'
>
> 10. The DEFENDANTS in this case did not claim a nonparty defense against the owners of the dog.
>
> 11. The ability of courts to implement the common law policy of credit for settlement agreements during an age of litigation under the Comparative Fault Act is best served by a rule that obliges defendants to name the settling nonparty if they are to seek a credit for the settlement. *See Mendenhall v. Skinner and Broadbent Co. Inc.*, 728 N.E.2d. 140, 144 (Ind. 2000).
>
> 12. When the nonparty is not added by the Defendant, the jury cannot provide an allocation of fault to that party and any effort by the court to calculate a credit is more speculative. *Id.*
>
> 13. While there was no jury in this case, the general principles of our Supreme Court's finding in *Mendenhall* applied to this case.

> 14. Based upon DAWSON'S injuries and the permanent loss of the full use of her middle finger, her pain, suffering, mental anguish, and the inability to earn income at the level of her 'dream job' because of her injury, the Court awarded (sic) damages in the amount of $80,000.00 against the DEFENDANTS herein.
>
> 15. The judgment herein shall be joint and several against these DEFENDANTS.
>
> 16. Based upon our Supreme Court's finding [in] *Mendenhall*, the Court will not apply a credit for the prior settlement against this judgment as no nonparty was named by either of the DEFENDANTS.

Id. at 162. Keep It Moving now appeals.

Discussion and Decision

I. Standard of Review

[12] The decision to grant or deny a motion for default judgment is within the trial court's discretion. *Whetstine v. Menard, Inc.,* 161 N.E.3d 1274, 1279 (Ind. Ct. App. 2020), *trans. denied.* We reverse only if the trial court's decision is clearly against the logic and effect of the facts and circumstances. *Id.* The trial court's discretion in granting or denying a motion for default judgment is considerable. *Green v. Karol*, 168 Ind. App. 467, 473, 344 N.E.2d 106, 110 (Ind. Ct. App. 1976). "The trial court should use its discretion to do what is 'just' in light of the unique facts of each case." *Allstate Ins. Co. v. Watson,* 747 N.E.2d 545, 547 (Ind. 2001) (quoting *In re Marriage of Ransom*, 531 N.E.2d 1171, 1172 (Ind.

1988)). Upon a motion for relief from a default judgment, the burden is on the movant to show sufficient grounds for relief under T.R. 60(B). *Huntington Nat'l Bank v. Car-X-Assocs. Corp.,* 39 N.E.3d 652, 655 (Ind. 2015).

[13] We note that a default judgment is "an extreme remedy and is available only where that party fails to defend or prosecute a suit. It is not a trap to be set by counsel to catch unsuspecting litigants." *Watson,* 747 N.E.2d at 547. As this court has observed:

> On the one hand, a default judgment plays an important role in the maintenance of an orderly, efficient judicial system as a weapon for enforcing compliance with the rules of procedure and for facilitating the speedy determination of litigation. On the other hand, there is a marked judicial preference for deciding disputes on their merits and for giving parties their day in court, especially in cases involving material issues of fact, substantial amounts of money, or weighty policy determinations. The trial court, in its discretion, must balance these factors in light of the circumstances of each case.

Whetstine, 161 N.E.3d at 1279 (quoting *Green,* 168 Ind. App. at 473, 344 N.E.2d at 110).

[14] T.R. 60(B)(1) provides in pertinent part that "[o]n 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: (1) mistake, surprise, or excusable neglect." A movant filing a motion pursuant to 60(B)(1) must also allege a meritorious claim or defense. *Id.*

[15] A motion under T.R. 60(B)(1) does not attack the substantive, legal merits of a judgment, but rather addresses the procedural, equitable grounds justifying the relief from the finality of a judgment. *Kretschmer v. Bank of Am., N.A.,* 15 N.E.3d 595, 600 (Ind. Ct. App. 2014), *trans. denied*. There is no general rule as to what constitutes excusable neglect under T.R. 60(B)(1). *Id.* Each case must be determined on its particular facts. *Id.* The following facts have been held to constitute excusable neglect, mistake, or surprise:

> (a) absence of a party's attorney through no fault of party; (b) an agreement made with opposite party, or his attorney; (c) conduct of other persons causing party to be misled or deceived; (d) unavoidable delay in traveling; (e) faulty process, whereby party fails to receive actual notice; (f) fraud, whereby party is prevented from appearing and making a defense; (g) ignorance of the defendant . . . .

Kmart Corp. v. Englebright, 719 N.E.2d 1249, 1254 (Ind. Ct. App. 1999), *trans. denied.*

II. Keep It Moving's Claims

A. Default Judgment

[16] Keep It Moving argues that the trial court abused its discretion when it denied its motion to set aside the default judgment because its failure to file an answer to Dawson's complaint constituted "mistake" and "excusable neglect" under T.R. 60(B)(1), there were misrepresentations or miscommunications by

Dawson's attorney pursuant to T.R. 60(B)(3), and exceptional circumstances were present that justified relief in accordance with T.R. 60(B)(8).

[17] In support of the motion to set aside the default judgment, Price submitted an affidavit stating in relevant part that

> 3. I am the owner and President of Keep it Moving. LLC. I am not now, nor ever have been an attorney-at-law and I have no legal training.
>
> 5. At the time I responded on behalf of Keep it Moving LLC to Plaintiffs' second amended complaint by filing a letter with the court on or about January 21, 2020, I was unaware that Indiana law required that corporations, such as Keep it Moving, LLC, be represented by counsel in legal actions such as the above-captioned matter.
>
> 6. Neither I nor any other representative of Keep It Moving LLC to my knowledge received notice of the September 22, 2020 hearing regarding Plaintiffs' motion to strike and motion for default judgment which is why neither I nor any other representative of Keep it Moving LLC, attended that hearing.

Appellant's Appendix Vol. II at 132-33.

[18] Price submitted a supplemental affidavit, averring in part that

> 5. At the time I responded on behalf of Keep it Moving, LLC to Plaintiffs' second amended complaint by filing a letter with the court on or about January 21, 2020, I was unaware that Indiana law required that corporations such as Keep it Moving, LLC, be represented by counsel in legal actions such as the above-captioned matter.

> 6. I was unaware of the September 26, 2019 hearing in the above-captioned matter because Keep it Moving, LLC was not yet a party this action and I had not otherwise been informed of the hearing.
>
> 7. I was unaware of the December 20, 2019 hearing in the above-captioned matter because Keep it Moving, LLC had not yet been served as a party defendant [to] this action and I had not otherwise been informed of the hearing.
>
> 8. To my knowledge I have never spoken to Plaintiffs' counsel.
>
> 9. To my knowledge I never received or saw correspondence from Plaintiffs' counsel regarding this litigation.
>
> 10. I have never had access to the Odyssey court filing or notification system and I have never been notified of anything regarding the above-captioned matter through that system.
>
> 11. I had no knowledge of any court Order entered prior to September 22, 2020 directed to, or requiring action by, Keep it Moving, LLC.
>
> 12. To my knowledge, Keep it Moving, LLC does not have any liability insurance coverage relevant to Plaintiffs' claims in this matter.

Id. at 165-66.[4]

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[4] Dawson acknowledges that she mistakenly alleged in her "Response Opposing Reversal of the Default Judgment" that Keep It Moving missed hearing dates on September 26, 2019 and on December 20, 2019.

[19] Notwithstanding Price's averments, it cannot be disputed that Price was aware of the action against Keep It Moving, as evidenced by the letter that she submitted to the trial court on January 14, 2020. Price denied any liability on Keep It Moving's part. Price made the decision to attempt to represent Keep It Moving by herself, which is not permissible for a corporation to do. *State ex rel. W. Parks, Inc. v. Bartholomew Cty. Court*, 270 Ind. 41, 44, 383 N.E.2d 290, 293 (1978).

[20] That said, a *pro se* litigant is held to the same standards as a trained attorney and is afforded no inherent leniency simply by virtue of being self-represented. *Zavodnik v. Harper*, 17 N.E.3d 259, 266 (Ind. 2014). The evidence established that Price/Keep It Moving made willful choices not to turn the matter over to legal counsel until months after the default judgment had been entered. Price does not claim in her affidavits that she made any effort to retain counsel or meaningfully participate in the litigation from the date of service—January 2, 2020—through the date of the default judgment on September 24, 2020.

[21] No one on Keep It Moving's behalf attended the scheduled hearings on March 23, 2020, May 28, 2020, July 23, 2020, and September 22, 2020. Dawson's counsel sent several letters addressed to "Kimberly Price, Keep It Moving," urging her to retain counsel and notifying her of the various hearing dates.

Dawson conceded in subsequent briefing and in response to Keep It Moving's motion to correct errors that those hearings were missed by co-defendant Graves. *Appellee's Brief* at 12.

Price ignored those repeated requests.[5] Thus, it is apparent that Price was well aware of the litigation, and she took no steps to address the matter aside from the initial letter sent to the trial court. It was only after entry of a judgment that matters became serious enough for Price/Keep It Moving to participate in the litigation. As our Supreme Court has observed, "[t]he judicial system simply cannot allow its process to be stymied by simple inattention." *Smith v. Johnson,* 711 N.E.2d 1259, 1262 (Ind. 1999).

[22] In light of this evidence—and unlike those cases where we have found excusable neglect, mistake, or surprise—we cannot say that the trial court abused its discretion in determining that Price's choice not to retain counsel and failing to participate in this litigation in a timely fashion did not justify relief on such grounds. *See, e.g., Car-X Assoc. Corp.,* 39 N.E.3d at 658 (observing that failure to respond to a complaint and summons for "no reason other than an employee's disregard of the mail" did not constitute a successful allegation of a breakdown in communication sufficient to establish excusable neglect); *Smith,* 711 N.E.2d at 1262 (holding that a physician's failure to open a summons that had been mailed was neglect, but not excusable neglect that would warrant relief from a default judgment in a medical malpractice action, where the

[5] The record shows that Dawson's counsel directed all correspondence to Price/Keep It Moving at the address that Price included on her letter that she sent to the trial court on January 14, 2020, denying Keep It Moving's liability. The certified mail receipts reflect that the correspondence was delivered and signed for at that address.

physician knew that the mail was unattended and, therefore, accepted the risk of adverse consequences).

[23] We also reject Keep It Moving's contention that the default judgment must be set aside because of alleged misleading and/or confusing statements by Dawson's counsel in the correspondence that was sent to Price/Keep It Moving. Price asserts that the correspondence contained an "incorrect statement" because she was not specifically advised that a default judgment would be sought "against Keep It Moving." *Appellant's Brief* at 22-23.

[24] Notwithstanding this claim, Price knew of the action as early as January 21, 2020, as evidenced by her filing of the letter with the trial court on Keep It Moving's behalf. The letter contained the trial court's cause number, referred to the action, and denied all liability by Keep It Moving. Price signed the letter on Keep It Moving's behalf. And even if Price might have been in some way confused initially, she had eight months to retain legal counsel or refer the matter to Keep It Moving's insurer prior to the entry of the default judgment. Thus, Price's contention that the default judgment must be set aside because of alleged confusion or miscommunication fails.

[25] Finally, Price asserts that the "catch-all" provision set forth in T.R. 60(B)(8) entitled her to relief because the facts and circumstances here "may not fit squarely within either T.R. 60(B)(1) or (3)." *Id.* at 28. This rule states that a party may be relieved from a default judgment for "any reason justifying relief

from the operation of the judgment, other than those reasons set forth in sub-paragraphs [1-4]."

[26] This provision applies where there are "exceptional circumstances . . . to justify relief from the dismissal. . . ." *Ind. Ins. Co. v. Ins. Co. of N. Am.,* 734 N.E.2d 276, 281 (Ind. Ct. App. 2000), *trans. denied*. The party seeking relief under T.R. 60(B)(8) must show that the failure to act was not merely because of an omission involving mistake, surprise, or excusable neglect. *Blichert v. Brososky,* 436 N.E.2d 1165, 1167 (Ind. Ct. App. 1982).

[27] In this case, Keep It Moving has not advanced any argument in support of its claim that the circumstances here are "exceptional." *See appellant's brief* at 28. To the contrary, Price—as president of Keep It Moving—was fully aware of the action against the company, and she simply took no action until several months after the default judgment was entered. As a result, the trial court properly rejected Keep It Moving's claim under T.R. 60(B)(8).

[28] For the reasons discussed above, we conclude that the trial court properly denied Keep It Moving's motion to set aside the default judgment.[6]

B. Reduction of Damages

[6] Because we have determined that Keep It Moving does not prevail under T.R. 60(B)(1), (3), or (8), we need not address the argument that it had a meritorious defense to Dawson's claims. *See Sanders Kennels, Inc. v. Lane,* 153 N.E.3d 262, 268 (Ind. Ct. App. 2020).

[29] In the alternative, Keep It Moving argues that notwithstanding the denial of its motion to set aside the default judgment, the damage award must be reduced. More specifically, Keep It Moving asserts that the trial court abused its discretion in deciding "not to apply a credit from the settlement between the Maatmans and Dawson so as to effectively reduce the damages judgment against Keep It Moving to zero." *Appellant's Brief* at 33-34.

[30] In resolving this issue, we note that our Supreme Court has recognized that in accordance with the Comparative Fault Act, Ind. Code § 34-51-2-1 *et. seq.,* parties may attribute fault to others without requiring those other at-fault parties to be named as parties. *Mendenhall,* 728 N.E.2d at 142. The "ability of courts to implement the common law policy of credit during an age of litigation under the Comparative Fault Act is best served by a rule that obliges defendants to name the settling nonparty if they are to seek credit for the settlements." *Id.* at 144.

[31] More specifically, a named defendant "may assert a 'nonparty' defense, seeking to attribute fault to a nonparty rather than to the defendant." *Palmer v. Comprehensive Neurologic Servs,* 864 N.E.2d 1093, 1097 (Ind. Ct. App. 2007), *trans. denied*. A nonparty is "a person who caused or contributed to cause the alleged injury, death, or damage to property but who has not been joined in the action as a defendant." *Mendenhall,* 728 N.E.2d at 142 (quoting I.C. § 34-51-2-14). A defendant must affirmatively plead the nonparty defense, and the defendant carries the burden of proof on the defense. *Palmer,* 864 N.E.2d at 1099; I.C. § 34-51-2-15. *Mendenhall* noted that with the addition of a nonparty,

"it is . . . possible to ascertain whether the plaintiff was overcompensated by the settling defendant." 728 N.E.2d at 144. If the defendant has not added the nonparty, an allocation of fault cannot be assigned to that party "and any effort by the court to calculate a credit is more speculative." *Id.* Hence, a litigating defendant who fails to add a settling defendant as a nonparty "may not seek credit for money paid by the settling co-defendant." *Palmer,* 864 N.E.2d at 1099 (citing *Mendenhall,* 728 N.E.2d at 145).

[32] As discussed above, Keep It Moving willfully decided not to actively participate in the litigation until well after the default judgment was entered. Had Keep It Moving participated prior to that time, it could have named the Maatmans as nonparty tortfeasors. As a consequence of Keep It Moving's failure to participate in the litigation in a timely fashion, we conclude that the trial court properly refused to reduce the damage award pursuant to the rule announced in *Mendenhall.*

[33] Judgment affirmed.

Bradford, C.J. and Robb, J., concur