## MEMORANDUM DECISION




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# IN THE COURT OF APPEALS OF INDIANA

Gilmore Construction, Inc.,
*Appellant-Defendant,*

v.

The Board of Commissioners of the County of Clark, Indiana,
*Appellee-Plaintiff,*

and

Wesbanco Bank, Inc. d/b/a Community Bank of Southern Indiana,
*Appellee-Plaintiff.*

November 10, 2021

Court of Appeals Case No. 21A-PL-160

Appeal from the Clark Circuit Court

The Honorable Frank Newkirk, Jr., Special Judge

Trial Court Cause No. 10C02-1611-PL-134

**Weissmann, Judge.**

[1] Exercising its power of eminent domain, the Board of Commissioners of the County of Clark, Indiana (County) acquired land owned by Gilmore Construction, Inc. (Gilmore) for the stated purpose of constructing a school bus turnaround. Gilmore believed the land would be used for a different purpose: as part of a proposed heavy haul road project for huge trucks (HHR Project). Gilmore claimed County should pay him more for the land as a result of the HHR Project.

[2] Prior to the damages trial, the trial court granted County's motion for partial summary judgment seeking to exclude all evidence of the HHR Project from the damages trial after County represented under oath that the land would be used for a school bus turnaround. In its order, the court ruled that evidence of the HHR Project was speculative and irrelevant to the issue of damages and, therefore, inadmissible at trial.

[3] While trial was pending, Gilmore learned that the land County had taken indeed was part of the HHR Project. Gilmore therefore sought to set aside the trial court's partial summary judgment. Despite its earlier finding that the HHR Project was too speculative to be relevant, the court now determined the HHR Project was "reasonably foreseeable," and the court denied Gilmore's request without an evidentiary hearing. We reverse and remand, concluding Gilmore was entitled to an evidentiary hearing on its motion to set aside the partial summary judgment.

# Facts

[4] In April 2016, the Indiana Department of Transportation notified County that the HHR Project was under development. The aim of the federally funded endeavor was to provide a specially built route for heavy haul trucks between the Ports of Indiana-Jeffersonville and other sites, via a State Road 265/Old Salem Road interchange. That interchange separates and abuts Gilmore's land.

[5] Heavy haul trucks are transportation goliaths. They measure 60 feet or more in length and have a gross vehicle weight of 134,000 pounds (40% heavier than Indiana's gross vehicle weight limits) and, therefore, require special roads. The HHR Project involved construction of a special three-lane road designed for such heavy trucks, with two 12-foot travel lanes and one 11- to 12-foot auxiliary lane.

[6] The HHR Project was still in the planning stage when, in late 2016, County used its power of eminent domain to acquire part of Gilmore's land along Old Salem Road. This taking (County Taking) purportedly was for a school bus turnaround, but Gilmore believed the land actually would be used for the HHR Project. After County successfully acquired the land, the trial court appointed appraisers to calculate Gilmore's damages.

[7] The court-appointed appraisers valued Gilmore's damages from the County Taking at $90,750. Neither County nor Gilmore agreed with that figure. Both parties filed exceptions to that report and sought a jury trial to determine damages. Gilmore's privately hired appraiser valued Gilmore's damages at

more than $550,000 based on an assumption that the heavy haul road would limit access to Gilmore's land and adversely affect its planned development there. County contended the HHR Project was irrelevant.

[8] In February 2017, County submitted affidavits of three county commissioners affirming that "[t]he proposed taking in this case has no other purpose other than the widening of Old Salem Road and the creation of a school bus turnaround." App. Vol. II, pp. 232-41. However, a year later, the State announced that its preferred alternative route of the HHR Project would intersect with Old Salem Road at the spot where County had taken Gilmore's land. County later filed a partial motion for summary judgment seeking, among other things, that all evidence of both the HHR Project and an earlier taking of Gilmore's land by the State be excluded at the County Taking damages trial. *Id.* at 186-89. County alleged such evidence "is unrelated to the issue of determining just compensation in this case." *Id.* at 187. In response, Gilmore filed a cross-motion for partial summary judgment seeking "judicial findings" that County's taking of Gilmore's land was part of the HHR Project and not for the stated purpose of building a school bus turnaround. *Id.* at 190-93.

[9] In January 2019, the trial court granted County's motion, ruling in relevant part:

> The only issue at trial in this eminent domain case is the total amount of just compensation due [Gilmore] for the real estate interests that [County] is acquiring in this case, and thus: no other case or any other project, including the acquisition involved in . . . the future Heavy Haul Road Project, is at issue in this case;

> and any evidence related to . . . the potential acquisition of [Gilmore's] real estate interest or use of any of the acquisition in this case for the HHR Project is not related to the issue of determining just compensation in this case, and therefore is superfluous and beyond the scope of the damages phase of this eminent domain case.

App. Vol. IV, p. 175.

[10] Two months later, the State filed a separate eminent domain action against Gilmore as part of its effort to build the HHR Project across Gilmore's property, intersecting with the County Taking. Eleven months after that, before evidence had been presented at the damages trial for the County Taking, Gilmore filed a motion to set aside the trial court's partial summary judgment. That motion, filed pursuant to Indiana Trial Rule 60(B)(7), alleged prospective application of the partial summary judgment order would be inequitable in light of "a change of circumstances that was not reasonably foreseeable at the time of the Judgment . . . includ[ing] . . . the fact that the story of building a 'school bus turnaround' has been ***finally*** truthfully disclosed as not being a 'school bus turnaround.'"[1] *Id.* at 176 (emphasis in original).

[11] In its 60(B) motion Gilmore argued that excluding evidence of the HHR Project at the damages trial for the County Taking was unfair, inasmuch as the HHR Project would impact those damages. *Id.* at 177-78. Gilmore and the State later

[1] Gilmore also sought relief under another provision of Indiana Trial Rule 60(B) which is not at issue in this appeal.

settled the State's separate eminent domain action, with the State agreeing to pay Gilmore $1,050,000.

[12] The trial court in the County Taking case initially set Gilmore's 60(B) motion for evidentiary hearing. However, it ultimately conducted a hearing at which only arguments—no presentation of evidence—were allowed. In its order denying the 60(B) motion, the trial court found that Gilmore's alleged changed circumstances, even if true, would not entitle Gilmore to relief from the partial summary judgment. App. Vol. V, p. 204. The trial court further concluded that all of Gilmore's "alleged changes of circumstances"—including the HHR Project's intersection with the County Taking—"[w]ere reasonably foreseeable" at the time of the judgment. *Id.* Gilmore appeals.

# Discussion and Decision

[13] Among other things, Gilmore claims the trial court erroneously failed to conduct an evidentiary hearing on its 60(B) motion. We agree and find that issue dispositive. Gilmore was entitled to an evidentiary hearing because its motion, filed within a reasonable time, was supported by pertinent evidence suggesting that prospective application of the partial summary judgment order would be unfair.

## I. Standard of Review

[14] Ordinarily, we review the denial of a 60(B) motion for an abuse of discretion. *Holland v. Ind. Univ. Trs.,* 171 N.E.3d 684, 688 (Ind. Ct. App. 2021), *reh. denied,*

*trans. denied*. However, where, as here, the trial court rules on the motion without conducting an evidentiary hearing, we review the decision *de novo*. *Id.*

## II. Hearing Required

[15] Indiana Trial Rule 60(B)(7), which fueled Gilmore's 60(B) motion, specifies a court may relieve a party from a judgment when "it is no longer equitable that the judgment should have prospective application." Establishing the inequity of a judgment's prospective application requires a showing of a change in circumstances not reasonably foreseeable at the time the original judgment was entered. *City of Indianapolis v. Tichy*, 122 N.E.3d 841, 845 (Ind. Ct. App. 2019). The plain language of Trial Rule 60(B) requires that a trial court conduct a hearing except where the motion lacks supporting "pertinent" evidence. *Holland,* 171 N.E.3d at 688; *Benjamin v. Benjamin*, 798 N.E.2d 881, 889 (Ind. Ct. App. 2003); *see also* Ind. Trial Rule 60(D) ("In passing upon a motion allowed by subdivision (B) of this rule[,] the court shall hear any pertinent evidence . . . .").

[16] The trial court detoured from the correct standard when determining that Gilmore was not entitled to an evidentiary hearing. Although it initially set the matter for evidentiary hearing, the court later limited the hearing to attorney arguments. App. Vol. II, pp. 61-62; Tr. Vol. II, pp. 106-08. The trial court explained this approach by informing Gilmore that "if you meet the threshold, that is, if all of the things that you allege to be facts justify relief, then the next

step is you've got to prove that those facts are true at the Evidentiary Hearing." Tr. Vol. II, pp. 98-99.

[17] Contrary to the trial court's statements, Gilmore was not required to prove all of his allegations were true to be entitled to an evidentiary hearing. Instead, Gilmore merely needed to show pertinent evidence supported the 60(B) motion and that the motion raised grounds on which Gilmore could recover. *See, e.g.*, *Benjamin*, 798 N.E.2d at 889; *Rothschild v. Devos,* 757 N.E.2d 219, 224 (Ind. Ct. App. 2001); T.R. 60(B), (D). Gilmore met that burden.

[18] Gilmore suggested its evidence would have established that the County Taking always had been intended for the HHR Project, despite sworn affidavits from the county commissioners that the County Taking was for the sole purpose of widening Old Salem Road and creating a school bus turnaround. Gilmore planned to call as witnesses at the 60(B) hearing two county commissioners, the county engineer, an appraiser, a surveyor, and Gilmore's chief officer to prove Gilmore's contention that—despite the commissioners' earlier contrary statements—the projects were always intertwined. Tr. Vol. 42, 67, 81; App. Vol. IV, pp. 184-195; App. Vol. V, pp. 63-64. Gilmore also intended to introduce evidence arising from subpoenas to the county engineer that showed County had never created any drawings or signed documents relating to a school bus turnaround. Tr. Vol. II, p. 103.

[19] Such evidence was pertinent to 60(B) relief. The trial court's finding of no connection between the HHR Project and County Taking underpinned the

entire partial summary judgment order. Because "[t]he order of appropriation controls the damages phase of [the eminent domain] proceedings" and "[t]here has been no physical taking of the Defendant's real estate for the HHR Project," the trial court ruled in that partial summary judgment order that Gilmore was not entitled to recover "for an acquisition of its real estate for the HHR Project in this case . . . ." App. Vol. IV, p. 172.

[20] The trial court further determined that "any claim for damages to [the County Taking] that may result from the HHR Project are [sic] not ripe." *Id.* at 173. The court concluded it therefore had no subject matter jurisdiction over such claims. *Id*. The court went on to rule that Gilmore "is not entitled [to] compensation of its real estate interests based on speculation about the impact of the HHR Project on the value of its real estate." *Id.* at 174. On that basis, the court excluded all evidence of the HHR Project from the damages trial for the County Taking through its entry of partial summary judgment. *Id.* at 175.

[21] These statements reflect the court's unequivocal view that the HHR Project's impact on the County Taking was "speculative" at the time of the partial summary judgment. Nonetheless, in its later order denying Gilmore's 60(B) motion, the trial court ruled that Gilmore's alleged changed circumstances—including the established connection between the County Taking and the HHR Project—were reasonably foreseeable, "anticipated by and discussed" in the partial summary judgment order, and "wholly irrelevant and impertinent to the issues decided" in that order. App. Vol. V, p. 204.

[22] These two rulings cannot be reconciled and essentially produced a Catch-22. The trial court initially entered partial summary judgment against Gilmore because the HHR Project was too speculative and unripe. In its later ruling, the court essentially viewed the same project as having been too definite at the time of partial summary judgment to allow Gilmore relief from that judgment. Moreover, the trial court's 60(B) ruling ignores that the reasonable foreseeability of changed circumstances normally is a question of fact for which a hearing is required. *See Pub. Serv. Comm'n of Ind. v. Schaller*, 157 Ind. App. 125, 299 N.E.2d 625, 630 (1973).

[23] If Gilmore established an earlier connection between the County Taking and the HHR Project, such proof could support a finding that prospective application of the earlier judgment would be inequitable. As Gilmore revealed evidence pertinent to its 60(B) claims—including the testimony of the county commissioner, county engineer, Gilmore's appraiser, and a Gilmore owner—Gilmore was entitled to an evidentiary hearing. The trial court abused its discretion in denying the motion without hearing evidence. [2]

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[2] The dissent appears to view Gilmore's 60(B) motion, in part, as an improper belated appeal of the partial summary judgment. The trial court did not deny Gilmore's 60(B) motion on that basis. In fact, the trial court's statements during the hearing suggest it viewed the issues presented in the 60(B) motion as different from those that could have been raised in an appeal of the earlier partial summary judgment. Tr. Vol. II, p. 76.

In any case, we do not view Gilmore's failure to appeal the partial summary judgment as an improper belated appeal. Conclusive evidence sufficient to persuade the trial court that the County Taking would be used for the HHR Project did not become available until the State filed its eminent domain action against Gilmore in March 2019. Yet, the deadline for initiating an appeal of the partial summary judgment, which was entered on the chronological case summary on January 10, 2019, expired in February 2019. *See* Ind. Appellate Rule

## II. Timing of 60(B) Motion

[24] Even if Gilmore's motion was supported by pertinent evidence, County contends the trial court's denial was proper because the motion was untimely. Trial Rule 60(B) required Gilmore to file the 60(B) motion "within a reasonable time" after the partial summary judgment. Gilmore's motion was filed 11 months after the State filed its eminent domain action related to the HHR Project and 13 months after entry of the partial summary judgment order that the motion sought to set aside.

[25] Whether a 60(B) motion is filed "within a reasonable time" depends on the circumstances of each case as well as the potential prejudice to the party opposing the motion and the basis for the moving party's delay. *Kirchgessner v. Kirchgessner*, 103 N.E.3d 676, 681 (Ind. Ct. App. 2018), *trans. denied*. The trial court's order denying Gilmore's 60(B) motion did not address the motion's timeliness.

[26] We agree with Gilmore that it filed the 60(B) motion within a reasonable time. When asked by the trial court about the delay in filing, Gilmore attributed it to his inability to schedule depositions of local officials. Tr. Vol. II, pp. 67-70. Gilmore suggested that his attempts at such scheduling had been met with "resistance" and that "they"—meaning either the persons to be deposed or the

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9(A) (appeal initiated through filing of notice of appeal within 30 days after judgment is entered on the chronological case summary).

County—did not want the depositions to occur because the depositions would establish a lack of truthfulness about the project. *Id.* at 69.

[27] In addition, the parties could not have known whether damages paid in the more recent eminent domain case brought by the State would duplicate potential damages from the County Taking until that State litigation was resolved. The settlement in the State's eminent domain case against Gilmore was not filed until July 2020—approximately seven months before Gilmore filed the 60(B) motion.

[28] Regardless of the reasons for the delay, the potential prejudice to County was minimal. The damages trial for the County Taking had not yet occurred when the 60(B) motion was filed. Therefore, the evidentiary exclusions required by the partial summary judgment order—that is, the exclusions that the 60(B) motion sought to set aside—had not yet been implemented.

[29] Under these circumstances, we find Gilmore's filing of the 60(B) motion 13 months after the judgment it attacked was "within a reasonable time" for purposes of Trial Rule 60(B). *See Merkor Mgmt. v. McCuan*, 728 N.E.2d 209 (Ind. Ct. App. 2000) (finding delay of nearly two years after judgment reasonable).

[30] In light of these circumstances, we reverse the trial court's denial of Gilmore's 60(B) motion and remand to the trial court to conduct an evidentiary hearing on that motion.[3]

Mathias, J., concurs.
Tavitas, J., dissents with a separate opinion.

[3] Given this disposition, we do not address the parties' remaining claims.

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Court of Appeals Case No.
21A-PL-160

**Tavitas, Judge, dissenting.**

[31] I respectfully dissent from the majority's holding that the trial court erred when it denied Gilmore's Rule 60(B)(7) motion. This case involved procedural irregularities and gamesmanship by both parties.

[32] I agree with the majority's acknowledgement that ". . . we review the denial of a 60(B) motion for an abuse of discretion." Slip. Op. at 6. I part ways with the

majority's determination that pertinent evidence was submitted to warrant a hearing pursuant to Rule 60(D) and that we review this determination de novo.

[33] The primary issue raised and argued by the parties is whether the trial court erroneously denied the Rule 60(B)(7) motion; according to Gilmore, with respect to the trial court's partial summary judgment order, "it is no longer equitable that the judgment should have prospective application." Ind. Tr. R. 60(B)(7).

[34] The majority correctly observes that our jurisprudence pertaining to Rule 60(B)(7) requires that:

> the movant must show that there has been a change in circumstances since the entry of the original judgment and that the change of circumstances was not reasonably foreseeable at the time of entry of the original judgment. *Jones v. Jones* (In re *Marriage of Jones*), 180 Ind. App. 496, 499, 389 N.E.2d 338, 341 (1979); *State v. Martinsville Dev. Co.*, 174 Ind. App. 157, 161, 366 N.E.2d 681, 684 (1977); *Warner v. The Young Am. Volunteer Fire Dep't*, 164 Ind. App. 140, 150, 326 N.E.2d 831, 837 (1975). This is because Trial Rule 60(B) "***is not a substitute for a belated appeal, nor can it be used to revive an expired attempt to appeal***. . . . Trial Rules 60(B)(7) and (8)" in particular "are concerned only with exceptional circumstances." *Masterson v. State*, 511 N.E.2d 499, 500 (Ind. Ct. App. 1987).

*City of Indianapolis v. Tichy*, 122 N.E.3d 841, 845 (Ind. Ct. App. 2019) (emphasis added).

[35] Gilmore alerted the trial court to its claim that, from the beginning of the County's eminent domain action, Gilmore believed that the real purpose for the

County's taking was for the State's HHR project. The trial court repeatedly questioned Gilmore's counsel about why Gilmore waited eleven months between Gilmore's definitive knowledge that the HHR project was moving forward and the filing of the Rule 60(B)(7) motion. Gilmore has yet to explain the delay. Gilmore did not meet its burden on the Rule 60(B)(7) motion because the HHR project was reasonably foreseeable at the time of the partial summary judgment, and Gilmore did not file its Rule 60(B)(7) motion within a reasonable time. Gilmore cannot reasonably claim that an eventuality that Gilmore apparently *foresaw* was somehow not reasonably foreseeable. Thus, no unforeseeable change in circumstances has occurred, and Gilmore's motion was not timely filed.

[36] In order for a party to be entitled to an evidentiary hearing under Rule 60(D), the court needs to determine if there was pertinent evidence that requires a hearing. ". . . [W]hen there is no pertinent evidence to be heard, a hearing is unnecessary." *Thompson v. Thompson*, 811 N.E.2d 888, 904 (Ind. Ct. App. 2004) (citing *Pub. Serv. Comm'n v. Schaller*, 157 Ind. App. 125, 133-34, 299 N.E.2d 625, 630 (1973)).

[37] Underpinning Gilmore's brief and arguments throughout this case is the suggestion that the County misrepresented its purpose for the taking of Gilmore's property for an alleged school bus turnaround, an issue the trial court found irrelevant to the damages phase of the County's eminent domain action. That issue is not before us. Gilmore did not raise fraud as a reason to set aside the partial summary judgment under Rule 60(B)(3). Gilmore had many

procedures available under the law to address the partial summary judgment, including an appeal of the summary judgment order. Gilmore chose not to pursue those avenues.

[38] Here, the County's taking was initiated on November 16, 2016. The State also acquired different property from Gilmore for the HHR project for which Gilmore was justly compensated. The issue before the trial court during the damages stage is the just compensation due to Gilmore at the time of the taking. "It has long been held in Indiana that damages in an eminent domain proceeding must be assessed at the time of the taking." *City of Elkhart v. No-Bi Corp.*, 428 N.E.2d 43, 48 (Ind. Ct. App. 1981) (citing *Cleveland, etc., R. Co. v. Smith* (1912), 177 Ind. 524, 97 N.E. 164); *see also* Appellee's Br. p. 19. The trial court found the State's HHR project irrelevant to the damages stage, a conclusion I agree with, as explained above. I would hold that Gilmore's Rule 60(B) is an attempted "substitute for a belated appeal" or an attempt "to revive an expired attempt to appeal." *Tichy*, 122 N.E.3d at 845. In the absence of "exceptional circumstances," and considering the unexplained delay to Gilmore's filing, I would affirm the trial court. *Id*.

[39] I conclude that Gilmore pointed to no pertinent evidence to warrant a Rule 60(D) hearing. Neither does Gilmore point to any evidence pertinent to whether Gilmore filed for equitable relief in a reasonable amount of time. I would find that the trial court did not abuse its discretion because there was no evidence pertinent to the required "change in circumstances." *Tichy*, 122 N.E.3d at 845. Additionally, the Rule 60(B)(7) motion was not filed within a

reasonable period of time under the circumstances. Accordingly, the trial court did not abuse its discretion in denying equitable relief to Gilmore pursuant to Rule 60(B)(7).

[40] I respectfully dissent.