MEMORANDUM DECISION

ATTORNEYS FOR APPELLANTS

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IN THE COURT OF APPEALS OF INDIANA

Milestone Contractors North, Inc. f/k/a Walsh and Kelly, Inc.,

Appellants,

v.

ReEnergize USA, LLC, d/b/a ReEnergize USA LLC, d/b/a ReEnergize of Indiana,

Appellee.

December 22, 2023

Court of Appeals Case No. 23A-CT-1607

Appeal from the Lake Superior Court

The Honorable John M. Sedia, Judge

Trial Court Cause No. 45D01-2112-CT-1228

Memorandum Decision by Judge Brown
Judges Vaidik and Bradford concur.

Brown, Judge

[1] Milestone Contractors North, Inc., f/k/a Walsh and Kelly, Inc., ("Milestone") appeals the trial court's order granting the motion for relief from judgment filed by ReEnergize USA, LLC d/b/a ReEnergize USA LLC d/b/a ReEnergize of Indiana ("ReEnergize"). Finding that ReEnergize did not establish grounds for relief under Ind. Trial Rule 60(B)(3), we reverse.

Facts and Procedural History

[2] In December 2021, Milestone filed a complaint against ReEnergize.[1] On November 4, 2022, Milestone filed an amended complaint alleging that it entered into a written agreement with ReEnergize to provide material, labor, and equipment to perform re-grading work in two phases, it performed the work as required for the first phase, ReEnergize never paid it for the work completed on the first phase and work under the second phase never commenced, and ReEnergize owed it $355,685.[2] On November 29, 2022, counsel for Milestone filed an Affidavit of Service of Certified Mail stating that, according to the records of the United States Post Office, certified mail service

[1] The chronological case summary ("CCS") indicates a summons was filed with the complaint but does not indicate that return of service was filed.

[2] The exhibits attached to the amended complaint include the written agreement, invoices, and email correspondence in April and May of 2021 between Jason Ding for ReEnergize and Dave Kozyra for Milestone. In his emails, Ding stated several times that payments on the invoices were being processed. Several of Ding's emails include his title as "Manager." Appellant's Appendix Volume II at 40-41, 44-45.

had been obtained on ReEnergize on November 21, 2022, and attaching receipts.[3]

[3] On December 15, 2022, Milestone filed a motion for default judgment. On December 20, 2022, the court entered default judgment in favor of Milestone and against ReEnergize upon the amended complaint, stating that ReEnergize had been properly served and had not filed an answer.

[4] On April 10, 2023, ReEnergize filed a motion for relief from judgment citing Ind. Trial Rule 60(B)(1), (3), (6), and (8).[4] In a memorandum, ReEnergize argued "Milestone has engaged in the kind of gamesmanship prohibited under T.R. 60(B)(3) and by the Supreme Court in *Smith* [*v. Johnson*, 711 N.E.2d 1259 (Ind. 1999)]." Appellant's Appendix Volume III at 102. It argued: "Milestone could have simply sent an e-mail or picked up the phone and contacted Mr. Ding, but instead it chose the path of gamesmanship like the plaintiff's attorney in *Smith*." *Id*. at 109-110. Milestone filed a response in opposition to the motion arguing that *Smith* "is clearly distinguishable from the case at hand, where there were no pre-suit dealings that informed Milestone's counsel ReEnergize had an attorney who had yet to appear in this matter and Mr. Ding

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[3] The affidavit stated in part "service was obtained as follows: REENERGIZE USA, LLC . . . By Serving: President or Next Highest Officer Found" and "REENERGIZE USA, LLC . . . By Serving: Secretary of State's Office, Agent." Appellant's Appendix Volume II at 62. One of the attached receipts states: "This USPS proof of delivery is linked to the customer[']s mail piece information as shown below: REENERGIZE USA, LLC . . . ATTN: PRESIDENT." *Id*. at 64.

[4] An entry in the CCS indicates that counsel for ReEnergize filed an appearance on April 10, 2023.

certainly is not comparable to an attorney" and that ReEnergize failed to show any gamesmanship or misconduct by Milestone. *Id*. at 136. On June 27, 2023, the court held a hearing.

[5] On June 28, 2023, the trial court issued an order granting ReEnergize's motion for relief from judgment based on Trial Rule 60(B)(3) and vacating the entry of default judgment.[5] The court cited *Smith v. Johnson*, 711 N.E.2d 1259 (Ind. 1999), and stated "Milestone's failure to at least attempt to contact Ding presents an inference that a trap was set by Milestone's counsel to catch an unsuspecting ReEnergize and achieve windfall recovery." Appellant's Appendix Volume II at 14. It also stated: "Even though service was properly effectuated and nothing that occurred rose to the level of extraordinary circumstances, Milestone should have advised Ding, ReEnergize's manager, whose email address and telephone number were readily available, that lawsuit had been filed and needed to be served. The judgment should be vacated." *Id*.

Discussion

[6] Milestone argues the trial court erred in granting ReEnergize's motion for relief from judgment based on Trial Rule 60(B)(3). It maintains "Indiana courts have repeatedly determined that plaintiff's failure to provide notice before moving for default judgment does not constitute misconduct justifying relief under Trial

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[5] The court did not find that ReEnergize was entitled to relief based on Trial Rule 60(B)(1), (6), or (8) and specifically found that Milestone served ReEnergize properly at an address designated by ReEnergize as its principal office address and upon its designated agent for service of process.

Rule 60(B)(3)." Appellant's Brief at 20. It argues that, unlike in *Smith*, "Milestone and ReEnergize had not engaged in prior proceedings related to this matter in which ReEnergize was represented," "Milestone had no contact with any attorney purporting to represent ReEnergize prior to filing suit," and "Ding is not an attorney, but an executive of ReEnergize whose last communications were empty promises that payment would be forthcoming." *Id*. at 22-23.

[7] We note that ReEnergize has not filed an appellee's brief. When an appellee fails to submit a brief, we do not undertake the burden of developing arguments, and we apply a less stringent standard of review, that is, we may reverse if the appellant establishes prima facie error. *Bixler v. Delano*, 185 N.E.3d 875, 877 (Ind. Ct. App. 2022) (citing *Zoller v. Zoller*, 858 N.E.2d 124, 126 (Ind. Ct. App. 2006)). Prima facie is defined as "at first sight, on first appearance, or on the face of it." *Id.* at 877-878 (citing *Graziani v. D & R Const.*, 39 N.E.3d 688, 690 (Ind. Ct. App. 2015)). This rule was established so that we might be relieved of the burden of controverting the arguments advanced in favor of reversal where that burden properly rests with the appellee. *Id.* at 878 (citing *Wright v. Wright*, 782 N.E.2d 363, 366 (Ind. Ct. App. 2002)).

[8] We generally review trial court rulings on motions for relief from judgment for an abuse of discretion. *Speedway SuperAmerica, LLC v. Holmes*, 885 N.E.2d 1265, 1270 (Ind. 2008), *reh'g denied*. The trial court granted ReEnergize's motion for relief from judgment based on Trial Rule 60(B)(3). Ind. Trial Rule 60(B) provides in part that "the court may relieve a party . . . 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 . . . ."

[9] To the extent ReEnergize cited *Smith v. Johnston*, 711 N.E.2d 1259 (Ind. 1999), to the trial court in support of its request for relief, we find *Smith* to be distinguishable. In *Smith,* Donald Johnston filed a medical malpractice claim against Dr. Ray Smith with the Indiana Department of Insurance in which Dr. Smith was represented by the law firm Locke Reynolds Boyd & Weissell ("Locke Reynolds"). 711 N.E.2d at 1261. The medical review panel unanimously found that Dr. Smith failed to comply with the appropriate standards of care, and soon after, counsel for Johnston, Karen Neiswinger, sent a letter to Locke Reynolds demanding the policy limits in settlement. *Id.* After a month passed without response, Johnston filed suit in court, and later that day Neiswinger found a letter in her mail from Locke Reynolds rejecting her settlement demand. *Id*. Dr. Smith and his practice were served with the complaint by certified mail, and a scrub nurse signed for the summonses. *Id.* Locke Reynolds did not file an appearance on Dr. Smith's behalf, and approximately six weeks after filing the complaint Johnston moved for default judgment. *Id.* Neiswinger did not communicate with Locke Reynolds after sending the settlement letter and did not alert Locke Reynolds of a pending default judgment motion. *Id.* Neiswinger also submitted a sworn affidavit to the trial court in which she stated:

> I certify that no pleading has been delivered to Plaintiffs or to their counsel by the Defendants or any attorney appearing for

> Defendants, nor to the knowledge of the undersigned has any attorney entered an appearance since the filling [sic] of this cause, nor has any attorney contacted undersigned regarding entering their appearance on behalf of Defendants in this case since the filing of this cause.

Id. The court granted a default judgment the next day, and following a damages hearing, the judgment was served on Dr. Smith. *Id.* Locke Reynolds filed an appearance six days later. Dr. Smith moved to set aside the default judgment under Trial Rule 60(B)(1) and (3). *Id.*

[10] The Indiana Supreme Court held that, although Neiswinger technically complied with the applicable Trial Rules, she committed misconduct under Trial Rule 60(B)(3) when she obtained a default judgment without notifying Locke Reynolds, specifically noting that considerations of confidence in our judicial system "preclude an attorney from inviting a default judgment without notice to an opposing attorney *where the opposing party has advised the attorney in writing of the representation in the matter.*" *Id.* at 1261-1262 (emphasis added). The Court observed there was "no doubt" that Neiswinger was on notice that Locke Reynolds was representing Smith in the matter and specifically noted that Neiswinger, following the panel proceeding before the medical review board, sent Locke Reynolds a settlement demand and received a response the same day she filed suit in the trial court. *Id.* at 1263. The Court stated "[t]he administration of justice requires that parties and their known lawyers be given notice of a lawsuit prior to seeking a default judgment" and "[a] default judgment is appropriate only where a party has not appeared in person or by

counsel and, if there is a lawyer known to represent the opposing party in the matter, counsel had made reasonable effort to contact that lawyer." *Id.* at 1264. The Court also noted regarding the affidavit that, although the sworn statement was "literally true . . . [,] it would be easy for a busy trial judge to take this as a statement that Neiswinger had not been contacted *at all* by Smith's attorneys, not that they had contacted her regarding settlement, but not their appearance," and accordingly, although it "may not be a direct misrepresentation, [] it certainly creates a potential for misperception on the part of the trial court, and to that extent was also prejudicial to the administration of justice." *Id.*

[11] Here, ReEnergize did not assert that it was represented by counsel at any point prior to the trial court's entry of default judgment or that an attorney had advised Milestone's counsel that the attorney represented ReEnergize in the matter. ReEnergize did not argue that it and Milestone were involved in a previous related proceeding where it was represented by counsel known to Milestone or its attorneys. In addition, it did not allege that Milestone made a false representation to the trial court or a representation which created a potential for misperception by the trial court. Further, to the extent ReEnergize asserted that Milestone's counsel had a duty to contact Ding before requesting default judgment, this Court has made clear that the duty in *Smith* applies only where counsel has clear knowledge that the opposing party is represented by an attorney. *See Allstate Ins. Co. v. Love*, 944 N.E.2d 47, 52 (Ind. Ct. App. 2011) (concluding that, because the plaintiff's attorney "had no clear knowledge" the defendant was represented by counsel, there was "no duty to provide notice to

[the defendant's attorney] before seeking a default judgment"); *see also Sears Roebuck & Co. v. Soja*, 932 N.E.2d 245, 252 (Ind. Ct. App. 2010) ("Hall is a claims adjuster, not an attorney. As such, *Smith*'s holding does not apply to the cause before us and thus, under the Rules of Professional Conduct James' counsel was not required to notify Hall of his intent to pursue a default judgment. Even if we were to conclude that it would only be courteous for James' counsel to contact Hall prior to filing for a default judgment, a failure to do so would not, standing alone, justify the setting aside of the default judgment."), *trans. denied*; *Mallard's Pointe Condo. Ass'n, Inc. v. L&L Invs. Grp., LLC*, 859 N.E.2d 360, 366 (Ind. Ct. App. 2006) ("As there was no attorney of record at the time L & L Investors filed its motion [for default judgment], we conclude that . . . L & L Investors was not required to send a copy of the motion to anybody other than the party, Mallard's Pointe. Therefore, L & L Investors' attorney engaged in no misconduct that would require relief from default judgment."), *reh'g denied*, *trans. denied*; *Delphi Corp. v. Orlik*, 831 N.E.2d 265, 269 (Ind. Ct. App. 2005) ("Here, in contrast [to *Smith*], Orlik had no way of knowing that Delphi had retained Himsel to represent it in this matter. This was a new case, not a continuation of a previous proceeding involving the same parties, attorneys, and issues, as in *Smith*."), *reh'g denied*; *Integrated Home Techs., Inc. v. Draper*, 724 N.E.2d 641, 642 (Ind. Ct. App. 2000) ("Concrete Specialists asserts in its motion that '[n]either plaintiff nor its attorney made any attempt to contact defendant or to give notice that plaintiff intended to file a motion for default judgment or to ascertain why defendant had filed no responsive pleading.' However, Concrete Specialists does not explain why Integrated

Home would have been required to contact or give notice to Concrete Specialists. Concrete Specialists does not allege, as in *Smith* . . . , that Integrated Home's attorney had knowledge of its representation by counsel. To the contrary, Concrete Specialists indicates that it had recently retained a law firm and made the firm aware of the default judgment. As a result, this provides no basis for its request for relief from the default judgment.") (footnote and internal citation omitted).

[12] Based on the record, we conclude that Milestone has established prima facie error and that ReEnergize did not show that Milestone's counsel committed misconduct warranting relief from judgment based on Trial Rule 60(B)(3).

[13] For the foregoing reasons, we reverse the trial court's order granting ReEnergize's motion for relief from judgment.

[14] Reversed.

Vaidik, J., and Bradford, J., concur.