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# IN THE
# COURT OF APPEALS OF INDIANA

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|---|---|---|
| WAL-MART STORES, INC., | ) | |
| | ) | |
| Appellant-Defendant, | ) | |
| | ) | |
| vs. | ) | No. 57A03-0708-CV-353 |
| | ) | |
| TIMOTHY KINNISON, TERRY KINNISON, | ) | |
| and NINA KINNISON, | ) | |
| | ) | |
| Appellees-Plaintiffs. | ) | |

APPEAL FROM THE NOBLE CIRCUIT COURT
The Honorable G. David Laur, Judge
Cause No. 57C01-0609-PL-023

**December 26, 2007**

**MEMORANDUM DECISION - NOT FOR PUBLICATION**

**BAKER, Chief Judge**

Appellant-defendant Wal-Mart Stores, Inc. (Wal-Mart), appeals the default judgment order entered against it on the complaint filed by appellees-plaintiffs Timothy, Terry, and Nina Kinnison (collectively, the Kinnisons). Wal-Mart contends that the default judgment order is void because service of process did not comply with Indiana Trial Rule 4.6 and that it has established excusable neglect based on the Kinnisons' ineffective service of process. Finding that Wal-Mart was not properly served with the summons and complaint, we reverse the judgment of the trial court and remand for further proceedings on the Kinnisons' complaint.

## FACTS

Wal-Mart's principal place of business is in Bentonville, Arkansas, and it is licensed to operate in Indiana. Its registered agent for service of process in Indiana is CT Corporation, which is located in Indianapolis. When a lawsuit is filed against Wal-Mart in Indiana, CT Corporation forwards the complaint and summons to the legal department in Bentonville. At that time, the case is assigned to one of Wal-Mart's in-house attorneys.

On September 21, 2006, the Kinnisons filed a complaint against Wal-Mart in Noble County, seeking damages stemming from an allegedly negligent oil change performed by Wal-Mart employees in Perris, California. Despite the facts that the alleged tort occurred in California and that CT Corporation is Wal-Mart's registered agent in Indiana, the Kinnisons attempted to serve the complaint and summons by sending them via certified mail to a Wal-Mart Store in Kendallville. The envelope was addressed to "Wal-Mart Stores, Inc." Appellant's App. p. 41. A postal worker delivered the envelope to the Customer Service

desk, where a customer service associate signed the receipt and accepted the documents. The envelope was then given to the manager of the Kendallville Wal-Mart. The manager opened the envelope, recognized that the claims were not related to the Kendallville store, and attempted to send the documents via facsimile to the Bentonville office. For an unknown reason, the Bentonville office never received the documents, nor was an in-house attorney assigned to the case. Consequently, Wal-Mart failed to file an answer to the Kinnisons' complaint.

On January 3, 2007, the Kinnisons filed a motion for default judgment, which the trial court granted on the same day, awarding damages in the amount of $83,692.[1] On January 23, 2007, Wal-Mart filed a motion for relief from judgment and to set aside the default judgment. Following a February 28, 2007, hearing, the trial court summarily denied Wal-Mart's motion on June 19, 2007. Wal-Mart now appeals.

DISCUSSION AND DECISION

As we consider Wal-Mart's contention that the trial court improperly refused to grant it relief from the default judgment, we note that a trial court's refusal to set aside a default judgment is generally entitled to deference and will be reviewed for an abuse of discretion. Allstate Ins. Co. v. Watson, 747 N.E.2d 545, 547 (Ind. 2001). Although the trial court must use its discretion to do that which is just in light of the unique facts of each case, it must do so in light of the disfavor in which default judgments are held. Id. Any doubt as to the

[1] Timothy alleged that the negligent oil change essentially destroyed the engine of his Dodge Ram pick-up truck. Consequently, he lost his job as an independent RV delivery driver. The amount of damages awarded by the trial court, therefore, included, among other things, $16,907 as the cost of repair of the vehicle and $66,785 in lost income. Appellant's App. p. 9-10.

propriety of a default judgment must be resolved in favor of the defaulted party. Id. Indiana law strongly prefers to dispose of cases on their merits. Coslett v. Weddle Bros. Constr. Co., 798 N.E.2d 859, 861 (Ind. 2003).

Trial Rule 60(B)(6) provides that a party is entitled to relief from an entry of default judgment if the judgment is void. Relevant to this appeal are the rules providing that ineffective service of process prohibits a trial court from having personal jurisdiction over a defendant and that a judgment entered against a defendant over whom the trial court did not have personal jurisdiction is void. Volunteers of Am. v. Premier Auto Acceptance Corp., 755 N.E.2d 656, 659 (Ind. Ct. App. 2001). The existence of personal jurisdiction over a defendant is a question of law to which we apply a de novo standard of review. Tomison v. IK Indy, Inc., 858 N.E.2d 1052, 1055 (Ind. Ct. App. 2006).

Indiana Trial Rule 4.6(A) provides that

> (A) Persons to be served. Service upon an organization may be made as follows:
>
> > (1) In the case of a domestic or foreign organization upon an executive officer thereof, or if there is an agent appointed or deemed by law to have been appointed to receive service, then upon such agent.
>
> ***
>
> (B) Manner of service. Service under subdivision (A) of this rule shall be made on the proper person in the manner provided by these rules for service upon individuals . . . .
>
> (C) Service at organization's office. When shown upon an affidavit or in the return, that service upon an organization cannot be made as provided in subdivision (A) or (B) of this rule, service may be made by leaving a copy of the summons and complaint at any office of

> such organization located within this state with the person in charge of such office.

We find Volunteers of America, a case in which a panel of this court applied Trial Rule 4.6, to be on point and instructive. 755 N.E.2d at 659. In Volunteers, a creditor obtained a judgment against an employee of Volunteers of America (VOA), and to satisfy the judgment, the creditor filed a motion for proceedings supplemental naming VOA as a garnishee defendant. A summons was sent to the Fort Wayne office of the VOA and was simply addressed to "Volunteers of America." Id. at 658. An employee signed the return receipt for the Summons but did not forward it to anyone else in the organization. Consequently, the trial court eventually entered a default judgment against VOA.

VOA filed a motion to set aside the default judgment pursuant to Trial Rule 60(B)(6) based on the ineffective service of process. The trial court denied VOA's motion, and VOA appealed. We reversed, holding that service of process was inadequate and that, as a result, the judgment was void:

> . . . VOA alleges that service was inadequate because the summons was simply addressed to "Volunteers of America." In a recent case, we noted that Trial Rule 4.6(A) "expressly provides that service be directed to an 'executive officer.'" [Northwestern Nat'l Ins. Co. v. Mapps, 717 N.E.2d 947, 953 (Ind. Ct. App. 1999)]. For purposes of the addressee on the summons, we have held that the Trial Rule 4.6(A) requirement that service be made upon the "executive officer" is satisfied by service addressed to the "highest available officer," the "Highest Executive Officer," or the "chief executive officer." Mapps, 717 N.E.2d at 953-954; [Fid. Fin. Servs., Inc. v. West, 640 N.E.2d 394, 401 (Ind. Ct. App. 1994)]; [Taco Bell Corp. v. United Farm Bureau Mut. Ins. Co., 567 N.E.2d 163, 164-165 (Ind. Ct. App. 1991)]. However, here, [the creditor] did not address the summons or other documents to any specific person. Therefore, [the creditor's] service of process upon VOA was inadequate under Trial Rule 4.6(A). Cf. Taco Bell, 567 N.E.2d at 164-165.

> Additional support for this decision can be found in Indiana Trial Rule 4.6(B), which provides that service must be made on the "proper person." For service to be made on the proper person, the proper person need not receive the service, however the service must be sent to the proper person. Precision Erecting, Inc. v. Wokurka, 638 N.E.2d 472, 474 (Ind. Ct. App. 1994), trans. denied. Here, the service was directed to "Volunteers of America" instead of to the "executive officer" or "registered agent" of VOA. Assuming arguendo that Trial Rule 83 permitted [the VOA employee] to sign for the receipt of the service in place of the executive officer or the office manager at the Fort Wayne office, the summons was not properly addressed. Therefore, service was not appropriate.

Id. at 659-60 (emphasis in original).

Here, similarly, the Kinnisons failed to address the envelope or documents within it to any specific person. Instead, they mailed the pleadings to "Wal-Mart Stores, Inc." Appellant's App. p. 41. Pursuant to Trial Rule 4.6 and Volunteers of America, therefore, we find that service of process was inadequate. The Kinnisons attempt to distinguish Volunteers of America from this case by pointing to the VOA employee's third-party intervention in the company's receipt of service, but we find this distinction to be unpersuasive. It is apparent that the court's decision hinged on the fact that the envelope was addressed improperly rather than the employee's intervention.

The Kinnisons direct our attention to Trial Rule 4.15(F), which provides that

> [n]o summons or the service thereof shall be set aside or be adjudged insufficient when either is reasonably calculated to inform the person to be served that the action has been instituted against him, the name of the court, and the time within which he is required to respond.

The Volunteers of America court rejected this argument, however, finding that because VOA was never actually informed of the garnishment proceedings, Trial Rule 4.15(F) did not cure the faulty service. 755 N.E.2d at 660.

Here, similarly, there is no evidence in the record that anyone other than the manager of the Kendallville Wal-Mart store learned of the Kinnisons' complaint until after the default judgment was entered. The Kinnisons insist that the fact that the Kendallville manager knew of the complaint was sufficient to prove that Wal-Mart knew of the lawsuit, but we must disagree. In an organization as large as Wal-Mart, the fact that a local manager—of a store that is located in a state not related to the situs of the complaint—learns of a lawsuit is insufficient to establish that the company received notice, especially where the company has a registered agent in Indiana and the envelope was incorrectly addressed. Rather than being a purely technical defect in the way the envelope was addressed, therefore, the ineffectiveness of the service actually prevented Wal-Mart from becoming aware of the lawsuit. Under these circumstances, we find that Trial Rule 4.15(F) did not cure the inadequate service of process.

The Kinnisons next direct our attention to Taco Bell Corp. v. United Farm Bureau Mut. Ins. Co., 567 N.E.2d 163, 165 (Ind. Ct. App. 1991). In Taco Bell, this court determined that service upon the chief executive officer, who resided and worked in California, was effective where the documents were mailed to a local Taco Bell franchise. The envelope, however, was addressed to the "Chief Executive Officer," and consequently complied with Trial Rule 4.6. Id. at 164-65. Here, on the other hand, the Kinnisons do not even attempt to argue that their service of process complied with Trial Rule 4.6. Thus, we find Taco Bell to be distinguishable from this case. We find the other cases relied upon by the Kinnisons to be distinguishable as well, inasmuch as they involve service of process on an individual rather

than an organization. LePore v. Norwest Bank Ind., N.A., 860 N.E.2d 632, 636 (Ind. Ct. App. 2007); Tomison, 858 N.E.2d at 1055.

In sum, because service of process was inadequate, the trial court did not have personal jurisdiction over Wal-Mart and the default judgment is void. Therefore, the trial court abused its discretion when it refused to grant Wal-Mart's motion for relief from the default judgment.[2]

The judgment of the trial court is reversed and remanded for further proceedings on the Kinnisons' complaint.

SHARPNACK, J., and RILEY, J., concur.

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[2] Even if service of process had been sufficient, these circumstances amply support Wal-Mart's claim that it is entitled to relief from judgment based on excusable neglect. T.R. 60(B)(1). There was an evident breakdown in internal communication—resulting in no small part from the ineffective service of process—that suffices to warrant the setting aside of the default judgment. See Whittaker v. Dail, 584 N.E.2d 1084, 1087 (Ind. 1992) (finding that a breakdown in communication resulting in the failure to answer a complaint may constitute excusable neglect). There is no evidence that Wal-Mart was dragging its feet or attempting to impede the litigation; to the contrary, the undisputed evidence establishes that the Kendallville store manager honestly attempted to fax the complaint and summons to the legal department in the Bentonville office but for some reason, the documents were not received. Additionally, the Kinnisons do not deny that Wal-Mart demonstrated the existence of a meritorious defense. Given our preference for resolving cases on their merits and the general disfavor with which default judgments are viewed, we find that even if service and personal jurisdiction had not been an issue, the default judgment should have been set aside based on Wal-Mart's excusable neglect.