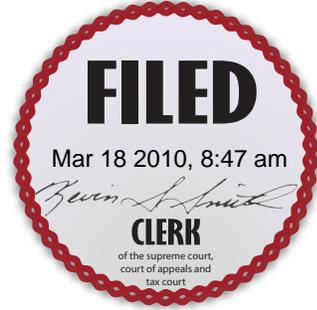


Pursuant to Ind.Appellate Rule 65(D), this Memorandum Decision shall not be regarded as precedent or cited before any court except for the purpose of establishing the defense of res judicata, collateral estoppel, or the law of the case.



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IN THE
COURT OF APPEALS OF INDIANA

ALEXANDER MILLER, M.D.,)

Appellant-Defendant,)

vs.)

No. 45A05-0906-CV-304

MARY KNIGHT,)

Appellee-Plaintiff.)

APPEAL FROM THE LAKE SUPERIOR COURT
The Honorable Diane Kavadias Schneider, Judge
Cause No. 45D01-0511-CT-234

March 18, 2010

MEMORANDUM DECISION - NOT FOR PUBLICATION

FRIEDLANDER, Judge

As a discovery sanction, the trial court entered a default judgment against Alexander Miller, M.D., in a medical malpractice action filed by Mary Knight. A jury trial was held to determine the amount of damages, which resulted in Knight being awarded a substantial judgment. On appeal, Miller presents three issues for review, which we restate as the following four issues:

1. Did the trial court abuse its discretion when it entered a default judgment against Miller as a discovery sanction for repeatedly failing to submit for deposition?
2. Did the trial court abuse its discretion by denying Miller's motion to set aside the judgment of default?
3. Did the trial court err when it prohibited Miller from presenting evidence and argument on the issue of causation at the trial on damages?
4. Did the trial court improperly allow Knight's expert witness to offer certain testimony, at the jury trial on damages, that was not fully disclosed to Miller during discovery?

We affirm.

Miller performed lumbar spinal surgery on Knight on May 2, 2002. Postoperatively, Knight immediately began experiencing complications. By May 6, symptoms were noted that indicated Knight had postoperatively developed cauda equine syndrome¹ and injury to the lumbar nerve roots. Miller, however, did not order a lumbar CT myelogram² until May

¹ Knight's expert witness explained this syndrome as follows: "[T]he nerve roots are being trapped by something, and it's creating a problem with the cauda equine, all those nerve roots that go down to function the bowel, bladder, sexual function.... Unfortunately not everyone recovers from that, and the sooner you can operate on it the better it is." *Trial Transcript* at 72.

² The CT scan showed "marked narrowing of the spinal canal at L4 with the left screw extending partly through the spinal canal. There was noted a large soft tissue density which could be either hematoma or post surgical changes." *Appellant's Appendix* at 1196.

10 and surgical exploration was not performed by him until May 11. As a result, Knight has permanent nerve damage and associated pain and dysfunction. Specifically, she has leg and back pain that has required the implantation of a morphine pump since December 2003 (replaced in January 2009). She also has weakness in her right foot, which significantly affects her ability to ambulate. Further, Knight has suffered from bowel, bladder, and sexual dysfunction. In June 2003, she required a third spinal surgery (performed by another surgeon) to remove an improperly positioned screw from the initial surgery performed by Miller.

Knight filed her proposed complaint with the Indiana Department of Insurance on December 1, 2003, and the claim was subsequently submitted to a Medical Review Panel (the Panel). In her panel submission, Knight alleged that Miller breached the applicable standard of care by failing to timely address her neurological changes, which suggested cauda equine syndrome, in the immediate postoperative period. As a result, Knight claimed she suffers from permanent nerve injury affecting motor and sensory function of her lower extremities, as well as bladder and bowel function. On October 25, 2005, the Panel unanimously found that Miller had failed to comply with the appropriate standard of care. The Panel, however, was not unanimous on the issue of whether the conduct complained of was a factor in Knight's claimed damages.

Knight filed her complaint for medical malpractice in Lake Superior Court in

November 2005.³ Beginning in May 2007, Knight began attempting to coordinate the taking of Miller's deposition. On July 13, after numerous attempts and no responses, Knight served a notice of deposition upon Miller's counsel, setting the deposition for August 21, 2007. On August 8, Knight's counsel received a phone call from Miller's counsel, during which Miller's counsel advised Knight's counsel that he was unaware of Miller's whereabouts and that Miller had been otherwise failing to cooperate in his defense. Miller's counsel therefore indicated that he could not produce his client for deposition.

On August 10, 2007, Knight filed a motion to compel the deposition of Miller. Thereafter, on August 21, the trial court ordered Miller to submit to a deposition within thirty days. Three days after the court's order, Miller's counsel filed a timely response to the motion to compel and also filed a motion for a protective order. Miller's counsel indicated that he had not been able to locate or communicate with his client since February 2006 (that is, within about three months of the instant complaint being filed). Miller's medical colleagues and family were apparently unaware of his location, and Miller had let his Indiana medical license expire. Counsel then generally indicated it was his understanding that Miller "suffered a mental breakdown in 2006" and that he believed Miller had "taken a leave of absence from the practice." *Appellant's Appendix* at 297. Counsel argued that in light of Miller's "illness" the court should issue a protective order suspending the taking of the deposition while Miller is "incapacitated." *Id.* at 297 and 298, respectively. Alternatively,

³ Knight's husband was also a plaintiff in this matter but was later dismissed as a party at the plaintiffs' request.

counsel proposed that the court order that Miller not be allowed to testify at trial unless he submits himself for deposition. On September 18, Miller's counsel requested that the trial court reconsider its ruling of August 21 in light of the subsequently-filed response to Knight's motion to compel.

On September 28, the trial court issued an order,⁴ which provided in relevant part as follows:

1. Court accepts filing of Defendant Alexander Miller's response to Motion to Compel.
2. Dr. Miller is presently unable to be located by his counsel.
3. Dr. Miller's deposition is hereby suspended.
4. Dr. Miller shall have sixty (60) days from the date of this order to submit to deposition.
5. Court sets matter for status conference and hearing on sanctions for December 13, 2007, at 1:00 p.m.

Id. at 318.

Miller did not submit to deposition as ordered, and, therefore, the court held an evidentiary hearing regarding discovery sanctions on December 13, 2007.⁵ The trial court took the matter under advisement. On January 25, 2008, the court entered an order of default judgment. The order provided in relevant part:

1. The defendant has continually violated this Court's Order of September 28, 2007 by failing to submit to deposition within the time set by this Court.
2. The plaintiffs' ability to prosecute their claim has been undermined by the defendant's failure to comply with this Court's Order.

⁴ The parties dispute whether the order came after a telephonic conference, which is not indicated in the CCS. Knight claims that during this conference, the trial court advised defense counsel that the court would consider issuing a default judgment in the event Miller did not submit to a deposition by the deadline.

⁵ Although it is clear that evidence was submitted at the hearing, Miller has failed to provide us with a transcript of said hearing.

3. The Court has not been provided sufficient evidence to support the contention that Dr. Miller suffered from a medical or mental condition so as to be a mitigating factor in determining the appropriate sanctions for his failure to submit to deposition.
4. The Court hereby sanctions the defendant in the form of default judgment.

Id. at 351.

On February 25, Miller's counsel (on behalf of his missing client) filed a motion for causation and damages hearing. Thereafter, he filed a motion to set aside the default judgment. Knight objected to both motions, and the trial court held a hearing on the pending motions on May 23, 2008.⁶ The court took the matter under advisement and issued an order on June 17, 2008. The trial court concluded that it had "no reason to reconsider and set aside its January 25, 2008 Order of Default" and that "the issue of causation shall not remain an issue at trial." *Id.* at 716. The court then indicated in its order that a jury trial on the issue of damages would commence on October 27, 2008.⁷

A one-day jury trial on the issue of damages was held in Miller's absence on April 23, 2009. At the conclusion of the evidence, the jury returned a verdict for Knight in the amount of over \$4.2 million. The parties stipulated that the judgment should be reduced to \$1.25 million in accordance with the limitation on damages contained in the Medical Malpractice Act. The trial court entered judgment accordingly. Miller now appeals. Additional facts will be provided below as necessary.

⁶ Once again, we have not been provided with a transcript of this hearing.

⁷ Upon motion by Miller's counsel, the trial court certified its June 17, 2008 order for interlocutory appeal. On October 6, 2008, this court declined to accept jurisdiction over the interlocutory appeal.

1.

Miller argues that the trial court erred when it entered the default judgment against him as a discovery sanction in January 2008. First, he claims that pursuant to Ind. Trial Rule 55(B) he was entitled to prior written notice of the application for default judgment before the hearing.⁸ Second, Miller argues that the trial court abused its discretion by entering such a severe discovery sanction.

With respect to Miller's T.R. 55(B) argument, we observe that "a trial court is not required to ensure strict compliance with the hearing requirement of Trial Rule 55 in entering a sanction of default judgment." *Mallard's Pointe Condo. Ass'n, Inc. v. L&L Investors Group, LLC*, 859 N.E.2d 360, 366 (Ind. Ct. App. 2006) (specifically addressing three-day notice requirement of T.R. 55(B)), *trans. denied*. Rather, Ind. Trial Rule 37(B)(2) is the more specific rule governing the trial court's actions when issuing a default judgment as a discovery sanction. *See Mallard's Pointe Condo. Ass'n, Inc. v. L&L Investors Group, LLC*, 859 N.E.2d 360. Trial Rule 37(B)(2) specifically grants the trial court the authority to sanction a party by default judgment where the party has failed to obey an order to provide discovery "so long as that remedy is 'just.'" *Mallard's Pointe Condo. Ass'n, Inc. v. L&L Investors Group, LLC*, 859 N.E.2d at 364. Therefore, instead of looking to the hearing and notice requirements of T.R. 55(B), the applicable standard is whether the entry of default

⁸ T.R. 55(B) provides in part as follows:

In all cases the party entitled to a judgment by default shall apply to the court therefore;.... If the party against whom judgment by default is sought has appeared in the action, he...shall be served with written notice of the application for judgment at least three [3] days prior to the hearing on such application....

judgment is just.

Here, in its September 28, 2007 order regarding Knight's motion to compel, the trial court granted Miller an additional sixty days to submit to deposition. Miller does not dispute this but, rather, argues that he was not timely warned of the possibility that a default judgment would be entered. In this regard, we initially observe that the parties dispute whether a telephonic status conference was held on September 28 and whether Miller was warned at that time that a judgment of default might be entered if he did not comply. Although the record before us does not indicate a telephonic conference occurred on September 28, we reiterate that Miller has not provided us with a complete record. Further, it is clear that this factual dispute (on which the trial court surely had an opinion) was argued by both parties in prehearing memoranda and was almost certainly addressed at the hearing on Miller's motion to set aside the default judgment. Without the transcript from said hearing, we cannot determine whether Miller was verbally warned by the trial court on or about September 28, and we will assume the trial court found in Knight's favor in this regard. Moreover, we find it disingenuous for Miller to imply he had no notice of this potential sanction given the fact that, immediately prior to the sanctions hearing on December 13, 2007, he filed a memorandum with the trial court in which he argued against the ultimate sanction of default. In sum, we conclude that the entry of default was not unjust due to lack of notice.

We now turn to Miller's more general claim that the trial court abused its discretion by entering the judgment of default. Specifically, Miller claims the sanction was too severe

given his mental illness and lack of obstreperous conduct or contumacious disregard for the trial court's orders. Moreover, Miller alleges Knight failed to present any evidence to establish that proceeding to trial without Miller's deposition would prejudice her claim.

Our discovery rules are designed to allow a liberal discovery process, the purposes of which are to provide parties with information essential to litigation of the issues, to eliminate surprise, and to promote settlement. *Mallard's Pointe Condo. Ass'n, Inc. v. L&L Investors Group, LLC*, 859 N.E.2d 360. "Although the rules of discovery are intended to require 'little, if any, supervision or assistance by the trial court,' when the goals of this system break down, Indiana Trial Rule 37 provides the trial court with tools to enforce compliance, including sanctioning litigants for their failure to comply with discovery orders." *Id.* at 364 (quoting *Pfaffenberger v. Jackson County Reg'l Sewer Dist.*, 785 N.E.2d 1180, 1183 (Ind. Ct. App. 2003)). Such sanctions may include an award of costs and attorney fees, exclusion of evidence, dismissing the action, or rendering a judgment by default. *Peters v. Perry*, 877 N.E.2d 498 (Ind. Ct. App. 2007). The trial court is not required to impose lesser sanctions before applying the ultimate sanction of dismissal or default judgment. *Id.*

Trial courts are vested with wide discretion in dealing with discovery matters, and we will reverse a trial court's decision regarding discovery only for an abuse of discretion. *Prime Mortgage USA, Inc. v. Nichols*, 885 N.E.2d 628 (Ind. Ct. App. 2008). An abuse of discretion will be found if the decision is clearly against the logic and circumstances before the court, or when the trial court has misinterpreted the law. *Id.* Further, "[b]ecause of the fact-sensitive nature of discovery issues, a trial court's ruling is given a strong presumption

of correctness.” *Peters v. Perry*, 877 N.E.2d at 499. “The only limitation on the trial court in determining an appropriate sanction is that the sanction must be just.” *Prime Mortgage USA, Inc. v. Nichols*, 885 N.E.2d at 649 (quoting *Bankmark of Fl., Inc. v. Star Fin. Card Servs., Inc.*, 679 N.E.2d 973, 978 (Ind. Ct. App. 1997)).

In determining whether a sanction is just, we recognize that “[a]lthough 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, in Indiana there is a marked judicial deference 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.”

Id. (quoting *Charnas v. Estate of Loizos*, 822 N.E.2d 181, 185 (Ind. Ct. App. 2005)).

When issuing the instant sanction, the trial court specifically found that it had “not been provided sufficient evidence to support the contention that Dr. Miller suffered from a medical or mental condition so as to be a mitigating factor in determining the appropriate sanctions for his failure to submit to deposition.” *Appellant’s Appendix* at 351. Without the transcript of the evidentiary hearing to review, we fail to see how Miller can ask us to conclude that the trial court abused its discretion in this regard. We remind Miller that it is his duty to provide us with a complete record sufficient to enable us to review the claimed error. *See Lenhardt Tool & Die Co., Inc. v. Lumpe*, 703 N.E.2d 1079, 1084 (Ind. Ct. App. 1998) (“[i]t is the duty of an appellant to provide this court with a record sufficient to enable us to review the claim of error”), *trans. denied*. He has not done so here.

Moreover, contrary to Miller’s assertion on appeal, default may be granted regardless of whether the noncompliant party’s conduct has or threatens to so delay or obstruct the

rights of the opposing party that any other relief would be inadequate. *See Nesses v. Specialty Connectors Co., Inc.*, 564 N.E.2d 322, 327 n.2 (Ind. Ct. App. 1990) (noting that the bad-faith requirement was deleted from T.R. 37(B) in 1982 and that “the threshold level of conduct which will subject a party to default or dismissal without the prior imposition of lesser sanctions is lower than it was before the 1982 amendments”). Here, Miller was aware of the lawsuit filed against him but absconded within a few months of the complaint being filed. In the nearly two years leading up to the sanctions hearing, Miller made no contact with his attorney (who was diligently trying to locate him) and wholly failed to participate in his defense. We find disingenuous Miller’s argument that his actions were not contumacious solely because he was not specifically aware of the requested deposition or the trial court’s orders. In light of the trial court’s determination that Miller’s actions were not excusable due to mental illness (which we must accept given the incomplete record before us), we find no abuse of discretion regarding the entry of default judgment following the sanctions hearing.

2.

Miller next argues that the trial court abused its discretion by denying his motion to set aside the default judgment pursuant to Ind. Trial Rule 60(B)(8). Miller acknowledges that relief under T.R. 60(B)(8) requires evidence of extraordinary circumstances and asserts that his “apparent mental illness, which caused him to abandon his family and medical practice, meets this requirement.” *Appellant’s Brief* at 19. In this regard, Miller relies exclusively on his sister’s two-page affidavit, which was submitted in support of his motion to set aside the default judgment.

Upon a motion for relief from default judgment, the burden is on the movant to show sufficient grounds for relief under Indiana Trial Rule 60(B). We review the grant or denial of a Trial Rule 60(B) motion for relief from judgment under an abuse of discretion standard. The trial court's discretion is necessarily broad in deciding whether to vacate a default judgment because any determination of excusable neglect, surprise, [] mistake [or extraordinary circumstances] must turn upon the unique factual background of each case. The trial court must balance the need for an efficient judicial system with the judicial preference for deciding disputes on the merits.

Mallard's Pointe Condo. Ass'n, Inc. v. L&L Investors Group, LLC, 859 N.E.2d at 365-66 (citations omitted).

T.R. 60(B)(8) allows the trial court to set aside a judgment within a reasonable time “for any reason justifying relief from operation of the judgment, other than those reasons set forth in sub-paragraphs (1), (2), (3), and (4).” T.R. 60(B)(8) is an omnibus provision that gives broad equitable power to the trial court in the exercise of its discretion. *Brimhall v. Brewster*, 864 N.E.2d 1148 (Ind. Ct. App. 2007), *trans. denied*. “The trial court’s residual powers under subsection (8) may only be invoked upon a showing of exceptional circumstances justifying extraordinary relief.” *Id.* at 1153 (“some extraordinary circumstances must be demonstrated affirmatively”).

In the instant case, a hearing was held on Miller’s motion to set aside, yet Miller has failed to provide a transcript of said hearing for our review. On the record before us, especially given the fact-sensitive nature of the trial court’s decision and without being able to review the transcript of the hearing, we cannot conclude that the trial court abused its discretion. Moreover, we observe that the cursory affidavit of Miller’s sister, Sarita Stevens,⁹

⁹ Stevens was subpoenaed to testify at the December 2007 sanctions hearing but did not appear.

does little to establish that Miller's absence was involuntary and the result of mental illness. To be sure, the affidavit does not indicate Miller was treated for any type of mental illness during the relevant two-year period, despite the fact he was living with family members for a significant period of time immediately before and shortly after leaving an apparent false suicide note¹⁰ for them in September 2006. The affidavit indicates simply that Miller was suffering from insomnia and sinus pain in 2006 and had sinus surgery in the fall of that year. While there is undoubtedly some reason underlying Miller's disappearance, the trial court was not bound to find it was due to mental illness.

Because we conclude that Miller has failed to demonstrate a sufficient reason for setting aside the default judgment under Trial Rule 60(B)(8), we need not decide whether he has presented sufficient evidence of a meritorious defense. *See Mallard's Pointe Condo. Ass'n, Inc. v. L&L Investors Group, LLC*, 859 N.E.2d 360. Thus, we conclude that the trial court's entry of default judgment was just and that the trial court did not abuse its discretion in refusing to grant Miller's motion to set aside the default judgment.

3.

Miller next argues that the trial court abused its discretion by precluding him from offering any evidence or argument on the issue of medical causation at the jury trial. Miller asserts that in doing so:

the trial court improperly relieved the plaintiff of her burden to establish causation in a case where there was a substantial amount of evidence that plaintiff had suffered from the conditions she ascribed to Dr. Miller's

¹⁰ Miller was found in a suburb of Chicago six days after leaving the note. He was driving around in a rental car, which had its windows broken out.

treatment for several years before she ever saw or treated with Dr. Miller, and two members of the medical review panel concluded that Dr. Miller's treatment did not cause the plaintiff's alleged injuries.

Appellant's Brief at 8.

We do not doubt that if this case went to trial without the entry of a default judgment, the key issue before the trier of fact would have been causation. The fact is, however, that a default judgment was entered in the instant case, foreclosing a trial on the merits. *See Whitewater Valley Canoe Rental, Inc. v. Board of Franklin County Comm'rs*, 507 N.E.2d 1001 (Ind. Ct. App. 1987), *trans. denied*. The trial court subsequently ordered a hearing on the issue of damages. "At such a hearing, the defendant may cross-examine the plaintiff's witnesses and he may call witnesses of his own to prove any matters which extenuate or mitigate the damages alleged by the plaintiff." *Stewart v. Hicks*, 395 N.E.2d 308, 312 (Ind. Ct. App. 1979). "Substantive defenses as to causation are no longer an issue between parties after there has been an entry of default against the defendant." *Siebert Oxidermo, Inc. v. Shields*, 446 N.E.2d 332, 338 (Ind. 1983) (citing *Stewart v. Hicks*, 395 N.E.2d 308). *See also Prime Mortgage USA, Inc. v. Nichols*, 885 N.E.2d at 660 ("[f]ollowing the entry of default judgment, the defendant may no longer avail himself of substantive defenses"). Thus, the trial court did not abuse its discretion here by refusing to allow Miller to argue to the jury that there was a lack of causation between Knight's alleged injuries and Miller's malpractice. *See Siebert Oxidermo, Inc. v. Shields*, 446 N.E.2d 332.

4.

Finally, Miller argues that Knight's expert, Sanford Davne, M.D., was improperly

allowed to testify to matters not disclosed during discovery. While Knight disclosed Davne's basic opinions as to the breach of standard of care, Miller contends Knight did not disclose Davne's explanation as to how a postsurgical hematoma shown on imaging studies impinged on Knight's spine, causing her to develop cauda equine syndrome. He acknowledges that Davne's report, which was disclosed prior to trial, stated that Knight's cauda equine syndrome and pain was attributable to either a hematoma or other postsurgical changes. Miller argues, "Knight's counsel could easily have informed the defendant prior to trial that Dr. Davne had resolved his quandary vis-à-vis post-surgical changes versus hematoma, and settled on the latter as the definite cause of Knight's injuries". *Appellant's Reply Brief* at 14.

Knight contends that Miller did not properly preserve his objection to the admission of Davne's testimony at trial. It is a general rule that a party must object to evidence at the time it is offered into the record. *Dennerline v. Atterholt*, 886 N.E.2d 582 (Ind. Ct. App. 2008), *trans. dismissed*. "To preserve a claimed error in the admission of evidence, a party must make a contemporaneous objection 'that is sufficiently specific to alert the trial judge fully of the legal issue.'" *Raess v. Doescher*, 883 N.E.2d 790, 797 (Ind. 2008) (quoting *Moore v. State*, 669 N.E.2d 733, 742 (Ind. 1996)).

Miller's only specific objection to the challenged testimony regarding the postsurgical hematoma was not timely. The objection to this particular testimony occurred after approximately thirty pages of additional testimony and unrelated argument and then only after a court recess for lunch and the conclusion of Knight's direct examination of Davne. Under these circumstances, we conclude that Miller's objection (including a motion to strike

and a motion for a mistrial) was untimely and that he has therefore waived any error in the challenged testimony. Moreover, we observe that any error in the admission of said testimony was harmless in light of the fact that medical causation had already been determined and was not an issue at trial. Therefore, it was irrelevant for purposes of determining damages whether Knight's cauda equine syndrome was caused by a hematoma or some other postoperative development that was belatedly treated by Miller.

Judgment affirmed.

NAJAM, J., and BRADFORD, J., concur.