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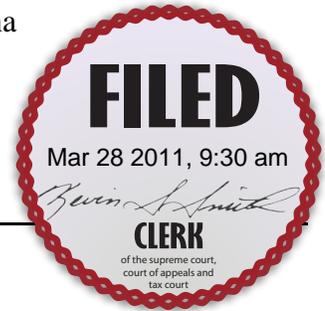
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**IN THE
COURT OF APPEALS OF INDIANA**

ALOIS CRONAUER,)

Appellant-Plaintiff,)

vs.)

No. 75A03-1009-PL-496

STARKE COUNTY JAIL; BOB SIMMS,)

SHERIFF; KEN PFOST, JAIL COMMANDER;)

CHAD DOOLAN, DEPUTY; SECOND)

DEPUTY, NAME UNKNOWN; STARKE)

COUNTY MEMORIAL HOSPITAL EMTS,)

NAMES UNKNOWN; ET. AL.,)

Appellees-Defendants.)

APPEAL FROM THE STARKE CIRCUIT COURT
The Honorable Kim E. Hall, Judge
Cause No. 75C01-0610-PL-52

March 28, 2011

MEMORANDUM DECISION - NOT FOR PUBLICATION

BROWN, Judge

Alois Cronauer appeals the denial of his motion for relief under Ind. Trial Rule 60(B). Cronauer raises three issues, which we revise and restate as whether the trial court abused its discretion in denying his Trial Rule 60(B) motion. We affirm.

The relevant facts follow. Cronauer states that “[o]n May 24, 2004, [he] was beaten by three inmates while being held in the Starke County Jail.” Appellant’s Brief at 5. On October 19, 2006, Cronauer filed a complaint for declaratory judgment against the Starke County Jail; Bob Simms, Sheriff; Ken Pfof, Jail Commander; Chad Doolan, Deputy; Second Deputy, name unknown; Starke County Memorial Hospital EMTs, Names Unknown, et. al. (together, “Defendants”). In the complaint, Cronauer alleged that he was in the custody of Defendants “when they grossly neglected both by allowing a deadly attack upon [Cronauer’s] person and negligently failed to [come to] his aid or send him promptly to medical assistance.” Appellant’s Appendix at 14. Cronauer sought the “judgment of the Court that the (so called) Indiana Tort Claim Act Plaintiff may amend his notice last ruled upon by this Court under Cause Number 75C01-00411-MI-048.”¹ Id. at 15.

On July 15, 2008, Defendants filed a motion to dismiss arguing that Cronauer does not state a cause of action. Also on that day, Cronauer filed a motion for default

¹ Cronauer states that he initiated this case *pro se* in November 2004 under cause number 75C01-0411-MI-048 (“Cause No. 48”) and points to a handwritten document in the appellant’s appendix “detailing his case.” Appellant’s Brief at 5. The trial court under Cause No. 48 entered an order on November 18, 2004 providing that the document was deemed a notice of tort claim and not a complaint.

judgment alleging that no answer had been made under Cause No. 48 or to the October 19, 2006 complaint.²

On June 2, 2009, Defendants filed a motion in opposition of motion for default and a memorandum in support of motion to dismiss and the court held a hearing on the motion to dismiss and the motion for default. On June 30, 2009, Defendants filed a memorandum in opposition to motion for default and in support of motion to dismiss. In the June 2, 2009 and June 30, 2009 memoranda, Defendants argued that Cronauer did not file his complaint within the statute of limitations set forth in Ind. Code § 34-11-2-4. On July 20, 2009, the court granted Defendants' motion to dismiss and denied Cronauer's request for default.

On October 12, 2009, Cronauer filed a Verified Petition for Nunc Pro Tunc Entry stating that he did not receive the July 20, 2009 order until August 31, 2009 because the notice was not mailed for two to three weeks from the date of judgment and requesting that judgment be entered as of August 28, 2009.³ The court indicated that Cronauer's petition would be granted unless an objection was filed within ten days, and on October 27, 2009, the court granted the petition.⁴

On November 23, 2009, Cronauer filed a Verified Petition for Amended Nunc Pro Tunc Entry requesting the court to amend its nunc pro tunc entry to make the date of the

² The chronological case summary ("CCS") also shows that Cronauer filed a motion for default judgment and proposed order on July 21, 2008, and July 24, 2008.

³ The CCS does not indicate that a copy of the July 20, 2009 order was sent to Cronauer or his counsel.

⁴ The CCS indicates that copies of the October 27, 2009 order were sent to counsel.

judgment December 1, 2009. That same day, the court denied the petition for an amended entry and stated that the issue was moot.

On May 12, 2010, Cronauer filed a motion for relief from judgment.⁵ In the motion, Cronauer argued for relief under Ind. Trial Rule 60(A) because there appeared to be a clerical mistake which led to confusion regarding the date of the judgment. Cronauer also argued for relief under Trial Rule 60(B)(1) “because a series of mistakes have resulted in a judgment being entered against Cronauer without Cronauer’s timely knowledge.” Id. at 49. Cronauer argued for relief under Trial Rule 60(B)(2) because “a motion to correct error could be granted, notwithstanding applicable deadlines” and that “[u]nfortunately, the error that led to the need for such a motion . . . is of the nature as to make the timely filing of a motion to correct error impossible.” Id. at 50. Lastly, Cronauer argued for relief under Trial Rule 60(B)(8) because “entering judgment against Cronauer, unbeknownst to him, is a fundamental violation of [his] due process rights.” Id. After a hearing on the motion on June 21, 2010, the court denied Cronauer’s motion for relief from judgment on August 25, 2010.

The issue is whether the trial court erred in denying Cronauer’s Trial Rule 60(B) motion. Cronauer argues that it was error for the trial court to deny him relief under

⁵ A CCS entry dated May 6, 2010, stated that the “[m]atter was before the Court on Defendants’ Objections to Plaintiff’s Motion for Relief from Judgment” and that the court found that no motion had “been filed with the court.” Appellant’s Appendix at 5. CCS entries dated May 12, 2010, indicate that new counsel filed an appearance on behalf of Cronauer and that Cronauer filed a Motion for Relief from Judgment. A CCS entry dated May 20, 2010, states that Defendants requested the court to reinstate their Objections to Plaintiff’s Motion for Relief from Judgment. The CCS does not indicate that the trial court ruled upon Defendants’ request to reinstate their Objections. The copy of the Objections included in the appellant’s appendix is not file-stamped and argues that Cronauer failed to allege any meritorious argument as to why his claim is not barred by the statute of limitations.

subparts (1), (6), and (8) of Trial Rule 60(B).⁶ Motions for relief from judgment are governed by Trial Rule 60(B), which provides in relevant part:

On motion and upon such terms as are just the court may relieve a party or his legal representative from a judgment . . . for the following reasons:

(1) mistake, surprise, or excusable neglect;

* * * * *

(6) the judgment is void;

* * * * *

(8) any reason justifying relief from the operation of the judgment, other than those reasons set forth in subparagraphs (1), (2), (3), and (4).

The motion shall be filed within a reasonable time for reasons (5), (6), (7), and (8), and not more than one year after the judgment, order or proceeding was entered or taken for reasons (1), (2), (3), and (4). A movant filing a motion for reasons (1), (2), (3), (4), and (8) must allege a meritorious claim or defense.

The burden is on the movant to establish grounds for Trial Rule 60(B) relief. In re Paternity of P.S.S., 934 N.E.2d 737, 740 (Ind. 2010). A motion made under Trial Rule 60(B) is addressed to the equitable discretion of the trial court; the grant or denial of the Trial Rule 60(B) motion will be disturbed only when that discretion has been abused. Id. at 740-741 (citation and quotation marks omitted). An abuse of discretion will be found only when the trial court's action is clearly erroneous, that is, against the logic and effect of the facts before it and the inferences which may be drawn therefrom. Id. at 741 (citation and quotation marks omitted).

⁶ Cronauer does not raise Trial Rule 60(A) or Trial Rule 60(B)(2) on appeal.

A motion for relief from judgment under Trial Rule 60(B) is not a substitute for a direct appeal. Id. at 740. Trial Rule 60(B) motions address only the procedural, equitable grounds justifying relief from the legal finality of a final judgment, not the legal merits of the judgment. Id.

Cronauer states that a Trial Rule 60(B) motion may not be used as a substitute for a direct appeal but argues that “the situation that presented itself in the present case left [him] with few, if any, options other than to pursue relief by way [of] Rule 60,” that he “was unaware of the trial court’s entry of judgment during the time frame in which a Rule 59 motion to correct error could have been filed,” and that “therefore a Rule 60(B) motion was the correct avenue for him to seek relief at the trial court.” Appellant’s Brief at 9. He argues that “[t]he requirement under Rules 60(B)(1) and (8) that there be a meritorious claim at issue is satisfied in the present case,” that his *pro se* filing in November 2004 should be considered a complaint, and that, if that filing is not considered a complaint, then the five-year limitations period found at Ind. Code § 34-11-2-6 is the applicable statute of limitations. Id. at 10.

Cronauer further argues that “[e]xcusable neglect in this case occurred when [he] did not contest the trial court’s dismissal because [he] was unaware of the dismissal” and that “[t]he apparent lack of notice of the judgment, combined with the delay in action on the nunc pro tunc motion, establishes grounds for Cronauer to obtain relief under Rule 60(B)(1).” Id. at 12-13. Cronauer argues that the CCS does not show that a copy of the July 20, 2009 order of judgment was mailed to counsel and that “[t]he lack of notice effectively rendered impotent any due process available to [him] and establishes that

denying [him] relief under Rule 60(B)(6) was an abuse of discretion.” Id. at 14. Cronauer also argues he was entitled to relief under Trial Rule 60(B)(8) and states “that there have been several instances in this case where filings have been delayed or recorded in such a manner as to prejudice his case.” Id. at 15. Cronauer specifically notes that the CCS indicated that his motion for default was filed three separate times and the CCS does not show that he was mailed a copy of the July 20, 2009 order dismissing the case. Cronauer argues the “mistakes and delays, for which all parties in this matter may bear some responsibility, have combined to deprive [him] of his right to seek redress for a serious, life-altering injury.” Id. at 16.

Defendants argue that Cronauer “has failed to make any meritorious argument as to why his claim is not barred by the statute of limitations.” Appellees’ Brief at 9. Defendants also argue that Cronauer failed to raise Trial Rule 60(B)(6) to the trial court and that the argument is therefore waived for appellate purposes.

The CCS indicates that the court granted Defendants’ motion to dismiss on July 20, 2009, and later, upon Cronauer’s request, ordered by nunc pro tunc entry that Defendants’ motion to dismiss be granted as of August 28, 2009. Cronauer did not initiate an appeal within thirty days of, or file a motion to correct error with respect to, the trial court’s July 20, 2009 order of dismissal or the August 28, 2009 nunc pro tunc entry of judgment. As previously mentioned, a motion for relief from judgment under Trial Rule 60(B) is not a substitute for a direct appeal. See In re Paternity of P.S.S., 934 N.E.2d at 740. To the extent Cronauer attempts to challenge the trial court’s order

granting Defendants' motion to dismiss and presents arguments regarding the legal merits of the judgment, we decline to address those arguments.

With respect to his arguments under Trial Rule 60(B), we initially note that Cronauer did not argue that he was entitled to relief under Trial Rule 60(B)(6) in his May 12, 2010 motion and raises the argument for the first time on appeal, and therefore he has waived the issue for purposes of appellate review. See Grathwohl v. Garrity, 871 N.E.2d 297, 302 (Ind. Ct. App. 2007) (“If a party does not present an issue or argument to the trial court, appellate review of the issue or argument is waived”).

In addition, with respect to Cronauer's other Trial Rule 60(B) arguments, we note as previously mentioned that Trial Rule 60(B) provides that “[a] movant filing a motion for reasons (1), (2), (3), (4), and (8) must allege a meritorious claim or defense.” Specifically, Cronauer was required to “make a prima facie showing of a meritorious claim, that is, a showing that will prevail until contradicted by other evidence.” See Munster Cmty. Hosp. v. Bernacke, 874 N.E.2d 611, 614 (Ind. Ct. App. 2007) (quoting Outback Steakhouse of Florida v. Markley, 856 N.E.2d 65, 73 (Ind. 2006)) (internal quotation marks omitted). He needed to “present evidence that, if credited, demonstrates that a different result would be reached if the case were retried on the merits and that it is unjust to allow the judgment to stand.” Id.

Cronauer's claim is that he was beaten by other inmates and injured on May 24, 2004. The applicable statute of limitation, Ind. Code § 34-11-2-4, provides that an action for “injury to person . . . must be commenced within two (2) years after the cause of action accrues.” See Walker v. Memering, 471 N.E.2d 1202, 1203 (Ind. Ct. App. 1984)

(noting that the applicable statute of limitations was the two-year period found in Ind. Code § 34-1-2-2, the former version of Ind. Code § 34-11-2-4, where the appellant/plaintiff brought a claim for personal injuries alleging negligence against various governmental entities and employees as a result of injuries he allegedly received as a result of being beaten by other inmates), reh'g denied. A cause of action for a personal injury claim accrues and the statute of limitations begins to run when the plaintiff knew, or in the exercise of ordinary diligence could have discovered, that an injury had been sustained as a result of the tortious act of another. City of East Chicago, Indiana v. East Chicago Second Century, Inc., 908 N.E.2d 611, 618 (Ind. 2009) (citation omitted), reh'g denied.

In the present case, Cronauer's alleged injury occurred on May 24, 2004. Cronauer filed his complaint in this action on October 19, 2006, after the expiration of the applicable two-year statute of limitations.⁷ The filing of a tort claim notice does not toll the statute of limitations, and thus Cronauer's November 2004 filing under Cause No. 48 did not extend the limitations period in which to file his personal injury complaint.

⁷ To the extent Cronauer argues that his *pro se* November 2004 filing under Cause No. 48, "which the trial court deemed a tort claim notice, should be considered to be a complaint," see Appellant's Brief at 10, we note as previously mentioned that the trial court under Cause No. 48 entered an order on November 18, 2004 providing that the document was deemed a notice of tort claim and not a complaint. We also note that the handwritten document contained in the appellant's appendix is unsigned and does not contain a file-stamp, and that Cronauer does not point to the record to show that the chronological case summary for Cause No. 48, which is not included in the appellant's appendix, or the handwritten document filed under that cause number was made a part of the trial court's record in the proceedings below. Moreover, Cronauer does not point to the record to show and our review has not disclosed that he raised the argument in the proceedings below that the November 2004 filing constituted a complaint. Indeed, at the June 21, 2010 hearing, Cronauer's counsel stated that the complaint was filed in "October, November, 2006." See Tr. at 17. As a result Cronauer has waived this argument. See Grathwohl v. Garrity, 871 N.E.2d 297, 302 (Ind. Ct. App. 2007) ("If a party does not present an issue or argument to the trial court, appellate review of the issue or argument is waived").

See Walker, 471 N.E.2d at 1204-1205 (noting that the two-year statute of limitations for personal injury is not tolled during the time expended in complying with tort claim notice provisions). Given that the statute of limitations expired before Cronauer filed his complaint, Cronauer has not met his burden to demonstrate that he has a meritorious claim or that “a different result would be reached if the case were retried on the merits.” See Munster Cmty. Hosp., 874 N.E.2d at 614. See also In re Paternity of P.S.S., 934 N.E.2d at 740 (noting that the burden is on the movant to establish grounds for Trial Rule 60(B) relief).

Based upon the record, we cannot say that the trial court abused its discretion in denying Cronauer’s motion for relief under Trial Rule 60(B). See In re Paternity of P.S.S., 934 N.E.2d at 740-741 (observing that the appellant advanced no argument explaining how the trial court may have abused its discretion in denying his 60(B) motion and that the substance of the appellant’s claim was a challenge to the merits of the trial court’s order of dismissal, noting that a motion under Trial Rule 60(B) is not a substitute for a direct appeal, and declining to entertain the attempted but untimely appeal of the trial court’s order).

For the foregoing reasons, we affirm the court’s denial of Cronauer’s Trial Rule 60(B) motion.

Affirmed.

ROBB, C.J., and RILEY, J., concur.