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.

ATTORNEY FOR APPELLANTS:

DONALD E. WERTHEIMER
South Bend, Indiana

ATTORNEY FOR APPELLEE:

ERIC von DECK
Tuesley Hall Konopa, LLP
South Bend, Indiana

IN THE
COURT OF APPEALS OF INDIANA

SB HOSPITALITY, L.L.C. and, GINA PATEL,	)	
Appellants-Defendants,	)	
vs.	)	No. 71A05-1008-PL-702
R.S. ELLIOTT SPECIALTY SUPPLY, INC.,	)	
Appellee-Plaintiff.	)	

APPEAL FROM THE ST. JOSEPH SUPERIOR COURT
The Honorable Michael P. Scopelitis, Judge
Cause No. 71D07-0812-PL-291

June 23, 2011

MEMORANDUM DECISION – NOT FOR PUBLICATION

BARNES, Judge

Case Summary

SB Hospitality, LLC, and Gita Patel (collectively "the Appellants") appeal the trial court's denial of their motion to withdraw admissions and the trial court's grant of summary judgment in favor of R.S. Elliott Specialty Supply, Inc. ("R.S. Elliott"). We affirm.

Issues

The Appellants raise four issues, which we consolidate and restate as:

I. whether the trial court properly denied their motion to withdraw admissions; and

II. whether the trial court properly granted summary judgment in favor of R.S. Elliott on its complaint for the foreclosure of a mechanic's lien.

Facts

In January 2008, SB Hospitality began the construction of a Candlewood Inn and Suites hotel at 3916, 3928, and 3939 Lincolnway West in South Bend. Anant Patel is the owner of SB Hospitality, and his sister, Gita Patel, loaned SB Hospitality $4,000,000 for the construction of the hotel in January 2008. Draws were made on the loan beginning in January until the loan was fully expended in June 2008. SB Hospitality contracted with Tywall Systems, LLC ("Tywall") to perform stucco work at the hotel. Pursuant to Tywall's proposal, Tywall was to supply work, labor, and materials.

On August 8, 2008, a mortgage in favor of Gita's $4,000,000 loan was recorded. On August 11, 2008, R.S. Elliott filed a notice of intent to hold a mechanic's lien. The

notice claimed that Anant Patel owed it $26,078.80 plus interest, expenses, and attorney fees for work done and/or materials it provided for the improvement of the property.

On December 12, 2008, R.S. Elliott filed a complaint against the Appellants[1] for the foreclosure of its mechanic's lien, alleging that it furnished $26,078.80 in materials from May 27, 2008 through July 15, 2008 for the construction of the hotel. Attached to its complaint were several R.S. Elliott invoices from May 2008 and July 2008, indicating Tywall would be billed for materials shipped to Candlewood Suites at "4130 Licoln Way." Appellants' App. p. 24.

On April 24, 2009, the Appellants filed a motion for summary judgment denying that R.S. Elliott provided any materials for the new hotel and asserting that the stucco portion of the project was exclusively under the province and control of Tywall, who, according to the Appellants, was paid in full for the R.S. Elliott invoices. The Appellants also argued that Gita's mortgage was superior to the purported mechanic's lien because the mortgage related back to the January 2008 draws. In support of their motion, the Appellants designated verified statements from Gita, Anant, Norman Patel, their father, who served as the general contractor, Steve Emmons, the job superintendent, Dave Smith, a mechanical contractor, and Jerry Dominiack, a plumbing contractor. These individuals indicated that they had not seen the delivery of stucco materials and that much of the construction was completed by early April 2008. On May 4, 2009, R.S. Elliott moved to strike Smith's and Dominiack's verified statements.

[1] Other defendants were named in the dispute. The issues before us today involve only the Appellants.

On August 10, 2009, R.S. Elliott filed a motion for partial summary judgment and a combined response in opposition to the Appellants' motion for summary judgment and memorandum in support of partial summary judgment. Among other documents, R.S. Elliott designated the invoices and an affidavit from Tywall's president, Anatoliy Osadchuk. In his affidavit, Osadchuk stated that Tywall performed stucco work at the hotel after Tywall entered into a contract with SB Hospitality to provide all labor and materials necessary to complete the stucco work. He said that to perform the stucco work he ordered materials from R.S. Elliott beginning in May 2008, believing that the address of the hotel was 4130 Lincoln Way West. He stated that the invoiced R.S. Elliott materials were actually delivered to the correct address either by independent truck drivers or himself and that he did not receive payment from SB Hospitality for the invoiced materials.

On November 9, 2009, the Appellants filed a response and opposition to R.S. Elliott's motion for summary judgment and asserted that R.S. Elliott never provided materials as evidenced by the "totally wrong address" on the invoices. Id. at 127. The Appellants suggested that it could be inferred that Tywall may have ordered materials from R.S. Elliott and misallocated deliveries. The Appellants submitted additional verified statements by Anant, Norman, and Dave Smith to support their claims.

On December 9, 2009, the trial court denied both motions for summary judgment because there were genuine issues of material fact. The trial court also granted R.S. Elliott's motion to strike.

On December 10, 2009, R.S. Elliott mailed a request for admissions to the Appellants. Although R.S. Elliott eventually agreed that the Appellants had until February 25, 2010 to complete the discovery requests, the Appellants sought two additional extensions but never responded to the request for admissions. On March 4, 2010, R.S. Elliott filed a second motion for summary judgment based on the evidence previously designated and its request for admissions, which were deemed admitted.

On April 14, 2010, the Appellants filed a motion to withdraw their admissions and submitted proposed responses to the request for admissions.[2] On April 22, 2010, R.S. Elliott filed a memorandum in opposition to the Appellants' motion to withdraw their admissions. On May 5, 2010, the trial court denied the Appellants' request, noting trial was scheduled to begin on May 26, 2010.

On May 6, 2010, the Appellants filed a designation of evidence in opposition to R.S. Elliott's second motion for summary judgment that included their proposed responses to R.S. Elliott's request for admissions, their previously designated evidence, and their previous memorandum opposing R.S. Elliott's motion for partial summary judgment. On May 12, 2010, the Appellants filed a motion to reconsider the denial of the request to withdraw their admissions.

On May 19, 2010, the trial court granted R.S. Elliott's motion for summary judgment and entered judgment in favor of R.S. Elliott in the amount of $48,754.87,

[2] Because the trial court properly denied the Appellants' motion to withdraw their admissions, their proposed responses do not establish a factual basis to support their arguments on appeal. As such, we disregard their references to the proposed responses in their Statement of Facts.

which included interest and attorney fees. The trial court also denied the Appellants' motion to reconsider. On June 18, 2010, the Appellants filed a motion to correct error, which the trial court denied on July 28, 2010. The Appellants now appeal.

Analysis

I. Admissions

The Appellants argue that the trial court improperly denied their request to withdraw their "inadvertent" admissions. Appellants' Br. p. 11. Pursuant to Indiana Trial Rule 36(A), a party may serve upon any other party a written request for the admission of the truth of any matters within the scope of Indiana Trial Rule 26(B), which governs the scope of discovery. "The matter is admitted unless, within a period designated in the request . . . the party to whom the request is directed serves upon the party requesting the admission a written answer or objection addressed to the matter, signed by the party or by his attorney." Ind. Trial Rule 36(A).

Indiana Trial Rule 36(B) provides:

> Any matter admitted under this rule is conclusively established unless the court on motion permits withdrawal or amendment of the admission. Subject to the provisions of Rule 16 governing amendment of a pre-trial order, the court may permit withdrawal or amendment when the presentation of the merits of the action will be subserved thereby and the party who obtained the admission fails to satisfy the court that withdrawal or amendment will prejudice him in maintaining his action or defense on the merits. Any admission made by a party under this rule is for the purpose of the pending action only and is not an admission by him for any other purpose nor may it be used against him in any other proceeding.

Thus, "matters admitted are deemed 'conclusively established' unless the trial court permits withdrawal or amendment of the admission." General Motors Corp., Chevrolet Motor Div. v. Aetna Cas. & Sur. Co., 573 N.E.2d 885, 888-89 (Ind. 1991).

Our supreme court has observed that the rule authorizing withdrawal or amendment is intended to avoid the binding effect of inadvertent admissions and that an admission should ordinarily be binding unless the admission is no longer true because of changed circumstances or a party has made an improvident admission through an honest error. Id. at 889. Further, the court recognized that, unless the party securing an admission can depend on its binding effect, he or she cannot safely avoid the expense of preparing to prove the matter admitted and the purpose of the rule is defeated. Id.

In determining whether a trial court may grant a party's request to withdraw an admission, our supreme court explained:

> Thus the rule itself limits the discretion of a trial court in ruling on a motion to withdraw admissions under T.R. 36(B). The court cannot grant such motion unless it determines both (1) that withdrawal or amendment will subserve the presentation of the merits and (2) that prejudice in maintaining the action or defense will not result to the party obtaining the admission. Even if both of these conditions are satisfied, the rule does not compel the trial court to grant withdrawal or amendment. Rather, the rule states that the court "may" then grant such request.

Id.

We have stated that the party seeking withdrawal has the burden of demonstrating that the presentation on the merits will be subserved by the withdrawal and the party who has obtained the admissions has the burden of demonstrating prejudice if the trial court

permits the withdrawal. Corby v. Swank, 670 N.E.2d 1322, 1326 (Ind. Ct. App. 1996). In this context, prejudice does not mean the loss of the benefit of the admission; rather, it means that the party has suffered a detriment in the preparation of the case. Id.

On December 10, 2009, the day after the trial court denied the parties' motions for summary judgment, R.S. Elliott mailed its request for admissions and requested a response within thirty days of service. On December 21, 2009, a bench trial scheduled for February 24, 2010 was reset to May 26, 2010. At some point, R.S. Elliott apparently agreed to extend the deadline on its request for admissions to February 25, 2010. According to R.S. Elliott, on the afternoon of Friday, February 25, 2010, the Appellants faxed a letter requesting an extension until March 3, 2010. On March 3, 2010, they requested another extension. The next day, apparently rejecting the requests for extensions, R.S. Elliott filed its second motion for summary judgment based in part on the responses that were deemed admitted.

Despite R.S. Elliott's March 4, 2010 motion for summary judgment, the Appellants did not move to withdraw the admissions until nearly six weeks later, on April 14, 2010, and only did so after the trial court raised the issue. In their motion to withdraw, the Appellants explained that they did not timely respond to the request for admissions because of "the unavailability of the Patel defendants and, further, an extremely heavy case load on the part of counsel for the Patel defendants . . . ." Appellee's App. p. 1. R.S. Elliott responded on April 22, 2010, arguing that permitting the Appellants to amend their responses would not subserve the presentation on the merits and that R.S. Elliott would not have time to conduct discovery regarding assertions

the Appellants made for the first time in their proposed responses or to depose the witnesses who had given verified statements because trial was scheduled to begin on May 26, 2010. R.S. Elliott argued that prejudice could have been avoided if the Appellants had responded to the request for admissions in a timely manner or moved to withdraw the admissions at an earlier date. On May 5, 2010, after a hearing, the trial court denied the motion to withdraw. The trial court stated:

> 1. The withdrawal or amendment of the admissions will only minimally, if at all, subserve the presentation of the merits of the action.
>
> 2. The withdrawal or amendment of the admissions will unduly prejudice the plaintiff in maintaining his action on the merits at the trial scheduled to commence on May 26, 2010.
>
> 3. Based on all the facts and circumstances surrounding defendants' failure to timely respond to plaintiff's request for admissions and other still outstanding discovery as outlined in plaintiff's Memorandum in Opposition to Defendants' Motion to Withdraw Admissions filed on April 22, 2010 and defendants' delay in addressing the failure to timely respond to the request for admissions beyond the agreed upon extended deadline date until the court itself had to raise the issue on April 7, 2010, the court should not in the exercise of its discretion grant defendants' motion.

Appellee's App. p. 33.

Even if permitting the Appellants to withdraw their admissions would have subserved the presentation on the merits, the trial court also found that the withdrawal of the admissions would unduly prejudice R.S. Elliott, and the record supports this finding. The Appellants waited until six weeks after R.S. Elliott filed its second motion for summary judgment before seeking to withdraw their admissions and did so only after the

trial court raised the issue. Moreover, trial was scheduled to begin just six weeks later. Given the Appellants' failure to promptly move to withdraw the admissions and the looming trial date, they have not established that the trial court abused its discretion in determining that R.S. Elliott would be prejudiced by the withdrawal of the admissions. Accordingly, the trial court properly denied the Appellants' motion to withdraw their admissions.

II. Summary Judgment

Our review of a trial court's ruling on a motion for summary judgment is de novo. Bules v. Marshall County, 920 N.E.2d 247, 250 (Ind. 2010). "We must determine whether the evidence that the parties designated to the trial court presents a genuine issue of material fact and whether the moving party is entitled to a judgment as a matter of law." Id. (citing Ind. Trial Rule 56(C)). We construe all factual inferences in favor of the non-moving party and resolve all doubts as to the existence of a material issue against the moving party. Id.

A. Motion to Strike

The Appellants contend the trial court improperly granted R.S. Elliott's motion to strike the verified statements of Dave Smith and Jerry Dominiack, which were designated in support of the Appellants' April 29, 2009 motion for summary judgment. R.S. Elliot moved to strike these verified statements because they were not affirmed under the penalties of perjury. In its order denying the parties' initial motions for summary judgment, the trial court granted R.S. Elliott's motion to strike.

A trial court has broad discretion in ruling on the admissibility of evidence. Kroger Co. v. Plonski, 930 N.E.2d 1, 5 (Ind. 2010). This discretion extends to rulings on motions to strike affidavits on the grounds that they fail to comply with the summary judgment rules. Id. Indiana Trial Rule 56(E) requires affidavits supporting and opposing motions for summary judgment to be made on personal knowledge, to set forth such facts as would be admissible in evidence, and to show affirmatively that the affiant is competent to testify to the matters stated therein. "The party offering the affidavit into evidence bears the burden of establishing its admissibility." Duncan v. Duncan, 764 N.E.2d 763, 766 (Ind. Ct. App. 2002), trans. denied.

The Appellants argue that because Smith subsequently issued a properly verified statement and Dominiack's signed statement was denominated "Verified Statement," there was sufficient authentication under Trial Rule 56. We disagree. "[A] court will not consider unsworn and unverified attachments in opposition to a motion for summary judgment." Id.; see also Kronmiller v. Wangberg, 665 N.E.2d 624, 627 (Ind. Ct. App. 1996) ("An unsworn statement or unverified exhibit does not qualify as proper evidence."), trans. denied. The Appellants have not established that the trial court abused its discretion by striking the unsworn statements.

B. Validity

The Appellants argue that summary judgment was improper because there are genuine issues of fact regarding the validity of R.S. Elliott's mechanic's lien.[3] The statute controlling notices of intent to hold a mechanic's lien provides in part:

> a person who wishes to acquire a lien upon property, whether the claim is due or not, must file in duplicate a sworn statement and notice of the person's intention to hold a lien upon the property for the amount of the claim:
>
> > (1) in the recorder's office of the county; and
> >
> > (2) not later than ninety (90) days after performing labor or furnishing materials or machinery described in section 1 of this chapter.

Ind. Code § 32-28-3-3(a).

The Appellants' admissions establish that SB Hospitality contracted with Tywall to perform stucco work at the hotel, that the contract required Tywall to provide all labor and materials to complete the stucco work, that Tywall procured stucco materials for the hotel project, that stucco materials were delivered to the site, and that stucco materials were applied to the exterior of and incorporated into the buildings that make up the hotel. Osadchuk stated in his affidavit that he began ordering materials in May 2008, which is consistent with the invoices that indicate materials were ordered from May 27, 2008 through July 15, 2008.

[3] In response to R.S. Elliott's second motion for summary judgment, the Appellants filed a "designation of evidence/materials in opposition to R.S. Elliott's second motion for summary judgment." Appellants' App. p. 225. Although the designation referred to the Appellants' memorandum opposing R.S. Elliott's first motion for summary judgment, the Appellants did not make any new arguments or otherwise address their admissions.

Relying on two of its requests for admissions, R.S. Elliott asserts that the Appellants have conceded the ultimate issue that the lien is valid and collectable. Those admissions provide:

> REQUEST NO. 27: If Tywall System, LLC obtained the stucco material used in the Candlewood Suites Hotel project located at 3916, 3928, 3939 Lincolnway West, South Bend, Indiana, 46628 from R.S. Elliott, then the mechanic's lien held by R.S. Elliott on the property located at 3916, 3928, and 3939 Lincolnway West, South Bend, Indiana 46628 is, subject to the rules concerning priority of such liens, valid and collectible.
>
> * * * * *
>
> REQUEST NO. [29]: Tywall Systems, LLC incorporated into the Candlewood Suites Hotel project located at 3916, 3928, and 3939 Lincolnway West, South Bend, Indiana, 46628, stucco provided by R.S. Elliott.

Appellants' App. p. 220. Thus, the Appellants admitted that, because Tywall incorporated stucco provided by R.S. Elliott into the hotel project, R.S. Elliott's mechanic's lien is, subject to rules of priority, valid and collectible.

The Appellants attempt to create genuine issues of material fact by pointing to their various verified statements. "A factual issue is material for the purposes of Trial Rule 56(C) if it bears on the ultimate resolution of a relevant issue." Bushong v. Williamson, 790 N.E.2d 467, 474 (Ind. 2003). Whether the Appellants or their representatives actually saw the delivery of stucco materials,[4] whether the invoices listed

[4] In their various verified statements Anant and Norman assert that R.S. Elliott did not deliver materials to the hotel site. We will not permit a party's contradictory, self-serving testimony to create a genuine issue of material fact for purposes of summary judgment. Plaza Group Properties, LLC v. Spencer County Plan Comm'n, 877 N.E.2d 877, 886 (Ind. Ct. App. 2007), trans. denied. This is especially

the incorrect address, and whether most of the construction was completed at a certain date do not establish that R.S. Elliott did not furnish materials for the hotel within ninety days of filing its intent to hold a mechanic's lien. Therefore, any issues of fact created by these statements are not material to the validity of the mechanic's lien. Because the Appellants admitted that Tywall obtained and incorporated stucco provided by R.S. Elliott into the hotel project and that R.S. Elliott's mechanic's lien is, subject to rules of priority, valid and collectible, the trial court properly concluded there are no genuine issues of material fact for trial.

C. Priority

The Appellants also argue that summary judgment was improper because in its December 9, 2009 order denying the parties' motions for summary judgment the trial court stated there were genuine issues of material fact as to matters raised in the motions. The Appellants contend, "Any genuine issues of material fact concerning the priority of liens which existed on December 9, 2009 still exist today." Appellants' Br. p. 14.

In its December 9, 2009 order, the trial court specifically addressed the issue of priority and stated:

> 5. As a matter of law, a properly recorded mechanic's lien relates back to the date the mechanic or other person began to perform labor or furnish materials or machinery. I.C. § 32-28-3-5(b). Once the mechanic's lien notice is properly recorded, the lien is perfected and its priority is determined not by the date recorded but by the date the claimant began work on the subject property.

---

relevant here, where Anant also states that Tywall was fully paid on all of its invoices. Given the Appellants' admissions, these self-serving statements may not be used to create issues of fact for trial.

> 6. As a matter of law, the priority of a mortgage is determined by the date it is properly recorded. A mortgage does not relate back to the date of any other event, including but not limited to the date the mortgagee actually gave the mortgagor all or a portion of the loan. Therefore, in determining the priority of liens on a parcel of real estate between a mechanic's lien and the mortgage, the recording date of the mortgage is compared to the date the holder of the mechanic's lien first began providing the labor or supplying the materials.

Appellants' App. p. 158. In its subsequent order granting R.S. Elliott's second motion for summary judgment, the trial court concluded there are no genuine issues of material fact and R.S. Elliott is entitled to judgment as a matter of law because R.S. Elliott's mechanic's lien was enforceable and had priority over Gita's mortgage.

On appeal, the Appellants do not acknowledge the trial court's reasoning in the December 9, 2009 order or provide us with any legal argument regarding the determination of priority. The undisputed facts show that R.S. Elliott's August 11, 2009 notice of intent to hold a mechanic's lien relates back to the invoices dated May 27, 2008, May 29, 2008, July 8, 2008, July 9, 2008, and July 15, 2008, before the date Gita recorded her mortgage on August 8, 2009. In the absence of any argument to contrary, the Appellants have not established that Gita's mortgage relates back to the January 2008 draws or otherwise takes priority over R.S. Elliott's mechanic's lien. Thus, they have not established that the trial court improperly granted R.S. Elliott's motion for summary judgment.

Conclusion

The trial court did not abuse its discretion when it denied the Appellants' motion to withdraw their admissions or granted R.S. Elliott's motion to strike Smith's and Dominiack's statements. Further, the Appellants have not established that the trial court improperly granted R.S. Elliott's second motion for summary judgment. We affirm.

Affirmed.

DARDEN, J., concurs.

RILEY, J., dissents with separate opinion.

IN THE
COURT OF APPEALS OF INDIANA

SB HOSPITALITY, L.L.C. and GINA PATEL,	)	
	)	
Appellants-Defendants,	)	
	)	
vs.	)	No. 71A05-1008-PL-702
	)	
	)	
R.S. ELLIOTT SPECIALTY SUPPLY, INC.,	)	
	)	
Appellee-Plaintiff.	)	

RILEY, Judge, dissenting with separate opinion.

I respectfully dissent from the majority's decision to affirm the trial court's order. Based on the evidence available, I conclude that (1) the trial court abused its discretion when it denied Appellants' motion to withdraw admissions and (2) Elliott is not entitled to summary judgment on its complaint.

As explained by the majority, the party who has deemed to have made admissions may move the trial court for withdrawal of those admissions pursuant to Ind. Trial Rule 36(B), if it can be established that (1) withdrawal or amendment will subserve the presentation of the merits; and (2) prejudice in maintaining the action or defense will not result to the party obtaining the admission. *General Motors Corp. v. Aetna Cas. & Sur. Co*., 573 N.E.2d 885, 888 (Ind. 1991). Even if both conditions are satisfied, the rule does not compel the trial court to grant a request to withdraw admissions. *Id*.

In *General Motors Corp.*, the Indiana Supreme Court held that the trial court did not abuse its discretion by denying the defendant's motion to withdraw admissions where:

> Neither [the defendant's] motion to withdraw admissions nor its supporting memorandum presented the trial court with any claim or indication that its failure to timely respond was inadvertent, that it had nevertheless continued to actively protect the issues involved in the challenged admissions, or that [the plaintiff] was aware that [the defendant] intended to contest the admitted issues at trial.

Id. at 889.

I note that while Appellants' belated, proposed responses still indicate admissions to many requests; R.S. Elliott's request to admit the material elements of its claim are now denied by Appellants. The Appellants assert that "[i]t was due to the unavailability of the Patel defendants, and further, an extremely heavy case load on the part of counsel for the Patel defendants," that the responses to R.S. Elliott's request for admissions were inadvertently overlooked. (Appellee's App. p. 1). Throughout the proceedings, Appellants actively continued to contest the issue of R.S. Elliott's delivery of supplies to its worksite and the legal grounds for the mechanic's lien. As such, I find that Appellants made a sufficient showing that withdrawal of the admissions would subserve the presentation of the merits. *See also Cross v. Cross*, 891 N.E.2d 635, 640 (Ind. Ct. App. 2008).

Also, I conclude that R.S. Elliot did not show that withdrawal of the admissions would be detrimental to his preparation of the case. *See Corby v. Swank*, 670 N.E.2d 1322, 1326 (Ind. Ct. App. 1996). R.S. Elliott mainly contends, and the majority agrees,

that withdrawal of the admissions six weeks prior to trial would result in prejudice. However, the only new material element that was discovered in the case through Appellants proposed admissions was the existence of a second contractor who resides in Illinois and who delivered stucco material when Tywall was unable to complete the job. Six weeks is sufficient to depose this additional witness. Because a withdrawal of the admissions would subserve the presentation of the merits and R.S. Elliott failed to establish prejudice, I find that the trial court abused its discretion when it denied Appellants' motion to withdraw admissions.

As recognized by the majority, "R.S. Elliott filed a second motion for summary judgment based on the evidence [] designated [in its first, failed motion for summary judgment] and its request for admissions, which were deemed denied." Slip op. p. 5. Because the only new evidence in the second motion for summary judgment consisted of the admissions which were deemed denied, it logically follows that by allowing the withdrawal of these admissions, a genuine issue of material fact remains to be litigated and R.S. Elliott has not demonstrated its entitlement to summary judgment as a matter of law. Therefore, I would reverse the trial court's grant of summary judgment for R.S. Elliot and remand for further proceedings.