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IN THE COURT OF APPEALS OF INDIANA

RICHARD L. SNIDER and SHERRIE W. SNIDER,	)	
Appellants-Plaintiffs,	)	
vs.	)	No. 02A04-1009-PL-614
EUROPEAN WARMBLOOD IMPORTS, INC., MICHAEL PEDERSEN and APRIL PEDERSEN,	)	
Appellees-Defendants.	)	

APPEAL FROM THE ALLEN SUPERIOR COURT
The Honorable Daniel G. Heath, Judge
Cause No. 02D01-0902-PL-66

August 31, 2011

MEMORANDUM DECISION - NOT FOR PUBLICATION

MAY, Judge

Richard and Sherrie Snider appeal the denial of their motion to correct error based on newly discovered evidence. As the evidence was discoverable with due diligence in time for trial, we affirm.

FACTS AND PROCEDURAL HISTORY

The Sniders entered into an oral agreement with Michael and April Pedersen pursuant to which the four would buy and import a horse named Kale. The Pedersens would board, train, and market Kale; the Sniders would be passive investors. Disputes arose concerning an injury to Kale while he was in the Pedersens' care and the cost of maintaining and training Kale, and the Sniders sued the Pedersens for breach of the agreement.

Trial commenced December 10, 2009. The trial court entered judgment for the Pedersens and the Sniders brought a motion to correct error. They asserted they had obtained newly-discovered evidence that "warrants a reconsideration" of the judgment. (App. at 36.) The source of that evidence was Sue Ann Thompson, an acquaintance of Richard Snider's mother, who had bought a horse from the Pedersens and who had told Richard Snider in a telephone conversation some two years earlier, in late 2007, that he should be "on guard" when dealing with the Pedersens. (*Id*. at 94.)

Richard Snider tried to contact Thompson about a year later in October 2008. He left a voicemail message but the record does not reflect he received a response. He sent Thompson an e-mail in March, 2009, and again two months later. He received no response. He tried to call Thompson five more times between November 2008 and December 2009.

On December 1, the Sniders moved for a continuance in hopes they could locate Thompson. It was denied. Thompson called Richard Snider back four days before trial, on December 6, 2009. The Sniders met with Thompson two days later and she gave the Sniders a list of people who had done business with the Pedersens.[1] Richard Snider began calling the people on the list and obtained information in the form of affidavits from two residents of Denmark who had previously dealt with the Pedersens. This newly-discovered evidence, the Sniders assert, "strongly suggests a scheme whereby Mr. Pedersen charged the Sniders for the purchase of two horses by inflating the price of [Kale]." (Br. of Appellants Richard L Snider and Sherrie W. Snider (hereinafter "Snider Br") at 6.) On December 8, the Sniders filed a motion to reconsider the denial of a continuance and the trial court denied that motion on December 9, the day before trial.

After judgment was entered for the Pedersens the Sniders brought a motion to correct error. The trial court held a hearing May 12, 2010, and the motion was deemed denied because the trial court did not rule on it.[2]

DISCUSSION AND DECISION

A motion to correct error is a prerequisite for appeal when a party seeks to address "[n]ewly discovered material evidence, including alleged jury misconduct, capable of production within thirty (30) days of final judgment which, with reasonable diligence, could

[1] Thompson testified at the trial but at that time could offer only evidence of reasonable boarding fees.

[2] Ind. Trial Rule 53.3(A) provides that a motion to correct error is deemed denied if a trial judge does not rule upon it within thirty days after it was heard.

not have been discovered and produced at trial." Ind. Trial Rule 59. Motions for a new trial based on newly discovered evidence are viewed with disfavor, *Helton v. State*, 273 Ind. 211, 216, 402 N.E.2d 1263, 1267 (1980), and are received with "great caution" because courts place "a high value on finality of judicial resolutions." *Speedway SuperAmerica, LLC v. Holmes*, 885 N.E.2d 1265, 1271 (Ind. 2008), *reh'g denied*. The decision whether to grant a new trial is an equitable one, and requires the court to "balance the alleged injustice suffered by the party moving for relief against the interest of the winning party and society in general in the finality of litigation." *Id*.

Reflecting this concern for finality, new evidence requires a new trial only when the party seeking relief demonstrates (1) the evidence has been discovered since the trial; (2) it is material and relevant; (3) it is not cumulative; (4) it is not merely impeaching; (5) it is not privileged or incompetent; (6) due diligence was used to discover it in time for trial; (7) the evidence is worthy of credit; (8) it can be produced upon a retrial of the case; and (9) it will probably produce a different result at retrial. *Id*. The movant has the burden of showing that the newly discovered evidence meets all nine prerequisites for a new trial. *Denney v. State*, 695 N.E.2d 90, 93 (Ind. 1998).

The Sniders assert the determination whether new evidence requires a new trial "involves a consideration of nine factors," (Snider Br. at 7), and they claim the trial court took an "unbalanced approach" because it considered only the Sniders' diligence. Instead, the Sniders suggest, it should have "weigh[ed] the Sniders' diligence against the probable impact of the new evidence." (*Id*.) The trial court did not err in considering only the

Sniders' diligence because the *Denney* test does not involve the "weighing" of factors. Rather, it lists nine "requirements," 695 N.E.2d at 92, all of which must be satisfied to warrant a new trial. *See id*. ("[t]he movant has the burden of showing that the newly discovered evidence *meets all nine prerequisites* for a new trial") (emphasis supplied).

"Motions for a new trial based on newly discovered evidence are subject to a hostile inference of want of due diligence in the absence of a clear showing to the contrary." *Id*. at 93 (quoting *Tyson v. State*, 626 N.E.2d 482, 485 (Ind. Ct. App. 1993), *cert. denied* 510 U.S. 1176 (1994)). A finding of due diligence does not rest on abstract conclusions about, or assertions of, its exercise but on a particularized showing that all the methods of discovery reasonably available to counsel were used but the newly-found information could not be uncovered. *Id*. at 94. We review the denial of such a motion for an abuse of discretion. *Scales v. Scales*, 891 N.E.2d 1116, 1120 (Ind. Ct. App. 2008).

The trial court did not abuse its discretion in determining the Sniders were not diligent enough, as the Sniders did not pursue all the methods of discovery reasonably available to them. A litigant is obliged to search for evidence in the place where, from the nature of the controversy, it would be most likely to be found. *Elkhart Cmty. Sch. v. Yoder*, 696 N.E.2d 409, 415 (Ind. Ct. App. 1998). In *Yoder*, we determined the trial court did not abuse its discretion when it denied the School's motion for a new trial based on newly discovered evidence because the school did not "search for evidence in the place where, from the nature of the controversy, it is most likely to be found -- here, the emergency personnel that were known to be present at the accident scene." *Id*. Similarly, in *Chicago and E.I.R. Co. v.*

McKeehan, 5 Ind. App. 124, 127, 31 N.E. 831, 832 (1892), a motion for new trial was properly denied where the appellant did not interview the residents of a house in plain view of a railroad crossing where an accident took place. The appellant was not sufficiently diligent even though the witnesses had agreed with each other to conceal from the appellant the information they had. *Id*.

The most likely place where information about the Pedersens' prior business dealings with others could be found was from the Pedersens. But the Sniders did not depose the Pedersens, did not serve interrogatories on them, did not serve requests for production, nor conduct any other discovery. Where parties neglect to follow-up with discovery, they do so at their own peril and may not later turn to the doctrine of newly discovered evidence for relief. *Hartig v. Stratman*, 760 N.E.2d 668, 671-72 (Ind. Ct. App. 2002), *reh'g denied, trans. denied*.

As the Sniders did not exercise due diligence in searching for the evidence they later asserted was newly discovered, it was not an abuse of discretion to deny their motion to correct error and we therefore affirm.

Affirmed.

BAKER, J., and BRADFORD, J., concur.