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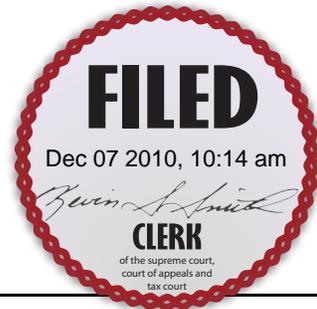
ATTORNEYS FOR APPELLANT
VANDERBURGH COUNTY
PROSECUTOR'S OFFICE:

GREGORY F. ZOELLER
Attorney General of Indiana

KATHY BRADLEY
Deputy Attorney General
Indianapolis, Indiana

ATTORNEY FOR APPELLEES:

JOSEPH J. REISWERG
Carmel, Indiana



**IN THE
COURT OF APPEALS OF INDIANA**

STATE OF INDIANA DEPARTMENT OF)
FAMILY SERVICES, VANDERBURGH)
COUNTY OFFICE OF FAMILY AND)
SOCIAL SERVICES, EVANSVILLE POLICE)
DEPARTMENT, and VANDERBURGH)
COUNTY PROSECUTOR'S OFFICE,)

Appellants-Defendants,)

vs.)

F.D., G.D., and T.D., by their Parents and Next)
Friends, J.D. and M. D., and J.D. and M.D.,)
Individually, B. H. and M. H., by their Parent)
and Next Friend, L.H., and L. H., Individually,)

Appellees-Plaintiffs.)

No. 82A04-1006-CT-364

APPEAL FROM THE VANDERBURGH SUPERIOR COURT

December 7, 2010

MEMORANDUM DECISION – NOT FOR PUBLICATION

BAKER, Chief Judge

Appellant-defendant Vanderburgh County Prosecutor's Office (VCPO) appeals the trial court's order denying VCPO's motion to set aside the default judgment entered in favor of the appellees-plaintiffs (collectively, the Appellees) on the Appellees' complaint against VCPO and other defendants. VCPO argues that it established excusable neglect and a meritorious defense such that the default judgment should be set aside. Finding that VCPO has met its burden under Trial Rule 60, we reverse and remand for further proceedings.

FACTS

On June 24, 2009, the Appellees filed a complaint against VCPO and a number of other entities. Among other things, the Appellees alleged that VCPO had failed to act upon reports of alleged child abuse and had failed to inform the parents of the children alleged to have been abused.

VCPO was served on July 1, 2009, and on July 15, 2009, VCPO forwarded the complaint to the Office of the Indiana Attorney General. The Deputy Attorney General to which the case was assigned failed to fully review the materials received from VCPO and failed to realize that a response was due on or before July 24, 2009. On July 27, 2009, the Deputy Attorney General entered an appearance on behalf of Indiana

Department of Child Protective Services¹ (CPS) but not on behalf of VCPO. On July 31, 2009, the Appellees filed a motion for default judgment against VCPO. The Deputy Attorney General then entered an appearance on behalf of VCPO on August 6, 2009, together with a motion for leave to file an answer. On September 28, 2009, the trial court summarily granted the Appellees' motion for a default judgment against VCPO.

On December 10, 2009, VCPO filed a motion to set aside the default judgment, which the trial court summarily denied on March 1, 2010. On March 23, 2010, VCPO filed a motion to reconsider, motion for evidentiary hearing, or, in the alternative, motion to certify interlocutory appeal. At the hearing on VCPO's motion, a Vanderburgh County deputy prosecutor testified that the complaint was sent in a timely fashion to the Attorney General's office per VCPO's usual procedure when a complaint is filed against it. The deputy prosecutor also testified that whether to file charges in child abuse cases is within the prosecutor's discretion. Following the hearing, the trial court granted VCPO's motion to certify interlocutory appeal and denied the motion to reconsider. VCPO now appeals the denial of the motion to set aside the default judgment.

DISCUSSION AND DECISION

We give substantial deference to the trial court when evaluating its ruling on a motion to set aside a default judgment. Shane v. Home Depot USA, Inc., 869 N.E.2d 1232, 1234 (Ind. Ct. App. 2007).

¹ The Appellees named the Vanderburgh County Office of Family and Social Services as a defendant, but this party was subsequently changed by interlineation to CPS.

Pursuant to Indiana Trial Rule 60(B)(1), a default judgment may be set aside because of mistake or excusable neglect so long as the motion to set aside the default judgment is entered not more than one year after the judgment and the movant also alleges a meritorious claim or defense. When considering whether a default judgment may be set aside because of excusable neglect, the trial court must consider the unique factual background of each case. Siebert Oxidermo, Inc. v. Shields, 446 N.E.2d 332, 340 (Ind. 1983). Although the trial court should do what is “just” under the circumstances, its discretion should be exercised in light of the disfavor in which default judgments are held. Allstate Ins. Co. v. Watson, 747 N.E.2d 545, 547 (Ind. 2001).

Here, VCPO followed its usual procedure when a complaint is filed against it by forwarding the complaint to the Indiana Attorney General’s Office and requesting representation. The complaint was forwarded in a timely fashion. The Deputy Attorney General assigned to the case simply made a mistake and failed to realize that there was a July 24, 2009, deadline to respond to the complaint. On July 31—only one week after the deadline had passed, and without otherwise contacting VCPO to inquire regarding the delay—the Appellees moved for a default judgment against VCPO. Just one week later, the Deputy Attorney General filed an appearance on VCPO’s behalf and a motion to file a belated answer to the complaint.

We can only conclude that the Deputy Attorney General made an honest mistake, and emphasize that once counsel realized a mistake had been made, quickly attempted to rectify it. Indeed, the motion to file a belated answer to the complaint on VCPO’s behalf was filed only two weeks after the original due date had passed. Under these

circumstances, and given our strong preference for deciding cases on their merits, we find that VCPO has established mistake or excusable neglect pursuant to Trial Rule 60(B)(1).

Our inquiry does not end there, however. VCPO must also establish a meritorious defense by presenting 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 default to stand. Smith v. Johnston, 711 N.E.2d 1259, 1265 (Ind. 1999). A “meritorious defense” for these purposes includes a showing that liability is in doubt. Outback Steakhouse of Fla., Inc. v. Markley, 856 N.E.2d 65, 81 (Ind. 2006). Some admissible evidence must be presented to the trial court showing that the defaulted party would suffer an injustice if the judgment is allowed to stand. Whelchel v. Cmty. Hosps. of Ind., Inc., 629 N.E.2d 900, 903 (Ind. Ct. App. 1994).

The complaint against VCPO alleges that VCPO failed to file charges related to reports of child abuse. Our Supreme Court has explained that prosecutors are protected by the doctrine of sovereign immunity:

Both the Attorney General of Indiana and the local prosecuting attorneys in this State exercise certain sovereign powers. . . . We therefore conclude that since it is a prosecutor’s duty to inform the public as to his investigative, administrative and prosecutorial activities, the prosecutor must be afforded an absolute immunity in carrying out these duties.

. . . [W]e also note that the duty to inform the public can be characterized as a discretionary function and thus would fall within the absolute immunity granted under the Indiana Tort Claims Act. This decision will insure that the prosecutor will be able to exercise the independent judgment necessary to effectuate his duties to investigate and prosecute criminals and to apprise the public of his activities. . . .

. . . [W]here, as here, the [prosecutor's] acts are reasonable within the general scope of authority granted to prosecuting attorneys, no liability will attach.

Foster v. Percy, 270 Ind. 533, 537-38, 387 N.E.2d 446, 449 (1979) (internal citation omitted). Indiana Code section 34-13-3-3 provides that a governmental entity or an employee acting within the scope of the employee's employment is not liable if a loss results from the performance of a discretionary function or from the failure to enforce a law.

Here, at the hearing on VCPO's motion to reconsider the trial court's refusal to set aside the default judgment, a Vanderburgh County deputy prosecutor testified that whether to bring child abuse charges in specific cases is within the prosecutor's discretion. Because such a decision is discretionary, VCPO is protected as a matter of law by sovereign immunity from this lawsuit.² Consequently, that testimony constitutes admissible evidence that demonstrates that a different result would be reached if the case were tried on the merits. We find, therefore, that the trial court erred by refusing to set aside the default judgment entered against VCPO.

The judgment of the trial court is reversed and remanded for further proceedings.

VAIDIK, J., and BARNES, J., concur.

² Furthermore, even if, as the Appellees argue, the deputy prosecutor's testimony was untimely, Indiana Code section 34-13-3-3(8) establishes as a matter of law that a governmental entity's failure to enforce a law is immune from liability as a matter of law—no testimony was required to establish this fact.