

**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**

ALVENA PERRY,)	
)	
Appellant-Plaintiff,)	
)	
vs.)	No. 42A05-0702-CV-107
)	
RICK PATTERSON, Individually)	
and d/b/a RECORD CELLAR,)	
)	
Appellee-Defendant.)	

APPEAL FROM THE KNOX SUPERIOR COURT
The Honorable Dean A. Sobecki, Special Judge
Cause No. 42D01-0404-PL-15

September 7, 2007

MEMORANDUM DECISION - NOT FOR PUBLICATION

DARDEN, Judge

STATEMENT OF THE CASE

Alvina Perry appeals the trial court's granting of the motion to correct error filed by Rick Patterson, individually and d/b/a Record Cellar ("Patterson").

We reverse.

ISSUE

Whether the trial court improperly granted Patterson's motion to correct error.

FACTS

Perry filed a complaint for damages against Patterson on April 2, 2004. Following a bench trial, the trial court entered its final order on July 6, 2006, awarding judgment against Patterson and in favor of Perry in the amount of \$6,263.50.

On July 14, 2006, Patterson timely filed a motion to correct error, asserting that the trial court erred in calculating the award.¹ Perry filed a response on July 31, 2006. The trial court did not set a hearing on the motion to correct error.² On January 29, 2007, the trial court entered an amended order, modifying the judgment against Patterson and in favor of Perry in the amount of \$4,263.50. Perry timely filed a notice of appeal on February 20, 2007.

¹ Patterson asserted that the award should have been for \$4,2643.50.

² According to the chronological case summary ("CCS"), the trial court set the "11-9-06 motion . . . for hearing on 3-16-07 . . ." (App. 3). The CCS shows that the only motion filed on November 9, 2006, was Perry's motion for proceedings supplemental.

DECISION³

Indiana Trial Rule 53.3(A) sets forth the time at which a trial court is deemed to have ruled on a motion to correct error. Ind. Trial Rule 59(C). Trial Rule 53.3(A) provides as follows:

In the event a court fails for forty-five (45) days to set a Motion to Correct Error for hearing, or fails to rule on a Motion to Correct Error within thirty (30) days after it was heard or forty-five (45) days after it was filed, if no hearing is required, the pending Motion to Correct Error shall be deemed denied. Any appeal shall be initiated by filing the notice of appeal under Appellate Rule 9(A) within thirty (30) days after the Motion to Correct Error is deemed denied.

The belated grant of a motion to correct error “is not necessarily a nullity but rather is voidable and subject to enforcement of the “deemed denied” provision of Trial Rule 53.3(A) in the event the party opposing the motion to correct error promptly appeals.” *Homeq Serv. Corp. v. Baker*, 863 N.E.2d 1262, 1264-65 (Ind. Ct. App. 2007) (quoting *Cavinder Elevators, Inc. v. Hall*, 726 N.E.2d 285, 288 (Ind. 2000)), *reh’g denied*. Furthermore, a trial court’s belated granting of a motion to correct error may stand only “where the party whose motion was deemed denied initiates a timely appeal.” *Garrison v. Metcalf*, 849 N.E.2d 1114, 1116 (Ind. 2006), *reh’g denied*.

In this case, the trial court did not set a hearing on Patterson’s motion to correct error. Thus, the motion was deemed denied on or about August 28, 2006, or forty-five

³ Patterson did not file an appellee’s brief. “[W]e do not undertake the burden of developing arguments for the appellee.” *Damon Corp. v. Estes*, 750 N.E.2d 891, 892-93 (Ind. Ct. App. 2001). In such cases, we apply a less stringent standard of review with respect to demonstrating reversible error; accordingly, we will reverse if the appellant can establish *prima facie* error. *Id.* at 893.

days after Patterson filed it. Patterson did not timely initiate an appeal after the motion was deemed denied. Perry, however, timely appealed the belated granting of the motion.

Given the facts before us, we find that the motion to correct error was deemed denied on or about August 28, 2006 pursuant to Trial Rule 53.3(A), and the trial court's belated granting of the motion cannot stand.

Reversed.

KIRSCH, J., and MATHIAS, J., concur.