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.

ATTORNEYS FOR APPELLANT:

ARLAND T. STEIN
APRIL L. OPPER
Columbus, Ohio

IN THE
COURT OF APPEALS OF INDIANA

LARRY E. BECKER,	)	
	)	
Appellant-Defendant,	)	
	)	
vs.	)	No. 49A04-0610-CV-562
	)	
T II, LLC, as successor-in-interest to Gordon Food Service, Inc.,	)	
	)	
	)	
Appellee-Plaintiff.	)	

APPEAL FROM THE MARION SUPERIOR COURT
The Honorable John Hanley, Judge
Cause No. 49D11-0607-CC-29181

SEPTEMBER 24, 2007

MEMORANDUM DECISION - NOT FOR PUBLICATION

BARTEAU, Senior Judge

STATEMENT OF THE CASE

Defendant-Appellant Larry E. Becker appeals the trial court's denial of his motion to vacate a default judgment entered in favor of Plaintiff-Appellee TII, LLC, as successor-in-interest to Gordon Food Service, Inc. We affirm.

ISSUE

Becker raises one issue for our review, which we restate as: Whether the trial court abused its discretion when it denied Becker's motion to vacate a default judgment.

FACTS AND PROCEDURAL HISTORY

The facts and procedural history pertaining to this case are gleaned from the trial court's certified case summary and from various documents included in Becker's appendix.

On July 17, 2006, TII filed a complaint in which it stated that both Purdue Acacia Building Association, Inc. and Becker d/b/a as Purdue Acacia Building were indebted to TII. TII became the account holder as successor-in-interest to Gordon, which had provided goods and services to the defendants on account. The complaint further alleged that Purdue Acacia had been administratively dissolved at the time it purchased the goods and services.

On July 20, 2006, a summons was served upon Becker by certified mail. Thereafter, on August 15, 2006, TII filed a motion asking that a default judgment be entered against Becker d/b/a Purdue Acacia. In the motion, TII alleged that "no pleading has been delivered to plaintiff's counsel by defendant or defendant's attorney, nor any appearance entered or proposed to be entered on behalf of the defendant." Appellant's

App. at 6C. On August 16, 2006, the trial court entered default judgment against Becker d/b/a Purdue Acacia. In doing so, the trial court noted that Becker was "duly served with notice" and that "more than the requisite number of days" had passed since the filing of the complaint and that TII was entitled to recover $1,829.29 from Becker. Appellant's App. at 6C.

On August 29, 2006, Arland T. Stein entered his appearance for both Becker and Purdue Acacia. On the same day, Stein filed a motion requesting time to answer the complaint. The motion also requested that the trial court "vacate any default judgment which may have been entered against any of them in this case." Appellant's App. at 6H. The motion to vacate the default judgment was denied, and this appeal ensued.

DISCUSSION AND DECISION

Becker contends that the default judgment should be set aside pursuant to Indiana Trial Rule 60(B)(1), (7), and/or (8).[1] Our standard of review of the denial of a motion to set aside a default judgment pursuant to T.R. 60(B) is limited to determining whether the trial court abused its discretion. *Bennett v. Andry*, 647 N.E.2d 28, 31 (Ind. Ct. App. 1995). An abuse of discretion occurs where the trial court's judgment is clearly against the logic and effect of the facts and inferences supporting the judgment for relief. *Id*. A party seeking to set aside a judgment must not only establish the existence of grounds for relief under T.R. 60(B) but must also make a prima facie showing of a meritorious defense. *Id*. at 34-35.

---

[1] We note that Becker's motion to vacate may be reviewed as a 60(B) motion. *See Hric v. Hamilton*, 165 Ind.App. 562, 333 N.E.2d 322 (1975).

In the instant case, Becker failed to present the trial court with the facts to establish the existence of grounds for relief. In addition, he did not cite any facts that established a prima facie showing of a meritorious defense. Indeed, Becker cited no facts at all.

On appeal, Becker refers to two affidavits attached to his Appellant's Brief as support of his contention. However, these two affidavits were not filed with the trial court, and they cannot now be used to establish the grounds for setting aside the default judgment.

Because Becker wholly failed to cite any facts to the trial court in support of his motion, the trial court correctly denied his motion. He cannot create a new record on appeal.

CONCLUSION

The trial court did not abuse its discretion in denying Becker's motion to vacate.

Affirmed.

ROBB, J., concurring.

SULLVAN, Senior Judge, concurring with separate opinion.

IN THE
COURT OF APPEALS OF INDIANA

LARRY E. BECKER,	)	
	)	
Appellant-Defendant,	)	
	)	
vs.	)	No.49A04-0610-CV-562
	)	
T II, LLC, as successor-in-interest to Gordon Food Service, Inc.,	)	
	)	
	)	
Appellee-Plaintiff.	)	
	)	

Sullivan, Senior Judge, concurring

I concur and in doing so note that apparently, although not a matter submitted to the trial court and therefore not properly before us, the claim of T II was not satisfied by payment from The Purdue Acacia Building Assn., Inc. until after the default judgment had already been entered against both defendants.

Appellant Becker is not without recourse, however. If indeed, the judgment has been fully satisfied by Acacia's payment, Becker may seek proof of satisfaction of the judgment pursuant to Indiana Trial Rule 67 (B) and I.C. 34-54-6-1.