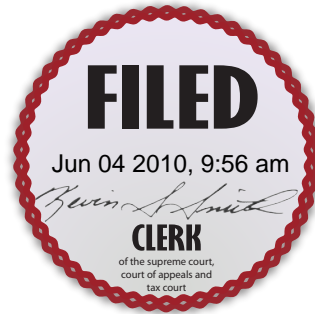


Pursuant to Ind. Appellate Rule 65(D), this Memorandum Decision shall not be regarded as precedent or cited before any court except for the purpose of establishing the defense of res judicata, collateral estoppel, or the law of the case.



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**IN THE
COURT OF APPEALS OF INDIANA**

SUSAN JIOSA and DAVID JIOSA,

Appellants/Plaintiffs,

vs.

HUNTINGTON COUNTY
BOARD OF COMMISSIONERS,

Appellee/Defendant.

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No. 90A02-0911-CV-1125

APPEAL FROM THE WELLS CIRCUIT COURT
The Honorable David L. Hanselman, Sr., Judge
Cause No. 90C01-0712-CT-11

June 4, 2010

MEMORANDUM DECISION - NOT FOR PUBLICATION

CRONE, Judge

Case Summary and Issue

Susan and David Jiosa appeal the trial court's denial of their motion to correct error and motion for relief from judgment of summary dismissal of their case against the Huntington County Board of Commissioners ("the County"). The dispositive issue is whether the trial court abused its discretion in entering a sua sponte summary dismissal of the Jiosas' case based on their counsel's failure to appear for an initial case management conference. We reverse and remand.

Facts and Procedural History

On August 24, 2007, the Jiosas filed a complaint against the County in Huntington Superior Court based on injuries that Susan allegedly sustained in a slip and fall on the courthouse steps. On October 29, 2007, the Jiosas filed a motion for change of venue. On January 7, 2008, the Huntington Superior Court granted the motion, and venue was transferred to Wells Circuit Court.

During the pendency of the action, the Jiosas relocated to Georgia. On September 6, 2007, the County served the Jiosas with requests for production and interrogatories.¹ On March 24, 2008, the County filed a motion to compel, and the trial court ordered the Jiosas to respond to the written discovery within fifteen days of April 2, 2008. The Jiosas provided their responses on April 17, 2008; however, the interrogatories were unsigned. The Jiosas

¹ The interrogatories were extensive, consisting of fifty-eight questions, each with numerous subparts, for a total of 231 questions.

were scheduled to be deposed on September 26, 2008, but the County canceled, and the depositions were eventually rescheduled for September 11, 2009.

On February 17, 2009, the Jiosas filed a motion for case management conference. The trial court scheduled the conference for 10:30 a.m. on August 17, 2009. The office of the Jiosas' counsel, Robert Plantz, is nearly three hours from Wells County. On Friday, August 14, 2009, Plantz encountered car trouble, which left him concerned that his vehicle was not in suitable condition to make the three-hour commute for the case management conference. That afternoon, he contacted the trial court to request permission to participate in Monday's conference telephonically. As he awaited the trial court's response, he called opposing counsel, Andrew Teel, who expressed that he had no objection to Plantz's telephonic participation. Plantz provided Teel with his cell phone number.

On the morning of the scheduled conference, Teel informed the trial court of counsel Plantz's vehicle troubles and informed him of Plantz's request to participate telephonically. The trial court summarily dismissed the Jiosas' case sua sponte, citing Indiana Trial Rule 16(K)(2). On August 26, 2009, the Jiosas filed a motion to correct error and motion for relief from judgment. On September 25, 2009, the County filed a verified response in opposition to the Jiosas' motions. On October 2, 2009, the Jiosas filed a reply in support of their motions, to which the County filed a surreply on October 8, 2009. On November 12, 2009, the trial court set all pending motions for hearing on Friday, December 11, 2009. However,

by that date, the Jiosas' motions were deemed denied by operation of law.² On November 12, the Jiosas filed a notice of appeal. On November 19, 2009, the County filed a notice of divestment of subject matter jurisdiction due to the clerk's completion of the record for appeal. Additional facts will be provided as necessary.

Discussion and Decision

On appeal, the Jiosas contend that the trial court erred in summarily dismissing their case. In entering its sua sponte summary dismissal, the trial court cited Indiana Trial Rule 16(K), which provides in pertinent part:

If without just excuse or because of failure to give reasonable attention to the matter, no appearance is made on behalf of a party at a pre-trial conference ... the court may order either one or both of the following:

- (1) The payment by the delinquent attorney or party of the reasonable expenses, including attorney's fees, to the aggrieved party; or
- (2) *Take such other action* as may be appropriate.

(Emphasis added.) "Such other action" has been held to include dismissal of the action under Indiana Trial Rule 41(E). *Grant v. Wal-Mart Stores, Inc.*, 764 N.E.2d 301, 303 (Ind. Ct. App. 2002). Trial Rule 41(E) addresses the failure to prosecute civil actions or comply with rules and provides in pertinent part,

Whenever there has been a failure to comply with these rules or when no action has been taken in a civil case for a period of sixty [60] days, the court, on motion of a party or on its own motion *shall order a hearing* for the purpose of dismissing such case. The court shall enter an order of dismissal at plaintiff's costs if the plaintiff shall not show sufficient cause at or before such hearing.

² See Ind. Trial Rule 53.3(A) (stating motion to correct error shall be deemed denied if court fails to rule on motion within forty-five days after it was filed).

(Emphasis added.)

We review a trial court's decision to dismiss a case under Trial Rule 41(E) for an abuse of discretion. *Beard v. Dominguez*, 847 N.E.2d 1054, 1058 (Ind. Ct. App. 2006), *trans. denied*. Likewise, we apply an abuse of discretion standard when reviewing the trial court's ruling on a motion to correct error. *Franciose v. Jones*, 907 N.E.2d 139, 145 (Ind. Ct. App. 2009), *trans. denied*. An abuse of discretion occurs when the trial court's decision is against the logic and effect of the facts and circumstances before it. *Beard*, 847 N.E.2d at 1058.

The plain language of Trial Rule 41(E) requires that the trial court "shall order a hearing for the purpose of dismissing such case." *See Grant*, 764 N.E.2d at 303 (finding abuse of discretion when trial court dismissed plaintiff's case under Trial Rule 16(K)(2) based on Trial Rule 41(E) failure to prosecute without first holding hearing to allow plaintiff to show sufficient cause why case should not be dismissed). Here, the scheduled conference was a case management conference, and it was held in response to the Jiosas' motion. After the Jiosas' case was dismissed, they filed a motion to correct error pursuant to Indiana Trial Rule 59. In the motion to correct error, counsel Plantz provided documentation tending to support his claim that his reason for missing the hearing was car trouble and that he contacted both the trial court and opposing counsel before the hearing. He could have filed a motion for continuance, but instead sought permission to participate telephonically. When counsel made his request, he was acting on the belief that he would be missing a case management

conference;³ thus, he was never afforded any opportunity to show sufficient cause why his clients' case should not be dismissed. Under Trial Rule 16(K)(1), the trial court could have imposed a monetary sanction for such action if it determined that such action amounted to unjust excuse or unreasonable inattention to the matter. Instead, the court simply dismissed the case. Moreover, we note that one of the factors we balance⁴ in analyzing whether a trial court has abused its discretion in entering dismissal for failure to prosecute is the extent to which the plaintiffs would be charged based not on their own acts but the acts of their

³ In this regard, we are unpersuaded by the County's reliance on *In re Martin*, 350 B.R. 812 (U.S.B.C.N.D. Ind. 2006). There, the commercial lender filed a motion for relief from stay, and the bankruptcy court set a trial for purposes of ruling on the motion. Having learned from her client that the obligation had been paid in full, lender's counsel filed a last-minute motion to withdraw the previous motion. However, with the matter left unresolved, lender's counsel opted not to appear for trial and instead notified the trustee of her intention not to attend. The bankruptcy court found counsel's action inexcusable, and noted, the "expectations are really quite simple: If the court needs to rule on something you have filed, you need to be there." *Id.* at 817. Here, the missed proceeding was not a trial or even a hearing to rule on a pending motion; it was merely an initial case management conference. Counsel Plantz had made a request to the court for telephonic participation, had provided opposing counsel with his telephone number, and was unaware that a summary dismissal was at stake.

⁴ In analyzing whether a trial court has abused its discretion by entering a Trial Rule 41(E) dismissal for failure to prosecute, we generally balance the following factors:

(1) the length of the delay; (2) the reason for the delay; (3) the degree of personal responsibility on the part of the plaintiff; (4) the degree to which the plaintiff will be charged for the acts of his attorney; (5) the amount of prejudice to the defendant caused by the delay; (6) the presence or absence of a lengthy history of having deliberately proceeded in a dilatory fashion; (7) the existence and effectiveness of sanctions less drastic than dismissal which fulfill the purposes of the rules and the desire to avoid court congestion; (8) the desirability of deciding the case on the merits; and (9) the extent to which the plaintiff has been stirred into action by a threat of dismissal as opposed to diligence on the plaintiff's part The weight any particular factor has in a particular case appears to depend upon the facts of that case.

Rueth Dev. Co. v Muenich, 816 N.E.2d 880, 884 (Ind. Ct App. 2004) (citations and internal quotation marks omitted), *trans. denied* (2005).

attorney. This is a classic case of penalizing the plaintiffs for the acts of their attorney, and summary dismissal is a penalty that due process cannot endure.⁵

As a final consideration, we address the County's request that we impose attorneys' fees. Indiana Appellate Rule 66(E) provides that we may assess such fees if the appeal is frivolous or filed in bad faith. However, our reversal clearly indicates that we find no such frivolity or bad faith on the part of the Jiosas. Thus, we deny the County's request.

In sum, the trial court abused its discretion in summarily dismissing the Jiosas' case as a sanction for counsel's failure to personally attend the case management conference. As such, the trial court abused its discretion in denying the Jiosas' motion to correct error, which was based on the dismissal. Accordingly, we reverse and remand for further proceedings.

Reversed and remanded.

BAKER, C.J., and DARDEN, J., concur.

⁵ To the extent the County argues that counsel Plantz's failure to attend the conference was based on his fear that the Jiosas would not pay him the fees associated with such travel, such issue would be a proper subject for a Trial Rule 41(E) hearing to show cause. Also, to the extent the County argues invited error, it is difficult to see how the Jiosas could have requested a Trial Rule 41(E) hearing prior to dismissal when the trial court summarily dismissed their case sua sponte. The Jiosas did file motions under Trial Rules 59 and 60 following the dismissal. Their statement in their reply to the County's opposition to those motions that "there is not much else that could be said at a Trial Rule 41(E) Hearing that won't already be said in the various Motions, Responses, and Replies that have been necessary following dismissal," Appellant's App. at 64, does not obviate the hearing requirement, especially since the trial court did not specifically rule against them on the motions, but the motions were deemed denied due to the lapse of time. Ind. Trial Rule 53.3.