MEMORANDUM DECISION

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IN THE COURT OF APPEALS OF INDIANA

Pekin Insurance Company and American Eagle Tree Service, LLC,

Appellants-Plaintiffs,

v.

Grove U.S. L.L.C.,

Appellee-Defendant.

December 28, 222

Court of Appeals Case No. 22A-CT-2208

Appeal from the Warrick Superior Court

The Honorable Amy S. Miskimen, Judge

Trial Court Cause No. 87D02-1909-CT-1444

Bradford, Chief Judge.

Case Summary

[1] Pekin Insurance Company and American Eagle Tree Service, LLC (collectively, "Appellants"), filed suit against Grove U.S. LLC ("Grove") alleging negligence, strict-products-liability, and breach-of-warranty claims after a boom truck ("the Truck"), which had been manufactured by Grove and purchased by American Eagle, failed. Following approximately sixteen months of inactivity by Appellants, Grove filed a motion to dismiss for failure to prosecute. The trial court denied Grove's motion after Appellants asserted that they would be in a position to respond to certain discovery requests by two specific dates. However, despite being ordered to provide complete responses by their proffered dates, Appellants failed to do so. Grove renewed its motion to dismiss and, after considering briefing submitted by the parties, the trial court granted the motion. Appellants appeal, arguing that the trial court abused its discretion in granting Grove's renewed motion. We affirm.

Facts and Procedural History

[2] On September 3, 2019, Appellants filed a complaint alleging negligence, strict-products-liability, and breach-of-warranty claims against Custom Truck and Equipment LLC; Manitowoc Crane Companies, LLC; and the Manitowoc Company, Inc. (collectively, "the original Defendants"). In their complaint, Appellants alleged

> 6. That at all times referred to herein, Pekin issued a policy of insurance to American Eagle, which policy insured [the

> Truck].…
> 7. That on or about September l2, 2017, the crane turret of [the Truck] failed, causing damage to the truck and its components.
> 8. That as a result of this failure, American Eagle incurred damages to [the Truck] and its components, loss of use of [the Truck], additional financing expense, loss of income and other damages, which damages were later determined to be in excess of $250,000.00.
> 9. Pekin, pursuant to the terms and conditions of the aforementioned insurance policies, tendered insurance benefits in excess of $200,000.00 to its insureds, American Eagle, relative to the September 12, 2017 incident.

Appellants' App. Vol. II p. 13. In claiming negligence, Appellants alleged that the original Defendants had supplied American Eagle with a "dangerously defective product" and failed to (1) "properly design, engineer, manufacture, fabricate, assemble, supply, maintain, service, repair and sell [the Truck]…;" (2) "adequately, properly and safely inspect and/or test [the Truck] and to make necessary corrections and adjustments thereto…;" (3) "properly inspect [the Truck] for defects in its work prior to placing [the Truck] into the stream of commerce;" and (4) "exercise due care under the circumstances." Appellants' App. Vol. II pp. 14–15. Appellants further alleged that

> [t]he damage, destruction and loss of property suffered by American Eagle was caused by a defect in [the original] Defendants' product, including [the original] Defendants' failure to warn, advise or instruct as to the hazards associated with its product, [the Truck], for which [the original] Defendants and their related companies and ventures are strictly liable.

Appellants' App. Vol. II p. 15. Appellants also alleged that the original Defendants had sold the Truck to American Eagle "on May 8, 2017 with expressed and implied warranties" and that the original Defendants "have materially breached the aforementioned express and implied warranties." Appellants' App. Vol. II p. 16. On January 6, 2020, the trial court granted Appellants' unopposed motion for interlineation, naming Grove as the proper defendant.

[3] On December 1, 2020, Appellants designated Joshua "Josh" Belt as their expert. In doing so, Appellants asserted that

> Josh Belt will provide an opinion as to the cause of the failure of the weld attaching the outrigger to the torsion box of [the Truck]. Mr. Belt's opinions are based, among many things, on his experience, inspection of [the Truck], inspection of the torsion box and outrigger, witness statements, review of any discovery responses, depositions and/or other documents exchanged during the course of discovery.

Appellants' App. Vol. II p. 18.

[4] On April 27, 2022, Grove filed a motion to dismiss for failure to prosecute. In this motion, Grove alleged that

> 1. On September 3, 2019, [Appellants] filed their Complaint against Grove, claiming negligence, strict products liability, and breach of warranty.
> 2. Following the filing of Grove's notice of automatic enlargement of time to respond to the Complaint, Grove timely answered the Complaint on November 1, 2019.

3. The Court has held three telephonic status conferences in this action: the first on May 19, 2020, the second on March 11, 2021, and the third on October 25, 2021. A fourth is currently set for April 28, 2022.
4. At the status conference on May 19, 2020, the Court set December 1, 2020 as [Appellants'] deadline to designate experts.
5. On June 12, 2020, Grove served [Appellants] with Grove's First Set of Interrogatories, Requests for Production of Documents, and Requests for Admission.
6. [Appellants] submitted their expert designation on December 1, 2020.
7. [Appellants] have not taken any action in this case since designating their expert on December 1, 2020.
8. Despite identifying their expert, [Appellants] have never responded to Grove's First Set of Interrogatories, including but not limited to Grove's interrogatory directed to the substance of the opinions to which [Appellants'] expert is expected to testify.

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11. [Appellants] have failed to diligently prosecute this action by failing to take any action in this case for over 16 months—since December 1, 2020.

Appellants' App. Vol. II pp. 21–22.

[5] In response, Appellants asserted that

1. The underlying case involves a products liability claim wherein the [Appellants] have alleged that [Grove] sold a product, i.e. [the Truck], which truck was sold with a defect. More specifically, [Appellants] contend that [Grove's] product was sold with defective welds, which welds was performed on a turret to which the [T]ruck's boom was mounted.
2. [Appellants] timely disclosed Joshua "Josh" S. Belt, B.Sc., a materials engineer with Colorado Metallurgical Services in Aurora, Colorado, as their expert. Josh Belt needs to examine and test the turret and its welds in lab environment in Aurora,

Colorado.

3. [The Truck] was damaged in Warrick County, Indiana and then transported to the original seller of the truck, which seller is located in Kansas City, MO, for an evaluation of damages. In order for the turret to be shipped to Colorado for the lab exam, the boom of the [T]ruck needed to be removed, thus allowing the turret to be removed from the truck bed. Unfortunately, the two (2) truck repair facilities located in the Kansas City area, which had the capability of removing the boom and turret, declined to perform such repairs. As such, [Appellants] are required to move the truck to Walter Payton Power Equipment in Lebanon, Indiana. However, to make [the Truck] roadworthy for the 8-hour trip from Odessa, Missouri to Lebanon, Indiana, the [T]ruck required repairs to its electrical system, replacement of batteries and repairs to the fuel system. The fuel system required the replacement of fuel lines and failed check valve, which repair parts were not readily available due to shipping issues resulting from the pandemic.

4. [Appellants] are presently in a position to provide [Grove] with complete discovery responses on or before Monday, **May 9, 2022**. However, these forthcoming responses are not going to address any discovery requests directed to [Appellants'] anticipated expert testimony. [Appellants] anticipate the requisite lab exam can be completed and that [Appellants] can provide full expert disclosures within the next ninety (90) days, or before **August 1, 2022**.

Appellants' App. Vol. II pp. 25–26 (bold in original). Appellants requested that the trial court deny Grove's motion to dismiss and order them "to respond to [Grove's] outstanding discovery requests on or before May 9, 2022 and further order [them] to provide complete responses to [Grove's] expert discovery requests on or before August 1, 2022." Appellants' App. Vol. II p. 26. Following a telephonic hearing, the trial court denied Grove's motion to

dismiss and ordered Appellants to respond to Grove's discovery requests by the dates proposed by Appellants.

[6] On August 3, 2022, Grove filed a renewed motion to dismiss for failure to prosecute, in which it alleged that

> 6. [Appellants] failed to respond to Grove's outstanding discovery requests by May 9, 2022 as ordered by the Court.
> 7. Instead, on August 1, 2022, [Appellants'] counsel electronically served American Eagle Tree's Response to Grove's First Set of Interrogatories.…
> 8. American Eagle Tree's discovery responses are not complete but rather include several indications that further responses are still anticipated.… Of note, American Eagle Tree did not provide any substantive response to Grove's Interrogatory No. 11, which is directed to discovery of "the substance of the opinions to which [Appellants'] expert is expected to testify and the facts on which the opinions are based."
> 9. Despite the Court's unambiguous June 21, 2022 Order that required [Appellants] to serve complete expert disclosures on or before August 1, 2022, as of the time of this filing, [Appellants] have not provided Grove with any discovery on the substance of the opinions to which [Appellants'] expert is expected to testify.
> 10. As of the time of this filing, [Appellants'] counsel has not contacted Grove's counsel to even attempt to schedule an inspection or testing to support any opinions to which [Appellants'] expert may testify.
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> 13. [Appellants] have failed to diligently prosecute this action within the meaning of Rule 41(E). [Appellants] failed to take any action in this case since December 1, 2020, necessitating Grove's April 27, 2022 Motion to Dismiss for Failure to Prosecute. [Appellants] then failed to comply with either the Court's Order on the record at the May 4, 2022 hearing or the Court's written

> Order dated June 21, 2022, necessitating this renewal of Grove's motion.

Appellants' App. Vol. II pp. 31–32.

[7] In their response to Grove's renewed motion, Appellants asserted that "due to a number of circumstances, [Belt's] inspection has not been completed, nor do [Appellants] anticipate completing this inspection in the near future." Appellants' App. Vol. II p. 43. Appellants further asserted that Belt would be "unable to opine as to the cause of [the] failure of the subject welds, i.e. poor material choice, slag inclusions, porosity, undercut, weld crack, incomplete fusion incomplete penetration, spatter, defective materials, etc." Appellants' App. Vol. II p. 44. Despite their acknowledgment that Belt would be unable to testify as to the specific cause of the failure, Appellants asserted that Grove's renewed motion should be denied because they "should be able to meet their requisite burden of proof … without the need to conduct a lab exam of the subject welds." Appellants' App. Vol. II p. 46. On August 16, 2022, the trial court issued an order granting Grove's renewed motion to dismiss.

Discussion and Decision

[8] Appellants contend that the trial court abused its discretion in granting Grove's renewed motion to dismiss. "We will reverse a Trial Rule 41(E) dismissal for failure to prosecute only in the event of a clear abuse of discretion, which occurs if the decision of the trial court is against the logic and effect of the facts and circumstances before it." *Belcaster v. Miller*, 785 N.E.2d 1164, 1167 (Ind. Ct.

App. 2003), *trans. denied*. "We will affirm if there is any evidence that supports the decision of the trial court." *Id.*

[9] Indiana Trial Rule 41(E) provides that

> **Failure to Prosecute Civil Actions or Comply with Rules.** 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. Dismissal may be withheld or reinstatement of dismissal may be made subject to the condition that the plaintiff comply with these rules and diligently prosecute the action and upon such terms that the court in its discretion determines to be necessary to assure such diligent prosecution.

(Bold in original). "The purpose of this rule is 'to ensure that plaintiffs will diligently pursue their claims. The rule provides an enforcement mechanism whereby a defendant, or the court, can force a recalcitrant plaintiff to push his case to resolution.'" *Belcaster*, 785 N.E.2d at 1167 (quoting *Benton v. Moore*, 622 N.E.2d 1002, 1006 (Ind. Ct. App. 1993)). "'The burden of moving the litigation is upon the plaintiff, not the court. It is not the duty of the trial court to contact counsel and urge or require him to go to trial, even though it would be within the court's power to do so.'" *Benton*, 622 N.E.2d at 1006 (quoting *State ex rel. Murray v. Heithecker's Estate*, 167 Ind. App. 156, 159, 338 N.E.2d 313, 315 (1975)). "Courts cannot be asked to carry cases on their dockets indefinitely and the rights of the adverse party should also be considered" as an adverse

party should not be left with a lawsuit hanging over its head indefinitely. *Belcaster*, 785 N.E.2d at 1167.

[10] In arguing that the trial court abused its discretion in granting Grove's renewed motion to dismiss, Appellants contend that (1) the trial court was required, but failed, to conduct a hearing before ruling on the motion and (2) "dismissal was unwarranted, as lesser and more effective sanctions were available" to the trial court. Appellants' Br. p. 9. For its part, Grove contends that (1) the trial court was not required to conduct a second hearing before ruling on its renewed motion and (2) dismissal was warranted based on the facts and circumstances of this case.

I. Requirement to Conduct a Hearing

[11] "The plain language of [Trial Rule] 41(E) requires the trial court to order a hearing once a party has moved to dismiss a case for failure to prosecute." *Metcalf v. Estate of Hastings*, 726 N.E.2d 372, 374 (Ind. Ct. App. 2000), *trans. denied*. It is undisputed that the trial court conducted a hearing on Grove's initial motion to dismiss. Appellants argue, however, that the requirement to conduct a hearing applies both to the initial motion to dismiss and to the renewed motion, meaning that the trial court was required to hold a second hearing. For its part, Grove argues that "[n]owhere in the plain reading of [Trial Rule 41(E)] is the trial court required to conduct multiple hearings, including when a previously-filed Motion to Dismiss (for which a hearing was already held) is merely renewed." Appellee's Br. p. 16.

[12] Appellants have not pointed to any authority indicating that Grove's renewed motion constituted a new motion to dismiss that would necessitate a second hearing. Grove, on the other hand, cites to our decision in *Baker Machinery, Inc. v. Superior Canopy Corp.*, 883 N.E.2d 818 (Ind. Ct. App. 2008), *trans. denied*, in support of its belief that the trial court was not required to conduct a second hearing.

[13] We find our decision in *Baker Machinery*, to be instructive. The underlying lawsuit in *Baker Machinery* was filed in March of 2001. 883 N.E.2d at 819. Multiple delays in getting to trial ensued, based at least in part on plaintiff's lack of funds to pursue the case. *Id.* at 820. On February 8, 2007, the trial court issued an order entitled "'Trial Rule 41(E) Notice and to Dismiss for Want of Prosecution,' directing Baker to show cause why [the case] should not be dismissed." *Id*. Baker submitted a written request for the case to continue and the trial court scheduled a telephonic case management conference. *Id.* On April 25, 2007, Superior filed a motion to reconsider. *Id.* On May 10, 2007, the trial court granted Superior's motion to reconsider. *Id.* at 820–21.

[14] On appeal, the parties contested the so-called triggering prompt. We determined that "the February 8 show-cause order represented a valid T.R. 41(E) prompt." *Id.* at 823.

> Simply put, the decision whether to dismiss Baker's lawsuit for failure to prosecute was raised sua sponte by the trial court via the court's February 8, 2007 show-cause order. Although the ultimate relief sought in Superior's subsequent motion to reconsider was indeed a T.R. 41(E) dismissal, that request related

> back to the trial court's show-cause order and did not constitute a new and independent T.R. 41(E) motion. In granting the motion to reconsider, the trial court's T.R. 41(E) dismissal represented a reconsideration of its earlier decision, not a decision on a new and separate motion to dismiss filed by Superior and Mega. Accordingly, the time-line requirement for T.R. 41(E) dismissal in this case was satisfied. That is, the T.R. 41(E) prompt was filed before Baker resumed prosecution. There is no procedural impediment to dismissal under T.R. 41(E).

Id.

[15] Similarly, in this case, we do not find Grove's renewed motion to be a new and separate motion to dismiss, but rather that it related back to Grove's initial motion. Review of the record reveals that the allegations in both Grove's initial motion and its renewed motion were the same, except for Grove's added claim that Appellants did not comply with the timelines for providing complete responses to Grove's discovery requests set forth in trial court's initial order, dates which, again, were proposed by Appellants themselves. Likewise, Appellants did not raise new arguments in their response, apart from indicating that their expert would not be able to testify as to the exact cause of the failure but that such testimony was not likely necessary for them to prove their case. The renewed motion and response can therefore reasonably be looked at as mere extensions of the parties' prior filings. As such, we conclude that the hearing on Grove's initial hearing was sufficient to satisfy the hearing requirement set forth in Trial Rule 41(E).

II. Whether the Trial Court Abused its Discretion in Dismissing the Lawsuit

[16] Courts of review generally balance several factors when determining whether a trial court abused its discretion in dismissing a case for failure to prosecute. These factors include: (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. *Lee v. Friedman*, 637 N.E.2d 1318, 1320 (Ind. Ct. App. 1994). "The weight any particular factor has in a particular case appears to depend upon the facts of that case." *Id.* However, a lengthy period of inactivity may be enough to justify dismissal under the circumstances of a particular case, especially if the plaintiff has no excuse for the delay. *Id.*

Belcaster, 785 N.E.2d at 1167.

[17] The first four *Belcaster* factors weigh against Appellants. Appellants have claimed since early on in this case that it was necessary for their expert to examine the Truck's components to determine the cause of the failure. In fact, Appellants "concede that the underlying matter was not set for a jury trial setting at [their request] in order to permit [them] to conduct the lab exam and testing of the turret welds which failed on September 21, 2017." Appellants' Br.

p. 11. Thus, they further concede that "the approximate three (3) years the underlying matter was pending before the Trial Court, without a jury trial date, was at the request of the [Appellants]." Appellants' Br. p. 11. For its part, Grove argues that

> [d]espite the fact that Appellants' expert first inspected the truck at issue well over four years ago in March of 2018, at which time the condition/location of the [Truck] (and therefore the welds) was well known to Appellants, Appellants have not in the intervening four years arranged for the subject welds to be shipped to [their] expert's Colorado facility for lab testing to determine the specific defect or the cause of the alleged failure/defect.

Appellee's Br. p. 15.

[18] Appellants seem to acknowledge that it was incumbent upon them to make sure that the testing, which, up until recently, they have indicated was necessary to prove their case, was completed. However, Appellants now claim that the testing is no longer necessary as they believe that they may be able to prove their case without any expert testimony relating to the cause of the equipment failure. If true, the delay in proceeding to trial was for naught. Further, while there may have been extenuating circumstances that made it more difficult for Appellants to deliver the Truck's components to their expert for testing, Appellants, and Appellants alone, were responsible for making the Truck and its components available to their expert in a timely manner so as not to cause an unreasonable delay in the underlying lawsuit.

[19] As for the fifth factor, Appellants argue that Grove "has not been prejudiced by [their] inability to complete the lab examination and testing for the turret welds" because they "previously and timely disclosed" their expert; "have identified, by name and address, all American Eagle employees that witnessed the incident" and who are expected to testify; and "have provided a summary of anticipated testimony of all identified witnesses." Appellants' Br. p. 12. For its part, Grove argues that

> [g]iven that this case has now lingered for more than three years, it is axiomatic that Grove has suffered prejudice as a result of the delay. Evidence has become stale, witnesses are likely unavailable, and Grove has expended considerable time and resources to get the discovery answers Appellants provided only after a court ordered them to do so (and even now, the answers fail to provide the requested information).

Appellee's Br. p. 15. Given the amount of time that has passed since the initial incident, which again occurred on September 12, 2017, we agree that Grove has been prejudiced by the fact that over five years have passed, meaning evidence has likely gone stale and memories have undoubtedly faded. As such, this factor also weighs against Appellants.

[20] We also do not find that the sixth, eighth, or ninth factors weigh heavily in favor of Appellants. The sixth factor clearly weighs in favor of Grove as the record suggests that Appellants have acted in a dilatory fashion throughout the proceedings, despite having taken some effort to provide Grove with some discovery at various points in the litigation. Also, while we generally do prefer

to decide cases on their merits, the trial court need not endlessly keep cases open on its docket in the hopes that the parties will, someday, be prepared to move forward with the case. Finally, while Appellants were stirred into action by Grove's motion to dismiss, they subsequently failed to comply with the trial court's order to provide Grove with all of the requested discovery by the deadline which, again, they had proposed.

[21] As for the seventh factor, Appellants argue that it was improper for the trial court to dismiss their case because "a lesser, and equally effective, sanction is available to the trial court." Appellants' Br. p. 13. Specifically, Appellants assert that

> [t]he trial court can bar [Appellants] from conducting the lab exam and testing, bar [Appellants] from bringing forth any expert testimony as to a specific defect for the failure of the turret welds, and bar [Appellants] from calling any witnesses not previously disclosed to [Grove] as of August 1, 2022.

Appellants' Br. p. 13. For its part, Grove asserts that Appellants could not prove their case without expert testimony because "[t]his case presents more complicated issues … [and] would require a law juror to sort through highly-technical potential causes contributing to alleged weld failures[.]" Appellee's Br. p. 20. Thus, Grove argues that "[e]xpert assistance is necessary to arrive at a theory of causation." Appellee's Br. p. 20. However, we need not determine whether Appellants could potentially prove their case without expert testimony because the trial court was not required to impose a penalty that was less severe than dismissal. *See Belcaster*, 785 N.E.2d at 1168 (providing that the trial court

need not impose a sanction less severe than dismissal where the record of dilatory conduct is clear).

[22] In this case, Appellants acted in a dilatory fashion for more than sixteen months. They then continued to proceed in a dilatory fashion, failing to comply with court orders, even after being given a second chance to provide complete responses to Grove's previously-tendered discovery requests after Grove first moved for dismissal. Given the record before us, we cannot say that the trial court abused its discretion in granting Grove's renewed Trial Rule 41(E) motion to dismiss for failure to prosecute.

[23] The judgment of the trial court is affirmed.

Bailey, J., and Pyle, J., concur.