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IN THE
COURT OF APPEALS OF INDIANA

JAMIE WICKER, Appellant/Plaintiff/Intervening Defendant/Counterclaim Plaintiff, vs. RODNEY McINTOSH, REBECCA GOEBEL, RONNIE "BUD" McINTOSH, RONALD "RONNIE" McINTOSH, INDIANA HOME CENTER, INC., AFFORDABLE HOMES, INC., and STATE FARM MUTUAL AUTOMOBILE INSURANCE COMPANY,	)	No. 72A01-0802-CV-70

Appellees/Defendants/Intervening Defendants,	)
and	)
UNITED FARM FAMILY MUTUAL INSURANCE COMPANY,	)
Appellee/Intervening Plaintiff.	)

APPEAL FROM THE SCOTT CIRCUIT COURT
The Honorable Roger Duvall, Judge
Cause No. 72C01-0508-CT-25

September 26, 2008

MEMORANDUM DECISION - NOT FOR PUBLICATION

BRADFORD, Judge

Appellant/Plaintiff/Intervening Defendant/Counterclaim Plaintiff Jamie Wicker appeals from the trial court's dismissal of his claim, for failure to prosecute, against Appellees/Defendants/Intervening Defendants Rodney McIntosh, Rebecca Goebel, Ronnie "Bud" McIntosh, Ronald "Ronnie" McIntosh, Indiana Home Center, Inc., Affordable Homes, Inc., and State Farm Mutual Automobile Insurance Company. We reverse and remand.

FACTS

According to Wicker's complaint, on September 13, 2003, he was riding in a golf cart driven by Rodney and/or Rebecca when he was thrown from the cart, suffering severe and permanent injury. (Appellant's App. 26). On August 23, 2005, Wicker filed suit, alleging

negligence against Rodney, Rebecca, Bud, Ronnie, Indiana Home Center, and Affordable Homes, and seeking to avail himself of the uninsured/underinsured motorist coverage he had with State Farm. (Appellant's App. 26-27). On April 3, 2006, United Farm Family Mutual Insurance Company ("Farm Bureau") moved to intervene on the basis that it was the liability carrier for Rodney, Rebecca, Bud, and Ronnie. (Appellant's App. 162-63).

On August 23, 2007, State Farm filed a motion to dismiss Wicker's claim for failure to prosecute, a motion in which Rodney, Rebecca, Bud, and Ronnie joined. (Appellant's App. 5). The motion to dismiss provided in part as follows:

> 1. On August 23, 2005, plaintiff filed his complaint. Defendants filed answers or motions to dismiss.
> 2. On April 2, 2006, Intervener Farm Bureau Insurance filed its motion to intervene which was granted. On June 28, 2006, the plaintiff filed its answer and counterclaim.
> 3. On August 21, 2006, the Court granted a motion to continue the hearing on the Motion to Dismiss.
> 4. In September, 2006, the parties reached an agreement to dismiss several defendants. On September 18, an Agreed Order of Dismissal was sent to plaintiff's counsel, but it has never been returned, despite repeated requests.
> 5. For almost one year, plaintiff has taken no action in this case.

Appellant's App. pp. 33-34.

On September 9, 2007, Wicker filed a response and objection to State Farm's motion to dismiss. (Appellant's App. 5). On November 19, 2007, Wicker's trial counsel Kevin Sciantarelli submitted an affidavit in support of Wicker's objection. The affidavit read in part as follows:

> 2. This is a personal injury action wherein the alleged tortfeasor's liability carrier has intervened for a declaration of rights as to coverage. Resolution of this matter hinges on resolution of the declaration of rights case. During the deposition of the defendant, the undersigned made requests for the

defendant's application for insurance and documents received from the insurer. The undersigned has no record of those documents being produced. (See attached Exhibit 1).

3. Counsel for Plaintiff recently requested the deposition of a representative of the liability carrier for purposes of conducting necessary discovery on the declaration of rights/coverage issues. No response has been received as yet. (See attached Exhibit 2).

4. The undersigned previously agreed to dismiss all the defendants except State Farm and Rodney McIntosh. It was only through oversight that an order was never entered and the undersigned has remedied that oversight by signing the order. (See attached Exhibit 3).

5. The defendant's assertion that no action has been taken in this case for "almost one year" is incorrect. In May and April of this year Plaintiff responded to discovery requests by executing requested medical records authorizations and requested various records from the defendants that had been subpoenaed. (See attached Exhibit 4).

6. In July of this year the undersigned took over responsibility for a large volume of cases after the resignation of lead attorney Diane Sonne. Some of those cases had imminent trial dates. In the following months the undersigned has reassigned a large number of these cases to other attorneys in the firm. The undersigned intends to take the deposition of a representative of the liability carrier and file a dispositive motion on the coverage issue and otherwise prosecute the tort claim as appropriate after the coverage issue is resolved.

Appellant's App. pp. 36-37. On December 10, 2007, after a hearing, the trial court dismissed Wicker's claim in an order that provides as follows:

> This case comes before the Court on November 19, 2007 upon the motions of the various Defendants to dismiss this action for failure to prosecute claim under Rule 41(E) of the Indiana Rules of Trial Procedure. The Court has received the arguments of counsel and reviewed the motions and responses of the parties. Further the Court has considered the agreement to dismiss the majority of the Defendants and the subsequent failure on the part of the Plaintiff to complete that agreement. The Court has also reviewed the case history. Having taken the matter under advisement,
>
> IT IS THEREFORE ORDERED that this cause of action is dismissed pursuant to Rule 41(E) of the Indiana Rules of Trial Procedure.

Appellant's App. p. 7.

DISCUSSION AND DECISION

Wicker contends that the trial court abused its discretion in dismissing his claim pursuant to Indiana Trial Rule 41(E), which provides in relevant part as follows:

> [W]hen 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.

We will reverse a Trial Rule 41(E) dismissal for failure to prosecute only in the event of a clear abuse of discretion. *Belcaster v. Miller*, 785 N.E.2d 1164, 1167 (Ind. Ct. App. 2003), *trans. denied*. An abuse of discretion occurs if the decision of the trial court is against the logic and effect of the facts and circumstances before it. *Id*. We will affirm if there is any evidence that supports the trial court's decision. *Id.*

The purpose of Trial Rule 41(E) rule is "to ensure that plaintiffs will diligently pursue their claims," and to provide "an enforcement mechanism whereby a defendant, or the court, can force a recalcitrant plaintiff to push his case to resolution." *Id*. (citing *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." *Belcaster*, 785 N.E.2d at 1167 (citing *Benton*, 622 N.E.2d at 1006). "Courts cannot be asked to carry cases on their dockets indefinitely and the rights of the adverse party should also be considered. [The defendant] should not be left with a lawsuit hanging over his head

indefinitely." *Belcaster*, 785 N.E.2d at 1167 (citing *Hill v. Duckworth*, 679 N.E.2d 938, 939-40 (Ind. Ct. App. 1997)).

We balance several factors when determining whether a trial court abused its discretion in dismissing a case for failure to prosecute. *Office Env't's, Inc. v. Lake States Ins. Co.*, 833 N.E.2d 489, 494 (Ind. Ct. App. 2005). These factors include: (1) the length of the delay; (2) the reason for the delay; (3) the degree of the plaintiff's personal responsibility; (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. *Belcaster*, 785 N.E.2d at 1167 (citing *Lee v. Friedman*, 637 N.E.2d 1318, 1320 (Ind. Ct. App. 1994)). "'The weight any particular factor has in a particular case depends on the facts of that case.'" *Id.* (quoting *Lee*, 637 N.E.2d at 1320). "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.* (citing *Lee*, 637 N.E.2d at 1320).

Under the circumstances of this case, we conclude that the trial court abused its discretion in immediately imposing the harshest possible sanction of dismissing Wicker's

lawsuit altogether. While we certainly do not condone the dilatory tactics of Sciantarelli,[1] we believe that dismissal would unfairly penalize Wicker for the actions of his attorney. We find that a few of the *Belcaster* factors outweigh all other considerations in this case. First, we would note that the chronological case summary ("CCS") seems to paint an incomplete picture in this case. To be sure, the CCS reflects no activity on Wicker's part for almost one year, but the record indicates that Wicker did address some discovery matters in April and May of 2007, making the actual period of inactivity something more like three or four months. Second, and perhaps most compelling, there is no indication whatsoever that Wicker himself bears any responsibility for any delays that may have occurred. Third, there is no history, beyond the delay at issue here, of an egregious pattern of deliberate delay, and Wicker has not defied any court orders. Fourth, no lesser sanctions, such as a scheduling order or rule to show cause, were ever attempted.

We would also note that the record indicates no attempt by any opposing party to enlist the trial court's assistance in resolving the matter of the agreement to dismiss several of the parties before a motion to dismiss was filed. While we acknowledge that "[t]he burden of moving the litigation is upon the plaintiff," not the defendants or the trial court, *id.*, a motion to enforce the agreement might have resolved the issue quickly. Finally, we believe that dismissal under the circumstances of this case would clearly run counter to Indiana's oft-stated policy of having cases decided on their merits whenever possible. In summary, the

[1] Should any of the appellees ultimately prevail, the trial court may award attorney's fees to them should it find that Wicker's action was frivolous, unreasonable, or groundless as to them, that Wicker continued to litigate such a claim, or that he litigated in bad faith. *See* Ind. Code § 35-52-1-1(b).

effect of a dismissal here would be to punish Wicker for the sins of his attorney, a result we do not wish to endorse.[2] We reverse and remand for reinstatement of Wicker's cause of action.

We reverse the judgment of the trial court.

BARNES, J., and CRONE, J., concur.

[2] We would observe that Trial Rule 41(E) seems to be something of an anachronism, a holdover from the days when litigants were required to file all discovery documents with the trial court. Currently, such filings are prohibited, and parties are expected to engage in discovery with minimal intervention from the trial court. As such, many months of intense discovery activity might appear to be completely devoid of any movement at all, at least according to the CCS.

We would also like to point out the possible operation of Trial Rule 41(E) in a case where the plaintiff is fully prepared for trial many months in advance of the trial date. Because such a plaintiff has taken no action in the case, he could then be haled into court every sixty days to respond to the latest in a string of successive Trial Rule 41(E) motions. Not only would this be a tremendous waste of judicial resources (not to mention the client's resources), the alternative is little better, *i.e.*, that such plaintiffs would insulate themselves from Trial Rule 41(E) motions by filing periodic discovery notices with the trial court.