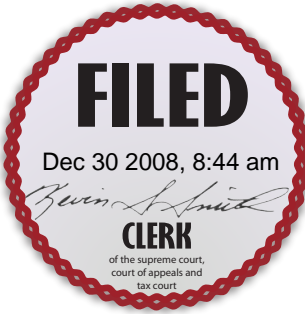


Pursuant to Ind. Appellate Rule 65(D), this Memorandum Decision shall not be regarded as precedent or cited before any court except for the purpose of establishing the defense of res judicata, collateral estoppel, or the law of the case.



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**IN THE
COURT OF APPEALS OF INDIANA**

DWYER INSTRUMENTS, INC.,)
)
Appellant-Defendant,)
)
vs.) No. 46A03-0807-CV-380
)
JAMES KELLER,)
)
Appellee-Plaintiff.)

APPEAL FROM THE LAPORTE SUPERIOR COURT
The Honorable Paul J. Baldoni, Judge
Cause No. 46D03-0705-CT-159

December 30, 2008

MEMORANDUM DECISION - NOT FOR PUBLICATION

CRONE, Judge

Dwyer Instruments, Inc. (“Dwyer”) appeals a trial court order granting James Keller’s (“Keller”) motion to set aside an order of dismissal. We affirm.

On May 4, 2007, Keller filed a personal injury action against Dwyer seeking damages for injuries allegedly sustained while Keller was acting as a temporary employee at Dwyer’s place of business. On June 29, 2007, Dwyer served Keller with interrogatories and a request for production of documents. Keller did not respond, and Dwyer sent Keller two follow-up letters, dated August 7 and August 24, 2007.

On September 20, 2007, Dwyer filed a motion to compel. On September 24, 2007, the trial court granted Dwyer’s motion and ordered Keller to respond within thirty days. Meanwhile, Keller answered the interrogatories on September 20, 2007. However, Keller did not respond to the request for production.

On November 19, 2007, Dwyer filed a motion to dismiss for failure to comply with discovery pursuant to Indiana Trial Rule 37(B) and for failure to prosecute pursuant to Indiana Trial Rule 41(E). The trial court summarily granted the motion on the same date and dismissed the case with prejudice. The order did not specify the basis for dismissal.

On February 13, 2008, Keller filed a motion to set aside the order of dismissal. The trial court held a hearing on June 20, 2008, and granted Keller’s motion on July 14, 2008. The court found “that the substance of the defendant’s Motion to Dismiss regarding discovery issues [was] not substantiated by the totality of the circumstances.” Appellant’s App. at 64. The trial court therefore concluded that its “Order to Dismiss with Prejudice was erroneously entered.” *Id.* Dwyer appeals.

Indiana Trial Rule 41(F) states that “[a] dismissal with prejudice may be set aside by the court for the grounds and in accordance with the provisions of Rule 60(B).” Thus, although neither Keller’s motion for relief nor the trial court’s order thereon mentions Trial Rule 60(B), we review the order as a grant of a motion pursuant to that rule. We review a grant or denial of an Indiana Trial Rule 60(B) motion for relief from judgment using an abuse of discretion standard. *Mallard’s Pointe Condo. Ass’n v. L & L Investors Group, LLC*, 859 N.E.2d 360, 365-66 (Ind. Ct. App. 2006), *trans. denied* (2007). “An abuse of discretion occurs when the trial court’s judgment is clearly against the logic and effect of the facts and inferences supporting the judgment for relief.” *In re Marriage of Holley*, 659 N.E.2d 581, 583 (Ind. Ct. App. 1995), *trans. denied* (1996).

As best we can discern, the applicable basis for Keller’s motion is either “mistake ... or excusable neglect” under sub-paragraph (1) of Trial Rule 60(B) or the catchall language found in sub-paragraph (8): “any reason justifying relief from the operation of the judgment, other than those reasons set forth in sub-paragraphs (1), (2), (3), and (4).” A party seeking relief under these sub-paragraphs must make a prima facie showing of a good and meritorious defense. *In re Marriage of Holley*, 659 N.E.2d at 583. A meritorious defense is one showing that, if the case were retried on the merits, a different result would be reached. *Id.* Interestingly, Keller’s motion seems to be based not on a mistake or an excusable act of neglect on *his* part, but rather on a procedural error committed by the trial court—namely, that the trial court failed to conduct a hearing or allow Keller an opportunity to respond before dismissing his case with prejudice.

In its motion to dismiss, Dwyer cited both Trial Rule 37(B) and Trial Rule 41(E). Trial Rule 41(E) provides that the trial court “shall order a hearing for the purposes of dismissing” a case where there has been a failure to prosecute the case for a period of sixty days. In contrast, Trial Rule 37(B), which authorizes sanctions for a party’s failure to comply with discovery orders, does not contain a similar requirement.

Here, the trial court did not hold a hearing before it granted Dwyer’s motion to dismiss and granted the motion on the very day it was filed. Thus, Keller was not afforded an opportunity even to file a response or request a hearing to show cause why his case should not be dismissed. It was not until he filed his motion for relief that he was given his day in court and could produce evidence of a meritorious defense regarding his compliance with the discovery order. To its credit, the trial court ultimately granted Keller an opportunity to be heard and set aside its order to dismiss. We cannot say that the trial court abused its discretion in doing so. Accordingly, we affirm.

Affirmed.

VAIDIK, J., concurs.

KIRSCH, J., dissents with opinion.

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vs.)	No. 46A03-0807-CV-380
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KIRSCH, Judge, *dissenting.*

I respectfully dissent.

Gladstone’s admonition that “Justice delayed is justice denied” is often quoted, but too rarely followed. This case is the latest example. The facts giving rise to this case occurred in 2005. In the intervening three and a half years, very little has happened to bring the case to a

just and efficient resolution. The plaintiff's failure to respond in a timely fashion to the defendant's discovery is the primary reason for the delay. Nothing in the documents before us justifies or explains such delay. As my colleagues note, there is no requirement that a trial court hold a hearing when it dismisses a case under trial Rule 37. I would reverse the trial court's order setting aside its order of dismissal.