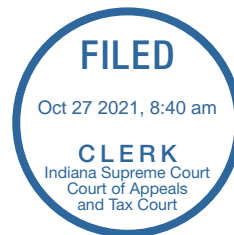


## MEMORANDUM DECISION

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

Christopher Meyers,  
*Appellant-Plaintiff,*

v.

Randolph Palmateer, et al.,  
*Appellees-Defendants,*

October 27, 2021

Court of Appeals Case No.  
21A-CT-933

Appeal from the Lake Superior  
Court

The Honorable Calvin D.  
Hawkins, Judge

Trial Court Cause No.  
45D02-1809-CT-554

**Altice, Judge.**

## Case Summary

[1] Christopher Meyers appeals the trial court’s dismissal of his complaint against Randolph Palmateer (Palmateer), Northwestern Indiana Building & Construction Trades Council (Northwestern) and 600 Enterprizes, Inc., d/b/a Gino’s Steakhouse of Merrillville (Gino’s Steakhouse) (collectively, Defendants) under Indiana Trial Rule 41(E), for failing to prosecute his personal injury claim against Defendants in a timely manner. Specifically, Meyers claims that the trial court abused its discretion in dismissing his complaint because there had only been a five-month delay “from the date discovery was propounded” and Defendants suffered no prejudice by the delay. *Appellant’s Amended Brief* at 6.

[2] We affirm.

## Facts and Procedural History

[3] On September 12, 2018, Meyers filed a complaint against Palmateer alleging that Palmateer negligently and/or recklessly hit him in the eye with a menu while both were dining at Gino’s Steakhouse. *Appendix Vol. II* at 12. Palmateer filed an amended answer to Meyers’s complaint on January 11, 2019.

[4] Thereafter, Palmateer moved to dismiss the complaint on March 3, 2020 pursuant to T.R. 41(E), requesting that the trial court dismiss the action for lack of prosecution. Palmateer advised the trial court that no action had been taken in the case since Meyers had filed the complaint eighteen months earlier. A

hearing on that motion was canceled because the trial court granted Meyers permission to file an amended complaint on April 6, 2020, adding Gino's Steakhouse and Northwestern as defendants in the action.<sup>1</sup>

[5] All defendants answered Meyers's amended complaint by June 5, 2020. On June 11, 2020, the trial court held a case management conference at which time it set a March 30, 2021<sup>2</sup> deadline for discovery completion.

[6] On August 25, 2020, counsel for Gino's Steakhouse sent, on Defendants' behalf, a request for the production of documents to Meyers's two attorneys. Service of the request for production was made via Odyssey to the email addresses supplied to the trial court. Attorney Rogelio Dominguez received those requests but attorney Susan Severtson did not, inasmuch as it had been sent to an incorrect email address. There was no communication between those attorneys regarding Defendants' discovery requests.

[7] Meyers did not respond to the discovery and on January 28, 2021, Defendants filed a joint motion to dismiss Meyers's amended complaint pursuant to T.R. 41(E) based on Meyers's continued failure to prosecute his case, coupled with his failure to respond to Defendants' discovery requests. The trial court granted the motion to dismiss with prejudice that same day.

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<sup>1</sup> Meyers added Northwestern as a defendant alleging that Palmateer was acting within the scope of his employment with Northwestern when the incident occurred.

<sup>2</sup> The parties acknowledged that the trial court's order stating that the discovery deadline was March 30, 2020, was erroneous.

[8] Thereafter, on February 3, 2021, Meyers filed a motion for relief from the dismissal order because Meyers’s lead counsel, Severtson, had allegedly not received Defendants’ discovery request.

[9] At a hearing on April 23, 2021, Defendants’ counsel pointed out that Meyers had done nothing to move the case forward since the initial complaint was filed in September 2018. More particularly, Meyers had not tendered discovery and had not filed any dispositive motions. Counsel argued that the matter has been “hanging over [Defendants’] heads without anything being done on it.” *Transcript* at 10. Meyers argued that he was prosecuting his claim and that he did not timely respond to Defendants’ discovery request because lead counsel had not received the discovery. Following the hearing, the trial court denied Meyers’s request for relief and affirmed the dismissal of the complaint with prejudice. Meyers now appeals.

## **Discussion and Decision**

[10] Meyers claims that the trial court abused its discretion in dismissing the complaint because any “miscommunication between Meyers’s attorneys . . . is not within the control of the plaintiff, . . . and he should not be penalized for it.” *Appellant’s Amended Brief* at 9. Meyers further asserts that dismissing the complaint was error because Defendants failed to show “any resulting prejudice from a brief five-month delay.” *Id.*

[11] This court will reverse a trial court’s dismissal for failure to prosecute only if there is a clear abuse of discretion. *Am. Family Ins. Co. v. Beazer Homes Ind.*,

*LLP*, 929 N.E.2d 853, 856 (Ind. Ct. App. 2010) (citing *Belcaster v. Miller*, 785 N.E.2d 1164, 1167 (Ind. Ct. App. 2003)), *trans. denied*. An abuse of discretion occurs when the trial court’s decision is clearly against the logic and effect of the facts and circumstances. *Ind. Dept. of Nat. Res. v. Ritz*, 945 N.E.2d 209, 213 (Ind. Ct. App. 2011), *trans. denied*. Although dismissals are generally viewed with disfavor and are considered extreme remedies that should be granted only under limited circumstances, we will affirm the trial court if there is any evidence that supports the trial court’s decision. *Ritz*, 945 N.E.2d at 213; *Beazer Homes*, 929 N.E.2d at 856.

[12] T.R. 41(E) provides:

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 condition that the plaintiff comply with the 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.

[13] We note that the purpose of T.R. 41(E) 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.” *Beazer Homes*, 929 N.E.2d at 856. It is the plaintiff’s burden to “[move] the litigation, and the trial court has no duty to urge or require counsel

to go to trial, even where it would be within the court’s power to do so.” *Ritz*, 945 N.E.2d at 214. We also note that trial courts “cannot be asked to carry cases on their dockets indefinitely and the rights of the adverse party should also be considered. [A Defendant] should not be left with a lawsuit hanging over his head indefinitely.” *Id.* (quoting *Hill v. Duckworth*, 679 N.E.2d 938, 939-40 (Ind. Ct. App. 1997)).

[14] We generally consider several factors to determine whether the trial court abused its discretion in dismissing a case for failure to prosecute. *Id.*

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.

*Ritz*, 945 N.E.2d at 215 (quoting *Olson v. Alick’s Drugs, Inc.*, 863 N.E.2d 314, 319-20 (Ind. Ct. App. 2007)).

[15] The weight each factor has in a particular case appears to depend upon the facts of that case. *Ritz*, 945 N.E.2d at 215. 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.* Although there is no

bright line rule indicating exactly how long of a delay justifies dismissal, . . . a one-year delay is on the excessive side.” *Sharif v. Cooper*, 141 N.E.3d 1258, 1262 (Ind. Ct. App. 2020).

[16] In this case, several of the above factors support the trial court’s dismissal of the complaint including the length of the delay, the failure to justify the delay, and the resulting prejudice to Defendants caused by the delay.

[17] Meyers filed his complaint against Defendants in 2018 and did nothing to move his claim forward for three years. Even though the trial court denied Defendants’ initial motion to dismiss the action in March 2020 and permitted Meyers to amend his complaint, he did not initiate discovery, take depositions, file any dispositive motions, or request a trial date. In short, even the threat of dismissal did not stir Meyers to action, and he presented no justification for the length and history of delay, other than point to why counsel did not answer Defendants’ discovery requests in a timely manner. *See Metcalf v. Estate of Hastings*, 726 N.E.2d 372, 374 (Ind. Ct. App. 2000) (holding that the burden is on the plaintiff to prove that there was sufficient cause or excuse for delay), *trans. denied*; *see also, Benton v. Moore*, 622 N.E.2d 1002, 1007 (Ind. Ct. App. 1993) (holding that dismissal of plaintiff’s complaint under T.R. 41(E) was warranted where it was determined that plaintiff had done nothing to cause the case to proceed “in years”). Even assuming Meyers’s lead counsel did not receive Defendants’ discovery request, there was no dispute that the other counsel of record did, in fact, receive the discovery. And those attorneys did

not consult with each other or make any effort to comply with Defendants' requests.

[18] While we prefer to decide cases on their merits, it is apparent that Meyers personally did nothing to pursue his claims against Defendants. In our view, that inaction evinces an unwillingness to move forward and resolve the dispute, even though Meyers alleged in his complaint that he had sustained serious eye injuries from the incident.

[19] The trial court also heard argument that Defendants were prejudiced by the delay. All have incurred legal fees, and the matter has been personally trying on Palmateer and his family for three years. Gino's Steakhouse has been placed in a bad business position as it may acquire a poor reputation and increased insurance premium costs because of this incident. It was also pointed out that Northwestern—a conglomeration of unions and tradesmen—is directly affected by this litigation because various operating engineers who desire to become affiliated members of Northwestern cannot join because of this pending matter. Thus, the litigation directly affects Northwestern's ability to prosper and remain sustainable.

[20] In sum, when considering the factors discussed above, we conclude that there is ample evidence in the record to support the trial court's dismissal order. Accordingly, Meyers has failed to establish an abuse of discretion.

[21] Judgment affirmed.



Bradford, C.J. and Robb, J., concur.