MEMORANDUM DECISION

ATTORNEYS FOR APPELLANTS

Susan E. Cline
Brendan A. Hogan
Cline Law Group, LLC
Indianapolis, Indiana

ATTORNEY FOR APPELLEE

Jason R. Delk
Delk McNally LLP
Muncie, Indiana

IN THE COURT OF APPEALS OF INDIANA

The Waters of Muncie, LLC and The Waters of Muncie, II LLC,

Appellants-Defendants,

v.

Carolyn Jones as Personal Representative of the Estate of Emma Jean Orick,

Appellee-Plaintiff.

November 15, 2023

Court of Appeals Case No. 23A-PL-1070

Appeal from the Delaware Circuit Court

The Honorable John M. Feick, Judge

Trial Court Cause No. 18C04-1909-PL-127

Memorandum Decision by Judge Mathias
Judges Riley and Crone concur.

Mathias, Judge.

[1] The Waters of Muncie, LLC and The Waters of Muncie, II LLC (collectively, "The Waters") appeal the Delaware Circuit Court's denial of their motion to dismiss an amended complaint for damages filed by Carolyn Jones as Personal Representative of the Estate of Emma Jean Orick ("the Estate"). The Waters presents a single issue for our review, namely, whether the trial court abused its discretion when it denied the motion to dismiss.

[2] We affirm.

Facts and Procedural History

[3] On September 5, 2017, Emma Jean Orick was a resident at a nursing home operated by The Waters when she fell and sustained injuries. On September 4, 2019, Orick filed a proposed complaint for damages against The Waters with the Indiana Department of Insurance ("IDOI") pursuant to the Indiana Medical Malpractice Act ("MMA"). Orick simultaneously filed a complaint for damages against anonymous defendants with the trial court.[1] Orick did not serve a copy of the complaint on The Waters. On September 23, the IDOI notified Orick that The Waters was not a qualified healthcare provider and was not, therefore, subject to the MMA. Orick died on November 25, 2019.

[4] More than one year later, in December 2020, despite the IDOI's September 23, 2019, letter stating that the MMA did not apply to Orick's complaint, her

[1] Indiana Code section 34-18-8-7 of the MMA provides that a complaint filed with the trial court while a proposed complaint is pending with a medical review panel "may not contain any information that would allow a third party to identify the defendant[.]"

attorney wrote a letter to the IDOI asking to convene a medical review panel. There was no response.

[5] On October 20, 2021, Carolyn Jones was appointed as personal representative of Orick's estate. On December 1, the Estate filed an amended proposed complaint with the IDOI to substitute Jones as plaintiff. And on December 13, the Estate filed a motion with the trial court to substitute Jones as plaintiff in Orick's complaint. The trial court granted that motion on December 14. On January 10, 2022, the IDOI notified the Estate's attorney, for the second time, that The Waters was not a qualified healthcare provider under the MMA.

[6] Nonetheless, on February 8, the Estate's attorney sent a letter to The Waters' attorney stating as follows:

> As you are aware, we represented Emma Jean Orick (deceased) in the above referenced claim against The Waters of Muncie. Her daughter and personal representative Carolyn Jones has been substituted as the petitioner in this matter. We received acknowledgement of our Request for Medical Panel Review from the Indiana Department of Insurance and would like to choose a panel chair to begin the process of naming a panel.
>
> We are open to suggestions for the Chair. . . .

Appellants' App. Vol. 2, p. 49. The Waters' attorney responded that she had "never appeared in [the purported medical malpractice] matter" and that "no summons [was] issued or service of process" made in the trial court proceeding. *Id.* at 50. The Waters' attorney stated further:

> Given that you have been on notice since 2019 that The Waters of Muncie was not a qualified provider under the Indiana Medical Malpractice Act, have made no effort to serve the state court action on The Waters, have made no effort to amend the Complaint to identify the Waters, and have taken no action other than to substitute the Estate, for a period in excess of two and a half years, The Waters of Muncie will oppose any effort to move this matter forward in state court.

Id. at 50-51.

[7] On June 16, The Waters filed a motion to dismiss alleging lack of service under Trial Rule 4 and failure to prosecute under Trial Rule 41(E). On October 13, the Estate moved to amend its complaint. Following a hearing on that motion and The Waters' motion to dismiss, the trial court granted the Estate's motion to amend the complaint but did not rule on the motion to dismiss. On October 19, the Estate filed its amended complaint naming Jones as the plaintiff and also naming The Waters as the defendant.

[8] On November 1, the trial court denied as "moot" The Waters' motion to dismiss. *Id.* at 100. On November 2, The Waters moved to dismiss the Estate's amended complaint. The trial court denied that motion following a hearing. This certified interlocutory appeal ensued.

Discussion and Decision

[9] The Waters contends that the trial court abused its discretion when it denied its motion to dismiss the Estate's amended complaint. As this Court has explained,

[w]e will reverse a [trial court's ruling on a] Trial Rule 41(E) [motion to dismiss] 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. *Metcalf v. Estate of Hastings*, 726 N.E.2d 372, 373-74 (Ind. Ct. App. 2000), *trans. denied*; *Hill v. Duckworth*, 679 N.E.2d 938, 939 (Ind. Ct. App. 1997). We will affirm if there is any evidence that supports the decision of the trial court. *Metcalf*, 726 N.E.2d at 374.

Trial Rule 41(E) provides in pertinent part:

> [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.

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." *Benton v. Moore*, 622 N.E.2d 1002, 1006 (Ind. Ct. App. 1993), *reh'g denied*. "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." *Id.* (quotation omitted). "Courts cannot be asked to carry cases on their dockets indefinitely and the rights of the adverse party should also be considered. He should not be left with a lawsuit hanging over his head indefinitely." *Hill*, 679 N.E.2d at 939-40 (quotation omitted).

Courts of review generally balance several factors when [considering a Trial Rule 41(E) motion to dismiss]. 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 v. Miller, 785 N.E.2d 1164, 1167 (Ind. Ct. App. 2003), *trans. denied*.

[10] The Waters maintains that the Estate misrepresented to the trial court that its delay in litigating this action in the trial court was due to the pending proposed complaint for damages with the IDOI. And The Waters asserts that, because the MMA never applied to this action, the trial court's "acceptance of that argument was an abuse of discretion." Appellants' Br. at 13. But there is no indication that the trial court accepted that or any other specific argument when it denied The Waters' motion to dismiss. Rather, the trial court did not give any reason for the denial.

[11] The Waters is correct when it says that:

> [o]nce Orick was advised that The Waters was not a qualified provider, it was incumbent upon her to pursue her action in the trial court. She was not prevented from doing so by the MMA because she had been advised by the IDOI, the appropriate entity to make such a determination, that The Waters was not qualified. Accordingly, once she was notified, the only action that was viable for this case was the Delaware Circuit Court action and Orick took no steps to move it forward for over three years, and five years after the care in question.

Id. at 16. And The Waters asserts that, "[o]verwhelmingly, when considering the factors outlined by this Court in *Lee*, it was well within the trial court's discretion to dismiss Orick's cause of action, and it was an abuse of discretion for it not to do so." *Id.* at 17. The Waters states that the Estate made no attempt to serve The Waters with a summons or complaint for three years despite the IDOI's immediate notice that The Waters was not a qualified healthcare provider and the MMA did not apply to Orick's claims. The Waters argues that the Estate has not provided any reasonable justification for its failure to prosecute and that The Waters has been "greatly prejudiced by the delay" and inactivity. *Id.* at 19. And The Waters asserts that, given that the underlying injuries to Orick occurred in 2017, its ability to prepare a defense will be hampered by difficulties in tracking down witnesses and medical records and witnesses' diminished memories.

[12] While The Waters makes a compelling case for dismissal, we simply cannot say that the trial court abused its discretion when it denied the motion to dismiss. As the Estate points out, there is no evidence that it willfully ignored the IDOI's letters stating that the MMA did not apply to Orick's claims. Rather, the

Estate's attorney stated that the confusion was the result of miscommunication within his office. No fault in the delay has been assessed to Orick or the Estate. Further, The Waters can only speculate that it might have difficulty preparing a defense, whereas the prejudice to the Estate by a dismissal is obvious. It is well settled that "Indiana law strongly prefers disposition of cases on their merits." *Coslett v. Weddle Bros. Const. Co.*, 798 N.E.2d 859, 861 (Ind. 2003). We hold that the trial court did not abuse its discretion when it denied The Waters' motion to dismiss.[2]

[13] Affirmed.

Riley, J., and Crone, J., concur.

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[2] The Waters also suggests that the trial court may have denied its motion to dismiss based on the Estate's argument that the Journey Account Statute applies here. *See* Ind. Code § 34-11-8-1. But the only reason to invoke that statute is to avoid a statute of limitations issue, and The Waters makes no contention that the Estate's claims are barred by the statute of limitations. *See Blackman v. Gholson*, 46 N.E.3d 975, 980-81 (Ind. Ct. App. 2015) (stating that "[t]he purpose of the JAS is to provide for continuation of a cause of action when a plaintiff fails to obtain a decision on the merits for some reason other than his or her own neglect and the statute of limitations period expires while the suit is pending.") Accordingly, we need not address this subissue.