MEMORANDUM DECISION

ATTORNEY FOR APPELLANT

Ross Vandegriff
Keis George LLP
Indianapolis, Indiana

ATTORNEYS FOR APPELLEE

Grant A. Liston
Larry L. Barnard
Carson LLP
Fort Wayne, Indiana

IN THE COURT OF APPEALS OF INDIANA

Progressive Paloverde Insurance Company,
Appellant-Plaintiff,

v.

Isaac P. Booher,
Appellee-Defendant.

January 11, 2022

Court of Appeals Case No. 21A-CP-1131

Appeal from the Allen Superior Court

The Honorable Craig J. Bobay, Judge

Trial Court Cause No. 02D02-1804-PL-129

Weissmann, Judge.

[1] Without informing Isaac Booher that he had been sued, Progressive Paloverde Insurance Company (Progressive) obtained a default judgment against Booher for his alleged negligence in causing a motor vehicle accident 2 years earlier. Booher did not learn of Progressive's negligence-claim-turned-judgment for another 2 ½ years, after which Progressive conceded it had not properly served Booher. The trial court granted Booher's unopposed motion to set aside the judgment[1] and later granted Booher's contested motion to dismiss under Indiana Trial Rule 41(E) for failure to prosecute.

[2] Progressive appeals the dismissal of its negligence claim, arguing that its failure to prosecute was reasonably caused by Progressive's belief that it already had a valid judgment against Booher. Given Progressive's lack of diligence in perfecting service of process and the prejudice to Booher which arises from receiving no notice of his potential liability for 4 ½ years, we cannot say that the trial court abused its discretion in granting the motion to dismiss. We therefore affirm.

Facts

[3] Eighteen-year-old Booher was involved in a two-car automobile accident in September 2016. Progressive insured the driver of the second vehicle and

[1] The dissent concludes that service was properly completed when Progressive mailed a copy of the summons and complaint to the Old Address. However, neither party makes this argument. Instead, both parties agreed that the default judgment should be set aside due to lack of proper service.

subrogated her claim for damages.[2] However, neither Progressive nor its insured contacted Booher after the accident.

[4] At the time of the accident, Booher and his parents lived at a Harlan, Indiana address (New Address), to which they had moved a year before the accident. Prior to that, they lived at a Fort Wayne, Indiana address (Old Address). The police report for the accident listed the Old Address for Booher and the New Address for his mother, who owned the vehicle Booher was driving when the accident occurred. The New Address was also readily available on the internet under Booher's name.

[5] On April 18, 2018, Progressive filed a negligence action against Booher. At Progressive's request, an Allen County Sheriff's officer left copies of the complaint and summons at the Old Address, though Booher had not lived at this address for 2 ½ years. The officer mailed copies to the Old Address as well.

[6] More than 100 days later, Progressive moved for default judgment against Booher, who had not responded to Progressive's complaint. The trial court granted Progressive's motion and, on August 14, 2018, mailed a notice of default judgment to Booher at the Old Address. This notice was returned to the

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[2] In this context, "subrogation" is "[t]he principle under which an insurer that has paid a loss under an insurance policy is entitled to all the rights and remedies belonging to the insured against a third party with respect to any loss covered by the policy." *Subrogation*, *Black's Law Dictionary* (11th ed. 2019).

court two weeks later, marked: "Return to Sender; Has not been at this address since 9/2015." Appellant's App. Vol. II, p. 13.

[7] Booher first learned of Progressive's lawsuit in late January 2021, when he received a letter from the Indiana Bureau of Motor Vehicles advising him that his license would be suspended due to non-payment of the judgment. A few weeks later, Booher filed an unopposed motion to set aside Progressive's default judgment, which the trial court promptly granted. Booher then filed a motion to dismiss Progressive's complaint for failure to prosecute under Trial Rule 41(E).

[8] Following a hearing, and without making any findings of fact or conclusions of law, the trial court granted Booher's unopposed motion to dismiss Progressive's complaint for failure to prosecute. Progressive now appeals.

Discussion and Decision

[9] Progressive argues that the trial court erred in granting Booher's motion to dismiss. We will reverse a Trial Rule 41(E) dismissal for failure to prosecute only if the trial court abused its discretion. *Sharif v. Cooper*, 141 N.E.3d 1258, 1261 (Ind. Ct. App. 2020). An abuse of discretion occurs if the trial court's decision is against the logic and effect of the facts and circumstances before the court. *Belcaster v. Miller*, 785 N.E.2d 1164, 1167 (Ind. Ct. App. 2003).

[10] 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.

Ind. Trial Rule 41(E). "The purpose of this rule is to ensure that plaintiffs will diligently pursue their claims." *Sharif*, 141 N.E.3d at 1261.

[11] Notably, the requirement of due diligence applies to obtaining service of process on named defendants. *Id.* (citing *Geiger & Peters, Inc. v. Am. Fletcher Nat. Bank & Tr. Co.*, 428 N.E.2d 1279, 1282 (Ind. Ct. App. 1981)). Indeed, while the general rule is that a Rule 41(E) motion should not be granted if the plaintiff resumes diligent prosecution before the defendant moves to dismiss, that rule does not apply when a complaint is filed but a summons is not served after undue delay or lack of diligence without cause. *Geiger*, 428 N.E.2d at 1283.

[12] When determining whether to dismiss a case for failure to prosecute, Indiana courts consider several factors. *Belcaster*, 785 N.E.2d at 1167. They include:

> (1) the length of 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; (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.

Id. The weight given to any particular factor depends upon the facts of the case. *Id.*

[13] With these factors in mind, we cannot say that the trial court abused its discretion. To begin with, even though the law is well established that these factors guide the court's review of a Rule 41(E) dismissal, Progressive does not discuss them at all. Even after Booher identified these factors in his appellee's brief along with caselaw recognizing them, and even after Booher argued these factors weigh in favor of affirming the trial court, Progressive neglected to file a reply brief responding to these points.

[14] When a party fails to file a reply brief responding to an appellee's argument, we analyze the appellee's argument for *prima facie* error, which is to say we review whether there is any error "at first sight, on first appearance, or on the face of it." *Buchanan v. State*, 956 N.E.2d 124, 127 (Ind. Ct. App. 2011). In his brief, Booher emphasizes that:

- his correct address was listed on the police report under his mother's name as the owner of the vehicle that he has driving;
- if Progressive had attempted mailing the summons and complaint when it was originally filed, it would have been returned just as the default judgment was, or it might have been forwarded to the correct address;
- a simple internet search would have revealed Booher's correct address;
- Progressive was on constructive notice that service was inadequate when the default judgment order was returned noting that Booher had not lived at that address since September 2015; and
- even after obtaining a default judgment Progressive did nothing for 2 ½ years.

We cannot say that there is any immediately apparent *prima facie* error in Booher's explanation that the nine factors generally weigh in favor of the trial court's decision.

[15] Without engaging in any analysis of the nine factors, Progressive is left to argue that a Rule 41(E) dismissal is improper because it had obtained a default judgment, albeit an invalid one. But Progressive does not cite to any authority suggesting that a party's claim cannot be dismissed under Rule 41(E) where it obtained a default judgment—whether or not the party knew or should have known that the judgment was invalid due to inadequate service. The only case Progressive cites that even touches on this point is *Benton v. Moore*, 622 N.E.2d 1002, 1006 (Ind. Ct. 1993), in which we held:

> when a plaintiff has requested the trial court to set a trial date, and a trial date has been set, the trial court is without discretion to grant a T.R. 41(E) motion to dismiss which is based on a sixty day period of inaction which occurs between the date of the request for trial setting and the date set for trial.

The limitation at issue in *Benton* has nothing to do with this case.

[16] None of this is to say the trial court was required to grant Booher's request to dismiss the case under Rule 41(E), but it was not required to deny it either. While Progressive argues that its reliance on an invalid judgment was reasonable, it was within the trial court's discretion to credit instead Booher's arguments that Progressive was on constructive notice that service was invalid based on the returned court order with a notation that Booher did not live at the

address where Progressive attempted service, that it was unreasonable for Progressive to do nothing with respect to the judgment for the next 2 ½ years, and that Booher was prejudiced by the lost opportunity to track down witnesses and collect other evidence.

[17] The dissent characterizes this opinion as proclaiming new rules for perfecting and vacating service. However, a lack of proper service was the only basis for Booher's unopposed motion to set aside the default judgment, and Progressive conceded that service was lacking. Tr. pp. 6-7. This concession is not surprising given prior caselaw recognizing that service to the wrong address was insufficient. *See, e.g.*, *U.S. Bank, Nat. Ass'n v. Miller*, 44 N.E.3d 730, 739 (Ind. Ct. App. 2015) (holding default judgment void because notice of foreclosure was sent to wrong address); *Mills v. Coil*, 647 N.E.2d 679, 681 (Ind. Ct. App. 1995) ("Service upon a defendant's former residence is insufficient to confer personal jurisdiction."). [3]

[18] It bears noting that Progressive's ambling continued in this appeal. It only filed its appellant's brief after Booher moved to dismiss the appeal based on Progressive's failure to file a brief. Even then, Progressive never responded to the motion to dismiss, never explained why its brief was late, and never sought leave to file a belated brief. Then, when Booher's appellee's brief renewed his

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[3] The dissent expresses concern that Booher would benefit from providing police with an inaccurate address. But the police report indicates that the Old Address was simply pulled from Booher's driver's license. We find no intent by Booher to deceive. More importantly, the police report also lists the accurate New Address as that of the vehicle's registered owner.

argument that the appeal should be dismissed based on the untimeliness of Progressive's brief, Progressive did not even file a reply brief to respond to that argument. While we do not grant Booher's renewed request to dismiss the appeal, Progressive's disregard of the appellate rules further illustrates the reasonableness of the trial court's conclusion that Progressive failed to pursue its claim with sufficient diligence.

[19] Because the trial court did not abuse its discretion, the judgment is affirmed.[4]

[20] Affirmed.

Molter, J., concurs.
Tavitas, J., dissents with a separate opinion.

[4] Neither parties' appendices include a copy of Progressive's motion for default judgment. However, the motion is available through Indiana's Odyssey Case Management System.

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Tavitas, Judge, dissenting.

[21] I respectfully dissent. I conclude that the trial court erred by granting Booher's motion to dismiss under Indiana Trial Rule 41(E).

[22] I take issue with several aspects of the majority opinion. First, the majority concludes that Progressive did not diligently perfect service when the facts are uncontroverted that service was perfected at the address listed on the police report for Booher. Second, the majority gives undue credence to handwriting on a returned envelope containing the default judgment order the trial court sent to Booher. As Progressive states in its brief, the handwritten note on the envelope could have been written by anyone. The majority gives legal

significance to this notation of "Return to Sender[.] Has not been at this address since 9/2015", and invents a rule that this vacates service. Appellant's App. Vol. II p. 13. The majority, however, fails to acknowledge that the complaint and summons mailed were at the same address and that the mailed copy was never returned. And third, the majority modifies the Indiana Trial Rules by determining that service is "undone" if the court sends out a court order and said order is returned to the court.

[23] Trial Rule 4.1 provides:

> (A) In General. Service may be made upon an individual, or an individual acting in a representative capacity, by:
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> * * * * *
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> (3) leaving a copy of the summons and complaint at his dwelling house or usual place of abode; or
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> * * * * *
>
> (B) Copy Service to Be Followed With Mail. Whenever service is made under Clause (3) or (4) of subdivision (A), the person making the service also shall send by first class mail, a copy of the summons and the complaint to the last known address of the person being served, and this fact shall be shown upon the return.

Further, Indiana Trial Rule 4.15(F) provides: "No summons or the service thereof shall be set aside or be adjudged insufficient when either is reasonably calculated to inform the person to be served that an action has been instituted

against him, the name of the court, and the time within which he is required to respond."

[24] "Service of process that is reasonably calculated to inform, consistent with the letter of Trial Rule 4.15(F), is sufficient even if it fails to actually inform the party to which it is directed." *Menard, Inc. v. Lane*, 68 N.E.3d 1106, 1111 (Ind. Ct. App. 2017) (quoting *Swaim v. Moltan Co.*, 73 F.3d 711, 721 (7th Cir. 1996), *cert. denied*, 517 U.S. 1244, 116 S. Ct. 2499 (1996)), *on reh'g*, 86 N.E.3d 228 (Ind. Ct. App. 2017), *trans. denied*. Progressive reasonably relied on the police report for Booher's address. The Sheriff's mailed copy of the summons and complaint were not returned to the Court. Service was thus complete.[5]

[25] I am concerned with Booher's misstatement of the facts in its brief, which falsely states that the sheriff never sent the complaint and summons by mail. Additionally, Booher takes advantage of the fact that the police report lists his old address—which presumably was relayed to police by Booher in some fashion. And, Booher benefits from providing an inaccurate address on the police report.

[26] The only question before us is whether the trial court abused its discretion by granting Booher's motion to dismiss under Trial Rule 41(E). Trial Rule 41(E) provides: "Whenever there has been a failure to comply with these rules or

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[5] I do not take issue with the setting aside of the default judgment. Rather, I take issue with using the service, which was reasonable at the time, as a basis for granting Booher's motion to dismiss under Trial Rule 41(E).

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."[6] Progressive did not delay in obtaining the default judgment. Once the default judgment was set aside, Progressive sent an alias summons to the newly identified address for Booher.

[27] Furthermore, the majority faults Progressive for failure to argue the factors the reviewing court should consider when determining when to dismiss a case for failure to prosecute pursuant to Trial Rule 41(E). This reasoning is flawed because Progressive does not concede that it ever failed to timely prosecute its case. Progressive obtained timely service under Indiana Trial Rule 4.1, obtained a timely default judgment, and timely filed an alias summons once the default judgment was set aside.

[28] Indiana Trial Rules provide the mechanism for achieving service and for setting aside a judgment. The majority is now proclaiming new rules for service and vacating service. That is the role of our Supreme Court to announce new rules if it sees fit to do so. I would find that the trial court abused its discretion by granting Booher's motion to dismiss under Trial Rule 41(E), and I would reverse. Accordingly, I respectfully dissent.

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[6] Although the trial court treated the motion as a motion for summary judgment, I note that Rule 41(E), unlike Rule 12(B), does not require the trial court to treat the motion as a motion for summary judgment when matters outside the pleadings are presented.