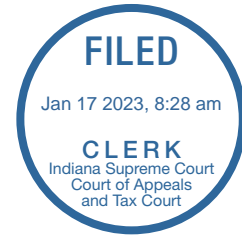


# MEMORANDUM DECISION

Pursuant to Ind. Appellate Rule 65(D), this Memorandum Decision shall not be regarded as binding precedent, but it may be cited for persuasive value or to establish res judicata, collateral estoppel, or law of the case.



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# IN THE COURT OF APPEALS OF INDIANA

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Clark Abney,  
*Appellant-Plaintiff,*

v.

Clint D. Walter, Dassler  
Domestic Logistic, Norfolk  
Southern Railway, and Kentucky  
Farm Bureau Mutual Insurance  
Company,  
*Appellees-Defendants.*

January 17, 2023

Court of Appeals Case No.  
22A-CT-2135

Appeal from the Perry Circuit  
Court

The Honorable M. Lucy Goffinet,  
Judge

Trial Court Cause No.  
62C01-1710-CT-656

**Tavitas, Judge.**

## Case Summary

- [1] Clark Abney appeals the trial court’s dismissal of his case for failure to prosecute. Abney argues that the trial court abused its discretion by failing to hold a hearing in accordance with Indiana Trial Rule 41(E). Defendants Clint Walter and Dassler Domestic Logistics, Inc. (hereinafter “Appellees”) concede that the trial court abused its discretion. We agree that the trial court abused its discretion and, accordingly, reverse and remand for the trial court to hold a hearing in accordance with Trial Rule 41(E).

## Issues

- [2] Abney raises three issues, one of which we find dispositive: whether the trial court abused its discretion by failing to hold a hearing before dismissing the case for failure to prosecute.

## Facts

- [3] On October 6, 2017, Abney filed a complaint against Appellees for damages arising out of a motor vehicle accident caused by Walter.<sup>1</sup> Appellees filed an answer on March 19, 2018. After several continuances, during a January 27, 2022 pre-trial conference, the parties set a trial date for December 5, 2022. The chronological case summary (“CCS”) entry for this conference states, “[P]arties

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<sup>1</sup> Abney named several other defendants, who were later dismissed.

set a jury trial, final pretrial deadlines for filings. Parties to submit an order.” Appellant’s App. Vol. II p. 12.

[4] On January 31, 2022, Appellees emailed Abney their proposed pre-trial entry and received no response. On February 28, 2022, Appellees again emailed Abney their proposed pre-trial entry and again received no response.

[5] On June 7, 2022, Appellees filed a motion to dismiss for failure to prosecute. Without first holding a hearing, on June 13, 2022, the trial court granted the motion to dismiss. On June 23, 2022, Abney filed a motion to correct error<sup>2</sup> to which Appellees filed a motion in opposition. Abney filed a reply, and Appellees filed a sur-reply. On August 2, 2022, Abney filed a motion for a hearing and/or ruling on his motion to correct error, on which the trial court did not rule. Abney now appeals.

## Discussion and Decision

[6] Abney argues that the trial court abused its discretion by granting Appellees’ motion to dismiss for failure to prosecute without first holding a hearing. Appellees concede that this was an abuse of discretion, and we agree.

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<sup>2</sup> Though styled as a motion to reconsider, Abney’s motion was in fact a motion to correct error because it was filed after the trial court dismissed the case. *See, e.g., Waas v. Ill. Farmers Ins. Co.*, 722 N.E.2d 861, 863 (Ind. Ct. App. 2000) (“[A]lthough substantially the same as a motion to reconsider, a motion requesting the court to revisit its final judgment must be considered a motion to correct error.” (quoting *Hubbard v. Hubbard*, 690 N.E.2d 1219, 1221 (Ind. Ct. App. 1998))), *reh’g denied*.

[7] “We will reverse a Trial Rule 41(E) dismissal for failure to prosecute ‘only for a clear abuse of discretion.’” *Caruthers v. State*, 58 N.E.3d 207, 210 (Ind. Ct. App. 2016) (quoting *Robertson v. State*, 687 N.E.2d 223, 224 (Ind. Ct. App. 1997), *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.* (quoting *Am. Family Ins. Co. ex rel. Shafer v. Beazer Homes Ind., LLP*, 929 N.E.2d 853, 856 (Ind. Ct. App. 2010)).

[8] Indiana Trial Rule 41(E) provides, in relevant part:

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 . . . .

(Emphasis added). The plain language of Trial Rule 41(E) requires the trial court to hold a hearing before dismissing a case for failure to prosecute. *See Caruthers*, 58 N.E.3d at 211.

[9] Here, the trial court failed to hold a hearing in accordance with Trial Rule 41(E). The trial court, thus, abused its discretion.<sup>3</sup> Accordingly, we reverse and

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<sup>3</sup> Because we find that the trial court abused its discretion by failing to hold a hearing in accordance with Trial Rule 41(E), we do not address Abney’s argument that the trial court lacked discretion to rule on Appellees’ motion to dismiss. Abney is free to raise that argument before the trial court on remand.

remand for the trial court to hold a hearing on Appellees' motion to dismiss for failure to prosecute.

## **Conclusion**

[10] The trial court abused its discretion by failing to hold a hearing on Appellees' motion to dismiss for failure to prosecute. Accordingly, we reverse and remand.

[11] Reversed and remanded.

Altice, C.J., and Brown, J., concur.