

## MEMORANDUM DECISION

Pursuant to Ind. Appellate Rule 65(D), this Memorandum Decision is not binding precedent for any court and may be cited only for persuasive value or to establish res judicata, collateral estoppel, or law of the case.



---

ATTORNEY FOR APPELLANT

Matthew J. McGovern  
Fishers, Indiana

---

## IN THE COURT OF APPEALS OF INDIANA

---

Thomas A. Turner,  
*Appellant-Plaintiff,*

v.

Cheryl Baker, Estate of Frank  
Wallace, Andreas Baker, and  
Frank Wallace,  
*Appellees-Defendants*

February 8, 2024

Court of Appeals Case No.  
23A-CT-2348

Appeal from the  
Washington Superior Court

The Honorable  
John Evans, Special Judge

Trial Court Cause No.  
88D01-2102-CT-108

**Memorandum Decision by Judge Vaidik**  
Judges May and Kenworthy concur.

**Vaidik, Judge.**

## Case Summary

- [1] Thomas A. Turner sued three defendants. When one year passed with no action by Turner, the defendants moved to dismiss the case for failure to prosecute under Indiana Trial Rule 41(E). Following a hearing, the trial court dismissed the case. Turner now appeals that dismissal. Finding no error, we affirm.

## Facts and Procedural History

- [2] On February 22, 2021, Turner filed a complaint against Cheryl Baker, Andreas Baker, and Frank Wallace (“Defendants”) for defamation, libel, malicious prosecution, abuse of process, and intentional infliction of emotional distress. Defendants moved to dismiss the complaint under Indiana Trial Rule 12(B)(6). Following a hearing, the trial court denied the motion on April 20, 2022.<sup>1</sup>
- [3] After one year of no action in the case, on April 20, 2023, Defendants moved to dismiss the case for failure to prosecute under Trial Rule 41(E), which provides that when no action is taken in a civil case for sixty days, the trial court, on its own motion or a party’s motion, shall hold a hearing for purposes of dismissing

---

<sup>1</sup> Shortly after the trial court denied this motion, Turner’s attorney updated his business address with the trial court.

the case. In their motion, Defendants alleged that Turner had taken no action for well over sixty days and that one of the defendants, Wallace, had died in December 2022. The trial court scheduled a Trial Rule 41(E) hearing for June 26.

[4] After Defendants filed their Trial Rule 41(E) motion on April 20, Turner didn't file anything until June 17, when his attorney moved to withdraw his appearance because he was "step[ping] away from the practice of law to pursue alternate career opportunities." Appellant's App. Vol. II p. 131. The judge recused himself, and a new judge was appointed. The new judge granted Turner's attorney's motion to withdraw and rescheduled the Trial Rule 41(E) hearing for September 7.

[5] On August 7, about six weeks after Turner's first attorney moved to withdraw and over three months after Defendants filed their Trial Rule 41(E) motion, a new attorney entered an appearance for Turner.<sup>2</sup> Thereafter, the new attorney requested a trial date and filed several motions, including a "Statement of Facts" with an affidavit from Turner. In the affidavit, Turner averred that he had not delayed the proceedings, his first attorney withdrew for personal reasons, and he hired a new attorney as soon as he could.

---

<sup>2</sup> Turner claims that his new attorney entered his appearance just seven days after his first attorney was allowed to withdraw. *See* Appellant's Br. p. 14. This is not correct. The trial court accepted the withdrawal of Turner's first attorney on **June 30, 2023**. *See* Appellant's App. Vol. II p. 137 (order dated "6/30/2023"). Turner's new attorney did not enter his appearance until **August 7, 2023**. *See id.* at 139. This is more than seven days. Based on this error, Turner goes on to make other miscalculations in his brief.

[6] At the hearing, the trial court asked the attorneys to summarize what had happened. Turner’s new attorney argued that Turner had “done absolutely nothing to delay this case,” that he wanted to go to trial, and that his first attorney withdrew in June 2023 because he left the practice of law. Tr. Vol. II p. 6. Following the hearing, the trial court granted Defendants’ Trial Rule 41(E) motion to dismiss the case:

2. There has been a lengthy period of inactivity in this matter of approximately one year between the Court’s April 20, 2022 order denying Defendants’ TR 12(B)(6) motion to dismiss and Defendants’ April 20, 2023 TR 41(E) motion to dismiss. Plaintiff provided no explanation or excuse for this delay.

3. Plaintiff did not resume prosecution of this action until after Defendants’ April 20, 2023 motion.

Appellant’s App. Vol. II pp. 9-10.

[7] Turner now appeals.

## Discussion and Decision

[8] Turner contends the trial court erred in dismissing the case for failure to prosecute under Trial Rule 41(E). We review such dismissals for “a clear abuse of discretion.” *Belcaster v. Miller*, 785 N.E.2d 1164, 1167 (Ind. Ct. App. 2003), *trans. denied*. Defendants, however, have not filed an appellees’ brief. When an appellee does not respond to an appeal, we will not undertake the burden of developing an argument on their behalf. *Trinity Homes, LLC v. Fang*, 848 N.E.2d

1065, 1068 (Ind. 2006). Rather, we will reverse the trial court’s judgment if the appellant’s brief presents a case of prima facie error. *Id.* In this context, “prima facie error” means error “at first sight, on first appearance, or on the face of it.” *Id.*

[9] 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.”

*Belcaster*, 785 N.E.2d at 1167 (quotation omitted). The burden of moving the litigation forward is on the plaintiff, not the court. *Id.* “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. [The adverse party] should not be left with a lawsuit hanging over his head indefinitely.” *Id.* (quotation omitted).

[10] We balance several factors when determining whether a trial court abused its discretion in dismissing a case for failure to prosecute: (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 that 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 any factor has depends on the facts of the case. *Id.* “[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.*

[11] Several factors favor the trial court's dismissal of Turner's lawsuit for failure to prosecute—most importantly, the length of the delay and the reason for the delay. First, Turner took no action for one year, from April 2022 to April 2023. This is substantially longer than the sixty days required by Trial Rule 41(E). *See id.* at 1168 (finding ten-month delay supported dismissal for failure to prosecute). And when Defendants moved to dismiss the case for failure to prosecute on April 20, 2023, it was another two months until Turner filed anything.

[12] Second, while Turner claims the inaction was due to his first attorney leaving the practice of law, he presented no argument or evidence below that his attorney's decision to leave the practice of law **caused** the lengthy period of inaction here. Indeed, the trial court found that Turner “provided no

explanation or excuse for this delay.” *See id.* (finding lack of explanation supported dismissal for failure to prosecute). This lack of explanation distinguishes this case from *Deutsche Bank National Trust Co. v. Harris*, 985 N.E.2d 804 (Ind. Ct. App. 2013), which Turner cites on appeal. In that case, although there were periods of inaction on the CCS, evidence was presented that negotiations were going on behind the scenes.

[13] Finally, the passage of time has no doubt caused prejudice to Defendants, as one of the defendants passed away in December 2022.

[14] We recognize that there are factors that favor allowing Turner to prosecute his lawsuit. First, there is a preference for deciding cases on the merits. Second, sanctions less drastic than dismissal were available to the trial court. But on this point we note that this Court has held that “the court need not impose a sanction less severe than dismissal where the record of dilatory conduct is clear.” *Belcaster*, 785 N.E.2d at 1168 (quotation omitted). After balancing the factors favoring the trial court’s dismissal with those favoring allowing Turner to prosecute his lawsuit, Turner has not established that the court committed *prima facie* error in dismissing the lawsuit.

[15] Affirmed.

May, J., and Kenworthy, J., concur.