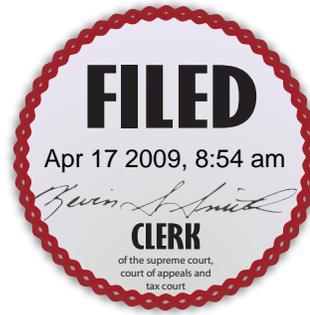


Pursuant to Ind.Appellate Rule 65(D), this Memorandum Decision shall not be regarded as precedent or cited before any court except for the purpose of establishing the defense of res judicata, collateral estoppel, or the law of the case.



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**IN THE
COURT OF APPEALS OF INDIANA**

BARBARA CARLSON and DAVID CARLSON,)

Appellants,)

vs.)

No. 45A03-0901-CV-1

PHILLIP R. GOODSON and STATE FARM)

MUTUAL AUTOMOBILE COMPANY,)

Appellees.)

APPEAL FROM THE LAKE SUPERIOR COURT
The Honorable Calvin D. Hawkins, Special Judge
Cause No. 45D02-0807-CT-208

April 17, 2009

MEMORANDUM DECISION - NOT FOR PUBLICATION

NAJAM, Judge

STATEMENT OF THE CASE

Barbara and David Carlson (“the Carlsons”) appeal from the trial court’s order granting Phillip R. Goodson’s motion to dismiss the Carlsons’ negligence complaint under Trial Rule 41(E). The Carlsons present three issues for review, which we consolidate and restate as:

1. Whether the Carlsons have waived any issue regarding notice that Goodson’s motion to dismiss would be argued at a status hearing on October 3, 2008, and whether they were denied an opportunity to respond to that motion.
2. Whether the trial court abused its discretion when it granted Goodson’s motion to dismiss the complaint.

We affirm.

FACTS AND PROCEDURAL HISTORY

This case arises from an automobile accident on September 5, 1999, in which Barbara Carlson was a passenger. The details of the proceedings below are outlined in our prior opinion, Goodson v. Carlson, 888 N.E.2d 217, 218-20 (Ind. Ct. App. 2008):

On July 17, 2001, [Barbara and David Carlson] filed a complaint against Goodson, alleging that Goodson was negligent in the operation of his vehicle. On July 18, 2001, the Lake County Sheriff attempted to serve Goodson with a summons at his address, as listed on the Crash Report: 2130 Meadow Lane, Schererville. The service, however, was “[u]nsuccessful” because the summons did not list an apartment unit for Goodson, which was noted on the return of service to the clerk’s office.

Approximately six months later, in January of 2002, counsel for the Carlsons accessed Goodson’s records from the Bureau of Motor Vehicles (the “BMV”). Goodson’s records listed 2130 Meadow Lane, Schererville as his address as of March 28, 2001. The record reflected the same address in 1998, 1999, and 2000. The address listed for 1999, however, included apartment number six. The Carlsons, however, made no attempt to serve Goodson at the apartment number listed in his BMV records.

On the trial court's own motion, it held a hearing on May 1, 2002, for the purpose of dismissing the Carlsons' case pursuant to Indiana Trial Rule 41(E). The trial court withheld dismissal and granted the Carlsons ninety days from May 1, 2002 to file an alias summons.

In May of 2002, counsel for the Carlsons again retrieved Goodson's records from the BMV. The records listed the same addresses as in January of 2002. The Carlsons did not file an alias summons and took no further action until April 8, 2003, when the Carlsons filed a praecipe for service by publication, directing The Lowell Tribune, a weekly newspaper circulated in Lake County, to publish notice of the Carlsons' complaint.

The Lowell Tribune published the notice on April 15, 22, and 29 of 2003. On May 8, 2003, the Carlsons filed their proof of publication. On November 4, 2003, the Carlsons filed a motion for default judgment, which the trial court granted on November 26, 2003. In July of 2004, State Farm—the Carlsons' automobile insurer—filed a motion to intervene. The trial court granted State Farm's request on July 8, 2004.

Illinois Founders Insurance ("Founders")—Goodson's automobile insurer at the time of the accident—learned of the Carlsons' lawsuit and default judgment on or about March 17, 2006, after receiving a letter from the Carlsons' counsel informing it of the same.^[1] On May 24, 2007, Founders, on behalf of Goodson,^[1] filed a motion to set aside the default judgment pursuant to Trial Rule 60(B). Goodson argued that service by publication "did not afford him his rights under both Indiana Trial Rule 4.13 and the federal and Indiana Due Process Clauses, respectively." Specifically, Goodson argued that the Carlsons failed to conduct a diligent search for him.

* * *

The trial court heard arguments on Goodson's motion to set aside the default judgment on July 12, 2007, after which it summarily denied Goodson's motion. On or about August 13, 2007, Goodson filed a motion to correct error, which the trial court denied on August 22, 2007. Following a trial on September 7, 2007, on the issue of damages only, a jury awarded the Carlsons damages in the amount of \$351,163.00.

(Some alterations original, citations to record omitted).

¹ Founders is not a party to this appeal.

Goodson appealed, arguing that the Carlsons' service of process was ineffective and that their "attempts at service did not comport with the Due Process Clause of the Fourteenth Amendment." Id. at 220. Another panel of this court agreed, holding that the trial court had never obtained personal jurisdiction over Goodson and, therefore, the default judgment was void. Id. at 222. As a result, this court remanded the case "with instruction for the trial court to grant Goodson's motion to set aside the default judgment." Id.

After the case was remanded, State Farm Mutual Automobile Company ("State Farm"), the Carlsons' insurer, filed a motion for change of judge, which the trial court granted. Judge Calvin D. Hawkins then issued an order assuming jurisdiction as special judge and setting the matter for a status conference on September 15, 2008. After that status conference, the court set the matter for hearing on October 3 "on [the] issue of service and also status."² Appellants' App. at 3, 31. On September 29, State Farm filed by mail, pursuant to Trial Rule 5(F)(3), a motion on behalf of Goodson to dismiss the complaint under Indiana Trial Rule 41(E).³ The Carlsons, Goodson, and State Farm appeared by counsel at the hearing on October 3, and each argued its position regarding

² The Chronological Case Summary ("CCS") states the date for the hearing as October 13, but the order in which Judge Hawkins assumed jurisdiction set the hearing for October 3. The hearing took place on October 3, and the Carlsons do not take issue with or note the date discrepancy.

³ The Appellants' Appendix contains a copy of the cover letter to the court and accompanying motion to dismiss. The CCS does not contain an entry showing that the motion was filed, but it does contain an entry showing that the parties appeared by counsel on October 3 for a hearing on Goodson's motion to dismiss.

the motion to dismiss. At the conclusion of the hearing, the trial court granted the motion.⁴ The Carlsons now appeal.

DISCUSSION AND DECISION

Issue One: Waiver

The Carlsons contend that the trial court abused its discretion when it dismissed the complaint because the court (1) gave no notice that Goodson's motion to dismiss would be argued at the October 3 status hearing, and (2) did not allow the Carlsons an opportunity to respond to the motion to dismiss "pursuant to [Indiana Trial Rule] 6(c) and subsequently being able to respond hold a hearing[.]" Appellants' Brief at 9. Goodson and State Farm, in separate briefs, counter that the Carlsons waived those issues by failing to raise them to the trial court. We agree with Goodson and State Farm.

Generally, "a party may not present an argument or issue to an appellate court unless the party raised that argument or issue to the trial court." Heaphy v. Ogle, 896 N.E.2d 551, 555 (Ind. Ct. App. 2008) (quoting GKC Ind. Theatres, Inc. v. Elk Retail Investors, LLC., 764 N.E.2d 647, 651 (Ind. Ct. App. 2002)). Failure to raise an issue before the trial court will result in waiver of that issue. Id. (citing Van Winkle v. Nash, 761 N.E.2d 856, 859 (Ind. Ct. App. 2002)).

Here, the trial court began the October 3 hearing by stating, "We're here today on the Defendant's Motion to Dismiss." Transcript at 3. The parties, including the Carlsons (by counsel), then proceeded to argue their respective positions regarding Goodson's

⁴ We observe that the Carlsons have not included an executed copy of the order appealed from in their appendix. We remind counsel for the Carlsons that an appellant's appendix must include a copy of the order or judgment appealed from. Ind. Appellate Rule 50(A)(2)(b). We acknowledge that the appendix contains an unsigned copy of the proposed order, but, in some instances, such a copy may not be the same as the final order executed by the trial court.

Trial Rule 41(E) motion. On appeal, the Carlsons argue that they were “blindsided by the Court hearing argument on Goodson’s 41(E)” motion. Appellants’ Brief at 11. But counsel for the Carlsons did not appear blindsided. Counsel for the Carlsons did not question or clarify the purpose of the hearing or otherwise object to the stated purpose, either during or after the hearing. Instead, he merely argued his clients’ opposition to the motion to dismiss.

The Carlsons have not directed us to any part of the record on appeal to show that they raised this issue to the trial court. Nor has our review of the record revealed that they raised lack of notice or the lack of an opportunity to respond to Goodson’s motion to dismiss before filing their appeal. As a result, the Carlsons have waived those issues for review. See id.

Issue Two: Motion to Dismiss

The Carlsons also argue that the trial court abused its discretion when it granted Goodson’s motion to dismiss under Trial Rule 41(E). In particular, they argue that (1) the trial court “failed to follow” this court’s specific instructions and “the law of the case” in Goodson by dismissing the complaint, and (2) the evidence does not support a finding of “contumacious disregard” for the trial court or that lesser sanctions would not have been effective. Id. at 10. We address each contention in turn.

The Carlsons first argue that the trial court failed to follow “the law of the case” in Goodson when it granted Goodson’s motion to dismiss the complaint under Trial Rule 41(E). The Carlsons’ argument, in its entirety, states:

An Appellate Court decision rendered upon a set of facts becomes the “law of the case” of those facts. Fair Share Organization, Inc. v. Mitnick, [245

Ind. 324, 198 N.E.2d 765 (1964), cert. denied]. If the same facts are then litigated at trial, the Appellate decision remains the “law of the case” binding the trial and a subsequent Appellate Court. Id. 198 N.E.2d at 766. The facts presented before this Court when it rendered its opinion are the same facts.

Therefore, the first Appellate Court decision is the “law of this case” and governs the trial court and this Court. Here, the trial court’s dismissal overstepped this Honorable Court’s direct instructions on remand to only “set aside the default judgment.” (Appellant’s App. at 60). This Honorable Court did not instruct the trial court to dismiss the matter outright without giving [the] Carlsons[] a chance to perfect service. If it had, this Honorable Court would have dismissed the matter itself. Since this Court did not do so, one can only conclude that it[’]s not what this Honorable Court intended and thus, this Honorable Court should reverse the trial court’s dismissal of this case and remand this case back again to the trial court with specific instructions to reinstate this matter.

Appellants’ Brief at 8 (underlining in original).

As in Issue One, the Carlsons did not make this argument to the trial court. As such, they have waived the argument for review. See Heaphy, 896 N.E.2d at 555. Moreover, their argument lacks cogent reasoning. The Carlsons accurately describe the law of the case doctrine. But they do not explain how our instruction to set aside the default judgment in any way limited the trial court’s options in proceeding on motions filed in the trial court after remand. As such, again, they have waived the argument for review. See App. R. 46(A)(8)(a).

We next consider the Carlsons’ argument that the evidence does not support a finding of “contumacious disregard” for the trial court or that lesser sanctions would not have been effective. Appellants’ Brief at 10. Here, again, the Carlsons waived this argument because they did not make it to the trial court. See Heaphy, 896 N.E.2d at 555.

Waiver notwithstanding, we address the merits of the argument.

In essence, the Carlsons argue that Goodson did not meet his burden of showing that dismissal was proper under Trial Rule 41(E). That rule 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 the condition that the plaintiff comply with these 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.

Ind. Trial Rule 41(E). We review dismissal of a cause of action under Trial Rule 41(E) for an abuse of discretion. Baker Mach., Inc. v. Superior Canopy Corp., 883 N.E.2d 818, 821 (Ind. Ct. App. 2008), trans. denied. In so doing, we consider whether the trial court's decision was against the logic and effect of the facts and circumstances; “we will affirm the trial court if any evidence supports the trial court's decision.” Id. at 1059 (citation omitted). The failure to diligently prosecute a case includes the failure to exercise due diligence in securing service of process. Geiger & Peters, Inc. v. Am. Fletcher Nat'l Bank & Trust Co., 428 N.E.2d 1279, 1283 (Ind. Ct. App. 1981).

This court held in Goodson that the Carlsons had not obtained service of process on Goodson and, therefore, the trial court had never obtained personal jurisdiction over him. Goodson, 888 N.E.2d at 222. We handed down our decision on June 3, 2008, and remanded the case to the trial court. Despite that holding, the Carlsons took no steps to obtain service of process on Goodson. A review of the CCS shows that their only actions were to strike a judge from the panel proposed after Goodson's motion for change of judge and to request a change of time and for telephonic attendance of the September 15

status conference. Although they claimed at the October 3 hearing that they needed court direction on how to properly obtain service of process on Goodson, they did not request such direction in the four months between our decision and that hearing.⁵ As such, the trial court did not abuse its discretion when it granted Goodson's motion to dismiss under Trial Rule 41(E). See Geiger & Peters, Inc., 428 N.E.2d at 1283.

Affirmed.

FRIEDLANDER, J., and VAIDIK, J., concur.

⁵ Counsel for the Carlsons argued at the hearing that they could not serve Goodson directly because he is represented by counsel. Counsel is incorrect that service of the complaint on Goodson would have violated a Rule of Professional Conduct. See Smith v. Johnston, 711 N.E.2d 1259, 1263 n.6 (Ind. 1999) ("Smith asserts that Johnston's attorney violated Rule of Professional Conduct 4.2 by communicating with 'a person known to be represented by counsel.' We do not agree. Serving a complaint is not 'communication' with a represented party prohibited by Rule of Professional Conduct 4.2. . . ."). Further, there is no evidence whether counsel for Goodson had agreed to accept service.