

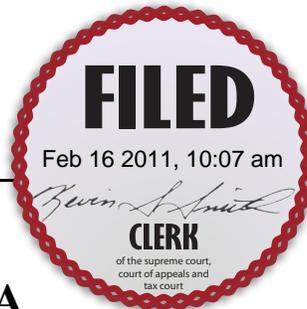
**Pursuant to Ind. Appellate Rule 65(D), this Memorandum Decision shall not be regarded as precedent or cited before any court except for the purpose of establishing the defense of res judicata, collateral estoppel, or the law of the case.**

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**IN THE  
COURT OF APPEALS OF INDIANA**

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SS ENTERPRISE, )

Appellant/Plaintiff, )

vs. )

LA JOYA APARTMENT, INC., )

Appellee/Defendant. )

No. 49A02-1005-CC-592

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APPEAL FROM THE MARION SUPERIOR COURT

The Honorable Cynthia J. Ayres, Judge

Cause No. 49D04-0702-CC-5966

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**February 16, 2011**

**MEMORANDUM DECISION - NOT FOR PUBLICATION**

**BRADFORD, Judge**

Appellant/Plaintiff SS Enterprise appeals following the trial court's dismissal, with prejudice, of its complaint against Appellee/Defendant La Joya Apartment, Inc. ("La Joya"). Specifically, SS Enterprise contends that the trial court abused its discretion in excluding its witnesses and exhibits from trial after it failed to timely file a final witness and exhibit list. We affirm.

### **FACTS AND PROCEDURAL HISTORY<sup>1</sup>**

On February 12, 2007, SS Enterprise commenced the underlying cause of action against La Joya. On or about April 18, 2007, La Joya responded to SS Enterprise's complaint, raised affirmative defenses, and filed counterclaims against SS Enterprise.

On September 29, 2009, the trial court entered a "Pretrial Conference Order" setting forth specific deadlines by which the parties were required to file their expert disclosures and final witness and exhibit lists. Appellee's App. p. 38. The September 29, 2010 pretrial order provided as follows:

2. **FINAL WITNESS AND EXHIBIT LISTS** shall be filed with the Court and exchanged with counsel no later than 1/9/10.
  - a. Plaintiff's expert(s) disclosures by 11/9/09.
  - b. Defendant's expert(s) disclosures by 12/9/09.
3. **WITNESSES** not so named shall not be permitted to testify except upon motion for good cause shown.

Appellee's App. pp. 31-32.

On December 28, 2009, forty-nine days after the deadline set by the trial court, SS Enterprise filed an expert disclosure. SS Enterprise did not file a timely final witness and

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<sup>1</sup> La Joya has filed a motion for oral argument, which we deny in an order issued simultaneously with this decision.

exhibit list. On January 14, 2010, La Joya filed a combined motion to strike SS Enterprise's untimely expert disclosure and to exclude SS Enterprise's witness and exhibits ("combined motion to strike"). The trial court conducted a hearing on La Joya's combined motion to strike on February 3, 2010.

On February 5, 2010, twenty-seven days after the deadline set by the trial court and two days after the aforementioned hearing before the trial court, SS Enterprise filed its final witness and exhibit list. On February 8, 2010, the trial court granted La Joya's combined motion to strike "as a result of [SS Enterprise's] failure to adhere to the clear deadlines provided by the Pretrial Conference Order, or to timely seek leave to extend those deadlines, and the resulting prejudice to [La Joya] because of such failure." Appellee's App. p. 39. Thus, SS Enterprise was "excluded from calling any witnesses or admitting any exhibits *in support of its claims at trial.*" Appellee's App. p. 39 (emphasis in original).

On February 10, 2010, SS Enterprise filed an emergency motion asking the trial court to reconsider its February 8, 2010 ruling, which was subsequently denied by the trial court. On February 23, 2010, SS Enterprise filed a second motion to reconsider.<sup>2</sup> On March 1, 2010, La Joya filed a Trial Rule 41(B) motion to dismiss. The trial court conducted a hearing on the parties' motions on March 8, 2010. At the conclusion of the March 8, 2010 hearing, the trial court denied SS Enterprise's second motion to reconsider. On May 3, 2010, the trial

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<sup>2</sup> SS Enterprise called this second motion to reconsider a motion to correct error. However, Trial Rule 59 indicates that a motion to correct error is filed following the entry of a final judgment. *See* Ind. Trial Rule 59. Therefore, we will treat SS Enterprise as a motion to reconsider.

court issued an order granting La Joya's motion to dismiss. This appeal follows.

### **DISCUSSION AND DECISION<sup>3</sup>**

SS Enterprise contends that the trial court abused its discretion in excluding its witnesses and exhibits from trial after it failed to timely file a final witness and exhibit list. "Indiana Trial Rule 16 contemplates the entry of a comprehensive order incorporating, among other things, the identification of witnesses and exhibits." *Daub v. Daub*, 629 N.E.2d 873, 875 (Ind. Ct. App. 1994), *trans. denied*; *see also* Ind. Trial Rule 16(J). Once the comprehensive order is entered, it controls the subsequent course of action unless modified to prevent manifest injustice. *Id.*

The question of whether particular witnesses or exhibits should be excluded from evidence because they were not timely submitted in a list of witnesses and exhibits is committed to the discretion of the trial court. *Id.* Furthermore, the trial court has broad discretion in managing its docket and enforcing deadlines. *Storey v. Leonas*, 904 N.E.2d 229, 239 n.5 (Ind. Ct. App. 2009), *trans. denied*; *Neeley v. State*, 156 Ind. App. 449, 452, 297 N.E.2d 475, 477 (1973). "An abuse of discretion occurs if the decision is clearly against the logic and effect of the facts and circumstances before the court, or the reasonable probable,

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<sup>3</sup> Initially we note that SS Enterprise's appellate brief does not conform with the requirements set forth in the Indiana Rules of Appellate Procedure. SS Enterprise's brief did not include a statement of the facts relevant to the issues presented for review as required by Indiana Appellate Rule 46(A)(6) and was largely devoid of citations to the record in violation of Indiana Appellate Rule 22(C). In addition, SS Enterprise failed to file an Appellant's Appendix as required by Indiana Appellate Rules 49 and 50. We remind counsel for SS Enterprise that all future filings with this court, whether related to this or other matters, must be filed in accordance with the Indiana Rules of Appellate Procedure.

Further, in light of the nonconforming nature of SS Enterprise's brief, La Joya has filed a verified motion to strike SS Enterprise's brief. Because we conclude that, despite the nonconforming nature of SS Enterprise's brief, the instant matter can be decided on its merits, we deny La Joya's motion as moot in an order issued simultaneously with this opinion.

and actual deductions to be drawn therefrom.” *Hatter v. Pierce Mfg., Inc.*, 934 N.E.2d 1160, 1173 (Ind. Ct. App. 2010). “While this court acknowledges that the opportunity to be heard in court is a litigant’s most precious right and should be sparingly denied, we will not condone disregard for the trial court’s orders.” *Prime Mortg. USA, Inc. v. Nichols*, 885 N.E.2d 628, 649 (Ind. Ct. App. 2008).

The record reflects that the trial court issued a pretrial order on September 29, 2010, instructing the parties as follows:

2. **FINAL WITNESS AND EXHIBIT LISTS** shall be filed with the Court and exchanged with counsel no later than 1/9/10.
  - a. Plaintiff’s expert(s) disclosures by 11/9/09.
  - b. Defendant’s expert(s) disclosures by 12/9/09.
3. **WITNESSES** not so named shall not be permitted to testify except upon motion for good cause shown.

Appellee’s App. pp. 31-32. The record further reflects that SS Enterprise filed its expert disclosure on December 28, 2009, forty-nine days after the deadline set by the trial court, and that it filed its final witness and exhibit lists on February 5, 2010, twenty-seven days after the deadline set by the trial court. SS Enterprise did not request an extension of time to file its expert disclosure or final witness and exhibit lists or provide a motion showing good cause why its belated disclosure and witness and exhibit lists should be accepted by the trial court.

SS Enterprise admits that it failed to comply with the trial court’s order and that it did not timely file either its expert disclosure or its final witness and exhibit lists. While acknowledging that the exclusion of its witnesses and exhibits “was not a dismissal or default judgment *per se*,” SS Enterprise argues that the exclusion of its witnesses and exhibits “essentially functioned as such.” Appellant’s Br. p. 8. SS Enterprise argues that the trial

court abused its discretion in excluding the testimony of its witnesses and its exhibits from trial because the exclusion of its witnesses and exhibits was a “harsh result” which runs counter to the idea that the trial court should have allowed SS Enterprise to submit exhibits and its witnesses to testify at trial out of a sense of justice and equity. Appellant’s Br. p. 8. In making this argument, SS Enterprise cites to *Prime Mortgage*, and *Wozniak v. Northern Indiana Public Service Co.*, 620 N.E.2d 33 (Ind. Ct. App. 1993), *trans. denied*. However, neither of these cases support SS Enterprise’s claim. In both *Prime Mortgage* and *Wozniak*, this court concluded that the trial court did not abuse its discretion in entering a default judgment and judgment on the evidence, respectively, and, as a result, affirmed the judgment of the trial court. *Prime Mortg.*, 885 N.E.2d at 649-50 (providing that the trial court did not abuse its discretion in entering default judgment in favor of the plaintiff following discovery violations by the defendant); *Wozniak*, 620 N.E.2d at 875-76 (providing that the trial court did not abuse its discretion in entering judgment on the evidence in favor of the defendants following discovery violations by the plaintiff).

Further, to the extent that SS Enterprise argues that the trial court abused its discretion in excluding its exhibits and witnesses, we disagree. SS Enterprise asserts that La Joya was not prejudiced by its failure to timely submit a final exhibit list because the exhibits that SS Enterprise ultimately included on its untimely final exhibit list had been included in the discovery that was previously exchanged between the parties. However, we are unable to verify the truth of this assertion that the proposed exhibits were in fact included in the discovery that was previously exchanged between the parties because SS Enterprise failed to

provide this court with an appendix containing the documentation that could potentially support its claim. Without any proof supporting SS Enterprise's argument, we are unable to evaluate its claim that the trial court abused its discretion in finding that SS Enterprise's failure to timely comply with the deadlines set forth in the September 29, 2010 pretrial order was not prejudicial to La Joya.

The judgment of the trial court is affirmed.

KIRSCH, J., and CRONE, J., concur.