

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.

ATTORNEY FOR APPELLANTS:

**KEVIN W. MARSHALL**  
Hobart, Indiana

ATTORNEYS FOR APPELLEES:

**JERE L. HUMPHREY**  
Plymouth, Indiana

**JAMES H. AUSTEN**  
Logansport, Indiana



---

**IN THE  
COURT OF APPEALS OF INDIANA**

---

ALAN McCOOK and MARY McCOOK, )  
 )  
 Appellants-Plaintiffs, )  
 )  
 vs. )  
 )  
 )  
 MMWCK & ASSOCIATES, LLC, )  
 )  
 Appellee-Plaintiff, )  
 )  
 and )  
 )  
 UNITED FAMILY FARM MUTUAL )  
 INSURANCE COMPANY, )  
 )  
 Appellee-Defendant. )

No. 43A03-1001-PL-15

---

APPEAL FROM THE KOSCIUSKO CIRCUIT COURT  
The Honorable Duane G. Huffer, Special Judge  
Cause No. 43C01-0611-PL-1083

---

**APRIL 6, 2010**

## MEMORANDUM DECISION - NOT FOR PUBLICATION

**SHARPNACK, Senior Judge**

### STATEMENT OF THE CASE

Appellants Alan McCook and Mary McCook (“the McCooks”) appeal from the trial court’s dismissal of their case. We affirm.

### ISSUES

The McCooks raise two issues, which we consolidate and restate as whether the trial court abused its discretion by dismissing the McCooks’ case pursuant to Indiana Trial Rule 41(E) for failure to prosecute.<sup>1</sup>

### FACTS AND PROCEDURAL HISTORY

On March 22, 2006, the McCooks’ house in Warsaw, Indiana was severely damaged by a leaking water pipe on the house’s second floor. The McCooks had purchased insurance for the house from Appellee United Farm Family Mutual Insurance Company d/b/a Indiana Farm Bureau Insurance Company (“Farm Bureau”) through Appellee Brent Cooper. On May 2, 2006, the McCooks signed a Statement of Authorization permitting Michiana to repair the McCooks’ house and clean their personal property.

---

<sup>1</sup> In its Appellees’ Brief, Appellee MMWCK & Associates, LLC d/b/a Michiana Restoration & Construction (“Michiana”) asks the Court to strike pages 80-81 from the McCooks’ Appellants’ Appendix because those documents were not filed with the trial court. The documents in question are actually on pages 80-82 of the Appellants’ Appendix. This Court is striking those documents by separate order, and those documents played no role in the consideration of this appeal.

It appears that the parties disagreed over the scope of work necessary to correct the damage. On November 1, 2006, Michiana began this case in Lower Cause Number 43C01-0611-PL-1083 (“PL-1083”) by filing suit against the McCooks. The McCooks filed a counterclaim against Michiana. Meanwhile, the McCooks filed their own civil complaint against Farm Bureau, Cooper, and Michiana in Lower Cause Number 43D01-0703-PL-220 (“PL-220”). On May 11, 2007, the trial court in PL-220 consolidated that case with the current case. Thus, the parties’ claims and counterclaims have proceeded under PL-1083.

Pursuant to an October 26, 2007 trial court order, the case was sent to mediation. On June 4, 2008, the mediator reported to the trial court that mediation had been unsuccessful. The next event on the docket occurred on September 15, 2009, when Farm Bureau and Cooper filed a motion to dismiss the McCooks’ complaint against them due to the McCooks’ failure to prosecute. Michiana joined in the motion to dismiss. The McCooks filed a response, in which they asked the trial court to set a trial date. After a hearing, the trial court dismissed the McCooks’ complaint for failure to prosecute. This appeal followed.

### DISCUSSION AND DECISION

Dismissal for failure to prosecute is governed by Indiana Trial Rule 41(E), which 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. 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.

We will reverse a Trial Rule 41(E) dismissal for failure to prosecute only in the event of a clear abuse of discretion, which occurs if the decision of the trial court is against the logic and effect of the facts and circumstances before it. *Belcaster v. Miller*, 785 N.E.2d 1164, 1167 (Ind. Ct. App. 2003), *transfer denied*. We will affirm if there is any evidence that supports the decision of the trial court. *Id.*

Courts of review generally balance several factors when determining whether a trial court abused its discretion in dismissing a case for failure to prosecute. These factors include: (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 or her 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 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 any particular factor has in a particular case appears to depend upon the facts of that case. *Lee v. Friedman*, 637 N.E.2d 1318, 1320 (Ind. Ct. App. 1994).

In this case, the McCooks assert that they had good reason for the delay. Specifically, the McCooks assert that during the period of inactivity on the docket, they were attempting to sell their home in the hopes that the sale would make them whole and end the case. Appellants' Br. p. 8. Therefore, they assert that they were not dilatory in pursuing their claims. We disagree. The McCooks were obligated to diligently pursue their claims regardless of whether their house sold. In addition, the McCooks do not explain why the lawsuit could not have moved forward while they attempted to sell their house. At a minimum, the McCooks could have notified the trial court of their continued attempts to sell the house and requested a stay of the case. Thus, the McCooks' attempt to sell their house is not a sufficient reason for the delay.

Turning to the other factors we consider when reviewing a dismissal for failure to prosecute, we note that the case sat inactive on the trial court's docket for over a year. Furthermore, it appears that the McCooks bear personal responsibility for the delay, because they, and not their attorney, were attempting to sell their house. Finally, the McCooks asked the trial court to reset the case for trial only after Farm Bureau, Cooper, and Michiana filed their motion to dismiss for failure to prosecute. These factors support the trial court's dismissal of the McCooks' complaint.

On the other hand, the record does not reflect that the McCooks had a history of dilatory behavior in this case prior to the delay that led to the dismissal. Furthermore, Farm Bureau, Cooper, and Michiana do not demonstrate that the McCooks' delay prejudiced them by hampering their ability to prepare their defenses for trial. In addition,

less drastic sanctions than dismissal may have sufficed to fulfill the purpose of the rules, and this Court prefers to consider matters on the merits when possible.

Although several factors weigh in favor of the McCooks, the trial court's decision to dismiss their claims is supported by the length of the delay, the lack of a sufficient reason for the delay, and the McCooks' failure to move forward with the case until after Farm Bureau, Cooper and Michiana filed their motion to dismiss. We conclude that there is evidence to support the trial court's decision, and dismissal was not against the logic and effect of the facts and circumstances before the trial court. *See Lee v. Pugh*, 811 N.E.2d 881, 886-887 (Ind. Ct. App. 2004) (affirming a dismissal for failure to prosecute where the appellants failed to offer a sufficient reason for the delay and violated the Indiana Rules of Trial Procedure).

#### CONCLUSION

For these reasons, we affirm the trial court's grant of Farm Bureau, Cooper, and Michiana's motion to dismiss for failure to prosecute.

Affirmed.

KIRSCH, J., and VAIDIK, J., concur.