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**IN THE  
COURT OF APPEALS OF INDIANA**

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KEVIN J. BYERS, )

Appellant-Plaintiff, )

vs. )

No. 52A04-1012-CT-767

CONSOLIDATED UNION, INC., )

Appellee-Defendant. )

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APPEAL FROM THE MIAMI CIRCUIT COURT  
The Honorable Robert A. Spahr, Judge  
Cause No. 52C01-0905-CT-264

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**August 12, 2011**

**MEMORANDUM DECISION - NOT FOR PUBLICATION**

**MAY, Judge**

Kevin Byers appeals summary judgment for Consolidated Union, Inc. (Consolidated).

He raises multiple issues for our review, which we consolidate and restate as:

1. Whether the trial court abused its discretion when it denied Byers' motion to amend his complaint and add a necessary third party; and
2. Whether summary judgment was proper.

We affirm.

### **FACTS AND PROCEDURAL HISTORY**

Sometime in the mid-1990's, Byers contacted Jill Spin, an insurance agent with Estlick, Girvin, and Lefever, to request homeowners' insurance for his residence. Spin helped Byers obtain a homeowners' insurance policy with Goodwill Mutual Insurance Company (Goodwill). In 2002, Spin became an insurance agent for Consolidated. She remained employed there until 2006.

On August 19, 2004, Goodwill sent a notice to Byers and the banks with which he had mortgages, First Farmers Bank and Trust (Bank) and The CIT Group, indicating his homeowners' insurance policy would terminate on September 24, 2004. Byers claimed he never received this notice and therefore did not procure alternate homeowners' insurance.

On May 25, 2007, Byers' residence was damaged by fire. After the fire, Byers contacted Consolidated to make a claim on his homeowners' insurance policy, and he was told he did not have a policy with Consolidated.

On May 28, 2009, Byers sued Consolidated, alleging it "did not contract for insurance coverage as requested by [Byers][,]" "failed to obtain insurance, and is in breach of

contract[,]” and is “negligent for failing to obtain insurance coverage for [Byers].” (App. at 2.) Consolidated answered the complaint on June 8, 2009, and raised a non-party defense, asserting the Bank was responsible for Byers’ damages.

Over a year later, on September 8, 2010, Consolidated filed a motion for summary judgment. On October 7, Byers filed a motion for substitution of counsel, which was granted. That same day, his new counsel,<sup>1</sup> moved to add Bank as a defendant. On October 28, Byers filed a response to Consolidated’s motion for summary judgment.

On November 12, the trial court held a hearing on Consolidated’s motion for summary judgment. The trial court granted summary judgment in favor of Consolidated in an order that denied Byers’ motion to amend his complaint; declined to consider Byers’ motion to amend as his response to Consolidated’s motion for summary judgment; struck Byers’ response to Consolidated’s motion for summary judgment as untimely; and held Byers’ claims were barred by the statute of limitations.

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<sup>1</sup> The attorney who replaced Byers’ original counsel is also his counsel in this appeal, and we take this opportunity to address a few procedural missteps made in Byers’ brief. First, we note Byers’ counsel included an “Appellant’s Proposed Appellate Order.” While trial courts may frequently accept draft orders from parties, nothing in our appellate rules suggests a proposed order by a party is necessary or permitted.

Additionally, we highlight counsel’s use of footnotes to indicate the portions of the appendix and transcript, as well as some cases and side arguments. The format used by counsel has been encouraged by many proponents, including Bryan Garner. *See Garner on Language and Writing* 475 (2009). At the present time, however, Ind. Appellate Rule 22 states that “[u]nless otherwise provided, a current edition of a Uniform System of Citation (Bluebook) shall be followed.” *See The Bluebook: A Uniform System of Citation* 4 (Columbia Law Review Ass’n et al. eds, 19<sup>th</sup> ed. 2010)(providing that “[i]n non-academic legal documents, citations appear within the text of the documents as full sentences or as clauses within sentences directly after the propositions they support. As opposed to academic legal documents, which cite to authority using footnotes . . .”). While the new or different format may be attractive to some, it is recommended counsel utilize our present process until the rules are amended.

## DISCUSSION AND DECISION

### 1. Motion to Amend

Byers contends the trial court should have allowed him to add the Bank as a party.

We review a ruling on a motion to amend for abuse of discretion. *Turner v. Franklin County Four Wheelers, Inc.*, 889 N.E.2d 903, 906 (Ind. Ct. App. 2008). An abuse of discretion occurs when “the trial court’s decision is clearly against the logic and effect of the facts and circumstances before the court, or if the court has misinterpreted the law.” *Id.* In determining if an abuse of discretion has occurred, we consider factors such as “undue delay, bad faith or dilatory motive on the part of the movant, repeated failure to cure deficiency by amendment previously allowed, undue prejudice to the opposing party, and futility of the amendment.” *Id.*

In granting summary judgment for Consolidated, the trial court “specifically reject[ed] the Motion to Amend Complaint to add [Bank] as Necessary party.” (App. at 192.) Byers’ motion came sixteen months after his complaint, and more than a year after Consolidated first advanced the affirmative defense that the Bank was responsible for Byers’ damages. Byers’ delay in amending his complaint unduly prejudiced Consolidated. *See Hilliard v. Jacobs*, 927 N.E.2d 393, 400 (Ind. Ct. App. 2010) (plaintiff’s tactic of “asserting new theories of recovery only after the original claims have proven unsound would place undue burden on [defendant] . . . and such undue burden constitutes prejudice”). In light of Byers’ delay in amending his complaint, we cannot say the trial court abused its discretion in

denying his motion.<sup>2</sup>

## 2. Summary Judgment

In his complaint, Byers alleged Consolidated breached their contract and was negligent when it did not procure homeowners' insurance at Byers' request.<sup>3</sup> In granting summary judgment, the trial court apparently applied the two-year limitations period for negligence claims<sup>4</sup> to determine Byers' claim was barred:

. . . counsel for [Consolidated] directed the Court to the fact that [Byers] suffered fire damage to his property on May 25, 2007, but failed to file his complaint against the Defendant, Consolidated Union until May 28, 2009.

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<sup>2</sup> The trial also declined to consider Byers' motion to amend as a response to Consolidated's motion for summary judgment. At the hearing on Consolidated's motion for summary judgment, Byers' counsel asked the court to consider his motion to amend complaint and add a necessary defendant a response to Consolidated's motion for summary judgment. Counsel said he thought the "motion to amend the complaint retire[d] [Consolidated's summary judgment motion]." (Tr. at 26.) Byers bases his argument on our recent decision in *Wise v. Hays*, wherein we allowed an exhibit in Wise's amended complaint to be considered as a response to what we characterized as Hays' motion for summary judgment. 943 N.E.2d 835, 839 (Ind. Ct. App. 2011). The instant case is distinguishable.

In *Wise*, Hays filed a motion to dismiss, which the trial court granted. On appeal, we determined the grant of the motion to dismiss amounted to a summary judgment for Hays because the trial court considered exhibits Wise submitted in her amended complaint. The rules regarding summary judgment pleadings were not at issue at the trial court, and we did not discuss them in our opinion. Here, however, Consolidated filed a motion for summary judgment, and thus the filing deadlines under T.R. 56 are applicable, not *Wise*.

Accordingly, we hold the trial court did not abuse its discretion in declining to consider his motion to amend a response to Consolidated's summary judgment motion.

<sup>3</sup> Byers also argues his response to Consolidated's Motion for Summary Judgment was timely. We disagree.

[W]here a nonmoving party fails to respond within thirty days by either (1) filing affidavits showing issues of material fact, (2) filing his own affidavit under Rule 56(F) indicating why the facts necessary to justify his opposition are unavailable, or (3) requesting an extension of time in which to file his response under 56(I), the trial court lacks discretion to permit that party to thereafter file a response. In other words, a trial court may exercise discretion and alter time limits under 56(I) only if the nonmoving party has responded or sought an extension within thirty days from the date the moving party filed for summary judgment.

*HomEq Servicing Corp. v. Baker*, 883 N.E.2d 95, 98 (Ind. 2008) (quoting *Desai v. Croy*, 805 N.E.2d 844, 850 (Ind. Ct. App. 2004)).

Consolidated filed its motion for summary judgment on September 13, 2010, and Byers was required to respond by October 14. Byers responded October 28, which was two weeks too late. He did not ask for an extension. Pursuant to *HomEq*, the trial court lacked the discretion to allow him to respond after the due date, *id.*, and therefore it properly struck Byers' response.

<sup>4</sup> Ind. Code § 34-11-2-4.

[Consolidated] had noted a statute of limitations defense with its answer filed June 8, 2009. The Court FINDS that the statute of limitations does bar [Byers] from recovering damages from [Consolidated].

(App. at 192.) Byers argues the trial court erroneously ignored his breach of contract claim, for which the limitations period is six years.<sup>5</sup> It did not.

The elements of a breach of contract action are the existence of a contract, the defendant's breach, and damages. *Fowler v. Campbell*, 612 N.E.2d 596, 600 (Ind. Ct. App. 1993). The evidence before the trial court does not indicate Byers and Consolidated Union had a contract concerning the property damaged in 2007.<sup>6</sup> Byers provided evidence he contracted with Spin to procure insurance for his property, and she helped him obtain a policy with Goodwill in the mid-1990's, before she started working for Consolidated. Byers testified he contacted Spin prior to the fire to ask her to continue as his insurance agent,<sup>7</sup> but he did not "initiate any contact with anybody from Consolidated Union . . . prior to the fire." (App. at 12.) Thus, the designated evidence was that Byers had no contact with Consolidated regarding insurance on his home until after his loss, and he had never asked Consolidated to procure insurance for him at that residence.

For purposes of computing a limitations period, "the nature or substance of the cause of action determines the applicability of the statute of limitations." *Butler v. Williams*, 527

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<sup>5</sup> Ind. Code § 34-11-2-7 establishes a six year statute of limitations for contracts not in writing.

<sup>6</sup> Byers argued at the summary judgment hearing and in his untimely response to Consolidated's motion for summary judgment that he contracted with Consolidated to procure insurance on another property, and thus he had a contract with Consolidated regarding the property damaged by fire. However, as we have held the trial court did not abuse its discretion in declining to consider Byers' response to Consolidated's summary judgment motion, we need not address Byers' argument.

N.E.2d 231, 233 (Ind. Ct. App. 1988). The gist of Byers' complaint is that he incurred damages because Consolidated did not procure insurance for him. *See Page v. Hines*, 594 N.E.2d 485, 487 (Ind. Ct. App. 1992) (agent's alleged failure to procure employer liability coverage was a negligence action, not a breach of contract action, so statute of limitations for negligence applied); *see also Butler*, 527 N.E.2d at 233 (agent's alleged failure to procure dram shop insurance coverage was a negligence action and subject to two year statute of limitations). The two year statute of limitations set forth in Ind. Code § 34-1-2-2(1) applies to Byers' complaint.

The limitations period for negligent failure to procure insurance begins to run when the insured "discovered, or reasonably should have discovered" the agent's negligent failure to procure insurance coverage. *Filip v. Block*, 879 N.E.2d 1076, 1083 (Ind. 2008), *reh'g denied*. The trial court found the limitations period commenced May 25, 2007, the day of the fire. Byers did not designate any evidence to create a genuine issue of material fact regarding the commencement date. Therefore, the finding that Byers' complaint, filed on May 28, 2009, was barred by the two year statute of limitations set forth in Ind. Code § 34-1-2-2(1) was not in error, and we accordingly affirm.

## CONCLUSION

The trial court did not abuse its discretion when it denied Byers' motion to amend and add the Bank as a defendant. Additionally, Consolidated was entitled to summary judgment

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<sup>7</sup> It is not clear when this communication occurred. Although Byers testified he contacted Spin to "switch back" to her, (App. at 12), that communication could have occurred after her termination of employment with Consolidated.

because Byers failed to timely designate evidence that would create a genuine issue of material fact about whether his claims were barred by the statute of limitations. Finally, the trial court properly denied Byers' request to consider his motion to amend as a response to summary judgment and properly struck Byers' response to Consolidated's motion for summary judgment because it was untimely. Accordingly, we affirm.

Affirmed.

BAKER, J., and BRADFORD, J., concur.