MEMORANDUM DECISION

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IN THE COURT OF APPEALS OF INDIANA

Bland's, LLC,
Appellant-Defendant,

v.

Shelter Mutual Insurance Company,
Appellee-Plaintiff

July 7, 2022

Court of Appeals Case No. 22A-PL-343

Appeal from the Monroe Circuit Court

The Honorable Holly M. Harvey, Judge

Trial Court Cause No. 53C06-2110-PL-2102

Vaidik, Judge.

Case Summary

[1] Bland's, LLC appeals the trial court's dismissal of its complaint against Shelter Mutual Insurance Company under Indiana Trial Rule 12(B)(6). We affirm.

Facts and Procedural History

[2] Bland's is a towing company. In November 2019, law enforcement called Bland's to the scene of a two-vehicle accident in Bloomington. Bland's removed Elizabeth Colson's Ford Explorer from a ditch and, after clearing the roadway of debris, transported the Explorer to a storage facility where it was held for eighty days. Bland's sent Colson two invoices for its services, totaling $3,322.20. Colson submitted the invoices to her auto insurer, Shelter. Shelter denied the claim, explaining that Colson's policy did not cover "collision[.]" Appellant's App. Vol. II pp. 11, 48.

[3] In January 2021, having not received any payment, Bland's filed suit against Colson to collect on the invoices. The trial court, by agreement of the parties, entered judgment against Colson and in favor of Bland's for $3,322.20 plus $206.07 in prejudgment interest. *See* Cause No. 53C04-2101-SC-89.

[4] As of October 2021, Bland's had only received $600 from Colson, so it filed suit directly against Shelter. Bland's sought a declaratory judgment that Colson's towing charges are covered by her policy with Shelter as well as an award of damages to cover the charges. Bland's attached a copy of the policy to its complaint. Shelter moved for dismissal under Trial Rule 12(B)(6) for failure to state a claim, asserting that the policy "did not include collision or comprehensive coverage that would pay for the invoice[.]" Appellant's App. Vol. II p. 54. The trial court granted Shelter's motion and dismissed the complaint "with prejudice." *Id.* at 8.

[5] Bland's now appeals.

Discussion and Decision

I. Dismissal

[6] Bland's argues the trial court erred by granting Shelter's motion to dismiss. A civil action may be dismissed under Trial Rule 12(B)(6) for "failure to state a claim upon which relief can be granted." A 12(B)(6) motion "tests the legal sufficiency of the plaintiff's claim, not the facts supporting it." *Residences at Ivy Quad Unit Owners Ass'n, Inc. v. Ivy Quad Dev., LLC*, 179 N.E.3d 977, 981 (Ind. 2022) (quotation omitted). To overcome a 12(B)(6) motion, the complaint must allege facts that demonstrate the "possibility of relief." *Id*. at 980. We review a 12(B)(6) dismissal de novo. *Id*. at 981. We take the alleged facts stated in the complaint as true, and we view the complaint "in the light most favorable to the nonmoving party," construing "every reasonable inference in that party's favor." *Id*. However, dismissal is proper if the complaint fails to allege any facts that could give rise to relief. *Id*. at 982. A written instrument attached to a complaint, such as an insurance policy, is considered part of the complaint. *See* Ind. Trial Rule 10(C); *Graves v. Kovacs*, 990 N.E.2d 972, 976 (Ind. Ct. App. 2013).

[7] Bland's contends that the trial court erred by dismissing its complaint because "it is not possible to conduct a review of the Auto Policy at the pleadings stage" and "[t]he parties may address the evidentiary issues through discovery." Appellant's Br. p. 16. However, it fails to direct us to any specific provision of

the policy that could even **potentially** cover Colson's towing and storage bill. It notes broadly that Colson's policy includes "coverage for property damage." *Id.* at 12, 13. This seems to refer to "COVERAGE B – PROPERTY DAMAGE LIABILITY COVERAGE." *See* Appellant's App. Vol. II pp. 26-29. But again, Bland's cites no language in that part of the policy that might apply here. The policy defines "property damage," in relevant part, as "demonstrable physical damage to real or personal property." *Id.* at 22. Bland's did not suffer any physical damage to its real or personal property. It only provided towing services, and it has identified no part of Colson's policy that could possibly provide coverage for those services.[1]

[8] Bland's also contends that even if the terms of the policy don't provide coverage, Shelter should have to pay the invoices because of Indiana's emergency-vehicle towing statute, Indiana Code section 24-14-3-3. That statute provides that a towing company can be called to the location of a disabled motor vehicle and that "[t]he fee charged by the towing company may not be more than normally charged by the towing company for the service provided." Ind. Code § 24-14-3-3. While the statute permits a towing company to charge a fee, it doesn't say anything about the driver's or owner's **insurer** having to pay the fee.

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[1] Bland's also contends it is a third-party beneficiary to Colson's policy with Shelter. Even if this is true, that status matters only if the policy covers towing costs. As just discussed, Bland's has identified no part of the policy that might provide such coverage.

[9] Finally, Bland's argues, "It would be illogical to interpret the legislature's intent of the financial responsibility law in a manner that would allow the insurer to avoid paying to remove a vehicle from a public roadway." Appellant's Br. p. 14. However, the only "financial responsibility law" it cites is Indiana Code section 9-25-4-4. That statute provides, generally, any motor-vehicle liability policy "must contain the terms, conditions, and provisions required by statute[.]" I.C. § 9-25-4-4. But it contains no specific coverage requirements, let alone a requirement for coverage of towing costs.

[10] The trial court did not err by dismissing the complaint for failure to state a claim.

II. Dismissal With Prejudice

[11] In the alternative, Bland's contends the trial court erred by dismissing its complaint "with prejudice." We agree. Trial Rule 12(B) provides, in part, "When a motion to dismiss is sustained for failure to state a claim under subdivision (B)(6) of this rule the pleading may be amended once as of right pursuant to Rule 15(A) within ten [10] days after service of notice of the court's order sustaining the motion and thereafter with permission of the court pursuant to such rule." In other words, an initial dismissal under Rule 12(B)(6) is necessarily without prejudice since the plaintiff has the right to file an amended complaint. *In re Scott David Hurwich 1986 Irrevocable Tr.*, 59 N.E.3d 977, 984 (Ind. Ct. App. 2016).

[12] Even so, we will find such an error harmless if the appellant fails to show how it would amend its complaint to avoid another dismissal. *See Baker v. Town of Middlebury*, 753 N.E.2d 67, 74 (Ind. Ct. App. 2001), *trans. denied*; *see also Saylor v. Reid*, 132 N.E.3d 470, 474 (Ind. Ct. App. 2019), *trans. denied*. Bland's argues "[t]he trial court's order is inherently prejudicial and prevented Bland's from receiving any relief on the merits," Appellant's Reply Br. pp. 6-7, but it does not specifically tell us how it would amend its complaint. Therefore, the trial court's error was harmless.

[13] Affirmed.

Crone, J., and Altice, J., concur.