ATTORNEY PRO SE

Rebekah A. Atkins
Marengo, Indiana

IN THE COURT OF APPEALS OF INDIANA

Rebekah A. Atkins,
Appellant-Plaintiff,

v.

Crawford County Clerk's Office, Elected Clerk, Lisa Stephenson Holzbog, Chief Deputy Clerk-Lisa Ward, Deputy Clerk Charla Dawn Wright, and Deputy Clerk Vicki McMullen,
Appellee-Defendants.

June 1, 2021

Court of Appeals Case No. 20A-MI-2160

Appeal from the Crawford Circuit Court

The Honorable Sabrina Bell, Judge

Trial Court Cause No. 13C01-2010-MI-27

Tavitas, Judge.

Case Summary

[1] Rebekah Atkins appeals the dismissal of her complaint against the Crawford County Clerk, the Clerk's office, and its employees (collectively "Appellees"). Atkins composed and filed a lengthy complaint in the Crawford Circuit Court.

Among its many claims, Atkins' complaint alleged that Appellees were withholding (and possibly creating) records pertaining to Atkins, in violation of Indiana's Access to Public Records Act ("APRA"). Atkins then filed a variety of motions, including a motion to waive the filing fee and a motion for appointed counsel, all of which were denied by the trial court. Appellees filed a motion to dismiss Atkins' complaint, arguing that it failed to state grounds upon which relief could be granted. The trial court agreed and dismissed Atkins' complaint with prejudice. Because we disagree with the trial court's denial of Atkins' motion to proceed in forma pauperis and the decision to dismiss her case, we reverse. We affirm, however, the trial court's determination to deny Atkins' motion for appointed counsel.

Issue

[2] Atkins purports to raise thirty-three issues[1], which we consolidate and restate as:

I. Whether the trial court erred by denying Atkins' motion to waive the filing fee.

II. Whether the trial court erred in denying Atkins' motion to appoint trial counsel.

III. Whether the trial court exhibited bias against Atkins.

[1] Because we reverse the trial court's dismissal, we do not address the many other issues raised by Atkins in her brief.

IV. Whether the trial court erred in granting Appellees' motion to dismiss.

Facts

[3] On October 26, 2020, Atkins filed a seventeen-page complaint in the Crawford Circuit Court. The complaint alleged that the Crawford County Clerk was "holding, maintaining, and creating illicit and fictitious court [ ] records [ ] pertain[ing] to Ms. Atkins's [i]dentity." Appellant's App. Vol. II p. 27. Atkins further alleged that Appellees repeatedly denied Atkins access to the various record storage systems in the Clerk's office and refused to provide Atkins access to the records that Atkins believed pertained to her. The complaint listed a series of other grievances, including that Appellees perjured themselves by asserting that their office had perfected service on Atkins[2]; that the Clerk's staff "harass" and "intimidate" Atkins; and that the Clerk "[s]huts down the entire Clerk's Office [ ] just to deny access to Ms. Atkins." *Id*. at 29. Atkins' complaint specifically asserted that Appellees' alleged denials of access were in violation of APRA, and unconstitutionally "restrain[ed] Ms. Atkins' [l]iberty. . . ." *Id*. at 36.

[4] Atkins claimed that she attempted to avail herself of various administrative remedies in an effort to gain access to public records. Atkins also claimed that she visited the Clerk's office, approximately fourteen different times, and was

[2] It is unclear from the complaint which documents are at issue with respect to this claim or in which cases service was alleged to have been perfected.

informed that she needed to obtain a court order if she wished to access records in Appellees' possession. The complaint also details a series of filings—made by Atkins, pro se—aimed at obtaining access to Clerk's records, including numerous petitions for a writ of habeas corpus. Atkins claimed that she had been denied entry to the courthouse as well, apparently with respect to a different suit against the Clerk.

[5] Atkins proceeded to make sixteen filings—motions, objections, petitions, and affidavits—including a motion to proceed in forma pauperis and a motion for appointed counsel, all of which the trial court denied.[3] Appellees responded on December 8, 2020, by filing a motion to dismiss Atkins' complaint, pursuant to Indiana Trial Rule 12(B)(6). The motion argued that Atkins' complaint failed to state grounds upon which relief could be granted, and that Atkins' complaint should be dismissed on the grounds that she failed to pay the filing fee. Appellees requested a hearing on their motion. Without a hearing, the trial court granted the motion to dismiss the complaint with prejudice on January 23, 2021. On January 26, 2021, the trial court entered a second order, striking all pleadings from the record on the grounds that the trial court had denied Atkins' motion for waiver of the filing fee and instructed the Clerk to reject any further filings under the cause number of the dismissed complaint. This appeal followed.

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[3] The trial court denied motions to proceed in forma pauperis and to have an attorney appointed on October 30, 2020.

Analysis

I. Filing Fee

[6] It is unclear from the record on what basis the trial court denied Atkins' motion to proceed in forma pauperis and to waive the filing fee. "Indigency determinations present a subject for the sound discretion of the trial court, and a very clear case of abuse must be shown before this discretionary power can be interfered with." *Campbell v. Criterion Grp.*, 605 N.E.2d 150, 159 (Ind. 1992) (internal citations omitted).

[7] Regarding the waiver of filing fees, Indiana Code Section 33-37-3-2 provides:

> (a) Except as provided in subsection (b), a person entitled to bring a civil action or to petition for the appointment of a guardian under IC 29-3-5 may do so without paying the required fees or other court costs if the person files a statement in court, under oath and in writing:
>
> > (1) declaring that the person is unable to make the payments or to give security for the payments because of the person's indigency;
> >
> > (2) declaring that the person believes that the person is entitled to the redress sought in the action; and
> >
> > (3) setting forth briefly the nature of the action.

[8] We pause to recognize the standard that Indiana Courts are:

> constrained to give a *liberal construction* to our statutes in favor of the pauper, for we can scarcely conceive of a system of law so

> inhuman and cruel that would consign the destitute and friendless to conviction and infamy, without affording full and ample means for investigation. . . . [T]hat part of our constitution, which provides that "justice shall be administered freely, and without purchase, completely and without denial," would be an empty boast, and worse than mockery to the poor.

Campbell, 605 N.E.2d at 155 (quoting *Falkenburgh v. Jones*, 5 Ind. 296, 299 (1854)) (emphasis added). "Arbitrary economic discrimination in the halls of justice is wrong." *Id.* at 159 (internal quotation omitted). We look to the record in this case to determine whether Atkins has complied with the requirements of Indiana Code 33-37-3-2 and has shown that she cannot afford to advance the filing fee due to indigency.

[9] Curiously, our jurisprudence regarding Indiana Code Section 33-37-3-2 and its legislative forefathers is largely bereft of cases in which courts have addressed waiver of the filing fee at the trial court level; most fee issues arise at the appellate level. We endeavor today to fill that gap, given that some version of a statute allowing persons lacking sufficient means to proceed with suits has been on our books for more than a century and a half. *See, e.g., Kerr v. State ex rel. Wray,* 35 Ind. 288, 290 (1871).

[10] The reasoning set forth in *Campbell*—a case pertaining to appellate filing fees—carries no less force when the fee at issue is the trial-court-level filing fee. As Justice DeBruler once remarked "[f]rom the date of its admission to the Union down to this day, Indiana has been a leader in providing indigent persons with free access to her courts and in providing them with fair treatment while in

court." *Thompson v. Thompson*, 259 Ind. 266, 273, 286 N.E.2d 657, 661 (1972). We reiterate that sentiment and observe that the dearth of cases regarding trial-court-level-filing fees may simply indicate that the application of our pauper statutes to such fees is so axiomatic as to escape reasonable challenge. We also note that the Indiana Code of Judicial Conduct gives guidance to trial courts and provides: "[a] judge may make reasonable efforts, consistent with the law and court rules, to facilitate the ability of all litigants, including self-represented litigants, to be fairly heard." Ind. Code Jud. Conduct R. 2.2. To vindicate the ability to be fairly heard, the obstacle of the filing fee must first be removed for those without the means to surpass it.

[11] Our review of Indiana authority suggests several ways exist in which trial courts can determine a litigant's indigency. In the context of adult guardianship services, for example, trial courts are instructed to determine whether the litigant "has an annual gross income of not more than one hundred twenty-five percent (125%) of the federal income poverty level as determined annually by the federal Office of Management and Budget under 42 U.S.C. 9902. . . ." Ind. Code § 12-10-7-2.

[12] In the criminal context, our Supreme Court has held:

> The determination as to the defendant's indigency is not to be made on a superficial examination of income and ownership of property but must be based on as thorough an examination of the defendant's total financial picture as is practical. The record must show that the determination of ability to pay includes a balancing of assets against liabilities and a consideration of the amount of

> the defendant's disposable income or other resources reasonably available to him after the payment of his fixed or certain obligations. The fact that the defendant was able to post a bond is not determinative of his nonindigency but is only a factor to be considered. The court's duty to appoint competent counsel arises at any stage of the proceedings when the defendant's indigency causes him to be without the assistance of counsel.

Moore v. State, 273 Ind. 3, 7-8, 401 N.E.2d 676, 679 (1980). Indeed, we have endorsed the approach articulated in *Moore* even in the civil context, as has our Supreme Court. *See, e.g., Sholes v. Sholes*, 760 N.E.2d 156, 161 (Ind. 2001); *Zimmerman v. Hanks*, 766 N.E.2d 752, 755 (Ind. Ct. App. 2002).

[13] Just as was the case in *Campbell*, a search of the record in this case reveals no justification for denying Atkins' motion to proceed as a pauper or for denying the filing fee waiver. The chief locus of this inquiry is whether Atkins has made a showing of indigency, which is to say, whether she demonstrated that she is "unable to make payments or give security for them." Ind. Code § 33-37-3-2. The trial court made no findings and offered no reasoning for denying Atkins' motion to proceed in forma pauperis. Moreover, the trial court did not hold a hearing to investigate whether Atkins' filings regarding her indigency were accurate, despite the fact that one was requested. We are, thus, confined to a scant record in order to determine whether the trial court clearly abused its discretion.

[14] Under oath and in writing, as required by Indiana Code Section 33-37-3-2(a), Atkins filed a "Verified Affidavit of Indigency." Appellant's App. Vol. II pp.

44-45. Therein, Atkins averred that ". . . because of my poverty I am unable to make payment of the costs of the proceeding or to give security for them." *Id.* at 44. Atkins further indicated that she owns "no personal property other than [her] clothing and other personal belongings of minimal value." *Id.* Additionally, Atkins filed documentation establishing that her cash assets totaled $3.09, that she received social security disability benefits in the amount of $874.00 per month, and that she receives food assistance. We note that Atkins filed a motion to proceed with this appeal in forma pauperis and that we granted that motion.

[15] If the trial court had any doubt about Atkins' indigency, the trial court could have exercised several options. A trial court may waive a filing fee, and, upon a later discovery that the litigant has the means to pay, order reimbursement of the waived fee; or a trial court may hold a hearing to examine the litigant's potential indigency. Either method will safeguard the longstanding, fundamental obligation to allow access to the courts by all, regardless of one's financial standing. By any standard, Atkins proved her indigency, and the trial court abused its discretion by denying Atkins' motion to proceed in forma pauperis and to waive court filing fees. Atkins is entitled to proceed with her suit without paying the filing fee.

II. Motion to Appoint Counsel

[16] Atkins also filed a motion for the appointment of counsel, which was similarly denied. Indiana Code Section 34-10-1-2 provides in pertinent part:

> (b) If the court is satisfied that a person who makes an application described in section 1 of this chapter does not have sufficient means to prosecute or defend the action, the court:
>
> > (1) shall admit the applicant to prosecute or defend as an indigent person; and
> >
> > (2) may, under exceptional circumstances, assign an attorney to defend or prosecute the cause.
>
> (c) The factors that a court may consider under subsection (b)(2) include the following:
>
> > (1) The likelihood of the applicant prevailing on the merits of the applicant's claim or defense.
>
> * * * * *
>
> (d) The court shall deny an application made under section 1 of this chapter if the court determines any of the following:
>
> > (1) The applicant failed to make a diligent effort to obtain an attorney before filing the application.
> >
> > (2) The applicant is unlikely to prevail on the applicant's claim or defense.

The permissive language of this statute—the trial court "may" assign an attorney—compels us to review this claim under an abuse of discretion standard. *See, e.g., Inman v. State Farm Mut. Auto. Ins. Co.*, 981 N.E.2d 1202, 1204 n.2 (Ind. 2012) (adopting an abuse of discretion standard where the

language of a statute is permissive). "The trial court abuses its discretion when its 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.* (quoting *State v. Willits*, 773 N.E.2d 808, 811 (Ind. 2002)). Though the record does reveal diligent attempts to secure representation, the trial court did not err in denying Atkins' request for the appointment of counsel. We do not find "extraordinary circumstances" inviting such an appointment, and the trial court was permitted to deny the request on the grounds that Atkins is unlikely to prevail on her claims. *See, e.g., Smith v. Indiana Dep't of Corr.*, 871 N.E.2d 975, 987 (Ind. Ct. App. 2007), *trans. denied*.

III. Bias

[17] Next, Atkins advances an array of accusations against the trial court, including violations of the Code of Judicial Conduct, partiality/bias, denial of access to the courts, and "[p]iratical behavior." Appellant's Br. p. 8. "Adverse rulings and findings by a trial judge are not sufficient reason to believe the judge has a personal bias or prejudice." *L.G. v. S.L.*, 88 N.E.3d 1069, 1073 (Ind. 2018). We "credit judges with the ability to remain objective notwithstanding their having been exposed to information which might tend to prejudice lay persons." *Id.* "The law presumes that a judge is unbiased and unprejudiced." *Id.* "To overcome this presumption, the moving party must establish that the judge has personal prejudice for or against a party." *Id.* "Such bias or prejudice exists only where there is an undisputed claim or the judge has expressed an opinion on the merits of the controversy before him [or her]." *Id.* "[P]rejudice must be

shown by the judge's trial conduct; it cannot be inferred from his [or her] subjective views." *Richardson v. Richardson*, 34 N.E.3d 696, 703 (Ind. Ct. App. 2015). A party "must show that the trial judge's action and demeanor crossed the barrier of impartiality and prejudiced" that party's case. *Id.* at 703-04.

[18] We find that the record is without evidence sufficient to overcome the presumption that the trial court judge was unbiased and unprejudiced. Adverse rulings on Atkins' multiple motions, without more, are insufficient to demonstrate bias. Accordingly, Atkins' argument on this score must fail.

IV. Motion to Dismiss

[19] Atkins argues that the trial court erroneously granted Appellees' motion to dismiss. We first note that the Appellees did not file an appellate brief. "[W]here, as here, the appellees do not submit a brief on appeal, the appellate court need not develop an argument for the appellees but instead will 'reverse the trial court's judgment if the appellant's brief presents a case of prima facie error.'" *Salyer v. Washington Regul. Baptist Church Cemetery*, 141 N.E.3d 384, 386 (Ind. 2020) (quoting *Front Row Motors, LLC v. Jones*, 5 N.E.3d 753, 758 (Ind. 2014)). "Prima facie error in this context means 'at first sight, on first appearance, or on the face of it.'" *Id.* This less stringent standard of review "relieves [us] of the burden of controverting arguments advanced in favor of reversal where that burden properly rests with the appellee." *Jenkins v. Jenkins*, 17 N.E.3d 350, 352 (Ind. Ct. App. 2014) (citing *Wright v. Wright*, 782 N.E.2d 363, 366 (Ind. Ct. App. 2002)). We are obligated, however, to correctly apply the law to the facts in the record in order to determine whether reversal is

required. *Id.* (citing *Trinity Homes, LLC v. Fang*, 848 N.E.2d 1065, 1068 (Ind. 2006)).

[20] "Our review of a trial court's denial of a motion to dismiss under Trial Rule 12(B)(6) is de novo and requires no deference to the trial court's decision." *Anonymous Physician 1 v. White*, 153 N.E.3d 272, 277 (Ind. Ct. App. 2020) (citing *Sims v. Beamer*, 757 N.E.2d 1021, 1024 (Ind. Ct. App. 2001)).

> "A motion to dismiss under Rule 12(B)(6) tests the legal sufficiency of a complaint: that is, whether the allegations in the complaint establish *any* set of circumstances under which a plaintiff would be entitled to relief." *Trail v. Boys and Girls Clubs of Northwest Ind.*, 845 N.E.2d 130, 134 (Ind. 2006) (emphasis added). "Thus, while we do not test the sufficiency of the facts alleged with *regards to their adequacy to provide recovery*, we do test their sufficiency with regards to whether or not they have stated *some* factual scenario in which a legally actionable injury has occurred." *Id.* When reviewing a Trial Rule 12(B)(6) motion to dismiss, we accept the facts alleged in the complaint as true and view the pleadings in a light most favorable to the nonmoving party and with every reasonable inference in the nonmoving party's favor. *Id.*

Id. (emphasis added). For these reasons, we regard motions to dismiss "'with disfavor because such motions undermine the policy of deciding causes of action on their merits,'" *id.* (quoting *McQueen v. Fayette County Sch. Corp.*, 711 N.E.2d 62, 65 (Ind. Ct. App. 1999), *trans. denied*.), which is our strong preference.

[21] > A plaintiff need not set out in precise detail the facts upon which the claim is based[,] but must still plead the operative facts

> necessary to set forth an actionable claim. Indeed, under the notice pleading requirements, a plaintiff's complaint needs only contain a short and plain statement of the claim showing that the pleader is entitled to relief. A complaint's allegations are sufficient if they put a reasonable person on notice as to why plaintiff sues. Defendants thereafter may flesh out the evidentiary facts through discovery.

Id. (internal citations and quotations omitted). "Dismissals are improper under 12(B)(6) 'unless it appears *to a certainty* on the face of the complaint that the complaining party is not entitled to any relief.'" *Id.* (quoting *Bellwether Properties, LLC v. Duke Energy Indiana, Inc.*, 87 N.E.3d 462, 466 (Ind. 2017)) (emphasis in original). "In addition, dismissals under T.R. 12(B)(6) are 'rarely appropriate.'" *Id.* (quoting *State v. Am. Fam. Voices*, Inc., 898 N.E.2d 293, 296 (Ind. 2008)).

[22] Our review of Atkins' complaint indicates that Atkins' complaint was sufficient to "put a reasonable person on notice" as to why Atkins filed her claims. *White*, 153 N.E.3d at 277. Appellees argued in their motion to dismiss that Atkins' complaint should have been dismissed because of her failure to pay the filing fee. That argument was premature under Indiana Trial Rule 12, which requires all but a handful of issues to be asserted via responsive pleading, as opposed to a motion, at such an early stage of a civil proceeding. Regardless, based on our reading of the order striking pleadings from the record—filed after the order dismissing Atkins' complaint—the trial court seems to have dismissed Atkins' complaint exclusively on the ground that it failed to state a claim upon which relief could be granted.

[23] Atkins argues that the trial court erroneously granted Appellees' motion to dismiss. Atkins' core claims rest on the APRA, which provides:

> A fundamental philosophy of the American constitutional form of representative government is that government is the servant of the people and not their master. Accordingly, it is the public policy of the state that all persons are entitled to full and complete information regarding the affairs of government and the official acts of those who represent them as public officials and employees. Providing persons with the information is an essential function of a representative government and an integral part of the routine duties of public officials and employees, whose duty it is to provide the information. This chapter shall be liberally construed to implement this policy and place the burden of proof for the nondisclosure of a public record on the public agency that would deny access to the record and not on the person seeking to inspect and copy the record.

Ind. Code § 5-14-3-1. APRA aims to achieve this policy end by providing that "[a]ny person may inspect and copy the public records of any public agency during the regular business hours of the agency. . . ." Ind. Code § 5-14-3-3(a). Moreover:

> A person who has been denied the right to inspect or copy a public record by a public agency may file an action in the circuit or superior court of the county in which the denial occurred to compel the public agency to permit the person to inspect and copy the public record.

Ind. Code § 5-14-3-9(e).

[24] Atkins' claims, though beset with irrelevant text and interjections, are nevertheless discernible.[4] She claims that Appellees are withholding public records to which Atkins is entitled. If true, Appellees are in violation of APRA, and Atkins is entitled to an equitable remedy. The question before us, however, is not whether Atkins is likely to prevail on her claims, but rather, whether the trial court prematurely dismissed those claims.

[25] We find no reason, at this phase in the proceedings, to conclude that Atkins should "properly be deprived of [her] day in court to show what [she] obviously so firmly believes. . . ." *Dioguardi v. Durning*, 139 F.2d 774, 775 (2d. Cir. 1944). We do not close the courthouse doors at this early stage to any litigant merely because we are skeptical about her chances of success. At this fledgling juncture, we must accept the facts alleged in Atkins' complaint as true. Thus, as a matter of basic civil procedure, dismissal was a premature, improper vehicle for the disposition of Atkins' claims.

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[4] We are reminded of the seminal case *Dioguardi v. Durning*, 139 F.2d 774 (2d. Cir. 1944), regarding civil pleading practice. Dioguardi, limited in his ability to write and speak English, and in an "obviously home drawn" complaint, accused the Collector of Customs at the Port of New York of improperly seizing and selling Dioguardi's merchandise: bottles of "tonics." *Id.* The complaint was dismissed by the trial court on the grounds that it "fail[ed] to state facts sufficient to constitute a cause of action." *Id.* The Second Circuit reversed, citing the now-familiar requirement that a complaint need only contain "a short and plain statement of the claim showing that the pleader is entitled to relief." *Id.* at 775 (citing Fed. R. Civ. Proc. 8(c)); *see also Bayer Corp. v. Leach*, 147 N.E.3d 313, 315 (Ind. 2020) ("Indiana is a notice pleading state and requires that pleadings contain only 'a short and plain statement of the claim showing that the pleader is entitled to relief[.]' Ind. Trial Rule 8(A)(1)"). The court found that Dioguardi's claims, despite being "inartistically" asserted, were sufficiently discernible to survive a motion to dismiss, holding of the dismissal: "here is another instance of judicial haste which in the long run makes waste." *Id.*

[26] The record suggests that there may be more to this story, given Atkins' multiple filings prior to the commencement of the instant action and allegations that she was previously banned from the courthouse. Our decision is dictated, however, not by the story, but by the record, and this record is devoid of any reason why Atkins should not be granted a fee waiver and her day in court. We find that Atkins' complaint meets the minimal standard required by our trial rules and that the trial court was, accordingly, in error when it dismissed Atkins' complaint.

Conclusion

[27] The trial court erroneously denied Atkins' motion to proceed in forma pauperis and erroneously granted Appellees' motion to dismiss. We, therefore, reverse those determinations. We affirm the trial court's denial of Atkins' motion for appointed counsel.

[28] Affirmed in part and reversed in part.

Najam, J. and Pyle, J. concur.