

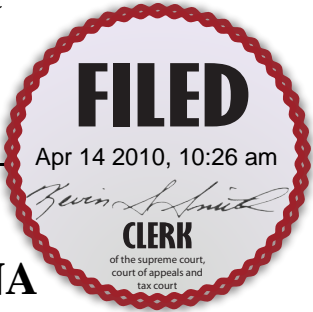
Pursuant to Ind.Appellate Rule 65(D), this Memorandum Decision shall not be regarded as precedent or cited before any court except for the purpose of establishing the defense of res judicata, collateral estoppel, or the law of the case.

ATTORNEY FOR APPELLANT:

STEPHEN W. VOELKER
Voelker Law Office
Jeffersonville, Indiana

ATTORNEY FOR APPELLEE:

KATHLEEN KEARNEY SCHELL
Jeffersonville, Indiana



**IN THE
COURT OF APPEALS OF INDIANA**

DORIS DUFFY,)
)
Appellant,)
)
vs.)
)
STANLEY J. DUFFY,)
)
Appellee.)

No. 88A01-0910-CV-610

APPEAL FROM THE WASHINGTON CIRCUIT COURT
The Honorable Vicki L. Carmichael, Special Judge
Cause No. 88D01-0811-CT-382

April 14, 2010

MEMORANDUM DECISION - NOT FOR PUBLICATION

BROWN, Judge

Doris Duffy appeals the trial court's grant of a motion to dismiss by Stanley Duffy. Doris raises two issues, which we consolidate and restate as whether the trial court erred by granting Stanley's motion to dismiss under Ind. Trial Rule 12(B)(6). We affirm.

The relevant facts follow. On November 20, 2008, Doris filed a Claim for Money Damages for Intentional Infliction of Mental Distress. Doris alleged that she had previously been married to Stanley, that Stanley is homosexual, and that Stanley hid his homosexuality from Doris throughout the marriage. Doris alleged that she discovered "e-mails that Stanley had sent to various lovers and homosexual porn sites." Appellant's Appendix.¹ Doris alleged that Stanley told her "that he used her to 'cover up.'" Id. Doris alleged that "[t]his revelation and the subsequent revelations caused [her] great mental distress and placed her under the care of psychiatrists and psychologists." Id. Doris also alleged that "Stanley was guilty of both a fraud and constructive fraud by hiding his homosexuality from Doris." Id. Doris requested "enough compensatory damages to compensate her for her damages, punitive damages, interests and [sic] costs." Id.

On December 18, 2008, Stanley filed a response to Doris's claim. Stanley alleged that he did not hide his homosexuality from Doris and that she believed that he was homosexual. Stanley requested that the trial court dismiss Doris's claim for intentional

¹ We remind Doris that Ind. Appellate Rule 51(C) provides that "[a]ll pages of the Appendix shall be numbered at the bottom consecutively"

infliction of mental distress and argued that “[t]he court may be opening the door for every dissolution action to pursue claims in court for intentional and [sic] infliction of mental distress.” Id. Stanley also filed a counterclaim for intentional infliction of mental and emotional distress and malicious prosecution and alleged that Doris “sent out a seven page letter to everyone in the community who had known the couple ‘outing’ [Stanley] as homosexual in an effort contrived to inflict emotional and mental distress upon him.” Id.

On March 26, 2009, Stanley filed a Motion to Dismiss Doris’s “action” and argued that Doris’s complaint “states a claim for which relief cannot be granted” and that “there are no bases for tort recovery of the emotional distress occurring due to acts or omissions during the marriage.” Id. After a hearing, the trial court granted Stanley’s Motion to Dismiss and dismissed Stanley’s counterclaim for intentional infliction of emotional distress.²

The issue is whether the trial court erred when it granted Stanley’s motion to dismiss. The standard of review on appeal of a trial court’s grant of a motion to dismiss for the failure to state a claim is *de novo* and requires no deference to the trial court’s decision. Sims v. Beamer, 757 N.E.2d 1021, 1024 (Ind. Ct. App. 2001). The grant or denial of a motion to dismiss turns only on the legal sufficiency of the claim and does not require determinations of fact. Id. “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

² Stanley does not appeal the trial court’s dismissal of his counterclaim.

any set of circumstances under which a plaintiff would be entitled to relief.” Trail v. Boys & Girls Clubs of Northwest Ind., 845 N.E.2d 130, 134 (Ind. 2006). Thus, while we do not test the sufficiency of the facts alleged with regard to their adequacy to provide recovery, we do test their sufficiency with regard to whether or not they have stated some factual scenario in which a legally actionable injury has occurred. Id.

A court should accept as true the facts alleged in the complaint, and should not only consider the pleadings in the light most favorable to the plaintiff, but also draw every reasonable inference in favor of the nonmoving party. Id. However, a court need not accept as true allegations that are contradicted by other allegations or exhibits attached to or incorporated in the pleading. Id. We also need not accept as true conclusory, nonfactual assertions or legal conclusions. Richards & O’Neil, LLP v. Conk, 774 N.E.2d 540, 547 (Ind. Ct. App. 2002). Ind. Trial Rule 8(A) requires only “a short and plain statement of the claim showing that the pleader is entitled to relief.” Although the plaintiff need not set out in precise detail the facts upon which the claim is based, she must still plead the operative facts necessary to set forth an actionable claim. Trail, 845 N.E.2d at 135. Under notice pleading, we review the granting of a motion to dismiss for failure to state a claim under a stringent standard and affirm the trial court’s grant of the motion only when it is apparent that the facts alleged in the challenged pleading are incapable of supporting relief under any set of circumstances. Id.

On appeal, Doris argues that the trial court erred in granting Stanley’s motion to dismiss her claim of intentional infliction of emotional distress because “[t]he trial court

clearly overstepped its bounds when it decided these issues on a factual basis.”³ Appellant’s Brief at 6. As previously mentioned, we review the trial court’s grant of Stanley’s motion to dismiss *de novo* and examine the legal sufficiency of Doris’s claim.

The Indiana Supreme Court recognized the tort of intentional infliction of emotional distress in Cullison v. Medley, which the Court defined as occurring when “one who by extreme and outrageous conduct intentionally or recklessly causes severe emotional distress to another [and] is subject to liability for such emotional distress” 570 N.E.2d 27, 31 (Ind. 1991) (quoting Restatement (Second) of Torts § 46 (1965)). To establish liability for intentional infliction of emotional distress, a plaintiff must prove that a defendant “(1) engaged in ‘extreme and outrageous’ conduct that (2) intentionally or recklessly (3) caused (4) severe emotional distress.” Doe v. Methodist Hosp., 690 N.E.2d 681, 691 (Ind. 1997) (quoting Restatement (Second) of Torts § 46 (1965)). “It is

³ The majority of Doris’s brief appears to be focused on her claim of intentional infliction of emotional distress. At one point, Doris cites Ind. Code § 16-18-2-49, which defines a “carrier” for purposes of Ind. Code §§ 16-41 as “a person who has: (1) tuberculosis in a communicable stage; or (2) another dangerous communicable disease.” Doris also cites Ind. Code § 16-41-7-1, which provides that “[c]arriers who know of their status as a carrier of a dangerous communicable disease described in subsection (a) have a duty to warn or cause to be warned by a third party a person at risk of the following: (1) The carrier’s disease status. (2) The need to seek health care such as counseling and testing.” Doris then argues that Stanley had “a duty to warn [her] that he is or may be a carrier of the AIDS virus,” and that “[t]his is the basis of the fraud and constructive fraud allegation.” Appellant’s Brief at 6. We observe that Doris’s complaint did not allege that Stanley was a carrier as defined by Ind. Code § 16-18-2-49. Rather, the complaint alleged only that Stanley was homosexual. Further, to the extent that Doris argues that the trial court erred in dismissing her claims of fraud and constructive fraud, Doris does not put forth a cogent argument. Consequently, this argument is waived. See, e.g., Loomis v. Ameritech Corp., 764 N.E.2d 658, 668 (Ind. Ct. App. 2002) (holding argument waived for failure to cite authority or provide cogent argument), reh’g denied, trans. denied.

the intent to harm one emotionally that constitutes the basis for the tort of an intentional infliction of emotional distress.” Cullison, 570 N.E.2d at 31.

We find Tucker v. Roman Catholic Diocese of Lafayette-In-Indiana, 837 N.E.2d 596 (Ind. Ct. App. 2005), reh’g denied, trans. denied, instructive. In Tucker, Debra Tucker appealed the dismissal of her suit against the Roman Catholic Diocese of Lafayette-in-Indiana, Most Reverend William L. Higi, Very Reverend Robert Sell, and Reverend Dennis Goth (collectively the “Diocese”) in which she asserted that the Diocese was liable for intentional infliction of emotional distress. 837 N.E.2d at 599-600, 603. This court observed that “Tucker’s claims against the Diocese allege, without more, that the Diocese’s intentional actions constituted extreme and outrageous conduct,” but held that “Tucker fails to allege, however, that it was the Diocese’s intent to emotionally harm Tucker.” Id. at 603. The court concluded that Tucker failed to state a claim upon which relief could be granted and affirmed the trial court’s dismissal of Tucker’s complaint. Id.

Here, Doris alleged that Stanley hid his homosexuality from Doris, that Doris discovered e-mails that Stanley sent “to various lovers and homosexual porn sites,” but did not allege that it was Stanley’s intent to emotionally harm her. Appellant’s Appendix. Accordingly, we conclude that the trial court did not err by granting Stanley’s motion to dismiss Doris’s claim.⁴ See Tucker, 837 N.E.2d at 603.

⁴ In her reply brief, Doris cites Dollar Inn, Inc. v. Slone, 695 N.E.2d 185 (Ind. Ct. App. 1998), reh’g denied, trans. denied, and argues that, in Dollar Inn, “this court held that a person could recover for

For the foregoing reasons, we affirm the trial court’s grant of Stanley’s motion to dismiss.

Affirmed.

MATHIAS, J., and BARNES, J., concur.

a reasonable fear of AIDS after an impact.” Appellant’s Reply Brief at 4. Doris argues that “[t]his court should follow its existing precedent in *Dollar Inn* and remand this case for discovery and trial.” *Id.* at 6. In *Dollar Inn*, Patsy Slone, a guest at the Dollar Inn, was stabbed in the thumb by a hypodermic needle concealed inside the center tube of a roll of toilet paper as she grabbed the roll. 695 N.E.2d at 186. Slone filed a complaint against Dollar Inn, Inc. (“Dollar”) for her physical pain and mental suffering associated with the needle stab. *Id.* at 187. A jury returned a verdict in favor of Slone and awarded her \$250,000. *Id.* Dollar filed a motion to correct error requesting that the trial court enter judgment on the evidence in its favor, which the trial court denied. *Id.* On appeal, this court addressed whether the trial court erred by denying Dollar’s motion for judgment on the evidence. *Id.* This court treated Slone’s claim as one of negligent infliction of emotional distress. *Id.* at 188. We do not find *Dollar Inn* instructive because it did not review a motion to dismiss a claim of intentional infliction of emotional distress, which is at issue here.