

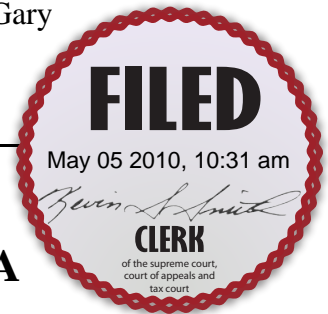
Pursuant to Ind. Appellate Rule 65(D), this Memorandum Decision shall not be regarded as precedent or cited before any court except for the purpose of establishing the defense of res judicata, collateral estoppel, or the law of the case.

APPELLANT PRO SE:

DONALD L. VACENDA
Inez, Kentucky

ATTORNEY FOR APPELLEES
CITY OF GARY, CAROLYN ROGERS,
JAMES CRAIG, CLORIUS LAY, and
RUDY CLAY:

CARL C. JONES
City Attorney, City of Gary
Gary, Indiana



**IN THE
COURT OF APPEALS OF INDIANA**

DONALD LEE VACENDAK,

Appellant-Plaintiff,

VS.

No. 45A03-0906-CV-293

CITY OF GARY, CAROLYN ROGERS,
JAMES CRAIG, CLORIUS LAY, RUDY CLAY,
and CORINTH BISHOP,

Appellees-Defendants.

APPEAL FROM THE LAKE SUPERIOR COURT
The Honorable John M. Sedia, Special Judge
Cause No. 45D01-0804-PL-39

May 5, 2010

MEMORANDUM DECISION - NOT FOR PUBLICATION

CRONE, Judge

Donald Lee Vacendak appeals the trial court's dismissal of his complaints against the City of Gary, Carolyn Rogers, James Craig, Clorius Lay, Rudy Clay, and Corinth Bishop (collectively, "Appellees"). We affirm. We also find Vacendak's appeal to be frivolous and therefore remand for a hearing to determine the amount of damages to which Appellees are entitled pursuant to Indiana Appellate Rule 66(E).

In its June 16, 2009, order dismissing Vacendak's complaints, the trial court found the following facts:

1. On April 11, 2008, the Plaintiff, Donald L. Vacendak d/b/a D&M Recycling, pro se, filed his Complaint against the Defendants City of Gary, Carolyn Rogers, James Craig, Clorius Lay and Rudy Clay. The operative allegations of the Complaint were that Carolyn Rogers, a Gary City Councilwoman, defamed Vacendak by making statements that he alleges are false and defamatory that were disseminated by television in the chambers of the Gary City Council; that the City of Gary refused to turn over to him the videotape of the meeting at which the statements were allegedly uttered and diss[e]minated; and that the City of Gary, James Craig (Zoning Administrator for the City of Gary) and Clorius Lay (an attorney representing the City of Gary) denied him a permit to remove scrap metal from his property thereby preventing him from using his property for the purposes for which it is zoned. On April 24, 2008, Vacendak filed a pro se Motion to Amend Complaint, seeking to add an additional count to his original Complaint, essentially restating the refusal to allow him access to the videotape of the meeting at which Rogers allegedly uttered the defamatory statements.
2. Prior to filing his Complaint, Vacendak filed three Tort Claim notices upon forms presumably provided to him by the City of Gary. The first notice, dated January 15, 2008, alleged a slander by Rogers and the second, dated February 6, 2008, also alleged a slander by Rogers and went into more specific alleged facts. Neither notice specified the day, date and time of the alleged slander. Upon the face of both of these notices was written the name of Rudy Clay. The third notice was filed on March 25, 2008, alleging that James Craig and Clorius Lay denied Vacendak a demolition permit.

3. After obtaining an extension of time to answer or otherwise plead to Vacendak's Complaint, the Defendants filed and were granted a Motion for Change of Venue from the Judge.
4. Once the venue was transferred, the Defendants then timely filed a Motion to Dismiss and Memorandum of Law in Support on July 11, 2008. On August 25, 2008 (after Vacendak obtained an extension of time to respond), counsel appeared for Vacendak and timely filed a Response to the Defendant's Motion to Dismiss that incorporated a Memorandum of Law within it.
5. On October 8, 2008, a hearing was conducted on the Defendant[s'] Motion to Dismiss. Vacendak's counsel failed to appear at the hearing and the Court dismissed Vacendak's Complaint against the City of Gary and Carolyn Rogers without prejudice and dismissed Vacendak's Complaint against Rudy Clay, James Craig and Clorius Lay with prejudice.
6. On November 13, 2008, Vacendak filed a Motion to Vacate Judgment, alleging that his counsel received no notice of the hearing on the Motion to Dismiss. After a hearing held on January 27, 2009, the Court granted Vacendak's Motion to Vacate Judgment, vacated its Order of October 7, 2008, and granted Vacendak thirty days to file an amended Complaint.
7. On February 25, 2009, Vacendak's counsel was granted permission to withdraw as his attorney and on March 3, 2009, Vacendak filed an Amended Complaint which added his former attorney as a defendant, alleging a claim of legal malpractice and conspiracy with the other defendants; more detailed allegations as to how he was damaged by Craig and Lay denying him the demolition permit; and also added a defendant styled "Gary City Counsel Chambers."
8. On April 21, 2009, the Defendants filed their Motion to Strike the Amended Complaint.
9. Throughout the course of the proceedings, Vacendak has filed numerous Interrogatories, Requests for Production and Motions to Compel discovery with the Court which the Court has not ruled upon nor set for hearing until such time as the Court rules upon whether or not the Defendant[s'] Motion to Dismiss, the disposition of which turns upon the legal sufficiency of Vacendak's Complaint and Amended Complaint, should be granted or not.

Based on its factual findings, the trial court entered the following conclusions thereon:

1. In the Court's Order of January 27, 2009, Vacendak was given thirty days to file an Amended Complaint with the Court. The Court's electronic docket together with the file stamps upon the Summons issued by the Clerk show a filing date of March 3, 2009. This is in excess of the thirty days set forth in the Order. Vacendak's Amended Complaint should therefore be stri[c]ken.

2. Even if the Amended Complaint were timely filed, however, the Court cannot find that either Vacendak's Complaint or Amended Complaint survives the Defendant[s'] Motion to Dismiss. Neither is legally sufficient. As the Defendants assert in their Memorandum, Vacendak filed his original Complaint before the 90 days required by the City to respond [to] the Tort Claims Notices he filed. In addition, two of the Notices, both regarding Rogers's slanderous statements, did not comply with I.C. 34-13-3-10 and I.C. 34-13-3-11 in that, although they did sufficiently specify the act Rogers was alleged to have committed, neither stated the time and place the loss occurred with any degree of specificity and were filed less than 90 days prior to the filing of the Complaint. The purpose of the Notice requirement is to provide the governmental entity with the opportunity to investigate the facts surrounding a claim so that it may determine its liability and prepare a defense, *LCEOC, Inc. v. Greer* 699 N.E.2d 763 (Ind.Ct.App. 1998)[]. The vagueness of these Notices, when taken with the premature filing of the Complaint, did not afford the Defendants an opportunity to investigate Vacendak's claim and respond to it. Moreover, neither of these notices made any allegations whatsoever about any activities by the Defendant Rudy Clay, even though his name was written upon the face of the notices.

3. As to the third notice, in addition to being filed less than three weeks before the filing of the Complaint with the Court, the allegations set forth therein are not ripe for determination since Vacendak did not exhaust his administrative remedies in purs[u]ing his claim of the wrongful denial of a permit. I.C. 36-7-4-918.1 provides as follows:

IC 36-7-4-918.1

Board of zoning appeals; review of orders, requirements, decisions, or determinations

¹ Our review of the record was significantly hampered by both parties' failure to include specific page references thereto as required by Indiana Appellate Rules 22(C) and 46(A).

Sec. 918.1 A board of zoning appeals shall hear and determine appeals from and review:

(1) any order, requirement, decision, or determination made by an administrative official, hearing officer, [or] staff member under the zoning ordinance;

(2) any order, requirement, decision, or determination made by an administrative board or other body except a plan commission in relation to the enforcement of the zoning ordinance; or

(3) any order, requirement, decision, or determination made by an administrative board or other body except a plan commission in relation to the enforcement of an ordinance adopted under this chapter requiring the procurement of an improvement location or occupancy permit.

As added by P.L.357-1983, SEC.10.

Any action by Craig and Lay in denying Vacendak a demolition permit was susceptible to review by the Board of Zoning Appeals. No allegations were made in the Tort Claim Notices, the Complaint, or the Amended Complaints that Vacendak sought or obtained such a review. Board of Zoning Appeals review is a prerequisite to bringing any court action as the landowner is required to exhaust administrative remedies. *Town Council v. Parker*, 726 N.E.2d 1217 (Ind. 2000).

4. As to the Defendant Corinth Bishop, even if the Amended Complaint was timely filed, the actions of which he is accused constitute a cause of action separate and apart from the cause of action against the other defendants. Although Vacendak is free to pursue an independent action against Bishop (he apparently has already filed a disciplinary complaint against him), he cannot do so in this matter.

5. As to the Defendant “Gary City Counsel Chambers,” the Court is unable to ascertain to what or whom Vacendak is referring and how “Gary City Counsel Chambers” is subject to a cause of action by Vacendak. In any event, Vacendak did not file a Tort Claim against “Gary City Counsel Chambers”.

6. Finally, Vacendak’s numerous Motions to Compel Discovery are not ripe for determination since the Motion to Strike and Motions to Dismiss filed by the Defendant[s] are dispositive of the issues herein.

JUDGMENT

IT IS THEREFORE ORDERED, ADJUDGED AND DECREED by the Court as follows:

1. The Defendant[s'] Motion to Strike Vacendak's Amended Complaint filed March 3, 2009, is granted.
2. All Complaints filed by Vacendak against the Defendants City of Gary, Carolyn Rogers, James Craig, Clorius Lay, Gary City Counsel Chambers, and Rudy Clay are dismissed with prejudice. Vacendak's Complaint against the Defendant Corinth Bishop is ordered dismissed without prejudice.
3. All of Vacendak's Motions relating to discovery are denied.

Id. at 71-72. Vacendak now appeals.²

Initially, we observe that Vacendak represents himself on appeal. "An appellant who proceeds pro se is held to the same established rules of procedure that a trained legal counsel is bound to follow and, therefore, must be prepared to accept the consequences of his or her action." *Anthony v. Ind. Farmers Mut. Ins. Group*, 846 N.E.2d 248, 252 (Ind. Ct. App. 2006) (citation and quotation marks omitted).

While we prefer to decide cases on their merits, we will deem alleged errors waived where an appellant's noncompliance with the rules of appellate procedure is so substantial it impedes our appellate consideration of the errors. The purpose of our appellate rules, especially Indiana Appellate Rule 46, is to aid and expedite review and to relieve the appellate court of the burden of searching the record and briefing the case.

Thacker v. Wentzel, 797 N.E.2d 342, 345 (Ind. Ct. App. 2003) (citation omitted). "We will not become an advocate for a party, nor will we address arguments which are either inappropriate, too poorly developed or improperly expressed to be understood." *Terpstra v. Farmers & Merch. Bank*, 483 N.E.2d 749, 754 (Ind. Ct. App. 1985), *trans. denied* (1986).

² Corinth Bishop has not filed a brief in this appeal.

Vacendak's statement of issues, statement of case, statement of facts, and summary of argument are verbose, often incoherent,³ occasionally inflammatory,⁴ and inappropriately rife with argument in contravention of numerous provisions of Indiana Appellate Rule 46(A) and established precedent. *See* Ind. Appellate Rule 46(A)(4) (“[The statement of issues] shall *concisely and particularly* describe each issue presented for review.”) (emphasis added); Ind. Appellate Rule 46(A)(5) (“[The statement of case] shall *briefly* describe the nature of the case, the course of the proceedings *relevant* to the issues presented for review, and the disposition of these issues by the trial court”) (emphases added); Ind. Appellate Rule 46(A)(6) (providing that statement of facts “shall describe the facts *relevant* to the issues presented for review” and “shall be stated in accordance with the standard of review appropriate to the judgment or order being appealed.”) (emphasis added); *Parks v. Madison County*, 783 N.E.2d 711, 717 (Ind. Ct. App. 2002) (“The statement of facts is to be a

³ *See, e.g.*, Appellant's Br. at 21 (“[T]he Trial Court in fact Struck the Appellants Illegally filed second Amended complaint, in which the Trial Court had well known not to in fact the allowance of, but to circumnavigate these proceedings for the Defendants [sic] in this cause, it in fact allowed the second filing and also then struck said complaint from the record and Dismissed the Appellants cause against said defendants [sic], in which this reviewing Court cannot ignore to the least on appeal.”).

⁴ Ironically, some of Vacendak's assertions regarding the trial court clerk and the trial court judge could be defamatory. *See, e.g.*, Appellant's Br. at 10 (“The Clerk of Lake County Indiana, in fact illegally withheld the Appellants Request to Enter Default for (5) days after the initial filing date of April 15th 2009, in which after (5) days of withholding said Request for Default, then said Clerk of Lake County Indiana the again file marked request for Default on April 20th 2009 in “Open” court for Judge Magistrate Sedia to adjudicate. The Clerk of Lake County, Indiana, in fact Falsified the official Record of proceedings, for submission by the Appellant to the Supreme Court for review in this cause, as evidenced by the (2) other Certified record of proceedings in which were exhibited in this appeal as evidence of the illegal falsification of State records, in which constitutes a Felonious act within the laws of the State of Indiana, by the Deletion of the Appellants First amended complaint as evidenced.”); *id.* at 22 (“Judge Sedia in fact refused to legally Default upon Defendant [sic] Bishop, in which it was basically a cover up in these proceedings as evidenced by a complete review of the hearing Transcripts of June 11th 2009 open court proceedings, in which are in need of review by this reviewing Court as evidence to these allegations for review by this court.”).

narrative statement of facts, and is not to be argumentative.”), *trans. denied* (2003); Ind. Appellate Rule 46(A)(7) (“The summary of argument should contain a *succinct, clear and accurate statement* of the arguments made in the body of the brief.”) (emphasis added).⁵

Moreover, in the argument section of his brief, Vacendak has failed to include for each issue a “concise statement of the applicable standard of review[,]” as required by Appellate Rule 46(A)(8)(b). In his original appellant’s brief, Vacendak only briefly addresses the trial court’s ruling on Appellees’ motion to strike and motion to dismiss. He invokes the “prison mailbox rule” to support his argument that his second amended complaint was timely filed,⁶ but he fails to address the merits of the trial court’s conclusion that dismissal of his complaints would be appropriate in any event because “[n]either is legally sufficient.” Appellant’s App. at 71. “A party generally waives any issue for which it fails to develop a cogent argument or support with adequate citation to authority and portions of the record.” *Romine v. Gagle*, 782 N.E.2d 369, 386 (Ind. Ct. App. 2003) (citing, *inter alia*, Ind. Appellate Rule 46(A)(8)(a)), *trans. denied*. Based on the foregoing, we conclude that Vacendak has waived any issue regarding the striking and dismissal of his complaints. His belated mention of the Indiana Tort Claims Act and defamation cases in his reply brief is of no avail. *See* Ind. Appellate Rule 46(C) (“No new issues shall be raised in the reply brief.”).

⁵ In fact, Vacendak’s summary of argument is nearly as long as the argument itself.

⁶ Aside from the certificate of service at the conclusion of his motion to amend complaint, Vacendak offers no proof that he actually gave his second amended complaint to the authorities of the prison in which he is incarcerated on February 23, 2009, as he claims. Nor does he offer proof to support his claim that the trial court clerk illegally deleted the filing of his first amended complaint and then withheld the filing of his second amended complaint until March 3, 2009, so that it would be stricken as untimely.

In the argument section of his original appellant's brief, Vacendak devotes most of his attention to his "Request to Enter Default," which he mailed to the attention of the trial court clerk – not the trial court judge – in April 2009. In the "Request," Vacendak asked the clerk to default Appellees because they allegedly had failed to timely respond to his complaints and discovery requests. Appellant's App. at 51. When the clerk failed to comply with the "Request," Vacendak sent the clerk a letter dated May 21, 2009, which reads in pertinent part as follows:

Appareltly [sic], you are not following your duties as a clerk of the Lake County Courts, being that per [Indiana Trial] Rule 55(a) as quoted; "When a party against whom a judgement [sic] for affirmative relief is sought has failed to plead or otherwise defend, and that failure is shown by affidavit or otherwise, the clerk must enter the party's default."

....

You have materially Breached Rule 55(a) by not entering a Default when there was an affidavit of Proof attached on the said request to enter Default, is which you apparently ignored, and per your Bond of Liability as a clerk, to uphold your sworn Duty to uphold the proceedings of law.

It should be brought to your attention, that you could be amended to this complaint for failure to abide by your duty as a clerk of the courts, and that also a request for an inquiry/investigation can be initiated by the Plaintiff in this cause for you not abiding by your sworn Duites [sic] as the Clerk of the Court.

Id. at 165.⁷

⁷ The clerk responded to Vacendak's letter as follows: "The clerk must have a[n] order from the court to enter any party's default. As I viewed your case all pending issues are scheduled for a hearing." Appellant's App. at 168.

This argument, which Vacendak renews on appeal, is based on a version of Indiana Trial Rule 55(A) that was amended almost forty years ago. Prior to January 1, 1971, Trial Rule 55(A) read as follows: “When a party against whom a judgment for affirmative relief is sought has failed to plead or otherwise defend as provided by these rules and that fact is made to appear by affidavit or otherwise, *the clerk shall enter his default.*” (Emphasis added.) Since that date, Trial Rule 55(A) has read as follows: “When a party against whom a judgment for affirmative relief is sought has failed to plead or otherwise comply with these rules and that fact is made to appear by affidavit or otherwise, *the party may be defaulted by the court.*” (Emphasis added.)

As the current wording of Trial Rule 55(A) suggests, “[t]he grant or denial of a default judgment is within the trial court’s discretion.” *Morton-Finney v. Gilbert*, 646 N.E.2d 1387, 1388 (Ind. Ct. App. 1995), *trans. denied*. Obviously, Vacendak has failed to consider – let alone address – this issue, as well as the related issue of whether the trial court judge was required to rule on a “Request” directed to the trial court clerk. As for the issue of whether Appellees were in fact tardy in filing a response to Vacendak’s complaints and discovery requests, Vacendak has failed to support his assertions on this point with the cogent reasoning and citations to relevant authorities and statutes required by Appellate Rule 46(A)(8)(a).⁸ Consequently, all these issues and arguments are waived. *See, e.g., Nealy v. Am. Family Mut. Ins. Co.*, 910 N.E.2d 842, 849 (Ind. Ct. App. 2009) (“Non-compliance with

⁸ Vacendak does not address the effect, if any, of the change of venue proceedings on the Appellees’ extended deadline for filing a response to his first amended complaint, or the fact that a motion to dismiss for failure to state a claim is considered a “proper responsive motion” to a plaintiff’s complaint. *Morton-Finney*, 646 N.E.2d at 1388.

[Appellate Rule 46(A)(8)(a)] results in waiver of the argument on appeal.”), *trans. denied*. Therefore, we affirm the trial court in all respects.

As a final consideration, Appellate Rule 66(E) provides that we “may assess damages if an appeal ... is frivolous or in bad faith. Damages shall be in the Court’s discretion and may include attorneys’ fees. The Court shall remand the case for execution.” We have assessed damages sua sponte on at least one occasion. *See GEICO Ins. Co. v. Rowell*, 705 N.E.2d 476, 483 (Ind. Ct. App. 1999) (finding sua sponte that damages should be assessed against appellant’s counsel pursuant to former Ind. Appellate Rule 15(G)). In exercising our discretionary power to assess damages pursuant to Appellate Rule 66(E), “we must use extreme restraint due to the potential chilling effect upon the exercise of the right to appeal.” *Montgomery v. Trisler*, 771 N.E.2d 1234, 1239 (Ind. Ct. App. 2002) (citation and quotation marks omitted), *trans. denied*. Nevertheless, “we can cut [Vacendak] no slack simply because [he has] no formal legal training.” *Watson v. Thibodeau*, 559 N.E.2d 1205, 1211 (Ind. Ct. App. 1990).

As we have amply documented above, Vacendak’s appellate brief is often incoherent, violates numerous rules of appellate procedure, recklessly accuses the trial court judge and clerk of serious misconduct, fails to address the merits of the trial court’s ruling, and focuses on the wording of a trial rule that was amended nearly forty years ago. By any definition of the term, Vacendak’s appeal must be considered frivolous. Consequently, we remand for a hearing to determine the amount of damages to which Appellees are entitled pursuant to Appellate Rule 66(E).

Affirmed and remanded.

BAKER, C.J., and DARDEN, J., concur.