APPELLANT PRO SE:

WILLIAM R. PINNER
Indianapolis, Indiana

ATTORNEY FOR APPELLEE:

WILLIAM E. LUKENS
American Family Insurance
Indianapolis, Indiana

IN THE COURT OF APPEALS OF INDIANA

WILLIAM R. PINNER,	)	
	)	
Appellant-Plaintiff,	)	
	)	
vs.	)	No. 49A05-0702-CV-98
	)	
PATRICK S. SKIDMORE and AMERICAN FAMILY INSURANCE CO.,	)	
	)	
Appellee-Defendant.	)	

APPEAL FROM THE MARION SUPERIOR COURT
The Honorable Robyn Moberly, Judge
The Honorable Kimberly D. Mattingly, Commissioner
Cause No. 49D06-0004-CT-587

December 27, 2007

MEMORANDUM DECISION - NOT FOR PUBLICATION

SHARPNACK, Judge

William Pinner appeals the trial court's grant of a motion to dismiss in his action against Patrick Skidmore. Pinner raises one issue, which we revise and restate as whether the trial court erred by granting the motion to dismiss under Ind. Trial Rule 12(B)(6). We affirm.

The relevant facts follow. On January 13, 2006, Pinner filed suit against Skidmore and American Family Insurance. On June 23, 2006, the trial court granted a motion to dismiss the action against American Family Insurance. After Skidmore passed away on December 10, 2006, Skidmore's counsel filed a motion to dismiss alleging that "Skidmore is no longer a proper party under this cause" and that "[Pinner] has not taken affirmative steps to substitute the necessary party in this action." Appellant's Appendix at 9. At the bench trial on January 17, 2007, Pinner moved for a continuance because he had not yet located his medical records. The trial court denied the motion for a continuance and granted the motion to dismiss Pinner's claim against Skidmore.

The issue is whether the trial court erred by granting the motion to dismiss. "Trial Rule 12 authorizes a party to present by motion certain defenses, one of which is specified by subsection 12(B)(6): 'Failure to state a claim upon which relief can be granted . . . .'" Meyers v. Meyers, 861 N.E.2d 704, 705-706 (Ind. 2007). A motion to dismiss asserting Rule 12(B)(6) challenges the legal sufficiency of a complaint. Id. (citing Trail v. Boys and Girls Clubs of Northwest Indiana, 845 N.E.2d 130, 134 (Ind. 2006)). In ruling on such a motion to dismiss, "a court is required to take as true all

allegations upon the face of the complaint and may only dismiss if the plaintiff would not be entitled to recover under any set of facts admissible under the allegations of the complaint." Id. (quoting Huffman v. Office of Envtl. Adjudication, 811 N.E.2d 806, 814 (Ind. 2004)). 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). In reviewing such motions, all reasonable inferences must be drawn in favor of the non-moving party. Meyers, 861 N.E.2d at 706 (citing Huffman, 811 N.E.2d at 814; Trail, 845 N.E.2d at 134). Pinner argues that the trial court should not have dismissed his case for failing to substitute the necessary party because "the Court should have order [sic] substitution of the proper parties." Appellant's Brief at 6.

Ind. Code § 34-9-3-3 provides that "[i]f an action commenced against the decedent before the decedent's death, the action is continued by substituting the decedent's personal representatives, as in other actions surviving the defendant's death." Ind. Trial Rule 25(A)(1) provides:

> If a party dies and the claim is not thereby extinguished, the court may order substitution of the proper parties. The motion for substitution may be made by the court, any party or by the successors or representatives of the deceased party and, together with the notice of hearing, shall be served on the parties as provided in Rule 5 and upon persons not parties in the manner provided in Rule 4 for the service of summons.

Thus, for Pinner to continue his action against Skidmore after Skidmore passed away, Pinner, the court, or Skidmore's counsel had to move to substitute Skidmore's personal

representatives. Because neither the court, nor the parties, including Pinner, moved to substitute Skidmore's personal representative, Pinner could not continue his action against Skidmore. Thus, we cannot say that the trial court erred when it dismissed Pinner's case.[1] See McCalment v. Eli Lilly & Co., 860 N.E.2d 884, 896 (Ind. Ct. App. 2007) (concluding that the trial court did not err by granting defendant's motion to dismiss).

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

Affirmed.

RILEY, J. and FRIEDLANDER, J. concur

[1] Pinner also argues that the trial court should not have denied his motion for a continuance because Pinner "was not given proper notice of [the] Motion to Dismiss, and proper time to respond." Appellant's Brief at 7. Pinner did not make this argument below. Rather, he moved for a continuance because he could not locate his medical records. "A party generally waives appellate review of an issue or argument unless that party presented that issue or argument before the trial court." Dedelow v. Pucalik, 801 N.E.2d 178, 183 (Ind. Ct. App. 2003). Thus, Pinner has waived appellate review of this issue.