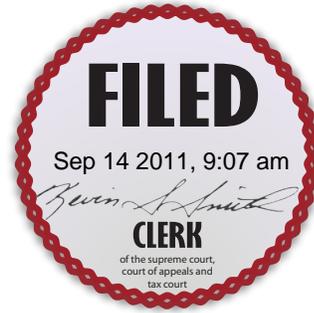


Pursuant to Ind.Appellate Rule 65(D), this Memorandum Decision shall not be regarded as precedent or cited before any court except for the purpose of establishing the defense of res judicata, collateral estoppel, or the law of the case.



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**IN THE  
COURT OF APPEALS OF INDIANA**

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DAVID PANNELL, )  
 )  
Appellant-Plaintiff, )  
 )  
vs. )  
 )  
STEVE CARTER, *et al.*, )  
 )  
Appellees-Defendants. )

No. 49A02-1003-PL-472

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APPEAL FROM THE MARION SUPERIOR COURT  
The Honorable Gerald Zore, Judge  
Cause No. 49D07-0911-PL-51849

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September 14, 2011

MEMORANDUM DECISION – NOT FOR PUBLICATION

**RILEY, Judge**

## STATEMENT OF THE CASE

Appellant-Plaintiff, David Pannell (Pannell), appeals the trial court's denial of his motion to amend his complaint.

We affirm.

## ISSUE

Pannell raises two issues on appeal, one of which we find dispositive and restate as follows: Whether the trial court abused its discretion when it denied his motion to amend his complaint.

## FACTS AND PROCEDURAL HISTORY

We adopt this court's statement of facts as set forth in our memorandum opinion issued on September 9, 2005:

Pannell was sentenced to sixty years for a 1996 murder and incarcerated at the Wabash Valley Correctional Facility [(WVCF)] in Carlisle, Indiana. On October 14, 1999, a correctional sergeant searched Pannell's cell and found tobacco, marijuana, and three "shanks" inside a television bearing his name and identification number. The next day, Pannell was charged with three infractions for possessing the contraband. The corresponding screening report forms indicate that Pannell pleaded not guilty and that his lay advocate would get witness statements for a disciplinary hearing set for October 26, 1999. On that date, the Conduct Adjustment Board [(CAB)], consisting of [Daniel] Brough, [Donald] Phlegley, and [Jerry] Mahurin, found Pannell guilty as charged and demoted him from Credit Class I to Credit Class III. The CAB also ordered that Pannell be placed in disciplinary segregation for two and one-half years.

On December 3, 1999, Pannell appealed the CAB's decision to Hanks, WVCF's superintendent. Pannell claimed that on October 19, 1999, he had submitted to the screening officer a request for interview and notice forms requesting that three witnesses appear and testify at the disciplinary hearing. Pannell alleged that the CAB had failed to call those witnesses. On January 14, 2000, Hanks denied Pannell's appeal, finding that "[t]he record clearly

shows that [Pannell] took responsibility for obtaining any statements [he] wanted. I find no reason to change the decision of the CAB.” On February 16, 2000, Pannell appealed Hank’s decision to Penfold, the final reviewing authority of the Department of Correction [(DOC)]. In a letter dated March 13, 2000, Penfold denied Pannell’s appeal, finding “no evidence of procedural or due process error.”

On February 7, 2001, Pannell filed a habeas corpus petition in the United States District Court for the Northern District of Indiana, alleging, *inter alia*, that he had been denied the “right to call witnesses[.]” On August 27, 2001, District Judge Sharp denied Pannell’s petition, finding that he did not request any witnesses. Pannell appealed. On September 30, 2002, a panel of the Seventh Circuit Court of Appeals vacated and remanded for further proceedings, noting that

Pannell’s verified habeas corpus petition states that he submitted to the screening officer a written request to have [two correctional officers] testify. Indiana has not disputed that assertion, instead claiming (incorrectly) that there was no evidence in the record that he made the requests. Moreover, Pannell’s assertion that he requested the witnesses is supported by a statement submitted by [one of the officers] indicating that Pannell had requested him to appear and testify. . . . Consequently, there is evidence that Pannell requested these witnesses to appear and testify. But because the [district] court denied the petition only a few days after Pannell submitted his request to grant it, Indiana has not yet been afforded the opportunity to meet Pannell’s evidence with its own.

[ ] On remand the court should allow Indiana to respond to Pannell’s submission before deciding whether an evidentiary hearing is necessary.

In a letter to Pannell dated February 19, 2003, Penfold stated that he was dismissing the disciplinary action against Pannell because the DOC could not “rehear this case due to it being over three (3) years old and staff do not have specific recollection to rehear it. All sanctions are hereby rescinded. All reference to the above noted case shall be expunged within thirty (30) days from receipt of this letter.” On February 20, 2003, the attorney general filed a motion to dismiss Pannell’s action for mootness. On February 24, 2003, Judge Sharp denied Pannell’s habeas corpus petition and granted the attorney general’s motion to dismiss.

On March 29, 2004, Pannell filed a five-count complaint against [Charles A. Penfold, Craig Hanks, Daniel Brough, Donald Phegley, and Jerry Mahurin (collectively, Penfold *et al.*)] in their individual capacit[ies], alleging that they had deprived him of a protected liberty interest without due process in violation of Article 1 Sections 12 and 13 of the Indiana Constitution “when [they] knowingly and intentionally denied [his] statutory rights” under Indiana Code [s]ection 11-11-5-5(a)(3) and –(5) to an impartial decisionmaker and to call witnesses and present documentary evidence “and then sanctioned [him] with demotion from Credit Class I to Credit Class III and 2½ years disciplinary segregation.” Pannell requested judgment against [Penfold *et al.*] “in an amount sufficient to compensate [him] for his damages, cost[s] of [the] action, prejudgment interest, and all other just and proper relied in the premises.

*Pannell v. Penfold*, No. 49A05-0410-CV-566 (Ind. Ct. App. September 9, 2005) (internal citations omitted).

On June 28, 2004, Pannell filed a motion for summary judgment alleging that Hanks and Penfold had “failed to provide meaningful review” of his disciplinary hearing in violation of Indiana Code section 35-50-6-5.5. *Id.* In response, Penfold *et al.* filed their own motion for summary judgment. At that time, according to Pannell, Indiana Attorney General Steve Carter (Carter) obtained a copy of Pannell’s expunged record from DOC employee Dawn Nelson (Nelson), who was the acting Keeper of the Records for the Indiana State Prison, and provided it to Deputy Attorney General Thomas Quigley (Quigley) for use in Pannell’s summary judgment proceedings.

On August 30, 2004, the trial court held a hearing and granted Penfold *et al.*’s motion for summary judgment. During the hearing, Quigley had submitted the copy of Pannell’s expunged record. Pannell appealed, and on September 9, 2005, we issued a memorandum decision, in which we affirmed the trial court’s decision on the premise that Pannell had filed

his complaint outside of the time frame for the requisite statute of limitations. *See id.* On October 11, 2005, Pannell petitioned for a rehearing, and we affirmed our September 9, 2005 decision in a memorandum decision issued December 21, 2005. *See Pannell v. Penfold*, No. 49A05-0410-CV-566 (Ind. Ct. App. December 21, 2005). Following this opinion, Pannell applied for transfer of his case to our supreme court, which the supreme court denied.

Subsequently, Pannell filed the instant 42 U.S.C. § 1983 civil action against Carter, Nelson, and Quigley (collectively, Carter *et al.*). In his complaint, dated November 12, 2009, Pannell alleged that Carter had deprived him of substantive due process in violation of the Fourteenth Amendment to the United States Constitution and Article I, Section 12 of the Indiana Constitution when Carter obtained a certified copy of Pannell's expunged record from Nelson in 2004 and provided it to Quigley for use in Pannell's summary judgment proceedings. Pannell also alleged that Nelson had violated his constitutional rights by providing a copy of his records, and Quigley had violated his constitutional rights by submitting the copy of the records to the trial court during the hearing on Pannell's summary judgment motion.

On December 8, 2009, Panell filed a verified motion for appointment of counsel, which the trial court denied on December 21, 2009. Then, on January 6, 2010, Carter *et al.* filed a motion to dismiss the complaint pursuant to Indiana Trial Rule 12(B)(6), which the trial court granted on January 25, 2010. Subsequently, on February 24, 2010, Pannell filed a motion to amend his complaint to allege that Carter *et al.* had deprived him of his substantive and procedural due rights in violation of both the Indiana and the United States Constitution.

The trial court denied Pannell's motion to amend the complaint on March 1, 2010 and dismissed the case on March 15, 2010.

Pannell now appeals. Additional facts will be provided as necessary.

### DISCUSSION AND DECISION

On appeal, Pannell argues that the trial court abused its discretion in denying his motion for the appointment of counsel and in denying his motion to file an amended complaint. Based on our review of the record, however, we will not address the trial court's denial of Pannell's motion for the appointment of counsel because we conclude that the trial court did not abuse its discretion in denying Pannell's motion to file an amended complaint.

In Indiana, trial courts have broad discretion in granting or denying an amendment to a pleading, and we will reverse only upon a showing of abuse of discretion. *Mullen v. Cogdell*, 643 N.E.2d 390, 399 (Ind. Ct. App. 1994), *trans. denied*. A 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. *Cutter v. Herbst*, 945 N.E.2d 240, 245 (Ind. Ct. App. 2011). If, as here, a court grants a motion to dismiss under Trial Rule 12(B)(6) for the pleading's failure to state a claim upon which relief may be granted, the plaintiff may amend the pleading as a matter of right within 10 days after the service of notice of the court's order. T.R.12(B)(8); *see also O'Connor v. Lowe*, 607 N.E.2d 398, 399 (Ind. Ct. App. 1993), *trans. denied*. After ten days, however, a plaintiff may amend the pleading only by leave of the court. *Kuehl v. Hoyle*, 746 N.E.2d 104, 108 (Ind. Ct. App. 2001).

Because Pannell did not submit his amended pleading within 10 days, we must now

determine whether the trial court abused its discretion in denying the amended complaint. A complaint is not subject to dismissal for failure to state a claim upon which relief can be granted unless it appears to be a certainty that the plaintiff would not be entitled to relief under any set of facts. *Bentz Metal Products Co., Inc. v. Stephans*, 657 N.E.2d 1245, 1247 (Ind. Ct. App. 1995). The trial court must take the allegations of the complaint as true, and the plaintiff is entitled to all reasonable inferences which can be drawn therefrom. *Id.* On appeal from a denial of a motion to dismiss, we apply essentially the same standard as the trial court to see whether the trial court acted properly in denying the motion to dismiss under T.R. 12(B)(6). *Id.*

In the instant case, the trial court granted Carter *et al.*'s motion for summary judgment and denied Pannell's motion to amend his complaint because, among other reasons, Carter, Quigley, and Nelson are immune from suit—Carter and Quigley for their representation of the State in court, and Nelson for providing testimony in the form of a certification of records. Based on our review of the record, we find the trial court's reasoning persuasive, although we find Nelson immune as a government official rather than as a witness.

With regards to Carter and Quigley, the United States Supreme Court held in *Imbler* that State prosecutors are entitled to absolute immunity from § 1983 damages liability. *Imbler v. Pachtman*, 424 U.S. 409, 96 S.Ct. 984, 47 L.Ed.2d 128 (1976). The Supreme Court's reasoning was:

The office of public prosecutor is one which must be administered with courage and independence. Yet how can this be if the prosecutor is made subject to suit by those whom he accuses and fails to convict? To allow this would open the way for unlimited harassment and embarrassment of the most

conscientious officials by those who would profit thereby. There would be involved in every case the possible consequences of a failure to obtain a conviction. There would always be a question of a possible civil action in case the prosecutor saw fit to move dismissal of the case. . . . The apprehension of such consequences would tend toward great uneasiness and toward weakening the fearless and impartial policy which should characterize the administration of this office. The work of the prosecutor would be thus impeded, and we would have moved away from the desired objective of stricter law enforcement.

*Id.* at 423-24. (quoting *Pearson v. Reed*, 6 Cal. App.2d 277, 287, 44 P.2d 592, 597 (1935)).

Subsequently, the Seventh Circuit Court of Appeals identified instances when prosecutors are entitled to qualified, rather than absolute, immunity. *Mendenhall v. Goldsmith*, 59 F.3d 685, 689 (7<sup>th</sup> Cir. 1995). According to the *Mendenhall* court,

Prosecutors may be entitled to either absolute or qualified immunity from civil liability under 42 U.S.C. § 1983 for actions undertaken pursuant to their official duties. Absolute immunity covers prosecutorial functions such as the initiation and the pursuit of a criminal prosecution, the presentation of the [S]tate's case at trial, and other conduct that is "intimately associated" with the judicial process. By contrast, a prosecutor has only the protection of qualified immunity when functioning in the role of an administrator or investigative officer rather than an advocate.

*Id.* (internal citations omitted).

Here, Carter and Quigley, in their positions as Indiana Attorney General and Indiana Deputy Attorney General, respectively, requested Pannell's expunged record from Nelson and submitted it at trial in the course of their representation of the five DOC defendants. Under Indiana Code section 4-6-1-6, Carter and Quigley both "represent the [S]tate in any matter involving the rights or interests of the [S]tate, including actions in the name of the [S]tate, for which provision is not otherwise made by law," so their positions are akin to

those of prosecutors. Therefore, as Pannell was attempting to hold five State employees liable for their actions as State employees, Carter and Quigley's actions in representing Penfold *et al.* were taken pursuant to their official duties and are immune under *Imbler* and *Mendenhall*. Moreover, the act in question—requesting the expunged record—was relevant to present an adequate defense in the proceeding as the very foundation of Pannell's claim concerned the disciplinary action that was the subject of the expunged record. As a result, it is “intimately associated” with the judicial process and affords Carter and Quigley absolute, rather than qualified, immunity. *See Mendenhall*, 59 F.3d at 689.

Nevertheless, Pannell argues that Carter and Quigley's actions were exceptions to the rule of absolute immunity because he claims that they deceived the trial court and committed fraud. We have noted that “attorneys have not been clothed with absolute protection from liability for all of the actions they take on behalf of clients. An Indiana statute subjects attorneys to criminal and civil damages if they are ‘guilty of deceit or collusion, or consent thereto, with intent to deceive a court or judge or a party to an action or judicial proceeding.’” *National City Bank, Indiana v. Shortridge*, 689 N.E.2d 1248, 1249 (Ind. 1997), *supplementing opinion*, 689 N.E.2d 1248 (Ind. 1998). However, we conclude that the submission of the record was not deceptive in light of Pannell's actions. Indiana Code section 35-38-5-4 states that

[i]f a person whose records are expunged brings an action that might be defended with the contents of such records, the defendant is presumed to have a complete defense to such an action. . . . If the plaintiff denies the existence of the records, the defendant may prove their existence in any manner compatible with the law of evidence.

Pannell himself put the disciplinary records at issue by filing a claim related to the disciplinary hearing, and Carter and Quigley were permitted to defend the DOC officials with those records under I.C. § 35-38-5-4. Whether the trial court improperly relied on those records is not an issue we are addressing on appeal today; instead we are merely addressing Carter and Quigley's actions in their official capacities. Accordingly, we conclude that the trial court did not abuse its discretion in determining that Carter and Quigley were immune from civil liability towards Pannell.

Turning to Nelson, we conclude that Nelson was immune as a result of her acts as a State official rather than as a witness. In *al-Kidd*, the Supreme Court recently reaffirmed that qualified immunity shields federal and state officials from money damages unless a plaintiff pleads facts showing that (1) the official violated a statutory or constitutional right, and (2) the right was "clearly established" at the time of the challenged conduct. *Ashcroft v. al-Kidd*, 131 S.Ct. 2074, 2080 (2011). A government official's conduct violates clearly established law when, at the time of the challenged conduct, "[t]he contours of a right [are] sufficiently clear" that every "reasonable official would have understood that what he is doing violates that right." *Id.* at 2083. Moreover, we do not require a case directly on point, but existing precedent must have placed the statutory or constitutional question beyond debate. *Id.*

In her capacity as acting Keeper of the Records for the Indiana State Prison, Nelson is a State official, and she was acting within the course of her duties by providing Carter and Quigley, in their capacities as representatives of State officials, with a record of a disciplinary action conducted by prison officials. Additionally, Pannell has not shown that Nelson

violated a statutory or constitutional right. If anything, her actions were statutorily permissible under I.C. § 35-38-5-4, since Pannell put the disciplinary records at issue in his civil proceedings. Accordingly, we cannot find that the trial court abused its discretion in determining that Nelson was immune from civil liability because we conclude that she provided Pannell's records within the course of her duties as a State official.

### CONCLUSION

Based on the foregoing, we conclude that the trial court did not abuse its discretion in denying Pannell's motion to amend his complaint.

Affirmed.

DARDEN, J. concur

BARNES, J. concurs in result with separate opinion

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**IN THE  
COURT OF APPEALS OF INDIANA**

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DAVID PANNELL,	)	
	)	
Appellant-Plaintiff,	)	
	)	
vs.	)	No. 49A02-1003-PL-472
	)	
STEVE CARTER, <i>et al.</i> ,	)	
	)	
Appellees-Defendants.	)	

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**BARNES, Judge, concurring in result with opinion.**

I concur in the result reached by the majority, to the extent the result of their opinion is affirmance of the trial court’s ruling. However, I strongly believe we should not have even addressed the merits of Pannell’s appeal. Instead, I would have preferred to dismiss the appeal outright, as the State has requested.

Pannell is a “frequent filer” who has repeatedly litigated claims against the Department of Correction and related State officials. Accordingly, in 2008, this court established a procedure for screening any future appeals by Pannell. Specifically, Pannell is required to “first file a motion for leave of this court to file any additional appeal directed to

this court seeking review of any matter arising out of any claim brought against or involving the Indiana Dept. of Correction.” Order in Pannell v. Penfold, No. 49A04-0711-CV-601 (July 23, 2008). Failure by Pannell to follow this procedure is supposed to subject any future purported appeal by him “to dismissal with prejudice.” Id.

Clearly, this appeal again concerns the Department of Correction and actions by State officials related to his prison discipline, and Pannell did not follow the screening procedure we previously established. This court ought to insist upon compliance with our orders. Moreover, the resources of this court and the Attorney General’s office should not have been expended in addressing the merits of Pannell’s appeal. Thus, I vote to dismiss Pannell’s appeal.