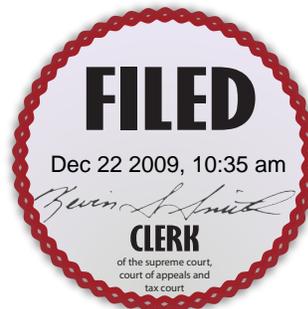


Pursuant to Ind.Appellate Rule 65(D), this Memorandum Decision shall not be regarded as precedent or cited before any court except for the purpose of establishing the defense of res judicata, collateral estoppel, or the law of the case.



ATTORNEY FOR APPELLANT:

JERRY D. ALTMAN
Monticello, Indiana

**IN THE
COURT OF APPEALS OF INDIANA**

IN THE MATTER OF THE ESTATE OF)
DENNIS J. ALBRECHT, DECEASED,)
)
CORY J. ALBRECHT,)
)
Appellant-Plaintiff,)
)
vs.)
)
JOAN M. BENDEL,)
)
Appellee-Defendant.)
)

No. 66A03-0906-CV-260

APPEAL FROM THE PULASKI CIRCUIT COURT
The Honorable Michael Anthony Shurn, Judge
Cause No. 66C01-0807-EU-13

December 22, 2009

MEMORANDUM DECISION - NOT FOR PUBLICATION

VAIDIK, Judge

Case Summary

Cory J. Albrecht appeals the trial court's grant of Joan M. Bendel's motion to strike Cory's purported pleadings contesting his father's will. Specifically, Cory contends that he filed his will contest in accordance with Indiana Code sections 29-1-7-17 and -18, and therefore the trial court wrongfully found that his action was not appropriately filed. Finding that Cory failed to furnish a summons to the clerk within the limitations period and thus failed to file his will contest in accordance with the Indiana Code, and further finding that Cory suffered no prejudice as Joan filed her motion to strike well beyond the limitations period in which he could appropriately file a will contest, we affirm.

Facts and Procedural History

On July 1, 2008, the trial court admitted Dennis J. Albrecht's will to probate in response to Joan's petition for probate of Dennis's will without administration. On September 28, 2008, Cory's attorney filed his appearance, which included a certificate of service showing service on Joan's attorney. The next day, Cory filed a complaint to contest his father's will, paid the filing fee, but did not furnish a summons to the clerk. On September 30, 2008, Cory filed a bond in accordance with Indiana Code section 29-1-7-19. No certificate of service was included on either the complaint or the bond. On February 23, 2009, Joan filed a motion to strike Cory's purported pleadings under Indiana Trial Rule 12(F). At the hearing on the motion to strike, the following exchange occurred:

THE COURT: I was looking at uh – when you sent [the will contest] into the Court you sent a cover letter.

[CORY'S ATTORNEY]: Yes.

THE COURT: So, I had questions about that too. But you don't show a copy to either – even more critical to me in this estate there is no appointed personal representative. There's just heirs. I mean, there's just a will spread of record. So, in your letter of, uh, September 26, you don't show that you carbon copied – I call it carbon copied – I guess we are beyond that in the 21st Century, but copied that to anybody except your client did you?

[CORY'S ATTORNEY]: The letter you mean?

THE COURT: The letter.

[CORY'S ATTORNEY]: I think – no, I don't think I sent the letter to anybody else.

THE COURT: Okay.

[CORY'S ATTORNEY]: I don't...

THE COURT: And then – and then – do you have a certificate of service on any of the pleadings showing they went anywhere else? Here – here we go. I guess your appearance has a certificate of service on [Joan's attorney], right?

[CORY'S ATTORNEY]: I must tell you that I don't have my appearance right here in front of me as I didn't think this was a part of the...

THE COURT: Right.

[CORY'S ATTORNEY]: ...case that we were – whatever the record indicated I...

THE COURT: The complaint. Well, I show your appearance on [Joan's attorney], or certificate of service. But I was trying to see on the complaint itself if that showed a certificate of service on anybody.

[CORY'S ATTORNEY]: I must tell you I would have to look at that. I don't –

THE COURT: Not saying it is or isn't, but I was just looking at that to say well does a certificate of service take the place of a summons. Well, that is something that I would have to decide. But I was just – even there – even there I was not finding any certificate of service. The only certificate of service I see is on the uh – is on the uh – appearance form.

Tr. p. 17-18. The trial court consequently granted the motion after taking it under advisement. Cory now appeals.

Discussion and Decision

At the outset, we note that Joan did not submit an appellee's brief. In such a situation, we do not undertake the burden of developing arguments for the appellee.

Applying a less stringent standard of review with respect to showings of reversible error, we may reverse the lower court if the appellant can establish prima facie error. *State Farm Ins. v. Freeman*, 847 N.E.2d 1047, 1048 (Ind. Ct. App. 2006). Prima facie is defined in this context as “at first sight, on first appearance, or on the face of it.” *Id.* The purpose of this rule is not to benefit the appellant. Rather, it is intended to relieve this Court of the burden of controverting the arguments advanced for reversal where that burden rests with the appellee. *Id.* Where an appellant is unable to establish prima facie error, we will affirm. *Id.*

Indiana Trial Rule 12(F) provides:

Upon motion made by a party before responding to a pleading, or, if no responsive pleading is permitted by these rules, upon motion made by a party within twenty [20] days after the service of the pleading upon him or at any time upon the court’s own initiative, the court may order stricken from any pleading any insufficient claim or defense or any redundant, immaterial, impertinent, or scandalous matter.

We have used Trial Rule 12(F) to strike material other than pleadings. *See WorldCom Network Servs., Inc. v. Thompson*, 698 N.E.2d 1233, 1237 (Ind. Ct. App. 1998) (striking portions of a petition for rehearing and supporting brief) (citing *State v. Hoovler*, 673 N.E.2d 767, 768 (Ind. 1997) (striking portions of a brief in support of a petition for rehearing)), *trans denied*. Joan’s motion to strike alleges that Cory “failed to properly commence an action to contest said will within the period of limitation set forth in IC 29-1-7-17 in that he has failed to tender his complaint, affidavit, summons, and bond supported by sufficient sureties as required by law.” Appellant’s App. p. 65. Her motion to strike is thus based on timeliness. However, the language of Trial Rule 12(F) permitting the trial court to strike “any insufficient claim or defense” is properly

construed as providing a means to redress the legal insufficiency of the content or substance of the claim or defense, not untimeliness. *Dreyer & Reinbold, Inc. v. AutoXchange.com., Inc.*, 771 N.E.2d 764, 768 (Ind. Ct. App. 2002), *trans. denied*. A 12(F) motion to strike was not the proper avenue of relief in this instance. Instead, the proper procedure for challenging timeliness is to apply for default under Indiana Trial Rule 55 before the will contest is appropriately filed. *See id.* at 769.

Notwithstanding Joan's deficient motion, a trial court has broad discretion in ruling on a motion to strike under Trial Rule 12(F), and its decision will not be reversed unless prejudicial error is clearly shown. *Id.* at 768. We thus examine whether Cory has demonstrated prejudice.

Cory contends that the trial court erred in granting Joan's motion to strike because he filed his will contest in accordance with Indiana Code sections 29-1-7-17 and -18, and therefore the trial court wrongfully found that his action was not appropriately filed.

Section 29-1-7-17 provides in pertinent part:

Any interested person may contest the validity of any will in the court having jurisdiction over the probate of the will within three (3) months after the date of the order admitting the will to probate by filing in the court the person's allegations in writing verified by affidavit The executor and all other persons beneficially interested in the will shall be made defendants to the action.

Section 29-1-7-18 provides:

When an action is brought to contest the validity of any will as provided in this article, notice is served upon the defendants in the same manner as required by the Indiana Rules of Trial Procedure.

We thus look to the Indiana Rules of Trial Procedure to determine whether Cory has appropriately filed his will contest within the three-month limitations period. Trial Rule 3 provides:

A civil action is commenced by filing with the court a complaint or such equivalent pleading or document as may be specified by statute, by payment of the prescribed filing fee or filing an order waiving the filing fee, and, where service of process is required, by furnishing to the clerk as many copies of the complaint and summons as are necessary.

Trial Rule 4(A) provides:

The court acquires jurisdiction over a party or person who under these rules commences or joins in the action, is served with summons or enters an appearance, or who is subjected to the power of the court under any other law.

The right to contest a will is statutory, and if it is not exercised within the allotted time period, it is lost. *Estate of Kitterman v. Pierson*, 661 N.E.2d 1255, 1257 (Ind. Ct. App. 1996), *reh'g denied, trans. denied*. Our Supreme Court has determined that a civil action is not timely commenced if the plaintiff files a complaint within the applicable statute of limitations but does not tender summons to the clerk within that statutory period. *Ray-Hayes v. Heinemann*, 760 N.E.2d 172, 173-74 (Ind. 2002), *rev'd on reh'g on other grounds*, 768 N.E.2d 899 (holding that the previous decision concluding that summonses must be tendered within the applicable statute of limitations period be applied prospectively). *Ray-Hayes* has since been applied in the context of will contests by another panel of this Court. In *Smith v. Estate of Mitchell*, Smith's attorney specifically named the Estate's attorney as the recipient of a summons on a form provided by the clerk. 841 N.E.2d 215, 217 (Ind. Ct. App. 2006). However, the summons was not served upon the Estate's attorney because the form was not a proper

summons form. *Id.* Although the Estate’s attorney nevertheless appeared at the intended pre-trial conference, the conference was vacated because the trial court found that a proper summons had not been issued. *Id.* We concluded that Smith did not appropriately file her will contest in part because “[she] did not . . . tender a proper summons within the three-month statutory period.” *Id.* at 219. *But see Johnson v. Morgan*, 871 N.E.2d 1050, 1054 (Ind. Ct. App. 2007) (concluding that Johnson tendered a proper summons even though it was uncontested that Johnson directed it to the wrong attorney).

Here, Dennis’s will was admitted to probate on July 1, 2008. Cory did not furnish the clerk with any summons, proper or improper, within the three-month statutory time period. Furthermore, he did not even give Joan actual notice by service of the complaint without the summons. He thus failed to appropriately file his will contest. More importantly, when Joan filed her motion to strike on February 23, 2009, the limitations period had already run.¹ Joan’s deficient motion thus had no bearing on Cory’s failure to file within the limitations period. Cory has failed to show prejudice, and the trial court did not abuse its discretion in granting Joan’s motion to strike.

Affirmed.

RILEY, J., and CRONE, J., concur.

¹ Cory ultimately filed a summons on May 7, 2009, the day before the trial court granted Joan’s motion to strike. This filing was not enough to resurrect his will contest as it was filed outside the three-month statutory period.