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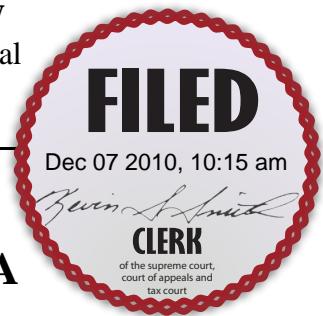
APPELLANT PRO SE:

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**IN THE  
COURT OF APPEALS OF INDIANA**

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BILLY J. LEMOND, )  
                        )  
Appellant-Plaintiff, )  
                        )  
                        )  
vs.                     )      No. 48A02-1005-SC-595  
                        )  
                        )  
ALLAN FINNAN and MICHAEL KIDDER, )  
                        )  
                        )  
Appellees-Defendants. )

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APPEAL FROM THE MADISON SUPERIOR COURT  
The Honorable David A. Happe, Judge  
The Honorable Steven D. Clase, Magistrate  
Cause No. 48D04-0911-SC-3186

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December 7, 2010

**MEMORANDUM DECISION - NOT FOR PUBLICATION**

**ROBB, Judge**

### Case Summary and Issues

Billy Lemond brought this small claims action against two employees of Pendleton Correctional Facility (“PCF”) and later sought to add PCF as a defendant. The small claims court dismissed Lemond’s notice of claim, denied his motion to amend his notice of claim to name PCF as a defendant, and denied his subsequent motion to correct error. Lemond appeals, raising five issues which we consolidate and restate as: 1) whether the small claims court properly dismissed Lemond’s notice of claim as against the PCF employees individually, for failure to state a claim on which relief could be granted; 2) whether the small claims court properly denied Lemond’s motion to amend his notice of claim to name PCF as a defendant; and 3) whether Lemond has stated a sufficient claim against PCF. We conclude the small claims court properly dismissed Lemond’s notice of claim as against the PCF employees individually, but erred when it denied his motion to amend his notice of claim to name PCF as a defendant. Further concluding Lemond has stated a sufficient claim against PCF, we reverse and remand for his claim to go forward against PCF only.

### Facts and Procedural History

The relevant facts as alleged by Lemond follow. Lemond purchased a set of headphones from the commissary at PCF, where he is incarcerated. In July 2009, the headphones broke, so Lemond gave them to PCF staff to be mailed out and repaired. A few weeks later, Michael Kidder, a PCF counselor, told Lemond his headphones were back for him to pick up. However, Kidder left the headphones lying out unsecured in his office. While Lemond was on his way to Kidder’s office to pick up the headphones, Kidder came

across Lemond in the hallway and told him the headphones had been stolen from his office. PCF policies and procedures require inmate property to be received by PCF staff upon its return before it is given back to the inmate.

In August 2009, Lemond filled out and submitted a “Notice of Loss of Property – Tort Claim” to the Indiana Department of Correction (“DOC”), requesting reimbursement for his lost headphones and the costs of filing his notice. Appellant’s Appendix at 5. The Attorney General responded by issuing a letter to PCF advising that Lemond’s claim was denied.

Lemond filed with the small claims court a notice of small claim, naming as defendants “Allen Finnан (Superintendent)” and “Michael Kidder (Counselor)” and listing their addresses at PCF. Id. at 7. Finnан and Kidder filed a motion to dismiss pursuant to Trial Rule 12(B)(6) for failure to state a claim on which relief could be granted. Lemond filed a response stating that his intent in his notice of claim was to name Finnан and Kidder in both their individual and official capacities. On February 18, 2010, the small claims court granted the motion to dismiss.

On March 2, 2010, Lemond filed a motion to reconsider and a motion to amend his notice of claim to name PCF as a defendant. The small claims court denied both motions. Lemond filed a motion to correct error, which the small claims court also denied. Lemond now appeals.

## Discussion and Decision

### I. Standard of Review

Lemond appeals from the denial of his motion to correct error. We generally review a ruling on a motion to correct error for an abuse of discretion, but where the issues on appeal are purely questions of law, our review is de novo. Ind. BMV v. Charles, 919 N.E.2d 114, 116 (Ind. Ct. App. 2009). Whether the small claims court properly dismissed Lemond's notice of claim pursuant to Trial Rule 12(B)(6), and whether his amended notice of claim states a sufficient claim against PCF, are issues of law. See Higgason v. State, 789 N.E.2d 22, 29 (Ind. Ct. App. 2003) (noting that in reviewing a Rule 12(B)(6) motion to dismiss, "we stand in the shoes of the trial court and determine whether the trial court misapplied the law"). We view the complaint in the light most favorable to the plaintiff, and will conclude dismissal is proper only if it is "apparent that the facts alleged in the complaint are incapable of supporting relief under any set of circumstances." Id. (quotation omitted). Under the less-stringent pleading standard applicable in small claims cases, a notice of claim is sufficient if it sets forth a "brief statement of the nature of the claim," and "is not required to set forth facts establishing a right to recover." Niksich v. Cotton, 810 N.E.2d 1003, 1005-06 (Ind. 2004) (quotation omitted), cert. denied, 543 U.S. 1226 (2005). Nonetheless, dismissal under Rule 12(B)(6) is proper if it is clear on the face of the notice of claim that the plaintiff is not entitled to relief. Id.

## II. Dismissal as to Employees Individually

First we address whether the small claims court properly dismissed Lemond’s notice of claim as against the PCF employees individually, for failure to state a claim on which relief could be granted. Indiana Code section 34-13-3-5(c), part of the Indiana Tort Claims Act (“ITCA”), provides that a tort lawsuit against a governmental employee personally “must allege that an act or omission of the employee that causes a loss is: (1) criminal; (2) clearly outside the scope of the employee’s employment; (3) malicious; (4) willful and wanton; or (5) calculated to benefit the employee personally.” The complaint “must contain a reasonable factual basis supporting the allegations.” Id. While the ITCA formulates these as pleading requirements, they also “amount[] to a legislative establishment of substantive elements of a claim,” and are therefore applicable to small claims cases. Niksich, 810 N.E.2d at 1006.

Lemond’s original and amended notices of claim allege Finnан and Kidder are at fault for his loss of property but do not allege any circumstances suggesting their act or omission was criminal, malicious, willful or wanton, or calculated to benefit them personally. Lemond’s amended notice of claim asserts Kidder was acting “in the performance of his duties” at PCF when he placed the headphones in an unsecure location where they could be stolen. Appellant’s App. at 22. Thus, Lemond is not alleging acts or omissions outside of the employees’ employment. Taking Lemond’s allegations as true at this stage of the case, he has not stated a claim against the PCF employees in their individual capacities. The small

claims court therefore properly dismissed Lemond's notice of claim as against the PCF employees individually.

### III. Motion to Amend

Trial Rule 12(B) provides that when the trial court grants a motion to dismiss under Rule 12(B)(6), the plaintiff may amend the complaint once as of right within ten days after service of notice of the trial court's order of dismissal. This rule applies "at least as liberally" in small claims cases. Niksich, 810 N.E.2d at 1008. Here, the small claims court granted Finnан and Kidder's motion to dismiss pursuant to Rule 12(B)(6) on February 18, 2010. As Lemond would have received service of the dismissal order by mail, he had three added days, for a total of thirteen days, to move to amend his notice of claim. See T.R. 6(E). Lemond responded with his motion to amend filed on March 2, 2010, one day before it was due. Therefore, the small claims court erred when it denied Lemond's motion to amend his notice of claim to name PCF as a defendant. This error is of consequence because, as explained below, Lemond's amended notice of claim states a sufficient claim against PCF.

### IV. Claim Against PCF

As this court and the Indiana Supreme Court have recognized, a small claims lawsuit brought by a prisoner against State prison employees in their official capacities is equivalent to a lawsuit against the prison or the State. See Niksich, 810 N.E.2d at 1008 (concluding plaintiff's naming of State prison employees in their official capacities was sufficient to bring a claim against the prison); Banks v. Brown, 876 N.E.2d 335, 336 (Ind. Ct. App. 2007) (holding prisoner's small claims suit against State prison employees in their official

capacities was a suit against the State). Lemond’s original notice of claim, which included the titles of the PCF employees and their addresses at PCF, was sufficient to name them in their official, as well as individual, capacities. See Banks, 876 N.E.2d at 336 (interpreting notice of small claim, which listed prison employees’ titles and their addresses at prison, as a suit against employees in their official capacities). Further, Lemond’s amended notice of claim specifically named PCF as a defendant.

Treating Lemond’s lawsuit as one against PCF, we can discern no reason for dismissing his claim at the present juncture. Before bringing this action, Lemond timely submitted an administrative claim to the DOC. See Ind. Code § 34-13-3-7(a) (section of ITCA requiring administrative claim to be filed within 180 days after the alleged loss “of the offender’s personal property . . . as a result of an act or omission of the [DOC] or any of its agents”). Lemond’s amended notice of claim sufficiently sets forth a brief statement of the nature of his claim, see Niksich, 810 N.E.2d at 1005-06, and alleges facts that could entitle him to recover against PCF for his lost property. See Smith v. Ind. Dep’t of Corr., 888 N.E.2d 804, 808-09 (Ind. Ct. App. 2008) (concluding failure of prisoner’s claims against individual DOC employees for lost property did not preclude him from going forward with claims against DOC and other State entities). The Attorney General concedes Lemond’s lawsuit should be allowed to go forward against PCF.

The Attorney General contends Lemond’s notice of claim was properly dismissed as to the PCF employees in their official capacities, yet also concedes “to the extent Lemond’s original complaint named [the PCF employees] in their official capacities, the case should

have gone forward because naming them in their official capacities was equivalent to naming the state agency.” Brief of Appellees at 5. Because the Attorney General is correct that suing prison employees in their official capacities is equivalent to suing the State prison, and because Lemond has stated a sufficient claim against PCF, we need not address whether the small claims court properly dismissed Lemond’s notice of claim as against the PCF employees in their official capacities.

### Conclusion

The small claims court properly dismissed Lemond’s notice of claim as against the PCF employees individually, but erred when it denied his motion to amend his notice of claim to name PCF as a defendant. Because Lemond has stated a sufficient claim against PCF, we reverse the denial of his motion to correct error and remand for his claim to go forward against PCF only.

Reversed and remanded.

MAY, J., and VAIDIK, J., concur.