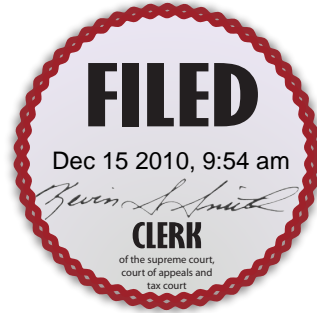


Pursuant to Ind. Appellate Rule 65(D), this Memorandum Decision shall not be regarded as precedent or cited before any court except for the purpose of establishing the defense of res judicata, collateral estoppel, or the law of the case.



APPELLANT PRO SE:

**CHARLES E. JUSTISE, SR.**  
Carlisle, Indiana

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**IN THE  
COURT OF APPEALS OF INDIANA**

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CHARLES E. JUSTISE, SR.,	)	
	)	
Appellant,	)	
	)	
vs.	)	No. 77A01-1006-SC-352
	)	
STATE OF INDIANA,	)	
	)	
Appellee.	)	

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APPEAL FROM THE SULLIVAN SUPERIOR COURT  
The Honorable Robert E. Springer, Judge  
Cause No. 77D01-1006-SC-493

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**December 15, 2010**

**MEMORANDUM DECISION - NOT FOR PUBLICATION**

**DARDEN, Judge**

## STATEMENT OF THE CASE

Charles E. Justise, Sr., an inmate in the Indiana Department of Correction (“DOC”), appeals the dismissal of his complaint pursuant to Indiana Code section 34-58-1-2.

We affirm.

### ISSUE

Whether the trial court erred when it dismissed Justise’s complaint.

### FACTS

On June 18, 2010, Justise, pro se, filed a complaint in Sullivan Superior Court against Wabash Valley Correctional Facility Superintendent James Basinger and two other employees of the DOC, identified only as Mr. Donaldson and Mr. McMahon (the defendants shall be referred to collectively as the “Employees”). In his complaint, Justise alleged that in February and March of 2009, the DOC charged him for supplies and postage, contrary to Indiana Code section 11-11-7-2, which provides that the DOC “shall provide an indigent confined person with free stationery, envelopes, postage, and notarial services for legal correspondence.”

Justise further alleged that Mr. Donaldson improperly charged him for postage in May of 2009. Specifically, he maintained that Mr. Donaldson “was upset that he had to carry all the envelopes” containing Justise’s legal correspondence and therefore “forced Justise to sign a remitt[a]nce slip [for postage] while Justise was indigent under the threat of not sending out Justise’s very important legal mail.” (App. 6).

Justise also asserted claims for lost property. He alleged that after he was sent to a segregated unit, Mr. McMahon misplaced his nail clippers; other unnamed DOC employees “left behind” his radio and headphones; and that “[h]is wash cloths never made it to” him. (App. 7). Justise sought damages in the amount of \$162.96.

On June 22, 2010, the trial court dismissed Justise’s complaint pursuant to Indiana Code section 34-58-1-2. Justise filed a notice of appeal, and on October 19, 2010, the Indiana Attorney General filed a notice of non-involvement.<sup>1</sup>

### DECISION

Justise asserts that the trial court erred in dismissing his complaint pursuant to Indiana Code section 34-58-1-2.

In reviewing the dismissal of an offender’s claim, complaint, or dismissal pursuant to Indiana Code § 34-58-1-2, we employ a de novo standard of review. Like the trial court, we look only to the well-pleaded facts contained in the complaint or petition. Further, we determine whether the complaint or petition contains allegations concerning all of the material elements necessary to sustain a recovery under some viable legal theory.

*Smith v. Donahue*, 907 N.E.2d 553, 555 (Ind. Ct. App. 2009) (internal citations omitted), *cert. dismissed*, 130 S. Ct. 800 (2009).

Indiana Code section 34-58-1-1 provides that “[u]pon receipt of a complaint of petition filed by an offender, the court shall docket the case and take no further action until the court has conducted the review required by section 2 of this chapter.” Section 2 provides, in pertinent part, as follows:

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<sup>1</sup> Generally, there is no respondent, and therefore, no appellee where a complaint is dismissed pursuant to Indiana Code section 34-58-1-2.

(a) A court shall review a complaint or petition filed by an offender and shall determine if the claim may proceed. A claim may not proceed if the court determines that the claim:

- (1) is frivolous;
- (2) is not a claim upon which relief may be granted; or
- (3) seeks monetary relief from a defendant who is immune from liability for such relief.

(b) A claim is frivolous under subsection (a)(1) if the claim:

- (1) is made primarily to harass a person; or
- (2) lacks an arguable basis either in:
  - (A) law; or
  - (B) fact.

Ind. Code § 34-58-1-2.

Here, Justise sought monetary damages only against the Employees, personally. Upon review of Justise's complaint, the trial court found it to be frivolous for, inter alia, failure "to allege facts sufficient to establish Defendant liability in accordance with I.C. 34-13-3-5." (App. 28). We agree.

Regarding tort claims against governmental employees, Indiana Code section 34-13-3-5(c) provides that when a plaintiff brings an action against an employee personally, the lawsuit:

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.

I.C. § 34-13-3-5(c).

As to the purported violations of Indiana Code section 11-11-7-2 in February and March of 2009, and Justise's lost property claims, Justise's complaint does not allege any of the acts or omissions delineated in Indiana Code section 34-13-3-5(c) against the Employees. Thus, we find no error in dismissing Justise's complaint as to those claims.

As to Justise's claim that Mr. Donaldson improperly charged him postage, even if we were to find that Justise adequately alleged an action or omission set forth by Indiana Code section 34-13-3-5(c), Justise provides no reasonable factual basis supporting such an allegation. We therefore find that the trial court correctly determined that Justise's claim could not proceed for lack of basis in fact. *See Smith v. Ind. Dep't of Corr.*, 888 N.E.2d 804, 808-09 (Ind. Ct. App. 2008) (finding no error in dismissing complaint against individual defendants).

Affirmed.

BROWN, J., and BRADFORD, J., concur.