

MEMORANDUM DECISION

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

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IN THE COURT OF APPEALS OF INDIANA

Tracey Wheeler,
Appellant-Plaintiff,

v.

Kathy Alvey, et al.,
Appellees-Defendants

September 29, 2021

Court of Appeals Case No.
21A-MI-321

Appeal from the Perry Circuit
Court

The Honorable Karen Werner,
Magistrate

Trial Court Cause No.
62C01-2010-MI-415

Crone, Judge.

Case Summary

- [1] Tracey Wheeler, an inmate, filed a complaint against various prison officials/employees after some of his undeliverable outgoing mail was destroyed by mailroom personnel. The defendants filed a motion to dismiss pursuant to Indiana Trial Rule 12(B)(6), which the trial court granted with prejudice. Wheeler now brings this pro se appeal from the trial court's order. We reverse and remand.

Facts and Procedural History

- [2] Wheeler is an inmate at Branchville Correctional Facility (BCF). Kathy Alvey is the warden of BCF, and Diane Pfeiffer is the grievance specialist who handles the inmate grievance process. Laura Purcell and Nicole Morris work in the mailroom at BCF, and their duties involve sorting and delivering mail.
- [3] In December 2019, while incarcerated at BCF, Wheeler mailed letters to Erica Morris and Aneesa Wheeler. Wheeler included three photographs and an original certificate of completion of a drug course in his correspondence. On February 8, 2020, Wheeler contacted the BCF mailroom because he had not received a response from his intended mail recipients. BCF mailroom employees informed Wheeler that the post office returned his mail as “undeliverable” and that they had destroyed the mail “per policy.” Appellant's App. Vol. 2 at 11.
- [4] Thereafter, Wheeler filed an informal grievance with Pfeiffer related to the destruction of his mail and requested that he be provided a copy of the policy

“that states that all returned mail will be destroyed.” *Id.* at 29. Pfeiffer responded to Wheeler telling him to “read the policy.” *Id.* at 11. Wheeler filed another informal grievance citing to Indiana Department of Correction (DOC) policy #02-01-103, pointing out that the policy does not provide that returned correspondence, personal or legal, should be destroyed. Morris responded to Wheeler and informed him, “Returned mail, regardless of the type gets destroyed.” *Id.* at 28. Thereafter, Wheeler filed a formal grievance regarding the destruction of his mail. Tim Jellison, the acting grievance specialist at the time, wrote to Wheeler, “[I]ssues and changes of policy with handling returned mail [...] were evident. It has been determined that all returned mail will be examined and if deemed appropriate, will open, copy, and deliverer back to the offender.” *Id.* at 30 (errors in original). Jellison further explained, “However in your case this does not correct that at the time clear direction was provided to the mailroom staff for all returned mail/legal to be destroyed. This will however in going forward be a process that is corrected immediately.” *Id.*

[5] Wheeler subsequently filed a notice of tort claim “seeking compensation for the destruction of his personal property,” but his request was denied by BCF. Appellant’s Br. at 14. On October 8, 2020, Wheeler filed a verified complaint against various prison officials/employees including Alvey, Pfeiffer, Morris, Purcell, and Robert Carter¹ (Defendants) alleging “negligence and destruction of personal property” as well as violations of the United States Constitution.

¹ Carter is the commissioner of the DOC.

Appellant’s App. Vol. 2 at 8. In his complaint, Wheeler sought damages “under the Indiana Tort Claims Act.” *Id.* The Defendants responded with a motion to dismiss Wheeler’s complaint for failure to state a claim pursuant to Indiana Trial Rule 12(B)(6). On January 22, 2021, the trial court issued its order granting the Defendants’ motion and dismissing Wheeler’s complaint with prejudice. This appeal ensued.

Discussion and Decision

- [6] We begin by noting that Wheeler proceeded pro se both in the trial court and on appeal. It is well settled that a pro se litigant is held to the same legal standards as a licensed attorney. *Zavodnik v. Harper*, 17 N.E.3d 259, 266 (Ind. 2014). Neither the trial court nor this Court owes Wheeler any inherent leniency simply by virtue of being self-represented. *Id.*
- [7] That being said, while Wheeler makes several broad and confusing assertions in his lengthy primary brief, and the Defendants respond to them in turn, we choose to focus on Wheeler’s reply brief, in which he better explains and narrows the focus of his appellate argument to one dispositive issue. Specifically, he argues that the trial court erred in dismissing his complaint with prejudice and not allowing him the opportunity to amend. We agree.
- [8] A motion to dismiss under Indiana Trial Rule 12(B)(6) tests the legal sufficiency of the plaintiff’s claim, not the facts supporting it. *Bellwether Props., LLC v. Duke Energy Indiana, Inc.*, 87 N.E.3d 462, 466 (Ind. 2017). It is well established that a dismissal with prejudice is a dismissal on the merits. *Brodnik v. Cottage Rents*

LLC, 165 N.E.3d 126, 128-29 (Ind. Ct. App. 2021). However, when a motion to dismiss is made and granted for failure to state a claim under Trial Rule 12(B)(6), the dismissal is to be without prejudice because the plaintiff is entitled to amend his complaint once as of right. Ind. Trial Rule 12(B); *Platt v. State*, 664 N.E.2d 357, 361 (Ind. Ct. App. 1996), *trans. denied, cert. denied* (1997). Therefore, it is indisputable that the trial court erred in dismissing Wheeler’s complaint with prejudice.

[9] The Defendants concede this point but maintain that any error was harmless. We have held that on appeal of a dismissal with prejudice, an appellant is required to show how he would have amended his complaint to avoid dismissal. *Saylor v. Reid*, 132 N.E.3d 470, 474 (Ind. Ct. App. 2019), *trans. denied* (2020). Otherwise, this Court will find that any error is harmless. *Id.* Likening the appellant’s burden to an offer of proof regarding an evidentiary issue, we have explained that we need “specific information as to how [the appellant] would have amended his complaint” so that we can make a rational assessment of whether he was prejudiced by the trial court’s erroneous ruling. *Baker v. Town of Middlebury*, 753 N.E.2d 67, 74 (Ind. Ct. App. 2001), *trans. denied* (2002).

[10] Our review of the original complaint here reveals that, among his numerous claims, Wheeler inartfully stated a claim for damages against the Defendants pursuant to the Indiana Tort Claims Act. On appeal, Wheeler gives us sufficiently specific information as to how he would have amended his complaint to better articulate the facts and to narrow that specific claim, as well as how he would have added the State of Indiana and the DOC as parties.

Under the circumstances, we think Wheeler has shown that he was prejudiced by the trial court's erroneous ruling. Contrary to the Defendants' assertion, we do not believe that it is undisputed that each of them was "acting within the scope of their employment" and that they are therefore immune from liability under the Act such that Wheeler's complaint faces certain dismissal regardless of amendment. Appellees' Br. at 20.² Indeed, no matter how we view Wheeler's odds of success on the merits of his tort claim down the road, he deserves, at the very least, the right to amend his complaint. Accordingly, the proper remedy is to reverse and remand to the trial court to allow Wheeler to amend his complaint. *See Baker*, 753 N.E.2d at 74 n.5.

[11] Reversed and remanded.

Bailey, J., and Pyle, J., concur.

² The Defendants point to specific, as well as general, allegations in Wheeler's original complaint in which they claim he admits that each of them was acting "within the scope of their employment." Appellees' Br. at 20; *see* Ind. Code § 34-13-3-5(c)(2) ("A lawsuit filed against an employee personally must allege that an act or omission of the employee that causes a loss is: ... clearly outside the scope of the employee's employment.") However, we find statements in Wheeler's complaint that clearly allege that the Defendants "were not acting under the scope of their employment." Appellant's App. Vol. 2 at 21. He is entitled to the opportunity to revise and attempt to harmonize any inconsistencies in this regard.