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IN THE
COURT OF APPEALS OF INDIANA

DONNIE CULPEPPER,	)	
	)	
Appellant-Plaintiff,	)	
	)	
vs.	)	No. 48A02-0506-CV-540
	)	
ZETTIE COTTON, et al.,	)	
	)	
Appellees-Defendants.	)	

APPEAL FROM THE MADISON SUPERIOR COURT
The Honorable Thomas Newman, Jr., Judge
Cause No. 48D03-0307-CT-629

November 14, 2006

MEMORANDUM DECISION - NOT FOR PUBLICATION

BARNES, Judge

Case Summary

Donnie Culpepper appeals the trial court's dismissal of his complaint. We affirm in part, reverse in part, and remand.

Issue

The issue is whether the trial court erred in dismissing with prejudice Culpepper's complaint against the Indiana Attorney General and employees of the Indiana Department of Correction.

Facts

In August of 2001, Donnie Culpepper, an inmate at Pendleton Correctional Facility, ordered a pair of Nike gym shoes for $56 from the commissary. Because the shoes were defective, Culpepper returned them to the Nike Corporation. Acknowledging that the shoes were, in fact, defective, Nike sent Culpepper a voucher worth seventy-five dollars, set to expire in November of 2002. On February 3, 2002, the business administrator at Pendleton informed Culpepper that the facility "does not currently do business with Nike, and therefore could not honor any type of shoe vouchers." Tr. p. 12. Unable to resolve the dispute, the voucher was released to the Pendleton Correctional Facility property room to be placed in Culpepper's personal property. After reviewing the list of his property withheld, Culpepper discovered that the voucher was not listed on his property form.

On July 17, 2003, Culpepper filed a complaint against Zettie Cotton, Superintendent of the Pendleton Correctional Facility, Evelyn Ridley-Turner, Commissioner of the Indiana Department of Correction,[1] and Stephen Carter, the Indiana Attorney General, for the loss of the voucher for his gym shoes. On May 9, 2005, Cotton filed a motion to dismiss on behalf of all the defendants, which was granted on May 10, 2005. Culpepper now appeals pro se.

Analysis

Culpepper contends the trial court erred in granting Cotton's pro se motion to dismiss. A motion to dismiss under Indiana Trial Rule 12(B)(6) tests the legal sufficiency of a complaint, not the facts underlying the complaint. Higgason v. State, 789 N.E.2d 22, 29 (Ind. Ct. App. 2003). Therefore, we view the complaint in the light most favorable to the non-moving party, drawing every reasonable inference in favor of the party, without looking at any evidence that may be in the record. Id. During our review, we stand in the shoes of the trial court and determine whether the trial court misapplied the law. Id. The trial court properly grants the motion to dismiss if it is apparent that the facts alleged in the complaint are incapable of supporting relief under any set of circumstances. Id. We sustain the trial court's ruling if we can affirm on any basis found in the record. Id.

Culpepper's "notice of claim" named three government employees in its caption as defendants: Cotton, Carter, and Ridley-Turner. There was no indication in the caption

[1] Cotton and Ridley-Turner have since left these positions, which are now occupied by Stanley Knight and J. David Donahue, respectively.

that these defendants were being sued in their official capacities. Indiana Trial Rule 10(A) requires the initial complaint filed in a case to properly name all of the parties in the suit.

Indiana Code Chapter 34-13-3 controls tort claims against governmental employees. A plaintiff may not maintain an action against a governmental employee personally if that employee was acting within the scope of his or her employment. Ind. Code § 34-13-3-5(b). Rather, to bring a suit against an employee personally, the plaintiff 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. I.C. § 34-13-3-5(c). In addition, the plaintiff's complaint must contain a reasonable factual basis supporting the allegations. Id.

Reviewing Culpepper's complaint on its face, he contends that Pendleton Correction Facility's decision to decline the Nike voucher amounts to discrimination and deprivation of his property. Culpepper, however, fails to allege that Cotton, Ridley-Turner, or Carter committed any actions that were criminal, outside the scope of their respective employment, malicious, willful and wanton, or calculated to benefit them personally. These elements are necessary in filing tort claims against governmental employees personally. See Higgason, 789 N.E.2d at 32. He alleges that his Nike shoes were defective and that Pendleton Correctional Facility declined to accept the Nike voucher, which are merely the supportive facts underlying the complaint. We conclude that Culpepper failed to allege facts required by Indiana Code Section 34-13-3-5(c)

sufficient to maintain a tort claim against these governmental employees personally. As such, the trial court properly dismissed Culpepper's complaint.

We note, however, that the trial court's dismissal was with prejudice. This was too draconian a step to take in this case. A dismissal with prejudice, although harmless to a plaintiff if the face of the complaint indicates no amendment is possible to make the complaint state a good cause of action, should not be granted if the complaint is amenable to amendment. Harp v. Indiana Dep't of Highways, 585 N.E.2d 652, 658 (Ind. Ct. App. 1992). The underlying philosophy of the rules of procedure is to facilitate decisions on the merits and to avoid pleading traps. Id. Although pleadings require technical exactness, the Indiana Trial Rules, consistent with their purpose, incorporate a policy of allowing liberal amendments to correct defects in the naming of parties. Id.

Dismissal of a complaint because it was improperly captioned and/or improperly named the parties falls under Indiana Trial Rule 12(B)(6), failure to state a claim upon which relief can be granted. State ex rel. Young v. Noble Circuit Court, 263 Ind. 353, 358, 332 N.E.2d 99, 102 (1975); see also Harp, 585 N.E.2d at 660. The trial court erred in characterizing its dismissal of Culpepper's complaint as being with prejudice; it should have been without prejudice because Trial Rule 12(B)(6) governed it. See Thacker v. Bartlett, 785 N.E.2d 621, 624 (Ind. Ct. App. 2003) (observing that "a Trial Rule 12(B)(6) dismissal is without prejudice"). "When such a dismissal is granted, the pleading may be amended once as of right pursuant to [Trial Rule] 15(A) within ten days after service of notice of the court's order sustaining the motion." Young, 263 Ind. at 358, 332 N.E.2d at 102 (citing Ind. Trial Rule 12(B)(8)). Moreover, Trial Rule 15(C) permits an amendment

that changes a party to relate back to the date of the original pleading if the claim or defense against the added party arose out of the conduct, transaction, or occurrence set forth in the original pleading and the party received notice within 120 days of the commencement of the action, would not be prejudiced defending on the merits, and knew or should have known the action would have been brought against him, or her, or, it but for a mistake. "Justice requires the trial court to provide the opportunity to resolve a claim on the merits without an unnecessary appeal on procedural grounds." Harp, 585 N.E.2d at 659.

We conclude that to the extent the trial court dismissed Culpepper's complaint with prejudice, it is with prejudice only with respect to claims against Cotton, Ridley-Turner, and Carter personally. It is not with prejudice with respect to claims against them or their successors in their official capacities as representatives of state agencies. Rather, dismissal of Culpepper's complaint should have been without prejudice and with an opportunity for him to amend his complaint to clearly indicate in the caption whether he intends to sue those persons or their successors in their official capacities as heads of their respective agencies or to sue those agencies directly.

If Culpepper does file an amended complaint, there would seem to be no question that it would relate back to the date of the original complaint pursuant to Trial Rule 15(C), which states in part that with respect to state governmental agencies, an amendment changing the parties relates back if there is evidence of delivery or mailing of process to the attorney general or a governmental executive. That occurred in this case with the service of process upon Cotton, Ridley-Turner, and Carter.

Conclusion

We affirm the dismissal of Culpepper's complaint. However, we reverse to the extent that the dismissal was with prejudice. We remand with instructions that Culpepper be allowed to amend his complaint within ten days of the trial court receiving a certified copy of this opinion, plus whatever additional time Culpepper may be entitled to under Indiana Trial Rule 6. See Browning v. Walters, 620 N.E.2d 28, 33 (Ind. Ct. App. 1993).

Affirmed in part, reversed in part, and remanded.

ROBB, J., concurs.

SULLIVAN, J., concurs in result with opinion.

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Appellees-Defendants.	)	

SULLIVAN, Judge, concurring in result

Although the caption of the lawsuit recites that the defendants are "Evelyn Ridley-Turner, Zettie Cotton, and Steve Carter" without reference to those named persons being sued in their official capacities, the "Notice of Tort Claim" clearly specified that the Notice of Claim is directed to those individuals in their respective official capacities.[2]

[2] It is well established in Indiana that: "We examine pleadings and treat them according to their content rather that their caption." Strodtmen v. Integrity Builders, Inc., 668 N.E.2d 279, 284 (Ind. Ct. App. 1996), trans. denied. It must also be noted that matters in a Small Claims setting are informal in nature and the Small Claims Rules are intended to supply a judicial resolution of the dispute without the procedural formality of typical civil litigation. See Miller v. Geels, 643 N.E.2d 922, 932 (Ind. Ct. App. 1994), trans. denied.

The body of the "Notice of Tort Claim" does specifically allege that the claim is against "the State of Indiana (State), Indiana Department of Correction (DOC), Pendleton Correctional Facility (PCF) and various State, DOC and PCF employees who are either named or described in the exhibits presented . . . ." (emphasis supplied).

Nevertheless, I agree with the majority that the complaint does not allege that Ridley-Turner, Cotton, or Carter, or any of them, were guilty of actions that were criminal, outside the scope of their employment, malicious, willful and wanton, or calculated to benefit them personally. A quite different situation may exist with reference to the other "various employees who are either named or described in the exhibits presented," but Culpepper's Small Claims complaint does not clearly demonstrate such.[3]

Therefore, I agree that it was error for the trial court to dismiss the complaint with prejudice. However, I would not restrict an amended complaint to alleging only an action against Ridley-Turner, Cotton, Carter and/or their successors. I would permit such amendment to include such other employees of the State, DOC, and/or PCF who may have acted criminally, outside the scope of employment, maliciously, willfully and wantonly, or with calculation to benefit themelves.

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[3] It is possible that a plausible argument might be made that in light of the purposeful informality of the small claims process, the Notice of Claim need not achieve the same degree of specificity as a complaint in an ordinary civil suit in order to withstand a Rule 12(B)(6) motion. Small Claims Rule 2 states that the Notice of Claim, which is the complaint, shall contain a "brief statement of the nature and the amount of the claim," (Emphasis supplied). Accordingly, one might conclude that a Notice of Claim such as is before us need not allege acts which are specified within I.C. § 34-13-3-5(c) in order to avoid a 12(B)(6) dismissal. Of course at trial, in order to be successful, the claimant would be required to prove such acts by admissible evidence.