

MEMORANDUM DECISION

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IN THE COURT OF APPEALS OF INDIANA

Timothy Marcus Mayberry,
Appellant-Plaintiff,

v.

Indiana Department of
Corrections, et al.,
Appellees-Defendants

February 16, 2023

Court of Appeals Case No.
22A-CT-2482

Appeal from the Sullivan Circuit
Court

The Honorable Robert E. Hunley,
II, Judge

Trial Court Cause No.
77C01-2203-CT-125

Memorandum Decision by Judge Crone
Judges Robb and Kenworthy concur.

Crone, Judge.

Case Summary

- [1] Timothy Marcus Mayberry, an inmate, filed a complaint against the Indiana Department of Correction (the IDOC) and four unnamed prison officials/employees alleging that some of his personal property was damaged or destroyed during his transfer from Wabash Valley Correctional Facility (WVCF) to Miami Correctional Facility (MCF). Among other things, his complaint alleged a tort claim for negligence. The IDOC filed a motion to dismiss the complaint pursuant to Indiana Trial Rule 12(B)(6), which the trial court granted. The trial court also denied as moot a motion for appointment of counsel made by Mayberry. Mayberry now brings this pro se appeal from the trial court's order. We affirm in part, reverse in part, and remand with instructions.

Facts and Procedural History

- [2] Mayberry is an inmate currently serving a seventy-five-year sentence for murder. On November 10, 2021, Mayberry filed a tort claim notice with the IDOC tort claims administrator and the wardens of WVCF and MCF. Mayberry alleged that on October 14, 2021, he was transferred from WVCF to MCF and that during the transfer, some of his personal property went missing and other property was damaged. In January 2022, the Special Investigation Division of the Attorney General's Office denied Mayberry's claim. On March 21, 2022, Mayberry filed his pro se complaint for damages and named IDOC

and four unknown employees as defendants. Specifically, Mayberry claimed that the IDOC and its employees had a duty to protect his personal property and, by their acts or omissions, deprived him of his property. He further alleged that the employees acted criminally and that he was entitled to bring suit against the employees individually pursuant to Indiana Code Section 34-13-3-5(c)(1).

- [3] In June 2022, the IDOC filed a motion to dismiss the complaint pursuant to Trial Rule 12(B)(6) for failure to state a claim upon which relief could be granted. Mayberry filed a response and also a verified motion for appointment of counsel. On July 29, 2022, the trial court dismissed Mayberry's complaint for failure to state a claim and further denied his motion for appointment of counsel as moot. This appeal ensued.

Discussion and Decision

Section 1 – The trial court erred in dismissing Mayberry's tort claim against the IDOC.

- [4] We begin by addressing the trial court's dismissal of Mayberry's complaint as it relates to his tort claim against the IDOC.¹ The IDOC concedes that the trial court erred in granting its motion to dismiss. A motion to dismiss under

¹ Although Mayberry's complaint included references to federal and state constitutional claims, he clarified in his response to IDOC's motion to dismiss that his complaint is brought solely pursuant to the Indiana Tort Claims Act. Appellant's App. Vol. 2 at 49-50. Moreover, Mayberry does not even make passing reference to those constitutional claims in his brief on appeal, and therefore it is clear that he has wholly abandoned those claims.

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 Ind., Inc.*, 87 N.E.3d 462, 466 (Ind. 2017). A complaint states a claim on which relief can be granted when it recounts sufficient facts that, if proved, would entitle the plaintiff to obtain relief from the defendant. *Id.* We review such matters de novo. *Residences at Ivy Quad Unit Owners Ass'n v. Ivy Quad Dev., LLC*, 179 N.E.3d 977, 981 (Ind. 2022). As part of our de novo review, we take the facts alleged in the complaint as true, consider all the allegations of the complaint in the light most favorable to the non-moving party, and draw every reasonable inference in the non-moving party's favor. *Id.* To overcome a 12(B)(6) motion, the complaint must allege facts that show the "possibility of relief." *Id.* at 980. Ultimately, our task is to determine whether the non-movant has alleged some factual scenario in which a legally actionable injury has occurred. *Id.* at 981.

- [5] It is well established that Indiana law authorizes a remedy in tort for damages to personal property "caused by another's negligence." *Id.* at 983. And when an injury is allegedly caused by the negligent acts of a government employee acting within the scope of their employment—as Mayberry alleges—the plaintiff is authorized to proceed only against the instrumentality of government that employed them. Ind. Code § 34-13-3-5(a). The IDOC concedes that Mayberry's allegations "passed muster under Indiana's pleading statute, and Mayberry should have been permitted to proceed on that claim." Appellee's Br. at 13. We

agree and reverse the trial court's dismissal of Mayberry's tort claim against the IDOC.²

Section 2 – The trial court did not err in dismissing Mayberry's claims against the unnamed IDOC employees in their individual capacities.

[6] We next address the trial court's dismissal of Mayberry's complaint as it relates to his claims against the unnamed IDOC employees in their individual capacities. We recognize that Mayberry 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 Mayberry any inherent leniency simply by virtue of being self-represented. *Id.* This means that pro se litigants are bound to follow the established rules of procedure and must be prepared to accept the consequences of their failure to do so. *Shepherd v. Truex*, 819 N.E.2d 457, 463 (Ind. Ct. App. 2004).

[7] In his primary brief on appeal, Mayberry barely acknowledges that he made claims against the unnamed IDOC employees in their individual capacities,

² Mayberry suggests that the trial court's "unreasonable" dismissal of his complaint was the result of judicial bias. Appellant's Br. at 7. But adverse rulings alone are insufficient to establish bias per se. *Moore v. Liggins*, 685 N.E.2d 57, 63 (Ind. Ct. App. 1997). Indeed, bias will rarely, if ever, be found on the face of rulings alone because the defendant must show an improper or extrajudicial factor or such a high degree of favoritism that a fair judgment was impossible. *Perry v. State*, 904 N.E.2d 302, 308 (Ind. Ct. App. 2009), *trans. denied*. Here, Mayberry has offered no evidence that the trial court's decision was motivated by an extrajudicial factor or the degree of favoritism necessary to establish judicial bias.

much less provides cogent argument or citation to relevant authority as to the legal sufficiency of those claims. Accordingly, he has waived our review of the trial court's dismissal of those claims. *See Kishpaugh v. Odegard*, 17 N.E.3d 363, 373 n.3 (Ind. Ct. App. 2014) (noting that under our Appellate Rules, "[i]t is not sufficient for the argument section that an appellant simply recites facts and makes conclusory statements without analysis or authoritative support").

[8] Waiver notwithstanding, our review of Mayberry's complaint reveals that while he sufficiently pled a tort claim against the IDOC, he failed to state a claim upon which relief can be granted against the IDOC employees in their individual capacities. Among other things, the Tort Claims Act provides that a lawsuit filed against an employee personally "must allege that an act or omission of the employee that causes a loss" is "criminal." Ind. Code § 34-13-3-5(c)(1). Moreover, the complaint "must contain a reasonable factual basis supporting the allegations. *Id.* Here, Mayberry's complaint merely cites to Indiana Code Section 34-13-3-5(c)(1) and baldly asserts that the "employees' acts amount to criminal conduct." Appellant's App. Vol. 2 at 11. But his complaint contains no reasonable factual basis to support such a bald conclusory statement, and therefore the trial court properly dismissed those claims.

[9] Further, by choosing to appeal the trial court's dismissal of his complaint, instead of attempting to amend the complaint, Mayberry waived the right to amend the complaint pursuant to Indiana Trial Rule 12(B)(8), which allows amendment as of right within ten days after a trial court grants a Trial Rule

12(B)(6) motion to dismiss.³ *Dixon v. Siwy*, 661 N.E.2d 600, 605 n.8 (Ind. Ct. App. 1996) (citing 1 William F. Harvey, *Indiana Practice: Rules of Procedure Annotated* § 12.12 (1987)). Indeed, when a plaintiff opts to appeal the trial court’s dismissal of his claim, rather than amend the complaint, the order of dismissal becomes an adjudication on the merits. *Id.* Accordingly, our decision to affirm the trial court’s dismissal of Mayberry’s claims against the unnamed employees in their individual capacities extinguishes those claims moving forward.

Section 3 – The trial court must consider Mayberry’s motion for appointment of counsel on remand.

[10] Finally, we address the trial court’s denial of Mayberry’s motion for appointment of counsel. Following its dismissal of Mayberry’s complaint, the trial court denied his motion for appointment of counsel as moot. *See Matter of Lawrance*, 579 N.E.2d 32, 37 (Ind. 1991) (a case is deemed moot when the controversy at issue has been ended or settled, or somehow disposed of so as to render it unnecessary to decide the question involved). The IDOC concedes that because Mayberry’s tort claim against it should proceed, his motion for appointment of counsel is no longer moot, and the trial court must consider

³ It is well established that when a motion to dismiss is made and granted for failure to state a claim under Trial Rule 12(B)(6), such dismissal is without prejudice and the pleading may be amended once as of right. *Baker v. Town of Middlebury*, 753 N.E.2d 67, 74 (Ind. Ct. App. 2001), *trans. denied* (2002). While we acknowledge that the trial court’s order here did not specifically state that its dismissal pursuant to Trial Rule 12(B)(6) was “without prejudice,” such fact is presumed in the absence of language to the contrary.

such motion on remand. We agree and instruct the trial court to do so. The judgment of the trial court is affirmed in part, reversed in part, and remanded.

[11] Affirmed in part, reversed in part, and remanded.

Robb, J., and Kenworthy, J., concur.