

## 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.



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## IN THE COURT OF APPEALS OF INDIANA

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Tracey Wheeler,  
*Appellant-Plaintiff,*

v.

Kathy Alvey, et al.,  
*Appellees-Defendants.*

June 30, 2022

Court of Appeals Case No.  
22A-MI-283

Appeal from the Perry Circuit  
Court

The Honorable Lucy Goffinet,  
Judge

The Honorable Karen Werner,  
Magistrate

Trial Court Cause No.  
62C01-2008-MI-339

**Bailey, Judge.**

## Case Summary

- [1] Tracey Wheeler (“Wheeler”) appeals, pro se, the dismissal of his complaint on the grounds that the dismissal was erroneous. We also address whether Wheeler has waived review of his claims against various state employees in their individual capacities, his federal constitutional claims, and his claim for default judgment.
- [2] We affirm in part, reverse in part, and remand.

## Facts and Procedural History

- [3] At all relevant times, Wheeler has been an inmate at the Branchville Correctional Facility (“BCF”). On August 18, 2020, he filed a pro se verified complaint for damages against various prison officials/employees, alleging negligence under the Indiana Tort Claims Act for the loss of personal property and asserting that he had exhausted all administrative remedies.<sup>1</sup> The State moved to dismiss the complaint for failure to state a claim pursuant to Indiana Trial Rule 12(B)(6). The trial court granted the motion to dismiss and Wheeler appealed. A panel of this Court reversed the dismissal and remanded the case to the trial court so that Wheeler could amend his complaint. *Wheeler v. State*, No. 20A-MI-2034, 2021 WL 4839060 at \*2 (Ind. Ct. App. Oct. 18, 2021)

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<sup>1</sup> On October 12, 2020, Wheeler amended his complaint, adding BCF as a defendant and raising federal constitutional claims of due process and First Amendment violations.

(noting that Wheeler’s “non-tort claims will not likely avoid subsequent dismissal regardless of amendment to the complaint,” but “it is possible for his tort claim to proceed”).

[4] On November 1, 2021, Wheeler filed his amended complaint related to the loss of his photographs against the State of Indiana, the Indiana Department of Correction (“DOC”), BCF (collectively, “the State”), and certain state employees “in their individual capacities.” App. at 34. Wheeler again raised tort and constitutional claims and stated that he had exhausted all administrative remedies. The State requested and obtained two extensions of time to file an answer to the amended complaint, up to and including January 18, 2022. On January 12, 2022, Wheeler filed a motion for default judgment, alleging the State had until December 21, 2021, to file an answer, had failed to do so, and should therefore be defaulted.

[5] On January 18, 2022, the State filed a motion requesting that the court screen Wheeler’s amended complaint pursuant to Indiana Code Section 34-58-1-2<sup>2</sup> and dismiss the amended complaint pursuant to Indiana Trial Rule 12(B)(6). The trial court granted both State motions and dismissed Wheeler’s amended complaint with prejudice. This appeal ensued.

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<sup>2</sup> The statute requires that a court review a complaint or petition filed by an offender and determine whether the claim may proceed.

## Discussion and Decision

[6] Wheeler appeals the dismissal of his amended complaint that raised tort and federal constitutional claims against the State and its employees. As an initial matter, we note that Wheeler has waived his federal constitutional claims, his claims against state employees in their individual capacities, and his claim for default judgment by failing to present any argument regarding those claims on appeal. Wheeler waived his claim against the state employees in their individual capacities by failing to raise that claim at all on appeal. *See* Appellate Rule 46(A)(8) (requiring contentions on the issues presented and cogent reasoning in support of those contentions); *Burnell v. State*, 110 N.E.3d 1167, 1171 (Ind. Ct. App. 2018) (noting we will not review undeveloped arguments). And, although Wheeler mentions in passing his federal constitutional claims, he has failed to develop any argument on those issues or cite to any authority. *Id.*; *see also Kishpaugh v. Odegard*, 17 N.E.3d 363, 373 n.3 (Ind. Ct. App. 2014) (noting, 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”). Similarly, Wheeler fails to develop any argument regarding his request for default judgment; rather, he simply asks for default judgment in the “Relief” section at the end of his brief. Appellant’s

Br. at 39. Therefore, that claim, too, is waived.<sup>3</sup> App. R. 46(A)(8); *see also, e.g., Kishpaugh*, 17 N.E.3d at 373 n.3.

[7] Wheeler has, however, sufficiently raised on appeal the trial court’s dismissal of his tort claim against the State. And, as the State concedes, Wheeler raised that claim in his complaint sufficiently to withstand a motion to dismiss on that claim.

[8] Indiana is a notice-pleading state; a pleading need only contain “(1) a short and plain statement of the claim showing that the pleader is entitled to relief, and (2) a demand for relief...” Ind. Trial Rule 8(A). Thus, to state a claim for relief, Wheeler was required to “plead the operative facts necessary to set forth an actionable claim” in his complaint. *ResCare Health Serv., Inc. v. Ind. Family & Social Serv. Admin.*, 184 N.E.3d 1147, 1153 (Ind. 2022). Indiana law authorizes remedies in tort for damages to personal property “caused by another’s negligence.” *Residences at Ivy Quad Unit Owners Ass’n, Inc. v. Ivy Quad Dev., LLC*, 179 N.E.3d 977, 983 (Ind. 2022). And when an injury is allegedly caused by the negligent acts of a government employee acting within the scope of their employment—as Wheeler alleges—the plaintiff is authorized to proceed only

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<sup>3</sup> We recognize that Wheeler brings this appeal pro se. However,

[i]t is well settled that pro se litigants are held to the same legal standards as licensed attorneys. *Twin Lakes Reg’l Sewer Dist. v. Teumer*, 992 N.E.2d 744, 747 (Ind. Ct. App. 2013). 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).

*Lowrance v. State*, 64 N.E.3d 935, 938 (Ind. Ct. App. 2016), *trans. denied*.

against the instrumentality of government that employed them. Ind. Code § 34-13-3-5(a).

[9] Wheeler sufficiently pled a state law tort claim against the State. Wheeler asserted that Rhonda Collins mailed him nine photographs that he was authorized to possess under DOC policy. He alleges that those photographs were negligently confiscated and then lost by DOC staff acting within the scope of their employment. Thus, as the State concedes, whatever the ultimate merits of those allegations, they passed muster under Indiana’s pleading standard, and Wheeler should have been permitted to proceed on his tort claim.

[10] Wheeler also correctly argues—and the State concedes—that the dismissal may not be sustained on the basis of his purported failure to claim exhaustion of his administrative remedies in his complaint. This Court has consistently held that an offender’s failure to exhaust his administrative remedies before bringing a lawsuit is an affirmative defense upon which the defendant bears the burden of proof, and it need not be pled by the offender in his complaint. *E.g.*, *Wheeler v. State*, 180 N.E.3d 305, 311 (Ind. Ct. App. 2021) (citing *Alkhalidi v. Dep’t of Corr.*, 42 N.E.3d 562 (Ind. Ct. App. 2015) and *Jackson v. Wrigley*, 921 N.E.2d 508 (Ind. Ct. App. 2010)).<sup>4</sup>

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<sup>4</sup> Furthermore, even if Wheeler was required to plead the exhaustion of his administrative remedies prior to filing suit, Wheeler pled facts supporting his exhaustion of his administrative remedies which would suffice under Indiana’s standard of review for a dismissal.

## Conclusion

- [11] The trial court erred when it dismissed Wheeler's state law tort claim for loss of property. However, Wheeler has waived all other claims by failing to raise and/or present them in compliance with the Appellate Rules.
- [12] Affirmed in part, reversed in part, and remanded.

Najam, J., and Bradford, C.J., concur.