

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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ATTORNEYS FOR APPELLEES

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IN THE COURT OF APPEALS OF INDIANA

Tracey Wheeler,
Appellant-Plaintiff,

v.

Kathy Alvey, et al.,
Appellees-Defendants

October 18, 2021

Court of Appeals Case No.
20A-MI-2034

Appeal from the Perry Circuit
Court

The Honorable Karen Werner,
Magistrate

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

Crone, Judge.

Case Summary

- [1] Tracey Wheeler, an inmate, filed a complaint against various prison officials/employees after some photographs that were contained in his incoming mail were confiscated by mailroom personnel. Among other things, his complaint alleged a tort claim for negligence. 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, inspecting, and delivering mail.
- [3] In February of 2020, Rhonda Collins mailed correspondence to BCF addressed to Wheeler. Purcell inspected the correspondence and located nine personal photographs, some of which depicted Wheeler graduating from a vocational course and others which depicted Wheeler with his daughter. Purcell confiscated the photographs and completed Indiana Department of Correction (DOC) State Form 11984 giving "Notice and Report of Action Taken on Correspondence," and indicating that the correspondence was being confiscated based upon a facility policy that inmates were not allowed to have photographs

of themselves. Appellant's App. Vol. 2 at 12. Also, Purcell provided Wheeler with DOC State Form 21682 regarding disposition of offender personal property/correspondence to allow Wheeler the opportunity to direct how he wanted the facility to dispose of the photographs.

[4] On February 17, 2020, Wheeler submitted State Form 21682 indicating that he intended to file a grievance, and therefore the correspondence should be held pending review. However, before Wheeler's grievance was addressed, he was informed that the correspondence was mailed out of the facility without his consent.

[5] Thereafter, Wheeler filed a series of informal and formal grievances related to the treatment of his photographs. Pfeiffer responded to one of his grievances stating that the mailroom staff needed to "pay closer attention" to the disposition forms submitted by inmates, and she conceded that the "pictures should not have been mailed out." *Id.* at 30. Wheeler subsequently filed a grievance appeal to which mailroom personnel responded that "it is unclear what happened to [his] photos." *Id.* at 16. Wheeler does not believe that the photographs were ever mailed out of the facility.

[6] On August 18, 2020, Wheeler filed a pro se verified complaint for damages against various prison officials/employees including Alvey, Pfeiffer, Morris, Purcell, and Robert Carter¹ (Defendants) alleging "negligence" under the

¹ Carter is the commissioner of the DOC.

Indiana Tort Claims Act for the “loss of personal property” as well as violations of the United States and Indiana Constitutions. *Id.* at 10, 21.² 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 October 14, 2020, the trial court issued its order granting the Defendants’ motion and dismissing Wheeler’s complaint with prejudice. Wheeler moved to amend his complaint on October 21, 2020. The trial court never ruled on Wheeler’s motion to amend, effectively denying it. This appeal ensued.

Discussion and Decision

- [7] 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.*
- [8] Although Wheeler makes several confusing claims in his brief, we focus on the dispositive issue: specifically, whether the trial court erred in dismissing Wheeler’s complaint with prejudice and not allowing him the opportunity to amend. 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

² On the same date, Wheeler filed an amended complaint to request “that all costs of this suit be paid by the defendants[.]” Appellant’s App. Vol. 2 at 32.

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. *Platt v. State*, 664 N.E.2d 357, 361 (Ind. Ct. App. 1996), *trans. denied, cert. denied* (1997). Indeed, a party may amend his pleading “once as of right pursuant to Rule 15(A) within ten [10] days after service of notice of the court’s order” granting a motion to dismiss under Trial Rule 12(B)(6). Ind. Trial Rule 12(B). Thus, it is indisputable that the trial court erred both in dismissing Wheeler’s complaint with prejudice and in failing to rule on (effectively denying) his motion to amend.

[9] The Defendants concede that these errors were not harmless, and that remand is appropriate. We agree with the Defendants that although Wheeler’s non-tort claims will not likely avoid subsequent dismissal regardless of amendment to the complaint, it is possible for his tort claim to proceed.³ Accordingly, we conclude that Wheeler was prejudiced by the trial court’s erroneous rulings, and no matter how we view his odds of success on the merits down the road, he deserves, at the very least, the right to amend his complaint. The proper remedy here is to reverse and remand to the trial court to allow Wheeler to

³ On appeal of an erroneous 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.* The Defendants concede that Wheeler has made this showing regarding his tort claim.

amend his complaint.⁴ *See Baker v. Town of Middlebury*, 753 N.E.2d 67, 74 n.5 (Ind. Ct. App. 2001), *trans. denied* (2002).

[10] Reversed and remanded.

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

⁴ Moving forward, the trial court may want to review any future claims filed by Wheeler pursuant to the Frivolous Prisoner Claim Statute, Indiana Code Section 34-58-1-1, et. seq. *See Benson v. WANE-TV*, 106 N.E.3d 1055, 1056 (Ind. Ct. App. 2018) (stating that Frivolous Prisoner Claim Statute is intended “to screen and prevent abusive and prolific offender litigation in Indiana”).