

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

Asher B. Hill
Carlisle, Indiana

IN THE COURT OF APPEALS OF INDIANA

Asher B. Hill,
Appellant

v.

Brian Marley and Kenny
Mitchell,
Appellees.

September 30, 2022

Court of Appeals Case No.
22A-CT-1428

Appeal from the Sullivan Superior
Court

The Honorable Hugh R. Hunt,
Judge

Trial Court Cause No.
77D01-2204-CT-199

Pyle, Judge.

Statement of the Case

- [1] Asher B. Hill (“Hill”), pro se, appeals the trial court’s dismissal of his prisoner complaint that he filed against two prison employees in their individual

capacities. Hill argues that the trial court erred by dismissing his complaint. Concluding that there was no error, we affirm the trial court's judgment.

[2] We affirm.

Issue

Whether the trial court erred by dismissing Hill's complaint.

Facts¹

[3] At all relevant times, Hill was an inmate in the Indiana Department of Correction ("DOC") at the Wabash Valley Correctional Facility. On April 27, 2022, Hill filed a prisoner complaint, under 42 U.S.C. § 1983, against DOC employees, Brian Marley ("Marley") and Kenneth Mitchell ("Mitchell") in their individual capacities. Hill did not name the DOC as a defendant. Hill alleged that Marley and Mitchell were prison maintenance employees who acted under the color of state law at all relevant times. Hill alleged that, in June 2020, Marley and Mitchell had violated his Eighth Amendment right to adequate shelter by subjecting him to air conditioning that was too cold. Hill

¹¹ Contrary to Indiana Appellate Rule 50(A)(1), Hill's Appendix does not include copies of "those parts of the Record on Appeal that are necessary for the Court to decide the issues presented." Specifically, Hill did not include in his Appellant's Appendix a copy of his original complaint, the trial court's April 2022 order that notified him that his complaint was defective and ordered him to file an amended complaint, or the trial court's May 2022 order that dismissed his complaint and is the subject of this appeal. We, however, take judicial notice of the pleading and orders, which are contained in the trial court's record as found in *Odyssey*. See Ind. Evid. R 201(a)(2)(C) (providing that a court may judicially notice the existence of records of a court of this state).

sought compensatory damages of \$25,000 and punitive damages of \$10,000 against both Marley and Mitchell.

[4] The following day, the trial court issued an order notifying Hill that his complaint was “defective” because he had “filed suit against two Defendants employed at the [DOC] but his complaint [had] fail[ed] to allege how their acts or omissions [we]re criminal, malicious, willful and wanton, outside the scope of their employment or calculated to benefit them personally.” (Judicial Notice of Trial Court’s April 28, 2022 Order). The trial court’s order informed Hill that he had thirty days to file an amended complaint or that his complaint would be subject to dismissal.

[5] Hill then filed an amended pro se prisoner complaint in May 2022. He again filed suit against Marley and Mitchell in their individual capacities and did not name the DOC as a defendant. Hill again alleged that Marley and Mitchell were prison maintenance employees who acted under the color of state law at all relevant times. The remaining content of Hill’s amended complaint was identical to his original complaint except that Hill added a statement that Marley and Mitchell had “acted outside the scope of their employment” and that they had “exhibited willful and wanton misconduct.” (App. Vol. 2 at 3, 8).

[6] Thereafter, the trial court issued an order dismissing Hill’s amended complaint. The trial court’s order provided as follows:

The Court, after having reviewed the Plaintiff's Amended Complaint and being duly advised, finds that under the facts alleged that there is no theory of liability for which the Defendants could be found liable in their individual capacity. Whereas there are no other survivable claims contained therein, Plaintiff's complaint is dismissed.

(Judicial Notice of Trial Court's May 25, 2022 Order).

[7] Hill now appeals.

Decision

[8] Hill argues that the trial court erred by dismissing his amended complaint. At the outset, we note that Hill has chosen to proceed pro se. It is well settled that pro se litigants are held to the same legal standards as licensed attorneys. *Evans v. State*, 809 N.E.2d 338, 344 (Ind. Ct. App. 2004), *trans. denied*. Thus, 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. *Id.* “We will not become a party’s advocate, nor will we address arguments that are inappropriate, improperly expressed, or too poorly developed to be understood.” *Barrett v. State*, 837 N.E.2d 1022, 1030 (Ind. Ct. App. 2005), *trans. denied*.²

² We also note that Appellees did not file an Appellees’ brief. When an appellee fails to submit an appellate brief, “we need not undertake the burden of developing an argument on the [A]ppellee’s behalf.” *Front Row Motors, LLC v. Jones*, 5 N.E.3d 753, 758 (Ind. 2014) (quoting *Trinity Homes, LLC v. Fang*, 848 N.E.2d 1065, 1068 (Ind. 2006)). Rather, “we will reverse the trial court’s judgment if the appellant’s brief presents a case of prima facie error.” *Front Row Motors*, 5 N.E.3d at 758 (quoting *Trinity Homes*, 848 N.E.2d at 1068).

- [9] Hill contends that the trial court erred by dismissing his amended prisoner complaint pursuant to INDIANA CODE § 34-13-3-5. We disagree.
- [10] A trial court is required to “review a complaint or petition filed by an offender and determine whether the claim may proceed.” I.C. § 34-58-1-2(a). An offender’s claim may not proceed if a trial court determines that an offender’s claim, among other things, lacks an arguable basis in either law or fact or is not a claim upon which relief may be granted. *See* I.C. § 34-58-1-2. “In general, a plaintiff may not maintain an action against a governmental employee personally if that employee was acting within the scope of his employment.” *Miner v. Sw. Sch. Corp.*, 755 N.E.2d 1110, 1114-15 (Ind. Ct. App. 2001) (citing I.C. § 34-13-3-5(a)). *See also Feldhake v. Buss*, 36 N.E.3d 1089, 1093 (Ind. Ct. App. 2015). If a plaintiff seeks to file a lawsuit against an employee personally, he “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) (format altered). Additionally, the plaintiff’s “complaint must contain a reasonable factual basis supporting the allegations.” *Id.*
- [11] Here, Hill filed an initial complaint against DOC employees Marley and Mitchell in their individual capacity, and he alleged that Marley and Mitchell

“Prima facie error in this context is defined as, at first sight, on first appearance, or on the face of it.” *Front Row Motors*, 5 N.E.3d at 758 (internal quotation marks and citation omitted).

were prison maintenance employees who acted under the color of state law at all relevant times. The trial court notified Hill that his complaint failed to comply with the requirements of INDIANA CODE § 34-13-3-5(c), and the court informed Hill that he had thirty days to file an amended complaint or that his complaint would be subject to dismissal. When Hill filed an amended complaint, he again alleged that Marley and Mitchell were prison maintenance employees who acted under the color of state law at all relevant times. The content of Hill's amended complaint was identical to his original complaint except that Hill added a statement that Marley and Mitchell had "acted outside the scope of their employment" and that they had "exhibited willful and wanton misconduct." (App. Vol. 2 at 3, 8). Hill's amended complaint, however, did not include the required "reasonable factual basis supporting the allegations." *See* I.C. § 34-13-3-5(c). Accordingly, the trial court did not err by dismissing Hill's amended complaint. *See Feldhake*, 36 N.E.3d at 1093 (explaining that "when a plaintiff fails to comply with the pleading requirement of INDIANA CODE § 34-13-3-5(c) and does not cure the defect with an amended complaint, the claim against the employee is barred").

[12] Affirmed.

Bradford, C.J., and Riley, J., concur.