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IN THE
COURT OF APPEALS OF INDIANA

Tracey Wheeler,
Appellant-Defendant,

v.

State of Indiana and Indiana
Department of Corrections,
Appellees-Plaintiffs.

November 17, 2021

Court of Appeals Case No.
21A-MI-1175

Appeal from the Perry Circuit
Court

The Honorable Karen Werner,
Magistrate

Trial Court Cause No.
62C01-2103-MI-94

Riley, Judge.

STATEMENT OF THE CASE

- [1] Appellant-Plaintiff, Tracey Wheeler (Wheeler), appeals the trial court's dismissal of his civil tort complaint against Appellees-Defendants, the State of Indiana and the Indiana Department of Correction¹ (DOC), (collectively, DOC).
- [2] We affirm in part, reverse in part, and remand for further proceedings.

ISSUE

- [3] Wheeler presents the court with two issues on appeal, one of which we find to be dispositive and restate as: Whether the trial court improperly dismissed his entire complaint with prejudice.

FACTS AND PROCEDURAL HISTORY

- [4] Wheeler was an offender confined at the Branchville Correctional Facility, a unit of the DOC. On March 11, 2021, Wheeler filed a verified complaint against the DOC in the Perry Circuit Court seeking monetary damages, alleging that Wheeler had filed a grievance against a DOC employee who then retaliated against him by searching his cell and wrongfully confiscating a partial bag of coffee and a partial bag of tortilla chips. In support of his complaint, Wheeler alleged that he had attempted to resolve the issue informally with the

¹ We have retained Wheeler's named party in the caption of this appeal, but we will refer to this party by its proper designation, the Indiana Department of Correction. *See* Indiana Code section 11-8-1-7.

employee performing the search at the time the search occurred. Wheeler further alleged and attached documents to his complaint showing that he had pursued a formal grievance, which was denied, and a facility-level appeal, which was also denied. According to Wheeler's complaint, he was informed by the prison's Grievance Specialist that his property was to be returned to him but that, due to staffing shortages causing a delay in retrieving the tortilla chips and coffee from the evidence locker, his items were probably no longer edible and his best option was to file a tort claim.

[5] On May 28, 2021, the DOC filed a motion to screen pursuant to Indiana Code section 34-58-1-2. The DOC stated in its motion that Wheeler was “an abusive filer in Indiana courts” who had three previous lawsuits dismissed in 2020 alone, which it argued did not mandate dismissal of the instant lawsuit but gave “greater reason to doubt the allegations and to screen [Wheeler’s] [c]omplaint prior to any further action in this case.” (Appellant’s App. Vol. II, p. 36). The DOC contended that, insofar as the allegations of Wheeler’s complaint stated claims under 42 U.S.C. § 1983 that the DOC was liable under a theory of *respondeat superior*, those claims were not legally cognizable. The DOC also argued in its motion to screen that Wheeler had failed to state a claim because he had averred in his complaint “that he was ‘retaliated’ against without any mention of how any alleged action against him constituted negligence.” (Appellant’s App. Vol. II, p. 37).

[6] On June 2, 2021, the trial court entered its order dismissing Wheeler’s complaint in relevant part as follows:

[] [T]he [c]ourt having screened [Wheeler’s] complaint, now dismisses this action in its entirety. The [c]ourt having considered the [DOC’s] motion and all applicable filings finds that the claims contained in [Wheeler’s] complaint may not proceed. [Wheeler’s] complaint is dismissed in its entirety pursuant to Indiana Code § 34-58-1-2. [] [A]ny and all claims in [Wheeler’s] complaint against [the DOC] are dismissed with prejudice.

(Appellant’s App. Vol. II, p. 6).

[7] Wheeler now appeals. Additional facts will be provided as necessary.

DISCUSSION AND DECISION

I. Standard of Review

[8] Indiana’s Screening Statute requires a trial court to assess complaints filed by offenders as soon as the complaints are received. Ind. Code § 34-58-1-2(a); *Zavodnik v. Harper*, 17 N.E.3d 259, 264 (Ind. 2014). The purpose of the statute is to screen and prevent abusive and prolific offender litigation in our state. *Benson v. WANE-TV 15*, 106 N.E.3d 1055, 1056 (Ind. Ct. App. 2018). An offender’s claim may not proceed and is subject to dismissal if the trial court determines that it

(1) is frivolous;

(2) is not a claim upon which relief may be granted; or

(3) seeks monetary relief from a defendant who is immune from liability for such relief.

I.C. § 34-58-1-2(a). If a trial court determines that a claim may not proceed, the statute requires that the trial court enter an order explaining why the claim may not proceed and stating if any of the offender's remaining claims may proceed.

I.C. § 34-58-1-3. We conduct a *de novo* review of a trial court's decision to dismiss a claim pursuant to the Screening Statute. *Smith v. Donahue*, 907 N.E.2d 553, 555 (Ind. Ct. App. 2009), *trans. denied*. In conducting our review, we look only to the well-pleaded facts contained in the complaint or petition to determine whether it contains allegations concerning all the material elements necessary to sustain a recovery under some viable legal theory. *Id.* We may affirm the trial court's dismissal on any theory or basis found in the record. *Smith v. Wal-Mart Stores East, LP*, 853 N.E.2d 478, 483 (Ind. Ct. App. 2006), *trans. denied*.

II. Analysis

[9] Wheeler's two central arguments on appeal are that he properly sought redress for the deprivation of his property by pursuing a claim under the Indiana Tort Claims Act (ITCA) and that the DOC only argued in its motion to screen that he was an abusive filer. These arguments miss the mark. There is no question that the ITCA applies to Wheeler's claims. *See* I.C. § 34-13-3, *et seq.* The DOC did not argue in its screening motion, and does not argue on appeal, that Wheeler failed to comply with the strictures of the ITCA. In addition, Wheeler mischaracterizes the DOC's motion to screen arguments in that the DOC did not contend that Wheeler's history of litigation subjected his complaint to dismissal. Rather, the DOC argued that Wheeler had failed to allege acts

constituting negligence and that it could not be held liable for any § 1983 claims under a theory of *respondeat superior*.

[10] On appeal, the DOC has abandoned its contention that Wheeler failed to state a claim by failing to plead any acts constituting negligence in favor of its new argument that Wheeler’s complaint was subject to dismissal because he failed to show in his complaint that he had exhausted his administrative remedies. The DOC also argues that any federal claims brought by Wheeler were properly subject to dismissal because the exhaustion requirement also applies to federal claims, the named defendants were not “persons” under federal law amenable to suit, and that the named defendants are not liable for § 1983 claims under a theory of *respondeat superior*. Wheeler has clarified in his reply brief that he is not pursuing any federal claims in his complaint. Therefore, we frame the substantive issues before us as: (1) Whether Wheeler sufficiently alleged a tort in his complaint; and (2) Whether Wheeler’s failure to show in his complaint that he had exhausted his administrative remedies prior to filing suit subjected his complaint to dismissal under the Screening Statute.

A. Tort Allegations

[11] The relevant allegations of Wheeler’s complaint are as follows:

22. After the grievance and appeal process it was concluded that [Wheeler] file a tort claim because his items had not been returned and the food items were no longer consumable.

23. The failure of the State and its employees to return [Wheeler’s] property in the same condition and useable condition

as it was in when it was unlawfully confiscated violates Indiana Tort Laws.

24. Due to the State employees['] deliberate and negligent acts [Wheeler] was deprived of his personal property and as a result of the deprivation [Wheeler's] property was destroyed (no longer consumable).

* * * *

26. [The DOC] had a duty to protect [Wheeler's] property and property interest.

* * * *

30. The State employees had no legal right to confiscate the property and then to unlawfully hold [Wheeler's] items to the point that the food items became unconsumable.

* * * *

34. [Wheeler] was in fact deprived of his property, whereas: the property was confiscated and held so long that it was no longer consumable; therefore [Wheeler] did not enjoy the interest of his property where he was not able to eat his chips or drink his coffee.

* * * *

37. [Wheeler] is entitled to relief in this action due to the State employees['] actions of retaliation, negligence and deliberate acts which led to an actual loss/damage of property in violation of

Ind[iana] statutory laws and the [DOC is] liable under Ind[iana] Tort Law.

38. As a direct and proximate result of the State employees['] acts [Wheeler] has incurred an unnecessary and wonton loss and deprivation of his property of a nature as to require compensation.

(Appellant's App. Vol. II, pp. 18-22). Wheeler thus alleged "[t]ortious acts of negligence, retaliation, and failure to protect [his] personal property" as well as "deliberate acts" resulting in his loss of property. (Appellant's App. Vol. II, pp. 7, 21).

[12] On appeal, Wheeler presents us with no legal authority that Indiana recognizes the independent tort of retaliation. The gravamen of his complaint is that he was damaged by the DOC's negligent failure to return his property in a timely manner. "A plaintiff seeking damages for negligence must establish (1) a duty owed to the plaintiff by the defendant, (2) a breach of the duty, and (3) an injury proximately caused by the breach of duty." *Pfenning v. Lineman*, 947 N.E.2d 392, 398 (Ind. 2011). Wheeler alleged in his complaint that (1) the DOC owed him a duty to protect his property, (2) it breached that duty after admittedly wrongfully confiscating his property by retaining the property until it was no longer capable of being consumed, and (3) that the DOC's actions proximately caused damage to, and loss of, his property. In light of these allegations, we conclude that Wheeler adequately stated a cause for negligence in his complaint. The DOC appears to concede as much by abandoning their challenge to the sufficiency of Wheeler's negligence allegations on appeal.

Therefore, we reverse the trial court's dismissal of Wheeler's entire complaint and hold that he may proceed on his negligence claim. In doing so, we express no opinion as to the validity of Wheeler's claim or the likelihood that it will withstand further pre-trial motions by the DOC, should any be forthcoming.

B. *Exhaustion of Remedies*

[13] The DOC argues that the trial court properly dismissed Wheeler's complaint because he failed to show that he had exhausted his administrative remedies prior to bringing suit, which the DOC contends resulted in a failure to state a claim upon which relief could be granted pursuant to Indiana Code section 34-58-1-2(a)(2). We agree with the DOC that an offender-litigant is generally required to exhaust his administrative remedies before bringing suit against the State on both state and federal claims. *See, e.g., Higgason v. Stogsdill*, 818 N.E.2d 486, 489-90 (Ind. Ct. App. 2004) (holding that prisoners must exhaust available administrative remedies prior to bringing any federal claims in either federal or state courts), *trans. denied*; *Higgason v. Lemmon*, 818 N.E.2d 500, 503 (Ind. Ct. App. 2004) (applying a similar analysis to state tort claims), *trans. denied*.

[14] However, in *Alkhalidi v. Indiana Department of Correction*, 42 N.E.3d 562 (Ind. Ct. App. 2015), we examined the issues of who must show the exhaustion of remedies and when it must be shown. Alkhalidi was imprisoned in a DOC facility, and his property was seized in a disciplinary action. *Id.* at 563. After some, but not all, of his confiscated property was returned, Alkhalidi pursued grievance and administrative tort claim proceedings, neither of which afforded him relief. *Id.* He then filed a replevin action in small claims court against the

DOC to recover the value of his unreturned property. *Id.* The trial court dismissed the complaint following the DOC's motion for judgment on the evidence, crediting the DOC's argument that Alkhalidi's failure to exhaust his administrative remedies deprived it of subject matter jurisdiction. *Id.* at 564. In reversing the dismissal, we relied on our supreme court's decisions in *K.S. v. State*, 849 N.E.2d 538, 542 (Ind. 2006), and *First American Title Insurance Company v. Robertson*, 19 N.E.3d 757, 760 (Ind. 2014), to conclude that a failure to exhaust administrative remedies is more properly characterized as a procedural error and not a jurisdictional defect. *Id.* at 565.

[15] In *Alkhalidi*, the DOC acknowledged that it was required to timely raise the issue of exhaustion. *Id.* We rejected the DOC's argument that, in order to survive its motion for involuntary dismissal, Alkhalidi was required to demonstrate that he had exhausted his administrative remedies. *Id.* at 566. We distinguished *Young v. State*, 888 N.E.2d 1255 (Ind. 2008), an appeal from the denial of a petition to determine educational credit-time wherein our supreme court held that a post-conviction proceeding was the proper vehicle for Young's claim and that, in order to prevail, Young must present evidence supporting each portion of his claim, including identifying DOC's grievance procedures and his exhaustion of those procedures. *Id.* We concluded that *Young*, which involved a post-conviction proceeding in which a petitioner bore the burden of proving grounds for relief by a preponderance of the evidence, did not apply to a civil replevin action. *Id.* We also noted our decision in *Jackson v. Wrigley*, 921 N.E.2d 508 (Ind. Ct. App. 2010), wherein we had reversed the trial court's

grant of summary judgment to the DOC on Jackson's federal § 1983 civil rights claims based on the DOC's contention that Jackson had failed to demonstrate a genuine issue of material fact regarding his exhaustion of his administrative remedies. *Id.* at 565-66. We observed that, in *Jackson*, we had specifically rejected the DOC's argument that Jackson was required to show in his complaint what steps he took to exhaust his administrative remedies, and we found that the exhaustion requirement was more properly characterized as an affirmative defense upon which the DOC bore the burden of proof. *Id.* at 566. The *Alkhalidi* court noted that, while not precisely on point, *Jackson's* reasoning should apply and held that, because exhaustion of remedies was not an element of Alkhalidi's replevin action, it was more appropriately considered to be an affirmative defense upon which the DOC bore the burden of proof. *Id.*

[16] We reach a similar conclusion here. While the instant action is one sounding in negligence, not a replevin action in small claims court, and this is an appeal from a dismissal pursuant to the Screening Statute rather than an appeal from a judgment on the evidence, we believe that *Alkhalidi* and its reasoning apply. A failure to exhaust administrative remedies is not an element of a claim for negligence. *See Pfenning*, 947 N.E.2d at 398. Therefore, Wheeler was not required to plead exhaustion of remedies in order to state a claim for relief, and his negligence claim was not subject to dismissal on that basis. The cases relied upon by the DOC, *Adams v. ArvinMeritor, Inc.*, 48 N.E.3d 1 (Ind. Ct. App. 2015), *aff'd in part, vacated in part*, 60 N.E.3d 1022 (Ind. 2016), and *Burks-Bey v. State*, 903 N.E.2d 1041 (Ind. Ct. App. 2009) (relying on *Young*), are both

factually distinguishable. *Adams* was an appeal from a summary judgment ruling, a later stage of litigation not procedurally equivalent to a dismissal under the Screening Statute, and *Burks-Bey* was an appeal from the denial of a motion for educational credit-time determination of the type we found distinguishable in *Alkhalidi*. *Adams*, 48 N.E.3d at 9-12; *Burks-Bey*, 903 N.E.2d at 1042. As such, we do not credit the DOC's argument.²

CONCLUSION

- [17] Based on the foregoing, we conclude that Wheeler's complaint for negligence against the DOC may proceed. We affirm the trial court inasmuch as it dismissed any other putative claims contained in Wheeler's complaint.
- [18] Affirmed in part, reversed in part, and remanded for further proceedings.
- [19] Najam, J. and Brown, J. concur

[1] ² Because we partially reverse the trial court's dismissal and remand for further proceedings, we do not address Wheeler's claim that the trial court failed to sufficiently explain its reasoning pursuant to Indiana Code section 34-58-1-3. We also observe that we are without authority to grant Wheeler's request that we order compensation for him directly, and we decline his request to assess sanctions based on his allegation that the DOC acted in bad faith in filing its motion to screen and its appellate brief.