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APPELLANT PRO SE:

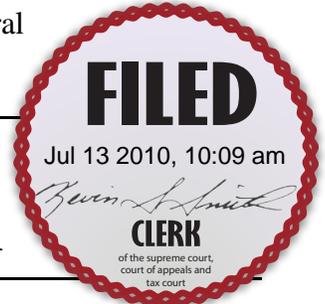
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**IN THE
COURT OF APPEALS OF INDIANA**



JOHN B. FELDER,)

Appellant-Petitioner,)

vs.)

STATE OF INDIANA,)

Appellee-Respondent.)

No. 48A02-0902-CV-156

APPEAL FROM THE MADISON SUPERIOR COURT
The Honorable Stephen D. Clase, Judge Pro Tempore
Cause No. 48D03-0504-MI-296

July 13, 2010

MEMORANDUM DECISION - NOT FOR PUBLICATION

MAY, Judge

John Felder appeals a judgment in favor of the State of Indiana and several Department of Correction (“DOC”) employees. He raises four issues, which we reorder and restate as:

- (1) whether the judge who presided over the trial was biased;
- (2) whether the trial court erred by denying Felder’s request for appointed counsel;
- (3) whether the trial court erred by granting the State’s motion for judgment on the evidence on his claim regarding the collection of urine samples; and
- (4) whether the trial court erred by finding against Felder on his battery claim.

The State asserts Felder’s claims should have been dismissed because he failed to comply with the Indiana Tort Claims Act, Ind. Code ch. 34-13-3.

We affirm.

FACTS AND PROCEDURAL HISTORY

On April 5, 2005, Felder filed a complaint against the State and several officers and officials from the DOC (collectively, “the State”)¹ regarding events that allegedly occurred while Felder was housed at the Pendleton Correctional Facility. The complaint alleged the DOC officials were negligent *per se* in the collection of multiple urine samples for drug testing. The complaint also described an incident in which an Officer Coleman committed a “foreseeable assault” against Felder, which led Felder to assert Officer Coleman was

¹ Felder’s complaint was captioned “John B. Felder v. The State of Indiana. Jean Rumler, et al.” (Appellant’s App. at A-(10)a.) It appears service was made or attempted on Rumler and six others. A single attorney entered an appearance and filed the “State Defendants’ Answer and Affirmative Defenses,” apparently on behalf of all the defendants. (Appellees’ App. at 1.)

negligent for failing to protect Felder. (*Id.* at 10a.)

Felder filed a motion for appointment of counsel, which initially was granted. However, the court *sua sponte* reversed that order on October 22, 2008. On January 7, 2009, six days before the scheduled trial date, Felder filed a motion for discovery. At trial, the court denied Felder's discovery motion as untimely.

Felder, who was the only witness at trial, testified regarding the collection of his urine samples on July 14; July 28; and August 30, 2003. He claimed he wrote to Jean Rumler, a DOC official responsible for maintaining the random drug screening list, about the issue, and she responded she had no record that he had provided a urine sample on July 14, 2003.² He then wrote to Steve Satinski, who is the DOC Director of Quality Assurance, and Satinski determined Felder gave a urine sample on July 14, 2003, and the taking of his July 28, 2003, sample was a mistake.³ Felder testified he felt he was entitled to damages because he believed the officers involved in the drug testing were harassing him.⁴

Felder also described an incident during which Officer Coleman allegedly hit him on the arm with keys. He claimed the assault aggravated a torn muscle in that arm. After Felder testified, the State moved for judgment on the evidence. The court granted the motion as to the drug screening claim, but not as to the claim against Officer Coleman.

² This document was not admitted into evidence. It was one of the documents Felder requested in his motion for discovery. However, the trial court allowed Felder to testify about the contents of the memorandum.

³ This letter also was not admitted into evidence, but apparently was attached to Felder's complaint, and the trial court allowed Felder to testify about its contents.

⁴ According to Satinski's letter, which Felder attached to his complaint and included in his Appendix, no adverse action was taken against Felder as a result of any of the drug tests.

The State then cross-examined Felder, and Felder clarified that he believed Officer Coleman hit him intentionally.⁵ The State admitted into evidence an Offender Grievance Program Complaint Form, Notice of Tort Claim, and Request for Health Care. In each document, Felder had described the battery, but had not mentioned that Officer Coleman struck him with a set of keys, and his descriptions of the location of the injury were not entirely consistent with his trial testimony. The State also admitted a letter from Georgia Cullors, the Health Care Administrator of Pendleton Correctional Facility, who indicated a nurse and a doctor examined Felder but found no injuries.

The trial court ultimately found in favor of the State on both claims.⁶

DISCUSSION AND DECISION

Before reaching Felder's arguments, we address a potentially dispositive issue raised by the State: whether Felder's claim should have been dismissed for failure to comply with the Indiana Tort Claims Act ("ITCA"), codified at Ind. Code §§ 34-13-3-1 through 20. In its answer, the State alleged Felder had "failed to serve the State of Indiana, or any State agency, with a proper Notice of Tort Claim." (Appellee's App. at 3.) The State appears to argue Felder was required to take affirmative steps to demonstrate he had provided the required notice. In support, the State quotes *LCEOC, Inc. v. Greer*, which states, "Compliance with

⁵ Thereafter, defense counsel referred to this claim as a battery, as that is the cause of action that fit Felder's testimony. This was not, as Felder contends, an admission that Officer Coleman committed a battery. We also will refer to Felder's claim against Officer Coleman as one for battery.

⁶ Felder urges us to review a videotape of his trial. But the record does not include a video, and there is no indication in the record that the trial was videotaped.

the ITCA is a procedural precedent which the [plaintiff] must prove and which the trial court must determine prior to trial.” 699 N.E.2d 763, 765 (Ind. Ct. App. 1998), *rev’d in part on other grounds* 735 N.E.2d 206 (Ind. 2000). However, in *LCEOC*, the State raised the issue of ITCA compliance in a motion for summary judgment.⁷ In Felder’s case, the State neither moved for summary judgment nor mentioned the issue at the hearing.⁸

The State cites no authority for the proposition that the rule in *LCEOC* applies even when the State has not sought a ruling on the issue. As the State did not raise this issue before the trial court, we will not consider it on appeal. *See, e.g., AGS Capital Corp., Inc. v. Product Action Int’l, LLC*, 884 N.E.2d 294, 309 (Ind. Ct. App. 2008) (argument not presented to the trial court was waived on appeal), *trans. denied*.

1. Bias of Judge

Felder argues Judge *pro tempore* Stephen Clase was biased against him.

When the impartiality of the trial judge is challenged on appeal, we will presume that the judge is unbiased and unprejudiced. To rebut that presumption, the defendant “must establish from the judge’s conduct actual bias or prejudice that places the defendant in jeopardy.” “To assess whether the judge has crossed the barrier into impartiality, we examine both the judge’s actions and demeanor.”

Perry v. State, 904 N.E.2d 302, 307-08 (Ind. Ct. App. 2009) (citations omitted), *trans. denied*.

⁷ The same was true in *Brunton v. Porter Memorial Hosp. Ambulance Serv.*, 647 N.E.2d 636, 639 (Ind. Ct. App. 1994), the decision *LCEOC* cited for this proposition.

⁸ In fact, the State admitted into evidence Felder’s notice of tort claim regarding the battery.

Felder argues Judge Clase initially found in his favor, but then reversed the decision after being questioned by the State's attorney. That is not what occurred. After Felder presented his evidence and the State moved for judgment on the evidence, the following discussion occurred:

THE COURT: Okay. Well, what I'm going to do, as to the issue[] on the urinalysis case, I will find on the evidence for the plaintiff and sir, Mr. Mullin, you are now crossing on the personal injury to the arm issue which we'll call count II and that I deny your Motion –

DEFENDANT'S COUNSEL – MR. MULLIN: Yes, Your Honor.

THE COURT: -- deny your Motion for Judgment on the Evidence on that issue. So you may proceed.

DEFENDANT'S COUNSEL – MR. MULLIN: Yes. Thank you, Your Honor, and you said, you said for the first count you[] were going to find for the plaintiff?

THE COURT: Judgment for the plaintiff on the evidence. Judgment for defendant on the evidence. I'm sorry.

DEFENDANT'S COUNSEL – MR. MULLIN: Okay. Thank you, Your Honor. I thought that's what you meant, I just –

THE COURT: It is what I meant.

DEFENDANT'S COUNSEL – MR. MULLIN: -- wanted to clarify that for the record. Thank you.

PLAINTIFF – MR. FELDER: Your Honor. Your Honor.

THE COURT: Yes, sir.

PLAINTIFF – MR. FELDER: I don't understand exactly why or what you just did.

THE COURT: I don't find that you proved your case in your request for money damages from the defendant[s] as to the urine test issue and that I'm calling Count I of your complaint and that's simply that's all there is to it. I don't find that you've made your case for that. I've refused to that or what we'll call Count II, the alleged injury to your arm and I'm asking Mr. Mullin to continue on with that part of the case.

(Tr. at 33-34.)⁹

Contrary to Felder's assertion, Judge Clase did not rule in his favor initially; from the

⁹ The defense attorney's name was misspelled in several places in the record. We have corrected the spelling.

context of this conversation, it is apparent that Judge Clase misspoke and then corrected himself. Judgment on the evidence cannot be entered in favor of a plaintiff unless a defendant has an opportunity to present its evidence. *See* Ind. Trial Rule 50(A) (“A party who moves for judgment on the evidence at the close of the evidence offered by an opponent may offer evidence in the event that the motion is not granted . . .”). Thus, the court could not have entered judgment in Felder’s favor when the State requested judgment on the evidence. As the State was entitled to present evidence prior to any ruling in favor of Felder, it was appropriate for the State to request clarification. Judge Clase then apologized for his misstatement and indicated he was granting the State’s motion as to Felder’s request for damages based on the urinalysis tests because Felder had failed to prove a case. The trial court did not change its ruling; it corrected a misstatement. Such correction does not reflect trial court bias.

Felder also claims that, when he attempted to introduce documentary evidence, Judge Clase acted improperly “to prevent or deter” Felder from doing so. (Appellant’s Br. at 14.) Felder does not identify any specific adverse evidentiary rulings or documents that were not admitted, so he has not demonstrated judicial bias. *See* Ind. Appellate Rule 46(A)(8)(d) (“If the admissibility of evidence is in dispute, citation shall be made to the pages of the Transcript where the evidence was identified, offered, and received or rejected, in conformity with Rule 22(C).”).

Felder also complains Judge Clase erroneously denied the motion for discovery that he

filed a few days before trial. The motion sought documents Felder had seen, but did not have. Judge Clase found Felder's motion untimely. Because Felder's motion was filed a mere six days before trial, the ruling was not an abuse of discretion, *see, e.g., Hitchcox v. Hitchcox*, 693 N.E.2d 629, 634 (Ind. Ct. App. 1998) (finding no abuse of discretion in denial of motion to compel production of documents when motion was filed seven days before trial), and does not demonstrate judicial bias.

Felder also complains Judge Clase changed the rules of the trial by altering whether his claim would be handled as a regular civil action or a small claim. The order reversing the appointment of a public defender for Felder states "the allegations and relief requested by Plaintiff are in the nature of a Small Claim." (Appellant's App. at 4.) Contrary to Felder's assertion, that order did not determine Felder's claim *was* a small claim; it simply analogized the complexity of Felder's case to cases that are filed in small claims court and typically do not merit appointment of counsel. Thus, Judge Clase's statement at the beginning of the trial that the case would proceed under the rules of civil procedure because it was filed on the plenary docket did not indicate he "changed the rules," (Appellant's Br. at 16), because Felder's case always was on the plenary docket. Because no change occurred, this allegation of bias has no merit.

Finally, Felder asserts he could not cross-examine witnesses. The State relied solely on cross-examination of Felder and did not call any witnesses of its own. There were no witnesses for Felder to cross-examine, so Felder has not demonstrated bias from the trial court judge.

Because none of his allegations have merit, Felder has not established that Judge Clase was biased.

2. Appointment of Public Defender

Although the trial court initially granted Felder's request for appointed counsel, it reversed that decision in an order that states:

[T]he Court has read and considered the Complaint and the entire record in[]this cause of action and now finds that the prior order granting Plaintiff a civil public defender was not justified as the allegations and relief requested by Plaintiff are in the nature of a Small Claim which the Plaintiff is capable of presenting pro se. Plaintiff[']s pleadings are well thought out, cogent, well written and he has the education to do so.

(Appellant's App. at 4.)

Felder argues appointment of counsel was mandatory pursuant to *Holmes v. Jones*, 719 N.E.2d 843, 846-48 (Ind. Ct. App. 1999), in which we held appointment of counsel was required for parties who were qualified to prosecute or defend as indigent persons. At the time *Holmes* was decided the controlling statute stated in its entirety:

If the court is satisfied that a person who makes an application described in section 1 of this chapter does not have sufficient means to prosecute or defend the action, the court *shall*:

- (1) admit the applicant to prosecute or defend as an indigent person; and
- (2) *assign an attorney* to defend or prosecute the cause.

All officers required to prosecute or defend the action shall do their duty in the case without taking any fee or reward from the indigent person.

Ind. Code § 34-10-1-2 (1998) (emphasis added).

Our legislature amended that statute in 2002. *See* Ind. Acts, Pub. Law 125-2002, § 1 (amended effective Mar. 26, 2002). The statute now gives trial courts discretion to appoint

counsel in “exceptional circumstances.” Ind. Code § 34-10-1-2(b)(2). As the statute no longer contains the mandatory appointment language upon which the decision in *Holmes* rested, *Holmes* no longer controls.

In determining whether exceptional circumstances exist to justify appointment of counsel, the court may consider the complexity of the issues, the viability of the plaintiff’s claim, and the plaintiff’s ability to present the case without assistance. Ind. Code § 34-10-1-2(c). We review a trial court’s decision whether to appoint counsel for abuse of discretion. *Smith v. Indiana Dep’t of Correction*, 871 N.E.2d 975, 986 (Ind. Ct. App. 2007), *reh’g denied, trans. denied, cert. denied*. The trial court found Felder’s claims were simple and Felder had the ability to present them *pro se* based on his level of education and his pleadings being “well thought out, cogent, [and] well written.” (Appellant’s App. at 4.) We therefore cannot find an abuse of discretion in the trial court’s conclusion that no “exceptional circumstances” required appointment of counsel. *See, e.g., Sabo v. Sabo*, 812 N.E.2d 238, 245 (Ind. Ct. App. 2004) (finding no abuse of discretion where “the issues involved in the civil matter were not so complicated as to require the assistance of counsel”).

3. Urine Samples

The trial court entered judgment on the evidence for the State on Felder’s claim that the State negligently collected too many urine samples from him. “In reviewing a trial court’s ruling on a motion for judgment on the evidence, we apply the same standard as the trial court and look only to the evidence and reasonable inferences most favorable to the non-

moving party.” *Smith v. Beaty*, 639 N.E.2d 1029, 1032 (Ind. Ct. App. 1994). When the defendant moves for judgment on the evidence at the close of the plaintiff’s evidence, the motion should be granted “only if there is a complete failure of proof on at least one essential element of the plaintiff’s case.” *Id.* “If there is any probative evidence or reasonable inferences to be drawn from the evidence or if there is evidence allowing reasonable people to differ as to the result, judgment on the evidence is improper.” *Id.*

Felder presented evidence that, due to an oversight, he was required to give two urine samples in July 2003 and, due to an alleged DOC policy, he was required to give a third sample in August 2003 because the second sample in July was “diluted.” Felder presented this claim as one for negligence *per se* because the employees “did not thoroughly examine and check accurately the random drug test list that was computer generated by central office on July 28, 2008.”¹⁰ (Appellee’s App. at 10(a).) The complaint also alleges the employees were “acting in the scope of there [sic] employment, and in the discharge of there [sic] duties before, and during the administration of these urine speciman [sic] drug test [sic].” (*Id.*)

A complaint “alleging that an employee acted within the scope of the employee’s employment bars an action by the claimant against the employee personally.” *See* Ind. Code § 34-13-3-5(b). Thus, judgment on the evidence against Felder on his complaint against the individual employees was not erroneous. *See, e.g., Bushong v. Williamson*, 790 N.E.2d 467,

¹⁰ On appeal, Felder challenges the “scientifically [sic] soundness of the testing procedure used.” (Appellant’s Br. at 8.) He also argues the tests violated the Fourth Amendment of the United States Constitution and Article 1, Section 11 of the Indiana Constitution. Because Felder did not advance these theories at trial, they are not available on appeal. *See Carr v. Pearman*, 860 N.E.2d 863, 871 n.3 (Ind. Ct. App. 2007) (issue raised for first time on appeal is waived), *trans. denied*.

474 (Ind. 2003) (court properly granted summary judgment to defendant where defendant was acting within the scope of his employment).

Neither can we hold the trial court erred when granting judgment on the evidence to the State as employer. Felder claims the taking of additional samples was negligence *per se* because the acts violated one statute and one clause of Operations Directive IR #22 RANDOM URINALYSIS PROGRAM. The statute provides the Commissioner of the Department of Correction “shall . . . [k]eep an accurate and complete record of all department proceedings, which includes the responsibility for the custody and preservation of all papers and documents of the department.” Ind. Code § 11-8-2-5(a)(10). The clause from the Operations Directive for Random Urinalysis states: “i. The following steps must be followed in preparing the specimen for transport: . . . 4) Failure to ensure proper procedures and documentation will subject the assigned staff to progressive personnel action.” (Appellant’s App. at A(10).)¹¹

Even if we could say the employees’ negligence in failing to properly read the drug testing list on July 28, 2003, violated the statute and operations directive, such that Felder demonstrated negligence *per se*, we could not hold the court erred by granting summary judgment to the State as Felder did not allege in his complaint, or submit any evidence at the hearing to demonstrate, an injury that was proximately caused by that negligence. As best we can tell, the only “result” proximately caused by the employees’ negligent reading of the list

¹¹ Felder has provided only two pages of what the footer of that document indicates is a fifteen-page document. The portion highlighted by Felder appears on “Page 10 of 15.” (Appellant’s App. at A(10).)

was that Felder had to walk to a collection location and urinate in a cup. Felder has not argued or cited any authority to suggest walking and urinating are compensable injuries. Therefore, we conclude Felder has not shown the trial court erred by granting the State's request for judgment on the evidence as to this claim.

4. Battery

As the plaintiff, Felder bore the burden of proof on his battery claim. *See Deep Vein Coal Co. v. Dowdle*, 218 Ind. 495, 504, 33 N.E.2d 981, 985 (1941) (plaintiff has burden of proof on battery). When reviewing a judgment, we do not reweigh evidence or assess witness credibility, and we consider only the probative evidence and the reasonable inferences supporting it. *Erie Ins. Co. v. Hickman by Smith*, 622 N.E.2d 515, 521 (Ind. 1993).

Felder argues the State did not refute his testimony that Officer Coleman battered him. However, the State was not obliged to prove anything, and the trial court was not required to believe Felder's version of events. We have explained:

The trier of fact may not arbitrarily disregard evidence, but the evidence as a whole and the circumstances of trial may justify rejection of evidence not directly controverted:

Among the factors that may be considered in determining the credit to be given to the testimony of a witness are: The interest of the witness, if any, in the outcome of trial; his bias and prejudice, if any is shown; his opportunity for knowing and recollecting the facts about which he testified; the probability or improbability of his testimony; and his demeanor while on the witness stand.

It has long been recognized that a jury may disbelieve uncontradicted oral evidence, on the basis of credibility.

Terry v. West, 524 N.E.2d 343, 348-49 (Ind. Ct. App. 1988) (quoting *Gemmer v. Anthony*

Wayne Bank, 181 Ind. App. 379, 386-87, 391 N.E.2d 1185, 1189 (1979), *reh 'g denied*), *reh 'g denied*. Thus, the court was not required to give weight to Felder's testimony.

The State admitted documents during its cross-examination of Felder that created doubt about Felder's credibility, as his description of the incident was different in his earlier accounts and medical personnel had not found any injury to his arm shortly after the alleged battery. Accordingly, we cannot say the judgment against Felder on his battery claim was clearly erroneous. *See, e.g., Singh v. Lyday*, 889 N.E.2d 342, 360 (Ind. Ct. App. 2008) (reinstating jury verdict for plaintiff following reversal of trial court's motion to correct error because "[a]lthough . . . there was sufficient evidence introduced at trial to support . . . a finding," "the jury found insufficient evidence that [plaintiff] committed battery"), *reh 'g denied, trans. denied*.

The judgment of the trial court is affirmed.

Affirmed.

BAILEY, J., and BARNES, J., concur.