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IN THE
COURT OF APPEALS OF INDIANA

ROY AUSTIN SMITH,	)	
	)	
Appellant-Defendant,	)	
	)	
vs.	)	No. 77A05-1011-PL-726
	)	
STATE OF INDIANA,	)	
	)	
Appellee-Plaintiff.	)	

APPEAL FROM THE SULLIVAN CIRCUIT COURT
The Honorable P.J. Pierson, Judge
Cause No. 77C01-0707-PL-243

August 4, 2011

MEMORANDUM DECISION - NOT FOR PUBLICATION

MAY, Judge

Roy Austin Smith appeals partial summary judgment in favor of the Indiana Department of Correction (IDOC). He asserts there was a genuine issue of material fact about whether filed notice with the Office of the Attorney General (AG) and the IDOC within 180 days of his loss as required by the Indiana Tort Claims Act (ITCA). We affirm.

FACTS AND PROCEDURAL HISTORY

The ITCA states in relevant part:

> An offender must file an administrative claim with the department of correction to recover compensation for the loss of the offender's personal property alleged to have occurred during the offender's confinement as a result of an act or omission of the department or any of its agents, former officers, employees, or contractors. A claim must be filed within one hundred eighty (180) days after the date of the alleged loss.

Ind. Code § 34-13-3-7(a).

On August 1, 2006, IDOC temporarily transferred Smith from the Indiana State Prison (ISP) to the Wabash Correctional Facility. He returned to ISP on September 1, 2006, and noticed many items were missing from his cell, including legal papers, clothes, food, and hygiene items. On October 26, 2006, Smith filed a grievance with IDOC requesting the return of his property.

Smith alleges he filed an ITCA notice with the AG on February 22, 2007. He also alleges he sent a copy of this claim to the IDOC. On April 13, Smith wrote to "Counselor Baker, Mailroom," (App. at 34), requesting copies of the remittance slips used to record the removal of money from Smith's prisoner account for the cost of postage. In this letter, Smith

claimed he "put the following legal material in [his] mailbag: Notice of Tort Claim to be mailed registered or certified mail to Office of the Attorney General," (*id*.), on March 19, 2007. None of the transactional receipts or reports submitted by Smith indicated he bought postage in March 2007.

At some point thereafter, Smith asked IDOC about the status of his claim. On June 1, 2007, IDOC told him it had not received his ITCA notice regarding a loss of property in 2006. On July 22, Smith filed a claim with the LaPorte Superior Court, requesting compensatory and punitive damages for loss of property. The trial court summarily dismissed Smith's claim on July 23 as "frivolous" noting Smith "failed to provide proof of compliance with the Indiana Tort Claims Act." (*Id*. at 11.)[1]

Smith appealed the summary dismissal of his claim, and we reversed. We held summary dismissal was not appropriate because, even if his claim ultimately would not be successful, the copy of the ITCA notice that Smith attached to his complaint and that he alleged he submitted to the AG's office on February 22, 2007, although not a file-stamped copy, was sufficient to demonstrate his cause was not frivolous for the purpose of summary dismissal under Ind. Code § 34-58-1-2.[2] *See Smith v. IDOC*, 888 N.E.2d 804, 809 (Ind. Ct.

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[1] On August 2, 2007, Smith filed an ITCA Notice with the AG and the IDOC. The AG received his claim and denied it on October 17, 2010.

[2] Another panel of this court found Smith's copy of the ITCA notice he allegedly sent on February 22, 2007, sufficient to preclude summary dismissal. That decision does not prevent us from deciding whether that same document is sufficient to preclude summary judgment, because the evidentiary standards are different for dismissal and summary judgment. *See Murphy v. Curtis*, 930 N.E.2d 1228, 1234-5 (Ind. Ct. App. 2010) ("Because of the different standards of governing review of a motion to dismiss under rule 12(B)(6) and a

App. 2008); see also Ind. Code § 34-58-1-2 (courts may summarily dismiss claims from prisoners if they are frivolous, not a claim upon relief may be granted or seeks monetary relief from a defendant who is immune from liability for such relief).

Following remand, Smith filed a motion for judgment on the evidence. The trial court held a hearing and on November 9, granted partial summary judgment for the IDOC because Smith could not prove his 2006 property loss claim was filed within the 180 days required by the ITCA. Smith attempted to appeal, but the trial court would not certify the issue for interlocutory appeal.[3] The trial court entered a final judgment on October 19, 2010.

DISCUSSION AND DECISION

Our standard of review of a summary judgment is the same as that of the trial court and is thus *de novo*. *Cox v. N. Ind. Pub. Serv. Co., Inc*. 848 N.E.2d 690, 695 (Ind. Ct. App. 2006). Summary judgment is appropriate only when the designated evidence shows there are no genuine issues of material fact and the moving party is entitled to judgment as a matter of law. *Id*.; T.R. 56(C). We view the pleadings and designated materials in the light most favorable to the non-moving party, and all facts and inferences therefrom are construed in

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motion for summary judgment under rule 56(C), we cannot say that the State's current appellate argument is precluded by operation of the law of the case doctrine.")

[3] The summary judgment regarding the 2006 claim was not a final judgment because Smith, in the same action, had also asserted a claim regarding an alleged 2005 loss of a hot pot. The trial court decided in favor of the IDOC regarding the 2005 claim on October 19, 2010, and Smith appeals from this final judgment. On appeal, the State argues the trial court's decision regarding the 2005 loss was appropriate. However, despite references to the 2005 loss in the argument section of his second issue, the two issues Smith asserts in his brief concern only the 2006 loss. (*See* Br. of Appellant at 3.) Thus we do not address the 2005 judgment.

favor of the non-moving party. *Cox*, 848 N.E.2d at 695.

A summary judgment is clothed with a presumption of validity and the losing party has the burden of demonstrating error. *Id*. We will affirm on any theory or basis supported by the designated materials; however, we carefully scrutinize summary judgments to ensure parties are not improperly prevented from having their days in court. *Id*. at 695-6.

Smith argues the trial court erred in determining he did not file his ITCA notice within 180 days of his loss: "[Smith's] failure to timely file his Tort Claim Notice within one hundred eighty (180) days of his loss on September 1, 2006, bars him from recovering damages." (App. at 73.) Smith contends he did not learn of his loss until October 26, 2006, and thus his ITCA notice was timely filed February 22, 2007. We disagree.

Smith was required to file his ITCA notice within 180 days of his loss. Even if Smith's loss occurred on October 26, 2006, when he contends he learned of his loss, the deadline for his ITCA Notice was April 24, 2007. The AG received only one ITCA notice, and it was sent August 2, 2007, over three months after the latest possible deadline.

Smith claims he sent his ITCA Notice on February 22, 2007, and includes a copy of that document in the record. However, this notice was not file stamped as "Received."[4] Smith argues the February 22 notice meets the deadline for filing pursuant to the Prison

[4] In contrast, the ITCA notice Smith sent regarding his 2005 loss is file stamped "Received." (App. at 17.) Both the Attorney General's Office and Smith agree the ITCA notice of the 2005 loss was sent and received, even though the agency that issued the stamp is unclear.

Mailbox Rule, pursuant to which a motion filed by a *pro se* prisoner is deemed filed once the motion is placed in the mail, provided the prisoner provides "reasonable, legitimate, and verifiable documentation" of the mailing. *Dowell v. State*, 922 N.E.2d 605, 606 (Ind. 2010). Our Indiana Supreme Court discussed various ways a prisoner may prove he mailed a legal document, such as producing a prison mail log or an affidavit from a prison employee indicating the prisoner placed the item in the mail. *Id*. at 608. The Court explained the benefit of this Rule would be available to only those prisoners who could provide documentation from someone other than themselves; an affidavit by a prisoner would not be sufficient to prove the prisoner's item was mailed on a particular date. *Id*. at 608-9.

Smith's evidence is insufficient to permit application of the Mailbox Rule to the ITCA notice he alleges he mailed on February 22. The copy he provided the trial court was not file stamped. The AG presented two affidavits indicating it did not receive an ITCA notice from Smith until August 2. Smith's extensive postal and monetary remittance records do not indicate he bought postage for a mailing on or around February 22. Smith, in his letter to Counselor Baker, asserts another date, March 19, as the day he sent his notice of tort claim, but the postal and remittance records do not indicate postage was purchased around that date.

Based on our Supreme Court's analysis of the Prison Mail Rule in *Dowell*, we cannot say Smith's bald assertions of mailing amount to adequate documentation to permit application of the Prison Mailbox Rule. *Cf. Dowell*, 922 N.E.2d at 608-9 (stating documentation from prisoner only would not support application of Rule).

Both parties agree Smith sent a Notice of Tort Claim to the AG and the IDOC on August 2, 2007. That notice was over three months late, and thus the trial court properly granted summary judgment for IDOC. Accordingly, we affirm.

Affirmed.

BAKER, J., and BRADFORD, J., concur.