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APPELLANT PRO SE:

FRED MOTT
Delano, California

IN THE
COURT OF APPEALS OF INDIANA

FRED MOTT,	)	
	)	
Appellant,	)	
	)	
vs.	)	No. 46A04-1003-SC-170
	)	
ED BUSS, Superintendent, Indiana State Prison, BRANDON SCOTT, Officer In Charge, Property Room, Indiana State Prison, and INDIANA STATE PRISON,	)	
	)	
Appellees.	)	

APPEAL FROM THE LA PORTE SUPERIOR COURT
The Honorable Steven E. King, Judge
Cause No. 46D03-0911-SC-2958

September 9, 2010

MEMORANDUM DECISION - NOT FOR PUBLICATION

DARDEN, Judge

STATEMENT OF THE CASE

Fred Mott appeals the trial court's dismissal of his small claims action.

We affirm.

ISSUE

Whether the trial court erred when it dismissed Mott's complaint.

FACTS

On November 23, 2009, Mott filed his small claims notice and complaint against Ed Buss, Superintendent, Indiana State Prison, and "Officer B. Scott (John Doe), Officer in Charge, Property Room, Indiana State Prison." (App. 13). Mott alleged that the defendants were responsible for his loss of a boombox, ten cassette tapes, a combination lock, and two "starfoam coolers," which were not returned to his possession when he was transferred to Kern Valley State Prison in California following his incarceration in the Indiana State Prison. *Id*. Attached to Mott's complaint were thirty pages of exhibits.

On January 5, 2010, counsel appeared for the defendants and moved for dismissal, asserting that Buss and Scott were "employees of the State of Indiana . . . sued in their individual capacity." (App. 67). The motion cited the Indiana statute stating as follows:

> A lawsuit filed against an employee personally 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.
> The complaint must contain a reasonable factual basis supporting the allegations.

Ind. Code § 34-13-3-5. The motion asserted that the averments of Mott's complaint were "without any factual basis to support the allegation that Ed Buss, B. Scott, and Joe Doe acted" in a manner that would subject them to personal liability, and that because Mott had "not met the requirements" of the statute, his claims "should be dismissed with prejudice." (App. 68).

On January 12, 2010, the trial court granted the motion. It dismissed Mott's complaint with prejudice.

On January 27, 2010, Mott filed his "opposition" to the trial court's dismissal order. (App. 74). Mott asserted that his complaint's allegations regarding "the acts and omissions of . . . Buss and Scott" should be "construed" as having alleged that their "unauthorized taking of property belonging to [Mott], without his consent or knowledge, was criminal, was outside the scope of their employment, and was willful and wanton." *Id.* Mott also filed a proposed amended complaint and amended notice of claim – reflected in the CCS as having been "sent back to" Mott based on the January 12th dismissal. (App. 6).

On February 1, 2010, Mott filed an "objection to court order dismissing defendants with prejudice and motion to correct errors." (App. 114). He asserted that his complaint "sufficiently allege[d]" that Scott "acted willfully, wantonly and in a malicious manner," and "[e]ven if" it did not, he should be allowed to "correct[] by amendment" any "pleading deficiency." (App. 114, 115). The CCS indicates that the trial court denied Mott's motion to correct errors on February 3, 2010.

On February 16, 2010, Mott filed his "notice of objection and intent to appeal," (app. 119), and his "objection to court rulings[,] request for reconsideration[,] and motion to correct errors." (App. 124). Mott continued to argue that he had "adequately pleaded the statutory requirements," and further argued that he should be allowed to file an amended complaint -- which he had attempted to do and which "cured the statutory deficiency." (App. 124, 128). The CCS states that such was "repetitive in nature" and that the trial court took no action thereon. (App. 3).

On March 4, 2010, Mott filed his notice of appeal.

DECISION

1. Complaint

Mott first argues that the trial court erred in dismissing his complaint because it was "adequately pleaded" to meet the statute and stated "a reasonable factual basis sufficient to justify personal liability causes of action." Mott's Br. At 7. We disagree.

With respect to negligence claims, prison officials are shielded from liability in their official capacity under the Indiana Tort Claims Act. *Smith v. Indiana Dept. of Correction*, 871 N.E.2d 975, 986 (Ind. Ct. App. 2007) (citing Ind. Code § 34-13-3-1 *et seq.*) *trans. denied*, *cert. denied*. Thus, in order to bring a suit against an employee personally, the Act provides that the plaintiff 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.'" *Id.* (quoting I.C. § 34-13-3-5(c)). Further, the plaintiff's complaint "must contain a reasonable factual basis supporting the allegations."

Id. The purpose of the Act is to "ensure that public employees can exercise their independent judgment necessary to carry out their duties without threat of harassment by litigation or threats of litigation over the scope of their employment." *Id.* (quoting *Celebration Fireworks, Inc. v. Smith*, 727 N.E.2d 450, 452 (Ind. 2000); *see also Higgason v. State*, 789 N.E.2d 22, 30 (Ind. Ct. App. 2003). When the employee's conduct is "of the same general nature as that authorized, or incidental to the conduct authorized," it is "within the scope of employment." *Higgason*, 789 N.E.2d at 30.

Mott's brief argues that his original complaint "allege[d]" that Scott, "the official directly responsible for storing and safekeeping inmate property," failed to do so in the manner required by various ISP rules, and "lied and made false representations to cover up and conceal his improper, unauthorized conduct." Mott's Br. at 8, 9. We note that the language used in Mott's brief to characterize the allegations of his complaint is <u>not</u> found in the complaint itself. The appellate brief recasts his complaint in legal conclusions. Further, Mott appears to equate the alleged failure of "Defendants" to "comply with" rules as to inmate property with "acting unlawfully and maliciously." *Id.* at 9. However, he cites no authority for the proposition that the failure to follow a rule is an unlawful act, and an act done "maliciously" is an act undertaken "with the deliberate intent to injure the appellee." *May v. Anderson*, 14 Ind. App. 251, 42 N.E.2d 946, 947 (1896). More recently, we have noted that "[a] malicious act is [a]n intentional, wrongful act performed against another without legal justification or excuse." *Higgason*, 789 N.E.2d at 29, n.5 (quoting BLACK'S LAW DICTIONARY 969 (7th ed. 1999)).

Mott's complaint did not expressly allege any act by either Buss or Scott that was criminal, clearly outside the scope of his employment, malicious, willful and wanton, or calculated to benefit the employee personally. Nor did he provide a "reasonable factual basis" to support his argument that an alleged failure to comply with ISP rules as to the security of inmate property constituted a "malicious" act by Buss and/or Scott so as to subject them to personal liability for his alleged loss. I.C. § 34-13-3-5(c). Therefore, the trial court did not err when it granted the motion to dismiss for failure to satisfy the statute.

2. Other Arguments

Mott raises two additional arguments. First, he argues that the trial court abused its discretion when it sustained the defendants' objections to his discovery request. On December 16, 2009, Mott served on the defendants a request for production – seeking records of his trust account at ISP between April 1, 2006 and February 13, 20008; invoices for his commissary and canteen purchases between June 1, 2006, and December 1, 2007; all inventory forms for his personal property between March 1, 2006, and February 1, 2008; all ISP personal property disposition forms as to Mott between March 1, 2006, and May 30, 2008; any records as to the alleged July 2, 2007 disposition of a boombox and cassette tapes belonging to Mott; and the full name of "B. Scott." (App. 62). On January 19, 2010, the defendants filed an objection to the discovery request.[1] By

[1] The small claims rule as to discovery provides as follows:

> Discovery may be had in a manner generally pursuant to the rules governing any other civil action, but only upon the approval of the court and under such limitations as may be specified. The court should grant discovery only upon notice and good cause shown and should limit such action to the necessities of the case.

the time this objection was filed, however, the trial court had already granted the defendants' earlier motion to dismiss and entered an order of dismissal. Having found that the trial court did not err when it dismissed Mott's complaint, we need not reach his argument that the trial court erred when it subsequently denied his requested discovery.

Mott also argues that the trial court erred when it did not grant his November 23, 2009, request for the appointment of counsel. On November 30, 2009, the trial court denied the request "for the reason that the subject matter of this litigation is not legally or factually complex and is readily amenable to lay presentation, as is the purpose of small claims courts." (App. 57). His brief cites no authority for his argument of trial court error, but simply cites to Indiana Code section 34-10-1-2. The statute provides that if the trial court determines that a person does not have sufficient means to prosecute an action, it "may, under exceptional circumstances, assign an attorney to . . . prosecute the cause," in which case the

> factors that a court may consider . . . include . . . :
> (1) the likelihood of the applicant prevailing on the merits of the applicant's claim . . . ; and
> (2) the applicant's ability to investigate and present the applicant's claims or defenses without an attorney, given the type and complexity of the facts and legal action.

I.C. § 34-10-1-2(b) and (c) (emphasis added).

The trial court found that Mott's claim was "not legally or factually complex," and "readily amenable to lay presentation." (App. 57). Mott has failed to persuade us that

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Ind. Small Claims Rule 6.

because he failed to frame the alleged noncompliance with prison rules so as to constitute action by Buss and Scott that subjects them to personal liability, this is a legally complex matter rather than one in which there can be no such liability. Therefore, we find no error in the trial court's denial of his request for counsel.

Affirmed.

BRADFORD, J., and BROWN, J., concur.