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APPELLANT PRO SE:

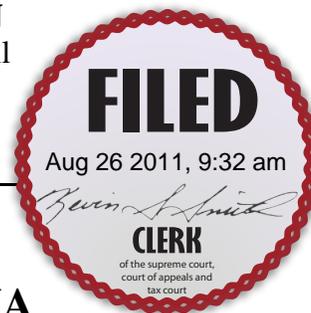
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**IN THE
COURT OF APPEALS OF INDIANA**

ERIC D. SMITH,)

Appellant-Plaintiff,)

vs.)

D. PATTON, SCOTT FITCH, LARRY)
BYNUM, CORRECTIONAL MEDICAL)
SERVICES,)

Appellees-Defendants.)

No. 33A01-1012-PL-681

APPEAL FROM THE HENRY SUPERIOR COURT
The Honorable Terry Snow, Special Judge
Cause No. 33D01-0810-PL-28

August 26, 2011

MEMORANDUM DECISION - NOT FOR PUBLICATION

BRADFORD, Judge

On appeal, Appellant-Plaintiff Eric D. Smith contends that the trial court erred in granting summary judgment in favor of Appellees-Defendants D. Patton, Scott Fitch, Larry Bynum (collectively, “Patton Appellees”), and Correctional Medical Services, Inc. Smith also contends that the trial court abused its discretion in denying him the appointment of counsel. We affirm.

FACTS AND PROCEDURAL HISTORY

Smith is an inmate who was, at all times relevant to the instant appeal, incarcerated in the Indiana Department of Correction (“DOC”). The Patton Appellees are officials at the New Castle Correctional Facility where Smith was previously incarcerated. Correctional Medical Services is a private company that contracts with DOC to provide medical services to inmates with Indiana prisons.

In early August 2008, Smith fractured his ankle while incarcerated in an Indiana prison facility. Since that time, Smith has submitted numerous requests for healthcare relating to his fractured ankle. The medical staff serving the facility responded to these requests. Smith also made numerous requests for healthcare beginning on October 23, 2008, for an infected, ingrown toenail. Again, the medical staff serving the facility responded to these requests.

At one point, Smith was scheduled for what was determined to be a necessary surgical procedure on his ankle. This procedure was later canceled after the orthopedist discovered that the originally scheduled procedure was not necessary and that Smith should have instead

been scheduled for an elective procedure to help alleviate ongoing pain. The elective procedure was not immediately scheduled because Smith did not complain of any pain in his ankle between February 2009 and June 2009. At some point after June of 2009, Smith again began complaining of ankle pain. Smith's ankle was reevaluated and it was determined that the ankle required surgery. On January 29, 2010, Smith had surgery on his ankle.

On October 27, 2008, the trial court received a complaint and *pro se* appearance from Smith alleging that the Patton Appellees violated the Eighth Amendment and 42 U.S.C. § 1983 by "being deliberately indifferent to [his] health and safety." Appellant's App. p. 53. In this complaint, Smith alleged that the Patton Appellees denied him access to medical care. Smith's complaint against the Patton Appellees was not officially filed with the trial court at this time because Smith failed to pay the filing fee. On June 29, 2009, Smith's complaint against the Patton Appellees was filed after Smith paid the filing fee. Smith filed numerous correspondences and motions relating to his complaint with the trial court between October 27, 2008, and June 29, 2009.

On June 10, 2009, Smith filed a complaint in the Marion Superior Court alleging that Correctional Medical Services violated the Eighth Amendment and 42 U.S.C. § 1983 by "denying and delaying [medical] treatment without any legitimate reason, causing [him] pain and suffering." Appellant's App. p. 42. In this complaint, Smith alleged that Correctional Medical Services delayed the surgery on his ankle for no legitimate reason. On December 9, 2009, Correctional Medical Services and the Patton Appellees filed motions to consolidate the Marion County action with the action filed in the trial court, arguing that the cases should

be consolidated because both cases involve common questions of law and “arise from the same facts and circumstances.” Appellant’s App. p. 83. The trial court issued an order consolidating the two cases on December 12, 2009.

Smith continued to file numerous motions with the trial court regarding the instant action both prior to and following consolidation. Correctional Medical Services filed a motion for summary judgment on May 10, 2010, and the Patton Appellees filed a motion for summary judgment on September 20, 2010. The trial court conducted a hearing on Correctional Medical Services’s and the Patton Appellees’ motions on November 30, 2010. Smith was scheduled to participate telephonically, but refused to do so. Smith did not respond to the Patton Appellees’ motion for summary judgment until December 9, 2010, and did not respond to Correctional Medical Services’s motion for summary judgment at all. The trial court granted Correctional Medical Services’s and the Patton Appellees’ motions on December 9, 2010.¹ This appeal follows.

DISCUSSION AND DECISION

I. Whether the Trial Court Erred in Granting Summary Judgment in Favor of the Patton Appellees and Correctional Medical Services

Smith contends that the trial court erred in granting summary judgment in favor of the Patton Appellees and Correctional Medical Services. The purpose of summary judgment is to end litigation about which there can be no factual dispute and which may be determined as a matter of law. *Shelter Ins. Co. v. Woolems*, 759 N.E.2d 1151, 1153 (Ind. Ct. App. 2001),

¹ It is unclear from the record whether the trial court issued its order granting the Patton Appellees’ motion for summary judgment prior to or after receiving Smith’s response to said motion.

trans. denied. Summary judgment is appropriate where the evidence shows that there is no genuine issue of material fact and that the moving party is entitled to judgment as a matter of law. *Colonial Penn Ins. Co. v. Guzorek*, 690 N.E.2d 664, 667 (Ind. 1997). All designated evidence must be construed liberally and any doubt resolved in favor of the non-moving party. *Woolems*, 759 N.E.2d at 1153. Summary judgment is inappropriate where material facts conflict or undisputed facts lead to conflicting material inferences. *Guzorek*, 690 N.E.2d at 667. Summary judgment may not be used as a procedural device to avoid a trial on claims that are perceived to be weak. *Id.*

We review a summary judgment order on appeal *de novo* and must determine whether the designated evidence before the trial court presents a genuine issue of material fact and whether the moving party is entitled to judgment as a matter of law. *Bules v. Marshall Cnty.*, 920 N.E.2d 247, 250 (Ind. 2010). Although the nonmoving party has the burden of demonstrating that the grant of summary judgment was erroneous, we carefully assess the trial court's decision to ensure that the nonmovant was not improperly denied its day in court. *McSwane v. Bloomington Hosp. and Healthcare Sys.*, 916 N.E.2d 906, 909-10 (Ind. 2009) (quotation omitted); *Guzorek*, 690 N.E.2d at 667. We may not reverse the entry of summary judgment on the ground that a genuine issue of material fact exists unless the material fact and the evidence relevant thereto were designated specifically to the trial court. *Woolems*, 759 N.E.2d at 1154. Furthermore, we will sustain the trial court's decision to grant a motion for summary judgment if it is sustainable by any theory or basis found in the record. *Id.*

On appeal, Smith claims that the trial court erred in granting summary judgment in

favor of the Patton Appellees and Correctional Medical Services for the following reasons: (1) the trial court lacked jurisdiction over the consolidated case; (2) the trial court failed to rule on pending motions; (3) the evidence showed that he did not intentionally miss the November 30, 2010 telephonic hearing; and (4) he should have been granted leave to file an amended complaint. These claims, however, were not raised below and are raised by Smith for the first time on appeal. The record demonstrates that Smith responded to the Patton Appellees' motion for summary judgment but did not argue that summary judgment was improper for any of the above-stated reasons. Moreover, Smith did not respond to Correctional Medical Services's motion for summary judgment at all. It is well-settled that issues not raised before the trial court on summary judgment cannot be argued for the first time on appeal and are waived. *Dunaway v. Allstate Ins. Co.*, 813 N.E.2d 376, 387 (Ind. Ct. App. 2004); *Poulard v. Lauth*, 793 N.E.2d 1120, 1123 (Ind. Ct. App. 2003). Accordingly, Smith has waived the above-stated arguments on appeal. *See Poulard*, 793 N.E.2d at 1123.

II. Whether the Trial Court Abused its Discretion in Denying Smith's Request for the Appointment of Counsel

Smith also contends that the trial court abused its discretion in denying his request for the appointment of counsel. An abuse of discretion involves a decision that is clearly against the logic and effect of the facts and circumstances before the court. *Gibson v. State*, 733 N.E.2d 945, 951 (Ind. Ct. App. 2000). In a civil action, a prisoner has no absolute right to counsel. *Sabo v. Sabo*, 812 N.E.2d 238, 242 (Ind. Ct. App. 2004); *Sholes v. Sholes*, 760 N.E.2d 156, 166 (Ind. 2001).

Rather, to establish whether to appoint counsel under Indiana Code Section 34-10-1-2, the trial court must determine whether the prisoner is indigent and without “sufficient means” to prosecute his or her action. *See [Sholes, 760 N.E.2d at 160]*. The trial court must further determine whether the prisoner has a colorable bona fide dispute over issues warranting the expense of counsel. *See id.* at 166.

Sabo, 812 N.E.2d at 242.

The determination of whether an applicant has “sufficient means” goes beyond a mere snapshot of the applicant’s financial status. [*Sholes, 760 N.E.2d at 161.*] Rather, the trial court must examine the applicant’s status in relation to the type of action before it. *Id.* Thus, if the action is of the type that is often handled by persons who are not indigent without the presence or assistance of counsel, the trial court may find that even an indigent applicant has “sufficient means” to proceed without appointed counsel. *Id.* In addition, there are not blanket categories of cases in which counsel should never be appointed. *Id.* Rather, the trial court should look to the particular issues presented in the action and make a determination of whether the indigent applicant requires appointed counsel. *Id.*

Maust v. Estate of Bair ex rel. Bair, 859 N.E.2d 779, 785 (Ind. Ct. App. 2007). The burden is on the pro se litigant to demonstrate that he meets the statutory requirements for the appointment of counsel. *Id.*

Smith argues that the trial court abused its discretion in denying his request for the appointment of counsel because issues at hand were too complex for a pro se litigant. However, in denying Smith’s request for the appointment of counsel in the instant matter, the trial court determined that Smith “has shown an unusual proficiency in filing lawsuits in a variety of situations and has demonstrated the ability to set forth his requests in a wide array of pleadings.” Appellant’s App. p. 332. The trial court further determined upon examination of the complaint that “the factual basis of the complaint does not appear to be complicated nor to require a wide range of witnesses or discovery.” Appellant’s App. p. 332.

Furthermore, considering the case as whole, the trial court determined that “the likelihood of the Plaintiff prevailing in the merits of his claim is slim.” Appellant’s App. p. 332.

Smith is no stranger to *pro se* civil litigation in Indiana. Smith has a history with this court wherein he has demonstrated that he is able to make complex, and sometimes successful, legal arguments before the court. In the instant matter, however, Smith has failed to demonstrate that the trial court’s determination that Smith has demonstrated an unusual proficiency for handling legal proceedings that his case was not likely to succeed on the merits was clearly against the logic and effect of the facts and circumstances before the court. Moreover, to the extent that Smith claims that the trial court abused its discretion in denying his request for the appointment of counsel because pre-consolidation, the Marion County Superior Court issued an order granting appointment of counsel, Smith has provided and we found no relevant authority stating that the trial court was bound by the decision of the prior court. As such, we cannot say that the trial court abused its discretion in this regard.

The judgment of the trial court is affirmed.

ROBB, C.J., and BARNES, J., concur.