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APPELLANT PRO SE:

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ATTORNEYS FOR APPELLEES:

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Attorney General of Indiana

**ELIZABETH ROGERS**  
Deputy Attorney General  
Indianapolis, Indiana

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**IN THE  
COURT OF APPEALS OF INDIANA**

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ERIC D. SMITH, )

Appellant-Plaintiff, )

vs. )

No. 49A02-0705-CV-430 )

INDIANA DEPARTMENT OF )  
CORRECTION, WESTVILLE CONTROL UNIT, )  
CORRECTIONAL LIEUTENANT BROOKS,<sup>1</sup> )  
CORRECTIONAL OFFICER JASON JACOB, )  
CORRECTIONAL OFFICER MARTY SEXTON, )  
and COUNSELOR STEVE EULER, )

Appellees-Defendants. )

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APPEAL FROM THE MARION SUPERIOR COURT

The Honorable Cynthia Ayers, Judge

Cause No. 49D02-0509-CT-35876

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<sup>1</sup> Lieutenant Brooks's first name is not revealed by the record on appeal.

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December 26, 2007

**MEMORANDUM DECISION – NOT FOR PUBLICATION**

**BAKER, Chief Judge**

Appellant-plaintiff Eric D. Smith appeals the trial court's orders entering summary judgment in favor of appellees-defendants Indiana Department of Correction, Westville Control Unit, Correctional Lieutenant Brooks, Correctional Officer Jason Jacob, Correctional Officer Marty Sexton, and Counselor Steve Euler (collectively, the DOC) on Smith's complaint against the DOC, denying his motion for appointment of an attorney, and denying his motion to amend the complaint. Finding no error, we affirm the judgment of the trial court.

FACTS

On September 13, 2005, Smith filed a complaint against the DOC, alleging that on February 23, 2005, Euler completed an unwarranted conduct report against Smith for abuse of mail to cause Smith harm and to retaliate against him for the multiple grievances and tort claims he had filed in the past. Smith alleged that the abuse of mail regulation was unconstitutionally vague and denied him due process and that the DOC failed to provide him with an impartial hearing on the allegation. Additionally, Smith alleged that on March 1, 2005, he was beaten by Sexton, Jacob, and Brooks and suffered injuries as a result of the beating. The complaint includes claims for conspiracy to retaliate against

him, failure to protect him, use of excessive force, and failure to provide proper medical treatment.

On September 13, 2005, Smith filed a motion for the appointment of counsel. Over the subsequent months, he filed a copious number of motions covering many different topics, only a small number of which are relevant to this appeal. On November 9, 2005, the DOC filed a motion for partial judgment on the pleadings. On January 1, 2006, Smith renewed his motion for the appointment of counsel. On April 20, 2006, he sought leave to file an amended complaint. On June 5, 2006, Smith filed another motion for the appointment of counsel. The trial court denied Smith's motion to amend his complaint on September 25, 2006. On April 5, 2007, the trial court entered summary judgment in favor of the DOC on Smith's complaint and found Smith's request for an attorney to be moot, noting that, in any event, he was not entitled to the appointment of counsel. Smith now appeals.

## DISCUSSION AND DECISION

### I. Judgment in favor of the DOC

As we review the trial court's order granting summary judgment in the DOC's favor, we note that summary judgment is appropriate only if the pleadings and evidence considered by the trial court show that there is no genuine issue as to any material fact and that the moving party is entitled to judgment as a matter of law. Owens Corning Fiberglass Corp. v. Cobb, 754 N.E.2d 905, 909 (Ind. 2001); see also Ind. Trial Rule 56(C). On a motion for summary judgment, all doubts as to the existence of material issues of fact must be resolved against the moving party. Owens Corning, 754 N.E.2d at

909. Additionally, all facts and reasonable inferences from those facts are construed in favor of the nonmoving party. Id. If there is any doubt as to what conclusion a jury could reach, then summary judgment is improper. Id.

An appellate court faces the same issues that were before the trial court and follows the same process. Id. at 908. The party appealing from a summary judgment decision has the burden of persuading the court that the grant or denial of summary judgment was erroneous. Id. When a trial court grants summary judgment, we carefully scrutinize that determination to ensure that a party was not improperly prevented from having his or her day in court. Id.

To the extent that Smith's complaint contained allegations regarding the abuse of mail regulation and the DOC's treatment of the conduct report, he was not entitled to judicial review of the DOC's actions. See Zimmerman v. State, 750 N.E.2d 337, 338 (Ind. 2001) (holding that an inmate is not entitled to review or relief when he is seeking "judicial intervention in the disciplinary actions of the [DOC]").

To the extent that Smith has brought negligence or other tort claims against employees of the DOC, his action is precluded by the Indiana Tort Claims Act, which provides that government employees acting within the scope of their employment are immune from liability. Ind. Code § 34-13-3-5(b). Conduct is within the scope of employment if it is "of the same general nature as that authorized, or incidental to the conduct authorized." Celebration Fireworks, Inc. v. Smith, 727 N.E.2d 450, 452 (Ind. 2000). To bring a suit against a government employee as a individual, the plaintiff must allege that an act or omission of the employee caused a loss and was "(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." I.C. §34-13-3-5(c). The complaint must contain "a reasonable factual basis supporting the allegations." Higgason v. State, 789 N.E.2d 22, 29-30 (Ind. Ct. App. 2003).

Here, the trial court found that Smith's complaint failed to contain a reasonable factual basis supporting his allegations of tortious behavior. With respect to Euler's decision to issue a conduct report for abuse of mail, while Smith alleges that Euler's conduct was malicious, he in no way makes any factual allegations to support that assertion. He also contends that Sexton and Jacob acted with malicious intent when they conducted the hearing on the abuse of mail hearing, but includes no factual basis in support of that allegation. Finally, although Smith contends that Sexton and Jacob used excessive force during a March 1, 2005, incident, he acknowledges that prior to the use of force, he had refused to walk back to his cell, cursed at Sexton and Jacob, and resisted the orders of Sexton, Jacob, and Brooks. Appellant's App. p. 34-36. Under these circumstances, Smith has failed to provide a factual basis for his allegation that these individuals were not acting within the scope of their duties. Thus, the trial court properly concluded that the Indiana Tort Claims Act prevented it from assuming personal jurisdiction over these defendants.

To the extent that Smith is seeking damages for alleged violations of the Indiana Constitution, his claims must fail. Even if we accept for argument's sake that it is possible that a violation of one's state constitutional rights gives rise to a private action for damages, our Supreme Court has held that the civil damages remedy is limited by,

among other things, the Indiana Tort Claims Act. Cantrell v. Morris, 849 N.E.2d 488, 507 (Ind. 2006). Thus, the individual official being sued is entitled to immunity and indemnity to the extent provided by the Act. Id. Inasmuch as we have already found that the Tort Claims Act precludes Smith's claims, he is not entitled to damages for alleged violations of his rights under the Indiana Constitution.

Finally, Smith alleges that the DOC's regulations violated Article 1, sections 9, 11, 12, 15, 16, and 23 of the Indiana Constitution. His brief includes approximately one-half of a page of text in support of this argument relating to no less than six sections of the constitution. Under these circumstances, he has waived these arguments by wholly failing to develop or support them. See Diaz v. State, 753 N.E.2d 724, 728 n.4 (Ind. Ct. App. 2001) (holding that a party waives an issue on appeal if the party failed to develop a cogent argument or provide adequate citation to authority and the record); Ind. App. Rule 46(A)(8)(a). Ultimately, therefore, we find that the trial court properly granted summary judgment in the DOC's favor on Smith's complaint.

## II. Other Motions

Smith also argues that the trial court erroneously denied his request for appointment of counsel. Indiana Code section 34-10-1-2 provides, in relevant part, as follows:

- (b) 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:
  - (1) shall admit the applicant to prosecute or defend as an indigent person; and

- (2) may, under exceptional circumstances, assign an attorney to defend or prosecute the cause.
- (c) The factors that a court may consider under subsection (b)(2) include the following:
- (1) The likelihood of the applicant prevailing on the merits of the applicant's claim or defense.
  - (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 issues in the action.
- (d) The court shall deny an application made under section 1 of this chapter if the court determines any of the following:
- (1) The applicant failed to make a diligent effort to obtain an attorney before filing the application.
  - (2) The applicant is unlikely to prevail on the applicant's claim or defense.

(Emphases added). Here, Smith was indigent and appears to have made some unsuccessful efforts to retain counsel. We have already concluded herein, however, that the trial court properly entered judgment in favor of the DOC on Smith's complaint. Thus, Smith was unlikely to, and indeed did not, prevail on his claims. Under these circumstances, the trial court was required to deny Smith's request for appointment of counsel.

Finally, Smith argues that the trial court erroneously denied his motion to amend his complaint. The trial court retains broad discretion in granting or denying amendments to pleadings, and we will reverse only upon a showing that the trial court abused that discretion. MAPCO Coal, Inc. v. Godwin, 786 N.E.2d 769, 777 (Ind. Ct. App. 2003). In determining whether the trial court abused its discretion, we examine a number of factors,

including the futility of the amendment. Palacios v. Kline, 566 N.E.2d 573, 575 (Ind. Ct. App. 1991). In his amended complaint, Smith clarified his legal claim, added defendants, and added federal claims. He has failed to argue on appeal that his federal claims are meritorious or that the clarifications and added defendants correct the deficiencies in the complaint that we have already described herein.<sup>2</sup> Under these circumstances, we find that the trial court did not abuse its discretion in denying Smith's motion to amend his complaint because the amendment would have been futile.

The judgment of the trial court is affirmed.

ROBB, J., and MATHIAS, J., concur.

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<sup>2</sup> To the extent that Smith draws attention to his status as a pro se litigant in support of the argument that he should have been permitted to amend his complaint, we direct his attention to the well-established rule that a person proceeding pro se is held to the same standard as are licensed attorneys. Goossens v. Goossens, 829 N.E.2d 36, 43 (Ind. Ct. App. 2005).