APPELLANT PRO SE:

JAMES H. HIGGASON, JR.
Westville, Indiana

IN THE
COURT OF APPEALS OF INDIANA

JAMES H. HIGGASON, JR.,	)	
	)	
Appellant-Defendant,	)	
	)	
vs.	)	No. 77A01-0512-CV-583
	)	
INDIANA DEPARTMENT OF CORRECTION, et al.,	)	
	)	
	)	
Appellee.	)	

APPEAL FROM THE SULLIVAN CIRCUIT COURT
The Honorable P. J. Pierson, Judge
The Honorable Ann Smith Mischler, Magistrate
Cause No. 77C01-0509-PL-298

November 2, 2006

MEMORANDUM DECISION - NOT FOR PUBLICATION

SULLIVAN, Judge

Appellant, James Higgason, Jr., challenges the trial court's removal of his complaint from the active docket following its determination pursuant to Indiana Code § 34-58-1-2 (Burns Code Ed. Supp. 2006) that his complaint could not proceed because it was frivolous and did not state a claim upon which relief could be granted.

We affirm.

On September 9, 2005, Higgason filed a twenty-eight-page complaint in the Sullivan Circuit Court seeking damages for alleged violations of his constitutional rights as they relate to his access to courts and deprivation of his "state created entitlement" to watch "electronic entertainment," i.e. television. Appendix at 147a, 126a. Contemporaneously therewith, Higgason filed a Motion to Recuse, citing Indiana Trial Rule 76, in which he requested that seven judicial officers whom he specifically identified recuse themselves from presiding over his cause of action. On September 13, 2005, the trial court, pursuant to Indiana Code § 34-58-2-1 (Burns Code Ed. Supp. 2006),[1] dismissed Higgason's complaint with prejudice. Higgason filed a motion to correct error, which the trial court granted in an order dated November 8, 2005, thereby reinstating Higgason's complaint to the active docket. In this same order, the trial court denied Higgason's motion to recuse. The trial court then determined, pursuant to I.C. § 34-58-1-2, that Higgason's civil complaint could not proceed because his claims were

[1] This statute provides, "If an offender has filed at least three (3) civil actions in which a state court has dismissed the action or a claim under IC 34-58-1-2, the offender may not file a new complaint or petition unless a court determines that the offender is in immediate danger of serious bodily injury (as defined in IC 35-41-1-25)."

frivolous and/or did not state a claim upon which relief could be granted. Thereafter, Higgason filed the instant appeal.

The Attorney General filed a "Notice of Non-Involvement" in the appeal, and for that reason no brief was filed on behalf of the Department of Correction or other defendant appellees.

Upon appeal, Higgason argues that the trial court was without jurisdiction to enter the November 8 order dismissing his complaint. And, even if the trial court had the authority to review his complaint and take action pursuant to I.C. § 34-58-1-2, Higgason argues that the trial court abused its discretion in doing so because he asserts that his complaint was not frivolous, that there is an arguable basis in the law for his claims, and that he did state claims upon which relief can be granted.[2]

We first consider Higgason's claim that the trial court was without jurisdiction to take any action other than to grant his "motion to recuse." As noted above, Higgason filed contemporaneously with his complaint a "motion to recuse"[3] in which he requested that seven identified judicial officers be "recused" from presiding over his cause of action. In his motion, Higgason cited Indiana Trial Rule 76 as authority for such request, and in his appellant's brief, Higgason refers to his "motion to recuse" as a motion for

[2] We further note that throughout his eighty-three-page appellant's brief, Higgason refers at length to other alleged incidents and other alleged violations of his constitutional rights, none of which pertain to the two specific issues presented in his complaint. We will therefore not address any of these other alleged incidents.

[3] We note that the Indiana Rules of Trial Procedure do not specifically provide for a "motion to recuse."

change of judge which is governed by Rule 76.[4] Higgason is correct in that when a timely and proper motion for change of judge is filed, the trial court is divested of jurisdiction to take further action except to grant the change of judge. See Harper v. Boyce, 809 N.E.2d 344, 346 (Ind. Ct. App. 2004).

Here, regardless of the title of the motion and the language used, it is apparent that Higgason is attempting to eliminate any possibility that any one of the seven judicial officers he identified would preside over his cause. Higgason's shotgun approach, however, is too speculative to warrant a determination upon the merits. Indeed, Higgason filed his "motion to recuse" before his cause was assigned to any particular judicial officer. Moreover, we note that Higgason filed his complaint in the Sullivan Circuit Court. Superior Court Judge Thomas E. Johnson and Magistrate Ann Smith Mischler, both of whom Higgason referenced in his "motion to recuse," are, as near as we can determine, the only two judicial officers, other than Circuit Court Judge P.J. Pierson, eligible to serve in Sullivan County. Of the remaining judicial officers identified by Higgason, two judicial officers serve in Vigo County, one serves in Clay County, and two are not listed as judicial officers.

Notwithstanding Higgason's attempt to peremptorily strike certain judicial officers from presiding over his cause of action, we conclude that the denial of Higgason's

[4] Trial Rule 76 provides in pertinent part:
"(B) In civil actions, where a change may be taken from the judge, such change shall be granted upon the filing of an unverified application or motion without specifically stating the ground therefor by a party or his attorney. Provided, however, a party shall be entitled to only one (1) change from the judge."

motion to recuse was appropriate. We recognize that Magistrate Mischler, whom Higgason sought to preclude from presiding over his cause, signed the November 8 order on the signature line "SO RECOMMENDED . . . ." P.J. Pierson, Judge of the Sullivan Circuit Court, however, signed the official order by signing on the signature line "SO ORDERED . . . ." Higgason did not name Judge Pierson in his "motion to recuse." We therefore conclude that Judge Pierson, having not been so named, had jurisdiction to preside over Higgason's cause.

Having concluded that the trial court was not without jurisdiction, we now consider whether the trial court's removal of Higgason's complaint from the active docket pursuant to I.C. § 34-58-1-2 was proper. We begin by noting that Higgason is no stranger to the trial and appellate processes. This court has previously acknowledged that Higgason has generated a tremendous volume of litigation during his incarceration. See, e.g., Higgason v. Lemmon, 818 N.E.2d 500, 504 (Ind. Ct. App. 2004), trans. denied. Indeed, Higgason admits and takes pride in the fact that he has generated a "prolific amount of litigation" while incarcerated, specifically listing 117 actions which he has instituted during his thirty-one years of confinement.[5]

"In an effort to address [the] unwarranted drain on the judicial system and constant harassment of the same few defendants," this court has imposed screening mechanisms aimed at "curtailing frivolous lawsuits" filed by Higgason and other "excessively litigious prisoners." Higgason, 818 N.E.2d at 504-05. See also, Parks v. State, 789

[5] Higgason's list of the causes of action he has filed is included in a document which Higgason filed with the trial court to show compliance with Indiana Code § 34-13-7-1 (Burns Code Ed. Supp. 2006).

N.E.2d 40, 49-50 (Ind. Ct. App. 2003), trans. denied. Apparently in response to the screening mechanisms imposed by this court, the Indiana General Assembly enacted Indiana Code § 34-13-7-1 (Burns Code Ed. Supp. 2006), which codified the additional filing requirements with which an offender must comply before filing a civil rights or tort claims action against a public employee or government entity.[6] We further note that contemporaneously therewith, the General Assembly enacted Indiana Code §§ 34-58-1-1 through 4 (Burns Code Ed. Supp. 2006). It is pursuant to these latter statutes that the trial court exercised its authority to remove Higgason's complaint from the active docket.[7]

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[6] Specifically, an offender must submit to the trial court, before filing such action:

"(1) a copy of the complaint the offender wishes to file;

(2) a list of all cases previously filed by the offender involving the same, similar, or related cause of actions; and

(3) a copy of all relevant documents pertaining to the ultimate disposition of each previous case filed by the offender against any of the same defendants in a state or federal court. The relevant documents include:

(A) the complaint;

(B) any motions to dismiss or motions for summary judgment filed by the defendants in the actions;

(C) the state or federal court order announcing disposition of the case; and

(D) any opinions issued in the case by any appellate court."

Subsection (c) of this statute dictates that "[i]f the trial court determines that the complaint is frivolous, malicious, or otherwise utterly without merit, or fails to state a claim upon which relief may be granted, the court shall dismiss the complaint."

[7] Upon appeal, Higgason also challenges the constitutionality of I.C. § 34-13-7-1 and I.C. §§ 34-58-1-1 through 4. In his nearly eighteen pages dedicated to this issue, Higgason baldly accuses the Indiana General Assembly and the "complete Indiana Judiciary" of conspiring to suppress and/or quash all prisoner litigation. Appellant's Brief at 65. Higgason even accuses the Chief Judge of this court of "screening his complaints" and "arbitrarily determining which of his appeals will be permitted to proceed." Appellant's Brief at 81. Outside of chastising the state legislature and the judiciary of this state for participating in what Higgason perceives to be a conspiracy against his "right" to be "a prolific pro se prison litigant," Higgason presents no cognizable argument regarding the constitutionality of the statutes enacted to stop the flood of frivolous litigation by "excessively litigious prisoners." Higgason has therefore waived review of this issue. See Ind. Appellate Rule 46(A)(8)(a).

Indiana Code § 34-58-1-1 provides that "[u]pon receipt of a complaint or petition filed by an offender, the court shall docket the case and take no further action until the court has conducted the review required by section 2 of this chapter." Under section 2, a court "shall review a complaint or petition filed by an offender and shall determine if the claim may proceed. A claim may not proceed if the court determines that the claim: (1) is frivolous; (2) is not a claim upon which relief may be granted; or (3) seeks monetary relief from a defendant who is immune from liability for such relief." A frivolous claim is a claim that is made primarily to harass a person or a claim that lacks an arguable basis in either law or fact. See I.C. § 34-58-1-2(b). Section 1 speaks to the duty of the trial court to review any complaint or petition filed by an offender under the standard provided in section 2.

In the instant action, Higgason's first claim is that he was denied access to court concerning the matter of Higgason v. Barnett, 77A04-0208-CV-371 (Ind. Ct. App. Apr. 2, 2003). The gist of Higgason's argument in this regard, as least as best as we can discern, is that his petition for transfer in such cause was improperly disposed of by certain prison officials. The trial court found that Higgason admittedly "has no direct knowledge that the Defendants disposed of his pleading but bases his allegation on a 'high probability' that either Defendant Ducharme or Defendant Stogsdill disposed of his pleading." Appellant's Brief, Appendix B at 2a. Having also reviewed Higgason's complaint and the factual basis for his claim and attendant argument which he provided in his Appellant's Brief, we too conclude that Higgason's claim in this regard is premised upon Higgason's many suppositions and baseless allegations, which, even if taken as

true, do not present a claim for denial of access to court. Higgason's nebulous argument and his repetitious ramblings about "an ongoing, systematic campaign of harassment" directed toward him do not support his claim for a violation of his right of access to court. We therefore hold that the trial court properly determined that Higgason's claim in this regard could not proceed.

Higgason's second claim is that he had a state-created entitlement to watch television in the privacy of his cell because he claims to have accumulated ninety days of good behavior. Higgason claims that deprivation of television privileges from June 16, 2003 through September 17, 2003 constituted a violation of his due process rights. The trial court reviewed Higgason's civil complaint and determined as follows:

> "[Higgason] has failed to cite any specific Indiana or Federal Case Law evidencing that inmates have a constitutional right to watch television while incarcerated. According to [Higgason's] CIVIL COMPLAINT, it appears the DOC affords inmates the privilege of watching television as a means to induce good behavior. [Higgason's] specific allegations in his Second Claims do not reference any specific constitutional violation. Thus, the Court finds that watching television is a privilege not a constitutional right, and as such, [Higgason] would not be entitled to damages." Appellant's Brief, Appendix B at 2a-3a.

We agree with the trial court that Higgason's claim for damages resulting from what he considers a "state created entitlement" to watch television could not proceed because such claim was frivolous in that it had no arguable basis in law and did not state a claim upon which relief could be granted. Pursuant to the authority set forth in I.C. § 34-58-1-2, the trial court could not permit Higgason's claim in this regard to proceed. We

therefore conclude that the trial court's removal of Higgason's complaint from the active docket was proper.[8]

The judgment of the trial court is affirmed.

BAKER, J., and MAY, J., concur.

[8] The trial court also provided as justification for removal of Higgason's complaint from the active docket (1) that Higgason failed to comply with the conditions imposed by this court in Higgason v. Lemmon, 818 N.E.2d 500, 505 (Ind. Ct. App. 2004); (2) that Higgason had failed to provide proof that he had exhausted his administrative remedies before filing the instant cause of action; (3) that Higgason had failed to comply with provisions of the Tort Claims Act requiring submission of his Notice of Tort Claim with the filing of his complaint; and (4) that Higgason failed to allege facts sufficient to pursue a cause of action against the named employees in accordance with Indiana Code § 34-13-3-5(c) (Burns Code Ed. Repl. 1998). Higgason challenges each of these determinations by the trial court. Having found that the trial court's removal of Higgason's complaint from the active docket was supported by the trial court's determination that his claims were frivolous and/or failed to state a claim upon which relief could be granted, we need not address the other determinations made by the trial court.