MEMORANDUM DECISION

APPELLANT PRO SE

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IN THE COURT OF APPEALS OF INDIANA

Kevin Martin,
Appellant-Defendant,

v.

Richard Brown,
Appellee-Plaintiff.

July 29, 2021

Court of Appeals Case No. 21A-CT-85

Appeal from the Sullivan Superior Court

The Honorable Hugh R. Hunt, Judge

Trial Court Cause No. 77D01-1807-CT-362

Tavitas, Judge.

Case Summary

[1] Inmate Kevin Martin filed a complaint in the Sullivan Superior Court alleging an array of claims against nine Indiana Department of Corrections officials and employees. After the defendants filed their answer, Martin sought leave to file an amended complaint, which the trial court denied. The defendants moved for summary judgment, which the trial court granted. Martin then filed this appeal pro se. We find that the trial court did not abuse its discretion in denying Martin's motion for leave to file an amended complaint. Moreover, Martin failed to establish that there are genuine issues of material fact, and, thus, the trial court properly granted summary judgment to the defendants. We affirm.

Issues

[2] Martin raises two issues, which we restate as:

I. Whether the trial court erred in denying Martin's motion for leave to file an amended complaint.

II. Whether the trial court erred in granting summary judgment in favor of the defendants.

Facts

[3] Martin was, during the pertinent times, an inmate at the Wabash Correctional Facility ("Wabash") in Sullivan County. The defendants, all employees of Wabash, are as follows: Theresa Littlejohn, Richard Brown, Christopher

Nicholson, Randall Purcell, Eric Drada, David Gilstrap, Blake McDonald, Major Dusty Russell, and Sergeant Melinda Wilson.[1]

[4] On July 23, 2018, Martin filed a complaint wherein he alleged: (1) corrections officers broke Martin's fan in retaliation for Martin filing a grievance; (2) corrections officers engaged in a pattern of discrimination against Martin on the basis of Martin's race, as well as for retaliation for Martin's legitimate exercise of his First Amendment right (for filing a grievance); (3) Wilson and Drada were "messing" with Martin's food as retaliation for some sort of battery incident involving McDonald;[2] and (4) Purcell directed racial slurs toward Martin and improperly confiscated Martin's papers, also as retaliation for Martin's previous grievance filing.[3] Appellee's App. Vol. II pp. 2-7.

[5] After the defendants filed their answer, Martin filed a motion for leave to amend the complaint, which the trial court denied on October 22, 2018. Discovery proceeded, and on November 25, 2020, the defendants filed a

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[1] Martin's complaint does not mention Gilstrap, McDonald, or Littlejohn, but does mention "Major Russell" and "Sgt. Wilson," neither of whom appear in the later proposed amended complaint. Summonses appear to have been issued to all nine defendants, all of whom are listed on the chronological case summary. Though we endeavor to ensure that we are fully apprised of the record, the record is not clear and reconstruction of the proceedings below is beyond the purview of this Court.

[2] The gist of this claim, though unclear, seems to be that Martin believes that corrections officers were putting bug spray in his food and that he suffered adverse medical effects as a result.

[3] The record does not specify which acts are alleged to have been retaliation for which grievances, further frustrating our ability to distill the issues of the case from the morass of materials contained in the record.

motion for summary judgment as to all claims. On December 28, 2020, the trial court granted the motion for summary judgment. This appeal followed.

Analysis

[6] As an initial matter, we note that Martin proceeds pro se, and we, therefore, reiterate that "a pro se litigant is held to the same standards as a trained attorney and is afforded no inherent leniency simply by virtue of being self-represented." *Zavodnik v. Harper*, 17 N.E.3d 259, 266 (Ind. 2014). "This means that pro se litigants are bound to follow the established rules of procedure and must be prepared to accept the consequences of their failure to do so." *Picket Fence Prop. Co. v. Davis*, 109 N.E.3d 1021, 1029 (Ind. Ct. App. 2018) (citing *Basic v. Amouri*, 58 N.E.3d 980, 983-84 (Ind. Ct. App. 2016)), *trans. denied*. Although we prefer to decide cases on their merits, arguments are waived where an appellant's noncompliance with the rules of appellate procedure is so substantial it impedes our appellate consideration of the errors. *Id.*

[7] Indiana Appellate Rule 46(A)(8)(a) requires that the argument section of a brief "contain the contentions of the appellant on the issues presented, supported by cogent reasoning. Each contention must be supported by citations to the authorities, statutes, and the Appendix or parts of the Record on Appeal relied on . . . ." We will not consider an assertion on appeal when there is no cogent argument supported by authority and there are no references to the record as required by the rules. *Id.* "'We will not become an advocate for a party or address arguments that are inappropriate or too poorly developed or expressed

to be understood.'" *Picket Fence*, 109 N.E.3d at 1029 (quoting *Basic*, 58 N.E.3d at 984).

I. Amended Complaint

[8] Martin contends that the trial court erred when it denied his motion for leave to file an amended complaint. Indiana Trial Rule 15(A) governs amendments to pleadings and provides as follows:

> A party may amend his pleading once as a matter of course at any time before a responsive pleading is served or, if the pleading is one to which no responsive pleading is permitted, and the action has not been placed upon the trial calendar, he may so amend it at any time within thirty [30] days after it is served. Otherwise a party may amend his pleading only by leave of court or by written consent of the adverse party; and leave shall be given when justice so requires. A party shall plead in response to an amended pleading within the time remaining for response to the original pleading or within twenty [20] days after service of the amended pleading, whichever period may be the longer, unless the court otherwise orders.

[9] "Amendments to pleadings are to be liberally allowed, but the trial court retains broad discretion in granting or denying amendments." *Miller v. Patel*, 160 N.E.3d 1111, 1115 (Ind. Ct. App. 2020) (citing *Hilliard v. Jacobs*, 927 N.E.2d 393, 398 (Ind. Ct. App. 2010), *trans. denied*). "We will reverse upon a showing of only an abuse of that discretion." *Id*.

> An abuse of discretion may occur if the trial court's decision is clearly against the logic and effect of the facts and circumstances before the court, or if the court has misinterpreted the law. *Fleming v. Int'l Pizza Supply Corp.*, 707 N.E.2d 1033, 1036 (Ind.

> Ct. App. 1999), *trans. denied*. We consider whether a trial court's ruling on a motion to amend is an abuse of discretion by evaluating a number of factors, including "undue delay, bad faith, or dilatory motive on the part of the movant, repeated failure to cure deficiency by amendment previously allowed, undue prejudice to the opposing party by virtue of the amendment, and futility of the amendment." *Palacios v. Kline*, 566 N.E.2d 573, 575 (Ind. Ct. App. 1991).

Hilliard, 927 N.E. 2d at 398.

[10] Because his arguments are not cogent, Martin has waived the claim that the trial court abused its discretion in denying his motion for leave to file an amended complaint. Furthermore, Martin fails to explain why justice required that his motion for leave to amend be granted. We reproduce a representative portion of Martin's argument on this point here:

> And also affidavit by William Jones state in relevant part fact that bring it conflict Circumstantial evidence may suffice to indicate that Brown the warden had knowledge of a violation when allegations are supported by corresponding evidence such as institutional appeals Form that martin first -8-14 amendment right was violation. This immunity is only waived if a claimant meet the requirement "to file a notice of tort claim with the governing body of the political with 180 days after the loss occurs. Martin meet this require and should with to trial.

Appellant's Br. pp. 17-18 (citations omitted) (errors in the original). This is not a cogent argument that the trial court abused its discretion when refusing to allow an amended complaint. Accordingly, the issue is waived, and we do not address it further. *See* Ind. Appellate Rule 46(A)(8); *Loomis v. Ameritech Corp.*,

764 N.E.2d 658, 668 (Ind. Ct. App. 2002) (holding that the failure to present a cogent argument waives the issue for appellate review), *trans. denied*.

II. Summary Judgment

[11] Martin further argues that the trial court erred when it granted summary judgment to the defendants. "When this Court reviews a grant or denial of a motion for summary judgment, we 'stand in the shoes of the trial court.'" *Burton v. Benner*, 140 N.E.3d 848, 851 (Ind. 2020) (quoting *Murray v. Indianapolis Public Schools*, 128 N.E.3d 450, 452 (Ind. 2019)). Summary judgment is appropriate "if the designated evidentiary matter shows that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law." *Murray*, 128 N.E.3d at 452; *see also* Ind. Trial Rule 56(C).

[12] The party moving for summary judgment bears the burden of making a prima facie showing that there is no genuine issue of material fact and that it is entitled to judgment as a matter of law. *Burton*, 140 N.E.3d at 851. The burden then shifts to the non-moving party to show the existence of a genuine issue. *Id*. On appellate review, we resolve "[a]ny doubt as to any facts or inferences to be drawn therefrom . . . in favor of the non-moving party." *Id*. We review the trial court's ruling on a motion for summary judgment de novo, and we take "care to ensure that no party is denied his day in court." *Schoettmer v. Wright*, 992 N.E.2d 702, 706 (Ind. 2013). "We limit our review to the materials designated at the trial level." *Gunderson v. State, Indiana Dep't of Nat. Res.*, 90 N.E.3d 1171, 1175 (Ind. 2018), *cert. denied*.

[13] Once more, Martin's arguments lack the requisite cogency and are, therefore, deemed waived. Nonetheless, we would find that summary judgment was appropriate, waiver notwithstanding. When the moving party meets its initial burden, it is not sufficient for the non-movant to rely only on its pleadings or on mere allegations therein. *See, e.g., Brown v. Buchmeier*, 994 N.E.2d 291, 295 (Ind. Ct. App. 2013) (citing *Crawford v. City of Muncie*, 655 N.E.2d 614, 619 (Ind. Ct. App. 1995)). Rather:

> When a motion for summary judgment is made and supported as provided in this rule, an adverse party may not rest upon the mere allegations or denials of his pleading, but his response, by affidavits or as otherwise provided in this rule, *must set forth specific facts showing that there is a genuine issue for trial*. If he does not so respond, summary judgment, if appropriate, shall be entered against him.

Ind. T.R. 56 (emphasis added).[4]

[14] Martin, at various points, references the First, Eighth, and Fourteenth Amendments to the United States Constitution. Martin's attempts to explain the nature of his Eighth or Fourteenth Amendment claims are so poorly asserted that we do not consider them further. *See* Ind. App. R. 46(A)(8) (requiring cogent argument). As for Martin's First Amendment claim, we can

[4] Martin himself points this out. Appellant's App. Vol. II pp. 38-39 (". . . but is required to offer evidence of specific fact[s] in the form of admissible discovery materials and/or affidavits . . . supporting and opposing affidavits must be made on Kevin Martin on personal knowledge and must establish the affiant[']s competency to testify on the matters stated") (errors in the original).

somewhat discern four claims in the original complaint: (1) corrections officers broke Martin's fan in retaliation for Martin filing a grievance; (2) corrections officers engaged in a pattern of discrimination against Martin on the basis of Martin's race, as well as for retaliation for Martin's legitimate exercise of his First Amendment right (for filing a grievance); (3) Wilson and Drada were "messing" with Martin's food, apparently as retaliation for some sort of battery incident involving McDonald; (4) Purcell directed racial slurs towards Martin and improperly confiscated Martin's papers, also as retaliation for Martin's previous grievance filing.[5] Appellee's App. Vol. II pp. 2-7.

[15] It is well settled that prisoners have a cause of action against correctional officers that retaliate for a prisoner's legitimate exercise of his First Amendment rights. *Medley v. Lemmon*, 994 N.E.2d 1177, 1189-90 (Ind. Ct. App. 2013) (citing *Franco v. Kelly*, 854 F.2d 584, 590 (2nd Cir. 1988); *Bridges v. Gilbert*, 557 F.3d 541, 546 (7th Cir. 2009); *Peterson v. Shanks*, 149 F.3d 1130, 1144 (10th Cir. 1998)). However:

> [I]n order to prevail on such a claim, a prisoner must show that: (1) he or she engaged in activity protected by the First Amendment; (2) he or she suffered a deprivation that would likely deter First Amendment activity in the future; and (3) the First Amendment activity was at least a motivating factor in the prison official's decision to take the retaliatory action. *Bridges*, 557 F.3d at 546. The third element implies that there must be a causal connection between the protected activity and the

[5] Martin's appellate brief references additional claims, but, as they were not raised below, we do not address them.

> deprivation or "adverse action" taken by a prison official. *See Dawes v. Walker*, 239 F.3d 489, 492 (2nd Cir. 2001), *overruled on other grounds by Swierkiewicz v. Sorema N.A.*, 534 U.S. 506, 122 S. Ct. 992, 152 L.Ed.2d 1 (2002); *Peterson*, 149 F.3d at 1144 (holding that a prisoner must prove "but for" retaliatory motive, disciplinary action would not have taken place).

Medley, 994 N.E.2d 1189-90.

[16] The defendants designated discovery documents contain the refutations of the correctional staff—who denied each of Martin's grievances—and the defendants, thereby, have carried their initial burden. Martin, in return, designated the internal prison grievance documents, copies of discovery documents, and an affidavit. We turn to whether Martin has designated evidence setting forth *specific facts* demonstrating the existence of genuine triable issues.

[17] The primary source of Martin's evidence appears in the form of an affidavit provided by Martin. Appellant's App. Vol. II pp. 22-42. Our Supreme Court has held that even a "perfunctory and self-serving" affidavit that specifically controverts the case of the opposing party may suffice to establish a genuine issue of material fact. *Hughley v. State*, 15 N.E.3d 1000, 1004 (Ind. 2014).

[18] There is a critical distinction between the affidavit in *Hughley* and Martin's affidavit here. The affidavit in *Hughley* memorialized *refutations* of allegations. Martin's affidavit merely repeats allegations from his complaint. Our Supreme Court surely did not intend *Hughley* to stand for the proposition that a plaintiff can simply convert the allegations of his pleading into affidavit form, without

any additional supporting evidence, and thereby automatically defeat a motion for summary judgment. Regardless of which party moves for summary judgement, the party that will ultimately carry the burden of proof at trial is situated differently from the party that will not. Mere denials from a defendant may suffice to defeat a summary judgment motion. Mere allegations from a plaintiff will not.

[19] Furthermore, this Court has held:

> Affidavits used for summary judgment purposes are evidential in nature. *Lee v. Schroeder* (1988), Ind. App., 529 N.E.2d 349, 352, *trans. denied*. Therefore, a court should disregard any inadmissible information contained in an affidavit. *Id*. Under Trial Rule 56(E), it is not necessary that the facts presented by affidavit be sufficient to support a verdict; rather, they need only be admissible as evidence. *Yang v. Stafford* (1987), Ind. App., 515 N.E.2d 1157, 1162, *trans. denied*.

Scott v. City of Seymour, 659 N.E.2d 585, 592 (Ind. Ct. App. 1995).

[20] "When an affiant presents a conclusion of fact, it must appear that the affiant had an opportunity to observe and did observe the matters about which he or she testifies." *Farley v. Hammond Sanitary Dist.*, 956 N.E.2d 76, 79 (Ind. Ct. App. 2011) (citing *Seymour*, 659 N.E.2d at 592), *trans. denied*. Opinions without facts are not enough, *Whitlock v. Steel Dynamics, Inc.*, 35 N.E.3d 265, 273 (Ind. Ct. App. 2015), *trans. denied*, and ". . . a court considering a motion for summary judgment should disregard inadmissible information contained in supporting or opposing affidavits. Further, the party offering the affidavit into

evidence bears the burden of establishing its admissibility." *City of Indianapolis v. Duffitt*, 929 N.E.2d 231, 239 (Ind. Ct. App. 2010) (citing *Price v. Freeland*, 832 N.E.2d 1036, 1039 (Ind. Ct. App. 2005); *Duncan v. Duncan*, 764 N.E.2d 763, 766 (Ind. Ct. App. 2002), *trans. denied*.)

[21] Martin's lengthy affidavit is not perfunctory, but it is meandering, repetitive, and largely incomprehensible. It contains long segments of legal argument and opinion, which we cannot consider as evidence. Martin's re-assertion of the claims raised in the complaint, in conclusory fashion, does not suffice as specific facts. We cannot consider Martin's speculation, or claims not based on his personal knowledge, to be sufficient. "Trial Rule 56(E) provides in part that supporting and opposing affidavits on summary judgment shall be made *on personal knowledge* and shall set forth such facts as would be admissible in evidence." *Seth v. Midland Funding, LLC*, 997 N.E.2d 1139, 1142 (Ind. Ct. App. 2013).

[22] We are able to discern only limited facts from Martin's affidavit: (1) Martin alleges that Gilstrap's actions were "motivated by evil"; (2) McDonald was "messing" with Martin's food and "turn[ed] off [Martin's] water 3 hour or 4"; (3) "McDonald messing with my food about 60 days straight mean martin are required to be serve food that is nutritious and prepared under clean conditions . . . meals cannot be denied as retaliation because McDonald put bug and spray bug spray on my food . . . ."; (4) "McDonald and other staff members checking all tray's before pass them out remove the top off to inspect . . . that give McDonald the change to do what he have to do to martin food? McDonald do

not work for Aramark so it not his job[.]"; (5) "every time martin refuse the tray's, I have inmate that heard McDonald make a statement that he be spray's bug spray's on my food is why I stop accept tray's?"; (6) Purcell allegedly used racial slurs against an inmate other than Martin; (7) numerous defendants "turn[ed] a blind eye to Martin['s] right been violation [sic]. . . ."; and (8) video tape, not in the record, would show that Martin's allegations about his food were accurate. Appellant's App. Vol. II pp. 24-27, 33 (errors in the original).

[23] We have often said—usually as a caution against over-kill in its use—that summary judgment is "'a lethal weapon.'" *Mundia v. Drendall L. Off., P.C.*, 77 N.E.3d 846, 853 (Ind. Ct. App. 2017) (quoting *Southport Little League v. Vaughan*, 734 N.E.2d 261, 269 (Ind. Ct. App. 2000), *trans. denied*), *trans. denied*. Thus, if a litigant possesses facts or evidence that support his claims sufficiently to survive a summary judgment, he *must* present them at the time he responds to the motion, or else lose his opportunities forever.

[24] Martin's unintelligible and piecemeal affidavit contains no personal knowledge of facts—admissible or otherwise—that could satisfy either the requirement that Martin suffered a deprivation that would likely deter First Amendment activity in the future or that the First Amendment activity was at least a motivating factor in the prison official's decision to take the alleged retaliatory action. "'Summary judgment is appropriate when the undisputed material evidence negates one element of a claim.'" *Schmidt v. Indiana Ins. Co.*, 45 N.E.3d 781, 785 (Ind. 2015) (quoting *Estate of Mintz v. Conn. Gen. Life Ins. Co.*, 905 N.E.2d 994, 998 (Ind. 2009)). No designated evidence or inferences therefrom, for

example, show that Martin's "First Amendment activity was at least a motivating factor in the prison official's decision to take the retaliatory action." *Medley*, 994 N.E.2d at 1190. "[M]ere speculation cannot create questions of fact." *Beatty v. Lafountaine*, 896 N.E.2d 16, 20 (Ind. Ct. App. 2008), *trans. denied*. Furthermore, Martin has failed to designate specific admissible evidence in support of his claims, including details such as dates and times. Accordingly, the trial court did not err in granting summary judgment to the defendants.

Conclusion

[25] Martin's claims are waived due to lack of cogency. Moreover, waiver notwithstanding, the trial court did not err in granting summary judgment to the defendants. We affirm.

[26] Affirmed.

Najam, J., and Pyle, J., concur.