

RENDERED: FEBRUARY 11, 2005; 2:00 p.m.
NOT TO BE PUBLISHED

Commonwealth Of Kentucky

Court of Appeals

NO. 2003-CA-002782-MR

LAWRENCE FROMAN; THOMAS WAYNE MITCHELL;
HANK MITCHELL; RANDALL BURKE; ROBERT
HICKS; LESTER CAUDILL; WILLIAM TRULOCK;
CLARK HICKS; JOHN DUNN; JAMES OLDHAM;
ROBERT JACKSON; GARY SMITH; LONNIE WOODALL;
AND KEITH MORGAN

APPELLANTS

v. APPEAL FROM OLDHAM CIRCUIT COURT
HONORABLE PAUL W. ROSENBLUM, JUDGE
ACTION NO. 03-CI-00650

VERTNER TAYLOR AND WILLIAM
SEABOLD

APPELLEES

OPINION
VACATING AND REMANDING

** ** *

BEFORE: COMBS, CHIEF JUDGE; BARBER, JUDGE; MILLER, SENIOR
JUDGE.¹

COMBS, CHIEF JUDGE: This is an appeal from an order entered by
the Oldham Circuit Court that dismissed an action against prison

¹ Senior Judge John D. Miller sitting as Special Judge by assignment of the
Chief Justice pursuant to Section 110(5)(b) of the Kentucky Constitution and
KRS 21.580.

officials and the Department of Corrections brought by eighteen inmates housed at Kentucky State Reformatory. We vacate and remand.

In a complaint filed October 8, 2003, the inmates alleged that prison officials and the Department of Corrections had subjected them to cruel and unusual punishment in violation of the Eighth and Fourteenth Amendments to the United States Constitution (and other constitutional and statutory provisions) by failing to provide them with adequate clothing; by failing to provide them with adequate medical treatment and supplies; by failing to protect them from violent inmates; and by failing to address deplorable conditions associated with over-crowding at the institution. They also alleged that they had been denied proper access to the courts.

On November 19, 2003, Thomas Mitchell, one of the original inmate-plaintiffs, filed an amended complaint indicating that he had been denied medically essential catheters for a period of approximately ten days. Therefore, he had no choice but to re-use a catheter repeatedly. As a result, Mitchell alleged that he had been rushed to a nearby hospital after a portion of that catheter splintered inside his bladder, causing pain and injury.

The defendants moved to dismiss the inmates' complaint and the amended complaint for failure to state a claim pursuant

to CR² 12.02(f). On December 1, 2003, the trial court granted the defendants' motion to dismiss and specifically rejected Mitchell's claim that the defendants had shown deliberate indifference to his need for medical supplies. The court concluded that the "delay in receiving medical supplies resulted from (Mitchell's) failure to fill out the appropriate request forms." The trial court also rejected the inmates' due process and equal protection claims, claims arising under the Kentucky Constitution, and claims arising under numerous state and federal statutes. This appeal followed.

Of various appellants, Mitchell alone has filed a brief with this Court.³ The appellees have not filed a brief in response. We are authorized by the provisions of CR 76.12(8)(c) to treat the appellees' failure to file a brief as a confession of error and to reverse the judgment summarily. Nevertheless, we have undertaken a review of the merits of the appeal. After carefully examining the record, we conclude that the trial court erred in dismissing Mitchell's action. Consequently, we vacate and remand for further proceedings.

In a motion filed with the court on November 25, 2003, Mitchell noted that the defendants had relied upon matters

² Kentucky Rules of Civil Procedure.

³ Before his brief was filed on February 6, 2004, Mitchell was transferred from Kentucky State Reformatory to Green River Correctional Complex in Central City, Kentucky.

outside the pleadings to support their motion to dismiss. Consequently, he argued that their motion should be treated as one for summary judgment and that he should be permitted an opportunity to present additional relevant material. We agree.

CR 12.02 provides, in pertinent part, as follows:

If, on a motion asserting the defense that the pleading fails to state a claim upon which relief can be granted, matters outside the pleading are presented to and not excluded by the court, the motion shall be treated as one for summary judgment and disposed of as provided in Rule 56, *and all parties shall be given reasonable opportunity to present all material made pertinent to such a motion by Rule 56.*

A matter outside the pleadings (information contained in the exhibit attached to the motion to dismiss) was presented to the trial court for its consideration. That information directly contradicted Mitchell's assertions that prison officials had failed -- with deliberate indifference -- to provide him with essential medical supplies. Consequently, we believe that submission of the extraneous material served to convert the defendants' motion to dismiss into a motion for summary judgment. Therefore, before the court entered an order dismissing his action, Mitchell was entitled to an opportunity to present facts to establish the existence of genuine issues of material fact with respect to his various claims.

We make no observation as to Mitchell's ultimate ability to defeat the defendants' motion for summary judgment on remand. Our holding is restricted to declaring that the defendants' motion should have been treated as one for summary judgment to be disposed of pursuant to the provisions of CR 56. Mitchell was entitled to sufficient notice of that fact and accordingly should have been afforded an opportunity to respond by developing evidence to establish the *prima facie* elements of his claims.

The order of the Oldham Circuit Court dismissing the action is vacated, and this matter is remanded for additional proceedings.

ALL CONCUR.

BRIEF FOR APPELLANT:

NO BRIEF FOR APPELLEE

Thomas Mitchell, *pro se*
Central City, Kentucky