

**Commonwealth Of Kentucky**  
**Court of Appeals**

NO. 2005-CA-000615-MR

JAMES LANG

APPELLANT

v. APPEAL FROM BELL CIRCUIT COURT  
HONORABLE JAMES BOWLING JR., JUDGE  
ACTION NO. 05-CI-00046

JAMES W. HOLSINGER, JR.,  
SECRETARY, CABINET FOR  
HEALTH AND FAMILY SERVICES

APPELLEE

OPINION  
AFFIRMING

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BEFORE: GUIDUGLI, McANULTY, AND SCHRODER, JUDGES.

McANULTY, JUDGE: James Lang, an inmate, brought a complaint in the Bell Circuit Court pursuant to KRS 418.040, the declaratory judgment statute, against the Cabinet for Health and Family Services and James W. Holsinger, Jr., the Cabinet Secretary (hereinafter the Cabinet). In his complaint, Lang made a number of allegations that the Cabinet was deviating from necessary health and safety regulations concerning correctional

facilities, as well as departing from American Correctional Association standards.

In particular, Lang objected to section 15 of 902 KAR 9:010 which provides for the grant of a variance from the provisions of that administrative regulation. Lang contended the provision for variances vitiated the standards in KRS 211.925-.945, those statutes charging the Cabinet with regulation of inmate health and safety. Lang further argued that the Cabinet amended the Kentucky Administrative Regulations (KAR) to allow for a change in the calculation of square footage allowed to a prisoner. He argued that it permits a calculation of total square footage in the living area as opposed to in the sleeping area only, in order to incorporate common areas into the calculation and contend with prison overcrowding issues. He argued such calculation creates a conflict with KRS 197.510(11), which provides:

A minimum of sixty (60) square feet of floor space per resident shall be provided in the sleeping area of the adult correctional facility. Other areas to be provided shall include space and furnishings to accommodate group meetings of the residents, private counseling space with adequate furniture, and a visiting area.

Lang also argued that the changes to the regulations violate nationally accepted norms in calculating area for prisoners.

Lang additionally contended the regulations were facially unconstitutional due to vagueness and the potential for absurd results in interpretation. He contended the regulation was unconstitutional as applied. Lang argued the Cabinet failed in its safety inspection duty because the method of calculating space actually included the use of fire lanes in the total square footage allocated to a prisoner's living area. Finally, he argued that the Cabinet failed in its regulatory duty to promulgate regulations relating to medical, dental, and nutritional aspects of the health of inmates.

The Cabinet filed a motion to dismiss pursuant to CR 12.02, on the basis that the complaint failed to state a claim on which relief could be granted. The Cabinet filed a memorandum in support of the motion to dismiss in which it extensively responded to all of Lang's allegations. The Cabinet noted that KRS 197.510 governs privatized corrections facilities and does not apply to the facility in which Lang is housed. The cabinet asserted further that: the regulation Lang questions was properly adopted according to statute and approved by the Legislative Research Commission; the Cabinet does not have organizational authority over the Department of Corrections in order to affect its policies regarding construction; that administration and oversight of aspects of inmate life and the environment inside facilities is the unique responsibility of

the Department of Corrections; the Cabinet, through its agents the local health departments, inspects correctional facilities for compliance with regulations, and the facility in which Lang is housed routinely received good inspection reports. In addition, the Cabinet noted that any variances granted are subject to an assessment of impact on inmate and public health. The trial court granted the motion to dismiss based on CR 12.02 after reviewing the pleadings and attachments thereto. Lang appeals that order, and argues that there remain issues of fact in dispute.

We concur that Lang has failed to state a justiciable claim. KRS 418.040 is available only where it appears that an actual controversy exists. Thus, under this standard, a court "will not decide speculative rights or duties which may or may not arise in the future, but only rights and duties about which there is a present actual controversy presented by adversary parties, and in which a binding judgment concluding the controversy may be entered." Veith v. City of Louisville, 355 S.W.2d 295 (Ky. 1962). We believe that much of Lang's arguments amount to speculative claims of potential harm and violations of rights. He has failed to show that the Cabinet has shirked its regulatory responsibilities. In addition, it appears that, as to some of his allegations, Lang has not cited the correct agency to redress his grievances, and that some statutes he

cites are inapplicable to his circumstances. We agree that Lang's allegations do not entitle him to relief under KRS 418.040.

Where matters outside the pleadings are considered in ruling on a motion to dismiss pursuant to CR 12.02, the motion is converted to one for summary judgment. Bowlin v. Thomas, 548 S.W.2d 515 (Ky. App. 1977). When a motion to dismiss is treated as a motion for summary judgment, the question is whether the record as submitted to the court discloses a genuine issue as to any material fact. Bell v. Courier-Journal & Louisville Times Co., 402 S.W.2d 84 (Ky. 1966). We agree that there are no genuine issues of material fact present for consideration. Accordingly, we affirm the order of the circuit court dismissing Lang's action below.

ALL CONCUR.

BRIEF FOR APPELLANT:

James Lang, Pro Se  
Pineville, Kentucky

BRIEF FOR APPELLEE:

John H. Walker  
Frankfort, Kentucky