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NOT TO BE PUBLISHED

# Commonwealth of Kentucky

## Court of Appeals

NO. 2005-CA-000690-MR

KEITH MORGAN

APPELLANT

v. APPEAL FROM JEFFERSON CIRCUIT COURT  
HONORABLE JUDITH E. McDONALD-BURKMAN, JUDGE  
ACTION NO. 03-CI-002681

MICHAEL HORTON; RONNIE  
MERRITT

APPELLEE

### OPINION AFFIRMING

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BEFORE: MINTON AND VANMETER JUDGES; MILLER, SENIOR JUDGE.<sup>1</sup>

MILLER, SENIOR JUDGE: Keith Morgan appeals from an order of the Jefferson Circuit Court dismissing his complaint against Sergeant, Michael Horton and Chief, Ronnie Merritt pursuant to Kentucky Rules of Civil Procedure (CR) 41.02 and Kentucky Revised Statutes (KRS) 454.405. We are of the opinion that the circuit court erroneously dismissed the action under CR 41.02

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<sup>1</sup> 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 Kentucky Revised Statute 21.580.

and KRS 454.405, nevertheless, Morgan filed his complaint outside of the limitations period for the causes of action stated in his complaint. Dismissal was therefore proper. We accordingly affirm.

Morgan alleges that on July 10, 1998, he was arrested and taken into custody at the Jefferson County Department of Corrections. While he was at the booking table, he told an officer that he had AIDS. This was overheard by another inmate, who shouted not to put Morgan in a cell with him. Thereafter, Morgan walked toward the cell to ascertain the identity of the other inmate. According to Morgan, Merritt and an unknown officer then grabbed him and rammed his head into the riot glass surrounding the control center. Merritt alleges that Horton stood around while he was beaten and also punched him during the incident. According to Morgan, as a result of the incident, he suffered a large bruise on his head, brain damage, headaches, and hearing loss.

In 1999 Morgan filed a complaint against the present defendants in Federal District Court. On January 18, 2000, the District Court dismissed the case without prejudice due to Morgan's failure to submit a full, completed, and signed complaint.

Morgan subsequently filed a second action in Federal Court. On June 1, 2000, the District Court entered an order

dismissing Morgan's claims against Horton for failure to state a claim upon which relief could be granted, and on July 3, 2000, dismissed the claim against Merritt as abandoned. Over two years later, on October 15, 2002, Morgan filed a Federal Rule of Civil Procedure 60(b) motion seeking relief from the July 3, 2002, order; the motion was denied as untimely and without merit by order entered December 19, 2002.

On March 27, 2003, Morgan filed, *pro se*, a complaint captioned "Civil Rights Complaint and Demand for Jury Trial" in the Jefferson Circuit Court. The complaint again named Horton and Merritt as defendants. The complaint alleged that the defendants violated Morgan's rights protected by Sections 13, 14, 109, and 112 of the Kentucky Constitution, and protected by the Fifth, Eighth, and Fourteenth Amendments to the Federal Constitution. The complaint requested compensatory, exemplary, future, and punitive damages totaling \$1,250,000.00 and injunctive relief.

Because Morgan's complaint raised a federal question by asserting a violation of his federal constitutional rights, the defendants removed the action from the Jefferson Circuit Court to the United States District Court, Western District of Kentucky, in Louisville pursuant to 28 U.S.C. § 1141.

After conducting an initial screening of the action pursuant to 28 U.S.C. § 1915A(b)(1), the District Court

construed Morgan's federal claims as an action pursuant to 42 U.S.C. § 1983 and subject to the one-year statute of limitations contained in KRS 412.140(1)(a). By an opinion rendered November 24, 2003, the District Court dismissed all federal claims as filed outside of the applicable limitations period. The District Court declined to exercise supplemental jurisdiction over Morgan's state law claims, and remanded the action to Jefferson Circuit Court.

By order entered September 16, 2004, the Jefferson Circuit Court set the matter for a pretrial conference. On September 16, 2004, the Jefferson Circuit Court issued an Order for Appearance of Prisoner, directing the Warden of the Kentucky State Reformatory to transport Morgan to the Jefferson Circuit Court on December 6, 2004.

By letter dated October 21, 2004, to the circuit court, the Justice and Public Safety Cabinet (Cabinet) notified the Jefferson Circuit Court that it was not able to comply with the Order for Appearance of Prisoner directing Morgan's transport to the Jefferson Circuit Court on December 6, 2004. The letter stated that "[r]eleasing this inmate to the general population of a courtroom setting would pose a serious violation of good security and endangerment to the public at large." Morgan subsequently filed a motion for appointment of a guardian ad litem pursuant to CR 17.04, KRS 31.110, and KRS 453.190.

On September 12, 2004, Horton and Merritt filed a motion to dismiss the action, with prejudice, pursuant to CR 41.02 and KRS 454.405. The motion sought dismissal on the basis that the Cabinet's letter that it was unable to comply with the circuit court's Order of Transport meant that Morgan would be unable to comply with the court's orders concerning court appearances; that the federal courts had previously dismissed Morgan's lawsuits based upon the same facts; and because the limitations period for bringing the claims stated in Morgan's complaint had expired.

On January 25, 2005, the circuit court denied Morgan's motion for appointment of a guardian ad litem, and on February 25, 2005, the circuit court granted the defendants' motion for dismissal of the action pursuant to CR 41.02 and KRS 454.405. On February 25, 2005, the circuit court denied Morgan's motion to alter, amend, or vacate the aforementioned orders. This appeal followed.

Morgan contends that the circuit court erred by dismissing his claim pursuant to CR 41.02 and/or KRS 454.405, and erred by failing to appoint a guardian ad litem.

CR 41.02(1) provides that "[f]or failure of the plaintiff to prosecute or to comply with these rules or any order of the court, a defendant may move for dismissal of an action or of any claim against him." Application of CR 41.02 is

a matter that is within discretion of the trial court. Thompson v. Kentucky Power Co., 551 S.W.2d 815, 816 (Ky.App. 1977).

Accordingly, we will reverse the circuit court's decision only if it abused its discretion by dismissing Morgan's claim under CR 42.01. "The test for abuse of discretion is whether the trial judge's decision was arbitrary, unreasonable, unfair, or unsupported by sound legal principles." The Goodyear Tire & Rubber Co. v. Thompson, 11 S.W.3d 575, 581 (Ky. 2000).

Though the trial court did not set forth its basis for applying CR 41.02 in this case, the order of dismissal granted the appellees' motion to dismiss under the rule. The basis for dismissal under CR 41.02 as stated in the appellees' motion is that Morgan would be unable to attend required court appearances because the Cabinet was "not able to comply" with the circuit court's then pending order of appearance. The Cabinet's October 21, 2004, letter stated that it was unable to comply with the order because "[r]eleasing this inmate to the general population of a courtroom setting would pose a serious violation of good security and endangerment to the public at large." Thus it appears that the Cabinet's refusal to transport Morgan was the underlying reason for the dismissal.

The circuit court abused its discretion by dismissing this case under CR 41.02. The reason that Morgan would be unable to attend any court appearances is because the Cabinet

refused to transport him.<sup>2</sup> Application of the rule in this way would make the Cabinet the arbiter of whether an inmate could pursue a civil lawsuit. Moreover, the Cabinet's October 21, 2004, letter stated "[w]e would like to offer to the Court the ability for the attorneys to take Mr. Morgan's deposition in person or to have him available by speaker phone for any consultation the Court may deem appropriate for whatever issue is presented in the case," thereby providing a viable alternative to the actual transportation of Morgan for personal court appearances. Dismissal of Morgan's claim pursuant to CR 41.02 under these circumstances would be unreasonable, unfair, and unsupported by sound legal principles, and, hence, an abuse of discretion.

We are also of the opinion that the circuit court erred by dismissing Morgan's complaint in reliance on KRS 454.405. KRS 454.405 provides, in relevant part, as follows:

At any time, and upon its own motion or on motion of a party, a court may dismiss a civil action brought by an inmate or on behalf of an inmate if satisfied that the action is malicious or harassing or if satisfied that the action is legally without merit or factually frivolous. . . .

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<sup>2</sup> The Department's proffered reason for its inability to transport Morgan, i.e., because it would be "a serious violation of good security and endangerment to the public at large" is questionable. It would seem that by appropriate shackling or other appropriate security methods, the Department could comply with the circuit court's order without endangering the public.

(3) A court which dismisses a civil action brought by an inmate for any of the reasons set out in subsection (1) of this section shall include as part of its order specific findings as to the reasons for the dismissal. The court shall, upon issuing the order, direct the circuit clerk to transmit a copy of the entire court order to the official having custody of the inmate and to the county attorney of the county where the action was filed.

. . . .

(5) No inmate may maintain a civil action for monetary damages in any state court for mental or emotional injury without a prior showing of physical injury. (Emphasis added).

The circuit court's order of February 25, 2005, does not comply with KRS 454.405(3) because it does not include as part of its order specific findings as to the reasons for the dismissal. Hence, dismissal under KRS 454.405 was improper.

The appellees argue that in any event dismissal was proper because Morgan's claims are barred by the statute of limitations. We agree.

While poorly drafted and difficult to understand, we construe Morgan's claims against Merritt and Morton as personal injury claims based upon the July 10, 1998, incident. As such the claims are subject to the one-year statute of limitations for personal injury as stated in KRS 413.140(1)(a). As did the Federal District Court, we discern no tolling issues which would bring the claims within the limitations period. Thus, we affirm

the circuit court's dismissal of the complaint, albeit for a different reason. Revenue Cabinet v. Joy Technologies, Inc., 838 S.W.2d 406, 410(Ky.App. 1992) (A correct decision by a trial court is to be upheld on review, notwithstanding it was reached by improper route or reasoning).

Based upon our disposition of the case, Morgan's argument that the circuit court erred by failing to appoint a guardian ad litem is moot. We accordingly will not address that issue on the merits.

For the foregoing reasons, the judgment of the Jefferson Circuit Court is affirmed.

ALL CONCUR.

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