

Commonwealth of Kentucky

Court of Appeals

NO. 2006-CA-002085-MR

JERRY JONES

APPELLANT

v. APPEAL FROM FAYETTE CIRCUIT COURT
HONORABLE PAMELA R. GOODWINE, JUDGE
ACTION NO. 05-CI-03026

STEVE HANEY, WARDEN, BLACKBURN CORRECTIONAL
COMPLEX (B.C.C.); B.C.C. MEDICAL STAFF; B.C.C.
RECREATION EMPLOYEES; AND PHYSICIAN ASSISTANT
AND/OR DOCTOR

APPELLEES

OPINION
AFFIRMING

** ** * ** * ** *

BEFORE: DIXON, MOORE, AND TAYLOR, JUDGES.

MOORE, JUDGE: Appellant Jerry Jones appeals the Fayette Circuit Court's order granting Appellees' Motion to Dismiss his civil action alleging negligence claims, as well as claims that Appellees violated his civil rights, pursuant to 42 U.S.C. § 1983 and the Eighth and Fourteenth Amendments to the United States Constitution. After a careful review of the record, we affirm the Fayette Circuit Court's order.

On August 27, 2004, Appellant, who is incarcerated at the Blackburn Correctional Complex (B.C.C.), was exercising in the prison's gym when the exercise bike he was using broke, causing him to fall backwards and break his back. He was examined by B.C.C.'s medical staff, who called a doctor at a University of Kentucky clinic. The doctor ordered Appellant to be given the medication Flexaril.

Appellant was again seen by two nurses at B.C.C. on August 30, 2004. On September 7, 2004, Appellant was examined by a doctor, who prescribed a five-day regimen of the medications Naproxen and Flexeril. The doctor told Appellant that if his condition did not improve, he should come back and the doctor would then consider sending Appellant for x-rays. Appellant was again seen by the nurse practitioner at B.C.C. on September 15, 2004, and the nurse told him that he would be sent for x-rays at an unspecified time. Appellant was eventually sent for x-rays, the date of which is unknown, and apparently, the x-rays revealed that Appellant's back was broken.

After exhausting his administrative remedies, Appellant filed a timely complaint alleging state-law claims of negligence, as well as federal claims of 42 U.S.C. § 1983 and Eighth and Fourteenth Amendment violations. Appellees moved to dismiss the complaint. Appellant moved to amend his complaint and moved for the appointment of counsel. The court granted his motion to amend and denied his motion for the appointment of counsel. The circuit court ultimately granted Appellees' motion to dismiss, reasoning that Appellees were entitled to the defenses of sovereign, qualified official, and/or qualified immunity.

Appellant filed his notice of appeal, and he moved to proceed *in forma pauperis* and to appoint counsel on appeal. The circuit court granted his motion to proceed *in forma pauperis* on appeal and initially granted his motion for the appointment of counsel. However, the court subsequently denied his motion to appoint counsel on appeal.

In his appellate brief, Appellant raises only the following claims: (1) the circuit court erred when it refused to appoint trial counsel for him and when the court would not permit an inmate legal aide to file pleadings on his behalf and argue his case for him in court; (2) the circuit court erred when it granted Appellant's motion for the appointment of counsel on appeal, then subsequently denied his motion for the appointment of appellate counsel; and (3) the circuit court erred when it granted Appellees' motion to dismiss after previously overruling that motion in a hearing. Appellees have not filed a brief on appeal.

Although we hold allegations in a *pro se* complaint to less stringent standards than allegations in formal pleadings that have been drafted by an attorney, *see Haines v. Kerner*, 404 U.S. 519, 520-21, 92 S.Ct. 594, 30 L.Ed.2d 652 (1972), Appellant has not asserted claims on appeal that entitle him to the relief he seeks.

As an initial matter, we note that the notice of appeal filed by Appellant lists in the caption the following as "defendants": Warden Steve Haney; "B.C.C. Medical Staff; Physician Assistant and/or Doctor[;] Recreation B.C.C. Employees, et al." (capitalization changed). The statement section of the notice of appeal provides as

follows: "The Appellees shall be the named Defendants in the above styled heading. . . ." (capitalization changed).

Civil Rule 73.03(1) requires, *inter alia*, that "[t]he notice of appeal shall specify *by name* all appellants and all appellees ("et al." and "etc." are not proper designation of parties)." (Emphasis added). With the exception of Warden Steve Haney, Appellant did not name any other Appellees by name, as required by CR 73.03(1). "The principal objective of pleadings is to give the opposing party fair notice, and where the conduct of the parties leaves no doubt that this objective has been met, [the Supreme Court] has upheld the intent of the "notice" nature of the Civil Rules." *Blackburn v. Blackburn*, 810 S.W.2d 55, 56 (Ky. 1991) (citation omitted). In the present case, we do not believe that Appellant's notice of appeal gave the opposing parties, with the exception of Warden Haney, "fair notice" that they are parties to this appeal. The body of the notice of appeal does not include a description of exactly who the other appellees are.

Because only Warden Haney has been properly named as an Appellee in the present appeal, this appeal will only proceed against him. Thus, the appeal is dismissed as it pertains to all other Appellees because they were not specified by name in the notice of appeal, and we cannot otherwise discern from the body of the notice of appeal the identities of the unnamed Appellees. *See* CR 73.03(1).

Regardless, even if we could discern the identities of the unnamed Appellees, Appellant's claims fail on the merits. Appellant's first claim on appeal alleges the circuit court erred when it refused to appoint counsel for him for purposes of the trial

court proceedings and when the court would not permit a prison inmate legal aide to assist him. "[T]here is no constitutional right to counsel in a civil case," except in "civil contempt proceedings where imprisonment is a potential punishment," or when "a prisoner fails to defend a civil action brought *against* him." *May v. Coleman*, 945 S.W.2d 426, 427 (Ky. 1997) (emphasis added). Therefore, the circuit court did not err when it refused to appoint counsel to represent Appellant during the trial court proceedings.

Additionally, the circuit court did not err when it refused to permit an inmate legal aide to assist Appellant. Appellant contends, pursuant to a consent decree discussed in *Kendrick v. Bland*, 541 F.Supp. 21 (W.D. Ky. 1981), that the court should have appointed an inmate legal aide to help him prepare his pleadings and prosecute his civil action in the circuit court. However, this same claim was brought in *May*, and in that case, the Kentucky Supreme Court held that the consent decree involved in *Kendrick*, a federal court case, "does not purport to create a legal right to have an inmate legal aide or assistant appointed to assist another inmate in the prosecution of a civil action in the Kentucky Court of Justice." *May*, 945 S.W.2d at 428. Furthermore, the Court noted that the consent decree did not and could not give inmate legal aides permission to practice law in Kentucky. The Court reasoned that the Kentucky Constitution vests only the Kentucky Supreme Court with the authority to determine who can practice law in the Commonwealth, and the Court noted that it has "guarded the practice of law with strict governance . . . and [it has] met the appearance of 'inmate litigators' with disapproval."

Id. (internal citation omitted). Therefore, the circuit court did not err in the present case when it refused to permit an inmate legal aide to assist Appellant in preparing and prosecuting his civil action.

Appellant's second claim asserts that the circuit court erred in granting Appellant's motion for the appointment of counsel on appeal, then subsequently denying his motion for the appointment of appellate counsel. As previously explained, Appellant is not entitled to have counsel appointed for him in this civil action. *See May*, 945 S.W.2d at 427. Therefore, the circuit court did not err when it denied his motion for the appointment of appellate counsel.

Appellant's third claim alleges that the circuit court erred when it granted Appellees' motion to dismiss after previously overruling their motion in a hearing. The standard of review on appeal from a trial court's granting of a motion to dismiss for failure to state a claim upon which relief could be granted has been set forth as follows:

The court should not grant the motion unless it appears the pleading party would not be entitled to relief under any set of facts which could be proved in support of his claim. In making this decision, the circuit court is not required to make any factual determination; rather, the question is purely a matter of law. Stated another way, the court must ask if the facts alleged in the complaint can be proved, would the plaintiff be entitled to relief?

James v. Wilson, 95 S.W.3d 875, 883-84 (Ky.App. 2002) (internal quotation marks, footnote, and citation omitted). However, in the present appeal, Appellant does not challenge the circuit court's determination concerning the merits of his claims. Rather, he simply argues that the court should not have granted Appellees' motion after it had orally

denied the motion in a hearing. Thus, on appeal, Appellant has waived any challenge he may have made to the circuit court's decision concerning the merits of his claims. *See Grange Mut. Ins. Co. v. Trude*, 151 S.W.3d 803, 815 (Ky. 2004).

Regarding Appellant's claim that the circuit court should not have granted the motion to dismiss after previously denying the motion during a hearing, his claim lacks merit. Courts have the discretion, before they lose jurisdiction over a case, to change their rulings. Moreover, as a general rule courts speak only through their written, signed, and entered orders. *See Midland Guardian Acceptance Corp. of Cincinnati, Ohio v. Britt*, 439 S.W.2d 313, 314 (Ky. 1968). Therefore, even if the circuit court did initially deny Appellees' motion orally, the court's subsequent written, signed, and entered order granting the motion to dismiss is the official order of the court, and the court did not err in orally denying the motion, then granting the motion in writing at a later time.

Accordingly, the order of the Fayette Circuit Court is affirmed.

ALL CONCUR.

BRIEF FOR APPELLANT:

NO BRIEF FOR APPELLEE.

Jerry Jones
Lagrange, Kentucky