

# Commonwealth Of Kentucky

## Court of Appeals

NO. 2005-CA-001437-MR

JOSEPH L. SILVERBURG

APPELLANT

v. APPEAL FROM JEFFERSON CIRCUIT COURT  
HONORABLE GEOFFREY P. MORRIS, JUDGE  
ACTION NO. 05-CI-04008

PRISON REALTY TRUST, INC.; CORRECTIONS  
CORPORATION OF AMERICA; AND  
HON. GEOFFREY P. MORRIS

APPELLEES

OPINION  
VACATING AND REMANDING

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BEFORE: JOHNSON<sup>1</sup> AND TAYLOR, JUDGES; BUCKINGHAM,<sup>2</sup> SENIOR JUDGE.

JOHNSON, JUDGE: Joseph L. Silverburg, pro se, has appealed from an order of the Jefferson Circuit Court entered on May 17, 2005, dismissing his complaint as frivolous, legally without merit, and harassing pursuant to KRS 454.405(1). Having concluded that

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<sup>1</sup> Judge Rick A. Johnson completed this opinion prior to the expiration of his term of office on December 31, 2006. Release of the opinion was delayed by administrative handling.

<sup>2</sup> Senior Judge David C. Buckingham sitting as Special Judge by assignment of the Chief Justice pursuant to Section 110(5)(b) of the Kentucky Constitution and Kentucky Revised Statutes (KRS) 21.580.

the trial court erred by failing to set forth specific findings as to the reason for the dismissal of the complaint, we vacate and remand.

Silverburg filed his complaint on May 6, 2005, against the appellee, Prison Realty Trust, Inc.,<sup>3</sup> setting forth various alleged claims arising while Silverburg was an inmate at the Lee Adjustment Center in Lee County, Kentucky. Silverburg alleged that on September 14, 2004, a riot occurred at L.A.C. and that officials of Prison Realty were deliberately indifferent to his safety and were careless with his personal property. Silverburg also alleged that when Prison Realty officials and employees at L.A.C. attempted to settle his claims for the loss and destruction of his personal property during the riot, they discriminated against him on the basis of race. Additionally, Silverburg alleged that he was subjected to retaliation by officials and employees of Prison Realty after he filed a grievance concerning his property claim. Finally, Silverburg alleged that he was placed in segregation without having violated any institutional rule and without a due process hearing.

The trial court sua sponte ordered Silverburg's complaint dismissed pursuant to KRS 454.405(1) on May 17, 2005,

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<sup>3</sup> According to Prison Realty's brief filed with this Court, Prison Realty is the former name of Corrections Corporation of America, which owns and operates the Lee Adjustment Center (L.A.C.).

prior to the running of time for the filing of an answer by the defendants.<sup>4</sup> In its order, the trial court briefly noted some of the alleged claims asserted by Silverburg and stated that “[t]he action is frivolous and legally without merit and harassing.” Silverburg moved the trial court pursuant to CR 59 to vacate the order. The trial court denied the motion in an order entered on May 27, 2005. This appeal followed.

KRS 454.405(1) provides, in pertinent 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.

As noted, the trial court dismissed Silverburg’s complaint on the basis that the action was frivolous, legally without merit, and harassing. However, the trial court did not make appropriate findings to support its decision to dismiss the complaint. KRS 454.405(3) states, in pertinent part, as follows:

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 [emphasis added].

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<sup>4</sup> Kentucky Rules of Civil Procedure (CR) 12.01.

The United States Supreme Court, in considering a federal statute<sup>5</sup> very similar to our KRS 454.405(1), has held that the "term 'frivolous,' when applied to a complaint, embraces not only the inarguable legal conclusion, but also the fanciful factual allegation"<sup>6</sup> [footnote omitted]. However, simply because a claim may ultimately be dismissed because it fails to state a claim upon which relief may be had, does not automatically mean the claim is frivolous in nature.<sup>7</sup>

[Section] 1915(d) accords judges not only the authority to dismiss a claim based on an indisputably meritless legal theory, but also the unusual power to pierce the veil of the complaint's factual allegations and dismiss those claims whose factual contentions are clearly baseless. Examples of the former class are claims against which it is clear that the defendants are immune from suit, and claims of infringement of a legal interest which clearly does not exist. . . . Examples of the latter class are claims describing fantastic or delusional scenarios . . . .<sup>8</sup>

We conclude that these same standards are applicable to a trial court's decision to dismiss an inmate's complaint pursuant to KRS 454.405(1).

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<sup>5</sup> 28 U.S.C.A. § 1915(d).

<sup>6</sup> Neitzke v. Williams, 490 U.S. 319, 325, 109 S.Ct. 1827, 104 L.Ed.2d 338 (1989).

<sup>7</sup> Id., 490 U.S. at 326.

<sup>8</sup> Lawler v. Marshall, 898 F.2d 1196, 1198 (6th Cir. 1990) (quoting Neitzke, 490 U.S. at 327-28).

In its brief, Prison Realty seeks affirmance of the trial court's order on the basis that Silverburg may not make a claim for mental or emotional injury as a result of the riot at L.A.C. because he has not asserted that he suffered any physical injury.<sup>9</sup> However, the trial court did not specify in its May 17, 2005, order that reason, or any other reason, for dismissal of Silverburg's complaint as required by 454.405(3). Additionally, this defense raised by Prison Realty does not address the remainder of Silverburg's allegations in his complaint.

Prison Realty also asserts that the dismissal should be affirmed because Jefferson County is an improper venue for employees and officials of L.A.C. and that Silverburg cannot maintain a claim against Prison Realty based upon respondeat superior for the actions of the individual officials and employees of L.A.C. We reject Prison Realty's arguments since improper venue, failure to assert a claim upon which relief can be granted, and failure to join a party are defenses to a claim that must be properly asserted pursuant to CR 12.02 in a responsive pleading. This type of defense is not a proper basis for a determination that a claim is legally without merit or factually frivolous on its face.<sup>10</sup> Additionally, at the time the complaint was dismissed by the trial court, Silverburg still had

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<sup>9</sup> KRS 454.405(5).

<sup>10</sup> Neitzke, 490 U.S. at 326-27.

the right to amend his complaint without leave of court under CR 15.01 because no responsive pleading had been filed. Finally, nothing in the trial court's order dismissing Silverburg's complaint indicates that any argument now asserted by Prison Realty was in fact the specific reason for the trial court's dismissal. Thus, it was error for the trial court to sua sponte dismiss Silverburg's complaint without proper findings as to the reason for the dismissal.

Based upon the forgoing, the order of the Jefferson Circuit Court dismissing the complaint is vacated, and this matter is remanded for further proceedings consistent with this Opinion.

ALL CONCUR.

BRIEFS FOR APPELLANT:

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BRIEF FOR APPELLEE, PRISON  
REALTY TRUST, INC.:

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