RENDERED: JULY 23, 2010; 10:00 A.M.
NOT TO BE PUBLISHED

Commonwealth of Kentucky

Court of Appeals

NO. 2008-CA-002110-MR

JAMES MICHAEL WHITE — APPELLANT

v.

APPEAL FROM CHRISTIAN CIRCUIT COURT
HONORABLE ANDREW SELF, JUDGE
ACTION NO. 08-CI-01236

FHC CUMBERLAND HALL, PATRICIA GRAY; JOHN COY; JAMES L. WAGNER; TIMOTHY BARTHOLOMEW AND TINA TAPP — APPELLEES

OPINION
AFFIRMING IN PART, REVERSING IN PART,
AND REMANDING

** ** ** ** **

BEFORE: ACREE AND CLAYTON, JUDGES; HARRIS,[1] SENIOR JUDGE.

ACREE, JUDGE: James Michael White appeals the October 29, 2008 order of the Christian Circuit Court dismissing his complaint against FHC Cumberland Hall,

[1] Senior Judge William R. Harris sitting as Special Judge by assignment of the Chief Justice pursuant to Section 110(5)(b) of the Kentucky Constitution and Kentucky Revised Statute (KRS) 21.580.

Patricia Gray, John Coy, James L. Wagner, Timothy Batholomew, and Tina Tapp (collectively, "FHC") with prejudice. For the following reasons, we affirm in part, reverse in part, and remand the case for further proceedings.

Appellant had been released from prison on parole when he began treatment for substance abuse at FHC on February 25, 2004. He claims he requested that all records regarding his treatment and care be kept confidential. Appellant's parole officer later acquired copies of his records from FHC on March 11, 2004, and August 5, 2004, and Appellant was ultimately returned to prison for violating the terms of his parole based on these records.

Nearly three years after FHC released records to the parole officer, Appellant filed his first complaint against FHC seeking damages for violations of the Health Insurance Portability and Accountability Act of 1996 (HIPAA) on the basis of allegations that FHC violated its agreement to keep his record of drug treatment confidential. The Christian Circuit Court dismissed the complaint with prejudice because HIPAA did not provide for a private cause of action.

On August 18, 2008, three days after the dismissal of his first complaint and approximately four years after the last time his treatment records were released, Appellant filed another complaint in the Christian Circuit Court against the same parties. This second complaint raised allegations of gross negligence, breach of contract, breach of confidentiality, invasion of privacy,

unlawful search and seizure, violations of due process, and cruel and unusual punishment, all based on the same course of events alleged in the first complaint. The circuit court dismissed the second suit "pursuant to the applicable statute of limitations." This appeal followed.[2]

A trial court's granting of a motion to dismiss is reviewed *de novo*. *Benningfield v. Pettit Environmental, Inc.*, 183 S.W.3d 567, 570 (Ky.App. 2005).

On appeal, Appellant asserts various reasons the statute of limitations has not run as to his causes of action.[3] Appellees argue that, in addition to being time-barred, Appellant's claims are barred by the doctrine of *res judicata*.

Appellant argues his claims are not barred by any statute of limitations. Appellees cite *Million v. Raymer*, 139 S.W.2d 914 (Ky. 2004) as establishing a one-year statute of limitations for all of Appellant's claims. The Kentucky Supreme Court held in *Million* that "state personal injury statutes of limitations govern timing for federal constitutional claims." *Id.* at 919, *citing Wilson v. Garcia*, 471 U.S. 261 (1985). Because Kentucky's statute of limitations for claims of injury to a plaintiff's person, codified in KRS 413.140(1)(a), is one

[2] Appellant raised arguments for the first time on appeal regarding the tort of outrage or intentional infliction of emotional distress, and negligent supervision. Neither was listed in the complaint, and arguments regarding them were not presented to the trial judge. We will not address them now.

[3] Although Appellant did not cite to portions of the record where his arguments were preserved, as required by Kentucky Rule of Civil Procedure (CR) 76.12(4)(c)(v), Appellant is pursuing his appeal *pro se* and the record is neither large nor unwieldy. While striking the brief is a penalty applicable to such a violation of the rules, CR 76.12(8)(a), and while review for manifest injustice only is permissible, *Elwell v. Stone*, 799 S.W.2d 46 (Ky.App.1990), neither penalty is required of this Court. We choose to apply the usual standard of review in this case.

year, federal constitutional claims must be filed within one year of the alleged injury. *Id.*

Federal constitutional claims are enforceable pursuant to the authority of 42 United States Code (U.S.C.) § 1983 that creates civil liability for those who cause "the deprivation of any rights, privileges, or immunities secured by the Constitution and laws[.]" The rights protected by this statute include the right to confidentiality and bodily privacy, freedom from cruel and unusual punishment and unlawful search and seizure, and the right to due process. 14 C.J.S. *Civil Rights* § 37. Pursuant to well-established law as articulated in *Million*, then, all of Appellant's federal constitutional claims must have been brought within one year of the alleged injury to avoid being barred by the statute of limitations. They were not. Therefore, these claims were properly dismissed.

Not all Appellant's claims can be categorized as federal constitutional claims, however. His claims of gross negligence and breach of contract are not rooted in 42 U.S.C. § 1983. The tort of gross negligence, when no allegations of "injury to the person of the plaintiff" are alleged as required by KRS 413.140(1)(a), has a five-year statute of limitations pursuant to KRS 413.120(7). *Craft v. Rice*, 671 S.W.2d 247, 249 (Ky. 1984) ("five-year statute of limitations applies when the gist of the tort is the claimed interference with the plaintiff's rights [without] bodily harm"). Appellant insists, and his complaint reflects, he has asserted no claim of physical injury. We therefore conclude that this claim is governed by KRS 413.120(7) and was timely filed.

Actions for breach of a contract not in writing are governed by another subsection of the same five-year statute of limitation, KRS 413.120(1). Additionally, actions for breach of a written contract may be brought within fifteen years of the alleged breach. KRS 413.090(2). We conclude Appellant's claims of breach of contract were also timely filed.

Appellees argue an alternative basis upon which we could affirm the trial court – the doctrine of *res judicata* – but we are not persuaded. We may, of course, affirm a trial court's ruling even if it is based upon an improper ground or rationale, so long as the result was correct. *Haddad v. Louisville Gas & Electric Company*, 449 S.W.2d 916, 919 (Ky.App. 1969). This is especially true where, as here, the parties presented the proper basis for dismissal to the trial judge. *Id.* (citing 5 Am.Jur.2d, *Appeal and Error*, §727, p. 170).

Res judicata operates to prevent the relitigation of a matter already finally decided, and requires the parties to raise all arguments or theories of recovery or defense the first time a dispute is litigated. *Hays v. Sturgill,* 193 S.W.2d 648, 650 (Ky. 1946). There are three elements to the doctrine of *res judicata*. "First, there must be identity of the parties. Second, there must be identity of the causes of action. Third, the action must have been resolved on the merits." *Yeoman v. Com., Health Policy Bd.*, 983 S.W.2d 459, 465 (Ky. 1998) (citations omitted).

Identity of parties exists in this case. Appellant named the exact same parties in each of his two complaints.

Second, although the theories under which Appellant wishes to recover are different in the instant case and the original case, identity of causes of action is still present. "The key inquiry in deciding whether the lawsuits concern the same controversy is whether they both arise from the same transactional nucleus of facts." *Yeoman v. Com., Health Policy Bd.*, 983 S.W.2d 459, 465 (Ky. 1998). The facts which underlie this suit are identical to those which underlie the earlier suit. Appellant has alleged the same series of incidents – the release of his medical records to his parole officer, resulting in the revocation of his parole – to support his theories of recovery. The second element is met in this case.

However, the third element is not satisfied; there was no decision on the merits. The original complaint was dismissed after Appellees filed a motion pursuant to Kentucky Rule of Civil Procedure (CR) 12.02(f) for failure to state a claim upon which relief can be granted and the trial court granted the motion on that basis. "A motion to dismiss for failure to state a claim does not test the merits of the action but is confined solely to the sufficiency of the pleading." *White v. Brock*, 487 S.W.2d 908, 909 (Ky. 1972). Therefore, Appellant's claims not barred by a statute of limitations should have survived Appellees' motion to dismiss.

Boiling Appellant's complaint down to those causes of action not barred either by a statute of limitation or the doctrine of *res judicata*, we conclude that two claims remain. First, Appellant pleaded the existence of a written and/or an oral contract between himself and FHC Cumberland Hall, that FHC Cumberland Hall and/or Patricia Gray breached the agreement, and the breach

caused Appellant to suffer damages. (Complaint, paragraphs 12 and 26). Second, Appellant pleaded a claim for gross negligence against FHC Cumberland Hall and Patricia Gray, (Complaint, paragraph 25), resulting in "an injury to the rights of the [Appellant], *not arising on contract*." KRS 413.120(7)(emphasis supplied).

This second claim, however, must necessarily be an alternative to Appellant's contract claim and not a claim additional to it. He cannot recover under both theories. If a written or oral contract is determined to exist, Appellant's gross negligence claim would not fall under KRS 413.120(7), but be disallowed as asserting only a federal constitutional claim that should have been filed in accordance with KRS 413.140 within one year of its accrual in 2004. *Million*, *supra*, 139 S.W.3d at 919.

For all the foregoing reasons, we affirm the Christian Circuit Court's order dismissing Appellant's civil complaint, in part, reverse the order, in part, as described hereinbefore, and remand the case for further proceedings consistent with this opinion.

ALL CONCUR.

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