

Commonwealth Of Kentucky

Court Of Appeals

NO. 1996-CA-002717-MR

RAYMOND DAVID WATSON

APPELLANT

v. APPEAL FROM MCCRACKEN CIRCUIT COURT
HONORABLE ROBERT J. HINES, JUDGE
ACTION NO. 95-CI-000257

CLIFF GILL, JAILER;
MCCRACKEN COUNTY, KENTUCKY

APPELLEES

OPINION
AFFIRMING IN PART;
VACATING IN PART AND REMANDING
** ** * * * * *

BEFORE: DYCHE, EMBERTON AND HUDDLESTON, JUDGES.

EMBERTON, JUDGE: The appellant, Raymond Watson, pro se, appeals from a summary judgment in his action alleging the appellee, McCracken County Jailer Cliff Gill, deprived him of medical attention while incarcerated at the jail.

On November 30, 1993, Watson was arrested, charged with murder, and placed in the McCracken County jail. On March 20, 1995, Watson filed this action against Gill alleging, that from the date of his incarceration through October 14, 1994, when he was transferred to the Eastern Kentucky Correctional Complex, he

was not given his prescribed medication and was not placed on a renal failure diet as prescribed by his physician.

On April 15, 1996, Watson moved to file an amended complaint seeking to add as defendants, William B. Hailey, M.D.; Jane Doe #1, nurse; Max Woods, Deputy Jailer; Mark Hayden, Deputy Jailer; Jane Doe #2, Deputy Jailer; Danny Orazine, McCracken County Judge/Executive; Annette Lofton, Deputy Judge/Executive; Dick R. McNeil, McCracken County Commissioner; Danny Cope, McCracken County Commissioner; Glenn Dale Bradford, McCracken County Commissioner; Glen Riley, McCracken County Commissioner; and the McCracken County Fiscal Court. After the trial court denied his motion, Watson sought leave to file an interlocutory appeal which was not ruled upon prior to the entry of summary judgment.

Gill filed a motion for summary judgment on July 11, 1996, arguing that Watson failed to file his action within one year of the specific instances alleged in the complaint and the action was, therefore, time-barred. He further argued that it was undisputed that Watson received proper medical care. Medical log sheets initialed by Watson show that the proper medication was received and Gill submitted an affidavit stating Watson had been placed on a special diet.

Without notice, on July 19, 1996, the trial court granted Gill's motion for summary judgment. Watson maintains that the failure to comply with Ky. R. Civ. P. (CR) 56.03 was prejudicial because he had no opportunity to respond to Gill's

motion. We agree and vacate and remand this case to the trial court.

CR 56.03 provides, in part, that a motion for summary judgment shall be served at least ten days before the time fixed for the hearing. Because summary judgment precludes a litigant's right to trial, the notice and hearing requirements of CR 56.03 are mandatory unless waived. Equitable Coal Sales, Inc. v. Duncan Machinery, Ky. App., 649 S.W.2d 415 (1983). Watson did not waive the requirements of CR 56.03, and in fact, requested an extension of time to respond.

Gill alleges that the failure to comply with CR 56.03 was harmless error and recites that it is reversible error only if the non-moving party can show prejudice. Perkins v. Hausladen, Ky., 828 S.W.2d 652 (1992). We are, as undoubtedly was the trial court, skeptical about Watson's claim. We must, however, cautiously apply the harmless error rule to CR 56.03. Although the trial courts must be free to respond expeditiously to meritless complaints, they must also be sensitive to the possibility of prison abuses and not dismiss legitimate complaints based on the presentations of unskilled inmates. Smith v. O'Dea, Ky. App., 939 S.W.2d 353, 356 (1997). The delay in complying with CR 56.03 is minimal when balanced against the litigant's right to be provided the opportunity to present evidence to support his claim.

Because Watson's claim is barred by the applicable statute of limitations, Gill argues, regardless of the factual

accuracy of his claim, summary judgment was appropriate. Gill maintains that an action based on 42 USC §1983, which Watson's claim appears to be, must be brought within one year of the date of the injury. Collard v. Board of Nursing, 896 F.2d 179, 189 (6th Cir. 1990). Watson's complaint alleges specific instances when he was deprived medical attention, the most recent being on March 7, 1994. With deference to the lack of artistry of its drafter, the complaint also alleges that he was deprived medical attention until the date of his transfer to the Eastern Correctional Complex in October 1994. We are not persuaded, that given the opportunity, it would be impossible for Watson to present evidence that the failure to provide medical care was in the nature of a continuing wrong which continued until his transfer to the Eastern Correctional Complex. Neel v. Rehberg, 577 F.2d 262 (5th Cir. 1978).

In summary, we are vacating this case because we find the procedural error to be so prejudicial that Watson must be given an opportunity to respond to the summary judgment motion. We are not, however, directing the trial court as to what action to take following its compliance with the Civil Rules.

Watson also argues that the trial court erred when it did not permit him to file an amended complaint naming additional defendants. CR 15.03 provides in relevant part:

- (1) Whenever the claim or defense asserted in the amended pleading arose out of the conduct, transaction, or occurrence set forth or attempted to be set forth in the original

pleading, the amendment relates back to the date of the original pleading.

(2) An amendment changing the party against whom a claim is asserted relates back if the condition of paragraph (1) is satisfied and, within the period provided by law for commencing the action against him, the party to be brought in by amendment (a) has received such notice of the institution of the action that he will not be prejudiced in maintaining his defense on the merits, and (b) knew or should have know that, but for a mistake concerning the identity of the proper party, the action would have been brought against him.

Watson did not file his motion until over one year after his transfer from the McCracken County jail. Any claim against the proposed defendants was, therefore, outside the applicable statute of limitations. There is no evidence that any of the proposed defendants had notice of the action within the statutory time period or that there was a mistake in identity precluding them from being named in the original action. We find no error in the trial court's refusal to permit the amendment.

The summary judgment is vacated and this case is remanded for proceedings consistent with this opinion. The denial of Watson's motion to amend his complaint is affirmed.

ALL CONCUR.

BRIEF FOR APPELLANT:

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