

**Commonwealth Of Kentucky**

**Court of Appeals**

NO. 2004-CA-001326-MR

DAVON BURKE

APPELLANT

v. APPEAL FROM CAMPBELL CIRCUIT COURT  
HONORABLE JULIE REINHARDT WARD, JUDGE  
ACTION NO. 04-CI-00112

GREG BUCKLER AND TERRY SETTERS

APPELLEES

OPINION  
AFFIRMING

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BEFORE: TACKETT AND TAYLOR, JUDGES; HUDDLESTON, SENIOR JUDGE.<sup>1</sup>

TAYLOR, JUDGE: Davon Burke brings this pro se appeal from a June 8, 2004, Order of the Campbell Circuit Court granting appellees' summary judgment on appellant's 42 U.S.C. § 1983 claim for deliberate indifference to his medical needs. We affirm.

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<sup>1</sup> Senior Judge Joseph R. Huddleston sitting as Special Judge by assignment of the Chief Justice pursuant to Section 110(5)(b) of the Kentucky Constitution and Kentucky Revised Statutes 21.580.

On February 3, 2004, appellant filed a complaint alleging that appellees intentionally denied appellant medical care while an inmate at the Campbell County Detention Center (detention center). Appellant maintained that such denial constituted a deliberate indifference to a serious medical need in violation of the Eighth Amendment to the United States Constitution, thus giving rise to a 42 U.S.C. § 1983 claim.<sup>2</sup> Appellant alleged that prior to his incarceration, his left hand was broken. While at the detention center, his hand was treated by Dr. Pamela O'Conner, and appellant alleged that Dr. O'Conner referred him to a "hand surgery specialist" for immediate surgery. He further alleged that he was never taken to the appointment, so he filled out an inmate grievance form on February 10, 2002. In response thereto, the jailer stated that the "jail is not responsible for any prior medical problems . . . ."

Appellees filed an answer and, thereafter, moved for summary judgment. They contended that the record was devoid of any evidence demonstrating that appellant suffered a serious medical condition that needed immediate attention. On June 8, 2004, the circuit court entered summary judgment in favor of appellees, thus precipitating this appeal.

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<sup>2</sup> The United States Supreme Court has recognized that state courts' possess concurrent jurisdiction over 42 U.S.C. § 1983 claims. Martinez v. California, 444 U.S. 277, 100 S. Ct. 553, 62 L. Ed. 2d 418 (1980).

Appellant contends the circuit court committed error by entering summary judgment dismissing his 42 U.S.C. § 1983 claim for deliberate indifference to his medical needs. We disagree.

Summary judgment is proper where there exist no material issues of fact and movant is entitled to judgment as a matter of law. Steelvest, Inc. v. Scansteel Service Center, Inc., 807 S.W.2d 476 (Ky. 1991). For reasons hereinafter stated, we conclude the circuit court properly entered summary judgment.

In Smith v. Franklin County, 227 F.Supp. 2d 667, 677 (E.D. Ky. 2002), the Court held:

[I]n order to state a cognizable claim under the Eighth Amendment concerning medical care of prisoners, an inmate must "allege acts or omissions sufficiently harmful to evidence deliberate indifference to serious medical needs."

When inquiring into "deliberate indifference," it is taught that a court must ask both (1) if the officials acted with a sufficiently culpable state of mind and (2) whether the alleged wrongdoing was "objectively 'harmful enough' to establish a constitutional violation."

Medical needs have been defined as serious if such needs have been "diagnosed by a physician as mandating treatment, or one that is so obvious that even a lay person would easily recognize the necessity for a doctor's attention" and such needs must

require immediate medical attention. Gaudrealt v. Municipality of Salem, Mass., 923 F.2d 203, 208 (1st Cir. 1990) and Caldwell v. Moore, 968 F.2d 595 (6th Cir. 1992). It has been recognized that "deliberate indifference to a prisoner's serious illness or injury states a cause of action under [42 U.S.C.] § 1983." Estelle v. Gamble, 429 U.S. 97, 105, 97 S. Ct. 285, 50 L. Ed. 2d 251 (1976).

In the case at hand, we agree with the circuit court that appellant failed to put on any evidence establishing that he suffered a serious medical condition that required immediate attention. In appellant's response to appellees' motion for summary judgment, he attached medical notes from Kentucky Orthopedics. In those notes, the last entry was dated November 7, 2002, and stated as follows:

PLAN: We're just going to put him in aluminum splint for a couple of weeks and would like to see a hand surgeon and we'll refer him to Dr. Sommerkamp's group for further evaluation. Follow-up here will be prn. PCO/cc T:11/13/02

X-RAYS: X-rays were obtained today of his hands and it looks like his metacarpal head fracture actually healed fairly well. There is one slight irregularity at the articular surface, but otherwise it looks like it is well healed. I don't see any obvious new injury. PCO/cc T:11/13/02

Appellant allegedly was denied a follow-up appointment in February 2003. According to the above medical note, the

physician stated that his hand appears to be well-healed and can discern no obvious new injury. He was referred for further evaluation but follow-up was to be "prn," which is "as needed." Upon the whole, the medical evidence submitted by appellant demonstrated that he did not suffer a serious medical injury requiring immediate attention.

Appellant also submitted what he claimed was a hand-written medical report from a physician who had treated him. The report is largely illegible and unreadable. Appellant contends the circuit court erred by failing to clarify this hand-written report and by failing to depose the physician who had written the report. However, the burden is on appellant, rather than the circuit court, to present sufficient evidence to support his claim for deliberate indifference to a medical need. Accordingly, we are of the opinion there existed no material issues of fact and appellees were entitled to summary judgment as a matter of law. We, thus, affirm the circuit court's dismissal of appellant's claim for deliberate indifference to a medical need under 42 U.S.C. § 1983.

For the foregoing reasons, the Order granting appellees' summary judgment by the Campbell Circuit Court is affirmed.

ALL CONCUR.

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