

Commonwealth of Kentucky  
Court of Appeals

NO. 2007-CA-001233-MR

JAMES MICHAEL WHITE

APPELLANT

v. APPEAL FROM CHRISTIAN CIRCUIT COURT  
HONORABLE ANDREW SELF, JUDGE  
ACTION NO. 07-CI-00053

FHC CUMBERLAND HALL;  
PATRICIA GREY; JOHN COY;  
JAMES L. WAGNER; TIMOTHY  
BARTHOLOMEW; AND TINA TAPP

APPELLEES

OPINION  
AFFIRMING

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BEFORE: MOORE, NICKELL, AND STUMBO, JUDGES.

STUMBO, JUDGE: James Michael White appeals from an order of the Christian Circuit Court dismissing with prejudice his action against FHC Cumberland, et al., alleging a violation of the Health Insurance Portability and Accountability Act (“HIPAA”). The circuit court determined that no individual private cause of action for a HIPAA violation exists under Kentucky or Federal law. White contends that

he is entitled to prosecute a variety of causes of action other than the HIPAA claim, and that the dismissal of the HIPAA claim improperly forecloses that opportunity. For the reasons stated below, we affirm the order on appeal.

White was paroled from incarceration on October 9, 2003. On February 25, 2004, while still on parole, White sought substance abuse treatment from FHC Cumberland Hall (hereinafter “FHC”). The following month, White’s probation and parole officer, Tina Tapp, obtained White’s treatment and/or medical records from FHC. Based on the information contained in the FHC records, Tapp alleged that White violated the terms of his parole status.

White was taken into custody on June 14, 2004, and a preliminary revocation hearing was conducted on June 21, 2004. The FHC records were introduced as evidence that White violated the terms of his parole, and the Administrative Law Judge found probable cause that White violated his parole status. A final revocation hearing was conducted on September 14, 2004. Acting in reliance on the FHC records, the Kentucky Parole Board determined that White had violated the terms of his parole.

On January 11, 2007, White filed the instant *pro se* action in Christian Circuit Court alleging that FHC violated his right to medical privacy by releasing its records to Tapp. The complaint alleged a violation of “Health Information Privacy Act [sic]” proximately resulting in emotional distress, pain and suffering. FHC, et al., answered with a general denial claiming that no individual cause of action was found under HIPAA. After an amended complaint was filed on April

16, 2007, to include reference to HIPAA, a hearing on the motion to dismiss was conducted on May 23, 2007. White participated in the hearing via telephone. White's complaint and amended complaint did not assert any causes of action other than violation of HIPAA.

On May 25, 2007, the Christian Circuit Court rendered an order dismissing White's action as to all defendants. As a basis for the dismissal, the court found that no individual cause of action for a HIPAA violation existed under Kentucky or Federal law. As such, the court concluded that White's complaint failed to state a cause of action upon which relief can be granted. This appeal followed.

White now argues that the circuit court erred in dismissing his action. While acknowledging that the circuit court was correct in dismissing the HIPAA claim,<sup>1</sup> White maintains that he is entitled to bring a number of other causes of action against FHC, et al., which entitle him to a reversal of the order on appeal. White contends that he is entitled to go forward with claims of invasion of privacy, gross negligence, breach of implied contract, breach of confidentiality, and unlawful search and seizure. The apparent focus of his claim of error is that the Christian Circuit Court erred in dismissing the HIPAA action because the dismissal foreclosed his opportunity to go forward with the other causes of action.

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<sup>1</sup> White states in the Introduction section of his reply brief that, "Again, hopefully once and for all, Appellant unequivocally states that he is not contesting that portions [sic] of the trial court's findings and is not seeking appellate review of the HIPAA claim."

We have closely examined the record and the written arguments, and find no error in the order on appeal. White's amended complaint alleged a cause of action arising under HIPAA. It did not raise any of the claims which White now asserts, i.e., invasion of privacy, gross negligence, breach of implied contract, breach of confidentiality, and unlawful search and seizure. As such, the sole issue before the Christian Circuit Court on FHC's motion to dismiss was whether White could maintain a claim arising under HIPAA. White acknowledges that the circuit court was correct in determining that he cannot.

A plaintiff may not assert new causes of action during the pendency of the proceeding which were not set out in the complaint, unless they are tried by the express or implied consent of the opposing party. *See generally*, CR 15.02; *Traylor Bros., Inc. v. Pound*, 338 S.W.2d 687 (Ky. 1960). The sole cause of action set out in White's amended complaint was his claim of a HIPAA violation, and nothing in the record indicates that the additional causes of action were raised or otherwise tried by consent. Though White may be entitled to assert the additional claims via the filing of another complaint, that issue is not before us.

*Arguendo*, even if the additional causes of action were raised in the amended complaint or tried by consent of the parties, on appeal White is constrained to those issues raised in his prehearing statement. CR 76.03(8) ("A party shall be limited on appeal to issues in the prehearing statement . . . ."). The only issue raised in White's prehearing statement is whether the circuit court erred

in dismissing the HIPAA claim. Similarly, the HIPAA claim was the sole issue addressed in the order on appeal.

Since White expressly acknowledges that the circuit court was correct in dismissing the HIPAA claim, and because the additional causes of action he now raises were not set out in the amended complaint, tried by consent of the parties, addressed in the order on appeal nor set out in the prehearing statement, we find no basis for reversing the order dismissing White's action.

For the foregoing reasons, we affirm the order of the Christian Circuit Court dismissing White's HIPAA claim.

ALL CONCUR.

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