RENDERED: OCTOBER 23, 2009; 10:00 A.M.
NOT TO BE PUBLISHED

# Commonwealth of Kentucky

# Court of Appeals

NO. 2008-CA-001546-MR

DANNY CHAMBERS — APPELLANT

v.

APPEAL FROM FRANKLIN CIRCUIT COURT
HONORABLE THOMAS D. WINGATE, JUDGE
ACTION NO. 04-CI-01310

DR. SCOTT A. HAAS;
DR. HAROLD DOUGLAS CRALL;
JOHN REES, COMMISSIONER,
DEPARTMENT OF CORRECTIONS;
DR. BASHIRAMED AMEJI; JOHN
DOE; AND JANE DOE — APPELLEES

OPINION
AFFIRMING

** ** ** ** **

BEFORE: MOORE AND WINE, JUDGES; HENRY,[1] SENIOR JUDGE.

[1] Senior Judge Michael L. Henry 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.

HENRY, SENIOR JUDGE: Danny Chambers filed this action alleging that he received improper medical treatment while an inmate at the Eastern Kentucky Correctional Complex. The Franklin Circuit Court granted summary judgment in favor of the appellees. Upon review, we affirm.

FACTS

During the times involved in this case the appellant, Danny Chambers, was an inmate at the Eastern Kentucky Correctional Complex at West Liberty, Kentucky. In February 2004 Chambers was seen by Dr. Bashir Ameji, a physician who was then employed by the Department of Corrections. Dr. Ameji found that Chambers had developed a hernia. In Dr. Ameji's opinion surgery was not indicated at that time because the hernia was not large, was reducible and did not descend into the scrotum. He ordered a truss for Chambers and directed that he not lift weights in the prison gym, and limited his lifting in other situations to twenty-five pounds. Dr. Ameji did not prescribe pain medication because in his opinion it was not indicated, but over-the-counter pain medication was available to Chambers thorough the inmate canteen or at pill call lines.

Even though Dr. Ameji did not believe that surgery was medically necessary to correct Chambers' hernia when it was first diagnosed, he referred the case to the prison's Therapeutic Level of Care Committee[2] with a request for surgical repair. The Committee did not refer Chambers for surgery.

[2] The Committee is a group of clinicians whose duties include review of non-emergency surgical referrals made by treating physicians employed by the Department of Corrections. The Committee, not the treating physician, is authorized to make referrals for non-emergency surgery.

In March, 2005, just over one year after the first diagnosis, Chambers was seen by a nurse practitioner regarding his hernia. Chambers was sent out for a surgical consult. Chambers' condition had worsened, and this time surgery was ordered. The surgery was performed in July 2005. As discussed below the complaint was filed prior to the surgery. No claim is made in this action relating to Chambers' hernia operation or the results of the surgery. For purposes of this case we assume that the surgery was successful and that his recovery was uneventful.

PROCEDURAL HISTORY

Chambers filed a grievance when the Committee denied Dr. Ameji's request for approval for hernia surgery. The grievance was denied on appeal. Thereafter Chambers filed this action *pro se* in Franklin Circuit Court. The complaint was filed in September 2004, after the first referral for surgery was denied in February 2004 but prior to the surgical consult in March 2005 and Chambers' surgery the following July. Discovery was conducted by both parties, motions and responses were filed, hearings were conducted and various rulings were made by the circuit court. Finally in August 2007 the defendants'/appellees' motion for summary judgment was granted and Chambers' complaint was dismissed. This appeal followed.

DISCUSSION

Chambers' appeal is divided into two arguments: first, that the circuit court erred by construing his complaint as only a 42 U.S.C. § 1983 action and ignoring his state law claims; and second, that the court failed to construe the

pleadings in the light most favorable to him as required by law. The appellees have countered these two arguments with a responsive brief divided into nine subparts. The first and last of these subparts respectively discuss the correct standard of review and the summary judgment standard. Three subparts deal with Chambers' claim that he is entitled to relief under the Eighth Amendment to the United States Constitution. The appellees also contend that they are entitled to qualified official immunity, that Chambers failed to establish a *prima facie* case for medical negligence, that he failed to state a claim for negligence against defendant/appellant John Rees, and that he failed to state a claim for intentional infliction of emotional distress.

We have generally followed the organization of the appellees' response because it provides a more thorough and coherent framework for our discussion.

## STANDARD OF REVIEW

"The standard of review on appeal of a summary judgment is whether the trial court correctly found that there were no genuine issues as to any material fact and that the moving party was entitled to judgment as a matter of law." *Scifres v. Craft,* 916 S.W.2d 779, 781 (Ky. App. 1996). In this case the circuit court's task was complicated by the moving target presented by Chambers' *pro se* pleadings. However it is also true that "[i]f the summary judgment is sustainable

on any basis, it must be affirmed." *Fischer v. Fischer,* 197 S.W.3d 98, 103 (Ky. 2006).

EIGHTH AMENDMENT CLAIM

While Chambers' pleadings below and some parts of his argument to this Court seem directed toward a recovery for medical malpractice or negligence, the circuit court interpreted his complaint to be primarily a *Bivens*[3]-type claim for a violation of his rights under the Eighth Amendment to the United States Constitution. As the federal cases have developed the law in this area, to state a cognizable claim for violation of his Eighth Amendment rights due to improper medical care an inmate "must allege acts or omissions sufficiently harmful to evidence deliberate indifference to serious medical needs." *Estelle v. Gamble,* 429 U.S. 97, 106, 97 S.Ct. 285, 292, 50 L.Ed.2d 251 (1976). In order to prevail, an inmate must show that "the official knows of and disregards an excessive risk to inmate health or safety[.]" *Farmer v. Brennan,* 511 U.S. 825, 837, 114 S.Ct. 1970, 1979, 128 L.Ed.2d 811 (1994). The failure or refusal to render proper treatment must be so callous and deliberate as to constitute "punishment," because "[t]he Eighth Amendment does not outlaw cruel and unusual "conditions"; it outlaws cruel and unusual "punishments." *Id.* Clearly, an inmate's complaint that his

[3] The United States Supreme Court recognized a federal cause of action against employees of the United States government for violations of a claimant's rights under the Fourth Amendment in *Bivens v. Six Unknown Fed. Narcotics Agents*, 403 U.S. 388, 91 S.Ct. 1999, 29 L.Ed.2d 619 (1971). A similar action against state officials pursuant to 42 U.S.C. § 1983 was discussed in *Carey v. Piphus*, 435 U.S. 247, 98 S.Ct. 1042, 55 L.Ed.2d 252 (1978); and a *Bivens*-type claim for violation of a prisoner's rights under the Eighth Amendment was discussed by the Court in *Estelle v. Gamble*, 429 U.S. 97, 97 S.Ct. 285, 50 L.Ed.2d 251 (1976).

successful hernia operation was performed in accordance with the prison's timetable rather than his own does not make out a cognizable claim. Our own review supports the circuit court's determination that there is no evidence (indeed, apart from Chambers' bare allegations there is nothing) in the record which would justify an Eighth Amendment claim.

NEGLIGENCE

We agree with the appellants that Chambers failed to establish a *prima facie* case for medical negligence. Leaving aside the fact that proof of some of the basic elements of any negligence case – duty, breach of duty, and consequent injury – cannot be found in the record, Chambers presented no expert medical testimony to support his claim. "It is an accepted principle that in most medical negligence cases, proof of causation requires the testimony of an expert witness because the nature of the inquiry is such that jurors are not competent to draw their own conclusions from the evidence without the aid of such expert testimony." *Bayliss v. Lourdes Hosp., Inc.,* 805 S.W.2d 122, 124 (Ky. 1991).

OUTRAGE

Because Chambers mentions "outrageous conduct" in his brief, the appellees felt compelled to respond that such a claim is not supported by the record of this case. Again, we agree. The tort of outrage or intentional infliction of emotional distress was neither sufficiently established by Chambers' pleadings, *see Humana of Ky. Inc. v. Seitz,* 797 S.W.2d 1, 2-3 (Ky. 1990), nor did the allegations made in his complaint rise to the level of seriousness required to establish the tort.

*Id.* And, because Chambers' state-law tort complaint for medical malpractice (if he had succeeded in making one) would of necessity be one to which he could append a claim for infliction of emotional distress, he had no separate claim for the tort of outrage unless he alleged and proved conduct by the tortfeasor which was intended *solely* to cause extreme emotional distress. *See Rigazio v. Archdiocese of Louisville,* 853 S.W.2d 295, 298-9 (Ky. App. 2001). Chambers did not allege such conduct, nor was there any indication in the record at the time of the appellees' summary judgment motion as to how Chambers might produce such proof.

SUMMARY

In the Opinion and Order the circuit court acknowledged its responsibility to view the record in the light most favorable to Chambers and to resolve all doubts in his favor, and stated the correct standard of review. As in the circuit court it appears to us "impossible for [Chambers] to produce evidence at trial warranting a judgment in his favor[,]" and therefore the motion for summary judgment was properly granted. *Steelvest, Inc., v. Scansteel Service Center,* 807 S.W.2d 476, 482 (Ky. 1991). We find it unnecessary to reach the appellees' remaining arguments including that they are protected by qualified official immunity and that some of them cannot be held accountable under a theory of *respondeat superior* liability, although each of those arguments may have merit in their own right. In sum, this action is utterly lacking in merit. We find no error and no basis for relief.

The Opinion and Order of the Franklin Circuit Court is affirmed.

ALL CONCUR.

BRIEFS FOR APPELLANT:

Danny Chambers, *pro se*
West Liberty, Kentucky

BRIEF FOR APPELLEES:

Amy V. Barker
Frankfort, Kentucky