

June 19, 2007

Charles R. Fulbruge III  
Clerk

IN THE UNITED STATES COURT OF APPEALS  
FOR THE FIFTH CIRCUIT

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No. 06-10624  
Conference Calendar

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JOSEPH JAMES FALCETTA, JR.,

Plaintiff-Appellant,

versus

DAVID K. CHAPMAN,

Defendant-Appellee.

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Appeal from the United States District Court  
for the Northern District of Texas  
USDC No. 4:06-CV-222  
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Before JONES, Chief Judge, and JOLLY and DENNIS, Circuit Judges.

PER CURIAM:\*

Joseph James Falcetta, Jr., Texas prisoner # 822447, appeals the sua sponte dismissal for lack of subject matter jurisdiction of his pro se lawsuit against former counsel. Both Falcetta and appellee David K. Chapman are residents of Texas; consequently, diversity jurisdiction does not exist. See 28 U.S.C. § 1332; Getty Oil Corp. v. Ins. Co. of N. Am., 841 F.2d 1254, 1258-59 (5th Cir. 1988).

Falcetta conclusionally asserts that his claim presents a federal question. However, his allegations of "legal

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\* Pursuant to 5TH CIR. R. 47.5, the court has determined that this opinion should not be published and is not precedent except under the limited circumstances set forth in 5TH CIR. R. 47.5.4.

malpractice" demonstrate that his claim is for negligence, which does not give rise to a claim under federal or constitutional law. See 28 U.S.C. § 1331.

Dismissal for lack of subject matter jurisdiction was not error. This appeal is without arguable merit, is frivolous, and is dismissed. See Howard v. King, 707 F.2d 215, 219-20 (5th Cir. 1983); 5TH CIR. R. 42.2.

The dismissal of the instant appeal counts as a strike for purposes of 28 U.S.C. § 1915(g). See Adepegba v. Hammons, 103 F.3d 383, 388 (5th Cir. 1996). Falcetta is cautioned that if he accumulates three strikes, he will be barred from proceeding in forma pauperis in any civil action or appeal filed while he is incarcerated or detained in any facility unless he is under imminent danger of serious physical injury. See § 1915(g).

DISMISSED; SANCTION WARNING ISSUED.