UNITED STATES COURT OF APPEALS

FOR THE FIFTH CIRCUIT

No. 92-3804
Summary Calendar

LESLIE E. KNIGHTEN,

Plaintiff-Appellant,

versus

CAVE & MCKAY, Attorneys at Law, ET AL.,

Defendants-Appellees.

Appeal from the United States District Court for the Middle District of Louisiana
(CA-91-1063-A-M1)

(July 29, 1994)

Before GARWOOD, SMITH and DeMOSS, Circuit Judges.[*]

GARWOOD, Circuit Judge:

Plaintiff-appellant Leslie E. Knighten (Appellant), a citizen of Mississippi, brought a *pro se* action under Title 42 U.S.C. §§ 1981, 1983, and 1985 against defendants-appellees, citizens of Louisiana, Cave & McKay, John F. McKay, Donald G. Cave, and Craig

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[*] Local Rule 47.5 provides: "The publication of opinions that have no precedential value and merely decide particular cases on the basis of well-settled principles of law imposes needless expense on the public and burdens on the legal profession." Pursuant to that Rule, the Court has determined that this opinion should not be published.

S. Watson (collectively Appellees), seeking over $3,000,000 damages for alleged violations of his constitutional rights for legal services they performed for him in a personal injury lawsuit. Appellant later amended his complaint to convert the civil rights claims into allegations of malpractice. The district court granted summary judgment in favor of Appellees and sanctioned Appellant $1,500 under Rule 11 for bringing a frivolous civil rights action. Appellant now appeals both the grant of summary judgment and the Rule 11 sanctions. We affirm.

Facts and Proceedings Below

Appellant was injured on March, 30, 1985, while working as an electrician for Todd Electric in Baton Rouge, Louisiana. Shortly thereafter, he employed the law firm of Cave & McKay to represent him in a Louisiana state court action for personal injury and intentional tort against Todd Electric, Sears Roebuck & Company (Sears), and several other defendants. On November 26, 1986, the state court ruled that his recovery against Todd Electric was limited to worker's compensation benefits because his injury did not result from any intentional tort on the part of his employer. The court dismissed his suit against Todd Electric but reserved his right to proceed against Sears and the remaining defendants. An appellate court affirmed this decision, and on March 18, 1988, the Louisiana Supreme Court denied certiorari.

On February 20, 1989, Appellant terminated the legal services of Cave & McKay and two weeks later filed a state court action against the firm for malpractice. On July 6, 1989, however, Appellant voluntarily dismissed that suit and immediately rehired

the firm to continue his suit against Sears. Appellant became increasingly dissatisfied with the handling of the suit against Sears and once again discharged the firm. On November 20, 1991, he filed the present federal court action asserting numerous civil rights violations for Appellees' failure to adequately protect his legal rights regarding the Todd Electric litigation. At a status conference on February 27, 1992, a magistrate judge warned Appellant that filing such frivolous civil rights claims would incur sanctions under Rule 11, FED.R.CIV.P. On March 27, 1992, Appellant amended his complaint to include claims of legal malpractice and to delete the civil rights claims.[1] On June 25, 1992, the district court granted summary judgment in favor of Appellees and sanctioned Appellant $1,500. Appellant now appeals both the grant of summary judgment and the award of Rule 11 sanctions. Appellees seek additional damages under Rule 38, FED.R.APP.P., for having to defend against a frivolous appeal. We affirm the district court's grant of summary judgment and imposition of Rule 11 sanctions, but deny Appellees' request for Rule 38 sanctions.

Discussion

I. Prescription of Malpractice Claim

This Court reviews a grant of summary judgement *de novo*. *Exxon Corporation v. Burglin*, 4 F.3d 1294, 1297 (5th Cir. 1993). Summary judgment is only appropriate when "there is no genuine

[1] Appellant's amended complaint, however, retained its original reference to 28 U.S.C. § 1343 (original jurisdiction over civil rights claims). Jurisdiction was also asserted under 28 U.S.C. § 1332 (diversity).

issue as to any material fact and . . . the moving party is entitled to a judgment as a matter of law." FED.R.CIV.P. 56(c). As the party moving for summary judgment, Appellees carry the initial burden of pointing out the respects in which there is an absence of evidence to support the nonmovant's case. *Burglin*, 4 F.3d at 1297; *Celotex Corp. v. Catrell*, 477 U.S. 317, 325, 106 S.Ct. 2548, 2553 (1986). After consulting the applicable substantive law to determine what facts and issues are material, we review the evidence in a light most favorable to the nonmovant to determine if any triable issues of fact exist. *Burglin*, 4 F.3d at 1297.

The district court dismissed the claims of legal malpractice as being time barred. Louisiana generally applies a one-year prescriptive period to claims of legal malpractice. *Lima v. Schmidt*, 595 So.2d 624, 628 (La. 1992); LA. CIV. CODE ANN. art. 3492 (West 1992). The state recognizes two exceptions to this general rule: (1) where the attorney expressly warrants a specific result and fails to obtain that result, and (2) where the attorney agrees to perform certain work and does nothing whatsoever. *See Lima*, 595 So.2d at 628 n.2. Neither of these situations applies in the present case. Appellant has made no allegation that Cave & McKay warranted any particular result, and the record clearly indicates that the law firm did at least do some work on the case including filing the original complaint and beginning discovery. Thus, the one-year prescriptive period began to run no later than March 18, 1988, when the Louisiana Supreme Court declined to review

Appellant's case against Todd Electric.[2] Filing the initial malpractice suit in state court acted to toll the statute of limitations while the suit was pending, LA. CIV. CODE ANN. art. 3463 (West 1993); however, prescription began to run anew from the date of the voluntary dismissal of the suit on July 6, 1989. Because Appellant did not file the present federal court action until November 20, 1991, the prescriptive period had expired and his suit appears time barred.

Where, as here, the plaintiff's complaint on its face reveals that prescription has run, "the burden is on the plaintiff to show why the claim has not prescribed." *Lima*, 595 So.2d at 628. Appellant argues that we should apply the doctrine of *contra non valentem non currit praescriptio,* meaning that prescription does not run against a person who could not bring his suit. *Id*. at 629. This doctrine tolls the statute of limitations for malpractice in certain situations where the attorney fraudulently conceals his fault, remains silent while the prescriptive period expires, or otherwise deliberately prevents his client from discovering a cause of action for malpractice.[3] *Id*. The present case does not involve

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[2] Appellant has failed to argue any malpractice claim against Cave & McKay regarding his suit against Sears and the other defendants or his unrelated slander suit against Dr. Wilkerson. Thus, both claims are considered abandoned on appeal.

[3] Louisiana courts also recognize the similar doctrine of "continuous representation." *Lima*, 595 So. at 630. Under this doctrine, prescription is "suspended during the attorney's continuous representation of this client regarding the specific subject matter in which the alleged wrongful act or omission occurred." *Id*. (citation omitted). In the present case, Appellees continued to represent Knighten regarding his claims against the remaining defendants until November 1991, but they did not represent him regarding the Todd Electric litigation

such activity. Appellant is charged with knowledge of the law pertaining to his claims, including the applicable statute of limitations. He was aware of all necessary facts giving rise to his malpractice claim, if any such claim existed, as of the filing of his state court action against his attorneys in February 1989SQmore than two and one-half years before he filed the present federal court action. As Appellant has offered no summary judgment evidence nor alleged any specific facts that would contradict this finding, we conclude that he failed to carry his burden of proving that his claim is not prescribed, and thus, summary judgment was appropriate.

Appellant also argues that he was denied due process because the district court did not allow him to propound discovery before granting defendants' motion for summary judgment. However, a party seeking additional discovery

> "must show how the additional discovery will defeat the summary judgment motion, that is, will create a genuine dispute as to a material fact, and 'may not simply rely on vague assertions that additional discovery will produce needed, but unspecified facts.'" *International Shortstop, Inc. v. Rally's, Inc.*, 939 F.2d 1257, 1267 (5th Cir. 1991), *cert. denied*, 112 S.Ct. 936 (1992) (citation omitted).

If the district court determines that additional discovery is unlikely to generate evidence pertaining to the motion for summary judgment, "the district court may, in its discretion, proceed to rule on the motion without further ado." *Id*. Appellant makes and made no attempt to explain what facts he hopes to uncover that

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beyond the Louisiana Supreme Court's denial of certiorari on March 18, 1988. Thus, continuous representation is inapplicable.

might affect prescription. Therefore, the district court acted within its discretion in disposing of the matter without permitting irrelevant and unnecessary discovery.

II. Rule 11 Sanctions

Appellees sought sanctions against Appellant for bringing an "unquestionably frivolous" civil rights action and for pursuing a malpractice claim that had clearly prescribed. The district court sanctioned Appellant $1,500 to partially defray Appellees' expense of defending the frivolous civil rights claims. We review a sanction by the district court only for an abuse of discretion. *Thomas v. Capital Security Services, Inc.*, 836 F.2d 866, 873 (5th Cir. 1988) (en banc). While the district court is obliged to construe *pro se* pleadings liberally, it is not required to condone blatantly frivolous, vexatious, or harassing conduct. *See Mayfield v. Klevenhagen*, 941 F.2d 346, 348 (5th Cir. 1991) ("Although *pro se* litigants are given considerable latitude, Mayfield has consumed his portion of the court's patience and then some. . . . His wasting of increasingly scarce judicial resources must be brought to an end."). On the contrary, Rule 11 as then in force mandated that such activity be punished regardless of its source, and Congress specifically amended the rule in 1983 to include *pro se* litigants. *See* William W. Schwarzer, Sanctions Under the New Rule 11SQA Closer Look, 104 F.R.D. 181, 184 (1985). By signing the original pleading, Appellant certified that, after making a "reasonable inquiry," he believed "the matters in his complaint were well-grounded in fact and warranted by existing law." *Mayfield*, 941 F.2d at 348. The objective aspect of the "reasonable

inquiry" dictates that a party electing to represent himself in court bears the burden of reading and understanding the applicable law. *Cf. Thomas*, 836 F.2d at 873 ("Rule 11 compliance is now measured by an objective, not subjective, standard of reasonableness under the circumstances.").

Appellant argues that he effectively abandoned these claims by amending his complaint and deleting all references to Title 42. The district court was not persuaded,[4] and neither are we. First, both the original intent and the plain language of Rule 11 require the reviewing Court to consider the litigant's conduct at the time each pleading is signed. *Thomas*, 836 F.2d at 874. "Like a snapshot, Rule 11 review focuses upon the instant when the picture is takensQwhen the signature is placed on the document." *Id*. Under Rule 11 as then in force, subsequently amending one's pleadings may have lessened the severity of the "appropriate sanction" but did not eliminate the original violation. *Id*. at 875 ("Rule 11 applies to each and every paper signed during the course of the proceedings and requires that each filing reflect a reasonable inquiry."). Secondly, any "reasonable inquiry" would reveal Appellant's civil rights claims to be patently frivolous. He had entered into a private employment contract with a private law firm. No section 1983 claim ever arose because no state action

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[4] The district court stated:

> "Plaintiff has apparently attempted to abandon the civil rights claims by calling them 'moot' in the amended complaint in a belated move at correction. The court has, however, been required to pass upon those claims because of the ineptness of the amended complaint."

was ever involved. Section 1981, while not requiring state action, only guarantees the right "to make and enforce contracts . . . as is enjoyed by white citizens." 42 U.S.C. § 1981. No matter how liberally we construe his complaint, we cannot conceive of how Appellant, a white male, might have been deprived of this right by his law firm, consisting of white males, simply because the firm failed to recover as much money as he felt he deserved. Finally, Appellant's amended complaint, ostensibly intended to retract the civil rights claims, seems to insist that such claims are proper and that the district court erred in denying them,[5] as if attempting to evade the magistrate's threat of sanctions while encouraging this Court to bestow damages for those very same claims.[6]

We recognize that Appellant is a *pro se* litigant and that he has at least made a belated attempt to correct his errors; however, we are not willing to infringe upon the district court's discretion in these matters. We are not asked to decide "whether this Court, in its own judgment and as an original matter, would have imposed

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[5] On appeal, Appellant insists that he has a right to bring suit for a violation of his right to enforce contracts, and that the district court committed "unlawful racial discrimination" by refusing to allow a white plaintiff to bring a section 1981 claim against a white defendant when an African-American plaintiff might be allowed to bring such a claim. This meritless argument ignores the plain language of section 1981 and merely serves to demonstrate Appellant's reluctance to abandon these claims.

[6] For instance, the amended complaint suggests that, "in the event the Plaintiff['s] claim . . . is insufficient to suffice for a cause of action of negligence and/or legal malpractice," the court should grant damages under any other unidentified statute not listed in the complaint which "enables Plaintiff a cause of action against Defendants Cave & McKay . . . ."

any of these sanctions," but rather "whether the district court abused its discretion in doing so." *Topalian v. Ehrman*, 3 F.2d 931, 934 (5th Cir. 1993) (citing *National Hockey League v. Metropolitan Hockey Club*, 427 U.S. 639, 642, 96 S.Ct. 2778, 2780 (1976)). Due to the obvious frivolity of the civil rights claims and Appellant's unwillingness to abandon them, we conclude the court acted within its discretion and accordingly affirm its imposition of sanctions.

III. Rule 38 Sanctions

Finally, the defendants argue that they are entitled to damages in the amount of $5,000 under Rule 38, FED.R.APP.P. Rule 38 permits an appellate court to award damages to the appellee if the court determines the appeal is frivolous. "An appeal is frivolous if the result is obvious or the arguments of error are wholly without merit." *Coghlan v. Starkey*, 852 F.2d 806, 811 (5th Cir. 1988). While we find the present appeal meritless, we do not consider it so unreasonable as to warrant additional sanctions. The courts have shown a particular reluctance to impose sanctions under Rule 38 when the appeal challenges a finding that is not mandatory, such as an abuse of discretion. *See id*. at 811 n.8. Thus, we conclude that Rule 38 sanctions would be inappropriate.

Conclusion

Accordingly, the district court's grant of summary judgment and imposition of Rule 11 sanctions are AFFIRMED, and the defendants' motion for Rule 38 sanctions is DENIED.