IN THE UNITED STATES COURT OF APPEALS

FOR THE FIFTH CIRCUIT

No. 92-5576
Summary Calendar

CHARLES L. M., on behalf of his daughter, Susan R. M.,

Plaintiff-Appellant,

v.

NORTHEAST INDEPENDENT SCHOOL DISTRICT, ET AL.

Defendants-Appellees.

Appeal from the United States District Court
for the Western District of Texas
(SA 89 CA1497)

June 4, 1993

Before KING, DAVIS and WIENER, Circuit Judges.

PER CURIAM:[*]

This is the third time that this litigation has been before us. See Charles L.M. v. Northeast Independent School District, 884 F.2d 869 (5th Cir. 1989); Susan R.M. v. Northeast Independent School District, 818 F.2d 455 (5th Cir. 1987). On this third appeal, this court is barraged with various pleadings and motions filed by the plaintiff-appellant, Charles L. M., acting as next

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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 Pursuant to that Rule, the court has determined that this opinion should not be published.

friend of his minor daughter, Susan R. M. We are also presented with a motion requesting sanctions against Charles L. M. filed by one of the appellees. We find that every argument made by the appellant is meritless but, in consideration of his pro se status, decline to impose sanctions.

I.

In 1985, Charles L.M., acting as next friend of his minor daughter, Susan R.M., brought suit against Northeast Independent School District (NEISD) and the Texas Education Agency (TEA) "claiming that the Education of All Handicapped Children Act (EAHCA) required [the defendants] to place his child in a residential psychiatric hospital with an in-house education program." Susan R. M., 818 F.2d at 457. This court affirmed the district court's determination that Charles L. M. did not have standing to bring the suit because Charles L. M. had previously obtained from a Texas state court the appointment of the State of Texas as his daughter's managing conservator. Id. The state court also appointed an attorney ad litem. Id. This Court left open a number of issues, including: i) the underlying EAHCA claim, which could be prosecuted by Susan through her attorney ad litem, ii) Charles L. M.'s right to recover possible damages sustained before Susan's managing conservatorship, and iii) Charles L. M.'s possible standing if -- after Susan turns eighteen and, thus, loses her court-appointed managing conservatorship -- he can show her to be incompetent. Id. at 458-59.

Susan turned eighteen on August 18, 1987. Shortly thereafter, Charles L. M. brought a second suit in his daughter's behalf. The district court dismissed for insufficient service and this court dismissed for untimely notice of appeal. Charles L. M., 884 F.2d 869, 869 (5th Cir. 1989). In October 1989, Charles L. M. once again filed suit on behalf of his daughter. In this complaint, he alleged that the defendants violated EAHCA and the Equal Protection Clause, violated state tort law, and requested that various Texas education statutes should be declared null and void to the extent that they conflicted with the EAHCA. Charles L. M. asked for damages, a declaratory judgment, and injunctive relief. He also asked for the district court to restore his legal control over Susan from the time of the state managing conservatorship until her eighteenth birthday in 1987.

NEISD answered by asserting the defenses of mootness, Charles L. M.'s lack of standing, the running of the statute of limitations, res judicata, collateral estoppel, and Eleventh Amendment sovereign immunity. TEA filed motions for dismissal and for sanctions. The district court referred the case to the magistrate judge for pre-trial matters. The magistrate judge ruled on many of the motions, including plaintiff's motions for default judgment. The magistrate judge recommended that the case be dismissed, basing his ruling on a finding of res judicata, Charles L.M.'s lack of standing, and the running of the statute of limitations. The magistrate also recommended

sanctions against Charles L. M. Charles L. M. filed timely objections that disputed his lack of standing, the application of res judicata, the application of Texas' two-year statute of limitations for this suit, and the propriety of sanctions. Among his many motions, Charles L. M. filed a motion for permission to file supplemental pleadings, which the district court treated as untimely objections to the magistrate report.

The district court, after de novo review, adopted the portions of the magistrate's report recommending dismissal but declined to impose sanctions. After timely notice of appeal was filed, the parties filed various motions in this Court.

II.

i) The Merits

A. The District Court's Application of the Res Judicata Doctrine

In attacking the district court's order of dismissal, Charles L. M. argues that the district court's ruling that his claims were res judicata was inappropriate. In the first suit, this court affirmed the district court's dismissal on standing grounds. Susan R. M., 818 F.2d at 457. Standing is viewed as a threshold jurisdictional issue and, therefore, the first suit was not a final decision on the merits. We agree that it thus would not support a dismissal on the basis of res judicata. See Gregory v. Mitchell, 634 F.2d 205, 206-07 (5th Cir. 1981).

B. Does Charles L. M. Have Standing?

As we observed in our prior decision, Charles L. M., by consenting to Susan's managing conservatorship, relinquished the right to assert any claims in her behalf while she remained a minor. Susan R. M., 818 F.2d at 458. We also observed that, after Susan R. M. turned eighteen, Charles L. M. would have no standing unless he showed that Susan had been declared mentally incompetent to bring her own lawsuit. See id. at 458-59; FED. R. CIV. P. 17(c). Considering that Susan is now twenty-two years old and has not been declared mentally incompetent, we agree with the lower court that Charles L.M. has no standing to assert any claims on his daughter's behalf that arose after her managing conservator was appointed.

C. Claims That Arose Before the Appointment of Susan R. M.'s Managing Conservator

Although his pleadings are unclear on this point, we will assume that Charles L. M. also is claiming that he is entitled to recover damages for claims that arose before the creation of the managing conservatorship. See Susan R. M., 818 F.2d at 458 (leaving the pre-conservatorship claim open). If this is indeed the case, we agree with the lower court that the statute of limitations bars this claim. The conservatorship came into existence in February 1986. Id. at 457. This Court uses a two-year statute of limitations for EAHCA actions arising in Texas. See Scokin v. Texas, 723 F.2d 432, 438 (5th Cir. 1984). Charles L. M. argues that Scokin was decided wrongly. We observe that "[i]n this circuit, one panel may not overrule the decision,

right or wrong, of a prior panel in the absence of an intervening contrary or superseding decision by the [C]ourt en banc or the Supreme Court." Society of Separationists, Inc. v. Herman, 939 F.2d 1207, 1211 (5th Cir. 1991), cert. denied, 113 S.Ct. 191 (1992).

Charles L. M. further argues that Texas law adds two years to the limitation to account for a claim arising during a plaintiff's minority. This makes no difference in this case because, as we previously decided, Charles L. M. does not have standing to assert his adult daughter's claims, even ones that arose while she was a minor.

D. Charles L. M.'s Plea that Susan R. M.'s Conservatorship Be Retroactively Invalidated

As noted supra, Charles L. M.'s complaint asked the district court to invalidate the managing conservatorship from 1986 through August 1987, when Susan turned eighteen and her conservatorship ceased. The district court held that such relief was beyond its jurisdictional power. Charles L. M. disagrees and cites Christopher T. v. San Francisco Unified School Dist., 553 F.Supp. 1107, 1120-21 (N.D. Cal. 1982), for the proposition that a federal court can invalidate the state's legal custody of a minor whose parents relinquished their parental rights in order for the child to receive needed educational and psychological care. His reliance on that case is misplaced. Christopher T. involved two minors. Id. at 1109-10. The court ordered legal custody restored to the minors' parents. Id. at 1120-21. Susan

is now twenty-two. The state's managing conservatorship ended upon her eighteenth birthday. We are aware of no legal authority that allows a federal court to retroactively invalidate a state court-created managing conservatorship which is no longer in existence, particularly when no federal constitutional basis has been offered for such a drastic intrusion into the traditional province of state courts.

E. Charles L. M.'s Invocation of Equitable Principles

Charles L. M. argues that "equitable considerations" provide an avenue for his suit's success notwithstanding the numerous legal obstacles in its path. We disagree. Charles L. M. simply misunderstands the nature of equity. See United States v. Coastal Refining & Marketing, Inc., 911 F.2d 1036, 1043 (5th Cir. 1990) ("A court in equity may not do that which the law forbids.").

F. Was the Case Improperly Referred to the Magistrate?

Charles L. M. argues that the district court erred in sending the case to the magistrate judge to rule on pretrial matters without obtaining the consent of the parties. Charles L. M. never objected to the district court's sending the case to a magistrate judge. Therefore, this court reviews for plain error. United States v. Paden, 908 F.2d 1229, 1237 (5th Cir. 1990), cert. denied, 111 S.Ct. 710 (1991). We find no plain error. The district court sent the case to the magistrate judge pursuant to

28 U.S.C. § 636(b)(1), a statute which does not require the consent of the parties.

G. Charles L. M.'s Motion for Default Judgment and TEA's Response to the Complaint

Charles L. M. argues that the district court and the magistrate erred in not granting his motion for default judgment. A defendant has twenty days to respond after the service of summons and complaint. See FED. R. CIV. P. 6(a), 12(a). NEISD received the summons and complaint on October 26, 1989, and filed its answer on November 15, 1989. TEA received the summons and complaint on October 27, 1989 and filed its Rule 11 and 12(b)(6) motions on November 16, 1989. That is, both defendants responded on the twentieth day following their respective receipts of the complaint.

Rule 12 allows the defendant to assert the defense of a failure to state a claim upon which relief can be granted as an independent motion in response to a complaint and need not be a part of an answer. See FED. R. CIV. P. 12(b). This is precisely what TEA did when it filed its 12(b)(6) motion. Default judgment is improper if a party is defending against suit. See FED. R. CIV. P. 55(a). The district court thus did not err in denying the motion for default judgment.[1]

[1] Charles L. M. also argues that the district court erred in failing to consider his motion for "judicial notice" of TEA's motion to dismiss as not being a proper answer to the complaint. Charles L. M. brought his motion pursuant to Rule 201(a) of the Federal Rules of Evidence, which governs judicial notice of "adjudicative facts." In view of the definition of "adjudicative

H. Charles L. M.'s Motion to Recuse the Magistrate Judge

Charles L. M. argues that the district court erred in denying his motion to recuse the magistrate judge. After the magistrate judge sent the case back to the district court, Charles L. M. filed a motion to have the magistrate recused from the case because this magistrate was the law clerk for the district court judge who presided over Charles L. M.'s first lawsuit in 1986.

The federal judicial recusal statute provides that "[a]ny justice, judge, or magistrate of the United States shall disqualify himself in any proceeding in which his impartiality might reasonably be questioned." 28 U.S.C. § 455(a). Nothing in Charles L. M.'s allegation would lead a reasonable person to question the impartiality of this magistrate judge. Moreover, this court imputes a timeliness requirement onto a § 455 request. See Delesdernier v. Porterie, 666 F.2d 116, 121-123 (5th Cir.), cert. denied, 459 U.S. 839 (1982). Because Charles L. M. filed his motion after the magistrate judge made his recommendation and sent the case back to the district court, this court can view the motion as "too tardily made for . . . consider[ation] . . . now." Id. at 123 (footnote omitted).

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facts" found in the rule's advisory notes, we believe that what Charles L. M. wanted the district court to notice judicially does not qualify an adjudicative fact. See id. Advisory Committee's Notes, subdivision (a). Moreover, Charles L. M. is simply incorrect in his argument that TEA's Rule 12(b)(6) motion to dismiss is not a proper response to a complaint.

I. Were Proper Findings of Fact Made?

Charles L. M. argues that the district court and the magistrate judge erred in failing to make findings of fact within their orders. He does not identify or specify which orders are allegedly faulty in this respect. The Federal Rules of Civil Procedure provide that "[f]indings of fact and conclusions of law are unnecessary on decisions of" Rule 12 motions. See FED. R. CIV. P. 52(a) & (c). This case was dismissed pursuant to a Rule 12 motion. Thus, no findings of fact were required in any event.

J. Did the District Court Err in Failing to Consider Charles L. M.'s "Counterclaim Supplemental Pleadings"?

Charles L. M. argues that the district court erred in refusing to consider in its final order his motions to file "counterclaim supplemental pleadings." The district court treated these motions as untimely objections to the magistrate judge's report and recommendations. "A district court . . . has the discretionary authority to allow a party to file objections after the ten-day period." Cay v. Estelle, 789 F.2d 318, 322 (5th Cir. 1986) (citing to FED. R. CIV. P. 6(b)).

Charles L. M.'s motions were brought pursuant to Rule 15(d) of the Federal Rules of Civil Procedure, which governs supplemental pleadings, not objections to a magistrate's proposed findings and conclusions. A district court must freely permit amendments "unless the ends of justice require denial." James v. Sadler, 909 F.2d 834, 836 (5th Cir. 1990); see also FED. R. CIV. P. 15, Advisory Committee's Notes (1963 amendments).

We believe that any error was harmless because the substance of what Charles L. M. was trying to add to the record would not have made a difference to the result reached by the district court. See FED. R. CIV. P. 61 (harmless error). Charles L. M.'s first "counterclaim-supplemental motion" made the argument that this third lawsuit and the second lawsuit were simply amended complaints which relate back to his original complaint filed in the first lawsuit. This argument is frivolous. The second motion argued that a Texas statute provides Charles L. M.'s daughter a tolling of the statute of limitations for the time she was in a psychiatric hospital. This is irrelevant because, as we previously have held, Charles L. M. does not have standing to assert his daughter's rights.

K. Substitution of Counsel

Charles L. M. argues that Rule 12(a) provides twenty days for an opposing party to respond to a motion and that the district court erred in granting TEA's motion to substitute counsel without affording Charles L. M. twenty days to respond. Charles L. M. also filed a motion to strike TEA's motion under Rule 12(f) after the district court granted the motion.

Rule 12(a) expressly applies to pleadings; a motion to substitute counsel is in no way connected with the pleadings. See FED. R. CIV. P. 7(a) & (b), 12(a). Any possible error that the district court might have made by granting TEA's motion would

be harmless because Charles L. M.'s substantive rights were not affected. See FED. R. CIV. P. 61.

L. Pro Se Pleadings

Charles L. M. argues that the district court did not construe liberally his pro se complaint and motions. He is correct that a court must construe liberally the legal papers of a pro se litigant. See Haines v. Kerner, 404 U.S. 519, 520 (1972). Our review of the record gives no indication that the district court or the magistrate judge did not afford Charles L. M.'s pleadings the requisite solicitude.

ii) Motions

A. Charles L.M.'s Motion to Quash TEA's Brief

Pending before this Court is Charles L. M.'s motion to quash TEA's brief. In this motion, Charles L. M. argues that, because TEA did not raise the defense of Eleventh Amendment sovereign immunity in the court below, as it does on appeal, TEA is prohibited from raising this issue for the first time in this court. We note that the Supreme Court has held that "the Eleventh Amendment defense sufficiently partakes of the nature of a jurisdictional bar so that it need not be raised in the trial court." Edelman v. Jordan, 415 U.S. 651, 677-78 (1974). Therefore, we deny Charles L. M.'s motion.[2]

[2] Charles L. M.'s related motions to quash NEISD's brief and to compel the clerk of the court to file his motion to quash NEISD's brief have previously been denied. See Charles L. M. v.

B. Charles L. M.'s Motion to Supplement His Appellate Brief

Also pending before this Court is Charles L. M.'s motion for leave to file a supplemental brief. He contends that a supplemental brief is necessary to rebut appellees' arguments regarding standing. He believes that he has standing to assert his daughter's claims based upon Erie R.R. Co. v. Fritsch, 72 F.2d 766, 767 (3rd Cir.), cert. denied, 293 U.S. 620 (1934), a case dealing with the appointment of a next friend under New Jersey law. That case is inapposite. We deny Charles L. M.'s motion.

C. Motions for Sanctions

Pending before this Court are NEISD's motion for sanctions against Charles L. M. and Charles L. M.'s motions for sanctions against counsel for NEISD. Charles L. M. argues that NEISD's counsel violated the Texas Rules of Professional Conduct in counsel's response to appellant's motion to file a supplemental

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Northeast Indep. School Dist., No. 92-5576 (5th Cir. Aug. 28, 1992) (one-judge order); id. (5th Cir. July 31, 1992) (one-judge order).

Although the Clerk of the Court has twice returned it to Charles L. M. on the ground that it was moot, for purposes of finality we herein deny Charles L. M.'s "Motion to Compel the Court Clerk to File His Previously Filed Pleading." The "previously filed pleading" to which Charles L. M. refers was actually his motion to quash NEISD's response to Charles L. M.'s motion to quash NEISD's brief. Charles L. M. filed the most recent motion to quash on the same day that this court denied Charles L. M.'s motion to quash NEISD's brief. Thus, Charles L. M.'s most recent motion to quash was in fact moot and was properly rejected by the Clerk of the Court.

brief. Specifically, Charles L. M. claims that NEISD's counsel "misrepresented the law" in his response to Charles L. M.'s appellate motion. We have reviewed all of NEISD's legal papers and disagree with Charles L. M. that counsel misrepresented the law, intentionally or otherwise. We thus deny Charles L. M.'s request for sanctions.

NEISD argues that we should award it sanctions in view of the frivolous nature of Charles L. M.'s most recent appeal in this seemingly never-ending litigation. "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). Although we agree that Charles L. M.'s appeal is wholly frivolous, we decline to impose sanctions in view of Charles L. M.'s pro se status. See Clark v. Green, 814 F.2d 221, 223 (5th Cir. 1987) (noting this court's caution in sanctioning pro se litigants). We do note, however, that should Charles L. M. file another frivolous lawsuit or appeal involving the same general subject matter involved in the last three rounds of this litigation, we will not indulge him in any further solicitude regarding sanctions.

III.

For the foregoing reasons, we AFFIRM the judgment of the district court in all respects and DENY every motion filed by Charles L. M. in this court. We also DENY Charles L. M. and NEISD's motions for sanctions.