UNITED STATES COURT OF APPEALS

FOR THE FIFTH CIRCUIT

No. 92-7055
Summary Calendar

STEVEN L. NALL,

Plaintiff-Appellant,

versus

J. L. STRINGER, ET AL.,

Defendants-Appellees.

Appeal from the United States District Court for the
Southern District of Mississippi
(CA S91 0420)

August 27, 1993

Before GARWOOD, JONES and EMILIO M. GARZA, Circuit Judges.*

GARWOOD, Circuit Judge:

Plaintiff-appellant Steven L. Nall (Nall) filed this civil rights action, pursuant to 42 U.S.C. § 1983, alleging that he had been deprived of his constitutional right to maintain the integrity of his family without due process. Because the lawsuit stems from state proceedings pending (currently and at the time the federal

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 Pursuant to that Rule, the Court has determined that this opinion should not be published.

action was commenced) on appeal before the Mississippi Supreme Court, the district court dismissed the action, following the abstention principles of *Younger v. Harris*, 91 S.Ct. 746 (1971), and its progeny. We affirm the dismissal of all claims and defendants; in addition, we agree with defendant-appellee Chancellor Barlow that this appeal is frivolous and accordingly grant his request for attorneys' fees and costs on appeal.

Facts and Proceedings Below

The facts of this case center around a dispute over visitation rights of Steven Joseph Randall Nall (Steven),[1] between his father and his great-grandmother.

Defendants in the federal court action are the Honorable Glen Barlow, Chancellor of the Chancery Court of the State of Mississippi, Sixteenth Chancery District (Chancellor Barlow), the judge who presided over the state trial proceedings; Eleanor Stringer, Steven's great-grandmother; J.L. Stringer, Eleanor's husband; Thomas E. Robertson, the Stringers' attorney in the state court action; and Henry Tillman, the guardian ad litem appointed by Mississippi to represent Steven.[2]

Steven is the son of plaintiff Nall and his ex-wife Melinda Nall. After Nall and Melinda were divorced, Melinda took Steven, of whom she had custody, to live with her grandmother, Eleanor Stringer and Eleanor's husband, J.L. Stringer. Steven remained

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[1] The briefs before us on appeal are not consistent in the spelling of Steven's name. We follow the spelling used in the brief filed on behalf of Nall, Steven's father.

[2] Chancellor Barlow is the only defendant to appear either at the district court level or before this Court.

with the Stringers for about ten months. The Stringers, with Melinda's consent, initiated proceedings to adopt Steven. Nall contested the adoption.

Melinda was killed in an automobile accident prior to the completion of the adoption process. Thereafter, in September 1989, Chancellor Barlow denied the adoption and awarded custody of Steven to Nall, subject to visitation rights granted to the Stringers pursuant to Mississippi's Grandparents' Visitation Rights Act, MISS. CODE ANN. §§ 93-16-1 to 93-16-7 (1992 Supp.). Apparently, Nall did not appeal from this visitation order.

In 1990, Nall remarried and moved to Florida. In August 1990, Steven failed to appear for a court-ordered visit with the Stringers, who then filed a Motion for Contempt against Nall. Several months later, Nall's attorney answered the citation for contempt and informed the court that his client had moved to Florida and had not given his attorney his new address. Chancellor Barlow set a hearing on the motion for contempt for December 7, 1990.

Although Nall was not personally served with notice of the hearing, both his new wife and his attorney were properly served. Nall did not attend the hearing; his attorney appeared on his behalf. Chancellor Barlow entered a temporary order, finding Nall in contempt for failing to appear at the scheduled hearing but allowing him until January 7, 1990, to appear before the order became final. In addition, the temporary order awarded "temporary" custody of Steven to the Stringers, with the warning that custody would become permanent if Nall failed to appear at the next

scheduled hearing. The Stringers did not take custody of Steven, however, because Nall applied for, and was granted, an emergency stay of the temporary order from the Mississippi Supreme Court.

After a second hearing before the Chancery Court, which Nall attended, Chancellor Barlow upheld his finding of contempt. Nall was sentenced to ninety days in jail for contempt, but his sentence was suspended in lieu of bond and his compliance with the new visitation decree. The court restored custody to Nall and modified the original visitation decree to take into consideration his residence in Florida.

Nall filed a motion for new trial, which Chancellor Barlow denied after slight modification of its January 17 order. Nall appealed to the Mississippi Supreme Court on March 13, 1991. His appeal remains pending in that court.

In September 1991, while his appeal was pending before the Mississippi Supreme Court, Nall filed this action in the United States District Court for the Southern District of Mississippi. In his complaint, which was amended in December 1991, Nall alleged that the defendants conspired to interfere with the integrity of his family. He sought actual and punitive damages totalling $2,000,000 against all defendants except Chancellor Barlow.[3] Nall also requested a declaratory judgment finding that the Mississippi statute granting visitation rights to grandparents, MISS. CODE ANN. §§ 93-16-1 to 93-16-7, is unconstitutional because it does not require that a parent be deemed unfit to care for a child before

[3] Chancellor Barlow is protected by judicial immunity from Nall's claims for damages.

visitation rights may be granted to grandparents. Finally, he applied for a preliminary injunction restraining the Chancery Court from enforcing the statute.

Chancellor Barlow filed two motions to dismiss and an alternate motion to abstain, alleging that the district court lacked subject matter jurisdiction and contending that Nall's complaint failed to state a claim. After a hearing held on December 20, 1991, the district court denied Nall's motion for preliminary injunction and granted Chancellor Barlow's motion to dismiss without prejudice pursuant to the abstention grounds of *Younger v. Harris*, 91 S.Ct. 746 (1971). Although Chancellor Barlow was the only defendant present or represented by counsel at the hearing, the district court dismissed the remaining defendants *in absentia*.

Discussion

Underlying Nall's complaint, with his allegations of a constitutional deprivation and his requests for declaratory and injunctive relief, is a facial challenge to the constitutionality of Mississippi's Grandparents' Visitation Rights Act as violative of his liberty interest in the custody of his child.

The district court dismissed Nall's complaint, concluding that the pending appeal before the Mississippi Supreme Court required the federal courts to abstain under the principles of *Younger v. Harris*. Further, the court denied Nall's application for a preliminary injunction.

The rule of *Younger v. Harris*, 91 S.Ct. 746, 749 (1971), provides that a federal court, in the absence of unusual

circumstances, may not interfere with a pending state criminal prosecution. *Younger* relies upon the principle of federalism which directs federal courts to refrain from hearing constitutional challenges to state actions where federal action would be an improper intrusion on the right of a state to enforce its own laws in its own courts. 17A WRIGHT, MILLER, AND COOPER, FEDERAL PRACTICE AND PROCEDURE, §4251 (1988). Although *Younger* concerned a pending state criminal prosecution, its rule has been extended to the civil context in cases where "the State's interests in the proceeding are so important that exercise of the federal judicial power would disregard the comity between the States and the National Government." *Pennzoil Co. v. Texaco, Inc.*, 107 S.Ct. 1519, 1526 (1987). *See also Middlesex County Ethics Comm. v. Garden State Bar Ass'n*, 102 S.Ct. 2515, 2521 (1982) ("The policies underlying *Younger* are fully applicable to noncriminal judicial proceedings when important state interests are involved.").

Abstention is appropriate where state proceedings (1) are pending at the time the federal action is filed, (2) implicate important state interests, and (3) provide an adequate opportunity to raise the federal claims.[4] *Middlesex County Ethics Comm.*, 102 S.Ct. at 2521. When these requirements are met, the federal district court has no choice but to dismiss the federal action;[5] it

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[4] The burden is on Nall, the federal plaintiff, to show that state procedural law barred the presentation of his constitutional claims in the state courts. *Pennzoil Co. v. Texaco, Inc.*, 107 S.Ct. at 1528.

[5] Two situations in which the federal court need not abstain even if the three requirements are met are: (1) where the state proceedings are being undertaken in bad faith or for purposes of

may not abstain, nor may it stay the federal action pending resolution of the state proceedings. *Gibson v. Berryhill*, 93 S.Ct. 1689, 1697 (1973) ("[*Younger*] contemplates the outright dismissal of the federal suit, and the presentation of all claims, both state and federal, to the state courts").

These requirements are clearly met here. First, Nall filed this federal action in September 1991; his appeal to the Mississippi Supreme Court was initiated in March 1991 and remains pending at the time of this decision.

Second, the Supreme Court has held that a state's interests in domestic relations and contempt proceedings implicate important state interests requiring abstention. *Moore v. Sims*, 99 S.Ct. 2371, 2383 (1979) (in context of pending proceeding by state for custody of abused children, Court noted that family relations "are a traditional area of state concern"); *Juidice v. Vail*, 97 S.Ct. 1211, 1217 (1977) ("The contempt power lies at the core of the administration of a State's judicial system . . . .").

Finally, Nall was able to, and indeed did, raise his constitutional challenges to the Mississippi statute in the state court proceedings. Record excerpts provided for our review on appeal indicate that Nall presented, as issues of error before the Mississippi Supreme Court, his claims that the state statute is unconstitutional and that his due process rights were violated by the state court proceedings. That court is certainly competent to

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harassment; or (2) where some other extraordinary circumstances exist, such as proceedings pursuant to a flagrantly and patently unconstitutional state statute. *Younger*, 91 S.Ct. at 753-755. These exceptions are not applicable here.

address these issues.

The district court's abstention from enjoining the appeal currently pending before the Mississippi Supreme Court, and from reaching the constitutionality of the Grandparents' Visitation Rights Act, was mandated by the rules of *Younger* abstention.

Nall also argues that the district court erred in denying his motion for a preliminary injunction. Since the case was properly dismissed, the district court did not err in denying the motion for preliminary injunction.[6]

The district court dismissed the entire complaint under the principles of *Younger*, including Nall's claim for actual and punitive damages against all defendants save Chancellor Barlow.

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[6] We further note that no court, to our knowledge, has found a law such as the challenged Mississippi statute to be unconstitutional, and at least one court has upheld a grandparent visitation right statute similar to that of Mississippi. Chancellor Barlow asserts that forty-eight states recognize grandparent visitation rights in some form when in the best interests of the child involved. In *Sketo v. Brown*, 559 So.2d 381, 382 (Fla. Dist. Ct. App. 1990), a Florida appeals court concluded that the statute in question was not facially unconstitutional, recognizing that the state has a "sufficiently compelling interest in the welfare of children that it can provide for the continuation of relations between children and their grandparents under reasonable terms and conditions so long as that is in the children's interest." The court did not decide if the statute was constitutional as applied in the particular order because it determined that the trial court abused its discretion in entering an order which was too extensive and unreasonable. *Id.* *See generally*, Annotation, *Grandparents' Visitation Rights*, 90 A.L.R.3d 222 (1979). The modified visitation order entered by Chancellor Barlow does not appear facially unreasonable. Eleanor Stringer was granted visitation with Steven for two weeks each June, two weeks each August, and for the week following Christmas of each year. Mrs. Stringer and Nall were to share expenses of the visitation for each year following 1991, in which year Nall was to bear all expenses himself.

Even if Nall could not have asserted his damage claim in the state court proceedings, however, we determine that abstention was proper in this instance. If we were to hold otherwise, Nall would be able to pursue, and possibly attain, damages for violation of his constitutional rights, while still contesting, in the pending state appeal, the validity of the state statute alleged to have violated those rights. This is surely in violation of the spirit of *Younger* and its progeny.

Even were the federal district court not required to abstain from considering the damage claim under *Younger*, Nall's allegations of conspiracy, upon which damage claims were based, are conclusory, and the district court's dismissal was appropriate. A plaintiff's allegations of conspiracy must be supported by pleading the operative facts upon which the allegations rest. "Bald allegations that a conspiracy existed are insufficient." *Young v. Biggers*, 938 F.2d 565, 569 (5th Cir. 1991) (quoting *Lynch v. Cannatella*, 810 F.2d 1363, 1369-1370 (5th Cir. 1987)).

Nall's charges of conspiracy asserted that (1) defendants discussed the case at meetings and during phone calls between and among the parties; (2) the Chancery Court ordered the guardian ad litem to obtain information against Nall; (3) the Chancery Court granted relief to the Stringers without notice to Nall; and (4) as a result of the conspiracy, the Chancery Court entered an order depriving him of his parental rights. The bulk of these assertions describe no more than the normal function of a court in enforcing

its order.[7]

Furthermore, Nall may not invest the federal district court with jurisdiction by disguising his dissatisfaction with a state court decision as a section 1983 action and alleging that the state court decision deprived him of constitutionally protected rights or interests. *Howell v. Supreme Court of Texas*, 885 F.2d 308, 311 (5th Cir. 1989), *cert. denied*, 110 S.Ct. 3213 (1990). "[A] United States District Court has no authority to review final judgments of a state court in judicial proceedings." *District of Columbia Court of Appeals v. Feldman*, 103 S.Ct. 1303, 1315 (1983). *See also Eitel v. Holland*, 798 F.2d 815 (5th Cir. 1986) (litigants may not seek review of state court actions by filing civil rights actions in federal court); *Brinkmann v. Johnston*, 793 F.2d 111 (5th Cir. 1986) (same, domestic relations case).

Nall has raised his constitutional claims in his appeal to the Mississippi Supreme Court; even had he not, his failure to raise the claims in state court would not automatically confer federal jurisdiction over his claims. *Chrissy F. by Medley v. Mississippi Dep't of Public Welfare*, No. 92-7002 (5th Cir. July 7, 1993) (quoting *District of Columbia Court of Appeals v. Feldman*, 103 S.Ct. 1303, 1314 (1983)). *See also Parratt v. Taylor*, 101 S.Ct. 1908, 1917 (1981) ("Although the state remedies may not provide the

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[7] Nall argues that he was not personally served with process notifying him of the first hearing, in December 1990, before the Chancery Court, in which temporary custody was awarded to the Stringers. This argument ignores the fact that Nall's wife and attorney were properly served and that his attorney attended the hearing on Nall's behalf. Nall did attend the second hearing in January 1991. In addition, we note that Nall was able to raise this contention in his appeal to the Mississippi Supreme Court.

respondent with all the relief which may have been available if he could have proceeded under § 1983, that does not mean that the state remedies are not adequate to satisfy the requirements of due process.").

The district court did not err in dismissing Nall's suit. Nall's federal suit is in substance nothing but an impermissible attempt to have the federal district court reverse the orders of the Mississippi Chancery Court in the ongoing Mississippi litigation.

Chancellor Barlow asserts that this appeal is frivolous and invites us to impose sanctions against Nall. FED. R. APP. P. 38 allows us, in our discretion, to award "just damages and single or double costs to the appellee" if we determine that an appeal is frivolous. A frivolous appeal is one in which the advanced claim is unreasonable or involves legal points which are wholly without merit. *Wheat v. Mass*, No. 91-3865 (5th Cir. July 6, 1993); *Montgomery v. United States*, 933 F.2d 348, 350 (5th Cir. 1991). We agree that such damages are appropriate in this circumstance, as there can be no good faith argument that the district court's dismissal of Chancellor Barlow was improper.

Counsel for Chancellor Barlow has attached as an appendix to its appellate brief an affidavit setting forth the costs and fees incurred by him on this appeal. Finding the request reasonable, we award damages of attorneys' fees and costs in the amount of $2,635.00 to Chancellor Barlow.

Conclusion

For the reasons stated above, we affirm the district court's dismissal of this action. In addition, we award attorneys' fees and costs of $2,635.00 to Chancellor Barlow pursuant to FED. R. APP. P. 38. The judgment of the district court is

AFFIRMED.