

IN THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

No. 93-8182
(Summary Calendar)

CHRISTOPHER L. MATA, Individually
and as natural father of Ester
May Mata,
Plaintiff-Appellant,

versus

SOUTH SAN ANTONIO INDEPENDENT
SCHOOL DISTRICT, ET AL.,
Defendants-Appellees.

Appeal from the United States District Court
for the Western District of Texas
(SA-91-CV-268)

(October 15, 1993)

BEFORE JOLLY, WIENER, and EMILIO M. GARZA, Circuit Judges.

PER CURIAM:*

Plaintiffs-Appellants Christopher Mata and his daughter Ester Mata appeal the district court's grant of summary judgment dismissing their claims of religious discrimination and malicious prosecution. A review of the record discloses no genuine issues of material fact on either claim. Finding Mata's appeal frivolous and

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 Pursuant to that Rule, the Court has determined that this opinion should not be published.

the actions of his attorney on appeal sanctionable, we dismiss this appeal and assess double costs against counsel for Mata.

I

FACTS AND PROCEEDINGS

This dispute arises out of charges filed by the Defendant-Appellee, the South San Antonio Independent School District (the school district) that Mata had violated the compulsory attendance laws during the fall of 1987 and 1988. Mata's daughter Ester, a student at Kindred Elementary school, apparently suffered from various medical ailments, most prominently stomach aches. With the cooperation of principal Casillas, Mata began taking Ester out of school during lunch hours, despite the school's closed campus policy. These off-campus lunches apparently alleviated Ester's stomach problems. Eventually, however, Casillas terminated the practice.

After the off-campus lunch periods ceased, Mata did not return Ester to school. He claims that Casillas told him that he would "have his day in court," which Mata interpreted as meaning that the issue must be appealed to the justice of the peace. He assumed, apparently, that he did not need to send Ester to school while the "appeal" was pending, as he does not allege that Casillas told him her attendance was not required. After Ester had been absent for five days without an excuse, the school district sent its attendance officer, Ms. Caro, to Mata's home. Ms. Caro attempted to serve Mata, but he refused to accept the papers. Nonetheless, Mata admitted in his deposition that Ms. Caro informed him that he was being charged with "truancy."

Subsequently, Mata was charged with violation of the attendance law, convicted by a justice of the peace, and ordered to return Ester to school. Instead, Mata apparently began teaching Ester at home and continued to do so for the remainder of the 1987-88 school year. When the 1988-89 school year began in the fall, Ester did not report to school. As there was no report to the school district that Mata had again commenced home schooling, Ms. Caro again visited the Mata residence. Mata admitted that he had not yet begun teaching Ester for that school year, but refused Ms. Caro's offer of assistance as well as the school's request to view his home classes and to see a curriculum.

As a result, the school again served Mata with a warning letter from the Court. Mata refused to sign for the letter, and he was again charged with violating the attendance law. For a second time, the justice of the peace convicted Mata for these violations. Mata appealed both convictions, consolidating them in a single appeal to the Bexar County Court. On appeal, the court ruled that the state had made a prima facie case of Mata's violations of the attendance laws. As a remedy, the court ordered Mata to submit to a home visit by the school district to determine if he was in fact teaching Ester at home. After that visit occurred, the court dismissed the charges.

Individually and as Ester's guardian, Mata filed the instant suit in district court against the school district, alleging religious discrimination and malicious prosecution for violation of the attendance laws. The district court dismissed all of Mata's

claims except the malicious prosecution claim based on the running of the statute of limitations. The court later granted motions for summary judgment dismissing Mata's malicious prosecution claim and all of Ester's claims.

II

ANALYSIS

A. Standard of Review

We review the district court's grant of summary judgment by "reviewing the record under the same standards which guided the district court."¹ A grant of summary judgment is proper when no issue of material fact exists that would necessitate a trial.² We affirm a grant of summary judgment when "we are convinced, after an independent review of the record, that "there is no genuine issue as to any material fact" and that the movant is "entitled to a judgment as a matter of law."³ In determining whether the grant was proper, all fact questions are viewed in the light most favorable to the nonmovant. Questions of law, however, are decided de novo.⁴

¹ Walker v. Sears, Roebuck & Co., 853 F.2d 355, 358 (5th Cir. 1988).

² Celotex Corp. v. Catrett, 477 U.S. 317, 323-25 (1986); see FED. R. CIV. P. 56(c).

³ Walker, 853 F.2d at 358 (quoting Brooks, Tarlton, Gilbert, Douglas & Kressler v. United States Fire Ins. Co., 832 F.2d 1358, 1364 (5th Cir. 1987)(quoting FED. R. CIV. P. 56(c))).

⁴ Id.

B. Summary Judgment

1. Malicious Prosecution

In his briefs, Mata alleges that he believed that Casillas' decision was being appealed to the justice of the peace. Moreover, he emphasizes that Casillas knew that Mata had picked up textbooks to enable him to provide home schooling to his daughter. Mata insists that "[o]n the same day that [he] was being told that the [justice of the peace] would pass on the necessity of the "Lunch with Dad" periods, (November 5, 1987), defendants instituted charges against Mr. Mata and his wife for violation of the State of Texas Compulsory Attendance Law." Mata also attacks the validity of the charging papers, which he claims were unsigned and falsely notarized. Mata insists that, taken together, this demonstrates that Casillas knew that Mata was not violating the attendance law, but that Casillas nevertheless initiated proceedings against Mata maliciously.

Yet, Mata concedes by his deposition testimony that he was in violation of the attendance law in November 1987: Ester had missed five days of school with no excuse and she was not receiving home schooling at the time. He testified that he was served with notice of his violation of the laws, although he understood it as "truancy." Moreover, Mata repeated his violation of the attendance law the next year and was convicted by the justice of the peace on both charges; and, on appeal, the county court held that the state had made a prima facie case regarding Mata's guilt. Despite Mata's protest that the ultimate dismissal of his caseSOnly after he

complied with the court's order⁵proves his innocence, a reading of that proceeding makes clear that the court made no such determination.

Mata insists in his reply brief that "defendants just don't get it!" On the contrary, it is not the defendants but Mata who fails to comprehend the standards for summary judgment. Stated simply, the Supreme Court has made clear in the oft-cited trilogy of summary judgment cases⁵ that the plaintiff must establish a genuine issue of material fact on every element of a claim for which at trial he would bear the burden of proof.⁶ A review of the record demonstrates that⁵Mata's vociferous protestations notwithstanding⁵he has raised no genuine issues of material fact as to at least two essential elements of malicious prosecution: lack of probable cause, and the plaintiff's innocence. Certainly the school district had probable cause to charge Mata with violating the attendance law given the undisputed fact that Ester was absent from school for the statutory period without excuse, and was not being schooled at home at the time. Moreover, two convictions by the justice of the peace, both of which were recognized as valid on appeal, eliminate Mata's claim of innocence.

The issues to which Mata repeatedly refers as creating a genuine issue of material fact are either irrelevant or flatly contradicted by his own deposition. We have made clear that a plaintiff cannot

⁵ Anderson v. Liberty Lobby, Inc., 477 U.S. 242 (1986); Celotex v. Catrett, 477 U.S. at 317; Matsushita Elec. Indus. Co. v. Zenith Radio Corp., 475 U.S. 574 (1986).

⁶ Anderson, 477 U.S. at 248.

create a genuine issue of material fact with bald and conclusionary statements. Neither can he manufacture a dispute simply by contradicting his prior testimony or selectively presenting the facts. We do not question Mata's subjective belief that all parties with which he has dealt—including the district court—have persecuted him. Such a belief, however, does not create an issue of material fact; yet that, in a nutshell, is what Mata argues on appeal.

The record demonstrates beyond cavil that Mata has received fair treatment by the school officials, the justice of the peace, and the district court. Regrettably, the record demonstrates that Mata and his attorney have not responded in kind. Most importantly, the record reveals that Mata has failed to raise genuine issues of material fact on at least two of the elements of malicious prosecution; therefore his claim cannot survive summary judgment.

2. Religious Discrimination

Mata also alleges that Ester's treatment and his prosecution are based on religious discrimination. Mata's arguments on this point are scattered conclusionary references to community and school bias against Jehovah's Witnesses. To the extent that he argues this issue at all, he presents nothing more than bald assertions, insufficient to survive a summary judgment motion.

C. Ad Hominem

We are constrained to remind Mata's counsel that he is an officer of this court, and that, as such, he owes duties that may not be disregarded even in the heat of zealous advocacy. Included among

the duties owed to us and to the district court are respect and honesty, precluding an attorney's making unsubstantiated accusations that, outside the courtroom, would verge on defamation. Two particularly brash incidents concern us here: allegations of ex parte communications with the district court's law clerk and veiled allegations of prejudice of the district court judge.

On January 12, 1993 Mata's counsel filed and served a notice of deposition for Mata along with a motion to perpetuate testimony. The deposition was set for January 27th. Counsel, by his own admission, called the district court every day to determine if the motion had been granted. At no time, however, did counsel notify his client, Mata, that the deposition was scheduled for that date. Sometime on the 26th, the district court granted the motion to perpetuate testimony. The school district's attorney called the district court early the next day to inquire as to the status of the motion. The judge's clerk informed the school district's counsel that the motion had been granted and the deposition would proceed as scheduled. When the school district's attorney arrived, however, Mata was not present for the deposition, and his counsel was unaware that the motion had been granted.

The school district's attorney sought sanctions for the failure to hold the deposition as arranged. Mata's counsel responded with allegations of ex parte communications between the school district's attorney and the law clerk, allegations amounting to a charge of conspiracy. The pleading, which contained pejorative subtitles, such as "continuing pattern of chicanery," alleged,

inter alia, that "the trial court's clerk is biased against the plaintiffs and the plaintiff's cause of action. . . . "[T]he Honorable Clerk `clearly manifested commitment to the Governmental entities construction of relevant events." Mata's only evidence to support his allegations were that: (1) he had never been informed that the particular clerk was involved and (2) the clerk to whom Mata's counsel had repeatedly spoken did not inform him that the motion had been granted. This "evidence" proves nothing more than: (1) the judge has more than one clerk authorized to advise whether a motion has been granted, and (2) Mata's attorney failed to determine that the motion had been granted. Certainly, that "evidence" falls far short of supporting the serious impropriety alleged, even by inference.

In addition to besmirching the name and character of the district judge's clerk unfairly, Mata's attorney clumsily states in his brief that the judge himself was predisposed to favor the school district's cause and was complicit in the school district's alleged religious discrimination. And just what is the "evidence" for this serious allegation? Nothing more than an allegation of the innocuous fact that years earlier the judge had graduated from a school in that district. Again, charges of a judicial conspiracy and judicial misconduct are serious ones, not to be made lightly or recklessly, and certainly not in the absence of any genuine evidence whatsoever.

Such unsubstantiated and intemperate attacks on the integrity of the court constitute sanctionable violations of the duties owed by

Mata's attorney. He is cautioned not to cross that line in the future lest he incur disciplinary sanctions from this court.

Additionally, this appeal is beyond question frivolous and wholly without merit. Under authority of Federal Rule of Appellate Procedure 38, we award double costs of this appeal to Appellee and direct that such costs be paid by Mata's attorney, and that they not be reimbursed by or charged to Mata.

APPEAL DISMISSED pursuant to Loc. R. 42.2, with sanctions pursuant to FRAP 38.