

IN THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

No. 93-8316
Conference Calendar

STAN HUNT,

Plaintiff-Appellant,

versus

JAMES ISBELL,

Defendant-Appellee.

- - - - -
Appeal from the United States District Court
for the Western District of Texas
USDC No. W-91-CV-256
- - - - -
(August 17, 1993)

Before JOLLY, JONES, and DUHÉ, Circuit Judges.

PER CURIAM:*

Because the district court did not specify whether it dismissed Stan Hunt's suit with or without prejudice, this Court must treat the dismissal as one with prejudice. See Callip v. Harris County Child Welfare Dept., 757 F.2d 1513, 1519 (5th Cir. 1985). This Court, therefore, must review the district court's judgment for an abuse of discretion. See id. Dismissals with prejudice will be affirmed only upon a "clear record of delay or contumacious conduct by the plaintiff" and when "lesser sanctions

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 Pursuant to that Rule, the Court has determined that this opinion should not be published.

would not serve the best interests of justice." Id. (citations omitted).

The district court granted Hunt's motion for leave to serve James Isbell by April 30, 1993. Isbell, moreover, was served on April 8, 1993. The return, however, was not filed until May 13, 1993, after the dismissal. The dismissal, therefore, was premature and amounts to an abuse of discretion. Accordingly, we REVERSE the district court's judgment dismissing the suit for want of prosecution and REMAND the case for further proceedings.

Hunt has also filed a motion "for leave to vacate judgment of the District Court." We DENY this motion as moot.