

IN THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

No. 94-11118

Summary Calendar

HENRY MITCHELL, Individually o/b/o
William Devon Mitchell and
DONNA MITCHELL, Individually o/b/o
William Devon Mitchell,

Plaintiffs-Appellants,

v.

STATE OF TEXAS, ET AL.,

Defendants,

DAVID C. BAKUTIS,

Defendant-Appellee.

Appeal from the United States District Court
for the Northern District of Texas
(4:94-CV-133-A)

(May 19, 1995)

Before KING, JOLLY, and DeMOSS, Circuit Judges.

PER CURIAM:*

Henry and Donna Mitchell, on behalf of their minor son
William Devon Mitchell, filed a complaint against state of Texas,
Texas Probate Court Judge Patrick Ferchill, and guardian ad-litem

*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that this opinion should not be published.

David Bakutis, alleging that the defendants conspired to deprive William Devon Mitchell of his settlement from a personal injury case. The district court dismissed the claims against the state of Texas based on Eleventh Amendment immunity and against Judge Ferchill based on absolute judicial immunity.

Because the record did not reflect that Bakutis had been served, the district court then ordered the Mitchells to file proof of service or an adequate explanation for why such proof cannot be filed. Henry Mitchell filed an affidavit establishing that Bakutis had been served. Bakutis then filed an answer to the complaint. The Mitchells filed a motion for default judgment against Bakutis because his answer was untimely, and Bakutis opposed the motion. The district court denied the motion for default, and the Mitchells' motion for rehearing. Subsequently, the district court dismissed the complaint for lack of subject matter jurisdiction. The district court also denied their Fed. R. Civ. P. 59(e) motion. The Mitchells appeal.

In their brief the Mitchells argue that the district court improperly refused to enter a default judgment against Bakutis because Bakutis failed to answer the complaint timely. Even if a party fails to answer the complaint, the district court cannot enter a default judgment if it lacks subject matter jurisdiction. See Forsythe v. Saudi Arabian Airlines, 885 F.2d 285, 288 n.6 (5th Cir. 1989). Because the Mitchells do not challenge the district court's determination that it lacked subject matter jurisdiction, the issue is abandoned. Evans v. City of Marlin,

Tex. 986 F.2d 104, 106 n.1 (5th Cir. 1993) (issues not raised or briefed on appeal are considered abandoned). Therefore, this appeal is dismissed as frivolous. See Lavergne v. Harris County Central Jail, No. 94-20112 (5th Cir. Sept. 20, 1994) (unpublished).

The Mitchells have been warned repeatedly in the district court and this court that filing frivolous pleadings will result in the imposition of sanctions. This court recently issued a sanction order requiring the Mitchells to obtain written authorization from an active judge of this court before filing any items in this court, and warned the Mitchells that the filing of further frivolous items would result in the imposition of more severe sanctions. See Mitchell v. Central Bank & Trust, No. 94-10847, slip. op. at 7-8 (5th Cir. Mar. 1, 1995) (unpublished). The brief in this appeal, however, was filed before the sanction order was issued. For that reason, no sanction will be imposed in this appeal. But further filings in this court will be governed by the order cited.

APPEAL DISMISSED.