

IN THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

No. 94-60068
(Summary Calendar)

DESMOND NUGENT,

Plaintiff-Appellant,

versus

RICK GASTON, Etc., ET AL.,

Defendants,

R. N. ELEUTERIUS, DAVID WHITE,
PHILLIP ALLEN, C. T. SWITZER, JR.,
and FRANK LAROSA,

Defendants-Appellees.

Appeal from the United States District Court
for the Southern District of Mississippi
(CA-S92-236(R)(R))

(December 2, 1994)

Before DUHÉ, WIENER and STEWART, Circuit Judges.

PER CURIAM:*

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 Pursuant to that Rule, the Court has determined that this opinion should not be published.

In this appeal of several adverse rulings by the district court in the 42 U.S.C. § 1983 action filed by Plaintiff-Appellant Desmond Nugent, we review the district court's grant of a dismissal motion filed on behalf of several co-defendants, namely, Harrison County (Mississippi) Sheriff Joe Price, Jail Captain Rick Gaston, Officer Vivian Adamson, and Officer Tom Timmons (collectively, the Prison Officials). We also consider Nugent's motion to add parties on appeal and to incorporate briefs filed by him or on his behalf in other appeals. For the reasons set forth below, we affirm in part some of the rulings of the district court, vacate in part and remand others, deny as unnecessary Nugent's motion to add parties on appeal, and deny his motion to incorporate briefs from other cases.

I

FACTS AND PROCEEDINGS

Nugent filed this civil rights suit against the Prison Officials as well as against members of the Harrison County Board of Supervisors (HCBS) and a medical doctor (Dr. Sproles) at the Gulfport Memorial Hospital in Gulfport, Mississippi.¹ Specifically, Nugent complained of the timing and quality of the medical care that he had received, or been denied.

The Prison Officials filed a motion to dismiss based on Nugent's failure to comply with a previous order of the district court compelling his participation in discovery. Separately,

¹The process intended for service on Everett Allen and Ron Stanley, two of the numerous individuals named as co-defendants in Nugent's pleadings, were returned unserved.

Dr. Sproles filed a motion for summary judgment. Nugent responded to both motions.

Following a hearing on the motion to dismiss the four Prison Officials, the district court granted the motion and dismissed Nugent's claims against them^{SO}Price, Gaston, Adamson and Timmons^{SO} without prejudice. Following a separate hearing, the district court granted Dr. Sproles' motion for summary judgment and entered a final judgment embodying that ruling. Nugent appealed the district court's grant of the motion to dismiss his claims against the Prison Officials (Nugent I), but we determined that we did not have jurisdiction to hear his appeal because the district court's action adjudicated the liability of fewer than all the parties and disposed of fewer than all the claims without certifying the partial final judgment as currently appealable under Fed. R. Civ. P. 54(b).

The five members of the HCBS (Eleuterius, White, Phillip Allen, Switzer and LaRosa) filed their own motion to dismiss or, in the alternative, for a summary judgment, to which motion Nugent filed a response. The following month the district court entered an order mooted this motion, stating that those five co-defendants, as members of the HCBS, ceased being parties to this action by virtue of an order entered by the court on or about March 3, 1993. The court explained that for some unknown reason neither the parties nor their attorneys had received copies of that order. To eliminate the confusion the district court then ordered that all pleadings filed by these parties subsequent to the March 3, 1993,

order were "held as moot," and formally dismissed those five HCBS members. Nugent filed a timely appeal of this order as well, which coupled with prior orders resulted in final disposition of all of the parties and claims of this action.

II

ANALYSIS

Nugent argues that the district court erred in dismissing the Prison Officials for Nugent's failure to comply with the court's previous Fed. R. Civ. P. 37 order to compel his discovery responses. He contends that he showed good cause for his inability to comply with that order.

The district court's order granting the motion to compel gave Nugent only seven (7) days following the date of the order within which to comply. Nugent filed two motions requesting more time to file his discovery responses after the court entered its order, explaining that this complicated action contained multiple defendants and that he did not have the resources to comply within such a short time. The record does not reflect that the district court ever responded to these motions by Nugent. Nevertheless, the court granted the Prison Officials' motion to hold discovery in abeyance until the court could rule on their motion to dismiss. Nugent filed his opposition to the motion to dismiss, again explaining that he had a dearth of available assistance or resources with which to comply. Nevertheless, the district court granted the motion to dismiss the Prison Officials. Although the court gave no reason for this order, the primary justification for

the dismissal of Nugent's claims against the Prison Officials appears to have been as a sanction under Rule 37(d) and (b)(2)(C).

A district court's Rule 37 sanction of dismissal with prejudice is reviewed for abuse of discretion. Batson v. Neal Spelce Assocs., Inc., 765 F.2d 511, 514 (5th Cir. 1985). The dismissal in the instant action had the effect of a dismissal with prejudice due to the running of the statute of limitations. See McGowan v. Faulkner Concrete Pipe Co., 659 F.2d 554, 556 (5th Cir. 1981). We consider a number of factors to determine whether a district court has abused its discretion in imposing a sanction of dismissal: 1) "dismissal is authorized only when the failure to comply with the court's order results from wilfulness [sic] or bad faith," 2) "dismissal is proper only in situations where the deterrent value of Rule 37 cannot be substantially achieved by the use of less drastic sanctions," 3) "whether the other party's preparation for trial was substantially prejudiced," and 4) whether the improper behavior is attributable to the attorney rather than the client or whether "a party's simple negligence is grounded in confusion or sincere misunderstanding of the court's orders." Batson, 765 F.2d at 514.

There is no indication in the record that the district court considered less severe sanctions. "Without explicit findings on this critical element, it is difficult to determine whether the court was within its discretion by choosing the ultimate sanction of dismissal." Batson, 765 F.2d at 516. "[D]ismissal is to be sparingly used and only in situations where its deterrent value

cannot be substantially achieved by use of less drastic sanctions." Marshall v. Segona, 621 F.2d 763, 768 (5th Cir. 1980) (footnote omitted).

Nugent was in prison at all relevant times; he contends that he had inadequate resources with which to comply when the Prison Officials wanted his responses to their discovery vehicles. As the record does not reflect that the district court considered a less severe sanction or the other Batson factors, we cannot avoid the conclusion that the court abused its discretion. See Batson, 765 F.2d at 516 (remanding case for failure to consider less drastic sanctions and for other reasons).

Additionally, unanswered questions remain regarding Nugent's proffered § 1983 claims. Not clear from the record is whether Nugent was a convicted prisoner or a pre-trial detainee. Additionally, Nugent alleges an eight-day delay in receiving treatment for his intestinal blockage, and also alleges that the problem still exists and that his appendix was erroneously removed. Further proceedings, including discovery, may reveal whether Nugent has a viable claim. Consequently, the judgments of dismissal must be vacated and the case remanded to the district court for further proceedings vis-à-vis Nugent's claims against Prison Officials Price, Gaston, Price and Timmons.

Nugent also claims that he experienced difficulty in receiving mail and that he was denied access to the courts because he was given no legal assistance or law library access while he was housed in the Harrison County jail. Unfortunately for Nugent, these

issues were not raised in the district court. We need not address issues that were not considered by the district court, and therefore do not address issues asserted by Nugent for the first time here. "[I]ssues raised for the first time on appeal are not reviewable by this court unless they involve purely legal questions and failure to consider them would result in manifest injustice." Vernado v. Lynaugh, 920 F.2d 320, 321 (5th Cir. 1991).

On appeal, Nugent does not challenge the district court's grant of summary judgment dismissing Dr. Sproles; neither does Nugent challenge the district court's dismissal of HCBS members Eleuterius, White, Phillip Allen, Switzer and LaRosa, as co-defendants. As a consequence of such failures, therefore, those issues have been abandoned and the rulings of the district court thereon stand. See Rollins v. Marsh, 937 F.2d 134, 136 n.3 (5th Cir. 1991); Price v. Digital Equip. Corp., 846 F.2d 1026, 1028 (5th Cir. 1988).

Finally, Nugent filed an unopposed motion (1) to incorporate by reference into his brief in this appeal briefs from other appeals to this court, and (2) to add Ron Stanley and Everett Allen as parties on appeal. Neither Ron Stanley nor Everett Allen was ever served, but neither were they ever dismissed as parties. Consequently, we deny as unnecessary Nugent's motion to add those two as parties.

Personnel in the office of our Clerk of Court granted Nugent's unopposed motion to incorporate by reference briefs filed previously in other appeals. Our Clerk's grant of any unopposed

motion remains subject to our review. 5TH CIR. R. 27.1. We do not permit a party to incorporate by reference into an appellate brief any other briefs or pleadings heretofore filed in other cases; instead, we look only to those issues that are properly addressed and argued in the briefs properly filed in the appeal under consideration. See Yohey v. Collins, 985 F.2d 222, 225 (5th Cir. 1993) (Court declined to incorporate arguments from other pleadings which would lengthen a 50-page brief). Consequently, the portion of the motion seeking to incorporate other briefs by reference, which our Clerk granted, is denied as improvidently granted.

III

CONCLUSION

As Nugent is deemed to have abandoned any complaint concerning the district court's grant of summary judgment dismissing Dr. Sproles as well as that court's dismissal of HCBS members Eleuterius, White, Phillip Allen, Switzer and LaRosa, those rulings are affirmed. Nugent's motion to incorporate briefs by reference into his appellate brief and to add Ron Stanley and Everett Allen as parties on appeal are denied as improvidently or unnecessarily granted. The district court's dismissal of the Prison Officials SQPrice, Gaston, Adamson and TimmonsSQis vacated for the reasons set forth above, and Nugent's claims against those and any other undismissed co-defendants are remanded for further proceedings consistent with this opinion.

AFFIRMED in part; VACATED in part and REMANDED.