UNITED STATES COURT OF APPEALS
For the Fifth Circuit

No. 94-60275
Summary Calendar

ROGER L. HENTZ,

Plaintiff-Appellant,

VERSUS

DONALD A. CABANA, ET AL.,

Defendants-Appellees.

Appeal from the United States District Court
For the Northern District of Mississippi
(91-CV-63)

(August 22, 1994)

Before THORNBERRY, DAVIS, and SMITH, Circuit Judges.

THORNBERRY, Circuit Judge:[*]

Facts and Prior Proceedings

In 1991, Roger L. Hentz, proceeding pro se and in forma pauperis, filed suit under 42 U.S.C. § 1983, complaining of an injury he received on May 6, 1983, as a pretrial detainee, and the subsequent medical treatment he received for that injury while

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 Pursuant to that Rule, the Court has determined that this opinion should not be published.

incarcerated. Hentz named at least 38 individuals as defendants. Essentially, Hentz complains of inadequate medical treatment for the 1983 injury as well as defendant's deliberate indifference to the severe medical complications that developed as a direct result of the that injury.[1] Hentz alleges that he suffered from medical disorders related to his injury for approximately seven years.[2]

In 1989, prior to the instant complaint, Hentz filed a similar section 1983 action and a motion for a temporary restraining order in district court. After a hearing on the restraining order, the magistrate judge ordered that Hentz be given additional medical treatment and be allowed to meet with the penitentiary's classification committee. The district court also gave Hentz 30 days to amend his complaint; Hentz failed to do so, and his complaint was later dismissed without prejudice. More than one year later, Hentz filed a motion for relief from the judgment dismissing his complaint. In an order dated February 26, 1991, the district court denied the motion as untimely.

The instant complaint was filed on April 10, 1991. After due consideration, the district court concluded that Hentz's complaint was barred by the doctrine of res judicata. The court ruled that

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[1] Hentz alleges that it was necessary for him to endure at least three surgeries as a result of life-threatening infections related to his injury.

[2] Hentz alleged that he was injured in an unsafe shower at the county jail while he was a pretrial detainee. In August 1983, Hentz was released on probation. In 1985, Hentz's probation was revoked and he was sent to the state penitentiary. Hentz again was paroled in 1987, but the parole was revoked a few months later. He is currently incarcerated in the state penitentiary in Parchman, Mississippi.

the dismissal of Hentz's previous complaint for failure to prosecute, as well as the district court's subsequent denial of Hentz's motion for relief from that judgment, barred Hentz from refiling the instant complaint. The court also concluded that Hentz's complaint was frivolous and dismissed the complaint pursuant to 28 U.S.C. § 1915(d). Hentz timely appeals to this Court for relief.

Discussion

Hentz argues that the application of the doctrine of res judicata is erroneous in this case. This Court reviews **de novo** a dismissal under the doctrine of res judicata. **Schmueser v. Burkburnett Bank**, 937 F.2d 1025, 1031 (5th Cir. 1991). The doctrine is applicable if: (1) the prior judgment was rendered by a court of competent jurisdiction; (2) there was a final judgment on the merits; (3) the parties, or those in privity with them, are identical in both suits; and (4) the same cause of action is involved in both suits. **Nagle v. Lee**, 807 F.2d 435, 439 (5th Cir. 1987). If these elements are established, the decree in the first case serves as an absolute bar to the subsequent action with respect to every theory of recovery presented and also as to every ground of recovery that might have been presented.

A review of the district court's order dismissing Hentz's previous lawsuit for failure to prosecute reveals that the court's dismissal was without prejudice. Thus, the dismissal had no res judicata effect. **See Nagle,** 807 F.2d at 442; **see generally,** Wright & Miller, Federal Practice and Procedure: Civil § 2373 (dismissal

without prejudice under Rule 41(b), although a final termination of the present action, does not bar a second suit). The district court erred by dismissing Hentz's complaint as res judicata.

The district court also dismissed Hentz's complaint as frivolous under 29 U.S.C. § 1915(d). A dismissal pursuant to section 1915(d) is appropriate if the complaint lacks an arguable basis in law or fact. **Booker v. Koonce,** 2 F.3d 114, 115 (5th Cir. 1993). The allegations in Hentz's complaint reveal possible causes of action regarding: (1) Hentz's original injury; (2) the alleged denial of treatment for Hentz's injury; (3) the conditions of confinement in relation to the failure of Hentz's injury to heal; and (4) the denial of access to the courts in 1986. The district court, however, never considered the merits of Hentz's claims, but instead, discussed the doctrine of res judicata and then dismissed the claims pursuant to section 1915(d) without any discussion germane to a section 1915(d) dismissal.[3]

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[3] An **in forma pauperis** complaint may be dismissed as frivolous if it lacks an arguable basis in law or fact. **Denton v. Hernandez**, _112 S.Ct. 1728 (1992). A finding of factual frivolousness is only appropriate in the limited class of cases wherein the allegations "rise to the level of the irrational or the wholly incredible," and does not include cases in which the court simply "finds the plaintiff's allegations unlikely." **Id.,** at 1733. Likewise, the Court has counseled against dismissing claims which ultimately may be dismissed under Rule 12(b)(6) but which have an arguable basis in law. **Neitzke v. Williams**, 109 S.Ct. 1827, 1833 (1989). If a plaintiff's claims have some chance of success, a dismissal of such claims under section 1915(d) is inappropriate. **Booker**, 2 F.3d at 116; **see also**, **Eason v. Thaler**, 14 F.3d 8, 9 n.5 (5th Cir. 1994)(claims should not be dismissed without further factual development unless they are "pure fantasy or based upon a legally inarguable proposition.")(citing **Neitzke**, 109 S.Ct. at 1833.).

This Court has insisted that when it is not apparent from the face of the complaint whether the prisoner's contentions are frivolous, the district court should make an effort to develop the known facts until satisfied that either the claims have merit or they do not. **Cay v. Estelle**, 789 F.2d 318, 325 (5th Cir. 1986). We have suggested that this may be done in a number of ways.[4] On remand, an effort should be made by the district court to ascertain the relevant facts surrounding all of the relevant issues.[5] In addition, the district court may wish to consider whether any of Hentz's claims are time-barred.[6]

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[4] A district court may send a questionnaire to a prisoner before service of process, requiring him to give greater detail about his claims. **Eason**, 14 F.3d at 9. The court may also authorize a magistrate to hold a **Spears** hearing. **Id.**(citing **Spears v. McCotter**, 766 F.2d 179, 181 (5th Cir. 1985). In addition, we have cited with approval the procedure developed by the Tenth Circuit: ordering the prison officials to investigate the facts surrounding a civil rights suit by inmates to construct "an administrative record . . . to enable the trial court to . . . make a determination [of frivolity] . . . ." **Cay,** 789 F.2d at 323 n.4. More recently, this Court allowed a pro se complainant to conduct discovery in order to more adequately state his claim. **Murphy v. Kellar**, 950 F.2d 290 (5th Cir. 1992).

[5] We note in passing that none of the defendants, including the state of Mississippi, have been served with process.

[6] In an action proceeding in forma pauperis, this Court may **sua sponte** consider affirmative defenses apparent from the record, such as whether or not a claim is time-barred. **Ali v. Higgs**, 892 F.2d 438, 440 (5th Cir. 1990). In the present case, however, it is not apparent from the record whether the claims are time-barred.

The applicable statute of limitations for the instant case is found in Miss. Code. Ann. § 15-1-49. **See Thomas v. New Albany**, 901 F.2d 476 (5th Cir. 1990). Prior to 1989, § 15-1-49 provided a general personal injury limitations period of six years. **See** Miss. Code Ann. § 15-11-49 (1972). However, the amended version of § 15-1-49 provides a general personal injury limitations period of three years. **See** Miss. Code. Ann. § 15-11-49 (1993). The provisions of the amended § 15-11-49 apply only to causes of action accruing on or after July 1, 1989. **Id.**, Editor's note, 7.

Conclusion

Accordingly, it is the decision of this Court that the judgment of the district court dismissing Hentz's complaint be vacated and the case remanded to the district court for proceedings consistent with this opinion.

VACATED & REMANDED.

The statute of limitations for a cause of action under § 1983 begins to run when the plaintiff is in possession of the critical facts that he has been hurt and who has inflicted the injury. **Gartrell v. Gaylor**, 981 F.2d 254, 257 (5th Cir. 1993). A determination of when these potential causes of action accrued and whether they are barred by the applicable limitations periods should be made in the first instance in the district court.