

IN THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

No. 94-60745
Conference Calendar

RICHARD BIRKS,

Plaintiff-Appellant,

versus

DR. GLENN BERRY,

Defendant-Appellee.

- - - - -
Appeal from the United States District Court
for the Southern District of Texas
USDC No. 90-CV-49
- - - - -

March 21, 1995

Before GARWOOD, BARKSDALE, and STEWART, Circuit Judges.

PER CURIAM:*

Pursuant to 42 U.S.C. § 1983, Texas prisoner Richard Birks, proceeding in forma pauperis, sued a prison physician, alleging medical malpractice and incompetence. A hearing was held pursuant to Spears v. McCotter, 766 F.2d 179 (5th Cir. 1985). Birks' allegation does not give rise to a § 1983 cause of action. Varnado v. Lynaugh, 920 F.2d 320, 321 (5th Cir. 1991). The district court did not abuse its discretion in dismissing the action as frivolous. See 28 U.S.C. § 1915(d); Booker v. Koonce,

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 Pursuant to that Rule, the Court has determined that this opinion should not be published.

2 F.3d 114, 115 (5th Cir. 1993). The dismissal was clearly supported by the Spears hearing.

Birks enhances his allegations on appeal, using language suggestive of deliberate acts. We do not consider factual issues raised for the first time on appeal. Varnado, 920 F.2d at 321.

Additional factual evidence is unnecessary because Birks has stated no cause of action. Furthermore, this appeal is frivolous. See Coghlan v. Starkey, 852 F.2d 806, 811 (5th Cir. 1988). It is dismissed as such. See 5th Cir. R. 42.2.

APPEAL DISMISSED.