

APS-152

UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

NO. 03-3710

FREDERICK W. FISHER, Jr.;
TIFFANY FISHER, Minor Daughter

v.

JOE MCDONALD; POCONO RECORD, INC.; OTTAWAY NEWSPAPER, INC.;
DOW JONES & COMPANY; BRYAN L. HILL, Individually; MARK PAZUHANICH;
RONALD E. VICAN; ROBERT J. O'HARA, Assistant A.G.; RICHARD A. MEYERS,
Ottaway Newspaper; JAMES H. OTTAWAY, Ottaway Newspaper; KENNETH
BURENGA; JOHN DOE OF POCONO RECORD; BEVERLY, Senior Vice Pres.,
Ottaway Newspaper a/k/a JOHN DOE OF OTTAWAY; PETER R., Chairman of the
Board, Dow Jones & Co a/k/a JOHN DOE OF DOW JONES; MONROE COUNTY
COMMISSIONERS; MONROE COUNTY MUNICIPALITY

Frederick W. Fisher, Jr.,
Appellant

On Appeal From the United States District Court
For the Middle District of Pennsylvania
(D.C. Civ. No. 98-cv-00282)
District Judge: Honorable William W. Caldwell

Submitted For Possible Dismissal Pursuant to 28 U.S.C. § 1915(e)(2)(B)
APRIL 1, 2004

Before: SLOVITER, ROTH AND AMBRO, Circuit Judges.

JUDGMENT

This cause came on to be heard on the record from the United States District Court

for the Middle District of Pennsylvania and was submitted for possible dismissal pursuant to 28 U.S.C. § 1915(e)(2)(B). On consideration whereof, it is now here ORDERED AND ADJUDGED by this Court that the appeal is DISMISSED pursuant to 28 U.S.C. § 1915(e)(2)(B)(i). All of the above in accordance with the opinion of this Court.

ATTEST:

Marcia M. Waldron

Clerk

DATED: April 23, 2004

**Certified as a true copy and issued in lieu
of a formal mandate on June 14, 2004**

Teste: *Marcia M. Waldron*

Clerk, U.S. Court of Appeals for the Third Circuit.

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UNREPORTED-NOT PRECEDENTIAL

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(Filed April 23, 2004)

OPINION

PER CURIAM.

In 1998, Frederick W. Fisher, a Pennsylvania inmate, filed this action under 42 U.S.C. § 1983 in which he asserted various claims in his Amended Complaint, including inadequate medical treatment and cruel and unusual punishment while at the Monroe County Correctional Facility in violation of the Eighth Amendment. Fisher also asserted state-law claims of defamation, libel and slander arising out of a series of newspaper articles published in a local paper, the Pocono Record. Fisher named both himself and his minor daughter as plaintiffs and sought compensatory and punitive damages.¹

The District Court initially dismissed this action sua sponte in its entirety for failure to state a claim. On Fisher's appeal, this Court vacated the dismissal as to Fisher's Eighth Amendment claims against Warden Brian Hill; remanded the unaddressed defamation, libel, and slander claims for consideration; and directed the District Court to appoint counsel to represent the interests of Fisher's minor daughter in accordance with

¹ This Court has previously described the nature of Fisher's claims, noting that Fisher alleges

a vast conspiracy among his former warden, the local judge, the local newspaper and one of its reporters, a Monroe County District Attorney, and an Assistant Attorney General of Pennsylvania. According to Fisher, the conspiracy sought to ruin him financially and endanger his life while he was incarcerated at a local county jail. Fisher alleges that the conspirators published defamatory, libelous and slanderous information about him, which resulted in mental suffering for Fisher and his minor daughter.

Fisher v. McDonald, C.A. No. 98-7352, Feb. 25, 2000, Op. at 1-2 (footnote omitted).

Osei-Afriyie v. The Med. College of Pa., 937 F.2d 876 (3d Cir. 1991). The District Court's judgment was affirmed in all other respects. See Fisher v. McDonald, C.A. No. 98-7352 (Opinion filed Feb. 25, 2000).

On remand, the District Court ordered service of process upon the remaining defendants and appointed counsel for Fisher's daughter. On December 15, 2000, the District Court denied on the undeveloped record before it Warden Hill's motion to dismiss the Eighth Amendment claims for failure to exhaust administrative remedies. The District Court further directed Fisher to provide the addresses of several defendants for service of process; dismissed all claims against Monroe County and the "John Doe" County Commissioners; and denied defendant O'Hara's motion to dismiss.

On October 25, 2001, the Magistrate Judge issued a Report in which he recommended granting the "Newspaper defendants" motion to dismiss the claims of defamation, libel, and slander as time-barred.² The Magistrate Judge explained that a one-year limitations period applies under Pennsylvania law; that the allegedly tortious newspaper articles were published between December 22, 1995, and August 27, 1996; and that Fisher filed his original complaint, at the earliest, on February 3, 1998. The Magistrate Judge recommended dismissing the state-law claims against defendant O'Hara for the same reason. By Order entered November 27, 2001, the District Court adopted the

² The Newspaper defendants are: Joe McDonald; Pocono Record, Inc.; Ottaway Newspapers, Inc.; Dow Jones and Co.; Beverly Jackson; James H. Ottaway, Jr.; Richard A. Myers; Peter R. Kann; and Kenneth L. Burenga.

Magistrate Judge's recommendation and dismissed all claims against all defendants with the exception of the Eighth Amendment claims against Warden Hill.

Warden Hill subsequently filed a fully supported motion for summary judgment, arguing that Fisher failed to exhaust administrative remedies before filing suit and, alternatively, that Fisher could not maintain a viable Eighth Amendment claim based on the conditions of his cell or the alleged denial of adequate medical care. Warden Hill also argued that, insofar as Fisher's minor daughter claimed that the warden's reference to her father in the media as a "con man" caused severe emotional distress, courts have not permitted such a suit based on the disparagement of a relative.

On February 3, 2003, the Magistrate Judge directed Fisher to file a brief opposing the summary judgment motion, noting that a failure to respond would be interpreted as a concurrence in the motion. On April 9, 2003, the Magistrate Judge entered an Order observing that no response had been filed. On August 26, 2003, the District Court noted that its Local Rule 7.6 provides fifteen days to file an opposing brief and that a failure to comply with the rule is deemed non-opposition. Because neither Fisher nor his daughter had responded and the response period had long since expired, the District Court granted Warden Hill's motion for summary judgment as to Fisher. The District Court added that the summary judgment motion was meritorious in any event and further held that the claim on behalf of Fisher's daughter is without merit.

Frederick Fisher timely filed this appeal, which he has been granted leave to

prosecute in forma pauperis.³ Because we conclude that the appeal lacks an arguable basis in law or fact, we will dismiss it pursuant to 28 U.S.C. § 1915(e)(2)(B)(i).

The District Court was plainly correct that Fisher's claims under Pennsylvania law for defamation, libel, and slander are barred under the one-year limitations period. A review of the record reflects that Fisher has made no viable argument that would bring his claims within the applicable limitations period.

The District Court also properly entered summary judgment for Warden Hill on the Eighth Amendment claims. Summary judgment is appropriate if "there is no genuine issue as to any material fact and ... the moving party is entitled to a judgment as a matter of law." Fed. R. Civ. P. 56(c). It has been stated that "[d]istrict courts must take care to insure that pro se litigants are provided with proper notice regarding the complex procedural issues involved in summary judgment proceedings." Jaxon v. Circle K Corp., 773 F.2d 1138, 1140 (10th Cir. 1985) (quoting Garoux v. Pulley, 739 F.2d 437, 439 (9th Cir. 1984)). Here, the Magistrate Judge fully advised Fisher of the consequences of failing to respond to the summary judgment motion, and the court afforded ample time for a response to be submitted. Fisher did not claim that he was unaware of the response period or without knowledge of the showing required to withstand a motion for summary judgment. Thus, we see no error in the District Court's decision to grant the summary

³ Fisher's minor daughter is not listed as an appellant and thus we are not asked to review the dismissal of her state-law claim. Nevertheless, we note that the District Court properly rejected her claim for the reasons stated in its August 26, 2003, Order.

judgment motion as unopposed. Significantly, the grounds asserted in the summary judgment motion were fully supported by the evidence Warden Hill submitted in support thereof, and thus a judgment against Fisher on the merits of the Eighth Amendment claims was warranted on the record.⁴

Finally, although Fisher makes numerous allegations of bias and prejudice on the part of the Magistrate Judge who heard this case, we find no evidence whatsoever to support Fisher's allegations.

For the reasons stated, we will dismiss the appeal as frivolous pursuant to § 1915(e)(2)(B)(i). Fisher's Motion for a "Stay or Injunction Pending Appeal"—wherein he claims that officials at SCI-Waymart, where he is housed, have confiscated needed legal materials and denied access to the courts—is denied without prejudice to Fisher's right to file a complaint raising these allegations in an appropriate district court.

⁴ We note that Fisher claims in his Motion for a "Stay or Injunction Pending Appeal" that his non-opposition to the summary judgment motion was "caused by the fact [that] all of Fisher's legal material was confiscated September 9, 2002." Br. in Support at 2. Fisher fails to explain, however, what those legal materials would have revealed in support of his Eighth Amendment claims such that a genuine issue of material of fact existed for trial. Given the clear record of Fisher's failure to exhaust prison remedies on his Eighth Amendment claims as well as the lack of substantive merit to the claims, we conclude that summary judgment was properly entered notwithstanding Fisher's failure to submit a response in opposition to the motion.