UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

JAMES E. PIETRANGELO, II,	
Plaintiff-Appellant,	Appeal No. 10-3843 10-4119
v.	
SANDUSKY LIBRARY, *et al.*	
Defendants-Appellees.	

MOTION FOR ORDER TO CLERK TO LODGE PLAINTIFF'S AMENDED NOTICE OF APPEAL UNDER APPEAL NO. 10-3843

Appellant James E. Pietrangelo, II hereby moves the Court for an order to the Sixth Circuit's Clerk to lodge Appellant's September 9, 2010 *Notice of Amended Appeal* under Appeal No. 10-3843 26, 2010, for the following reasons.

On June 22, 2010, the District Court for Northern Ohio dismissed Appellant's complaint with prejudice in case 3:09-cv-2560 and entered judgment accordingly. In its June 22, 2010 dismissal order, the District Court also awarded the Appellees' attorneys' fees and costs, to be specifically determined by the District Court in a later order upon submission of bills by Appellees. However, at the time, the District Court did not inform the parties when it would issue the later order of a specific award, and in fact ultimately issued it *after* the 30 days for Appellant to appeal the June 22, 2010 dismissal-and-general-award order/judgment had expired. As a result, Appellant had to—to be timely in his appeal of the June

22, 2010 dismissal-and-general-award order/judgment—and did, file a notice of appeal on July 9, 2010, listing the orders, judgments, *etc.*, appealed from as including the June 22, 2010 dismissal and general award, as well as any future order of a specific award. In his July 9, 2010 notice of appeal, Appellant also specifically reserved the right to amend his notice of appeal to include, by specific reference, the actual order of a specific award once it was issued. When Appellant filed his July 9, 2010 notice of appeal with the District Court, he paid the $455 filing fee. Appellant's July 9, 2010 notice of appeal was docketed as Appeal No. 10-3843. On August 23, 2010—again, more than 30 days beyond the dismissal and general award—the District Court issued its order of a specific award. On September 9, 2010—within 30 days of the August 23, 2010 order of a specific award—Appellant filed an amended notice of appeal with the District Court. The September 9, 2010 amended notice of appeal was *identical* to the July 9, 2010 original notice of appeal, except that the former expressly identified the August 23, 2010 order of a specific award as the future order of a specific award mentioned in the latter. Appellant did not pay a filing fee to the District Court for the amended notice of appeal.

On September 21, 2010, Appellant received a letter dated September 13, 2010, from Sixth Circuit Case Manager Michelle Davis—who is in charge of Appeal No. 10-3843—indicating that Appellant's amended notice of appeal was

actually docketed as a separate and new appeal, Appeal No. 10-4119, and that this new appeal might or would be dismissed unless he paid a filing fee for the amended notice of appeal by September 27, 2010. Appellant immediately wrote Ms. Davis, informing her of his belief that the amended notice of appeal had been improperly lodged as a new appeal, and asking her to lodge the amended notice of appeal under existing Appeal No. 10-3843, and the reasons why. To date, Appellant's amended notice of appeal remains as a new appeal—for which Appellant has not paid the filing fee.

The amended notice of appeal should not have been docketed as a separate and new appeal and assessed a separate and new filing fee, but should have been accepted as an amendment of the existing docketed appeal for which Appellant had already paid a filing fee. This is obviously so for several reasons. First, FRAP 4(a)(4)(B)(iii) plainly, expressly, and unequivocally states that "[n]o additional fee is required to file an amended notice." As a separate provision, it has no limitation to amended notices based on just the motions listed above it. *Cf.* Owen v. Harris County, Texas, Nos. 09-20479/10-20063, 2010 U.S. App. LEXIS 17850 at * 5 (5th Cir. Aug. 26, 2010) ("More significantly, although the placement of the prohibition within rule 4(a)(4) is curious, the absolute and plain language of the subsection—"[n]o additional fee is required to file an amended notice" of appeal—is both compelling and difficult to avoid. We conclude, therefore, that no fee can be

required for any amended notice of appeal, irrespective of whether it pertains to a post-judgment motion.") (court of appeals held that appellant should not have had to pay second filing fee for amended notice of appeal). Second, even if FRAP 4(a)(4)(B)(iii) is limited to one of the enumerated motions, Appellant's amended notice is arguably based on one of the enumerated motions—FRAP 4(a)(4)(A)(ii)'s motion "to amend or make additional factual findings under Rule 52(b)." See FRCP 52(b) ("On a party's motion filed no later than 28 days after the entry of judgment, the court may amend its findings—or make additional findings—and may amend the judgment accordingly."). The Appellees' post-June 22, 2010-order/judgment application (motion) for specific attorneys' fees and costs were motions for the District Court to make findings regarding the amount of attorneys' fees and costs they had allegedly incurred.

Third, it would be grossly illogical, unjust, and inefficient to treat an amended notice of appeal in such a situation as Appellant's as a second appeal. The final order/judgment entered in this case and triggering the 30-day appeal clock was the June 22, 2010 order/judgment of dismissal with prejudice and general award of fees and costs. The August 23, 2010 order of a specific award was not itself a judgment—it was not entered separately as a judgment, see docket—but was simply a post-judgment order in execution or aid of or relating back to the June 22, 2010 order/judgment. Under FRAP 4(a)(1)(A), Appellant *had*

to file a notice of appeal of the June 22, 2010 order/judgment by July 22, 2010. He simply could *not* have waited until August 23, 2010—when the District Court eventually issued its order of a specific award—and then filed a notice of appeal of everything, as clearly such a later filing would have been beyond the 30 days and considered untimely. Thus, it was not Appellant's error as a party that the later order could not be specifically—beyond a general future reference and reservation—included in the original notice, but rather a function of the District Court's not ruling on the specific award before the 30 days, and thus Appellant should not be penalized by having to pay a second filing fee *and costs of a duplicate appeal.*

A duplicate appeal would also be a simple waste of time and money for both the Court and Appellant, as well as for Appellees. There is no new or stand-alone issue really to be appealed or being appealed here with the amended notice of appeal. Again, the August 23, 2010 specific award—which is mentioned by name in the amended notice of appeal—related back to the June 22, 2010 general award which was included in the original notice of appeal. Moreover, and critically, Appellant expressly mentioned the future specific award in his original notice of appeal:

> Any pending or future order and entry of judgment of a specific award of fees and costs to Defendants based on or connection with the above and Defendants' applications for same. Plaintiff specifically reserves the right to amend this notice to include same.

July 9, 2010 *Notice of Appeal* at ¶ 4. It simply makes no sense to break up a single case into two separate appeals. Appellant is not getting or seeking a "free" appeal here, but merely an administrative updating of an appeal he already filed and paid for.

The only two Sixth Circuit cases (unpublished) which Appellant has found on the matter of a second filing fee for an amended notice recognize this distinction between an amended notice of appeal which merely administratively relates back, and an amended notice of appeal that does not relate back. In each of those Sixth Circuit cases, the original or first appeal was actually terminated or addressed on the merits already by the time the amended notice of appeal was filed, so that there was indeed or effectively a new appeal with the amended notice of appeal. See Thompson v. Caruso, Nos. 05-2681/06-1385, 2006 U.S. App. LEXIS 32794 at *7 (6th Cir. Oct. 10, 2006)("In fact, when the notice of appeal was filed for case number 06-1385, Plaintiffs had already filed their appellate brief for case number 05-2681."); Perotti v. Wilkinson, 90 Fed. Appx. 884, 886 (6th Cir. Feb. 4, 2004) ("First, Perotti voluntarily dismissed his initial interlocutory appeal before he paid any appellate filing fee and before the district court entered its final judgment granting summary judgment for defendants. Similarly, Perotti's notice of appeal taken from the district court's order that denied his motion for relief from the earlier imposition of the appellate filing fee was not filed until after this court

dismissed Perotti's underlying appeal for want of prosecution."). In this case, Appellant's original appeal was not disposed of at the time he filed the amended notice of appeal, and still has not even been briefed yet.

Indeed, treating Appellant's amended notice of appeal as a separate new appeal would have disastrous effect. It would expose the parties to competing, conflicting appellate decisions. If Appellant pays or had paid the second filing fee, and both appeals proceeded, and the panel hearing the first appeal decided in his favor on the general award, and the panel hearing the second appeal decided in Appellees' favor on the specific award, or *vice versa*, there would be no settlement of the matter and arguably no precedent for proceeding further on appeal (*i.e.*, which appeal would yield?).

The provision for filing an amended notice of appeal simply is useless if an amended notice of appeal is treated as a new appeal. The very concept of amendment presumes that an existing appeal may be updated for precisely the reason involved here.

Therefore, Appellant asks the Court to order the Clerk to properly lodge the amended notice of appeal under Appeal No. 10-3843.

Respectfully submitted,

October 12, 2010

James E Pietrangelo II

JAMES E. PIETRANGELO, II
Appellant-Plaintiff *Pro Se*
P.O. Box 1601

Sandusky, OH 44871
(802) 338-0501

PROOF OF SERVICE & FILING

I declare under penalty of perjury of the laws of the United States of America that I served the foregoing *Motion* on all Appellees by mailing via first-class U.S. Mail on October 12, 2010, a copy of same, to

William P. Lang
Ste. 1301
1300 W. 9th St.
Cleveland, OH 44113
Counsel for City Appellees

Margaret Koesel
Porter Wright Morris & Arthur LLP
925 Euclid Ave. Ste. 1700
Cleveland, OH 44115
Counsel for Library Appellees,

and that on that same day and by that same method I sent for filing four copies including one original of the foregoing *Motion(s)* to the Office of the Clerk, U.S. Court of Appeals, Sixth Circuit, 540 Potter Stewart U.S. Courthouse, 100 E. Fifth St., Cincinnati, OH 45202-3988.

James E. Pietrangelo, II
JAMES E. PIETRANGELO, II

RICHARD THOMPSON; RONALD JORDAN, Plaintiffs-Appellants, v. PATRICIA CARUSO, Defendant-Appellee.

Nos. 05-2681/06-1385

UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

2006 U.S. App. LEXIS 32794

October 10, 2006, Filed

NOTICE: NOT RECOMMENDED FOR FULL-TEXT PUBLICATION. SIXTH CIRCUIT RULE 28 LIMITS CITATION TO SPECIFIC SITUATIONS. PLEASE SEE RULE 28 BEFORE CITING IN A PROCEEDING IN A COURT IN THE SIXTH CIRCUIT. IF CITED, A COPY MUST BE SERVED ON OTHER PARTIES AND THE COURT. THIS NOTICE IS TO BE PROMINENTLY DISPLAYED IF THIS DECISION IS REPRODUCED.

SUBSEQUENT HISTORY: On remand at, Injunction denied by, Motion denied by Jordan v. Caruso, 2007 U.S. Dist. LEXIS 7004 (W.D. Mich., Jan. 31, 2007)

PRIOR HISTORY: [*1]
ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE WESTERN DISTRICT OF MICHIGAN.
Thompson v. Caruso, 2005 U.S. Dist. LEXIS 46827 (W.D. Mich., Sept. 7, 2005)

CASE SUMMARY

PROCEDURAL POSTURE: Appellant state prisoners sued appellee corrections department director, challenging a policy requiring prison staff to open and inspect all legal prisoner mail outside the presence of the prisoners. The United States District Court for the Western District of Michigan dismissed the complaint, issued deficiency orders regarding the payment of appeal fees, and denied the prisoner's Fed. R. Civ. P. 60(b) motion. The prisoners appealed.

OVERVIEW: The prison's mail policy was improper given judicial precedent establishing that prisoners had to the right to be present when their legal mail was opened. Although the case law establishing the right had not been decided at the time the policy was instituted, the director was not entitled to qualified immunity where the prisoners alleged that their legal mail was opened and inspected after the case law had clearly established that the policy was unconstitutional. The district court did not abuse its discretion in denying the prisoners' Fed. R. Civ. P. 60(b) motion for relief from the deficiency orders where their appeals from the district court's judgment dismissing the case and the denial of their motion for relief from the deficiency orders were treated as separate appeals, and their brief in the appeal of the dismissal had already been filed when the second notice of appeal was filed. Thus, the second notice of appeal was not an amended notice of appeals that required no appellate filing fee. Rather, the second appeal required the payment of appellate fees under Fed. R. App. P. 3(e) and 4(a)(4)(B)(ii).

OUTCOME: The judgment dismissing the case was vacated, and the case was remanded for further proceedings. The order denying the Rule 60(b) motion was affirmed.

CORE TERMS: mail, notices of appeal, case number, prisoner, post-judgment, filing fee, opened, constitutional rights, inspected, judgment of dismissal, right to receive, summary judgment, prison officials, inspect, taxing

LexisNexis® Headnotes Hide Headnotes

Civil Procedure > Summary Judgment > Appellate Review > Standards of Review

HN1 The United States Court of Appeals for the Sixth Circuit reviews de novo the district court's grant of summary judgment.

Civil Rights Law > Prisoner Rights > Freedom of Speech

HN2 Prisoners have a limited First Amendment right to receive mail during incarceration. A prisoner's right to receive mail is subject to prison policies and regulations that are reasonably related to legitimate penological interests, such as order, discipline, or security. However, legal mail should not be opened and inspected by prison officials unless the prisoner to whom the mail is addressed is present if such a request has been made by the prisoner.

Civil Rights Law > Immunity From Liability > Defenses

HN3 Qualified immunity protects government officials performing discretionary functions from liability for civil damages insofar as their conduct does not violate clearly established statutory or constitutional rights of which a reasonable person would have known.

Civil Procedure > Judgments > Relief From Judgment > General Overview
Civil Procedure > Appeals > Standards of Review > Abuse of Discretion

HN4 The United States Court of Appeals for the Sixth Circuit reviews the district court's denial of a Fed. R. Civ. P. 60(b) motion for an abuse of discretion.

Civil Procedure > Appeals > Reviewability > Notice of Appeal

HN5 See Fed. R. App. P. 3(e).

Civil Procedure > Appeals > Reviewability > Notice of Appeal

HN6 If a litigant desires to appeal either a postjudgment motion listed in Fed. R. App. P. 4(a)(4)(A), or an altered or amended judgment, the litigant must file a notice of appeal, or an amended notice of appeal. Fed. R. App. P. 4(a)(4)(B)(ii). If an amended notice of appeal is filed, no additional fee is required. Fed. R. App. P. 4(a)(4)(B)(iii).

COUNSEL: RICHARD THOMPSON (#311040), Plaintiff - Appellant (05-2681), Pro se, Marquette, MI.

RONALD JORDAN (#125764), Plaintiff - Appellant, Pro se, Marquette, MI.

For PATRICIA CARUSO, Defendant - Appellee: John L. Thurber, Assistant Attorney General, Office of the Michigan Attorney General, Lansing, MI; Julia R. Bell, Assistant Attorney General, Office of the Michigan Attorney General, Lansing, MI.

RICHARD THOMPSON (#311040), Plaintiff - Appellant (06-1385), Pro se, Marquette, MI.

RONALD JORDAN (#125764), Plaintiff - Appellant, Pro se, Marquette, MI.

For PATRICIA CARUSO, Defendant - Appellee: Julia R. Bell, Assistant Attorney General, Office of the Michigan Attorney General, Lansing, MI; John L. Thurber, Assistant Attorney General, Office of the Michigan Attorney General, Lansing, MI.

JUDGES: Before: SILER and CLAY, Circuit Judges; STAFFORD, District Judge. *

* The Honorable William H. Stafford, Jr., United States District Judge for the Northern District of Florida, sitting by designation.

OPINION

ORDER

Richard Thompson and Ronald Jordan, Michigan prisoners proceeding *pro se,* appeal, in case number 05-2681, a district court judgment [*2] dismissing their civil rights complaint filed pursuant to 42 U.S.C. § 1983. Thompson and Jordan also appeal, in case number 06-1385, a district court order denying their post-judgment motion for relief from deficiency orders regarding the payment of appeal fees. This case has been referred to a panel of the court pursuant to Rule 34(j)(1), Rules of the Sixth Circuit. Upon examination, this panel unanimously agrees that oral argument is not needed. Fed. R. App. P. 34(a).

On September 9, 2004, Thompson and Jordan ("Plaintiffs") filed a complaint against Patricia Caruso, Director of the Michigan Department of Corrections ("MDOC"). The Plaintiffs alleged that on May 1, 2002, Caruso issued an order requiring MDOC staff to open and inspect all legal mail sent to MDOC prisoners outside the presence of the prisoner to whom the mail was addressed. The Plaintiffs alleged that before May 1, 2002, "all legal mail was opened/inspected only in [the] presence of the prisoner." According to the Plaintiffs, the "pretext used for" the 2002 mail policy change was the September 11, 2001, terrorist attacks. Relying upon the First Amendment, the Plaintiffs alleged that the 2002 mail policy violated their [*3] constitutional rights. The Plaintiffs sought declaratory and monetary relief.

Caruso filed a motion for summary judgment pursuant to Fed. R. Civ. P. 56, to which the Plaintiffs responded. A magistrate judge filed a report in which he recommended granting Caruso's motion. Over the Plaintiffs' objections, the district court approved and adopted the magistrate judge's report and recommendation and dismissed the complaint. The district court subsequently denied the Plaintiffs' motion for reconsideration and denied their motion for relief from deficiency orders regarding the payment of appeal fees. The Plaintiffs filed timely notices of appeal from the judgment of dismissal (05-2681) and the post-judgment order regarding appeal fees (06-1385). The cases have been consolidated.

In case number 05-2681, the Plaintiffs challenge the district court's judgment dismissing their complaint HN1 We review *de novo* the district court's grant of summary judgment. *Ailor v. City of Maynardville, Tenn.,* 368 F.3d 587, 595 (6th Cir. 2004).

HN2 Prisoners have a limited First Amendment right to receive mail during incarceration. *Thornburgh v. Abbott,* 490 U.S. 401, 407-09, 109 S. Ct. 1874, 104 L. Ed. 2d 459 (1989); *Kensu v. Haigh,* 87 F.3d 172, 174 (6th Cir. 1996). [*4] A prisoner's right to receive mail is subject to prison policies and regulations that are "reasonably related to legitimate penological interests," such as order, discipline, or security. *Turner v. Safley,* 482 U.S. 78, 89, 107 S. Ct. 2254, 96 L. Ed. 2d 64 (1987); *accord Sheets v. Moore,* 97 F.3d 164, 166 (6th Cir. 1996). However, legal mail should not be opened and inspected by prison officials unless the prisoner to whom the mail is addressed is present "if such a request has been made by the prisoner." *Sallier v. Brooks,* 343 F.3d 868, 874 (6th Cir. 2003).

Upon review, we conclude that the MDOC's May 1, 2002, mail policy, which required prison officials to open and inspect all legal mail outside the presence of its prisoners was improper. *See id.* Furthermore, Caruso is not entitled to HN3 qualified immunity, which protects "government officials performing discretionary functions . . . from liability for civil damages insofar as their conduct does not violate clearly established statutory or constitutional rights of which a reasonable person would have known." *Harlow v. Fitzgerald,* 457 U.S. 800, 818, 102 S. Ct. 2727, 73 L. Ed. 2d 396 (1982). The Plaintiffs' complaint alleged that Caruso violated a clearly established constitutional right. On September 18, [*5] 2003, *Sallier* established that prisoners have the right to be present when their legal mail is opened *Sallier,* 343 F.3d at 874, 877-78. When Caruso instituted the legal mail policy at issue in this case on May 1, 2002, *Sallier* had not yet been decided. However, Plaintiffs alleged in their complaint that their legal mail was opened and inspected on December 14, 2003, after *Sallier* had clearly established that the MDOC's legal mail policy was unconstitutional. Thus, Plaintiffs' clearly established constitutional rights were violated when their legal mail was opened and inspected outside their presence on December 14, 2003.

We [*6] decline to consider Plaintiffs' challenge of the district court's award of costs in favor of Caruso since their appeal from the district court's judgment taxing costs has been dismissed. Plaintiffs filed a notice of appeal on November 29, 2005, following the district court's November 10, 2005, judgment taxing costs. The appeal was docketed in this court under case number 05-2683. However, this court dismissed Plaintiffs' appeal in that case on March 30, 2006, because they failed to pay the filing fee. Therefore, we decline to consider the post-judgment award of costs.

In case number 06-1385, Plaintiffs challenge the district court's order denying their Fed. R. Civ. P. 60(b) motion

for relief from deficiency orders regarding the payment of appeal fees. HN4 We review the district court's denial of a Fed. R. Civ. P. 60(b) motion for an abuse of discretion. *Jinks v. AlliedSignal, Inc.*, 250 F.3d 381, 385 (6th Cir. 2001).

HN5 "Upon filing a notice of appeal, the appellant must pay the district clerk all required fees." Fed. R. App. P. 3 (e). HN6 If a litigant desires to appeal either a post-judgment motion listed in Fed. R. App. P. 4(a)(4)(A), or an altered or amended judgment, the litigant "must file [*7] a notice of appeal, or an amended notice of appeal." Fed. R. App. P. 4(a)(4)(B)(ii). If an amended notice of appeal is filed, "[n]o additional fee is required." Fed. R. App. P. 4(a)(4)(B)(iii).

Upon review, we conclude that the district court did not abuse its discretion when it denied Plaintiffs' Fed. R. Civ. P. 60(b) motion. Plaintiffs' appeal from the district court's judgment of dismissal requires the payment of an appellate filing fee. *See* Fed. R. App. P. 3(e). Plaintiffs' subsequent appeal from the district court's denial of their motion for relief from the deficiency orders also requires the payment of an appellate filing fee. *See id.* Because such notice of appeal was an appeal from one of the post-judgment motions listed in Fed. R. App. P. 4 (a)(4)(A), Plaintiffs were required to file a notice of appeal and pay the requisite filing fee. *See* Fed. R. App. P. 3 (e) and 4(a)(4)(B)(ii). In addition, Plaintiffs' notices of appeal were treated as separate appeals by this court and assigned different case numbers. In fact, when the notice of appeal was filed for case number 06-1385, Plaintiffs had already filed their appellate brief for case number 05-2681. Under these circumstances, [*8] the notice of appeal from the post-judgment denial of relief from the deficiency orders is not an amended notice of appeal for which no appellate filing fee is due. Plaintiffs are responsible for payment of the appellate filing fees for each of their appeals.

Accordingly, we vacate the district court's judgment appealed in case number 05-2681 and remand the case for further proceedings. We affirm the district court's order appealed in case number 06-1385. Rule 34(j)(2)(C), Rules of the Sixth Circuit.

JOHN W. PEROTTI, Plaintiff-Appellant, v. REGINALD A. WILKINSON, et al., Defendants-Appellees.

No. 03-3016

UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

90 Fed. Appx. 884; 2004 U.S. App. LEXIS 1813

February 4, 2004, Filed

NOTICE: [**1] NOT RECOMMENDED FOR FULL-TEXT PUBLICATION. SIXTH CIRCUIT RULE 28(g) LIMITS CITATION TO SPECIFIC SITUATIONS. PLEASE SEE RULE 28(g) BEFORE CITING IN A PROCEEDING IN A COURT IN THE SIXTH CIRCUIT. IF CITED, A COPY MUST BE SERVED ON OTHER PARTIES AND THE COURT. THIS NOTICE IS TO BE PROMINENTLY DISPLAYED IF THIS DECISION IS REPRODUCED.

PRIOR HISTORY: Northern District of Ohio. 02-00027. Gwin. 10-07-02.

DISPOSITION: Affirmed. Petitioner's motion for counsel denied.

CASE SUMMARY

PROCEDURAL POSTURE: Plaintiff, a prisoner, moved for the appointment of counsel on appeal from a United States District Court for the Northern District of Ohio order that denied his Fed. R. Civ. P. 60 motion in which he sought relief from an earlier district court order that imposed the appellate filing fee in an underlying appeal from the district court's final judgment in this civil rights action against defendant prison officials filed under 42 U.S.C.S. § 1983.

OVERVIEW: On appeal, the prisoner contended that the district court improperly imposed a second appellate filing fee in this appeal because he intended his notice of appeal to be an amended notice of appeal. This claim lacked merit. Although the record reflected confusion regarding the prisoner's payment of the appellate filing fees, the district court properly fulfilled its obligation to assess the appellate filing fees in the prisoner's appeals. Further, the prisoner's claim that no appellate filing fee was due because his notice of appeal was intended to be an amended notice of appeal lacked merit. None of the prisoner's notices of appeal could be construed as an amended notice of appeal. First, the prisoner voluntarily dismissed his initial interlocutory appeal before he paid any appellate filing fee and before the district court entered its final judgment granting summary judgment for the prison officials. Similarly, the prisoner's notice of appeal taken from the district court's order that denied his motion for relief from the earlier imposition of the appellate filing fee was not filed until after the appellate court dismissed his underlying appeal for want of prosecution.

OUTCOME: The motion for counsel was denied, and the district court's judgment was affirmed.

CORE TERMS: filing fee, notice of appeal, prisoner, forma pauperis, want of prosecution, prison, final judgment, civil rights, leave to file, leave to proceed, summary judgment, record reflects, partial payment, assess

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Civil Procedure > Dismissals > Involuntary Dismissals > Failures to Prosecute
Civil Rights Law > Prisoner Rights > Prison Litigation Reform Act > Filing Fees
Commercial Law (UCC) > Negotiable Instruments (Article 3) > Discharge & Payment > General Overview

HN1 Under the Prison Litigation Reform Act, a prisoner bringing a civil action in forma pauperis must file an affidavit of indigency and a certified copy of his prison trust fund account statement for the six-month period immediately preceding the filing of the complaint. 28 U.S.C.S. § 1915(a).

If the prisoner does not pay the full filing fee and fails to provide the required documentation to proceed in forma pauperis, the district court must notify the prisoner of the deficiency and the prisoner will then have 30 days from the date of the deficiency order to correct the error or pay the full filing fee. If the prisoner does not comply with the district court's directions, the district court must presume that the prisoner is not a pauper, assess the full filing fee, and dismiss the case for want of prosecution.

Civil Procedure > Appeals > Appellate Jurisdiction > Interlocutory Orders
Civil Procedure > Appeals > Dismissals of Appeals > Voluntary Dismissals
Civil Procedure > Appeals > Reviewability > Notice of Appeal

HN2 Generally, Fed. R. App. P. 4(a)(B)(ii) provides that a party may challenge a district court order disposing of a Fed. R. Civ. P. 60 motion by filing an amended notice of appeal. Fed. R. App. P. 4(a)(B)(iii) provides that no additional appellate filing fee is required when an amended notice of appeal is filed.

COUNSEL: JOHN W. PEROTTI, Plaintiff - Appellant, Pro se, Cleveland, OH.

For REGINALD A. WILKINSON, Defendant - Appellee: Marianne Pressman, Office of the Attorney General, Cincinnati, OH.

For GREGORY EATON, EVAN TOBIN, DAVID ORSINELLI, Defendants - Appellees: Stuart W. Harris, Kegler, Brown, Hill & Ritter, Columbus, OH.

JUDGES: Before: NORRIS, GILMAN, and ROGERS, Circuit Judges.

OPINION

[*885] ORDER

John W. Perotti moves for the appointment of counsel on appeal from a district court order that denied his Fed. R. Civ. P. 60 motion in which he sought relief from an earlier district court order that imposed the appellate filing fee in an underlying appeal from the district court's final judgment in this [**2] civil rights action filed under 42 U.S.C. § 1983. This case has been referred to a panel of the court pursuant to Rule 34(j)(1). Rules of the Sixth Circuit. Upon examination, this panel unanimously agrees that oral argument is not needed. Fed. R. App. P. 34(a).

Perotti filed a civil rights complaint in the district court on January 4, 2002, alleging that the defendant Ohio prison officials violated his civil rights. Perotti filed an amended complaint, and subsequently filed a motion for leave to file a second amended complaint. The district court granted in part Perotti's motion for leave to file another amended complaint and denied the motion in part, and Perotti filed a notice of appeal. On May 7, 2002, the district court ordered Perotti to pay the appellate filing fee or file a motion for leave to proceed in forma pauperis. Before Perotti took either action, this court granted Perotti's motion to voluntarily dismiss the appeal. *Perotti v. Wilkinson,* No. 02-3513 (6th Cir. May 29, 2002) (unpublished).

Thereafter, the district court granted defendants' motions for judgment on the pleadings and for summary judgment [**3] and entered judgment accordingly on June 21, 2002. Perotti filed a timely notice of appeal, and the district court again ordered Perotti to pay the appellate filing fee or file a motion for leave to proceed in forma pauperis. The record reflects that Perotti submitted a partial payment of the filing fee to the district court clerk, and the district court then assessed the entire filing fee with credit granted for the partial payment against Perotti's prison account on September 17, 2002. Shortly thereafter, this court dismissed Perotti's appeal for want of prosecution. *Perotti v. Wilkinson.* No. 02-3802 (6th Cir. Sept. 23, 2002) (unpublished).

On September 26, 2002, Perotti served a motion for relief from the district court's order assessing the entire filing fee pursuant to Fed. R. Civ. P. 60. The district court denied the motion as meritless. Perotti filed a timely notice of appeal. On appeal, Perotti contends that the district court improperly imposed a second appellate filing fee in this appeal because he intended [*886] his notice of appeal in this case to be an amended notice of appeal pursuant to the Federal Rules of Appellate Procedure.

[**4] Upon consideration, we deny the motion for counsel, and affirm the district court's order because Perotti's claim on appeal lacks merit. HN1 Under the Prison Litigation Reform Act, a prisoner bringing a civil action in forma pauperis must file an affidavit of indigency and a certified copy of his prison trust fund account statement for the six-month period immediately preceding the filing of the complaint. *See* 28 U.S.C. § 1915(a). If the prisoner does not pay the full filing fee and fails to provide the required documentation to proceed in forma pauperis, "the district court must notify the prisoner of the deficiency and the prisoner will then have thirty days from the date of the deficiency order to correct the error or pay the full filing fee." *McGore v. Wrigglesworth,* 114 F.3d 601, 605 (6th Cir. 1997). "If the prisoner does not comply with the district court's directions, the district court must presume that the prisoner is not a pauper," assess the full filing fee, and dismiss the case for want of prosecution. *Id.* Here, although the record reflects confusion regarding Perotti's payment of the appellate filing fees in this case, the [**5] district court properly fulfilled its obligation to assess the appellate filing fees in Perotti's appeals.

Further, Perotti's claim on appeal that no appellate filing fee is due because his notice of appeal was intended to be an amended notice of appeal lacks merit. HN2 Generally, Fed. R. App. P. 4(a)(4)(B)(ii) provides that a party may challenge a district court order disposing of a Fed. R. Civ. P. 60 motion by filing an amended notice of appeal. Fed. R. App. P. 4(a)(4)(B)(iii) provides that no additional appellate filing fee is required when an amended notice of appeal is filed. However, none of Perotti's notices of appeal can be construed as an amended notice of appeal. First, Perotti voluntarily dismissed his initial interlocutory appeal before he paid any appellate filing fee and before the district court entered its final judgment granting summary judgment for defendants. Similarly, Perotti's notice of appeal taken from the district court's order that denied his motion for relief from the earlier imposition of the appellate filing fee was not filed until after this court dismissed [**6] Perotti's underlying appeal for want of prosecution. Under these circumstances, none of Perotti's notices of appeal can be construed as an amended notice of appeal.

For the foregoing reasons, the motion for counsel is denied, and the district court's judgment is affirmed. *See* Rule 34(j)(2)(C). Rules of the Sixth Circuit.