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JUDY RADA LENZ AND RUSSELL G. LENZ, APPELLANTS, V. DAVID HICKS, APPELLEE.

824 N.W.2d 769

Filed December 18, 2012. No. A-12-064.

1. **Affidavits: Appeal and Error.** Denial of in forma pauperis eligibility is reviewed de novo on the record based on the transcript of the hearing or the written statement of the court.
2. **Actions: Words and Phrases.** For purposes of Neb. Rev. Stat. § 25-2301.02 (Reissue 2008)—the statute governing applications to proceed in forma pauperis—a frivolous legal position is one wholly without merit, that is, without rational argument based on the law or on the evidence.
3. **Actions: Appeal and Error.** Principles of liberal construction apply to the review of a denial of a motion to proceed in forma pauperis upon the ground that the complaint was frivolous.

Appeal from the District Court for Douglas County: JAMES T. GLEASON, Judge. Reversed and remanded for further proceedings.

Judy Rada Lenz, pro se.

Russell G. Lenz, pro se.

No appearance for appellee.

IRWIN, PIRTLE, and RIEDMANN, Judges.

PIRTLE, Judge.

INTRODUCTION

Judy Rada Lenz and Russell G. Lenz appeal from the order of the district court for Douglas County denying their motion for leave to proceed in forma pauperis with their action against attorney David Hicks. We find the district court erred in holding that Judy and Russell asserted a legal position which was frivolous or malicious and in denying the motion.

BACKGROUND

Judy and Russell hired Hicks to handle Russell's voluntary petition for chapter 13 bankruptcy. Judy and Russell were unsatisfied with Hicks' representation and produced a handwritten document titled "Civil action In forma Pauperis

request," as well as a financial affidavit. The "Civil action" document was dated December 28, 2011. It stated that Judy and Russell sued Hicks for "Wa[i]ving All Plaintiffs[']s Rights in Bankruptcy Court" and requested $100 million in damages.

The district court filed an in forma pauperis order on January 18, 2012, stating that the court "on its own motion pursuant to *Neb. Rev. Stat.* § 25-2301.02, objects on the grounds that the applicant is asserting legal positions which are frivolous or malicious, and the application to proceed *in forma pauperis* is denied for the following reasons," after which was handwritten "no cause of action pled."

On January 24, 2012, Judy and Russell subsequently filed a handwritten document titled "Notice of APPEAL & in Forma Pauperis Request," as well as another financial affidavit. The notice stated that Judy and Russell intended to appeal the district court's order denying them in forma pauperis status in the civil action. The district court granted in forma pauperis status for the appeal.

ASSIGNMENT OF ERROR

Judy and Russell assert the district court should have granted them leave to proceed in forma pauperis in the civil action.

STANDARD OF REVIEW

[1] Denial of in forma pauperis eligibility is reviewed de novo on the record based on the transcript of the hearing or the written statement of the court. *Tyler v. Natvig*, 17 Neb. App. 358, 762 N.W.2d 621 (2009). See Neb. Rev. Stat. § 25-2301.02 (Reissue 2008).

ANALYSIS

The issue on appeal is whether the district court erred in denying in forma pauperis status in this case.

Nebraska's in forma pauperis statutes, Neb. Rev. Stat. § 25-2301 et seq. (Reissue 2008), enacted in 1972, are based substantially on the federal in forma pauperis statute at 28 U.S.C. § 1915 (2006). The federal version was designed to ensure that indigent litigants have meaningful access to the federal courts and to ensure equality of consideration for all litigants. *Neitzke v. Williams*, 490 U.S. 319, 109 S. Ct. 1827,

104 L. Ed. 2d 338 (1989). The federal statute authorizes federal courts to dismiss a claim filed in forma pauperis "'if the allegation of poverty is untrue, or if satisfied that the action is frivolous or malicious.'" 490 U.S. 319 at 324. See 28 U.S.C. § 1915.

Nebraska's statute, § 25-2301.02, allows the court to object on its own motion to an application to proceed in forma pauperis "on the grounds that the applicant is asserting legal positions which are frivolous or malicious."

The definition of a "malicious" action is not well settled; however, the decisions which have addressed the issue show that it is appropriate to consider the number and kinds of cases instituted, and the extent to which the conduct of the litigant constitutes an abuse of the judicial process. *Pratt v. Houston*, Nos. A-96-049, A-96-050, 1997 WL 119561 (Neb. App. Mar. 18, 1997) (not designated for permanent publication). The conduct of Judy and Russell does not fit within this definition, so we next consider whether the petition should have been dismissed on the ground that the legal position asserted was "frivolous."

[2] For purposes of § 25-2301.02—the statute governing applications to proceed in forma pauperis—a frivolous legal position is one wholly without merit, that is, without rational argument based on the law or on the evidence. See *Tyler v. Nebraska Dept. of Corr. Servs.*, 13 Neb. App. 795, 701 N.W.2d 847 (2005).

In this case, the district court objected on its own motion and filed an order stating that Judy and Russell asserted legal positions which were frivolous or malicious and their application was denied for "no cause of action pled." However, in *Neitzke v. Williams*, the U.S. Supreme Court reasoned that to conflate the standards of frivolousness and failure to state a claim would deny indigent plaintiffs the "practical protections against unwarranted dismissal generally accorded paying plaintiffs under the Federal Rules." 490 U.S. at 330. The U.S. Supreme Court ultimately held that a complaint filed in forma pauperis is not automatically frivolous simply because it fails to state a claim. This court cited *Neitzke*, while acknowledging that the statute gives the court authority to dismiss as frivolous

a claim that is based on an indisputably meritless legal theory. See *Pratt v. Houston, supra*.

[3] This court has held that principles of liberal construction apply to the review of a denial of a motion to proceed in forma pauperis upon the ground that the complaint was frivolous. See *Tyler v. Nebraska Dept. of Corr. Servs., supra*. Liberally construed, Judy and Russell's petition claims their attorney committed malpractice in his representation of them in a bankruptcy case. While this claim may ultimately prove meritless, the district court erred in its finding that the petition was frivolous or malicious on its face and in denying in forma pauperis status for failure to plead a cause of action.

CONCLUSION

We conclude that the district court erred in denying Judy and Russell's motion to proceed in forma pauperis. We therefore reverse the judgment and remand the cause for further proceedings consistent with this opinion.

REVERSED AND REMANDED FOR FURTHER PROCEEDINGS.