

1 United States Court of Appeals,
2
3 Fifth Circuit.

4
5 No. 94-41204.

6
7 SARAW PARTNERSHIP, et al., Plaintiffs-Appellants,

8
9 v.

10 UNITED STATES of America, et al., Defendants-Appellees.

11
12 Oct. 31, 1995.

13
14 Appeal from the United States District Court for the Eastern
15 District of Texas.

16
17 Before REYNALDO G. GARZA, KING and HIGGINBOTHAM, Circuit Judges.

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19 REYNALDO G. GARZA, Circuit Judge:

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21 Background

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23 Saraw Partnership, Wilburn A. Roberts, Shirley J. Roberts, and
24 Robert Schlegel (collectively Saraw or the partnership) sued the
25 United States and Citizens and Southern National Bank (the bank)
26 pursuant to the Federal Tort Claims Act (FTCA) for alleged
27 mishandling of a Veterans' Administration (VA) loan.¹ The
28 partnership was formed in 1984 for the purpose of acquiring
29 residential real property which was in the process of being
30 foreclosed on or had already been foreclosed. Saraw would improve
31 the property for rental use and eventual sale. In the same year
32 that it was formed, Saraw purchased parcels of real estate from the
33 United States, acting through the VA. Saraw executed nine
34 promissory notes in favor of the VA, each of which was given an
35 internal loan number by VA.
36

37 This dispute centers on the purchase of a property in

¹The bank acted as a depository for receiving and crediting of payments on Saraw's VA loans.

1 Jefferson County, Texas. The VA financed the purchase of the
2 property and assigned it Loan # 28541. Saraw was to make monthly
3 loan payments to VA and VA was to send a payment coupon on each
4 loan. The payment coupon contained information such as the payment
5 due date, the amount due, and the VA loan number. The VA sent
6 Saraw payment coupons for all of the loans except Loan # 28541.
7 This failure to send payment coupons for Loan # 28541 apparently
8 was caused by an erroneous computer data entry made by one of the
9 VA's employees. Saraw notified the VA that it did not have a
10 payment coupon for the loan and sent the payment for Loan # 28541
11 with other payments, designating the checks for Loan # 28541.

12 Saraw alleged that the payments it sent for Loan # 28541 were
13 applied to their various other loans, allowing Loan # 28541 to fall
14 into arrears. The bank was not permitted to credit loan payments
15 without payment coupons attached. As a result, the VA twice
16 foreclosed on the property securing Loan # 28541, placed a cloud on
17 Saraw's title, continued to demand payments for Loan # 28541 and
18 refused to account for and return Saraw's prior payments. During
19 the period 1987-1989, Saraw continued to make payments on Loan #
20 28541 while it worked with VA to resolve the dispute. VA admitted
21 by letter that the problem arose because of erroneous data entry
22 and VA's failure to correct that erroneous entry.

23 Saraw settled its claim against the bank but pursued its
24 action against the VA, claiming that the VA acted negligently in
25 the handling of Saraw's loans. The parties consented to have a
26 magistrate judge conduct the proceedings. Several pleadings
27 followed. The magistrate judge granted Saraw's motion to file a

1 fifth amended complaint but then considered the United States'
2 alternative motions for dismissal or summary judgment. Holding
3 that the majority of Saraw's claims were barred under 28 U.S.C. §
4 2680(h) as arising under the tort of misrepresentation, the
5 magistrate judge dismissed the action for lack of subject matter
6 jurisdiction. Saraw moved for a new trial and new judgment. The
7 court denied Saraw's motion and Saraw timely appealed. We hear the
8 appeal to decide whether the plaintiffs have alleged an action
9 under misrepresentation which is barred or have made a permissible
10 negligence claim under FTCA.

11 Discussion

12 A. Standard of Review

13 We review *de novo* the magistrate judge's grant of the Rule
14 12(b)(1) motion to dismiss for lack of subject matter jurisdiction.
15 *Hobbs v. Hawkins*, 968 F.2d 471, 475 (5th Cir.1992). This Court
16 will not affirm the dismissal "unless it appears certain that the
17 plaintiff[s] cannot prove any set of facts in support of [their]
18 claim which would entitle them to relief." *Id.* (internal quotation
19 and citation omitted). Since this matter comes to us from a
20 dismissal pursuant to Fed.R.Civ.P. 12(b)(1), we must take as true
21 all of the allegations of the complaint and the facts as set out by
22 the appellant. *Garcia v. United States*, 776 F.2d 116, 117 (5th
23 Cir.1985). Because we find that plaintiff could prove facts
24 demonstrating negligent performance of an operational task on the
25 part of the United States, we reverse the decision of the
26 magistrate judge.

27 B. Liability Under FTCA

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1 The United States as a sovereign is immune from suit except
2 as it has consented to suit. *Williamson v. U.S.D.A.*, 815 F.2d 368,
3 373 (5th Cir.1987). The FTCA provides that the United States can
4 be liable in tort for any

5 negligent or wrongful act or omission of any employee of the
6 Government while acting within the scope of his employment,
7 under circumstances where the United States, if a private
8 person, would be liable to the claimant in accordance with the
9 law of the place where the act or omission occurred.

10
11 28 U.S.C. § 1346(b). There are several exceptions to this consent
12 to be sued which must be strictly construed in favor of the
13 government. *Atorie Air Inc. v. F.A.A.*, 942 F.2d 954, 958 (5th
14 Cir.1991). The exception relevant to this dispute is that which
15 bars claims "arising out of ... misrepresentation." 28 U.S.C. §
16 2680(h). This exclusion encompasses claims for negligent as well
17 as intentional misrepresentation. *Williamson*, 815 F.2d at 377 & n.
18 8. It also covers both affirmative acts of misrepresentation and
19 omissions of material fact. *McNeily v. United States*, 6 F.3d 343,
20 347 (5th Cir.1993).

21 The magistrate judge dismissed on the grounds that the
22 plaintiffs alleged the tort of misrepresentation, stating that

23 Although the chain of events in this case may have started
24 with a mistake in key-punching an address on a computer data
25 sheet, the damages asserted in this case were caused by the
26 government allegedly failing to communicate to the plaintiff
27 that there was a problem with its loan payments.

28
29 Saraw claims *contra* that its alleged damages arose *primarily* from
30 the negligent keystroke. The government asserts that the
31 magistrate judge properly held that any damages arose from VA's
32 alleged failure to communicate to Saraw the problems with the loan;
33 thus Saraw's claim is barred under the misrepresentation exclusion

1 of FTCA, 28 U.S.C. 2680.

2 As is evident from this conflict, the line between what
3 constitutes a permissible negligence claim and a barred
4 misrepresentation claim has not been clearly delineated. This
5 Circuit has no clear precedent commanding a result in this case.
6 However, the 9th Circuit recently had a chance to consider the
7 troublesome distinction between negligence and misrepresentation in
8 a case involving facts similar to those now before us.

9 In *Mundy v. U.S.*, 983 F.2d 950 (9th Cir.1993), the plaintiff
10 (Walter Mundy, a Northrop Corporation employee) sued the United
11 States under the FTCA for negligently handling his request for a
12 higher security clearance. The government misfiled a document and
13 then overlooked that document during the processing of his security
14 clearance, resulting in a denial of security clearance. The
15 government then communicated the result of the security clearance
16 process to the plaintiff's employer who promptly terminated the
17 plaintiff. The issue in that case was whether the plaintiff's
18 claim was based on negligent misrepresentation from the government
19 or from its negligent performance of an operational task. The
20 court turned to *United States v. Fowler*, 913 F.2d 1382, 1387 (9th
21 Cir.1990) for guidance:

22 Courts have had difficulty in determining whether a claim is
23 one for misrepresentation. The concept is slippery; any
24 misrepresentation involves some underlying negligence and any
25 negligence action can be characterized as one for
26 misrepresentation because anytime a person does something he
27 explicitly or implicitly represents that he will do the thing
28 non-negligently. *Guild v. United States*, 685 F.2d 324, 325
29 (9th Cir.1982). To determine whether a claim is one for
30 misrepresentation or negligence the court examines the
31 distinction

32
33 between the performance of operational tasks and the

1 communication of information. The government is liable
2 for injuries resulting from negligence in performance of
3 operational tasks even though misrepresentations are
4 collaterally involved. It is not liable, however, for
5 injuries resulting from commercial decisions made in
6 reliance on government misrepresentations. *Fowler*, 913
7 F.2d at 1387 (quoting *Guild*, 685 F.2d at 325).

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9 *Mundy*, 983 F.2d at 952. The *Mundy* court reasoned that

10 Mundy's negligence claim focuses on the performance of an
11 operational task—the processing of a requested security
12 clearance—rather than the communication of information....
13 Although the government necessarily communicated the result of
14 this operational task to Northrop, the communication was not
15 a misrepresentation: the security clearance had in fact been
16 denied. Viewed in this way, the communication was only
17 collaterally involved in Mundy's inquiry. The government's
18 alleged operational error—overlooking a misfiling in
19 processing Mundy's security clearance—remains the focal point
20 of this suit.

21
22 *Id.* Thus the Ninth Circuit held that the claim was not based on a
23 misrepresentation and allowed the claim. *Id.* at 953. The
24 communication—the accurate conveyance of the results of the
25 security clearance processing—was only collaterally involved; the
26 negligence at the heart of Mundy's claims lay in the processing
27 errors of misfiling and the failure to discover the misfiling. *Id.*

28 The court below correctly cited *Mundy* but incorrectly applied
29 it to the facts of this case. In our estimation, the decision of
30 the magistrate judge misapprehends the source of this conflict and
31 the nature of misrepresentation. We will look to the essential act
32 that spawned the damages. In doing so, we reach a conclusion
33 similar to that of the Ninth Circuit.

34 The erroneous keypunch for Loan # 28541 was the *causa sine qua*
35 *non* for all the problems that followed.² This case is not about

²*Cf. Redmond v. United States*, 518 F.2d 811 (7th Cir.1975)
(where *misrepresentations* were the *sine qua non* in chain of
causative events on which claim of complaint was founded, claim

1 reliance on faulty information or on the lack of proper
2 information; rather, the gist of this case is the government's
3 careless handling of Saraw's loan payments. As in *Mundy*, any lack
4 of communication on the government's part seems collateral to the
5 fact of the mishandling of Saraw's payments. The court erroneously
6 characterized Saraw's claim as one under misrepresentation. The
7 proper focal point of this suit is the alleged
8 negligently-performed operational task of the government. Thus,
9 Saraw should be allowed to bring an action under FTCA.

10 Additionally, we note that "the essence of an action for
11 misrepresentation is the communication of misinformation *on which*
12 *the recipient relies.*" *Block v. Neal*, 460 U.S. 289, 296, 103 S.Ct.
13 1089, 1093, 75 L.Ed.2d 67 (1983) (emphasis added). The record in
14 this case is replete with evidence that Saraw did not rely on the
15 lack of communication by VA that there were problems with the loan.
16 Rather, Saraw notified VA when the payment coupon was noticed to be
17 missing and has attempted since then on numerous occasions to undo
18 the effects of the erroneous keypunch. Saraw continued to make
19 payments precisely to avoid the kind of harm apparently caused by
20 the government's erroneous keypunch (foreclosure, clouded title,
21 etc...). Where there is no detrimental reliance on an alleged
22 miscommunication, no claim for misrepresentation is made. *Ware v.*
23 *United States*, 626 F.2d 1278, 1283 (5th Cir.1980). We believe
24 under these facts that the misrepresentation exclusion does not
25 apply.

26 We REVERSE the dismissal by the court below and REMAND for

was barred under 28 U.S.C. § 2680(h)).

1 further proceedings in accordance with the opinion of this Court.

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