UNITED STATES COURT OF APPEALS
FIFTH CIRCUIT

No. 91-4986

(Summary Calendar)

KENNETH GREGORY THOMPSON, JR.,

Plaintiff-Appellant,

VERSUS

MURRAY L. HARRIS, ET AL.,

Defendants-Appellees.

Appeal from the United States District Court
For the Eastern District of Texas
(6:90 CV 259)

(December 28, 1992)

Before GARWOOD, JONES, and EMILIO M. GARZA, Circuit Judges.

PER CURIAM:*

Plaintiff, Kenneth Gregory Thompson, Jr., an inmate within the Texas Department of Criminal Justice, Institutional Division, ("TDCJ") filed a civil rights action, pro se and in forma pauperis ("IFP") against the Clerk and a deputy clerk of the United States District Court for the Eastern District of Texas, (collectively referred to as "the clerks") and three Fifth Circuit judges. The

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* Local Rule 47.5.1 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 Pursuant to that Rule, the Court has determined that this opinion should not be published.

district court dismissed Thompson's case sua sponte, with prejudice. Thompson appeals. We affirm in part, and in part vacate and remand to the district court for entry of an order of dismissal without prejudice.

I

In a prior action (the "1987 action"), Thompson alleged that TDCJ officials violated his constitutional rights. The district court ordered a jury trial on Thompson's retaliation claim, but dismissed the other claims as frivolous. Thompson filed a notice of appeal challenging the district court's dismissal, but was told the notice was premature.[1] Subsequently, the remaining cause of action))the retaliation claim))was settled. As a result, the district court dismissed the retaliation claim as frivolous on May 10, 1988. The order of dismissal was entered on May 11, 1988.

On May 31, 1988, Thompson filed a motion to reconsider the order of dismissal,[2] which the district court denied on June 10, 1988. Thompson filed another notice of appeal ("Third Notice of Appeal") on June 20, 1988, which a panel of this Court considered. The panel found the Third Notice of Appeal untimely as to the 1987 action, because it was filed more than thirty days after entry of final judgment, and limited Thompson's appeal to a challenge of the

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[1] This notice of appeal was not effective under Fed. R. Civ. P. 4(a)(4) because Thompson had concurrently filed a motion to reconsider the dismissal within ten days from the entry of the order of dismissal. *See Thompson v. Collins,* No. 88-2333, slip op. at 3 n.2 (5th Cir. Apr. 27, 1989) (5th Circuit opinion on petition for rehearing).

[2] In this motion to reconsider, Thompson requested that his suit be reinstated because the TDCJ officials were not abiding by the terms of the settlement agreement.

district court's ruling on the motion to reconsider. Thompson filed a motion for rehearing with this Court, explaining that he had attempted to file a timely second notice of appeal ("Second Notice of Appeal") along with his motion to reconsider on May 31, 1988. Thompson claimed that the clerks had returned to him the Second Notice of Appeal on the ground that the motion to reconsider had to be disposed of before he could file a notice of appeal. The motion was denied without written explanation. Subsequently, a petition for writ of certiorari to the United States Supreme Court was denied.

Thompson then filed a civil rights action against the clerks and three Fifth Circuit judges.[3] The gravamen of Thompson's complaint was that he was denied his constitutional right of access to the courts))for appellate review of the district court's order

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[3] Thompson claims that these federal officials violated 42 U.S.C. § 1983 (1988). Relief under § 1983 is not available because these federal officials were acting under color of federal law, and not state law. *See Broadway v. Block,* 694 F.2d 979, 981 (5th Cir. 1982) (federal officials acting under color of federal law rather than state law are not subject to § 1983). Nevertheless, we construe Thompson's complaint liberally because he is proceeding pro se. *See United States v. Weathersby,* 958 F.2d 65, 66 (5th Cir. 1992). A pro se complaint "`however inartfully pleaded,'" must be held to "`less stringent standards than formal pleadings drafted by lawyers.'" *Estelle v. Gamble,* 429 U.S. 97, 106, 97 S. Ct. 285, 292, 50 L. Ed. 2d 251 (1976) (quoting *Haines v. Kerner,* 404 U.S. 519, 520-21, 92 S. Ct. 594, 596, 30 L. Ed. 2d 652 (1972)). To the extent that Thompson is seeking monetary damages, his action can be liberally construed as arising under *Bivens v. Six Unknown Named Agents of Federal Bureau of Narcotics,* 403 U.S. 388, 397, 91 S. Ct. 1999, 2005, 29 L. Ed. 939 (1946) (holding that petitioner could recover monetary damages for any injuries suffered as a result of federal officials' violation of Fourth Amendment). To the extent that Thompson is seeking injunctive relief, his complaint can be liberally construed as arising under *Bell v. Hood,* 327 U.S. 678, 685, 66 S. Ct. 773, 777, 90 L. Ed. 939 (1946) ("[W]here federally protected rights have been invaded, it has been the rule from the beginning that courts will be alert to adjust their remedies so as to grant the necessary relief."). *See U.S. v. Farrar,* 414 F.2d 936, 938 (5th Cir. 1969) ("As the Supreme Court has pointed out on many occasions, federal courts are empowered to fashion such remedies, including the issuance of injunctions, as are necessary to vindicate rights which have been secured under the Constitution and laws of the United States." (citing *Bell v. Hood,* 327 U.S. 678, 66 S. Ct. 773, 90 L. Ed. 939 (1946)).

of dismissal of his claims in the 1987 action))because the clerks should not have returned his Second Notice of Appeal. Thompson also claimed that the judges violated his constitutional rights by finding his third notice of appeal untimely as to the 1987 action, and limiting his appeal to a challenge of the motion for reconsideration.

The district court referred the case to a United States magistrate. *See* 28 U.S.C. 636(b)(1)-(b)(3) (1988). In his report and recommendation, the magistrate found that: a) the claims against the judges were frivolous because the judges were absolutely immune in their judicial functions; b) the claims against the clerks were barred by collateral estoppel and res judicata; and c) the clerks properly returned the Second Notice of Appeal. The magistrate then recommended that Thompson's suit be dismissed with prejudice. The district court reviewed the record de novo, and concluded that the findings and conclusions of the magistrate were correct. Accordingly, the district court adopted the findings and conclusions of the magistrate and dismissed Thompson's suit with prejudice.[4]

Thompson appeals, arguing that the district court erred in dismissing his case. Thompson claims that the district court erroneously concluded that: (1) the judges were absolutely immune in their judicial functions; (2) he was precluded by res judicata

[4] The district court did not state on what grounds it was dismissing Thompson's case. Because the district court dismissed Thompson's case sua sponte prior to the service of process on the defendants, we find that the district court dismissed the case as frivolous under § 1915(d).

and collateral estoppel from bringing an action against the clerks and; and (3) he was not denied access to the courts because the clerks were correct in returning his notice of appeal.

II

A district court may dismiss an IFP complaint as frivolous if it lacks an arguable basis in law or fact, pursuant to 28 U.S.C. § 1915(d) (1988). *Neitzke v. Williams,* 490 U.S. 319, 325, 109 S. Ct. 1827, 1831, 104 L. Ed. 2d 338 (1989); *Ancar v. Sara Plasma, Inc.,* 964 F.2d 465, 468 (5th Cir. 1992); *Mayfield v. Collins,* 918 F.2d 560, 561 (5th Cir. 1990). A district court may also dismiss a case as frivolous where a defendant is absolutely immune from liability. See *Kimbel v. Beckner,* 806 F.2d 1256, 1257 (5th Cir. 1986) (upholding dismissal of case under § 1915(d) where federal district judge absolutely immune from liability). In order to save prospective defendants from the inconvenience and unnecessary expense of answering such complaints, courts often dismiss IFP cases sua sponte prior to the service of process. *Neitzke,* 490 U.S. at 324, 109 S. Ct. at 1831. District courts have broad discretion in determining whether a complaint is frivolous justifying dismissal under § 1915(d). *Mayfield, 918 F.2d at 561*. Accordingly, we review a § 1915(d) dismissal for abuse of discretion. *Denton v. Hernandez,* ___ U.S. ___, 112 S. Ct. 1728, 1730, 118 L. Ed. 2d 340 (1992); *Mayfield,* 918 F.2d at 561.

III

A

Thompson alleged that the judges violated his constitutional

rights to equal protection and due process of the laws by finding his Third Notice of Appeal untimely as to the 1987 action, and limiting his appeal to a challenge of the motion for reconsideration. Thompson sought both declaratory and injunctive relief against the judges.[5] Thompson claims that the district court erred in dismissing his claims against the judges as frivolous on the ground that the judges were absolutely immune in their judicial functions.

Judges are absolutely immune from liability in exercising their judicial authority except in the "clear absence of all jurisdiction." *Stump v. Sparkman,* 435 U.S. 349, 356-59, 98 S. Ct. 1099, 1104-06, 55. L. Ed. 2d 331 (1978).[6] We conclude that the circumstances of this action do not warrant the granting of equitable relief. The judges had clear jurisdiction over the subject matter of Thompson's suit, and carried out a normal

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[5] Thompson urged the district court to "[i]ssue a Mandatory Injunction that compel[led] [the judges] to immediately withdraw [the opinion in which they limited the Third Notice of Appeal] . . . and the denial of the petition for rehearing . . . , and forthwith undertake a judicial review and make a determination of Plaintiff's constitutional claim on appeal in [the 1987 action]." Record on Appeal at 58. Thompson also sought a declaration that the judges violated his constitutional rights by "circumvent[ing], imped[ing], and foreclos[ing] to [Thompson] his right to have the lower court's adverse judgment [in the 1987 action] reviewed." *Id.*

[6] Although some cases distinguish between claims for monetary damages and claims for equitable relief))allowing absolute immunity only for damage actions))other cases refuse to draw such a distinction. *See United Steelworkers of America, AFL-DCIO v. Bishop,* 598 F.2d 408, 412 (1979) (surveying cases in this area); *compare Mireles v. Waco,* ___ U.S. ___, 112 S. Ct. 286, 287 & n.1 (1991) (noting that while the Supreme Court has held that judges are absolutely immune from claims for money damages, it has held that judges are not immune from claims for prospective injunctive relief) *with Zimmerman v. Spears,* 428 F. Supp. 759, 761 (W.D. Tex. 1977) ("The doctrine of judicial immunity applies to a proceeding in which injunctive or other equitable relief is sought, as well as to suits for money damages. The reasons for the rule of judicial immunity apply regardless of the nature of the relief sought.").

judicial function when they limited his Third Notice of Appeal and denied his petition for rehearing. *Cf. Zimmerman v. Spears,* 565 F.2d 310 (5th Cir. 1977) (affirming district court dismissal of plaintiff's suit as frivolous under § 1915(d) where plaintiff brought suit against Fifth Circuit judges for denying plaintiff's petition for a writ of mandamus and for prohibition). As we stated in *Bishop,* where a discretionary judicial function is in dispute, "[t]he issuance of equitable relief against [judges] would unnecessarily risk the inhibition of future exercise of judicial discretionary functions and . . . no such relief is warranted." *Bishop,* 598 F.2d at 413; *see also Cheramie v. Tucker,* 493 F.2d 586 (5th Cir.), *cert. denied,* 419 U.S. 868, 95 S. Ct. 126, 42 L. Ed. 2d 107 (1974) (where plaintiff sought declaratory relief against judge, we held that granting such relief would interfere with the discretionary functions of state judges by effectively reversing their decisions).

We therefore hold that the district court did not err in dismissing Thompson's claims against the judges as frivolous under § 1915(d).

B

Thompson claimed that the clerks by returning his Second Notice of Appeal denied him access to the courts. Thompson alleges that the district court erred in finding that his claim against the clerks was barred by res judicata and collateral estoppel.[7]

[7] The magistrate stated in his report and recommendation))which the district court adopted))that "the claims against [the clerks] could be considered to be barred by collateral estoppel and res judicata because such

Whether a suit is barred by res judicata or collateral estoppel is a question of law, and thus reviewable de novo. *See Schmueser v. Burkburnett Bank,* 937 F.2d 1025, 1031 (5th Cir. 1991).

An action is barred by res judicata only if four requirements are met: "(1) the parties must be identical in the two suits; (2) the prior judgment must have been rendered by a court of competent jurisdiction; (3) there must be a final judgment on the merits; and (4) the same cause of action must be involved in both cases." *Russell v. Sunamerica Securities, Inc.,* 962 F.2d 1169, 1172 (5th Cir. 1992); *see also Nilsen v. Moss Point,* 701 F.2d 556, 559 (5th Cir. 1983) (en banc) (adopting the transactional test of the *Restatement (Second) of Judgments* for determining whether two suits involve the same cause of action for res judicata purposes).

"To satisfy the identity element, strict identity of parties is not necessary. A non-party can assert res judicata so long as it is in `privity' with the named defendant." *Russell,* 962 F.2d at 1173. "Privity" is a "broad concept" that is not well-defined. *See id.* "In short, parties which are sufficiently related to merit the application of claim preclusion are in privity." *Id.* at 1174. The defendants in the 1987 action were prison officials; the defendants in this action are court clerks who had duties to be neutral in the 1987 action. We find that the parties are not "sufficiently related" to be in privity.

Moreover, as for the fourth requirement, if "`a case arises out of the same nucleus of operative facts, or is based upon the

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claims were impliedly considered and denied by [the Fifth Circuit] on appeal."

same predicate, or a former action, . . . the two cases are really the same "claim" or "causes of action"'" *Id.* at 1173 (quoting *Citibank, N.A. v. Data Lease Financial Corp.,* 904 F.2d 1498, 1503 (11th Cir. 1990)); *see also Matter of Howe,* 913 F.2d 1138, 1144 (5th Cir. 1990) ("critical issue is whether plaintiff bases the two actions on the same nucleus of operative facts"). The operative facts of the 1987 action involve the conduct of prison officials toward Thompson within the actual confines of prison. The operative facts of this action, however, involve the conduct of court clerks that occurred during the litigation of Thompson's 1987 action. Consequently, we find that the same cause of action is not involved in this case as was involved in the 1987 action, and hold that Thompson's action was not barred by res judicata.

Thompson also argues that the district court incorrectly determined that his action was barred by collateral estoppel. In determining that Thompson's action was barred by collateral estoppel, the magistrate stated in his report and recommendation))which the district court adopted))that "the claims against the clerks . . . were impliedly considered and denied [by the Fifth Circuit in Thompson's petition for rehearing]."

There are three requirements for an action to be barred by collateral estoppel: (1) the issue must be the same as the one involved in the prior action; (2) the issue must have been actually litigated in the previous case; and (3) "the determination made of the issue in the prior action must have been necessary and essential to the resulting judgment." *Hughes v. Santa Fe Intern.*

Corp., 847 F. 2d 239, 240 (5th Cir. 1988).

As for the second element, if "a question of fact is put in issue by the pleadings, and is submitted to the jury or other trier of facts for its determination, and is determined, that question of fact has been `actually litigated.'" *James Talcott, Inc. v. Allahabad Bank, Ltd.,* 444 F.2d 451, 459 (5th Cir.), *cert. denied,* 404 U.S. 940, 92 S. Ct. 280, 30 L. Ed. 2d 253 (1971). The questions of fact in this case involve whether Thompson sent a notice of appeal with the motion for reconsideration filed May 31, and whether the clerks returned the motion unfiled. In the 1987 action, Thompson raised those issues of fact for the first time in his petition for rehearing. Therefore, the questions of fact were not "actually litigated" in the petition for rehearing because a trier of fact did not receive and determine the factual issues.

In addition, determination of Thompson's access-to-courts claim was not "necessary and essential" to the ruling on the petition for rehearing. The Fifth Circuit panel may have rejected the petition for rehearing because the access-to-courts issue was presented for the first time on appeal, because the issue was not purely legal, and because failure to consider the issue would not lead to manifest injustice. *See Knowlton v. Greenwood Indep. School District,* 957 F.2d 1172, 1182 n. 16 (5th Cir. 1992) ("[I]ssues raised for the first time on appeal `are not reviewable by [the Fifth Circuit] unless they involve purely legal questions and failure to consider them would result in manifest injustice.'" (quoting *Self v. Blackburn,* 751 F.2d 789, 793 (5th Cir. 1985))).

Furthermore, the panel may have determined that the allegations were not relevant to the legal question before them: whether the district court abused its discretion in denying the Rule 60(b) motion regarding the retaliation claim. We therefore conclude that Thompson's claim against the clerks was not barred by collateral estoppel.

C

Thompson also argues that the district court abused its discretion in dismissing his case on the basis that he had not been denied access to the courts. "A denial-of-access-to-the-courts claim is not valid if a litigant's position is not prejudiced by the alleged violation." *Henthorn v. Swinson,* 955 F.2d 351, 354 (5th Cir.), *cert. denied,* ___ U.S. ___, 112 S. Ct. 2974, 119 L. Ed. 2d 593 (1992) (citing *Richardson v. McDonnell,* 841 F.2d 120, 122 (5th Cir. 1988)) (where plaintiff's case was closed for failure to exhaust administrative remedies, and plaintiff alleged that prison officials prevented him from doing so, this Court found no prejudice where plaintiff's case was reopened and he was allowed to proceed with case).

Thompson can still claim that he was denied access to the courts by filing a Fed. R. Civ. P. 60(b)(6) motion in the 1987 action.[8] We therefore find that Thompson has not yet been prejudiced by the clerks' alleged violations. Accordingly, we hold

[8] Fed. R. Civ. P. 60(b)(6) provides that, "on motion and upon such terms as are just, the Court may relieve a party or a party's legal representative from a final judgment, order, or proceeding for the following reasons . . . any . . . reason justifying relief from the operation of the judgment.

that Thompson's claim))that he was denied access to the courts))is premature and lacks an arguable basis in law and, consequently, the district court did not abuse its discretion in dismissing Thompson's claim as frivolous under § 1915(d).[9]

D

Relief under the allegations contained in Thompson's complaint requires resolution of two factual issues: (1) whether Thompson filed a notice of appeal on May 31, 1988 and (2) whether the clerks returned the notice of appeal to Thompson. Both issues should be considered first through a Rule 60(b)(6) motion in the 1987 action.

If these factual issues are determined in Thompson's favor,

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[9] Thompson argues on appeal that the district court erred in dismissing his claims against the clerks on the basis that the clerks were qualifiedly immune from his claim against them.

Thompson claimed that "Defendant Harris authorized Defendant Hart to return to Plaintiff his notice of appeal and, in a cover letter, informed Plaintiff that his notice of appeal was `untimely' submitted in view of his motion for reconsideration. Defendants Harris and Hart further informed Plaintiff that depending upon the outcome of his motion for reconsideration he may desire to re-file his notice of appeal." Record on Appeal at 53-54. Thompson further alleged that the clerks had violated his constitutional rights because they had

> acted outside the scope of their respective jurisdiction . . . by refusing to file Plaintiff's timely notice of appeal, notwithstanding the mandatory language of the federal statutes governing the same; and . . . [the clerks] knew or should have known that they were violating clearly established law inasmuch as the language contained within the frame of the applicable statutes compels [the clerks] to comport with said statutes, i.e., that all notices of appeal from adverse judgements be filed, docketed, and considered by the courts . . . .

Record on Appeal at 56-57.

Because we hold that the constitutional claim underlying the claim against the clerks is frivolous, we do not address whether the district court properly dismissed Thompson's claims against the clerks on the ground that they were protected by qualified immunity. *Cf. Siegert v. Gilley,* ___ U.S. ___, 111 S. Ct. 1789, 1793, 114 L. Ed. 2d 277 (1991) (on summary judgment, court must first resolve constitutional issue before deciding qualified immunity issue); *Enlow v. Tishomingo County, Miss.,* 962 F.2d 501, 508 (5th Cir. 1992) (same); *Duckett v. City of Cedar Park, Tex.,* 950 F.2d 272, 276-77 (5th Cir. 1992) (same).

the clerks would have been incorrect in returning the May 31 notice of appeal. Fed. R. App. P. 4(a)(4) provides that a notice of appeal filed before certain post-judgment motions has no effect.[10] Rule 4(a)(4) expressly applies to Fed. R. Civ. P. 59 motions, but not to motions under Fed. R. Civ. P. 60. Therefore, a motion filed under Rule 60 does not nullify a timely notice of appeal. *See Harcon Barge Co. v. D & G Boat Rentals, Inc.,* 784 F. 2d 665, 666 (5th Cir. 1986), *cert. denied,* 479 U.S. 930, 107 S. Ct. 398, 93 L. Ed. 2d 351 (1986).

Because of the disparate treatment of Rule 59 and Rule 60 motions under Fed. R. App. P. 4(a)(4), characterization of a post-judgment motion as one type or the other is critical. In *Harcon Barge,* we have distinguished Rule 59 from Rule 60 motions, stating that:

> any post-judgment motion to alter or amend the judgment served within ten days after the entry of the judgment, other than a motion to correct purely clerical errors covered by Rule 60(a), is within the unrestricted scope of Rule 59(e) and must, however designated by the movant, be considered as a Rule 59(e) motion for purposes of Fed. R. App. P. 4(a)(4). *If, on the other hand, the motion asks for some relief other than correction of a purely clerical error and is served after the ten-day limit, then Rule 60(b) governs its timeliness and effect.*

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[10] Fed. R. App. P. 4(a)(4) provides:

> If a timely motion under the Federal Rules of Civil Procedure is filed in the district court by any party: (i) for judgment under Rule 50(b); (ii) under Rule 52(b) to amend or make additional findings of fact, whether or not an alteration of the judgment would be required if the motion is granted; (iii) under Rule 59 to alter or amend the judgment; or (iv) under Rule 59 for a new trial, the time for appeal for all parties shall run from the entry of the order denying a new trial or granting or denying any other such motion. A notice of appeal filed before the disposition of any of the above motions shall have no effect. A new notice of appeal must be filed within the prescribed time measured from the entry of the order disposing of the motion as provided above. No additional fees shall be required for such a filing.

Id. at 667 (emphasis added).

Under these rules, Thompson's May 31 motion to reconsider must be classified as a Rule 60(b) motion.[11] His motion was filed twenty days after the May 10 order of dismissal was entered on May 11, and it requested that his claim be reinstated,[12] not merely a clerical correction. As stated above, a Rule 60 motion to reconsider has no deleterious effect on a timely filed notice of appeal. Therefore, if the district court finds that Thompson concurrently filed a notice of appeal with his May 31 motion to reconsider and that the clerks returned the notice of appeal to Thompson, the clerks would have been incorrect in returning the notice of appeal, and, more importantly, the notice of appeal, filed on May 31, would allow Thompson to appeal the order of dismissal entered on May 11, 1988.[13] On the other hand, the district court could resolve these factual issues against Thompson. In either situation, Thompson's claim of denial of access to the courts would be frivolous.

IV

For the foregoing reasons, we AFFIRM that part of the district court's order dismissing Thompson's claims against the three

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[11] In considering Thompson's Third Notice of Appeal in the 1987 action, a panel of this Court also classified the motion to reconsider as a Rule 60(b) motion. *See Thompson v. Harris,* No. 88-2333, slip op. at 3 (5th Cir. Apr. 27, 1989).

[12] *See supra* note 2.

[13] Refusal to grant such Rule 60(b)(6) relief under these circumstances would be appealable and subject to reversal if deemed an abuse of discretion. *See Midland West Corp. v. Federal Deposit Insurance Corporation,* 911 F.2d 1141, 1145 (1990); *Barrs v. Sullivan,* 906 F.2d 120, 121 (5th Cir. 1990).

circuit judges, VACATE the district court's order dismissing Thompson's claims against the clerks, and REMAND to the district court for entry of an order of dismissal without prejudice so that Thompson can file a Rule 60(b)(6) motion in the 1987 action.