IN THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

No. 93-8468
(Summary Calendar)

RICHARD A. JACKSON,

Plaintiff-Appellant

versus

UNITED STATES OF AMERICA,
ET AL.,

Defendants-Appellees,

Appeal from the United States District Court
for the Western District of Texas

(A-90-CV-108)

Consolidated on Appeal with

No. 93-8666
(Summary Calendar)

RICHARD JACKSON,

Plaintiff-Appellant,

versus

COX, Lieutenant, and
BEASLEY, Lieutenant,

Defendants-Appellees.

Appeal from the United States District Court
for the Western District of Texas

(A-93-CV-241)

(July 19, 1994)

Before JOLLY, WIENER and EMILIO M. GARZA, Circuit Judges.

PER CURIAM:*

Plaintiff-Appellant Richard A. Jackson, a federal prisoner in 1985, appeals (1) an adverse judgment in his Federal Torts Claims Act (FTCA) suit against the United States, (2) an adverse jury verdict in his Bivens action against two individual defendants, and (3) the dismissal of his Bivens action against two other individual defendants for his failure to serve them in accordance with FEDERAL RULE OF CIVIL PROCEDURE 4(m). On review, however, we find that Jackson's Bivens claims against Lieutenants Cox and Beasley are res judicata by virtue of the judgment in favor of the United States in Jackson's FTCA action; so we modify the district court's dismissal of the claims against Cox and Beasley from being without prejudice to being with prejudice. In all other respects we find no reversible error and therefore affirm.

I

FACTS ACCORDING TO JACKSON

Jackson testified that he slipped and fell while exiting the shower at the Bastrop, Texas, Federal Correctional Institution (FCI Bastrop) on June 14, 1985. According to Jackson, he had previously suffered a leg injury while playing handball in the prison and was therefore unable to walk without the assistance of

* Local Rule 47.5 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 Pursuant to that Rule, the Court has determined that this opinion should not be published.

crutches; and he was usually taken to the prison shower in a wheelchair. On June 14 Corrections Officer Brandon Warren, citing a new prison policy, ordered Jackson to walk to the shower using only one crutch, to which he was handcuffed for the walk to the shower. Warren returned the crutch to Jackson upon completion of his shower, but when Jackson noticed a pool of water on the floor outside his shower stall he asked Warren to mop it up. Warren told Jackson not to worry, but when Jackson attempted to exit the shower stall he slipped and fell backwards into the stall. He alleges that as a result he was severely injured, including the loss of consciousness. When he regained consciousness he was several feet from where he had fallen.

Jackson was taken to a local hospital where a doctor told him to lie flat for three weeks. Shortly thereafter, however, three unnamed corrections officers came to the hospital, lifted Jackson and carried him to a van. The officers tossed Jackson onto the floor in the rear of the van and took him to the infirmary at FCI Bastrop.

Shortly thereafter, Lieutenants Cox, Beasley, Dillard Martin and R. D. Smith, and Officer Vernon Grieger entered Jackson's room. Cox first ordered Jackson to get out of bed and get dressed, then grabbed Jackson's shirt, pulled him out of bed, slammed him against the edge of the bed, and let him fall to the floor. Cox and Beasley then lifted Jackson off the floor, slammed him against the wall, dropped him, and kicked him. Next, Corrections officers wheeled Jackson to a bus at the front of FCI Bastrop and threw him

into the front seat. Jackson slipped to the floor where he remained until the bus arrived at FCI El Reno, Oklahoma. There, Beasley and another corrections officer grabbed Jackson and dragged him from the bus. Smith then dragged Jackson to an isolation cell.

II

PROCEEDINGS

In 1990 Jackson filed a complaint naming as defendants the director of the Bureau of Prisons and the warden of FCI Bastrop.[1] The magistrate judge substituted the U.S. as defendant. In 1991 Jackson filed a second amended complaint in which he outlined claims against the U.S. under the FTCA, and claims against Cox, Martin, Beasley, Smith, Carlos Ortiz, the director and former director of the Bureau of Prisons, and the warden of FCI Bastrop, pursuant to Bivens v. Six Unknown Named Agents of Federal Bureau of Narcotics, 403 U.S. 388, 91 S.Ct. 1999, 29 L.Ed.2d 619 (1971).[2]

Shortly before trial, Jackson moved to sever his claims against Cox and Beasley because he had been unable to accomplish service on those two lieutenants. The district court granted Jackson's severance motion.

A jury heard testimony and found for Martin and Smith on Jackson's Bivens claims. The district court considered Jackson's FTCA claims and found for the United States. The court denied

[1] Jackson pursued administrative remedies for his fall from 1987 to 1990. It is unclear whether he pursued administrative remedies for the other incidents he alleges.

[2] The district court dismissed Jackson's claims against Ortiz, the director and former director of the Bureau of Prisons, and the warden of FCI Bastrop.

Jackson's post-trial motions for a judgment in his favor and for reconsideration of the judgment.

Jackson moved for the district court to permit Cox and Beasley to be served by publication, but the court denied Jackson's motion and dismissed his action against Cox and Beasley without prejudice, for failure to serve them in the time allowed by the federal rules. While Jackson's motion for reconsideration under FED. R. CIV. P. 59(e) was pending, we dismissed Jackson's appeal for lack of appellate jurisdiction. The district court then denied Jackson's Rule 59 motion, and Jackson timely filed a notice of appeal. A judge of this court denied Jackson's motion to consolidate his appeals.

III

ANALYSIS

Jackson contends that the district court improperly applied the premises-liability standard of Texas tort liability, rather than the negligent-activity standard, to his FTCA claim regarding his fall. He also contends that the district court failed to make factual findings under the proper standard of liability and that the judge's statement that he would not have found for Jackson even under the proper standard is inadequate to withstand appellate review.

As the alleged torts occurred in Texas, the law of Texas governs the FTCA liability of the United States. Urbach v. United States, 869 F.2d 829, 831 (5th Cir. 1989). Among the elements of a premises-liability action in Texas are:

> (1) Actual or constructive knowledge of some condition on the premises by the owner/ operator; [and]
>
> (2) That the condition posed an unreasonable risk of harm [.]

Keetch v. Kroger, 845 S.W.2d 262, 264 (Tex. 1992). "Recovery on a negligent activity theory requires that the person have been injured by or as a contemporaneous result of the activity itself rather than by a condition created by the activity." Id.

The district court held that Jackson was pursuing a premises-liability action. Jackson's theory of the case in his complaint, second amended complaint, at trial, and on appeal, is that he slipped and fell due to (1) water on the waxed floor outside the shower, (2) Warren's failure to have the water cleaned up before requiring Jackson to hobble out of the shower on one crutch, and (3) Warren's failure to assist Jackson in leaving the shower.

Under Jackson's theory of the case, the water on the waxed floor was the dangerous condition that ultimately caused him to slip. Jackson alleges that the water outside the shower came from his shower stall; he does not allege that the water was on the floor as the result of Warren's actions contemporaneous with Jackson's fall. Jackson's claim therefore comes within the definition of premises liability.

The district court found that there was no water outside Jackson's shower and concluded that Warren had not been negligent. Jackson does not contend that the district judge's conclusion of no premises liability was incorrect. He therefore has waived any such

contention. In re Municipal Bond Reporting Antitrust Litigation, 672 F.2d 436, 439 n.6 (5th Cir. 1982). Moreover, the facts as found by the district court do not reflect the existence of any condition creating an unreasonable risk of harm. The court's findings are not clearly erroneous. See FED. R. CIV. P. 52(a). Therefore the district court's conclusion of no premises liability is correct.

As Jackson makes no other contentions regarding his FTCA claim based on his fall, we affirm the judgment of the district court regarding that claim.

Jackson next contends that the district judge failed to make factual findings regarding his claims that (1) corrections officers injured him by throwing him into the back of a van, by removing him from the hospital after his fall, and by transferring him to FCI El Reno after a doctor had ordered him to lie flat for three weeks, and (2) his injuries were incurred while he was under the care of the Bureau of Prisons. In this Jackson is correct. The district court made no factual findings regarding those assertions. It need not have made any factual findings, however, as the court properly did not allow Jackson to amend his complaint after trial.

Jackson never alleged that prison personnel had thrown him onto the floor of a van after taking him from the local hospital until he testified at trial. He repeated his allegation in his proposed findings of fact and conclusions of law and contended that the van incident constituted negligence at least. After the district court entered judgment, Jackson moved for reconsideration

in light of his proposed findings and conclusions.

A plaintiff may amend his complaint to raise issues that are not raised in it but that are tried by the express or implied consent of the parties. FED. R. CIV. P. 15(b). "`[T]he introduction of evidence relevant to an issue already in the case may not be used to show consent to trial of a new issue absent a clear indication that the party who introduced the evidence was attempting to raise a new issue.'" Bernard v. Florida East Coast Ry., 624 F.2d 552, 555 (5th Cir. 1980) (citation omitted). Jackson's proposed findings and conclusions, in conjunction with his motion calling into question the correctness of the judgment, arguably amounted to a motion to amend his complaint to conform with the evidence at trial.

Jackson's allegation that he was taken from his hospital bed and tossed into the back of a van was relevant to his Bivens claim that prison personnel were deliberately indifferent to his serous medical needs. Additionally, his testimony regarding the van was part of his narrative about the events of June 14 and 15. It was not at all clear, however, that Jackson was attempting to raise a new issue when he testified about having been tossed into the back of the van. Therefore, there was no consent to trial of the new issue.

Jackson, who was represented by counsel, raised solely as a Bivens claim his contention that prison personnel were deliberately indifferent to his serious medical needs when they transferred him despite a physician's directive that he lie flat for three weeks.

He did not raise his medical contention as an FTCA claim. Neither did Jackson contend in his proposed findings and conclusions that the United States was liable for deliberate indifference to his serious medical needs. But even assuming, arguendo, that he had so contended, that contention would be unconvincing. The jury had already found against Jackson on his Bivens claim that Martin and Smith were deliberately indifferent to his medical needs. The district court therefore would have had substantial reason to deny Jackson's motion to amend his complaint to seek relief under the FTCA on his medical claim. See Jamieson v. Shaw, 772 F.2d 1205, 1208 (5th Cir. 1988) (substantial reason necessary to deny permissive motion to amend). As Jackson failed to raise FTCA claims regarding deliberate indifference to his serious medical needs, the district court need not have made any factual findings regarding such a claim.

In addition, the district court need not have made a factual finding whether Jackson was injured while in custody of the Bureau of Prisons. The jury and the district court found no liability on the theories advanced by Jackson. The court's factual findings were adequate regarding Jackson's FTCA allegations. Thus the court was not obliged to make any findings beyond those that were necessary to dispose of Jackson's case.

Jackson next contends that defense counsel engaged in reversible misconduct by making comments calculated to evoke jury sympathy toward Martin and Smith, and by mischaracterizing Jackson's Florida state-law conviction of lewd and lascivious

behavior in the presence of a minor. Jackson's contention on this claim is likewise unconvincing.

At the outset of his closing argument, defense counsel commented that "ever since Mr. Smith, Mr. Martin were sued in this case -- and they and their pocketbooks have been at risk, because their [sic] concerned obviously about what might happen at the trial." Jackson's attorney objected on the ground that "[w]e've already discussed that in the jury charge, and that's improper." Jackson did not object to the jury charge. The judge instructed the jury extensively regarding damages. Jackson's attorney evidently objected to defense counsel's remarks on the ground that the defendants' financial resources were discussed in the instructions. Thus Jackson did not object on the ground that defense counsel was appealing to the passions and prejudices of the jury. Neither did Jackson object when defense counsel remarked that "Mr. Smith and Mr. Martin didn't do anything wrong but still can be worried when you're brought into court for doing your job, and you didn't do anything wrong, it's scary. That can happen to anybody."

As Jackson did not object in the trial court on the ground that defense counsel's remarks constituted a "golden rule" argument, we would review the contention only if it were purely legal and refusing to address it would lead to manifest injustice. Knowlton v. Greenwood Indep. School Dist., 957 F.2d 1172, 1182 n.16 (5th Cir. 1992). But refusal to review this issue clearly would not lead to manifest injustice. Defense counsel's remarks were

relatively innocuous and were unlikely to have evoked jury sympathy.

On direct examination, Jackson testified that he had been convicted the previous month in Florida of lewd and lascivious conduct in the presence of a minor, adding that he was appealing his conviction. On cross-examination, defense counsel raised the topic of that conviction, asking Jackson, "did they charge you in that judgment that you were also assault --" Jackson's attorney objected on the ground that defense counsel's question went beyond the scope of proper cross-examination. Jackson responded, "no" and the court overruled Jackson's objection. Defense counsel, however, did not pursue his question.

Defense counsel referred to the lewd and lascivious behavior conviction during his closing argument: First, he stated,

> [h]e says he was assaulted. But in federal court, he was convicted of three assault related charges, one involving threats against the president of the United States, and then two federal convictions for assaults against federal officers, and just recently for lewd behavior toward a minor female, all itself a type of behavior.
>
> So I think it's a fair inference to say that more likely in a situation like that, Mr. Jackson tends to be a person who is an assaultor [sic], if you will use the word, or as opposed to an assaultee [sic]. So we know he's quite capable of assaultive conduct.

Jackson did not object. Second, defense counsel argued,

> [he] also said he was incapable of enjoying sex, but he was able to help the woman enjoy it. I guess the question that comes out is who is getting the benefit of sexual enjoyment when he displayed lewd behavior to the minor female for which he was convicted and sentenced to twenty-five years.

Jackson objected on the ground that "[t]hat goes way beyond the admissible basis," and the district court overruled Jackson's objection. After the jury retired to deliberate, Jackson moved for a mistrial based on defense counsel's use of the lewd and lascivious behavior conviction during closing arguments. Jackson's attorney contended that defense counsel's comments went beyond permissible impeachment; that those comments were calculated to prejudice the jury against Jackson; and that there was no evidence of any assault on a minor. The district court denied Jackson's motion for a mistrial.

> Even if remarks are deemed improper and a trial judge's response is deemed inadequate, a new trial will not be granted unless, after considering counsel's trial tactics as a whole, the evidence presented, and the ultimate verdict, the court concludes that "manifest injustice" would result by allowing the verdict to stand.

Johnson v. Ford Motor Co., 988 F.2d 573, 582 (5th Cir. 1993).

Counsel's characterization of the lewd and lascivious behavior conviction as an assault was without evidentiary support in the record. Jackson denied that he had been charged with assault in conjunction with his conviction, and neither defense counsel nor Jackson placed a copy of the Florida conviction into evidence. Moreover, while Florida's lewd and lascivious conduct statute penalizes some types of assaultive behavior, it also penalizes some obscene behavior that is not assaultive in nature. See State v. Hernandez, 596 So. 2d 671, 671-72 (Fla. 1992) (exposure and masturbation in front of children); Schmitt v. State, 590 So. 2d 404, 410 (Fla. 1991) ("lewd" and "lascivious" defined as requiring

"an intentional act of sexual indulgence or public indecency, when such act causes offense to one or more persons viewing it or otherwise intrudes upon the rights of others.") (footnote omitted), cert. denied, 112 S.Ct. 1572 (1992); FLA. STAT. § 800.04 (1993) (LEXIS copy attached).

We conclude that no manifest injustice occurred as a result of defense counsel's unsupported characterization of Jackson's Florida state-law conviction as an assault. First, Jackson had been convicted of other offenses that were assaultive in nature. Therefore, defense counsel's characterization of Jackson as a person who committed assaults was not based solely on his conviction for lewd and lascivious conduct. Second, the only evidence Jackson presented against Martin and Smith was his testimony that the two officers were present while Cox and Beasley verbally and physically abused him and that "R.D.," presumably Smith, dragged him to an isolation cell once the prison bus arrived in Oklahoma. Vernon Grieger, Smith, Donald Thompson, and Martin all testified that Jackson was not beaten or otherwise abused during the transfer to Oklahoma. When asked whether any of the medical records he had seen reflected that he had told medical personnel about falling or having been beaten, Jackson testified that he had been reluctant to talk about the causes of his injuries and that "[d]octors aren't going to put that down." The evidence supporting Jackson's claims against Martin and Smith was extremely weak.

Jackson also sought damages for loss of sexual enjoyment. He

testified on direct examination that he had experienced a sexual relationship after having been injured but that due to nerve damage he was unable to obtain pleasure from sexual activity. The fact of Jackson's conviction of lewd and lascivious behavior is at least marginally relevant to impeach his damage claim for loss of sexual enjoyment. It is logical to infer from his conviction that he was able to obtain some type of sexual pleasure from some activity.

Jackson next contends that defense counsel engaged in misconduct by attempting to call witnesses not previously on the defense's witnesses list; improperly characterizing the Florida state-law conviction as an assault; improperly referring in closing arguments to the Florida state-law conviction; mentioning Jackson's use of a credit card; and telling the jury about an independent medical examination. These contentions too are unavailing.

First, the trial judge sustained Jackson's objection to defense counsel's attempt to call a previously unlisted witness, and defense counsel did not press the issue further. Second, we have already addressed the issue of defense counsel's use of the Florida state-law conviction. Third, defense counsel's questions about Jackson's use of his friend's credit card led nowhere. Fourth, the district court sustained Jackson's objection to defense counsel's question whether Jackson refused a neurological examination while on parole, immediately after Jackson denied that he had refused the examination. In sum, Jackson has not demonstrated that defense counsel's actions warrant reversal. See Johnson, 988 F.2d at 582.

Jackson also complains about the dismissal of his claims against Cox and Beasley. Jackson contends solely that the court erred first by denying his motion for permission to serve Cox and Beasley by publicationSQcontending that such service is allowed by Texas law and permitted by FED. R. CIV. P. 4(c)(2)(C)(i)SQand then by dismissing his complaint against those two lieutenants for failure to serve them within 120 days after filing his complaint.

We need not address this contention by Jackson as any error there is harmless. See FED. R. CIV. P. 61. His claims against Cox and Beasley now are res judicata. While res judicata generally is an affirmative defense, we may raise it sua sponte to affirm the district court. Russell v. Sunamerica Securities, Inc., 962 F.2d 1169, 1172 (5th Cir. 1992).

> Four requirements must be met in order to apply res judicata: (1) the parties must be identical in both 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.

Howell Hydrocarbons, Inc. v. Adams, 897 F.2d 183, 188 (5th Cir. 1990). "The identity of parties test is met not only as to parties to the earlier litigation, however, but also to those in privity with them." Id.

> A non-party is in privity with a party for res judicata purposes in three instances: (1) if he is a successor in interest to the party's interest in the property; (2) if he controlled the prior litigation; or (3) if the party adequately represented his interests in the prior proceeding.

Id. Two cases involve the same cause of action for res judicata purposes if they are based on the same nucleus of operative facts. In re Baudoin, 981 F.2d 736, 743 (5th Cir. 1993).

Jackson's FTCA claims were based in significant part on his alleged beating by Cox and Beasley. When the district court severed Jackson's claims against Cox and Beasley, it did not sever the FTCA claims based on Cox's and Beasley's alleged actions. The district court found as fact that Jackson was not beaten during the prisoner transfer. To avoid liability, the government had to show that Cox and Beasley did not violate Jackson's constitutionally protected rights. The government therefore adequately represented Cox and Beasley.

The judgment on Jackson's FTCA claim was a judgment on the merits. As is discussed above, Jackson has shown no basis for vacating the judgment in the FTCA action. Jackson's FTCA claim regarding Cox's and Beasley's actions and his Bivens claims against both men arose from precisely the same incident. Jackson's claims against Cox and Beasley are precluded as res judicata. We therefore modify the judgment of the district court to the extent that its dismissal of those claims was without prejudice. As modified, that part of the judgment shall specify dismissal with prejudice. See Ali v. Higgs, 892 F.2d 438, 440 (5th Cir. 1990); FED. R. CIV. P. 41(b).

MODIFIED, and as modified, AFFIRMED.