

UNITED STATES COURT OF APPEALS  
For the Fifth Circuit

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No. 93-8645  
Summary Calendar

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FREDERICK C. FERMIN,

Plaintiff-Appellant,

versus

NATIONAL HOME LIFE ASSURANCE  
COMPANY,

Defendant-Appellee.

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Appeal from the United States District Court  
For the Western District of Texas  
(SA 93 CA 280)

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( January 14, 1994 )

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

PER CURIAM:\*

Pro se Plaintiff-Appellant Frederick Fermin appeals the district court's grant of summary judgment in favor of his insurer, Defendant-Appellee National Home Life Assurance Company, dismissing

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 Pursuant to that Rule, the Court has determined that this opinion should not be published.

his various claims against National Home for deprivation of civil rights and fraud arising out of the denial of claims for hospitalization benefits, and that court's Rule 11 sanction of Fermin. As we agree with the district court that the complaint in the underlying litigation alleged claims that had been raised or should have been raised in Fermin's earlier suit against National Home, we conclude that such claims are barred by res judicata. We likewise find no abuse of discretion in the district court's imposition of Rule 11 sanctions against Fermin. We therefore dismiss Fermin's appeal as frivolous, and assess double costs against Fermin under Fifth Circuit Rule 38.

I

FACTS AND PROCEEDINGS

Fermin filed a diversity complaint for damages based on bad faith against National Home in federal court in Austin, Texas in January 1992 (the Austin case).<sup>1</sup> He alleged various causes of action under Texas law arising from National Home's denial of his claims for benefits under hospitalization indemnity certificates issued to him by National Home.<sup>2</sup> National Home moved for summary judgment in September 1992. Subsequently, and four months after a court-imposed deadline for the amendment of pleadings, Fermin filed a motion for leave to have the pending litigation tried under

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<sup>1</sup>Fermin is a Texas resident; National Home is a Missouri insurance company with its principal place of business in Pennsylvania. The amount in controversy exceeded \$50,000.

<sup>2</sup>Fermin argued that he was entitled to hospitalization benefits for treatment of alcoholism, but the policy specifically excluded hospitalization charges incurred for such treatment.

Missouri and federal statutes. That motion was denied. The Austin court then granted National Home's summary judgment motion, from which Fermin appealed. This court affirmed in March 1993.

In April 1993, Fermin again filed suit against National Home, this time in San Antonio (the San Antonio case). His complaint was based on fraud under Missouri law and deprivation of civil rights and federal law. He again sought damages for the denial of claims for hospitalization benefits that he alleges are due him under the same National Home certificates which were the subject of the Austin case. National Home moved for summary judgment, arguing that Fermin's present claims are barred by the doctrine of res judicata. The district court agreed, and granted the motion. The district court also sanctioned Fermin under Rule 11 for filing a complaint based on claims that are clearly barred by res judicata. Fermin was ordered to pay \$5,924.04 to National Home Life in reasonable expenses and attorney's fees incurred as a result of the filing of the second complaint. Fermin appeals the district court's grant of National Home's motion for summary judgment and for Rule 11 sanctions.<sup>3</sup>

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<sup>3</sup>Fermin also complains that the district court failed to take any official action on three motions filed by him. As the court properly dismissed his complaint on res judicata grounds, those motions were moot and need not have been addressed.

Additionally, Fermin assigns as error the district court's denial of his motion for sanctions based on perjury. Even if we were to assume that a sanction could be imposed for perjury in answers to interrogatories, we find no support in the record for Fermin's perjury claim.

## II

### ANALYSIS

#### A. Summary Judgment

We review the district court's grant or denial of summary judgment de novo, "reviewing the record under the same standards which guided the district court."<sup>4</sup> Summary judgment is proper when no genuine issue of material fact exists that would necessitate a trial.<sup>5</sup> In determining on appeal whether the grant of a summary judgment was proper, all fact questions are viewed in the light most favorable to the nonmovant.<sup>6</sup> Questions of law are always decided de novo.<sup>7</sup>

Fermin's claims in the San Antonio case are clearly barred by the doctrine of res judicata. Fermin does not dispute that (1) the parties were identical in the Austin and San Antonio cases, (2) the prior judgment was rendered by a court of competent jurisdiction, and (3) the Austin case was resolved by a final judgment on the merits. <sup>8</sup> Fermin disputes whether the "same cause of action" was involved in both cases,<sup>9</sup> and whether National

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<sup>4</sup>Walker v. Sears, Roebuck & Co., 853 F.2d 355, 358 (5th Cir. 1988).

<sup>5</sup>Celotex Corp v. Catrett, 477 U.S. 317, 323-25, 106 S. Ct. 2548, 2552-54, 91 L. Ed. 2d 265 (1986); see FED. R. CIV. P. 56(c).

<sup>6</sup>Walker, 853 F.2d at 358.

<sup>7</sup>Id.; Calpetco 1981 v. Marshall Exploration, Inc., 989 F.2d 1408, 1413 (5th Cir. 1993).

<sup>8</sup>See Nilsen v. City of Moss Point, 701 F.2d 556, 559 (5th Cir. 1983) (en banc).

<sup>9</sup>Id.

Home is entitled to raise res judicata as a defense in bar to his second suit.

First, Fermin argues that because the San Antonio case raises one more claim than the four raised in the Austin case, and the claims are based on Missouri and federal law rather than Texas law, the requirement that the same cause of action be involved is not met. Fermin's argument is flawed. The law is settled that res judicata extends to "matters that should have been raised in the earlier suit as well as those that were."<sup>10</sup> Claims are part of the same cause of action if they arise out of the same transaction, or the same operative nucleus of fact, underlying the earlier litigation.<sup>11</sup> Such claims are barred by res judicata, assuming, as in this case, that the other elements of res judicata are met. As Fermin's claims in both suits arise out of the denial of hospitalization benefits under indemnity certificates issued by National Home, the requirement that the same cause of action be involved is clearly met.

Second, Fermin argues that National Home has "unclean hands" and is therefore not entitled to raise res judicata as a defense to his suit. But National Home did not cause Fermin to omit from the Austin case the claims he later asserted in the San Antonio case. It was Fermin's own error, and not any fraud, deception, or wrongful conduct on National Home's part, that caused him to omit

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<sup>10</sup>In re Air Crash at Dallas/Fort Worth Airport, 861 F.2d 814, 816 (5th Cir. 1988) (internal quotations omitted).

<sup>11</sup>Id.

claims under Missouri and federal law in the Austin case.<sup>12</sup> Fermin could have asserted such claims if they had been timely raised.

B. Rule 11 Sanctions

We apply an abuse of discretion standard in our review of a district court's determination that a party has violated Rule 11.<sup>13</sup> The court is vested with discretion to determine the type and amount of sanctions once a Rule 11 violation has been found.<sup>14</sup>

We likewise find no error in the district court's grant of National Home's motion for sanctions. Fermin's persistence in litigating this lawsuit, even after he was put on notice that res judicata barred his lawsuit, clearly violates Rule 11.<sup>15</sup> Imposition of sanctions is mandatory once a Rule 11 sanction is found.<sup>16</sup> Fermin's appearance pro se does not affect the applicability of Rule 11.<sup>17</sup> We find that the award of \$5,924.04 in expenses and

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<sup>12</sup>See McCarty v. First of Georgia Ins. Co., 713 F.2d 609, 612-13 (10th Cir. 1983).

<sup>13</sup>Cooter & Gell v. Hartmarx Corp., 496 U.S. 384, 405, 110 S. Ct. 2447, 2461, 110 L. Ed. 2d 359 (1990).

<sup>14</sup>Jennings v. Joshua Indep. School Dist., 948 F.2d 194, 198 (5th Cir. 1991), cert. denied, \_\_\_ U.S. \_\_\_, 112 S. Ct. 2303, 119 L. Ed. 2d 226 (1992).

<sup>15</sup>Robinson v. National Cash Register Co., 808 F.2d 1119, 1131 (5th Cir. 1987). An award of attorney's fees to defendants that were forced to respond to claims which were barred by res judicata as a sanction against plaintiffs is not without precedent. See Nothwang v. Payless Drug Stores Northwest, Inc., 139 F.R.D. 675, 676 (D. Or. 1991).

<sup>16</sup>Id. at 1130.

<sup>17</sup>See Business Guides, Inc. v. Chromatic Communications Enter., Inc., 498 U.S. 533, 551, 111 S. Ct. 922, 933, 112 L. Ed. 2d 1140 (1991); Hoover v. Gershman Inv. Corp., 774 F. Supp. 60, 64-65 (D. Mass. 1991).

attorney's fees is reasonable.<sup>18</sup> We therefore conclude that the district court did not abuse its discretion in its imposition of sanctions against Fermin under Rule 11.

The district court's opinion more than adequately addressed and disposed of these issues. Fermin's appeal in the face of that opinion is frivolous. We can add nothing to the correct and comprehensive analysis of this case contained in the district court's opinion. Instead of writing separately, then, we adopt the reasoning, findings, and conclusions expressed therein, incorporate it by reference, and annex a copy hereto.

### III

#### CONCLUSION

Fermin's argument that his claims are not barred by res judicata has no arguable basis in law or in fact and is thus frivolous.<sup>19</sup> Given the obvious application of the doctrine and notice to Fermin that the doctrine applied to bar his claims the district court did not abuse its discretion in awarding to National Home its reasonable expenses and attorney's fees incurred as a result of the filing of the second complaint by Fermin. We therefore dismiss Fermin's appeal as frivolous and award, and order Fermin to pay, double costs under Fifth Circuit Rule 38 to National Home Life.

DISMISSED, with Sanctions.

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<sup>18</sup>Under Thomas v. Capital Sec. Svcs. Inc., 836 F.2d 866, 878-79 (5th Cir. 1988) (en banc), the expenses reimbursed must be reasonable.

<sup>19</sup>See 5TH CIR. R. 42.2.

