

UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

No. 94-20388
Summary Calendar

SEAL PARTS,

Plaintiff,

VERSUS

NATIONAL PARTS SYSTEM, ET AL.,

Defendants,

HARRY L. BOWLES,

Defendant-Cross
Defendant-Appellant,

VERSUS

KECK, MAHIN and CATE, ETC.,

Defendant-Cross
Defendant-Appellee,

and

GRANT, COOK, ETC. and PATRICIA RIDDICK, ETC.,

Intervenor-Defendant
Cross-Defendant-Appellee.

Appeal from the United States District Court
for the Southern District of Texas
(CA-93-2375)

(February 7, 1995)

Before JONES, BARKSDALE, and BENAVIDES, Circuit Judges.

PER CURIAM:¹

¹ Local Rule 47.5.1 provides: "The publication of opinions that have no precedential value and merely decide particular

Harry L. Bowles appeals *pro se* from the dismissal of his civil RICO claims and the denial of his motion for a new trial. We **AFFIRM.**

I.

As a defendant in an action brought by Seal Parts & Repair Company, Bowles cross-claimed against, *inter alia*, the law firm of Keck, Mahin & Cate (KMC) for civil RICO violations. His claims arise from alleged fraudulent corporate activity by officers of National Parts System (NPS) and its corporate counsel, KMC. KMC moved for summary judgment on the cross-claim as barred by *res judicata*, citing a prior state court summary judgment on claims arising from the same operative facts.² Bowles responded that his RICO claims were new claims, discovered after the state court judgment. The district court dismissed Bowles' claims with prejudice, finding that they arose from the same operative facts and were very similar to the claims raised in state court. Bowles' motion for new trial was denied.

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 Pursuant to that rule, the court has determined that this opinion should not be published.

² KMC originally filed a motion to dismiss; however, the district court construed KMC's motion and Bowles' response as cross-motions for summary judgment, and ordered the parties to supplement their supporting evidence.

II.

A.

We review *de novo* a dismissal under the doctrine of *res judicata*. ***Schmueser v. Burkburnett Bank***, 937 F.2d 1025, 1031 (5th Cir. 1991). In determining whether it bars Bowles' federal claims as a matter of law, we must give the state court judgment the same preclusive effect as it would be given under Texas law. ***Hogue v. Royse City, Tex.***, 939 F.2d 1249, 1252 (5th Cir. 1991).³

Under Texas law, an existing final judgment rendered upon the merits by a court of competent jurisdiction is conclusive of the rights of the parties in all other actions on the points at issue and adjudicated in the first suit. Further, the rule of *res judicata* bars litigation of all issues connected with a cause of action or defense which, with the use of diligence, might have been tried in a former action as well as those that were actually tried. The preclusion of issues not actually litigated or decided in the prior action thus turns on whether the causes of action in the successive suits are the same.

Id. at 1252 (internal citations and emphasis omitted; footnote modified). Under Texas law, "[a] different cause of action is not merely a different theory of recovery; it should differ in `the theories of recovery, the operative facts, and the measure of recovery.'" ***Id.*** at 1253 (quoting ***Flores v. Edinburg Consol. Indep. Sch. Dist.***, 741 F.2d 773, 777-79 (5th Cir. 1984)) (emphasis omitted).

In ***Lawlor v. National Screen Serv. Corp.***, 349 U.S. 322, 328 (1955), the Supreme Court held that a subsequent action was a

³ Contrary to Bowles' contention, a state court summary judgment is entitled to preclusive effect. See ***Hogue***, 939 F.2d at 1252 n.3.

"different action" and not barred by *res judicata*, because the action was based in part upon events which occurred after the judgment in the first action. Although Bowles raised factual issues in the district court regarding events which occurred after the state court judgment, none of them were presented to the district court as summary judgment evidence.⁴ Therefore, the summary judgment record provides no basis for concluding that Bowles' RICO claim is based on different operative facts. In sum, we agree that Bowles' claims are barred by *res judicata*.⁵

B.

Bowles contends that the district court erred in denying his Fed. R. Civ. P. 59(a) motion for a new trial. We review such a denial for an abuse of discretion. ***United States v. Millet***, 804 F.2d 853, 859 (5th Cir. 1986).

In his motion, Bowles presented additional evidence in opposition to *res judicata* dismissal, as noted, and also alleged that KMC conspired with state court judges to deprive him of certain constitutional rights.⁶ The district court denied the

⁴ Bowles did submit an affidavit with exhibits in connection with his motion for a new trial. As noted *infra*, however, that motion was properly denied.

⁵ Bowles has offered several additional arguments why *res judicata* should not apply. He contends, *inter alia*, that the state court proceeding was irregular or erroneous, that federal courts have exclusive jurisdiction over RICO claims, and that defendant's should be precluded from raising *res judicata* because they have committed fraud. Bowles' arguments lack either factual or legal basis and are, therefore, without merit.

⁶ Bowles claims a conspiracy to deny his access to the courts. To the extent that this claim differs from his claim in support of his motion for new trial, it was not raised in the district

motion on the ground that Bowles did not demonstrate good cause in failing at trial to present the new claims and evidence. Our review of the record reveals no abuse of discretion. See **Simon v. United States**, 891 F.2d 1154, 1159 (5th Cir. 1990) (motion for new trial should not be granted when matter could have been raised prior to original judgment).

C.

KMC has moved for sanctions. Rule 38, Fed. R. App. P., permits them when the Court determines that an appeal is frivolous. "An appeal is frivolous if the result is obvious or the arguments of error are wholly without merit." **Coghlan v. Starkey**, 852 F.2d 806, 811 (5th Cir. 1988). KMC contends that Bowles' contentions on appeal are not supported by the record, are wholly without merit, and rely on legal propositions which are either no longer valid or have been settled against his position. KMC asserts also that Bowles has "unreasonably and vexatiously multiplied the proceedings" in this appeal and in numerous other actions based upon the same core of operative facts.

We are cautious in imposing sanctions against a pro se litigant, especially in the absence of a prior warning. **Moody v. Baker**, 857 F.2d 256, 258 (5th Cir.), *cert. denied*, 488 U.S. 985 (1988). Therefore, we **DENY** the motion for sanctions, but warn

court, and he offers no support for it.

Bowles that he will be sanctioned in the future if he files frivolous motions or appeals.⁷

III.

For the foregoing reasons, the judgment is

AFFIRMED.

⁷ Two additional motions are pending before the court. KMC's motion to strike Bowles' original brief is **DENIED**. Bowles' motion to file his reply brief out of time is **DENIED**; he has failed to show good cause for his failure to file timely.