IN THE UNITED STATES COURT OF APPEALS

FOR THE FIFTH CIRCUIT

No. 94-40439
Summary Calendar

JANE ALICE PSARIANOS, individually and as personal representative of the estate of Efstratios Stavros Psarianos, ET AL.,

Plaintiffs-Appellants,

versus

UNITED KINGDOM MUTUAL STEAM SHIP ASSURANCE ASSOCIATION (BERMUDA) LTD.,

Defendant-Appellee.

Appeal from the United States District Court for the Eastern District of Texas
(1:93-CV-467)

(May 24, 1995)

Before JONES, BARKSDALE, and BENAVIDES, Circuit Judges.

FORTUNATO P. BENAVIDES:[*]

Plaintiffs-Appellants appeal the district court's judgment granting Defendant-Appellee's motion for summary judgment and denying Plaintiffs-Appellants motions to remand, for discovery, for continuance, for summary judgment and to stay on the basis that Plaintiffs-Appellants' claim for relief was barred by the doctrine of *res judicata.* Finding Plaintiffs-Appellants' appeal frivolous,

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Pursuant to that Rule, the Court has determined that this opinion should not be published.

we AFFIRM the district court's judgment and impose sanctions against Plaintiffs-Appellants as requested by Defendant-Appellee.

BACKGROUND

Following the sinking of the *M/V Thomas K* in international waters on February 1, 1984, Plaintiffs-Appellants brought personal injury and wrongful death actions in federal court against the vessel owner, Eagle Transport Limited, Inc. ("Eagle"), the manager and operator, Standard Marine Limited ("Standard Marine"), Peter Kikis ("Kikis") and the American Bureau of Shipping. A jury returned a verdict in favor of Plaintiffs-Appellants in excess of $22 million. However, United Kingdom Mutual Steamship Assurance Association (Bermuda), Ltd. ("the Club"), the protection and indemnity insurer of the vessel, declined to cover any liability.

Eagle, Standard Marine and Kikis instituted third-party proceedings against the Club claiming breach of an insurance contract and seeking indemnification for the amount that they were required to pay to Plaintiffs-Appellants. The district court granted the Club's motion to compel arbitration as required by the insurance contract. While arbitration was still pending, Plaintiffs-Appellants expressed their intention to initiate an action against the Club in state court. The Club responded by requesting the district court to declare that Plaintiffs-Appellants had no claim against the Club. Plaintiffs-Appellants filed a counter-claim seeking a declaratory judgment that the insurance contract provided by the Club covered the liabilities of Eagle and that they were entitled to proceed directly against the Club.

The arbitration panel found that Eagle had not complied with the insurance contract under the indemnity policy, and therefore, Eagle could not recover from the Club. The district court confirmed the arbitration award and dismissed Plaintiffs-Appellants claims against the Club. The district court's judgment was affirmed by this Court in *Psarianos v. Standard Marine, Ltd., Inc.*, 12 F.3d 461 (5th Cir.), *cert. denied*, ___U.S.___, 114 S.Ct. 2164, 128 L.Ed.2d 887 (1994).

On August 31, 1993, while the district court's judgment was still on appeal to this Court, Eagle and Plaintiffs-Appellants filed suit in Texas state court asserting both claims on the insurance contract and extracontractual bad faith claims under Texas state law. Plaintiffs-Appellants sought to nullify the arbitration award, alleging the same causes of action that had previously been decided by the federal district court. The Club removed the case to federal court pursuant to 9 U.S.C. § 205 and federal question jurisdiction under 28 U.S.C. § 1441.

On October 19, 1993, the Club moved to dismiss Plaintiffs-Appellants' claims and for summary judgment. Plaintiffs-Appellants filed a motion to remand. On March 29, 1994, after this Court issued an opinion in the prior appeal, the district court entered an opinion and final judgment granting the Club's motion for summary judgment, finding that Plaintiffs-Appellants claim for relief was barred by the doctrine of *res judicata*. The court issued an amended opinion on April 8, 1994. Plaintiffs-Appellants then filed a motion for new trial, which the district court denied.

ANALYSIS

We review the district court's summary judgment *de novo*. *Bodenheimer v. PPG Industries, Inc.*, 5 F.3d 955, 956 (5th Cir. 1993). Summary judgment is appropriate when there exists no genuine issue of material fact so that the moving party is entitled to judgment as a matter of law. *See* FED. R. CIV. P. 56(c). In making this determination, the Court must draw all justifiable inferences in favor of the nonmoving party. *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 255, 106 S.Ct. 2505, 2513, 91 L.Ed.2d 202 (1986).

Defendant-Appellee properly removed this case pursuant to 9 U.S.C. § 205[1], which provides a procedural basis for federal jurisdiction. Plaintiffs-Appellants state court petition seeks recovery under the insurance contract between the Club and Eagle, which is subject to arbitration. Further, Plaintiffs-Appellants seek to invalidate the prior arbitration award. Therefore, this case is one that "relates to an arbitration agreement or award falling under the Convention" and is subject to removal. The district court did not err in refusing to remand the case.

Furthermore, the district court was correct in concluding that

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[1] Section 205 provides in pertinent part:

> Where the subject matter of an action or proceeding pending in State court relates to an arbitration agreement or award falling under the Convention, the defendant or the defendants may, at any time before the trial thereof, remove such action or proceeding to the district court of the United States for the district and division embracing the place where the action or proceeding is pending.

the relief sought by Plaintiffs-Appellants is barred by *res judicata*. An action is barred by *res judicata* if: 1) the prior judgment was rendered by a court of competent jurisdiction; 2) the prior judgment was final on the merits; 3) the prior judgment adjudicated all claims which were or could have been made in the prior action; and 4) the parties against whom *res judicata* is asserted were either identical to, or are in privity with, the parties to the prior action. *Southmark Properties v. Charles House Corp.*, 742 F.2d 862, 869 (5th Cir. 1984) (citing *Nilsen v. City of Moss Point, Miss.*, 701 F.2d 556, 599 (5th Cir. 1983) (*en banc*)). The district court in the prior judgment ruled that Plaintiffs-Appellants had no "bad faith" claim against the Club, and that they had no standing to contest the arbitration award. This Court affirmed. Thus, that ruling is *res judicata* on this renewed attempt by Plaintiffs-Appellants to invalidate the arbitration award.

We find Plaintiffs-Appellants' appeal frivolous. We are authorized under FED. R. APP. P. 38 to "'award just damages and single or double costs to the appellee' if we determine that an appeal is frivolous." *Buck v. United States*, 967 F.2d 1060, 1062 (5th Cir. 1992), *cert. denied*, ___U.S.___, 113 S.Ct. 1052, 122 L.Ed.2d 360 (1993). An appeal is frivolous when "'the result is obvious or the arguments of error are wholly without merit.'" *Montgomery v. United States*, 933 F.2d 348, 350 (5th cir. 1991) (quoting *Cohlan v. Starkey*, 852 F.2d 806, 811 (5th Cir. 1988)). Plaintiffs-Appellants claims have been wholly rejected by this

Court in a prior appeal and any attempt by Plaintiffs-Appellants to distinguish their claims is wholly without merit, as illustrated by their continual reliance on Texas appellate caselaw subsequently overruled by the Texas Supreme Court. Thus, we find that the result is obvious because Plaintiffs-Appellants claims are unquestionably barred by *res judicata* and are wholly without merit. We further find that an award of $2,500 in lieu of costs and attorneys' fees is just and reasonable, and we award damages in that amount in favor of Defendant-Appellee and against Plaintiffs-Appellants.

CONCLUSION

For the reasons articulated above, this frivolous appeal is dismissed. See Local Rule 42.2. Further, we award $2,500 in damages in favor of Defendant-Appellee and against Plaintiffs-Appellants.