IN THE UNITED STATES COURT OF APPEALS

FOR THE FIFTH CIRCUIT

NOS. 94-50399, 94-50402,
94-50567 and 94-50763
Summary Calendar

JASON LARISCEY, Plaintiff-Appellant,

versus

WENDELL SMITH, ET AL, Defendants-Appellees.

Appeals from the United States District Court for the
Western District of Texas
(A 93 C 567 & A 88 CA 429)

(August 18, 1995)

Before KING, SMITH, and BENAVIDES, Circuit Judges.

PER CURIAM*:

This is a consolidated appeal assailing the decisions of the district court that denied a post-judgment motion to reinstate one lawsuit, granted a summary judgment to Defendants-Appellees, denied appointed counsel and requested sanction in a subsequent suit involving the same subject matter. Finding no error, we affirm.

BACKGROUND

Proceeding *pro se*, Jason Lariscey ("Lariscey"), formerly an inmate at F.C.I. Bastrop and now a Georgia-state prisoner, filed

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Pursuant to that Rule, the Court has determined that this opinion should not be published.

suit on December 17, 1987 against the Department of the Army and several federal employees affiliated with F.C.I. Bastrop.[1] He alleged that Defendants-Appellees' civil RICO enterprise deprived him of his invention, a jig to cut kevlar material, and its revenues. On January 14, 1991, the district court adopted the magistrate judge's recommendation to grant Defendants-Appellees' motion to dismiss, and alternatively, premised dismissal on Lariscey's failure to prosecute the case.

Lariscey also filed a separate civil rights and RICO suit (second suit) on September 9, 1993 in the U.S. District Court for the Southern District of Georgia, which was later transferred to the Western District of Texas. This suit named as defendants several federal agencies and federal employees, alleging deprivation of property rights in the kevlar-cutting device.[2] In that case, Lariscey moved for appointment of counsel and for a court-ordered stipulation as to perjury. The magistrate judge denied the motions, and Lariscey filed his appeal with the district court, which was denied.

Defendants-Appellees moved for dismissal, or in the alternative, summary judgment, asserting dismissal based on *res*

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[1] The RICO suit was originally filed in the U.S. District Court for the District of Columbia. That court later transferred the suit to the Western District of Texas.

[2] In a related case (the Claims Court suit), the United States Claims Court granted summary judgment for the Government in Lariscey's suit claiming damages for the alleged taking of his invention and for the alleged breach of an implied contract. *See Lariscey v. United States*, 20 Cl. Ct. 385, 387, 392 (Cl. Ct. 1990), *aff'd en banc*, 981 F.2d 1244 (Fed. Cir. 1992), *cert. denied*, ___U.S.___, 113 S.Ct. 2997, 125 L.Ed.2d 691 (1993).

judicata, collateral estoppel, and statute of limitations. Along with his response to this motion, Lariscey moved to reopen his first RICO suit, dismissed in 1991. The district court denied the motion.

The magistrate judge recommended the grant of the Defendants-Appellees' motion to dismiss and the dismissal of the case, concluding that the statute of limitations had run on Lariscey's civil rights claims[3] and that *res judicata* from the judgment in the old RICO suit precluded Lariscey's RICO claim. After Lariscey filed objections to the report, the district court reviewed the record *de novo*, adopted the magistrate judge's report, granted the Defendants-Appellees' motion and dismissed the case.

REINSTATEMENT OF RICO SUIT

Lariscey contends that the district court erred in dismissing his first RICO suit for failure to prosecute without giving him notice and opportunity to respond and that the court erred by failing to provide him with a copy of his *Spears* hearing transcript. He argues that compensation is owed him due to the taking of his property, his invention.[4] Because his motion to reinstate was served after ten days from entry of the final judgment, the motion is viewed as a motion brought pursuant to Fed.

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[3] The magistrate judge analyzed the claims under 42 U.S.C. §§ 1983, 1985, 1986. However, the defendants are federal actors, not state actors. Therefore, Lariscey's claims were brought pursuant to *Bivens v. Six Unknown Named Agents of Fed. Bureau of Narcotics*, 403 U.S. 388, 91 S.Ct. 1999, 29 L.Ed.2d 619 (1971).

[4] The Court of Claims found that Lariscey did not have a property interest in the invention under the Fifth Amendment. *See Lariscey*, 20 Cl. Ct. at 388-92.

R. Civ. P. 60(b). *See Ford v. Elsbury*, 32 F.3d 931, 937 n.7 (5th Cir. 1994). A district court's denial of such a motion is reviewed for an abuse of discretion. *Edward H. Bohlin Co., Inc. v. Banning Co., Inc.*, 6 F.3d 350, 353 (5th Cir. 1993).

An appeal of the Rule 60(b) order does not raise for appeal the underlying final judgment. *See Aucoin v. K-Mart Apparel Fashion Corp.*, 943 F.2d 6, 8 (5th Cir. 1991). Therefore, the merits of the underlying judgment, which Lariscey argues on appeal, are not properly before us. To the extent that Lariscey's argument may be liberally construed as an argument contending that the court abused its discretion in denying to reopen the suit because Lariscey never received notice of the court's final judgment, this argument has been conclusively decided against Lariscey's position. *See Latham v. Wells Fargo Bank, N.A.*, 987 F.2d 1199, 1204-05 (5th Cir. 1993). Failure to receive notice of dismissal is an insufficient basis under Rule 60(b). *Id.* Therefore, we find that the district court did not abuse its discretion.

SUMMARY JUDGMENT

Lariscey contests the dismissal of his 1993 suit raising civil rights and RICO claims.[5] The district court adopted the magistrate judge's report and granted the defendants' motion to dismiss. In

[5] Lariscey amended his complaint to include state law claims concerning the alleged theft of his invention. Neither the magistrate judge nor the district court addressed this aspect of Lariscey's complaint in dismissing or recommending dismissal of Lariscey's suit. However, Lariscey does not make a state-law argument on appeal. Therefore, any issue concerning the court's handling of the matter is deemed abandoned on appeal. *See Yohey v. Collins*, 985 F.2d 222, 225 (5th Cir. 1993).

determining the merits of the defendants' motion, the magistrate judge looked beyond the pleadings by considering the preclusive effect of Lariscey's first RICO suit. When a district court dismisses a suit for failure to state a claim, but does not exclude matters outside of the pleadings which were presented to the court, the dismissal is treated as a grant of summary judgment. FED. R. CIV. P. 12(b), 56. Therefore, our review is *de novo*. *McKee v. Brimmer*, 39 F.3d 94, 96 (5th Cir. 1994).

The district court dismissed Lariscey's suit because the *res judicata* precluded his RICO claim and because the statute of limitations had run on his civil rights claims. We review the propriety of district court's application of the doctrine of *res judicata* and the statute of limitations.

Res Judicata

> Application of res judicata is proper only if the following 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 Secs., Inc., 962 F.2d 1169, 1172 (5th Cir. 1992). The first element, identical parties, does not require strict identity as long as there is sufficient connection, or "privity," between the earlier defendants and the defendants in Lariscey's present suit. *See id.* at 1173. Excluding the private actors who were dismissed from the suits at Lariscey's requests, the defendants from both RICO suits were either the same persons or agencies or employees of the federal government. Thus, there is

sufficient privity for the parties to be identical. *See Boone v. Kurtz*, 617 F.2d 435, 436 (5th Cir. 1980).

The prior judgment was determined by the same district court judge entering judgment in the present case. In the prior RICO suit, the district court adopted the magistrate judge's report and dismissed the suit pursuant to the defendants' motion to dismiss and, in the alternative, for failure to prosecute. A Rule 12(b)(6) dismissal is a dismissal on the merits for purposes of *res judicata*. *Federated Dep't Stores, Inc. v. Moitie*, 452 U.S. 394, 399 n.3, 101 S.Ct. 2424, 69 L.Ed.2d 103 (1981). In both suits, Lariscey contended that the named defendants conspired to deprive him of his claimed property rights in the kevlar-cutting invention and to retaliate against him for attempting to exercise those rights.

As analyzed above, the district court correctly applied the doctrine of *res judicata* to bar Lariscey's RICO claim. Lariscey argues that this was an improper application because he was denied a full and fair opportunity to litigate his RICO claim in the first RICO suit. However, we find that the record of his first RICO suit that was pending more than three years before dismissal negates his claim of lack of opportunity to litigate. Lariscey argues that *res judicata* is improper because he did not have notice or opportunity to respond to the court's earlier Rule 12(b)(6) dismissal, but Lariscey's failure to keep abreast of his litigation is irrelevant to the application of *res judicata*. Thus, we find that the district court did not err in granting summary judgment for the

defendants on the RICO claim.

Additionally, a review of Lariscey's complaint indicates that his *Bivens* claims are the underlying predicate acts of his RICO action. To the extent that Lariscey's *Bivens* claims are not barred by *res judicata*, these claims are considered in light of the applicable statute of limitations. We look to state law to determine the applicable limitations period for a *Bivens* action. *Spina v. Aaron*, 821 F.2d 1126, 1128-29 (5th Cir. 1987). The applicable limitations period in Texas is two years. *See Gartrell v. Gaylor*, 981 F.2d 254, 256-57 (5th Cir. 1993).

Although state law governs the limitations period, federal law governs when the cause of action arises or accrues. *Id.* at 257.

> Under federal law, a cause of action accrues when the plaintiff knows or has reason to know of the injury which is the basis of the action. The statute of limitations therefore begins to run when the plaintiff is in possession of the "critical facts that he has been hurt and who has inflicted the injury . . . ."

Id. (citations omitted). Our review of Lariscey's allegations indicates that he knew the critical facts no later than 1988. He filed suit in September 1993. To the extent that Lariscey's *Bivens* claims concern acts by Defendants-Appellees that occurred in the litigation in the Claims Court, that litigation at the trial level ended in May 11, 1990. *See Lariscey*, 20 Cl. Ct. at 385. Thus, we find that the limitations period has run on Lariscey's *Bivens* claims.

Statute of Limitations

Lariscey also argues that the district court erred in

determining that the limitations period had run because it should have been tolled. Lariscey asserts several reasons why limitations should have been tolled. First, he contends his harm is continuing because he is being denied his right to his invention, a right which lasts 17 years. Federal law recognizes a similar tolling exception, the continuing violation doctrine. *See Hendrix v. City of Yazoo City, Miss.*, 911 F.2d 1102, 1103 (5th Cir. 1990). However, Lariscey's argument is premised upon his alleged property right in the kevlar-cutting invention. The Claims Court determined that Lariscey does not have such a right in the unpatented invention. *See Lariscey*, 20 Cl. Ct. at 388-92. Thus, the exception is inapplicable.

Second, Lariscey argues that Defendants-Appellees' acts included misrepresentations and criminal acts, thus limitations should be tolled. Even if Lariscey sufficiently raised this argument below, his reasoning is circular and presumes as justification for tolling the acts of Defendants-Appellees alleged by Lariscey in his complaint. Therefore, his argument has no merit.

Third, Lariscey argues that, at the time his action arose in 1987, Texas tolled limitations for incarcerated individuals. Even if Lariscey raised this argument in the district court, it would be unavailing because Texas eliminated this tolling provision beginning in September 1987. *See Burrell v. Newsome*, 883 F.2d 416, 419 (5th Cir. 1989). Limitations began to run on September 1, 1987, for any claim which Lariscey may have had before that date.

Fourth, Lariscey contends that limitations were tolled until the Claims Court litigation ended. As legal support, he mistakenly relies upon a Third Circuit case concerning a claim for malicious prosecution. *See Rose v. Bartle*, 871 F.2d 331, 348 (3d Cir. 1989). Under Texas law, such a tolling provision is unavailable unless the earlier proceeding's outcome is a necessary prerequisite to the filing of the suit in issue. *See Martinez v. Hardy*, 864 S.W.2d 767, 774 (Tex. App.-Hous. (14 Dist.) 1993). Lariscey does not contend that the Claims Court determination that he does not have a property interest in the unpatented, kevlar-cutting invention was necessary to the bringing of his *Bivens* action. Instead, he appears to argue that his allegations concerning the defendants' violations of 18 U.S.C. §§ 1001 and 1621, criminal statutes covering perjury and making a false statement, have been ongoing and that the Claims Court decision is an example of these continuing violations because that decision is in error. We find that this meritless and confusing argument is insufficient to preserve the unknown issue for appeal. *See Yohey*, 985 F.2d at 225.

Finally, Lariscey argues that the federal doctrine of equitable tolling should apply to his suit because he has been diligent in his effort to obtain evidence. The circumstances of Lariscey's case, which includes the earlier dismissed RICO suit and the Claims Court decision covering the same operative facts underlying this case, negate any claim that Lariscey has been so diligent as to invoke equitable tolling. *See Lambert v. United States*, 44 F.3d 296, 298-99 (5th Cir. 1995). Moreover, a similar

Texas tolling provision concerning the plaintiff's reasonable diligence in discovering the right of action against a party who has fraudulently concealed information in which that party had a duty to disclose appears equally inapplicable to Lariscey. *See Moreno v. Sterling Drug, Inc.*, 787 S.W.2d 348, 352 n.1 (Tex. 1990). Accordingly, we find that the district court did not err in granting summary judgment for Defendants-Appellees on the basis of *res judicata* and limitations.

APPOINTMENT OF COUNSEL

Lariscey argues that the district court erred in denying his appeal, or request for reconsideration, of the magistrate judge's orders denying appointment of counsel and denying Lariscey's request for a court-ordered stipulation on perjury. In such a case as Lariscey's, appointment of counsel is within the court's discretion, and such a request should be granted when "the case presents exceptional circumstances." *Ulmer v. Chancellor*, 691 F.2d 209, 212-13 (5th Cir. 1982).

In denying Lariscey's appeal, the district court noted that it had reviewed the applicable record and law. In light of the analysis covering the propriety of summary judgment, there was no need for a trial, and the case was not complex -- Lariscey's claims either were barred by the doctrine of *res judicata* or were stale by the running of limitations. Thus, we find that the district court did not abuse its discretion in denying appointed counsel.

As for Lariscey's request for court-ordered stipulation to require the prosecution of anyone who knowingly made a false

statement in the litigation of this case, we find no basis in law authorizing such a court-ordered stipulation between the parties. Thus, the district court did not err in denying such a frivolous request.

LARISCEY'S REQUEST FOR SANCTIONS

Lariscey argues that the district court erred in denying his request for sanctions against Defendants-Appellees. A denial of sanctions, whether pursuant to FED. R. CIV. P. 11 or 28 U.S.C. § 1927, is reviewed for an abuse of discretion. *See National Assoc. of Gov't Employees v. National Fed'n of Fed. Employees*, 844 F.2d 216, 222-23 (5th Cir. 1988). Lariscey sought large monetary awards of attorney's fees as a sanction for Defendant-Appellees' alleged improprieties. The record encompassing these four appeals reveals that Lariscey has attempted to litigate the taking of his alleged property three times, once in the Claims Court and twice in the district court. Upon this record, we can find no abuse of discretion in denying attorney's fees as a sanction.

Defendants-Appellees also request sanctions against Lariscey to prevent further frivolous litigation. This is the first time Lariscey has come before this Court, but we have noted the voluminous record he has generated in the district court through these cases, his filing of repetitive claims and his comments regarding the district court's alleged bias. Although we deny Defendants-Appellees' request for sanctions, we caution that sanctions may be appropriate if Mr. Lariscey continues his meritless pursuit of money from the kevlar-cutting device.

AFFIRMED.