SUPREME COURT OF THE UNITED STATES

No. 91–522

SAUDI ARABIA, KING FAISAL SPECIALIST HOSPITAL AND ROYSPEC, PETITIONERS *v.*
SCOTT NELSON ET UX.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE ELEVENTH CIRCUIT

[March 23, 1993]

JUSTICE KENNEDY, with whom JUSTICE BLACKMUN and JUSTICE STEVENS join as to Parts I-B and II, concurring in part and dissenting in part.

I join all of the Court's opinion except the last paragraph of Part II, where, with almost no explanation, the Court rules that, like the intentional tort claim, the claims based on negligent failure to warn are outside the subject-matter jurisdiction of the federal courts. These claims stand on a much different footing from the intentional tort claims for purposes of the Foreign Sovereign Immunities Act (FSIA). In my view, they ought to be remanded to the District Court for further consideration.

I agree with the Court's holding that the Nelsons' claims of intentional wrongdoing by the Hospital and the Kingdom of Saudi Arabia are based on sovereign, not commercial, activity, and so fall outside the commercial activity exception to the grant of foreign sovereign immunity contained in 28 U. S. C. §1604. The intentional tort counts of the Nelsons' complaint recite the alleged unlawful arrest, imprisonment, and torture of Mr. Nelson by the

Saudi police acting in their official capacities. These are not the sort of activities by which a private party conducts its business affairs; if we classified them as commercial, the commercial activity exception would in large measure swallow the rule of foreign sovereign immunity Congress enacted in the FSIA.

By the same token, however, the Nelsons' claims alleging that the Hospital, the Kingdom, and Royspec were negligent in failing during their recruitment of Nelson to warn him of foreseeable dangers are based upon commercial activity having substantial contact with the United States. As such, they are within the commercial activity exception and the jurisdiction of the federal courts. Unlike the intentional tort counts of the complaint, the failure to warn counts do not complain of a police beating in Saudi Arabia; rather, they complain of a negligent omission made during the recruiting of a hospital employee in the United States. To obtain relief, the Nelsons would be obliged to prove that the Hospital's recruiting agent did not tell Nelson about the foreseeable hazards of his prospective employment in Saudi Arabia. Under the Court's test, this omission is what the negligence counts are "based upon." See *ante*, at 7.

Omission of important information during employee recruiting is commercial activity as we have described it. See *Republic of Argentina* v. *Weltover, Inc.,* 504 U. S. ___ (1992). It seems plain that recruiting employees is an activity undertaken by private hospitals in the normal course of business. Locating and hiring employees implicates no power unique to the sovereign. In explaining the terms and conditions of employment, including the risks and rewards of a particular job, a governmental entity acts in "the manner of a private player within" the commercial marketplace. *Id.*, at ___. Under the FSIA, as a result, it must satisfy the same general duties of

care that apply to private actors under state law. If a private company with operations in Saudi Arabia would be obliged in the course of its recruiting activities subject to state law to tell a prospective employee about the risk of arbitrary arrest and torture by Saudi authorities, then so would King Faisal Specialist Hospital.

The recruiting activity alleged in the failure to warn counts of the complaint also satisfies the final requirement for invoking the commercial activity exception: that the claims be based upon commercial activity "having substantial contact with the United States." 28 U. S. C. §1603(e). Nelson's recruitment was performed by Hospital Corporation of America (HCA), a wholly owned subsidiary of a U. S. corporation, which, for a period of at least 16 years beginning in 1973, acted as the Kingdom of Saudi Arabia's exclusive agent for recruiting employees for the Hospital. HCA in the regular course of its business seeks employees for the Hospital in the American labor market. HCA advertised in an American magazine, seeking applicants for the position Nelson later filled. Nelson saw the ad in the United States and contacted HCA in Tennessee. After an interview in Saudi Arabia, Nelson returned to Florida, where he signed an employment contract and underwent personnel processing and application procedures. Before leaving to take his job at the Hospital, Nelson attended an orientation session conducted by HCA in Tennessee for new employees. These activities have more than substantial contact with the United States; most of them were "carried on in the United States." 28 U. S. C. §1605(a)(2). In alleging that the petitioners neglected during these activities to tell him what they were bound to under state law, Nelson meets all of the statutory requirements for invoking federal jurisdiction under the commercial activity exception.

Having met the jurisdictional prerequisites of the FSIA, the Nelsons' failure to warn claims should survive petitioners' motion under Federal Rule of Civil Procedure 12(b)(1) to dismiss for want of subject-matter jurisdiction. Yet instead of remanding these claims to the District Court for further proceedings, the majority dismisses them in a single short paragraph. This is peculiar, since the Court suggests no reason to question the conclusion that the failure to warn claims are based on commercial activity having substantial contact with the United States; indeed, the Court does not purport to analyze these claims in light of the statutory requirements for jurisdiction.

The Court's summary treatment may stem from doubts about the underlying validity of the negligence cause of action. The Court dismisses the claims because it fears that if it did not, "a plaintiff could recast virtually any claim of intentional tort committed by a sovereign act as a claim of failure to warn, simply by charging the defendant with an obligation to announce its own tortious propensity before indulging it." *Ante*, at 13–14. In the majority's view, "[t]o give jurisdictional significance to this feint of language would effectively thwart the Act's manifest purpose to codify the restrictive theory of foreign sovereign immunity." *Id.,* at 14. These doubts, however, are not relevant to the analytical task at hand.

The FSIA states that with respect to any claim against a foreign sovereign that falls within the statutory exceptions to immunity listed in §1605, "the foreign state shall be liable in the same manner and to the same extent as a private individual under like circumstances." 28 U. S. C. §1606. The Act incorporates state law and "was not intended to affect the substantive law determining the liability of a foreign state." *First Nat'l City Bank* v. *Banco Para el*

Comercio Exterior de Cuba, 462 U. S. 611, 620 (1983). If the governing state law, which has not yet been determined, would permit an injured person to plead and prove a tortious wrong for failure to warn against a private defendant under facts similar to those in this case, we have no authority under the FSIA to ordain otherwise for those suing a sovereign entity. "[W]here state law provides a rule of liability governing private individuals, the FSIA requires the application of that rule to foreign states in like circumstances." *Id.*,, at 622, n. 11.

The majority's citation of *United States* v. *Shearer*, 473 U. S. 52, 54–55 (1985) (opinion of Burger, C. J.), see *ante*, at 14, provides no authority for dismissing the failure to warn claims. *Shearer* refused to permit a plaintiff to recast in negligence terms what was essentially an intentional tort claim, but that case was decided under the doctrine of *Feres* v. *United States*, 340 U. S. 135 (1950). The *Feres* doctrine is a creature of federal common law that allows the Court much greater latitude to make rules of pleading than we have in the current case. Here, our only task is to interpret the explicit terms of the FSIA. The Court's conclusion in *Shearer* was also based upon the fact that the intentional tort exception to the Federal Tort Claims Act at issue there, 28 U. S. C. §2680(h), precludes "[a]ny claim arising out of" the specified intentional torts. This language suggests that Congress intended immunity under the FTCA to cover more than those claims which simply sounded in intentional tort. There is no equivalent language in the commercial activity exception to the FSIA. It is also worth noting that the Court has not adopted a uniform rule barring the recasting of intentional tort claims as negligence claims under the FTCA; under certain circumstances, we have permitted recovery in that situation. See *Sheridan* v. *United States*, 487 U. S. 392 (1988).

As a matter of substantive tort law, it is not a novel

proposition or a play on words to describe with precision the conduct upon which various causes of action are based or to recognize that a single injury can arise from multiple causes, each of which constitutes an actionable wrong. See Restatement (Second) of Torts §§447–449 (1965); *Sheridan*, *supra*, at 405 (KENNEDY, J., concurring in judgment); *Wilson* v. *Garcia*, 471 U. S. 261, 272 (1985). In *Sheridan*, for example, this Court permitted an action for negligent supervision to go forward under the FTCA when a suit based upon the intentional tort that was the immediate cause of injury was barred under the statute. See 487 U. S., at 400. As the Court observed, "it is both settled and undisputed that in at least some situations the fact that an injury was directly caused by an assault or battery will not preclude liability against the Government for negligently allowing the assault to occur." *Id.,* at 398.

We need not determine, however, that on remand the Nelsons will succeed on their failure to warn claims. Quite apart from potential problems of state tort law that might bar recovery, the Nelsons appear to face an obstacle based upon the former adjudication of their related lawsuit against Saudi Arabia's recruiting agent, HCA. The District Court dismissed that suit, which raised an identical failure to warn claim, not only as time barred, but also on the merits. See *Nelson* v. *Hospital Corp. of America*, No. 88–0484–CIV-Nesbitt (SD Fla., Nov. 1, 1990). That decision was affirmed on appeal, see 946 F. 2d 1546 (CA11 1991) (Table), and may be entitled to preclusive effect with respect to the Nelson's similar claims against the sovereign defendants, whose recruitment of Nelson took place almost entirely through HCA. See generally *Montana* v. *United States*, 440 U. S. 147, 153 (1979) ("a final judgment on the merits bars further claims by parties or their privies based on the same cause of action"); *Lawlor* v. *National Screen Service Corp.*, 349 U. S. 322, 330

(1955) (defendants not party to a prior suit may invoke res judicata if "their liability was . . . `altogether dependent upon the culpability' of the [prior] defendants") (quoting *Bigelow* v. *Old Dominion Copper Mining and Smelting Co.*, 225 U. S. 111, 127 (1912)); 18 C. Wright, A. Miller & E. Cooper, Federal Practice & Procedure, §4463, p. 567 (1981) (recognizing general rule that "judgment in an action against either party to a vicarious liability relationship establishe[s] preclusion in favor of the other"); Restatement (Second) of Judgments §51 (1982).

But the question of claim preclusion, like the substantive validity under state law of the Nelsons' negligence cause of action, has not yet been litigated and is outside the proper sphere of our review. "[I]t is not our practice to reexamine a question of state law of [this] kind or, without good reason, to pass upon it in the first instance." *Sheridan*, 487 U. S., at 401. That a remand to the District Court may be of no avail to the Nelsons is irrelevant to our task here; if the jurisdictional requirements of the FSIA are met, the case must be remanded to the trial court for further proceedings. In my view, the FSIA conferred subject-matter jurisdiction on the District Court to entertain the failure to warn claims, and with all respect, I dissent from the Court's refusal to remand them.