NOT FOR PUBLICATION

UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

JOSEPH FERRARI, Plaintiff-Appellant, v. UNITED STATES OF AMERICA, Defendant-Appellee, and ERIN FORD, Defendant.	No. 20-36071 D.C. No. 3:19-cv-05996-RJB-TLF MEMORANDUM* (Filed Nov. 12, 2021)

Appeal from the United States District Court
for the Western District of Washington
Robert J. Bryan, District Judge, Presiding

Submitted November 9, 2021**
Seattle, Washington

Before: WARDLAW, TALLMAN, and BUMATAY, Circuit Judges.

Joseph Ferrari appeals the district court's orders denying Ferrari's motion for denial of certification and

* This disposition is not appropriate for publication and is not precedent except as provided by Ninth Circuit Rule 36-3.

** The panel unanimously concludes this case is suitable for decision without oral argument. *See* Fed. R. App. P. 34(a)(2).

substitution of the United States as defendant under the Westfall Act and granting the United States' motion to dismiss Ferrari's complaint. We have jurisdiction under 28 U.S.C. § 1291, and we affirm.

1. The district court properly substituted the United States as the defendant in this case under the Westfall Act, 28 U.S.C. § 2679(d)(1). The district court made specific findings to determine that Naval Lt. Ford was acting within the scope of her employment in reporting Ferrari's alleged misconduct, and those findings of disputed fact were not clearly erroneous. *See Billings v. United States*, 57 F.3d 797, 800 (9th Cir. 1995) (reviewing the "relevant district court's findings of disputed fact for clear error").

2. The district court properly dismissed this case under the *Feres* doctrine. *See Feres v. United States*, 340 U.S. 135 (1950). Under the *Feres* doctrine, "members of the armed services [cannot] sue the government for injuries that arise out of or are in the course of activity incident to service." *Stauber v. Cline*, 837 F.2d 395, 397 (9th Cir. 1988) (quotation and citation omitted). The district court concluded that Ferrari's claims were incident to his service as an active-duty military member and dismissed the case for lack of subject matter jurisdiction under *Feres*. *See Stauber*, 837 F.2d at 400.

Ferrari did not appeal the district court's dismissal for lack of subject matter jurisdiction under *Feres* in his opening brief. "[A]rguments not raised by a party in its opening brief are deemed waived." *Smith v.*

Marsh, 194 F.3d 1045, 1052 (9th Cir. 1999); *see also Brookfield Commc'ns, Inc. v. W. Coast Ent. Corp.*, 174 F.3d 1036, 1046 n.7 (9th Cir. 1999).

3. The Federal Tort Claims Act (FTCA) also bars the relief that Ferrari seeks. Ferrari seeks damages arising from the slander and libel that Ford allegedly committed in reporting Ferrari's alleged misconduct to naval officers. But the FTCA explicitly provides that the statutory waiver of federal sovereign immunity "shall not apply to . . . [a]ny claim arising out of . . . libel [or] slander." 28 U.S.C. § 2680(h).

4. Ferrari's failure to administratively exhaust his claims operates as another bar to judicial review of his claims. Under the FTCA, "[a]n action shall not be instituted upon a claim against the United States for money damages . . . unless the claimant shall have first presented the claim to the appropriate Federal agency." *Id.* § 2675(a). Ferrari does not dispute that he failed to make his defamation claim to the Navy, as was required before he could bring suit against the United States in district court. *See* 28 C.F.R. § 14.2(a); *Wiseman v. United States*, 976 F.2d 604, 605 (9th Cir. 1992).

AFFIRMED.

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF WASHINGTON
AT TACOMA

JOSEPH FERRARI, Plaintiff, v. UNITED STATES OF AMERICA, Defendant.	CASE NO. 19-5996 RJB-TLF ORDER GRANTING UNITED STATES' MOTIONS TO DISMISS (Filed Oct. 21, 2020)

This matter comes before the Court on the United States' motion to dismiss based on the doctrine announced in *Feres v. United States*, 340 U.S. 135 (1950), (made in its Response to the Plaintiffs' motions – Dkt. 36) and the United States' renewed motion to dismiss (Dkt. 8). The Court has considered the pleadings filed regarding the motions and the remaining file.

This case arises from reports that Plaintiff Joseph Ferrari sexually assaulted Erin Ford while they were both officers in the United States Navy. Dkt. 1. The Amended Complaint maintains that Ford lied. Dkt. 1-1. The Plaintiff asserts claims for slander, libel, defamation, and a "tortuous act." *Id.* The United States removed the case to this Court. Dkt. 1. Pursuant to the Westfall Act, 28 U.S.C. § 2679(d)(1), the United States certified that Ford was employee of the United States and was acting within the course and scope of her official duties at the time. Dkt. 2-1. The United States substituted itself as the Defendant. Dkt. 2.

On October 25, 2019, the United States filed a motion to dismiss arguing that the case should be dismissed because: (1) the Court lacks subject matter jurisdiction over tort claims (like libel, slander and defamation) that are barred by the Federal Tort Claims Act ("FTCA"), 28 U.S.C. § 1346, *et. seq.* and (2) the Court lacks subject matter jurisdiction because the Plaintiff failed to exhaust his administrative remedies. Dkt. 8. The Court granted the Plaintiff's motion for leave to do discovery on the certification issue and stayed all other deadlines. Dkt. 16. The government's motion to dismiss (Dkt. 8) was stricken, to be renoted, if appropriate. *Id.*

Included in its Response to Plaintiffs motion for summary judgment and Motion for Denial of Certification and Substitution of United States and Dismissal of United States, was the United States' motion for the case to be dismissed because this Court lacks jurisdiction over the claims pursuant to the doctrine announced in *Feres v. United States*, 340 U.S. 135 (1950). Dkt. 36.

On June 5, 2020, the Court ordered that an evidentiary hearing be held on the issue of the propriety of the United States' certification and substitution. Dkt. 46. After the evidentiary hearing, the Court denied Plaintiff's challenge to the United States' certification that Ford was acting within the scope of her employment; the Court concluded that United States' substitution as defendant was proper. Dkt. 73. The United States' motions to dismiss (Dkts. 8 and 36) were renoted for October 16, 2020. Dkt. 76. Parties were

informed that any further pleadings regarding these motions should be filed in accord with the Local Rules. *Id.* The Plaintiff s motion for reconsideration (Dkt. 77) and motion for a new trial, or relief from the judgment, or reconsideration (Dkt. 79) were denied. Dkts. 78 and 88. No further pleadings regarding the Unites States' motions to dismiss were filed.

The United States' motions to dismiss (Dkts. 8 and 36) have merit and should be granted. The Court does not have subject matter jurisdiction to consider the Plaintiff's claims. Pursuant to 28 U.S.C. § 2680(h), the FTCA does not apply to "[a]ny claim arising out of assault, battery, false imprisonment, false arrest, malicious prosecution, abuse of process, **libel, slander**, misrepresentation, deceit, or interference with contract rights . . . " 28 U.S.C. § 2680(h) (*emphasis added*). Further, there is no showing that the Plaintiff exhausted his administrative remedies.

Additionally, the Plaintiff's claims are incident to his service as an active duty military member and so his claims are barred by the doctrine announced in *Feres v. United States*, 340 U.S. 135 (1950).

IT IS ORDERED THAT:

- The United States' motions to dismiss (Dkts. 8 and 36) **ARE GRANTED**; and
- This case **IS DISMISSED**.

The Clerk is directed to send uncertified copies of this Order to all counsel of record and to any party appearing *pro se* at said party's last known address.

Dated this 21st day of October, 2020.

/s/ Robert J. Bryan
ROBERT J. BRYAN
United States District Judge

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF WASHINGTON
AT TACOMA

JOSEPH FERRARI, Plaintiff, v. UNITED STATES OF AMERICA, Defendant.	CIVIL JUDGMENT (Filed Oct. 21, 2020) CASE NO. C19-5996-RJB

___ **Jury Verdict.** This action came to consideration before the Court for a trial by jury. The issues have been tried and the jury has rendered its verdict.

XX **Decision by Court.** This action came to consideration before the Court. The issues have been considered and a decision has been rendered.

THE COURT HAS ORDERED THAT

- The United States' motions to dismiss (Dkts. 8 and 36) ARE GRANTED;
- This case IS CLOSED.

Dated this 21st day of October, 2020.

William M. McCool
Clerk of Court

s/Tyler Campbell
Tyler Campbell, Deputy Clerk

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF WASHINGTON
AT TACOMA

JOSEPH FERRARI, Plaintiff, v. UNITED STATES OF AMERICA, Defendant.	CASE NO. 19-5996 RJB-TLF ORDER ON PLAINTIFF'S MOTION (Filed Oct. 20, 2020)

This matter comes before the Court on the motion of Plaintiff for Federal Rule of Civil Procedure 59 and 60 Relief from Judgment (Dkt. 79). The Court is familiar with the records, files herein, documents filed in support of and in opposition to the motion, and the events of the trial. This matter was noted for 23 October 2020, but all pleadings are in, so ruling need not be delayed.

In his motion, Plaintiff claims that there is newly-discovered evidence that justifies reopening the case for further evidence and other relief under either Federal Rule of Civil Procedure 59 and/or Federal Rule of Civil Procedure 60.

The newly-discovered evidence was found by Plaintiff's wife, apparently on her cell phone, that captured the contents of communications between Plaintiff and his wife between 2300 and 2330 hours in [sic, on] 9 December 2016 – the time at which the events triggering

this case allegedly happened. Plaintiff's position is that this new information belies the testimony of Lieutenant Ward [sic, should be "Ford"] and makes all of her testimony unbelievable. It is not clear to the Court exactly what electronic means were used in the conversations between Plaintiff and his wife on the day in question. Those conversations are, however, attached to the Declaration of Mrs. Ferarri (Dkt. 83). If the record of the communications is to be believed, it reflects that a series of communications to his wife, beginning at 2140 on 9 December 2016 with follow up communications at 2239 and 2251, and his wife responded at 2301 and 2303, and communications continued periodically from that time through 2132.

As set forth in Defendant's responsive brief (Dkt. 84) at page 4:

> Relief from judgment on the basis of newly discovered evidence is warranted if (1) the moving party can show the evidence relied on in fact constitutes newly discovered evidence within the meaning of Rule 60(b); (2) the moving party exercised due diligence to discover this evidence; and (3) the newly discovered evidence must be of such magnitude that production of it earlier would have been likely to change the disposition of the case. *Ferguson*, 2008 WL 11508829, at *2 (quoting *Feature Realty, Inc. v. City of Spokane*, 331 F.3d 1082, 1093 (9th Cir. 2003)).

While this new evidence is highly suspect, it was apparently discovered through inadvertence. It is doubtful that Plaintiff exercised due diligence to

discover the evidence; however, the critical issue before the Court on these motions is whether the newly-discovered evidence is of such magnitude that production of it earlier would have been likely to change the disposition of the case. It appears to the Court highly unlikely that production of that evidence earlier would have changed the Court's ruling.

Although Plaintiff has argued about the importance of timelines throughout this case, the Court has not felt that specific timelines were important. When Lieutenant Ward [sic, should be "Ford"] first testified about when events occurred on 9 December 2016, the Court marked, in his notes, "2300 +/-", meaning about 2300.[1] Lieutenant Ward [sic, should be "Ford"] also testified that she checked her watch around 2300, before going to Plaintiffs quarters. Later in her testimony, she testified that her recollection was that the events occurred over about 15 minutes between 2300 and 2330. The Court was not then, and is not now, convinced that those specific times actually reflected when the events occurred. It could well have been shortly after 2330. That view of the evidence is reflected in the Court's opinion when he referred to the events as "occurring during a late night," without any finding as to exact hours. That view is also reflected in the Court's oral finding that the fact differences in witnesses' recall of details and in Lieutenant Ward's [sic, should be

[1] Apparently no transcript of the hearing or the Court's ruling has been ordered, so the Court relies on his memory and his notes in recounting events of the hearing.

"Ford's"] report were within normal expectations at trial.

The Court's conclusion that Lieutenant Ward's [sic, should be "Ford's"] testimony was consistent and believable is not changed, even if Plaintiff was communicating with his wife between 2300 and 2332 on 9 December 2016 and the events at issue occurred after 2332.

Plaintiff has not shown facts which, if true, would justify relief under Federal Rule of Civil Procedure 59 or 60. Therefore, Plaintiff's Motion (Dkt. 79) is DENIED.

The Clerk is directed to send uncertified copies of this Order to all counsel of record and to any party appearing *pro se* at said party's last known address.

Dated this 20th day of October, 2020.

/s/ Robert J. Bryan
ROBERT J. BRYAN
United States District Judge

UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

JOSEPH FERRARI, Plaintiff-Appellant, v. UNITED STATES OF AMERICA, Defendant-Appellee, and ERIN FORD, Defendant.	No. 20-36071 D.C. No. 3:19-cv-05996-RJB-TLF Western District of Washington, Tacoma ORDER (Filed Dec. 22 2021)

Before: WARDLAW, TALLMAN, and BUMATAY, Circuit Judges.

Judges Wardlaw and Bumatay have voted to deny the petition for rehearing en banc, and Judge Tallman so recommends. The full court has been advised of the petition for rehearing en banc, and no judge of the court has requested a vote on the petition for rehearing en banc. Fed. R. App. P. 35(b).

The petition for rehearing en banc (Dkt. No. 45) is DENIED.