FILED
United States Court of Appeals
Tenth Circuit

November 9, 2023

Christopher M. Wolpert
Clerk of Court

UNITED STATES COURT OF APPEALS

FOR THE TENTH CIRCUIT

A. SHAW, an individual; L. SHAW, individually and as guardian to A. Shaw; M. SHAW, individually and as guardian to A. Shaw,

Plaintiffs - Appellants,

v.

CITY OF NORMAN, a municipal corporation; OFC. MICHAEL LAUDERBACK, an individual; JASON BRAKHAGE,

Defendants - Appellees.

No. 23-6087
(D.C. No. 5:21-CV-01124-J)
(W.D. Okla.)

ORDER AND JUDGMENT*

Before **MATHESON**, **BRISCOE**, and **EID**, Circuit Judges.

Plaintiffs A. Shaw, L. Shaw, and M. Shaw appeal from the district court's denial of their motion for relief from judgment pursuant to Fed. R. Civ. P. 60(b).

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* After examining the briefs and appellate record, this panel has determined unanimously that oral argument would not materially assist in the determination of this appeal. *See* Fed. R. App. P. 34(a)(2); 10th Cir. R. 34.1(G). The case is therefore ordered submitted without oral argument. This order and judgment is not binding precedent, except under the doctrines of law of the case, res judicata, and collateral estoppel. It may be cited, however, for its persuasive value consistent with Fed. R. App. P. 32.1 and 10th Cir. R. 32.1.

Exercising jurisdiction pursuant to 28 U.S.C. § 1291, we affirm the district court's decision.

I

For purposes of background, we draw from this court's previous decision in this case:

> According to plaintiffs' second amended complaint, Officer Michael Lauderback attempted to conduct a traffic stop on a pickup truck driven by Jimmy Hinson around 9:00 a.m. on a weekday morning in January 2018. Hinson did not immediately stop when Lauderback initiated his lights and siren, but he did not increase his speed or take evasive action. Hinson eventually pulled into a school parking lot, where a young child exited the pickup and walked toward the school. Lauderback approached Hinson and spoke with him for approximately five minutes before returning to his patrol car to discuss matters with a second officer who had just arrived. Lauderback told the second officer that Hinson would be receiving several tickets because he ran a stop sign, lacked a driver's license, and did not have insurance.
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> But while Lauderback was writing the tickets, Hinson fled in his pickup. Lauderback immediately followed; he "did not have time to put on [a] seatbelt and did not have both hands on [the] steering wheel and was fumbling while calling on the radio [that] he ha[d] a runner." App. 170. Lauderback's supervisor initially told him to stop pursuing Hinson but then changed course and authorized the pursuit.
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> During the chase, Hinson drove recklessly and quickly, including driving across a median and crossing four lanes of traffic. He continued until he ran a red light at an intersection and struck several vehicles, including one occupied by Shaw. As a result of this incident, Shaw "suffered permanent and debilitating injuries." *Id.* at 173.

Shaw v. City of Norman, No. 22-6106, 2023 WL 2923962, at *1 (10th Cir. Apr. 13, 2023) (*Shaw II*).

II

On October 7, 2019, Shaw and his Parents, L. Shaw and M. Shaw, filed suit in Oklahoma state court against the City and various individual defendants asserting, in relevant part, a claim of "Negligence GTCA," in reference to Oklahoma's Governmental Tort Claims Act, Okla. Stat. tit. 51, §§ 151–172. *Shaw v. City of Norman*, No. 120,666, slip op. at 5 (Okla. Civ. App. Jan. 30, 2023) (*Shaw I*). Plaintiffs, however, failed to prosecute the state court action and it was dismissed without prejudice on November 12, 2021. At the time of the dismissal, plaintiffs' "time for filing a cause arising under the GTCA had expired." *Id.*

On November 28, 2021, plaintiffs "availed themselves of the savings provision of [Okla. Stat. tit. 12, § 100] to refile the action in federal court."[1] *Id*. Their federal complaint named as defendants the City, Lauderback, Officer Jason Brakhage, four unidentified police officers, Hinson, and Hinson's wife Christina. Aplt. App., Vol. I at 5. The complaint asserted claims against the defendant officers under 42 U.S.C. § 1983 for excessive force and denial of due process, § 1983 *Monell* and Fourteenth

[1] Section 100, titled "Limitation of new action after reversal or failure otherwise than on merits," provides:

> If any action is commenced within due time, and a judgment thereon for the plaintiff is reversed, or if the plaintiff fail in such action otherwise than upon the merits, the plaintiff, or, if he should die, and the cause of action survive, his representatives may commence a new action within one (1) year after the reversal or failure although the time limit for commencing the action shall have expired before the new action is filed.

Okla. Stat. tit. 12, § 100.

Amendment equal protection claims against the City, and state negligence claims against the City and the Hinsons.

The City and the defendant officers moved to dismiss the federal complaint. On March 10, 2022, the district court issued an order granting in part and denying in part the motion to dismiss. More specifically, the district court concluded that plaintiffs' Fourth Amendment excessive force claims were subject to dismissal with prejudice because, even "[t]aking Plaintiffs' alleged facts as true, . . . no Fourth Amendment seizure occurred." Aplt. App., Vol. I at 84. The district court further concluded that defendants Lauderback and Brakhage were entitled to qualified immunity from plaintiffs' Fourteenth Amendment substantive due process claim because the allegations in the complaint did not support any reasonable inference that these defendants intended any harm either to Shaw or Hinson, or that defendants' actions in any way shocked the conscience. The district court in turn concluded that because plaintiffs failed to state valid claims for relief against Lauderback and Brakhage, they could not maintain related § 1983 claims against the City. As for plaintiffs' § 1983 equal protection claim against the City, the district court concluded that plaintiffs' complaint "wholly failed to allege facts that would establish that" plaintiffs were "treated differently from others who [we]re materially similar." *Id*. at 90. The district court concluded that the Parents "failed to offer any facts which would establish that [the] high-speed pursuit of Mr. Hinson was directed at [their] familial relationship with . . . Shaw," and that they "lack[ed] standing to sue under § 1983" "[a]s to . . . Shaw's constitutional rights." *Id*. at 91. The district court

therefore dismissed the Parents' Fourth Amendment claim with prejudice and "the Fourteenth Amendment claims . . . related to . . . Shaw's constitutional rights and [the Parents'] . . . familial association rights. . . without prejudice." *Id*. at 92. Lastly, the district court rejected the City's argument that the GTCA shielded the City from liability on plaintiffs' negligence claim. The district court granted plaintiffs leave to amend their complaint within fourteen days.

Plaintiffs then filed two amended complaints, the second and most recent of which named as defendants only the City and Lauderback. The second amended complaint asserted claims against Lauderback under § 1983 for depriving Shaw of his right to equal protection and substantive due process under the Fourteenth Amendment, similar § 1983 claims against the City, and a state negligence claim against the City.

The City and Lauderback moved to dismiss the second amended complaint. On May 23, 2022, the district court granted the motion to dismiss. In doing so, the district court concluded that Lauderback was entitled to qualified immunity from plaintiffs' substantive due process claim because plaintiffs' second amended complaint failed to allege that Lauderback intended to harm Shaw during the high-speed pursuit of Hinson or created a situation in which Hinson violated Shaw's due process rights. The district court also concluded that Lauderback was entitled to qualified immunity from plaintiffs' equal protection claim because plaintiffs failed to sufficiently allege that Lauderback treated Shaw differently from others similarly situated. The district court also concluded that "a second opportunity" to amend the

claims against Lauderback "would be futile" and consequently "dismisse[d] the claims against . . . Lauderback with prejudice." *Id*. at 239. For essentially the same reasons, the district court also dismissed with prejudice plaintiffs' § 1983 claims against the City. Lastly, the district court concluded that there was "no persuasive reason to retain jurisdiction" over plaintiffs' state law negligence claim against the City, and therefore dismissed that claim without prejudice.[2] *Id*. at 241.

Following the district court's dismissal of their claims, plaintiffs then proceeded on two fronts. First, they appealed the district court's decision. On April 13, 2023, this court "reject[ed] each of plaintiffs' challenges" and affirmed the district court's decision. *Shaw II*, 2023 WL 2923962, at *1. In particular, this court "reject[ed] plaintiffs' argument that the district court erred in dismissing their state-law claim and should have instead transferred that claim to state court." *Id*. at *5. In doing so, this court noted that "[p]laintiffs point[ed] to no legal mechanism by which a federal district court can transfer state-law claims to a state court," and there was "no abuse of discretion in the district court's decision to decline supplemental jurisdiction over plaintiffs' state-law claim after it had dismissed all federal claims, particularly given that it warned plaintiffs it would do so in its first dismissal order." *Id*.

[2] Although plaintiffs filed a response to the defendants' motion to dismiss and discussed the merits of their state law negligence claim, they made no mention of the previous litigation history, nor did they assert that if the district court declined to exercise jurisdiction over that claim, they would be unable to refile it in state court.

In addition to appealing the district court's decision, plaintiffs also refiled their negligence claim against the City in Oklahoma state court. More specifically, on June 21, 2022, plaintiffs filed a petition in state court against the City alleging a single claim of negligence. The City responded by filing a motion to dismiss. The state district court granted the City's motion and dismissed the petition. Plaintiffs appealed to the Oklahoma Court of Civil Appeals (OCCA), which affirmed the state district court's decision in an unpublished opinion issued on January 30, 2023. *Shaw I*, slip op. at 2, 8. The OCCA stated, in relevant part:

> Here, the conduct underlying Appellants' negligence claim occurred on January 22, 2018. Accordingly, Appellants had one year, or until January 22, 2019, to file a notice of claim and, after the claim's denial, 180 days to file suit. The record provides Appellants filed suit against City and various defendants on October 7, 2019, asserting, inter alia, a "Negligence GTCA" claim. The petition, however, contained no assertions related to compliance with the GTCA provisions, including the date Appellants filed a notice of tort claim or its denial. This action was dismissed without prejudice for failure to prosecute on November 12, 2021, over two years after the petition was filed and almost four years after the date of the conduct underlying their GTCA claim. Accordingly, the time for filing a cause arising under the GTCA had expired when the court dismissed their action for failure to prosecute on November 12, 2021.
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> On November 29, 2021, Appellants availed themselves of the savings provision of 12 O.S. 2011, § 100 to refile the action in federal court within one year of the dismissal "otherwise than on the merits." After the federal suit was dismissed, Appellants filed a petition in state court on June 21, 2022, again alleging "Negligence GTCA" against the City. Section 100, however, only affords one refiling opportunity after the limitations has run. *See Sisk v. J.B. Hunt Transport, Inc.*, [81 P.3d 55, 56 n.3 (Okla. 2003)]; *Pointer v. Western Heights Indep. Sch. Dist.*, [919 P.2d 5, 6 (Okla. 1996)]. Accordingly, Appellants could not employ § 100's savings provision a second time to save the subsequent state action.

Id. at 5–6 (footnotes omitted). The OCCA also rejected plaintiffs' argument that "their petition was timely pursuant to the tolling provision in . . . 28 U.S.C. § 1367." *Id*. at 6. The OCCA explained that "[s]ection 1367(d) . . . 'can only operate to save a claim that initially comes before the federal court while the limitations controlling that claim is still running.'" *Id*. at 7 (quoting *Pointer*, 919 P.2d at 7). The OCCA in turn noted that "[i]n the instant case, the time for filing the GTCA claim had already expired when Appellants refiled the state claim in federal court," and thus "there were no limitations for § 1367(d) to toll." *Id*. "Accordingly," the OCCA concluded, "Appellants could not employ the tolling provision of § 1367(d) to save the subsequent state action." *Id*.

Plaintiffs did not file a petition for writ of certiorari with the Oklahoma Supreme Court.

On May 22, 2023, having failed to prevail on appeal in this court or in the Oklahoma state courts, plaintiffs returned to the district court and filed a motion pursuant to Fed. R. Civ. P. 60(b) to vacate the portion of the district court's May 23, 2022 order dismissing the plaintiffs' state law negligence claim against the City without prejudice. In their motion, plaintiffs asserted that they originally filed their negligence claim against the City "in state court on October 7, 2019." *Id*., Vol. II at 6. Plaintiffs further asserted that "[d]ue to a number of factors including continuing care and treatment of . . . Shaw," "personal impediments . . . of their counsel due to several personal illnesses and surgeries," and "the interference of the nationwide pandemic," the claim "could not be prosecuted immediately" and "was dismissed

without prejudice by the state court on November 12, 2021." *Id*. at 7. Plaintiffs asserted that "[b]y statute," they "were allowed one (1) year or until November 12, 2022, to refile their case." *Id*. (citing Okla. Stat. tit. 12, § 100). Plaintiffs then recounted the history of their federal litigation and asserted that, when the district court dismissed their negligence claim against the City without prejudice, they "believed they would still be able to file" that claim "prior to the November 2022 deadline." *Id*. at 8. However, "upon refiling" their claim in state court, "the City immediately filed a motion to dismiss," and "[t]he state court immediately dismissed the case indicating the federal court dismissal was a second dismissal and prohibited the refiling." *Id*. Plaintiffs asserted that they sought "review by the state appellate court[,] but were not allowed to brief and or provide any supplemental material other than what was already in the record," and that the state appellate court affirmed the dismissal of their claim. *Id*. at 10. Plaintiffs asserted that they were therefore "without any means to pursue their previous claims and [we]re severely prejudiced" as a result. *Id*. at 9. Plaintiffs argued that it was therefore "proper for the [district] court to allow reinstatement" of their claims pursuant to Rule 60(b)[3] in order "to avoid the unknown or knowable consequences of" plaintiffs "believing their state law claims needed to be filed separately from the related federal claims." *Id*. at 9–10.

On May 25, 2023, the district court issued an order denying plaintiffs' motion to vacate. The district court noted that when plaintiffs refiled their negligence claim

[3] Plaintiffs did not specify in their motion to vacate which subsection of Rule 60(b) they were relying on.

in state court, "[d]efendants sought dismissal based on expiration of the statute of limitations and the [state] court agreed, finding that Okla. Stat. tit. 12, § 100 permits only one refiling after the statute of limitations has expired." *Id*. at 16. The district court in turn noted that because "that refiling had occurred in this action, the [state] court concluded that Plaintiffs could not file the claim a second time outside the statute of limitations," and "[t]he state appellate court" affirmed that decision. *Id*. Turning to the merits of plaintiffs' motion, the district court noted that plaintiffs

> seemingly rel[ied] on Rule 60(b)(3) and (6), arguing that Defendants hid from the Court that Plaintiffs' state law claim would be barred by the statute of limitations if the Court declined supplemental jurisdiction and, alternatively, that the loss of their right to pursue the negligence claim in state court justifie[d] th[e] Court hearing the claim under supplemental jurisdiction.

Id. at 17. The district court "disagree[d] with both arguments." *Id*. The district court noted, to begin with, that "it was Plaintiffs—not Defendants—who had a duty to raise the statute of limitations concern," and that the district court had "warned Plaintiffs that if their amended complaint failed, it anticipated 'denying supplemental jurisdiction over the remaining state law claim.'" *Id*. (quoting ECF No. 9 at 14). "Thus," the district court noted, "when Defendants again asked the Court to decline supplemental jurisdiction over the state law claim, Plaintiffs should have presented their argument that dismissal would prevent them from returning to state court." *Id*. The district court further noted that "even had Plaintiffs presented the Court with such an argument[,] it would have been unpersuasive." *Id*. at 18. That is because, the district court noted, after plaintiffs' state court action was dismissed for failure to

prosecute, they "made the unilateral decision to present their one and only refiling" in federal court, which meant that the district court "had the discretion to decline supplemental jurisdiction over the state law claim." *Id*. "In sum," the district court noted, "it [wa]s Plaintiffs' decisions that led to their predicament and under such circumstances, the 'values of judicial economy, convenience, fairness, and comity' would not have persuaded th[e] Court to keep jurisdiction over the state law claim." *Id*. (quoting *Woodberry v. Bruce*, 109 F. App'x 370, 373 (10th Cir. 2004)).

Plaintiffs filed a notice of appeal on June 26, 2023.[4]

III

In their appeal, plaintiffs argue that the district court erred in three respects in denying their Rule 60(b) motion to reopen the case and allow their state law negligence claim against the City to proceed. We review the district court's denial of their Rule 60(b) motion for abuse of discretion. *Johnson v. Spencer*, 950 F.3d 680, 701 (10th Cir. 2020). "Given the lower court's discretion, the district court's ruling is only reviewed to determine if a definite, clear or unmistakable error occurred below." *Zurich N. Am. v. Matrix Serv., Inc.*, 426 F.3d 1281, 1289 (10th Cir. 2005) (internal quotation marks omitted).

Rule 60(b) provides as follows:

[4] The original opening brief that plaintiffs filed in this appeal was, according to defendants, identical to the opening brief that plaintiffs filed in *Shaw I* and did not mention Rule 60(b) or the district court's May 25, 2023 order. Plaintiffs, however, have since filed an amended opening brief that addresses the district court's denial of their Rule 60(b) motion.

> On motion and just terms, the court may relieve a party or its legal representative from a final judgment, order, or proceeding for the following reasons:
> (1) mistake, inadvertence, surprise, or excusable neglect;
> (2) newly discovered evidence that, with reasonable diligence, could not have been discovered in time to move for a new trial under Rule 59(b);
> (3) fraud (whether previously called intrinsic or extrinsic), misrepresentation, or misconduct by an opposing party;
> (4) the judgment is void;
> (5) the judgment has been satisfied, released, or discharged; it is based on an earlier judgment that has been reversed or vacated; or applying it prospectively is no longer equitable; or
> (6) any other reason that justifies relief.

Fed. R. Civ. P. 60(b). "Relief under Rule 60(b) is extraordinary and may only be granted in exceptional circumstances." *Bud Brooks Trucking, Inc. v. Bill Hodges Trucking Co.*, 909 F.2d 1437, 1440 (10th Cir. 1990).

In "Proposition I" of their opening brief, plaintiffs argue that "the district court erred by disregarding the unfairness created by not providing a clarifying order or reopening the case in the interest of justice." Aplt. Br. at 7 (capitalization omitted). Plaintiffs do not explain, however, what they mean by "not providing a clarifying order." *Id*. To the extent they are asserting that the district court failed to explain its reasons for denying their Rule 60(b) motion, we reject that assertion. In our view, the district court's decision sufficiently outlined its reasons for denying plaintiffs' motion.

As for plaintiffs' argument that the district court erred by not reopening the case "in the interest of justice," plaintiffs assert that to avoid splitting a single cause of action or claim they "were essentially required" by both federal and Oklahoma law "to file their valid state tort claim with their federal claims." *Id*. at 12. Plaintiffs in

turn assert that they have "me[t] the conditions for [equitable] tolling" because they "ha[ve] been pursuing [their] rights diligently" and "that some extraordinary circumstance stood in [their] way." *Id*. at 14. We reject these arguments. As the district court noted, it was plaintiffs who "made the unilateral decision to present their one and only refiling in" federal district court, rather than to refile in state court. Aplt. App., Vol. II at 18. Further, "when Defendants . . . asked the" district court "to decline supplemental jurisdiction over the state law claim, Plaintiffs should have presented their argument that dismissal would prevent them from returning to state court," but they failed to do so. *Id*. at 17. Finally, plaintiffs are not entitled to equitable tolling because they have not diligently pursued their claims (as the district court noted, they "filed their original action in state court and then let it sit unattended for two years") and have not identified any extraordinary circumstance that stood in the way of pursuing their claims. *Id*. at 18.

In "Proposition II" of their opening brief, plaintiffs argue that "the district court erred by making a presumption that [plaintiffs] had known that the state court would raise a dismissal rule that conflicted with the provisions of 28 U.S.C. § 1367(d) and not providing an opportunity to address the district court's erroneous conclusions." Aplt. Br. at 16 (capitalization omitted). It is not entirely clear what plaintiffs are attempting to argue. To the extent they disagree with, and are effectively seeking to modify or set aside, the OCCA's interpretation of § 1367(d) and its conclusion that plaintiffs' negligence claim was time-barred, the *Rooker-Feldman* doctrine precludes us from reviewing the OCCA's decision. *See*

Graff v. Aberdeen Enterprizes, II, Inc., 65 F.4th 500, 514–515 (10th Cir. 2023). To the extent that plaintiffs are simply asserting that the district court applied an improper presumption or failed to provide them with an adequate opportunity to argue their position, we reject that assertion because it is belied by the record in this case.

In "Proposition III" of their opening brief, plaintiffs argue that "the district court erred by not providing any relief from its final order even though there was a clear mistake or inadvertence, surprise or excusable neglect in discovering the unanticipated adverse effect of declining jurisdiction." Aplt. Br. at 19 (capitalization omitted). Again, it is not clear what plaintiffs are attempting to argue. If they are asserting that the district court should have granted relief under Rule 60(b)(1) based upon "mistake, inadvertence, surprise, or excusable neglect," we reject that argument. Fed. R. Civ. P. 60(b)(1). We have held that Rule 60(b)(1) "provides for the reconsideration of judgments only where: (1) a party has made an excusable litigation mistake or an attorney in the litigation has acted without authority from a party, or (2) where the judge has made a substantive mistake of law or fact in the final judgment or order." *Cashner v. Freedom Stores, Inc.*, 98 F.3d 572, 576 (10th Cir. 1996). "Excusable litigation mistakes," we have held, "are not those which were the result of a deliberate and counseled decision by the complaining party." *Yapp v. Excel Corp.*, 186 F.3d 1222, 1231 (10th Cir. 1999). "Rather, the kinds of mistakes remediable under a Rule 60(b)(1) motion are litigation mistakes that a party could not have protected against, such as counsel acting without authority." *Id*. "Thus, a party

who simply misunderstands or fails to predict the legal consequences of his deliberate acts cannot later, once the lesson is learned, turn back the clock to undo those mistakes." *Id*. Nothing in the record in this case persuades us that plaintiffs' counsel made an excusable litigation mistake or that the district court made a substantive mistake of law or fact.

IV

The decision of the district court is AFFIRMED.

Entered for the Court

Mary Beck Briscoe
Circuit Judge