FILED
United States Court of Appeals
Tenth Circuit

September 15, 2023

Christopher M. Wolpert
Clerk of Court

UNITED STATES COURT OF APPEALS

FOR THE TENTH CIRCUIT

STEVE GOLDSMITH,

Plaintiff - Appellant,

v.

UNITED STATES OF AMERICA,

Defendant - Appellee.

No. 23-7002
(D.C. No. 6:22-CV-00036-EFM)
(E.D. Okla.)

ORDER AND JUDGMENT*

Before **TYMKOVICH**, **EID**, and **CARSON**, Circuit Judges.

Steve Goldsmith appeals the dismissal of his action against the United States, which he brought under the Federal Tort Claims Act (FTCA), 28 U.S.C. §§ 1346(b), 2680(h), and the Department of Veterans Affairs (VA) Immunity Statute, 38 U.S.C § 7316. The district court dismissed the action for lack of subject matter jurisdiction, ruling that Mr. Goldsmith abandoned one of his claims and the rest were barred by sovereign immunity. Exercising jurisdiction under 28 U.S.C. § 1291, we affirm.

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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 This order and judgment is not binding precedent, except under the doctrines of law of the case, res judicata, and collateral estoppel.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.

I

Mr. Goldsmith alleged an unidentified VA staff member wrongfully placed a "Red Flag" note in his patient record. Aplt. App. at 23, ¶ 5. He averred the red flag restricted his access to medical treatment and caused him embarrassment, humiliation, and emotional anguish. He also alleged an unidentified VA staff member falsely wrote in his medical file that he sent pornographic material through the VA email system and made a complaint against his podiatrist. Based on these allegations, Mr. Goldsmith asserted claims for negligence, intentional infliction of emotional distress (IIED), defamation (both slander and libel), "falsifying government documents," "malicious abuse of power," and deprivation of his constitutional right to free speech. *Id.* at 24-25, ¶ 8. He asserted the district court had jurisdiction to adjudicate these claims under the FTCA and the VA Immunity Statute.

The government moved to dismiss under Federal Rule of Civil Procedure 12(b)(1) based on sovereign immunity and Federal Rule of Civil Procedure 12(b)(6) for failure to state a claim. Over Mr. Goldsmith's objection, the district court granted the motion. The district court ruled that Mr. Goldsmith abandoned his negligence claim by failing to respond to the government's Rule 12(b)(6) arguments. The district court also ruled that his federal free-speech claim was not cognizable under the FTCA because the FTCA does not waive sovereign immunity for federal constitutional violations. *See* Aplt. App. at 56 & n.11 (citing *FDIC v. Meyer*, 510 U.S. 471, 477-78 (1994)). Of the remaining claims, the district court determined that all but the IIED claim were barred under the FTCA's intentional torts exception, 28 U.S.C. § 2680(h), and the VA Immunity Statute

did not provide an alternative waiver of immunity. As for the IIED claim, the district court observed that it did not expressly fall under the intentional torts exception, but the allegations were ambiguous as to whether the IIED claim arose from the other intentional tort claims, which were barred under the intentional torts exception. Construing that ambiguity in favor of sovereign immunity, the district court concluded that the IIED claim did arise from the other claims and was barred as well. Thus, the district court dismissed the action for lack of jurisdiction.

II

As an initial matter, we note that Mr. Goldsmith does not address the district court's determination that he abandoned his negligence claim by failing to respond to the government's Rule 12(b)(6) arguments. *See Nixon v. City & Cnty. of Denver*, 784 F.3d 1364, 1366 (10th Cir. 2015) ("The first task of an appellant is to explain to us why the district court's decision was wrong."). Instead, he argues for the first time that the district court had jurisdiction over his negligence claim because it was intertwined with his intentional tort claims. But "absent extraordinary circumstances, arguments raised for the first time on appeal are waived." *Little v. Budd Co.*, 955 F.3d 816, 821 (10th Cir. 2020). Although Mr. Goldsmith cites the plain-error standard of review, suggesting he prefers that we treat this new argument as forfeited rather than waived, he does not engage in a substantive plain-error analysis, which waives the issue. *See Richison v. Ernest Grp., Inc.*, 634 F.3d 1123, 1127-28, 1130-31 (10th Cir. 2011) (distinguishing between forfeited and waived theories and explaining that forfeited theories may be considered under the plain-error standard but the failure to argue for plain error on appeal constitutes waiver).

Mr. Goldsmith also waived any challenge to the dismissal of his free-speech claim by failing to address it in his opening brief. *See Bronson v. Swensen*, 500 F.3d 1099, 1104 (10th Cir. 2007) ("[W]e routinely have declined to consider arguments that are not raised, or are inadequately presented, in an appellant's opening brief.").

This leaves Mr. Goldsmith's remaining claims for IIED, slander, libel, falsification of government documents (which the district court construed as a misrepresentation claim), and malicious abuse of power (which the district court seems to have likened to a claim for abuse of process).[1] The district court dismissed these claims based on sovereign immunity. "Sovereign immunity is jurisdictional in nature." *Meyer*, 510 U.S. at 475. We review the district court's jurisdictional determination de novo. *Ingram v. Faruque*, 728 F.3d 1239, 1243 (10th Cir. 2013).

"[S]overeign immunity prohibits suits against the United States except in those instances in which it has specifically consented to be sued." *Id.* at 1245 (internal quotation marks omitted). The FTCA is one instance in which Congress has granted "a limited waiver of the federal government's sovereign immunity from suit." *Estate of Trentadue ex rel. Aguilar v. United States*, 397 F.3d 840, 852 (10th Cir. 2005).

> The prerequisite for liability under the FTCA is a "negligent or wrongful act or omission of any employee of the Government while acting within the scope of his office or employment, under circumstances where the United States, if a private person, would be liable to the claimant in accordance with the law of the place where the act or omission occurred."

[1] The district court treated the claims for falsification of government documents and malicious abuse of power as intentional tort claims. Mr. Goldsmith does not challenge the district court's interpretation of these claims and, in fact, he contends these claims are "components of [the other] torts he alleged." Aplt. Opening Br. at 10-11.

Id. (quoting 28 U.S.C. § 1346(b)). However, the FTCA excepts from this waiver of immunity certain intentional torts, including "[a]ny claim arising out of . . . abuse of process, libel, slander, [and] misrepresentation." 28 U.S.C. § 2680(h).

Complementing the FTCA, "[t]he VA Immunity Statute applies the remedy available against the United States under the FTCA to damages arising from the provision of medical services by health care employees of the VA." *Ingram*, 728 F.3d at 1245. But the VA Immunity Statute also states the intentional torts exception, § 2680(h), "shall not apply to any claim arising out of a negligent or wrongful act or omission of any [health care employee] *in furnishing medical care or treatment* . . . while in the exercise of such person's duties in or for the [VA]." 38 U.S.C. § 7316(f) (emphasis added). This means the intentional torts exception "does not bar application of the FTCA to intentional tort claims arising out of the conduct of VA medical personnel within the scope of 38 U.S.C. § 7316(f)." *Ingram*, 728 F.3d at 1246 (brackets and internal quotation marks omitted).

Given this statutory framework, Mr. Goldsmith's reliance on the FTCA and the VA Immunity Statute is misplaced because neither statute waives the government's immunity from his claims. The FTCA is unavailing because Mr. Goldsmith's intentional tort claims are barred by § 2680(h), as is his IIED claim, which arises from those claims, *see United States v. Shearer*, 473 U.S. 52, 55 (1985) (plurality opinion) ("Section 2680(h) does not merely bar claims *for* [the enumerated intentional torts]; in sweeping language it excludes any claim *arising out of* [the enumerated intentional torts]."). Although an IIED claim is not enumerated under § 2680(h), the district court explained that Mr. Goldsmith

did not plead any allegations to support an independent factual basis for his claim, and thus the district court concluded it arose from his other barred claims. Mr. Goldsmith does not address that conclusion on appeal, giving us no reason to revisit it.[2]

The VA Immunity Statute is also unavailing. Mr. Goldsmith insists the VA Immunity Statute expands the remedy provided by the FTCA to his otherwise-barred intentional tort claims. But the district court correctly rejected that argument, recognizing that Mr. Goldsmith did not allege VA staff members engaged in tortious conduct "in furnishing medical care or treatment," as required by 38 U.S.C. § 7316(f). *Cf. Ingram*, 728 F.3d at 1250 (concluding claim of false arrest or false imprisonment fell within the scope of § 7316(f) because the plaintiff alleged he was wrongfully detained in a psychiatric ward by VA medical personnel during the course of his mental health treatment). Rather, he alleged the VA staff member's placement of the red flag note in his patient record "*restricted* [his] access to medical treatment." Aplt. App. at 23, ¶ 5 (emphasis added). He also alleged "a VA staff member wrote untrue entries into his VA medical file," which "cause[d] [him] to be subjected to embarrassing and humiliating special treatment whenever he seeks medical treatment." *Id.* at 24, ¶ 7. These allegations

[2] Mr. Goldsmith's opening brief tracks, almost verbatim, his response to the government's motion to dismiss filed in the district court. Because his appellate arguments are in large measure a copy of his arguments presented to the district court, they fail to fully confront the district court's grounds for dismissal. *See Semsroth v. City of Wichita*, 555 F.3d 1182, 1186 n.5 (10th Cir. 2009) (noting appellants' brief, which was a verbatim copy of their summary judgment response, "fail[ed] to address in a direct way the decision under review and, as a result, d[id] not effectively come to grips with the district court's analysis of the deficiencies in their case").

do not indicate the complained-of conduct occurred during the course of his medical treatment, and thus the VA Immunity Statute does not apply, and sovereign immunity bars his claims.[3]

III

Mr. Goldsmith fails to show reversible error in the district court's dismissal for lack of jurisdiction. We therefore affirm the district court's judgment.

Entered for the Court

Allison H. Eid
Circuit Judge

[3] In his reply brief, Mr. Goldsmith argues for the first time on appeal that a medical professional's practice of writing entries into a medical record, or "charting," is an integral part of providing medical services that qualifies as "furnishing medical care or treatment." Reply Br. at 2 (internal quotation marks omitted). The problem with this argument, however, is that by waiting to raise it for the first time on appeal in his reply brief, Mr. Goldsmith waived it. *See In re Motor Fuel Temperature Sales Pracs. Litig.*, 872 F.3d 1094, 1112 n.5 (10th Cir. 2017).