FILED
United States Court of Appeals
Tenth Circuit

February 9, 2018

Elisabeth A. Shumaker
Clerk of Court

UNITED STATES COURT OF APPEALS

FOR THE TENTH CIRCUIT

ESTATE OF BETTY LOU McDERMED, Deceased, by and through DIANE L. MCDERMED, ADMINISTRATOR, as her representative; PAUL C. MCDERMED; GEORGIA LEE IOCCO, individually,

Plaintiffs - Appellants,

v.

FORD MOTOR COMPANY, a Delaware corporation,

Defendant - Appellee.

No. 17-3105
(D.C. No. 2:14-CV-02430-CM)
(D. Kan.)

ORDER AND JUDGMENT*

Before **LUCERO**, **KELLY**, and **MATHESON**, Circuit Judges.

The estate of Betty McDermed, by and through its representative Diane McDermed, along with Betty McDermed's children, Paul McDermed and Georgia Iocco (collectively "the McDermeds"), brought a product liability action against the Ford Motor Company ("Ford") following Betty McDermed's death in a car accident. After Ford filed two motions to exclude the McDermeds' expert witnesses

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* This order and judgment is not binding precedent, except under the doctrines of law of the case, res judicata, and collateral estoppel.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

("*Daubert*[1] motions"), the McDermeds filed requests for extensions of time to respond (the "Extension Motions"), but these requests were filed late. While the McDermeds' Extension Motions were pending, the McDermeds filed late responses to the *Daubert* motions. The district court denied the Extension Motions and excluded the McDermeds' late responses, granted Ford's *Daubert* motions, and granted summary judgment for Ford. The McDermeds then filed a motion to reconsider, alter, and amend the court's orders ("Reconsideration Motion"), which the court denied.

The McDermeds appeal the district court's denial of their Reconsideration Motion. They preserve only their argument that the district court erred in determining the Extension Motions were filed out of time. Exercising jurisdiction under 28 U.S.C. § 1291, we affirm.

I. **BACKGROUND**

Betty McDermed died after suffering severe injuries in a 2012 car accident, in which she had been a passenger in a Ford car. The McDermeds sued Ford in the United States District Court for the District of Kansas, alleging strict liability based on a design defect and failure to warn. This appeal concerns motions made by both parties after most of the discovery had taken place.

On February 1, 2016, Ford filed three motions: a motion for summary judgment and two motions to exclude expert testimony under *Daubert v. Merrell Dow Pharmaceuticals, Inc.*, 509 U.S. 579 (1993).

[1] *Daubert v. Merrell Dow Pharmaceuticals, Inc.*, 509 U.S. 579 (1993).

On February 18, 2016, the McDermeds filed the Extension Motions to request additional time to respond to the *Daubert* motions. They acknowledged that their Extension Motions were untimely because their responses had been due on February 15 under Federal Rule of Civil Procedure 6 and District of Kansas Rule 6. They explained that they had missed the deadline because their counsel had consulted an outdated version of the Federal Rules of Civil Procedure. Ford opposed the Extension Motions as untimely filed. On March 14, 2016, before the district court had ruled on the Extension Motions, the McDermeds filed their responses to Ford's three motions.

The district court denied the Extension Motions, granted Ford's *Daubert* motions, and ultimately granted summary judgment for Ford. The court explained that in the District of Kansas, the court must find "excusable neglect" to grant a motion for extension of time that was filed after the deadline to file a response had passed. *Estate of McDermed v. Ford Motor Co.*, No. 14-2430-CM, 2016 WL 4128440, at *3 (D. Kan. Aug. 3, 2016). It considered four factors to determine whether the neglect was excusable:

> (1) the danger of prejudice to the opposing party;
>
> (2) the length of the delay and its potential impact on judicial proceedings;
>
> (3) the reason for the delay, including whether it was within the reasonable control of the movant; and
>
> (4) whether the movant acted in good faith.

Id. at *3-4 (quoting *Pioneer Inv. Servs. Co. v. Brunswick Assocs. L.P.*, 507 U.S. 380, 394-95 (1993)). The court found the danger of prejudice to Ford was low, but the other three factors weighed against a finding of excusable neglect. *Id.* at *4-5.

Because the McDermeds had not filed a timely response to Ford's *Daubert* motions, the district court considered them to be unopposed under District of Kansas Rule 7.4, and granted the motions to exclude the McDermeds' experts. *Id.* at *6. On the same day, the court granted summary judgment for Ford because the McDermeds' claims failed for lack of any "admissible evidence regarding the alleged defect or dangerous conditions" of the car and how those defects or conditions related to the decedent's injuries and death. *Estate of McDermed v. Ford Motor Co.*, No. 14-2430-CM, 2016 WL 4142107, at *3 (D. Kan. Aug. 3, 2016).

The McDermeds filed the Reconsideration Motion. They asked the district court to alter, amend, or set aside both the order on the *Daubert* motions and the summary judgment order under Federal Rules of Civil Procedure 59(e) and 60(b) and District of Kansas Rule 7.3. They argued for the first time that the *Daubert* motions were "dispositive," which would mean that under Kansas Rule 6.1, the McDermeds should have had 21 rather than 14 days to respond to them or file the Extension Motions. ROA, Vol. 9 at 506-07.

The district court denied the McDermeds' Reconsideration Motion. *See Estate of McDermed v. Ford Motor Co.*, No. 14-2430-CM, 2017 WL 1492931 (D. Kan. Apr. 26, 2017) ("Reconsideration Order"). First, it denied reconsideration to "correct clear error or prevent manifest injustice" under Rule 59(e) or District of Kansas Rule 7.3(b). *Id.* at

*3-4. The court said the McDermeds waived their primary argument—that the *Daubert* motions were dispositive motions with a 21-day response period—because they raised it for the first time in their Reconsideration Motion. *Id.* at *3. But even if the argument had been timely raised, "it would not have been clear error for the court to hold these motions were non-dispositive." *Id.* Second, the court also denied relief under Federal Rule of Civil Procedure 60(b) because the McDermeds had "fail[ed] to identify sufficient grounds for relief." *Id.* at *5.

II. **DISCUSSION**

We have jurisdiction to address only the Reconsideration Order because the McDermeds' Notice of Appeal specifically identified only that order and did not mention the underlying *Daubert* and summary judgment orders. We address only the Reconsideration Order's Rule 59(e)[2] determination because the McDermeds have waived any arguments about the Rule 60(b) determination. We conclude the district court did not abuse its discretion in denying relief under Rule 59(e).[3]

[2] The district court considered the McDermeds' arguments under Federal Rule of Civil Procedure 59(e) and District of Kansas Rule 7.3(b) together because the grounds justifying relief under either rule "are essentially the same." Reconsideration Order at *3. The McDermeds have not challenged this treatment on appeal, nor have they attempted to distinguish arguments made under the two rules. We therefore follow the district court and consider these arguments together. We refer to arguments made under both rules as Rule 59(e) arguments.

[3] We are not fully convinced the McDermeds' arguments are adequately briefed. "[W]e routinely have declined to consider arguments that are not raised, or are inadequately presented, in an appellant's opening brief." *Schneider v. City of Grand Junction Police Dept.*, 717 F.3d 760, 773 (10th Cir. 2013) (quotations omitted). And "appellant[s] must present [their] claims in a way that does not compel us to scavenge through [their] brief for traces of argument." *United States v.*

A. ***Scope of Appeal***

Because the McDermeds' Notice of Appeal lists only the Reconsideration Order for review and there is no clear intent to appeal the other orders, our jurisdiction is limited to that issue. A notice of appeal must "designate the judgment, order, or part thereof being appealed." Fed. R. App. P. 3(c)(1)(B). This court "lack[s] jurisdiction to review orders not identified in the notice of appeal or its functional equivalent." *Lebahn v. Owens*, 813 F.3d 1300, 1304 n.2 (10th Cir. 2016) (quotations omitted).

An appeal from the denial of a Rule 59 motion may be sufficient to permit consideration of the merits of the underlying orders "if the appeal is 'otherwise proper, the intent to appeal from the final judgment is clear, and the opposing party was not misled or prejudiced.'" *Artes-Roy v. City of Aspen*, 31 F.3d 958, 961 n.5 (10th Cir. 1994) (quoting *Grubb v. FDIC*, 868 F.2d 1151, 1154 n.4 (10th Cir. 1989)). Courts have found clear intent to appeal from underlying judgments when parties brief and argue the merits of the underlying judgment. *See Foman v. Davis*, 371 U.S.

Fisher, 805 F.3d 982, 991 (10th Cir. 2015). Although the McDermeds' briefs are poorly organized and unclear, we address the denial of the Rule 59(e) motion because those arguments are the most decipherable.

The McDermeds do not argue in their briefs that the district court erred in denying relief under Rule 60(b). Although their opening brief includes scattered references to "fraud on the court," the 60(b) argument raised in the district court, these references do not satisfy Federal Rule of Appellate Procedure 28(a). This rule requires an appellant's argument to contain "a concise statement . . . identifying the rulings presented for review" and an argument that presents "appellant's contentions and the reasons for them." Fed. R. App. P. 28(a)(6), (a)(8). The McDermeds did not satisfy this requirement. We therefore consider the Rule 60(b) issue waived as inadequately briefed. *See Fisher*, 805 F.3d at 991 ("[A]n issue mentioned in a brief on appeal, but not addressed, is waived.") (quotations omitted).

178, 181 (1962) (intent to appeal earlier orders was clear in part because the parties had briefed the merits of the earlier judgment); *Wiest v. Lynch*, 710 F.3d 121, 127-28 (3d Cir. 2013) (same); *see also Moran Vega v. Cruz Burgos*, 537 F.3d 14, 19 (1st Cir. 2008) (considering the record as a whole to determine whether the appellant had manifested an intent to appeal the underlying order).

The McDermeds' Notice of Appeal states they are appealing "the final Judgment entitled Memorandum and Order denying Plaintiffs'. . . Motion for Reconsideration, and . . . Motion for New Trial entered in this action on April 24, 2017." ROA, Vol. 10 at 636. This language unambiguously refers only to the district court's Reconsideration Order and reflects no intent to appeal the summary judgment order or any earlier orders. Nor do the McDermeds' briefs to this court clearly indicate that they are seeking review of the *Daubert* and summary judgment orders. In its response brief, Ford understood the McDermeds had appealed only from the Reconsideration Order. This court raised the scope of our appellate jurisdiction at oral argument. The McDermeds did not respond to either opportunity to argue that we have jurisdiction over the underlying orders. We therefore lack jurisdiction to consider the underlying orders because they were not included in the Notice of Appeal and there is no clear intent to appeal them. We consider the McDermeds' arguments only as they concern the Reconsideration Order.[4]

[4] For this reason, we decline to consider the McDermeds' argument that they were improperly penalized for untimely filings. The alleged "harsh penalty" was the summary judgment order. Aplt. Br. at 40. We do not have jurisdiction to review this order because it was not included in the Notice of Appeal.

B. *Standard of Review*

We review a district court's denial of a Rule 59(e) motion for abuse of discretion. *See Ysais v. Richardson*, 603 F.3d 1175, 1180 (10th Cir. 2010). "We will not disturb such a decision unless we have a definite and firm conviction that the lower court made a clear error of judgment or exceeded the bounds of permissible choice in the circumstances." *Id.* (quoting *Barber ex rel. Barber v. Colo. Dep't of Revenue*, 562 F.3d 1222, 1228 (10th Cir. 2009)).[5]

C. *Legal Background*

We briefly describe the Rule 59(e) standard and then discuss District of Kansas Rule 6.1, which governs time limits for filing responses to motions.

1. **Rule 59(e)**

Rule 59(e) authorizes "[a] motion to alter or amend a judgment," Fed. R. Civ. P. 59(e), which may be granted when "the court has misapprehended the facts, a party's position, or the law." *United States v. Christy*, 739 F.3d 534, 539 (10th Cir. 2014). "Grounds warranting a motion to reconsider include (1) an intervening change in the controlling law, (2) new evidence previously unavailable, and (3) the

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[5] The McDermeds suggest that our standard of review may be different because the timing rules at issue are "clearly jurisdictional and not procedural." Aplt. Br. at 25. They are incorrect. Federal Rule of Civil Procedure 6, which governs computing time periods and extending time, "does not alter federal subject matter jurisdiction in any sense; it is a procedural rule governing procedural matters and the extension of certain filing periods." C. Wright & A. Miller, 4B Federal Practice & Procedure: Civil § 1161 (4th ed., Apr. 2017 update). The local version of Rule 6, District of Kansas Rule 6.1, is likewise not jurisdictional.

need to correct clear error or prevent manifest injustice." *Servants of Paraclete v. Does*, 204 F.3d 1005, 1012 (10th Cir. 2000).

This court "[does] not ordinarily entertain arguments made for the first time in a motion to alter or amend the judgment." *Sprint Nextel Corp. v. Middle Man, Inc.*, 822 F.3d 524, 535 (10th Cir. 2016); *id.* at 536 (holding "the district court did not abuse its discretion in declining to alter or amend the judgment based on" an argument made for the first time in a Rule 59(e) motion).

2. **Kansas Rule 6.1**

District of Kansas Rule 6.1 governs the time for filing responses to motions. Motions for extensions of time to file responses must be filed "before the specified time expires." D. Kan. R. 6.1(a). A court will not grant extensions requested after the time expires unless the requesting party has shown "excusable neglect." *Id*.

The rule specifies the following time periods to file responses to motions:

> (1) *Non-dispositive motions.* Responses to non-dispositive motions (motions other than motions to dismiss, motions for summary judgment, motions to remand, or motions for judgment on the pleadings) must be filed and served within 14 days. . . .
>
> (2) *Dispositive motions.* Responses to motions to dismiss, motions for summary judgment, motions to remand, or motions for judgment on the pleadings must be filed and served within 21 days. . . .

Id. 6.1(d).

D. ***Analysis***

The district court did not abuse its discretion by denying the Reconsideration Motion. It properly refused to consider arguments raised for the first time in this

motion. Moreover, those arguments were meritless because *Daubert* motions are non-dispositive under District of Kansas Rule 6.1(d). The McDermeds' Extension Motions were therefore filed too late.

The district court properly declined to consider arguments raised for the first time in the McDermeds' Rule 59(e) motion. In their memoranda supporting the Extension Motions, the McDermeds acknowledged that these motions were untimely. They nonetheless asked the court to find excusable neglect and grant the extensions. In their Reconsideration Motion, the McDermeds argued for the first time that their Extension Motions were timely because the *Daubert* motions were "dispositive" motions. The district court concluded the McDermeds "impermissibly" raised these arguments for the first time in the Reconsideration Motion. Reconsideration Order at *3. We agree. Rule 59(e) motions should not be used to advance arguments that the McDermeds could have raised previously. *See Sprint Nextel Corp.*, 822 F.3d at 535-36. The district court thus could have refused to consider the "dispositive motion" argument.

The district court nonetheless explained why the newly raised argument lacked merit. The McDermeds' Reconsideration Motion invoked only one Rule 59 rationale: the "need to correct clear error or prevent manifest injustice." ROA, Vol. 9 at 507. As the district court noted, District of Kansas Rule 6.1(d) lists the types of dispositive motions: "motions to dismiss, motions for summary judgment, motions to remand, or motions for judgment on the pleadings." D. Kan. R. 6.1(d). All other

motions are non-dispositive. *Id.* Because *Daubert* motions are not listed as dispositive motions, they are non-dispositive.

The McDermeds therefore had 14 days to file a response to the *Daubert* motions or to file requests for extensions of time to file those responses. *See id.* 6.1(a). Their Extension Motions were filed on February 18, 2016—17 days after the *Daubert* motions were filed. The district court therefore correctly determined the McDermeds filed their Extension Motions late and did not abuse its discretion.[6]

III. **CONCLUSION**

We affirm the district court's denial of the McDermeds' Rule 59(e) motion.

Entered for the Court

Scott M. Matheson, Jr.
Circuit Judge

[6] The McDermeds argue that our decision in *Rimbert v. Eli Lilly & Co.*, 647 F.3d 1247 (10th Cir. 2011), shows that the *Daubert* motions were dispositive. But that case originated in the District of New Mexico. District of Kansas Rule 6.1 controls here.