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United States Court of Appeals
Tenth Circuit

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Christopher M. Wolpert
Clerk of Court

UNITED STATES COURT OF APPEALS

FOR THE TENTH CIRCUIT

CELIA GONZALEZ DE GOMEZ, as surviving spouse and personal representative of the Estate of Luis Gomez Ciprez,

Plaintiff - Appellant,

v.

ADAMS COUNTY; ADAMS COUNTY SHERIFF'S OFFICE; ADAMS COUNTY WORK RELEASE; RICHARD A. REIGENBORN; VINCENT E. SAUTER; CORY A. WILLS, in their individual and official capacities; WELLPATH; JOHN DOES, 1-10,

Defendants - Appellees.

No. 22-1199
(D.C. No. 1:20-CV-01824-CMA-NYW)
(D. Colo.)

ORDER AND JUDGMENT*

Before **MATHESON**, **BACHARACH**, and **ROSSMAN**, Circuit Judges.

Celia Gonzalez de Gomez, the surviving spouse of Luis Gomez Ciprez and the personal representative of his Estate, appeals the district court's entry of judgment

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* After examining the briefs and appellate record, this panel has determined unanimously to honor the parties' request for a decision on the briefs without oral argument. *See* Fed. R. App. P. 34(f); 10th Cir. R. 34.1(G). The case is therefore 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 This order and judgment is not binding precedent, except under the doctrines of law of the case, res judicata, and collateral estoppel.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.

against her on claims arising from Mr. Gomez Ciprez's death while incarcerated at the Adams County Detention Facility (Jail). Exercising jurisdiction under 28 U.S.C. § 1291, we affirm.

I. BACKGROUND

Mr. Gomez Ciprez pleaded guilty to a criminal charge and was sentenced to a 120-day work-release program through the Jail. On his application for the program, he listed prescription medications he was taking to treat liver cirrhosis, hepatic encephalopathy, and hypertension. He also provided defendants with a schedule for his medications. According to the complaint in this action, filed through counsel, defendants failed to properly administer Mr. Gomez Ciprez's medications while he was on the work release program, causing his ammonia levels to rise, several hospitalizations, several surgeries, and ultimately his death.

Ms. Gonzalez de Gomez asserted claims under 42 U.S.C. § 1983 alleging the denial of medical care violated the Eighth and Fourteenth Amendments. She also asserted state-law claims for wrongful death and negligent failure to train or supervise. Defendant Wellpath, the medical provider at the Jail, filed a motion to dismiss under Federal Rule of Civil Procedure 12(b)(6). The district court adopted a magistrate judge's recommendation to grant the motion and dismissed the claims against Wellpath. The remaining defendants (Adams County Defendants[1]) filed a

[1] The Adams County Defendants are Adams County, Adams County Sheriff's Office, then-Adams County Sheriff Richard Reigenborn, and two employees of the work release program, Vincent E. Sauter and Cory Wills. Although the work release

motion for summary judgment, which the district court granted. The district court also denied Ms. Gonzalez de Gomez's motion for leave to amend the complaint because the motion was untimely and she failed to show good cause to excuse its lateness. This timely appeal followed.

II. DISCUSSION

We will address Ms. Gonzalez de Gomez's appellate arguments by examining each of the district court's rulings they concern. We first discuss the ruling granting Wellpath's motion to dismiss, then the denial of the motion to amend, and finally the order granting the Adams County Defendants' motion for summary judgment.

A. Motion to dismiss

1. District court proceedings

On February 23, 2021, the magistrate judge recommended granting Wellpath's motion to dismiss because Ms. Gonzalez de Gomez failed to plausibly allege Wellpath was liable under any of the theories she had advanced against it.[2] The recommendation provided a clear warning that the failure to file written objections to the recommendation within fourteen days would "result in a waiver of the right to appeal from a judgment of the district court based on the proposed findings of fact, legal conclusions, and recommendations of the magistrate judge." Aplt. App.

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program was named as a separate defendant, the district court determined that it was not a separate and distinct entity from the Sheriff's Office.

[2] Those theories were municipal liability under *Monell v. Department of Social Services*, 436 U.S. 658 (1978), violation of substantive due process, and negligent failure to train or supervise.

at 215 n.7. However, Ms. Gonzalez de Gomez's counsel filed no objections. Instead, on the day objections were due, March 9, 2021, counsel filed a motion for leave to amend the complaint, a supporting memorandum, and an amended complaint. On April 2, the district court denied the motion and struck the amended complaint for failure to comply with local court rules and electronic-filing rules. The same day, Ms. Gonzalez de Gomez's counsel filed a motion for leave to amend in proper form and a supporting memorandum. The district court referred the motion to the magistrate judge.

On April 22, while the motion for leave to amend was still pending, the district court ruled on the motion to dismiss. Noting the lack of objections to the magistrate judge's recommendation, the court reviewed it for clear error and found none. The court therefore adopted the recommendation as the court's order, granted the motion to dismiss, and dismissed the claims against Wellpath without prejudice.[3]

2. Application of firm waiver rule

On appeal, Ms. Gonzalez de Gomez challenges the dismissal of her claims against Wellpath. But because she failed to file any objections to the magistrate judge's recommendation, our firm waiver rule dictates that she has waived appellate review of the district court's dismissal of those claims unless she can show that "the

[3] The district court later denied the motion for leave to amend, a ruling we take up in the subsection II.B of our decision.

interests of justice require review," *Morales-Fernandez v. INS*, 418 F.3d 1116, 1119 (10th Cir. 2005) (internal quotation marks omitted).[4]

"[T]he interests of justice exception in counseled cases is a narrow one." *Key Energy Res. Inc. v. Merrill (In re Key Energy Res. Inc.)*, 230 F.3d 1197, 1200 (10th Cir. 2000). In "counseled, civil, nonhabeas cases," we do not consider "the merits of the underlying case." *Id.* Instead, we "focus . . . on the facts that purport to excuse the lack or untimeliness of the filing of objections." *Id.*

In her opening brief, Ms. Gonzalez de Gomez does not acknowledge her failure to file objections to the magistrate judge's recommendation on the motion to dismiss or attempt to show that the interests of justice require us to review the dismissal order. Only in her reply brief—after Wellpath pointed out the waiver—does Ms. Gonzalez de Gomez address the issue. She argues that in August 2020, she objected to the magistrate judge's jurisdiction, and the recommendation on the motion to dismiss "was not final . . . in light of [that] objection," Aplt. Reply Br. at 10. She also claims she responded to the recommendation by filing the motion for leave to amend her complaint, which no defendant opposed. She further points out the motion for leave to amend was still pending when the district court ruled on the recommendation to grant Wellpath's motion to dismiss, apparently suggesting the

[4] Because Ms. Gonzalez de Gomez was represented by counsel, the other exception to the firm waiver rule ("when . . . a *pro se* litigant has not been informed of the time period for objecting and the consequences of failing to object," *Morales-Fernandez*, 418 F.3d at 1119), is inapplicable. In any event, the magistrate judge's recommendation informed Ms. Gonzalez de Gomez of the time period for objecting and the consequences of failing to do so.

court should have considered the proposed amendments as part of ruling on the motion to dismiss. Under these circumstances, she claims, it would be wrong "to punish" her for failing to file objections to the recommendation. *Id.*

Ms. Gonzalez de Gomez fails to persuade us to review the merits of the dismissal order in the interests of justice. First, her objection to the magistrate judge's jurisdiction meant only that the magistrate judge could not issue rulings on dispositive matters. *See* 28 U.S.C. § 636(c)(1). It did not preclude the magistrate judge from issuing a recommendation on a motion to dismiss. *See id.* § 636(b)(1)(B). We fail to see any role the non-finality of the recommendation plays in our consideration of the interests of justice exception, and Ms. Gonzalez de Gomez has not offered any persuasive contrary argument. Second, filing the motion for leave to amend the complaint does not explain or justify the failure to also file objections to the recommendation. Neither does the pendency of that motion at the time the district court granted Wellpath's motion to dismiss. We therefore apply the firm waiver rule and decline to address Ms. Gonzalez de Gomez's challenges to the order granting Wellpath's motion to dismiss.

B. Motion for leave to amend

1. District court proceedings

After the district court granted Wellpath's motion to dismiss, the magistrate judge denied the motion for leave to amend the complaint as moot. Ms. Gonzalez de Gomez filed a motion for reconsideration of that ruling. The magistrate judge concluded it was clear error to deny the motion for leave to amend as moot and

therefore recommended that it be reinstated. The magistrate judge then recommended denying the motion because it was filed well beyond the October 16, 2020, deadline for amendments set out in the scheduling order, and Ms. Gonzalez de Gomez failed to address the good cause requirement applicable to such motions, as Federal Rule of Civil Procedure 16(b)(4) and related case law require.

Ms. Gonzalez de Gomez objected to the recommendation. The district court overruled the objection, affirmed and adopted the magistrate judge's recommendation, and denied the motion for leave to amend. Observing that Ms. Gonzalez de Gomez "failed to raise any argument under Rule 16(b)," the court concluded she had "failed to establish good cause to justify . . . amendment." Aplt. App. at 36. The court rejected her attempt to fault the magistrate judge, finding that Ms. Gonzalez de Gomez herself was responsible because she "could have sought amendment of the Complaint while Wellpath's motion to dismiss was pending" given that the motion outlined the deficiencies in her complaint. *Id.* The court further found that the new defendants and allegations Ms. Gonzalez de Gomez sought to add with "the proposed amended complaint were available to [her] at the time she filed her original complaint." *Id.* at 37. The court concluded that "[i]nstead of seeking further leave of the Court and addressing the proper legal standard, [Ms. Gonzalez de Gomez] filed an Objection and blamed the magistrate judge for [her] deficient motion. This is insufficient." *Id.*

2. Standard of review and general legal principles

We review a district court's denial of leave to amend a complaint after expiration of a scheduling order deadline for abuse of discretion. *Gorsuch, Ltd., B.C. v. Wells Fargo Nat'l Bank Ass'n*, 771 F.3d 1230, 1240 (10th Cir. 2014). "A district court abuses its discretion if its decision is arbitrary, capricious, whimsical, or manifestly unreasonable." *Tesone v. Empire Mktg. Strategies*, 942 F.3d 979, 989 (10th Cir. 2019) (internal quotation marks omitted).

"After a scheduling order deadline, a party seeking leave to amend must demonstrate (1) good cause for seeking modification under [Rule] 16(b)(4) and (2) satisfaction of the [Federal] Rule [of Civil Procedure] 15(a) standard." *Gorsuch*, 771 F.3d at 1240. Rule 16(b)(4) provides that a scheduling order "may be modified only for good cause and with the judge's consent." Thus, a plaintiff who seeks to amend the complaint "after a scheduling order deadline must establish good cause for doing so." *Gorsuch*, 771 F.3d at 1241. The good cause "standard requires the movant to show the scheduling deadlines cannot be met despite the movant's diligent efforts." *Id.* at 1240 (brackets and internal quotation marks omitted).

3. Ms. Gonzalez de Gomez's appellate arguments

We first take up Ms. Gonzalez de Gomez's references to Rule 15(a)(2)'s directive that a "court should freely give leave [to amend] when justice so requires," and to factors related to that standard, *see, e.g.*, *Bylin v. Billings*, 568 F.3d 1224, 1229 (10th Cir. 2009) (listing factors as "undue delay, undue prejudice to the opposing party, bad faith or dilatory motive, failure to cure deficiencies by

amendments previously allowed, or futility of amendment" (internal quotation marks omitted)). She appears to argue that the district court's denial of leave to amend violated these tenets. But a district court does not abuse its discretion in denying a motion for leave to amend after expiration of a scheduling order deadline if a plaintiff "fail[s] to satisfy *either* factor—(1) good cause *or* (2) Rule 15(a)." *Gorsuch*, 771 F.3d at 1241 (emphasis added). As we explain, the district court did not abuse its discretion in determining Ms. Gonzalez de Gomez failed to show good cause. We therefore need not address her Rule 15(a)(2) arguments. *Id.* at 1242 (declining to consider Rule 15(a) issue where plaintiffs failed to demonstrate good cause).

Ms. Gonzalez de Gomez argues she showed good cause because it took the magistrate judge nearly six months[5] to issue the recommendation on Wellpath's motion to dismiss, she moved for leave to amend only two weeks after that recommendation was filed, and no defendant opposed her motion. But Ms. Gonzalez de Gomez's arguments are lacking. She does not address the district court's reasons for finding she had not been *diligent* in seeking leave to amend. Significantly, the court determined the new allegations and the 25 new defendants she sought to add was information available to her at the time she filed her original complaint. Ms. Gonzalez de Gomez does not argue otherwise.

Ms. Gonzalez de Gomez observes the district court must have anticipated amendments to the complaint might be permitted after discovery. That may be true.

[5] In acknowledging this length of time, we do not intend to pass on whether the time to disposition was dilatory.

After all, "Rule 16's good cause requirement may be satisfied . . . if a plaintiff learns new information through discovery." *Id.* at 1240. But that general rule has no application here, where Ms. Gonzalez de Gomez has not identified any new information she learned during discovery. *Cf. id.* ("If the plaintiff knew of the underlying conduct but simply failed to raise tort claims, however, the claims are barred.").

Ms. Gonzalez de Gomez maintains it was only the magistrate judge's recommendation on Wellpath's motion to dismiss that put her on notice of deficiencies in her complaint. We are not persuaded. On the record before us, the district court correctly determined Wellpath's motion to dismiss put Ms. Gonzalez de Gomez on notice. Notwithstanding this, Ms. Gonzalez de Gomez elected to respond to the motion to dismiss rather than to amend her complaint. The response was filed several weeks before entry of the scheduling order and almost six weeks before the deadline for amendments. These circumstances do not satisfy Rule 16(b)(4)'s good cause requirement.

Finally, Ms. Gonzalez de Gomez relies on *Curley v. Perry* for its statement that "dismissal under Rule 12(b)(6) without affording the plaintiff notice or an opportunity to amend is proper only when it is patently obvious that the plaintiff could not prevail on the facts alleged, and allowing him an opportunity to amend his complaint would be futile," 246 F.3d 1278, 1281–82 (10th Cir. 2001) (internal quotation marks omitted). Wellpath responds that *Curley* is procedurally distinguishable because it involved the sua sponte dismissal of a pro se litigant's

case. Assuming *Curley*'s rule applies where a motion to dismiss is filed against a plaintiff with counsel, the rule is satisfied here. Wellpath's motion to dismiss afforded Ms. Gonzalez de Gomez the notice necessary to support a Rule 12(b)(6) dismissal without an opportunity to amend. *See Hall v. Bellmon*, 935 F.2d 1106, 1109–10 (10th Cir. 1991) (explaining that a Rule 12(b)(6) motion to dismiss "giv[es] [a] plaintiff notice and [an] opportunity to amend").

For all these reasons, we conclude the district court did not abuse its discretion in denying Ms. Gonzalez de Gomez's motion for leave to amend her complaint.

C. Adams County Defendants' summary judgment motion

The Adams County Defendants moved for summary judgment on all claims against them. Their arguments for summary judgment relied in significant part on Ms. Gonzalez de Gomez's failure to respond to requests for admission. These discovery requests asked Ms. Gonzalez de Gomez to admit that (1) Sheriff Reigenborn had no personal contact with Mr. Gomez Ciprez and did not make any decisions regarding his incarceration; (2) Sheriff Reigenborn, Mr. Sauter, and Mr. Wills had no access to Mr. Gomez Ciprez's medical records while he was in custody and no personal knowledge of his medical condition or medications he required; (3) Mr. Gomez Ciprez died while out of custody and from complications arising from surgery; and (4) there was no causal connection between Mr. Gomez Ciprez's death and the actions of defendants Reigenborn, Sauter, Wills, or Adams County.

The failure to respond to a request for admissions can have significant adverse consequences. Federal Rule of Civil Procedure 36(a)(1)(A) provides that "[a] party may serve on any other party a written request to admit, for purposes of the pending action only, the truth" of certain matters including "facts, the application of law to fact, or opinions about either." If the receiving party fails to respond to the request within 30 days, or within such other time as the court may allow, the matter is deemed admitted. Fed. R. Civ. P. 36(a)(3). "A matter admitted under [Rule 36] is conclusively established unless the court, on motion, permits the admission to be withdrawn or amended." Fed. R. Civ. P. 36(b).

Ms. Gonzalez de Gomez never responded to the requests for admission, nor did she seek extra time to respond. She also never filed a motion to withdraw the deemed admissions. The district court therefore deemed the admissions conclusively established and observed they "essentially eviscerate[d] [Ms. Gonzalez de Gomez's] entire case." Aplt. App. at 40. The court then examined the Adams County Defendants' arguments for summary judgment in light of the admissions, concluding that summary judgment was proper on all of Ms. Gonzalez de Gomez's claims.[6]

[6] The court ruled she had not satisfied all the elements of her Eighth Amendment claim against defendants Sauter and Wills and therefore the claim failed. The court determined those defendants were also entitled to qualified immunity on the Eighth Amendment claim and on the Fourteenth Amendment substantive due process claim. The court granted Sheriff Reigenborn qualified immunity on the claims against him because of admissions that he had no role in Mr. Gomez Ciprez's incarceration, no personal contact with him, and no personal knowledge of his medical condition or required medications. The court granted summary judgment on the municipal liability claims against Adams County and the Adams County Sheriff's Office because of the admissions that there was no causal connection between any of

We first address Ms. Gonzalez de Gomez's failure to respond to the request for admissions. She explains she was waiting for the district court to rule on her motion to reconsider the denial of her motion to amend as moot. She says she assumed discovery would be stayed pending resolution of that motion because, if it was granted, then a new set of requests for admission would have been necessary. She therefore concludes it was error for the district court to grant summary judgment to the Adams County Defendants based on the deemed admissions.

This argument is wholly unpersuasive. Ms. Gonzalez de Gomez has offered no legally-sufficient justification to excuse her failure to timely reply to the request for admissions, file a motion to expand the time to reply, or file a motion for permission to withdraw or amend the deemed admissions. *Cf. United States v. Kasuboski*, 834 F.2d 1345, 1349–50 (7th Cir. 1987) (rejecting defendants' reliance on fact that parties were close to settlement as reason for failure to answer requests for admission because that fact did "not explain why the defendants did not file with the district court a motion to toll the 30 day response period"). We therefore reject her argument and see no error in the district court's reliance on the deemed admissions. *See id.* at 1350 ("Admissions made under Rule 36, even default admissions, can serve as the factual predicate for summary judgment."); Fed. R. Civ. P. 36, advisory

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the Adams County Defendants and Mr. Gomez Ciprez's death, and that he died while out of custody from complications arising from surgery. Finally, the court held that the Adams County Defendants were entitled to immunity under a provision of the Colorado Governmental Immunity Act, Colo. Rev. Stat. § 24-10-118(2), because Ms. Gonzalez de Gomez could not demonstrate that their conduct was willful and wanton in light of the deemed admissions.

committee's note to 1970 amendment ("Unless the party securing an admission can depend on its binding effect, he cannot safely avoid the expense of preparing to prove the very matters on which he has secured the admission, and the purpose of the rule is defeated.").

Having determined the district court properly relied on the deemed admissions, we now turn to Ms. Gonzalez de Gomez's remaining arguments regarding the grant of summary judgment. Summary judgment is proper if "there is no genuine dispute as to any material fact and the movant is entitled to judgment as a matter of law." Fed. R. Civ. P. 56(a). We review de novo a district court's decision to grant summary judgment, applying the same standard used by the district court. *Rivero v. Bd. of Regents of Univ. of N.M.*, 950 F.3d 754, 758 (10th Cir. 2020).

In her opening brief, Ms. Gonzalez de Gomez incorporates all of the arguments she set out in her response to the motion for summary judgment on her Eighth Amendment claims. We decline to consider those arguments. Federal Rule of Appellate Procedure 28(a) lists the requirements for an appellant's brief. One of those requirements is that an "appellant's brief must contain . . . the argument, which must contain . . . appellant's contentions and the reasons for them, with citations to the authorities and parts of the record on which the appellant relies." Fed. R. App. P. 28(a)(8)(A). Consistent with Rule 28(a)(8)(A)'s requirements, "we routinely have declined to consider arguments that are not raised, or are inadequately presented, in an appellant's opening brief." *Bronson v. Swensen*, 500 F.3d 1099, 1104 (10th Cir. 2007). Further, our local rule provides that "[i]ncorporating by reference portions of

lower court or agency briefs or pleadings is disapproved and does not satisfy the requirements of Federal Rules of Appellate Procedure 28(a)." 10th Cir. R. 28.3(B).

Applying these rules, we have declined to consider arguments purportedly made "through incorporation by reference to . . . trial court papers or other materials." *United States v. Gordon*, 710 F.3d 1124, 1137 n.15 (10th Cir. 2013). We do the same here and decline to consider arguments Ms. Gonzalez de Gomez purports to make by incorporating arguments she made in opposition to the Adams County Defendants' motion for summary judgment. The requirements of the Federal Rules of Appellate Procedure and our local rules are not empty technicalities. We cannot discern, based on the incorporation-by-reference in Ms. Gonzalez de Gomez's appellate briefing, why she thinks the district court erred in ruling against the arguments she advanced in opposition to summary judgment.

Ms. Gonzalez de Gomez also contends the district court erroneously disregarded emails submitted with her response to the summary judgment motion. According to Ms. Gonzalez de Gomez, these emails showed, contrary to the deemed admissions, Mr. Sauter and Mr. Wills knew of Mr. Gomez Ciprez's medical conditions. We disagree. The district court actually considered the emails, but concluded that even if they contradicted the deemed admissions, they came too late in the proceedings. Ms. Gonzalez de Gomez has not explained why that ruling was incorrect, and we decline to disturb it. *See, e.g.*, *Kasuboski*, 834 F.2d at 1350 (explaining that a party cannot refute default admissions of fact "by resisting a

motion for summary judgment" or through evidence "entered in opposition to summary judgment").

III. CONCLUSION

The district court's judgment is affirmed.

Entered for the Court

Veronica S. Rossman
Circuit Judge