IN THE
ARIZONA COURT OF APPEALS
DIVISION TWO

TODD HEZLITT,
Plaintiff/Appellant,

v.

THE STATE OF ARIZONA,
Defendant/Appellee.

No. 2 CA-CV 2019-0127
Filed March 12, 2020

THIS DECISION DOES NOT CREATE LEGAL PRECEDENT AND
MAY NOT BE CITED EXCEPT AS AUTHORIZED BY APPLICABLE RULES.
NOT FOR PUBLICATION
See Ariz. R. Sup. Ct. 111(c)(1); Ariz. R. Civ. App. P. 28(a)(1), (f).

Appeal from the Superior Court in Pima County
No. C20174692
The Honorable Catherine Woods, Judge

AFFIRMED

COUNSEL

Law Office of Stacy Scheff, Tucson
By Stacy Scheff
Counsel for Plaintiff/Appellant

Mark Brnovich, Arizona Attorney General
By Christopher P. White, Assistant Attorney General, Tucson
Counsel for Defendant/Appellee

MEMORANDUM DECISION

Presiding Judge Eppich authored the decision of the Court, in which Judge Espinosa and Judge Eckerstrom concurred.

E P P I C H, Presiding Judge:

¶1 Todd Hezlitt appeals the trial court's denial of his motion to amend judgment for clerical error. We affirm.

Factual and Procedural Background

¶2 In September 2017, Hezlitt sued the State of Arizona alleging that the Arizona Department of Corrections ("ADOC") negligently allowed him to be assaulted by other inmates while he was in the custody of the ADOC. Hezlitt's suit was based on state-law claims of negligent undertaking of duty and gross negligence.

¶3 In March 2018, the state filed a motion for summary judgment, arguing that Hezlitt had failed to properly file a notice of claim pursuant to A.R.S. § 12-821.01(A). According to the state, Hezlitt was barred from pursuing his action because he sent his notice of claim to an assistant attorney general rather than filing it with the Attorney General as required by Rule 4.1(h)(1), Ariz. R. Civ. P. The next day, Hezlitt asked the state via email if it would stipulate to a dismissal with prejudice. The state agreed, and Hezlitt responded with two documents that he had drafted: (1) a proposed stipulation for voluntary dismissal and (2) a proposed order of dismissal. The next day, the court accepted the parties' stipulation and entered an order—substantially in the form of the proposed order—dismissing the case with prejudice.

¶4 In September 2018, Hezlitt filed a federal lawsuit raising federal-law claims related to the assault. *See Hezlitt v. Ryan et al.*, No. 2:18-cv-03021 (D. Ariz. filed Sept. 24, 2018). In that case, the state moved to dismiss the federal-law claims, arguing that these claims were precluded because they had already been dismissed with prejudice. In May 2019, Hezlitt filed a motion to amend the state court judgment pursuant to Rule 60(a), Ariz. R. Civ. P., arguing that the March 2018 dismissal order contained a clerical error or oversight because it should have only dismissed his state-law claims with prejudice. Hezlitt claimed the judgment should have been corrected accordingly to reflect the actual

intent of the parties. The state opposed the motion arguing that there was no clerical error because the court had entered the order as it intended and as Hezlitt requested. According to the state, any possible mistake in this case was a "unilateral judgment error" on Hezlitt's behalf.

¶5 In June 2019, the court denied Hezlitt's motion after concluding the stipulated order prepared by Hezlitt was not the product of clerical error within the meaning of Rule 60(a), finding "the facts and circumstances presented by [Hezlitt] would suggest, at best, that the Stipulated Order of Dismissal may have been the product of [Hezlitt's] mistake or inadvertence." The court noted that a Rule 60(b)(1) motion may have provided an avenue for relief under these circumstances but such relief was no longer appropriate because the motion would have been untimely. Hezlitt appealed, and we have jurisdiction under A.R.S. § 12-2101(A)(2).

Clerical Mistakes

¶6 Hezlitt suggests the trial court erred by not granting him relief under Rule 60(a) because the court can correct clerical mistakes made by a party. According to Hezlitt, he should have been allowed to "amend the judgment granting voluntary dismissal of his State-law claims to clarify that it was only the State-law claims that were dismissed, and not the Federal claims arising from the same circumstances."

¶7 We review a court's decision to deny a Rule 60 motion for an abuse of discretion. *See Johnson v. Elson*, 192 Ariz. 486, ¶ 9 (App. 1998); *see also Blanton v. Anzalone*, 813 F.2d 1574, 1577 (9th Cir. 1987). Rule 60(a) provides that "a court must correct a clerical mistake or a mistake arising from oversight or omission if one is found in a judgment, order, or other part of the record." Rule 60(a) may permit relief from clerical mistakes made by the court, clerk, jury or party. *See Crye v. Edwards*, 178 Ariz. 327, 329 (App. 1993).[1] But it only authorizes the correction of "'clerical' errors—to show what the court actually decided but did not correctly represent in the written judgment; it may not be used to correct 'judicial errors'—to supply something the court could have decided, but did not." *Egan-Ryan Mech. Co. v. Cardon Meadows Dev. Corp.*, 169 Ariz. 161, 166 (App. 1990);

[1]Although Rule 60 was amended in 2017 to more closely align with its federal counterpart there is no indication that these amendments changed it to extend beyond ministerial corrections. *See* 2B Daniel J. McAuliffe & Shirley J. McAuliffe, *Arizona Practice: Civil Rules Handbook* R. 60 cmt. 2 (July 2019 update).

see also Vincent v. Shanovich, 243 Ariz. 269, ¶ 8 (2017) (clerical error only occurs "when the written judgment fails to accurately set forth the court's decision"). Whether an error is judicial or clerical "turns on the question [of] whether the error occurred in rendering judgment or in recording the judgment rendered," because "[t]he power to correct clerical error does not extend to the changing of a judgment, order, or decree which was entered as the court intended." *Ace Auto. Prods., Inc. v. Van Duyne*, 156 Ariz. 140, 142-43 (App. 1987).

¶8 Here, Hezlitt has not provided any argument addressing how the mistake in this case is clerical. *See Sholes v. Fernando*, 228 Ariz. 455, ¶ 16 (App. 2011) (insufficient argument on appeal may constitute abandonment and waiver of claim). In any event, nothing in the record suggests the order does not correctly represent what the court intended. Hezlitt concedes he "did not include an explicit statement that only State-law claims were being dismissed" with prejudice in the stipulated order *he* drafted and submitted to the court. Because there was no clerical mistake, the trial court did not abuse its discretion by refusing to grant relief under Rule 60(a).

¶9 For the first time on appeal, Hezlitt summarily asserts that the trial court erred by not extending the deadline for a Rule 60(b)(2) or (b)(3) motion because the "trial court had the authority to extend the deadline." Because Hezlitt never made that argument below, he has waived any such claims. *See Nat'l Broker Assoc., Inc. v. Marlyn Nutraceuticals, Inc.*, 211 Ariz. 210, ¶ 30 (App. 2005) ("We will not address issues raised for the first time on appeal."). Therefore, we find no error.[2]

Disposition

¶10 We affirm the trial court's denial of Hezlitt's motion to amend judgment.

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[2]Because Hezlitt's notice of appeal refers only to the trial court's order denying his Rule 60(a) motion and the court has not ruled on Hezlitt's subsequent motion under Rule 60(b)(6), this court lacks jurisdiction to address Hezlitt's Rule 60(b)(6) claims. *See Lee v. Lee*, 133 Ariz. 118, 124 (App. 1982) (this court lacks jurisdiction over matters not included in a notice of appeal); *Barassi v. Matison*, 130 Ariz. 418, 422 (1981) (appellate courts will dismiss cases for lack of jurisdiction where person attempts to appeal motion still pending in trial court).