FILED
United States Court of Appeals
Tenth Circuit

July 21, 2023

Christopher M. Wolpert
Clerk of Court

**UNITED STATES COURT OF APPEALS**

**FOR THE TENTH CIRCUIT**

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ANGELA RENEE KESTER,

Plaintiff - Appellant,

v.

JANSSEN PHARMACEUTICALS, INC.,

Defendant - Appellee.

No. 22-7026
(D.C. No. 6:20-CV-00283-PRW)
(E.D. Okla.)

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**ORDER AND JUDGMENT***

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Before **PHILLIPS**, **MURPHY**, and **EID**, Circuit Judges.**

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Angela Renee Kester appeals an order dismissing her claims as time-barred and denying her motion for an evidentiary hearing. Oklahoma's two-year statute of limitations bars Kester's claims, and the district court did not abuse its discretion in denying her motion because the motion to dismiss could be resolved on the record. Accordingly, we affirm the district court's order.

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* This order and judgment is not binding precedent, except under the doctrines of law of the case, res judicata, and collateral estoppel.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

** 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 submitted without oral argument.

## I.

On July 20, 2009, Kester was prescribed Levaquin, an antibiotic in the fluoroquinolone family of drugs. After experiencing severe side effects, she stopped taking the medication. Her side effects persisted, however, and she has received treatment ever since for a variety of health conditions, including peripheral neuropathy.

On August 14, 2015, Kester brought her first of three suits against Janssen Pharmaceuticals ("Janssen") in state court. But on June 12, 2018, after the suit was transferred to the Fluoroquinolones Products Liability Litigation in the United States District Court for the District of Minnesota (the Multidistrict Litigation, or "MDL"), Kester voluntarily dismissed the suit. On February 5, 2018, Kester filed a second suit against Janssen, this time in the United States District Court for the Eastern District of Oklahoma. This suit was also transferred to the MDL, and on April 8, 2019, Kester again dismissed the suit voluntarily.

Kester filed the present suit on August 17, 2020. She alleges that Janssen's failure to include adequate information in Levaquin labels concerning its side effects—specifically, the development of peripheral neuropathy—precluded medical professionals from advising her on the dangers of taking the drug.[1] Janssen filed a motion to dismiss

[1] Kester lists numerous legal theories to support her claims: "negligence, infliction of emotional distress, financial losses, lost income, ongoing medical care, expensive bills, carelessness, product[s] liability, fraud, deceptive trade practices, strict liability, [and] invasion of privacy." R. Vol. I at 12–13. We agree with the district court, however, that only the negligence and products liability theories are legally cognizable and have at least some factual support in the record. *See Ashcroft*

for failure to state a claim, arguing, among other things, that Oklahoma's two-year statute of limitations barred Kester's claims. Before the court ruled on Janssen's motion, Kester filed a "Motion to Proceed," requesting that the court "proceed with a hearing or onto a speedy trial." Motion to Proceed at 1, *Kester v. Janssen Pharms., Inc.* (E.D. Okla. May 18, 2022) (No. 6:20-cv-00283-PRW). Janssen responded that it would appear at any hearing on its pending motion to dismiss. Resp. to Pl.'s Motion to Proceed/Motion for Hearing at 1, *Kester v. Janssen Pharms., Inc.* (E.D. Okla. May 18, 2022) (No. 6:20-cv-00283-PRW). Nevertheless, the court granted Janssen's motion without holding a hearing, finding that Kester's claims were time-barred and dismissing them with prejudice.

Kester appeals. Because she proceeds pro se, we construe her filings liberally but will not act as her advocate. *Haines v. Kerner*, 404 U.S. 519, 520 (1972); *Hooks v. Atoki*, 983 F.3d 1193, 1196 n.1 (10th Cir. 2020) (quoting *James v. Wadas*, 724 F.3d 1312, 1315 (10th Cir. 2013)).

**II.**

Kester argues that the district court erred in (1) dismissing her claims as time-barred, and (2) failing to hold an evidentiary hearing on Janssen's motion to dismiss.[2] Because we sit in diversity jurisdiction, we apply the substantive law of the forum state—here, Oklahoma—and federal procedural law. *Hanna v. Plumer*, 380 U.S.

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*v. Iqbal*, 556 U.S. 662, 678 (2009) (requiring "sufficient factual matter" for a complaint to state a claim).

[2] Although Kester did not clearly state that she sought a hearing for this purpose, we adopt this reading of the motion as consistent with both parties' briefs.

460, 465 (1965). A state's substantive law includes its statutes of limitations. *Elm Ridge Expl. Co., L.L.C. v. Engle*, 721 F.3d 1199, 1210 (10th Cir. 2013).

**a.**

First, Kester contends that the court erred in granting Janssen's motion to dismiss her claims as time-barred in light of Oklahoma's discovery rule. We review a district court's grant of a motion to dismiss de novo. *Tavernaro v. Pioneer Credit Recovery, Inc.*, 43 F.4th 1062, 1066 (10th Cir. 2022). "To survive a motion to dismiss, a complaint must contain sufficient factual matter, accepted as true, to 'state a claim to relief that is plausible on its face.'" *Ashcroft v. Iqbal*, 556 U.S. 662, 678 (2009) (quoting *Bell Atlantic Corp. v. Twombly*, 550 U.S. 544, 570 (2007)). When, as here, the complaint "make[s] clear that the right sued upon has been extinguished" because the applicable statute of limitations has run, the court should dismiss the claim unless the plaintiff meets their "burden of establishing a factual basis for tolling the statute." *Aldrich v. McCulloch Props., Inc.*, 627 F.2d 1036, 1041 n.4 (10th Cir. 1980).

Oklahoma imposes a two-year statute of limitations on negligence and products liability claims. Okla. Stat. tit. 12, § 95(A); *Samuel Roberts Noble Found., Inc. v. Vick*, 840 P.2d 619, 624 (Okla. 1992) (two-year statute of limitations applies to negligence actions); *Kirkland v. Gen. Motors Corp.*, 521 P.2d 1353, 1361 (Okla. 1974) (same for products liability actions). Under Oklahoma's discovery rule, the statutory period does not begin until the plaintiff knows, or a reasonably prudent person could have known, that they have an injury potentially attributable to the defendant's actions. *Daugherty v. Farmers Co-op. Ass'n*, 689 P.2d 947, 950–51 (Okla. 1984).

Kester argues that the discovery rule tolled the statute until August 23, 2019, when she was formally diagnosed with peripheral neuropathy. This assertion interprets the rule too broadly. As Kester herself has stated, she has been treated for severe peripheral neuropathy, among other conditions, since July 2009. Indeed, these conditions formed the basis for two previous suits filed a year or more in advance of her diagnosis. Furthermore, the record shows that Levaquin's label warned about peripheral neuropathy as early as 2008,[3] and in 2013, the Food and Drug Administration issued a public report warning that fluoroquinolones could cause peripheral neuropathy, among other side effects. Thus, "the connection between the product and the injury was discoverable" well before Kester's 2019 diagnosis, indicating that she had "sufficient information . . . to start the running of the statute of limitations" more than two years before she filed the present suit. *Id.*; *see Schrock v. Wyeth, Inc.*, 727 F.3d 1273, 1280–81 (10th Cir. 2013) (Oklahoma's discovery rule did not toll the statute where patient understood her symptoms were connected to the medication she was taking). Therefore, the discovery rule does not save Kester's claims.[4]

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[3] Kester repeatedly claims that the label for Levaquin did not warn about the risk of peripheral neuropathy until 2016. But as her own Exhibit J indicates, the label listed peripheral neuropathy as a potential side effect in 2008.

[4] In addition to the discovery rule, Kester relies on the equitable tolling and equitable estoppel doctrines. Kester only raised these arguments below in her "Plaintiff's Response Support to Not Dismiss," which she filed after Janssen's reply to her opposition to the motion to dismiss; therefore, the court did not address them. "As a general rule, we do not consider an issue not presented, considered, and decided by the district court." *United States v. Duncan*, 242 F.3d 940, 950 (10th Cir. 2001). But even if we were to exercise our discretion to address these issues, our conclusion would not change. Oklahoma has only recognized equitable tolling in a few circumstances, none of which apply here. *See Masquat v. DaimlerChrysler*

Nor, as the district court noted, does Oklahoma's savings clause, which states that a new action is not barred if it is commenced within one year of a timely filed action that is voluntarily dismissed. Okla. Stat. tit. 12, § 100. Kester filed the present suit sixteen months after the second voluntary dismissal; thus, even if her first two suits were timely, her current suit does not fall within the savings clause.

**b.**

Second, Kester asserts that the district court erred in denying her motion for an evidentiary hearing on Janssen's motion to dismiss. We review the denial of an evidentiary hearing for abuse of discretion. *United States v. Gines*, 964 F.2d 972, 977 (10th Cir. 1992). "An abuse of discretion occurs when the district court bases its ruling on an erroneous conclusion of law or relies on clearly erroneous fact findings." *Kiowa Indian Tribe of Oklahoma v. Hoover*, 150 F.3d 1163, 1165 (10th Cir. 1998).

A court does not abuse its discretion when it denies an evidentiary hearing because it finds that "the claim can be resolved on the record." *Anderson v. Att'y Gen. of Kansas*, 425 F.3d 853, 859 (10th Cir. 2005) (citing *Torres v. Mullin*, 317 F.3d 1145, 1161 (10th Cir. 2003)). A court need not hold an evidentiary hearing if "a party's claims are facially deficient and the party therefore has no relevant or material evidence to present."

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*Corp.*, 195 P.3d 48, 54–55 (Okla. 2008) (recognizing fraudulent concealment as a basis for equitable tolling); *Resolution Tr. Corp. v. Grant*, 901 P.2d 807, 811 (Okla. 1995) (same for adverse domination in the context of corporations). And the equitable estoppel doctrine requires showing that the defendant's actions "exclude[d] suspicion and preclude[d] inquiry," thereby "induc[ing] one to refrain from timely bringing an action." *Jarvis v. City of Stillwater*, 732 P.2d 470, 473 (Okla. 1987). Kester has made no such allegations.

*Sheldon v. Vermonty*, 269 F.3d 1202, 1207, 1207 n.5 (10th Cir. 2001); *see also Roberts v. Generation Next, L.L.C.*, 853 F. App'x 235, 244–45 (10th Cir. 2021) (unpublished)[5] (upholding denial of evidentiary hearing where claims can be decided as a matter of law).

Here, Kester filed a response to Janssen's motion to dismiss, giving her sufficient opportunity to present her opposing arguments. And nothing in her response suggested that she had evidence to correct the facial deficiency in her original complaint—that her claims were time-barred. Thus, Kester did not identify any relevant evidence she could have presented at a hearing. Accordingly, we hold that the district court did not abuse its discretion in refusing to grant one.

**III.**

We AFFIRM the district court's grant of Janssen's motion to dismiss and its denial of Kester's motion for an evidentiary hearing.

Entered for the Court

Allison H. Eid
Circuit Judge

[5] "Unpublished decisions are not precedential, but may be cited for their persuasive value." Fed. R. Civ. P. 32.1; 10th Cir. R. 32.1 (2023).