United States Court of Appeals for the 10th Circuit

Medical Supply Chain, Inc.,	)	
Samuel K. Lipari	)	
Appellants	)	
v.	)	Case No. 06-3331
	)	
Neoforma, Inc., *et al*	)	
Defendants	)	

Response to Appellees' Motion to
Dismiss For Timeliness of Appellants' Notice of Appeal

Comes now the appellants Medical Supply Chain, Inc. (a dissolved Missouri corporation with all interests assigned to Samuel Lipari) and Samuel Lipari through their attorney Dennis Hawver and make the following respond to appellees' motion for dismissal:

1. The appellee's motion for dismissal due to timeliness was docketed 11/ /2006 is untimely under local rule 27.2(3) and under local rule 27.2(C) suspends the appellants' brief due date.

2. The appellants' Notice of Appeal is from the District Court's Doc. 104 entitled "ORDER striking Doc. 80 Motion for Reconsideration" filed on 08/07/2006.

3. The Motion for Reconsideration was filed by Samuel Lipari on 03/14/2006 within ten days of the District Court's Doc. 78 MEMORANDUM AND ORDER dated 03/07/2006 granting sanctions against Samuel Lipari individually.

4. When Samuel Lipari was identified in the District Court's Doc. 78 Memorandum and Order which ordered Lipari to be sanctioned separately from Medical Supply Chain, Inc. even though Lipari was not a party, he was summoned before the court. "A nonnamed party may also have standing to appeal if the district court has otherwise "summoned" him into court." *Shults v. Champion Intern*. Corp., 35 F.3d 1056 at 1061 (C.A.6 (Tenn.), 1994) and became an interested party and had the right to appeal: "[t]he right of a nonparty to appeal an adjudication of contempt cannot be questioned," *United States Catholic Conference v. Abortion Rights Mobilization, Inc*., 487 U.S. 72, 76 (1988), given the binding nature of that adjudication upon the interested nonparty."

5. The Tenth Circuit has clearly established the rights of nonparties to appeal under these circumstances:

> "Obviously under all of the circumstances Fiflis is an aggrieved party and his property interest can be protected only by recognizing this as one of those extraordinary cases where a nonparty may be allowed to appeal. *Commercial Security Bank v. Walker Bank & Trust Company*, 456 F.2d 1352, 1354 (10th Cir. 1972); *West v. Radio-Keith-Orpheum Corp*., 70 F.2d 621, 623-624 (2d Cir. 1934)."

Dietrich Corp. v. King Resources Co., 596 F.2d 422 (C.A.10 (Colo.), 1979).

6. The District court did reconsider its memorandum and order dismissing the complaint as a result of Samuel Lipari's Motion to Reconsider, changing its direct sanctioning of Lipari and his former counsel Bret D. Landrith to a sanction of Medical Supply Chain, Inc. but

reaffirming Lipari's ultimate individual responsibility for the fine and thus Lipari's status as an interested party was recognized. Therefore the 03/07/2006 order was not the final or appealable order:

> "Where the court has power to further review its judgment, it cannot be said that the judgment is final as long as it is being considered by the court. It makes no difference whether the attention of the court is directed to a further consideration of its judgment by a pleading filed as a matter of right, **or by a pleading which has no standing in the case as a matter of law**, or springs from the court itself. The fact that the court expresses an intent to further consider the judgment prevents its finality." *Suggs v. Mutual Ben. Health & Accident Ass'n*, 10 Cir., 115 F.2d 80." [Emphasis added]

Director of Revenue, State of Colorado v. United States, 392 F.2d 307 at 308-309 (10th Cir., 1968)

7. No separate judgment required under Fed. R. Civ. P. 58(a) was entered by the district court for Doc. 104 entitled "ORDER striking Doc. 80 Motion for Reconsideration" dated 03/07/2006.

8. The order dated 08/07/2006 denying reconsideration had a finding of facts, detailed legal analysis and reasoning and cannot, standing alone, trigger the appeal process under *Clough v. Rush*, 959 F.2d 182 (C.A.10 (N.M.), 1992).

9. Where "Rule 58 requires that a judgment or order be set forth in a separate document but there was none, both Rule 4(a)(7) and Rule 58 have been amended to provide that such judgment or order is deemed entered — and the 30-day time period to file notice of

appeal starts to run — upon expiration of 150 days from the date of entry of the judgment or order on the civil docket. See Fed. R.App. P. 4(a)(7)(A)(ii) (2002); Fed.R.Civ.P. 58(b)(1)-(2) (2002)."*Freudensprung v. Offshore Technical Services, Inc*., 379 F.3d 327 (5th Cir., 2004).

10. The notice of appeal 31 days after the District Court's order on the Motion to reconsider was within the 180 time limit under Fed. R.App. P. 4(a)(7)(A)(ii) and Fed.R.Civ.P. 58(b)(1)-(2). See *Key v. Kaiser*, 2002 C10 1188 at ¶ 15 (USCA10, 2002).

Whereas for the above reasons, the appellants respectfully request that the court deny the defendants' motion to dismiss the appeal for timeliness and restart the briefing schedule to allow an additional thirty days to prepare the appellants' brief.

Respectfully submitted,

/s/ Dennis Hawver

_____

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CERTIFICATE OF SERVICE

I certify that in addition to the service requirements of the Federal Rules of Appellate Procedure and Tenth Circuit Rules, identical copies of the materials submitted to the Clerk in Digital Form were simultaneously provided to counsel for all other parties hereto by e-mail on November 28, 2006.

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IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF KANSAS

MEDICAL SUPPLY CHAIN, INC.,	)	
	)	
Plaintiff,	)	
	)	**CIVIL ACTION**
v.	)	
	)	**No. 05-2299-CM**
NEOFORMA, INC., et al.,	)	
	)	
Defendants.	)	
	)	

MEMORANDUM AND ORDER

Pending before the court are plaintiff's Motion for Reconsideration (Doc. 80); plaintiff's counsel Ira Dennis Hawver's Motion to Withdraw (Doc. 81); plaintiff's Motion Under Rule 15 for Leave to Rewrite and Amend Complaint to Cure Any Defects Requiring Dismissal Remaining After Outcome of Reconsideration Motion (Doc. 92); plaintiff's Motion to Strike Documents # 82, 83, 84, 85, 86, 87, 88, 89, 90, 91, 93 (Doc. 95); and plaintiff's Motion to Rewind Action and Return Proceeding to the Western District of Missouri in the Interest of Justice Under 28 U.S.C. [§] 1631 (Doc. 102).

I. Background

On March 9, 2005, plaintiff Medical Supply Chain, Inc. ("Medical Supply") filed the above-captioned case in the United States District Court for the Western of District Missouri, case number 05-2010-CV-W-ODS. Plaintiff brought suit against Neoforma, Inc.; Robert J. Zollars; Volunteer Hospital Association ("VHA"); Curt Nonomaque; University Healthsystem Consortium; Robert J. Baker; US Bancorp NA; U.S. Bank National Association; Jerry A. Grundhofer, Andrew Cesare;[1]

[1] Throughout the docket sheet, this defendant's last name was spelled numerous different ways. The court will use "Cesare," the spelling most often used by defendants' counsel.

Piper Jaffray Companies; Andrew S. Duff; Shughart Thomson & Kilroy, P.C.,[2] and Novation, LLC. Plaintiff's 115 page complaint alleges sixteen counts including claims for price restraint under the Sherman Act, restraint of trade and monopolization under both federal and Missouri law, conspiracy, tortious interference with contract or business expectancy, breach of contract, breach of fiduciary duty, fraud, prima facie tort, and claims under RICO and the USA PATRIOT Act.

The Western District of Missouri court transferred the case to this court on July 14, 2005. On March 7, 2006, this court dismissed plaintiff's case after finding that each of plaintiff's federal claims failed to state a claim upon which relief can be granted pursuant to Federal Rule of Civil Procedure 12(b)(6), and declining to retain supplemental jurisdiction over plaintiff's state law claims. The court also found that claim preclusion barred several of plaintiff's claims. Furthermore, the court held that plaintiff's 115 page complaint violates Federal Rules of Civil Procedure 8(a) and 8(e)(1), and granted sanctions to defendants pursuant to Federal Rule of Civil Procedure 11(b) and 28 U.S.C. § 1927.

II. Analysis

A. Motion to Withdraw

On January 30, 2006, Bret D. Landrith withdrew as counsel for plaintiff after being disbarred from the practice of law in the State of Kansas on December 9, 2005 for violating Kansas Rules of Professional Conduct relating to competence, meritorious claims, candor toward the tribunal, fairness to opposing parties and counsel, respect for rights of third persons, and misconduct. On February 2, 2006, the court denied plaintiff's request to substitute Samuel K. Lipari, CEO of Medical Supply, as plaintiff for Medical Supply because although Medical Supply's corporate status was dissolved on

[2] Plaintiff's complaint names "Shughart Thomson & Kilroy Watkins Boulware, P.C." but the law firm's correct name is "Shughart Thomson & Kilroy, P.C.."

January 27, 2006, dissolution had not occurred at the time Mr. Lipari filed his motion to substitute. The court ordered Medical Supply to retain counsel because Mr. Lipari could not proceed *pro se* on behalf of a corporation. On February 7, 2006, Ira Dennis Hawver entered his appearance on behalf of Medical Supply.

Mr. Hawver requests that the court allow him to withdraw because Mr. Lipari no longer requires his representation. Attached to his motion to withdraw is Mr. Lipari's Entry of Appearance (Doc. 79), suggesting that Mr. Lipari intends to replace Mr. Hawver. But Mr. Lipari is not an attorney, and Mr. Hawver did not offer substitute counsel. The court finds that Mr. Hawver's motion does not comport with D. Kan. Rule 83.5.5, which requires withdrawing counsel without substitute counsel to "provide evidence of notice to the attorney's client containing (1) the admonition that the client is personally responsible for complying with all orders of the court and time limitations established by the rules of procedure or by court order and (2) the dates of any pending trial, hearing or conference." Mr. Hawver did not provide such notice to the court. As such, the court denies Mr. Hawver's motion to withdraw.

B. Mr. Lipari's Motions (Docs. 80, 92, 95 and 102)

On March 14, 2006, one week after this court dismissed plaintiff's case, Mr. Lipari filed an Entry of Appearance (Doc. 79). Since that time, Mr. Lipari has filed four motions currently pending before the court. The question before the court is whether Mr. Lipari may represent Medical Supply or substitute himself for Medical Supply.

Because Medical Supply was incorporated under the laws of Missouri, the effect of corporate dissolution on pending litigation is governed by Missouri law. Pursuant to Mo. Ann. Stat. § 351.476.2(6), "[d]issolution of a corporation does not: . . . (6) Abate or suspend a proceeding pending by or against the corporation on the effective date of dissolution." *See also Reben v. Wilson*, 861

S.W.2d 171, 176 (Mo. App. E.D. 1993). Therefore, even though Medical Supply was dissolved, its corporate existence continues for purposes of proceeding with this litigation. Medical Supply remains the sole plaintiff in this case.

Moreover, Mr. Lipari cannot proceed *pro se* on behalf of Medical Supply because a *pro se* individual may not represent a corporation. *See Nato Indian Nation v. State of Utah*, 76 Fed. Appx. 854, 856 (10th Cir. 2003) ("Individuals may appear in court pro se, but a corporation, other business entity, or non-profit organization may only appear through a licensed attorney.") (citations omitted).

The court also finds that Mr. Lipari may not substitute himself for Medical Supply. Federal Rule of Civil Procedure 25(c), which governs the procedural substitution of a party after a transfer of interest, states: "In case of any transfer of interest, the action *may* be continued by or against the original party, *unless the court upon motion directs the person to whom the interest is transferred to be substituted in the action*." Fed. R. Civ. P. 25(c) (emphasis added). As evidenced by the plain language of Rule 25(c), the court has discretion to allow Mr. Lipari to substitute. *Prop-Jets, Inc. v. Chandler*, 575 F.2d 1322, 1324 (10th Cir. 1978). The court declines to exercise its discretion, however, because this case has been dismissed, and substitution will not change that outcome.

Mr. Lipari also argues that because the court sanctioned him personally, the court should allow him to represent himself *pro se*. Mr. Lipari is mistaken. The court sanctioned Medical Supply, not Mr. Lipari. Although the court discussed Mr. Lipari's personal involvement in the litigation in its ruling opposing sanctions against plaintiff and plaintiff's counsel, it did so for the purpose of demonstrating plaintiff's culpability. It is irrelevant that Mr. Lipari, as Medical Supply's sole shareholder, is ultimately liable for plaintiff's sanctions.

For the above-mentioned reasons, the court strikes each of Mr. Lipari's pending motions, including Documents 80, 92, 95 and 102. Consistent with this ruling, the court cautions Mr. Lipari

against filling additional motions. Of course, plaintiff may allow Mr. Hawver or other counsel to represent it. But the court reiterates that it dismissed plaintiff's case with prejudice and sanctioned plaintiff for violations of Federal Rule of Civil Procedure 11(b) and 28 U.S.C. § 1927. Plaintiff has a history of filing frivolous lawsuits and motions, for which the court has sanctioned plaintiff on several occasions. Future attempts to resurrect this case could result in the court imposing additional sanctions.

IT IS THEREFORE ORDERED that Ira Dennis Hawver's Motion to Withdraw (Doc. 81) is denied.

IT IS FURTHER ORDERED that plaintiff's Motion for Reconsideration (Doc. 80); plaintiff's Motion Under Rule 15 for Leave to Rewrite and Amend Complaint to Cure Any Defects Requiring Dismissal Remaining After Outcome of Reconsideration Motion (Doc. 92); plaintiff's Motion to Strike Documents # 82, 83, 84, 85, 86, 87, 88, 89, 90, 91, 93 (Doc. 95); and plaintiff's Motion to Rewind Action and Return Proceeding to the Western District of Missouri in the Interest of Justice Under 28 U.S.C. [§] 1631 (Doc. 102) are hereby stricken from the record.

Dated this 7th day of August 2006, at Kansas City, Kansas.

s/ Carlos Murguia
CARLOS MURGUIA
United States District Judge

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959 F.2d 182
1992-1 Trade Cases P 69,758, 22 Fed.R.Serv.3d 1189
John CLOUGH, MD, Plaintiff-Appellant,
v.
Dominica RUSH; Rueben Marchisano, MD; Pete Grenko, MD; Donald Clark, Personal Representative for the Estate; James Hockenberry, MD; Robert Trimble; Donald W. Welch, all individual defendants sued in their individual capacities and officials of the Hospital sued in their official capacities; Adventist Health Systems, Inc., Defendants-Appellees.
No. 91-2062.
United States Court of Appeals,
Tenth Circuit.
March 18, 1992.

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Denise M. Glore, Albuquerque, N.M., for plaintiff-appellant.

John B. Pound of Montgomery & Andrews, P.A., Santa Fe, N.M., for defendants-appellees.

Before LOGAN and BARRETT, Circuit Judges, and PATRICK F. KELLY, ** District Judge.

PATRICK F. KELLY, District Judge.

The underlying antitrust action arises from the suspension of Plaintiff John Clough's medical privileges at Sierra Vista Hospital (SVH) in Truth Or Consequences, New Mexico. Dr. Clough seeks reversal of the district court's entry of summary judgment in favor of Defendants, who were physicians, administrators, and owners of the hospital at the time of the suspension. The district court dismissed the action on res judicata and collateral estoppel grounds. Prior to reaching a review of that ruling, however, we must address the threshold question of whether we have jurisdiction to consider Dr. Clough's appeal. Upon careful review of the issues presented, we answer that question in the affirmative, and likewise affirm the district court on the merits. 1

Background

In March 1982, Dr. Clough applied for, and received, appointment to the medical staff at SVH as a general surgeon. In late 1984, he performed routine surgery on an elderly female patient. The next day, nurses noticed she had no urinary output. Two days after the surgery, Dr. Clough performed an intravenous pyelogram (IVP) on the patient. The test revealed blockage of the ureters. This is a very dangerous condition, as it can lead to kidney failure, which is life threatening.

Dr. Clough determined that sutures inserted during the initial operation caused the blockage. Without assistance from any other physicians, he performed a second operation to remove the sutures. During that surgery, Dr. Clough obtained an immediate flow of urine. As a consequence, he believed he had removed the blockage. He did not perform a second IVP to determine whether he had removed the entire blockage.

Approximately two weeks after the second surgery, the same patient was readmitted to SVH complaining of lower abdominal pain. Dr. Clough referred her to a different physician, who performed additional

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surgery after an IVP revealed there was a suture remaining in her right ureter. The patient and her daughter later contacted SVH administrators complaining about Dr. Clough and threatening to sue the hospital. After reviewing the matter, the hospital's executive committee suspended Dr. Clough's privileges. Following several hearings and a review of the case by a panel of outside physicians, the privileges were reinstated. Dr. Clough resigned from the medical staff in May 1985.

On November 20, 1986, Dr. Clough filed an action in New Mexico state court alleging violations of New Mexico's antitrust act, as well as other contract and tort claims. The state court granted summary judgment in favor of Defendants. That decision was affirmed on appeal. Clough v. Adventist Health Sys., Inc., 108 N.M. 801, 780 P.2d 627, 633 (1989). While that case was pending, Dr. Clough filed this action, asserting the same state court claims but adding two claims under the Sherman Antitrust Act, 15 U.S.C. §§ 1-2.

The district court in this case granted Defendants' motion for summary judgment, concluding that res judicata and collateral estoppel bar the federal lawsuit. That order, which is fifteen pages long and contains extensive legal discussion, was entered on January 31, 1991. The district court docket sheet reflects entry of the order on that date.

On February 19, 1991, Dr. Clough's attorney contacted counsel for the Defendants requesting a one-day extension to file a Fed.R.Civ.P. 59(e) motion. 2 Defense counsel agreed to the extension, and the district court granted it. On February 20, Dr. Clough's attorney filed a self-styled "motion for reconsideration" pursuant to Rule 59(e). Defense counsel filed a response, citing Marane, Inc. v. McDonald's Corp., 755 F.2d 106 (7th Cir.1985), which pointed out that the court had no jurisdiction to entertain the motion for extension.

On March 7, 1991, the district court denied the motion for reconsideration. The court based its denial on the acknowledgment that it had no jurisdiction to entertain the untimely motion. Approximately eight days later, Dr. Clough's counsel filed a notice of appeal. At no time did counsel file a motion to extend the time to appeal. See Fed.R.App.P. 4(a)(5). In his reply in support of the motion for reconsideration, however, Dr. Clough argued that the time periods identified in Rule 59 did not apply to the case because the district court never entered a "separate document" pursuant to Fed.R.Civ.P. 58.

After this appeal was initiated, Defendants filed a motion to dismiss, arguing that the January 31 order triggered the time for filing an appeal. They urge that because the Rule 59 motion was untimely, it could not toll the thirty-day period for bringing an appeal. See Browder v. Director, Dep't of Corrections, 434 U.S. 257, 264-65, 98 S.Ct. 556, 561, 54 L.Ed.2d 521 (1978). Thus, they argue Dr. Clough's appeal period expired on March 2, 1991. Under Fed.R.App.P. 4(a)(5), a party may extend the time for appealing if a motion for extension is filed within thirty days of the expiration of the appeal period. Defendants argue that this appeal is untimely because Dr. Clough did not use this procedure. Instead, he simply filed a notice of appeal.

Conversely, Dr. Clough maintains that because no separate document was filed, as is required under Fed.R.Civ.P. 58, entry of the January 31 order did not trigger the thirty-day period for filing a notice of appeal. He contends that as a result, his motion for reconsideration and the subsequent notice of appeal were timely. After careful review of the issues presented, we hold that the absence of a separate document renders the January 31 order nonfinal. We conclude this action is properly before the court. On the merits, however, we affirm the district court.

I.

Fed.R.Civ.P. 58 states, in pertinent part, "[e]very judgment shall be set forth

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on a separate document. A judgment is effective only when so set forth and when entered as provided in Rule 79(a)." 3 Under the former rules, it was not always clear when judgment entered for purposes of triggering the appeal process. The intended purpose of the existing rule is to eliminate those uncertainties. See Kline v. Department of Health & Human Servs., 927 F.2d 522, 523 (10th Cir.1991). When the 1963 amendments were made to Rule

58, the advisory committee added the following note:

> Hitherto some difficulty has arisen, chiefly where the court has written an opinion or memorandum containing some apparently directive or dispositive words, e.g., 'the plaintiff's motion [for summary judgment] is granted.' Clerks on occasion have viewed these opinions or memoranda as being in themselves a sufficient basis for entering judgment in the civil docket as provided by Rule 79(a)....
>
> The amended rule eliminates these uncertainties by requiring that there be a judgment set out on a separate document--distinct from any opinion or memorandum--which provides the basis for the entry of judgment.

Fed.R.Civ.P. 58 advisory committee's note (citations omitted). Thus, the rule applies in any case where there is uncertainty about whether final judgment has entered. United States v. Clearfield State Bank, 497 F.2d 356, 358 (10th Cir.1974).

The separate document rule does not apply, however, where "there is no question about the finality of the court's decision." Slade v. United States Postal Serv., 952 F.2d 357, 359 n. 1 (10th Cir.1991). Generally, orders containing neither a discussion of the court's reasoning nor any dispositive legal analysis can act as final judgments if they are intended as the court's final directive and are properly entered on the docket. See Kline, 927 F.2d at 523-24; see also, e.g., Laidley v. McClain, 914 F.2d 1386, 1390 (10th Cir.1990) (single page order adopting magistrate's recommendation on summary judgment meets requirements of Rule 58); Kunkel v. Continental Casualty Co., 866 F.2d 1269, 1272 n. 3 (10th Cir.1989) (court properly exercised jurisdiction where, despite absence of separate document, district court disposed of entire complaint); Clearfield, 497 F.2d at 358-59 (no separate document needed where order granting summary judgment is itself a separate document).

The order which the district court entered disposing of the motion for summary judgment does not meet Rule 58 requirements. In addition to being fifteen pages long, it contains detailed legal analysis and reasoning. Thus, it could not, standing alone, trigger the appeal process. A separate document constituting the court's final judgment was needed. Because no separate entry was made, the January 31 Order was not final.

Under certain circumstances, however, the parties may waive the separate document requirement. See Slade, at 359 n. 1. Normally this occurs where both parties proceed under the mistaken assumption that an order is final when, in fact, no separate document was ever filed. See generally Aviles v. Lutz, 887 F.2d 1046, 1047 n. 1 (10th Cir.1989) (court entertaining jurisdiction despite absence of separate document where, apparently, no objection was made and the district court "disposed of the entire complaint").

The Supreme Court has instructed that under such circumstances, the absence of a separate document should not be used to defeat consideration of the merits.

> If, by error, a separate judgment is not filed before a party appeals, nothing but delay would flow from requiring the court of appeals to dismiss the appeal. Upon dismissal, the district court would simply file and enter the separate judgment, from which a timely appeal would then be taken. Wheels would spin for no practical purpose....

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.... The need for certainty as to the timeliness of an appeal ... should not prevent the parties from waiving the separate-judgment requirement where one has accidentally not been entered.

Bankers Trust Co. v. Mallis, 435 U.S. 381, 385-86, 98 S.Ct. 1117, 1120-21, 55 L.Ed.2d 357 (1978) (footnote omitted). The actions which Dr. Clough's counsel took in this case could be construed as admitting the finality of the district court's summary judgment order. In particular, counsel implicitly acknowledged the finality of the order when she filed a motion under Fed.R.Civ.P. 59, which only applies to judgments. 4 Moreover, it is clear from a reading of the court's order that it disposed of all claims.

We hold, however, that the absence of a separate document is fatal to Defendants' motion to dismiss. The separate document rule "should be interpreted to prevent loss of the right to appeal." Bankers Trust, 435 U.S. at 386, 98 S.Ct. at 1121. As a consequence, waiver may not be used to defeat jurisdiction. See Amoco Oil Co. v. Jim Heilig Oil & Gas, Inc., 479 U.S. 966, 969, 107 S.Ct. 468, 471, 93 L.Ed.2d 413 (1986) (Blackmun, J., dissenting from denial of certiorari) ("the separate-document requirement must be applied mechanically in order to protect a party's right of appeal"); Reid v. White Motor Corp., 886 F.2d 1462, 1465-68 (6th Cir.1989) (holding appellant could not waive Rule 58 requirements to defeat jurisdiction), cert. denied, 494 U.S. 1080, 110 S.Ct. 1809, 108 L.Ed.2d 939 (1990); see also United States v. Indrelunas, 411 U.S. 216, 219, 93 S.Ct. 1562, 1563, 36 L.Ed.2d 202 (1973) ("Rule 58 was substantially amended ... to remove uncertainties as to when a judgment is entered....").

Our holding that Rule 58 waiver may not be used to defeat jurisdiction does not, however, end our inquiry. In this case, no separate document was ever filed. Therefore, we must consider whether remand is appropriate. We hold it is not. In Bankers Trust, the Supreme Court acknowledged that requiring remand in waiver cases would amount to an exercise in "wheel spinning." 435 U.S. at 385, 98 S.Ct. at 1120. The same is true here. Efficiency and judicial economy would not be served by requiring the parties to return to the district court to obtain a separate judgment. For this reason, we accept jurisdiction and move on to consider the merits of Dr. Clough's appeal.

II.

The district court ruled res judicata and collateral estoppel bar Dr. Clough's federal claims. We review this ruling de novo, applying the same standards as the district court under Fed.R.Civ.P. 56(c). Summary judgment is appropriate only when the case involves no genuine issues of fact and the moving party is entitled to judgment as a matter of law. Russillo v. Scarborough, 935 F.2d 1167, 1170 (10th Cir.1991). After reviewing the record in a light most favorable to Dr. Clough, we conclude the district court's disposition was correct. 5

Although res judicata and collateral estoppel are closely related, there are differences between the two which are significant for purposes of analyzing Dr. Clough's claims.

Under res judicata, "a final judgment on the merits of an action precludes the parties or their privies from relitigating issues that were or could have been raised in that action."

Under collateral estoppel, "once a court has decided an

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issue of fact or law necessary to its judgment, that decision may preclude relitigation of the issue in a suit on a different cause of action involving a party to the first case."

Sil-Flo, Inc. v. SFHC, Inc., 917 F.2d 1507, 1520 (10th Cir.1990) (citations omitted). At the heart of the res judicata and collateral estoppel doctrines is an effort to "relieve parties of the cost and vexation of multiple lawsuits, conserve judicial resources, and, by preventing inconsistent decisions, encourage reliance on adjudication." Northern Natural Gas Co. v. Grounds, 931 F.2d 678, 681 (10th Cir.1991). It is with these principles in mind that we review the issues presented.

Counts III through VII of Dr. Clough's federal complaint are mirror reflections of the claims brought in state court. Specifically, counts III and IV state claims under New Mexico's antitrust act. See N.M.Stat.Ann. §§ 57-1-1, 57-1-2. Counts V through VII allege state law tort and contract causes of action which were raised in state court. The parties sued are the same. See Clough, 780 P.2d at 628.

"In determining the validity of a plea of res judicata three questions are pertinent: Was the issue decided in the prior adjudication identical with the one presented in the action in question? Was there a final judgment on the merits? Was the party against whom the plea is asserted a party or in privity with a party to the prior adjudication?"

Grounds, 931 F.2d at 682 (quoting Bernhard v. Bank of Am. Nat'l Trust & Sav. Ass'n, 19 Cal.2d 807, 122 P.2d 892, 895 (1942)). Here, the three requirements have been met. The claims presented in counts III through VII are exactly the same in both lawsuits, as are the parties. Further, the New Mexico Supreme Court issued a decision addressing the merits of the claims. We agree with the district court, therefore, that these claims are barred.

Dr. Clough's Sherman Act claims could not be brought in state court. See General Inv. Co. v. Lake Shore & M.S. Ry., 260 U.S. 261, 287, 43 S.Ct. 106, 117, 67 L.Ed. 244 (1922). In order to be barred, therefore, the claims must fall under the doctrine of collateral estoppel, or issue preclusion. This doctrine applies where there is "an identity of issues raised in the successive proceedings and the determination of these issues by a valid final judgment to which such determination was essential." Sil-Flo, 917 F.2d at 1520. Further, collateral estoppel cannot be applied unless the party had an opportunity to "fully and fairly" present and argue its claims in the prior proceeding. Smith Machinery Co. v. Hesston Corp., 878 F.2d 1290, 1293 (10th Cir.1989), cert. denied, 493 U.S. 1073, 110 S.Ct. 1119, 107 L.Ed.2d 1026 (1990).

In New Mexico, courts interpret state antitrust claims " 'in harmony with judicial interpretations of the federal antitrust laws.' " Clough, 780 P.2d at 630 (quoting Smith Machinery Corp. v. Hesston, Inc., 102 N.M. 245, 694 P.2d 501, 505 (1985)). Indeed, the New Mexico statute was patterned after the Sherman Act. Id.; see also Smith, 878 F.2d at 1292-93 ("[W]e observe that any preclusion arguments made with regard to the state antitrust claim logically would apply to the Sherman Act claim as well [because] [t]he relevant state law is patterned after section 1 of the

Sherman Act....") (footnote omitted)). Thus, the New Mexico decision can preclude consideration of the federal claim. See Marrese v. American Academy of Orthopaedic Surgeons, 470 U.S. 373, 380-81, 105 S.Ct. 1327, 1332, 84 L.Ed.2d 274 (1985) (state court judgment may preclude later action that is within federal court's exclusive jurisdiction).

Dr. Clough argues that preclusion should not apply because he was not given an opportunity in the state case to pursue discovery to prove his conspiracy claims. He contends Defendants intentionally withheld information in the state case. Further, he maintains that because the state court summary judgment was based on insufficiency of the evidence, rather than litigation of actual factual issues, preclusion does not apply. After a careful review

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of the voluminous record in this case, we must disagree.

There is nothing in the record to indicate Dr. Clough was not afforded a full and fair opportunity to litigate his claims. While he claims Defendants fraudulently withheld evidence in the state case, there is no support in the record for that proposition. Further, unlike the situation in Smith, on which Dr. Clough relies, the state court here considered the merits of all the claims. See Smith, 878 F.2d at 1293 (party not afforded full opportunity to litigate claims where state court stressed that its decision "[was] not to be construed as a commentary on the ultimate merits"). There is no support for Dr. Clough's argument that he was somehow restricted in the state court proceedings. Accordingly, we hold the federal claims are barred.

Defendants' Motion To Dismiss Appeal is DENIED. The judgment of the United States District Court for the District of New Mexico is AFFIRMED.

** Honorable Patrick F. Kelly, District Judge, United States District Court for the District of Kansas, sitting by designation.

1 After examining the briefs and appellate record, this panel has determined unanimously that oral argument would not materially assist the determination of this appeal. See Fed.R.App.P. 34(a); 10th Cir.R. 34.1.9. The case is therefore ordered submitted without oral argument.

2 We note that Dr. Clough's motion was untimely regardless of the extension, as Fed.R.Civ.P. 59(e) requires motions to be served "not later than 10 days after entry of the judgment."

3 Fed.R.Civ.P. 79 is entitled "Books and Records Kept by the Clerk and Entries Therein." Rule 79(a) governs civil docket entries.

4 The self-styled "motion for reconsideration" is not recognized under Rule 59. See Van Skiver v. United States, 952 F.2d 1241, 1243 (10th Cir.1991). Counsel's belief to the contrary notwithstanding, Rule 59 is a vehicle for amending or altering judgments.

5 As a preliminary matter, we note "the prevailing sentiment that summary judgment should be used sparingly in antitrust cases." City of Chanute v. Williams Natural Gas Co., 955 F.2d 641 (10th Cir.1992). Where the standards of Fed.R.Civ.P. 56(c) are met, however, it is an appropriate vehicle for deciding antitrust cases. See id. at 646-647 (outlining procedures for reviewing grant of summary judgment in antitrust case).

CERTIFICATE OF SERVICE

I certify that in addition to the service requirements of the Federal Rules of Appellate Procedure and Tenth Circuit Rules, identical copies of the materials submitted to the Clerk in Digital Form as a single pdf document were again simultaneously provided to counsel for all other parties hereto by e-mail on November 29, 2006.

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