No. 22-8023

IN THE UNITED STATES COURT OF APPEALS
FOR THE TENTH CIRCUIT

STEVEN DAKOTA KNEZOVICH, an individual, STEVEN L. KNEZOVICH and DEBRA M. KNEZOVICH, husband and wife, ANDREW M. TAYLOR, and DENA DEA BAKER, husband and wife, RICHARD D. WRIGHT and DEONE R. WRIGHT, husband and wife, and THE HOBACK RANCHES PROPERTY OWNERS IMPROVEMENT AND SERVICE DISTRICT, COUNTY OF SUBLETTE, STATE OF WYOMING,

Plaintiff-Appellants,

v.

UNITED STATES OF AMERICA

Defendant-Appellee.

On Appeal from the
United States District Court for the District of Wyoming
No. 21-CV-00180-ABJ, The Honorable Alan B. Johnson

OPENING BRIEF OF PLAINTIFF-APPELLANTS DENA BAKER AND ANDREW TAYLOR

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STATEMENT PURSUANT TO 10TH CIR. R. 31.3(B)

Appellants Dena Baker and Andrew Taylor are represented by separate counsel in this appeal. Prior to preparing their respective opening briefs, counsel for Appellants Baker and Taylor conferred with counsel for the other Appellants pursuant to 10th Cir. R. 31.3(a). Appellants agreed to consolidate their briefing to the greatest extent possible. However, in addition to the arguments raised by the other Appellants, Appellants Baker and Taylor intended to incorporate argument as to the district court's denial of their motion filed pursuant to Fed. R. Civ. P. 56(d). In an effort to limit the duplication of briefing, Appellants Baker and Taylor joined the briefing filed by the other Appellants and included separate briefing as to this specific issue.

RULE 26.1 DISCLOSURE

Not applicable.

STATEMENT OF RELATED CASES

There are no prior or related appeals.

STATEMENT REGARDING ORAL ARGUMENT

Appellants take no position on oral argument.

JURISDICTIONAL STATEMENT

Appellants Dena Baker and Andrew Taylor join and adopt the jurisdictional statement of all other Appellants. (Knezovich Principal Brief at 2).[1]

STATEMENT OF ISSUES PRESENTED FOR REVIEW

1. Whether the district court abused its discretion in denying Appellants leave to take limited discovery as requested under Fed. R. Civ. P. 56(d) where crucial factual issues remained in dispute.

2. Appellants Dena Baker and Andrew Taylor join and adopt the remaining issues presented for review by all other Appellants. (Knezovich Principal Brief at 3).

STATEMENT OF THE CASE

Appellants Dena Baker and Andrew Taylor join and adopt the statement of the case of all other Appellants. (Knezovich Principal Brief at 4).

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[1] "Kzenovich Principal Brief" denotes citations to the Principal Brief of Appellants Steven Dakota Knezovich, Steven L. Knezovich, Debora M. Knezovich, Richard D. Wright, Deone R. Wright, and The Hoback Ranches Property Owners Improvement and Service District, County of Sublette, State of Wyoming. Together with Appellants Dena Baker and Andrew Taylor, these parties are referred to herein as "Appellants" or "the victims".

SUMMARY OF THE ARGUMENT

Summary judgment is meant to be an efficient tool to resolve litigation where the facts are clear and a case can be adjudicated solely through application of the law. Where material facts are in dispute, and the nonmoving party makes a showing that such facts can be readily ascertained through limited discovery, a court may order that such discovery be conducted or deny the motion entirely.

In this case, the district court erred in denying such discovery where the USFS[2] had control of the relevant evidence and refused to produce it to support its motion. In ruling on the defendant's motion for summary judgment, the district court examined two important issues: (1) whether there are regulations taking away relevant discretion from the USFS and (2) whether there are sufficient facts to show the USFS acted outside the sphere of discretion given to it. As to the latter issue, evidence concerning the decisions made by the USFS is crucial – and the best quality evidence of these decisions could only come from those that made the decisions themselves.

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[2] The Defendant in this action is the United States of America, standing in for the USDA Forest Service. The abbreviation "USFS" is used herein to refer to this party.

Instead of relying on the testimony of these individuals, the USFS introduced evidence in the form of declarations from witnesses with no personal knowledge of the underlying decision-making process and incomplete reports generated by other people. Although the victims rebutted this evidence with public statements made by the USFS indicating that they did act outside of their discretion, they had no access to the best source of the information – the decision-makers themselves – and asked the court to allow them to take limited discovery in the form of depositions before ruling on the USFS's converted motion for summary judgment. The victims were unable to take such discovery without leave of the court because the USFS had not answered their complaint. Rather than allow the discovery as requested, the court found the USFS's limited evidentiary showing credible enough, denying the victims' Rule 56(d) motion and granting the USFS summary judgment.

The district court had the choice to allow limited discovery into what motivated the USFS officials to allow a wildfire to grow out of control to the point of injuring citizens and damaging property, but instead decided to rely on the USFS's deficient evidence and dismiss the

case. The victims ask that this Court reverse the decision below and allow the limited discovery.

ARGUMENT[3]

1.0 The district court erred in denying Plaintiffs relief under Fed. R. Civ. P. 56(d).

1.1 Standard of review.

The Court of Appeals reviews denial of a motion brought under Rule 56(d) for an abuse of discretion. *Valley Forge Ins. Co. v. Health Care Mgmt. Partners, Ltd.*, 616 F.3d 1086, 1096 (10th Cir. 2010). Reversal is proper where a ruling denying discovery "exceed[s] the bounds of the rationally available choices given the facts and the applicable law in the case at hand," *FDIC v. Arciero*, 741 F.3d 1111, 1116 (10th Cir. 2013) (quoting *Valley Forge Ins. Co.*, 616 F.3d at 1096). A district court abuses its discretion if it "bases its ruling on an erroneous conclusion of law or relies on clearly erroneous fact findings." *Ellis v. J.R.'s Country Stores, Inc.*, 779 F.3d 1184, 1192 (10th Cir. 2015). "A finding of fact is clearly erroneous if it is without factual support in the record or if, after

[3] Appellants Dena Baker and Andrew Taylor join and adopt the arguments made in the Knezovich Principal Brief and incorporate them by reference.

reviewing all of the evidence, we are left with the definite and firm conviction that a mistake has been made." *Id*.

1.2 Procedure under Fed. R. Civ. P. 56(d).

A court may grant summary judgment where "the movant shows that 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). Where, however, a party opposing a motion for summary judgment shows that, for specified reasons, it cannot present facts essential to justify its opposition, a district court may: (1) defer considering the motion or deny it; (2) allow time to obtain affidavits or declarations or to take discovery; or (3) issue any other appropriate order. Fed. R. Civ. P. 56(d).

In its affidavit, the party moving for discovery must specify: (1) the probable facts not available, (2) why those facts cannot be presented currently, (3) what steps have been taken to obtain these facts, and (4) how additional time will enable the party to obtain those facts and rebut the motion for summary judgment. *Adams v. C3 Pipeline Constr. Inc.*, 30 F.4th 943, 968 (10th Cir. 2021) (citing *Gutierrez v. Cobos*, 841 F.3d 895, 908 (10th Cir. 2016)).

In the case below, the victims filed their motion seeking discovery according to the guidelines set forth in Fed. R. Civ. P. 56(d) and those articulated by this Circuit. (App. Vol. I at 256).

1.3 Probable facts were unavailable to the victims and the USFS solely possessed them.

1.3.1 Evidence was needed to show whether the USFS acted outside its discretion.[4]

The USFS had a duty to suppress human-caused fires "without consideration to achieving resource benefits." (App. Vol. II at 358).[5] Under the Federal Tort Claims Act, sovereign immunity is waived where a party files suit against the United States arising out of certain torts committed by federal employees acting within the scope of their employment. *See United States v. Orleans*, 425 U.S. 807, 813 (1976), abrogated on other grounds by *United States v. Olson*, 546 U.S. 43 (2005).

The discretionary function exception is an exception to the FTCA's waiver of sovereign immunity which precludes the imposition of liability against the United States for conduct "based upon the exercise or performance or the failure to exercise or perform a discretionary function

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[4] The issues discussed in this section are more thoroughly examined in the Knezovich Principal Brief. The facts and law are summarized herein to provide context for the argument that follows.

[5] Appendix citations herein refer to Appellants' Appendix.

or duty on the part of a federal agency or employee of the United States, whether or not the discretion involved be abused." 28 U.S.C. § 2680(a).

Because the USFS had a duty to attempt to suppress the Roosevelt Fire without consideration for achieving resource benefits, it is crucial, therefore, to determine whether or not the USFS did in fact delay suppressing the fire in favor of achieving such resource benefits. The victims allege in their complaint that the USFS did so, in part relying on a news article quoting a USFS official and in part based upon other statements made by the USFS itself. The USFS provided no testimony from any decision-makers, or even witnesses to the decision-making process, in rebutting these statements. Although the USFS is in the best and only position of identifying and securing testimony from these individuals, it failed to do so.

Accordingly, direct evidence relating to the decision-making process is crucial in determining whether the discretionary function exception applies in this case.

1.3.2 The evidence presented by the USFS is inadequate.[6]

At summary judgment the content or the substance of evidence must be admissible. *Bryant v. Farmers Ins. Exch.*, 432 F.3d 1114, 1122 (10th Cir. 2005) (citing *Hardy v. S.F. Phosphates Ltd.*, 185 F.3d 1076, 1082 n.5 (10th Cir. 1999)). Statements of mere belief must be disregarded, and unsubstantiated allegations should be given no weight. *Argo v. Blue Cross & Blue Shield of Kan., Inc.*, 452 F.3d 1193, 1200 (10th Cir. 2006); *Hasan v. AIG Prop. Cas. Co.*, 935 F.3d 1092, 1098 (10th Cir. 2019). "[E]vidence, including testimony, must be based on more than mere speculation, conjecture, or surmise." *Hasan*, 935 F.3d at 1098.

In support of its Rule 12(b)(1) motion, the USFS presented scant evidence supporting its claim that it did not improperly consider achieving resource benefits when deciding how to address the Roosevelt Fire. It presented the declarations of Francisco Romero (App. Vol. I at 69-81) and Lathan D. Sidebottom (App. Vol. I at 203-208), it presented Wildland Fire Decision Support System ("WFDSS") reports relating to the fire (App. Vol. I at 146-170; App. Vol. I at 171-202), and it presented

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[6] The facts and law relating to the issues discussed in this section are primarily discussed in the Knezovich Principal Brief at Sect. 2.

a press release (App. Vol. I at 253-255). None of the evidence proffered by the USFS is sufficient to grant it summary judgment.

First, neither of the declarants, Romero and Sidebottom, had any personal knowledge of the actual decisions made by the USFS officials with regard to the Roosevelt Fire. Instead, they relied on incomplete WFDSS reports and opined as to what they personally believed to be the intent of the actual decision-makers. Although the USFS had access to the *actual individuals* who made the decisions, and who could best testify as to their decision-making process, the USFS failed to produce any testimony from these individuals.

Second, the WFDSS reports that the declarants, and the district court, relied upon to determine that achieving resource benefits from the fire was not considered by the USFS officials. Romero testified that "***Typically***, when resource benefit objectives are pursued, a description of the benefit being sought is provided in 'Benefits.' See *id*. at 14. In the 9/16/18, 'Benefits' was left blank, leaving no indication that resource benefits were being pursued." (App. Vol. I at 77-78, ¶27) (emphasis added). Although he makes these presumptions, Romero's declaration does not state whether he interviewed any of the witnesses that actually

prepared the WFDSS report in order to form his opinion as to this particular report.

Finally, the evidence presented by both the victims and the USFS indicates that for the first days of the fire, the USFS's stated goal was solely to "monitor" the fire. The WFDSS reports provided by the USFS likewise indicated that it intended to "assess[] options for long-term management strategy." Although disputed by the USFS, the victims presented ample evidence that "monitoring" and suppressing a fire are not consistent and is evidence that the USFS officials did not follow USFS regulation. Likewise, the victims provided evidence that the USFS's use of the term "long-term management strategy" is synonymous with a resource benefit strategy. *See generally,* Knezovich Principal Brief at Sect. 2(C)(ii)(c).

The evidence presented by the USFS was insufficient for the district court to grant summary judgment and the victims' request for discovery should have been granted.

1.4 The rational remedy was to allow discovery.

The USFS failed to provide any evidence in support of its motion which spoke to the actual intent of the decision-makers controlling its

response to the Roosevelt Fire, and the district court abused its discretion in denying them access to such evidence.

"[S]ummary judgment [should] be refused where the nonmoving party has not had the opportunity to discover information that is essential to his opposition." *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 250 n.5 (1986). "Unless dilatory or lacking in merit," motions seeking relief under Rule 56(d) "should be liberally treated." *Comm. for First Amendment v. Campbell*, 962 F.2d 1517, 1522 (10th Cir. 1992) (quoting James W. Moore & Jeremy C. Wicker, *Moore's Federal Practice* para. 56.24 (1988)).

Here, testimony relating to the issue of the Interagency Standards and what the USFS officials who were actually in charge of managing the Roosevelt Fire knew and why they made their decisions was essential to the victims' opposition to USFS's motion. Although the USFS proffered the testimony of two expert witnesses, neither of these witnesses had any personal knowledge of the decision-making process relating to the Roosevelt Fire. Meanwhile, the WFDSS exhibits filed by the USFS identified no fewer than five witnesses who could testify as to how decisions were made in managing the fire, and at least one witness who

could testify as to the circumstances of the statement made to reporters on behalf of the USFS claiming that it was using the Roosevelt Fire to "reintroduce fire in its natural role." These witnesses would have personal knowledge of the intentions of the USFS to improperly delay their fire suppression efforts in favor of seeking resource benefits associated with the fire.

Without regard for the victims' request to discover reliable evidence, the district court chose to use the artificial dearth of evidence against the victims, finding that:

> Aside from one news article, all other information, including the database which outlines the Forest Service's official actions, points to the Forest Service not considering resource benefits in their decisions regarding the Roosevelt Fire.

(App. Vol. II at 450). In deciding to weigh the evidence in this manner and deny the victims' request, the district court "exceed[ed] the bounds of the rationally available choices given the facts and the applicable law." *Arciero*, 741 F.3d at 1116.

CONCLUSION

In light of the foregoing, Appellants ask this Court to reverse the district court's order denying discovery pursuant to Rule 56(d) and remand the case with instructions to grant the requested discovery.

Respectfully Submitted,

/s/ Marc J. Randazza

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Dated: October 11, 2022.

CERTIFICATE OF COMPLIANCE

Pursuant to Fed. R. App. P. 32(g)(1) and Fed. R. App. P. 29(a)(5), I certify that this Brief:

(a) was prepared using 14-point Century Schoolbook font;

(b) is proportionately spaced; and

(c) contains 2,491 words.

Submitted this 11th day of October 2022.

/s/ Marc J. Randazza
Marc Randazza, Esq.

CERTIFICATE OF DIGITAL SUBMISSION

I hereby certify that with respect to the foregoing:

(1) all required privacy redactions have been made per 10th Cir. R. 25.5;

(2) if required to file additional hardcopies, that the ECF submission is an exact copy of those documents; and

(3) the digital submissions have been scanned for viruses with the most recent version of a commercial virus scanning program, and according to the program are free from viruses.

Submitted this 11th day of October 2022.

/s/ Marc J. Randazza
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CERTIFICATE OF SERVICE

I hereby certify that a copy of this Opening Brief was served on October 11, 2022, via electronic service via ECF/CM on the following:

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