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EXCEPT AS AUTHORIZED BY APPLICABLE RULES.  
See Ariz. R. Supreme Court 111(c); ARCAP 28(c);  
Ariz. R. Crim. P. 31.24

IN THE COURT OF APPEALS  
STATE OF ARIZONA  
DIVISION ONE

LOREN R. SHIRK, an individual, ) No. 1 CA-CV 12-0131  
)  
Plaintiff/Appellee, ) DEPARTMENT D  
)  
v. ) **MEMORANDUM DECISION**  
) Not for Publication  
) (Rule 28, Arizona Rules  
MICHAEL LANCASTER, an ) of Civil Appellate Procedure  
individual; HILARIO TANAKKEYOWMA )  
and MICHELLE TANAKKEYOWMA, )  
husband and wife, )  
)  
Defendants/Appellants. )  
\_\_\_\_\_ )

Appeal from the Superior Court in Maricopa County

Cause No. CV2007-018088

The Honorable Eileen S. Willett, Judge

**REVERSED**

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G E M M I L L, Judge

¶1 Loren Shirk seeks damages for allegedly negligent conduct by two Gila River Indian Community ("GRIC") police officers. Because we conclude the trial court erred in granting Shirk's motion to set aside the prior final judgment in favor of the officers, we reverse.

**FACTUAL AND PROCEDURAL HISTORY**

¶2 This case involves an off-reservation traffic stop made by two GRIC police officers, Detective Michael Lancaster and Sergeant Hilario Tanakeyowma (the "Officers"). On October 19, 2006, at approximately 5:00 p.m., the Officers were traveling northbound on State Route 87/Arizona Avenue in a GRIC vehicle. The Officers had attended a mandatory training session in Tucson and were returning to Officer Tanakeyowma's home in Chandler. At the time, both Officers were certified under the Arizona Peace Officer Standards and Training Board ("AZ POST").

¶3 As the Officers entered south Chandler they observed a car driving erratically and weaving in and out of traffic. The driver of the car was later determined to be Leshedrick Sanford. The Officers turned on their police lights and sirens in order to effectuate a stop on Sanford's vehicle. The Officers stopped

behind Sanford at a red light at the intersection of Ocotillo Road and Arizona Avenue. As Officer Lancaster exited the police vehicle to approach Sanford's vehicle, Sanford accelerated into the intersection against a red light. Sanford's car collided with a motorcycle operated by Shirk, traveling eastbound on Ocotillo Road. Shirk was thrown from his motorcycle and suffered serious injuries: his left leg was shattered below the knee, his right shoulder was broken in several places and his right leg had to be amputated. Sanford fled from the scene but was quickly apprehended and arrested by the Officers.

¶4 Shirk initially filed suit on October 3, 2007 against the Officers and the City of Chandler in the Maricopa County Superior Court. The court dismissed the case as to the City of Chandler under Arizona Revised Statutes ("A.R.S.") section 13-3874(B) (2010).<sup>1</sup> Furthermore, the court dismissed the action against the Officers based on The GRIC's sovereign immunity, finding the Officers were acting in their official capacity. On

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<sup>1</sup> Section 13-3874(B) provides:

Each agency appointing any Indian police officer pursuant to this section shall be liable for any and all acts of such officer acting within the scope of his employment or authority. Neither the state nor any political subdivision shall be liable for any acts or failure to act by any such Indian police officer.

December 10, 2008, the trial court entered a final judgment in favor of the Officers. Shirk did not appeal the judgment.

¶15 Subsequently, on August 27, 2009, Shirk filed a claim in federal district court against the United States and the Bureau of Indian Affairs ("BIA") under the Federal Tort Claims Act ("FTCA"). Shirk argued the Officers should be deemed federal employees under the FTCA.<sup>2</sup> On April 7, 2010, the United States moved to dismiss the case arguing the Officers were not acting in furtherance of the self-governance contract at the time of the incident. On August 27, 2010, the district court dismissed the case on the basis that the court lacked subject matter jurisdiction because the Officers were not acting as federal employees under the FTCA at the time of the incident. See *Shirk v. U.S. ex rel. Dep't of Interior*, CV-09-01786-PHX-NVW, 2010 WL 3419757, at \*7 (D. Ariz. 2010). Shirk filed a

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<sup>2</sup> In 1990, Congress extended FTCA coverage:

With respect to claims resulting from the performance of functions . . . under a contract . . . authorized by the Indian Self-Determination and Education Assistance Act of 1975 . . . an Indian contractor is deemed hereafter to be part of the Bureau of Indian Affairs . . . while carrying out any such contract or agreement and its employees are deemed employees of the Bureau . . . while acting within the scope of their employment in carrying out the contract . . . .

Pub. L. No. 101-512, Title III, § 314 (1990) (codified at 25 U.S.C. § 450f Note).

notice of appeal on October 27, 2010, and the federal court appeal has been stayed pending the outcome of this proceeding in state court.

¶16 Returning to superior court, Shirk filed a motion to set aside the prior judgment pursuant to Rule 60(c) on December 22, 2010. Shirk's motion relied on a new theory that a federal statute, 25 U.S.C. § 450f(c), operated to abrogate the GRIC's sovereign immunity and justified setting aside the prior judgment. After hearing oral argument from the parties, the trial court on December 19, 2011 granted Shirk relief pursuant to Rule 60(c)(6) of the Arizona Rules of Civil Procedure.

¶17 The Officers filed a timely notice of appeal. We have jurisdiction pursuant to A.R.S § 12-2101(A)(1) (Supp. 2012).

#### **DISCUSSION**

¶18 On appeal, the Officers challenge the trial court's decision to set aside the judgment.

¶19 Under Arizona Rule of Civil Procedure 60(c), a party may be relieved from a final judgment for the following reasons:

(1) mistake, inadvertence, surprise or excusable neglect; (2) newly discovered evidence which by due diligence could not have been discovered in time to move for a new trial under Rule 59(d); (3) fraud (whether heretofore denominated intrinsic or extrinsic), misrepresentation or other misconduct of an adverse party; (4) the judgment is void; (5) the judgment has been satisfied, released or discharged, or a prior judgment on which it is based has been

reversed or otherwise vacated, or it is no longer equitable that the judgment should have prospective application; or (6) any other reason justifying relief from the operation of the judgment.

A motion for Rule 60(c)(6) relief must be filed within a "reasonable time" after judgment is entered. *Id.* The catch-all provision of Rule 60(c) applies only when our "systematic commitment to finality of judgments is outweighed by extraordinary circumstances of hardship or injustice." *Panzino v. City of Phoenix*, 196 Ariz. 442, 445, ¶ 6, 999 P.2d 198, 201 (2000) (citations and internal punctuation omitted). To obtain relief under Rule 60(c)(6), a party must demonstrate that extraordinary circumstances exists other than those listed in Rule 60(c)(1) through (5). *Id.*; *Webb v. Erickson*, 134 Ariz. 182, 186-87, 655 P.2d 6, 10-11 (1982). Furthermore, a plaintiff must show that the (1) plaintiff diligently and vigorously prosecuted the case; (2) the parties took reasonable steps to inform the court of the case status; (3) substantial prejudice will result unless relief is granted; (4) plaintiff sought relief promptly and (5) plaintiff has a meritorious claim. *Jepson v. New*, 164 Ariz. 265, 273, 792 P.2d 728, 736 (1990); *Copeland v. Ariz. Veterans Mem'l Coliseum & Exposition Ctr.*, 176 Ariz. 86, 89, 859 P.2d 196, 199 (App. 1993).

¶10 We review a trial judge's decision to grant a Rule 60(c) motion for an abuse of discretion. *City of Phoenix v.*

*Geyler*, 144 Ariz. 323, 328, 697 P.2d 1073, 1078 (1985). The trial court's discretion, however, is not unlimited. *Gorman v. City of Phoenix*, 152 Ariz. 179, 182, 731 P.2d 74, 77 (1987). The trial court may not misapply law or legal principles, act arbitrarily or inequitably, nor make decisions unsupported by facts or sound legal policy. *Id.* Although we are reluctant to disturb the trial court's factual findings, we will act to correct legal error. See *State v. Moran*, 151 Ariz. 378, 381, 728 P.2d 248, 251 (1986).

¶11 In Shirk's motion to set aside the original judgment he principally argued one issue: the Officers failed to disclose that under federal law The GRIC's sovereign immunity was abrogated up to the limits of its federally funded insurance policy. Specifically, Shirk argued, "the Defendants, here, did not bring 25 U.S.C. § 450f(c) to the attention of the Court." At oral argument on the motion, Shirk also argued the Officers failed to disclose the GRIC's insurance policy. In Shirk's motion, he cited subsections 3 and 6 of Rule 60(c) as providing a proper basis for setting aside the judgment. The trial court granted the motion in part stating that the "Plaintiff has a viable cause of action in State Court [and the] Plaintiff has pursued relief in all available forums with diligence."

¶12 After consideration of the importance of finality of judgments and the considerations attendant to a motion to set

aside under Rule 60(c)(6), we determine the trial court erred in granting Shirk's motion to set aside the prior judgment.

¶13 We initially conclude that Shirk does not provide an independent reason justifying relief outside the five subsections preceding subsection 60(c)(6). Shirk argues essentially that the Officers failed to make proper disclosure of relevant information. Specifically, the Officers should have brought the statute, 25 U.S.C. § 450f(c), to the attention of the court and disclosed the GRIC insurance policy. The principle thrust of Shirk's alleged grounds for setting aside the initial judgment is covered under Rule 60(c)(3). Subsection 3 grants relief when the adverse party has committed acts amounting to fraud, misrepresentation, or other misconduct. Ariz. R. Civ. P. 60(c)(3). We have previously stated the "failure to disclose evidence that may be relevant . . . can constitute misconduct under Rule 60(c)(3)." *Norwest Bank v. Symington*, 197 Ariz. 181, 186, ¶ 21, 3 P.3d 1101, 1106 (App. 2000); see also Ariz. R. Civ. P. 26(b)(2) ("A party may obtain discovery of the existence and contents of any insurance agreement under which any person . . . may be liable to satisfy part or all of a judgment which may be entered in the action"). Because the basis for Shirk's motion – the Officers should have disclosed relevant information – is substantially covered by subsection (3), the motion under subsection (6) must generally



be denied because the catch-all provision of subsection (6) usually applies only when one of the five mutually exclusive grounds under Rule 60(c) does not provide a basis for setting aside the judgment.

¶14 There is a limited exception to this principle, as recognized in *Amanti Elec., Inc. v. Engineered Structures, Inc.*, 229 Ariz. 430, 433, ¶ 10, 276 P.3d 499, 502 (App. 2012). Shirk relies on *Amanti* for the proposition that he is not precluded from relief under Rule 60(c)(6) despite advancing a reason enumerated in clauses 1 through 5. The court in *Amanti* explained that:

We acknowledge the general validity of [the mutual exclusivity] principle, but clarify that even when relief might have been available under one of the first five clauses but for the fact that the time limits of the rule had elapsed, this does not necessarily preclude relief under clause (6) *if the motion also raises exceptional additional circumstances that convince the court the movant should be granted relief in the interest of justice.*

*Id.* (emphasis added). Shirk overstates the import of *Amanti*, which does not provide relief to a claimant under Rule 60(c)(6) who relies solely on a reason within the first five subsections. The claimant is not necessarily barred from relief under Rule 60(c)(6) if the reason advanced is properly within one of the first five subsections *and* the claimant also has "exceptional

additional circumstances" demonstrating that relief from a judgment must be granted in the interest of justice.

¶15 Shirk does not, however, demonstrate such exceptional additional circumstances. In other words, we cannot conclude that Shirk has provided a reason sufficiently extraordinary, unique, or compelling to justify relief under Rule 60(c)(6). See *Park v. Strick*, 137 Ariz. 100, 105, 669 P.2d 78, 83 (1983); *Panzino*, 196 Ariz. at 445, ¶ 6, 999 P.2d at 198 ("the 'other reason' advanced must be one that *justifies* relief") (citations omitted) (emphasis in original).

¶16 Shirk's newly discovered argument based on the alleged significance of 25 U.S.C. § 450f(c) does not establish an extraordinary basis for relief under subsection 6. A Rule 60 motion is not a tool simply to present new arguments upon law or facts that existed at the time of the original action. See *Cashner v. Freedom Stores, Inc.*, 98 F.3d 572, 577 (10th Cir. 1996) (holding new arguments that a party could have raised in prior action do not warrant relief under the catch-all provision of Federal Rule 60); *Panzino*, 196 Ariz. at 445 n.1, ¶ 5, 99 p.2d at 201 n.1 (noting Rule 60(c) has been interpreted similarly to its counterpart in Federal Rule 60).

¶17 Shirk could have raised his 25 U.S.C. § 450f(c) sovereign immunity argument in his prior case in superior court. The federal statute Shirk now relies on was cited in the GRIC's

Contract attached to the Officer's motion to dismiss, which identified this section as governing the GRIC's self-determination contract. Furthermore, the statute has remained unamended since 1990. *Cf. Edsall v. Superior Court*, 143 Ariz. 240, 243, 693 P.2d 895, 898 (1984) (granting relief under Rule 60(c)(6) when there was "a change in the law affecting substantial rights of a litigant"). Moreover, if Shirk disagreed with the original trial court decision regarding sovereign immunity as a matter of law, he could have appealed, but he did not do so. *See Ackerman v. United States*, 340 U.S. 193, 197-98 (1950) (analyzing federal Rule 60 and concluding the plaintiff cannot be "relieved" of his calculated choice not to appeal). We conclude, therefore, that Shirk does not present the requisite extraordinary circumstances to warrant relief under Rule 60(c)(6).

¶18 Because we determine that Shirk did not establish the requisite extraordinary circumstances for relief under Rule 60(c)(6), we need not decide whether he presented a meritorious claim on sovereign immunity. To prevail under Rule 60(c)(6), a movant must satisfy all relevant factors. *See Jepson*, 164 Ariz. at 273, 792 P.2d at 736; *see also Panzino*, 196 Ariz. at 448, ¶ 18, 999 P.2d at 204 (noting "public policy requires an end to litigation and even erroneous final judgments must be honored in

order to continue the well-ordered functioning of the judicial process") (citations and internal punctuation omitted).

**CONCLUSION**

¶19 For the foregoing reasons, we conclude the trial court erred in granting Shirk relief under Rule 60(c)(6), and we therefore reverse and remand with instructions to the trial court to deny the Rule 60(c) motion.

/s/

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JOHN C. GEMMILL, Presiding Judge

CONCURRING:

/s/

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JON W. THOMPSON, Judge

/s/

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DONN KESSLER, Judge