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CIVIL PROCEDURE

United States v. Bizzell, 921 F.2d 263

Author: Judge Moore

Defendants, John and Charles Bizzell, argued that the district court should have granted their motion to dismiss based on double jeopardy. In particular, the Bizzells argued that because they were subjected to civil sanctions from the Department of Housing and Urban Development (“HUD”), double jeopardy applied, thereby barring their criminal charges.

The Tenth Circuit affirmed the district court’s denial of their motion to dismiss. The court found that because HUD civil sanctions were remedial and not punitive, jeopardy did not attach to the civil proceeding. The court, however, reversed the district court’s finding that a \$30,000 HUD assessment against John Bizzell was a punishment. In holding the assets as remedial, the court considered the payment as an alternative to debarment and that the government’s losses exceeded the payment.

Brezovski v. United States Postal Serv., 905 F.2d 334

Per Curiam

Plaintiff, Brezovski, appealed the district court’s dismissal of his claims for unlawful termination of employment. The district court reasoned that Brezovski failed to timely file a complaint against the proper defendant. Brezovski argued that the time period for filing his claim should be tolled because the notification of his right to suit misled him into naming the wrong defendant.

The Tenth Circuit said the Brezovski’s amended complaint with the proper defendant would be barred unless requirements for relation back were met within the prescribed limitations period. Since the requirements were not met during the limitation period, the court noted that the limitations period could be tolled when affirmative misconduct on the part of a defendant lulled plaintiff into inaction. The court concluded that the language in a right-to-sue letter sent to Brezovski was sufficiently misleading to justify the tolling of the limitations period and that, therefore, Brezovski’s amended complaint did relate back to the filing of the original complaint. The court reversed and remanded to the district court.

Farmers & Merchants Nat’l Bank v. Bryan, 902 F.2d 1520

Author: Judge O’Connor, sitting by designation

Defendants, Bruce and Robert Bryan, former officers of the plaintiff, Farmers and Merchants National Bank, appealed a jury verdict finding them liable for violating federal lending limits and making

imprudent loans. The district court denied the Bryans' motion for directed verdict, holding the question of whether the statute of limitations had tolled to be one of material fact for the jury.

The Tenth Circuit affirmed, holding that: (1) the district court properly denied the motion for directed verdict since there was evidence upon which a reasonable jury could find that the doctrine of "adverse domination" tolled the statute of limitations; (2) the district court properly admitted federal examination reports under Fed. R. Evid. 803(8)(c), the "public records" exception to the hearsay rule; and (3) the prejudicial value of the reports was not outweighed by the probative value.

Bud Brooks Trucking, Inc. v. Bill Hodges Trucking Co., 909 F.2d 1437

Author: Judge Anderson

Plaintiff, Bud Brooks Trucking Company, Inc. ("Brooks"), appealed the district court's denial of its motion to vacate the order dismissing the action. The suit was dismissed because of Brooks' failure to comply with discovery orders and failure to attend a pretrial settlement conference.

The Tenth Circuit affirmed the decision of the district court. The court explained that the district court did not abuse its discretion. The court noted that while dismissal with prejudice is a severe sanction, the dismissal was proper since Brooks failed to show any reason or compelling circumstance explaining its failure to comply with the discovery orders.

G.J.B. & Assocs., Inc. v. Singleton, 913 F.2d 824

Author: Judge Baldock

Claro, an attorney, challenged the district court's *sua sponte* imposition of sanctions upon him for violating Fed. R. Civ. P. 11 and 16(f) during a trial. The district court ruled that Claro failed to comply with the court's pre-trial scheduling orders and failed to produce discovery documents.

The Tenth Circuit sustained the Rule 16(f) sanctions as lawfully imposed but vacated the Rule 11 sanction for want of procedural due process under the abuse of discretion standard. Before addressing the merits, the court stated that a sanction order against an attorney currently of record was not a final decision for purposes of a 28 U.S.C. § 1291 appeal, where the underlying controversy remained unsolved. The court also found that the sanction order was not an exception to the final decision rule under the collateral order doctrine. The court reasoned that retroactive application of this holding would be inequitable. Accordingly, the court exercised jurisdiction. Reaching the merits, the court set aside the Rule 11 sanction. The court reasoned that Claro was given neither notice that the court was considering Rule 11 sanctions nor an opportunity to respond either before or after their imposition. Finally, the court found that providing Claro with an opportunity during

trial to justify his actions with regard to Rule 16(f) was sufficient due process given the moderate nature of the sanction.

Bank of Oklahoma v. The Islands Marina, Ltd., 918 F.2d 1476
Per Curiam

Plaintiff, First National Bank and Trust of Vinita ("FNBV"), attempted to recover proceeds received by defendant, Courtney, following the sale of a boat in The Islands Marina, Ltd. ("Marina") inventory. FNBV claimed a superior interest in the inventory of the Marina. First Oklahoma Savings Bank ("FOSB") joined in the action, and Federal Savings and Loan Insurance Corporation ("FSLIC") was named receiver for FOSB. FSLIC filed a removal petition, asserting federal jurisdiction pursuant to 12 U.S.C. § 1730(k)(1). Courtney asserted that because FSLIC was never formally made a party, the district court did not derive jurisdiction for § 1730(k)(1)(B). The district court asserted that it had subject matter jurisdiction and granted FNBV's motion for summary judgment. Courtney subsequently appealed.

The Tenth Circuit affirmed the district court's decision. The court noted that the issue of subject matter jurisdiction may be raised at any time. The court then stated that FSLIC was a party contemplated under 12 U.S.C. § 1730(k)(1)(B). The court explained that a federal court may retain jurisdiction when all federal claims are dismissed if the remaining claims are based on the common operative facts, and a plaintiff would ordinarily be expected to try all of the issues in one proceeding. The court also maintained that judicial economy and fairness required retaining federal jurisdiction.

Depex Reina 9 Partnership v. Texas Int'l Petroleum Corp., 897 F.2d 461
Author: Judge Brorby

Defendant, Texas International Petroleum Corporation ("TIPCO"), appealed the district court's award of damages, interest, and costs to Depex Reina 9 Partnership ("Depex"). On appeal, TIPCO argued that the district court lacked jurisdiction because complete diversity between the parties never existed. Specifically, TIPCO and one of the general partners of each Depex partnership were Delaware corporations. Also, TIPCO argued that the district court erred in holding that principles of *res judicata* precluded it from raising the issue of lack of subject matter jurisdiction.

The Tenth Circuit reversed and remanded. First, the court ruled there was no diversity jurisdiction because parties on one side of the litigation were not of different citizenship from all parties on the other side of litigation. Second, the court ruled that principles of *res judicata* did not preclude TIPCO from raising the issue of subject matter jurisdiction. The court explained that this issue may be raised at anytime during the proceedings either by the parties or the court. Further, the court held that the earlier trial, appeal, and remand which took five

years, did not create a final judgment thereby precluding TIPCO from raising the issue of lack of subject matter jurisdiction.

Gilles v. United States, 906 F.2d 1386

Author: Chief Judge Holloway

Dissent: Judge Seth

Plaintiff, Gilles, alleged that physicians at the Veterans Administration Hospital ("VA") in Oklahoma City committed medical malpractice, thereby causing him to sustain personal injuries under the Federal Tort Claims Act. The district court dismissed Gilles' claims on the grounds of improper service. The district court also stated that it lacked jurisdiction over claims asserted against the VA by virtue of 28 U.S.C. § 2676, and over claims asserted against the doctors due to the provisions of 38 U.S.C. § 4116. Gilles contended that the amended complaint was not defective and was, therefore, timely served.

A divided panel of the Tenth Circuit affirmed in an unpublished order and judgment. The court later granted rehearing *en banc* and vacated the panel's order. The court held that the action was timely commenced, the government had timely notice of the suit, and the amended suit was properly filed as a matter of right. The court found that service was properly perfected, and that the amended complaint related back. Accordingly, the court reversed the district court's dismissal of the case regarding the government and the two doctors. The court, however, affirmed the dismissal of the action against the VA since it is not suable pursuant to 28 U.S.C. § 2679(a).

Grandbouche v. Lovell, 913 F.2d 835

Per Curiam

Plaintiff, Voss, acting for the personal estate of John Grandbouche, filed a motion to substitute himself as plaintiff. The district court dismissed this action for failure to file a timely motion for substitution pursuant to Fed. R. Civ. P. 25(a)(1). On appeal, Voss contended that the ninety-day limitations period under Rule 25(a)(1) was not triggered because a formal suggestion of death was not made on the record.

The Tenth Circuit reversed the district court's decision, and remanded the case for further proceedings. The court explained that the mere reference of a party's death in court proceedings or pleadings, as performed here in a court ordered supplemental brief, was not sufficient to trigger the limitations period. Furthermore, the court ruled that the requirement of service was not satisfied. Specifically, the successors or representative of the estate were not served pursuant to Fed. R. Civ. P. 4. Therefore, because the personal representative of the decedent's estate did not receive service of any purported suggestion of death, the ninety-day limitations period did not begin to run and the action was erroneously dismissed.

Kennedy v. Freeman, 919 F.2d 126

Author: Judge Seymour

Plaintiff, Kennedy, a resident of Oklahoma, brought suit in Oklahoma. She alleged that Freeman, a physician in Texas, negligently undermeasured and reported the size of a lesion removed by Kennedy's physician in Oklahoma. The district court granted Freeman's motion to dismiss for lack of personal jurisdiction. The district court found that jurisdiction over a nonresident physician could only be established if there were some form of solicitation. Kennedy subsequently appealed.

The Tenth Circuit reversed the district court's decision. The court ruled that solicitation is not required to assert jurisdiction over a non-resident physician. Rather, personal jurisdiction may be asserted when a physician has purposefully availed himself of the privileges of conducting activities within his patient's state. The court found that Freeman's actions were sufficient to establish jurisdiction. Although he did not solicit Kennedy's business in Oklahoma, Freeman willingly accepted the lesion sample, sent his bill to Oklahoma, and rendered a diagnosis through the mail, knowing it would be used as a basis for Kennedy's further treatment in Oklahoma. The court also found that asserting jurisdiction over Freeman was not unreasonable. While the state does have a compelling interest in ensuring access to out-of-state, specialized medical care, the state has a greater interest in deterring medical malpractice against its residents when a physician purposefully directs his activities at the forum state.

Lewis v. City of Ft. Collins, 903 F.2d 752

Author: Judge Brorby

Plaintiff, Lewis, an hispanic female over forty years of age, brought an action alleging employment discrimination against defendants, City of Ft. Collins (the "City") and several city officials. The City appealed the order of the district court which denied its motion for summary judgment based on qualified immunity.

The Tenth Circuit reversed the district court and granted the City's motion for summary judgment based on qualified immunity. The court first noted that it had appellate jurisdiction. The court reasoned that the City faced discovery which exceeded the threshold necessary to consider the issue of qualified immunity. The court also found that the City made a *prima facie* showing of objective reasonableness of its actions. Moreover, Lewis failed to produce specific evidence that the City's actions were tainted by a discriminatory motive.

Coriz v. Martinez, 915 F.2d 1469

Author: Judge Anderson

Plaintiff, Coriz, brought suit pursuant to 42 U.S.C. § 1983, after defendant, Guillen, an aide to a gym teacher, threw him to the floor and injured him while attempting to maintain discipline at a high school.

Coriz alleged, *inter alia*, that his right to procedural due process was violated because he had no adequate post-deprivation remedy. The district court granted summary judgment against him, holding the defendants qualifiedly immune. The district court reasoned that Coriz's post-deprivation remedy was adequate. Coriz subsequently appealed.

The Tenth Circuit affirmed the decision of the district court. The court noted that procedural due process rights were not violated by a state employee if adequate post-deprivation remedies were available. Where the defense of availability of such remedies is raised, the plaintiff has the burden of showing that such remedies do not exist. Here, although the state law was not clear and federal district courts had previously disagreed, it could not be said definitively that no remedy existed. Thus, the court presumed a remedy did exist.

Pelican Prod. Corp. v. Marino, 893 F.2d 1143

Author: Judge Henley, sitting by designation

Plaintiff, Pelican Production Corporation ("Pelican"), brought an antitrust claim against defendant, Marino. The district court subsequently entered a default judgment of dismissal against Pelican after it failed to respond to motions to dismiss and for summary judgment. Pelican appealed, alleging the district court erred when it denied Pelican's Fed. R. Civ. P. 60(b) motion to relieve it from judgment. Pelican argued that it received no notice from its attorney of the motion to dismiss, had no communication from him, and did not become aware of the default judgment until nearly a month after it was entered. Pelican also appealed the district court's decision to adopt the magistrate's recommended award of attorney's fees.

The Tenth Circuit affirmed the decision of the district court. First, the court held that carelessness by a litigant or his counsel does not afford a basis for relief under Rule 60(b)(1). Moreover, the court noted that Pelican was not an uneducated party, and it also had at least constructive notice because it had in-house legal staff who initiated the lawsuit. The court also upheld the award of attorney's fees. The court explained that the determination was supported by the record, and thus, there was no abuse of discretion.

Taylor v. Phelan, 912 F.2d 429

Per Curiam

Plaintiffs, Brenda and Michael Taylor, residents of Kansas City, Kansas, discovered that Michael Moore sexually assaulted their daughter in Kansas City, Missouri. They reported the incident to the Kansas City, Missouri police department. The police then telephoned Moore to notify him that a warrant was issued for his arrest. Subsequently, Moore broke into the Taylors' home and assaulted the family members. The Taylors brought personal injury, wrongful death and damage actions against the Kansas City police department, detective Phelan, and the Missouri Board of Police Commissioners. The district court granted

summary judgment in favor of the defendants. The district court reasoned that it did not have personal jurisdiction over the Missouri defendants. The Taylors subsequently appealed.

The Tenth Circuit reversed and remanded the order of the district court. In making its determination, the court applied a two-part analysis: (1) did the defendants' conduct fall within the scope of the relevant section of the long-arm statute; and (2) did the exercise of personal jurisdiction comport with the requirements of due process. The court concluded that the Kansas long-arm statute applied to the defendants' actions. The court also found that the requisite minimum contacts did exist between the defendants and Kansas. The court reasoned that the detective's visit to the Taylors' house and repeated phone contacts with them in Kansas were sufficient contacts.

Wang v. Hsu, 919 F.2d 130

Author: Judge Anderson

Clayton, a non-party deponent, was served with a deposition subpoena. This subpoena commanded Clayton to appear and bring specified documents. Clayton did not file a written objection to inspecting or copying the documents within the ten-day time requirement as specified pursuant to Fed. R. Civ. P. 45. Rather, Clayton appeared with the documents, and allowed them to be inspected, but refused to allow them to be copied. Clayton subsequently motioned for a protective order, but it was denied. Clayton appealed the denial of his motion, alleging that the subpoena did not specifically authorize the right to inspect and copy.

The Tenth Circuit affirmed the decision of the district court. The court stated that the district court did not abuse its discretion and, therefore, its decision to deny a protective order could not be reversed. First, the court reasoned that although Clayton orally objected at the deposition, he failed to make a written objection within ten days after the service of the subpoena as required by Rule 45. Second, the court stated that the subpoena commanding Clayton to produce documents simultaneously authorized their inspection and copying.

