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Ascot Dinner Theatre, Ltd. v. Small Business Administration, 887 F.2d 1024
Author: Chief Judge Holloway

In this case of first impression, defendant Small Business Administration ("SBA") appealed a district court decision awarding damages to plaintiff, Ascot Dinner Theatre ("Ascot"). SBA argued that sovereign immunity precludes the award of damages against the SBA for losses to Ascot when it was denied loan assistance on the basis of an agency regulation subsequently held unconstitutional by the district court.

The Tenth Circuit reversed. Though Ascot argued that 15 U.S.C. § 634(b)(1) provided an unrestricted waiver of immunity, the court held that such a "sue and be sued" statute applied to nontort actions, and Ascot's original claim was an alleged constitutional tort controlled by the Federal Torts Claims Act. The express language of 28 U.S.C. §§ 2679-80 barred Ascot's damages claim as a challenge to the unconstitutional agency regulation premised on tort theory. In addition, the court rejected Ascot's argument that there was a waiver of sovereign immunity and right to recover on a contractual theory. The court found the record devoid of any oral or written contract by the SBA or its personnel, and therefore Ascot's claim was tortious.

Ayala v. Joy Manufacturing Co., 877 F.2d 846
Author: Judge McKay

Following an explosion in a coal mine, plaintiff, Ayala, sued the United States and the mining machine manufacturer, Joy Manufacturing Company, under the Federal Tort Claims Act ("FTCA"). The district court dismissed Ayala's complaint against the United States for failure to state a claim under FED. R. CIV. P. 12(B)(6). The district court found that the Mining Safety Health Administration ("MSHA") inspector had acted within the discretionary function exception to the FTCA.

On appeal, the Tenth Circuit reversed the district court's order, finding that Ayala pled sufficient facts to withstand the motion to dismiss. Ayala had asserted that the MSHA inspectors' actions involved technical assistance, not policy-making choices; therefore, invocation of the discretionary function exception to dismiss Ayala's claim was improper. The court remanded for further proceedings.

Boyd v. United States, 881 F.2d 895
Author: Judge Logan
Dissent: Judge Tacha

Plaintiff, Boyd, brought suit against the United States following the death of her husband at a recreation area leased to the state of Oklahoma by the United States Army Corps of Engineers. The district

court dismissed for lack of subject matter jurisdiction, finding the suit barred by the discretionary function exception of the Federal Tort Claims Act ("FTCA"), and finding inapplicable both an Oklahoma recreational use statute and a federal flood control statute.

The Tenth Circuit reversed and remanded, holding that the failure to warn of hazards in a public recreation area was a direct omission by the government, not an exercise of discretion involving a policy decision. Congress did not intend to shield the government from liability when the initial discretionary decision must be separated from the duty to warn. The court found the connection between flood control activity and recreational use too attenuated to warrant invocation of the immunity provision of the federal flood control statute. Thus, neither federal statute barred action against the United States. The court directed the district court on remand to resolve the issue of liability under the state recreational use statute.

Cleveland v. Piper Aircraft Corp., 890 F.2d 1540
Author: Judge Russell, sitting by designation

While piloting his aircraft from the rear seat, plaintiff, Edward Charles Cleveland ("Cleveland"), collided with a vehicle parked across the runway during take off. Cleveland sued defendant Piper Aircraft Corporation ("Piper"), alleging that inadequate rear-seat visibility caused the collision and lack of a rear-seat shoulder harness caused Cleveland's injuries. Cleveland then appealed, based on the district court's failure to enter judgment on the crashworthiness claim rather than on the forward visibility claim.

The Tenth Circuit held that the special verdict form used by the district court was erroneous because it did not permit the jury to determine whether the negligence of original tortfeasors was a proximate cause of Cleveland's enhanced injuries. Nor did the form allow a comparison of the negligence of any original tortfeasors found to be a proximate cause of the enhanced injuries to the negligence of any crashworthiness tortfeasors found to have proximately caused Cleveland's enhanced injuries. Holding that the district court's failure to allow the jury to make these determinations was contrary to New Mexico law, the case was vacated and remanded for new trial.

Cox v. United States, 881 F.2d 893
Per Curiam

Plaintiff, Cox, sued the United States for negligence under the Federal Tort Claims Act ("FTCA"). The district court directed a verdict for the United States, holding that Oklahoma's recreational use statute shielded the United States from liability for injuries sustained on property owned and operated by the United States Army Corps of Engineers.

The Tenth Circuit held that Congress, in enacting the FTCA, limited the scope of the federal government's tort liability, shielding the

United States from liability when a private person would be so shielded. Thus, because a private person would not be liable under the Oklahoma statute, neither is the United States. The intent of the Oklahoma legislature is not relevant to the issue of the government's liability.

Durant v. Neneman, 884 F.2d 1350
Author: Judge Moore

Plaintiffs, Sandra Durant and James Tassin, filed suit for damages against defendant, Neneman, in his individual capacity, alleging that Neneman's negligence caused the death of Charles Durant and physical injuries to Tassin when the vehicle Neneman was driving struck them. At the time of the accident, Neneman was wearing a military uniform and driving his private vehicle to a duty assignment, and Durant and Tassin were engaged in a training exercise in military formation at a military base. The district court dismissed the claims, holding that *Feres v. United States*, 340 U.S. 135 (1950), granted tort immunity to Neneman because the injured parties were engaged in military activity at the time of the accident.

While the original *Feres* immunity doctrine applied only to actions brought against the United States under the Federal Tort Claims Act ("true" *Feres* cases), a *Feres* rationale decrying the propriety of civilian courts delving into military matters has been applied to claims outside the Federal Tort Claims Act and an outgrowth of this has come to be known as the "doctrine of intramilitary immunity." The Tenth Circuit held that even this expanded zone of immunity, however, was never intended to protect individual acts which in no way implicate the function or authority of the military. The court reversed and remanded.

Farrell v. Klein Tools, Inc., 866 F.2d 1294
Author: Judge Anderson

Plaintiff, Farrell, an iron worker, brought a products liability action against defendant, Klein Tools, Inc. ("Klein"), manufacturer of the safety belt and lanyard Farrell used for fall protection. Farrell appealed the jury verdict in favor of Klein, alleging that the district court erred in giving jury instructions on abnormal use of the product and assumption of risk.

The Tenth Circuit held that there was insufficient evidence to warrant a jury instruction on the defense of abnormal use. The court based its decision on the evidence which showed it was foreseeable that the safety equipment would be used in such a way and that the equipment was given to Farrell for such use. The court also held that the general verdict could not stand because it could not be determined with absolute certainty that the jury was not influenced by the submission of the abnormal use instruction. The court, therefore, reversed and remanded for a new trial.

Florom v. Elliott Manufacturing, 867 F.2d 570
Author: Chief Judge Holloway

Plaintiff, Florom, suffered injuries while using a crane manufactured and sold by a predecessor corporation of defendant, Elliott Equipment Corporation ("New Elliott"). Florom argued that: (1) an issue of material fact existed as to whether New Elliott, a successor corporation of Old Elliott, was liable for Florom's tort claims; (2) New Elliott could be held liable for defective products manufactured by a predecessor under both the product line theory and a continuity of enterprise theory; and (3) the district court should not have summarily rejected his claim that New Elliott had an independent duty to warn of unreasonable dangers of Old Elliott's products.

The Tenth Circuit affirmed in part and reversed in part. The court held that New Elliott did not demonstrate the absence of a genuine issue of material fact with respect to a successor corporation's nonliability. The court stated that there was disagreement as to whether New Elliott would assume Old Elliott's tort liabilities. Consequently, summary judgment on this claim was reversed. The court further held that the product line theory and the expanded continuity of enterprise theory should not be adopted as further exceptions to successor corporation nonliability. As a result, summary judgment on this claim was upheld. Finally, there was dispute as to whether New Elliott had an independent duty to warn about the use of Old Elliott's products. The court stated that this duty stems from a relationship between the successor corporation and the predecessor's customers. This issue was, therefore, reversed and remanded for further proceedings.

Florom v. Elliott Manufacturing, 879 F.2d 801
Per Curiam

Defendant, Elliott Manufacturing ("New Elliott"), petitioned for rehearing and argued that a corporate successor has no duty to warn. New Elliott argued that the duty to warn is based only on negligence principles and does not arise from strict liability under section 402(A) of the *Restatement (Second) of Torts*. New Elliott also argued that, under a strict liability theory, a duty to warn would apply only if it had agreed to assume the liabilities of its predecessor.

The Tenth Circuit stated that despite adherence to the traditional rule of nonliability for successor corporations, a continuing relationship existed which established a duty to warn. The court also ruled that Colorado law does not bar recovery for breach of a duty to warn on strict liability principles. The court held that the plaintiff's claims could be based on both negligence and strict liability in tort theories. Finally, the court determined that the duty to warn is an independent duty unrelated to any contractual agreement between successive corporations. New Elliot's petition for rehearing was, therefore, denied.

Henry v. Merck & Co., 877 F.2d 1489
Author: Judge Ebel

Plaintiffs, the Henrys, brought this action against defendants, Merck & Company and its wholly owned subsidiary Kelco (jointly referred to as "Kelco") to recover damages for injuries sustained when an employee of Kelco stole sulfuric acid from the company and threw it in Ms. Henry's face. Plaintiffs alleged that Kelco negligently stored the acid. The district court entered judgment in plaintiffs' favor. Kelco appealed.

Interpreting Oklahoma law, the Tenth Circuit ruled that, absent special circumstances, no duty is imposed on a party to anticipate and prevent the intentional or criminal acts of a third party. Since Kelco had no relationship whatsoever with Ms. Henry and had no way of anticipating the employee's criminal action, no special circumstances existed. Consequently, Kelco had no duty to prevent the employee from stealing the acid and throwing it on Ms. Henry.

The court further held that Kelco's actions were not the proximate cause of Ms. Henry's injuries. Instead, the employee's criminal acts of stealing the acid and throwing it on Ms. Henry constituted a superseding cause. The court reversed the judgment with instructions to direct a verdict in favor of Kelco.

Hokansen v. United States, 868 F.2d 372
Author: Judge Anderson
Dissent: Chief Judge Holloway

Plaintiffs sued the United States under the Federal Torts Claim Act, alleging that defendant, Veterans Administration Medical Center ("VAMC"), had negligently breached a duty to victims of a shooting by releasing Garcia from voluntary inpatient treatment. Plaintiffs appealed the district court's order granting summary judgment to the United States.

The Tenth Circuit affirmed the district court's decision. The court found that under the Kansas statutes the VAMC was not required to make a determination of "no longer dangerous to himself or others" for a voluntary inpatient. In addition, the court held that the issue of whether the VAMC had a duty to warn the public was not properly before the court because plaintiffs had failed to allege a "special relationship." Even if the issue had been properly raised, the court found nothing in Kansas law to suggest that such an affirmative duty would be imposed.

Kitts v. General Motors Corp. and *Richart v. Ford Motor Co.*, 875 F.2d 787
Author: Judge McKay

Several district courts previously reached opposite conclusions as to whether section 1392(d) of the National Traffic and Motor Vehicle Safety Act, 15 U.S.C. § 1381 (the "Act"), preempts state tort claims. In particular, the courts considered whether the Act preempts state claims

against automobile manufacturers who comply with federal motor vehicle safety standards, but who fail to install air bags. Consequently, the Tenth Circuit, on its own motion, consolidated two cases to address this preemption issue.

The court found that state action is impliedly preempted. The court reasoned that if there were state action, this would circumvent section 1392(d)'s prohibition of nonidentical state standards which cover the same aspect of performance as a federal safety standard. This would, in turn, conflict with Congress' goal of establishing uniformity.

Lamb v. W-Energy, Inc., 884 F.2d 1349
Per Curiam

Plaintiff, Lamb, appealed a summary judgment granted by the district court to defendant, W-Energy, Inc., held to be statutory employers, in a tort action involving injuries sustained by Lamb, an employee, in an explosion. The Utah workers' compensation statute had provided for such employer immunity.

The Tenth Circuit reversed and remanded for further proceedings because in the summer of 1989 the Utah Supreme Court overruled its prior precedent in this regard, saying the statute shall no longer be construed to provide tort immunity to employers who have not been required to pay benefits to the injured worker. The court reasoned that since Utah favors a retroactivity rule with respect to overruling prior decisions, the same should apply here.

Lilly v. Fieldstone, 876 F.2d 857
Author: Judge McKay

Defendant, Fieldstone, a private physician, performed emergency surgery on plaintiff, Lilly, at Irwin Army Hospital. The district court substituted the United States ("Government") as defendant for Fieldstone. The district court reasoned that under the Federal Tort Claims Act, the Government is the proper party defendant in any civil action against a government employee for damage or injury. The district court subsequently dismissed the complaint. The district court based its decision on the governmental immunity doctrine. Under this doctrine, the government is granted full immunity for injuries to military personnel which arise out of, or are incident to, service. The propriety of the district court's substitution depended on whether Fieldstone was a government employee or an independent contractor when he performed Lilly's surgery.

The Tenth Circuit reversed and remanded, holding that Fieldstone was an independent contractor. The court found that the Government did not supervise the day-to-day operations of Fieldstone. Therefore, the government did not have enough "control" over Fieldstone to render him a government employee. The court noted that physicians, in the exercise of professional judgment, cannot permit others to control

the detailed physical performance of their duties. Physicians may be held as employees, however, whenever the evidence manifests an intent or express agreement to consider the doctor an employee, subject to other permissible forms of control. The court found no such evidence in this case.

Q.E.R., Inc., v. Hickerson, 880 F.2d 1178
Per Curiam

Plaintiff, Q.E.R., Inc. ("Q.E.R."), brought this action against defendant, Hickerson, for intentional interference in contractual relations and for aiding and abetting general partner's breach of fiduciary duty to Q.E.R. The district court directed a verdict in favor of Hickerson, and Q.E.R. appealed.

The Tenth Circuit held that Colorado law would recognize a claim for aiding and abetting a breach of fiduciary duty and that there was sufficient evidence for a jury to sustain such a finding. The court also determined that although the evidence regarding the intentional interference of contractual relations was not conclusive, it raised an issue of fact, and the jury must conduct a balancing test to determine whether the alleged interference was warranted under the circumstances. Because a court may grant a directed verdict only if the evidence points but one way and is susceptible to no reasonable inferences which may support the opposing party's position, the court reversed and remanded the case for a new trial.

Richards v. Platte Valley Bank, 866 F.2d 1576
Author: Judge Brorby

Defendant, Platte Valley Bank ("Bank"), appealed the district court's decision in favor of plaintiff, Richards, on his claim for breach of fiduciary duty. The Bank claimed that the district court improperly instructed the jury on the issue of liability by applying the standard of "actual notice" of the facts, rather than "actual knowledge" as required by the Uniform Fiduciaries Act.

The Tenth Circuit reversed and remanded for dismissal of Richards's claim against the Bank. The court held that the proper standard was actual knowledge or bad faith. Finding no evidence of either, the court held that the district court erred in failing to direct a verdict for the Bank.

Smith v. Pinner, 891 F.2d 784
Per Curiam

Plaintiff, Smith, brought an action against defendants, his immediate supervisor, Pinner, and his employer, Loffland Brothers Company ("Loffland"), for injuries suffered in a car accident. Smith was a passenger in the car, which was owned and operated by Pinner. Smith contended that Loffland was liable for his injuries under the theories of

vicarious liability and negligent entrustment. The district court dismissed the negligent entrustment claim and rejected the vicarious liability claim as outside the scope of employment. Smith subsequently appealed the district court's rejection of the vicarious liability claim.

The Tenth Circuit affirmed the district court's decision. The court, however, disagreed with the district court's reasoning. The district court reasoned that Loffland's reimbursement to Pinner for travel expenses, without more, would not bring Pinner within the scope of employment. The court disagreed with this reasoning, and held that in worker's compensation cases, employer reimbursement of travel expenses brings an employee within the scope of employment. The court stated that worker's compensation cases apply to vicarious liability claims. The court held, however, that the facts failed to place the accident within the scope of employment. First, Loffland reimbursed Pinner for only a portion of the trip, and the accident occurred on an unreimbursed portion. Second, even on a reimbursed portion, Loffland's ridesharing status prevented vicarious liability. The court stated that COLO. REV. STAT. § 8-41-104, eliminates application of the travel reimbursement rule to a reimbursed employee who is ridesharing.

Tafoya v. Sears, Roebuck and Co., 884 F.2d 1330
Author: Chief Judge Holloway

Plaintiff, Tafoya, was awarded a $150,000 jury verdict based on strict products liability after his hand was caught in the blades of a riding lawnmower. The jury found Tafoya fifty percent at fault, thereby reducing his award to $75,000. The seller, defendant Sears Roebuck and Company ("Sears"), was found twenty percent at fault and the manufacturer, defendant Roper Corporation ("Roper"), was found thirty percent at fault. Sears and Roper appealed the denial of their motions for a new trial and judgment notwithstanding the verdict.

The Tenth Circuit affirmed the denial of defendants' motion for judgment notwithstanding the verdict. The court found that Sears could constitute a "manufacturer" under Colorado's strict liability statute since it owned Roper in part. Additionally, the district court correctly instructed the jury that a presumption of nondefectiveness, pursuant to Colo. Rev. Stat. § 13-21-403, could be rebutted by a preponderance of evidence. The court further held that the crashworthiness or enhanced injury doctrine was applicable, and there was sufficient evidence to establish the enhancement of Tafoya's injuries due to the lawnmower's lack of a "deadman" device. There was also sufficient evidence to support an inference that the lawnmower was unreasonably dangerous. Finally, the court held that the jury was entitled to find that Tafoya did not voluntarily assume the risk of injury.

The Tenth Circuit affirmed the denial of defendants' motion for a new trial because the verdict was not clearly or decidedly against the weight of evidence.

Weiss v. United States, 889 F.2d 937
Author: Judge Anderson

Plaintiffs' claims arose when a helicopter piloted by Joseph Weiss crashed in the Pike National Forest after striking an aerial tramway cable suspended above the ground. The plaintiffs sued the United States ("government") for damages under the Federal Tort Claims Act ("FTCA"), basing their claims on negligence and premises liability. The district court dismissed the claim under the discretionary function exception to the FTCA, and dismissed the premises liability claim on grounds that Colorado law imposed no duty on the United States Forest Service ("USFS") to remove the cable or warn of its existence. On appeal, the court found that a Colorado landowner could have a duty to warn of or remove the cable and reinstated the premises liability claim. On remand, the government raised the discretionary function exception and the district court dismissed the suit. The plaintiffs appealed, contending that section 5714.16 of the Forest Service Manual created a mandatory, rather than discretionary, duty to remove the tramway cable or make it safe.

In affirming the district court's decision, the Tenth Circuit found that, when read in its entirety, section 5714.16 of the Forest Service Manual applied only to operations conducted by the USFS or its contractors and thus did not govern the plaintiffs' situation. The court further held that USFS policy regarding what objects should be removed for the safety of civil aviation was an exercise of discretionary regulatory authority.