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## COURTS AND PROCEDURE

*United States v. Evans & Associates Construction Co. Inc.*, 857 F.2d 720

The government sought to retain control of grand jury transcripts for its own use and to exclude defendants' use of the same despite the court's order to produce the transcripts. The Tenth Circuit held that the trial court's order to produce the transcripts was well within its discretion because the defendants showed particularized need. Although the Tenth Circuit did not agree with the sanctions imposed by the trial court when the government refused to produce the grand jury transcripts, the court affirmed the lower court's original opinion.

*Hoops v. Watermelon City Trucking, Inc.*, 846 F.2d 637

Hoops was injured in an automobile accident involving trucks owned by Watermelon City Trucking, Inc. (WCT) and Leeway Motor Freight, Ins. (Leeway). Leeway and Hoops entered into a contingency agreement setting a minimum and maximum amount that Leeway would pay Hoops, regardless of whether there was no verdict or a verdict greater than the maximum amount. The district court denied WCT's motion for dismissal based on the contingency agreement.

On appeal, the Tenth Circuit noted that the Oklahoma Supreme Court had invalidated "Mary Carter" agreements for being against public policy. However, the court affirmed the district court's order, finding that an essential element of the typical Mary Carter agreement was missing from the contingency agreement; that is, Leeway had no interest in Hoops' verdict against WCT. Thus, the court held that the contingency agreement was not void.

*Westcot Corp. v. Edo Corp.*, 857 F.2d 1387

The Tenth Circuit chastised appellant's counsel for wasting the court's time and appellant's funds. The court's rule that a petition for rehearing should not be filed routinely is not a mere suggestion; it's a standard to which counsel must adhere. Pursuant to Rule 40.1, the court ordered appellant to pay costs to appellee for filing a meritless petition for rehearing.

*Lone Star Steel Co. v. United Mine Workers of America*, 851 F.2d 1239

The company in this action appealed a district court ruling that the objectives of a union's strike ("coal lands" and "royalty" clauses) were not in violation of § 8(e) of the Labor Management Relations Act. Lone Star challenged the court's fact finding with regard to the strike's objective. The Court of Appeals upheld the district court's opinion as "not clearly erroneous" (when review of the entire evidence does not leave the reviewing court with the "definite and firm conviction that a mistake

has been committed") (quoting *United States v. United States Gypsum Co.*, 333 U.S. 364, 395 (1948).

*Tuck v. United Services Automobile Ass'n*, 859 F.2d 842

Appellant USAA appeals from an adverse judgment, claiming that the judgment was entered without subject matter jurisdiction. Remanded for consideration of the jurisdictional question.

Appellees Tuck were awarded \$775,000 in damages as a result of USAA's failure to pay benefits under the uninsured motorist provision of an insurance policy they issued to appellees' son, Captain Johnny L. Tuck. Captain Tuck was killed in an automobile accident caused by an uninsured motorist. USAA filed a notice of appeal from the judgment, and several months later, a motion to dismiss for lack of subject matter jurisdiction alleging incomplete diversity between the parties. USAA is structured as an unincorporated association. For purposes of diversity jurisdiction, the citizenship of all of its members must be considered. Because some members of USAA are citizens of Oklahoma, as are the Tucks, complete diversity is lacking.

USAA's motion to dismiss is denied, and the case remanded for further inquiry into the issue of jurisdiction. Consideration is to be afforded the following issues: (1) whether the court may dismiss nondiverse parties in order to achieve diversity after the judgment has already been entered, (2) whether appellees must move to first dismiss USAA from the suit, and then add as defendants only the diverse members of the association, (3) whether any such members of association are indispensable, and thus, must be joined, and (4) if dismissal of the action is required, whether sanctions should be imposed against USAA for allowing an improper action to proceed.

*Willner v. Budig*, 848 F.2d 1032

Appellant Willner appeals the district court's grant of summary judgment for the defendant-appellees and the imposition of attorney's fees and costs in her civil rights suit. Affirmed.

Appellant alleges that while acting as agents of the University of Kansas and under color of state law, the appellees conspired to commit and did commit acts of harassment and retaliation against her for bringing a sex discrimination claim against the university. Appellant claims those acts violated the first, fifth, and fourteenth amendments, the Civil Rights Acts (Title 42 U.S.C. §§ 1983, 1985, 1986) and Title IX (20 U.S.C. § 1681). Appellant added pendent state law claims for fraudulent interference with economic relations, slander, and intentional infliction of emotional distress.

The Tenth Circuit found that appellant's claims in this case were necessarily decided in an earlier employment discrimination suit brought by appellant against the university. In that case, the court entered judgment for the defendants, finding that neither the university

nor its agents, employees, or officials retaliated against Willner or harassed her because of her sex discrimination claim. Appellant's section 1983 claim was therefore barred by collateral estoppel.

The court of appeals also held that the court properly granted summary judgment on appellant's section 1985, section 1986, and pendent state law claims because appellant failed to meet her burden of showing there were genuine issues for trial. The court denied appellee's request for costs, expenses and attorney's fees.

*Farmers Irrigating Ditch & Reservoir Co. v. Kane*, 845 F.2d 229

Claimants appeal the district court's denial of their motion to dismiss appellee-Farmers from this interpleader action. The panel reversed the district court, holding that appellee was not a proper party in interpleader. The case is remanded with direction that the district court grant claimant's motion to dismiss appellee.

Appellee was the owner of a reservoir that broke, flooding the Town of Estes Park and causing several deaths and great property damage. The panel considered whether appellee, an admitted tortfeasor who caused considerable damage, can file an interpleader action, tender in to the court registry a minimal sum (\$2,500), ask that this sum be prorated among numerous individuals, and ask to be discharged from further liability for flood damage. The panel found that appellee could not.

*Zimmer v. First Federal Savings and Loan Ass'n*, 848 F.2d 1047

Plaintiffs brought this suit against Western Plains Service Corporation (WPSCP), a savings and loan service company that packages, services, and sells loans made by other banks or associations. Plaintiffs allege that WPSC agreed to loan them 2.2 million dollars to finance a housing development in Gillette, Wyoming, that WPSC only loaned them \$600,000 and then wrongfully foreclosed the project. At trial, plaintiffs based their claims against defendants on theories of breach of contract, promissory estoppel and fraud. The jury found against plaintiffs on all claims except promissory estoppel. On that claim, the jury awarded plaintiffs 1.5 million dollars in damages. The Tenth Circuit upholds the trial court in all matters except an error in the jury instructions regarding the promissory estoppel claim. It stated that since the jury found for the plaintiffs, only on a promissory estoppel claim, it could not hold Brown and Bjordahl, officers of WPSC, personally liable for their corporation's failure to keep its promise. The court reversed the judgment against them on the promissory estoppel claim.

*Tolbert v. Martin Marietta Corp.*, 858 F.2d 1479

Upheld the Colorado Supreme Court's decision that the state Workman's Compensation Act provides an exclusive remedy for an employee against her employer (1) for injuries resulting from a sexual as-

sault by a co-worker motivated by considerations neither personal to the injured employee nor distinctively associated with the employment, and (2) when the employee has fixed hours and place of employment and the injury occurred while employee was in her building of employment but away from her work station, on her way to lunch in the employees' cafeteria.

*Willner v. University of Kansas*, 848 F.2d 1023

Plaintiff appeals a judgment for the defendant. The Tenth Circuit addresses on appeal her arguments of prejudice due to exclusion of parol evidence and failure of the trial judge to recuse himself.

The district court determined the exchange of letters between plaintiff and defendant constituted an integrated contract. The Tenth Circuit concluded under Kansas law that the court's instruction to the jury not to consider parol evidence was appropriate. The Tenth Circuit then held that where, as here, a recusal is requested many months after an action has been filed, denial of the motion is warranted. Affirmed.

*Toma v. City of Weatherford*, 846 F.2d 58

Plaintiff appealed the dismissal of her complaint for failure to comply with the district court's scheduling of a discovery order. The court of appeals held that absent a showing of wilfulness, bad faith or some fault of petitioner other than inability to comply, dismissal for violation of discovery rules constitutes an abuse of discretion by the district court. Reversed and remanded.

*Benally v. Amon Carter Museum of Western Art*, 858 F.2d 618

Plaintiffs Benally appeal from the district court's dismissal of their invasion of privacy action for lack of personal jurisdiction. The issues on appeal were (1) whether the New Mexico long-arm statute, N.M. Stat. Ann. § 38-1-16, permits the exercise of diversity jurisdiction over the Texas-based museum, and if so, (2) whether the exercise of such jurisdiction would offend the "traditional notions of fair play and substantial justice" of the due process clause of the fourteenth amendment. Reversed and remanded.

Plaintiffs are Navajo Indians residing in New Mexico. In 1932, Lillie Benally permitted artist Laura Gilpin to photograph Lillie and her baby in native dress, but it is alleged that the Benallys never authorized publication or public exhibition of the print, entitled "Navajo Madonna." Many of Gilpin's works were published and exhibited, including "Navaho Madonna." Before her death in 1979, Gilpin bequeathed her photographic collection, including the Benally photograph, to the defendant museum, a nonprofit corporation organized under Texas law. Throughout the gift process, the museum made several visits to New Mexico for purposes of negotiating the terms of the exhibition with Gilpin, taking possession and transporting the collection, and invoking

the benefits of New Mexico's laws of testamentary disposition. After Gilpin's death, the museum maintained ties with New Mexico through its continuing obligation to make annual reports regarding the exhibit to a resident of New Mexico.

In August 1981, the Benallys learned of a recent reproduction of the Benally photograph in two Texas-based magazines. At that time, plaintiffs were not aware that the photograph had previously been published. The Benallys filed suit in federal district court in New Mexico for unlawful public disclosure of private facts and misappropriation of likeness.

The case was dismissed for lack of personal jurisdiction over the museum. The district court found that the nonprofit museum had not "transacted business" in New Mexico within the meaning of the long-arm statute, that the plaintiff's cause of action was not sufficiently related to the museum's business in New Mexico to support jurisdiction under the statute due to the time lapse between most of the museum's activities in New Mexico and the complained-of publication. This court reversed, finding that a nonprofit organization can "transact business" within the meaning of the long-arm statute through the accomplishment of its objectives, when such accomplishment purposely invokes the privilege of conducting activities within the forum state. This court also held that the plaintiffs' cause of action is closely related to the museum's earlier activities in New Mexico, justifying the exercise of personal jurisdiction. The court also held that the exercise of such jurisdiction does comport with the requirements of the due process clause of the fourteenth amendment since the museum intentionally conducted business in New Mexico and the burden on defendant is slight.

*Grimes v. Crown Life Insurance Co.*, 857 F.2d 699

Appellant Grimes, the Oklahoma Insurance Commissioner and the receiver for the United Equity Life Insurance Co., appeals a district court decision which found a reinsurance agreement between Crown Life and the United Equity Life Insurance Co. to be invalid on the basis of fraud and ambiguity. Reversed.

Grimes challenged the jurisdiction of the district court. The court of appeals held that while the district court had jurisdiction over the matter, it should have abstained from exercising it. In reaching this decision, the court noted the McCarran-Ferguson Act encourages states to regulate insurers, and that a federal court's exercise of its jurisdiction would prove highly disruptive of state efforts to provide comprehensive schemes for insurance company regulations and liquidation.

Here, the suit was not based on an exclusively federal cause of action, and required the district court to decide issues directly relevant to state policy. In addition, the decision to exercise jurisdiction overlooked an Oklahoma statute which gave exclusive original jurisdiction in insurance liquidation matters to the Oklahoma County District Court.

*Federal Savings & Loan Ins. Corp. v. Huff*, 851 F.2d 316

Plaintiff appealed dismissal for lack of subject matter jurisdiction. In an *en banc* decision, the Tenth Circuit held that notice of the appeal filed after the order granting a motion to dismiss for lack of subject matter jurisdiction was effective to confer jurisdiction for appeal, notwithstanding that counterclaims and crossclaims were not specifically addressed or dismissed. The appeal, though premature, was viewed as having ripened when the district court formally dismissed the crossclaims and counterclaims, leaving nothing unadjudicated in the suit. The court also held that notice of appeal from an order dismissing an action for lack of subject matter jurisdiction is premature and is not appealable without a Rule 54(b) certification when counterclaims and/or crossclaims remain pending, even if the pending counterclaims and crossclaims are substantively dependent upon the dismissed action. Ordered accordingly.

*Gates Learjet Corp. v. Duncan Aviation*, 851 F.2d 303

Gates Learjet Corp. ("Gates") brought this action for contribution and indemnification in a Kansas state court against Duncan Aviation ("Duncan") which serviced the aircraft prior to the crash giving rise to wrongful death actions against both companies. The district court granted Duncan's motion for summary judgment and Gates appealed. The Tenth Circuit held that the district court correctly relied on state law in deciding whether the plaintiff was estopped from asserting its claims based on prior state court litigation. The court held that under Michigan law, Duncan cannot use the traditional doctrine of collateral estoppel to prevent Gates from litigating the issue of liability, as Michigan adheres to recognized limitations on collateral estoppel. These include actual litigation and determination of an issue leading to judgment and the requirement that the same issue underlie the original action and subsequent action. Concerning the issue of negligence, however, the court held that Gates was equitably estopped from litigating the fault, if any, of Duncan with respect to the aircraft crash previously tried in Michigan. Gates was a party in the Michigan action at the time of the trial on the wrongful death claims and had not developed any theory that Duncan was negligent nor had it responded to the crossclaims. Duncan's motion for a directed verdict on Gates' negligence claim was considered and granted, without any evidence of Duncan's negligence asserted by Gates. Gates is estopped from asserting that claim now. Affirmed.

*Lewis v. B.F. Goodrich Co.*, 850 F.2d 641

Plaintiff sued defendants for slander in federal district court. The district court granted summary judgment in favor of the defendants, summarily disposing of less than all of the claims. Plaintiff appealed. After plaintiff filed notice of appeal, the remaining claims were dis-

missed. The Tenth Circuit held that premature notice of appeal from an order disposing of less than all of the claims in the case is nevertheless effective where appellant obtains certification or a final adjudication of matter before the appeal is considered on its merits. So ordered.

*Bryant v. O'Connor*, 848 F.2d 1064

Plaintiff, a former probation officer of the United States District Court for the District of Kansas, appeals summary judgment. He alleged termination of his employment with the court and denial of equal employment opportunities due to racial discrimination. All the judges of the district recused themselves. A judge from Wyoming was assigned to adjudicate the case. Plaintiff had three chances to comply with a court order requiring him to file a specific discovery plan limited to responding to appellees' motion for summary judgment and explaining why his massive discovery requests were necessary. He failed to produce any specific facts to support his allegations and his response was insufficient to forestall the summary judgment granted to appellees. The lower court also held that Chief Judge O'Connor was absolutely immune from civil damage liability and that the Chief Probation Officer and plaintiff's immediate supervisor was shielded by quasi-judicial immunity. The Court of Appeals upheld the verdict for summary judgment because there were no specific facts illustrating a genuine issue for trial.

*Burnette v. Dreser Industries*, 849 F.2d 1277

Appellants appeal from an interlocutory order denying their motion to amend a pretrial order to include a claim of manufacturing defects against appellee Dresser. Appellee cross-appeals denial of summary judgment.

Appellants claim that unless the pretrial order is modified to add a manufacturing and design defect claim against Dresser, they will sustain manifest injustice. Dresser claims that it had no duty to warn appellants because it was a supplier of a non-defective part and was not aware that the part would be used in the way the refinery ("Total") used it.

The Tenth Circuit held that plaintiffs had knowledge of, but failed to allege, claims for manufacturing or design defects before date set by magistrate and thus were not entitled to amend the pretrial order to assert such claims against Dresser in products liability action. The court found that material fact issues existed, such as whether refinery employees controlling the use of the pressure relief valve on the storage tank knew of the need for a servicing schedule. Thus, summary judgment as to whether the valve manufacturer was liable, on theory of failure to warn, for explosion of tank allegedly caused by malfunctioning of relief valve was precluded. Denial of summary judgment affirmed.

*Hancock v. City of Oklahoma City*, 857 F.2d 1394

Counsel for plaintiff did not notice that the City filed a motion for



summary judgment since the motion was placed at the bottom of a one and one-half inch stack of materials received by counsel on December 24, 1986. Local Court Rule 14(A) of the district court for the Western District of Oklahoma provides that any motion not opposed within 15 days shall be deemed confessed. In conjunction with this rule, the district court entered a formal summary judgment in favor of the City. The Tenth Circuit reversed stating that (1) this was an innocent mistake which counsel attempted to rectify as soon as it was discovered, (2) the City would not have been prejudiced in any legal or equitable sense, by allowing the plaintiff to file a brief in opposition and having the motion resolved on its merits, (3) any interference with the judicial process was too insufficient a burden to justify dismissal, and (4) the district judge abused his discretion. The district court's judgment is reversed and case remanded.

*Paz v. Carman Industries*, 860 F.2d 977

Appellant Paz appeals the district court's denial of his motion for judgment n.o.v. and his alternative motion for a new trial. Affirmed.

On March 7, 1982, Paz was severely burned in an explosion at his employer's gilsonite plant. Paz's original complaint named four defendants. He entered into an out-of-court settlement with all but Carman. Paz's claim against Carman proceeded to trial before a jury based on a strict products liability cause of action. The jury returned a verdict in favor of Carman. The judgement was appealed by Paz. The Tenth Circuit found there was sufficient evidence before the jury upon which it could properly find against Paz, thus the motion for judgement n.o.v. was properly denied. Additionally, the district court's denial of the motion for a new trial did not constitute a manifest abuse of discretion.

*Varley v. Tampax*, 855 F.2d 696

Defendant Tampax appeals the denial of its motion seeking amendment of the court's order of dismissal. The action was a consolidation of two cases. The plaintiffs were the deceased's administratrix (a Kansas citizen) and her parents (Iowa citizens). The defendants were also diverse. Tampax alleged in its motion this consolidation was improper.

Extensive discovery was heard on the case below. The trial court found the plaintiffs' evidence insufficient to establish either toxic shock syndrome as the cause of death or product defect. Summary judgement as to this defendant was granted. However, in the same order, the court then dismissed the case *in its entirety* due to lack of subject matter jurisdiction.

Tampax filed its motion under Fed. R. Civ. P. 59(e) asking both for an extension of time to file a supporting brief (granted) and that the district court dismiss the administratrix' action to preserve federal jurisdiction over the remaining plaintiffs' claim against all defendants. In its

supporting brief, Tampax argued, for the first time, that since co-defendants were not indispensable parties, they should be dismissed.

The Tenth Circuit found Tampax's motion to amend judgement was timely filed and permitted the district court jurisdiction to amend for *any* reasons; hence the court was not limited to grounds set forth in Tampax's motion alone. The Tenth Circuit further found the district court's failure to dismiss the indispensable defendants, which would have caused no prejudice to plaintiffs, constituted an abuse of discretion. Finally, it was held that since summary judgment was granted to Tampax on the merits, to force a second defense of these claims would be inequitable. Reversed and remanded, with directions to the court to vacate its previous order and enter judgement for Tampax.

*Ocelot Oil Corp. v. Sparrow Industries*, 847 F.2d 1458

Appellant Ocelot Oil Corp. appeals a district court decision upholding a magistrate's order which struck Ocelot's pleading as to certain defendants and imposed attorney's fees on Ocelot as a Fed. R. Civ. P. 37 sanction for abuse of the discovery process. Affirmed in part, reversed in part, and remanded.

The district court adopted the report of the magistrate after reviewing it under the clearly erroneous standard. The court of appeals held that while the decision to impose attorney's fees was properly reviewed, that part of the magistrate's decision which struck Ocelot's pleadings was a "dispositive motion," and thus was subject to a de novo standard of review and determination by the district court.

*ANR Pipeline Co. v. The Corporation Commission of the State of Oklahoma*, 860 F.2d 1571

Appellant Corporation Commission appeals a district court ruling that the Oklahoma ratable take structure for natural gas is in contravention of the supremacy clause of the United States Constitution. Affirmed.

The appellate court first held that the district court did possess sufficient jurisdiction under the Declaratory Judgement Act to enjoin the Commission from enforcing its regulations, despite the fact the Commission had yet to undertake any enforcement action. The court then determined that the Natural Gas Act and Natural Gas Policy Act preempted all state regulation of the purchase or taking of natural gas by interstate gas companies, and that the state interest in conservation did not warrant interference with the federal regulatory scheme.

*Anderson v. Deere & Co.*, 852 F.2d 1244

Plaintiff appeals the order for summary judgement entered for Deere & Co. ("Deere") on February 11, 1986. Plaintiff was injured by equipment manufactured in 1961 by Deere and originally filed suite for breach of warranty, negligence and strict liability against two Deere sub-

sidiaries, neither of whom was in existence at the time of the equipment's manufacture. Deere itself was added on May 24, 1985. On August 14, 1985 the district court dismissed the two subsidiaries as improper defendants. Deere was granted summary judgment on breach of warranty claim and then, on February 11, 1986, the district court held that Fed. R. Civ. P. 15(c) doesn't preserve the negligence and strict liability claims against the Colorado statute of limitations. Plaintiffs filed a motion for reconsideration of the district court's orders, which that court denied as untimely. On review, the Tenth Circuit held that since the district court's orders of August 14 and 28, 1985 were interlocutory, plaintiff's motion for reconsideration, filed within ten days of the district court's final order issued February 11, 1986, was not untimely. The district court's error as to timeliness was held harmless on review since the Deere subsidiaries were improper defendants and thus properly dismissed.

The Tenth Circuit then stated three requirements to be met for an amendment adding a new party to "relate back" under Fed. R. Civ. P. 15(c). Plaintiffs fulfilled all three requirements. It was also held that plaintiff's delay in adding Deere once knowledge of identity was obtained could not defeat the relation back of the amendment. Upheld in part, reversed in part and remanded for further proceedings.

*Furr v. AT&T Technologies*, 842 F.2d 253

The Tenth Circuit was petitioned for rehearing based upon the withdrawal of a piece of evidence prior to the submission of the case to the jury. The court concluded that since the evidence was sufficient to support the jury's findings of liability and willfulness, the petition would be denied.

*Grubb v. FDIC*, 833 F.2d 222

Appellant filed a petition for rehearing, with an *en banc* suggestion, raising a new argument in support of its motion to exonerate *supersedeas* bonds, which was denied previously. The Tenth Circuit declined to address an issue not raised prior to the petition for rehearing and denied the suggestion for a rehearing *en banc*.

*United States v. 31.63 Acres of Land*, 840 F.2d 760

The United States, appellee, initiated a condemnation action to acquire land owned by Tinker Area Investors, the appellant. The district court awarded Tinker an amount greater than the government's deposit. Tinker, in addition, requested attorney's fees. The court denied attorney's fees finding the government's position to be substantially justified. Instead of appealing the order, Tinker sought reconsideration pursuant to Rule 60(b)(6). The motion under Rule 60(b) was denied because it cannot be used as a substitute for an appeal. Affirmed. A Rule 60(b) motion requires that the appellant show unusual circumstances which

justify the extraordinary relief provided by the rule. The Tenth Circuit held that since Tinker was arguing the merits of the underlying judgment, Rule 60(b) relief was inappropriate.

*First National Bank in Dallas v. Don Adams Mining, Inc.*, 840 F.2d 766

A federal court in Texas entered judgment in May 1977 for plaintiff bank against several defendants. The bank had a writ of execution issued in New Mexico. The statute of limitations for enforcement of judgments in New Mexico was seven years. In 1983, New Mexico amended its limitations period to the lesser of 14 years or the applicable limitations period in the foreign jurisdiction. Two years later, 1985, the bank registered the judgment a second time. Defendant objected to the registration and moved for a stay of execution, claiming the seven-year limitations period had passed and barred any action on the 1977 judgment. The district court denied the stay. The bank attempted to take the deposition of the defendant's wife in a companion case to facilitate collection on the second writ of execution. Although the defendant's wife objected the lower court denied her motion to quash. Both defendant and his wife appealed.

The Tenth Circuit affirmed. First, it held that New Mexico's amendment of the limitations period was retroactive and applied to the bank's writ of execution. Consequently, the bank had the lesser of 14 years from judgment or the limitations period of the foreign jurisdiction, which was Texas. Since Texas allows for two 10-year periods, or a total of 20 years, the lesser 14-year period was applied and bank's second writ was deemed valid. Second, the court held that a post-trial deponent has the same rights as a pre-trial deponent. Since pre-trial discovery orders are not final and are not appealable, neither was the defendant's wife's motion to quash.

*Greenwood Explorations v. Merit Gas*, 837 F.2d 423

Appellants were sued for breach of contract for failure to drill oil wells. Prior to trial, appellants' counsel moved to withdraw from the case due to appellants' refusal to cooperate. Withdrawal was granted, and the trial was continued. Prior to the subsequently scheduled trial, the new counsel also moved for withdrawal, asserting the same grounds. Although the judge was willing to grant the request, the judge asked the counsel to remain. Counsel obliged, but was unable to win at the trial due to appellants' lack of cooperation. Appellants moved to vacate the judgment pursuant to Fed. R. of Civ. P. 60(b), or in the alternative, for a new trial pursuant to Rule 59(b). The district court denied the motions, finding that the appellants were guilty of gross carelessness in the handling of their case. The Tenth Circuit affirmed, holding that appellants' explanation that they failed to file for a new trial within the required time due to surprise as a result of their not receiving a copy of the district court's Findings of Fact and Conclusions of Law was merely an invalid excuse.

*Eastridge Development Company v. Halpert Associates*, 853 F.2d 772

Appellee Eastridge Development sued appellee Halpert Associates and its parent company, Professional Services Industries, Inc. (PSI). The complaint alleged that Eastridge suffered damages from water seepage at a construction site because of Halpert's negligent engineering tests and reports. Eastridge further alleged that PSI was the alter ego of Halpert, which was bankrupt by the time Eastridge filed its suit. The district court ruled that it lacked *in personam* jurisdiction over the matter because PSI had no contact with Wyoming aside from this litigation. Reversed.

The court of appeals found that PSI had assumed all responsibility and control over Halpert's financial and legal affairs, and that there was gross undercapitalization and complete domination of Halpert by its parent company. Thus, the court held PSI had sufficient contacts with Wyoming to make exercise of *in personam* jurisdiction reasonable and consistent with due process.

*United States v. Sharp Ranch, Inc.*, 850 F.2d 634

Appellant Sharp Ranch, Inc. sued the U.S. government for inverse condemnation and severance damages. At the conclusion of this trial, the jury returned a substantial verdict for the appellant, based in part on evidence of offering prices of replacement properties which were mathematically erroneous. The government moved for, and was granted, a new trial. In the second trial, the court refused to let the appellant testify regarding the value of the condemned property unless it could substantiate these opinions with statistical evidence. Appellant was unable to produce this evidence, and the second jury returned a lower verdict. Appellant moved for, and was denied, a motion for yet another new trial. Appellant appeals both this denial and the district court's decision to grant a new trial following the first jury verdict. Affirmed in part, reversed in part, and remanded.

The court of appeals held that (1) the district court properly granted the second trial, because the first verdict was based in part on improper evidence and was against the clear weight of the evidence; and (2) the district court committed reversible error by refusing a third trial because the landowner's unsubstantiated opinion evidence of the value of his land is admissible, though challengeable, as a matter of law. The court noted that the jury must determine the validity and accuracy of the owner's opinion.

*Massie v. Godfather's Pizza, Inc.*, 844 F.2d 1414

After being raped on her employer's premises in the course of robbery attempt, plaintiff sued her employer, alleging negligence and vicarious liability under the doctrine of *respondeat superior*. After the jury returned a verdict in favor of the plaintiff for \$36,000 in special damages and \$200,000 in general damages, the district court reduced the special

damage award to \$10,000. Both the plaintiff and the defendant employer appealed. Affirmed.

The Tenth Circuit held that (1) whether or not plaintiff's injuries arose out of, or in the scope of, her employment so that worker's compensation would bar her tort claim was a factual question for the jury; (2) the jury could determine that Godfather's written "robbery policy" established foreseeability giving the defendant a duty to the plaintiff; (3) the jury could find the supervisor's refusal to cooperate with the robbers was a proximate cause of plaintiff's injuries; (4) the district court's instruction to the jury that any damages assessed were strictly for the purpose of compensating the plaintiff and not to punish the defendant remedied an improper remark by plaintiff's counsel in closing argument; (5) the district court's instruction, coupled with the clear focus of the case remedied improper references by the plaintiff's counsel to the applicable standard for determining whether plaintiff was working at the time of the injuries; (6) the general damage award of \$200,000 was not excessive in light of plaintiff's injuries; and (7) the district court's order of remittitur to reduce plaintiff's special damages from \$36,000 to \$10,000 was within the court's discretion due to the imprecise nature of the plaintiff's future medical expenses.

*Oklahoma v. Graham*, 846 F.2d 1258

An action was filed by the state of Oklahoma in state court against the Chickasaw Nation based upon the state's attempts to tax certain tribal affairs transacted on the territory of the Chickasaw Nation. Upon removal to federal district court, the case was dismissed for lack of subject matter jurisdiction. Affirmed.

The court of appeals examined the issue of whether removal from state court was proper. The court held that since the state's complaint only alleged state claims which were grounded in state law, and since the Chickasaw nation is only subject to suit under conditions prescribed by Congress, the complaint was not well-pleaded since it failed to plead either tribal consent to the suit or that the tribe had validly waived its rights, and that there was no essential element of a federal question inherent in the state's action; thus, removal was not available. Therefore, the court of appeals was without subject matter jurisdiction.

*Reed v. Bowen*, 849 F.2d 1307

Appellant attorney brought a class action against the Social Security Administration on behalf of individuals who were improperly subjected to withholdings from their old-age, survivors, and disability benefits. The district court denied certification of the class. Affirmed.

The Tenth Circuit held that a class action must comply with Fed. R. Civ. P. 23(a), and that a prerequisite of compliance with this rule is the existence of a "live class" of aggrieved individuals. Because appellant

failed to show the existence of a "live class," the court held that the district court properly dismissed the action.

*Gear v. Boulder Community Hospital*, 844 F.2d 764

Appellant appeals the granting of defendant's motion for summary judgment, alleging that the district court violated Fed. R. Civ. P. 56 by failing to give appellant an oral hearing or notice of the date on which the motion was to be decided.

The Tenth Circuit held that although a hearing on a motion for summary judgment is required, it need not be formal and accompanied by oral argument. Because the issues and evidence of this case could be adequately addressed with written briefs and affidavits, the district court had satisfied the Rule 56 "hearing" requirement. The court also held that the district court's reliance on Rule 402 of the Local Rules of Practice for the United States District Court of Colorado fulfilled the notice requirement.

The court found that the filing requirements of Rule 402 provide non-movants with adequate notice that the motion is ready for determination on its merits. The court held that it was not an abuse of discretion for the district court to base its judgment on a review of the record as of the date the parties should have known the motion would be considered. Because appellant failed to produce evidence to support her allegations after sufficient notice of the need to do so, the court held that summary judgment was proper.

*Wheeler v. John Deere Company*, 862 F.2d 1404

Plaintiff was seriously injured when his right arm was caught in a combine machine manufactured by defendant. Jury returned a verdict for plaintiff. Defendant appealed to the Tenth Circuit Court of Appeals, asserting (1) the judge improperly admitted live testimony of five individuals injured previously by other combines manufactured by defendant; (2) the judge improperly refused to grant defendant's motion for directed verdict; (3) the judge improperly instructed the jury on the elements of Kansas strict liability law; (4) the judge improperly permitted defendant's expert witness to be impeached with other accidents which the judge had not previously found to be substantially similar; and (5) the judge erroneously permitted evidence of subsequent remedial measures.

The Tenth Circuit reversed and remanded. First, the court found no error in (1) the permittance of testimony from the five witnesses due to the substantially similar nature of their accidents; (2) the denial of defendant's motion for directed verdict, since evidence was sufficient to support a jury verdict; and (3) the attempt to define in the jury instructions the duties of all those whose fault must be comparatively determined. The court, however, held that it was reversible error to permit the introduction of evidence of (1) other accidents which the judge had

not previously found to be substantially similar; and (2) subsequent design changes where defendant had previously stipulated to their feasibility and thus had not brought feasibility into issue.

*Cascade Oil Company v. Crooker*, 848 F.2d 1062

Issue in this case is whether a notice of appeal was timely filed. The judgment was entered on October 28, 1987 and the appeal filed November 30, 1987. Appellant argued that Thanksgiving Day fell on Thursday, November 26, 1987, and the following day was a day appointed as a holiday in the state of Kansas because the state courts were closed. Therefore, his appeal was timely filed. The Tenth Circuit held that legal holidays are those designated by the legislature enumerated state holidays in Kan. Stat. Ann. sec. 35-107 (1986). The day following Thanksgiving was not among those designated holidays, therefore the notice of appeal was not timely filed.

*Bath v. National Association of Intercollegiate Athletics*, 843 F.2d 1315

Appellant Bath participated in an athletic competition at the small college level before enrolling in Mesa College. At Mesa she learned that her eligibility to participate in intercollegiate athletics was adversely affected by a rule of the National Association of Intercollegiate Athletics (NAIA). She filed suit against Mesa and NAIA, a Missouri corporation and the only diverse defendant. The district court dismissed leaving only a section 1983 claim against the Colorado defendants and dismissed with prejudice as to NAIA.

The only ground for dismissing the negligence claim against NAIA was that the state law claim would predominate and confuse the jury. The Tenth Circuit held that this is a permissible reason for the district court's refusal to exercise pendant jurisdiction over a state law claim, but because the dismissal was not on the merits, the district court incorrectly designated the disposition as a dismissal with prejudice. The court held that because the district court did not determine the negligence count on its merits, the claims should not be examined for the first time on appeal. Reversed and remanded.

*United States v. Toribio Soto-Orneles*, 863 F.2d 1487

The defendant was charged with illegal representation and use of a social security number and illegal representation of U.S. citizenship. He was convicted by a jury on all counts and sentenced to two years probation and a \$50.00 fine for each count. The issues were raised in this appeal: (1) whether the district court erred in denying defendant's motion to suppress all evidence obtained following allegedly unconstitutional interrogation and arrest; and (2) whether his conviction violated fifth amendment due process rights because of inconsistency with the Immigration Reform and Control Act of 1986.

The Tenth Circuit court holds that defendant's initial interrogation



did not violate defendant's sixth amendment right to counsel because he had not been placed in custody and no formal charges had been initiated against him when he was questioned by INS agent Bell. Neither did Bell act unlawfully in directly approaching the defendant because the INS guidelines are internal administrative policies, not statutory nor constitutional requirements.

The court finds the second issue bordering on the frivolous because the Act was not intended to bestow amnesty to aliens for their unlawful acts committed during their undocumented residency. There is no mention in the Act or its legislative history of granting amnesty for anything other than the status of being an illegal alien.

*Walters v. Western State Hospital*, 864 F.2d 695

This case involved an appeal of a denial of summary judgment based on a defense of qualified immunity. This interlocutory appeal found that whether or not the plaintiff's seclusion was justified is a genuine issue of material fact which precludes summary judgment.

The defendant doctors contend that they are immune from suit because their conduct was the product of professional judgment in an emergency situation. The Tenth Circuit held there were genuine issues of material fact as to whether a reasonable person, exercising professional judgment and possessing the information before the defendants, would have believed that an emergency existed and whether the forced medication of the plaintiff was consistent with the exercise of professional judgment. Furthermore, the plaintiff's constitutional right to communicate with others outside the institution was clearly established at the time of his involuntary admission and the doctors should have known that their actions in forcibly detaining him without his consent and holding him incommunicado for seven to ten days infringed upon that right.

*Dalton v. First Interstate Bank of Denver*, 863 F.2d 702

A judgment was entered awarding plaintiff \$50,000, "plus the interest that the sum would have accumulated had it not been withdrawn according to the terms of the certificate of deposit at defendant bank to this date." Plaintiff timely moved to amend the judgment with respect to the interest. Defendant also filed a motion to alter or amend the judgment and to stay enforcement. The district court granted the plaintiff's motion and entered an amended judgment reflecting the requested clarification.

A motion questioning the correctness of a judgment and timely made within ten days thereof will be considered under Rule 59(e) by the Tenth Circuit. Defendant argued that the motion to amend the judgment should be construed as a Rule 60(a) motion to correct a clerical error rather than Rule 59(e) which permits amendment of judgment for any reason. The court adhered to its previous policy of only allowing

Rule 60(a) in cases where the thing spoken, written, or recorded is not what the person intended, not because the person later discovers the thing said, written, or recorded was wrong.

The court dismissed the defendant's appeal holding that the Rule 59(e) motion requires that a new notice of appeal be filed after disposal of the motion.

*FDIC v. Antonio*, 843 F.2d 1311

The Federal Deposit Insurance Corporation (FDIC) took over the Aurora Bank and brought an action for civil violations of RICO for violations of a similar Colorado law against Aaron Mosko and 21 others. The FDIC alleged a scheme to defraud the bank, and sought damages. Because Mosko appeared to be dissipating his assets, an injunction was sought and granted requiring all defendants to give an account of their assets without prior notice and authorization. Mosko appeals this preliminary injunction.

The court of appeals upholds the district court's authority under Colorado statute. The Colorado pretrial injunctive relief provisions are broader than those of the federal RICO statute, and specifically allow an injunction before a final determination on the merits. The lower court's interpretation of Colorado law as permitting an injunction upon a showing that Mosko appeared to be transferring most of his assets to relatives and others is not erroneous.

*Sawyer v. Swift & Co.*, 836 F.2d 1257

Sawyer brought suit against his former employer, Swift & Co., claiming that he was terminated in violation of 38 U.S.C. § 2021(b)(3). Sawyer was also a member of the Navy Reserves and his termination by Swift was allegedly due to his attendance at a reserve make-up drill on January 8, 1983, which caused him to fail to report to work. Sawyer had been scheduled to attend the drill one month earlier, in December. The district court ruled in favor of Sawyer since there was evidence that he had given Swift adequate notice in December of his intention to attend the January drill. Swift appealed and the Tenth Circuit reversed.

Sawyer's notice was inadequate as it was not understood and acted upon by Swift, and Sawyer knew or should have known that the notice was inadequate. Furthermore, Sawyer's record was replete with unexcused absences and tardiness, and he was one infraction away from termination. Thus, the court said it would be erroneous to find Sawyer was terminated due to his reserve status since other reservists at Swift were given time off without problem. Sawyer was terminated for reasons of absenteeism and tardiness having little to do with his Reserve obligations.

*Ebrahimi v. E.F. Hutton & Co.*, 847 F.2d 653

Appellant E.F. Hutton appeals from a jury verdict for the plaintiffs

on allegations of unauthorized trading pursuant to the Commodity Exchange Act, 7 U.S.C. § 6(b), on the grounds that the plaintiffs' cause of action was barred due to the running of the statute of limitations. Reversed and remanded.

Plaintiffs filed their complaints in February, 1984, more than four years after the disputed transactions had taken place. At trial, E.F. Hutton asserted that the plaintiffs' claims were barred by the statute of limitations. Since § 6(b) of the Commodity Exchange Act does not specify a statute of limitations, a three year time limit borrowed from Colorado law was adopted by the trial court. While the plaintiffs did not deny the validity of the three year limit, they successfully argued that the statute had been tolled due to mental illness.

The Tenth Circuit held that while three years was the proper statute of limitations in a § 6(b) action, the federal equitable tolling doctrine controlled its application. Since this doctrine does not permit mental illness to toll the statute of limitations in fraud actions, the case was remanded with instructions to enter judgment in favor of the defendants.