FEDERAL JURISDICTION

Appellate Jurisdiction

General Steel Domestic Sales, L.L.C. v. Chumley,840 F.3d 1178 (10th Cir. 2016) (Kelly)

A steel company filed an action against a competitor asserting unfair competition under Lanham Act, libel, intentional interference with prospective business advantage, and civil conspiracy. The dispute involved the competitor's negative online advertising campaign. When internet users searched for the plaintiff General Steel, negative advertisements from Armstrong Steel would appear on the results page. Clicking on the advertisements would direct users to Armstrong Steel's web page, which was entitled "Industry Related Legal Matters."

The "Industry Related Legal Matters Page contained thirty-seven posts, twenty of which formed the basis of this action. The posts at issue summarized lawsuits involving the plaintiff General Steel.

The defendant competitor filed a motion for summary judgment, arguing that it was entitled to immunity under section 230 of the Communications Decency Act, 47 U.S.C. § 230(e)(3). The district court granted the motion in part, but denied it as to seventeen posts and as to the internet search ads. The court found that the competitor created and developed the content of the ads and was therefore not entitled to immunity.

The competitor appealed, but the Tenth Circuit dismissed the appeal. The court held that as a matter of first impression, section 230 of the Communications Decency Act, 47 U.S.C. § 230(e)(3), only provides immunity from liability, not immunity from suit. Therefore, the Tenth Circuit lacked appellate jurisdiction. The competitor could not establish the third element of the collateral order doctrine–*i.e.*, that the district court's decision was effectively unreviewable on appeal from a final judgment.

Williams v. Akers, 837 F.3d 1075 (10th Cir. 2016) (Moritz)

After her son committed suicide at a county jail, the plaintiff filed a § 1983 action against state law enforcement agents, alleging that agents knew but failed to inform the booking staff that her son was suicidal. The district court denied the agents' motion to dismiss and later denied their motion to reconsider.

The agents appealed, and the Tenth Circuit dismissed the appeal. It held that the agents, who failed to designate the order denying motion to reconsider in the notice of appeal, did not express intent to appeal that order, and thus Court of Appeals lacked jurisdiction over that order.

Judge Moritz explained, "The defendants could have immediately appealed the district court's order denying their motion to dismiss. They didn't Nor did they immediately file a motion to alter or amend judgment, or a motion seeking relief from judgment. They could have. *See* FED. R. CIV. P. 59(e); FED. R. CIV. P. 60(b). Instead, nearly eight months later—after the United States Supreme Court decided *Taylor v. Barkes*, —— U.S. ——, 135 S.Ct. 2042, 192 L.Ed.2d 78 (2015)—the defendants filed a motion to reconsider the district court's denial of their motion to dismiss. In an order dated July 31, 2015, the district court considered but denied that motion, finding *Barkes* inapplicable to Williams' claim. Four days later, the defendants filed a notice of appeal indicating they were appealing the district court's October 8, 2014 order denying their motion to dismiss. But in their opening brief, the defendants instead ask us to review and reverse the district court's July 31, 2015 order denying their motion to reconsider. . . . [W]e lack jurisdiction to grant that request." 837 F.3d at 1077.

Tulsa Airports Improvement Trust v. Federal Aviation Administration, 839 F.3d 945 (10th Cir. 2016) (Briscoe)

An airport improvement trust brought a breach of contract action against the Federal Aviation Administration (FAA), alleging it wrongfully determined that reimbursements requested by an airport trust were not allowable grant costs under grants made by the FAA to the airport trust. The Court of Federal Claims determined that it did not have subject matter jurisdiction and transferred action to Court of Appeals.

The Tenth Circuit dismissed the appeal. The court held that (1) the statute governing review of an agency;s decision to withhold a payment that was due under a grant agreement—49 U.S.C § 47111—did not apply; (2) "Because section 47111 does not apply, the petitioner was required to challenge the FAA's action under the general judicial review provision, 49 U.S.C. § 46110;" (3) .the FAA's letter to trust denying the trust's request for reimbursement of costs under FAA grant was a final order suitable for judicial review; and (3) the trust's failure to submit a timely petition for judicial review of the FAA's denial of its request for reimbursement was not excusable on the basis of an ambiguity in the FAA's final denial letter to the trust.

New Mexico v. Trujillo, 813 F.3d 1308 (10th Cir. 2016) (Matheson)

New Mexico filed a suit regarding water rights of various individuals in a stream system emanating from Sangre de Cristo Mountains in Santa Fe County, New Mexico. The district court entered an order based on a special master's summary judgment order that adjudicated an individual property owner's rights to underground water from the system through the use of domestic water wells. The property owner appealed.

The Tenth Circuit affirmed. It held that (1) the district court's certification of the order as a final appealable judgment did not clearly articulate "finality or "no just reason for delay," and therefore the order fell short of proper certification; (2) the order addressing the property owner's water rights could not be considered final, as required to be certified as final appealable order; (3) the danger of injustice did not outweigh the inconvenience and the costs of piecemeal review, and thus the order could not be reviewed under the pragmatic finality doctrine.

Nevertheless, (4) the order describing the property owner's water rights expressly granted the State's request for an injunction, and thus the appellate court could exercise jurisdiction to review it under 28 U.S.C. § 1292(a)(1).

On the merits, the court held that (5) the property owner had inadequately presented her argument on appeal that she was entitled to irrigate her land. The court therefore affirmed the district court's injunctive order.

KCOM, Inc. v. Employers Mutual Casualty Company, 829 F.3d 1192 (10th Cir. 2016) (Baldock)

An insured motel operator filed a state-court action against a commercial property insurer, asserting claims for breach of contract and bad faith arising from insurer's alleged unreasonable delay in failing to pay full amount due after motel sustained hail damage. Insurer removed action to federal court. The insurer then moved for the district court to

confirm an appraisal award entered pursuant to the Colorado Uniform Arbitration Act CUAA) § 13–22–222. The district court denied that motion, and the insurer appealed.

The Tenth Circuit dismissed the appeal on the grounds that it lacked jurisdiction. The court held that: (1) the court lacked jurisdiction over the insurer's interlocutory appeal, and (2) the district court's order was not immediately appealable under collateral order doctrine.

Judge Baldock explained, "Our reading of [the Federal Arbitration Act] as a whole, however, dispels any assertion that Congress intended FAA § 16(a) to be an avenue for interlocutory appeal of a motion to confirm brought under one of any fifty state laws, including CUAA § 13–22–222, a Colorado state statute with a far broader reach than FAA." 829 F.3d at 1197-98.

Diversity

Management Nominees, Inc. v. Alderney Investments, LLC, 813 F.3d 1321(10th Cir. 2016) (McHugh)

After the dissolution of a Wyoming limited liability company (LLC), a Belizean corporation brought action against an LLC, seeking declaratory and injunctive relief recognizing corporation as the LLC's sole member, and also seeking reinstatement of the LLC. The district court granted summary judgment to the corporation. 90 F.Supp.3d 1230.

The LLC appealed, and the court vacated and remanded with instructions. The court held that (1) the Wyoming LLC's citizenship would be determined by that of its members, and (2) the district court lacked diversity jurisdiction because all of the LLC's members were foreign entities or individuals, so that there were only foreign entities on both sides of the dispute.

Personal Jurisdiction

Anzures v. Flagship Restaurant Group, 819 F.3d 1277 (10th Cir. 2016) (Matheson)

A limited liability company member filed a state court action against another member and its principal—alleging breach of fiduciary duty, fraud, negligent misrepresentation, and breach of contract. After removal, the district court adopted the report and recommendation of a magistrate judge and dismissed the complaint.

The plaintiff appealed, and the Tenth Circuit affirmed. It held that the defendants were not subject to specific personal jurisdiction in Colorado. Judge Matheson explained that "[the plaintiff] reached out to [the individual defendant] in Nebraska to form [the proposed financial business], and [the business] as created as a Nevada LLC, listed its principal place

of business as being in Nebraska, and maintained its corporate office and bank account in Nebraska. Hence, the facts of record do not show that either defendant expressly aimed any conduct at Colorado regarding the formation or alleged alteration of [the proposed business's funding or ownership structure or the reduction of [the plaintiff's compensation. In short, defendants' suit-related conduct did not create any meaningful contacts with Colorado itself, and the fact that [the plaintiff] was affected in Colorado (because he resides there) is insufficient to authorize personal jurisdiction over [the] defendants." 819 F.3d 1282.

American Fidelity Assur. Co. v. Bank of New York Mellon, 810 F.3d 1234 (10th Cir. 2016) (Matheson)

An insurance company filed an action asserting claims for breach of contractual and fiduciary duties against a commercial bank as the trustee of a trust that held mortgage-backed securities owned by the insurance company. The district court denied the bank's motion to dismiss, *see* 2014 WL 4471606, and then denied the bank's motion for reconsideration.

The bank appealed, and the Tenth Circuit affirmed. The court held that the bank's personal jurisdiction defense was available to it prior to Supreme Court's decision in *Daimler AG v. Bauman*, 134 S.Ct. 746 (2014). Accordingly, the bank waived the defense by failing to raise it in its motions to dismiss prior to *Daimler* and only raising it after *Daimler.*

Judge Matheson explained, " [The bank's] general jurisdiction defense was available when it previously moved to dismiss American Fidelity's original and second amended complaints and when it filed its answer because the defense could be asserted to the same extent under *Goodyear [Dunlop Tires Operations, S.A. v. Brown*, —— U.S. ——, 131 S.Ct. 2846 (20110] as it could be asserted under *Daimler.* The defense is therefore waived under Rule 12(h)." 810 F.3d at 1242.

Removal

Paros Properties LLC v. Colorado Casualty Insurance Company, 835 F.3d 1264 (10th Cir. 2016) (Hartz)

An insured property owner filed a state court action against an insurer after its commercial building was destroyed in a mudslide, seeking payment under property insurance policy and damages for bad-faith breach of the insurance contract. After removal, the district court denied the insured's motion to remand, 2014 WL 2875042, and granted insurer's motion for summary judgment, 2015 WL 5139293. The insured appealed.

The Tenth Circuit affirmed. It first held that the motion to remand was untimely. It reasoned that (1) presuit e-mail was not an "other paper" giving insurer notice of removability; but (2) civil cover sheet filed in state court was an "other paper" giving insurer notice of removability.

The court then affirmed the grant of summary judgment to the insurer. It reasoned that mudslide damage fell within the policy's water damage exclusion; and the explosion exception to the water damage exclusion did not apply.

Standing

Kerr v. Hickenlooper, 824 F.3d 1207 (10th Cir. 2016) (Lucero)

Current and former Colorado legislators, parents of school-aged children, and educators brought action against Governor of Colorado, challenging the constitutionality of Taxpayer's Bill of Rights (TABOR), which limited revenue-raising power of state and local governments by requiring voter approval in advance for any new tax. The district court denied the Governor's motion to dismiss for lack of standing and certified its order for interlocutory appeal. *See* 880 F.Supp.2d 1112. In a prior appeal, the Tenth Circuit accepted jurisdiction and affirmed. *See* 744 F.3d 1156.

The United States Supreme Court then granted the Governor's petition for a writ of certiorari, vacated, and remanded. *See* 135 S.Ct. 2927.

On remand from the Supreme Court, the Tenth Circuit held that (1) the legislators had alleged only institutional injury and (2) the legislators had pursued action in their individual capacities, rather than as representatives for the General Assembly as a whole, and they therefore lacked standing to maintain the action.

Judge Lucero explained, "In so holding, we do not suggest that an individual legislator can never bring suit. An individual legislator certainly retains the ability to bring a suit to redress a personal injury, as opposed to an institutional injury. For example, if a particular subset of legislators was barred from exercising their right to vote on bills, such an injury would likely be sufficient to establish a personal injury. Under those circumstances, the legislator could claim a personal injury that zeroes in on the individual and is thus concrete and particularized. But the legislator-plaintiffs allege a different sort of injury altogether. They claim that they have been individually disempowered only concomitantly as a result of TABOR's diminution of the General Assembly's authority as an institution, 824 F.3d at 1216-17 (citations omitted).

The court remanded the case for a determination of whether the non-legislator plaintiffs had standing. "If . . . the district court holds that some other plaintiffs possess

standing, the district court may then consider other justiciability hurdles." 824 F.3d at 1217.