TORTS

Federal Tort Claims Act

Hardscrabble Ranch, L.L.C. v. United States, 840 F.3d 1216 (10th Cir. 2016)

A property owner whose land bordered national forest filed an action against the government. The owner asserted that the United States Forest Service's partial suppression strategy of fighting fires ignited by lightening had damaged his property. The district court granted summary judgment to the government.

The Tenth Circuit affirmed. The court held that the discretionary function exception to the waiver of immunity applied because (1) the actions at issue involved the exercise of discretion: the Forest Service's regulations and policies did not explicitly tell "the Forest Service to suppress the fire in a specific manner and within a specific period of time," 840 F.3d at 1222; and (2) the choice at issue was the kind that the discretionary function exception was designed to shield: "The nature of the USFS actions in fighting the Sand Gulch Fire are susceptible to a policy analysis grounded in social, economic, or political concerns." *Id.* at 1223.

Nelson v. United States 827 F.3d 927 (10th Cir. 2016) (Tymkovich)

The plaintiff, who was injured when his bicycle fell into a sinkhole, filed a tort action against the United States. The injury occurred on property owned by the United States Air Force Academy. The district court conducted a bench trial and then entered judgment for the plaintiff for $7 million against the government.

The government appealed, and the Tenth Circuit reversed and remanded. The court held that (1) the plaintiff was a permissive user under Colorado Recreational Use Act, COLO. REV. STAT. § 33-41-101, et seq., and thus, the government was entitled to immunity unless the government had acted willfully and maliciously in failing to warn the bicyclist of the dangers of riding on its property; and (2) the district court, rather than the appellate court, should determine whether the conduct was willful or malicious.

Lopez v. United States, 823 F.3d 970 (10th Cir. 2016) (Briscoe)

A patient filed an action pursuant to Federal Tort Claims Act (FTCA) alleging that surgeon at Veterans Administration hospital was negligent in performing surgery, and that hospital was negligent in credentialing and privileging supervising physician involved in surgery. Following a bench trial, the district court entered judgment in the government's favor.

The Tenth Circuit held that:

1. The evidence supported the district court's ruling on the medical negligence claim. Judge Briscoe explained, "At the conclusion of the trial proceedings, the district court found in its written memorandum of decision that it was [a physician] who was not a federal employee, who actually performed the surgery and removed the nerve tissue. In making this finding, the district court stated that it found [certain] trial testimony on this issue 'more credible' than [contrasting deposition testimony . . . On appeal, Lopez has not challenged as clearly erroneous the district court's finding on this fundamental point." 823 F.3d at 974.

2. The patient's administrative claim did not give government notice of his negligent credentialing and privileging claim.

The court therefore affirmed the district court's entry of judgment in favor of the United States on the medical negligence claim. It reversed the district court's judgment in favor of the government on the negligent credentialing and privileging claim and remanded the case with directions to dismiss that claim for lack of jurisdiction.

State law tort actions

In re Aramark Sports and Entertainment Services, LLC, 831 F.3d 1264 (10th Cir. 2016) (Hartz)

After a fatal drowning accident on Lake Powell, a boat-rental business brought an action for limitation of liability. Because the accident occurred on navigable waters, the case fell within the federal courts' federal admiralty jurisdiction. Anticipating that it would be sued for damages, the rental company filed a petition under the Limitation of Liability Act, 46 U.S.C. §§ 30501–12, which permits a boat owner to obtain a ruling exonerating it or limiting its liability based on the capacity or value of the boat and freight. The district court denied the petition, leaving for further proceedings the issues of gross negligence, comparative fault, and the amount of damages.

The company appealed, and the Tenth Circuit reversed and remanded. The court held that:

1. It had appellate jurisdiction over the district court's denial of limitation and exoneration under 28 U.S.C. § 1292(a) (3), which broadly permits "[i]nterlocutory decrees of such district courts or the judges thereof determining the rights and liabilities of the parties to admiralty cases in which appeals from final decrees are allowed."

2. The rental company had no duty to obtain a weather forecast and provide it to the boaters.

3. The rental company had no duty to monitor the weather and then make the decision for customers about whether it was advisable to venture onto the lake.

4. The court did not need to decide whether a marina could be liable for gross negligence or recklessness in renting a boat during inclement weather. The evidence of record, particularly the fact that the forecasted bad weather was not supposed to arrive for several hours, would not support such a claim.

5. The rental company *did* have a duty to warn the boaters of a design limitation. "Such a duty to warn is quite different from a duty to warn about the weather when the boaters had at least as good access to information as Aramark. We can think of no reason of policy or principle to excuse Aramark from negligence for failure to warn a renter of a boat's limitations. Therefore, RESTATEMENT (THIRD) § 7(a) applies and Aramark had a duty to exercise reasonable care. But we express no view on whether Aramark failed to exercise such care. Because the relevant facts have not been resolved by the district court, we must remand for further proceedings on the issue." 831 F.3d at 1284.

6. The court could not rule as a matter of law that the boaters' own negligence was the superseding cause of the accident.

It therefore remanded the case for further proceedings.

Helmer v. Goodyear Tire & Rubber Co., 828 F.3d 1195 (10th Cir. 2016) (Lucero)

Homeowners filed a class action products liability suit against manufacturer of a radiant-heating hose, claiming the hose suffered design defects leading to cracks and leaks. After the jury returned verdict in favor of manufacturer, the district court denied the homeowners' renewed motion for judgment as a matter of law and their motion for a new trial.

The homeowners appealed, and the Tenth Circuit affirmed. The court held that (1) because the jury concluded that the hose was not defectively designed, it did not reach any question as to nonparty liability; accordingly, even if the evidence of nonparty fault was insufficient for the defendant manufacturer to raise that defense, any error in that instruction was harmless; (2) the Colorado statute 13–21–403(3), that established a rebuttable presumption that a product was not defective if ten years had passed since it was first sold did not require, as a "necessary fact" for the presumption to apply, that the jury find that the product had been used beyond its useful safe life.

Hill v. J.B. Hunt Transport, Inc., 815 F.3d 651 (10th Cir. 2016) (Matheson)

The estate of a worker who died as result of injuries he sustained on poultry farm when the driver of vehicle similar to forklift hit his ankle, resulting in infection, brought a wrongful death action in state court against the driver's employer, alleging that employer was vicariously liable for the driver's negligence. The employer removed action to federal court.

On the first day of trial, the parties' counsel informed the district court (for the first time) that the driver had refused to appear at trial. On the second day, the defendant moved for a bench warrant for the arrest and delivery of the driver to the court. Alternatively, the defendant moved to admit the driver's deposition under Federal Rule of Evidence 804(A)(5)(a). The court called the driver to attempt to cajole him into appearing, but he did not answer the court's call.

The district court denied both requests. First, it declined to order the marshals to deliver the driver. It reasoned that he lived over 120 miles away from the courthouse, that there was only a slim chance that he would be at home because he was an over-the-road truck driver, and that attempting to compel his appearance would disrupt the trial. As to the deposition testimony, the court declined to admit it because the defendant had failed to include it in its deposition designations.

The jury found in favor of the plaintiff, attributing 98% of the negligence that caused the accident to the defendant and 2% to a non-party. The jury awarded $3.4 million in damages to be reduced by the 2% fault of the non-party, yielding $3.332 million.

The district court then denied the defendant's motion for a new trial or remittitur.

The employer appealed, and the Tenth Circuit affirmed. The court held that (1) the refusal to issue a bench warrant to compel the driver's appearance did not warrant a new trial; (2) the exclusion of the driver's deposition testimony did not prejudice the employer's substantial rights and also did not warrant a new trial; and (3) the award of damages was not excessive.

On the third holding, Judge Matheson explained, "The jury had wide latitude to choose an award based on the evidence. And the district court had broad discretion to accept it." 815 F.3d at 670 (citations omitted).

Espinoza v. Arkansas Valley Adventures, LLC, 809 F.3d 1150 (10th Cir. 2016) (Gorsuch)

After his mother died during rafting trip, the plaintiff filed a tort action against a rafting company, alleging negligence per se and fraud. The district court granted summary judgment to the defendant rafting company. The plaintiffs appealed, and the Tenth Circuit affirmed.

The court held that:

1. The release, purporting to excuse the rafting company from all claims of negligence, did not violate Colorado public policy.

Following *Jones v. Dressel*, 623 P.2d 370, 376 (Colo. 1981), the Tenth Circuit considered (a) the existence of a duty to the public; (b) the nature of the service performed; (c) whether the contract was fairly entered into; and (d) whether the intention of the parties was expressed in clear and unambiguous language. Judge Gorsuch explained, "It's clear enough that Colorado allows private parties to assume some of the risks associated with their recreational pursuits. It's a policy choice that, no doubt, means some losses go uncompensated but one that also promotes the output and diversity of recreational services consumers may enjoy. Of course, the Colorado Supreme Court and the Colorado General Assembly may change their judgment on this score at any time. And maybe someday they will prefer a policy that shifts the burden of loss to the service provider, ensuring compensation in cases like this even if also impairing to some degree individual choice and output. But that decision is their decision to make, not ours, and their current policy is clear." 809 F.3d at 1153.

2. The fact that the Colorado River Outfitters Act makes it a misdemeanor for rafting companies "to operate any raft in a careless or imprudent manner," *see* Colo.Rev.Stat. § 33–32–107(2)(b), and that the plaintiff had alleged negligence per se did not render the release invalid.

3. The release was fairly entered into and clear in its terms.

Judge Hartz dissented in part. In his view, "[A] jury must resolve whether Ms. Apolinar was misled about the danger of the rapids. Although the warning provided to her at the outfitter's office listed all the potential risks that she would face, the description of the rapids is what would convey the probability of those risks. It is not enough to list a risk if the customer has been misled about its probability." 809 F.3d at 1258.