
Summaries of Selected Opinions

No. 17-4177. American Charities for Reasonable Fundraising Regulation, Inc. v. O'Bannon. 11/21/2018. D.Utah. Judge Bacharach. *Mootness—Change in Statute—Exceptions to Mootness—Manifest Injustice.*

Plaintiff is a New York company that advises charities on fundraising. A Utah state law required plaintiff to register and obtain a Utah permit. Plaintiff sued the state official in charge of enforcing the requirements, claiming the statutory requirements were unconstitutional. The district court granted summary judgment for defendant, and plaintiff appealed. While the appeal was pending, Utah revised the law, and defendant conceded that the registration and permit requirements no longer apply to plaintiff.

On appeal, plaintiff denied that the appeal is moot, arguing that the law did not materially change and that disputes remain over damages, interest, and attorney fees. The change in the law fundamentally altered the registration and permit requirements. This material change in the law renders the appeal moot. Further, plaintiff's complaint did not request damages, nor did plaintiff move for interest or attorney fees. Thus, a case or controversy no longer exists.

Plaintiff also argued that the appeal falls into an exception to the mootness doctrine because it is "capable of repetition which will evade review." The behavior here (the adoption of the statute) is not necessarily too quick for resolution through litigation, so this exception does not apply. Nor does the exception for defendant's voluntary cessation of the challenged practice apply; plaintiff did not suggest a reason to believe that Utah would rescind or improperly enforce the statutory changes, and the Utah legislature has expressed no intent to reenact the old law.

Plaintiff further argued that the dismissal for mootness would create "manifest injustice."

The Tenth Circuit held that it could not overlook the jurisdictional nature of mootness even if the outcome was manifestly unjust.

The appeal was dismissed and the case was remanded with instructions to the district court to vacate the judgment and dismiss the case.

No. 17-4178. Wakaya Perfection, LLC v. Youngevity International, Inc. 12/11/2018. D.Utah. Judge Bacharach. *Parallel Appeals—Abstention Doctrine—Two Pending Federal Cases—First-to-File Rule—Arbitration.*

Plaintiffs sued defendants in Utah state court. Defendants then filed suit in California federal court and removed the Utah state suit to federal court. This resulted in concurrent federal cases sharing some claims, one of which was whether arbitration was required. The California litigation progressed, and the Utah federal district court ordered dismissal, ruling that the Utah court should abstain from exercising jurisdiction and that plaintiffs' claims must be decided by an arbitrator.

On appeal, the Tenth Circuit held that the district court applied the wrong abstention test when deciding whether to dismiss the Utah lawsuit. However, the Tenth Circuit recognized that it had not established a comprehensive test governing abstention when both cases are in federal court, and it provided guidance for deciding whether to dismiss a case when two federal suits are pending. Courts should start with the "first-to-file" rule. Under this rule, courts consider (1) the chronology of events, (2) the similarity of the parties involved, and (3) the similarity of the issues or claims at stake. After determining the sequence and similarities in the cases, courts must determine whether equitable considerations merit not applying the first-to-file rule in a particular case.

Plaintiff challenged the district court's ruling that arbitrability should be decided by an arbitrator, arguing that this issue should be decided by a court. Unless the parties clearly provide otherwise, the question of arbitrability is to be decided by the court. Here, plaintiff did not sign an arbitration agreement, so the arbitrability of its claims must be decided by the court.

Defendants moved for judicial notice and sanctions. The Tenth Circuit granted the motion for judicial notice, but denied the motion for sanctions.

The judgment was reversed and the case was remanded for further proceedings.

No. 17-1182. United States v. Glaub. 12/18/2018. D.Colo. Judge Murphy. *False Claims Act—What Constitutes a "False Claim"—First Amendment Defense.*

Defendant sent personal bills and invoices to the Director of the Finance Office at the U.S. Department of Agriculture (USDA) seeking payment, despite knowing that he was responsible for the debts and for paying the invoices. The debts or invoices involved vehicle purchases, student loan debt, and a debt defendant owed to a credit union. Several of his submissions included detailed instructions on how to transfer money to his bank account and to a car dealership. A jury convicted defendant of violating the False Claims Act.

On appeal, defendant argued that the district court erred by refusing to dismiss the charges against him, by failing to acquit him, and by "expanding the reaches of the False Claims Act." Defendant contended that by submitting the bills and invoices for payment he had exercised his First Amendment right to petition the government for payment of his private

debts. However, submission of a false claim to the government is not protected by the First Amendment. Whether defendant had filed a false, fictitious, or fraudulent claim depended on whether he possessed the requisite criminal intent when he sent his bills to the USDA. That was an issue for the jury to resolve.

Defendant also asserted that there was insufficient evidence to show his claims were false, fictitious, or fraudulent. Here, there was sufficient evidence for a jury to find that (1) by submitting the bills and invoices to the USDA, defendant was making a false, fictitious, or fraudulent statement that the government had an obligation to pay them, and (2) defendant knew the government had no obligation to pay the bills. Further, the prosecution did not have to prove an actual risk of loss to the government.

Defendant also made two constitutional challenges to his conviction. He waived his first argument on selective prosecution. His second argument was that the statute is unconstitutional as applied because it is overbroad if it reaches his conduct. This is a facial challenge, not an as-applied challenge, and the overbreadth doctrine does not apply.

Defendant further raised several challenges to the jury instructions but failed to establish reversible error in the jury instructions given.

Lastly, the district court did not abuse its discretion by denying defendant's motion to continue the trial.

The convictions were affirmed.

No. 17-4131. United States v. Martinez. 12/18/2018. D.Utah. Judge Moritz. *Fourth Amendment—Reasonable Suspicion.*

An Arizona State Trooper stopped a white Cadillac on an Arizona highway after hearing two state police dispatch reports. The first reported a robbery at a Wells Fargo bank near Winslow and identified two suspects, a man wearing a Bud Light hat and a man wearing a blue-and-white checkered shirt and blue jeans. The second reported a suspicious white Cadillac spotted outside a Wells Fargo branch in Flagstaff driven by a Native American man wearing a light blue checkered hoodie and a Bud Light hat.

The trooper pulled over the vehicle because he believed it was involved in the Winslow

robbery. When the driver opened the door, the trooper noticed an overwhelming marijuana smell and observed the driver was a woman whose race he could not discern. Defendant was seated in the front passenger seat. A search of the car revealed evidence linking defendant to a different bank robbery in Utah. Defendant entered a conditional guilty plea to the Utah bank robbery, reserving the right to challenge the denial of his motion to suppress evidence seized from the vehicle.

On appeal, defendant argued that the district court wrongly concluded that the trooper had reasonable suspicion to stop the car. Before initiating an investigatory stop, an officer must have a "particularized and objective" basis for suspecting an individual may be involved in criminal activity. Here, although the trooper could have reasonably inferred that the Flagstaff Cadillac was connected to the Winslow robbery,

there were not specific and articulable facts to support an inference that the Cadillac he stopped was the same Cadillac seen in Flagstaff. A white Cadillac on an interstate highway is not specific, nor is a driver with Native American facial features, especially in Arizona. Further, the timeline involving the vehicle's travel was imprecise. Accordingly, the trooper lacked reasonable suspicion to detain defendant, and the district court erred in concluding otherwise.

The order denying defendant's motion to suppress was reversed and the case was remanded for further proceedings.

No. 17-6034. Husky Ventures, Inc. v. B55 Investments, Ltd. 12/18/2018. W.D.Okla. Judge Holmes. *New Trial Motion—Jurisdiction—Amended Notice of Appeal—Permanent Injunction—Irreparable Harm—Money Damages—Reasonable Degree of Certainty.*

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Plaintiff and B55 Investments Ltd. (B55) entered into agreements under which B55 agreed to finance oilfield development for plaintiff in exchange for interests in various projects. Plaintiff sued B55 and its president (collectively, defendants) for breach of contract and tortious interference with contract or business relationships under Oklahoma law. B55 counterclaimed for breach of contract, declaratory judgment, and fraud. A jury awarded plaintiff \$6 million in compensatory and punitive damages. The district court then entered a permanent injunction prohibiting defendants from interfering with plaintiff's business. Defendants filed a notice of appeal, naming the final judgment as the order appealed from. Defendants also moved for a new trial under Fed. R. Civ. P. 59(a) or, alternatively, to certify a question of law to the Oklahoma Supreme Court. The district court denied the motion.

The Tenth Circuit initially held that it lacked jurisdiction to address defendants' arguments concerning the district court's order denying their motion for a new trial because defendants did not file a new or amended notice of appeal designating the order denying the new-trial motion. The Tenth Circuit rejected defendants' argument that an amended notice of appeal was not required because no issue presented on appeal was presented solely in the new-trial motion. Fed. R. App. P. 4(a)(4)(B)(ii) speaks of the order being challenged, not the issues raised in the post-judgment motions. Defendants' failure to comply with these requirements precluded the Tenth Circuit from considering defendants' challenges to the district court's order denying the Rule 59(a) motion. Accordingly, the motion to certify was denied as moot.

Defendants also challenged the permanent injunction, alleging that because money damages are available, plaintiff could not prove that it would suffer irreparable harm without the injunction. Defendants contended that injunctive relief is unavailable in light of this adequate remedy at law. A jury's award of damages for a past injury does not preclude a court from entering a permanent injunction, and money damages are inadequate unless the extent of future harm can be calculated with a reasonable degree of certainty. Here, the trial

evidence demonstrated that defendants posed a significant risk of continuing and future harm to the plaintiff, so the district court's grant of the injunction was proper.

Defendants also contended that the district court erroneously overlooked an ambiguity in the agreements that should have been construed against plaintiff. The Tenth Circuit upheld the district court's decision that there was no ambiguity in the contract.

Lastly, defendants claimed that the district court erred in twice denying B55 leave to file amended counterclaims against plaintiff. The Tenth Circuit discerned no error.

The challenges to the district court's order denying the motion for new trial were dismissed for lack of appellate jurisdiction and the motion to certify a related question to the Supreme Court of Oklahoma was accordingly denied as moot. The judgment was otherwise affirmed.

No. 17-3242. United States v. Currie. 12/21/2018. D.Kan. Judge Matheson. *Prosecutorial Misconduct—Prosecutor's Comments—Heat-of-Passion Defense.*

Defendant had a difficult working relationship with his supervisor and he assaulted her by splashing her with gasoline, lighting her on fire, attempting to stand on her neck, and attacking her with a straight razor and scissors. A grand jury indicted defendant for knowing and intentional assault with intent to commit murder and knowing and intentional assault with a dangerous weapon. At defendant's request, the trial court instructed the jury concerning the lesser included offense of attempted voluntary manslaughter resulting from the heat of passion. The jury convicted defendant of assault with intent to commit murder and acquitted him of assault with a deadly weapon. Defendant filed a motion for acquittal and a new trial, which was denied.

On appeal, defendant contended that several of the prosecutor's comments rose to the level of prosecutorial misconduct and deprived him of a fair trial. The misconduct analysis has two steps: (1) determining whether the prosecutor's comments were improper, and (2) if they were, examining whether they deprived the defendant of a fair trial. Here, two comments about the

government's burden were plainly improper because they misstated the law by telling the jury to consider heat of passion only if it did not find defendant guilty of attempted murder. But in light of the overwhelming evidence of premeditation, the jury instructions, and the prosecutor's articulation of the law at other points during closing argument, defendant failed to show these comments affected the jury's verdict. Other comments, which discussed the heat-of-passion standard and urged the jury not to legitimize violence, were not improper or plainly improper, given the context of the argument and the issues in the case. The improper statements did not render defendant's trial fundamentally unfair and did not affect the jury's verdict.

The conviction was affirmed. **CI**

These summaries of selected Tenth Circuit opinions are written by licensed attorneys Katherine Campbell and Frank Gibbard. They are provided as a service by the CBA and are not the official language of the court. The CBA cannot guarantee the accuracy or completeness of the summaries. The full opinions are available on the CBA website and on the Tenth Circuit Court of Appeals website.