

LITIGATION INSIGHTS

MOORE'S FEDERAL PRACTICE—TOP THREE HIGHLIGHTS

The following three summaries are this month's Editor's Top Picks from the dozens of decisions added to Moore's Federal Practice and Procedure.

DISCOVERY

Duty to Disclose

Turubchuk v. S. Ill. Asphalt Co.

2020 U.S. App. LEXIS 13730 (7th Cir. Apr. 29, 2020)

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The Seventh Circuit holds that a state-law claim for negligent misrepresentation cannot be based on a violation of the duty to disclose under Federal Rule of Civil Procedure 26.

DISMISSAL

Voluntary Dismissal as Final Judgment

Galaza v. Wolf

954 F.3d 1267, 2020 U.S. App. LEXIS 11013 (9th Cir. Apr. 8, 2020)

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The Ninth Circuit holds that when a party that has suffered an adverse partial judgment subsequently dismisses any remaining claims without prejudice, and does so without the approval and meaningful participation of the district court, the appellate court lacks jurisdiction under 28 U.S.C. § 1291.

PERSONAL JURISDICTION

Minimum Contacts

Pederson v. Frost

ASR Hip Implant Prods. Liab. Litig.

951 F.3d 977, 2020 U.S. App. LEXIS 7374 (8th Cir. Mar. 10, 2020)

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The Eighth Circuit has held that the district court properly declined to exercise specific personal jurisdiction when the defendants' only contacts with the forum were through the plaintiff and did not reflect the defendants' own direct affiliation with the forum.

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By: Heather Robinson-Wilcox

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The Wagstaffe Group Practice Guide Videos

Candace Kelly, *Regional Solutions Consultant*

While Civil Procedure is a course everyone covers in law school, it can be a difficult topic to understand. The Wagstaffe Group Practice Guide is here to help you tackle civil procedure! This Lexis exclusive source has everything you need to refresh on topics such as the Erie Doctrine, subject matter jurisdiction, removal jurisdiction, and much more.

The Wagstaffe Group Practice Guide contains videos, checklists, cross-references, and more to help you tackle tough pre-trial topics. The videos, as shown below, are presented by James Wagstaffe himself and are a fun way to digest the material! These videos provide an easy way to review confusing or misunderstood topics while also providing links to secondary sources, case law, and statutes that are discussed in the video's topic.

Video 3:6 The *Erie* Doctrine—Introduction



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DISCOVERY

Duty to Disclose

Turubchuk v. S. Ill. Asphalt Co.

2020 U.S. App. LEXIS 13730 (7th Cir. Apr. 29, 2020)

The Seventh Circuit holds that a state-law claim for negligent misrepresentation cannot be based on a violation of the duty to disclose under Federal Rule of Civil Procedure 26.

▸ **Background.** A fatal car crash in southern Illinois led to a personal injury lawsuit against the companies repaving the highway where the wreck occurred. A family of six had been riding in the vehicle; five members were injured and one died as a result of his injuries. The crash occurred in a construction zone where the asphalt had recently been repaved. Two companies—Southern Illinois Asphalt Company and E.T. Simonds Construction Company—had formed a joint venture to perform this repaving for the State of Illinois. All lines had not been repainted on the repaved road, and pieces of asphalt lay on the shoulder. Before the repaving work, this stretch of highway had a guardrail, which had not been replaced before the crash.

Plaintiffs retained attorney Komron Allahyari and sued the two construction companies, alleging they had created unreasonably dangerous conditions, failed to erect appropriate barricades, and not warned of dangers created by the repaving, causing the crash. According to plaintiffs, shortly after filing suit Allahyari spoke by telephone with defendants' attorney, Richard Green. Plaintiffs alleged Green told Allahyari the two companies were operating as a joint venture with a \$1 million liability insurance policy. By letter Allahyari then made a \$1 million, 30-day time-limited settlement demand of the joint venture. At the same time, Green sent Allahyari defendants' initial disclosures under Federal Rule of Civil Procedure 26. The response regarding insurance coverage listed the joint venture's \$1 million policy as the only insurance coverage; no policies were listed for the companies individually.

The construction companies agreed to plaintiffs' settlement demand of \$1 million. Plaintiffs signed a release of all claims against defendants individually and as a joint venture. That release contained a "non-reliance clause" in which plaintiffs agreed they were not relying on any statements by, among others, any parties' attorneys. The district court approved the settlement (which included two minors and the deceased's estate) and the first lawsuit was dismissed with prejudice.

Four years later, plaintiffs filed a second lawsuit against the same defendants, this time alleging the companies misrepresented their insurance coverage. In the interim between the two lawsuits, plaintiffs discovered that the two defendant companies carried their own separate liability policies. Plaintiffs alleged they settled the first case for \$1 million because the joint venture's policy was limited to that amount, and that the defendants concealed the actual available insurance coverage before settlement. According to plaintiffs, Green should have disclosed under Rule 26 that the contractors had their own liability policies with higher limits. Plaintiffs sued again in the Southern District of Illinois, claiming the two construction companies misrepresented "the existence of liability insurance policies potentially available to pay for any judgment" in the underlying case.

During the seven years the second lawsuit was pending, the district court ruled on many matters. In granting partial summary judgment for the plaintiffs, the court ruled as a matter of law that (1) defendants' failure to identify and provide their individual insurance policies with their initial disclosures or at any time before settlement violated Rule 26, and the undisclosed individual policies would have afforded coverage for plaintiffs' claims; and (2) no joint venture agreement existed between the construction companies based on the court's reading of that agreement.

Later the district court ruled on the parties' motions in limine, which further narrowed the issues for trial. Just before trial, plaintiffs elected to proceed on only their negligent-misrepresentation claim. To prove this claim under Illinois law, which applied in this diversity case, plaintiffs had to show (1) a false statement of material fact, (2) carelessness or negligence in ascertaining the truth of the statement by the party making it, (3) an intention to induce the other party to act, (4) action by the other party in reliance on the truth of the statements, (5) damage to the other party resulting from such reliance, and (6) a duty on the party making the statement to communicate accurate information.

By then the district court had decided all but one of the elements to establish negligent misrepresentation. In its various rulings the court had found three of these elements as a matter of law: Southern Illinois Asphalt made a false statement of material fact by disclosing only the \$1 million policy in its initial disclosures, Southern Illinois Asphalt and its attorney Green were negligent in disclosing only that policy, and plaintiffs justifiably relied on the initial disclosures when settling the underlying lawsuit. The sole liability question—whether Green intended to induce plaintiffs to settle when he sent the disclosures—and any resulting damages were the only elements left for the jury to decide. The jury instructions reflected these district-court rulings and the special verdict posed only those inquiries.

The trial testimony centered on the interactions between the parties' lawyers soon after the first lawsuit began. Allahyari testified that he made the \$1 million demand based on his phone call with Green, and that the demand letter was sent the next day. Allahyari said he would have demanded more had he known about the companies' individual policies. Green said he was retained to represent the joint venture, and that his phone call with Allahyari took place after, not before, he received the demand letter. Green said that in their phone call Allahyari was adamant that plaintiffs wanted \$1 million within 30 days. According to Green, Allahyari never asked him if the companies had individual insurance policies. Green was not aware of any other insurance, and given the quick policy-limits demand, he made no additional inquiries about other insurance and defendants accepted plaintiffs' settlement demand.

The jury returned a verdict for plaintiffs against Southern Illinois Asphalt and assessed damages of \$8,169,512.84. The district court denied defendants' post-trial motions under Rule 50 for judgment as a matter of law and under Rule 59 for a new trial. Defendants appealed.

▼ **Negligent-Misrepresentation Claim Cannot Be Based on Rule 26.** Plaintiffs went to trial solely on their claim that Southern Illinois Asphalt by its counsel negligently misrepresented in its Rule 26 initial disclosures the existence of liability insurance policies potentially available to pay damages in the underlying case. The Seventh Circuit noted that the sixth element of the negligent-misrepresentation cause of action is a duty on the party making the statement to communicate accurate information. The district court concluded that while the underlying cause of action was premised on Illinois state law, the duty of care was based on Federal Rule of Civil Procedure 26. The Seventh Circuit could not find any cases recognizing a state-law duty of care based on a Federal Rule of Civil Procedure.

The Rules Enabling Act, which gives the judicial branch authority to promulgate the federal rules, provides that the Federal Rules of Civil Procedure “shall not abridge, enlarge or modify any substantive right” [28 U.S.C. § 2072(b)]. No authority establishes the federal rules as a predicate for a state-law negligence claim. Rather, the rules themselves provide remedies for their violation [see, e.g., Fed. R. Civ. P. 11, 26(g), 37]. Violation of the federal rules has not been recognized as the duty component of a state-law negligence claim. On this topic, after the jury's verdict, the district court concluded that because plaintiffs “proceeded on a negligent misrepresentation claim; not [a] claim for a violation of Rule 26,” this case did not recognize a new private cause of action. The Seventh Circuit found, however, that plaintiffs expressly claimed Southern Illinois Asphalt negligently misrepresented facts in its Rule 26 disclosure and violated its duty under that rule, and the jury was so instructed.

The Seventh Circuit noted that existing authority in this area cut against plaintiffs' position. In *Living Designs, Inc. v. E.I. DuPont de Nemours and Co.* [431 F.3d 353 (9th Cir. 2005)], plaintiffs settled products liability actions against defendant. They later learned that during discovery and before the settlements defendant had failed to reveal damaging test results. Plaintiffs claimed they had been wrongfully induced to settle their previous cases. The district court dismissed the negligence claims, and the Ninth Circuit affirmed, reasoning that “the Federal Rules of Civil Procedure do not create duties on which an opposing party may base a negligence claim.”

The Seventh Circuit reached a similar conclusion in *Roppo v. Travelers Comm. Ins. Co.* [869 F.3d 568 (7th Cir. 2017)]. On claims of negligent misrepresentation under Illinois law for failure to respond to an interrogatory in state court, the court decided that the duty of care runs from attorney to client, and goes to third parties only when an attorney is hired for that specific purpose. The court ruled that it was an error to conflate the duty element of a negligent-misrepresentation claim with a duty imposed by a court on attorneys during litigation.

Thus, the Seventh Circuit concluded that it was legal error for the district court in the second lawsuit to allow plaintiffs' negligence claim to proceed when it relied on a Federal Rule of Civil Procedure for a duty of care.

▼ District Court Incorrectly Found Elements of Negligent-Misrepresentation

Claim Satisfied as a Matter of Law. Every other element of the negligent-misrepresentation claim was decided as a matter of law by the district court. In each instance the Seventh Circuit concluded that the district court incorrectly stepped into the province of the jury. In its pretrial rulings on summary judgment and in limine, the district court found as a matter of law that Southern Illinois Asphalt was negligent by violating Rule 26 in not identifying its individual insurance policies within its initial disclosures and before settlement. The jury was so instructed. As a matter of law, the court also found that the defendant breached its duty and that plaintiffs justifiably relied on the defendant's representations. And in limine the court precluded the defendant from presenting evidence that Green was not negligent and acted reasonably.

The court explained that, on a negligence claim, the jury usually determines whether a defendant has breached a duty. Similarly, the element of justifiable reliance is a question of fact to be decided by the jury in light of the surrounding circumstances. On plaintiffs' motion for partial summary judgment (and later revisited on post-verdict motions) the district court found that under Illinois law no joint venture existed between Southern Illinois Asphalt and E.T. Simonds. The Seventh Circuit found that whether a joint venture existed between Southern Illinois Asphalt and E.T. Simonds presented a question of fact, and the district court erred by prematurely ruling on it as a matter of law.

▼ **Conclusion.** In summary, the Seventh Circuit found that the district court incorrectly permitted plaintiffs to base their negligent-misrepresentation claim on Federal Rule of Civil Procedure 26. The district court also incorrectly found as a matter of law that all but one of that claim's elements had been met. Furthermore, the evidentiary decisions reached on the elements were an abuse of discretion. Therefore, the Seventh Circuit concluded that the jury's verdict had to be reversed, but the court declined to enter judgment as a matter of law in favor of Southern Illinois Asphalt. The type and number of errors that occurred greatly affected the outcome of the second lawsuit. Thus, in an abundance of caution, the court reversed the judgment in its entirety and remanded for further proceedings.

DISMISSAL

Voluntary Dismissal as Final Judgment

Galaza v. Wolf

954 F.3d 1267, 2020 U.S. App. LEXIS 11013 (9th Cir. Apr. 8, 2020)

The Ninth Circuit holds that when a party that has suffered an adverse partial judgment subsequently dismisses any remaining claims without prejudice, and does so without the approval and meaningful participation of the district court, the appellate court lacks jurisdiction under 28 U.S.C. § 1291.

▼ **Background.** Plaintiff began working as a Transportation Security Officer with the Transportation Security Administration (TSA) in April 2003. After being injured several times in 2004 and 2005, plaintiff was given a "permanent limited duty position" but was eventually removed from this position in 2006. TSA terminated her employment in 2010.

Plaintiff filed a complaint in the U.S. District Court for the District of Nevada, alleging numerous federal and state-law claims, including violations of Title VII of the Civil Rights Act of 1964, and a violation of the Rehabilitation Act based on disability discrimination. The government filed a motion to dismiss, arguing as to the Rehabilitation Act claim that the district court lacked subject matter jurisdiction because any such claim is preempted by the Aviation and Transportation Security Act (ATSA). The district court granted the government's motion with prejudice as to all claims except the Title VII hostile work environment, sex discrimination, and retaliation claims. The district court granted plaintiff an opportunity to amend as to those remaining claims. The district court specifically found the Rehabilitation Act claim preempted by the ATSA.

Plaintiff then filed her first amended complaint asserting Title VII claims for sex discrimination, race discrimination, and retaliation. She also filed a motion for reconsideration regarding the dismissal of her Rehabilitation Act claim. The government filed a motion to dismiss the first amended complaint and opposed the motion for reconsideration. In her opposition to the government's motion to dismiss, plaintiff consented to the dismissal of her retaliation claim with prejudice.

The district court denied the government's motion to dismiss without prejudice to renewing the motion after a brief period of discovery addressed to the issue of whether plaintiff had adequately exhausted her administrative remedies. The court found that plaintiff had otherwise adequately pled Title VII sex and race discrimination claims. The district court did not separately address plaintiff's Title VII retaliation claim. The district court also denied plaintiff's motion for reconsideration, affirming its decision that the ATSA preempts the Rehabilitation Act.

Plaintiff then filed a notice of voluntary dismissal of her race and sex discrimination claims without prejudice under Federal Rule of Civil Procedure 41(a)(1)(A)(i), followed by a notice of appeal. The district court was never asked to, and did not, enter a separate judgment. On appeal, plaintiff sought only review of the dismissal of her Rehabilitation Act claim.

▼ **Ninth Circuit Lacked Jurisdiction.** As a threshold matter, the Ninth Circuit considered whether it had jurisdiction to hear the appeal under 28 U.S.C. § 1291. The court explained that, under the final judgment rule embodied in 28 U.S.C. § 1291, the courts of appeals have jurisdiction over appeals from all final decisions of the district courts of the United States. As a general rule, the whole case and every matter in controversy in it must be decided in a single appeal. A Rule 41(a)(1) voluntary dismissal of all remaining claims with prejudice can potentially act in some circumstances to create an appealable final judgment under 28 U.S.C. § 1291. However, a voluntary dismissal without prejudice is ordinarily not a final judgment from which the plaintiff may appeal.

The court acknowledged an exception to this general principle, as established in *James v. Price Stern Sloan, Inc.* [283 F.3d 1064 (9th Cir. 2002)]. In *James*, the district court granted the plaintiff's motion to dismiss her remaining claims so that she could pursue an appeal after the district court had granted partial summary judgment dismissing the majority of her claims. Although the dismissal was without prejudice, the appellate court ruled that the judgment was final and appealable, because (1) there was no evidence of any attempt to manipulate appellate jurisdiction, and (2) the plaintiff had sought the district court's permission to dismiss the remaining claims. For these reasons, the *James* court held that "when a party that has suffered an adverse partial judgment subsequently dismisses remaining claims without prejudice with the approval of the district court, and the record reveals no evidence of intent to manipulate our appellate jurisdiction, the judgment entered after the district court grants the motion to dismiss is final and appealable under 28 U.S.C. § 1291."

Conversely, in *American States Ins. Co. v. Dastar Corp.* [318 F.3d 881 (9th Cir. 2003)], the court found no jurisdiction to consider an appeal, because (1) both parties had attempted to create appellate jurisdiction through manipulation, and (2) the district court did not meaningfully participate in the voluntary dismissal of all remaining claims after granting partial summary judgment. The Ninth Circuit noted that "the active involvement of the district court . . . would have empowered the district court to manage the development of this action, thereby facilitating efficiency[] [and] avoiding this premature appeal."

In this case, although there was no overt record evidence of any attempt to manufacture appellate jurisdiction through manipulation, there was no meaningful district-court participation in the voluntary dismissal of all remaining claims. Because plaintiff never requested an entry of partial final judgment under Rule 54(b), the district court was not informed in advance that plaintiff had any intent to appeal the dismissal of her Rehabilitation Act claim, or that she had any intent to voluntarily dismiss her remaining claims to seek appellate review.

The court rejected plaintiff's argument that, as a practical matter, the dismissal of the race and sex discrimination claims was effectively with prejudice because the statute of limitations had since expired for those claims. The court explained that, while it is true that subsequent events can validate a prematurely filed appeal, it is also well-settled that entry of a final judgment by the district court is still needed to make appealable an order that otherwise would have been non-final. If plaintiff wanted to appeal the dismissal of her Rehabilitation Act claim while she kept her race and sex discrimination claims alive, she needed the district court's permission to do so.

The court emphasized that it has regularly expressed the importance of the district court's involvement in the voluntary dismissal of a plaintiff's claims in determining whether appellate jurisdiction is proper. In *James*, the district court's participation in the dismissal of the claims without prejudice allowed the district court to review the plaintiff's reasons for seeking dismissal, thus allowing the district court in effect to make a determination that its adjudication of those claims was ripe for review. In *American States Ins. Co.*, because the district court was not involved when the parties filed a stipulation to dismiss a claim without prejudice, the Ninth Circuit noted that circumventing the district court's involvement in the dismissal eliminated the district court's gate-keeping role, thereby depriving the appellate court of jurisdiction.

▼ **Conclusion.** For these reasons, the Ninth Circuit dismissed the appeal for lack of appellate jurisdiction.

PERSONAL JURISDICTION

Minimum Contacts

Pederson v. Frost

ASR Hip Implant Prods. Liab. Litig.)

951 F.3d 977, 2020 U.S. App. LEXIS 7374 (8th Cir. Mar. 10, 2020)

The Eighth Circuit has held that the district court properly declined to exercise specific personal jurisdiction when the defendants' only contacts with the forum were through the plaintiff and did not reflect the defendants' own direct affiliation with the forum.

▼ **Background.** A Minnesota attorney filed this suit against several defendants in Minnesota state court, alleging claims for common-law fraud and tortious interference with prospective economic advantage. The plaintiff had served as outside counsel to a California corporation, beginning when he was a resident of California but continuing after he moved to Minnesota and began working out of a Minnesota office. He alleged that one of this corporation's founders and other associated individuals induced him to continue representing the company through repeated false promises of either an in-house position or increased compensation. He eventually discovered the fraud and quit.

Nearly all the relevant events occurred in various locations outside Minnesota. The plaintiff alleged that he had received hundreds of related telephone and email contacts in his Minnesota office, but there was no allegation that any of the defendants ever resided or set foot in Minnesota. The defendants removed the case from state to federal court and immediately filed a motion to dismiss for lack of personal jurisdiction. The district court granted the motion, concluding that the connection between the defendants and Minnesota was too tenuous to exercise personal jurisdiction.

▼ **Court Lacked Personal Jurisdiction.** To ensure that personal jurisdiction exists, a federal district court must satisfy itself that hearing the case is consistent with both the law of the forum state and due process. Minnesota's long-arm statute authorizes courts to exercise jurisdiction to the full extent of the Due Process Clause. Accordingly, the sole question here was whether requiring the defendants to litigate the case in Minnesota would offend due process. The focus of the inquiry must be on the defendants. The plaintiff argued that the defendants were subject to specific jurisdiction because they had sufficient suit-related contacts to create a "substantial connection" with Minnesota.

Five factors are relevant to the specific jurisdiction analysis, the Eighth Circuit said: (1) the nature and quality of the defendant's contacts with the forum state, (2) the quantity of the defendant's contacts, (3) the relationship of the cause of action to the defendant's contacts, (4) the interest of the forum state in providing a forum for its residents, and (5) the convenience or inconvenience to the parties.

The first three contact-based factors weighed heavily against the exercise of personal jurisdiction. The plaintiff had not alleged that any of the defendants had ever visited Minnesota, had any suit-related business there, or otherwise “purposely availed” themselves of the state’s benefits and protections. The plaintiff admitted that the parties’ physical meetings took place in other states.

The plaintiff did allege that he had received hundreds of phone calls and emails from some of the defendants in his Minnesota office. However, this also was not enough to show that the defendants had purposely availed themselves of Minnesota’s benefits and protections. There was no allegation that these communications were part of some broader effort by the defendants to create a connection with Minnesota. Calls, emails, and text messages, the Eighth Circuit said, may be relevant contacts, but when the only connection between the defendants and the forum state is the plaintiff himself, they are not enough. The contacts must reflect the defendants’ own affiliation with the forum. Here, the contacts fit into the category of “random, fortuitous, or attenuated” contacts that are insufficient to support personal jurisdiction, because the defendants’ connection with Minnesota existed only because the plaintiff happened to work and maintain an office there. The plaintiff cannot be the only link between the defendant and the forum.

The plaintiff also argued that, under *Calder v. Jones* [465 U.S. 783, 790, 104 S. Ct. 1482, 79 L. Ed. 2d 804 (1984)], personal jurisdiction existed because an intentional tort caused him to suffer harm in Minnesota, including damaged business relationships, reputational injuries, unpaid attorney fees, and emotional distress. *Calder* held that personal jurisdiction can sometimes exist over a nonresident defendant who commits an intentional tort when its effect is felt primarily within the forum state. This holding has two limitations. First, the relationship between the defendant and the forum must arise out of contacts that the defendant has created with the forum state. Second, it is the defendant’s contacts and conduct with the forum state itself that are the focus, not the defendant’s contacts with people who happen to reside there. Here, the defendants had done nothing to create a connection between the effects of their actions and Minnesota. The proper question is not where the plaintiff experienced a particular injury or effect, but whether the defendants’ conduct connects them to the forum in a meaningful way. However significant the plaintiff’s connections may be they cannot be decisive in determining whether the defendants’ due process rights are violated.

The court also noted that the last two of the five factors—the forum state’s interest and the convenience of the parties—cannot themselves create personal jurisdiction. They are to be considered only after it has been decided that a defendant purposefully established minimum contacts with the forum. Accordingly, the Eighth Circuit affirmed the judgment of the district court dismissing the case for lack of personal jurisdiction.