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United States Court of Appeals
Tenth Circuit

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Elisabeth A. Shumaker
Clerk of Court

UNITED STATES COURT OF APPEALS

FOR THE TENTH CIRCUIT

COOPER CLARK FOUNDATION, on behalf of itself and others similarly situated; PHILLIP FINK, on behalf of himself and others similarly situated,

Plaintiffs - Appellants,

v.

OXY USA INC.,

Defendant - Appellee.

No. 19-3136
(D.C. No. 6:18-CV-01222-JWB-KGG)
(D. Kan.)

ORDER AND JUDGMENT*

Before **TYMKOVICH**, Chief Judge, **BALDOCK** and **HARTZ**, Circuit Judges.

Plaintiffs Cooper Clark Foundation and Phillip Fink filed three separate class actions in Kansas state courts in three different counties on behalf of three different classes of royalty owners in oil and gas wells in Kansas.[1] After litigating the cases

* After examining the briefs and appellate record, this panel has determined unanimously to honor the parties' request for a decision on the briefs without oral argument. *See* Fed. R. App. P. 34(f); 10th Cir. R. 34.1(G). The case is therefore submitted without oral argument. This order and judgment is not binding precedent, except under the doctrines of law of the case, res judicata, and collateral estoppel. It may be cited, however, for its persuasive value consistent with Fed. R. App. P. 32.1 and 10th Cir. R. 32.1.

[1] Cooper Clark Foundation is the lead plaintiff in two of the three class actions.

separately for some time, plaintiffs in each class action moved to consolidate their cases under Kan. Stat. Ann. § 60-242(a), which permits consolidation when cases share "a common question of law or fact." Plaintiffs sought consolidation to more efficiently and economically litigate the three actions. The state court granted the motion.

Defendant Oxy USA Inc. subsequently filed a notice of removal, asserting that the federal district court has jurisdiction over the consolidated action under the Class Action Fairness Act of 2005 ("CAFA"), 28 U.S.C. § 1332(d), after aggregating the amount of damages from all three state actions. "CAFA gives federal courts jurisdiction over certain class actions, defined in § 1332(d)(1), if the class has more than 100 members, the parties are minimally diverse, and the amount in controversy exceeds $5 million." *Dart Cherokee Basin Operating Co. v. Owens*, 135 S. Ct. 547, 552 (2014). Oxy's expert determined that the amount in controversy after aggregating the damages from the three actions was $5,467,462.

Plaintiffs moved to remand the action to state court, arguing that the amount in controversy for federal jurisdiction under CAFA had not been satisfied because the amounts at issue in the three state actions could not be aggregated to determine jurisdiction. The district court denied the motion to remand, and plaintiffs petitioned this court for permission to file an interlocutory appeal challenging that decision. We granted permission, and this appeal followed. Exercising jurisdiction under 28 U.S.C. § 1453(c)(1), we reverse.

I.

We review de novo the district court's decision denying plaintiffs' motion to remand to state court. *See Dutcher v. Matheson*, 840 F.3d 1183, 1189 (10th Cir. 2016); *Parson v. Johnson & Johnson*, 749 F.3d 879, 886 (10th Cir. 2014). The narrow issue in this case is whether the consolidation of the three class actions in Kansas state court resulted in a merger of the consolidated cases such that they could be treated as one action for the purpose of determining whether the action met the amount in controversy required for federal jurisdiction under CAFA.

Kansas courts have not explicitly addressed the effect of consolidation under § 60-242(a). "Where no controlling state decision exists, the federal court must attempt to predict what the state's highest court would do." *Wade v. EMCASCO Ins. Co.*, 483 F.3d 657, 666 (10th Cir. 2007) (internal quotation marks omitted). Plaintiffs argued in their motion to remand that the Kansas Supreme Court would follow federal authority interpreting the virtually identical language in Rule 42 of the Federal Rules of Civil Procedure and find that the three state class actions were not merged. Oxy argued that consolidation had retained its meaning from Kan. Stat. Ann. § 60-765, a previous statute that addressed consolidation, and therefore the cases were merged after they were consolidated.

To resolve the dispute, the district court considered whether consolidation under § 60-242(a) means the same thing as consolidation under Rule 42. The Supreme Court recently reiterated that, under Rule 42, consolidation is not equivalent to merger and consolidated cases do not lose their separate identities because of

consolidation. *See Hall v. Hall*, 138 S. Ct. 1118, 1130-31 (2018). The district court concluded, however, that Kansas would not follow the federal interpretation of consolidation; it predicted instead "that the Kansas Supreme Court would hold that consolidation under section 60-242(a)(2) results in a merger of the consolidated cases into a single case." Aplt. App., Vol. II at 479. For the reasons that follow, we conclude the district court erred in reaching this conclusion and in denying the motion to remand.

A.

Prior to the enactment of § 60-242(a), Kansas addressed consolidation under § 60-765. That statute stated as follows: "Whenever two or more actions are pending in the same court *which might have been joined*, the defendant may, on motion and notice to the adverse party, require him to show cause why the same shall not be consolidated, and if no cause be shown the said several actions shall be consolidated." *Gardner v. Pereboom*, 398 P.2d 293, 295 (Kan. 1965) (internal quotation marks omitted). Section 60-765 was repealed in 1963 when Kansas adopted a large portion of the Federal Rules of Civil Procedure.

Oxy relies on the Kansas Supreme Court's decision in *Gardner*, asserting that it provides the "only" Kansas law on "the meaning of 'consolidation.'" Aplee. Br. at 9. In *Gardner*, the appellant asserted that the trial court erred in consolidating his case with two other cases arising out of the same automobile collision. 398 P.2d at 294-95. Although § 60-765 had been repealed by the time the Kansas Supreme Court issued its decision, the court explained that "[t]he appellant had a right to try his case

under the law as it existed at the time the case was tried." 398 P.2d at 297. The court therefore analyzed the consolidation question under § 60-765. But it expressly stated that its "opinion [would] afford no precedent for the future." *Id*.

In *Gardner*, the Kansas Supreme Court emphasized that under § 60-765, "actions which are to be consolidated are those which 'might have been joined.'" *Id*. at 295. The court further explained that the reason for the joinder language is apparent because of the effect of a consolidation under § 60-765. It then cited to a prior decision, which held that "[t]he effect of a consolidation of two or more actions under G.S. 1949, 60-765 is to unite and merge them into a single action for the purpose of all future proceedings the same as though the different causes of action had been joined in a single action." *Id*. (internal quotation marks omitted).

In considering whether consolidation was proper, the Kansas Supreme Court looked to two other statutes related to joinder: Kan. Stat. Ann. § 60-410, which determines who may be joined as plaintiffs, and Kan. Stat. Ann. § 60-601, which determines what causes of actions may be joined. *See* 398 P.2d at 295. The court concluded that the trial court had erred in consolidating the three separate cases for trial, noting that the parties involved in the three cases did not have an interest in the same subject matter or the same relief, and citing cases involving improper joinder for further support. *See id*. at 295-96.

Section 60-242(a) and Rule 42 do not include the language about actions "which might have been joined" that was central to the Kansas Supreme Court's analysis of whether consolidation was proper in *Gardner*. In fact, § 60-242(a) and

Rule 42 use fundamentally different language from the repealed statute. Section 60-242(a) states:

> (a) Consolidation. If actions involving a common question of law or fact are pending before the court in the same or different counties in the judicial district, the court may:
>
> (1) Join for hearing or trial any or all matters at issue in the actions;
>
> (2) consolidate the actions; or
>
> (3) issue any other orders to avoid unnecessary cost or delay.

Kan. Stat. Ann. § 60-242(a). Rule 42 is almost identical to § 60-242(a) as it states:

> (a) Consolidation. If actions before the court involve a common question of law or fact, the court may:
>
> (1) join for hearing or trial any or all matters at issue in the actions;
>
> (2) consolidate the actions; or
>
> (3) issue any other orders to avoid unnecessary cost or delay.

Fed. R. Civ. P. 42(a).

In one of its first decisions addressing § 60-242(a), the Kansas Supreme Court considered an appellant's argument that the trial court erred in consolidating four cases for trial before a single jury.[2] *See Schwartz v. W. Power & Gas Co.*, 494 P.2d 1113, 1119 (Kan. 1972). The Kansas Supreme Court first recognized that § 60-242(a) "is substantially identical to Rule 42 of the Federal Rules of Civil Procedure." *Id*. Citing to Wright & Miller's Federal Practice and Procedure, the court explained that "the purpose of Rule 42 is to give the court a broad discretion to

[2] Although the four cases were consolidated and tried to a single jury, there were separate verdicts and judgments for each of them. 494 P.2d at 1115-16.

decide how cases on its docket are to be tried so that the business of the court may be dispatched with expedition and economy while providing justice to the parties." *Id*. Citing to Wright & Miller again, it also stated that "[i]t is for the court to weigh the saving of time and effort that consolidation would produce against any inconvenience, delay or expense that it would cause." *Id*.

In analyzing the consolidation issue, the Kansas Supreme Court noted that "[t]he statute provides that actions may be consolidated where they involve 'a common question of law or fact.'" *Id*. And, "[i]n the case at bar each of the four condemnation appeals arose out of a common condemnation action instituted by the appellant Western." *Id*. Thus, the court ultimately held the actions involved common questions of law and fact within the meaning of § 60-242(a) and that "[i]t is clear that by consolidation of the four cases for trial the saving of time and expense would be substantial in view of the low monetary awards made by the court appointed appraisers." *Id*. at 1120.

When the Kansas Supreme Court held that consolidation was equivalent to merger, it was considering the specific question of "[t]he effect of a consolidation of two or more actions *under* G.S. 1949, 60-765." *Gardner*, 398 P.2d at 295 (emphasis added) (internal quotation marks omitted). Because of the change in the law with § 60-765 being repealed and § 60-242(a) being enacted, the Kansas Supreme Court explicitly stated that its decision in *Gardner* would not be precedential for the future. *See* 398 P.2d at 297. Consistent with the change in statutory language from § 60-675 to § 60-242(a), the Kansas Supreme Court's analysis of consolidation under

§ 60-242(a) shifted away from the joinder question that had been central to the analysis under § 60-675 and instead focused on whether there were common questions of law and fact among the consolidated cases, as the language in § 60-242(a) requires. *See Schwartz*, 494 P.2d at 1119-20. The court's analysis also focused on the purpose of consolidation behind Rule 42, which was to dispose of cases expeditiously and economically. *See id*. The question of whether the actions could have been joined, which was a necessary part of the analysis under § 60-675, was not part of the Kansas Supreme Court's analysis for consolidation under § 60-242(a).

Moreover, since the Kansas legislature adopted the Federal Rules of Civil Procedure, the Kansas Supreme Court has consistently looked to federal authority when interpreting its statutes that are similarly worded to the federal rules. *See*, *e.g., Dennis v. Se. Kan. & Gas Co.*, 610 P.2d 627, 632 (Kan. 1980) (recognizing that Kan. Stat. Ann. § 60-254(b) is identical to Rule 54(b) of the Federal Rules of Civil Procedure and stating that "[i]n interpreting K.S.A. 60-254(b), we adopt and follow the federal decisions which interpret Rule 54(b) of the Federal Rules of Civil Procedure"); *Stock v. Nordhus*, 533 P.2d 1324, 1326-27 (Kan. 1975) (relying on federal authority for guidance in interpreting Kan. Stat. Ann. § 60-213(a), which is identical to Rule 13(a) of the Federal Rules of Civil Procedure, and explaining that "[t]raditionally we have followed federal interpretation of federal procedural rules after which our own have been patterned"); *Schwartz*, 494 P.2d at 1119 (acknowledging that § 60-242(a) and Rule 42 are "substantially identical" and relying

on federal authority regarding the purpose behind Rule 42 when considering the propriety of consolidation under § 60-242(a)). Because Kansas has consistently relied on federal authority when interpreting its statutes that are patterned after the Federal Rules of Civil Procedure, we predict that the Kansas Supreme Court would do the same when interpreting the effect of consolidation under § 60-242(a).

Here, in denying plaintiffs' motion to remand, the district court concluded that "there is no indication that, by the adoption of the federal rules, the legislature intended to change the prior meaning of terms that had specific meaning and were not defined by the new statute. Clearly, Kansas courts interpreted consolidation to mean merger prior to the adoption of the new statute." Aplt. App., Vol. II at 479. But the district court cited no authority for the proposition that Kansas would follow the interpretation of a statute after it was repealed and replaced with a statute that is virtually identical to Rule 42 of the Federal Rules of Civil Procedure. And the district court failed to address the different language in the two statutes or to consider how the Kansas Supreme Court has analyzed the question of consolidation under the two statutes. We therefore disagree with the district court that consolidation had a specific meaning that equated to merger, which would carry over to § 60-242(a) after the repeal of § 60-675. Instead, we agree with plaintiffs that the Kansas Supreme Court would likely interpret consolidation under § 60-242(a) consistent with federal authority interpreting Rule 42. The United States Supreme Court has made clear that consolidation does not equal complete merger; instead, the constituent cases retain

their separate identities and are entitled to separate verdicts, judgments, and appeals. *Hall*, 138 S. Ct. at 1130-31.

B.

The district court gave several other reasons to support its decision that Kansas courts would interpret consolidation to equal complete merger. We find these reasons unpersuasive. First, the court concluded that the record demonstrated that the practice in Kansas courts is to treat consolidated cases as merged. It referenced Oxy's evidence of four consolidated class actions that were resolved with a single judgment, noting that a single judgment indicates the cases were merged. But plaintiffs contend that the parties in those cases specifically moved post-consolidation and pre-judgment to be treated as a merged, single class by seeking certification as a single class and/or filing a single consolidated amended class action petition. *See* Aplt. Opening Br. at 25-26. As plaintiffs correctly note, "Oxy offer[ed] nothing in response to this argument." Aplt. Reply Br. at 4. Accordingly, those cases do not demonstrate that Kansas automatically treats all consolidated cases as merged.

Next, the district court considered Oxy's argument that plaintiffs' language in their motions to consolidate indicated that they intended to have the cases treated as merged. The district court offers no authority for the proposition that plaintiffs' intent is relevant to determining whether Kansas courts would treat a consolidated case as a merged case. And the only authority Oxy relied on to support its position that plaintiffs' intent is relevant for determining this jurisdictional question is an

unpublished decision that addressed a different provision under CAFA related to mass actions, *see J.B. ex rel. Benjamin v. Abbott Labs., Inc*., No. 12-cv-385, 2012 WL 1655980, at *1, *3-4 (N.D. Ill. May 9, 2012). That decision does not address the question before us and is not binding on this court in any event.

But even if we were to consider plaintiffs' intent, we do not believe plaintiffs clearly sought merger when they requested consolidation. And, contrary to Oxy's representation in its brief on appeal, the state court never ordered that the cases be consolidated "as one action for all purposes." *Compare* Aplee. Br. at 2 (citing Aplt. App., Vol. I at 90) *with* Aplt. App., Vol. I at 90 (no reference to consolidating cases "as one action for all purposes").

In opposing the motion to remand, Oxy also argued that the local rules for the 26th Judicial District support the conclusion that consolidation equals merger because those rules require only one pleading to be filed in consolidated cases. The district court declined to rely on this argument. *See* Aplt. App., Vol. II at 482 ("Oxy states that by 'requiring' a single pleading, the court has merged the actions into one. The rule, however, is not clear and the court is reluctant to make much of it." (citation omitted)). But even so, Oxy raises it as its first argument on appeal. *See* Aplee. Br. at 7. We agree with plaintiffs, however, that this rule simply supports the administrative convenience of consolidation; it does not suggest that consolidation strips the consolidated cases of their separate identities.

The district court actually relied on a different local rule from the 10th Judicial District to support its decision. That rule states "unless otherwise ordered by the

assigned judge, any case numbers that have been consolidated into another number *will be administratively terminated*." Aplt. App., Vol. II at 482 (internal quotation marks omitted). The district court asserted that "[t]his rule explicitly requires the termination of all constituent cases after consolidation and allows only the lead case to remain on the active docket." *Id*. at 483. We disagree that a local rule regarding the administrative termination of a case number provides authority to answer the question of whether consolidation equals merger under Kansas law.

Finally, as "additional support for [its] decision," the district court "observe[d] the inherent difficulties in entering separate judgments in certain types of cases." *Id*. It discussed some perceived problems with reaching a single judgment in class actions, *see id*. at 483-84, and then stated that "[t]hese problems suggest to the court that while consolidation of cases involving discrete parties may not necessitate merger, consolidation of cases such as class actions and perhaps derivative actions where separate judgments may arguably become meaningless counsels more strongly in favor of merger in those contexts," *id*. at 484. The district court then concluded that "the Kansas Supreme Court would likely find that *consolidation of class actions* under K.S.A. 60-242(a)(2) merges those cases into a single case." Aplt. App., Vol. II at 484 (emphasis added). We disagree. The district court did not provide any specific authority for its conclusion that Kansas would treat class actions differently from other actions when considering the effect of consolidation under § 60-242(a).

II.

For the foregoing reasons, we hold the district court erred in concluding that the consolidated class actions were merged into one single action for the purpose of determining the amount in controversy under CAFA. Without a merger and a corresponding aggregation of damages, Oxy has not met its burden of establishing the requisite amount in controversy for federal jurisdiction under CAFA.[3] We

[3] The district court noted in its decision that, according to Oxy's expert's calculations, if the actions were "considered individually, none of the three underlying actions would satisfy the [CAFA] amount in controversy." Aplt. App., Vol. II at 475. As the party seeking removal, Oxy had the burden of establishing jurisdictional facts to show it could meet the amount in controversy for federal jurisdiction. *See McPhail v. Deere & Co*., 529 F.3d 947, 954-55 (10th Cir. 2008). Oxy relied only on an aggregation of the potential damages from the three state actions to meet the $5,000,000 amount in controversy for federal jurisdiction under CAFA; it did not present evidence showing that the three separate actions had sufficient potential damages individually to meet the jurisdictional requirement. *See* Aplt. App., Vol. I at 115-16 (citing to expert's calculations to support amount in controversy of $5,467,462); *id*. at 129-31 (Oxy's expert's affidavit in which she explains that she relied on the claims found in the three separate state petitions to produce the table that shows an aggregation of the claims equals $5,467,462).

The situation here is similar to that in *Rich v. Lambert*, 53 U.S. (12 How.) 347 (1851) (cited with approval in *Hall*, 138 S. Ct. at 1125-26). In *Rich*, several admiralty cases were filed against the owners of a ship by separate owners of cargo that had been damaged. *Id*. at 352. The cases were consolidated. *Id*. The cargo owners were each awarded damages and the ship owners sought to appeal to the Supreme Court. *Id*. The cargo owners challenged jurisdiction, asserting that the amounts awarded for most of the cases did not meet the minimum threshold amount of $2,000 for the Supreme Court to exercise appellate jurisdiction. *Id*. The ship owners argued in response that the jurisdictional amount was met if the damages for the consolidated cases were aggregated. *Id*. The Supreme Court rejected that argument, holding that it lacked appellate jurisdiction, except for the two cases where the amount individually awarded exceeded the $2,000 jurisdictional threshold. *Id*. at 352-53.

therefore reverse and remand to the district court with instructions to that court to enter an order granting the plaintiffs' motion to remand the case to state court.

Entered for the Court

Timothy M. Tymkovich
Chief Judge