



Jessica Smith

Associate
303.295.8374
Denver
jjsmith@hollandhart.com

The Law of the Case Doctrine and Mandate Rule

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Parties often disagree about what to do at the district court on remand following an appeal. While the law of the case doctrine and the mandate rule guide the issue, sometimes reasonable minds can differ on what an appellate court actually intended. Such was the case in *Harte v. Board of Commissioners*, — F.3d —, No. 18-3091, 2009 WL 4892274 (10th Cir. Oct. 4, 2019) (*Harte II*). During its second visit to the Tenth Circuit (and probably not its last), *Harte II* answered the question of what to do when none of the appellate judges on a panel agree on the reasoning for and scope of a remand.

'Operation Constant Gardener'

The Hartes, former federal intelligence officers, settled in Leawood, Kans. to enjoy their indoor tomato garden and loose-leaf tea. Unbeknownst to them, a highway patrol officer was running his “Operation Constant Gardener” where he tracked the license plate numbers of customers leaving a local garden store on the theory that marijuana growers require garden supplies. Mr. Harte had the misfortune of visiting the garden store one day when the officer was running his operation.

In the hopes of accomplishing successful drug busts, the local police department took “Operation Constant Gardener” to the next level and started searching the Hartes' trash. In the trash, the officers found remnants of the Hartes' loose-leaf tea, which the officers believed to be marijuana. Putting the one garden visit together with the loose-leaf tea, the officers obtained a search warrant for the Hartes' home.

Armed with their warrant, the officers donned their bullet proof vests and guns to raid the Hartes' house. After about 15 to 20 minutes, the officers found the Hartes' indoor tomato garden. At 90 minutes, some deputies claimed to smell “the faint odor of marijuana,” but the drug-sniffing dog disagreed. The officers finally gave up, never finding anything related to marijuana.

First Round of District Court Proceedings

The Hartes sued the officers who obtained the search warrant and conducted the search, raising four federal claims and a variety of state-law claims:

- Count I: a constitutional challenge to the validity of the search warrant;
- Count II: a constitutional challenge to the execution of the search

- warrant;
- Count III: an excessive force claim;
- County IV: a municipal liability claim under *Monell v. Department of Social Services*, 436 U.S. 658 (1978); and
- State law claims: trespass, assault, false arrest and imprisonment, abuse of process, intentional infliction of emotional distress, and false light invasion of privacy.

The district court granted summary judgment in favor of defendants on all claims, and the Hartes appealed.

First Appeal to the Tenth Circuit

For the first appeal, the Tenth Circuit issued a one paragraph per curiam opinion in *Harte v. Board of Commissioners*, 864 F.3d 1154 (10th Cir. 2017) (*Harte I*). The per curiam opinion explained that “[a]lthough the panel members write separately, each issue has been resolved by a minimum two-judge majority.” As to the particular counts, the per curiam opinion outlined the results for each of the claims:

We AFFIRM the district court’s grant of summary judgment on all claims asserted against defendant Jim Wingo. We similarly AFFIRM as to the plaintiffs’ excessive force and *Monell* liability claims. However, we REVERSE the district court’s grant of summary judgment on the unlawful search and seizure claims asserted against the remaining defendants. On remand, plaintiffs’ claim under *Franks v. Delaware*, 438 U.S. 154, 98 S.Ct. 2674, 57 L.Ed.2d 667 (1978), is limited to their theory that one or more of the remaining defendants lied about the results of the field tests conducted in April 2012 on the tea leaves collected from the plaintiffs’ trash. We further REVERSE the grant of summary judgment as to the four state-law claims raised on appeal. We REMAND these claims to the district court for further proceedings not inconsistent with these opinions.

Id. at 1158.

Judges Lucero, Phillips, and Moritz then each wrote separately to explain their respective decisions. For those counts remanded to the district court, no two panelists agreed on the reasoning even though two agreed on the result.

District Court Proceedings on Remand

On remand, the parties and the district court were left to interpret the per curiam opinion based on the three separate opinions. In so doing, the district court relied on the law of the case doctrine and the mandate rule. As explained by *Harte II*, the district court was left the “unenviable” task of applying these two doctrines with very unclear guidance from *Harte I*. The district court allowed the Hartes to proceed on Count I and the four state law claims, but concluded that *Harte I* had held all other claims were properly dismissed. The case ultimately proceeded to a jury trial, where the

jury found in favor of the Defendants on all claims tried to it.

After losing at the district court, the Hartes appealed again, this time arguing that the district court had incorrectly applied the law of the case doctrine and violated the mandate rule after the remand in *Harte I*. While the parties agreed as to the scope of the mandate for Counts I, III, IV, and the state-law claims, they disagreed about Count II.

Law of the Case Doctrine and Mandate Rule

“Under the law of the case doctrine, ‘once a court decides an issue, the same issue may not be relitigated in subsequent proceedings in the same case.’” *Harte II*, 2019 WL 4892274, at *7 (citation omitted). “[L]aw of the case is an amorphous concept,” which “posits that when a court decides upon a rule of law, that decision should continue to govern the same issues in subsequent stages in the same case.” *Arizona v. California*, 460 U.S. 605, 618 (1983), decision supplemented, 466 U.S. 144 (1984). The Tenth Circuit “has accepted the doctrine as ‘a restriction self-imposed by the courts in the interests of judicial efficiency. It is a rule based on sound public policy that litigation should come to an end, and is designed to bring about a quick resolution of disputes by preventing continued re-argument of issues already decided.’” *United States v. Monsivais*, 946 F.2d 114, 116 (10th Cir. 1991) (citation omitted). “The law of the case doctrine also serves the purposes of discouraging panel shopping at the court of appeals level and assuring district court compliance with the decisions of the appellate court.” *Id.*

The mandate rule is “an important corollary of the law of the case doctrine” and “provides that a district court must comply strictly with the mandate rendered by the reviewing court.” *Harte II*, 2019 WL 4892274, at *7. “[T]o decide whether the district court violated the mandate, it is necessary to examine the mandate and then look at what the district court did.” *Colorado Interstate Gas Co. v. Nat. Gas Pipeline Co. of Am.*, 962 F.2d 1528, 1534 (10th Cir. 1992).

But the application of the law of the case doctrine and the mandate rule is “discretionary, not mandatory,” and both come with “well-recognized exceptions[.]” *Grigsby v. Barnhart*, 294 F.3d 1215, 1218-19 (10th Cir. 2002); see also *id.* at 1219 n.4 (discussing exceptions).

Second Appeal to the Tenth Circuit

In *Harte II*, the court answered the question of what to do in a situation where a case is remanded but none of the panelists agree on why. *Harte II* explained that “[a]lthough none of these individual opinions carries binding precedential effect, our per curiam ‘mandate’ had the concurrence of two judges and is therefore the law of the case.” *Harte II*, 2019 WL 4892274, at *7. But “where only one judge endorses a theory, that theory cannot be viewed as the rationale of the court.” *Id.* at *8 (citation and quotation marks omitted).

For guidance on what to do under these circumstances, the court looked to the so-called *Marks* doctrine, which is used “[i]n the analogous context of a

fragmented Supreme Court decision where five Justices do not assent to a single rationale” and “the holding of the Court may be viewed as that position taken by those Members who concurred in the judgments on the narrowest grounds.” Id.

The court applied the *Marks* doctrine to determine the “narrowest grounds” for the per curiam holding from *Harte I*. The problem, however, was that “no single opinion from the prior panel commanded majority support, even though two members of the panel agreed on a result.” Id. at *10. The Court rejected the concept that in such a circumstance the law of the case doctrine and mandate rule allow a district court to look at the “common reasoning” regardless of the result. Id. Where there is no majority reasoning that relates to a majority result, the common reasoning is not binding. Instead, courts “need only look to and adopt the *result* the prior panel reached.” Id.

For Count II (the main count in dispute), the court analyzed whether the district court had achieved the “result” intended by the per curiam opinion. Noting that “[t]he per curiam opinion reversed the district court’s entry of summary judgment regarding Plaintiffs’ search and seizure claims,” *Harte II* reasoned that “[t]he per curiam opinion’s use of the plural ‘claims’” was enough (particularly when combined with an analysis of the *Harte I* panelists’ separate opinions) to conclude the district court erred by allowing only the one federal search and seizure claim from Count I to proceed to trial. Id. at *10. The court concluded that because Count II was also one of the asserted search and seizure claims, it fell within the per curiam opinion’s intended “result” for the remand. Id.

Because the district court erred in preventing the Hartes from proceeding on Count II, the Tenth Circuit remanded Count II for further proceedings. Luckily for the district court, all three panelists joined both the reasoning and the result for *Harte II*.

Christina Gomez and Jessica Smith are attorneys at Holland & Hart LLP specializing in complex commercial litigation. Christina chairs the firm’s Appellate Practice Group and has handled dozens of appeals in various federal and state courts. Jessica has substantial appellate experience and leads the firm’s Religious Institutions and First Amendment Practice.

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