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Another FRCP Victory: Tenth Circuit Says Federal Rule Trumps State Law

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In *Stender v. Archstone-Smith Operating Trust*, No 18-1432, 2020 WL 2109208 (10th Cir. May 4, 2020), the Tenth Circuit considered whether a federal court sitting in diversity can award costs under a state law when those same costs aren't recoverable under Federal Rule of Civil Procedure 54(d). Applying the U.S. Supreme Court's decision in *Shady Grove Orthopedic Associates, P.A. v. Allstate Insurance Company*, 559 U.S. 393 (2010), the Tenth Circuit concluded that the Federal Rule takes precedence.

The Background

In this diversity action, the parties litigated over a corporate merger for a little over a decade. Plaintiffs were minority shareholders who brought a class action, raising claims for breach of contract and fiduciary duties. *Stender*, 2020 WL 2109208, at *1. Ultimately the defendants prevailed, and the district court awarded them about $480,000 in costs, including $230,500 for electronic legal research and attorney travel and lodging. Id. On appeal, the plaintiff-appellants challenged that award.

Federal and State Law on Costs

Federal Rule of Civil Procedure 54(d) broadly states that “costs—other than attorney's fees—should be allowed to the prevailing party.” But over the years, the Supreme Court has imposed significant restrictions on the costs a court can award under Rule 54. In particular, in *Crawford Fitting Co. v. J.T. Gibbons*, the Supreme Court held that costs under Rule 54 are limited to those covered by 28 U.S.C. §1920. 482 U.S. 437, 440 (1987). Thus, the district court's discretion is “solely a power to decline to tax, as costs, the items enumerated in §1920.” Id. at 442. And because §1920 doesn't cover electronic legal research or attorney travel and lodging, Rule 54 wouldn't permit the district court in this case to award that $230,500.

Colorado's law on costs, however, is more expansive than its federal analogue. As the Tenth Circuit noted, under state law trial courts have considerable discretion in the matter, and they may choose to award costs for legal research and attorney travel and lodging. *Stender*, 2020 WL 2109208, at *2. Thus, the Tenth Circuit had to determine whether state law could expand the scope of awardable costs. To answer that question, the Tenth Circuit turned to the Supreme Court's *Shady Grove* decision.

Supreme Court Precedent

In *Shady Grove*, the Supreme Court took up a case involving a New York law that prohibited class actions seeking statutory penalties. *Shady Grove*, 559 U.S. at 397. Shady Grove brought a putative class action against Allstate in federal court under diversity jurisdiction, and the Supreme Court had to decide whether Federal Rule of Civil Procedure 23 trumped the New York law. Id. The Supreme Court held that a federal rule governs if two conditions are met: the federal rule (1) "answer[s] the same question" as the state law and (2) isn't "ultra vires." Id. at 399. By "ultra vires," the court meant that the rule was both constitutional and constituent with the Rules Enabling Act. Through that Act, "Congress authorized this Court to promulgate rules of procedure subject to its review, but with the limitation that those rules 'shall not abridge, enlarge or modify any substantive right.'" Id. at 408 (quoting 28 U.S.C. §2072(b)).

In filling out the meaning of that second condition, the court wasn't able to pull together a solid majority. Justice Scalia, writing for four Justices, concluded that "this limitation means that the Rule must "really regulate procedure—the judicial process for enforcing rights and duties recognized by substantive law and for justly determining remedy and redress for disregard or infraction of them." Id. at 407 (plurality opinion of Scalia, J.) (quotation omitted). Scalia's opinion theorized that the test isn't "whether the rule affect's a litigant's substantive rights," but whether "it governs only the manner and the means by which the litigants' rights are enforced …" Id. Justice Stevens wrote a concurrence that rejected Justice Scalia's formulation, concluding instead that the analysis "turns on whether the state law actually is part of a State's framework of substantive rights or remedies … ." Id. at 419 (Stevens, J. concurring). That is, a federal rule isn't valid if it "would displace a state law that is procedural in the ordinary sense of the term but is so intertwined with a state right or remedy that it functions to define the scope of the state-created right." Id. at 423.

Resolving This Appeal

In applying the *Shady Grove* test to this case, the Tenth Circuit first asked whether Colorado law "answer[s] the same question" as Rule 54(d). *Stender*, 2020 WL 2109208, at *5 The appellate court didn't have any trouble saying that it did, concluding that both authorities "tell the courts what costs can be awarded to a prevailing party" and that "the answers to the costs question given by [these two authorities] cannot be reconciled." Id. at *5-6.

Turning to the second *Shady Grove* question, the Tenth Circuit noted the disagreement between Justice Scalia and Justice Stevens about which test controls. Id. While the court recognized that in an earlier case the Tenth Circuit had "held that Justice Stevens's concurrence states Supreme Court law," id. at *6, it noted the existence of a circuit split by citing "then-Judge Kavanaugh's" decision in a D.C. Circuit case. Id. (citing *Los Lobos Renewable Power v. Americulture*, 885 F.3d 659, 688 n.3 (10th Cir. 2018); *Abbas v. Foreign Policy Grp*., 783 F.3d 1328, 1336-37 (D.C. Cir. 2015)). But the court held that the outcome here didn't hinge on that split because "a challenge in this case under the Rules Enabling Act fails under any

available Supreme Court doctrine." Id. (The court declined to explicitly say that the Tenth Circuit's adoption of Justice Stevens' concurrence would be controlling, though surely it would have been. See, e.g., *United States v. Bettcher*, 911 F.3d 1040, 1046 (10th Cir. 2018) ("Absent en banc reconsideration, earlier panels' decisions bind us unless the Supreme Court issues an intervening decision that is 'contrary' to or invalidates our previous analysis.") (quotation omitted).) The court concluded that Rule 54(d) "is a procedural rule," and therefore "unquestionably is within Congress's constitutional powers." Id. at *5 (citation omitted).

On this point, the Tenth Circuit fell comfortably in line with the Supreme Court. As both the *Stender* opinion and academic commentators have pointed out, the high court has never held that a federal rule violates the Rules Enabling Act. Id. at *6; A. Benjamin Spencer, *Substance, Procedure, and the Rules Enabling Act*, 66 UCLA L. Rev. 653, 657 (2019). Thus, we can chalk this case up as another win for the Federal Rules.

Preservation

Finally, in closing out its decision the Tenth Circuit also considered whether the appellants had preserved the issue for appeal. Id. at *6-7. Though the district court had concluded that the plaintiffs failed to argue that federal law precluded the award under state law, the Tenth Circuit disagreed. Id. at *7. The appellate court recognized "that Plaintiffs' argument did not track the analysis we have applied," "did not even cite *Shady Grove*," and relied on Tenth Circuit case law that was superseded by later Supreme Court opinions. Id. But, the court noted, the plaintiffs did argue more generally that the challenged costs weren't permissible. Id. Relying in part on the principle that an appellate court isn't "performing our duty to provide guidance to the lower courts if we resolved this appeal under superseded doctrine," the Tenth Circuit held that the "Plaintiffs adequately preserved their challenge"—"although barely." Id.

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