

FOR PUBLICATION

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

JAMIEN RAE JENSEN, individually and as parent and next friend of minor D.J. and as Personal Representative of the Wrongful Death Estate of unborn child C.J.; CHAVIS JOHNSON, individually and as Personal Representative of the Wrongful Death Estate of Butch Corey Johnson; MARGARET JOHNSON; FRANK JOHNSON; FRANCESCA JOHNSON; JUSTIN JOHNSON; HOLLY JOHNSON; DOMINIQUE JOHNSON; RAYMOND JENSEN, Sr.; LOUISE R. JENSEN; KATRINA JENSEN; RAYMOND JENSEN, Jr.; MURPHY JENSEN; NICOLE JENSEN; RYAN JENSEN; JUSTIN JENSEN,

Plaintiffs-Appellants,

v.

EXC, INC., DBA D.I.A. Express, Inc., DBA Express Charters, a Nevada corporation; CONLON GARAGE, INC., a Colorado

No. 20-15908

D.C. No.
3:15-cv-08019-
SPL

OPINION

corporation; GO AHEAD
VACATIONS, INC., a Massachusetts
corporation; RUSSELL J. CONLON,
individually; NATIONAL
INTERSTATE INSURANCE CO.,

Defendants-Appellees.

Appeal from the United States District Court
for the District of Arizona
Steven P. Logan, District Judge, Presiding

Argued and Submitted May 11, 2021
San Francisco, California

Filed September 22, 2023

Before: WALLACE and COLLINS, Circuit Judges, and
RAKOFF,* District Judge.

Opinion by Judge Collins;
Partial Concurrence and Partial Dissent by Judge Wallace

* The Honorable Jed S. Rakoff, United States District Judge for the
Southern District of New York, sitting by designation.

SUMMARY**

Evidence / Arizona and Tribal Law / Negligence

In a diversity action involving personal injury and wrongful death claims arising from a collision between a sedan and a tour bus on a U.S. highway within the boundaries of the Navajo Nation reservation, the panel affirmed the district court's judgment in favor of defendants to the extent that it dismissed all claims that had been asserted solely under Navajo law; reversed the district court's judgment on the claims that were submitted for trial because the district court erroneously allowed the introduction of hearsay opinions of a non-testifying putative expert; and remanded for a new trial.

The panel held that the district court abused its discretion in allowing, under the guise of impeachment evidence against plaintiffs' expert witnesses, defendants' counsel to elicit the opinions expressed in a police report prepared by the Arizona Department of Public Safety as to the cause of the accident. An opinion rendered by a person of unknown qualifications and contained in a report that, without any other explanation, relies uncritically on the hearsay statements of only selected witnesses and that does not expressly take account of, or address, any other relevant considerations, does not bear sufficient indicia of reliability and trustworthiness to be admitted as a competing expert "opinion" that a testifying expert may be required to address

** This summary constitutes no part of the opinion of the court. It has been prepared by court staff for the convenience of the reader.

on cross-examination. The panel held that the error was not harmless, and reversed and remanded for a new trial.

Next, the panel affirmed the district court's conclusion that Arizona law applied and its resulting dismissal of all claims that were asserted only under Navajo law. In determining what law governed the case, the panel applied Arizona substantive law. Arizona courts generally follow the Second Restatement of Conflict of Laws in determining the applicable law in a tort case. Applying the relevant factors set forth in the Restatement, the panel agreed with the district court that Arizona law applied rather than Navajo law.

Finally, plaintiffs challenged the district court's refusal to hold that, as a matter of law, defendant Russell Conlon's negligence proximately caused the accident. As a threshold issue, the panel held that it could not review the district court's denial of summary judgment on the causation issue where an actual trial has intervened between the summary judgment ruling and the final judgment on appeal. The panel was limited to reviewing only the denial of plaintiffs' comparable arguments in its Fed. R. Civ. P. 50 motions for judgment as a matter of law at trial. The panel held that the district court properly denied plaintiffs' motions for judgment as a matter of law because, under Arizona law, a reasonable jury could find that Conlon's negligence was not the proximate cause of the accident.

Concurring in part and dissenting in part, Judge Wallace would affirm the district court in all respects. He concurred with the majority that Arizona state law governed this action and that the district court did not err in denying plaintiffs' motion for judgment as a matter of law. He dissented from the majority's resolution of the evidentiary question, and he

would hold that the district court did not abuse its discretion in permitting defendants' counsel to ask the plaintiffs' experts about the police officer's report and conclusions because the report was sufficiently reliable to be considered and to be the subject of limited cross-examination.

COUNSEL

Geoffrey R. Romero (argued), Law Offices of Geoffrey R. Romero, Albuquerque, New Mexico; John P. Lavelle, University of New Mexico, Albuquerque, New Mexico; Thomas A. Biscup, Zebrowski Law, Shelby Township, Michigan; for Plaintiffs-Appellants.

Eileen D. GilBride (argued), John T. Masterson, Elizabeth A. Gilbert, and Brandi C. Blair, Jones Skelton & Hochuli PLC, Phoenix, Arizona, for Defendants-Appellees.

OPINION

COLLINS, Circuit Judge:

This diversity suit involves personal injury and wrongful death claims arising from a collision between a sedan and a tour bus on a U.S. highway within the boundaries of the Navajo Nation reservation. Before trial, the district court held that Arizona law applies to the accident, and it therefore dismissed all claims based on Navajo law. At trial, the jury rejected all remaining claims asserted by the sedan's surviving passengers and by the estate of the sedan's driver, and the district court entered judgment in favor of the tour bus driver, the tour organizer, and other related corporations.

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