ORAL ARGUMENT HEARD MAY 6, 2020

Case No. 19-1330

In the United States Court of Appeals for the Tenth Circuit

BOARD OF COUNTY COMMISSIONERS OF BOULDER COUNTY, *et al.*,
Plaintiffs-Appellees

v.

SUNCOR ENERGY (U.S.A), INC., *et al.*,
Defendants-Appellants

On Appeal from the United States District Court
for the District of Colorado (Civ. No. 18-1672)
(The Honorable William J. Martinez, J.)

PLAINTIFFS-APPELLEES' REPLY IN SUPPORT OF MOTION FOR SUMMARY AFFIRMANCE

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Plaintiffs timely filed their motion for summary affirmance following the Fourth Circuit's ruling on the scope of appellate jurisdiction in *Mayor of Baltimore v. BP P.L.C., ("Baltimore"),* 952 F.3d 452 (4th Cir. 2020). The mandate in *Baltimore* was issued on March 30, 2020 and Plaintiffs filed their motion on April 24.

Defendants' suggestion that Plaintiffs forfeited their collateral estoppel arguments by basing them upon the court of appeals' decision is baseless. *See* Opp. at 3. While an issue decided in the district court typically has preclusive effect, that cannot be true of appellate jurisdiction, which can only be decided by the court of appeals. Plaintiffs could not have asserted collateral estoppel regarding the scope of appellate jurisdiction, nor moved for summary affirmance, until the court of appeals rejected Exxon's Section 1447(d) argument.

Even as to Defendant Exxon's federal officer argument, it was reasonable to wait for the court of appeals. Indeed, had Plaintiffs asserted that the district court decision was preclusive, Exxon surely would have argued that the Court should wait to hear from the court of appeals.

Defendants' arguments that the Fourth Circuit's decision does not have preclusive effect lack merit. Exxon's federal officer argument, which turns on the facts of its asserted relationship with the federal government, is not a "pure" question of law. Opp. at 5. While the scope of appellate jurisdiction may be a

question of law, no circumstances warrant an exception from the usual rules of preclusion where, as here, defendant has already fully litigated and lost the same issue.

Issue preclusion applies to "unmixed" questions of law as well as issues of fact. *See, e.g., Burlington N.R.R. v. Hyundai Merch. Marine Co.,* 63 F.3d 1227, 1229 (3d Cir. 1995); Restatement (Second) of Judgments, § 27 (issue preclusion applies to issues of "fact or law"); *id.* cmt. c. ("An issue on which relitigation is foreclosed may be one of evidentiary fact, of … the application of law to fact[ ], or of law"). Defendants' sources show only that, in subsequent litigation with others, among the factors a court considers is whether an issue is "one of law *and* treating it as conclusively determined would inappropriately foreclose opportunity for obtaining reconsideration of the legal rule upon which it was based." Restatement § 29(7) (emphasis added). *See also id*. § 28(2). But Exxon has an opportunity to obtain reconsideration of the rule through its petition to the Supreme Court for *certiorari* from the Fourth Circuit. Issue preclusion would not prevent this Court from "developing the law," Opp. at 4, since this Court is not bound by the Fourth Circuit's decision in *future* cases. It can consider the rule in the next case in which it arises, but *Exxon* should not get another bite at the apple.

Defendants' remaining arguments are similarly unfounded. While Defendants argue there are no cases applying nonmutual offensive collateral

estoppel to issues of subject matter jurisdiction, they cite no case rejecting it. And Defendants' assertion that the federal officer issue in this case is "not identical" to the issue in *Baltimore,* Opp. at 7, is incorrect. Exxon made the same arguments about offshore leases in both cases, and each of the lease provisions Exxon cites in this case, *see* Defendants-Appellees' Opening Brief at 39-40; Defendants-Appellees' Reply Brief at 20, are standard lease terms also present in the form leases it relied on in *Baltimore*.[1]

Exxon argues there is a difference between the complaint in this case and the complaint in *Baltimore*, that makes the Fourth Circuit's conclusion that there was an insufficient nexus between the leases and the plaintiff's claims inapplicable here, Opp. at 8, but even if true, that would be irrelevant. The Fourth Circuit also held that the leases do not show Exxon was acting under a federal officer, and their failure to meet that separate requirement precludes its federal officer argument here.

Since issue preclusion should bar Exxon from arguing appellate jurisdiction encompasses anything beyond the federal officer issue, and from relitigating the merits of its unsuccessful federal officer argument, that should dispose of this

[1] *Compare,* App. 49-50 §10 *with Baltimore,* No. 18-cv-2357, Notice of Removal ("*Baltimore* NOR") (D.Md. July 31, 2018) Ex. B § 10 (1991 Form Lease); *compare also* App. 49-50 §§15(c), 15(d) *and* App. 68 §§ 15(c), 15(d) *with Baltimore* NOR Ex. C §§15(c), 15(d) (2017 Form Lease); *and compare* App. 64 §§9, 10 *with Baltimore* NOR Ex. C §§ 9, 10.

appeal. The Suncor Defendants suggest they can argue Exxon's federal officer jurisdiction position, but that cannot be right. They would have to have sufficient connection to Exxon to have standing to assert Exxon's argument, which they do not, but even if they did, that connection would also mean they too are bound by the Fourth Circuit's decision. That is, if Suncor can assert Exxon's federal officer argument, they can be bound by Exxon's loss in the Fourth Circuit on that argument. And Suncor cites nothing supporting its suggestion that they can argue that the Court has jurisdiction to hear all of the remand issues, even though it has no federal officer argument of its own. Accordingly, summary affirmance is appropriate.

Dated: May 11, 2020

Respectfully submitted,

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Dated: May 11, 2020

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