10.13

THE CDLA UPDATE

Highlighting Important Issues Facing Today's Defense Attorneys

CDLA EVENT: AMICUS BRIEF WRITING

Justice Márquez, keynote speaker, presented an informative session for CDLA members and their guests. Highlights inclued the do's and don'ts of Amicus Briefs when presenting to the Supreme Court. Pictured from left to right: CDLA President Jan Spies, Spies Powers & Robinson; Jeff Ruebel, Ruebel & Quillen; Colorado Supreme Court Justice Monica M. Márquez,; Jerry Pratt, Pratt & Landry

If you missed it, you missed out! Attend all CDLA events to get the most up-to-date infomation and happenings with the practice of defensive law and the CDLA. If you'd like to present for CDLA, please visit our website at codla.org.

QUICK LINKS

Stresscon Corp. v. Travelers Property Casualty Company of America

Sebastian v. Douglas County

Riccatone v. Colorado Choice Health Plans

Mullins v. Medical Lien Management, Inc.

Idaho Pacific Lumber Company, Inc. v. Celestial Land Company Limited

Egelhoff v. Taylor

Braswell v. Cincinnati Incorporated

EEOC v. Abercrombie & Fitch

COURT OF APPEALS

Stresscon Corp. v. Travelers Property Casualty Company of America.— *Court of Appeals expands notice–prejudice rule and the damages available under unreasonable delay statute (CA 09/12/13).* In this construction case, the general contractor and the concrete company settled their dispute without litigation. Before entering into the settlement, the concrete company did not inform the insurance company of the settlement or obtain its consent. The insurance company argued that the notice–prejudice rule does not apply to breaches of "no voluntary payment" clauses, and insurers are prejudiced as a matter of law whenever an insured settles with a third-party claimant before that third party has filed a lawsuit. The Court of Appeals disagreed, and held that the notice–prejudice rule applies to "no voluntary payment" clauses in insurance policies. An insured's pre-litigation settlement with a third party does not conclusively establish that an insurer was prejudiced. Here, sufficient evidence was presented at trial to support the jury's finding that the insurance company was not prejudiced. Traveler's then argued that the trial court should have granted a judgment notwithstanding the verdict because the court had erroneously allowed the jury to consider conduct that occurred before the effective date of CRS §§ 10-3-1115 and 1116. The Court found that Travelers had waived this argument, however, because it did not request a limiting instruction. On cross-appeal, relying on the collateral source rule, the concrete company argued that the trial court improperly reduced its damages by the amount that the insurer of one of the members of the crane team paid to satisfy the judgment in the first trial. The unambiguous

language of the "other insurance" clauses in the insurance policies, however, states that the concrete company contracted away its right to recover benefits from both the insurance company and the insurer of the member of the crane team. Therefore, the trial court did not err when it reduced the damages by the amount that the insurer for the member of the crane team paid to the concrete company to satisfy the judgment in the first trial. The concrete company also argued that the trial court incorrectly deducted the fees and costs that it incurred in bringing the fee request—namely, the "fees-on-fees"—from its award under CRS § 10-3-1116(1). A request for fees-on-fees in connection with a § 10-3-1116(1) claim is a request for damages, and the trial court was found to have erred in denying this portion of the concrete company's fees claim.

Sebastian v. Douglas County— *Miscalculation of deadlines is not excusable neglect for purposes of setting aside default judgment. (CA 09/12/13).* Deputy Black allowed a K-9 dog to give chase to two other suspects who fled. The dog stopped at a fence that the two suspects had successfully climbed. It returned to the suspect vehicle, where Sebastian remained seated, and proceeded to attack him. Sebastian asserted that he was entitled to recover damages because the attack violated rights guaranteed him by the Fourth and Fourteenth Amendments to the U.S. Constitution. On appeal, Sebastian contended that the district court erred in denying his 60(b)(1) motion setting aside the default. Sebastian's failure to file a timely response, however, was not excusable based on his attorney's miscalculation of the deadline. The district court concluded that Sebastian's allegations would not support a finding of the threshold issue—that is, an intentional seizure—to support his 42 USC § 1983 claim. Although the trial court did not analyze any equitable considerations in favor of granting Sebastian's 60(b)(1) motion, the district court's decision refusing to vacate the judgment of dismissal was not manifestly arbitrary, unreasonable, or unfair based on the first two factors.

Riccatone v. Colorado Choice Health Plans—*Court of Appeals holds that financial incentive to insurance entity necessary for bad faith action (CA 09/12/13).* Plaintiffs were plan participants under the San Luis Valley Combined Educators Health Plan. Among the defendants was GBS, a broker and advisor for the Plan. Plaintiffs brought claims based on the denial of benefits to Duran based on a provision in the Plan excluding from coverage injuries resulting from the illegal use of alcohol. Plaintiffs contended that the district court erred in granting summary judgment to defendants on plaintiffs' common law bad-faith breach of insurance contract. The district court properly granted summary judgment against defendants on plaintiffs' common law bad-faith breach of insurance contract claims, because these defendants were not the insurer and importantly did not have a financial incentive to deny plaintiff's claims or coerce a reduced settlement; therefore, the Court concluded, they did not owe a duty of good faith and fair dealing to plaintiffs. Additionally, the district court properly granted summary judgment in favor of GBS and Choice on plaintiffs' claim for unreasonable denial of insurance benefits under CRS § 10-3-1116(1), because neither GBS nor Choice was a proper defendant under the statute. They were not engaged in the business of insurance, which includes only those individuals or entities against whom a common law claim of bad-faith breach of insurance contract would exist.

Mullins v. Medical Lien Management, Inc.—*Medical Lien claimant prevails on claim against interplead settlement funds (CA 09/26/13).* This interpleader action stems from settlement proceeds recovered by Mullins due to a car accident. Mullins's law firm withheld a portion of the settlement pursuant to the fee agreement. However, MLM claimed to hold a medical lien of $17,081.10, an amount in excess of the settlement funds, which represented charges for care provided to Mullins by SpineOne P.C., as a result of injuries sustained by Mullins in the car accident. Among the issues raised on appeal, Mullins asserted that the trial court abused its discretion by admitting evidence presented by MLM because MLM failed to provide notice of the evidence to Mullins before trial. However, the Court found that sanctions were not proper absent prejudice, and since Mullins was familiar with the content of the trial exhibits, the late disclosure could not have caused prejudiced Mullins or otherwise warranted sanctions. Next, Mullins objected to MLM's calling a witness not identified in disclosures statements or in the witness list. The Court of Appeals, however, held that since the witness had submitted an affidavit in support of summary judgment, Mullins reasonably could have anticipated the witness would testify and could have anticipated the content of his testimony. Therefore, sanctions or exclusion were not appropriate. Further, Mullins had notice of the witness's identity because an affidavit in support of MLM's motion for summary judgment contained statements from the witness similar to his testimony. Thus, the trial court did not abuse its discretion by allowing MLM's witness to testify. Mullins further argued that the trial court abused its discretion by allowing MLM's witness to testify as a lay witness about the reasonableness and necessity of SpineOne's medical bills. The witness's conclusions, however, did not involve a process of reasoning that could not be reached by an ordinary citizen without specialized training or experience. Therefore, the trial court did not err in allowing this witness to testify about his lay opinion. The Court also affirmed the trial court's exclusion of the amount of consideration paid by MLM in purchasing the medical lien, finding this evidence immaterial.

The witness's conclusions, however, did not involve a process of reasoning that could not be reached by an ordinary citizen without specialized training or experience.

Idaho Pacific Lumber Company, Inc. v. Celestial Land Company Limited—*Amounts owed to independent contractor are not earnings for purpose of garnishment (CA 09/26/13).* Judgment creditor served garnishee with a writ of garnishment. Garnishee, who was an independent contractor rather than an employee, answered the writs that the debt owed to judgment debtor constituted earnings. The Court of Appeals held that because indebtedness owed to an independent contractor is not earnings. It also held that there is no Colorado authority that supports judgment creditor's request for such a broad writ of assistance under CRCP 69 and thus the trial court did not err in denying judgment creditor's motion for a writ of assistance.

Egelhoff v. Taylor—*Judge Egelhoff prevails in spurious lien suit against him. (CA 09/26/13).* Taylor filed a document purporting to be a lien with the Denver County Clerk and Recorder, asserting that Egelhoff owed him $500 million and that this debt was secured by Egelhoff's real and personal property. The lien was found to be invalid pursuant to CRS § 38-35-204 and CRCP 105.1. On appeal, Taylor asserted that the court erred in concluding that his lien was spurious and, thus, invalid. Neither documents Taylor sent to the district court nor his arguments on appeal provided any legal or factual support for the validity of the lien. Taylor also contended that Egelhoff failed to exhaust his administrative remedies before challenging the liens as spurious under CRS § 38-35-204 and, therefore, the court lacked subject matter jurisdiction. Egelhoff had no available administrative remedies to exhaust. The proper procedure for removing a spurious lien is to file a petition in a court seeking an order to show cause under CRS § 38-35-204, as Egelhoff did here. In addition, both Taylor and Egelhoff proceeded in this action as private parties, not state agencies. Therefore, the doctrine of exhaustion of administrative remedies was inapplicable.

Tenth Circuit Court of Appeals

Braswell v. Cincinnati Incorporated, et al, ______ F. 3d ______, 12-5128 (09/23/13) Press brake found not to be unreasonably dangerous after modifications to original equipment resulted in injury to worker. Derek Braswell suffered a horrific workplace accident: while operating a press brake manufactured by Cincinnati, Inc., his right arm was crushed, and eventually had to be amputated. Despite warnings, Braswell reached into the die area to remove a jammed piece of metal. The machine's safety equipment designed to prevent this type of accident had been removed or disabled sometime prior to the accident. After his injury, Braswell filed a suit against Cincinnati on theories of strict products liability and negligence. The district court granted summary judgment for Cincinnati on the grounds that a subsequent owner had modified the press brake to create the danger and that the gated pedal on the original model made the press brake not unreasonably dangerous. The Tenth Circuit agreed that the press brake was not unreasonably dangerous: with its warnings and safety devices, the machine did not pose a danger beyond that which the ordinary operator of the machine would appreciate.

EEOC v. Abercrombie & Fitch - _____ F.3d _____, No. 11-5110 (10th Cir. 10/01/13) – Notice of need for religious accommodation excuses failure to accommodate. Abercrombie & Fitch appealed the district court's grant of summary judgment in favor of the Equal Employment Opportunity Commission and the court's denial of summary judgment in favor of Abercrombie, on the EEOC's claim that Abercrombie failed to provide a reasonable religious accommodation for a prospective employee, Samantha Elauf in violation of Title VII of the Civil Rights Act of 1964. After review, the Tenth Circuit concluded Abercrombie was entitled to summary judgment as a matter of law because there was no genuine dispute of material fact that Ms. Elauf ever informed Abercrombie prior to its hiring decision that she wore a hijab for religious reasons and that she needed an accommodation for that practice because of Abercrombie's clothing policy. Accordingly, the case was remanded to the district court with instructions to vacate its judgment and for entry of judgment in favor of Abercrombie.

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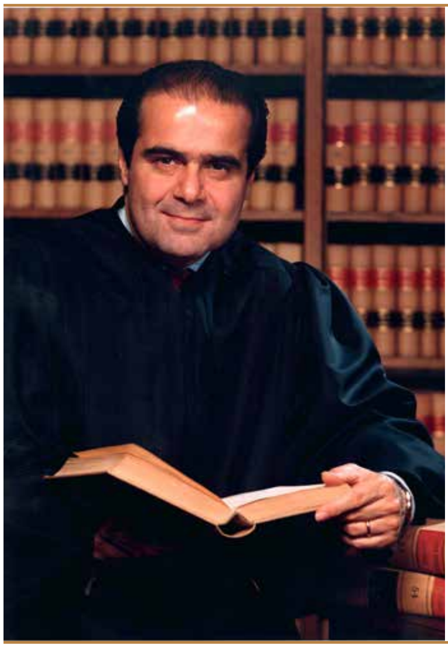

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Alternate Hotel—Columbia Hotel (use the code CODLA)
or call 800-201-9505 and reference "Colorado Defense Lawyers Association"
(located at the bottom of the gondola in the town of Telluride)

Alternate Hotel—The Peaks Resort and Spa (Reference Colorado Defense Lawyers Association) Toll Free (800) 789-2220

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