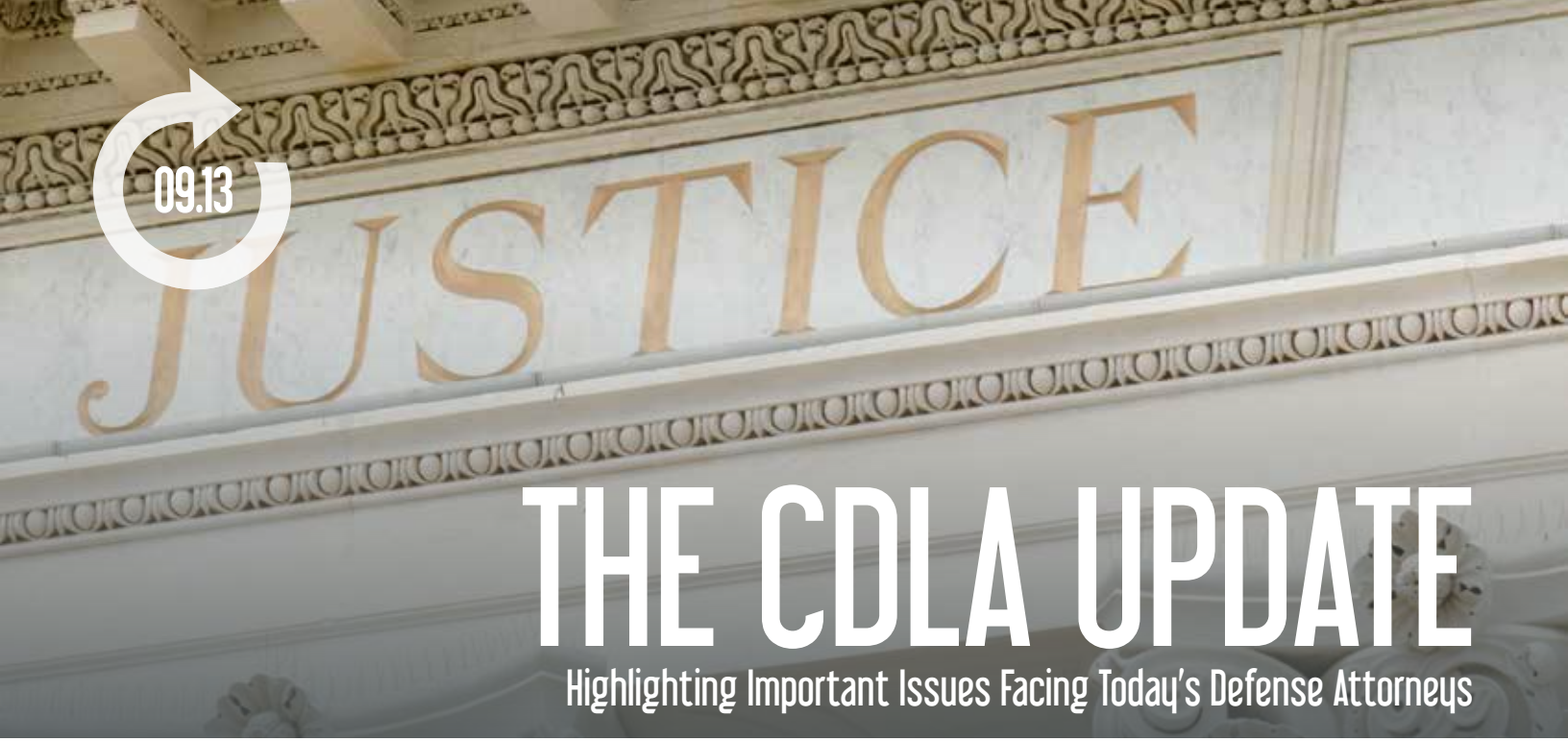


THE CDLA UPDATE

Highlighting Important Issues Facing Today's Defense Attorneys

SEMINAR UPDATE

Many of you may recall the 'lunch and learn' session that was held on Saturday at the annual seminar this year. Mark Fogg brought us up to date on a proposed change to Rule 54 dealing with the award of costs. The Rules Committee met and reconsidered the proposed amendment. Brendan Powers will be providing a comprehensive update, but members should be advised that committee decided to delay any action pending further study, input and consideration of the proposed change.

COLORADO SUPREME COURT

Planning Partners International, LLC v. QED, Inc.—*Supreme Court finds trial courts have discretion in awarding attorney's fees under contract (SC 07/01/13).* Petitioner challenged the court of appeals' ruling that a trial court must apportion attorney fees in proportion to the amount recovered on a promissory note, less the amount recovered on the counterclaim. Petitioner argued that apportionment is not mandatory when determining reasonable attorney fees under a contract providing for such an award. The Supreme Court agreed, concluding that the determination of whether and how to apportion attorney fees is typically within the discretion of the trial court. Accordingly, the judgment was reversed.

Gibbons v. Ludlow—*Supreme Court sets proof requirements for broker malpractice (SC 07/01/13).* The Supreme Court held that to sustain a professional negligence claim against a transactional real estate broker, a plaintiff must show that, but for the alleged negligent acts of the broker, he or she either: (1) would have been able to obtain a better deal in the underlying transaction; or (2) would have been better off by walking away from the underlying transaction. The Court found that here, the sellers failed to present evidence of the fact of damages; they did not establish beyond mere possibility or speculation that they suffered a financial loss as a result of the transactional brokers' professional negligence. Because no injury could be shown, the trial court properly granted summary judgment as a matter of law.

QUICK LINKS

Planning Partners International, LLC v. QED, Inc.

Gibbons v. Ludlow

Smith v. Kinningham

U.S. Taekwondo Committee v. Kukkiwon

Strudley v. Antero Resources Corporation

Town of Castle Rock v. Industrial Claim Appeals Office

Reid v. Berkowitz

Just In Case Business Lighthouse, LLC v. Murray

Mauro v. State Farm Mutual Auto Insurance

Mid Valley Real Estate Solutions V, LLC v. Hepworth-Pawlak Geotechnical, Inc.

Premier Members Federal Credit Union v. Block

Hickman v. Catholic Health Initiatives

Newsome v. Gallacher

Schneider v. City of Grand Junction Police Dep't.

Talavera v. Wiley, et al

Grosvenor v. Qwest Corporation, et al

Prager v. Campbell County Memorial Hospital

Carolina Casualty Insurance v. Nanodetex Corporation, et al

Queen, et al v. TA Operating, LLC

COURT OF APPEALS

Smith v. Kinningham—*Trial Court did not err in excluding Medicaid benefits, as such benefits are collateral source benefits. (CA 07/03/13).* The Defendants argued that the trial court erred in granting plaintiffs' pretrial motion to exclude evidence of Medicaid benefits that were paid on Smith's behalf for medical services he received. The Court of Appeals held that Medicaid benefits were collateral source benefits and thus, under CRS § 10-1-135(10)(a), evidence of Medicaid benefits paid on behalf of a plaintiff was inadmissible at trial for any purpose. The court did say:

Because the issue on appeal involves only whether the trial court erred in excluding evidence of Smith's alleged Medicaid benefits and amounts paid by Medicaid to his healthcare providers, and we are not being asked to determine whether plaintiffs' award should have been reduced post-verdict, we are concerned only with the pre-verdict evidentiary component of the rule, and we need not consider the post-verdict provisions of section 13-21-111.6, C.R.S. 2012.

Kinningham and Smith were involved in a car accident on a one-way street in Denver. Smith braked suddenly to avoid hitting a third vehicle going the wrong way on the one-way street. Kinningham also braked, but he was unable to stop in time and rear-ended Smith's car. Kinningham was part owner of ANS, but ANS did not own the car that Kinningham was driving. Smith and his wife, Laurita, brought this action against Kinningham and ANS. Defendants also contended that the trial court erred in declining to give their tendered instruction on the sudden emergency doctrine. However, the sudden emergency doctrine was abolished. Therefore, there was no error. Defendants further contended that the trial court erred in awarding plaintiffs their costs without holding an evidentiary hearing to determine the reasonableness of those costs. The trial court was found to have erred in awarding plaintiffs their costs and expert witness fees without conducting an evidentiary hearing, as requested. ANS argued that the trial court erred in denying its motion to be declared a prevailing party, and in denying its request for attorney fees and costs. The Court of Appeals agreed that ANS was a prevailing party and was entitled to recover its costs pursuant to CRS § 13-16-105. However, it was not entitled to an attorney fees award, because plaintiffs' claims against ANS were not frivolous and were not made in bad faith. Finally, the court did not abuse its discretion in denying defendants' motion for enlargement of time to designate a non-party at fault; denying defendants' motion for sanctions concerning tax returns and alleged false statements; sustaining defendants' objection to a question about liability insurance; and admitting Kinningham's testimony regarding his own blood alcohol content. It also did not err in denying defendants' motions for mistrial and for a new trial.

U.S. Taekwondo Committee v. Kukkiwon—*Court of Appeals finds no FSIA immunity in commercial transaction (CA 07/03/13).* Kukkiwon is a South Korean organization that promotes the martial art of Taekwondo. It initially existed as a nongovernmental entity, and so constituted, it contracted with plaintiffs U.S. Taekwondo Committee and U.S. Kukkiwon, making plaintiffs its overseas branch in the United States. Shortly after the contract with plaintiffs was formed, the South Korean government passed a law making Kukkiwon a "special corporation," and giving the South Korean Minister of Culture, Sports, and Tourism authority over several of Kukkiwon's activities. Subsequently, Kukkiwon notified plaintiffs that it was unilaterally cancelling the contract, and plaintiffs filed this action for breach. Plaintiffs contended that the Court of Appeals lacked jurisdiction to determine this appeal because it was interlocutory. An interlocutory appeal from a ruling denying Foreign Sovereign Immunities Act (FSIA) immunity is immediately reviewable as a "final judgment," pursuant to CRS § 13-4-102(1). Therefore, the Court had appellate jurisdiction to review this issue. On the other hand, it did not have the authority

to review a related act of state doctrine ruling, because it did not have pendent appellate jurisdiction. Defendant argued that the trial court erred in finding that it did not have FSIA immunity. FSIA is a federal statute that provides immunity to any "agency or instrumentality" of a foreign state unless, as pertinent here, the claim is based on "commercial activity." The contract at issue here constituted commercial activity because it made plaintiffs an overseas branch of Kukkiwon and contemplated activity in the United States that could create revenue and profits. Therefore, defendants were not entitled to FSIA immunity.

Strudley v. Antero Resources Corporation—*Court of Appeals finds trial court has no authority to modify case management order (CA 07/03/13).* In this toxic-tort case, plaintiffs appealed the trial court's orders requiring them to present evidence to support their claims before the initiation of discovery beyond Rule 26 and dismissing their claims with prejudice for not meeting this burden. The Strudleys sued defendants, Antero Resources Corporation and three other companies, claiming negligence, negligence per se, nuisance, strict liability, and trespass related to physical and property injuries allegedly caused by the companies' natural gas drilling operations with proximity to their home. The Strudleys asserted that the trial court erred by entering a modified case management order, which required the Strudleys to present evidence to support their claims before full discovery could commence, because such orders are not permitted as a matter of Colorado law. The Court of Appeals agreed, holding that a trial court may not enter case management orders such as entered here before allowing discovery on matters central to a plaintiff's claims. The Court found that although the initial disclosures provided the Strudleys with some information related to their claims, the disclosed information was insufficient to enable them to respond fully to the modified case management order. The modified case management order, therefore, interfered with the "full truth-seeking purpose of discovery." Certiorari has been sought and the CDLA has supported the granting of the Petition.

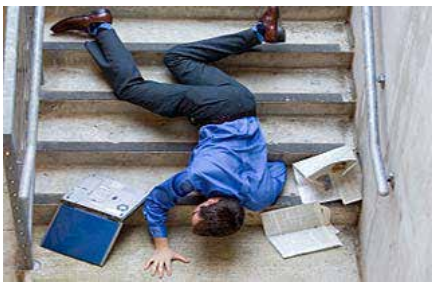
Town of Castle Rock v. Industrial Claim Appeals Office—*(CA 07/03/13).* Claimant had worked as a firefighter, engineer, and paramedic for the Town of Castle Rock since November 2000. He grew up in Albuquerque, New Mexico, and served as a firefighter there before moving to Colorado. During his off hours, claimant worked in construction—and sometimes outdoors—framing and building decks. In 2011, claimant was diagnosed with malignant melanoma on his right outer calf. He underwent three surgeries to remove the growth and subsequently was released to work full duty. Claimant sought both medical benefits and temporary total disability (TTD) benefits under CRS § 8-41-209. The parties stipulated that CRS § 8-41-209's presumption of compensability applied. The only issue at the hearing was whether the Town had overcome the presumption. The ALJ ruled that to overcome the presumption, a specific non-work-related cause of the cancer had to be established. The Town's expert opined that claimant's various other exposures and risk factors placed him at far greater risk of developing melanoma than his activities as a firefighter. The ALJ ruled that the opinion testimony was insufficient to overcome the presumption, finding that the statute required showing "by a preponderance of the medical evidence that such condition or impairment did not occur on the job" and interpreting this to mean an employer must show that "a claimant's cancer comes from a specific cause not occurring on the job."

The ALJ ruled that the opinion testimony was insufficient to overcome the presumption, finding that the statute required showing "by a preponderance of the medical evidence that such condition or impairment did not occur on the job."

The introduction of other risk factors was not enough. The Town argued that the ALJ misinterpreted the statute and asserted that the ALJ should have considered the evidence of risk factors it introduced to determine whether the presumption was overcome and the Court of Appeals agreed. The statute provides that an otherwise compensable cancer "[s]hall not be deemed to result from the firefighter's employment if the firefighter's employer or insurer shows by a preponderance of the medical evidence that such condition or impairment did not occur on the job." The Court held that evidence of risk factors can be sufficient to overcome the presumption under this language and that it was error to require the Town to prove that the

cause of claimant's cancer arose outside work. The standard applied by the ALJ is nearly insurmountable because the cause of most cancers cannot be determined. Such a standard would amount to a strict liability statute mandating that every firefighter who develops one of the prescribed cancers is entitled to workers' compensation coverage. The Court held that an employer may overcome the statutory presumption of compensability with specific risk evidence demonstrating that a particular firefighter's cancer probably was caused by a source outside work. The case was remanded to the Panel to remand to the ALJ to review the evidence under the standard articulated by the Court.

Reid v. Berkowitz—*Court of Appeals reverses judgment for licensee for failure to give comparative negligence instruction. (CA 07/18/13).* Plaintiff, a construction worker, had accompanied his friend, a painter, to a house that was being constructed by defendant in Denver. Plaintiff sustained significant injuries when he tripped at the top of the stairs, grabbed a handrail that gave way, and fell three stories to the floor below. Defendant contended that the trial court erred in determining that plaintiff was a licensee at the time of the incident. The trial court found that plaintiff was a licensee because (1) he had an ongoing business relationship with defendant; (2) he had worked on the construction site in question; (3) it was customary for workers on the project to help each other and defendant was aware of this custom; (4) workers had flexibility as to how and when they could perform their work; and (5) at the time of the accident, plaintiff was on the property helping the painter while waiting for a ride. Furthermore, defendant maintained an "open worksite," meaning that it was acceptable for workers to bring additional help to the site to complete a task without defendant's knowledge. These facts and circumstances are sufficient to support the trial court's findings and conclusion that plaintiff had permission or consent to be on the premises. Therefore, the trial court did not err in concluding that plaintiff was a licensee. Defendant also contended that the trial court erred in refusing to instruct the jury that it could apportion liability and fault to the two co-workers who had installed the handrail. Because the two co-workers owed plaintiff a duty of care, defendant was entitled to a jury instruction directing the jury to measure the fault of the two coworkers in addition to the fault of defendant, and the trial court erred in rejecting defendant's tendered instruction. As to this issue, though, the error was harmless because defendant had a non-delegable duty as a landowner to maintain the premises in a safe condition, and under the non-delegability doctrine, any fault of the two coworkers would be imputed to defendant in any event. Defendant further asserted that the trial court erred in refusing to instruct the jury on plaintiff's comparative negligence. There was evidence that plaintiff did not see the cords over which he claimed to have tripped; the cords might have been disclosed by the use of adequate light; and had he seen the cords, he might not have tripped. Therefore, there was sufficient evidence that justified giving an instruction on comparative negligence and the trial court erred in rejecting it. The part of the judgment rejecting a comparative negligence instruction was reversed, and the case was remanded for a new trial on liability only.



Furthermore, defendant maintained an "open worksite," meaning that it was acceptable for workers to bring additional help to the site to complete a task without defendant's knowledge.

Just In Case Business Lighthouse, LLC v. Murray—*Court of appeals addresses evidentiary issues involving summaries, contingent fee witnesses; finds mere filing of summary judgment on issue does not preserve issue on appeal when contesting directed verdict (CA 07/18/13).* On appeal, defendant argued that the trial court erred in allowing Preston Sumner, whom plaintiff hired and agreed to compensate on a contingent basis, to testify as a fact witness. Plaintiff hired Sumner as an advisor to develop its case. Over the course of four years,

Sumner spent between 500 and 1,000 hours examining business records and preparing summaries. Sumner's agreement with plaintiff provided that he would receive 10% of any judgment or settlement obtained herein. Contingent compensation of a fact witness requires the trial court to determine whether the witness should be stricken as a sanction. Here, because the trial court misstated the law on contingent compensation of witnesses and did not rule on the propriety of a sanction, the case was remanded to address this issue. Defendant also argued that the trial court erred in allowing Sumner to testify as a summary witness because he had no personal knowledge of the facts. However, Sumner only testified as to evidence that had already been admitted by the court, and his testimony assisted the jury in understanding the facts. Therefore, the court's ruling to allow such testimony was not manifestly arbitrary, unreasonable, or unfair. Defendant argued that the trial court erred in admitting exhibits prepared by Sumner, contending they were inadmissible under CRE 1006 because they were based on evidence already admitted during the trial and were unduly prejudicial. CRE 1006 allows for the admission of such summaries when the documents underlying the summary are voluminous. Here, more than 200 exhibits were admitted during the eight-day trial. Moreover, the underlying documents were admitted as evidence and CRE 1006 does not "require the fact finder to accept the information present on the summary charts as true." Accordingly, the trial court did not abuse its discretion in admitting Sumner's summary exhibits. Defendant also contended that a directed verdict should have been entered because the economic loss rule bars plaintiff's fraud claim. Defendant raised the economic loss rule in his motion for summary judgment, which was denied. Because defendant did not raise it when moving for a directed verdict, at any other time during the trial, or in a post-trial motion, he did not preserve this issue and the trial court did not err in denying the directed verdict motion. Defendant contended that the trial court erred in declining to instruct the jury that Pearl Development Company was a nonparty at fault. A defendant is not entitled to a nonparty-at-fault designation where the party's fault is only vicarious.

Defendant raised the economic loss rule in his motion for summary judgment, which was denied.

Mauro v. State Farm Mutual Auto Insurance—*Court reverses decision not to allow carrier to intervene (CA 08/01/13).* State Farm sought to intervene in the litigation pursuant to CRCP 24(b) for the limited purpose of opposing the protective order sought by Walter Mauro approving a proposed confidentiality agreement covering his and his daughter's medical, school, employment, and tax records. State Farm contended that the district court erred by denying its motion to intervene as a matter of right to challenge the protective order. State Farm's ability to comply with state law and insurance regulations, as applicable to Maranda Mauro's claim, is "an interest relating to the property or transaction which is the subject of the action," as required under the first prong of CRCP 24(a)(2). In addition, State Farm has no other practical alternative for challenging the protective order but to request intervention. Finally, State Farm's interest is not adequately represented by the existing parties to the action. Therefore, State Farm met all the requirements of CRCP 24(a) and had a limited right to intervene in this case.

Mid Valley Real Estate Solutions V, LLC v. Hepworth-Pawlak Geotechnical, Inc.—*Court of Appeals extends duty owed to and definition of 'homeowners' for purposes of economic loss rule (CA 08/01/13).* A developer entered into a written contract with Defendant H-P to analyze the soils on which houses would be built for resale. H-P's report recommended a particular type of foundation. The developer's general contractor entered into an oral contract with SKPE to provide structural engineering services, including foundation design. The general contractor built the house at issue according to H-P's recommendations and SKPE's design. The developer couldn't sell the house and eventually defaulted on the construction loan agreement with the bank. The default was resolved with a deed-in-lieu agreement. The bank received $355,000 and title to the house was transferred to Mid Valley, which entity was created to hold the house, its sole asset, for resale. Structural damage then began to appear, beginning with foundation cracks. Mid Valley sued defendants for negligence and sought costs of repair. The Court reviewed the economic loss rule and found that there is an independent duty of care on the part of a design professional in residential construction that renders the economic loss rule inapplicable in that context. However, this is not the case, however, in the commercial construction context, and defendants urged this was a commercial

case. The Court looked to whether Mid Valley fell within the class of plaintiffs who may enforce this independent duty of care. It concluded that because the duty arises from the services provided and the residential nature of a project, the attributes of the owner harmed when the latent defect ripens does not limit the scope of the duty. Thus, while Mid Valley was not a traditional homeowner, allowing defendants to avoid liability for this reason would afford them a windfall resulting from the fortuity that the latent defect caused damage before Mid Valley sold the house.

Premier Members Federal Credit Union v. Block—*Court of Appeals affirms failure to pay jury fee is waiver, notwithstanding excusable neglect; and that employee cannot seek indemnity from employer where engaged in wrongful conduct (CA 08/29/13).* Einspahr appealed the judgment entered after a bench trial and also appealed the court's dismissal of his cross-claim that sought indemnification. Einspahr was the manager of the special finance department of car dealership. He and another employee in the department recommended high-risk buyers for car loans from Premier. The fraud claim was based on their conduct of "power booking," in which they artificially inflated the values of vehicles (which would create a better loan-to-value ratio) to induce Premier to approve the car loans. Einspahr contended that the trial court erred when it denied his request for a jury trial on the basis that he had failed to timely pay his jury fee. The Court of Appeals held that CRCP 6(b), which governs enlargements of time, does not apply to the statutory deadline for payment of jury fees. Einspahr's failure to pay the jury fee at the time of filing of the jury demand constituted his waiver of a jury trial and trial court has no discretion to excuse untimely payment. Einspahr also contended that, following the bench trial, the court erroneously dismissed his cross-claim for indemnification against his employer, despite finding that employer was vicariously liable for Einspahr's fraudulent "power booking." An employee-tortfeasor is barred from seeking indemnification from his or her vicariously liable employer when, as here, that employee knew he or she was engaging in wrongful conduct. Here Einspahr had no right to seek indemnification.

Hickman v. Catholic Health Initiatives—*Court of Appeals holds § 12-36.5-203(2) is retroactive and revokes peer review immunity. (CA 08/29/13).* In this interlocutory appeal under CAR 4.2, defendant hospital appealed the trial court's order denying the hospital's assertion of immunity. In 2011, Hickman sustained a knee injury. She sought treatment from a physician who was credentialed to practice as a vascular surgeon at the hospital. Allegedly as a result of the physician's failure to diagnose and treat a circulatory problem, Hickman's leg was amputated on November 18, 2011. Hickman and her husband sued the hospital and the physician on January 23, 2013 for negligent credentialing. Since 1989, Colorado hospitals have been statutorily immune from damages in any civil action brought against them with respect to peer review proceedings. However, the current statute abrogated this immunity as to credentialing decisions, effective July 1, 2012. The hospital asserted that the current statute does not apply because the credentialing decision and injury at issue occurred before the statute's effective date, although the action was filed after that date. The Court of Appeals held that the plain language shows that the General Assembly clearly intended the current statute to apply retroactively, that such application is not unconstitutionally retrospective and the current statute applied to this matter,. Thus, the trial court was correct in rejecting the hospital's assertion of immunity.

Allegedly as a result of the physician's failure to diagnose and treat a circulatory problem, Hickman's leg was amputated on November 18, 2011.

Tenth Circuit Court of Appeals

Newsome v. Gallacher—*Tenth Circuit finds OK court has personal jurisdiction over corporate officers from Canada (10th Cir. 07/17/13).* Newsome, as bankruptcy trustee, brought suit in the Northern District of Oklahoma alleging various breaches of fiduciary duty against the corporation's former directors and officers, other closely affiliated persons, and a law firm that provided legal services to the corporation. All defendants are Canadian citizens or entities. The defendants moved to dismiss for lack of personal jurisdiction and the district court granted that motion. The Tenth Circuit concluded the district court erred in part. Specifically, the Court held the that individual defendants (every defendant but the law firm) cultivated sufficient contacts with Oklahoma to justify suit there: (1) the defendant purposefully directed its activities at residents of the forum state; (2) the plaintiff's injury arose from those purposefully directed activities; and (3) defendants did not show that exercising jurisdiction in Oklahoma would offend traditional notions of fair play and substantial justice. The Tenth Circuit further held that the fiduciary shield doctrine—under which personal jurisdiction may not attach to a corporate agent by virtue of actions the agent takes solely on the corporation's behalf—did not apply. As for the law firm, however, the Tenth Circuit affirmed. Given the law firm's out-of-state character and that it performed all of its relevant services out of state on an out-of-state transaction, it did not cultivate sufficient contacts with Oklahoma to justify personal jurisdiction there.

Schneider v. City of Grand Junction Police Dep't. (10th Cir. 06/05/2013). D.Colo. Plaintiff alleged that she was raped by a police officer for the City of Grand Junction, Colorado, the day after he responded to her 911 call about an altercation with her teenage son. She brought claims under 42 USC § 1983 of inadequate hiring and training of the assaulting officer, inadequate investigation of a prior sexual assault claim against him, and inadequate discipline and supervision of him. Conceding that the officer had raped plaintiff, defendants moved for summary judgment on the grounds that the officer did not act under color of state law and that plaintiff could not prove they were deliberately indifferent to the risk of rape. The district court granted summary judgment to defendants, and plaintiff appealed. The Tenth Circuit first addressed whether the supervisors could be held liable, and concluded that they could not. Plaintiff failed to show the required "affirmative link" (personal involvement, causation, and state of mind) between the supervisors and the constitutional violation. Similarly, the Circuit ruled that the municipality could not be held liable because plaintiff did not establish that her injury was caused by a municipal policy or custom enacted or maintained with deliberate indifference to constitutional injury.

Talavera v. Wiley, et al.—*Med malpractice case dismissed for failure to establish causal element of claim (10th Cir. 08/07/13).* Plaintiff Carmen Talavera suffered a stroke while visiting a store, incurring permanent disabilities that she attributed to the medical malpractice of personnel at the Southwest Medical Center (SWMC). Plaintiff brought claims against a number of the medical personnel defendants alleging that they should have diagnosed and immediately treated her stroke symptoms with blood-clotting therapy or proceeded with early surgical intervention to prevent damage caused by swelling in her brain. The district court granted summary judgment finding Plaintiff failed to demonstrate their negligence caused her injuries. Upon review, the Tenth Circuit concluded the district court did not err. Plaintiff failed to: establish a dispute of fact that she would have qualified for blood-clotting therapy, or show that any doctor owed her a duty of care when this therapy was still a viable treatment option.

Grosvenor v. Qwest Corporation, et al—*Appellate court dismisses appeal of arbitration order (10th Cir. 08/14/13).* Qwest Corporation and Qwest Broadband Services, Inc. appealed a district court order granting partial summary judgment. After Richard Grosvenor filed a putative class action, Qwest moved to compel arbitration under the Federal Arbitration Act. The district court denied Qwest's motion and scheduled a trial to determine whether the parties had reached an agreement to arbitrate. Both parties then moved for partial summary judgment. The district court granted both motions in a single order, concluding that the parties entered into an agreement, but that the agreement was illusory and unenforceable. On appeal to the Tenth Circuit, Qwest argued that the Tenth Circuit had jurisdiction to review the district court's order. Finding that in order to invoke appellate jurisdiction under the FAA, Qwest did not satisfy the Act's criteria by either explicitly moving to stay litigation and/or compel arbitration pursuant to the FAA, or making it unmistakably clear from the four corners of the motion that the movant sought relief provided for in the FAA. Accordingly, the Court dismissed Qwest's appeal.

Prager v. Campbell County Memorial Hospital—*Appellate court finds no error in medical malpractice verdict (10th Cir. 08/12/13).* The injured plaintiff, Louis Prager, alleged that Campbell County Memorial Hospital and its employee, Dr. Brian Cullison together, the Hospital Defendants, negligently failed to diagnose Mr. Prager's broken neck following an automobile accident, resulting in serious nerve damage to his left arm. After a trial, the jury awarded damages to Mr. Prager. Mr. Prager's wife, Becky, was awarded damages for loss of consortium. The jury awarded seven million dollars to Mr. Prager and two million dollars to Ms. Prager. The Hospital Defendants asked the district court to order a new trial or reduce the Pragers' award of damages. The district court declined to disturb the verdict in favor of Mr. Prager but ordered Ms. Prager's damages reduced to $500,000. The Hospital Defendants appealed, and Ms. Prager cross-appealed the district court's remittitur of her loss-of-consortium award. On appeal, the Hospital Defendants argued that the district court erred in (1) allowing Dr. Linscott to offer previously undisclosed opinions at trial; (2) permitting testimony that Mr. Prager had suffered a "traumatic brain injury"; (3) excluding evidence of collateral-source payments of Mr. Prager's medical bills; (4) letting Mr. Prager testify about the amounts of his medical bills without adequate personal knowledge of their contents; (5) denying them judgment as a matter of law regarding Mr. Prager's "speculative" damages; and (6) denying their post-trial motion for remittitur or, in the alternative, a new trial as to Mr. Prager's $7,000,000 in damages. The appellate court found no abuse of discretion by the district court in allowing Dr. Linscott to testify about his interpretations of the radiological images of Mr. Prager's neck. The court concluded that the trial judge's evidentiary rulings landed within the realm of rationally available choices in the context of the litigation. Second, the district court's pretrial order stated that the Pragers could not refer to or make claims of permanent traumatic injury of the brain. However, nobody alleged at trial that Mr. Prager had suffered a permanent brain injury. Any mention of brain injury came within the proper context of discussing whether Mr. Prager might have been experiencing the effects of a concussion or similar head trauma immediately after his accident, during which he was believed to have briefly lost consciousness. Third, the court held that the district court correctly applied the collateral-source rule in keeping out evidence of the payments made by Wyoming Workers' Compensation. The collateral-source rule holds that payments made to or benefits conferred on the injured party

After a trial, the jury awarded damages to Mr. Prager. Mr. Prager's wife, Becky, was awarded damages for loss of consortium. The jury awarded seven million dollars to Mr. Prager and two million dollars to Ms. Prager.

from other sources are not credited against a tortfeasor's liability, although they cover all or a part of the harm for which the tortfeasor is liable. Fourth, the Tenth Circuit concluded that the district court did not abuse its discretion in allowing Mr. Prager to testify about his medical bills. Fifth, there is a medical device known as a spinal-cord stimulator, which is implanted in some patients as a way of controlling chronic pain. Dr. Siegler testified that (due to the nature of Mr. Prager's injuries and ongoing pain) it was reasonably likely that Mr. Prager would eventually be implanted with a spinal-cord stimulator as part of his medical treatment. Calling Dr. Siegler's testimony impermissibly speculative, the Hospital Defendants moved for judgment as a matter of law. The district court denied the motion. The Tenth Circuit held that Dr. Siegler adequately conveyed to the jury—to a reasonable degree of medical probability—his professional opinion that Mr. Prager would at some point require implantation of the device. Finally, the court lacked jurisdiction to consider Defendants' challenge to the district court's denial of the motion as to Mr. Prager's damages. As to Ms. Prager's damages, the Tenth Circuit held that the jury acted within the reasonable bounds of its wide latitude and discretion, and that the district court abused its discretion in reducing her jury award from $2,000,000 to $500,000.

Carolina Casualty Insurance v. Nanodetex Corporation, et al—*(10th Cir. 08/19/13).* Nanodetex Corporation and two of its principals (the Insureds) were successfully sued for malicious abuse of process. [The New Mexico Supreme Court has recognized a new tort called "malicious abuse of process." which subsumes causes of action for malicious prosecution and abuse of process.] The Insureds sought indemnification from Carolina Casualty Insurance Company, which covered the Insureds under a management liability policy. Carolina denied the claim, relying on an exclusion in the policy for losses arising from claims for "malicious prosecution." It sought a declaratory judgment that it was not liable for the damages arising from the 'malicious-abuse-of-process' judgment. On Carolina's motion for summary judgment, the district court agreed with Carolina and also rejected the Insureds' counterclaims. Upon review, the Tenth Circuit reversed the declaratory judgment, holding that the term "malicious prosecution" in the exclusion does not encompass all claims of malicious abuse of process, but only claims whose elements are essentially those of the common-law cause of action for malicious prosecution. Because the judgment against the Insureds in the tort case was not substantially the same as common-law malicious prosecution, the exclusion in the Carolina Policy did not apply.

Queen, et al v. TA Operating, LLC—*Failure to list claim as asset in bankruptcy bars plaintiff from right to pursue claim. (10th Cir. 08/20/13)* Plaintiffs Richard and Susan Queen sued Defendant TA Operating, LLC for an injury Mr. Queen sustained when he slipped and fell in a parking lot operated by TA. During the court of the proceedings, the Queens filed for Chapter 7 bankruptcy, but did not disclose this case in its bankruptcy pleadings. TA learned of the omission and brought it to the attention of the bankruptcy trustee. The Queens amended their bankruptcy petition, providing an estimate of the value of its litigation with TA for the slip and fall. The Queens were ultimately granted a no-asset discharge in bankruptcy. TA then moved the district court to dismiss on the grounds of judicial estoppel because the Queens did not disclose the lawsuit in their bankruptcy proceedings. The district court granted TA summary judgment, and the Queens appealed, arguing the district court erred in applying judicial estoppel. Because the Queens adopted an inconsistent position that was accepted by the bankruptcy court, and because the Queens would receive an unfair advantage if not estopped from pursuing the district court action, the Tenth Circuit concluded it was not an abuse of discretion to grant TA summary judgment.

Because the Queens adopted an inconsistent position that was accepted by the bankruptcy court, and because the Queens would receive an unfair advantage if not estopped from pursuing the district court action, the Tenth Circuit concluded it was not an abuse of discretion to grant TA summary judgment.

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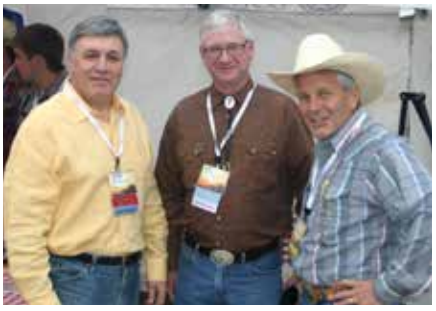

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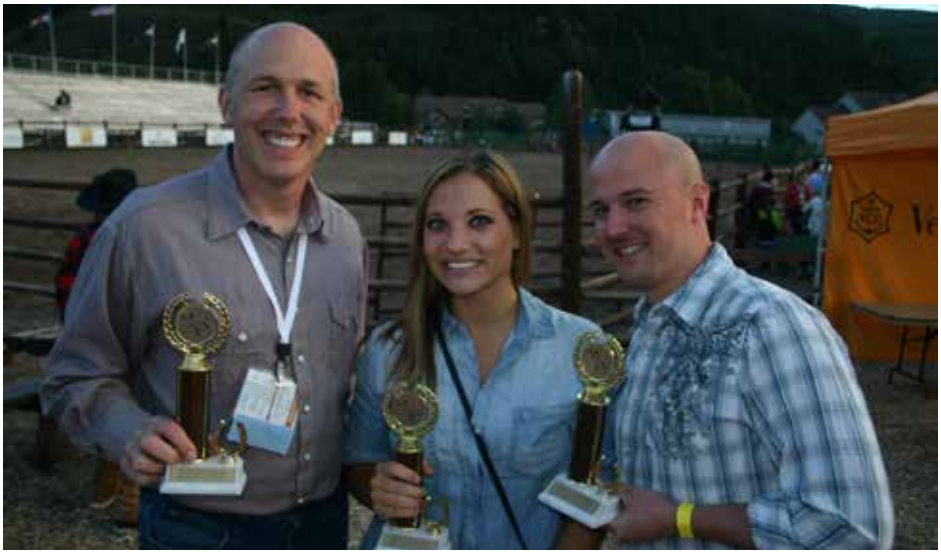

First place team Team 3 Asses and A Lass from Nathan Bremer Dumm & Myers "The Best Donkey Show North of Tijuana" Bernie Woessner - Leonia NJ, Ashley Barr - Aurora, Tim Fiene - Ft Collins

Glen Laird about to get buried by his ass.

Katherine Otto and June Baker Laird

Your burro my ass Team captain Kristin Caruso getting a prime viewing spot to root for her team.

Team Jamie and the jackasses

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