

08.14

THE CDLA UPDATE

Highlighting Important Issues Facing Today's Defense Attorneys

COLORADO COURT OF APPEALS

Wainscott v. Centura Health Corporation – *Court of Appeals holds that strict compliance with hospital lien is not required* (CA 08/14/14). Centura asserted a statutory hospital lien against any settlement or judgment that Donald Wainscott might receive to secure payment for treatment received by Wainscott as a result of a motor vehicle accident. The trial court declared that Centura's failure to strictly comply with the hospital lien statute rendered its lien unenforceable. On appeal, Centura argued that it substantially complied with the hospital lien statute and that the trial court erred in finding the lien was unenforceable. The Court of Appeals held that minor filing and notice deficiencies should not invalidate an otherwise valid hospital lien and that substantial compliance may be sufficient to satisfy the filing and notice provisions of Colorado's hospital lien statute. It further stated that a lienholder substantially complies when it satisfies the statute's purposes through timely actual notice of the lien to those against

whom the lienholder attempts to enforce the lien. The Court also held that Centura did not have a duty to disclose that it planned to pursue payment from the tortfeasors or their insurer.

Sure-Shock Electric, Inc. v. Diamond Lofts Venture, LLC – *Court of Appeals decides important issues regarding blanket mechanic's liens.* (CA 08/28/14).

Defendant was the developer and owner of a building project at 2210 Blake Street. Sure-Shock Electric installed the electrical work throughout the building. When it was not paid amounts claimed, Sure-Shock filed a mechanics' lien for the unpaid contract price. The trial court affirmed an arbitrator's award and entered a decree of foreclosure authorizing the sale of the units still owned by the Defendant to satisfy Sure-Shock's lien. On appeal, Defendant contended that the trial court erred in allowing Sure-Shock to foreclose on its lien because Sure-Shock failed to comply with the statutory requirements necessary to perfect the lien. The Court of Appeals disagreed, holding that Sure-Shock was not required to



QUICK LINKS

Lenox MacLaren Surgical v. Medtronic

Holmes v. Colorado Coalition

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Salzer v.
SSM Health Care of Oklahoma, Inc.

Robert L. Kroenlein Trust, et al v.
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Teamsters Local Union No. 455 v. NLRB

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Abercrombie & Fitch

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provide an additional notice before it filed its amended lien statement when the only amendment was to correct the amount claimed. Additionally, although Defendant only owned seven of the twenty-nine units in the Blake Street property at that time, Sure-Shock's lien statement sufficiently identified the property by listing the entire Blake Street property and naming only Defendant as the property owner. Finally, Sure-Shock was not required to apportion the unpaid contract price according to the amount due for work on the Defendant units, rather than claiming the full amount due. In its cross-appeal, Sure-Shock contended that the trial court abused its discretion in apportioning the lien (the trial court determined that an equitable apportionment should be based on the actual benefit enjoyed by each unit). The Court disagreed, and affirmed the award to Sure-Shock of 33.1% of the lien amount, which corresponded to the total square footage of the Defendant units relative to the square footage of the entire Blake Street property. In addition, because Sure-Shock's lien was determined to be valid, Sure-Shock succeeded on a "significant issue in the litigation" and hence the trial court did not abuse its discretion in concluding that Sure-Shock was the prevailing party and awarding it costs.

TENTH CIRCUIT COURT OF APPEALS

Lenox MacLaren Surgical v. Medtronic – *Tenth Circuit finds possible alleged monopolization actions requires fact finding* - [13-1307] (10th Cir. 08/05/14). Lenox MacLaren Surgical began to sell some of its bone mills (a device it manufactured for use in spinal surgery) through a Medtronic entity. The

arrangement ended badly: Medtronic Sofamor Danek USA initiated a recall of Lenox's bone mills, and another Medtronic entity began to manufacture and sell its own bone mill. The result, according to Lenox, was that four Medtronic entities acquired an unfair competitive advantage; thus, Lenox sued these entities for monopolization and attempted monopolization from 2007 to 2010. Lenox appealed defendants' summary judgment granted on both claims. Upon review of the claims and the district court record, the Tenth Circuit concluded that genuine issues of material fact existed regarding market definition, monopoly power, exclusionary conduct, and harm to competition. Thus, the Court reversed the district court's grant of summary judgment to Medtronic on the claims involving monopolization and attempted monopolization and remanded the case for further proceedings.



Holmes v. Colorado Coalition – *Claimant must exhaust administrative remedies prior to asserting claim under ERISA* - [13-1175] (10th Cir. 08/12/14) (McHugh). Plaintiff appealed a district court's ruling that her claim for disability benefits under the Employee Retirement Income Security Act (ERISA) was barred due to her failure to exhaust administrative remedies. Finding no reversible error, the Tenth Circuit affirmed.

Al-Turki v. Robinson, et al – *Tenth Circuit finds prison nurse not entitled to qualified immunity* - [13-1107] (10th Cir. 08/12/14). (McKay) This case was an interlocutory appeal from the district court's denial of qualified immunity in an Eighth Amendment case brought by a Colorado state prisoner. Plaintiff Homaidan Al-Turki filed suit under 42 U.S.C. 1983 against several prison officials, including Defendant Mary Robinson (a prison nurse) based on these officials' failure to provide him with any type of medical evaluation or treatment while he was suffering through several hours of severe abdominal pain from what turned out to be kidney stones. The district court granted qualified immunity to the other prison officials, none of whom were medical professionals, but denied Defendant Robinson's summary judgment motion for qualified immunity. On appeal, the issues presented to the Tenth Circuit were: (1) whether the hours of severe pain Plaintiff experienced constituted a sufficiently serious medical need to satisfy the objective prong of the Eighth Amendment deliberate indifference test; and (2) whether Defendant's alleged actions violated clearly established law. Finding no reversible error, the Tenth Circuit affirmed the district court on both issues.

Salzer v. SSM Health Care of Oklahoma, Inc. – *ERISA claim supports removal of state civil action* (10th Cir. 08/06/14). Salzer filed suit against SSM in Oklahoma state court, alleging breach of contract, violation of the Oklahoma Consumer Protection Act, deceit, and tortious interference with contract. He purported to represent a putative class of Oklahoma residents who received treatment at SSM facilities and were similarly billed in violation of provider agreements with insurance companies. Salzer sought damages and specific performance of the provider agreement. SSM removed the case to federal district court. In its notice of removal, SSM alleged that Salzer was a beneficiary of his wife's employer-provided health plan operated by Aetna and governed by ERISA. SSM further alleged Salzer's claims were preempted because they can be characterized as seeking to enforce rights under ERISA. Salzer moved to remove the case back to state court, but the district court denied his motion, ruling that his claims were completely preempted by ERISA. Salzer then filed an amended complaint that reasserted his original claims and added other state law claims. SSM moved to dismiss for failure to state any ERISA claims. The district court dismissed Salzer's complaint with prejudice, concluding that Salzer disregarded the court's prior orders by failing to allege any ERISA claims and by continuing to argue that ERISA did not preempt the lawsuit. Salzer appealed to the Tenth Circuit. The Tenth Circuit examined first the district court's denial of Salzer's motion to remand based on ERISA preemption. The Tenth Circuit looked at each of Salzer's six claims and decided that the first five claims did not implicate ERISA and could have been remanded to state court. However, the sixth claim was indeed an ERISA

claim, and the district court correctly refused to remand to the state court for determination of the ERISA claim. The Tenth Circuit found federal jurisdiction over one claim is sufficient to support removal.

Robert L. Kroenlein Trust, et al v. Kirchhefer – *Tenth Circuit bars RICO claim under statute of limitations due to claimants' lack of diligence in discovering basis for claim* – [13-8040] (10th Cir. 08/25/14). The Robert L.

In 2005, a salesman for one of J&B's beer distributors, Gary Kirchhefer, began stealing beer from J&B's account and reselling the stolen beer to other bars and liquor stores in Wyoming, including those owned by the defendants. Kirchhefer was operating a scheme in which he would order more beer than J&B needed and then steal the extra beer and sell it to other bars.

Kroenlein Trust owned and operated J&B Liquors. In 2005, a salesman for one of J&B's beer distributors, Gary Kirchhefer, began stealing beer from J&B's account and reselling the stolen beer to other bars and liquor stores in Wyoming, including those owned by the defendants. Kirchhefer was operating a scheme in which he would order more beer than J&B needed and then steal the extra beer and sell

it to other bars. One of the owners of J&B discovered Kirchhefer's theft in 2007, and Kirchhefer was eventually prosecuted and convicted of the crime. Seeking recovery of its losses, Kroenlein filed suit in 2011 against Kirchhefer, two of the bars to which he sold the stolen beer, and the owners of the bars. The suit asserted several claims alleging that the defendants had violated the RICO statute. The defendants moved for summary judgment on several grounds, including that Kroenlein's RICO claims were barred by RICO's four-year statute of limitations. Kroenlein argued there was no way for it to have discovered its injury prior to August 31, 2007, and alternatively the limitations period was equitably tolled by defendants' fraudulent concealment. The district court granted summary judgment on the grounds that all of Kroenlein's RICO claims were time-barred. The Tenth Circuit concluded that had Kroenlein exercised due diligence it would have discovered the fraud as early as September 2005 under the injury-discovery rule. RICO's four-year statute of limitations expired in 2009. RICO requires only discovery of harm, not discovery of the source of harm. The Court accordingly agreed that Kroenlein's RICO claims were time-barred and affirmed the district court's dismissal of its claims.

Teamsters Local Union No. 455 v. NLRB – *Tenth Circuit affirms order of backpay to striking union members* (12-9519) (10th Cir. 09/02/14). When negotiations between the Teamsters and Harborlite reached an impasse, management told the union that unless it would agree to the company's final offer it would lock out union members and "immediately begin hiring permanent replacements for locked out employees." Several days later, the company backed off its threat: while it

continued the lockout and began hiring new workers, it said that “until further notice” these workers would only be temporary. After three months, the company let its temporary workers go and permitted union members to return to work even though the union never did accept the company’s purportedly final offer. The union petitioned the National Labor Relations Board, and the Board agreed with the union that the act of threatening to hire permanent replacement workers violated 29 U.S.C. 158(a)(1). The Board ordered Harborlite to cease making such threats and to post a notice admitting its violation of the law. The union appealed the Board’s decision, arguing that Harborlite’s lockout was itself unlawful and therefore entitled its union employees to back pay. After review, the Tenth Circuit concluded that the Board did not err in refusing to order additional remedial measures against the company, namely, back pay.

CO Cross-Disability Coalition, et al v. Abercrombie & Fitch – *Store design found not within aims of ADA* [13-1377] (10th Cir. 09/02/14). Defendants–Appellants (collectively, Abercrombie) appealed several district court orders

holding that their clothing stores violated the Americans with Disabilities Act (ADA). Plaintiff–Appellee is a disability advocacy organization in Colorado. In 2009, CCDC notified Abercrombie that Hollister stores at two malls in Colorado violated the ADA. Initial attempts to settle the matter were unsuccessful, and this litigation followed. Abercrombie took it upon itself to correct some barriers plaintiff complained of: it modified Hollister stores by lowering sales counters, rearranging merchandise to ensure an unimpeded path of travel for customers in wheelchairs, adding additional buttons to open the adjacent side doors, and ensuring that the side doors were not blocked or locked. However, one thing remained unchanged: a stepped, porch-like structure served as the center entrance at many Hollister stores which gave the stores the look and feel of a Southern California surf shack. The Tenth Circuit affirmed in part and reversed in part the district court’s judgment: affirming the court’s denial of Abercrombie’s summary judgment motion and certification of a class. However, the Court reversed the district

court’s summary judgment to plaintiffs, and vacated the court’s permanent injunction: “It was error to impose liability on the design of Hollister stores based on ‘overarching aims’ of the ADA. It was also error to impose liability based on the holding that the porch as a ‘space’ must be accessible. Finally, it was error to hold that the porch must be accessible because it is the entrance used by a ‘majority of people.’”

Giuliano v Colvin, [13-1455] (09/02/14) Giuliano applied for benefits in 2008, claiming she was disabled by migraine headaches and sleep apnea. After a hearing an administrative law judge determined at step five of the five-step sequential evaluation process, that Ms. Giuliano was not disabled because she retained the residual functional capacity to perform the full range of work at all exertional levels, subject to certain nonexertional limitations. Ms. Giuliano sought review, claiming the ALJ (1) improperly evaluated Dr. Gamuac’s opinion, (2) incorrectly assessed her RFC, and (3) wrongfully discredited her testimony. Upon review, the 10th Circuit affirmed the ALJ.



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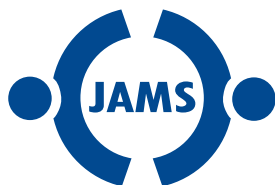
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