03.15

THE CDLA UPDATE

Highlighting Important Issues Facing Today's Defense Attorneys

COLORADO SUPREME COURT

S K Peightal Engineers, LTD v. Mid Valley Real Estate Solutions – *Supreme Court holds subsequent residential purchaser may not be owed independent duty* (SC 02/09/15). A developer built several homes on the Western Slope suffered financial problems, and turned the inventory over to the bank, which transferred title of the unsold residences to a newly created artificial entity. The homes then started showing distress which was claimed to be a result of design and construction errors. The Supreme Court held that the independent duty imposed on construction professionals does not apply here because, as a third-party beneficiary of a commercially negotiated commercial loan contract, the bank entity could not properly be considered a subsequent homeowner. Parties or third-party beneficiaries that receive a home through a commercially negotiated contract are not owed an independent duty. The bank entity had argued that it was in the same position as any other purchaser of the home, but the Court disagreed, noting that the bank could have negotiated protections under contract. As a result, the Court found the entity was not within the class of persons to whom the special duty under Colorado law was owed. CDLA had argued that the special duty imposed on construction professionals under common law should be limited to unsophisticated home buyers who are purchasing residences without having been afforded the opportunity to protect themselves.

Craft v. Philadelphia Indemnity Insurance Co. – *Supreme Court holds that late notice-prejudice rule does not apply to 'claims made' policies* (SC 02/17/15) The Supreme Court addressed the issue of whether Colorado's notice-prejudice rule applies to a date-certain notice requirement in a claims-made insurance policy. The Court concluded that excusing noncompliance with such a requirement would alter a fundamental term of the insurance contract and would not serve the public policy interests that originally supported the adoption of the notice-prejudice rule in general liability policies.

QUICK LINKS

Roper v. Carneal

People v. Glover

First National Bank of Durango v. Lyons, Jr.

Monell v. Cherokee River, Inc.

Monfore v. Phillips

Donner v. Nicklaus

National Credit Union v. Barclays Capital

COLORADO COURT OF APPEALS

Roper v. Carneal – *A snowplow is a snowplow, not a piece of special mobile machinery* (CA 02/12/15). Carneal, an El Paso County employee, was driving a county-owned snowplow when he allegedly failed to stop at a stop sign. Plaintiff, Roper, drove off the road to avoid Carneal and crashed, suffering personal injuries and damage to her car. She filed an action against Carneal and the Board of County Commissioners of El Paso County, alleging claims of negligence per se, negligence, respondeat superior, and property damage/loss of use. Defendants moved to dismiss for lack of subject matter jurisdiction, arguing they were immune from suit under the GIA. The CGIA waives immunity for a public employee's operation of a motor vehicle under certain circumstances. Defendants argued the snowplow was "special mobile machinery" rather than a "motor vehicle," and therefore the motor vehicle waiver of immunity did not apply. The district court denied the motion to dismiss based on the nature of the vehicle (a modified dump truck with seats for two but generally driven by one operator and used exclusively on county roads to remove snow and ice). On interlocutory appeal, the Court of Appeals reviewed the statutory definitions of "motor vehicle" and "special mobile machinery" and concluded the snowplow in this instance was a "motor vehicle"; therefore, governmental immunity was waived. The Court noted that a "motor vehicle" under CRS §42-1-102(58) must be designed primarily for travel on the public highways and generally and commonly used to transport persons and property over the public highways. The undisputed evidence was that the snowplow was a dump truck designed to remove snow and ice from the public highways by traveling on them. The Court found that a vehicle need only transport persons or property, despite the use of "and" in the statute, because requiring transport of both persons and property would be "absurd and unreasonable." It further held that carrying sand and salt constituted transporting property. The Court also held that the definition of "special mobile machinery" requires a finding that the vehicle is "only incidentally operated or moved over public highways." Because it was exclusively driven over the public highways, the snowplow did not meet this requirement.

People v. Glover – *Printouts of communications subpoenaed from Facebook are admissible* (CA 02/26/15). On appeal, defendant contended that the trial court erroneously admitted printouts from his Facebook account of communications relating to the murder. The lead detective testified that he had subpoenaed records of defendant's Facebook activity, and that Facebook complied with the subpoena and sent the detective compact discs containing the requested records. Therefore, sufficient evidence was presented under CRE 901(b) to conclude that the printouts contained content from Facebook. Additionally, sufficient evidence was presented under CRE 901(b) to permit the jury to conclude that the account belonged to defendant and that he sent the messages contained in the printouts. The documentation from Facebook did not appear to have been the result of any specialized knowledge, so expert testimony was not necessary uncovering information, experience, or knowledge common among ordinary people using, or considering the use of, Facebook.

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First National Bank of Durango v. Lyons, Jr. - (CA 02/26/15). Defendants William S. Lyons, Jr., William S. Lyons III, and others comprised the Board of Directors of Lincoln Creek Metropolitan District. Defendants' company, LCV, LLC, owned almost all of the property in the District and was the developer of Lincoln Creek Village. In March 2006, plaintiffs (Banks) purchased $4.13 million of General Obligation Tax Bonds issued by the District to partially fund construction of Lincoln Creek Village. In July 2008, the bank that held the deed of trust securing the development loan foreclosed on the encumbered Lincoln Creek Village property. The Banks then filed this

action alleging that defendants misrepresented and omitted material facts in connection with the offer and sale of the bonds, in violation of the Colorado Securities Act. Defendants asserted the defense of governmental immunity and filed a motion to dismiss for lack of subject matter jurisdiction, arguing that the Banks had failed to provide notice of the claims to the District, a jurisdictional prerequisite under the Colorado Governmental Immunity Act. The district court denied the motion and on interlocutory appeal, defendants argued that the Banks' security claims lie in tort or could lie in tort. The Court of Appeals noted that defendants are public employees for purposes of the GIA. The Court next found that the complaint demonstrated that the injury underlying the Banks' claims was tortious in nature, essentially alleging that they relied on a misrepresentation of material fact by defendants. As a second argument, the Banks also argued that the misrepresentations were made by defendants in their capacity as private developers and not within the scope of any "public employment" with the District. The Court remanded the case to the district court to decide whether the claims against the Defendants are based on acts or omissions that occurred within the scope of their public employment. If it finds the misrepresentations alleged were made by defendants within the scope of their employment with the District, then it must dismiss the Banks' claims. However, if the claims were premised on misrepresentations made by defendants as private developers and outside the scope of their employment with the District, the GIA does not apply and statutory notice was not required.

Monell v. Cherokee River, Inc. – *Court of Appeals provides guidance on claims surrounding defense recovery under frivolous and groundless statute* (CA 02/26/15). Plaintiff was hired by N.J. Liming, a subcontractor to defendant CRI, for the construction of a steel building. Plaintiff was working near high-voltage overhead electrical lines when electricity arced from the lines and electrocuted him, causing severe burns, shock, and temporary heart stoppage. Plaintiff received workers' compensation benefits from N.J. Liming. He then sued the landowner, and several other defendants, including CRI. CRI moved to dismiss for failure to state a claim, because it was plaintiff's statutory employer under CRS § 8-41-401. The district court agreed and dismissed the negligence claims against CRI. CRI moved for attorney fees and costs under CRS § 13-17-201. The district court awarded CRI fees and costs related to defending the tort action and litigating the fees and costs motion. On appeal, plaintiff argued that the district court erred because CRI was not his statutory employer. The Court of Appeals disagreed, noting plaintiff's injuries arose from an activity that was within the scope of CRI's business and work. Because CRI was plaintiff's statutory employer, it was immune to tort liability for his injury. Plaintiff contended that CRS § 13-17-201 provides that the defendant shall have judgment for his or her reasonable attorney fees, but because CRI's insurer paid the attorney fees, CRI had incurred no attorney fees that plaintiff could pay. He also argued that CRI's insurer was ineligible for a fees award because it was not a defendant in the case. The Court disagreed. The purpose of the attorney fees statute is to discourage the institution or maintenance of unnecessary tort claims. To whom plaintiff pays the fee award is irrelevant to this purpose. Plaintiff further argued it was error to award fees for litigating the fees and costs motion, because CRS § 13-17-201 only authorizes an award of fees incurred "in defending the action." The Court agreed. A defendant is entitled to fees for litigating a CRS § 13-17-201 motion for fees only if the plaintiff's defense to the motion is substantially frivolous, substantially groundless, or substantially vexatious. There was no such finding here. Finally, CRI requested appellate attorney fees. The Court granted

CRI its reasonable fees relating to the defense of the dismissal order but denied its request for fees relating to its defense of the court's fee award.

TENTH CIRCUIT COURT OF APPEALS

Monfore v. Phillips – *Trial management order is counsel's commitment to the chosen trial theory* (No. 13-7075) (02/10/15). The widow of Sherman Shatwell sued her husband's medical care providers for negligence after a missed diagnosis. Shatwell complained of neck pain, and was sent home with antibiotics. By the time he learned the pain was caused by cancer, it was too late to treat it. Two weeks before trial, some of the medical providers settled out of court. Dr. Kenneth Phillips remained a party to the case. Days before jury selection, Phillips sought permission from the court to amend the pretrial order so he could amend his trial strategy, including adding new jury instructions, exhibits, and witnesses to support his new defense. The district court denied the motion, and the doctor was ultimately found liable for damages totaling over $1 million. On appeal Phillips argued the district court erred by not allowing him to amend the pretrial order. Finding no reversible error, the Tenth Circuit affirmed, holding "when a fellow litigant settles on the eve of trial you can't bank on the right to claim surprise and rewrite your case from top to bottom." Holding that a final pretrial order focused on formulating a plan for an impending trial may be amended "only to prevent manifest injustice", it found no abuse of discretion in denying the defendant's motion for continuance.

Donner v. Nicklaus – *Court rejects election of remedies defense where evidence showed failure to meet the necessary elements* (No. 13-4057) (10th Cir. 02/19/15) Jack Nicklaus' participation in a developer's plan to build a luxurious golf course and housing plan allegedly led plaintiffs-appellants Jeffrey and Judee Donner to invest $1.5 million in the development. "Plans went awry:" the developer's parent company went bankrupt, and the project was never built. The Donners settled with the developer's parent company in its bankruptcy proceedings, then sued Jack Nicklaus and Jack Nicklaus Golf Club, LLC for intentional misrepresentation, negligent misrepresentation, and violation of the Interstate Land Sales Full Disclosure Act. The district court dismissed the action, holding in the alternative: (1) the complaint failed to state a valid claim for relief; and (2) defendants were entitled to summary judgment because the Donners elected their remedies by entering into a settlement agreement with other parties. After review, the Tenth Circuit disagreed with the district court with respect to two issues: (1) the dismissal of the claim involving intentional misrepresentation of Mr. Nicklaus's membership status; and (2) finding the settlement agreement did not include defendants. Election of remedies is an affirmative defense, but here, the Donners neither affirmed nor repudiated a contract in bringing suit against Nicklaus. The Tenth Circuit held that the contract was not "affirmed" through receipt of a lot worth less than $1.5 million or "repudiated" through the assertion of tort claims. Thus, in these circumstances, the election-of-remedies doctrine does not apply and summary judgment was inappropriate.

National Credit Union v. Barclays Capital – *Tenth Circuit enforces promises in tolling agreement notwithstanding efforts to legally abrogate provision - Docket: 13-3183* (10th Cir. 03/03/15). Plaintiff-appellant NCUA appealed the district court's order dismissing as untimely its complaint against defendants-appellees. This case arose from the failure of two of the nation's largest federally insured credit unions: U.S. Central Federal Credit Union and Western Corporate Federal Credit Union. The NCUA was appointed conservator and later as their liquidating agent. The NCUA determined that the Credit Unions had failed because they had invested in residential mortgage-backed securities sold with offering documents that misrepresented the quality of their underlying mortgage loans. The NCUA set out to pursue recoveries on behalf of the Credit Unions from the issuers and underwriters of the suspect securities, including Barclays, and began settlement negotiations with Barclays and other potential defendants. As these negotiations dragged on through 2011 and 2012, the NCUA and Barclays entered into a series of tolling agreements that purported to exclude all time that passed during the settlement negotiations when "calculating any statute of limitations, period of repose or any defense related to those periods or dates that might be applicable to any Potential Claim that the NCUA may have against Barclays." Significantly, Barclays also expressly made a separate promise in the tolling agreements that it would not "argue or assert" in any future litigation a statute of limitations defense that included the time passed in the settlement negotiations. After negotiations with Barclays broke down, the NCUA filed suit, more than five years after the RMBS were sold, and more than three years after the NCUA was appointed conservator of the Credit Unions. Barclays moved to dismiss for failure to state a claim on several grounds, including untimeliness. Barclays initially honored the tolling agreements but argued that the NCUA's federal claims were nevertheless untimely under the Securities Act's three-year statute of repose, which was not waivable. While Barclays's motion to dismiss was pending, the district court in a separate case involving different defendant Credit Suisse, granted Credit Suisse's motion to dismiss a similar NCUA complaint on the grounds that contractual tolling was not authorized under the Extender Statute. Barclays amended its motion to dismiss asserting a similar Extender Statute argument. The district court dismissed the NCUA's complaint, incorporating by reference its opinion in Credit Suisse. The NCUA appealed, arguing that its suit was timely under the Extender Statute. The Tenth Circuit reversed and remanded: "while it is true that the NCUA's claims are outside the statutory period and therefore untimely, that argument is unavailable to Barclays because the NCUA reasonably relied on Barclays's express promise not to assert that defense."

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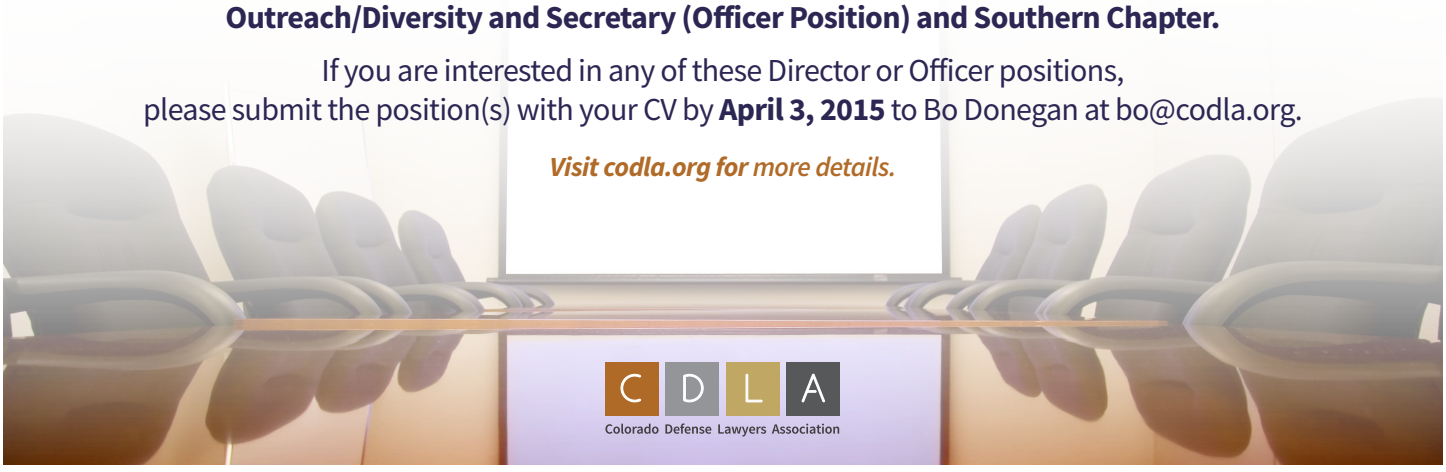

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