RETROSPECTIVE OF COLORADO LAW

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Presenters[1]

Katherine Otto
Messner Reeves LLP
kotto@messner.com

Kendra Beckwith
Lewis Roca Rothgerber Christie LLP
kbeckwith@lewisroca.com

SUPREME COURT DECISIONS

Arapahoe Cnty. Dep't of Hum. Servs. v. Velarde, 2022 CO 18, 507 P.3d 518

Opinion Author: Justice Samour

Summary: This case contemplated whether the thirty-five day deadline in section 24-4-106(4), C.R.S. (2021) (which governs proceedings initiated by an adversely affected aggrieved person seeking proceedings initiated by an adversely affected or aggrieved person seeking judicial review of an agency's action) applies to proceedings initiated by an agency seeking judicial enforcement of one of its final orders. The court held that the thirty-five-day deadline in subsection 106(4) applies to judicial review cases but not to judicial enforcement cases. The court held that there was a difference between an aggrieved person seeking judicial review of an agencies actions and a person seeking judicial enforcement of a final order.

Auto-Owners Ins. Co. v. Bolt Factory Lofts Owners Ass'n Inc., 2021 CO 32, 487 P.3d 276

Opinion Author: Justice Márquez

[1] The presenters wish to thank Gregory Gerbus, Lewis Roca Rothgerber Christie Summer Associate, for his work in compiling this compendium.

Dissent: Justice Samour (joined by Chief Justice Boatright and Justice Hood)

Summary: An insurer who is defending its insured under a reservation of rights in not entitled to intervene as a right of C.R.C.P. 24(a)(2) where the insured has entered into a *Nunn* agreement (or an equivalent agreement) with a third-party claimant. The court concludes that the insurer's interest in the litigation was not impaired by the agreement because the insurer may sufficiently protect its interest in a subsequent proceeding. The court holds the uncontested trial was permissible under *Nunn* and will not result in subsuming insurance defense because it is within the court's discretion whether to require the parties to stipulate to judgment rather than proceed to an uncontested trial. Additionally, the district court can mitigate concerns over the outcome of the uncontested trial by building into its findings the one-sided nature of the trial.

***Bd. of Cnty. Comm'rs of Cnty. of La Plata v. Colo. Dep't of Pub. Health & Env't*,**

2021 CO 43, 488 P.3d 1065

Opinion Author: Justice Gabriel

Summary: The La Plata County Board of Commissioners challenges the Colorado Department of Public Health and Environment's authority to bring enforcement against the county under the Solid Waste Disposal Sites and Enforcement Act (SWA). The County contends that it is not a person under the SWA and is therefore cannot be a target for SWA enforcement. Additionally, the County contends that any such action is barred by the Colorado Governmental Immunity Act (CGIA). The court does not address whether the County is a person under the SWA and concludes that the Department's enforcement action is not barred by the CGIA because the action is not a claim for injury that lies in tort or could lie in tort.

***Brown v. Long Romero*,**

2021 CO 67, 495 P.3d 955

Opinion Author: Justice Boatright

Summary: The court holds that a plaintiff's direct negligence claims against an employer are not barred where the plaintiff does not assert vicarious liability for an employee's negligence. The plaintiff brought direct negligence claims against the Denver Center for Birth and Wellness (DCBW) and the employee, but did not assert vicarious liability. DCBW acknowledged vicarious liability, but the plaintiff did not and therefore the claim is not barred.

***Chronos Builders, LLC v. Dep't of Lab. & Emp., Div. of Fam. & Med. Leave Ins.*,**

2022 CO 29

Opinion Author: Justice Márquez

Summary: This decision stems from the passage of Proposition 118, passed in November 2020 and the subsequent Paid Family and Medical Leave Insurance Act (Act). This Act created a paid family and medical leave insurance program. The court considers whether the Division of Family and Medical Leave Insurance's (Division) collection of premiums under the Paid Family and Medical Leave Insurance Act violates section (8)(a) of the Taxpayer's Bill of Rights (TABOR), which provides, as relevant here, that "[a]ny income tax law change . . . shall also require all taxable net income to be taxed at one rate, . . . with no added tax or surcharge." Specifically, the court determined whether the premium is an unconstitutional "added tax or surcharge" on income that is not "taxed at one rate." The court held that the premium collected by the Division does not implicate section (8)(a) because the relevant provision of that section concerns changes to "income tax law." The Act, a family and medical leave law, is not an income tax law or a change to such a law. Therefore, the Act does not violate section (8)(a).

***Delta Airlines, Inc. v. Scholle*,**

2021 CO 20, 484 P.3d 695

Opinion Author: Justice Hart

Dissent: Justice Gabriel (joined by Justices Hood and Berkenkotter)

Summary: When a workers' compensation insurer settles its subrogation claim for reimbursement of medical expenses with a third-party tortfeasor, the injured employee's claim for past medical expenses is extinguished completely. The court concluded that an injured party need not present evidence of either billed or paid medical expenses in the absence of a viable claim for such expenses, and therefore the collateral source rule is not implicated.

***Ford Motor Co. v. Forrest Walker*,**

2022 CO 32

Opinion Author: Justice Samour

Dissent: Justice Márquez joined by Justice Hart

Justice Berkenkotter did not participate

Summary: The court determines that section 13-12-101, C.R.S. (2021) (Interest on Damages) is ambiguous. It holds that when a personal injury debtor successfully appeals the judgment and obtains a new trial but ultimately incurs another money judgment at that new trial, the interest between the date of the appealed judgment and the date the final judgment is satisfied must be calculated using the market-based rate, not the statutorily fixed rate of 9%. Therefore, whenever the judgment debtor appeals the judgment, the interest rate switches from 9% to the market-based rate. In sum, if the judgment debtor doesn't appeal the judgment, the 9% interest rate applies from accrual of the claim through satisfaction of the final judgment. But if the judgment debtor appeals the judgment, then: (1) the 9% interest rate applies from accrual of the claim through the date of the appealed judgment, and (2) the market-based post-judgment interest rate applies from the date of the appealed judgment through satisfaction of the final judgment.

***French v. Centura Health Corp.*,**

2022 CO 20, 509 P.3d 443

Opinion Author: Justice Gabriel

Summary: The court holds that a hospital services agreement left the price term open when it did not reference the chargemaster (a database used by Centura), disclose the chargemaster to the patient, nor incorporate the chargemaster by reference. The patient had spinal fusion surgery and was told that the procedure would cost her $1,336.90, but after the surgery, Centura found it had misread the insurance card and the patient was out-of-network and owed $229,112.13. However, the trial court concluded that the appropriate amount of payment for the services was $766.74. Centura argued that the price term was unambiguous and that the patient agreed to pay all charges predetermined by Centura's chargemaster. The supreme court however, agreed with the trial court's conclusion that the price term of the parties' agreement was left open, and the trial court properly allowed the jury to determine the reasonable value of Centura's services.

***Gill v. Waltz*,**

2021 CO 21, 484 P.3d 691

Opinion Author: Justice Hart

Dissent: Justice Gabriel (joined by Justices Hood and Berkenkotter)

Summary: This is a companion case to *Scholle*. The court reiterates its holding for past medical expenses, but holds that a plaintiff may still pursue claims for noneconomic damages and any economic damages not covered by his workers' compensation insurer (such as lost wages, physical impairment, or non-covered medical expenses). The court held that the subrogation right is not limited to the amount actually paid by the insurer and that an employee does not have the right to seek the difference.

***Harvey v. Catholic Health Initiatives*,**

2021 CO 65, 495 P.3d 935

Opinion Author: Justice Gabriel

Summary: The court held that under Colorado's Lien Statute, a hospital must bill Medicare before it can file a lien against a patient who has been injured in an accident and whose primary health insurance is provided by Medicare. The court held that this interpretation is consistent with the language of the Lien Statute and there is no conflict between the Lien Statute and the Medicate Secondary Payer statute. The Lien statute distinguishes between "the property and casualty insurer," on the one hand, and "the primary medical payer of benefits," on the other, and also reflects the legislature's intent to protect insureds from abusive liens.

***L.H.M. Corp., TCD v. Martinez*,**

2021 CO 78, 499 P.3d 1050

Opinion Author: Justice Márquez

Summary: The court affirms a bright-line rule that a judgment on the merits is final for purposes of appeal, notwithstanding an unresolved issue of attorney fees. The court settles a caselaw dispute by overruling *Ferrell v. Glenwood Brokers, Ltd.*, 848 P.2d 936 (Colo. 1993) and reaffirming *Bladwin v. Bright Mortgage Co.*, 757 P.2d 1072 (Colo. 1988). The court concludes that both litigants and courts are best served by the bright-line rule adopted in *Baldwin*.

***Lodge Props., Inc. v. Eagle Cnty. Bd. of Equalization*,**

2022 CO 9, 504 P.3d 960

Opinion Author: Justice Gabriel

Summary: This case is about the valuation for real property tax purposes of a luxury resort and whether the net income generated from fees paid by the condominiums to overnight guests should be included in the resort's actual value under the "income approach" to valuation. The court concludes the net income generated from rentals of the individually and separately owned condominium units was not income

generated by the Lodge and therefore should not have been included in the Lodge's actual value under the income approach to valuation.

***Matter of Abrams*,**

2021 CO 44, 488 P.3d 1043

Opinion Author: Justice Hart

Summary: The defendant was accused of violating Colo. RPC 8.4(g) for his language in an email regarding the presiding judge for one of his cases, calling the judge a "gay, fat, fag." He claimed that Rule 8.4(g) was unconstitutionally broad and unconstitutionally vague. The court held that the rule was narrowly tailored to achieve compelling state interests and did not overburden a substantial amount of constitutionally protected speech.

***Nieto v. Clark's Mkt., Inc.*,**

2021 CO 48, 488 P.3d 1140

Opinion Author: Justice Hart

Summary: Under the Colorado Wage Claim Act (CWCA), there is no automatic right to vacation pay, but once the employer chooses to provide such pay, it cannot be forfeited once earned. Therefore, all earned and determinable vacation pay must be paid upon separation. Any agreement made that purports to forfeit earned vacation pay is void. The court held that defendant's policy, that an employee who is discharged for any reason or does not give proper notice will forfeit all earned vacation pay, violated the CWCA.

***Ronquillo v. EcoClean Home Servs., Inc.*,**

2021 CO 82, 500 P.3d 1130

Opinion Author: Justice Márquez

Dissent: Justice Gabriel concurs in part and dissents in part, joined by Justices Samour and Berkenkotter

Summary: The court determines whether a medical finance company is a collateral source for purposes of the pre-verdict evidentiary component of Colorado's Collateral source rule. The court holds that the medical finance company in this case is not a collateral source because it did not confer a "benefit" onto the injured party. The court holds that to provide a benefit or a collateral source payment the party must "indemnify," "compensate," "reimburse" or be a "payment" for an injured party's medical expenses. The medical finance company paid the healthcare providers so plaintiff could receive prompt medical care. However, under the terms of their contract plaintiff remains liable to the medical finance company for the full amount billed by her medical providers.

***Rudnicki v. Bianco*,**

2021 CO 80, 501 P.3d 776

Opinion Author: Justice Gabriel

Dissent: Justice Hart dissents, joined by Chief Justice Boatright and Justice Márquez

Summary: The case is about who can collect damages for medical expenses for an unemancipated child prior to the child turning 18. The common law rule is that only the plaintiff's parents may recover tort damages. The court abandons the common law rule and concludes that either the child or their parents may recover the child's pre-majority medical expenses, but double recovery is not permitted. The court concludes that the traditional rationales for the common law rule no longer apply and that the realities of today's health care economy compel us to abandon that rule.

***Ryser v. Shelter Mut. Ins. Co.*,**

2021 CO 11, 480 P.3d 1286

Opinion Author: Justice Gabriel (Justice Márquez does not participate)

Summary: The court held that the Workers' Compensation Act exclusivity and co-employee immunity principles barred a plaintiff from recovering UM/UIM benefits from a co-employee vehicle owner's insurer

for damages stemming from a work-related accident in which another co-employee negligently drove the owner's vehicle and the injured party was an authorized passenger. Here, the court denied the plaintiff's claim for UM/UIM benefits from his co-worker's insurance carrier for an accident that occurred on the job when the injured plaintiff was a passenger in a vehicle negligently driven by one co-worker and owned by a third co-worker, when all three were acting within the scope of their employment.

Schaden v. DIA Brewing Co.,

2021 CO 4M, 478 P.3d 1264

Opinion Author: Justice Gabriel

Summary: The court held that C.R.C.P. 15(a) must be read harmoniously with C.R.C.P. 59 and 60. Therefore, once a judgment enters and becomes final, plaintiff no longer has the right to file an amended complaint as a matter of course. The plaintiff must either seek leave of the court or the defendant's written consent to file an amended complaint. The court further held that the plaintiff, as an appropriate remedy should be provided an opportunity to seek relief from the judgment and leave to file its amended complaint, assuming such an amendment would not be futile.

Skillett v. Allstate Fire & Cas. Ins. Co.,

2022 CO 12, 505 P.3d 664

Opinion Author: Justice Hart

Summary: The court accepted jurisdiction in this case to answer a question of law from the United States District Court for the District of Colorado. The question was whether an employee of an insurance company who adjusts an insured's claim in the course of employment may for that reason be liable personally for statutory bad faith under Colorado Revised Statutes Sections 10-3-1115 and -1116 ("Statutes"). The court held that an individual many not be held liable. An action for unreasonably delayed or denied insurance benefits under Colorado law

may be brought against an insurer, not against an individual adjuster acting solely as an employee of the insurer.

COURT OF APPEALS DECISIONS

***AA Wholesale Storage, LLC v. Swinyard*,**

2021 COA 46, 488 P.3d 1213

Opinion Author: Judge Berger (Judges Dailey and Navarro concur)

Summary: The division affirmed the district court's decision to deny plaintiff's turnover motion. The division held that the trial court is not required to automatically grant CRCP 69(g) motions because the use of the word "may" in the rule language grants the trial court discretion. The plaintiff had been unsuccessful in collecting its judgment against the defendant and learned that defendant was in the early stages of litigation against a third party in an unrelated civil action. The plaintiff then moved under CRCP 69(g) for a turnover of plaintiff's claims, which was denied. The division held that the trial court did not abuse its discretion by denying the motion.

***Barnes v. State Farm Mut. Auto. Ins. Co.*,**

2021 COA 89, 497 P.3d 5

Opinion Author: Judge Brown (Judges Navarro and Casebolt concur)

Summary: Plaintiff contends that the district court erred by allowing State Farm to file a C.R.C.P. 12(b)(5) motion to dismiss after it had already filed a separate C.R.C.P. 12(f) motion to strike because C.R.C.P. 12(g) requires consolidation of C.R.C.P. 12 motions. The division agreed that the court erred, but conclude the error was harmless. Additionally, the division rejected that State Farm's disclosure stating the uninsured motorist (UM) coverage follows the insured person rather than the insured vehicle, legally obligated State Farm to further disclose that an insured who rejects UM coverage on one of multiple policies loses the ability to stack available uninsured motorist coverage. The plaintiff insured two of her cars under State Farm automobile liability insurance policies, but rejected the UM coverage on one car, a 1990 Geo, but not the other, a 2006 Honda. When the plaintiff was hurt in an accident

and sustained serious bodily injury, plaintiff sought the $100,000 max amount of UM coverage available under the Honda and another $70,000 of UM coverage under the Geo. State Farm paid the $100,000 max under the Honda policy, but rejected the $70,000 because plaintiff had rejected the UM policy on the Geo. The division held that State Farm did not fraudulently misrepresent the UM policy and did not have to disclose the "stacking information" between policies.

***Bd. of Cnty. Comm'rs of Boulder Cnty. v. Crestone Peak Res. Operating LLC*, 2021 COA 67, 493 P.3d 917, *cert. granted in part,* No. 21SC477, 2022 WL 103333 (Colo. Jan. 10, 2022)**

Opinion Author: Judge Graham (Judges Tow and Taubman concur)

Summary: The division holds that the term "production" in an oil and gas lease means "capable of producing oil and gas in commercial quantities" not necessarily extracting the oil and gas from the ground. Because of this definition, the court held that the defendant did not break its lease with Boulder County when it paused extraction for 102 days for repairs, but continued to have regular site visits, pressure measurements, record keeping, and maintenance.

***Bradley v. Sch. Dist. No. 1 in City & Cnty. of Denver*,**

2021 COA 140, 504 P.3d 979

Opinion Author: Judge Yun (Judges Roman and Berger concur)

Summary: The division holds that a claimant's written notice for a tort claim complies with section 24-10-109(1), C.R.S. (2016), when it does not contain an explicit statement that requests monetary damage. A document constitutes written notice of a claim under 24-10-109(1) if it reasonably and objectively can be inferred from the document as a whole that the claimant is in fact making a claim for monetary damages. There are no particular words or talismanic language that must be strictly complied with. The defendant's sole argument on appeal was that the letter written on behalf of defendant for her claim did not explicitly request payment of monetary damages. However, the defendant did not argue that it failed to understand the letter to make a claim for monetary damages or that it suffered any prejudice from the

lack of explicit language. The plaintiff's letter made clear that she was asserting a claim against the defendant and therefore it strictly complied with section 24-10-109(1).

Browne v. ICAO,

2021 COA 83, 495 P.3d 974

Opinion Author: Judge Dailey (Judges Freyre and Yun concur)

Summary: The division considers whether the impairment rating of an injured worker for multiple work-related injuries to the same body part under section 8-42-107.5, C.R.S. (2020) should be calculated: (1) first by the final apportioned impairment rating, resulting in the application of the lesser benefits cap, or (2) calculated based on the combined rating and then reduced by subtracting earlier awards. The court division holds that the apportioned "impairment rating" should be calculated first.

CadleRock Joint Venture LP v. Esperanza Architecture & Consulting, Inc.,

2021 COA 119, 500 P.3d 402

Opinion Author: Justice Martinez (Judges Fox and Pawar concur)

Summary: The division holds that a revolving line of credit is not a negotiable instrument and therefore the UCC does not apply. The defendant's received a revolving line of credit ("Credit Agreement") for $750,000 and signed a Business Loan Agreement. Defendant's stopped making payments in January 2012. The trial court held the Credit Agreement was a negotiable instrument and therefore governed by the UCC. The trial court then held that plaintiff was barred from enforcing the defaulted line of credit under the UCC. The division held that the Credit Agreement was not a negotiable instrument because it did not meet the "fixed amount of money" requirement. The trial court held that the amount of money the borrowers could have taken out was changing, but the amount the promised to pay was fixed. The division disagreed because the amount that the borrower promises to pay can

fluctuate significantly over the course of the loan and is therefore not a "fixed amount" and not a negotiable instrument.

City & Cnty. of Denver v. ICAO,

2021 COA 146, 506 P.3d 100

Opinion Author: Judge Gomez (Judges Richman and Harris concur)

Summary: The division holds that the reopening statute, section 8-43-303, C.R.S. (2021), constrains the authority of the Director of the Division of Worker's Compensation to reopen an award that has been automatically closed for failure to prosecute. The award at issue was closed when the claimant failed to respond to an order to show cause why his claim seeking additional benefits shouldn't be dismissed for failure to prosecute. The director then allowed for additional time to respond to the show cause order, which effectively set aside the automatic closure of the award. The court held the director's actions were subject to the reopening statue and because the director, the administrative law judge, and the Industrial Claim Appeals Office never considered whether the claimant satisfied the reopening criteria. The order was set aside and remanded back to the law judge and director.

Colorado Div. of Ins. v. Statewide Bonding, Inc.,

2022 COA 67

Opinion Author: Judge Schutz (Judges Welling and Taubman concur)

Summary: The division holds that the Commissioner of Insurance's jurisdiction, as delegated to the employees at the Colorado Division of Insurance ("division"), to investigate and regulate Colorado-licensed insurance producers that provide immigration bonds is not preempted by federal law. This case stems from a Colorado state probation officer's complaint to the Division about an undocumented immigrant who was possibly being extorted by Libre by Nexus Inc. The Division requested information from the defendants related to the undocumented immigrant's bond and their relationship with Libre. The Division then sent another request related to their lack of collateral, how they would

obtain funds to pay bonds, and how they instruct immigrants about where to appear in court. Instead of answering the request, defendants surrendered their license to act as a non-resided insurance provider. However, the Division advised defendant that their surrender of licenses did not deprive the Division of its authority to enforce the state's insurance licensing laws. The court of appeals held that because both defendants were Colorado-licensed, non-resident insurance producers when the investigation was conducted, the plain language of the statutes unambiguously permitted the Division to investigate defendants' conduct and relationship to activities potentially violative of Colorado insurance laws, subject to any valid claim of preemption. Therefore, because federal law does not preempt the Division's ability to investigate and regulate the Colorado licensed insurance providers, the Division inquiry letter was a reasonable exercise of its investigative authority.

Colo. Jud. Dep't, Eighteenth Jud. Dist. v. Colorado Jud. Dep't Pers. Bd. of Rev., **2021 COA 82, 495 P.3d 355,** ***cert. granted*****, No. 21SC548, 2022 WL 355074 (Colo. Jan. 31, 2022)**

Opinion Author: Judge Jones (Judges Navarro and Yun concur)

Summary: The division held that the Colorado Judicial System Personnel Rules establish a process for Judicial Department employees to challenge the termination of their employment with the branch. The last step in the challenge process is an appeal to the Judicial Department Personnel Board of Review (Board). The division held that the Board's decision resolving an appeal may not be challenged in district court under C.R.P.C. 106(a)(4).

Dream Finders Homes LLC v. Weyerhaeuser NR Co.,

2021 COA 143, 506 P.3d 108

Opinion Author: Judge Lipinsky (Judge Furman concurs, Judge Brown specially concurs)

Summary: The division answers the question of whether a sophisticated buyer of a defective product, who received a warranty from the manufacturer of the product, may assert tort claims based on the

manufacturer's alleged negligence and fraud in representing the quality of its product and failing to disclose the defect, even though the buyer received the remedy specified in the warranty and the warranty expressly excluded the very type of damages the buyer seeks to recover through its tort claims. The defendant appeals the trial court's judgment finding it liable for negligence, negligent misrepresentation, and fraudulent concealment. The division holds that the economic loss rule bars the plaintiff's negligence, negligent misrepresentation, and fraudulent concealment claims.

***Deines v. Atlas Energy Servs., LLC*, 2021 COA 24, 484 P.3d 798**

Opinion Author: Judge Harris (Judges Fox and Grove concur)

Summary: The division overrules a granting of summary judgment because the issue of proximate cause should have gone to the jury rather than being decided by the judge. The district court determined that defendants' alleged negligence in causing 1,000 gallons of hazardous liquid to spill onto a highway was not, as a matter of law, the proximate cause of the injuries sustained by plaintiff (who was rear-ended approximately forty minutes later, as he came to a stop in a line of traffic being diverted off the highway to a nearby exit). The division finds a narrow holding that it is possible a rational juror could find that the traffic accident that injured plaintiff was reasonably foreseeable based on defendant's negligent act of causing an oil spill on the highway. Therefore, the division reverses the summary judgment and remands for further proceedings. The division holds that there is no bright-line rule to whether proximate cause is a matter of fact or law, but in this case, it should have been a matter of fact rather than law.

***Fisher v. ICAO*,**
2021 COA 27, 484 P.3d 816

Opinion Author: Chief Judge Bernard (Judges Rothenberg and Taubam concur)

Summary: The division considers the question of whether the phrase "shall be based on the revised third edition" of the American Medical Association's, *Guides to the Evaluation of Permanent Impairment*,

means that a doctor is barred from using an evaluative process to determine an impairment rating that is not described in the Guides' revised third edition when evaluating a workers' compensation claim. The division states that the answer is no. The physician used a method known as normalization to determine the amount of net impairment to the patient's knee. The third edition of the Guidelines do not discuss normalization, but the fifth edition does. Also, the process is outlined in the Desk Aid, which has been taught to doctors in workers' compensation accreditation courses for at least the last decade. The division holds that when the legislature stated that impairment ratings shall be "based on" the revised third edition of the Guides, it meant that the revised third edition is the starting point, not the exclusive source, of impairment rating methodology.

Fogel v. Bankoff,

2021 COA 20, 484 P.3d 788

Opinion Author: Judge Lipinsky (Judge Richman concurs. Judge Pawar dissents)

Summary: The division holds that the 2012 amendments to the Colorado Rules of Civil Procedure require that a witness be tendered the required mileage fee before a subpoena can be validly served. The division held that per the 2012 amendments, a subpoena is not validly served unless the individual receiving the subpoena has received the required mileage fee "within a reasonable time after service of the subpoena, but in any event prior to the appearance date." The trial court found that the documents had been provided to Fogel, but that there was no evidence that a mileage check was included in the documents. Although the fee does not have to be provided at the time of service, it must be provided within a reasonable time. Therefore, the division remanded the case for the trial court to determine whether the mileage fee was provided within a reasonable time.

Garcia v. Puerto Vallarta Sports Bar, LLC,

2022 COA 17, 509 P.3d 1092

Opinion Author: Judge Jones (Judges Gomez and Lipinsky concur)

Summary: The division holds that CRCP 60(a) can be used to correct the misspelled name of the defendant following a default judgment, and the correction does not change the party against which the judgment was entered. Default judgment was originally entered against Puerta Vallarta Sports Bar, LLC, but the defendant's bar was actually called Puerto Vallarta Sports Bar, LLC. Additionally, the division held that the defendant waived its challenge to the sufficiency of service of process in two ways: (a) by failing to raise the issue until after the court entered default judgment while all along having actual notice of the case and (b) by failing to raise that issue when it first challenged the default judgment.

The division held that (1) defendant had actual notice of the action against it, and it didn't raise the issue of invalid service of process until after the court entered default judgment; and (2) defendant failed to raise the issue with its first challenge to the default judgment.

***Gregory v. Safeco Ins. Co. of Am.*,**

2022 COA 45

Opinion Author: Judge Kuhn (Judges Furman and Pawar concur)

Summary: Plaintiff brought suit against her insurer, Safeco Insurance Company of America, after Safeco denied her first-party insurance claim for property damage as untimely under her homeowners' insurance policy. The plaintiff appeals the decision, rejecting the applicability of Colorado's notice-prejudice rule to policies like hers. The division concluded that only the supreme court may decide whether to replace the traditional rule with the notice-prejudice rule for first party claims under homeowners' insurance policies. The division therefore affirmed the judgment of dismissal, but noted that this case may present an opportunity for the Colorado supreme court to provide clarity on this question. In this case, plaintiff had a homeowner's insurance policy that covered specified direct physical damage to her home that occurs during the policy period. During the policy period, a hailstorm damaged plaintiff's roof. However, plaintiff did not notify the insurer or file a claim for loss until roughly 18 months later after a contractor informed her of the damage. The insurer denied the claim as untimely due to its 365-day notice policy. More than two years after

defendant denied her claim, plaintiff filed suit, claiming that defendant's denial was a breach of contract and a bad-faith breach of an insurance policy, and that defendant unreasonably delayed and denied payment of her claim under sections 10-3-1115 and -1116, C.R.S. (2021). The district court held that plaintiff's claim was untimely under the plain terms of the Policy and that her delay was unexcused as a matter of law. In its conclusion, the district court reasoned that the supreme court has not extended Colorado's notice-prejudice rule to first-party claims under homeowners' insurance policies.

***Hale v. Se. Colorado Power Ass'n*,**

2022 COA 36

Opinion Author: Judge Richman (Judges Navarro and Yun concur)

Summary: The division holds that a court has authority to recognize, and take action with respect to, an alleged mistake in a statutory offer after the offer has been accepted but before a judgment has been entered. Specifically, the division concludes that, pursuant to section 13-17-202(1)(a)(IV), a court need not enforce a settlement agreement as written and may instead apply common law contract principles to alter, modify, or decline to enforce the agreement.

***Hodge v. Matrix Grp., Inc.*,**

2022 COA 4, 507 P.3d 1010

Opinion Author: Judge Yun (Judges Berger and Vogt concur)

Summary: Defendant argues that the district court reversibly erred by permitting plaintiff to offer evidence of the lost profits of his solely owned S corporation, Hodge Services, Inc., to support his claim of lost earning capacity following a slip-and-fall accident. Because plaintiff is the sole shareholder of Hodge Services and the corporation's profits are attributable to plaintiff's own skill and effort rather than invested capital and the labor of others, the division concluded, as a matter of first impression in Colorado, that the jury could properly consider the corporation's lost profits in determining plaintiff's loss of earning capacity. Plaintiff brought this personal injury lawsuit alleging

negligence and violations of the Premises Liability Act when he slipped and fell on ice during a visit to his storage unit he was leasing from defendant. Plaintiff claimed a loss of earning capacity as part of his economic damages. The division affirmed the district court's ruling and conclude it was within the district court's discretion to determine whether, under the circumstances, the profits of plaintiff's solely owned S corporation were admissible as evidence of his lost earning capacity.

Hughes v. Essentia Ins. Co.,

2022 COA 49

Opinion Author: Judge Welling (Judges Dunn and Yun concur)

Summary: The plaintiff was injured in a car accident and sought recover uninsured/underinsured motorist (UM/UIM) benefits under her auto insurance policy from defendant, Essentia Insurance Company (Essentia), which insured her two classic cars. At the time of her injury, plaintiff wasn't driving either of the classic cars and was, instead, driving her "regular use vehicle" — a vehicle she was required to have and separately insure in order to maintain her classic car insurance policy. The classic car insurance policy explicitly excepted "regular use vehicles" from UM/UIM coverage, and therefore Essentia refused to provide plaintiff with UM/UIM benefits for her injuries because she wasn't using one of the classic cars at the time of the accident. Plaintiff filed suit, alleging that she was entitled to the UM/UIM benefits under the Essentia classic car insurance policy regardless of what vehicle she was driving at the time of the accident. The division holds that an automobile insurance policy restriction that insureds can only access their UM/UIM benefits when they are injured in the covered vehicle is not valid under section 10-4-609. The division holds that per *DeHerrera v. Sentry Insurance Co.*, 30 P.3d 167 (Colo. 2001), UM/UIM benefits cover persons injured by uninsured or underinsured motorists and can't be tied to the occupancy or use of a particular vehicle or type of vehicle.

***Johnson v. Rowan Inc.*,**

2021 COA, 488 P.3d 1174

Opinion Author: Judge Lipinsky (Judge Pawar and Justice Martinez concur)

Summary: The division concludes that a health care provider that either does not provide the written copy of the arbitration agreement to the patient or does not sign it, fails to substantially comply with the Health Care Availability Act. The division held that Rowan Community, a long-term care facility, could not enforce the agreement (and the arbitration clause) against the plaintiffs because Rowan failed to give a written copy of any arbitration agreement and failed to sign the arbitration agreement itself.

***Johnson Nathan Strohe, P.C. v. MEP Eng'g, Inc.*,**

2021 COA 125, 501 P.3d 826

Opinion Author: Judge Berger (Judges Richman and Welling concur)

Summary: The division holds that limitations of liability clauses are not subject to the same rules of construction and invalidity as exculpatory agreements. Therefore, a limitation is not void simply because it is ambiguous. The division held that the limitations of liability provision was ambiguous, but the ambiguity does not make the provision void. A limitation of liability clause is not the same as an exculpatory clause because it is not a complete bar to liability, but leaves the benefitting party exposed to a bargained-for level of liability. The division therefore remanded to the district court to determine the meaning of the disputed provision as an issue of fact using ordinary methods of contract interpretation.

***Macaulay v. Villegas*,**

2022 COA 40M

Opinion Author: Judge Lipinsky (Judge Brown concurs, Judge Taubman concurs in part and dissents in part)

Summary: The division examines the interplay of two statutes of limitations under the Workers' Compensation Act: the six-year statute of limitations within which a closed claim can be reopened under section 8-43-303, C.R.S. (2021); and the one-year statute of limitations within which a party must assert a penalty claim under section 8-43-304(5), C.R.S. (2021). The division holds that the sections work together and therefore limit the assertion of penalty claims to open or reopened claims. So, once the statute of limitations for reopening has expired, a party can no longer pursue penalties in that claim. Plaintiff in this case brought penalty claims after the window to reopen his case closed, and therefore the penalty claims were dismissed.

McWhinney Centerra Lifestyle Ctr. LLC v. Poag & McEwen Lifestyle Centers-Centerra LLC,

2021 COA , 486 P.3d 439

Opinion Author: Judge Roman (Judges Fox and Gomez concur)

Summary: The division holds that in most instances the economic loss rule will not bar intentional tort claims. The economic loss rule generally does not bar common law intentional claims such as fraudulent concealment, intention interference with contractual obligations, and intention inducement of breach of contract. This case came from the failed joint venture to open the Promenade Shops at Centerra.

Morin v. ISS Facility Servs., Inc.,

2021 COA 55, 487 P.3d 1289

Opinion Author: Judge Fox (Judges Bernard and Roman concur)

Summary: The statute of limitations deadline must still be followed even if the deadline falls on a Saturday. In this personal injury claim, plaintiff was injured on July 13, 2017 and did not file until July 15, 2019, after the 2-year statute of limitation expired. July 13, 2019 fell on a Saturday. The division held that the statute of limitations runs on the anniversary date, not the Monday after. Also, the division reasoned that

electronic filing is available and the courthouse being closed was not an obstacle.

***Mitchell v. Chengbo Xu*,**

2021 COA 39, 488 P.3d 1200

Opinion Author: Judge Fox (Judge Freyre concurs, Judge Lipinsky specially concurs)

Summary: The trial court misconstrued section 13-17-202, C.R.S. 2020, and erroneously awarded actual costs to the defendant. The defendant made two statutory offers of settlement and the trial court did not include the pre-offer costs along with the prejudgment interest to the jury's verdict. The division held the trial court erred in finding that the pre-offer costs should not be included.

***Owners Ins. Co. v. Dakota Station II Condo. Ass'n, Inc.*,**

2021 COA 114, 499 P.3d 1069

Opinion Author: Judge Gomez (Judges Furman and Tow concur)

Summary: The division held the umpire's appraisal award was invalid because the only appraiser to agree to the award lacked impartiality. The division affirmed the trial court's decision. The hired appraiser was working on a contingency basis and therefore had a financial interest in the claim's outcome. This case is the second appeal to a division of the court of appeals. The first appeal found the appraiser impartial but was overturned and remanded by the Supreme Court for using the wrong standard of impartiality. The Supreme Court required the appraiser's impartiality "requires the appraiser to be unbiased, disinterested, without prejudice, and unswayed by personal interest" and to "not favor one side more than the other." The trail court then found the appraiser was not impartial based on the Supreme Court's standard. The trial court found that the appraiser was not a credible witness and separated her bias into three categories, (1) biased and acting as an advocate; (2) interested; and (3) swayed by personal interest. The division affirmed.

***People v. Martinez*,**

2022 COA 28

Opinion Author: Judge Lipinsky (Judge Gomez concurs, Judge Jones specially concurs)

Summary: The division held that the 2000 amendments to the restitution statutes did not alter the prior case law allowing insurance companies that indemnify their policyholders for losses proximately caused by felonies, misdemeanors, or other offenses specified in the restitution statutes to obtain restitution from offenders. A crime victim is entitled to restitution for "losses or injuries proximately caused by [the] offender's conduct and that can be reasonably calculated and recompensed in money." Because the statutory definition of "victim" includes other persons besides the direct victim of the crime, it is not always clear who, besides the direct victim, is a "victim" for purposes of the restitution statutes.

***Pilmenstein v. Devereux Cleo Wallace*,**

2021 COA 59, 492 P.3d 1059

Opinion Author: Judge Lipinsky (Judge Richman concurs, Judge Pawar specially concurs)

Summary: The Colorado Minimum Wage Orders (MWOs) require that employers in the health and medical industries must provide their employees with compensated "duty free" rest periods. The division unanimously agrees with the district court's ruling that Devereux was required to provide its DCPs with rest periods and, thus, affirms the district court's judgment. The majority concludes that plaintiff's right to sue for the unprovided rest breaks arises under the Colorado Minimum Wage Act, sections 8-6-101 to -119, C.R.S. (2020), because plaintiff stipulated to limit her recovery to the minimum wage. The special concurrence believes the right comes from Colorado Wage Claim Act, sections 8-4-101 to -123, C.R.S. (2020), based on the language in the plaintiff's complaint.

***Pisano v. Manning*,**

2022 COA 22, 510 P.3d 572

Opinion Author: Judge Harris (Judges Roman and Lipinsky concur)

Summary: A jury awarded plaintiff approximately $1.5 million in noneconomic damages incurred in connection with a traffic accident caused by defendant. The damages cap [section 13-21-102.5(3)(a)] states any award of noneconomic damages "shall not exceed" $468,010, unless the court "finds justification by clear and convincing evidence therefor," in which case the court may award up to $936,030. Plaintiff argued she was entitled that the $936,030 amount. The trial court disagreed and the COA affirmed. Plaintiff's argument was that the statute limits the trial court inquiry under the statute to determining whether the jury's award of noneconomic damages was supported by clear and convincing evidence. In rejecting that argument, the division stated that what must be supported by clear and convincing evidence is the trial court's justification for exceeding the statutory cap. In determining whether a justification exists, the court could properly consider whether plaintiff's injuries amounted to "exceptional circumstances." Here, however, the division concluded that the record supports the trial court's determination that the circumstances of the case were not exceptional.

***Salazar v. ICAO*,**

2022 COA 13, 508 P.3d 805

Opinion Author: Judge Brown (Judges Furman and Lipinsky concur)

Summary: The plaintiff in this case was denied a benefit claim by final order of the Industrial Claim Appeals Office. The administrative law judge determined that the claimant did not sustain compensable injury from moving logs while at his place of work, and therefore, the injuries he later sustained in a motor vehicle accident on his way to a medical appointment did not fall under the quasi-course of employment doctrine. The division affirmed the law judge's decision and held that injuries sustained in a subsequent accident are compensable only when there first exists an initial compensable injury.

Silvernagel v. US Bank Nat'l Ass'n,

2021 COA 128, 503 P.3d 165

Opinion Author: Judge Dailey (Judges Dunn and Kuhn concur)

Summary: The division held that plaintiff's discharge of a debt in bankruptcy had no effect on the time within which a bank had to foreclose the deed of trust given as security for that debt. The division further held that the district court erroneously dismissed plaintiff's complaint based on its rejection, as a matter of law, of their claim that any suit by US Bank would be barred by the statute of limitations. The division holds that the discharge of the borrower's personal liability on a note alerts the lender that the limitations period to foreclose on a property, held as a security, has commenced. Therefore, plaintiff's discharge of responsibility for the underlying debt in October 2012 and US Bank's failure to initiate foreclosure proceedings as of June 2019 means that US Bank failed to timely seek relief within the 6-year limitations period.

***State Farm Mut. Auto. Ins. Co. v. Goddard*, **

2021 COA 15, 484 P.3d 765

Opinion Author: Judge Brown (Judges Bernard and Vogt concur)

Summary: The division declines to adopt a blanket *Nunn* rule that an insured can never breach a contract when entering into a Nunn agreement. The division does not read *Nunn* as immunizing an insured against a claim for breach of contract. Instead, the division believes *Nunn* explained that before an insured is justified in stipulating to a judgment and assigning its claims against its insurer to a third-party claimant, it must first appear that the insurer has unreasonably refused to defend the insured or to settle the claim within policy limits. The division also holds that acting unreasonably is a question of fact for the factfinder. The defendant in this case had stipulated to entry of a judgment against him for an amount to be determined by binding arbitration and assigned to a third party any claims he had against State Farm. The division also rejects the rule that there must be a finding of bad faith on the part of the insurer before an insured is justified in entering into a *Nunn*-like agreement.

Town of Vail v. Vill. Inn Plaza-Phase V Condo. Ass'n,

2021 COA 108, 498 P.3d 1123

Opinion Author: Judge Davidson (Judges Roman and Lipinsky concur)

Summary: The division found that the Town of Vail's ordinance violated the Colorado Common Interest Ownership Act, even though the ordinance was passed before the Act. The Act does not generally apply to communities created before its effective date, but there are two exceptions. One exception is if the community chooses to adopt the Act. The other exception applies to pre-existing communities who experience qualifying "events and circumstances occurring on or after July 1, 1992." The division holds that the Town's actions in attempting to enforce section 11(6) of the 1987 ordinance are "events and circumstances" triggering application of the CCIOA's anti-discrimination clause.

***Tug Hill Marcellus LLC v. BKV Chelsea LLC*,**

2021 COA 17, 486 P.3d 461

Opinion Author: Judge Lipinsky (Judges Richman and Pawar concur)

Summary: The court of appeals lacks jurisdiction to hear appeals from orders denying a motion to consolidate separate arbitration proceedings. The division has jurisdiction to review final judgments of the district courts, but the Colorado Revised Uniform Arbitration Act narrowly restricts the appellate court's ability to review arbitration court orders entered before an arbitrator enters an award. There are two specific instances in which the court of appeals may intervene prior to a final award: an order denying a motion to compel arbitration and an order granting a motion to stay arbitration. Therefore, the division denied having jurisdiction for a denial to consolidate separate proceedings made by the arbitrator before an award was entered.

***Walker Com., Inc. v. Brown*,**

2021 COA 60, 492 P.3d 1045 *cert. granted,* No. 21SC390, 2022 WL 288074 (Colo. Jan. 24, 2022)

Opinion Author: Judge Brown (Judges Roman and Welling concur)

Summary: The division holds that C.R.C.P. 6(b)(2) allows a court to accept a C.R.C.P. 106(a)(4) complaint filed beyond the jurisdictional deadline set by C.R.C.P. 106(b), upon a showing of excusable neglect. Therefore, determining whether an excusable neglect exists requires a balancing of equities. The evaluation under C.R.C.P. 6(b)(2) parallels the standard under C.R.C.P. 60(b). The court notes that holding the plaintiff to the deadline does not violate the right of due process, but the court may accept a complaint filed beyond the deadline upon a showing of excusable neglect.

***Wesley v. Newland*,**

2021 COA 142, 505 P.3d 318

Opinion Author: Judge Berger (Judges Yun and Davidson concur)

Summary: The prevailing party in this civil case sought an award of attorney fees under the frivolous and groundless litigation statute against both the opposing party and her lawyer who had previously withdrawn from representing her. This appeal came from a tort action that concluded after the district court granted defendant's motion to dismiss for failure to prosecute. The district court awarded fees against the opposing party, but did not address whether fees should be awarded against the party's withdrawn lawyer. The division holds that the district court has authority under the Colorado Rules of Civil Procedure to join the former lawyer for purposes of post judgment proceedings under section 13-17-102 C.R.S. (2021). A court may conclude that the attorney brought a civil action that lacked substantial justification and is liable jointly or severally with the client for the opposing party's attorney fees Additionally, the division holds that the court must consider the allocation of fees between the party's present or former counsel and must make sufficient findings to enable meaningful appellate review. The statute does not require a district court to impose liability jointly and severally against a party and an attorney (or to

otherwise allocate the responsibility to pay the fees to the client or attorney), but the statute does require that a district court exercise its discretion by at least considering doing so.

RULE CHANGES

RULE CHANGE 2021(18) COLORADO RULES OF PROFESSIONAL CONDUCT (Change to Fee Rate Portion)

- Announced 9/13/2021

RULE CHANGE 2021(20) COLORADO RULES OF JUDICIAL DISCIPLINE (Change to the Code of Conduct for Members, Section 3.5)

RULE CHANGE 2022(01) COLORADO RULES OF CIVIL PROCEDURE RULES 16, 16.1, 30, AND 45 FORMS 26, 29, 32, 33, 47, 250, 601, AND 603

- Announced 1/10/2022

RULE CHANGE 2022(02) COLORADO RULES OF CIVIL PROCEDURE Chapter 25 Colorado Rules of County Court Civil Procedure Rules: 304, 312, and 404 Forms: 28A and 105

- Announced 1/10/2022

RULE CHANGE 2022(05) THE COLORADO APPELLATE RULES Form 1905 and Rules 1, 2, 3, 3.4, 4, 4.1, 5, 7, 10, 21, 26, 28, 28.1, 29, 30, 32, 39.1, 41, 42, 51, 52, 53, and 55

- Announced 2/28/2022

RULE CHANGE 2022(07) THE COLORADO RULES FOR CIVIL INFRACTIONS (entirely new provision)

- Announced 4/11/2022