COLORADO DEFENSE LAWYERS ASSOCIATION CASE LAW DIGEST 2022-23

COLORADO SUPREME COURT

In re Arvada Village Gardens, LP v. **Garate-** *Federal law requiring longer notice period for FED actions still applies in Colorado* - 23SA34 (05/15/23). Before landlords may evict tenants, they must provide a ten-day notice. During the COVID-19 pandemic, however, Congress passed the Coronavirus Aid, Relief, and Economic Security Act ("CARES Act"), which, in relevant part, requires a thirty-day-notice period before landlords of certain" covered" properties may file an eviction action. Looking at the plain language of the CARES Act, the Colorado Supreme Court held that, although another provision of the CARES Act has expired, the thirty-day-notice provision is still in effect. Accordingly, before filing an FED claim in Colorado, landlords of properties which are "covered" by the CARES Act must give thirty days' notice of a lease violation.

State v. Ctr. for Excellence in Higher Educ., Inc. – *CCPA remedies are equitable and thus defendant not entitled to jury* - 2023 CO23 (05/15/23). This case was a civil enforcement action under the Colorado Consumer Protection Act and the Colorado Consumer Credit Code ("UCCC"). The issue was whether the Court of Appeals erred when it (1) concluded that civil penalty claims under the CCPA are equitable and thus that CollegeAmerica was not entitled to a jury trial on those claims; (2) remanded the case for a new trial on each of the State's CCPA claims; and (3) concluded that section 5-6-112(3)(a) of the UCCC requires individualized evidence (e.g., evidence regarding specific consumers) in determining whether CollegeAmerica' s loan program was unconscionable. The Supreme Court concluded that the division below properly determined that CCPA's civil penalty claims are equitable in nature and thus do not entitle CollegeAmerica to a jury trial on those claims. The Court further concluded that the division erred in remanding the case for a new trial without first assessing whether the parties had a full and fair opportunity to litigate the issue of significant public impact and, if so, whether the evidence sufficiently established such an impact. Last, the Court concluded that the division correctly determined that CollegeAmerica' s loan program was not unconscionable, although it disagrees with the COA's conclusion that individualized evidence regarding the probability of repayment was necessary to establish unconscionability.

State v Juul – *Supreme Court reverses finding of personal jurisdiction* - 2022CO46 (9/26/22) The district court's denied defendants Adam Bowen, James Monsees, Nicholas Pritzker, and Riaz Valani' s motions to dismiss for lack of personal jurisdiction. Defendants are California residents who served in various capacities as officers or directors of JUUL Labs, Inc., an e-cigarette manufacturer, or its predecessor companies. The court concluded that that because (1) the district court

based its determination on allegations directed against JUUL and the group of defendants as a whole, rather than on an individualized assessment of each defendant's actions, and (2) the State did not allege sufficient facts to establish either that defendants were primary participants in wrongful conduct that they purposefully directed at Colorado, or that the injuries alleged in the amended complaint arose out of or related to defendants' Colorado-directed activities, the district court erred in finding that the State had made a *prima facie* showing of personal jurisdiction in this matter.

People v. Vanderpauye – *Court gives guidance ot self-serving hearsay -* 2023 CO42 (06/20/23). Of particular interest in this criminal case is the holding that under the excited utterance exception in CRE 803(2), the self-serving nature of a defendant's hearsay statement may be probative of whether the statement was a spontaneous reaction, rendering it potentially admissible, or the result of reflective thought, rendering it inadmissible.

Aurora Public Schools v. A.S. *– Supreme Court holds sexual abuse statute was not retroactive* - 2023 CO39 (06/20/23). The Supreme Court held that the Child Sexual Abuse Accountability Act (CSAAA) violates the constitutional prohibition on retrospective legislation, as applied to conduct that predates the Act and for which any previously available claims would be time-barred. First, the court rejects the plaintiffs' objections to the school district's standing and concluded it had subject matter jurisdiction to review the constitutional challenge to the CSAAA. Turning to the merits, the court held that, to the extent a statute creates a new cause of action that permits parties to bring claims for which any previously available cause of action would be time-barred, the statute created a new obligation and attached a new disability to past transactions, thereby violating Colorado's constitutional prohibition on retrospective legislation.

State v. Hill – *Supreme Court finds no standing in dispute over river ownership -* 2023CO31(06/05/23). The Supreme Court held a declaratory judgment is procedural, not substantive, in nature. Accordingly, to demonstrate a legally protected interest to establish standing for a declaratory judgment, a party must assert a legal basis on which a claim for relief can be grounded. Here, the individual plaintiff was found to have no legally protected right independent of the State's alleged ownership of the riverbed onto which he can hook a declaratory judgment claim. His asserted legally protected interests rested on an antecedent question of whether the State owns the property at issue. Therefore, the State cannot provide him with standing to pursue a declaratory judgment action.

COLORADO COURT OF APPEALS

People v Perkins —*Strict compliance with industry standards publication not necessary* - 2023COA38A (05/04/23). division of the Court of Appeals holds that the standards set by the National Fire Protection Association (NFPA) and specifically NFPA 921 [Guide for Fire and Explosion Investigations], constitute a reliable basis for an expert's opinion, under *People v. Shreck*, 22 P.3d 68 (Colo. 2001). As a matter of first impression, the division further holds that strict compliance with NFPA 921 is not required for an expert's testimony to be admissible under CRE 702, and that deviations from NFPA 921 go to the weight of the expert's opinion and not the opinion's admissibility.

Macasero v. ENT Credit Union — *COA affirms method of updating membership agreement* - 2023COA40 (05/04/23) The Court of Appeals considered whether plaintiff was placed on constructive notice of updated terms and conditions of her membership agreement with defendant credit union, including an arbitration agreement with an opt-out provision, by language, including hyperlinks, in her monthly banking statement email. The Court concluded that plaintiff was placed on constructive notice of the change in terms because she received the notice in the manner she had agreed upon, and the notice was sufficiently clear and conspicuous considering the parties' prior course of dealing, the email was designed in such a way that the notice was reasonably conspicuous, and the change in terms was easily accessible.

Heidel v. Rio Blanco — *COA interprets GIA provision on immunity* - 2023COA41 (CA 05/18/23). The question presented in this wrongful death action is whether the plaintiffs' claims against the Rio Blanco Sheriff's Office are barred by the GIA. Under the GIA, the State waives immunity for injuries sustained as a result of the negligent operation of a jail if the claimant is "incarcerated but not yet convicted of the crime for which such claimant [is] being incarcerated," but the waiver does not apply to "claimants who have been convicted of a crime and incarcerated in a . . . jail pursuant to such conviction." At the time the decedent died by suicide in the county jail, she had been arrested and detained for, but not yet convicted of, the offense of violation of a protection order. The protection order had been entered in an earlier harassment case, for which the decedent was serving a sentence of probation. The Court of Appeals held that the waiver of immunity under statute applies. Because the decedent was detained only for the offense of violation of a protection order and she had not yet been convicted of that offense, she was "incarcerated but not yet convicted of the crime for which" she was being incarcerated, notwithstanding that the protection order arose out of the earlier harassment conviction. The GIA does not bar plaintiffs' claims.

Heights Healthcare v. BCER — *COA hold Homeowner Protection applies to commercial property* - 2023COA44 (05/25/23) In this construction defect case, a division of the court of appeals reverses a trial court order enforcing a limitation of

liability provision in the parties' contract. (The division also rejected defendant's cross-appeal of the trial court's verdict finding it liable for breach of contract.) In resolving this appeal, the division interpreted a provision of the Homeowner Protection Act of 2007. The HPA provides that "any express waiver of, or limitation on, the legal rights, remedies, or damages" provided by CDARA to "claimants asserting claims arising out of residential property" "are void as against public policy." Applying HPA, the trial court determined that a limitation of liability clause in the parties' contract was enforceable by the defendant against the plaintiff because "the property in question in this case was zoned 'commercial' at the time that the parties entered into the contract." In *Broomfield Senior Living Owner, LLC v. R.G. Brinkmann Co.*, 2017 COA 31, the Court of Appeals held that the HPA's prohibition against enforcement of limitation on the accrual of claims protected the owners of a senior living facility when the property was located on a parcel zoned "for residential use only." In this case, the Court addresses a question left open by the division in Broomfield Senior Living — namely, whether the residential living quarters of a senior living community located on a parcel that is zoned "commercial" or "mixed use" constitutes "residential property" that is protected by the HPA. The Court concluded that it does and reversed the trial court's determination that the limitation of liability is valid and enforceable. The Court further concluded that the record supports the trial court's finding that defendant breached the parties' contract and that that breach isn't excused by any alleged breach by the plaintiff.

People v. Toro-Ospina — *COA enters ruling on jury questionnaire and implicit bias instruction* - 2023COA45 (06/01/23). For the first time in Colorado, an appellate court decided whether a trial court is required to ask prospective jurors to disclose their race or ethnicity when requested by a party. The COA also decided, for the first time in Colorado, whether a trial court must provide the jury with an implicit bias instruction when requested by one of the parties. The Court concluded that a trial court is not required to ask a race/ethnicity question, and it is not required to provide an implicit bias instruction. Rather, the decision whether to ask such a question or provide an implicit bias instruction is entrusted to the trial court's exercise of its sound discretion.

Marriage of James — *Rule 50 motion does not toll appeal on decision by magistrate* - 2023COA51 The court of appeals concluded that under the Colorado Rules for Magistrates, specifically C.R.M. 5(a), and the applicable Colorado Appellate Rules, a party in a proceeding before a magistrate acting with the parties' consent may not file a C.R.C.P. 59 motion for reconsideration and thereby toll the forty-nine-day deadline for filing a notice of appeal pursuant to C.A.R. 4(a)(3). Accordingly, the division dismissed a party's appeal of the permanent orders of a magistrate, acting with the consent of the parties, as untimely because (1) the party filed the notice of appeal more than forty-nine days after the entry of the magistrate's permanent orders and (2) the party's C.R.C.P. 59 motion was not permitted under C.R.M. 5(a) and thus did not toll the forty-nine-day deadline to file the notice of appeal.

Colorado v. International Association of Firefighters — *Statute does not bar private intervenor in AG action* - 2023COA52 (06/08/23). The Court of Appeals considered whether section 24-31-113 — which permits the attorney general to bring a civil suit against a governmental authority when the attorney general has reasonable cause to believe that the governmental authority has engaged in a pattern or practice of conduct that deprives persons of rights, privileges, or immunities protected by law — bars a third party from intervening pursuant to C.R.C.P. 24. Based on the plain language of the statute and being informed by how federal courts have addressed motions to intervene in cases brought under a similar federal statute, the Court concluded that the statute does not bar intervention. The Court then addressed whether the appellant met the criteria for intervention under Rule 24. It concluded that the district court did not err by denying the appellant's motion to intervene as of right under Rule 24(a), but that it erred by failing to address the appellant's request for permissive intervention under Rule 24(b).

Turoff v. Itachi Capital —Court finds no jurisdiction to review district court order re: arbitration - 2022COA147 (12/29/23). An arbitrator entered an award in Itachi's favor and later awarded Itachi its attorney fees and costs. Appellant Turoff then filed a motion to vacate the arbitration award, arguing that the refusal to postpone the hearing and permit discovery was fundamentally unfair and substantially prejudiced her rights. The district court vacated the award and ordered the parties "to resubmit their dispute to JAG for a new hearing." Itachi brought an interlocutory appeal, contending that the district court erred by vacating the arbitration award and ordering a new hearing. A division of the court of appeals concluded that an order vacating an arbitration award and directing a rehearing under section 13-22-228(1)(e) of the Colorado Revised Uniform Arbitration Act is not appealable as an 'implicit order' denying confirmation of the arbitration award under section 13-22-228(1)(c) of the Act.

Adams County Housing v. Panzlau - COA clarifies recusal obligation of judge in matter involving former law firm - 2022COA148 (12.29.23). A division of the court of appeals decided three issues of first impression in this case: (a) a judge is not required to recuse from a case involving a previous client of the judge's former law firm, where the judge was not involved with the client's matters while at the firm and the case pending before the judge is unrelated to the matters in which the law firm represented the client; (b) a judge is not required to stay the proceedings under C.R.C.P. 97 when a party files a successive recusal motion that rests on the same factual allegations as the party's prior unsuccessful motion to recuse; and (c) under Warne v. Hall, 2016 CO 50, 373 P.3d 588, a proponent of a claim must plead facts that, if true, would satisfy each element of the claim

Hicks v Colorado Hamburger Company —2022COA149. In this interlocutory appeal filed pursuant to section 13-20- 901, C.A.R. 3.3, and C.R.C.P. 23(f), a division

of the court of appeals considers whether the district court abused its discretion in denying a proposed class certification for fast food workers allegedly deprived of meal and rest breaks. Plaintiff's lawsuit is premised on purported violations of the Colorado Overtime and Minimum Pay Standard Order, a DLE regulation that articulates various protections for hourly wage earners. The Court affirmed a holding that Plaintiff's claim based on the deprivation of meal breaks cannot proceed because individual issues will predominate over common ones. However, the COA went on to hold that because Plaintiff plans to use a viable class-wide means of proving liability and damages for the alleged deprivation of rest breaks, common issues will predominate over individual ones, thus rendering class certification appropriate. Accordingly, the case is remanded with directions to certify the proposed class on Hicks' rest break claim [but not the meal claim], and to conduct further proceedings.

San Juan Hut Systems, Inc. v. Board of County Commissioners - 2023COA10 — (02/02/23). In a case of first impression, the Court of Appeals considered a county's statutory authority under section 42-4-106(3)(d) to restrict vehicular traffic during periods when "snow-packed conditions are . . . likely to exist" and to direct nonvehicular, over-the-snow traffic from that road to a designated trail. Concluding that the county was granted this express statutory authority while the appeal was pending, the division dismisses in part and otherwise affirms. [Okay, it is a little obscure, but I needed to put SOMETHING in this newsletter, and if it is good enough to publish, it is good enough for our newsletter….].

Fear v. Geico —*COA holds that noneconomic damages analysis does not provide basis for Fisher payment* - 2023COA31 (03/30/23). The Court noted that in *Fisher v. State Farm Mutual Auto Ins. Co*., 2018 CO 39 (Fisher II), the Supreme Court held that an automobile insurer must promptly pay to a first-party claimant their uninsured or underinsured motorist benefits when the first-party claimant's damages are undisputed. [Note – no discussion about the wisdom of the decision… it is what it is…]. In this case, the Court of Appeals declined to extend Fisher II, and held that an insurer's internal evaluation of a first-party claimant's noneconomic damages does not establish an "undisputed" amount of benefits owed and is therefore not subject to immediate payment.

Blakeland v Taghavi —*Indivisible damages precludes finding of joint and several liability* - 2023COA30 (03/30/23). The trial court entered judgment holding defendants jointly and severally liable for environmental property damage. On appeal, the Court of Appeals held that §13-21-111.5 [contribution statute] precludes a judgment of joint and several liability with regard to damages that the trial court found were indivisible. The Court concluded that the General Assembly did not adopt the Restatement (Second) of Torts section 433B (2) (Am. L. Inst. 1965), which provides that a court may determine that defendants are jointly and severally liable when it finds that damages are indivisible. Accordingly, it held that the plain language of

section 13-21-111.5 requires the apportionment of liability in this case and that section 433B (2) of the Restatement (Second) of Torts may not supersede the statute.

Air Solutions v. Spivey — *Manifesto on specific performance issued by COA* - 2023COA14 (Colo. App. 02/09/23). The Court of Appeals addressed a number of issues [112 pages worth] relating to specific performance as a remedy for a breach of contract. In particular, it addressed the adequacy of damages and perceived uncertainties in the parties' agreement as those issues bear on specific performance of a contract to convey an interest in a closely held business.

DeAguero v. Latitude Tree House LLC – *Construction accident on premises was not within the scope of PLA* - 21CA1988 (1/26/23) **(NSOP)** - Latitude retained Primo Construction, LLC to undertake landscape improvements at the apartment complex. Primo started the landscaping improvements in April 2018, and Latitude received regular updates and reports regarding Primo's work. While Primo worked on the project at the apartment complex, DeAguero worked for Primo as an independent contractor. In late July 2018, an employee of Primo rotated the excavator bucket, striking Plaintiff DeAguero in the head. DeAguero was seriously injured. He brought a premises liability claim and the trial court granted summary judgment. The Court of Appeals affirmed the summary judgment in favor of Latitude because (1) the district court properly defined the "dangerous condition" and (2) Latitude did not have actual or constructive knowledge of the dangerous condition. It noted that the dangerous condition was Toribio changing the tire by lifting the skid steer with the excavator, which created the risk of DeAguero getting hurt, not the overall construction site working conditions. It specifically held that while it is true that a landowner under the PLA cannot delegate a duty to an independent contractor to protect an individual against dangers on their property, those dangers must be "within the scope of the statute" and that the "dangers within the "scope of the statute" of the PLA entail dangers that the "landowner actually knew about or should have known about."

Mitton v. Danimaxx of Colo. —*COA holds selling alcohol to patron who did not consume it does not create liability* = 2023COA18 (02/23/2023). In this civil action under the Colorado Dram Shop Act, § 44-3- 801(3)(a) to recover for losses caused by a drunk driver, the Court of Appeals considered whether a vendor can be liable where it sold alcohol to the already-intoxicated driver, but the driver did not consume that alcohol before the accident. Relying on the plain language of section 44-3-801(3)(a), the division concluded that the statute unambiguously requires that there be a causal connection between the alcohol sold by the vendor and the intoxication of the purchaser. Thus, the vendor is not liable in the circumstances presented here. In so holding, the Court rejected the plaintiffs' argument that the statutory language can support a contrary conclusion, as well as the plaintiffs' reliance on public policy, legislative history, and case law from other jurisdictions.

Bara v. ICAO —*Court affirms denial of unemployment benefits due to failure to get COVID vaccination* - 2023COA19 (02/23/23). In this unemployment benefits case, the court of appeals concluded that the Industrial Claim Appeals Office correctly determined that the claimant was disqualified from unemployment benefits because her separation from employment was based on her volitional violation of a company rule that required employees to either get a COVID-19 vaccination or request an exemption by a specified deadline.

Mid-Century Insurance Company v. HIVE Construction, Inc. —*Court of Appeals held economic loss rule does bar claims for willful and wanton conduct* - 2023COA25 (03/16/23) In this tort action, where the plaintiff asserted a single negligence claim, alleging that the defendant engaged in willful and wanton conduct. The district court denied the defendant's motion for a directed verdict based on the economic loss rule, extending the holding of *McWhinney Centerra Lifestyle Center LLC v. Poag & McEwen Lifestyle Centers-Centerra LLC,* 2021 COA 2, to conclude that the economic loss rule does not apply to bar claims alleging willful and wanton conduct. The Court of Appeals concluded that the district court erred because neither McWhinney nor the supreme court case on which McWhinney relied, *Bermel v. BlueRadios, Inc*., 2019 CO 31, preclude application of the economic loss rule to bar common law negligence claims involving willful and wanton conduct. Instead, the Court clarified that the economic loss rule may still apply to such a claim, provided the claim is based solely on the breach of a contractual duty resulting in purely economic loss.

Madalena v. Zurich Am. Ins. Co. — *Court of Appeals holds findings in WC compensation proceeding are not determinative in subsequent bad faith litigation - 2023*COA32 (04/06/23). The Court of Appeals concluded that findings of fact and conclusions of law in workers' compensation proceedings are binding on an insurance company in the injured worker's subsequent bad faith litigation against that insurer or whether they were barred by the doctrine of issue preclusion. The Court concluded that the issues for which the appellant in this case asserted issue preclusion were not identical to the issues actually litigated and necessarily adjudicated in the workers' compensation proceedings. (The issues litigated in the bad faith case did not include the compensability of the worker's injury or the benefits due to him under the Workers' Compensation Act of Colorado.) Similarly, the division concludes that the appellees did not have a full and fair opportunity to litigate those issues in the prior proceedings. Therefore, the division holds that, under the facts of this case, the administrative determinations do not have preclusive effect in the bad faith case.

USIC Locating Servs v. Project Res Grp — *Voluntary dismissal voids earlier orders on indispensable parties-* 2023COA33 (04/06/23). Defendant filed a Rule 19 motion asserting indispensable parties were not named and that the suit should be dismissed. The trial court agreed but indicated it would permit an amended complaint. Plaintiff then voluntarily dismissed its complaint. The issue in this appeal

was whether the plaintiff's voluntary dismissal of its complaint under Rule 41(a)(1)(A) voided the trial court's prior orders on necessary and indispensable party issues under Rules 12(b)(6) and 19 and divested the trial court of jurisdiction to enter a later order dismissing the action with prejudice. The Court of Appeals held it did. The court vacated the trial court order of dismissal and remanded with instructions to dismiss the action without prejudice. The court also concluded that it lacks jurisdiction to consider the defendant's challenge to an order awarding attorney's fees because the trial court has not reduced the amount of fees to a sum certain and, thus, the order is not final.

Giron v. Hice —*Lights, camera, then chase the bad buy or else you are liable* - 2022COA85 (7/28/22). Under *Tidwell v. City & County of Denver,* 83 P.3d 75 (Colo. 2003), the Supreme Court held that Colorado governmental immunity could be waived when an operator of an emergency vehicle is in pursuit of an actual violator of the law. One issue that remained was Defendant's emergency lights were only being activated for five or 10 seconds prior to the collision. That court concluded if an officer and public entity want governmental immunity, the officer must activate lights or a siren when exceeding the speed limit. It's not enough to activate lights or sirens sometime after the speed limit is exceeded. and does not have the vehicle's emergency lights or sirens activated at all during that pursuit.

Nation SLP, LLC v. Bruner —*Forum non conveniens is not a final judgment.* - 2022COA76 (07/14/22). Does another jurisdiction's dismissal of an action on *forum non conveniens* grounds has a preclusive effect on a similar action brought in Colorado courts? That is the question here. The division concludes that, because a *forum non conveniens* dismissal is not a "final judgment on the merits," the doctrine of issue preclusion does not bar litigating the case in Colorado.

Leonard v. Interquest — *Expansion of CORA approved by Court* - 2022COA78 (07/14/22) The operative holding in this case is that when a public entity has a contractual right to access documents from a third party, that entity has "direct[ed] [the third party] to have care, custody, or control of the document[s]." The Court of Appeals concludes that if the documents are used for a public purpose, as they were here, the documents are therefore public records within the meaning of the Colorado Open Records Act (CORA), and the public entity must produce those documents upon a proper CORA request.

In re Estate of Chavez —*How to calculate a civil theft claim*- 2022COA89 (08/04/22). As a matter of first impression, a division of the court of appeals concluded that in awarding treble damages under section 18-4-405 [civil theft] a trial court must treble the actual damages awarded by the jury before offsetting any amounts already repaid.

Galef v. University of Colorado — *A wet mopped floor may be a dangerous condition* — 2022COA91 (08/04/22). For a slip-and-fall tort claim under the Premises Liability Act against the University of Colorado, a division of the court of appeals considers whether the University has waived its sovereign immunity for a "dangerous condition of any public building". Specifically, the division considers whether a "dangerous condition" exists when the University failed to post a "wet floor" sign or otherwise warn that a recently mopped dormitory staircase is imperceptibly wet and slippery. The Court first concluded that the University's failure to warn the plaintiff of a hazard it created by mopping can constitute a "dangerous condition," as it is a "negligent . . . omission . . . [in] maintaining" the dormitory that is not attributable solely to the inadequate design of the staircase. The Court then concluded that the imperceptibly wet, slippery stairs — together with the University's failure to warn of them — "constitute[d] an unreasonable risk to the health or safety of the public" under the definition of "dangerous condition" as it's been interpreted by the supreme court.

Herrera v. Santangelo Law Offices, P.C. *– Arbitrator has no authority to sanction party's counsel* - 2022COA93 (8/11/22). Touchstone contracted with Santangelo for legal services which contained the arbitration clause that the parties agree to submit any controversy or claim that arose from this agreement or the parties' relationship to confidential binding arbitration by a single attorney. In an arbitration between Santangelo Law Offices, P.C. and Touchstone Home Health LLC, an arbitrator sanctioned Touchstone's arbitration counsel, Robert Herrera, after Herrera was accused of fraudulently obtaining Santangelo's signature on a settlement agreement while falsely telling an arbitrator the parties settled. The arbitrator awarded Santangelo about $150,000 against Herrera personally for attorney fees Santangelo incurred when responding to Herrera's alleged falsehood and in pursuing sanctions against him. In a district court suit, Herrera moved to vacate the arbitrator's award of sanctions against him, which the court denied. Herrera believed the award of sanctions should be vacated because he didn't agree to arbitrate the issues of attorney sanctions either individually in the arbitration or as a non-party that was bound to the Touchstone-Santangelo fee agreement. He also contended the arbitrator didn't have the authority to sanction the attorney of an arbitrating party, unless there was an agreement granting the arbitrator that authority. The appeals court agreed with both of Herrera's contentions. As a non-party to the arbitration agreement, the attorney wasn't bound to his client's arbitration obligation under ordinary principles of contract or agency law. The appeals court concluded the arbitrator didn't possess the authority to sanction the attorney by virtue of the client's arbitration obligation. The appeals court also concluded the arbitrator didn't possess the authority to sanction the attorney.

Fresquez v. Trinidad Inn — 2022COA96 (8/25/22). A division of the court of appeals considers an agent's authority to bind a principal to an arbitration agreement under the Health-Care Availability Act (the Act), §§ 13-64-101 to -503, C.R.S. 2021.

While the Act details the steps a health care provider must take to form an enforceable arbitration agreement with a patient, it is silent regarding the requirements that a patient's agent must satisfy to bind the patient to an arbitration agreement. In this case, the division considers the novel issue of whether an agent with actual authority to execute the documents required to admit the patient to a health care facility necessarily also possesses the authority to bind the patient to an arbitration agreement with the facility. The division holds that an agent's actual authority to make health care decisions for a patient and to sign the documents necessary to admit the patient to a health care facility does not encompass the authority to bind the patient to an arbitration agreement, unless the patient has granted the agent an unlimited power of attorney or otherwise clearly granted the agent the specific authority to bind the patient to an arbitration agreement.

Mohammadi v. Kinslow – *Tolling and the statute of limitations* - 2022COA103 (9/8/22). Daniala Mohammadi appealed a district court's judgment dismissing her complaint against Mark Kinslow, as time-barred. In 2015 Mohammadi, who was 16 at the time, was injured when Kinslow allegedly hit her bicycle with his car. Mohammadi turned 18 in January 2017 and sued Kinslow almost three years later in December 2019, alleging negligence and negligence per se. Under section 13-81-103(1)(c), a plaintiff who is a "person under disability" when her cause of action accrues but whose disability is later terminated may take action "within the period fixed by the applicable statute of limitations or within two years after the removal of the disability, whichever period expires later." As a matter of first impression in Colorado, the Court of Appeals had to determine the application of section 13-81-103(1)(c) to a situation in which the plaintiff's disability is terminated before the applicable statute of limitations expires. In a 2-1 decision, the Court of Appeals concluded that it is bound by precedent holding that the applicable statute of limitations is tolled during the plaintiff's period of disability and then it begins to run when the disability is terminated.

M.G. Dyess, Inc. v. MarkWest Liberty Midstream & Resources, L.L.C. — *Party entitled to jury on quantum meruit claim; and court may not unilaterally reduce damages of jury verdict* - 2022COA108 (9/15/22). The Court of Appeals considers whether quantum meruit claims are legal or equitable for purposes of determining whether a party has a right to a jury trial on such a claim. The Court concluded that, where the claimant has requested monetary damages, the quantum meruit claim is legal, and the claimant is entitled to a jury trial. The Court further considered whether, pursuant to C.R.C.P. 52, a trial court may unilaterally reduce the amount of damages awarded in a binding jury verdict. It concludes that C.R.C.P. 52 does not provide that authority.

Salazar v. Public Trust Institute —*The first SLAPP case* - 2022COA109 (9/15/22). The Court of Appeals held that for an administrative proceeding to form the basis of

a malicious prosecution claim under section 13-20-1101, commonly known as Colorado's anti-SLAPP statute, it must be quasi-judicial in nature.

Scholle v. Ehrichs, et al. – *An extensive and comprehensive opinion on medical cap limits and interest that is too long to summarize but should be read* - 2022COA87 (7/28/22). [CERT GRANTED] A 2-1 decision, so we have not heard the last of this case. Among other things, the Court of Appeals considered whether the trial court abused its discretion in entering a judgment in excess of the Health-Care Availability Act's $1 million damages cap. The COA held that in entering judgment in excess of the damages cap, the trial court did not consider that the injured party would not have to repay any third-party providers or payers for approximately $6 million in past medical expenses and reversed the trial court.

Stickle v. County of Jefferson — *Jeffco is liable for a PLA claim at its county parking garage* – 2022COA79 - (7/21/22) [CERT GRANTED]. The plaintiff fell and was injured in a county's public parking structure. She brought this premises liability claim against the county based on the incident. The county moved to dismiss, asserting immunity from the plaintiff's claim under the GIA. The county also asserted that the GIA's waiver of immunity for a dangerous condition of a public building does not apply in this case as it was a design defect. The trial court disagreed and denied the motion to dismiss. On a Trinity appeal, the Court of Appeals held that a public parking structure can be a public building under the CGIA. The division also rejected the county's contention that the defect alleged here was not a dangerous condition because it was attributable to the design of the parking structure.

Woo v. Baez - Substituted *service on attorney representing defendant in regulatory action was sufficient* - 2022COA113 (09/29/22). Plaintiff appealed the judgment dismissing his claims against defendants Jose Angel Baez and Michelle Medina for lack of personal jurisdiction and his claims against defendant Richard Bednarski due to Woo's failure to file a certificate of review. The Court of Appeals reversed the jurisdiction dismissal as to the claims against Baez and Medina because the district court erred by denying substituted service upon the attorney representing them in a regulatory action. The Court also rejected the unconstitutional 'as applied' challenge to the certificate of review statute, finding because Woo could not comply with the statute solely because he was indigent, the challenge to its constitutionality failed.

People v. Johnson —*Court of Appeals adopts per se approach to race-based juror challenges* - 2022COA118 (10/13/22) The Court of Appeals held that when the proponent of a peremptory challenge offers both a race-based and a race-neutral explanation in response to a *Batson* challenge, the trial court must apply the "*per se*" approach and uphold the challenge because once a discriminatory reason has been offered, this reason taints the entire jury selection process. Applying that approach here, the division reversed the defendant's convictions and remands for a new trial. Because it may arise on remand, the division addresses, and rejects, the challenge to

the admission of the generalized expert testimony about common features of domestic violence relationships even though some of those features "had no logical connection" to the facts of the case.

People v. Romero — *Court of Appeals reverses conviction because record as to reason for pre-emptory challenge was not contained in record* - 2022COA119 (10/13/22) A division of the court of appeals considers whether the trial court's ultimate ruling denying a Batson challenge was clear error. The majority examined whether anything in the record supported the trial court's decision to credit the prosecution's proffered race-neutral reason (that the juror appeared disinterested) for the peremptory challenge. The majority concluded that the trial court's ruling was clear error because (1) there was nothing in the record supporting the trial court's decision to credit the prosecution's subjective assessment that the juror appeared disinterested, not even an identification of the juror's behavior that led the prosecution to believe he was disinterested; and (2) other parts of the record tended to undermine the credibility of the prosecution's assessment that the juror appeared disinterested. The majority therefore reversed the judgment of conviction and remands for retrial. The dissent disagrees.

DiPietro v Coldiron — *Attorney client privilege records not subject to disclosure under Open Records Act* - 2022COA121 (10/13/22) In this C.A.R. 4.2 interlocutory appeal, The Court of Appeals considered as a matter of first impression whether records protected by the attorney-client privilege, or the deliberative process privilege are nevertheless subject to disclosure to a "person in interest" under the Colorado Open Records Act. The division concluded that they are not subject to disclosure under the plain language of section 24-72-204(3)(a).

Home Improvement, Inc. v. Villar No. - Court *of Appeals addresses the meaning of service at a last known address* - 2022COA129 (11/03/22). A division of the court of appeals defined for the first time "address" and "last known address" as those terms are used for purposes of service of process by mail or publication in and in rem proceeding. Rule 4(g) permits service by mail or publication under certain circumstances. A verified motion seeking service by mail or publication must state "the address, or last known address" of the person to be served. For service by mail, a copy of the process must be sent by registered or certified mail to such address and a signed return receipt is required before service is complete. Return of the mailing establishes that the address is not the last known address. Thus, "address" is the place at which a party generally recognizes that another party can be communicated with, and "last known address" is the most recent such place.

US SUPREME COURT

Dupree v. Younger – *Post-trial appeal of strictly legal decision is unnecessary* - Docket: 22-210 (05/25/23). A post-trial motion under Federal Rule of Civil Procedure 50 is not required to preserve for appellate review a purely legal issue resolved at summary judgment. Holding that a reviewing court does not benefit from having a district court reexamine a purely legal pretrial ruling, the Court resolved a conflict among circuits and found a strictly legal decision is not "supersede[d]" by later developments in the litigation and so such rulings merge into the final judgment, at which point they are reviewable on appeal.

United States ex rel. Schutte v. Supervalu Inc. – *Court holds False Claims scienter refers to defendant's knowledge, not objective belief* - Docket: 21-1326 (06/01/23). Petitioners sued retail pharmacies under the False Claims Act (FCA), which permits private parties to bring lawsuits in the name of the United States against those who they believe have defrauded the federal government and imposes liability on anyone who "knowingly" submits a "false" claim to the government. The Supreme Court held that the FCA's scienter element refers to a defendant's knowledge and subjective beliefs—not to what an objectively reasonable person may have known or believed. The FCA's three-part definition of the term "knowingly" largely tracks the traditional common-law scienter requirement for claims of fraud: Actual knowledge, deliberate ignorance, or recklessness will suffice.

Perez v. Sturgis Public Schools - Docket: 21-887 (3/21/23) (Gorsuch). The Individuals with Disabilities Education Act includes administrative procedures for resolving disputes concerning a free and appropriate public education for a child with a disability. The statute says that "Nothing in [IDEA] shall be construed to restrict" the ability of individuals to seek "remedies" under "other Federal laws protecting the rights of children with disabilities," section 1415(l), "except that before the filing of a civil action under such [other federal] laws seeking relief that is also available under this subchapter, the procedures under subsections (f) and (g) shall be exhausted." Those subsections establish the right to a "due process hearing" followed by an "appeal" to the state education agency. Perez, who is deaf, attended Sturgis public schools and was provided with aides to translate classroom instruction into sign language. In this action, Perez alleged that the aides were either unqualified or absent from the classroom. Sturgis allegedly promoted Perez regardless of his progress. Perez believed he was on track to graduate from high school. Months before graduation, Sturgis revealed that it would not award him a diploma. Perez filed a complaint with the Michigan Department of Education. Before an administrative hearing, the parties settled. Sturgis promised to provide Perez with forward-looking equitable relief, including additional schooling at the Michigan School for the Deaf. Perez then sought compensatory damages under the Americans with Disabilities Act (ADA), 42 U.S.C. 12101. The Supreme Court dismissed, reasoning that compensatory damages are unavailable under IDEA. Although Perez's suit is premised on the

denial of a FAPE, the administrative exhaustion requirement applies only to suits that "see[k] relief … also available under" IDEA.

Wilkins v. United States - Docket: 21-1164 (03/28/23) (Sotomayor). Petitioners acquired their properties along the road in 1991 and 2004; in 1962, their predecessors in interest had granted the government an easement for the road. The government moved to dismiss the petitioners' suit under the Quiet Title Act, citing the 12-year limitations period, 28 U.S.C. 2409a(g). The Ninth Circuit affirmed the dismissal for lack of jurisdiction. The Supreme Court reversed, characterizing section 2409a(g) as a non-jurisdictional claim-processing rule, intended to promote the orderly progress of litigation. Limits on subject-matter jurisdiction have a unique potential to disrupt the orderly course of litigation, so courts should not lightly apply that label to procedures Congress enacted to keep things running smoothly unless traditional tools of statutory construction plainly show that Congress imbued a procedural bar with jurisdictional consequences. Congress's separation of a filing deadline from a jurisdictional grant indicates that the time bar is not jurisdictional. The Quiet Title Act's jurisdictional grant is in section 1346(f), far from 2409a(g), with nothing linking those separate provisions. Section 2409a(g) speaks only to a claim's timeliness. The Court characterized a case cited by the government as a "textbook drive-by jurisdictional" ruling that "should be accorded no precedential effect" as to whether a limit is jurisdictional. Rejecting other cited cases, the Court stated that it has never definitively interpreted section 2409a(g) as jurisdictional.

TENTH CIRCUIT COURT OF APPEALS

DIRTT Environmental Solutions, et al. v. Falkbuilt, et al. – *Forum non conveniens action must be dismissed as to all parties* - Docket: 21-4078 (04/11/23). In a matter of first impression, the issue presented for the Tenth Circuit's review centered on whether a district court could appropriately dismiss part of an action pursuant to the *forum non conveniens* doctrine while allowing the other part to proceed before it. Reasoning that the *forum non conveniens* doctrine was fundamentally concerned with the convenience of the venue the Court concluded the answer to that question was "no", a district court clearly abuses its discretion when, as here, it elects to dismiss an action as to several defendants under a theory of *forum non conveniens* while simultaneously allowing the same action to proceed against other defendants.

Elevate Federal Credit Union v. Elevations Credit Union – *Court within authority to disallow expert testimony for failure to disclose; and affirms lack of confusion finding by district court* - Docket: 22-4029 (05/10/23). This appeal concerns a trademark dispute between two credit unions: "Elevate Federal Credit Union" and "Elevations Credit Union." Elevate sued for a declaratory judgment of noninfringement, and Elevations counterclaimed for trademark infringement under the Lanham Act. The appeal presented two issues for the Tenth Circuit's resolution: (1) whether the district court acted within its discretion when disallowing Elevations' expert testimony because Elevations failed to disclose information that the expert witness considered; and (2) whether the marks belong to credit unions with differing eligibility restrictions in distinct geographic markets, could the presence of some similarities create a likelihood of confusion. The Tenth Circuit concluded the district court did not abuse its discretion in disallowing the expert testimony, and the differing eligibility restrictions in differing markets did not create a likelihood of confusion.

Giertz v. State Farm – *Bifurcation and bad faith* - No. 22-2224 (10th Cir. 05/26/23). Giertz was injured in an automobile-bicycle accident involving Gordon. Giertz sought underinsured motorist benefits from State Farm, her automobile liability insurer. The district court severed for trial Giertz's contract claim from her common-law and statutory bad faith claims. It concluded that by first resolving whether State Farm breached its contract with Giertz, the court could potentially save time and resources. The Tenth Circuit held the district court did not abuse its wide discretion in severing the issue of Gordon's liability from the remaining breach issues and from the bad-faith claims. The liability issue is separate from the remaining breach issues and bad-faith claims. The district court reasonably concluded bifurcation would further efficiency, while minimizing prejudice and confusion. And, the appellate court continued, the district court correctly concluded, pursuant to the dictates of *Sunahara*, that State Farm's internal claim deliberations were legally irrelevant to

the question of Gordon’s liability. **[Note: the case is not binding precedent but may be cited for persuasive value].**

M Welles & Associates v. Edwell – *Court affirms finding of unlikelihood of confusion* - Docket: 22-1248 (05/31/23). Plaintiff-Appellant M Welles and Associates, Inc. appealed a district court's decision concluding that Defendant-Appellee Edwell, Inc. was not liable for trademark infringement, thereby granting final judgment for Edwell. The marks were similar, but similarity notwithstanding, the magistrate judge found that consumers were unlikely to be confused by the marks because Edwell never intended to copy Welles’s mark, the parties operated in different markets, consumers were likely to exercise a high degree of care in selecting the parties’ services, and there was almost no evidence of actual confusion. On appeal, Welles argued the magistrate judge applied an erroneous legal standard in analyzing likelihood of confusion, urged the Tenth Circuit Court of Appeals to adopt a presumption of confusion for cases like this one, and contended that the magistrate judge clearly erred in finding no likelihood of confusion. The Tenth Circuit rejected each of Welles’s arguments and affirmed final judgment for Edwell.

McAuliffe, et al. v. Vail Corporation – *Court affirms dismissal of breach of contract claim, but remands action without prejudice to permit other causes of action* - Docket: 21-1400 (06/06/23). In March 2020, The Vail Corporation and Vail Resorts, Inc. (collectively, “Vail”) closed its ski resorts and did not reopen them until the start of the 2020–2021 ski season. Plaintiffs-Appellants (“Passholders”) were a group of skiers and snowboarders who purchased season passes from Vail to access its resorts during the 2019–2020 ski season. Passholders, on behalf of themselves and a class of similarly situated individuals, brought contractual, quasi-contractual, and state consumer protection law claims based on Vail’s decision to close due to the COVID-19 pandemic without issuing refunds to Passholders. The district court granted Vail’s 12(b)(6) motion to dismiss all of Passholders’ claims for failure to state a claim. Passholders appealed, arguing the district court erred in its interpretation of their contracts with Vail. Although it did not agree with the district court’s interpretation of “2019–2020 ski season,” the Tenth Circuit concurred with the ultimate conclusion that Passholders failed to state a contractual claim. Passholders sought only one form of relief in their complaint, but they purchased passes under the condition that the passes were not eligible for refunds of any kind. Recognizing that Passholders might amend their breach of contract and breach of warranty claims to seek other forms of relief, the Tenth Circuit vacated the dismissal of these two claims with prejudice and remanded for the district court to modify its judgment to a dismissal without prejudice. As to the Passholders’ breach of contract and breach of warranty claims, the Court concluded the district court correctly dismissed Passholders’ consumer protection claims. Recognizing Passholders could refile these claims to seek an alternative remedy, the Tenth Circuit vacated the district court’s dismissal of Passholders’ state consumer protection law claims with prejudice so the district court could modify its dismissal of these six claims to be without prejudice.

Health and Hospital Corp. of Marion County v. Talevski - Docket: 21-806 (10th Cir. 6/8/23). After Talevski's move to a nursing home proved problematic, Talevski sued a county-owned nursing home [Plaintiff] under 42 U.S.C. 1983, claiming that HHC's actions violated rights guaranteed him under the Federal Nursing Home Reform Act (FNHRA). The Seventh Circuit reversed the dismissal of the suit, concluding that the FNHRA rights cited by Talevski—the right to be free from unnecessary chemical restraints and rights to be discharged or transferred only when certain preconditions are met, "unambiguously confer individually enforceable rights on nursing home residents," presumptively enforceable via section 1983. The Supreme Court affirmed. The FNHRA provisions at issue unambiguously create section 1983-enforceable rights. There is no incompatibility between private enforcement under section 1983 and the remedial scheme that Congress devised. The Court rejected HHC's argument that, because Congress apparently enacted the FNHRA pursuant to the Spending Clause, Talevski cannot invoke section 1983 to vindicate rights recognized by the FNHRA. FNHRA lacks any indicia of congressional intent to preclude section 1983 enforcement, such as an express private judicial right of action or any other provision that might signify that intent. Plaintiff cited the comprehensiveness of FNHRA's enforcement mechanisms, but implicit preclusion is shown only by a comprehensive enforcement scheme that is incompatible with individual enforcement under section 1983. There is no indication that private enforcement under section 1983 would thwart Congress's scheme by circumventing the statutes' pre-suit procedures, or by giving plaintiffs access to tangible benefits otherwise unavailable under the statutes.

Johnson v. Heath, et al. – *Tenth Circuit holds sales scam does not constitute RICO violation* - Docket: 20-4095 (10th Cir. 12/28/22). Defendants Michael and Dawn Heath sold Plaintiff Harry Johnson a gasoline and automobile-service station in Wells, Nevada. Soon after the sale, Plaintiff allegedly discovered that the property had material, undisclosed defects and that Defendants had artificially inflated the business's profits by scamming customers over the years. In suing them, Plaintiff asserted many state-law claims against both Defendants and a claim against Defendant Michael Heath under the federal RICO. The district court dismissed Plaintiff's RICO claim for failure to state a claim upon which relief could be granted and declined to exercise supplemental jurisdiction over the remaining state claims. The issue Plaintiff's appeal raised for the Tenth Circuit's review centered on whether Defendants' actions as alleged plausibly violated the federal RICO statute. Because the Court concluded they did not, it affirmed the district court's judgment.
Evanston Insurance Company v. Desert State Life Management, et al. – Mixed holding in NM rescission/coverage case - Docket: 21-2145 (10th Cir. 12/30/22). Evanston Insurance Company appealed the judgment following a bench trial on an insurance-coverage dispute. After determining that Evanston failed to timely rescind the policy and that a policy exclusion did not apply, the district court required Evanston to continue defending Desert State Life Management against a class action

arising from its former CEO's embezzlement scheme. Though the Tenth Circuit agreed with the district court that rescission was untimely, it disagreed about the likely application of New Mexico law on applying policy exclusions. Judgment was thus affirmed in part and reversed in part.

Rocky Mountain Wild v. United States Forest Service, et al. – *Tenth Circuit affirms district court holding on FOIA disclosure* - Docket: 21-1169 (10th Cir. 12/30/22). For years the parties in this case litigated the propriety of a proposed development in the Wolf Creek Ski Area—which the US Forest Service managed. The proposed development was a plan for highway access known as "the Village at Wolf Creek Access Project." Plaintiff challenged this plan because of alleged environmental risks to the surrounding national forest. The highway-access litigation continued, and it generated a 2018 FOIA request from Plaintiff asking Defendant for "all agency records regarding the proposed Village at Wolf Creek Access Project." Plaintiff's request caused an enormous undertaking by Defendant. The statute instructed government agencies to use reasonable efforts to produce responsive records upon request. The response exempted nine categories of records from public disclosure. Plaintiff requested and received voluminous records under FOIA but claimed Defendants United States Forest Service and United States Department of Agriculture abused statutory limitations to hide information about projects that harmed the environment. The district court rejected Plaintiff's speculative theory and found USFS's efforts to comply with Plaintiff's FOIA request reasonable. Finding no reversible error in that judgment, the Tenth Circuit affirmed.

Sagome v. Cincinnati Insurance Company – *Tenth Circuit rejects coverage argument of COVID losses* - Docket: 21-1359 (10th Cir. 01/03/23). Sagome, Inc.'s restaurant, L'Hostaria, suffered significant financial losses from reduced customer traffic and government lockdowns and restrictions relating to the COVID-19 pandemic. It sought to recover under its comprehensive general insurance policy. Like many insurers, Cincinnati denied coverage because the virus did not impose physical loss or damage as required by the policy. Sagome sued, but the district court concluded its financial losses were not covered. Addressing Sagome's coverage under Colorado law, the Tenth Circuit agreed and affirmed: COVID-19 did not cause Sagome to suffer a qualifying loss because there was never any direct physical loss or damage to L'Hostaria.

Brigham v. Frontier Airlines - *Tenth Circuit affirms ADA claim holding duty to accommodate did not require taking steps inconsistent with bargaining agreement* - Docket: 21-1335 (10th Cir. 01/24/23). Plaintiff-appellant Rebecca Brigham worked as a flight attendant for defendant Frontier Airlines. Brigham was a recovering alcoholic who wanted to avoid overnight layovers because they tempted her to drink. To minimize overnight layovers, Brigham asked Frontier: (1) to excuse her from the airline's bidding system for flight schedules; or (2) to reassign her to the General Office. Frontier rejected both requests. Unable to bypass the bidding system or move

to the General Office, Brigham missed too many assigned flights and Frontier fired her. The firing led Brigham to sue under the Americans with Disabilities Act. The district court granted summary judgment to Frontier, finding that the airline's "duty to accommodate" didn't require the employer to "take steps inconsistent with" a collective bargaining agreement. Further, Frontier had no vacancy in the General Office. A position in the General Office was available only for employees injured on-the-job. Brigham had no on-the-job injury, so she wasn't similarly situated to the flight attendants eligible for reassignment to the General Office. Finding that the district court correctly granted summary judgment to Frontier, the Tenth Circuit affirmed.

Markley v. U.S. Bank – *Tenth Circuit holds notwithstanding flawed investigation, ADEA requires evidence of pretext* - Docket: 21-1240 (10th Cir. 02/28/23). U.S. Bank National Association ("U.S. Bank") employed Darren Markley as Vice President and Managing Director of Private Wealth Management at its Denver, Colorado location. Markley managed a team of wealth managers and private bankers. After an investigation, a disciplinary committee unanimously voted to terminate Markley's employment. At no time during the investigation did Markley suggest the allegations against him were motivated by his age, but over a year later, Markley filed suit advancing a claim under the Age Discrimination in Employment Act ("ADEA") and a wrongful discharge claim under Colorado law. U.S. Bank moved for summary judgment. As to the ADEA claim at issue in this appeal, the district court concluded Markley did not sustain his burden of producing evidence capable of establishing that U.S. Bank's reason for terminating his employment was pretext for age discrimination. On appeal, Markley contended U.S. Bank conducted a "sham" investigation, and this established pretext. For two reasons, the Tenth Circuit rejected Markley's assertion: (1) while an imperfect investigation may help support an inference of pretext, there must be some other indicator of protected-class-based discrimination for investigatory flaws to be capable of establishing pretext; and (2) even if deficiencies in an investigation alone could support a finding of pretext, Markley's criticisms of the investigation were unpersuasive and insufficient to permit a reasonable jury to find U.S. Bank's reasons for termination pretextual. Accordingly, the Court affirmed the district court's grant of judgment.

In re: Syngenta AG MIR162 – *Tenth Circuit affirms attorney's fees allocation of class action suit* - Docket: 19-3008 (02/28/23). Numerous plaintiffs from multiple different states sued Syngenta AG, an agricultural company. The suits against Syngenta were organized into complex, federal multi-district litigation ("MDL") based in a court in the United States District Court for the District of Kansas. Syngenta ultimately settled with the class action plaintiffs. This appeal involved a dispute over the allocation of approximately $503 million in attorneys' fees and expense awards stemming from the settlement – and to which of the myriad firms participating in the class action those funds should be paid. Appellants in this case—the various plaintiffs' lawyers and law firms that took part in the MDL against Syngenta—

challenged numerous orders published by the Kansas district court concerning the apportionment and allocation of that $503 million. The district court, having concluded it possessed significant authority to craft the allocation of attorneys' fees in the most reasonable manner, had adopted a two-stage, "general approach" of an appointed special master to the allocation of the attorneys' fee award. Appellees, also lawyers and law firms from Kansas, Minnesota, and Illinois, who acted as co-lead counsel and by-and-large spearheaded the litigation against Syngenta in the three main fora, opposed Appellants' arguments and sought an order affirming the Kansas district court's fee-allocation orders. Finding no reversible error in the Kansas court's distribution of the fees, the Tenth Circuit affirmed.

Atlas Biologicals v. Biowest, et al. - Docket: 20-1401 (10/11/22). Plaintiff-Appellee Atlas Biologicals, Inc. sued its former employee Thomas Kutrubes for various federal intellectual-property claims. Kutrubes, seemingly as an attempt to thwart Atlas's ability to collect a likely judgment against him, transferred his 7% ownership interest in Atlas to Atlas's rival Defendant- Appellant Biowest, LLC ("Biowest"). Once Atlas found out about this alleged transfer, it sought a writ of attachment in the district court against Kutrubes's interest in Atlas, which the district court granted. But in granting the writ, the district court explained that it did not know what interest Kutrubes still had in Atlas and raised the idea of Atlas filing a separate declaratory judgment action. Atlas did so, and that action was the lawsuit before the Tenth Circuit in this appeal. The question for the Court was whether the district court properly found in favor of Atlas in this action in light of the fact that it did not have an independent source of federal jurisdiction to decide the question of state law that the action presented—a question that implicated a third party not involved in the initial suit. Reviewing these matters de novo, the Tenth Circuit concluded the district court acted properly and within the scope of its jurisdiction and agreed with the district court's resolution of the merits.

C1.G v. Siegfried, et al. – *10th Circuit reverses dismissal of student suspension* - Docket: 20-1320 (10th Cir. 07/06/22). Plaintiff-Appellant Cl.G., on behalf of his minor son, C.G., appealed a district court's dismissal of his case against Defendants-Appellees Cherry Creek School District (District or CCSD) and various employees for alleged constitutional violations stemming from C.G.'s suspension and expulsion from Cherry Creek High School (CCHS). In 2019, C.G. was off campus at a thrift store with three friends. He took a picture of his friends wearing wigs and hats, including "one hat that resembled a foreign military hat from the World War II period." C.G. posted that picture on Snapchat and captioned it, "Me and the boys bout [sic] to exterminate the Jews." C.G.'s post (the photo and caption) was part of a private "story," visible only to Snapchat users connected with C.G. on that platform. Posts on a user's Snapchat story are automatically deleted after 24 hours, but C.G. removed this post after a few hours. He then posted on his Snapchat story, "I'm sorry for that picture it was ment [sic] to be a joke." One of C.G.'s Snapchat "friend[s]" took a photograph of the post before C.G. deleted it and showed it to her father. The father

called the police, who visited C.G.'s house and found no threat. Referencing prior anti-Semitic activity and indicating that the post caused concern for many in the Jewish community, a CCHS parent emailed the school and community leaders about the post, leading to C.G.'s expulsion. Plaintiff filed suit claiming violations of C.G.'s constitutional rights. Defendants moved to dismiss, which was ultimately granted. On appeal, Plaintiff argued that the First Amendment limited school authority to regulate off-campus student speech, particularly speech unconnected with a school activity and not directed at the school or its specific members. Defendants maintained that C.G. was lawfully disciplined for what amounts to off-campus hate speech. According to Defendants, although originating off campus, C.G.'s speech still spread to the school community, disrupted the school's learning environment, and interfered with the rights of other students to be free from harassment and receive an education. The Tenth Circuit determined Plaintiff properly pled that Defendants violated C.G.'s First Amendment rights by disciplining him for his post; the district court's dismissal of Plaintiff's first claim was reversed in part. The Court affirmed dismissal of Plaintiff's further facial challenges to CCSD's policies. Questions of qualified and absolute immunity and Plaintiff's conspiracy claim were remanded for further consideration.

Irizarry v. Yehia - *No qualified immunity for officer interfering with journalist recording arrest -* Docket: 21-1247 (07/11/22). Plaintiff-appellant Abade Irizarry, a YouTube journalist and blogger, was filming a DUI traffic stop in Lakewood, Colorado. Officer Ahmed Yehia arrived on the scene and stood in front of Irizarry, obstructing his filming of the stop. When Irizarry and a fellow journalist objected, Officer Yehia shined a flashlight into Irizarry's camera and then drove his police cruiser at the two journalists. Irizarry sued under 42 U.S.C. § 1983, alleging that Officer Yehia violated his First Amendment rights. The district court granted the motion, concluding that the complaint alleged a First Amendment constitutional violation based on prior restraint and retaliation. Although the Tenth Circuit had not previously recognized a First Amendment right to record police officers performing their official duties in public, the district court, relying on out-of-circuit decisions, held that the First Amendment guaranteed such a right, subject to reasonable time, place, and manner restrictions. The district court nonetheless held that Officer Yehia was entitled to qualified immunity because Irizarry had not shown a violation of clearly established law. The Tenth Circuit found the complaint alleged a First Amendment retaliation claim under clearly established law, so Officer Yehia was not entitled to qualified immunity. Accordingly, judgment was reversed.

Nelson, et al. v. United States – *10th Circuit affirms fee award under exception to sovereign immunity -* Docket: 20-1267 (07/15/22). Plaintiff-appellee James Nelson was seriously injured while riding his bicycle on a trail on Air Force Academy property in Colorado. He and his wife, Elizabeth Varney, sued the United States under the Federal Tort Claims Act. Nelson sought damages for his personal injuries; Varney sought damages for loss of consortium. After several years of litigation, the district

court ruled the government was liable for Nelson's accident and injuries. The court based its decision on the Colorado Recreational Use Statute ("CRUS"). The court awarded Nelson more than $6.9 million and awarded Varney more than $400,000. In addition to the damages awards, the district court also ordered the government to pay plaintiffs' attorney's fees. CRUS contained an attorney's-fees-shifting provision, allowing prevailing plaintiffs to recover their fees against defendant landowners. Providing an exception to the United States' sovereign immunity, the Equal Access to Justice Act ("EAJA") provided that "[t]he United States shall be liable for such fees and expenses to the same extent that any other party would be liable under the common law or under the terms of any statute which specifically provides for such an award." The district court concluded that the government had to pay for plaintiffs' fees. The issue this case presented for the Tenth Circuit's review centered on whether the district court erred in ordering the government to pay the attorney's fees after holding the CRUS qualified under the EAJA as "any statute which specifically provides for" an attorney's fees award. Finding no reversible error, the Tenth Circuit affirmed the district court.

Wyoming Supreme Court

Safeway Stores v. WY Plaza – *Overpayment on lease entitles lessee to restitution* - Docket: 20-8064 (04/07/23) (WY law). Lessee, Safeway Stores 46, Inc., overpaid its lessor, WY Plaza, L.C. The lease allowed Safeway to deduct construction costs from the payments to WY Plaza, but Safeway neglected to make these deductions for twelve years before demanding repayment. WY Plaza rejected the demand based on Safeway's delay. Safeway responded by paying under protest and suing for restitution and a declaratory judgment. Both parties sought summary judgment. WY Plaza denied the availability of restitution because the parties' obligations had been set out in a written contract and the district court agreed. The court went further, deciding *sua sponte* that Safeway's delay prevented recovery under the doctrine of laches. The Tenth Circuit disagreed as to both bases for the trial court rulings. The Tenth Circuit concluded the district court erred in failing to notify Safeway before granting summary judgment to WY Plaza based on laches, in part because the district court relied on arguments that WY Plaza hadn't raised. The district court also erred in granting summary judgment to WY Plaza on the restitution claim: "The unilateral nature of Safeway's mistake doesn't prevent restitution." The Tenth Circuit reversed the entire case and held Safeway was entitled to summary judgment because WY Plaza failed to create a triable fact-issue, entitling Safeway to summary.