Colorado Defense Lawyers Association

Case law update

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COLORADO SUPREME COURT

Aurora Public Schools v. A.S. – *Statute bars claims under retroactive statute* - 2023CO39 (6/20/23). The Supreme Court held that the Child Sexual Abuse Accountability Act violates the constitutional prohibition on retrospective legislation. Legislation cannot revive claims for conduct that predates the Act and for which any previously available claims would be time-barred. The Court held that this Act creates a new cause of action that permits parties to bring claims for which any previously available cause of action would be time-barred. In so doing, the statute created a new obligation and attached a new disability to past transactions, thereby violating Colorado's constitutional prohibition on retrospective legislation.

Killmer Lane & Newman LLP v. BKP, Inc. – *Alleged defamation in news conference violates litigation privilege* - 21SC930 (09/22/23). The Colorado Supreme Court Monday found that an attorney's criticism of a beauty parlor during a news conference was protected from defamation claims finding that the attorney was merely repeating assertions of a wage lawsuit to reach potential class members. At a news conference and in a subsequent press release, the claimant attorney she said the company was "simply too cheap to pay its workers the money they deserve." The defendant asserted this defamed the company. The Colorado Court of Appeals panel found "no rational reason" for the law firms to make those statements to the media, but the Supreme Court disagreed, finding the attorney was clearly advancing the goals of the lawsuit. The Court also agreed with amici that the appellate ruling would create an "unworkable" limit on the litigation privilege, but it declined to adopt a bright-line rule that "would always allow defamatory statements," finding that such a broad ruling was not necessary.

Colo. State Bd. of Educ. v. Adams County School Dist. 14 and **Weld County v. Ryan-** *Supreme Court overrules special standing rule* - 2023CO52 and 2023CO54 (10/16/23). The Colorado Supreme Court threw out a 1976 rule that established a special standard for state and local government entities to have standing to file lawsuits, finding that they are subject to the same standing test as anyone else. The standing test prevented lawsuits challenging government decisions brought by subordinate government entities unless specifically allowed by law, but the test, known as "the rule of Martin" was held to be too confusing.

Edwards v. New Century Hospice, Inc. – *Supreme Court denies immunity to corporate entity* - 2023 CO49 (09/25/23). The supreme court considers whether the trial court properly denied immunity to corporate defendant and its subsidiaries under four different statutes. Three of the statutes only authorize immunity for a "person." § 12-20-402(1); § 12-255-123(2) and § 18-6.5-108(3). Relying on the plain meaning of "person," the Supreme Court held that a corporate defendant is not entitled to immunity because it does not meet the definition of "person" set forth in these three statutes. The fourth statute

explicitly entitles corporations to immunity, but only if certain conditions are met. Applying the plain language of that statute, the Supreme Court held that the defendant in this case was not entitled to summary judgment on the issue of immunity under this statute because it failed to demonstrate that all such conditions were met.

Garcia v. Colo. Cab- *Court holds rescuer can recover under rescue doctrine if injuries are foreseeable* - 2023CO56 (11/14/23) In this negligence case, the supreme court addresses (or continues to try and address) how to analyze proximate cause, in this case under the rescue doctrine. Utilizing the foreseeability approach, the court holds that, to prove proximate cause, a rescuer must show that his injuries were reasonably foreseeable based on the defendant's alleged tortious conduct and the nature of the rescue attempt. The Court then held that a rescuer's injuries are reasonably foreseeable if they naturally flow from the circumstances created by the defendant's tortious conduct or the rescue attempt. The opinion added that this does not mean that precisely how the injuries occurred had to be foreseeable, only that the harm was within the scope of risk that was reasonably foreseeable. The court then concluded that, based on the facts of this case, a reasonable jury could - and did - find that the rescuer's injuries were proximately caused by defendant's negligence.

Antero Treatment v. **Veolia Water Technologies-Statutory** – *Statutory cap on supersedeas bonds is constitutional* - 2023 CO59 (12/04/23). In this original proceeding, the Supreme Court addressed whether the $25,000,000 supersedeas bond cap set by section 13-16-125(1), C.R.S. (2023), is unconstitutional. The court concluded that the statute does not unconstitutionally infringe on the court's rulemaking authority as exercised in C.R.C.P. 121, section 1-23(3)(a), nor does the statutory bond cap violate equal protection principles. Finally, the court concluded that the trial court did not abuse its discretion by refusing to order post-judgment discovery or security beyond the $25,000,000 supersedeas bond. [Note: CDLA had testified in favor of the bill enacting this statute and joined in an amicus in support of the Defendant].

Johnson v. **Bursek** - *Rules of Professional Conduct*- 2024CO1 (01/16/24). The Supreme Court held that Colorado Rule of Professional Conduct 5.6(a) prohibits agreements which require a lawyer departing from a firm to pay the firm an undifferentiated per-client fee [$X per client taken] for continued representation of those clients. The court also held that Rule 5.6(a) constitutes public policy and that contractual violations of the Rule are void as against public policy. Finally, the court took notice of the court of appeal's *sua sponte* severability ruling and, in light of fairness concerns, vacated the court of appeals' opinion insofar as it conflicts with the trial court's severability analysis.

City & County of Denver v. Bd. of County Comm'rs of Adams County – *Breach of contract accrual* - 2024CO5 (01/29/2024). The Supreme Court clarified when a breach-of-contract claim accrues for purposes of the applicable three-year statute of limitations. It held that a breach-of-contract claim accrues at the time the breach is,

or in the exercise of reasonable diligence should have been, discovered. It found that the court of appeals erred when it applied an accrual rule based on when a plaintiff becomes aware of damages and possesses certainty of harm and incentive to sue, holding that that rule is inconsistent with the plain and ordinary meaning of the language of Colorado's accrual statute [§ 13-80-108(6)], the relevant case law, and the public policy considerations that underpin statutes of limitations.

County of Jefferson v. Stickle – *Court holds that parking structure was building and dangerous condition was not solely a design condition* – 2024CO7 (02/05/24). The Supreme Court held that PLA suit for damages sustained from an accident at the parking structure adjacent to the Jefferson County Courts and Administration Building may proceed and the County is not immune from suit. It held that the parking structure fell under the plain meaning of a "building" as the word is used in the GIA. Second, the court concluded that the dangerous condition that led to Stickle's accident was not attributable solely to the design of the parking structure and thus the County was not immune from suit under the GIA.

GHP Horwath, P.C. v. Kazazian -*Supreme Court enjoins litigant from filing more litigation* – 2024CO8 (02/20/2024). The Supreme Court enjoined Nina H. Kazazian, acting individually or on behalf of another entity, from proceeding *pro se* as a proponent of a claim (e.g., as plaintiff, third-party claimant, cross-claimant, or counterclaimant) in any present or future litigation in the state courts of Colorado. Acknowledging that every person has an undisputed right of access to Colorado courts, the Court also held that the right may not be abused and must yield to the principle that that right and justice should be administered without sale, denial, or delay. From this principal, the Court held that when a *pro se* litigant hampers the efficient administration of justice to an intolerable degree, it has a duty to stop the abuse with an injunction.

Hice v. Giron – *Court defines when the GIA exception for emergency vehicle use* - 2024 CO 9 (02/20/24). Defendant brothers died when Officer Hice collided with the Girons' van as the officer pursued a suspected speeder. The court of appeals reversed a summary judgment ruling, concluding that the governmental entity waived its immunity because Officer Hice did not use his emergency lights or siren for the entire time he was speeding in pursuit of the suspected speeder. Holding that an emergency driver waives GIA immunity when a plaintiff's injuries could have resulted from the driver's failure to use alerts while speeding in pursuit of a suspected or actual lawbreaker, the Court found that Hice's failure to use his lights or siren until the final five to ten seconds of his pursuit could have contributed to the accident, the Supreme Court remanded instructing the lower courts to analyze whether Officer Hice waived governmental immunity by failing to satisfy the condition that emergency drivers refrain from endangering life or property while speeding.

Miller v. Amos-Landlord and Tenant – *Court holds Fair Housing Act violation is an affirmative defense to FED action* - 2024CO11 (02/20/2024). The issue in this case was whether a tenant contesting a forcible entry and detainer action based on a notice to quit may assert a landlord's alleged violation of the Colorado Fair Housing Act as an affirmative defense. After examining the interplay between the Colorado Fair Housing Act and the forcible entry and detainer statute, the Supreme Court concluded that a tenant may assert a landlord's alleged violation of the Colorado Fair Housing Act as an affirmative defense to an eviction under the forcible entry and detainer statute.

Essentia Ins. Co. v. Hughes – *Court finds classic-car regular-use exclusion in UM/UIM policy is valid* - 2024CO17 (03/25/24). The supreme court held that a UM/UIM limitation deserves different treatment when it is found in a specialty antique/ classic-car policy that contains certain terms. Specifically, the court holds that a specialty antique/ classic-car policy that requires an insured to have a regular-use vehicle and to insure it through a standard policy that provides UM/UIM coverage may properly limit its own UM/UIM coverage to the use of any antique/ classic car covered under the specialty policy. An adjunctive antique/ classic-car policy, which excludes UM/UIM benefits with respect to situations involving a regular-use vehicle but works in tandem with a standard regular-use-vehicle policy that provides UM/UIM coverage, satisfies both the language of section 10-4-609, and the public policy goals underpinning the statute. Thus, the Court finds the exclusion in the UM/UIM provision is valid and enforceable under Colorado law.

Kinslow v. Mohammadi – *Court dismisses suit by minor for failure to timely file suite before SOL expires* - 2024 CO 19 (04/08/24). In November 2015, Mark Kinslow hit Daniala Mohammadi with his car while she was riding her bicycle. Mohammadi, who was a minor at the time of the accident, sued Kinslow in December 2019, more than two years but less than three years after she turned eighteen. Kinslow moved to dismiss the suit, arguing that the statute of limitations had expired two years after Mohammadi's eighteenth birthday. Mohammadi countered that the usual three-year statute of limitations for motor vehicle accidents had not started to run until her eighteenth birthday. The trial court granted Kinslow's motion to dismiss, concluding that Mohammadi was required to bring her claim either within three years of the incident, or within two years after she turned eighteen. The Supreme Court concluded that the plain language of section 13-81-103(1)(c) gives a plaintiff who turns eighteen within the three-year limitation period for a motor vehicle accident a statute of limitations that is the longer of (1) the full three years normally accorded an accident victim, or (2) two years from their eighteenth birthday. For Mohammadi, this meant that she was required to bring her claim by January 1, 2019—two years after she turned eighteen. Because her suit was filed after that date, it was untimely.

Scholle v Ehrlichs – *Court interprets contract exception to collateral source statute* - 2024CO22 (04/22/24). In this medical malpractice case, the Supreme Court considers

the interrelationship between the collateral source statute,§ 13-21-111.6 and the Health Care Availability Act §§ 13-64-101 to-503. Specifically, the court examines whether the contract exception to the collateral source statute applies in a post-verdict proceeding under the HCAA seeking to reduce a jury's damages award in a medical malpractice action. The court concludes that the contract exception to the collateral source statute prohibits a trial court from considering evidence regarding a plaintiff's insurance contract liabilities when making its good cause determination under the HCAA and that section 13-64-402, C.R.S. (2023), does not compel a different result. Accordingly, the court reversed that portion of the division majority's opinion, affirms the rest of the judgment, and remands for the trial court to recalculate interest and enter judgment accordingly.

Wolf v. Brenneman— *C.R.C.P. 54(b)—No Just Reason for Delay*— 2024 CO 31 (05/20/24). The case revolves around the interpretation of Colorado Rule of Civil Procedure 54(b), which allows trial courts to certify a ruling on a subset of claims as "final" for appeal purposes when there is "no just reason for delay." The Supreme Court emphasized that Colorado Rule of Civil Procedure 54(b) gives trial courts discretion to certify a ruling on any subset of claims as "final" when there is "no just reason for delay[ing]" an appeal of that subset of claims. In doing so, the supreme court overruled the decision of the court of appeals in *Allison v. Engel,* 2017 COA 43, 395 P.3d 1217. That decision had 'inappropriately narrowed the applicability of Rule 54(b)' and a division of the court of appeals in this case followed that narrow approach. The Supreme Court of the State of Colorado disagreed with the court of appeals' interpretation of Rule 54(b). It emphasized that Rule 54(b) grants trial courts discretion to certify a ruling as final for appeal purposes when there is no just reason for delay and remanded the case back to the court of appeals to determine whether the trial court had abused its discretion by certifying Wolf's claims as final under Rule 54(b).

Miller v. Crested Butte, LLC— *Exculpatory release case* - 2024CO30 (05/20/24). Ski lift injury: The Supreme Court considers whether a defendant may absolve itself of statutory duties imposed by the Ski Safety Act and the Passenger Tramway Safety Act, as well as regulations promulgated thereunder. The Court majority concluded that Crested Butte could not absolve itself, by way of private release agreements, of liability for violations of the statutory and regulatory duties. The Court did conclude that the district court properly applied the *Jones* factors to determine that the release agreements that the plaintiff signed are enforceable and thus bar plaintiff's purported claim for "negligence-highest duty of care."

Jordan v Terumo – Supreme Court draws a line on discovering privilege - 2024 CO 38 – (06/10/24). Plaintiffs retained an expert to opine on where and when they were exposed to a carcinogen that they claim was emitted from a plant operated by defendants. To facilitate the completion of the expert's analysis, plaintiffs' counsel provided to the expert a spreadsheet detailing where each plaintiff lived and worked

and when. Terumo demanded that plaintiffs produce to them not only the spreadsheet but also any communications between plaintiffs and their counsel that contained the information that plaintiffs' counsel used to create the spreadsheet. Over plaintiffs' objection that such communications were privileged and beyond the scope of disclosures. The district court granted Terumo's request and ordered plaintiffs to produce "the raw facts or data reported by plaintiffs" to their counsel. Plaintiffs then sought relief under C.A.R. 21, and the Supreme Ct. issued a rule to show on two issues: (1) whether the district court erred in finding that the attorney-client privilege does not apply to protect a client's confidential communications of facts to trial counsel; and (2) whether the district court erred in finding that, when trial counsel provided a spreadsheet of information learned in confidential client communications to an expert, did plaintiffs waive—and C.R.C.P. 26(a)(2) requires disclosure of—the underlying client communications that the expert never saw. The Supreme Court concluded that although the underlying facts are not privileged, the district court erred in finding that the attorney-client privilege does not apply to protect a client's confidential communications of such facts to trial counsel. It held that while clients routinely provide factual information to their counsel, this does not mean that opposing counsel is entitled to obtain the clients' communications containing such facts. Rather, the Court held, the proper method of obtaining such facts is through discovery directed at the clients. It further concluded that the district court erred in finding that C.R.C.P. 26(a)(2) required plaintiffs to disclose not only the spreadsheet provided to their expert, but also any privileged and confidential communications that the expert never saw but that counsel used to prepare the spreadsheet. Plaintiffs were obligated to produce only the information that they provided to their expert.

In the Matter of the Estate of Ashworth – Court confirms physician-patient privilege extends beyond death - 2024CO39 (06/10/24). Brian Ashworth, Robert Ashworth's son, contested the validity of that will, which named only his sisters Christine Miller and Gwendolyn Tovado as beneficiaries. Robert Ashworth had named all four of his children as beneficiaries in a 2017 will but then later cut two of them out when executed his final will in 2022. Brian Ashworth said the 2022 will was executed when his father's mental faculties had deteriorated too far for it to be legally binding. Miller, who was named personal representative for her father in the 2022 will, had refused to provide medical records, saying they were privileged. She petitioned the justices for review after the Weld County District Court ordered her to produce the records for an in camera review. The justices said that making the necessary assessments in court for whether a deceased person's mental faculties were strong enough to properly execute their final will would be "severely curbed" if the relevant medical records on that person were not available. It said "This court has never expressly held that the physician-patient privilege extends beyond the death of the patient, but we have made clear that the attorney-client privilege does." The Court then noted "Noting the privileges' similarities in purpose and operation, we hold that the protections of the physician-patient privilege continue after the privilege-holder

has died." The testamentary exception applies to doctor-patient privilege only for whatever medical records are relevant to the question that needs answering to execute that patient's estate, the court concluded.

City of Aspen v. Burlingame Rance – Governmental Immunity is not affected by economic loss rule 2024C046 (June 17, 2024)

The suprem.e court clarifies th.at its jurisprudence lays out a freestanding, self-sufficient framework for determining whether an action brought against a public entity is barred. by the Colorado Governmental [mmunity Act rcGIA"}, §§ 24-10-101 to -1201 C.R.S. (2023), fher-eby depriving the trial court of subject matter jurisdiction. Therefore# it holds that the economic loss rule1 a fundam.entaUy different and uru·elated doctrine, !has no part to play in this inquiry. \.¥here, as here, the sole question is whether the CGIA precludes a plaintiff's daims, the court .must consider the nature of the in.jury underlying the claims and the relief sought. [f the injury arises out of tortious conduct or the breach of a duty arising in tort, and the relief seeks to compensate the plaintiff for that injury, H is barr,ed by the CGIA. Even if such daims could arise in both tort amt contract, they' re still barred because they "could lie in tort" for purposes of the CGIA. § 24-10-106(1), C.R.S. (2023) (emphasis added). It is of no moment that an analysis under the economic loss rule could prohibit any tort claim. The economic loss rule does not involve a jurisdictional question and cannot come to the rescue of an otherwise CGIA-barred claim. Accordingly, the division's judgment is reversed, and the case is remanded to be returned to the district court for further proceedings.

COLORADO COURT OF APPEALS

Estate of Liebe —*Transfer of title not necessary to effectuate a gift* - 2023COA55 (6/15/23). In this probate proceeding, the COA considered whether transfer of title is required to complete a gift of a vehicle. Relying on a line of Colorado cases holding that certificate of title is not necessary to determine ownership of a vehicle, the Court concluded that transfer of title is not required to effectuate a gift of a vehicle. The Court justified its rationale by suggesting that to hold otherwise would add an element to the *inter vivos* gift test that Colorado appellate courts have not traditionally required.

Tremitek, LLC v. Resilience Code, LLC — *Court finds no duty on part of landlord to sell property upon tenant default but refuses to enforce liquidated damages clause as written* - 2023COA54 (6/15/23). Tenant defaulted on a lease with seven years remaining. Finding that the landlord failed to mitigate its damages by refusing to sell the property, the district court limited the damages to five months of rent, which it found to be a reasonable period of time to sell. The Court of Appeals held that a

landlord is not required to exercise reasonable efforts to sell leased property to satisfy its duty to mitigate damages following a tenant's breach, even when the landlord has previously listed the property for sale. The Court also held, however, that the liquidated damages provision in the lease was unenforceable to the extent it allowed the landlord to recover the full amount of unpaid rent without deducting the reasonable rental value of the property for the remaining lease term.

Brennan v. Broadmoor Hotel— *Wage clarification decision issued on banquet servers* - 2023COA53 (6/15/23). The Court of Appeals interprets, for the first time, two terms in Colorado Minimum Wage Order Number 35. First, the Court of Appeals concluded that the hearing officer reasonably found that a "service charge" for food and drink consumed during a banquet does not constitute a "tip" under the Minimum Wage Order because banquet clients cannot decide whether to pay a service charge and, if so, how much. Second, the Court of Appeals concluded that a banquet server is not a "sales employee" under the Minimum Wage Order because a banquet server is not employed for the purpose of making sales.

Hagerty v. Luxury Asset — *Warranty of title not excluded by 'as is' clause in sale contract* - 2023COA57 (6/22/23). The Court of Appeals considered whether the warranty of title imposed by section 4-2-312 may be excluded by contractual language announcing that a good is sold "as is" and without any express or implied warranties. The COA concluded that such language is not sufficient to exclude the warranty of title. The warranty may be excluded only by specific language or by the circumstances described in section 4-2-312(2).

Alderman v. CSU — *Court finds issue of fact for unjust enrichment during COVID closing* - 2023COA61 (06/29/23). This case is the first case interpreting 23-30-111 and applies the law of unjust enrichment to the facts. The Court of Appeals considered whether, in this putative class action, plaintiff students have properly asserted claims seeking damages for breach of contract, or alternatively for unjust enrichment, against CSU, in connection with the closures of the CSU campuses in response to the COVID 19 pandemic. The Court affirmed dismissal of the breach of contract claims but reversed the dismissal of the unjust enrichment claims.

Rosten v. ICAO — *Court holds failure to conduct in-person examination does not invalidate medical finding* - 2023COA62 (06/29/23). The Court of Appeals addressed whether the failure to conduct an in-person examination invalidates a doctor's report finding that a claimant has no permanent impairment. It concluded that, while a record review without a personal examination is not the preferred method of conducting an impairment rating, any associated deficiencies or limitations are relevant to the report's persuasiveness, not its validity. Thus, the issuance of a final admission of liability predicated upon such a report does not render the finding invalid.

Dodge v. Padilla — *Immunity waiver by sheriff's office may give rise to vicarious liability* - 2023COA67 (7/13/13). The Court of Appeals held that (1) a sheriff's office is a "public entity" under the plain language of the GIA; and (2) when a sheriff's office has waived immunity under the GIA, the sheriff's office may be held responsible under the doctrine of *respondeat superior* for its deputies' negligent acts occurring in the scope of the deputies' employment.

Gomez v. Walker — *Section 2-4-108 does not extend statute of limitations* - 2023COA65 (07/13/23). The Court of Appeals held that section 2-4-108(2), does not operate to extend the statute of limitations established by section 13-80-101, to the next business day when the limitations period ends on a Saturday, Sunday, or legal holiday.

Anderson v. Shorter Arms — *Tenant must strictly comply with habitability statute* - *23*COA71 (7/20/23). The Court of Appeals decided, as a matter of first impression, that a tenant must strictly comply with the statutory notice requirements to be able to maintain a claim under the warranty of habitability statute, § 38-12-503. Because the tenant's notice here was not in strict compliance with the statute, the COA affirmed the district court's dismissal of his claim against the landlord. However, the dissent concluded that, even under a strict compliance standard, disputed issue of material fact remained regarding whether the *pro se* plaintiff provided adequate notice of uninhabitable conditions. The dissent also concluded that a lease term expressly granting the landlord permission to enter the apartment to make needed repairs satisfied the statutory requirement for such permission.

Simon v. ICAO — *Shot or sign – employee claiming religious exemption must sign form* - 2023COA74. The Court of Appeals considered whether, under section 8-73-108(5)(e)(VI), an employee is barred from receiving unemployment benefits as a consequence of her refusal to sign her employer's religious exemption form after informing the employer that she would not take a COVID-19 vaccine based on her religious beliefs. The employer placed the employee on unpaid leave after she refused to sign the exemption form. The Court of Appeals holds that the employee is barred from receiving benefits under section 8-73-108(5)(e)(VI) because she deliberately disobeyed her employer's reasonable instruction that she either get vaccinated or sign the exemption form.

Rosenblum v. Budd — *Court holds that two out of three is good enough to be a prevailing party in Anti-SLAPP suit* - 2023COA72. In this anti-SLAPP case, a Court of Appeals held that the plaintiff established a reasonable probability of success at trial on two claims against one of the defendants but failed to do so on a third claim against that defendant. The Court concluded that a partially prevailing defendant on an anti-SLAPP motion filed pursuant to section 13-20-1101(3)(a) must be considered a prevailing party for purposes of attorney fees and costs unless the results of the

partially successful motion were so insignificant that the defendant did not achieve any practical benefit from bringing the motion. Pursuant to C.A.R. 39.1, the case was remanded for a determination of whether that defendant is partially prevailing and to what extent his partial appellate success — if any — warrants an apportionment of fees, and the reasonableness of his appellate fees.

King Soopers v ICAO —*Court of Appeals puts burden of proof cause element on employers in unknown injury cases* - 2023COA73 (08/03/23). In this workers' compensation action, a Court of Appeals addressed the following question: Does an employee meet the burden of proof to obtain compensation for an on-the-job injury when the facts of record show that the cause of the injury is unknown, but not due to a preexisting condition or other personal risk? Noting that the decisions of the ICAO addressing the question have yielded varying results, the Court of Appeals answered the above question "yes."

Gebert v Sears Roebuck & Co. – *Cap is constitutional; change in amended pleading is inadmissible* - No. 22CA0887 (11/09/23). In this personal injury action, the plaintiff cross-appeals the district court's reduction of her noneconomic damages to the statutory cap imposed by section 13-21-102.5(3)(a), arguing that it violates the Seventh Amendment to the United States Constitution. Published Colorado cases have rejected other constitutional challenges to statutory damage caps. In this case, the Court of Appeals concluded that Colorado's general statutory cap on noneconomic damages does not run afoul of the Seventh Amendment because longstanding precedent instructs that that amendment does not apply to the states. In its appeal, Sears challenged the district court's admission of evidence that Sears initially denied negligence in response to the first Request For Admissions, but later amended its RFA response to admit negligence. Sears claimed that its denial and later admission were irrelevant to the issues remaining at trial [causation and damages]. The Court of Appeals agreed, but also concluded that any error was harmless.

Rudnicki v. Bianco — *In a professional liability, court of appeals holds prejudgment interest can result in award exceeding damages limitation of Health Care Availability Act* — 22CA1246 (11/02/23). In this medical malpractice action, the Court of Appeals rejected the defendant doctor's contention that the district court should have computed prefiling, prejudgment interest on the jury's award of pre-majority medical expenses to the minor plaintiff from the date the Colorado Supreme Court decided *Rudnicki v. Bianco,* 2021 CO 80, which abolished the common law rule precluding minors from recovering that category of damages. The division concluded that *Rudnicki* did not alter the date from which prefiling, prejudgment interest is calculated under section 13-21-101(1). Thus, the division concluded that the plaintiff was entitled to prefiling, prejudgment interest on his pre-majority medical expenses from the date his cause of action accrued. The division also rejected the doctor's contention that the district court erred by awarding prefiling, prejudgment interest in an amount that would make the total award exceed the $1 million damages

limitation under the Health Care Availability Act, section 13-64-302(1)(b). Generally following the rationale of *Scholle v. Ehrichs*, 2022 COA 87M, ¶ 107 (cert. granted Apr. 10, 2023), the division concluded that prefiling, prejudgment interest on past and future economic damages may exceed the $1 million cap in the HCAA, provided the other statutory requirements for exceeding the cap are met.

Gomez v. Walker —*If statute of limitations period ends on weekend or holiday, limitation period is not extended* - 2023COA79 A division of the court of appeals holds that section 2-4108(2), does not operate to extend the statute of limitations established by section 13-80-101, , to the next business day when the limitations period ends on a Saturday, Sunday, or legal holiday.

Tolle v. Steeland —*Lease provision that mandates all disputes be arbitrated does not apply to Premises Liability claim* - 2023COA84 (09/21/23). A division of the court of appeals considers whether a residential lease's clause mandating arbitration of "all disputes arising in connection with this lease" covers wrongful death claims arising from a fatal apartment fire. The Court concluded that, because the Premises Liability Act provides the exclusive remedy for such claims, they do not "aris[e] in connection with" the lease and are, therefore, not subject to the arbitration clause.

South Conejos Sch. Dist. RE-10 v. Wold Architects Inc. —*Sophisticated partis may extend accrual time for construction defect claim* - 2023COA85. In this C.A.R. 4.2 interlocutory appeal, the Court of Appeals considered whether, under Colorado law, a contract provision extending the time for accrual of construction defect claims beyond that identified in section 13-80-104(1)(b), C.R.S. 2023, is void and unenforceable. It concluded that sophisticated contracting parties may agree to extend the accrual period without violating public policy.

Gonzales v. Hushen — *Court defines when immunity under anti-SLAPP statute attaches* - 2023COA87 (09/28/23). This anti-SLAPP case concerns a plaintiff's defamation and intentional infliction of emotional distress claims relating to statements made by defendants accusing plaintiff of sexual misconduct. Defendants' statements closely preceded, or were made in the course of, a Title IX investigation into plaintiff's alleged actions. Defendants argue that their statements are absolutely privileged because they were made in connection with the Title IX investigation, which they assert is a quasi-judicial proceeding. The Court of Appeals held that, for a proceeding to be considered "quasi-judicial" for the purposes of applying absolute immunity, the proceeding must contain sufficient procedural safeguards to ensure reliability and fundamental fairness and that courts must look to the totality of the circumstances in determining whether the safeguards are sufficient. Applying this holding to the Title IX proceeding at issue, the Court affirmed the portion of the district court's order concluding that the proceeding is not quasi-judicial.

Farmers Ins. Exch. v. Kretzer — *Court affirms excluded driver means excluded driver* - 22CA1804 (CA 10/05/23). In this insurance coverage dispute, an insurance company sought a declaration that it was not required to provide uninsured and underinsured (UM/UIM) and MedPay benefits to a member of the insured's household who was subject to a "Named Driver Exclusion Endorsement" and was identified as "Excluded" on the declaration page of the insured's policy. The household member was injured while using a vehicle not listed on the policy. The Court of Appeals held that the insurance policy at issue unambiguously excluded the injured household member from coverage under these circumstances. The Court then addressed whether, under section 10-4-630(2), named driver exclusions apply only when a claim arises out of the operation or use of an insured motor vehicle listed on the policy. The Court ruled that interpreting section 10-4-630(2) this way produces "illogical," "unreasonable," and "absurd" results. The Court further rejected the defendants' argument that interpreting an exclusion to apply when a purportedly excluded household member is using a vehicle not listed on a policy violates section 10-4-630(2). Colorado law permits an insurer "to exclude from coverage, by name, [any] person whose claim experience or driving record would have justified the cancellation or nonrenewal" of an automobile liability insurance policy under which more than one person is insured. § 10-4-630(1). Under this statute, insurance providers are authorized to exclude all coverage, which is precisely what the plaintiff did in this case.

Far Horizons v. Flying Dutchman — *Court of Appeals determines statutory amendment alters prevailing party analysis* - 2023COA99 (10/26/23). Court of Appeals held amendments to section 38-33.3-123(1)(c), a part of the Colorado Common Interest Ownership Act enacted in 2006, required a court to determine which party was the overall prevailing party for purposes of awarding attorney fees under that statute. It held that prior decisions by the court of appeals holding that the determination of the prevailing party must be made on a claim-by-claim basis were abrogated by the 2006 amendments. The Court of Appeals next concluded that the district court erred by awarding costs to the UOA under the offer of settlement statute, section 1317-202(1)(a)(II), thereby reducing the award of costs to Far Horizons. Finally, because Far Horizons' recovery exceeded the amount offered by the UOA when judged according to the terms of the UOA's offer, the UOA is not entitled to recover costs under that statute.

Gresser v. Banner Health —*COA interprets authority of trial court under Health Care Act* - 2023COA108 (11/16/23). Court of Appeals considers the scope of a trial court's discretion to award past and future economic damages once the court decides to lift the $1 million statutory cap in a case governed by the Health Care Availability Act. As a matter of first impression, the COA holds that, after making the necessary findings to exceed the cap pursuant to section 13-64-302(1)(b), C.R.S. 2023, a trial court retains its authority to reduce by remittitur the jury's award of past and future

economic damages in excess of the cap if the court determines that such award is grossly and manifestly excessive in light of the evidence before the jury. The COA concluded that the trial court applied the correct standard by first conducting a "good cause" and "unfairness" analysis to lift the cap, and then by awarding damages for past and future economic damages in the amount the jury found because the record amply supported that amount, and it was not grossly and manifestly excessive.

Perez v. By the Rockies — *Court of Appeals reverses summary judgment under statute of limitations* - 2023COA109 (11/16/23). In this civil action, an employee appealed the district court's dismissal of his claim under the Colorado Minimum Wage Act, section 8-6-118 as untimely. The district court applied the statute of limitations in the Colorado Wage Claim Act, section 8-4-122. Purporting to apply the plain language of that statute, the majority of a Court of Appeals panel concluded that section 8-4-122 does not apply to claims brought under the Minimum Wage Act. Instead, the majority held the applicable statute of limitations is section 13-80-103.5. Because the employee's claim was timely under that statute, the majority reversed the judgment of the district court. The dissent was persuaded by the reasoning applied to this question by a federal district court and concluded that section 8-4-122 does apply.

Tender Care v. Barnett — 2023COA114 (11/30/23). In this defamation action, f the Court of Appeals considers whether an online review of a veterinary clinic was made in connection with an issue of public interest such that it is subject to the protections of Colorado's anti-SLAPP statute, § 13-20-1101, C.R.S. 2023. Recognizing that a private dispute concerning the quality of veterinary services may implicate a public interest, the COA determines that (1) there must be some nexus between the challenged statements and the issue of public interest; (2) labelling speech a "warning" does not automatically warrant protection under the anti-SLAPP statute; and (3) such protection is not warranted where protected statements are merely incidental to unprotected conduct. Examining the entire context of the statements made here — including the speaker, audience, purpose, and content — the COA concludes that statements made primarily for the purpose of airing a private dispute, and that they are merely incidental to any protected conduct and are not protected by the anti-SLAPP statute. Consequently, the COA affirms the district court's decision denying a special motion to dismiss the action.

Sentinel Colo. v. Rodriguez, K —*Court of Appeals finds City council meeting within Open Meetings law* - 2023COA118 (12/07/23). Court of Appeals concluded that a local newspaper is entitled to a recording of an Aurora City Council executive session because the City Council violated Colorado's Open Meetings Law by not properly announcing the executive session and then taking a position or formal action during this session. The COA also concluded that the City Council waived its attorney-client privilege by trying to cure the Open Meetings Law violations at the next regularly scheduled City Council meeting. Finally, the COA concluded that the

City Council may not rely on Colorado Off-Highway Vehicle Coalition v. Colorado Board of Parks & Outdoor Recreation, 2012 COA 146, ¶ 22, which recognizes that public bodies may cure Open Meetings Law violations by holding a properly convened meeting, because the local newspaper was not challenging the substance of what took place during the executive session.

People v. Duncan —*COA decides what protracted means* - 023COA122 (12/21/23). Court of appeals holds that the word "protracted," as used in the definition of "serious bodily injury," [§ 18-1-901(3)(p)] means "prolonged, continued, or extended" but does not necessarily mean "permanent."

In the Matter of the Estate of Ybarra – *Motion for extension of time to file appeal does not toll deadline for appeal* - 2024COA3 As a matter of first impression, the Court of Appeals considered whether a motion seeking an extension of the deadline to file post-trial motions, or an order granting such a motion, tolls the deadline to file a notice of appeal under C.R.C.P. 59 and C.A.R. 4(a)(1) when no cognizable C.R.C.P. 59 motion is ever filed. The COA concluded that it does not. Thus, the Court held that the appeal was untimely and was filed beyond the maximum period allowed for excusable neglect under C.A.R. 4(a)(4). It also held that unique circumstances do not justify accepting the untimely appeal and dismissed the appeal for lack of jurisdiction. The court also awards appellate attorney fees and costs to the appellee.

Wolven v. del Rosario Velez — *Not good rulings from the COA on medical lien act and impairment* - 2024COA8 (01/19/24). Defendant appealed the trial court's decision to exclude evidence of the plaintiff's health-care provider lien from trial, arguing that because the lien was amended to comply with the statute shortly before trial, it did not meet the statutory requirements. The Court of Appeals concluded, as a matter of first impression, that so long as a health-care provider lien agreement conforms with the statute when it is created or amended, it must be excluded from trial per section 38-27.5-103(2). The Court also held that the trial court's admission of the plaintiff's expert testimony concerning an "impairment rating," as calculated using the American Medical Association's Guides to the Evaluation of Permanent Impairment (5th ed. 2001), was proper, and it agrees with another division of this court's decision to admit such evidence in *Herrera v. Lerma,* 2018 COA 141. The division also upheld the trial court's denial of a request for a limiting instruction informing the jury how impairment ratings differ in personal injury and worker's compensation cases.

Stone Group Holdings v Ellison — *Court states when an order of prejudgment interest is appealable* - 2024 COA 10 (01/25/24). The appellate court had left a question left unresolved in its decision in *Grand County Custom Homebuilding, LLC v. Bell,* 148 P.3d 398 (Colo. App. 2006) – which is when is an order for prejudgment interest appealable? In this case, the Court of Appeals held that an order is appealable when the amount is calculable on the face of the order. Thus, an order is

appealable when the order granting prejudgment interest is reduced to a sum certain and is therefore final. Prejudgment interest is facially calculable when the order states (1) the amount of the judgment; (2) the prejudgment interest rate; and (3) the date when the interest began accruing.

Babayev v. Hertz —*Rental company can be an insurer* - 2024COA15 (02/15/24). The Court of Appeals held that a motor vehicle rental company can be an insurer in light of the statutory amendments enacted in the wake of *Passamano v. Travelers Indemnity Company*, 882 P.2d 1312 (Colo. 1994).

Thomas v. Childhelp, Inc. - *Class certification ruling* - 2024COA16 (02/15/24).The Court of Appeals held that when a complaint contains a claim requesting the certification of a class, but certification is not granted, the plaintiff may nonetheless still pursue the claim to recover their individual losses.

Schnelle v. Cantafio —*Denial of summary judgment motion does not mean claim defeats malicious prosecution claim* (02/15/24). In this interlocutory appeal, the Court of Appeals decided whether, in considering the denial of a defense motion for summary judgment or a directed verdict, the denial establishes probable cause for bringing a claim as a matter of law, thus automatically defeating a later malicious prosecution claim. The Court concluded that the denial does not establish a presumption of probable cause but, instead, is merely a factor that may be considered in determining whether there was probable cause to bring the claims in the previous case.

Million v. Grasse — *Court limits equitable doctrines in interpreting ambiguous contract terms and imposes additional requirement to succeed in civil theft claim for money*. 2024COA22 (02/29/24). In deciding a real estate dispute between two friends, the Court of Appeal held the doctrine of piercing the corporate veil nor the concept of alter ego should be used to interpret disputed contract terms. The case centers on a settlement agreement between the two friends, Gilbert Million and Carol Grasse, to resolve a previous dispute over a piece of property in Boulder County, Colorado. The panel also concluded that the trial court was right to dismiss Million's civil theft claim, finding it was impossible to determine based on the settlement terms how much Million was owed and noting that there was no trust account set up to receive the money, even though that was part of the settlement terms. The Court held that to state and prevail on a claim for civil theft that is based on the theft of money, in addition to the other statutory requirements, the claimant must allege and prove that there is a specifically identifiable funds, or funds from a specifically identifiable account, which belong to the plaintiff and were stolen.

Hobbs v. City of Salida — *Amusing disagreement in COA – both majority and dissent argue plain language supports their position* - 2024COA25 (03/07/24). The COA addresses, for the first time in a published opinion, the interplay between the

general noise standards set by Colorado's Noise Abatement Act (Act), see §§ 25-12-101 to -110, and noise standards authorized through amplified noise permits issued by local governmental entities. The majority concludes that the plain language of section 103(11) provides municipal entities, such as the City of Salida, with the authority to issue amplified noise permits to private entities to hold cultural, entertainment, athletic, or patriotic events, including, but not limited to, concerts and music festivals on the permittee's property. The dissent argues that the plain text of section 103(11), considered in context, and, alternatively, the legislative history of that section, mandate a conclusion that the exemption only authorizes a political subdivision of the state, such as a municipality, to issue amplified noise permits to entities which will use property that is used by that municipality.

Gestner v. Gestner – *Court of Appeals holds default judgment is not reviewable unless motion to set aside has been filed in district court* - 2024COA55 (05/16/24) The court of appeals addressed the extent to which a default judgment is reviewable on appeal when no motion to set aside the default judgment has been filed and ruled upon in the district court. The Court held that, although it has jurisdiction over a direct appeal from a default judgment, the normal rules of preservation apply. Thus, when the appellant did not appear or present any arguments in the district court before the default judgment was entered, an appeal of the default judgment generally will not be reviewable on the merits because the appellant's arguments will ordinarily be unpreserved.

Ortiz v Progressive Ins – *COA implores Supreme Court to please revisit Brekke* - 2024COA54 (05/16/24) The court of appeals held that the district court did not err by barring an automobile insurer from contesting its insured's claim that the uninsured driver was at fault for the crash that caused the insured's injuries. The COA concluded that the district court correctly applied the holding of *State Farm Mutual Automobile Insurance Co. v. Brekke*, 105 P.3d 177 (Colo. 2004), when it ruled that the insurance company could not contest liability because it had not informed the court and its insured of its intent to do so as soon as was practicable. **Noteworthy:** The special concurrence agrees that the district court correctly applied Brekke, but it urges the supreme court to reconsider its holding in that case.

Life Care Centers v. ICAO - *COVID can be an occupational disease* - 2024COA47— (05/02/24). Court of appeals concludes, as a matter of first impression, that COVID-19 can be an occupational disease under the Workers' Compensation Act of Colorado.

Stalder v. Colorado Mesa University – *Court of Appeals nixes inquiry into suspicious service animal* - 2024COA29. As a matter of first impression, the court of appeals rejects the "legitimate suspicions" doctrine, under which some jurisdictions permit more extensive inquiry than explicitly permitted by ADA regulations into the

nature of a person's disability and the scope of a purported service animal's training and tasks.

Coomer v. Donald J. Trump for President, Inc. — *COA green lights claim against Trump election corporation* - 2024COA35. Applying the anti-SLAPP statute, § 13-20-1101, the court of appeals concluded that the plaintiff had established a reasonable likelihood of success on his claims for defamation and intentional infliction of emotional distress arising out of statements by various defendants that the plaintiff (1) asserted on a conference call in September 2020 that he had "made sure" then-President Trump was not going to win the 2020 presidential election and (2) took steps to interfere with the election results. The COA concluded that, accepting the plaintiff's evidence as true, the plaintiff has shown a reasonable likelihood that each defendant made these statements, that the statements were false, and that the defendants made them with actual malice. It concluded that the plaintiff had not established a reasonable likelihood of success on his conspiracy claim because the plaintiff presented no evidence of an agreement to defame him. Finally, the COA affirmed the district court's denial of the special motions to dismiss the plaintiff's claims for defamation and intentional infliction of emotional distress.

Town of Kiowa v. Industrial Claim Appeals Office — *Establishing injury time, place decision relies on 1940 case* - 2024COA36. In this workers' compensation proceeding, the court of appeals addressed and clarified the proposition set forth in *Prouse v. Industrial Commission,* 69 Colo. 382, 194 P. 625 (1920), that a claimant must establish a definitive time, place, and cause of injury. Relying on *Gates v. Central City Opera House Ass'n*, 107 Colo. 93, 100, 108 P.2d 880, 883 (1940) the Industrial Claim Appeals Office Panel concluded that the claimant sufficiently established a time reasonably definite through his testimony and that of his wife and his surgeon. The Court of Appeals concluded that substantial evidence supported the Panel's conclusion.

Wenzell v. United Servs. Auto. Ass'n —*What can we say?* - 2024COA40. Wenzell held a State Farm UIM policy with a $1 million per person coverage limit and was also covered by a USAA secondary excess UIM policy with a $300,000 coverage limit issued to his brother. In April 2017, Wenzell was involved in a car accident and later settled with the at-fault driver's insurer for $100,000. He then sought benefits from State Farm and USAA, with his counsel arguing that both policies were triggered. Wenzell sued the insurers in September 2021, in an attempt to recover UIM benefits. He accused USAA of violating state law by unreasonably denying or delaying his request for coverage and later amended the complaint to make the same accusation against State Farm after the insurer completed its claim investigation and determined it owed nothing. USAA maintained that its policy hadn't been triggered because Wenzell had yet to exhaust the State Farm policy and as a result USAA could not have unreasonably denied or delayed payment. State Farm said that it hadn't

acted unreasonably because a prior accident that injured Wenzell raised concerns for the insurers over which accident Wenzell's present injuries were attributable to. The insurers also argued that Wenzell "failed to cooperate" by failing to provide acceptable medical record release authorizations. Wenzell responded that the insurers were precluded from raising a noncooperation defense because they didn't meet statutory requirements of CRS Section 10-3-1118, which requires an insurer to meet several conditions in its request for information from an insured and was enacted in September 2020. Upon competing motions for summary judgment, the lower court ruled in the insurers' favor. Wenzell subsequently appealed. The COA determined the trial court erred in its findings that Wenzell failed to cooperate with the insurers and that USAA, as a secondary insurer, did not have an independent duty to evaluate Wenzell's claim until State Farm's primary policy limits were exhausted. It held USAA and State Farm didn't meet statutory requirements before asserting that a mutual insured didn't comply with their claim inquiring following a motor vehicle incident, and that USAA was required to conduct a claim investigation independent of State Farm's. [Both companies requested medical release authorizations several times, but neither company formally and in writing provided Wenzell sixty days to comply with their specific requests for information nor did either company give Wenzell a statutorily compliant opportunity to cure any particularized alleged failures per the COA]. The appellate court also held that the lower court erred in finding that USAA's policy was not yet triggered, instead finding that USAA's UIM policy did not require the exhaustion of State Farm's policy. Since the USAA policy didn't require the exhaustion of the State Farm policy, USAA had an independent duty to investigate Wenzell's claim to determine if its own coverage might be implicated.

Brightstar, LLC v. Jordan —*COA finds Rule 5 provides for unique service* - 2024COA39 In interpreting C.R.C.P. 5, the Court of Appeals decided that service of a pleading or other paper by email to a party's attorney is effective if the attorney has included an email address in previous court filings. The division also considers various other issues raised by the parties in this appeal from a district court judgment vacating a $100 million arbitration award.

Estate of McClain v. Killmer, Lane & Newman, LLC - *COA cuts claimant firm fees for misconduct* - 2024COA50. The COA applied the Restatement (Third) of the Law Governing Lawyers § 37 to assess whether a lawyer's wrongful conduct causes the lawyer to forfeit any fee associated with their representation of the client. The case analyzes the factors set forth in section 37 in view of existing Colorado case law and ethical considerations and applies them to a unique set of facts involving a case of ongoing public interest. Ultimately, it cut the fee of the Killmer, Lane firm.

Bullington v. Barela – *Pregnancy is not a failure to mitigate* - 2024COA56—In this car accident case, the plaintiff contends that the district court erred by instructing the jury on the affirmative defense of failure to mitigate damages. In deciding to give the instruction, the district court found that the plaintiff's "voluntary decision" to get pregnant twice after the accident could be considered by the jury as evidence of her failure to mitigate damages because "the fact that she was both pregnant and nursing delayed her treatment." The court of appeals concluded that the record does not support the district court's finding that the plaintiff "voluntarily" elected to get pregnant. Specifically, a personal injury plaintiff for whom an otherwise recommended medical treatment is contraindicated while pregnant or nursing has no duty to terminate the pregnancy or forgo nursing in order to receive the treatment.

Riggs Oil & Gas Corp. v. Jonah Energy LLC – *Prejudice is not a factor in determining whether to accept late filing* - 2024COA57—A division of the court of appeals considers whether, and if so, under what circumstances, the Colorado appellate courts consider prejudice to the parties in deciding whether to accept an untimely notice of appeal in a civil case on grounds of excusable neglect under C.A.R. 4(a)(4). The division holds that the courts do not consider prejudice to the parties when determining whether the late filing of a notice of appeal under C.A.R. 4(a) was attributable to excusable neglect. Rather, courts only consider prejudice if the court first determines that the neglect was excusable and then proceeds to analyze whether it should exercise its discretion to accept the untimely notice of appeal. Under this standard, the COA concludes that the appellant's untimely notice of appeal was not a result of excusable neglect when the attorney failed to timely read the district court's submission receipt showing that his nonlawyer assistant had filed the notice of appeal in the wrong court. Thus, the division does not consider whether the one-day delay would prejudice the appellees, and it dismisses the appeal for lack of jurisdiction.

Potts v. Gaia Children LLC – *COA announces test for evaluating claim of actual discharge* - 2024COA58. In the first reported case in Colorado to do so, a division of the court of appeals adopts a test for evaluating a claim of actual discharge under Colorado law. Unless otherwise agreed upon, the default employment arrangement in Colorado is at will — meaning either the employer or the employee may terminate the relationship at any time, for any reason. On appeal, the parties likewise dispute only whether it is plausible, based on the allegations in Potts's complaint, that Gaia actually or constructively terminated her employment. Federal courts have addressed the issue and generally recognize that, regardless of the legal context, "[a]n actual discharge . . . occurs when the employer uses language or engages in conduct that 'would logically lead a prudent person to believe [her] tenure has been terminated.'" The test is therefore objective rather than subjective and requires consideration of whether the circumstances would lead a reasonable employee to understand that she has been discharged from employment.

Roane v. Elizabeth School District — *Open meeting statute does not require meaningful connection to public body* - 2024COA59 .In this interlocutory appeal under C.A.R. 4.2, a division of the court of appeals considers as a matter of first impression whether a plaintiff has standing to pursue a violation of the Open Meetings Law (OML) under section 24-6-402, C.R.S. 2023, when the plaintiff has not pleaded meaningful connections to the local public body whose actions are being challenged. In concluding that he does, the COA first holds that section 24-6-402(9)(a) creates a legally protected interest in favor of at least every natural person in Colorado — including the plaintiff here — to have public bodies conduct public business in compliance with the OML. The Court then determines that the plaintiff has articulated sufficient injury in fact by alleging a violation of that interest.

VOA Sunset v. D'Angelo —*Significant holdings regarding anti-SLAPP procedure* - 2024COA61 (05/30/24). As matters of first impression, the court of appeals resolves several issues arising under the state's statute governing the early dismissal of strategic lawsuits against public participation, commonly known as the anti-SLAPP statute. See § 13-20-1101, C.R.S. 2023. First, the division determines that the anti-SLAPP statute applies to actions in county court. Thus, special motions to dismiss under the statute may be filed in and resolved by county courts. Second, the Court determines that the anti-SLAPP statute applies to forcible entry and detainer actions, as long as the actions arise from protected speech or petitioning in connection with a public issue. Third, the Court determines that all appeals from rulings on special motions to dismiss — even those coming from county court — are to be filed in the court of appeals. Fourth, the Court determines that the anti-SLAPP statute is not confined to defamation and related tort claims but, rather, applies to any type of claim that arises from protected speech or petitioning in connection with a public issue. Finally, reaching the merits of the appeal, the Court concludes that the county court erred in its assessment of the special motion to dismiss.

Wright v. Tegna Inc. – *Court of Appeals proscribes level of evidence a plaintiff must present in special motion to dismiss anti-SLAPP claim* - 2024COA64 (06/13/24). A division of the court of appeals considers the quality and quantity of evidence a plaintiff must present in order to "establish[] . . . a reasonable likelihood that the plaintiff will prevail on the claim," the second step in a court's assessment of an anti-SLAPP special motion to dismiss, § 13-20-1101(3)(a), C.R.S. 2023. The division determines that while a plaintiff need not support every allegation by affidavit or tendering "admissible evidence," a defendant will generally prevail when the defendant proffers evidence, such as affidavits, that refutes the plaintiff's unsupported allegations.

US SUPREME COURT

United States ex rel. Polansky v. Executive Health Resources, Inc. – *Government motion to dismiss False Claim Act claim dismisses suit in entirety* - Docket: 21-1052 (6/16/23). The False Claims Act (FCA) imposes civil liability on those who present false or fraudulent claims for payment to the federal government, 31 U.S.C. 3729–3733, and authorizes private parties (relators) to bring "qui tam actions" in the name of the government. A relator may receive up to 30% of any recovery. The relator must file his complaint under seal and serve a copy and supporting evidence on the government, which has 60 days to decide whether to intervene. As a "real party in interest," the government can intervene after the seal period ends, if it shows good cause. Polansky filed an FCA action alleging Medicare fraud. The government declined to intervene during the seal period. After years of discovery, the government decided that the burdens of the suit outweighed its potential value and moved under section 3730(c)(2)(A) (Subparagraph (2)(A)), which provides that the government may dismiss the action notwithstanding the objections of the relator if the relator received notice and an opportunity for a hearing. The government may move to dismiss an FCA action whenever it has intervened, whether during the seal period or later. The government's motion to dismiss will satisfy FRCP 41 in all but exceptional cases. The government gave good grounds for believing that this suit would not vindicate its interests. Absent extraordinary circumstances, the showing suffices for the government to prevail.

Mallory v. Norfolk Southern Railway Co. – *By registering company to do business in a state without more, company may create jurisdiction - Docket*: 21-1168 (6/27/2023). Mallory worked as a Norfolk mechanic for 20 years in Ohio and Virginia. After leaving the company, *Mallory* moved to Pennsylvania, then returned to Virginia. He attributed his cancer diagnosis to his work and sued Norfolk under the Federal Employers' Liability Act, in Pennsylvania state court. Norfolk, incorporated and headquartered in Virginia, challenged the court's exercise of personal jurisdiction. Pennsylvania requires out-of-state companies that register to do business to agree to appear in its courts on "any cause of action" against them. The Pennsylvania Supreme Court held that the Pennsylvania law violated the Due Process Clause. The US Supreme Court vacated. Pennsylvania law is explicit that qualification as a foreign corporation shall permit state courts to exercise general personal jurisdiction over a registered foreign corporation. 'For more than two decades, Norfolk has agreed to be found in Pennsylvania and answer any suit there. Suits premised on these grounds do not deny a defendant due process of law.

FBI v. Fikre – *When is a case moot?* - Docket: 22-1178 (03/19/24). The case involves Yonas Fikre, a U.S. citizen and Sudanese emigree, who brought a lawsuit alleging that the government unlawfully placed him on the No-Fly List. In 2016, the

government removed Fikre from the No-Fly List and argued in court that this action rendered Fikre's lawsuit moot. The district court agreed with the government's assessment, but the Ninth Circuit reversed, stating that a party seeking to moot a case based on its own voluntary cessation of challenged conduct must show that the conduct cannot "reasonably be expected to recur." The Supreme Court of the United States affirmed the Ninth Circuit's decision. The Court stated that a defendant's "voluntary cessation of a challenged practice" will moot a case only if the defendant can prove that the practice cannot "reasonably be expected to recur."

TENTH CIRCUIT COURT OF APPEALS

McAnulty v. McAnulty – *10th Circuit holds Colo S Ct will adopt Restitution 3d of Unjust Enrichment* - Docket: 22-1099 (08/28/23). Husband Steven McAnulty was married twice: once to Plaintiff Elizabeth McAnulty, and once to Defendant Melanie McAnulty. Husband's first marriage ended in divorce; the second ended with his death. Husband's only life-insurance policy (the Policy) named Defendant as the beneficiary. But the Missouri divorce decree between Plaintiff and Husband required Husband to procure and maintain a $100,000 life-insurance policy with Plaintiff listed as sole beneficiary until his maintenance obligation to her was lawfully terminated (which never happened). Plaintiff sued Defendant and the issuer of the Policy, Standard Insurance Company (Standard), claiming unjust enrichment and seeking the imposition on her behalf of a constructive trust on $100,000 of the insurance proceeds. The district court dismissed the complaint for failure to state a claim. Plaintiff appealed. The only question to be resolved was whether Plaintiff stated a claim. Resolving that issue required the Tenth Circuit Court of Appeals to predict whether the Colorado Supreme Court would endorse Illustration 26 in Comment g to § 48 of the Restatement (Third) of Restitution and Unjust Enrichment (Am. L. Inst. 2011) (the Restatement (Third)), which would recognize a cause of action in essentially the same circumstances. Because the Tenth Circuit predicted the Colorado Supreme Court would endorse Illustration 26, the Court held Plaintiff has stated a claim of unjust enrichment, and accordingly reversed the previous dismissal of her case.

Mark Wilson v. Schlumberger Technology Corporation – *10th Circuit reverses overtime award* - No. 21-1231 (09/11/23). The Tenth Circuit found that a lower court incorrectly instructed a jury to determine whether a salaried oilfield worker was considered overtime-exempt. The claimant alleges that Schlumberger Technology Corp. misclassified him as overtime-exempt. The district court instructed a jury to determine the issue, but the 10th Circuit held that the question was a legal issue for the court to determine. Wilson, a measurement-while-drilling operator for the oilfield services company from 2009 until 2016, was paid a set biweekly base salary regardless of how many hours, days or shifts he worked and an hourly rig-rate bonus

for time spent in the field. He also received other bonuses throughout his time at the company and earned over $100,000 per year from 2009 through 2014, after which the price of oil increased and work slowed down, court records say. Section 541.604 of the FLSA, which governs overtime law, states in subsection A that to qualify as exempt, an employee must be compensated on a salary basis of no less than $455 per week, and subsection B considers workers exempt if they regularly receive a predetermined amount of pay. The lower court had instructed the jury to determine whether the FLSA exemption for salaried workers applied to Schlumberger's compensation scheme. The jury found that Wilson did not qualify for an FLSA exemption and was owed overtime pay for weeks when he worked over 40 hours. The Tenth Circuit determined Monday that Section 541.604(a) covers employees who received a fixed base salary above the mandated minimum wage plus additional compensation paid on any basis, and 541.604(b) covers employees whose base compensation is computed on an hourly, daily or shift basis. The day rate bonus system "fits squarely within" Section 541.604(a), the Court stated because the subsection expressly allows additional compensation to be paid on any basis.

Waetzig v. Halliburton Energy Services – *Court dismisses suit to set aside arbitration as it had been dismissed previously* - Docket: 22-1252 910/22/23) Plaintiff-appellee Gary Waetzig filed an age discrimination lawsuit against his former employer, Halliburton Energy Services, Inc. Because he was contractually bound to arbitrate his claim, he voluntarily dismissed his suit without prejudice under Federal Rule of Civil Procedure 41(a) and filed for arbitration. The arbitrator sided with Halliburton. Dissatisfied with the outcome, Waetzig returned to federal court. But instead of filing a new lawsuit challenging arbitration, he moved to reopen his age discrimination case and vacate the arbitration award. Relying on Rule 60(b), the district court concluded it had jurisdiction to consider Waetzig's motion, reopened the case, and vacated the award. The Tenth Circuit found the district court erred: the district court could not reopen the case under Rule 60(b) after it had been voluntarily dismissed without prejudice. Under Federal Rules of Civil Procedure 41(a) and 60(b), a court cannot set aside a voluntary dismissal without prejudice because it is not a final judgment, order, or proceeding.

Knezovich, et al. v. United States – *Court finds Forest Service not liable for discretionary decision on wildfire* - Docket: 22-8023 (10/15/23). Victims of the 2018 Roosevelt Fire in Wyoming sued the United States Forest Service, alleging it negligently delayed its suppression response. The Forest Service moved to dismiss the complaint on the grounds that it was not liable for the way it handled the response to the fire. Under the Federal Tort Claims Act, a government actor could not be sued for conducting a so-called "discretionary function," where the official must employ an element of judgment or choice in responding to a situation. The government contended that responding to a wildfire required judgment or choice, and its decisions

in fighting the fire at issue here met the discretionary function exception to the Act. The district court agreed and dismissed the suit. The Tenth Circuit Court of Appeals also concluded the Forest Service was entitled to the discretionary function exception to suit.

Estate of Allan George, et al. v. Ryan, et al. – *Pursuing fleeing felon entitles officer to qualified immunity* - Docket: 22-1355 (11/09/23). The plaintiffs in this case, which included the estate and surviving family members of Allan Thomas George, filed a 42 U.S.C. § 1983 action against the City of Rifle, Colorado (the City), Tommy Klein, the chief of the Rifle Police Department (RPD), and Dewey Ryan, a corporal with RPD, alleging that the defendants violated George's Fourth Amendment rights by employing excessive and deadly force against him in the course of attempting to arrest him on a felony warrant. Plaintiffs also raised a Colorado state law claim of battery causing wrongful death against Ryan. Defendants moved for summary judgment with respect to all the claims asserted against them. Defendants Ryan and Klein asserted, in particular, that they were entitled to qualified immunity from the § 1983 excessive force claim. The district court denied defendants' motion in its entirety. Defendants filed an interlocutory appeal challenging the district court's ruling. After review, the Tenth Circuit concluded that where, as here, a police officer's employment of deadly force against a fleeing felony suspect was objectively reasonable under the Fourth Amendment, the officer's use of force cannot, as a matter of law, be deemed to be in "conscious disregard of the danger." The Court therefore concluded the district court erred in denying summary judgment to the defendant officers and reversed with respect to all defendants.

Legal Note: The 10th Circuit decided two significant issues in an otherwise garden-variety off-the-clock case, one relating to arbitration and the other to one inherent problem in such cases. *Brayman v. Keypoint Government Solutions, Inc.,* Case Nos. 22-1118 & 22-1168 (10th Cir. 2023). The facts of the Brayman case were generally unremarkable. The defendant was in the business of performing investigations and background checks for various federal agencies. It employed field investigators to undertake the necessary interviews, public records searches, and the writing of investigation reports. Like most employers, it required advance approval of overtime. As is often the case in this type of litigation, the plaintiffs contended that they could not complete all their work without overtime, and that they underreported their time to avoid the possibility of discipline. The district court conditionally certified the case and 214 individuals opted in, sixty-three of whom were from California. The plaintiffs then asserted a Rule 23 set of claims for all California employees based on similar off-the-clock allegations and claimed missed meal and rest breaks. The defendant asserted arbitration agreements as to most of the California employees, which the district court found to be unenforceable. The court also certified Rule 23 class and granted "final FLSA certification" as to the rest.The 10th Circuit reversed on both

counts. As to arbitration, the plaintiffs raised colorable arguments that the arbitration agreements did not apply, but the Court found that the agreements also provided that such determinations were to be made by the arbitrator. As to the off-the-clock claims, the court found that the lower court's analysis was lacking and did not constitute the required "rigorous" inquiry Rule 23 required. It found multiple questions, such as whether there was common evidence (i.e., common to the class) that the employer was aware that off-the-clock work was being performed. The district court similarly did not analyze whether, in fact, the work could be done in the allotted time or whether some employees' difficulties stemmed from purely local concerns or even their own performance. In a comment that would apply to many such cases, the court stated:

"There is no illegality in setting very high (perhaps unrealistic) productivity requirements. Those requirements might lead to dismissal of many, perhaps even a large majority, of those hired. But as long as they are paid what they are due, they have no complaint [under applicable law]."

Stenson v. Edmonds, et al. – *Tenth Circuit acknowledges common law* - 22-1285 (11/15/23). On August 1, 2016, Plaintiff Sean Stetson and Defendant Edmonds were part of a low-speed, sideswipe vehicle accident. Although no one reported injuries on the scene, two weeks after the accident, Plaintiff sought medical treatment for injuries he claimed he sustained in the accident. With this visit, Plaintiff filed his now "plainly evident" campaign to fabricate a claim for damages. The Court noted that when a party to litigation seeks to intentionally deceive the court and its adversary, a district court may issue reasonable sanctions and require the deceitful party to pay attorney fees. Finding plaintiff did just that in this case, and the district court sanctioned him with reasonable attorney fees and dismissal of his non-economic claims, the Tenth Circuit affirmed the sanctions.

United States v. Yellowhorse – *Fascinating evidentiary question results in reversal of district court* - 23-2011 (11/21/23). Timothy Chischilly gathered five relatives to get something “off his chest.” To the shock of the relatives, Chischilly confessed that he and his girlfriend, defendant-appellee Stacey Yellowhorse, had killed a woman. The relatives told law enforcement about Chischilly’s confession, and the accounts were largely consistent: Chischilly had admitted: he held the woman down while Yellowhorse bludgeoned the woman with a sledgehammer or mallet; and he and Yellowhorse pinned the woman down with nails and a hammer. Authorities later found parts of the woman’s skeletal remains in various locations, including a fire pit next to Chischilly’s house. Despite confessing to the murder, Chischilly pleaded not guilty. That plea led the district court to set Chischilly’s trial after Yellowhorse’s. At Yellowhorse’s upcoming trial, the government wanted Chischilly to testify about what he told his relatives. Because his statements were self-incriminating, however, the government expected Chischilly to invoke the Fifth Amendment if he was called as a witness. The government asked the district court to allow the relatives to testify at

Yellowhorse's trial about three of Chischilly's statements. Chischilly's statements would ordinarily constitute inadmissible hearsay; the hearsay exception would apply only if Chischilly's statements harmed his penal interest and had corroboration. The government argued the district court applied the wrong test by assuming that Chischilly's statements about Yellowhorse's involvement were not self-inculpatory. Yellowhorse disagreed, adding that the excluded parts were also inadmissible because the court shouldn't have found corroboration. In the Tenth Circuit's view, the district court's approach contradicted its precedent.

Team Industrial Services v. Zurich American Insurance Company, et al. – *Tenth Circuit affirms summary judgment on coverage* - 22-3275 (11/29/23). Plaintiff Team Industrial Services, Inc. (Team) suffered a $222 million judgment against it in a wrongful-death lawsuit arising out of a steam-turbine failure in June 2018 at a Westar Energy, Inc. (Westar) power plant. Team sought liability coverage from Westar, Zurich American Insurance Company (Zurich), and two other insurance companies, arguing that it was, or should have been, provided protection by Westar's Owner-Controlled Insurance Program (OCIP) through insurance policies issued by Zurich and the two other insurers. Team's claims derived from the fact that its liability for the failure at the Westar power plant arose from work that had previously been performed by Furmanite America, Inc., which had coverage under Westar's OCIP. The district court granted summary judgment to Defendants, and Team appealed. Not persuaded by Team's arguments for reversal, the Tenth Circuit affirmed the district court.

United States v. Ramos – *Government required to have rationale to impound private vehicle on private property* - 23-6071 (12/15/23) The Tenth Circuit ruled that impounding a vehicle from a private property without a reasonable, non-pretextual community-caretaking rationale violates the Fourth Amendment. The defendant, Isaac Ramos, was arrested after an altercation at a convenience store. His truck was impounded from the store's parking lot, and a subsequent inventory search revealed a machine gun and ammunition. Ramos was charged with unlawful possession of a machine gun and being a felon illegally in possession of ammunition. He moved to suppress the evidence, arguing that the impoundment of his truck violated the Fourth Amendment. The district court denied his motion, and he appealed. The Tenth Circuit reversed the district court's decision, finding that the impoundment was not supported by a reasonable, non-pretextual community-caretaking rationale. The court considered five factors: whether the vehicle was on public or private property; if on private property, whether the property owner had been consulted; whether an alternative to impoundment existed; whether the vehicle was implicated in a crime; and whether the vehicle's owner and/or driver had consented to the impoundment. The court found that all of these factors weighed against the reasonableness of the impoundment, and thus, it violated the Fourth Amendment. The court remanded the case to the district court with instructions to grant Ramos's suppression motion and conduct any further necessary proceedings.

ORP Surgical v. Howmedica Osteonics Corp. - Docket: 22-1430 (02/06/2024). This litigation arises from the breakdown of a profitable business relationship that ended with a cohort of disgruntled employees jumping ship from one company to the other. The two parties are corporations engaged in the medical-device-sales industry. At a bench trial, they levied claims and crossclaims against each other for breach of their two sales agreements, governed by New Jersey law. After trial, the district court entered judgment for ORP Surgical, LLC (ORP), and awarded damages, attorneys' fees, sanctions, and costs against Howmedica Osteonics Corp., referred to throughout this litigation by the name of its parent company, Stryker. The Tenth Circuit Court of Appeals affirmed the district court's holdings on the breach-of-contract claims but reversed its award of attorneys' fees under the indemnification provision.

Dartez v. Peters – *10th circuit interprets Offer of Settlement as ambiguous – construes against offeror* - Docket: 22-3155 (03/26/24). This case involved the interpretation of an offer of judgment in a lawsuit where a prisoner, Samuel Lee Dartez, II, sued state officers for excessive force under 42 U.S.C. § 1983. The state officers offered a judgment of $60,000 "plus reasonable attorneys' fees and costs allowed by law, if any." The district court interpreted this offer as allowing attorneys' fees exceeding the statutory cap and waiving the plaintiff's obligation to contribute to these fees. On appeal, the Tenth Circuit affirmed the district court's interpretation. The court determined that the offer of judgment was ambiguous in its language pertaining to the statutory cap on attorney fees and the requirement for the plaintiff to contribute to those fees. The ambiguity was resolved against the defendants, who had drafted the offer, and found that the defendants had waived the statutory cap and the plaintiff's contribution requirement.

Bradford v. US Dep't of Labor - *Court upholds the DOL's rule requiring federal contractors to pay a $15.00 minimum hourly wage* - Docket 22-1023 (04/30/24). The case involves Duke Bradford, Arkansas Valley Adventure, and the Colorado River Outfitters Association appealing the denial of their motion to preliminarily enjoin a Department of Labor (DOL) rule requiring federal contractors to pay their employees a $15.00 minimum hourly wage. The DOL promulgated this rule in accordance with Executive Order 14,026, issued by President Biden on April 27, 2021. The plaintiffs argued that the DOL's rule exceeds the authority granted under the Federal Property and Administrative Services Act (FPASA), which authorizes the President to prescribe policies and directives for the procurement and supply of property and nonpersonal services. They claim that the government does not procure or supply the relevant recreational services and, therefore, the DOL's rule is not a permissible regulation under FPASA. The court concluded that the DOL's rule is likely authorized under FPASA because it permissibly regulates the supply of nonpersonal services and advances the statutory objectives of economy and efficiency.

Doe v. Rocky Mountain Classical Academy – *Student earring case results in finding of discrimination, but not retaliation* - Docket: 22-1369 (04/30/24). A student, John Doe, through his mother, Jane Doe, filed a lawsuit against Rocky Mountain Classical Academy (RMCA) alleging that the school's dress code, which prohibited boys from wearing earrings, violated his rights under the Fourteenth Amendment's Equal Protection Clause and Title IX. The plaintiff also claimed that the school retaliated against him for complaining about sex discrimination. The United States District Court for the District of Colorado dismissed the plaintiff's claims, applying the "comparable burdens" test from the Seventh Circuit's decision in *Hayden ex rel. A.H. v. Greensburg Cmty. Sch. Corp.* The district court found that the dress code imposed comparable burdens on both boys and girls, and therefore did not constitute sex discrimination. On appeal, the United States Court of Appeals for the Tenth Circuit disagreed with the district court's application of the "comparable burdens" test. The appellate court held that the district court should have applied the intermediate scrutiny standard, which requires a sex-based classification to serve important governmental objectives and be substantially related to achieving those objectives. The court found that the plaintiff had stated a claim upon which relief could be granted under both the Equal Protection Clause and Title IX, as the school had not provided an "exceedingly persuasive justification" for its sex-based classification. Therefore, the court reversed the district court's dismissal of the plaintiff's sex discrimination claims. However, the appellate court agreed with the district court's dismissal of the plaintiff's Title IX retaliation claim. The court found that the plaintiff had not stated a plausible claim for retaliation, as the complaint only permitted the inference that the school took disciplinary actions because of the plaintiff's dress code violations.

Pryor v. School District No. 1 – *First Amendment case regarding criticism of school district* - Docket: 23-1000 (04/30/24). The case involves Brandon Pryor, an advocate for quality educational opportunities in Far Northeast Denver, who was stripped of his volunteer position and restricted from accessing Denver School District No. 1 facilities after he criticized the district and its officials. The district claimed that Pryor's conduct was abusive, bullying, threatening, and intimidating. Pryor sued the district, Superintendent Alex Marrero, and Deputy Superintendent Anthony Smith, alleging First Amendment retaliation. The United States District Court for the District of Colorado granted a preliminary injunction in part, enjoining the defendants from enforcing the restrictions and from taking any other retaliatory action against Pryor, his family, or the school he co-founded, the Robert W. Smith STEAM Academy. The defendants appealed the preliminary injunction. The United States Court of Appeals for the Tenth Circuit affirmed the district court's decision. The court found that Pryor was substantially likely to succeed on the merits of his First Amendment retaliation claim. The court also found that Pryor would suffer irreparable injury if the injunction were denied, that the harm to Pryor without the injunction outweighed the harm to the defendants with the injunction, and that the injunction was not adverse to the public interest. The court concluded that the district court did not abuse its discretion in granting the preliminary injunction.

Does 1-11 v. Board of Regents – *Univ. of Colorado found to have violated First Amendment religious rights* - Nos. 21-1414 & 22-1027 (May 7, 2024). The appeal focuses on two policies: the September 1 Policy and the September 24 Policy. The September 1 Policy required religious exemptions from the COVID-19 vaccine mandate to be based on official doctrine of an organized

religion. It discriminated against certain religions and denied exemptions to applicants whose beliefs were deemed personal or not part of a comprehensive system of beliefs. The September 24 Policy allowed for religious accommodations but only if they did not unduly burden the health and safety of others. It did not provide religious exemptions or accommodations for students. The Does filed a motion for a preliminary injunction to challenge both policies, arguing that they violated their First Amendment rights. The district court denied the motion, ruling that the Does had not met the threshold for mootness and failed to demonstrate a likelihood of success on their constitutional claims. The appeal argues that the district court abused its discretion in failing to enjoin both policies. It asserts that the September 1 Policy violates the Establishment Clause and the Free Exercise Clause, and that the September 24 Policy discriminates against religious exemptions for students. The opinion concludes that the Does have standing to seek injunctive relief for the September 1 Policy and some employee plaintiffs have standing for the September 24 Policy, while the appeal is moot for student plaintiffs. The Does are likely to succeed on the merits of their claims, as the September 1 Policy discriminates against certain religions and the September 24 Policy imposes burdens on religious exercise. The opinion highlights that the irreparable harm suffered by the Does outweighs any harm to the university, and therefore, a preliminary injunction should be granted.

Owens v. Unified Government of Wyandotte County – *No error in denying new trial where attorney contracted COVID mid-trial* - (D.C. No. 2:21-CV-02185-KHV) Tenth Circuit panel ruled that the remote court appearance of a plaintiff's attorney who contracted COVID-19 was not grounds to declare a mistrial after a Black utility worker lost his Title VII workplace discrimination case in Kansas, finding that the plaintiff could not show that he was prejudiced by his lead counsel's absence. Owens' lead attorney tested positive for COVID-19 halfway through the four-day trial and appeared in court for only two days. The panel ruled the trial court was correct to deny a motion for a new trial after a jury found the government not liable on all counts in November 2022.

MISCELLANEOUS RULING

St. Paul Guardian Insurance Company v. Walsh Construction Company – *Cracks in welds on steel columns are not 'property damage' under CGL* - No. 23-1662 (7th Cir. 2024). In 2003, the City of Chicago contracted with Walsh Construction Company to manage the construction of a canopy and curtain wall system at O'Hare International Airport. Walsh subcontracted with LB Steel, LLC to fabricate and install steel columns to support the wall and canopy. Several years into the project, the City discovered cracks in the welds of the steel columns and sued Walsh for breaching its contract. Walsh, in turn, sued LB Steel under its subcontract. Walsh also asked LB Steel's insurers to defend it in the City's lawsuit, but they never did. Walsh eventually secured a judgment against LB Steel, which led it to declare

bankruptcy. Walsh then sued LB Steel's insurers to recover the costs of defending against the City's suit and indemnification for any resulting losses. The district court granted summary judgment in favor of the plaintiff insurers on both issues. The court reasoned that, because the physical damage at issue was limited to LB Steel's own products, it did not constitute "property damage" as that term appears in the policies, thereby precluding coverage. As for the duty to defend, the court determined that the Insurers had none, because the City's underlying claims did not implicate potential coverage under LB Steel's policies. The United States Court of Appeals for the Seventh Circuit affirmed the district court's decision. The court concluded that the defects in the welds and columns do not constitute "property damage" under LB Steel's commercial general liability (CGL) policies.

GEICO General v. M.O. et al. – 23-1686 (8th Cir.) –

United States for the Use and Benefit of Jay Worch Electric v. Atlantic Specialty – 8:20220CV02420 (D. MD. 05/21/24). Worch was a subcontractor to PDSI, the general contractor. Worch's email was hacked. The hacker instructed PDSI to make payment to the hacker's address, which it did. JWE sued the surety for PDSI. Court held PDSI owed Worch payment under its contract.

2024 WL 2830949
Only the Westlaw citation is currently available.
United States District Court, D. Colorado.

LJUBINKA STANISAVLJEVIC, Plaintiff,
v.
THE STANDARD FIRE INSURANCE COMPANY, d/b/a TRAVELERS INSURANCE COMPANY, Defendant.

Civil Action No. 1:22-cv-03287-RM-SBP
|
06/04/2024

Susan Prose, United States Magistrate Judge

ORDER ON DECEMBER 14, 2023 DISCOVERY DISPUTES AND DEFENDANT'S MOTION FOR RULE 35 EXAMINATION

Susan Prose, United States Magistrate Judge

***1** This matter is before this court on discovery and clawback disputes that the court heard in a discovery conference of December 14, 2023. ECF No. 98 (minute entry); ECF No. 113 (transcript). On December 11, 2023, the parties emailed separate Discovery Statements concerning those disputes, per the court's then-practice standard. The court refers to those statements respectively as "Plaintiff's Discovery Statement" and "Defendant's Discovery Statement." Because a clawback dispute arose concerning Plaintiff's Exhibit 3 to that statement, the court also allowed both sides to email position statements on that issue, on December 21, 2023.

The court has carefully reviewed the discovery and clawback statements, heard the arguments of counsel on December 14, 2023, reviewed the transcript of that conference (ECF No. 113), and reviewed the applicable law. As follows, the court largely grants Defendant's discovery requests—including its clawback request—and largely denies Plaintiff's requests.

This court also has before it Defendant Standard Fire Insurance's Motion for Rule 35 Examination of Plaintiff Ljubinka Stanisavljevic, ECF No. 99, which the court GRANTS.

Finally, the court addresses the actions of Plaintiff and her counsel with respect to discovery in this case. As detailed below, Plaintiff is respectfully cautioned that the continuation of frivolous and disrespectful conduct may lead to future sanctions in this matter and/or the appointment of a special master, at her expense, to oversee discovery.

I. Background

The court has already issued three lengthy rulings in this case on pre-trial issues, namely on Plaintiff's first motion (ECF No. 18) to strike the answer in part, a motion (ECF No. 36) to quash Plaintiff's subpoena to Defendant's then-litigation counsel in this case (Montgomery Amatuzio Chase Bell Jones LLP, "MAC-Legal"), and Plaintiff's motion (ECF No. 50) to amend the complaint to add a punitive damages request.

Plaintiff has also filed two additional motions to strike defenses of Defendant. ECF No. 129 (not referred, motion to strike the "Never-Plead Fraud Affirmative Defense and Request for Sanctions"); No. 154 (not referred, motion to strike the No. 147 answer and request for sanctions).

Plaintiff *also* filed another motion to compel discovery, ECF No. 148, which this court has denied without prejudice to refiling a motion that complies with this court's page limit for discovery motions.

And finally, Defendant has also filed two motions to restrict certain filings which were occasioned by Plaintiff's motions. ECF No. 159 (concerning Plaintiff's unredacted motion filed at ECF No. 149); No. 160 (concerning Defendant's response to Plaintiff's motion No. 129).

In light of the ongoing, extensive motion practice, the court attempts to streamline the resolution of the matters addressed in this order.

This is a case concerning an underlying auto accident in which Plaintiff was injured as a passenger. She brings a breach of contract claim for underinsured motorist ("UIM") benefits from Defendant as the insurer of the vehicle's driver, and she brings claims for bad faith delay under Colorado statutory and common law. The court has outlined the factual and procedural history in prior orders. The court assumes familiarity with those orders here.

***2** Plaintiff alleges that, on July 31, 2020, she sustained severe injuries when the car in which she was a passenger was struck by another vehicle. Amended Complaint, ECF No.

131. Plaintiff settled with the insurance carrier of the person who caused the accident for that individual's policy limit of $25,000. *Id.* ¶ 44. Plaintiff then sought to obtain $250,000 in UIM benefits under a Standard Fire policy on the vehicle in which Plaintiff was a passenger. *Id.* ¶¶ 12-13, 56. To date, Standard Fire has not paid the full policy limit that Plaintiff claims "she is legally entitled to collect and [is] owed under the policy." *Id.* ¶ 109.

The litigation officially commenced on November 9, 2022, when Plaintiff filed the case in Denver District Court, prompting Standard Fire to remove the case to this court. ECF No. 1 at 1-2. As noted, Plaintiff brings claims for UIM benefits, breach of contract, willful and wanton breach of contract, breach of the duty of good faith and fair dealing, and undue delay or denial of insurance benefits in violation of Colo. Rev. Stat. § 10-3-1116(1). On her bad faith claims, Plaintiff seeks up to two times the covered benefit—i.e., an additional $500,000—plus her attorney fees and costs. She also seeks exemplary or punitive damages. ECF No. 119 (Sixth Claim for Relief).

II. Legal Standards for Discovery

"Parties may obtain discovery regarding any nonprivileged matter that is relevant to any party's claim or defense and proportional to the needs of the case, considering the importance of the issues at stake in the action, the amount in controversy, the parties' relative access to relevant information, the parties' resources, the importance of the discovery in resolving the issues, and whether the burden or expense of the proposed discovery outweighs its likely benefit." Fed. R. Civ. P. 26(b)(1). And as also pertinent here:

> On motion or on its own, the court must limit the frequency or extent of discovery otherwise allowed by these rules or by local rule if it determines that:
>
> (i) the discovery sought is unreasonably cumulative or duplicative, or can be obtained from some other source that is more convenient, less burdensome, or less expensive;
>
> (ii) the party seeking discovery has had ample opportunity to obtain the information by discovery in the action; or

(iii) the proposed discovery is outside the scope permitted by Rule 26(b)(1). Rule 26(b)(2)(C).

Relevance under Rule 26(b)(1) is "broadly construed" in relation to discovery, and a request is considered relevant "if there is 'any possibility' that the information sought may be relevant[.]" *Stanton v. Encompass Indem. Co.*, No. 12-cv-00801-PAB-KLM, 2013 WL 2423094, at *2 (D. Colo. June 4, 2013) (quoting *Cardenas v. Dorel Juvenile Grp., Inc.*, 232 F.R.D. 377, 382 (D. Kan. 2005)); *Brackett v. Walmart Inc.*, No. 20-cv-01304-KLM, 2021 WL 1749975, at *3 (D. Colo. May 4, 2021) ("[R]elevance is not so narrowly construed as to limit a story to its final chapter, and neither party is entitled to make it impossible for all meaningful parts of the story to be told."). "[T]he party resisting discovery has the burden to establish the lack of relevance by demonstrating that the requested discovery (1) does not come within the scope of relevance as defined under [Rule 26], or (2) is of such marginal relevance that the potential harm occasioned by discovery would outweigh the ordinary presumption in favor of broad disclosure." *Simpson v. Univ. of Colo.*, 220 F.R.D. 354, 359 (D. Colo. 2004) (quotation omitted).

In considering proportionality, this court "weighs the importance of the discovery to the issues at stake in the action, the amount in controversy, the parties' relative access to relevant information, the parties' resources, the importance of discovery in resolving the issues, and whether the burden or expense of the proposed discovery outweighs its likely benefit." *Carlson v. Colo. Ctr. for Reprod. Med., LLC*, 341 F.R.D. 266, 274 (D. Colo. 2022) (citing Fed. R. Civ. P. 26(b)(1)). The Advisory Committee Notes to the 2015 Amendments make clear that the party seeking discovery does not bear the burden of addressing all proportionality considerations. Advisory Comm. Notes to Fed. R. Civ. P. 26(b)(1).

***3** "[D]iscovery rulings are within the broad discretion of the trial court, and [the Tenth Circuit] will not disturb them absent a definite and firm conviction that the lower court made a clear error of judgment or exceeded the bounds of permissible choice in the circumstances." *Kenno v. Colo. Governor's Off. of Info. Tech.*, Nos. 21-1353 & 21-1434, 2023 WL 2967692, at *7 (10th Cir. Apr. 17, 2023) (internal quotation marks omitted) (quoting *Cole v. Ruidoso Mun. Sch.*, 43 F.3d 1373, 1386 (10th Cir. 1994)); *see also S.E.C. v. Merrill Scott & Assocs., Ltd.*, 600 F.3d 1262, 1271 (10th Cir. 2010) (discovery rulings are reviewed for abuse of discretion). Rule 26(b)(2)(C) allows a court to limit discovery on motion or on its own if it determines: (1) the discovery sought is unreasonably cumulative or duplicative, or may be obtained from some other source that is more convenient, less burdensome, or less expensive; (2) the party seeking discovery has had ample opportunity to obtain the

information by discovery in the action; or (3) the proposed discovery is outside the scope permitted by Rule 26(b)(1). Fed. R. Civ. P. 26(b)(2)(C).

III. Analysis

A. Discovery Disputes Heard December 14, 2023

1. Plaintiff's Requests

a. Plaintiff's Request for Post-Complaint Claims Handling Documents and

Defendant's Request to Partially Clawback the One Post-Complaint UIM Worksheet it Inadvertently Produced

Plaintiff argues that because an insurer's duty to interact with insureds in good faith encompasses the entire relationship, both pre- and post-litigation, Plaintiff is therefore entitled to discovery of post-complaint claims handling information. Plaintiff relies on *U.S. General, LLC v. GuideOne Mut. Ins. Co.*, 22-1145, No. 2022 WL 17576353 (10th Cir. Dec. 12, 2022) (unofficially published). In that case, the Tenth Circuit recognizes that under Colorado law, the insurer's duty of good faith encompasses the entire relationship with the insured—including after a complaint is filed—and the insurer can therefore be held liable for post-complaint delay in paying an undisputed claim amount. *Id.* at *4-6. But even if the case had precedential value, which it does not, the opinion does not address the scope of discovery. The case does not support Plaintiff's contention in the slightest.

Federal Rule 26(b) does not ordinarily permit discovery of documents that Defendant or its representatives created for use in litigation. Fed. R. Civ. P. 26(b)(3)(A) (exempting from discovery "documents...prepared in anticipation of litigation or for trial" by a party or its representative). Under Rule 26(b), the obligation is on "the party seeking protection to show that the requested materials were prepared in anticipation of litigation or for trial by or for the party or the party's attorney." *Menapace v. Alaska Nat'l Ins. Co.*, No. 20-cv-00053-REB-STV, 2020 WL 6119962, at *12-13 (D. Colo. Oct. 15, 2020). Defendant has met that burden here. The information that Defendants asserts is work product for use in this litigation was added to the document after Plaintiff filed this lawsuit and consists of notes for the Defendant's representative to use and discuss with Defendant's attorney concerning questions of strategy and discovery to undertake in this case.

The court also agrees with the caselaw that Defendant cites, which is directly on point and which clearly rejects Plaintiff's position: *Johnston v. Standard Fire Insurance Co.*, No. 20-cv-02106-CMA-MEH, 2022 WL 1225311 (D. Colo. Apr. 25, 2022).

> [F]rom a practical standpoint, requiring production of post-litigation claim notes would necessarily result in inconsistent discovery obligations between parties. Once an insured files suit, insurers are required to defend against claims of breach of contract and bad faith, and they are subject to the discovery rules and deadlines set by courts. If insurers are required to continue to evaluate claims post-litigation and provide information to plaintiffs, plaintiffs could simply circumvent discovery rules and deadlines by submitting new information and demanding an insurer's post-litigation analysis. This is not what the law requires. To hold otherwise would incentivize plaintiffs to rush to the courthouse to file a lawsuit and then continue to submit records to insurers in an attempt to avoid the discovery process.

***4** *Id.* at *4. *See also Stanley v. State Farm Mut. Auto. Ins. Co.*, No. 21-cv-00996-NYW-NRN, 2023 WL 2479953, at *13-14 (D. Colo. Mar. 13, 2023) (adopting *Johnston's* reasoning and granting summary judgment to defendant on insured's common law bad faith claim); *Byron-Amen v. State Farm Mut. Auto. Ins. Co.*, No. 21-cv-02364-NYW-NRN, 2023 WL 2632783, at *2 (D. Colo. Mar. 24, 2023) (stating that "*GuideOne* ...did not address the issue of relevance at all," and denying reconsideration of order that denied the insured's motion to compel post-litigation claims notes as irrelevant to her breach of contract and bad faith claims). **In short, Plaintiff's request for this discovery, and her arguments in support thereof, are frivolous.**

For much the same reasons, Defendant's request to "clawback" the post-complaint claim analysis that it inadvertently produced—contained within the UIM

Worksheet to which Plaintiff points as "cherry picking," Exhibit 3 to her Discovery Statement and bates numbered SFI__002665-73—is GRANTED. The information that Defendant has highlighted for clawing back is plainly protected work product for use in this litigation. Plaintiff has not shown that she has a "substantial need for the materials to prepare [her] case and cannot, without undue hardship, obtain their substantial equivalent by other means." Fed. R. Civ. P. 26(b)(3)(A)(ii). Although Plaintiff argues that at least some of this information is the "smoking gun" that Defendant improperly asserted the driver was at fault for purposes of comparative fault, Defendant notes that it had already determined by the time of the scheduling conference not to pursue that defense. And although Plaintiff *argued* Defendant's pursuit of this comparative fault theory as one of the facts supporting her request for punitive damages, that is one of the "litigation conduct" facts that the court expressly found *unpersuasive*in allowing her to add the punitive damages request. ECF No. 127 (Order of March 28, 2024) at 14, 17.

Accordingly, Plaintiff and her counsel shall immediately destroy every copy of the version of the document SFI__002665-73 (whether paper or electronic) that she used as Exhibit 3 to her Discovery Statement. Plaintiff's counsel shall certify compliance to Defendant within three business days of this order. Plaintiff and her counsel shall use only the further redacted version of that document that Defendant's counsel provided shortly before the December 14, 2023 discovery conference. Defendant shall add these redactions to its privilege log, if it has not done so already, and provide the amended privilege log to Plaintiff's counsel within three business days of this order.

b. Plaintiff's Request for Defendant's "File Cabinet" Document Repository

Plaintiff argues that Defendant has not produced a "File Cabinet" document repository from its claim file, which Defendant uses to organize and date-stamp the documents received and sent on an insured's claims. Defendant responds that it has produced the non-privileged portions of its claim file already, and that the "File Cabinet" is an electronic platform like Outlook or iManage for law firms, not a document that can be produced. At the hearing, Defendant confirmed that it has already produced "the claim file cabinet printout. We've given them that." ECF No. 113 (Hrg. Tr.) at 57. Plaintiff did not dispute this assertion at the hearing. Plaintiff has not shown that she is entitled to further information from the "File Cabinet" repository, and as such, this request is denied.

c. Plaintiff's Interrogatory No. 3: Other Instances that Defendant Retained MAC-Legal for Claims Handling

***5** Plaintiff requests that Defendant identify other instances in which it retained MAC-Legal for claims handling in the last seven years. Plaintiff's Discov. Stmt. at 10 (citing Ex. 9, at Interrogatory No. 3). Plaintiff argues that Defendant's handling of her claim was unreasonable in part because it delegated claims handling to an inexperienced lawyer and paralegal at MAC-Legal. She cites a Colorado insurance regulation concerning the obligation to retain claims records, for insurers and persons who have a "regular business practice" of claims handling. C.C.R. § 702-1-1-7(5)(E)(4). Plaintiff also cites *Jewkes v. USAA Cas. Ins. Co*., No. 13-cv-01673-RPM, ECF No. 20 (slip op.) at 2 (D. Colo. June 26, 2014), as reflecting that an insurer's "track record and history with any such consultant or assistance (such as a medical or engineering consultant) is relevant to the reasonableness of Traveler's reliance on such claims advice." Plaintiff's Discovery Statement at 11.

Defendant opposes, arguing "[t]he general rule is that evidence regarding other insurance claims is not admissible in this District." Defendant's Discovery Statement at 15 (citing *Cunningham v. Standard Fire Ins. Co*., No. 07-cv-0538-REB-KLM, 2008 WL 2902621, at *9 (D. Colo. July 24, 2008); *Bituminous Cas. Corp. v. Monument Well Corp*., No. 06-cv-02294-WYD-MEH, 2007 WL 2712347, at *1 (D. Colo. 2007)).

Plaintiff's citations do not support her request. First, the insurance regulation only imposes a records retention obligation on persons whose regular business practice is to provide claims handling; it says nothing about whether an insurer must provide discovery of other instances in which it retained a particular vendor for claims handling. Plaintiff asserts that she is claiming that Defendant is "essentially, laundering their claim handling process through the lawyers who are not subject to these DOI regulations so that they don't have to comply with them," *id*. at 74 (*see* ECF No. 131, Am. Complaint ¶¶ 123-124), and she argues that Defendant "put it at issue in this case" in asserting that the regulations do not apply to MAC-Legal's work for Defendant. ECF No. 113 (Hrg. Tr.) at 73. But Plaintiff misconstrues the significance of that argument. Defendant has argued that this insurance regulation does not apply to MAC-Legal's work, but Defendant did not withhold non-privileged information

on that basis. That was the subject of the court's order in February 2024. *See* ECF No. 109 (February 9, 2024 Order) at 8. Defendant has already produced the discoverable claims-handling information from MAC-Legal's files.

Second, the slip opinion in *Jewkes* is not published (even unofficially), and the case does not address the scope of discovery. [1] *Jewkes* simply notes that:

> USAA relies on [its claims adjuster]'s subjective evaluation of the plaintiff's claim [in which she relied on expert reports from an engineering firm and an environmental and industrial hygiene service company]. The issue is the reasonableness of the company's action, an objective standard. The veracity of the opinions expressed in those expert reports, the quality of the investigations done and the competence of the investigators are relevant issues and the plaintiff's initial response [to the insurer's summary judgment motion] demonstrates that these questions should be answered by a jury.

Jewkes, slip op. at 1, 2.

Certainly, the veracity and competency of experts' opinions and investigations on which a claims adjuster relies are relevant to whether an insurer acted reasonably or unreasonably in handling an insured's claim. But here, Plaintiff's claim is that the particular MAC-Legal lawyer and paralegal who were assigned to Plaintiff's claim were not experienced or competent in claims handling. Yet Plaintiff asks for every instance that Defendant retained the entire law firm for claims handling. This is overbroad.

***6** Even as to the specific MAC-Legal lawyer and paralegal in question, Plaintiff does not articulate why their work for Defendant *on other insureds' claims* handling would be probative of their relative competence or incompetence in handling Plaintiff's claim. Even if Defendant answered this interrogatory and identified the other insureds' claims that the lawyer and paralegal handled for Defendant, how would Plaintiff (or a jury) evaluate the veracity or competency of their handling unrelated claims? Plaintiff does not seek, and this court would reject as frivolous, any request for the complete claim files for those unrelated claims. In short, even if narrowed to just the lawyer and paralegal in question, Plaintiff's interrogatory seeks information that is not probative of the reasonableness or unreasonableness of Defendant's retention of MAC-Legal or the particular lawyer and paralegal in question, or at best seeks information that is only marginally relevant and which would be disproportional or unduly burdensome to produce. *See, e.g., Cunningham*, 2008 WL 2902621, at *9 (finding that the insurer's "conduct with regard to other claims" is not relevant). The disproportionality and undue burden are particularly apparent in the several subcategories of information that Plaintiff requests as to each instance of claims handling over the last seven years: the claim number, claimant's name, adjuster's name, and a description of all activities that MAC-Legal performed for Defendant.

Moreover, Plaintiff already has the deposition testimony of Defendant's claims adjuster (Mr. Burnham) that he has hired MAC-Legal before. Plaintiff's Discovery Statement at 10. In short, Plaintiff's request to compel Defendant to answer Interrogatory No. 3 is frivolous or very close to it, and it is denied.

d. Plaintiff's Request for "Meaningful Organization of Medical Records and Knowledge Guide Materials Produced in Discovery"

Plaintiff argues that Defendant produced over 1,700 pages of Plaintiff's medical records in no particular order despite the "File Cabinet" platform's ability to date-stamp when Defendant received the documents. Plaintiff further argues that in Defendant's response to Request for Production No. 1—requesting "various claim manual materials"—Defendant improperly refers to a range of over 600 pages (its "Knowledge Guide") without identifying which pages are responsive to the nine discrete topics contained in that request. Plaintiff argues that this fails to comply with Rule 34(b)(2)(E)(i), which requires producing documents "as they are kept in the usual course of business or...organize[d] and label[led]...to correspond to the categories in the request."

It does not appear that Defendant specifically addressed this issue in its Discovery Statement; nor does it appear that

either side addressed it at the hearing. The date of receipt for specific medical records is relevant and proportional to the bad faith claim. *To the extent* Defendant has not already done so, it shall review how it organized the medical and billing records to which Plaintiff refers as SFI_000091-1676 and SFI_001677-1720. If Defendant did not produce those documents in either of the two organizational formats permitted by Rule 34(b)(2)(E)(i), or if the "File Cabinet" printout it produced to Plaintiff does not make plain when the specific records were received, then Defendant shall either re-produce those documents in a sequence permitted by the rule or produce an index of the date Defendant received them. [2]

This is the only aspect of Plaintiff's many requests addressed at the December 2023 conference that has some merit. And as will be seen below, none of Plaintiff's arguments opposing Defendant's discovery requests has any merit.

2. Defendant's Requests

a. Which Defenses Should the Court Consider for the Scope of Relevance? At the outset, the court addresses a preliminary issue concerning Defendant's discovery requests: which defenses the court should the court consider for determining relevance?

In the December 14, 2023 conference, because Plaintiff's Discovery Statement purported to back away from seeking wage loss damages, and because Defendant understood at the time that Plaintiff was also withdrawing her assertion that she suffers from depression because of the accident, Defendant argued that the information sought in its discovery requests would support a defense that it noted at the time it would need to raise by amending its pleading: the Plaintiff's fraud or deception in making her claim under the policy. ECF No. 113 (Hrg. Tr.) at 34-35.

***7** In the meanwhile, the court allowed Plaintiff to amend the complaint to add a punitive damages request. Defendant has answered the amended complaint and included therein the affirmative defense counsel had discussed in the December hearing: that Plaintiff engaged in fraud or deception in making her claim under the policy. ECF No. 147. Plaintiff twice moved to strike at least the new affirmative defense because Defendant did not file a motion to amend to support it. ECF No. 129 (before Defendant pleaded the defense); No. 154 (motion to strike the No. 147 answer). As noted above, those motions are not referred to this court.

It is a straightforward proposition that relevance must be determined in light of the claims and defenses currently pleaded in a case, not those which a party anticipates adding later. However, Plaintiff created unique circumstances at the December 14, 2023 discovery conference: her Discovery Statement clearly attempted to deflect the need for Defendant's discovery of her employment information by asserting that she does not seek wage loss damages, which was apparently the first time that Plaintiff communicated that significant change of position to Defendant. Plaintiff was, at best, cryptic in attempting to draw a distinction between wage loss and loss of the opportunity to continue pursuing the medical billing business that she had started before the accident. At the same time, it would be highly inefficient to ignore intervening changes in the claims and defenses, such that a party would be required to reinitiate the discovery process simply because they later added a new claim or defense to which the discovery would have a more obvious relevance.

In this case, the court need not resolve those issues because Defendant's discovery requests at issue are relevant to defenses it had pleaded at the time. At the time Defendant propounded and argued the discovery requests that are at issue here, Defendant had an affirmative defense based on the terms and conditions of the policy:

> Plaintiff's claims are subject to, and limited by, the terms and conditions of the subject policy, including but not limited to the policy conditions, coverage limits, and exclusions to coverage, and the same are plead[ed] herein in extensor.

ECF No. 90 at 26 (Sixth Affirmative Defense). [3] The policy at issue provides, for instance, that Defendant has "no duty to provide coverage under this policy if the failure to comply with the following duties is prejudicial to us: * * * B. A person seeking any coverage must: 1**. Cooperate with us** in the investigation, settlement or defense of any claim or suit." ECF No. 50-7 at 4 (emphasis added, initial paragraphs in "Duties After an Accident or Loss," bates numbered SFI_000038, in copy of policy attached to Plaintiff's motion to add punitive damages request).

At the time of the December 14, 2023 discovery conference, Defendant also had at least three other affirmative defenses to which its discovery requests may be relevant:

> 8. Plaintiff has failed to submit evidence of and reasonable proof in support of those damages for which she claims a right to recovery in this action.
>
> * * *
>
> 12. Plaintiff's injuries or damages, if any, may be the result of pre-existing conditions and/or subsequent injuries.
>
> * * * 14. While Standard Fire affirmatively disputes and denies that it has breached its contract of insurance with the Plaintiff, strictly arguendo and in the event a breach is otherwise found, Standard Fire asserts that any such breach was induced, caused, or contributed to by the acts, inaction and conduct of the Plaintiff, thereby relieving Standard Fire from any and all liability.

***8** ECF No. 90 at 26 (Eighth, Twelfth, and Fourteenth Affirmative Defenses).

In short, the court analyzes the relevance of Defendant's pending discovery requests in light of the above affirmative defenses that Defendant had pleaded at the time of the December 14, 2023 conference. The court does not decide whether the subject discovery is also relevant to the new affirmative defenses that Defendant purports to add in ECF No. 147.

b. Defendant's Request for Releases of Plaintiff's Employment Information

Defendant requests that Plaintiff be compelled to execute releases for her employment information. Defendant argues that "Plaintiff claimed approximately $400,000 in future lost wages at one point during the claim adjustment." Def. Discov. Stmt. at 1 (citing Def. Ex. 3, 04/30/21 Claim Note). Defendant further argues that documents produced to date "indicate[ ] that Plaintiff has struggled with keeping regular employment for years due to various reasons—all unrelated to the car accident." *Id*. at 1-2 (citing Def. Ex. 4, 2017 Pre-Accident Medical Record mentioning "extreme pain," loss of her job, and a "struggle[ ] with depression all her life"; Def. Ex. 5, 2018 Pre-Accident Medical Record reflecting Plaintiff was not employed at that time). Defendant further argues that the tax returns that Plaintiff has disclosed (which apparently do not include all five years that Defendant requests) "similarly show[ ] very low and inconsistent earnings that are incompatible with Plaintiff's claimed future lost wages." *Id*. at 2. Defendant seeks releases from Plaintiff so that it may subpoena her employment information from her prior

employers.

In Plaintiff's Discovery Statement (submitted the same day as Defendant's), Plaintiff notes that there are nine releases at issue. She argues that Defendant could have sought this information in adjusting her claim before litigation, and that by not doing so, Defendant is barred by "the doctrines of waiver, estoppel, laches, proportionality," and "various permutations of Colorado law standing for the notion that if an insurer foregoes obtaining some piece of information or documentation during its claim handling and evaluation, that it cannot later seek a 'do-over' when that claim handling and evaluation is called out as being deficient." Plaintiff's Discov. Stmt. at 19. Plaintiff cites several cases in support of that proposition. *Id*. at 18-20.

As for the allegedly disproportionate aspect of this discovery, Plaintiff notes that she

> is claiming the inability to pursue the career/business venture of her choice and dreams, and the inability to work as she used to. Plaintiff has in fact continued to work and earn a living after the accident in a different employment capacity (as a real estate agent instead of pursuing and building her own medical billing business). To that end, Plaintiff has not presented in this litigation a computation of damages for wage loss, and does not intend to. Thus, these releases seek information that is wholly irrelevant to this litigation.

Plaintiff's Discov. Stmt. at 19 n. 6.

At the December 14, 2023 conference, Defendant stated that this was the first time it learned that Plaintiff was no longer pursuing the wage loss that she had claimed before litigation. The court notes that in the April 12, 2023 Scheduling Order, Plaintiff included "income loss and/or earning capacity" among the damages that she seeks in this case. ECF No.

30 at 7-8. Even Plaintiff's current amended complaint (filed April 11, 2024) reflects her wage loss claim without noting that she has withdrawn that request. ECF No. 131 ¶¶ 61-66. For instance, the current complaint alleges that "Travelers' requirement that Plaintiff get a work restriction letter from her doctor to be able to evaluate her wage loss claim and failure to pay for her appointment to get that record improperly dilutes Plaintiff's UIM benefits that she is owed under the policy." *Id*. ¶ 66. This allegation does not make plain that Plaintiff no longer seeks the wage loss that she claimed before this litigation. To the contrary, it seems to imply that she does still seek wages that she has lost due to the accident.

***9** In addition, Plaintiff alleges:

> Also on March 3, 2021 Plaintiff sent to Ms. Belletire and Travelers a 9-page victim impact statement detailing her injuries from the accident and how they had affected her life, including issues with ongoing pain that precluded her from being able to earn a living to the same level that she did prior to the collision.
>
> In her March 3, 2021 victim impact statement Plaintiff explained to Travelers that since the accident she was experiencing recurring neck pain, headaches and numbness into her hands and fingers that she had never experienced before the July 31, 2020 collision.
>
> In her March 3, 2021 victim impact statement Plaintiff explained to Travelers that her neck pain, headaches and numbness in her upper extremities from the collision precluded her from being able to work for a full day at her computer like she had been able to do for decades prior to the July 31, 2020 collision.

ECF No. 131 (Am. Complt.) ¶¶ 36-38. *See also* ECF No. 146 (Defendant's PowerPoint presentation) at 16-18 (quoting excerpt from the victim impact statement in question, bates numbered SFI_1938-1946, "prevents me from being able to work at my computer for a full day like I used to do...as I had done for 25 plus years;" "Before 7-31-2020 I worked at my computer from 8 to 12 hours a day with no issues."). [4]

If Plaintiff's only claims in this case were for bad faith, then her opposition to this discovery would have merit. When the insurer has paid all benefits available under a policy before the insured sues, and there is no breach of contract issue in the case, then the reasonableness of the insurer's conduct in adjusting the claim is measured by what the insurer knew at the time. In a bad-faith-only case, the insurer cannot use civil discovery to shore up its earlier decisions with information that it could have sought at the time but did not. *Schultz v. Geico Casualty Co.*, 429 P.3d 844, 846 (Colo. 2018) (the reasonableness of an insurer's coverage decision "must be evaluated based on *the evidence before it when it made its coverage decision*").

But Plaintiff's case is not limited to bad faith claims; she also brings a breach of contract claim. ECF No. 131 (Am. Complt.) at 15 (Second Claim for Relief). It is undisputed that Defendant has not paid Plaintiff the full $250,000 policy limit for UIM benefits. Accordingly, the scope of discovery in this case is clearly not governed by *Schultz*. "Courts in this District routinely follow *Schultz*—**except in cases where an insured raises a breach of contract claim."** *Rosen v. Nationwide Prop. & Cas. Ins. Co.*, No. 22-cv-01378-DDD-SBP, 2023 WL 11113895, at *7 (D. Colo. Oct. 18, 2023) (emphasis added, note omitted, collecting cases), *on reconsideration,* 2024 WL 2245174 (D. Colo. May 17, 2024). [5] *See, e.g.*, *Martinez v. Nationwide Affinity Ins. Co. of Am.*, No. 21-cv-02495-CNS-SKC, 2023 WL 3865717, at *3 (D. Colo. June 7, 2023) (holding that a subpoena from an insurer seeking bank records was not relevant to the plaintiff's bad faith claim under *Schultz*, but "that the information sought is relevant to the breach of contract claim and Nationwide's related defenses"); *Rowell v. Nw. Mut. Life. Ins. Co.*, No. 21-cv-00098-PAB-NYW, 2021 WL 5072064, at *5 (D. Colo. Aug. 23, 2021) (recognizing that "the question of reasonableness is not an element of a breach of contract claim," in holding that "an insurer's failure to seek certain information during the adjustment of a claim does not necessarily form a bar to further discovery once litigation commences for breach of contract") (collecting cases); *Sack v. Colo. Farm Bureau Ins. Co.*, No. 20-cv-2580-WJM-NYW, 2021 WL 4991180, at *3 (D. Colo. Oct. 27, 2021) (holding that a medical report that was not available to the insurer at the time of its decision was "inapposite to the bad faith analysis"), *motion to amend denied*, 2022 WL 1211583 (D. Colo. Apr. 25, 2022).

***10** In short, because Plaintiff brings a breach of contract claim for additional UIM benefits, she relies on clearly inapplicable caselaw to oppose Defendant's discovery of her employment information. Nor is the discovery Defendant seeks disproportional to the needs of the case. Though there are nine former employers or clients of Plaintiff whom Defendant wishes to subpoena, Plaintiff seeks to recover significant damages: $232,000 remaining in the policy's limit that Defendant did not pay her; up to twice the covered benefit ($500,000) for bad faith; and her attorney's fees and costs—in

other words, at least $732,000 *plus* attorney's fees and costs. *See, e.g.*, ECF No. 30 (Scheduling Order) at 8. Defendant has pointed to statements Plaintiff has made in her victim impact statement (and perhaps elsewhere) that the accident has markedly reduced her ability to work and to earn an income. Defendant now seeks to confirm the facts concerning Plaintiff's actual employment from her former employers, who are indisputably the best objective source of that information. These facts bear directly on at least Defendant's sixth, eighth, twelfth, and fourteenth affirmative defenses, as noted above, because Plaintiff's prior and current employment is directly relevant to whether her statements during the claim adjustment process were truthful and whether she was cooperative with Defendant's attempts to investigate her claim. Plaintiff's filings to date also make plain that despite disclaiming a "wage loss" claim, she nonetheless continues to seek economic damages for her future income potential versus her pre-accident income potential. Her employment information is relevant to that issue as well.

Neither are the specific details that Defendant seeks concerning Plaintiff's employment disproportional, harassing, or otherwise objectionable. Defendant focuses on relevant employment information, and since Defendant plans to subpoena the documents from others, not Plaintiff, she lacks standing to object on the basis of undue burden. *See, e.g.*, *Vyanet Operating Group, Inc. v. Maurice,* No. 21-cv-02085-CMA-SKC, 2023 WL 3791458, at *1, 3 n.3 (D. Colo. June 2, 2023) ("in this district, a party has no standing to quash a subpoena served on a third party unless a claimed privilege or privacy interest is implicated," and "even where a party has standing to quash a subpoena based on a privacy or personal interest, they lack standing to object based on undue burden").

Plaintiff also complains that Defendant should have requested her employment information first from Plaintiff under Rule 34, and only subsequently should Defendant be allowed to subpoena that information from her former employers and clients. Plaintiff's Discov. Stmt. at 17. If the court had before it motions to quash the subpoenas—which it does not—it *may* find that a subpoena would be unduly burdensome to the non-party if the subpoena-issuer could have, but did not, first seek the discovery from a party. *See, e.g.*, *Al Muderis v. Hernandez*, No. 20-mc-00090-RM, 2021 WL 119348, at *2, 5 (D. Colo. Jan. 13, 2021). However, Plaintiff simultaneously argues that if Defendant had issued her a discovery request for her employment information, she would have objected because the request would require her to create or prepare new documents only for the production. Plaintiff's Discov. Stmt. at 17. This argument is therefore at best only obstructive.

Accordingly, Defendant's request to compel Plaintiff to releases for her employment information is GRANTED.

c. Plaintiff's Responses to Interrogatories 1, 3, 7, 8, 9, and 10: Generic References to Entire Disclosures

Defendant asserts that Plaintiff has responded to several interrogatories by generically referring to thousands of pages or entire disclosures. Plaintiff does not appear to address this issue in her Discovery Statement, and neither side seems to have raised the issue at the conference. This issue is quite similar to Plaintiff's request, above, that under Rule 34(b), Defendant did not properly identify which manuals were responsive to each of the subtypes Plaintiff requested. Here, Rule 33 expressly provides the standard:

> **(d) Option to Produce Business Records.** If the answer to an interrogatory may be determined by examining, auditing, compiling, abstracting, or summarizing a party's business records (including electronically stored information), and if the burden of deriving or ascertaining the answer will be substantially the same for either party, the responding party may answer by:
>
> **(1)** specifying the records that must be reviewed, **in sufficient detail to enable the interrogating party to locate and identify them as readily as the responding party could**.

***11** Fed. R. Civ. P. 33(d)(1) (emphasis added).

The court could also cite extensive caselaw applying Rule 33(d). But here, the Rule itself suffices: if Plaintiff responded to any interrogatory by identifying an entire disclosure or a page range of thousands, this plainly does not comply with Plaintiff's obligations under Rule 33(d). She shall supplement her responses to interrogatories 1, 3, 7, 8, 9, and 10 to fully comply with the rule.

d. Plaintiff's Response to Interrogatory 5: Healthcare Providers who Recommend Future Treatment

Defendant argues that Plaintiff responded to this interrogatory merely by asserting her belief that she will need ongoing

treatment, but that she did not identify therein any health care provider who has recommended such treatment. Plaintiff does not address this issue in her Discovery Statement, and neither side raised it at the conference. The identity of healthcare providers who have recommended future treatment for injuries or conditions that Plaintiff ascribes to the accident is directly relevant to all of Plaintiff's claims, and she does not argue that this discovery is objectionable. Plaintiff shall supplement her response to this interrogatory to provide a complete answer identifying all such healthcare providers.

e. Plaintiff's Responses to Requests for Production 8, 13, and 14, and Request for Admission 13: Did the Parties Fully Confer?

Request for Production No. 8 asks for Plaintiff's federal and state tax documents from the five years prior to the accident. Request for Production No. 13 seeks all of Plaintiff's medical records related to treatment for depression from 10 years prior to the date of the car accident to the present. Request for Production No. 14 requests all records and documentation regarding any mental status exam related to Plaintiff's application for social security disability.

Defendant notes that Plaintiff produced two years of tax records (for 2017 and 2018) and that Plaintiff agreed to supplement, but she had not done so as of the date Defendant submitted its Discovery Statement. Defendant further explains that counsel attempted to confer on these discovery requests but had not heard back when the Discovery Statement was due. Discovery Statement at 10 n.1.

It is thus unclear to the court whether Defendant still needs a ruling on these requests. Although the court is loath to receive another discovery motion in this case, the parties shall fully confer on these responses if they have not already done so. Defendant may raise any issues that remain in a separate motion to compel.

B. Defendant's Motion for a Rule 35 IME of Plaintiff

Rule 35 provides that "[t]he court where the action is pending may order a party whose … physical condition… is in controversy to submit to a physical … examination by a suitably licensed or certified examiner." Fed. R. Civ. P. 35(a)(1). "The order … may be made only on motion for good cause." *Id.* Rule 35(a)(2)(A). "Rule 35 requires an affirmative showing by the moving party that each condition as to which the examination is sought is really and genuinely in controversy and good cause exists for ordering each particular examination." *Anchondo-Galaviz v. State Farm Mut. Auto. Ins. Co.*, No. 18-cv-01322-JLK-NYW, 2019 WL 11868519, at *10 (D. Colo. July 19, 2019) (citing *Schlangenhauf v. Holder*, 379 U.S. 104, 118 (1964)). In *Schlangenhauf*, the Supreme Court held:

> ***12** The specific requirement of good cause would be meaningless if good cause could be sufficiently established by merely showing that the desired materials are relevant, for the relevancy standard has already been imposed by Rule 26(b). Thus, by adding the words '* * * good cause * * *,' the Rules indicate that there must be greater showing of need under Rule...35 than under the other discovery rules.

Schlagenhauf, 379 U.S. at 118 (internal quotation marks omitted).

Rule 35's good cause standard thus acknowledges an individual's right to privacy. *Id.* at 112; *see also Schultz,* 429 P.3d at 847 ("a medical examination against [a litigant's] will...implicates her privacy interests in her body and her health"). "Rule 35, therefore, requires discriminating application by the trial judge, … [and] the movant must produce sufficient information, by whatever means, so that the district judge can fulfill his function mandated by the Rule":

> Of course, there are situations where the pleadings alone are sufficient to meet these requirements. **A plaintiff in a negligence action who asserts mental or physical injury...places that mental or physical injury clearly in controversy and provides the defendant with good cause for an examination to determine the existence and extent of such asserted injury**.

Schlagenhauf, 379 U.S. at 119 (internal citation omitted, emphasis added).

In this case, Defendant argues that there is good cause for an IME in that Plaintiff asserts that she incurred several types of injuries in the accident—with permanent, current, or lingering symptoms and impairments—for which she continues to seek UIM benefits in her breach of contract claim. Plaintiff opposes Defendant's request for an IME primarily because (1) in her view, the caselaw that restricts discovery in bad faith cases also applies to breach of contract cases, and (2) Plaintiff already underwent an IME at Defendant's request in March 2022— several months before she filed this action. Plaintiff also appears to take issue with having to travel to Colorado at her expense to attend the IME in Colorado Springs, where Defendant's chosen provider is located.

As noted above, the caselaw that limits an insurer in bad faith cases to the information it knew at the time of the alleged bad faith conduct does not apply when the insured also brings a breach of contract claim. *Anchondo-Galaviz*, for example, expressly rejected the position that an insurer waives a Rule 35 examination by not pursuing a medical examination before litigation, when the plaintiff's condition remains at issue. *Anchondo-Galaviz*, 2019 WL 11868519, at *10 (citing *Morrison v. Chartis Prop. Cas., Co.*, No. 13-CV-116-JED-PJC, 2014 WL 1323743, at *2 (N.D. Okla. Apr. 1, 2014); *Ligotti v. Provident Life & Cas. Ins. Co.*, 857 F. Supp. 2d 307, 318– 19 (W.D.N.Y. 2011)). And Plaintiff's claims put her present physical condition at issue. [6]

Plaintiff contends that the requested IME would be duplicative of the pre-litigation IME and, therefore, Defendant has not shown good cause. Plaintiff points to Judge Neureiter's question in the April 2023 scheduling conference to Defendant's former counsel, that "you're not going to take another Rule 35 exam, are you, after...having done an IME?" ECF No. 38 (Hrg. Tr.) at 23. Former counsel asserted they would if there were new issues, but not as to "the same issue that their IME already...related to." *Id*. at 23-24. Judge Neureiter did not purport to decide the question; rather, he said "you're going to have to convince me." *Id*. at 24. One IME does not by definition exclude a second:

> ***13** When permanent injuries are claimed or under other appropriate circumstances, the court may allow a second examination just before trial. *Galieti v. State Farm Mut. Auto. Ins. Co.,* 154 F.R.D. 262 (D. Colo. 1994). A stronger showing of necessity is usually required for a second examination. *Furlong v. Circle Line Statue of Liberty Ferry, Inc.,* 902 F. Supp. 65 (S.D.N.Y. 1995).

Dillon v. Auto-Owners Ins. Co., No. 14-cv-00246-LTB-MJW, 2014 WL 4976315, at *2 (D. Colo. Oct. 6, 2014). It also bears noting that "the Rule 35 decision is intensely fact-specific, and no general rules can be set out." 8B Wright & Miller, Fed. Prac. & Proc. Civ. § 2234.1 (3d ed.).

Consistent with the early discussion at the April 2023 Scheduling Conference, the parties continue to vigorously dispute whether, before this litigation, Plaintiff asserted all of the conditions that she now alleges stem from the accident—particularly whether she suffered a concussion or other head injury in the accident. But unlike at the time of the Scheduling Conference, Plaintiff's March 2022 IME is now over two years old, and the parties have in the meantime undertaken significant discovery. In the summer of 2023, Plaintiff underwent an examination with her own medical expert (Dr. Hurst) who opines that Plaintiff suffered a concussion in the 2020 car accident. ECF No. 100-1 at 3. Dr. Hurst also notes that Plaintiff "continues to experience debilitating symptoms on a daily basis." *Id.* at 7. The very fact that *Plaintiff* has obtained a more recent examination herself—and claims that she has ongoing debilitating symptoms—highlights why Defendant should be allowed to conduct an updated IME to fully explore the conditions and injuries for which Plaintiff now seeks damages. Dr. Hurst's report is a new fact that allows Defendant to make the strong showing required to obtain an updated IME of Plaintiff on the subjects identified in the notice. ECF No. 99-3.

This leaves the question of the location for the IME, and who should be responsible for Plaintiff's travel expenses if it is to be held in Colorado as Defendant has specified. [7] The court is persuaded that Plaintiff, having chosen to bring her suit in Colorado, has assumed the responsibility to travel to this state at her own expense to attend the IME:

> "The general rule" regarding the location of Rule 35 examinations is that a plaintiff who brings suit in a particular forum may not avoid appearing for an examination in that forum. Courts have developed a general rule that plaintiffs should submit to the examination in the forum in which they chose to bring suit. This rule ensures that the examining specialist is available as an

> expert witness at trial, and accounts for the fact that the facilities and equipment an examiner needs are likely at his place of practice.
>
> To be excepted from this general rule, a plaintiff must show that traveling to the examination poses undue burden or hardship.

Cameron v. Gutierrez, No. CV 19-841 GJF/KK, 2020 WL 5326946, at *3 (D.N.M. Sept. 4, 2020) (note omitted; cleaned up, citing *Ornelas v. S. Tire Mart, LLC*, 292 F.R.D. 388, 399-400 (S.D. Tex. 2013); *Sanchez v. Swift Transp. Co. of Ariz., L.L.C.*, No. PE: 15-cv-15, 2016 WL 10588049, at *3 (W.D. Tex. June 22, 2016); *Mansel v. Celebrity Coaches of Am., Inc.*, No. 2:13-cv-01497-JAD, 2013 WL 6844720, at *1 (D. Nev. Dec. 20, 2013)). And "[t]he general rule is [also] that plaintiffs are required to bear the costs and difficulties of travel, including travel from other forums." *Pepe v. Casa Blanca Inn & Suites, LLC*, No. 18-cv-476 JCH/JFR, 2019 WL 10960399, at *1 (D.N.M. July 11, 2019) ("Although exceptions may be made due to financial hardship, Plaintiff has made no argument that she is financially unable to travel. The Court, therefore, denies Plaintiff's request for travel costs associated with the IME.") (cleaned up).[8] *See also Wagner v. Apisson*, No. 2:13-cv-937, 2014 WL 5439592, at *3 (D. Utah Oct. 24, 2014) ("The travel costs Plaintiff will incur in his trip to Utah are ordinary litigation expenses and should have been reasonably anticipated when Plaintiff brought suit in this district. Therefore, Plaintiff is responsible for all costs associated with traveling to Utah for the above ordered deposition and IME."). Plaintiff initiated this lawsuit and put her physical condition at issue. She must now submit to discovery, including an IME and a deposition, and will necessarily incur expenses and costs in the process. *See Pearson v. Progressive Direct Insur. Co.*, CIVIL NO. 10-130 JC/LFG, 2010 WL 11622781, *2 (D.N.M. June 7, 2010) (Defendant employer did not need to pay plaintiff for attending IME, recognizing "[a] party is not entitled to file a lawsuit and then object to the discovery process because it will be inconvenient or because participation in discovery will cause him to lose money.").

***14** Much as in *Pepe*, Plaintiff complains of the inconvenience and expense of traveling from Florida to Colorado. Unique to this case, Plaintiff also points out that Defendant already required her to travel from Florida to Chicago for the 2022 IME, at her expense. That is one of the facts on which Plaintiff bases her bad faith claim, asserting that the policy did not require her to pay those travel expenses. But Plaintiff does not assert that she is financially unable to travel from Florida to Colorado for the IME. That is an ordinary litigation expense Plaintiff should have anticipated when she filed this action in Colorado—where the accident occurred—instead of Florida, where she lives. And it would be premature for this court to take a side on the parties' underlying dispute of whether the policy required Plaintiff to travel out of state at her expense for the 2022 IME. The court therefore will not shift the cost of Plaintiff's travel to Defendant.

Nor is the court persuaded that the IME should be videotaped or audiotaped, as Plaintiff suggests in her response brief. Defendant argues that such recordings are disfavored and objects, citing *Ornelas v. S. Tire Mart, LLC*, 292 F.R.D. 388, 397 (S.D. Tex. 2013). The party requesting that an IME be recorded has the burden of showing that the recording—as a form of protective order under Rule 26(c)—is necessary. *See, e.g.*, *Dillon v. Auto-Owners Ins. Co.*, No. 14-cv-00246-LTB-MJW, 2014 WL 4976315, at *2 (D. Colo. Oct. 6, 2014); *Byron-Amen v. State Farm Mut. Auto. Ins. Co.*, No. 21-cv-02364-NYW, *slip. op*. ECF No. 28 (D. Colo. Jan. 25, 2022); *Byron-Amen*, 2022 WL 1567563, at *2 (D. Colo. May 18, 2022), *reconsideration denied,* 2023 WL 2632783 (D. Colo. Mar. 24, 2023) (both orders reflecting that the court had found the insured did not show that recording the IME was a necessity). *See also Douponce v. Drake*, 183 F.R.D. 565, 567 (D. Colo. 1998) (declining to permit a third party's presence and tape recording of IME). Showing that recording is necessary requires more than a general distrust of Defendant or its counsel; it requires facts to support that the examiner will use inaccurate or unreliable techniques. *See, e.g.*, *Byron-Amen*, Jan. 25, 2022 order at 14. Plaintiff has not met that burden here.

Accordingly, Defendant's motion for Rule 35 examination is GRANTED. The parties shall promptly confer concerning a date and time for the IME.

C. Caution to Plaintiff Concerning Frivolous Arguments and Incendiary Rhetoric

In the February 9, 2024 order—denying Plaintiff's request to depose MAC-Legal personnel and granting MAC-Legal's motion to quash Plaintiff's subpoena—this court noted the inordinate amount of discovery disputes in this case. The court further noted that Judge Neureiter's comment (to Plaintiff's counsel) in the Scheduling Conference presaged the evolution of this case. As Judge Neureiter emphasized, this isn't the IBM antitrust case, and we shouldn't spend thousands of dollars on discovery as though it were. ECF No. 109 at

21-22. Most of this court's February 9, 2024 criticism of the "drill to the center of the earth approach" was directed to Plaintiff's counsel. *Id*.

Obviously, the parties submitted their respective Discovery Statements for the December 2023 conference *before* the court issued that ruling. Nevertheless, **the court observes that the great majority of Plaintiff's arguments on the informal discovery disputes here were frivolous**. In addition, Plaintiff's Discovery Statement contains many instances of disrespectful attacks on Defendant or its counsel. *See, e.g.*, Plaintiff's Discovery Statement at 9 n.4 ("Of course, both of these propositions [of Defendant] are ridiculous and disingenuous."). It is also marked by inflated rhetoric, including that if Defendant did not identify every instance that it retained MAC-Legal for claims handling, it would "likely [be] a due process violation." *Id*. at 9. Such language has not been employed by Defendant in its Discovery Statement or its other filings that have been referred to this court.

***15** In addition, while Plaintiff's response to the Rule 35 motion also predates the February 9, 2024 order, that brief is rife with inappropriate hyperbole and insistence that the court should see every instance in which Defendant or its counsel have not acceded to Plaintiff's discovery demands in this litigation as another example of bad faith. *See, e.g.*, ECF No. 105-1 at 1-3, 19. [9] For example, Plaintiff argues therein that Defendant obtained Plaintiff's pre-litigation IME by fraud, or fraudulently. But the policy expressly provides that after an accident, the insured has an obligation to **"[s]ubmit, as often as we reasonably require...[t]o physical exams by physicians we select. We will pay for these exams."** ECF No. 99-9 (the policy) at 2 ¶ 3.a (bates numbered SFI_000038). Plaintiff clearly had an obligation under the policy to attend the pre-litigation IME, if she wished to obtain benefits thereunder. While she certainly can argue that Defendant misrepresented that the policy required her to travel to Chicago at her own expense for the IME, that is a far cry from saying the entire IME was obtained by fraud. Yet Plaintiff ignores this obvious distinction.

After the February 9, 2024 order, in a February 14, 2024 filing, Plaintiff's counsel "withdr[e]w any and all references to purported discovery and/or rule violations, misrepresentations, or sanctions etc. from ECF No. 104 as it is agreed that such commentary is unnecessary and detracts from the merits of the case. Undersigned counsel commits to move forward in a more conciliatory, less abrasive manner." ECF No. 112 at 2. But notably, Plaintiff has since filed three motions that seek sanctions: ECF No. 129 (not referred, seeking sanctions under 28 U.S.C. § 1927), No. 154 (same), and No. 148 (seeking exclusion of evidence and arguments under Rule 37).

The court cautions Plaintiff and her counsel that if any of her additional filings referred to this court include similarly frivolous arguments, deliberately inciting rhetoric, or language reflecting disrespect toward Defendant or its counsel, this court may award monetary sanctions against Plaintiff or her counsel. The court will also consider appointing a special master to govern discovery, at the expense of Plaintiff, as the "party...more responsible than other parties for the reference to a master." Fed. R. Civ. P. 53(g)(3). To date, Plaintiff has been more responsible than Defendant for an inordinate number of disputes in a case involving a single claimant injured in an auto accident. *See, e.g.,* ECF No. 53 (minutes setting motion hearing and allowing supplemental briefing at Plaintiff's request); ECF No. 75 (order overruling Plaintiff's opposition to the withdrawal of Defendant's former counsel, which Plaintiff occasioned); ECF No. 91 (two-hour discovery conference and hearing on the motion to quash Plaintiff's subpoena); ECF No. 98 (90-minute discovery conference); ECF No. 137 (order overruling Plaintiff's opposition to Defendant's request to extend the schedule so the discovery disputes—on which Defendant has mostly prevailed—could be resolved). If the court deems a special master is warranted, the parties will have an opportunity to be heard before the appointment of such. Fed. R. Civ. P. 53(b)(1). The court also may consider any other form of sanctions authorized under its inherent powers or the Federal Rules of Civil Procedure that it deems necessary to deter conduct that has needlessly complicated this matter.

IV. Conclusion

***16** Accordingly, for the foregoing reasons, the parties' discovery disputes heard at the December 14, 2023 conference are resolved as stated above. Defendant's motion (ECF No. 99) for a Rule 35 examination is GRANTED. [10] The parties shall promptly confer to set a mutually convenient date for the Rule 35 examination to occur at Dr. Rauzzino's offices.

DATED: June 4, 2024 BY THE COURT:

Susan Prose

United States Magistrate Judge

All Citations

Slip Copy, 2024 WL 2830949

Footnotes

1 *Jewkes* is also in part no longer good law. *See* *Green Earth Wellness Center, LLC v. Atain Specialty Ins. Co.*, 163 F. Supp. 3d 821, 836-37 (D. Colo. 2016) (disagreeing with *Jewkes'* denial of an insurer's summary judgment motion as having improperly placed the burden of proof on insurer to show its reliance on experts was reasonable, when the burden is instead on the insured to prove those actions were unreasonable).

2 As for Plaintiff's request for claim notes from MAC-Legal and for training logs (lists) of Defendant's adjusters, the court decided those issues in the February 9, 2024 Order.

3 *See also* ECF No. 146 at 12 (PowerPoint presentation of December 14, 2023 hearing, quoting this affirmative defense as one to which the subject discovery requests were relevant).

4 At the December 14, 2023 conference, Defendant also asserted that Plaintiff's Discovery Statement was the first time it learned that Plaintiff has continued to work after the accident. The current record before the court is too limited for the court to fully that assertion, but Defendant does cite Plaintiff's victim impact statement wherein she asserted her injuries from the accident "have forced me into early retirement." ECF No. 146 at 17.

5 Later, when the insurer in *Rosen* filed its answer asserting as a defense that the insured failed to cooperate, the court granted its motion for reconsideration and compelled the discovery relating to the insured's medical history. *Id*., 2024 WL 2245174 at *3 ("Because Nationwide's affirmative defenses now make Plaintiff's prior medical history directly relevant, the court concludes that *Schultz* does not apply to this case.").

6 It appears Plaintiff also still seeks non-economic damages for alleged impairment of quality of life and emotional distress (ECF No. 30, Scheduling Order at 8), but it does not appear that Defendant seeks an IME of Plaintiff's mental or emotional condition.

7 Defendant notes that instead of the originally-noticed location in Colorado Springs, Dr. Rauzzino has since moved to Lone Tree, Colorado. ECF No. 138. Lone Tree, of course, is much closer to the Denver metropolitan area, and therefore the court does not need to address Plaintiff's arguments complaining of needing to drive from Denver International Airport to Colorado Springs.

8 *Pepe* cites *Jones v. Greyhound Lines, Inc.*, No. 08-1185-MLB-DWB, 2009 WL 1650264, *5 (D. Kan. Mar. 8, 2011) ("Absent a clear showing that plaintiff is indigent, Plaintiff will be required to pay for his own transportation to the [IME] examination."); *Maes v. Progressive Direct Insur. Co.,* Civ. No. 18-1038 KBM/KK, 2019 WL 998811, *3 (D.N.M. Feb. 27, 2019) (concluding that travel expenses were not reimbursable); *Hatchett v. United Parcel Serv. Inc.,* No. 13-cv-1183 MCA/SMV, 2014 WL 12792348, *2 (D.N.M. June 12, 2014) (requiring out of state plaintiff to travel to Albuquerque for IME where there was no evidence of financial hardship or physical inability to travel).

9 Plaintiff argues for instance that "[s]uch dishonest gamesmanship should not be rewarded by granting Travelers a 'do-over' of their substandard claim investigation, particularly in light of the context of the prior request for an IME wherein Travelers fraudulently misrepresented the terms of the policy to the brain-injured

insured so as to coerce her to travel across the country to attend an IME that it was setting up for secretly anticipated litigation in Chicago. Travelers already obtained one IME under false pretenses, and they must be precluded from doing it again"; "Travelers waited fourteen (14) months after suit was filed to finally decide to demand a Rule 35 examination, all in a transparent attempt to expert shop and obtain a 'do-over' of its pre- litigation, specifically selected, independent medical examination that Travelers obtained by fraud"; and "Travelers takes the ridiculous position..."

10 Rule 72 of the Federal Rules of Civil Procedure provides that within fourteen (14) days after service of a Magistrate Judge's order or recommendation, any party may serve and file written objections with the Clerk of the United States District Court for the District of Colorado. 28 U.S.C. §§ 636(b)(1)(A), (B); Fed. R. Civ. P. 72(a), (b). Failure to make any such objection will result in a waiver of the right to appeal the Magistrate Judge's order or recommendation. *See Sinclair Wyo. Ref. Co. v. A & B Builders, Ltd.*, 989 F.3d 747, 782 (10th Cir. 2021) (firm waiver rule applies to non-dispositive orders); *but see Morales-Fernandez v. INS*, 418 F.3d 1116, 1119, 1122 (10th Cir. 2005) (firm waiver rule does not apply when the interests of justice require review, including when a "pro se litigant has not been informed of the time period for objecting and the consequences of failing to object").

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