Summaries of Published Opinions

February 8, 2018

2018 COA 12. No. 14CA0144. People v. Trujillo. *Criminal Law—Foreclosure—Theft—Criminal Mischief—Sentencing—Jury Instructions—Evidence—Motive—Prosecutorial Misconduct—Probation—Indeterminate Sentence—Costs.*

Trujillo took out a construction loan from the victim, a bank, for home construction. After construction was completed on the house, Trujillo stopped making his monthly loan payments, and the bank subsequently initiated foreclosure proceedings. Before the foreclosure sale, Trujillo removed or destroyed property in the house, which resulted in a decrease in the home's value from $320,000 to $150,000. A jury found him guilty of theft and criminal mischief.

On appeal, Trujillo contended that he should have benefited from an amendment to the theft statute reclassifying theft between $20,000 and $100,000 as a class 4 felony. Before the amendment, theft over $20,000 constituted a class 3 felony. Trujillo was charged with theft before the statute was amended but was not convicted or sentenced until after the General Assembly lowered the classification for theft between $20,000 and $100,000. Thus, Trujillo was entitled to the benefit of the amendment.

Trujillo also asserted that the trial court erred in rejecting various jury instructions regarding his theory of the case. Throughout trial, the defense's theory of the case was that Trujillo lacked the requisite intent to commit the charged offenses because he believed that the property he removed from the house belonged to him. Here, the trial court instructed the jury on Trujillo's theory of the case in an instruction that clearly stated that Trujillo believed the property he took from the house was "his sole property." The trial court did not abuse its discretion in drafting a theory of defense instruction that encompassed the defense's tendered instructions.

Trujillo next asserted that the trial court erred in allowing the People to introduce evidence that another property of his had been foreclosed. However, the evidence was directly relevant to Trujillo's intent and motive. Therefore, the trial court did not err in admitting it.

Trujillo further argued that the prosecutor improperly commented on the district attorney's screening process for bringing charges and Trujillo's decision to not testify, and improperly denigrated defense counsel and the defense's theory of the case. Although the prosecutor improperly denigrated defense counsel and the defense's theory of the case, viewing the record as a whole there was not a reasonable probability that the remarks contributed to Trujillo's convictions. There was no basis for reversal.

Trujillo also contended that the trial court exceeded its statutory authority in sentencing him to indeterminate probation. The statute, however, does not prohibit such sentencing, and based on the substantial amount of restitution Trujillo owed, the trial court did not abuse its discretion in sentencing him to an indefinite probation sentence.

Lastly, the Court of Appeals agreed with Trujillo's assertion that the trial court erred in awarding the full costs of prosecution requested by the People without making a finding on whether any portion of the costs was attributable to the acquitted charge.

The judgment of conviction was affirmed. The sentence was affirmed in part and vacated in part, and the case was remanded with directions.

2018 COA 13. No. 15CA0170. People v. Van Meter. *Criminal Law—Possession of a Weapon by a Previous Offender—Reasonable Doubt—Mistrial—Prosecutorial Misconduct—Jury Instruction—Possession—Evidence.*

Van Meter pleaded guilty to multiple crimes and served time in the Department of Corrections' custody. After Van Meter was released on parole, his employer told Van Meter's parole officer that Van Meter had a gun in his car and was possibly using heroin and stealing from customers. When Van Meter arrived at work he was arrested, and officers found a loaded semi-automatic handgun inside a toolbox in the trunk of his car. A jury found Van Meter guilty of possession of a weapon by a previous offender (POWPO).

On appeal, Van Meter argued that the trial court reversibly erred in failing to declare a mistrial after a prospective juror stated in front of the panel that he was aware of the underlying case because he was a deputy sheriff and had transported Van Meter to court. The record supports the trial court's determination that the challenged comments did not taint the entire panel because they did not necessarily imply that the deputy sheriff transported Van Meter to court for the underlying case rather than a previous case, and the POWPO charge required the jury to learn that Van Meter had a prior felony conviction. The trial court did not abuse its discretion in declining to declare a mistrial.

Van Meter next asserted that the trial court reversibly erred by allowing the prosecutor to show the jury a picture of a partially completed puzzle of an iconic and easily recognizable space shuttle image to explain the concept of reasonable doubt. There was no contemporaneous objection. The challenged behavior constituted prosecutorial misconduct. However, because all the elements of the POWPO charge were clearly proven, and the error was neither obvious nor substantial, the trial court did not plainly err in allowing the prosecutor's improper conduct.

Van Meter also argued that the trial court erroneously instructed the jury on the definition of "possession" in the context of the POWPO charge. The trial court gave the definition of "possession" from the new criminal jury instructions, and defense counsel affirmatively declined to object to the challenged instruction three times. The challenged instruction was not

incorrect or otherwise confusing to the extent that it constituted plain error.

Van Meter next contended that the trial court reversibly erred in allowing evidence that the gun found in his vehicle was stolen and that Van Meter was allegedly using illicit drugs. Here, defense counsel offered no contemporaneous objections and strategically chose to elicit CRE 404(b) evidence, and there was overwhelming evidence of Van Meter's guilt. Any error in allowing the challenged evidence did not rise to the level of plain error.

The judgment was affirmed.

2018 COA 14. No. 16CA1383. Danko v. Conyers, MD. *Torts—Medical Malpractice—Evidence—Pro Rata Liability—Non-Party Fault—Costs.*

Dr. Conyers performed carpal tunnel surgery on Danko. He did not order a post-operative biopsy to detect possible infection and ultimately released Danko from further care. Danko sought a second opinion from Dr. Scott, who performed a minor procedure on Danko's wrist and later diagnosed her with an infection. Subsequently, Danko saw Dr. Savelli, who recommended a regimen of antibiotics and periodic surgical debridement of infected tissue. Two weeks later, Danko consulted Dr. Lindeque, who amputated Danko's forearm. Danko filed a complaint alleging that Dr. Conyers negligently failed to detect an infection resulting from the surgery, which led to amputation of her forearm. The jury found Dr. Conyers liable and awarded damages of $1.5 million.

On appeal, Dr. Conyers challenged the trial court's exclusion of his evidence that physicians who treated Danko after the surgery were at fault for the amputation. Dr. Conyers did not seek to apportion fault between himself and the other providers. Instead, he sought to admit evidence of their negligence as a superseding cause of Danko's amputation. Such evidence is admissible under CRS § 13-21-111.5 (the nonparty at fault statute) even if a nonparty at fault has not been designated. Thus, the part of the trial court's ruling excluding evidence that was based on CRS § 13-21-111.5(b)(3) was incorrect. But the trial court also based its ruling on *Restatement (Second) of Torts* § 457, which provides an exception to the liability of initial physicians for harm from subsequent physicians' extraordinary misconduct, a superseding cause. Here, the trial court acted within its discretion in excluding evidence of the other providers' fault, under both *Restatement* § 457 and CRE 403, because Dr. Conyers had not presented evidence sufficient to invoke the extraordinary misconduct exception. Further, the trial court did not err in instructing the jury consistent with this ruling.

On cross-appeal, Danko challenged the trial court's denial of certain costs, including jury consulting expenses. Danko made a settlement offer under CRS § 13-17-202(1)(a)(I), which Dr. Conyers did not accept. The verdict exceeded the amount of the offer. A party may recover jury consulting expenses when that party made a statutory settlement offer that was rejected, and did better than the offer at trial. Here, the trial court improperly denied costs for jury consulting and related travel expenses.

The judgment was affirmed. The costs award was affirmed in part and reversed in part, and the case was remanded to increase Danko's costs award.

2018 COA 15. Nos. 16CA1521 & 17CA0066. Marso v. Homeowners Realty, Inc. *Respondeat Superior—Agent—Amendment of Answer—Affirmative Defense—Setoff—Settlement—Statutory Prejudgment Interest.*

Dilbeck was employed by or associated with Homeowners Realty, Inc., d/b/a/ Coldwell Banker Home Owners Realty, Inc. (Coldwell), and acted as the Marsos' agent in their purchase of a house. Two years after the purchase, the Marsos discovered that uranium tailings had been used as fill material, creating a potential health hazard. The Marsos filed a complaint against Dilbeck and Coldwell alleging negligence against Dilbeck and respondeat superior liability against Coldwell. Before the scheduled trial date, the Marsos settled with Dilbeck for $150,000, inclusive of interest. The jury was instructed to determine the total amount of damages sustained by the Marsos and was not informed of the amount of the settlement with Dilbeck. The jury returned a verdict of $120,000 against Coldwell. In post-trial proceedings, the trial court set off the settlement payment of $150,000 against the $120,000 jury verdict, resulting in a zero recovery for the Marsos. Because the settlement payment exceeded the jury verdict, the court entered judgment in favor of Coldwell and later entered a cost award against the Marsos of approximately $30,000.

On appeal, the Marsos contended that the court abused its discretion in allowing Coldwell to amend its answer to assert the affirmative defense of setoff over the Marsos' timeliness objection. Because Coldwell did not obtain the settlement agreement until shortly before trial and the Marsos had no right to rely on the absence of a setoff, the amendment did not result in legal prejudice to the Marsos. Under these circumstances, the court did not abuse its discretion in allowing Coldwell to pursue its setoff defense.

The Marsos next argued that the trial court erred when it set off the settlement payment against the jury verdict. When a party's liability is based entirely on respondeat superior, a settlement with the agent is setoff against the jury verdict entered against the principal. Therefore, the trial court did not err in this regard.

The Marsos also contended that the trial court erred when it set off the settlement payment before statutory prejudgment interest accrued on the jury verdict. Statutory prejudgment interest accrues on the jury verdict before the setoff. Here, the court must calculate the interest that accrued on the jury's verdict from the date of the Marsos' injury to the date of Dilbeck's settlement payment and add it to the jury verdict.

The judgment and cost award in Coldwell's favor was reversed, and the case was remanded for further proceedings.

2018 COA 16. No. 16CA1522. Campaign Integrity Watchdog, LLC v. Colorado Citizens Protecting our Constitution. *Election Law—Campaign Finance—Major Purpose Test for Political Committee.*

Colorado Citizens Protecting our Constitution (Colorado Citizens) paid for a radio advertisement that supported a candidate for state senate. Campaign Integrity Watchdog, LLC (Campaign Integrity) filed a complaint with the Colorado Secretary of State (Secretary) alleging that Colorado Citizens had not

registered as a political committee as required by article XXVIII of the Colorado Constitution and the Fair Campaign Practices Act. Colorado Citizens and the Secretary moved for summary judgment before the administrative law judge (ALJ). Colorado Citizens argued it was not a political committee because it did not have the "major purpose" of supporting or opposing candidates. The Secretary added that it could not be a political committee because it did not make or receive contributions. The motions were denied.

Following a hearing on the merits, the ALJ found that Colorado Citizens' spending on political candidates only accounted for little more than one-third of its total spending, while the majority of its spending involved political issues. He concluded it was not a political committee because it did not have the major purpose of nominating or electing political candidates.

On appeal, Campaign Integrity argued that the ALJ misapplied the major purpose test and erred in holding that Colorado Citizens was not a political committee. The Court of Appeals first reaffirmed that the "major purpose" test was the correct test to be applied. To determine an organization's major purpose, a court can (1) examine its central organizational purpose, or (2) examine the organization's spending to determine whether the preponderance of expenditures are for express advocacy or candidate contributions. The Court agreed with the ALJ that Colorado Citizens' statement of its organizational purpose was unhelpful and that analyzing Colorado Citizens' spending activity was the appropriate method. The Court determined that the record supported the ALJ's determination that the organization was not a political committee because, based on the amount of its spending on political advocacy for candidates, it did not have the major purpose of nominating or electing candidates.

Campaign Integrity also argued that when applying the major purpose test, the ALJ should have considered Colorado Citizens' spending in a calendar year, instead of a consecutive 12-month period. The records the judge examined were those subpoenaed by Campaign Integrity. It was up to Campaign Integrity to provide the additional records if it had wanted the judge to consider them. In addition, there is no legal authority requiring a calendar year analysis.

Campaign Integrity further argued that the ALJ improperly excluded evidence from his analysis that Colorado Citizens had made $76,000 in candidate contributions during March and April of 2015. The Court found the judge did not err because there was no evidence regarding other expenditures made during that time period, so the record was incomplete as to Colorado Citizens' total spending in those months. Moreover, even if the $76,000 were included, the total candidate spending would still have constituted less than 50% of Colorado Citizens' overall candidate-related expenditures, or less than what would constitute the central purpose for which Colorado Citizens was created.

The order was affirmed.

2018 COA 17. No. 16CA1864. Brunson v. Colorado Cab Company, LLC. *Colorado Minimum Wage Act—Colorado Wage Claim Act—Colorado Wage Order 31—Summary Judgment—Interstate Drivers.*

Brunson is a shuttle van driver who transports passengers to and from Denver International Airport but does not drive out of state. He claimed that Shamrock Charters, Inc. and Colorado Cab Company, LLC (collectively, Shamrock) failed to pay him overtime compensation in violation of the Colorado Minimum Wage Act and the Colorado Wage Claim Act. The Acts are implemented by Colorado Wage Order 31, which requires covered employers to pay overtime. As pertinent here, the Wage Order exempts "interstate drivers" from its provisions. Neither the Acts nor the Wage Order defines the term "interstate drivers."

The district court granted summary judgment in favor of Shamrock. It found that the Wage Order's language closely follows the federal Motor Carrier Act (MCA) exemption of the Fair Labor Standards Act (FLSA) and construed "interstate drivers" in accordance with federal interpretation. Thus, the district court concluded that "interstate drivers" includes drivers involved in interstate commerce even if their work is entirely within the state. The court further concluded that Brunson was an interstate driver and was, as a matter of law, exempt from the Wage Order's overtime pay requirements.

On appeal, Brunson contended that the federal interpretation of the MCA exemption does not apply to his state claims. The Court of Appeals determined that federal and state overtime pay exemptions are not identical or substantially identical. Further, the Colorado Department of Labor has published clear persuasive evidence of its intent to provide greater protections than those under FLSA. Therefore, the Court concluded that federal case law's interpretation of "interstate drivers" does not apply to Brunson's state claims. Having determined that federal case law is not persuasive authority as to the meaning of "interstate driver," the Court relied on the Department's interpretation of its own regulation in its Advisory Bulletin and construed the term "interstate drivers" to apply only to drivers whose work takes them across state lines. Thus, Shamrock did not "plainly and unmistakably" demonstrate that Brunson fell within the Wage Order's exemption.

The summary judgment was reversed and the case was remanded.

2018 COA 18. No.17CA0043. Save Cheyenne v. City of Colorado Springs. *Land Exchange—Home Rule Cities.*

The Colorado Springs City Council adopted a resolution approving a land exchange between the City, on the one hand, and the Broadmoor Hotel, Inc.; the Manitou and Pike's Peak Railway Company; the COG Land & Development Company; and PF, LLC (collectively, the Broadmoor) on the other hand. As relevant here, a 189.5 acre parcel within Cheyenne Park known as "Strawberry Fields" was transferred to the Broadmoor for construction of a private equestrian center on an 8.5 acre building envelope within the parcel. As a condition of the transfer, the Broadmoor is required to allow continued public access to Strawberry Fields, with the exception of the land within the building envelope. In exchange, the Broadmoor transferred to the City more than 300 acres of land and trail easements to be added to the City's park system.

Plaintiff, a local nonprofit corporation, filed suit, seeking a declaration that the resolution authorizing the land exchange was null and void, and injunctive relief preventing the land

exchange. It also alleged a zoning violation. The City and the Broadmoor moved to dismiss under CRCP 12(b)(5), for failure to state any claims, and under CRCP 12(b)(1), arguing that the zoning challenge was unripe. The district court granted the motion.

The Court of Appeals first rejected defendants' motion to dismiss plaintiff's appeal based on mootness. Plaintiff argued that the resolution was an ultra vires act of the City Council because Cheyenne Park had previously been dedicated as a public park, and as a consequence, the City holds the park in trust for the public and cannot convey the park's land. The Court concluded that no valid statutory dedication of Cheyenne Park occurred, and that any common law dedication was abrogated. The City Council had the power to convey Strawberry Fields when it authorized the land exchange.

Plaintiff next argued that under CRS § 31-15-713(1)(a) no conveyance of the parkland could be made unless it was authorized by a vote in a public election. Colorado Springs is a home rule city and therefore in matters of local concern, a home-rule ordinance supersedes a conflicting state statute. The Colorado Springs City Code provides that land exchanges are to be reviewed by the City Council and approved by resolution. The Code provision applies, and the City was not required to hold an election before making the land transfer.

The Court also rejected plaintiff's argument that the resolution and land exchange violated article XI, section 2 of the Colorado Constitution, which prohibits transfers of city property without consideration. Here, the City received consideration for the parkland.

Plaintiff next contended that the City Council's resolution approving the land exchange violates the City Charter. The Charter sections at issue only regulate granting franchises and leases on public property and city-owned parklands. The transaction here did not create a lease or franchise on City property, and these provisions do not apply to the conveyance.

Lastly, the Court concluded that plaintiff's claim of zoning violations is not yet ripe for review. The record does not demonstrate that a final zoning decision has been made regarding the permitted uses of Strawberry Fields. The district court properly dismissed this claim.

The judgment was affirmed.

2018 COA 19. No. 17CA0322. Montoya v. Industrial Claim Appeals Office. *Workers' Compensation—Medical Incapacity—Temporary Partial Disability.*

Claimant worked as an interior designer for Ethan Allen Retail, Inc. Her pay was based entirely on commissions. Claimant suffered admitted work-related injuries. Although she was neither given work restrictions nor medically limited in her ability to work, her medical appointments caused her to be absent from the showroom floor and not be able to meet potential and current clients. Claimant sought temporary partial disability benefits (TPD) in a workers' compensation action. She testified that the absences caused her to lose more than $20,000 in commission earnings. The administrative law judge (ALJ) awarded claimant TPD benefits to compensate her for the commissions she lost while attending medical appointments.

A panel of the Industrial Claim Appeals Office (Panel) set aside the award of TPD benefits, reasoning that disability benefits are only available if a claimant demonstrates both medical incapacity and temporary loss of wage earning capacity. Here, because the ALJ had found that claimant had no work restrictions and was able to perform her job duties, the Panel held she did not establish the requisite "medical incapacity" prong of disability and therefore, as a matter of law, was not entitled to receive TPD benefits.

On appeal, claimant contended that the Panel's interpretation of "disability" was too narrow. The Court of Appeals concluded that although the concept of disability incorporates both "medical incapacity" and "loss of wage earnings," a claimant need not prove both components to establish entitlement to disability benefits under the Workers' Compensation Act. The Court then found that the evidence presented amply supported the ALJ's finding that claimant's wage loss was attributable to her work-related injury. The Panel erred in setting aside the ALJ's decision.

The Panel's decision was set aside and the case was remanded with instructions.

February 22, 2018

2018 COA 20. No. 15CA0126. People v. Rojas. *Criminal Law—Theft—Colorado Public Assistance Act—Food Stamps—Fraudulent Acts.*

Rojas received food stamps. When requesting an extension of food stamp benefits, Rojas reported that she had no employment income, although she had been hired as a restaurant manager. While continuing to work as a restaurant manager, Rojas received $5,632 worth of food stamps to which she was not entitled. Rojas was found guilty of two counts under the general theft statute, CRS § 18-4-401, and one count under CRS § 26-2-305(1)(a), which criminalizes failing to report a change in financial circumstances that affects that participant's eligibility for food stamps.

On appeal, Rojas challenged the trial court's denial of her motion to dismiss the general theft counts. She argued that the trial court erred in finding that she could be prosecuted for theft of food stamps under the general theft statute. The prosecution is barred from prosecuting under a general criminal statute when the legislature evinces a clear intent to limit prosecution to a more specific statute. CRS § 26-2-305(1)(a) creates a more specific criminal offense, theft of food stamps by a fraudulent act, than the general theft statute, and the General Assembly intended it to supplant the general theft statute.

The convictions under the general theft statute were vacated.

2018 COA 21. No. 16CA0817. Dorsey & Whitney LLP v. RegScan, Inc. *Attorney Fees—Personal Jurisdiction—Long Arm Statute—Due Process—Expert Witness—Fed. R. Evid. 703—Jury Instructions—CRE 408—Settlement Negotiations—Evidence.*

RegScan, Inc., a Pennsylvania-based Internet company, reached out to and retained a specific Colorado attorney in Dorsey & Whitney LLP (the law firm) to represent it in a matter ultimately filed in Virginia. After a disagreement about the amount of fees owed, the law firm sued RegScan in Denver District Court. Judgment was ultimately entered for $373,707.43 against RegScan.

On appeal, RegScan argued that the district court lacked personal jurisdiction. It contended

that its actions connecting it to Colorado did not demonstrate purposeful availment because it merely contacted a Minnesota-based firm that happened to staff the case with Colorado attorneys. A plaintiff desiring to invoke a Colorado court's jurisdiction over a nonresident defendant must show that doing so comports with the long-arm statute and due process. Here, RegScan specifically retained an attorney in Colorado based on an existing relationship. The totality of the circumstances surrounding this retention demonstrates that RegScan's purposeful activities directed at Colorado satisfy the minimum contacts requirement. Further, requiring RegScan to defend this case in Colorado was not unreasonable. Therefore, the district court did not err in denying RegScan's motion to dismiss for lack of personal jurisdiction.

RegScan next contended that the court erred by allowing the law firm's expert witness on the reasonableness of its fees to testify to the substance of information in pro forma bills (records reflecting the total number of hours worked) that the law firm didn't offer into evidence. Fed. R. Evid. 703 allows an expert to base his opinion on facts or data that wouldn't be admissible if such facts and data are of a type on which experts in the field would reasonably rely. But the expert may not disclose those inadmissible facts to the jury unless the court so allows after engaging in the balancing analysis required by the rule. RegScan's argument confuses information that can't be admitted under the evidence rules with information that simply has not been admitted. Here, RegScan failed to timely argue that the pro formas weren't admissible. Further, the substance of the testimony was already in evidence, and RegScan did not argue that the witness's ultimate opinion was inadmissible or wrong. Therefore, there was no violation of Fed. R. Evid. 703.

RegScan also contended that the district court erred by failing to include a fairness element in the elemental breach of contract jury instruction. Even if the court erred in omitting the element that the fee agreement was "fair and reasonable under the circumstances," all relevant evidence in the record overwhelmingly shows that the fee agreement was fair and reasonable under the circumstances. Thus, any error was harmless.

Finally, RegScan argued that the district court erred by relying on CRE 408 to exclude email communications in which RegScan disputed the reasonableness of the law firm's fees and didn't admit liability. This evidence was properly excluded under CRE 408 because at the time the communications occurred the parties disputed the amount owed and were exchanging offers to resolve the dispute.

The judgment was affirmed.

2018 COA 22. No. 16CA1446. People in re J.C. *Juvenile—Delinquency—Indeterminate Sentence—Mandatory Sentence Offender—Repeat Juvenile Offender—Multiple Adjudications—Illegal Sentence.*

J.C., a juvenile, pleaded guilty to charges in three separate cases, pursuant to a global plea agreement, on the same day during a hearing addressing all three cases. She pleaded guilty first to a third-degree assault charge, then to a second-degree criminal trespass charge, and finally to a second-degree assault charge. The court accepted the pleas and adjudicated J.C. delinquent in all three cases. The juvenile court sentenced J.C. to an indeterminate one-to-two-year term of commitment in the custody of the Division of Youth Corrections (DYC), with a mandatory minimum term of one year.

J.C. filed a motion to correct illegal sentence, arguing that the court lacked authority to sentence her to a mandatory minimum period of confinement as a mandatory sentence offender because the three adjudications required for the relevant statute to apply had all occurred at the same hearing. The court denied the motion. J.C. then filed for postconviction relief, alleging that she received ineffective assistance of plea counsel and that she hadn't knowingly, voluntarily, or intentionally pleaded guilty. In denying the motion, as relevant here, the court ruled that because it was not shown that the court relied on the "mandatory sentence offender" classification, J.C. did not show prejudice.

On appeal, J.C. argued that the juvenile court erred by summarily denying her petition for postconviction relief because she had alleged that neither her lawyer nor the court had advised her that she would be sentenced as a repeat juvenile offender. She alleged that she was prejudiced by counsel's deficient performance and the court's failure to advise her because she wouldn't have pleaded guilty if she'd known she would be sentenced to a mandatory minimum term of confinement. The Court of Appeals reviewed the entire juvenile sentencing scheme and concluded that a court may not sentence a juvenile to DYC for an indeterminate term. Because the court sentenced J.C. to one to two years in DYC, her sentence is indeterminate and therefore illegal.

Because the issue will likely arise on remand, the Court also addressed whether the juvenile court may sentence J.C. to a mandatory minimum period of commitment. A mandatory minimum sentence to DYC commitment is authorized only if the juvenile qualifies as a special offender under CRS § 19-2-908. Two categories of special offenders are relevant here: mandatory sentence offenders and repeat juvenile offenders. However, a juvenile doesn't qualify as a mandatory sentence offender under CRS § 19-2-516(1) or a repeat juvenile offender under CRS § 19-2-516(2), when, as in this case, the multiple adjudications required by those provisions occurred in the same hearing. Therefore, the juvenile court couldn't have legally sentenced J.C. to a mandatory minimum term of commitment as a mandatory sentence offender or repeat juvenile offender and cannot do so on remand.

The sentence was vacated and the case was remanded with directions to resentence J.C.

2018 COA 23. No. 16CA1492. In re Marriage of Runge. *Dissolution of Marriage—Post-Decree—CRCP 16.2(e)(10)—Subject Matter Jurisdiction—Disclosures.*

In this post-dissolution of marriage dispute, wife moved under CRCP 16.2(e)(10) to discover and allocate assets that she alleged husband did not disclose or misrepresented in the proceedings surrounding their 2011 separation agreement. Husband moved to dismiss wife's motion and the district court granted the dismissal.

As an initial matter, husband contended that the district court lacked subject matter jurisdiction under CRCP 16.2(e)(10) because the five-year period during which it may reallocate

assets expired the day after wife moved for such relief. CRCP 16.2(e)(10) does not limit the court's jurisdiction to rule on timely motions if the five-year period expires before the ruling. Therefore, the district court had jurisdiction to rule on the motion because wife's motion was timely filed within the five-year period under the rule.

On appeal, wife contended that the district court erred by not applying the "plausibility" standard announced in *Warne v. Hall*, 2016 CO 50, when granting husband's motion to dismiss. The *Warne* plausibility standard does not apply here because wife's motion was not a pleading and husband's motion to dismiss was not pursuant to CRCP 12(b)(5).

Wife also contended that the district court erred by ruling that she did not state sufficient grounds in her motion and that the court should have allowed her to conduct discovery to prove her allegations. Wife did not allege that husband failed to disclose specific items mandated under CRCP 16.2(e)(10) and husband certified that he provided all such items. Instead, wife asserted suspicions and speculations that husband likely failed to disclose and misrepresented assets. In light of the information about husband's assets that wife had pre-decree, and her choice to enter into a separation agreement rather than to evaluate this information, wife's motion did not state sufficient grounds to trigger an allocation of misstated or omitted assets. Further, CRCP 16.2(e)(10) was not intended to create a right for an ex-spouse to conduct discovery into the other spouse's assets post-decree.

The order was affirmed.

2018 COA 24. No. 16CA1643. People v. Joslin. *Criminal Procedure—Postconviction Motion—Restitution—Interest.*

After entering into plea agreements, defendant was sentenced to 92 years to life in the custody of the Department of Corrections and ordered to pay over $14,000 in fees and $1,520 in restitution. When defendant did not pay the restitution within a year, he was charged interest on that unpaid restitution pursuant to CRS § 18-1.3-603(4)(b). He then filed two nearly identical Crim. P. 35(c) motions, alleging that in each case he was never told that he would be charged interest on unpaid restitution. He claimed that he would never have pleaded guilty if he had known he would have to pay interest. The district court denied the motions without a hearing.

On appeal, defendant contended that he was entitled to postconviction relief because either the district court or his counsel (or both) was required to tell him that he would be required to pay interest on unpaid restitution and they failed to do so. Interest on unpaid restitution is a collateral consequence of a plea and neither the district court nor defendant's counsel had a duty to advise defendant of this possibility. Therefore, defendant's postconviction allegations, even if true, do not warrant relief, and the district court did not err in denying defendant's motion without a hearing.

The order was affirmed.

2018 COA 25. Nos. 16CA1646 & 17CA0074. Scott v. Scott. *Torts—Conversion—Unjust Enrichment—Life Insurance Proceeds—Motion to Dismiss under CRCP 12(b)(5) and (6)—Attorney Fees and Costs.*

Roseann's marriage to Melvin Scott was dissolved. Their separation agreement provided that Melvin's life insurance policies were to be maintained until Roseann remarried, and at that time the beneficiaries could be changed to the children of the parties. Upon emancipation of the children, if Roseann had remarried, Melvin could change the beneficiary to whomever he wished. A Prudential life insurance policy was the policy at issue in this case.

After the divorce, Melvin married Donna and remained married to her until his death. Roseann never remarried. A few years before Melvin died and decades after his divorce from Roseann, Melvin changed the named beneficiary on his life insurance policies to Donna. Melvin died and Donna received the proceeds from his life insurance policies. Roseann sent a demand letter to Donna, requesting the proceeds pursuant to the separation agreement. The proceeds were placed in a trust account pending the outcome of this litigation.

Roseann sued Donna in Mesa County District Court, alleging civil theft, conversion, and unjust enrichment/constructive trust. Donna did not answer but removed the case to federal district court based on administration of the veteran life insurance policies by the federal government. She then moved to dismiss Roseann's claims under a theory of federal preemption. Ultimately, the federal court agreed with the preemption argument and dismissed Roseann's claims with prejudice as to the veteran policies but remanded the remaining claims to the Mesa County District Court for resolution regarding the Prudential policy.

Donna filed a motion in the district court to dismiss under CRCP 12(b)(5) and (6), arguing that Roseann's claims failed to state a claim upon which relief could be granted and that she had failed to join Melvin's estate, a necessary party. The district court granted the motion and a subsequent motion for attorney fees and costs.

On appeal, the Court of Appeals first examined whether Roseann had stated claims sufficient to withstand the plausibility standard required to survive a motion to dismiss under CRCP 12(b)(5). To state a claim for civil theft, a plaintiff must allege the elements of criminal theft, which requires the specific intent of the defendant to permanently deprive the owner of the benefit of his property. Roseann made a single, conclusory allegation, repeating the language in the statute, that Donna acted with the requisite intent to state a claim for civil theft. The Court concluded that, without more, the allegation was not entitled to the assumption of truth, and the district court did not err in dismissing the civil theft claim.

Conversion, unlike civil theft, does not require that the convertor act with the specific intent to permanently deprive the owner of his property. Even a good faith recipient of funds who receives them without knowledge that they belonged to another can be held liable for conversion. Here, Roseann adequately alleged that Donna's dominion and control over the Prudential policy proceeds were unauthorized because of the separation agreement language and Donna's refusal to return the allegedly converted funds. Roseann pleaded each element of conversion sufficiently for that claim to be plausible and withstand a request for dismissal under CRCP 12(b)(5).

Similarly, the Court concluded it was error to dismiss Roseann's claim for unjust enrichment and constructive trust. In general, a person who is unjustly enriched at the expense of another is subject to liability in restitution. Here, Roseann alleged that Donna received a benefit that was promised to Roseann in the separation agreement and it would be inequitable for Donna to retain the funds. Roseann asked the court to impose a constructive trust on the assets. While this may be a difficult case in that two arguably innocent parties are asserting legal claims to the same insurance proceeds, resolution should be left to the fact finder and not resolved under a CRCP 12(b)(5) motion to dismiss.

It was not clear whether the district court had dismissed the claims for failure to join a necessary party under CRCP 12(b)(6), so the Court addressed this issue as well. Here, the Court held that Melvin's estate was not a necessary party because Donna has possession of the proceeds at issue, and thus complete relief can be accorded between Roseann and Donna. In addition, the life insurance proceeds were never a part of Melvin's estate assets and therefore the estate has no interest in those proceeds. Further, this is not an action for enforcement of the separation agreement, but is essentially an action in tort. The district court erred by dismissing the case under CRCP 12(b)(6).

Lastly, Roseann contended that Donna is not entitled to attorney fees and costs because the court erred in granting Donna's motion to dismiss. The Court agreed.

The judgment was affirmed in part and reversed in part, and the case was remanded with directions. The award of attorney fees and costs was vacated.

2018 COA 26. No. 17CA0178. Denver Police Protective Association v. City and County of Denver. *Labor Relations—Collective Bargaining—Body-Worn Cameras—Summary Judgment.*

The City and County of Denver (Denver) and the Denver Police Protective Association (DPPA) are parties to a collective bargaining agreement. That agreement implements the City and County of Denver Charter (Charter), which sets forth Denver's obligations regarding collective bargaining with certain of its employees. A category in the Charter that is not required to be subject to collective bargaining is officer health and safety matters, except for personal safety and health equipment.

In 2015, the Denver Police Department (DPD) promulgated, without bargaining or consultation with DPPA, a policy regarding the use of body-worn cameras (BWCs). The policy required "patrol officers and corporals assigned to all six police Districts, the Gang Unit and Traffic Operations" to wear and use BWCs. DPPA immediately contended that this was a mandatory subject of collective bargaining and demanded that Denver bargain. Denver refused.

DPPA sued, alleging Denver violated the collective bargaining agreement by implementing the BWC policy without first bargaining in good faith with DPPA. The parties filed cross-motions for summary judgment. The district court granted summary judgment in favor of DPPA and ordered Denver to bargain over the implementation of the BWC policy.

On appeal, the Court of Appeals considered whether the BWCs are "personal safety and health equipment" subject to collective bargaining as claimed by DPPA and agreed to by the district court, or if they are equipment that relates to "officer safety and health matters," as Denver argued, and therefore are not a mandatory subject of collective bargaining.

Analyzing the Charter, the Court concluded that it is reasonable to restrict the definition of "personal safety and health equipment" to equipment whose principal purpose is the safety of officers. The case thus turned on whether the principal purpose of BWCs is officer safety. While BWCs may incidentally impact officer safety, their principal purpose is not to increase the safety of the officer. The Court therefore concluded that BWCs are not "personal health and safety equipment" under the Charter and are not a mandatory subject of collective bargaining.

The judgment was reversed.

2018 COA 27. No. 17CA0608. People in re L.H. *Dependency and Neglect—Indian Child Welfare Act—Notice Requirement.*

In this dependency and neglect proceeding, mother initially denied Native American heritage but then informed the Jefferson County Department of Human Services (Department) that her biological brother is registered with "Navajo-Deni." The Department sent six separate notices to the Navajo Nation at six different addresses. The Navajo Nation responded that there was no record of the family with the Navajo Nation, and therefore the child was not enrolled or eligible for enrollment with the Navajo Nation. Based on this response, at the termination hearing the trial court found that the Indian Child Welfare Act (ICWA) did not apply in this case.

Mother appealed the judgment terminating the parent–child legal relationship with her child. Based on its review of the record, the Court of Appeals could not determine whether the Department complied with the ICWA. A review of the Bureau of Indian Affairs (BIA) list of Tribal Agents by Affiliation shows that the Colorado River Indian Tribes are also tribes historically affiliated with the Navajo. The Court concluded that because mother had made a general reference to Navajo, and not just the Navajo Nation, the Department was required to also notify the Colorado River Indian Tribes. The notice to only the Navajo Nation was insufficient to satisfy the ICWA's notice requirement.

The case was remanded with instructions for the limited purpose of directing the Department to send appropriate notice to the Colorado River Indian Tribes. CL

These summaries of published Court of Appeals opinions are written by licensed attorneys Teresa Wilkins and Paul Sachs. They are provided as a service by the CBA and are not the official language of the Court; the CBA cannot guarantee their accuracy or completeness. The full opinions, the lists of opinions not selected for official publication, the petitions for rehearing, and the modified opinions are available on the CBA website and on the Colorado Judicial Branch website.