

Summaries of Published Opinions

February 5, 2018

2018 CO 8. No. 17SC412. People in Interest of C.W.B., Jr. Children's Code—Dependency or Neglect Proceedings—Standing on Appeal.

The Supreme Court reviewed whether the foster parents in this case had standing to appeal the trial court's denial of a motion to terminate the parent-child legal relationship. The foster parents intervened in the trial court proceedings pursuant to CRS § 19-3-507(5)(a) and participated in a hearing on the guardian ad litem's (GAL) motion to terminate the parent-child legal relationship between the mother and the child. The trial court denied the motion. Neither the state nor the GAL appealed the trial court's ruling, but the foster parents did. The Court of Appeals concluded that the foster parents had standing to appeal the trial court's ruling.

The Supreme Court concluded that the foster parents in this case did not have a legally protected interest in the outcome of termination proceedings, and that CRS § 19-3-507(5)(a) did not automatically confer standing on them to appeal the juvenile court's order denying the termination motion, where neither the Department of Social Services nor the GAL sought review of the trial court's ruling. Because the GAL was statutorily obligated to advocate for the best interests of the child, including on appeal, there was no need to confer standing on the foster parents to represent the best interests of the child on appeal. The Court therefore reversed the judgment of the Court of Appeals and remanded the case with instructions to dismiss the appeal.

2018 CO 9. No. 16SA224. In re 2015-2016 Jefferson County Grand Jury. Privileged Com-

munications and Confidentiality—Crime-Fraud exception—Wiretapping.

A grand jury investigating M.W. and his company I.I. issued a subpoena duces tecum to I.I.'s attorney ordering her to produce all documents related to her representation of I.I. Along with the subpoena, the People served a notice of hearing to determine whether the documents were protected by the attorney-client privilege. In the notice, the People provided wiretap summaries as an offer of proof that the crime-fraud exception to the attorney-client privilege applied. Reasoning that I.I.'s entire endeavor was illegal, the district court ordered all of the attorney-client communications stripped of privilege without reviewing them in camera.

The Supreme Court held that a two-step process applies when a party seeks disclosure of attorney-client-privileged documents under the crime-fraud exception. First, before a court may review the privileged documents in camera, it must "require a showing of a factual basis adequate to support a good faith belief by a reasonable person that wrongful conduct sufficient to invoke the crime or fraud exception to the attorney-client privilege has occurred." *Caldwell v. Dist. Court*, 644 P.2d 26, 33 (Colo. 1982). Second, the court may strip a communication of privilege only upon a showing of probable cause to believe that (1) the client was committing, or attempting to commit, a crime or fraud, and (2) the communication was made in furtherance of the putative crime or fraud. Because the People failed to make such a showing here, the district court abused its discretion in stripping the documents of privilege. The Court also held that, based on the facts of this case, the district court should have required the People to disclose the applications and authorizations for the intercepts that it

provided to support the subpoena under CRS § 16-15-102(9) of Colorado's wiretap statutes.

2018 CO 10. No. 15SC627. Smokebrush Foundation v. City of Colorado Springs. Colorado Governmental Immunity Act—Sovereign Immunity.

In this case, the Supreme Court reviewed the Court of Appeals division's conclusion that petitioners' claims against respondent city were barred under the Colorado Governmental Immunity Act (CGIA). Petitioners asserted a number of tort claims for alleged injuries resulting from airborne asbestos released during demolition activities on the city's property in 2013 and from the subsurface migration of coal tar pollutants created by historical coal gasification operations on the city's property. The division concluded that each of these claims was barred under the CGIA.

The Supreme Court first addressed whether petitioners' asbestos-related claims fell within the waiver of immunity set forth in CRS § 24-10-106(1)(c) for injuries resulting from the dangerous condition of a public building. The CGIA defines a "dangerous condition," in pertinent part, as a physical condition of a facility or the use thereof that constitutes an unreasonable risk to the health or safety of the public and that is proximately caused by the negligent act or omission of the public entity in "constructing or maintaining" such facility. CRS § 24-10-103(1.3). Because the complete and permanent demolition of a building does not come within the plain meaning of the terms "constructing" or "maintaining" a facility, the Court concluded that the dangerous condition of a public building exception does not apply.

Next, the Court addressed whether petitioners' coal tar-related claims fell within the waiver

of immunity set forth in CRS § 24-10-106(1)(f) for injuries resulting from the operation and maintenance of a public gas facility when, as here, petitioners' cause of action accrued after the CGIA's enactment but the operation and maintenance of the facility that caused the injury occurred before that enactment. Because petitioners have established that (1) the facility at issue was a public gas facility, (2) petitioners' claimed injuries from the coal tar contamination resulted from the operation and maintenance of that facility, and (3) petitioners' coal tar-related claims accrued after the CGIA's enactment, the Court concluded that under the plain language of CRS § 24-10-106(1)(f), the city waived its immunity for these claims.

Accordingly, the Court affirmed the portion of the division's judgment requiring the dismissal of petitioners' asbestos-related claims but reversed the portion of the judgment requiring the dismissal of petitioners' coal tar-related claims.

February 12, 2018

2018 CO 11. No. 15SC801. *Burton v. Colorado Access*; No. 16SC163. *Olivar v. Public Service Employee Credit Union Long Term Disability Plan*. *Service of Process—Actions to Recover Benefits—Void Judgments—Parties Liable*.

The Employee Retirement Income Security Act (ERISA) allows plaintiffs to serve the U.S. Department of Labor Secretary under 29 USC § 1132(d)(1) 17 (2016) when an employee-benefit plan has not designated in the summary plan description an "individual" as agent for service of process. In these cases, the Supreme Court held that "individual" in § 1132(d)(1) includes a corporation. Therefore, service of process on the Labor Secretary is proper only when a plan fails to designate either a plan administrator or some other person, including a corporation, as agent for service of process. Because the plans in these cases designated corporations as agents for service of process, petitioners' service on only the Labor Secretary was insufficient. The Court further held that judgments void for lack of service may be set aside at any time. Finally, the Court held that the insurer, not the plan, is the only proper defendant in an ERISA claim

for benefits due when the plan's terms provide that only the insurer is obligated to pay and to determine eligibility for benefits. Because the insurers alone were obligated to pay and to determine eligibility for benefits in these cases, they (not the plans) are the proper party defendants. Therefore, the Court affirmed the judgment of the Court of Appeals in both cases.

2018 CO 12. No. 16SC666. *Oakwood Holdings, LLC v. Mortgage Investments Enterprises, LLC*. *Foreclosure—Redemption—CRS § 38-38-302—Right to Cure*.

This case required the Supreme Court to determine whether a junior lienor who has complied with its obligations under CRS § 38-38-302 is entitled to redeem, or whether it has a duty to accept a tendered lien payoff from the certificate of purchase holder who bought the property at a foreclosure sale and who obtained a power of attorney from the debtor-prior owner authorizing the certificate holder to pay off the prior owner's debts. The Court concluded that under the plain language of the applicable redemption statutes, a junior lienor who has complied with its obligations by timely filing its notice of intent to redeem is entitled to do so and, at that point, has no duty to accept a tendered payoff from a certificate of purchase holder like the respondent did here. Although the debtor-prior owner had a right to cure before the foreclosure sale, respondent gained no additional rights by obtaining a limited power of attorney from the debtor-prior owner after the sale. Accordingly, the Court reversed the judgment of the Court of Appeals and remanded the case for further proceedings.

February 20, 2018

2018 CO 13. No. 15SC3. *Pernell v. People*. *Criminal Law—Harmless Error*.

The Supreme Court reviewed the Court of Appeals' opinion affirming defendant's conviction for burglary, kidnapping, sexual assault, and other offenses. The Court of Appeals held that although the trial court erred by admitting a victim's out-of-court statements as excited utterances under CRE 803(2), the trial court's

error did not require reversal because the statements were admissible as prior consistent statements to rehabilitate the victim's credibility after defense counsel attacked it during his opening statement. The Court concluded that any error in the admission of the victim's out-of-court statements was harmless because there was no reasonable possibility that the admission of these statements contributed to defendant's conviction. Accordingly, the Court declined to address whether defense counsel's opening statement opened the door to the admission of the victim's out-of-court statements and expressed no opinion on this issue. The Court therefore affirmed the judgment of the Court of Appeals, albeit on different grounds.

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