Summaries of Published Opinions

January 11, 2018

2018 COA 1. No. 15CA0171. People v. Sparks. *Sexual Assault—Child—Prosecutorial Misconduct—Sufficiency of Evidence—Hearsay—Jury Instructions—Video Interview of Defendant.*

Sparks attended a party at his wife's cousin's house. The cousin's daughter A.M. reported that while she was at the party and Skyping on her computer, Sparks touched her breast over her clothing. She also reported that as she was Skyping, her friend S.F. (the victim) and Sparks were behind her, and that through her computer's camera she saw the victim grabbing Sparks's groin area and making other movements. At the time, A.M. was 14 and the victim was 13. Sparks admitted to what A.M. reported and to touching the victim's groin, breast, and bottom area. Sparks was convicted of one count of sexual assault on a child as to the victim.

On appeal, Sparks contended that the prosecutor engaged in misconduct by misstating the law and evidence during closing argument. Specifically, Sparks asserted it was error for the prosecutor to tell the jury that it did not matter that the victim initiated the sexual contact, arguing that CRS § 18-3-405(1), the sexual assault on a child statute, required the prosecution to prove that he caused the victim to become subservient or subordinate or that the child victim initiated the sexual contact at his directive. Sexual contact includes the touching of the defendant's intimate parts by the victim. The phrase "subjects another . . . to any sexual contact" in the statute does not require the People to prove that defendant caused the child-victim to become "subservient or subordinate" or that the child-victim initiated the sexual contact at defendant's directive. There was no error in the prosecutor's statement to the jury.

Sparks also argued that the prosecutor misstated the evidence by saying A.M. saw improper sexual contact between the victim and Sparks through a computer camera while on Skype and that Sparks knew exactly how old the victim was. As discussed below, the court did not err in admitting this evidence, and given this evidence, the prosecutor did not misstate nor draw improper inferences from it.

Sparks further contended that the prosecution failed to produce sufficient evidence to prove that he committed sexual assault on a child because the only evidence as to the victim's age was inadmissible. He contended that the court erred in admitting the detective's and A.M.'s testimony and Sparks's interview statement about the victim's age because these were hearsay. All of this evidence was admitted without objection. A.M.'s testimony may have been based on her personal knowledge or the victim's reputed age, and thus would not have been hearsay or would have fallen within a hearsay exception. Thus, the trial court's ruling on A.M.'s testimony was not erroneous, much less obviously so. Similarly, the basis for the detective's testimony could not be determined, but the Court of Appeals could not conclude that the trial court's admission of this testimony was obviously erroneous. And even assuming that admitting this testimony was obvious error, such error would be harmless in light of A.M.'s testimony and Sparks's interview statement. CRE 805 does not apply to Sparks's interview admission because as a party opponent his statement does not require firsthand knowledge to be admissible. It was not plain error to admit the evidence, and it was sufficient.

Sparks also asserted that the court abused its discretion by instructing the jury that it could assign his interview video any weight it wanted when the court provided the video to the jury during deliberations. The court did not instruct the jury to give Sparks's statements any weight it wanted. Further, no special protections against undue emphasis as to a defendant's out-of-court statements were required. Lastly, the court provided specific instructions for the jury to follow in viewing the evidence, and thus appropriately exercised its discretion.

Sparks further contended that the trial court denied him his constitutional right to effective assistance of counsel by providing his interview video to the jury during deliberations without notifying his counsel. The Court agreed, but concluded this error was harmless beyond a reasonable doubt.

The judgment of conviction was affirmed.

2018 COA 2. No. 16CA2159. Romero v. Colorado Department of Human Services. *Colorado State Administrative Procedure Act—Sexual Abuse—Evidentiary Facts—Adverse Inference—Fifth Amendment.*

In this administrative law case, the Larimer County Department of Human Services (DHS) made a finding confirming that Romero sexually abused his grandchildren and exposed one grandchild to an injurious environment, which required Romero to be listed in the statewide child abuse registry. Romero appealed DHS's confirmations pursuant to Colorado's State Administrative Procedure Act (APA). An administrative law judge (ALJ) concluded in an initial decision that the preponderance of the evidence did not support DHS's confirmation decisions. DHS appealed, and the Colorado Department of Human Services (Department) reversed the ALJ's initial decision, concluding that the evidentiary facts, including an adverse inference based on Romero's invocation of his Fifth Amendment right to remain silent, supported a finding that Romero sexually abused his grandchildren. Romero appealed to the district court, which reversed the Department's final decision.

On appeal, the Department argued that the district court erred by overruling the Department's final decision and by restricting the application of the adverse inference to situations where the Department provides an "adequate explanation" of why it has applied

the inference. An agency's determination in a final agency action to apply an adverse inference to a defendant's invocation of his right to remain silent is an ultimate conclusion of fact under the APA. Consequently, the agency is required, as a matter of law, to make its own determination regarding the adverse inference and can substitute its own judgment for that of the administrative law judge regarding the inference and the weight to give the inference in light of the other evidence presented. To apply the adverse inference for invocation of the right against self-incrimination, a party in a civil case must have been asked questions the answers to which would have been potentially incriminating in a future criminal action, and the party must have invoked his Fifth Amendment rights. There must also have been probative evidence offered against the person claiming the privilege.

It is undisputed that during discovery for the ALJ hearing, DHS deposed Romero and asked him incriminating questions, including whether he touched his grandchildren for his own sexual gratification. It is also undisputed that Romero invoked his Fifth Amendment rights for the entire deposition except for the first few questions. Further, the record is clear that had Romero been called to testify at the ALJ hearing, he would have invoked his Fifth Amendment rights because of the ongoing criminal investigation into the allegations. Here, the Department's application of the adverse inference was not arbitrary or capricious because it was supported by the record; it considered Romero's constitutional rights; and it was not contrary to the law on Fifth Amendment adverse inference. Further, there is no authority that supports the district court's imposition of a duty on the Department to provide an explanation for why it was applying the inference. Accordingly, the district court erred by effectively precluding the Department from making its own determination on the adverse inference.

Romero argued that the district court's judgment should be upheld because the facts relied on by DHS to support findings of sexual abuse are speculative and do not support the ultimate findings. The Department's view of the evidence was not speculative or contrary to the weight of the evidence presented to the ALJ.

The district court's judgment overturning the Department's final decision was reversed.

2018 COA 3. No. 17CA0097. L.J. v. Carricato. *Wrongful Death—Child Protection Act of 1987—Colorado Governmental Immunity Act—Police Officer—Failure to Report Child Abuse—Public Entity—Vicarious Liability—Tort—Willful and Wanton—Exemplary Damages.*

D.J.M., age 2, died after suffering a beating by his mother's boyfriend. D.J.M.'s father brought an action against the City of Colorado Springs (City) and Officer Carricato, individually and in his capacity as an officer with the City of Colorado Springs Police Department, for failing to report child abuse that father complained about to them multiple times. The complaint alleged violation of the Child Protection Act of 1987 (CPA); negligence (wrongful death) by the City and Officer Carricato; negligence per se by the City and Officer Carricato; violation of 42 USC § 1983 by the City and Officer Carricato; vicarious liability against the City; and an entitlement to exemplary damages under CRS § 24-10-118(1)(c) against Officer Carricato. The district court determined that while the negligence claims for wrongful death and negligence per se were barred by the Colorado Governmental Immunity Act (CGIA), the claim for violation of the CPA was not barred because it was not a claim based in tort. The district court allowed the claim for vicarious liability to stand insofar as it related to the violation of the CPA and found, without conducting a hearing under *Trinity Broadcasting of Denver, Inc. v. City of Westminster*, that the complaint alleged a sufficient factual basis to support a claim of willful and wanton behavior.

On appeal, the City and Officer Carricato argued that the district court erred because the CGIA bars the claim for violation of the CPA and father's complaint does not allege specific facts sufficient to support a finding that Officer Carricato's conduct was willful and wanton. The City is undisputedly a "public entity." The exceptions to sovereign immunity are not applicable here because (1) the enumerated statutory exceptions are not at issue; (2) the CPA does not fit within any of the statutory exceptions; and (3) father is not requesting equitable, remedial, or non-compensatory remedies. Here, the essence of father's claim is that the City breached a duty of care owed to D.J.M., which caused his death. Because father's claim lies or could lie in tort, the CGIA bars the claim against the City for alleged violation of the CPA. Thus, the district court improperly denied that part of the motion to dismiss. Similarly, the vicarious liability claims are claims that lie in tort or could lie in tort and are thus barred by the CGIA.

Furthermore, public employees are immune from liability for tort claims unless their act or omission was willful and wanton. The district court must determine whether the conduct was in fact willful or wanton. Here, the district court failed to hold a *Trinity* hearing on this issue.

Finally, Officer Carricato argued that the claim for exemplary damages cannot stand because it was improperly pleaded and that exemplary damages cannot be awarded against a police officer. The CGIA allows a claim for exemplary damages against public employees only if their conduct was willful and wanton. The claim for exemplary damages against the police officer was prematurely pled.

The portions of the judgment on the claims against the City, the vicarious liability claim, and the exemplary damages claim were reversed. The portion of the judgment relating to the claims against Officer Carricato was remanded.

January 25, 2018

2018 COA 4. No. 14CA1181. People v. Figueroa-Lemus. *Crim. P. 32(d)—Withdrawal of Plea—Deferred Judgment—Immigration—Deportation—Ineffective Assistance of Counsel.*

Defendant pleaded guilty to possession of a schedule II controlled substance and driving under the influence (DUI). The parties stipulated to a two-year deferred judgment on the possession count and probation on the DUI count. The court accepted the deferred judgment and sentenced defendant to two years of probation. About five months later, defendant filed a Crim. P. 32(d) motion to withdraw his guilty plea to the possession count, arguing that his defense and immigration counsel were ineffective for failing to advise him of the clear immigration consequences of the plea. After an evidentiary hearing, the district court denied the motion.

The People filed a motion to dismiss the appeal, arguing that there was no jurisdiction to review the order denying the Crim. P. 32(d) motion. They contended that the order was not final and appealable because defendant's motion challenged a deferred judgment (a non-final judgment) that had not been revoked when the court entered the order or when defendant filed the notice of appeal. Under Crim. P. 32(d), a defendant may challenge a guilty plea involving a deferred judgment that is still in effect. The Court of Appeals concluded it could review the district court's order denying the Crim. P. 32(d) motion.

Defendant argued on appeal that his guilty plea was not made knowingly, voluntarily, and intelligently because his counsel never informed him of the clear immigration consequences of the plea. The record supports the district court's finding that defendant's counsel advised him on multiple occasions that a guilty plea to a drug felony would result in deportation. The Court also rejected defendant's argument that counsel should have advised him that he would be held in custody during the removal proceeding, because counsel was not required to give this advice. Therefore, counsel's performance was not deficient, and the district court did not abuse its discretion when it denied the Crim. P. 32(d) motion.

The order was affirmed.

2018 COA 5. No. 14CA2479. People v. Campbell. *Constitutional Law—Fourth Amendment—Illegal Search and Seizure—Reasonable Suspicion—Reasonable Expectation of Privacy—GPS Data—Identification.*

Campbell's vehicle was pulled over and Campbell was arrested on suspicion of burglary. Officers searched Campbell and found he had on an ankle monitor, which he was wearing at the request of a private bail bondsman. A detective later requested and received the global positioning system (GPS) data from the company owning the ankle monitor. The GPS data revealed that, within the month before the victim's home was broken into, Campbell had been at the location of two other homes when they were burglarized. The GPS data also placed Campbell at the victim's house at the time of the break-in. Campbell was convicted of two counts of second degree burglary, one count of attempted second degree burglary, and three counts of criminal mischief.

On appeal, Campbell contended that the trial court erred in denying his motion to suppress evidence obtained as a result of an illegal seizure

and search of his person. The officers had reasonable suspicion to stop Campbell based on his violation of traffic laws. Further, the officers had probable cause to believe defendant was committing the felony of vehicular eluding, and therefore constitutionally arrested and searched him. The trial court did not err in denying Campbell's motion to suppress evidence obtained as a result of his seizure and search.

Campbell also contended that the trial court erred in denying his motion to suppress GPS data obtained from the ankle monitor. The Court of Appeals concluded, as a matter of first impression, that defendant did not have a reasonable expectation of privacy in the GPS location data generated by the ankle monitor under the U.S. or Colorado Constitutions. Defendant voluntarily disclosed the data, which was transmitted to and collected by a third party that voluntarily gave the data to law enforcement officials. Further, the trial court did not err in admitting the GPS evidence without first conducting a hearing pursuant to *People v. Shreck*, 22 P. 3d 68 (Colo. 2001), to assess its reliability, because GPS technology is prevalent and widely regarded as reliable.

Campbell additionally contended that the trial court erred in denying his motion to suppress the victim's identification because the identification was unduly suggestive and unreliable. The victim had the opportunity to see the intruder for one or two seconds in a well-lit area while the two men were approximately 10 feet apart before Campbell ran out of the house. Although the victim was not wearing contact lenses or eyeglasses, he felt he was able to see the intruder sufficiently to identify him. The victim immediately called 911 and described Campbell. The police brought Campbell to the scene handcuffed in the back of a police vehicle for a one-on-one identification. The identification occurred less than an hour after the victim saw the intruder. Although the lineup was suggestive, it was reliable under the totality of the circumstances.

The judgment was affirmed.

2018 COA 6. No. 15CA1395. People v. Palacios. *Criminal Law—Fifth Amendment—Photo Identification—Demonstrative Exhibit.*

Defendant was convicted of felony murder, aggravated robbery, and other offenses after a drug-deal-turned-robbery ended in the shooting death of the victim by defendant's accomplice.

On appeal, defendant argued that the court erred in failing to suppress a witness's identification as the product of an impermissibly suggestive identification procedure because defendant's photo was placed in position 3 in the photo array after the witness had selected a filler photograph in position 3 from the initial array. The witness, the victim's girlfriend, witnessed the murder. She had previously selected photos in positions 1, 3 and 5. Position 3 did not have special suggestive properties, as defendant's argument would apply with equal force if the officer had placed his photo in either position 1 or 5. The mere placement of defendant's photo in a particular position, without more, does not render the identification procedure impermissibly suggestive. The court properly denied the motion to suppress the girlfriend's identification.

Defendant also argued on appeal that the court erred in permitting the prosecution to use demonstrative aids because their size was inaccurate, and the inaccuracy rendered the mock-ups misleading and therefore unfairly prejudicial. Here, the prosecution used a full-size mock-up of the garage crime scene as a demonstrative aid during the testimony of a sheriff's department investigator and the eyewitness drug supplier. The prosecution also referred to a smaller version of the mock-up during closing argument. A demonstrative aid must be authentic, relevant, a "fair and accurate representation of the evidence to which it relates," and not unduly prejudicial. Here, the record demonstrated that the full-size mock-up was substantially similar to the actual garage, and defendant failed to show any prejudice from the use of such mock-up. Further, defense counsel admitted that the smaller mock-up was accurate. Accordingly, the district court did not err in allowing the prosecution to use the demonstrative aids.

The judgment was affirmed.

2018 COA 7. No. 16CA0198 In re the Interest of Black. *Probate—Disability—Conservator—Fiduciary Duty—Conflict of Interest—Jurisdiction—Civil Theft.*

Black is the former conservator for his mentally-ill sister, Joanne. When he filed his petition to be appointed conservator, he did not tell the probate court that he sought the appointment to disclaim Joanne's interest in payable-on-death (POD) assets so that they could be redistributed in accordance with his and his children's expectations of his mother's estate plan. Nor did he disclose this conflict of interest when he requested authorization to disclaim Joanne's assets. Black later admitted this conflict. The probate court found that Black breached his fiduciary duties and committed civil theft by converting his sister's assets for his own benefit. Specifically, the court concluded that Black failed to adequately disclose his intent to use a disclaimer to divest his sister of one-third of the POD assets, and therefore did not have the court's authorization to redirect the assets. The court determined that his actions were undertaken in bad faith and satisfied the elements of civil theft. Based on its findings, the court surcharged Black in the amount of the converted funds and then trebled those damages under the civil theft statute.

On appeal, Black first argued that the probate court lacked jurisdiction to enter the hearing order because only a CRCP 60(b) motion, and not a motion to void the disclaimer, could undo the court's order authorizing the disclaimer. However, the motion to void the disclaimer did not seek relief from a final order. Instead, the motion alleged that Black had breached his fiduciary duties to Joanne while acting as conservator, and it sought to unwind a transaction based on this breach. Thus, the probate court's jurisdiction was based on the court's authority to monitor fiduciaries over whom it has obtained jurisdiction. Accordingly, the court had jurisdiction to adjudicate the allegations and issues raised by the motion to void the disclaimer. Additionally, Black had sufficient notice of the proceedings.

Black next argued that he could not have breached his fiduciary duty to Joanne because his conversion of one-third of her POD assets was disclosed to and approved by the probate court in accordance with CRS § 15-14-423.

CRS § 15-14-423 allows a fiduciary to engage in a conflicted transaction only when the fiduciary has disclosed the conflict of interest and demonstrated that the conflicted transaction is nonetheless reasonable and fair to the protected person. Black received authority to transfer the POD funds to a Supplemental Needs Trust (SNT) for Joanne's benefit. Instead, he redistributed the POD funds two-thirds to the SNT and one-third to the Issue Trust, which benefited himself and his children. Because Black did not disclose the conflict of interest or demonstrate that this proposed redistribution was reasonable or fair, he did not have safe harbor under the statute. Thus, the probate court did not err in finding that Black breached his fiduciary duties.

Next, Black contended that the probate court erred in finding him liable for civil theft, arguing that the probate court lacked jurisdiction over the claim; the claim was time-barred; and that, in any event, the evidence was insufficient to establish civil theft. The civil theft claim is coterminous with the breach of fiduciary duty claim and thus directly related to Black's duties as conservator. The probate court had jurisdiction over the civil theft claim, of which Black had notice. The record amply supports that the civil theft claim was timely asserted. As to the sufficiency of the evidence, Black did not dispute that he obtained control over Joanne's assets with the intent to permanently deprive her of them; he disputed only the probate court's finding of deception. The record supports the probate court's finding that Black made misrepresentations or misleading statements or that he concealed material facts. When a conservator allegedly commits theft from a protected person by deception on the probate court, reliance is established if that court relied on the misrepresentation in authorizing the theft. Here, the court relied on Black's misrepresentations in authorizing the disclaimer, and it would not have authorized the transaction had it known the true facts. The evidence was sufficient to support the finding that Black committed civil theft.

Black also contended that reversal is required because the probate court committed a series of errors that made the evidentiary hearing unfair. The Court of Appeals was unpersuaded by these arguments.

Lastly, Black contended that the court erred in concluding that he lacked authority to create a separate trust for Joanne's workers' compensation and Social Security disability benefits. The Court discerned no error.

Joanne cross-appealed, contending that the court erred by failing to make explicit findings denying her request to void the disclaimer. The court did not abuse its discretion in imposing a surcharge rather than ordering that the disclaimer transaction be unwound.

The order was affirmed and the case was remanded for determination of reasonable appellate attorney fees.

2018 COA 8. No. 16CA1901. Town of Breckenridge v. Egencia, LLC. *Taxation—Municipalities—Accommodation Tax—Lessors—Renters—Online Travel Companies—Jurisdiction—Exhaustion of Administrative Remedies—Class Certification.*

The Town of Breckenridge sought to collect accommodation and sales taxes from 16 online travel companies (OTCs). The OTCs maintain websites through which travelers can book hotel accommodations and travel-related services. As relevant here, under the "merchant model" the OTCs contract with a hotel to allow customers logging into the OTC's website to book reservations for the hotel. These contracts offer rooms to OTCs at a discounted rate. OTCs coordinate information between travelers and hotels; OTCs neither purchase nor reserve rooms in advance.

Breckenridge brought this action to recover unpaid accommodation and sales taxes from the OTCs, asserting five causes of action. The district court partially granted the OTCs' motion to dismiss but refused to dismiss the accommodation tax claim. Breckenridge then unsuccessfully sought class certification for 55 home rule cities that also levy a lodger's or accommodation tax. The parties filed cross-motions for summary judgment, which were resolved in favor of the OTCs.

On appeal, Breckenridge contended that the district court erred in concluding that OTCs are neither "lessors" nor "renters" of hotel rooms because they sell the legal right to use hotel rooms in exchange for consideration. Breckenridge asserted that the OTCs are capable of leasing or renting even without physical possession of hotel rooms. Because the hotels maintain possession of the rooms and are the sole grantors of the right of occupancy, hotels are lessors or renters and OTCs are essentially brokers. The accommodation tax statute indicates that the accommodation tax applies only to those who have a possessory interest in the accommodation being taxed. The OTCs had no possessory interest and were not engaged in the business of owning, operating, or leasing, and could not independently grant customers access to rooms, so they are not subject to Breckenridge's accommodation tax.

Breckenridge also contended that the court erred in granting summary judgment because issues of fact exist. Breckenridge failed to meet its burden of producing sufficient evidence to establish that a genuine issue of fact exists as to whether OTCs acquire inventory, whether the OTCs provide customer service, and the extent of the hotels' involvement in merchant model transactions. The court properly granted the OTCs' summary judgment motion.

Breckenridge also contended that the district court erred in concluding that it lacked subject matter jurisdiction over its sales tax claim because Breckenridge failed to exhaust administrative remedies. Breckenridge argued that it was not required to exhaust its own administrative remedies because doing so would be futile and whether OTCs are subject to sales tax was a question of law not subject to exhaustion requirements. It is evident from the Breckenridge Town Code that a party's first step in seeking relief for unpaid sales taxes is to petition for administrative review from the finance director. Breckenridge failed to take this step. Therefore, the district court lacked subject matter jurisdiction to address Breckenridge's unpaid sales tax claim.

Finally, Breckenridge contended that the district court abused its discretion by denying Breckenridge's request for class certification. Breckenridge was not entitled to class certification under CRCP 23(b)(2) because Breckenridge was seeking primarily monetary damages, and it failed to meet the CRCP 23(b)(3) requirements because there was no predominance of common

questions nor was class action the superior remedy.

The judgment was affirmed.

2018 COA 9. No. 16CA2104. Airth v. Zurich American Insurance Co. *Motor Vehicle Insurance—Uninsured/Underinsured—Summary Judgment.*

Airth was seriously injured in an accident while operating a semi truck owned by his employer, Sole Transport LLC, d/b/a Solar Transport Company (Solar). He was struck by a negligent, uninsured driver. Solar had uninsured/underinsured motorist (UM/UIM) insurance coverage of $50,000 for its employees through a policy issued by Zurich American Insurance Co. Airth brought a claim for declaratory relief, seeking to reform Solar's policy to provide UM/UIM coverage of $1 million. He alleged he was entitled to the higher amount because Zurich had failed, as required by CRS § 10-4-609, to (1) offer Solar UM/UIM coverage in an amount equal to its bodily injury liability coverage ($1 million), and (2) produce a written rejection by Solar of such an offer. On cross-motions for summary judgment, the district court entered judgment for Zurich, ruling, as a matter of law, that (1) Zurich's documents adequately offered Solar UM/UIM coverage in an amount equal to the bodily injury liability limits of the policy, and (2) there is no requirement that the rejection of UM/UIM limits in an amount equal to liability limits be in writing.

On appeal, Airth contended that both of the district court's rulings were incorrect and the court therefore erred in granting Zurich's summary judgment motion and denying Airth's cross-motion. CRS § 10-4-609(1)(a) prohibits an insurer from issuing an automobile liability policy unless a minimum amount of UM/UIM coverage is included in the policy, except where the named insured rejects UM/UIM coverage in writing. CRS § 10-4-609(2) requires an insurer, before a policy is issued or renewed, to offer the insured the right to obtain UM/UIM coverage in an amount equal to the insured's bodily injury liability limits. The facts here were undisputed. Before renewing Solar's policy, Zurich sent a package of documents pertaining to Solar's rights related to UM/UIM coverage and Solar's counsel affirmed that he had read all the documents. This included an opportunity to reject UM/UIM coverage or to select a higher than minimum level of UM/UIM coverage. Airth argued that none of this constituted an "offer" of the ability to obtain higher UM/UIM coverage, because the documents did not contain a premium quote or a way to estimate the premium for purchasing UM/UIM coverage commensurate with a bodily injury liability limit of $1 million. The Court of Appeals agreed that this would be the case if it were applying the meaning of the term "offer" as used in contract law. But the Colorado Supreme Court has attributed a different meaning to "offer" as it is used in CRS § 10-4-609; the dispositive question is whether, under the totality of the circumstances, the insured was adequately informed that higher UM/UIM coverage was available. Here, that standard was met by the documents Zurich provided to Solar.

Airth also argued that Zurich was not entitled to summary judgment because there was no evidence that anyone from Solar read or understood the document. This argument overlooks that attestation of Solar's counsel.

Airth further argued that reversal is required because the documents were signed and dated a month after the policy went into effect. The operative question is whether the insurer gave the insured the opportunity to purchase statutorily-compliant coverage before the insured needed it. The record reflects that Solar had received and responded to the notification and offer before the accident that injured Airth.

Airth also contended that the district court erred in determining that the statute only requires a written rejection with respect to the minimum UM/UIM coverage available and not to the additional coverage available. The Court agreed with the district court's conclusion that a written rejection is required only if the insured declines the minimum amount of UM/UIM coverage, which was not the case here.

The judgment was affirmed.

2018 COA 10. No. 17CA0255. People in re M.R.M. *Dependency and Neglect—Final and Appealable Order—Lack of Jurisdiction.*

The Garfield County Department of Human Services (Department) filed a petition in dependency and neglect, naming mother and M.M. (father of two children and stepfather to the third, M.A.M.) as respondents. The children were initially placed with their maternal grandmother, but then M.M. moved from Florida to Colorado and sought custody of all three children. The children were placed with him under the protective supervision of the Department. The court adjudicated the three children dependent and neglected with respect to mother. The court adopted treatment plans for mother and M.M., but shortly thereafter he moved to modify the order under which he shared custody of the children with mother and to dismiss the dependency and neglect case. M.M. shared custody of the two older children with mother under a domestic relations order and asserted he should have custody of M.A.M. as her psychological parent. The juvenile court entered an order allocating parental responsibilities for the children between M.M. and mother (the APR order). The court concluded it had jurisdiction to allocate parental responsibilities as to M.A.M. pursuant to CRS 14-10-123(1)(d), which provides that a proceeding concerning allocation of parental responsibilities may be commenced by someone other than a parent who has been allocated parental responsibilities through a juvenile court order. Approximately two weeks later, the court entered an order terminating its jurisdiction and closing the case, from which order mother appealed.

The Court of Appeals requested supplemental briefs addressing whether mother's appeal was timely and determined that the appealable order was the APR order. CRS § 19-1-104(6) provides that entry of an order allocating parental responsibilities for a child who is the subject of a dependency and neglect proceeding requested by a party to the case, once filed in the county where the child will permanently reside, will be treated as any other decree in a proceeding allocating parental responsibilities. This action ends the dependency and neglect proceeding and transfers jurisdiction over the child to the district court. Such an order is final and appealable, and a party who wishes to appeal must file a notice of appeal within 21 days of entry of the order. Here, the juvenile court entered an

APR order and ordered that it be certified into an existing custody proceeding in the district court as to M.M.'s children, and certified into a new domestic relations case as to M.A.M. Mother did not appeal from that order but rather appealed from the order purportedly terminating its jurisdiction and closing the dependency and neglect case. Mother's appeal was untimely, and the Court lacked jurisdiction to hear it.

However, mother argued the APR order wasn't a final, appealable order because the juvenile court didn't have jurisdiction to make the findings needed to grant APR to a nonparent. She contended that because the court did not adjudicate M.A.M. dependent and neglected with respect to her biological father, and the adjudication of the two older children with respect to father M.M. was still in "deferred" status, the APR order was invalid. The Court rejected this argument, reasoning that the question was not whether the juvenile court had jurisdiction to enter the order, but whether it was final and appealable. The APR order here was final and appealable

Similarly, because mother failed to timely appeal the APR order, the Court rejected mother's argument that because the juvenile court failed to commence a paternity action it did not have independent jurisdiction under the Uniform Parentage Act (UPA) to enter an order allocating parental responsibilities.

Finally, mother argued the APR order was not a final, appealable order because it did not fully resolve the rights and liabilities of the parties as to paternity, support, and parental responsibilities with respect to M.A.M. Analyzing the issue under the UPA, the Court concluded there was no need for a paternity proceeding as to M.A.M. The Court rejected mother's argument that the APR order did not fully resolve the rights and liabilities of the parties because it didn't find anything else that needed to be resolved; the order addressed visitation, parenting time, and other matters relevant to the allocation or parental responsibilities between mother and M.M.

Mother also argued that the APR order was not final because it was subject to revision. Once it was entered and certified to the district court, jurisdiction to modify it was transferred to the district court, leaving nothing for the juvenile court to do. The Court further noted that all orders concerning parenting time and decision-making responsibility may be modified when circumstances warrant a change.

Mother also raised an issue about noncompliance with the Indian Child Welfare Act. The Court declined to address this because it lacked jurisdiction due to the untimeliness of the appeal.

The appeal was dismissed with prejudice for lack of an appealable order.

2018 COA 11. No. 17CA0339. People in re J.L. *Dependency and Neglect—Indian Child Welfare Act—Tribal Notification Requirements.*

In this dependency and neglect proceeding, the trial court first inquired about the applicability of the Indian Child Welfare Act (ICWA) at the termination hearing after orally ordering termination of parental rights. When the inquiry was made, mother responded that both she and the father had Native American blood and she and her family had been "kicked off the tribe." At a subsequent hearing, mother indicated she had Indian heritage through her biological family and named several tribes. She stated she was an adoptee, but her biological mother would know of her tribal affiliation. The Alamosa County Department of Human Services (Department) stated it did not believe the ICWA applied, but failed to describe the efforts it had made to determine whether any of the children was an Indian child, and the record contained no evidence that the Department sent notice to the tribes named. Mother appealed the judgment terminating her parent–child legal relationship with her children.

CRS § 19-1-126(1)(a) requires the petitioning party to make continuing inquiries to determine whether the child subject to the proceeding is an Indian child. The petitioning party must also disclose in the commencing pleading whether the child is an Indian child and the identity of the child's tribe, or what efforts the petitioner made to determine whether the child is an Indian child. The Bureau of Indian Affairs regulations and guidelines also contain notice and inquiry provisions for trial courts and require trial courts to ask participants in emergency or voluntary or involuntary child-custody proceedings whether they know or have reason to know that the child is an Indian child. This inquiry is made at the commencement of the proceeding, and all responses should be on the record. Departments must directly notify each concerned tribe by registered mail with return receipt of the pending proceedings and its right to intervene.

Here, the trial court's inquiry should have been made at the first hearing after the petition in dependency and neglect was filed and again at the start of the termination proceeding. Mother's disclosures gave the trial court reason to believe the children were Indian children. The Department did not comply with the ICWA's notice requirements.

The Department contended that mother's signing of a written advisement of her rights, which included a question about the ICWA, served as the court's initial inquiry. The inquiry should be made on the record. Regardless, the Court of Appeals found that the Department failed to send notice to the appropriate tribes when mother identified a reason to believe the children were Indian children.

The case was remanded with instructions for the limited purpose of directing the Department to send appropriate notice to the Kiowa Indian Tribe of Oklahoma and the Pueblo of Taos.

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