Summaries of Published Opinions

March 8, 2018

2018 COA 28. No. 15CA0683. People v. Robles-Sierra. *Child Pornography—Constitutional Law—Sixth Amendment—Public Trial—Distribution—Publishing—File Sharing Software—Expert Testimony—Jury Instruction.*

Sheriff's department detectives found over 600 files of child pornography—in both video recording and still image form—on various electronic devices defendant owned. In each instance, defendant had downloaded someone else's file to his computer using ARES peer-to-peer file sharing software. Defendant downloaded the files in such a way that other users downloaded hundreds of defendant's files. Defendant admitted that he'd downloaded and looked at the sexually exploitative material, but stated as a defense that he hadn't knowingly violated the law because he did not know how ARES software works. A jury found defendant guilty of four counts of sexual exploitation of a child.

On appeal, defendant challenged all the convictions. He first argued that the district court violated his constitutional right to a public trial by closing the courtroom during the presentation of parts of certain exhibits. Two of the prosecution's witnesses testified about videos and still images taken from defendant's devices, describing them in graphic terms. Over defense counsel's objection, the prosecutor displayed the videos and still images using a screen that could be seen by the witnesses and the jurors, but not by anyone in the courtroom gallery. That portion of a trial when evidence is presented should be open to the public, but that right does not extend to the viewing of all exhibits by the public as those exhibits are introduced or discussed. The right concerns the public's presence during or access to the trial; where no one is excluded from the courtroom, the right is not implicated. Here, the district court didn't exclude any member of the public during the presentation of the evidence. Because the court didn't close the courtroom, there wasn't any violation of defendant's right to a public trial.

Defendant also challenged all convictions on the basis that the district court erred by allowing the prosecution's experts to testify to ultimate legal conclusions that were the jury's sole prerogative to decide. Even assuming all of the challenged testimony was improper, any error fails the plain error test.

Defendant further challenged his two convictions for publishing, offering, or distributing sexually exploitative material because the prosecution's theories of publishing and distributing were "legally insufficient." He alleged that the mere downloading of sexually exploitative material to a share-capable file isn't publication or distribution, and because we don't know if the jury convicted on either basis or some proper basis, the verdicts on these counts can't stand. The Court of Appeals analyzed the meaning of "publishing" and "distribution" and concluded that defendant's downloading of sexually exploitative material to his computer using peer-to-peer file sharing software, and his saving of that material in sharable files or folders accessible by others using the same software, constituted both publishing and distributing the material within the meaning of the statute.

Finally, defendant challenged his two convictions for publishing, offering, or distributing sexually exploitative material because the jury instruction defining "offer" had the effect of directing a verdict against him on these charges. Here, the instruction was an accurate statement of the law and described a factual circumstance that would constitute an offer. The fact that the jury could have found that factual evidence existed from the evidence presented doesn't mean the instruction directed a verdict.

The judgment was affirmed.

2018 COA 29. No. 16CA1369. Taylor v. HCA-HealthONE LLC. *Medical Malpractice—Service—CRCP 4(m)—CRCP 60(b)—Excusable Neglect.*

Plaintiff filed a medical malpractice action but failed to serve defendants within the CRCP 4(m) deadline. The district court dismissed the action without prejudice, and because the statute of limitations had run, plaintiff could not refile the lawsuit. She moved to set aside the judgment under CRCP 60(b) based on excusable neglect. Without holding a hearing, the district court concluded that counsel's docketing errors did not amount to excusable neglect and denied the motion.

On appeal, plaintiff first argued that the district court's dismissal order was invalid under CRCP 4(m) because the delay reduction order was premature. Although the rule requires notice before dismissal, it does not require notice after expiration of the service deadline. Thus, plaintiff was not entitled to additional notice beyond the delay reduction order and the district court's order of dismissal was valid.

Plaintiff also argued that the court erred in failing to apply the three-factor test in *Craig v. Rider*, 651 P.2d 397 (Colo. 1982), in evaluating her Rule 60(b) motion to set aside the order of dismissal. That test requires the district court to consider not just whether the neglect that resulted in the order of dismissal was excusable, but also whether the plaintiff has alleged a meritorious claim and whether relief from

the order would be consistent with equitable considerations. The district court abused its discretion in failing to analyze the Rule 60(b) motion under the three-part *Craig* test.

The order was vacated and the case was remanded to the district court to apply the *Craig* test.

2018 COA 30. No. 16CA1524. Abu-Nantambu-El v. State. *Sexual Assault—Kidnapping—Felony—Misdemeanor—Exoneration Statute—Wrongful Conviction—Compensation.*

Defendant was convicted of first degree sexual assault (a class 3 felony), second degree kidnapping (a class 2 felony), and third-degree assault (a class 1 misdemeanor) in the same case, all arising out of an incident in which the victim claimed that defendant had raped her. Thereafter, the felony convictions were vacated based on defendant's successful Crim. P. 35(c) motion claiming ineffective assistance of counsel. The district court denied the Crim. P. 35(c) motion as to the misdemeanor conviction. Based on the order vacating his felony convictions, defendant filed a petition for compensation pursuant to the Exoneration Statute. The State moved to dismiss and the district court granted the State's motion.

On appeal, defendant contended that the district court erred when it concluded that his misdemeanor conviction precluded him from filing a petition for compensation. He argued that because the Exoneration Statute addresses only wrongly convicted felons, the legislature could not have meant to include misdemeanor convictions within its parameters. The Court of Appeals concluded that the General Assembly intended to require that all convictions in a case be vacated or reversed for a petition for compensation to qualify for the district court's consideration.

The judgment was affirmed.

2018 COA 31. No. 16CA1869. In re Marriage of Yates and Humphrey. *Dissolution of Marriage—Receiver—Colorado Medical Marijuana Code—Retail Marijuana Code.*

Petitioner-Appellee Yates filed a petition to dissolve her marriage to respondent-appellee Humphrey. She requested the appointment of a receiver over marital property, which included marijuana businesses. A number of these marijuana businesses were licensed medical and recreational marijuana entities. The court appointed Sterling Consulting Corporation, including its principal Richard Block, as the receiver. When the court entered the receivership order, neither Block nor his employees held the licenses required by the Colorado Medical Marijuana Code and the Colorado Retail Marijuana Code to own, operate, manage, control, or work in a licensed marijuana business.

After learning of the receivership order, the Colorado Department of Revenue, officially acting as the State Licensing Authority (SLA), moved to intervene and modify the receivership order by removing the receiver, at least until Block and his employees obtained the requisite licenses. The court granted the motion to intervene, but denied the motion to modify.

On appeal, SLA challenged the court's authority to appoint receivers who are not licensed to operate marijuana businesses. A district court may only appoint a receiver for a marijuana business who complies with Colorado's marijuana licensing laws.

The order appointing the receiver was reversed and the case was remanded with directions.

2018 COA 32. No. 17CA0019. Meardon v. Freedom Life Insurance Co. of America. *Health Insurance Policy—Mandatory Arbitration—Conformity Clause—Federal Arbitration Act—CRS § 10-3-1116(3)—McCarran-Ferguson Act—Federal Supremacy—Preemption—Reverse Preemption.*

Defendants Freedom Life Insurance Company of America and Robert J. Pavese (collectively, Freedom Life) denied health insurance benefits claimed by plaintiff Meardon under a health insurance policy (policy) issued to her by Freedom Life. The policy contained a mandatory arbitration clause to resolve disputes. The policy also contained a "conformity clause" stating that a policy provision that conflicts with the laws of the policyholder's state is amended to conform to the minimum requirements of such laws. Freedom Life moved to compel arbitration and to dismiss the case, relying on the mandatory arbitration clause. The trial court denied the motion, relying on CRS § 10-3-1116(3), which allows denied claims to be contested in court before a jury.

On appeal, Freedom Life contended that (1) CRS § 10-3-1116(3) cannot be applied because it is preempted by the Federal Arbitration Act (FAA); (2) even if the FAA does not preempt the statute, the arbitration clause remains in effect for those claims that fall outside the statute; and (3) Meardon must arbitrate her claims to "exhaust her administrative remedies" under CRS § 10-3-1116(3). The plain words of the statute conflict with the mandatory arbitration clause. This conflict triggered the policy's conformity clause, the application of which invalidated the arbitration clause for those claims covered by CRS § 10-3-1116(3). Further, the FAA does not preempt CRS § 10-3-1116(3) because the McCarran-Ferguson Act preempts the FAA under the doctrine of reverse-preemption.

Freedom Life alternatively contended that only those claims covered by CRS § 10-3-116(3) are exempted from the arbitration clause and the remaining claims must be arbitrated. Because the parties did not seek a ruling from the trial court on this specific issue, the Court of Appeals was unable to determine which claims are subject to the arbitration clause.

The court's order denying arbitration of those claims covered by CRS § 10-3-1116(3) was affirmed. The case was remanded for the trial court to determine which claims are covered by CRS § 10-3- 1116(3) and which are subject to the policy's arbitration clause.

2018 COA 33. No. 17CA0099. Crocker v. Greater Colorado Anesthesia, P.C. *Shareholder Employment Agreement—Merger—Dissenters' Rights—Covenant Not to Compete—Judicial Appraisal—Liquidated Damages.*

Crocker, an anesthesiologist, was a shareholder in Metro Denver Anesthesia from 2001 until 2013, when that entity merged with Greater Colorado Anesthesia, P.C. (old GCA), now known as Greater Colorado Anesthesia, Inc. (new GCA). In conjunction with the merger, Crocker purchased one share of old GCA stock for $100. In April 2013 he signed a shareholder employment agreement (the Agreement), which

contained a provision for liquidated damages to be paid to old GCA in the event that the former employee violated the "Damages Upon Competition" section within two years immediately following termination of the Agreement.

In 2014, old GCA began entertaining a merger with U.S. Anesthesia Partners (USAP) under which USAP would buy out GCA shares for a lump sum of cash plus USAP common stock. To receive that payment, shareholders of old GCA would be required to execute a new employment agreement reflecting a 21.3% reduction in pay and a five-year employment commitment. Old GCA would form an interim company (GCA Merger Sub, Inc.), file amended and restated articles of incorporation, and convert the company into a C-corporation, new GCA.

Crocker voted against the action and provided notice under CRS § 7-113-202 that he would demand payment for his share of old GCA if the merger were approved, in exercise of his dissenter's rights.

The merger was approved in 2015. Each approving shareholder would receive $626,000 in cash; $224,000 in USAP common stock, to fully vest in five years; and a signing/retention bonus. Old GCA sent Crocker $100 for his share. He refused it and later demanded $1,030,996.

Crocker communicated that he did not understand how the merger would affect his employment status and offered to work under a temporary contract, but GCA did not offer one. He did not return to work, but took a temporary position and then signed an employment agreement with Guardian Anesthesia Services and began providing services at a hospital within the noncompete area of the Agreement.

As relevant to this appeal, the district court held a trial to address (1) new GCA's claim for damages resulting from Crocker's alleged breach of the Agreement's noncompete terms, and (2) new GCA's request for a judicial appraisal of the fair value of Crocker's 1.1% share of old GCA. The district court found that Crocker was no longer bound by the Agreement and the covenant not to compete could not be enforced against him. It also found that the fair value of Crocker's share of old GCA was $56,044 plus interest.

On appeal, GCA argued that the district court erred in finding the noncompete provision unenforceable. The Court of Appeals stated, as a threshold matter, that generally a noncompete provision will survive a merger and the right to enforce the provision will vest in the surviving entity. But the Court held that new GCA could not enforce the noncompete provision against Crocker because it is unreasonable to enforce the provision against a dissenting shareholder forced out of employment by the action of a merger. Here, it was undisputed that an anesthesiologist must reside within 30 minutes of where he works, and as a practical matter, enforcing the noncompete provision would have required Crocker to move or to pay GCA damages to continue to practice. Enforcement would thus further penalize Crocker's exercise of his right to dissent rather than protect him from the conduct of the majority. Under these circumstances, the noncompete is unreasonable and imposes a hardship on Crocker. It is thus not enforceable against him as of the date the merger was finalized.

Further, CRS § 8-2-113(3) directs that a damages term in a noncompete provision such as the one here is enforceable only if the amount is reasonably related to the injury suffered. Under the Agreement's liquidated damages provision, Crocker would have to pay $207,755 in damages for the alleged violation of the noncompete provision. The district court determined, with record support, that the injury suffered by old GCA because of Crocker's departure was zero. Here, there was no reasonable relationship between the actual injury suffered and the damages calculated per the formula, and the noncompete was not enforceable against Crocker.

Crocker cross-appealed the district court's valuation of his share of old GCA, contending that the court erred in valuing his share by excluding evidence of the price USAP paid for old GCA. The district court did not refuse to consider the deal price, but properly rejected it because it found the price to be an unreliable starting point from which to determine fair value.

The judgment was affirmed.

2018 COA 34. No. 17CA0262. In re Marriage of Boettcher. *Post-Dissolution—Child Support Modification—Child Support Guidelines—Presumptive Amount—Discretion—Retroactive—Attorney Fees.*

The parties' dissolution of marriage agreement that no child support would be owed by either of them was incorporated into the decree. Mother subsequently moved to modify child support, alleging changed income resulting in more than a 10% change in the amount of support that would be due. The district court ordered father to pay mother child support of $3,000 per month as of the date she moved to modify, as well as 70% of mother's attorney fees.

On appeal, father argued that the district court erred by determining there was no rebuttable presumptive child support obligation when the parents' combined incomes exceed the highest level of the statutory income schedule, $30,000. He argued that for combined incomes above this amount, the child support obligation at the highest level is the presumptive amount, such that any greater award constitutes a guidelines deviation. The statute's plain language does not support this argument, but rather states that, in this circumstance, the judge may use discretion to determine child support, but that the obligation must not be less than it would be based on the highest level. Further, deviation does not apply when the court awards more than the amount of support from the schedule's highest level. Here, father alone earns $92,356 per month and the parties together earn $105,699 per month. The district court was correct in finding that there was no presumptive child support amount under these circumstances, that there was a minimum presumptive amount under the guidelines, and that it could use its discretion to determine a higher amount. Further, the court made sufficient findings concerning the relevant statutory factors and properly exercised its discretion.

Father also argued that the court erred by retroactively modifying the child support back to the date that mother moved to modify. A child support modification should be effective as of the filing date of the motion unless the court finds this "would cause undue hardship or substantial injustice." Father did not argue that applying the statute would cause undue

hardship or substantial injustice, and the district court did not abuse its discretion.

Lastly, father argued it was an abuse of discretion for the court to award mother a portion of her attorney fees without making sufficient findings. The district court is afforded great latitude in apportioning costs and fees appropriate to the circumstances in a given case. The findings were amply supported by the record.

Mother contended the appeal was frivolous and requested appellate attorney fees. Fees should be awarded only in clear and unequivocal cases when the appellant presents no rational argument, or the appeal is prosecuted for the purpose of harassment or delay. That was not the situation here. The Court of Appeals denied her request.

The order was affirmed.

2018 COA 35. No. 17CA0292. White v. Estate of Soto-Lerma. *Probate—Prejudgment Interest—Costs—Insurance Policy—Liability Limits—Offer of Settlement.*

Plaintiff's claim arose from a car accident that occurred about a year before decedent died from unrelated causes. More than two years after decedent's death, plaintiff filed suit, asserting that decedent had been negligent. Decedent's estate consisted solely of his automobile insurance policy, which had a policy limit of $50,000 per person injured. Defendant rejected plaintiff's pretrial statutory offer of settlement for the insurance policy limit of $50,000. After trial, a jury awarded plaintiff $100,000 in damages. The court reduced the award to $50,000, but ultimately entered judgment for $79,218, which included $11,600 in costs and $17,618 in prejudgment interest.

On appeal, defendant contended that the trial court erred in awarding plaintiff prejudgment interest. CRS § 15-12-803(1)(a) bars all claims against a decedent's estate that arose before the decedent's death and were not presented within the statutory timeframe. It was undisputed that plaintiff's claim was not timely presented. CRS § 15-12-803(3)(b) states that nothing prevents a proceeding to establish decedent's liability to the limits of his insurance protection. This statute conflicts with CRS § 13-21-101(1), which requires a court to award prejudgment interest. The Court of Appeals concluded that prejudgment interest is part of the underlying liability claim against an estate and is therefore subject to the insurance policy limits and the CRS § 15-12-803(3)(b) bar on claims above that limit. CRS § 15-12-803 bars an award of prejudgment interest above defendant's $50,000 policy limit.

Plaintiff cross-appealed the judgment, arguing that the court should have entered judgment for the jury's $100,000 damages award plus corresponding costs and prejudgment interest. Plaintiff contended that regardless of whether she could collect the jury award from defendant's insurance company, judgment in excess of the policy limits was proper to leave open the possibility that plaintiff could be assigned the right to bring a bad faith claim against defendant's insurer. The statutory language is clear that any untimely liability claim in excess of policy limits is barred.

Defendant also argued it was error to award costs in the final judgment, because such an award ignores the bar on claims in excess of insurance policy limits. Plaintiff argued for costs only under CRS § 13-17-202, which provides that a plaintiff must be awarded costs only if the final judgment exceeds the settlement offer. Given that the final judgment did not and could not exceed the policy limit, which was also the amount of the settlement offer, plaintiff was not entitled to costs under CRS § 13-17-202 and the trial court erred in entering a costs judgment above the policy limit.

The judgment was reversed and the case was remanded for entry of judgment for plaintiff in the amount of $50,000.

2018 COA 36. No. 18CA0398. People v. Ray. *Death Penalty—Postconviction—Freedom of Religion—First Amendment—Refusal to Testify—Direct Contempt—Rational Basis—Strict Scrutiny.*

Ray was sentenced to death in a first degree murder case. Ray's attorneys hired Lindecrantz as an investigator to assist them in the penalty phase of the case.

The trial court began the required postconviction review of Ray's conviction and sentence. Ray sought postconviction relief, in part alleging ineffective assistance of counsel. Part of that claim challenges Lindecrantz's investigation. The prosecution subpoenaed Lindecrantz to testify. She moved to quash, arguing that as a devout Mennonite she is opposed to the death penalty on religious grounds and she feared that in truthfully answering the prosecutor's questions, she would provide information from which the prosecutor could argue that Ray received effective assistance, which could lead to upholding the conviction and death sentence.

The trial court denied the motion to quash, finding that under either a rational basis or strict scrutiny analysis, Lindecrantz's sincerely held religious beliefs did not justify her refusal to answer questions under oath in response to the subpoena. She took the stand and refused to testify. The court ultimately found her in direct contempt and remanded her to the sheriff's custody "until she elects to answer the questions" as a remedial sanction. She has been in jail since February 26 of this year.

On appeal, Lindecrantz argued that being called as a witness for the prosecution makes her a "tool" or "weapon" of the prosecutor's efforts to execute Ray. She would answer the trial court's questions on direct examination and the prosecutor's and defense counsel's questions on cross-examination, but does not want to answer the prosecutor's questions on direct examination. The Court of Appeals weighed the substantial burden on Lindecrantz's religious beliefs against the state's compelling interests in ascertaining the truth and rendering a just judgment in accordance with the law and concluded that Lindecrantz's position fails under both a rational basis and strict scrutiny analysis. Lastly, holding Lindecrantz in contempt is narrowly tailored to advance the government's compelling interests.

The order was affirmed.

March 22, 2018

2018 COA 37. No. 15CA0654. People v. Wakefield. *Second Degree Murder—Self-Defense—Jury Instruction—Voluntary Statements—Photographic Evidence.*

Defendant and the victim were longtime friends, and the victim was visiting defendant from out of state. The victim and defendant argued and were involved in a series of increasingly violent physical fights. Defendant shot the victim, killing him. Right after the shooting defendant indicated to two people that he had acted in self-defense. Defendant testified at trial that when the victim stepped forward and reached for the shotgun defendant was holding, defendant pulled the gun up and away from the victim's reach, and the gun "went off." According to defendant, he thought that the victim was going to grab the gun and hurt him with it. Defendant maintained that he did not intend to shoot or hurt the victim. Defendant was tried for first degree murder, but was convicted of the lesser included offense of second degree murder.

On appeal, defendant first argued that the trial court erred by declining to give his tendered jury instruction on self-defense. Article II, section 3 of the Colorado Constitution recognizes the right of a person to act in self-defense, and under binding case law, when a defendant presents at least a scintilla of evidence in support of a self-defense instruction, the court must instruct the jury on self-defense. Here, defendant's claim of accident in the course of self-defense was not so inconsistent as to deprive him of the right to have the jury instructed on self-defense, and counsel's tendering of the self-defense instruction was sufficient to preserve the issue for appeal. The trial court's error warrants reversal of the conviction.

Defendant also argued that the trial court erred by declining to suppress statements he made to both a private security guard and the police following his apprehension. The trial court did not err in declining to suppress the statements under *Miranda v. Arizona* because they were (1) made to a private security guard and not subject to *Miranda*; (2) based on *Miranda*'s public safety exception; or (3) volunteered and therefore not the product on an interrogation. However, the trial court did not make the required findings as to whether defendant's statements to the police warranted suppression because of defendant's assertion that the statements were involuntary.

Defendant further argued that the trial court erred by admitting photographs showing a large amount of marijuana in his apartment. Because the probative value of this evidence was substantially outweighed by the danger of unfair prejudice, it should have been excluded under CRE 403, and the court erred in admitting the photos.

The judgment of conviction was reversed and the case was remanded for a new trial. On remand, the court must conduct an evidentiary hearing on the voluntariness and admissibility of defendant's statements to the police officers, and photos depicting marijuana should be excluded from evidence.

2018 COA 38. No. 16CA0215. People v. Palmer. *Murder—Arson—Amendment of Information—Crime of Violence—Crim. P. 7(e)—Discovery Violation.*

When Palmer found out that the man she had been dating was having sex with another woman, she set fire to a bag of his things outside the front door of his apartment. The fire spread from the bag, and soon the entire apartment complex was ablaze. Palmer was charged with five counts of attempted first degree murder and one count of first degree arson. After the trial began, the trial court granted the prosecution's motion to amend the information to add a crime of violence designation. The amended information alleged that Palmer committed arson by means of a deadly weapon (a lighter and lighter fluid). Because of the amendment, Palmer faced a longer prison sentence if convicted. The jury acquitted Palmer of attempted murder but convicted her of first degree arson and the lesser nonincluded offense of fourth degree arson. The jury also found that first degree arson was a crime of violence because Palmer used a deadly weapon.

On appeal, Palmer contended that the trial court abused its discretion by allowing the prosecutor to amend the information. She argued that the amendment was one of substance and thus had to be made before trial. Crim. P. 7(e) permits amendments only as to form once trial has begun and provides that the trial court may reject an amendment during trial if it charges an additional or different offense or prejudices the defendant's substantial rights. Here, the amendment required proof of an additional element, use of a deadly weapon, and carried a harsher minimum and maximum sentence, so the trial court abused its discretion in granting the motion to amend once trial was underway.

Palmer also argued that the trial court should have granted her motion for mistrial because the prosecution failed to timely disclose two fire investigators' reports. During testimony, the prosecution discovered and promptly disclosed two previously undisclosed reports from the fire lieutenants. The trial court found that the discovery violation was inadvertent. Instead of granting a mistrial, the trial court prohibited the prosecution from calling a second fire lieutenant and permitted Palmer to re-examine the first fire lieutenant based on the newly discovered information. The trial court did not abuse its discretion in denying Palmer's motion for mistrial and imposing other remedies for the discovery violation.

The sentence was reversed and the case was remanded for resentencing. The judgment was affirmed in all other respects.

2018 COA 39. No. 16CA1269. Colorado Medical Board v. Boland, MD. *Physician—Subpoena—State Administrative Procedure Act—Medical Practice Act—Colorado Department of Public Health and Environment—Open Meetings Law—Disciplinary Procedures.*

Dr. Boland, a licensed Colorado physician, received a subpoena duces tecum from the Colorado Medical Board (Board) to produce certain medical records. A letter accompanying the subpoena explained that the Board had received information regarding Dr. Boland's conduct as a physician and a possible violation of the Medical Practice Act. The letter also noted that the Board had received a complaint from the Colorado Department of Public Health and Environment (CDPHE) related to Dr. Boland's medical marijuana recommendations. In response, Dr. Boland sent a written objection to the Board, arguing that CDPHE's referral policy was invalidly adopted, and on that basis he refused to produce the records. The Board filed an application for an order enforcing the subpoena, which was granted by the district

court. The district court concluded that even if the referral policy was invalid, only CDPHE could be enjoined from enforcing it.

On appeal, Dr. Boland argued that the trial court erred in enforcing an unlawful subpoena. He alleged that because CDPHE based its referral on a policy that was unlawfully adopted, the subpoena caused by the referral had no lawful purpose. Even assuming the policy was adopted in violation of the Open Meetings Law, CDPHE's conduct does not determine whether the Board acted lawfully in issuing the subpoena. The Board has a statutory duty to investigate whether a licensed physician engages in unprofessional conduct and is vested with authority to conduct investigations and issue administrative subpoenas. Thus, the subpoena in this case was issued for a lawful purpose.

The judgment enforcing the subpoena was affirmed.

2018 COA 40. No. 17CA0051. Maralex Resources, Inc. v. Colorado Oil and Gas Conservation Commission. *Administrative Law—Constitutional Law—Fourth Amendment—Search and Seizure—Warrantless Search—Administrative Search.*

O'Hare was the president of Maralex Resources, Inc. (Maralex), a Colorado corporation licensed to conduct oil and gas operations in the state. Maralex operated over 200 oil wells in Colorado. Maralex operated wells located on the O'Hares' ranch. The O'Hares owned both the surface and mineral rights, but leased the mineral rights to Maralex. The Colorado Oil and Gas Conservation Commission (COGCC) obtained an administrative search warrant authorizing entry and inspection of certain Maralex locations, and after conducting inspections, COGCC issued multiple notices of alleged violations to Maralex and O'Hare. After an administrative hearing, the COGCC issued an order finding violation (OFV), concluding that Maralex had violated several rules, and Maralex was assessed a penalty of $94,000. Maralex and the O'Hares sought judicial review of COGCC's order. The district court denied their request for injunctive and declaratory relief and affirmed the OFV in full.

On appeal, Maralex and the O'Hares contended that COGCC Rule 204 permitting unannounced, warrantless searches of oil and gas locations violated the U.S. and Colorado Constitutions. There are exceptions to the requirement that searches be conducted pursuant to a warrant issued upon probable cause. One exception is in the context of administrative searches made pursuant to a regulatory scheme of a closely regulated industry. A warrantless inspection conducted pursuant to a regulatory scheme of a closely regulated industry is reasonable if (1) the scheme is informed by a substantial government interest, (2) it is necessary to further that government interest, and (3) the scheme provides a "constitutionally adequate substitute" for a warrant. The Court of Appeals concluded that the oil and gas industry is closely regulated; the state has a substantial interest in regulating oil and gas operations; warrantless searches are necessary to further the state's substantial interest in the safe and efficient operation of oil and gas facilities; and COGCC's inspection regime provides a constitutionally adequate substitute for a warrant. Therefore, warrantless inspections made pursuant to Rule 204 do not violate either the Colorado or U.S. Constitution.

The O'Hares also raised constitutional challenges to Rule 204 in their capacity as surface owners of land including oil and gas locations subject to COGCC oversight. They first contended that Rule 204 is unconstitutional as applied to surface owners because, unlike operators of oil and gas locations, they have an expectation of privacy in the property searched. In this case, the O'Hares granted Maralex a very broad set of rights under the surface agreement. By granting the corporation an unlimited easement on the surface estate, the O'Hares substantially lessened any objective expectation of privacy in the property over which they willingly transferred access and control rights to Maralex. The Court of Appeals also rejected the O'Hares' broader challenge to the facial constitutionality of Rule 204 as to all surface owners, concluding that where a surface owner grants a mineral lessee a broad surface easement, warrantless entry of the surface estate would not necessarily violate the surface owner's rights.

Maralex also challenged the COGCC's order concluding that it violated multiple rules in relation to certain wells. The COGCC's finding that Maralex violated Rule 204 on March 20, 2014 was arbitrary and capricious because the inspection supervisor agreed to delay the inspection until the next day. Thus, there was not substantial evidence to support COGCC's determination that Maralex failed to provide access to its wells at all reasonable times. As to the remaining dates at issue, the evidence supports COGCC's determination that Maralex violated Rule 204 for the duration of that six-day period.

The Court also found record support for COGCC's determination that Maralex violated Rules 603.f, 905(a), and 907(a)(1).

The district court's order affirming that part of the OFV concluding Maralex violated Rule 204 on March 20, 2014 and the corresponding penalty were reversed. In all other respects, the order was affirmed. The case was remanded for further proceedings.

2018 COA 41. No. 17CA0073. Colorado Medical Board v. McLaughlin, MD. *Physician—Subpoena—State Administrative Procedure Act—Colorado Department of Public Health and Environment—Open Meetings Law—Disciplinary Procedures.*

Dr. McLaughlin, a licensed Colorado physician, received a subpoena duces tecum from the Colorado Medical Board (Board) to produce certain medical records. The Board issued the subpoena after it had received a complaint from the Colorado Department of Public Health and Environment (CDPHE) related to Dr. McLaughlin's medical marijuana recommendations. Dr. McLaughlin objected to the Board's subpoena, arguing that CDPHE's referral policy was invalidly adopted. On that basis, he refused to produce the subpoenaed records. The Board filed an application for an order enforcing the subpoena. The district court concluded that although the physician referral policy was invalid, the subsequent investigation and subpoena were for a lawfully valid purpose, and the court granted the Board's application.

On appeal, Dr. McLaughlin contended that the subpoena was not issued for a lawful purpose because the policy prompting the Board's investigation was adopted in violation of Colorado's

Open Meetings Law. Here, the subpoena was issued solely as a result of a physician referral policy promulgated in violation of the Open Meetings Law and the State Administrative Procedure Act. Because the Board had no basis for investigating the physician apart from the invalid physician referral policy, the subpoena had no lawful purpose and the district court erred in enforcing the subpoena.

The judgment was reversed. However, the dissent agreed with the majority in *Colorado Medical Board v. Boland*, 2018 COA 39, and would affirm the district court's judgment.

2018 COA 42. No. 17CA0212. CAW Equities, L.L.C. v. City of Greenwood Village. *Eminent Domain—Private Condemnation—Prior Public Use Doctrine—Colorado Constitution Article XVI, Section 7.*

CAW Equities, L.L.C. (CAW) sought private condemnation of a public equestrian and pedestrian trail (public trail) that bisects two of its adjacent properties to construct a ditch from the Highline Canal to the southern end of its properties. The City of Greenwood Village (City) owned the public trail from a plat dedication and separate dedication for equestrian and pedestrian use. The City moved to dismiss under CRCP 12(b)(1).The district court denied the petition and awarded the City attorney fees and costs.

On appeal, CAW argued that the district court erred in holding that CAW lacked the authority to condemn the public trail. The Court of Appeals agreed with the district court, finding that the legislature, through the eminent domain statutes, may regulate Colo. Const. art. XVI, section 7 (Section 7) so long as it does not unnecessarily limit or curtail the constitutional right.

CAW also argued that Section 7 is self-executing and cannot be limited or curtailed by the eminent domain statutes. The Court concluded that while Section 7 may be self-executing, well-settled law recognizes the legislature's ability to regulate private condemnation, and the eminent domain statutes properly regulate the exercise of this right under Section 7.

CAW alternatively argued that even if the eminent domain statutes apply, its proposed plan does not violate them. It claimed that Section 7 does not require it to show a ditch is necessary and it provides an absolute right to condemn. The Court did not decide whether CAW must prove the ditch is necessary to access its water rights to be able to condemn the ditch because the land CAW sought to condemn was already in public use as a public trail. The Court decided, as a matter of first impression, that the prior public use doctrine applies to private condemnation proceedings under Section 7. Though Section 7 grants general authority to condemn public property for a right-of-way to access water, it does not expressly grant the authority to extinguish an existing public use on such property; it merely grants express authority to a right-of-way if that right-of-way does not extinguish the public use. Further, the right to condemn an entire tract of public land in public use is not a necessary implication of the general right to privately condemn a right-of-way for a ditch. Here, there were other ways of transporting the water without interfering with the public trail. Where a private condemnor can obtain a right-of-way without extinguishing the existing public use, the condemnation power does not necessarily imply such a power. The district court was correct in finding that CAW failed to (1) allege express authority for its right to condemn all of the public trail; (2) prove that the right to condemn property already in public use was a necessary implication of its private condemnation right; and (3) prove that some public exigency existed to justify the necessity of condemning the public trail.

The Court also affirmed the City's award of its attorney fees and costs.

The judgment was affirmed.

2018 COA 43. No. 17CA0235. Johnson v. Civil Service Commission of the City and County of Denver. *Police Officer Discipline—Use of Force—Standard of Review in Disciplinary Appeals.*

Johnson, a Denver police officer, worked off-duty at a nightclub in downtown Denver. One night Brandon and his friends left the nightclub and began arguing with Johnson about Johnson's earlier interaction with one of their friends. Johnson moved the group under a High Activity Location Observation (HALO) camera, which video-recorded their interactions (no audio was recorded). The video revealed that everyone in the group was visibly intoxicated. Eventually only Brandon and another man remained. Johnson then told Brandon he was going to detox and to turn around to be handcuffed. Brandon profanely told Johnson not to touch him. Johnson then suddenly moved toward Brandon and shoved him with both hands near the neck. Brandon fell backward onto some stairs and was handcuffed.

Brandon filed a disciplinary complaint against Johnson. The Chief of Police determined that Johnson had violated Denver Police Department Rules and Regulations RR-306 (inappropriate force) and suspended him for 30 days without pay. The Manager of Safety (MOS) approved the discipline imposed. Johnson appealed to a civil service commission hearing officer. The hearing officer reversed the suspension because (1) the MOS had erroneously applied the deadly force rather than the non-deadly force standard to Johnson's conduct, and (2) the MOS had failed to present sufficient evidence to create a reasonable inference that finding a violation of RR-306 was correct.

The City appealed to the Civil Service Commission (Commission). The Commission reversed the hearing officer. The district court affirmed the Commission.

On appeal, Johnson contended that the Commission abused its discretion when it made its own findings of fact from a video recording of events at issue and rejected contrary facts found by the hearing officer. The "video exception" was created in a prior Commission case and is described as "statements an officer makes in direct contradiction to objectively verifiable facts in an otherwise authenticated video of the scene are not entitled to a presumption of truth." Both the Denver City Charter's and the Denver Civil Service Commission Rules' standards of review govern the Commission's review of the MOS's order and the hearing officer's findings, and they require the Commission to defer to the hearing officer's findings of fact. They do not address a video exception, which is beyond the Commission's authority to make. The video

exception is contrary to law and invalid, and both the Commission and district court erred in relying on it to reverse the hearing officer's decision.

The Court of Appeals further held that the Denver Police Department's use of force policy articulates a single standard for reviewing an officer's use of force and that separate standards do not exist for deadly and non-deadly force. Accordingly, the Commission correctly determined that the hearing officer erred in her application of the use of force standard.

Despite finding that the Commission erred in relying on the video exception to reverse the hearing officer's decision, the Commission nevertheless reached the right result because (1) the hearing officer erroneously concluded that separate standards existed for deadly and non-deadly force, and (2) the hearing officer did not properly defer to the MOS's findings as required by the clearly erroneous standard of review applicable to hearing officers and as set forth in the Commission's rules. The hearing officer erred in substituting her own findings for those of the MOS.

The judgment was affirmed.

2018 COA 44. No. 17CA0407. Minshall v. Johnston. *CRCP 4(f)—Substituted Service—Default Judgment.*

The Minshalls filed a complaint against Johnston. Johnston was not personally served with process; instead, the court permitted substitute service under CRCP 4(f) on the registered agent of Aries Staffing LLC (Aries), a corporation of which Johnston was a co-owner and shareholder. The district court entered a default judgment against Johnston when he failed to respond to the complaint. Six months after he claimed he learned of the default judgment, Johnston moved pro se to set it aside, arguing that he was not properly served with process. The district court denied the motion.

On appeal, Johnston argued that the judgment against him is void for lack of jurisdiction. He contended that the Minshalls did not exercise due diligence in attempting to serve Johnston personally, which was a necessary condition precedent to serving him by substituted service. It was undisputed that the Minshalls complied with the procedural requirements of Rule 4(f) by filing an affidavit from the process server detailing his numerous unsuccessful attempts to serve Johnston. They also documented numerous other ways they tried to locate and serve Johnston. The record supports the district court's finding that the Minshalls met the due diligence requirement of the rule.

Johnston also argued that substituted service on Aries' registered agent, Incorp Services, Inc., was not reasonably calculated to give him actual notice of the suit. The Court of Appeals found no authority supporting the proposition that service on a registered agent of a corporation is sufficient, by itself, to effectuate valid service on a "co-owner" of a corporation. Here, there was no indication in the record of a separate relationship between Incorp and Johnston or other facts that would support the required finding under Rule 4(f).

The order was vacated. The case was remanded for a determination as to whether service on Incorp under Rule 4(f) was reasonably calculated to give actual notice to Johnston.

2018 COA 45. No. 17CA0652. People in re B.C. *Dependency and Neglect—Required Findings—Termination of Parental Rights—Appropriate Treatment Plan.*

In this dependency and neglect proceeding, mother admitted that the child's environment was injurious to his welfare and stipulated to an adjudication. She also stipulated to a preliminary treatment plan, but no dispositional hearing was held. Based on the stipulation, the trial court entered an order adjudicating the child dependent and neglected. The court further ordered the Pueblo County Department of Social Services (Department) to submit a formal treatment plan within 20 days that would be adopted and made an order of the court if no objections were filed. There was no finding that the plan was "appropriate." Mother did not object to the submitted treatment plan.

The Department later moved to terminate mother's parental rights. Mother objected and asserted that she was in compliance with the treatment plan. Approximately a year after the petition was filed, following a contested hearing, the court entered judgment terminating mother's parental rights. The court found that mother had not complied with the treatment plan.

On appeal, mother contended that the trial court erred by not conducting a dispositional hearing or adopting a formal treatment plan that was found to be appropriate. CRS § 19-3-508(1) requires the court to "approve an appropriate treatment plan," and CRS § 19-3-604(1)(c)(I) requires a finding that "an appropriate treatment plan approved by the court has not been reasonably complied with" before parental rights are terminated. Here, there was no dispositional hearing, and the trial court did not approve an appropriate treatment plan nor make a finding that the proposed plan was appropriate.

The order was reversed and the case was remanded for further proceedings. CL