Summaries of Published Opinions

March 5, 2018

2018 CO 14. No. 17SA20. In re Bailey v. Hermacinski. *Physician–Patient Privilege—Implied Waiver.*

In this original proceeding, the Supreme Court considered the scope of the physician–patient privilege in a medical malpractice action. Contrary to the conclusion of the trial court, the Court held that plaintiffs' non-party medical providers were not in consultation with defendants such that the typically privileged information held by those non-party medical providers was no longer protected by the physician–patient privilege. Therefore, the trial court abused its discretion when it granted defendants' request to hold ex parte interviews with those non-party medical providers on consultation grounds. However, the Court remanded the case to the trial court for consideration of whether plaintiffs impliedly waived the protection of the physician–patient privilege such that ex parte interviews may still be permitted.

2018 CO 15. No. 17SA77. Hernandez v. Ray Domenico Farms, Inc. *C.A.R. 21.1—Certified Questions of State Law—Colorado Wage Claim Act—Statute of Limitations—Statutory Construction.*

The Supreme Court accepted jurisdiction under C.A.R. 21.1 to answer a certified question of law from the U.S. District Court for the District of Colorado regarding how far back in time a terminated employee's unpaid wage claims can reach under the Colorado Wage Claim Act, CRS §§ 8-4-101 to -123. The Court held that, under the plain language of CRS § 8-4-109, a terminated employee may seek any wages or compensation that were unpaid at the time of termination; however, the right to seek such wages or compensation is subject to the statute of limitations found in CRS § 8-4-122. That statute of limitations begins to run when the wages or compensation first become due and payable and thus limits a terminated employee to claims for the two years (three for willful violations) immediately preceding termination.

March 12, 2018

2018 CO 16. No. 14SC190. Ybanez v. People. *Post-Conviction Proceedings—Criminal Trials—Sentencing.*

Ybanez petitioned for review of the Court of Appeals' judgment affirming his conviction of first degree murder and directing that his sentence of life without the possibility of parole be modified only to the extent of permitting the possibility of parole after 40 years. *See People v. Ybanez*, No. 11CA0434 (Colo.App. Feb. 13, 2014). In an appeal of his conviction and sentence, combined with an appeal of the partial denial of his motion for postconviction relief, the intermediate appellate court rejected Ybanez's assertions that (1) the trial court abused its discretion and violated his constitutional rights by failing to sua sponte appoint a guardian ad litem; (2) he was denied the effective assistance of counsel both because his counsel's performance was adversely affected

by a non-waivable conflict of interest under which that counsel labored and because he was prejudiced by a deficient performance by his counsel; and (3) he was entitled to an individualized determination regarding the length of his sentence rather than merely the possibility of parole after 40 years.

The Supreme Court affirmed the judgment of the Court of Appeals. The Court held that (1) Ybanez lacked any constitutional right to a guardian ad litem and the trial court did not abuse its discretion in not appointing one as permitted by statute; (2) Ybanez failed to demonstrate either an adverse effect resulting from an actual conflict of interest, even if his counsel actually labored under a conflict, or that he was prejudiced by his counsel's performance, even if it actually fell below the required standard of competent representation; and (3) Ybanez is constitutionally and statutorily entitled only to an individualized determination whether life without the possibility of parole or life with the possibility of parole after 40 years is the appropriate sentence. The case was remanded with directions to return it to the trial court for resentencing consistent with this opinion.

2018 CO 17. No. 15SA281. Johnson v. School District No. 1 in the City and County of Denver. *Public Employment—Education.*

In this case, the Supreme Court considered two certified questions from the U.S. Court of Appeals for the Tenth Circuit: (1) whether the unpaid-leave provisions of CRS § 22-63-202(2)(c.5) apply to all non-probationary teachers who are not employed in a "mutual consent" placement, or only to those who are displaced for the reasons enumerated in CRS § 22-63-202(2)(c.5)(VII); and (2) whether a non-probationary teacher who is placed on unpaid leave under CRS § 22-63-202(2)(c.5)(IV) is deprived of a state property interest in salary and benefits. The Court held that the provisions of CRS § 22-63-202(2)(c.5) apply to all displaced non-probationary teachers, not just non-probationary teachers who are displaced because of a reason stated in CRS § 22-63-202(2)(c.5)(VII). The Court further held that non-probationary teachers who are placed on unpaid leave have no vested property interest in salary and benefits, meaning a non-probationary teacher who is placed on unpaid leave under CRS § 22-63-202(2)(c.5)(IV) is not deprived of a state property interest.

2018 CO 18. No. 15SC1062. School District No. 1 in the City and County of Denver v. Masters. *Public Employment—Education.*

In this case, the Supreme Court considered (1) whether the General Assembly, by enacting the Teacher Employment, Compensation, and Dismissal Act of 1990 (TECDA), created a legislative contract that it later impaired by enacting the unpaid-leave provisions of CRS § 22-63-202(2)(c.5); and (2) whether a non-probationary teacher who is placed on unpaid leave under CRS § 22-63-202(2)(c.5)(IV) is deprived of due process. The Court held that TECDA did not create a legislative contract or vest non-probationary teachers who are placed on unpaid leave with a property interest in salary and benefits. The Court therefore concluded that the General Assembly has not impaired a contractual obligation by enacting the unpaid-leave provisions and that non-probationary teachers who are placed on unpaid leave have not suffered a violation of their right to due process.

March 19, 2018

2018 CO 19. No. 15SC469. People v. Washam III. *Crim. P. 7(e)—Time-Allegation Amendments.*

In this case, the Supreme Court considered whether an amendment to an information narrowing the date range after trial began was permissible under Crim. P. 7(e). To do so, as required under Rule 7(e), the Court analyzed whether the amendment was one of form or substance and whether it prejudiced defendant's substantial rights. Because the amendment simply narrowed the date range in the information and did not prejudice defendant's substantial rights, the Court concluded that the amendment was one of form and was permissible after trial began. Hence, the trial court did not abuse its discretion in permitting the amendment to the information.

2018 CO 20. No. 16SC815. Love v. Klosky. *Adjoining Landowners—Stare Decisis.*

In this case, the Supreme Court considered whether to overrule *Rhodig v. Keck*, 421 P.2d 729 (Colo. 1966), which outlines the test for ownership of a tree that encroaches onto a neighbor's land. Under that test, an encroaching tree remains the sole property of the owner of the land where the tree first grew, unless the tree was jointly planted, jointly cared for, or treated as a partition between the two properties. The Supreme Court upheld *Rhodig*. The Court found that *Rhodig*'s approach remains sound and it failed to see how overruling *Rhodig* would do more good than harm.

The Court then applied *Rhodig* to the decision at hand. Here, the trial court found that the tree in question began life on Klosky's land and encroached onto the Loves' land, and there was no joint activity implying shared ownership of the tree. Because the Loves failed to prove any such shared property interest in the tree, the Court concluded that the Loves cannot prevent Klosky from removing the encroaching tree.

March 26, 2018

2018 CO 21 No. 16SC276. People v. Sandoval. *Plain Error Review—Sentencing.*

The Supreme Court held that *Blakely v. Washington*, 542 U.S. 296 (2004), applies to a direct sentence to community corrections. The Court further held that it was plain error for the trial court to sentence defendant to an aggravated sentence to community corrections without meeting *Blakely*'s requirements. The Court affirmed the decision of the Court of Appeals and remanded the case for resentencing. CL

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