Summaries of Published Opinions

May 3, 2018

2018 COA 60. No. 14CA1390. People v. Kessler. *DUI—Evidence—Possession of a Controlled Substance—Search and Seizure—Search Incident to Arrest—Motor Vehicle—Reasonable Suspicion—Cross-Examination.*

Defendant was pulled over by the police for speeding. Upon approaching the car with a flashlight, an officer spotted a half-empty schnapps bottle on the floor behind the passenger's seat. The officer asked defendant for his license, registration, and proof of insurance multiple times before defendant presented his registration and proof of insurance. Defendant admitted he did not have a valid driver's license. Because defendant showed signs of intoxication, the officer asked him to step out of the vehicle. Defendant needed to use the car door for support to get out of the car, and he eventually admitted he had drunk from the schnapps bottle. Defendant performed roadside sobriety maneuvers unsatisfactorily, and his breath test registered .154g/210L. Defendant was arrested for DUI and placed in the back of the police car. Two other officers then searched the car for further evidence of alcohol consumption and found a bag of cocaine in the console, inches from where defendant sat. Among other things, defendant was convicted of possession of a controlled substance (cocaine).

On appeal, defendant contended that the evidence was insufficient to convict him of possessing a controlled substance (cocaine). He argued that he was not in exclusive possession of the car on the date in question and denied knowing the cocaine was in the car. The possibility that someone else was in the car earlier that day does not change the fact that defendant was in exclusive possession of the vehicle when it was stopped and searched, making him subject to the inference that he knowingly possessed the cocaine. Further, the location of the cocaine and defendant's testimony that no one else had interacted with the console support the inference. There was sufficient evidence for the jury to convict him on this charge.

Defendant next contended that the trial court should have suppressed evidence related to the recovery of cocaine from his car because the police lacked sufficient grounds to search the car once they seized the half-empty schnapps bottle. The police are permitted to search a vehicle incident to a lawful arrest. Here, the officer had probable cause to arrest defendant on a DUI charge, defendant initially denied consuming alcohol, and it was likely the officers would find evidence of alcohol while searching defendant's vehicle. The officers' reasonable suspicion that the car contained alcohol did not evaporate once the officers found some alcohol. Therefore, the search that uncovered the cocaine was proper.

Finally, at trial, the amount of alcohol in the schnapps bottle when the officer discovered it was contested: the officer said it was half full, while defendant testified it was two-thirds full. During cross-examination, the prosecution asked defendant if the officer "made up" the amount of schnapps in the bottle. Although the prosecution's question was improper, it did not cast doubt on the reliability of the conviction. The error was not substantial and did not warrant reversal under the plain error rule.

The judgment of conviction was affirmed.

2018 COA 61. No. 15CA2082. People v. Cali. *Theft—Theft by Receiving—Appeal—Statutory Amendment—Collateral Attack—Crim. P. 35(c)(2)(VI)—Postconviction Remedies.*

Cali was convicted of theft and theft by receiving, both class 4 felonies, as well as two habitual criminal counts. The trial court sentenced him to 18 years in the custody of the Department of Corrections. Cali directly appealed his convictions, and his theft conviction was vacated. After Cali had filed his notice of appeal in the direct appeal and while the appeal was still pending, the legislature reclassified theft by receiving, as committed by Cali, to a class 6 felony. After his direct appeal became final, Cali timely filed a pro se Crim. P. 35(c) motion asserting, as relevant here, that he was entitled to the benefit of the changed statute. The postconviction court denied Cali's motion without a hearing.

On appeal, Cali argued that the trial court erred by analyzing his postconviction claim as a request for retroactive application of the statutory amendment. He contended that because the amendment took effect while his direct appeal was pending and before his conviction became final, he is entitled to the benefit of the amendment. The amended statute applied to Cali because before Cali's conviction became final, the State lost the authority to prosecute him for committing the class 4 felony of theft by receiving. That a different statute classifying theft by receiving as a class 6 felony could then be applied to Cali does not change the fact that the State lost the authority to enforce the statute under which Cali had been convicted. Although Cali did not raise the State's loss of authority to prosecute him before his conviction became final on appeal, he could collaterally attack his conviction under Crim. P. 35(c)(2)(VI). Cali asserted a timely postconviction claim that entitles him to reversal of his conviction. But the trial court must convict him of the class 6 felony and sentence him accordingly.

The postconviction order was reversed. Cali's conviction was vacated, and the case was remanded with directions.

2018 COA 62. No. 16CA0192. People v. Madison. *Restitution Agreement.*

Madison stole scores of bottles of expensive wine from multiple liquor stores. He pleaded guilty, and the court sentenced him to a two-year term of probation and ordered restitution. As

part of the restitution agreement, Madison was permitted to take possession of the stolen property if he paid restitution to the victims within a contractual period of time. (The liquor stores declined to accept the recovered wine because the storage method could not be confirmed, and thus the wine was not marketable.) Madison and the prosecution also entered into an "Evidence Disposition Agreement." Defendant did not pay the restitution and, five years later, the sheriff's office moved for an order authorizing it to destroy the stolen property. The motion was granted by the court.

On appeal, Madison argued that he had an ownership interest in the wine. He contended that the court should have either permitted him to sell the wine or ordered the sheriff's office to sell it, with any proceeds applied to his restitution obligation. Disposition of the wine was governed by the restitution agreement, which expressly provided for the destruction of the wine if Madison failed to both pay the restitution and pick up the wine within 90 days. Because Madison failed to meet that deadline, the sheriff's office had the right to dispose of the wine without seeking approval from the court or notifying Madison. Further, the agreement did not give Madison the right to determine the particular disposition of the wine or to demand that any proceeds from the disposition be distributed to the victims and then applied to reduce his restitution balance.

Madison also contended that the agreement gave him an ownership interest in the wine, notwithstanding his failure to satisfy its requirements, based on the Uniform Commercial Code (UCC) and conversion principles. Disposition of the stolen property is governed by the agreement, not by the UCC or conversion principles. Madison had a right to obtain the property only upon satisfaction of conditions precedent, which he failed to satisfy.

The order was affirmed.

2018 COA 63. No. 16CA0428. In re Parental Responsibilities Concerning W.C. *Parental Responsibilities—Jurisdiction—Appeal—Motion to Modify—Changed Circumstances.*

In this allocation of parental responsibilities case, father appealed the district court's permanent orders granting mother sole decision-making authority and majority parenting time. Though his appeal is pending with this court, father filed verified motions to modify parenting time and decision-making in the district court. The district court concluded that it lacked jurisdiction to consider those motions while the appeal was pending; it decided to take no action on father's motions unless and until the Court of Appeals finds that the district court has jurisdiction or remands and gives the court authority to consider the motions.

The Court determined that under Colorado's Uniform Dissolution of Marriage Act, a district court retains continuing jurisdiction over motions to modify parental responsibilities while the current allocation order is on appeal, as long as those motions are based on a material change in circumstances that occurred after the original order was entered.

Father's motion to clarify was granted and the case was remanded.

2018 COA 64. No. 17CA0435. Bringle Family Trust v. Board of County Commissioners of Summit County. *Property Tax—Classification—Residential—Vacant—Contiguous.*

The Bringle Family Trust (Trust) owns two parcels of land in Summit County that are platted lots in the Bills Ranch Subdivision. The "residential parcel" is separated from the "subject parcel" by a road. This road is a public right-of-way maintained by the Bills Ranch Subdivision Association. In early 2016, the Trust petitioned the Board of County Commissioners of Summit County (the County) for an abatement or refund of taxes, arguing that the subject parcel's property tax assessment classification should be changed from vacant to residential for tax years 2013 to 2015. The County denied

the Trust's petitions. The Board of County Commissioners (Board) upheld this decision.

On appeal, the Trust contended that the Board erroneously denied its petition by misconstruing CRS § 39-1-102(14.4)(a) to conclude that the subject parcel was not contiguous to the residential parcel or "used as a unit in conjunction with the residential improvements located thereon." The subject parcel must be contiguous to the residential parcel to be classified as residential property for tax purpose. Parcels are contiguous only if they touch. The Trust's subject and residential parcels are distinct parcels separated by a public road that the Trust does not own. The Trust failed to show that the subject parcel meets the CRS § 39-1-102(14.4)(a) contiguity requirement, and thus the Board correctly declined to reclassify the subject parcel as residential property. Given this determination, the Court of Appeals did not address the Trust's contention that the subject parcel meets the "used as a unit" requirement.

The Board's order was affirmed.

2018 COA 65. No. 17CA0696. Stor-N-Lock Partners # 15, LLC v. City of Thornton. *Administrative Law—CRCP 106—Specific Use Permit—Zoning Regulations—Evidence—Bond—Preliminary Injunction.*

Plaintiff, Stor-N-Lock Partners #15, LLC (Stor-N-Lock), owns a self-storage facility located in the City of Thornton (the City). The Stor-N-Lock facility is located next to vacant property. Defendant Resolute Investments, Inc. (Resolute) contracted to buy the vacant property and then sought a specific use permit from the City to operate a self-storage facility there. The City granted the permit. Stor-N-Lock appealed the City's decision to the district court under CRCP 106. While the case was pending in district court, Resolute filed a motion to require Stor-N-Lock to post a bond, theorizing that by filing the Rule 106 action, Stor-N-Lock had effectively obtained an injunction. The district court summarily denied the motion and affirmed.

On appeal, Stor-N-Lock argued that the City granted the permit in violation of its own zoning regulations, because the City failed to find that Resolute's use of the property as a self-storage facility enhanced Stor-N-Lock's property. However, the record evidence supports the City Council's determination that the proposed use of the property would contribute to, enhance, or promote the welfare of adjacent properties, including Stor-N-Lock's property. This evidence was sufficient to clear Rule 106(a)(4)'s low no-competent-evidence bar. Thus, the City Council did not abuse its discretion in granting the permit.

On cross-appeal, Resolute argued that although Stor-N-Lock did not seek a preliminary injunction, and the district court did not enjoin Resolute's use of the property in any way, Stor-N-Lock should nonetheless have been ordered to post a bond when it initiated its Rule 106 action in the district court. Resolute argued that the mere filing of the action increased the financial risk associated with the project and thus created an "effective stay" of its development plan. However, a plaintiff is required to post a bond only when a restraining order or preliminary injunction has been entered. Here, Stor-N-Lock did not seek injunctive relief or a temporary restraining order and therefore was not required to post a bond. The district court did not err in denying Resolute's motion to require security.

The judgment was affirmed.

2018 COA 66. No. 18CA0018. Curry v. Zag Built LLC. *Construction Defect Action Reform Act—CRCP 4(m)—Service—Notice—Notice of Claim—Statute of Limitations.*

Defendants Zag Built LLC and its owner, Zagrzebski, (collectively, Zag Built) built a house for the Currys. Shortly after the Currys moved into the house in July 2013, they noticed signs of damage, such as cracks in the drywall and sagging doors. In late-June 2015, the Currys filed a complaint naming Zag Built (among others) as defendants and citing the applicability of the Construction Defect Action Reform Act's (the Act) notice of claim process, CRS § 13-20-803.5. After filing a status report and two updates, the Currys filed an amended complaint in mid-May 2016. In early July 2017, Zag Built filed a motion for summary judgment, contending that the trial court should dismiss the case. The trial court denied the motion. Zag Built then filed a C.A.R. 4.2 motion for interlocutory review.

On appeal, Zag Built asserted that pursuant to CRCP 4(m) the trial court erred when it did not dismiss the case when the Currys had not served it within 63 days of the filing of the original complaint. CRCP 4(m) does not require a trial court to dismiss a case if the plaintiff does not serve the defendant within 63 days of when the plaintiff filed a complaint. Instead, applying the plain language of Rule 4(m), if the court is contemplating dismissing the case within that 63-day period, it must provide the plaintiff with (1) notice that it is contemplating dismissing the case, and (2) an opportunity to show good cause why the court should not dismiss the case. If the plaintiff shows good cause, the court must extend the deadline. If the plaintiff does not show good cause, the court has the discretion to dismiss the case without prejudice, or order that the plaintiff serve the defendant within a specified time. Here, the trial court did not give the Currys notice. Further, CRS § 13-20-803.5(9) stayed the case until mid-April 2016. Therefore, the trial court did not err in declining to dismiss the case.

Zag Built also contended that the trial court should have dismissed this case because the Currys did not send it a notice of claim under the Act until after the statute of limitations had run. First, the statute of limitations stops running once a case is commenced by filing a complaint. Here, the Currys filed their complaint in mid-June 2015, before the statute of limitations had expired. Second, the Act's notice of claim process is not a prerequisite to filing a complaint or commencing an action. If a plaintiff files a complaint before completing the notice-of-claim process, the case is stayed until the plaintiff completes the process. Therefore, the trial court did not err in declining to dismiss the case on this basis.

The order was affirmed and the case was remanded.

May 17, 2018

2018 COA 67. No. 15CA0300. People v. Coleman. *Aggravated Driving After Revocation Prohibited—Driving Under the Influence—Careless Driving—Department of Corrections—Probation—*Miranda*—Motion to Suppress—Prosecutorial Misconduct—Illegal Sentence.*

Coleman was convicted of aggravated driving after revocation prohibited—driving under the influence (ADARP); driving under the influence (DUI)—third or subsequent alcohol related offense; and careless driving. The trial court sentenced him to concurrent terms of one year in the custody of the Department of Corrections (DOC) on the ADARP conviction; one year of jail and one year of additional jail, suspended subject to completion of four years of probation, on the DUI conviction; and 90 days in jail on the careless driving conviction.

On appeal, Coleman contended that the trial court erred in denying his motion to suppress. He argued that because he was in custody when he first said he wanted to be taken to bond out and had not yet been given a *Miranda* advisement, that statement should have been suppressed. However, Coleman was not in custody during the brief traffic stop for *Miranda* purposes. Therefore, it was not error to deny the motion to suppress.

Coleman next contended that the prosecutor's comments in summation on his pre-arrest and post-arrest silence violated his constitutional right against self-incrimination. Because defense counsel opened the door on the subject, Coleman's pre-arrest silence was at issue, and the prosecutor's comment was not error. Additionally, although the prosecutor's comment on Coleman's post-arrest silence was error, it was brief and did not materially contribute to defendant's conviction. Therefore, there was no reversible error for this comment.

Lastly, Coleman contended that his probationary sentence is illegal under the DUI sentencing statute, CRS § 42-4-1307. CRS § 42-4-1307(6) prohibits a trial court from imposing probation on a defendant sentenced to DOC custody where that defendant has been sentenced to prison on a felony. Because Coleman cannot be sentenced to both the custody of the DOC and probation, his sentence was improper.

The judgment of conviction was affirmed. The entire sentence was vacated and the case was remanded for resentencing.

2018 COA 68. No. 16CA0835. People v. Wagner. *Stalking—Merger—Evidence—Unanimity Jury Instruction—Double Jeopardy.*

Wagner was arrested and charged with three counts of stalking his ex-wife. He was found guilty on all counts and sentenced to 90 days in jail on each count with all jail terms to run consecutively, and six years of probation on each count with all probation terms to run consecutively.

On appeal, the People conceded that two of Wagner's stalking convictions should have merged at sentencing. The Court of Appeals determined that the People did not prove factually distinct instances of conduct sufficient to support multiple stalking convictions. The Double Jeopardy Clauses of the U.S. and Colorado Constitutions required that defendant's three stalking convictions merge. The Court concluded that defendant was charged with and convicted of multiplicitous counts and it was plainly erroneous for the trial court to enter three stalking convictions.

Wagner argued that there was insufficient evidence to support all three of his convictions. However, the evidence was sufficient to show both that Wagner's conduct would have caused a reasonable person serious emotional distress and that it caused the victim serious emotional distress. Additionally, the evidence was sufficient for the jury to find that Wagner made credible threats.

Wagner further contended that the trial court erred in rejecting a defense-tendered unanimity jury instruction or, in the alternative, failing to require the prosecution to elect between the alleged credible threats. The prosecution presented evidence of numerous occasions on which Wagner contacted and followed the victim, any number of which could have supported a stalking conviction. The defense did not argue that Wagner did not commit the acts about which the victim and witnesses testified,

and the jury would be likely to agree either that all of the acts occurred or that none occurred. Therefore, the prosecution was not required to elect the acts on which it was relying to prove that Wagner had made a credible threat, nor was the trial court required to give a unanimity instruction.

Two of the counts were vacated. The case was remanded for the trial court to merge the convictions and correct the mittimus. The judgment was otherwise affirmed.

2018 COA 69. No. 16CA1983. State of Colorado v. Robert J. Hopp & Associates, LLC. *Foreclosure Commitments—Colorado Consumer Protection Act—Colorado Fair Debt Collection Practices Act—Deceptive Trade Practices—Statute of Limitations—Title Insurance Policy—Cancellation Fee—Civil Penalties—Evidence.*

Hopp is an attorney whose law firms provided legal services for mortgage defaults, including residential foreclosures, in Colorado. Hopp also owned businesses that supported the law firms' foreclosure services, including National Title, LLC and First National Title Residential, LLC, which provided foreclosure commitments for the law firms. National Title and First National Title Residential issued title commitments and policies through an underwriter, Fidelity National Title Insurance Company (Fidelity). Fidelity had a Division of Insurance (DOI)-approved manual that set forth rates and charges for foreclosure commitments.

While representing loan servicers, the law firms typically ordered foreclosure commitments from Hopp's title companies. National Title invoiced the law firms a charge of 110% of the schedule of basic rates upon the delivery of a foreclosure commitment. As a routine practice, within 10 days of filing a foreclosure action, the law firms passed this cost on to the servicers by billing and seeking reimbursement from them for the charge of 110% of the schedule of basic rates, even though this cost may not have actually been incurred.

The State of Colorado ex rel. Cynthia H. Coffman, Attorney General for the State of Colorado, and Julie Ann Meade, Administrator, Uniform Consumer Credit Code (collectively, plaintiffs) sued Hopp, his law firms, his affiliated title companies, and his business that provided accounting and bookkeeping services for the law firms and title companies (collectively, defendants), alleging that defendants violated the Colorado Consumer Protection Act (CCPA) and the Colorado Fair Debt Collection Practices Act (CFDCPA) by engaging in the billing practices described above. The district court found in favor of plaintiffs and imposed penalties of $624,000.

On appeal, defendants contended that the trial court erred by imposing penalties under the CCPA and the CFDCPA because they were barred by the one-year limitation period in CRS § 13-80-103(1)(d) and CRS § 5-16-113(5) (CFDCPA claims), and CRS § 6-1-115 (CCPA claims). Because the CCPA contains a statute of limitations specifically addressing cases brought under its provisions, the three-year statute of limitations controls over the more general CRS § 13-80-103(1)(d). Further, because the CFDCPA did not contain a clear statute of limitations applying to government enforcement actions at the times relevant to this action, a catch-all provision applies requiring the government to file any claims within one year of discovery, which was done in this case. Therefore, the trial court did not err in concluding that the CFDCPA claims were timely filed.

Defendants next contended that the trial court erred when it concluded that they violated the CCPA and the CFDCPA by charging 110% of the schedule of basic rates for foreclosure commitment required by Fidelity's rates on file with the DOI. This was the same amount that Fidelity's manual listed as the charge for a completed title insurance policy, even in cases where the policy would never be issued because the foreclosure was cured or cancelled. Defendants did not charge amounts in compliance with Fidelity's filed rates because they required payment from servicers even when a title insurance policy was never issued. The evidence supported the trial court's finding that defendants misrepresented the premium charges as actually incurred costs. Therefore, the trial court did not err.

Defendants also contended that the trial court erred when it concluded that they knowingly engaged in a deceptive trade practice. Here, the trial court's finding that defendants acted knowingly was supported by evidence in the record.

Defendants next argued that the trial court abused its discretion when it admitted plaintiffs' Exhibit 103 and relied on it in assessing civil penalties against defendants. Exhibit 103 is a 1,114-page spreadsheet compiling electronic invoicing data submitted by Hopp's law firms through a billing software to the servicers from 2008 until the time of trial. The trial court did not abuse its discretion when it admitted Exhibit 103 as a business record under CRE 803(6).

Plaintiffs contended on cross-appeal that the trial court abused its discretion when it admitted defendants' Exhibit 1093 to rebut plaintiffs' Exhibit 104. At times, servicers directed the law firms to order foreclosure commitments from LSI Default Title and Closing (LSI), instead of from one of Hopp's affiliated title companies. Plaintiffs amended their complaint to add claims for defendants' violation of the CCPA and CFDCPA through conduct regarding the LSI transactions. Exhibit 104 reflected that LSI appeared to charge defendants only $350 for title commitments ordered, which was representative of a cancellation fee. Exhibit 1093 was an email from an LSI representative to Hopp's wife, which included an attached spreadsheet showing charges for full policy premiums rather than outstanding charges of $350. There were "unusual and unexplained adjustments" to Exhibit 104, and the trial court declined to place any weight on the exhibit in its final order and concluded that plaintiffs failed to prove their claim based on the LSI transactions. Here, there was a proper foundation for admitting Exhibit 1093, and given the late addition of the LSI claim and the parameters of the claim set forth in the plaintiffs' written notice, the trial court did not abuse its discretion in declining to exclude Exhibit 1093 as a sanction for defendants' failure to supplement their mandatory disclosures at a late point in litigation.

Both parties requested an award of attorney fees and costs incurred in this appeal. Plaintiffs, but not defendants, are entitled to an award.

The judgment was affirmed and the case was remanded with directions.

2018 COA 70. No. 16CA2230. Bell v. Land Title Guarantee Co. *Buy and Sell Contract—Mineral Rights—Warranty Deed—Negligence—Breach of Contract—Statute of Limitations—Third Party—Cause of Action—Accrual Date.*

The Bells hired Orr Land Company LLC (Orr) and its employee Ellerman to represent them in selling their real property. Orr found a buyer and the Bells entered into a buy and sell contract with the buyer, which provided, as pertinent here, that the sale excluded all oil, gas, and mineral rights in the property. Orr then retained Land Title Guarantee Company (Land Title) to draft closing documents, including the warranty deed. In 2005 the Bells signed the warranty deed and sold the property to the buyer. The Bells didn't know that the warranty deed prepared by Land Title didn't contain any language reserving the Bells' mineral rights as provided in the buy and sell contract. For over nine years, the Bells continued to receive the mineral owner's royalty payments due under an oil and gas lease on the property. In 2014 the lessee oil and gas company learned that the Bells didn't own the mineral rights, so it began sending the payments to the buyer. After that, the Bells discovered that the warranty deed didn't reserve their mineral rights as provided in the buy and sell contract. In 2016 the Bells filed this negligence and breach of contract action against defendants Land Title, Orr, and Ellerman. Defendants moved to dismiss, arguing that the Bells' claims were untimely because the statute of limitations had run. The district court granted defendants' motion to dismiss.

On appeal, the Bells contended that the district court erred in granting defendants' motions to dismiss because they sufficiently alleged facts that, if true, establish that the statute of limitations didn't begin to accrue on their claims until the oil and gas company ceased payment in September 2014, which is when they contended they discovered that the warranty deed didn't reserve their mineral rights. A plaintiff must commence tort actions within two years from the date the cause of action accrues, and contract actions within three years from the date the cause of action accrues. A cause of action accrues on the date that "both the injury and its cause are known or should have been known by the exercise of reasonable diligence." The trial court relied on the legal principle that one who signs a document is presumed to know its contents, so the Bells should have known on the day they signed the deed that the mineral rights reservation language was not included, and thus their claims accrued on that date. However, the presumed-to-know principle applies conclusively only where a party (for example, a grantor) seeks to avoid the legal effects of a deed in an action against another party to the conveyance (a grantee), not where a party (a grantor) asserts claims against third parties who failed to conform the deed to an underlying agreement on that party's behalf. Here, the Bells claims against defendants, who aren't parties to the deed, don't seek to avoid the deed, but seek damages for negligent preparation of the deed, and the purpose of the presumed-to-know principle isn't applicable. Taking the complaint's factual allegations as true, the Bells filed their negligence and breach of contract claims within the statute of limitations and stated a plausible claim for relief. The court erred in granting defendants' motions to dismiss.

The order of dismissal was reversed.

2018 COA 71. No. 17CA0303. State of Colorado v. Robert J. Hopp & Associates, LLC. *Bankruptcy—Attorney Fees—Colorado Consumer Protection Act—Colorado Fair Debt Collection Practices Act—Civil Penalty—Reasonableness—Groundless.*

The State brought an action alleging that Hopp and his wife Lori Hopp, and Hopp's law firms and affiliated companies, violated the Colorado Consumer Protection Act (CCPA) and the Colorado Fair Debt Collection Practices Act (CFDCPA) (see 2018 COA 69, No. 16CA1983,

State of Colorado v. Robert J. Hopp & Associates, LLC). The district court entered judgment against Hopp and in favor of plaintiffs, but concluded there was insufficient evidence to find Lori Hopp liable for any alleged misconduct. The trial court also awarded plaintiffs most of their reasonable attorney fees and costs incurred in bringing the enforcement action under the CCPA and CFDCPA.

On appeal, Hopp contended that the trial court erred when it imposed an award of attorney fees and costs against him because it was precluded from doing so by his discharge of debts in bankruptcy. Hopp filed for bankruptcy in January 2013 and obtained a discharge in February 2014. Plaintiffs' enforcement action was filed 10 months later. Hopp argued that the bankruptcy discharge applied to any claim for attorney fees and costs that could have been fairly or reasonably contemplated during the bankruptcy case. The trial court's attorney fee awards under the CCPA and CFDCPA are not dischargeable, and the Court of Appeals declined to order that they be vacated as void under 11 USC § 5243.

Hopp further contended that the trial court erred when it failed to reduce plaintiffs' attorney fees award by the amount of any fees incurred for their unpursued and unsuccessful claims. Because plaintiffs' claims involved a common core of facts and were brought under the same legal theories, the trial court did not abuse its discretion in declining to reduce plaintiffs' attorney fees.

Lori Hopp contended that the trial court erred in rejecting her argument that she was entitled to her attorney fees and costs under CRS §§ 13-17-101 to -106 for defending against plaintiffs' eventually unsuccessful claims against her. The trial court's decision that plaintiffs' CCPA claim against Lori Hopp was not substantially groundless was not manifestly arbitrary, unreasonable, or unfair, and the trial court did not abuse its discretion when it declined to award her attorney fees.

The order was affirmed.

2018 COA 72. No. 17CA0436. Rust v. Board of County Commissioners of Summit County. *Vacant Land Tax Assessment—CRS § 39-1-102(14.4)(a)—Residential Property—"Used as a Unit" Element—Assessor's Reference Library.*

Rust bought residential property in Summit County and a year later bought the adjacent undeveloped parcel (the subject property). He and his family have used the two parcels for decades. The county assessor classified the subject property as vacant land for the years 2013 through 2015, subjecting it to a tax rate almost triple the rate for residential property. Rust sought reclassification, asserting that both properties should be classified as residential under CRS § 39-1-102(14.4)(a). The Board of Assessment Appeals (BAA) affirmed the decision of the Board of County Commissioners of Summit County denying reclassification.

On appeal, Rust contended that the BAA misconstrued the "used as a unit" element in CRS § 39-1-102(14.4)(a), which defines residential land. County assessors use the Assessor's Reference Library (ARL) for guidance in classifying land under this statute. The ARL further defines "used as a unit" as contiguous parcels of land that are under common ownership and are "used as an integral part of a residence." Assessors use four guidelines when applying this definition. Here, the parties stipulated that the parcels are commonly owned and contiguous; the only issue was whether the subject property was "used as a unit" with the residential parcel. The assessor found no evidence that the subject property was an integral part of the residence, and the use of the subject property failed to support its reclassification as residential property. There was no error in the BAA's decision.

The BAA's order was affirmed.

2018 COA 73. No. 17CA0462. Wal-Mart Stores, Inc. v. Pikes Peak Rural Transportation Authority. *Annexation—Colorado Constitution Article XX, section 6—Regional Transportation Authority—Sales Tax—Use Tax—Matter of Mixed Local and State Concern.*

Colorado's Regional Transportation Authority law (RTA Law) allows municipalities, counties, special districts, and the state to combine to provide regional transportation services and to collect sales and use taxes to pay for such services. In 2014, the City of Fountain annexed a parcel of vacant land (the Property) from unincorporated El Paso County. The Property was within the boundaries of the Authority when it was formed in 2004. Fountain, a home rule city in El Paso County, has never been a member of the Authority. After the Pikes Peak Rural Transportation Authority (Authority) announced its intention to collect a 1% sales tax from recently built retail businesses on the Property, the operators of the businesses, WalMart Stores, Inc. and Sam's West, Inc. (collectively, plaintiffs) filed a declaratory judgment action against the Authority and the Colorado Department of Revenue (DOR), which collects sales tax on behalf of both Fountain and the Authority. Plaintiffs sought a declaration that defendants could not collect sales and use taxes on the Property because the Property was now part of Fountain, which was not a member of the Authority. On cross-motions for summary judgment, the district court declared that the taxes could be collected and entered summary judgment for defendants.

On appeal, plaintiffs first argued that Fountain's annexation of the Property removed it from the Authority's boundaries and that the Authority's attempt to tax retail sales outside of its boundaries violates the RTA law. A municipality may annex property from unincorporated parts of the county in which it lies. However, that annexation power does not permit a municipality to automatically remove territory from other political subdivisions of the state. The Property remained within the Authority's boundaries.

Plaintiffs' also argued that under CRS § 43-4-603(2)(d) the Property was no longer within the boundaries of the Authority due to its annexation by Fountain, which is not a "member of the combination" constituting the Authority and must be deemed to be outside the Authority's boundaries under RTA Law. The Court of Appeals concluded that the legislature intended the statute to define the boundaries of an authority at its inception, not to define requirements for changing those boundaries thereafter. Further, the RTA law defines a specific procedure for how territory may be removed from an established authority, which was not followed here. Fountain's annexation of the Property did not remove it from the Authority's boundaries

Plaintiffs further contended that the Authority's statutory power to tax is preempted by Article XX, section 6 of the Colorado Constitution, which they argued gives home rule cities "plenary" and "sole" authority over local concerns such as municipal taxation and supersedes state statutes that conflict with local laws in these areas. Colorado case law has long recognized that transportation regulation is generally a matter of mixed local and state concern, and the Colorado Constitution does not give home rule cities sole authority over taxation within their boundaries. The provision of transportation services to the Property and the imposition of taxes to pay for such services is not a matter of purely local concern that under article XX, section 6 would supersede conflicting state law. Further, plaintiffs failed to establish that the state statute granting the Authority the right to impose such a tax conflicts with Fountain's power to impose its own taxes. The district court did not err in rejecting plaintiffs' preemption argument and concluding that the Authority's sales tax on eligible transactions on the Property was valid.

Lastly, the Court rejected plaintiffs' argument that the district court erred by failing to address all of the factors that courts frequently consider in determining whether an issue is a matter of local, mixed, or state concern.

The judgment was affirmed.

2018 COA 73. No. 17CA0473. In the interest of Spohr v. Fremont County Department of Human Services. *Emergency Guardianship—Non-Emergency Guardianship—Personal Service of Notice—Jurisdiction—Probate Code.*

On July 15, 2016, the Fremont County Department of Human Services (Department) filed a petition for emergency appointment of a guardian for Spohr in the district court. Counsel was appointed for Spohr and an emergency hearing was held three days later. There was no transcript of the hearing and no indication that Spohr was present or that he received notice of the hearing. On July 19 the magistrate issued an order dispensing with notice under CRS § 15-14-312 stating that Spohr would be substantially harmed if the appointment was delayed. The court appointed the Department as emergency guardian and required notice of the appointment to be personally served on Spohr within 48 hours, as required by CRS § 15-14-312(2). There is no proof that service was made. Despite the CRS § 15-14-312(1) requirement that an emergency guardian appointment may not exceed 60 days, the court did not hold another hearing for more than six months and the emergency guardianship remained in place during that time. A permanent guardian was appointed for Spohr at a February 2017 hearing, but there is no indication that he was served with notice of this hearing. The trial court record includes a finding that the "required notices have been given or waived."

The Court of Appeals previously remanded this case to the district court to make findings as to whether any of the required notices were ever sent to Spohr. On remand, the Department presented no further information and the court found that the record remained unclear as to service.

On appeal, Spohr argued for the first time that he did not receive personal service of a notice of hearing on the petition for guardianship. As relevant to this case, the Colorado Probate Code requires personal service on the respondent of a notice of hearing on a petition for guardianship. The Probate Code would have allowed the appointment of an emergency guardian to be made without notice to Spohr only if the court found, based on testimony at the emergency hearing, that he would have been substantially harmed if the appointment were delayed. If the protected person was not present at the hearing, he must be given notice within 48 hours after the appointment. While the magistrate made this finding, the requisite notice within 48 hours of the appointment was never made.

The Probate Code does not contain provisions for how a transition is to be made from an emergency guardianship to a non-emergency guardianship. In the absence of such provision, the Court concluded that after the 60-day limit on emergency guardianship, if a guardianship is still sought for the protected person, CRS § 15-14-304, governing judicial appointment of a guardian on a non-emergency basis, must be followed. Among other requirements for this process, CRS § 15-14-309(1) requires that a copy of the petition and notice of hearing on the petition must be served personally on the respondent. Further, the notice requirement is jurisdictional, and the lack of notice may therefore be raised at any time. Here, Spohr was not given notice within 48 hours after the appointment of his emergency guardian, nor did he waive notice of the appointment and the ability to request a hearing on the emergency guardian's appointment. And the emergency guardian served long after 60 days had passed.

The record also fails to show that Spohr was provided with the required notice before his non-emergency guardianship. The failure to personally serve the respondent 14 days before the guardianship hearing is jurisdictional and respondent cannot waive service. Thus the court lacked jurisdiction to appoint a permanent guardian.

The judgment was vacated.

2018 COA 74. No. 17CA1534. People in interest of I.B.-R. *Dependency and Neglect—Indian Child Welfare Act Notice—Bureau of Indian Affairs.*

In this dependency and neglect proceeding, J.S.R. is the father of one of the four children. He told the Weld County Department of Human Services (Department) that he had Cherokee heritage on his father's side and his lineage descended from a tribe in Arkansas, but he did not know which tribe. The Department did not notify any tribe or the Bureau of Indian Affairs (BIA) of the dependency and neglect proceeding. Following the filing of their motion to terminate parental rights, the Department sent notice of the termination proceedings to the three federally recognized Cherokee Tribes. Each responded that the child was not a member or eligible for membership. The Department also notified the BIA, but did not mention J.S.R.'s reported affiliation to an unknown tribe in Arkansas. No further inquiry was made and all three parents' parental rights were terminated.

On appeal, J.S.R. contended that the trial court and the Department did not comply with the Indian Child Welfare Act of 1978 (ICWA) after he asserted Native American heritage. He argued the Department failed to comply with the ICWA's notice requirements because it did not send notice to any tribes in Arkansas. ICWA-im-

plementing legislation in Colorado requires that in dependency and neglect proceedings, the petitioning party must make continuing inquiries to determine whether the child is an Indian child. When there is reason to know or believe that a child involved in a child custody proceeding is an Indian child, the petitioning party must send notice of the proceeding to the potentially concerned tribe or tribes. The BIA publishes a list of designated tribal agents for service of ICWA notice in the Federal Register each year. There are no federally recognized tribes with designated tribal agents in Arkansas. If the identity or location of a tribe cannot be determined, notice must be given to the BIA. While the ICWA does not require courts or departments of human services to find tribal connections from vague information, it was the BIA's burden to research whether there could be a tribal connection in Arkansas. However, the notice in this case did not alert the BIA that J.S.R. had reported a tribal connection to Arkansas, so it had no reason to conduct such an investigation.

The case was remanded with detailed directions to proceed with ICWA compliance.

May 31, 2018

2018 COA 75. Nos. 14CA2099 & 14CA2463. Landmark Towers Association, Inc. v. UMB Bank, N.A. *Special District—Taxation—Taxpayer's Bill of Rights—Due Process—Injunction—Uniform Tax Clause of the Colorado Constitution—Mill Levy—Misappropriation of Bond Sales.*

A developer created the Marin Metropolitan District (the District), a special district, to comprise two separate projects, the Landmark Project and the European Village Project. The developer created the District as a means to use owners of condominiums in the Landmark Project to pay for improvements in the European Village Project. As part of his application to Greenwood Village for approval of the District, the developer submitted a Service Plan. Using dubious means and without notice to the Landmark Project buyers, the developer and his associates then voted in an election to organize the District and approve bonds and "taxes" to pay for the bonds. The District sold bonds to Colorado Bondshares (Bondshares). UMB Bank, N.A. (UMB) held the bond sales proceeds in trust. Among other things, the Service Plan capped the debt service levy for the bonds at 49.5 mills, but the District imposed a levy of 59.5 mills. The developer drew on the funds, but the European Village Project infrastructure was never built.

Landmark Towers Association, Inc. (Landmark), a homeowners association, sued UMB, Bondshares, and the District (collectively, defendants), challenging the creation of the District. Landmark asserted that the special district can't levy Landmark owners' properties to pay for bonds issued by the special district, which funded improvements on other property, because the election organizing the special district, approving the bonds, and approving the levies paying for the bonds violated the Taxpayer's Bill of Rights (TABOR) and the Landmark owners' rights to due process. The district court ruled that the election was illegal; Landmark is entitled to injunctive relief preventing the District's levy; the District's mill levy rate exceeds the legal limit; Landmark owners are entitled to a refund of excessive assessments; and Landmark owners are entitled to a "refund" of misappropriated bond sale proceeds. It enjoined the District from trying to collect levies from the Landmark owners and ordered that the owners may recover bond proceeds misappropriated by the District's creator under TABOR.

On appeal, defendants asserted that the district court erred in finding that including the Landmark Project in the District violated the Landmark owners' rights to due process. Specifically, defendants argued that the levy was a tax, and property subject to a tax does not need to receive any benefit in return for the tax payments. Colorado law is clear that imposing a special assessment on property that doesn't specially benefit from the funded improvements violates the due process rights of those property owners. Here, the Landmark project was included in the District only to use it as a payment source for improvements to other property, and Landmark receives no benefit from those improvements. Further, the "tax" is in substance a special assessment because it doesn't defray the general expenses of government but funds a private venture's infrastructure. Because the Landmark owners derive no benefit from the improvements, the special assessments violated the owners' rights to due process.

Defendants also argued that the district court erred in weighing the equities in imposing the injunction. The district didn't abuse its discretion in balancing the equities.

Defendants further contended that the injunction violated the Uniform Tax Clause of the Colorado Constitution because it means that only some of the property in the district can be taxed. First, it is undisputed that defendants raised this issue for the first time in their motion for reconsideration, which was too late. Second, the Uniform Tax Clause applies only to taxes, not special assessments. Third, the injunction doesn't obligate the District to do anything with respect to other persons or property outside the Landmark Project. Fourth, the violation of the Landmark owners' rights to due process under both the U.S. and Colorado Constitutions entitles them to the injunctive relief they request, as a matter of law. Therefore, the district court correctly ruled on this issue.

Defendants also contended that the district court erred in ruling that the District may not levy property taxes in excess of 50 mills. The mill levy rate imposed by the District exceeds that allowed by the statutorily required service plan approved by the City of Greenwood Village. Furthermore, it did not comply with the District's Service Plan or the financing plan. Therefore, the 59.5-mill-rate levy was illegal.

Finally, defendants contended that the district court erred in ruling that the misappropriation of bond sale proceeds violated TABOR and in ordering a refund of those proceeds because the bond proceeds aren't "revenue." The bond proceeds at issue are borrowed funds, not "revenue" within the meaning of the relevant TABOR provision. Further, they aren't subject to refund because they were lent to the District by a private, outside entity and not collected from property owners. Therefore, the owners may not recover bond proceeds misappropriated by the District's creator under TABOR. Nor may the owners recover those misappropriated

funds under other provisions of the Colorado Constitution because the District is not subject to those provisions. Therefore, the district court erred in ordering refunds of the misappropriated money.

The portion of the judgment ordering TABOR refunds was reversed. The remainder of the judgment was affirmed and the case was remanded.

2018 COA 76. No. 15CA1081. People v. Jaquez. *Criminal Law—Voice Identification—Fifth Amendment—Custodial Interrogation—Agent of the State*—Miranda.

The victim of an armed robbery was directed by the police to speak with defendant while he was in custody to see if defendant would say anything to the victim. At the time, defendant was handcuffed in the backseat of a police vehicle with the window closest to him rolled down. Defendant was not warned of his Fifth Amendment rights under *Miranda v. Arizona*. Unlike a typical voice identification procedure, defendant was not merely asked to repeat the words heard by the victim during the robbery. Instead, defendant and the victim had a brief conversation during which defendant made statements that were nearly identical to the statements made by the robber. The victim identified defendant as the robber and based on this identification, he was arrested and charged with armed robbery. Defendant moved to suppress both the out-of-court voice identification and the statements he made during the voice identification procedure. The trial court denied the motion. The statements were admitted at defendant's criminal trial as substantive evidence of his guilt. Defendant was convicted as charged.

On appeal, defendant contended that the trial court violated his Fifth Amendment right against self-incrimination when it admitted the statements he made to the victim during his voice identification. Here, the statements were made during a custodial interrogation, and the victim was acting as an agent of the state because he was acting at the specific direction of law enforcement officials. Further, the words spoken by defendant were not merely a voice exemplar used to identify him but were volitional statements used by the prosecution as substantive evidence of his guilt. Therefore, the admission of defendant's statements made during a one-on-one voice identification procedure not preceded by *Miranda* warnings violated his Fifth Amendment right against self-incrimination. This error was not harmless beyond a reasonable doubt.

The conviction was reversed and the case was remanded for a new trial.

2018 COA 77. No. 15CA1239. People in Interest of G.B. *Juvenile Delinquency—Sufficiency of the Evidence—Sexual Assault—Right to a Public Trial.*

In this juvenile delinquency proceeding, a jury convicted 16-year-old G.B. of offenses that would, if committed by an adult, constitute felony sexual assault against the 15-year-old victim. The trial court adjudicated G.B. delinquent and sentenced him to the custody of the Division of Youth Corrections.

On appeal, G.B. challenged the sufficiency of the evidence that he knew the victim was incapable of appraising the nature of her conduct. However, the record evidence, including testimony about the victim's drug and alcohol use and her testimony that she wasn't able to move on her own and didn't remember certain events from the night in question until she had nightmares and flashbacks months later, was sufficient to support a conclusion by a reasonable jury that G.B. knew the victim was incapable of appraising the nature of her conduct.

G.B. also contended that the trial court violated his right to a public trial by excluding, over his objection, all spectators during his cross-examination of the sexual assault nurse examiner, and by excluding all spectators under 18 from a significant portion of the trial. The trial court's closure of the courtroom to all spectators under 18 was broader than necessary to achieve the trial court's legitimate interest in protecting young children from exposure to age-inappropriate evidence. Further, the trial court failed to consider reasonable alternatives when it closed the courtroom to all spectators under 18. The trial court committed structural error by excluding from two days of trial all spectators under 18.

The judgment was reversed and the case was remanded for a new trial.

2018 COA 78. No. 15CA1838. People v. Laeke. *Criminal Procedure—Not Guilty by Reason of Insanity—Crim. P. 32(d)—Withdrawal of Guilty Plea—CRS § 16-8-115.*

The prosecution charged defendant with one count of criminal attempt to commit unlawful sexual contact and one count of indecent exposure. These charges were based on events that occurred while defendant was a patient at a psychiatric ward. Defense counsel entered an insanity plea on defendant's behalf over his objection. The court ultimately accepted defendant's insanity plea, and it found defendant not guilty by reason of insanity. Defendant spent almost 10 years at the Mental Health Institute. Shortly after being placed in the community, defendant filed a Crim P. 32(d) motion to withdraw his insanity plea, which the trial court denied.

On appeal, defendant argued that the court erred by denying his Rule 32(d) motion. A request to withdraw a plea under Rule 32(d) applies only to guilty pleas and nolo contendere pleas, not to pleas of not guilty by reason of insanity. Further, an insanity plea should not be treated as the equivalent of a guilty plea for purposes of Rule 32(d). Rule 32(d) did not apply to defendant's request to withdraw his insanity plea.

The order was affirmed.

2018 COA 79. No. 16CA0854. People v. Jackson. *Criminal Law—Murder—Accessory—Fifth Amendment—Double Jeopardy—Undisclosed Alibi Defense—Mistrial—Testimonial Hearsay Statements—Doctrine of Forfeiture by Wrongdoing—Residual Hearsay Exception—Complicity Jury Instruction—Lesser Included Offense—Transferred Intent.*

Jackson and his friends were members of "Sicc Made," a subset of the Crips gang. Jackson drove a vehicle to the apartment of E.O., a rival gang member, with the intention of shooting E.O. Victim Y.M. lived in E.O.'s apartment complex. Believing Y.M. was E.O., another "Sicc Made" gang member got out of Jackson's car, walked over to an SUV, and shot Y.M. twice in the head, killing him instantly. When they realized they

had killed the wrong man, the men turned and fired numerous shots into E.O.'s apartment. Defendant was convicted of first degree murder after deliberation, attempted first degree murder after deliberation, attempted first degree murder with extreme indifference, conspiracy to commit first degree murder, and accessory.

On appeal, Jackson first challenged the court's decision to declare a mistrial after cross-examination of his ex-wife revealed an undisclosed alibi defense. A defendant may not elicit alibi evidence, absent good cause, without first complying with the Crim. P. 16(II)(d) alibi disclosure requirements. It is undisputed that the defense provided no notice to the prosecution of the alibi, despite receiving it a month before trial. The defense decided not to disclose the new information but to elicit it on cross-examination in violation of Rule 16. Further, the trial court carefully considered the parties' arguments and its available options and was in the best position to assess the prejudicial impact. The trial court did not abuse its discretion in deciding to declare a mistrial.

Jackson next contended that the trial court erroneously admitted testimonial hearsay statements of uncharged co-conspirator Walker to law enforcement officials under the doctrine of forfeiture by wrongdoing and under the CRE 807 residual hearsay exception. However, (1) the prosecution proved by a preponderance of the evidence that Jackson forfeited his right to confront Walker because he caused Walker's refusal to testify, and (2) the trial court did not abuse its discretion in admitting Walker's statements under CRE 807.

Jackson also contended that the complicity instruction was erroneous. The jury instruction defining first degree murder after deliberation, when read with the complicity instruction, accurately required the jury to find that Jackson was aware that the shooter acted after deliberation and with the intent to cause the death of the victim. Accordingly, there was no error in the complicity instruction.

Finally, Jackson contended that the trial court erred in imposing two convictions and consecutive sentences for his attempted murder convictions. When a defendant attempts to deliberately kill one person but mistakenly kills a different person and is convicted of both the attempted murder of the intended victim and the actual murder of the unintended victim, the attempted murder conviction must be vacated because it is a lesser included offense of the murder conviction. Here, the undisputed evidence shows that the shooter and Jackson intended to kill E.O. and mistakenly killed Y.M., believing him to be E.O. Under the doctrine of transferred intent, Jackson's specific intent to kill E.O. transferred to Y.M. and made him criminally liable for Y.M.'s death. Therefore, the attempted murder of E.O. after deliberation is a lesser included offense of the murder after deliberation of Y.M. The trial court's error was obvious, substantial, and undermined the fairness of the proceeding.

The convictions of first degree murder after deliberation, attempted first degree murder with extreme indifference, conspiracy to commit first degree murder, and accessory were affirmed. The judgment for attempted first degree murder after deliberation was vacated and the case was remanded for correction of the mittimus.

2018 COA 80. No. 17CA0233. Cordell v. Klingsheim. *Tax Sale—Adequate Notice—Treasurer's Deed—Due Process—Reinstatement Order.*

The Cordells owned a tract of land in La Plata County. After they failed to pay taxes for several years, Heller purchased a tax lien for the property and assigned it to Klingsheim, who later requested a deed from the La Plata County Treasurer. Before issuing the deed, the Treasurer sent the Cordells a copy of the notice of application for a treasurer's deed by certified mail. The notice was mailed to the Cordells in one envelope, using a New Mexico address listed for the Cordells in the county tax records. A return receipt was received indicating the notice had been received by Mr. Cordell's mother. The Cordells did not redeem, and the Treasurer issued a treasurer's deed to Klingsheim.

Sometime later the Cordells learned of the notice and filed suit, seeking a declaratory judgment that they were the owners of the property and the treasurer's deed was void. The trial court ruled that the Treasurer had not made a "diligent inquiry" in attempting to notify the Cordells that their land might be sold to satisfy the tax lien and voided the deed. The alternative basis for the decision was that the deed was void because no "separate notice" was mailed to Ms. Cordell. The Court of Appeals previously affirmed the voiding order but did not address the "separate notice" argument. On certiorari review, the Colorado Supreme Court concluded that the Treasurer fulfilled the diligent inquiry duty and the Treasurer's transmission of the notice by certified mail satisfied due process, and the Court reversed and remanded the case. On remand to the Court of Appeals, the Cordells requested the division to consider the separate notice argument. The division declined to do so, and a mandate was issued reversing the voiding order and remanding the case to the trial court. On remand, the trial court issued a reinstatement order without substantive analysis of its own.

On appeal of the reinstatement order, the Cordells argued that the trial court was not required to reinstate the treasurer's deed on remand because the Supreme Court's holding reached only one of the two grounds on which the trial court rested the voiding order. Neither the Supreme Court nor the trial court reached the separate notice issue. Because the issue was not resolved, the Court of Appeals considered whether the trial court's failure to consider the issue warrants reversal. Here, the Cordells were married and both were receiving mail at the same address. The Court concluded that notice mailed to both record owners in a single piece of mail is constitutionally adequate. Thus, the reinstatement of the treasurer's deed on remand was proper.

The reinstatement order was affirmed.

2018 COA 81. No. 17CA0431. Kelly v. Board of County Commissioners of Summit County. *Property Tax—Residential Land—Common Ownership—Vacant Land—CRS § 39-1-102(14.4)(a).*

Kelly purchased two adjacent parcels of land in Summit County (the County). She built a home on one parcel (the residential parcel) and left the subject parcel vacant. Sometime later, Kelly placed the residential parcel in an irrevocable trust and the subject parcel in a revocable family trust. Kelly was the settlor, trustee, and beneficiary of both trusts.

For tax purposes, the Summit County Assessor classified the residential parcel as residential land but the subject parcel as vacant land, which is taxed at a higher rate. In 2016, Kelly appealed the subject parcel's classification to the Summit County Board of County Commissioners, requesting that it be reclassified as residential under CRS § 39-1-102(14.4)(a), and sought a tax abatement for the tax years 2014 and 2015. The County denied the petition. The Board of Assessment Appeals (BAA) affirmed, finding that because the two parcels were owned by two separate trusts, they were not commonly owned, and therefore the subject parcel did not qualify under the statutory section.

On appeal, Kelly contended that the BAA erred in concluding that the subject parcel was not residential land. She argued that the BAA misconstrued the "common ownership" element of CRS § 39-1-102(14.4)(a). The statute does not define common ownership, and the Property Tax Administrator has neither defined nor offered guidance to assessors on determining whether parcels are under common ownership. The BAA and the County interpreted "common ownership" to mean the same record titleholder. The Court of Appeals focused its analysis on the meaning of "ownership," noting that ownership goes beyond mere record title and focuses on who has the power to possess, use, enjoy, and profit from the property. It concluded that ownership of contiguous parcels for purposes of CRS § 39-1-102(14.4)(a) depends on a person's or entity's right to possess, use, and control the contiguous parcels. Here, the unchallenged testimony that Kelly was the beneficiary, trustee, and settler of both trusts established that Kelly held legal title to and was the equitable owner of both parcels. Further, Kelly testified that she only placed the parcels in the trusts on the advice of counsel for tax and estate planning purposes and that she possessed, controlled, and used the parcels before and after they were placed in trust. The Assessor testified that she considered the parcels separate simply because the names on the trusts were different. The Court of Appeals concluded that the parcels were under common ownership for tax years 2014 and 2015 and the BAA erred in denying the request to reclassify the subject property.

Kelly also argued that the BAA abused its discretion when it rejected the parties' stipulation that the contiguous parcels element was not at issue. The BAA's decision to reject the signed stipulation two months after the close of evidence and without notice to the parties was manifestly unfair.

The BAA's order was reversed and the case was remanded with directions for the BAA to reclassify the subject parcel as residential land.

2018 COA 82. No. 17CA1296. Arline v. American Family Mutual Insurance Co. *Uninsured/Underinsured Settlement and Release Agreement—CRCP 12(b)(1) Dismissal.*

Arline submitted claims to American Family Mutual Insurance Company (American) under insurance policies that provided $5,000 in MedPay coverage and $50,000 in individual underinsured motorist (UIM) coverage. American paid $5,000 in MedPay benefits on Arline's behalf and negotiated Arline's damages under her UIM coverage to be $27,000, after subtracting the $5,000 in MedPay benefits already paid. In November 2015, Arline, represented by counsel, accepted the $27,000 payment and signed a release agreement (Agreement) releasing American under the UIM policy.

In November 2016, the Colorado Supreme Court held for the first time in *Calderon v. American Family Mutual Insurance Co.*, 2016 CO 72, that CRS § 10-4-609(1)(c) prohibits insurers from reducing the UIM benefits paid on a claim by the amount of MedPay benefits paid on that claim, which the court deemed a "setoff." (Counsel in that case now represents Arline.) Arline then sued American for breach of contract and seeking class certification, asserting that American had unlawfully reduced UIM payments using a MedPay setoff. American responded that the Agreement was a complete bar to the cause of action and moved to dismiss. The district court found the Agreement enforceable and granted American's motion to dismiss for lack of standing.

On appeal, Arline argued that the district court erred in dismissing her complaint because American's payment pursuant to the Agreement caused her to suffer an injury-in-fact to a legally protected interest. Though the Supreme Court held that CRS § 10-4-609(1)(c) prohibits policy provisions allowing a setoff from other coverage, it did not hold that the statute extended to settlement agreements. An insured may agree to a settlement and release as long as the terms do not violate statutory prohibitions or public policy. If a release agreement is valid, dismissal of claims encompassed by the agreement is proper. Here, Arline entered into the Agreement voluntarily while represented by counsel who was fully informed that certiorari had been granted in Calderon. She negotiated her damages benefits and agreed that the UIM benefit amount paid compensated her sufficiently to warrant releasing American from any further claims. In addition, Colorado public policy favors the settlement of disputes when the settlement is fairly reached. Arline signed a valid release agreement that is not void as against public policy or prohibited by statute. The district court properly dismissed her claim.

The judgment was affirmed. CL

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