

Summaries of Published Opinions

November 5, 2018

2018 CO 87. No. 18SA135. *Schultz v. GEICO Casualty Co. Insurance—Bad Faith—CRS § 10-3-1115—Fair Debatability—CRCP 35—Independent Medical Exams.*

In this original proceeding pursuant to C.A.R. 21, the Supreme Court reviewed the district court's order requiring plaintiff to undergo

an independent medical examination (IME), pursuant to CRCP 35, at defendant's request. The Court issued a rule to show cause.

In this case, plaintiff, who was insured by defendant, alleged that defendant insurance company breached its duty of good faith and fair dealing and violated its statutory obligation to evaluate and pay her insurance claim without unreasonable delay. Defendant denied liability,

asserting that because the question of medical causation was "fairly debatable" at the time it made its coverage decision, it did not act unreasonably or in bad faith. To establish these defenses, defendant sought an IME of plaintiff, and over plaintiff's objection, the district court granted that request.

The Court concluded that defendant's conduct must be evaluated based on the evidence before it when it made its coverage decision. Thus, defendant is not entitled to create new evidence to try to support its earlier coverage decision. The Court further concluded that the district court abused its discretion when it ordered plaintiff to undergo an IME over three years after the original accident that precipitated this case and a year and a half after defendant had made the coverage decision at issue. The Court therefore made the rule to show cause absolute.

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2018 CO 88. No. 18SA204. *People v. Cox. Searches and Seizures—Judicial Review or Determination—Scope of Inquiry or Review, in General.*

In this interlocutory appeal, the Supreme Court considered whether the trial court erred in ruling that the affidavit in support of a search warrant failed to establish probable cause. The search warrant was obtained after law enforcement officers observed what they believed was a large marijuana grow on defendant's agricultural and residential property. The trial court found that the affidavit was deficient because it failed to mention that defendant was a registered industrial hemp farmer and that marijuana and industrial hemp appear and smell the same.

The Supreme Court concluded that the trial court erred by (1) reviewing the magistrate's probable cause determination de novo instead of according it great deference, (2) considering information not contained within the four corners of the affidavit, and (3) failing to afford the affidavit a presumption of validity. When giving the information articulated within the four corners of the affidavit the presumption of validity to which it is entitled, the Court determined that the magistrate had a substantial basis to find that probable cause existed to

believe that contraband or evidence of criminal activity would be found on defendant's property. Therefore, the trial court's suppression order was reversed.

November 13, 2018

2018 CO 89 No. 16SC515. *People v. Janis*. *Right to Be Present—Waiver—Formal Advisements*.

At trial, defendant, who was in custody, asked through her counsel to leave the courtroom during the victim's testimony. She claimed that the testimony might trigger her post-traumatic stress disorder. Without first advising her of her right to be present or inquiring with her directly about her desire to leave, the trial court granted defendant's request. Defendant asserted on appeal that this constituted reversible error. A division of the Court of Appeals agreed.

The Supreme Court held that a formal advisement of the right to be present at trial is not a prerequisite to a valid waiver of that right, even when a defendant is in custody. The touchstone is whether, under the totality of the circumstances, the waiver was knowing, intelligent, and voluntary. In this case, the Court concluded that defendant's waiver was knowing, intelligent, and voluntary. Accordingly, the Court reversed the Court of Appeals' judgment and remanded the case to address any previously unresolved issues.

2018 CO 90. No. 14SC997. *Friend v. People*. *Plain Error Review—Double Jeopardy—Mergers—Lesser Included Offenses*.

This case principally presents two double jeopardy questions: (1) whether the child abuse statute, CRS § 18-6-401, prescribes more than one unit of prosecution and whether the prosecution presented sufficient evidence to establish that defendant committed more than one crime of child abuse; and (2) whether child abuse resulting in death under CRS § 18-6-401(1)(a) and (7)(a)(1) is a lesser included offense of first-degree murder of a child under CRS § 18-3-102(1)(f) ("child abuse murder").

As to the first double jeopardy question presented here, applying the principles set forth in *Schneider v. People*, 382 P.3d 835, 839 (Colo. 2016), and *People v. Abiodun*, 111 P.3d

462, 466-68 (Colo. 2005), the Supreme Court concluded that the division below correctly determined that CRS § 18-6-401 creates one crime of child abuse that can be committed in alternative ways. The question thus becomes whether the prosecution proved separate counts of child abuse. The Court again agreed with the division and concluded that the prosecution did not do so, and thus each of the child abuse convictions must merge into one conviction for child abuse resulting in death.

As to the second double jeopardy question at issue, the Court concluded for two reasons that the division erred in determining that defendant's merged child abuse resulting in death conviction does not merge into his child abuse murder conviction. First, the plain language of the applicable statutes shows that "[w]hen a person knowingly causes the death of a child who has not yet attained twelve years of age and the person committing the offense is one in a position of trust with respect to the child," that person is to be convicted of child abuse murder and not child abuse resulting in death. CRS § 18-6-401(7)(c). Second, under the clarified principles set forth in *People v. Rock*, 402 P.3d 472 (Colo. 2017), and *Page v. People*, 402 P.3d 468 (Colo. 2017), which were announced after the division's decision in this case, child abuse resulting in death is a lesser included offense of child abuse murder.

Having determined that the trial court erred in not merging the various counts in this case, the question remained whether these errors were plain. The Court concluded that they were and therefore affirmed in part and reversed in part the division's judgment.

2018 CO 91. No. 17SA130. *People v. Sease*. *Contempt—Acts or Conduct Constituting Contempt of Court*.

In this direct appeal, the Supreme Court reviewed the water court's contempt order, which imposed punitive and remedial sanctions on defendant. The water court determined that defendant was responsible for work performed on his property, the Sease Ranch, which caused out-of-priority depletions of water from Sheep Creek in violation of a court order. In its ruling, the water court inferred from defendant's own-


ership of the Sease Ranch that he, not someone else, was responsible for the contemptuous work.

The Court concluded that the water court had ample evidence to find that defendant is the owner of the Sease Ranch. Further, the Court determined that the water court did not shift the burden of proof to defendant. The water court was entitled to draw reasonable and commonsense inferences from the circumstances before it. Thus, it was appropriate for the water court to consider the lack of evidence, and the corresponding improbability, that someone else entered the Sease Ranch and performed the contemptuous work without defendant's authorization.

Accordingly, the water court's judgment was affirmed.

November 19, 2018

2018 CO 92. No. 16SC653. *Mountjoy, Jr. v. People*. *Aggravated Sentences—Due Process—Jury Trial*.

This case required the Supreme Court to determine whether the trial court's decision to find discretionary aggravation was compliant with *Blakely v. Washington*, 542 U.S. 296 (2004). The trial court relied on a jury finding beyond a reasonable doubt as to elements of offenses for which there were convictions to aggravate defendant's sentences for concurrent convictions. The Court held that elements of an offense for which there is a conviction are *Blakely*-compliant facts because they were found by a jury beyond a reasonable doubt. Therefore, a trial court can rely on such facts to aggravate a sentence for a concurrent conviction. Accordingly, the Court of Appeals' judgment was affirmed on other grounds. 

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