Summaries of Published Opinions

May 6, 2019

2019 CO 31. No. 17SC246. Bermel v. BlueRadios, Inc. *Economic Loss Doctrine—Torts—Civil Theft.*

The Supreme Court reviewed whether the economic loss rule bars a claim under CRS § 18-4-405 for civil theft where the theft also constitutes a breach of the parties' contract. Assuming that a claim for civil theft sounds in tort, the Court held that separation of powers principles dictate that the judge-made economic loss rule cannot bar a statutory cause of action, particularly one designed to compensate for economic loss caused by intentionally wrongful conduct. The Court overruled *Makoto USA, Inc. v. Russell*, 250 P.3d 625 (Colo.App. 2009) to the extent it is inconsistent with this opinion. The Court affirmed the Court of Appeals' judgment and remanded with instructions to return the case to the trial court for further proceedings.

2019 CO 32. No. 18SA110. Sheek v. Brooks. *Ditch Easement—Sufficiency of Resume Notice—Water Court Subject Matter Jurisdiction.*

The Supreme Court upheld the water court's entry of summary judgment affirming the validity of a change of water right, determining that the resume notice was sufficient to alert interested parties to the nature, scope, and impact of the proposed change despite an initial error in the location description for an impacted headgate. The Court affirmed the dismissal on other grounds, however, because all ancillary claims should have been dismissed for lack of subject matter jurisdiction after the notice was deemed sufficient.

2019 CO 33. No. 19SA20. People v. Cline. *Privilege Against Self-Incrimination*—Miranda *Warnings—What Constitutes Custody.*

In this interlocutory appeal, the Supreme Court considered whether the trial court erred in suppressing a statement made by defendant following a search of his residence by his parole officer and a member of the police department. After the search of defendant's bedroom yielded a zippered pouch containing a glass pipe and a small piece of straw with residue that tested presumptively positive for methamphetamine, the police officer decided to question defendant outside his residence. He asked defendant about the zippered pouch, and defendant denied it was his. He then inquired about who had access to the bedroom, and defendant indicated that other people had access to the room and that a lot of people had been staying with him recently. Finally, the police officer asked defendant when he last used methamphetamine, and defendant responded that it was two to three weeks earlier.

The trial court found that confronting defendant with the zippered pouch and questioning him about it effectively rendered him under arrest. In a written order, the trial court reiterated that once the police officer confronted defendant with the zippered pouch, a reasonable person in that position would not have believed he was free to leave. The trial court ruled that any subsequent questions of defendant should have been preceded by a *Miranda* advisement. Since no such advisement was provided, it suppressed a statement made by defendant.

The Court held that the trial court erred by applying the "free to leave" standard. The relevant question is not whether a reasonable person would believe he was free to leave, but whether such a person would believe he was deprived of his freedom of action to a degree associated with a formal arrest. Applying the correct standard, the Court concluded that, under the totality of the circumstances, a reasonable person in defendant's position would not have considered himself so deprived. While the police officer's confrontation of defendant with the zippered pouch is a factor that weighs in favor of a finding of custody for purposes of *Miranda*, when viewed in conjunction with the other circumstances present, it is insufficient to warrant a determination that defendant was in custody and that the police officer was required to read him his *Miranda* rights. Therefore, the Court reversed the trial court's suppression order.

May 20, 2019

2019 CO 34. No. 16SC442. People v. Anderson. *Homicide—Degree of Offenses—Extreme Indifference—Sufficiency of the Evidence.*

The People petitioned for review of the Court of Appeals' judgment vacating Anderson's conviction for attempted extreme indifference murder. The Court of Appeals found the evidence insufficient to support the conviction because it concluded that the universal malice element of extreme indifference murder requires that more than one person have been endangered by the defendant's conduct, and no evidence was offered here to prove Anderson's shooting endangered anyone other than the victim.

The Supreme Court held that the statutory definition of extreme indifference murder does not limit conviction of that offense to conduct

endangering more than one person, and found the evidence in this case was sufficient to permit a jury determination of Anderson's guilt of attempted extreme indifference murder. The Court of Appeals' judgment vacating Anderson's conviction was reversed, and the case was remanded for consideration of any assignments of error concerning that conviction not yet addressed.

2019 CO 35. No. 18SA292. People v. Tomaske. *Fourth Amendment—Exclusionary Rule—Attenuation Doctrine.*

In this case, the Supreme Court considered whether evidence of defendant's alleged assault of a police officer should be suppressed based on police misconduct. The police entered defendant's property in violation of the Fourth Amendment and defendant responded by allegedly assaulting and attempting to disarm a police officer. The Court held that the evidence of defendant's alleged criminal acts should not be suppressed because the evidence was sufficiently attenuated from the police misconduct. Defendant's choice to physically resist broke the causal connection between the evidence and the police misconduct, so the deterrent purpose of the exclusionary rule was not satisfied and the rule does not apply. The trial court's suppression order was reversed and the case was remanded for further proceedings.

2019 CO 36. No. 17SC584. People v. McKnight. *Searches and Seizures—Drug-Detection Dogs—Probable Cause.*

In this case, the Supreme Court considered the impact of the legalization of small amounts of marijuana for adults who are at least 21 years old on law enforcement's use of drug-detection dogs that alert to marijuana when conducting an exploratory sniff of an item or area. The Court held that a sniff from a drug-detection dog that is trained to alert to marijuana constitutes a search under the Colorado Constitution because that sniff can detect lawful activity, namely the legal possession of up to one ounce of marijuana by adults 21 and older. The Court further held that, in Colorado, law enforcement officers must have probable cause to believe that an item or area contains a drug in violation of state law before deploying a drug-detection dog that alerts to marijuana for an exploratory sniff.

The Court concluded that there was no probable cause in this case to justify the sniff of McKnight's truck by a drug-detection dog trained to alert to marijuana, and thus, the trial court erred in denying his motion to suppress. The Court further concluded that the appropriate remedy for this violation of the Colorado Constitution is the exclusion of the evidence at issue. Thus, the Court affirmed the Court of Appeals' decision to reverse McKnight's judgment of conviction.

2019 CO 37. No. 18SA208. People v. Gadberry. *Searches and Seizures—Drug-Detection Dog—Probable Cause.*

At issue in this interlocutory appeal is whether law enforcement needed probable cause before deploying a drug-detection dog that was trained to alert to both marijuana and other substances. Adopting the analytical framework announced in the companion case, *People v. McKnight*, 2019 CO 36, __ P.3d __, the Supreme Court held that the officers needed probable cause before deploying such a drug-detection dog, and Gadberry's statements regarding the presence or non-presence of marijuana did not change this. Because the officers did not have probable cause, the drug-detection dog should not have been deployed. Accordingly, the trial court's suppression order was affirmed.

2019 CO 38. No. 17SC735. City of Golden v. Sodexo America, LLC. *Taxation—Sales Tax—Wholesale Tax Exemption.*

In this sales tax dispute, the Supreme Court considered whether a food service vendor to a university sold meals directly to students with meal plans at retail, or whether the vendor sold those meals to the university at wholesale. If the meal-plan meals were sold at retail to the students, they would be taxable under the relevant municipal ordinances; if the meals were sold at wholesale to the university, they

would be exempt from taxation. After examining the plain language of the ordinances, the Court held that the food service vendor sold the meal-plan meals to the university at wholesale, and thus the transactions were tax-exempt. Accordingly, the Supreme Court affirmed the Court of Appeals' decision.

May 28, 2019

2019 CO 39. No. 18SC186. Town of Breckenridge v. Egencia, LLC. By operation of law, the decision of the Court of Appeals Case No. 16CA1901 (Colo.App. Jan. 25, 2018) was affirmed by an equally divided court. *See* C.A.R. 35(b).

2019 CO 40. No. 18SA228. In re Reeves-Toney v. School District No. 1 in the City & County of Denver. *Standing—Persons Entitled to Sue—Taxpayers.*

In this original proceeding under C.A.R. 21, the Supreme Court reviewed the trial court's denial of a motion to dismiss a constitutional challenge to the mutual consent provisions of CRS § 22-63-202(2)(c.5) of the Teacher Employment, Compensation, and Dismissal Act. Plaintiff, a nonprobationary teacher employed by defendant School District No. 1 in the City and County of Denver, alleged that these provisions violate the local control clause of article IX, section 15 of the Colorado Constitution by delegating local school boards' hiring decisions to principals and other administrators. The Supreme Court agreed with the trial court that plaintiff lacks individual standing to bring her claim, and held that because plaintiff has not alleged an injury based on an unlawful expenditure of taxpayer money, she also lacks taxpayer standing to bring her challenge to CRS § 22-63-202(2)(c.5). Accordingly, the Court made the rule to show cause absolute and remanded the case to the trial court with directions to dismiss plaintiff's complaint.

2019 CO 41. No. 17SC840. Department of Revenue v. Agilent Technologies, Inc. *Corporate Income Tax—Taxation of Holding Companies.*

This case principally required the Supreme Court to decide two questions. First, the Court had to determine whether the Colorado Department of Revenue and its executive director can require the parent company of a worldwide family of affiliated corporations to include a holding company and wholly owned subsidiary of the parent in its Colorado combined income tax returns for certain tax years at issue. If the answer to that question is no, then the Court had to consider whether the Department may nevertheless allocate the holding company's gross income to the parent to avoid abuse and to clearly reflect income.

As to the first question, the Court concluded that CRS §§ 39-22-303(11) and (12) do not authorize the Department to require the parent to include its holding company in its combined tax returns for the tax years at issue, because that holding company is not an includable C corporation within the meaning of those provisions. As to the second question, the Court likewise concluded that the Department may not allocate the holding company's income to the parent under CRS § 39-22-303(6) because (1) that section has been superseded by CRS § 39-22-303(11) as a vehicle for requiring combined reporting for affiliated C corporations, and (2) even if CRS § 39-22-303(6) could apply, on the undisputed facts of this case, no allocation would be necessary to avoid abuse or clearly reflect income. Accordingly, the Court concluded that the district court properly granted summary judgment in the corporate parent's favor and therefore affirmed the Court of Appeals' judgment.

2019 CO 42. No. 18SC3. Department of Revenue v. Oracle. *Corporate Income Tax—Taxation of Holding Companies.*

This case, like *Department of Revenue v. Agilent Technologies, Inc.*, 2019 CO 41, announced the same day, principally required the Court to decide two questions. First, the Court had to determine whether the Colorado Department of Revenue and its executive director can require the corporate parent of a worldwide group of affiliated corporations to include a holding company and wholly owned subsidiary of the parent in its Colorado combined income tax return for the tax period at issue. If the answer to that question is no, the Court had to consider whether the Department may nevertheless allocate to the parent the holding company's gain from the sale of shares that it held in a related company to avoid abuse and to clearly reflect income.

For the reasons set forth in *Agilent Technologies*, the Court concluded that the pertinent statutory provisions and regulations do not permit the Department either to require the parent to include the holding company in its combined tax return for the tax year at issue or to allocate to the parent the capital gains income that the holding company realized on the sale of shares. Accordingly, the Court concluded that the district court properly granted summary judgment in the corporate parent's favor and therefore affirmed the Court of Appeals' judgment.

2019 CO 43. No. 17SC350. Colorado Custom Maid, LLC v. Industrial Claim Appeals Office. *Unemployment Tax Liability.*

The Supreme Court determined whether Colorado Custom Maid, LLC (CCM), which considers itself a referral service, employs house cleaners for purposes of the Colorado Employment Security Act (CESA). Because the realities of CCM's relationship with its cleaners are those of an employment relationship, the Court concluded that CCM is liable for unemployment taxes on wages paid to the cleaners. In so doing, the Court disapproved the notion that to determine whether an individual is an employee under CESA, CRS § 8-70-115(1)(b) requires a "threshold" showing that the services being provided by the putative employee are being provided for the benefit of the putative employer. CL

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