

# Summaries of Selected Opinions

April 4, 2019

**2019 COA 48. No. 15CA0546. People v. Perez.** *Criminal Law—Traffic Stop—Search and Seizure—Miranda—Public Safety Exception—Possession of a Weapon by a Previous Offender—Motion to Suppress.*

Police officers conducted a traffic stop of a vehicle for various traffic infractions. The officers observed that the occupants were acting suspiciously. An officer asked the passenger (Perez) to step out of the car, and he began running. When the officers finally caught Perez, he resisted officers' efforts to take him into custody and broke an officer's nose. After handcuffing Perez, an officer frisked him and found two shotgun shells in his pocket. Before advising him of his *Miranda* rights, the officer asked Perez where the gun was. Perez responded that he had thrown it away. The shotgun was found in the vehicle. A jury convicted Perez of second degree assault on a peace officer and four counts of possession of a dangerous weapon by a previous offender (POWPO).

On appeal, Perez first contended that the trial court erred by denying his motion to suppress incriminating statements he made after his arrest and before police advised him of his *Miranda* rights. Absent warnings against self-incrimination, the prosecution generally cannot introduce in its case-in-chief statements obtained from a suspect that resulted from custodial interrogation. The public safety exception to *Miranda* warnings applies if the officer's questioning related to an objectively reasonable need to protect the police or the public from immediate danger associated with a weapon. Although bullets may suggest possession of a gun, here the suggestion was

not strong enough to give the officer reason to believe that Perez had discarded a shotgun while being chased. Because the officer's question was not required to protect the police or public from immediate danger associated with a weapon, the public safety exception did not apply, and the trial court erred in denying the motion to suppress the incriminating statement. However, the evidence of Perez's possession of the weapon was overwhelming without regard to the statement, so the error was harmless beyond a reasonable doubt.

Perez also contended that the trial court erred in allowing the jury to convict him of four counts of POWPO when the charges derived from the same weapon. A person with multiple prior felony convictions may not be convicted of multiple POWPO counts for possession of a single gun during a single incident. Thus, the convictions should have merged, and the error was plain.

Finally, Perez contended that the trial court erred by allowing the prosecution to proceed when law enforcement's outrageous conduct violated his federal and state rights to due process. Perez cited no authority suggesting that the conduct here was outrageous, and he did not show any error, let alone plain error.

The judgment was reversed in part and the case was remanded with directions to vacate Perez's POWPO convictions and sentences in counts four, five, and six, and to correct the mittimus accordingly. The judgment was affirmed in all other respects.

**2019 COA 49. No. 17CA0923. State ex rel. Weiser v. Castle Law Group, LLC.** *Colorado Consumer Protection Act—Colorado Antitrust Act—Law of the Case Doctrine—Fifth*

*Amendment—Nonparty Witnesses—Statute of Limitations—Public Harm.*

Castle Law Group, LLC (the law firm) was the largest foreclosure law firm in Colorado during the subprime mortgage crisis that occurred about a decade ago. Because of the large volume of foreclosures during this period, mortgage servicers, acting on behalf of lenders, hired foreclosure law firms using comprehensive retainer agreements. As relevant here, the mortgage servicers included two quasi-public entities, the Federal National Mortgage Association (Fannie Mae) and the Federal Home Loan Mortgage Corporation (Freddie Mac). Under the retainer agreements at issue in this case, the mortgage servicers would agree to pay the law firm a flat fee for each case, and the law firm would arrange for all the foreclosure legal work, including posting of notices and land title research. The law firm would hire an outside vendor to complete these services. The mortgage servicers would then reimburse the firm for its "actual, necessary, and reasonable" costs for these services, in accordance with Colorado law.

In 2014, the State of Colorado and the State's Administrator of the Uniform Commercial Code (collectively, the State) filed a civil enforcement action under the Colorado Consumer Protection Act (CCPA), CRS §§ 6-1-101 et seq. It alleged that the law firm and its principals exploited the reimbursement system by engaging in a deceptive scheme with Absolute Posting & Process Services, LLC and its principals (the posting company) and RE Records Research, LLC and its principals (the title company). The alleged scheme involved false or misleading statements of fact concerning the price of their foreclosure services under the CCPA. The State also alleged that the law firm had illegally fixed prices in violation of the Colorado Antitrust Act of 1992. Following a bench trial, the trial court ruled in favor of defendants on all the claims but one. As to the State's one successful claim, the trial court assessed civil penalties against the law firm and its principals.

On appeal, the State contended that the trial court disregarded the law of the case doctrine when it determined that the prices of the title company and the posting company were "actual"

and “reasonable.” It was alleged that the law firm conspired with the title company and the posting company to set prices for services in excess of the market rate and shared in the profits from the inflated costs. The State asserted that the Supreme Court’s opinion in *State ex rel. Coffman v. Castle Law Group, LLC*, 2016 CO 54, required the trial court to consider the market rate evidence to determine whether the prices were artificially inflated. The Court of Appeals held that (1) the trial court did not err by rejecting the State’s market rate evidence; (2) even if the trial court erred in concluding that the costs were “actual,” it did not commit reversible error; (3) the trial court did not err when it considered Fannie Mae’s approval of the charges as evidence that the charges were reasonable; and (4) the trial court did not improperly consider the State’s “kickback theory.” Therefore, the trial court’s findings did not contravene the law of the case. Further, the trial court’s findings that the prices for the services were not inflated and that the vendors set their prices independently of any influence from the law firm were supported by the record.

The State also contended that the trial court erred in allowing a nonparty witness to make a blanket invocation of her Fifth Amendment rights without having to take the witness stand to invoke the rights on a question-by-question basis. Here, the trial court allowed the State to make an offer of proof of the questions it intended to ask the witness, the witness knew what she would be asked, and there was no doubt that she would decline to answer the questions. Thus, even if the witness had taken the witness stand, the trial court would have made the same findings and conclusions. Therefore, the trial court did not err in allowing the witness to invoke the Fifth Amendment without taking the witness stand. Further, the trial court’s decision to decline to draw any adverse inference against the law firm based on the witness’s silence was supported by the record.

On cross-appeal, the law firm argued that the trial court erred by applying the statute of limitations in the CCPA instead of the statute of limitations for civil penalties in CRS § 13-80-103(1)(d). Because the CCPA has a statute of limitations specifically addressing cases

brought under its provisions, it controls over the more general CRS § 13-80-103(1)(d), and the trial court did not err.

The law firm also argued that the trial court erred in assessing civil penalties under CRS § 6-1-112, because it incorrectly determined that the deceptive act significantly impacted the public as actual or potential consumers. A deceptive practice does not violate the CCPA simply because it impacts the public generally; the practice must impact the public specifically as actual or potential consumers of the goods or services at issue. The State had to prove that the law firm’s nondisclosure of its relationship with the posting company had a significant public impact. Here, the deceptive practice impacted only two clients, Fannie Mae and Freddie Mac. The public’s interest in these entities as taxpayers does not constitute a significant public impact. Therefore, the trial court erred as a matter of

law in determining that the nondisclosure significantly impacted the public as actual or potential consumers.

The judgment was affirmed in part and reversed in part. The case was remanded to vacate the judgment against the law firm.

**2019 COA 50. No. 17CA2046. Houchin v. Denver Health and Hospital Authority.** *Colorado Governmental Immunity Act—Colorado Anti-Discrimination Act—Equitable Relief—Legal Remedies—Political Subdivisions.*

Plaintiff is a former human resources manager at Denver Health and Hospital Authority (Denver Health), which is a political subdivision of the State of Colorado. Denver Health terminated plaintiff’s employment, purportedly because he used confidential patient records of Denver Health employees for disciplinary purposes, in violation of the Federal Health

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Insurance Portability and Accountability Act of 1996. Plaintiff filed a discrimination charge with the Colorado Civil Rights Division (CCRD), asserting that the real reasons for his termination were sexual orientation discrimination and unlawful retaliation for asserting his rights under the Colorado Anti-Discrimination Act (CADA).

The CCRD did not timely resolve the discrimination charge, and plaintiff filed suit in district court. Plaintiff alleged sexual orientation discrimination in violation of CADA; two claims of retaliation under CADA; wrongful discharge in violation of public policy; whistleblower retaliation under the State Employee Protection Act (SEPA); and breach of implied contract or promissory estoppel. Plaintiff's CADA claims were brought under the 2013 amendments to CADA. Denver Health claimed governmental immunity under the Colorado Governmental Immunity Act (CGIA) and moved under CRCP

12(b)(1) to dismiss all but the implied contract/promissory estoppel claim for lack of subject matter jurisdiction. The district court granted Denver Health's motion as to the wrongful discharge in violation of public policy claim and the whistleblower claim under SEPA. The district court denied Denver Health's motion as to the remaining claims.

On interlocutory appeal, Denver Health contended that the district court's denial of governmental immunity as to the CADA claims was erroneous. To the extent plaintiff asserts claims for reinstatement, back pay, and other equitable relief, he is not subject to the CGIA. To the extent he asserts the legal remedies available under CADA as amended, he is subject to the CGIA. Thus, plaintiff's claims against Denver Health for compensatory relief are subject to the requirements of the CGIA, and the district court's conclusion to the contrary

is incorrect. However, to the extent plaintiff's complaint seeks equitable relief, such as back pay or reinstatement, his claims may proceed independently of compliance with the CGIA, including any notice requirement.

The order denying Denver Health's motion to dismiss the CADA claims under the CGIA was reversed. The order was affirmed to the extent it denied the motion as to plaintiff's equitable relief requests. The remaining claims were remanded to the district court.

**2019 COA 51. No. 17CA2375. Murr v. Civil Service Commission of the City and County of Denver. Police—Disciplinary Procedures—Jurisdiction—Denver City Charter—Finality.**

Murr and Sparks were Denver Police Department officers (the officers). They were investigated for excessive use of force after arresting two men outside a Denver nightclub. The Deputy Chief of Police recommended that Sparks be docked three days of pay and Murr be suspended for three days. The Manager of Safety (MOS) reviewed the recommendations according to the Charter of the City and County of Denver (the Charter) procedure, and he accepted them. The officers did not appeal this first disciplinary order.

After video of the incident was released to the public, the MOS reopened the investigation, rescinded the first disciplinary order, and remanded the matter. The officers brought an action in district court to enjoin the MOS from issuing new disciplinary orders, asserting that the MOS lacked authority to rescind a disciplinary order and issue a new one after the deadline for filing an appeal had passed without one being taken. The district court denied injunctive relief. The MOS terminated the officers, and they timely appealed this second disciplinary order. A hearing panel concluded that the first disciplinary order became final when the appeal period lapsed and the Charter did not authorize the MOS to reassert jurisdiction over the matter. The MOS appealed to the full Civil Service Commission of the City and County of Denver (the Commission). Ultimately, the Commission interpreted the Charter to give the MOS implied authority to reopen the officers' disciplinary matter, rescinded the



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discipline previously imposed, and upheld the terminations. The district court affirmed the Commission's order.

On appeal, the officers argued that the Charter does not expressly or impliedly grant the MOS power to rescind a disciplinary order once it becomes final and the time for appealing that order to the Commission expires. Even if the MOS has the implied power to rescind a disciplinary order, the Charter provisions and principles of finality and jurisdiction provide that this power and authority exists only until an order becomes final and while the MOS retains jurisdiction of the matter, which ends once the appeal time of that order expires. Here, the MOS's first disciplinary order was a final order because it determined the matter in full, imposed legal consequences on the officers, and left nothing further to be done to determine any party's rights. Absent a timely appeal to the Commission within the 10 days, the officers became bound to accept their discipline, which the DPD was required to implement. Thus, the Commission exceeded its jurisdiction and abused its discretion in concluding that the MOS had the implied authority and power to rescind the order.

The judgment was reversed and the case was remanded with directions to remand to the Commission for reentry of the first disciplinary order.

**2019 COA 52. No. 18CA0474. *Rechberger v. Boulder County Board of County Commissioners. Taxpayers—Voters—Standing.***

Plaintiffs were taxpayer-voters. They sued the Boulder County Board of County Commissioners and the Boulder County Housing Authority, alleging they failed to uphold promises made during a 1993 campaign to raise taxes to purchase and maintain "open space" land. The district court dismissed some of plaintiffs' claims for lack of standing and other claims for failure to state a claim upon which relief could be granted.

On appeal, plaintiffs contended that the district court erred in dismissing their complaint. To support standing, a plaintiff's complaint must establish a personal stake in the alleged dispute and an alleged injury that is particular as to

the plaintiff. Here, plaintiffs' asserted injuries are no different than those suffered by other individuals who voted for the proposed tax increases. And though Colorado allows broad taxpayer standing, this typically applies where the plaintiffs allege constitutional violations, which was not the case here. Plaintiffs also lack standing as voters because they did not allege that they were denied the right to vote, that their votes were diluted, or that their right to vote was otherwise infringed upon. Instead, plaintiffs' claims were predicated on unfulfilled expectations arising from campaign promises, which are not legally protected or cognizable interests. Consequently, the district court properly dismissed plaintiffs' complaint.

The judgment was affirmed.

**April 11, 2019**

**2019 COA 53. No. 18CA0498. *Yeutter v. Industrial Claim Appeals Office. Workers' Compensation—Impairment—Maximum Medical Improvement—Permanent Partial Disability—Division-Sponsored Independent Medical Examination—Permanent Total Disability—Maintenance Medical Benefits—Causation—Due Process.***

In 2012 claimant sustained serious injuries in a work-related accident in which he was struck in the head and shoulder and knocked to the ground by a robotic arm. In 2015 claimant's primary authorized treating physician (ATP) assessed him as suffering from narcolepsy that was likely related to traumatic brain injury and placed him at maximum medical improvement (MMI) with a permanent impairment rating of 67% of the whole person. Mental health and medical experts that employer retained did not agree that the narcolepsy was caused by trauma from the work-related accident. A division-sponsored independent medical examination (DIME) agreed with the ATP that claimant reached MMI in 2015 and had narcolepsy, but he gave claimant a lower impairment rating. The DIME physician deferred to claimant's ATP on the cause of claimant's narcolepsy. Employer did not contest the DIME physician's opinions, and filed a final admission of liability (FAL) accepting the MMI date and admitting claimant's entitlement

to permanent partial disability (PPD) benefits. However, employer did not admit liability for any continuing post-MMI maintenance benefits.

Claimant then filed for a hearing seeking permanent total disability (PTD) and future maintenance medical benefits. An administrative law judge (ALJ) denied and dismissed his claims, and a divided panel of the Industrial Claim Appeals Office affirmed the ALJ's order.

On appeal, claimant contended that the ALJ erred in requiring him to prove his entitlement to PTD and maintenance medical benefits by a preponderance of the evidence. He asserted that the ALJ should have given the DIME opinion presumptive weight as to the cause of his injury and that employer should have been required to overcome the DIME's causation opinion with clear and convincing evidence. A DIME physician's opinions concerning MMI and impairment are afforded presumptive weight, but a DIME's opinion as to the cause of a claimant's injury does not have similar presumptive weight. Here, claimant's claims involved neither MMI nor permanent impairment because those issues had already been conceded by employer in its FAL. Therefore, claimant bore the burden of establishing his entitlement to PTD and maintenance medical benefits, including proof of causation, by a preponderance of the evidence. Accordingly, the ALJ did not err in denying and dismissing claimant's claims for PTD and maintenance medical benefits.

Claimant also argued that he was deprived of his property rights without due process. He asserted that by requiring him to apply for further permanency and medical benefits, employer was able to avoid its burden to overcome the DIME's opinion by clear and convincing evidence, and the burden to prove the cause of claimant's narcolepsy was improperly shifted to him. No improper burden shifting occurred because it was claimant's burden to prove his entitlement to the benefits he sought. Further, claimant had no protected property interest in PTD and maintenance medical benefits, and he had two hearings on his request for benefits. There was no due process violation because claimant failed to show he was deprived of a protected right to liberty or property without due process of law.

The order was affirmed.

April 18, 2019

**2019 COA 54. Nos. 17CA0044 & 17CA0677. Lorenzen v. Pinnacol Assurance.** *Workers' Compensation—Bad Faith Breach of Insurance Contract—CRE 702—Causation—Evidence—Expert Testimony.*

Lorenzen was working as a groundskeeper for a country club when he injured his back and suffered a herniated disc with an extruded caudally migrated fragment. Pinnacol Assurance (Pinnacol), employer's workers' compensation insurer, denied Lorenzen's request for surgery to treat the injury on grounds that it was not work-related. The denial resulted in a 13-day delay between the date of the surgery request and the date Lorenzen underwent surgery under his private health insurance. Several months later, Pinnacol determined that Lorenzen's injury was work-related and it reimbursed him

for his medical costs and paid other workers' compensation benefits.

Lorenzen sued Pinnacol for bad faith breach of an insurance contract, alleging that the insurer's 13-day delay in authorizing surgery caused permanent nerve damage. Lorenzen disclosed four doctors as experts who intended to opine that the delay in approving the surgery request caused him to suffer the permanent nerve damage. The doctors relied on a theory that prolonged nerve compression from a disc herniation causes nerve damage, so prompt surgery is preferable to delayed surgery to preserve nerve function. The district court concluded that this theory was not a scientifically reliable theory of medical causation and disallowed the expert testimony. Consequently, Lorenzen could not prove causation or damages, and the district court granted summary judgment in favor of Pinnacol.

On appeal, Lorenzen contended that the district court erred in excluding his expert testimony by imposing the too stringent but-for causation standard, and that even under the court's standard, his causation theory satisfied CRE 702. The test for causation-in-fact is whether but for the tortious conduct, the harm would not have occurred. Further, the principle that early treatment is preferable to later treatment is not a viable theory of causation. Instead, evidence was needed that would allow a jury to find that, but for the delay, Lorenzen would not have suffered the impairment. Here, Lorenzen's expert testimony left significant gaps between the premise that nerve compression should be alleviated by prompt surgery and the conclusion that it is more likely than not the 13-day delay in undergoing surgery caused his permanent nerve damage. Therefore, the district court did not abuse its discretion in disallowing the experts' testimony because it would not have assisted the jury in determining whether Pinnacol's delay in authorizing surgery caused Lorenzen's permanent impairment.

Lorenzen also contended that the district court erred in entering judgment for Pinnacol because he retained a claim for noneconomic damages that did not require expert testimony. The Court of Appeals construed Lorenzen's complaint liberally and concluded that it contained a single claim for economic and noneconomic damages based on his physical impairment. Because Lorenzen cannot prove that Pinnacol's conduct caused his physical impairment, he also cannot prove that Pinnacol is responsible for the noneconomic damages resulting from his physical impairment. Therefore, the court did not err in dismissing Lorenzen's complaint and entering judgment for Pinnacol.

The judgment was affirmed.

**2019 COA 55. No. 17CA0102. People v. Delgado.** *Criminal Procedure—Ineffective Assistance of Counsel.*

The People charged defendant with aggravated incest and three counts of sexual assault on a child by one in a position of trust. He hired a private attorney to represent him, but that attorney withdrew several months before trial. Defendant couldn't pay another attorney

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but didn't qualify for a public defender, so he proceeded to trial pro se. A jury convicted him of all charges. Defendant was represented by a public defender at sentencing. The court sentenced him to an indeterminate 15 years to life for aggravated incest and concurrent 15-year sentences on the other charges. Defendant successfully appealed his convictions, but was retried and the district court again imposed an indeterminate sentence of 15 years to life on the aggravated incest count after the second trial.

Defendant filed a Crim. P. 35(c) motion, asserting 10 claims of ineffective assistance of counsel and requesting a hearing on those claims. According to the motion, the public defender told him that the prosecutor had made a post-verdict, presentence offer of a fixed, 10-year sentence to the custody of the Department of Corrections, but the offer wasn't favorable because the maximum prison term he could get was 15 years. Relying on this advice, defendant rejected the offer. The district court denied the motion without a hearing.

On appeal, defendant argued that the district court erred in denying his Rule 35(c) motion without a hearing. He contended that the public defender incorrectly advised him about the possible sentence after the first trial, and further argued that if he had been granted a hearing he would have presented evidence that but for his attorney's advice he would have accepted the offer of a determinate 10-year sentence. Here, defendant made sufficient allegations of ineffective assistance and resulting prejudice to justify a hearing on this claim.

Defendant also contended that the district court erred by summarily denying his claim that he received ineffective assistance of counsel at his second trial when his lawyer advised him not to testify. However, defendant didn't make any allegations showing a reasonable probability that the outcome would have been different if he had testified. Therefore, the court did not err in summarily denying this claim.

Lastly, defendant contended that the district court should have held a hearing on his claim that his attorney provided ineffective assistance of counsel by not investigating the case thoroughly. Defendant alleged that the lack of investigation resulted in him being

unable to provide the jury with context for his incriminating statements to the victim and he couldn't strategically attack her allegations. Defendant's conclusory statements without supporting factual allegations weren't enough to entitle him to a hearing on this claim, which the district court properly denied.

The portion of the district court's order summarily denying defendant's claim that he received ineffective assistance of counsel because his attorney incorrectly advised him about his sentencing exposure was reversed, and the case was remanded for a hearing on that claim. In all other respects, the order was affirmed.

**2019 COA 56. No. 17CA0159. People in the Interest of D.M. Juvenile Law—Sentencing—Restitution—Federal Controlled Substances Act—Marijuana—Preemption.**

D.M., a juvenile, and two of his friends broke into a licensed marijuana dispensary and stole marijuana plants and products worth \$178,000. D.M. pleaded guilty to burglary of a non-dwelling. The district court accepted the plea agreement, adjudicated D.M. delinquent, sentenced him to nine months of probation, and ordered D.M. to pay the store owner \$178,000 in restitution.

On appeal, D.M. argued that the court couldn't order such restitution because the Federal Controlled Substances Act (CSA) preempts Colorado's restitution statutes. He contended that because the CSA makes it a federal offense to distribute marijuana and provides that no one has a property interest in marijuana, Colorado's restitution statutes can't be applied to his conduct. Here, the restitution order only requires D.M. to make the victim whole for value lost because of his conduct; it doesn't require

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him to violate the CSA. Further, the argument that the CSA conflicts with the order because it effectively recognizes a property interest in marijuana lacks authority, and in any event, recognizing a state property interest in marijuana under Colorado law doesn't positively conflict with the CSA. The CSA does not indicate that Congress intended to supersede the restitution statutes, and there is no positive conflict between the CSA and Colorado's restitution statutes as applied in this case. Therefore, the CSA doesn't preempt those statutes.

The order was affirmed.

**2019 COA 57. No. 17CA1924. People in the Interest of B.D. Juvenile Law—Delinquency—Miranda—Interrogation—Search—Voluntary—Theft—At-Risk Person—Complicitor—Sentencing.**

Sixteen-year-old B.D., along with two other juveniles, broke into two homes and stole sev-

eral items. At one of the homes, one of B.D.'s accomplices crossed paths with the 77-year-old homeowner. Officers stopped B.D. on the street shortly after the burglary and he told a sergeant he had alcohol in his backpack and allowed the sergeant to search the backpack. The sergeant found a bottle of vodka and an iPad, which were later determined to belong to the victim, and B.D. was arrested. Before trial B.D. filed a motion to suppress, which the magistrate denied. B.D. was adjudicated delinquent for two counts of felony burglary and two counts of theft. One of the theft counts was a misdemeanor but the other was enhanced to a class 5 felony because it was committed in the presence of an at-risk person.

On appeal, B.D. contended that the magistrate erred in denying his motion to suppress because (1) police improperly obtained evidence by obtaining incriminating statements during a custodial interrogation; (2) he was coerced

into allowing police to search his backpack; and (3) his fingerprints were improperly obtained. Here, the only incriminating statement that B.D. made to the sergeant was that he had alcohol in his backpack. The statement was made when he was on a street in a public place with his friends, and he was questioned by the officer in a calm, conversational tone for only a few minutes. B.D. was not in custody when he made this statement. Further, the record shows that there was nothing coercive about the search, to which B.D. voluntarily consented. Finally, because nothing about B.D.'s interrogation, backpack search, or arrest was unlawful, police were authorized to obtain B.D.'s fingerprints as part of the routine identification process that accompanies an arrest. Therefore, the magistrate did not err in denying the motion to suppress.

B.D. also argued that the prosecution presented insufficient evidence to support the conclusion that he was guilty of theft in the presence of an at-risk person as a complicitor. Because there was no evidence that B.D. was aware that the principal would commit the burglary in the presence of an at-risk person, he cannot be held strictly liable for the sentence enhancer.

The adjudication and sentence for theft from an at-risk person were reversed. The case was remanded for resentencing on that count as a non-enhanced misdemeanor theft and to amend the mittimus accordingly. The judgment was affirmed in all other respects.

**2019 COA 58. No. 18CA0161. Southern Cross Ranches, LLC v. JBC Agricultural Management, LLC. Civil Procedure—Summary Judgment—Prior Inconsistent Ruling—CRCP 56(c).**

JBC Agricultural Management, LLC (JBC) entered into separate contracts to buy cattle from Southern Cross Ranches, LLC, and Ranch Management, LLC (collectively, sellers). In turn, JBC contracted to sell the cattle to its subsidiary (collectively, buyers). Sellers brought this action alleging that JBC had breached the contracts by failing to make any payments. JBC counterclaimed alleging that after the initial payment deadlines had been extended, sellers breached the contracts. JBC moved for summary judgment on its breach of contract



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counterclaim. It supported the motion with an affidavit from its principal. Sellers opposed the motion with counter affidavits and a brief. The trial court denied JBC's motion, stating that a genuine dispute of material fact existed. Shortly thereafter, the trial court granted buyers' counsel's motion to withdraw. Sellers then moved for summary judgment on all claims, counterclaims, and third-party claims. Because buyers were still without counsel, they could not oppose the motion. The court granted sellers' summary judgment motion without mentioning any aspect of the earlier summary judgment proceeding.

Four weeks later, buyers' new counsel entered an appearance and moved to vacate the summary judgment orders. The court denied the motion.

On appeal, buyers contended that sellers failed to meet their burden of showing the absence of a disputed material fact. Here, sellers' affidavits are admissible evidence and support summary judgment. Sellers met their burden of showing the absence of a factual issue on JBC's breach by nonpayment. Thus, the burden shifted to buyers to respond and show that a genuine issue for trial exists. Here, JBC did not respond, but argued on appeal that its principal's affidavit established disputed issues of material fact and the trial court was required to review all materials then on file. CRCP 56(c) does not require a trial court to review the record beyond the materials cited in the summary judgment motion and any opposition. Thus, buyers cannot rely on the principal's affidavit to show a disputed issue of material fact.

Buyers next contended that the trial court erred by entering summary judgment in favor of sellers because the court departed from its earlier summary judgment ruling, without explanation, that found disputed material facts. Here, while the court had discretion to disregard its prior ruling, the record does not show that it consciously did so. And comparing the prior order to the affidavits sellers submitted in support of their summary judgment motion leaves no doubt that there are factual issues. The court's failure to reconcile its prior inconsistent ruling was an abuse of discretion.

The summary judgments in favor of sellers were reversed and the case was remanded for further proceedings.

#### **April 25, 2019**

#### **2019 COA 59. No. 18CA0033. Bjornsen v. Board of County Commissioners of Boulder County. Administrative Law—Colorado Open Meetings Law—Colorado Open Records Act—Public Records—Work Product Exception.**

Bjornsen was concerned about Boulder County authorizing an affordable housing development at the Twin Lakes Open Space. She requested public records pursuant to the Colorado Open Records Act (CORA) related to the Board of County Commissioners of Boulder County's (the Board) consideration of this issue. She was provided some records, but the Board and the executive director of the Boulder County Housing Authority (collectively, defendants) determined that some information Bjornsen sought was not subject to public disclosure under CORA. Accordingly, defendants withheld some documents and redacted others.

Bjornsen sued defendants, alleging that they wrongfully withheld certain documents in violation of CORA and the Colorado Open Meetings Law (the COML). She also alleged that the Board convened numerous executive sessions in violation of the COML. The district court granted defendants' summary judgment on the executive session claims and, after a hearing, ruled that defendants properly withheld the contested documents.

On appeal, Bjornsen argued that the district court violated CRCP 42(b) by bifurcating the case and addressing the executive session and document disclosure claims separately without making any findings. While the district court should have explained its bifurcation ruling, trial courts have wide discretion in bifurcating claims, and here the ruling did not affect Bjornsen's substantial rights. The trial court did not abuse its discretion.

Bjornsen next argued that the district court erred by granting defendants summary judgment on her claims that the Board convened executive sessions in violation of the COML. The COML allows a local body to convene an executive

session that is not open to the public in certain limited circumstances, such as convening to receive legal advice, but it must comply with the COML's procedures when doing so. Here, the court made no findings and provided no analysis in granting summary judgment. Upon review of the record, the undisputed facts did not establish that the executive sessions Bjornsen identified complied with the COML. Therefore, defendants were not entitled to summary judgment, and the district court erred by ruling otherwise.

Bjornsen also challenged the district court's rulings that defendants (1) properly withheld drafts of an email that was eventually sent to the public, and (2) properly redacted five emails that involved communications of commissioners. Here, although the draft emails were work product, they were prepared for an unelected appointee and therefore constituted public records that Bjornsen was entitled to inspect. As to the redacted emails, the district court's clearly erroneous identification of the senders and recipients as staff did not affect the propriety of the court's ruling that the redactions were proper under CORA. However, the district court erred in ruling that the redacted material did not constitute public meetings under the COML because the emails show that there was no discussion among or between elected officials.

Bjornsen further argued that the district court erred by ruling that she was not entitled to a privilege log that defendants withheld under attorney-client privilege. The deputy county attorney's testimony that only his clients viewed the document was sufficient to establish that the document was not shared beyond the attorney and the attorney's clients. The district court did not err in relying on this testimony in ruling that the privilege log was protected from disclosure by attorney-client privilege, and Bjornsen was not entitled to the privilege log.

The summary judgment in favor of defendants on Bjornsen's executive session claims was reversed. The order denying Bjornsen access to the draft emails and the ruling upholding the redactions to the commissioner emails under the COML were reversed. The remainder of the order was affirmed. The case was remanded with directions to conduct further proceedings on the executive session claims.



**2019 COA 60. No. 18CA0321. Shekarchian v. Maxx Auto Recovery, Inc. Colorado Consumer Protection Act—Replevin—Standing—Treble Damages—Standard of Proof.**

Maxx Auto Recovery, Inc. (Maxx Auto) runs a repossession service and impound lot. It repossessed and impounded Shekarchian’s car and refused to return it unless Shekarchian agreed to sign a form release, before inspecting the car, representing that he had carefully examined the car and its contents and found no damage, and releasing Maxx Auto from any claims. Shekarchian refused to sign the release without first seeing the car and ultimately left without the car.

Shekarchian and his company (collectively, plaintiffs) jointly owned the car in question. They filed a lawsuit asserting, as relevant here, a replevin claim and a claim under the Colorado Consumer Protection Act (the CCPA). The district

court heard the replevin claim and ordered Maxx Auto to return the car to Shekarchian. By that time, the car needed repairs because it had been impounded for over seven months. After a bench trial on the CCPA claim and Maxx Auto’s counterclaim for additional storage fees, the district court found that Maxx Auto routinely required car owners to sign the release without an opportunity to inspect their vehicles and determined that the practice violated the CCPA. The district court entered judgment in favor of plaintiffs, awarded damages in the amount of the cost of repairs, and trebled the damages on a finding that Maxx Auto had engaged in bad faith conduct.

On appeal, Maxx Auto first argued that plaintiffs lacked standing to bring a CCPA claim. Shekarchian suffered injuries to a legally protected interest because he was deprived of the use of his car for more than seven months

and the car was damaged from being left in the impound lot. Therefore, plaintiffs had standing to sue under the CCPA.

Maxx Auto further contended that it did not engage in the conduct forming the basis of the court’s finding of a CCPA violation. The evidence supports the court’s finding that Maxx Auto requires vehicle owners to sign the release without giving them an opportunity to carefully examine the vehicle and its contents, contrary to the representations in the release itself. Accordingly, the court’s conclusion that Maxx Auto forced consumers to endorse a false statement on a release is likewise supported by the evidence. Further, this practice constitutes an unfair or deceptive trade practice under the CCPA and the practice significantly impacts the public. Therefore, the district court did not err in finding that Maxx Auto violated the CCPA.

Maxx Auto also argued that the district court erred in awarding treble damages under the CCPA. Here, the court erroneously used a preponderance of the evidence standard of proof rather than a clear and convincing standard of proof in determining that Maxx Auto had engaged in bad faith conduct and awarding treble damages.

The treble damages award was reversed and the case was remanded for reconsideration of treble damages under the proper standard of proof. The judgment was affirmed in all other respects. <sup>CL</sup>



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