Summaries of Published Opinions

January 10, 2019

2019 COA 1. No. 14CA1384. People v. Irving. *Constitutional Law—Sixth Amendment—Public Trial—Courtroom Closure.*

Defendant was charged with first degree murder and conspiracy to commit murder in connection with a gang-related dispute. During his trial, the prosecutor requested that the court exclude defendant's mother from the courtroom during his former girlfriend's testimony because, according to the prosecution, defendant's mother had urged the girlfriend not to cooperate with the police about four years earlier. The trial court granted the prosecution's request and partially closed the courtroom during the testimony of defendant's former girlfriend. Defendant was convicted of second degree murder and conspiracy to commit murder.

On appeal, defendant contended that the courtroom closure violated his constitutional right to a public trial. The proponent of a courtroom closure must demonstrate not only an overriding interest but also a substantial probability that the identified interest will be prejudiced by an open courtroom. The need to protect witnesses from intimidation constitutes an overriding interest. Here, the alleged intimidation was based on a single, ambiguous, four-year-old statement that the girlfriend later disregarded. The trial court may have identified an overriding interest, but it failed to make any finding that the interest in preventing witness intimidation would be prejudiced unless defendant's mother was excluded from the courtroom during the girlfriend's testimony. Therefore, the court erred in partially closing the courtroom and violated defendant's constitutional right to a public trial. Further, the error was structural.

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

2019 COA 2. No. 17CA0772. People v. Fuerst. *Driving Under the Influence—Driving While Ability Impaired—Express Consent Statute—Breath and Blood Tests—Confrontation Rights.*

Defendant backed his car into a pickup truck. A bystander told a police officer on the scene that after the accident, defendant asked her if she wanted his beer because he needed to hide it. Defendant performed several roadside sobriety tests. Based on his performance on these tests and the bystander's statement, the officer believed defendant was under the influence of alcohol. Defendant then elected to take a breath alcohol test, which showed that defendant's blood alcohol content was zero. The officer then asked defendant to take a blood test to test for drugs. Defendant initially refused, but after an officer told him his license would be revoked if he refused, defendant consented to the test. The blood test revealed 101 nanograms of Alprazolam, which is near the upper limit of the therapeutic range.

Before trial, defendant moved to suppress the blood test results. The trial court denied the motion. At trial, the jury found defendant not guilty of driving under the influence but found him guilty of driving while ability impaired and unsafe backing.

On appeal, defendant contended that the trial court erred in denying his motion to suppress the blood test because the officer violated his constitutional rights by requiring him to complete the blood test after he had already selected and completed the breath test. Defendant argued that the Expressed Consent Statute doesn't authorize an officer to request a drug test if the officer has already requested, and the suspect has completed, an alcohol test. Under the Expressed Consent Statute, if a police officer has probable cause to believe that a driver is under the influence of alcohol or drugs, the officer may request either the applicable alcohol tests, the applicable drug tests, or both, and the driver is obligated to complete them. The statute doesn't say an officer can only do one or the other. Accordingly, the procedure the officer employed didn't violate the Expressed Consent Statute. Because defendant's statutory claim fails, his constitutional claim necessarily fails. The trial court did not err in denying the motion to suppress.

Defendant also contended that the trial court violated his confrontation rights and CRS § 16-3-309(5) by admitting a laboratory report containing his blood test results. He contended that the witness who testified about the report and the blood test results wasn't sufficiently involved in the process of testing the blood sample and certifying the results. Here, the Colorado Bureau of Investigation (CBI) toxicologist, who was qualified as an expert in forensic science and forensic toxicology, testified about the report. The toxicologist led the process of reviewing the test results, employed the CBI's quality control process, and certified the results by signing the laboratory report. That fell within the meaning of "accomplishing" the report under CRS § 16-3-309(5). The laboratory report was admissible.

The judgment was affirmed.

2019 COA 3. No. 17CA1381. Garcia v. Colorado Cab Co. LLC. *Negligence—Personal Injury—Common Carrier/Passenger Relationship—Duty of Care—Rescue Doctrine.*

A passenger in one of Colorado Cab Company's taxis got into an altercation with the cab driver, Yusuf. Garcia, who thought the cab was the one for which he had called, approached the cab, told the passenger to leave Yusuf alone, and told them to stop fighting. Ultimately, the passenger assaulted Yusuf and Garcia and stole the taxi. The passenger then hit Garcia with the taxi, ran him over, and dragged him down the street.

Garcia suffered extensive injuries and sued Colorado Cab for negligence. Colorado Cab

moved for summary judgment, arguing that it didn't owe Garcia a duty of care and that any breach of such duty did not proximately cause Garcia's injuries as a matter of law. The district court denied the motion. At trial, Colorado Cab moved twice for a directed verdict, based on the same reasoning in the summary judgment motion, and the district court denied those motions. A jury found for Garcia, and the district court entered judgment against Colorado Cab. The district court denied Colorado Cab's subsequent motion for judgment notwithstanding the verdict.

On appeal, Colorado Cab argued that the district court erred in determining that it owed Garcia a duty of care. In this case, Garcia alleged that Colorado Cab's failure to take safety measures caused his injuries, which is nonfeasance (the defendant's failure to prevent harm). In such cases, a duty exists only if there is a special relationship between the plaintiff and the defendant, which, as relevant here, is a common carrier/passenger relationship. No evidence showed that Garcia was a passenger or prospective passenger of the cab, so as a matter of law, there was no common carrier/passenger relationship between Garcia and Colorado Cab. Further, Garcia does not fall under the "rescue doctrine," which extends a defendant's liability to a plaintiff who attempts to rescue someone (1) to whom the defendant owed a duty, and (2) who was in danger because of the defendant's negligence. Here, although Yusuf was in imminent peril, there was no evidence in the record that Garcia attempted to physically intervene. Therefore, there was no basis for extending any duty to Garcia, and the district court erred in denying Colorado Cab's directed verdict and post-trial motions.

The judgment was reversed and the case was remanded for the district court to enter judgment in Colorado Cab's favor.

2019 COA 4. No. 17CA1678. People in the Interest of G.S.S. *Children's Code— Juvenile Court—Delinquency—No-Bond Order—Speedy Trial.*

G.S.S. was arrested and charged with two delinquent acts for threatening to shoot students at his middle school. He was placed in secure detention. At the initial detention hearing on May 2, 2017, the district court ordered that G.S.S. be held without bond. Numerous hearings were held over the next several months regarding the status of G.S.S.'s release from detention. On August 9, 2017 defense counsel moved to dismiss the case for violation of G.S.S.'s statutory speedy trial rights. The district court granted the motion.

On appeal, the prosecution argued that G.S.S.'s requests for continuances waived or extended the speedy trial period, and if there was a speedy trial violation, dismissal is not the proper remedy. Under CRS § 19-2-509(4)(b), a court is required to bring a juvenile to trial within 60 days of a no-bond order, so G.S.S. was entitled to a trial within 60 days of May 2, 2017, or July 1, 2017. The court did not hold a trial within that 60-day limit. In addition, counsel's actions on behalf of G.S.S. were designed to get G.S.S. released, not to delay a trial date. Thus, G.S.S.'s requested continuances did not waive, toll, or extend the speedy trial period. Accordingly, the district court violated G.S.S.'s statutory speedy trial rights. Further, the Court of Appeals discerned that it was the legislature's intent to require dismissal when a speedy trial violation occurs, regardless of whether the speedy trial period was established by a no-bond hold order or entry of a not guilty plea. Therefore, the district court did not err by dismissing G.S.S.'s case.

The order was affirmed.

2019 COA 5. No. 18CA0885. People v. Salgado. *Powers and Duties of Attorney General—Executive Order—Medicaid Fraud.*

In 1987, then-Governor Romer promulgated an executive order (the 1987 Executive Order) requiring the Attorney General, through

the Medicaid Fraud Control Unit (MFCU), to investigate and prosecute Medicaid fraud and patient abuse cases. The 1987 Executive Order has never been repealed, rescinded, or modified. In December 2017, the MFCU filed a felony charge involving neglect of an at-risk adult against Salgado, an employee of an assisted living facility. The Jefferson County District Attorney filed a notice asserting that the Attorney General lacked legal authority or jurisdiction to file and prosecute the case. The district court found that Governor Romer had the authority to require the Attorney General to investigate and prosecute Medicaid fraud and patient abuse cases during his terms as governor but that reliance on the 1987 Executive Order to confer authority in 2018 would be an unconstitutional exercise of legislative power by the executive branch. It further found that a former governor cannot require the current Attorney General to act. The district court then dismissed the charge.

On appeal, the Attorney General argued that the district court incorrectly found that the 1987 Executive Order had expired at the conclusion of Governor Romer's term. Absent a clear limitation on the effective lifespan of an executive order, or a limitation in the terms of the executive order itself, an executive order remains in effect until modified, rescinded, or superseded, and it does not expire simply because the issuing governor is no longer in office. Further, at the time it was promulgated, the 1987 Executive Order was not an act of legislation, and for 30 years the General Assembly has tacitly permitted and funded the MFCU's operation. Therefore, the 1987 Executive Order directs, and therefore properly authorizes, the Attorney General in his or her own capacity to prosecute cases of Medicaid fraud and patient abuse in Colorado.

The judgment was reversed and the case was remanded for the district court to reinstate the charge against Salgado.

January 24, 2019

2019 COA 6. No. 15CA1147. People v. Coahran. *Criminal Mischief—Affirmative Defense—Self-Defense—Use of Physical Force in Defense of Person.*

Coahran and her ex-boyfriend had an argument during which Coahran kicked the ex-boyfriend's car door, causing damages. Coahran was charged with criminal mischief. She argued in a pretrial conference that she had kicked the door in self-defense. The trial court determined that self-defense wasn't available for her mischief charge because her use of physical force was directed at physical property rather than a person. Coahran was convicted of criminal mischief and ordered to pay restitution.

On appeal, Coahran asserted that the trial court improperly instructed the jury on self-defense. When an individual uses force to defend herself from the use or imminent use of unlawful physical force, she is allowed to take those actions that are reasonably necessary to do so. Therefore, a defendant charged with criminal mischief may be entitled to a jury instruction on self-defense as an affirmative defense under CRS § 18-1-704(1) where a defendant is charged with a property crime, uses force to defend herself from the use or imminent use of unlawful physical force by another, and takes only those actions that are reasonably necessary to do so, whether those actions are upon the other person directly or indirectly. Here, according to Coahran's testimony, the ex-boyfriend grabbed her wrist when she tried to walk away. She asked the ex-boyfriend twice to let her go, and he refused. Even though they were in a public parking lot, Coahran worried that the situation would escalate, so she kicked the car door in an effort to get away. Under these circumstances, there was sufficient evidence presented to support a self-defense instruction. Because the trial court didn't properly instruct the jury on self-defense as an affirmative defense, the prosecution didn't bear the burden of disproving self-defense, and Coahran was deprived of her right to possible acquittal on that ground. The court's error was not harmless beyond a reasonable doubt.

Coahran also argued that the evidence was insufficient to support the damage amount necessary to sustain her conviction. The prosecution presented a repair shop estimate and the testimony of the ex-boyfriend and a police officer on the amount of damage to the car door. This evidence was sufficient to sustain Coahran's conviction of felony mischief, and she may be retried on this charge.

The conviction was reversed, the restitution order was vacated, and the case was remanded for a new trial.

2019 COA 7. No. 17CA1423. Security Credit Services, LLC v. Hulterstrom. *Civil Procedure—Creditors and Debtors—Judgments—Judgment Liens—Revival.*

In 2010, the district court entered a money judgment in favor of plaintiff. In 2017, Marshall Recovery II LLC (Marshall) filed notice with the district court that it had purchased the money judgment from plaintiff. Soon thereafter, but more than six years after entry of the judgment, Marshall moved under CRCP 54(h) to revive the judgment. The district court denied the motion.

On appeal, Marshall argued that the trial court erred in denying its request to revive the judgment. A creditor may obtain a judgment lien at any time during the 20-year life of the judgment, but if more than six years have passed since entry of the judgment, the creditor must first revive the judgment and record the transcript of the revived judgment. This is true whether or not the judgment creditor previously obtained a judgment lien. Here, not more than 20 years had passed since the judgment entered, so Marshall was entitled to revive the judgment to obtain a judgment lien.

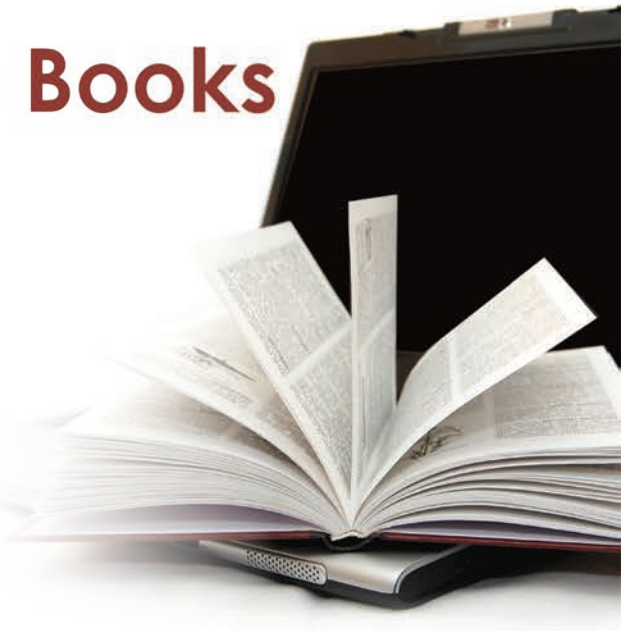
The order denying the motion was reversed and the case was remanded to address the motion.

2019 COA 8. No. 17CA1662. Roybal v. City and County of Denver. *Municipal Law—Termination—Charter of the City and County of Denver—Designated Authority.*

Roybal was a deputy sheriff with the Denver Sheriff Department (DSD). After an investigation, the Department of Safety's Civilian Review administrator (the administrator) determined that Roybal had violated multiple rules, which warranted disciplinary action, and terminated his employment. Roybal appealed the termination to a career service hearing officer, who affirmed the termination, and then to the City and County of Denver's Career Service Authority

CBA CLE books

Trust & Estate Books



Orange Book Forms: Colorado Estate Planning Forms, 8th Edition (Includes 2018 Updates)

It also includes Electronic PDF e-Book which contains Forms in Microsoft Word® and WordPerfect® *Orange Book Forms: Colorado Estate Planning Forms* is a remarkable compilation of estate planning forms designed and written by the Orange Book Forms Committee of the CBA Trust & Estate Section. This book is a must have for every estate planning attorney. It contains several will and trust forms, including marital deduction wills and trusts, pourover wills, joint revocable trusts, irrevocable life insurance trusts, and more. The book also includes forms for powers of attorney, appointment of guardians, client letters and intake questionnaires, and various drop-in provisions for special situations in estate planning.

CLE Item Number: **ZCEPFB17B**
CBA Member Price: **$259**
Non-Member Price: **$279**

The Green Book: Selected Colorado Materials on Wills, Estates, Trusts, and Taxes, 2018 Edition

The Green Book is a joint project of the Colorado Bar Association Trust & Estate Section and CBA-CLE. *The Green Book* contains the entire Title 15, Colorado Revised Statutes, plus selected statutes dealing with taxes, evidence, and more. It also includes all of the Colorado State Judicial Branch's JDF forms, plus Practitioner Forms developed by the CBA Trust & Estate Section's Rules and Forms Committee. The 2018 edition is updated through the 2018 legislative session and contains updates to the Colorado Revised Statutes, including the Colorado Uniform Trust Code, the revised Colorado Rules of Probate Procedure as adopted by the Colorado Supreme Court, and a new Supplemental Fee Disclosure form developed by the Rules and Forms Committee.

CLE Item Number: **ZTGBSB18B**
CBA Member Price: **$129**
Non-Member Price: **$149**

Three Convenient Ways to Order:

ONLINE AT: www.cba-cle.org
CALL: In Denver 303.860.0608
Toll Free 888.860.2531
STOP BY: Our office and save on shipping!

CBA-CLE Books

$11.95 S&H plus sales tax are applied as follows: Denver 8.31%; RTD, 4%; rest of Colorado, 2.9%.

Colorado Bar Association CLE

The nonprofit educational arm of the Colorado Bar Association and the Denver Bar Association
1290 Broadway, Suite 1700, Denver, Colorado 80203

Board (Board), which affirmed the hearing officer's decision. Roybal appealed to the district court, which affirmed the Board's order.

On appeal, Roybal contended that the district court erred in affirming the Board's decision and order. He argued that under the Charter of the City and County of Denver (Charter), the authority to discipline and terminate DSD employees rests solely with the manager or the deputy, not the administrator, and therefore his termination was void as an ultra vires act. The safety manager may authorize a designee within the department, other than the deputy manager of safety, for the purposes of hiring, disciplining, and terminating DSD employees. Therefore, the Board did not err when it concluded that (1) the Charter and the Career Service Rules (CSR) do not limit the manager's ability to designate authority solely to the deputy, and (2) the manager was permitted to delegate disciplinary authority to the administrator.

Roybal also argued that (1) two division chiefs were required to be at his hearing, and only one was present; and (2) the sheriff failed to initiate the discipline by written recommendation to the manager. Roybal claimed that in making these procedural errors, the Board effectively created a new CSR without engaging in rulemaking and applied the rule retroactively to his case to excuse the DSD's violations of its own policies. Roybal asserted that these errors require reversal of his termination and that the Board erred in concluding otherwise. Here, the Board's mention of existing CSR 16-72(D) was limited to explaining its reasoning in concluding that trivial deviations from pre-disciplinary regulations do not warrant the reversal of a termination decision. Simply discussing and implementing the policy behind the rule does not implicate quasi-legislative rulemaking by the Board. The Board did not err in finding that Roybal received a fair pre-disciplinary process, and any procedural irregularities are trivial.

The judgment was affirmed.

2019 COA 9. No. 17CA1955. People v. Terry. *Constitutional Law—Cruel and Unusual Punishment—Criminal Procedure—Postconviction Remedies.*

Terry was charged in two cases with multiple offenses arising from two separate incidents. In the first incident, Terry rammed his truck into a patrol car when officers attempted to stop him for breaking into parked vehicles. In the second incident, officers responded to a report of an intoxicated man (later identified as Terry) driving his truck around a Walmart parking lot. Terry got into his truck, slammed an officer's hand in the door, and ran over the officer's foot as he sped away. After a chase, Terry sped toward officers and rammed the patrol cars. A jury found him guilty of attempted extreme indifference murder, second degree assault on a peace officer, two counts of first-degree criminal trespass, third degree assault on a peace officer, two counts of criminal mischief, two counts of vehicular eluding, and four habitual criminal counts. After the court adjudicated Terry a habitual criminal in a separate trial, it sentenced him to an aggregate total of 204 years in the custody of the Department of Corrections.

Terry filed pro se for postconviction relief with a request for counsel. The district court denied three of his four claims and appointed counsel to address only the one claim on which it had not already ruled. It simultaneously ordered that a copy of the motion be served on the Office of the Public Defender (OPD) and the prosecution, and instructed the prosecutor to respond to the pro se motion and any supplemental motion within 30 days of its filing. The OPD determined it had a conflict of interest, so alternate defense counsel was appointed who filed a supplemental motion raising six claims of ineffective assistance of counsel. The district court concluded that five of the six claims did not entitle Terry to relief and ordered the prosecution to respond to the remaining claim, which Terry withdrew. The district court dismissed his five claims of ineffective assistance of counsel, without first ordering the prosecution to respond.

On appeal, Terry contended that the district court erred in denying his petition for postconviction relief because Crim. P. 35(c)(3)(V) requires, in the circumstances presented here, that the prosecution respond and the defendant be allowed an opportunity to reply to that response. Crim. P. 35(c)(3)(V) does not prevent the court from ordering the prosecution to respond to only that portion of a postconviction motion that the court considers to have arguable merit. Here, the district court's procedure fell within the bounds of prescribed procedure; it ruled on the pro se and supplemental petitions based on the motions, record, and facts and ordered the prosecution to respond to the one claim it deemed potentially meritorious. The trial court did not err, but even if it did, any error was harmless because Terry did not show prejudice.

Terry next contended that the district court erred in denying his postconviction petition because Terry sufficiently pleaded ineffective assistance of counsel. Here, (1) trial counsel's decisions not to pursue a not guilty by reason of insanity plea or other mental health defense were objectively reasonable; (2) trial counsel's failure to pursue a voluntary intoxication defense was strategically sound; (3) it was not error for defense counsel to decide not to pursue lesser nonincluded offenses based on trial strategy; (4) defense counsel did not err in deciding not to file a suppression motion; and (5) defense counsel did not err in failing to request a proportionality review, because attempted extreme indifference murder constitutes a per se "grave and serious" crime for purposes of an abbreviated proportionality review. Therefore, the trial court did not err in denying the postconviction motion.

The order was affirmed.

2019 COA 10. No. 17CA1992. Stiles v. Department of Corrections. *State Personnel Board—Disciplinary Proceedings—Standard of Review.*

Stiles was selected for a random drug screening while serving as a full-time correctional officer for the Department of Corrections (DOC). The day after the test, Stiles submitted a confidential incident report to DOC admitting to marijuana use and explaining the extenuating circumstances that led to it, including a bout of insomnia and personal problems. The test results came back positive for THC, the main psychoactive chemical in marijuana. The warden issued a notice of disciplinary action terminating Stiles.

Stiles appealed his termination to the Colorado State Personnel Board (Board). An

administrative law judge (ALJ) conducted a hearing and issued an initial decision finding that the warden's decision was arbitrary, capricious, and contrary to rule or law. Specifically, the ALJ found that the warden had (1) failed to candidly and honestly consider all of the evidence he procured, particularly Stiles's lack of prior disciplinary history and his extenuating mitigating circumstances; and (2) imposed discipline that was not within the range of reasonable alternatives by failing to consider the disciplinary alternatives set forth in the DOC regulation directed at marijuana use. The ALJ rescinded Stiles's termination and modified his discipline. On review, the Board adopted the ALJ's initial decision.

On appeal, the DOC contended that the ALJ employed an incorrect standard of review and improperly reweighed the evidence when he reviewed the disciplinary action. A CRS § 24-50-125(4) hearing is a de novo hearing at which the ALJ makes credibility, factual, and legal findings without deference to the appointing authority. Therefore, the ALJ applied the correct standard of review.

The DOC next contended that the ALJ misapplied the arbitrary and capricious standard in modifying the warden's decision. Here, the ALJ's decision and the Board's order adopting it were supported by the record, including the warden's failure to properly weigh the mitigating evidence and the absence of any prior discipline and the imposition of the most severe form of discipline for Stiles's misconduct.

The order was affirmed.

2019 COA 11. No. 17CA2089. Brown v. American Standard Insurance Co. of Wisconsin. *Automobile Insurance Coverage Cancellation Requirements—Accuracy of Reason for Cancellation.*

In March 2014, Brown purchased motorcycle insurance from American Standard Insurance Co. (American Standard). In August 2014 American Standard mailed Brown a notice that it was cancelling his policy for lack of a driver's license. In September 2014, Brown was involved in a motorcycle accident. He made a claim against the American Standard uninsured/underinsured motorist coverage. American Standard denied coverage for the accident, and Brown sued. American Standard moved for summary judgment. Brown filed a response to the motion supported by an affidavit attesting that he had a valid Colorado driver's license both at the time of cancellation and on the date of the accident. The trial court concluded there were no issues of material fact and granted the motion.

Brown appealed the summary judgment. Colorado law requires insurers to strictly comply with statutory and contractual requirements when canceling an automobile policy. A cancellation notice, other than one for nonpayment, must include either a reason for cancellation or a statement that a reason will be provided upon request. It is implicit in these requirements that the stated reason for cancellation be factually accurate. The Court of Appeals held, as a matter of first impression, that when an insurer provides a reason for cancellation the reason given must be accurate or the notice of cancellation is ineffective. Here, there is a disputed issue of material fact as to whether Brown had a valid driver's license at the time of cancellation, and the trial court erred in treating the cancellation notice as dispositive on summary judgment.

American Standard contended that its policy cancellation was effective regardless of whether the cancellation reason was inaccurate because Brown didn't contest the cancellation until well after the accident and not before filing suit. The fact that Brown did not challenge the cancellation before bringing suit on the policy did not constitute a waiver of his right to sue under the policy or a ratification of the allegedly improper cancellation.

The summary judgment was reversed and the case was remanded.

2019 COA 12. No. 17CA2254. Tallman v. Aune. *Default Judgment—Presumption of Regularity—Lost or Destroyed Records—CRCP 60(b)(3).*

In 1996, Tallman obtained a default judgment against Aune. About 15 years after the judgment entered, the district court destroyed the case file under its records retention policy. In 2016, Tallman filed writs of garnishment to enforce the judgment and the writs issued. Shortly after, Aune filed a motion to vacate the default judgment and quash the writ of garnishment, asserting that he had not been aware that a judgment had been entered against him and he had not been served. In response, Tallman admitted he could not produce the affidavit of service, but he attached copies of the default motion and default judgment and cited the register of actions entry noting service had been made. The district court granted Aune's motion to vacate, finding that Tallman failed to establish by clear and convincing evidence that Aune was properly served. It also denied Tallman's motion to revive the default judgment as moot. Tallman moved for reconsideration, arguing that the presumption of regularity must apply. The district court dismissed the case.

On appeal, Tallman argued that the district court erred in vacating the default judgment and it should have applied the presumption of regularity to presume the default judgment was entered with jurisdiction. Here, though the return of service is no longer available, the register of actions, the limited record, and the 1996 default judgment show service was effectuated, so the presumption of regularity applies. The district court erred in declining to apply the presumption of regularity to the default judgment when it granted the motion to vacate. Further, the burden remained on Aune to overcome the presumption as to the default judgment. At most, Aune provided the district court with an unsworn assertion that he had not been served two decades ago. These inferences do not constitute sufficient evidence to overcome the presumption of regularity. For the same reason, Aune didn't satisfy his burden of proof to present clear and convincing evidence to set aside the default judgment

Tallman also requested the Court of Appeals to direct the district court to "grant a nunc pro tunc order for revival of judgment," arguing he complied with the procedural requirements to revive the default judgment. Because the default judgment must be reinstated, the motion to revive is not moot.

The judgment was reversed and the case was remanded to reinstate it and to consider Tallman's request to revive the default judment.

2019 COA 13. No. 17CA2293. In re Marriage of Thorstad. *Post-Dissolution Action—CRS § 14-10-122(2)—Modification of Maintenance upon Retirement—Rebuttable Presumption—CRS § 14-10-114.*

The parties were divorced in 2002. They had a separation agreement that required husband to pay wife maintenance and reserved jurisdiction for the court to modify maintenance. Husband retired from his job, in part due to health problems. He requested termination of his maintenance obligation based on CRS § 14-10-122(2)(a), (b), and (c), which establish a rebuttable presumption that a decision to retire was made in good faith when certain conditions are met. These subsections did not exist in their present form when the parties entered into their separation agreement. The magistrate granted the request. Wife sought review in the district court, which denied her petition.

On appeal, wife argued that the trial court erred when it relied on CRS § 14-10-122 instead of CRS § 14-10-114 when granting husband's motion. CRS § 14-10-122 was the correct statute for the trial court to use. However, if a payor satisfies the retirement provisions in subsections 122(2)(b) and (c) that the decision to retire was made in good faith, the payor's good faith retirement becomes one of the factors for the court to consider in analyzing whether under subsection 122(1)(a) the payor can show a substantial and continuing change of circumstances that makes the existing maintenance order unfair. In doing so, the court must also consider the factors listed in the 2001 version of CRS § 14-10-114(3) and (4) (the new version of CRS § 14-10-114 is applicable to petitions filed on or after January 1, 2014). Here, the trial court erred because it treated husband's good faith decision to retire as conclusive in resolving his motion; the order failed to address whether husband's retirement and declining health were continuing and changed circumstances that rendered his obligation unfair; and the trial court did not consider husband's and wife's needs and abilities as required by the 2001 version of CRS § 14-10-114(3) and (4). Further, the separation agreement did not reserve jurisdiction over the question of what effect husband's retirement would have on his maintenance obligation. Thus, the separation agreement did not require the trial court to use CRS § 14-10-114 to resolve husband's motion instead of CRS § 122(1)(a), (2)(a), (2)(b), and (2)(c).

The order was reversed and the case was remanded for the court to (1) determine whether husband's circumstances have changed in such a substantial and continuing way as to make the existing terms of the maintenance obligation unfair, and (2) consider wife's request for appellate attorney fees under CRS § 14-10-119.

2019 COA 14. No. 18CA1506. People v. Rieger. *Order of Dismissal—Tampering with Physical Evidence—Electronic Documents are Physical Evidence.*

Rieger had been charged in a separate case with numerous offenses in connection with an alleged assault on his girlfriend. While in jail, Rieger corresponded with his girlfriend through Telmate, an electronic messaging system that allows detainees to communicate with people outside the jail. Through Telmate, the girlfriend forwarded a picture to Rieger of bruises on her arms that he had allegedly caused during the assault. Rieger asked her to remove the picture because it could incriminate him. She removed the picture from the Telmate account.

A District Attorney's investigator reviewed the Telmate account, which led to a charge in this separate case of solicitation to commit tampering with physical evidence. After a preliminary hearing, the district court dismissed the case, finding that the definition of physical evidence did not apply to the electronic record under CRS § 8-8-610.

On appeal, the People contended that the district court improperly dismissed the case because it erred in interpreting the definition of "physical evidence" to exclude electronic documents. CRS § 18-8-610(2) defines phys-

ical evidence as including articles, objects, documents, records, or other things of physical substance. The Court of Appeals concluded it is clear that electronically stored documents or information fall within the ambit of "physical evidence." Further, electronically stored, digital images qualify as physical evidence for purposes of the tampering with physical evidence statute. It was therefore error to dismiss on the grounds that electronically stored images are not physical evidence.

Rieger argued that even if the photo was physical evidence, the dismissal should be affirmed because the electronic duplicate uploaded to Telmate is not physical evidence. The Court perceived no reason why a duplicate of a photograph is not physical evidence for purposes of the tampering statute.

Rieger further argued that the removal of the image does not evince a specific intent to make the image unavailable at trial. Here, Rieger asked the girlfriend to remove the photograph because it could incriminate him. In addition, this evidence was being reviewed in relation to a probable cause determination after a preliminary hearing, which is a low standard to meet. The evidence was sufficient to induce a person of ordinary prudence and caution to entertain a reasonable belief that Rieger intended to deprive the prosecution of the ability to use the picture. Probable cause supported the charge of tampering with physical evidence. Therefore, the case should not have been dismissed.

The order of dismissal was reversed and the matter was remanded with directions to reinstate the case.

2019 COA 15. No. 18CA1772. Garrou v. Shovelton. *Interlocutory Appeal—Uniform Insurers Liquidation Act—Federal Liability Risk Retention Act—Enforcement of South Carolina Order.*

The Garrous sued Shovelton, among others, for medical malpractice. Shovelton's malpractice insurer is Oceanus, a South Carolina industrial insured captive corporation formed as a risk retention group. In 2017, a South Carolina court issued an order commencing liquidation proceedings against Oceanus that, among other things, imposed an injunction and an automatic stay of proceedings against the insurer, its assets, and its policyholders. Shovelton moved to stay the proceedings based on the South Carolina order. The district court denied the motion, and Shovelton moved for C.A.R. 4.2 certification of the court's order denying the stay.

On appeal, Shovelton contended that the district court erroneously denied his motion for stay because Colorado and South Carolina are reciprocal states under the Uniform Insurers Liquidation Act (UILA), so Colorado must give full faith and credit to any injunction order in a liquidation proceeding. Because Colorado and South Carolina are reciprocal states under the UILA, Colorado must recognize South Carolina's order. In addition, the Federal Liability Risk Retention Act of 1986 governs risk retention groups and requires Colorado to honor the South Carolina order. South Carolina has jurisdiction over Oceanus and its policyholders, including Shovelton. The district court erred in denying the motion for stay as to Shovelton.

The order was reversed and the case was remanded with directions to stay the proceedings as to Shovelton and to enter any further orders deemed necessary and appropriate as to the remaining parties. 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.