

# Summaries of Published Opinions

March 7, 2019

**2019 COA 30. No. 16CA0750. *People v. Gonzales*.** *Criminal Law—Evidence—Authentication—Voicemail Recording—Photographs.*

Gonzales grew up down the street from the victim. He was sexually attracted to the victim from a young age. Gonzales eventually moved away from the neighborhood. Years later, Gonzales broke into the victim's house and waited a substantial time for the victim to return. When the victim returned, Gonzales repeatedly stabbed him in the neck, killing him. Gonzales then sexually assaulted the victim's dead body and attempted, unsuccessfully, to set the house on fire to destroy the evidence. Gonzales fled the scene with a credit card, a debit card, and cash that he had taken from the victim's wallet. Gonzales was charged and convicted of first degree murder with intent and after deliberation, first degree felony murder, abuse of a corpse, stalking, arson, burglary, and aggravated robbery.

On appeal, Gonzales argued that the trial court erred in admitting a tape recording of a voicemail that he allegedly left for the victim because the prosecution did not properly authenticate the recording of the voicemail. Here, the victim's sister found the recording in his house after the premises were released to her by the police. A police officer who interrogated Gonzales at length testified that Gonzales's voice was heard on the voicemail. Gonzales did not claim that the recording was falsified or manipulated. These uncontested facts supported a CRE 901 finding that the voicemail was what the prosecutor purported it to be, a voicemail left by Gonzales for the victim. Accordingly, the trial court did not abuse its discretion in admitting the voicemail.

Gonzales also argued that the trial court abused its discretion in admitting a photograph showing Gonzales's tattoos because it was both irrelevant and highly prejudicial. The tattoo on one arm says "CHUBBY" and the tattoo on the other says "CHASER." Gonzales admitted both that he was he was attracted to larger men and that he killed a person who fit that physical description. On these facts, the jury was entitled to consider the probative value of the tattoos.

The judgment was affirmed.

**2019 COA 31. No. 16CA2229. *People v. Roehrs*.** *Criminal Law—Judge—Recusal—Personal Knowledge—Extrajudicial Source Doctrine—Colorado Code of Judicial Conduct Rule 2.11(A)(1)—Appearance of Impropriety—Disqualification.*

Roehrs was an interested party in a dependency and neglect hearing at which Judge Cisneros presided. At the hearing, Sergeant Couch testified concerning Roehrs's presence at the scene of an investigation that he was conducting. During Sergeant Couch's testimony, Roehrs stood up, walked toward the witness stand, and said, "You're a liar. I am going to have your job." Judge Cisneros asked Roehrs to leave the courtroom, which Roehrs did. After Sergeant Couch's testimony, Roehrs threatened him in the courtroom hallway. Judge Cisneros later called Sergeant Couch and the attorneys into her chambers to discuss what had happened outside the courtroom.

The People charged Roehrs with retaliation against a witness, harassment, and intimidating a witness. Before trial, Roehrs's counsel moved to recuse Judge Cisneros. Judge Cisneros denied the motion, ruling that Roehrs failed to prove bias or personal knowledge of the disputed facts. Judge Cisneros presided over Roehrs's

criminal trial. Roehrs contested a number of factual issues. A jury found Roehrs guilty of retaliation against a witness and harassment.

On appeal, Roehrs contended that the trial court erred in denying her motion to recuse because she had personal knowledge of disputed facts and was a material witness to Roehrs's conduct; thus, there was an appearance of bias or prejudice. Judge Cisneros was not a likely material witness. But under Colorado Code of Judicial Conduct Rule 2.11(A)(1), a judge need not be a likely material witness for disqualification to be mandated; all that is required is personal knowledge of the facts that are in dispute. The Court of Appeals examined the scope of the extrajudicial source doctrine and concluded that although knowledge gained in the course of a judge's courtroom duties does not normally prevent a trial judge from presiding over subsequent, related proceedings, when a trial judge witnesses all or part of a crime in the courtroom, she has personal knowledge of facts that are in dispute within the meaning of Rule 2.11(A)(1). Here, the judge witnessed part of the crime and thus had personal knowledge of disputed facts. Accordingly, Roehrs's motion was sufficient to raise an appearance of bias or prejudice and Judge Cisneros's continued participation in the trial was improper.

The judgment of conviction was reversed and the case was remanded with directions to grant appellant a new trial before a different judge.

**2019 COA 32. No. 17CA0705. *People v. Williams*.** *Criminal Law—Photo Lineup—Sixth Amendment—Motion to Continue—Sentencing—Habitual Criminal.*

Defendant robbed the victim, an Uber driver, at knifepoint in a Denver alleyway. After the jury returned its verdict, the trial court held a hearing to determine whether defendant was a habitual criminal. Based on defendant's prior convictions for first degree assault (heat of passion) and two prior convictions for distribution of a Schedule II controlled substance, the trial court adjudicated him a habitual criminal and sentenced him to 64 years in prison.

On appeal, defendant argued that the pretrial photo lineup, from which the victim identified him, was impermissibly suggestive. He con-

tended that he was older than the other men in the photo array and there were impermissible differences in the clothing and tattoos depicted. Here, defendant's photo matched the victim's description and the filler photos depicted men who generally fit the witness's description. The number of photos in the array (six) and the details of the photos did not render the lineup impermissibly suggestive.

Defendant also contended that the trial court abused its discretion and violated his Sixth Amendment right to his counsel of choice by denying his motion for a continuance. The trial court considered the appropriate factors in balancing defendant's right to have counsel of his choosing against the efficient and effective administration of justice. The trial court's findings were supported by the record, and the court did not abuse its discretion in denying defendant's motion for a continuance.

Defendant next contended that the trial court abused its discretion by denying his motion for a continuance to allow the People to complete fingerprint testing and that completed testing would have allowed for the production of exculpatory evidence. Here, the fingerprint results were inconclusive and the prosecution did not have possession or control of any exculpatory fingerprint comparison results. Considering the totality of the circumstances, there was no error in the trial court's ruling on the motion.

Defendant further contended that the trial court erroneously sentenced him under the habitual criminal sentencing statute because two of his three prior felony convictions were permissively joined for trial. Defendant argued that because the two cases charging him with distribution of a Schedule II controlled substance were joined for trial under Crim. P. 13, they would have been tried together had he not entered guilty pleas, so his previous convictions for distribution should be treated as one conviction for habitual criminal purposes. Here, the offenses were joined for trial and would not have been tried separately. The prosecution failed to meet its burden to prove beyond a reasonable doubt that defendant's predicate felonies were separately brought and would have been separately tried had defendant not entered guilty pleas. The guilty pleas resulted

in one conviction for purposes of the habitual criminal sentencing statute and the trial court erred in sentencing defendant under that statute.

The judgment of conviction was affirmed. The case was remanded for the trial court to impose a new sentence and to correct the mittimus.

**2019 COA 33. No. 17CA2388. Colorado Real Estate Commission v. Vizzi.** *Administrative Law—Real Estate License—Transaction-Broker—Mandatory Duties—Federal Antitrust Law—Due Process—Sanctions.*

Vizzi entered into contracts in 2013 and 2014 with three clients to provide unbundled real estate brokerage services in exchange for a flat fee. In one instance, he contracted only to list the client's property on the Multiple Listing Services (MLS) list. In two other instances, he contracted only to provide a yard sign, a lock box, and centralized showing services, and to

list the properties on the MLS. An anonymous informant notified the Colorado Real Estate Commission (Commission) of Vizzi's practices and the Commission charged Vizzi with failing to fulfill his statutory duties under CRS § 12-61-807(2). An administrative law judge (ALJ) found that Vizzi was required to provide his clients all of the services listed in CRS § 12-61-807(2) and failed to do so in the transactions at issue. The Commission adopted the ALJ's findings of fact and conclusions of law and modified the discipline imposed on Vizzi to include public censure.

On appeal, Vizzi maintained that he was permitted by statute to contract out many of the duties imposed on transaction-brokers under CRS § 12-61-807(2) and the contracts in question successfully accomplished that goal. A transaction-broker's statutory duties are mandatory and cannot be contracted away. Here,

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the record supports the ALJ's findings that Vizzi intended not to act as a transaction-broker and manifested that intent by inserting language into the contracts disclaiming the duties of such a broker, and Vizzi violated CRS §§ 12-61-113(1)(k), 12-61-113(1)(n), and 12-61-803(1).

Vizzi also argued that the Commission's policy prohibiting the provision of limited real estate services violates federal antitrust law. The Commission's discipline of defendant for failing to perform his statutory duties fell within the Commission's statutory authority and is properly considered state sovereign action. Therefore, it did not violate federal antitrust laws.

Vizzi next maintained that the ALJ violated his due process rights by denying his motion to compel disclosure of the identity of the anonymous complainant. Vizzi did not show how the complainant's identity was relevant to his ability to defend against the Commission's

charges. Therefore, the Commission did not err in upholding the ALJ's denial of Vizzi's motion to compel disclosure of the anonymous complainant.

Vizzi further contended that the Commission exceeded its statutory authority and thus violated his due process rights when it imposed public censure after the ALJ had imposed only a fine and continuing education. Alternatively, Vizzi argued the decision to impose public censure was arbitrary and capricious. Vizzi violated his statutory duties multiple times after the Commission's December 2010 position statement put him on notice that the listing contracts he prepared in 2013 and 2014 were improper. And the public censure penalty was sought in the initial charge against Vizzi. Therefore, the Commission acted within its statutory authority by imposing a sanction beyond that imposed by the ALJ, and the Commission's sanction bore

some relation to Vizzi's misconduct and to the needs of the public.

The order was affirmed.

**2019 COA 34. No. 18CA0041. People v. Knoeppchen.** *Criminal Procedure—Restitution—Sentence Imposed in Illegal Manner—Timeliness—Due Process.*

Defendant pleaded no contest to third degree assault and was sentenced to probation. As part of the plea agreement, he agreed to pay restitution. At the time of the agreement, the prosecution did not have complete information regarding restitution, so the district court reserved the restitution determination for 90 days. The prosecution moved for an order imposing restitution 100 days later. Defendant filed no response, and the district court granted the motion, stating that the amount was not final because the amount of restitution owed to the victim compensation fund had yet to be determined. The prosecution later moved to amend the restitution amount, reducing the total amount due. Defendant again filed no response, and the district court granted this motion as well. More than three years later, defendant filed a motion to vacate the restitution order, which was denied.

On appeal, defendant claimed that the district court did not address good cause in a timely fashion, thus ignoring essential procedural rights or statutory considerations. Defendant's claim was a challenge to the manner in which the sentence was imposed rather than a claim that his sentence was not authorized by law. A claim that a sentence was imposed in an illegal manner must be raised within 126 days of the imposition of the sentence. Because defendant filed his motion to vacate the restitution order well beyond the 126-day limit, his motion was time barred.

Defendant also asserted that the district court violated his due process right by making a post hoc finding of good cause in permitting the tardy restitution request and relying on information presented by the prosecution long after the restitution order was entered. This is a challenge to the constitutionality of the restitution component of the sentence. As such, this claim is cognizable under Crim.



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P. 35(c). However, a Rule 35(c) challenge to a misdemeanor conviction or sentence must be brought within 18 months of the conviction. Because defendant’s motion was filed after this deadline, his due process challenge is also time barred.

The order was affirmed.

**2019 COA 35. No. 18CA0057. Heotis v. Colorado State Board of Education.** *Teacher’s License—CRS § 19-3-304(2)(l) Reporting Duties—Constitutionality.*

Several months before the expiration of her teacher’s license, Heotis submitted a renewal application to the Colorado State Board of Education (the Board). The Board denied her application because while Heotis was employed as a public school teacher, she did not report to authorities that her then-husband had sexually abused their daughter. The Board determined

her failure to report the abuse was unethical under Colorado’s Teacher Licensing Act, CRS § 22-60.5-107(4) (the Act). An administrative law judge (ALJ) upheld the Board’s decision, and the district court upheld the Board’s final order.

On appeal, Heotis argued that the Act violates due process on its face and as applied because the disciplinary options provided to the Board by the Act are too limited as compared to the greater disciplinary flexibility provided to other licensing boards. The Court of Appeals found no authority to support the proposition that the greater flexibility in other licensing statutes represents a constitutional minimum. Heotis failed to establish that the Act is unconstitutional.

Heotis also contended that there was insufficient evidence to support the conclusion that she engaged in unethical behavior. She argued that she was not required to report the abuse

of her daughter. CRS § 19-3-304(2)(l) required Heotis, as a public school teacher, and thus a mandatory reporter, to immediately report any known or suspected child abuse or neglect. This duty applies irrespective of the circumstances in which the reporter learns of or suspects abuse or neglect. The statute reflects a moral standard in the community for teachers. Substantial evidence in the record supported the Board’s conclusion that Heotis engaged in unethical conduct through her failure to report because it offended the morals of the community.

Heotis further argued that she was excused from reporting based on evidence that she suffered from battered woman syndrome. The statute does not include an exception for persons suffering from battered woman syndrome. Moreover, there was substantial evidence in the record that Heotis did not report because she was trying to keep her family together, not because of battered woman syndrome.

The judgment was affirmed.

**2019 COA 36. No. 18CA0118. People in the Interest of S.K.** *Americans with Disabilities Act—Reasonable Accommodations—Termination of Parental Rights—Dependency and Neglect—Rehabilitation Act of 1973.*

The Gunnison County Department of Health and Human Services (Department) received reports that S.K. was failing to thrive. The Department initiated a dependency and neglect case and took custody of S.K.

The parents stipulated that the child was dependent and neglected because she was without proper care through no fault of their own. The juvenile court adopted treatment plans for the parents and appointed a guardian ad litem for each parent. Ultimately, the Department moved to terminate the legal relationships between S.K. and the parents. Mother and father filed a joint motion requesting (1) a finding that the Department had not made reasonable efforts to reunify them with the child, (2) dismissal of the termination motion, and (3) amendment of the treatment plans to provide reasonable accommodations under the Americans with Disabilities Act (ADA). Following a hearing, the court rejected the parents’ arguments and terminated their parental rights.



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On appeal, the parents challenged the appropriateness of their treatment plans, the efforts the Department made to reunify them with the child, and the extent of reasonable accommodations required under the ADA. An appropriate treatment plan is one that is approved by the court and is reasonably calculated to render the parent fit to provide adequate parenting within a reasonable time and that relates to the child's needs. When evaluating parental unfitness and the likelihood that a parent's conduct or condition will change, the court must consider whether reasonable efforts have been unable to rehabilitate the parent. The reasonable efforts standard is met when services are provided in accordance with CRS § 19-3-208, including appropriate assessments and referrals and mental health and substance abuse treatment services, if funding is available. Title II of the ADA prohibits a public entity from discriminating against a qualified individual with disabilities in the provision or operation of public services, programs, or activities. Section 504 of the Rehabilitation Act of 1973 applies the same requirement to entities that receive federal financial assistance. There is an affirmative duty placed on a public entity to make reasonable accommodations for qualified individuals with disabilities.

Whether a parent is a qualified individual with a disability under the ADA is a case-by-case determination. When a parent in a dependency and neglect proceeding has a disability under the ADA, the Department and the juvenile court must make reasonable accommodations for the parent's disability in the treatment plan and the rehabilitative services provided. When deciding whether to terminate parental rights, the juvenile court must consider whether reasonable accommodations were made for the parent's disability in determining whether the parent's treatment plan was appropriate and reasonable efforts were made to rehabilitate the parent. The juvenile court's primary concern is the child's health and safety.

Here, it was undisputed that both parents had serious intellectual and developmental disabilities. Though these were disabilities under the ADA, the ADA does not restrict a court from terminating parental rights when

the parent, even after reasonable accommodations, is unable to meet his child's needs. The juvenile court considered the many services offered to the parents in concluding that the Department provided services that reasonably accommodated the parents' limitations; the parents' treatment plans were appropriate; and the Department made reasonable efforts to rehabilitate the parents. These conclusions were supported by the record.

Mother contended that the juvenile court erred in finding that she was an unfit parent and her conduct or condition was unlikely to change in a reasonable time. However, the record evidence, including the opinions of professional evaluators, did not support this argument.

Father argued that placing the child with the paternal grandmother was a less drastic alternative to termination. The record showed that a home study resulted in the paternal grandmother being denied placement for the child and otherwise supported the juvenile court's determination that there was no less drastic alternative to termination.

The judgment was affirmed.

**2019 COA 37. No. 18CA0565. Burren v. Industrial Claim Appeals Office.** *Workers' Compensation—Maximum Medical Improvement.*

Burren sustained admitted work-related injuries to her arm and shoulder in 2014. Several physicians treated her for her injuries into 2017, but Burren complained that her pain continued to worsen and that none of the treatment improved her condition. None of her physicians placed her at maximum medical improvement (MMI).

In 2015 employer retained Dr. Fall to perform a medical examination of Burren. She did not find Burren at MMI, but in 2016 she found Burren had reached MMI. Employer then requested Dr. Henke to perform a 24-month division-sponsored independent medical examination (DIME) because no treating physician had placed Burren at MMI. Dr. Henke determined that Burren was not at MMI.

Employer then applied for a hearing to dispute Dr. Henke's DIME opinion. The ALJ ruled that employer had clearly and convinc-

ingly overcome the DIME and found MMI was reached in 2016. An Industrial Claim Appeals Office panel (the Panel) upheld the ALJ's order.

On appeal, Burren argued that the Panel and the ALJ misinterpreted CRS § 8-42-107(8)(b) because an ALJ cannot determine a claimant's MMI as a matter of fact without an authorized treating physician (ATP) placing her at MMI. She contended that if a DIME performed under the statute finds a claimant is not at MMI, treatment should proceed until an MMI determination is made. The Court of Appeals analyzed the statute and the Panel's historical practices and concluded that when the DIME and the ATP agree that a claimant is not at MMI, treatment should continue until either the DIME or the ATP places the claimant at MMI. Thus, the ALJ and the Panel misinterpreted CRS § 8-42-107(8)(b)(II). While the Court's conclusion effectively precludes an employer from challenging a 24-month DIME when the DIME agrees with the ATP that a claimant is not at MMI, it does not prohibit an employer from re-invoking the 24-month DIME process at an appropriate future time.

The order was set aside and the case was remanded to the Panel with directions to return it to the ALJ to enter an order consistent with the opinion.

**March 21, 2019**

**2019 COA 38. No. 15CA0982. People v. Cohen.** *Criminal Law—Attorney—Colorado Office of Attorney Regulation Counsel—Evidence—Opening the Door Doctrine—Hearsay—Relevance—Sixth Amendment—Rules of Professional Conduct.*

Defendant, a former attorney, was charged with multiple counts of theft related to mishandling client funds. A significant portion of defendant's trial focused on her ethical obligations under the Colorado Rules of Professional Conduct (Colo. RPC), and the district court admitted evidence concerning the Colorado Office of Attorney Regulation Counsel's (OARC) case against her. Defendant was convicted of 13 counts of theft.

On appeal, defendant first contended that the district court erred by admitting three OARC complaints into evidence. The prosecution

argued that defendant “opened the door” by claiming the complaints weren’t based on her conduct with clients. The opening the door doctrine is limited, and any otherwise inadmissible evidence introduced after one party opens the door must be confined to preventing any unfair prejudice or misleading impression that might otherwise result. Here, certain statements introduced in defendant’s trial went far beyond anything allowed by the opening the door doctrine. The prosecution used the complaints for the truth of the matters asserted therein, and the complaints were inadmissible on hearsay, relevance, and undue prejudice grounds. Further, allowing the hearsay evidence violated defendant’s constitutional right to confrontation. The error in allowing this evidence was not harmless beyond a reasonable doubt.

Defendant also argued that the district court erred by including a jury instruction about an

attorney’s ethical obligations in relation to earning fees and handling client funds. The district court gave an instruction that quoted provisions of the Colo. RPC and defined when an attorney “earns” the money a client pays her. The court didn’t tell the jurors how to use the instruction and what its limits were, and the jury indicated it didn’t understand how to apply it. The instruction was at best incomplete.

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

**2019 COA 39. No. 17CA0397. People v. Murphy.** *Criminal Law—Lay Witness Testimony—Evidence.*

K.H. was 15 years old when he attended a concert with his 35-year-old stepsister Murphy, who allegedly provided K.H. with methamphetamine before the concert. At trial, a deputy testified that based on his training

and experience, he believed that K.H.’s body language suggested an affirmative answer when he looked down and away in response to a question about whether Murphy gave him the methamphetamine. The jury found Murphy guilty of distributing methamphetamine and contributing to the delinquency of a minor.

On appeal, Murphy contended that the trial court erred in permitting the deputy to interpret the meaning of K.H.’s body language because his testimony was inadmissible under CRE 701. Testimony interpreting body language is inadmissible lay testimony. Here, the deputy’s testimony exceeded the bounds of CRE 701 because it provided more than an opinion or inference rationally based on his perception; instead, it interpreted K.H.’s body language based on his training and experience. Further, K.H.’s credibility was a significant issue at trial. Therefore, the admission of this testimony did not constitute harmless error.

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

**2019 COA 40. No. 17CA0956. In re Adoption of I.E.H.** *Family Law—Stepparent Adoption—Termination of Parental Rights—Subject Matter Jurisdiction.*

Mother and father had a child, I.E.H., in 2008. Mother was wounded while serving in the military, and she suffers from post-traumatic stress disorder. In 2013 mother and father stipulated in father’s paternity case that I.E.H. would live with father and mother would spend time with I.E.H. and pay child support to father. The juvenile court adopted the stipulation. Mother never paid any child support. In August 2016, the child’s stepmother filed a petition to adopt I.E.H. and to terminate mother’s parental rights. The juvenile court found that mother abandoned I.E.H. and entered a judgment terminating mother’s legal relationship with the child, but did not issue an adoption decree. This appeal was filed before the adoption was finalized.

As an initial matter, the Court of Appeals considered whether the juvenile court’s order terminating mother’s parental rights in anticipation of the stepparent adoption was final for appellate purposes, even though a final adoption decree had not been issued. CRS § 19-1-109(2)

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(b) governs appeals from proceedings under the Colorado Children’s Code, including stepparent adoptions, and authorizes the appeal of specified termination orders that would not otherwise be final. The Court held that the order was final, and therefore appealable.

On appeal, mother contended that the juvenile court did not have subject matter jurisdiction to terminate her parental rights because the court order in the paternity case allowed her to resume parental responsibilities when she was ready. A juvenile court has exclusive original jurisdiction in cases involving adoptions and cases involving the termination of parental rights. Here, the juvenile court had continuing jurisdiction over the child via the paternity proceeding.

Mother also contended that the juvenile court did not make sufficient findings to support its decision that she had not provided reasonable support for I.E.H. The record, which includes the fact that mother paid only \$125 in the 12 months preceding the filing of the adoption petition, was receiving \$1,300 per month in veterans benefits, and did not have any housing expenses for a portion of the time supports the juvenile court’s findings that she did not provide reasonable support for I.E.H. and was unlikely to pay child support in the future.

Mother also asserted that there was no record evidence that her failure to pay child support proved that she intended to abandon I.E.H. There is no indication that the juvenile court considered mother’s failure to provide reasonable support as evidence of abandonment. Rather, the court relied on record evidence that mother had not seen or otherwise contacted the child since 2013.

The judgment terminating mother’s parental rights was affirmed.

**2019 COA 41. No. 17CA1591. Tisch v. Tisch.** *Corporations—Shareholder Derivative Action—Closely Held Corporation—Civil Theft—Piercing the Corporate Veil—Alter Ego—Dividends and Distributions—Statute of Limitations.*

Father assigned his stock in the Liquor Barn, Ltd. (Liquor Barn) to his son Gary, who was the company’s sole director and majority shareholder. The two other Tisch siblings (the

Tisch siblings) held nonvoting shares in Liquor Barn. The Tisch siblings filed a complaint against Gary alleging various causes of action related to his fiduciary duties. A jury found that Gary had committed civil theft against the Tisch siblings individually and against Liquor Barn by using the Liquor Barn profits for his private use. It awarded the Tisch siblings treble damages on the civil theft claim. The trial court entered judgment against Gary and Liquor Barn and awarded the Tisch siblings costs and attorney fees.

Gary moved to amend the judgment, arguing that the trial court erred in piercing the corporate veil and that this error would prejudice Liquor Barn’s creditors. He then filed a combined motion for new trial and relief from judgment, arguing that the trial court erred in disqualifying his expert witness and in piercing the corporate veil. The trial court denied the postjudgment motions and awarded the Tisch siblings attorney fees that exceeded the lodestar.

On appeal, Gary contended that the trial court erroneously found that he, as an individual, and the Liquor Barn were “alter egos.” Here, the record shows that Gary commingled his personal and other business funds with the Liquor Barn’s funds, kept inadequate corporate records, routinely disregarded the legal formalities of declaring shareholder distributions and filing taxes related to payments he made to himself, and used corporate funds for noncorporate purposes; and Gary’s position as controlling and sole voting shareholder facilitated his misuse of Liquor Barn’s funds. The record also shows that Gary used the corporate fiction to defeat the Tisch siblings’ rightful claims to distributions, and thus justice requires recognizing the substance of the relationship between Gary and Liquor Barn over the corporate form. Therefore, the court’s finding achieved an equitable result.

Gary next contended that the statute of limitations barred the civil theft and breach of fiduciary duty claims. However, the Tisch siblings were well within the relevant two- and three-year statute of limitations periods for both civil theft and breach of fiduciary duty. Thus, the trial court properly directed a verdict on the statute of limitations defense.

Gary also contended that the Tisch siblings never had a property interest in Liquor Barn’s

profits because he never declared a shareholder distribution, and therefore they had no valid civil theft claim against him. He reasoned that because a shareholder is entitled only to a corporation’s profits and not its divisible assets, the Tisch siblings had no standing to assert civil theft. A majority shareholder’s use of corporate profits for personal and other business reasons can be submitted to a fact finder and found to constitute “corporate distributions” available to all shareholders when no formal distribution is declared. A minority shareholder has a proprietary interest in undeclared distributions sufficient to support an individual civil theft claim against the majority shareholder. Whether Gary’s payments to himself and his other entities constituted a “distribution of profits” payable to all shareholders was a factual question for the jury.

Gary further contended that there was insufficient evidence to support the jury’s total damages award. Here, the jury found that Gary took funds for himself and his other companies, which it concluded constituted distributions, and he failed to share 20% of those distributions with the Tisch siblings. This award reasonably reflects the portion of total profits that the jury believed the Tisch siblings should have received as a distribution.

On cross-appeal, the Tisch siblings argued that the court’s cap on expert witness fees was arbitrary. The Tisch siblings are not entitled to relief because they failed to avail themselves of the remedy provided by the trial court, which permitted either side to file to seek relief from the caps.

The Tisch siblings next contended that the trial court should have based the attorney fee award on the treble damages amount rather than on the jury’s verdict and urged the Court of Appeals to adopt a contingency fee multiplier. Here, the trial court considered the contingency nature of the representation when increasing the lodestar amount, and the trial court was not required to give any greater effect to a contingency agreement in setting a reasonable fee or to apply a contingency percentage to a punitive award. The award is supported by the record, and the trial court did not abuse its discretion.

Finally, the Tisch siblings challenged the trial court's grant of summary judgment to Gary on their declaratory judgment claim. The trial court correctly concluded that this claim was barred by the statute of limitations.

The Tisch siblings requested appellate attorney fees, claiming that Gary's appeal of the civil theft judgment was frivolous. While Gary's arguments are not entirely without merit, the Tisch siblings are entitled to reasonable appellate attorney fees under the civil theft statute.

The judgment was affirmed and the case was remanded for the determination of reasonable attorney fees related to the civil theft claim.

**2019 COA 42. No. 17CA2036. Gagne v. Gagne. Business Organizations—Limited Liability Companies—Judicial Dissolution—In-Kind Distribution.**

Paula and Richard Gagne are mother and son. They agreed to a joint business venture in which Paula would buy apartment complexes and Richard would manage them. They created limited liability companies (LLCs) to buy and manage the properties. After years of acrimony, Richard sued, seeking judicial dissolution of the four LLCs and a declaratory judgment as to the parties' respective rights and obligations concerning the LLCs. Ultimately, the trial court ordered dissolution and an in-kind distribution of assets, with Richard and Paula each receiving two of the apartment buildings.

On appeal, Paula contended that the court erred, both legally and factually, in ordering dissolution of the LLCs. An LLC may be dissolved if it is established that it is not reasonably practicable to carry on its business. A party seeking judicial dissolution must establish that the managers and members of the company are unable to pursue the purposes for which the company was formed in a reasonable, sensible, and feasible manner. In determining whether a party seeking judicial dissolution has met this burden, the court must consider seven nonexclusive factors. Here, the record reflects that the district court expressly addressed each of the seven factors and concluded that the factors weighed heavily in favor of dissolution. Therefore, the district court didn't abuse its discretion in ordering dissolution.

Paula also contended that the district court erred in ordering an in-kind distribution of the LLCs' assets, rather than ordering the assets sold and the resulting proceeds distributed to the members. Here, the operating agreements don't bar in-kind distributions, and the process ordered by the court was appropriate. Therefore, the district court didn't abuse its discretion by ordering an in-kind distribution of the LLCs' assets.

Next, Paula argued that the district court erred in ordering various adjustments to each member's side of the ledger. The district court's adjustments included payments to attorneys and other professionals, salary payments to Paula as manager, rent payments for office space at Paula's house, various payments for loans and travel expenses, the cost to repair one of the apartment buildings, improper distributions, and payments for vacation properties the LLCs didn't own. The court also ordered Paula to pay Richard's attorney fees. Paula's arguments on this point amount to an invitation to reweigh the evidence, which is not the appellate court's role.

The judgment was affirmed and the case was remanded for a determination of Richard's reasonable attorney fees incurred on appeal.

**2019 COA 43. No. 17CA2105. In re Parental Responsibilities of A.C.H. and A.F. Psychological Parent—Child Support—CRS § 14-10-123.**

In 2006, mother and Hill became romantically involved and moved in together. Mother had a 3-month-old son, A.F., whose biological father had been absent since his birth. In 2007, mother gave birth to A.C.H., a daughter fathered by Hill. They all lived together until the couple broke up in 2010. The parties agreed to and followed an equal parenting time schedule with both children.

In 2016, mother sought permission to relocate to Texas and petitioned the district court for an allocation of parental responsibilities with respect to A.C.H. only. Hill asserted he was A.F.'s psychological parent and filed his own case seeking an allocation of parental responsibilities for A.F. The district court consolidated the cases. Among other things, the district court subsequently issued an opinion concluding it could not impose a child support obligation

on Hill for the benefit of his psychological child absent a legal parent-child relationship.

Mother argued that as A.F.'s psychological parent, Hill was on equal footing with her as a biological parent and therefore he also has the responsibility to pay child support. The Court of Appeals determined that while neither the statutes nor case law expressly imposes financial obligations on a psychological parent, they do support the proposition that such obligations may be imposed. The Court concluded that the district court has the authority to impose a child support obligation on psychological parents who established themselves as parents (rather than guardians) and sought and received an intended-to-be-permanent allocation of parental responsibilities. The Court noted that it is neither creating a new class of stepparent obligors nor suggesting that the mere existence of a psychological parent-child relationship, on its own, establishes a support obligation under CRS § 14-10-115. Further, the opinion does not mean that A.F.'s biological father, if found, is relieved from his duty to support his child.

The part of the district court's order holding it was foreclosed from ordering Hill to pay child support was reversed, and the case was remanded to consider Hill's child support obligation.

**2019 COA 44. No. 17CA2160. Whiting-Turner Contracting Co. v. Guarantee Company of North America USA. Construction Performance Surety Bonds—Conditions Precedent—Balance of the Contract Price—Attorney Fees.**

Whiting-Turner Contracting Co. (Whiting-Turner) was the general contractor for an office building construction project (the Project). Whiting-Turner entered into an agreement with Klempco Construction (Klempco) for Klempco's construction of an anchor system at the Project's underground parking garage (the Subcontract). Klempco's work included the installation of sprayed concrete (shotcrete) to support the anchoring system. The Subcontract price was \$1,785,783.

Whiting-Turner required Klempco to furnish a performance bond and a payment bond. Klempco obtained the bonds from Guarantee Company of North America USA (GCNA). The

bonds specified three conditions precedent that Whiting-Turner would have to satisfy to trigger GCNA's obligations as surety, one of which was to pay the balance of the contract price in accordance with the Subcontract to GCNA or a contractor selected to perform the Subcontract. The "balance of the contract price" was defined as the total amount payable by Whiting-Turner to Klempco under the Subcontract "after all proper adjustments have been made, . . . reduced by all valid and proper payments made to or on behalf of [Klempco] under the [Subcontract]."

Klempco immediately fell behind schedule and stopped paying its sub-subcontractors, and directed Whiting-Turner to assume responsibility for the shotcrete installation and to work directly with two of its sub-subcontractors. Whiting-Turner sent Klempco and GCNA a letter declaring Klempco in default. Following a meeting between Whiting-Turner, Klempco, and GCNA, the Subcontract price was reduced by \$553,707, which was the price of the shotcrete work to be performed by Whiting-Turner. Klempco then notified Whiting-Turner that it was demobilizing from the Project. Whiting-Turner requested advice from GCNA, but GCNA did not respond.

Whiting-Turner terminated the Subcontract following Klempco's default. GCNA did not respond to Whiting-Turner's demands that it honor its obligations under the performance bond. Whiting-Turner provided GCNA with its calculation of the balance of the contract price. The balance was \$720,819, but from that it deducted \$256,897.90 for its payments to unpaid sub-subcontractors who were lien-ing the Project and \$553,707 for the shotcrete work, leaving a negative balance.

Klempco sued Whiting-Turner for breach of the Subcontract. Whiting-Turner counter-claimed for breach of the Subcontract and filed third-party claims against GCNA for breach of the performance and payment bonds. GCNA asserted that Whiting-Turner failed to comply with a condition precedent of the performance bond by miscalculating the balance of the contract price and consequently failing to pay the correct sum to GCNA. The district court found that Klempco had breached the Subcontract; Whiting-Turner had complied with

the condition precedent in the performance bond; and GCNA breached the performance and payment bonds. The district court awarded Whiting-Turner \$832,260.24 in damages against Klempco and GCNA jointly and severally. It also awarded attorney fees and costs in the amount of \$504,785.27 and \$18,990.14 in interest.

On appeal, GCNA argued that the trial court erred in finding that Whiting-Turner satisfied the condition precedent for the performance bond because it miscalculated the balance of the contract price and did not pay the correct amount to GCNA. Here, (1) no language in the performance bond or the subcontract barred Whiting-Turner from reducing the balance of the contract price by the amount of its post-termination payments to unpaid sub-subcontractors; (2) Whiting-Turner and Klempco agreed to reduce Klempco's payment for the shotcrete work; and (3) Whiting-Turner correctly subtracted the back

charge from the balance of the contract price. The record supported the trial court's findings that Whiting-Turner satisfied this condition.

GCNA further contended that Whiting-Turner sought the same dollars in three ways. The record does not reflect that the trial court awarded duplicative damages.

Lastly, GCNA contended that the trial court erroneously awarded Whiting-Turner attorney fees under the performance bond or, alternatively, the trial court improperly failed to segregate the fees awardable to Whiting-Turner for its claim against GCNA from the fees attributable to Whiting-Turner's other claims and defenses. As stated above, Whiting-Turner complied with the performance bond, and the trial court did not abuse its discretion in awarding Whiting-Turner attorney fees under the performance bond. On the latter argument, all the claims in this case arose from a common core of facts. Therefore,



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the trial court did not err in finding that Whiting-Turner's fees could not be apportioned, and it correctly held that under the performance bond, GCNA was liable to Whiting-Turner for all of its attorney fees.

The judgment was affirmed.

**2019 COA 45. No. 17CA2260. Rinker v. Colina-Lee.** *Easement—Irreparable Harm—Injunctive Relief.*

Rinker and Colina-Lee are neighbors on Galena Court, an unpaved roadway in the Soldier Canyon Estates subdivision (the subdivision) in Larimer County. The households on Galena Court entered into the Galena Court Property Owners' Association Road Maintenance Agreement (the Agreement), which established the Galena Court Property Owners' Association (the Association) and required the homeowners to pay annual dues to fund the maintenance of Galena Court.

Rinker installed a culvert along the front of his driveway to divert runoff from the land above his home. About a decade later, Brewen reshaped a portion of Galena Court uphill from Rinker's property and placed recycled asphalt material on Galena Court. Brewen also increased the grade and altered the contour of Galena Court. These changes caused sediment and asphalt particles to run through the culvert and collect on Rinker's front yard. The Association also changed the shape of the section of Galena Court uphill from Rinker's property, allegedly exacerbating the asphalt deposits on his yard and increasing the difficulty of accessing his property.

Rinker complained to the Association. The Association installed a filtration system to protect Rinker's property from the runoff, but neither that nor filters installed by Rinker solved the problem. Rinker then blocked the culvert to protect his property from further damage.

This caused road sediment to flow onto, and to erode, Galena Court. Larimer County demanded Rinker unblock the culvert.

Rinker sued Larimer County and Brewen. Larimer County moved for injunctive relief and an order requiring Rinker to join all property owners in the subdivision as necessary parties. The district court granted the motion, and Rinker amended his complaint to include claims against all the subdivision property owners, including Colina-Lee. Colina-Lee pleaded, as an affirmative defense, that Rinker had breached the Agreement.

Before trial, Larimer County vacated the public right-of-way on Galena Court and Rinker agreed to dismiss his claims against Larimer County and Brewen, which dismissed their counterclaims. As part of the settlement, Rinker agreed to remediate portions of Galena Court that his culvert had damaged. The stipulated



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judgment, however, would have granted Rinker authority to alter Galena Court without consulting the other owners of property adjoining Galena Court. Rinker requested his claims against the other property owners be dismissed. Colina-Lee objected because the stipulated judgment would give Rinker authority to alter Galena Court without the approval of the remaining Galena Court owners, in violation of the Agreement.

At a pretrial conference, the district court allowed Colina-Lee to assert counterclaims for breach of the Agreement without providing Rinker an opportunity to address this motion to amend. Rinker subsequently moved for reconsideration of the court's ruling allowing Colina-Lee leave to amend, which was summarily denied. In her counterclaims, Colina-Lee sought an injunction requiring Rinker to comply with the Agreement and open the blocked culvert and a declaratory judgment that, under the Agreement, Rinker had no right to make unilateral changes to Galena Court without the approval of the other owners. A new trial date was set.

Two months before trial, Rinker sought leave to amend his complaint to join the Association as a defendant and to assert claims against it for nuisance and trespass as well as for a declaratory judgment that the Agreement required the Association to maintain Galena Court. The court denied the motion.

Following trial, the court granted the relief requested by Colina-Lee, entering an injunction requiring Rinker to unblock the culvert and a declaratory judgment setting forth the rights under the Agreement.

On appeal, Rinker first argued it was an abuse of discretion for the district court to grant Colina-Lee leave to amend to assert counterclaims because the motion was untimely. Colina-Lee did not unreasonably delay in moving for leave to amend, given the changed posture of the case following Rinker's settlement with Larimer County and Brewen, which significantly impacted Colina-Lee's ability to protect her interest in Galena Court. The trial court did not abuse its discretion.

Rinker also argued that granting Colina-Lee leave to amend improperly deprived him of

the benefits of his settlement with Brewen and forced him to start over in defending a claim for alleged breach of the agreement. Here, when Larimer County and Brewen settled with Rinker, Colina-Lee needed to protect her interests by asserting her own breach of contract counterclaims. Rinker conceded that Colina-Lee's counterclaims were substantially similar to Brewen's breach of contract counterclaim, which Rinker had litigated for months. Any possible prejudice was cured by the trial court's continuation of the trial date.

Rinker then argued that the district court abused its discretion in not granting his request for leave to amend his complaint. Rinker was not merely moving to amend but sought to join the Association as a new party and to assert new claims against it just two months before trial. Case law supports the district court's decision that preservation of the trial date warranted denial of Rinker's motion for leave to amend. The district court did not abuse its discretion in denying Rinker's motion for leave to amend.

Rinker further contended that the injunction was improperly entered because it was overbroad and not based on proper findings as to three elements necessary for a permanent injunction: that (1) irreparable harm would result unless the injunction issued, (2) the threatened injury outweighs the harm to the opposing party, and (3) the injunction would not adversely affect the public interest. Because Colorado courts have not considered whether a court must satisfy the irreparable harm element before enjoining interference with an easement, the Court of Appeals looked to the *Restatement (Third) of Property: Servitudes* and held that a party seeking an injunction as a remedy for wrongful interference with an easement is not required to prove irreparable harm. As to the remaining two elements, the record reflected that the district court (1) properly balanced the injury that Rinker was causing to Colina-Lee's interest in Galena Court against the harm that the requested injunction would cause to Rinker and concluded that the benefit of remediating the damage to Galena Court outweighed the harm that Colina-Lee's injunction would cause to Rinker; and (2) considered whether the public interest supported entry of the injunction when it

found that Rinker's actions had degraded Galena Court so badly that operators of passenger vehicles had difficulty driving on it.

Rinker then challenged the scope of the injunction, asserting that it was an abuse of discretion to require him to unblock the culvert rather than just to cease violating the terms of the Agreement. Under Colorado law, the traditional and preferred equitable remedy for a continuing trespass is a mandatory injunction requiring the removal of the encroachment. The district court did not abuse its discretion in ordering Rinker to unblock the culvert.

The judgment was affirmed.

**2019 COA 46. No. 18CA0417. People in the Interest of A.N-B. Dependency and Neglect—Attorney-Client Privilege for Expert Report.**

Based on a report from neighbors, the Jefferson County Division of Children, Youth, and Families (the Division) removed the children in this case and placed them with their maternal grandfather, where they remained throughout the proceedings. The Division filed a petition in dependency and neglect based on the fact that mother left the 3-year-old twins home alone for over six hours. This family had been involved with child protective services on two prior occasions due to physical abuse and severe injuries to the children.

Before the hearing, mother requested appointment of a child psychology expert to evaluate her parenting time. Because mother was indigent, the court appointed the expert at the state's expense. Based on the expert's report, mother elected not to call the expert as a witness, but the guardian ad litem (GAL) requested the expert's report. The juvenile court ordered the report disclosed and allowed the GAL to call the expert to testify at the termination hearing. The juvenile court adjudicated the children dependent and neglected and adopted treatment plans for the parents. The GAL subsequently filed a motion to terminate the parent-child relationships, and the court terminated mother's and father's parental rights.

On appeal, mother argued that the juvenile court violated her attorney-client privilege when it required disclosure of the expert's report and admitted the report and the expert's

testimony at the termination hearing. Under CRS § 19-3-610(1), when an indigent parent's attorney requests appointment of an expert, the attorney-client privilege generally protects communications between the parent and the expert. However, here much of the expert's report and testimony concerned observations of the children, and thus fell outside the privilege. In addition, the expert advised mother, orally and in writing, that the evaluation and interview would not be considered confidential and were being conducted to inform the juvenile court with respect to the dependency and neglect proceeding, so mother had no expectation of privacy in the evaluation. The juvenile court did not violate mother's attorney-client privilege when it required disclosure of the expert's report and admitted the report and the expert's testimony.

Mother also argued that she reasonably complied with her treatment plan. However, the record supports the findings that (1) mother was unable to provide nurturing and safe parenting adequate to meet the children's needs and conditions, and (2) mother's treatment plan was not successful because she continued to exhibit the same problems addressed in the treatment plan without adequate improvement.

Mother and father argued that the juvenile court erred when it terminated their parental rights without allowing them a reasonable time to comply with their treatment plans. The juvenile court found that mother would need a lot more therapy before it would be safe to return the children to her. Testimony from the children's therapists indicated that they were suffering from post-traumatic stress disorder, and father's caseworker indicated that it was not in the children's best interests to maintain a relationship with father. Further, this case was subject to expedited permanency planning because the children were under 6 years old. Accordingly, the juvenile court did not err.

Lastly, mother and father contended that the juvenile court erred when it found that an allocation of parental responsibilities (APR) to the maternal grandfather was not a viable less drastic alternative to termination of their parental rights. Here, the record supports the juvenile court's finding that an APR to the grand-

father was not a viable less drastic alternative to termination of parental rights.

The judgment was affirmed.

**2019 COA 47. No. 18CA0888. Bolton v. Industrial Claim Appeals Office.** *Workers' Compensation—Maintenance Medical Benefits—Intervening Cause.*

Claimant sustained admitted work-related injuries when she fell backward to the ground. Physicians diagnosed a concussion as well as cervical and lumbar strains. Within a few months claimant developed clinical depression related to the work injury. Employer admitted the compensability of the depression treatment.

In October 2015, a physician who performed a division-sponsored independent medical examination placed claimant at maximum medical improvement. Pursuant to a settlement agreement that was approved by an administrative law judge (ALJ), employer paid claimant a lump sum for her permanent partial disability award. In addition, employer agreed to continue paying for maintenance care through authorized providers that was reasonable, necessary, and related to the compensable injury. The primary care that claimant was receiving was psychological. Several months later, employer retained a psychiatrist to examine claimant, and he and several other health care providers concluded claimant had returned to baseline and required no further maintenance care related to the work injury.

Employer petitioned to terminate claimant's maintenance medical benefits. An ALJ agreed that claimant had returned to baseline and that any further treatment was related to claimant's pre-injury condition, not to her work-related injury. A panel of the Industrial Claim Appeals Office (the Panel) affirmed.

On appeal, claimant argued that because her claim had closed, employer could only modify her maintenance medical benefits by first seeking to reopen the claim. Future maintenance medical benefits are by their nature not yet awarded, so those benefits remain open and are not closed by an otherwise closed final admission of liability. Here, claimant was entitled to receive future ongoing maintenance medical benefits for her depression. The issue

was not closed, and reopening was not required to assess the continuation of those benefits. Further, the evidence supports the ALJ's factual finding that claimant's continuing need for medical care was no longer work-related. The Panel correctly determined that employer was not required to reopen the claim to challenge claimant's need for continuing medical care.

Claimant also contended that the Panel improperly attributed her need for continuing treatment to an intervening cause. While the Panel erred by addressing the concept of intervening cause, any error was harmless. Substantial evidence supported the ALJ's finding that claimant's continuing need for medical care was not work related.

The order was affirmed. 

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.

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**FEATURING:**

**Dr. Milana Hogan:** True Grit and a Growth Mindset: Traits that Predict Success for Women in Law

**Jennifer Winslow & Leila Hock** of Diversity Lab: Using Design Thinking to Spur Innovation and Collaboration: How Every Organization Can Supercharge Diversity & Inclusion Efforts

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