

Summaries of Published Opinions

September 5, 2019

2019 COA 137. No. 15CA1517. *People v. Ojeda*. Constitutional Law—Fourteenth Amendment— Challenge for Cause—Race.

A jury found defendant guilty of first degree murder, second degree kidnapping, and first degree sexual assault.

On appeal, defendant contended that the trial court erred in denying his challenge under *Batson v. Kentucky*, 476 U.S. 79 (1986), when the prosecutor removed R.P., a prospective Hispanic juror, from the venire. When a party raises a *Batson* challenge, the trial court must conduct a three-step analysis to assess the claim of racial discrimination. First, the opponent of the peremptory strike must allege a prima facie case showing that the striking party struck the prospective juror on the basis of race. Next, the burden shifts to the striking party to provide a race-neutral explanation for excusing the prospective juror. The opponent is then given the opportunity to rebut the striking party's explanation.

Here, the prosecutor claimed concern with R.P.'s views that the criminal justice system disproportionately affects people of color and those with mental disabilities. In addressing the *Batson* challenge, the trial court did not explicitly evaluate the prosecutor's proffered reasons for striking R.P. Instead, the court sua sponte offered two race-neutral reasons to justify striking R.P. The court also failed to recognize that the record refuted most of the prosecutor's proffered excuses. Thus, the trial court erred in denying the *Batson* challenge.

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

2019 COA 138. No. 16CA1057. *People v. Marx*. Criminal Law—Sexual Assault—Expert Testimony—Lay Witness Testimony—Credibility— Rape Shield Statute—False Reports of Sexual Assault—CRE 608.

The accuser alleged that defendant had sexually assaulted her on multiple occasions when she was a teenager. Defendant was convicted of sexual assault on a child (position of trust as part of pattern of abuse), sexual assault on a child (position of trust), and aggravated incest.

On appeal, defendant argued that the trial court erred by allowing improper expert testimony. An expert may not offer a direct opinion on a child victim's truthfulness or an opinion on whether children tend to fabricate sexual abuse allegations. Here, the trial court allowed the prosecutor to introduce expert testimony on the percentage of children and teenagers who fabricate allegations of sexual abuse, the percentage of girls who are sexually abused by family members, and the percentage of women who have been sexually assaulted. The testimony regarding the small percentage of children and teenagers who make false allegations of sexual assault improperly bolstered the victim's credibility. The testimony about the percentages of women and children who are victims of sexual assault was irrelevant and inadmissible to the extent it suggested that the accuser's claims were truthful. Therefore, the trial court erred in permitting this testimony, and the error required reversal of defendant's judgment of conviction.

Defendant also contended that the trial court erred by excluding a neighbor's testimony challenging the accuser's truthfulness. The trial court disallowed the neighbor's testimony that the accuser was "sneaky and attention seeking,"

had abused animals, and was "untrustworthy." This testimony focused on issues that had nothing to do with credibility, was of questionable relevance, and was not probative of a character for untruthfulness under CRE 608. Therefore, the trial court correctly excluded the neighbor's statements.

Defendant further argued that the trial court erred by rejecting the defense's request under the Rape Shield statute for an evidentiary hearing to determine whether he could introduce at trial evidence of the victim's purported history of falsely accusing classmates of sexual assault. To determine whether a defendant charged with sexual assault may introduce evidence of the victim's alleged history of falsely reporting sexual assaults, the Rape Shield statute requires the defendant to make an offer of proof through a written motion and a supporting affidavit, and if the court finds that the offer of proof is sufficient, the defendant is entitled to an in camera pretrial evidentiary hearing on the admissibility of the evidence of the alleged false reporting. Here, defendant made a sufficient offer of proof regarding the accuser's alleged false reports of sexual assault, including referencing multiple witnesses who would testify as to those false reports and the school's findings that the victim had previously made false allegations of sexual assault. Thus, the facts described in the affidavit sufficiently established that defendant could demonstrate at an evidentiary hearing, by a preponderance of the evidence, the falsity of the accuser's multiple previous allegations of sexual assault, and the trial court erred.

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

2019 COA 139. No. 17CA0040. *People v. McEntee*. Criminal Law—Unlawful Sexual Contact.

Defendant was convicted of unlawful sexual contact and sentenced to sex offender intensive supervised probation for an indeterminate term of 10 years to life.

On appeal, defendant contended that the evidence was insufficient to support his conviction for unlawful sexual contact under CRS § 18-3-404(1.5), arguing that the statute applies to sexual contact involving a third person other than the victim and the defendant. Specifically,

he contended that because the State did not prove that defendant induced or coerced the victim to engage in sexual contact with another person for defendant's own sexual gratification, the conviction cannot stand. The phrase "another person" as used in CRS § 18-3-404(1.5) is ambiguous. The Court of Appeals construed it to be viewed from the perspective of the victim, so the perpetrator is "another person" in relation to the victim. Consequently, CRS § 18-3-404(1.5) does not require the participation of an additional person beyond the victim and the defendant. Therefore, sufficient evidence supported defendant's conviction.

The judgment was affirmed.

2019 COA 140. No. 18CA0032. People v. Vidauri. *Theft of Public Benefits—Failure of Proof—Class 4 Felony—Proof of Amount of Benefits Overpayment—CRE 403—CRE 702.*

Defendant submitted three applications for Medicaid and Child Health Plan Plus benefits to the Garfield County Department of Human Services (Department) between 2008 and 2011. The applications contained inaccurate household income information. Based on her applications, defendant and her children received \$31,417.65 in benefits.

In 2016, a Department fraud investigator questioned defendant about her financial information. The documentation produced showed that defendant had owned her own housecleaning business and her husband owned his own electrical contracting business during the entire time defendant received benefits, and each owned significant unreported property. At trial, the fraud investigator opined that the applications did not accurately describe defendant's financial state, but she was unable to opine on the amount of benefits defendant

would have been entitled to had her application been accurate, nor that the inaccurate application forfeited all rights to benefits. Defendant was convicted of one count of class 4 felony theft—\$20,000 to \$100,000 and three counts of forgery.

On appeal, defendant argued that there was insufficient evidence to support a conviction because the prosecution failed to present evidence sufficient to prove her intent or to establish the value of the purportedly stolen benefits. As to her intent, ample evidence created a reasonable inference that defendant understood the generally inverse relationship between income and eligibility. As to the value, the prosecution was required to prove how much defendant was overpaid. However, while the evidence established the total value of benefits defendant received, it did not show the value she would have been entitled to had she fully disclosed her household income. Further, the prosecution did not present sufficient evidence to prove that the overpayment amount exceeded \$20,000. But because there was sufficient evidence for a reasonable juror to determine that defendant obtained some benefits by deceit, the conviction need only be downgraded to a class 1 petty offense, which is the only grade of theft that does not require proof of value.

Defendant also argued as to the forgery counts that the prosecution failed to present sufficient evidence to prove either that she intended to defraud the Department or that any false assertions on the applications were material. Based on the same evidence presented from which the jury could have found that defendant intended to commit theft, a reasonable jury could have found that she intended to commit forgery and that her false assertions affected the Department's eligibility determination and thus were material. The prosecution presented sufficient evidence to prove the felony forgery counts.

Defendant further contended that the trial court abused its discretion when it accepted one of the Department's witnesses as an expert and overruled objections during the expert's testimony. The witness had more than 10 years of experience in public assistance administration as a case manager, benefits technician, and fraud

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investigator, and extensive training from the Colorado Department of Human Services. The witness had sufficient experience and training in fraud investigations to satisfy CRE 702's threshold, and her testimony served to aid the jury's understanding of defendant's finances. The trial court's decision to overrule defendant's objections to portions of the witness's testimony was not manifestly arbitrary, unreasonable, or unfair.

Defendant further argued that the probative value of the expert's testimony was substantially outweighed by its unfair prejudice. Given CRE 403's strong preference for admissibility and the relevance of the expert's testimony, the trial court did not abuse its discretion.

Defendant also contended that statements the prosecutor made during voir dire, witness examination, and closing arguments denied her a fair trial. The trial court did not abuse its discretion in overruling the burden-shifting objection, and there was no plain error in other statements made by the prosecutor.

Lastly, defendant argued that the combined impact of numerous errors denied her right to a fair trial. The two unpreserved errors in the prosecutor's closing argument, which were not plain, did not deprive defendant of a fair trial.

The felony conviction was reversed, and the case was remanded for the trial court to enter a conviction of class 1 petty theft. The judgment was affirmed in all other respects.

2019 COA 141. No. 18CA0269. LB Rose Ranch, LLC v. Hansen Construction, Inc. *Torts—Contribution—Due Process.*

A group of homeowners sued LB Rose Ranch, LLC (Rose), Hansen Construction, Inc. (Hansen), and other defendants for damages caused by defects in the design, construction, and repair of 20 single-family homes. Hansen and other defendants compelled arbitration, but Rose did not. The arbitrator awarded damages to the homeowners and found that Hansen, Rose, and other defendants jointly caused the damages.

Rose and the homeowners went to a jury trial. The jury found defendants jointly and severally liable for damages and found Rose 30% at fault and Hansen 15% at fault. The arbitrator attributed 20% fault to Rose and 18% to Hansen.

Both the arbitrator and jury awarded damages on a lot-by-lot basis, rather than a single aggregate award. The trial court confirmed and entered judgment on the arbitration awards against Hansen and others. Hansen satisfied the judgment as to each homeowner, paying a total of over \$9 million.

The trial court found that Rose was bound by the jury's findings and Hansen by the arbitrator's findings, and the homeowners could not receive double recovery for damages already paid by Hansen. The court held that Rose had to pay each homeowner only those damages awarded by the jury that exceeded those awarded by the arbitrator and already paid by Hansen. It entered judgment against Rose for the entire amount of the jury award but found the judgment satisfied to the extent Hansen had already paid the damages. For many lots this extinguished Rose's duty to pay. Only \$698,548.93 had not been satisfied by Hansen. Rose then settled with the homeowners for approximately \$1 million and they released Rose from all claims, and both waived their right to appeal.

Hansen sought a contribution judgment against Rose for the amount of common liability to the homeowners that Hansen had satisfied. The court applied the jury's finding as to Rose's percentage of fault and concluded Rose should pay Hansen 30% of the joint liability, or \$1,774,369.91.

On appeal, Rose argued that Hansen's satisfaction of the arbitration judgment did not extinguish Rose's liability to the homeowners because Rose was not a party to the arbitration and therefore Hansen had no right of contribution. However, Rose was a party to the jury trial, and the court found that Hansen had already satisfied over \$5.9 million of Rose's common liability, meaning that Rose did not have to pay that amount to the homeowners. The right of contribution under CRS §13-50.5-102(2) exists in favor of a tortfeasor who has paid more than his or her pro rata share of the common liability. Hansen paid all of the common liability it shared with Rose and was entitled to contribution from Rose.

Rose then argued that the release it obtained from the homeowners precluded Hansen's contribution claim. Here, Rose settled only

its individual liability to the homeowners, not its common liability shared with Hansen. The judgment on the jury verdicts identifies the parties' common liability by noting the amount of the judgment that Hansen had already satisfied. It was thus appropriate to hold Rose to the assessment of the common liability of \$5.9 million, and because Hansen had fully paid this common liability before Rose settled with the homeowners, Rose's settlement did not resolve any common liability. The district court correctly concluded that Hansen was entitled to contribution from Rose.

Finally, Rose argued that the contribution judgment violated its right to due process because the district court held Rose to the arbitrator's findings even though it did not have a full and fair opportunity to litigate damages in the arbitration. Rose was not bound by the arbitration judgment because it was not a party to the arbitration, and the trial court did not bind Rose to those findings. Instead, the court held Rose to only the jury verdicts when determining Rose's joint liability with Hansen, and it used only the percentage of fault found by the jury, not the arbitrator. Thus, there was no due process violation.

The judgment was affirmed.

September 12, 2019

2019 COA 142. No. 13CA1435. People v. Burrell. *Constitutional Law—Due Process—Sixth Amendment—Right to Be Present at Trial—Waiver—Evidence—Juror Question—Fifth Amendment—Prosecutorial Misconduct.*

Defendant was living with his parents when he got into an argument with his father, who has health issues. His father threatened to call police if he didn't leave, and defendant grabbed him by the wrists and made him sit down on the couch. Then defendant grabbed some of his belongings and left the house. Several hours later his parents called the police. Defendant was convicted of third-degree assault of an at-risk victim and harassment and sentenced to three years of supervised probation.

On appeal, defendant argued that the trial court committed reversible error by taking the verdict while he was not present. To proceed with

trial in a criminal defendant's absence, a trial court is required to find that the defendant is voluntarily absent. Here, rather than attempt to find out why defendant was late, the trial court assumed that the unexplained absence was voluntary. Therefore, the court erred. However, because nothing in the record suggested any juror was conflicted in this case, there was no reasonable possibility that defendant's absence contributed to the verdict. Accordingly, the error was harmless.

Defendant next argued that the trial court erred when it allowed the prosecution to introduce evidence that defendant's mother consulted with a mental health professional before deciding to call the police because the evidence was not relevant, and even if it was, any probative value was outweighed by the danger of unfair prejudice. The evidence presented was that defendant's mother called a colleague who was both a psychiatrist and a psychologist and was familiar with defendant, and the colleague recommended she call the police. No testimony was presented that defendant was dangerous or had been diagnosed or treated for mental illness. Therefore, the trial court did not act arbitrarily, unreasonably, or unfairly in admitting the evidence.

Defendant also contended that the trial court did not properly respond to a jury question during deliberations requesting a definition of third degree assault. Here, the trial court's response properly directed the jury to the appropriate instruction and informed the jury that assault in the third degree and third degree assault refer to the same crime. Therefore, there was no error.

Lastly, defendant claimed that the trial court erred when it denied his motion for a mistrial after the prosecutor, in his opening statement, improperly referred to defendant's invocation of his Fifth Amendment rights. Not every reference to a defendant's exercise of his or her right to remain silent requires reversal. Here, the prosecutor did not directly argue that defendant's silence reflected guilt, nor did he provide any detail about the specific questions defendant refused to answer. The prosecutor's comment was brief and not repeated. Although the prosecutor's comment was improper, the

court gave a curative instruction and the prosecutor's comment did not so prejudice defendant as to warrant a mistrial.

The judgment was affirmed.

2019 COA 143. No. 16CA0218. People v. Mosely.
Criminal Law—Assault—Felony Menacing—Due Process—Jury Instructions—Affirmative Defense—Self-Defense—Provocation Exception—Initial Aggressor Exception—Unanimous Jury Verdict—Res Gestae Evidence.

Officers removed defendant from a strip club after he exhibited confrontational and aggressive behavior toward other patrons. A short while later, in the club's parking lot, an argument and physical altercation erupted between defendant and a group of men attending a bachelor party. During the fight, defendant stabbed T.K. in the abdomen with a small folding knife. A jury found him guilty of second degree assault and felony menacing.

On appeal, defendant asserted that the trial court violated his right to due process when, in response to a juror's question, it erroneously instructed the jurors that they need not unanimously agree on the basis on which the prosecution disproved defendant's affirmative defense of self-defense. When a defendant presents sufficient evidence to raise an affirmative defense, the prosecutor must prove not only that the defendant committed the charged offense, but also the nonexistence of the affirmative defense. In this case, the jury had to agree unanimously as to the applicability of either the provocation or initial aggressor exception to self-defense. Accordingly, the trial court abused its discretion in permitting the prosecution to prove felony menacing without instructing the jury that it must unanimously agree on which exception to self-defense it relied. Further, the juror's question suggested that some jurors may have believed defendant was the initial aggressor, while others may have believed that he goaded members of the bachelor party into fighting with him. Accordingly, the error was not harmless beyond a reasonable doubt and the menacing conviction cannot stand.

Defendant also contended that the trial court erred in admitting as res gestae evidence an incident that took place inside the strip club

before the altercation at issue. The evidence explained why defendant left the strip club and gave the jury some idea of why he verbally confronted the bachelor party members in the parking lot, and thus helped the jury understand the circumstances surrounding the charged offenses. The trial court did not abuse its discretion in concluding that defendant's conduct in the strip club contextualized the altercation in the parking lot.

The second degree assault conviction was affirmed. The felony menacing judgment was reversed and the case was remanded for a new trial on this conviction.

2019 COA 144. No. 16CA1724. People v. Leyba.
Criminal Law—Motion to Suppress—Right to Counsel—Revocation—Jury Instructions—Theft—Lesser Nonincluded Offense—Aggravated Robbery—Affirmative Defense—Robbery—Prosecutorial Misconduct.

Defendant and his fellow gang member Flores went to a house where a known drug dealer was staying. For reasons that are unclear, Flores shouted at the drug dealer and then shot and killed him and two juveniles who worked for him. Defendant and Flores then took from the house guns, a toolbox, and a curling iron box thought to contain money and eventually left the house. When police arrested defendant, the gun used in the murders fell out of his pants. A jury found defendant guilty of aggravated robbery and three counts of accessory to first degree murder.

On appeal, defendant argued that the district court erred by denying his motion to suppress the video-recorded statements he made after he invoked his right to counsel because the detectives didn't honor his request. A defendant who is being interrogated by a law enforcement officer may revoke his or her request for an attorney by reinitiating discussion about the investigation immediately after having made the request. Here, defendant invoked his right to counsel and the detectives stopped questioning him. But defendant immediately continued the conversation, volunteering general information about the incident and indicating a willingness to discuss it. Therefore, the totality of the circumstances indicates that defendant knowingly

and intelligently waived his previously invoked right to counsel, and the district court did not err in denying his motion to suppress.

Defendant next contended that the district court erred by failing to instruct the jury on theft as a lesser nonincluded offense of aggravated robbery. Given the undisputed evidence showing the use of deadly force, the district court concluded that there was no rational basis for defendant's requested theft instruction, and it correctly denied the request.

Defendant also contended that he was entitled to an instruction on the affirmative defense of duress for the aggravated robbery counts because there was credible evidence showing a specific and imminent threat that Flores would harm him. However, there was no evidence to support a finding that Flores threatened defendant in the house or elsewhere. Therefore, the district court didn't err in refusing to instruct the jury on the affirmative defense.

Lastly, defendant contended that prosecutorial misconduct during closing argument required reversal because the prosecutor improperly appealed to the sympathy of the jury and misstated the law of complicity. Although the prosecutor showed pictures of the victims to the jury, nothing indicated that the prosecutor's statements were calculated to inflame the passions or prejudice of the jurors or ask them to determine guilt based on emotion rather than evidence. Additionally, the prosecutor didn't misstate the law of complicity to the jury. Therefore, there was no prosecutorial misconduct.

The judgment was affirmed.

2019 COA 145. No. 17CA1299. People v. Avila. *Criminal Law—Evidence—Possessing a Controlled Substance—Juror Challenge for Cause—Compensated Employee of a Public Law Enforcement Agency—Reasonable Doubt—Due Process.*

Defendant was asked to leave a bar, and when she refused, staff called police. The police questioned defendant outside the bar. She appeared upset and intoxicated, and without prompting said, "I don't have anything on me." When the police conducted a pat down, defendant resisted and was arrested. The police

search of defendant produced what was later identified as cocaine. A jury found her guilty of possessing a controlled substance and resisting arrest.

On appeal, defendant contended that insufficient evidence supported her conviction for possessing a controlled substance. She asserted that the evidence only established that she had a residue of cocaine, and it was insufficient to support a jury inference that she knowingly possessed it. Even if the evidence didn't establish that the cocaine powder was a usable quantity, the jury could have inferred knowing possession from the cocaine's location and packaging and defendant's evasive behavior and comments.

Defendant also contended that the district court erred in denying her challenge for cause as to prospective juror E.D. because he was legally biased as a "compensated employee of a public law enforcement agency." E.D. was an employee of the Homeland Security Fusion Center, which is not a public law enforcement agency within the meaning of CRS § 16-10-103(1)(k). Therefore, the court didn't err in denying defendant's challenge for cause as to E.D.

Defendant further contended that the district court's reasonable doubt illustrations during voir dire impermissibly lessened the prosecutor's burden of proof, violating her right to due process. Here, the court's illustrations didn't lower the prosecution's burden of proof because in the context of the entire record, the trial court properly instructed the jury on the law.

Defendant also argued that the district court plainly erred by refusing to declare a mistrial because two prospective jurors exposed the jury to extraneous information about the arresting officer during voir dire, violating her right to a fair trial. During voir dire, a juror indicated that he knew the arresting officer and he was a standup person, and a second juror indicated that he had a personal relationship with the officer. Both jurors were removed for cause. Even assuming that the prospective jurors' comments were potentially prejudicial because they vouched for the arresting officer's veracity as a trial witness, the comments did not so undermine the trial's fundamental fairness as to cast serious doubt on the judgment of conviction's reliability. The

district court didn't plainly err by not declaring a mistrial on its own motion.

The judgment was affirmed.

2019 COA 146. No. 18CA2308. Packard v. Industrial Claim Appeals Office. *Workers' Compensation—Statute of Limitations—Notice of Injury—Equitable Estoppel.*

Claimant is a firefighter for the City and County of Denver (the City). In July 2013, he was diagnosed with cancer, and on July 24, 2013, he advised the City of his cancer diagnosis and asserted his belief that the melanoma was related to or caused by his work as a City firefighter. Claimant filed an application for hearing on October 6, 2017, seeking medical and temporary total disability benefits. The City admitted compensability, but asserted a statute of limitations defense, arguing that the claim was barred because claimant filed his application more than four years after learning of his melanoma and reporting it to the City. A panel of the Industrial Claim Appeals Office (Panel) agreed with the City, and the claim was dismissed as time barred.

On appeal, claimant contended that the Panel misinterpreted the applicable statute of limitations, CRS § 8-43-103(2). He argued that the City had adequate notice of his intent to pursue compensation through the Division of Workers' Compensation's (Division) assignment of a claim number to the case, the City's filing of certain forms, and his filing of several documents. CRS § 8-43-103(2) requires a claimant seeking workers' compensation to file a "notice claiming compensation" within two years of discovering the work-related nature of the claimant's injuries, or within three years if the claimant can establish a reasonable excuse for late filing and the employer suffered no prejudice as a result. The Division's assignment of a claim number does not satisfy a claimant's obligation to notify the Division and the employer of his or her intent to seek compensation, and none of the documents claimant points to specifies that claimant was seeking compensation as that term is defined in CRS § 8-43-103. Based on claimant's admission that he knew in 2013 that his firefighting duties may have caused his melanoma, he needed to file his claim by

2015 to comply with the two-year statute of limitations, or by 2016 if he could establish a reasonable excuse for failing to file within two years. Because claimant did not file his application for a hearing with the Division until October 2017, his claim was barred.

Claimant also argued that the firefighter cancer presumption statute, CRS § 8-41-209, does not have a statute of limitations, and the Panel frustrated the legislature's intent by imposing a limit on firefighters. By its express language, CRS § 8-43-103(2) makes clear that, with the exception of certain injuries caused by radioactive materials, it applies to all claims for compensation and benefits under CRS title 8, articles 40 to 47. Thus, the Panel did not violate the Act's legislative declaration.

Claimant next contended that the City should have been required to show prejudice before his claim was dismissed as time barred. Contrary to claimant's assertion, this provision only applies when a claimant files a claim after the two-year statute of limitations has expired but before a third year has elapsed. Claimant filed outside the three-year limit, so the City was not required to show prejudice.

Lastly, claimant contended that the City should have been estopped from asserting a statute of limitations defense because the notice of contest form it filed "informed [claimant] that the only requirement for his moving forward with his claim was to apply for hearing." Claimant failed to prove the elements of equitable estoppel, and this language did not estop the City from raising the statute of limitations defense. Further, claimant implicitly conceded that his decision to file his application for hearing after the statute of limitations had expired was unrelated to the advisement addressing expedited hearings in the City's notice of contest form.

The order was affirmed.

2019 COA 147. No. 19CA0574. Affiniti Colorado, LLC v. Kissinger & Fellman, P.C. Attorney-Client Privilege—Corporations—Dissolution—Interlocutory Review.

EAGLE-Net was formed to deploy and operate a broadband Internet network, funded by a federal grant, to provide rural schoolchildren with Internet access. Affiniti Colorado, LLC

is a limited liability company that provides broadband technology to rural communities. It negotiated and executed a management agreement with EAGLE-Net, based on an Opinion Letter provided by Fellman, acting as EAGLE-Net's general counsel. Under the agreement's terms, Affiniti agreed to manage EAGLE-Net's network and to provide capital funding for the project in exchange, in part, for EAGLE-Net's agreement to grant Affiniti a security interest in its assets.

Affiniti later sued EAGLE-Net for breach of the agreement and obtained a judgment. Due to a depletion of assets, EAGLE-Net dissolved and ceased to exist, and Fellman no longer represented EAGLE-Net. Affiniti then brought a negligent misrepresentation action against Fellman premised on alleged misrepresentations in the Opinion Letter, and the court approved discovery of attorney-client communications between Fellman and EAGLE-Net.

On interlocutory appeal under C.A.R. 4.2, Fellman challenged the court's discovery ruling, claiming that the attorney-client privilege survives the dissolution of a corporation. The attorney-client privilege does not survive a corporation's dissolution when (1) no one with the authority to assert or waive the privilege remains, and (2) there are no ongoing post-dissolution proceedings. Here, the record supports the district court's finding that EAGLE-Net is a dissolved corporation with no management to act on its behalf and Fellman lacks the authority to invoke the privilege.

The order was affirmed.

2019 COA 148. No. 18CA0977. FD Interests, LLC v. Fairways at Buffalo Run Homeowners Association, Inc. Real Property—Colorado Common Interest Ownership Act—Homeowners Association—Declaration of Covenants, Conditions, and Restrictions—Reformation.

In 2005, a developer purchased 12.5 acres of real property adjacent to the Buffalo Run Golf Course in Commerce City (the Property) through FD Interests, LLC (FDI) and Fairways Land, LLC for a residential development of patio homes. The developer carried out the project through several entities: FDI; Fairways Builders, Inc. (Builders); Buffalo Run Fairways,

LLC (BRF); and Fairways Homes, LLC (Homes) (collectively, the Developer Entities). In January 2006, Builders recorded the "Amended and Restated Declaration of Covenants, Conditions and Restrictions for Fairways at Buffalo Run Homeowners Association, Inc." (the CCR), which created the homeowner's association (HOA) for the common interest community, "The Fairways at Buffalo Run." As required by CRS § 38-33.3-205(1)(h), the CCR set a deadline for development activity, which provided that development rights would expire if there was a gap of more than five years between construction projects.

Development of the Property began after the CCR was recorded, but construction stalled during the Great Recession. On December 31, 2009, the Developer Entities recorded their most recent supplemental declaration, thereby starting the five-year clock on the development deadline. When the Developer Entities were ready to resume construction, the time limit to develop the Property had expired. After development began again in January 2016, the HOA blocked the developers from entering the Property. The Developer Entities sued the HOA, seeking, among other things, a declaratory judgment that FDI and Homes owned the undeveloped portion of the property. The HOA and the unit owners, who were HOA members, filed counterclaims for a declaratory judgment determining ownership of the undeveloped portion of the Property and reformation of the CCR and other documents governing the common interest community.

The trial court concluded that the CCR encompassed the entire Property when the community was established, including both the developed and undeveloped portions. But after identifying inconsistencies in the Property's chain of title, the court reformed the CCR by adding BRF to the CCR's signature line, because despite its sole ownership of the Property at the time, it had not executed the CCR. The court reasoned that this reformation would cure the title defects.

On appeal, the Developer Entities argued that the trial court incorrectly interpreted the CCR because the undeveloped portions of the Property were never annexed into the common interest community and are therefore not subject

to the CCR. Here, Exhibit A to the CCR identified the entire Property as belonging to the community from its creation. Therefore, the entirety of the Property, including both the developed and undeveloped portions, was encumbered by the CCR at the time the community was formed, and the trial court correctly interpreted the CCR.

The Developer Entities also contended that the trial court lacked the power to reform the CCR by adding BRF as a signatory because equity may not be employed to cure defects in a declaration to conform with the parties' intent. Here, CCR section 1.1 affirmatively stated that Builders owned the Property, even though BRF did. Because the CCR's Exhibit A encumbers the entire Property, and given the parties' general historical compliance with the CCR's requirements, the inaccuracy in CCR section 1.1 is an insubstantial failure and thus does not affect the marketability and security of the titles of the individual unit owners or the Property as a whole. Because this interpretation of the CCR resolves any concerns created by the discrepancies between the statements in the CCR and the actual chain of title, reformation was unnecessary, and the trial court erred by acting in equity and adding BRF to the signature line of the CCR. However, this error was harmless because it did not affect the parties' substantial rights.

The Developer Entities further argued that the trial court erred by ordering FDI to convey the Property's roads to the HOA. Their argument relied on a dedication on the final plat recorded that has language granting Commerce City easements for public use. However, there is no record evidence that Commerce City was ever offered or accepted this public dedication, so no public right was created in the Property's roads. Because the Property's roads are not public roads and the CCR designated them as "Common Elements" in the common interest community, the trial court did not err in conveying the roads to the HOA.

The judgment was affirmed. The case was remanded for the trial court to determine the HOA's reasonable attorney fees and award that amount to it against the Developer Entities and, in its discretion, to address the HOA's request for costs.

2019 COA 149. No. 18CA1209. In re Marriage of Zander. *Family Law—Colorado Marital Agreement Act—Uniform Dissolution of Marriage Act—Disposition of Marital Property.*

The district court dissolved the parties' 17-year marriage and divided the marital estate equally. In doing so, the court determined that an oral agreement the parties entered into during the marriage was valid and enforceable.

On appeal, husband contended that the district court erred in finding that the alleged oral marital agreement was valid and enforceable. He asserted that under the Colorado Marital Agreement Act (CMAA), only written and signed marital agreements are valid and enforceable. The record reflects that the parties entered the marriage with separate retirement accounts and received inheritances from their parents during the marriage. Wife testified that the parties orally agreed to keep their retirement accounts and inheritances as their separate property. The Uniform Dissolution of Marriage Act (UDMA) creates a statutory presumption that property acquired during the marriage is marital property. That presumption may be overcome by establishing that the property was acquired by one of several methods, including, under CRS § 14-10-113(2)(d), property acquired during the marriage that was excluded "by valid agreement of the parties." The UDMA does not define "valid agreement," but under the CMAA a valid agreement of the parties to exclude as marital property certain property acquired during the marriage must be written and signed by both parties. The more specific CMAA provision requiring a marital agreement to be in writing prevails over the general UDMA provision for disposition of property. Therefore, the district court erred in not following the CMAA's plain language and construing a "valid agreement" to include an oral marital agreement.

The judgment was reversed. The case was remanded for the district court to determine what, if any, portion of the parties' retirement accounts and inheritances are marital property and to redetermine an equitable property distribution. **CL**

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