

Summaries of Published Opinions

June 4, 2018

2018 CO 46. No. 17SC346. *Mason v. Farm Credit of Southern Colorado*. ACA—CRCP 38—*Right to a Jury Trial—Legal or Equitable—Basic Thrust Test*.

This case concerns the right to a jury trial in a civil case. The Supreme Court considered whether trial courts must review the claims in a plaintiff's amended complaint, as opposed to those in its original complaint, to determine whether a party is entitled to a jury trial under CRCP 38. The Court concluded that its prior cases and the Colorado Rules of Civil Procedure require it to answer that question affirmatively. Accordingly, the Court held that when a plaintiff amends its complaint and a party properly demands a jury trial under CRCP 38, the trial court should determine whether the case may be tried to a jury based on the claims in the amended complaint. The Court further held that CRCP 38 permits a case to be tried to a jury when the claims in the plaintiff's amended complaint are primarily legal, as opposed to equitable. Finally, after examining respondents' amended complaint, the Court concluded that respondents' claims against petitioner are primarily legal. Thus, petitioner was entitled to a jury trial under CRCP 38.

The Court of Appeals' judgment was reversed.

2018 CO 47. No. 18SA1. *In re People v. Austin*. *Preliminary Hearings*.

Austin petitioned for relief pursuant to C.A.R. 21 from a district court order denying his motion for a preliminary hearing. The Supreme Court issued its rule to show cause why the order should not be disapproved, and the People responded. The Court here made

the rule absolute and ordered that Austin be given a preliminary hearing because he was charged by information with a class 4 felony committed as a "crime of violence" as defined in CRS § 18-1.3-406(2)(a)(I)(B) and (II)(C), which statutorily entitles him to a preliminary hearing, whether or not he would actually be subject to mandatory sentencing for a crime of violence.

2018 CO 48. No. 15SC462. *Gessler v. Smith*. *Amendment 41—Independent Ethics Commission—Jurisdiction*.

The Supreme Court considered whether Colorado's Independent Ethics Commission (the IEC) had jurisdiction pursuant to article XXIX of the Colorado Constitution to hear a complaint based on allegations that then-Secretary of State Scott Gessler (the Secretary) breached the public trust by using money from his statutorily provided discretionary fund for partisan and personal purposes. The IEC investigated the complaint, held an evidentiary hearing, and determined that the Secretary's conduct breached the public trust. The Secretary sought judicial review of the IEC's ruling, arguing that the IEC lacked jurisdiction over the case, the relevant jurisdictional language must be narrowly construed to avoid unconstitutional vagueness, and the IEC violated his procedural due process rights. Both the district court and the Court of Appeals affirmed the IEC's ruling.

The Court held that relevant jurisdictional language in Colo. Const. art. XXIX, § 5 authorizes the IEC to hear complaints involving ethical standards of conduct relating to activities that could allow covered individuals, including elected officials, to improperly benefit financially from their public employment. The Court further held that CRS § 24-18-103 is one such ethical standard of conduct. This provision establishes

that the holding of public office or employment is a public trust, and that a public official "shall carry out his duties for the benefit of the people of the state." Because the allegations against the Secretary clearly implicated this standard, the Court concluded that the complaint fell within the IEC's jurisdiction and rejected the Secretary's jurisdictional and vagueness challenges. Additionally, the Court rejected the Secretary's procedural due process claim because he failed to demonstrate that he suffered any prejudice as a result of the alleged violation.

The Court of Appeals' judgment was affirmed.

2018 CO 49. No. 17SA64. *Renfandt v. New York Life Insurance Co*. *Life Insurance Policies—Suicide Exclusion Clauses*.

In this opinion, the Supreme Court answered a question of state law certified by the U.S. District Court for the District of Colorado. The Court was asked to interpret the meaning of the words "suicide, sane or insane" when used in life insurance policies. The Court concluded that, under Colorado law, a life insurance policy exclusion for "suicide, sane or insane" excludes coverage only if the insured, whether sane or insane at the time, committed an act of self-destruction with the intent to kill himself.

2018 CO 50. No. 17SA299. *State Farm Fire and Casualty Co. v. Griggs*. *Attorney-Client Privilege—Implied Waiver*.

In this original proceeding pursuant to C.A.R. 21, the Supreme Court reviewed the district court's determination that petitioner State Farm Fire and Casualty Company impliedly waived the attorney-client privilege protecting communications between it and its former counsel when it submitted an affidavit from that former counsel to rebut factual allegations of discovery misconduct. The Court issued a rule to show cause why the district court's finding of implied waiver should not be reversed and now makes that rule absolute. The attorney affidavit submitted in this case did not put privileged information at issue by asserting a claim or defense that depends on privileged information or attorney advice. Rather, the affidavit contained only factual statements that

were intended to rebut allegations of discovery misconduct. Accordingly, the Court concluded that the district court erred in finding that State Farm impliedly waived its attorney-client privilege on the facts presented.

June 11, 2018

2018 CO 51. No. 17SA113. In re People v. Shank. *Public Defender Representation—Statutory Interpretation.*

In this case, the Supreme Court determined whether the Office of the State Public Defender has statutory authority to represent an indigent defendant in a civil forfeiture matter. Reviewing the plain language of the relevant statutes, the Court concluded that the Office of the State Public Defender was not statutorily authorized to enter its appearance in the underlying civil forfeiture matter.

2018 CO 52. No. 16SC814. Colorow Health Care, LLC v. Fischer. *Health Care Availability Act—Statutory Construction—Alternative Dispute Resolution.*

CRS § 13-64-403 of the Health Care Availability Act governs arbitration agreements between patients and healthcare providers. Under CRS § 13-64-403(4), such agreements must contain a certain notice to patients to help ensure that they enter the agreements voluntarily, and the notice must be emphasized by at least 10-point font and bold-faced type. The agreement here contained the notice in 12-point font, but it was not bold-faced. The Court of Appeals determined the statute requires strict compliance and that the agreement therefore failed for lack of bold-faced type.

The Supreme Court held that CRS § 13-64-403 requires only substantial compliance. The Court further concluded the agreement here substantially complied with the formatting requirements of CRS § 13-64-403, notwithstanding its lack of bold-faced type. Accordingly, the Court reversed the Court of Appeals' judgment and remanded the case for further proceedings consistent with the opinion.

2018 CO 53. No. 15SC931. Verigan v. People. *Suppression of Statements—Two-*

Step Interrogation—Plurality Supreme Court Opinions—Miranda Warnings.

This case required the Supreme Court to decide (1) whether the U.S. Supreme Court's fractured opinion in *Missouri v. Seibert*, 542 U.S. 600 (2004), created a precedential rule that could be applied to future cases, and (2) whether statements made by petitioner after she was given *Miranda* warnings should be suppressed because the statements were made after petitioner provided unwarned, incriminating statements to the police.

The Court concluded that Justice Kennedy's concurring opinion in *Seibert*, which created an exception to the framework established in *Oregon v. Elstad*, 470 U.S. 298 (1985), for cases involving a deliberate two-step interrogation aimed at undermining the efficiency of the *Miranda* warning, is the controlling precedent to be applied. Applying Justice Kennedy's test here, the Court concluded that the officers in this case did not engage in a two-step interrogation in a deliberate attempt to undermine the effectiveness of *Miranda* warnings provided to petitioner. Therefore, the Court concluded that the *Elstad* framework applies, and because petitioner's pre- and post-warning statements were indisputably voluntary, the Court concluded that the division correctly determined that petitioner's post-warning statements were admissible.

Accordingly, the Court affirmed the Court of Appeals division's judgment.

2018 CO 54. No. 16SC305. Rocky Mountain Exploration, Inc. v. Davis Graham & Stubbs LLP. *Undisclosed Principals—Fraud—Breach of Fiduciary Duty—Restatement (Third) of Agency.*

This case arose out of a sale of oil and gas assets by petitioners to a buyer who was acting as an agent for a third company. The third company was represented by respondents, but due to a prior, contentious business relationship between petitioners and the third company, neither the buyer, the third company, nor respondents disclosed to petitioners that the buyer was acting on behalf of the third company in the sale.

After the sale was complete, petitioners learned of the third company's involvement

and sued respondents, among others, for breach of fiduciary duty, fraud, and civil conspiracy. The district court ultimately granted summary judgment for respondents, and a division of the Court of Appeals affirmed.

The Supreme Court here decided whether (1) petitioners could avoid their sale agreement for fraud when the buyer and respondents purportedly created the false impression that the buyer was not acting on behalf of the third company; (2) an assignment clause in the transaction documents sufficiently notified petitioners that the buyer was acting on behalf of others, such that the third company would not be considered an undisclosed principal under the *Restatement* provision on which petitioners' contract avoidance argument is exclusively premised; (3) petitioners stated a viable claim for fraud against respondents; and (4) prior agreements between petitioners and the third company negated any joint venture relationship or fiduciary obligations between them.

The Court first concluded that the assignment clause in the pertinent transaction documents made clear that the buyer had partners in the transaction to whom it could assign a portion of its interests. As a result, the third company was not an undisclosed principal under the *Restatement* provision on which petitioners' rely, and petitioners' contract avoidance argument and the civil conspiracy claim that flows from it fail as a matter of law. The Court further concluded that, even if the *Restatement* provision did apply, the record did not support a finding that either the buyer or respondents created a false impression that the buyer was not acting on behalf of an undisclosed principal. For this reason as well, petitioners' civil conspiracy claim failed as a matter of law.

The Court next concluded that, as a matter of law, petitioners did not demonstrate the requisite false representation or reasonable reliance to support a viable claim for fraud against respondents.

Finally, the Court concluded that the controlling agreements between petitioners and the third company expressly disavowed any pre-existing joint ventures and fiduciary obligations between the parties, and therefore the district court properly granted summary

judgment for respondents on petitioners' claim for aiding and abetting a breach of fiduciary duty.

Accordingly, the Court affirmed the Court of Appeals division's judgment.

2018 CO 55. No. 18SA19. In re People v. Owens. *Constitutional Law—Public Access to Court Records.*

In this original proceeding, the Supreme Court considered and rejected a news organization's contention that a trial court erred in refusing to grant public access to certain records maintained under seal in a capital murder case. The Court emphasized that, while presumptive access to judicial proceedings is a right recognized under both the state and federal constitutions, neither the U.S. Supreme Court nor the Colorado Supreme Court has ever held that records filed with a court are treated the same way. The Court thus declined the invitation to hold that unfettered access to criminal justice records is guaranteed by either the First Amendment or Article II, section 10 of the Colorado Constitution.

June 18, 2018

2018 CO 56. No. 16SC365. U.S. Welding, Inc. v. Advanced Circuits, Inc. *Breach of Contract—Mitigation—Settlement Offer—Accord and Satisfaction.*

U.S. Welding, Inc. (Welding) sought review of the Court of Appeals' judgment affirming the district court's order awarding it no damages whatsoever for breach of contract with Advanced Circuits, Inc. (Advanced). Notwithstanding its determination following a bench trial that Advanced breached its contract to purchase from Welding all its nitrogen requirements during a one-year term, the district court reasoned that by declining Advanced's request for an estimate of lost profits expected to result from Advanced's breach before the contract term expired, Welding failed to mitigate.

The Supreme Court reversed the Court of Appeals' judgment concerning the failure to mitigate and remanded the case for further proceedings. The Court held that the district court erred by requiring Welding to settle for a projection of anticipated lost profits, rather

than its actual loss, as measured by the amount of nitrogen Advanced actually purchased from another vendor over the contract term, because an aggrieved party is not obligated to mitigate damages from a breach by giving up its rights under the contract.

2018 CO 57. No. 15SC701. McMullin v. Hauer. *Colorado Common Interest Ownership Act—Common Interest Communities—Homeowners' Associations.*

The Supreme Court reviewed the Court of Appeals' opinion affirming the trial court's order finding that the recorded instruments in this case were sufficient to create both a common interest community by implication and an unincorporated homeowners' association. The Court held that the recorded instruments were insufficient under the Colorado Community Interest Ownership Act to create a common interest community by implication. Accordingly, the Court reversed the Court of Appeals' judgment and remanded the case for further proceedings consistent with this opinion.

2018 CO 58. No. 17SC55. Roberts v. Bruce. *Attorney Fees—Statutory Interpretation.*

In this case, the Supreme Court considered whether a trial court may award attorney fees under CRS § 13-17-102 for conduct occurring outside Colorado courts. Reviewing the plain language of section 102, the Court concluded that an award of attorney fees pursuant to that section is limited to conduct occurring in Colorado courts and therefore affirmed the judgment of the Court of Appeals.

2018 CO 59. No. 16SC894. City of Boulder v. Public Service Company of Colorado. *Declaratory Judgment Actions—CRCP 57—CRCP 106—Municipal Ordinances—Finality.*

This case arises out of respondents' challenge to petitioner city's attempt to create a light and power utility. Respondents assert that the ordinance establishing the utility violates the city's charter. Respondents thus seek a declaratory judgment deeming that ordinance null and void. The city asserted that respondents' complaint was, in reality, an untimely CRCP 106 challenge to a prior ordinance by which the

city had concluded that it could meet certain prerequisites for the formation of the utility as prescribed by the city charter. The district court agreed with the city and dismissed respondents' complaint for lack of jurisdiction. A division of the Court of Appeals, however, vacated the district court's judgment, concluding that neither of the pertinent ordinances was final and therefore respondents' complaint was premature.

The Supreme Court reversed the division's decision and remanded the case for further proceedings on respondents' declaratory judgment claim. Although the Court agreed with the city that the division erred, contrary to petitioners' position and the premises on which the courts below proceeded, the Court agreed with respondents that the complaint asserted a viable and timely claim seeking a declaration that the ordinance establishing the utility violated the city charter. Accordingly, the Court concluded that the district court had jurisdiction to hear respondents' declaratory judgment claim, and the Court remanded the case to allow that claim to proceed.

2018 CO 60. No. 18SA26. People v. Stackhouse. *Double Jeopardy.*

Pursuant to C.A.R. 21, the People challenged a district court order granting Stackhouse's motion to compel the People to elect a particular allegation of sexual assault on a child as their sole basis for proceeding in Stackhouse's retrial. The Supreme Court held that the district court erred when it concluded that the jury in Stackhouse's first trial had necessarily concluded that he did not commit multiple acts of assault, and therefore that he could not be retried for more than a single assault. The Court made the rule to show cause absolute, reversed the district court's order, and remanded the case to the district court for further proceedings.

June 25, 2018

2018 CO 61. No. 17SA248. In re Rains. *CRCP 59(d)—Proper Grounds for New Trial.*

In this case, the Supreme Court considered whether the trial court abused its discretion when it granted plaintiffs' motion for a new trial

after a jury found that defendants, two pilots, were not negligent during a near collision that resulted in one plane crashing and killing all five passengers on board. The Court concluded that the trial court's stated reasons did not meet the grounds enumerated in CRCP 59(d) and that a trial court may not grant a new trial for reasons other than those enumerated in CRCP 59(d). Thus, the trial court abused its discretion in granting a new trial. The Court made its rule to show cause absolute and remanded the case for further proceedings.

2018 CO 62. No. 14SC990. Castillo v. People. *Self-Defense—Initial Aggressor—Jury Instructions.*

Defendant fired a gun at several people in a parking lot. He asserted that he did this in self-defense. Over defendant's objection, the trial court instructed the jury on two exceptions to the affirmative defense of self-defense: initial aggressor and provocation. The jury convicted defendant of several criminal charges. The Supreme Court concluded the division of the Court of Appeals erred when it determined that the trial court correctly instructed the jury on the initial aggressor exception to self-defense. The Court further concluded the error was not harmless in light of the prosecution's repeated references to the initial aggressor exception during closing argument. Accordingly, defendant is entitled to a new trial. The Court of Appeals' judgment was reversed and the case was remanded.

2018 CO 63. No. 17SA55. Coors Brewing Co. v. City of Golden. *Amendment of Augmentation Plans—Return Flows.*

This case concerns appellant's application to amend its decreed augmentation plans to authorize the reuse and successive use of return flows from water that appellant diverts out of priority pursuant to those plans. On competing motions for determinations of questions of law, the water court ruled that (1) any amount of water not beneficially used by appellant for the uses specified in its decreed augmentation plans must be returned to the stream; (2) appellant's decreed augmentation plans did not authorize the reuse or successive use of such water; and (3) appellant may not obtain the right to reuse

or make successive use of such water by way of amendment to its augmentation plans but could only obtain such rights by adjudicating a new water right.

The Supreme Court affirmed the water court's judgment. To obtain the right to reuse and make successive use of the return flows at issue, appellant must adjudicate a new water right and may not circumvent this requirement by amending its decreed augmentation plans. Further, the diversion of native, tributary water under an augmentation plan does not change its character. Accordingly, the general rule, which provides that return flows belong to the stream, applies. The water court also correctly construed appellant's augmentation plans.

2018 CO 64. No. 17SA165. In the Matter of Wollrab. *Colorado Rules of Professional Conduct—Attorney Discipline—Colo. RPC 1.8—Colo. RPC 4.2.*

In this attorney discipline proceeding, the Supreme Court was confronted with questions as to what Colorado Rules of Professional Conduct 1.8 and 4.2 require of an attorney who enters into a business relationship with his client. The Court concluded that the attorney in this case violated Rule 1.8(a)(1) when he signed a lease with his client's company without complying with any of Rule 1.8(a)'s prophylactic requirements. The attorney also violated Rule 1.8(a)(3) when he entered into an option agreement with his client without obtaining his client's informed, written consent to his role in the deal. However, because the attorney had the implied consent of his client's independent counsel for the purposes of the option agreement, he did not violate Rule 1.8(a)(1) or (2) or Rule 4.2 in that transaction. The Court remanded the case to the hearing board for determination of the appropriate sanction in light of its conclusions. ^{CL}

These summaries of Colorado Supreme Court published opinions are provided by the Court; the CBA cannot guarantee their accuracy or completeness. Both the summaries and full opinions are available on the CBA website and on the Colorado Judicial Branch website.

METRO VOLUNTEER LAWYERS



Offering free and low-cost legal services for civil matters to those in need in the Denver area since 1966.

DENBAR.ORG/MVL



DENVER BAR ASSOCIATION
METRO VOLUNTEER LAWYERS