Summaries of Published Opinions

October 4, 2018

2018 COA 146. No. 15CA1722. People v. Oliver. *Criminal Law—Possession of a Weapon by a Previous Offender—Right to Jury Trial—Waiver.*

Defendant was tried on two felony menacing charges. Before trial, the parties agreed to bifurcate a possession of a weapon by a previous offender (POWPO) count. However, near the end of the trial, defense counsel agreed with the court's suggestion of using a special interrogatory on possession instead of having a separate trial on the POWPO count after the jury returned its verdict on the menacing counts. Counsel also stipulated that defendant was a previous offender. The jury was not instructed on the POWPO charge. The jury acquitted defendant on one count and hung on the other. Based on the stipulation and the jury's "yes" answer to the special interrogatory that asked whether defendant had possessed a firearm, the trial court entered a judgment of conviction for POWPO.

On appeal, defendant argued that the trial court directed a verdict on the POWPO charge in violation of his federal and state constitutional rights to a jury trial, which he did not personally waive. To return a verdict, a jury must have been instructed on the offense. Here, even if counsel stipulated to the prior offender element, defendant did not personally waive his right to have the jury return a verdict on the POWPO charge, and the trial court never told the jury that it was deciding the POWPO charge. Therefore, the judgment of conviction on the POWPO charge violated defendant's constitutional right to a jury trial.

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

2018 COA 147. No. 17CA1605. Big Sur Waterbeds, Inc. v. City of Lakewood. *Sales and Use Tax—Displayed Furniture—Primary Purpose of Purchase.*

The City of Lakewood (Lakewood) imposes use tax on tangible personal property purchased at retail and used in the city. The use tax does not apply to wholesale purchases (i.e., purchases for resale to others). Big Sur Waterbeds, Inc., Denver Mattress Co., LLC, and Sofa Mart, LLC (collectively, plaintiffs) purchase furniture tax-free from wholesalers worldwide and resell it in stores, including in Lakewood. At each Lakewood store, plaintiffs provide a showroom where they display furniture for customers to peruse and try out. Plaintiffs also maintain warehouses where they store the bulk of their inventory. Plaintiffs ultimately sell all the furniture, including the displayed furniture, and fill customer orders from either the warehouses or the showrooms. Plaintiffs' customers pay Lakewood's sales tax on each purchase.

Lakewood assessed use tax on plaintiffs' purchases of displayed furniture from 2012 to 2015, on the theory that plaintiffs purchased the displayed furniture at retail for their own use in advertising their products. Plaintiffs challenged the assessments in the district court, which entered judgment in their favor.

On appeal, Lakewood contended that while plaintiffs' inventory purchases were initially treated as exempt wholesale purchases, when a portion of this wholesale inventory was withdrawn for use as demonstration and promotion tools, the transactions were properly recharacterized as taxable retail transactions. Lakewood relied on its Initial Use Regulation and regulation 3.01.300(1)(b), pertaining to initial use of property, which focus on the primary purpose of the purchase. The Court of Appeals employed the "primary purpose" test from *A.B. Hirschfeld Press, Inc. v. City and County of Denver*, 806 P.2d 917, 918–26 (Colo. 1991), and determined that the totality of plaintiffs' conduct indicates that they purchased the displayed furniture primarily for resale in an unaltered condition and basically unused. Because plaintiffs purchased the displayed furniture primarily for resale, not for their own use or consumption, the Initial Use Regulation does not apply. Similarly, regulation 3.01.300(1)(b), which pertains to tax-free purchases for resale that are later removed from inventory for the purchaser's own use, does not apply because the displayed furniture was always available for resale and eventually sold. Therefore, Lakewood's use tax does not apply to the retailers' purchases and minor use of the furniture for display.

The judgment was affirmed.

2018 COA 148. No. 17CA1663. Town of Monument v. State. *Real Property—Eminent Domain—Restrictive Covenant—Compensable Property Interest.*

The Town of Monument (the Town) bought a parcel of real property in a residential subdivision. The Town intended to construct a municipal water storage tank on the lot, but a restrictive covenant prohibiting such structures applied to all lots in the subdivision. The Town filed this case, seeking to use its power of eminent domain to have the court declare its property free of the restrictive covenant. Some lot owners in the subdivision intervened in the case and argued that because the restrictive covenant benefits all property in the subdivision, the Town cannot eliminate the restrictive covenant on its lot without paying every property owner in the subdivision an amount compensating each of them for the loss in value to their respective properties. The district court agreed with the landowners, and the parties stipulated to a dismissal of the case with prejudice.

On appeal, the Town argued that the district court erred in finding that the restrictive covenant was a compensable property interest to the surrounding landowners. The Court of Appeals determined that under *Smith v. Clifton Sanitation District,* 300 P.2d 548 (Colo. 1956), a restrictive covenant banning certain uses of property is not a compensable property interest in an eminent domain case.

The judgment was reversed and the case was remanded.

October 18, 2018

2018 COA 149. No. 17CA1502. Rocky Mountain Gun Owners v. Hickenlooper. *Constitutional Law—Large-Capacity Magazines—Colorado Constitution—Right to Keep and Bear Arms.*

In the wake of the mass shootings at Columbine High School and the Aurora movie theatre, the Colorado General Assembly passed House Bills 13-1224 (HB 1224), limiting large-capacity magazines (LCMs) for firearms, and 13-1229 (HB 1229), expanding mandatory background checks for firearm sales and transfers. HB 1224 added CRS §§ 18-12-301, -302, and -303 (collectively, the statutes), which generally define an LCM as a magazine able to hold more than 15 rounds of ammunition and provide (with exceptions) criminal penalties for their sale, possession, and transfer after July 1, 2013.

Rocky Mountain Gun Owners, the National Association for Gun Rights, Inc., and Sternberg (collectively, plaintiffs) challenged the facial constitutionality of both bills under Colo. Const. art. II, § 13, which affords individuals the right to keep and bear arms. The district court granted the Governor's CRCP 12(b)(5) motion to dismiss the complaint for failure to state a claim upon which relief could be granted. On the first appeal, a Court of Appeals' division affirmed with respect to HB 1229, but remanded the case because the district court had erred in dismissing the HB 1224 claim. After a bench trial, the district court found that the statutes were constitutional.

On appeal, plaintiffs contended that the district court erred in finding the statutes constitutional. They argued that the prospective LCM ban should be subject to a heightened standard of review. However, the Colorado Supreme Court established the "reasonable exercise test" as the standard governing review of a claimed violation of the Colorado right to bear arms.

Plaintiffs also contended that the statutes should be interpreted as unconstitutionally broad because they ban "an overwhelming majority of magazines." The Court applied the reasonable exercise test and determined that the statutes are constitutional as a reasonable exercise of the state's police power to protect the public's health and safety because they (1) reasonably further a legitimate governmental interest in reducing mass shooting deaths; (2) are reasonably related to the legislative purpose of reducing mass shooting deaths; and (3) do not sweep constitutionally protected activities within their reach.

The order was affirmed.

2018 COA 150. No. 17CA1504. Garrett v. Credit Bureau of Carbon County. *Debt Collection—Colorado Fair Debt Collection Practices Act—Least Sophisticated Consumer.*

Credit Bureau of Carbon County (Credit Bureau) is an agency that collects or attempts to collect debts owed, due, or asserted to be owed or due to another. It sent Garrett two collection notices demanding payment on a consumer debt. Garrett sued Credit Bureau, asserting that the language of its communications overshadowed and contradicted the statutory requirements of the Colorado Fair Debt Collection Practices Act (the Act). The district court concluded that Credit Bureau's notices had not violated the Act and denied Garrett's motion for judgment on the pleadings, granted Credit Bureau's motion for summary judgment, and dismissed the case.

On appeal, Garrett contended that the district court wrongly concluded that Credit Bureau did not violate the Act because the format and content of Credit Bureau's notices overshadowed or contradicted the statutorily required disclosures. The Act requires debt collectors to provide a debt validation notice describing the debt. It prohibits debt collectors from using false, deceptive, or misleading representations when collecting a debt. Overshadowing occurs when a collection letter contains the requisite validation notice, but that information is obscured or diminished by the letter's presentation or format. Contradiction occurs when language accompanying the validation notice is inconsistent with the substance of the rights and duties that the statute imposes. In *Flood v. Mercantile Adjustment Bureau, LLC,* 176 P.3d 769 (Colo. 2008), the Supreme Court adopted the "least sophisticated consumer" test to determine whether a collection agency's notice was confusing with respect to the statutorily required disclosures. Here, Credit Bureau's use of the bold and capitalized phrase **"WE CANNOT HELP YOU UNLESS YOU CALL"** in the second notice would confuse the least sophisticated consumer because it was capable of being reasonably interpreted as changing the manner in which the consumer was required by law to dispute the debt or its amount. As a matter of law, the notice was deceptive or misleading in violation of the Act.

The judgment was reversed and the case was remanded for the district court to enter judgment for Garrett and award her statutory damages, costs, and a reasonable amount of attorney fees incurred on appeal.

2018 COA 151. No. 17CA2064. Hernandez v. City and County of Denver. *Negligence—Willful and Wanton Conduct—Colorado Governmental Immunity Act—Public Employee—Waiver of Sovereign Immunity—Jail Operation.*

Hernandez sustained injuries while a pretrial detainee at the Denver Detention Center. She sued six of the jail's employees, including Deputy Sheriff Dodson, alleging, as relevant to this appeal, willful and wanton conduct. Following an evidentiary hearing pursuant to *Trinity Broadcasting of Denver, Inc. v. City of Westminster,* 848 P.2d 916 (Colo. 1993), and pursuant to CRCP 12(b)(1), the district court found that Dodson and another defendant had not engaged in willful and wanton conduct and therefore enjoyed immunity from suit on those allegations.

On appeal, Hernandez alleged that the district court erred in finding Dodson was entitled to immunity. The Colorado Governmental Immunity Act provides that a public employee may not assert immunity in an action for injuries resulting from the negligent operation of a jail, regardless of whether the employee engaged in willful and wanton conduct. Because the allegations of willful and wanton conduct here do not raise an issue of sovereign immunity, the district court erred in dismissing them before trial via Rule 12(b)(1) and a *Trinity* hearing.

The order was vacated and the case was remanded for further proceedings. CL

These summaries of published Court of Appeals opinions are written by licensed attorneys Teresa Wilkins (Englewood) and Paul Sachs (Steamboat Springs). They are provided as a service by the CBA and are not the official language of the Court; the CBA cannot guarantee their accuracy or completeness. The full opinions, the lists of opinions not selected for official publication, the petitions for rehearing, and the modified opinions are available on the CBA website and on the Colorado Judicial Branch website.