

Summaries of Published Opinions

October 15, 2018

2018 CO 81. No. 16S721. Ybarra v. Greenberg & Sada, P.C. *Finance, Banking, and Credit—Insurance—Statutory Interpretation—Torts.*

Ybarra petitioned for review of the Court of Appeals' judgment affirming the dismissal of her Colorado Fair Debt Collection Practices Act action against Greenberg & Sada, P.C. The district court dismissed for failure to state a claim, finding that damages arising from a subrogated tort claim do not qualify as a debt within the contemplation of the Act. The Court of Appeals agreed, reasoning that the undefined term "transaction" in the Act's definition of "Debt," required some kind of business dealing, as distinguished from the commission of a tort; and to the extent an insurance contract providing for the subrogation of the rights of an insured constitutes a transaction in and of itself, that transaction is not one obligating the debtor to pay money, as required by the Act.

The Supreme Court held that because a tort does not obligate the tortfeasor to pay damages, a tort cannot be a transaction giving rise to an obligation to pay money, and is therefore not a debt within contemplation of the Act; and because an insurance contract providing for the subrogation of the rights of a damaged insured is not a transaction giving rise to an obligation of the tortfeasor to pay money, it also cannot constitute a transaction creating a debt within contemplation of the Act.

Accordingly, the Court of Appeals' judgment was affirmed.

2018 CO 82. No. 16SC552. Zapata v. People. *Physician–Patient Privilege—Psychologist–Client Privilege—Competency Evaluations—Res Gestae.*

In this case, the trial court declined to give defendant access to, or to review in camera, com-

petency reports regarding another defendant in a factually related but separate case. Over objection, the trial court also admitted uncharged misconduct evidence as *res gestae*.

The Supreme Court held that competency reports are protected by the physician–patient or psychologist–client privilege and that the examinee did not waive the privilege as to defendant when he put his competency in dispute in his own case. The Court also held that defendant's confrontation right was not implicated and that defendant did not make a sufficient showing that the competency reports contained exculpatory evidence to justify their release to him or review by the trial court pursuant to due process or Crim. P. 16.

The Court further held that any error in admitting the uncharged misconduct evidence as *res gestae* was harmless given the strong evidence of defendant's guilt.

Accordingly, the Court of Appeals' judgment was affirmed.

2018 CO 83. No. 15SC754. People v. DeGreat. *Self-Defense—Aggravated Robbery—Jury Instructions—Affirmative Defenses.*

This case required the Supreme Court to decide whether a division of the Court of Appeals erred in concluding that the statutory right to self-defense can apply to justify a defendant's robbery of taxi cab services. On the unique facts presented, the Court concluded that the division correctly determined that defendant was entitled to a self-defense instruction as to the aggravated robbery charge, although the Court's reasoning differed from that on which the division relied. The Court concluded that defendant presented some credible evidence to allow a reasonable jury to conclude that the robbery of services that he allegedly committed was committed in self-defense. Accordingly, the

Court affirmed the division's judgment, albeit based on different reasoning.

2018 CO 84. No. 18SA169. People v. Bailey. *Searches and Seizures—Probable Cause—Search Without Warrant (Odor Detection; Use of Dogs).*

In this interlocutory appeal, the Supreme Court considered whether the trial court erred in ruling that state troopers lacked probable cause to search defendant's car when they placed Mason, a narcotics-detecting dog, inside the car to sniff around. The Court held that the totality of the circumstances, including Mason's alert to the odor of narcotics while sniffing the exterior of defendant's car, provided the troopers with probable cause to search the car. The fact that Mason's alert was not a final indication did not render it irrelevant to the troopers' probable cause determination. Therefore, the Court reversed the trial court's order suppressing evidence collected by the troopers during a subsequent hand search of the car.

October 29, 2018

2018 CO 85. No. 16SC906. In re Marriage of Rooks. *Divorce—Assisted Reproduction—Embryos.*

In this dissolution of marriage proceeding, the Supreme Court reviewed how courts should resolve disagreements over the disposition of a couple's cryogenically preserved pre-embryos when that couple divorces. The Court held that because the underlying interests at stake are the equivalently important, yet competing, right to procreate and right to avoid procreation, courts should strive, where possible, to honor both parties' interests in procreational autonomy. Thus, courts should look first to any existing agreement expressing the spouses' intent regarding disposition of the couple's remaining pre-embryos in the event of divorce. In

the absence of such an agreement, courts should seek to balance the parties' respective interests in receipt of the pre-embryos. In balancing those interests, courts should consider the intended use of the party seeking to preserve the pre-embryos; a party's demonstrated ability, or inability, to become a genetic parent through means other than use of the disputed pre-embryos; the parties' reasons for undertaking in vitro fertilization in the first place; the emotional, financial, or logistical hardship for the person seeking to avoid becoming a genetic parent; any demonstrated bad faith or attempt to use the pre-embryos as unfair leverage in the divorce process; and other considerations relevant to the parties' specific situation. However, courts should not consider whether the party seeking to become a genetic parent using the pre-embryos can afford a child. Nor shall the sheer number of a party's existing children, standing alone, be a reason to preclude preservation or use of the pre-embryos. Finally, courts should not consider whether the party seeking to become a genetic parent using the pre-embryos could instead adopt a child or otherwise parent non-biological children. The Court reversed the judgment of the Court of Appeals and remanded the case with directions to return the matter to the trial court to apply the announced balancing framework.

2018 CO 86. No. 17SC195. *People v. Lozano-Ruiz*. Plain Error—Criminal Jury Instructions.

In this case, the Supreme Court reviewed the trial court's reversal of a sexual assault conviction for failure to provide a jury instruction containing the statutory definition of "sexual penetration." The Court concluded that because the question of whether sexual penetration had occurred was not a contested issue at trial, the county court did not plainly err by failing to give a corresponding instruction to the jury. Accordingly, the Court reversed the trial court's order and affirmed Lozano-Ruiz's conviction. CL

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Colorado Supreme Court

Rules Committees

Notice of Request for Comments, Colorado Rules of Professional Conduct

Deadline for Comments: January 16, 2019 at 5 p.m.

The Colorado Supreme Court requests written public comments by any interested person on the proposed amendments to Rule 1.5 and Comment to Rule 1.5 of the Colorado Rules of Professional Conduct, and Proposed Form Flat Fee Agreement. Written comments should be submitted to Cheryl Stevens, Clerk of the Supreme Court. Comments may be mailed or delivered to 2 East 14th Avenue, Denver, CO 80203 or emailed to cheryl.stevens@judicial.state.co.us no later than 5 p.m. on January 16, 2019. The Clerk will post written comments on the Colorado Supreme Court's website.

By the Court:

Monica M. Márquez

Justice, Colorado Supreme Court

William W. Hood, III

Justice, Colorado Supreme Court

Note: The proposed amendments can be found on the Court's website at

https://www.courts.state.co.us/Courts/Supreme_Court/Rule_Changes.cfm CL

Visit the Supreme Court's website for complete text of rule changes, including corresponding forms and versions with highlights of revisions (deletions and additions), which are not printed in Court Business. Material printed in Court Business appears as submitted by the Court and has not been edited by *Colorado Lawyer* staff.